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THE INTERESTS OF “PEOPLES” IN THE Cooperative Management of Sacred Sites

Kristen A. Carpenter*

I. INTRODUCTION

Much has been written about “cooperation” in the management of federal public lands. Scholars have considered, for example, “cooperative federalism” as a theoretical and doctrinal basis for involving tribal, state, local, and other entities in the management of federal public lands. Others have looked at the practical challenges presented by various models of cooperative management. As scholars have suggested, the issue of cooperation has important implications for American Indian interests on the public lands.

This essay looks at the question of cooperation in the context of American Indian sacred sites located on federal public lands. For many American Indians, these sites are integral to their religious and cultural practices, as well as political and community vitality. Thus, many American Indians feel that it is important to maintain an atmosphere of quiet reverence appropriate for ceremonial activities and to protect the physical integrity of sacred sites from desecration. Yet, these sites are located on public

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lands where non-Indians engage in recreation, extractive industries, or their own religious use. These competing uses create challenges for the federal agencies entrusted with managing the public lands on behalf of all American people.

Changes in the administrative process have certainly improved sacred sites management over the past decade. Statutes, executive orders, agency regulations, and guidelines provide Indian tribes and other affected groups and individuals with significant opportunities to participate in the development of federal management plans, particularly through consultation processes. Federal agencies demonstrate increasing awareness of the many issues involved in sacred sites accommodations. More often than not, citizens comply with management plans that have special provisions recognizing Indian needs at sacred sites. Yet problems remain. Land management plans offering even modest accommodations of American Indian religious uses are fiercely contested in court, and some people continue to express bitterness about these accommodations. In short, the management of sacred sites located on federal public lands continues to be highly contentious.

Part of the problem seems to be that, despite the recent changes, a number of groups feel their interests are still marginalized in federal sacred sites management. Indian tribes, local citizens' groups, far-away citizens' groups, and others are sometimes unsatisfied with both the process and substance of federal accommodations. In the ensuing battles, members of these groups start to accentuate their differences and deny the legitimacy of competing claims to sacred sites. Often times, conversations about

5. See id.
6. Review infra note 111 on guidelines about Indian sacred sites published by the U.S. Forest Service, National Park Service, and Department of Defense.
7. At Devils Tower National Monument, for example, compliance with the National Park Service's Final Climbing Management Plan "has been roughly 85%, meaning the number of people climbing in June since the voluntary ban was implemented in 1996 is 85% less than the number of people who climbed in June 1995." George Linge, Student Author, Ensuring the Full Freedom of Religion on Public Lands: Devils Tower and the Protection of Indian Sacred Sites, 27 B.C. Envtl. Aff. L. Rev. 307, 331 n. 45 (2000).
8. See e.g. Bear Lodge Multiple Use Assn. v. Babbitt, 175 F.3d 814 (10th Cir. 1999) (challenging management plan that asks rock climbers to refrain from climbing on Devil's Tower in the month of June); Natural Arch & Bridge Soc'y v. Alston, 209 F. Supp. 2d 1207 (D. Utah 2002) (challenging management plan that asks tourists to walk around rather than under Rainbow Bridge).
9. For a sense of various attitudes held by people at and around several sacred sites, review In the Light of Reverence (Bullfrog Films 2002) (conducting interviews with individuals on all sides of sacred sites disputes) (transcr. available at http://www.sacredland.org/ITLOR_pages/transcript.html (accessed Jan. 19, 2007)).
12. See In the Light of Reverence, supra n. 9. Winnie Bush, the mayor of Hulett, Wyoming, provides an example:

Our culture is as important as the Indian culture and we people who have lived here all our lives, we have our own culture that is being invaded by the Indians coming here all the time and taking over.

[All] the prayer bundles at Devils Tower to me is offensive. . . . They have all the rest of the United States to hang 'em in. Why do they have to hang 'em at Devils Tower?
rights at sacred sites devolve into mudslinging and only serve to polarize groups and diminish chances for cooperation in the planning process.  

This essay contends that there is a structural element of federal law and policy that, unfortunately, sets up these battles over sacred sites. The Supreme Court has held that whatever rights groups may have at sacred sites, the federal government’s rights as owner and sovereign of the public lands ultimately prevails. Federal agencies can, if they choose, accommodate various interests on the public lands, but such decisions are left to fluctuating executive policy and the discretion of land managers. This approach reflects well-established doctrine in public lands law, but leaves various citizens and groups clamoring for the federal government to recognize their interests and battling one another in the process.

To foster a more cooperative approach to sacred sites management, it may help to transcend the model of absolute federal control with various groups left fighting over the crumbs of accommodation. Instead, federal land management should recognize the concerns of groups on all sides of sacred sites disputes, make those concerns an explicit part of legal analysis, and develop models to recognize the various interests at stake. Of course, it will be immensely challenging to reform the management of sacred sites in these ways, and this essay aims only to offer some preliminary thoughts on the topic.

This essay argues for analysis of sacred sites problems through the language of “peoples” and “peoplehood.” In its plain meaning sense, a people is defined as “a body of persons that are united by a common culture, tradition, or sense of kinship, that typically have common language, institutions, and beliefs, and that often constitute a politically organized group.” And peoplehood means the sense or state of belonging to

When I go to Devils Tower, I definitely have a religious experience. I think it’s one of the most awesome sites I’ve ever seen, and I been looking at it all my life. But it’s not like the church. It has no similarities at all.

Id.


15. *Id.* at 453–54 (“Nothing in our opinion should be read to encourage governmental insensitivity to the religious needs of any citizen. The Government’s rights to the use of its own land, for example, need not and should not discourage it from accommodating religious practices like those engaged in by the Indian respondents.”).

