

CULTURAL CONFLICTS REGARDING LAND USE: THE CONFLICT BETWEEN RECREATIONAL USERS AT DEVIL’S TOWER AND NATIVE AMERICAN CEREMONIAL USERS

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INTRODUCTION

Conflicts over appropriate uses of public lands containing areas sacred to Native Americans are not new. In a number of federal court cases in the last two decades, Native Americans have brought Free Exercise Clause challenges to certain uses of, and sought to protect access to, public lands containing sacred sites, generally without success.¹ Some government agencies, however, recently have taken action to protect and accommodate

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1. For an analysis of federal court cases involving Native Americans’ free exercise rights at sacred sites on public lands, see Allison M. Dussias, *Ghost Dance and Holy Ghost: The Echoes of Nineteenth-Century Christianization Policy in Twentieth-Century Native American Free Exercise Cases*, 49 STAN. L. REV. 773, 776, 807–08 (1997).

traditional Native American cultural and religious uses of such lands and to prevent disruption of Native American uses by other users of the lands. Some of these actions have led to conflicts between Native Americans and some recreational users of the lands. These recreational users allege that accommodation of Native American cultural and religious uses violates the First Amendment's Establishment Clause.

Such a conflict has arisen at Wyoming's Devils Tower National Monument, which is a sacred site for several Plains tribes,² some of whom refer to the Tower as "Bear (or Bear's) Lodge."³ In *Bear Lodge Multiple Use Ass'n v. Babbitt*,⁴ the plaintiffs, who were interested in access to the Tower for recreational and commercial rock climbing activities,⁵ challenged a climbing management plan instituted by the National Park Service ("NPS"). This plan included a voluntary ban on climbing on the Tower in June, an interpretive education program explaining the Tower's significance for Native Americans, and a provision for the placement of signs encouraging visitors to remain on the trail around the Tower⁶ (known as the "Tower Trail"). The plaintiffs alleged that the management plan promoted religion in violation of the Establishment Clause.⁷ The Wyoming federal district court rejected the plaintiffs' claims in April 1998, holding that the management plan was a legitimate exercise of agency discretion.⁸

The *Bear Lodge* case involves conflicting views of several groups as to the proper use and treatment of the Tower. The plaintiffs, reflecting the attitudes of mainstream American culture, focus on recreational and commercial uses of the Tower, which they regard as an attractive site for rock climbing.⁹ Certain Native American tribes see the Tower as having a deeper, sacred significance, and travel to the Tower to engage in traditional

2. See *Bear Lodge Multiple Use Ass'n v. Babbitt*, 2 F. Supp. 2d 1448, 1450 n.1 (D. Wyo. 1998) (noting that the Tower is a sacred site for several Indian peoples of the northern plains).

3. See *infra* notes 86–89 and accompanying text (discussing the Lakota name "Bear's Lodge").

4. 2 F. Supp. 2d 1448 (D. Wyo. 1998).

5. See *id.* at 1450 n.3. According to the district court opinion in the case, the Bear Lodge Multiple Use Association is a nonprofit corporation based in Hulett, Wyoming "whose goal is to develop management objectives for natural resources that maintain economic stability, public access and environmental sustainability and/or health, in and around local communities." *Id.*

6. See *id.* at 1451.

7. See *id.* See also *infra* notes 145–47 and accompanying text (discussing the filing of the suit and the plaintiffs' request for an injunction).

8. See *Bear Lodge*, 2 F. Supp. 2d at 1456–57.

9. Over 6,000 recreational climbers visit the Tower annually. See *id.* at 1450 n.1. See also *infra* notes 45–71 and accompanying text (discussing the activities of climbers at the Tower).

practices.¹⁰ The Tower is also important to birds of prey that nest on the Tower's crags and ledges. Many of these birds' nesting activities have been disrupted by climbers.¹¹ In addition, the public at large has an interest in the preservation of the Tower because of its status as a national monument and its eligibility, as a traditional cultural property, for inclusion on the National Register of Historic Places.¹²

This article examines the conflict between Native Americans' and climbers' uses of the Tower, and how the NPS and federal district court have addressed this conflict in determining a climbing management plan for the Tower. Part I discusses the history and significance of the Tower, from the perspectives of Euro-American and Native American cultures, and the conflicting uses of climbers and Native Americans at the Tower. Part II examines the NPS's final climbing management plan, and how it balances the conflicting uses. Part III analyzes the district court's decision in the *Bear Lodge* case. The Conclusion offers some final thoughts on the struggle of Native Americans to preserve the physical and spiritual integrity of, and overcome barriers to the performance of traditional practices at, sacred sites. Further, it addresses the potential role of federal land managers in this struggle.

10. See *Bear Lodge*, 2 F. Supp. 2d at 1450 n.1 (noting that the Tower is a sacred site and that Native Americans are increasingly traveling to the Tower to perform "'traditional cultural activities'"). See also *infra* notes 76–83 and accompanying text (discussing the activities of Native Americans at the Tower).

11. See *Bear Lodge*, 2 F. Supp. 2d at 1450 (noting that the National Park Service's plan provided for the seasonal closing of climbing routes to protect raptor nests) & n.1 (noting that climbing activities had affected nesting raptors). See also *infra* notes 61–68 and accompanying text (discussing the activities of raptors at the Tower and how they are affected by climbing).

12. See *Bear Lodge*, 2 F. Supp. 2d at 1450 n.1 (referring to the Tower as a national monument and noting its eligibility for the National Register). See also *infra* notes 28–34 and accompanying text (discussing the Tower's eligibility).

I. PERSPECTIVES ON DEVILS TOWER: ITS HISTORY AND CONFLICTING USES

A. *Devils Tower as a National Monument and Traditional Cultural Property*

Devils Tower is a striking monolith rising above the Belle Fourche River in northeastern Wyoming.¹³ The Tower received widespread exposure in the 1977 film *Close Encounters of the Third Kind*.¹⁴ Approximately 600 feet tall, the Tower reaches an elevation of 5,117 feet at its summit, and has a base diameter of approximately 800 feet and a relatively flat top.¹⁵ According to geologists, the Tower was formed by molten rock that hardened at or just beneath the surface approximately 54 million years ago, and then was exposed by the erosion of surrounding sediments.¹⁶

The name “Devils Tower” was bestowed by an 1875 scientific team escorted by Colonel Richard I. Dodge, apparently as a literal translation of “Bad God’s Tower,” the name that some Native Americans may have used.¹⁷ Dodge described the Tower as an “immense obelisk of granite,” noting that “[t]he sides are fluted and scored by the action of the elements, and immense blocks of granite, split off from the column by frost, are piled in huge, irregular mounds about its base.”¹⁸

In 1906, Congress enacted the Antiquities Act,¹⁹ authorizing the President to declare as national monuments “historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest”

13. See National Park Service, Devils Tower NM—Final Climbing Management Plan—Purpose and Need for the Plan, at 6 (visited Sept. 7, 1998) <http://www.nps.gov/planning/deto/detopurp.html> [hereinafter FCMP—Purpose].

14. See Bruce Westbrook, *Spielberg Has Another Video Encounter with His Hit Film*, HOUSTON CHRON., May 13, 1998, at 1.

15. See National Park Service, Devils Tower NM—Final Climbing Management Plan—Environmental Consequences, at 2 (visited Sept. 7, 1998) <http://www.nps.gov/planning/deto/detoec.html> [hereinafter FCMP—Environmental].

16. See FCMP—Environmental, *supra* note 14, at 2.

17. See Devils Tower National Monument, at 7–8 (visited Sept. 7, 1998) <http://www.dcomp.com/sundance/dtower.htm>. See also FCMP—Purpose, *supra* note 13, at 77 (noting that the name was given by Colonel Dodge). The name is also spelled “Devil’s Tower.”

18. See FCMP—Purpose, *supra* note 13, at 20 (quoting STEVE GARDINER & DICK GUILMETTE, DEVILS TOWER NATIONAL MONUMENT, A CLIMBER’S GUIDE).

19. See Pub. L. No. 59-209, 34 Stat. 225 (1906) (codified at 16 U.S.C. § 431, 432–33 (1994)).

on public lands.²⁰ The Act also provided penalties for injury to, or destruction of, ruins, monuments, and objects of antiquity located on such lands.²¹ Devils Tower National Monument (a 1,347 acre park consisting of the Tower and surrounding land)²² was the first national monument declared under the Act.²³ President Theodore Roosevelt's proclamation noted that "the lofty and isolated rock known as 'Devils Tower' . . . is such an extraordinary example of the effect of erosion in the higher mountains as to be a natural wonder and an object of historic and great scientific interest."²⁴

When Congress established the NPS in 1916, it charged the organization with promoting and regulating the use of national parks, monuments, and reservations in keeping with their fundamental purpose. This purpose was to conserve the scenery, objects, and wildlife therein, and to provide for enjoyment of them in a way that would "leave them unimpaired for the enjoyment of future generations."²⁵ Thus the NPS is charged with protecting human and animal interests in the monuments, and managing them for current and future generations.²⁶ The NPS's management policies also provide that activities may be restricted or prohibited because they conflict with other allowed uses.²⁷

In addition to its status as a national monument, Devils Tower, along with the area within the Tower Trail, is also eligible for inclusion, as a "traditional cultural property," on the National Register of Historic Places (the "National Register") established by the National Historic Preservation Act ("NHPA").²⁸ "Traditional," as used in the phrase "traditional cultural

20. 16 U.S.C. § 431. The provision covers "lands owned or controlled by the Government of the United States." *Id.*

21. *See id.* at 433 (providing penalties for "[a]ny person who shall appropriate, excavate, injure, or destroy any historic or prehistoric ruin or monument, or object of antiquity" on public lands without the permission of the relevant agency secretary).

