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SACRED EASEMENTS

*Patrick E. Reidy, C.S.C.**

In the last forty years, Native American faith communities have struggled to protect their sacred sites using religious liberty law. When confronting threats to sacred lands, Native Americans stridently assert constitutional and statutory free exercise protections against public authorities. But unlike litigation involving non-Indian religious property, cases involving sacred sites seek to protect land that tribal faith communities do not themselves own. Because they lack an explicit ownership interest, Native Americans struggle to protect their sacred sites from desecration and destruction. Courts asked to weigh Indian religious liberty claims against non-Indian property claims always side with the landowner. Since sacred sites are often located on land owned by the federal government, the government regularly wins. Religious liberty precedent leaves sacred sites effectively unprotected.

This Article proposes a new approach that is rooted in property law. It argues that Native American religious practice at sacred sites may have created circumstances under which easements arose by force of law.

* Associate Professor of Law, Notre Dame Law School; priest of the Congregation of Holy Cross. I received valuable feedback on previous drafts of this Article from participants in the Yale Law School Property Seminar, the Nootbaar Fellows Conference, and the Notre Dame Law School Faculty Colloquium. I offer my heartfelt thanks to Stephanie Barclay, Christian Burset, Sam Bray, Sherif Girgis, Luke Goodrich, Daniel Markovits, Jen Mason McAward, John Meiser, Nell Newton, Chris Pagliarella, Claire Priest, Nicole Garnett, Rick Garnett, Michael Helfand, Carol Rose, Reva Siegel, Jim Sonne, James Stern, and Gerald Torres for their insightful comments and instructive suggestions. My thanks extend to Audrey Payne and Andrew White, whose masterful editing and thoughtful encouragement brought this Article to completion.

Before the federal government severed their ancestral lands, Native American tribes used certain inherently sacred parts of their territory regularly, necessarily, and predictably for their religious practice. Where Native American claimants can demonstrate sacred land uses that persisted through dispossession, flowing from intergenerational traditions uniting past and present, their religious practice can provide the kind of secular evidence courts typically consider in defining easements. An easement arising by force of law—by prescription, customary claim, or implication—would allow their tribes to exercise an ownership interest in their sacred sites, rather than assert an access right that can be balanced against another owner's right to exclude.

This Article also argues that Congress can, and should, create a statutory property right for tribes to claim an explicit ownership interest in their sacred sites, corresponding to their sacred land use. Modeled on conservation easements, such nonpossessory ownership interests would preserve sacred sites for Native American religious practice. Tribes granted "sacred easements" could monitor—and, if necessary, constrain—both present and future uses of government-owned lands, ensuring compliance with the needs of their religious practice without barring public access to sacred sites.

Divided property rights can help Native American faith communities and the federal government assuage fears of mutual exclusion from sacred sites located on public land. By allowing tribes to claim sacred land use easements in their ancestral territory, the government can help to cure lingering defects in title created by tribal land acquisition efforts during the nineteenth century. Sacred easements accord with the government's trust responsibility for tribal religious exercise. Historic federal efforts to suppress Native religions warrant present federal accommodation of Native sacred land use.

"The Constitution does not, and courts cannot, offer to reconcile the various competing demands on government, many of them rooted in sincere religious belief . . . . That task, to the extent that it is feasible, is for the legislatures and other institutions . . . . Whatever rights the Indians may have to the use of the area, however, those rights do not divest the Government of its right to use what is, after all, its *land."*

– Lyng v. Northwest Indian Cemetery Protective Association[1]

INTRODUCTION

Since "time immemorial," Western Apaches have lived and worshipped on Chi'chil Biłdagoteel, known in English as Oak Flat.[2] Situated within Arizona's vibrant Tonto National Forest, Oak Flat embraces "jagged cliffs, boulder fields, grassy basins, Emory oaks, and perennial waters" that refresh "songbirds, mountain lions, fox, bear, and deer."[3] Western Apaches believe that the Creator gives life to all things, including air, water, and Mother Earth herself, Nahagosan.[4] They "strive to remain intertwined with the earth, with the mother."[5] While Western

[1] 485 U.S. 439, 452–53 (1988).

[2] Emergency Motion for an Injunction Pending Appeal Under Circuit Rule 27-3 at 1, Apache Stronghold v. United States, 38 F.4th 742 (9th Cir. 2022) (No. 21-15295) [hereinafter Emergency Motion].

[3] Id. at 3–4 ("Oak Flat [is] a 6.7-square-mile traditional cultural property between Apache Leap on the west and Ga'an Canyon (called Devil's Canyon by non-Indians) on the east."); Zinaida Carroll, The Spiritual Connection of Indigenous Women to the Land and its Crucial Role in the Apache's Battle for Sovereignty, Nat'l Indigenous Women's Res. Ctr., https://www.niwrc.org/restoration-magazine/june-2021/oak-flat-chichil-bildagoteel [https://perma.cc/MFW3-NLY2] (last visited Feb. 26, 2024).

[4] Emergency Motion, supra note 2, at 3.

[5] Id. (citation omitted).

Apache religious and cultural identities are inextricably tied to the land of their ancestors, Oak Flat remains the tribes' most sacred site, a place "uniquely endowed with holiness and medicine," a kind of "direct corridor" to their religion.[6] Ritual practices defined by ancestral custom unite Western Apaches with Mother Earth and her Creator, but also with their parents and grandparents, whose own parents and grandparents passed down tribal religious traditions at Oak Flat.[7] Western Apaches gather "sacred medicine plants, animals, and minerals essential to . . . [religious] ceremonies," drawing "sacred spring waters that flows [sic] from the earth with healing powers not present elsewhere," offering ancient prayers and songs that testify to their place in creation.[8] Many fundamental religious practices—including Sunrise Ceremonies and Holy Grounds Ceremonies—"must take place there," since only from Oak Flat can Western Apache "prayers directly go to [the] creator."[9] Neither the "powers resident there," nor Western Apache religious practices that "pray to and through these powers can be relocated."[10]

The federal government has protected Oak Flat for more than six decades, in keeping with its trust responsibility to Western Apache tribal communities in Arizona.[11] But in 2014, a last-minute rider attached to the

[6] Id. at 5. As the Emergency Motion explained, "Central to this connection [between Apaches and the Creator] are the Ga'an, who are 'guardians' and 'messengers' between the Creator and people in the physical world—roughly comparable to angels in Christianity. Usen [the Creator] . . . created specific 'blessed places' for the Ga'an to dwell. One of the most important of the Ga'an dwelling places is Oak Flat . . . ." (citations omitted). Id. at 3. Chi'chil Biłdagoteel holds significant cultural and spiritual meaning for many Native American tribes, including the San Carlos Apache, Tonto Apache, White Mountain Apache, Yavapai Apache, Zuni, Hopi, Yavapai Prescott Indian Tribe, Gila River Indian Community, and Saltwater Pima Maricopa Indian Community. Carroll, supra note 3.

[7] See Declaration of Cranston Hoffman Jr. at 2–3, Apache Stronghold v. United States, 519 F. Supp. 3d 591 (D. Ariz. 2021) (No. 21-15295) [hereinafter Declaration].

[8] Emergency Motion, supra note 2, at 5.

[9] Id. (citation omitted). Beyond the gathering of medicinal plants, animals, minerals, and spring water, Apache religious practices at Oak Flat include the Sunrise Ceremony, Holy Ground ceremonies, and sweat lodge ceremonies. See id. at 6–8 (describing the Sunrise Ceremony).

[10] Id. at 5 (internal quotation marks omitted) (citation omitted).

[11] President Eisenhower reserved 760 acres of Oak Flat for "public purposes" to protect it from mining in 1955. Reserving Lands Within National Forests for Use of the Forest Service as Camp Grounds, Recreation Areas, or for Other Public Purposes, 20 Fed. Reg. 7336, 7336–37 (Oct. 1, 1955) (referred to by the Department of the Interior as Public Land Order 1229). President Nixon renewed that protection in 1971. Modification of Public Land Order 1229, 36 Fed. Reg. 19029, 19029 (Sept. 25, 1971) (Public Land Order 5132). The National Park Service eventually placed Oak Flat in the National Register of Historic Places: "Chi'chil Biłdagoteel is an important feature of the Western Apache landscape as a sacred site, as a source of

National Defense Authorization Act revoked presidential orders protecting the site and authorized transfer of a 2,422-acre parcel—including the entirety of Oak Flat—to Resolution Copper, a foreign-owned mining company.[12] Since Resolution intends to "tunnel below the ore, fracture it with explosives, and remove it from below," any land above its mine will eventually collapse into a pit nearly two miles wide and 1,100 feet deep.[13] Oak Flat lies just outside the boundaries of San Carlos Apache Reservation, where trust obligations assumed by the federal government might have offered its cliffs and oaks and waters renewed protection.[14] Instead, the most sacred site in traditional Western Apache religion would be destroyed forever.[15]

Oak Flat is hardly the first Native American sacred site threatened with destruction or desecration.[16] In 2020, Indian burial grounds were "blown

supernatural power, and as a staple in their traditional lifeway." Emergency Motion, supra note 2, at 10 (quoting Chi'chil Biłdagoteel Historic District, Traditional Cultural Property, Nat'l Reg. of Historic Places Registration Form, at 8 (Dec. 2, 2015), https://www.resolutionmineeis.us/sites/default/files/references/nez-2016.pdf [https://perma.cc/8HGZ-VTCB]).

[12] See Eric Lipton, In Last Rush, Trump Grants Mining and Energy Firms Access to Public Lands, N.Y. Times (Jan. 16, 2021), https://www.nytimes.com/2020/12/19/us/politics/in-last-rush-trump-grants-mining-and-energy-firms-access-to-public-lands.html [https://perma.cc/FB3K-TZSR]; Lydia Millet, Selling off Apache Holy Land, N.Y. Times (May 29, 2015), https://www.nytimes.com/2015/05/29/opinion/selling-off-apache-holy-land.html [https://perma.cc/84DY-5ZN5].

[13] Emergency Motion, supra note 2, at 12.

[14] See United States v. Mitchell, 463 U.S. 206, 225–26 (1983) (recognizing that the federal government's control over tribal resources may give rise to fiduciary duties, based on common law trust principles); Seminole Nation v. United States 316 U.S. 286, 296–97 (1942) ("In carrying out its treaty obligations with the Indian tribes, the Government is something more than a mere contracting party. Under a humane and self imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, it has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards.").

[15] Emergency Motion, supra note 2, at iii, 12–14 ("'Mitigation measures cannot replace or replicate the tribal resources and traditional cultural properties that would be destroyed.' As Apache Stronghold members testified, this would render their core religious practices impossible." (quoting 3 U.S. Dep't of Agric., Final Environmental Impact Statement: Resolution Copper Project and Land Exchange 856 (Jan. 2021), https://www.resolutionmineeis.us/sites/default/files/feis/resolution-final-eis-vol-3.pdf [https://perma.cc/E3XW-8VU4])).

[16] Throughout this Article, I use "Native American" and "Indian" interchangeably. While I acknowledge that these terms are imprecise, my intent is to locate within them the numerous and diverse peoples whose traditional homelands fall within the political borders of the United States, including federally recognized Indian tribes, state-recognized tribes, tribes seeking legal recognition, Alaska Natives, and Native Hawaiians. Each of these Native peoples has a

up" during construction of the Mexico-United States border wall.[17] Nor is *Apache Stronghold v. United States*[18] the first case to challenge such a threat on religious liberty grounds.[19] In 2018, Indian free exercise claims failed to protect an ancient stone altar and tribal burial grounds from government bulldozers, which a federal district court allowed for purposes of road expansion.[20] When confronting threats to their sacred sites, Native American communities stridently assert the free exercise protections of the First Amendment,[21] the federal Religious Freedom Restoration Act[22] ("RFRA"), and the Religious Land Use and Institutionalized Persons Act[23] ("RLUIPA") against public authorities. Yet unlike religious liberty litigation involving non-Indian property—

unique history and legal relationship with the United States, though many share a common history of sacred site dispossession.

[17] See, e.g., Native Burial Sites Blown Up for US Border Wall, BBC News (Feb. 10, 2020, 3:24 AM), https://www.bbc.com/news/world-us-canada-51449739 [https://perma.cc/H4X5-CAMJ] (describing places of worship for the Tohono O'odham Nation near Organ Pipe Cactus National Monument in Arizona); see also Nina Lakhani, 'That's Genocide': Ancient Tribal Graves Threatened by Trump Border Wall, The Guardian (Dec. 16, 2019, 9:37 AM), https://www.theguardian.com/environment/2019/dec/16/tribe-fights-to-save-ancestral-graves-in-the-path-of-trumps-border-wall [https://perma.cc/9RMW-8VQV] (discussing the threat to such places of worship months before their destruction).

[18] 38 F.4th 742 (9th Cir. 2022), *aff'd en banc*, 95 F.4th 608 (9th Cir. 2024), *opinion modified on denial of reh'g*, No. 21-15295, slip op. (9th Cir. May 14, 2024).

[19] See, e.g., Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1062–63 (9th Cir. 2008), *cert. denied*, 556 U.S. 1281 (2009); Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 441–42 (1988); Wilson v. Block, 708 F.2d 735, 739 (D.C. Cir. 1983); Crow v. Gullet, 541 F. Supp. 785, 788 (D.S.D. 1982); Badoni v. Higginson, 638 F.2d 172, 175 (10th Cir. 1980); Sequoyah v. Tenn. Valley Auth., 620 F.2d 1159, 1160 (6th Cir. 1980); Julie Watson, Tribe Says New Border Wall Harming Burial Sites; Sues Trump, Associated Press (Aug. 12, 2020, 4:38 PM), https://apnews.com/277668808d1209533cb2ae0ae5878599 [https://perma.cc/Q4RD-SGTC].

[20] See Slockish v. U.S. Fed. Highway Admin., No. 08-cv-01169, 2018 WL 2875896, at *1 (D. Or. June 11, 2018); Slockish v. U.S. Fed. Highway Admin., No. 08-cv-01169, 2020 WL 8617636, at *17–18 (D. Or. Apr. 1, 2020); Slockish v. U.S. Dep't of Transp., No. 21-35220, 2021 WL 5507413, at *1 (9th Cir. Nov. 24, 2021), *cert. denied*, 144 S. Ct. 324 (2023); Maxine Bernstein, Tribal Members to Challenge Decision in Destruction of Sacred Burial Site, The Oregonian (Mar. 5, 2018, 3:34 PM), https://www.oregonlive.com/environment/2018/03/tribal_members_to_challenge_ju.html [https://perma.cc/MA5V-H7AU].

[21] U.S. Const. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."). The Establishment Clause and the Free Exercise Clause were likewise incorporated against the states through the Fourteenth Amendment. See Everson v. Bd. of Educ., 330 U.S. 1, 15 (1947) (incorporating the Establishment Clause); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) (incorporating the Free Exercise Clause).

[22] 42 U.S.C. §§ 2000bb–2000bb-4 (2018).

[23] 42 U.S.C. §§ 2000cc–2000cc-5 (2018).

challenging, for example, zoning regulations that preclude the construction of a mosque,[24] or an eminent domain action against church summer camps[25]—cases like *Apache Stronghold* seek to protect land that tribal faith communities do not themselves own. In fact, Native Americans rarely own the property upon which they seek to practice their religion; historic dispossession of tribal lands remains largely unremedied in the United States.[26] Because they lack an explicit ownership interest, Native Americans struggle to protect their sacred sites from destruction or desecration. Courts asked to weigh Indian religious liberty claims against non-Indian property claims always side with the landowner; since most sacred sites are located on land owned by the federal government, the government always wins.[27]

[24] See, e.g., Albanian Associated Fund v. Twp. of Wayne, No. 06-cv-3217, 2007 WL 2904194, at *10 (D.N.J. Oct. 1, 2007) ("[O]ver the past 22 years, the Mosque's congregation has grown from fewer than 100 individuals to over 200 families. '[Houses of worship] cannot function without physical space adequate to their needs and consistent with their theological requirements. The right to build, buy, or rent such a space is an indispensable adjunct of the core First Amendment right to assemble for religious purposes.'" (quoting Mintz v. Roman Cath. Bishop of Springfield, 424 F. Supp. 2d 309, 321 (D. Mass. 2006))).

[25] See, e.g., United States v. 564.54 Acres of Land, 441 U.S. 506, 508 (1979) (involving camps taken from the Southeastern Pennsylvania Synod of the Lutheran Church in America); State Highway Dep't v. Augusta Dist. of N. Ga. Conf. of Methodist Church, 154 S.E.2d 29, 30 (Ga. Ct. App. 1967) (allowing consequential damages for property taken from "a recreational and Christian training camp area for youth").

[26] See Stephanie Hall Barclay & Michalyn Steele, Rethinking Protections for Indigenous Sacred Sites, 134 Harv. L. Rev. 1294, 1297 (2021); Kevin J. Worthen, Eagle Feathers and Equality: Lessons on Religious Exceptions from the Native American Experience, 76 U. Colo. L. Rev. 989, 1007 (2005) [hereinafter Worthen, Eagle Feathers and Equality]. Historically, the federal government "justified" tribal land dispossession through legal doctrines upholding "'the exclusive right of the United States to extinguish' Indian title . . . by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise." United States v. Santa Fe Pac. R.R. Co., 314 U.S. 339, 347 (1941) (quoting Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 586 (1823)).

[27] See Kristen A. Carpenter, A Property Rights Approach to Sacred Sites Cases: Asserting a Place for Indians as Nonowners, 52 UCLA L. Rev. 1061, 1063 (2005) [hereinafter Carpenter, A Property Rights Approach to Sacred Sites Cases] ("[A] special problem that American Indians face in practicing their religious and cultural activities at sacred sites [is that] many Indian sacred sites are now located on lands owned by the federal government and the government has the legal power to destroy them."); Barclay & Steele, supra note 26, at 1297 ("The problem is as follows: because tribes were divested of their traditional homelands by the government, Indigenous peoples are often placed in the difficult position of being beholden to the government to continue to engage in centuries-old practices and ceremonies."); Fed. Agencies Task Force, American Indian Religious Freedom Act Report, at i (1979) ("Native American people have been denied access to sacred sites on federal lands for the purposes of worship. When they have gained access, they have often been disturbed during their worship by federal officials and the public. Sacred sites have been needlessly and thoughtlessly put to

Courts rarely construe the free exercise of religion as a property right. Claims involving religious liberty and property rights remain largely incommensurate, particularly for Native American worshippers who struggle to prove a substantial burden on their religious practice. While courts interpret constitutional and statutory religious liberty protections to shield houses of worship from eminent domain, they often allow condemning authorities to take other properties owned by faith communities, including properties that faith communities consider integral to their religious missions.[28] In these "church takings" cases, courts frequently make judgments based on their own determinations of what counts as "essential" for faith communities' free exercise of religion, imposing an inappropriate, judicial theology on religious property.[29]

other uses which have desecrated them," quoted in Barclay & Steele, supra note 26, at 1304 n.32).

[28] See Patrick E. Reidy, C.S.C., Note, Condemning Worship: Religious Liberty Protections and Church Takings, 130 Yale L.J. 226, 235 (2020) ("While courts consistently protect those structures deemed necessary for religious devotion, for ritual prayer, and for worship, many church-owned parcels and buildings have been successfully condemned. Paradigmatically, courts will protect from eminent domain *the religious sanctuary itself*—that physical structure in which the faith community gathers for worship. But case law reflects that courts do allow condemning authorities to take other connected properties owned by the faith community—including parking lots and cemeteries, as well as camps and undeveloped parcels of land. These properties are taken even though they, like the religious sanctuary, are often integral to the community's religious mission." (footnotes omitted)).

[29] Id. at 270 ("Decisions to block takings *inside* the sanctuary while allowing takings *outside* the sanctuary—all because of *where* and *how* courts believe religious exercise paradigmatically occurs—impose an inappropriate, judge-made theology on church property."). When courts make judgments about religious property based on what they deem "essential" for faith communities' free exercise of religion, they resolve theological questions that judges are not competent to answer, the very thing First Amendment jurisprudence forbids. See, e.g., Holt v. Hobbs, 574 U.S. 352, 361–62 (2015) (dismissing the district court's misguided evaluation of an Islamic prisoner's sincere religious exercise under RLUIPA's "substantial burden" analysis); Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 185–87 (2012) (summarizing cases that underscore the Court's avoidance of "quintessentially religious controversies whose resolution the First Amendment commits exclusively to [church authorities]" (quoting Serbian E. Orthodox Diocese for U.S. & Can. v. Milivojevich, 426 U.S. 696, 720 (1976))); Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531 (1993) ("[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." (quoting Thomas v. Rev. Bd. of Ind. Emp. Sec. Div., 450 U.S. 707, 714 (1981))); Emp. Div. v. Smith, 494 U.S. 872, 886–87 (1990) ("It is no more appropriate for judges to determine the 'centrality' of religious beliefs before applying a 'compelling interest' test in the free exercise field, than it would be for them to determine the 'importance' of ideas before applying the 'compelling interest' test in the free speech field."); *Thomas*, 450 U.S. at 714 ("The determination of what is a 'religious' belief or practice . . . is not to turn upon a judicial perception of the particular belief or practice in question . . . ."); Wisconsin v. Yoder, 406 U.S.

In cases involving sacred sites, courts make similar judgments about what is "essential" to Native American religious practice.[30] But unlike in church takings, courts largely overlook the property aspects of Indian claims to sacred sites. Courts focus on arguments that sound in Indian religious liberty, rather than property or quasi-property, only to frame their ultimate decision in terms of non-Indian ownership rights. Because Native American religious claimants lack an explicit ownership interest in their sacred sites, courts can—and consistently do—decide in favor of the government as landowner, regardless of anticipated or actual burdens on Indians' free exercise of religion.[31] The Supreme Court's formulation of government ownership rights in *Lyng v. Northwest Indian Cemetery Protective Association* effectively bars most religious liberty arguments that Native Americans attempt to make in defense of their sacred sites: "Whatever rights the Indians may have to the use of the area, however, those rights do not divest the Government of its right to use what is, after all, *its* land."[32]

205, 215 (1972) ("[A] determination of what is a 'religious' belief or practice entitled to constitutional protection may present a most delicate question . . . .").

[30] See, e.g., Wilson v. Block, 708 F.2d 735, 744 (D.C. Cir. 1983) ("[P]laintiffs seeking to restrict government land use in the name of religious freedom must, at a minimum, demonstrate that the government's proposed land use would impair a religious practice that could not be performed at any other site."); Sequoyah v. Tenn. Valley Auth., 620 F.2d 1159, 1164 (6th Cir. 1980) ("Granting as we do that the individual [Cherokee] plaintiffs sincerely adhere to a religion which honors ancestors and draws its spiritual strength from feelings of kinship with nature, they have fallen short of demonstrating that worship at the particular geographic location in question is inseparable from the way of life (*Yoder*), the cornerstone of their religious observance (*Frank*), or plays the central role in their religious ceremonies and practices (*Woody*)."); Badoni v. Higginson, 455 F. Supp. 641, 646 (D. Utah 1977) ("Plaintiffs fail, however, to demonstrate in any manner a vital relationship of the [religious] practices in question with the Navajo way of life or a 'history of consistency' which would support their allegation of religious use of Rainbow Bridge . . . .").

[31] See Allison M. Dussias, Ghost Dance and Holy Ghost: The Echoes of Nineteenth-Century Christianization Policy in Twentieth-Century Native American Free Exercise Cases, 49 Stan. L. Rev. 773, 823–33 (1997) ("[F]ederal courts have subordinated the free exercise rights of Native American plaintiffs to property rights."); Alex Tallchief Skibine, Towards a Balanced Approach for the Protection of Native American Sacred Sites, 17 Mich. J. Race & L. 269, 270 (2012) ("[A]mong all the Native American cultural and religious issues, protection of sacred sites is the one area where Native Americans have enjoyed by far the least success."); Marcia Yablon, Note, Property Rights and Sacred Sites: Federal Regulatory Responses to American Indian Religious Claims on Public Land, 113 Yale L.J. 1623, 1634–38 (2004) (asserting that *Lyng* was correct, in part, because of the "inability of Western law and legal institutions to protect native land rights").

