

# Tulsa Law Review

---

Volume 39

Number 2 *The Indian Trust Doctrine After the 2002-2003 Supreme Court Term*    Volume 39 | Number 2

---

Winter 2003

## Conflict between the Public Trust and the Indian Trust Doctrines: Federal Public Land Policy and Native Indians

Rebecca T. Tsosie

Follow this and additional works at: <https://digitalcommons.law.utulsa.edu/tlr>



Part of the [Law Commons](#)

---

### Recommended Citation

Rebecca T. Tsosie, *Conflict between the Public Trust and the Indian Trust Doctrines: Federal Public Land Policy and Native Indians*, 39 Tulsa L. Rev. 271 (2003).

Available at: <https://digitalcommons.law.utulsa.edu/tlr/vol39/iss2/3>

This Native American Symposia Articles is brought to you for free and open access by TU Law Digital Commons. It has been accepted for inclusion in Tulsa Law Review by an authorized editor of TU Law Digital Commons. For more information, please contact [megan-donald@utulsa.edu](mailto:megan-donald@utulsa.edu).

# **THE CONFLICT BETWEEN THE “PUBLIC TRUST” AND THE “INDIAN TRUST” DOCTRINES: FEDERAL PUBLIC LAND POLICY AND NATIVE NATIONS**

Rebecca Tsosie\*

## INTRODUCTION

National parks and national monuments harbor some of the most scenic areas in the United States. Each summer, motorists line up to see the majesty of places like Glacier National Park and Yellowstone, gawking at wildlife and snapping photos to share with relatives in places like Boston or Chicago. These “public lands” are also rich in natural resources, such as coal, oil, gas, and timber. Americans generally expect their Nation’s political leadership to use these “public lands” wisely. While environmentalists frequently deplore the idea that natural resources exploitation can achieve a friendly coexistence with “preservation” of these spectacular places, the current political climate reflects President Bush’s emphatic commitment to commercial exploitation of public lands. Ever the politician, however, Bush has declared, “There’s a mentality that says you can’t explore and protect land. . . . We’re going to change that attitude. You can explore and protect land.”<sup>1</sup>

Native peoples’ longstanding interests in these “public lands” are frequently reduced to a “religious attachment” or, in policy terms, an interest in “sacred sites protection.” Not surprisingly, the issue receives little focus in the debate over the use of “public lands.” After all, policymakers generally assume that the United States Constitution calls for a separation between church and state, which means that any religious interest would be a suspect platform for public lands management. What this discussion overlooks, however, is that Native peoples have a unique relationship with their ancestral homelands, which were forcibly taken by the United States government during the nineteenth century for use as “public lands.”

Native people have legal, moral, political, and cultural interests in their ancestral homelands, and these multiple and complex interests should not be described as purely “religious” in nature. This essay addresses a compelling issue for contemporary

---

\* Lincoln Professor of Native American Law and Ethics and Executive Director, Indian Legal Program, Arizona State University.

1. Mike Soraghan, *Bush: National Monuments Have Oil-Drilling Potential*, Denv. Post A-01 (Mar. 15, 2001) (quoting Pres. George W. Bush) (internal quotations omitted).

policymakers: how ought we consider the interests of Native peoples on those ancestral homelands now designated as the “public lands” of the United States? Do Indian nations have any interests as sovereigns on “public lands,” and, if so, how should the federal government protect those interests? In particular, this essay examines the conflict between the idea of a “public trust” on public lands and the trust doctrine that applies to Indian nations and their resources (hereafter referred to as the “Indian trust doctrine”).

This essay advocates an “intercultural interpretation” of the Indian trust doctrine, which entails a need to understand tribal interests as part of a foundational bargain with the United States which ought to endure and receive protection against contrary assertions of the “public interest” of American citizens. This essay posits that the two sets of interests are not “coequal” and that a political “compromise” among “equally situated stakeholders” is neither necessary nor desirable. Rather, domestic public land policy should be shaped by the preexisting obligations of the United States to the first nations of this continent. Part I of this essay describes the contours of the federal government’s trust responsibility to Indian nations, including the notion of “government-to-government consultation.” Part II of this essay evaluates the concept of the “public trust” as it relates to the federal government’s land management policies, and also probes the intersection of federal public lands policy and cultural resources policy. The federal government’s cultural resources policies are necessarily related to Native peoples’ rights on public lands. Part III of this essay examines two examples of the conflict between the Indian trust doctrine and the idea of a public lands “trust,” and evaluates the procedural and substantive framework for adjudication of such conflicts to see how tribal interests are considered by agencies charged with management authority and how federal policy is implemented at the agency level. Part IV of this essay explores specific case studies in which Native interests have been successfully harmonized within federal public lands policy and highlights the intercultural values necessary to resolve potential conflicts.

## I. THE FEDERAL TRUST RESPONSIBILITY TO INDIAN NATIONS

For the past two centuries, the United States and the Indian nations have shared a unique political relationship. Although this relationship is beset with conflict and quite difficult to characterize, Indian nations and the federal government both agree that a defining feature is the federal government’s trust responsibility toward the Indian nations. They often disagree, however, on the substantive content of the trust doctrine. In some cases, the trust doctrine imposes duties and obligations on the government with respect to its dealings with the Indian nations. Other interpretations of the trust doctrine touch upon international law and domestic policy, as well as the private common law applicable to fiduciaries. This section discusses the historical basis of the trust doctrine, its substantive content under contemporary law, and its relevance to the dealings of federal agencies with Indian nations.

### A. *The Historical Basis of the Trust Doctrine*

The federal trust responsibility to Indian nations has long been recognized by the courts, Congress, and the executive branch. The roots of the trust responsibility extend back to the earliest treaties between European governments and Indian nations.

According to Professor Robert Williams, two core principles emerge from the classical era treaty diplomacy: first, that the treaty creates a relationship of "sacred trust," and second, that the most important promise contained in the treaty is the promise of protection given a treaty partner in times of need or crisis.<sup>2</sup> Williams claims that these themes of trust and protection were incorporated into the treaties between the Indian nations and the United States. For example, the Treaty of Hopewell with the Cherokee Nation, which was signed in 1785, offers "peace to all the Cherokees, and [pledges to] receive them into the favor and protection of the United States of America."<sup>3</sup>

The principles of trust and protection that emerged from the treaty relationship formed the basis for Chief Justice John Marshall's articulation of the United States' trust responsibility toward Indian nations in two foundational Indian law cases. In *Cherokee Nation v. Georgia*<sup>4</sup> and *Worcester v. Georgia*,<sup>5</sup> Marshall defined the political relationship between the Indian nations and the United States and began to articulate the dimensions of the federal government's unique responsibilities to Indian nations.<sup>6</sup> In *Cherokee Nation*, Marshall described the Cherokee Nation's political status as a "domestic dependent nation[]"<sup>7</sup> and claimed that "the relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist no where else."<sup>8</sup> Marshall analogized this unique relationship to that of "a ward to his guardian."<sup>9</sup> According to Marshall, the guiding principles of federal Indian law derived from the fact that the Indian Nations recognized a relationship of trust arising out of their treaties with the United States: "[The Indians] look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants . . . ."<sup>10</sup>

Marshall's subsequent opinion in *Worcester* further elaborated the nature of the federal government's trust responsibility. Marshall analyzed the treaties between the United States and the Cherokee Nation and found that the status of the Indians under these agreements "was that of a nation claiming and receiving the protection of one more powerful: not that of individuals abandoning their national character, and submitting as subjects to the laws of a master."<sup>11</sup> Under Marshall's analysis, the federal government had a duty to protect Cherokee rights from incursions by the states and private citizens. According to Marshall, this duty stemmed from the treaties with the Cherokee Nation, as well as the Commerce Clause of the United States Constitution, which provides that Congress shall have the sole authority to manage trade with foreign nations, among the several states, and with the Indian nations.

---

2. See Robert A. Williams, Jr., *Linking Arms Together: American Indian Treaty Visions of Law and Peace, 1600-1800*, 124-37 (Oxford U. Press 1997).

3. *Documents of United States Indian Policy* 7 (Francis Paul Prucha ed., 2d ed., U. Neb. Press 1990) (quoting Treaty of Hopewell) (internal quotations omitted).

4. 30 U.S. 1 (1831).

5. 31 U.S. 515 (1832).

6. See *id.* at 549-57; *Cherokee Nation*, 30 U.S. at 16-18.

7. 30 U.S. at 17.

8. *Id.* at 16.

9. *Id.* at 17.

10. *Id.*

11. *Worcester*, 31 U.S. at 555.

The duty of protection was also encompassed within federal statutes. Some statutes were quite specific in their purpose, such as the Trade and Intercourse Acts, which codified the federal government's exclusive jurisdiction to regulate trade between non-Indians and the Indian nations in order to protect Indians from unscrupulous white profiteers.<sup>12</sup> The Northwest Ordinance, passed by Congress in 1787, formalized a very broad federal duty of protection, stating:

The utmost good faith shall always be observed towards the Indians, their lands and property shall never be taken from them without their consent; and in their property, rights and liberty, they shall never be invaded or disturbed . . . but laws founded in justice and humanity shall from time to time be made, for preventing wrongs being done to them, and for preserving peace and friendship with them.<sup>13</sup>

As Professor Vine Deloria, Jr., has noted, these words are not mere "poetic sentiment."<sup>14</sup> Rather, they define clear principles which Congress intended as standards of behavior for the United States. In that sense, these judicial and congressional acknowledgments of the federal trust responsibility to Indian nations provide a broad foundation for the notion of a protective relationship designed to validate and affirm Native rights.

#### *B. The Substance of the Trust Doctrine*

The trust doctrine that emerges from treaties, federal statutes, and the Supreme Court's jurisprudence acknowledges the United States' duty to protect tribal rights. However, as Reid Chambers pointed out in his 1975 article, the trust doctrine has undergone revision throughout the history of federal Indian law.<sup>15</sup> Under Chief Justice Marshall's view, the trust responsibility could serve either as a principle of federal preemption with respect to states' attempts to secure jurisdiction over Indian lands, or as an implicit recognition of the preexisting sovereignty of Indian nations, and the duty of the United States to protect tribal self-governance.<sup>16</sup> In the "plenary power" era of federal Indian policy, the trust doctrine was interpreted to confirm the exercise of a virtually unlimited federal power over Indians, including the power to unilaterally abrogate treaty rights.<sup>17</sup> The Supreme Court, in cases such as *United States v. Kagama*<sup>18</sup> and *Lone Wolf v. Hitchcock*,<sup>19</sup> claimed that the "dependent" nature of the Indian nations necessitated a comprehensive federal power to exercise criminal jurisdiction and abrogate treaty rights, in order to "protect" the Indian nations. Thus, the plenary power era cases interpret the trust doctrine as a *source* of congressional power (distinct from the

---

12. "The first of these laws was passed in 1790, the final and enduring [version passed] in 1834." Francis Paul Prucha, *American Indian Policy in the Formative Years: The Indian Trade and Intercourse Acts, 1790-1834*, at 2 (U. Neb. Press 1962).

13. *Id.* at 37 (quoting *Journals of the Continental Congress*, XXXII, 340-41) (internal quotations omitted).

14. Vine Deloria, Jr., *Laws Founded in Justice and Humanity: Reflections on the Content and Character of Federal Indian Law*, 31 *Ariz. L. Rev.* 203, 221 (1989).

15. See Reid Peyton Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 *Stan. L. Rev.* 1213, 1215-34 (1975).

16. *Id.* at 1221.

17. *Id.* at 1223.

18. 118 U.S. 375 (1886).

19. 187 U.S. 553 (1903).

federal government's constitutional commerce power) to regulate Indian affairs. Finally, in modern cases dealing with federal executive action, the trust doctrine has been used to enforce *limitations* on federal action that seemed to conflict with the federal government's role as a fiduciary with respect to tribal lands and resources.<sup>20</sup>

These historical developments point to two key features of the trust responsibility. The trust responsibility is clearly premised on a "moral obligation" that requires the utmost good faith and fair dealing from the United States government in its interactions with Indian nations. Because of this, most Indian people assume that the doctrine will be used to *protect tribal rights* such as rights to natural and cultural resources, which are necessary to the continued survival of Indian nations, and also to *limit* government actions that undermine tribal self-determination. Paradoxically, however, to the extent that the trust doctrine has been used to justify congressional plenary authority over Indian nations, there is a tendency to link the two doctrines in a way which may ultimately *disadvantage* tribal claims to self-determination and autonomy.

Professor Mary Christina Wood is among the scholars who have pointed to the need "to delink the trust doctrine and the plenary power doctrine."<sup>21</sup> Indeed, several cases subsequent to *Kagama* employ the trust doctrine to critique the appropriateness of federal power over Native people. For example, in *Lane v. Pueblo of Santa Rosa*,<sup>22</sup> the Court specifically found that Congress's plenary power to regulate Indian lands for the benefit of Indian people does not include the power to dispose of those lands under the public land laws.<sup>23</sup> The Supreme Court enjoined the Secretary of the Interior from such an action, claiming that it "would not be an exercise of guardianship, but an act of confiscation."<sup>24</sup> In *Seminole Nation v. United States*,<sup>25</sup> the Tribe prevailed on a claim for damages against the United States for actions that were contrary to the Tribe's treaty with the United States. The Supreme Court analogized the federal government's duties to those of a private fiduciary and found that "[i]n carrying out its treaty obligations with the Indian tribes, the Government . . . has charged itself with moral obligations of the highest responsibility and trust."<sup>26</sup>

This historical survey demonstrates that during the nineteenth century, the federal government used the trust doctrine as a justification for federal power over Indian nations. After World War II, with increased national attention given to human rights, the United States began to address previous harms to Indian tribes, in part through the Indian Claims Commission process.<sup>27</sup> During this period, as Professor Robert Clinton has observed, "the legal doctrine of the federal trusteeship . . . evolved into a source of

---

20. See Chambers, *supra* n. 15, at 1230.

21. Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 Utah L. Rev. 1471, 1504.

22. 249 U.S. 110 (1919).

23. *Id.* at 113.

24. *Id.*

25. 316 U.S. 286 (1942).

26. *Id.* at 296-97.

27. The Indian Claims Commission Act of 1946, 60 Stat. 1049 (1946), was designed to facilitate the settlement of five types of claims by Indian tribes against the United States, including claims for breach of treaty rights and takings of aboriginal title. The Act also authorized tribes, for the first time, to bring a cause of action in the Claims Court for claims arising after the effective date of the statute.

right.”<sup>28</sup> The trust doctrine therefore became a legal theory under which the Indian nations could sue the United States for past wrongs.

