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In the Eyes of the Beholder: Understanding and Resolving Incompatible Ideologies and Languages in US Environmental and Cultural Laws in Relationship to Navajo Sacred Lands

SHARON MILHOLLAND

Meeting the legal requirement and moral imperative to protect both the physical and spiritual integrity of sacred lands depends on applying traditional indigenous philosophies and bodies of knowledge. Although important progress is evident in US environmental and cultural laws written to acknowledge the needs, rights, and interests of Native peoples in the management of sacred lands, a significant amount of work remains. Native peoples still face working within a body of federal law that imposes values, concepts, and languages of the dominant Western society and barely recognizes the traditional Native knowledge systems and values necessary for meaningful protection and access to sacred lands. Consequently, the legal tools intended to protect sacred lands often conflict with traditional indigenous values relative to land and religious practices, privilege the values of the dominant society, erode tribal identity and sovereignty, and leave sacred lands vulnerable to desecration or destruction.

In the United States, federal and state environmental, cultural, and religious freedoms protection laws mandate cooperation and consultation with Native peoples to protect effectively, and permit access to, sacred places on federally held lands. The federal government is charged with a legal trust duty to tribal governments to exercise the highest standards of good faith and integrity in order to protect Indian lands, resources, and cultural heritage. Regardless of this substantial legal framework, Native nations across

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the United States have repeatedly expressed concerns that consultation and collaboration efforts with state and federal land-management agencies are inconsistent and inadequate.¹ They believe that land management prescriptions and practices are unilaterally determined, geographically limited in scope, and not culturally compatible.² Native nations complain that various forms of industrial, commercial, and recreational development continue to threaten essential sacred places.³

For example, in the state of Georgia, the Muscogee people are battling proposed interstate highway expansion that threatens to restrict access to, and damage, mound temples and historic villages in the Ocmulgee Old Fields.⁴ In Nevada, the Western Shoshone Nation is fighting to protect its sacred Yucca Mountain from transformation into this country's central repository for nuclear waste.⁵ Southeastern California is the stage for the Quechan tribe's struggle to halt the permit for an open-pit gold mine that threatens to obliterate sacred sites and a sacred trail network in Indian Pass.⁶ In the Pacific, Native Hawaiians are fighting telescope development on top of their elder ancestor, Mauna Kea. This volcano on the island of Hawaii is the highest point in Pacific Polynesia and is the "highest portal to the Hawaiian Universe."⁷ In Alaska, the Gwich'in are fighting proposed oil drilling in the National Arctic Wildlife Refuge. These grounds are sacred because they are habitat for caribou, the very source of Gwich'in subsistence and nationhood.⁸

To Native peoples, compliance with existing environmental and cultural laws by itself does not result in meaningful and effective sacred lands protection and access. Intent and interpretation of the language of existing environmental and cultural laws are at issue. Effective strategies for sacred lands protection and access are those that scrutinize existing law and management practice for incompatible and hegemonic ideologies and languages. Resolving the problem of incompatible ideologies and languages in laws treating sacred lands can include tribal governments working with Congress to integrate traditional indigenous worldviews directly into the law. More importantly, resolution depends on cultivating a willingness among legislators, public land managers, project proponents, and stakeholders to commit to the practice of fulfilling sacred lands' protection needs according to traditional indigenous philosophies prior to drafting new legislation or implementing negotiations or environmental evaluations mandated in existing US law.⁹

In this article, I raise a few examples of incompatible concepts and languages in US federal environmental and cultural laws affecting the management of indigenous sacred lands. I explain these examples by describing the management of a selection of Navajo (Diné) sacred places and elsewhere. Through fundamental concepts rooted in postcolonial theory and critical race theory, I suggest an intellectual framework for understanding why traditional indigenous values and knowledge are marginalized and why incompatible Western values have been privileged and enshrined in US law and policy in relationship to the management of Native sacred lands. Finally, I want to introduce you to *hozho*, the Navajo philosophy of harmony and natural beauty, which is intimately related to the Navajo orientation to their land.¹⁰ This is an abstract, complex, highly spiritual doctrine of Navajo philosophy

and spiritual practice. The environmental and cultural laws and policy of the United States are not inclusive of the philosophy of *hozho*. By considering the Navajo traditional philosophy of *hozho*, I discuss how incorporating traditional indigenous values and knowledge in sacred lands management can resolve values conflict for Native peoples, as well as raise some complex issues regarding the introduction of traditional cultural and spiritual concepts into the language of tribal or federal law.

