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Cry, Sacred Ground: Big Mountain, U.S.A.

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CRY, SACRED GROUND: BIG MOUNTAIN, U.S.A.

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Relocation is a word that does not exist in the Navajo language. To be relocated is to disappear and never to be seen again.

Pauline Whitesinger

On Dec. 22, 1974, Congress enacted the Navajo-Hopi Indian Relocation Act[1] to provide a "final solution" to a land dispute between the Navajo and Hopi tribal governments that a federal court called the "largest title problem in the West."[2] The "Relocation Act" partitioned into two equal parts 1.8 million acres of land formerly held in common by both tribes and compelled resettlement of eleven thousand Navajos and ten Hopis who lived on the "wrong side of the partitioning fence."[3] The massive rangelands

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1. Pub. L. No. 93-531, 88 Stat. 1712 (1974); Pub. L. No. 96-305, 94 Stat. 929 (codified as amended in 25 U.S.C. § 640(d) to 640(d)(28) (1982)).

2. Healing v. Jones (II), 210 F. Supp. 125, 129 (D. Ariz. 1962), *cert. denied*, 373 U.S. 758 (1963). Rather than finally settling the land dispute, the court's decision has served to intensify the controversy, generate further litigation, and has given rise to continuing efforts by an international support coalition to reverse the human rights abuses caused by the Relocation Act that provided for the partition and explusion solution.

Many traditional Hopi and Navajo people support the view that the "Navajo-Hopi land dispute" is a misnomer, diverting attention from the variety of interests involved in the land dispute — interests which have the effect of destroying the foundation of traditional life within the formerly jointly held Holy Lands. *See* Goodman & Thompson, *The Hopi-Navajo Land Dispute*, 3 AM. INDIAN L. REV. 397 (1975); Tehan, *Of Indians, Land and the Federal Government: The Navajo-Hopi Land Dispute*, 2 ARIZ. ST. L.J. 173 (1976); Whitson, *A Policy Review of the Federal Government's Relocation of Navajo Indians Under P.L. 93-531 and Pub. L. 96-306*, 27 ARIZ. L. REV. 371 (1985).

3. The precise number of relocatees has always been a matter of controversy, with estimates ranging from approximately 3,500 to 15,000. However, the Relocation Act has resulted in the largest forced relocation of a racial group since the internment of Japanese-Americans during World War II under Exec. Order No. 9066, 3 C.F.R. 1092 (1942).

located in the center of the Navajo nation in the northern reaches of Arizona have a special significance to both Navajo and Hopi people.[4] For Navajos who practice their traditional religion, occupancy is necessary to engage fully in a religious practice which, as a theological matter, inextricably links the people to the land.[5] For Hopis, the lands within this 1882 Executive Order reservation form part of the Hopi aboriginal territory and are viewed by practitioners of traditional Hopi religion as a sacred gift from Massau'u (Great Spirit), which must be "forever protected by the Hopi," who were instructed to maintain life in balance through "prayers, meditation and Song."[6]

The Hopi tribal government provided for the resettlement of the Hopi families who lived on the lands partitioned to the Navajo tribe, and by 1988, nearly 80% of the Navajos who had lived on Hopi Partitioned Lands (HPL) had moved.[7] However, some fifteen hundred to two thousand Navajos refuse to go.[8] The "resisters" say relocation violates the essence of their religious beliefs. The resisters explain that the essence of their resistance is their religion.[9] To protect their religious beliefs, forty-five resisters brought a lawsuit against the government in federal courts,

4. Distinct but generally compatible visions on overlapping Holy Lands are the historical antecedents to the land dispute. Black Mesa is inextricably woven into the spiritual lives of both the Navajo and Hopi practitioners of traditional religion who find the land a living expression of their inner lives. *See* F. MITCHELL, NAVAJO BLESSINGWAY SINGER: THE AUTOBIOGRAPHY OF FRANK MITCHELL, 1881-1967 (1980); J. KAMMER, THE SECOND LONG WALK: THE NAVAJO-HOPI LAND DISPUTE (1981); P. ZOLBROD, DINÉ BAHANE: THE NAVAJO CREATION STORY (1984); J. Wood & W. Vanette, A Preliminary Assessment of the Significance of Navajo Sacred Place in the Vicinity of Big Mountain, Arizona (Unpublished paper of Navajo-Hopi Relocation Commission, Flagstaff, Ariz., Jan. 1979); Clemmer, *Hopi History, 1940-1974*, in 9 HANDBOOK OF NORTH AMERICAN INDIANS (W. Sturvetent ed. 1978).

5. *See* J. Wood & W. Vanette, *supra* note 4 (affidavits in support of *Manybeads v. United States*, particularly those of Betty A. Tso, Ella Badonie, Kee Shay, Jack Hatathlie and Kee Watchman).

6. Interviews with Kikmongwis Starlie Lomayaktewa, Mishongnovi Village, Wu'Wuchim Chief Grandfather David Monongye and former tribal Chairman Abbott Sekaquaptewa, 1985-86.

7. Interview with Peter MacDonald, chairman of the Navajo Nation, Jan. 1988.

8. Testimony by attorney Lee Brooke Phillips before U.S. District Court, Washington, DC, in support of a motion for preliminary injunction in Manybeads v. United States, originally filed Jan. 26, 1988 in the United States District Court for the District of Columbia. The case was transferred on defendants' motion.

9. The value system that shapes Navajo society on the HPL finds its expression and the method of renewal and continuation in the ceremonies, songs and philosophy of the Navajo Way. In a form of mutual reinforcement, Navajo practice both reaffirms and ensures the existence of a Navajo way of life that is formed by Navajo religious belief. Expulsion from sacred lands within the Four Sacred Mountains that form the visi-

Manybeads v. United States, to challenge Public Law 93-531 on first amendment grounds.[10] Plaintiffs argue that the government action infringes on their practice of Navajo religion and, therefore, violates the free exercise clause of the first amendment. What the Navajo plaintiffs seek, in the name of religious freedom, is the right to remain on their ancient Holy Lands from which they are scheduled to be expelled.[11]

With their free exercise claim, the Navajo plaintiffs both implicitly and explicitly raise questions that challenge the cornerstone of federal Indian law. The lawsuit highlights a troublesome conflict of tribal sovereignty, the federal trust obligation, the plenary power doctrine (whereby the government retains the power to abrogate treaties with Native Americans) and the rights of individual native Americans to seek a remedy for government action that unintentionally violates their free exercise rights.[12] Although several circuits

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ble expression of Navajo belief would create the most unconscionable of all sacrileges — the elimination of a people and a way of life that is rooted to specific areas of sacred ground. *See generally* J. FARELLA, THE MAIN STALK: A SYNTHESIS OF NAVAJO PHILOSOPHY (1984).

10. Manybeads v. United States, No. 410 (D. Ariz. filed Jan. 25, 1988).

11. *Id. Manybeads* seeks injunctive relief for plaintiffs who oppose compulsory relocation as it applies to them. Plaintiffs claim that forcible relocation from their ancestral homelands unconstitutionally violates their right to religious freedom as guaranteed by the free exercise clause.

As a defense to the claims of Navajo petitioners, the U.S. government claims Healing I and II are res judicata. Further, the government argues that, since the Hopi tribe is an indispensable party, a cause for dismissal under Federal Rule of Civil Procedure 19 exists in that the Hopi tribe enjoys sovereign immunity and is incapable of joinder without its consent. Plaintiffs claim they seek a religious easement which will not disturb the property interests of the Hopi tribe but will satisfy their first amendment claim. *Id.*

12. The congressional power to determine the questions and political life in Indian country is exceedingly broad. "The power of Congress extends from the control of use of the lands, through the grant of adverse interests in the land, to the outright sale and removal of the Indians' interests. And this is true, whether or not the lands are disposed of for public or private purposes." F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 94-95 (1972).

