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Challenging the Narrative of Conquest: The Story of *Lyng v. Northwest Indian Cemetery Protective Association*

Imagine a majestic wilderness with Douglas firs over 300 feet tall, lush green underbrush, mountain streams, and springs. Imagine a place on earth protected by the ancient religion of the indigenous peoples living there for over 10,000 years. Imagine a place so powerful that only people with years of religious preparation are allowed to visit because of the strength of the medicine in each tree, plant, and rock, each gust of air and drop of water. Imagine a place so secluded that humans can only access it by days of foot travel guided by religious leaders to ensure that the medicine doesn't harm those daring to enter. Imagine a place occupied by pre-human spirits known as the *Woge*[1] with whom specially-trained Indian doctors communicate. Imagine a place that provides medicine to heal the sick, control the weather, and bring peace to the world. This is the ''High Country,'' the holy land of the Yurok, Karuk, and Tolowa Indians.

In *Lyng v. Northwest Indian Cemetery Protective Association*,[2] the Supreme Court rejected claims by Yurok, Karuk, and Tolowa Indians that a United States Forest Service plan to build a logging road through the High Country would violate rights protected under the First Amendment and various federal statutes.[3] The Indians had alleged that the timber and road project would irreparably damage certain sacred sites and interfere with religious rituals that depended on privacy, silence,

[1] The *Woge* were pre-human spirits, that sometimes would take on physical shapes, that occupied Yurok Country at the creation of the humans. When the humans were created, the *Woge* moved to the High Country. Now the *Woge* occupy the High Country and can be called upon by Indian people for good luck and power if one obtains the right physical and mental state.

[2] Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988).

[3] *Id*. at 451–53.

and the undisturbed natural setting of the High Country.[4] But the Supreme Court held that the government could go ahead with the project even if would ''virtually destroy'' the Indians' ability to practice their religion.[5]

Desecration of the sacred High Country, located in the Six Rivers National Forest, was allowable, according to the *Lyng* majority, for two reasons. First, the First Amendment only prevents the government from imposing penalties based on religious activity or coercing behavior that violates religious belief. The Free Exercise Clause does not prohibit ''incidental effects of government programs,'' such as the road construction's impact on the High Country, which may interfere with the practice of certain religions. Second, in the Court's view, the government's ownership gave it near absolute management authority over the public lands. As Justice O'Connor wrote: ''Whatever rights the Indians may have to the use of the area, . . . those rights do not divest the Government of its right to use what is, after all, *its* land.''[6]

Understandably, legal scholars remember *Lyng* for its extremely narrow formulation of the First Amendment, in which the Supreme Court found the Free Exercise Clause somehow inapplicable to the protection of Indian religious practices that occur at sacred sites.[7] Others remark on *Lyng's* extremely broad formulation of property rights, in which the government's ownership of the public lands gave it the right to destroy sacred sites located there.[8] *Lyng* is also infamous for making a mockery of the federal Indian trust doctrine—serving as a stark example of the many instances where the government not only failed to protect, but actually sought to harm, Indians' most precious religious and cultural resources—and the Supreme Court allowed it to happen.[9]

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[4] *Id.* at 442.

[5] *Id*. at 451–53.

[6] *Id.* at 450–51, 453 (emphasis in the original).

[7] *See, e.g.*, Alan Brownstein, *Taking Free Exercise Rights Seriously*, 57 Case W. Res. L. Rev. 55, 140–41 (2006); Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. Chi. L. Rev. 115, 125–26 (1992); Robert J. Miller, Note, *Correcting Supreme Court ''Errors'': American Indian Response to* Lyng v. Northwest Indian Cemetery Protective Association, 20 Envtl. L. 1037, 1037 (1990); Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 Harv. L. Rev. 933, 944–46 (1989); S. Alan Ray, Comment, Lyng v. Northwest Indian Cemetery Protective Association: *Government Property Rights and the Free Exercise Clause*, 16 Hastings Const. L. Q. 483, 490–510 (1989).

[8] *See, e.g.,* Kristen A. Carpenter, *A Property Rights Approach to Sacred Sites Cases: Asserting a Place for Indians as Non–Owners*, 52 UCLA L. Rev. 1061, 1062–67, 1077–85 (2005); 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 (2000); 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).

[9] *Compare* Jeri Beth K. Ezra, Comment, *The Trust Doctrine: A Source of Protection for Native American Sacred Sites*, 38 Cath. U. L. Rev. 705 (1989).

While *Lyng* deserves this notoriety, an exclusive focus on defects in the holdings obscures other important dimensions of the case.[10] Indeed, the Supreme Court's opinion comes close to silencing altogether the Indians' perspective on their sacred High Country. This is a significant omission. The Yurok, Karuk, and Tolowa Indian tribes (the ''Tribes'') have resided along the nearby Klamath River since their creation. Unlike many other tribes, they have never been removed or relocated. Their aboriginal territory encompasses the sacred High Country, which the Tribes continue to use for spiritual and medicinal purposes today. The United States is a late comer to this region, having only claimed the land as ''its'' property since the 1850s—after unilaterally converting the Tribes' aboriginal territory into the public domain, refusing to ratify treaties negotiated with the Tribes, and establishing a reservation that excluded the Tribes' most sacred lands. Despite such a recent and clouded history, however, *Lyng* suggests that these events not only conferred legal title on the United States, but also eradicated any past, present, or future relationship between the Tribes and their traditional lands.

Yet the tribal narratives underlying the *Lyng* case suggest the opposite is true—that tribal attachment to place persists before, during, and after legal conquest.[11] Indeed, at every step, the Yurok, Karuk, and Tolowa people have resisted the United States' attempts to sever their relationship with the land and quash related cultural practices. When the United States asserted title in the mid–19th century, and later turned the area into a national forest, tribal religious practitioners continued to use the High Country for spiritual purposes. When the federal government sponsored programs to ''assimilate'' tribal people into the white Christian mainstream, some Yurok, Karuk, and Tolowa temporarily suppressed external indicia of Indian culture and identity—only to reclaim these through spirited activism around land, fishing, and governance rights in the 1970s. And despite *Lyng's* holding that the government had unfettered power to destroy sacred sites for its timber project, the contested section of logging road was never built. In 1984, while the case was still pending, Congress passed the California Wilderness Act exempting much of the High Country from logging. In 1990, Congress passed the Smith River National Recreation Area Act, exempting the proposed site of the road from such construction. The sacred areas were largely preserved. Today, medicine women still travel to the

[10] For a treatment of *Lyng* by a religious studies scholar, *see* Brian Edward Brown, *Religion, Law, and the Land: Native Americans and the Judicial Interpretation of Sacred Land* 119–170 (1999).

[11] Chief Justice John Marshall held in 1823 that Indian nations possessed original Indian title to their lands, and that the federal government held the sole and exclusive right to acquire their title ''by purchase or by conquest.'' Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 587 (1823) (see Chapter 1, this volume). *See generally* Robert A. Williams, Jr., *The American Indian in Western Legal Thought: The Discourses of Conquest* (1990) (discussing the origins of the doctrine of discovery and other legal doctrines that Europeans and Americans used to justify the dispossession or ''conquest'' of Indian lands).

High Country to prepare for ceremonies, and religious dances flourish with record levels of attendance in tribal villages.

This tribally-centered version of *Lyng* is rarely told, at least outside of tribal communities.[12] It is a story of cultural revival fueled by the Indian way of life. It is a story of a community forced to defend itself against the assimilationist agenda of the federal government—and developing a contemporary political identity in the process. It is a story of the inextricable relationship between Indian people and lands, in which the Tribes' attachment to their sacred sites ultimately triumphed over the Supreme Court's narrow application of religion and property laws. And, finally, it is a story about the power of narrative itself. In the many stages of the *Lyng* litigation, the Supreme Court stands alone as the only court that refused to listen to the tribal people's claims about the critical quality of the High Country to their religious freedom. In the final analysis, however, the Indian story of religious and cultural persistence has prevailed over *Lyng*'s ostensible narrative of conquest.

Traditional Culture and History

The *Lyng* case can only be understood with an appreciation for the culture of the Yurok, Karuk, and Tolowa tribes (the ''Tribes''). Their traditional way of life reflects a deep connection between the people and their lands. Indeed, the Tribes' identity, subsistence, religion, and law are deeply entwined with the mountains and rivers, forests and prairies, of northwest California and southern Oregon. For a traditional perspective on these matters, the following discussion relies significantly on interviews with Yurok elders Lavina Bowers and Raymond Mattz, and tribal leaders and members Susan Masten, Chris Peters, Abbey Abinanti, Javier Kinney, and Bill Bowers, as well as print materials examining tribal life ways from a number of disciplines.[13]

Since time immemorial, the Yurok and Karuk have lived along the banks of the Klamath River in northern California, while the Tolowa

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[12] Our discussion of tribal perspectives on the *Lyng* case draws largely from co-author Amy Bowers' knowledge and experience as a Yurok tribal member, as well as interviews with other tribal members, and documentary sources that we cite below. We do not speak universally for the Yurok, Tolowa, or Karuk communities, but try to share both generally-accepted information and specific opinions on the case. We realize that some people may remember or understand the case differently than we do, and we respect those viewpoints. Finally, as the reader will quickly observe, we make no attempt to discuss *Lyng* from the perspective of the Forest Service, state government, timber companies, or their employees—voices which would almost certainly tell a different story.

[13] Telephone Interviews with Lavina Bowers and Raymond Mattz, Yurok elders, Feb. 17 and 19, 2009. Telephone Interviews with Susan Masten, Abby Abinanti, Javier Kinney, Chris Peters and Bill Bowers, Yurok tribal leaders, Feb. 20–27, 2009. In addition to the sources we cite specifically below, *see generally* Lucy Thompson, Che-na-wah Weitch–Ah–Wah, *To the American Indian: Reminiscences of a Yurok Woman* (Heyday Books 1991) (1916); A.L. Kroeber, *Handbook of the Indians of California*, chs. 1–4, published as Bulletin 78, Bureau of American Ethnology 1–97 (1925); Robert F. Heizer & Albert B. Elsasser, *The Natural World of the California Indians* (1980); M. Kat Anderson, *Tending the Wild: Native American Knowledge and the Management of California's Natural Resources* (2005).

lived north of the Klamath River along the Smith River.[14] The territory of the Yurok or *Pulikla*, meaning ''down river,'' stretched from the ocean near the mouth of the Klamath River to about twenty miles upriver and into the mountains surrounding the River. The Karuk, meaning ''up river'' people, were located on the midsection of the Klamath River and surrounding hills. Together, the Tribes occupied a vast aboriginal territory encompassing much of present-day northwestern California.[15]

The Klamath River basin had abundant forest and river resources for food, housing, clothing, and implements. Long before the United States Forest Service or California Department of Fish and Game existed, the Tribes managed these resources according to a complex set of societal rules founded in indigenous science, technology, religion, and law that produced a landscape quite different from the appearance of the Klamath River Basin today. The northwestern California mountain ranges included forests of redwood, Douglas fir, and oak trees, interspersed with large prairies—a varied landscape that the Tribes cultivated through controlled burning techniques. An exploration party in the early 20th century in Karuk and Yurok Country, explained:

> Within the forests, at all elevations from sea level to the top of the ridges, there were small open patches, known locally as prairies, producing grass, ferns, and various small plants. . . . [M]ost of these patches if left to themselves would doubtless soon have produced forests, but the Indians were accustomed to burn them annually so as to gather various seeds.[16]

The Tribes used fire to create elk and deer hunting grounds, prevent disease, inhibit pests, and encourage the growth of hazel and willow shrubs used for baskets and medicine.[17] They also used fallen trees in the forests for canoes and housing.

At the lower elevations, the mighty Klamath River ran from the ocean in northern California to its headwaters in southern Oregon. The Klamath River was abundant with several large salmon runs, fresh water eels, candle fish, and sturgeon providing the Tribes with an annual food supply. Traditional fisheries resource management included property rights, traditional ecological knowledge, and cultural con-

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[14] While the Yuroks, Tolowa, and Karuk have been closely connected to one another for as long as anyone can remember, they come from three distinct linguistic groups—with Algonquian, Athabascan, and Hokan roots, respectively.

[15] *See* James Collins, *Understanding Tolowa Histories: Western Hegemonies and Native American Responses* 75 (1998); Leaf Hillman and John F. Salter, *Environmental Management: American Indian Knowledge and the Problem of Sustainability,* http://www.magickriver.net/karuk.htm. Leaf Hillman is director of the Karuk Tribe's Natural Resources Department and Jonathan Salter is the Karuk Tribal Anthropologist.

[16] Llewellyn L. Loud, *Ethnogeography and Archaeology of the Wiyot Territory*, 14 University of California Publications in American Archaeology and Ethnology 221, 230 (1918).

[17] Since the early 1900s the United States Government has not allowed controlled burns and the prairies have since grown into forests.

straints. The first salmon run would arrive in late May, welcomed by a ceremony to celebrate their return. After the ceremony the community fished for salmon, the preferred traditional food, until late fall. The people were expert fishermen, relying upon generations of experience to understand the life cycles and preferences of their desire. They knew when the fish would run, where they would rest, and how to catch them most efficiently.

Most families had a fishing hole that they ''owned'' pursuant to Yurok property law. Under Yurok law, each family had the right to exclude others from their fishing hole, with remedies for trespass and takings. With these rights came an obligation to manage the resource in a sustainable manner. Fishermen were instructed to never take more fish than was needed to support a family. This was the core principle informing all tribal fishing. People at the mouth of the Klamath River, where the salmon were the most abundant, limited their catches to ensure that people up the river would have enough. Most people followed these rules, creating an effective system of natural resource management that allowed the people, river, and salmon to thrive as a community.

