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PROTECTION FOR INDIAN SACRED SITES

The Honorable William A. Fletcher
U.S. Court of Appeals for the Ninth Circuit

34TH ANNUAL INDIAN LAW SYMPOSIUM
RESTATEMENT OF THE LAW OF AMERICAN INDIANS
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I would like to speak today about protection for Indian sacred sites. I am both honored and humbled to have been asked to address this group. Many of you know more about the topic than I do. I have nowhere near the depth of knowledge of scholars such as Professor Kristen Carpenter, Michael McNally, and the late Professor Vine Deloria. They have written extensively and thoughtfully on the topic I am about to address. So I speak to you with some trepidation.

I begin by thanking a number of people.

First, those responsible for the preparation of the Restatement. They are the reason we are here. Professor Matthew Fletcher, from whom you have just heard, is the Reporter. Professor Wenona Singel and Kaighn Smith are the Associate Reporters. Along with many others, I was part of the Advisory Group for the Restatement, so I was able to see firsthand the amount of superb work they put into the project.

Second, Professor Eric Eberhard, who has put together this wonderful conference.

Third, and here my thanks get more personal, Judge Stanley Weigel. Judge Weigel sat for many years on the federal district bench in San Francisco. My first job out of law school was as his law clerk. Judge Weigel was an old-fashioned Republican, with an old-fashioned Republican's sense of justice. He was the district judge who (some years after I worked for him) decided the *Lyng*¹ case, to which I will return. He sustained the claim of the Indians.

Fourth, Judge William Canby of the Ninth Circuit. Judge Canby knows, far and away, more Indian law than any other federal judge. When I became a judge over twenty years ago, Bill sent me a copy of his Nutshell

1. *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988).

on Indian Law. I sent him a polite note thanking him; but I didn't yet know how much I owed him. I confess—though maybe I am giving away a professional secret—that I call Bill when I have a particularly tough question in an Indian law case. Because, until I've checked with Bill, I'm not confident I understand the question. Judge Canby wrote two separate opinions for the Ninth Circuit affirming Judge Weigel's decision in *Lyng*.

Finally, Justice Brennan. My second job out of law school was as a law clerk for Justice Brennan. Justice Brennan dissented in *Lyng*.

My first professional exposure to Indian law was when I clerked for Justice Brennan during October Term 1976. I did the first draft of *Delaware Tribal Business Committee v. Weeks*.² That case was an equal protection challenge brought by the Kansas Delawares to a congressional distribution of funds awarded for a breach of a treaty. The long-term importance of the case, if any, is that it repeats what the Court had told us three years earlier in *Morton v. Mancari*³ that Congress' power over Indian affairs is limited by the Constitution, despite the Court's language to the contrary in 1903 in the *Lone Wolf*⁴ case. I had no idea at the time that this part of the Court's opinion was important.

For those of you who have ever wondered whether Justice Brennan wrote his own opinions, I can tell you this. The Justice stopped by my desk on Friday evening on his way home, complimenting me (generous man that he was) on my draft. When he came back into chambers on Monday morning, the only thing left was the factual narrative. All, and I mean all, of the legal analysis was new, written out by the Justice, by hand, on a yellow pad.

I am not an expert on Free Exercise law, though I have read the major cases. Nor am I an expert on Indian religions, though I have read a fair amount, much of it in preparation for this talk. Nor am I an expert on other religions. My academic specialties are legal history, jurisdiction, and procedure. For purposes of today's topic, I am a generalist. That is—and I am being redundant—I am a federal judge.

The history of the U.S. government's treatment of Indian religious practices is, to use a word that dramatically understates the proposition, fraught. It is a history from which the tribes have never fully recovered. In the late 1700s, Congress directed the establishment of Christian missions among the Indian tribes.⁵ Government-sanctioned and sponsored

2. 430 U.S. 73 (1977).

3. 417 U.S. 535 (1974).

4. *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903).