INCOMPATIBLE IDEOLOGIES AND LANGUAGES BETWEEN US ENVIRONMENTAL OR CULTURAL LAWS AND TRADITIONAL NAVAJO VALUES AND KNOWLEDGE

Native worldviews regarding the sacredness of the land are essential when making decisions about the land. Certain distinctive landscapes are valued as an essential and vital part of Indian being, and a moral duty to protect these places exists in order to secure the future survival of the earth, sun, stars, and all forms of life.¹¹ “A culture’s vitality is literally dependent on individuals [living] in community with the natural world.”¹² The land’s features, and the sense of place and kinship they create, are central to the identity of a Native individual and a people.¹³

The land with its water, plants, and animals is a spiritual creation put into motion by the gods in their wisdom. These elements are here to help, teach, and protect through an integrated system of beliefs that spell out man’s relationship to man, nature, and the supernatural. To ignore these teachings is to ignore the purpose of life, the meaning of existence.¹⁴

The importance Native Americans traditionally place on “connecting” with their place is not a romantic notion that is out of step with the times; instead, it is the quintessential ecological mandate of our time.¹⁵

Navajo Sacred Lands and Traditional Philosophy

Sacred places, belief systems, and spiritual practices are unique to each Native culture. To the Navajo, sacred lands generally include locations mentioned in oral tradition, places where something supernatural has happened; plants, minerals, and healing waters may be collected; or humans communicate with the supernatural world by means of prayers and offerings.¹⁶ A special type of sacred place is the “built” Anasazi site, such as masonry pueblos, burial areas, or rock image panels.¹⁷ Because warfare was an important part of Navajo life, ceremonial sites connected to battle are also sacred.¹⁸ In terms of their physical form, most sacred places are distinctive features on the natural landscape.

The Navajo people describe the perimeter of their homeland, or the Diné Bibeayah, with four sacred mountains. The mountains are where the natural and spiritual universes join, and they embody the values that are most pervasive in Navajo life: “healing the sick, protecting the people and their goods,

bringing rain for crops and livestock, and insuring tranquility in life.”¹⁹ These mountains are essential to Navajo being and a significant source of food, water, medicinal plants, and places of worship.²⁰ The four sacred mountains marking the terrestrial boundaries of their traditional territory are the most powerful of the Navajo sacred landscapes.²¹

Our Navajo spiritual and social laws are represented by the sacred mountains, as well as the four seasons and the four parts of the day. The foundations of our rules and laws for our lives are within our sacred mountains, the four seasons and the four parts of the day. The sacred mountains were placed here to give us the understanding of our strength and courage. They shield us from evil, harm, and danger. . . . We think of them as our home, as the foundation of our hogan and our life.²²

Traditional Indigenous Values and Knowledge Are Marginalized

The complex environmental and cultural legislative and regulatory framework governing indigenous sacred places that are in the stewardship of the United States does not always recognize the Native system of moral values, elegantly expressed as “the quintessential ecological mandate of our time,” as an obvious and justifiable source of guiding principles. Rather, environmental and cultural protection laws embody the ideologies and languages of Western science and property law. Legislators defined sacred places, religious objects, and American Indian human remains as “historic property” or “cultural resources.” They also defined Western scientists as the most qualified authorities to understand and care for this property through laws like the 1906 Antiquities Act, the 1966 National Historic Preservation Act (NHPA), and the Archaeological Resources Protection Act.²³

At the time Congress enacted these statutes, legislators did not take into account the unique values and philosophies of Native peoples, such as *hozho*, in the treatment of this cultural property.²⁴ In the United States, property law is defined in accordance with the dominant society’s values, and the ability to hold property is consistent with the ability to wield power.²⁵ Consequently, decision makers for federal land-management agencies largely privilege scientific, recreational, and economic values over indigenous traditional values in managing cultural property. Whether by deliberate or inadvertent decisions or actions, the federal government has culturally constructed, socially sanctioned, and legally legitimized the removal of the voices and values of Native peoples from the management of their cultural property. In the end, the legal tools designed to manage sacred lands conflict with traditional indigenous values relative to land and religious practice, privilege the values of the dominant society, erode tribal identity and sovereignty, and leave sacred lands vulnerable to desecration or destruction.

Postcolonial Theory, Critical Race Theory, and Indigenous Sacred Lands

To understand why traditional indigenous values and knowledge are marginalized, and why incompatible Western values have been privileged and enshrined in US law and policy in relationship to the management of Native sacred lands, I examine this legal architecture under the lens of critical theory. Postcolonial theory and critical race theory can be linked together to form an intellectual framework for analysis of American Indian affairs because the subjects of race and political standing for indigenous peoples are unavoidably intertwined.²⁶ American Indians are a distinct racial group that entered into formal treaties with the US government on a nation-to-nation basis. Understanding how social, political, and legal institutions in the United States create and maintain hierarchical power structures with Native governments, and then fail to resolve power and values conflicts, can be explained through central tenets emerging in these two bodies of theory.