The Tribes lived in villages scattered along the banks of the Klamath River. Homes were built from large redwood planks and stayed in families for generations, eventually called by the family name. The river and trails served as highways connecting the villages, sacred sites, and other areas of community gathering. Politics and legal affairs were conducted by ''heads of families,'' each of whom represented a family in public affairs and settled disputes according to commonly-accepted law. The law was based upon common beliefs including ''cultural covenants'' that helped the Tribes to regulate behavior.[18]

Cultural Covenants

Traditional Yurok, Karuk, and Tolowa life was governed by a series of social rules known as ''cultural covenants.'' These covenants were based on religious principles and taught through stories. The creation story was the most important as it defined the people's relationship with the land, natural resources, and animals.[19] The story begins with the creator making the land, water, and animals, and finally the humans, each created to support the others. Each had a purpose in the chain of life, and if that purpose was not fulfilled, the natural order would begin to break down. The creator explained that the animals and plants would provide for the well-being of the people, but cautioned to take only what

[18] The Tribes had a very complex system of law based on restitution. The most common crimes were assault, murder, or violation of a property right, such as trespass. Common crimes had agreed upon prices that the perpetrator would be required to pay to the injured party. Debts were paid either through money exchanges or through personal services. Once the debt was paid, both parties were forbidden to speak of the grievance again.

[19] Telephone Interview with Lavina Bowers, Yurok elder, Feb. 19, 2009. For classic anthropological accounts, *see* A.L. Kroeber, *Yurok Myths* (1978) and A.L. Kroeber & E.W. Gifford, *Karok Myths* (1980).

was needed to survive, because exploitation of the natural world would stop the regeneration of resources.

The tribal worldview acknowledged a natural order, perpetuating the well-being of all creation—and that the tribal people had a role in maintaining this order. If they were good stewards of the land, prayed and held ceremonies, the world would live in peace and prosper. While individuals had to pray on a daily basis to wish good for other people and the environment, the entire community was obligated to undertake several annual ceremonies. Failure to uphold cultural covenants, complete ceremonies, or use medicine properly could result in great harm to the community and natural environment. In this way, the Tribes believed the entire world was at risk if they were unable to practice their religion.

Individual wealth accumulation depended on adherence to the cultural covenants. The creator would provide ''wealth,'' such as eagle feathers, white deerskins, and other items used in making regalia, to individuals who were proper stewards of the land, prayed regularly, and participated in ceremonies. The Tribes had three classes of people: wealthy, middle class, and indentured servants. At the bottom of the social structure were indentured servants who in most cases did not have enough money to pay a debt owed to a particular family. Debts were paid by working for the family or individual. Wealthy people were considered to be living good lives in accordance with cultural covenants and were rewarded with wealth. The more wealth one acquired, the higher his or her position in society.

Religion

With this context, one can begin to understand the Yurok, Karuk, and Tolowa religion underlying the *Lyng* case.[20] Like most religions, the tribal religion creates social standards that govern the human interaction with the sacred. But unlike many other religions, the sacred was not found in heaven; rather, it was *here* on earth.[21] Consistent with the tribal worldview, the religion contemplated roles for the people, land, water, plants, and animals in the Tribes' aboriginal territories. The sacred flowed through these things, empowering them with a life force capable of assisting humans in their struggles to heal the sick, create peace, and ensure continuance of the natural world. To access the sacred and fulfill their cultural covenants, the Indian people performed ceremonies and relied on Indian religious leaders, known as medicine people or ''doctors.''

Doctors: Training and Ceremonies

Indian doctors or medicine people were responsible for healing the sick and presiding over world renewal ceremonies. Each doctor had to

[20] For background on Yurok spiritual practices, *see* Thomas Buckley, *Standing Ground: Yurok Indian Spirituality*, 1850–1990 (2002).

[21] The leading treatment of indigenous religions, particularly as compared with Western religions, is Vine Deloria, Jr., *God is Red: A Native View of Religion* (2d ed.1992).

complete training before performing any service. The creator chooses medicine people usually through a dream. A girl would know the creator had chosen her to become a medicine woman by dreaming she had ingested a snake or similar animal. In this dream, the snake represented a ''pain'' or an illness. If she accepted the call, the girl became a ''trainee'' and would go in to a long period of training with an experienced doctor. Her first task in training, was to extract the pain from her person, with the guidance of medicine men. The trainee would enter a sweathouse where she would work to rid herself of the pain, aided by songs that caused her to go into a trance. The men sang and the trainee danced until she extracted the pain by vomiting.

Next, the trainee was required to go to the High Country to find the other half of the pain. She traveled from her village to the High Country by boat and trail, guided by a medicine woman. During this time, the trainee was acquiring power but could not yet control it. She avoided other people because even eye contact could cause serious damage to the other person. Once in the High Country, the trainee would stand on rocks (like altars) and begin dancing and praying. Through this process, the other half of the pain was ingested. The trainee would then complete the sweathouse ceremony again to rid herself of the pain.

Doctors went to the High Country to prepare for all ceremonies or healing services. Similar to the training process, 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. The doctor could then travel to the High Country to acquire the medicine needed to accomplish her goal. Medicine in the High Country was both physical and metaphysical—it involved the tangible and non-tangible. Plants found only in the High Country were collected for medicine. Doctors achieved a mental state during the process of collecting the medicine that allowed them to communicate with the sacred. Without the appropriate mental state, the doctor would not be empowered to accomplish the goal of the ceremony or to heal the sick. The mental state was created by seclusion and privacy found in the High Country—any disruptions in the natural environment, whether visual or aural, would be detrimental to the doctor's preparation for the ceremony.

The ceremonies were a critical element of maintaining the universal balance between the natural environment, the creator, and the people, as required by the Tribes' religion. Failure to complete ceremonies and maintain that balance would result in harm to the community. Throughout the summer, the Tribes held, at specific sites, world renewal ceremonies including the White Deer Skin Dance, Jump Dance, Flower Dance, and Boat Dance. Healing ceremonies, called Brush Dances, could take place at any time in the home of the sick. The entire community participated in these dances, each of which required medicine from the High Country to accomplish the goal of the ceremony.

The High Country

In all of these realms, the High Country was critical. The Tribes considered the land so sacred that humans could not interfere with the creator's natural intention or use it for any other purpose than gathering medicine, preparing for ceremonies, and training Indian doctors. It was so sacred Indian people only talked about the High Country for religious purposes. It was not referenced in day-to-day discussions. 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.

Because the High Country was so sacred, few people could go there. As described above, only highly trained Indian doctors or those undergoing doctor training were permitted to visit the High Country—and these individuals went after cleansing themselves through days of fasting. Doctors used the entire forest for collecting medicine, but certain sites had specific importance. The most recognized of these are Dr. Rock, Peak Eight, Bad Place, Chimney Rock, South Red Mountain, Doctor Rock Two, Meadow Seat, Wylie's Classic Prayer Seat, Turtle Rock, and the Golden Stairs Trail. These places are similar to altars where the doctor can communicate with, or even travel to, the spiritual world.

To state it simply, the High Country played a central role in the Indians' worldview. The most important aspects of the religion—the medicine and communication with the sacred—could only be accomplished by a doctor visiting the High Country in its pristine condition. The fruits of the doctor's journey empowered ceremonies, giving humans the power to pray for the wellbeing of the universe. If the High Country were jeopardized, the entire culture, and indeed the entire world, would begin to crumble.

Post–Contact Experience

In the traditional Yurok, Karuk, or Tolowa experience, where the High Country was secluded, protected, and revered, destruction of this sacred area was unthinkable. The arrival of Europeans into the Tribes' territory, however, brought struggles over land and culture that would ultimately threaten the High Country and its guardians, the Indian people. The following history highlights the events most relevant to the *Lyng* case.

1500s–1892

The first Spanish explorers arrived in northwest California in the 1500s. Few made permanent settlements and the Tribes had little contact with foreign sovereigns until the United States and its citizens began to enter the region in the 1800s. Initially United States citizens engaged in modest fur trading efforts; but with the 1849 discovery of gold at Gold Bluffs and Orleans, mining expeditions descended on the

area. Increasing numbers of settlers moved through the area and hostilities ensued, leading to the destruction of Indian villages, loss of life, and culture. Tribal estimates suggest that, during the Gold Rush era, at least 75% of the Yurok people died from massacres and disease, and other tribes in California lost 95% of their populations.[22]

The United States quickly followed its citizens into the Tribes' territory, purporting to acquire all of present-day California from the Mexican government via the Treaty of Guadalupe–Hidalgo in 1848.[23] The Treaty required the United States to recognize all pre-existing Mexican and Spanish private land grants,[24] and in 1851, Congress passed the Private Land Claims Act (alternatively called the ''California Land Claims Act'') setting up a commission to hear land grant claims.[25] Any unclaimed land would become part of the public domain, to be eventually opened for settlement. The Indians on the Klamath River did not submit claims, most likely because they were unaware of this Act and because their title to land was not derived from the Spanish or Mexican government, but rather from their ancient and continuing occupancy.[26]

California was admitted to the Union just a year before this land claims process began in 1850, and significant numbers of white citizens soon came to settle. Congress appropriated $25,000 for the negotiation of treaties with the Indians of California.[27] The United States negotiated a treaty with the Lower Klamath Indians that would have set aside a reservation including the villages on the lower and middle Klamath River and some sections of the prairies.[28] For reasons that remain unclear in the historical record, the promised reservation did not include the High Country. We can only speculate that, in addition to its plan to turn the Indians into farmers, the United States may have had early designs on the timber-rich area, causing it to restrict the reservation to agrarian land along the lower elevations of the Klamath River. The Indians, for their part, would have been unlikely to disclose their use of the sacred High Country to federal agents and may not have requested its inclusion in the reservation.

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[22] *See* Website of the Yurok Tribe, http://www.yuroktribe.org/culture/culture.htm (last visited Oct. 16, 2009). *See also* Russell Thornton, *American Indian Holocaust and Survival: A Population History Since 1942* at 107–09 (1987).

[23] Treaty of Peace, Friendship, Limits, and Settlement with the Republic of Mexico, U.S.–Mex., Feb. 2, 1848, 9 Stat. 922, 1848. *See also* Christine A. Klein, *Treaties of Conquest: Property Rights, Indian Treaties, and the Treaty of Guadalupe Hildago*, 26 N.M. L. Rev. 201 (1996).

[24] Thompson v. United States, 8 Ind. Cl. Comm. 194 (1959).

[25] California Land Claims Act, 9 Stat. 631 (1851).

[26] Bruce S. Flushman & Joe Barbieri, *Aboriginal Title: The Special Case of California*, 17 Pac. L.J. 391 (1986).

[27] Act of Sept. 30, 1850, ch. 91, 9 Stat. 544, 558 (1850).

[28] Treaty with the Pohlikla or Lower Klamath Indians, Oct. 6, 1851, Kapplar, Vol. IV (1927). Although it was not ratified, this treaty is referenced in *Karuk Tribe of California v. Ammon*, 209 F.3d 1366, 1371 n.3 (Fed. Cir. 2000).

Of course the issue is somewhat moot because the Peace Treaty with the Lower Klamath Indians was never ratified and the land was never reserved for the Tribes. The President submitted the Treaty to Congress on June 1, 1853, along with seventeen other treaties that had been negotiated with tribes throughout the state. The Senate refused to ratify them, largely because the California congressional delegation lobbied hard to prevent valuable land from being reserved for Indians.

Just months before the California Indian treaties arrived at Congress, the California Land Claims Act, March 3, 1853, had transferred large tracts of Indian lands to the public domain. White citizens clamored to settle there, specifically in northern California.[29] In 1853, Congress passed an ''Act to Provide for the Survey of the Public Lands of California and the Granting of Preemption Rights to Settlers.''[30] Whites' attempts to homestead lands resulted in violent clashes with the Indians. At first, Congress responded by authorizing the President to establish a number of ''military'' reservations out of the public domain ''for Indian purposes,'' each to be no greater than 25,000 acres.[31] President Pierce subsequently issued an executive order in 1855 creating the Klamath River Indian Reservation (''Reservation'').[32] The Reservation began at the mouth of the Klamath River and proceeded up twenty miles, one mile on each side of the river, but excluded the villages up river in order to keep within the statutory limit of 25,000 acres. The Reservation did not include the High Country.

The battle for this territory was not over, however. Nine years later, the Act of April 8, 1864 authorized the President, at his discretion, to create four Indian reservations in California and to authorize allotments for individual Indians residing on existing Indian reservations that would be terminated by the Act.[33] The President did not take immediate action on the Lower Klamath River Reservation pursuant to this Act. Eventually, in 1891, President Harrison issued an Executive Order enlarging the Hoopa Valley Reservation, which was located about 50 miles upstream from the Klamath River's mouth, by ''one mile in width on each side of the river, from 'the present limits' of the Hoopa Valley Reservation to the Pacific Ocean'' in order to reduce the number of

[29] For a general discussion of the treatment of California tribes' land by the federal government, *see, e.g.*, Amy C. Brann, Karuk Tribe of California v. United States: *The Courts Need a History Lesson*, 37 New Eng. L. Rev. 743, 753–54 (2003). *See also* William Wood, *The Trajectory of Indian Country in California: Rancherias, Villages, Pueblos, Missions, Ranchos, Reservations, Colonies, and Rancherias*, 44 Tulsa L. Rev. 317 (2008); Carole Goldberg–Ambrose, *Public Law 280 and the Problem of Lawlessness in California Indian Country,* 44 UCLA L. Rev. 1405, 1408–09 (1997).

[30] Act of Mar. 3, 1853, ch. 143, 10 Stat. 244.

[31] Act of March 3, 1853, 10 Stat. 226, 238; Act of March 3, 10 Stat. 686, 699 (1855).

[32] Exec. Order (Nov. 16, 1855), *cited in* 2 *Indian Affairs: Laws and Treaties* 817 (Charles J. Kappler ed., 1904).

[33] Act of April 8, 1864, 13 Stat. 39, 40 (1864).

