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## GOVERNMENT MANAGED SHRINES: PROTECTION OF NATIVE AMERICAN SACRED SITE WORSHIP

*People come to Devils Tower and think, "We're on vacation, we're going to go see Indians and take videos of them doing their ceremonies while we drink beer and wear short shorts."*<sup>1</sup>

### I. INTRODUCTION

Cremated human remains, a .38 caliber bullet, and beef jerky have all been left as offerings at Native American religious shrines by visiting sightseers.<sup>2</sup> Tourists trample over Indian graves, Steven Spielberg lands a spaceship on a sacred shrine,<sup>3</sup> and families traipse poodles through sacred ceremonies.<sup>4</sup> In response, the National Park Service has closed federal land areas containing Native American sacred sites to tourists or has restricted public access.<sup>5</sup> Native Americans claim that the government is accommodating their free exercise rights.<sup>6</sup> Tourists claim that the government is unconstitutionally managing shrines: "Many people feel having the government say we should bend on the knee of fealty at this place is blasphemous."<sup>7</sup>

A conflict exists between public use and Native American sacred

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<sup>1</sup> Elizabeth Manning, *There's a notion that Indians practicing their religions are less than religions*, HIGH COUNTRY NEWS, May 26, 1997, at 1 (quoting Charlotte Black Elk, a spiritual and cultural leader of the Lakota Sioux Tribe).

<sup>2</sup> Chris Smith & Elizabeth Manning, *The Sacred and Profane Collide in the West*, HIGH COUNTRY NEWS, May 26, 1997, at 9 [hereinafter Smith & Manning, *Sacred*].

<sup>3</sup> *Id.* In Steven Spielberg's movie, *CLOSE ENCOUNTERS OF THE THIRD KIND* (Columbia/Tristar Studios 1977), a spaceship landed on Devils Tower. *Id.* An increase in tourism to the Nation's first monument resulted. *Id.*

<sup>4</sup> Smith & Manning, *Sacred*, *supra* note 2.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* Native Americans claim that their free exercise right entitles their religion to a measure of respect: "[I]f you went to a church to see beautiful stained-glass windows and even though you may not believe in that religion, there's some things you probably wouldn't do, out of respect, like walking on the altar." *Id.*

<sup>7</sup> Christopher Smith, *Seeking Religious Respect At Parks Is OK, Judge Says*, THE SALT LAKE TRIBUNE, May 3, 1998, at A1.

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use of National Park lands.<sup>8</sup> The executive, judicial, and legislative branches have all attempted various solutions to resolve the conflict.<sup>9</sup> However, the majority of their attempts at compromise have not been successful in withstanding First Amendment challenges.<sup>10</sup> On one side, mandatory accommodation measures can be challenged as being violative of the Establishment Clause for governmental promotion of a religion.<sup>11</sup> On the other side, voluntary accommodation measures provide no legal redress for governmental actions which burden free exercise rights.<sup>12</sup> This Note will propose a legislative enactment that could effectively accommodate both public and sacred uses of federal land within the confines of the First Amendment.<sup>13</sup>

Section II of this Note provides a background of the history of traditional Native American religious worship and the development of the First Amendment Establishment and Free Exercise Clauses.<sup>14</sup> Section III of this Note discusses the history of judicial decisions concerning sacred site worship and the current legal trend toward protection and accommodation of Native American sacred sites and worship.<sup>15</sup> Section IV provides a response to the issue by creating model legislation that addresses concerns relating to the effectiveness of the current law.<sup>16</sup> The goal of this Section is to provide the best possible measure of accommodation for both public and sacred uses of federal land.<sup>17</sup>

## II. BACKGROUND

The history of the conflict between public use and Native American sacred use of government lands illustrates the phases of discrimination against Native Americans by the federal government that have culminated in the current dispute.<sup>18</sup> This Section first addresses the

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<sup>8</sup> Ann M. Hooker, *American Indian Sacred Sites on Federal Public Lands: Resolving Conflicts Between Religious Use and Multiple Use at El Malpais National Monument*, 19 AM. INDIAN L. REV. 133, 133-34 (1994).

<sup>9</sup> See *infra* Part III and accompanying text for a discussion of the attempted various legal methods to resolve the conflict.

<sup>10</sup> See *infra* Part III.

<sup>11</sup> See *infra* Part II.B.2.

<sup>12</sup> See *infra* Part III.

<sup>13</sup> See *infra* Part IV.

<sup>14</sup> See *infra* Part II.

<sup>15</sup> See *infra* Part III.

<sup>16</sup> See *infra* Part IV.

<sup>17</sup> See *infra* Part IV.

<sup>18</sup> See *infra* Part II.A-B.

basis for Native American sacred site worship,<sup>19</sup> followed by a discussion of the history of the Free Exercise and Establishment Clauses of the First Amendment.<sup>20</sup>

#### A. Native American Worship Practices Utilizing Government Lands

Traditional Native American religious practices are inseparably bound to natural land formations.<sup>21</sup> According to Native Americans, spirits, which function as the medium between Native Americans and the Great Spirit, dwell within natural resources.<sup>22</sup> Native Americans consider sites where spirits most often reveal themselves to be sacred and, for this reason, utilize the sites for religious ceremonies.<sup>23</sup>

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<sup>19</sup> See *infra* Part II.A.

<sup>20</sup> See *infra* Part II.B.

<sup>21</sup> ARLENE HIRSCHFELDER & PAULETTE MOLIN, *THE ENCYCLOPEDIA OF NATIVE AMERICAN RELIGIONS* 251 (1992).

<sup>22</sup> *Id.* See also AKE HULTKRANTZ, *BELIEF AND WORSHIP IN NATIVE NORTH AMERICA* 123 (Christopher Vecsey ed., 1981). Supporting the belief that the Great Spirit communicates through natural resources, Plains Cree Indian Stan Cuthand stated: "[T]he Supreme Being is in everything, he is in all of nature, in man and all the animals." *Id.* at 126. Supporting the belief that the divinity manifests itself through nature, Allen Wolf Leg, deputy for the Northern Blackfoot stated:

In the Indian religion there is God, the Indian people, and Nature in between. We do not have Jesus Christ, yet on the other hand he existed among those people who made up Christianity. The same God, the same human beings, though of a different race, but this has Christ, that has Nature.

*Id.* at 118, 126-27. See Hooker, *supra* note 8, at 134. Native Americans believe that nature is the "living manifestation of the Great Spirit." *Id.* at 135. Native Americans further believe that they must receive guidance from the Great Spirit in order to understand nature and the intentions of the Great Spirit as to the actions they should take in their daily life. *Id.*

<sup>23</sup> S. REP. NO. 103-411, at 2 (1994) (stating that sacred sites on public lands are holy places of worship, equivalent to churches, temples or synagogues). The Report defined "sacred site" as an area that is sacred by reason of the traditional practices or ceremonies associated with it and its significance to a Native American religion. *Id.* at 9. See HIRSCHFELDER & MOLIN, *supra* note 21, at 251. A sacred site may be the place of the creation of a tribe, a location where an important revelation was revealed, a locale of medicines that hold healing powers, or a particular place where people communicate with the spirit world through prayers and offerings. *Id.* See HIRSCHFELDER & MOLIN, *supra* note 21, at 251. "Sacred places include mountains, lakes, piles of rocks, unusually-shaped mounds, middens, caves, burial rounds, rock art cites, ceremonial grounds, doctoring sites and medicine or training sites." *Id.* See also HIRSCHFELDER & MOLIN, *supra* note 21, at 251 (relating that major forms of Native American rituals include the Sun dance, Potlatch, Vision Quest, Ghost Dance, fasts, Sweat Lodges). See also Funk and Wagnall's, *Encyclopedia* at <http://www.funkandwagnalls.com/encyclopedia/low/articles/s/s024001452f.html> (1999). The sun dance is a summer religious ceremony performed by Indians of the Plains Tribe in veneration of the sun. *Id.* The 8-day-long ceremonial involves various sacred objects and sometimes includes voluntary self-laceration or torture. *Id.* The Potlatch is a

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The efficacy of Native American worship depends on the physical conditions of a sacred site's natural environment.<sup>24</sup> Acts such as logging trees, altering the terrain, building new roads, and the presence of tourists and vandals damage the sacred nature of a site and negatively impact the Native American religion.<sup>25</sup> Accordingly, the destruction or degrading of sacred ground is believed to cause the death and disappearance of spirits.<sup>26</sup> Once the sacred site is destroyed, there is no alternate place of worship because a different sacred site cannot be substituted.<sup>27</sup>

Many sacred sites are located on government lands managed by federal agencies. However, sacred site worship and the traditional activities of the Native American religion have not been accepted by the federal government. Rather, the governmental response to the Native American religion has been one of discrimination.

The history of governmental treatment of the Native American religion has gone through three discriminatory phases: deprivation, criminalization, and toleration with obstruction.<sup>28</sup> The phase of deprivation began in the 1860's when President Andrew Johnson authorized the removal of Native Americans from their homeland, with

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ceremonial distribution of gifts observed by North American Indian tribes on occasions such as weddings and deaths in the host's family. *Id.* The Vision Question is a rite of passage for North American Indian youth, in that a youth goes into the wilderness alone, without food or water, in search of a personal guardian spirit that will be revealed to him in a dream. *Id.* The Ghost Dance began in about 1888 when Wovoka, a Native American, suffered a fever accompanied by delirium and claimed to have had a vision of God instructing him to teach his fellow Indians a certain dance ritual. *Id.* The Ghost Dance was suppose to enable the Native Americans to recover their land and reunite them with their ancestors. *Id.* The Ghost Dance was regularly performed until the slaying of the Sioux chief Sitting Bull and the massacre at Wounded Knee. *Id.*

<sup>24</sup> HIRSCHFELDER & MOLIN, *supra* note 21, at 251; *see also* Lyng v. Northwest Cemetery Protective Ass'n, 485 U.S. 439, 442 (1988) (stating that Native American rituals are done in a strictly specific manner with appropriate participants and depend on privacy, silence, and an undisturbed natural setting).

<sup>25</sup> HIRSCHFELDER & MOLIN, *supra* note 21, at 251. *See also* DEPARTMENT OF THE INTERIOR, IMPLEMENTATION REPORT FOR EXEC. ORDER NO. 13,007 7 (May 23, 1997) [hereinafter IMPLEMENTATION] (discussing tribal concerns of environmental factors which harm the physical integrity of sacred sites, such as light, noise and pollutants).

<sup>26</sup> HULTKRANTZ, *supra* note 22, at 127.

<sup>27</sup> HIRSCHFELDER & MOLIN, *supra* note 21, at 251.

<sup>28</sup> Anastasia P. Winslow, *Sacred Standards: Honoring the Establishment Clause in Protecting Native American Sacred Sites*, 38 ARIZ. L. REV. 1291, 1309-12 (1996). *See also* S. REP. NO. 103-411, at 1 (1994) (stating that the history of discrimination against Indians dates back to the arrival of Columbus in the new world and has continued into the present times).

a premise of civilizing and Christianizing the "heathenish people."<sup>29</sup> As a result of being forced onto reservations, Native Americans lost possession of many sacred sites.<sup>30</sup> The government imposition of express bans and an attitude of intolerance toward Native American religious practices began in 1890 with the massacre at Wounded Knee, where federal soldiers, attempting to suppress the outlawed Ghost Dance, killed 360 Sioux men and women, who had gathered to perform the Dance.<sup>31</sup> From 1880 until 1930, the federal government prohibited and criminalized many Native American forms of worship in an attempt to expurgate the Native American religion.<sup>32</sup> Beginning in 1930, government prohibitions of Native American worship ceased.<sup>33</sup> However, in the twentieth century, the federal government has impeded Native worship by permitting physical alterations to sacred sites and denying First Amendment protection for Free Exercise Clause challenges to government actions that place substantial burdens on the ability of Native Americans to practice their religion.<sup>34</sup>

#### B. *History and Development of the First Amendment*

Religious freedom is a fundamental right embedded in the foundation of the United States.<sup>35</sup> Colonists who immigrated to the New

<sup>29</sup> S. REP. NO. 103-411, at 2 (1994) (stating that Christianity was equated with civilization and the Native American religions were regarded as being uncivilized and immoral).

<sup>30</sup> Winslow, *supra* note 28, at 1309.

<sup>31</sup> Rayanne J. Griffin, *Sacred Site Protection Against a Backdrop of Religious Intolerance*, 31 TULSA L.J. 395, 400 (1995) (citing Jack F. Trope, *Protecting Native American Religious Freedom: The Legal, Historical, and Constitutional Basis for the Proposed Native American Free Exercise of Religion Act*, 20 REV. L. & SOC. CHANGE, 373-74 (1993)). See also *supra* note 23 and accompanying text.

<sup>32</sup> Winslow, *supra* note 28, at 1310-11. Native Americans could be imprisoned if found to be practicing Native American dances, entering plural marriages, using ceremonial intoxicants, wearing braids (males), practicing the Sun Dance, Potlatch, and medicine man practices. *Id.* at 1310-11 and n.167. See also S. REP. NO. 103-411, at 2 (1994) (writing that federal laws forbade Native Americans from speaking their native language, holding religious ceremonies, as well as promoting the separation of young Native American children from their parents and culture and putting them in a federal boarding school system).

<sup>33</sup> Griffin, *supra* note 31, at 401. In 1933, John Collier was appointed as the Commissioner of Indian Affairs. *Id.* Collier, a former social worker and a student of Indian culture and spirituality, put an end to official prohibitions on Native American practices. *Id.*

<sup>34</sup> *Id.* See also *infra* Part II.C; S. REP. NO. 103-411, at 5 (1994) (citing that, as of 1994, government actions threatened over forty-four Native American sacred sites). Physical alterations include logging and mining operations, hydroelectric plants, Forest Service regulations, urban growth and highways. HIRSCHFELDER & MOLIN, *supra* note 21, at 251.

<sup>35</sup> *Freedom From Religion Found v. Thompson*, 920 F. Supp. 969, 972 (W.D. Wis. 1996) (stating that "[r]eligious freedom is basic to this nation").

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World sought to escape religious persecution and to worship without government interference.<sup>36</sup> When forming the nation, the colonists established a society governed by the precepts of their religion.<sup>37</sup> In an effort to maintain absolute political and religious supremacy, the colonists followed a doctrine of religious intolerance, holding those liable for sedition that dissented from the established faith.<sup>38</sup>

The eighteenth century development of the fundamental belief in individual rights led to rebellion, the idea of toleration of other religions, and an advocacy of religious freedom.<sup>39</sup> In a venture to free individuals from laws that compelled support of government-favored churches, the nation's founders struggled to guard against an established religion and to secure the right of each citizen to freely exercise their chosen faith in the new federal government.<sup>40</sup> The wall separating church and State<sup>41</sup> began to rise in the late Eighteenth Century<sup>42</sup> when Thomas Jefferson composed the Virginia Bill for Religious Liberty<sup>43</sup> and James Madison wrote his Memorial and Remonstrance against the law,<sup>44</sup> both advocating a separation of religion and government.<sup>45</sup> The premise

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<sup>36</sup> *Id.*

<sup>37</sup> FRANCIS GRAHAM LEE, *ALL IMAGINABLE LIBERTY: THE RELIGIOUS LIBERTY CLAUSES OF THE FIRST AMENDMENT 18-19* (1995). "[I]n 1630 people did not make neat distinctions between church and state . . . . [T]hey were so intertwined that people thought of them as one . . . ."