That a first amendment claim would succeed against federal legislation is currently dubious. "The Supreme Court has sustained nearly every piece of federal legislation it has considered directly regulating Indian tribes, whether challenged as being beyond federal power or within that power but violating Indian rights." Newton, *Federal Power Over Indians: Its Sources, Scope and Limitations*, 132 U. PA. L. REV. 195, 195 (1984). The broad authority of Congress to regulate affairs of Indian country in a virtually unreviewable manner was established during the era of Chief Justice John Marshall.

The concept of unreviewable congressional action was formulated in 1903 in Lone Wolf v. Hitchcock, 187 U.S. 553 (1903), a decision which Judge Nichols in his concurring opinion in Sioux Nation of Indians v. United States, 601 F.2d 157, 173 (Ct. Cl. 1979), *aff'd*, 448 U.S. 371 (1980), called the "Indian Dred Scott." "Plenary authority over the tribal

have rendered decisions in a growing body of case that involve the practice of Indian religions on federal lands, the United States Supreme Court has only recently decided a land theology case to offer firm guidance on the extent to which practitioners might expect constitutional protection for their unique theological link to the land.[13] The most that can be said of the courts' guarantees to Indian religions is that the courts acknowledge their existence.[14]

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relations of the Indians has been exercised by Congress from the beginning, and the power has always been a political one, not subject to be controlled by the judicial department of the government." *Lone Wolf*, 187 U.S. at 564-65.

Policymakers continue to deny native Americans who live tribally the basic freedoms accorded other United States citizens, based on legal and political theories that find the relationship between the United States and Indian tribes "an anomalous one and of a complex character." United States v. Kagama, 118 U.S. 375, 381 (1885).

The Supreme Court has held that Indians are not entitled to compensation under the fifth amendment for the U.S. government's taking of timber from aboriginal lands. "The power of Congress is supreme." *See* Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 281 (1955).

The courts show extraordinary deference to Congress, limiting its use of the plenary power only in very limited fifth amendment circumstances involving compensation and payments of interest to Indian tribes for lands wrongfully taken. Delaware Tribal Business Comm'n v. Weeks, 430 U.S. 73 (1977).

Whether a first amendment claim might reverse or modify legislation that burdens free exercise did not reach the courts prior to *Lyng*. The judicial ability to curb congressional infringement on constitutional rights does exist. In United States v. Alcea Band of Tillamooks (Alcea I), 329 U.S. 40, 54 (1946), the Court held that "[t]he power of Congress over Indian affairs may be of a plenary nature, but it is not absolute." *See also* Delaware Tribal Business Comm'n v. Weeks, 430 U.S. 73 (1977). Congress could have partitioned the joint use area with Navajo first amendment interests in mind: *"Healing v. Jones* contained no express mandate to the Congress as to the one and only proper way of apportioning the interests in the joint-interest area, as Congressman Owens suggested to this colleagues." Shifter & West, Healing v. Jones: *Mandate for Another Trail of Tears?* 51 N.D.L. REV. 73, 80 (1974-75).

But with expulsion as the solution to the Navajo-Hopi land dispute, coupled with the decision in *Lyng v. Northwest Indian Cemetery Protective Ass'n*, Congress and the courts appear to be indicating that the Indian wars are not yet over.

13. Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988). The Supreme Court ruled in *Lyng* that the first amendment's free exercise clause does not forbid the government from permitting timber harvesting in, or constructing a road through, a portion of the national forest that traditionally has been used for religious purposes by members of three American Indian tribes in northwestern California. In its 5-3 decision, the Court diminished the authority of the American Indian Religious Freedom Act, Pub. L. 95-341 (1978), stating that the courts would not create a religious preserve for Indian practitioners. *Lyng*, 485 U.S. at 451-52. In an interview in *The Washington Post*, Justice O'Connor said of *Lyng*, "However much we might wish that it were otherwie, the government simply could not operate if it were required to satisfy every citizen's religious needs and desires." Kamen, *Ist Amendment No Obstacle to Road-Building on Holy Ground*, Wash. Post, Apr. 20, 1988, at A12, cols. 1-2.

14. *Lyng* provides useful standards for the *Manybeads* plaintiffs who seek to exercise their rights on tribal rather than on federal lands and to curb the reach of Pub. L. 93-531

The purpose of this analysis is to examine briefly the major legal obstacles that impede the Navajo practitioners in *Manybeads* from exercising their first amendment rights. Thus it supports the view that the legal and political branches of the United States government have institutionalized procedures that have a cumulative effect of extinguishing traditional Navajo religion by creating a Navajo exile community, far removed from the source of their religion.

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as it affects their religious practice. The *Lyng* Court examined the degree to which the "spiritual practices would become ineffectual" if the governmental action were not discontinued, the degree to which governmental action has a tendency to "coerce individuals into acting contrary to their religious beliefs," whether the government action is so disruptive that "it will doom their religion," and the extent of inquiry into the effect of the challenged governmental policy that would burden the religious practice. *Lyng*, 485 U.S. at 450-51. In these analyses, the case of Navajo plaintiffs is strengthened, although *Lyng* suggests that the Supreme Court is instructing the lower courts to entertain seriously only those free exercise claims that involve a God-centered religious tradition which regards the worship of a supreme being as the center of religious experience. *See* Gianella, *Religious Liberty, Nonestablishment, and Doctrinal Development, Part I: The Religious Liberty Guarantee*, 80 HARV. L. REV. 1381 (1967).

Much is now being written about the opposing visions of reality that form tribal beliefs and the opposing beliefs of the dominant society. But even as political organization in the international community of indigenous and aboriginal peoples gains momentum, very little has been incorporated in the dominant culture's legal and political system. *See* V. DELORIA, JR., METAPHYSICS OF MODERN EXISTENCE (1979). Deloria notes that aboriginal people model their societies after the natural processes of the universe, a sensibility that underlies native theology. In the course of his discussion, Deloria comments that the fundamental harmonies required by native theologies are completely ignored by Euro-American jurisprudence, which has no place for the natural world: "Physical entities that support life, such as air, water and land, are conceived in a legal sense as if they had no existence apart from the human legal rights that have been attached to them." *Id.* at 135. *See also* V. DELORIA, JR., GOD IS RED (1973); A. JOSEPHY, JR., NOW THAT THE BUFFALO'S GONE (1982); NATIONAL LAWYERS GUILD COMM. ON NATIVE AMERICAN ISSUES, RETHINKING INDIAN LAW (1983); and AMERICAN INDIANS AND THE PROBLEM OF HISTORY (C. Martin ed. 1987).

Underlying theological concepts of traditional Navajo religion are perhaps best understood in environmental terms which require a similar nexus of events necessary to sustain life as found in traditional indigenous religions, which take the environmental logic one step further. *See* Sierra Club v. Morton, 405 U.S. 727 (1972), especially the dissenting opinion of Justice William O. Douglas in which he argued for the legal standing of trees; Stone, *Should Trees Have Standing? — Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450 (1972). Stone's argument moves toward rights for the environment but provided the basis for a compelling argument for procedural safeguards that might also be applied to the land theologies of native religions. *See also* S. Talbot, Desecration and American Indian Religious Freedom (unpublished report, Department of Sociology and Anthropology, University of the District of Columbia, Washington, undated).

