

# A LOCAL DEVELOPMENT AGREEMENT ON ACCESS TO SACRED LANDS

ROBERT RETHERFORD\*

## INTRODUCTION

*Our Spiritual belief is that we were created as part of the land—so our identity, our names, and our songs are all tied to the land.*<sup>1</sup>

Across the country, Indians<sup>2</sup> are speaking out against the development of lands that they consider sacred, even when the lands are not within the boundaries of their current reservations.<sup>3</sup> Discoveries of Indian artifacts or identification of sacred sites on municipal or county lands could occur at any time, whether through construction or even erosion.<sup>4</sup> As tribes exert stronger political and economic influence on the national, state,

---

\* Candidate for Juris Doctor, University of Colorado School of Law, 2004; M.A. Linguistics, Ohio University, 1993; B.A. English, Hanover College, 1987. The author would like to thank all who helped this article come into its present form, particularly Olivia Denton and Tory Bantz for their editing assistance.

1. Chief Roderick Robinson, Nisga'a, *quoted in* DON COYHIS, FALL: MEDITATIONS WITH NATIVE AMERICAN ELDERS 55 (1994) [hereinafter COYHIS, FALL].

2. This comment will use "Indian" throughout for the indigenous peoples of the Americas. While "Indian" has both positive and negative implications, some general term is needed for the discussion. The best practice is to refer to individual groups by their own name, and this has been done where possible.

Similarly, this comment uses "Euro-American" as a general term when discussing cultural and social aspects of the dominant social group of the United States. While recognizing that this term glosses over the plurality of the United States, this comment necessarily focuses on such generalities.

3. See, e.g., Sara Jean Green, *Tolt MacDonald Park Ancestral Land, Tribe Says*, SEATTLE TIMES, Mar. 26, 2003, at B2 (Snoqualmie Tribe trying to persuade King County to transfer park land of sacred and historical significance to the tribe, as the county has transferred park lands to other local governments).

4. In Tacoma, Washington, for example, the Niqually Tribe is suing the largest developer in town to stop construction that they believe will harm tribal artifacts. Angie Leventis, *Tribe Sues Over Subdivision*, NEWS TRIB., Jan. 6, 2004, at B01, available at <http://www.tribnet.com/news/local/story/4585413p-4556004c.html>. The wind and weather can also lead to "unanticipated discoveries" on land owned by local governments. Owen S. Good, *Indian Tribes to Have Say on Open Space*, ROCKY MTN. NEWS, Jan. 11, 2002, at 25A.

and local level,<sup>5</sup> local governments need to understand the issues surrounding sacred lands and cultural artifacts so they can find common goals, not conflicts, with tribes.<sup>6</sup> Local governments need to work with tribes to head off problems that could bring bad publicity, development headaches, or even federal or state intervention, which would take decision-making out of local hands.<sup>7</sup> While it may be easier for tribes to initiate this dialogue, because they know better which areas of the country their people have ties to, both groups need to be willing to communicate. Tribes and local governments may find common goals, such as sharing financial resources to help maintain lands open to the public,<sup>8</sup> cooperatively developing tourist resources,<sup>9</sup> or properly handling any discovered sacred sites, cultural artifacts, or human remains. Existing compacts between

---

5. There are many examples of Indians' increasing political power. For example, six of the nine 2004 Democratic presidential candidates appeared one way or another at a recent convention of tribes, as did a representative of President George W. Bush. *Indian Gathering Marks New Political Power*, ALBUQUERQUE J., Nov. 26, 2003, at A12. See also Kathy Kiely, *The Newest Kingmakers: Indian Tribes*, USA TODAY, Oct. 2, 2003, at A01; Daniel B. Wood, *Despite Casino Setbacks, Indian Clout Rises*, CHRISTIAN SCI. MONITOR, Nov. 10, 2003, at 3. Indians' economic clout, whether from casinos or other sources, is also having more effect on non-Indians. See, e.g., Terry Pristin, *Arizona Indians Turn to Real Estate Development*, N.Y. TIMES, Dec. 24, 2003, at C4.

6. Some state and county governments have made agreements with tribal governments over their respective jurisdictional controls, especially over economic issues. See Lorie Graham, *The Role of Jurisdiction in the Quest for Sovereignty: Securing Economic Sovereignty Through Agreement*, 37 NEW ENG. L. REV. 523 (2003). This comment focuses on tribal governments as representatives of Indians, though there is a significant and politically savvy urban Indian population "that is too often left out." Interview with Don Ragana, Representative for the Tallbull Memorial Council, in Boulder, Colo. (Feb. 13, 2004) (on file with author). The Tallbull Memorial Council is a good example of an urban Indian group that has made an effective agreement with the City of Denver, Colorado, for recognition of the cultural needs of Indians in the Denver area. *Id.*

7. See, e.g., Native American Sacred Lands Act, H.R. 2419, 108th Cong. (1st Sess. 2003), [http://www.sacredland.org/NA\\_SLA\\_HR\\_.html](http://www.sacredland.org/NA_SLA_HR_.html) (last visited Apr. 5, 2004). This bill has been referred to the House Committee on Resources. H.R. 2419, 108th Cong., 149 CONG. REC. H5265 (daily ed. June 11, 2003), [http://frwebgate.access.gpo.gov/cgi-bin/getpage.cgi?dbname=2003\\_record&page=H5265&position=all](http://frwebgate.access.gpo.gov/cgi-bin/getpage.cgi?dbname=2003_record&page=H5265&position=all) (last visited Apr. 5, 2004).

8. The Snoqualmie Tribe has proposed this as one reason for King County to transfer tribally-significant park land to the tribe. Green, *supra* note 3. See also Kerry Benefield, *Casino Group Hands Over Land*, GREENBELT ALLIANCE, [http://www.greenbelt.org/resources/press/clippings/archive/clip\\_2003Nov11.html](http://www.greenbelt.org/resources/press/clippings/archive/clip_2003Nov11.html) (last visited Feb. 27, 2004).

9. This is another of the Snoqualmie Tribe's suggestions. See Green, *supra* note 3.

tribes and state governments, involving such issues as gaming and child welfare, show that such agreements can work.<sup>10</sup>

Many Indians see sacred lands as integral to their very identity, and individual Indians are not the only ones becoming more active about Indian issues: the federal government has also begun to address their concerns. Despite the lack of Supreme Court recognition of off-reservation religious rights,<sup>11</sup> Congress has passed legislation that recognizes the land-based nature of Indian religious traditions and makes a priority of Indian privacy and access to sacred sites.<sup>12</sup> Some state governments, as well, have struggled with tribal claims to sacred lands.<sup>13</sup> Finally, tribal governments are increasingly vocal and powerful.<sup>14</sup>

Considering that Indian tribes once occupied all of the territory that is now the United States, every government in the country should consider what to do in the likely event of a dispute over sacred lands or artifacts. Across the country, Indians have waged a series of court battles to protect lands they view

---

10. One author cites a steady devolution of power from federal to tribal governments as one reason for the increase in compacts between tribes and states. DANIEL KEMMIS, *THIS SOVEREIGN LAND* 170 (2001). Another reason for the increase would be the increasing political and economic clout of tribes discussed *supra* text accompanying note 5 and *infra* text accompanying notes 15–22.

11. See *Lyng v. N.W. Indian Cemetery Ass'n*, 485 U.S. 439 (1988) (permitting a federal government plan for logging and road construction near an area of national forest that several tribes view as sacred); see *infra* Part II.C. This is in contrast to the Court's recognition of treaty rights for off-reservation hunting and fishing. See, e.g., *United States v. Winans*, 198 U.S. 371 (1905); *Tulee v. Washington*, 315 U.S. 681 (1942).

12. See, e.g., American Indian Religious Freedom Act, 42 U.S.C. § 1996 (2000) (making it U.S. policy to protect the traditional religions of the indigenous peoples of the U.S., "including but not limited to access to sites"); National Historic Preservation Act, 16 U.S.C. §§ 470 to 470x-6 (2000) (including Indian tribes for considerations of preserving cultural heritage pursuant to a 1980 amendment); see also Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001–3013, 18 U.S.C. § 1170 (2000) (establishing a means of determining ownership of cultural items discovered on federal or tribal land).

13. See *infra*, Part II.D.

14. See, e.g., Tony Davis, *Tribes, UA Want Gas Pipeline Away from Tumamoc Hill*, ARIZ. DAILY STAR, Sept. 19, 2003, at B5 (reporting that five tribes near Tucson are involved in deciding where a new pipeline should be laid); Jack Brubaker, *They Were Here Before Us; Shouldn't Their Sacred Land be Preserved?*, LANCASTER NEW ERA, Aug. 15, 2003, at A8, LEXIS, Nexis Library, ALLNWS File (disagreeing with possible development on a historic and sacred site for the Susquehannock Indians in Pennsylvania); Glenn Coin, *Tribes: Money Isn't the Point*, THE POST-STANDARD, Nov. 11, 2003, at B1, 2003 WL 5859604 (reporting that three tribes have bought land in Central New York because they say they want to return to their homelands).

as sacred,<sup>15</sup> with the United States Supreme Court recently refusing to grant certiorari on a lower court decision favorable to Indian interests.<sup>16</sup> In the northeast, Montauket Indians argued that their claim to sacred land in a state park on Long Island should prevent its development.<sup>17</sup> In the southwest, the All Indian Pueblo Council fought city of Albuquerque officials over widening a road that would involve redrawing the boundaries of Petroglyph National Monument.<sup>18</sup> In Hawaii, Native Hawaiians have opposed adding more telescopes to a mountain viewed as the center of their religious world.<sup>19</sup> In the West, a recently vetoed bill in California<sup>20</sup> would have given tribes "what could amount to a veto power over certain development

---

15. See, e.g., *Badoni v. Higginson*, 638 F.2d 172 (10th Cir. 1980) (allowing the federal government to build a dam that would flood Glen Canyon on the Colorado river in Utah); *Inupiat Community of the Arctic Slope v. U.S.*, 548 F. Supp. 182 (D. Alaska 1982) (denying an injunction of federally-sanctioned oil exploration off the coast of Alaska); *Lyng*, 485 U.S. 439 (permitting a federal government plan for logging and road construction through the "High Country" in the Six Rivers National Forest).

Vernon Masayesva, Hopi, cautions about the dangers of thinking that a particular spot is sacred, because it logically suggests that other places are not when in reality, *all* of the earth is sacred. Vernon Masayesva, Executive Director of the Black Mesa Trust, Presentation on Sacred Sites at Native American Awareness Week, University of Colorado, Boulder (Apr. 14, 2004).

16. *Bugenig v. Hoopa Valley Tribe*, 266 F.3d 1201 (9th Cir. 2001), *cert. denied*, 122 S.Ct. 1296 (2002). See also Brad Knickerbocker, *Native Tribes Seek Clout on Nontribal Lands*, CHRISTIAN SCI. MONITOR, Sept. 4, 2002, at 3.

17. Rick Murphy, *In Midst of Preservation Battle, 2 Claims to Montauket Chief*, N.Y. TIMES, Mar. 1, 1998, at 14L11.

18. See Michael Turnbull, *Pueblo Leaders Urge Options to Extending Paseo*, ALBUQUERQUE J., May 3, 1997, at D1. There are now proposals to build a stretch of road around rather than through the monument, which would also alleviate traffic congestion, but a group called the Sacred Alliance for Grassroots Equality opposes any road through the petroglyphs because "[i]t is part of religious beliefs in that area [that] (building roads) uproots the prayers." Chris Vogel, *Universe Boulevard Lawsuit Dropped*, ALBUQUERQUE J., Dec. 13, 2002, at 1, 2002 WL 103443768.

19. See Kevin Dayton & Vicki Viotti, *OHA Hails NASA Decision in Impact Statement*, HONOLULU ADVERTISER, Nov. 5, 2003, at 4; Jean Christensen, *Native Hawaiians Denounce Telescopes as Unholy Intrusion*, DAILY CAMERA, June 17, 2000, at 7B.

20. Senate Bill 1828, introduced by John Burton, D-San Francisco, and supported by Jim Battin, R-Palm Springs, would have established a procedure for identifying and cataloging sacred sites and "require[d] local governments to protect them when a development is proposed." Greg Lucas, *Easy OK for Sacred Land Bill: Indians Given Power Over Developments*, S.F. CHRON., Aug. 29, 2002, at A19, 2002 WL 4028936. The bill passed the California Assembly but was vetoed by Governor Gray Davis. Gregg Jones, *A Legislative Year that Fits Labor's Bill*, L.A. TIMES, Oct. 6, 2002, at B1, 2002 WL 2508748.

projects.”<sup>21</sup> In Colorado, the city of Boulder has made an unusual agreement with a coalition of Indian tribes historically connected to the area.<sup>22</sup>

This comment examines issues surrounding the decision by the city of Boulder (“the City”) to voluntarily work out an agreement which allows the tribes to have input on the use and development of City-owned open space.<sup>23</sup> Originally alerted to Indian concerns by a federal agency,<sup>24</sup> the City and the tribes

---

21. Knickerbocker, *supra* note 16. See also Lucas, *supra* note 20. A similar bill, the Native American Sacred Lands Protection Act, is gathering support in the U.S. Congress. Knickerbocker, *supra* note 16.

22. The agreement deals with issues such as religious access to and the disposition of human remains and funerary objects on city lands. See *infra* Part IV.B. It is reportedly the only such agreement between a city and an Indian group. Email from Francis B. Brown, President of the Medicine Wheel Coalition, to author (Jan. 5, 2003, 15:37:48 MDT) (on file with author). Other local governments have made agreements with tribes or with Indian groups, however, such as the one Denver made with the Tallbull Memorial Council to establish an area for cultural activities. Interview with Don Ragona, *supra* note 6. The Boulder agreement is also unusual because any agreements over Indian land use are usually made after conflicts arise over a discovered artifact or claimed sacred site, Good, *supra* note 4, or, as in the Denver agreement, for avowedly cultural rather than religious reasons. Interview with Don Ragona, *supra* note 6. It should be noted, however, that the Euro-American dichotomy between religion and other areas of life, such as culture, is not nearly as strong a divide for traditional Indian societies.