Indian reservations in California.[34] Essentially, the two reservations were merged into one. Then, in 1892 an Act opened up the territory formally known as the Lower Klamath River Reservation to allotment and non-Indian settlement.[35] During this time period, 10,000 acres were allotted to Yuroks, but 15,000 acres of the most valuable Klamath River timber lands were sold to white settlers and timber companies.[36] The Act did not terminate the Klamath River Reservation but created much confusion about the status of the land. As the Supreme Court later noted in *Mattz v. Arnett*,[37] the Klamath River Reservation continued its ''de facto'' existence, with the Yuroks continuing to reside there and the Department of Indian Affairs maintaining its administrative duties.

1893—1934

Turn-of-the-century California Indians were also dealing with shifting federal Indian policies that aimed to ''kill the Indian and save the man.''[38] Racism informed federal policy and interactions between Indians and white people. Leaders in government, education, and religion joined forces across the United States to destroy tribal cultures and force Indians to adopt western civilization.[39]

Beginning in the 19th century, the federal government outlawed tribal religions, with a particularly brutal focus on what it perceived to be ''heathenish'' ceremonial dances. In 1883, the Commissioner of Indian Affairs issued ''Rules for Indian Courts'' that defined a number of ''Indian Offenses,'' including participation in the sun dance. The ''usual practices of so-called 'medicine men' '' were also prohibited, as were ritual acts of property destruction carried out in accordance with tribal mourning customs.[40] To enforce this new Code of Indian Offenses, the 1883 Rules directed the Commissioner of Indian Affairs to establish Courts of Indian Offenses at each federal Indian agency, staffed with judges appointed by the local federal agents.[41]

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[34] *Mattz*, 412 U.S. 481 at 493.

[35] Act of June 17, 1892, 27 Stat. 52.

[36] Brown, *supra* note 10, at 121.

[37] 412 U.S. 481, 490 (1973).

[38] Richard H. Pratt, *The Advantages of Mingling Indians with Whites*, extract, Official Report of the Nineteenth Annual Conference of Charities and Correction, 1892, *excerpted in Americanizing the American Indians: Writings by the ''Friends of the Indian'' 1880–1900*, at 260, 261 (Francis Paul Prucha ed., 1973).

[39] William Bradford, *An American Indian Theory of Justice*, 66 Ohio St. L.J. 1, 28 (2005).

[40] Dussias, *supra* note 8, at 788–89 (quoting an 1882 letter from Secretary of the Interior Henry Teller to the Commissioner of Indian Affairs). Dussias demonstrates that the federal suppression of Indian ceremonial dances occurred in various regions of the country and continued well into the 20th century. *See id.* at 800–05.

[41] *See generally* William T. Hagan, *Indian Police and Judges: Experiments in Acculturation and Control* (1980).

While the Courts of Indian Offenses were not entirely successful at their tasks, Indian agents did suppress religious ceremonies through various means, including the destruction of dance houses, denial of food rations, imprisonment, and the threat of military intervention. According to tribal elders, Indian agents in northern California rigorously enforced the prohibitions on religion. While many Indian dances continued, practitioners were forced to go underground. For the first time in tribal memory, certain ceremonies were not performed on an annual basis. While Indian doctors were harassed and ridiculed by Indian agents, Christian missionaries preached that the tribal religion was the ''devil's religion.''

This was also the era of ''Indian boarding schools,'' a mean arrow in the federal government's quiver of assimilation policies. Across the country, the government and churches established such schools to teach Indian children English, Christianity, and the ''civilized'' way of life.[42] Indian children were taken, without their parent's consent in some instances, to residential schools located far from their homes. In the early 1900s, the Indian children of the Klamath River were sent to boarding schools in northern Oregon. These children left the Reservation speaking tribal languages, believing in their cultural covenants, and practicing the religion—only to be beaten and punished for exactly these traditional practices by boarding school teachers and administrators. These students became the first generation of Indian people from the Klamath River not to live in their aboriginal territory or participate in annual tribal religious ceremonies.

As in many regions of the country, state and local governments piggybacked on federal policy by treating Indians and their lands as if their distinctive identity and legal status no longer existed. The state of California began to assert jurisdiction in the Tribes' territory, most provocatively, perhaps, for traditional Yuroks, by outlawing gillnet fishing on the Klamath River.[43] It also restricted access to the forests and the prairies in the lower elevations where the Tribes had traditionally produced and gathered food. Indian agents discouraged tribal fire management and suppression practices, causing brush plants and trees to crowd out the carefully cultivated prairies on which the Tribes relied for hunting and gathering practices. Logging companies began buying fee land within the original reservation boundaries. There was great concern among the Tribes that the High Country would be logged at this time. The logging companies however focused on forests at lower elevations surrounding the Klamath River, a timber supply that kept the mills running for almost fifty years. The High Country remained safe—for the time being.

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[42] *See generally* David Wallace Adams, *Education for Extinction, American Indians and the Boarding School Experience: 1875–1928* (1995).

[43] *Mattz*, 412 U.S. 481 at 484.

1934—1975

By the 1930s, the federal government began to recant its policy of assimilation, recognizing the detrimental effect on Indian communities. The Indian Reorganization Act of 1934 (''IRA'') provided tribes the opportunity to adopt constitutional governments and qualify for new federal funding.[44] And yet, the IRA was also criticized in Indian country as undesirable for its failure to observe traditional norms and procedures of tribal government.[45] For these and other reasons, many tribes rejected the IRA. In northern California, both the Hoopa Valley and Klamath River Reservations voted overwhelmingly in 1934 against adoption of an IRA government.[46] Tribal elders remember that the Bureau of Indian Affairs continued to control tribal natural resources, financial and government affairs, and even communication with the outside world, through the middle of the 20th century.

Indian assimilation began to have detrimental effects on tribal identity as well. Racism and discrimination were still prevalent. With rights to land, religion, subsistence, and self-governance at an all-time low, many people were scared to ''be'' *Indian*, at least in public, for fear of social and political persecution by the white community. With the grace of Indian humor, a Yurok elder in her 70s explains that she was ''Italian'' from 1945 to 1970, which was necessary to obtain employment and avoid racial discrimination.[47]

Moreover, the generation of tribal people sent to boarding schools faced difficult conditions when they returned to the Reservation: substandard housing without running water or electricity and few employment opportunities in the declining logging and fishing industries. Knowing little about the ways of their mothers and fathers, they were largely unable to pass along the ancient traditions to the next generation. Their identity as Indian people had been literally beaten out of their souls. They were the lost generation.

Yet, even at this low point in the history of the Tribes, hope was on the horizon—the civil rights era of the 1960s was headed to the Klamath River. The generation raised pre-contact was still alive. Although they were weary to ''be Indian,'' they still knew their traditions. Children born in the 1940s and later were not sent away to boarding schools and in fact, they had been exposed to a better education in local public schools. Some of them had made it to college, graduated, and headed

[44] Indian Reorganization Act, Pub. L. No. 73–383, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461–479).

[45] For a poignant story of the Hopi Tribe's adoption of the IRA and ensuing repercussions for traditional governance, *see* Charles Wilkinson, *Fire on the Plateau: Conflict and Endurance in the American Southwest* 276–313 (1999).

[46] *See* Theodore H. Haas, *Ten Years of Tribal Government Under IRA* (1947), available at http://madison.law.ou.edu/IRA/IRAbook/tribalgovpt1tblA.htm.

[47] Telephone Interview with Lavina Bowers, Yurok elder, Feb. 19, 2009.

home.[48] Their university experiences exposed them to Indian activism at Wounded Knee and Alcatraz, where Indian people had asserted treaty rights and strongly expressed Indian pride.[49] With the benefit of these experiences, Yurok, Karuk, and Tolowa people came back to the Lower Klamath River, eager to engage the elders and their communities in a social movement to revitalize tribal cultures and religions.

They began by developing a tribal political, religious, and cultural presence in their aboriginal territory. With the exception of the Hoopa Valley Tribe, the Tribes had not formed modern governments.[50] Non-profit entities such as the Northern California Indian Development Council and the Del Norte Indian Welfare Association organized the community in the absence of tribal governments. They were funded by federal money authorized in the ''war on poverty,'' and hosted community events where elders could teach the youth cultural traditions, such as how to dance in ceremonies, sing Indian songs, and make regalia.

Remarkably, within a few years the people began to dance again. In 1973, brush dances led by Dewey George, Walt Lara, and Calvin Rube were held at the sites of Witchepec, Somes Bar, and Katmin. Medicine women emerged from decades of religious oppression, empowered again by the peoples' request to conduct ceremonies. They went to the High Country; it had survived the European invasion. Protected by Indian prayers and its remote location, it had remained undeveloped and undisturbed by the human hand. The *Woge* were still there; the medicine was still there; the medicine people could still communicate with the sacred. They went to the High Country and returned—pure in body, mind, and soul—to hold ceremonies, again.[51] These events were significant to revitalizing the tribal religion and many of the participants would later become plaintiffs in the *Lyng* litigation.

Next, the community looked to the courts to reaffirm their rights to land and natural resources. In one sweeping victory, the United States Supreme Court decision in *Mattz v. Arnett*[52] confirmed the status of the Lower Klamath River as Indian country and tribal fishing rights, and laid the ground work for asserting tribal sovereignty. Raymond Mattz, a Yurok Indian, challenged a thirty year old California state law that

[48] Telephone Interview with Chris Peters, Yurok tribal leader, Mar. 2, 2009.

[49] Alvin M. Josephy, Jr., *Red Power: The American Indians' Fight for Freedom* (1971).

[50] While the Hoopa ultimately adopted an IRA-style constitutional government in 1950, the Yuroks, Karuks, and Tolowa would not formalize their governments for several decades. In 1993, for example, the Yurok Tribe, adopted a constitution that sets forth its governing institutions and substantive law. *See* http://www.yuroktribe.org/government/councilsupport/documents/Constitution.pdf.

[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.

[52] Mattz v. Arnett, 412 U.S. 481 (1973).

outlawed gillnet fishing within the original Lower Klamath River Reservation boundaries.[53] This regulation was neutral on its face, but had a discriminatory impact on Indian fishing because gill netting was the primary means of fishing for Indian people on the Klamath River. Mattz challenged the state law after being arrested several times by the California State Game Warden.[54] The *Mattz v. Arnett* lawsuit claimed that California did not have jurisdiction over Indian fishing on the Lower Klamath River Reservation because the territory was still Indian country, with federally reserved Indian fishing rights. After losing in the lower courts, Mattz appealed to the Supreme Court, which held that the land was still Indian country.[55] The Yuroks had won their reservation and fishing rights back.

The victory in *Mattz* was transformative for the Indians on the Klamath River. As Lavina Bowers explains, ''Once the fishing rights were given back, people could be *Indian* again. It made people stronger. People had rights, rights to be Indian again. People could pray out loud and in public.'' Indian people began to reclaim their tribal affiliation and culture. People came home, back to the reservation. They fished. Importantly, they held more and more ceremonies.

As a result of their increasing prominence and activism, the Tribes were also gaining recognition by the state of California. In 1975, Governor Jerry Brown established the Native American Heritage Commission (''NAHC'') and appointed an Indian leader as its Chair. The NAHC was charged, under state law, with addressing the preservation and protection of Indian cultural heritage.[56] One of its first tasks was to address the widespread problem of robbing Indian graves in California. The Indian tradition of burying the deceased in traditional regalia had made grave robbing a lucrative venture for anthropologists, museum professionals, and other prospectors for Indian ''artifacts.'' Yurok Indians including Milton Mark and Walt Lara sat on the Commission, which, in turn, created the Northwest Indian Cemetery Protective Association (''NICPA'') to address this problem. The NICPA was able to rely upon state funding to pay employee salaries and had the ear of the state for political issues affecting Indian communities. The NAHC and NICPA would become key plaintiffs in the *Lyng* case.

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[53] Cal. Fish & Game Code §§ 8664, 8686, and 8630.

[54] Telephone Interview with Raymond Mattz, Yurok elder, Feb. 13, 2009.

[55] Mattz v. Arnett, 412 U.S. 481 (1973).

[56] *See* Cal. Pub. Res. Code §§ 5097.0–5097.99.

The Lyng *Case*

''NO–GO on the G–O ROAD!''—Tribal Slogan[57]

Factual Background: The Federal Administrative Process and Indian Activism

Shortly after the *Mattz* decision in 1973 the Forest Service began to discuss clear cutting in the High Country. Arnold Pilling, a well-known anthropologist who studied the Lower Klamath River Indians, first alerted the Tribes about the Forest Service's intentions. Pilling had been tracking the Forest Service's activities in the High Country because of the area's religious meaning to the Tribes. Yurok and Karuk elders including Sam Jones, Jimmy James, and Calvin Rube perceived the severity of the threat to the High Country and began organizing resistance.[58]

In 1974, the Forest Service issued a Draft Environmental Statement outlining various possible land use plans for the ''Blue Creek Unit'' of the Six Rivers National Forest. In 1975, it issued a Final Environmental Statement including several proposals. ''Alternative E,'' the proposal that would ultimately be selected by Regional Forester Zane Smith, called for harvesting 733 million board feet of timber over the course of eighty years and required construction of 200 miles of logging roads in the areas adjacent to Chimney Rock. To support this activity, the government proposed constructing a new road to connect the towns of Gasquet and Orleans (the ''G–O road''). This road would bisect the High Country, separating Chimney Rock from Peak 8 and Doctor Rock.[59] The Forest Service estimated that 76 logging and 92 other vehicles would travel through the Chimney Rock area every day.

Initially the tribal communities were split on the proposal. Some Indians wanted the road built to provide logging jobs that were desperately needed. The traditional people opposed the road from the beginning. For them, this plan was the most direct attack on the High Country in history. 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.

An organized movement of tribal artists, activists, political and religious leaders, elders, and children emerged to advocate against the Forest Service's plan. Community members made t-shirts, engaged local media, and protested. ''No–Go on the G–O road'' was a popular slogan. The Community used the movement to reclaim their turf, to tell their story, and to emerge as a political, social, and religious entity. They

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[57] Telephone Interview with Javier I. Kinney, Feb. 10, 2009.

