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### Recommended Citation

Burton, Lloyd and Ruppert, David (1999) "Bear's Lodge or Devils Tower: Intercultural Relations, Legal Pluralism, and the Management of Sacred Sites on Public Lands," *Cornell Journal of Law and Public Policy*: Vol. 8: Iss. 2, Article 1.  
Available at: <http://scholarship.law.cornell.edu/cjlpp/vol8/iss2/1>

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# BEAR'S LODGE OR DEVILS TOWER: INTER-CULTURAL RELATIONS, LEGAL PLURALISM, AND THE MANAGEMENT OF SACRED SITES ON PUBLIC LANDS\*

Lloyd Burton† and David Ruppert††

## INTRODUCTION

Seven young girls strayed from camp and were chased by bears. As the bears were about to catch them they sought refuge on a low rock about three feet in height. One girl prayed for the rock to take pity on them. As a result the rock began to grow skyward pushing the girls out of reach of the bears. The bears jumped and scratched at the rock [giving it its present columnar character]. The young girls are said to be still in the sky [and became the seven stars the pleiades].<sup>1</sup>

Some 60 million years ago, great Earth stresses began to deform the crust of the continent, resulting in the uplifting of the Rocky Mountains and Great Plains region. As the surface rock layers began to crumple and fault, magma from deep inside the Earth welled up into resulting gaps and fissures . . . The Missouri Buttes and Devils Tower . . . are believed to be necks of extinct volcanoes. Geologic evidence indicates the Missouri Buttes formed first in two separate eruptions. The magma hardened

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\* An earlier version of this paper was presented in June, 1998, at the annual meeting of the Law and Society Association, Aspen, Colorado.

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<sup>1</sup> This is a summary of a Kiowa creation story, as relayed in RAY H. MATTISON, *DEVILS TOWER NATIONAL MONUMENT, A HISTORY*, 3-4 (1956). Mattison notes that this story was published in the *SUNDANCE TIMES*, Nov.10, 1927 and reprinted in the *ROCKY MOUNTAIN NEWS*, July 24, 1927. The phrase *Mateo Teepee*, or *Mato Tipi*, of Lakota origin, usually translated as Bear's Lodge or Bear's Teepee, is often used to refer to the American Indian name of the Tower. The name for the Tower differs by tribe: the Kiowa refer to the Tower as *T'sou'a'e* ("aloft on a rock"); the Cheyenne refer to the Tower as *Na Kovea* ("Bear's Lodge"). See Jeffrey R. Hanson & Sally Chirinos, *Ethnographic Overview and Assessment of Devils Tower National Monument, Wyoming*, Denver: National Park Service, Intermountain Region Cultural Resource Selections No. 9 (1997).

plugging the plumbing underneath. A third eruption to the southeast resulted in Devils Tower.<sup>2</sup>

Offered above are two creation stories about the same landmark from two very different cultures. They begin this article because they demonstrate the interplay of forces at work in the discussion and debate over appropriate care of sites on public lands thought to be sacred by indigenous peoples.

One way to comparatively understand these two accounts is from the perspective of scientific rationalism. The two tales both describe the materialization of the same natural phenomenon; they are mutually exclusive in all their particulars; and an analysis of the available evidence will determine which one is true or correct. But there are other ways to view this apparent conflict between the stories. One alternative is to perceive them as simultaneously occurring differences in realms of knowing, just as spiritual and rational dimensions simultaneously co-exist in the consciousness of most human beings. Yet another alternative is to acknowledge that the stories reflect each culture's attempt to ascribe meaning to and better understand the significance of the unique monolith that is their subject. The one is intimate, personal, and intuitive; the other is dispassionate, removed, and analytical. Thus, the two cultures perceptually construct the landmark in two very different ways: as a natural cathedral through one cultural lense, and as a geologic curiosity and rock climber's playground through the other.<sup>3</sup>

Early on, contrasting cultural perspectives carried over into the naming of the place. In accordance with the first of the creation stories opening this article, to the Lakota and some other nearby tribes, this was "Bear's Lodge,"<sup>4</sup> the site at which to save them in a contest with a natu-

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<sup>2</sup> GREG BEAUMONT, DEP'T OF THE INTERIOR, HANDBOOK NO. 111, DEVILS TOWER CH. 2 (1984).

<sup>3</sup> We acknowledge here that we are making something of an overstatement in order to make a point. There may well be some members of local tribes who are not imbued with, or deeply moved by, the significance their tribe's spiritual leaders ascribe to the site, just as there may be members of traditional Euro-American religions who clearly see in such landmarks the handiwork of their Creator, and those of other spiritual orientations who experience some form of transcendence in the presence of such natural features.

<sup>4</sup> The story given above is from the Kiowa oral tradition. A variant of this is another Kiowa story that involves two sisters, one a girl-bear who mistreated her sister. See Weston LaBarre, *Origin Story: The 10 Medicines and the Bear Society*, in NOTES ON KIOWA ETHNOGRAPHY (Santa Fe Laboratory of Anthropology, Expedition of 1935 (n.d.), papers of Weston LaBarre, typescript of student notes, on file with the Kiowa Tribal Environmental Program). Seven brothers of these sisters came to the aid of the mistreated girl. In an attempt to help their sister and protect her from the bear-girl, the seven brothers called upon a rock for help. The rock told the boys to circle it four times and then come up on top. When they did this, the rock grew upwards. The bear-girl made a lunge for the seven brothers and missed the top by inches, fell to the bottom, and scratched the rock's face. In this version, the seven brothers became seven stars. See *id.*

ral foe, Earth's children were lifted into the heavens. It is a portal of entry into a welcoming universe (presaging a recent similar analogy to the butte as an inter-galactic place of peaceable "close encounters").

But to the Euro-American settler culture, which at mid-nineteenth century still tended to fear natural forces and to see wilderness as an ungodly chaotic domain to be tamed and subdued,<sup>5</sup> a more fitting designation was "Bad God's Tower," or the "Devils Tower,"<sup>6</sup> an impre-

Mattison, *see supra* note 1, at 4, also notes that the Cheyenne version of the origin of the Tower is quite different. The Cheyenne origin story tells of seven brothers, one who had the ill fortune of having his wife carried off by a bear to his cave. *See id.* The youngest brother instructs the others to make four arrows, while he transforms himself into a gopher and digs into the bear's cave. While the bear is asleep, he succeeds in escaping from the cave with his older brother's wife. The bear awakens and gathers other bears of his clan to give chase. The youngest brother, who had great power, always carried a small rock with him. He took the rock in his hand and sang to it four times. When he finished, the rock had grown to the size the Tower is today. The bear attacked the Tower, leaving the scratch marks that are visible today. *See id.*

Other tribes have similar origin stories related to the Tower. The Crow version of the story tells of two girls who were attacked by a bear while playing on a rock. *See* Hanson & Chirinos, *supra* note 1, at 19 (reviewing additional stories collected by others from the Northern Cheyenne and the Arapaho); *see also* DICK STONE, *HISTORY OF DEVILS TOWER, 1804-1934* (microfilm on file at Wyoming State Archives, Museums and Historical Department, Cheyenne); Mary Alice Gunderson, *1988 Devils Tower Stories, in HISTORY OF DEVILS TOWER, 1804-1934* (Glendo, Wyoming: High Plains Press), *cited in* David R. M. White, *Naming Bear Lodge: Ethnotoponymy and the Devils Tower National Monument, Wyoming* (report Prepared for the National Park Service, Intermountain Region, Denver, 1998) at 28-51. The Great Spirit saved them by causing the rock to grow to its present size carrying the girls aloft. *See* Hanson & Chirinos, *supra* note 1, at 19. Hanson and Chirinos also link Lakota stories regarding the Tower to Lakota cosmology, and they review ethnographic accounts by others pointing to the importance of the Black Hills, and specifically to the Tower, as a place where traditional Lakota religious activities took place in the past, and continue to take place today. *See* Hanson & Chirinos, *supra* note 1, at 25-29.

<sup>5</sup> *See generally* RODERICK NASH, *WILDERNESS AND THE AMERICAN MIND* (1967).

<sup>6</sup> In 1857, Lieutenant G.K. Warren and F.V. Hayden passed through the country and caught sight of "Bear's Lodge" to the north of their travels from Fort Laramie to explore the Black Hills. *See* MATTISON, *supra* note 1, at 4-5. In 1875, Colonel Richard Dodge, commander of a military escort for a U.S. Geological Survey party, took special note of the Tower. In his 1876 book, *The Black Hills*, he identifies the name of the Tower as "Devils Tower," explaining that the Indian name for the Tower was "The Bad God's Tower." *See* MATTISON, *supra* note 1, at 5.

A bill was introduced in the 104th Congress by Wyoming representative Barbara Cubin to ensure retention of the name "Devils Tower" for the monument. *See* H.R. 4020, 104th Cong. (1996). This bill did not pass. Subsequently, Representative Cubin introduced another bill to preclude the National Park Service, or any other agency, from taking action to change the name to anything other than "Devils Tower." *See* H.R. 129, 105th Cong. (1997). This bill also did not pass. Both bills were the result of rumors that there were efforts, at the time, to change the name of the monument to something more in keeping with tribal cultures.

Although the title of this article alludes to cultural conflict over the name of the site, that particular dispute is not our subject. One of the authors of this article—the academic—usually prefers a hybrid bi-cultural name in referring to contested sites. But the other—the federal government employee who occasionally works in a facilitative capacity—does not wish to take sides on such a contentious political issue. The aesthetic concerns of the former author therefore yield to the professional status concerns of the latter. In this article, the name used to

cise translation of another Indian name. Although the Indian name “Bear’s Lodge” and the Anglo appellation “Devils Tower” were both used in the late nineteenth century in various government reports, the latter name stuck and was used in President Theodore Roosevelt’s 1906 Proclamation, naming it the nation’s first national monument,<sup>7</sup> under the authority of the Antiquities Act Congress had adopted just three months earlier.<sup>8</sup>

Perceptual contrasts can exist not only between distinct culture groups, but also within and between governmental institutions in the same culture, which brings us to the research reported in this article. Our subject is the law and policy of sacred site management on public lands, which is best understood as divisible into two closely related sub-topics. The first is procedures for the management of sites (held sacred by indigenous peoples) on public lands by federal agencies entrusted with the care of those lands on behalf of all the peoples of the United States. The second is review of agency decision-making on sacred site management by the federal courts. Our means of contributing to knowledge of this subject is the presentation of an in-depth case study of cultural and legal conflict over the management of the Devils Tower National Monument by the National Park Service (“NPS”)—especially its efforts to balance the cultural preservation needs of tribes who hold the site sacred with the legal and economic interests of Euro-American commercial climbing guides who may view the Tower quite differently.

Earlier, we described different ways of understanding the two creation stories that open this article. One way of viewing them is as mutually incompatible accounts that cannot simultaneously be taken as true or correct. However, they could also be understood as mutually accommodative perspectives that can each be deemed valid within their respective realms of understanding. As we will see below, the same is true of the governmental institutions of the dominant culture that now have oversight authority for management of this, the United States’ oldest national monument, as well as for many other sites on federal public lands that indigenous peoples have identified as having particular ceremonial significance in the perpetuation of their cultural heritage.

Our own story begins with an ethnohistory of the Devils Tower site, followed by a description of the NPS’s efforts to accommodate competing interests in the derivation of its climbing management plan. Following that is an overview of the broader legal context within which these actions were taken. We discuss two kinds of lenses through which vari-

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refer to the monument will be that ascribed to it when it was first established as a national monument.

<sup>7</sup> See Proclamation No. 658, 34 Stat. 3236 (1906).

<sup>8</sup> See Antiquities Act of 1906, 16 U.S.C. § 431-433 (1906).

ous federal courts have viewed discretionary decisionmaking by government agencies responsible for factoring indigenous cultural concerns into policy implementation decisions. One lens is explicitly reductionist and binary; it perceives all spiritually implicated indigenous interests exclusively in First Amendment terms. Spiritual dimensions of tribal life are seen as structurally separable from other elements of indigenous culture in this mode of constitutional discourse, and deity-associated rituals are accorded roughly the same status as a Catholic mass or Protestant prayer meeting. Under this first view, tribal spiritual life receives no greater (and sometimes far less) deference than that of the Baptists or Buddhists, and agency management actions are judicially viewed solely in terms of whether they impermissibly burden the free exercise of tribal "religion," or defer to indigenous management preferences to the extent that they impermissibly establish tribal "religion."

On the other hand, the other judicial view recognizes that, as distinguished from the atomistic structuring of U.S. society into separate boxes labeled "religion," "culture," and "education," in most traditional indigenous societies in North America, these are all utterly interdependent, each having little meaning without the other. To attempt such separation is like removing all the blood from a living body and then wondering why it no longer lives. The judicial approach from this other view has been to support the agencies' recognition of indigenous societies as being structurally distinct and different from the dominant culture, and to accord the agencies far greater deference in their efforts to simultaneously accommodate divergent cultural perspectives in sacred site management.<sup>9</sup>

After a discussion and critique of the consultation process leading up to management plan derivation and the approach taken by a U.S. District Court (in Wyoming) in handling this dispute, we move from retrospective to prospective analysis. The article closes with policy recommendations concerning inter-cultural consultation and public participation in formulating management plans for sacred sites on all public lands; and with recommendations as to how federal courts can use a more pluralist perspective in reviewing the federal agency practice of inter-cultural conciliation in the management of sacred places.

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<sup>9</sup> Early sociologists, such as Emile Durkheim, viewed religion as a reification of society itself. See EMILE DURKHEIM, *THE ELEMENTARY FORMS OF RELIGIOUS LIFE* (1912). This view has been echoed, to some extent, in the comparative anthropological literature, which shows statistical relationships between a cultural group's political economy, or its socialization practices, and the form its religious beliefs and practices exhibit. See GUY SWANSON, *THE BIRTH OF THE GODS: THE ORIGIN OF PRIMITIVE BELIEFS* (1960); ANTHONY WALLACE, *RELIGION: AN ANTHROPOLOGICAL VIEW* (1960); MARVIN HARRIS, *CULTURAL ANTHROPOLOGY* (1991); Robert LeVine, *Witchcraft and Co-Wife Proximity in Southwestern Kenya*, 1 *ETHNOLOGY* 39 (1962).

## I. DEVILS TOWER: PAST AND PRESENT

## A. ETHNOHISTORY

A recently published assessment of the ethnohistoric landscape of Devils Tower points to the fact that the Black Hills in general, and the Tower itself, were the overlapping traditional territories of many Indian tribes of the Plains.<sup>10</sup> According to Jeffrey R. Hanson and Sally Chirinos, at least six tribes have varying degrees of cultural affiliation with the Tower.<sup>11</sup> Archaeological evidence establishes the presence of bands of the Eastern Shoshone in the Bighorn-Powder River area (Southeastern Montana) in 1500 AD, while later sites display their presence in northern Wyoming into the eighteenth century.<sup>12</sup> At the beginning of the nineteenth century, historic records indicate the presence of Shoshone bands living with or near the Crow at the confluence of the Bighorn and Shoshone rivers.<sup>13</sup> Although originating from farther west, Shoshone use areas may have expanded and contracted depending on relationships with nearby tribes. Contemporary interviews with Shoshone representatives indicate a strong traditional association between the tribe and the Tower.<sup>14</sup> The Eastern Shoshone today are confined to the Wind River Reservation in west-central Wyoming.