[32] 485 U.S. 439, 453 (1988); e.g., Apache Stronghold v. United States, No. 21-15295, slip op. at 27 (9th Cir. May 14, 2024) (en banc) ("Apache Stronghold asserts that the transfer of Oak Flat from the Government to Resolution Copper would 'violate the Free Exercise Clause.'

And yet, before the federal government claimed title to sacred sites like Oak Flat, the land belonged to Native American communities that used the land for their religious practice, in keeping with ancestral custom. This religious practice persisted through the government's dispossession—by force, sale, or broken treaty—of each sacred site where use rights and preservation have been litigated.[33] Where Native American religious claimants can demonstrate sacred land use that has persisted through dispossession, that flows from intergenerational traditions uniting past and present, their religious practice at sacred sites gives evidence of more than free exercise interests. They affirm the possibility of use rights in sacred sites—a kind of "sacred easement" over government land.

Framed in terms of property, and not solely religious liberty, claims for Native American sacred use rights can prove effective. When the Zuni Tribe sought access to a path across private lands for making sacred pilgrimage—a 110-mile trek from their reservation in New Mexico to Zuni Heaven in Arizona, completed by tribal religious leaders on horseback every four years, as early as 1540—it sued for a prescriptive easement, in addition to seeking relief under the First Amendment.[34] The court granted the easement, finding that the tribe's use of the path demonstrated actual, hostile, open and notorious, and continuous and uninterrupted use for the statutory period.[35] Evidence of the Zuni pilgrims' "religious purposes" was admitted "only to the extent it demonstrated when and how the land in question was used."[36] Tribal pilgrims would be free to use the path every four years, unimpeded in their journey to Zuni Heaven.

This claim fails under the Supreme Court's controlling decision in *Lyng* . . . ." (citation omitted)); see Carpenter, A Property Rights Approach to Sacred Sites Cases, supra note 27, at 1064.

[33] See, e.g., Apache Stronghold v. United States, 38 F.4th 742, 774 (9th Cir. 2022) (Berzon, J., dissenting); Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1081 (9th Cir. 2008) (Fletcher, J., dissenting); *Lyng*, 485 U.S. at 459 (Brennan, J., dissenting); *Sequoyah*, 620 F.2d at 1162; *Badoni*, 638 F.2d at 177.

[34] United States ex rel. Zuni Tribe of N.M. v. Platt, 730 F. Supp. 318, 319–20, 324 (D. Ariz. 1990). The Tribe knew that limitations imposed be *Lyng*, decided two years earlier, could scuttle their case. See Kristen A. Carpenter, In the Absence of Title: Responding to Federal Ownership in Sacred Sites Cases, 37 New Eng. L. Rev. 619, 629 (2003) [hereinafter Carpenter, In the Absence of Title].

[35] *Platt*, 730 F. Supp. at 323–24.

[36] Id. at 324 ("In reaching its decision, the Court does not base its ruling on any religious or 1st Amendment rights to the land in question.").

The federal government can allow similar claims for use rights over public land.[37] Under the Supreme Court's precedent in *United States v. Winans*, courts have recognized the servitudes that provide for treaty-reserved rights in practices central to Native American religion and culture, including fishing and hunting.[38] But nineteenth-century treaties, negotiated against the backdrop of federal policies designed to suppress Indian religious beliefs, practices, language, and identity, are predictably silent on reserved use rights in sacred sites.[39] Were tribes in an equal bargaining position with the federal government, tribes' failure to reserve explicit land use rights in their sacred sites would seem implausible, given evidence of persistent religious practice involving those sites. Such sacred property interests were "part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which were not much less necessary to the existence of the Indians than the atmosphere they breathed."[40] Their absence from treaties negotiated between tribes and the United States evidences a certain defect in title to sacred sites located on public land.

The federal government has done nothing to cure this defect in title—which it created during the nineteenth century—and done "little of consequence to protect the ability of tribes to access and preserve sacred sites," despite its "assertion of sweeping plenary power over Indian affairs."[41] Under *Lyng*, federal courts continue to allow Native American sacred sites to be desecrated and destroyed. Following the U.S. Court of Appeals for the Ninth Circuit's decision in *Apache Stronghold*, Oak Flat

[37] See discussion infra Section II.B.

[38] See United States v. Winans, 198 U.S. 371, 381 (1905) ("[T]he treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted. And the form of the instrument and its language was adapted to that purpose. Reservations were not of particular parcels of land, and could not be expressed in deeds as dealings between private individuals. The reservations were in large areas of territory and the negotiations were with the tribe. They reserved rights, however, to every individual Indian, as though named therein. They imposed a servitude upon every piece of land as though described therein."); see also id. at 381–82 ("The contingency of the future ownership of lands, therefore, was foreseen and provided for—in other words, the Indians were given a right in the land . . . . And the right was intended to be continuing against the United States and its grantees as well as against the State and its grantees.").

[39] See Dussias, supra note 31, at 823–33; Barclay & Steele, supra note 26, at 1307–17.

[40] *Winans*, 198 U.S. at 381.

[41] Barclay & Steele, supra note 26, at 1297.

may suffer the same fate.[42] The Court's religious liberty precedent leaves many sacred sites effectively unprotected.[43]

This Article proposes a new approach, rooted in property law. It argues that Native American religious practice at sacred sites may have created circumstances under which tribal easements arose by force of law. Before the federal government severed their ancestral lands, Native American tribes used certain inherently sacred parts of their territory regularly, necessarily, and predictably for their religious practice. Where Native American claimants can demonstrate such persistent sacred land uses, their religious practice can provide the kind of secular evidence courts typically consider in defining easements. An easement arising by force of law—by prescription, customary claim, or implication—would allow their tribes to exercise an ownership interest in their sacred sites, rather than assert an access right that can be balanced against another owner's right to exclude.

This Article also argues that Congress can, and should, create a statutory property right for tribes to claim an explicit ownership interest in their sacred sites—easements corresponding to their sacred land use.[44] Modeled on conservation easements, these nonpossessory ownership interests would preserve sacred sites for Native American religious practice.[45] By statute, Congress would not only create a forum for adjudicating tribal claims against the United States (e.g., the Court of

[42] In June 2022, the Ninth Circuit affirmed an Arizona district court's denial of Apache Stronghold's motion for a preliminary injunction "seeking to stop the Land Exchange and prevent any copper mining" beneath Oak Flat. Apache Stronghold v. United States, 38 F.4th 742, 748 (9th Cir. 2022). The Ninth Circuit reheard *Apache Stronghold* en banc and (again) affirmed the district court in March 2024; the court subsequently issued an amended opinion in May 2024 with minor edits. Apache Stronghold v. United States, 95 F.4th 608, 614 (9th Cir.) (en banc), *opinion modified on denial of reh'g*, No. 21-15295, slip op. at 15 (9th Cir. May 14, 2024) (holding that "Apache Stronghold's claims under the Free Exercise Clause and RFRA fail under [*Lyng*]").

[43] See discussion infra Section I.B.

[44] Of course, the federal government could transfer its *entire* ownership interest in sacred sites to tribal communities, a kind of fee simple reparation for centuries of tribal land dispossession. See, e.g., Return of the Blue Lake Act, Pub. L. No. 91-550, 84 Stat. 1437 (1970) (returning 48,000 acres in northern New Mexico to Taos Pueblo, including their sacred Blue Lake); In Observance of the 50th Anniversary of the Blue Lake Bill H.R. 471, Richard Nixon Museum & Libr., https://www.nixonlibrary.gov/observance-50th-anniversary-blue-lake-bill-hr-471 [https://perma.cc/SDA8-3382] (last visited Feb. 26, 2024). But absent political will for this kind of restoration, the government could also divide its property rights such that tribes gain a nonpossessory ownership interest in their sacred sites.

[45] See Unif. Conservation Easement Act § 1(1) (amended 2007), 12 U.L.A. 174 (1981).

Federal Claims), but also permit the federal government to divide its property rights in public lands at those particular places that tribes continue to hold sacred.[46] Tribes granted "sacred easements" could monitor—and, if necessary, constrain—both present and future uses of government-owned lands, ensuring compliance with the needs of their religious practice without barring public access to sacred sites.

Divided property rights can help Native American faith communities and the government assuage fears of mutual exclusion from sacred sites located on federal land. By allowing tribes to claim sacred land use easements in their ancestral territory, the federal government can help to cure lingering defects in title created by tribal land acquisition efforts during the nineteenth century. Sacred easements accord with the federal government's trust responsibility for tribal religious exercise. Historic federal efforts to suppress Native religions—many of which ran afoul of the Establishment Clause—warrant present federal accommodation of Native sacred land use.[47]

This Article is organized as follows. Part I considers how courts have located Native American sacred sites outside of federal protections for religious exercise. While exploring the unique significance of these sites for traditional Native American religious practice, it reviews constitutional and statutory religious liberty protections relevant to sacred sites. Part II elaborates on the argument for implying easements from sacred land use. After offering a historical overview of federal land acquisition from Native American tribes, it discusses the development of reserved use rights in tribal lands. It then maps the doctrine of easements implied from quasi-easements onto sacred land use, suggesting how tribal religious practices at sacred sites functioned as quasi-easements before the federal government severed tribes' ancestral territory. Finally, Part III describes the private law structure of statutory sacred easements,

[46] Congress created a similar jurisdictional act in response to the Sioux Nation's claim that the federal government took their sacred Black Hills without just compensation, in violation of the Fifth Amendment. See United States v. Sioux Nation of Indians, 448 U.S. 371, 384–91 (1980); Barclay & Steele, supra note 26, at 1314 (describing the Black Hills, Paha Sapa, "as 'the heart of everything that is' and the womb of Mother Earth," held "sacred to the Lakota" (citation omitted)). The statute allowed "claims against the United States 'under any treaties, agreements, or laws of Congress, or for the misappropriation of any of the funds or lands of said tribe or band.'" *Sioux Nation*, 448 U.S. at 384 (quoting Act of June 3, 1920, ch. 222, 41 Stat. 738).

[47] See Dussias, supra note 31, at 787–805 (describing efforts by the federal government to suppress various Native American ceremonial dances).

addressing concerns about the "right to exclude" non-Indian activity from sacred sites. It concludes by showing how sacred easements accord with the federal government's trust responsibility for Native American religious exercise.

I. SACRED LAND USE AND RELIGIOUS LIBERTY

When the federal government authorized transfer of Oak Flat to Resolution Copper, its actions construed the Western Apache sacred site as private property. The 2014 legislative rider introduced by Arizona Senators John McCain and Jeff Flake defined a 2,422-acre surface parcel, above an abundant subsurface copper deposit, with little acknowledgment of any other value imbuing the site.[48] The "sacred medicine plants, animals, and minerals essential to [religious] ceremonies," the "sacred spring waters that flows from the earth with healing powers," the cliffs and oaks standing watch over Sunrise Ceremonies "[s]ince before recorded history"—all that had been federally protected "as a source of supernatural power" for Western Apaches, "uniquely endowed with holiness and medicine," changed hands overnight, based on what laid beneath the ground.[49] By revoking presidential orders that prohibited mining on Oak Flat, the rider left Indian religious liberty interests at the mercy of non-Indian property interests. Congress commodified the "most sacred site" in Western Apache religion.[50]

Courts rarely construe the free exercise of religion as a property right.[51] Claims involving religious liberty and property rights remain largely incommensurate, particularly for Native American worshippers who struggle to prove substantial burden of their religious practice. In cases involving Native American sacred sites, courts focus on arguments that sound in Indian religious liberty, rather than property or quasi-property, only to frame their ultimate decision in terms of non-Indian ownership rights. Because Native American religious claimants lack an explicit

[48] Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 3003(b)(2), (b)(4), (c)(1), 128 Stat. 3292, 3732–33 (2014); see Emergency Motion, supra note 2, at 10–11; Millet, supra note 12. Many Apache religious practices "must take place there," since only from Oak Flat "can their 'prayers directly go to [the] creator.'" Emergency Motion, supra note 2, at 5 (citation omitted).

[49] Opening Brief of Plaintiff-Appellant at 6–9, 16, Apache Stronghold v. United States, 38 F.4th 742 (9th Cir. 2022) (No. 21-15295).

[50] Id. at 55.

[51] But see Reidy, C.S.C., supra note 28, at 237–54 (discussing how religious liberty protections have limited the government's eminent domain power in certain contexts).

ownership interest in their sacred sites, they find their religious liberty arguments largely unavailing. Courts decide in favor of the government as landowner, regardless of anticipated or actual burdens on Indians' free exercise of religion.[52] Federal courts reject Indian free exercise claims on the grounds that granting relief would infringe upon government property rights.[53] But they do so by holding that Indian claimants have asserted no "substantial burden" on their religious practice, rather than concluding that government ownership of sacred sites satisfies the "compelling government interest" prong of strict scrutiny.[54]

This Part discusses how courts have located Native American sacred sites outside of federal protections for religious exercise. Before reviewing constitutional and statutory religious liberty protections relevant to sacred sites, an exploration of their unique significance for traditional Native American religious practice is instructive.

A. Religious Practice on Sacred Land

Since time immemorial, Native American "Holy Men have gone into the high places, lakes, and isolated sanctuaries to pray, receive guidance from the Spirits, and train younger people in the ceremonies that constitute the spiritual life of the tribal community."[55] According to the late Professor Vine Deloria, Jr., these traditional religious practices nurture relationships of mutuality between human beings and creation. Medicine men and women "represented the whole web of cosmic life in the continuing search for balance and harmony," participating with

[52] According to Professor Allison M. Dussias, this approach "echoes the nineteenth-century government policy of imposing on the Indians the American system of individual property rights in land, as well as the policy of suppressing ceremonial dances involving the distribution or destruction of property." Dussias, supra note 31, at 819 ("The emphasis on property rights in these cases is, moreover, reminiscent of the Peace Policy's allotment of the Indian agencies to religious groups for Christianization purposes.").

[53] See, e.g., *Apache Stronghold*, 38 F.4th at 767 ("[W]hen it comes to the federal government's use of its own land, 'giving one religious sect a veto over the use of public park land would deprive others of the right to use what is, by definition, land that belongs to everyone.'" (quoting Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1063–64 (9th Cir. 2008))).

[54] See, e.g., id. at 756.

[55] Vine Deloria, Jr., Sacred Lands and Religious Freedom (1990), *reprinted in* The Sacred Land Reader 15, 15 (Marjorie Beggs & Christopher McLeod eds., 2003) [hereinafter Deloria, Sacred Lands and Religious Freedom].

animals and plants in rituals through which "harmony of life was achieved and maintained."[56]

Traditional Native American religious practice dwells within the cosmotheistic worldview of numerous tribal communities.[57] Native peoples imbued with such a worldview comprehend themselves, and all human beings, animals, plants, natural objects, and natural phenomena, to be animated by spiritual power.[58] These spiritually "animated beings are interrelated through kinship and reciprocal obligations."[59] They interact with each other and human beings through transfers of sacred power, and by their interactions, "they establish a dialogue that must be maintained by ritual prescriptions," through "prayer, song, and oral evocation."[60] Sacred power, or "medicine," "gives life and movement to the universe" and to all living things.[61] Without it, creation would cease to exist.[62]

This cosmotheistic worldview embraces the entire landscape in which Native American communities live and worship.[63] As a result of their "creations and placement on the landscape," all beings—animals, plants, and spiritually animated natural objects alike—are "endowed with a [unique] sacred power," with medicine.[64] Humans can come to possess

[56] Id.

[57] See Gregory R. Campbell & Thomas A. Foor, Entering Sacred Landscapes: Cultural Expectations Versus Legal Realities in the Northwestern Plains, 24 Great Plains Q. 163, 164 (2004).

[58] Id.

[59] Id.; Joseph Epes Brown & Emily Cousins, Teaching Spirits: Understanding Native American Religious Traditions 93–96 (2001) (describing animals as "teachers" and "guardians" for human beings).

[60] Campbell & Foor, supra note 57, at 164, 178.

[61] Id. at 165; see Brown & Cousins, supra note 59, at 32 ("[N]umerous Plains tribes see the Sweet Grass Hills as a part of an intricate web that connects the people to the Creator, the elements, the animal beings, the plant beings, and tribal ceremonies. Mining in the Sweet Grass Hills would disrupt the entire web. 'It's like when you make medicine to cure someone,' says the Chippewa-Cree tribal member Don Good Voice. 'If you are missing one ingredient, it won't work. That's how it is with the Sweet Grass Hills. Our medicine, ceremonies, prayers—without the Hills, none of it will be as effective.'").

[62] See Deloria, Sacred Lands and Religious Freedom, supra note 55, at 21 ("Among the duties that must be performed at these holy places [e.g., Bear Butte, Blue Lake, and the High Places] are ceremonies that the people have been commanded to perform in order that the earth itself and all its forms of life might survive.").

[63] Campbell & Foor, supra note 57, at 164 ("For traditionalists there exists a complex web of relationships, if not a unity, between ecology, humanity, and supernatural beings. Those relationships require sustained reciprocity and moral acknowledgement.").

[64] Id. at 165.

medicine through ritual interactions with the landscape, the source of sacred power.[65] For Native American worshippers, these religious practices affirm their ancestors' recognition of specific geographical locations and cultural ceremonies as "sacred sources of spiritual power."[66] Each tribal community "embedded those geographical and cultural 'portals' to the sacred within the unique context of their own worldviews."[67] Their religious practice at sacred sites thus forms a communal sense of memory, identity, and destiny for Native peoples who understand themselves as people of a particular place.[68] Because their particular homelands and landscapes are inexplicably tied to their identity as peoples, their sacred places are inextricably tied to their spiritual practices and cultural rituals.[69] Native peoples are far from unique in their

[65] Id.; see Peter Nabokov, Sacred Places of Native America: A Primer to Accompany the Film *In the Light of Reverence*, *in* The Sacred Land Reader 27, 45 (Marjorie Beggs & Christopher McLeod eds., 2003) (describing the "supernaturally powerful 'high country' [areas]" at issue in *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 442 (1988), where medicine people "acquire their medicine powers" through fasting and prayer, renewing "the connection that unites them as individuals with all of creation and with all of their spiritual needs").

[66] Campbell & Foor, supra note 57, at 165.

[67] Id.

[68] See Deloria, Sacred Lands and Religious Freedom, supra note 55, at 17–18. Many tribal names reveal this connection between particular places and communal identity. Among the Dakota people, "Wahpeton" means "forest dwellers," and "Sisseton" means "marsh dwellers." Barclay & Steele, supra note 26, at 1304 n.35 (quoting Original Tribal Names of Native North American People, Native Languages of the Ams., https://www.native-languages.org/original.htm [https://perma.cc/FJB4-EFWY] (last visited Feb. 26, 2024)). "'Hualapai' means 'people of the pine trees' and 'Havasupai' means 'people of the blue-green water.'" Id.

[69] Barclay & Steele, supra note 26, at 1305 ("For many tribes, their particular rituals may not be performed elsewhere, so central is a particular place, feature, or landscape to the religious rite.").

reverence for sacred sites,[70] yet their traditional religious practice is uniquely "site-specific."[71]

Native American communities reverence different kinds of sacredness in their sacred sites. While acknowledging that any "classification" cannot fully represent the "nature of reality," Deloria groups together sacred sites into four categories based on holiness and history.[72] One grouping includes places held sacred by communities because a historic event of "great importance took place" there.[73] These sites "instill a sense of social cohesion in the people" and remind them of experiences shared across generations of the tribal community.[74] In this grouping, the sacred site "is sanctified each time ceremonies are held and prayers offered there."[75]

Another grouping involves "a deeper, more profound sense of the sacred"—locations where "something mysteriously religious . . . has

[70] Jewish people consider the Western Wall in Jerusalem one of their holiest sites. Western Wall, Encyclopedia Britannica, https://www.britannica.com/topic/Western-Wall [https://perma.cc/J3D3-W2CT] (last updated Feb. 5, 2024). Able-bodied Muslims are encouraged to make pilgrimage to Mecca (Hajj), the holiest city in Islam, at least once in their lifetime. Pillars of Islam, Oxford Dictionary of Islam (John L. Esposito ed., 2003), https://www.oxfordreference.com/display/10.1093/oi/authority.20110803100327395 [https://perma.cc/5K3Y-BHA2] (last visited Feb. 26, 2024). Christians of all denominations revere Jerusalem's Church of the Holy Sepulchre, believed to contain the sites where Jesus of Nazareth was crucified, buried, and resurrected from death. Church of the Holy Sepulchre, Encyclopedia Britannica, https://www.britannica.com/place/Holy-Sepulchre [https://perma.cc/RT4D-QNT4] (last visited Feb. 26, 2024).

[71] Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 461 (1988) (Brennan, J., dissenting); see Skibine, supra note 31, at 270 ("Native American religions are land based.").

[72] Deloria, Sacred Lands and Religious Freedom, supra note 55, at 18–23; Vine Deloria, Jr., God Is Red 275–81 (3d ed. 2003) [hereinafter Deloria, God Is Red]; cf. Carpenter, A Property Rights Approach to Sacred Sites Cases, supra note 27, at 1067 n.24 (setting forth another "typology" of sacred sites and sacred landscapes which does not make distinctions based on sites' relative holiness: "(1) religious sites associated with oral tradition and origin stories, (2) trails and pilgrimage routes, (3) traditional gathering areas, (4) offering areas—alters [sic] and shrines, (5) vision quest and other individual-use sites, (6) group ceremonial sites—sweat lodges, dances, and sings [sic], (7) ancestral habitation sites, (8) petroglyph and pictographs—ceremonial rock art, (9) individual burials and massacre sites, and (10) observatories and calendar sites" (citing Andrew Gulliford, Sacred Objects and Sacred Places: Preserving Tribal Traditions 70–91 (2000))).

[73] Deloria, Sacred Lands and Religious Freedom, supra note 55, at 19.

[74] Deloria, God Is Red, supra note 72, at 276. Within this category, Deloria locates Wounded Knee, South Dakota, where Lakota religious practitioners were massacred by United States calvary. Deloria, Sacred Lands and Religious Freedom, supra note 55, at 19. Gettysburg provides a non-Indian comparison. Id.

[75] Deloria, Sacred Lands and Religious Freedom, supra note 55, at 19.

happened or been made manifest."[76] These places are not made sacred by the actions of human beings; rather, "the sacred appeared in the lives of human beings" and became a part of human experience "in an otherwise secular situation."[77] Natural locations where Native peoples "completed their migrations and were told to settle," or "first established their spiritual relationships with bear, deer, eagle, and the other forms of life," provide the sacred ground whereupon "the whole of creation becomes an active participant in ceremonial life."[78] Respect for kinship and mutuality with the "other peoples" involved in their religious practices—birds, animals, and plants—leaves many Native American worshippers "reluctant to articulate the specific elements of either the ceremony or the location" of these sites.[79]

A third grouping involves "places of overwhelming holiness where the Higher Powers, on their own initiative, have revealed Themselves to human beings."[80] According to Deloria, the reality of these inherently sacred places is not limited to Native American religious practice:

> [T]radition tells us that there are, on this earth, some places of inherent sacredness, sites that are holy in and of themselves. Human societies come and go on this earth, and any prolonged occupation of a geographical region will produce shrines and sacred sites discerned by the occupying people . . . . These holy places are locations where human beings have always gone to communicate and be with higher spiritual powers.[81]

At these sites, where "the highest spirits dwell," people have been "commanded to perform ceremonies . . . so that the earth and all its forms

[76] Deloria, God Is Red, supra note 72, at 276–77. Deloria places in this category Buffalo Gap in the Black Hills, "where the buffalo emerged each spring to begin the ceremonial year of the Plains Indians." Deloria, Sacred Lands and Religious Freedom, supra note 55, at 19–20. He compares this site to the place where Joshua led the Hebrews across the Jordan River, when "the waters of the Jordan 'rose up' . . . and the people, led by the Ark, crossed over on 'dry ground.'" Id. at 19 (citing Joshua 3:16–17).