C. *The Contemporary Relevance of the Trust Doctrine*

Today, the trust doctrine serves an important role in adjudicating tribal rights and federal responsibilities. Modern caselaw has defined the contours of the federal trust responsibility and highlighted its application to both congressional and executive action. Importantly, the executive branch has reaffirmed the trust responsibility in several significant actions during recent years. For example, in 1994, President Clinton held a meeting with over 300 tribal leaders in which he pledged to fulfill the federal government's trust responsibility. Several agencies within the executive branch have developed or begun to develop trust policies to guide their actions with respect to Indian nations.<sup>29</sup>

As illustrated by the Supreme Court's decisions in the *Mitchell* cases,<sup>30</sup> the federal government's trust relationship with Indian tribes carries at least three different aspects.<sup>31</sup> First, the federal government maintains a “general” trust relationship with the Indian tribes, which represents the government's historical obligation to protect tribal lands and tribal self-government and to observe the “utmost good faith” towards the Indian people as would a private fiduciary.<sup>32</sup> This general trust principle is sometimes referred to as imposing “merely a moral obligation” that is not specifically enforceable by the courts. In other cases, it is used as a canon of construction to assist the Court in its interpretation of legal duties.

Second, the federal government has enacted statutes, such as the General Allotment Act, that create specific duties in order to serve the purpose of the statute.<sup>33</sup> Under this “limited” trust responsibility, the government affirmatively assumes certain duties in order to carry out the specific goals of the statute. To the extent that the government fails to execute its statutory duties, Indian nations may bring actions for declaratory or injunctive relief to compel performance.

The third category of trust relationship is the full fiduciary relationship which arises from comprehensive federal management of tribal assets, which the *Mitchell II*

---

28. *Federal Trust Responsibility and Conflicts of Interest: Environmental Protection or Natural Resource Development*, 71 N.D. L. Rev. 365, 371 (1995) (quoting Prof. Robert Clinton).

29. See *infra* nn. 104-09 and accompanying text.

30. See *U.S. v. Mitchell*, 463 U.S. 206 (1983) (“*Mitchell I*”); *U.S. v. Mitchell*, 445 U.S. 535 (1980) (“*Mitchell II*”). The *Mitchell* cases involved the consolidated claims of the Quinault Tribe and individual Quinault allottees to monetary damages for the federal government's mismanagement of timber resources on the reservation. In *Mitchell I*, the Court held that the General Allotment Act did not impose a fiduciary duty to manage timber on allotted lands and remanded the case for further consideration. On remand, the Court of Claims found that the federal timber management statutes and regulations imposed a fiduciary duty on the United States to manage timber resources on lands held in trust. This finding became the basis for the Court's decision in *Mitchell II*, which found that “a fiduciary relationship necessarily arises when the Government assumes such elaborate control over forests and property belonging to Indians [because] . . . the necessary elements of a common-law trust are present: a trustee (the United States), a beneficiary (the Indian allottees), and a trust corpus (Indian timber, lands, and funds).” 463 U.S. at 225.

31. See Judith V. Royster, *Equivocal Obligations: The Federal-Tribal Trust Relationship and Conflicts of Interest in the Development of Mineral Resources*, 71 N.D. L. Rev. 327, 332 (1995).

32. See *id.*

33. See *id.* at 333.

Court found could be established by comprehensive federal statutes and regulations or by actual pervasive federal control.<sup>34</sup> Not surprisingly, the full fiduciary relationship gives rise to enforceable duties remediable by actions for damages or other relief for breach of trust.<sup>35</sup>

### 1. Application of the Trust Doctrine to Congressional Action

Although several Supreme Court cases have recognized Congress's fiduciary duties toward Indian tribes and have affirmed its duty to act in good faith toward the Indian nations in the exercise of its duty to protect them, the trust doctrine has never been used to invalidate a federal statute. The trust doctrine has been used, however, to suggest a certain standard in dealing with Native American trust assets. For example, in *United States v. Sioux Nation*,<sup>36</sup> the Court determined that Congress enjoys a fiduciary's power to manage the affairs of the Indian nations, including their lands and resources. Congress can transfer treaty-guaranteed lands out of tribal ownership so long as it makes a "good faith effort" to provide the tribes with cash or property of equivalent value. To the extent, however, that Congress fails to do this, it will be held liable under the Fifth Amendment for a taking of vested property rights without just compensation.

The Court has also recognized that because of its trust duties, Congress's actions toward Indian nations deserve judicial scrutiny under a rational basis test. Thus, Congress's actions must be "tied rationally to the fulfillment of [its] unique obligations toward the Indians."<sup>37</sup> The Supreme Court has both acknowledged federal power over Indian affairs and suggested certain limitations that inhere in the fiduciary duties that attach to the exercise of federal power.

Importantly, however, the Supreme Court has also affirmed that Congress has the power to terminate its trust relationship with particular Indian nations. The termination legislation of the 1950s, for example, operated to terminate the federal government's trust relationship with certain Indian nations.<sup>38</sup> Under most of these statutes, tribal lands and other assets were liquidated to cash, and individual tribal members were paid a lump sum in final "settlement" of the government's obligation to them. Thereafter, individual tribal members were deemed to be in the same position as non-Indian citizens within the

---

34. *See id.*

35. *See Mitchell II*, 463 U.S. at 226.

36. 448 U.S. 371 (1980).

37. *Del. Tribal Bus. Comm. v. Weeks*, 430 U.S. 73, 85 (1977) (quoting *Morton v. Mancari*, 417 U.S. 535, 555 (1974)) (internal quotations omitted).

38. The termination policy was officially activated in 1953 by House Concurrent Resolution 108, which stated:

[I]t is declared to be the sense of Congress that, at the earliest possible time, all of the Indian tribes and the individual members thereof located within the States of California, Florida, New York, and Texas, and [various named tribes] should be freed from Federal supervision and control and from all disabilities and limitations specifically applicable to Indians . . . .

*See Charles F. Wilkinson & Eric R. Biggs, The Evolution of the Termination Policy*, 5 Am. Indian L. Rev. 139, 150 (1977) (quoting H.R. Res. 108, 83d Cong. (1953) (enacted)). Congress subsequently enacted a series of statutes that terminated specific tribes and bands from federal recognition. The Secretary of the Interior was charged with developing a termination plan for the tribe, which would specify the disposition of tribal lands and resources. After the plan was implemented, the federal-tribal trust relationship ended, and tribal members became the responsibility of the states as "equal citizens." *See id.* at 149-62.



state. However, in cases where the operative statute did not expressly extinguish Indian treaty rights to hunt and fish on particular lands, the federal courts found that these rights survived and should be respected by federal or state agencies charged with land management authority.<sup>39</sup>

## 2. Application of the Trust Doctrine to Executive Action

A significant body of caselaw exists enforcing fiduciary duties against the executive branch in its management of Indian affairs.<sup>40</sup> Unlike Congress, agencies lack plenary power over Indian tribes, and thus, in the context of executive action, the trust doctrine has been used as a tool to restrain, rather than authorize, federal actions. For example, the trust doctrine has been used

to force the [federal] government to properly manage tribal trust funds; consider Indian interests when allocating water rights; clean up pollution on reservations; protect Indian lands against trespassers and infringing development; distribute income and proceeds to appropriate individuals; prevent improper conveyance of Indian lands; and compensate for resource mismanagement.<sup>41</sup>

Federal Indian policy has increasingly moved from being the product of congressional action to one of administrative action. Thus, Indian nations may enforce "the federal fiduciary duty . . . through equitable, declaratory, or mandamus relief in federal district court pursuant to the Administrative Procedure Act . . ."<sup>42</sup> Tribal claims to enforce the trust responsibility carry significant flexibility in this context because the federal district courts have broad authority to hear federal common law claims and to grant equitable and declaratory relief for such claims. In many cases, injunctive relief based on the trust responsibility is the preferred remedy to stop federal actions that would impair tribal rights.<sup>43</sup> Such actions may be imperative to preserve important tribal resources from misallocation or waste.

---

39. See e.g. *Menominee Tribe of Indians v. U.S.*, 391 U.S. 404, 412-13 (1968) (holding that the statute that terminated the Menominee Tribe, which was silent on their treaty hunting and fishing rights, did not implicitly abrogate those rights).

40. For an excellent and detailed discussion of this caselaw, see Wood, *supra* note 21.

41. *Id.* at 1513-14 (footnotes omitted) (citing cases in support of each proposition).

42. *Id.* at 1514-15 (footnotes omitted).

43. See e.g. *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp. 252 (D.D.C. 1973). In the *Pyramid Lake Paiute* case, the district court overturned a Department of Interior regulation establishing the amount of water to be diverted to an irrigation district from the Truckee River. The river serves as the primary water source for Pyramid Lake, a desert lake located on the Tribe's reservation and essential to the tribe's economic and cultural survival. Though the point of diversion was located off the reservation, the consequential decline in water flow seriously jeopardized the lake environment. The court found that the Secretary of the Interior had a fiduciary duty to the Tribe to assert his authority "to the fullest extent possible" to preserve water for the Tribe. The Secretary reached his decision by making a "judgment call" that allocated the water resource between the tribe and the irrigation district. The Court held that the Secretary had violated his fiduciary duty to the Tribe by reaching such an "accommodation" and by failing "to justify any diversion of water from the Tribe with precision." *Id.* at 256.

In a subsequent related case, the Ninth Circuit Court of Appeals held that the Secretary of the Navy owed a fiduciary duty to the Tribe "to preserve and protect the Pyramid Lake fishery" when leasing appurtenant water rights that could diminish water levels in Pyramid Lake. *Pyramid Lake Paiute Tribe of Indians v. U.S. Dept. of Navy*, 898 F.2d 1410, 1420 (9th Cir. 1990). The court explicitly stated that the trust duty is not limited to management of tribal property, but instead "extend[s] to any federal government action." *Id.*

The trust responsibility, however, may also form the basis for a tribe's suit for damages in the United States Claims Court, pursuant to the Indian Tucker Act.<sup>44</sup> The *Mitchell* cases suggested that damages may be appropriately awarded where the federal government assumes "elaborate control"<sup>45</sup> of tribal property and assets and then breaches its duties, because in that case "[a]ll of the necessary elements of a common-law trust [were] present: a trustee (the United States), a beneficiary (the Indian allottees), and a trust corpus (Indian timber, lands, and funds)."<sup>46</sup> The Court in *Mitchell II* reasoned that a damages remedy is essential to deter federal officials from mismanaging tribal resources.<sup>47</sup> However, the Indian Tucker Act was merely a jurisdictional statute authorizing such claims to be litigated in the Court of Federal Claims, so long as there was some other substantive source of law providing the right. In *Mitchell II*, the federal timber management statutes and regulations supported this substantive right.

More recent cases from the U.S. Supreme Court appear to have narrowed the trust doctrine as it applies to tribal actions for damages. In *Navajo Nation v. United States*,<sup>48</sup> the Supreme Court refused to uphold the Navajo Nation's claim for damages against the federal government for breach of fiduciary duty, finding that these claims did not derive from any "liability-imposing provision"<sup>49</sup> of the 1938 Indian Mineral Leasing Act (IMLA) or its regulations. The facts in *Navajo Nation* demonstrated that Interior Department officials had clearly violated common law trust obligations by holding ex parte communications with Peabody Coal Co., the party adverse to the Navajo Nation in the lease renewal negotiations, and by concealing material facts about the process from the beneficiary. These actions put the tribe at a marked disadvantage in the negotiations.

The Federal Circuit Court of Appeals found that the 1938 statute put "pervasive control"<sup>50</sup> over mineral leasing on the reservation in the hands of the federal government, rather than the tribes, and thus drew a parallel between the IMLA and the timber statutes and regulations at stake in *Mitchell II*. However, the Supreme Court disagreed and held that the Tribe had failed to identify a substantive source of law that mandated specific duties that were breached and that would support compensation in damages. The Court found that the IMLA and its regulations did not speak to common law fiduciary duties, and that the Secretary of the Interior had met his only "real" duty under the statute, which was to ensure a "bare minimum royalty"<sup>51</sup> for the tribe before approving the lease.

In a companion case, the Court issued an opinion that narrowly upheld the White Mountain Apache Tribe's claim for damages under a 1960 statute, which placed the

---

44. Wood, *supra* n. 21, at 1515 n. 204 (noting that the Indian Tucker Act is the portion of the Indian Claims Commission Act that authorizes tribes to bring suit in the Court of Claims for actions arising after the effective date of the statute). In fact, "[t]he bulk of caselaw enforcing the trust obligation resides in Court of Claims opinions awarding damages for breaches of fiduciary duty." *Id.* at 1515.

45. *Mitchell II*, 463 U.S. at 225.

46. *Id.* (footnote omitted).

47. *See id.* at 227.

48. 537 U.S. 488 (2003).

49. *Id.* at 493.

50. *Navajo Nation v. U.S.*, 263 F.3d 1325, 1331 (Fed. Cir. 2001).

51. *Navajo Nation*, 537 U.S. at 511.

federal government in control of trust property belonging to the Tribe.<sup>52</sup> In *United States v. White Mountain Apache Tribe*, the Tribe sued the United States for the amount necessary to rehabilitate several buildings on property occupied by the government under the authority of the 1960 statute. The statute provided that the former military post of Fort Apache would be "held by the United States in trust for the White Mountain Apache Tribe, subject to the right of the Secretary of the Interior to use any part of the land and improvements for administrative or school purposes for as long as they are needed for the purpose."<sup>53</sup> The government failed to maintain the buildings, and a 1998 engineering assessment commissioned by the Tribe found that it would cost approximately \$14 million to rehabilitate the property. The government refused to cover the cost of the rehabilitation, leading the Tribe to sue for breach of fiduciary duty.

In a very close opinion, five members of the Court found that the federal government was potentially liable for damages and that the case should move forward in the Court of Federal Claims. The Court held that "[t]he 1960 Act goes beyond a bare trust and permits a fair inference that the Government is subject to duties as a trustee and liable in damages for breach."<sup>54</sup> The Court relied on the specific language of the statute, which refers to land "held in trust," and on the fact that the federal government had the actual duty to administer the trust property prior to turning it over to the Tribe. The Court then relied on common law trust principles to imply a cause of action for damages, noting that "a fiduciary actually administering trust property may not allow it to fall into ruin,"<sup>55</sup> and that "the trustee [has a duty] to preserve and maintain trust assets."<sup>56</sup> The four dissenting Justices held firm to the belief that any grant of a right of action for money damages against the United States must be made with specificity, and further believed that the existence of a "trust relationship" is not a sufficient basis to imply a cause of action for damages.

While it is too early to draw any firm conclusions about future cases,<sup>57</sup> it seems clear that the current Supreme Court is deeply divided over the propriety of tribal actions for damages against the United States premised on breach of trust. A majority of the Court seems committed to following the basic structure of the *Mitchell* cases, but would demand that the substantive law be very clear and specific about the existence of duties that, if breached, require redress through damages. To the extent that a federal statute

---

52. *U.S. v. White Mt. Apache Tribe*, 537 U.S. 465 (2003).

53. *Id.* at 469 (quoting Pub. L. No. 86-392, 74 Stat. 8 (1960)) (internal quotations omitted).

54. *Id.* at 474.

55. *Id.* at 475.

56. *Id.* (quoting *C. Sts., S.E. & S.W. Areas Pension Fund v. C. Transport, Inc.*, 472 U.S. 559, 572 (1985)) (internal quotations omitted).