16. *See* Carpenter, supra n. 10 at 1120–21 (discussing the legal basis for, and scope of, federal authority over the public lands).


a people. The concept of peoplehood thus helps to explain and validate why human beings group themselves in certain ways and why certain things may be important to them. In the sacred sites context, peoplehood has at least two important ramifications: (1) it can expand the discussion beyond the power of the federal government to include the interests of subnational groups, and (2) it can inspire those groups to recognize and accept one another’s interests. Thus, considering the interests of peoples might lay the groundwork for an attitude of cooperation at sacred sites.

I should say at the outset that recognizing varied groups as peoples does not mean they will all have the same needs or equal entitlements at sacred sites. Advocates for Indian tribes may, in particular, fear that peoplehood models ignore tribes’ special claims to sovereignty or reduce tribes to mere stakeholders along with everyone else who ever drove an RV into a national park. This is certainly not the aim of my argument.

Rather, once all peoples with legitimate interests in sacred sites are identified and included in the management process, then they should have an opportunity to discuss their different rights and needs at sacred sites. Tribal sovereignty—which along with federal and state sovereignty and the status of local governments—will be a baseline for the discussion. When it comes to specific needs, tribes may raise religious and cultural practices, while non-Indian peoples might articulate economic, recreational, and their own religious needs. Any discussion of peoplehood interests should take into account the differing political rights and the substantive needs of different peoples.

Part II of this essay describes peoplehood concerns in current sacred sites disputes, pointing out that these concerns are prevalent among many groups but silenced in the legal discourse. Part III introduces several scholarly definitions of peoples and peoplehood that may serve to explicate collective concerns at sacred sites. Part IV considers what peoplehood brings to the sacred sites conversation, as well as potential critiques of this approach. Part V suggests additional areas for research and study related to peoplehood concerns at sacred sites.

II. PEOPLES AT SACRED SITES

In January 2006, a federal district court rejected efforts of the Navajo Nation and other tribes to challenge the expansion of skiing and implementation of snowmaking at the Arizona Snowbowl. The tribes claimed, in particular, that the Snowbowl’s plan to use reclaimed water in the snowmaking operations would desecrate the San Francisco Peaks, where the ski area is located, a place of religious significance to the Navajos. The federal district court held that the snowmaking plan, as approved by the United States Forest Service, did not violate any relevant statutes on religious freedom.

19. Id.
20. E.g. Nell Newton, Indian Claims in the Courts of the Conqueror, 41 Am. Univ. L. Rev. 753, 776, 779, 781 & n. 142 (1992) (on the “right to exist as a tribe” as implicating issues of peoplehood).
22. See Tsosie, supra n. 3, at 292, 300.
24. Id. at 870, 887–89.
25. Id. at 905–06.
national historic preservation, environmental protection, or administrative procedure. The court also found the plan satisfied requirements of the federal government's trust duty to tribes. For all of these reasons, the district court granted summary judgment to the Forest Service and other defendants.

The Snowbowl decision is, as a legal opinion, completely unremarkable. It follows a long line of precedents denying Indian tribes relief against federal land use management practices that interfere with the tribes' ability to use public lands for religious and cultural practices. For the tribal plaintiffs and surrounding community members, however, the case invoked deeply held sentiments. Navajo President Joe Shirley, Jr., decried the outcome: "It is another sad day . . . [when] in the 21st Century, genocide and religious persecution continue to be perpetrated on Navajo people, other Native Americans living in the states of Arizona and New Mexico, who regard the Peaks as sacred."

Tesoque Pueblo Governor Mark Mitchell was reported to have said, "[my] people have lived through natural and human-created disasters, and now with a stroke of a pen the future of a people is at risk." Coconino County Supervisor Louise Yellowman echoed the feelings of injustice and outrage, asserting: "[t]he Native Americans are forgotten people in the United States including the veterans who sacrificed their lives and everything they had to protect this country and liberty for freedom of the United States. And yet our Native American vets are not treated with respect."

On the other side, the case prompted the former chair of the New Mexico Republican Party and gubernatorial candidate, John Dendahl, to issue an opinion piece using the Snowbowl case as support for his claim that "Indian sovereignty has outlived its usefulness." Professing skepticism about the sincerity of the Indians' religious interest in the San Francisco Peaks, Dendahl further argued that Indian claims, religious and otherwise, threaten to divide the American people:

Why do Indians have any standing whatsoever to deny on religious grounds others' use of public lands when public practice of religion by the rest of us is thoroughly circumscribed?

26. Id. at 878–80.
27. Id. at 872–78, 881–82.
29. Id. at 882.
30. Id. at 908. The tribes appealed to the Ninth Circuit Court of Appeals, and the court heard oral arguments in September 2006.
33. Dendahl, supra n. 13 (citation omitted).
34. Cole, supra n. 32.
35. On November 7, 2006, Dendahl lost the gubernatorial race to Bill Richardson. When Dendahl wrote his opinion piece, he indicated he had been "chairman of the Republican Party of New Mexico for more than eight years." Dendahl, supra n. 13.
36. Id.
37. Id. ("I am deeply skeptical of [the Indians'] claim. I have enjoyed Ski Santa Fe since its first, rustic year of operation and can find no one who has ever seen an Indian anywhere in the ski area vicinity seeking spiritual nourishment other than what we all enjoy from recreation there.").
Add to that the overwhelming list of evidence that the Indians’ status as wards of the federal government, but “sovereign” as against the states, is not in anyone’s best interests.

[The legal status of Indians is] just flat backward. This is a time for making rational what it means to be American, not playing footsie with those who seek national weakness through divisive schemes leading straight toward Balkanization.

There is no time better than the present to commence an earnest discussion as to how we achieve equal standing among all American citizens, none superior, none inferior, and all celebrated as individuals.38

The rhetoric from the Indian and non-Indian sides of this case, though seemingly so disparate, actually agrees on one thing: sacred sites cases evoke strong feelings about our existences as peoples. Navajo President Shirley uses the language of “genocide,” articulating the idea that spraying reclamed water on a sacred site threatens the ability of Navajos to exist as Navajos. Tesque Pueblo Governor Mitchell worries that “the future of a people is at risk.” County Supervisor Yellowman queries why Navajos have sacrificed their lives in world wars only to be denied a basic freedom guaranteed to “the American people”—the right to worship freely.