22. *See* National Park Service, Devils Tower National Monument, at 6 (visited Sept. 7, 1998) <http://www.nps.gov/deto/>.

23. *See* Raymond Cross & Elizabeth Brenneman, *Devils Tower at the Crossroads: The National Park Service and the Preservation of Native American Cultural Resources in the 21st Century*, PUB. LAND & RESOURCES L. REV. 5, 16 (1997).

24. Proclamation No. 658, 34 Stat. 3236 (1906), *quoted in* FCMP–Purpose, *supra* note 13, at 7.

25. Act of Aug. 25, 1916, ch. 408, sec. 1, 39 Stat. 535 (1916) (codified as amended at 16 U.S.C. § 1 (1992)). Later statutes reiterated that the promotion and regulation of the lands within the national park system was to be consistent with the purpose described in the 1916 Act, and provided that the power to manage the lands should "not be exercised in derogation of the values and purposes for which the various areas have been established." 16 U.S.C. § 1a-1 (1992).

26. *See id.*

27. *See* FCMP–Purpose, *supra* note 13, at 15.

28. *See Bear Lodge*, 2 F. Supp. 2d at 1450 n.1 (referring to the Tower as a national monument and noting its eligibility for the National Register); FCMP–Purpose, *supra* note 13, at 53 (noting that the Tower and the area within the trail surrounding the Tower were determined to be eligible for listing in

property,” refers to “those beliefs, customs, and practices of a living community of people that have been passed down through the generations, usually orally or through practice.”²⁹ “Culture” refers to “the traditions, beliefs, practices, lifeways, arts, crafts, and social institutions of any community, be it an Indian tribe, a local ethnic group, or the people of the nation as a whole.”³⁰ Consequently, a “traditional cultural property” is one that is eligible for listing on the National Register because of “its association with cultural practices or beliefs of a living community that (a) are rooted in that community’s history and (b) are important in maintaining the continuing cultural identity of the community.”³¹

The head of any federal agency with jurisdiction over a proposed federal or federally assisted project, or with authority to license such a project, must take into account the effect of the project on any property that is listed or eligible for listing on the National Register.³² This must be done prior to approving the expenditure of federal funds or the granting of a license for the project.³³ The NHPA now provides specifically that properties of traditional religious and cultural importance to a tribe may be eligible for listing.³⁴ Thus, listing and eligibility for it provide at least potential protection against projects that might damage a traditional cultural property, but there is no outright ban on such projects. Furthermore, the NHPA now provides specifically that properties of traditional religious and cultural importance to a tribe may be eligible for listing.

B. Devils Tower as a Rock Climbing Site

Most visitors to the Tower come to enjoy activities such as hiking and camping.³⁵ It was the activities of climbers, however, that necessitated a

1994). The National Register is maintained by the Secretary of the Interior, who also has the authority to establish criteria for inclusion on the National Register and promulgate related regulations. *See* 16 U.S.C. § 471a(1)(A), (2) (1985 & Supp. 1998).

29. Patricia L. Parker & Thomas F. King, *Guidelines for Evaluating and Documenting Traditional Cultural Properties—Introduction I*, in NAT’L REG. BULL. 38 (1990) (visited Sept. 18, 1998) http://www.cr.nps.gov/nr/bulletin/nr38_int.html.

30. *See id.* *See also id.* app. 1 (discussing the definition of “culture” in the NPS’s internal cultural resource management guidelines).

31. *See id.* at 1.

32. *See* 16 U.S.C. § 470f (West Supp. 1998).

33. *See id.*

34. *See* 16 U.S.C. § 470a(d)(6)(A) (West Supp. 1998). Tribal consultation is required. *See id.* at § 470a(d)(6)(B).

35. *See* FCMP–Purpose, *supra* note 13, at 27 (noting that climbers “accounted for approximately 1.3 percent of the annual visitation over the past six years”).

specific management plan.³⁶ Recreational climbing at the Tower dates to the 1890's, when two area ranchers became the first Americans to complete the climb,³⁷ an event that foreshadowed the current use of the Tower for commercial purposes by guide companies. The advertised climb of the Tower attracted almost 3,000 spectators.³⁸ The first climb using modern rock climbing techniques occurred in 1937.³⁹ From 1937 to 1973, 51 routes reaching the summit of the Tower were established.⁴⁰ In 1974, climbers began making shorter climbs that did not reach the summit, and by 1981 such climbers outnumbered summit climbers.⁴¹ During the 1980s, 177 new climbing routes were established.⁴² Today there are approximately 220 named routes.⁴³ The proliferation of climbing routes has been accompanied by an increase in the number of climbers. For example, while there were only 312 climbers in 1973, there are now over 6,000 climbers annually.⁴⁴

Three types of climbing are commonly practiced on the Tower. These include crack climbing, face climbing, and aid climbing. Climbers regard the Tower as a premier crack climbing area because of the extensive cracks between the individual rock columns that compose the Tower.⁴⁵ Crack climbers wedge their hands and feet into the natural fractures in the surface in order to support their climb.⁴⁶ Face climbing, in which climbers use natural hand and foot holds on the smooth rock surface between the cracks,⁴⁷ has become increasingly popular at the Tower.⁴⁸ Face climbers usually use permanent bolts (long metal rods that are hammered into the

36. *See id.* at 2 (noting that increased climbing activity led to the drafting of the FCMP).

37. *See id.* at 21, 23. Ranchers Willard Ripley and William Rogers used a stake ladder to make the climb. *See id.* According to Native American oral tradition, some Native Americans climbed the Tower as part of a ceremony. *See id.*

38. *See id.* at 21. The two ranchers received about \$300 for the first commercial use of the Tower.

39. *See id.* at 24.

40. *See id.* at 25.

41. *See id.* at 26.

42. *See id.*

43. *See id.*

44. *See id.* at 25, 26. During the years 1989 through 1994, the average number of climbers per year was 5,742. *See id.* at 27.

45. *See id.* at 29.

46. *See* National Park Service, Devils Tower NM—Final Climbing Management Plan—Appendix C—Glossary 10, at 24, available at <http://www.nps.gov/detoref.html> (last visited Sept. 7, 1998) [hereinafter FCMP—Appendix C] (defining “crack climbing”).

47. *See id.* at 34 (defining “face route/face climbing”).

48. *See* FCMP—Purpose, *supra* note 13, at 29.

rock surface)⁴⁹ to protect themselves during their climb.⁵⁰ Finally, aid climbing, a traditional method of climbing using iron spikes called “pitons” that are hammered into cracks in the rock surface⁵¹ and sometimes connected with chains or slings,⁵² is also practiced but is decreasing in popularity at the Tower.⁵³

Both the placement and the removal of bolts and pitons permanently damage the Tower’s surface.⁵⁴ As of 1992 there were 580 bolts on the Tower, and there are currently several hundred pitons.⁵⁵ Climbing-related damage can also occur when climbers chip or glue hand and foot holds; forcefully remove rocks and vegetation to enhance a climbing route; or unintentionally remove rocks with their hands or feet or by the use of climbing equipment.⁵⁶ Climbers also mark the Tower with the chalk that they use on their hands.⁵⁷

Physical damage also extends beyond the surface of the Tower. Loss of vegetation and soil occurs in the area surrounding the Tower when climbers do not use the established approach trails.⁵⁸

In addition to damaging the surface of the Tower, the bolts, pitons, and other equipment, such as slings, ropes, and anchors, placed on the Tower alter the visual aesthetics of the Tower. Viewing the Tower is the main objective of many visitors to the monument, and the visual distractions created by the climbers themselves and by their equipment detract from their enjoyment.⁵⁹ Climbers also disturb the natural quiet of the Tower

49. See FCMP–Appendix C, *supra* note 46, at 32 (defining “expansion bolts” as “2 to 4-inch metal rods that are typically threaded on one end and machined on the other end so that the end expands with great force when the rod is either twisted or hammered into a drilled hole”).

50. See *id.* at 34 (defining “face route/face climbing”).

51. See *id.* at 3 (defining “aid climbing/aid route”). Pitons usually can be removed by pulverizing the surrounding rock, although some are considered permanently fixed. See *id.* at 59 (defining “pitons”). Pitons have an eye or hole at the end, in which a “carabiner” – a metal snap-link used to connect protective gear to a climber’s rope – can be clipped. See *id.* at 12 (defining “carabiner”).