[77] Deloria, Sacred Lands and Religious Freedom, supra note 55, at 19 ("No matter how we might attempt to explain this event in later historical, political, or economic terms, the essence of the event is that the sacred has become a part of our experience.").

[78] Id. at 20.

[79] Id. ("And since some ceremonies involve the continued good health and prosperity of the 'other peoples,' discussing the nature of the ceremony would violate the integrity of these relationships."); Deloria, God Is Red, supra note 72, at 278.

[80] Deloria, God Is Red, supra note 72, at 278–79.

[81] Deloria, Sacred Lands and Religious Freedom, supra note 55, at 20–21.

of life might survive and prosper."[82] Native American worshippers "complete the largest possible cycle of life, ultimately representing the cosmos in its specific realizations, becoming thankfully aware of itself."[83] Religious practice thus involves spiritual guardianship of creation, rather than individual or tribal prosperity.[84]

A fourth and final grouping involves places yet to be revealed by higher spiritual powers.[85] According to Deloria, the possibility of future revelation reminds human beings that deities and spirits are alive.[86] As such, Native American communities, and all human beings, "must always be ready to receive new revelations at new locations," adopting new ritual practices in accord with revelation.[87]

Sacred sites thus ground Native American religious practice. Without such irreplaceably holy places, many traditional tribal religions could not exist: "To deprive tribal people of access to certain sites, or to compromise the integrity of those sites, is to effectively prohibit the free exercise of their religion. There is no adequate substitute and no adequate compensation for the deprivation."[88] Oak Flat exemplifies this dynamic. Like Rainbow Bridge in Utah[89] or Medicine Lake in California,[90] the

[82] Deloria, God Is Red, supra note 72, at 279. Deloria identifies Bear Butte, Blue Lake, and the High Country (of the *Lyng* case) with this category; he compares these sites to the place where Moses encountered the burning bush, "when the Lord spoke to him from the bush." Deloria, Sacred Lands and Religious Freedom, supra note 55, at 20–21 (citing Exodus 3:5). I would also include Oak Flat, one of the Western Apache's "blessed places" of encounter between Creator and creation. Emergency Motion, supra note 2, at 3.

[83] Deloria, Sacred Lands and Religious Freedom, supra note 55, at 22.

[84] Id. ("It's not that Indians should have exclusive rights there, it's that that location is sacred enough so that it should have time of its own, and once it has time of its own then the people who know how to do ceremonies should come and minister to it." (quoting In the Light of Reverence (Bullfrog Films 2001)).

[85] Id.

[86] Deloria, God Is Red, supra note 72, at 281.

[87] Deloria, Sacred Lands and Religious Freedom, supra note 55, at 22.

[88] Barclay & Steele, supra note 26, at 1305.

[89] See Badoni v. Higginson, 638 F.2d 172, 177 (10th Cir. 1980) (describing Rainbow Bridge and its surroundings as a place of "central importance" to the Navajo religion and "incarnate forms of Navajo gods"); see also Amber L. McDonald, Note, Secularizing the Sacrosanct: Defining "Sacred" for Native American Sacred Sites Protection Legislation, 33 Hofstra L. Rev. 751, 751 (2004) (elaborating on the importance of Rainbow Bridge and its surroundings for Navajo religious practice). Rainbow Bridge is also sacred to the Hopi, San Juan Southern Paiute, Kaibab Paiute, and White Mesa Ute tribes. See Rainbow Bridge: History & Culture, Nat'l Park Serv., https://www.nps.gov/rabr/learn/historyculture/index.htm [https://perma.cc/AP9G-VX75] (last updated June 5, 2015).

[90] See Dean E. Murphy, U.S. Approves Power Plant in Area Indians Hold Sacred, N.Y. Times (Nov. 28, 2002), https://www.nytimes.com/2002/11/28/us/us-approves-power-plant-

Western Apache sacred site gathers family, tribe, and people together in ritual ceremony and devotion. Oak Flat's unique holiness imbues medicine plants, animals, minerals, and spring waters with sacrality for Apache who worship there—women and men, children and elders.[91] Like so many Native peoples, the Western Apache have "an understanding of the relatedness, or affiliation, of the human and nonhuman worlds," which "gives rise to 'moral responsibilities and obligations'" toward creation.[92]

Courts struggle to conceptualize and evaluate the land-based, site-specific religious exercise characteristic of tribal communities like the Western Apache: "While the Anglo-American world view tends to see law, religion, art, and economics as separate aspects of society, the Native American worldview tends to see them as interdependent parts of an organic, unified whole."[93] When sacred sites are threatened with desecration or destruction, more than religious practice is burdened. The cultural survival of Native peoples as peoples turns on how our American legal system frames and answers questions of religious liberty and property where those rights conflict at Native American sacred sites.[94]

B. Federal Protections for Religious Practice at Sacred Sites

Threats to Native American sacred sites are litigated against an expansive framework of constitutional and statutory religious liberty protections. At first glance, courts' failure to shield sacred sites from desecration and destruction may seem anomalous, given the judicial protection afforded to non-Indian houses of worship confronting eminent

in-area-indians-hold-sacred.html [https://perma.cc/Z7QP-9AXE] (describing the Bush Administration's decision to approve construction of a geothermal plant over Medicine Lake). Medicine Lake is regarded by the region's Pit River, Wintu, Karuk, Shasta, Klamath, Yana, and Modoc tribes as holy and imbued with healing powers. Historic Victory for Protection of Sacred Medicine Lake, Int'l Indian Treaty Council (Sept. 24, 2019), https://www.iitc.org/historic-victory-for-protection-of-sacred-medicine-lake/ [https://perma.cc/99P3-C79R].

[91] Emergency Motion, supra note 2, at 5–8.

[92] See Carpenter, A Property Rights Approach to Sacred Sites Cases, supra note 27, at 1068 (citing Laurie Anne Whitt, Mere Roberts, Waerete Norman & Vicki Grieves, Belonging to Land: Indigenous Knowledge Systems and the Natural World, 26 Okla. City U. L. Rev. 701, 704–05 (2001)).

[93] See Dussias, supra note 31, at 806 ("Indeed, no Native American language has a word that can be translated as 'religion.' Thus, attempting to isolate religion from other aspects of life is 'an exercise which forces Indian concepts into non-Indian categories.'" (quoting Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 459 (1988) (Brennan, J., dissenting))).

[94] Barclay & Steele, supra note 26, at 1306; Carpenter, A Property Rights Approach to Sacred Sites Cases, supra note 27, at 1068.

domain.[95] Religious liberty protections—including the Free Exercise Clause, RFRA, and RLUIPA—could safeguard the ability of tribes to access and preserve their sacred sites. But since *Lyng*, courts have found sacred sites outside these protections, subordinating Indian religious liberty rights to non-Indian property rights.

Prior to *Employment Division v. Smith*,[96] free exercise claims under the First Amendment were subjected to strict scrutiny.[97] Following the standard established in *Sherbert v. Verner*[98] and *Wisconsin v. Yoder*,[99] laws that burdened religious exercise could only pass strict scrutiny if they served a compelling government interest by the least restrictive means, with each law reviewed generally and as applied to an individual claimant. When laws failed to meet both criteria, they were struck down; if they met both criteria generally but failed when applied to individual claimants, they were allowed to stand with exemptions for claimants' religious exercise. Certain aspects of religion remained off-limits to local, state, and federal regulation unless they involved explicit criminality—including religious beliefs, assembly, and worship.[100]

In 1978, Congress enunciated an additional policy of protecting Native American religious liberty through the American Indian Religious Freedom Act ("AIRFA").[101] Under this law, the federal government

[95] See Reidy, C.S.C., supra note 28, at 233.

[96] 494 U.S. 872 (1990). The plaintiffs in *Smith* had been fired from their jobs for using peyote in a Native American Church ceremony and were denied unemployment benefits because their termination was based on work-related misconduct. Id. at 874. In dissent, Justice Blackmun noted that peyote use seemed "closely analogous to the sacramental use of wine by the Roman Catholic Church." Id. at 913 n.6 (Blackmun, J., dissenting).

[97] The Supreme Court first applied strict scrutiny under the Free Exercise Clause in *Sherbert v. Verner*, 374 U.S. 398, 406 (1963). But ever since *Cantwell v. Connecticut*, the Court had applied heightened scrutiny to free exercise claims. John Witte, Jr. & Joel A. Nichols, Religion and the American Constitutional Experiment 122 (4th ed. 2016) (citing Cantwell v. Connecticut, 310 U.S. 296, 303–04 (1940)). John Witte, Jr. and Joel Nichols note that "after the First Amendment religion clauses were made binding on the states in the 1940s, most laws in America that touched religion became subject to First Amendment influence, if not scrutiny." Id. at 117.

[98] 374 U.S. at 404–06.

[99] 406 U.S. 205, 221 (1972).

[100] See *Cantwell*, 310 U.S. at 303 ("The constitutional inhibition of legislation on the subject of religion has a double aspect. On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion.").

[101] 42 U.S.C. § 1996 (2018).

would "protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise" their religion, "including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites."[102] But in *Lyng*, the Supreme Court denied that AIRFA provided Indian free exercise plaintiffs any basis for relief,[103] rendering the statute "a hollow freedom" for tribal communities.[104]

Two years after *Lyng*, the Court rejected strict scrutiny analysis in *Smith*, holding that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"[105] After *Smith*, any neutral and generally applicable law can be constitutional under the First Amendment, even if the law burdens "conduct . . . 'central' to the individual's religion."[106] Strict scrutiny still applies to governmental action that "targets religious conduct for distinctive treatment,"[107] particularly through systems of "individualized governmental assessment of the reasons for the relevant conduct."[108] But since 1990, the Free Exercise Clause has provided faith communities with "the *lowest* scrutiny and the *least* promising pathway to relief against both federal and state laws," including those which implicate Native American sacred sites.[109]

In 1993, Congress rebuked the Court's decision in *Smith*, passing RFRA[110] with support from one of the broadest political coalitions in

[102] Id.

[103] Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 454–55 (1988).

[104] See id. at 477 (Brennan, J., dissenting) ("Given today's ruling, [plaintiffs' religious] freedom amounts to nothing more than the right to believe that their religion will be destroyed. The safeguarding of such a hollow freedom not only makes a mockery of [AIRFA], it fails utterly to accord with the dictates of the First Amendment.").

[105] Employment Div. v. Smith, 494 U.S. 872, 879 (1990) (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)).

[106] Id. at 886–87.

[107] Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546 (1993).

[108] Id. at 537 (quoting *Smith*, 494 U.S. at 884); see id. at 546 (holding that "a law restrictive of religious practice must advance interests of the highest order and must be narrowly tailored in pursuit of those interests" (internal quotation marks omitted) (citation omitted)).

[109] Witte & Nichols, supra note 97, at 125. In a future article, I plan to explore the implications of recent Supreme Court decisions involving the Free Exercise Clause on Native American sacred site litigation—specifically, *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020), *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021), and *Kennedy v. Bremerton School District*, 142 S. Ct. 2407 (2022).

[110] 42 U.S.C. §§ 2000bb–2000bb-4 (2018).

recent history.[111] RFRA restored the strict scrutiny standard established in *Sherbert*[112] and *Yoder*[113]: the government may not "substantially burden" individual or communal religious exercise, "even if the burden results from a rule of general applicability," unless it demonstrates that the burden furthers a "compelling government interest" and is the "least restrictive means" of furthering that interest.[114] While *City of Boerne v. Flores* declared RFRA unconstitutional as applied to the states, its protections for religious exercise still guide judicial review of federal laws.[115]

Congress again responded to the Supreme Court in 2000, passing RLUIPA.[116] Following the *Boerne* decision, congressional hearings investigating state and local restrictions on religious exercise had unearthed statistical and anecdotal evidence revealing widespread discrimination against faith communities in land use decisions.[117] RLUIPA applied RFRA's strict scrutiny protections to land use. Consolidating much of the statutory language detailed above, RLUIPA's substantial burden provision draws together religious exercise and property:

> No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution—(A) is in furtherance of a compelling

[111] Douglas Laycock & Oliver S. Thomas, Interpreting the Religious Freedom Restoration Act, 73 Tex. L. Rev. 209, 210 (1994). That coalition included sixty-six religious and civil liberties groups. Id. at 210–11 n.9. The Senate voted 97-3 in favor of RFRA, while the House of Representatives passed a similar bill unanimously, and later also passed the Senate version. Id. at 210.

[112] 374 U.S. 398, 404–06 (1963).

[113] 406 U.S. 205, 221 (1972).

[114] 42 U.S.C. § 2000bb-1(a)–(b) (2018). In RFRA's "declaration of purposes," Congress notes that *Employment Division v. Smith* "virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion" and finds "the compelling interest test as set forth in prior Federal court rulings [to be] a workable test for striking sensible balances between religious liberty and competing prior governmental interests." § 2000bb(a)(4)–(5).

[115] 521 U.S. 507, 536 (1997).

[116] 42 U.S.C. §§ 2000cc–2000cc-5 (2018).

[117] See Derek L. Gaubatz, RLUIPA at Four: Evaluating the Success and Constitutionality of RLUIPA's Prisoner Provisions, 28 Harv. J.L. & Pub. Pol'y 501, 510 (2005). Hearings also revealed extensive religious discrimination in prisons. Id.

> government interest; and (B) is the least restrictive means of furthering that compelling governmental interest.[118]

Land use regulations may not be imposed or implemented "in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution."[119] And while courts have historically construed "religious exercise" relative to Native American sacred sites in line with worship and ritual, RLUIPA offers a more capacious definition: "The term 'religious exercise' includes *any* exercise of religion, *whether or not* compelled by, or central to, a system of religious belief."[120] While Native peoples have attempted to invoke RLUIPA in sacred sites litigation, the statutory text has been read narrowly and found inapplicable to "the [federal] government's management of its own land."[121]

Lingering behind these constitutional and statutory religious liberty protections is Executive Order 13007, which requires federal land managers to "(1) accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and (2) avoid adversely affecting the physical integrity of such sacred sites," where such accommodation is "not clearly inconsistent with [law or] essential agency functions."[122] Issued by President Bill Clinton in 1996, the Executive Order was meant to supplement AIRFA and RFRA protections limited by *Lyng*.[123] But since it conveys no right of action and cannot be "construed to require a taking of vested property interests," the Executive Order has proven insufficient to protect sacred sites.[124]

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[118] 42 U.S.C. § 2000cc(a)(1) (2018).

[119] Id. § 2000cc(b)(1).

[120] Id. § 2000cc-5(7)(A) (emphases added).

[121] Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1077 (9th Cir. 2008) ("RLUIPA, by its terms, prohibits only state and local governments from applying regulations that govern land use . . . to impose a 'substantial burden' on the exercise of religion."). In a future article, I plan to address whether RLUIPA *should* be found inapplicable to the federal government's management of public lands.

[122] Exec. Order No. 13007, 61 Fed. Reg. 26771 (May 24, 1996).

[123] Campbell & Foor, supra note 57, at 169.

[124] Exec. Order No. 13007, 61 Fed. Reg. at 26772 ("This order is intended only to improve the internal management of the executive branch and is not intended to, nor does it, create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity by any party against the United States, its agencies, officers, or any person."). The Executive Order also cannot be "construed to impair enforceable rights to use of Federal lands that have been granted to third parties through final agency action." Id.

C. Locating Sacred Sites Outside of Religious Liberty Protection

Despite shifts in federal religious liberty protections during the late twentieth century, courts have consistently ruled against Native American religious claimants in cases involving sacred sites on public land.[125] Judges typically reject free exercise claims by sidestepping established strict scrutiny analysis—as defined by *Sherbert* and *Yoder*, RFRA and RLUIPA—and deciding that any grant of relief would infringe upon the government's rights as landowner, regardless of anticipated or actual burdens on Indian religious practice.[126] The Supreme Court's formulation of government ownership rights in *Lyng* effectively bars most religious liberty arguments that Native Americans attempt to make in defense of their sacred sites: "Whatever rights the Indians may have to the use of the area, however, those rights do not divest the Government of its right to use what is, after all, *its* land."[127]

Lyng involved decisions by the U.S. Forest Service to permit timber harvesting and to complete construction of a logging road in the Blue Creek Unit of Six Rivers National Forest.[128] The Blue Creek Unit contained an area of land that northwestern California's Yurok, Karok, and Tolowa Tribes considered profoundly sacred: the "High Country."[129] For centuries, tribal members hiked into the High Country to "use 'prayer seats' located at Doctor Rock, Chimney Rock, and Peak 8 to seek religious guidance or personal 'power' through 'engaging in emotional [and] spiritual exchange with the creator'"—exchange made possible "by the solitude, quietness, and pristine environment found" there.[130] Key

[125] See, e.g., Apache Stronghold v. United States, 38 F.4th 742, 773 (9th Cir. 2022), *aff'd en banc*, 95 F.4th 608, 614 (9th Cir. 2024), *opinion modified on denial of reh'g*, No. 21-15295, slip op. at 15 (9th Cir. May 14, 2024); Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1080 (9th Cir. 2008); Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 458 (1988); Sequoyah v. Tenn. Valley Auth., 620 F.2d 1159, 1165 (6th Cir. 1980); Badoni v. Higginson, 638 F.2d 172, 181 (10th Cir. 1980).

[126] See Dussias, supra note 31, at 823–33; Skibine, supra note 31, at 271; Yablon, supra note 31, at 1634–36.

[127] 485 U.S. at 453; see Carpenter, A Property Rights Approach to Sacred Sites Cases, supra note 27, at 1064.

[128] Nw. Indian Cemetery Protective Ass'n v. Peterson, 565 F. Supp. 586, 589–90 (N.D. Cal. 1983), *aff'd in part and vacated in part*, 795 F.2d 688 (9th Cir. 1986), *rev'd sub nom.* Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988). The Blue Creek Unit comprised 67,500 acres and contained approximately 31,000 acres of virgin Douglas fir. Id. at 590. The Forest Service plan called for harvesting over 733 million board feet of timber over eighty years. Id.

[129] Id. at 591.

[130] Id.

participants in tribal religious ceremonies visited the High Country "to purify themselves and to make 'preparatory medicine'" before their ritual dances.[131] Because the High Country "constitutes the center of the spiritual world" for the Yurok, Karok, and Tolowa peoples, its desecration—through increased timber harvesting operations and the construction of logging roads bisecting its sacred peaks—would carry "a very real threat of undermining the [tribal] communit[ies] and religious practice[s] as they exist today."[132] The Native American plaintiffs argued that this desecration violated their free exercise of religion, with consequences for all humankind.[133]

The district court initially concluded that government plans for the High Country violated the Free Exercise Clause.[134] Finding that Forest Service actions in the High Country would substantially infringe upon the Indian plaintiffs' free exercise of religion, the court determined that the disputed six-mile logging road and timber harvesting plan "would not serve any compelling public interest," thus failing strict scrutiny.[135] Notably absent was any assertion that the government's property interest precluded the Indian plaintiffs' religious liberty claims. In fact, the court underscored that the "plaintiffs' lack of a property interest in the high country does not release [the government] from the constitutional responsibilities the First Amendment imposes on them."[136] The Ninth Circuit affirmed this finding, agreeing that the proposed government actions violated the Free Exercise Clause.[137]

[131] Id. (including "the White Deerskin and Jump Dances").

[132] Id. at 594 (citing Wisconsin v. Yoder, 406 U.S. 205, 218 (1972)).

[133] Id. at 592 ("[T]he Indian plaintiffs contend that construction of the Chimney Rock Section would violate the sacred qualities of the high country and impair its successful use for religious purposes."); see Amy Bowers & Kristen Carpenter, Challenging the Narrative of Conquest: The Story of *Lyng v. Northwest Indian Cemetery Protective Association*, *in* Indian Law Stories 489, 505 (Carole Goldberg, Kevin K. Washburn & Philip P. Frickey eds., 2011) ("Construction of the road and logging of the High Country would make it impossible to gather medicine necessary to cure the sick, pray, and host ceremonies. Failure to complete these activities would have serious consequences for the general health, safety, and welfare of not only Indian people, but all humankind.").

[134] *Peterson*, 565 F. Supp. at 594–96.

[135] Id. at 595–96. The district court noted that "the government must attempt to accommodate the legitimate religious interests of the public when doing so threatens no public interest, even when those religious interests involve use of public property." Id. at 594 n.8.

[136] Id. at 593–94 (discussing and distinguishing *Badoni* and *Sequoyah*); see Carpenter, A Property Rights Approach to Sacred Sites Cases, supra note 27, at 1079.

[137] Nw. Indian Cemetery Protective Ass'n v. Peterson, 795 F.2d 688, 695 (9th Cir. 1986), *rev'd sub nom.* Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988) ("In our

The Supreme Court reversed. Writing for the majority, Justice O'Connor concluded that the Free Exercise Clause did not prohibit government plans for timber harvesting or road construction in the High Country.[138] O'Connor confessed that these government actions could "virtually destroy the . . . Indians' ability to practice their religion"—in agreement with the lower courts[139]—but found that, since no "individuals [would] be coerced by the Government's action into violating their religious beliefs," strict scrutiny did not apply.[140] In the absence of coercion or penalty, the Forest Service need not provide a compelling justification for its land use plan.[141] AIRFA provided the Indian plaintiffs no additional basis for relief.[142]

The Court's constricted free exercise standard for Native American religious practice has been controversial since the day *Lyng* was decided. Writing in strident dissent, Justice Brennan expressed his astonishment that "a federal land-use decision that promises to destroy an entire religion does not burden the practice of that faith in a manner recognized by the Free Exercise Clause."[143] Brennan faulted the majority's erroneous

view, the government has fallen short of demonstrating the compelling interest required to justify its proposed interference with the Indian plaintiffs' free exercise rights."). But see id. at 699, 704 (Beezer, J., dissenting in part) ("The Indian plaintiffs are attempting to use the free exercise clause to bar the development of public lands . . . . The government's interest in putting public lands to productive use must be weighed carefully in the balance. While the government has many obligations that are not shared by private landowners, the government retains a substantial, perhaps even compelling, interest in using its land to achieve economic benefits.").

[138] Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 441–42 (1988).

[139] Id. at 451 (quoting *Peterson*, 795 F.2d at 693).

[140] Id. at 449–50 ("[N]or would either governmental action penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens.").

[141] Id. at 450–51.

[142] Id. at 455 ("Nowhere in the law is there so much as a hint of any intent to create a cause of action or any judicially enforceable individual rights."). But see id. at 477 (Brennan, J., dissenting) ("The safeguarding of such a hollow freedom . . . makes a mockery of the 'policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the[ir] traditional religions' . . . ." (citation omitted)).

[143] Id. at 476 (Brennan, J., dissenting); id. at 476–77 ("Having thus stripped respondents and all other Native Americans of any constitutional protection against perhaps the most serious threat to their age-old religious practices, and indeed to their entire way of life, the Court assures us that nothing in its decision 'should be read to encourage governmental insensitivity to the religious needs of any citizen.' I find it difficult . . . to imagine conduct more insensitive to religious needs than the Government's determination to build a marginally useful road in

imposition of non-Indian norms on Indian religious practice: "Where dogma lies at the heart of Western religions, Native American faith is inextricably bound to the use of land. The site-specific nature of Indian religious practice derives from the Native American perception that land is itself a sacred, living being."[144] Rather than balancing the "competing and potentially irreconcilable interests" between Indian religious liberty and government property, the majority defined the Indian plaintiffs' injury as "nonconstitutional," effectively bestowing on the government "unilateral authority to resolve all future disputes in its favor."[145]

But *Lyng* also elevated the government's property interest in Six Rivers National Forest. While acknowledging that laws which prohibit access to sacred sites "would raise a different set of constitutional questions," the Court found superior use rights inherent in federal land ownership.[146] The Court likewise framed the Indian plaintiffs' litigation as an attempt to establish property rights in the High Country—a "religious servitude."[147] Using language that would come to haunt cases involving Native American sacred sites, O'Connor expressed concern that the Indian plaintiffs "might seek to exclude all human activity but their own" from sacred sites located on public lands:

> No disrespect for these practices is implied when one notes that such beliefs could easily require *de facto beneficial ownership* of some rather spacious tracts of public property. Even without anticipating future cases, the diminution of the Government's property rights, and the concomitant subsidy of the Indian religion, would in this case be far from trivial . . . .[148]

Brennan disagreed with the majority's characterization. Accepting that cases involving "site-specific religious practices raise[] the specter of future suits in which Native Americans seek to exclude all human activity

the face of uncontradicted evidence that the road will render the practice of respondents' religion impossible." (citation omitted)).