5. Alison M. Dussais, *Ghost Dance and Holy Ghost: The Echoes of Nineteenth-Century Christianization Policy in Twentieth-Century Native American Free Exercise Cases*, 49 STAN. L. REV. 773, 777 (1997).

Christian proselytizing continued throughout the 19th and into the early 20th century. A familiar story in Washington State, where I grew up, is that of the Whitman Mission near what is now Walla Walla. The core of the somewhat complex story is that Marcus and Narcissa Whitman established their mission in the 1830s. Members of the Cayuse and Umatilla tribes contracted measles, almost certainly from blankets supplied at the mission, and many died. In a form of retaliation, tribal members killed Marcus and Narcissa in 1847. Far from bringing religious enlightenment, the Whitmans brought death.

Immediately after the Civil War, the U.S. government established what it called the “Peace Policy,” designed to “civilize” the western tribes and to protect them from some of the most severe violence of white settlers.⁶ Part of the policy was government financial support of churches and religiously affiliated schools. Direct government funding of sectarian Indian “contract” schools ended in the 1890s, but religious instruction continued in government schools on an ostensibly nondenominational basis. That’s an odd use of the word “nondenominational” in this context when the only religion being taught was the white man’s religion. Indian religion was not taught. Indian religion was disparaged. Violence can be physical. It can also be cultural.

In 1883, the U.S. government banned Indian dances, including purely religious dances such as the sun dance.⁷ In the winter of 1888–1889, the Lakota Sioux heard rumors of an Indian messiah. Several Sioux traveled to the Paiute Reservation in western Nevada to meet a Paiute named Wovoka, the ostensible messiah, who taught them the “Ghost Dance” religion. Its primary tenets were: “You must not hurt anybody or do harm to anyone. You must not fight. Do right always.”⁸ Wovoka predicted that the buffalo would return and that dead Indians would come back to life. Wovoka’s teachings were viewed by many non-Indians as a threat.

The Sioux returned to the Sioux reservations and taught the Ghost Dance and its religion. Most of you know, all too well, what is coming. The government sent troops to suppress the Ghost Dance. By November 1890, half of the infantry and cavalry of the U.S. Army were concentrated on Sioux reservations. On December 29, 1890, at Wounded Knee Creek on the Pine River Reservation, U.S. soldiers opened fire on a gathering of Sioux, killing 300 men, women and children in the snow.⁹

We cannot alter this history of which I have only given you an

6. *Id.* at 777 et seq.

7. *Id.* at 788.

8. *Id.* at 794.

9. *Id.* at 797–98.

abbreviated version. Like it or not, it is part of us and of our mutual heritage. But perhaps we can move forward. My topic is the possibility of moving forward with respect to Indian sacred sites.

For our purposes, there is one central Supreme Court Indian religion case, the *Lyng*¹⁰ case, decided in 1988. Indians in Northern California—the Yurok, Karok and Tolowa, all of them members of federally enrolled tribes (I can't simply say three tribes, for the Tolowa were members of several tribes)—sought to enjoin the construction of a logging road in the Six Rivers National Forest. The road would pass near Chimney Rock, a part of the National Forest that was sacred to the Indians who used this “high country,” in the words of Judge Weigel, “to communicate with the ‘great creator,’ to perform rituals, and to prepare for specific religious and medicinal ceremonies.”¹¹ Judge Weigel concluded that “such use of the high country is ‘central and indispensable’ to the Indian plaintiffs’ religion,” and the court enjoined the construction of the road.¹²

Judge Canby, writing for the Ninth Circuit, affirmed. He wrote: “The record . . . amply supports, indeed virtually compels, the conclusion that logging and the construction of logging roads would be utterly inconsistent with the Indians’ religious practices.”¹³ The Supreme Court reversed. The Court wrote:

The Government does not dispute, and we have no reason to doubt, that the logging and road building projects at issue in this case could have devastating effects on traditional Indian religious practices Even if we . . . accept the Ninth Circuit’s prediction, according to which the . . . road will “virtually destroy the . . . Indians’ ability to practice their religion,” . . . the Constitution simply does not provide a principle that could justify upholding respondents’ legal claims.¹⁴

The Court continued, “Whatever rights the Indians may have to the use of the area, . . . those rights do not divest the Government to use what is, after all, *its* land.”¹⁵ The Court italicized the word “*its*.” *Its* land. The government’s land.