Dendahl claims to be concerned with Americans’ interests as individuals, but he ultimately sounds just as worried about the fate of the American people. He expresses the view that Indians do not really need special access to sacred sites to survive, and if they do, then perhaps it is time to stop allowing them to exist as sovereign peoples within the larger American citizenry. After all, Indian peoplehood may limit non-Indian citizens’ use of public lands—an equal right of access that seems integral to their American citizenship—and may even factionate Americans.

But while the interests of peoples resonate throughout sacred sites disputes like the Snowbowl case, these interests remain the legal elephant in the room. The United States legal system, with its focus on individual rights, does not often recognize the claims of collective peoples.39 Indian tribes are usually somewhat of an exception to this observation, of course. Federal treaties, statutes, judicial decisions, and administrative rulings regularly recognize rights of Indian nations as collective entities that maintain a relationship with the United States on a government-to-government basis.40 Yet for all of its recognition of tribal rights, the body of federal Indian law has not protected the collective interests of tribes in sacred sites cases.41

38. Id. (parenthetical added).
Non-Indian religious communities, citizens of local towns, and recreation groups complain that they too are disenfranchised in federal sacred sites cases. The current practice of federal administrative agencies is to consult with affected individuals and groups before announcing management plans for sacred sites located on public lands. While such administrative policy has resulted in the accommodation of multiple user groups on the public lands—for example, Lakota religious practitioners and non-Indian climbers at Devils Tower, Wyoming—a number of problems persist. Some stakeholders critique federal consultation at both the process and substance levels, complaining it disadvantages certain groups and results in unsatisfactory management of public lands.

Indian participants sometimes find the federal processes to be culturally foreign, particularly when it comes to discussing the sensitive topic of religion. They may not feel inclined, or permitted by their religious beliefs, to submit written comments or voice public statements about their ceremonial practices. Moreover, tribes may lack the financial or administrative resources to participate in formal consultation processes. When Indian tribes and individuals do surmount these challenges and participate in federal consultations, they sometimes find that the government ends up disregarding their opinions. But non-Indian citizens claim that the administrative process actually bends over backwards to foster Indian participation and ultimately results in substantive decisions that prefer Indians over non-Indians.

These concerns manifest in a number of sacred sites disputes. In the Snowbowl case, for example, the Forest Service pointed out that it did consult with affected Indian tribes but ultimately used its administrative discretion to pursue the ski area expansion and snowmaking plan anyway. Similarly, in *Lyng v. Northwest Indian Cemetery Protective Association*, in which the Supreme Court affirmed the right of the federal government to destroy sacred sites, the Forest Service had been aware of Indian concerns about a proposed development project. The Forest Service engaged experts to conduct a study, including interviews with Indian elders, to assess the impacts of the proposed project on the tribal religious and cultural practices. This study found that the project would “produce an irreparable impact” on the Indian religion and recommended avoiding sacred places in the construction of a road and timber project.

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42. See generally Pendley, supra n. 11.
45. See Pendley, supra n. 11, at 1024–25.
46. *Navajo Nation*, 408 F. Supp. 2d at 879 n. 11 (“Throughout the tribal consultation process, the Forest Service made over 200 phone calls, held 41 meetings, and exchanged 245 letters with tribal representatives. Although the consultation process did not end with a decision the tribal leaders supported, this does not mean that the Forest Service’s consultation process was substantively and procedurally inadequate.”).
47. 485 U.S. at 441–42.
48. Id. at 442
49. Id.
50. *N.W. Cemetery Protection Assn. v. Peterson*, 795 F.2d 688, 693 (9th Cir. 1986); see *Lyng*, 485 U.S. at 442. The court concluded that the road and timber project would “virtually destroy . . . the Indians’ ability to practice their religion.” 795 F.2d at 693; see *Lyng*, 485 U.S. at 467 (Brennan, Marshall, & Blackmun JJ., dissenting).
But the Forest Service rejected the recommendation and decided to go ahead with the project.\textsuperscript{51} In both cases, the Forest Service decided to avoid certain particular sensitive areas, such as shrines, but still elected to pursue larger development projects that would, in the tribes' view, harm Indian religious practices. When their input can be substantially disregarded, tribes may wonder if an opportunity to consult or otherwise participate in federal decision-making processes can actually protect their religious and cultural needs.\textsuperscript{52}

The facts of the infamous Devils Tower case reveal dissatisfaction among groups on various sides of the federal consultation and accommodation process. Non-Indian residents of towns bordering the monument complain that accommodating Indian religious practices harms the local economy by discouraging tourists from visiting the area.\textsuperscript{53} They also question the extent of Indian history and religious practice at Devils Tower.\textsuperscript{54} Rock climbers argue that a voluntary climbing ban interferes with their recreational and commercial uses of the Tower.\textsuperscript{55} When these non-Indians try to challenge federal accommodations in court, they are denied standing to sue.\textsuperscript{56}

Indians, on the other hand, are supposed to be content with federal accommodations that offer only very modest protection for their religious practices: the centerpiece of the much-contested Final Climbing Management Plan at Devils Tower is a mere request that rock climbers voluntarily restrict their climbing during the month of June.\textsuperscript{57} By contrast, the federal courts have permitted Christian denominations to exclude the public completely from their religious events, for short periods of time.\textsuperscript{58} Rock climbing is banned altogether on national monuments such as Mount Rushmore\textsuperscript{59} which is also closed on Christmas Day.\textsuperscript{60}

The above discussion begins to suggest some groups' dissatisfaction with federal sacred sites law and policy. Yet, there is other data showing substantial compliance with at least some federal management plans,\textsuperscript{61} and, without extensive empirical work, it is difficult to state conclusively whether accommodation of multiple users at sacred sites has been largely successful or not—or even to define what "success" would mean in this context. Yet, it seems reasonable to conclude that some groups feel their issues are not

\textsuperscript{51} Id. at 443.

