PROSECUTING WILDLIFE TRAFFickers: Important Cases, Many Tools, Good Results

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"Between $10 billion and $20 billion in plants and animals were traded illegally around the world last year, with the United States leading the list of buyers, at about $3 billion."†

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INTRODUCTION

International wildlife traffickers today face a spectrum of prospective federal charges, from century-old Title 16 conservation offenses, to today’s “white collar” offenses. But to understand what charging options lie ahead, federal prosecutors must be willing to sift through the entire text of conservation statutes to find the applicable criminal provisions scattered there. New federal prosecutors will soon learn, however, what their more experienced colleagues already know. The effort is worthwhile; flagrant wildlife offenders can and do receive stiff sentences under the Sentencing Guidelines. Wildlife and Marine Resources Section prosecutors who

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specialize in wildlife trafficking violations can lighten your burden along the way to conviction.

The diversity of wildlife trafficking is co-extensive with the diversity of the earth’s fauna. Live animals—exotic birds (parrots and macaws), mammals, reptiles, and fish—are hidden in secret compartments, in shipping containers, under clothing, or in luggage, and smuggled across international borders, or are openly declared at the border, but accompanied by false paperwork to make their importation appear legal. Wildlife parts too numerous to list (or even imagine) are smuggled at one time or another for commercial or personal use: big game trophy animals, animal skins, ivory, complete tiger carcasses, bear gall bladders and bile salts, rhinoceros horns, whole or ground (a reputed aphrodisiac and one of the world’s most valuable commodities), fresh sea turtle eggs, and mounted butterflies (whose species worldwide number in the tens of thousands). This trade in live animals and their parts feeds a voracious market of exotic medicine users, collectors, wildlife dealers, clothiers, leather craftsmen, and pet fanciers.

Though often overshadowed by the publicized problem of habitat loss and degradation, illegal wildlife trade deserves serious attention from federal prosecutors. First, this trade contributes directly to the loss of global biodiversity. Poaching drives species such as the tiger, rhinoceros, and Asian bear closer to extinction. Second, live animals inhumanely transported in cramped or concealed compartments frequently die before reaching the market. Third, this trade spreads disease, and introduces injurious pests and exotic species that crowd out native species, permanently damaging or altering natural ecosystems. Fourth, organized crime is making an aggressive entry into the international wildlife marketplace.

The export of our native wildlife is also a serious problem, and poaching of domestic wildlife has reached epidemic proportions. More than one hundred native species, including twelve listed as “endangered” or “threatened” under the Endangered Species Act of 1973, are routinely killed within our national parks.

Today, traffickers face stiff federal criminal penalties from:

1. Traditional fish and wildlife trafficking statutes usually found in Title 16, such as the Lacey Act Amendments of 1981 (commonly called the Lacey Act);¹

¹ 16 U.S.C. §§ 3371-78.
2. More vigorous application of Title 18 offenses—such as money laundering, smuggling, and tax and currency transaction violations — once reserved for drug and white collar offenders. Traffickers confront a gauntlet of wildlife and white collar charges, with maximum penalties of twenty years’ imprisonment, $500,000 fines, and other Title 16 conservation sanctions, such as forfeiture (wildlife and other property), civil penalty assessment, injunctive relief, and permit revocation.

AUSAs are authorized to prosecute violations of Federal wildlife laws. In the Department’s Wildlife and Marine Resources Section of the Environment and Natural Resources Division, a team of six wildlife prosecutors provides information and support to local federal prosecutors conducting federal wildlife prosecutions, and can and does assume the lead role in prosecuting complex, multi-district, or novel cases anywhere in the United States. The Wildlife Section has sample charging language, jury instructions, and a variety of subject matter outlines. The Division also has an experienced staff in the Appellate Section to handle criminal appeals. Please notify the Appellate and Wildlife Sections of any fish and wildlife criminal appeals.

I. REGULATION OF THE INTERNATIONAL WILDLIFE TRADE

A. The Lacey Act

The Lacey Act, enacted in 1900, is the United States’ oldest national wildlife protection statute. After 100 years and many revisions, the Lacey Act is now an anti-trafficking statute protecting a broad range of wildlife. The Lacey Act applies to all “wild” (i.e., not domesticated) animals, alive or dead, and to any part, product, egg, or offspring. The Act’s prohibitions have two prongs: wildlife trafficking, both domestic and international, and false labeling (the wildlife equivalent of an 18 U.S.C. § 1001 offense).