<sup>38</sup> See, e.g., *id.* at 19. Those who dissented were either banished or put to death. *Id.* at 19-21. See also *Everson v. Bd. of Educ.*, 330 U.S. 1, 10 (1947) (stating that "[a]ll of these dissenters were compelled to pay tithes and taxes to support government-sponsored churches whose ministers preached inflammatory sermons designed to strengthen and consolidate the established faith by generating a burning hatred against dissenters").

<sup>39</sup> LEE, *supra* note 37, at 24-26.

<sup>40</sup> *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 593 (1940) (stating that the First Amendment "sought to guard against repetition of those bitter religious struggles by prohibiting the establishment of a state religion and by securing to every sect the free exercise of its faith").

<sup>41</sup> *Everson*, 330 U.S. at 16 (according to Jefferson, the Establishment Clause was intended to erect "a wall of separation between Church and State") (quoting *Reynolds v. United States*, 98 U.S. 145, 164 (1878)).

<sup>42</sup> LEE, *supra* note 37, at 26-27.

<sup>43</sup> 14 Henig, *Statutes of Virginia* (1823).

<sup>44</sup> See generally JAMES MADISON, *JAMES MADISON: WRITINGS* (Jack N. Rakove ed., 1999).

<sup>45</sup> *Everson*, 330 U.S. at 10. Jefferson and Madison both opposed Virginia's tax levy, which supported the Established church. *Id.* Jefferson wrote that:

[T]o compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical; that even the forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor, whose morals he would make his pattern . . . .

of religious liberty gained public acceptance and was incorporated into the First Amendment in 1791,<sup>46</sup> making the United States the first nation to include the principle of religious liberty in its basic laws.<sup>47</sup> The adoption of the First Amendment served to sever the bond between church and State and to promote religious freedom.<sup>48</sup>

The First Amendment, made applicable to the states by the Fourteenth Amendment,<sup>49</sup> provides religious protection by limiting the government's ability to regulate an individual's freedom to believe and act in accordance with a religion.<sup>50</sup> The First Amendment grants individuals the right to choose and practice any religious faith or none at all.<sup>51</sup> Two components of the First Amendment, the Free Exercise Clause and the Establishment Clause, function to guarantee religious liberty.<sup>52</sup>

### 1. The Free Exercise Clause

The Free Exercise Clause of the First Amendment bans government actions which burden the free exercise of religion.<sup>53</sup> The extent of Constitutional protection afforded by the Clause has been

*Id.* at 13. Furthermore, the Court in *Everson* explained Madison's belief that: A true religion did not need the support of law; that no person, either believer or non-believer, should be taxed to support a religious institution of any kind; that the best interest of a society required that the minds of men always be wholly free; and that cruel persecutions were the inevitable result of government-established religions.

*Id.* at 12.

<sup>46</sup> The First Amendment states, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . ." U.S. CONST. amend. I.

<sup>47</sup> *Everson*, 330 U.S. at 12.

<sup>48</sup> LEE, *supra* note 37, at 28.

<sup>49</sup> RELIGIOUS LIBERTY IN THE SUPREME COURT: THE CASES THAT DEFINE THE DEBATE OVER CHURCH AND STATE 1 (Terry Eastland ed., 1993). "[I]n a series of cases commencing in 1897, the Supreme Court established the principle that the due-process Clause 'incorporate' or absorbs certain provisions of the Bill of Rights, that the states, like the federal government, must therefore obey." *Id.* See also *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) ("[T]he Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws.").

<sup>50</sup> Mark S. Cohen, Note, *American Indian Sacred Religious Sites and Government Development: A Conventional Analysis in an Unconventional Setting*, 85 MICH. L. REV. 771, 772-73 (1987).

<sup>51</sup> *Wallace v. Jaffree*, 472 U.S. 38, 53 (1985). See also *Cantwell*, 310 U.S. at 303 (holding that the "[f]reedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law").

<sup>52</sup> BARRY LYNN ET AL., *THE RIGHT TO RELIGIOUS LIBERTY: THE BASIC ACLU GUIDE TO RELIGIOUS RIGHTS 1* (Norman Dorsen ed., 2d ed. 1995).

<sup>53</sup> U.S. CONST. amend. I. See, e.g., *Jimmy Swaggert Ministries v. Board of Equalization*, 493 U.S. 378, 384 (1990) (holding that a government action must have placed a substantial burden on a religious belief or practice to violate the Free Exercise Clause).

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interpreted by the judiciary to extend to all religions, regardless of size or popularity.<sup>54</sup> Further, the judiciary has interpreted “free exercise” to embrace both the freedom to believe and the freedom to act.<sup>55</sup>

While the right to hold religious beliefs is absolute, the right to act on such beliefs is not.<sup>56</sup> Religious conduct is subject to governmental regulation for the protection of society.<sup>57</sup> Beginning in 1940, a series of cases began to examine the limits of religious free exercise.<sup>58</sup> Throughout these cases, claimants explored the scope of the Free Exercise Clause.<sup>59</sup> Case rulings denied the government the ability to pass legislation that burdens religious beliefs and actions or compels one to do something against a religious belief.<sup>60</sup> From these cases, four dominant methods

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<sup>54</sup> See *Church of the Lukumi Babalu Aye v. Hialeah*, 508 U.S. 520, 531 (1993) (stating that laws must be religion neutral and cannot be adopted for an anti-religious purpose); *Larson v. Valente*, 456 U.S. 228, 246 (1982) (holding that the government cannot target a religious group or show preference, even if the law is facially neutral); Note, *A Non-Conflict Approach to the First Amendment Religion Clauses*, 131 U. PA. L. REV. 1175, 1189 n. 70 (1983) (stating that “[w]hatever the government may or may not do, it is required to respect religious liberty”).

<sup>55</sup> *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (stating that “the Amendment embraces two concepts, - freedom to believe and freedom to act”).

<sup>56</sup> *Id.* at 303-04 (holding that freedom to adhere to a chosen religious organization cannot be restricted by law: “the Amendment embraces two concepts, - freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be.”). See, e.g., *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944) (holding that the prohibition of child labor does not violate one’s freedom of religion); *Reynolds v. United States*, 98 U.S. 145, 166 (1878) (making polygamy illegal); *Jehovah’s Witnesses v. King County Hosp.*, 278 F. Supp. 488, 505 (W.D. Wash. 1967) (holding that ordering a transfusion to save an infant’s life, despite the religious based protests of the parents, does not violate the First Amendment).

<sup>57</sup> *Reynolds*, 98 U.S. at 164 (holding that Congress was “left free to reach actions which were in violation of social duties or subversive of good order”).

<sup>58</sup> LEE, *supra* note 37, at 135; RELIGIOUS LIBERTY, *supra* note 49, at 1 (stating that one reason for the sudden onset of religion-clause cases was the relatively small role the federal government played in American life prior to the New Deal).

<sup>59</sup> LEE, *supra* note 37, at 135; RELIGIOUS LIBERTY, *supra* note 49, at 1.

<sup>60</sup> See, e.g., *Hobbie v. Unemployment Appeals Comm’n*, 480 U.S. 136, 139 (1987) (holding that the government cannot refuse unemployment compensation to a Seventh Day Adventist who quit her job because of contrary religious beliefs); *Thomas v. Review Bd.*, 450 U.S. 707 (1981); *Wisconsin v. Yoder*, 406 U.S. 205, 222 (1972) (holding that the government could not compel an Amish child to go to school beyond eighth grade); *Sherbert v. Verner*, 374 U.S. 398, 403 (1963) (holding that the government cannot refuse unemployment compensation to a Seventh Day Adventist who quit her job because of contrary religious beliefs); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (holding that the government could not require a child to salute the American flag); *Cantwell v. Connecticut*, 310 U.S. 296, 307 (1940) (holding that Jehovah’s Witnesses acts of going door to door to spread their faith could not be convicted under State laws forbidding unlicensed solicitation).

developed to assist the court in determining whether a government action violated the Free Exercise Clause.<sup>61</sup>

An early method of considering whether a Free Exercise Clause violation existed was to distinguish the government action, depending on whether the effect was a direct or indirect burden on religion.<sup>62</sup> The U.S. Supreme Court held that a direct burden violates the Free Exercise Clause if it has a coercive effect or imposes a penalty or a significant burden on religious liberty.<sup>63</sup> The Court further held that an indirect burden is permissible, unless the government was able to accomplish its purpose in an alternative way that would not burden religious liberty.<sup>64</sup> The Supreme Court deemed this distinction to be irrelevant in *Sherbert v. Verner*.<sup>65</sup>

The Court, in *Sherbert*, applied a strict scrutiny test to all Free Exercise claims in order to determine whether the government had violated First Amendment free exercise rights.<sup>66</sup> Under the *Sherbert* test, the claimant must show that his conduct is motivated by a sincere<sup>67</sup> religious belief and that the government has imposed a substantial burden on that conduct.<sup>68</sup> Overall, the claimant will prevail if he can establish these two criteria. Nonetheless, the government may overcome the challenge by showing that the restriction on religious practice is in furtherance of a compelling governmental interest<sup>69</sup> and represents the least restrictive means of achieving that interest.<sup>70</sup> The *Sherbert* test is significant in that it entitles religious practitioners to free exercise protection of religious conduct and imposes strict limits on the

<sup>61</sup> See *infra* notes 62-80 and accompanying text.

<sup>62</sup> *Braunfield v. Brown*, 366 U.S. 599, 603 (1961) (holding that a law which imposes an indirect burden on the free exercise of religion is permissible).

<sup>63</sup> *Sherbert v. Verner*, 374 U.S. 398, 404 (1963).

<sup>64</sup> *Braunfield*, 366 U.S. at 607.

<sup>65</sup> *Sherbert*, 374 U.S. at 403.

<sup>66</sup> LYNN ET AL., *supra* note 52, at 68.

<sup>67</sup> *Id.* (stating that "the belief need not be reasonable, logical or acceptable to others; it need only be sincere"). See also *Thomas v. Review Bd.*, 450 U.S. 707, 716 (1981) (holding that the court can consider the extent to which the belief was sincerely held, but can not chose between doctrinal viewpoints); *United States v. Ballard*, 322 U.S. 78, 86 (1944) (holding that the court could decline to consider the truth or falsity of a belief or doctrine).

<sup>68</sup> *Sherbert*, 374 U.S. at 406.

<sup>69</sup> LYNN ET AL., *supra* note 52, at 70 (describing a compelling government interest as one of the highest order, involving some substantial threat to public safety, peace and order).

<sup>70</sup> *Sherbert v. Verner*, 374 U.S. 398, 406 (1963). See also Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. REV. 1465, 1467 (1999) (stating that it was up to the courts to decide whether the strict scrutiny test was met).

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government's ability to regulate such behavior.<sup>71</sup>

The Court in *Wisconsin v. Yoder*<sup>72</sup> refined the *Sherbert* test by requiring that the burdened practice or belief be central to the claimant's religion.<sup>73</sup> The determination of the centrality of the practice or belief was left to judicial determination.<sup>74</sup> As a result, the *Yoder* test restricted free exercise protection to practices or beliefs which the judiciary determined were "rooted in religion."<sup>75</sup> This subjective determination was overruled in *Employment Division v. Smith*,<sup>76</sup> when Justice Scalia wrote that the importance of the practice or belief to a religion was inappropriate for a judge to determine.<sup>77</sup>

The Court in *Smith* limited the *Sherbert* and *Yoder* tests by establishing a new test to assess Free Exercise Clause violation claims.<sup>78</sup> The *Smith* Court held that strict scrutiny is only applicable to government actions that directly target a religion or religious practice, and found that the government need only articulate a rational basis to justify neutral actions that place an incidental burden on the free exercise of religion.<sup>79</sup> The *Smith* test restored the direct and indirect distinction

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<sup>71</sup> Cohen, *supra* note 50, at 773.

<sup>72</sup> 406 U.S. 205 (1972).

<sup>73</sup> *Id.* at 215 ("[T]o have the protections of the Religion Clauses, the claims must be rooted in religious belief."). See also *Ballard*, 322 U.S. at 86 (holding that the government cannot decide if religious beliefs are true or really based on religion).

<sup>74</sup> *Yoder*, 406 U.S. at 205. However, even if centrality could be established, a compelling state interest could subsequently override the claimant's religious interest, so long as the law was narrowly tailored. *Id.* at 214.

<sup>75</sup> Samuel J. Levine, *Rethinking the Supreme Court's Hands-Off Approach to the Questions of Religious Practice and Belief*, 25 FORDHAM URB. L.J. 85, 110 (1997).

<sup>76</sup> 494 U.S. 872, 885 (1990).

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Smith*, 494 U.S. at 872-73 (holding that an exemption from a generally applicable and religion-neutral law, that has the effect of burdening a particular religion, cannot be evaluated under the *Sherbert* balancing test). The *Smith* ruling denied the Native American Church from obtaining an exemption in order to utilize peyote in religious ceremonies. *Id.* at 872. See also Bonnie I. Robin-Vergeer, *Disposing of the Red Herrings: A Defense of the Religious Freedom Restoration Act*, 69 S. CAL. L. REV. 589, 742 (1996). In response to *Smith's* holding that only the intentional targeting of religion would trigger strict scrutiny, Justice O'Connor pointedly observed that "few states would be so naive as to enact a law directly prohibiting or burdening a religious practice as such." *Id.* (citing S. REP. NO. 103-111, at 7-8 (1993) reprinted in 1993 U.S.C.C.A.N. 1892, 1897). See also Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. REV. 1465, 1468 (1999). *Smith* required that exemptions from a generally applicable and religion-neutral law be determined by the legislature. *Id.* See also *infra* Part III.B. (explaining that, in 1993, Congress unsuccessfully attempted to reinstate the *Sherbert* test by enacting the Religious Freedom Restoration Clause).

deemed irrelevant in *Sherbert* and limited the strict scrutiny analysis in *Sherbert* and *Yoder* to apply to only those actions directly targeting a religion. The *Smith* test is currently the authoritative rule for evaluating whether a government action has violated the Free Exercise Clause.<sup>80</sup>

## 2. The Establishment Clause

The Establishment Clause prohibits government actions respecting the establishment of religion.<sup>81</sup> The Clause bars the government from designating a national or state church and government actions giving preference to a particular religion or to religion in general.<sup>82</sup> The aim of the Establishment Clause is to ensure the equality of all religions and the freedom of each citizen from government imposition of religion.<sup>83</sup>

The scope of permissive and violative government actions under the Establishment Clause began with a concrete list of prohibitions<sup>84</sup> and evolved into a balancing test.<sup>85</sup> In *Everson v. Board of Education*,<sup>86</sup> the Supreme Court delineated the reach of the Establishment Clause<sup>87</sup>

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<sup>80</sup> *But see infra* notes 184-85 and accompanying text.

<sup>81</sup> U.S. CONST. amend I, XIV. *See also* LYNN ET AL., *supra* note 52, at 1.