\textsuperscript{52} Compare Yablon, supra n. 4, at 1646 (on the "effectiveness" of statutory consultation provisions in the sacred sites realm).

\textsuperscript{53} See In the Light of Reverence, supra n. 9 ("Recreation is one of the top five income generators in every western state. It's very, very important. But what we also see is the potential that mining activity, oil and gas activity, or timber harvesting, or ranching or water development, or these other activities that are very important economically, could also be stopped as a result of, 'Well, somebody thinks it's sacred, and that's enough for us.'").

\textsuperscript{54} See id. ("Our family history goes back seven generations in Crook County in the ranching business. And there really were no Native Americans here—until they were invited by the park service." (quoting rancher Jesse Driskill)).

\textsuperscript{55} See Bear Lodge, 175 F.3d at 821.

\textsuperscript{56} Id. at 822.

\textsuperscript{57} Id. at 819–20.

\textsuperscript{58} O'Hair v. Andrus, 613 F.2d 931, 937 (D.C. Cir. 1979).

\textsuperscript{59} See 36 C.F.R. § 7.77(a) (2006) ("Climbing Mount Rushmore is prohibited.").


\textsuperscript{61} Review supra note 9 and accompanying text.
being addressed and that their dissatisfaction impedes opportunities to foster a more cooperative and less litigious approach to sacred sites management. Toward that end, the next section discusses how the language of peoplehood may help to explicate the concerns of groups at sacred sites on the public lands.

III. NAMING COLLECTIVE CONCERNS: PEOPLEHOOD

In common parlance, the term peoples connotes a collective association of individuals based on political affiliation, religion, culture, language, or other factors.\(^6\) This broad definition suggests obvious national groups like the American, Iraqi, or Israeli people. It also includes subnational groups like the Mormon, Orthodox Jewish, or Navajo people within the United States; the Sunni, Shiite, or Kurdish people in Iraq; and the Jewish or Arab people in Israel. Peoples may be small groups such as the citizens of a particular town or the members of a tiny linguistic or religious group. The term peoplehood refers to the state of being a people or the sense of belonging to a people.\(^6\) It is a sense of peoplehood that prompts people to identify as American or Navajo or Arab and to comport their lives according to the values and behaviors of those peoples.

Beyond these common meanings of the terms, scholars advance a number of useful definitions of peoples and peoplehood. Rogers Smith defines "a political people" as a group that is "a potential adversary of other forms of human association, because its proponents . . . assert that its obligations legitimately trump many of the demands made on its members in the name of other associations."\(^6\) Under this definition, a people may be constituted along religious, cultural, ethnic, racial, or other lines. Recognizing that peoples have varying power and influence over issues of varying breadth and depth, Smith recognizes the following as examples of peoples: China, the U.S., Belgium, the Navajos, Puerto Rico, Ecovillages, Quebec, Wales, Antioquia, Brooklyn, Hong Kong, Jehovah's Witnesses, the AFL-CIO, Greenpeace, Oxfam, and PEN.\(^6\)

Though Smith's list of political peoples is obviously very inclusive, he is careful to point out that some will "advance 'strong' claims to allegiance over a 'wide' range of issues down to those more politically trivial groups that advance only 'weak' claims to allegiance over a 'narrow' range of issues."\(^6\) Moreover, some groups or associations are not peoples at all. The political nature of his model would exclude, for example, "football clubs, singing groups, and Girl Scout troops."\(^6\) Although members might feel "great loyalty" to such groups, "neither the leaders nor members of such associations are ever likely to assert seriously that the obligations of those memberships justify them in violating governmental laws."\(^6\)

Ultimately, Smith focuses on the way peoples partake in political life. Peoples

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62. Supra n. 18.
63. Supra n. 19.
65. Smith, supra n. 64, at 21.
66. Id. at 20.
67. Id.
68. Id.
articulate “ethically constitutive stories” that seek to define their place in the larger society.\textsuperscript{69} Clashes between peoples can be dangerous, as in incidents of violent ethnic conflict and racial oppression. But peoples often meet in political forums and their interactions, both conflictual and cooperative, are important to community building.\textsuperscript{70} Thus, peoples can contribute productively to society.

The language of peoples and peoplehood also arises in international human rights law. S. James Anaya argues that “in a world of increasingly overlapping and integrated political spheres,” the term peoples “should be understood to refer to all those spheres of community, marked by elements of identity and collective consciousness, within which people’s lives unfold—indeed, independently of considerations of historical or postulated sovereignty.”\textsuperscript{71} Anaya writes with awareness of a major debate at the United Nations concerning the question of whether indigenous peoples are peoples in the international law sense, with its attendant right of self-determination.\textsuperscript{72} In his view, Indian tribes are “indigenous peoples” in the following sense:

They are indigenous because their ancestral roots are embedded in the lands in which they live, or would like to live, much more deeply than the roots of more powerful sectors of society living on the same lands or in close proximity. Furthermore, they are peoples to the extent they comprise distinct communities with a continuity of existence and identity that links them to the communities, tribes, or nations of their ancestral past.\textsuperscript{73}

American Indian Studies scholar Tom Holm grounds his definition of peoplehood specifically in American Indian experiences and perspectives. He identifies four attributes of peoplehood that have ensured the survival of Indian tribes during periods of conquest and colonization: (1) maintaining language; (2) understanding place; (3) keeping particular religious ceremonies alive; and (4) perpetuating a sacred history.\textsuperscript{74} Though he does not explicitly include it in his matrix, Holm also writes extensively about a fifth element essential to American Indian peoplehood: retaining rights as political sovereigns.\textsuperscript{75} These attributes of American Indian peoplehood both explain the persistence of Indian peoples—against federal programs designed specifically to eradicate them—and suggest how tribes might continue to survive in the future.