52. See FCMP–Purpose, *supra* note 13, at 57.

53. See *id.* at 29.

54. See *id.* at 57.

55. See *id.* at 36.

56. See *id.* at 56. The first two practices are banned under federal regulations.

57. See *id.* at 70. This chalk is sometimes noticeable to viewers below on the more popular climbing routes.

58. See *id.* at 68. Rather than using the approach trails set out in the Tower climbing guidebooks, some climbers approach the Tower base by the shortest route possible, which can be in a straight line. See *id.* See also FCMP–Environmental, *supra* note 14, at 35 (discussing damage to vegetation and soil).

59. See FCMP–Purpose, *supra* note 13, at 70. Some of the slings (which are sometimes left on the Tower) and ropes are brightly colored, which must have a particularly strong impact on visitors. See *id.*

when they hammer in new bolts and pitons or shout to each other while on the Tower.⁶⁰

In addition to damaging the physical integrity of the Tower and the surrounding area, and disturbing other human visitors, climbers have also disturbed raptors (predatory birds) that nest on the Tower. The NPS has noted three characteristics of climbing that affect the behavior of birds that nest on cliffs: “a) activity in close proximity to nest sites; b) activity of significant duration; and c) presence above nest sites.”⁶¹ Prairie falcon nesting sites on the Tower’s crags and ledges have been recorded since the early 1970’s.⁶² Mates and nest sites are selected in March, nesting begins as early as April, and young are fledged from mid-June to mid-July.⁶³ Rock climbing begins to increase in May and generally peaks in June and August.⁶⁴ Thus, climbers and nesting prairie falcons are most active on the Tower at the same time of the year. Although prairie falcons are the only raptors known to nest on the Tower, other birds may also be affected by climbers’ activities.⁶⁵ The falcons have demonstrated their disturbance from climbing activities by screaming and diving at climbers in the vicinity of nests.⁶⁶ The stress caused by the proximity of humans can cause raptors’ nesting efforts to be unsuccessful,⁶⁷ and this is likely to have happened to falcons at Devils Tower in recent years.⁶⁸

Climbers offer a variety of explanations for why they enjoy this recreational activity. Some climbers enjoy the physical challenge it presents; some simply want to see the summit and the view from the top; and still others experience psychological or spiritual satisfaction from

60. *See id.* at 67. Because of the relatively small size of the monument, visitors on any of the monument’s trails can hear climbers communicating with each other on the Tower.

61. *See id.* at 73. Raptors that are disturbed may call out, temporarily leave their nests or perches, make defensive or territorial displays, or attack the intruder.

62. *See* FCMP–Environmental, *supra* note 14, at 14.

63. *See id.*

64. *See id.*

65. *See id.* at 13. Other possibly affected birds include the American kestrel, rock dove, turkey vulture, and white-throated swift. *See id.*

66. *See* National Park Service, Devils Tower NM–Final Climbing Management Plan–Action Elements of the Final Climbing Management Plan, at 31 (visited Sept. 7, 1998) <<http://deto.planning.nps.gov/detoact.html>> [hereinafter FCMP–Action Elements]. *See also* FCMP–Purpose, *supra* note 13, at 72 (noting reports of attacks on climbers who got too close to nests).

67. *See* FCMP–Action Elements, *supra* note 66, at 31. *See also* FCMP–Environmental, *supra* note 14, at 21 (describing the actions that raptors whose nesting efforts are disturbed by climbers may take, culminating in abandonment of nesting territories).

68. *See* FCMP–Environmental, *supra* note 14, at 23. This was the conclusion of a 1992 study on climbing at Devils Tower. *See id.*

climbing.⁶⁹ For others, climbing presents commercial opportunities. For example, one of the plaintiffs in the Bear Lodge case runs a commercial guiding service for Tower climbers.⁷⁰ The NPS has authorized several commercial climbing guide companies to operate at the Tower under NPS licenses.⁷¹

Whatever their motivations for climbing, climbers' activities at Devils Tower continue to cause damage to the physical integrity of the United States' first national monument. Moreover, their use of the Tower continues to disrupt activities of other visitors, both human and animal.

C. Bear's Lodge: Native American History and Use of the Tower

While most climbers at Devils Tower view their use of the Tower in recreational or commercial terms,⁷² for some Native Americans the Tower and the land surrounding it have religious and cultural significance. The NPS has determined that Devils Tower is a sacred site for many Native Americans of the Northern Plains.⁷³ According to a 1991 ethnographic assessment of Devils Tower, six tribes -- the Wind River or Eastern Shoshone, Kiowa, Crow, Cheyenne, Arapaho, and Lakota nations -- have inhabited the Devils Tower area at some point and consider it a sacred site.⁷⁴ In addition, as many as 23 other tribes have been identified as having a cultural affiliation with the Tower.⁷⁵ The NPS has identified traditional Native American activities at the Tower which predate the existence of the United States.⁷⁶ These include the leaving of prayer bundles, prayer offerings, the Sun Dance, sweat lodge rites, and vision quests.⁷⁷ Burials,

69. See FCMP–Purpose, *supra* note 13, at 28.

70. See *Bear Lodge*, 2 F. Supp. 2d at 1450 n.3.

71. See FCMP–Purpose, *supra* note 13, at 38. As of 1994, there were 7 authorized companies. See *id.* By 1997, eight companies were operating at the Tower. See *Native Rites and Wrongs*, THE NATION, July 21, 1997, at 4 [hereinafter *Native Rites*].

72. See *supra* notes 69–71 and accompanying text (discussing climbers' various motivations for climbing).

73. See FCMP–Environmental, *supra* note 14, at 54. This conclusion was based on “[o]bservation, literature searches, interviews with American Indians, public scoping for the DCMP [Draft Climbing Management Plan], and public response to the DCMP.”

74. See *id.* at 55.

75. See *id.*

76. See *Native Rites*, *supra* note 71, at 4. See also National Park Service, Devils Tower NM–Final Climbing Management Plan–Finding of No Significant Impact, § E(4), available at <http://www.nps.gov/detofnsi.html> (last visited Sept. 7, 1998) [hereinafter FCMP–FNSI] (noting that tribes held ceremonies at the Tower for hundreds of years before recreational climbing began).

77. See FCMP–Environmental, *supra* note 14, at 54. For discussions of some of these activities as carried on by the Oglala Sioux, see THE SACRED PIPE: BLACK ELK'S ACCOUNT OF THE SEVEN RITES

hunting activities, and winter camps may also have occurred there.⁷⁸ The NPS has noted that the nature, locations, and times of such traditional activities occurring at the Tower are not completely known, and that Native Americans are very private about such activities.⁷⁹

The Lakota Sioux have an ancient, strong relationship with Devils Tower and the Black Hills area, where they fast, pray, worship, and perform the Sun Dance.⁸⁰ Some Lakota have held the Sun Dance at Devil's Tower since 1984⁸¹ though it was banned by the federal government during the nineteenth century.⁸² They have also held sweat lodge ceremonies and left offerings there.⁸³

Many Northern Plains tribes refer to the Tower in their oral traditions,⁸⁴ and Native Americans have offered a number of different explanations for how the Tower was created.⁸⁵ The Lakota refer to the Tower as "Bear's Lodge," a name that commemorates its creation.⁸⁶ According to the Lakota, seven girls who were playing in the woods were chased by a group of bears. The girls ran and took refuge on top of a small rock, to which one of them prayed for salvation. The rock grew into the sky, beyond the reach of the bears, who scratched vertical furrows into the growing tower with their claws, thus creating the Tower's characteristic vertically cracked surface. The girls themselves became the cluster of seven stars known as the

OF THE OGLALA SIOUX 31–43 (sweat lodge, or purification, rite), 44–66 (vision quest, or "crying for a vision"), 67–100 (the Sun Dance) (Joseph Epes Brown, ed., 1971) [hereinafter THE SACRED PIPE].

78. See FCMP–Environmental, *supra* note 14, at 57.

79. See *id.*

80. See *id.* at 56. The FCMP describes the Sun Dance as a renewal of life ceremony for the Lakota. See *id.* See also THE SACRED PIPE, *supra* note 77, at 67–100 (describing the Oglala Sioux Sun Dance).

81. See FCMP–Environmental, *supra* note 14, at 54. The sun dance is one of the seven sacred ceremonies of the Sioux. See *All Things Considered* (radio broadcast, July 14, 1997), available in 1997 WL 12831458 [hereinafter *All Things Considered*] (statement of Charlotte Black Elk, a Lakota).

82. See *infra* notes 159 & 171–74 and accompanying text (discussing government suppression of the Sun Dance and other ceremonies).