This discussion is divided into five sections. Part I presents the problem and provides a brief synopsis of traditional Navajo religion. Part II analyzes the preliminary question of standing, or qualification for bringing suit, as it threatens to bar traditional Navajo practitioners from a forum capable of vindicating their free exercise claims. Part III discusses the first amendment considerations, arguing that a more compelling first amendment situation is hard to imagine. Part IV briefly describes the appropriate principles of international law. Part V concludes that Congress should be prohibited from enacting legislation that uproots people from land that is the source of their religion.

I. Navajo Religion as Practiced on the Hopi Partitioned Lands (HPL)

The 1974 Relocation Act provides for access to religious shrines by relocatees.[15] However, in its efforts to protect traditional Navajo and Hopi religious practices, Congress instead passed a law that is destroying traditional Navajo religion.

Access to religious shrines is insufficient to enable the continuation of the fundamental theological link between Navajo practitioners and the land. Reference to protection of shrines in the 1974 act reflects a misunderstanding of the nature of Navajo religion.[16] Because the generally pantheistic Indian religions differ fundamentally from the dominant culture's religions in their relationship to land, it is relatively easy for government-sponsored infringements to occur.[17] Unlike Judeo-Christian beliefs, Navajo religion requires occupancy on ancestral homelands.[18] The Nava-

15. "In any division of the surface rights to the Joint Use Area, reasonable provision shall be made for the use of and right of access to identified religious shrines for the members of each tribe on the reservation of the other tribe where such use and access are for religious purposes." 25 U.S.C. § 604d-5(c).

16. Senator Barry Goldwater, in order to block a moratorium bill, claimed that the ongoing relocation of some eleven thousand Navajos "does not involve grave questions of religious freedom nor of Indian policy." 132 CONG. REC. S7726 (daily ed. June 18, 1986).

17. "The courts view property in a single dimension. For the Hopi, land is viewed at multiple levels, as property, as spirit and as the essence of their complex belief system which cannot be defined, determined or protected in a single level of perception. That is why Indian land cases are so difficult. And that is why the larger society has difficulty in understanding Indian religions." Interview with author Dr. Jack Forbes, professor of Indian Studies at the University of California at Davis (March 1988).

18. *See* affidavits accompanying Manybeads v. United States, No. 410 (D. Ariz. filed Jan. 25, 1988); J. Wood & W. Vanette, *supra* note 4.

jos who practice their ancient religion say that the interconnection between the people and the land is central to their religion. The practitioners claim that they are "rooted" to the land on which they were born. Particular clans are required to make offerings at specific locations which enjoy a particular place in the Navajo spiritual universe. The Sings conducted during the major ceremonies express the location of the boundaries of the Navajo universe and provide moral and practical instruction to the people who practice a land theology that has been passed from generation to generation in the oral tradition. The clans, particular sacred places, and the Navajo boundaries are inextricably linked to form the foundation of a delicately balanced Navajo universe from which knowledge is drawn to teach the younger generations how to live in the Navajo Way. Without such teachings, the religion — and the people who practice it — will die.[19]

Occasional site visits to the Navajo homeland would replace a living religion with empty ritual, devoid of meaning. According to the complaint filed in federal court on behalf of Navajos who seek to stop the relocation, "Traditional Navajos believe that the Creator placed them on their particular ancestral homelands and gave them the responsibility to remain on and care for the land through prayers and offerings made at specific sacred places."[20]

Instead of adhering to anthropological versions of migrations from Athapaskan country in Alaska, traditional Diné (the people) maintain that they emerged from previous worlds to live on their homelands between the Four Sacred Mountains that form the contours of the Navajo universe. Here, between the Four Sacred Mountains that are the "Great Hogan," the Diné were instructed to live in order to "caretake the land and maintain the natural balance and harmony of the universe."[21]

In the world of the Diné, everyday life is defined by an interplay of prayers, offerings and ceremony through an intricate network of clan relations which have developed a noncash economy based on sheepherding. The purpose of the interplay of these com-

19. A description of the nexus of these beliefs is found in the relatively untranslatable term, hoozhooji, the act of becoming in the Way of the Blessingway. In the religious concept hoozhooji, the Navajo practitioner experiences the inextricable interrelationship between himself and the world. *See* J. FARELLA, *supra* note 9.

20. Plaintiffs' brief, *Manybeads*, No. 410 at 23.

21. J. Wood & W. Vanette, *supra* note 4, and P. ZOLBROD, *supra* note 4.

plex elements is to maintain a reciprocal relationship that will ensure the continuation of a balanced life lived in the Navajo Way.[22]

The relationship to the land is made visible in the ceremonies that begin with the preparation for a birth. Before a Navajo child is born, an introduction to Mother Earth is made. This concept is known as the "planting of the spirit." A Blessingway ceremony is conducted to make the first tie of the fetus to the universe, marking the unborn child's place in it.

When the child is born, the "afterbirth is taken and offered to a young tree or a greasewood bush." When the umbilical cord falls off, it is buried in the land near the place of birth. This is the initial link of the child to the earth and the spirit world, the place where the child may always return. By the time the child grows to be an Elder, his roots are anchored deep into the earth. With each prayer, each song, each generation, the roots of the practitioners of traditional Navajo religion go "deep into the ground."[23]

Navajo ceremonial life on the HPL is designed not to mystify but to make the invisible theological dimensions of Navajo cosmology visible. Perhaps the connection between the land inside the Four Sacred Mountains and the Navajo Way is best understood in the ceremonies conducted to restore the mental health of a person who is the subject of a Navajo Sing, or ceremony. The individual cannot find balance outside of his/her context; the balance of an individual is restored only in relationship to the Navajo universe. To accomplish this restorative act, the medicine man returns the patient to the Navajo Creation and Emergence, re-

22. Folklorist Barre Toelken perhaps best explains the matrix of events, the "oneness":

> My Navajo sister says that the reason these beads (juniper berries strung together) will prevent nightmares and keep one from getting lost in the dark is that they represent the partnership between the tree that gives its berries, the animals which gather them, and humans who pick them up (being careful not to deprive the animals of their food). It is a three-way partnership—plant, animal and man. Thus, if you keep these beads on you and think about them, your mind, in its balance with nature, will tend to lead a healthy existence . . . . They are reminders of a frame of mind which is essentially cyclic, in the proper relationship with the rest of nature — a frame of mind necessary to the maintenance of health.

Toelken, *Seeing with a Native Eye: How Many Sheep Will It Hold?* in SEEING WITH A NATIVE EYE 18-19 (W. Capps, ed. 1976); *see also* R. WILLIAMSON, LIVING THE SKY (1984).

23. Interviews with Betty Tso. *See* two hundred hours of recorded interviews in Navajo-Hopi Land Dispute Documents (1988) (available in Special Collections Library, University of New Mexico); *see also* A. PARLOW, CRY, SACRED GROUND: BIG MOUNTAIN, U. S. A. (1988).

creating both time and place. When the patient returns, a rebirth has occurred and the balance is restored.

The Navajo way of life is a restorative cycle of events, maintained by ceremony and lived in daily life. Without the ability to renew and realign with Creation, the sacred knowledge, power and continuity of the Navajo people would be lost. According to a Navajo medicine man who succumbed to relocation, "Relocation to Denver, Phoenix or Winslow is something less than Navajo." The deportations from the spiritual world of the Navajo grandfathers are viewed as the most recent chapter in a long history of government intervention in the Navajo way of life.