<sup>82</sup> LYNN ET AL., *supra* note 52, at 1. *See also* Larson v Valente, 456 U.S. 228, 244 (1982); East Bay Asian Local Dev. Corp. v. California, 81 Cal. Rptr. 2d 908, 912 (Cal. App. 3d. Dist. 1999). "A growing body of evidence suggests that the Framers principally intended the Establishment Clause to perform two functions: to protect state religious establishments from national displacement, and to prevent the national government from aiding some but not all religions." *Id.* at n.2.

<sup>83</sup> Winslow, *supra* note 28, at 1305 (citing Larson v. Valente, 456 U.S. 228, 244 (1982)).

<sup>84</sup> *See infra* note 87.

<sup>85</sup> *See infra* notes 91-96 and accompanying text.

<sup>86</sup> 330 U.S. 1 (1947).

<sup>87</sup> *Id.* at 15-16. The Court in *Everson* held that:

The "establishment of religion" Clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws that aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa.

*Id.* at 16.

necessary to separate church and State.<sup>88</sup> *Everson* marked a shift in the Court's focus from protecting religion in the public realm to separating religion from the public realm.<sup>89</sup> *Everson* reigned as the precedential interpretation of the Establishment Clause until the Supreme Court decided *Lemon v. Kurtzman*<sup>90</sup> in 1971.

In *Lemon*, Chief Justice Burger announced a three-part test for determining whether a challenged governmental action giving aid to a religion survives an Establishment Clause challenge.<sup>91</sup> First, the government action must have a secular purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion;<sup>92</sup> and, third, the government action must not foster an excessive government entanglement with religion.<sup>93</sup> Justice O'Connor modified the "*Lemon Test*" in her *Lynch v. Donnelly*<sup>94</sup> concurrence by suggesting what has become known as the "Endorsement Test."<sup>95</sup> O'Connor aimed to clarify the Establishment Clause by focusing on whether the purpose or effect of a government action advances or inhibits religion and gives the appearance that the government is endorsing religion.<sup>96</sup>

Additionally, the *Lemon* decision continued the concept of accommodation, which was used by the Supreme Court as a justification for favoring the free exercise of religion as early as *Zorach v. Clauson*<sup>97</sup> in

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<sup>88</sup> *Id.* at 16.

<sup>89</sup> Ann E. Stockman, *ACLU v. Black Horse Pike Regional Board of Education: The Black Sheep of Graduation Prayer Cases*, 83 MINN. L. REV. 1805, 1811 (1999).

<sup>90</sup> 403 U.S. 602 (1971).

<sup>91</sup> *Eastland*, *supra* note 49, at 213.

<sup>92</sup> See *Bd. of Educ. v. Allen*, 392 U.S. 236, 243 (1968) (providing the basis for the first two elements of the *Lemon* test).

<sup>93</sup> *Lemon*, 403 U.S. at 609. See also *Walz v. Tax Comm'n*, 397 U.S. 664, 670 (1970) (providing the basis for the third element of the *Lemon* test).

<sup>94</sup> 465 U.S. 668, 687 (1984) (O'Connor, J., concurring).

<sup>95</sup> LYNN ET AL., *supra* note 52, at 4.

<sup>96</sup> *Lynch v. Donnelly*, 465 U.S. 668, 682 (1984) (holding that a municipality's inclusion of a Nativity scene in an annual Christmas display did not violate the Establishment Clause because it was not an endorsement of religion, but a celebration of cultural diversity). Justice O'Connor feared that government endorsement of religion or a particular religion would send a message to nonadherents that they were outsiders to the political community. *Id.* at 688. Justice O'Connor explained that the Endorsement test should be perceived from the viewpoint of the reasonable, objective observer. *Id.* at 690.

<sup>97</sup> 343 U.S. 306, 312 (1952) (holding that religious instruction that is taught off school premises and paid for by religious organizations under a "released time" arrangement does not violate the first amendment and is considered an accommodation of religion permitted by the Establishment Clause).

1952.<sup>98</sup> The Court in *Zorach* held that the government and church do not have to be separate in all respects: the government must respect the religious nature of the citizens and must accommodate the public service to their needs.<sup>99</sup> In *Lynch v. Donnelly*,<sup>100</sup> the Court declared that the Constitution actually mandates accommodation of all religions.<sup>101</sup> In *Estate of Thornton v. Caldor, Inc.*,<sup>102</sup> the Court defined the modern conception of accommodation, mandating accommodation of religious practices so long as it does not impose an undue hardship or require absolute accommodation.<sup>103</sup>

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<sup>98</sup> *Id.* But see *McCullum v. Board of Educ.*, 333 U.S. 203, 210 (1948) (holding that a released time arrangement given in public schools violates the First Amendment).

<sup>99</sup> *Zorach v. Clauson*, 343 U.S. 306, 314 (1952) (stating that “[t]o hold that it [government] may not [accommodate the public service to the spiritual needs of the citizens] would be to find in the Constitution a requirement that the government show a callous indifference to religious groups”). See also *Hernandez v. Comm’r*, 490 U.S. 680, 695 (1989) (holding that not permitting the Church of Scientology to deduct payments to the Church as charitable donations did not violate the Establishment Clause); *Corporation Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 337 (1987) (holding that applying religious exemption to Title VII’s prohibition against religious discrimination in employment to secular nonprofit activities of religious organization did not violate Establishment Clause); *Marsh v. Chambers*, 463 U.S. 783, 792 (1983) (holding that a state legislature’s practice of opening the legislative day with a prayer given by a chaplain who was paid by the state does not violate the Establishment Clause); *Mueller v. Allen* 463 U.S. 388, 394 (1983) (holding that a state law that provides tax deductions for both public and private school expenses does not violate the First Amendment); *Wisconsin v. Yoder*, 406 U.S. 205, 235 (1972) (holding that the government may not require Amish parents to send their children to school beyond the eighth grade if they object to doing so on religious grounds); *Waltz v. Tax Comm’n*, 397 U.S. 664, 673 (1970) (holding that tax exemptions to religious organizations do not violate the First Amendment); *Sherbert v. Verner*, 374 U.S. 398, 403 (1963) (holding that the government may not refuse unemployment compensation to a person unwilling to work on Saturday, if that is the Sabbath day of her faith); *Eastland*, *supra* note 49, at 105 (stating that Douglass later recanted his accommodationist view of the no-establishment provision); *LYNN ET AL.*, *supra* note 52, at 73 (stating that the principle of accommodation allows the government to draft policies containing exemptions from laws of general application in order to avoid placing burdens on religious exercise).

<sup>100</sup> 465 U.S. 668 (1984).

<sup>101</sup> *Id.* at 673 (stating that “[n]or does the Constitution require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions and forbids hostility toward any”).

<sup>102</sup> 472 U.S. 703 (1985).

<sup>103</sup> *Id.* at 710-11 (holding unconstitutional a law that forbade employers from refusing requests to not work on the Sabbath because it mandated absolute and unqualified accommodation). See also *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327, 335 (1987) (interpreting *Lemon* as permitting accommodation to alleviate significant governmental interference with their religious missions).

### III. CURRENT STATUS OF SACRED SITE PROTECTION

The development of the *Lemon*, *Sherbert*, *Yoder*, and *Smith* tests of the Free Exercise and Establishment Clauses has impacted legal treatment of Native American sacred sites and religious worship.<sup>104</sup> The legal trend toward sacred site worship has developed from reactions of intolerance to attempts at protection and accommodation.<sup>105</sup> This Section traces the legal justifications provided and solutions attempted by the three branches of government.<sup>106</sup>

#### A. Judicial Decisions Considering the Protection of Native American Sacred Site Worship

The inability of Native Americans to rely on the First Amendment for Constitutional protection of their religious practices on federal land is documented through the judicial treatment of Native American claims of Free Exercise Clause violations.<sup>107</sup> Whether this Constitutional blind spot is the result of the inadequacy of the First Amendment to protect minority religions, such as that of the Native Americans; or the result of an unwillingness on behalf of the judiciary to accommodate Native American religious practices, is difficult to ascertain.<sup>108</sup> Native Americans have been largely unsuccessful in Free Exercise Clause suits

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<sup>104</sup> See *infra* Part III.A-B.

<sup>105</sup> See *supra* Part II.A. for a discussion of government intolerance and criminalization of Native American religious and cultural practices. See, e.g., *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988) (denying Native Americans protection from government interference with sacred site); *Wilson v. Block*, 708 F.2d 735 (D.C. Cir. 1983) (denying tribes protection from government destruction of sacred site); *Crow v. Gullet*, 706 F.2d 856 (8th Cir. 1983) (denying tribes protection from government interference with a sacred site); *Badoni v. Higginson*, 638 F.2d 172 (10th Cir. 1980) (denying Native Americans protection from government interference with a sacred site); *Sequoyah v. Tennessee Valley Auth.*, 620 F.2d 1159 (6th Cir. 1980) (denying tribes protection from government destruction of sacred site). *But see* *Bear Lodge Mult. Use. Ass'n v. Babbitt*, 175 F.3d 814 (10th Cir. 1999) (protecting privacy and accommodating Native American sacred site ceremonies).

<sup>106</sup> See *infra* Part III.A-B.

<sup>107</sup> See discussion of judicial rejections of Native American claims of Free Exercise Clause violations *infra* Part III.A.1. See also Lydia T. Grimm, *Sacred Lands and the Establishment Clause: Indian Religious Practices on Federal Lands*, 12 NAT. RESOURCES & ENV'T 19 (1997) (writing that Native Americans have been largely unsuccessful in Free Exercise Clause cases).

<sup>108</sup> Comment, *A Non-Conflict Approach to the First Amendment Religion Clauses*, 131 U. PA. L. REV. 1175, 1198 (1983) ("Most free exercise cases have involved minority religions unable to rely on the political process for protection of their religious rights."). See also *Hernandez v. Commissioner of Internal Revenue*, 490 U.S. 680 (1989) (demonstrating the judiciary's tendency to close their eyes to nonmainstream religions, such as that of the Church of Scientology).

filed in response to government actions that have burdened their ability to freely exercise their religion or have destroyed their sites of worship.<sup>109</sup> This Subsection analyzes the history of judicial decisions denying protection to Native American sacred sites and religious worship and the current trend toward accommodation and protection.<sup>110</sup>

### 1. Judicial Decisions Denying Protection to Native American Sacred Sites and Religious Worship

Government actions opening federal lands containing Native American sacred sites to public access and permitting physical alterations to sacred site lands have led to Free Exercise Clause violation claims by Native American tribes who allege that their ability to freely exercise their religion was burdened by the resulting disruption.<sup>111</sup> Through reliance on the Establishment Clause and a narrow definition of the Free Exercise Clause as defenses, the government has been able to overcome Free Exercise Clause challenges to government actions brought by Native Americans.<sup>112</sup> In *Badoni v. Higginson*,<sup>113</sup> the Tenth Circuit reasoned that the exclusion of tourists by the National Park Service ("NPS") from Rainbow Bridge National Monument for the avowed purpose of aiding Native American religious ceremonies would be a clear violation of the Establishment Clause under the *Lemon* test<sup>114</sup> because the stated purpose would be the advancement of religion.<sup>115</sup>

<sup>109</sup> Smith & Manning, *Sacred*, *supra* note 2. The outcomes of the cases have not been surprising to Native Americans, who point out that "not once have the courts saved a sacred place based exclusively on Native American arguments that their right to freely practice their religion was compromised or destroyed." *Id.*

<sup>110</sup> See *supra* notes 97-103 and accompanying text for a discussion of the concept of accommodation.

<sup>111</sup> See *infra* notes 113-28 and accompanying text.

<sup>112</sup> *Id.*

<sup>113</sup> 638 F.2d 172 (10th Cir. 1980).

<sup>114</sup> *Id.* See *supra* notes 91-96 and accompanying text for a discussion of the *Lemon* test.

<sup>115</sup> *Badoni*, 638 F.2d at 179. In *Badoni*, federal managers of Rainbow Bridge National Monument, a sacred site for the Navajo tribe, impounded water to form Lake Powell in order to allow public access to the monument. *Id.* at 175. Members of the Navajo tribe claimed that their free exercise rights were violated because the government actions taken by the management drowned some of their gods, denied them access and the ability to conduct religious ceremonies at sacred prayer sites, allowed tourists to visit Rainbow Bridge, and permitted desecration of the sacred site. *Id.* at 176. The National Park Service and Bureau of Reclamation constructed docks and licensed boats to provide better tourist access to the bridge. *Id.* at 175. As a result of the increased use of the area, there was an increase in noise and litter, and the bridge itself had been defaced. *Id.* at 177. The Tenth Circuit concluded that the key complaint was the presence of tourists who interfered with the Native Americans' right to exercise their religion. *Id.* at 178. The court reasoned that

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Similarly, in *Lyng v. Northwest Cemetery Protective Ass'n*,<sup>116</sup> the Supreme Court held that it would be a violation of the Constitution for the government to treat the Six Rivers National Forest as sacred.<sup>117</sup> In *Crow v. Gullet*,<sup>118</sup> the Eighth Circuit resolved the free exercise issue by distinguishing between the right and the ability to freely practice one's religion.<sup>119</sup> The court held that the government is only required to protect and refrain from burdening the former.<sup>120</sup> As such, the Tribes' free exercise claims were not within First Amendment protection because the disruption affected their ability, and not their right, to freely exercise their religion.<sup>121</sup>

Government actions that have destroyed Native American's sites

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the government may not aid a religion or insist that others conform their conduct to another's religious necessities. *Id.* at 179. The court further reasoned that the Native Americans' free exercise rights were not burdened by increased tourism at Rainbow Bridge National Monument, a sacred site for the tribe, because they could still enter the monument on the same basis as the general public. *Id.* at 177. See also Lydia T. Grimm, *Sacred Lands and the Establishment Clause: Indian Religious Practices on Federal Lands*, 12 NAT. RESOURCES & ENV'T 19 (1997).

<sup>116</sup> 485 U.S. 439 (1988).

<sup>117</sup> *Id.* at 452. In *Lyng*, the United States Forest Service planned to build a road between two towns with a six-mile connection segment through the Six Rivers National Forest, which was utilized by the American Indian tribe plaintiffs for Native American worship rituals. *Id.* at 442. The tribes claimed their free exercise rights would be violated because their rituals depended on privacy, silence, and an undisturbed natural setting. *Id.* The Supreme Court held that the incidental effects on the tribes' ability to freely exercise their religion did not rise to the substantial burden required by the Free Exercise Clause because they were not coerced into acting contrary to their religious beliefs. *Id.* at 450-51. The Court further held that it is not within the rights of the Native Americans to regulate the use of government land: "Whatever rights the Indians may have to the use of the area . . . these rights do not divest the government of its right to use what is, after all, its land." *Id.* at 452-53. See also S. REP. NO. 103-411, at 2 (1994) (stating that the result of *Lyng* was that the government's use of its own land does not burden religious exercise, even if it results in the destruction of a Native American sacred site or religion). In *Lyng*, the Supreme Court made it clear that the First Amendment is not available to practitioners of the Native American religions to prevent government interference. *Lyng*, 485 U.S. at 452-53.

<sup>118</sup> 706 F.2d 856 (8th Cir. 1983).

<sup>119</sup> *Id.* at 858. In *Crow*, the State of South Dakota at Bear Butte State Park, a site utilized for various Native American religious ceremonies by the Lakota and Tsistsistas Nations, constructed an access road, parking lot and viewing platform to encourage public access to the park. *Id.* at 857. The plaintiffs filed a class action suit, claiming that the disruption of the expansion and resulting increase in tourists violated their right to freely exercise their religion. *Id.* The court held that the Native Americans' free exercise rights were not violated because the disruption caused by construction and tourists did not burden the right to practice religious exercises. *Id.* at 858-59.