83. See FCMP–Environmental, *supra* note 14, at 56.

84. See FCMP–Purpose, *supra* note 13, at 28.

85. See Jim Hughes, *Devil's Tower: A Monument to Clash of Cultures; Indians Resent Climbers at Site Shrouded in Myth*, DENVER POST, July 5, 1998, at B05.

86. See *id.* See also FCMP–Purpose, *supra* note 13, at 77 (noting that the earliest map of the region labeled the Tower "Grizzly Bear's Lodge," or Mateo Tepee to some tribes); Candy Hamilton, *Climbers Respect Devils Tower Climbing Ban: Volunteer Ban Reduced Climbers to 241 in 1997 Compared to 1,293 in 1994*, NEWS FROM INDIAN COUNTRY, Aug. 31, 1997, at 8A (noting that the Lakotas call the Tower Mato Tipi (Bear's Lodge)); Charles Levendosky, *Respecting Sacred Sites Why Not Accommodate Indians at Devils Tower as We Accommodate Christians Elsewhere?*, ROCKY MTN. NEWS, May 18, 1997, at 1B (noting that the Northern Plains Indians call the Tower Mato Tipila (Bear Lodge) or He Hota Paha (Grey Horn Butte)).

Pleiades.⁸⁷ Arvol Looking Horse, the keeper of the sacred White Buffalo Calf Pipe,⁸⁸ has described the Tower as “the heart of everything that is.”⁸⁹

Pulitzer Prize winner N. Scott Momaday, a Kiowa, has described Devils Tower as being “upthrust against the gray sky as if in the birth of time the core of the earth had broken through its crust and the motion of the world was begun.”⁹⁰ Reflecting this sense of awe that the Tower inspires in visitors, he wrote, “There are things in nature that engender an awful quiet in the heart of man; Devil’s Tower is one of them.”⁹¹ Momaday’s grandmother told him a story of the creation of the Tower⁹² that is similar to the Lakota tradition.⁹³ In the Kiowa version, seven sisters and their brother were playing when the brother suddenly turned into a bear. He chased his sisters and they ran to a tree stump, which told them to climb it. The tree rose into the air, the bear scratching it as it rose. The seven sisters became the stars of the Big Dipper.⁹⁴

In light of this traditional view, some Native Americans have objected to climbing on the Tower and the proliferation of climbing equipment there as a desecration of the site.⁹⁵ For them, the very act of climbing demonstrates the climbers’ lack of respect for their culture. Climbing during the performance of traditional ceremonies and during prayer times is particularly objectionable⁹⁶ because these activities can be disrupted by the climbers’ disturbance of the natural quiet.⁹⁷ Charlotte Black Elk, a Lakota, has described how climbers distract ceremony participants by leaving

87. See Hughes, *supra* note 85. See also Jeffery R. Hanson and Sally Chirinos, *Ethnographic Overview and Assessment of Devils Tower National Monument, Wyoming*, 20–21 (Nat’l Park Serv., 1996).

88. See Kevin McCullen, *Indians Defend Climbing Limits at Devils Tower*, ROCKY MTN. NEWS, Apr. 19, 1997, at 9A. Arvol Looking Horse was an intervenor defendant in the *Bear Lodge* case. See *Bear Lodge*, 2 F. Supp. 2d at 1449.

89. See Margaret Loftus, *The Fight for Devils Tower*, U.S. NEWS & WORLD REP., June 16, 1997, at 12 (quoting Arvol Looking Horse). According to Charlotte Black Elk, Devil’s Tower is also important to the Sioux as the place where the sacred pipe was first brought to them. See *All Things Considered*, *supra* note 81 (statement of Charlotte Black Elk, a Lakota).

90. See N. SCOTT MOMADAY, *THE WAY TO RAINY MOUNTAIN* 8 (1969).

91. *Id.*

92. See *id.*

93. See *supra* notes 86–87 and accompanying text (describing the Lakota tradition).

94. See MOMADAY, *supra* note 90. The Big Dipper is in the constellation Ursa Major, meaning “Great Bear.” See 12 THE NEW ENCYCLOPEDIA BRITANNICA 208 (15th ed. 1989) (describing Ursa Major).

95. See FCMP–Purpose, *supra* note 13, at 44.

96. See *id.*

97. See *id.* at 67. See also Hamilton, *supra* note 86, at 8A (noting that climbers’ yelling and cursing and their brightly colored equipment distract Native American worshippers).

climbing equipment, which is in effect litter, on the sacred site.⁹⁸ She identified the attitude that may underlie the disrespect shown by some climbers to Native Americans at Devils Tower: "People in America have the attitude that they have the God-given right to be entertained, whether it's climbing a tower or coming and peeking at Native American ceremonies. . . ."⁹⁹ Some Native Americans have likened climbing Devil's Tower to climbing a church and putting holes in it,¹⁰⁰ and have compared the lack of privacy of Native American worshipers to the situation that would result if Native Americans went to a Christian church and picnicked in the aisles and took pictures during the services.¹⁰¹ According to some elders, the presence of so many visitors, and their use of the Tower, have caused the spirits that inhabited the area to leave, so that it is no longer a good place to worship.¹⁰²

A 1993 resolution drawn up by the Dakota, Nakota, and Lakota Nations recognized Devils Tower as a site which is "primary and significant" for their religion, and which is vital to the continuation of their "traditional beliefs and values."¹⁰³ They noted that damage had been done to the Tower by the activities of rock climbers and the hundreds of embedded steel pins. They also acknowledged that it was their "legacy to protect these sites for future generations, so they too, may be able to enjoy these holy places for prayer and revitalization of Mother Earth. . . ."¹⁰⁴ The three nations resolved that they did not support efforts by federal land managers to allow further destruction of Devils Tower by recreational users.¹⁰⁵

In sum, for at least some Native Americans, Devils Tower is a sacred site, at which important traditional ceremonies are performed. From their perspective, climbing activities threaten not only the physical, but also the cultural and spiritual, integrity of the Tower.

98. See Hughes, *supra* note 85.

99. *Id.* (quoting Charlotte Black Elk).

100. See Loftus, *supra* note 89, at 12.

101. See Chris Welsch, *A Conversation With Jerry Flute, Advocate for Indian Sacred Sites*, STAR-TRIBUNE (Minneapolis), Apr. 13, 1997, at 5G.

102. See FCMP-Purpose, *supra* note 13, at 44.

103. See *id.* at 46, 48 (quoting Dakota, Lakota, and Nakota Nations, Summit V Resolution No. 93-11 (1993)). The Dakota (or Santee), Lakota (or Teton), and Nakota (or Yankton), are the three main groups of the Sioux. See EDWARD LAZARUS, BLACK HILLS/WHITE JUSTICE: THE SIOUX NATION VERSUS THE UNITED STATES, 1775 TO THE PRESENT 4 (1991).

104. FCMP-Purpose, *supra* note 13, at 49.

105. See *id.* at 50.

II. THE FINAL CLIMBING MANAGEMENT PLAN: BALANCING CULTURAL AND RECREATIONAL LAND USES

Prior to adopting the FCMP, which sought to balance the competing uses of the Tower, the NPS considered six alternatives in a Draft Climbing Management Plan (“DCMP”).¹⁰⁶ The preparation of the DCMP involved input from a work group composed of representatives from Native American, climbing, environmental, and county interests, as well as NPS staff members and the general public.¹⁰⁷ During a public comment period following the DCMP’s release, copies of the DCMP were distributed to the public, comments were received, and six public meetings were held.¹⁰⁸ The resulting FCMP then was adopted in March 1995.¹⁰⁹

The FCMP sought to accommodate Native American cultural practices by providing for a voluntary halt to climbing in the month of June.¹¹⁰ Rather than enforcing this closure itself, the NPS decided to rely on climbers to voluntarily refrain from climbing and it also relied on a new cross-cultural education program aimed at fostering “a better understanding, among all visitors, of the [T]ower as a sacred site and as a recreational resource.”¹¹¹ The closure was to extend to all lands within the Tower Trail.¹¹² The NPS explained that the reasons for the June voluntary closure were “not tied directly to religious ceremonies at Devils Tower,” but rather June was selected because the summer solstice “is a very culturally significant time for American Indians.”¹¹³ Selecting a modern calendar month, rather than determining closure dates on the basis of the shifting lunar calendar, was considered a “compromise in the modern world.”¹¹⁴

106. For a summary of the common elements of and differences between the six alternatives, *see generally* National Park Service, Devils Tower NM—Final Climbing Management Plan—Alternatives from the DCMP Including the Preferred Alternative (visited Sept. 7, 1998) <http://www.nps.gov/planning/deto/detoalt.html>.

107. *See* FCMP—Purpose, *supra* note 13, at 2. *See also id.* at 42 (describing the composition of the work group and its work).

108. *See id.* at 3, 43. For a description of the comments received during the comment period and NPS responses to them, *see generally* FCMP—FNSI, *supra* note 76.

109. *See* 61 Fed. Reg. 41,424 (1996).

110. *See* FCMP—Action Elements, *supra* note 66, at 2.