57. The decisions in *White Mountain Apache Tribe* and *Navajo Nation* are so recent that it is difficult to tell how lower federal courts will interpret them. One recent case applying the analysis in both the *Mitchell* cases and *Navajo Nation* is *Shoshone Indian Tribe of the Wind River Reservation v. U.S.*, 56 Fed. Cl. 639 (2003). The U.S. Court of Federal Claims evaluated an action by the Shoshone Tribe against the United States for breach of fiduciary duty in actions dealing with the management and payment of royalties on oil and gas production on Indian lands. The defendant filed a motion to dismiss, and the plaintiff filed a motion for summary judgment. The court considered the oil and gas statute and regulations to be more similar to the statute in *Mitchell II* than to the coal lease provisions at stake in *Navajo Nation*. Nonetheless, the court found that the government did not have an affirmative duty to maximize oil and gas revenue from tribal lands, although it did have a fiduciary duty to properly value the oil and gas upon which royalties were paid.

speaks to tribal “self-determination” and requires tribal participatory control over resources, as did the Indian Mineral Leasing Act, it may be interpreted as negating any fiduciary duty on the part of the United States. However, when the statute is instead premised on tribal “dependency” and locates full management and control in the federal government, the federal government may be liable for breach of fiduciary duty when this is the only way for the tribe to preserve the value of its assets from mismanagement.

Another recent Supreme Court decision, *Department of the Interior v. Klamath Water Users Protective Association*,<sup>58</sup> also raises concern about the Court’s willingness to endorse a broad and protective notion of the trust doctrine. The case is consistent with the minimalist view of the trust responsibility articulated by Justice Rehnquist in *Nevada v. United States*,<sup>59</sup> as he excused the government’s failure to protect Indian resources from the conflicting demands of a reclamation project in the early 1900s, opining that the government’s congressionally-imposed obligation to “wear two hats” exempted it from any need to “follow the fastidious standards of a private fiduciary.”<sup>60</sup>

In the *Klamath* case, the Court interpreted the Freedom of Information Act (FOIA) to require disclosure of records obtained in the course of a federal agency’s consultation with Indian tribes. These records could then be used against the tribe in litigation by opponents seeking rights to the same resources. The Court in *Klamath* did not question the existence of the trust responsibility or contest the government’s assertion that a failure to apply the deliberative process privilege under Exemption 5 of FOIA would compromise the ability of the federal trustee to candidly consult with the tribal beneficiary pursuant to its trust obligation.<sup>61</sup> The Court merely elevated the government’s duty of public disclosure to a higher status than its trust responsibility to the Indian nations. The “public interest” in accessing this information trumps the trust responsibility to Indian nations.

The result of both *Nevada* and *Klamath* is the protection of non-Indian property owners’ interests through subordination of the federal government’s trust responsibility to the Indian nations. As the next section of this essay demonstrates, this dynamic is also present in certain aspects of public lands management.

## II. THE CONCEPT OF A “PUBLIC TRUST”: FEDERAL LAND MANAGEMENT POLICY

Unlike the trust doctrine in federal Indian law, the concept of a “trust” applicable to public lands is largely the creation of public policy, and it is more of a way to describe the public’s *interest* in wise stewardship of common resources than an actual “trust doctrine.”<sup>62</sup> As Professor Charles Wilkinson has observed, “[I]nland federal lands are

---

58. 532 U.S. 1 (2001).

59. 463 U.S. 110 (1983).

60. *Id.* at 128. Rehnquist, writing for the Court, further articulated that because the principle of *res judicata* barred the Tribe’s claim, it could not assert its interest in protecting its water resource from antagonistic public uses. *Id.* at 143-44.

61. See *Klamath*, 532 U.S. at 9-10.

62. Charles Wilkinson’s article contains an excellent discussion of the historical development of the concept. See Charles F. Wilkinson, *The Public Trust Doctrine in Public Land Law*, 14 U. Cal. Davis L. Rev. 269 (1980).

not 'trust resources' according to the classic formulation of the [public trust] doctrine"<sup>63</sup> that has been applied to tidal waters and navigable waterways. In fact, as he further notes, there are a number of compelling policy reasons for *not* applying the trust doctrine to public lands, including: public lands were originally designed to be alienated for private ownership; public land law is heavily governed by statute; public lands are quite diverse and fall under the jurisdiction of federal agencies with very different organic acts and purposes, such as the National Park Service, Bureau of Land Management, and Forest Service; and the remaining public lands are in many cases "common, even mundane"<sup>64</sup>—the "leftovers"<sup>65</sup> that no one wanted to homestead or claim.

Nonetheless, the concept of a "trust" in public lands has structured the interpretation of public land law by designating the range of citizen interests—e.g., commercial, recreational, aesthetic—that the federal government must consider as it manages these lands. It is constructive to examine the historical development of the concept, and it is also interesting to compare the contemporaneous development of the Indian trust doctrine.

*A. The Historical Development of the Public Trust Doctrine in Public Land Law*

In the early years of the nation's history, the Court found that those inland public lands that did not pass from federal ownership at statehood continued to be held by the United States in trust for a specific purpose: "to 'convert the land into money for the payment of the debt, and to erect new states over the territory thus ceded.'"<sup>66</sup> The idea of free public availability of resources was an important building block for western expansion. During this early period, the Indian trust doctrine formulated in the Cherokee cases was used in part to *protect* Indian people from the rapid development of the states and their aggressive attempts to extend state law to Native lands and people.

During the latter part of the nineteenth century, a movement began to keep some valuable resources—e.g., timber, water, and minerals—within federal control for the benefit of future generations.<sup>67</sup> The Court used trust language in several opinions to justify federal plenary power to protect public lands. This, in turn, justified broad-based delegations of congressional authority to federal land management agencies.<sup>68</sup> The Indian trust doctrine during this period was also interpreted to justify an expansive federal plenary power. That plenary power was used in part to facilitate the dispossession of Native lands during the allotment era, in order to facilitate expansion and settlement of "public lands." However, it was also used to confirm federal supremacy and preempt state jurisdiction over Indian country.

Finally, the third era, which commenced in the early 1970s, "involve[d] the direct or indirect use of the public trust doctrine to limit federal power and to justify rights of

---

63. *Id.* at 273-74.

64. *Id.* at 276.

65. *Id.* at 277.

66. *Id.* at 279 (quoting *Pollard v. Hagan*, 44 U.S. 212, 224 (1845)).

67. *Wilkinson*, *supra* n. 62, at 280.

68. *Id.* at 282.

the public against the federal government.”<sup>69</sup> In a very analogous movement to the doctrine developing in the Indian trust cases, litigants in public lands cases sought to require federal land managers to protect public lands and resources. This movement has been problematic, however, in part because the goals of federal land management have vacillated over the years, reflecting a clear tension between policies favoring conservation, preservation, and development.

During the years of westward expansion, federal policy centered upon disposing of “public lands” through homesteading laws, mining laws, and railroad grants.<sup>70</sup> Conservation goals did not become part of the national policy until the late nineteenth century, when Congress created Yellowstone National Park and established the Forest Service to manage reserves of forest lands in a scientific manner. As Professor Wilkinson notes, however, the emphasis of federal public lands policy has consistently been on development, and notions of environmental protection have “played at most a marginal role.”<sup>71</sup> The main thrust of federal public lands policy has been “to transfer public resources into private hands on a wholesale basis in order to conquer nature.”<sup>72</sup> In fact, as Wilkinson observes, despite modern notions of sustainable use, western natural resources policy is still “dominated by the lords of yesterday, a battery of nineteenth-century laws, policies, and ideas that arose under wholly different social and economic conditions but that remain in effect due to inertia, powerful lobbying forces, and lack of public awareness.”<sup>73</sup> In particular, Wilkinson points to the 1872 Hardrock Mining Law, which dedicates “more than half of all public lands to mining as the preferred use”<sup>74</sup> and requires the United States to “pay dearly” whenever it deems some other activity as the “highest and best use”<sup>75</sup> of lands claimed by a mining company.

This public lands policy, of course, had a devastating impact upon the natural environment, and western states are still struggling with the legacy of the mining laws on western lands and water resources. According to Professor Wilkinson, there are over 1.1 million hardrock mining claims still existing on federal public lands.<sup>76</sup> The mining companies extract approximately \$4 billion in minerals annually from these lands, and yet, under the very liberal terms of the Hardrock Mining Law, they do not pay royalties to the United States and only are required to pay a very nominal leasing fee (\$5 or less per acre) for lands within the claim area.<sup>77</sup> The costs of these enterprises, on the other hand, are staggering:

---

69. *Id.* at 284.

70. See George Cameron Coggins, Charles F. Wilkinson & John D. Leshy, *Federal Public Land and Resources Law* 83-85, 91-92, 97-98 (3d ed., Found. Press 1993) (noting that from 1868 to 1904, when most public lands were withdrawn from entry, almost 100 million acres were homesteaded; summarizing early history of mining policy on public lands; and discussing grants to railroads, noting that between 1850 and 1871, “[w]ell over 100 million acres, in alternate odd-numbered sections, were granted to the railroads, directly and indirectly” (emphasis omitted)).

71. Charles F. Wilkinson, *Crossing the Next Meridian: Land, Water, and the Future of the West* 18 (Island Press 1992).

72. *Id.*

73. *Id.* at 17.

74. *Id.* at 20.

75. *Id.* at 73.

76. Wilkinson, *supra* n. 71, at 20.

77. *Id.* at 30.

Contamination of water and soil from acid mine drainage, heavy metals, arsenic, and mercury pose widespread and significant hazards to wildlife and human health. Hardrock mines on public lands already account for fifty Superfund sites, and many more are sure to be designated as scientists uncover more poisons from abandoned mines.<sup>78</sup>

With over 25 million acres of public lands subject to hardrock mining claims, the environmental impacts of these uses on adjacent public lands and Indian trust lands are considerable. Moreover, even though the federal government now has environmental regulations on the books, Wilkinson notes that government oversight of hardrock mining lags far behind that of other health and environmental hazards, in part due to the legal framework of the 1872 Hardrock Mining Act, which extends to mining companies a "right to mine,"<sup>79</sup> and maintains that hardrock mining is the highest and most preferred use of public lands.<sup>80</sup>

The history of public lands management demonstrates that, regardless of the official policy as one committed to "development" or "conservation," federal land laws have always served the "public" interest. The ideal of "preservation" has become a political football in congressional debates over public land policy and a contest between developers, recreationalists, environmentalists, and industrialists. For most of this nation's history, Native peoples have not been considered stakeholders in the debate over the future of America's public lands. The American public has conveniently overlooked the fact that federal "public lands" are the same lands that were appropriated from Native people by military force during the "Indian Wars" of the nineteenth century. Native lands have been appropriated for homesteading, grazing, mining, railroads, national parks, reclamation projects, and military installations. In most cases, these lands are no longer "Indian country" although the tribes retain important connections to these ancestral lands within their own traditions. Thus, there is an important intersection between federal public land policy and cultural resources policy. The following section uses the intersection of public land policy and cultural resources policy to draw the parallels and examine them within an applied context.

#### *B. The Intersection of Public Land Policy and Cultural Resources Policy*

Cultural resources policies form an important adjunct to federal public land policy, and in many cases land management authority is structured around the need to protect cultural resources.<sup>81</sup> From a Native perspective, the continued survival of Indian nations depends to some extent upon the tribes' ability to protect and preserve their cultural resources. Federal actions that affect Indian lands and public lands often have profound impacts on tribal cultures. Hydroelectric power plants or activities such as coal strip-mining can have severe impacts on sacred places, natural springs and other water sources, and fish and wildlife resources that have cultural and religious significance. For

---

78. *Id.* at 31.

79. *Id.* at 33 (internal quotations omitted).

80. *Id.*

81. For a comprehensive account of the legal framework affecting cultural resources on public lands, see Sandra B. Zellmer, *Sustaining Geographies of Hope: Cultural Resources on Public Lands*, 73 U. Colo. L. Rev. 413 (2002).

example, Hopi traditionalists have vehemently condemned coal strip-mining on Black Mesa, asserting that this activity desecrates a place that has deep spiritual significance to the Hopi people and threatens natural springs and other sites that are essential to the continuance of Hopi life.<sup>82</sup>

### 1. The Statutory and Regulatory Framework

Many federal statutes and executive orders recognize tribal interests in protecting cultural resources and serve to guide the developing discussion about the role of the federal trust responsibility in protecting such resources. There are at least ten different statutes that require consultation with Native nations or consideration of Native cultural interests (as part of the analysis of impacts on "cultural or historic resources") as part of the agency process to undertake actions on federal lands.<sup>83</sup> There are also two main executive orders that govern such actions: Executive Order No. 13007 on Indian Sacred Sites<sup>84</sup> and Executive Order No. 13175 on Consultation and Coordination with Indian Tribal Governments.<sup>85</sup> Agencies are also bound by "numerous agency regulations, memoranda, guidelines, bulletins, manuals, handbooks, and interagency programmatic agreements."<sup>86</sup>

These statutes and orders should be consulted by federal agencies concerned about the permissible scope of various land management activities. To give an illustrative (but not comprehensive) view of this process, this section focuses on the requirements of several of the major statutes.<sup>87</sup>

The National Environmental Policy Act (NEPA)<sup>88</sup> requires some assessment of the impacts of federal activities under various federal statutes, including the American Indian Religious Freedom Act (AIRFA)<sup>89</sup> and the various statutes that apply to protect cultural resources. The scope of this assessment, of course, varies somewhat depending upon whether the federal action will have a significant impact on human health and the environment, thus meriting a detailed environmental impact statement.

82. See *Lomayaktewa v. Hathaway*, 520 F.2d 1324 (9th Cir. 1975). In this case, Hopi traditionalists challenged the Tribal Council's decision to lease Black Mesa for coal strip-mining; they asserted that strip mining was a desecration and contrary to everything that Hopi culture and religion mean. The suit was eventually dismissed for failure to join an indispensable party—the Hopi Tribe. *Id.* at 1324-25.

83. See Connie Rogers, *Native American Consultation in Resource Development on Federal Lands*, 31 Colo. Law. 113, 114 (Jan. 2002) (listing the National Historic Preservation Act, Federal Land Policy and Management Act, National Forest Management Act, Surface Mining Control and Reclamation Act, Mineral Leasing Act of 1920, General Mining Law of 1872, National Environmental Policy Act of 1969, American Indian Religious Freedom Act, Native American Graves Protection and Repatriation Act, and the Archaeological Resources Protection Act).

84. 61 Fed. Reg. 26771 (May 24, 1996).

85. 65 Fed. Reg. 67249 (Nov. 6, 2000).

86. Rogers, *supra* n. 83, at 114.

87. For a detailed analysis of these statutes and their application to public lands, see Zellmer, *supra* note 81.

88. Pub. L. No. 91-190, 83 Stat. 852 (1970).

89. Pub. L. No. 95-341, 92 Stat. 469 (1978). AIRFA states:

[I]t 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.