Let that sink in for a moment. Even if building the road will “virtually

10. *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439 (1988).

11. *Nw. Indian Cemetery Protective Ass’n v. Peterson*, 565 F. Supp. 586, 594 (N.D. Cal. 1983), *aff’d in part, vacated in part*, 764 F.2d 581 (9th Cir. 1985), *on reh’g*, 795 F.2d 688 (9th Cir. 1986), *rev’d sub nom.* *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439 (1988).

12. 764 F.2d at 584.

13. 795 F.2d at 692.

14. *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 451–52 (1988) (quoting *Nw. Indian Cemetery*, 795 F.2d at 693).

15. *Id.* at 453 (emphasis in original).

destroy” the Indians’ ability to practice their religion, they have no claim under the Free Exercise Clause of the First Amendment.¹⁶ The reason? They have no claim because the land belongs to the government. A government that took the land from them by force. This land is the government’s land. I can sing the next line. We all know the song. In this context it is bitter-sweet: This land is our land. More bitter than sweet. This is not your land. This is the Government’s land.

What can be done to protect and foster Indian religions and religious practices? What tools are available?

First, what about litigation under the Free Exercise Clause and its statutory offshoot, the Religious Freedom Restoration Act, “RFRA”?¹⁷

The *Lyng* case was not a surprise. A series of Free Exercise cases before *Lyng* in the lower courts had reached the same conclusion. For example, in 1980, the Sixth Circuit, in *Sequoyah v. TVA*,¹⁸ had allowed the flooding of sacred sites behind the Tellico Dam. The Endangered Species Act, protecting the infamous snail darter, could stop the Tellico Dam. But the Free Exercise Clause could not.

In 1980, the Tenth Circuit, in *Badoni v. Higginson*,¹⁹ had allowed the flooding behind the Glen Canyon Dam, covering sacred sites near Rainbow Bridge.

In 1983, the Eighth Circuit, in *Crow v. Gullet*,²⁰ had allowed the development of a state park at sacred Bear Butte at the edge of the Black Hills in South Dakota.

The pattern continued after *Lyng*.

In 2008, in the *Navajo Nation*²¹ case, the Ninth Circuit held en banc that the use of treated sewage effluent to make artificial snow for a commercial ski area on the sacred San Francisco Peaks in Arizona did not constitute a “substantial burden” under RFRA. Even though the evidence in the case was extensive and undisputed, the lack of purity—not merely physical but also spiritual—of the water on the peaks after it had been treated sewage effluent would prevent the various tribes surrounding the peaks from practicing their religion. As many of you know, I dissented.

In the long-running Standing Rock litigation over the Dakota Access Oil Pipeline, the Cheyenne River Tribe objected to the pipeline under RFRA on the ground that it would pass under a lake whose waters were

16. *Nw. Indian Cemetery*, 795 F.2d at 693.

17. Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1.

18. *Sequoyah v. Tenn. Valley Auth.*, 620 F.2d 1159 (6th Cir. 1980).

19. *Badoni v. Higginson*, 638 F.2d 172 (10th Cir. 1980).

20. *Crow v. Gullet*, 706 F.2d 856 (8th Cir. 1983).

21. *Navajo Nation v. U.S. Forest Service*, 535 F.3d 1058 (9th Cir. 2008) (en banc).

used in religious ceremonies.²² In 2017, the district court held that the pipeline did not impose a substantial burden under RFRA.²³

Sacred site Free Exercise and RFRA cases very are hard—verging on impossible—to win. One reason is that the First Amendment, as now understood, does not match well with Indian religious practices and sacred sites. The Amendment was written and adopted with Christian beliefs and practices in mind. It was a product of the religious wars and conflicts in Europe and Great Britain. The conflicts were largely between Protestants and Catholics, but also, in Great Britain, between the Church of England and Protestant sects.