Oral traditions from the Crow and the Hidatsa tribe confirm that the Crow were once part of the Hidatsa Tribe, who lived in farming villages along the Missouri River.<sup>15</sup> Separation from the Hidatsa and migrations across the plains (perhaps more than one) brought the Crow to their present location on the Montana/Wyoming border by the late prehistoric or the early historic period.<sup>16</sup> Like their Shoshone neighbors and other tribes in the area, the Crow adapted to the Plains as equestrian bison hunters and ranged far and wide to hunt and trade.<sup>17</sup> Although the Crow use area was to the west of the Tower, Hanson suggests that travel to and from Mandan and Hidatsa territories to the east would certainly have brought the Crow into close contact with the Tower.<sup>18</sup> He also cites

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<sup>10</sup> See Hanson & Chirinos, *supra* note 1.

<sup>11</sup> See *id.*

<sup>12</sup> See *id.* at 7.

<sup>13</sup> See Jeffrey R. Hanson, *Ethnohistoric Problems in the Crow-Hidatsa Separation*, 20 *ARCHAEOLOGY IN MONT.* 73, 82 (1979).

<sup>14</sup> See Hanson & Chirinos, *supra* note 1, at 7.

<sup>15</sup> See *id.* at 9.

<sup>16</sup> See *id.*

<sup>17</sup> See *id.*

<sup>18</sup> See *id.* at 9-11.

Stone<sup>19</sup> and Gunderson<sup>20</sup> showing that the Crow were familiar enough with Devils Tower to encode it into their oral tradition.

Although the Kiowa today live in Oklahoma, their oral traditions of past migration place them in the Black Hills and nearby areas.<sup>21</sup> Hanson and Chirinos cite others who indicate that the Kiowa were in the Black Hills and Devils Tower area during the late eighteenth and early nineteenth centuries.<sup>22</sup> That the Kiowa encoded the Tower in their oral tradition has long been known, and it is the Kiowa story mentioned previously that has been used by the NPS to explain Indian affiliation with the Tower.<sup>23</sup>

The tribes expressing the strongest affiliation with the Tower and the surrounding area are the Northern Cheyenne, who today reside on the Northern Cheyenne Reservation in southeastern Montana, and the Lakota, the largest of the Sioux bands now residing on the Pine Ridge Indian Reservation in South Dakota.<sup>24</sup> Numerous historic sources place both the Cheyenne and the Lakota in the general region of the Black Hills in the eighteenth and nineteenth centuries.<sup>25</sup> Through oral tradition, the Lakota share with other tribes the general features of the story of the Tower's origins and consider the entire Black Hills region a sacred place as the origin of their people. The Northern Cheyenne share the view of the Tower as a sacred place and associate important culture heroes with both the Tower and with nearby Bear Butte.<sup>26</sup>

Consultation with a number of tribal groups since Hanson's ethnohistoric work has revealed potential for more tribal groups to be added to the list of those having affiliation with the Tower.<sup>27</sup> Although research has not been conducted to document and verify these additional tribal affiliations, it is clear that the Tower has played a role in the traditional belief systems of a number of American Indian tribes. The fluid nature of tribal territorial boundaries over time no doubt brought many tribes into contact with the Tower itself and/or allowed the sharing of oral traditions between tribal groups. Continuing consultation with rep-

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<sup>19</sup> See *id.* Stone's work is a compilation of general information, interviews, and correspondence regarding Indian recollections and oral traditions as they relate to the Devils Tower. Hanson and Chirinos, *supra* note 1, at 10, note that this compilation was made in the early twentieth century.

<sup>20</sup> See *id.*

<sup>21</sup> See *id.*

<sup>22</sup> See *id.*

<sup>23</sup> See *id.* at 19-20; see also White, *supra* note 4, at 33-34 (a more complete review of the versions of the Kiowa story).

<sup>24</sup> See Hanson & Chirinos, *supra* note 1.

<sup>25</sup> See *id.*

<sup>26</sup> See *id.*

<sup>27</sup> This information is derived from notes taken at a consultation meeting between Indian tribal representatives and the Devils Tower superintendent and staff from 1995 to 1998, which are on file at park headquarters [hereinafter Consultation meeting notes].

representatives of a number of Plains Indian tribes makes it clear that the character of the cultural landscape surrounding the Tower is complex and must be viewed with an eye to the nature of Indian tribal histories, ways of life, oral traditions, and religious beliefs.<sup>28</sup>

Aside from the oral traditions and variety of stories collected over the years by anthropologists, the Tower Monument staff have in recent years witnessed evidence that ritual activity by American Indians at the Tower continues to the present day.<sup>29</sup> Prayer offerings (e.g., tobacco or sage wrapped in brightly colored ribbon) have been found throughout the Tower grounds.<sup>30</sup> These ritual activities are described as very private in character and go largely unseen or unnoticed by the public and monument staff when they occur.<sup>31</sup> In addition to this private activity, larger, more public ritual celebrations have been held at the monument. Segments of the contemporary Lakota have sponsored a Sun Dance at the Tower each year for the past decade.<sup>32</sup> The variety of aboriginal origin stories and the continuance of both private and more public ceremonies at the Tower attest to the significant role the Tower has played, and continues to play, in the traditional and contemporary religious life of many Indian people.

The earliest records of Euro-Americans in the region come from trappers and government sponsored expeditions.<sup>33</sup> Many of these early visitors to the area note the Black Hills in their records, but do not specifically identify the Devils Tower.<sup>34</sup> The earliest mention of the Hills came from the La Verendrye brothers, who travelled up the Missouri through the Black Hills as early as 1743.<sup>35</sup> Lewis and Clark made reference to the Black Hills (Cout Noir) during their expedition, but they did not mention the Tower.<sup>36</sup> The earliest reference to the Tower comes from a map of uncertain date and authorship. The map is thought to have been produced by a fur trapper named John Dougherty sometime between

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<sup>28</sup> See *id.*

<sup>29</sup> See Hanson & Chirinos, *supra* note 1; see also Consultation meeting notes, *supra* note 27.

<sup>30</sup> See Hanson & Chirinos, *supra* note 1.

<sup>31</sup> See *id.*

<sup>32</sup> See Devils Tower National Monument permit records that are on file at park headquarters.

<sup>33</sup> See MATTISON, *supra* note 1, at 4-5; see also White, *supra* note 4, at 14-20.

<sup>34</sup> See MATTISON, *supra* note 1, at 4-5; see also White, *supra* note 4, at 14-20.

<sup>35</sup> See THOMAS ODELL, MATO PAHA: THE STORY OF BEAR BUTTE, BLACK HILLS LANDMARK AND INDIAN SHRINE: ITS SCENIC, HISTORIC, AND SCIENTIFIC UNIQUENESS (1942); G. H. SMITH, THE EXPLORATIONS OF THE LA VERENDRYES IN THE NORTHERN PLAINS, 1738-1743 (1980); Ralph Ehrenberg, *Exploratory Mapping of the Great Plains Before 1800*, in MAPPING THE NORTH AMERICAN PLAINS 3 (F.C. Luebke et al. eds., 1987).

<sup>36</sup> See THE ORIGINAL JOURNALS OF THE LEWIS AND CLARK EXPEDITIONS (R.G. Thaites ed., 1959); J.L. Allen, *Patterns of Promise: Mapping the Plains and Prairies*, in MAPPING THE NORTH AMERICAN PLAINS, *supra* note 35, at 41-62.

1810 and 1814. The crudely hand-drawn map indicates two concentric circles with a dot in the middle, and the legend "Devils Mountain" appears alongside the circles. This feature is placed east of the headwaters of the Little Missouri River and north of the Cheyenne River.<sup>37</sup>

Later references to the Tower come from explorers visiting the area in the latter part of the nineteenth century. Lieutenant Colonel R.I. Dodge,<sup>38</sup> in a 1876 publication, refers to the Tower as "Bad God's Tower," which may have been a faulty translation of Indian names for the place. Other visitors to the region make note of the Tower, but indicate names that more directly reflect Indian names. For example, Coulton and Coulton<sup>39</sup> refer to the Tower as "Bear's Lodge." This name is also used by Gillespie<sup>40</sup> and Smith.<sup>41</sup> V.L. Pirsson<sup>42</sup> uses the Indian name "Mato Teepee," as do I.C. Russell<sup>43</sup> and Thomas Jagger.<sup>44</sup> However, the name "Devils Tower" seems to have stuck and was used in the Presidential Proclamation that established the Tower as a national monument in 1906.<sup>45</sup>

## B. DEVELOPMENTS IN THE BEAR'S LODGE/DEVILS TOWER CONFLICT

### 1. *Process, Design and Implementation.*

It is a truism that the American public has discovered the vast potential for the recreational use of public lands. All manner of recreational activities on federal and state lands has seen a dramatic increase over the past few decades. One of these activities has been the increased

<sup>37</sup> Interview with Dr. David White, Applied Cultural Dynamics, in Santa Fe, N.M. (Nov. 11, 1997) (referring to Linda R. Zellmer, *Close Encounters: Mapping Devils Tower* (unpublished draft manuscript on file with author)). This map was retrieved from the National Archives by Zellmer (Records of the Office of the Quartermaster General, Record Group 92, Post and Reservation File, Map 281). Map inscriptions await hand-writing analysis, as it is speculated that notes on the map may be from the hand of William Clark, of the Lewis and Clark expedition.

<sup>38</sup> See White, *supra* note 4, at 22.

<sup>39</sup> G.W. COULTON & C.B. COULTON, *Coulton's Montana, Idaho, and Wyoming, in COULTON'S GENERAL ATLAS OF THE WORLD* (1881).

<sup>40</sup> MAJOR G.L. GILLESPIE, U.S. WAR DEP'T, *MAP OF YELLOWSTONE AND MISSOURI RIVERS AND THEIR TRIBUTARIES* (1876) (revising and enlarging the map from the explorations of Captain W.F. Reynolds and First Lieutenant H.E. Maynadier, 1859-1860).

<sup>41</sup> D.N. SMITH, *BLACK HILLS MAP INCLUDING NEBRASKA AND PART OF DAKOTA, WYOMING, COLORADO, AND KANSAS* (1876).

<sup>42</sup> L.V. PIRSSON, *Description of the Character of the Igneous Rocks Making Up Mateo Teepee and the Little Missouri Buttes*, 47 *AM. J. SCI.* 341 (1894).

<sup>43</sup> I.C. RUSSELL, *Igneous Intrusions in the Neighborhood of the Black Hills of Dakota*, 4 *J. GEOLOGY* 25, 27, 28, 31-35, 41 (1896).

<sup>44</sup> THOMAS JAGGER, *LACCOLITHS OF THE BLACK HILLS* (Twenty-First Annual Report of the U.S. Geological Survey to the Secretary of the Interior, Vol. III, 1901).

<sup>45</sup> See *id.*

use of public lands for recreational rock climbing.<sup>46</sup> Most agencies charged with managing lands were ill prepared to deal with the increases in rock climbing since it has been a relatively recent development on the recreational front.<sup>47</sup> In 1992, the NPS, recognizing the increase in climbing and the potential impacts this activity could have on the natural and cultural resources of protected areas, directed those parks with significant numbers of climbers to prepare plans providing a general framework for the management of climbing activities.<sup>48</sup> The goals of these plans would be to examine the appropriateness of climbing in specific parks areas, provide an assessment of impacts that climbing could have on natural and cultural resources, and outline management strategies and actions that could be used to lessen these impacts. In response, most national parks applied the agency's customary public planning process and produced useful and effective plans within a short period.<sup>49</sup>

Construction of a climbing management plan for the Devils Tower National Monument was not a straightforward endeavor. As indicated earlier in this article, a number of factors indicate that Devils Tower was more than an igneous rock sparking the interest of western geologic science.<sup>50</sup> During the 1980s and early 1990s, the staff at the Tower noticed an increase in the number of what were presumed to be American Indian prayer "offerings" that were left at or near the base of the Tower.<sup>51</sup> These offerings commonly consisted of colorful ribbon and wrapped bundles of sage (or other types of vegetation such as tobacco), and they were commonly understood to be an indication of Indian religious activity at the Tower.<sup>52</sup> Although a general sense existed that the Tower was an area of cultural significance to some Indian groups, the NPS needed to

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<sup>46</sup> This information is derived from an administrative record. See NAT'L PARK SERVICE, U.S. DEP'T OF INTERIOR, FINAL CLIMBING MGMT. PLAN FINDING NO SIGNIFICANT IMPACT, ROCKY MOUNTAIN REGION, DENVER (1995) (on file at park headquarters) [hereinafter FINAL CLIMBING MGMT. PLAN].

<sup>47</sup> See FINAL CLIMBING MGMT. PLAN, *supra* note 46, at xii.

<sup>48</sup> Directive from U.S. Dep't of the Interior, National Park Service, to All Regional Directors (1991). The memorandum stated that "each park area with climbing activities should develop a climbing management plan based on Chapter 8.3 of the NPS Management Policies." *Id.*

<sup>49</sup> Although climbing was a recreational activity that had seen dramatic increases in recent years and had not been considered in management plans prior to this time, parks were directed to apply standard planning techniques to address this issue. See FINAL CLIMBING MGMT. PLAN, *supra* note 46.

<sup>50</sup> A Presidential Proclamation established the Tower under the authority of the newly passed Antiquities Act. See Proclamation No. 658, 34 Stat. 3236 (1906); Antiquities Act of 1906, 16 U.S.C. § 431-433 (1906). The Proclamation focuses on preserving the Tower for its value to geologic science. No mention is made of preserving the Tower for cultural reasons.

<sup>51</sup> See Hanson & Chirinos, *supra* note 1.

<sup>52</sup> See *id.*

gain a greater understanding of this significance, and therefore commissioned the Hanson and Chirinos study cited throughout this article.<sup>53</sup>

Additional factors served to make the planning process more complex than most. First, Devils Tower was the first national monument in the United States, and as such, it is the focus of much local pride.<sup>54</sup> Second, the Tower itself is considered by most climbers to be a world class technical climbing opportunity, and the increase in climbers there over the years has come to include international as well as domestic rock climbers.<sup>55</sup> The increase in visitorship and climbing has spawned tourist businesses that rely on climbers and climbing.<sup>56</sup> These businesses had a stake in any plan that addressed climbing activities. Third, not long before the climbing planning began at Devils Tower, regional Indian groups had been involved in a lengthy planning process over the Medicine Wheel, another site on national forest lands in northern Wyoming that is considered sacred by Indian tribes.<sup>57</sup> Indian intertribal organizations were formed with the intent of becoming more involved in the Forest Service planning process that addressed the management of the Medicine Wheel.<sup>58</sup> After fighting to protect the Medicine Wheel and winning significant concessions for protection of this site, these organizations turned their attention to Devils Tower and the climbing management plan.<sup>59</sup>

## 2. *Designing the Planning Process.*

With these factors in mind, the NPS understood that the Devils Tower presented a rather unique case of potential conflict between climbers and American Indians. As a premier rock climbing site, the Tower was a destination point for climbers from all over the world. As a site considered sacred by American Indian groups, the Tower was

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<sup>53</sup> *See id.*

<sup>54</sup> Personal communications between David Ruppert, NPS Planners, and the Devils Tower superintendent and staff, 1992, in preparation for the climbing management plan process.