For the agreement itself, see Memorandum of Understanding Between the City of Boulder and American Indian Tribal Representatives Concerning Open Space and Mountain Parks Land Use (Draft, Nov. 1, 2001) [hereinafter Agreement]. The Agreement was made between the City of Boulder, the Medicine Wheel Coalition for Sacred Sites in Northern America, the United Tribes of Colorado, and the following individual tribes: the Southern Ute, the Ute Mountain Ute, the Jicarilla Apache, the Kiowa Tribe of Oklahoma, the Comanche Nation of Oklahoma, the Southern Cheyenne Tribe of Oklahoma, the Southern Arapaho Tribe of Oklahoma, the Pawnee Nation of Oklahoma, the Eastern Shoshone, the Northern Arapaho, the Northern Cheyenne, the Oglala Sioux, and the Rosebud Sioux. *Id.* The City Council unanimously approved the Agreement on September 17, 2002. See City of Boulder, City Council Agenda Item, Meeting Date Sep. 17, 2002, available at <http://www.ci.boulder.co.us/clerk/previous/Minutes/2002/2002index.html> (last visited Mar. 29, 2004) [hereinafter Boulder City Council Agenda Item, Sept. 17, 2002].

23. Boulder, Colorado, is located 25 miles northwest of Denver along the Front Range of the Rocky Mountains. It is a politically progressive city, see *infra* Part IV.A., and is the home of the University of Colorado’s main campus. See Good, *supra* note 4; Kristin Dizon, *Group Seeks Protection for Sacred Land*, DAILY CAMERA, Nov. 3, 1997, at 1B.

24. The federal agency here met with representatives of tribes independently from Boulder, even though the separate meetings concerned the same land. Boulder learned of the separate meeting and asked to be included, and later signed its own agreement with the tribes. See *infra* Part IV.A.

established guidelines for resolving conflicts that may arise over land that the City now controls but tribes historically used, in an effort to protect "Indian cultural resources and areas of religious and cultural significance."<sup>25</sup> Such agreements are a way for local governments to be proactive in dealing with Indian issues.<sup>26</sup> The city of Boulder views this agreement as a "partnership,"<sup>27</sup> which emphasizes the ways in which tribes and local governments can work together to achieve common goals.

The first part of this comment examines some of the broad cultural differences surrounding land use, including the differing worldviews and conceptions of the sacred that can stand in the way of an agreement between tribes and localities. The second part addresses some of the federal and state government strictures, such as federal legislation, executive orders, and state laws, that would have an impact on local governments once issues of Indian access to sacred lands and objects are raised. In the third part, the comment examines Boulder's agreement and the process by which it was reached. Finally, the fourth part discusses how applicable Boulder's experience is as a model for other local governments.

## I. THE CONCEPT OF SACRED LANDS

*In the absence of the sacred, nothing is sacred—everything is for sale.*<sup>28</sup>

Before any agreements on land use can be reached between local governments and Indian groups, each side needs to better understand the other.<sup>29</sup> Modern Euro-American society

---

25. Weekly Information Packet to the Mayor and City Council, from the Office of the City Attorney, Dec. 13, 2001, at 1, <http://www.ci.boulder.co.us/clerk/WIP/2001/121301/121301cover.htm> (last visited Mar. 29, 2004) [hereinafter Weekly Information Packet]. While the agreement does not say that any land in Boulder is "sacred," it does recognize and respect the ties that the signatory tribes have with the area.

26. Such agreements would be helpful for large private landowners as well, such as ranchers or groups like The Nature Conservancy. Establishing a contractual understanding with tribes may forestall government imposition.

27. Agreement, *supra* note 22, at 2.

28. Oren Lyons, Onondaga, *quoted in* COYHIS, FALL, *supra* note 1, at 61.

29. When dealing with such a diverse country as the United States, some simplification is necessary to make general points. Obviously, not all U.S. citizens

and traditional Indian societies have markedly different worldviews, especially in the area of religion.<sup>30</sup> As these worldviews, "polar opposites in intellectualization and cultur[e],"<sup>31</sup> interact, conflicts naturally arise. These conflicts, such as over the construction of a logging road near an area that some Indians view as sacred,<sup>32</sup> are what the city of Boulder sought to forestall by its agreement with thirteen individual tribes and two coalitions.<sup>33</sup>

### A. Different Worldviews

Understanding different points of view is vital to living harmoniously in a multi-cultural society and sharing limited resources; without such an understanding, agreements between local governments and tribes will be extremely difficult. "The recognition of the legitimacy of Native sacred sites presupposes the ability of non-Natives to step out of their own culturally created and defined religiosity,"<sup>34</sup> just as the Indian has had to learn how to operate within the Euro-American system. Thus, this section first discusses briefly the different foundations for the Euro-American and Indian worldviews, and then looks at different ways in which land can be viewed or defined as sacred.

---

are Euro-Americans, and not all ethnically European Americans operate under the Euro-American mindset described *infra*. Likewise, Indians are a diverse collection of groups with a multitude of beliefs, some of which will correlate to the description here and some of which will not. "The values of Indian people as outlined vary in specifics across tribal traditions but are nonetheless fundamental," writes one scholar who is an Indian. Donald L. Fixico, *The Struggle for Our Homes*, in DEFENDING MOTHER EARTH 41 (Jace Weaver ed., 1997).

30. See VINE DELORIA, JR., *GOD IS RED* (1992). This book is a seminal work on the indigenous worldview of North America. For a brief but varied list of examples of Indian tribes' religious ties to land, see Robert Charles Ward, *The Spirits Will Leave: Preventing the Desecration and Destruction of Native American Sacred Sites on Federal Land*, 19 *ECOLOGY L.Q.* 795, 800-02 (1992).

31. Fixico, *supra* note 29, at 30.

32. See *Lyng v. Northwest Indian Cemetery Ass'n*, 485 U.S. 439 (1988), *infra* Part II.C. For discussions of this specific conflict, see Joel Brady, "Land is itself a sacred, living being": *Native American Sacred Site Protection on Federal Lands Amidst the Shadow of Bear Lodge*, 24 *AM. INDIAN L. REV.* 153 (Winter 1999).

33. Interview with Joseph N. de Raismes, III, City Attorney of Boulder, Colorado, in Boulder, Colo. (Nov. 14, 2002) [hereinafter Interview with Joseph N. de Raismes, III]. See *supra* note 22 for a list of the tribes and coalitions.

34. Bryan Cummins & Kirby Whiteduck, *Toward a Model for the Identification and Recognition of Sacred Sites*, in *SACRED LANDS: ABORIGINAL WORLD VIEWS, CLAIMS, AND CONFLICTS* 3 (Jill Oakes, et al. eds., 1998).

## 1. The Foundations of the Euro-American View

The Euro-American worldview is heavily influenced by the Judeo-Christian tradition.<sup>35</sup> This tradition holds that humanity has dominion over all of creation,<sup>36</sup> that wilderness is dangerous, and that the land must be brought under control and cultivated.

In the Judeo-Christian tradition, the natural world is a wilderness into which fallen humanity was exiled. When the Garden of Eden closed, nature fell with humanity and became corrupted as well.<sup>37</sup> Thus, the land is a wilderness, full of the monsters of folklore and plagued by the vagaries of an indifferent nature, a place where survival is uncertain.<sup>38</sup> Survival is more easily secured when the land is tamed.<sup>39</sup>

In the Judeo-Christian tradition, the world and all of its creatures have been handed over to humans to tend as a gardener would.<sup>40</sup> Humans are to multiply and fill the earth as they subdue it.<sup>41</sup> Land is objectified,<sup>42</sup> thought of as raw material to be bought and sold, and as something to be transformed from "wilderness" into something worthwhile.<sup>43</sup> In addition, the "reduction of the amount of wilderness defined man's achievement as he advanced toward civilization."<sup>44</sup> Thus, in the traditional Euro-American worldview, each individual has a duty to subdue the wilderness and a right to seek personal profit from a given piece of real estate.<sup>45</sup>

As a result, Europeans came to North America and saw a vast expanse of raw material, uncultivated and apparently up

---

35. See, e.g., RODERICK NASH, *WILDERNESS AND THE AMERICAN MIND* 8, 13 (3d ed., Yale Univ. Press 1982) (1967). It is important to note that, in the interest of focus and comparison, this comment ignores significant minority trends in Euro-American cultural history and current practices, such as the environmental movement, Christian mystical traditions, and Jungian psychology.

36. See DELORIA, *supra* note 30, at 82.

37. See *id.* at 80.

38. See NASH, *supra* note 35, at 8-9, 24.

39. See *id.* at 7.

40. See *Genesis* 2:15.

41. *Genesis* 1:28.

42. See Leroy Little Bear, *Aboriginal Relationships to the Land and Resources*, in *SACRED LANDS: ABORIGINAL WORLD VIEWS, CLAIMS, AND CONFLICTS* 17 (Jill Oakes, et al. eds., 1998).

43. See Eugene C. Hargrove, *Anglo-American Land Use Attitudes*, 2 ENVTL. ETHICS 145 (1980).

44. NASH, *supra* note 35, at 9.

45. See Cummins & Whiteduck, *supra* note 34, at 9.



for grabs.<sup>46</sup> The pioneers set out to tame this wilderness and lay claim to the land.<sup>47</sup> Even today, this “[p]rejudice against wilderness [has] the strength of centuries behind it”<sup>48</sup> and continues to influence the policy and development choices of the United States by favoring an objectifying, utilitarian view of the land.<sup>49</sup>

## 2. The Foundations of Indian Views

In contrast to the Judeo-Christian tradition, most Indian societies view nature as a system of which humanity is a part. The “Earth is a living, conscious being that must be treated with respect and care.”<sup>50</sup> “For many Indian tribal religions the whole of creation was good,” and as a result, “all parts of [creation] functioned together to sustain it.”<sup>51</sup>

Like early Europeans, Indians traditionally look at nature as “an awesome force . . . , always overwhelming and powerfully intimidating.”<sup>52</sup> However, Indians have seen their relationship with nature as one of dependence on a beneficial Creator<sup>53</sup> rather than a struggle for dominion. Because of this beneficial relationship, the task of Indian religions “is to determine the proper relationship that the people of the tribe must have with other living things,” to determine how to act

---

46. For example, Chief Justice John Marshall described the English taking possession of North American territory as “a complete recognition” of the doctrine of discovery, which was “confined to countries then unknown to all Christian people” but which “assert[ed] a right to take possession, notwithstanding the occupancy of the natives, who were heathens.” *Johnson v. M’Intosh*, 21 U.S. 543, 576–77 (1823).

47. See NASH, *supra* note 35, at 23–24.

48. *Id.* at 43. The American environmental movement represents growth away from this dominant paradigm, though. See, e.g., MICHAEL P. DOMBECK, ET AL., FROM CONQUEST TO CONSERVATION 141 (2003).

49. The debate over whether to allow drilling for oil in the Alaskan wilderness is an example of how the Euro-American objectifying view continues to shape national policy. See, e.g., Timothy Egan, *Bah, Wilderness! Reopening a Frontier to Development*, N.Y. TIMES, May 4, 2003, at sec. 4, p. 3. Several scholars have even argued that Christianity has had a major role in establishing the mindset that has led to today’s ecological crisis. See Rebecca Tsosie, *Tribal Environmental Policy in an Era of Self-Determination: The Role of Ethics, Economics, and Traditional Ecological Knowledge*, 21 VT. L. REV. 225, 248 (1996).

50. Tsosie, *supra* note 49, at 276.

51. DELORIA, *supra* note 30, at 81.

52. Fixico, *supra* note 29, at 34.

53. See *id.*

"harmoniously with other creatures" including the land.<sup>54</sup> As a necessary part of creation, the landscape includes the spirit world.<sup>55</sup> Thus,

Elders often say that when something is sacred it has spiritual value. You'll hear, on the Earth there are sacred spots. . . . When something is sacred it means it's so holy you can't attach a value to it. Therefore, it's not for sale. It's an insult to suggest buying something sacred.<sup>56</sup>

Historically, Indian property systems differed from the Euro-American conception.<sup>57</sup> For example, unlike Western property law, land was not seen as fungible but rather as a unique gift in itself.<sup>58</sup> It could be transferred to others, but not outside of the tribe.<sup>59</sup> Even today, many traditional Indians view themselves as related to the land instead of owning it, and view particular pieces of land as having a sacred quality, because the sacred "is an embedded attribute of all phenomena."<sup>60</sup> This attitude is in sharp contrast to the Euro-American tradition of seeing oneself as a proprietary owner who buys and sells land.

Traditionally, Indian societies view nature as good, and because land exists for the good of the entire community, "[a]ll members of the nation have a vested interest in the land."<sup>61</sup> Indian "holistic understanding emphasized sharing rather than [an individual's] accumulation of material goods."<sup>62</sup> As a result, the idea that a sacred site is on some individual's private property or government's land may not seem as important as the

---

54. DELORIA, *supra* note 30, at 88.

55. See ANDREW GULLIFORD, SACRED OBJECTS AND SACRED PLACES: PRESERVING TRIBAL TRADITIONS 67 (2000).

56. COYHIS, FALL, *supra* note 1, at 61.

57. See Kenneth H. Bobroff, *Retelling Allotment: Indian Property Rights and the Myth of Common Ownership*, 54 VAND. L. REV. 1559 (2001) (providing an overview of traditional property systems among different tribes).

58. *Id.* at 1601.

59. *Id.* at 1602.

60. Deward E. Walker, Jr., *Protection of American Indian Sacred Geography*, in HANDBOOK OF AMERICAN INDIAN RELIGIOUS FREEDOM 103 (Christopher Vecsey ed. 1991).

