Tribal Cultural Resource Management Module 3/Week 3 Assignment
Topic: Sacred Lands • Coordinator/Mentor Notes

The intent in presenting both these works is to help define what a "sacred site" is, provide examples of such sites, detail the legal and political strategies various tribes are using to protect these sites, analyze the shortcomings of these strategies, and begin to formulate solutions for these challenges. These are all things students will be asked to do in their final projects. As a side note, I find it perfectly acceptable for coordinators and mentors to add their own insight on definitions of concepts like "sacred" or "religion." I recognize that these concepts are incredibly complex and vary tribe by tribe and even within tribes.

In the Light of Reverence

Highlights four examples of sacred places and the steps different tribes are taking to protect those sacred places. In the writing assignment, students will be asked to summarize an example of one of those sites and the strategies employed to protect it.

An additional takeaway from this film is the concept of "mitigation." Mitigation is essentially compromise. How do the tribes in the film address the challenge of "mitigation" when multiple parties argue that they have equal rights in a situation of conflicting use? For example, does a ski resort have the same rights as a tribe trying to prevent desecration of the site where the ski resort is located because the tribe considers that site sacred? What about water? In the California desert, several projects purport to deliver much needed water to California's urban centers but could drain desert springs that are culturally significant sites to the area's tribes. For tribal members and tribal advocates, the answers are very clear but under existing American property law and constitutional law regimes, the solutions are not so forthcoming.

Secularizing the Sacrosanct: Defining "Sacred" for Native American Sacred Sites Protection Legislation, Amber L. McDonald (2004).

My goal in including this article is to give students a brief history of the laws pertaining to "sacred sites" and the limitations inherent in US sacred sites/cultural protections laws and reliance on the US legal system. This is not to suggest that these laws are a complete failure or that tribes haven't successfully asserted their rights in court to protect their lands and culture. Rather, it is to expose the weaknesses in the legal system to suggest that tribes and tribal advocates must push to revise the law in ways most favorable to tribes and effectively use both the courts and the US political system as part of greater strategies to protect sacred sites and tribal lands and culture.

McDonald's article is framed in four parts: 1) demonstrates the need for sacred sites protection legislation; 2) an overview of traditional Native American religion, providing a comparison between native and nonnative faiths and the lingering intolerance of nonnatives toward tribal faiths; 3) history of the Native American legal struggle to protect sacred sites and 4) which examine the definitions of "sacred" utilized in legislation intended to protect the sacred sites of indigenous people in Australia and New Zealand. Part four also examines several California legislative bills that were current at the time and formed the basis for what became AB 52 – the current state legislation governing sacred sites protection; and 5) which offers a revised definition of "sacred" in light of actions in the US, Australia, and New Zealand.

<u>Main Points Part 1</u>:

- Currently, tribes lack a cause of action to protect their sacred sites from development and destruction. (752)
- One of the primary challenges to effective legislative strategies (legal solutions) for sacred sites protection is an adequate definition of what is "sacred."
- In traditional Native American "religions" all land is sacred. Some sites, such as birthplaces, homes of gods, areas of cleansing or ritual, may be considered more sacred. (754)

- Different concepts of sacred have led to misunderstandings by nonnatives on what constitutes tribal religion/belief.
    - 1) Most significantly, traditional native religions do not, in general, have "institutional structures" like those found in other organized religions, such as Jewish synagogues, Christian churches and Moslem mosques. (755)
    - 2) Sacred sites are not interchangeable. Unlike Catholicism, in which the faith's practitioners may worship at any Catholic church, in traditional tribal religion the particular location in which a ceremony is performed is crucial to that ceremony's success.
    - 3) Sacred sites cannot be moved or changed as manmade structures can.
- Non-natives have historically made little effort to understand native concepts of faith and land – tribal religious practice was criminalized (note the examples listed on page 758).
- How historic actions in the US have left their mark on tribal lands and religious practice:
    - 1) Due to US removal policy, which took people away from their original homeland and the sites which they held sacred, many holy sites are not on native-held land. And, growth in population since World War II, improved farming practices that have made formerly unusable land cultivatable.
    - 2) Because the United States gained its property through the denial of native land rights, American values have been formed against traditional Native American religions (759)

Main Points Part 2:

- Religious Freedom was a huge issue for the Founding Fathers.
- Two Constitutional provisions emerge that impact such religious freedom:
    - Free Exercise Clause: designed to permit people to worship as they see fit but had provided little protection to tribes. (761) Suits brought by Native Americans under the Free Exercise Clause are analyzed under a test unique to them. (762)
    - Equal Protection: purpose is to create a wall of separation between church and state such that the government is not subjugated by religion and, likewise, religion is not dominated by the state. (764) This provision is often used against tribes attempting to create or use state and federal laws to protect sites.
- American Indian Religious Freedom Act of 1978: fails to provide Native Americans with a cause of action (765); also note the *Lyng* case.
- Section 106 of the National Historic Preservation Act: requires federal agencies to mitigate impacts to sites (769); also note cases where application of this law was ineffective.

Main Points Parts 3 & 4:

- Australia Aboriginal Land Rights Act – failed to incorporate certain needed suggestions but returned aboriginal lands to aboriginal ownership – prevents taking of land (722); also note that the Act and others provide mitigation procedures that may have rendered protections less effective.
    - Australia passed Sacred Sites Act in 1989; protects sites but requires registration which is critical to protecting a site in court (775)
- New Zealand: Resource Management Act also creates a consultation and mitigation procedure for Maori sites and developers. (776)
- California: Sacred Sites Bill drafted by John Burton in 2002 (which ultimately became law under SB 18, Traditional Tribal Cultural Places (2005) – this law will be addressed later in the course, as well as other updates to state law in California). Notes strengths and weaknesses of that bill and other proposals at the time.

The takeaway from the final sections is that all laws put into place involve a consultation and mitigation process. The challenge with such processes is that they often fail to provide a way of protecting a site in its totality and usually involve a compromise that results in less than full protection. The author concludes that

the better compromise is found in the Northern Territory Aboriginal Sacred Sites Act and in the Traditional Tribal Cultural Sites bill (SB 18, California). Thus far, California has some of the most far reaching protections for sacred sites.