II. Standing

Procedural obstacles, particularly the standing question, threaten to deprive plaintiffs of an appropriate forum before which to bring their first amendment claim. A dismissal for lack of standing would permanently deny traditional Navajo practitioners who reside on the HPL a remedy to government action that infringes on their fundamental constitutional rights.[24] Traditional Indian plaintiffs rarely fare well in the courts, which generally recognize tribal governments as the appropriate party to challenge federal activity on behalf of its members[25] or find Indian interests subordinate to federal interests.[26] However, in *Manybeads*, plaintiffs who are

24. "The very essence of civil liberty consists in the right of every individual to claim protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection." Marbury v. Madison, 5 U.S. (11 Cranch) 137, 163 (1803). The courts are reluctant to dismiss if the effect of dismissal is to deprive plaintiff of a remedy of forum. Provident Tradesmen Bank and Trust Co. v. Patterson, 390 U.S. 102, 109 (1969).

The United States has a fiduciary responsibility, as a trustee, to Native Americans. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 16-17 (1831). The Supreme Court has consistently held that acts of Congress which may adversely affect Indian rights must be narrowly construed. Bryan v. Itasca County, 426 U.S. 373, 379 (1976). A statute cannot restrict Indian rights unless it contains a "clear and plain" expression of intent by Congress to do so. United States ex rel. Hualpai Indians v. Santa Fe Pac. R.R., 314 U.S. 339, 353 (1941). In its amicus curiae brief support of *Manybeads v. United States*, the Navajo Nation's attorney general wrote: "If Congress had intended to bar plaintiffs from asserting their individual constitutional rights, that action in itself would have been unconstitutional." Manybeads v. United States, No. 410 (D. Ariz. filed Jan. 25, 1988).

25. Lomayakteau'a v. Hathaway, 520 F.2d 1324, 1327 (9th Cir. 1975), *cert. denied*, 425 U.S. 903 (1976). In dismissing the case, the court reasoned that the Hopi tribal council was an indispensable party to the lawsuit but because of sovereign immunity could become a party to the lawsuit only by voluntary action.

26. Lyng v. Northwest Cemetery Protective Ass'n, 485 U.S. 439 (1988). The decision does not bode well for the constitutional rights of traditional Indian practitioners. In In-

also dual citizens[27] of the Navajo nation raise grave constitutional questions and claim rights as individual American citizens, with the expectation that their individual rights must not be immunized from review.

To meet the Article III requirements,[28] plaintiffs must meet a three-pronged test. Plaintiffs must show that they have "personally suffered some actual or threatened injury as a result of the conduct of [the] defendant," that the injury can be "fairly traced to the challenged action," and that it is "likely to be redressed by a favorable decision."[29] Central to the standing question is the factor of the party's "personal stake in the outcome of the controversy to assure . . . concrete adversariness."[30]

In *Manybeads*, plaintiffs' "direct stake in the outcome" could not be more personal. The Navajo petitioners face a forcible ejection from land that is the center of their spiritual, political and economic life.

Plaintiffs believe the spiritual beings placed them on the lands within the Four Sacred Mountains that form the contours of the Navajo spiritual universe and instructed them to care for particular areas to maintain religious balance.[31] Relocation will prevent them

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dian cases which are grounded in a theology of land, the accumulated historical wrongs have become judicially institutionalized and have formed the basis for the denial of relief. In *Lyng*, the Supreme Court has gone beyond the taking of Indian land and has deprived spiritual access.

27. The Citizenship Act of 1924 naturalized all "Indians born within the territorial limits of the United States." 43 Stat. 253, 8 U.S.C.A. § 1401(a)(2) (1970). The Act enabled the assertion of rights under federal and state law.

28. U.S. CONST. art. III. This article limits the power of federal courts to resolve only actual cases and controversies.

29. Valley Forge Christian College v. American United, 454 U.S. 464, 472 (1982).

30. Baker v. Carr, 369 U.S. 186, 204 (1962).

31. The Relocation Act established an independent government agency, the Navajo-Hopi Indian Relocation Commission, to carry out the resettlement of the Navajos and Hopis located on the "wrong side of the fence" as a result of the 1974 Act. 25 U.S.C. § 640(d)(11). In 1979, the Commission contracted with anthropologists John J. Wood and Walter M. Vanette to study the religious implications of relocation in the seat of the resistance, the Big Mountain community. Wood and Vanette concluded that the "right of access to and use of sacred places without occupancy does not make sense." J. WOOD & W. VANETTE, A REPORT FOR THE NAVAJO AND HOPI INDIAN RELOCATION COMMITTEE (1979). Professor Wood's subsequent studies have reaffirmed this conclusion. J. Wood and K. Stemmler, Land and Religion at Big Mountain: The Effects of the Navajo-Hopi Lands Dispute on Navajo Well Being (privately printed, 1981, available on order through Northern Arizona University Bookstore, Flagstaff, Ariz.); *see also* SENATE SELECT COMM. ON INDIAN AFFAIRS, REPORT AND PLAN OF THE NAVAJO-HOPI RELOCATION COMMISSION, 96th Cong., 2d Sess. at Appendices (1981).

from exercising their religious beliefs.[32] Plaintiffs, and many non-plaintiffs who are also subject to resettlement,[33] believe that relocation will lead to their spiritual death.

For the plaintiffs, to be relocated is to be banished from the universe where Navajo religion operates — religion that requires occupancy to enable an ongoing interaction between the land, the people, the sheep and the spiritual beings that links them to the cosmos in a unified vision of life. Further, the ostensibly neutral statute, intended to resolve a traumatic land dispute,[34] has created a climate of harassment by government officials who work on the HPL[35] as they uproot people from the cradle of their religion.

Passed without input from plaintiffs, the law has also caused enormous hardship. A number of anthropologists, sociologists, social workers and doctors have testified before Congress to the draconian effects of the law: despair, alcoholism, broken families,

32. *See* J. WOOD & W. VANETTE, *supra* note 31; M. TOPPER, EFFECTS OF P.L. 93-351 ON NAVAJO AREA MENTAL HEALTH PATIENTS FROM THE FORMER NAVAJO-HOPI JOINT USE AREA (1980); T. SCUDDER, NO PLACE TO GO: EFFECTS OF COMPULSORY RELOCATION ON NAVAJOS (1982); A. PARLOW, CRY, SACRED GROUND (1988); recorded interviews in Navajo-Hopi Land Dispute Documents (1988), which, in part, describe the relationship of the JUA Navajo to the land (available in Parlow Collection, Special Collections Library, University of New Mexico).

33. Recorded interviews, *supra* note 32.

34. A 1.8 million-acre area surrounding the Hopi mesas within both Navajo and Hopi aboriginal territory was set aside by President Chester A. Arthur in his Executive Order of Dec. 16, 1882 for "the use and occupancy of the Moqui (Hopi), and such other Indians as the Secretary of the Interior may see fit to settle thereon." The area in question was jointly occupied by both Navajos and Hopis. *See* Healing v. Jones, 210 F. Supp. 125, 129 n.1 (D. Ariz. 1962), *aff'd* 373 U.S. 758 (1963). In 1958, Congress authorized litigation to define title to that reservation. Act of July 22, 1958, Pub. L. No. 85-547. After *Healing v. Jones*, Congress passed legislation to partition this "Joint Use Area" and relocate individuals who found themselves on the "wrong side of the partitioning fence." Pub. L. No. 93-531, 88 Stat. 1712, (amended July 8, 1980, Pub. L. No. 96-305, 94 Stat. 929 and codified as amended at 25 U.S.C. § 640(d)). However, Hopi Kikmongwise and other spiritual leaders from Hotevilla, Shungopavi, Mishongnovi and Kykotsmovi have consistently opposed relocation. *See* letters in National Archives; *see also* S. TULLBERG, REPORT TO THE HOPI-KIKMONGUIS AND OTHER TRADITIONAL HOPI LEADERS ON DOCKET 196 AND THE CONTINUING THREAT TO HOPI LAND AND SOVEREIGNTY, (Indian Law Resource Center 1979).