42 U.S.C. § 1996 (2000).



There are many other federal statutes that specifically protect "cultural" or "historic" resources. Under the Archaeological Resources Protection Act (ARPA),<sup>90</sup> the federal government has a duty to protect archaeological resources on federal and Indian lands from exploitation by individual collectors and commercial interests and to foster the professional gathering of information for future benefit.<sup>91</sup> Although ARPA is not responsive to the full array of tribal interests in cultural resources protection, it does provide a legal mechanism to take action against individuals who excavate on tribal or federal lands without obtaining the appropriate permits, and it criminalizes the sale in interstate commerce of objects obtained from private or state lands in violation of state law.<sup>92</sup> ARPA also contains provisions requiring notice and consultation with an Indian tribe whenever issuance of a permit could result in harm to or destruction of any site with religious or cultural significance to a tribe.<sup>93</sup>

The Native American Graves Protection and Repatriation Act (NAGPRA)<sup>94</sup> was designed to empower Native Americans to protect their cultural and spiritual heritage and repatriate their deceased ancestors. The statute requires federal agencies and federally funded museums and institutions to inventory their collections to ascertain whether they have any Native American remains, funerary objects, sacred objects, or objects of cultural patrimony.<sup>95</sup> Any such items within the possession and control of such agencies and institutions must be repatriated to the appropriate Indian nations upon their request.

NAGPRA also covers the "ownership" of the listed categories of cultural objects excavated on federal or tribal lands through intentional or unintentional actions. NAGPRA contains detailed provisions highlighting the need for notice to affected tribes and consultation with them prior to going forward with the excavation activity, with the intent to protect such items and return them to the culturally affiliated Indian nations.<sup>96</sup>

The National Historic Preservation Act (NHPA)<sup>97</sup> requires agencies to assess the impacts of development activities on significant historic resources, including any structure, area, or district listed or eligible for listing on the National Register of Historic Places.<sup>98</sup> Sites that have religious and cultural significance to Indian nations may be eligible for listing on the National Register even if they are essentially "natural"—as opposed to "manmade"—properties.<sup>99</sup> The NHPA covers "Traditional Cultural Properties," which are sites that are associated with the cultural practices and beliefs of a

---

90. Pub. L. No. 96-95, 93 Stat. 721 (1979).

91. See 16 U.S.C. § 470aa (2000).

92. See e.g. *U.S. v. Gerber*, 999 F.2d 1112 (7th Cir. 1993) (affirming defendant's conviction under ARPA).

93. See 16 U.S.C. § 470cc(c).

94. Pub. L. No. 101-601, 104 Stat. 3048 (1990).

95. See 25 U.S.C. § 3003 (2000).

96. See *id.* § 3002(c), (d).

97. Pub. L. No. 89-665, 80 Stat. 915 (1966).

98. See 16 U.S.C. § 470f. NHPA is primarily a procedural statute. Section 106 of the statute provides that agencies must consider the effect of federal undertakings on districts, sites, structures, and objects eligible for inclusion on the National Register through detailed consultation requirements. If an agency fails to comply with these responsibilities, the agency and its permittees may be enjoined from proceeding with the undertaking. *Id.*; see *Pueblo of Sandia v. U.S.*, 50 F.3d 856, 859 (10th Cir. 1995).

99. See Dean B. Suagee, *Tribal Voices in Historic Preservation: Sacred Landscapes, Cross-Cultural Bridges, and Common Ground*, 21 Vt. L. Rev. 145, 168-74 (1996).

living community and are important in maintaining the community's continuing cultural identity.<sup>100</sup> Thus, the NHPA may provide a means to protect places that are considered sacred to an Indian nation or several Indian nations. Under the 1992 amendments to the NHPA, if a proposed federal undertaking might affect a site that is eligible for listing on the National Register as a Traditional Cultural Property, the agency must consult with the tribe as part of the section 106 process. This requirement applies regardless of the ownership status of the land.

## 2. Executive Orders

There are two primary executive orders that agencies currently are required to adhere to when managing public lands that harbor cultural sites of importance to Native nations. The Executive Order on Indian Sacred Sites was intended to protect the interests of Indian nations in preserving sacred sites from harmful development activities.<sup>101</sup> The executive order requires federal agencies with responsibility for management of federal lands to (1) accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners; (2) avoid adversely affecting the physical integrity of such sites; and (3) maintain the confidentiality of such sites.<sup>102</sup> The executive order leaves agencies considerable discretion, however, and specifies that they must only adhere to these duties if "practicable" and only to the extent "permitted by law." Furthermore, the action must not impair "essential agency functions." Nor is there a legal cause of action for an agency's failure to abide by these duties. The order specifies that it does not "create any right, benefit, or trust responsibility, substantive or procedural,"<sup>103</sup> which would be enforceable "at law or equity" by any party against the United States or its officers or agencies. Despite these limitations, the executive order is clearly designed to protect tribal interests in important cultural resources, and in that sense it bolsters the federal government's general trust responsibility to protect tribal cultural rights.

The Executive Order on Consultation and Coordination with Indian Tribal Governments acknowledges the government's trust responsibility to federally-recognized Indian nations and establishes specific requirements that agencies must follow as they develop and carry out policy actions that affect Indian nations.<sup>104</sup> The order emphasizes the need for consultation with tribal communities, and the need to respect the sovereignty of Native nations. The order also highlights the federal government's commitment to support tribal self-government and self-determination and to respect the "government-to-government" relationship it has with the Indian nations. Executive Order 13175 became

---

100. See Patricia L. Parker & Thomas E. King, *National Park Service, National Register Bulletin: Guidelines for Evaluating and Documenting Traditional Cultural Properties*, U.S. Department of the Interior, *National Park Service National Register, History and Education* <<http://www.cr.nps.gov/nr/publications/bulletins/nrb38/nrb38%20introduction.htm>> (accessed Jan. 6, 2004).

101. Exec. Or. 13007, 61 Fed. Reg. 26771, 26771 (May 24, 1996).

102. *Id.*

103. *Id.* at 26772.

104. Exec. Or. 13175, 65 Fed. Reg. 67249, 67249 (Nov. 6, 2000).

effective on January 5, 2001, and it revoked the previous Executive Order (No. 13084) on Consultation and Coordination with Indian Tribal Governments.<sup>105</sup>

Executive Order 13175 is binding on all federal agencies. It requires each federal agency to "have an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications."<sup>106</sup> The executive order defines such policies to include "regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes."<sup>107</sup> Within thirty days of the effective date of the order, the head of each agency was required to designate an official with the primary responsibility for the agency's implementation of the order. Within sixty days of the effective date of the order, the designated official was required to submit to the Office of Management and Budget (OMB) a description of the agency's consultation process.<sup>108</sup>

The executive order basically imposes on agencies the duty to "(1) establish clear procedures for consultation on agency rulemaking[] and (2) give maximum possible deference to tribes in areas in which tribes administer regulatory programs delegated to them under federal statutes."<sup>109</sup> These requirements have important implications for the process of public lands management because of the prevalence and importance of tribal cultural resources on such lands.

### 3. Cultural Resources and the Indian Trust Doctrine

Professor Mary Christina Wood has suggested that the trust doctrine might prove more responsive to tribal cultural and religious needs than a claim based on the First Amendment because a trust claim encompasses the "complex interrelationship between culture, religion, spirituality, and tradition"<sup>110</sup> that defines tribal ways of life and provides a standard of "affirmative protection" of native cultural and religious vitality.<sup>111</sup> Professor Wood's point is particularly compelling given the Supreme Court's general refusal to recognize Native religious interests as meriting protection under the First Amendment Free Exercise Clause. In *Lyng v. Northwest Indian Cemetery Protective Association*,<sup>112</sup> the Supreme Court held that the traditional balancing test used to evaluate government conduct that burdens free exercise rights did not apply to assess whether the government could construct a road on National Forest lands that would pose devastating consequences to traditional Native religious practitioners who used the site for important ceremonial practices.<sup>113</sup> Justice O'Connor, who wrote for the majority,

---

105. *Id.* at 67251.

106. *Id.* at 67250.

107. *Id.* at 67249.

108. *Id.* at 67250.

109. Rogers, *supra* n. 83, at 114.

110. Mary Christina Wood, *Protecting the Attributes of Native Sovereignty: A New Trust Paradigm for Federal Actions Affecting Tribal Lands and Resources*, 1995 Utah L. Rev. 109, 210-11.

111. *Id.*

112. 485 U.S. 439 (1988).

113. *Id.* at 450-51.

declared that even if the construction of the road would "virtually destroy the . . . Indians' ability to practice their religion,"<sup>114</sup> the Constitution did not provide a legal principle to uphold the Native practitioners' claims.<sup>115</sup> O'Connor noted that the government had not passed a law prohibiting the Indians from visiting the area, and the government was merely exercising "its right to use what is, after all, *its* land."<sup>116</sup>

By enacting the Religious Freedom Restoration Act (RFRA),<sup>117</sup> Congress attempted to rehabilitate the "compelling interest" balancing test after the Supreme Court's opinion in *Employment Division, Department of Human Resources of Oregon v. Smith*<sup>118</sup> virtually obliterated the test. Although RFRA has been held unconstitutional as applied to state and local laws,<sup>119</sup> some lower federal courts continue to enforce the statute as applied to federal actions that limit practitioners' religious rights.<sup>120</sup> However, given the Court's previous opinion in *Lyng* that "neutral" government actions (such as road construction) on federally owned lands do not impair Native religious rights, it is unclear that RFRA would assist Native practitioners in "public lands" cases.<sup>121</sup>

Moreover, Professor Wood's observation that the trust doctrine may be a better foundation for Native cultural and religious rights seems all the more relevant given the statutory and regulatory requirements that pertain to agency actions on public lands, as well as the executive orders on tribal consultation and sacred sites protection. All of these instruments embody the federal trust responsibility and should be interpreted to support a positive notion of tribal cultural and political rights with respect to ancestral cultural sites.

One of the challenges to this approach, of course, is convincing agency officials to appreciate the complexity of tribal interests in cultural resources and to give these interests legal effect. Indeed, Professor Wood suggests that one of the primary challenges to the effective use of the trust doctrine to protect tribal cultural resources is to "instill a sensitivity in both the federal agencies and the judicial system"<sup>122</sup> for tribal

---

114. *Id.* at 451 (quoting *N.W. Indian Cemetery Protective Assn. v. Peterson*, 795 F.2d 688, 693 (9th Cir. 1986)) (internal quotations omitted).

115. *Id.* at 451-52.

116. *Id.* at 453.

117. Pub. L. No. 103-141, § 2, 107 Stat. 1488 (1993).

118. 494 U.S. 872 (1990) (upholding Oregon's criminal ban on peyote use without exemption for Native religious practitioners on the basis that the Free Exercise Clause does not prohibit the government from applying a "neutral, generally applicable law" to preclude religiously motivated conduct unless some other constitutional protection such as freedom of speech or press is implicated).

119. In *City of Boerne v. Flores*, the Supreme Court struck down RFRA as applied to state and local laws that impinge upon religious rights, holding that Congress had exceeded its constitutional authority to enforce the Due Process and Equal Protection Clauses under the Fourteenth Amendment. 521 U.S. 507, 534-36 (1997).

120. See e.g. *U.S. v. Hardman*, 297 F.3d 1116, 1132, 1135 (10th Cir. 2002) (en banc) (holding that Indian religious practitioners who were not enrolled in a federally recognized tribe had a religious right to possess eagle feathers, even without a permit, pursuant to RFRA).

121. For a contrary argument, see Zellmer, *supra* note 81, at 486-87. Professor Zellmer argues that if RFRA, as applied to federal actions, should survive constitutional scrutiny, "decisions that incidentally but substantially affect religious beliefs by restricting access to public lands, or by interfering with religious practices by altering the landscape, would be subject to strict scrutiny." *Id.* at 486. Professor Zellmer acknowledges that *Lyng* suggests that the federal prerogative to control public lands may be viewed as a compelling governmental interest, but would limit the case to its facts because the Court also noted that the Forest Service had taken all possible measures to ameliorate the damaging effects of the road on Native sacred sites. *Id.* at 486-87.

122. Wood, *supra* n. 110, at 221.

world views, which integrate concepts of religion with the natural environment. Tribal sovereignty should provide an important basis for such an ethic of respect. According to Professor Wood, tribal sovereignty contains "at least four distinct elements that may serve as focal points for trust analysis: (1) a stable land base; (2) a functioning economy; (3) the ability to govern; and (4) cultural and religious vitality."<sup>123</sup> Wood asserts that the trust doctrine should afford protection to all four attributes of sovereignty, just as all of these attributes of sovereignty have received validation in the law to some degree through treaties, statutes, and judicial opinions.<sup>124</sup>

Professor Wood's analysis provides a useful template of the primary interests that Indian nations have expressed in their commitment to sovereignty. To explore how these interests are featured in conflicts over the use of federal public lands, the next section will analyze two cases that raise many of these issues.

### III. THE CONFLICT BETWEEN THE "INDIAN TRUST DOCTRINE" AND THE IDEA OF A "PUBLIC TRUST"

Today, the conflict between the Indian trust doctrine and the idea of a "trust" on public lands continues to cloud the resolution of important policy issues regarding public lands. Sometimes the conflicts are subtle, and sometimes the interests they represent are in direct opposition. This section discusses two case studies as a way to raise the issues. In the first case study, the conflict is between traditional Native religious practitioners and commercial mountain climbing interests. The conflicts may seem more subtle in this case study because policymakers generally consider mountain climbing to be a "recreational" use that ought to be consistent with traditional Native uses since both depend, to some extent, upon the preservation of the mountain and its aesthetic qualities. However, it is far too simplistic to assume that "recreational" use of public lands is consistent with "preservation" uses. In fact, many emerging conflicts over use of public lands are between recreational users (e.g., mountain bikers and rock climbers) and preservationists who are concerned with protection of biodiversity and ecosystem management.<sup>125</sup> The second case study poses a direct opposition between Native religious practitioners who seek to gather eaglets from a national monument where all hunting and trapping is banned. Both cases provide important insight into the processes that are currently used to adjudicate such disputes and the way Native interests are evaluated within those processes.

#### A. *The Controversy over "Bear Lodge"*

The Bear Lodge case concerned conflicting uses of the Devils Tower National Monument and provides an excellent example of the problems that Indian nations face in

---

123. *Id.* at 132.