111. *Id.* at 4.

112. *See id.* at 2.

113. *Id.* at 15.

114. *Id.* The FCMP explained that “[a] predictable voluntary closure fixed on a modern calendar month has a better chance to be communicated and understood and to be successful than dates based on a shifting lunar calendar.” *Id.* A lunar calendar is based on a year consisting of complete cycles of phases of the Moon. *See* 7 NEW ENCYCLOPEDIA BRITANNICA 560 (15th ed. 1989). Lunar calendars are still used by some religious groups. *See id.* The calendar in general use today, the Gregorian or “New Style”

The NPS showed its support for the voluntary closure by providing that NPS staff would not climb on the Tower in June, and by deciding that it would not issue commercial use licenses for June climbing guide activities for 1996 or later years.¹¹⁵

The NPS adopted the voluntary closure provision in order to better balance Native Americans' cultural values and connections to the Tower with climbers' recreational interests. In a marked departure from previous practices in which the NPS had highlighted recreational climbing activities, while neglecting the importance of Native American cultural values at the Tower,¹¹⁶ the NPS decided that the voluntary June closure would "promote understanding and encourage respect for the culture of the American Indian tribes who are closely affiliated with Devils Tower as a sacred site."¹¹⁷ The NPS also stated that it was "protecting cultural resources, not closing Devils Tower for religious purposes."¹¹⁸

The NPS's ultimate goal for the voluntary June closure was to have all climbers choose to refrain from climbing at the Tower out of respect for Native American cultural values.¹¹⁹ The NPS suggested that if the voluntary closure proved unsuccessful, it would consider making the June closure mandatory.¹²⁰ The NPS explained that the mandatory closure language was intended to demonstrate the NPS's serious commitment to protecting the Tower as a cultural resource, and to acknowledge Native American concerns.¹²¹

The prospective FCMP cross-cultural education program was designed to be presented year-round and to give particular emphasis to Native American culture during June.¹²² The NPS explained that it hoped "to help preserve a part of America's cultural heritage and promote amicable relations between American Indian societies and the prevalent western

calendar, is a solar calendar. See 5 NEW ENCYCLOPEDIA BRITANNICA 476 (15th ed. 1989). A solar calendar is "based on the seasonal year of approximately 365 1/4 days, the time it takes the Earth to revolve once around the Sun." 10 NEW ENCYCLOPEDIA BRITANNICA 941(15th ed. 1989).

115. See FCMP–Action Elements, *supra* note 66, at 5. NPS staff would, however, climb on the Tower in order to enforce laws and regulations or to deal with emergencies. See *id.*

116. See *id.* at 16.

117. *Id.*

118. FCMP–FNSI, *supra* note 76, at § F(17).

119. See FCMP–Action Elements, *supra* note 66, at 9.

120. See *id.* at 11.

121. See *id.* at 14. The NPS noted that it had the authority to impose a mandatory closure but hoped that it would not be necessary, and that the Devils Tower superintendent had authority to prohibit certain activities in order to protect cultural and natural resources. See *id.* at 13.

122. See *id.* at 16.

society in America.”¹²³ Thus, as was the case with the voluntary closure, the interpretive program was intended to create a better balance between Native American cultural activities and previously favored climbing activities. The NPS also acknowledged the importance of the Tower to Native Americans by noting that the Tower’s status as a “sacred site of great importance” had made it eligible for listing on the National Register of Historic Places as a traditional cultural property. It explained, however, that nomination of the site for listing would occur only if affiliated tribes approved of it after consultation.¹²⁴

In addition to including provisions aimed at protecting the cultural and spiritual integrity of the Tower, the FCMP also included several measures designed to stop further damage to the Tower’s physical integrity by climbing activities. For example, the NPS would not allow climbers to use new bolts or fixed pitons, in order to prevent new damage to the Tower.¹²⁵ To facilitate achievement of this goal, no new face climbing routes requiring new bolt installation would be permitted.¹²⁶ Climbers will be allowed, however, to replace existing bolts and related equipment.¹²⁷ Further, climbers were encouraged to stay on trails, which will be rehabilitated to mitigate damage to vegetation and soil erosion.¹²⁸

The NPS also sought to deal with the aesthetic damage caused by climbing. For instance, the FCMP provided that no new climbing hardware can be left on the Tower. Further, other hardware will be replaced with camouflaged hardware, so that no equipment left on the Tower is visible from the Tower Trail.¹²⁹ Finally, the FCMP included provisions designed to protect raptors’ nesting activities from disruption by climbers.¹³⁰ The goal was to allow falcons to select and establish nest sites and occupy the nests for the entire breeding season without suffering stress caused by

123. *Id.* See also FCMP–Environmental, *supra* note 14, at 69 (noting that the program “will help various visitors [sic] groups understand each other better and respect each other’s uses of the monument”).

124. See FCMP–Action Elements, *supra* note 66, at 22–24. See also *supra* notes 28–34 and accompanying text (discussing Devils Tower’s eligibility for listing on the National Register).

125. See FCMP–Action Elements, *supra* note 66, at 17.

126. See *id.* at 25–26. The NPS decided to manage the Tower as “a predominantly crack climbing area.” *Id.* at 26. See also *supra* notes 45–50 and accompanying text (discussing crack climbing and face climbing).

127. See FCMP–Action Elements, *supra* note 66, at 17. See also *supra* notes 49–55 and accompanying text (discussing bolts and pitons and the damage they cause).

128. See FCMP–Action Elements, *supra* note 66, at 28.

129. See *id.* at 29.

130. See *id.* at 32–39.

climbers.¹³¹ Thus, as a general rule, all climbing routes approaching within 50 meters of occupied raptor nests, that are identified by the NPS will be closed, along with part of the summit edge above nest sites.¹³²

Overall, the FCMP was carefully designed to accommodate the needs and interests of all visitors to the Tower, both human and animal. It attempted to provide a balance between the recreational uses of climbers, which had been favored in the past, and the cultural uses of Native Americans, which historically had received little respect, while also protecting nesting raptors.

In addition, the FCMP is consistent with actions by Congress and the President encouraging respect for Native American religious and cultural values. The American Indian Religious Freedom Act of 1978, for example, provided that it is the policy of the United States to protect and preserve Native Americans' freedom to believe, express, and exercise their traditional religions, including access to sacred sites.¹³³ The NHPA and the National Environmental Policy Act of 1969 ("NEPA"), taken together, require federal agencies to consider the environmental impacts of proposed actions, including their effects on sites of historic and cultural significance, such as Devils Tower.¹³⁴ More recently, a 1996 executive order instructed federal agencies with land management responsibilities to accommodate access to, and ceremonial use of, Native American sacred sites, and to avoid adversely affecting the integrity of such sites.¹³⁵ In addition, the Supreme Court has been supportive of government accommodation of Native American worshipers. In *Lyng v. Northwest Indian Cemetery Protective*

131. *See id.* at 32.

132. *See id.* at 32, 34. Routes selected for closure will remain closed until after fledged young have several days to practice flying. *See id.* at 35.

133. *See* 42 U.S.C. § 1996 (1994). Although the Supreme Court rejected the Act as a basis for relief in the Native American free exercise case *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 454–55 (1988), it still stands as a statement of government policy and the NPS believed it to be significant enough to cite it in connection with the establishment of the FCMP. *See* FCMP–Purpose, *supra* note 13, at 18 (quoting the Act). *See also infra* notes 201–03 and accompanying text (discussing *Lyng*).

134. *See* Lydia T. Grimm, *Sacred Lands and the Establishment Clause: Indian Religious Practices on Federal Land*, 12-Sum NAT. RESOURCES & ENV'T 19, 20 (citing the NHPA, 16 U.S.C.A. § 470-470w-6 (West Supp. 1997), & the NEPA, 42 U.S.C.A. §4321–4370d (1994)). *See also supra* notes 28–34 and accompanying text (discussing the National Register). The NHPA also requires the Secretary of the Interior to work with tribes to preserve their historic properties. *See* 16 U.S.C. § 470a(d) (West Supp. 1998). *See also* FCMP–FNSI, *supra* note 76, at § F(5) (discussing the NPS's compliance with the NHPA and the NEPA).

135. *See* Exec. Order No. 13,007, 61 Fed. Reg. 26,771 (1996). The instruction is limited by the proviso that such actions are to be taken to the extent that they are practicable, legally permissible, and not inconsistent with essential agency functions. *See id.* *See also* 61 Fed. Reg. 41,424 (1996) (discussing the Executive Order).