Postcolonial theory is a rapidly evolving field of scholarship generally sharing skepticism about value neutrality in Western institutions. The term *post-colonial* is inclusive of a wide spectrum of definitions of power-holding Western institutions and ideologies in societies having colonial histories. Although “post” colonialism suggests that colonial practices and ideologies are erased, colonized lands and peoples actually have residual colonial institutions, including government, courts, education, mass media, and the church, that continue to shape national identity even in a postcolonial political era.²⁷ Exploring the nature and degree of how the institutions in power sustain and legitimize their political positions is one focus of postcolonial theory.²⁸ The concept of incommensurability is the condition in which dominant Western institutions construct concepts and languages are so incompatible with non-Western values and goals that these are leveraged into the margins, and the dominant society maintains power in order to privilege its own values and goals.²⁹

Critical race theory is another rapidly evolving intellectual tradition expanding across multiple disciplines that essentially questions the existence of neutral principles of constitutional law. *Black's Law Dictionary* defines it as “a reform movement within the legal profession . . . whose adherents believe that the legal system has disempowered minorities. Critical race theorists observe that even if the law is couched in neutral language, it cannot be neutral because those who fashion it have their own subjective perspective that, once enshrined in law, has disadvantaged minorities and even perpetuated racism.”³⁰ Critical race theory emerged in the mid-1970s among legal scholars who built on the insights of critical legal studies and feminism in response to a need for a new theory to address racism occurring after the civil rights era of the 1960s. Critical race scholars argue that the practice of relying on precedent in civil rights litigation lacks effectiveness in securing rights for people of color in any sustained way. Critical race scholars also claim that arguments for rights for minorities have procedural solutions focused on the appearance of equality rather than substantive solutions focused on actual equality. Further miring equal rights advancement for minorities, those rights are usually limited when they conflict with the interests of the powerful.³¹

The first assumption of critical race scholarship is that for people of color racism is commonplace and can be encountered in aversive or deliberate form.³² Second, critical race theory holds that the concept of race is a social invention and that these social concepts of race are enshrined in the law.³³ Third, critical race theory recognizes the “voice of color” as a unique collection of personal stories of individuals who have been ignored or alienated by the dominant institutions.³⁴ Critical race theorists posit that progress to eradicate racism occurs only when it is to the advantage of the dominant society to do so, a concept known as *interest convergence*.³⁵ The concept of interest convergence emerged from the work of Derrick Bell, one of the intellectual founders of critical race theory.³⁶ In his analysis of the 1954 US Supreme Court ruling in *Brown v. Board of Education*, he asserts that civil rights advances always coincide with the self-interest of the dominant society.³⁷ Conversely, impediments to civil rights advancement can also be rationalized by the self-interest of the dominant society.

Incommensurability, Interest Convergence, and Indigenous Sacred Lands

The concepts of incommensurability and interest convergence are evident in US environmental and cultural protection laws relative to the preservation of indigenous sacred places. A very broad example of incommensurability in this body of law is the distinction between the cultural environment and the natural environment, rather than considering them as integrated. This body of law also transforms spiritual responsibilities and “the quintessential ecological mandate of our time” to a set of bureaucratic procedures often just giving the appearance of adequate treatment. One of the most important specific demonstrations of incommensurability and interest convergence in the legal language of sacred lands management is the codification of the fundamental term *sacred land*.

Indigenous sacred lands have generally been described as natural features such as rivers, waterfalls, springs, mountains, buttes and spires, or built features such as burial areas, rock image panels (pictographs or petroglyphs), medicine wheels, vision quest monuments, dance arbors, sweat bath enclosures, and gathering areas where sacred trees, plants, stones, water, or other natural materials are collected.³⁸ Lawmakers have seized on the physical place and the built environment in order to create a single legal definition that is narrow in scope and not necessarily consistent with how Native peoples regard sacred or holy places. The Sacred Sites Executive Order 13007 (24 May 1996) directs agencies administering federal lands to accommodate access to, and ceremonial use of, Indian religious sites to the “extent practicable” as determined at the discretion of a land manager. This order defines *sacred site* in the following manner: “‘Sacred site’ means any specific, discrete, narrowly delineated location on Federal land that is identified by an Indian tribe or Indian individual determined to be an appropriately authoritative representative of an Indian religion, as sacred by virtue of its established religious significance to, or ceremonial use by, an Indian religion, provided that the tribe or appropriately authoritative representative of an Indian religion has informed the agency of the existence of such a site.”³⁹

Another effort to codify the term *sacred* occurs in the Native American Sacred Lands Act (H.R. 2419).⁴⁰ This bill strives to enact Executive Order 13007 into law and provide authority to place federal land into trust for the benefit of the Indian tribe or tribes for which the land is considered sacred.⁴¹ The latest draft of this bill was motivated in direct response to the Quechan tribe's fight against the development of an open-pit gold mine in Indian Pass, California. In general, the bill intends to protect indigenous sacred sites from aggressive energy development. Additionally, this bill provides authority for federal land managers to enter into cooperative agreements with tribes in order to manage a sacred landscape on federal land and any lands adjacent to sacred places.⁴² The bill also underscores the importance of Native science and oral history as valid lines of evidence supporting the definition and significance of sacred sites. It also provides a more accurate definition of *sacred land*. "The term 'sacred land' means any geophysical or geographical area or feature which is sacred by virtue of its traditional cultural or religious significance or ceremonial use, or by virtue of a ceremonial or cultural requirement, including a religious requirement that a natural substance or product for use in Indian tribal or Native Hawaiian organization ceremonies be gathered from that particular location."⁴³

Important criticism remains, however, regarding the sufficiency of this definition and the appropriateness of attempting to codify definitions of the sacred.⁴⁴ Arguably, a single statutory definition cannot capture the grand multiplicity of perspectives on what is "sacred." The concept of "sacred" is broad, abstract, and imbued with such deep personal spiritual meaning transcending the physical and the metaphysical, that the notion of creating a single definition of *sacred* extends beyond incommensurable and approaches impossible. Native peoples are qualitatively different from each other in cultural and spiritual heritages. Definitions of what constitutes "sacred" are accordingly particular. The meaning of the sacred, or sacred lands, is relative to individual geographical areas; individual cultures or tribes, bands, clans, or societies within the tribe; or men and women within the tribe.