124. *Id.*

125. See Jan G. Laitos & Thomas A. Carr, *The Transformation on Public Lands*, 26 Ecology L.Q. 140, 162-66 (1999).

management decisions affecting public lands.<sup>126</sup> The Devils Tower National Monument, which is under the authority of the National Park Service (NPS), was the first national monument created under the authority of the Antiquities Act of 1906. Devils Tower is a strikingly unique rock formation that rises out of the plains of Wyoming. It is a sacred site to several of the Plains tribes, including the Kiowa, Crow, Lakota, Northern Cheyenne, and Arapaho. These tribes maintain a historical cultural affiliation with the site, and they continue to use the area for various religious activities.<sup>127</sup> Today, Devils Tower is also sought after by rock climbers. The difficulty of climbing the mountain attracts rock climbers from throughout the world, and commercial enterprises market that attraction.<sup>128</sup>

In furtherance of the policy of the American Indian Religious Freedom Act, the NPS sought to reconcile Native peoples' religious use of the monument with its recreational use by the rock climbers. Normally, planning for management decisions is conducted internally within the agency, and public meetings are held to elicit public reaction to a series of proposed alternative actions. The Devils Tower plan followed this general procedure, but also added to the process a workgroup composed of agency and non-agency members. The workgroup was composed of two representatives from each of four identifiable groups of "stakeholders": (1) recreational mountain climbers from local and national organizations; (2) local and national environmental organizations; (3) the local government (county commissioner's office); and (4) American Indian communities that had cultural affiliation with the Devils Tower site.<sup>129</sup> After a series of meetings that lasted a year, the members ultimately reached a "compromise" position which involved the "voluntary" annual closure of the monument to climbing during the month of June, which is the month that much of the religious activity by Native people takes place.<sup>130</sup>

The NPS issued the Final Climbing Management Plan (FCMP) which incorporated the recommendations of the workgroup. Specifically, the plan called for a prohibition on the use of climbing hardware that would damage and destroy the rockface of the Tower, and it instituted the voluntary June closure to climbing combined with a suspension of the issuance of commercial climbing licenses for the month of June. A coalition of commercial mountain climbers sued to enjoin enforcement of the plan, and a federal district court granted a preliminary injunction on the grounds that the climbers were likely to prevail on their Establishment Clause claim at trial.<sup>131</sup> Subsequently, the Tower superintendent instituted a reconsideration of the FCMP, which clarified the voluntary nature of the June suspension of climbing activities and dropped the moratorium on commercial licenses.<sup>132</sup>

---

126. Discussion in this part is drawn from Lloyd Burton & David Ruppert, *Bear's Lodge or Devils Tower: Intercultural Relations, Legal Pluralism, and the Management of Sacred Sites on Public Lands*, 8 Cornell J.L. & Pub. Policy 201 (1999).

127. *Id.* at 206-08.

128. *Id.* at 210-11.

129. *Id.* at 211-12.

130. *Id.* at 214-17.

131. See *Bear Lodge Multiple Use Assn. v. Babbitt*, 2 F. Supp. 2d 1448, 1450 (D. Wyo. 1998).

132. Burton & Ruppert, *supra* n. 126, at 217-18.

In 1998, the district court issued its opinion on the merits of the case.<sup>133</sup> The court found that the voluntary closure policy was a permissible accommodation of religious worship and said that the purposes behind the policy "are really to remove barriers to religious worship occasioned by public ownership of the Tower. This is in the nature of accommodation, not promotion, and consequently is a legitimate secular purpose."<sup>134</sup> On appeal, the Tenth Circuit Court of Appeals held that the climbers lacked standing to make the Establishment Clause argument, and thus the court did not reach the merits of the case.<sup>135</sup> The court's opinion, however, highlights the cultural and historical significance of the site to many different Indian nations and indicates that this provides a legitimate *secular* purpose for the policy. Indeed, the Tenth Circuit opinion notes that one of the primary bases for the Tower's designation as a national monument was "the prominent role it has played in the cultures of several American Indian tribes of the North Plains."<sup>136</sup>

The Bear Lodge case provides a useful example of the conflicts between the Indian trust doctrine and the idea of a "trust" on public lands. Bear Lodge is a sacred site to many tribes that shared use of these lands prior to their appropriation by non-Indians. Bear Lodge is also a protected place for non-Indian people because of its status as a "national monument," which indicates that the site may be protected from destructive uses. The reality for Indian people, however, is that the site is off-reservation and is considered to belong to the American public; therefore, Native interests are merely those of "stakeholders." Indian people are "stakeholders," not sovereigns, with respect to the use of Bear Lodge. Their interests are accommodated by the federal agency with management authority on the same level as the interests of the environmentalists and the rock climbers. As individual religious practitioners, they apparently are protected by the Free Exercise Clause of the First Amendment, but the federal agency is also limited by the Establishment Clause of the First Amendment. Thus, while the moratorium on commercial licenses during the month of June was necessary to protect the actual religious use of the monument by the Native practitioners, this requirement had to be dropped from the final management plan due to the First Amendment problems.

Burton and Ruppert, two commentators on this case, have pointed out that the court in the *Bear Lodge* case adopted an Establishment Clause analysis that sought to accommodate pluralism by focusing on perceived *sameness*, while the trust doctrine might have been used to protect Native peoples' rights by focusing on *difference*: namely, the uniqueness of the federal government's relationship to the Indian nations as "quasi-sovereign" entities, rather than groups of individual religious practitioners.<sup>137</sup>

Which approach is preferable for Indian nations seeking to gain respect for their continuing cultural connections to lands that were involuntarily appropriated from tribal ownership? As Burton and Ruppert observe, the *Bear Lodge* case involved different

---

133. See *Bear Lodge Multiple Use Assn. v. Babbitt*, 2 F. Supp. 2d 1448 (D. Wyo. 1998).

134. *Id.* at 1455.

135. *Bear Lodge Multiple Use Assn. v. Babbitt*, 175 F.3d 814, 822 (10th Cir. 1999).

136. *Id.* at 819.

137. Burton & Ruppert, *supra* n. 126, at 231-32.

applications of cultural pluralism.<sup>138</sup> At the agency level, the NPS process that established the workgroup to generate recommendations for the agency was oriented toward accommodating value pluralism in federal management decisions. That is, all stakeholders needed to appreciate the intercultural values being advocated by the Indian people, the environmentalists, and the recreationalists, and needed to consider ways to accommodate all of these values, even if the only way to do so was through “compromise.”

The litigation phase of the case, on the other hand, arguably required the court to engage in an exercise of constitutional pluralism, evaluating the unique constitutional position of the tribes within the federal system. The litigation was inspired by the failure of the administrative process, which was focused on value pluralism. The commercial rock climbing groups refused to accept the compromise generated by the recreational rock climbers. At trial, they sought to force the agency to adhere to a completely secular management policy that would favor “multiple use” by the public over “religious use” by the Indian people. The court used the First Amendment to uphold the plan, as amended, rather than discussing the trust responsibility of the federal government as a means to provide special protection for Indian rights.<sup>139</sup>

Burton and Ruppert posit that there are at least three potential responses to the question of whether the First Amendment or the trust doctrine is more useful in protecting Native cultural interests on public lands.<sup>140</sup> Some would argue that the trust responsibility is the appropriate means to analyze federal agency management of sacred sites, and that Establishment Clause issues really are outside the scope of the analysis.<sup>141</sup> On this theory, AIRFA and the Executive Order on Indian Sacred Sites mandate special treatment of tribal cultural interests in “public lands.” This position is bolstered by the Executive Order on Tribal Consultation and Coordination, which mandates government-to-government consultation and not merely dialogue with “stakeholders,” and the numerous statutes and regulations requiring tribal consultation when federal action would impact cultural or historic resources. Moreover, as a matter of basic morality, the brutal history of the government’s dispossession of tribes from their sacred and ancestral lands instructs that tribal cultural and religious rights should be protected by the trust responsibility.

A middle position would consider the trust responsibility as supporting federal agency actions that accommodate tribal religious use of public lands on the theory that this action really has a predominantly secular purpose, aiding tribal cultural preservation, which is within the trust doctrine.<sup>142</sup> This position would accept that the agency might go “too far” and commit a violation of the Establishment Clause, but would require a considerable degree of deference to the agency on the theory that it is discharging a trust responsibility. This interpretation seems consistent with the language of the Executive Order on Sacred Sites, which gives agencies a fair amount of discretion and requires

---

138. *Id.* at 232-38.

139. *Id.* at 230-31.

140. *Id.* at 235-38.

141. *See id.* at 235-36.

142. Burton & Ruppert, *supra* n. 126, at 236.



them to accommodate the needs of Native religious practitioners only to the extent "permitted by law."

A third approach rejects the emphasis on the trust responsibility on the theory that this level of deference to federal power can be equally destructive of tribal sovereignty and can impinge upon the interests of individual Indian people, who would otherwise be entitled to all the rights and privileges of other American citizens.<sup>143</sup> This theory insists that Indian religious practitioners would best be advised to base their claims upon the First Amendment, assisted by equal protection arguments to ensure that the First Amendment is applied equally to serve Indian people. This mode of analysis has been used to accommodate other minority religions, such as the Amish involved in *Wisconsin v. Yoder*.<sup>144</sup> Some scholars assert that minority religions can be protected under this hybrid First Amendment-equal protection analysis.<sup>145</sup> The Supreme Court's caselaw to date, however, is hardly encouraging of such an approach.<sup>146</sup> To evaluate these approaches, this essay examines another recent conflict between Native cultural and religious practices and federal public lands policy.

#### B. *Hopi Eagle Use at Wupatki National Monument*

In 2001, the National Park Service issued a proposed rule that would allow the Hopi Tribe to use a permit process to collect golden eaglets within the Wupatki National Monument outside Flagstaff for religious ceremonial use.<sup>147</sup> The Hopi Tribe has been harvesting eaglets from the area for centuries in accordance with the Tribe's religious practices directing that eaglets be harvested from specific areas within its aboriginal lands, which are under the control and stewardship of particular clans.<sup>148</sup> In 1999, members of the Hopi Tribe requested permission from the NPS to take eaglets in these traditional areas. The Tribe's request was denied on the basis of the National Park Service Organic Act and implementing regulations, which do not consider hunting and trapping wildlife to be authorized activities within the Wupatki National Monument.<sup>149</sup> The Assistant Secretary of the Interior convinced the Park Service to withdraw the letter and asked that the Department of Interior review the issue and make a recommendation. The Assistant Secretary asserted that the trust relationship of the federal government to

---

143. *Id.* at 237-38.

144. 406 U.S. 205 (1972) (holding that Wisconsin could not require members of the Amish Church to send their children to public school after the eighth grade where refusal to do so was based on a religious belief and was not merely a way to preserve a "traditional way of life").

145. See e.g. Kenneth L. Karst, *Groups and the Free Exercise Clause*, 87 Cal. L. Rev. 1093 (1999); Anastasia P. Winslow, *Sacred Standards: Honoring the Establishment Clause in Protecting Native American Sacred Sites*, 38 Ariz. L. Rev. 1291 (1996).

146. In the two major cases on protection of Native religion, the Supreme Court in fact refused to apply heightened scrutiny to federal and state actions that burden Native religions. See *Smith*, 494 U.S. 872 (refusing to apply free exercise balancing test and holding that state could include religious peyote use within its criminal prohibition on use of peyote without exception for Native Americans who are members of the Native American Church and use peyote as a sacrament in Church ceremonies); *Lyng*, 485 U.S. 439 (refusing to apply free exercise balancing test and holding that federal government could permissibly construct a road through a portion of national forest land traditionally used by Native practitioners for religious purposes even though this action might "virtually destroy the Indians' ability to practice their religion").

147. 66 Fed. Reg. 6516 (Jan. 22, 2001).

148. *Id.* at 6516-17.

149. *Id.* at 6517.

the Hopi Tribe warranted a special review of the case. The basis of the proposed rule issued on January 22, 2001, contains a detailed analysis of the issue as an accommodation of religious practice, rather than as a response to a particular trust responsibility. Nonetheless, the trust analysis provides an important backdrop for the accommodation issue.

The proposed rule starts by outlining the need to revise the regulations, documenting the historical use of the Hopi people of the Wupatki site, and describing the centrality of eagle gathering to the Hopi Tribe's religious and cultural structure.<sup>150</sup> According to this summary, the Tribe's 1936 constitution specifically mentions the right of the Tribal Council to negotiate with federal agencies and others to secure its right to hunt eagles within its traditional lands.

The rule next outlines the "legal considerations" that attach to the issue, noting that the purpose of the National Park Service under its Organic Act is to "conserve the scenery and the natural and historic objects and the wildlife"<sup>151</sup> in protected areas, for the "enjoyment of future generations."<sup>152</sup> The Organic Act was amended in 1978 to highlight the fact that lands under the administration of the NPS are to be managed for "the common benefit of all the people of the United States"<sup>153</sup> and "in light of the high public value and integrity of the [NPS]."<sup>154</sup> Not surprisingly, the NPS has generally prohibited "consumptive uses" of NPS resources, although some recreational fishing and harvesting have been permitted.

Moving from the "public interest" to the foundation of the Tribe's unique claim, the proposed rule outlines the basis for its conclusion that "applicable laws and policies allow the NPS to accommodate the Hopi's religious ceremonial interest in collecting golden eaglets . . . at Wupatki National Monument."<sup>155</sup> In particular, the ruling highlights the First Amendment concerns of the Hopi and the need to accommodate those interests according to the requirements of the Religious Freedom Restoration Act, the American Indian Religious Freedom Act, and various executive orders and policy statements instructing federal agencies to accommodate Native American religious practice and consult with Native people prior to making policy decisions that will impact religious practice.<sup>156</sup>

In conclusion, the text of the proposed rule maintains that there is a "reasonable legal basis" for NPS to promulgate a regulation that allows the Hopi Tribe to collect golden eaglets at Wupatki National Monument for religious ceremonial purposes.<sup>157</sup> The Hopi have a documented historical connection to the site, and the collection of eaglets is an important part of their traditional religion. Moreover, the NPS will be able

---

150. *See id.* at 6516-17.

151. *Id.* at 6517 (quoting 16 U.S.C. § 1) (internal quotations omitted).

152. 66 Fed. Reg. at 6517 (quoting 16 U.S.C. § 1) (internal quotations omitted).

153. *Id.* (quoting 16 U.S.C. § 1a-1) (internal quotations omitted).

154. *Id.* (quoting 16 U.S.C. § 1a-1) (internal quotations omitted).

155. *Id.*

156. *Id.* at 6518-19 (discussing President Clinton's 1994 policy statement on the Distribution of Eagle Feathers for Native American Religious Purposes, the 1996 Executive Order on Sacred Sites, and the 1998 Executive Order on Consultation and Coordination with Tribal Governments).

157. 66 Fed. Reg. at 6519.

to use a permit process which will establish the necessary terms and conditions to ensure that the activity is consistent with the NPS's management goals for the monument. The rule only applies "to this narrow situation" and is not meant to apply to other requests by Indian nations for similar activities on these lands or other public lands. Thus, the proposed rule appears to adopt the "centrist" approach, which attempts to accommodate a particular tribal religious practice on the basis of the tribe's historic and documented adherence to the practice and the federal government's trust responsibility to protect Native cultural practices.

In fact, there are a number of cases across the nation where Indian tribes claim the right to hunt in national parks or monuments, so the Wupatki issue could serve as a policy, if not legal, precedent for other cases. The federal government has issued generally applicable permit requirements for Native religious harvesting of bald or gold eagles, which exempt from prosecution Native Americans who are in compliance under other statutes, such as the Bald and Golden Eagle Protection Act or the Migratory Bird Treaty Act.<sup>158</sup> However, this rule does not speak to potential conflicts with federal policies governing specific public lands, which may allow federal land managers to refuse to issue a permit.

The final section of this essay considers the fundamental values that are at stake in conflicts over the use of public lands and attempts to generate an idea of the "intercultural" values that might be necessary to successfully resolve disputes.