[58] Telephone Interview with Chris Peters, Mar. 2, 2009.

[59] Nw. Indian Cemetery Protective Ass'n v. Peterson, 565 F.Supp. 586, 592 at n. 5 (1983) (citing Forest Service exhibit).

organized in the Indian way, by turning inward to rely upon the strength of the entire community to protect tribal rights.

While the tribal people organized, the Forest Service pursued the next steps in the administrative process. In response to comments on the Draft Environmental Statement, it commissioned a study of Yurok, Karuk, and Tolowa cultural sites in the area. The resulting 423–page document came to be known as the Theodoratus Report, after its principal author Dr. Dorothea Theodoratus.[60] It found the entire area to be ''significant as an integral and indispensable part of Indian religious conceptualization and practice.'' The Report went on to explain that ''specific sites are used for certain rituals,'' and ''successful use of the [area] is dependent upon and facilitated by certain qualities of the physical environment, the most important of which are privacy, silence, and an undisturbed natural setting.'' Because constructing a road along any of the available routes ''would cause serious and irreparable damage to the sacred areas which are an integral and necessary part of the belief systems and lifeway of Northwest California Indian peoples,'' the Theodoratus Report recommended that the G–O road not be completed.

Apparently this was not the perspective the Forest Service was seeking from its academic experts. In 1981, the Forest Service issued its ''Blue Creek Unit Implementation Plan,'' which selected the ''Alternative E'' logging plan. A year later, the agency announced that the logging road would be built in the Chimney Rock Section, thus rejecting the ultimate recommendation of the Theodoratus Report. The Forest Service did select a road route that ostensibly avoided archeological sites and was removed as far as possible from the sites used by contemporary Indians for specific spiritual activities. Yet, alternative routes that would have avoided the Chimney Rock area were rejected because they required the purchase of private land, had soil stability problems, and would still have disturbed other Indian cultural sites. The Forest Service also called for one-half mile protective zones around all the religious sites identified in the Theodoratus Report. Yet tribal religious practitioners and political activists were far from satisfied with this accommodation.

Litigation Strategy

After losing administrative appeals, members of the Indian community (including Chris Peters, Calvin Rube, and NICPA) decided they had no other choice but to sue the Forest Service. They contacted the California Indian Legal Services (''CILS'') office in nearby Eureka, California about filing litigation. Founded in the late 1960s, CILS was the first Indian-controlled law firm to provide specialized representation to Indian tribes and people.[61] A young attorney at CILS named Marilyn

[60] Theodoratus Cultural Research, *Cultural Resources of the Chimney Rock Section, Gasquet–Orleans Road, Six Rivers National Forest*, Fair Oaks, CA [hereinafter Theodoratus Report].

[61] Today, California Indian Legal Services is the leading public interest law firm focusing on Indian law in California today. *See* California Indian Legal Services, www.

Miles became the Indians' attorney.[62] Abby Abinanti, then a young Yurok lawyer, played an early role in the case, as did Chris Peters who sat on the CILS board.[63]

At the same time, a number of national and local environmental organizations were also preparing to sue over the G–O road, including the Sierra Club, Wilderness Society, California Trout, Siskiyou Mountains Resources Council, Redwood Region Audubon Society, and Northcoast Environmental Center. The Indian plaintiffs prepared to bring their claims under the First Amendment and American Indian Religious Freedom Act of 1978, while the environmental groups focused on environmental protection statutes such as the National Environmental Policy Act.

Some lawyers involved in the case remember the period leading up to the litigation as one of constant negotiation and translation. The environmental groups and Indians shared a common goal—preventing construction of the road—but they lacked a shared worldview or vocabulary. Abby Abinanti recalls: ''There was a strategy of cooperation with environmental [parties] which was strained. It was like we did not speak the same language. [We] saw something happening and knew it was wrong . . . but we were never comfortable with each other, nor did we have a common language/feeling, or so it seemed to me.''[64]

Conversations within the Indian community focused on how to demonstrate what the G–O road would do to the Tribes' religion. This was a particularly sensitive topic, as it was not culturally acceptable to

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calindian.org (last visited Oct. 30, 2009). In the 1970s CILS also played an instrumental role in extending specialized Indian law representation to tribes nationwide, through a pilot project that eventually became the Native American Rights Fund, one of the nation's pre-eminent Indian law organizations. *See* Native American Rights Fund, http://www.narf.org/about/history.htm (last visited Oct. 30, 2009).

[62] Marilyn Miles grew up in Arcata, California. Before attending law school, she earned a masters degree in psychology. She was admitted to the bar in 1980 and served as the directing attorney of CILS from 1982–1996 when she was elected to serve as a Superior Court Judge in Humboldt County.

[63] The following description of events leading up to and including the *Lyng* litigation relies significantly on interviews with Abby Abinanti, Chris Peters, and Lavina Bowers, as well as briefs and decisions in the case, and earlier accounts by the elders and leaders in the case. Journalist Sara Neustadtl provides a particularly moving account, told largely through the observations of traditional religious practitioners Sam and Audrey Jones, Lowanna Brantner, Charlie Thom, Dewey George, Jimmie James, and Chris Peters, and published at a time when the *Lyng* litigation was still ongoing. *See* Sara Neustadtl, *The Medicine Rocks*, in *Moving Mountains: Coping with Change in Mountain Communities* 179 (1987).

[64] Email correspondence from Abby Abinanti, Chief Judge of the Yurok Tribal Court and Court Commissioner of the San Francisco Superior Court, July 29, 2009. Abby continued her thought in distinctly Yurok terms, writing that working with the environmental lawyers was ''like offering eels to a starving person (non-Indian), they would know to eat but would be afraid of eating . . . because they are EELS. So we would in general agree not to starve, but it was never comfortable.'' Co-author Amy Bowers further explains: ''Yuroks eat a lot of eels.''

talk about the High Country. Tribal members recall that many people just wanted the issue to go away. They didn't want to talk about it because they thought it would attract attention to the area, which was the exact opposite of the result they wanted.[65] The High Country had been protected for thousands of years by cultural and religious covenants requiring the utmost respect and privacy. Now the same people who had lived by this rule were being asked to explain the sacred qualities of the area and its spiritual meaning to non-Indians who questioned the validity of their religious beliefs. Moreover, they were asked to accomplish this crushing task in a foreign language. Most of the elders who would testify in the case spoke ''Indian'' (whether Yurok, Karuk, or Tolowa) as their first language. These tribal languages have words for cultural and religious concepts that English does not have, and in several instances elders, who were not familiar with English, did not know how to translate Indian expressions and emotions into English.

All of these challenges—of coalition-building, culture, and language—made it difficult, if not unthinkable, for the Indians to contemplate explaining the significance of the High Country in a courtroom setting. But the Indians and their lawyers realized early on that, to win a First Amendment case, the Indians *had* to make the case that destruction of the High Country would burden their religious freedom. While non-Indian expert witnesses could, and would, testify, the most powerful statements would come from the Indians themselves, the people who became known as ''religious practitioners'' in the case. These were people who relied upon the High Country for spiritual strength and guidance, and prayed on a daily basis for the well-being of the entire world. They understood it was time for them to tell the story of the High Country. Their way of life and the survival of their ancient religion depended on it. For all of these reasons, the Indian people began to talk and the lawyers began to translate.

Trial in the Federal District Court

The plaintiffs in the case eventually included the Northwest Indian Cemetery Protective Association, four Indian religious practitioners (Jimmie James, Sam Jones, Lowana Brantner, and Christopher H. Peters), the six environmental organizations mentioned above, and two individual members of the Sierra Club.[66] A second lawsuit, filed by the state of California, acting through the Native American Heritage Commission, was consolidated for trial. The defendants were the Secretary of Agriculture John R. Block, Forest Service Chief R. Max Peterson, and Regional Forester Zane H. Smith. (By the time the case reached the

[65] Interview with Abby Abinanti, Chief Judge of the Yurok Tribal Court and Court Commissioner of the San Francisco Superior Court, May 20, 2009; Interview with Lavina Bowers, Yurok elder, Feb. 17, 2009.

[66] *See* Northwest Indian Cemetery Protective Ass'n v. Peterson, 565 F.Supp. 586 (1983), *rev'd sub nom.* Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 451–53 (1988).

Supreme Court, Richard E. Lyng had become Secretary of Agriculture and the case was known forever after as ''*Lyng*.'')

The plaintiffs brought eight claims, arguing that the Forest Service's decisions violated: (1) the First Amendment of the Constitution of the United States; (2) the American Indian Freedom of Religion Act,[67] (3) the National Environmental Policy Act of 1969 (NEPA)[68] and the Wilderness Act,[69] (4) the Federal Water Pollution Control Act,[70] (5) water and fishing rights reserved to American Indians on the Hoopa Valley Indian Reservation, and defendants' trust responsibility towards those rights, (6) the Administrative Procedure Act,[71] (7) the Multiple–Use Sustained–Yield Act of 1960,[72] and (8) the National Forest Management Act of 1976.[73]

The Indian First Amendment claim alleged that completion of the road would violate the Free Exercise clause by degrading the sacred qualities of the High Country and impeding its use for religious purposes. More specifically, plaintiffs argued that the visibility of the road, the noise associated with it, and the resulting environmental damage would all ''erode the religious significance of the areas'' and ''impair the success of religious and medicinal'' activities, thereby burdening the Indians' ability to practice their religion.[74] According to plaintiffs, this activity would violate not only the First Amendment, but also the recently passed American Indian Religious Freedom Act (''AIRFA''), which provided:

> [I]t shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian . . . including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship.[75]

Along with the Indians' testimony, the plaintiffs presented various academic experts and referenced the 400–page Theodoratus Report, the Forest Service's own study, in support of their argument that the Forest

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[67] 42 U.S.C. § 1996.

[68] 42 U.S.C. §§ 4321–4347.

[69] 16 U.S.C. §§ 1131–1136.

[70] 33 U.S.C. §§ 1251–1387.

[71] 5 U.S.C. § 706.

[72] 16 U.S.C. §§ 528–531.

[73] 16 U.S.C. § 1600.

[74] Northwest Indian Cemetery Protective Ass'n v. Peterson, 565 F.Supp. 586, 592 (1983), *rev'd sub nom.* Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 451–53 (1988).

[75] American Indian Religious Freedom Act (AIRFA) of 1978, Pub. L. No. 95–341, 92 Stat. 469 (codified as amended at 42 U.S.C. § 1996). The Supreme Court held that while AIRFA is a strong statement of federal policy, it creates no enforceable rights. *See* Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 455 (1988).

Service's plan would irreparably harm their religion in violation of the First Amendment.

The federal district court first denied the plaintiffs' motion for a preliminary injunction to prevent the Forest Service from soliciting bids on the G–O road construction, and then scheduled a trial on the merits. The case was assigned to Judge Stanley A. Weigel, a Jewish Republican known for his toughness and independence. It was a fortunate selection for the plaintiffs. A member of the national board of the American Civil Liberties Union at the time President John F. Kennedy appointed him to the bench, Weigel was unafraid to uphold unpopular causes, and had represented professors in a dispute over loyalty oaths with the University of California.[76] In a later oral history interview, he described himself as an ''agnostic,'' although he always identified as Jewish.[77]

Having prepared themselves to testify, the tribal plaintiffs set off from their homeland to the federal district court in San Francisco. Florence Jones, a famous Wintu doctor, was said to have told some of the plaintiffs that ''she'd do what she could'' and would pray over the case.[78] Sam Jones, with his wife Audrey, picked up Lowana Brantner and they drove the eight-hour trip together—staying together in a San Francisco motel for the duration of the trial.[79]

On the first day of trial, Chris Peters, grandson of an Indian doctor, took the stand, explaining: ''The high country was placed there by the creator as a place where Indian people could seek religious power . . . This area is our church: cannot be moved or disturbed in any way.'' He continued, ''any adverse changes in the high country will have a direct impact on the practice of our religious beliefs.'' This is, he said, ''the very core of our culture identity.''[80]

Next Yurok medicine woman Lowana Brantner took the stand. She testified first about the significance of the Medicine Rocks in the High Country:

> We always wanted to protect the top of the mountain, because anyone knows the Klamath, for the first two miles, it's just rock, stray bluffs, and cliffs. So beyond that God left us a strip about ten miles wide where the Karuks can come and gather their grain, their seeds, and things, and once I heard them say, Do you hunt at Doctor Rock? No, ma'am, we do not hunt at Doctor Rock. It's a sacred place. Nothing is killed at Doctor Rock and Chimney Rock. Chimney

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[76] Wolfgang Saxon, *Judge Stanley Weigel, 93, Dies; Acted to Improve Prisons*, N.Y. Times, Sept. 4, 1999, A11.

[77] *Stanley Weigel, Litigator and Federal Judge*, Interviews conducted by William Fletcher in 1989, Northern California U.S. District Court Oral History Series at 14 & 61, http://www.archive.org/stream/litigatorstanley00weigrich#page/n5/mode/2up.

[78] Neustadtl, *supra* note 63, at 204.

[79] *Id*. at 203.

[80] Joint Appendix to the Petition for a Writ of Certiorari at 370–72, 485 U.S. 439 (1988) (No. 86–1013).