35. Letter from Assistant Secretary of Indian Affairs Ross O. Swimmer to Navajo Tribal Chairman Peterson Zah (May 20, 1986) ("[I]n response to your letter dated April 10, 1986, concerning the alleged ongoing harassment of elderly Navajo families awaiting relocation from Hopi Partitioned Lands west of the Dennibito Trading Post. . . . The complaints enumerated in your letter have been substantially confirmed by the Navajo Area and Agency Criminal Investigators on April 19, 1986.").

impoverishment and a sense of hopelessness.[36] A favorable ruling on behalf of the plaintiffs would reverse further destruction.

In several sections, the Relocation Act[37] grants authority to the chairmen of the Navajo and Hopi tribes to bring certain lawsuits and authorizes them to represent the tribes and their members in those suits.[38] Although the courts have denied standing to individuals in several cases brought under the Relocation Act, those decisions should not be construed to apply to the constitutional claims of individuals.[39] In instances where the courts denied standing to individuals, plaintiffs sought to exercise rights that were either derived from tribal rights or from communally held rights.[40]

36. T. SCUDDER, *supra* note 32; J. JOE, FINAL REPORT: EFFECTS OF FORCED RELOCATION ON A TRADITIONAL PEOPLE (1985).

37. 25 U.S.C. § 640(d)(7)(a).

38. Indian tribes enjoy sovereign immunity, requiring specific waiver by the tribes or Congress to enable litigation between the Navajo and Hopi tribes. Congress included provisions in the Relocation Act to enable lawsuits for the limited purpose of resolving title or other questions that arise from Pub. L. 93-531. United States v. Wheeler, 435 U.S. 313, 320 (1978); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978). Congress has the power to waive tribal sovereignty immunity, but the waiver must be clearly expressed.

39. All of the litigation under the Relocation Act involves only intertribal interests. In Sekaquaptewa v. MacDonald ("Sekaquaptewa II"), 591 F.2d 1289, 1298 (9th Cir. 1979), the court denied the intervention of two Navajo persons who sought to determine title to land. According to the court, "Section 604d-17c provides that individual interests may be litigated in a suit between two tribes only when those interests are represented by the tribal chairmen." *Id.* at 1291. In Sidney v. Zah, 718 F.2d 1453, 1456 (9th Cir. 1983), the court followed its earlier ruling that the Relocation Act refers to intertribal lawsuits, not suits against the U.S. government.

Although individual Navajo plaintiffs were found to have insufficient standing to bring suit against the United States on matters that arose from the Relocation Act, in *Walker v. Navajo-Hopi Indian Relocation Commission* an individual Navajo had standing to bring an action against the Relocation Commission for denial of relocation benefits. Walker v. Navajo-Hopi Indian Relocation Comm'n, 728 F.2d 1276, 1278 (9th Cir.), *cert. denied*, 469 U.S. 918 (1984). Similarly, in Belin v. United States, No. 79-448 (D. Ariz. Jan. 7, 1980), an individual Navajo brought suit against the United States for a breach of fiduciary duty for allowing land to become part of the reservation system. *See also* Begay v. United States, 650 F.2d 288 (1980), *cert. denied*, 450 U.S. 1040 (1981).

Ignorance of Indian religions has been the substantial reason for governmental abuse. American Indian Religious Freedom Act, 42 U.S.C. § 1996 (1978).

40. *See* plaintiffs' brief, Manybeads v. United States, No. 410 (D. Ariz. filed Jan. 25, 1988), in support of Motion for Preliminary Injunction; Sekaquaptewa v. MacDonald ("*Sekaquaptewa I*"), 544 F.2d 396 (9th Cir. 1979), *cert. denied*, 430 U.S. 931 (1977) (individual standing denied regarding tribal grazing rights); United States v. Kahinto, 456 F.2d 1087 (9th Cir.) (individual tribal member's claim to aboriginal title denied), *cert. denied*, 409 U.S. 842 (1972).

The Navajo nation has filed an *amicus curiae* brief in support of the plaintiffs' first amendment claims, asserting its view that Congress did not expressly delegate authority to the Navajo nation to assert constitutional claims on behalf of individuals. In an affidavit that accompanies the *Manybeads* complaint, the Navajo attorney general stated that, had Congress wanted to authorize the tribe to bring claims on behalf of individuals who seek to assert their constitional rights, it would have done so. In his brief, he expanded his thinking: "Congress has authorized extensive litigation of property rights among the Tribes and the United States,but nowhere in these provisions did Congess authorize the Tribal chairman to . . . challenge that [Relocation Act] policy."[41] It is unlikely that Congress would have so intended, opening the question of an appropriate forum for individual Navajo constitutional claims arising from the Relocation Act.

III. Relocation Violates the Free Exercise of Religion for Traditional Practitioners

Infringement

The first amendment forbids infringement on the free exercise of religion.[42] The courts have consistently held that government action violates the free exercise clause if it imposes a burden on the free exercise of religion.[43] The sole exceptions to this stringent rule that the courts have allowed are situations where a state interest is of "sufficient magnitude" to override the interest of the peti-

41. Plaintiffs' brief, *Manybeads*, No. 410 (D. Ariz., filed Jan. 25, 1988).

42. U.S. CONST. amend I.

43. Wisconsin v. Yoder, 406 U.S. 205, 235-36 (1972). The Supreme Court established guidelines to evaluate free exercise claims, determining whether governmental action is sufficiently compelling to burden a religious practice. The state, in pursuit of a compelling interest, may burden religious practices. United States v. Lee, 455 U.S. 252, 256-57 (1982). However, "only those interests of the highest order and those not otherwise served can overbalance a legitimate claim to the free exercise of religion." *Yoder*, 406 U.S. at 215.

In *Yoder*, a group of Amish citizens sought exemption from prosecution under a Wisconsin statute that required school attendance until the age of sixteen. The Supreme Court exempted the Amish from prosecution under the statute because it found that mandatory high school attendance interfered with the Amish ability to practice a fundamental component of their religion. *Id.* at 235. The analogy with *Manybeads* is quite specific. A fundamental tenet of traditional Navajo beliefs on the JUA is that forced resettlement will make it impossible for them to practice their religion as instructed by their Creator.

tioner claiming protection under the free exercise clause.[44] The courts have been extremely circumspect before upholding legislation or policy that interferes with religious practice. The courts have found sufficiently compelling interest in situations that involve national defense,[45] public health and safety,[46] the maintenance of the social security system,[47] and the management of lands dedicated to public use.[48] In all other situations, the two-pronged *Sherbert v. Verner*[49] test is applied to contested state action to scrutinize the extent to which the government action is sufficiently compelling to allow an interference with religious expression.