61. Cummins & Whiteduck, *supra* note 34, at 6. For some tribes, sacred lands might be held by the entire band, though with only shamans and other leaders having ready access to them. Bobroff, *supra* note 57, at 1590.

62. Fixico, *supra* note 29, at 39.

necessity for the entire community that a ceremony take place there.

### 3. Ways to look at the Sacredness of Land

"Sacred land" can be defined in a variety of ways.<sup>63</sup> Indian societies traditionally recognize more ways in which land can be considered sacred than are accepted by modern American society, and "sacred geography is a universal and essential feature of the practice of American Indian religions."<sup>64</sup> Some general ways in which lands can become sacred are by historical human action,<sup>65</sup> by having a sacred nature independent of human involvement,<sup>66</sup> or by "new revelations at new locations."<sup>67</sup>

#### *a. Land Made Sacred by Human Action*

Many Euro-Americans and Indians would agree that a parcel of land is sacred when something of great historical importance occurred on that spot,<sup>68</sup> or when human action has consecrated land. A difference lies, however, in whether sacredness can also be recognized as autochthonous or whether it is always human-generated.

When an important event occurs on a place, that land is recognized as hallowed. Euro-American examples include land formally set aside for churches or cemeteries, battlefields like the one at Gettysburg,<sup>69</sup> or even the place where our ancestors originated, like the family farm. Similarly, many Indians recognize Wounded Knee as a place held sacred.<sup>70</sup> "The Indian way is to recognize the earth as the place of our ancestors.

---

63. See DELORIA, *supra* note 30, at 272. How to define or categorize sacredness is difficult, as Deloria recognizes. *Id.* at 271. Gulliford gives a different classification scheme in his book. GULLIFORD, *supra* note 55, at 70-90.

64. Walker, *supra* note 60, at 101.

65. See DELORIA, *supra* note 30, at 272.

66. See *id.* at 273.

67. *Id.* at 277.

68. See *id.* at 272.

69. In his famous address, Lincoln recognized Gettysburg as having been consecrated by the soldiers' sacrifices. *Id.*

70. However, because Indians generally did not see war as a holy enterprise, battlefields were not traditionally sacred for Indians. See DELORIA, *supra* note 30, at 272.

That is why certain places on earth are considered sacred areas and sacred land; this is the place of our ancestors."<sup>71</sup>

However, an important difference in Euro-American and Indian viewpoints is that, for Indians, this sense of the sacred exists independently of anyone recognizing it, while the Judeo-Christian tradition requires that sacred sites be codified or formally recognized.<sup>72</sup> In an Indian worldview, human action can hallow land in a permanent sense, independent of any means of designating its sacredness to others.<sup>73</sup> Even without a historical marker, "[y]ou can often feel that sacredness of these places because of what has happened on them. . . . Even if someone you didn't know did something on the earth and you come along later, the power will be there to help you."<sup>74</sup> In contrast are sites in the Middle East that European Christians have historically referred to as part of "the Holy Land." The sacred sites which Christianity, Judaism, or Islam recognize as authentic are ones that appear in the sacred texts—places that are "recorded and codified."<sup>75</sup>

While traditional Indian societies view the land as a relative or part of the interrelationship of life, Euro-Americans tend to have little religious connection to land itself. Protestant Christians, the historically dominant group in the United States, are "evangelical, transportable, Bible-based, and not rooted to a particular landscape."<sup>76</sup> Because religion is based on the word, not the landscape, Euro-Americans are able to sanctify a piece of land or even desanctify it, turning former churches into shops or private homes. If the codification is established, the land is sacred; if it is not, the land reverts to the raw material from which fortunes can be made.

As a result, even though Euro-American and Indian societies both see that human action can help make a particular place sacred, the need for external recognition causes Euro-Americans to raise questions about proof when Indians say

---

71. DON COYHIS, WINTER: MEDITATIONS WITH NATIVE AMERICAN ELDERS 52 (1994) [hereinafter COYHIS, WINTER].

72. See Cummins & Whiteduck, *supra* note 34, at 7.

73. These sites include places where rituals like vision quests or sweat baths take place, where structures like medicine wheels have been built, or from which a group originated. See Walker, *supra* note 60, at 108.

74. DON COYHIS, SPRING: MEDITATIONS WITH NATIVE AMERICAN ELDERS 82 (1994) [hereinafter COYHIS, SPRING].

75. Cummins & Whiteduck, *supra* note 34, at 7.

76. GULLIFORD, *supra* note 55, at 67.

that a specific site is sacred.<sup>77</sup> Indians who follow traditional values “need a guarantee of religious freedom for their ceremonies, festivals, medicinal plant gathering, and pilgrimages,”<sup>78</sup> and any agreement between tribes and other governments must naturally include access to sacred lands.

*b. Sacredness in Land without Human Action*

Traditionally, Indians and many other cultures have believed there are places on the earth that are sacred without humans having done anything to mediate or produce this quality.<sup>79</sup> Although Euro-Americans have a differing view, Indians believe that “[o]bjects and behaviors are not themselves inherently sacred; rather, it is the supernatural which makes them sacred.”<sup>80</sup>

There are some “places of overwhelming holiness where the Higher Powers, on their own initiative, have revealed [t]hemselves to human beings.”<sup>81</sup> In Europe, for example, many cathedrals are built on the sites of the temples of earlier cultures, and these earlier temples were built on sites felt to be sacred.<sup>82</sup> Modern Euro-Americans often attribute the sense of wonder one gets at such places to an aesthetic<sup>83</sup> or historic appreciation, but Indian traditions hold that some places on earth “often are more than mere symbols” of the divine, because “God may actually be present in places or things here on earth.”<sup>84</sup> Sacredness then is immanent in certain places, and Indian tra-

---

77. Indians are thus “beholden” to the dominant society, which decides whether or not to validate important aspects of Indian cultural traditions. Cummins & Whiteduck, *supra* note 34, at 9.

78. GULLIFORD, *supra* note 55, at 68.

79. See DELORIA, *supra* note 30, at 275; Sandra Zellmer, *Sustaining Geographies of Hope: Cultural Resources on Public Lands*, 73 U. COLO. L. REV. 413, 432 (2002) [hereinafter Zellmer, *Sustaining Geographies of Hope*].

80. Cummins & Whiteduck, *supra* note 34, at 4.

81. DELORIA, *supra* note 30, at 275 (illustrating as an example from the Old Testament the site where God spoke to Moses from the burning bush).

82. See *id.*

83. Though from an Indian perspective this aesthetic stage might be seen as a “primitive” way of “appreciating the personality of our lands” because it lacks an appreciation for the land’s sacredness. *Id.* at 2.

84. Vernon Masayesva, *Epilogue* to HANDBOOK OF AMERICAN INDIAN RELIGIOUS FREEDOM 135 (Christopher Vecsey ed., 1991); see also Walker, *supra* note 60, at 102–103.

ditions hold that these powerful places are important "access points" to the sacred.<sup>85</sup>

Much of mainstream Euro-American culture does not tend to recognize sacred immanence in land; it often seems like an idea whose time passed with saints and miracles. However, Indian traditions recognize a greater sanctifying force than simply human action.<sup>86</sup> Perhaps this difference is related to the ways these cultures view land: the Euro-American view of land as wilderness to be conquered and then traded may also reflect a tendency to not believe in modern miracles, while the Indian's view that land itself can be sacred without human intervention parallels a view of the world as having a more present and ongoing spiritual dimension.

*c. The Continuing Revelation of the Sacred*

An important difference in how Euro-American and Indian societies view the sacred is in whether the sacred continues to manifest, and in how it does so. The continuing revelation of the sacred means that places may not be used with apparent regularity, or even that new sacred places may be discovered. Contrast this with the Euro-American concepts of unchanging sacred lands such as cemeteries and the Holy Land in Israel.

Followers of traditional Indian religions do not always use sacred places in manner that most Americans would view as consistent or regular. Indian religions have places that are sacred primarily at a particular time, such as equinoxes and solstices,<sup>87</sup> perhaps similar in a way to Euro-Americans who only go to church on Christmas and Easter. Use of a sacred place is not on the same schedule every year, though: "ultimate control of [a sacred place at any given time] is in the hands of the spirits, who must decide if the supplicant or petitioners are worthy of admission to the sacred."<sup>88</sup>

The sacred may also reveal itself in new locations. The Catholic Church is still open to the possibility that the Virgin Mary may appear in a new place, or that new saints may be

---

85. Walker, *supra* note 60, at 104 (explaining that these powerful places are used for ceremonies, vision quests, and other religious observances).

86. See DELORIA, *supra* note 30, at 273.

87. See Walker, *supra* note 60, at 104.

88. *Id.*

recognized.<sup>89</sup> Similarly, "[t]raditional [Indian] religious leaders tell us that in many of the ceremonies new messages are communicated to them."<sup>90</sup> Thus, new places and new messages continue to become sacred in different traditions.

United States courts have had a particularly hard time with the idea that the sacred continues to manifest.<sup>91</sup> As a result, scholar Vine Deloria talks about federal courts having difficulty accepting "newly created" sacred lands, insisting instead that an area have an established historical use.<sup>92</sup> Several courts

irrationally and arbitrarily circumscribe this universal aspect of religion by insisting that traditional religious practitioners restrict their identification of sacred locations to places that were historically visited by Indians, implying that, at least for the federal courts, God is dead.<sup>93</sup>

However, if a religion is alive, the higher powers must be active. "People must always be ready to experience new revelations at new locations,"<sup>94</sup> and it is unnecessarily formalistic for Euro-American courts to refuse to acknowledge that a place may be sacred absent an established, regular, documented use. A conflict in defining "sacred land" naturally arises when one worldview sees the sacred as having a continuing possibility for manifestation while another requires historical proof that a landscape has been seen as sacred and vital.

In conclusion, Indian access to sacred lands is essential, because "[w]ithout continuing access to many sacred sites that maintain their physical integrity, most practitioners of traditional American Indian religions will be denied the opportunity to practice many vital ceremonies."<sup>95</sup> If Indians are unable to practice vital ceremonies, then their religions are in danger of being destroyed. To put this idea in a Euro-American context, imagine bulldozing the Lourdes Cathedral for a shopping cen-

---

89. For example, Pope John Paul II recently beatified Mother Theresa. *The Week Ahead: Step Toward Sainthood*, N.Y. TIMES, Oct. 19, 2003, at sec. 4, p. 2. Beatification is the final step before canonizing someone as a saint. *Id.*

90. DELORIA, *supra* note 30, at 277.

91. Zellmer, *Sustaining Geographies of Hope*, *supra* note 79, at 478.

92. DELORIA, *supra* note 30, at 277.

93. *Id.*

94. *Id.*

95. Walker, *supra* note 60, at 101.

ter, allowing rock-climbing on the Wailing Wall of Jerusalem, or granting an injunction to prevent pilgrimages to the site of a new miraculous vision of Mary.<sup>96</sup> Agreements between Indians and local governments may be ways to avoid such desecrations of another's religious tenets.

### *B. Conflicts Between These Worldviews*

Euro-American and Indian outlooks are not only different, but are sometimes in direct conflict.<sup>97</sup> Conflicts between the Euro-American and Indian views of proper land use and ownership arose as soon as Columbus landed,<sup>98</sup> and the legal wrangling began early in American history.<sup>99</sup> "The battle over sacred sites dates back more than a century, when the government forced Indians onto reservations and ordered them to abandon their religion for Christianity."<sup>100</sup> Disputes over land use are even more likely to arise today than at any other time in the last 100 years because of the increasing power of Indian voices. As a result, the more Indians and Euro-Americans understand the differences and conflicts between their worldviews, the easier it will be for them to come to agreements.

---

96. See, e.g., built, natural, burial, pilgrimage, and other sites listed as endangered around the world. Sacred Sites International Foundation, [http://www.sitesaver.org/preservation/angered\\_examples.html](http://www.sitesaver.org/preservation/angered_examples.html) (last visited Feb. 18, 2004).

97. See Howard J. Vogel, *The Clash of Stories at Chimney Rock: A Narrative Approach to Cultural Conflict Over Native American Sacred Sites on Public Land*, 41 SANTA CLARA L. REV. 757 (2001) (explaining that one way to look at the conflict is in terms of the "master stories" told by each culture).

98. See REPORT OF THE NATIVE AMERICAN SACRED LANDS FORUM app. 3, at 55 (2001) [hereinafter REPORT]. The landing of Columbus "[p]ut [native peoples] on notice the sacred [was] seen in different perspective than us. Invaders see it as an economic opportunity for exploitation—we see it as sacred and to conserve it for the future. Our problems (native) began when Chris came on his boat." *Id.*

99. *Johnson v. McIntosh*, 21 U.S. 543 (1823), written by Chief Justice John Marshall, was the first major conflict between these opposing worldviews to be decided in an American court. This foundational case established that Indians, the original inhabitants of the land, have a right of *occupancy* as opposed to *ownership*. Marshall cited the doctrine of discovery to argue that Indians could not sell their land to anyone except the United States government. This doctrine held that whichever "civilized" nation "discovers" a piece of land first had exclusive rights to get the land from the indigenous peoples. Indians were, of course, *not* "civilized" under this application of a Eurocentric doctrine.

100. Pauline Arrillaga, *Sacred Sites Become Battlegrounds*, DENV. POST, July 16, 2000, at B02 (Sun. First ed.), 2000 WL 4467432.



One example of cultural conflict that arises from different views of the world is how different views of time lead to radically different ways of valuing nature. In Euro-American culture, time is generally treated as a linear progression, while Indian tradition holds it to be cyclical in nature.