<sup>55</sup> *See id.*; *see also* Jack Trope, *Existing Federal Law and the Protection of Sacred Sites: Possibilities and Limitations*, 19(4) CULTURAL SURVIVAL QUARTERLY 30 (1996).

<sup>56</sup> *See id.*

<sup>57</sup> *See id.*

<sup>58</sup> Two groups were formed to protect sacred Indian sites. The first of these was the Medicine Wheel Alliance, which was spearheaded by a highly respected Northern Cheyenne elder, the late Bill Tall Bull. *See Trope, supra* note 55. Another organization with a similar purpose was formed later and named the Medicine Wheel Coalition. *See id.* The Coalition differed from the Alliance in that its members were sanctioned by the tribal councils of each tribe that joined the group. *See id.* This factor was of some importance when it came time for the NPS to form the planning work group that would help design the climbing management plan for Devils Tower.

<sup>59</sup> *See* Duane Suagee, *Tribal Voices in Historic Preservation: Sacred Landscapes, Cross-Cultural Bridges, and Common Ground*, 21 Vt. L. REV. 145, 164 (1996).

viewed as being desecrated by climbing activities. The planning process would have to confront these starkly different cultural views in a manner that would both acknowledge the potential conflict and try to develop solutions. To this end, the NPS decided on a planning process that maximized input from the various potential conflicting factions.<sup>60</sup>

The planning process itself was a departure from the usual procedures used by many NPS planners. The process was designed, as all planning processes are designed in a federal agency, around the need to comply with laws and regulations related to assessments of environmental impacts and appropriate public input in reaching a management decision. Normally, most planning is largely done internally within the agency and public meetings are held to elicit public reaction to a range of proposed alternative actions. The Devils Tower plan followed this course, but also added a work group to this process composed of agency and non-agency members.<sup>61</sup> While the Tower superintendent held authority over final decisions, this work group became a core element in the planning process.

The work group was composed of representatives of those groups that had, up to that point, expressed the greatest interest in the planning process, or who were perceived by the agency to be major "stake holders," or interested parties, in the outcome of the climbing management plan. The following groups were identified as the four major stakeholders: 1) climbing community, represented by both local and national climbing organizations; 2) local and national environmental organizations; 3) the local government, represented by the county commissioner's office; and 4) those American Indian communities that had been identified through recent in-house studies<sup>62</sup> as having a strong affiliation with the Tower.<sup>63</sup>

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<sup>60</sup> The NPS's actions were in keeping with the most widely accepted principles of effective contemporary environmental conflict management practice. See generally Barbara Gray, *Framing and Re-Framing of Intractable Environmental Disputes*, 6 RES. ON NEGOTIATION IN ORGANIZATIONS 163 (1997).

<sup>61</sup> This added dimension to the process was verbally approved by the superintendent and the Assistant Regional Director of the Rocky Mountain Regional Office in Denver, not long before the planning process began.

<sup>62</sup> See Hanson and Chirinos, *supra* note 1; Jeffrey R. Hanson & David Moore, *Ritual and Recreational Perception and Use at Devils Tower National Monument, Wyoming: An Applied Ethnographic Study*, 1993 (unpublished manuscript on file at the Devils Tower National Monument headquarters).

<sup>63</sup> The Access Fund, a national organization representing the interests of rock climbers, was invited to sit at the work group table, as were the local chapter of the Sierra Club, and the local county commissioner. This determination was made at initial meetings between the park superintendent and regional park service staff. One of the authors of this article, David Rupert, was in attendance at these initial meetings. All three of these groups agreed to become members of the work group for the climbing management plan. Agency officials were concerned that such a work group would violate the Federal Advisory Committee Act, as amended, which was designed to prevent special interest groups from having too great an

The superintendent invited two representatives from each of these interest groups to serve on the planning work group. Since at least six tribes were known at that time to have a cultural and historic affiliation with the Devils Tower, the superintendent decided to invite two tribal representatives from the Medicine Wheel Coalition.<sup>64</sup> The Coalition's representatives were sanctioned by the tribal governments of those tribes who were its members. By inviting this organization to participate, the NPS sought to preserve a government-to-government relationship with the larger group of tribes having an interest in climbing issues at the Tower.<sup>65</sup>

The work group held five meetings over a period of approximately one year. The first of these meetings drew the proverbial lines in the sand. Representatives of the climbing group felt that few or no restrictions should be placed on climbers at the Tower, and that the plan should recognize the monument as an important site for climbers from around the world.<sup>66</sup> Members representing tribal interests called for an outright ban on all climbing at the Tower and referred to climbing as a "desecration" of a sacred place.<sup>67</sup> The Sierra Club representative focused on the impact that climbing has had on the natural resources of the Tower, and the local government representative expressed concern over the potential adverse impact any restriction on climbing would have on local businesses.<sup>68</sup>

The differences in points of view between the work group members representing American Indian interests and those representing the climb-

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influence in governmental management decisions. *See* Federal Advisory Committee Act, Pub. L. No. 92-463, 86 Stat. 770 (1971). Consequently, the work group was designed in a way that ensured that members were reacting to agency proposals and not constructing alternative actions themselves. However, throughout the lengthy meetings during the planning process, the work group provided many important ideas that were seriously taken into consideration when the agency constructed the draft and final plan.

<sup>64</sup> *See supra* note 63.

<sup>65</sup> The Tower superintendent at that time, Debbie Bird, traveled to tribal offices of other tribes and organizations who were not themselves invited to become members of this work group, although they were known to have a real interest in the issues. She sought concurrence from affiliated tribes with her decision to have the Coalition represent tribal interests on the planning work group. Deb Liggett, who succeeded Ms. Bird as Superintendent, shepherded the climbing plan to its final form and eventually implemented it in the park. These meetings and visits with tribes is part of the administrative record held at the park. The first year of the implementation of the voluntary climbing closure in 1996 resulted in an 85% compliance rate. This information is part of the administrative record on compliance with the plan, which is part of the administrative record on file at the park headquarters. Simply, this means that 85% of those climbers that would normally have climbed the Tower in June chose voluntarily not to do so after being informed of the work group's call for a voluntary closure.

<sup>66</sup> This information is part of the administrative record of work group meeting notes on file at park headquarters.

<sup>67</sup> *See supra* note 66.

<sup>68</sup> *See id.*

ers were greatest at the outset of the planning meetings. Tribal representatives repeatedly equated climbing the Tower to climbing St. Peter's Cathedral in Rome.<sup>69</sup> Such an act, they claimed, would certainly be viewed as a desecration of a sacred place by Catholics around the world. The climbers' representatives understood that climbing may need to be managed, but they strongly resisted any suggestion that climbing be banned to accommodate a group's religious beliefs, since such a ban would set a dangerous precedent for the management of other climbing areas.<sup>70</sup>

### 3. *Work Group Meetings: Education, Cultural Brokering, and Solutions Reflecting Cultural Values.*

Three factors dominated the evolving nature of the work group and constituted the driving forces that brought about a compromise of irreconcilable differences.<sup>71</sup> The first of these factors was the recognition that there was a wide and persistent cultural gap between the conflicting parties. Each group came to the table not as representatives from the same larger society, but as representatives of groups with different languages, histories, values, beliefs and ways of life. When a member of each of these groups viewed the Tower, they saw a vastly differing landscape—a landscape that was home to core values shaped by different histories, and consequently, different ways of perceiving the world and their respective places in that world.

Thus, from a practical standpoint, there was a clear need to direct the early work group sessions toward some kind of mutual cross-cultural education. The tribal elders spent many hours during the early meetings trying to explain to the non-Indian climbers how culturally important and sacred a place like Devils Tower is to Indian peoples.<sup>72</sup> The elders spoke of religious ceremonies and tribal origin stories related to the Tower.<sup>73</sup> They spoke allegorically and directly about the religious significance of the Tower, and they spoke in some detail of tribal religions in an effort to impart an understanding of their cultural perspectives to the other work group members.<sup>74</sup> Such information, it was explained, is closely guarded and often not shared with outsiders, but it was important that the climbers understand the nature and character of the Tower's religious importance.

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<sup>69</sup> See *id.*

<sup>70</sup> See *id.*

<sup>71</sup> See *id.*

<sup>72</sup> See *id.*

<sup>73</sup> See *id.*

<sup>74</sup> See *id.*

From the other side, an effort was made to explain to tribal members the importance of climbing, and the climbing experience, to those who engaged in this activity.<sup>75</sup> They explained that for some the act of climbing was a kind of religious experience, and therefore climbing should be afforded any accommodations provided to American Indian religious practitioners. Since the tribal elders often voiced concern over the number of bolts and pitons used in climbing Devils Tower, the climbers brought in new technical climbing equipment and explained that bolting was only used in those instances when it was considered the only safe way to climb a route.<sup>76</sup>

The second factor involved the emergence of a cross-cultural “broker” that helped shepherd the group through issues that both sides found difficult to address.<sup>77</sup> Early in the planning process, it became evident that there was a need to provide an “interpretation,” or “translation,” of the significance of the Tower to Indian people through the voices of the Native American elders who were members of the work group.<sup>78</sup> One individual, Elaine Quiver from Pine Ridge, who was originally not a member of the work group, offered explanations or interpretations of stories that the elders were sharing with the work group.<sup>79</sup> Quiver’s contributions helped to bridge the gap of understanding for all the group members, and eventually she was invited to become a member of the group.

Essentially, Quiver served as an effective cultural broker between the American Indians and the climbers who were members of the work group. Her ability to understand the at times allegorical communication methods used by tribal elders was coupled with an ability to explain or retell these stories in a manner understandable to all the non-Indian members of the group.

The third factor was the character of the compromise itself. All compromise can be viewed as an assessment of mutual loss and gain. One party is often willing to alter an original position if they perceive that their adversary is also willing to adjust their original demands. Part of this process is educational—each party coming to at least a partial understanding of what the original positions are and what they mean.

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<sup>75</sup> *See id.*

<sup>76</sup> American Indian work group members felt strongly that it was wrong to drill for bolts or in any other way use intrusive equipment on the Tower, since it viewed such activity as damaging to a sacred site. *See id.* The climbers in the work group demonstrated newer equipment, such as “friends”—a ridged, tapered piece of metal that is secured by wedging it within rock cracks without removing rock. Equipment like this is normally removed after each use. *See id.*

<sup>77</sup> *See id.*

<sup>78</sup> *See id.*

<sup>79</sup> *See id.*

These processes of education and interpretation are often hard enough within a monocultural context. However, the situation becomes more complex when the parties are separated not only by negotiating positions, but also by different cultural heritage. The cultural differences affect, and often hamper, the communication and learning process, and they certainly affect the process of interpretation and understanding, since the meaning attached to each party's position is normally most easily understood within the context of each group's own cultural orientation.

The compromise planning solution at Devils Tower was reached not only by the recognition that each party was willing to change their original positions, but that the new agreed upon position had important and salient cultural meanings for each group. After all parties agreed to make some effort to limit climbing at the Tower out of respect for American Indian religious values, the discussion turned to a choice between a mandatory or voluntary annual closure to climbing during the month of June each year.<sup>80</sup> The climbers strongly opposed any mandatory closure out of a fear that a mandatory closure would set a precedent for the management of other climbing areas.<sup>81</sup> Indian work group members felt that they had already compromised a great deal by limiting the closure to only one month of the summer, albeit the busiest climbing month of the year at the Tower.<sup>82</sup> At this stage in the process, the American Indian representatives felt that they needed to go back home and discuss this issue with their own tribal members and seek advice on how to proceed.<sup>83</sup>

The mandatory versus voluntary closure debate ended when the American Indian work group members, through Elaine Quiver, announced that after consulting with other tribal members it was decided that a voluntary closure was not only an acceptable solution, but it was the preferred solution.<sup>84</sup> Quiver explained that while many still argued for a mandatory closure to climbing, others felt that respect for Indian traditions and religious beliefs was a more important issue.<sup>85</sup> A

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<sup>80</sup> *See id.*

<sup>81</sup> *See id.*

<sup>82</sup> *See id.*

<sup>83</sup> The time taken to hold a number of meetings over a relatively long period of time anticipated the need for work group members to return to their own constituents to discuss what they had heard and to get advice on how to proceed. *See id.* Returning home to discuss issues raised at the work group meetings was especially important for the American Indian work group members. Throughout the planning process, they often expressed the need to return home to discuss the issues with tribal leaders and elders. *See id.* Of course, all tribes are different, but as a general rule, consultation with American Indian groups often involves the need for those representing tribes to "take the issues home" to discuss with other appropriate tribal members. *See id.* A consultation process which does not allow time for this may often be viewed as incomplete.

<sup>84</sup> *See id.*

<sup>85</sup> *See id.*

mandatory closure may keep people from climbing, but this forced restriction would not allow people to express their respect for Indian cultural values. A voluntary closure meant that climbers would have the opportunity to choose not to climb, and this personal decision would express their respect for Indian people and their traditions. As it was expressed at one planning meeting by a tribal member, "if someone chooses not to climb, the respect comes from their heart."<sup>86</sup>

The voluntary closure was acceptable from the climbing groups' perspective in that it would not place formidable mandatory legal controls on climbing the Tower, and as mentioned above, would not set management precedent for other rock climbing areas.<sup>87</sup> The climbing representatives agreed that should the plan be approved as a temporary voluntary closure, their organizations would help educate the climbing public about the closure through public announcements and articles in national climbing magazines.<sup>88</sup>

#### 4. *Administrative Outcomes and Legal Challenges.*

The end result of this remarkable effort was the NPS's issuance in February, 1995, of a Final Climbing Management Plan ("FCMP") for Devils Tower.<sup>89</sup> The Plan called for a prohibition on the use of climbing hardware that would damage and deface rockfaces on the Tower, and it implemented the voluntary June closure to climbing that had been agreed upon in the negotiations described above.<sup>90</sup> The latter action included a suspension by the NPS of the issuance of commercial climbing licenses for the month of June.<sup>91</sup>

Three months later, President Clinton issued an Executive Order applicable to all federal land management agencies with jurisdiction over sacred sites, instructing them to assure access to and ceremonial use of such sites by indigenous peoples, and to ensure the physical integrity of such sites.<sup>92</sup> The language of the Executive Order closely paralleled, in both intent and instruction, the very actions just taken by the NPS regarding the Devils Tower FCMP.