The Lacey Act attacks wildlife trafficking by making it unlawful to import, export, transport, sell, receive, acquire, or purchase any fish or wildlife already taken (i.e., captured, killed, or collected), possessed, transported, or sold in violation of state, federal, American Indian tribal, or

2. See USAM 5-10.310, 5-10.312.
foreign laws, or regulations that are fish or wildlife-related (the so-called “underlying law” or “predicate offense”). Together, these are referred to as the “two steps” necessary for an offense. An interstate or foreign commerce nexus is required when the “underlying law” violated is state or foreign, but none when it is federal or tribal law. A two-tiered penalty scheme exists, creating both misdemeanor and felony offenses, distinguished by the defendant’s knowledge of the underlying law violations. For a felony, the defendant must “know” about, or be generally aware of, the illegal nature of the wildlife, but not necessarily the specific law violated. A misdemeanor merely requires that the defendant, “in the exercise of due care,” should know the facts constituting the underlying law violation. “Due care is that degree of care which a reasonably prudent person would exercise under the same or similar circumstances.” This is a lesser-included offense of a felony violation. Felony violations, in addition to a “knowing” scienter or mens rea requirement, require either proof that the defendant “knowingly” imported or exported wildlife, or “knowingly” engaged in conduct during the offense that involves the sale, purchase, offer, or intent to sell, purchase, or offer wildlife for over $350. Felony violations can result in up to five years imprisonment, a $250,000 fine ($500,000 for organizations), and forfeiture of equipment involved in the offense, while the maximum Class A misdemeanor penalty is one year imprisonment and a $100,000 fine ($200,000 for organizations). Strict liability forfeiture exists for wildlife contraband without the need to first obtain a criminal conviction. Violations can be aggregated for charging purposes; the government need not charge the defendant with the smallest “unit of prosecution” available.

The Act also requires that contents of shipments of fish and wildlife traveling in interstate or foreign commerce be accurately marked and labeled on the shipping containers. Failure to mark or label a shipment

6. United States v. Carpenter, 933 F.2d 748 (9th Cir. 1991).
11. United States v. Hansen-Sturm, 44 F.3d 793 (9th Cir. 1995).
13. 16 U.S.C. § 3374 (a); United States v. One Afgan Urial Ovis Blanfordii Fully Mounted Sheep, 964 F.2d 474 (5th Cir. 1992).
properly is a civil penalty violation punishable by a fine. But making or submitting any false record, account, label for, or identification of any wildlife transported or intended to be transported in interstate or foreign commerce may be prosecuted as either a misdemeanor or felony, depending on what additional specific conduct occurs. This parallels trafficking offenses. No "underlying law" or "predicate offense" is required for these false labeling offenses.

One unique feature of the Lacey Act is its ability to incorporate foreign laws as an underlying law or predicate offense to "trigger" a Lacey Act violation. This is best illustrated in the prosecution of Taiwanese nationals for attempting to import 500 metric tons of salmon taken in violation of a Taiwanese law that they themselves had not violated. In another case, a California defendant was charged with selling tarantulas collected in violation of Mexican law. At trial, the relevant Mexican law was admitted to serve as the underlying violation for a felony conviction. A person who imports wildlife into the United States taken, possessed, transported, or sold in violation of a foreign law or regulation of general applicability (local, provincial, or national laws all included) can be prosecuted in the United States for a Lacey Act offense built upon a violation of that foreign country’s laws. Of course, the defendant need not be the one who violated the foreign law; the wildlife itself becomes “tainted” even if someone else commits the foreign law violation, but the defendant must know or should know, in the exercise of due care, about its illegal nature.