Ass'n, the Court rejected a Native American free exercise claim related to sacred sites on government land, but stated that the fact that the government was not constitutionally required to act in a certain way on public land “need not and should not discourage it from accommodating religious practices like those engaged in by the Indian respondents.”¹³⁶ Finally, the NPS’s adoption of the FCMP is consistent with the federal government’s trust relationship with tribes.¹³⁷

The NPS’s actions to protect Native American cultural and religious values at the Tower are not unusual in comparison to its treatment of Christian places of worship on other government lands. In a number of national parks, the NPS owns or leases churches and other religious properties, and imposes restrictions on activities that would conflict with dominant faiths.¹³⁸ For example, a traditional High Mass is held annually at a church in the Tumacacori National Historic Park in Arizona. Further, the NPS sponsors an annual Christian morality play, which was used by missionaries to proselytize Native Americans, at the San Antonio, Texas Missions. In both places the NPS seeks to ensure a peaceful atmosphere without disruption of the services.¹³⁹ The NPS also manages Ebenezer Baptist Church, where Martin Luther King, Jr. was a pastor, as a national historic site, and closes it to the public for some Christian religious services.¹⁴⁰

The response of climbers to the June voluntary closure of the Tower indicated that most of these recreational users were willing to respect Native American cultural values by not climbing in June. For example, in June 1994, 1,293 people climbed the Tower prior to the adoption of the FCMP.¹⁴¹ In June 1995, 1996, 1997, and 1998, only 193, 185, 241, and 190

136. 485 U.S. 439, 453–54 (1988). *See also infra* notes 201–03 and accompanying text (discussing *Lyng*).

137. *See Cross & Brenneman, supra* note 23, at 26 n.95 (discussing the trust duty, or trust doctrine); Grimm, *supra* note 134, at 23–24 (discussing the trust relationship). *See also Court Rules for Indian Religious Freedom*, 23 NARF LEGAL REV., Winter–Spring 1998, at 1, 3 [hereinafter *Court Rules*] (noting that “[i]t is appropriate that the federal Indian trust relationship necessarily include cultural and religious protection”); Sharon L. O’Brien, *Freedom of Religion in Indian Country*, 56 MONT. L. REV. 451, 478–83 (1995) (discussing the trust relationship and the obligations that it imposes with respect to protection of Native American culture and religion).

138. *See Native Rites, supra* note 71, at 4 (noting that the NPS owns and manages churches in many federal parks); *Legal Fight Over Indian Religious Freedom and Devil’s Tower National Monument*, NATIVE AMERICAS, June 30, 1997, at 11 [hereinafter *Legal Fight*] (noting that the NPS owns and leases churches and manages them to avoid disruptions of religious services).

139. *See Levendosky, supra* note 86, at 1B. At the San Antonio Missions, for example, visitors are told: “Parish priests and parishioners deserve your respect; please do not disrupt their services.” *Id.*

140. *See id.*

141. *See Hamilton, supra* note 86, at 8A.

climbers, respectively, ignored the FCMP and climbed on the Tower.¹⁴² The voluntary closure has also received support from the Access Fund, a non-profit climbing organization.¹⁴³

Compliance, however, has not been universal. For example, some climbers are hostile toward the FCMP's provisions aimed at protecting Native American uses. Andy Petefish, a climber who also operates a commercial guide service, has stated that "I'm a Euro-American. . . . I don't want to understand Indian religion, and I don't have to."¹⁴⁴ Also, a small group of climbers opposing the FCMP, including Petefish, sued the NPS in the federal district court of Wyoming. In June 1996, the district court issued a preliminary injunction against the FCMP's restriction of commercial guiding activities during June.¹⁴⁵ In November 1996, the NPS adopted an addendum to the FCMP that deleted the provision relating to commercial use licenses for June climbing guide activities.¹⁴⁶ The remainder of the FCMP, however, remained intact, including the provision establishing a voluntary June closure for recreational climbing,¹⁴⁷ which has led to more litigation.

III. BEAR LODGE MULTIPLE USE ASSOCIATION V. BABBITT

In *Bear Lodge Multiple Use Ass'n v. Babbitt*, the Bear Lodge Multiple Use Association ("BLMUA"), Andy Petefish (who operates a commercial guiding service for Devils Tower climbs), and four other individuals who had climbed on the Tower for some time,¹⁴⁸ challenged several provisions

142. See Devils Tower Pleaded with Voluntary Climbing Closure Results (visited Sept. 7, 1998) <http://www.nps.gov/deto/detocmp.htm> (statistics for 1995); Hamilton, *supra* note 86, at 8A (statistics for 1996 and 1997); *Climbs on Devils Tower Decline*, ROCKY MTN. NEWS, July 7, 1998, at 8A (statistics for 1997 and 1998).

143. See *Legal Fight*, *supra* note 138, at 5.

144. See *Native Rites*, *supra* note 71, at 4 (quoting Andy Petefish).

145. See Cross & Brenneman, *supra* note 23, at 9 & n.11 (citing *Bear Lodge Multiple Use Ass'n v. Babbitt*, 96-CV-063-D (D. Wyo. June 8, 1996) (unpublished order granting, in part, plaintiffs' motion for an injunction)); Grimm, *supra* note 134, at 19. See also 61 Fed. Reg. 41,424 (1996) (describing the court's decision and the NPS's reaction).

146. See National Park Service, Devils Tower National Monument, Final Climbing Management Plan Addendum (visited Sept. 7, 1998) <http://www.nps.gov/planning/deto/addend.htm> [hereinafter Addendum]; 61 Fed. Reg. 68,292 (1996) (describing the Addendum and noting that it was adopted on Nov. 26, 1996).

147. See Grimm, *supra* note 134, at 19, 22 (discussing the court's opinion). The plaintiffs amended their complaint to challenge the voluntary closure and two other FCMP actions on Establishment Clause grounds. See *id.* at 22.

148. See *Bear Lodge*, 2 F. Supp. 2d at 1450 n.3. The court noted that the four other individual plaintiffs had been climbing the Tower for periods ranging from over one to over twelve years. See *id.*

of the FCMP. They objected to the voluntary ban on June climbing, the cross-cultural education program, and the placement of signs encouraging visitors to remain on the Tower Trail,¹⁴⁹ alleging that the FCMP violated the First Amendment's Establishment Clause by promoting religion.¹⁵⁰ In effect, the plaintiffs sought to upset the balance struck by the FCMP.

A. *The Cultural Interpretive Program*

The plaintiffs alleged that the cross-cultural education program (also referred to as the cultural interpretive program) promoted Native American religion, in violation of the Establishment Clause,¹⁵¹ by proselytizing children who visited the Tower during school outings.¹⁵² They claimed that, under the guise of educating children about the history surrounding the tower, the NPS was indoctrinating them in Native American religious beliefs.¹⁵³ The defendants challenged the plaintiffs' standing, arguing that they had failed to sufficiently allege injury from the interpretive program.¹⁵⁴

To Native Americans, the argument that the program indoctrinated visiting school children may well have seemed both ludicrous and ironic. First, Native American religions are not proselytizing religions, eager to win converts,¹⁵⁵ so Native Americans would not support such activities. Indeed, Native Americans have struggled to protect the integrity of their sacred sites and religious beliefs and practices from outside intervention, particularly by "New Agers" and self-proclaimed shamans and medicine

They had all climbed the Tower in June. *See id.* Although Native American users of the Tower were not named by the plaintiffs as defendants, the Cheyenne River Sioux Tribe and some individual Native Americans participated as intervenor defendants. *See id.* at 1449. The Medicine Wheel Coalition on Sacred Sites of North America, the Northern Cheyenne Tribe, the National Congress of American Indians, and the Becket Fund for Religious Liberty were amici curiae. *See id.*

149. *See id.* at 1451. The signs stated "'The Tower is sacred to American Indians—Please stay on the trail.'" Grimm, *supra* note 134, at 22.

150. *See Bear Lodge*, 2 F. Supp. 2d at 1451. The plaintiffs also objected to the ban on commercial climbing during June that the NPS had rescinded. *See id.* *See also supra* notes 145–46 and accompanying text (discussing the injunction against the ban and the addendum). The court decided that the commercial climbing ban issue was moot and did not address it. *See Bear Lodge*, 2 F. Supp. 2d at 1452.

151. The Establishment Clause of the First Amendment provides that "Congress shall make no law respecting an establishment of religion. . . ." U.S. CONST., amend. I.

152. *See Bear Lodge*, 2 F. Supp. 2d at 1452.

153. *See id.* at 1453.

154. *See id.* at 1452.