The calendar is an example of the linear thought of Euro-American tradition. It presents time as a march of days, weeks, months, and years, each year adding onto the previous total. Time in this sense "is dynamic, forever moving."<sup>101</sup> The Anglo-American legal view of land interests reflects this view. Land may be held in fee simple, or subject to conditions that may be met as time passes, or in leases that relate directly to lengths of time.<sup>102</sup> A title in fee simple grants perpetual ownership of a piece of land to a single individual and her heirs. Because time is linear, there is an ultimate cause and an ultimate goal to actions, and ownership is permanent.

Linear thinking may also lead more readily to dichotomies—to black and white, either/or thinking that holds there is only a single truth or right answer.<sup>103</sup> A linear, "one right answer" culture develops a hierarchical view of nature.<sup>104</sup> In Judeo-Christian religious thought, the pinnacle of the hierarchy is God, who created all the world and its creatures and placed humanity in charge; in evolutionary thought, the process of evolution has led to the current pinnacle of development: humanity. Regardless of the particular myth one follows in a linear culture, humans are in control. When a linear culture places humans in control of a hierarchy, it logically "emphasiz[es] capitalistic individualized gain and individualized religious inclination."<sup>105</sup> As a result, there are "no qualms about exploitation because everything was put there for our benefit."<sup>106</sup>

In contrast, traditional Indian cultures developed a sense of time as cyclical,<sup>107</sup> perhaps based on the seasons. More important than the linear march of time is the space in which one

---

101. Little Bear, *supra* note 42, at 16.

102. *See id.* at 17.

103. *See id.*

104. *See id.*

105. Fixico, *supra* note 29, at 30.

106. Little Bear, *supra* note 42, at 17.

107. *See id.* at 18.

moves<sup>108</sup> and waiting for the appropriate time to arrive. There is no fixed time by which an event must occur; rather, events like ceremonies happen when everything that is needed for the event is in the right place.<sup>109</sup> As a result, nature is a cyclical process in which everything, people included, is in constant change and renewal.<sup>110</sup>

Indians' more cyclical understanding of nature "lends itself to holistic thinking."<sup>111</sup> Everything in nature has a spirit, and "all of creation is interrelated"<sup>112</sup> in a holistic community that includes all animate beings—humans, animals, plants, spiritual beings, and geography.<sup>113</sup> Because nature is a cycle in which this larger community operates, owning land is meaningless. Land is simply a place where the "interrelational network" between animate beings occurs,<sup>114</sup> and "the land is one of [the Indian's] very close relatives."<sup>115</sup> Land thus is not owned in the sense of holding a piece of property for a set period of time. Instead, the songs, stories, and ceremonies of a people are the basis for establishing that there is a relationship with a particular area of land.<sup>116</sup>

Just as the Euro-American and Indian traditions view such elemental aspects of life as time and nature in radically different ways, so do their respective views of the nature of land conflict. The two groups of people met and each expected the other to adopt its own views. Indians expected "that non-Indian society was going to incorporate into" their interrelational network,<sup>117</sup> and Europeans arriving on this shore expected Indians to become farmers.<sup>118</sup> Neither group has fully

---

108. *See id.* at 19.

109. *See id.*

110. *See id.* at 18.

111. Leroy Little Bear, *cited in* Cummins & Whiteduck, *supra* note 34, at 6.

112. Little Bear, *supra* note 42, at 18.

113. *See* Fixico, *supra* note 29, at 36.

114. Little Bear, *supra* note 42, at 19; Tsosie, *supra* note 49, at 285 (explaining that this interrelationship, "combined with the deeply rooted ethics of reciprocity and balance, lead to a long-term view of ecological stability or, . . . a concern with 'sustainability.'").

115. Little Bear, *supra* note 42, at 18.

116. *See id.* at 20.

117. *Id.*

118. The Euro-American expectation that Indians would hold land as individuals was made explicit in the General Allotment Act of 1887, ch. 119, 24 Stat. 388.

assimilated to the other, but if the two cultures hope to work together, they need to understand one another's differences.

### *C. Searching for Common Ground*

Regardless of differing worldviews, conflict is not inevitable, nor is it desirable for either the dominant Euro-American society or for Indians. Both can benefit the other, not only conceptually but also pragmatically.

As mentioned above,<sup>119</sup> tribal and local governments have a lot of reasons to try to work together. Tribes, of course, want to ensure that their people have access to lands needed for religious purposes. Local governments want to ensure that they maintain control over lands that they currently own. Conflicts between the two groups over land usage can lead to bad publicity and development headaches, at the least.<sup>120</sup> At the worst, from the point of view of city and county governments, federal or state laws may take decision-making out of local hands. Indian cultural expertise is crucial for the proper handling of any sacred sites, cultural artifacts, or human remains discovered on lands that local governments own—Indians can provide the means for ensuring that federal and state law do not come down on local governments that inadvertently mishandle protected objects.<sup>121</sup>

However, local governments have more reasons to work with Indians than simply avoiding problems. City and county governments may find that they share common goals with tribes. As Indians gain economic and political power,<sup>122</sup> they have resources to offer. Money from gaming and other tribal enterprises has gone to cultural centers and tourist attractions on the reservations, and some tribal governments are willing to share.<sup>123</sup> Combining tribal and local government clout on political issues may have beneficial outcomes for the shared region.<sup>124</sup> Finally, in addition to the feel-good quotient of cooper-

---

119. See *supra* text accompanying notes 4–10.

120. See, e.g., *supra* notes 4, 14, 16–19.

121. For the federal law controlling the handling of protected Indian gravesites, cultural items, and human remains, see Native American Graves Repatriation Act, 25 U.S.C. §§ 3001–3013 (2004).

122. See *supra* text accompanying note 5.

123. See, e.g., Green, *supra* note 3.

124. See *infra* Part IV.B.

ating with peoples who have historically been treated dismally by all levels of American government, it may be simply good politics for some local politicians to show their constituents, many of whom are increasingly conservation-minded, that they are sensitive to the need for proper stewardship of the land.

Working together can benefit both the Indians and the local government. A speaker at the first Canadian conference on sacred lands concluded that

[t]he unique bond that Aboriginal people have with Mother Earth must be shared with our non-Aboriginal partners, just as Aboriginal people must learn their culturally distinct traditions in order to grow economically viable for our children's future. This must be done with absolute consideration at all times as to how these decisions will best benefit our lives today, tomorrow, and into the next millennium.<sup>125</sup>

When two societies accept one another's worldview—not adopt, but accept—they recognize that “another person's religious beliefs may not be similar to one's own, but that they, too, are equally valid and entitled to expression and preservation.”<sup>126</sup> These groups must begin a dialogue if they are going to live together in harmony, one that involves educating the Euro-American society about Indian values<sup>127</sup> just as Indians have been expected to learn Euro-American ways.<sup>128</sup> Such an educational process can have the extra benefits of avoiding problems and sharing resources.

## II. FEDERAL AND STATE PRONOUNCEMENTS ON SACRED LANDS

*Every part of this soil is sacred in the estimation of my people. Every hillside, every valley, every plain and grove, has*

---

125. Belinda Vandenbroeck, *Sacred Lands: Living in Harmony*, in *SACRED LANDS: ABORIGINAL WORLD VIEWS, CLAIMS, AND CONFLICTS* xiv (Jill Oakes, et al. eds., 1998).

126. Cummins & Whiteduck, *supra* note 34, at 13.

127. Steven C. Moore, *Sacred Lands and Public Lands*, in *HANDBOOK OF AMERICAN INDIAN RELIGIOUS FREEDOM* 82 (Christopher Vecsey ed., 1991) (hoping that this dialogue would help the dominant society “to increase substantially its understanding of and tolerance for Indian religious beliefs and practices”).

128. See, e.g., DAVID H. GETCHES, ET AL., *FEDERAL INDIAN LAW* 140–90 (1998) (discussing assimilation).

*been hallowed by some sad or happy event in days long vanished.*<sup>129</sup>

Because federal and state policies and actions concerning sacred lands are inconsistent, it may be best for tribes and local governments to cooperate. As Sections A, B, and C discuss, all three branches of the federal government have made various pronouncements on sacred lands and Indians' access to lands they do not own but to which they claim ties and rights. State governments have also weighed in with a variety of regulations and policies, a brief overview of which is given in Section D. Regardless of how satisfied Indians are with government responses to their calls for action, executive, judicial, and legislative decisions can have a large impact on the operations of local government. The fact that the three branches of federal government and state governments have made contradictory pronouncements about sacred lands adds to the confusion for both tribes and local governments.

#### A. *Federal Legislation on Indian Religious Freedom and Land Use*

Congress has passed a number of laws that offer some measure of protection for Indian rights,<sup>130</sup> though their individual effectiveness varies. Although some legislation has proven more effective,<sup>131</sup> a controversial act that can shed light on the issues raised by such legislation is the American Indian Reli-

---

129. Chief Sealth, Duwamish, *quoted in* COYHIS, SPRING, *supra* note 74, at 82.

130. For an overview of federal regulations that mandate consultation with tribes, see generally Sandra B. Zellmer, *The Protection of Cultural Resources on Public Lands: Federal Statutes and Regulations*, 31 ENVTL. L. REP. 10689 (2001) (discussing the National Historic Preservation Act (NHPA), Archaeological Resources Protection Act (ARPA), Native American Graves Protection Act (NAGPRA), American Indian Religious Freedom Act (AIRFA), and Religious Freedom Restoration Act (RFRA), among others) [hereinafter Zellmer, *Protection of Cultural Resources*]. For an overview from a corporate view, see Connie Rogers, *Native American Consultation in Resource Development on Federal Lands*, 31 COLO. LAW. 113 (Jan. 2002) (inferring that the most effective of these laws has been the NHPA).

131. See, e.g., Zellmer, *Protection of Cultural Resources*, *supra* note 130, at 10694-97 (explaining that NAGPRA, for example, is seen as a fairly effective piece of legislation, though imperfect).

gious Freedom Act of 1978 (AIRFA).<sup>132</sup> AIRFA is a particularly instructive piece of legislation because it was specifically crafted to deal with religious issues, and yet its own sponsor conceded that "[i]t has no teeth in it."<sup>133</sup> This section discusses the actual legislation; how case law has evolved around AIRFA is discussed below in Section II.C.

AIRFA was adopted as a Joint Resolution of Congress and was hailed at the time as a great step forward for Indian religious rights.<sup>134</sup> One of its strengths is in its preamble, which

expressly recognize[s] that this country was *not* founded with any consideration for the principle of religious freedom for its Native people, and that the government of the United States has, both deliberately and through ignorance and inadvertence, infringed upon the free exercise of Indian religion.<sup>135</sup>

Another strong point is that AIRFA declared that it is now United States policy

to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions . . . including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.<sup>136</sup>

The legislation instructed federal agencies to consult with Indian leaders in a review of all their policies, procedures, and practices, "with an eye toward making changes to correct this historical legacy of persecution, intolerance, and insensitivity."<sup>137</sup>

Despite the encouraging purpose of AIRFA, critics say that federal agencies generally do not live up to the policy state-

---

132. Act of Aug. 11, 1978, Pub. L. No. 95-341, 92 Stat. 469 (current version at 42 U.S.C. § 1996 (2002)).

133. A sponsor of the bill that would become AIRFA, Representative Udall, made this statement during the debate. 124 CONG. REC. H21445 (daily ed. July 18, 1978) (statement of Rep. Udall).

134. Moore, *supra* note 127, at 81.

135. *Id.* at 83.

136. 42 U.S.C. § 1996 (2002).

137. Moore, *supra* note 127, at 83.

ments they crafted in response to this legislation.<sup>138</sup> Indian rights "face an entrenched federal bureaucracy, with an engrained resistance to *any* change," especially one that conflicts with the dominant society's values.<sup>139</sup> Instead of framing the needs of Indian religious practices in terms of freedom of religion, "[t]he legal issues involving sacred landscapes are unfortunately couched in terms of 'cultural resources,' and framed according to the adequacy of compliance with historic preservation regulations."<sup>140</sup> As a result, "Native peoples are forced to seek protection for their sacred places through laws that do not recognize their essential and special characteristics."<sup>141</sup> Attempts to use AIRFA have not been very successful.<sup>142</sup>

In spite of this entrenchment, "federal agencies increasingly seek ways to protect Indian sacred lands and the religious practices associated with them."<sup>143</sup> For example, the National

138. See, e.g., Masayesva, *supra* note 84, at 134 (saying that AIRFA "has been called the law with no teeth"); Moore, *supra* note 127, at 82 (saying that "AIRFA has proven to be of little real utility in protecting Indian religion"); Sharon O'Brien, *A Legal Analysis of the American Indian Religious Freedom Act*, in *HANDBOOK OF AMERICAN INDIAN RELIGIOUS FREEDOM* 27-43 (Christopher Vecsey ed., 1991).

139. Moore, *supra* note 127, at 84.

140. Claire Cummings, *Sacred Landscapes from a Legal Perspective: Examples from the United States*, in *SACRED LANDS: ABORIGINAL WORLD VIEWS, CLAIMS, AND CONFLICTS* 289 (Jill Oakes, et al. eds., 1998).

141. *Id.* "Principles of property and ownership are the bedrock of our legal system but they are largely irrelevant to matters involving the sacred and spiritual dimensions of a place or belief system." *Id.* at 278.

142. Cases in which AIRFA was unsuccessfully invoked to protect sacred lands include *Sequoyah v. Tenn. Valley Auth.*, 620 F.2d 1159 (6th Cir. 1980) (in which Cherokee attempts to prevent the flooding of the Little Tennessee River failed); *Badoni v. Higginson*, 638 F.2d 172 (10th Cir. 1980) (in which the Navajo were unable to reduce the water levels of Lake Powell or limit tourist access to the Rainbow Bridge area in southern Utah); *Crow v. Gullet*, 706 F.2d 856 (8th Cir. 1983) (in which the Lakota could not prevent South Dakota from expanding a parking lot in Bear Butte State Park); *Wilson v. Block*, 708 F.2d 735 (D.C. Cir. 1983) (in which the Navajo and Hopi were unable to stop expansion of a ski resort in the San Francisco Mountains near Flagstaff, Arizona). Claims made under AIRFA to protect Indians' rights to religious practice are now routinely dismissed. See, e.g., *Sunn v. Cattell*, 2002 WL 31455482 (D.N.H.) (dismissing an AIRFA claim against a warden for violating inmates' religious rights); *Fowler v. Fowler*, 2002 WL 571776 (Mich. Ct. App.) (declining to consider an AIRFA claim that a divorce decree infringed on a father's rights to include his son in the peyote rites of the Native American Church).