[144] Id. at 460–61.

[145] Id. at 473 (noting the only limit on this "unilateral" government authority is "the Court's toothless exhortation to be 'sensitive' to affected religions").

[146] Id. at 453 (majority opinion) ("Whatever rights the Indians may have to the use of the [High Country], . . . those rights do not divest the Government of its right to use what is, after all, its land.").

[147] Id. at 452; see Dussias, supra note 31, at 830.

[148] *Lyng*, 485 U.S. at 452–53 (emphasis added).

from [sacred sites]," the *Lyng* plaintiffs "never asked the Forest Service to exclude others" from the High Country.[149]

Lyng settled the role of property rights in cases involving Native American sacred sites. Government ownership of sacred sites could be dispositive; indeed, the government's "prerogative as landowner should always take precedence over a claim that a particular use of federal property infringes religious practices."[150] Since *Lyng*, courts have allowed federal property rights to shield the government from Indian religious liberty claims.[151] But they have done so through holdings that deny Indian claimants have asserted any "substantial burden" on their religious practice, rather than by concluding that government ownership of sacred sites satisfies the "compelling government interest" prong of strict scrutiny.[152]

Navajo Nation v. U.S. Forest Service illustrates this jurisprudential pattern.[153] *Navajo Nation* challenged the use of recycled sewage effluent for snowmaking on the San Francisco Peaks in Arizona.[154] The Forest Service approved Arizona Snowbowl expansion plans that required artificial snow for its ski area on Humphrey's Peak.[155] Numerous Native American tribes objected that spraying one of their holiest mountains with "reclaimed water" from homes and hospitals would "spiritually contaminate the entire mountain."[156] The Hopi religion is based upon Kachinas' seasonal migrations between their home among the Peaks and tribal villages.[157] Sewage effluent would pollute the Kachinas' home,

[149] Id. at 473, 476 (Brennan, J., dissenting) (contrasting "the dominant Western culture, which views land in terms of ownership and use, and that of Native Americans, in which concepts of private property are not only alien, but contrary to a belief system that holds land sacred").

[150] Id. at 465.

[151] See Dussias, supra note 31, at 831–33 (citing United States v. Means, 858 F.2d 404, 405 (8th Cir. 1988); Manybeads v. United States, 730 F. Supp. 1515, 1517 (D. Ariz. 1989); Attakai v. United States, 746 F. Supp. 1395, 1413 (D. Ariz. 1990); and Havasupai Tribe v. United States, 752 F. Supp. 1471, 1505 (D. Ariz. 1990), *aff'd sub nom.* Havasupai Tribe v. Robertson, 943 F.2d 32, 34 (9th Cir. 1991) (per curiam)).

[152] Cf. Barclay & Steele, supra note 26, at 1299–302 ("Currently, courts have made it essentially impossible for tribal plaintiffs to demonstrate a substantial burden in the context of sacred sites owned by the government.").

[153] 535 F.3d 1058 (9th Cir. 2008), *cert. denied*, 556 U.S. 1281 (2009).

[154] Id. at 1062–63.

[155] Id. at 1064–66.

[156] Id. at 1063, 1082.

[157] Navajo Nation v. U.S. Forest Serv., 479 F.3d 1024, 1034 (9th Cir. 2007), *aff'd on reh'g*, 535 F.3d 1058 (9th Cir. 2008), *cert. denied*, 556 U.S. 1281 (2009).

threatening the water they supply to Hopi corn, the lifeblood of their sustenance.[158] Pollution of mountain plants, medicines, and springs would also violate Navajo, Hualapai, and Havasupai tribal purity requirements for religious pilgrimages and resources collected on the Peaks.[159] Tribal "shrines" on the sacred mountains would be utterly desecrated; "healing ceremonies" would be rendered all but impossible.[160] Plaintiff tribes sued the Forest Service, arguing that this desecration violated their free exercise of religion under RFRA.[161]

The Ninth Circuit disagreed. Following *Lyng*, the court determined that tribal plaintiffs had been subject to no governmental coercion: "[T]he sole effect of the artificial snow is on the [Indians'] subjective spiritual experience."[162] A government action that "decreases the spirituality, the fervor, or the satisfaction with which a believer practices his religion is not what Congress has labeled a 'substantial burden' . . . on the free exercise of religion."[163] Interpreting RFRA through *Lyng*, the court held that the Forest Service could desecrate the tribes' sacred site.[164]

Judges and scholars have critiqued courts' analysis of what constitutes "substantial burden" of Native American religious practice under the Free Exercise Clause, RFRA, and RLUIPA.[165] Recent work by Professors

[158] Id. at 1041–42, 1099.

[159] Id. at 1039. Multiple tribes also expressed concern that sewage effluent from mortuaries or hospitals would come into contact with the dead, rendering anything sprayed with effluent impure based on religious taboos and precluding "pilgrimages to the Peaks." Id. at 1040.

[160] Id. at 1035.

[161] Id. at 1029. The Ninth Circuit noted that this case was "not the first time Indian tribes ha[d] challenged the operation of the Snowbowl." *Navajo Nation*, 535 F.3d at 1064–65 (citing Wilson v. Block, 708 F.2d 735, 739 (D.C. Cir. 1983)). In 1981, before the enactment of RFRA, multiple tribes brought a challenge to Forest Service approval of "upgrades to the Snowbowl, including . . . new lifts, slopes, and facilities," under the Free Exercise Clause. Id. The tribes asserted that those "upgrades would 'seriously impair their ability to pray and conduct ceremonies upon the Peaks' and to gather from the Peaks sacred objects necessary to their religious practices." Id. at 1065 (citing *Wilson*, 708 F.2d at 740). In *Wilson*, the D.C. Circuit "rejected the Indian tribes' challenge," following *Badoni* and *Sequoyah*. Id. (citing *Wilson*, 708 F.2d at 739–45).

[162] Id. at 1063.

[163] Id.

[164] Id. at 1071–72; see id. at 1071 n.13 ("That *Lyng* was a Free Exercise Clause, not RFRA, challenge is of no material consequence. Congress expressly instructed the courts to look to pre-*Smith* Free Exercise Clause cases, which include *Lyng*, to interpret RFRA.").

[165] See, e.g., Apache Stronghold v. United States, 38 F.4th 742, 773–74 (9th Cir. 2022) (Berzon, J., dissenting) ("[R]edefining 'substantial burden' to exclude great burdens on religious exercise because accommodating a religious practice could interfere with other uses of federal land is a disingenuous means of reconciling those competing claims. Instead of denying the burden exists, the appropriate way to address the conflicting interests is at the

Stephanie Barclay and Michalyn Steele illustrates how disputes over sacred sites unwittingly partake in longstanding philosophical debates about the nature of coercion.[166] They argue that "regardless of whether we formally label the government's actions as 'coercive' or as something else, the important question is whether the government is bringing to bear its sovereign power in a way that inhibits the important ideal of religious volunteerism," precisely the sort of question courts ask when evaluating government burdens on other forms of non-Indian religious exercise.[167] Because Native Americans practice their religion subject to "omnipresent government interference with the use of many of their most sacred sites," the standard established in *Lyng*—that tribal members would not be "coerced by the Government's action" through threat of penalties or denial of benefits "enjoyed by other citizens"—presumes an inaccurate baseline for Indian religious exercise, one of coercion rather than voluntary religious practice.[168] That baseline of government coercion makes it "essentially impossible" for Native American religious plaintiffs

justification stage. If accommodating the religious practice would cause other societal harms, then the government may well be able to show that applying the burden is the 'least restrictive means of furthering [a] compelling governmental interest.'" (quoting 42 U.S.C. § 2000bb-1(b))); Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 476–77 (1988) (Brennan, J., dissenting) ("Today, the Court holds that a federal land-use decision that promises to destroy an entire religion does not burden the practice of that faith in a manner recognized by the Free Exercise Clause . . . . Nor do I believe that respondents will derive any solace from the knowledge that although the practice of their religion will become 'more difficult' as a result of the Government's actions, they remain free to maintain their religious beliefs. Given today's ruling, that freedom amounts to nothing more than the right to believe that their religion will be destroyed."); Barclay & Steele, supra note 26, at 1320–43; Kristen A. Carpenter, Limiting Principles and Empowering Practices in American Indian Religious Freedoms, 45 Conn. L. Rev. 387, 387 (2012) [hereinafter Carpenter, Limiting Principles and Empowering Practices] ("[T]he Supreme Court's Indian cases share a common and previously overlooked feature: in all of them, the Court assessed the Indian claims as too broad or too idiosyncratic to merit Free Exercise Clause protection . . . ."); Dussias, supra note 31, at 823–33.

[166] Barclay & Steele, supra note 26, at 1320–33.

[167] Id. at 1300–01. In this respect, Barclay and Steele compare government control over sacred sites to its "baseline of coercion in prison, the military, and even zoning requirements," areas where "government controls access to worship areas and resources, and it exerts decisive control over individuals' ability to use spaces of worship consistent with theological requirements . . . ." Id. at 1301. In each of these contexts, "government is obliged by law (both constitutional and statutory) to provide affirmative religious accommodations to ensure individuals in these spaces can practice their religion." Id.

[168] Id. at 1299–301 (quoting *Lyng*, 485 U.S. at 449) ("[B]ecause of the history of government divestiture and appropriation of Native lands, American Indians are at the mercy of government permission to access sacred sites."); see also Bowers & Carpenter, supra note 133, at 531 (recounting the decisions of lower courts after *Lyng*).

to demonstrate substantial burden of their religious practice, foreclosing any prima facie case for constitutional or statutory protection of their sacred sites.[169]

* * *

In June 2022, the Ninth Circuit affirmed an Arizona district court's denial of Apache Stronghold's motion for a preliminary injunction "seeking to stop the Land Exchange and prevent any copper mining" beneath Oak Flat.[170] The court echoed *Lyng*'s specter of exclusion through "de facto beneficial ownership"[171] of public property, concluding that its decision in *Navajo Nation* resolved the case:

> [W]hen it comes to the federal government's use of its own land, "giving one religious sect a veto over the use of public park land would deprive others of the right to use what is, by definition, land that belongs to everyone." . . . The government need not satisfy strict scrutiny to manage federal lands in these ways.[172]

The dissent lamented how the majority's "flawed test" for identifying a substantial burden on religious exercise led to "an absurd result: blocking Apaches' access to and eventually destroying a sacred site where they have performed religious ceremonies for centuries does not substantially burden their religious exercise."[173]

The Ninth Circuit reheard *Apache Stronghold* en banc and (again) affirmed the district court in March 2024.[174] A majority of the court held that "under *Lyng*, a disposition of government real property does not impose a substantial burden on religious exercise" when that property decision "has 'no tendency to coerce individuals into acting contrary to their religious beliefs,' does not 'discriminate' against religious adherents, does not 'penalize' them, and does not deny them 'an equal share of the rights, benefits, and privileges enjoyed by other citizens.'"[175] Finding the copper mine "indistinguishable"[176] from the project

[169] Barclay & Steele, supra note 26, at 1302; see 42 U.S.C. § 2000bb-1 (2018).
[170] *Apache Stronghold*, 38 F.4th at 748.
[171] Id. at 767 (quoting *Lyng*, 485 U.S. at 453).
[172] Id. (quoting Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1063–64 (9th Cir. 2008), *cert. denied*, 556 U.S. 1281 (2009)).
[173] Id. at 774 (Berzon, J., dissenting).
[174] Apache Stronghold v. United States, 95 F.4th 608, 614 (9th Cir.) (en banc), *opinion modified on denial of reh'g*, No. 21-15295, slip op. at 15 (9th Cir. May 14, 2024).
[175] *Apache Stronghold*, slip op. at 14–15 (quoting *Lyng*, 485 U.S. at 449–50, 453).
[176] Id. at 31.

challenged in *Lyng*, the en banc court concluded that "Apache Stronghold's claims under the Free Exercise Clause and RFRA fail."[177] Oak Flat is "not fungible with other locations" for Western Apache religious exercise.[178] Yet Western Apache religious exercise alone cannot protect Oak Flat from destruction because non-Indian property interests trump Indian free exercise interests.

II. EASEMENTS ARISING FROM SACRED LAND USE

Ritual practices defined by ancestral custom unite Western Apaches with Mother Earth and her Creator, but also with their parents and grandparents, whose own parents and grandparents passed down tribal religious traditions at Oak Flat.[179] Western Apaches gather "sacred medicine plants, animals, and minerals essential to [religious] ceremonies," drawing "sacred spring waters that flow[] from the earth with healing powers not present elsewhere," offering ancient prayers and songs that testify to their place in creation.[180] Many fundamental religious practices "must take place there," since only from Oak Flat can Western Apache "prayers directly go to [the] [C]reator."[181]

Western Apache girls ritually enter into womanhood through their coming-of-age Sunrise Ceremony on Chi-Chil Biłdagoteel, "a female mountain."[182] To prepare, each girl gathers acorns, yucca, saguaro cactus, cedar, and other plants from Oak Flat, speaks to the spirit of Chi-Chil Biłdagoteel, and thanks her for providing every created good needed for the four-day ceremony.[183] Dressed by her godmother in traditional

[177] Id. at 15, 31 (rejecting Apache Stronghold's religious liberty claim: "Under *Lyng*, Apache Stronghold seeks, not freedom from governmental action 'prohibiting the free exercise' of religion, . . . but rather a 'religious servitude' that would uniquely confer on tribal members 'de facto beneficial ownership of [a] rather spacious tract[] of public property.'" (quoting *Lyng*, 485 U.S. at 452–53)).

[178] *Apache Stronghold*, 38 F.4th at 783–84 (Berzon, J., dissenting).

[179] See Declaration, supra note 7, at 2–3.

[180] Opening Brief of Plaintiff-Appellant, supra note 49, at 9.

[181] Id.

[182] National Indigenous Women's Resource Center, supra note 3.

[183] The Irreparable Environmental and Cultural Impacts of the Proposed Resolution Copper Mining Operation: Oversight Hearing Before the Subcomm. for Indigenous Peoples of the U.S. of the H. Comm. on Nat. Res., 116th Cong. 116–34, at 5 (2020) (statement of Naelyn Pike, Youth Organizer, Apache Stronghold); Dana Hedgpeth, This Land Is Sacred to the Apache, and They Are Fighting to Save It, Wash. Post (Apr. 12, 2021, 7:00 AM), https://www.washingtonpost.com/history/2021/04/12/oak-flat-apache-sacred-land [https://perma.cc/8RB4-BDH6].

clothing, the girl is surrounded by tribal members whose dance, song, and prayer convey how the spirit within her will bless and provide for their people.[184] The girl stays in an oak and brush wickiup, awakening with each sunrise to dance and pray—her relatives sharing intimately in each ritual movement.[185] She strikes the ground "in time with the drumbeat to wake up the sacred mountain, the spirits, and the *Gaans*, also known as Angels, bringing them back to life," since no ceremony would be efficacious without them.[186] On her third day of dancing and prayer, the girl becomes "the white-painted woman," drawing her tribe once more into its story of creation:

> In our creation story, the white-painted woman came out of the earth, covered with white ash from the earth's surface. Being painted with the Glesh [white clay taken from Oak Flat] represents the white-painted woman and her entrance into a new life. The paint molds and glues the prayers and blessings from the ceremony onto me. With my face completely covered, my godmother wiped my eyes with a handkerchief. Once my eyes opened, I looked upon the world not as a little girl, but as a changed woman.[187]

The new woman is forever imprinted with the spirit of Chi-Chil Biłdagoteel, of Oak Flat.[188] And her Sunrise Ceremony renews belief in Western Apache hearts that their "way of life is not just history, but the present and future," living and breathing.[189] Their religious practices and cultural traditions come alive on Oak Flat's holy ground.

Before the government claimed title to sacred sites like Oak Flat, the land belonged to Native American communities that used the land for their religious practice, in keeping with ancestral custom. Many religious practices like the Sunrise Ceremony persisted through government dispossession—by force, sale, or broken treaty—of sacred sites where use rights and preservation have been litigated.[190] But courts have not

[184] See id.; Opening Brief of Plaintiff-Appellant, supra note 49, at 11.
[185] National Indigenous Women's Resource Center, supra note 3.
[186] Statement of Naelyn Pike, supra note 183, at 7.
[187] Id.; see National Indigenous Women's Resource Center, supra note 3.
[188] Opening Brief of Plaintiff-Appellant, supra note 49, at 13.
[189] Statement of Naelyn Pike, supra note 183, at 8.
[190] See, e.g., Apache Stronghold v. United States, 38 F.4th 742, 774 (9th Cir. 2022) (Berzon, J., dissenting); Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1081 (9th Cir. 2008) (Fletcher, J., dissenting), *cert. denied*, 556 U.S. 1281 (2009); Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 459 (1988) (Brennan, J., dissenting); Sequoyah v. Tenn.

construed these religious practices in ways that might grant Native American communities property rights in their sacred sites. Following *Lyng*, judges consistently sidestep established strict scrutiny analysis in deciding that any grant of relief would infringe upon the government's right to own and to use "*its* land."[191]

Unlike religious liberty litigation involving non-Indian property, cases like *Apache Stronghold* seek to protect land that Indian faith communities do not themselves own. When zoning regulations would preclude construction of a mosque,[192] or an eminent domain action threatens to close church summer camps,[193] courts can intuitively identify the plaintiff faith communities' explicit ownership interest in their disputed property. But most Native American sacred sites are located on land owned by the federal government.[194] Since historic dispossession of tribal lands remains largely unremedied in the United States, Native Americans can rarely claim 'title' to property upon which they seek to practice their religion.[195] Lacking an explicit ownership interest, Native American religious plaintiffs struggle to defend their sacred sites from desecration and destruction. The Supreme Court's "very robust, or even extreme" formulation of federal ownership rights in *Lyng* remains problematic for Indian property arguments.[196] Judicial precedent leaves many sacred

Valley Auth., 620 F.2d 1159, 1162 (6th Cir. 1980); Badoni v. Higginson, 638 F.2d 172, 177 (10th Cir. 1980).

[191] *Lyng*, 485 U.S. at 453.

[192] See, e.g., Albanian Associated Fund v. Twp. of Wayne, No. 06-cv-03217, 2007 WL 2904194, at *10 (D.N.J. Oct. 1, 2007); United States v. Rutherford County, No. 12-cv-00737, 2012 WL 13082000, at *2 (M.D. Tenn. Aug. 3, 2012).

[193] See, e.g., United States v. 564.54 Acres of Land, 441 U.S. 506, 507–08 (1979); State Highway Dep't v. Augusta Dist. of N. Ga. Conf. of Methodist Church, 154 S.E.2d 29, 30 (Ga. Ct. App. 1967); Father Flanagan's Boys' Home v. Millard Sch. Dist., 242 N.W.2d 637, 640 (Neb. 1976); State v. First Methodist Church of Ashland, 488 P.2d 835, 837 (Or. Ct. App. 1971).

[194] See sources cited supra note 27.

[195] See sources cited supra note 26.

[196] Carpenter, A Property Rights Approach to Sacred Sites Cases, supra note 27, at 1064.

sites—from the Salt Song Trails[197] to Snoqualmie Falls,[198] and Mt. Tenabo[199] to Lake Oahe[200]—effectively unprotected.

For these reasons, legal scholars have questioned whether property law can protect Native American religious practice at sacred sites.[201] Seeking possibilities, Professor Kristen Carpenter explores how Native Americans might challenge the absolutist version of ownership espoused in *Lyng*.[202] She argues that, even as nonowners, "Indian nations . . . may have enforceable rights at sacred sites located on federal public lands," and that, "despite the government's status as the owner, it may have enforceable obligations at sacred sites."[203] Because "property law does not offer absolute protection to *any* owner," Carpenter finds the property holding in *Lyng* flawed.[204] Her project affirms that "law's inability to recognize Indian property rights has been overstated," and that "the assertion of property rights at sacred sites is both possible and important in bolstering Indian claims in sacred sites cases."[205]

[197] La Cuna de Aztlan Sacred Sites Prot. Circle Advisory Comm. v. U.S. Dep't of Interior, No. 11-cv-01478, 2014 WL 12597035, at *3, *9 (C.D. Cal. June 20, 2014).

[198] Snoqualmie Indian Tribe v. FERC, 545 F.3d 1207, 1211 (9th Cir. 2008).

[199] S. Fork Band v. U.S. Dep't of Interior, 643 F. Supp. 2d 1192, 1205–06 (D. Nev. 2009), *aff'd in part, rev'd in part sub nom*. S. Fork Band Council of W. Shoshone of Nev. v. U.S. Dep't of Interior, 588 F.3d 718 (9th Cir. 2009).

[200] Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, 239 F. Supp. 3d 77, 80 (D.D.C. 2017).

[201] See sources cited supra note 31.

[202] Carpenter, A Property Rights Approach to Sacred Sites Cases, supra note 27, at 1062–67; see also Kristen A. Carpenter, Sonia K. Katyal & Angela R. Riley, In Defense of Property, 118 Yale L.J. 1022, 1112–24 (2009) (critiquing judicial interpretations of the First Amendment and RFRA in cases involving sacred sites, arguing for an approach to cultural property rooted in stewardship and cooperative governance with indigenous peoples). Of course, Professor Carpenter also engages with Native American religious exercise in sacred sites cases, though this Article focuses on her property law scholarship. See Carpenter, Limiting Principles and Empowering Practices, supra note 165, at 387 ("[T]he Supreme Court's Indian cases share a common and previously overlooked feature: in all of them, the Court assessed the Indian claims as too broad or too idiosyncratic to merit Free Exercise Clause protection.").

[203] Carpenter, A Property Rights Approach to Sacred Sites Cases, supra note 27, at 1065.

[204] Id. at 1067; see also id. at 1092–138 (describing potential sources of nonowner-property rights for Native Americans, including: common law, treaties, the federal Indian trust doctrine, federal authority over public lands, the public trust doctrine, and human rights law—specifically Indigenous "use" rights); cf. Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2072 (2021) (holding that, aside from three exceptions, it is a per se taking whenever the government authorizes an involuntary entry to land).

[205] Carpenter, A Property Rights Approach to Sacred Sites Cases, supra note, 27, at 1066; see also id. at 1066 n.21 ("The common misconception suggesting [Cherokees did not own and value property] is merely an imperialistic mechanism aimed at soothing the collective

Carpenter is correct: courts and scholars alike have overstated law's inability to recognize Native American property rights in sacred sites.[206] In cases involving sacred sites—both before and after *Lyng*—courts have largely overlooked the property or quasi-property aspects of Native American claims. Courts frame claims solely in terms of religious exercise, rather than communal land use, implicitly treating Native American religious practice at sacred sites as a government license, revocable at will.[207] Because Native American religious claimants lack an explicit ownership interest in their sacred sites, courts decide in favor of the government as landowner, neglecting the possibility that historical realities and persistent land uses might ground viable, nonpossessory ownership interests in those sites.

This Part explores how property law—specifically, prescriptive easements, claims based on custom, and easements by implication—could ground nonpossessory ownership interests in Native American sacred sites. Where Native American religious claimants can demonstrate sacred land uses that have persisted through dispossession, that flow from intergenerational traditions uniting past and present, their religious practice at sacred sites offers evidence of more than free exercise interests. They affirm the possibility of affirmative use rights in their sacred sites, a kind of "sacred easement" over government land.