<sup>120</sup> *Id.* at 858. The court further held that the plaintiffs' interests were outweighed by the improvements to a unique geological and historical landmark. *Id.*

<sup>121</sup> *Id.*

of worship have also survived Free Exercise Clause challenges.<sup>122</sup> The government has prevailed in such challenges based on subjective judicial determinations of the centrality of the site to the Native American religion, in accordance with *Yoder*.<sup>123</sup> In *Sequoyah v. Tennessee Valley Authority*,<sup>124</sup> the Sixth Circuit held that the Little Tennessee Valley, containing a Cherokee sacred site, was not central to the tribe's religious practices because the number of ceremonies performed at the site were minimal.<sup>125</sup> In *Wilson v. Block*,<sup>126</sup> the D.C. Circuit held that, although the site was specific to the Hopi and Navajo religions, it was not shown to be indispensable to their religious practices.<sup>127</sup> As such, the plaintiffs' free exercise rights were not violated.<sup>128</sup>

Subsequent to the above decisions, many of the defenses used by the government in Free Exercise Clause challenges were weakened. While the Establishment Clause remained a plausible defense for the government, the concept of accommodation strengthened in *Thornton v. Caldor, Inc.*,<sup>129</sup> undermined the defense of using a narrow definition of the Free Exercise Clause.<sup>130</sup> Further, the decision in *Smith* overruled using the centrality of a religion as a defense to a Free Exercise Clause

<sup>122</sup> See *infra* notes 124-28 and accompanying text.

<sup>123</sup> *Wisconsin v. Yoder*, 406 U.S. 205 (1972). See *supra* notes 72-77 and *infra* notes 124-28 and accompanying text for a discussion of *Yoder*.

<sup>124</sup> 620 F.2d 1159 (6th Cir. 1980).

<sup>125</sup> *Id.* at 1163. In *Sequoyah*, Cherokee Indians challenged the flooding of the Little Tennessee Valley under the Free Exercise Clause because the flooding destroyed sacred sites, medicine gathering sites, holy places, and cemeteries. *Id.* at 1160. The court further noted that the medicines could be found at higher elevations and that a loss to culture or history is not protected by the First Amendment. *Id.* at 1164-65.

<sup>126</sup> 708 F.2d 735 (D.C. Cir. 1983).

<sup>127</sup> *Id.* at 742. In *Wilson*, the plaintiffs challenged action taken by the Forest Service and Department of Agricultural to develop a recreational ski facility in the Coconino National Forest in the San Francisco Peaks. *Id.* The plaintiffs claimed that the peaks were sacred and that the expansion would violate their free exercise rights by destroying the area. *Id.* at 739-40.

<sup>128</sup> *Id.* at 745. The court further affirmed the holding in the court below. *Id.* See also *Hopi Indian Tribe v. Block*, Nos. 81-0481, 81-0493, 81-0558, 1981 U.S. DIST. LEXIS 18421, AT \*17-21 (D.D.C. June 15, 1981) (holding that extending the First Amendment to restricting the rights of the public and development of the property in order to facilitate the exercise of religious beliefs "would clearly fly in the face of the principles of the Establishment Clause of the First Amendment"). In *Hopi*, the court held that the Establishment Clause does not allow the government to restrict expansion in order to advance religion. *Id.* at \*21. The court stated that the "[p]laintiffs do not have a Constitutional right under the First Amendment to require that the government manage this property as a religious shrine for them." *Id.* at \*22.

<sup>129</sup> 472 U.S. 703 (1985).

<sup>130</sup> See *supra* notes 113-21 and accompanying text.

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violation claim.<sup>131</sup> As a result, although none of the former decisions were overruled, few remained influential for subsequent cases.<sup>132</sup>

2. Judicial Accommodation of Native American Sacred Sites and Religious Worship

The judicial rejection of applying the First Amendment in order to protect the Native American religion from a government imposed burden on free exercise or from the destruction of sacred sites utilized for Native American worship remained the trend throughout the 1980's.<sup>133</sup> However, this trend was unexpectedly challenged in the 1990's with the decision of *Bear Lodge Multiple Use Ass'n v. Babbitt*.<sup>134</sup>

In *Bear Lodge*, recreational climbers of Devils Tower National Monument challenged the National Park Service's Final Climbing Management Plan ("FCMP").<sup>135</sup> The FCMP provides in part that, in respect for the reverence Native Americans hold for the Monument, climbers are asked to "voluntarily refrain from climbing on Devils Tower during the culturally significant month of June."<sup>136</sup> The Wyoming

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<sup>131</sup> See *supra* notes 78-80 and 124-28 and accompanying text.

<sup>132</sup> See *Bear Lodge Mult. Use Ass'n v. Babbitt*, 175 F.3d 814 (10th Cir. 1999) (finding both *Badoni* and *Lynn* inapplicable to the case at bar).

<sup>133</sup> Grimm, *supra* note 107, at 19. "Indians were remarkably unsuccessful in challenging government actions that harmed sacred sites as violations of their Free Exercise Rights, and lost a series of cases in the 1980s." *Id.*

<sup>134</sup> 175 F.3d 814 (10th Cir. 1999), *aff'g* 2 F.Supp.2d 1448 (D.Wyo. 1998), *cert denied*, 120 S.Ct. 1530 (2000).

<sup>135</sup> *Id.* The National Park Service supplemented the voluntary ban with signs to encourage people to remain on the trail and an interpretive educational program to explain the religious and cultural significance of the Monument. *Bear Lodge*, 175 F.3d at 819. The signs read, "The Tower is sacred to American Indians. Please stay on the trail." *Id.* at 819 n.9.

<sup>136</sup> See *Bear Lodge*, 175 F.3d at 819; *Bear Lodge*, 2 F.Supp.2d at 1450. Devils Tower is the site from where the White Buffalo Calf Woman emerged at the beginning of creation and gave the Sioux people the White Buffalo Calf Pipe, a sacred religious artifact. *Bear Lodge*, 175 F.3d at 816. Devils Tower is also prominent in traditional Sioux stories and is central to the Indians etiological explanation of the universe. *Id.* The Tower was designated as the first national monument by President Roosevelt in 1906. *Id.* at 819. One basis for its designation was the prominent role it played in the culture of North Plains tribes. *Id.* Devils Tower is also used for recreational climbing. Recreational climbing on Devils Tower increased dramatically from 312 climbers in 1973 to over 6,000 annually in 1998. *Bear Lodge*, 2 F. Supp. 2d at 1449 n.1. A ban was enacted by the National Park Service following complaints by the Native Americans that the presence of climbers had adversely impacted their traditional activities and impaired the spiritual quality of the site. *Id.* In addition to placing permanent and temporary metal stakes in the rock, climbing requires climbers to yell commands to their partners. *Bear Lodge*, 175 F.3d at 818. Climbers have also taken pictures of Native Americans in ceremonies, removed sacred prayer bundles, and intruded on the Native American's solitude. *Id.*

District Court analyzed the challenge to the voluntary climbing ban<sup>137</sup> under the First Amendment Establishment Clause.<sup>138</sup>

The court in *Bear Lodge* utilized the *Lemon* test<sup>139</sup> in its Establishment Clause analysis of the voluntary climbing ban.<sup>140</sup> At the onset of its tripart analysis, the court declared that the ability of the government to accommodate religious practices would be balanced in its analysis of whether the voluntary ban<sup>141</sup> was within the confines of the Establishment Clause's mandate of separation between church and State.<sup>142</sup> The court found that the purpose of the FCMP was to remove barriers that existed on the Native American's right to worship because their sacred property was found on United States property.<sup>143</sup> Although the purpose of the Plan was related to religion, the court considered the purpose to be secular because the real intent of the ban was to accommodate and not to advance or promote religion.<sup>144</sup> The court next held that the government act that banned the normal use of an area to climbers in order to accommodate Native American religious practices did not have the effect of coercing others into supporting the Native

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<sup>137</sup> But see "War on West" continues, book's author says, THE DESERT NEWS, Dec. 31, 1999, at B09. According to Perry Pendley, chief legal officer for the Mountain States Legal Foundation, "This is as voluntary as paying taxes." *Id.*

<sup>138</sup> *Bear Lodge*, 2 F. Supp. 2d at 1453. The District Court first dismissed the challenge to the commercial climbing ban, that was originally mandatory, as moot because the NPS had made the ban voluntary. *Id.* at 1452. The court held the climbers had no standing to challenge the culturally interpretive program signs asking visitors to stay on trails as violative of the First Amendment Establishment Clause because there was no injury in fact or redressibility. *Id.* at 1453. The Climbers alleged that the signs and program were indoctrinating children. *Id.* However, because neither the children nor their parents were parties to the case and the plaintiffs were not hindered by either the signs or educational program, the injury was a generalized grievance against allegedly illegal government conduct was insufficient to invoke standing. *Id.* The court utilized the three standing requirements from *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), that require: 1) an injury in fact that is a) concrete and particularized and b) actual or imminent, not hypothetical or conjectural; 2) a causal connection between the injury and the conduct complained of; and 3) likely to be redressed by a favorable decision. *Bear Lodge*, 2 F. Supp. 2d at 1452-53.

<sup>139</sup> See *supra* notes 91-96.

<sup>140</sup> *Bear Lodge*, 2 F. Supp. 2d at 1454.

<sup>141</sup> See *supra* notes 135-38 and accompanying text.

<sup>142</sup> *Bear Lodge*, 2 F. Supp. 2d at 1454. The court stated that the Supreme Court "has long recognized the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause." *Id.* (citing *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136 (1987)).

<sup>143</sup> *Bear Lodge*, 2 F. Supp. 2d at 1454. The Plan aimed to provide the atmosphere necessary for the Native American worship. *Id.* at 1456.

<sup>144</sup> *Id.* at 1455.

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American religion because the ban was voluntary.<sup>145</sup> The court finally reasoned that, because the accommodation of Native American religious worship was custodial in nature and there was no government involvement in actual worship, the ban did not constitute an excessive entanglement with religion.<sup>146</sup> As such, because the three prongs of the *Lemon* test were met, the Plan did not violate the Establishment Clause.<sup>147</sup>

The *Bear Lodge* opinion is significant since it reverses the trend concerning protection of Native American sacred site worship.<sup>148</sup> The District Court's recognition that a site is sacred to Native Americans<sup>149</sup> and the application of the accommodation principle to the Native American religion is a significant step toward providing Native Americans with First Amendment protection.<sup>150</sup> In doing so, the court made a deliberate decision to protect and accommodate both sacred sites and Native American religious worship.<sup>151</sup>

On appeal, the Tenth Circuit strengthened the policy toward judicial protection of sacred sites and Native American worship practices.<sup>152</sup> In its opinion, the court recognized the need for an atmosphere of solemnity and solitude for Native American spiritual ceremonies,<sup>153</sup> affirmed the sincerity of the Native American religious practices, and acknowledged the necessity of the ceremonies in maintaining a stable and healthy Native American community.<sup>154</sup> The Tenth Circuit justified its decision as being in accordance with the change in federal policy toward Native Americans which has occurred

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<sup>145</sup> *Id.* at 1455-56.

<sup>146</sup> *Id.* at 1460.

<sup>147</sup> *Id.* at 1456-57.

<sup>148</sup> Telephone Interview with Monument Spokesperson, Devils Tower National Monument (Oct. 4, 1999); Telephone Interview with Park Spokesperson, National Park Service (Oct. 6, 1999).

<sup>149</sup> See also *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 452 (1988) (holding that it would be a violation of the First Amendment for the government to treat the site in the Six Rivers National Forest as sacred).

<sup>150</sup> Telephone Interview with Park Spokesperson, National Park Service (Oct. 6, 1999).

<sup>151</sup> Telephone Interview with Monument Spokesperson, Devils Tower National Monument (Oct. 4, 1999).

<sup>152</sup> See *Bear Lodge Multiple Use Ass'n v. Babbitt*, 175 F.3d 814 (10th Cir. 1999).

<sup>153</sup> Compare *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988); *Badoni v. Higginson*, 638 F.2d 172 (10th Cir. 1981); *Crow v. Gullett*, 706 F.2d 1159 (8th Cir. 1980).

<sup>154</sup> *Bear Lodge*, 175 F.3d at 815-17.

over the last sixty-five years.<sup>155</sup>

*Bear Lodge* is also significant because it is the first case to directly address agency accommodation attempts.<sup>156</sup> While *Bear Lodge* allows federal agencies new power to accommodate sacred site worship, the power to enact accommodation measures is limited in two ways: agencies cannot prohibit the public use of federal land to provide for Native American religious practices and agencies cannot require third parties to conform their conduct to Native American religious concerns.<sup>157</sup> Both the advancements and restrictions imposed by *Bear Lodge* will influence future cases, which are inevitable because the conflict of public use and Native American sacred use of federal lands is far from resolved.<sup>158</sup> It is likely that any agency accommodation efforts that interfere with other uses of the public lands can expect to be challenged as violating the Establishment Clause.<sup>159</sup>

#### B. Legislative and Executive Laws Directed at Protection of Native American Sacred Site Worship

The conflict between public use and Native American sacred use of

<sup>155</sup> *Id.* at 817-18. The court cited to a number of laws in support of accommodation utilized by federal agencies: 16 U.S.C. § 228i(c) (1992) (preserving access to federal park lands and archeological sites for traditional Native American religious purposes); 16 U.S.C. § 410pp-6 (1999) (authorizing temporary closure of Cibola Historical Park for Native American religious services); El Malpais National Monument and National Conservation Area General Provisions, 16 U.S.C. § 460uu-47 (1999) (authorizing access and temporary closure of the El Malpais National Monument for traditional cultural and religious purposes); The National Historical Preservation Act Amendments of 1992, 16 U.S.C. § 470a(d)(6)(A)-(B) (1985 and 1998 Supp) (allowing properties of traditional religious and cultural importance to Native Americans to be considered eligible for inclusion on the National Register as well as require federal agencies to consult with a tribe that attaches religious and cultural significance to such properties); 25 U.S.C. §§ 640d-20 (1995) (providing the Hopi and Navajo tribes with rights to use and access sacred sites); The Native American Graves and Repatriation Act, 25 U.S.C.A. § 3001 (1999) (requiring federal land managers to protect Native American graves, consult with tribes concerning religious cultural sites and objects, and repatriate cultural and religious items found on federal lands); The American Indian Religious Freedom Act, 42 U.S.C. § 1996 (1994) (creating a government-wide policy to protect both sacred sites and Native American forms of worship); Exec. Order No. 13,007, 61 Fed. Reg. 26,771 (May 24, 1996) (ordering federal agencies to accommodate access to and ceremonial use of sacred sites by Native American religious practitioners and to avoid adversely affecting the physical integrity of such sites).

<sup>156</sup> See Grimm, *supra* note 107, at 22. "Until *Bear Lodge*, the few courts that addressed potential accommodations for Indian religious practices on federal land did so only indirectly, in the context of Free Exercise claims." *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 19.