143. Lydia T. Grimm, *Sacred Lands and the Establishment Clause: Indian Religious Practices on Federal Lands*, 12 NAT. RESOURCES & ENV'T 19, 19 (Summer 1997).

Park Service issued a Final Climbing Management Plan which proposed that rock climbers voluntarily refrain from ascending Bear Lodge (also called Devil's Tower) during the summer solstice out of respect for Indian religious practices.<sup>144</sup> A consistent problem with legislation, however, is that Congress establishes procedural mechanisms that encourage consulting with Indians about sacred sites and yet do not require any actual protection of these places.<sup>145</sup> As a result, the potential for inconsistent application of federal legislation makes it difficult for local governments to anticipate what they may face if sacred lands issues arise in their backyard.

*B. President Clinton's Executive Order on Indian Sacred Sites*

Like the United States legislature, the executive branch has spoken inadequately on Indian religious freedom. In 1997, President Clinton signed Executive Order 13007 to "protect and preserve Indian religious practices."<sup>146</sup> This order could have been an encouraging step by the executive branch, but unfortunately "was hedged about with so many loopholes that it had little effect."<sup>147</sup> It establishes a preference, however, that might cause problems for a local government dealing with a federal agency in this area if the agency decides to follow the order and push an issue.

President Clinton ordered that every federal agency in the executive branch that manages federal lands "shall, to the extent practicable, permitted by law, and not clearly inconsistent with essential agency functions," allow Indian religious practitioners to have access to sacred sites for ceremonial reasons and "avoid adversely affecting the physical integrity of such sacred sites."<sup>148</sup> This strong statement was immediately weakened, however. Though the order defines sacred sites broadly,<sup>149</sup> it carefully notes that the order should not be con-

---

144. Bear Lodge Multiple Use Ass'n v. Babbitt, 175 F.3d 814, 815 (10th Cir. 1999).

145. See Grimm, *supra* note 143, at 22; SACRED LANDS OF INDIAN AMERICA, *supra* note 130, at 134 (describing ideas for what federal legislation should include).

146. Exec. Order No. 13,007, 3 C.F.R. 196 (1996).

147. SACRED LANDS OF INDIAN AMERICA, *supra* note 130, at 132.

148. 3 C.F.R. 196, 196.

149. 3 C.F.R. 196. Sacred sites are defined as:



strued as a taking of property interests<sup>150</sup> or as creating "any right, benefit, or trust responsibility."<sup>151</sup> The order also does not provide any enforcement mechanism other than a review of the agencies' actions to implement the order after one year. It provides no cause of actions for tribes, "is very non-threatening and it cannot be used in a court of law."<sup>152</sup> Indians should not look to the order as a guarantee of access to sacred lands.

Despite its weaknesses, this flimsy order could have some benefit. Failure to observe the Executive Order "could arguably" be seen as arbitrary and capricious.<sup>153</sup> Local governments might need to be wary of a sympathetic judge who could use the order as a way to decide in favor of Indians attempting to practice ceremonies on federal lands. As a result, President Clinton's Executive Order 13007 resembles AIRFA in being something that local governments cannot ignore if they have to go to court, in spite of its reputation for being toothless.

### C. Federal Court Decisions on Indians and Land Rights

Federal courts have also been less than helpful in enforcing any rights that the legislative and executive branches have attempted to guarantee for Indians. The current United States Supreme Court has certainly not been friendly to Indian interests,<sup>154</sup> and its treatment of AIRFA in *Lyng v. Northwest Indian Cemetery Ass'n*<sup>155</sup> is a prime example of this attitude.<sup>156</sup> In ad-

---

any specific, discrete, narrowly delineated location on Federal land that is identified by an Indian tribe, or Indian individual determined to be an appropriately authoritative representative of an Indian religion, as sacred by virtue of its established religious significance to, or ceremonial use by, and Indian religion, provided that . . . the agency . . . [is told] of the existence of such a site.

3 C.F.R. 196, 196-97.

150. 3 C.F.R. 196, 197.

151. 3 C.F.R. 196, 197.

152. REPORT, *supra* note 98, at xv.

153. See Zellmer, *Protection of Cultural Resources*, *supra* note 130; see also *supra* text accompanying note 147.

154. See, e.g., Ben Welch, *U.S. Supreme Court: A Slippery Slope*, 17 AM. INDIAN REP. 12, 12 (Oct. 2001).

155. 485 U.S. 439 (1988).

156. See Kevin J. Worthen, *Protecting the Sacred Sites of Indigenous People in U.S. Courts: Reconciling Native American Religion and the Right to Exclude*, 13 ST. THOMAS L. REV. 239, 240-41 (2000) (stating that one scholar argues that a change in the Supreme Court's paradigm has resulted in decisions like *Lyng*, and

dition, Indians face an uphill battle in First Amendment litigation because of the problem of proving that a given piece of land is central and indispensable to their culture, regardless of whether it is sacred.

In *Lyng*, three tribes from Northern California opposed the United States Forest Service's plan to build a road through the High Country in the Six Rivers National Forest.<sup>157</sup> The Forest Service's own anthropologist recommended that the road not be built, because her investigation of the ethnographic literature and interviews with Indians led her to conclude "that the proposed land development activities would destroy the 'very core' of their religious beliefs and practices."<sup>158</sup>

Although the Ninth Circuit upheld the lower courts' injunctions against the road,<sup>159</sup> the Supreme Court did not.<sup>160</sup> The Rehnquist Court held that the federal government is not barred from conducting activities that would harm an Indian religion as long as the government does not "coerce" individuals "into violating their religious beliefs."<sup>161</sup> Activities that have "incidental interference" with religious beliefs are thus acceptable even without compelling government justification.<sup>162</sup>

*Lyng* has been interpreted to mean that "government actions that 'merely' prevent conduct consistent with religious belief are 'incidental' and thus not unconstitutional."<sup>163</sup> This is like saying that the federal government can prevent someone from exercising her freedom of speech as long as the govern-

---

that this shift has been toward interpreting rights from a brightline property viewpoint rather than using a test that balances the interests of different parties).

157. *Lyng*, 485 U.S. at 443.

158. Moore, *supra* note 127, at 89 (citing to the anthropologist's report at 420, as quoted in Northwest Indian Cemetery Protective Ass'n v. Peterson, 565 F.Supp. 586, 594-595 (N.D. Cal.1983)); see also *Lyng*, 485 U.S. at 442.

159. N.W. Indian Cemetery Protective Ass'n v. Peterson, 795 F.2d 688, 698 (9th Cir. 1986).

160. 485 U.S. at 458.

161. *Id.* at 449.

162. *Id.* at 450.

163. Moore, *supra* note 127, at 91. One commentator sees *Lyng* as having spawned "a development rush that has increased in intensity over the past 15 years." Suzan Shown Harjo, *Protecting Sacred Places Against All Odds*, INDIAN COUNTRY TODAY, Nov. 12, 2003, at A3. In reaction to *Lyng*, the American Indian Religious Freedom Coalition attempted to persuade Congress to overturn *Lyng* by amending AIRFA, and succeeded in getting President Clinton to pass the Executive Order mentioned *supra* Part II.B. GETCHES ET AL., *supra* note 128, at 767.

ment does not stop her from saying anything important.<sup>164</sup> Given the Rehnquist Court's disinclination to protect their religious freedoms, Indians should not look to the Supreme Court for assistance in accessing sacred lands that are not located on what Anglo-American law defines as their property.<sup>165</sup>

Apart from *Lyng*, federal courts have applied the "centrality" standard in reference to attempts by Indian groups to protect land that they view as sacred.<sup>166</sup> As applied to Indians, this "bizarre and almost impossible to satisfy" test<sup>167</sup> requires that in order to assert rights under AIRFA to a particular part of the landscape, plaintiffs must show that a religious practice or belief is central and indispensable, and that the practice cannot occur someplace else.<sup>168</sup> A Hopi elder pointed out the problem with this three-part test:

How do people define which practices or beliefs in their religion are central and which are not?

... How can any people tell which practices or beliefs are indispensable? Can Catholics do without the Vatican?

---

164. "After *Lyng* Indians need not worry about special religious rights: the effect of the *Lyng* decision is to strip them of all constitutional religious rights for the protection of sacred sites." Moore, *supra* note 127, at 93.

*Lyng* may not have been an unmitigated disaster for tribes, though. Justice O'Connor's majority opinion suggests that federal agencies can accommodate Indian religious practices. Interview with Charles Wilkinson, Moses Lasky Professor of Law, in Boulder, Colo. (Apr. 13, 2004) (on file with author). This opinion can be seen as combining with the findings of AIRFA, which gives federal agencies reason to accommodate. *Id.* Since *Lyng*, there has been "considerable activity in these agencies in terms of accommodating traditional tribal religious practices, including gathering." *Id.*

165. For an examination of the difficulties plaintiffs have had in using any Constitutional doctrines to protect sacred lands, see generally Brady, *supra* note 32; Grimm, *supra* note 142, at 19.

166. Walker, *supra* note 60, at 100 (referring to Robert S. Michaelson, *American Indian Religious Freedom Litigation: Promise and Perils*, 3 J.L. & RELIGION 47 (1986), which describes this three-part test from First Amendment case law).

167. Masayesva, *supra* note 84, at 135.

168. See, e.g., *Sequoyah v. Tenn. Valley Auth.*, 620 F.2d 1159, 1164 (6th Cir. 1980).

... If we push you out of the way with a bulldozer, can you go someplace else?<sup>169</sup>

The federal courts are not currently offering much help for Indians in securing any rights to off-reservation sacred lands. However, it is sometimes difficult to predict what a court will decide, so local governments should consider whether they would rather chance what a court may decide or negotiate their own agreements with a tribe.

#### *D. A Brief Overview of State Government Views*

While the focus of this comment is on local rather than state action, it is important to note what concerns exist for states. State concerns will have an impact on what local governments can and are willing to do. Local governments sometimes have an uneasy relationship with the state, since cities and counties naturally want to make their own decisions about how to use land, while states have their own agendas and do not always share the same goals as local governments. In addition, one suggestion from the Sacred Lands Forum<sup>170</sup> was that Indians and others concerned with sacred lands "should be giving increasing attention to legislation at the state level."<sup>171</sup> Given the increasing clout of tribes,<sup>172</sup> Indians are able to lobby for their interests in more and more state capitals.<sup>173</sup> As a result, state legislation could increasingly tie the hands of local governments.

States have treated the issue of Indian sacred lands and objects in a variety of ways. Arizona, for example, requires a report to the director of the Arizona state museum any time human remains, funerary objects, or sacred or ceremonial objects are found during construction or surveying on lands owned by any institution of the state, county, or municipal gov-

---

169. Masayesva, *supra* note 84, at 135 (emphasis in original).

170. The Native American Sacred Lands Forum was held at the University of Colorado on Oct. 9-10, 2001.

171. REPORT, *supra* note 79, at 6 (quoting Charles Wilkinson, professor of law at the University of Colorado).

172. See *supra* text accompanying notes 5, 14, 17-20.

173. Across the country, tribes and states have signed numerous agreements, particularly for gaming. Recently, four separate compacts were mentioned in the Federal Register. See Indian Gaming, 68 Fed. Reg. 1068 (Jan. 8, 2003).

ernments.<sup>174</sup> Following the report, notice is required to anyone believed to be kin, including tribes, with subsequent consultation on the disposition of the objects.<sup>175</sup> California prohibits any interference with the free expression or exercise of Indian religion, and also prohibits any severe or irreparable damage to sacred sites found on public property.<sup>176</sup> Colorado has not yet developed a comprehensive statute looking at the relationship between governments and tribes over sacred land issues. This placed the city of Boulder in a difficult position when it considered whether or not to make an agreement with the tribes.

Although individual states have not come to any consensus, the National Conference of State Legislatures (NCSL)<sup>177</sup> came to a series of conclusions and recommendations on how states and tribes could develop better relationships.<sup>178</sup> Suggestions to states included working with tribes to determine a means of negotiating settlements, allowing "state agencies and political subdivisions to enter into intergovernmental agreements with Indian tribes," and enacting "more extensive protection of archaeological sites and repatriation of human remains and funerary objects."<sup>179</sup> Sacred lands and religious freedom were two items on a list of critical issues that tribes and states agreed they were facing.<sup>180</sup>

The NCSL report was also careful to point out the positive and negative aspects of litigation. Litigation can be positive in working out "murky" questions of law such as jurisdiction, and can help protect elected officials so they can make politically unpopular decisions that courts say they must.<sup>181</sup> However, litigation is often costly. Litigation also produces winners and

---

174. See ARIZ. REV. STAT. § 41-844(A) (1999). Similarly, Connecticut law defines "sacred site" or "sacred land", and requires consultation if any archaeological or sacred sites are located. CONN. GEN. STAT. ANN. §§ 10-381, 387 (West 2002).

175. See ARIZ. REV. STAT. § 41-844.

176. See CAL. PUB. RES. CODE § 5097.9 (West 2001). However, public property of cities and counties amounting to less than 100 acres is exempted.

177. The National Conference of State Legislatures was established in 1975 to work on developing "interstate communication," improve the "effectiveness of state legislatures," and provide state legislatures a "voice in the federal system." NATIONAL CONFERENCE OF STATE LEGISLATURES, STATES AND TRIBES: BUILDING NEW TRADITIONS, at ii (James B. Reed & Judy A. Zelio, eds., 1995).