> Rock is a man's place to go and have—to prove that they can stand anything that comes along and be brave, to face the world.[81]

Brantner also emphasized the history of dispossession that gave rise to the current dispute, testifying that the Indians had lost their lands without their knowledge or consent: ''In that way we lost everything, and now we are standing on the last peak. Doctor Rock. Chimney Rock.''[82]

By all accounts, Branter's testimony had a significant impact on the judge. Brantner explained, for example, that Indian land had been taken, ''not because [white people] were cruel, but because they didn't understand''[83]—to which Judge Weigel responded, ''you are generous in saying they weren't cruel.''[84] At some point, according to one commentator, ''the lawyer had stopped asking questions . . . and Lowana had been making her own decisions about what words to tell the judge.''[85]

As many Yuroks remember it, Brantner eventually asked the judge to close his eyes and take a journey with her to the High Country. She proceeded to describe the High Country and her experiences preparing for religious ceremonies. The whole courtroom was silent in anticipation and, when Judge Weigel opened his eyes, he seemed to have understood. Indeed, speaking to the open courtroom, he paraphrased Brantner's testimony about the High Country's importance.[86] As Brantner prepared to step down from the witness stand, Judge Weigel said, ''I don't know where the ball is finally going to bounce. I haven't heard all the evidence. But I think you should go knowing that what you've said has been very helpful.''[87]

The trial continued for two more weeks, with Judge Weigel issuing his decision at the end of May. In an opinion that quoted heavily both the trial testimony and Theodoratus Report, he observed that the plaintiffs had demonstrated that the High Country was indispensable and central to the Indian religion—and that the government's proposed activity would impermissibly interfere with religious practice.[88] For several pages of the opinion, he described, in moving terms, the physical attributes of the High Country and the ways that the Indians visited the High Country to communicate with the creator, prepare for their ceremonies, and train young people in traditional religious beliefs and

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[81] Neustadtl, *supra* note 63, at 204–05.

[82] *Id.*

[83] *Id.*

[84] *Id.*

[85] *Id.* at 206.

[86] *Id.*

[87] *Id.*

[88] Northwest Indian Cemetery Protective Ass'n v. Peterson, 565 F.Supp. 586, 592 (1983), *rev'd sub nom.* Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 451–53 (1988).

practices. These practices were ''possible in the high country because of the pristine environment and opportunity for solitude found there.'' The road construction and logging would ''seriously damage the salient visual, aural, and environmental qualities of the high country.'' And even the Forest Service's ''own study concluded that 'intrusions on the sanctity of the Blue Creek high country are . . . potentially destructive of the very core of Northwest [Indian] religious beliefs and practices.' ''[89]

Comparing plaintiffs' case to *Wisconsin v. Yoder*, the Supreme Court case striking down mandatory public education as violating Amish religious freedom, Judge Weigel observed, ''degradation of the high country and impairment of [religious] training would carry a 'very real threat of undermining the [tribal] communit[ies] and religious practices[s] as they exist today.' ''[90] He thus concluded that the Forest Service's actions in the High Country would impose an ''unlawful burden'' on the Indians' religion.[91] The government had, in turn, failed to show a compelling interest in the 6–mile road project.[92] None of its stated objectives—increasing the quantity of timber accessible to logging operations, stimulating employment, providing recreational opportunities, enhancing efficiency of the forest management, or increasing bidding prices on future timber sales—met the test. The Forest Service had failed to present evidence showing that its plan would actually achieve the first three objectives, whereas the last two fell short of the ''paramount interests'' required to justify infringements on religious freedom under the Supreme Court's precedents.[93]

In Judge Weigel's view, the Indians ''lack of a property interest in the high country does not release [the government] from the constitutional responsibilities the First Amendment imposed on them.''[94] Following the Supreme Court's decision in *Sherbert v. Verner*, he wrote, ''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.''[95] Under this reasoning, the Indians—as members of the public—had a legitimate interest in accessing public property for religious purposes. Judge Weigel did not even describe the government as an ''owner'' of the public lands, much less suggest that its status as an owner would justify the demonstrated burden on religion in the absence of a compelling interest.

The only other discussion of property in the district court opinion concerned *Indian* property rights. The plaintiffs claimed that the govern-

[89] *Id.* at 594–95 (quoting Theodoratus Report, *supra* note 60, at 420).

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

[91] *Peterson*, 565 F.Supp. at 594–95.

[92] *Id.* at 595–97.

[93] *Id.* at 596.

[94] *Id.* at 594.

[95] *Id.* at 594 (citing Sherbert v. Verner, 374 U.S. 398 (1963)).

ment's activities would violate their reserved water and fishing rights, as well as the government's obligation to protect those rights. Finding the project would ''significantly decrease the quantity of anadromous fish'' in the sections of the Klamath River flowing through the Hoopa Reservation, Judge Weigel agreed that the project would violate the federal government's trust duties to the tribe.[96]

On the environmental claims, Judge Weigel held that the Forest Service had violated NEPA by failing sufficiently to disclose the immediate and cumulative impact of either the G–O road construction or timber harvesting in Blue Creek on water quality, and by failing to identify mitigation efforts for water quality and fish habitats. Further, the project violated NEPA and the Wilderness Act by failing to consider how the road would impact the ''roadless'' quality of the wilderness area. The Forest Service's plan also failed to meet water quality standards under the Federal Water Pollution Control Act.

The plaintiffs did not prevail on all of their claims. Following other lower courts, Judge Weigel held that AIRFA created no cause of action and only required agencies ''at most'' to evaluate their own policies with the goal of protecting Indian religious freedom. The Forest Service had discharged this nominal duty by commissioning reports and holding hearings to investigate the issue, and selecting a road route that would minimize impacts on the Indian religion.[97] Under NEPA, the Forest Service's environmental impact statements had adequately disclosed geologic and soil stability problems, weighed the religious interests at stake, considered alternatives to the road construction between Chimney Rock and Doctor Rock, and incorporated new information made available about Indian cultural practices.[98] To the extent that the Forest Service's plan would affect lands listed on the National Register of Historic Places (namely the 13,500 Helkau District located in the High Country), the Forest Service had adequately met Section 106 of the National Historic Preservation Act's requirement that the Advisory Council on Historic Preservation have an opportunity to comment on the plan.[99] The Forest Service had similarly met obligations under the Multiple–Use, Sustained–Yield Act and National Forest Management Act to balance competing uses of public lands.[100]

Overall, however, it was a win for the Indian plaintiffs. Judge Weigel permanently enjoined the Forest Service from timber harvesting or road construction in the High Country, and enjoined logging and construction in other portions of the Blue Creek Unit unless or until the Forest Service could comply with the various environmental statutes. The plaintiffs held a picnic supper at a community hall near the Klamath

[96] *Id.* at 605.

[97] *Id.* at 597–98.

[98] *Id.* at 598–99.

[99] *Id.* at 604.

[100] *Id.* at 606.

River to celebrate the victory. Lowana Brantner attributed her success to ''the Indian doctoring.''[101] The people had told their story and the High Country was safe. They could enjoy a celebratory dinner. Nevertheless, ''it was a cautious celebration—cautious because the Forest Service immediately appealed the decision.''[102]

THE NINTH CIRCUIT DECISIONS

The Ninth Circuit heard the *Lyng* case twice, first on direct appeal[103] and then on rehearing.[104] Judge William Canby, Jr., the federal judge best known for expertise in Indian law matters, wrote the opinions for a panel of himself, Judge Benjamin Duniway, and Judge Robert Beezer.[105] Both times, the Ninth Circuit affirmed the district court's holding that the G–O road project would impermissibly burden the Yurok, Tolowa, and Karuk peoples' religious freedoms.[106]

In reviewing the First Amendment claim, Judge Canby's first opinion took up an issue that had concerned other circuit courts in their review of sacred sites claims—that is, whether the area was ''indispensable'' and ''central'' to the religious practices.[107] Other tribal religious practitioners had failed to meet this test in claims involving areas that were found to be sacred but insufficiently critical to the religion. But here, Judge Canby noted, the district court's findings on use of the High Country to communicate with the creator, perform religious rituals, and prepare for religious ceremonies satisfied the ''central and indispensable'' test.

In a portion of the opinion foreshadowing a litigation issue still current in 2010, the Ninth Circuit panel also expressly ''reject[ed] the government's argument that the free exercise clause cannot be violated unless the governmental activity in question penalizes religious beliefs or practices.''[108] The court cited *Sherbert* and other Supreme Court deci-

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[101] Neustadtl, *supra* note 63, at 207.

[102] *Id.*

[103] Northwest Indian Cemetery Protective Ass'n v. Peterson, 764 F.2d 581 (9th Cir. 1985), *rev'd sub nom.* Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 451–53 (1988).

[104] Northwest Indian Cemetery Protective Ass'n v. Peterson, 795 F.2d 688 (9th Cir. 1986), *rev'd sub nom.* Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 451–53 (1988).

[105] Judge Canby is a well-known authority in federal Indian law and the author of the popular reference book, William C. Canby, Jr., *American Indian Law in a Nutshell* (5th ed. 2009).

[106] *Peterson*, 764 F.2d at 585–86; *Peterson*, 795 F.2d at 692–94.

[107] *Peterson*, 764 F.2d at 585 (distinguishing Sequoyah v. Tennessee Valley Authority, 620 F.2d 1159 (6th Cir. 1980)) (rejecting Eastern Cherokee claims that flooding sacred valley for dam project violated the First Amendment); Wilson v. Block, 708 F.2d 735 (D.C. Cir. 1983) (rejecting Hopi claims that ski area development on sacred mountain violated First Amendment).

[108] *Peterson,* 764 F.2d at 586.

sions for the proposition that even ''indirect'' burdens are invalid if they make the exercise of religion more difficult or impede religious observances. There was no Establishment Clause violation because the district court's decision merely required the government to manage the national forest in a way that avoiding infringing on religious belief, a measure that would amount to allowable ''accommodation'' of religion versus any impermissible entanglement. The panel further upheld the district court's finding that the government had failed to demonstrate a ''compelling interest'' in burdening the Indians' religion.[109]

With respect to the environmental claims, Judge Canby upheld the district court's finding that the environmental impact statement failed to discuss adequately the impact of the logging and road construction plan on water quality. Likewise, his opinion concluded that the proposed projects would violate the Federal Water Pollution Control Act.

One major factual development had occurred since the district court's decision. In 1984, President Reagan signed the California Wilderness Act of 1984, granting wilderness status to 19,000 acres of the Eightmile Creek Area and 26,000 acres of the Blue Creek Unit.[110] Because the statute closed the area to commercial timber activities, the Ninth Circuit lifted the district court's now unnecessary injunction on development there.[111] Yet, these statutes did not moot the entire case because Congress had excluded from its wilderness protection the very strip of land required to complete the G–O road.[112]

A year later the Ninth Circuit reheard the case with the same three judges comprising the panel, and issued a holding much like its original. On the compelling governmental interest prong, Judge Canby's opinion on rehearing went somewhat further than either the district court or panel decision, observing that the government ''makes little attempt to demonstrate that compelling governmental interests . . . require the completion of the paved G–O road or the logging of the high country.''[113] Although forest management would be ''made easier by the road,'' statewide employment rates would not change and improvement in recreational access would be modest. The evidence did not show the compelling interest needed to justify the infringement of the Indian religious freedoms.[114]

The most notable aspect of the Ninth Circuit's decision on rehearing was a new dissenting opinion by Judge Beezer, the lone Republican on the panel. Although he had voted with the majority on the original panel, Judge Beezer now had two objections to the Indians' position. With

[109] *Id.* at 586–87.

[110] Pub. L. 98–425, 98 Stat. 1619.

[111] *Peterson,* 764 F.2d at 586.

[112] *Peterson*, 795 F.2d at 704.

[113] *Id.* at 694.

[114] *Id.* at 695.

respect to the First Amendment, he opined that the various threats to religious exercise (aural and visual impact of the road) could be mitigated, and because the High Country was so large, the Indians could conduct their religious activities in parts less affected by those activities. Thus the adverse effects of the Forest Service's project did not merit an injunction against the construction. Judge Beezer also suggested a property rights analysis that, in hindsight, seems to have grabbed the attention of the Supreme Court. Judge Beezer's view of the case was that, ''the Indian plaintiffs are attempting to use the Free Exercise Clause to bar the development of public lands.''[115]

Judge Beezer's concerns hinged, in part, on his understanding of the ''government's ownership rights in public lands.'' While the district court had focused on the G–O road's potential benefit to the public, Judge Beezer disagreed, stating, ''the issue is not whether the *public* has a compelling interest, but whether the *government* has a compelling interest.'' He acknowledged that ''the government has many obligations that are not shared by private landowners,'' but still concluded that ''the government retains a substantial, perhaps even compelling, interest in using its land to achieve economic benefits.'' For this reason, he would have remanded, requesting the district court to reconsider the threat of development to the Indians' religion in light of ''the strength of the government's interest in developing the high country.''[116]

Thus in the early stages of *Lyng*, a federal district court and two panels of the Ninth Circuit held that building a road through, and harvesting timber in, the High Country would burden the Indians' freedom of religion and that the government had failed to show a compelling interest in the project. Only one dissenting opinion suggested that the government's interests as a property owner were even relevant to the case. Also notable, in hindsight, was that the courts' decisions were growing increasingly abstract. Whereas Judge Weigel had paid close attention to the Indians' spiritual experiences in the High Country and their ongoing relationship with the land, subsequent judges seemed more concerned with the theoretical and doctrinal limits of the First Amendment. The judges' movement away from the specific facts of the case would not serve the Indians' interests in the Supreme Court.

Arguments Before the Supreme Court

Attention to the *Lyng* case mounted as the Solicitor General's office filed its petition for certiorari to the Supreme Court. When certiorari was granted on the Free Exercise issue, it became clear that this was a high stakes case, not only for Indian tribes but for religious groups of all persuasions. Amicus briefs supporting the Indians were filed by the American Civil Liberties Union, the Christian Legal Society, the American Jewish Congress, Concerned Women for America, the Bureau of Catholic Indian Missions, and the National Congress of American Indi-

[115] *Id.* at 699.

[116] *Id*. at 704.

ans. On other the side of the case, however, were amici concerned that the case posed a threat to local development and employment opportunities (Howonquet Community Association, Carpenters' Union Local 1040, Tri–Agency Development Corporation, the Area Independent Development Association, the Crescent City–Del Norte Chamber of Commerce, and Del Norte Taxpayers League) and natural resource extraction (the Mining Associations of Colorado, Nevada, Utah, and Wyoming, along with the Montana Coal Council).