Unlike Christian religions that focus on individual faith and salvation, Indian religions are collective, tied to life in the tribe, indeed to the very existence of the tribe. While there are of course differences among Indian religions—how could it be otherwise given the vast expanse of North America—there are some generalizations that hold true. Though they take different forms, Indian religious beliefs and practices are not separate from other aspects of Indian life. Deities, nature, and humans—including human government—are seen as part of a harmonious integrated whole.

Further, some Indian religious beliefs and practices seem odd to outsiders. In the *Navajo Nation* case, a primary objection of the Navajos was that the water—the treated sewage effluent—had passed through mortuaries.²⁴ This objection seems odd to an outsider, who is more likely to focus on fecal matter and germs. In my dissent, I analogized putting treated sewage effluent on the sacred peaks to putting such treated effluent in a baptismal font, in an effort to persuade my colleagues of the injury to the Navajo religious practices that required pure water. The analogy failed to persuade them. But, of course, the analogy was narrow and misleading. The measure of a religion, and of a burden imposed on that religion, should be understood in the terms of that religion, not limited to what might be considered a burden on another religion. We need to protect the religions as they exist, not only when they are analogous to Christian practices.

Finally, and this is a crucial difference, Indian religious practices are tied to specific sacred places. There are sacred places in Judeo-Christian religions, but they are in the Middle East. Indian sacred sites are here. Protecting them would interfere with other uses of the land, much of it government land. It is hard to escape the suspicion in many of the sacred site cases that, because of that consequence, the defendants, and

22. *Standing Rock Sioux Tribe v. U.S. Army Corp. of Engineers*, 239 F.Supp.3d 77 (D.D.C. 2017).

23. *Id.* at 91–100.

24. *Navajo Nation*, 535 F.3d at 1103 (W. Fletcher, J., dissenting).

sometimes the judges, simply did not want to understand and sympathetically embrace Indians' beliefs and practices. I am reminded of Upton Sinclair's cynical, but accurate, crack: "It is difficult to get a man to understand something when his salary depends on his not understanding it."²⁵

Second, what about statutes other than RFRA? Several existing statutes are focused specifically on Indians: The American Indian Religious Freedom Act ("AIRFA"),²⁶ the Native American Graves Protection and Repatriation Act ("NAGPRA")²⁷, and the Eagle Feather law²⁸ (really an exception to two laws restricting possession of eagle feathers and parts). But these laws have limited utility, AIRFA because it does not provide a cause of action, as the Court in *Lyng* was at pains to remind us, and NAGPRA and the Eagle Feather law because of their limited scope.

The Antiquities Act of 1906²⁹ has been used to designate a few sacred sites. The National Historic Preservation Act³⁰ has also been useful in designating sacred sites as National Historic Landmarks, but the Act requires only consultation. It does not dictate any particular result. In the *Navajo Nation* litigation, protection was sought under the Historic Preservation Act, to no avail. The National Environmental Policy Act ("NEPA")³¹ can sometimes be useful, but like the Historic Preservation Act,³² NEPA does not require any particular result. It requires only that alternatives be analyzed and considered. In the *Navajo Nation* litigation, protection was sought under NEPA, also to no avail. Further, and this is important, the focus of these statutes is not on Indian sacred sites. The protection sometimes provided to sacred sites is an incidental effect rather than the central purpose of the statutes.

What about a new statute, one that does not now exist? A statute that specifically focuses on Indian sacred sites. A statute that requires more than consultation and consideration. A statute that sets out criteria for the designation of a site as sacred with the result, if the criteria are satisfied, that the site must be so designated. Not may be, but must be. There would be numerous advantages to proceeding in this way. The legislative process that would produce the statute would be an echo of the "behind the veil"

25. Upton Sinclair, I, CANDIDATE FOR GOVERNOR: AND HOW I GOT LICKED (1935).

26. American Indian Religious Freedom Act, Pub. L. No. 95-341, 92 Stat. 469 (1978).

27. 25 U.S.C. § Ch. 32, Refs. & Annos.