What is striking about these definitions of peoples and peoplehood, coming from such disparate sources, is how similar they are. Each envisions a group of individuals united by some combination of political organization or institution, culture, and relationships. On the other hand, the two definitions of indigenous or Indian peoples contain an element of physical or geographical place that is missing in both the plain language and political theorist definitions. Thus, this inexhaustive review leaves open the question of whether a people must have some relationship to land, though it is safe

\textsuperscript{69} Id. at 64–65.
\textsuperscript{70} See generally Smith, supra n. 64, at 19–71 (on a “theory of peoplemaking”).
\textsuperscript{72} Id. at 100–03.
\textsuperscript{73} Id. at 3 (footnote omitted).
\textsuperscript{75} Id. at xvii.
to say that for most Indian peoples this element is an attribute of peoplehood.

Importantly, each definition resists equating peoplehood with "statehood." John Rawls explains that he uses the term peoples as a deliberate choice "to distinguish [his] thinking from that about political states as traditionally conceived, with their powers of sovereignty included in the (positive) international law."76 Given his very broad goal of working out principles for the operation of a "just democratic society," Rawls realizes that limiting his concern to traditional states, with dominion over their people and the right to wage war, would improperly exclude relevant groups.77 Moreover, international law itself is recognizing limitations in the powers of states and the importance of non-state actors. Therefore, Rawls focuses on peoples and "highlight[s] their moral character and the reasonably just, or decent, nature of their regimes."78

Rawls puts his finger on what is most useful about the term peoples: it is both inclusive and reflective of the way societies really function. Typically, states have dominated political activity and thinking. But today, other collective entities—ranging from sub-national political groups to internet marketplaces and corporations—are players in the world arena. Though states remain powerful, an exclusive focus on them obscures what is really going on in international and domestic settings. The term peoples, unlike states, includes numerous entities that have a role to play in contemporary society, including in sacred sites disputes.

IV. WHAT DO PEOPLEHOOD MODELS ADD TO THE DISCUSSION?

A. Framing the Discussion Meaningfully

The importance of including peoples versus just states or sovereigns in legal and political matters plays out in the sacred sites context. The Supreme Court has adhered to the outmoded idea that the federal government is the only party that ultimately matters in sacred sites analysis because it wields both political sovereignty and property ownership over the public lands.79 Therefore, the Court has held that the government can do whatever it wants with its property—and is largely free to accommodate or ignore the interests of other groups. While other stakeholders such as Indians, recreationalists, and local townspeople have clamored for a role in sacred sites management, they have won tiny accommodations of process and substance only at the discretion of the government.

As the opening anecdotes about the Arizona Snowbowl case suggest, however, an exclusive focus on the government’s rights at sacred sites leaves out the interests of many deeply affected parties, both individuals and groups. Individuals have a whole slew of claims that they might bring in sacred sites cases—free exercise, establishment clause, association, speech, and equal protection to name just a few. But collective entities have fewer claims that might allow them to participate in sacred sites cases. By

77. Id. at 26.
78. Id. at 27.
79. See Lyng, 485 U.S. at 453 ("Whatever rights the Indians may have to the use of [the sacred site], . . . those rights do not divest the Government of its right to use what is, after all, its land.").
re-conceptualizing sacred sites disputes in terms of the interests of peoples, perhaps we can work toward a more inclusive approach to these disputes. The goal should be to allow meaningful participation by all peoples that can demonstrate some legitimate interest in any particular sacred site.  

How might such an approach function in the Snowbowl case, for example? Ideally, at the outset, the Forest Service would try to gather representatives of all of the peoples with stakes in the outcome. These might include tribal officials and religious leaders, representatives of local non-Indians whose livelihoods depend on the Snowbowl, and spokespersons for the American people's interests in Coconino National Forest lands. Perhaps there would be other groups represented as well.

With all of the legitimately invested peoples at the table, the Forest Service might frame its analysis as follows: What are the needs of the various affected peoples at San Francisco Peaks? Can a management decision be made that recognizes all of their peoplehood concerns? If not, how should the competing claims among peoples to the public lands be prioritized? Would it be possible to engage the affected peoples in a cooperative conversation or even a co-management model? This approach would differ in some respects from what actually happened in the case. To some extent, the interests of groups were considered as the Forest Service evaluated the ski area development and snowmaking plan. The Forest Service undertook "an extensive environmental review under [the National Environmental Protection Act] that spanned several years of public participation, tribal consultation and input, and analysis." It also engaged in consultation with tribes as mandated under the National Historic Preservation Act. But it does not appear that each group's needs as peoples formed an explicit part of the analysis. Rather,

[t]he Forest Service identified the overall purpose and need for the [snowmaking] project as follows: (1) to ensure a consistent and reliable operating season, thereby maintaining the economic viability of the Snowbowl and stabilizing employment levels and winter tourism within the local community; and (2) to improve safety, skiing conditions, and recreational opportunities, bringing terrain and infrastructure into balance with current use levels.

The Forest Service thus seems to have asked: "Can we approve these upgrades to the ski resort?" and not, "How can we manage these lands in a way that responds to the needs of various peoples with an interest in this place?"

Interestingly the Forest Service's statement of "purpose" alludes to some group interests; for example, it references the "the local community" and its economic and employment needs and also alludes to skiers and tourists. There is, however, no mention of the various Indian peoples or their interests in San Francisco Peaks. Even though they had an opportunity to consult on the management plan, Indian tribes and their needs do

80. See Joseph William Singer, *Entitlement: The Paradoxes of Property* 91 (Yale U. Press 2000) (advancing an entitlement model of property law whose focus "shifts from identifying the owner to identifying the conflicting rights of everyone with legitimate claims to rights in the property in question").


82. *Id.* at 878–80 ("Throughout the tribal consultation process, the Forest Service made over 200 phone calls, held 41 meetings, and exchanged 245 letters with tribal representatives.").