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<sup>86</sup> *Id.*

<sup>87</sup> The final plan did call for mandatory closure of selected climbing routes on the Tower grounds during the nesting season of predatory birds. See *supra* notes 46 and 66. This closure for natural resource reasons led one Indian work group member to comment that the NPS gave more weight to the protection of birds than it did to the protection of Indian heritage. See *id.*

<sup>88</sup> See *supra* note 66.

<sup>89</sup> See FINAL CLIMBING MANAGEMENT PLAN, *supra* note 46. For a recounting of administrative action on this matter and the contents of the FCMP, see *Bear Lodge Multiple Use Ass'n v. Babbitt*, No. 96-CV-063-D (D.Wyo. June 8, 1996), at 1-3 (order granting in part and denying in part plaintiffs' motion for a preliminary injunction).

<sup>90</sup> See *supra* note 46.

<sup>91</sup> See *Bear Lodge Multiple Use Ass'n*, at 2.

<sup>92</sup> See Exec. Order No. 13,007, 61 Fed. Reg. 26,771-26,772 (1996).

Nonetheless, a mere two weeks subsequent to publication of the President's Order, U.S. District Court Judge William Downes, from the District of Wyoming, granted a preliminary injunction against implementation of the FCMP.<sup>93</sup> Judge Downes' order cited the likelihood that the plaintiff commercial climbing guides would prevail at trial on the argument that the June moratorium on issuance of commercial climbing permits represented an impermissible establishment of Indian religion by the NPS.<sup>94</sup> Therefore, the Tower superintendent did not impose the moratorium, and instead issued a subsequent FCMP Reconsideration clarifying the voluntary nature of the June suspension of climbing activities.<sup>95</sup>

## II. CONSTITUTIONAL DIMENSIONS OF THE CLIMBING MANAGEMENT CONFLICT AT DEVILS TOWER

### A. GENERAL BACKGROUND

From the perspective of the NPS and the tribes participating in the FCMP consultation process, the district court's action was a highly unsettling decision in what some thought to be a fairly settled area of law—the discretion of federal agencies to accommodate tribal religious practices in the management of public lands.

At the constitutional level, two general realms of doctrine are implicated: the trust relationship between the U.S. Government and American Indian tribes, and the religion clauses of the First Amendment to the U.S. Constitution. The congressional enactments and court decisions discussed below are best understood as continuing efforts to fashion a workable relationship between the two, and as legal developments arising from the Devils Tower dispute have demonstrated, this continues to be very much a work in progress.

#### 1. *The Trust Relationship.*

As indicated in the introduction to this article, federal judicial treatment of issues regarding the spiritual practices of indigenous peoples has varied over the years, but it may generally be understood as following one of two paths of analysis. They emanate from different articles and amendments to the U.S. Constitution, and they usually tend to reach different destinations.

The first is the *trust responsibility* of the United States to its indigenous "nations within,"<sup>96</sup> incurred by a combination of original constitu-

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<sup>93</sup> See *Bear Lodge Multiple Use Ass'n*, No. 96-CV-063-D (D. Wyo. June 8, 1996).

<sup>94</sup> See *id.* at 14.

<sup>95</sup> See Nat'l Park Service, U.S. Dep't of Interior, Devils Tower National Monument, Reconsideration of Certain Climbing Limitations in the Final Climbing Mgmt. Plan (1992) (on file at park headquarters).

<sup>96</sup> Chambers, *infra* note 111.

tional language, early Supreme Court caselaw, and military subjugation of American Indian tribes by the U.S. Army. The U.S. had been making treaties with Indian tribes for nearly a decade prior to the writing of the Constitution.<sup>97</sup> These treaties included promises that tribal lands would only be acquired through purchase or cession, and not by conquest.<sup>98</sup> Thus, the Article II powers granted to the President to make treaties, subject to Senate ratification,<sup>99</sup> were assumed to extend to future land acquisition agreements with Indian tribes as well as European nations, meaning that the Supremacy Clause would apply to enforcement of such treaties as against state law whenever the two were found to conflict.<sup>100</sup> And since Article I gave Congress the power to regulate commerce with "foreign nations, and among the several states, and with Indian tribes,"<sup>101</sup> it was a reasonable enough assumption at the time that the tribes were more like foreign nations than like states, since states are not in a treaty-making relationship with the federal government.<sup>102</sup>

However, nearly four decades passed from the time these Articles were drafted until the U.S. Supreme Court first crafted a definitive declaration of the legal status of American Indian tribes within the constitutional framework. In Justice John Marshall's opinion in *Johnson v. McIntosh*,<sup>103</sup> the otherwise eminent jurist came closer than perhaps at any other time in his thirty years of administering justice to simply declaring that might makes right. The court found that "discovery" of lands in North America by the U.S. Government created title to all such lands in the government; that "the title by conquest is acquired and maintained by force;"<sup>104</sup> that the "conqueror prescribes its limits;"<sup>105</sup> and that Indian tribes hold not the rights of absolute ownership reserved to sovereign governments, but only a "right of occupancy"<sup>106</sup> that the U.S. could extinguish at will.<sup>107</sup> Eight years later in *Cherokee Nation v. Georgia*,<sup>108</sup> Marshall further clarified the status of the tribes by holding that they were "domestic dependent nations,"<sup>109</sup> with the relationship between the

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<sup>97</sup> See LLOYD BURTON, AMERICAN INDIAN WATER RIGHTS AND THE LIMITS OF LAW 12 (1991).

<sup>98</sup> See *id.*

<sup>99</sup> See U.S. CONST. art. II, § 2, cl. 2.

<sup>100</sup> See U.S. CONST. art. VI, cl. 2.

<sup>101</sup> U.S. CONST. Art. I, § 8, cl. 3.

<sup>102</sup> See BURTON, *supra* note 97.

<sup>103</sup> 21 U.S. (8 Wheat.) 543, 5 L.Ed. 681 (1823).

<sup>104</sup> *Id.* at 589.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 591.

<sup>107</sup> See *id.* at 587.

<sup>108</sup> 30 U.S. (5 Pet.) 1, 8 L.Ed. 25 (1831).

<sup>109</sup> *Id.* at 17.

tribes and the federal government resembling that of a “ward to his guardian.”<sup>110</sup>

This was a breathtaking usurpation of the rights of self-governance over their peoples and resources that the tribes had enjoyed from time immemorial until their conquest in the field by U.S. armed forces, and in court by the reasoning of John Marshall. It was a seizure that would come at a price. Having created the analogy to the common law ward-guardian relationship, the federal government would from that time forward be bound in theory, and more often than not in practice, by that same jurisprudential tradition—to hold in trust for the benefit of the tribes the powers of governance and of resource management that, in the *Cherokee Nation* decision, the Supreme Court had abrogated.

While it is far beyond the scope of this article to review the trust relationship in its entirety, suffice it to say that it survives as the most durable and often-referenced touchstone in federal government dealings with American Indian tribes.<sup>111</sup> To be sure, Congress has been recognized by the courts as having broad latitude to determine through the policy process what is in the tribes’ “best interest.”<sup>112</sup> During the nineteenth century, it was first to remove them west of the Mississippi to Indian Country, then to confine them to reservations, and ultimately to force their assimilation into the dominant culture by allotting reservation lands to individual tribal members and selling off the rest to non-Indian settlers, and (indirectly) land developers.<sup>113</sup> The allotment/assimilation period also included a concerted federal effort to obliterate tribal culture altogether. The government sent Indian children to English-only boarding schools many miles from home and family, and prohibited, under penalty of criminal sanction, many of the most significant tribal religious ceremonies.<sup>114</sup>

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<sup>110</sup> *Id.*

<sup>111</sup> Although slightly dated, one of the more thoughtful in-depth overviews of the trust relationship is Reid Chambers, *Judicial Enforcement of the Trust Responsibility*, 27 STAN. L. REV. 1218 (1975). As Chambers demonstrates, a reading of Marshall’s decisions in historical context does allow for a more charitable interpretation than their language on its own might suggest. During the time these cases were being decided, Euro-Americans were illegally entering and settling on tribal lands throughout the western frontier, and the federal government was doing little to stop it, in part because it had also failed to keep its promise to states to eject indigenous peoples from within state borders. See *id.* Thus, the “Marshall trilogy” of decisions—*M’Intosh*, *Cherokee Nation*, and *Worcester v. Georgia*—achieved the dual objectives of subordinating tribal rights to federal authority on the one hand, while shielding tribes from land predation by hostile state governments and settlers on the other. For additional discussion of these decisions in historical context, see CHARLES WILKINSON, *AMERICAN INDIANS, TIME, AND THE LAW* (1987).

<sup>112</sup> *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903).

<sup>113</sup> See S. LYMAN TYLER, *A HISTORY OF INDIAN POLICY* (1973).

<sup>114</sup> See Anastasia Winslow, *Sacred Standards: Honoring the Establishment Clause in Protecting Native American Sacred Sites*, 38 ARIZ. L. REV. 1291 (1996).

When it became apparent that these nineteenth century efforts at forced assimilation were not succeeding, Congress eventually had a change of heart, and it passed legislation in 1934 granting the tribes greater conditional powers of self-governance.<sup>115</sup> Except for another brief attempt by Congress in the 1950s to terminate tribal governments and sell off their natural resources, the policy trend throughout most of the twentieth century has been toward greater tribal self-determination and gradual restoration of sovereignty.<sup>116</sup> The civil rights era in American society brought with it several federal legislative efforts on behalf of indigenous peoples' rights.<sup>117</sup>

More recently, in the realm of indigenous spiritual practices and related cultural properties, Congress has embarked upon what might be called the "era of atonement." In frank recognition of past abuses of the trust responsibility—including actions to erase tribal culture (such as religious practices) from the national memory—Congress has enacted a series of measures designed to atone for what, by today's standards, appear to be nineteenth century acts of attempted cultural extermination. This particular policy trend began with the 1978 American Indian Religious Freedom Act ("AIRFA"),<sup>118</sup> to be followed by the 1990 Native American Grave Protection and Repatriation Act ("NAGPRA"),<sup>119</sup> the 1992 amendments to the National Historic Preservation Act ("NHPA"),<sup>120</sup> the 1993 Religious Freedom Restoration Act ("RFRA"),<sup>121</sup> and the proposed AIRFA Amendments of 1994.<sup>122</sup>

## 2. *The Trust Relationship Meets the First Amendment.*

However, Congress did not create these atonement era policies in a jurisprudential vacuum. The legislative histories of these statutes reveals a congressional awareness that while one line of federal judicial analysis has treated tribal religion-based claims primarily as a matter of intergovernmental relations (necessitating federal and state governmental accommodation of tribal religious interests within the ambit of the trust relationship), an alternative approach has been to treat these disputes as predominantly susceptible to principles derived in interpretation of the religion clauses (Free Exercise and Establishment) of the First Amend-

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<sup>115</sup> See 25 U.S.C. § 461 (1934).

<sup>116</sup> See TYLER, *supra* note 113, at 151-88.

<sup>117</sup> See Indian Civil Rights Act of 1968, 25 U.S.C. § 1301; Indian Self-Determination and Assistance Act of 1975, 25 U.S.C. § 450a-450n.

<sup>118</sup> 42 U.S.C. § 1996 (1978).

<sup>119</sup> 25 U.S.C. § 3001-3013 (1996).

<sup>120</sup> 16 U.S.C. § 470a (1992).

<sup>121</sup> 5 U.S.C. § 504 (1993).

<sup>122</sup> 42 U.S.C. § 1996-1996a (1994).

ment.<sup>123</sup> The former approach has usually, although by no means always, proved more advantageous to tribal interests than the latter, as the following discussion of relevant caselaw indicates.

In reviewing these cases, certain distinguishing features of fact and law are worth keeping in mind. First is the relationship between the trust responsibility and the religion clauses, in terms of which set of doctrines had the greatest impact on case outcomes. Second is the question of whether it was the Free Exercise Clause or the Establishment Clause that was chiefly implicated. Third is the question of whether the religious practice in question was tied to the management of a specific sacred site, or dealt instead with a ritual unattached to a land use management decision.

Preceding AIRFA, the first of the atonement era statutes, by four years was a Supreme Court decision that encouraged the development of these laws by holding that the trust relationship provided a congressional basis for preferential treatment of tribal governments in ways not usually allowable under the Equal Protection Clauses of the Fifth and Fourteenth Amendments.<sup>124</sup> In *Morton v. Mancari*,<sup>125</sup> the Court upheld a tribally-imposed employment preference for Indians, finding that such preferences can be viewed with less exacting scrutiny than preferences for other racial or ethnic groups because of the historical and political relationship between tribes and the federal government (i.e., the trust relationship).<sup>126</sup> The Court determined that "as long as special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward Indians, such legislative judgments will not be disturbed."<sup>127</sup> The Court upheld the hiring preference because it was found to be rationally related to the legitimate congressional objective of fostering greater tribal self-determination; it was not racial in nature because it favored indigenous persons as members of a tribe subject to the trust relationship, and not simply as individuals in a discrete ethnic group.<sup>128</sup>

Thus, when AIRFA was being debated in Congress, the reasoning in *Morton* created some hope on the part of tribal advocates that the historical antipathy of federal policy makers toward tribal religion might now be truly remedied. But there was fear on the part of others that AIRFA might create some sort of preferential "religious servitude" on public lands outside reservation boundaries that neighboring tribes might hold

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<sup>123</sup> See Winslow, *supra* note 114.

<sup>124</sup> See *Morton v. Mancari*, 417 U.S. 535 (1974).

<sup>125</sup> *Id.*

<sup>126</sup> See *id.* at 550.

<sup>127</sup> *Id.* at 555.

<sup>128</sup> See *id.* at 555.

sacred.<sup>129</sup> Morris Udall, a Congressman from southern Arizona and the bill's sponsor, sought to allay such fears during debate on the measure by portraying it only as a "sense of Congress" to ensure that "the basic right of Indian people to exercise their traditional religious practices is not infringed without a clear decision" of the federal government to do so; that the act would "not change any existing State or Federal law;" and that therefore, in terms of enforceability, the law "has no teeth in it."<sup>130</sup>

The federal courts would soon prove Congressman Udall's words to be all too true. AIRFA provided no support for the Cherokees' unsuccessful effort in 1980 to halt construction of the Tellico Dam because it would flood sacred homelands,<sup>131</sup> for failed Navajo attempts that same year to prevent the filling of Lake Powell from flooding the base area of Rainbow Bridge (a sacred site) and thereby encouraging a proliferation of tourists,<sup>132</sup> or for the vain efforts of the Navajo and Hopi tribes two years later to enjoin expansion of a ski resort near the San Francisco Peaks in northern Arizona's Coconino National Forest.<sup>133</sup>

In these cases, the tribes sought to influence governmental land management decisionmaking in recognition of their religious affinity with the site in question, based not only on the "sense of Congress" expressed in AIRFA, but on arguments that their First Amendment rights to free exercise of their environmentally rooted religions were being denied as well.<sup>134</sup> In each of these cases, the free exercise argument failed. In most free exercise cases not involving public lands, non-Indian plaintiffs need only show that a governmental action places a substantial burden on the free exercise of their religion in order for the government to be required to demonstrate a compelling interest in limiting religious practices;<sup>135</sup> but in these sacred site cases the tribes had to show more. The courts imposed the additional requirement that preservation of, and access to, the site in question was *central and indispensable* to the practice of tribal religion;<sup>136</sup> and in none of these cases could the tribes meet that requirement to the respective courts' satisfaction. Unable to make this showing, the federal government, in its defense, had only to demonstrate that a legitimate (non-Indian) public interest was being served by the

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<sup>129</sup> See DAVID GETCHES, CHARLES WILKINSON & ROBERT WILLIAMS JR., *FEDERAL INDIAN LAW* 751 (3<sup>rd</sup> ed. 1993).