178. *Id.* at 72.

179. *Id.* at 74. The recommendations included similar suggestions for tribes to consider the importance of negotiating with states before litigating as well. *Id.*

180. See *id.* at 8.

181. See *id.* at 18-19.

losers as opposed to the win/win situation that can arise from negotiation. In addition, litigation tends to answer narrow questions rather than solving broad problems, with often unpredictable results.<sup>182</sup>

Thus, states have a variety of ways of dealing with sacred land issues. Local governments may be tempted to stick with their state if they think they will have more protection than potential problems. The NCSL may influence even those states with policies more favorable to local governments to move towards a more Indian-friendly stance, particularly when tribes have an increasing voice at the state level.

In conclusion, there seems to be confusion about how to treat sacred lands at the federal and state levels. As a result of the actions of Congress, the President, and the Judiciary, federal agencies like the Forest Service, Park Service, and the Bureau of Land Management must balance the needs of such diverse groups as Indians, state and local governments, and tourists, and of powerful industries like ranching, logging, and mining. Given the conflict over federal regulations and the multitude of interests federal agencies consider, rightly or wrongly, "the only point all seem to agree on is that Congress or the courts will have to determine future management" of sacred sites.<sup>183</sup> Until Congress or the courts make this determination, the confusion currently places both tribes and local governments in a difficult position. Neither party can know when or to what extent a federal agency will act, or when a state agency will act on either federal or state regulations.

### III. THE CITY OF BOULDER MAKES AN AGREEMENT

*Be respectful of these sites—that's all we're asking.*<sup>184</sup>

Almost a decade ago, the city of Boulder came face to face with questions about sacred lands and artifacts. Tribes historically associated with the Boulder area determined that there was religious and cultural significance to some of the lands owned by the city of Boulder. Instead of initiating a long-term

---

182. See *id.* at 19.

183. Arrillaga, *supra* note 100.

184. Dizon, *supra* note 23 (quoting Alden Naranjo, representative of the Southern Ute tribe).

conflict, the City and the tribes came to an agreement that is a step towards recognizing and working with one another's worldviews. The Agreement is not perfect; already, it is apparent that the Agreement does not adequately address the concerns of urban Indians and does not address potential Establishment Clause problems. However, the Agreement can serve as a model both as to its formation and its contents. The Agreement delineates the rights and obligations of the parties and lays the foundation for the amicable resolution of future conflicts, and avoids the uncertainties prevalent at federal and state levels.

### A. *The Development of the Agreement*

What was to become an agreement between the city of Boulder and a coalition of Indian tribes to cooperate on access to and utilization of city land began with a lawsuit by city residents on a completely different issue. The development of this agreement is an example of how a local government may be forced to consider Indian issues without any prior warning and illustrates the wisdom of making an agreement before problems arise.<sup>185</sup>

The lawsuit began when the National Institute of Standards and Technology (NIST)<sup>186</sup> planned to develop some property it owns in the southern part of the City.<sup>187</sup> Neighbors of the proposed facility were worried about how the planned building would affect their view of the mountains,<sup>188</sup> and sued

---

185. The City and the Tribes have since made a second agreement granting the City a utility easement over the cultural easement. It provides for the presence of a tribal monitor during any excavation in case Indian cultural items are found. Weekly Information Packet, *supra* note 25, at 2. See also Deed of Easement Between National Institute of Standards and Technology (NIST), United States Department of Commerce and the City of Boulder (Feb. 1, 2000).

186. The National Institute of Standards and Technology is part of the United States Department of Commerce. It is non-regulatory, and its "mission is to develop and promote measurement, standards, and technology to enhance productivity, facilitate trade, and improve the quality of life" through its laboratories and its technical assistance programs for businesses. National Institute of Standards and Technology, *General Information*, at [http://www.nist.gov/public\\_affairs/general2.htm](http://www.nist.gov/public_affairs/general2.htm). (last updated Jan. 5, 2004).

187. See Dizon, *supra* note 23.

188. Mountain views are highly esteemed in Boulder, as shown by Boulder City Charter § 48, which limits buildings in the City to between fifty and fifty-five feet, the height of mature trees. General growth is strictly regulated through City initiatives like the Open Space Program. See *supra* Part IV.A.

the federal government to get an environmental impact statement (EIS)<sup>189</sup> on the effect the structure would have on the area.<sup>190</sup> The EIS examined how such aspects as the proposed land use and expected numbers of people and cars would affect such things as the location's air quality and traffic flow.<sup>191</sup>

As a result of the conflict over the building plans, the City entered into a Memorandum of Agreement (MOA) with NIST and its parent organization, the United States Department of Commerce (Commerce), on December 8, 1993.<sup>192</sup> The City and Commerce came up with an MOA on construction and land use, but the EIS, completed after the MOA was made, required consultation with tribes because of what was believed to be a medicine wheel<sup>193</sup> found on the grounds.<sup>194</sup>

---

189. An environmental impact statement is a study of how a proposed building plan would affect the environment, and is required for agencies. See National Environmental Policy Act of 1969, § 102, 42 U.S.C.A. § 4332(2)(C) (2002).

190. Interview with Joseph N. de Raismes, III, *supra* note 32. The City had also asked NIST for an EIS, but the neighborhood coalition took to the issue to court. City of Boulder City Council Agenda Item, 2 (Oct. 7, 1997), at <http://www.ci.boulder.co.us/clerk/previous/list/971007/10.html> (last visited Mar 29, 2004) [hereinafter Boulder City Council Agenda Item, Oct. 7, 1997]. This court challenge coincided with the negotiations between the City and Commerce. Interview with Joseph N. de Raismes, III, *supra* note 32.

On the other hand, Dr. Charlie Cambridge says that at about this same time he and a student initiated a suit against NIST to protect what he believes to be a medicine wheel on the NIST land. Dr. Charlie Cambridge, Presentation on Sacred Sites at Native American Awareness Week, University of Colorado, Boulder (Apr. 13, 2004). The author could not locate a published decision of either suit, so it is unclear what relationship these two lawsuits have to one another and to the events that transpired.

191. See *Indians to Inspect Proposed Lab Site*, ROCKY MTN. NEWS, Sept. 9, 1994, at 32A.

192. Boulder City Council Agenda Item, Oct. 7, 1997, *supra* note 190, at 1. According to City Attorney Joseph N. de Raismes, III, the City Council was not happy with the original plans for the proposed NIST building, and although the Department of Commerce could have overruled it, the federal government was required by statute to negotiate with the City. Negotiations took place after then-Representative David Skaggs attached a rider on a bill "permitting" Commerce to negotiate. Interview with Joseph N. de Raismes, III, *supra* note 32.

193. A medicine wheel is a circular structure built of stone which is connected with Indian spiritual traditions such as vision quests and astronomical studies. For an accessible explanation, see The Provincial Museum of Alberta, Human History: Archaeology FAQ, *What is a Medicine Wheel?* (2001), at <http://www.pma.edmonton.ab.ca/human/archaeo/faq/medwhls.htm> (last updated Apr. 2, 2001).

194. Interview with Joseph N. de Raismes, III, *supra* note 32. A medicine wheel had previously been discovered on the NOAA/NIST land in Boulder in "the early 1980's." Weekly Information Packet, *supra* note 25, at 1. See also Good, *supra* note 4. This may be the medicine wheel Dr. Cambridge discussed, though he



Following the requirements of the EIS,<sup>195</sup> Commerce contacted the tribes that were historically related to the land along the Front Range of the Rocky Mountains.<sup>196</sup> Despite having already negotiated an MOA with the City, Commerce began negotiations for another MOA with the Medicine Wheel Coalition for Sacred Sites of Northern America, the United Tribes of Colorado, and thirteen individual tribes (collectively, "the Tribes").<sup>197</sup> This second agreement ultimately gave the Tribes easements that partially overlapped the City's,<sup>198</sup> and resulted in necessary amendments to the MOA between the City and Commerce.<sup>199</sup> When the City first heard that the federal government was meeting with the Tribes, the City asked to come into the negotiations as well.<sup>200</sup> The City had not thought about involving Indians until NIST did, so the meeting between NIST and the Tribes "sparked [the City's] conscience and interest."<sup>201</sup>

The first meeting between the City and the Tribes was mainly a chance for the parties to get to know one another and their positions, sponsored by the federal government.<sup>202</sup> Representatives of the Tribes could not agree on whether the rock formations found on NIST land, whose presence instigated the

---

said that he was first shown the rock structure in 1993. Cambridge, *supra* note 190.

195. The EIS required that NIST reach an agreement with the relevant Indian tribes on "the preservation of certain 'sacred and special' portions of the NOAA/NIST site for the exercise of the religious and cultural beliefs of the Tribes on the site." Boulder City Council Agenda Item, Oct. 7, 1997, *supra* note 190, at 2.

196. Brown, *supra* note 22.

197. Interview with Joseph N. de Raismes, III, *supra* note 32. See also Boulder City Council Agenda Item, Oct. 7, 1997, *supra* note 190, at 2. Thirteen tribes are listed in the final agreement, though the number apparently fluctuated during the negotiations. For example, the City Council Agenda mentioned ten tribes in the negotiations. *Id.* The *Daily Camera* reported fourteen "members", though it is unclear from the article whether this meant fourteen individuals or fourteen tribes. Dizon, *supra* note 23.

198. Interview with Joseph N. de Raismes, III, *supra* note 32. The state of Colorado was not involved in any of these negotiations. *Id.*

199. The amendments were required for several reasons, such as changes in a proposed road, but for the purposes of this comment the most important reason was that the lands designated as "sacred and special" in NIST's MOA with the Tribes were proposed to be placed within the boundaries of the City's Protected Area Easement. Boulder City Council Agenda Item, Oct. 7, 1997, *supra* note 190, at 2.

200. Interview with Joseph N. de Raismes, III, *supra* note 32.

201. *Id.*

202. *Id.*

EIS and ultimately produced negotiations between the City and the Tribes, were an actual medicine wheel.<sup>203</sup> However, they did say that the site in question has religious and cultural significance.<sup>204</sup> The City then decided to make its own Agreement with the Tribes, because the City wanted to preserve the cultural resources on its land, and the City recognized that the Tribes "have a unique capacity to gather information and advice concerning cultural resources."<sup>205</sup>

A second meeting between the Tribes and the City resulted in the Agreement between the two parties.<sup>206</sup> The Agreement provides, among other things, access for the Tribes to certain areas of land and for City fire protection at the Tribes' ceremonial events.<sup>207</sup> Although the negotiations were not easy, the Tribes "really did not lose anything [in the negotiations], but gained something [they] had lost a long time ago."<sup>208</sup> A draft Agreement between the City and the Tribes was first discussed in 1997<sup>209</sup> and adopted by the Boulder City Council in 2002.<sup>210</sup>

At the second meeting, the City began talking about cultural resources that might be found on new land the City had just acquired: the Jewel Mountain and Van Vleet properties.<sup>211</sup>

---

203. *Id.* According to some Indians who inspected the site, "there was a medicine wheel there, but it was all destroyed already." *Indians Seek to Block Development*, ROCKY MTN. NEWS, Dec. 11, 1995, at 16A, 1995 WL 10622136. To the best of the City's knowledge, artifacts have been found in City-owned Open Space, and no sacred sites on City land have been disturbed. See Good, *supra* note 4.

204. Interview with Joseph N. de Raismes, III, *supra* note 32. The Boulder Valley was "a major crossroads for many tribes, who used the land for different purposes." Dizon, *supra* note 23 (quoting Alden Naranjo, representative of the Southern Ute tribe).

205. Agreement, *supra* note 22, at 2.

206. Tribal representatives recommended changes at an October 27, 2001, conference in Boulder. These changes were incorporated into the November 1, 2001, "Discussion Draft" that became the Agreement. Weekly Information Packet, *supra* note 25, at 1. The City paid for this second meeting. Interview with Joseph N. de Raismes, III, *supra* note 32.

207. Interview with Joseph N. de Raismes, III, *supra* note 32. See also Agreement, *supra* note 22, at 3. As of November 14, 2002, representatives from the Tribes had requested access to and used one particular, unnamed site within the agreed lands a number of times, although they have only used this one specific location. Interview with Joseph N. de Raismes, III, *supra* note 32.

208. Brown, *supra* note 22.

209. See Boulder City Council Agenda Item, Oct. 7, 1997, *supra* note 190, at 1.

210. See Boulder City Council Agenda Item, Sept. 17, 2002, *supra* note 22.

211. Interview with Joseph N. de Raismes, III, *supra* note 32.

The Tribes were interested in the City's Open Space Program<sup>212</sup> because it is designed to preserve the traditional landscape as much as possible.<sup>213</sup> The Tribes sent representatives to do a walk-through on these properties to see if there were any sites of sacred or cultural significance.<sup>214</sup> While no shards or burial sites were found, the group did note teepee rings and "lots of significant items on the land," indicating that there was one area in particular that was likely to have been a favorite campground,<sup>215</sup> which would clearly have cultural significance, and possibly sacred as well.

This walk-through also interested the Tribes in the neighboring Rocky Flats territory,<sup>216</sup> and may lead to an alliance with the City to secure federal action regarding that territory. The Department of Energy used Rocky Flats for developing plutonium triggers for nuclear weapons. The City's long-term goal is to ensure that Rocky Flats becomes a protected area.<sup>217</sup> Because of the federal laws protecting Indian cultural and religious sites,<sup>218</sup> the Tribes could be valuable allies in this goal for Rocky Flats. If cultural resources are found within Rocky Flats, as they have been on the neighboring Jewel

---

212. The City's Open Space Program began in 1967 and has resulted in protecting approximately a third of the planning area in the Boulder Valley from development. See JOSEPH N. DE RAISMES, III, *FROM LEFTHAND TO COAL CREEK: BOULDER'S OPEN SPACE PROGRAM 1* (1999). See *infra* Part IV.A. for a discussion of the Open Space Program.