#### IV. RESOLVING THE CONFLICTS: THE INTERCULTURAL VALUE OF PUBLIC LANDS

As many federal cases indicate, in evaluating disputes dealing with the management of public lands, the federal courts frequently look at the asserted interests in terms of whether they are sufficient to give rise to a legal cause of action. For example, in *Lyng*, the Supreme Court found that the interests of the religious practitioners were not sufficient to override the federal government's interest in managing its lands. In the *Bear Lodge* case, the district court found that the Park Service permissibly tailored its policies to respect the cultural and historic uses of the lands, thereby protecting the Park Service against an Establishment Clause claim by the commercial climbers who asserted that their "secular" interests were subordinated to the "religious" interests of the Native people. The administrative process of the agencies is also oriented toward bringing together different "interest groups" to accommodate "multiple use" of public lands.

It is necessary, however, to take a step back and consider the fundamental values that underlie these claims. What are the societal values at stake in the management of public lands? What values drive Native peoples' efforts to limit or prevent certain federal land management policies? Will these values always be antagonistic to one another and necessitate "compromise" solutions that will never fully satisfy either party? Or can legal or structural mechanisms be developed that will provide a more coherent way to manage such conflicts?

---

158. See 50 C.F.R. § 22.22 (2002).

American conservation policies have historically focused on a utilitarian philosophy of scientific resource management and the idea that human beings can exploit natural resources in a "scientific manner" without causing harm to the natural world or a loss for future generations.<sup>159</sup> This philosophy led to the development of the "multiple use" policy, the idea that resources have value as economic commodities and ought to be managed in a way that would permit sustained yield over time.<sup>160</sup> Federal agency management of public lands, therefore, historically was intended to support the "traditional commodity uses of grazing, mining, and timber."<sup>161</sup> The "sustained yield/multiple use" platform of the conservation policy is importantly different from the "preservation" policy, which speaks to the intrinsic value of nature and the need to preserve biological diversity and ecosystem health by limiting the uses of public lands.<sup>162</sup> The latter policy led to the creation of national parks and national monuments, which were designed, in part, to support the growth of "recreational and preservation uses." In many cases, commodity use of public lands is considered to be inconsistent with recreational or preservation use.<sup>163</sup> However, federal land managers are often required to accommodate both sets of values.

Conservation and preservation are policies that have been developed by the dominant society to favor the political goals of the majority. Native people have their own cultural values about appropriate land use, although these values have not been given equal respect within public decisionmaking under the current structure. An "intercultural" approach to public land policy suggests a more active role for Indian nations as sovereigns who are able to apply their own norms and values to structure appropriate land use. This is ideally accomplished by repatriation of traditional lands back to tribal ownership and control. However, it can also be accomplished on public lands through the exercise of tribal co-management authority and possibly through federal legislation that provides enforceable protection for compelling cultural interests of Native nations. These alternatives are becoming increasingly important given the focus of President Bush's administration upon increased commodity use of public lands.<sup>164</sup>

#### A. *The Controversy over Designation of National Monuments*

Today there is an active controversy over whether the President of the United States should have the unilateral authority to protect certain areas as national monuments

---

159. See Laitos & Carr, *supra* n. 125, at 150.

160. *Id.* at 150-51 (discussing forestry management as an example).

161. *Id.* at 151-52.

162. The Wilderness Act of 1964 is probably the best example of the "preservation" policy. That act states: "A wilderness, in contrast with those areas where man and his own works dominate the landscape, is hereby recognized as an area where the earth and its community of life are untrammelled by man, where man himself is a visitor who does not remain." 16 U.S.C. § 1131(c).

163. See Wilkinson, *supra* n. 71, at 293-306 (arguing that the historic policies supporting commodity use of public lands are jeopardizing western land and water resources and ought to be conformed to represent modern values and needs); Laitos & Carr, *supra* n. 125, at 146-48 (arguing that the use of public lands has transitioned from primarily commodity use to primarily "non-consumptive" use, e.g., recreation and preservation).

164. See *infra* notes 173-79 and accompanying text.

under the Antiquities Act.<sup>165</sup> The 1906 Antiquities Act was enacted in response to the realization of federal policymakers that the value of "preservation" could not be adequately protected by the political fray necessary to create the National Park system and establish protective management policies.

The Antiquities Act delegated authority to the President to create national monuments where necessary to protect objects of historic or scientific interest.<sup>166</sup> This practice became even more significant after public land use policy changed again in the 1960s and 1970s to stress multiple-use and sustained-yield planning programs for public lands. The Federal Land Policy and Management Act of 1976, which has become the cornerstone of public land law, defines multiple use as "the management of the public lands and their various resource values so that they are utilized in the combination that will best meet the present and future needs of the American people . . . ."<sup>167</sup> Sustained yield is defined as "the achievement and maintenance in perpetuity of a high-level annual or regular periodic output of the various renewable resources of the public lands consistent with multiple use."<sup>168</sup> Both policies suggest that development is an acceptable, indeed necessary, part of public lands management, and to that extent, may jeopardize ideals of preservation.

In many cases, these laws (primarily the Federal Land Policy and Management Act) constrained presidential authority to make land withdrawals and delegated authority to the Department of the Interior to make small, temporary withdrawals when necessary to achieve specific public purposes. However, the President's authority under the Antiquities Act was not addressed in these laws. Thus, the President apparently retained authority under the Antiquities Act to make certain types of land withdrawals with no procedural requirements, durational limits, or provision for congressional notification or review. The Antiquities Act merely requires that the lands be reserved for protection of "historic landmarks and prehistoric structures, and other objects of historic or scientific interest,"<sup>169</sup> and that the amount of land reserved is restricted to the "smallest area compatible with the proper care and management of the objects to be protected."<sup>170</sup> Once reserved as a national monument, the lands can be subjected to fairly restrictive management, barring off-road motor vehicles and withdrawing the lands from mining and other uses inconsistent with preservation (although existing rights under leases and grazing allotments are unaffected).

National attention focused on presidential authority to create national monuments in 1996, when President Clinton declared 1.7 million acres of federal land in Utah as the

---

165. *Act of June 8, 1906*, ch. 3060, 34 Stat. 225 (1906).

166. The Antiquities Act also provided the first instance of federal protection for "archaeological resources" on federal lands, including Native American human remains and cultural objects by (1) creating criminal sanctions for the destruction of antiquities and (2) establishing permit procedures for the examination and excavation of archeological sites. See Sherry Hutt, Elwood W. Jones & Martin E. McAllister, *Archaeological Resources Protection* 33-36 (Preservation Press 1992).

167. 43 U.S.C. § 1702(c) (2000).

168. *Id.* § 1702(h).

169. 16 U.S.C. § 431.

170. *Id.*

Grand Staircase-Escalante National Monument.<sup>171</sup> In Arizona, similar controversy attached to the Shivwits Plateau, near the Grand Canyon, and the Perry Mesa region along the Agua Fria River, north of Phoenix.<sup>172</sup> In December of 1999, Interior Secretary Bruce Babbitt recommended to President Clinton that both areas be protected as national monuments under the Antiquities Act. Despite the objections of Arizona Governor Jane Hull and Arizona's Republican congressmen that such an action would impede necessary development in the state, President Clinton acted on these recommendations in January 2000 by creating the Grand Canyon-Parashant National Monument, which encompasses over one million acres, and the Agua Fria National Monument, which encompasses a 71,000-acre archaeological site.

The controversy over the President's authority under the Antiquities Act raises complex issues of federalism and the respective constitutional authority of different branches of government over our collective environmental destiny. A series of bills has been introduced into Congress to limit the presidential power to use the Antiquities Act.<sup>173</sup> Proponents of unfettered presidential power to create national monuments claim that the Antiquities Act constitutes a powerful preservation mechanism that allows the President to protect lands that would otherwise be placed in jeopardy by regional pushes for development. Opponents claim that the Antiquities Act is increasingly being used in a way that is inconsistent with the Act's limited focus on protecting discrete areas of scientific and archeological interest, and also in a way that violates the intent of subsequent federal policies reallocating authority of public lands to the Department of Interior in an effort to respond to multiple use and sustained yield policies. The debate is largely centered around "states' rights," as a recent joint statement from the ten Republican western governors indicates. The governors want the President to consult local communities before creating national monuments. They claim that "[i]t is unfair to the people who cherish their local landscapes and whose lives will be most directly affected because of decisions made in Washington, D.C."<sup>174</sup>

President Bush has demonstrated his administration's commitment to opening public lands for intensive mineral and timber exploration. This pro-development policy is being applied to lands that were under consideration for national monument status in the waning days of the Clinton administration,<sup>175</sup> as well as to lands that already possess

---

171. See Ann E. Halden, Student Author, *The Grand Staircase-Escalante National Monument and the Antiquities Act*, 8 Fordham Env'tl. L.J. 713, 713 (1997).

172. See James Peck, *Arizona Monuments: The Controversy over President Clinton's New Designations under the Antiquities Act*, 36 Ariz. Att'y. 10, 11 (July 2000).

173. See e.g. *National Monument Fairness Act*, H.R. 2386, 108th Cong. (2003). This bill would amend the Antiquities Act to limit the President's authority to create a national monument or increase lands of an existing national monument involving more than 50,000 acres by requiring the President to first solicit the state governor's written comments, and by providing that any presidential proclamation will lapse in two years unless it has been approved by Congress. In addition, the President is required to solicit public participation and comment in the development of a monument proclamation and to consult with the state's governor and congressional delegation, to the extent practicable, at least sixty days prior to any national monument proclamation. *Id.* § 2.

174. Associated Press, *Governors Want Role in Monument Decisions*, Ariz. Republic B9 (July 1, 2000).

175. For example, Bruce Babbitt had considered a proposal from environmentalists to set aside almost one million acres of federal land in southwestern Oregon to create the Siskiyou Wild Rivers National Monument. The administration did not have time to take action on the proposal and instead imposed a two-year moratorium on new mining claims for the land. The Bush administration cancelled the moratorium without soliciting

a national monument designation.<sup>176</sup> President Bush is convinced that development of national monument lands is appropriate because it is possible to leave intact “the integral part, the precious part”<sup>177</sup> of such lands, while still exploring for oil and other minerals. “You can explore and protect land,”<sup>178</sup> President Bush has declared, boasting that his policy supports a “wiser use” of the nation’s resources.<sup>179</sup>

The conflict between developers and preservationists is clearly a feature of the contemporary political arena. For Native people, however, this is not merely a debate about which side will prevail. The debate also raises the question of how the complex rights of Native people will be protected given this policy shift. Within the procedural process that governs agency decisionmaking on federal lands, Native peoples’ rights are often not differentiated in any meaningful way from the interests of other “stakeholders.” All stakeholders have some right to participate in a democratic dialogue to assist in agency management of public lands. However, Native peoples’ *interests* as “stakeholders” must be differentiated from their *rights* as separate nations that have a trust relationship with the United States government. As the *Lyng* case demonstrates, Indian “religious” interests may be entirely disregarded on public lands because of the U.S. government’s overriding “ownership” interest.<sup>180</sup> In that case, of course, Justice O’Connor refused to find a free exercise problem with construction of a logging road through a forest area used by Native practitioners in the region, even though there was considerable evidence that they would be precluded from practicing their religion by this action.

An important comparison to this perspective is the idea that Indian nations, as sovereigns, have a unique range of interests and rights, both cultural and political, which should be given independent weight in the policy battles over public lands. The next section of this article discusses this perspective by drawing on the “cultural sovereignty” of Indian nations to support the notion that tribes should be able to regain ownership and control—or at least be able to assert co-management authority—over public lands that house important tribal cultural resources.<sup>181</sup>

---

public input. See Elizabeth Shogren, *White House OKs New Mining in Sensitive Ore. Habitat*, L.A. Times 20 (May 22, 2002).

176. For example, in December 2002, the Bush administration announced a draft management plan for the 329,000-acre Giant Sequoia National Monument, which proposes a commercial logging program that would even permit logging of giant, ancient trees. The Giant Sequoia National Monument was created to protect “the sequoia ecosystem and the species it supports, including the California spotted owl and the mink-like Pacific fisher.” Chad Hanson, *The Administration Can’t See the Forest for the Sequoias*, L.A. Times B11 (Dec. 30, 2002). The proposed logging plan, environmentalists contend, will cause serious harm to this unique ecosystem and threaten the Pacific fisher with extinction. *Id.*

177. Soraghan, *supra* n. 1. (quoting Pres. George W. Bush) (internal quotations omitted).

178. *Id.* (quoting Pres. George W. Bush) (internal quotations omitted).

179. *Id.*

180. See 485 U.S. 439.

181. For a full account of the role of “cultural sovereignty” in contemporary federal Indian policy, see Wallace Coffey & Rebecca Tsosie, *Rethinking the Tribal Sovereignty Doctrine: Cultural Sovereignty and the Collective Future of Indian Nations*, 12 Stan. L. & Policy Rev. 191 (2001).

### B. *Cultural Sovereignty and Public Land Policy*

While tribal sovereignty is widely recognized within federal law and policy, it is generally understood as a political concept, largely defined by federal Supreme Court decisions that establish the jurisdictional contours of tribal governmental authority. Increasingly, that political notion of tribal sovereignty reflects a narrow conception of tribal governmental power that is limited to tribal members and trust lands.<sup>182</sup> It is necessary to expand the definition of tribal sovereignty to include both its political and cultural contours. Cultural sovereignty reflects the effort of Native people to exercise their own norms and values in structuring their collective futures.<sup>183</sup> Cultural sovereignty implicates the philosophical core of Native peoples' belief systems and requires them to create their own appraisal of what "sovereignty" means and what rights, duties, and responsibilities are entailed in their relationships to each other, to the federal or state governments, and to ancestors and future generations. The exercise of cultural sovereignty evokes a process of repatriation: of land, traditional knowledge, and cultural identity. These are the tools that will strengthen Native nations and enable them to go into the future as healthy, vibrant communities.

The federal government, on the other hand, must respect the cultural sovereignty of Indian nations as the expression of their autonomous existence as separate governments. The concept of cultural sovereignty, as applied to federal public lands policy, requires a careful analysis of the unique relationship between Native nations and the United States and the *cultural, political, and historical context* that formed this relationship. Federal public land policy must respond to the critical connections between land, culture, and tribal sovereignty, which are amply illustrated in the treaties and laws that form a *rights-based* structure for articulating tribal interests in contemporary policy debates. As this section demonstrates, such an approach requires attention to Indian treaty claims, to the need for affirmative congressional protection of Native cultural sites on public lands, and to the possibility of repatriating certain ancestral lands back to tribal ownership and control.

#### 1. The Importance of Treaty Claims

An important component of tribal sovereignty that affects the dialogue about public lands concerns the continuing importance of treaty claims to these lands. Indian treaties constitute the backbone of federal Indian law and represent bilateral agreements between the United States and various sovereign governments.<sup>184</sup> Many Indian nations believed that the treaties created ongoing duties of reciprocity, respect, and good faith between the two governments.<sup>185</sup> Indeed, treaty interpretation should be a bilateral

---

182. See e.g. *Nev. v. Hicks*, 533 U.S. 353, 374 (2001) (holding that the Fallon Paiute-Shoshone Tribal Court did not have jurisdiction over a civil rights tort action brought by a tribal member against state officials for damages arising from a search of his residence on a tribal land); *Strate v. A-1 Contractors*, 520 U.S. 438, 442 (1997) (holding that the Fort Berthold Tribal Court did not have jurisdiction over a tort lawsuit between non-Indians that arose out of an automobile accident on a state highway right-of-way through the reservation).