<sup>130</sup> 124 CONG. REC. 21,444, 21,445 (1978).

<sup>131</sup> See *Sequoyah v. Tennessee Valley Authority*, 620 F.2d 1159 (6th Cir. 1980).

<sup>132</sup> See *Badoni v. Higginson*, 638 F.2d 172 (10th Cir. 1980).

<sup>133</sup> See *Wilson v. Block*, 708 F.2d 735 (D.C. Cir. 1982).

<sup>134</sup> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend. I.

<sup>135</sup> See Winslow, *supra* note 114.

<sup>136</sup> See *id.*

management decision in question in order to shield its actions from a tribal free exercise challenge.<sup>137</sup>

Perhaps the most graphic example of the relative powers of the tribes and the federal government agencies in this area is the Supreme Court's 1988 decision in *Lyng v. Northwest Cemetery Protective Association*.<sup>138</sup> In this case, plaintiffs sought to enjoin USFS road construction through a traditional indigenous cemetery on Forest Service land, which was also the site of contemporary tribal religious observances.<sup>139</sup> The plaintiff tribes established both centrality and indispensability, resulting in a district court injunction against construction of the logging road that was upheld on the government's appeal before the Ninth Circuit Court of Appeals.<sup>140</sup> However, the Supreme Court reversed, holding that road construction did not burden Indian religious practices because it did not coerce individuals to "act against their faith."<sup>141</sup> The Court found that the Forest Service could literally destroy tribal religion by building a road, since the construction would not coerce Indian religious practitioners into actively violating their own beliefs.<sup>142</sup>

While the Court in *Lyng* surely did not uphold an outcome supportive of tribal free exercise interests, it nevertheless clearly upheld the ability of federal agencies to factor tribal religious practices into land use decision-making, if at their discretion they choose to do so. While specifically disclaiming the existence of a tribal "religious servitude" on public lands, either by reason of AIRFA or interpretation of the Free Exercise Clause of the First Amendment, the Court specifically acknowledged the ability of the Forest Service to incorporate tribal religious interests into its management practices in holding that the "[g]overnment's rights to the use of its own land need not and should not discourage it from accommodating religious practices."<sup>143</sup> Thus, it is left to the federal land management agency to determine what constitutes a reasonable accommodation of tribal religious needs.

In 1990, the Court appeared similarly unsympathetic to an Indian Free Exercise claim outside the realm of land use. In *Oregon Department of Human Resources v. Smith*,<sup>144</sup> the Court upheld a state statute criminalizing the use of peyote against a Free Exercise challenge by two

<sup>137</sup> See *id.* at 1291-92.

<sup>138</sup> 485 U.S. 439 (1988).

<sup>139</sup> See *id.*

<sup>140</sup> See *Northwest Indian Cemetery Protective Ass'n v. Peterson*, 764 F.2d 581 (9th Cir. 1985).

<sup>141</sup> Here the court was distinguishing *Sherbert v. Verner*, 374 U.S. 398 (1963), a decision in which it had voided enforcement of a state employment law requiring the plaintiff to work on her Sabbath.

<sup>142</sup> See *Lyng*, 485 U.S. at 451-52.

<sup>143</sup> *Id.* at 454.

<sup>144</sup> 494 U.S. 872 (1990).

American Indians fired from their jobs (and subsequently denied unemployment compensation), because they had participated in sacramental use of the substance at a ritual conducted by the Native American Church. In upholding the Oregon statute, a five-member majority of the Court determined that the state need only show that it had enacted a "valid and neutral law of general applicability," the impact of which on the free exercise of religion was "incidental."<sup>145</sup> In the majority opinion, Justice Scalia acknowledged that "leaving [religious] accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in."<sup>146</sup> However, he found the potential for such majoritarian discrimination greatly preferable to "courting anarchy"<sup>147</sup> by more searching judicial scrutiny of religious practice restrictions, which in his view would result in a "system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs."<sup>148</sup> He therefore found the need for judicial restraint and deference to state law sufficiently strong to defeat the Free Exercise claim.<sup>149</sup>

Justice O'Connor wrote a separate concurrence, in which she disagreed strongly with what she saw as the majority opinion's retreat from judicial responsibility in this case.<sup>150</sup> She argued that any law so completely prohibiting an important religious practice should require the state to carry the heavier burden of proof of showing a compelling interest that was being achieved by means least restrictive of religious liberty.<sup>151</sup> She concurred only in finding the state law constitutional, because (in her view) it would survive the strict judicial scrutiny she advocated.<sup>152</sup>

The dissenters in *Smith* argued that strict scrutiny should apply and that the Oregon law should not survive it.<sup>153</sup> This argument was based in no small part on the judgment of Congress, as expressed in the legislative history of AIRFA, that "certain substances, such as peyote, 'have religious significance, because they are sacred, they have power, they heal, they are necessary to the exercise of the rites of religion, they are necessary to the cultural integrity of the tribe, and therefore, religious survival.'"<sup>154</sup>

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<sup>145</sup> *Id.* at 879.

<sup>146</sup> *Id.* at 890.

<sup>147</sup> *Id.* at 888.

<sup>148</sup> *Id.* at 890.

<sup>149</sup> *See id.*

<sup>150</sup> *See id.* at 891, 903.

<sup>151</sup> *See id.* at 891-907.

<sup>152</sup> *See id.* at 905.

<sup>153</sup> *See id.* at 907.

<sup>154</sup> *Id.* at 920-21 (citing H.R. REP. NO. 95-1308, at 2 (1978)).

Although the trust responsibility received no direct mention in this case (since it was federal judicial review of state law), the peyote use issue arose again in federal appeals court just one year later, in a case in which the trust relationship played a central role. It also implicated the Establishment Clause, rather than the Free Exercise Clause, and resulted in quite a different outcome for tribal interests in the protection of spiritual practices and traditions. In *Peyote Way Church of God v. Thornburgh*,<sup>155</sup> the Fifth Circuit used the reasoning found in the majority opinion in *Smith* to uphold state and federal exemptions from prohibitions against the possession and use of peyote.<sup>156</sup> Since membership in the Native American Church was predicated on enrollment in a federally-recognized American Indian tribe, the court found that the federal exemption from criminal sanctions of NAC members did not represent an impermissible establishment of religion by government since the exemption arose from the intergovernmental trust relationship; thus, the preferential classification was political rather than religious.<sup>157</sup> Exemplifying one of the judicial perspectives described in the introduction to this article, the court reasoned that “the federal government cannot at once fulfill its constitutional role as protector of tribal Native Americans and apply conventional separatist understandings of the Establishment Clause to that relationship,” because “[t]he unique guardian-ward relationship between the federal government and Native American tribes precludes the degree of separation ordinarily required by the First Amendment.”<sup>158</sup>

A year later the First Circuit applied similar reasoning to a non-Indian challenge to a tribal exemption from the federal criminal prohibition against possession of eagle feathers, so the feathers could be used in Native American religious rituals.<sup>159</sup> Acknowledging that the exemption represented preferential treatment of practitioners of traditional religions in federally-recognized tribes, the court reasoned that such treatment was nonetheless constitutionally permissible because it “finds its source in Congress’ historical obligation to respect Native American sovereignty and to protect Native American culture.”<sup>160</sup>

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<sup>155</sup> 922 F.2d 1210 (5th Cir. 1991).

<sup>156</sup> *See id.* at 1213.

<sup>157</sup> *See id.* at 1215.

<sup>158</sup> *Id.* at 1217.

<sup>159</sup> *See* *Rupert v. Director, U.S. Fish and Wildlife Service*, 957 F.2d 32 (1st Cir. 1992).

<sup>160</sup> *Id.* at 35. For a discussion of *Rupert* and *Peyote Way*, as exemplifying an appropriate path of judicial analysis in support of agency discretion in the accommodation of tribal religion, see Craig Alexander, Protection of Indian Sacred Places and the Religious Accommodation Doctrine, Sovereignty Symposium X, June 9-11, 1997, Tulsa, Oklahoma, Office of Tribal Justice, U.S. Dep’t of Justice, Washington, D.C., (on file with authors). Craig Alexander is an attorney for the U.S. Department Justice, and this piece is a briefing paper that he wrote for the park superintendent and staff.

It was also in 1992 that Congress amended the NHPA to make more explicit the need for consultation with affected tribes whenever management plans for historic sites covered by the Act were being drawn up in a way that might implicate the preservation and perpetuation of tribal culture.<sup>161</sup> In yet another congressional reaffirmation of the federal trust responsibility as instrumental in the protection of religious freedom, the 103rd Congress passed the RFRA.<sup>162</sup> This federal legislative action was undertaken with the stated intent of reversing the burden of proof ruling in the majority opinion in *Oregon v. Smith*—thereby restoring the compelling interest standard to judicial review of government action burdening the free exercise of religion, as Justice O'Connor's concurrence and the dissenting opinion in *Smith* had advocated.<sup>163</sup>

#### B. APPLICATION TO THE DEVILS TOWER CASE

As demonstrated above, the trust responsibility perspective and the First Amendment Free Exercise approach represent two very different modes of constitutional discourse on the same subject. Choice of perspective, and the precedents that inform them, tend to pre-ordain outcomes in instant cases. Thus, it might reasonably be expected that any contemporary judicial pronouncements in this subject area would attempt an accounting of both perspectives, as well as at least some effort to workably articulate the two. To dwell only on one approach is to say what the law is after having told only half the legal story.

However, that is precisely what happened when the Devils Tower controversy was cast into constitutional terms in Wyoming's U.S. District Court. In Judge Downes' preliminary injunction against NPS's implementation of the temporary commercial climbing moratorium,<sup>164</sup> there is no mention whatsoever of the federal trust responsibility to the affected tribes; it receives only oblique and implicit acknowledgment by reference to AIRFA.<sup>165</sup> Judge Downes held the controlling language to be the dicta in a 1980 Tenth Circuit decision regarding a Free Exercise claim lodged by tribes against the federal government (instead of an Establishment challenge issued by non-Indians, as in the Devils Tower controversy)—the case in which the Navajos sought unsuccessfully to

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<sup>161</sup> See 16 U.S.C. § 470a (1992).

<sup>162</sup> 5 U.S.C. § 504 (1993).

<sup>163</sup> The Supreme Court has since ruled that the compelling interest test does not apply to judicial review of local government land use regulation of church property. See *City of Boerne v. Flores*, 521 U.S. 507 (1996).

<sup>164</sup> See *Bear Lodge Multiple Use Ass'n. v. Babbitt*, No. 96-CV-063-D (D.Wyo. June 8, 1996).

<sup>165</sup> See *id.* at 8.

permanently exclude all tourist access to the Rainbow Bridge National Monument.<sup>166</sup>

Judge Downes' hostility to and general disregard for the federal trust responsibility perspective in this case became even more apparent at trial. Plaintiff commercial climbing guides were represented by the Mountain States Legal Foundation, which asked the court not only to enjoin permanently the implementation of the voluntary summer solstice climbing moratorium, but also to order the NPS to delete references to tribal religion from the Devils Tower National Monument interpretive program, since in the plaintiffs' view this represented impermissible government entanglement in the teaching of religion.<sup>167</sup>

As plaintiffs argued the climbing moratorium issue at the hearing, the judge made some remarkably candid and oddly revealing observations on the record. "As I've told you before," he said from the bench, "you're in front of the right judge on this issue, I think."<sup>168</sup> He then told a poignant personal story of being humiliated as a fourth grade student in public school when the teacher refused to allow him to participate in a class Bible reading because the class was using a Protestant Bible and he was Catholic.<sup>169</sup>

This is very much the sort of public institutional behavior that the Supreme Court would later find violative of the Establishment Clause in *Lee v. Weisman*.<sup>170</sup> It became evident as the trial wore on that the judge's painful personal experience as a stigmatized 10-year old member of a religious minority group—and the vindication of his feelings half a century later in *Weisman*—provided much of the perspective through which he viewed the Devils Tower controversy. During the government's presentation, the judge encouraged the Justice Department attorney representing the NPS to agree that as a fourth grader he would have had a cause of action under *Weisman* if such a precedent had existed at that time.<sup>171</sup>

In their arguments, Justice Department attorneys and defendant-intervenor's Indian Law Resource Center attorneys both emphasized the federal government's trust responsibility to the tribes and the recent find-

<sup>166</sup> See *Badoni v. Higginson*, 638 F.2d 172 (10th Cir. 1980).

<sup>167</sup> See *Bear Lodge Multiple Use Ass'n. v. Babbitt*, 2 F. Supp. 2d 1448 (D.Wyo. 1998) (transcript of hearing on the merits, held April 18, 1997. Transcript was certified September 2, 1997).

<sup>168</sup> *Id.* at 28.

<sup>169</sup> See *id.* at 28-29.

<sup>170</sup> 505 U.S. 577 (1992) (finding that the Establishment Clause was offended by recitation of a Christian prayer at a high school graduation ceremony, since it compelled non-Christian students to involuntarily engage in a sectarian ritual if they wished to participate in their own graduation).