213. Interview with Joseph N. de Raismes, III, *supra* note 32.

214. *Id.* See *infra* Part III.B.2. for more discussion on this walk-through and the change in practice it signifies for such surveys.

215. Interview with Joseph N. de Raismes, III, *supra* note 32. The discussion of what was found will remain vague at the request of the City Attorney, who is concerned that if the exact location and nature of cultural items found on the lands may subject them to improper use or destruction. Francis Brown said the findings were "confidential," but that they were primarily related to the Northern and Southern Cheyenne and Arapahos and ranged in age from 2,000 to 100 years old. *Id.* See also Brown, *supra* note 22.

216. Interview with Joseph N. de Raismes, III, *supra* note 32. Rocky Flats is approximately seven miles south of the City itself, and with the Van Vleet and Jewel Mountain purchases, the facility abuts the Open Space. The stretch between Boulder and Denver is experiencing rampant development, and the area around Rocky Flats could be prime real estate for commuting to either city if it were cleaned up.

217. *Id.* For a discussion of the opportunities for land and wildlife preservation which are offered by closing federal facilities, and specifically the possible benefits and problems at Rocky Flats, see Thomas P. Quinn, *The Best Use: Conversion of Closed Federal Facilities for Wildlife Habitat*, 26 COLO. LAW. 81 (Aug. 1997).

218. See discussion *supra* Part II.A.

Mountain and Van Vleet properties, the federal government may be more likely to preserve Rocky Flats as a wildlife refuge. The argument for preservation would be even stronger if both the City and the Tribes worked together to pressure the federal government to act.<sup>219</sup>

The City and the Tribes took seven years to produce the Agreement.<sup>220</sup> This document, described in the next section, is the basis for a long-term working relationship between the city of Boulder and the tribes historically associated with the Boulder area. The Agreement should forestall future misunderstandings, hopefully saving time and expense in the long run.

### *B. The Agreement Itself*

The Agreement between the City and the Tribes covers open space in general and the Jewel Mountain and Van Vleet properties in particular. There are a few differences in the rights and obligations each party has for the general open space and for the Jewel Mountain and Van Vleet properties, but the Agreement lays the foundation for future cooperation.<sup>221</sup>

#### 1. Rights and Obligations on Open Space Property

In general, the Agreement gives the Tribes consultation rights on the City's Open Space property, though the Tribes do not have a veto power on City plans,<sup>222</sup> and obligates the Tribes

---

219. Interview with Joseph N. de Raismes, III, *supra* note 32. As of February 2004, the federal government still plans to make Rocky Flats into a wildlife refuge. The City's agreement with the Tribes is a means of ensuring that Rocky Flats remains protected, regardless of political and economic changes on the national scene.

220. See Minutes of the Open Space Board of Trustees, 3 (Sept. 11, 2002), at [http://www.ci.boulder.co.us/openspace/about/osbt-minutes/9\\_11\\_02.htm](http://www.ci.boulder.co.us/openspace/about/osbt-minutes/9_11_02.htm) (last updated Feb. 26, 2004).

221. Like any agreement, this one is *not* perfect. For example, there is a 30-day notice requirement for an individual Indian to get a permit to use Open Space land. Agreement, *supra* note 22, at 3. Because Indian religious observances are tied to natural events, such as deaths, rather than a calendar, this is not the best possible provision. Interview with Don Ragona, *supra* note 6. However, this comment seeks to emphasize the process used and the benefits to be gained from such an agreement.

222. Interview with Joseph N. de Raismes, III, *supra* note 32. Tribes do have a veto over plans for the Jewel Mountain and Van Vleet properties. *Id.*

to take care of the land when they use it. In turn, the City has rights and obligations of notice and protection to the Tribes.

The Tribes "agree to provide cultural resource evaluation and advice" during the acquisition and management of Open Space land as an "ongoing consultation . . . for the purpose of identifying and protecting areas of religious and cultural significance and recognizing cultural resources in the area."<sup>223</sup> In turn, the City will "host an annual consultation" with representatives of the Tribes.<sup>224</sup>

If members of the Tribes want to use any of the Open Space land, they have the same rights as anyone else for pedestrian usage, and the additional right of a permit procedure that would allow them to build temporary structures on City land.<sup>225</sup> The permit process involves giving the City a thirty-day notice that relates to such issues as how many people would attend, safety measures, and parking.<sup>226</sup> The Tribes also agree to be responsible for "leaving the area in the same condition as they found it."<sup>227</sup> In return, the City promises to notify the particular tribe that such a permit has been requested so that the tribe can approve it as well, and to approve any permits that do not conflict with the City Charter, ordinances, or previously scheduled events.<sup>228</sup> In addition, the City promises to "provide reasonable fire protection services" for approved Tribal events.<sup>229</sup>

The Agreement gives the Tribes special rights on the Jewel Mountain Open Space area that can restrict its development. The Tribes must give the City permission to build on those properties,<sup>230</sup> and the City must notify the Tribes of any planned plowing, cultivating, intentional burning, or mineral extraction.<sup>231</sup> If there is a conflict over the planned City activi-

---

223. Agreement, *supra* note 22, at 2.

224. As long as money is budgeted for such a conference. *Id.* at 3. This is a positive element of the Agreement, because this consultation process was suggested to federal agencies as "the most important step in overcoming the ignorance of and noncompliance [of these agencies] with the 1978 AIRFA policies." Moore, *supra* note 127, at 96.

225. Temporary structures might include sweat lodges or tipis. Agreement, *supra* note 22, at 3.

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.*

230. Interview with Joseph N. de Raismes, III, *supra* note 32.

231. Agreement, *supra* note 22, at 3.

ties, representatives of the Tribes and the City must meet to resolve the conflict. Nothing may be done unless the City and at least fifty percent of the Tribes sign off on a management plan.<sup>232</sup>

Finally, the City agrees to consult with the Tribes on the disposition of any "American Indian cultural resources, including funerary objects and human remains," inadvertently found on Open Space lands.<sup>233</sup> The City will protect the objects until a decision can be made on reinterment, though the City acknowledges that it must act in accordance with federal and state law.<sup>234</sup>

Thus, the Agreement establishes procedures for dealing with potential problems such as Indian ceremonial access to lands and the discovery of cultural artifacts. The Tribes' rights center on access and consultation rather than limitation, and "[t]ribal representatives made clear that they did not want the land to be off-limits to locals."<sup>235</sup>

## 2. The Consultation and Monitoring Processes

The Agreement sets up procedures for the City to consult with the Tribes over development and permit approval, and it provides for a tribal representative to monitor excavation on Open Space lands. These provisions are good examples of proactive measures the City and the Tribes have taken to avoid potential problems with both access to Open Space lands and disposition of any found artifacts.<sup>236</sup>

---

232. *Id.* at 4.

233. *Id.*

234. *Id.* For example, the draft Memorandum of Understanding Between the City of Boulder and the State Historical Society of Colorado specifies that the Native American Graves Repatriation Act, 25 U.S.C. § 3001-3013 (1990), will apply. Memorandum of Understanding between the City of Boulder and the State Historical Society of Colorado 3 (Draft, Sept. 11, 2002) [hereinafter Memorandum Draft of Sept. 11, 2002]. This Memorandum was approved on July 1, 2003. City of Boulder, City Council Agenda Item, Meeting Date July 1, 2003, at <http://www.ci.boulder.co.us/clerk/previous/Minutes/2003/07-01Appmin.pdf> (last visited Mar. 30, 2004).

235. Dizon, *supra* note 23.

236. For consultation to be successful, it must happen "early and often," the notice and consultation must both be meaningful, and there needs to be a conflict-resolution procedure in case consultation does not produce agreement. Dean B. Suagee, *Tribal Voices in Historic Preservation: Sacred Landscapes, Cross-Cultural Bridges, and Common Ground*, 21 VT. L. REV. 145, 215-18 (1996).

The City has developed guidelines for conducting an inventory of cultural resources on City land, as well as for evaluating, curating, and protecting them, plus educating the public about them if appropriate.<sup>237</sup> These guidelines include a provision that the artifacts be overseen by a "cultural resource professional with qualifications appropriate to the investigation being conducted."<sup>238</sup> Alden Naranjo, a Southern Ute and member of the United Tribes of Colorado, has served as the tribal monitor in the past.<sup>239</sup> As a monitor, he has provided his cultural expertise to help the City decide what areas may be of sacred interest and which ones might contain artifacts.

Although the City has some concerns that this Agreement may come back to "bite" it,<sup>240</sup> there have been no problems thus far, and the Agreement makes it more likely that there will not be any in the future. The City worried that the Agreement might open the door to Indian demands for greater use or even control over City-owned land. However, the Agreement establishes a framework within which the City can negotiate with the Tribes. Also, by working with the Tribes, the City has reduced the chances that individuals will make demands on its time and property: the City refers individuals to their tribes for a decision on what requests are legitimate.

In addition, the Agreement makes it more likely that these two parties will become natural allies over time.<sup>241</sup> During the negotiations, both sides found that they share many goals, including "a desire to preserve land and lessen environmental impacts."<sup>242</sup> Together, the Tribes and the City should be able to ensure that the Open Space lands remain undeveloped, and they may be able to expand this ethic to nearby lands as well.<sup>243</sup>

---

237. City of Boulder, Cultural Resource Inventory Guidelines 5–11 (Draft, Aug. 2002) [hereinafter Cultural Resource Inventory Guidelines Draft].

238. *Id.* at 5.

239. Interview with Joseph N. de Raismes, III, *supra* note 32.

240. *Id.*

241. *Id.*

242. Dizon, *supra* note 23.

243. As mentioned *supra* Part IV.A, Rocky Flats may become a national wildlife preserve. Tribal involvement can help the City persuade the federal government to do what it would like them to by strengthening the argument. See Interview with Joseph N. de Raismes, III, *supra* note 32.

### C. Future Relations

Two areas of particular concern during the negotiations of the Agreement were protecting the land and any found artifacts and deciding who would be allowed to exercise the Tribes' rights to use the designated land. In addressing these concerns, the Agreement establishes a framework for future interactions between the City and the Tribes.

#### 1. Protecting Cultural Resources and Land

Once the Agreement with the Tribes was concluded, the City began developing an agreement with the Colorado State Archaeologist and the Colorado Historical Society to better protect cultural resources within the Open Space.<sup>244</sup> Because there is currently no way to physically guard any cultural and religious sites on Open Space land,<sup>245</sup> the City and the Tribes are both concerned that such an agreement protect the precise locations of cultural resources.<sup>246</sup> They also want to ensure that the State Archaeologist would only provide redacted information should such be requested.<sup>247</sup> The City Attorney felt that the State should be involved because Colorado could more readily provide redacted versions of relevant information in case of public demands for disclosure.<sup>248</sup> The City also wants to ensure that the Historical Society "agrees to protect confidential information in the files of both the Society and the City"<sup>249</sup> so that the precise locations of cultural resources remain confidential.

In the future, the City plans to take more proactive measures by fencing off some areas to protect both cultural and

---

244. *Id.*

245. Protection is necessary; the National Park Service reported a 1000% increase in vandalism against Indian sites in the 1980s alone. See Cummings, *supra* note 140, at 278.

246. Interview with Joseph N. de Raismes, III, *supra* note 32.

247. *Id.*

248. *Id.*

249. Cultural Resource Inventory Guidelines Draft, *supra* note 237, at 3. This confidentiality policy is also based on the Native American Graves Protection and Repatriation Act, 25 U.S.C. § 3002 (2001), and National Register Bulletin No. 29, providing Guidelines for Restricting Information About Historic and Prehistoric Resources. *Id.*



wildlife resources.<sup>250</sup> Preservation is the means of ensuring that these resources are available for all to use, and is a key goal of the Open Space Program.<sup>251</sup> While another goal is to provide recreational opportunities, the public does not need to walk over every square inch of Open Space.<sup>252</sup> Pathways will guide the public use, while the areas' privacy, and potentially fences, will carry out the preservation and protection purposes of the Open Space Program.

## 2. Determining Bona Fide Tribal Uses

When negotiating the Agreement, the City expressed concern about determining the legitimacy of permit requests.<sup>253</sup> The Tribes, already recognized in the Agreement for their cultural expertise, assumed the role of determining bona fide requests, which should help forestall future conflicts over who is a legitimate user of the Open Space land.

The Agreement requires that a permit request be for a "bona fide" use, but it does not clearly define this term. When a permit is requested, the City contacts the tribe with which the applicant claims an affiliation to ask if the request is bona fide.<sup>254</sup> The City did not want to get involved in questioning any individual's motivations.<sup>255</sup> The definition of "bona fide" is thus tied to how a federally recognized tribe defines it,<sup>256</sup> because each tribe will determine what it considers to be bona fide and only approve tribal members' requests that meet the tribe's internal standards.

Initially, no Indians requested use of any of the City's land except for a particular location that the City preferred not to

---

250. Interview with Joseph N. de Raismes, III, *supra* note 32. Cultural resources on Open Space lands would include Indian-related artifacts and sites as well as those related to the later farmers and ranchers who settled Boulder.

251. City of Boulder, Open Space and Mountain Parks, Long Range Management Policies, Introduction, at <http://www.ci.boulder.co.us/openspace/planning/Lrmp/lrmpchapter1.htm> (last updated Feb. 26, 2004).

252. *Id.* See *infra* Part IV.A. for more discussion on the Open Space Program and its goals.