A. Federal Acquisition of Tribal Lands and Reserved Use Rights

Within two centuries of the first European settlements in North America, the United States had claimed title to nearly every acre of the

white conscience. If individual Cherokees and other Indian tribes do not own or covet real property, then it is not as egregious if their property is taken from them outright or exchanged for inferior lands or cash." (quoting Stacey L. Leeds, The Burning of Blackacre: A Step Toward Reclaiming Tribal Property Law, 10 Kan. J.L. & Pub. Pol'y 491, 493 (2001))).

[206] Id. at 1066; see also Kevin J. Worthen, Protecting the Sacred Sites of Indigenous People in U.S. Courts: Reconciling Native American Religion and the Right to Exclude, 13 St. Thomas L. Rev. 239, 248 (2000) [hereinafter Worthen, Protecting the Sacred Sites of Indigenous People in U.S. Courts] ("Regardless of the reason, or the appropriateness, of the hesitation to protect sacred sites on overtly religious-based grounds, such as the Free Exercise Clause, the phenomenon is real enough that some consideration should be given to seeking protection not on free exercise or other grounds dependant on the value of religion to society, but on grounds more directly compatible with common law property principles which appear to be in ascendency in federal courts in both the Indian and non-Indian law context.").

[207] See Stuart Banner, How the Indians Lost Their Land: Law and Power on the Frontier 205 (2005) (describing how lawmakers and settlers came to view tribes as "tenants at will," rather than landowners, after *Johnson v. M'Intosh* and *Fletcher v. Peck*).

continent.[208] Federal title is classically, and perhaps controversially, understood to flow from the "great case of *Johnson v. McIntosh*," in which the Supreme Court held that the government of the United States possessed the "exclusive right to extinguish" Native American interests in their lands, "either by purchase or by conquest."[209] Those interests in land were defined not as fee simple ownership—which belonged to the United States—but rather as a right of occupancy, a "perpetual right of possession in the tribe or nation inhabiting [the land], as their common property, from generation to generation."[210] The federal government had the exclusive right to purchase that right of occupancy whenever a tribe was willing to sell; but, at least in principle, the government could not force a sale.[211]

In practice, federal land transactions placed Native Americans halfway between force and consent. The government acquired tribal lands using time-tested techniques—bribery of tribal representatives, implicit threats of force against tribes, passive acquiescence in response to violence committed by settlers, and a willingness to negotiate with groups other than tribes' official leadership—compelling tribes to remove from the

[208] Eric Kades, The Dark Side of Efficiency: *Johnson v. M'Intosh* and the Expropriation of American Indian Lands, 148 U. Pa. L. Rev. 1065, 1068 (2000) ("At the root of most land titles in America today sits a federal patent.").

[209] Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 279–80 (1955) (quoting Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 587 (1823)). The complicated legal, moral, and theological foundations of the "doctrine of discovery," which grounds Chief Justice Marshall's opinion in *Johnson v. M'Intosh*, lie beyond the scope of this Article. See generally Steven T. Newcomb, Pagans in the Promised Land: Decoding the Doctrine of Christian Discovery (2008) (exploring the doctrine's theological dimensions).

[210] Mitchel v. United States, 34 U.S. (9 Pet.) 711, 713 (1835). According to Professor Stuart Banner, this notion of "occupancy" as something less than landownership represented a major shift in American legal thought: "In the early 1790s the land not yet purchased from the Indians was thought to be owned by the Indians; by the early 1820s that land was thought to be owned by the state and federal governments. Like many transformations in legal thought, this one was so complete that contemporaries often failed to notice that it had occurred. They came to believe instead that they were simply following the rule laid down by their English colonial predecessors, and that the Indians had *never* been accorded full ownership of their land. And that view, expressed most prominently by the Supreme Court in *Johnson v. M'Intosh*, has persisted right up until today . . . . Knox, Jefferson, and Hamilton did not speak of any 'right of occupancy' midway between ownership and non-ownership. They considered the Indians to be landowners." Banner, supra note 207, at 150–51.

[211] *Mitchel*, 34 U.S. (9 Pet.) at 746 (holding "it as a settled principle, that [Indians'] right of occupancy is considered as sacred as the fee simple of the whites"); see Banner, supra note 207, at 236–39.

fullness of their ancestral lands.[212] An 1835 essay from the *North American Review* captures this pattern of removal:

> We state the following as the means by which cessions of land are usually obtained of the Indians. The whites encroach and settle upon their territory. They increase greatly in number in a short time, and representations are soon made to the government, concerning the value of the land and the necessity of buying it. Commissioners are sent, large presents are made to the chiefs, (formerly whisky was copiously distributed), and their ears are filled with the glory and power of the whites. Such representations are not, however, needed to convince them either of the ability or the will of the United States to oppress them, and they usually sell, what they think would otherwise be taken by force.[213]

Land sales took place within "circumstances constructed by whites to yield a state of affairs in which selling was the lesser of evils."[214] And since tribes could only sell to the federal government, the government could offer terms that tribal representatives could not refuse.[215]

During the eighteenth and nineteenth centuries, Native American communities relinquished rights of occupancy to vast expanses of their ancestral lands in exchange for treaty rights and fiduciary obligations by

[212] Banner, supra note 207, at 198, 227.

[213] Life of Black Hawk, 40 N. Am. Rev., no. 86, at 68, 75 (1835). This article was quoted in Banner, supra note 207, at 227 n.61.

[214] Banner, supra note 207, at 227; see Kades, supra note 208, at 1105 ("The United States . . . did not have to resort to violence or even threats to lower the price of Indian lands. Its most powerful alternative was breathtakingly simple: settlement on the frontier. Settlers killed relatively few Indians in raids, massacres, skirmishes and the like. They killed many more by spreading endemic diseases like smallpox. Perhaps even more importantly, by clearing forests for agriculture, introducing European animals, and hunting at prodigious rates, they thinned the game animals on which the Indians depended for food, clothing, and other necessities.").

[215] The Trade and Intercourse Acts—a series of federal statutes enacted in 1790, 1793, 1796, 1799, 1802, and 1834—prohibited any land transactions with tribes absent congressional approval. Also known as the Non-Intercourse Acts, these statutes regulated commerce with tribes and proscribed punishments for non-Indian crimes in Indian Country. See, e.g., Act of July 22, 1790, ch. 33, 1 Stat. 137 (first Trade and Intercourse Act); Act of June 30, 1834, ch. 161, 4 Stat. 729 (partially codified as amended at 25 U.S.C. §§ 177, 261–65 (2018)); 18 U.S.C. § 1152 (2018) (final Trade and Intercourse Act). Professor Eric Kades argues that the *M'Intosh* rule and these Non-Intercourse Acts "facilitated low-cost acquisition of Indian lands by stifling bidding by Americans for Indian land and making the United States a monopsonistic buyer. . . . [They] solved a collective action problem and left the Indians facing a single buyer assured of no competition." See Kades, supra note 208, at 1105.

the federal government.[216] Many relocated eastern tribes came to occupy land that the government had selected from its own land—which had recently been purchased from western tribes—and reserved for their use.[217] Tribes not compelled to relocate across the Mississippi River engaged in land transactions whereby they ceded their right of occupancy to part of their land and reserved the diminished remainder for themselves.[218] By the 1880s, tribes retained virtually no land that was not part of a reservation.[219]

As a matter of Supreme Court precedent, Native American tribes enjoyed the right to live on their own land, for as long as they desired, throughout the nineteenth century. Legally, they could refuse to sell their land to the federal government, just as they could refuse to relocate onto a reservation. "A person conversant with the Supreme Court's cases, but not with actual practice in the West, would have believed it impossible for an Indian reservation to exist unless a tribe wished to live there."[220] On the ground, federal land acquisition and relocation of tribes onto reservations looked much different. The U.S. Army forced several tribes onto reservations at gunpoint, even while the federal government continued to structure land transactions as "voluntary sales" by the tribes.[221] The Cherokees, the Creeks, the Cheyennes, the Navajos, the Crows, the Sioux—their compelled resettlements into federal Indian Territory (present-day Oklahoma) and onto reservations carved from ancestral lands inspired tremendous grief, suffering, and loss of life.[222]

[216] See Banner, supra note 207, at 191–227. "The actual land transactions that constituted removal [of eastern Indians west of the Mississippi River] were indistinguishable from earlier Indian land purchases, with the sole exception that the purchase price was western land rather than money or goods." Id. at 227.

[217] See id. at 230; see also id. at 235 ("By the early 1850s . . . federal Indian policy turned to the reservation. Virtually all Indian land cessions from then on resulted in the designation of a circumscribed area in which the selling tribe was to live.").

[218] See id. at 235 (noting how "land transactions typically had two components, a cession from the Indians to the United States and the delineation of a reservation for the Indians").

[219] See id. at 228–29 (distinguishing "reservation" in property law: "the act of retaining for oneself rights in land one was conveying to another").

[220] See id. at 237.

[221] See id. at 229 (opining that "everyone on both sides of the frontier knew that the contractual form [for tribal land acquisition] was a sham").

[222] In describing nineteenth-century federal Indian policy, historians traditionally divide the "removal" period (when eastern tribes were forced to migrate west of the Mississippi River) from the "reservation" period (when all tribes were compelled to live in federally designated, circumscribed areas). But the patterns of federal land acquisition from Native American communities, which came to occupy reservations through compelled cessions of ancestral

Even in the absence of force, the treaties creating reservations often revealed gaps between formal law and actual practice. Promised compensation was not always paid. Signatures from tribal leaders were obtained through bribes. In California, tribes negotiated treaties that were never ratified, while Congress transferred their ancestral lands to the public domain, without ever purchasing (and thus extinguishing) the "right of occupancy" that tribes still possessed.[223] When western settlement created enough pressure on reservation borders, executive and legislative acts shrunk, merged, or opened reservations to non-Indian land claims, inspiring confusion over ownership interests while limiting Native American use rights in land once reserved for them.[224]

By the 1880s, the West was dotted with reservations created in the previous decades. Tribal property rights in those reservations had been guaranteed by the federal government in treaty after treaty, and after 1871, through statutes and executive orders.[225] But the pressures of western settlement invariably shifted reservation boundaries and ownership

lands, remains broadly consistent across both periods. See generally id. at 191–256 (describing the Trail of Tears, the Sand Creek Massacre, and other tragedies of these periods).

[223] The California Land Act established a commission to hear land grant claims in California after the United States acquired it from Mexico via the 1848 Treaty of Guadalupe-Hidalgo. Any unclaimed land would become part of the public domain and eventually opened to settlement. See Act of Mar. 3, 1851, ch. 41, 9 Stat. 631 (1851). "The Senate refused to ratify [the treaties] largely because the California congressional delegation lobbied hard to prevent valuable land from being reserved for Indians." Bowers & Carpenter, supra note 133, at 499.

[224] See Banner, supra note 207, at 254–56 ("Perhaps the reason most commonly voiced for why the reservations were unproductive . . . was that the federal government was constantly redrawing their boundaries under the pressure of white settlement."); Bowers & Carpenter, supra note 133, at 499–500 (describing this pattern on the Klamath River Indian Reservation in northern California).

[225] See, e.g., Treaty with the Cherokee (Treaty of New Echota), Cherokee-U.S., Dec. 29, 1835, 7 Stat. 478; Treaty Between the United States and Different Tribes of Sioux Indians (Treaty of Fort Laramie), Apr. 29, 1868, 15 Stat. 635; Treaty Between the United States of America and the Navajo Tribe of Indians (Treaty of Fort Sumner), Navajo-U.S., June 1, 1868, 15 Stat. 667; see also Banner, supra note 207, at 247–56 (analyzing the effects of changes in the legal form of land transactions). In 1871, Congress passed a statute purporting to prohibit treaty negotiation and ratification between Indian tribes and the federal government. See Act of Mar. 3, 1871, ch. 120, 16 Stat. 544, 566 (codified at 25 U.S.C. § 71 (2018)). The United States would continue to recognize rights reserved by treaty before that date. Id. Most of the approximately 375 federal-tribal treaties ratified between 1778 and 1871 remain in effect. See John R. Welch, "United States Shall So Legislate and Act as to Secure the Permanent Prosperity and Happiness of Said Indians": Policy Implications of the Apache Nation's 1852 Treaty, 12 Int'l Indigenous Pol. J. 1, 1 (2021); see also Vine Deloria, Jr., Behind the Trail of Broken Treaties: An Indian Declaration of Independence 161–70 (1985) (arguing against major objections to legal recognition of Native American tribes' international status) [hereinafter Deloria, Behind the Trail of Broken Treaties].

interests in parcels severed from tribal lands, clouding the preexisting use rights that tribes enjoyed in those parcels.

Many of those use rights, expressly guaranteed by the federal government and reserved by treaty, came to be understood as servitudes on ancestral lands that lie beyond reservation borders. Since the Supreme Court's landmark decision in *United States v. Winans*—interpreting the Stevens Treaties' guarantee of tribal fishing rights in the Pacific Northwest[226]—courts have recognized that treaty-reserved use rights impose a beneficial "servitude" on lands where tribes once fished, hunted, or gathered, but no longer retain a right of occupancy:

> [T]he treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted. And the form of the instrument and its language was adapted to that purpose. Reservations were not of particular parcels of land, and could not be expressed in deeds as dealings between private individuals. The reservations were in large areas of territory and the negotiations were with the tribe. They reserved rights, however, to every individual Indian, as though named therein. They imposed a servitude upon every piece of land as though described therein.[227]

While treaties extinguished Native American rights of occupancy, thus "opening the land for settlement and preparing the way for future States," their reservation of use rights gave tribes "a right in the land" which "fixe[d] in the land such easements as enable[] the right to be exercised."[228] Like any servitude intended to run with the land, treaty-

[226] 198 U.S. 371, 380 (1905). The "Stevens Treaties" were principally negotiated by Isaac Stevens, Governor of the Washington Territory from 1853 to 1857. Whitney Angell Leonard, Habitat and Harvest: The Modern Scope of Tribal Treaty Rights to Hunt and Fish, 3 Am. Indian L.J. 285, 294–95 (2014). They contain nearly identical language guaranteeing usufructuary rights to tribes in the Pacific Northwest—including Yakama fishing rights, at issue in *Winans*: "The exclusive right of taking fish in all the streams, where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory, and of erecting temporary buildings for curing them; together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land." Treaty Between the United States and the Yakama Nation of Indians, U.S.-Yakama, June 9, 1855, art. 3, 12 Stat. 951, 952–53; see Leonard, supra, at 294–95.

[227] *Winans*, 198 U.S. at 380–81.

[228] Id. at 381, 384 ("And surely it was within the competency of the Nation to secure to the Indians such a remnant of the great rights they possessed . . . .").

reserved use rights were "intended to be continuing against the United States and its grantees as well as against the state and its grantees."[229]

Since *Winans*, scholars and courts have continued to recognize treaty-reserved use rights as tribal property interests in ancestral lands that lie beyond reservation borders.[230] These nonpossessory ownership interests, guaranteed by the federal government, allow tribal members to enter ceded lands within their ancestral territories, to fish, or hunt, or gather, and to take the spoils of their harvest.[231] But treaty promises made, and broken, by the federal government do not represent the fullness of rights retained by tribes.[232] Tribes retain use rights on their reservation, even if specific rights to hunt, or fish, or gather were not conferred by treaty. A treaty's silence means that the tribe's inherent use rights were unaffected by the treaty.[233]

B. Sacred Land Use Easements

Nineteenth-century treaties, negotiated against the backdrop of federal policies designed to suppress Indian religious beliefs, practices, language,

[229] Id. at 381–82 ("The contingency of the future ownership of the lands, therefore, was foreseen and provided for . . . .").

[230] See, e.g., Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 205 (1999) (tribe's hunting and fishing rights on off-reservation lands were durable and were not extinguished by a territory's transition to statehood); Washington v. Wash. State Com. Passenger Fishing Vessel Ass'n, 443 U.S. 658, 679 (1979) (tribal fishing rights include an implied right of actual harvest); Menominee Tribe of Indians v. United States, 391 U.S. 404, 405–06, 413 (1968) (curtailing or abrogating hunting and fishing rights granted under the Wolf River Treaty of 1854 would mean "destroying property rights" and would constitute a taking of the tribe's property, requiring just compensation); Leonard, supra note 226, at 294–99 (describing treaty-reserved usufructuary rights as "profit à prendre"); Mary Christina Wood, The Tribal Property Right to Wildlife Capital (Part I): Applying Principles of Sovereignty to Protect Imperiled Wildlife Populations, 37 Idaho L. Rev. 1, 36 (2000); Michael C. Blumm, Native Fishing Rights and Environmental Protection in North America and New Zealand: A Comparative Analysis of Profits à Prendre and Habitat Servitudes, 8 Wis. Int'l L.J. 1, 2 (1989).

[231] In this respect, many treaty-reserved use rights represent a profit à prendre, "an easement that confers the right to enter and remove timber, minerals, oil, gas, game, or other substances from land in the possession of another." Restatement (Third) of Prop.: Servitudes § 1.2(2) (Am. L. Inst. 2000).

[232] The United States has violated each of its approximately 375 "Indian" treaties. See Welch, supra note 225, at 1; Deloria, Behind the Trail of Broken Treaties, supra note 225, at 161–86; Comm'r Indian Affs., Report of the Commissioner of Indian Affairs to the Secretary of the Interior 646–51 (1869) (describing the United States' "shameful record of broken treaties and unfulfilled promises" to tribal communities).

[233] See Stephen L. Pevar, The Rights of Indians and Tribes 47–48 (Eve Cary ed., 3d ed. 2002) (describing this "reserved rights doctrine").

and identity, are predictably silent on reserved use rights in sacred sites.[234] In an equal bargaining position with the federal government, tribes' failure to reserve explicit land use rights in their sacred sites seems implausible, given evidence of persistent religious practice involving those sites. Such sacred property interests were "part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which were not much less necessary to the existence of the Indians than the atmosphere they breathed."[235] Their absence from treaties negotiated between tribes and the United States evidence a certain defect in title to sacred sites located on public land.[236]

The reserved rights doctrine does not, by itself, grant explicit ownership interests to Native American communities.[237] Where treaties expressly reserved rights to fish, or hunt, or gather in their ancestral territory, *Winans* holds that tribes enjoy "a right in the land" which "fixes in the land such easements as enable the right to be exercised."[238] Unenumerated rights reserved to tribes offer no explicit property claim. Still, the idea that "servitudes" provide for treaty-reserved rights in practices central to Native American religion and culture, like fishing and gathering, should not be overlooked.[239] It points to an understated reality

[234] See Dussias, supra note 31, at 774–75; Barclay & Steele, supra note 26, at 1307–17.

[235] United States v. Winans, 198 U.S. 371, 381 (1905).

[236] Indian law and property law scholars have long acknowledged the various "clouds on" and "defects in" federal title to Native American tribal lands, particularly given the rapid and coercive nature of tribal land transactions throughout the nineteenth century. See, e.g., Joseph William Singer, Entitlement: The Paradoxes of Property 179–96 (2000); State v. Elliott, 616 A.2d 210, 218 (Vt. 1992) (holding defects in title to Abenaki tribal land resolved by extinguishment may be "established by the increasing weight of history"). As Professor Joseph Singer comments, non-Indian landowners strive not to see these defects: "We are sure that current non-Indian titles are valid, no matter what happened in the past. We assume that it simply must be the case that tribal title was lawfully extinguished, at some point, in some way. We hope that this was accomplished formally and according to the letter of the law, but if not, so be it. The expectations of non-Indian owners are such that they believe their title is unimpeachable, no matter what the formal inadequacies of the process by which title was transferred." Singer, supra, at 228.

[237] Guy Charlton, The Law of Native American Hunting, Fishing and Gathering Rights Outside of Reservation Boundaries in the United States and Canada, 39 Can.-U.S. L.J. 69, 82 (2015) ("The effect of the reserved rights doctrine can be overstated. Absent contrary language, the courts assume that the United States was negotiating for the unimpeded settlement and economic exploitation of the area."); Pevar, supra note 233, at 47–48.

[238] *Winans*, 198 U.S. at 381, 384.

[239] See Worthen, Eagle Feathers and Equality, supra note 26, at 1005 ("Even seemingly mundane daily tasks, such as hunting, planting crops, weaving, or preparing food are religious acts imbued with sacred meaning. Thus, for many Native Americans, culture is the same as

of tribal religious practice: certain parts of tribes' ancestral territory were regularly, necessarily, and predictably used for their religious practice. Where Native American claimants can demonstrate sacred land uses that persisted through dispossession, that flow from intergenerational traditions uniting past and present, their religious practice can provide the kind of secular evidence that courts typically consider in defining easements.

1. Prescriptive Easements and Customary Claims over Sacred Land

Persistence of sacred land uses that follow specific, observable patterns over time may give rise to prescriptive easement claims, or even claims based on custom.[240] Native American claimants can present evidence of their religious practice to demonstrate when and how they have used disputed land, without requiring courts to adjudicate questions of religious belief. The case of *United States ex rel. Zuni Tribe of New Mexico v. Platt* offers an instructive example of how this could work.[241]

Every four years, at the time of the summer solstice, sixty members of the Zuni Tribe make a 110-mile pilgrimage by horseback from their reservation in northwest New Mexico to mountains in northeast Arizona.[242] Since potentially as early as 1540, the Zuni have journeyed to these sacred mountains (known as Kohlu/wala:wa), which they believe to be their tribe's "place of origin, the basis for their religious life, and the home of their dead."[243] The pilgrimage was largely uncontested until 1985, when Earl Platt threatened to block Zuni pilgrims from crossing roughly twenty miles of land he owned or leased in Arizona.[244] The United States instituted an action on behalf of the Zuni Tribe claiming a prescriptive easement across Platt's private property.[245] The Zuni Tribe

religion, and most unique features of Native American cultures are in fact unique religious features . . . .").

[240] To be sure, the doctrine of custom "has only scant adherence . . . in the United States." State ex rel. Thornton v. Hay, 462 P.2d 671, 677 (Or. 1969). But its rootedness in "ancient" practice (i.e., to be "held good, a customary right must have existed without dispute for a time that supposedly ran beyond memory") suggests that the doctrine of custom could support communal sacred land use claims, at least theoretically. Carol Rose, The Comedy of the Commons: Custom, Commerce, and Inherently Public Property, 53 U. Chi. L. Rev. 711, 740 (1986) (noting that customary rights claims also had to be "well-defined" and "reasonable").

[241] 730 F. Supp. 318 (D. Ariz. 1990).

[242] Id. at 319–20.

[243] Id. at 319.

[244] Id.

[245] Id.

also intervened as plaintiff, alleging additional claims under the Free Exercise Clause—religious liberty claims which the court "severed, for purposes of this trial, from the issue of prescriptive rights."[246]

The dispute arose, in part, because Zuni pilgrims do not "deviate from their customary path" when making religious pilgrimage to Kohlu/wala:wa.[247] The pathway, approximately fifty feet wide, "has been consistent and relatively unchanged" for generations.[248] And while "topographical changes may necessarily alter the route," Zuni pilgrims would not allow "man made obstacles" to impede their journey, to the point of "tak[ing] down fences in their way."[249] The Tribe's pilgrimage was openly visible and known to communities along the route.[250] The court found their sacred land use could be plotted in rectangular survey terms:

> The Zuni pilgrimage begins at the Zuni Reservation, in Northwestern New Mexico, and follows a fairly direct path to Kohlu/wala:wa in Apache County, Arizona. The pilgrimage generally crosses the defendant's land along the line of Township 15 North (T. # N.)—Range 28 East (R. # E.) sections 13, 24, 23, 22, 21, 28, 29, 30 continuing on to R.27E. sections 25, 36, 35, 34, 33, T.14 N. sections 4, 5, T.15 N. section 32 and back into T.14 N. section 5 . . . . The return route re-enters the defendant's property at T.14 N.—R.27 E. section 9 goes through section 10, leaves and then re-enters Platt land at T.15 N.—R.27 E. section 36 continuing through R.28 E. sections 31, 32, 29 & 28 at which time the route of egress merges with the route of ingress to Kohlu/wala:wa.[251]

If the Tribe could prove that their quadrennial pilgrimage along the pathway demonstrated actual, hostile, open and notorious, continuous and uninterrupted possession of that land (as defined by Arizona state law) for the ten-year statutory period, an easement by prescription could be granted.