183. Coffey & Tsosie, *supra* n. 181, at 196.

184. See Rebecca Tsosie, *Sacred Obligations: Intercultural Justice and the Discourse of Treaty Rights*, 47 UCLA L. Rev. 1615 (2000).

185. See Williams, *supra* n. 2, at 124-37.



process that evaluates the intent of the Indian people in agreeing to the treaty terms, as well as the legal meaning of the English words used to record the treaty covenants.<sup>186</sup> As Chief Justice John Marshall observed in *Worcester v. Georgia*, the federal government's treaty "duty of protection" should be construed as the pledge of the United States to protect the Indian nations in their own national identity. Marshall rejected the notion that Native nations had given up their rights to territorial sovereignty and autonomy, except insofar as they sought to forge alliances with *foreign* nations in competition with the United States. In *Worcester*, Chief Justice Marshall emphasized the continuing vitality of tribal governmental autonomy, stressing that "[p]rotection [by the United States government] does not imply the destruction of the protected."<sup>187</sup>

The treaties with Indian nations evoke the federal government's trust responsibility. The "trust doctrine" should be interpreted in accordance with Native nations' understanding of their relationship to the United States government, including their commitment to having their separate political existence affirmed by the United States, and their belief that the treaties entailed a series of moral duties between two groups that pledged to live in peace with one another and act in good faith. Indian nations continue to advocate that their treaties ensure religious access to sacred sites that have since been appropriated from tribal ownership. This is an important dimension of the Lakota peoples' claim to sacred places within their traditional, treaty-guaranteed territory of Paha Sapa (the Black Hills).<sup>188</sup> This is also an aspect of the Lakota peoples' current effort to reclaim treaty-guaranteed lands along the Missouri River that were appropriated from tribal ownership for the Pick-Sloane Dam in the 1930s, and which the federal government now intends to grant to the State of South Dakota.<sup>189</sup>

An important question for further consideration is whether Indian treaty rights to religious use and access continue on public lands. These public lands are largely within the original treaty boundaries of Indian reservations. The argument here would be that Indian nations never intended to give up their rights to conduct ceremonies at sacred sites, to protect ancestral burials, or to give up rights to access herbs or animals used in traditional lifeways. This is the essence of tribal identity as "indigenous peoples" belonging to ancestral lands. Many tribes, for example, have retained treaty rights to

---

186. Coffey & Tsosie, *supra* n. 181, at 204.

187. 31 U.S. at 552.

188. Bear Butte is one of the most sacred places within the Black Hills. The site was purchased by the State of South Dakota in 1962 and subsequently designated as a state park. *Crow v. Gullet*, 541 F. Supp. 785, 787 (D.S.D. 1982). In *Crow*, the plaintiffs, traditional leaders of the Lakota and Cheyenne Nations, brought suit against the manager of the Bear Butte State Park, alleging that the state's management of the park infringed upon the plaintiffs' rights to access Bear Butte for cultural, spiritual, and religious uses. *Id.* at 787-88. The district court granted the State's motion for summary judgment on the basis that the plaintiffs had failed to establish any violation of their constitutional rights. *Id.* at 794.

189. In the 1930s, the federal government took lands adjacent to the Missouri River from the Sioux people for the Pick-Sloane Dam Project. These lands are no longer needed for federal purposes, and Congress passed legislation granting these lands to the State of South Dakota rather than the Indian people. The legislation purports to have a beneficial conservation purpose. Coffey & Tsosie, *supra* n. 181, at 205. However, many tribal leaders "have protested this legislation as a violation of their rights under the 1868 Fort Laramie Treaty," *id.*, and they fear that, once the lands are in state ownership, the cultural protections within statutes such as NAGPRA and the NHPA will no longer be available to protect cultural resources and sites on these lands.

hunt, fish, and gather on ceded lands,<sup>190</sup> and the argument for religious use is comparable in many ways.

## 2. Potential Federal Statutory Protection of Treaty Rights and Sacred Sites

Whether or not the federal courts are willing to accept the treaty argument for protecting tribal cultural rights on traditional lands, there is a strong argument that Congress should enact protective legislation in recognition of its trust responsibility to Indian nations. The argument here builds on Professor Wood's observation that a trust claim should encompass the "complex interrelationship between culture, religion, spirituality, and tradition"<sup>191</sup> that defines tribal ways of life and provides a standard of "affirmative protection" of native cultural and religious vitality. The Executive Order on Sacred Sites and AIRFA are positive steps in that general direction. However, both lack any legal enforceability and thus are insufficient to protect tribal interests.

The issue of sacred sites protection on federal lands is currently under consideration by Congress in the form of H.R. 2419, The Native American Sacred Lands Act, which was introduced by Representative Nick J. Rahall on June 11, 2003.<sup>192</sup> According to Rahall, the bill is necessary to protect Native American sacred sites from the Bush administration's plans to open up public lands for energy exploration.<sup>193</sup> The bill purports to "give[] Indian tribes the ability to petition the government to place federal lands off-limits to energy leasing or other incompatible developments when they believe those proposed actions would cause significant damage to their sacred lands."<sup>194</sup> The bill would also enact into law the Executive Order on Sacred Sites by ensuring access and ceremonial use of sacred lands and mandating all federal land management agencies to take the necessary steps to prevent significant damage to sacred lands.<sup>195</sup>

The need for such a bill was highlighted by the struggle of the Quechan Tribe to halt the development of a 1600-acre open pit gold mine in Indian Pass, California. The Clinton administration had rejected the mining proposal on the grounds that it would cause irreparable harm to the Quechan Indian Tribe, since it is an extremely sacred place to the Tribe and embodies the core of their ancestral cultural and religious practices.<sup>196</sup> The Bush administration reversed this ruling, paving the way for the gold mine to commence operation. The Quechan Tribe expressed appreciation for Rep. Rahall's bill,

---

190. See e.g. *Minn. v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 175 (1999) (upholding continuing validity of off-reservation treaty right to fish); *U.S. v. Winans*, 198 U.S. 371, 381 (1905) (describing tribal treaty right to fish "at all usual and accustomed places" on off-reservation lands as a reserved right which "imposed a servitude upon every piece of land as though described therein").

191. Wood, *supra* n. 110, at 211.

192. H.R. 2419, 108th Cong. (2003). This is the latest version of a bill that was introduced as H.R. 5155 on July 18, 2002. See H.R. 5155, 107th Cong. (2002).

193. U.S.H. Reps., *News from the Democrats, Committee on Resources, 'Sacred Sites are More Precious than Gold': Bill Introduced to Protect Native American Sacred Lands* <<http://resourcescommittee.house.gov/resources/democrats/pr2002/20020718NativeAmericanSacredLandsActIntro.html>> (July 18, 2002).

194. 149 Cong. Rec. E1231 (daily ed. June 11, 2003) (remarks of Rep. Nick Rahall).

195. *Id.*

196. For an account of the procedural steps that led to that ruling, see Zellmer, *supra* note 81, at 466-71.

stating that, if passed, the bill would allow the Tribe to halt the project.<sup>197</sup> The National Congress of American Indians also came out in support of the proposal to enact the Executive Order on Sacred Sites into federal law.<sup>198</sup> The Quechan Tribe's concern is shared by a number of Indian nations, who are also fighting to protect sacred sites on public lands.<sup>199</sup>

Not all Native leaders and policy advocates agree with the terms of the Rahall bill. For example, Suzan Shown Harjo, President of the Morningstar Institute and a long-time Native policy advocate, fears that in its attempt to "codify" the executive order, the bill will only "make mischief."<sup>200</sup> Specifically, Harjo says that the bill: (1) would "disenfranchise" Native traditional religious leaders and practitioners by centralizing tribal authority in the political leadership; (2) would provide a virtually "unusable cause of action"<sup>201</sup> because it only holds agencies to an arbitrary and capricious standard in their decisionmaking, which is the lowest available standard; and (3) has a "clumsy definition of sacred site"<sup>202</sup> that would omit "whole categories of sacred places"<sup>203</sup> and "forc[e] proof that others are included."<sup>204</sup> Suzan Harjo claims that "[w]hat is needed is a bill with a substantive cause of action to defend sacred places in court and to serve as incentive for serious negotiations for the return, co-management or protected status of sacred places—one that does not try to define or limit the sacred."<sup>205</sup>

Ms. Harjo identifies several important components of a successful legislative solution. First, the concept of tribal sovereignty as it applies to sacred places on public lands must be inclusive of the spiritual and political leadership of Native nations. This is the essence of the "cultural sovereignty" of Native nations. Second, the bill must provide a legal cause of action that is sufficiently stringent to protect tribal rights. The idea of agency discretion is built into the executive order, but federal agencies are necessarily constrained by the delegation doctrine in their exercise of federal authority. Each agency has a "charge" that it is bound to follow, and the executive order contemplates that Native interests will be accommodated within the scope of the

---

197. See U.S.H. Reps., *supra* n. 193.

198. See *id.*

199. See e.g. 148 Cong. Rec. H1414 (daily ed. Apr. 18, 2002) (remarks of Rep. George Miller of California, referring to the situation of the Pechanga Band of Mission Indians fighting to protect a parcel of land in Riverside County, California and "dozens of other similar areas" that are "threatened with desecration"); 148 Cong. Rec. H1416 (daily ed. Apr. 18, 2002) (remarks of Rep. Rahall at the same hearing, referring to the Valley of Chiefs in Montana, which "contains historic rock art and is used for ceremonial purposes[, y]et the Bush administration believes it is a pretty good place to drill for oil and gas"); Suzan Shown Harjo, *Indian Country Today, Perspectives, Harjo: Prayers to Protect Salt Mother and Sacred Places* <<http://indiancountry.com/?1060357108>> (Aug. 8, 2003) (acknowledging the Zuni Pueblo for prevailing in its struggle to prevent the Salt River Project utility company from creating a coal strip mine in New Mexico which would have devastated the sacred Zuni Salt Lake area and noting that the extensive political resistance of the Zuni Pueblo resulted in the SRP's decision to move the coal strip mine to Wyoming); Suzan Shown Harjo, *Indian Country Today, Perspectives, Sacred Places under Attack in Native America* <<http://IndianCountry.com/?1040221839>> (Dec. 18, 2002) (listing many Native sacred sites).

200. See Suzan Shown Harjo, *Indian Country Today, Perspectives, Harjo: American Indian Religious Freedom Act at 25* <<http://www.indiancountry.com/?1059748335>> (Aug. 1, 2003).

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*

205. Harjo, *supra* n. 200.

agency's mandate. However, Congress, which possesses "plenary power" over Indian affairs, can certainly issue affirmative and mandatory protection for Native sacred places and can impose such a requirement on federal agencies. Finally, the "definition" of sacred sites, while obviously necessary to enforce the terms of a statute, must be responsive to Native cultural concerns. To illustrate this, one can compare two distinctive definitions of the term "sacred lands." According to the Rahall Bill, "sacred land" means:

any geophysical or geographical area or feature which is sacred by virtue of its traditional cultural or religious significance or ceremonial use, or by virtue of a ceremonial or cultural requirement, including a religious requirement that a natural substance or product for use in Indian tribal or Native Hawaiian organization ceremonies be gathered from that particular location.<sup>206</sup>

Suzan Shown Harjo favors a more descriptive notion of "sacred lands" which indicates the types of uses that may be made of such lands, but does not establish a "test" for determining the existence of such lands.<sup>207</sup> Harjo cites the description of Native American sacred lands from the President's Report to Congress on American Indian Religious Freedom pursuant to the American Indian Religious Freedom Act:

The Native peoples of this country believe that certain areas of land are holy. These lands may be sacred, for example, because of religious events which occurred there, because they contain specific natural products, because they are the dwelling place or embodiment of spiritual beings, because they surround or contain burial grounds or because they are sites conducive to communicating with spiritual beings.<sup>208</sup>

Ms. Harjo also points out the need to respect the confidentiality of Native practitioners in disclosing the existence and specific location of these places. As Harjo notes, in some Native cultures, it is considered a violation of religious tenets for a spiritual leader to disclose this information to persons not qualified to receive it, whether they are tribal members or nonmembers.<sup>209</sup> In other cases, religious leaders are reluctant to disclose such information for fear of attracting hordes of curious non-Indians to the

---

206. H.R. 2419, 108th Cong. at § 1(b)(5).

207. Harjo, *supra* n. 200.

208. Suzan Shown Harjo, *Indian Country Today, Perspectives, Fact Sheet: Protection of Native American Sacred Places* <<http://indiancountry.com/?1024667682>> (June 22, 2002) (quoting President's Report to Congress on American Indian Religious Freedom) (internal quotations omitted). The description further provides:

There are specific religious beliefs regarding each sacred site, which form the basis for religious laws governing the site. These laws may prescribe, for example, when and for what purposes the site may or must be visited, what ceremonies and rituals may or must take place at the site, what manner of conduct must or must not be observed at the site, who may or may not go to the site and the consequences to the individual, group, clan or tribe if the laws are not observed. The ceremonies may also require preparatory rituals, purification rites or stages of preparation. Both active participants and observers may need to be readied. Natural substances may need to be gathered. Those who are unprepared or whose behavior or condition may alter the ceremony are often not permitted to attend. The proper spiritual atmosphere must be observed. Structures may need to be built for the ceremony or its preparation. The ceremony itself may be brief or it may last for days. The number of participants may range from one individual to a large group.

*Id.* (quoting President's Report to Congress on American Indian Religious Freedom) (internal quotations omitted).

209. *Id.*

site. The Supreme Court's decision in *Klamath* that information disclosed to a federal agency in consultation with a tribal government is not protected by FOIA has created another layer of concern for Indian nations. In some cases, federal statutes specifically protect the confidentiality of certain types of cultural information.<sup>210</sup> However, to the extent that the information falls outside of these limited statutory dictates, Native practitioners' interest in confidentiality may not be protected. Thus, the cultural concerns and requirements of Native practitioners must become an important part of the process of identification and protection of sacred sites on public lands.<sup>211</sup> Suzan Shown Harjo is currently working with several other Native leaders who are part of the Coalition to Protect Native American Sacred Places in order to identify an appropriate process.

### 3. Repatriation of Ancestral Lands

From a cultural sovereignty perspective, the preferred solution is to repatriate ancestral sacred lands to tribal ownership. This may or may not be feasible from a federal perspective, depending upon the nature of the lands and the purposes for which they were taken. In some cases, the federal government appropriated Native lands for specific purposes, such as military installations and dam projects. Where the purpose of the taking has since been fulfilled and the lands are no longer needed, it makes sense to repatriate the lands back to the tribe. For example, in 2000, the Department of the Army transferred 4900 acres of land at Lake McFerren on the former Fort Wingate Army Depot in New Mexico to the Bureau of Indian Affairs for the Navajo and Zuni Tribes.<sup>212</sup> These lands represented the first phase of an eventual transfer of 21,881 acres. Malcolm Bowekaty, then Governor of the Zuni Pueblo, spoke about the trauma to the Zuni people when the land was taken from them, and said that the transfer was "the first big step to reclaiming our ancestral grounds"<sup>213</sup> and "a tribute to our forefathers who always told us to have patience and tolerance."<sup>214</sup> The Navajo Nation's President, Kelsey Begaye, also expressed the happiness of the Navajo people that they were able to "come back to the land or the land has come back to us."<sup>215</sup> The partnership between the Navajos and Zunis in the Fort Wingate transfer is a compelling exercise of tribal unity in the exercise of cultural sovereignty.