There was an interesting split among state and local governments. The state of California, through its Native American Heritage Commission, had been a plaintiff when the case was initiated. Explaining that it had entered the case at the request of Yurok, Karuk, and Tolowa religious practitioners and in accordance with state law requiring the protection of sacred sites and access to them, the state filed a brief focused on the distinctiveness of the Indian religion. California's Indian policy had clearly evolved, since its mid–19th century resistance to Indian treaty ratification. Yet, on the other side, the states of Hawaii, South Dakota, Utah, and Washington, filed amicus briefs arguing that that they could not govern state and local public lands if forced to accommodate American Indian religious claims.

The federal government was represented by Solicitor General Charles Fried and various attorneys in the Solicitor's Office. Assistant to the Solicitor General Andrew J. Pincus was on the brief and later represented the government at oral argument.[117] The government's brief began by explaining that the twenty-five mile-wide High Country was located in Six Rivers National Forest and ''none of this land ever formed part of an Indian Reservation, and no Indian treaty imposes a trust duty upon the United States with respect to this land.''[118] Thus ignoring the longer history of Indian occupancy in the area, the government turned quickly to its First Amendment argument, leading with a distinction between the right to believe, which was absolutely protected by the First Amendment, and the right to act on religious beliefs, which enjoyed narrower protections.[119] Even if the Indians were unable to ''act'' on their religious beliefs as a result of the road construction, the government argued, they would still be able to maintain their religious beliefs,

[117] After his service in the Reagan administration, Andrew Pincus went into private practice at the law firm of Mayer Brown LLP where he is well-known for his Supreme Court advocacy. *See* http://www.mayerbrown.com/lawyers/profile.asp?hubbardid=P139278592. He also co-directs the Supreme Court Advocacy Clinic at Yale Law School.

[118] Brief for the Petitioners at 2, Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988) (No. 86–1013). An interesting argument for reserved rights to sacred sites is presented in Donald Falk, Lyng v. Northwest Indian Cemetery Protective Association: *Bulldozing First Amendment Protection of Indian Sacred Lands*, 16 Ecology L.Q. 515, 559 n.336 (1989) (''Arguably, in [some] cases the government has always owned former Indian territory subject to religious use and preservation. Seen this way, aboriginal title, now a minimally enforceable right of occupancy, . . . might impose a servitude on certain lands such that the lands could not be developed so as to impede their religious function.'')

[119] Brief for the Petitioners, Lyng, 485 U.S. 439 (1988) (No. 86–1013).

and this was all the First Amendment required. To show a burden under the Free Exercise clause, the Indian plaintiffs would have to show the government had ''coerce[d] a decision against faith.'' The Supreme Court had found such coercion in two types of cases (1) direct regulation of religiously motivated conduct as in Wisconsin's compulsory education law in *Yoder*,[120] and (2) forcing an individual to choose between receiving a government benefit and following religious beliefs, as in the denial of unemployment benefits to someone who refused to work on the Sabbath in *Sherbert*.[121]

But the United States argued that *Lyng* was not at all like *Yoder* or *Sherbert*. In the opening brief, reply brief, and again at oral argument, the government hammered home the idea that *Lyng* was virtually indistinguishable from a more recent case, *Bowen v. Roy*.[122] In *Bowen*, plaintiffs had challenged the requirement that they obtain a social security number for their daughter in order to obtain state welfare benefits, contending that the assigned number would rob their daughter of her spirit, in violation of their ''Native American'' religious beliefs. The Supreme Court had found no First Amendment violation because the government could not be expected to accommodate individual sensibilities to the extent the plaintiffs demanded. *Bowen* was a quirky case to say the least. While the father in *Roy* was said to descend from the Abenaki Indians, there was no allegation that aversion to social security numbers was an aspect of Abenaki religious practice. The parents had social security numbers for themselves and their older daughter but claimed to have developed a ''recent religious objection'' to obtaining a number for their younger daughter, Little Bird of the Snow.

It is safe to say that the *Bowen* claim, while ostensibly taken at face value by the courts, was not treated seriously, and was used to undermine subsequent American Indian religious freedom claims. The *Bowen* Court wrote:

> The Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens . . . As a result, Roy may no more prevail on his religious objection to the Government's use of a Social Security number for his daughter than *he could on a sincere religious objection to the size or color of the Government's filing cabinets*.''[123]

The *Bowen* Court seemed to suggest that if an American Indian could wake up one day and decide that something as innocuous as a social security number violated his religion, then perhaps there was no limit to Indian religious claims—and thus no possibility that the federal govern-

[120] Wisconsin v. Yoder, 406 U.S. 205 (1972).

[121] Sherbert v. Verner, 374 U.S. 398 (1963).

[122] Bowen v. Roy, 476 U.S. 693 (1986).

[123] *Id.* at 699–700 (emphasis added).

ment could be obligated to accommodate them under the First Amendment.

This proved to be a powerful line of argument in *Lyng,* where the government's brief claimed, ''the decision to attach religious significance to a particular parcel of land . . . flows solely from individual religious belief.''[124] Back at trial, of course, it had been clear that Lowana Brantner had *not* awakened one day and made a personal decision to attach religious significance to the High Country.[125] But now the government lawyers were arguing as if that hypothetical, inspired by *Bowen*, should govern the outcome in *Lyng*. The ancient cultural covenants *requiring* the plaintiffs, as a matter of tribal law and religion, to care for the High Country from time immemorial to the present, were receding into legal obscurity. The Indians' history in the Klamath River Basin, their cultural connections to the forests and rivers, their intergenerational traditions of religious ceremony and healing medicines, became almost irrelevant.

Indeed the government insisted that under *Bowen*, the Indian plaintiffs had not demonstrated a burden on their religious freedom.[126] And even if they had demonstrated a burden, the government argued that it had a compelling interest in the road construction. In this portion of the briefs, the government picked up on the property theme advanced by Judge Beezer in the Ninth Circuit. The government pointed out that this case, unlike the Supreme Court's decisions in *Yoder* and *Sherbert*, concerned the management of public land. The Constitution's Property Clause entrusted Congress with legislative power over the public lands. Congress had, in turn, delegated this power to the Secretary of Agriculture and his designee the Chief of the Forest Service. The plaintiffs' claims were so problematic, the United States contended, because they purported to interfere with the government's property rights. The government ''no less than a private owner of property has power to preserve the property under its control for the use to which it is lawfully dedicated.''[127]

Moreover, the government's management ''of its own property'' did not command or coerce religious acts; ''indeed, these [governmental] decisions are not directed toward respondents at all.''[128] The complained-of acts were merely ''unavoidable but incidental effects'' on individuals and their religion. For all of these reasons, the ''government's general interest in managing its own property,'' particularly if exercised ''reasonably'' as in this case, was sufficient to demonstrate a compelling inter-

[124] *Id*. at 41.

[125] Lowana Brantner, who was born in 1908, passed away before the case reached the Supreme Court.

[126] Brief for the Petitioners, *supra* note 118; Reply Brief for the Petitioners, Lyng, 485 U.S. 439 (1988) (No. 86–1013).

[127] Brief for the Petitioners, *supra* note 118, at *39.

[128] *Id.* at *16.

est.[129] In an ironic turn of events, the government was now characterizing *Lyng* as a case about *its* relationship with the High Country, a relationship defined by the all-powerful notion of ''ownership.'' Indeed, specific arguments about the G–O road seemed to take a backseat to the government's more general right to control government-owned lands.

The brief on behalf of NICPA and the other Indian parties, authored by CILS attorneys Marilyn Miles and Stephen Quesenberry, was about the rule of law, largely calling for the Court to affirm the Ninth Circuit's holding as consistent with the Supreme Court's own Free Exercise precedents. They attempted to distinguish *Lyng* from *Bowen*, and in particular to respond to the government's ''slippery slope'' arguments. The Indians' brief drew attention to the long-standing nature of their religious practices in the High Country, the Tribes' traditional relationship with the land, and the fact that several hundred medicine people and doctors visited the High Country in support of thousands of Yurok, Karuk, and Tolowa Indians.[130] These were not the subjective, emotional, or unique claims of mere individuals. Rather, the Indian practices at the High Country affected entire tribal communities and went to the very heart of ancient tribal religions.[131] The state of California's brief was particularly eloquent on the nuances of the Tribes' religious practices, attempting to ground the case in Indian and expert testimony.[132]

The plaintiffs' brief devoted some attention to the property point but always with a focus on the religious freedoms issues. They pointed out that Congress had recently, through the enactment of AIRFA, declared federal policy in support of protecting Indian religious practices. Legislative history suggested Indian religious practices should only be infringed upon ''a clear decision on the part of Congress or the administrators that such religious practices must yield to some higher consideration.'' The Indian plaintiffs argued that the ''government's general interests in managing its property'' could not be the kind of higher consideration that Congress intended.[133] Moreover, the plaintiffs argued, the Indians were not looking for a religious ''sanctuary'' or ''subsidy'' on federal lands. They were asking only that the government ''not destroy their most sacred site and their religious practices that have existed for hundreds of years—a request fully in accord with the basic values of the First Amendment.''[134]

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[129] *Id.* at *19.

[130] Brief for the Indian Respondents, Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988) (No. 86–1013).

[131] In these arguments, the Indian plaintiffs were trying to meet the centrality and indispensability tests of previous First Amendment precedents. O'Connor rejected these tests in *Lyng*.

[132] Brief for Respondent State of California, Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988) (No. 86–1013).

[133] *Id.* at *43.

[134] Brief for the Indian Respondents, *supra* note 130, at *28.

But the arguments about Yurok, Karuk, and Tolowa religious practices that had been so effective in the lower courts were losing ground. By the time oral arguments occurred, the *Lyng* case had taken a new direction. It was now about a ''different'' standard that should apply in the case of Free Exercise claims occurring on government-owned lands.[135]

At oral argument, Assistant to the Solicitor General Pincus pressed the property point for the government. When the court asked ''Is it your position, Mr. Pincus, that the Government need not make any concessions whatever to the interests of the Indians in this case,'' Pincus answered ''Yes, Your Honor.''[136] According to Pincus, the Forest Service's investigation of the Indian claims and decision to make modest accommodations was ''appropriate,'' but ''the Constitution does not require the Government to do anything'' to protect Indian religious beliefs. This was the crux of the government's position: the Forest Service had no obligation to accommodate the Indians' religious practices on federally-owned lands. The federal government could simply not function, according to Pincus, if it were required to accommodate individual Indian religious practices, especially in light of the parade of horribles suggested by *Bowen*. And, as a theoretical matter, there was no reason why the government should have to accommodate Indian religious practices on its own land.

Marilyn Miles represented NICPA and other Indian plaintiffs at oral argument. She spent most of her time responding to the Justices' factual hypotheticals. She explained, in patient terms, that no, the Indians were not trying to stop Forest Service rangers from conducting ''fire protection,'' nor were they trying to prevent ''Boy Scout encampment(s),'' nor were they trying to exclude ''citizens . . . who would be offensive to the Indians.'' The Indians were not complaining about ''back-packing trails'' or ''overnight cabins'' or ''hunting'' or ''motorcycles'' or ''jeeps.'' None of these claims was before the Court, Miles explained; but the Court was not convinced.

The Court came back to *Bowen v. Roy* several times, with one Justice finally asking Miles, ''I just wonder how you get around that [case]. The thrust of it is that the Government needn't use its own property in a way as to account for the religious activities or beliefs of others.''[137] Miles responded that there were two principled bases for distinguishing this case and, more generally, for deciding in favor of the

[135] Reply Brief for the Petitioners, *Lyng*, 485 U.S. 439 (1988) (No. 86–1013) at *18 (''[T]he unique nature of land and the weight accorded to the government's interest as a property owner require a different constitutional standard.'').

[136] References to the Supreme Court oral argument in *Lyng* (hereinafter ''Oral Argument Transcript'') rely on the transcript available at http:www.oyez.org/cases/1980–1989/1987/1987_86_1013/argument/.

[137] The Oyez Project, Lyng v. Northwest Indian CPA, 485 U.S. 439 (1988), *available at* http://www.oyez.org/cases/1980–1989/1987/1987_86_1013/argument (last visited Monday, June 28, 2010). The transcript does not identify by name the particular Justices asking questions.

Indians. First, while *Bowen* alleged interference with subjective belief, here the government's actions would be ''physically terminating'' an Indian religion. Second, whereas Indians had lost other First Amendment cases concerning peripheral practices, here the High Country went to ''the very core'' of the religion.[138]

Looking back, however, the government's arguments about *Bowen* and about property rights carried the day. The Supreme Court's opinion was littered with the government's language and sentiments on these points—and contained precious little of the Indians' story of culture, land, or religion.[139]

The Supreme Court Opinion

The Supreme Court issued its opinion in *Lyng* on April 19, 1988, about fifteen years after the Indians had first gotten wind of the Forest Service's decision to clear cut the High Country. Writing for the majority, Justice Sandra Day O'Connor held that destruction of the High Country would not burden the Indian religion and, in any event, the government was free, as the owner of the land, to do what it wanted with the High Country.

First, the Court dealt with the Free Exercise issue. As always in religious freedoms cases, the Court claimed to treat the religious practitioners' claims as ''sincere,'' recognizing that, according to the Indians' beliefs, ''the rituals would not be efficacious if conducted at other sites than the ones traditionally used, and too much disturbance of the area's natural state would clearly render any meaningful continuation of traditional practices impossible.''[140] Yet Justice O'Connor added a nugget of doubt on this point of theology, suggesting, ''the Indians themselves were far from unanimous in opposing the G–O road, and it seems less than certain that construction of the road will be so disruptive that it will doom their religion.''