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[246] Id. The Tribe knew that limitations imposed by *Lyng*, decided two years earlier, could scuttle their case. See Carpenter, In the Absence of Title, supra note 34, at 629.

[247] *Platt*, 730 F. Supp at 320.

[248] Id. at 320–21.

[249] Id. at 320.

[250] Id. at 321.

[251] Id. at 320.

Ultimately, the court granted an easement over Platt's land "for purposes of ingress to and egress from Kohlu/wala:wa."[252] The easement's scope—"25 feet in either direction" of the established route, to be used by "no more than 60 persons on foot or horseback," limited to "a 2 day period (one day each direction), during the summer solstice, once every four years"—was determined by the use through which it was acquired.[253] Each element required for prescription was proved in turn:

> *Actual*: Zuni pilgrims "have not recognized any other claim to the land at the time of the pilgrimage, as evidenced by their lack of deviation from the established route."[254]
>
> *Hostile*: "[T]he Zuni pilgrims, at the time of their pilgrimage, claim exclusive right to the path they cross to Kohlu/wala:wa. The claim of right to temporary and periodic use of the defendant's land is evidenced by the cutting or pulling down of fences and the lack of deviation from the route . . . . The use, by the pilgrims, of the defendant's land is 'hostile' to Earl Platt's title. Also there was no evidence presented at trial which would indicate that the Zuni Tribe sought permission to cross the land of Earl Platt."[255]
>
> *Open and Notorious*: "The Zuni Tribe has not attempted to hide their pilgrimage or the route they were taking, although they do regard it as a personal and private activity. It was known generally throughout the community that the Zuni Indians took a pilgrimage every few years. It was also common knowledge in the community, generally, what route or over which lands the pilgrimage took place. . . . The Zuni tribe also cut, tore down or placed gates in, fences on the property owned or leased by [Platt] and others."[256]
>
> *Continuous and Uninterrupted*: "[T]he Zuni Tribe continually used a portion of the defendant's land for a short period of time every four years at least since 1924 and very probably for a period of time spanning many hundreds of years prior to that year."[257]

[252] Id. at 324.
[253] Id.
[254] Id. at 322.
[255] Id. at 323.
[256] Id. at 322–23.
[257] Id. at 322.

Because the Zuni pilgrims' use and possession of Platt's land had been actual, hostile, open and notorious, continuous and uninterrupted "for at least 65 years," and was "known by the surrounding community," the Tribe was entitled to an easement by prescription.[258]

Importantly, evidence of the Zuni pilgrims' "religious purposes" was admitted "only to the extent it demonstrated when and how the land in question was used."[259] While nearly all of the evidence was "of religious orientation," government lawyers representing the Tribe underscored that "the specific activity, that is the actual physical *use* of the land . . . [was not] presented to the court as a legally cognizable religious right but as mere indicia of the fulfillment of the requirements for a prescriptive easement."[260] Tribal pilgrims would be free to use the path every four years, unimpeded in their journey to Zuni Heaven.

Of course, prescriptive easement claims are not permitted against the government. Federal law prohibits adverse possession or prescription of land owned by the United States.[261] And customary claims enjoy "only scant adherence . . . in the United States."[262] But the United States has waived its immunity from adverse possession, at least once, for purposes of curing historic defects in title; and claims based on custom have been recognized in certain circumstances.[263] If the federal government allowed similar prescription claims, other Native American claimants could follow the Zuni Tribe's example. Their sacred land-based claims, defined

[258] Id. at 323–24.

[259] Id. at 324.

[260] Worthen, Protecting the Sacred Sites of Indigenous People in U.S. Courts, supra note 206, at 248–49 & n.53 (quoting Hank Meshorer, The Sacred Trail to the Zuni Heaven: A Study in the Law of Prescriptive Easements, *in* Readings in American Indian Law: Recalling the Rhythm of Survival 318, 323 (Jo Carrillo ed., 1998)).

[261] See 48 U.S.C. § 1489.

[262] State ex rel. Thornton v. Hay, 462 P.2d 671, 677 (Or. 1969).

[263] See Color of Title Act, 43 U.S.C. § 1068 (permitting the Secretary of the Interior to issue a patent to public lands for up to 160 acres, upon payment of not less than $1.25 per acre, to any claimant who establishes that he has held the tract "in good faith and in peaceful, adverse, possession . . . under claim or color of title for more than twenty years, and that valuable improvements have been placed on such land or some part thereof has been reduced to cultivation"). The Oregon Supreme Court confirmed a public right to access Oregon's dry-sand beach areas based on custom. See *Thornton*, 462 P.2d at 678 ("It seems particularly appropriate in the case at bar to look to an ancient and accepted custom in this state as the source of a rule of law. The rule in this case, based upon custom, is salutary in confirming a public right, and at the same time it takes from no man anything which he has had a legitimate reason to regard as exclusively his.").

by traditional religious practice, would allow them to seek easements over public land.

2. Sacred Land Use as Quasi-Easement

Where courts recognize that "servitudes" provide for treaty-reserved rights in practices central to Native American religion and culture, they frequently underscore how those practices correspond to tribes' prior use of their ancestral territory. In *Winans* and subsequent cases interpreting the Stevens Treaties' guarantee of tribal fishing rights in the Pacific Northwest, courts emphasized treaty language reserving to tribes "the right of taking fish at all *usual and accustomed places*"—that is, places where they used to fish when the land belonged to them.[264] This was true of hunting and gathering, building and planting, sheltering and worshipping. Certain parts of every tribe's ancestral territory were regularly, and necessarily, used by the tribe to benefit other parts of its territory. Before their dispossession, quasi-easements existed on Native American lands.

Quasi-easements exist when an owner of a single parcel of land uses part of her land to benefit a second part.[265] The owner's land use does not constitute a true easement, since she cannot obtain an easement in her own land. While she holds unity of title as common owner of both parts, such that both parts of her parcel remain united, no formal servitude may be imposed on either part.[266] Yet the owner may use both parts, under unity of title, in such a way that, upon division of her single parcel of land into separate parts, an easement may be implied from the quasi-easement.[267]

[264] See, e.g., United States v. Winans, 198 U.S. 371, 381 (1905) (emphasis added) (quoting the Stevens Treaties' "usual and accustomed places" language); Washington v. Wash. State Com. Passenger Fishing Vessel, 443 U.S. 658, 664–69 (1979) (same); Puyallup Tribe, Inc. v. Dep't of Game of Wash., 433 U.S. 165, 175 (1977); Dep't of Game of Wash. v. Puyallup Tribe, 414 U.S. 44, 45 (1973) (same); Puyallup Tribe v. Dep't of Game of Wash., 391 U.S. 392, 395–99 (1968) (same).

[265] See Jon W. Bruce, James W. Ely, Jr. & Edward T. Brading, The Law of Easements & Licenses in Land § 4:15 (2023) (discussing the underlying theory of easements implied from quasi-easements); 2 American Law of Property § 8.26 (A. James Casner ed., 1952).

[266] See Bruce et al., supra note 265, § 4:17 (discussing the requirement of "common ownership" for easements implied from quasi-easements).

[267] Id. § 4:21 (discussing "severance" of commonly owned parcels in the creation of easements implied from quasi-easements). When owners fail to mention, reserve, or specify a quasi-easement upon severing unity of title and transferring part of their property, courts must discern whether the transfer imparts a grant of property with all the benefits and burdens that

When the parcel is divided, courts may recognize by implication of law a grant or reservation of the right to continue such beneficial land use if the quasi-easement was apparent, continuous, and necessary for the continued use and enjoyment of either the part transferred or the part retained by the owner.[268] Courts imply easements from quasi-easements based on the inferred intent of the parties, focusing on the nature of the owner-grantor's prior use, as well as the reasonable expectations of the claimant.[269] Both parties will be presumed to have intended to include in their exchange an easement necessary for the continued use and enjoyment of the benefitted parcel.[270]

Before the government claimed title to sacred sites like Oak Flat, the land belonged to Native American communities that used the land for their religious practice, in keeping with ancestral custom.[271] That religious practice was more than mere remembrance or pious devotion. Upon those inherently sacred sites "at which the highest spirits dwell"—those "places of overwhelming holiness," Deloria confides, "where the Higher Powers, on their own initiative, have revealed Themselves to human beings"—Native peoples were "commanded to perform ceremonies . . . so that the

existed at the time of transfer, even though such a grant was not reserved or specified. See id. § 4:15.

[268] Id. § 4:2 (distinguishing between easements of necessity and easements implied from quasi-easements); 2 Casner, supra note 265, § 8.43. For an exemplary discussion and application of implied easement law, see generally Patterson v. Buffalo Nat. River, 76 F.3d 221 (8th Cir. 1996). See also Nicole Stelle Garnett, Three Things: A Tribute to Judge Morris Sheppard Arnold, 18 Green Bag 255 (2015) ("Please tell [Judge Arnold] that his decision deserves to be in a casebook. And tell him that I consider implied easements to be the pinnacle of the law." (quoting Professor Robert Ellickson)).

[269] Bruce et al., supra note 265, § 4:15 (quoting Mitchell v. Castellaw, 246 S.W.2d 163, 167 (Tex. 1952)). This is not the only form of implied servitude. In addition to easements implied based on prior use, there are easements of necessity and easements implicit in deed descriptions, references to a plat, and acts of dedication. See id.

[270] See id.; 2 Casner, supra note 265, § 8.26. Where circumstances such as an apparent prior land use support the inference of intention to include an easement, the claimed easement's required necessity is less than when necessity is the only circumstance from which the inference of intention is drawn. Id. § 8.43.

[271] See, e.g., Badoni v. Higginson, 638 F.2d 172, 177 (10th Cir. 1980) (land used by Navajo for at least 100 years); Inupiat Cmty. of Arctic Slope v. United States, 548 F. Supp. 182, 185 (D. Alaska 1982) (land used by Inupian "from time before human memory"); Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 451 (1988) (land used for religious practices "for a very long time"); see also Opening Brief of Plaintiff-Appellant, supra note 49, at 1 ("Western Apaches have centered their religious practices on Chi'chil Biłdagoteel . . . since time immemorial.").

earth and all its forms of life might survive and prosper."[272] Their religious practice at sacred sites was an exercise in spiritual guardianship of all creation.[273]

But religious practice at sacred sites also sought to ensure that tribes, and their lands, prospered. By their creation and placement on particular landscapes, every animal, plant, and natural object was endowed with a unique sacred power, with "medicine" that tribes could come to possess through ritual interaction with the landscape.[274] Tribal medicine people established and maintained a "dialogue" on behalf of their community through religious practices at sacred sites, acquiring sacred medicine for health and home, hunt and harvest.[275] Their ritual prescriptions called for specific prayers, songs, meals, fasts, dances, stories, and dress, for entering into communion with the efficacious holiness of their communal sacred sites.[276] Medicine people "represented the whole web of cosmic life" in the persistent search for balance and wholeness, participating with animals and plants in religious practices through which "harmony of life was achieved and maintained."[277]

Yet, in an earthy, practical sense, medicine people also "made medicine" at sacred sites, for members of their tribe—their parents and grandparents, their children and grandchildren—and for their lands, upon

[272] Deloria, God Is Red, supra note 72, at 278–79; see Brown & Cousins, supra note 59, at 24 ("Native American groups maintain the presiding sense of the sacred that is present in their land by entering into relationship with the land. These relationships constitute a sacred reciprocity.").

[273] See Deloria, Sacred Lands and Religious Freedom, supra note 55, at 22; Brown & Cousins, supra note 59, at 99–102.

[274] Brown & Cousins, supra note 59, at 32, 35 ("The mountains, the air, the water, the wind, the rock, the wood, everything in the ecology—we use every bit of the ecology in our religious ceremonies. These things, wind, air, mountains, water, rock, Indian religion, are connected."); Campbell & Foor, supra note 57, at 164 (detailing how, within the cosmotheistic worldview of their communities, Native peoples understood themselves to be related through kinship and reciprocal obligations with other human beings, but also with animals, plants, natural objects, and natural phenomena, all of which were believed to be animated with sacred power).

[275] See Nabokov, supra note 65, at 45–46 (describing how medicine people "acquire their medicine powers" through fasting and prayer at sacred sites, renewing "the connection that unites them as individuals with all of creation and with all of their spiritual needs").

[276] See Deloria, Sacred Lands and Religious Freedom, supra note 55, at 18–22; Deloria, God Is Red, supra note 72, at 275–79.

[277] Deloria, Sacred Lands and Religious Freedom, supra note 55, at 15; see Brown & Cousins, supra note 59, at 96–97 ("The relationships that Native American traditions sustain with nature are cyclical. Humans gain power, knowledge, and life from animals and natural forces, and in turn they give respect, honor, and appreciation. The values that support this balance are embedded within the interactions among humans, animals, plants, and elements.").

which they relied for their every provision.[278] To make medicine, tribes required specific places of inherent, awe-inspiring holiness. These "portals to the sacred" were not fungible with other locations for each tribe's religious practices; on the contrary, each tribe's religious practices affirmed their ancestors' recognition of specific geographical locations and communal ceremonies as sources of sacred power.[279] Medicine people used certain, inherently sacred parts of their tribe's ancestral territory, regularly and necessarily, to benefit other parts of that territory. Their religious practices on sacred land effected quasi-easements, giving medicine to place and people.[280]

The Yurok, Karuk, and Tolowa religious practices underlying *Lyng*, and the sacred "High Country" where they occurred, reveal this beneficial land use dynamic. Long before Justice O'Connor expressed concern that their religious beliefs "could easily require *de facto* beneficial ownership of some rather spacious tracts of public property,"[281] the Tribes sent medicine people into the High Country seeking sacred power "to heal the sick, create peace, and ensure continuance of the natural world" around

[278] See Brown & Cousins, supra note 59, at 24 ("The land nurtures the people by sharing its power, giving songs for ceremonies, herbs for healing, and visions for strength. In turn, people honor the land by treating it with respect, performing ceremonies, and singing songs of thanks."); Deloria, Sacred Lands and Religious Freedom, supra note 55, at 17, 19–20 ("[S]ome ceremonies involve the continued good health and prosperity of the 'other peoples' [i.e., animals] . . . .").

[279] Campbell & Foor, supra note 57, at 165 (internal quotation marks omitted); see Apache Stronghold v. United States, 38 F.4th 742, 783–84 (9th Cir. 2022) (Berzon, J., dissenting), (affirming that Oak Flat is "not fungible with other locations" for Western Apache religious practice); Opening Brief of Plaintiff-Appellant, supra note 49, at 9–13 (arguing that many fundamental religious practices "must take place" on Oak Flat since only from there can Western Apache "prayers directly go to [the] creator" (citation omitted)).

[280] To be sure, Native American communities who claimed sacred sites as part of their ancestral territory would not have viewed the relationship between both parts of their land in terms of servitude law. They simply used their land for religious practices. But their sacred land use, like any beneficial land use, can be conceived in terms of quasi-easements just the same. See Deloria, Sacred Lands and Religious Freedom, supra note 55, at 21 ("Among the duties that must be performed at these holy places are ceremonies that the people have been commanded to perform in order that the earth itself and all its forms of life might survive."); Campbell & Foor, supra note 57, at 165; see also Michael V. Hernandez, Restating Implied, Prescriptive, and Statutory Easements, 40 Real Prop. Prob. & Tr. J. 75, 95–97, 96 n.95 (2005) ("Generally, an easement implied by prior use requires reasonable necessity at severance. Although most courts define reasonableness as a beneficial use, others have adopted the lower standard of mere convenience.").

[281] Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 453 (1988).

them.[282] These tribal "doctors" used the entire alpine forest area for making medicine, though certain peaks were considered transcendentally holy: Chimney Rock, Doctor Rock, Peak Eight, Bad Place, South Red Mountain, Meadow Seat, Doctor Rock Two, Turtle Rock, Wylie's Classic Prayer Seat, and the Golden Stairs Trail.[283] In preparing for every ceremony, whether to heal the sick or to renew the land, doctors climbed into the High Country.[284]

Doctors preparing for religious ceremonies gathered medicine in the High Country. Medicine was "both physical and metaphysical," its gifts both "tangible and non-tangible."[285] Certain medicinal plants, curative for destructive ailments, only grow in the High Country. By searching for them, and collecting other medicine, doctors "achieved a mental state . . . that allowed them to communicate with the sacred."[286] That mental state, "created by [the] seclusion and privacy found in the High Country," allowed doctors to perform religious ceremonies—to heal the sick, to renew the land, to lead the tribe in worship.[287] Failure to complete ceremonies and so maintain "balance between the natural environment, the creator, and the people" would result in harm to the community and to its land.[288]

None of these sacred land use details were lost on the U.S. District Court for the Northern District of California when Yurok, Karuk, and Tolowa plaintiffs first brought their lawsuit against road construction and timber harvesting in the High Country.[289] The court affirmed that tribes'

[282] Bowers & Carpenter, supra note 133, at 495 ("Consistent with the tribal worldview, the religion contemplated roles for the people, land, water, plants, and animals in the Tribes' aboriginal territories.").

[283] Id. at 497 ("These places are similar to altars where the doctor can communicate with, or even travel to, the spiritual world.").

[284] Id. at 496–97 ("Its keepers were the *Woge*, pre-human spirits that had retired to the High Country after helping the first humans survive in the lowlands, and the ancient medicine people whose souls reside there for all eternity. These spirits along with the plants gave the High Country its medicine, which the High Country, in turn, gave to the medicine people.").

[285] Id. at 496. For this reason, "a doctor would first fast for several days so that her mind, body, and soul would be pure, enabling her to receive the messages sent from the spirits and administer the medicine." Id.

[286] Id.

[287] Id. ("[A]ny disruptions in the natural environment, whether visual or aural, would be detrimental to the doctor's preparation for the ceremony.").

[288] Id. These ceremonies include the White Deer Skin Dance, Jump Dance, Flower Dance, Boat Dance, and healing Brush Dances. Id.

[289] See supra notes 132–39 and accompanying text; Nw. Indian Cemetery Protective Ass'n v. Peterson, 565 F. Supp. 586, 589–90 (N.D. Cal. 1983), *aff'd in part and vacated in part*, 795

religious use of the High Country "dates back to the early nineteenth century . . . and probably much earlier," underscoring that "[n]o other geographic areas or sites hold equivalent religious significance" for them.[290] But rather than engage tribal property or quasi-property interests, the court focused on arguments that sound in Indian religious liberty, affirming "plaintiffs' lack of a property interest" in the High Country.[291] Setting *religion* against property, rather than *property* against property, Judge Weigel sowed the seeds of his decision's reversal in *Lyng*.[292]

What if Judge Weigel had affirmed plaintiffs' use rights in the High Country instead? The Yurok, Karuk, and Tolowa demonstrated sacred land uses that had persisted through dispossession, that flowed from intergenerational traditions uniting past and present, that mapped onto patterns of beneficial land use consistent with quasi-easements.[293] They negotiated treaties with the federal government that were never ratified; and Congress transferred their ancestral lands to the public domain, without ever purchasing (and thus extinguishing) the "right of occupancy" they still possessed.[294] Given such historical realities, their religious practices at sacred sites in the High Country evidenced more than free exercise interests. They could have implied nonpossessory ownership interests in those sites—a kind of "sacred easement" over government land.

C. Seeing Sacred Land Use

The challenge for courts and for tribes seeking "sacred easements" by prescription, customary claim, or implication is how to see what was intentionally unseen. Apart from *Lyng*, courts considering tribes' historic use of ancestral land may be hard-pressed to accept that religious practices

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

[290] *Peterson*, 565 F. Supp. at 591, 594.

[291] Id. at 594.

[292] 485 U.S. at 453 ("Whatever rights the Indians may have to the use of the area, however, those rights do not divest the Government of its right to use what is, after all, *its* land.").

[293] See *Peterson*, 565 F. Supp. at 591–92 (citing the 423-page "Theodoratus Report" on tribes' historic, cultural, and religious use of the High Country); Bowers & Carpenter, supra note 133, at 503 n.51 ("The Indian doctors never stopped visiting the High Country. Their ability to use the High Country, however, for religious purposes had been severely limited by Indian agents on the Reservation.").

[294] See supra note 223 and accompanying text.

were *apparent* to anyone outside the tribal community.[295] Sacred land uses that had been continuous for generations of tribal members, that remained necessary for the continued use and enjoyment of reserved tribal lands (within the religious worldview of tribes), collided with federal policies designed to suppress Indian religious beliefs, practices, language, and identity in the nineteenth century.[296] These coercive policies, aimed at converting Native Americans to Christianity, took sacred land uses off the bargaining table.[297]

During the nineteenth century, federal efforts to compensate Native American communities for their ancestral lands "by bestowing on them civilization and Christianity" took on a new zeal.[298] Policies of Indian removal, reservation, allotment, and termination formed a "mighty pulverizing engine to break up the tribal [land] mass," but they also served government interests in breaking up tribal religious practice.[299] The federal government had provided funding to Christian missionary activities with Native peoples since 1776.[300] Beginning in 1869, its "Peace Policy" turned over federal administration of many reservations

[295] When implying easements based on quasi-easements, courts rely on "apparent use" to discern the intent of the parties to the land conveyance, and specifically, the grantee's expectation of receiving land burdened by an easement. See Bruce et al., supra note 265, § 4:19 ("Apparent use is utilized to infer intent, not to establish actual intent.").

[296] See generally Dussias, supra note 31, at 819–23 (describing federal policies that created "tension between property rights and free exercise rights" for Native American communities); Barclay & Steele, supra note 26, at 1307–17; see also Bruce et al., supra note 265, § 4:2 (describing how courts may imply easements when quasi-easements are apparent, continuous, and necessary for the continued use and enjoyment of either the parcel transferred or the parcel retained by the owner).

[297] See Dussias, supra note 31, at 774; Barclay & Steele, supra note 26, at 1307–09; Nathan S. Chapman, Forgotten Federal-Missionary Partnerships: New Light on the Establishment Clause, 96 Notre Dame L. Rev. 677, 684 (2020) ("The federal government inherited and transformed a colonial legacy of government-missionary partnerships to evangelize and pacify Native peoples.").

[298] See Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 572–73 (1823) ("On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. Its vast extent offered an ample field to the ambition and enterprise of all; and the character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendency.").

[299] See Barclay & Steele, supra note 26, at 1307 (quoting Angela R. Riley & Kristen A. Carpenter, Owning *Red*: A Theory of Indian (Cultural) Appropriation, 94 Tex. L. Rev. 859, 879 (2016)).

[300] See Dussias, supra note 31, at 777 ("As early as 1776, Congress passed resolutions directing the establishment of missions among certain tribes and provided funding for missionaries' salaries.").

to members of Protestant religious groups, whose job was to "convert and educate the Indians" under their authority.[301] The Peace Policy was eventually replaced by federal emphasis on Indian schools, both on- and off-reservation, which were characterized by "a distinct and pervasive Christian influence."[302] As part of federal efforts to suppress Native American religion, Indian boarding schools proved particularly devastating:

> [T]he government facilitated the forcible removal of generations of American Indian children from their homes, placing them in boarding schools aimed at rooting out their "savagism." The federal policy embodied the philosophy that to "save the man" required they "kill the Indian." With federal funding and approval, such schools often forbade these children from practicing their traditional religions, maintaining meaningful familial or tribal bonds, or speaking their native languages; instead, they were coerced to participate in Christian modes of worship and taught that to be "Indian" was to be inferior.[303]

[301] Id. at 781, 778–79 (describing the government's plan as "aimed at finding, with the aid of religious groups, agents who would be 'competent, upright, faithful, moral, and religious,'" and as "implementing a policy that was intended, 'through the instrumentality of the Christian organizations, acting in harmony with the Government,' to provide churches and schools that would lead the Indians to appreciate 'the comforts and benefits of a Christian civilization and thus be prepared ultimately to assume the duties and privileges of citizenship'" (quoting Francis Paul Prucha, American Indian Policy in Crisis: Christian Reformers and the Indian, 1865–1900, at 31–32 (1976))).