83. *Id.* at 873.
not seem to have been a primary consideration in the planning or evaluation process. Thus it should have come as no surprise that six Indian tribes sued to challenge the Forest Service’s plan.\textsuperscript{84}

Including affected peoples in a more meaningful way in the planning process might have helped to legitimize the Forest Service’s decision about the Snowbowl development and reduced the legal challenges to it. For example, explicit attention to peoplehood concerns could open the door for tribal people to articulate how the protection of sacred sites truly implicates their survival as peoples. If Holm’s model is helpful to them, they might discuss how sacred sites are important to maintaining and expressing tribal languages, places, religious ceremonies, sacred histories, and rights as political sovereigns.\textsuperscript{85} Or they might choose a different, tribal-specific way of articulating peoplehood concerns.

The non-Indian local community or communities might also represent themselves as peoples and articulate their concerns about the Snowbowl in a way that corresponds with one of the peoplehood models. Perhaps they would discuss how employment at the Snowbowl allows them to maintain a certain way of life, culture, tradition, or sense of kinship—in addition to the economic, recreation, and tourism concerns that the Forest Service appears to have identified already.\textsuperscript{86} Depending on the facts, environmental and recreational groups could also have claims to participate in peoplehood discussions surrounding the Snowbowl.\textsuperscript{87}

The Forest Service might not be able to accommodate each group’s peoplehood concerns and would ultimately have to prioritize. Some claims to peoplehood at sacred sites will be stronger than others.\textsuperscript{88} But with peoplehood concerns on the table, land management plans will have a better chance of reflecting the needs of the various peoples with a stake in the particular place—and of giving these peoples a sense that their collective interests were heard.

\textbf{B. Responding to Critiques}

1. Sovereignty versus Peoplehood

In the Snowbowl case, where Indian concerns were largely ignored by the Forest Service and federal court, attention to peoplehood might improve Indians’ status in the decision-making framework. But in other cases, non-Indian groups could use the language of peoplehood to argue for their own inclusion. To the extent that Indian and non-Indian groups are then similarly characterized as peoples, tribal advocates may respond that Indian nations are entitled to a higher stakeholder status in sacred sites

\textsuperscript{84} \textit{Id} at 869–70 (plaintiff tribes included the Hopi, Havasupai, Hualapai, Navajo, White Mountain Apache, and Yavapai Apache).

\textsuperscript{85} See Holm, supra n. 74.

\textsuperscript{86} See supra n. 18 (quoting dictionary definition of “peoples”).

\textsuperscript{87} Under most of the peoplehood definitions, business organizations such as corporations would not be included as peoples, yet I acknowledge that entities such as the Arizona Snowbowl Resort Limited Partnership may have legitimate interests to consider at sacred sites.

\textsuperscript{88} See Smith, supra n. 64, at 20 (stating, “the strength of the demands made in their name [and] the number of issues over which they assert priority”).
disputes than other potentially affected peoples. After all, a basic principle of federal Indian law is that tribes are sovereigns. The language of peoples is not necessary, they might argue, because Indian peoplehood is already defined by federal law—tribes are “domestic dependent nations” who enjoy an exclusive political relationship with the United States. Tribes need not compete with other peoples—especially those with varying degrees of political, cultural, or institutional identity—for the attention of the federal government. The government already owes tribes a high duty of attention and care, embodied in the federal trust relationship obligating the government to protect Indian assets and resources. These principles of sovereignty should function to assure Indian rights, particularly at sacred sites where Indian interests are so significant. A new language of peoplehood might diminish Indians’ unique status and increase the number of groups competing for access. For all of these reasons, the language of peoplehood may seem not only superfluous but also undesirable to tribal advocates.

I appreciate this critique. It is a principled approach to Indian law problems that relies on well-established legal doctrines. And I do not want to throw out these principles merely because they have not often worked to protect Indian religious and cultural freedoms at sacred sites. Rather, I believe that the special status of Indian nations and the unique relationship of Indians with their sacred sites should play a prominent role in decisions about sacred sites management. All of tribes’ peoplehood interests, including political sovereignty, should be recognized at sacred sites. Indeed, this and other attributes of Indian peoplehood will often give tribes stronger claims at sacred sites than other affected peoples. But acknowledging differences in political status and weight of claims at sacred sites does not mean that non-Indians as peoples should be excluded in the sacred sites conversation.

Even from the perspective of a tribal advocate, I still think the better approach is broad inclusion of all affected peoples in the sacred sites management process. The present situation is that tribal viewpoints on sacred sites inspire challenges from all quarters. Non-Indians who feel left out of the process or unhappy with the outcome wage lawsuits, challenging just about every single federal land management plan that accommodates Indian religion. Perhaps anticipating such challenges, federal public land managers now extend only the smallest accommodations of sacred site usage to tribes in the hopes that these accommodations survive legal challenges.

Thus the current model provides that federal courts will not disturb “voluntary accommodations,” and these are the type of accommodations that federal agencies are implementing. But these accommodations offer only modest protections for Indian

90. For recent elucidations of tribal sovereignty as a general matter, see Angela R. Riley, Sovereignty and Illiberalism, ___ Cal. L. Rev. ___ (forthcoming 2007); Sarah Krakoff, The Virtues and Vices of Sovereignty, 38 Conn. L. Rev. 797 (2006). For a discussion of tribal sovereignty as applied in the sacred sites context, review Tsosie, supra n. 3, at 272, 301–10 (exploring how Indian claims to sacred sites can be based in the tribal sovereignty framework).
91. Cherokee Nation v. Ga., 30 U.S. 1, 17 (1831).
92. See Smith, supra n. 64, at 20 (discussing the relative strengths of different types of peoples over different issues).
religions. In the Devils Tower case, the government asks rock climbers not to climb for one month out of the year, but they are perfectly free to climb anyway, irrespective of whether they will disturb Indian religious practices. In the Rainbow Bridge case, tourists are asked to walk around the arch out of respect for Navajo values, but of course they can walk under it if they choose.\(^9\) And in the Snowbowl case, the Forest Service approved the ski area expansion and snowmaking plan as proposed by the Arizona Snowbowl Resort Limited Partnership, and rejected alternatives proposed by the tribes.\(^9\) The Forest Service offered minor accommodations to the tribes, such as free use of the ski lifts and efforts to protect shrines and traditional plants.\(^9\) The fact that these were not responsive to the tribes’ main concerns did not alter the court’s decision to uphold the Forest Service’s approval of the project.\(^6\)