<sup>159</sup> *Id.* at 20.

federal lands has been recognized by both the legislative and executive branches, which have attempted to find resolutions while staying within the confines of the Establishment and Free Exercise Clauses.<sup>160</sup> In 1978, Congress enacted the American Indian Freedom of Religion Act for the protection of Native American religious practices, which was amended in 1994 after two prior attempts failed in 1989 and in 1994.<sup>161</sup> In 1990, Congress created the El Malpais National Monument Plan of 1990 in order to accommodate public use and Native American sacred use of the Monument.<sup>162</sup> In 1993, Congress enacted the Religious Freedom Restoration Act to restore the strict scrutiny test created in *Sherbert* to protect free exercise protection.<sup>163</sup> In 1996, President Clinton issued Executive Order 13007 to protect and preserve Native American sacred sites and worship.<sup>164</sup> Subsections one to four analyze the effectiveness of these Congressional and Executive attempts to protect the Native American religion.<sup>165</sup>

### 1. The American Indian Freedom of Religion Act of 1978

In 1978, Congress acknowledged that Native American religious practices, although unconventional, are entitled to protection.<sup>166</sup> The American Indian Freedom of Religion Act of 1978 ("AIRFA") enumerates that the policy of the United States shall be to protect and preserve the Native Americans' freedom to believe, express, and exercise their traditional religions.<sup>167</sup> This policy is implemented through recognition of the right of Native Americans to sacred site access, use and possession

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<sup>160</sup> Grimm, *supra* note 107, at 19.

<sup>161</sup> See *infra* Part III.B.1. American Indian Religious Freedom Act Amendments of 1994, Pub. L. No. 103-244, 108 Stat. 3125; American Indian Religious Freedom Act Amendments of 1989, S. 1124, 101st Cong.; Native American Cultural Protection and Free Exercise of Religion Act of 1994, S. 2269, 103rd Cong.

<sup>162</sup> See *infra* Part III.B.3.

<sup>163</sup> See *infra* Part III.B.2 for a discussion of the limitations of the Religious Freedom Restoration Act.

<sup>164</sup> See *infra* Part III.B.4.

<sup>165</sup> See *infra* Part III.B.1-4.

<sup>166</sup> See Laurie Ensworth, Note, *Native American Free Exercise Rights to the Use of Public Lands*, 63 B.U. L. REV. 141, 154 (1983).

<sup>167</sup> The American Indian Religious Freedom Act of 1978 requires:

On and after August 11, 1978, it 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, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.

42 U.S.C. § 1996 (1994).

of sacred objects, and the freedom to worship through ceremonials and traditional rituals.<sup>168</sup>

However, AIRFA is viewed as containing inherent and fundamental flaws, rendering it ineffective to protect Native American sacred sites and religious practices.<sup>169</sup> The fundamental problems identified with AIRFA are threefold: 1) the Act does not create legal rights of action or allow for substantive relief arising from agency violations;<sup>170</sup> 2) the Act does not prohibit agencies from making choices that could harm sacred sites or religious practices;<sup>171</sup> and 3) the Act is dependent on federal administrative good will to be implemented.<sup>172</sup>

Three sets of Amendments were proposed in Congress in 1989

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

<sup>169</sup> See Grimm, *supra* note 107, at 20. AIRFA has failed to provide protection of sacred sites for Native Americans in challenges to governmental actions that would affect their worship sites and practices. *Id.* See *Wilson v. Block*, 708 F.2d 735 (D.C. Cir. 1983). In *Block* the court held that:

[T]he AIRFA requires federal agencies to consider, but not necessarily to defer to, Indian religious values. It does not prohibit agencies from adopting all land uses that conflict with traditional Indian religious beliefs or practices. Instead, an agency undertaking a land use project will be in compliance with the AIRFA if, in the decision-making process, it obtains and considers the views of Indian leaders, and if, in project implementation, it avoids unnecessary interference with Indian religious practices.

*Id.* at 747. See also S. REP. NO. 103-411, at 2-3 (1994) (stating that the desired result of protecting Indian religious practices has not been accomplished); *Badoni v. Higginson*, 638 F.2d 172, 180 (10th Cir. 1981) (holding that AIRFA is of no consequence to the case because the pleadings afford no basis for relief); *Sequoyah v. Tenn. Valley Auth.*, 620 F.2d 1159, 1161 (6th Cir. 1980) (holding that relief under the American Indian Religious Freedom Act is "foreclosed by a provision of the Energy and Water Development Appropriation Bill").

<sup>170</sup> See Grimm, *supra* note 107, at 20. According to a sponsor of AIRFA, it has "no teeth." *Id.*

<sup>171</sup> *Wilson*, 708 F.2d at 745. See also Grimm, *supra* note 107, at 22 (stating that, while Congress requires agencies to ensure access to sites, it does not prohibit agencies from making decision that could harm such sites); S. REP. NO. 103-411 (1994).

<sup>172</sup> Michael J. Simpson, *Accommodating Indian Religions: The Proposed 1993 Amendment to the American Indian Religious Freedom Act*, 54 MONT. L. REV. 19, 20 (1993) (writing that protection of minority religions is vulnerable to insensitive government officials); Charles Levendosky, *President Clinton Acts to Protect Sacred Sites of American Indians*, SEATTLE POST-INTELLIGENCER, June 6, 1996, at A17 (writing that AIRFA, which contains no enforcement power, is "Empty rhetoric. A pose. Another unfulfilled promise."); PRINCIPLES FOR GOVERNING NATIVE AMERICAN INDIAN ACCESS AND TEMPORARY CLOSURE WITHIN WILDERNESS § II(2) (Proposed Draft 1999) [hereinafter INDIAN] (stating that AIRFA does not provide direction for federal agencies regarding Native American requests for access or closures).

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and 1994 to deal with the shortcomings of AIRFA.<sup>173</sup> The proposed American Indian Religious Freedom Act Amendments of 1989, which did not pass, required a strict scrutiny justification for federal land management decisions that interfere with traditional Native American religious practices by requiring a compelling governmental interest and the least intrusive means available.<sup>174</sup> The American Indian Religious Freedom Act Amendments of 1994, passed in response to *Smith*,<sup>175</sup> provided for the traditional use of peyote by Native Americans for religious purposes.<sup>176</sup> Following the adoption of the 1994 Amendments, Senator Inouye made a third attempt to amend AIRFA to provide for protection of sacred sites.<sup>177</sup> The Native American Cultural Protection and Free Exercise of Religion Act of 1994 proposed to authorize temporary closure of sacred site areas to general public use in order to protect the privacy of religious or cultural activities; require federal agencies to manage their lands in a way consistent with AIRFA, and provide for criminal sanctions for damage caused to sacred sites.<sup>178</sup> Congress defeated the Native American Cultural Protection and Free Exercise of Religion Act of 1994, leaving AIRFA with no enforcement solution.<sup>179</sup>

## 2. The Religious Freedom Restoration Act of 1993

In 1993, Congress enacted the Religious Freedom Restoration Act

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<sup>173</sup> American Indian Religious Freedom Act Amendments of 1989, S. 1124, 101st Cong.; Native American Cultural Protection and Free Exercise of Religion Act of 1994, S. 2269, 103d Cong.; American Indian Religious Freedom Act Amendments of 1994, Pub. L. No. 103-244, 108 Stat. 3125.

<sup>174</sup> The American Indian Religious Freedom Act Amendments of 1989, S. 1124, 101st Cong. The Amendments, which did not pass, attempted to require federal agencies to select the course of action least intrusive to sacred Native American religious practices. *Id.*

<sup>175</sup> 494 U.S. 872 (1990).

<sup>176</sup> The American Indian Religious Freedom Act Amendments of 1994, P.L. 103-244, 108 Stat. 3125.

<sup>177</sup> The Native American Cultural Protection and Free Exercise of Religion Act of 1994, S. 2269, 103d Cong. The Act, which did not pass, attempted to grant Native Americans access to sacred sites; authorize federal agencies to take reasonable measures to ensure access and use, including temporary closure of sacred sites to general public use to protect the privacy of religious or cultural activities; require consultation and cooperation between federal agencies and Native Americans in identification, planning and land management where appropriate; and impose criminal sanctions on persons or organizations damaging sacred sites on tribal lands. *Id.*

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

<sup>179</sup> *Id.* See also S. REP. NO. 103-411 (1994) (stating that the 1978 Act was sound policy, but lacked enforcement authority).

("RFRA")<sup>180</sup> in order to safeguard free exercise rights of minority religions<sup>181</sup> from government imposed burdens.<sup>182</sup> RFRA provides that the government shall not substantially burden a person's free exercise, even if the burden results from a generally applicable law, unless the government entity demonstrates that the burden is a means of furthering a compelling governmental interest and is the least restrictive means of furthering that interest.<sup>183</sup> RFRA restores the *Yoder* and *Sherbert* tests that

<sup>180</sup> 42 U.S.C. §§ 2000bb to 2000bb-4 (1999). See also Robin-Vergeer, *supra* note 79, at 591. President Clinton signed the Act, a congressional repudiation of the Supreme Court's decision in *Smith*, into law on November 16, 1993. *Id.*

<sup>181</sup> *Id.* at 749 (writing that unconventional minority creeds, unlike mainstream religions, are especially vulnerable to religious discrimination due to lack of political clout and influence).

<sup>182</sup> The Religious Freedom Restoration Act of 1993 provides in part:

(a) Findings

The Congress finds that--

(1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;

(2) laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;

(3) governments should not substantially burden religious exercise without compelling justification;

42 U.S.C. § 2000bb(a)(1)-(3) (1994). See also DEPARTMENT OF THE INTERIOR, FEDERAL INDIAN POLICIES 20 (1993-1998). According to President Clinton: "Religious freedom is literally our first freedom . . . . With the Religious Freedom Restoration Act we made it possible . . . for Native Americans, . . . to practice the full range of their religious practices when they might have otherwise come in contact with some governmental regulation." *Id.*

<sup>183</sup> Robin-Vergeer, *supra* note 79, at 753. Representative Henry Hyde observed that RFRA "will not guarantee that religious claimants bringing free exercise challenges will win, but only that they have a chance to fight." *Id.*, (citing H.R. REP. NO. 88, 103d Cong., 1st Sess. 17 (1993)). The Religious Freedom Restoration Act of 1993 provides in part: (a) Findings, The Congress finds that . . . (5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests. 42 U.S.C. § 2000bb(a)(5) (1994).

RFRA provides for the protection of the free exercise of religion:

2000bb-1. Free exercise of religion protected

(a) In general

Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this Section.

(b) Exception

Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person--

(1) is in furtherance of a compelling governmental interest;

and

(2) is the least restrictive means of furthering that compelling governmental interest.

(c) Judicial relief

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were limited in *Smith* in favor of a rational basis test.<sup>184</sup> Overall, the intent behind RFRA was to restore Constitutional protection to the free exercise of religion.<sup>185</sup> However, the Court in *Boerne v. Flores*<sup>186</sup> overruled RFRA as applied to the states because the Act exceeded Congress' enforcement powers.<sup>187</sup> Courts, however, have held that *Boerne* did not

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A person whose religious exercise has been burdened in violation of this Section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this Section shall be governed by the general rules of standing under article III of the Constitution.

42 U.S.C. § 2000bb(a)(1)-(3) (1994).

<sup>184</sup> *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Sherbert v. Verner*, 374 U.S. 398 (1963). See also *Grimm*, *supra* note 107, at 19. The *Sherbert* analysis suggests that government actions that harm sacred lands and burden Native American religious beliefs, are prohibited under the Free Exercise Clause. *Id.* See *Employment Div. v. Smith*, 494 U.S. 872, 873 (1990) (holding that an exemption from a generally applicable and religion-neutral law, that has the effect of burdening a particular religion, cannot be evaluated under the *Sherbert* balancing test). *Sherbert* cannot require a compelling government interest when the conduct that the law prohibits is essential to a religion because that would require judges to determine the centrality of a religious belief. *Id.* AIRFA's provision that explicitly restores *Sherbert* and *Yoder* provides:

(b) Purposes

The purposes of this chapter are—

(1) 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; and

(2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

42 U.S.C. § 2000bb(b) (1994). See also WILLIAM B. LOCKHART ET. AL., *CONSTITUTIONAL LAW* 1125 (8th ed. 1996); HOOKER, *supra* note 8, at 133-34, 154.

<sup>185</sup> HOOKER, *supra* note 8, at 133-34, 154. RFRA's statutory claim or defense is a substitute for constitutional protection needed as a result of the decision in *Smith*. *Id.* See also S. REP. NO. 103-411 (1994). The *Smith* decision "sent shock waves through Indian communities nationwide, caused an outcry from religious institutions across the country, and created a need for legislation that would restore the compelling state interest test." *Id.* at 3.

<sup>186</sup> 521 U.S. 507 (1997).

<sup>187</sup> *Id.* at 512 (holding that RFRA cannot be applied to limit the States). RFRA has subsequently been enacted by state legislatures to protect free exercise rights. See S.B. 604, 1998 Reg. Sess. (Ala. 1998); CONN. GEN. STAT. ANN. § 52-571b (West 1998); FLA. STAT. ANN. § 761.01 (West 1997); 775 ILL. COMP. STAT. ANN. 35/10 (West 1999); R.I. GEN. LAWS § 42-80.1-3 (1998). See also H.B. 2421, 43d Leg., 1998 Reg. Sess. (Ariz. 1998); A.B. 1617, 1997-98 Reg. Sess. (Cal. 1997), vetoed Sept. 27, 1998; H.R. 865, 144th Gen. Assembly, 1997-98 Reg. Sess. (Ga. 1997); H.B. 2916, 77th Leg., 1998 Reg. Sess. (Kan. 1998); H.B. 167A, 1998 Spec. Sess. A (La. 1998); S.B. 515, H.B. 1041, 1998 Reg. Sess. (Md. 1998); S.B. 678, H.B. 4376, 89th Leg., 1997 Reg. Sess. (Mich. 1997); H.B. 1470, 2d year of the 155th Sess. of the General Court (N.H. 1997) defeated Feb. 18, 1998; S.B. 321, A.B. 903 208th Leg. (N.J. 1998); S.B. 5673, A.B. 8499, 220th Annual Leg. Sess. (N.Y. 1997); H.B. 3469, 70th Leg. Assembly, 1999 Reg. Sess. (Ore. 1999); H.B. 2068, 181st Gen. Assembly, 1997-98 Reg. Sess. (Pa. 1997); H.B. 5045, 112th

invalidate RFRA as applied to the federal government and to federal law.<sup>188</sup>

RFRA, however, fails to protect religions in which land use is an essential component of religious practices, such as the Native American sacred site religions.<sup>189</sup> The destruction of land cannot be challenged under RFRA based on the reasoning that such actions do not burden the free exercise of religion.<sup>190</sup> The inapplicability of RFRA to Native American sacred site religions is further solidified by Senate Report Number 111, that assured Congress that RFRA would not create a cause of action for Native Americans seeking to protect sacred sites.<sup>191</sup> As such, Congress passed RFRA with knowledge that it did not provide protection against government imposed burdens on sacred site worship.<sup>192</sup> The Religious Freedom Restoration Act, although unsuccessful in protecting Native American sacred site religions, illustrates the Congressionally recognized necessity of applying strict scrutiny to government actions that burden the free exercise of religion.