[302] Frank Pommersheim, Broken Landscape: Indians, Indian Tribes, and the Constitution, 185 (2009) ("In 1886 . . . almost a third of the federal schools in Indian country were operated by religious groups funded by Congress. None of this caused a constitutional stir until there was inter-Christian rivalry and hostility. This hostility was largely Protestant hostility directed toward Catholic groups, who by the end of the 1880s were receiving almost two thirds of the federal contract funds."); Dussias, supra note 31, at 784.

[303] Barclay & Steele, supra note 26, at 1308–09 (internal citations omitted); see William Bradford, Beyond Reparations: An American Indian Theory of Justice, 66 Ohio St. L.J. 1, 29 (2005) ("Beginning in the late nineteenth century, Indian children were spirited off to boarding schools where their hair was cut, their tribal clothing was exchanged for Western garb, and harsh abuses were meted out for speaking tribal languages or engaging in customary religious practices."); Ann Piccard, Death by Boarding School: "The Last Acceptable Racism" and the United States' Genocide of Native Americans, 49 Gonz. L. Rev. 137, 141 (2013–2014) ("[T]he federal government's mandatory boarding school . . . [was] designed not to educate those children but, instead, to instill in them the whites' belief that everything 'Indian' was bad, inferior, and evil."); see also Barclay & Steele, supra note 26, at 1309 ("To be sure, many advocating for these policies believed themselves to be acting in the best interest of the tribes, motivated by sympathy for their plight.").

The government's policy of "forced assimilation through religious reeducation" isolated thousands of Native Americans from their families, cultures, languages, lands, and religious practices.[304] As late as 1909, Congress granted tribal reservation land to Christian missionary organizations seeking to evangelize Native peoples.[305]

The government also compelled assimilation by criminalizing Native American religious practices. Numerous dances, ceremonies, and rituals conducted by medicine women and men were prohibited under the Indian Religious Crimes Code, on pain of imprisonment and withholding of food rations.[306] Courts of Indian Offenses, established on most reservations by the Department of the Interior (rather than by congressional enactment), were met with substantial Indian resistance; their "success" in prosecuting and sanctioning Indian religion was often limited by Native judges unwilling to interfere with religious practices of family and friends.[307] Still, federal regulations prescribed penalties for "Indian Offenses" involving burial rites, face paint and other ritual adornments, hair style and length, distribution of personal property, and participation in ceremonial dances.[308]

Government officials rarely saw the religious significance of Native American sacred practice, particularly with respect to property. Ceremonial dances and medicinal rituals were viewed as "means of avoiding work" and "militant celebration," with many seen to involve the

[304] Barclay & Steele, supra note 26, at 1309; see Michalyn Steele, Indigenous Resilience, 62 Ariz. L. Rev. 305, 316 (2020) (noting that federal policies of assimilation "failed in [their] aim to eradicate tribes and indigenous identity" but "exacerbated the systemic poverty and intergenerational trauma from which many families and tribes are still working to heal").

[305] See Pommersheim, supra note 302, at 186 (citing Act of Mar. 3, 1909, ch. 263, 35 Stat. 781 (1909), which granted Rosebud Sioux reservation land to the Bureau of Catholic Missions).

[306] See Barclay & Steele, supra note 26, at 1307; Lee Irwin, Freedom, Law, and Prophecy: A Brief History of Native American Religious Resistance, 21 Am. Indian Q. 35, 35–36 (1997).

[307] See Pommersheim, supra note 302, at 186–87.

[308] See Barclay & Steele, supra note 26, at 1307; Pommersheim, supra note 302, at 187; Dussias, supra note 31, at 788–89, 800–01; see also Felix S. Cohen, Handbook of Federal Indian Law 175 n.347 (1942) ("The sun-dance, and all other similar dances and so-called religious ceremonies are considered 'Indian Offences' under existing regulations, and corrective penalties are provided. I regard such restriction as applicable to any [religious] dance which involves . . . the reckless giving away of property . . . frequent or prolonged periods of celebration . . . in fact any disorderly or plainly excessive performance that promotes superstitious cruelty, licentiousness, idleness, danger to health, and shiftless indifference to family welfare." (quoting Off. of Indian Affs., Circular No. 1665: Indian Dancing (1921))).

"reckless" destruction and "giving away" of personal property.[309] As Professor Frank Pommersheim notes in reviewing federal assimilation efforts, the "single word that most permeates . . . government and field reports is *superstition*."[310] Federal officials "could not see any practice as religious unless it was Christian. Christianity and religion were synonymous and identical. There was no religious expression outside Christianity."[311] Native American religiosity went intentionally unseen.

For this reason, courts considering tribes' historic use of ancestral land may be hard-pressed to accept that religious practices were apparent to federal land agents during negotiations with tribal representatives—or to anyone outside the tribal community. But government officials' willful blindness to Native American sacred land use need not preclude courts from finding such quasi-easements "apparent" for purposes of granting or implying easements at sacred sites. In the context of implied easements, the term *apparent* does not mean that the quasi-easement must be clearly visible to any casual observer.[312] Rather, courts require that any prior land use by the property's common owner (prior to its division into separate parcels) "merely must be discoverable upon reasonable inspection by one familiar with the type of easement claimed. The use itself need not be open to view [e.g., an underground sewer pipe], but signs of its existence must be evident."[313] Courts discern apparentness based on what the grantee-buyer could have discovered about the grantor-owner's prior use of both parcels together. Purchasers of severed land parcels cannot later deny knowledge of quasi-easements, secular or sacred, simply because they chose not to see them.[314]

[309] Pommersheim, supra note 302, at 187–89 ("The concerns included that such dancing ceremonies took valuable time away from work in the fields, often resulted in the reckless giving away of property, were generally immoral because they involved excess, and were not Christian."); Dussias, supra note 31, at 800–01.

[310] Pommersheim, supra note 302, at 189.

[311] Id. ("Government practices that enforced these views were presumably unconstitutional . . . but no court ever pronounced them as such."); see id. at 187 ("Free exercise meant free exercise of *Christian* religion. The First Amendment stopped at the Cross.").

[312] See Bruce et al., supra note 265, § 4:19 ("Courts sometimes state that the prior use must be 'plainly visible' or 'obvious,' but such expansive statements are often made when there is no controversy as to whether the use was apparent.").

[313] Id. § 4:19 & nn.14–16 (collecting cases). Apparentness "must be determined by evidence on the servient estate itself, rather than by what can be observed on neighboring property." Id. § 4:19.

[314] See Stewart E. Sterk, Neighbors in American Land Law, 87 Colum. L. Rev. 55, 63–64 (1987) ("If the servient owner wished at severance to terminate the existing use, one would

During the nineteenth century, federal officials chose not to see Native American sacred land use. The government subordinated tribal religious practice, seeking to bestow "civilization and Christianity" on Native communities separated from their ancestral lands.[315] But tribal religious practice persisted just the same. In the sacred High Country of California, Yurok, Karuk, and Tolowa doctors continued to gather medicine for tribal ceremonies, both to heal the sick and to renew the land.[316] At Rainbow Bridge, Navajo singers continued to visit shrines among the sandstone geological formations—believed to be "incarnate forms of Navajo gods"—seeking sacred power to protect tribal lands and members from destruction.[317] And on Oak Flat, Western Apache girls continued to be painted with white clay, imprinting the spirit of Chi-Chil Biłdagoteel upon them as "changed" women.[318]

* * *

During the nineteenth century, Native American communities negotiated treaties with the United States that severed their ancestral territory. Large portions of tribal land, including land embracing most sacred sites, were transferred to the federal government in exchange for promises that land reserved to tribes, and their off-reservation use rights,

have expected him to express his wishes at that time. The servient owner's silence, then, must be taken either as an attempt to 'put one over' on the dominant owner, or as an assent to the existing use. The easement-by-implication rule presumes, perhaps based on experience, perhaps on moral preference, that the servient owner's silence constitutes assent.").

[315] Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 572–73 (1823).

[316] See Nw. Indian Cemetery Protective Ass'n v. Peterson, 565 F. Supp. 586, 591–92 (N.D. Cal. 1983), *aff'd in part and vacated in part*, 795 F.2d 688 (9th Cir. 1986), *rev'd sub nom.* Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988) (citing the 423-page "Theodoratus Report" on tribes' historic, cultural, and religious use of the High Country); Bowers & Carpenter, supra note 133, at 503 n.51.

[317] Badoni v. Higginson, 455 F. Supp. 641, 643–44 (D. Utah 1977) (claiming that flooded shrines had "performed protective and rain-giving functions for generations of Navajo singers," that desecrated geological formations were "incarnate forms of Navajo gods," and that destruction of these places of "central importance in the religion of the Navajo people" had caused their community "severe emotional and spiritual distress"); Brown & Cousins, supra note 59, at 31 (describing the "Protectionway" ceremony involving Rainbow Bridge: "During the ceremony, an invisible shield of armor is invoked by prayer and held over the patient's head to shelter the person from destructive forces. Like most Navajo ceremonies, the Protectionway draws power from the land.").

[318] Statement of Naelyn Pike, supra note 183, at 5; see Opening Brief of Plaintiff-Appellant, supra note 49, at 13.

would remain protected.[319] But when settlers put sufficient pressure on reservation borders, executive and legislative acts shrunk, merged, or opened reservations to non-Indian land claims, creating confusion over ownership interests while limiting Native American use rights in land purportedly reserved for them.[320] Only certain tribal use rights that existed pre-severance found expression in treaties. Comparable language reserving use rights in sacred sites was missing.

In an equal bargaining position with the federal government, tribes' failure to reserve explicit land use rights in their sacred sites seems implausible given evidence of persistent religious practice involving those sites. The welfare of each community, its remaining land, and all creation relied upon prescribed religious practices in particular places, sacred sites that were not fungible with other locations. Bargaining with the federal government for their ancestral lands, freely and equally, tribes would not have left their sacred sites on the table.[321]

Of course, Native American tribes have *never* been in an equal bargaining position with the federal government. Following the Non-Intercourse Acts and *Johnson v. M'Intosh*, tribes faced the United States as "a single buyer assured of no competition" in bidding for their land.[322] Since tribes could only sell to the federal government, the government could offer terms that tribal representatives could not refuse.[323] Even while the federal government continued to structure land transactions as "voluntary sales" by tribes, it forced numerous tribes onto reservations at gunpoint.[324] The coercive nature of tribal land transactions suggests that treaties negotiated during the nineteenth century should not offer the last word on sacred land use rights.

For Native American tribes seeking to protect sacred land use rights, the reserved rights doctrine can do real work. The doctrine of "reserved rights" recognizes that treaty promises made by the federal government

[319] Excluding Hawaii and Alaska, the United States took control of nearly 1.5 billion acres of Native land; only 56 million acres (approximately 2.7%) remain under Native American control. See Welch, supra note 225, at 1 (citing federal Bureau of Indian Affairs statistics).

[320] See Banner, supra note 207, at 254–56; Bowers & Carpenter, supra note 133, at 499–500.

[321] See supra note 236 and accompanying text.

[322] See Kades, supra note 208, at 1105.

[323] See supra notes 208–15 and accompanying text.

[324] See supra notes 216–23 and accompanying text; Banner, supra note 207, at 229 (opining that "everyone on both sides of the frontier knew that the contractual form [for tribal land acquisition] was a sham").

do not represent the fullness of rights retained by the tribes.[325] No treaty enumerated all the rights that tribes were presumed to retain, nor did treaties operate on standard principles of land conveyance—points that the Supreme Court underscored in *Winans*.[326] Reserved rights could allow courts to correct for past bargaining inequalities between tribes and the government. Where common law conveyance principles run out, courts would look to the substance of use rights, without limiting themselves by the technical rules of property law.

Before the federal government severed their ancestral lands—by force, sale, or broken treaty—Native American tribes used certain, inherently sacred parts of their territory regularly, necessarily, and predictably for their religious practice. Where Native American claimants can demonstrate sacred land uses that persisted through dispossession, that flow from intergenerational traditions uniting past and present, their religious practice can provide the kind of secular evidence courts typically consider in defining easements. An easement arising by force of law (i.e., by prescription, customary claim, or implication) would allow their tribe to exercise an ownership interest in its sacred site, rather than asserting an access right that can be balanced against another owner's right to exclude.

The possibility of such "beneficial ownership" should not be foreclosed by arguments that sacred land uses were not apparent to federal land agents during the nineteenth century.[327] Property law does not permit owners of severed land parcels to refute quasi-easements simply because they chose not to see them.[328] To deny easements at sacred sites—by prescription, customary claim, or implication—based on "apparentness" is to allow the government to benefit from its willful blindness toward Native American religion, identity, and culture during a shameful period in the First Amendment's history.

III. STATUTORY SACRED EASEMENTS

Native American religious practices persist within a dynamic cultural self-understanding. Across time, space, and encounters with new communities, many tribes continue to embrace their sacred sites, even as ceremonies and rituals rooted in those holy places assume an evolving

[325] See supra notes 226–39 and accompanying text.

[326] See United States v. Winans, 198 U.S. 371, 380–82 (1905).

[327] Cf. Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 453 (1988) (voicing concerns about tribes' "*de facto* beneficial ownership of . . . public property").

[328] See supra notes 312–14 and accompanying text.

significance.[329] Where certain religious practices no longer persist—for example, ceremonies honoring tribal war efforts—others take on new meaning.[330] For many Western Apache families, the Sunrise Ceremony allows them to remain rooted within their tribe's traditional religious soil, even as they encounter new faith traditions and ways of living on their ancestral land.[331]

This incorporation of old and new may explain how many Native Americans participate in ancestral rituals while maintaining membership in Christian denominations. "Most Indians did not see any conflict between their old beliefs and the new religions of the white man," notes Deloria.[332] The late Professor Joseph Epes Brown expands on this insight:

> Christianity is yet another thread that has been woven into Native cultural fabric. For many Native Americans, contact with Christianity is more of an adhesion than an exclusivist conversion. There are certainly extremes among tribal members, those who reject Christianity and those who adopt it exclusively, but there is also an even larger group that is situated in a unique manner between the two. Running through virtually all indigenous Native American traditions is the pervasive theme that the sacred mysteries of creation may be communicated to humans through all forms and forces of the immediately experienced natural environment. Such openness of mind and being toward manifestations of the sacred has made it possible for Native Americans to adopt and adapt the Christian expression of values into the fabric of their own religious cultures.[333]

[329] See Brown & Cousins, supra note 59, at 110–11 ("Native American[] traditions are sustained by the understanding that culture is dynamic. New ideas and innovations may be incorporated into a culture without diminishing its core values."); see also Deloria, Sacred Lands and Religious Freedom, supra note 55, at 18 ("The Indian community passes knowledge along over the generations as a common heritage that is enriched by the experiences of both individuals and groups of people in the ceremonies. Both the ceremony and the people's interpretation of it change as new insights are gained.").

[330] See Brown & Cousins, supra note 59, at 110.

[331] See id.; Statement of Naelyn Pike, supra note 183, at 5–8; see National Indigenous Women's Resource Center, supra note 3.

[332] Deloria, Sacred Lands and Religious Freedom, supra note 55, at 15.

[333] Brown & Cousins, supra note 59, at 110 ("Black Elk, for instance, was willing and able to be a catechist and still participate in the rites of the Sacred Pipe and the shamanistic Yuwipi ceremonies.").

Renewed, and sometimes reimagined, ancestral rituals at sacred sites allow Native American worshippers to center their memory, identity, and destiny on holiness in an often secular world.[334]

Courts may prove reluctant to grant or imply sacred land use easements, particularly where tribal religious practices have changed over time. While First Amendment jurisprudence forbids judges from resolving theological questions about religious property (e.g., how Christian influences shape Navajo understanding of their Protectionway Ceremony involving Rainbow Bridge), courts may determine that material differences between nineteenth-century and present-day tribal land use at sacred sites preclude an easement by prescription, customary claim, or implication.[335]

But there are other reasons why courts may find the common law of easements too limiting to effectively—or permissibly—address Native American religious claims. Easements are limited in their scope (e.g., "no more than 60" members of the Zuni Tribe, "on foot or horseback," may travel along the established pilgrimage route, which spans "25 feet in either direction," "during the summer solstice, once every four years").[336] For some tribal religious practices, that limited scope may be too limited to provide sufficient protection for their sacred sites.

Easements arising by force of law also require specific, observable land uses. Where tribal religious practices are kept hidden from the world, evidence of their relationship to sacred sites will be too indeterminate for courts to grant or imply an easement. Deloria writes that respect for kinship and mutuality with the "other peoples" involved in their religious practices (i.e., birds, animals, and plants) leaves many Native American

[334] See Deloria, Sacred Lands and Religious Freedom, supra note 55, at 15–23; see also Brown & Cousins, supra note 59, at 111–12 ("Spiritually effective rites must accomplish three cumulative possibilities: purification, expansion, and identity. Purification is necessary, for that which is impure may not be united with the purity of sacred power. Expansion follows, because only that which is perfect, total, or whole can be united with absolute perfection and holiness. One must cease to be a part, an imperfect fragment; one must realize what one really is so as to expand to include the Universe within oneself. Only then, when these two conditions of purification and expansion have been actualized, may one attain the final stage, in which one's identity is grounded in a union with all that is.").

[335] See supra notes 28–30 and accompanying text. To be sure, such scrupulosity over differences of religious *belief* surrounding religious *practices* at sacred sites need not preclude courts from granting or implying easements based on prior use. In fact, such scrupulosity may run afoul of the First Amendment. See id.

[336] See United States ex rel. Zuni Tribe of N.M. v. Platt, 730 F. Supp. 318, 324 (D. Ariz. 1990).

worshippers "very reluctant to articulate the specific elements of either the ceremony or the location" of these sites.[337] Such reluctance would defeat an easement claim.

To be sure, prescriptive claims over government land remain largely impermissible.[338] Further, even if federal courts were statutorily permitted to find sacred easements by implication, concerns may arise that Congress should be correcting any potential defect in federal title to Native American ancestral lands, rather than the judiciary. After all, Congress is reputed to possess plenary power over Indian affairs.[339]

The federal government has "done little of consequence to protect the ability of tribes to access and preserve" their sacred sites, "despite its assertion of sweeping plenary power."[340] Under *Lyng*, federal courts continue to allow Native American sacred sites to be desecrated and destroyed. Following the Ninth Circuit's decision in *Apache Stronghold v. United States*, Oak Flat may suffer the same fate.[341] For tribes concerned that the Court's religious liberty precedent leaves their sacred sites effectively unprotected, a property-based approach is needed.

This Part proposes just such an approach, one rooted in federal trust doctrine and arising under congressional plenary power over Indian

[337] Deloria, Sacred Lands and Religious Freedom, supra note 55, at 20 ("And since some ceremonies involve the continued good health and prosperity of the 'other peoples,' discussing the nature of the ceremony would violate the integrity of these relationships."); Deloria, God Is Red, supra note 72, at 276–78.

[338] See supra notes 261–63 and accompanying text.

[339] See U.S. Const. art. I, § 8, cl. 3; Lone Wolf v. Hitchcock, 187 U.S. 553, 565 (1903) (asserting federal plenary power over Indian affairs, including congressional authority to abrogate treaty agreements with Indian Tribes: "Congress possessed a paramount power over the property of the Indians, by reason of its exercise of guardianship over their interests, and . . . such authority might be implied, even though opposed to the strict letter of a treaty with the Indians."); United States v. Kagama, 118 U.S. 375, 382 (1886) (locating congressional power to regulate internal tribal affairs in the relationship between Indian Nations and the United States, belittlingly characterizing tribes as "wards of the nation" and "pupils"). Recently, some scholars have begun to question whether such "plenary power" over Indian affairs exists. See, e.g., Lorianne Updike Toler, The Missing Indian Affairs Clause, 88 U. Chi. L. Rev. 413, 420 (2021) (arguing that the absence of an "Indian Affairs Clause" from the Constitution deals congressional plenary power over tribes "a mighty if not mortal blow"); Gregory Ablavsky, Beyond the Indian Commerce Clause, 124 Yale L.J. 1012, 1015 (2015) (explaining how the plenary power doctrine "rest[s] on unstable foundations").

[340] See Barclay & Steele, supra note 26, at 1297.

[341] See Apache Stronghold v. United States, 38 F.4th 742, 773 (9th Cir. 2022), *aff'd en banc*, 95 F.4th 608, 614 (9th Cir. 2024), *opinion modified on denial of reh'g*, No. 21-15295, slip op. at 15 (9th Cir. May 14, 2024).

affairs and federal land.[342] It argues that Congress can, and should, create a statutory property right for tribes to claim an explicit ownership interest in their sacred sites—a sacred easement. Modeled on the conservation easement, this nonpossessory ownership interest would preserve sacred sites for Native American religious practice.[343] Before describing the private law structure of sacred easements, this Part addresses a concern voiced in judicial precedent: the "right to exclude" non-Indian activity from sacred sites.

A. Addressing the Right to Exclude

Cases involving Native American sacred sites operate within an ownership paradigm defined by rights to exclude, to transfer, to use, and to possess. In *Lyng*, this paradigm framed the question of "which party had rights to use the Forest Service land."[344] As owner, the government could exclude tribal religious practice and use the Blue Creek Unit for timber harvesting; as non-owners, the Indians could exclude neither timber harvesting nor road construction from their sacred High Country. When courts deny protection for Indian plaintiffs' religious exercise, they often focus on exclusion.[345] Echoing Justice O'Connor, judges "raise[] the specter of future suits in which Native Americans seek to exclude all human activity" from their sacred sites.[346]

Yet ownership interests need not entail tribes assuming a property right to exclude, or for that matter, estates in fee simple absolute. Of course, the federal government *could* transfer its entire ownership interest in sacred sites to tribal communities, a kind of fee simple reparation for

[342] See supra note 339; U.S. Const. art. IV, § 3, cl. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . .").

[343] See Unif. Conservation Easement Act § 1(1) (amended 2007), 12 U.L.A. 174 (1981).

[344] See Carpenter, In the Absence of Title, supra note 34, at 626 (2003) ("*Lyng* reflects the pervasive notion that owners 'are free to use their property as they wish,' that owners have virtually unlimited rights to exclude, to transfer, to use, and to possess property." (quoting Joseph William Singer, Entitlement: The Paradoxes of Property 2 (2000))).

[345] See Worthen, Protecting the Sacred Sites of Indigenous People in U.S. Courts, supra note 206, at 240 (noting that federal courts have "reduced a somewhat nuanced theory of jurisdiction and inherent sovereignty . . . into a much more simplified test focusing largely on a single aspect of traditional property law—a landowner's right to exclude").