155. *See Legal Fight*, *supra* note 138, at 10 (quoting statement of Steven Gunn of the Indian Law Resource Center that "Indians have absolutely no interest in proselytizing or converting others to their point of view").

men.¹⁵⁶ Moreover, many participants in Native American ceremonies and other practices consider it inappropriate to reveal the exact nature of their beliefs and practices to outsiders.¹⁵⁷

Secondly, Native Americans who themselves, or whose elders or other relatives, were subjected to the proselytization efforts of white Christian missionaries may well have found this concern over alleged Native American proselytization ironic. After all, from the beginning of their contact with Europeans, Native Americans have been subjected to Christian proselytization.¹⁵⁸ In the second half of the nineteenth century, the government increased its efforts to Christianize Native Americans by suppressing their traditional practices and sponsoring missionary activities on reservations.¹⁵⁹ Under the "Peace Policy," the government allotted the reservations to religious groups for proselytization,¹⁶⁰ and called upon religious groups to nominate reservation agents.¹⁶¹ Thus, Native Americans were required to share the use of their treaty-guaranteed lands with missionaries. In general, Native American culture was deemed to be ripe for destruction and replacement with Euro-American culture, as Native Americans were being assimilated into the mainstream of American society.¹⁶² The unabashed entanglement of church and state, aimed specifically at the extermination of Native American religions and their replacement with Christianity, was not attacked on Establishment Clause grounds until the end of the nineteenth century, when anti-Roman Catholic sentiment led to Protestant objections to the role of religious groups on

156. For example, at Sedona, Arizona, ancient arrangements of stones, placed in accordance with Native American religion for specific ceremonies, have been rearranged by "New Age" adherents. See Welsch, *supra* note 101, at 5G.

157. See *supra* note 79 and accompanying text (noting the NPS's understanding of the secrecy surrounding some aspects of Native American religions). See also Welsch, *supra* note 101, at 5G (quoting statement by Jerry Flute, executive director of the Association on American Indian Affairs, that "[t]he theology is never to shut anybody out of Native American religion unless there's a custom of secrecy or privacy").

158. For example, by the first half of the sixteenth century, Franciscan missionaries in the southwestern United States were already attempting to convert Native Americans. See ESTELLE FUCHS & ROBERT J. HAVIGHURST, *TO LIVE ON THIS EARTH: AMERICAN INDIAN EDUCATION 2* (1972).

159. For an analysis of the government's program to Christianize Native Americans and suppress traditional practices, See Dussias, *supra* note 1, at 776–805. See also Cross & Brenneman, *supra* note 23, at 8 (discussing the federal policy to eradicate "ancient values and ceremonies").

160. See Dussias, *supra* note 1, at 778–83 (discussing the Peace Policy and the allotment of the agencies for proselytization).

161. See *id.* at 781.

162. For an analysis of the assimilation program, See generally John W. Ragsdale Jr., *The Movement to Assimilate the American Indians: A Jurisprudential Study*, 57 U. MO. KAN. CITY L. REV. 399 (1989).

reservations.¹⁶³ In light of historical government actions aimed at replacing Native American religions with Christianity, the NPS's establishment of a cross-cultural education program at Devils Tower is difficult to interpret as an effort to convert local children to Native American beliefs and practices.

The *Bear Lodge* court examined the plaintiffs' standing to challenge the program under the test discussed by the Supreme Court in *Lujan v. Defenders of Wildlife*.¹⁶⁴ The test required an "injury in fact," a causal connection between the injury and the conduct complained of, and a likelihood that the injury would be redressed by a favorable decision.¹⁶⁵ The only injury alleged by the plaintiffs from the interpretive program was the indoctrination of children in Native Americans' religious beliefs when they were exposed to the program during school outings.¹⁶⁶ The plaintiffs' affidavits had not indicated, however, that any of the plaintiffs had children participating in the school outings who had been exposed, or that any of the children's parents were members of the BLMUA.¹⁶⁷ Therefore, the district court concluded that the plaintiffs had failed to establish that they suffered an "injury in fact" from the interpretive program, and thus they had no standing to challenge the program.¹⁶⁸ As a result, the court did not examine the merits of the plaintiffs' claim.

B. The Signs Encouraging Visitors to Remain on the Trail

The plaintiffs also argued that the signs asking visitors to stay on the Tower Trail coerced visitors "into supporting and participating in Native American religions by not allowing them to approach the Tower."¹⁶⁹ The plaintiffs thus objected to a provision that was designed to encourage them to refrain from disrupting Native American practices at the Tower. The plaintiffs, by objecting to the provision, were in effect claiming the right to engage in potentially disruptive activity. In claiming this right, the

163. See Dussias, *supra* note 1, at 784–86 (discussing the demise of congressional funding for schools operated by religious groups under government contracts once Catholic-run schools received the majority of the funding).

164. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). In *Lujan*, the Court examined whether several environmental organizations had standing to challenge the Secretary of the Interior's interpretation of a provision of the Endangered Species Act. *See id.* at 557–58. The Court concluded that the plaintiffs lacked standing. *See id.* at 578.

165. *See id.* at 560. The plaintiffs have the burden of establishing the three elements. *See id.* at 561.

166. *See Bear Lodge*, 2 F. Supp. 2d at 1453.

167. *See id.*

168. *See id.*

169. *See id.* *See also supra* note 149 (describing the signs' text).

plaintiffs were following in the footsteps of a long line of Euro-Americans who had sought to disrupt and even prohibit Native American ceremonies, even on tribal lands.

As discussed above,¹⁷⁰ in the nineteenth and early twentieth centuries, the federal government, assisted by missionaries, also claimed the right to disrupt traditional Native American ceremonies on reservations in the pursuit of Christianization and assimilation. For example, ceremonial dances, similar to those that have been performed at Devils Tower, were banned in 1883,¹⁷¹ and government officials used a number of techniques to suppress the dances.¹⁷² In 1890, the suppression efforts took a deadly turn when several hundred Sioux men, women, and children, who had gathered at Wounded Knee Creek on the Pine Ridge Reservation to participate in ceremonies of the Ghost Dance religion, were killed by government troops.¹⁷³ Even in the early twentieth century, the government continued to limit, and periodically prohibit, traditional dances.¹⁷⁴ In contrast, at Devils Tower today, a government agency is discouraging the disruption of Native American ceremonies by recreational users, while the plaintiffs seek to defend their “right” to continue such disruption.

The *Bear Lodge* district court concluded that the plaintiffs did not have standing to challenge the placement of the signs.¹⁷⁵ As with their objection to the cultural interpretive program,¹⁷⁶ the plaintiffs failed to establish that they had been injured by the NPS’s decision to install the signs.¹⁷⁷ They had not claimed that they had been hindered from approaching the Tower.¹⁷⁸ Instead, they alleged that BLMUA members who had children had been injured because the signs had coerced the children into staying on the trail to comply with Native American religious beliefs.¹⁷⁹ However, they did not allege that they themselves were BLMUA members.¹⁸⁰ Again, because the

170. See *supra* notes 159–63 and accompanying text.

171. See Dussias, *supra* note 1, at 788–94 (discussing the dance ban).

172. See *id.* at 791–92.

173. For a description of the Ghost Dance and the efforts to suppress it, See *id.* at 794–99.

174. See *id.* at 800–05 (discussing government regulations and other efforts aimed at suppressing dances, particularly those performed by the Pueblo Indians).

175. See *Bear Lodge*, 2 F. Supp. 2d at 1453.

176. See *supra* notes 164–68 and accompanying text (discussing the court’s holding that the plaintiffs lacked standing to challenge the implementation of the cultural interpretive program).

177. See *Bear Lodge*, 2 F. Supp. 2d at 1453.

178. See *id.*

179. See *id.*

180. See *id.* The court said that it could not ignore the record before it by simply assuming “that the injury complained of somehow relates to the parties in the case.” *Id.*

plaintiffs lacked standing,¹⁸¹ the court did not address the merits of their claim with respect to the signs.

C. *The Voluntary Climbing Ban*

Lastly, the individual plaintiffs alleged that in the past they had climbed Devils Tower in June,¹⁸² and that the voluntary climbing ban violated the Establishment Clause.¹⁸³ In addressing the merits of this claim,¹⁸⁴ the court first noted the Supreme Court's holding in *Lemon v. Kurtzman*.¹⁸⁵ Under *Lemon*, a government action does not violate the Establishment Clause if it has a secular purpose, its principal or primary effect neither advances nor inhibits religion, and it does not foster an excessive government entanglement with religion.¹⁸⁶ In a later case, Justice O'Connor tried to clarify the *Lemon* analysis by focusing on whether the government action endorsed religion.¹⁸⁷ Also, the Tenth Circuit held in a 1997 case that a government action must satisfy Justice O'Connor's endorsement analysis, as well as *Lemon*'s excessive entanglement test, to pass muster.¹⁸⁸ The *Bear Lodge* defendants contended that the voluntary ban was an appropriate accommodation for Native American worshipers that did not violate the Establishment Clause.¹⁸⁹ The court acknowledged that the proper analysis of the permissibility or impermissibility of the NPS's action required balancing the ability of the government to accommodate religious practices, such as those of Native Americans at Devils Tower.¹⁹⁰

181. *See id.*

182. *See id.* at 1450 n.3.

183. *See id.* at 1451.

184. The district court's opinion does not address the plaintiffs' standing to challenge the voluntary ban. Presumably the court concluded that the plaintiffs had established that they had suffered an injury from the ban, which they had failed to do for their challenges to the cultural interpretive program and signs. *See supra* notes 164–68 & 175–81 and accompanying text (discussing the plaintiffs' failure to establish standing)

185. 403 U.S. 602 (1971).