### 3. The El Malpais National Monument Plan of 1990

The El Malpais National Monument Plan of 1990 exhibits a new model of cooperation between Congress and Native Americans that was developed during the establishment of the El Malpais lava flows as a National Monument in 1987.<sup>193</sup> El Malpais has been utilized throughout history for sacred site religious practices by the Acoma, Zuni, Laguna,

Sess. of Gen. Assembly (S.C. 1997); S.B. 3054, H.B. 3051, 100th Gen. Assembly, 1998 Reg. Sess. (Tenn. 1998); H.B. 550, 1997-98 Leg. Sess. (Vt. 1997-98); H.B. 1, 1998 Leg. Sess. (Va. 1998). See also Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. REV. 1465, 1474 (1999) (stating that *Boerne* did not preclude the enactment of state RFRA's).

<sup>188</sup> See, e.g., *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.2d 826 (9th Cir. 1999); *Alamo v. Clay*, 137 F.3d 1366 (D.C. Cir. 1998).

<sup>189</sup> Winslow, *supra* note 28, at 1315.

<sup>190</sup> *Id.* "Thus, under Supreme Court precedent and now under RFRA, sacred-site claims have been resolved with the proposition that government land use cannot be challenged under the Free Exercise Clause." *Id.* See also Grimm, *supra* note 107, at 19-24, 78. Native Americans have found that courts are not willing to interpret the Free Exercise Clause to prohibit government actions that harm sacred lands, despite effects that significantly impact religious practices and beliefs. *Id.*

<sup>191</sup> Winslow, *supra* note 28, at 1314 (citing S. REP NO. 103-111, at 19 (1993)). The Senate Report leading to RFRA did not overrule *Lyng v. Northwest Cemetery Protective Ass'n*. *Id.* 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." *Id.* As such, RFRA does not create a cause of action for Native Americans seeking to protect sacred sites. *Id.*

<sup>192</sup> Winslow, *supra* note 28, at 1314.

<sup>193</sup> Hooker, *supra* note 8, at 153.

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and Ramah Navajo Indians.<sup>194</sup> In 1969, the Bureau of Land Management withdrew El Malpais from the public domain.<sup>195</sup> In 1972, Congress and the Acoma exchanged 1.5 million acres of land, including portions of El Malpais, for 6.2 million dollars.<sup>196</sup> However, the Acoma continued to assert rights to sacred site areas, which they claim were mistakenly included in the 1877 survey.<sup>197</sup> The federal government was unwilling to return the land, but agreed to accommodate religious practices.<sup>198</sup>

Congress, believing that the area could attract tourists and boost the economy if established as a National Monument, was faced with the competing demands of economic development, site preservation, and accommodation of Native American religious and cultural uses.<sup>199</sup> The Property Clause of the U.S. Constitution gives Congress the power to make rules and regulations regarding U.S. property.<sup>200</sup> Additionally, the Public Trust Doctrine allows Congress to manage lands designated as Indian Reservations for public purposes.<sup>201</sup> Congress, however, cannot make rules or manage lands in violation of the Free Exercise and Establishment Clauses.<sup>202</sup> In an effort to balance the competing demands, Congress established the El Malpais National Monument and National Conservation Area in 1987 and preserved the area as a sacred site.<sup>203</sup>

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<sup>194</sup> *Id.* at 142. The Acoma may have settled El Malpais as early as A.D. 1050. *Id.* The Navajo settled in the region by the Thirteenth Century. *Id.* The Ramah Navajo do not have proven ancestral ties to the land in El Malpais, while the Zuni tribe claims ancestral ties to the land. *Id.* The Zuni Pueblo and Ramah Navajo reservations are west of El Malpais and the Acoma Pueblo and Laguna Pueblo reservations are east of El Malpais. *Id.*

<sup>195</sup> Hooker, *supra* note 8, at 134, 144.

<sup>196</sup> *Id.* at 146. See also BUREAU OF LAND MANAGEMENT, U.S. DEP'T. OF THE INTERIOR, MULTIPLE-USE MANAGEMENT: A PLAN FOR THE GRANTS LAVA FLOWS AND SURROUNDING AREAS 14 (1972).

<sup>197</sup> Hooker, *supra* note 8, at 146 n.115. See also 133 CONG. REC. S00000-18 (1987); 133 CONG. REC. H11763-01 (1987); 133 CONG. REC. H4070-02 (1987).

<sup>198</sup> Hooker, *supra* note 8, at 146.

<sup>199</sup> *Id.*

<sup>200</sup> The Property Clause reads: "Section 3. [2] The Congress shall Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular site." U.S. CONST. art. IV, § 3, cl. 2.

<sup>201</sup> Hooker, *supra* note 8, at 136. Additionally, the federal-tribal relationship provides Congress with the authority to develop statutory exemptions and preferences for Native Americans that might otherwise be unconstitutional. See also Grimm, *supra* note 107, at 23.

<sup>202</sup> Hooker, *supra* note 8, at 133-34, 137.

<sup>203</sup> El Malpais National Monument and Conservation Area Act, Pub. L. No. 100-225, 101 Stat. 1539 (1987). See also Hooker, *supra* note 8, at 134.

When preserving El Malpais as a sacred site, Congress chose three elements that would accommodate Native Americans religious and cultural practices without giving Native Americans exclusive use of an area.<sup>204</sup> These three elements were implemented into the El Malpais National Monument and National Conservation Area General Provisions in 1990.<sup>205</sup> First, Congress granted the Secretary of the Interior the duty to ensure nonexclusive access to the monument by Indian people for traditional cultural and religious purposes.<sup>206</sup> Second, Congress authorized the secretary to take recommendations from Indian leaders in preparing plans for the monument in order to ensure access, enhance the privacy of traditional cultural and religious activities, and protect the traditional religious and cultural sites.<sup>207</sup> Third, Congress authorized the secretary to temporarily close the lands to the general public in order to protect the privacy of religious activities by Indian people.<sup>208</sup> A request for a temporary closure must be made by an appropriate Indian tribe and affect the smallest practicable area for the minimum period necessary.<sup>209</sup>

The method of accommodation designed by Congress in the El Malpais Plan has not yet been judicially challenged to determine its Constitutionality or its success when protecting Native American sacred site religious practices.<sup>210</sup> An anticipated problem with the Plan includes the dilemma that may arise upon a request of non-Indians who wish to use the area for spiritual purposes.<sup>211</sup> Further, although providing a model guideline for accommodation of Native American sacred sites and worship, agencies lack the power to implement similar plans without the explicit backing of Congress.<sup>212</sup> The Plan, though possibly unconstitutional, has been emulated in National Park Service General Plans.<sup>213</sup>

In the course of sixteen years, Congress made five attempts to

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<sup>204</sup> El Malpais National Monument and Conservation Area Act, Pub. L. No. 100-225, 101 Stat. 1539 (1987).

<sup>205</sup> El Malpais National Monument and National Conservation Area General Provisions, 16 U.S.C. § 460uu-47 (1999).

<sup>206</sup> *Id.* § 460uu-47(a).

<sup>207</sup> *Id.* §§ 460uu-47(b)(1)-(3).

<sup>208</sup> *Id.* § 460uu-47(c).

<sup>209</sup> *Id.*

<sup>210</sup> Hooker, *supra* note 8, at 153.

<sup>211</sup> *Id.*

<sup>212</sup> See *infra* Part IV. and accompanying text.

<sup>213</sup> See *infra* note 221. See, e.g., INDIAN, *supra* note 172, at § II.

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protect Native American religious worship.<sup>214</sup> All five attempts have been rendered inadequate.<sup>215</sup> In response to Congress' repeated failure to provide legislation that would adequately protect Native American sacred sites and worship, in 1996 President Clinton issued Executive Order 13,007.<sup>216</sup>

4. Executive Order 13,007 of 1996

On May 24, 1996, President Clinton issued Executive Order 13,007 for the purpose of protecting and preserving Native American sacred sites and associated religious practices.<sup>217</sup> The Order applies to agencies that manage federal lands and requires them to accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and to avoid adversely affecting the physical integrity of sacred sites.<sup>218</sup> The Order requires agencies to implement procedures to ensure reasonable notice of proposed actions or management policies that may either restrict access, restrict ceremonial use, or adversely affect a sacred site.<sup>219</sup> The Order further asks the agencies to maintain the confidentiality of sacred sites where appropriate.<sup>220</sup>

In response to Executive Order 13,007, National Park Service

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<sup>214</sup> See *supra* notes 160-64 and accompanying text.

<sup>215</sup> See *supra* notes 160-213 and accompanying text.

<sup>216</sup> See *infra* Part III.B.4; Levendosky, *supra* note 172, at A17 (writing that "President Clinton took the first important step toward the necessary accommodation" after Congress' repeated failure to pass legislation that would protect sacred sites and accommodate associated religious and cultural ceremonies). See also DEPARTMENT OF THE INTERIOR, FEDERAL INDIAN POLICIES i (1993-1998). In reference to accommodation of Native American religious and cultural practices, President Clinton stated:

Together we can open the greatest era of cooperation, understanding and respect among our people ever . . . and when we do, the judgement of history will be that the President of the United States and the leaders of the sovereign Indian nations met . . . and together lifted our great nations to a new and better place.

*Id.*

<sup>217</sup> Exec. Order No. 13,007, 61 Fed. Reg. 26,771 (May 24, 1996). See Grimm, *supra* note 107, at 24 (writing that this Order is an approach that aims to avoid harming sacred lands whenever possible).

<sup>218</sup> Exec. Order No. 13,007, 61 Fed. Reg. 26,771 (May 24, 1996). Agencies are required to comply "to the extent practicable, permitted by law, and not clearly inconsistent with essential agency functions." *Id.* See also Grimm, *supra* note 107, at 25. Section 1(a)(1) restates principles that are already applicable to agencies through AIRFA while Section 1(a)(2) adds a new element that helps close a gap that was left by AIRFA, because access to a site is "meaningless if the site itself is not protected from damage." *Id.*

<sup>219</sup> Exec. Order No. 13,007, 61 Fed. Reg. 26,771 (May 24, 1996).

<sup>220</sup> *Id.*

General Plans reflect the policy of accommodation and protection of Native American worship and sacred sites.<sup>221</sup> However, the accommodation is qualified by limiting it "to the extent practicable, permitted by law, and not clearly inconsistent with the agency functions."<sup>222</sup> This cautionary language does not provide protection of agency accommodation efforts against Establishment Clause litigation.<sup>223</sup> Further, if the agency action violates Native American religious rights, then Executive Order 13,007 establishes no cause of action to compel the agency to comply with the Executive Order.<sup>224</sup> Additionally, the Department of the Interior encountered impediments that hindered implementation of the Order, which require corrective legislative action.<sup>225</sup>

Currently, there is no general sacred site protection law.<sup>226</sup> The need for such protection is apparent throughout the history of public and sacred conflicts regarding land use and numerous attempts by all three

<sup>221</sup> National Parks and Recreation Act of 1978, Pub. L. No. 95-625, 92 Stat. 3467. The National Park Recreation Act of 1978 requires each National Park unit to develop a General Management Plan. *Id.* See also *V. Dion Haynes, U.S. Culture Clash: Native Americans vs. Park Tourists*, CHICAGO TRIBUNE, June 15, 1997, at 6C (writing that the Park Service is protecting Native American sacred grounds on public land with the backing of Executive Order 13007); *INDIAN*, *supra* note 12, at § II(3); *IMPLEMENTATION*, *supra* note 25, at 16-23. In addition to the National Park Service, implementation plans have also been designed by the Bureau of Reclamation, the U.S. Geological Survey, the Bureau of Land Management, the Office of Surface Mining Reclamation and Enforcement, the Minerals Management Service, the Fish and Wildlife Service, and the Office of Environmental Policy and Compliance. *IMPLEMENTATION*, *supra* note 25, at 16-23.

<sup>222</sup> Exec. Order No. 13,007, 61 Fed. Reg. 26,771 (May 24, 1996).

<sup>223</sup> Grimm, *supra* note 107, at 24. Unless and until Congress acts to create a general sacred lands statute, federal agencies will continue to test the limits of their authority in accommodating Indian religious practices, "keeping a watchful eye on emerging Establishment Clause litigation." *Id.* See also *IMPLEMENTATION*, *supra* note 25, at App. A.19. (discussing the lack of authority for general managers to make changes).

<sup>224</sup> The Order explicitly states that it does not create a right enforceable at law:

Sec. 4. This order is intended only to improve the internal management of the executive branch and is not intended to, nor does it, create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity by any party against the United States, its agencies, officers, or any person.

Exec. Order No. 13,007, 61 Fed. Reg. 26,771, § 4 (May 24, 1996).

<sup>225</sup> See Letter from Bruce Babbitt, Secretary of the Interior, to Bruce N. Reed, Assistant to the President for Domestic Policy (May 27, 1997) (on file with author) (discussing statutory impediments encountered during the review of existing practices and procedures in accordance with Exec. Order No. 13,007 § 2(b), 61 Fed. Reg. 26,771 (May 24, 1996)). See also *IMPLEMENTATION*, *supra* note 25, at 10-15 (discussing impediments which could not be administratively alleviated by the Department).

<sup>226</sup> See *supra* note 223.

branches of government to provide such protection.<sup>227</sup> In addition, there is no binding judicial precedent that would offer sacred site protection, and such a precedent is likely to conflict with the Establishment Clause.<sup>228</sup> Furthermore, Congress has the power to enact legislation providing for sacred site protection, but has yet to find a way to do so that would accommodate both public and sacred uses of federal land within the confines of the Establishment Clause.<sup>229</sup> There is also uncertainty surrounding whether the Executive branch has the power to issue an order capable of providing for the protection of sacred sites.<sup>230</sup> The following Section offers a possible solution.<sup>231</sup>

#### IV. MODEL LEGISLATION

This Section proposes a model Act to enforce and supplement the American Indian Freedom of Religion Act of 1978 ("AIRFA") and Executive Order 13,007.<sup>232</sup> Three key problems that currently exist will be addressed in this Act: (1) neither AIRFA or Executive Order 13,007 creates legal rights of action or allows for substantive relief arising from federal agency violations; (2) both AIRFA and Executive Order 13,007 are dependent on administrative good will to be implemented; and (3) neither AIRFA or Executive Order 13,007 prohibits federal agencies from taking actions that could adversely affect sacred sites or religious practices.<sup>233</sup> This Act also addresses concerns identified by the National Park Service in implementing AIRFA and Executive Order 13,007.<sup>234</sup>

#### ARTICLE I: DEFINITIONS

##### A. "Adversely Affect" means any action that would,

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<sup>227</sup> See *supra* Parts II, III. See also DEPARTMENT OF THE INTERIOR, FEDERAL INDIAN POLICIES 39 (1993-1998) (citing NORTHWEST ORDINANCE art. III (1787)). According to Article Three of the Northwest Ordinance, "The utmost good faith shall always be observed towards the Indians; their lands and property shall never be taken from them without their consent . . . but laws founded in justice and humanity shall, from time to time, be made, for preventing wrongs being done to them . . ." *Id.*

<sup>228</sup> See *supra* Parts II.B.2, III.A.1-2.

<sup>229</sup> See *supra* Part III.B.1-3. See also U.S. CONST. art. IV, § 3, cl. 2; Stephanie Simon, *Rock Climbers, Washoe Indians Clash Over Cave Rock*, L.A. TIMES, May 14, 1997, at A1 (suggesting that compromise is impossible because there is "no middle ground").