The "sacred" also embodies a tribe's unique experience and language. Different groups of people may see the same phenomenon as either sacred or secular. Sacredness of a place can derive from human actions of great significance, nonhuman actions of great significance, or from higher powers having revealed themselves to human beings.⁴⁵ Stories about places without any obvious physical definitions may still encompass sacredness.⁴⁶ Tribal philosophers and scholars who have compared Native faiths and the concept of sacred have concluded that tribes have some general spiritual ideas and practices in common, and that these generalities are more appropriate for secular discussion.⁴⁷ For example, a generally accepted broad description of *sacred*, rather than a legal definition, is "something special, something out of the ordinary, and often it concerns a very personal part of each one of us because it describes our dreams, our changing, and our personal way of seeing the world. The sacred is also something that is shared, and this sharing or collective experience is necessary in order to keep the oral traditions and sacred ways vital. . . . Having a guiding vision in common as a people and maintaining it with renewals, ceremonials, rituals, and prayers."⁴⁸

The National Environmental Policy Act of 1969 (NEPA) is one of the most significant pieces of environmental legislation enacted in the United States.⁴⁹ It requires rigorous assessment of the ecological and cultural impacts of federal undertakings and preservation of important historical, cultural, and natural aspects of our national heritage. This law contains concepts and language that are incommensurable with Native worldviews on sacred lands management. For example, indigenous cultures and spirituality are intertwined with the land, and the effects of an action on the land also impacts Native culture, spirituality, and sovereignty. Yet the NEPA does not adequately consider the effects of proposed projects on indigenous societies and cultures in a way that is meaningful to Native peoples. Specific examples of concepts and language central to the NEPA in which Indian people must participate and integrate their values, understandings, and bodies of knowledge are *social impact assessment* and *mitigation*.

Social impact assessment is a part of the environmental impact analysis required by the NEPA. Social impact includes “the consequences to human populations of any public or private action—that alter the ways in which people live, work, play, relate to one another, organize to meet their needs and generally cope as members of society. The term also includes cultural impacts involving changes to the norms, values, and beliefs that guide and rationalize their cognition of themselves and their society.”⁵⁰

Socioeconomic variables and values primarily define and measure social impact. These variables include per capita income, housing availability, and employment opportunity. Social impact also considers, to a lesser extent, the potential effect to cultural resources. Defining and measuring potential impact to all cultural resources that are important to Native peoples are inadequate. Traditional indigenous values defining environmental and cultural sustainability fall in between the socioeconomic environment described under the NEPA and the cultural environment defined under the NHPA.⁵¹ The effects of a proposed action over sacred places, like highway construction or surface mining, are usually limited to a discussion about material, or archaeological, remains and their intrinsic scientific or educational values. Social impact analysis of effect resulting from an action on sacred natural places does not routinely include discussions of ceremonies, stories, songs, dance, language, technology, or art forms linking land and cultural identity.

The process outlined in NEPA guidelines for defining impact to cultural properties generally includes defining concrete boundaries for places of cultural or spiritual interest. Assigning rigid physical boundaries to places of spirituality and power is an incommensurable practice to Native peoples. For example, the sacred mountains defining the Diné Bideyah are imbued with such deep personal spiritual meaning transcending the physical and the metaphysical, that the notion of demarking a physical boundary around discrete locations of “sacredness” is an incommensurable concept. “There are no boundaries. Boundaries don’t make sense. All ceremonies go to the four sacred mountains. Ceremonies and mountains are inside us. The land is within us and we take it with us. You can’t put a boundary around that.”⁵²

Legal and administrative boundaries ultimately supplant cultural boundaries for sacred lands definition and protection. To illustrate, the Diné'tah is a Navajo sacred landscape spanning several hundred square miles in northwestern New Mexico. According to origin stories, the modern Navajo people, Nihookáá Diné, emerged into the modern world within the Diné'tah. This region is also the birthplace of some of the most important spiritual beings in Navajo creation. Gobernador Knob, or Ch'ool'íí, a prominent dome-shaped rock outcrop, is the birthplace of Changing Woman. She created the four pairs of Diné who became the originators of the four original clans.⁵³ The fundamental values for Navajo identity, culture, and "charter of life" are based on Changing Woman's life.⁵⁴ Dził Ná oodilii, commonly known as Huerfano Mesa, is the first terrestrial hogan marking the center of the Navajo world around which the people were to travel.⁵⁵ Gobernador Knob and Huerfano Mesa are situated within the Diné'tah and are two of the six most sacred and revered mountains in the Navajo physical and metaphysical universe.