---

210. For example, § 304 of the National Historic Preservation Act provides that an agency director may "withhold from disclosure to the public, information about the location, character, or ownership of a historic resource" after consultation with the Secretary of the Interior "if the Secretary and the agency determine that the disclosure may— (1) cause a significant invasion of privacy; (2) risk harm to the historic resources; or (3) impede the use of a traditional religious site by practitioners." 16 U.S.C. § 470w-3. Importantly, a determination that the site is eligible for listing on the National Register is required for this provision to be applicable. Section 9 of the Archaeological Resources Protection Act also provides authority for agencies to withhold information about "archaeological resources" that are subject to a permit requirement unless the disclosure would otherwise further statutory purposes and would not create a risk of harm to such resources or the site at which the resources are located. *Id.* § 470hh.

211. The Rahall Bill does contain a provision on confidentiality. See H.R. 2419, 108th Cong. at § 4.

212. See Chaka Ferguson, *Navajos, Zunis Regain Forest Land*, Ariz. Republic B11 (July 1, 2000).

213. *Id.* (quoting Zuni Pueblo Gov. Malcom Bowekaty) (internal quotations omitted).

214. *Id.* (quoting Zuni Pueblo Gov. Malcom Bowekaty) (internal quotations omitted).

215. *Id.* (quoting Navajo Nation President Kelsey Begaye) (internal quotations omitted).

The repatriation solution, however, may seem problematic as applied to lands designated as national parks or national monuments, in part because of the notion that these lands are held in "trust" for the public. The Rahall Bill contemplates that in some cases, a federal agency would be willing to transfer sacred lands into trust for the benefit of an Indian tribe or tribes so long as these tribes agree to "manage the land in perpetuity to protect that sacredness."<sup>216</sup> This should not be inconsistent with public lands policy so long as Congress clearly delineates the need to protect these sacred places from development and destruction.

There are some success stories for Native peoples who have reclaimed their sacred lands from federal control.<sup>217</sup> The classic example is the Taos Pueblo's successful repatriation of Blue Lake. Blue Lake is a very sacred place to the people of Taos Pueblo, and it occupies a central place in their cosmology and in their daily, living existence.<sup>218</sup> Vince Lujan, Jr., a member of Taos Pueblo, described the significance of Blue Lake to the Taos people:

Blue Lake is the symbol of Taos' cultural identity. It... [ensures] the cultural perpetuation of the Red Willow People [and] is a source of physical... and religious sustenance... Blue Lake... symbolizes a place, a ceremony, and finally a destination, following the Trail of Life that leads to religious enlightenment.<sup>219</sup>

In 1906, President Theodore Roosevelt appropriated Blue Lake from the Taos Pueblo when he established the Taos Forest Reserve, which was then incorporated into the Carson National Forest. For years, Pueblo elders and leaders traveled to Washington, D.C. annually to testify before Congress and ask for the return of Blue Lake. "Finally, in 1970, President Nixon signed House Resolution 417, which restored 48,000 acres of land, including Blue Lake, to [the] Taos Pueblo."<sup>220</sup> As Acoma poet Simon Ortiz noted, the persistence and "determination of the Pueblo people was 'truly epic, and their resource was the oral tradition and its mythic power to confirm existence and continuance.'"<sup>221</sup>

Another example is the repatriation of the sacred island of Kaho'olawe to the Native Hawaiian people. Kaho'olawe was traditionally used by Native Hawaiian people as a place for the training of religious leaders, and it is rich with cultural sites, including petroglyph clusters, fishing shrines, temples, dwelling sites, and burial sites.<sup>222</sup> The island was seized by the U.S. military in 1941 to be used as a practice bombing target during World War II. Although the military initially promised to return the island to the

216. H.R. 2419, 108th Cong. at § 6(a).

217. See Suzan Shown Harjo, *Indian Country Today, Perspectives, Protecting Native Peoples' Sacred Places* <<http://IndianCountry.com/?1017430958>> (Apr. 1, 2002) (mentioning the return of Blue Lake and Bear Lake to the Taos Pueblo, the return of Mount Adams to the Yakama Nation, and the return of 120 acres of Bear Butte to the Cheyenne and Arapaho Tribes).

218. See Coffey & Tsosie, *supra* n. 181, at 205.

219. *Id.* at 205-06 (quoting Vince Lujan, Jr., *A Case Study in the Protection of American Indian Religious Freedom: Taos Pueblo's Search for Religious Privacy* 14-15 (unpublished manuscript 1999)) (internal quotations omitted).

220. *Id.* at 206.

221. *Id.* (quoting Simon Ortiz, *Speaking for Courage*, in *A Circle of Nations: Voices and Visions of American Indians* 24, 28 (John Gattuso ed., Beyond Words 1993)).

222. A more detailed account of the Kaho'olawe case is at Coffey & Tsosie, *supra* note 181, at 206.

Native people after the war, it was not until 1990 when President Bush directed the Secretary of Defense to cease using the island for bombing and target practice.<sup>223</sup>

In 1993, Congress pledged to clean up the shrapnel and unexploded bombs and then convey the island within ten years to the State of Hawaii, which established the Kaho'olawe Island Reserve to facilitate this. Under state law, the reserve is created in perpetuity for the preservation and practice of customary and traditional Native Hawaiian rights, including those necessary to continue Native cultural, spiritual, and subsistence practices. On November 11, 2003, the Navy officially returned the 28,800 acre island back to Hawaii, sixty-two years after it was taken.<sup>224</sup> Although the island is still severely damaged by the years of abuse by the U.S. military and will require extensive reforestation, the Native Hawaiian people consider Kaho'olawe a sacred place that will be instrumental in the cultural revitalization of the Hawaiian people.

All of these examples testify to the determination of many Native nations to settle for nothing less than the return of their most sacred ancestral lands. The Lakota people, for example, are legendary for their refusal to acquiesce to "payment" for the government's taking of their sacred Black Hills, and they insist that the lands be returned.<sup>225</sup> In other cases, Native nations may be amenable to participating in the management of public lands as distinct governments, thereby protecting Native cultural interests while still allowing other uses of public lands. Co-management of public lands by federal agencies and Indian nations allows for tribal governmental participation in decision-making authority and does not reduce tribal interests to the position of "equal stakeholders" with other "special interest groups." The idea of federal-tribal co-management has received a great deal of attention in recent years. Congress has considered several bills to encourage Native contracting over the management of federal lands, as a general principle,<sup>226</sup> and has also passed specific legislation for particular tribes and lands. These legislative initiatives build upon the federal trust responsibility and the self-governance authority of tribes under the Indian Self-Determination and Education Assistance Act,<sup>227</sup> and respond to tribal needs for inclusion on

---

223. After World War II, President Eisenhower issued a 1952 executive order indefinitely appropriating the island for military operations. Over the ensuing years, Naval activities, including bombing, deforestation, and waste dumping, severely damaged the extensive natural and cultural resources of the island. The Native Hawaiian people, through the "Protect Kaho'olawe Ohana" organization (PKO), steadfastly worked to gain return of their sacred island. In 1969, the PKO filed an action in federal court, which ultimately led to a consent decree that provided for access to the island for religious, cultural, educational, and scientific activities. In 1981, the island was listed on the NHPA's National Register of Historic Places. *Id.*

224. See Timothy Hurley, *Kaho'olawe: A New Day on the Horizon*, Honolulu Advertiser 1A (Nov. 2, 2003); Vicki Viotti, *Rites Mark Kaho'olawe Transfer*, Honolulu Advertiser 1A (Nov. 13, 2003).

225. For an excellent historical analysis of this issue and the impact of current proposals to create a "conservation area" in this region from a Lakota/Dakota/Nakota cultural perspective, see John P. LaVelle, *Rescuing Paha Sapa: Achieving Environmental Justice by Restoring the Great Grasslands and Returning the Sacred Black Hills to the Great Sioux Nation*, 5 Great Plains Nat. Resources J. 40 (2001).

226. See e.g. *Alaska Federal Lands Management Demonstration Project Act*, H.R. 950, 108th Cong. (2003) (described as a bill "[t]o expand Alaska Native contracting of Federal land management functions and activities and to promote hiring of Alaska Natives by the Federal Government within the State of Alaska, and for other purposes"); *Indian Contracting and Federal Land Management Demonstration Project Act*, Sen. 288, 108th Cong. (2003) (describing as its purpose "to encourage contracting by Indians and Indian tribes with respect to management of Federal land" and for other purposes); *Native American Contracting and Federal Lands Management Demonstration Project Act*, Sen. 2921, 107th Cong. (2002).

227. Pub. L. No. 93-638, 88 Stat. 2203 (1975).

decisionmaking that involves their ancestral lands. The case study that follows details a successful example of federal-tribal co-management over lands within a national monument.

#### 4. Co-Management: The Agua Caliente Band and the Santa Rosa National Monument

The Santa Rosa and San Jacinto Mountains National Monument was established by Public Law 106-351 on October 24, 2000.<sup>228</sup> The monument, located in southern California, encompasses a beautiful mountain wilderness area that forms the backdrop for the Coachella Valley. According to the Act, these mountains have unique cultural value for the Agua Caliente Band of Cahuilla Indians, and they house several significant cultural sites, including village sites, trails, and petroglyphs.

The monument was placed under the joint authority of the Bureau of Land Management and the Forest Service, and the Secretary of Interior and Secretary of Agriculture are charged with managing the monument in a way that will protect its resources and further the purposes of the monument. The monument is located in a highly urbanized area, leading to several interesting provisions within the Act. First, the Act specifically protects existing property rights within the boundaries of the monument, whether those belong to an Indian nation, the State of California, or private landowners.<sup>229</sup> It also disclaims any intent to establish an express or implied protective perimeter or buffer area around the monument.

Second, the Act calls for the Secretaries to prepare and implement a management plan for the monument, in consultation with the Agua Caliente Band of Cahuilla Indians,<sup>230</sup> and also in consultation with a local advisory committee established by § 7 of the Act.<sup>231</sup> The local advisory committee requires representation from several groups of stakeholders: scientists, fish and game personnel, local governments, conservation organizations, developers, and community and recreational interest groups.<sup>232</sup> Section 7(b)(5) includes the Agua Caliente Band as one of the required stakeholders for the local advisory committee.<sup>233</sup> Thus, within the portions of the Act relating to the need for public participation in the management of the monument, the Agua Caliente Tribe is specifically listed both as a stakeholder and as a government entitled to consultation.

Finally, however, the Act constructs a unique management role for the Agua Caliente Band by recognizing the Tribe's authority to enter cooperative agreements with the federal land agencies to co-manage the lands, and also exchange lands, where necessary to achieve the purposes of the monument.<sup>234</sup> The Agua Caliente Band holds lands adjacent to the monument which are culturally interconnected through a system of canyons and cultural sites that traverses the area. The Tribe owns a site called "Tahquitz

---

228. 114 Stat. 1362 (2000).

229. *Id.* at § 3(c), 1364.

230. *Id.* at § 4(b)(2), 1365.

231. *Id.* at § 4(b)(1), 1365.

232. *Id.* at § 7, 1368.

233. 114 Stat. at 1368.

234. *Id.* at § 6(e), 1367.



Canyon,” which it has restored into an important nature park with unique environmental and cultural resources. The Tribe’s success in managing its own parklands won the respect of the BLM and Forest Service, whose representatives signed a historic cooperative agreement with the Tribe regarding management of Indian Canyons, Tahquitz Canyon, and also the Santa Rosa and San Jacinto Mountains National Monument. This co-management authority provides the Tribe with uniform jurisdiction to manage the lands within the monument to preserve their unique environmental and cultural character. Michael Kelner, environmental resources manager for the Tribe, has explained how the Tribe intends to reinstate traditional land management practices to preserve native vegetation used for food and cultural purposes.<sup>235</sup> He says, “We want to be able to begin a new era in ecological management by doing it the way the ancestors did.”<sup>236</sup>

The Santa Rosa and San Jacinto Mountains National Monument case study highlights the opportunity for Indian nations to enter into cooperative agreements to manage traditional areas located on public lands in the exercise of cultural sovereignty.<sup>237</sup> This approach provides a favorable comparison to the standard approach used by federal land managers, which considers tribal interests as part of the many interests advanced by stakeholders and accommodated through the “multiple use” policy applicable to public lands.

#### CONCLUSION

This essay has attempted to demonstrate that considerations of cultural and political empowerment for Native nations are prominently featured in conflicts over the appropriate use of “public lands.” Any potential future solutions must respond to the cultural distinctiveness of Native nations, as well as their unique political status within the domestic federal system and also within the international system. This essay has advocated an intercultural interpretation of the trust doctrine which entails the need to understand tribal interests as part of a foundational bargain with the United States which ought to endure and provide protection against contrary assertions of the “public interest” of American citizens. The trust doctrine embodies the United States’ treaty promises to protect the Indian nations in their right to self-government and to protect the environmental and cultural resources necessary for continued tribal survival. In that sense, it is also a significant feature of Native efforts to assert self-determination as autonomous “peoples” within the international legal system.

Historically, the policy shifts within federal Indian law have been dramatic. Today the federal government has pledged to respect tribal rights to self-determination and to their lands and resources. Tribal sovereignty is multidimensional and forms a critical

---

235. James May, *Indian Country Today, Lifeways, Agua Caliente: Parks Link Past, Present* <<http://indiancountry.com/?2402>> (Jan. 24, 2001).

236. *Id.* (quoting Michael Kelner) (internal quotations omitted).

237. This approach has also been used successfully in the management of other national monuments, such as the Kasha Katuwe Tent Rocks National Monument in New Mexico, which is under the joint management authority of the Bureau of Land Management and the Pueblo of Cochiti. See Bureau of Land Mgt., *Albuquerque FO, Kasha-Katuwe Tent Rocks National Monument, Kasha-Katuwe Facts* <[http://www.nm.blm.gov/aufotent\\_rocks/final\\_docs/tent\\_rocks\\_final.PDF](http://www.nm.blm.gov/aufotent_rocks/final_docs/tent_rocks_final.PDF)> (accessed Dec. 30, 2003).

foundation for tribal rights to cultural and political survival. The federal courts, however, have shown a marked lack of consistency in interpreting the nature and scope of tribal sovereignty and tribal rights. The trust doctrine provides a way to measure the federal government's compliance with the moral and legal commitments it has made to Native peoples. The trust doctrine should not be viewed as a tool of the paternalistic history of federal Indian law, but as a compact between nations that stems from the treaty era and is currently available to adjudicate the rights of Indian nations and the responsibilities of the federal government.