[346] Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 473 (1988). O'Connor raised this "specter" despite the fact that Indian plaintiffs in *Lyng* "never asked the Forest Service to exclude others" from the High Country. Id. at 476.

centuries of colonial dispossession.[347] But when courts express concern that Indian religious plaintiffs "might seek to exclude all human activity but their own" from sacred sites located on public lands, they evidence an absence of political will for such complete restoration of title to Native Nations.[348] Regardless of whether tribes actually desire the right to exclude non-members from their sacred sites, "*de facto* beneficial ownership" need not require exclusive possession.[349]

B. A Template for Statutory Sacred Easements

Divided property rights can help Native American faith communities and the government assuage fears of mutual exclusion from sacred sites located on federal land. By statute, Congress can allow tribes to bring claims for nonpossessory ownership interests in their sacred sites—easements corresponding to their traditional religious practices. Such legislation would not only create a forum for adjudicating tribal claims against the United States (e.g., the Court of Federal Claims),[350] but also permit the federal government to divide its property rights in public lands,

[347] See Tenzin Shakya & Anthony Rivas, To Native Americans, Reparations Can Vary from Having Sovereignty to Just Being Heard, ABC News (Sept. 25, 2020, 4:15 PM), https://abcnews.go.com/US/native-americans-reparations-vary-sovereignty-heard/story?id=73178740 [https://perma.cc/Q8KU-PJUE]; see also Return of the Blue Lake Act, Pub. L. No. 91-550, 84 Stat. 1437 (1970) (returning 48,000 acres in northern New Mexico to Taos Pueblo, including their sacred Blue Lake); In Observance of the 50th Anniversary of the Blue Lake Bill H.R. 471, Richard Nixon Presidential Libr. and Museum, https://www.nixonlibrary.gov/observance-50th-anniversary-blue-lake-bill-hr-471 [https://perma.cc/SDA8-3382] (last visited Feb. 26, 2024).

[348] *Lyng*, 485 U.S. at 452–53; see also Sam Levin, 'This Is All Stolen Land': Native Americans Want More than California's Apology, The Guardian (Jun. 21, 2019, 1:00 AM), https://www.theguardian.com/us-news/2019/jun/20/california-native-americans-governor-apology-reparations [https://perma.cc/ZNQ6-7ULU] (contrasting the California governor's apology to state tribal communities with concrete forms of reparation, including return of ancestral lands).

[349] See *Lyng*, 485 U.S. at 452–53; Worthen, Protecting the Sacred Sites of Indigenous People in U.S. Courts, supra note 206, at 252 (describing how courts have ruled against tribal claims based on the "erroneous view that aboriginal title exists only in the form of an exclusive possessory right").

[350] Congress created a similar jurisdictional act in response to the Sioux Nation's claim that the federal government took their sacred Black Hills without just compensation, in violation of the Fifth Amendment. See U.S. v. Sioux Nation of Indians, 448 U.S. 371, 384–91 (1980); Barclay & Steele, supra note 26, at 1314 (describing the Black Hills, *Paha Sapa*, as "the heart of everything that is" and "the womb of Mother Earth," held sacred to the Lakota). The statute allowed "claims against the United States 'under any treaties, agreements, or laws of Congress, or for the misappropriation of any of the funds or lands of said tribe or band . . . .'" *Sioux Nation*, 448 U.S. at 384 (quoting Act of June 3, 1920, ch. 222, 41 Stat. 738).

at those particular places that tribes continue to hold sacred.[351] Tribes granted "sacred easements" could monitor, and constrain if necessary, both present and future uses of government-owned lands, ensuring compliance with the needs of their religious practice without barring public access to sacred sites.

In many respects, sacred easements could emulate conservation easements in their telos and structure. The Uniform Conservation Easement Act ("UCEA") defines a conservation easement as:

> [A] nonpossessory interest of a holder in real property imposing limitations or affirmative obligations the purposes of which include retaining or protecting natural, scenic, or open-space values of real property, assuring its availability for agricultural, forest, recreational, or open-space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural, archaeological, or cultural aspects of real property.[352]

Certain legal features of conservation easements circumvent common law restrictions on land servitudes—hence, their creation by statute.[353] They function as negative covenants "in gross" held by an individual or organization, rather than "appurtenant," or attached to a specific parcel of encumbered land.[354] While preserving their in-gross features, state enabling statutes provide for the assignability and appurtenance of

[351] Federal law prohibits adverse possession or prescription of land owned by the United States. See 48 U.S.C. § 1489 (2018). But Congress can waive federal immunity from such claims. See, e.g., Color of Title Act, 43 U.S.C. § 1068 (2018).

[352] Unif. Conservation Easement Act § 1(1) (amended 2007), 12 U.L.A. 174 (1981).

[353] At common law, courts recognized three different kinds of servitudes: easements, real covenants, and equitable servitudes. See Susan F. French, Toward a Modern Law of Servitudes: Reweaving the Ancient Strands, 55 S. Cal. L. Rev. 1261, 1266–81 (1982). Common law courts only permitted a few types of negative easements—which empowered the holder to prevent an owner of burdened land from engaging in prohibited conduct—including easements for light and air, the flow of an artificial stream, lateral support, and subjacent support. Id. at 1267. Courts have "exhibited great reluctance to recognize additional negative easements in the absence of legislative authorization." Julia D. Mahoney, Perpetual Restrictions on Land and the Problem of the Future, 88 Va. L. Rev. 739, 748 n.32 (2002).

[354] See Unif. Conservation Easement Act § 4 (amended 2007), 12 U.L.A. 174 (1981) (not requiring conservation easements to be "appurtenant" or attached to a benefited parcel); 4 Richard R. Powell, Powell on Real Property § 34A.01 (Michael Allan Wolf ed., 2006). By way of example, Colorado's conversation easement statute declares that "it is in the public interest to define conservation easements in gross, since such easements have not been defined by the judiciary." Colo. Rev. Stat. Ann. § 38-30.5-101 (2020).

conservation easements.[355] They must be narrowly tailored to satisfy the conservation purposes delineated by each state and may only be owned, or held, by a governmental agency or, in some states, a statutorily authorized qualified charitable organization.[356] The easement holder is responsible for monitoring future uses of the land to ensure compliance with the terms of the easement and to enforce the terms if a violation occurs; and in fact, an easement may empower an entity other than the immediate holder to enforce its terms.[357] To become legally enforceable use restrictions on the real property they encumber, conservation easements must satisfy all state statutory requirements.[358] Insofar as their restriction on "the use which may be made of the real property" is granted in perpetuity, conservation easements become eligible for deductibility under the Internal Revenue Code.[359]

Flexibility makes conservation easements attractive for preservation. They are "enviably malleable," affording contracting parties a wide

[355] See 4 Powell, supra note 354, § 34A.01. Before recording, English courts promoted notice indirectly through doctrinal limitations that "disfavored especially unnoticeable easements." Molly Shaffer Van Houweling, The New Servitudes, 96 Geo. L.J. 885, 894 (2008). For easements to run, their benefit needed to be appurtenant, rather than in gross, since attachment to a specific parcel of land promoted notice. "Appurtenant easements, which often benefit land that neighbors the servient estate, are easier to observe—and their beneficiaries are easier to identify—than easements that benefit people who may have no presence in the neighborhood or connection to the land (whose remoteness, in other words, is especially pronounced)." Id. at 894 (citing French, supra note 353, at 1286–87). As result, common law judges would not allow easements in gross to transfer. Id. at 894–95.

[356] 4 Powell, supra note 354, § 34A.03[2]; see, e.g., Alaska Stat. §§ 34.17.010, .17.060 (1989); Idaho Code §§ 55-2101–2102 (1988); N.C. Gen. Stat. §§ 121-35, 121-37 (1979, 1995); Unif. Conservation Easement Act § 1(2), § 1 cmt. (amended 2007), 12 U.L.A. 174 (1981).

[357] See Unif. Conservation Easement Act § 1(2), § 1 cmt. (amended 2007), 12 U.L.A. 174 (1981) ("[T]he possessor of the third-party enforcement right must be a governmental body or a charitable corporation, association, or trust.").

[358] 4 Powell, supra note 354, § 34A.03[1]. Many state statutes patterned on the UCEA share its language defining a conservation easement as "a nonpossessory interest of a holder in real property imposing limitations or affirmative obligations" for conservation purposes, Unif. Conservation Easement Act § 1(1) (amended 2007), 12 U.L.A. 174 (1981), and include some combination of "cultural," "historical," "archaeological," "architectural," "paleontological," or "scientific" in their definitions of conservation. See, e.g., Ariz. Rev. Stat. Ann. § 33-271(1) (1985); Colo. Rev. Stat. § 38-30.5-102 (2003); N.M. Stat. Ann. § 47-12A-2 (1995); S.D. Codified Laws § 1-19B-56 (1984); Utah Code Ann. § 57-18-2 (West 1985); Wyo. Stat. Ann. § 34-1-201(b)(i) (2008). Some state statutes limit the use of conservation easements to protecting only those cultural, historic, or architectural resources that satisfy the National Register criteria or that are already listed in the National Register. See, e.g., Colo. Rev. Stat. § 38-30.5-104 (2021); N.M. Stat. Ann. § 47-12A-2(A) (West 1995).

[359] I.R.C. § 170(h)(2)(C) (2018).

variety of options.[360] "Landowners need not choose between selling or donating the entire fee simple or retaining all the rights associated with their property," while government agencies can "hammer out private agreements with the owners of environmentally sensitive property, affording them an alternative to traditional regulation."[361] In this respect, conservation easements would seem ideally suited to protect Native American sacred sites. Nearly every state enabling statute allows government entities to grant and to hold conservation easements.[362] Yet with an approach to sacred site preservation that relies upon traditional conservation easements, both technical and moral problems arise.

Technically, the government could grant an easement over sacred site property to another charitable organization—the Nature Conservancy, for example. Rather than purchasing the easement with federal funds, the government would simply donate land it already owns to be monitored for compliance with easement terms.[363] Whether federal lands currently owned and managed by the National Park Service or the Forest Service can be subject to non-governmental encumbrances raises legal questions that easement-enabling statutes fail to address. Also, land use restrictions imposed by conservation easements are commonly required to persist into perpetuity.[364] But if an easement-holding tribe's religious practices no longer require such use restrictions on their ancestral land, perpetuity may actually come to infringe upon, rather than protect, their free exercise of religion.[365]

Morally, the government should be protecting Native American sacred sites, not the Nature Conservancy. Donation to charitable organizations simply relocates the problem that conservation easements would be

[360] Mahoney, supra note 353, at 752.

[361] Id.

[362] New Mexico seems to remain an exception. See Lawrence R. Kueter & Christopher S. Jensen, Conservation Easements: An Underdeveloped Tool to Protect Cultural Resources, 83 Denv. U. L. Rev. 1057, 1067 (2006).

[363] Many conservation easements are purchased with federal, state, and local government funds. Every five years, the Farm Bill provides new sources of funding for conservation easement purchase. See Jeff Pidot, Conservation Easement Reform: As Maine Goes Should the Nation Follow?, 74 Law & Contemp. Probs., no. 4, 2011, at 1, 4.

[364] See Mahoney, supra note 353, at 741, 753 ("Indeed, the inflexibility with which they bind future owners is fundamental to the idea of conservation easements, for these instruments embody the conviction that present generations should be able to constrain forever the acceptable uses of the property.").

[365] Cf. Nebraska v. Parker, 577 U.S. 481, 484–86 (2016) (discussing the Omaha Tribe's century-long absence from disputed lands in considering reservation diminishment).

intended to solve: the government's failure to protect Native American sacred sites from desecration and destruction. A charitable organization would be tasked with doing what the government, pursuant to its trust responsibility, should already be doing.[366] If desired, the government could simply extinguish an easement by eminent domain whenever the value of prospective development projects exceeds that of conservation interests—that is, Native American religious exercise—protected by the easement, with non-Indian organizations receiving "just" compensation for property taken once more from Indian faith communities.[367] Another kind of property right is needed to ensure that sacred sites remain protected.

C. Sacred Easements and Federal Trust Responsibility

Congress can create an instrument that preserves Native American sacred sites while allowing tribes to gain a nonpossessory ownership interest. By statute, and pursuant to federal plenary power over Indian affairs, the government can allow tribes to bring claims for easements corresponding to their traditional religious practices.[368] Where Native American claimants can demonstrate persistent sacred land use in their ancestral territory—religious practices that flow from intergenerational traditions uniting past and present—Congress can share certain federal property rights with them.[369]

Sacred easements claimed from the United States would be held by federally recognized tribes themselves, rather than by third-party charitable organizations, and defined in accordance with tribal religious practice. Federal recognition allows tribes to condition tribal membership on compliance with communal religious norms, including those concerning sacred land use.[370] As easement holders, tribes would be able

[366] See discussion infra Section III.C.

[367] That is, if compensation may even be considered "just" for taken Native American property. See United States v. Sioux Nation of Indians, 448 U.S. 371, 409 (1980) ("[I]n passing the 1877 Act, Congress had not made a good-faith effort to give the Sioux the full value of the Black Hills.").

[368] See supra note 350.

[369] See supra note 351.

[370] As Professor Kevin Worthen notes, members of federally recognized tribes subject themselves to tribal jurisdiction, often implicitly consenting to tribal religious norms. Worthen, Eagle Feathers and Equality, supra note 26, at 1013; see also id. at 1009 ("[A]s a result of constitutional history and current federal policy, Native Americans who belong to federally recognized tribes are to some extent subject to differing governmental norms than

to monitor, and to constrain if necessary, both present and future uses of government-owned lands (i.e., their ancestral lands), ensuring compliance with the needs of their religious practice without barring public access to sacred sites—that "specter" of exclusion courts raise in ruling against Native American plaintiffs. And since a sacred easement could be structured with third-party enforcement rights, like a conservation easement, an entity other than the tribal easement-holder may be empowered to enforce its terms.[371] Native descendants who embrace their ancestors' religious practices at sacred sites, but do not enjoy tribal membership, would be able to bring claims under the tribe's sacred easement.[372]

Conservation can actually function as a limiting principle for courts and legislatures concerned about tribes placing beneficial servitudes over too much public land.[373] Because they would also be limited in developing property placed under sacred easement, tribes would have an incentive to define the property interest as narrowly as their religious practice requires. Their sacred easement would correspond meaningfully to their sincerely held religious belief, making it easier for courts to adjudicate tribal claims when sacred sites are threatened.[374]

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are Native Americans who are not members of federally recognized tribes. The federal government has, from the outset, generally dealt with Native Americans on a tribal, rather than individual, basis, and in doing so has distinguished between Native Americans who are citizens of sovereign entities with which the United States has a formal relationship (federally recognized tribes) and those who are not. . . . Consistent with American notions of freedom, the Constitution also recognized that individual Native Americans could disassociate themselves from their tribes and submit themselves to the jurisdiction of the federal and state governments.").

[371] Cf. supra notes 356–57 and accompanying text.

[372] For example, members of the Black Cherokee community who embrace their ancestors' religious practices at sacred sites in the Little Tennessee Valley (e.g., Chota)—but who have been denied formal membership in the Cherokee Nation—could also enforce the Nation's sacred easement under this model. Cf. Sequoyah v. Tenn. Valley Auth., 620 F.2d 1159, 1162 (6th Cir. 1980) (examining the affidavits submitted by plaintiffs, specifically the plaintiffs' connections to the religious beliefs and practices of their ancestors); Russell Contreras, Cherokee Nation Wants Info on Black Descendants Linked to Slavery, Axios (Feb. 13, 2022) (discussing the tribal membership rights of those descended from the persons held in slavery by the Cherokee Nation), https://www.axios.com/2022/02/13/cherokee-nation-black-descendants-slavery [https://perma.cc/XSC4-5LLH].

[373] See Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 453 (1988) ("No disrespect for these [Indian religious] practices is implied when one notes that such beliefs could easily require de facto beneficial ownership of some rather spacious tracts of public property.").

[374] In fact, sacred easements might allow courts to avoid interrogating the "substantial burden" that government action places on Native American religious belief. Since land is

By allowing tribes to claim sacred land use easements in their ancestral territory, the federal government can help to cure lingering defects in title created by tribal land acquisition efforts during the nineteenth century. The coercive nature of those land transactions—and simultaneous government efforts to suppress Native American religion—suggests that treaties negotiated during that period should not offer the last word on sacred land use rights.[375]

The federal government's "course of dealing" with tribes gives rise to its trust responsibility for Native lands, resources, and welfare—including religious exercise.[376] That course of dealing regarding the tribes' lands and resources is "echoed in the course of dealing with the tribes' religious exercise rights":

> [T]he federal government so thoroughly inserted itself into every aspect of tribal religious life and practice over the course of its dealings with the tribes—even regulating the hairstyles, dancing, face paint, and other practices of tribal members—that those dealings may also have given rise to a responsibility of trust in accommodating tribal religious exercise. The role of government in Indigenous religious life has been so pervasive and detrimental that . . . "there arises the duty of protection, and with it, the power," presumably to protect.[377]

While the scope and actionability of federal trust responsibility can be debated, the obligation owed to tribes, and the political power to carry out that obligation through protective legislation, clearly exist.[378] The federal government is always "something more than a mere contracting party" when carrying out its obligations toward Indian tribes.[379] "Under a

involved, the ownership interest could allow courts to rely on property law (e.g., takings analysis) in determining whether rights have been infringed by government action. See supra notes 28–30 and accompanying text.

[375] See discussion supra Section II.C.

[376] The federal trust doctrine is an entrenched principle of federal Indian law that arises not only from treaties—although treaties impose their own obligations on the United States—but more specifically from the federal government's "course of dealing" with the Indian tribes. See United States v. Kagama, 118 U.S. 375, 384 (1886); Lone Wolf v. Hitchcock, 187 U.S. 553, 567–68 (1903).

[377] Barclay & Steele, supra note 26, at 1352 (quoting *Kagama*, 118 U.S. at 384); see Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831) (defining Indian tribes not as foreign nations but as "domestic dependent nations," and describing their relationship to the United States as resembling "that of a ward to his guardian").

[378] See, e.g., United States v. Lara, 541 U.S. 193, 201 (2004); United States v. Mitchell, 463 U.S. 206, 219–28 (1983); Seminole Nation v. United States, 316 U.S. 286, 290–93 (1942).

[379] *Seminole Nation*, 316 U.S. at 296.

humane and self imposed policy which has found expression in many acts of Congress and numerous decisions of [the Supreme] Court," the government has "charged itself with moral obligations of the highest responsibility and trust."[380]

Federal trust doctrine should ensure that Establishment Clause concerns do not thwart congressional efforts to create religiously motivated ownership interests by statute. The unique relationship between Indian tribes and the federal government "authorizes, and even requires, treating tribes differently" than other religious groups for purposes of the Establishment Clause.[381] Barclay and Steele underscore this distinction: "Even if neutrality were the rule required by the Establishment Clause for government relations vis-à-vis religious groups, the tribes are not religions per se. Thus, no such duty of neutrality should apply to the federal government."[382] Because tribes have a "sui generis, government-to-government relationship with the United States,"[383] the federal government can legislate, negotiate, and enforce legal agreements in the tribes' best interests; and "[a]s long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed."[384]

Sacred easements accord with the federal government's trust responsibility. Historic federal efforts to suppress Native religions—many of which ran afoul of the Establishment Clause—warrant present federal accommodation of Native sacred land use.[385] By investing tribal communities with authority to maintain sacred sites for their religious

[380] Id. at 296–97.

[381] Barclay & Steele, supra note 26, at 1357.

[382] Id. (citing Morton v. Mancari, 417 U.S. 535, 553–54 (1974)).

[383] Id.

[384] *Mancari*, 417 U.S. at 555.

[385] The Establishment Clause sets the limit of permissible government accommodation, and that limit is not coextensive with the noninterference mandated by the Free Exercise Clause. Accommodation can exceed what would be required to prevent a free exercise violation, but it must be something less than the establishment of religion. See Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 334–35 (1987); see also Lynch v. Donnelly, 465 U.S. 668, 673 (1984) (noting the Constitution "affirmatively mandates accommodation, not merely tolerance, of all religions"). In *Kennedy v. Bremerton School District*, the Supreme Court instructed that "the Establishment Clause must be interpreted by 'reference to historical practices and understandings,'" rather than "*Lemon* and the endorsement test." 142 S. Ct. 2407, 2428 (2022) (quoting Town of Greece v. Galloway, 572 U.S. 565, 576 (2014)). In a future article, I hope to consider how courts interpret the federal government's "historical practices and understandings" concerning Native American religion, including those which ran afoul of the Establishment Clause.

benefit, rather than merely delegating that power to federal officials, the government faithfully upholds its trust responsibility to them. Western Apaches can define the jagged cliffs, boulder fields, grassy basins, ancient oaks, and perennial waters that comprise Oak Flat,[386] ensuring that land use by public and private actors avoids desecration of their most sacred site. And because the government's trust responsibility subjects its conduct to "the most exacting fiduciary standards," the tribe knows that its property interest—which is also its religious liberty interest—will be protected.[387]

CONCLUSION

Threats to Native American sacred sites often follow valuable natural resources that lie beneath, upon, or around tribes' ancestral lands. In the sacred High Country of California, the Forest Service planned to harvest 733 million board feet of timber.[388] At Rainbow Bridge, the Bureau of Reclamation sought to pool fresh water from the Colorado River behind Glen Canyon Dam, storing billions of gallons for Colorado, Wyoming, New Mexico, and Utah.[389] And beneath Oak Flat, Resolution Copper still intends to mine "one of the largest undeveloped copper deposits in the world," containing nearly two trillion tons of ore.[390] Such natural abundance often tips the scales in favor of economic development where fair market value is weighed against sacred value.[391] Timber, fresh water, and copper are likely worth more, to more people, than tribal medicine, tradition, or history.

Absent an explicit ownership interest, Native American tribes will remain beholden to other forces acting upon their sacred sites. While claims based on property law may not ensure victory for Native

[386] Emergency Motion, supra note 2, at 3–4.

[387] Seminole Nation v. United States, 316 U.S. 286, 297 (1942).

[388] See Nw. Indian Cemetery Protective Ass'n v. Peterson, 565 F. Supp. 586, 590 (N.D. Cal. 1983) (describing the 80-year timber harvesting plan for the Blue Creek Unit).

[389] See Badoni v. Higginson, 455 F. Supp. 641, 646–48 (D. Utah 1977) (describing the integral role of Lake Powell in Colorado River water storage for "Upper Basin" and "downstream" states) (citing Friends of the Earth v. Armstrong, 485 F.2d 1, 6 (10th Cir. 1973)); Badoni v. Higginson, 638 F.2d 172, 177 (10th Cir. 1980).

[390] Apache Stronghold v. United States, 38 F.4th 742, 748 (9th Cir. 2022).

[391] See Worthen, Protecting the Sacred Sites of Indigenous People in U.S. Courts, supra note 206, at 252 (noting that "the Indian Claims Commission generally awarded compensation only for the economic uses to which the land could be put and not the actual uses Native Americans made of it" (citing Michael Lieder & Jake Page, Wild Justice: The People of Geronimo vs. The United States 142 (1997))).

Americans seeking to practice their religion, they should create affirmative use rights for sacred sites located on public lands, something that constitutional and statutory religious liberty protections have been incapable of doing.

This Article has argued that courts, and Congress, can create real property rights for Native American tribes to claim ownership interests in their sacred sites. Before the federal government severed their ancestral lands—by force, sale, or broken treaty—Native American tribes used certain inherently sacred parts of their territory regularly, necessarily, and predictably for their religious practice. Where Native American claimants can demonstrate sacred land uses that persisted through dispossession, that flow from intergenerational traditions uniting past and present, their religious practice can provide the kind of secular evidence courts typically consider in defining easements. An easement arising by force of law (i.e., by prescription, customary claim, or implication) would allow their tribe to exercise an ownership interest in its sacred site, rather than asserting an access right that can be balanced against another owner's right to exclude.

By statute, Congress can permit the federal government to divide its property rights, at those places that tribes continue to hold sacred. Tribes granted sacred easements could monitor, and constrain if necessary, both present and future uses of government-owned lands, ensuring compliance with the needs of their religious practice without barring public access to sacred sites.

Divided property rights can help Native American tribes and the federal government assuage fears of mutual exclusion from sacred sites. By allowing tribes to claim sacred land use easements in their ancestral territory, the federal government can help to cure lingering defects in title created by tribal land acquisition efforts during the nineteenth century. Historic federal efforts to suppress Native religions warrant present federal accommodation of Native sacred land use.

Of course, sacred easements would protect places, like Oak Flat. But more than jagged cliffs, or sandstone arches, or ancient oaks, sacred easements would protect peoples, like the Western Apache, whose religious practice at sacred sites preserves their communal sense of memory, identity, and destiny.