<sup>230</sup> Dean B. Suagee, *The Cultural Heritage of American Indian Tribes and the Preservation of Biological Diversity*, 31 ARIZ. ST. L.J. 483, 525-26 (1999).

<sup>231</sup> See *supra* Part IV.

<sup>232</sup> American Indian Religious Freedom Act of 1994, 42 U.S.C. § 1996; Exec. Order No. 13,007, 61 Fed. Reg. 26,771 (May 24, 1996).

<sup>233</sup> See *supra* notes 170-72, 222-25 and accompanying text.

<sup>234</sup> Telephone Interview with Park Spokesperson, National Park Service (Oct. 6, 1999).

*directly or indirectly, desecrate, destroy, disturb, inhibit, interfere, infringe upon, substantially alter or burden a Native American sacred site or the free exercise of traditional religious and cultural activities that are conducted at a sacred site.*<sup>235</sup>

B. *"Federal Activity" refers to any new or reauthorized projects, plans, or activities by federal agencies, including new phases of existing projects, but does not cover routine maintenance or ongoing and continuing projects that have been the subject of a final decision and where substantial funding or implementation has taken place.*<sup>236</sup>

C. *"Federal Agency" means any department, agency, or instrumentality of the United States.*<sup>237</sup>

D. *"Federal Land" includes any lands or interest in land owned or controlled by the United States, including leasehold interests held by the United States, except Indian trust lands.*<sup>238</sup>

E. *"Native American" or "Indian" or "Recognized Native American" refers to a member of an Indian or Alaska Native tribe, Nation, people, band, pueblo, village, group, or community that the Secretary of the Interior acknowledges to exist as an Indian tribe pursuant to Public Law Number 103-454, 108 Stat. 4791.*<sup>239</sup>

F. *A "Sacred Site" includes any specific, discrete, narrowly delineated location on Federal land that is identified by a Native American tribe or individual determined to be an appropriately authoritative representative of a Native American religion, as sacred by virtue of its established traditional religious, cultural or historical significance to, or*

<sup>235</sup> See, e.g., S. REP. NO. 103-411, at 9 (1994); 40 C.F.R. § 1508.8 (1999).

<sup>236</sup> See S. REP. NO. 103-411, at 9 (1994); IMPLEMENTATION, *supra*, note 25, at App. A. at § 3.3(D) (discussing tribal comments on adverse affects).

<sup>237</sup> See, e.g., The Native American Graves and Repatriation Act, 25 U.S.C. § 3001 (1994).

<sup>238</sup> See, e.g., The Native American Graves and Repatriation Act, 25 U.S.C. § 3001 (1994); Exec. Order No. 13,007, 61 Fed. Reg. 26,771 (May 24, 1996).

<sup>239</sup> See, e.g., The Native American Graves and Repatriation Act, 25 U.S.C. § 3001 (1994); Exec. Order No. 13,084, 63 Fed. Reg. 27,655 § 1(b) (1998); Exec. Order No. 13,007, 61 Fed. Reg. 26,771 (May 24, 1996); IMPLEMENTATION, *supra*, note 25, at App. A. § 3.3(B); Native American Relationships Policy, 47 Fed. Reg. 53,688-01 (1982); INDIAN, *supra*, note 172, at § III. (17)-(21).

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*ceremonial use by, a Native American religion; provided that the tribe or appropriately authoritative representative of an Indian religion has informed the agency of the existence of such a site.*<sup>240</sup>

G. *"Traditional Religious or Cultural Activity" includes any belief, act or practice that has been transmitted across generations and is identified by their Native American practitioners as necessary to the perpetuation of their religion and/or culture.*<sup>241</sup>

Commentary:

Article I clearly defines the material terms as used for purposes of this Act. Religion and culture have been defined together, rather than separately, because past acts using separate definitions have led to disagreements.<sup>242</sup> Other definitions are the result of the integration of past definitions for the purpose of creating a comprehensive definition.

ARTICLE II: ACCESS

*In managing federal lands, federal agencies have a duty to ensure the right of Native Americans to access<sup>243</sup> sacred sites in order to practice their traditional religious and cultural activities.<sup>244</sup> The right of Native Americans to access sacred sites also extends to the following situations:*

A. *If Native Americans require assistance to access a sacred site for purposes of traditional Native American religious and cultural activities, then the manager shall provide assistance.*<sup>245</sup>

B. *If the management of federal lands containing sacred*

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<sup>240</sup> See, e.g., Exec. Order No. 13,007, 61 Fed. Reg. 26,771 (May 24, 1996); S. REP. NO. 103-411, at 9 (1994); Native American Relationships Policy, 47 Fed. Reg. 53,688-01 (1982).

<sup>241</sup> See, e.g., Native American Relationships Policy, 47 Fed. Reg. 53,688-01 (1982).

<sup>242</sup> See, e.g., S. REP. NO. 103-411 (1994).

<sup>243</sup> See, e.g., 16 U.S.C.A. § 543f (1999); El Malpais National Monument and National Conservation Area General Provisions, 16 U.S.C. § 460uu-47(a) (1999); California Desert Protection Act of 1994 § 705(a), 16 U.S.C. § 410aaa-75 (1994).

<sup>244</sup> See H.R. REP. NO. 95-1308 at 1-2 (1978), reprinted in 1978 U.S.C.C.A.N. 1262.

<sup>245</sup> Telephone Interview with Park Spokesperson, National Park Service (Oct. 6, 1999). According to the Park Spokesperson, some sacred sites, such as those located at the bottom of the Grand Canyon, are difficult to access. *Id.* In such cases, the Park Service provides assistance to the Native Americans to access the sites. *Id.*

*sites requires permits to be issued before Native Americans may utilize federal lands for purposes of traditional Native American religious and cultural activities, then the permit requirements shall allow for the smallest practicable area for the minimum time period necessary for such purposes.*<sup>246</sup>

C. *If a federal action will adversely affect access to sacred sites or the privacy of traditional Native American religious and cultural activities, then the federal agency shall consult with Native American leaders to ensure the necessary access and privacy.*<sup>247</sup>

D. *No accommodation actions shall be taken if an undue hardship is imposed on the agency managing the federal land containing the pertinent Native American sacred site.*<sup>248</sup>

#### Commentary:

Article II grants federal agencies the power and duty to ensure the right of Native Americans to access sacred sites, as enumerated in the American Indian Freedom of Religion Act and Executive Order 13,007.<sup>249</sup> This Article also changes the current law in six ways. First, the Article encompasses both religion and culture to negate the characterization dilemma that has resulted.<sup>250</sup> Second, this Article provides for "activities" rather than "ceremonials" or "rites" to allow for incidents such as site visitation.<sup>251</sup> Third, this Article implicitly allows for access to both federal public and non-public lands to provide for sacred sites located on both.<sup>252</sup> Fourth, this Article addresses two concerns raised by the National Park Service relating to hard to access sacred sites and

<sup>246</sup> See, e.g., *INDIAN*, *supra* note 172, at III(12) (Proposed Draft 1999) (stating that the government should not require a Native American group to have a permit for access to sacred sites); *IMPLEMENTATION*, *supra* note 25, at 8 (discussing tribal opposition to the federal government imposing a permit system on religious practitioners' use of sacred areas).

<sup>247</sup> See, e.g., Native American Relationships Policy, 47 Fed. Reg. 53,688-01 (1982).

<sup>248</sup> See, e.g., *id.*; S. REP. NO. 104-363 (1996).

<sup>249</sup> See The American Indian Religious Freedom Act of 1978, 42 U.S.C. § 1996 (1994); Exec. Order No. 13,007, 61 Fed. Reg. 26,771 (May 24, 1996).

<sup>250</sup> Telephone Interview with Park Spokesperson, National Park Service (Oct. 6, 1999). See also The American Indian Religious Freedom Act of 1978, 42 U.S.C. § 1996 (1994); Exec. Order No. 13,007, 61 Fed. Reg. 26,771 (May 24, 1996).

<sup>251</sup> See, e.g., Exec. Order No. 13,007, 61 Fed. Reg. 26,771 (May 24, 1996).

<sup>252</sup> *Id.* See, e.g., 16 U.S.C. § 410aaa-75 (1999) (providing only for access to public lands); *INDIAN*, *supra* note 172, at § III(1) (allowing for access to areas otherwise closed to the general public).

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parks that require use permits.<sup>253</sup> Fifth, this Article mandates consultation for actions adversely affecting access to sacred sites, which was unenforced in both AIRFA and Executive Order 13,007.<sup>254</sup> Finally, this Article provides an exception for accommodation actions which impose an undue hardship on the federal agency.

ARTICLE III: ACCOMMODATION

*Federal land managers shall accommodate traditional Native American religious and cultural activities that occur at sacred sites located on federal lands.*<sup>255</sup> *The extent of accommodation required shall be determined on a case-by-case basis in accordance with the following conditions:*<sup>256</sup>

A. *If exclusive use of a sacred site located on federal land is necessary in order to protect the privacy and solitude of the traditional religious and cultural activity, then the manager shall temporarily close to the general public use, the smallest practicable area for the minimum time period necessary for such purposes. Temporary closure shall be granted only upon request by a leader of a recognized Native American tribe.*<sup>257</sup>

B. *If certain public uses of federal land adversely affect the privacy and solitude of traditional Native American religious and cultural activities taking place at a sacred site, then the manager may enact a voluntary ban on the activity to*

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<sup>253</sup> See *supra* notes 245-46 and accompanying text.

<sup>254</sup> See *supra* notes 170-72, 222-25 and accompanying text.

<sup>255</sup> See, e.g., INDIAN, *supra* note 172, at § 1.

<sup>256</sup> Telephone Interview with Monument Spokesperson, Devils Tower National Monument (Oct. 4, 1999); Telephone Interview with Park Spokesperson, National Park Service (Oct. 6, 1999). According to a spokesperson for Devils Tower National Monument and a spokesperson for the National Park Service, each sacred site requires different levels of accommodation. *Id.* In nine out of ten sites, the public or tourists are not likely to be there since the Native American ceremonies are held away from the public or government view. *Id.* For instance, at least eight tribes worship at sacred sites located at the bottom of the Grand Canyon. *Id.* In Chaco Canyon, the National Park Service is not even aware of most Native American religious or cultural activity taking place on the lands due to the breath of areas. *Id.* Other places, such as sacred sites at Devils Tower, are within the public view. *Id.*, see also National Park Service, Final Climbing Management Plan (1995); see IMPLEMENTATION, *supra* note 25, at 7-9 (discussing tribal concerns relating to access of sacred sites due to the expansive geographic areas of some sites).

<sup>257</sup> See, e.g., 16 U.S.C. § 460jjj-1 (1999); 16 U.S.C. § 410pp-6 (1999); 16 U.S.C. § 410aaa-75 (1999); 16 U.S.C. § 543f (1999); El Malpais National Monument and National Conservation Area General Provisions, 16 U.S.C. § 460uu-47 (1999); INDIAN, *supra* note 172, at §§ I, III(5)-(11).

*accommodate the Native American's ability to worship. A voluntary ban should affect the smallest practicable area for the minimum time period necessary for such purposes.<sup>258</sup> In such cases, the development of a cross-cultural education plan is encouraged in order to facilitate a better understanding of the voluntary ban.<sup>259</sup>*

*C. If a federal action will adversely affect the privacy of traditional Native American religious and cultural activities, then the federal agency shall consult with Native American leaders to ensure the necessary access and privacy.<sup>260</sup>*

*D. No accommodation actions shall be taken if an undue hardship is imposed on the agency managing the federal land containing the pertinent Native American sacred site<sup>261</sup> or if such practices violate laws concerning protection of the environment or endangered species.<sup>262</sup>*

#### Commentary:

Article III enforces the policies of accommodating and protecting the rights of Native Americans to freely engage in traditional religious and cultural activities at sacred sites, as contained in the American

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<sup>258</sup> See Paul Watson, *Respect Our Rock*, THE TORONTO STAR, March 9, 1998, at A12. Aboriginal guardians request that visitors not climb the famed Australian sacred rock, Uluru or Ayer's Rock. *Id.* See also *Bear Lodge Mult. Use. Ass'n v. Babbitt*, 175 F.3d 814 (10th Cir. 1999) (using a voluntary climbing ban); Christopher Smith, *Devils Tower is Sacred to Plains Indians: Plains Indians Score Religious Victory Over Devils Tower Climbers*, THE SALT LAKE TRIBUNE, May 4, 1999, at A1. Land managers at Rainbow Bridge National Monument use a voluntary ban to discourage people from walking underneath the Monument, which is sacred to Native Americans. *Id.*

<sup>259</sup> See, e.g., *Bear Lodge Multiple Use Ass'n v. Babbitt*, 175 F.3d 814 (10th Cir. 1999). Devils Tower monument managers use rangers to ask people not to climb and to inform visitors of the reasons for the voluntary ban. *Id.* at 819. Additionally, the Tower has signs asking people not to climb as well as a cultural center. *Id.* at 820. See Paul Watson, *Respect Our Rock*, THE TORONTO STAR, March 9, 1998, at A12. At Uluru in Australia, a pamphlet is available to tourists to explain the religious significance of the Rock and explain to tourists what activities are considered disrespectful to the tribes. *Id.* Uluru also has cultural development projects and a cultural center for visitor education. *Id.* The intent behind cross-cultural education is to lead the public to a better understanding to encourage the success of the voluntary ban. *Id.*

<sup>260</sup> See, e.g., Native American Relationships Policy, 47 Fed. Reg. 53,688-01 (Nov. 26, 1982).

<sup>261</sup> See, e.g., Native American Relationships Policy, 47 Fed. Reg. 53,688-01 (Nov. 26, 1982); S. REP. NO. 104-363 (1996).

<sup>262</sup> See, e.g., Native American Relationships Policy, 47 Fed. Reg. 53,688-01 (Nov. 26, 1996).

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Indian Religious Freedom Act and Executive Order 13,007.<sup>263</sup> This Article also incorporates accommodation provisions contained in National Park General Plans.<sup>264</sup> This Article furthers these provisions by establishing the authority and duty of federal agencies to accommodate access to sacred sites and as well as accommodate traditional religious and cultural activities at sacred sites, unless such accommodation imposes an undue hardship on the federal agency. Additionally, this Article narrows the exceptions from all laws to laws that protect the environment or endangered species to remedy past agency actions that imposed more restrictive regulations than necessary.<sup>265</sup>

ARTICLE IV: PROTECTION

*If a proposal for a federal action, plan, policy or regulation will adversely affect a Native American sacred site, then:*

A. *The federal agency shall provide reasonable formal notice of the proposed action, plan, policy or regulation to an appropriate Native American tribal leader.*<sup>266</sup>

B. *The federal agency shall facilitate consultation with and shall take recommendations from appropriate Native American leaders regarding methods of protecting and conserving the sacred site.*<sup>267</sup> *No action is to be taken to approve or commence the proposed activity until reasonable attempts at consultation efforts have occurred.*<sup>268</sup>

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<sup>263</sup> See The American Indian Religious Freedom Act of 1978, 42 U.S.C. § 1996 (1999); Exec. Order No. 13,007, 61 Fed. Reg. 26,771 (May 24, 1996).