Nevertheless, she wrote, even if the Court assumed that the road construction *would* ''virtually destroy the Indians' ability to practice their religion,'' there was no Free Exercise Clause violation.[141] As in *Bowen*, she wrote, the government's activity here ''would interfere significantly with private persons' ability to pursue spiritual fulfillment according to their own religious beliefs.'' But such interference did not trigger the compelling interest test. Federal programs ''which may make it more difficult to practice certain religions'' are non-actionable unless they either ''coerce'' an individual ''into violating his religious beliefs''

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[138] *Id.*

[139] Miles did not devote any of her argument to explaining how the High Country had come to be public lands of the United States in the first place. *See* notes 23–33 *supra*, and accompanying text. It is impossible to know whether that questionable history would have made a difference in the Justices' thinking.

[140] Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 451 (1988).

[141] *Id.* at 451.

(as in *Yoder*) or ''penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens'' (as in *Sherbert*).[142]

This had to be the standard, O'Connor wrote, because ''the First Amendment must apply to all citizens alike, and it can give to none of them a veto over public programs that do not prohibit the free exercise of religion.'' The facts of the case showed ''why the analysis in [*Bowen*], but not respondents' proposed extension of *Sherbert* and its progeny, offers a sound reading of the Constitution.'' While the plaintiffs ''apparently do not *at present* object to the area's being used by recreational visitors, other Indians, or forest rangers,'' they were seeking a legal holding that would allow them to make such objections in the future. The Indians might ''seek to exclude all human activity but their own from sacred areas of the public lands'' at some point in the future. The Indians were already seeking an injunction on commercial timber harvesting and road construction in an area measuring 17,000 acres.[143] The First Amendment did not, according to the Court, entitle the Indians to such protection.

The United States had persuaded the Court that the public lands setting of this case required different analysis. In this portion of the opinion, Justice O'Connor was particularly concerned that the Yurok, Karuk, and Tolowa Indians' religion required ''undisturbed naturalness'' in the sacred High Country, located within the National Forest. This claim challenged the federal government's right to use the land according to its own plans. Justice O'Connor explained: ''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.''[144] Finding for the Indians would cause, in her view, an inappropriate ''diminution of the Government's property rights, and the concomitant subsidy of the Indian religion.''[145] The upshot was that, ''whatever rights the Indians may have to the use of the area, . . . those rights do not divest the Government of its right to use what is, after all *its* land.''[146]

Notwithstanding the forcefulness of the holdings, O'Connor allowed for the possibility of accommodating Indian religion, stating in dicta:

> Nothing in our opinion should be read to encourage governmental insensitivity to the religious needs of any citizen. The Government's rights to the use of its own land, for example, need not and should

[142] *Id.* at 449

[143] *Id.* at 452–53.

[144] *Id.*

[145] *Id.* at 453.

[146] *Id.*

> not discourage it from accommodating religious practices like those engaged in by the Indian respondents.[147]

Thus, Indians might still enjoy religious freedom on public lands, but it would occur at the government's discretion and not as a legal right.

Justice Brennan's dissent, which Justices Marshall and Blackmun joined, criticized both the religion and property aspects of the decision. Brennan objected to what he saw as a constricted application of the First Amendment.

> ''[T]he Free Exercise Clause,'' the Court explains today, ''is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government.'' Pledging fidelity to this unremarkable constitutional principle, the Court nevertheless concludes that even where the Government uses federal land in a manner that threatens the very existence of a Native American religion, the Government is simply not ''*doing*'' anything to the practitioners of that faith.[148]

In Justice Brennan's view, the majority's error stemmed, in part, from its senseless imposition of Western norms on Indian religions. The Court's approach to Free Exercise jurisprudence might protect practitioners of Judeo–Christian religions, which are based on individual belief in God; but it offered no protection for practitioners of Indian traditions, which do not separate belief from practice, and which rely on community engagement with specific sacred places to keep the culture and religion alive.

On the property point, Justice Brennan pointed out that the Indians were not claiming ownership rights. The Indians had not asked the government to return the property to the tribes—this was not a land claims suit. Nor had the Indians tried to exclude other people from the area.[149] Instead, the Indians requested that the United States manage its lands in a way that would provide the ''privacy and solitude'' necessary for Indian religious practices.

In sum, as Justice Brennan pointed out, the Indians lost in *Lyng* not because the religious practices at issue were not central, nor because the government's interest in its project was so compelling. The Indians lost in *Lyng* because the majority effectively held that the Free Exercise Clause did not apply to their religion, at least when the government's land ownership was at stake. In Justice Brennan's words: ''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. [The Court has] thus stripped respondents and all other Native Americans of any constitutional protec-

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[147] Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 453–54 (1988).

[148] *Id.* (Brennan, J., dissenting) (quoting the majority opinion at 456).

[149] *Id.* at 476 (Brennan, J., dissenting).

tion against perhaps the most serious threat to their age-old religious practices, and indeed to their entire way of life.''[150]

Immediate Impact of Lyng

''I lived complying with your decision, but I never accepted it as anything but bending to brute, irresistible, and immoral force.''—Abby Abinanti[151]

How can one read the *Lyng* opinion as anything other than the Supreme Court trying to hammer in the final nail in the coffin of Indian conquest?[152] How can one understand why Justice O'Connor, otherwise known as the great moderate Justice of our time, took such an extreme position on the government's power to destroy Indian religions?[153] The decision was quickly maligned by critics, both for the general harm it wreaked on religious freedoms jurisprudence and its specific insensitivity to Indian culture. As the noted legal and religious studies scholar Vine Deloria, Jr. remarked, ''Most observers of the Supreme Court were simply confounded at the majority's conclusion which suggested that destroying a religion did not unduly burden it and that no constitutional protections were available to the Indians.''[154]

Perhaps Justice O'Connor was merely looking for a bright line. The Court did not believe that the government could accommodate every Indian—or other—religious claim that might arise on public lands. And it seemed uncomfortable with any of the limiting principles advanced by the lower courts, such as the requirement that a practice must be ''central'' or ''indispensable'' to a religion to be eligible for Free Exercise protection, or that the contested place must have a ''long-standing history'' of First Amendment use under the public forum doctrine.[155]

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[150] *Id.* at 476.

[151] Abby Abinanti, *A Letter to Justice O'Connor*, 1 Indigenous Peoples' J.L. Culture & Resist. 1, 21 (2004).

[152] For the claim that conquest occurs today whenever the Court fails to protect Indian property and sovereignty, rather than ''something that happened in the distant past which cannot be corrected,'' see Joseph William Singer, *Sovereignty and Property*, 86 Nw. U. L. Rev. 1, 55 (1991).

[153] As Professor Singer has written about Justice O'Connor's opinion in *Lyng*:

> What would you have to believe to think that there is no coercion involved in forcibly desecrating sacred lands? You would have to believe (1) that physical places are not central to religious practice; (2) that forcible removal of a person protesting desecration of a sacred place is not *religious* coercion; (3) that alteration by human beings of natural spaces is not an intrusion on religion; (4) that religion is not connected to a place and can be practiced anywhere; (5) that religion is a set of beliefs and rituals and that coercion arises only when the state requires forced avowals of belief or prohibits the practice of ritual.

Joseph William Singer, *Property and Coercion in Federal Indian Law: The Conflict Between Critical and Complacent Pragmatism,* 63 S. Cal. L. Rev. 1821, 1832 (1990).

[154] Vine Deloria, Jr., *For This Land: Writings on Religion in America* 205 (1999).

[155] *See Lyng,* 485 U.S. at 457–58 (''[T]he dissent proposes a legal test under which [the Court] would decide which public lands are 'dispensable' or 'peripheral,' and would then

These lines of inquiries got the Court uncomfortably involved in questions of theology. Thus Justice O'Connor seemed to think it preferable to hold the government has no obligation, in *any* case, to protect religious practices on the public lands, and let the political branches figure it out. Perhaps she thought this was the most workable rule, the fairest rule, she could come up with. But the Indians didn't see it that way.

When the *Lyng* opinion hit the banks of the Klamath River, the tribal communities were shocked, devastated, and despondent. This was their first major defeat since the cultural and religious revitalization began in the early 1960s. Abby Abinanti remembers that, prior to the Supreme Court proceeding, the Indian communities had felt confident about the case.[156] The tribal witnesses had offered strong testimony on the sacredness of the High Country. The lawyers and the plaintiffs in the case had had built a strong record regarding the burden placed upon the religion. It was a record the Supreme Court had to rely on, as a matter of law, in making its decision. Three lower courts had ruled in their favor. The Indians felt confident that the Supreme Court would afford constitutional protection to tribal religions—but it did not.

Abby remembers the community's disbelief and pain. How could the Indians on the Klamath River be ineligible for the protections of the Constitution? The Supreme Court justices ''must not have understood,'' she explained, ''because if they did how could they have allowed an ancient religion to be completely destroyed just to permit the construction of a road?'' She continues, ''I have to believe they didn't get it, because I can't be a citizen of a government that treats its people with such disregard for their religious freedom. I have to believe they didn't understand.'' Chris Peters elaborates on the feelings in the community: ''We were shocked at the extent of the damage. They (the Supreme Court) just went so far. My phone began ringing off the hook. Reporters and community members wanted to know what was next—what were we going to do.''[157] In his own state of shock, Peters stayed upriver for about a week, contemplating the next step.

The litigation process had exhausted the financial resources of the tribal communities, environmental groups, CILS, and the individual Indian plaintiffs. They decided to focus remaining resources on educating others about the lack of constitutional protection for Native American sacred sites and religion. Other Indian groups, tribes, and Native Hawaiians came to the Klamath River to learn about the case. The lawyers and the plaintiffs spoke on college campuses throughout the United States. The protection of Indian sacred sites began to command political attention on the national stage.

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decide which government programs are 'compelling' enough to justify 'infringement of those practices.'. . . We think that such an approach cannot be squared with the Constitution or with our precedents, and that it would cast the Judiciary in a role that we were never intended to play.'')

[156] Interview with Abby Abinanti, *supra* note 65.

[157] Interview with Chris Peters, supra note 13.

Their perseverance eventually paid off. Two years after the Supreme Court handed down the *Lyng* decision, Congress passed the Smith River National Recreation Area Act of 1990.[158] While Indian people supported the legislation, they were not directly involved in the lobbying process. Some tribal leaders speculate the Act was passed to avoid widespread protest in northern California. Chris Peters explains: ''If the road was built, an occupation would have happened.''[159] The Act protected the *entire* High Country, including the proposed site of the G–O road, from development by adding it to the Siskiyou Wilderness Area.[160] The High Country was *safe*, at last.

Continuing Importance of Lyng *Today*

We're a culture people, we're a fishing people and a ceremony people.[161]*—Raymond Mattz*

Lyng's Legacy in the Tribal Communities

Ironically, perhaps, even though *Lyng* denied to the Yurok, Karuk, and Tolowa people the basic protections of the First Amendment, the case furthered the revival of traditional religious practices. With the *Lyng* plaintiffs spanning several generations, the case brought the young and old together to learn, as the community had done before European contact. Despite the Court's skepticism, the tribal people did not question the validity of their own religious practices. In fact, the religious beliefs of the Yurok, Karuk, and Tolowa people had been revived and confirmed in their hearts and minds through working with anthropologists, providing depositions preparing for the case, and testifying in court. The process made the Indian people stronger. Even the highest court in the land could not stop them.

This movement continues today. More than twenty years after *Lyng*, the Brush Dance, the White Deer Skin Dance, the Kick Dance, the Boat Dance, the Flower Dance, and the Jump Dance are held frequently. Almost every weekend in the summer a tribal ceremony is being held on the Klamath River. Tribal members come from across the country to participate. More community members are playing bigger roles in the dances and taking on more responsibility. More of the young people are learning the songs and traditions necessary to continue these dances. Tribal Council member Raymond Mattz, former plaintiff in *Mattz v. Arnett,* describes the Mattz family Brush Dance of 2007: ''[I]t seemed like people needed that dance so bad . . . I think they *needed* the

[158] Smith River National Recreation Area Act, Pub L. No. 101–612, 104 Stat. 3209 (1990) (codified at 16 U.S.C. § 460bbb).

[159] Telephone Interview with Chris Peters, *supra* note 48.

[160] Smith River National Recreation Area Act, *supra* note 158, at § 460bbb–3(b)(2)(H).

[161] Telephone Interview with Raymond Mattz, Yurok elder, Feb. 17, 2009.

ceremony to get their thoughts on the river and the culture. It was a good feeling.''[162]

Still, people worry about the future of the religious ceremonies. Training of Indian doctors doesn't occur as often as it should. The youth are bombarded with video games and pop culture distracting them from learning traditional culture or language. The community hosts more ceremonies with more participants than ever, but people wonder whether it will be enough to pass the religious ways to the next generation. People are concerned that acculturation is happening even faster than it did in the boarding school era. The generation most knowledgable about the culture, including elders who are traditional regalia holders and speak the language, are beginning to pass. There is fear they will pass before their knowledge can be taught to the younger generation.

Yet there are new developments in contemporary cultural revitalization. The Yurok Tribe formed a modern tribal government in 1988. The Tribal Constitution embodies the cultural and religious covenants previously mentioned. The Preamble identifies:

> Our people [Yurok] have always lived on this sacred and wondrous land along the Pacific Coast and inland on the Klamath River, since the Spirit People, *Wo'ge*' made things ready for us and the Creator, *Ko-won-no-ekc-on Ne ka-nup-ceo,* placed us here. From the beginning, we have followed all the laws of the Creator, which became the whole fabric of our tribal sovereignty. In times past and now Yurok people bless the deep river, the tall redwood trees, the rocks, the mounds, and the trails. We pray for the health of all the animals, and prudently harvest and manage the great salmon runs and herds of deer and elk. We never waste and use every bit of the salmon, deer, elk, sturgeon, eels, seaweed, mussels, candlefish, otters, sea lions, seals, whales, and other ocean and river animals. We also have practiced our stewardship of the land in the prairies and forests through controlled burns that improve wildlife habitat and enhance the health and growth of the tan oak acorns, hazelnuts, pepperwood nuts, berries, grasses and bushes, all of which are used and provide materials for baskets, fabrics, and utensils.