Today, the Diné'tah is not managed as a whole or culturally defined sacred or heritage landscape. Most of this region is divided among multiple federal, state, and private landowners, as well as the Navajo Nation. The physical and spiritual integrity of the Diné'tah as a holy land is deteriorating from large-scale energy, commercial, and recreational development. The Diné'tah is located in the San Juan Basin, one of the largest natural gas fields in the United States. Oil and gas production in this region has been ongoing for more than fifty years.⁵⁶ In 2003, the US Bureau of Land Management (BLM) approved additional large-scale oil and gas resources development.⁵⁷ The proposed wells, pipeline, and road network expand over one hundred thousand acres of northwest New Mexico, including the sacred lands of the Diné'tah. The Navajo Nation rejected BLM approval of this proposal, expressing concerns over the adverse effects to Ch'ool'íí and Dził Ná oodilii and inadequate compliance with federal environmental and cultural protection statutes.⁵⁸

Ch'ool'íí and Dził Ná oodilii, along with several other important cultural properties within the Diné'tah, are individually managed as a discretely defined Area of Critical Environmental Concern (ACEC).⁵⁹ An ACEC is a special management designation applied to protect and prevent irreparable damage to important historical, cultural, and scenic values; fish or wildlife resources; or other natural systems or processes, or to protect human life and safety from natural hazards.⁶⁰ What is problematic about the ACEC concept relative to sacred landscapes is that an ACEC is a narrowly defined management unit encompassing a natural or human-built physical feature. Consequently, the larger cultural or spiritual landscape is arbitrarily fragmented into noncontiguous "islands of preservation." Additionally, the cultural landscape of the Diné'tah is fragmented into multiple federal, tribal, and state management jurisdictions, missions, and management priorities, none of which are organized around the traditional cultural concept of the Diné'tah or the traditional philosophy of *hozho*.

Finally, preservation of resources in the ACEC is limited to visible surface features and does not normally include the air space or the substrate.

Although surface gas wells, pumping stations, roads, and pipelines are not permitted inside the ACEC, the sacred properties inside this protective unit are still vulnerable to desecration or destruction as consequences of directional drilling from locations outside of the ACEC boundary or from hydraulic fracturing. Directional drilling is the process of drilling a curved or angled well in order to reach a target that is not directly beneath the drill site, and where a vertical hole may not be optimal, such as when trying to reach a gas reservoir located beneath a body of water.⁶¹ Hydraulic fracturing, or fracking, involves high-pressure injection of fluids into the bedrock to break up formations surrounding the oil and gas, allowing it to flow more freely. According to the Environmental Protection Agency, fracturing fluids can include a long list of hazardous materials and carcinogens, such as diesel fuel and formaldehyde. Fracking can result in physical damage to surface features, and any injected fluids that remain trapped underground are sufficiently toxic to contaminate groundwater.⁶²

Another incommensurable NEPA and NHPA concept relative to the treatment of sacred places is the idea of “mitigating” adverse effects to sacred lands. Common mitigation measures implemented by project proponents include avoiding the impact altogether, minimizing impacts by limiting the degree or magnitude of the action, rectifying the impact by repairing or restoring the affected environment, reducing or eliminating the impact over time by preservation and maintenance operations, or compensating for the impact by replacing or providing substitute resources or environments.⁶³ Indigenous sacred lands can be places of spiritual power and can have physical and metaphysical elements or metaphysical or intangible characteristics. Places of power can be esoteric and even dangerous; therefore, the standard alternatives provided under NEPA regulations, or standard archaeological practice, cannot apply to sacred lands or traditional cultural properties (TCPs). Tribes argue that mitigating adverse effects to the metaphysical or spiritual components of sacred lands is not always possible.⁶⁴ The only option for mitigating impact to sacred lands is no action at all.⁶⁵

Navajo elders echoed these opinions in reaction to the treatment of Dook’o’ooshííd (San Francisco Peaks), the westernmost of the four Diné sacred mountains, located in northeastern Arizona.⁶⁶ Dook’o’ooshííd is a living being created and brought from the underworld by the Holy People. It is the residence of the Holy People who guide and support the Diné. This mountain range is a significant source of food, water, and medicine, and it is an essential place of worship.⁶⁷ Navajo elders living near Dook’o’ooshííd first argue that desecration of sacred lands cannot be mitigated. Second, they suggest that if mitigation or “repair” of sacred lands is a possibility, mitigation is not limited to measures applied by non-Navajos like a federal agency or project proponents. Navajo people, specifically medicine people, need to aid the mountain.