An infringement is found if government action has a "coercive effect" on a religious practice.[50] However, the effect of infringe-

44. Sherbert v. Verner, 374 U.S. 398 (1963) establishes that the first amendment sometimes requires the government to refrain from acting in order to prevent a plaintiff from being forced to relinquish religious beliefs. A burden on free exercise may be "justified by a compelling state interest in the regulation of a subject within the State's constitutional power to regulate . . . ." *Id.* at 403. The Court ruled that the state cannot condition public benefits, whatever their purpose, so that they operate to "inhibit or deter the exercise of First Amendment freedoms." *Id.* at 405. In *Sherbert*, a Seventh Day Adventist challenged a South Carolina statute which denied the plaintiff unemployment benefits because she refused to accept available work which required her to work on her Sabbath day. The Supreme Court ruled that by withholding statutory benefits, South Carolina unconstitutionally forced the plaintiff to choose between observing her religious practice and accepting benefits under the program.

In Cantwell v. Connecticut, 310 U.S. 296 (1940), the Court held that the first amendment's guarantee of free exercise "embraces two concepts — freedom to believe and freedom to act. The first is absolute. The second is conduct that remains subject to regulation for the protection of society." *Id.* at 303-04. The Supreme Court ruled in NAACP v. Button, 371 U.S. 415, 438 (1963), that "only the gravest abuses, endangering paramount interest, give occasion for permissible limitation."

45. Gillette v. United States, 401 U.S. 437 (1971).

46. Lawson v. Commonwealth, 164 S.W.2d 972 (Ky. 1942).

47. United States v. Lee, 455 U.S. 252 (1982). *See* Sherbert v. Verner, 374 U.S. 398 (1963) (Sunday closing laws); *In re* Jemison, 374 U.S. 14 (1963) (jury duty); Frank v. Alaska, 604 P.2d 1068 (Alaska 1979) (fish and game laws); People v. Woody, 394 P.2d 813 (1964) (drug abuse). All have given way to the protection of religious practice.

48. *Lyng*, 485 U.S. 439 (1988).

49. Additionally, in Pillar of Fire v. Denver Urban Renewal Auth., 509 P.2d 1250, 1254 (1976), the court noted that even in highly politically motivated programs, such as urban renewal where massive and expensive city management plans are being executed, planners must avoid direct confrontations between religious facilities and urban renewal plans because of the constitutional protection of religious expression.

50. The "coercive effect" standard is useful to define the kind of harm required to trigger first amendment protection. *See* Note, *Indian Worship v. Government Development: A New Breed of Religion Case*, 1984 UTAH L. REV. 313, 316. In Abington v. Schempp, 374 U.S. 203, 223 (1963), the Court shows little precedent for interpreting "coercive effect" to require "coercive intent." Recent Supreme Court decisions have not re-

ment need not coerce to the point of prohibition; impediment to religious practice is sufficient to trigger constitutional scrutiny of the challenged governmental practice.[51] The courts have ruled that whatever the stated objective of a law, it "is constitutionally invalid even though the burden may be characterized as being only indirect."[52]

In order to establish an infringement upon free exercise, several threshold requirements must be met. The religious practice burdened must further an actual religious belief whose source is the religion.[53] The courts must accept a petitioner's characterization of his belief, otherwise the court would be cast in the role of determining matters of theology which are exclusively under the authority of the religious practitioners.[54] The religious belief must be one that is sincerely held.[55] Perhaps the most controversial dimension to Indian

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quired coercive intent to prohibit governmental action. *See* Thomas v. Review Bd., 450 U.S. 707, 709 (1981); *Sherbert*, 374 U.S. at 400 n.3. In *Badoni v. Higginson*, the court denied relief, in part, because government disturbance of religious belief was incidental to the government's interest in expanding the ski resort on the Hopi Holy Lands at the San Francisco Peaks. Badoni v. Higginson, 635 F.2d 172, 176 (10th Cir. 1980), *cert. denied*, 452 U.S. 954 (1981).

51. *See Sherbert*, 374 U.S. at 404; Braunfield v. Brown, 366 U.S. 599, 607 (1961). "Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it defines such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial." *Id.* at 607. Dayton Christian Schools, Inc. v. Ohio Civil Rights Comm'n, 766 F.2d 932, 950 (1985), *rev'd*, 477 U.S. 619 (1986).

52. "If the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect. But if the State regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the State's secular goals, the statute is valid despite its indirect burden on religious observances unless the State may accomplish its purpose by means which do not impose such a burden." Braunfield v. Brown, 366 U.S. 599, 696 (1961) (emphasis added).

53. Thomas v. Review Bd., 450 U.S. 707, 713 (1981); Wisconsin v. Yoder, 406 U.S. 205, 215 (1972).

54. *Thomas*, 450 U.S. at 715-16; Cantwell v. Connecticut, 310 U.S. 296, 310 (1940). "Courts are not arbiters of scriptural interpretation," as determined in United States v. Lee, 455 U.S. 252, 257 (1982).

Given the recent decision in *Lyng*, the courts are increasingly encouraging conformity with the dominant society. In *Lyng*, the Supreme Court is following a century of questionable takings of Indian land with a current practice of denying a continuing spiritual connection to sacred lands.

55. *Yoder*, 406 U.S. at 241.

religion cases is the requirement that the burdened practice be theologically central to the plaintiffs' religion.[56] The degree of religious centrality of the burdened action is not a specific threshold requirement for a free exercise claim but one that has been used

56. Some controversy exists as to the evolution and meaning of the centrality test. Howard Stambor writes that this "centrality" test has no precedent and was constructed specifically for cases involving Indian land theologists. Stambor, *Manifest Destiny and American Indian Religious Freedom: Sequoyah, Badoni and the Drowned Gods*, 10 AM. INDIAN L. REV. 59, 68 (1982).

In Indian religion cases, the courts have denied relief to plaintiffs based on the reasoning that the disputed practices were shown not to be central to their religion. In the emphasis on "centrality" and "indispensability," the courts have developed a standard that narrows the scope of free exercise protection to "familiar and well-documented religious tenets." Gordon, *Indian Religious Freedom and Government Development of Public Lands*, 94 YALE L. REV. 1447 (1985). "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion. . . . If there are any circumstances which permit an exception, they do not now occur to us." West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

In *Manybeads* the "inextricable" linkages among the matrix of events that compose Navajo religion square with the centrality test, and are perhaps more "inextricably" intertwined with Navajo religion than the Amish situation in *Yoder*. In citing the *Yoder* decision, the Supreme Court wrote: "Because the Amish religious beliefs and their way of life are so inextricably intertwined, wrenching the children out of the home and community and teaching them values and subjects contrary to the beliefs held by the Amish was viewed as having a potentially devastating effect on the continuation of this religious sect." Dayton Christian Schools, Inc. v. Ohio Civil Rights Comm'n, 766 F.2d 932, *rev'd*, 477 U.S. 619 (1986).

Marc Galanter wrote of the ethnocentric nature of the centrality test: "The further from the core of belief and worship that a particular activity lay, the less weight it would be accorded in assessing free exercise claims." Galanter, *Religious Freedom in the United States: A Turning Point*, 1966 WIS. L. REV. 217, 275 (1966). Galanter noted that the courts' picture of religion is primarily derived from the major kinds of Christianity found in the United States. Id. at 275 n.348. "It may be somewhat less congenial to other religions in which the center of religious gravity is the moral ordering of public life." *Id.* Land theology controversies continue to be the notable exception to the *Sherbert* rule. *Lyng* demonstrates that either the courts fundamentally do not understand the significance of the government-sanctioned desecrations to Indian religion or they are intentionally carving Indian religious expression out of the protected arena of the first amendment.