<sup>171</sup> See *Bear Lodge Multiple Use Ass'n*, 2 F. Supp. 2d 1448 (transcript of hearing on the merits, at 44-45).

ings of the First and Fifth Circuits (in *Thornburgh* and *Rupert*) that the government enjoys very substantial latitude in fulfilling that responsibility in the accommodation of Native American religion.<sup>172</sup> But in a 100-page trial transcript, Judge Downe's only acknowledgement of the potential applicability of the trust relationship doctrine to the Devils Tower case was a two-sentence dismissal of these precedents as inapplicable because they had not been decided by the Tenth Circuit.<sup>173</sup> He had no comment on the government's observation that the Tenth Circuit had just decided a case in which it had rejected an Establishment Clause attack on an EPA decision to allow a tribe in New Mexico to adopt more stringent water quality standards than the rest of the state (so that the water would be suitable for ceremonial purposes).<sup>174</sup>

At the close of the trial, the judge referred to governmental responsibility, but in quite a different context. He wondered at what was, from his perspective, the misapplication of such skilled legal talent to the defense of the government's actions to accommodate tribal cultural preservation.<sup>175</sup> In his view, the real threat to tribal survival was the wave of crime and alcoholism sweeping across the reservations within his jurisdiction, and which Congress had not seen fit to address by the funding of programs to which he could divert the youthful Indian offenders who regularly appeared before him.<sup>176</sup> He urged advocates to spend more time on these issues, else "we may still have preserved Native American religion into the next century, but I'm not at all certain that there'll be many Indian children left to exercise it."<sup>177</sup>

Finally, the attorney general for the Cheyenne River Sioux Tribe rose to make apparent the connection between the two issues. Survival is the common theme, he commented: "we appear here in federal court to protect our traditions because we believe that our traditions are in fact the root of the solution to all of our societal ills."<sup>178</sup>

The first week of April of 1998, the trial court handed down its decision on the merits in *Bear Lodge Multiple Use Ass'n. v. Babbitt*.<sup>179</sup> As in the preliminary injunction hearing, the decision made no reference at all to the trust responsibility doctrine. Instead, the court based its findings entirely on a First Amendment analysis.<sup>180</sup> Nevertheless, most of

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<sup>172</sup> See *id.* at 75-82.

<sup>173</sup> See *id.* at 78.

<sup>174</sup> See *id.* at 61-69. The case is *City of Albuquerque v. Browner*, 97 F.3d 415, 428-29 (10th Cir. 1996).

<sup>175</sup> See *Bear Lodge Multiple Use Ass'n*, 2 F. Supp. 2d 1448 (transcript of hearing on the merits, at 95-97).

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* at 97.

<sup>178</sup> *Id.* at 100.

<sup>179</sup> *Bear Lodge Multiple Use Ass'n*, 2 F. Supp. 2d 1448.

<sup>180</sup> See *id.*

the holdings in this decision were in favor of the NPS and the inter-cultural consultation process by which the amended climbing management plan was derived.<sup>181</sup>

First, the court held moot the plaintiff's original challenge to the management plan (which had initially placed a moratorium on the issuance of commercial climbing permits in June), since the NPS had made the commercial moratorium voluntary subsequent to the court's preliminary injunction against a mandatory one.<sup>182</sup> Plaintiffs had argued that even though the ban was voluntary in print, it was not in practice, since under the amended plan the NPS reserved the authority to again impose a mandatory ban if the voluntary one failed to keep most climbers off the Tower during the month of June.<sup>183</sup> However, the court found the possibility of a future attempted mandatory ban to be "remote and speculative,"<sup>184</sup> although the judge did note that were such a ban to be imposed, it might not pass constitutional muster for the same reasons given when he granted the preliminary injunction in the first place.<sup>185</sup>

Second, the court dismissed plaintiff's complaints that the NPS interpretive program was indoctrinating children into the religious beliefs of Native Americans, and that the signs asking visitors to voluntarily stay on trails (referencing its sacred status) represented a coerced observance of indigenous religions.<sup>186</sup> However, these dismissals were made for lack of plaintiff standing to sustain their complaints, and without comment on the substance of the issues.<sup>187</sup> For the interpretive program, a substantial discussion would have probably involved a painstakingly detailed and inevitably subjective parsing of interpretive program materials and public address transcripts to determine whether the program was merely educational, or had impermissibly crossed the line into indoctrination and compelled observance of indigenous religious tenets.

As discussed earlier, one of the more noteworthy features of the trial court's ruling was that it substantially upheld the tribal and NPS positions without any acknowledgment of the federal trust doctrine *per se*. Instead, the court cast the NPS's actions as a permissible accommodation of religious worship (alleviating a burden on the indigenous freedom to practice), in much the same way that the Supreme Court had shielded the Mormon Church from an Establishment Clause attack on its religion-

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<sup>181</sup> *See id.*

<sup>182</sup> *See id.* at 1450.

<sup>183</sup> *See id.*

<sup>184</sup> *Id.* at 1456.

<sup>185</sup> *See id.*

<sup>186</sup> *See id.* at 1453.

<sup>187</sup> *See id.*

based hiring practices a decade earlier.<sup>188</sup> Following the *Amos* decision, Judge Downes ruled that “the purposes underlying the [voluntary June climbing] ban are really to remove barriers to religious worship occasioned by public ownership of the Tower. This is the nature of accommodation, not promotion, and consequently is a legitimate secular purpose.”<sup>189</sup> In other words, the degree of accommodation is no more or less than that for any other religious denomination—the only difference being that the tribes’ place of worship happens to be on public lands.

Ironically, this accommodation is precisely the policy objective Congressman Morris Udall was trying to achieve twenty years earlier in his drafting and advocating passage of the AIRFA at the outset of the atonement era.<sup>190</sup> But AIRFA’s constitutional basis lies in both the trust responsibility doctrine *and* the First Amendment, and Judge Downes seemed determined to make his findings without any reference to the former. The significance of this choice is that applying an exclusively Establishment Clause frame of reference operates by trying to demonstrate similarities in law between tribal spiritualism and Anglo-American religious denominations, while the trust responsibility approach instead emphasizes the uniqueness of the federal government relationship to the tribes as semi-sovereign peoples rather than religious practitioners. As applied in the Devils Tower trial court decision, pure Establishment Clause analysis seeks to accommodate pluralism by focusing on perceived sameness, while trust responsibility doctrine seeks the same objective by focusing on difference.

The distinction between the two is more than strictly academic. Confining the analysis solely to Establishment Clause discourse denies both the NPS and the affected tribes the moral authority to seek any accommodation beyond that allowed by the decision (such as the temporary mandatory commercial climbing ban the superintendent first tried to impose at the Tower). Following this approach, the superintendent may have potent discretionary authority to prohibit all commercial and recreational activity in order to protect the physical integrity of the monument or the well-being of its wildlife, but not to assure the unimpeded replication of spiritual aspects of tribal culture.

First Amendment analysis provides a more crisply defined, familiar, and fairly predictable unifying framework within which to debate and

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<sup>188</sup> See *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter Day Saints v. Amos*, 483 U.S. 327 (1987).

<sup>189</sup> *Bear Lodge Multiple Use Ass’n*, 2 F. Supp. 2d at 1454. In April of 1999, the Tenth Circuit denied plaintiffs standing to appeal this decision, agreeing with the district court that any possible future harm plaintiffs might suffer from the voluntary climbing moratorium was “remote and speculative.” *Bear Lodge Multiple Use Ass’n v. Babbitt*, 1999 U.S. App. LEXIS 7950, No. 98-8021 (10<sup>th</sup> Cir. April 26, 1999).

<sup>190</sup> See 124 CONG. REC. 21,444, 21,445 (1978).

make decisions on these matters; but it does so by ignoring the fact that the spiritual dimensions of tribal societies are inextricably woven into the fabric of daily life in specific (publicly held) landscapes. It also ignores the nineteenth century history of forcible removal of indigenous peoples from these sacred landscapes, and of recent congressional efforts to foster some degree of re-connection between indigenous peoples and sites they hold sacred. In contrast, the trust responsibility doctrine takes full account of these realities, but it does so at the expense of requiring the continuing education of the dominant culture (both non-indigenous public land users and the federal judiciary) as to why particular deference must be accorded peoples whose cultural survival depends on periodic unimpeded access to sacred places.

### III. PLURALIST PERSPECTIVES ON SACRED SITE MANAGEMENT

In Anglo-American legal literature, "legal pluralism" has at least three different meanings. The first, historic use of the term describes the parallel existence of indigenous "law ways" in small non-industrial cultures and the European-style colonial or national legal systems superimposed upon them.<sup>191</sup> Much of early twentieth century anthropology's focus on non-literate indigenous culture groups and their forms of social ordering relative to colonizing legalization is reflective of this original meaning of the concept.

More recently, a distinction has been made between this earlier "classic" legal pluralism and the "new" legal pluralism, which refers instead to "relations between dominant and subordinate groups, such as religious, ethnic, or cultural minorities, immigrant groups, and unofficial forms of ordering located in social networks or institutions . . . [These] plural normative orders are found in virtually all societies."<sup>192</sup> This construction still includes a superordinate state-imposed legal system, within which the "plural normative orders" continue to function with varying degrees of success based in part on how well their substantive and procedural norms are harmonized with those of the state. Thus, the concept is as applicable to modern industrial and post-industrial societies as the classic meaning of the term was and is to developing, post-colonial nation-states.

Yet a third use of the term has now come into being that makes no direct reference to culture or cultural sub-groups, but rather refers to diverse approaches to interpreting the same core texts of a given legal sys-

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<sup>191</sup> See Sally Engle Merry, *Legal Pluralism*, 22 L. & Soc'y REV. 869 (1988).

<sup>192</sup> *Id.* at 872-873.

tem.<sup>193</sup> This "constitutional pluralism" may exist with or without substantial cultural diversity in the society governed by that system. The pluralist perspective arises from fundamentally different understandings and resultant interpretations of the same constitutive doctrines by scholars and jurists trained in the same legal tradition.<sup>194</sup>

All three meanings of the term have some applicability in the study of policies governing sacred site management on the public lands of the U.S. Regarding "classic" legal pluralism, most of the roughly 500 indigenous nations, tribes, and bands of people subject to the jurisdiction of the U.S. Government have been governing themselves as much as their subordinate and uncertain legal status would permit for at least as long as the U.S. has been in existence, and they continue to do so today.

The consultative process by which the NPS derived the Devils Tower Climbing Management Plan is demonstrative of the second meaning of the term. The consultations included not only tribal representatives, but non-Indian local government officials, rural business interests, modern outdoor recreational interests, and non-Indian historic preservationists.<sup>195</sup> Each group had its own value orientation and its own site management objectives based on those values. The challenge the NPS successfully met was to design procedures for the attainment of outcomes in which each of these sub-cultural groups felt that their values were sufficiently respected and their objectives sufficiently established that they could consent to the resulting plan in its final form.<sup>196</sup>

What did *not* happen at trial in the Devils Tower case was due consideration of the diverse constitutional perspectives applicable to such conflict situations. This is unfortunate, given the amount of national attention that will inevitably be focused on this controversy. Moreover, conflicts such as the one that arose at Devils Tower are hardly unique in the public lands of the western United States. As of this writing, there are several ongoing, substantially unresolved situations at sites such as Rainbow Bridge (where the NPS now seeks voluntary compliance with a request that there be no tourist incursions directly under the arch), Chaco Canyon and Bandelier National Monuments in New Mexico, and Cave Rock, which is near Lake Tahoe on the California-Nevada border.<sup>197</sup>

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<sup>193</sup> See Stephen Griffin, *Pluralism in Constitutional Interpretation*, 72 TEX. L. REV. 1753 (1994).

<sup>194</sup> See *id.*

<sup>195</sup> See Consultation meeting notes, *supra* note 27.

<sup>196</sup> This is precisely the approach encouraged by observers who see in federal statutes such as the NHPA the potential for rich, community-building, inter-cultural education and cultural co-habitation on which the potential for peaceable existence in a pluralistic society depends. See Suagee, *supra* note 59.

<sup>197</sup> See Chris Smith and Elizabeth Manning, *The Sacred and the Profane Collide in the West*, 29(10) HIGH COUNTRY NEWS 1, May 26, 1997, at 8.

Some recent similar controversies have been consensually resolved to the satisfaction of all parties concerned, such as the Bighorn Medicine Wheel management plan for a site on National Forest lands in northern Wyoming,<sup>198</sup> while others, like Devils Tower, have ended up being adjudicated in federal court.<sup>199</sup>

What do these pluralist perspectives consist of, and how might they inform judicial review of future deliberations over the derivation of management plans at such contested sites? In his survey of pluralist perspectives on constitutional interpretation, Stephen Griffin<sup>200</sup> found that scholars have discerned several different frameworks that the Supreme Court has applied over time in interpreting various provisions of the U.S. Constitution, from Fallon's five-stage hierarchy of literal text, framers' intent, theory, precedent, and moral/policy values,<sup>201</sup> to Robert Post's non-hierarchical array of the differing forms of *authority* referenced by judicial interpreters (doctrinal, historical, and responsive),<sup>202</sup> to Philip Bobbitt's similarly co-equal modes of constitutional interpretation (historical, structural, prudential, and ethical).<sup>203</sup>

Within this diversity of analytic frameworks, there actually lie some commonalities, including appeals to historical tradition, to logically derived structural doctrines, and to the morally compelling needs of the times and circumstances in which a constitutional dispute arises. Each of these has some applicability to the subject at hand. For instance, Post takes up modern Establishment Clause jurisprudence by way of demonstrating his analytic framework.<sup>204</sup> He notes that the Court did a painstakingly thorough job of articulating a clear, if controversial, doctrinal approach in its 1971 decision in *Lemon v. Kurtzman*.<sup>205</sup> To avoid Establishment Clause problems, government action must have both a secular purpose and a primarily secular effect, and it must not excessively entangle the government in religious practices.<sup>206</sup>

<sup>198</sup> See *id.*

<sup>199</sup> For a description of one such case, concerning the unsuccessful attempts of local Apache tribes to block University of Arizona-sponsored construction of a large telescope at a site held sacred by the tribes on National Forest lands on the slopes of Mount Graham, see, e.g., Robert Williams, *Large Binoculars, Telescopes, Red Squirrel Piñatas, and Apache Sacred Mountains: Decolonizing Environmental Law in a Multicultural World*, 96 W. VA. L. REV. 1133 (1996).

<sup>200</sup> See Griffin, *supra* note 193.

<sup>201</sup> See Richard Fallon, *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1194 (1987).

<sup>202</sup> See Robert Post, *Theories of Constitutional Interpretation*, 30 REPRESENTATIONS 13, 19 (1990).

<sup>203</sup> See PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* 13-21 (1991).

<sup>204</sup> See Post, *supra* note 202.

<sup>205</sup> 403 U.S. 602 (1971).

<sup>206</sup> See Post, *supra* note 202.

Yet, just over a decade later, the majority of the Court would find no constitutional problem with a state legislature hiring a chaplain to open its sessions with Christian prayer.<sup>207</sup> In its reasoning, the majority dealt with the self-evident conflict of its decision with at least the first two elements of the *Lemon* test, essentially by ignoring this fairly well-established doctrinal approach, basing its holding instead on "the fact that the 'opening of sessions of legislative and other deliberative bodies with prayer is deeply embedded in the history and tradition of this country.'"<sup>208</sup> A year later the Court would again abandon the *Lemon* test in favor of a history-based rationale for upholding a municipal government's practice of displaying a Nativity scene on public property, owing to the historical origins of an event recognized as a traditional holiday.<sup>209</sup>

Post also demonstrates how the Court can and does explicitly reject both "settled" doctrines and historical tradition when those past-rooted perspectives deeply offend the contemporary moral order.<sup>210</sup> This enables the Constitution to function in what Oliver Wendell Holmes would term as its "organic" capacity: its ability to serve as a living, socially responsive, and contextual restatement of founding principles.<sup>211</sup> In Post's view, the most notable example of this moral/responsive approach is the Court's 1954 decision in *Brown v. Board of Education*,<sup>212</sup> in which it rejected both the structural underpinnings of the "separate but equal" doctrine set forth in *Plessy v. Ferguson*<sup>213</sup> in 1896, and the half-century's worth of subsequent federal caselaw it had spawned.