The traditional culture and religion are now tribal law. The Yurok tribal government offers language and culture programs, and seeks to reacquire land in the Tribe's aboriginal territory, specifically the High Country. Through these types of community initiatives, the people of the Klamath River continue to exercise self-government and work toward developing a stronger, healthier community founded in culture and place.

LYNG'S LEGACY IN THE LAW

Beyond its ramifications for the parties in the case, *Lyng* became a basis for lower courts to reject most, if not all, First Amendment claims

[162] *See* Jesse McKinley, *For Struggling Tribe, Dark Side to a Windfall*, N.Y. Times, Sept. 2, 2007, *available at* http://www.nytimes.com/2007/09/02/us/02yurok.html?fta=y&pagewanted=all.

involving sacred sites on the public lands.[163] As one commentator put it ''the decision in *Lyng* effectively marked the end of Native American attempts to employ the Free Exercise Clause to protect Native American religious sites on public lands.''[164] But American Indians are no strangers to legal defeat and, as they have done many times before, they adapted as well as they could to changing legal circumstances.[165] Among the most critical legal developments in the post-*Lyng* era were statutory and regulatory advances in favor of ''accommodating'' Indian religious practices on public lands. This model may have followed from Justice O'Connor's statement in *Lyng* that the government *could* protect such practices even if the First Amendment did not require it.

The first major step towards the accommodation model was Congress's 1992 amendment of the National Historic Preservation Act (NHPA), making Indian sacred sites eligible for treatment as ''properties of traditional religious and cultural importance'' and requiring land management agencies ''to consult'' with Indian tribes on federal undertakings that may adversely affect the physical integrity of such properties.[166] Then, in 1996, President Clinton issued an executive order requiring officers on federally managed property both to accommodate access to Indian sacred sites and also to avoid adversely affecting the physical integrity of those sites.[167] Federal land management agencies, including the Forest Service and Park Service, then developed internal guidelines to implement these policies.[168]

As a result of these developments, federal agencies often hold hearings (sometimes in Indian Country) on land use decisions and conflicts—developing a significant dialogue among federal officials, tribal representatives, natural resource developers, recreationalists, local citizens, and others. Proposed land management plans are published for notice and comment before implementation. The resulting plans often

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[163] *See* Dussias, *supra* note 8, at 823–33 (discussing United States v. Means, 858 F.2d 404 (8th Cir. 1988)); Manybeads v. United States, 730 F.Supp. 1515 (D. Ariz. 1989); Attakai v. United States, 746 F.Supp. 1395 (D. Ariz. 1990); Havasupai Tribe v. United States, 752 F.Supp. 1471 (D. Ariz. 1990), *aff'd sub nom.* Havasupai Tribe v. Robertson, 943 F.2d 32 (9th Cir. 1991) (per curiam). A recent case is *Navajo Nation v. United States Forest Serv.*, 535 F.3d 1058, 1070 (9th Cir. 2008), discussed below.

[164] Charlton H. Bonham, *Devils Tower, Rainbow Bridge and the Uphill Battle Facing Native American Religion on Public Lands*, 20 Law & Ineq. 157, 165 (2002).

[165] *See* Hank Meshorer, *The Sacred Trail to Zuni Heaven: A Study in the Law of Prescriptive Easements* in *Readings in American Indian Law* 318, 319–20 (Jo Carillo ed., 1998) (suggesting the *Lyng* decision played a role in the Zuni Tribe's decision to bring a claim for access to religious pilgrimage lands under state law of prescriptive easements instead of the First Amendment).

[166] National Historic Preservation Act, 16 U.S.C. §§ 470a(d)(6)(A)–(B), 470f.

[167] *See* Exec. Order No. 13,007, 61 Fed. Reg. 26,771 (May 24, 1996).

[168] *See, e.g.,* U.S. Forest Serv., Forest Service National Resource Guide to American Indian and Alaska Native Relations (1997), *available at* http://www.fs.fed.us/people/tribal/tribexec.pdf; U.S. Dep't of the Interior, National Park Service Management Policies (2000), *available at* http:// www.nps.gov/refdesk/mp/chapter8.pdf.

accommodate the interests of Indian religious practitioners alongside other stakeholders. At Devil's Tower National Monument, for example, the National Park Service allows commercial and recreational rock climbing, but suggests a climbing hiatus during the month of June while the annual Lakota Sun Dance takes place there.[169] In the Bighorn National Forest, a management plan prevents logging around the Medicine Wheel, a site sacred to several tribes.[170] These plans represent progress from *Lyng's* threat to destroy altogether an Indian sacred site.

Still, from the perspective of tribal advocates, the legislative and regulatory programs described above contain serious limitations. At Devils Tower, for example, even though statistics suggest an 85% compliance rate with the voluntary climbing ban, some rock climbers go ahead and climb during the sun dance, a decision that is permitted under the accommodation plan. While such ''voluntariness'' helps insulate land management plans against Establishment Clause challenges, it also leaves religious practitioners vulnerable to ongoing disruptions during ceremonies.[171]

Perhaps even more troubling, the NHPA grants tribes only a *procedural* right of consultation on sacred sites management; it does not guarantee any *substantive* standard of protection for sacred sites. AIRFA similarly grants no enforceable right of religious freedom. What this means in practice is that a public land agency can afford tribes their procedural rights of notice, comment, and a hearing, but then still decide to go ahead with a management plan that adversely affects an Indian sacred site or limits access to it.[172] In the recent case of *Navajo Nation v. United States Forest Service*, for example, the en banc Ninth Circuit upheld the Forest Service's decision to permit the use of reclaimed water (or treated sewage effluent) in ski area snowmaking—despite volumes of testimony on the devastating religious impacts of that decision for Navajo, Hopi, Havasupai, Hualapai and other tribal people who regard the mountain as sacred.[173]

From a religious freedoms perspective, the *Navajo Nation* decision is also disappointing because it seems to give *Lyng* a role in limiting the

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[169] *See* Bear Lodge Multiple Use Ass'n v. Babbitt, 175 F.3d 814 (10th Cir. 1999). *See also* Natural Arch & Bridge Soc'y v. Alston, 98 F. App'x 711, 716 (10th Cir. 2004) (upholding the Park Service management plan for Rainbow Bridge National Monument against Establishment Clause and other challenges).

[170] *See* Wyoming Sawmills, Inc. v. United States Forest Serv., 383 F.3d 1241, 1252 (10th Cir. 2004) (upholding the Forest Service's management plan for Medicine Wheel National Historic Landmark against Establishment Clause and National Forest Management Act challenges).

[171] In both *Bear Lodge* and *Natural Arch*, where the land management plans requested ''voluntary'' accommodation of Indian religion, the courts held that non-Indian challengers failed to show the ''actual injury'' requirement for standing to sue.

[172] *See also* Kristen A. Carpenter, *Real Property and Peoplehood*, 27 Stan. Envtl. L.J. 313, 320–21, nn.42–44 (2008) (describing several current ongoing sacred sites cases).

[173] Navajo Nation v. United States Forest Serv., 535 F.3d 1058 (9th Cir. 2008).

Religious Freedom Restoration Act (''RFRA'') of 1993.[174] In RFRA,[175] Congress made clear that the federal government cannot impose a ''substantial burden'' on religious exercise unless it can demonstrate a ''compelling interest'' in the burdensome activity—thus restoring a standard that the Supreme Court eroded even further after *Lyng*.[176] RFRA does not define ''substantial burden.'' The Ninth Circuit held in *Navajo Nation* that a plaintiff could only meet its ''substantial burden'' test by showing governmental coercion or the denial of a governmental benefit—a standard that comes from *Lyng* and, as that case demonstrates, allows the government to destroy a religion without substantially burdening it![177] Yet, not all courts have taken this approach. In *Comanche Nation v. United States*, the Western District of Oklahoma refused to treat RFRA's ''substantial burden'' test so narrowly, explicitly rejecting the *Navajo Nation* approach.[178] Instead, the district court invoked Tenth Circuit cases holding that government actions substantially burden religion under RFRA if they ''significantly inhibit or constrain conduct or expression or deny reasonable opportunities to engage in religious activities.''[179] In a decision that did not cite *Lyng*, the court thus enjoined the construction of a building on federally-owned land that would interfere with a sacred ''viewscape'' critical to Comanche religious practices.[180]

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[174] Religious Freedom Restoration Act of 1993, Pub. L. No. 103–141, 107, Stat. 1488 (codified at 42 U.S.C. §§ 2000bb to 2000bb–4), as amended by Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106–274, 114 Stat. 803 (codified at 42 USC §§ 2000cc to 2000cc–5). Under these statutes, the government ''shall not substantially burden'' a person's exercise of religion even under ''a rule of general applicability,'' unless it can show the burden on religion furthers a ''compelling governmental interest'' and is the ''least restrictive means'' of furthering that interest.

[175] RFRA has been declared unconstitutional as to state governments, *see* City of Boerne v. Flores, 521 U.S. 507 (1997), but still applies to the federal government. *See* Gonzales v. o Centro Espirita Uniao do Vegetal, 546 U.S. 418 (2006).

[176] Following *Lyng*, the First Amendment was limited even further in *Employment Division v. Smith*, 494 U.S. 872 (1990), an Indian peyote case, where the Court held that states could burden religious freedoms through neutral laws of general applicability. In direct response to *Smith*, Congress enacted RFRA which explicitly states that the purpose of the Act is ''to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972), and to guarantee its application in all cases where free exercise of religion is substantially burdened.'' 42 U.S.C. 2000bb(b)(1).

[177] Navajo Nation v. Forest Service, 535 F.3d. 1058, 1064–74 (9th Cir. en banc 2008), *cert. denied*, 129 S.Ct. 2763 (June 8, 2009). For a poignant dissenting view, *see id.* at 1080–1114 (Fletcher, J., dissenting).

[178] Comanche Nation v. United States, No. CIV–08–849–D, 2008 WL 4426621, at *3 n.5 (W.D.Okla., Sept. 23, 2008).

[179] *Id.* (quoting Thiry v. Carlson, 78 F.3d 1491, 1495 (10th Cir. 1996)).

[180] *Id.* Based on the divergent approaches in *Navajo Nation* and *Comanche Nation*, it appears that a circuit split may be developing over the definition of ''substantial burden'' under RFRA.

Some commentators will argue that RFRA's legislative history indicates Congress intended to keep *Lyng* in place, much like the Ninth Circuit held in *Navajo Nation*.[181] Yet the statutory language of RFRA does not contain a public lands exception and RFRA does apply to the federal government's management of international customs and high security prisons.[182] It is difficult to see any principled reason for excluding American Indian sacred sites from RFRA's coverage. To the contrary, RFRA has the potential to give substantive effect to the model of accommodation that emerged in the post-*Lyng* era, ensuring that agencies do more than pay mere lip service to the requirements of consultation contained in statutes such as the NHPA and NEPA.[183]

Conclusion

Reflecting on the *Lyng* case, Bill Bowers, a Yurok tribal member once remarked: ''Just because you make the rules, doesn't make them right.''[184] Abby Abinanti, who is now a state court commissioner and Chief Judge of the Yurok Tribe, concurs: ''*Lyng* was a complete moral and legal disregard of religion freedom. The decision was wrong then and it continues to be wrong.''[185] The decision strikes many tribal people, and others committed to religious freedoms, as unjust.

Just as important, *Lyng* purports to tell a story that turns out to be untrue. When Justice O'Connor wrote that, ''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,''[186] she seemed confident that the legal rules of conquest would dictate reality on the ground. Having already seized the Tribes' land, the government was

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[181] Anastasia P. Winslow, *Sacred Standards: Honoring the Establishment Clause in Protecting Native American Sacred Sites*, 38 Ariz. L. Rev. 1291, 1315 (1996) (''Congress was assured that RFRA would not create a cause of action on behalf of Native Americans seeking to protect sacred sites. The Senate report stated that RFRA would not overrule Lyng and that, under Lyng, 'strict scrutiny does not apply to government actions involving only management of internal government affairs or the use of the government's own property or resources.' '').

[182] *See, e.g.*, Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006); (granting RFRA relief after U.S. Customs inspectors seized *hoasca* shipment required for religious practices); O'Bryan v. Bureau of Prisons, 349 F.3d 399 (7th Cir. 2003) (applying RFRA to religious freedom claim of federal prisoner at Federal Correctional Institution on grounds that RFRA may be applied to the internal operation of the national government); Kikumura v. Hurley, 242 F.3d 950 (10th Cir. 2001) (applying RFRA to religious freedom claim of federal prisoner at the United States Penitentiary, Administrative Maximum (Florence ADX), which houses prisoners deemed the most dangerous and in need of the tightest control).

[183] *See* Kristen A. Carpenter, Sonia K. Katyal & Angela R. Riley, *In Defense of Property*, 118 Yale L.J. 1022, 1112, 1123 (2009) (arguing that RFRA facilitates a model of indigenous peoples' ''stewardship'' of sacred sites on public lands, even in the absence of title).

[184] Telephone Interview with Bill Bowers, *supra* note 13.

[185] Interview with Abby Abinanti, *supra* note 65.

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

now free to destroy their culture, and not even the First Amendment could stop the process.

But it didn't happen. Despite all of the government's best efforts, the sacred sites were not destroyed and the tribal cultures were not demolished. Indeed, the religions are now flourishing, albeit with modern challenges, and the Tribes are newly revitalized as cultural and political entities. The Tribes continue to use what is, after all, *their own* aboriginal territory. As it turns out, they could no more abandon the High Country than they could stop being Indian.

Lyng remains an unjustifiable decision about American Indian religious freedoms and property rights, a judicial attempt to reify the rules of conquest. And yet, from the Tribes' perspective, the case also stands as a powerful testament to Indian cultural survival against great odds. This is the story that the tribal people will keep telling and living.