However, *Lyng* does not settle the *Manybeads* case. The significant distinctions are that the challenged land is not open to the entire public, thereby giving rise to no management problems. The court must look to the first amendment and balance the Hopi interest and religious claims which do not require occupancy against the claims of Navajo petitioners. It is settled in Delaware Tribal Business Commission v. Weeks, 430 U.S. 73 (1977), and Sioux Nation of Indians v. United States, 601 F.2d 157, 173 (Ct. Cl. 1979), *aff'd*, 448 U.S. 371 (1980), that the plenary power does not bar consideration of claims for individual constitutional rights.

frequently in cases that involve Indian religious rights on federal lands.[57]

In the *Manybeads* case, plaintiffs claim that the Relocation Act infringes on their free exercise of religion. They have for generations lived on their ancestral homelands and practiced a religion in which the people, the land, the plant and animal life, and the forces of natural law are inextricably connected — and for which they have responsibility to serve as stewards to maintaining this balance. Occupancy on this land is essential to maintain their beliefs — a pantheistic, meta-ecological system that is the nerve center of the daily life of the practitioners. Much like the judically guaranteed right of the Amish to educate their children according to Amish principles, the Navajos, too, claim a right to live within the context of their own spirituality. Without occupancy on the sacred lands from which they believe they were created to live in the Navajo Way, it would be impossible to practice their religion.

57. Because there are so few sacred land decisions, it is perhaps instructive to mention briefly the major ones. In Sequoyah v. Tennessee Valley Auth., 620 F.2d 1159 (6th Cir.), *cert. denied*, 449 U.S. 953 (1980), members of the Cherokee Indian Tribe brought an action to enjoin construction of the Tellico Dam on the Little Tennessee River on the grounds that the completed dam would flood their "sacred homeland" and destroy locations of cultural and medicinal significance to their nation. The court of appeals upheld the federal district court's grant of summary judgment for the defendants based on its view that plaintiffs had failed to demonstrate the centrality of the land to religious practice. *Id.* at 1164. In the decision, the test of "centrality" was added to the *Sherbert* standard that requires that the government interest be demonstrably and significantly compelling to burden religious practice. Even then, the interference must be made with the "least restrictive means." Sherbert v. Verner, 374 U.S. 398, 403-09 (1963).

Armed with the added centrality standard, the federal district court of the District of Columbia easily ruled against Hopi practitioners who claimed in Hopi Indian Tribe v. Block, 8 Indian L. Rep. 3073 (D.D.C. June 15, 1981) that the development and expansion of ski facilities known as the Arizona Snow Bowl that are located in the San Francisco Peaks area of the Coconino National Forest burdened their religion. Plaintiffs claimed that the ski development disturbed the kachinas (Hopi spiritual beings) who live in the peaks and are necessary for the proper practice of their religion. The district court ruled that the proposed ski trails would "not impinge upon the continuation of all essential trial practice." *Id.* at 3075. The Hopi Court extended the parameters of allowable interference with native religious practice by setting itself up as the arbiter of what is and what is not central to Hopi religion.

Not until Badoni v. Higginson, 638 F.2d 172 (10th Cir. 1980), *cert. denied*, 452 U.S. 954 (1981), did any court directly address the issue of what state interest may justify government policy that burdens Indian religion. In *Badoni*, the Tenth Circuit Court of Appeals upheld the district court's grant of summary judgment to defendants who sustained a challenge from Navajo traditional practitioners who claimed that the government operation

State Interests

Once an infringement is established, the governmental action can be upheld only if the infringement is outweighed by a compelling state interest and the government uses the "least restrictive means" to accomplish its objectives.[58] The primary congressional interest in passing the Relocation Act ordering the compulsory relocation of traditional Navajo and Hopi people was to clear

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and management of the Glen Canyon Dam flooded ceremonial grounds and a sacred prayer spot at Rainbow Bridge National Monument. See K. LUCKERT, NAVAJO MOUNTAIN AND RAINBOW BRIDGE RELIGION (1977), an eloquent book written as a result of a religious freedom crisis that would destroy the sanctity of the sacred land known as Rainbow Bridge. The practitioners also challenged the government activity on the ground that the behavior of tourists at Rainbow Bridge prevented successful conduct of religious ceremonies. In its decision, the court for the first time shifted the focus from the centrality test to ask directly what state interest may justify a government-imposed burden on native American religious practice. Presumably, then, some government action might not withstand a constitutional challenge in land-theology controversies. *Id.* at 646. To illuminate its "balance of interest" theory, the *Badoni* court cited Pillar of Fire v. Denver Urban Renewal Auth. 509 P.2d 1250 (1976), where the Urban Renewal Authority filed a petition to condemn the first permanent church building of the Pillar of Fire Church. The Colorado Supreme Court thoroughly considered the first amendment issues and remanded the case for an evidentiary hearing with specific instructions to balance the interests of the Urban Renewal Authority and the First Amendment issues involved in a building with great historical and religious significance. On remand, it was held that the city could condemn and acquire the church. Denver Urban Renewal Auth. v. Pillar of Fire, 552 P.2d 23 (1976). The *Badoni* court would appear to be moving away from the precedent of allowing any state-generated economic policy to interfere with Indian religious practice.

The shift in the *Badoni* court influenced the only lower court decision to uphold an Indian challenge to government plans that would burden native religion. In 1983, the United States District Court for the Northern District of California permanently enjoined defendants from engaging in any commercial timber harvesting or constructing any logging roads on Yurok, Karok and Tolowa traditional ceremonial lands — the Chimney Rock section of a paved road that runs from Gasquet, California to Orleans, California, or the "G-O road." Northwest Indian Cemetery Ass'n v. Peterson, 795 F.2d 688 (1986), *r'vsd*, 485 U.S. 439 (1988). In holding for Indian practitioners, the court found compelling the fact that practitioners "hike into the high country and use 'prayer seats' . . . to seek religious guidance or personal 'power' through engaging in emotional and spiritual exchanges with the Creator." *Id.* at 698. Directly referring to the specific elements of land theology, the court reminded the government defendant that "it must be remembered that their unorthodox character is no basis for denial of the protection of rights guaranteed by the Free Exercise Clause." *Id.* at 692. The Supreme Court reversed *Lyng*.

58. "The Free Exercise Clause proscribes government action that burdens religious beliefs or practices, unless the challenged action serves a compelling governmental interest that cannot be achieved in a least restrictive manner." Williamson v. Block, F.2d 735, 740 (D.C. Cir.), *cert. denied*, 464 U.S. 956, 1056 (1983); *see also* Sherbert v. Verner, 374 U.S. 398, 403. (1963).

the people from the land to enable beneficial use by the Hopi tribe. There is no question that the Hopi tribe has rights to the land set aside by the 1882 Executive Order, which have been diminished by excesses of the Navajo tribal government.[59] The U.S. government's responsibility to serve the Hopi claims simply does not constitute the "paramount interest" necessary to justify the destruction of the way of life of one of the last remaining traditional Indian people in North America.

Relocation Is Not the Least Destructive Alternative

The primary reason for the enactment of the Relocation Act and the forced resettlement of plaintiffs was to return to the Hopi tribe its share of the 1882 Executive Order reservation for its beneficial use and to fulfill the tribe's spiritual aspiration. However, given the enormity of the human rights violations caused by the conditions attendant to the compulsory resettlement, the government's interest could be equally served by compensating the Hopi tribe with a combination of money and land. Congress has already spent over $200 million through fiscal year 1987 for relocation costs, and estimates run as high as $450 million before the resettlement plan is completed.[60] In addition, indirect costs and attorney fees are substantial.