Stop talking about the mountain. Only climb the mountain with song and prayer . . . and the snow will come back. We need to teach this to everyone and our future generations.⁶⁸

Effect to the physical properties or significance of traditional cultural properties cannot be mitigated by any measure other than avoidance. If TCPs are adversely affected their power can be diminished or lost. This loss can be measured by success in healing.⁶⁹

Today, the US Forest Service manages Dook'o'oolshíid. Although there are numerous commercial and recreational uses of forest resources on the mountain, the citizens of the Navajo Nation consider a facilities improvement project at the seven-hundred-acre Snowbowl Ski Area as one of the most egregious threats of desecration to this sacred landscape. More specifically, variable levels of natural snowfall affect ski area operations, and in drought years, snow levels are not sufficient for the Snowbowl to remain open long enough each year to make the business profitable. To augment natural snow levels, Snowbowl management has proposed using reclaimed wastewater from the city of Flagstaff to make artificial snow and then spread it throughout the ski area. Navajo Nation President, Joe Shirley Jr., stated, "To Navajos, the use of effluent on one of its four sacred mountains surrounding the Navajo Nation is an outrageous desecration of a holy site. The proposed development of the sacred *Dook'o'oolshíid* would be like having a child witness the brutal violation of its mother, leaving it emotionally and psychologically scarred forever."⁷⁰

The Navajo Nation along with twelve other tribes sued the Forest Service for its 2005 decision permitting the Snowbowl Ski Area to upgrade its existing facilities and utilize treated sewage effluent for snowmaking.⁷¹ *Navajo Nation et al. v. U.S. Forest Service et al.* (January 2006) is the most recent case testing the Religious Freedom and Restoration Act (RFRA).⁷² The 1993 RFRA affirms the language and intent of the American Indian Religious Freedom Act to recognize the inherent right of Native peoples as a group to believe, express, and exercise their religious beliefs and declares it the policy of the United States to protect that right.⁷³ The RFRA further mandates that the federal government shall not "substantially burden" a person's exercise of religion unless that burden is in the "compelling interest" of the government.

For tribal governments, the legal fight to save Dook'o'oolshíid from desecration evolved into an argument over the definition of *substantial burden*. Tribal attorneys argued that the purity of the water and the soil on the peaks would be compromised by the use of recycled sewage and would, therefore, put a substantial burden on the ability of tribal members to practice their traditional faith.⁷⁴ The US District Court judge rejected arguments from the tribes that upgrading existing facilities and dispersing snow made with reclaimed water within the Snowbowl Ski Area present a substantial burden to thirteen Native nations considering the mountains sacred. After a three-member panel of the Ninth Circuit Court of Appeals reversed the lower court's decision and sided with the tribes, the court later reheard the case and, in an eight to three vote, finally rejected the tribal RFRA claim.⁷⁵ The court concluded that the Forest Service decision to permit the use of treated effluent does not require Native peoples to act contrary to their religious beliefs.⁷⁶

The Navajo Nation petitioned the US Supreme Court to review the Ninth Circuit ruling. In June 2009, the Supreme Court officially declined to hear

the case.⁷⁷ This decision leaves the Ninth Circuit's interpretation of substantial burden in place and marks the end of the intertribal, four-year struggle to protect the mountain with a religious freedom argument. This standing judicial interpretation of substantial burden also serves as another example of incommensurability and interest convergence in US law. A dominant Western institution interpreted the concept of substantial burden in a manner that privileges economic and property values. Consequently, this decision impedes the fundamental human right of Native peoples to worship at a reverent natural place that is free of desecration. Snowbowl management remains focused on implementing planned improvements at the resort.⁷⁸ Additionally, in October 2009, the Navajo Nation Council voted to consider legislation that would allow the tribe to try to buy the Snowbowl.⁷⁹

Preservation and protection of this nation's most important historic and cultural resources is at the core of the NHPA.⁸⁰ The NHPA "represents the cornerstone of federal historic and cultural preservation policy, and it is the most widely litigated federal statute in the area of cultural property law."⁸¹ The National Register of Historic Places (NRHP), authorized by the NHPA, gives recognition to places meeting "historical significance" criteria in American history, architecture, archaeology, engineering, and culture. Places significant to indigenous peoples were not adequately recognized until 1992 when amendments to the act provided explicit recognition of traditional religious and cultural values and places important to American Indians, Alaska Natives, or Native Hawaiian organizations and stated that these may be eligible for National Register listing. For the first time, an indigenous TCP could be defined and evaluated for National Register eligibility against criteria that are inclusive of traditional cultural perspectives and priorities.⁸² An important advantage of listing sacred sites on the National Register is that it honors the property and its significance as an indigenous spiritual place and signals the property's worthiness of protection for traditional cultural reasons.

Managers and scholars have raised questions about the effectiveness of listing an indigenous sacred place on the NRHP, designating it as a National Historic Landmark, or naming it to the Endangered Historic Places List, or other similar historic or heritage designation.⁸³ To illustrate, Mount Graham, or Dzil Nchaa Si An, is a sacred mountain to the Western Apache and is "eligible" for listing on the National Register. This mountain, home to sacred beings, is central to Apache religion and life.⁸⁴ Designating this TCP as eligible to the National Register is a positive administrative step toward recognizing the nature, extent, and importance of the mountain as a sacred place, but designation of a property does not guarantee its protection according to the expectations of Native people.