I do not want to diminish the importance of these accommodations, given that some of them represent important progress since the Lyng era, when the federal government seemed poised to destroy certain sacred sites altogether. Some accommodations may genuinely help Indian religious practitioners access and protect sacred sites, and in that respect, they are valuable. As the Snowbowl case suggests, however, tribes would like more substantial accommodations in some instances. Including all affected peoples in the land management process might encourage them to “buy in” to more extensive accommodations of Indian sacred sites usage. Non-Indian peoples who feel that sacred sites management plans also address their concerns hopefully will less likely sue to set aside these plans. In the long run, a comprehensive peoplehood approach may allow federal land managers to propose substantial sacred sites accommodations that actually respond to Indian concerns.

Some scholars and advocates will argue that this approach is wrong because it capitulates to the “actual state of things” (meaning Indian disempowerment) rather than insisting on legal principle (meaning Indian sovereignty).\(^7\) To some extent they will be

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\(^9\) Review supra note 8.

\(^9\) See Navajo Nation, 408 F. Supp. 2d at 870–71. The tribes contend that the Forest Service violated [the National Environmental Protection Act] by failing to consider a reasonable range of alternatives. For example, the Navajo Plaintiffs contend that the Forest Service should have considered a proposal to close the ski area, a buy-out by the tribes, or an alternative with reduced snowmaking coverage. In addition, the Havasupai Plaintiffs maintain that the Forest Service should have considered water trading. In response, the Forest Service states that it did, in fact, consider many of the alternatives raised by the Plaintiffs, but reasonably eliminated them from more detailed evaluation because they did not meet the purposes and needs for the proposed action.

Accordingly, the Court concludes that the Forest Service did not act unreasonably in rejecting the various alternatives raised by the Plaintiffs during the project’s public scoping process.

\(^9\) Id. at 874–75

\(^9\) Id. at 878–80 (listing measures to avoid adverse effects of development project to historic property, as required under the National Historic Preservation Act).

\(^9\) See id. at 879 n. 11. (“Although the consultation process did not end with a decision the tribal leaders supported, this does not mean that the Forest Service’s consultation process was substantively and procedurally inadequate.”).

\(^7\) For perspectives on the “actual state of things” in Indian country, review Robert Laurence, Learning to Live with the Plenary Power of Congress over the Indian Nations: An Essay in Reaction to Professor Williams’ Algebra, 30 Ariz. L. Rev. 413, 435–37 (1988); Robert A. Williams, Jr., Learning Not to Live with Eurocentric
right: I am acknowledging that the power of the government and non-Indians requires Indians to confront other stakeholders on the public lands. As a point of legal realism, however, the discussion of sacred sites on public lands pertains to a category of property where tribes have lost sovereignty, at least in the sense of governing authority. I hope, of course, that some day tribes will be able to reclaim ownership and jurisdiction over such land, and that, in the meantime, they will be able to assert other rights and principles of cultural sovereignty to protect their interests there. But I also hope that even when non-Indians are meaningfully included as peoples in the management of public lands, they can acknowledge that Indian sovereignty—along with specific Indian cultural traditions and histories—should shape the substance of federal land management plans. Peoples should be able to articulate the peoplehood concerns that are most meaningful to them. This idealistic proposition might actually work if Indians are, in turn, willing to acknowledge whatever is most crucial to non-Indian peoples in the management of public lands.

2. Administrative Law Issues

Another critique will likely come from agency officials and administrative law experts who can point out that the above discussion largely ignores at least three administrative law concerns: (1) agency authority over the public lands is limited by congressional delegations instructing entities such as the Forest Service to manage land in certain ways; (2) within the bounds of delegations, agencies enjoy a considerable amount of discretion in choosing among competing claims to the public lands; and (3) the peoplehood discussion conflates process and substance concerns.

To take the first part of the critique, Congress created the Forest Service within the Department of Agriculture to manage the nation’s timber. Congress did not charge the Forest Service with effectuating cultural, religious, economic, and other concerns of subgroups of the American peoples. However, in recognition that priorities change with the times, Congress passed the National Forest Management Act recognizing competing demands on the national forests. The Act now provides that

the Forest Service, by virtue of its statutory authority for management of the National Forest System, research and cooperative programs, and its role as an agency in the Department of Agriculture, has both a responsibility and an opportunity to be a leader in assuring that the Nation maintains a natural resource conservation posture that will meet the requirements of our people in perpetuity.

This broad attention to the Nation’s people can surely include the varied needs of subgroups of people beyond timber harvesting.


98. See generally Carpenter, supra n. 10 (advancing a property rights approach to sacred sites cases).
99. See Tsosie, supra n. 3.
101. Id. at §§ 1600–1687.
102. Id. at § 1600(6).
The Act contemplates flexibility and responsiveness to changing circumstances in the management of the Nation’s forests. It requires “a comprehensive assessment” of needs and demands on the forests.103 Moreover, such assessment of the Nation’s needs must occur with “public participation”104 and based upon research that promotes “effective management, use, and protection of the Nation’s renewable resources.”105

Taking into account peoplehood concerns at sacred sites will help the Forest Service meet its statutory mandate to “meet the requirements of our people in perpetuity.”106 Other federal land managers such as the National Park Service and Bureau of Land Management also work under congressional delegations that may be flexible enough to authorize the agencies to consider peoplehood concerns.107

The next question is whether these proposals to consider peoplehood interfere with agency discretion. Courts grant agencies considerable discretion in policy decisions,108 such as the Forest Service’s decision about whether to allow snowmaking at San Francisco Peaks.109 This discretion reflects that agencies are deemed “accountable” to the public through the executive branch and “expert” in the subject matters where they exercise authority.110 Courts only intervene in such policy matters when agencies act contrary to congressional intent or in a way that is arbitrary and capricious; needless to say, perhaps, courts are unlikely to start imposing a peoplehood standard in sacred sites cases. Rather peoplehood concerns should come up at the agency level and through the leadership of federal land managers—much in the way that many agencies have developed specific practices and enhanced awareness of Indian issues, as reflected in new agency-prepared guidelines and manuals.111 Agencies have done so out of a desire to improve their administration of the public lands and to be more responsive to their constituents. Deciding to pay attention to peoplehood concerns, as a matter of policy, could further help agencies meet these goals.