IV. Relocation: A Human Rights Violation

The Relocation Act violates the principles of international law as well as the United States Constitution. It is not possible to compensate traditional Navajo with a substitute for the land that is the focal point of their religious, cultural, economic and psychological life.[61] Public Law 93-531 destroys the essential matrix of

59. Healing v. Jones, 210 F. Supp. 125, 129 (D. Ariz. 1962), *cert. denied*, 373 U.S. 758 (1963).

60. Congressional Research Service, Issue Brief, *Navajo-Hopi Relocation*, updated June 17, 1986, No. 1B-86021, 13-15; comments of Senator Daniel K. Inouye (D-Hawaii) in 133 CONG. REC. S6766 (daily ed. May 19, 1987) upon introduction of Senate bill 1236.

61. Hawley, Howland, Nanda, Rhedin, & Shwader, *Human Rights Violations by the U.S. Government Against Native Americans in the Passage and Enforcement of Pub. L. No. 93-531*, 15 DEN. J. INT'L L. & POL'Y 339 (1985). This discussion articulates nine distinct precepts under international law which are violated by Pub. L. 93-531, and concludes that the Relocation Act is in violation of both international law and the U.S. Constitution. *See also* Berman, *The Concept of Aboriginal Rights in the Early Legal History of the United States*, 27 BUFFALO L. REV. 637 (1978); Clinebell & Thomson, *Sovereignty and Self-Determination: The Rights of Native Americans under International Law*, 27 BUFFALO L. REV. 669 (1978).

events connecting the Navajos, their sacred lands and their chosen way of life, leaving in its wake the permanent destruction of a people. Although the purpose of the Relocation Act is not necessarily the forced assimilation of Navajos into mainstream United States society, this is — at best — the result.

The effects of Public Law 93-531 meet the minimal standards to trigger the protection of human rights as expressed in principles of international law. Domestic courts have applied human rights law[62] and have utilized human rights instruments to interpret and broaden the scope of constitutional and statutory standards.[63]

International law specifically prohibits the forced relocation of indigenous populations. Article 12(2) of the 1957 International Labor Organization Convention 107, "Concerning the Protection and Integration of Indigenous and Other Tribal Populations in Independent Countries," states in Article 4:

> In applying the provisions of this Convention relating to the integration of populations concerned: (a) due account shall be taken of the cultural and religious values . . . existing among the populations; (b) the danger involved in disrupting the values and institutions of the said populations unless they can be replaced by appropriate structures . . . shall be recognized.

Fundamental to indigenous philosophies are the underlying beliefs that what is most important is the perpetuation of a proper perspective on the relationship of people to the natural world. To express freely such sensibility, it is necessary that each person continue to be in direct touch with his or her culture and its "carefully prescribed and perpetuated forms." The issue is whether the dominant cultures will allow tribalism — tribal people and the particular spirituality that underlies tribalism — to exist. The *Lyng, Secretary of Agriculture et al. v. Northwest Indian Cemetery Protective Association* lawsuit is a microcosm of the problem that tribal and other indigenous people experience globally in conflict with dominant cultures whose metaphysical ethos is focused on

62. Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980), *on remand*, 577 F. Supp. 86 (E.D.N.Y. 1984) (stating that "deliberate torture . . . violates universally accepted norms of the international law of human rights."). The court in *Filartiga* referred to the following instruments of international law: the UN Charter, the Universal Declaration of Human Rights, and the UN Declaration Against Torture, as well as other international conventions, domestic law and writings.

63. Oyama v. California, 332 U.S. 633 (1948).

control and development rather than acceptance of natural rhythms and harmonies that underlie indigenous spiritualities. The conflict becomes more obvious in sacred places that are targeted for uranium mining, coal slurry pipelines, or other energy developments. However, the issue for American jurisprudence remains the same: Will the courts allow tribal people, and therefore tribal spirituality, to exist?

V. Conclusion

In the land dispute between the Navajo and Hopi tribes, the courts and Congress have imposed a legal solution defined by the parameters of Anglo-Saxon property law upon people whose spirituality does not limit them to a single vision of reality. Additionally, the historical method of settling disputes in both the Navajo and Hopi nations has been to discuss the problem until consensus is reached. With the intervention of federal courts and Congress, existing controversies have been exacerbated, removing the method of conflict resolution as well as the options from the control of the people directly affected. Navajo plaintiffs ask the courts to break new ground, to reverse a century of denial of Indian religious freedom, and grant them the right to remain on the land that is the source of their religious beliefs. More broadly, the spiritual traditions of traditional Navajo and Hopi people offer an alternative in its consciousness of the relationship of human society to the natural world. It is a sad irony that the dominant culture's newest concepts of energy and electricity promise a unified view of nature that is quite compatible with the philosophy and theology of tribal people, but that culture's method of dealing with tribal America would decimate indigenous life. The Elders and other traditional people interviewed agreed that they will not relinquish their lives as traditional people and that one day the sacred order of things will be restored, so that the order of the universe will live — once again — in harmony. What they say is not speculation but is based on the adherence to and wisdom of a spirituality that will continue — until that which has been profaned is again made sacred.

Afterword

Prior to going to print, the United States District Court for the District of Arizona rendered a decision in *Manybeads v. United States*, denying plaintiff's claim for injunctive relief. The

district court relied exclusively on the *Lyng* decision,[64] in which the highest court ruled that the free exercise clause does not "divest the Government of its right to use what is, after all, *its* land."[65]

The district court further adumbrated the rights of traditional people to practice their land theologies by noting that the American Indian Religious Freedom Act contains no legally enforceable rights.[66]

The *Lyng* decision and its application in *Manybeads* should set to rest any thoughts of litigation to vindicate any first amendment rights regarding sacred lands. The Gessell opinion is dismaying in its application of *Lyng* as a decision that would seemingly terminate all rights of practitioners of Indian land theologies who seek to freely exercise their beliefs on sacred lands. In this context, the Gessell court appears to view itself as an instrument to protect congressional action that would extinguish rights of Native Americans rather than guarantee their constitutional claims against the state.[67]

64. *Manybeads*, Civ. No. 88-410-PCT-EHC, slip opinion at 4 (D.C. Ariz. Oct. 20, 1989). Citing *Lyng*, the court ruled, "*Lyng* provides direct and dispositive answers to the plaintiff's First Amendment claims. The holdings of *Lyng* are the law of this country—whether or not personally acceptable to plaintiffs or those who espouse their cause."

The pleadings and decisions rendered by the Arizona District Court have a decidedly personal tone. Judicial economy and common sense do require consolidation, but raise a question of whether plaintiffs can expect a truly impartial hearing. This action was originally filed on Jan. 26, 1988 in the United States District Court for the District of Columbia. The case was transferred to the United States District Court for the District of Arizona on defendant's motion.

65. *Lyng*, 485 U.S. at 453 (emphasis in original).

66. *Manybeads*, slip op. at 8, citing *Lyng*, 485 U.S. at 455. The Native American Rights Fund and other Indian organizations recently announced a lobbying campaign to expand AIRFA so that it creates a cause of action.

67. With logic analogous to the Court's opinion in *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1953), in which the highest court ruled that the United States could take Indian property without due process and without compensation, the *Lyng* decision appears to stand for the principle that the United States has no constitutional restrictions regarding state interference with the practice of traditional Indian religions.