Although Mount Graham is eligible for listing on the National Register, the current land steward, the Forest Service, is considering permit renewal for continued operations of three existing telescopes within the University of Arizona's Mount Graham International Observatory (MGIO). As many as seven telescopes have been approved for construction within the MGIO.⁸⁵ According to the Western Apache, construction of the MGIO, and associated infrastructure, has profoundly desecrated Dzil Nchaa Si An and has

elicited significant controversy among Apache traditional practitioners, the Forest Service, project proponents, and the local communities over Apache demands for telescope removal.⁸⁶ In the end, a National Register listing, or a positive eligibility determination for a sacred mountain like Dzil Nchaa Si An, does not, by itself, define a special protocol for sacred lands management, nor does it necessarily achieve the desired protection of the physical or spiritual integrity of the property. Site protection is a public-interest decision that is made at the discretion of the property manager. Finally, determining the significance of indigenous sacred lands within a Western process is incommensurate with Native values. Listing properties on the National Register follows a rigid bureaucratic process in which disclosure of sensitive traditional cultural information occurs to convince the US government, and the general public, of its significance and that a sacred place is sacred and worthy of preservation.

RESOLVING INCOMPATIBLE IDEOLOGIES AND LANGUAGES

Traditional Navajo Values and Knowledge

Meeting the legal requirement and moral imperative to protect the physical and spiritual integrity of sacred lands depends on traditional indigenous philosophies and bodies of knowledge. For the Navajo Nation, a sacred lands management policy, applied on and off the reservation, should be based on a combination of the principles of *hozho*, natural law, tribal law, and federal environmental and cultural resources protection law. *Hozho* is an abstract, complex, highly spiritual doctrine of Navajo philosophy and spiritual practice described as “perfection so far as it is attainable by man, the end toward which not only man but also supernaturals and time and motion, institutions, and behavior strive. Perhaps it is the utmost achievement of order.”⁸⁷ This Navajo philosophy of harmony and natural beauty is intrinsic to how Navajo people treasure their land and is, therefore, intrinsic to sacred lands preservation. It is also the incentive and direction for all Navajos to work together. “Religious leaders need to be involved in creating a Navajo Nation sacred lands management policy. Sacred lands need to be foremost managed as sacred. They constitute a part of Navajo identity which is defined by language, land base and culture. This is the guiding philosophy for sacred lands treatment.”⁸⁸

A sacred lands management policy based on the doctrine of *hozho* may have important spiritual and practical benefits. Such a plan could be applied to all Navajo traditional territory, the Diné Bikeyah, which is inclusive of all sacred places located on reservation and nonreservation lands. A sacred lands policy based on the doctrine of *hozho* may resolve some of the incommensurable ideologies and languages embedded throughout federal environmental and cultural protection laws. With a central plan guiding local decision making across the Diné Bikeyah, sacred lands will be treated competently and consistently according to a vision based on tradition and to what constitutes compliance with all Navajo Nation and federal environmental and cultural protection laws. A sacred lands policy grounded in *hozho* may be an important

means to assure that all Navajo people representing a wide spectrum of interests have the opportunity to express concerns and take part in decisions.

A uniform policy would eliminate the influence of single individuals. The person with authority for decision-making at the time has tremendous influence over policy and individual site protection. This applies to tribal positions as well as federal positions. Individual people, philosophy, and policy all work together to influence sacred lands management.

A uniform policy would also address the need to decide what is the role of economic development on sacred lands both on reservation and off. An internal disagreement among Navajo Nation citizens exists regarding alteration of a sacred place from a proposed action related to economic development. Some feel that sacred lands should never be altered for economic development regardless of who benefits (including Navajo communities).⁸⁹

Some Navajo citizens expressed concerns over the absence of a commitment to the traditional philosophy of *hozho* in the treatment of sacred lands. Navajo people collectively need to decide what their commitment to sacred lands protection and tradition is going to be in relationship to decisions about proposing or permitting projects like communications towers, energy production, or tourism development. One Navajo citizen stated, "Sacred lands should be treated as sacred lands," because the consequences of not protecting sacred lands and conducting ceremonies extend far beyond noncompliance with tribal or federal environmental and cultural laws.⁹⁰

The wisdom shared by Navajo elders is that complying with the law is not what the Navajo or anyone else should be worried about. Our collective concern should be about the health and survival of local communities practicing traditional subsistence off the land. Without proper understanding of, and respect for, the profound effects of landscape loss to traditional cultures and ways of life, federal management practices remain agents of adverse change in indigenous cultures. One Native scholar describes the most severe of these consequences as "environmental genocide."⁹¹ The elders clarified that beyond the well-being of the Navajo people, the larger issues are caring for the environment in order to ensure the survival of all humanity.