186. *See id.* at 612–13. *See also Bear Lodge*, 2 F. Supp. 2d at 1454 (discussing *Lemon*).

187. *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring). As interpreted by the Tenth Circuit, under Justice O'Connor's "refined analysis," government conduct endorses religion if it "has either (1) the purpose or (2) the effect of conveying a message that religion or a particular religious belief is favored or preferred." *Bauchman v. West High School*, 132 F.3d 542, 551 (10th Cir. 1997).

188. *See Bear Lodge*, 2 F. Supp. 2d at 1454 (citing *Bauchman*, 132 F.3d at 552).

189. *See id.*

190. The court quoted the Supreme Court's statement in *Lynch* that "[t]he Constitution actually 'mandates religious accommodation, not merely tolerance, of all religions, and forbids hostility toward any.'" *Id.* at 1454 (quoting *Lynch*, 465 U.S. at 673).

1. The purpose of the ban.

Under the *Lemon* test's first prong, the plaintiffs needed to show that the NPS's action "had no clear secular purpose or that despite a secular purpose the actual purpose is to endorse religion."¹⁹¹ The defendants argued that the FCMP was drafted, in part, to eliminate impediments to Native Americans' free exercise of religion. Additionally, the type of accommodation provided was particularly appropriate, the defendants asserted, where such impediments arose because a sacred site lay on federal land.¹⁹² They further contended that their actions were intended to support preservation of Native Americans' historical, social, and cultural practices, "which are necessarily intertwined with their religious practices."¹⁹³ This demonstrated an appreciation that Native Americans do not distinguish what Euro-American society refers to as "religion" from other aspects of their life and culture.¹⁹⁴ In some Native American Free Exercise Clause cases, courts have tried to force Native American beliefs and practices into Euro-American categories and have rejected the plaintiffs' claims on the grounds that they were cultural rather than religious.¹⁹⁵ In the FCMP, the NPS emphasized the cultural aspect of its provisions,¹⁹⁶ but the *Bear Lodge* court was "not persuaded" that a legitimate distinction could be drawn between religious and cultural practices at the Tower.¹⁹⁷ The court concluded that the real purpose underlying the voluntary ban was the removal of barriers to religious worship resulting from federal ownership of the Tower, and, because this was an accommodation, rather than a promotion, of religion, it was a legitimate secular purpose.¹⁹⁸

2. The effect of the ban.

In order to be permissible, an accommodation of the free exercise of religion cannot have a principal effect of advancing religion by coercing

191. *Id.*

192. *See id.*

193. *Id.*

194. *See* JOSEPH EPES BROWN, *THE SPIRITUAL LEGACY OF THE AMERICAN INDIAN* 2 (1982).

195. *See* Dussias, *supra* note 1, at 805–11.

196. *See* FCMP–FNSI, *supra* note 76, at § F(17). *See also* *Bear Lodge*, 2 F. Supp. 2d at 1450 n.2 ("The Defendants attempt to characterize these measures as relating solely to American Indian culture and being wholly separate from any religious practices"). For an argument that the practices at Devils Tower should be treated as cultural, *see* Cross & Brenneman, *supra* note 23, at 40–42.

197. *See* *Bear Lodge*, 2 F. Supp. 2d at 1450 n.2.

198. *See id.* at 1455.

people into its support.¹⁹⁹ If the climbing ban was not truly voluntary, thus coercing visitors and depriving them of their legitimate use of the Tower, so that Native Americans could worship there, then the accommodation was impermissible.²⁰⁰ The court declared the Supreme Court's decision in *Lyng v. Northwest Indian Cemetery Protective Ass'n* "largely irrelevant."²⁰¹ In that case the plaintiffs brought an unsuccessful free exercise challenge to decisions by the U.S. Forest Service to complete a logging road and to permit timber harvesting in a California national forest. Part of this forest was sacred to Yurok, Karok, and Tolowa Indians.²⁰² *Lyng* addressed the other side of the issue in *Bear Lodge*, namely, what accommodation is constitutionally required (as opposed to what accommodation is constitutionally permissible).²⁰³

The plaintiffs claimed that the voluntary climbing ban was not truly voluntary. They noted that the NPS had stated that its goal was to have all climbers decide not to climb at the Tower in June. Further, the NPS could make the ban mandatory if a significant reduction in climbing did not result from the current provision.²⁰⁴ The court maintained, however, that the manner in which the NPS implemented its goals, rather than the nature of the goals, was the proper measure of coercion. Thus, it explained that "coercion only manifests itself in the NPS's actions, not its aspirations."²⁰⁵ Because a mandatory ban was only one of several options that the NPS had said it might consider if the voluntary ban proved unsuccessful, the possibility that a mandatory ban might be instituted did not make the NPS's actions coercive.²⁰⁶ Thus, neither of the plaintiffs' concerns changed the FCMP's voluntary climbing ban into a coerced one.²⁰⁷

199. *See id*

200. *See id*

201. *See id.* at 1455 n.6 (citing *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988)). *Lyng* was cited by both the plaintiffs and the defendants. *See id.*

202. *See Lyng*, 485 U.S. at 441–42. The Court held that the Free Exercise Clause did not prohibit the Forest Service's planned actions. *See id.* at 441–42, 458.

203. *See Bear Lodge*, 2 F. Supp. 2d at 1455 n.6.

204. *See id.* at 1455.

205. *Id.* at 1455–56. The court elaborated that the NPS's goals would not be advanced by a mandatory ban on climbing because its goal was to have climbers personally choose to refrain from climbing. *See id.* at 1456.

206. *See id.* at 1456.

207. *See id.* at 1455.

3. Excessive entanglement.

In addressing whether the voluntary climbing ban constituted an excessive entanglement between government and religion,²⁰⁸ the court noted that the tribes that benefited from the voluntary ban were not solely religious organizations; they also represented “a common heritage and culture.”²⁰⁹ Consequently, there was much less danger that the NPS’s actions would provide excessive support for solely religious activities.²¹⁰ Furthermore, the NPS was not involved in the kind of worship that took place at Devils Tower, but was only seeking to provide a more peaceful atmosphere that would be more conducive to worship there.²¹¹ Therefore, the kind of “custodial function” performed by the NPS did not create “excessive entanglement” between the government and religion.²¹²

In sum, the court concluded that the voluntary climbing ban balanced visitors’ competing needs with respect to use of Devils Tower, while not offending the Constitution.²¹³ Because the court found that the voluntary ban was constitutional and that the plaintiffs lacked standing to challenge both the cultural interpretive program and the signs encouraging visitors to stay on the trail, the FCMP was a legitimate exercise of the Department of the Interior’s discretion to manage Devils Tower National Monument.²¹⁴

CONCLUSION

The Wyoming federal district court’s holding in *Bear Lodge* rejected the claim that a voluntary ban on climbing Devils Tower in the traditionally significant month of June violated the Establishment Clause.²¹⁵ The court thus upheld the National Park Service’s decision to encourage respect for

208. This was the last prong of the *Lemon* test. *See supra* notes 185–86 and accompanying text (discussing the three-part *Lemon* test).

209. *See Bear Lodge*, 2 F. Supp. 2d at 1456.

210. *See id.*

211. *See id.* (“The government is merely enabling Native Americans to worship in a more peaceful setting. . . . [T]he Park Service has no involvement in the manner of worship that takes place, but only provides an atmosphere more conducive to worship”).

212. *See id.*

213. *See id.*

214. *See id.* at 1457. The court also rejected the plaintiffs’ argument that the FCMP violated NPS policies on Native American practices, which provided that use of an area for traditional activities could not be a reason for prohibiting its use by others. There was no conflict between the FCMP and NPS policies, the court explained, because the FCMP did not prohibit use of Devils Tower. *See id.* at 1456.

215. *See id.* at 1453–57.

Native American cultural and religious values and free exercise rights. Native Americans and their supporters have hailed the decision as an important victory for Native American religious freedom,²¹⁶ which has received so little protection in the past.²¹⁷

The Final Climbing Management Plan represents a careful effort to resolve a conflict over use of public lands by balancing a particular recreational use of the Tower that threatens its physical integrity with Native American cultural and religious uses. This is necessary because Native Americans believe that the spiritual and cultural integrity of the Tower are also threatened. Moreover, the National Park Service has sought to educate all visitors about the Tower's multiple uses, including previously neglected Native American uses. It also expressed the hope that visitors would have more respect for Native American cultural and religious uses once they had a better understanding of them. If more federal land managers are willing to follow the approach taken at Devils Tower, and undertake the responsibility to provide opportunities for Native Americans to use public lands for cultural and religious purposes with less disruption, there is hope that Native Americans will at last enjoy greater freedom to engage in traditional religious and cultural practices at sacred sites.

216. See, e.g., Paul Richardson, *Victory at Devil's Tower*, INDIAN COUNTRY TODAY, Apr. 27, 1998, at A1; Court Rules, *supra* note 137.

217. See *supra* notes 158–63 and accompanying text (discussing past government efforts to exterminate Native American religions).