<sup>264</sup> See, e.g., 16 U.S.C. § 460jjj-1 (1999); 16 U.S.C. § 410pp-6 (1999); 16 U.S.C. § 410aaa-75 (1999); 16 U.S.C. § 543f (1999); El Malpais National Monument and National Conservation Area General Provisions, 16 U.S.C. § 460uu-47 (1999).

<sup>265</sup> See H.R. REP. NO. 95-1308 (1978).

<sup>266</sup> Exec. Order No. 13,007, 61 Fed. Reg. 26,771 (May 24, 1996); S. REP. NO. 103-411 (1994); IMPLEMENTATION, *supra* note 25 (discussing tribal concerns of receiving notification early in the process); IMPLEMENTATION, *supra* note 25, at app. C, 1-7 (discussing tribal comments, concerns, and recommendations relating to the point of contact between the federal agency and the tribe).

<sup>267</sup> S. REP. NO. 103-411 (1994). See IMPLEMENTATION, *supra* note 25 (discussing a federal-tribal consultation plan committed to the Federal-tribal consultation process at each stage of implementation). Tribal leaders have expressed concerns that political leaders may lack expertise in Native American religious matters and have suggested that political leaders defer to traditional leaders concerning sacred site issues. *Id.* at 8.

<sup>268</sup> See, e.g., El Malpais National Monument and National Conservation Area General Provisions, 16 U.S.C. § 460uu-47 (1999); 16 U.S.C. § 460jjj-1 (1999); Exec. Order No. 13,007, 61 Fed. Reg. 26771 (May 24, 1996).

C. *The federal agency shall consider the following in its decision-making process:*<sup>269</sup>

1. *The adverse effects of the proposed action, plan, policy or regulation;*
2. *Alternatives to the proposed action, plan, policy or regulation; AND*
3. *The adverse effects of the alternatives.*

D. *The federal agency shall prepare a record of its decision,*<sup>270</sup> *that shall include the following:*

1. *Any adverse effect of the proposed action, plan, policy or regulation;*<sup>271</sup>
2. *Alternatives considered and/or proposed;*<sup>272</sup> *AND*
3. *Support that the decision has a compelling governmental interest and is the least intrusive means available.*<sup>273</sup>

E. *The federal agency may provide for a joint management plan with the affected Native American tribe or may train and hire Native Americans to manage, protect, preserve, maintain or conserve the sacred site.*<sup>274</sup>

F. *The federal agency shall not reveal to the general public, information provided pertaining to the confidential location of a Native American sacred site or confidential*

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<sup>269</sup> See, e.g., National Environmental Policy Act of 1969, § 102, 42 U.S.C. § 4321 (1994).

<sup>270</sup> S. REP. NO. 103-411 (1994); see, e.g., IMPLEMENTATION, *supra* note 25, at 22 (discussing implementation guidelines for the Office of Environmental Policy and Compliance which require an affirmative statement with reasons for proposed Departmental projects of actions with unavoidable, minimal, or no impact on sacred sites); IMPLEMENTATION, *supra* note 25, at App. A § 3.5(B)(1).

<sup>271</sup> American Indian Religious Freedom Act Amendments of 1994, Pub. L. No. 103-244, 108 Stat. 3125; National Environmental Policy Act of 1969, § 102, 42 U.S.C. § 4321 (1994).

<sup>272</sup> National Environmental Policy Act of 1969, § 102, 42 U.S.C. § 4321 (1994).

<sup>273</sup> See, e.g., American Indian Religious Freedom Act Amendments of 1989, S. 1124, 101st Cong., The Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb to 2000bb-4.

<sup>274</sup> See, e.g., 16 U.S.C. § 410pp-5 (1999); S. REP. NO. 104-363 (1996); S. REP. NO. 103-91 (1993); S. REP. NO. 102-181 (1991); S. REP. NO. 101-307 (1990); H.R. REP. NO. 95-1308 (1978).

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*Native American religious and ceremonial activities.*<sup>275</sup>

Commentary:

The purpose of Article IV is to ensure more adequate protection against federal actions that adversely affect Native American sacred sites. This Article promotes a more informed decision-making process by requiring an analysis of possible adverse effects to sacred sites at the proposal stage of a federal action as well as encouraging Native American involvement in the analysis.<sup>276</sup> This Article also functions as an enforcement mechanism of Executive Order 13,007's policy to protect Native American sacred sites<sup>277</sup> in three ways: 1) requiring a strict scrutiny justification for federal actions that substantially burden Native Americans right to freely exercise their religions;<sup>278</sup> 2) requiring a record of decision and setting a burden of proof standard to provide a basis for administrative or judicial review and relief; and 3) providing a statutory exemption from the Freedom of Information Act to protect the confidentiality of sacred site locations.<sup>279</sup>

ARTICLE V: ENFORCEMENT

A. *Federal agencies shall establish an administrative review process to be utilized when a Native American petitioner claims that one or more of the above duties has been violated. An aggrieved party may file a civil suit only after administrative remedies have been exhausted.*<sup>280</sup>

B. *Any person who intentionally damages a known*<sup>281</sup>

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<sup>275</sup> See, e.g., S. REP. NO. 103-411 (1994); Exec. Order No. 13,007, 61 Fed. Reg. 26,771 (May 24, 1996); IMPLEMENTATION, *supra* note 25 (discussing tribal recommendations that they be required to provide general and not specific, location information).

<sup>276</sup> See also First Covenant Church of Seattle v. Seattle, 840 P.2d 174 (Wash. 1992) (stating that the Free Exercise Clause encompasses protection of sites of worship). According to the court, the church building itself is an expression of religious belief entitled to protection. *Id.* at 182.

<sup>277</sup> Exec. Order No. 13,007, 61 Fed. Reg. 26,771 (May 24, 1996).

<sup>278</sup> See *supra* notes 180-92 and accompanying text for a discussion of the Religious Freedom Restoration Act, which does not currently apply to sacred site religions.

<sup>279</sup> See IMPLEMENTATION, *supra* note 25 (discussing the Freedom of Information Act's constraint on the Department's ability to guarantee confidentiality and the need for a statutory exemption from the Act).

<sup>280</sup> See, e.g., IMPLEMENTATION, *supra* note 25, App. C, at 16-17 (discussing tribal concerns, comments, and recommendations regarding dispute resolution).

<sup>281</sup> *Id.* at App. B (cautioning Park managers that sacred sites may exist on lands they manage which have not been identified by Indian tribes or may not yet exist because sacred sites are created through the practice of the Indian religion).

*sacred site or intentionally releases information with the knowledge that it is confidential, in violation of this Act or federal land management regulations, shall be criminally punished by a fine, imprisonment, or both.*<sup>282</sup>

Commentary:

The purpose of Article V is to create a cause of action to enforce the above Articles and the policies of the American Indian Freedom of Religion Act and Executive Order 13,007.<sup>283</sup> This Article strengthens the protection of sacred sites and the free exercise of religion by Native Americans. Section B of this Article provides exceptions for unregulated federal and recreational activities that damage sacred sites.

Commentary on Constitutionality:

The Model Act is within the confines of the First Amendment Establishment Clause.<sup>284</sup> The Establishment Clause protects against the establishment of religion by the government.<sup>285</sup> This Constitutional protection conjointly bans the government from giving preference to a particular religion and promotes the equality of all religions.<sup>286</sup> Accordingly, the government may not give preference to the Christian religion.

The Model Act functions to ensure three guaranties to Native Americans: 1) the ability to access sacred sites;<sup>287</sup> 2) the ability to exercise their religion without disruption;<sup>288</sup> and 3) the protection of their sites of worship.<sup>289</sup> These three assurances are comparable to assurances given to Christian religious practitioners whose sites of worship are also located on federal lands.

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<sup>282</sup> See, e.g., American Indian Religious Freedom Act Amendments of 1994, Pub. L. No. 103-244, 108 Stat. 3125; S. REP. NO. 103-411 (1994); IMPLEMENTATION, *supra* note 25 (discussing tribal recommendations that federal agencies protect against those who exploit or abuse confidential knowledge).

<sup>283</sup> American Indian Religious Freedom Act of 1994, 42 U.S.C. § 1996; Exec. Order No. 13,007, 61 Fed. Reg. 26,771 (May 24, 1996). See also *Lockhart v. Kenops*, 927 F.2d 1028, 1036 (8th Cir. 1991) (stating that AIRFA has no cause of action for violations).

<sup>284</sup> See *supra* notes 81-103 and accompanying text for a discussion of the Establishment Clause.

<sup>285</sup> See *supra* notes 81-103 and accompanying text.

<sup>286</sup> See also *Larson v. Valente*, 456 U.S. 228, 244 (1982).

<sup>287</sup> See *supra* Article II of Model Act.

<sup>288</sup> See *supra* Article III of Model Act.

<sup>289</sup> See *supra* Article IV of Model Act.

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Christians have the ability to access sites of worship located on federal land. Tumacacori National Historic Park in southern Arizona contains a Franciscan church built in the 1700's that is now a part of Park Service land.<sup>290</sup> A High Mass is held annually in the church in addition to weekly services.<sup>291</sup> Worshippers are able to access the church and, in some cases, park fees are waived for such events.<sup>292</sup> This privilege is comparable to allowing Native Americans the ability to access sacred sites located on federal lands for traditional religious and cultural purposes.<sup>293</sup>

Christians also have the privilege of the undisturbed free exercise of religion in churches located on federal lands. Each year at the San Antonio Missions in Texas, the performance of a Christian morality play, *Los Pastores*, is sponsored by the National Park Service.<sup>294</sup> A Park Service brochure requires visitors to the Missions to be considerate: "Parish priests and parishioners deserve your respect; please do not disrupt their services."<sup>295</sup> Additionally, the National Park Service has banned recreational activities at Arlington National Cemetery in Virginia in order to preserve the solemnity of the site.<sup>296</sup> Further, the Ebenezer Baptist Church in Georgia is now a National Historic site that is managed by the National Park Service.<sup>297</sup> The Church, where Martin Luther King, Jr. was a co-pastor with his father, is open to the public, except during special services when the sanctuary is mandatorily closed to the public.<sup>298</sup> Further, in 1996, a church located on Cumberland Island was closed by the National Park Service for the marriage ceremony of John F. Kennedy, Jr.<sup>299</sup> These privileges are comparable to allowing

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<sup>290</sup> See Tumacacori National Historic Park Guide, *High Mass* (2000) at [http://www.nps.gov/tuma/special\\_events.htm](http://www.nps.gov/tuma/special_events.htm).

<sup>291</sup> *Id.*

<sup>292</sup> *Id.*

<sup>293</sup> See *supra* Article II of Model Act.

<sup>294</sup> Charles Levendosky, *Why Not Accommodate Indians at Devils Tower as We Accommodate Christians Elsewhere?*, DENVER ROCKY MOUNTAIN NEWS, May 18, 1997, at 1B. The play was used by Franciscan missionaries to teach the tenets of Christianity to the local Native Americans. *Id.*

<sup>295</sup> *Id.*

<sup>296</sup> *Id.* The National Park Service has banned recreational activities at Arlington National Cemetery in Virginia. *Id.* The Cemetery, known as "our nation's most sacred shrine" has not been challenged as an unconstitutional establishment of religion. *Id.*

<sup>297</sup> *Id.*

<sup>298</sup> *Id.*

<sup>299</sup> Levendosky, *supra* note 172, at A17. See Telephone Interview with Park Spokesperson, National Park Service (Oct. 6, 1999). According to a Park Spokesperson, land managers encounter trouble with the Establishment Clause when closing federal land for a religious reason. *Id.*

federal agencies to take reasonable measures to ensure the privacy and solitude of traditional native American religious and cultural activities taking place at a sacred site.<sup>300</sup>

Christians have federal protection of religious sites of worship located on federal lands. The National Park Service manages numerous churches located on federal lands, several as historic sites.<sup>301</sup> This privilege is comparable to ensuring protection against federal actions that adversely affect Native American sacred sites.<sup>302</sup>

If such rights are allowed to Christians, it would be a violation of the Establishment Clause for the government not to allow such rights to Native American religious practitioners. Such a double standard would give the appearance that the government is establishing or favoring the Christian religion.<sup>303</sup> It follows that a Model Act which assures such rights to Native American religious practitioners is not a violation of the Establishment Clause.

The Model Act also conforms to the *Lemon* test.<sup>304</sup> The purpose of the Act is to accommodate and protect religious exercise and not to promote the Native American religion.<sup>305</sup> Additionally, this Act does not command absolute accommodation, in compliance with *Thornton*.<sup>306</sup> The effect of the Act is not coercive because the public is not expected to conform to the Native American religion.<sup>307</sup> Finally, the Act does not foster excessive entanglement between the government and religion because the role of the government is custodial in nature.<sup>308</sup>

The Model Act provision requiring that a federal agency must offer support that a decision which adversely affects a sacred site has a compelling governmental interest and is the least intrusive means

<sup>300</sup> See *supra* Article III of Model Act.

<sup>301</sup> See *supra* note 290. The Ebenezer Baptist Church in Georgia is now a National Historic site that is managed by the National Park Service. *Id.*

<sup>302</sup> See *supra* Article IV of Model Act.

<sup>303</sup> See *Levendosky*, *supra* note 294, at 1B (demonstrating that this lack of protection of the Native American religion sharply contrasts to treatment for majority religions, creating a "double standard"). See *supra* notes 81-103 and accompanying text for a discussion of the Establishment Clause.

<sup>304</sup> See *supra* notes 91-96 and accompanying text for a discussion of the requirements of *Lemon v. Kurtzman*.

<sup>305</sup> *Id.* See also notes 139-47 and accompanying text for a similar analysis in *Bear Lodge*.

<sup>306</sup> 472 U.S. 703 (1985). See *supra* notes 102-03 and accompanying text.

<sup>307</sup> See *supra* notes 90-96, 139-47 and accompanying text.

<sup>308</sup> *Id.*

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available does not violate RFRA. RFRA was overruled by *Bornes* as applied to the States.<sup>309</sup> Courts, however, have held that *Boerne* did not invalidate RFRA as applied to the federal government and to federal law.<sup>310</sup> As such, this Model Act is constitutional as applied to the federal government.

In conclusion, the Model Act does not violate the Establishment Clause because the Act promotes the equality of all religions, passes the *Lemon* test, and does not violate RFRA.

V. CONCLUSION

The current form of religious discrimination against Native Americans in the twentieth century involves lack of protection of Native American sacred sites and accommodation of Native American religious and cultural ceremonies on federal lands. Native American sacred sites and associated ceremonies face not only threats from tourist interference, but threats from government management of federal lands as well. To combat this problem, Native Americans need an enforceable law mandating accommodation of their free exercise rights. There is no current general law providing effective and enforceable free exercise protection to Native American sacred site worship because of conflicts with the Establishment Clause. This Note provides a model Act to enforce and supplement the American Indian Freedom of Religion Act of 1978 and Executive Order 13,007 within the confines of the Free Exercise and Establishment Clauses. The Model Act mandates federal agency protection and accommodation of Native American sacred sites and associated activities as well as creating a means of enforcement. Thus, the adoption of this Act will decrease current discrimination against and burdens on Native American sacred site worship.

Shawna Lee

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<sup>309</sup> See *supra* notes 186-87 and accompanying text.

<sup>310</sup> See *supra* note 188 and accompanying text.