Contemporary commentators on judicial review of government agency management decisions in sacred site controversies have mixed views on what approach should be taken. One school of thought seems to hold that the matter should begin and end with application of the trust responsibility doctrine.<sup>214</sup> Though judicially originated by Justice Marshall's common law analogy in *Cherokee Nation*<sup>215</sup> 170 years ago, the doctrine enjoys renewed vitality in modern "atonement era" congressional enactments<sup>216</sup> and Executive Orders<sup>217</sup> (as well as site-based ad-

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<sup>207</sup> See *Marsh v. Chambers*, 463 U.S. 783 (1983).

<sup>208</sup> Post, *supra* note 202, at 17.

<sup>209</sup> See *Lynch v. Donnelly*, 465 U.S. 668 (1984).

<sup>210</sup> See Post, *supra* note 202, at 17.

<sup>211</sup> See *id.* at 23.

<sup>212</sup> 346 U.S. 483 (1954).

<sup>213</sup> 163 U.S. 537 (1896).

<sup>214</sup> See, e.g., Raymond Cross and Elizabeth Brenneman, *Devils Tower at the Crossroads: The NPS and the Preservation of Native American Cultural Resources in the 21st Century*, 18 PUB. LAND & RESOURCES L. REV. 5 (1997).

<sup>215</sup> 30 U.S. (5 Pet.) 1, 8 L.Ed. 25 (1831).

<sup>216</sup> See 42 U.S.C. § 1996 (1978); 25 U.S.C. § 3001-3013 (1996); 16 U.S.C. § 470(a) (1992); 5 U.S.C. § 504 (1993).

<sup>217</sup> See Exec. Order No. 13,007, 61 Fed. Reg. 26,771, 26,772 (1996).

ministrative actions such as the Devils Tower Climbing Management Plan), and in contemporary appellate decisions such as *Rupert*<sup>218</sup> and *Peyote Way*.<sup>219</sup> From this perspective, traditional religion clause doctrines are largely irrelevant, and should play no controlling role.

A slightly more centrist position speaks instead of a range of permissible behavior between the First Amendment's twin prohibitions against government either establishing religion or prohibiting the free exercise thereof—a “window” of continuing judicial adjustment within which federal government agencies may accommodate indigenous spiritual practices for the predominantly secular purpose of aiding in tribal cultural preservation (in keeping with the trust responsibility), while still acknowledging that in extreme cases the Establishment Clause concerns of non-Indians might be legitimately implicated.<sup>220</sup>

However, an opposing perspective holds that serious dangers lie in relying too heavily on the trust responsibility doctrine.<sup>221</sup> According to this alternative view,<sup>222</sup> while this approach might appear an appealing instrument for the assertion of tribal interests in the form of the atonement era statutes, President Clinton's 1996 Executive Order on sacred site management,<sup>223</sup> and decisions such as *Mancari*,<sup>224</sup> *Rupert*,<sup>225</sup> and *Peyote Way*,<sup>226</sup> the doctrine can be equally as destructive of tribal interests in the hands of federal legislators, administrators, and judges who determine that legal pluralism has gone too far and more national uniformity is needed. It was only 100 years ago, for instance, that Congress and the executive branch forcibly removed Indian children from their homes for education at remote government boarding schools and criminalized most tribal religious practices<sup>227</sup>—all based on the rationale that it was in the best interests of the United States' indigenous peoples that their cultures be obliterated and that they be fully assimilated into mainstream American society.<sup>228</sup> The courts rarely intervened during the assimilation era, on the theory that shaping the contours of the trust re-

<sup>218</sup> 957 F.2d 32 (1992).

<sup>219</sup> 922 F.2d 1210 (1991).

<sup>220</sup> See Alexander, *supra* note 160.

<sup>221</sup> See Winslow, *supra* note 114 (a thorough argument in favor of this perspective).

<sup>222</sup> See *id.*

<sup>223</sup> See Exec. Order No. 13,007, 61 Fed. Reg. 26,771, 26,772 (1996).

<sup>224</sup> 417 U.S. 535 (1974).

<sup>225</sup> 957 F.2d 32.

<sup>226</sup> 922 F.2d 1210.

<sup>227</sup> See Allison Dusias, *Ghost Dance and the Holy Ghost: The Echoes of the 19<sup>th</sup> Century Christianization Policy in the 20<sup>th</sup> Century Native American Free Exercise Cases*, 49 STAN. L. REV. 773, 783-805 (1997).

<sup>228</sup> See *id.*

sponsibility doctrine is mostly a matter of political judgment, and thus should be left to the political branches.<sup>229</sup>

Furthermore, this argument runs, the dangers of recognizing such plenary power over the fate of American Indian tribes to reside solely in the federal government did not entirely pass away with the twentieth century demise of the assimilation doctrine. Congress engineered a brief, but radical, reversal of federal Indian policy as recently as a half-century ago—the last time, prior to the present day, that states' rights-oriented conservatives controlled both houses of Congress.<sup>230</sup> Some remarkably similar policy initiatives have been advocated by conservative western politicians in the similarly configured 104th and 105th Congresses of the 1990s. An example would be Washington's Senator Gorton.<sup>231</sup> Moreover, the recent sovereignty gains of indigenous *tribes* under the trust responsibility doctrine have sometimes been at the expense of a severe loss of legal status by indigenous *persons*. The Supreme Court has denied state court access to Native Americans for the conduct of adoption proceedings, justifying such race-based disparate treatment of individuals on the theory that it benefited the class of which they were a part.<sup>232</sup> The same reasoning has been applied to rationalize the denial of equal protection to Native American women at family law,<sup>233</sup> and to bar Indian criminal defendants from access to the state judicial system, where but for their race they would have been tried under rules much less likely to result in the first degree murder convictions they suffered in federal court.<sup>234</sup>

From this position, relying too heavily on the trust responsibility doctrine to shield federal agency sacred site management decision-making from Establishment Clause attacks will work only as long as the courts are willing to rely exclusively on the "morally compelling need"<sup>235</sup> category of pluralist approaches; and will work only as long as Congress perceives a need to preserve and protect tribal culture rather than an equally compelling need to annihilate it. The exclusive emphasis on tribal sovereignty and the trust responsibility doctrine also can, and occasionally does, severely disadvantage the status of individual Native Americans, who would otherwise be entitled to all the rights and privileges of other American citizens.

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<sup>229</sup> See *id.*

<sup>230</sup> See BURTON, *supra* note 97, at 27-28.

<sup>231</sup> See Timothy Egan, *Senate Measures Would Deal Blow to Indian Rights*, N.Y. TIMES, August 27, 1997, at A20.

<sup>232</sup> See *Fisher v. District Court*, 424 U.S. 382 (1976).

<sup>233</sup> See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

<sup>234</sup> See *United States v. Antelope*, 430 U.S. 641 (1977).

<sup>235</sup> Post, *supra* note 202.

In Anastasia Winslow's view, a safer approach is to rely on equal protection arguments to safeguard the practices of indigenous religious observants rather than relying only on the good will of the government to accede to the wishes of the tribal government or other political entity of which the practitioners are members.<sup>236</sup> This grounds arguments for sacred site protection in other realms in the pluralist array, such as historical tradition (as applied in *Marsh v. Chambers*<sup>237</sup> and *Lynch v. Donnelly*<sup>238</sup>); and it has the added virtue of protecting the free exercise rights of individual Native Americans, or of assemblages of religious elders or dissidents within a tribe whose views may be at variance with those of the leadership of tribal government.

Winslow argues that such an approach could be effective in prohibiting the physical alteration of sacred sites under the jurisdiction of agencies such as the NPS.<sup>239</sup> However, it would be of little avail in situations such as the Devils Tower climbing management controversy. The trial court, and even the plaintiffs, readily acknowledged the NPS's authority to regulate tourist behavior in order to protect the physical integrity of the site (including wildlife habitat).<sup>240</sup> What plaintiffs asserted the NPS could *not* do was regulate such behavior in the interests of cultural preservation.<sup>241</sup>

But the debate over whether the trust responsibility doctrine or religion clauses doctrines should have the stronger claim over analysis of sacred site management tends to obscure the possibility of establishing an alternative, pluralism-based framework for analysis of these issues. The concluding section of this article therefore contains recommendations for the design of multi-cultural consultation processes for sacred site management planning; and for a step-wise approach to judicial review of those plans, which uses the trust responsibility doctrine as its alpha, but not always its omega.

#### IV. RECOMMENDATIONS FOR ADMINISTRATIVE PROCESS DESIGN AND JUDICIAL REVIEW OF PROCESS OUTCOMES

##### A. MULTI-CULTURAL CONSULTATION AND SITE-SPECIFIC MANAGEMENT PLANNING

Clearly, the issues surrounding the Devils Tower case have policy implications for federal land management agencies. There is a growing

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<sup>236</sup> See Winslow, *supra* note 114, at 1342.

<sup>237</sup> 463 U.S. 783 (1983).

<sup>238</sup> 465 U.S. 668 (1984).

<sup>239</sup> See *id.*

<sup>240</sup> See *Bear Lodge Multiple Use Ass'n*, 2 F. Supp. 2d 1448.

<sup>241</sup> See *id.*

need for agencies to re-examine their resource protection and preservation procedures and policies as they apply to areas considered "sacred" by American Indian groups.

Three factors contribute to the need for this reconsideration. First, existing legislation and agency regulations focus primarily on properties of "historic" value. This generally translates into policies that protect important archaeological sites or historic structures. Often, however, lands that are considered religiously important to American Indians do not contain such "fabric"—no archaeological remains or historic architecture. In fact, places of religious importance to Indian peoples may be an entire mountain or a valley—landscapes that exhibit no obvious remnant of human activity as viewed by non-Indian observers. While there are provisions for considering these places for protection as "traditional cultural properties"<sup>242</sup> under the NHPA (and its recent amendments),<sup>243</sup> the criteria used to classify these properties are largely, if not entirely, derived from the NHPA itself, and not necessarily from the perspective of the communities that define these places as important. A recent Executive Order directs federal agencies to protect Indian sacred sites to the extent possible under existing law, but leaves to each agency the task of designing procedures to ensure this protection.<sup>244</sup> However, existing federal law does not directly address these kinds of cultural properties, and unresolved First Amendment issues, such as those implicated in the Devils Tower case, continue to cast a shadow of legal uncertainty over multicultural consultations. Without clear provisions in law, agencies are left to craft creative solutions from legislation that may not be directly applicable.

Second, the internal procedures used by agencies to make planning and resource use decisions do not normally take into consideration the special relationship they have with federally-recognized Indian tribes. Too often, Indian tribes are viewed as just another set of special interest groups, when in fact their unique relationship with the federal government under the trust responsibility doctrine, and in some cases as a result of specific treaty language, gives them a legal status apart from the general public. To date, this special status has not translated into a set of consistent agency procedures (outside of the Bureau of Indian Affairs)

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<sup>242</sup> NAT'L PARK SERVICE, U.S. DEP'T. OF INTERIOR, INTERAGENCY RESOURCES DIVISION, BULLETIN 38, GUIDELINES FOR EVALUATING AND DOCUMENTING TRADITIONAL CULTURAL PROPERTIES. A critical element of this bulletin is the set of guidelines it provides to protect sites that are of contemporary importance to living communities. Bulletin 38 was the first serious attempt to deal with properties like Devils Tower, which are seen as having cultural importance to existing ethnic groups—beyond its value to the earth sciences.

<sup>243</sup> See 42 U.S.C. § 1996-1996(a) (1978).

<sup>244</sup> See Exec. Order No. 13,007, 61 Fed. Reg. 26,771, 26,772 (1996).

that recognize this legal relationship and afford consideration of tribal requests for sacred site protection on non-Indian federal lands.

Third, quite apart from any special legal relationship agencies may have with tribal peoples, the Devils Tower case points to the need for agencies to consider how resources are managed and how decisions are reached in a climate of cultural pluralism. To what extent should (or can) agencies be "blind" to the ethnic or heritage differences of their constituent publics? Aside from American Indian tribes, ethnic groups in the U.S. do not enjoy any unique set of the rights or privileges that are not shared by the general population. On the other hand, agency planners and decision-makers who are not knowledgeable and sensitive to the cultural differences of groups may be unable to avoid conflict that results from the clash of differing cultural values. While agencies should act in accordance with law and design procedures that are judged to be fair, the Devils Tower planning process suggests that there are ways to take cultural differences into consideration in ways that do not conflict with federal obligations under law. While the outcome was challenged as unconstitutional, the NPS's procedures for reaching that decision in a multi-cultural environment were not.

## B. JUDICIAL REVIEW

Following the advice given above, the first step for an agency contemplating the conduct of a multi-cultural consultation over sacred site management planning is to be as explicit as possible concerning the treaty-based, statutory, and regulatory authority under which the consultation is being conducted. If a recognized indigenous nation, tribe, or band has any sort of historical use relationship with the site in question, the trust responsibility doctrine is automatically implicated. The doctrine then becomes the starting point not only for process design, but for possible subsequent judicial review as well, at least insofar as a non-Indian Establishment Clause challenge to the resultant management plan is concerned.<sup>245</sup>

Also of relevance is the nature and duration of the historical relationship (including pre-Columbian) between the site in question and tribes participating in the consultation, as well as the circumstances under which the tribes were originally divested of unregulated access to the site. Likewise, it can be helpful to ascertain whether there has been any effort since such divestiture to use the site for ceremonial purposes. All of these factors may eventually influence how determinative a role

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<sup>245</sup> This is the approach followed by the federal appellate courts in *Rupert*, 957 F.2d 32, and *Peyote Way*, 922 F.2d 1210.

the trust relationship will play in sustaining a possible court challenge to a specific management plan.

The Supreme Court's pluralistic approach to Establishment Clause interpretation, as discussed in Robert Post's work,<sup>246</sup> was very much on the minds of the Fifth Circuit judges hearing the 1991 *Peyote Way* case on appeal.<sup>247</sup> First, they quoted an earlier Supreme Court decision on the subject: "[t]he course of constitutional neutrality in [First Amendment jurisprudence] cannot be an absolutely straight line; rigidity could well defeat the basic purpose of these provisions."<sup>248</sup> They then made the observation, quoted earlier in this article, to the effect that the trust relationship precludes the degree of separation ordinarily required by the First Amendment, and then added: "The federal government cannot at once fulfill its constitutional role of protector of tribal Native Americans and apply conventional separatist understandings of the establishment clause to that same relationship."<sup>249</sup>

A year later, in a unanimous opinion joined by then-judge Stephen Breyer, the First Circuit quoted this same language as a basis for its holding in *Rupert*.<sup>250</sup> These courts recognized the same point made near the beginning of this article: that spiritual practices are not separable from other aspects of traditional indigenous cultures, and that trying to vivisect them into component parts conforming to structural doctrines of the First Amendment religion clauses is an act that itself severely inhibits the ability of a tribe to preserve its culture within the context of a dominant nation-state.