Finally, this essay has admittedly glossed over the question of whether peoplehood concerns should influence the process or substance of land management issues. The short answer is that, within the bounds of administrative law as discussed above, agencies should be attentive to peoplehood at both the process and substance stages. Specific proposals along these lines—such as how to include peoples in the consultation

103.  Id. at § 1600(3).
104.  Id.
106.  Id. at § 1600(6).
107.  See Carpenter, supra n. 10, at 1118–19 (on the use of tribal custom in fulfilling congressional mandates for the national parks).
109.  See Navajo Nation, 408 F. Supp. 2d at 875 ("[T]he Court concludes that the Forest Service did not act unreasonably in rejecting the various alternatives raised by the Plaintiffs during the project’s public scoping process.").
and notice and comment processes and how substantively to effectuate competing claims of peoples or prioritize among them—will be considered in a subsequent essay.

3. Is Peoplehood More Divisive Than Cooperative?

Finally, some readers might argue that recognizing the interests of peoples will make sacred sites law and policy even more divisive. Indeed, some contemporary scholars reject the whole notion of peoplehood as a desirable way of organizing society today. For example, John Lie argues that peoplehood grows out of now anachronistic and somewhat irrelevant designations of race, ethnicity, and nation. Lie recognizes that individuals continue to long for collective experiences and affiliate themselves in racial, ethnic, religious, and other groups. However, he deconstructs claims to peoplehood such as language, religion, and culture as failing to “offer[] a solid basis for modern peoplehood.” The only explanation for the persistence of peoples today is “common consciousness” reflecting the modern preoccupation with “identity transmission” over “status distinction.”

Lie’s descriptive critique boils down to the idea that peoplehood is “absurd” in a modern era where attempts to classify and categorize individuals according to rigid identifiers can all be deconstructed. As examples, he points out that “the German language . . . extends across much of continental Europe; Christianity is a world religion; and Western culture or civilization can be found outside of the West.” An individual’s identification with a (singular) people obscures overlapping identities and the mobility of populations. Further, Lie argues, peoplehood distinctions perpetuate normatively undesirable developments. Modern states have constructed peoplehood classifications for their own purposes, and the ugly underside of building national identity along racial, ethnic, and religious lines is conflict between groups. Incidents of genocide in the modern era reflect these tensions between national and sub-national identities at their most extreme.

Despite what Lie sees as the theoretical and empirical weaknesses of peoplehood, Lie accepts that individuals will continue to identify and associate as peoples. He hopes, however, that a critical approach to peoplehood will encourage contemporary peoples to reflect on topics such as “crimes against humanity” and “nonracist

112. Improvements to the consultation processes under the National Environmental Policy Act and the National Historic Preservation Act are continually being made. See generally Palmer et al., supra n. 43.
113. Lie, supra n. 64, at 14.
114. Id. at 3–10, 233–51.
115. Id. at 15.
116. Id.
117. See id. at 42.
118. Lie, supra n. 64, at 41.
119. See id. at 269 (“Modern peoplehood creates a fiction of homogeneity, of holistic essences.”), 272 (“Particular individuality is bypassed in the name of an abstract collectivity. In denying the full repertoire of overlapping belongings and the inevitable flux of populations, the world of modern peoplehood weighs like a nightmare on the minds of the living.”).
120. Id. at 164–90 (on discrimination based on gender, race, disability, and other classifications).
121. See id. at 224.
122. Id. at 191–231.
123. Lie, supra n. 64, at 237, 269–72.
thought."\textsuperscript{124}

Thus Lie is more of a pragmatic realist than critics like Dendahl who want to sweep the concerns of peoples under the rug.\textsuperscript{125} Denying the existence of subnational peoples and their competing interests in the public lands is not a useful technique for this particular problem. Trumpeting the First Amendment's protections for individual religious freedom and the Equal Protection Clause's guarantee that all citizens have equal access to the public lands does little to meaningfully resolve sacred sites disputes. Granting the federal government absolute power over sacred sites on the public lands is similarly unhelpful in this regard.\textsuperscript{126} Sacred sites disputes continue to arise in ways that need actual solutions, preferably solutions that take into account not only the rights of individuals but the interests of groups. The United States has long struggled with the tension between its liberal principles and its pluralist reality,\textsuperscript{127} and the sacred sites context is only one place where frank recognition of the interests of peoples could facilitate more meaningful approaches to problems.

V. CONCLUSION

This essay has argued that talking about peoples at sacred sites makes sense for several reasons: it reflects the way groups actually interact at and around the public lands; it coincides with a growing body of scholarship recognizing the peoplehood interests of subnational groups; and it offers a platform for groups to afford legitimacy to one another in contentious situations. While peoples often conflict on the public lands, their varying rights and interests, practices, and values all contribute to a rich spectrum of ideas about how these lands should be used. Using the language of peoplehood to explicate collective concerns about sacred sites may help groups afford one another legitimacy and encourage the federal government to facilitate meaningful accommodations among them. Hopefully, such changes would lay the groundwork for enhanced cooperation in the management of sacred sites on the public lands.

\textsuperscript{124} See id. at 273.

\textsuperscript{125} Review Dendahl, supra note 13, and notes 36-38 and accompanying text.

\textsuperscript{126} See Lyng, 485 U.S. at 453.

\textsuperscript{127} See e.g. Riley, supra n. 40.