A sacred lands policy based on the doctrine of *hozho* may raise as many complex issues as it resolves because this would be an attempt to blend traditional sacred doctrine with secular US law. For example, because the doctrine of *hozho* can be characterized as an abstract, complex, highly spiritual, unconscious operation, then it is largely unavailable for precise explanation or codification.⁹² It may be a challenge for Navajo Nation lawmakers to introduce concepts of true *hozho* into a secular policy that also incorporates Western concepts of property law and science. Additionally, lawmakers may be challenged to blend *hozho* with the doctrines and sacred beliefs of other cultures, including other Native cultures. For example, the Hopi tribe would vigorously seek to have their doctrines and beliefs considered in the management of

their traditional cultural places that are under Navajo or federal jurisdiction. Finally, the doctrine of *hozho* is a spiritual paradigm in which to manage cultural property that, for some communities, may be a source of economic development and heritage tourism. Native communities and individuals may have to debate the compatibility of spiritual and economic paradigms for sacred lands management.

INNOVATIVE STRATEGIES FOR SACRED LANDS MANAGEMENT

Traditional indigenous philosophies and bodies of knowledge are essential to meet the legal requirement and moral imperative to protect the physical and spiritual integrity of sacred lands. A culture's vitality is dependent on individuals living in community with the natural world. The land's features, and the sense of place and kinship they create, are central to the identity of a Native individual and a people. Sacred lands loss, desecration, or neglect can result in spiritual, practical, cultural, and political risk to Native peoples.⁹³ Eroded sacred lands diminish the spiritual practices that are central to religious belief systems, personal and cultural identity, and human survival. One Navajo elder pointed to contamination of ground water and plant communities on Dook'o'osliid as a practical example of potential adverse effect to the health and survival of local communities living directly off the land. Environmental and human rights are at risk for all Native nations because the Forest Service and the Ninth Circuit Court of Appeals have forced the Navajo Nation into a compelling, but very risky, decision to argue their position on the Snowbowl Ski Area expansion proposal to an, historically, unsympathetic Supreme Court. Now the Navajo Nation is forced to contemplate using limited economic resources to attempt to purchase the ski area in order to protect not only the mountain but also their faith, culture, and sovereignty.

In the United States, a complex environmental and cultural legislative and regulatory framework governs indigenous sacred places that are in federal stewardship. Unfortunately, this legal architecture, intended to protect sacred lands, ultimately conflicts with traditional indigenous values relative to land and religious practice, privileges the values of the dominant society, erodes tribal identity and sovereignty, and leaves sacred lands vulnerable to desecration or destruction. An examination of the ideologies and languages in US environmental and cultural protection laws demonstrates sacred lands management is another arena of tribal rights and environmental justice in which the critical theory concepts of incommensurability and interest convergence are operative. Effective strategies for sacred lands protection and access are those that identify and reflect on incompatible and hegemonic ideologies and languages in the law and in practice and then take action to transform them. The examples of terms and concepts I discuss in this article, codifying a definition of *sacred land*, defining and measuring *social impact* and *mitigation*, delineating discrete boundaries for sacred landscapes, determining historical significance, and defining *substantial burden* on the free exercise of religion, do not form an exhaustive list. They comprise a small sample of unambiguous demonstrations of how the law privileges Western values of science and

property rights over indigenous spiritual values in the treatment of sacred lands and fails to balance the inequity by imposing procedures largely giving the appearance of equality rather than actual equality.

For Native peoples, just complying with existing environmental and cultural laws does not alone result in meaningful and effective sacred lands protection and access. Meeting the legal requirement and moral imperative to protect the physical and spiritual integrity of sacred lands depends on a commitment to traditional indigenous philosophies and bodies of knowledge. Resolving the problem of incompatible ideologies and languages in sacred lands protection law and practice may include integrating traditional indigenous worldviews directly into federal and tribal law. For the Navajo Nation, a uniform sacred lands management policy could be based on a combination of the principles of *hozho*, natural law, tribal law, and federal environmental and cultural resources protection law.⁹⁴

Discussions about the Navajo Nation revealed that directly integrating the sacred ideologies and languages of Native tradition into secular law may result in important spiritual and practical benefits, as well as present its own unique suite of complex issues.⁹⁵ It may be a challenge for Navajo Nation lawmakers to introduce concepts of true *hozho* into a secular policy that also incorporates Western concepts of property law and science. Additionally, lawmakers may be challenged to blend *hozho* with the doctrines and sacred beliefs of other cultures, including other Native cultures. Finally, the doctrine of *hozho* is a spiritual paradigm in which to manage cultural property that, for some communities, may be a source of economic development and heritage tourism.

Regardless of these issues, directly integrating traditional ideology into sacred lands protection laws is a significant step in developing innovative strategies for sacred lands management. Also important, effective sacred lands protection depends on cultivating a willingness among federal lawmakers, land managers, project proponents, and stakeholders to commit to honoring traditional values and working with Native governments and traditional practitioners in order to identify and change incommensurate and hegemonic ideologies and languages prior to drafting new legislation or implementing negotiations or environmental evaluations mandated in existing US law.⁹⁶ Although not impossible, this will be a formidable challenge because the larger social and political context involves convincing those with the power to share it.

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