The plaintiffs in the Devils Tower litigation understood this perspective, but used it to achieve the opposite effect. They reasoned that if spiritual beliefs and practices are not structurally separable from other aspects of Indian culture, then agencies such as the NPS should be precluded from any activities the purpose of which is to aid in the preservation of spiritual aspects of tribal culture, since these activities will inevitably involve the impermissible "teaching" of religion.<sup>251</sup>

Were such an argument to ultimately prevail, it would deny the NPS its ability to teach, a function it has performed to some degree almost since its inception. It teaches visitors not only about the natural history of these sites, but about their human history as well. Seen in one light, then, the Mountain States Legal Foundation's brief for the dissident commercial climbing guides may be regarded as an act of cultural warfare. It

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<sup>246</sup> See Smith & Manning, *supra* note 197.

<sup>247</sup> See *Peyote*, 922 F.2d 1210.

<sup>248</sup> *Id.* at 1217 (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 669 (1970)).

<sup>249</sup> *Id.*

<sup>250</sup> 957 F.2d at 35.

<sup>251</sup> See Brief for Plaintiff at 22, *Bear Lodge Multiple Use Ass'n. v. Babbitt*, No. 96-CV-063-D (D. Wyo. June 8, 1996).

is an effort to deny visitors to national parks and monuments the opportunity to learn about the cultural pluralism which is so important an element of the human history of the United States. It is an effort to suppress knowledge of the "other"—the minority culture groups who were the first to develop a relationship with the land, and whose moral claims to the ability to honor their deities at the sites where they are believed to reside pre-date by hundreds, or thousands, of years the imposition of the legal system of the dominant culture that now controls the landscape. Suppression of knowledge of pre-Columbian and historic indigenous cultures therefore also entails suppressing knowledge of the moral basis for their undisturbed occasional use of sites they hold sacred in the present day.

Ideally, NPS interpretive programs provide the public with accurate cultural and historical information on peoples who once lived and thrived on what are now park lands. These programs seek to provide the visitor with an understanding of how the cultural knowledge of these people provided a means of communication, methods of manufacturing appropriate tools, food procurement, finding shelter, or securing a mate. In general, they provide information on how a group—through the applications of its cultural knowledge—sustained itself under specific environmental conditions that existed when the park was inhabited.

Because of this, the maintenance of cultural knowledge, or successfully passing it along to subsequent generations, is of vital importance to the survival of the group as a whole. But environmental conditions often change, and cultural knowledge and behavior adapts to these changes in ways that allow for the survival of the cultural group. In the face of a change in environmental conditions many traditions survive and provide for continuity across generations. Some traditions may change, thus providing new knowledge that can be successfully used to sustain the cultural group. Consequently, cultural knowledge, and the teaching of this knowledge or tradition, is of inestimable value, and not just for the sake of preserving the ancient culture that originated them. Understanding how human cultures adapt to changes to sustain themselves in the face of environmental change has applicability to all human groups. Because of this, cultural knowledge, as it related to national park areas, is a national treasure as much as the landscapes found within them.<sup>252</sup>

Sometimes overlooked in our regard for national parks and monuments is the fact that they are also national classrooms. A quick survey of license plates in any major national park parking lot, or a careful listen to the accents and languages of visitors, reveals that people from all over

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<sup>252</sup> For a critical review of related social and anthropological theory, see ROY ELLEN, *ENVIRONMENT, SUBSISTENCE AND SYSTEM: THE ECOLOGY OF SMALL-SCALE SOCIAL FORMATIONS* (1994).

the nation and all over the world are visiting these sites. We come to learn about the natural wonders of these places; but we also come to learn about who we are by learning who we were. The parks are an inter-cultural crossroads, in part, because they are also crossroads in time. We encounter our collective past there as an important aspect of the ongoing task of charting our collective future as a culturally diverse society.

Some scholars claim that the United States is now entering a somber and frightening era characterized by what they call a "culture war"<sup>253</sup>—a period when the assertion of absolute and mutually incompatible individual rights is crowding out and shouting down our concomitant efforts to understand, appreciate, respect, and accommodate the cultural pluralism that has always been a defining feature of the American experience.<sup>254</sup> According to some of these same scholars, about all that keeps this war of words from becoming a war of bombs and bullets is the mitigating and moderating influences of our institutions (governmental, educational, commercial, and religious), for it is through these institutions that the social values of tolerance, respect for difference, and discernment of commonalities across differences are taught.<sup>255</sup> Of course, other commentators assert that, in isolated instances, the shooting has already started, as exemplified by recent acts of domestic political terrorism committed against family planning clinics, the field offices of western federal land management agencies, and against federal employees and their families.<sup>256</sup>

Our national parks and monuments are surely among these mediating and mitigating institutions. In addition to teaching our pluralist history through its interpretive programs, inter-cultural consultations such as the one leading up to the Devils Tower Climbing Management plan provided an opportunity for parties to the process to teach and to learn about each other— about who they are, what they value and why, and how it might be possible to work together to achieve their respective ends. When it works as expected, such a process can provide not only an educational function, but also a community building and healing function. It is a mode of interaction upon which the future of peaceable life in our pluralistic society may well depend. This is one of the reasons why it is so important for federal judges to uphold federal agency discre-

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<sup>253</sup> JAMES DAVISON HUNTER, *CULTURE WAR* (1991).

<sup>254</sup> For a treatise dealing exclusively with the assertion of rights aspect of this phenomenon, see MARY ANN GLENDON, *RIGHTS TALK* (1991).

<sup>255</sup> See RHYS H. WILLIAMS, *Cultural Wars, Social Movements, and Institutional Politics, in CULTURAL WARS IN AMERICAN POLITICS* 283, 284-93 (Rhys H. Williams ed., 1997).

<sup>256</sup> See James Davison Hunter, *Reflections on the Culture Wars Hypothesis, in THE AMERICAN CULTURE WARS: CURRENT CONTESTS AND FUTURE PROSPECTS* 243, 249 (James L. Nolan, Jr. ed., 1996).

tion—under both the trust doctrine *and* the First Amendment—to administer these processes and implement their outcomes, unless those outcomes are deemed such egregious Establishment Clause infractions that some mitigation is called for.

From the standpoint of the culture wars hypothesis, it should come as no surprise that the interpretive program as well as the climbing management plan at Devils Tower fell under attack in the Mountain States Legal Foundation's challenge. Its brief represents a fairly overt attempt at the assertion of cultural dominance—its effect, if not its explicit intent, being to suppress dissemination of knowledge of our pluralist heritage, and to homogenize the present in the image of the dominant culture. In this case, resort to Establishment Clause jurisprudence to trump the trust responsibility doctrine can be seen as an effort by ideologically motivated plaintiffs to enlist federal judges in this cultural call to arms.

Furthermore, some proponents of the culture wars perspective also point out that the drive for cultural hegemony on either side is often accompanied by an economic agenda as well: toward redistributive public policies on the part of "progressives," and toward privatization on the part of "traditionalists."<sup>257</sup> It is worth noting that every Free Exercise claim the tribes have lost (and they have basically lost all of the land-based ones, at least in the published cases), has involved a tribal effort to halt, or at least scale down, privately remunerative uses of public lands.<sup>258</sup> In the Devils Tower case, it was not recreational rockclimbers who brought the Establishment Clause challenge subsequent to adoption of the climbing management plan. It was a small group of dissident commercial climbing guides who might suffer financial loss if even the voluntary climbing ban were successful; that is, if their would-be clients developed moral qualms about climbing the Tower once they had been asked (but not ordered) by the NPS not to. Although questions of cultural dominance are certainly at stake here, it is not difficult to imagine that these plaintiffs may have been a little less concerned about perceived government coercion to honor the indigenous deities of Bear's Lodge than they were about a temporary impairment of their ability to use public land for private gain.

We are not asserting here that any interested party or federal jurist who perceives Establishment Clause implications in a federal agency management plan that seeks to somehow limit the range of public activities at a public place in the interest of spiritual accommodation is an absolutist cultural warrior or an opportunistic privatizer cruising under First Amendment colors. As defendant-intervenors in the Devils Tower

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<sup>257</sup> William Hoynes, *Public Television and the Culture Wars*, in *THE AMERICAN CULTURAL WARS*, *supra* note 145, at 61.

<sup>258</sup> See *supra* notes 131-33, 138.

case demonstrated, there are plenty of examples of the NPS's accommodation of religious practices at the sites they manage, from the weekly Christian worship services held in many national parks, to the several churches that are also national historical sites and monuments, to the national cemeteries.<sup>259</sup> At all these sites, non-observant visitor behavior is regulated in the interest of ceremonial participants. None of this behavioral regulation is seen as an establishment of religion, but rather as equally important accommodation of it, which First Amendment jurisprudence also encourages.

In similar future situations, there are several fact-specific questions that agencies should address when drafting sacred site management plans, and that reviewing courts can use in making their own determinations as to whether review of the plan should be governed only by trust responsibility doctrine principles, or whether Establishment Clause principles have a role to play as well. First, what is the nature of the otherwise allowable activity that is sought to be limited?<sup>260</sup> Second, how restrictive is the proposed limitation?<sup>261</sup> Third, over what duration will the limitation occur?<sup>262</sup> Fourth, is the limitation solely for the purpose of cultural preservation, or are there other congruent management objectives being sought as well?<sup>263</sup> Finally, what is the impact on third parties?<sup>264</sup>

It seems generally that the more pervasive and permanent the proposed restriction on an otherwise allowable non-Indian use of a sacred site solely on behalf of ceremonial practices preservation, the more troubling such a proposal has been to the courts, whether it was in the form of a tribal Free Exercise claim or a non-Indian Establishment Clause claim. In our view, it is only in cases toward the "pervasive and

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<sup>259</sup> See Brief for Defendant-Intervenor, *Bear Lodge Multiple Use Ass'n*, 2 F. Supp. 2d 1448. The brief, submitted by the Indian Law Resource Center, relies on supporting affidavits.

<sup>260</sup> This goes to the related issues of how integral to the traditional uses of the park the activity is, and what percentage of park visitors would be directly affected by the proposed limitation.

<sup>261</sup> That is, how wide an array of activities is precluded and over how long a period of time.

<sup>262</sup> This can be estimated as a percentage of total visitor days.

<sup>263</sup> This is not to imply that cultural preservation under one or more of the atonement-era statutes, implementing regulations, and executive orders described in this article is not a sufficient basis for seeking behavioral limitations—just that there is sometimes strength in multiple justifications for management planning.

<sup>264</sup> The plaintiffs' brief included a complaint that a popular tourist activity at Devils Tower was watching the rock climbers—something that might be denied them were the plan to be fully implemented. Conversely, however, there was no consideration at trial of the possibility that there might be just as many tourists wishing to see the Tower in its pre-Columbian, if not Edenic state; that is, without climbers using space-age equipment to ascend its many crags and crevices.

permanent restrictions solely for ceremonial reasons”<sup>265</sup> end of the continuum (of which the Devils Tower climbing management plan is not one) that Establishment Clause principles should properly be implicated. And even at that end, the “historical traditions” rationale offered in cases like *Lynch*<sup>266</sup> and *Chambers*,<sup>267</sup> as well as the secular purpose intent of the trust doctrine itself (in relation to the first of the three elements of the *Lemon* test), can provide federal judges with the flexibility they need to accommodate the cultural preservation goals of a sacred site management plan, if indeed it is flexibility that the judge is seeking.<sup>268</sup>

In the end, a great deal will depend on whether a federal judge in a given case wishes to craft a workable articulation of the trust responsibility and Establishment Clause doctrines, or instead to simply use the latter to cancel the former. Judge Downes’ decision using purely Establishment Clause jurisprudence to uphold accommodation of Indian spiritual practices on public lands rather than inhibit them is as of yet a rarity. Judges have many options at their disposal, as this discussion of constitutional pluralism and some related cases make clear. But in disputes implicating both cultural and legal pluralism, it is also true that parties seeking accommodation of difference face a substantial challenge. For in the binary world of constitutional adjudication, “they are bringing a conflict with the dominant culture into an institution of that same culture which, while committed to the autonomy of law, rights, and liberties, is also part of a nation-state committed to the integrity and unity of the larger body politic.”<sup>269</sup>

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<sup>265</sup> One example is total exclusion, as urged by the Navajo nation in its unsuccessful free exercise argument in *Badoni*. 638 F.2d 172 (10<sup>th</sup> Cir. 1980).

<sup>266</sup> 465 U.S. 668.

<sup>267</sup> 463 U.S. 783.

<sup>268</sup> For instance, there is a “historical tradition” of indigenous spiritual observances at Devils Tower considerably pre-dating its seizure by the dominant culture. See Brief for Defendant-Intervenor, Bear Lodge Multiple Use Ass’n v. Babbitt, 2 F. Supp. 2d 1448 (relying on supporting affidavits). If the courts can ignore the *Lemon* test, in allowing state legislatures to hire chaplains to open working sessions with Christian prayer and local governments to display Christian creches on public property in the name of historical preservation of Euro-American culture, surely the same deference could and should be granted to the NPS. It is simply seeking to honor some well-established spiritual practices—historical traditions that pre-date not only the adoption of the First Amendment, but Columbus’ first landfall in the Caribbean as well.

<sup>269</sup> JILL NORGREN AND SERENA NANDA, *AMERICAN CULTURAL PLURALISM AND LAW* 7 (2d ed. 1996). In the federal trial court proceedings, Lakota elders approached the court clerk to ask if it might be possible for a few of the elders to speak about Devils Tower and its meaning to them—in the courtroom, but in the absence of the adversarial question and answer format that the federal rules of civil procedure normally require. See *id.* What they were asking for was a chance to speak about the Tower and its important cultural meanings for Indian peoples in ways that are appropriate to their own context. The court, apparently concerned that it not be perceived as overly accommodative of the wishes of tribal spiritual advisors (as plaintiffs were asserting the NPS had been), denied their request. See *id.*

Experience suggests that there are segments of many American Indian tribes that generally have no desire to be involuntarily subjected to such unifying forces, inasmuch as when it has happened historically, it has usually been to the severe disadvantage of these indigenous nations within the larger, more dominant nation-state. The challenge for federal land managers is to find ways to accommodate tribal needs for autonomy and cultural preservation while simultaneously honoring the Establishment Clause principles discussed in this article. And the task for reviewing judges is to recognize that, insofar as sacred site management planning is concerned, it is in the consensus-oriented mutual accommodation of inter-cultural differences by parties in conflict at sacred sites that the "integrity and unity of the larger body politic"<sup>270</sup> in as pluralistic a nation as ours is actually to be found.

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<sup>270</sup> *Id.*