253. See *infra* Part IV.A.

254. Agreement, *supra* note 22, at 3.

255. Interview with Joseph N. de Raismes, III, *supra* note 32.

256. Brown, *supra* note 22.

name,<sup>257</sup> and all of the Indians who had come to the City for a permit were from a reservation.<sup>258</sup> The permit process itself is designed take care of any of the City's concerns with defining "bona fide," since it is left to the individual tribe to make that determination. This provision allows for the great diversity between the religious ceremonies and beliefs of individual tribes, solving the problem of having one culture rule on the legitimacy of another culture's activities.<sup>259</sup> Recent events have revealed a hole in the Agreement, though: how to deal with urban Indians who live in the area, have religious and cultural practices, but do not necessarily have strong ties with particular tribal signatories of the Agreement.<sup>260</sup> It remains to be seen exactly how this issue will be resolved.

#### IV. THE CITY OF BOULDER AS A MODEL FOR LOCAL GOVERNMENTS

*The ground on which we stand is sacred ground. It is the dust and blood of our ancestors.*<sup>261</sup>

Boulder is an unusual city in many respects. Nevertheless, the City's Agreement with the Tribes can serve as a model for cities and counties that share certain important characteristics. The Agreement also indicates the kinds of measures that can be taken to reach understandings between these potential adversaries.

##### A. *What Makes Boulder Unique?*

The city of Boulder is a particularly receptive place for an agreement with Indian tribes because of both the political

---

257. Interview with Joseph N. de Raismes, III, *supra* note 32. The City Attorney requested that this location not be named to protect it from unapproved use.

258. *Id.* This is rather surprising, because a few years ago nearby Denver was touted as having the largest concentration of urban Indians in the country. See James Brooke, *Indian Country Finds a Capital in Denver*, N.Y. TIMES, Feb. 22, 1999, at A12.

259. See Cummins & Whiteduck, *supra* note 34, at 6.

260. This has come to light in a recent controversy over access to an area in Boulder called Valmont Butte. See Pamela White, *On Common Ground*, BOULDER WEEKLY, Jan. 22–28, 2004, at 10.

261. Plenty Coups, Crow, *quoted in* COYHIS, WINTER, *supra* note 71, at 52.

views of its people and the City's vigorous Open Space plan. The people of Boulder tend to be very concerned with environmentalism, development management, and other more typically liberal issues.

The City shows its environmental values in its extensive recycling program, water conservation,<sup>262</sup> and push to encourage hybrid cars.<sup>263</sup> In addition, the Open Space Program has a significant impact on development and is supported by a generous sales and use tax,<sup>264</sup> because "having undeveloped land preserved in perpetuity [is] a deeply held value in Boulder."<sup>265</sup>

Indian issues may be more on the radar in Boulder than in many other cities. The City is home to the founding office of the Native American Rights Fund and the National Indian Law Library, and average citizens seem aware of Indian issues. During an Open Space Board of Trustees discussion of the Agreement, one citizen commented that he "hope[d] that the Board approves [the Agreement] especially considering the historical treatment of the Indians and their land," and that this Agreement "was a way of showing respect."<sup>266</sup> A political environment like this made the Open Space trustees more receptive to hearing the concerns of indigenous peoples.<sup>267</sup>

The City's Open Space Program has resulted in the City owning approximately 41,000 acres as of November 2002.<sup>268</sup> Boulder County owns an additional 70,000 acres of land dedicated to minimal development.<sup>269</sup> No United States city has a comparable amount of undisturbed land.<sup>270</sup> This land base

---

262. See *Boulder on Target with Conservation Efforts, Says City*, COLO. DAILY, Feb. 4, 2003, at 6.

263. State Senator Ron Tupa, from Boulder, sponsored a bill to allow drivers whose cars use both electricity and gas to use the express lanes for free. See *Tupa Altfuel Bill Moves On, but RTD Tax Measure Fails*, COLO. DAILY, Feb. 5, 2003, at 7.

264. The tax currently amounts to .73 percent. See DE RAISMES, *supra* note 212, at 7. Boulder was the first city in the country to pass a sales tax for the purpose of acquiring open space lands. See <http://www.ci.boulder.co.us/openspace/about/osdept.htm> (last updated Feb. 26, 2004). See *infra* Part IV.A. for more on the Open Space Program.

265. Dizon, *supra* note 23.

266. Minutes of the Open Space Board of Trustees (Sept. 11, 2002), [http://www.ci.boulder.co.us/openspace/about/osbt-minutes/9\\_11\\_02.htm](http://www.ci.boulder.co.us/openspace/about/osbt-minutes/9_11_02.htm) [hereinafter Minutes of Open Space Board of Trustees].

267. Interview with Joseph N. de Raismes, III, *supra* note 32.

268. Minutes of Open Space Board of Trustees, *supra* note 266.

269. Interview with Joseph N. de Raismes, III, *supra* note 32.

270. *Id.*

makes Boulder, city and county, particularly attractive to Indians as a place to work out a land-use agreement: there is enough land at stake to make the Indians' time worthwhile.<sup>271</sup> This is because the Open Space charter<sup>272</sup> guarantees that the land is more than a park—Open Space land is legally committed to always being the way that it is,<sup>273</sup> and it gives the City “something to show” Indians: land which has been preserved and which belongs to the heritage of tribes historically connected to this area.<sup>274</sup>

In conclusion, there are many aspects of the city of Boulder that make it unusually, and perhaps uniquely, apt for reaching an agreement such as it did. However, there are also many aspects the City shares with other local governments, some of which virtually all local governments would have in common.

### *B. What Makes Boulder Universal?*

Although Boulder has one of the oldest and most extensive open space programs in the country,<sup>275</sup> many local governments are developing similar programs as the greenbelt movement spreads, with cities and counties expanding the amount of land they own to curb over-development. Currently, numerous local governments have programs that seek to acquire undeveloped land.<sup>276</sup> Boulder's agreement with the Tribes can thus be a good model for other local governments to use in forestalling problems with the potentially conflicting interests of Indians connected to the area.<sup>277</sup>

---

271. *Id.*

272. For a copy of the charter, see [http://www.ci.boulder.co.us/openspace/about/osmp\\_charter.htm](http://www.ci.boulder.co.us/openspace/about/osmp_charter.htm) (last updated Feb. 26, 2004).

273. *Id.*

274. Interview with Joseph N. de Raismes, III, *supra* note 32.

275. See City of Boulder, Boulder's Open Space & Mountain Parks: A History, at <http://www.ci.boulder.co.us/openspace/about/OSMP-history.htm> (last updated Feb. 26, 2004).

276. An Internet search on “open space” and “city or county” yields local government programs from Camden County, New Jersey, to the city of Los Angeles, California, and from Cook County, Illinois, to Austin, Texas. Local governments of all kinds and places are seeking to improve their citizens' quality of life by purchasing open space. See, e.g., the discussion to create a greenbelt around Ann Arbor, Michigan, at <http://www.a2openspace.org/index.html> (last updated Nov. 16, 2003); the Greenbelt Alliance in the San Francisco Bay, at <http://www.greenbelt.org/index.shtml> (last visited Feb. 27, 2004).

277. Interview with Joseph N. de Raismes, III, *supra* note 32.

Just as "Native groups usually find their interests in alignment with other important user groups who benefit from the preservation of the federal public land base,"<sup>278</sup> Indian tribes also have a common cause with local governments and environmental groups who wish to preserve or improve the quality of life in cities and counties. Tribes share similar problems with local governments in making decisions about land resource management in general. "Environmental policy is the product of the combined influences of environmental ethics, science, and economics,"<sup>279</sup> and so both governing bodies could help one another find new answers to similar questions. In addition, groups like the United Tribes of Colorado and the Medicine Wheel Coalition may make the process of finding a common cause both easier, because the local government can deal with a larger group of Indians, and more pressing, as groups may be able to bring more pressure to bear.

Any community with federal facilities nearby might also benefit from Indian involvement in their goals. Federal lands, such as national parks, wildlife areas, and even military-related complexes like Rocky Flats, have an impact on the local economy. Following the American Indian Religious Freedom Act,<sup>280</sup> federal agencies have adopted the policy of consulting with tribes on how federal lands are developed or altered.<sup>281</sup> By building coalitions with Indian tribes historically associated with their area, local governments strengthen their bargaining position to change federal behavior in directions that could be more favorable to both local governments and the tribes.

In addition, sacred lands and "Indian artifacts are all over the West"<sup>282</sup> and can be located virtually anywhere in the country.<sup>283</sup> Finding lands sacred to Indians, or human or cultural

---

278. Moore, *supra* note 127, at 98.

279. Tsosie, *supra* note 49, at 226.

280. 42 U.S.C. § 1996 (2001).

281. For example, the Deputy Director for the Mountain-Prairie Region of the United States Department of Interior sent a letter to the Cheyenne and Arapaho Tribes of Colorado inviting them to participate in the development of a comprehensive conservation plan and environmental impact statement related to the future of Rocky Flats. Letter from John A. Blankenship, Deputy Director, U.S. Department of Interior, to James Pedro, Cheyenne and Arapaho Tribes of Oklahoma (July 30, 2002) (on file with author).

282. *Id.*

283. For recent news stories mentioning finds of Indian artifacts, see *Old Rum Distillery Buried as Ground Shifts on its Fate*, N.Y. TIMES, Mar. 29, 2001, at B5; Bill Workman, *Early Morning Protest at Stanford Site*, S.F. CHRON., June 18,

remains, are likely to raise issues of justice and delay or derail a development project.<sup>284</sup> It simply makes sense for municipalities and counties to be proactive in establishing procedures to deal with the concerns of the Indians who formerly lived on the lands they now control.

Finally, when a local government makes such an agreement on its own initiative, preservation becomes a municipal value rather than a state or federal one. This makes it "easier to swallow"<sup>285</sup> because such an agreement is made on the locality's own initiative and on its own terms instead of through forced compliance with federal or state laws. The city of Boulder's independent Agreement with the Tribes has potentially resulted in a much better relationship between the two governmental groups than might have resulted if the State had imposed an agreement on the municipality, because the City had more control over the process.

## CONCLUSION

The Agreement between the City and the Tribes may be the start of a new way for local governments and Indian tribes to relate to one another—by attempting to be proactive before problems arise. Indians and Euro-Americans "are destined to live side by side" as the new millennium continues, "so it is imperative that we respect and honour . . . all lands considered sacred" by either group.<sup>286</sup>

A persistent problem leading to conflict between Indians and Euro-Americans is in identifying what is sacred to Indians

---

1999, at A21; Terry Lockman, *Living History: Family on Same Property Since 1809*, ATLANTA J.-CONST., May 14, 1998, at 5; Karen Maeshiro, *Artifacts Link to Long Ago*, DAILY NEWS OF L.A., Mar. 22, 1998, at AV1; Kimball Perry, *Artifact Find Stalls Water-Line Expansion*, CINCINNATI POST, Dec. 1, 1993, at 6A; Kevin McCullen, *Fire Pit Yields 6,000-Year-Old Tools*, ROCKY MTN. NEWS, Feb. 3, 1993, at 22.

284. See, e.g., *Old Rum Distillery Buried as Ground Shifts on its Fate*, N.Y. TIMES, Mar. 29, 2001, at B5; Bill Workman, *Early Morning Protest at Stanford Site*, S.F. CHRON., June 18, 1999, at A21; Kimball Perry, *Artifact Find Stalls Water-Line Expansion*, CINCINNATI POST, Dec. 1, 1993, at 6A.

285. Interview with Joseph N. de Raismes, III, *supra* note 32.

286. Vandenbroeck, *supra* note 125, at xiv. "The understanding and protection of sacred sites involves accepting complex belief systems which are based in oral traditions, a Native world view, subjectivity, and a relationship with the land which does not involve ownership and exploitation." Cummings, *supra* note 140, at 289.

in a way that is meaningful to American society, and especially to the courts and politicians.<sup>287</sup> This difficulty means that tribes may have to be the first to reach out, because they have better knowledge of the lands their ancestors once held. Once *rapprochement* occurs, though, it is possible that the divergent Euro-American and Indian views can be reconciled in a way that brings benefits to both parties. To do that, however, each must approach the other's cultural views with respect<sup>288</sup> and take from one other what can be of benefit.

Each group has something to learn from the other. Over the years, Indians have been learning how to work within the dominant society, though often unwillingly. Modern American society can learn from the Indian understanding of the relationship between human beings and nature.<sup>289</sup> This is especially true from a conservation/ecological standpoint, where the ethical and spiritual goals of Indians and some environmentalists connect.<sup>290</sup> Sacred places remind us that there are things larger than ourselves, and "that we have responsibilities to the rest of the world that transcend our own personal desires and wishes."<sup>291</sup> The Judeo-Christian tradition of subduing nature tends to blind mainstream American society to the fact that humans are part of the natural world, not above it, and that we humans will suffer the same fate as any other creature if we do not work to preserve the land and nature.

The city of Boulder is making a step towards recognizing the importance of a partnership between the City and the Tribes. A partnership like this can benefit both parties in an agreement such as the one they negotiated, as Indians and local governments can help one another avoid problems, resolve them quickly when they arise, and share resources. In addition, "partnerships could grow into more long-term and more

---

287. See Cummins & Whiteduck, *supra* note 34, at 3-14.

288. Although usually governments and the law value the status quo, saying "we'll listen to [your divergent opinion] so long as we can find loopholes in the existing body of law. 'Let's lay the law aside and come up with something new' is never the approach considered." Little Bear, *supra* note 42, at 16.

289. See David H. Getches, *A Philosophy of Permanence: The Indians' Legacy for the West*, J. OF THE WEST, July 1990, at 54.

290. See Ward, *supra* note 30, at 829-30. Likewise, Indian goals for preserving cultural treasures and significant landscapes will probably have a large impact on similar preservation movements within the dominant society. GULLIFORD, *supra* note 55, at 120.

291. DELORIA, *supra* note 30, at 281.

broadly focused relationships, which might be called 'alliances'<sup>292</sup> for the benefit of both societies.

---

292. Suagee, *supra* note 236, at 218.