28. 16 U.S.C. § 668.

29. Antiquities Act of 1906, Pub. L. No. 59-209, ch. 3060, 34 Stat. 225 (1906) (American Antiquities Preservation Act) (National Monument Act).

30. National Historic Preservation Act (NHPA), Pub. L. No. 89-665, 80 Stat. 915 (1966).

31. National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (1970).

32. Historic Preservation Act, 54 U.S.C. § 300101.

idea of John Rawls.³³ When the statute is being enacted, the focus would largely be on the fairness of the criteria for designation, not on the result for any particular site. Once the statute is enacted, an administrative process—not a hotly contested litigation process—would be followed in determining whether a particular site satisfies the statutory criteria.

But there is a fundamental problem, affecting both Free Exercise and RFRA cases, as well as any proposed sacred site statute. The fundamental problem is power. The religion of the dominant culture in the United States is Judeo-Christian. It is not surprising that the dominant Judeo-Christian culture in the United States has not treated Indian religions with full seriousness. The religion of the dominant culture is “faith”; the religion of the non-dominant culture is “superstition.” For centuries, a standard Protestant characterization, in England and then in the United States, of Catholic faith was superstition.

Which brings me to the Restatement that we are here to celebrate. I graduated from law school in 1975. There was no course in Indian law. The only treatise was the fabulous Cohen treatise, but it was out of date. It had been updated in 1958, but it was a cut and paste job done by the Interior Department. There were Indian law practitioners, some of them very distinguished; but there weren’t very many of them. There were even fewer Indians who were practitioners. There was no one on the Supreme Court who knew, or cared about, Indian law. I can tell you from my experience as a law clerk from 1976–1977 that the Justices regarded opinion assignments in Indian law cases as undesirable.

This has changed, and the Restatement is emblematic of that change. It would have been unimaginable forty years ago, maybe even twenty years ago, that we should have a Restatement of Indian Law. But now we have it. There are more Indian law practitioners, and more Indians who are practitioners. There are respected tribal courts. There is the Indian Gaming Regulatory Act (“IGRA”)³⁴ and all the money (and lobbyists) it has produced for the tribes. I don’t intend to be entirely cynical, but I will point out the obvious. Money makes a difference.

And finally, there is a Justice on the Supreme Court who understands and embraces Indian law, Justice Gorsuch. It is possible, just possible, that Justice Gorsuch will be able to persuade his conservative colleagues on the bench that *Lyng* was wrongly decided. That is, I admit, a long shot. But who would have thought that the Court could be persuaded in the *McGirt*³⁵ case that half the State of Oklahoma is an Indian reservation?

33. JOHN RAWLS, A THEORY OF JUSTICE: REVISED EDITION (1999).

34. Indian Gaming Regulatory Act, Pub. L. No. 100-497, 102 Stat. 2467 (1988).

35. *McGirt v. Oklahoma*, __ U.S. __, 140 S. Ct. 2452 (2020).

(We'll see if they remain persuaded.)

The problem with our Free Exercise jurisprudence is not the wording and original narrow meaning of the First Amendment. For a Court that can read out of the Second Amendment an introductory clause referring to a "well regulated militia,"³⁶ interpreting the Free Exercise Clause to protect Indian religious practices and sacred sites would be child's play. The question is not whether the Justices could do it, but whether they want to do it.

At the moment, of course, our Congress is dysfunctional. There is no chance that the current Congress could be persuaded to pass a sacred site statute such as I have proposed. But someday, I hope, we will have a functional Congress again. And when we do, we may be able to get something like the statute I have proposed.

The fundamental problem is indeed power. The power balance is changing, and we are here to celebrate the Restatement and the change it represents.

36. U.S. CONST. amend. II.