The Lacey Act occupies a central place within the framework of federal wildlife laws for several additional reasons. First, the Lacey Act applies to a wider array of wildlife than any other single protection law, including the Endangered Species Act. Second, it has the stiffest potential penalties. It can “bootstrap” some federal misdemeanor offenses into felonies, and use as underlying laws prohibitions found in statutes with no criminal penalties. Third, its prohibitions have a greater reach. Lacey Act offenses are subject to a federal five year statute of limitations, not a shorter one applicable to the underlying law. The current utility of the Lacey Act is best reflected by the Ninth Circuit Court of Appeals publication of model Lacey Act jury instructions in the Manual of Model Criminal Jury Instructions.

15. 16 U.S.C. §§ 3372(b) and 3373(a)(2).
20. United States v. Cameron, 888 F.2d 1279 (9th Cir. 1989).

B. *Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)*

In 1973, 21 countries signed a document called the Convention on International Trade in Endangered Species of Wild Fauna and Flora.24 Frequently called “CITES,” and sometimes “the Washington Convention” (it was signed in Washington, D.C.), this treaty became effective in 1975. It now boasts more than 140 member nations. CITES seeks to regulate the international wildlife trade (i.e., the import, export and re-export of live and dead animals, fish and plants, and their parts and derivatives) by placing species in three “Appendices,” based on the degree of threatened extinction by international trade.25 CITES regulates trade between countries, imposing the greatest restrictions on species found in Appendix I and the least on those in Appendix III. This is implemented through a program of permits or certificates, issued by both member and non-member countries, that must accompany lawful shipments.

The type of permit or certificate required, and the restrictions placed on the CITES shipment, depend on the particular appendix in which a species is listed: either Appendix I, II, or III.26 Appendix I is the most restrictive and bans wildlife trade between countries for commercial purposes. Appendix II permits some commercial trade under permit for species not yet considered in danger of imminent extinction. Appendix III contains species which are of special concern only to a country where they exist and are even less rigorously regulated.27

CITES is not a self-executing treaty. It contains no internal implementation or enforcement mechanism which automatically establishes enforcement infrastructures, management authorities, or penalties within the countries acceding to the treaty. Thus, CITES can only be effective to the extent that member countries enact and enforce the specific provisions. The United States has done so through the Endangered Species Act.28

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25. WILLEM WINJESTEKERS, THE EVOLUTION OF CITES (4th ed. 1995); CITES Art. II.
26. CITES Arts. III, IV, V.
27. CITES Art. V.
28. 16 U.S.C. §§ 1537a; 1538(c)(1).
C. Other Federal Laws Penalizing Illegal Wildlife Trafficking


The Endangered Species Act (ESA), enacted in 1973, is one of the country’s most significant wildlife laws. ESA authorizes a listing of wildlife species considered by the Federal Government to be in imminent danger or threat of extinction, and requires government action to restore populations of those species. Both exotic and domestic species are listed, matching many of those listed by CITES.

The ESA also helps interdict wildlife traffickers. First, the statute and implementing regulations make it illegal for any person subject to the jurisdiction of the United States to import, export, offer, or sell in interstate or foreign commerce, or to receive, carry, transport, or ship in interstate or foreign commerce in the course of a commercial activity, any endangered or threatened species. Lists of endangered and threatened species appear in regulations published by the Department of the Interior. The ESA also makes it unlawful to “take” any endangered or threatened species within the United States or its territorial seas or upon the high seas.

Second, the ESA also carries out our CITES obligations, designates the United States Fish and Wildlife Service to carry out its functions, and prescribes penalties for anyone caught importing, exporting, or possessing CITES-listed specimens traded in violation of the treaty. A criminal violation of ESA only requires general intent. It can occur without the defendant knowing that the wildlife is protected, and without intending to violate the law.

Most criminal violations of the ESA are Class A misdemeanors with penalties ranging from one year imprisonment and fine; $100,000 for individuals and $200,000 for organizations. A few violations, generally those involving threatened species, are Class B misdemeanors with

30. 50 C.F.R. § 17.11, 17.12.
32. 50 C.F.R. §17.11.
33. 16 U.S.C. § 1532(19) defines “take” as “to harass, harm, pursue, shoot, wound, kill, trap, capture or collect or attempt to engage in any such conduct”.
37. United States v. McKittrick, 142 F.3d 1170 (9th Cir. 1998).
38. 16 U.S.C § 1540(b)(1).
maximum penalties of six months imprisonment and $25,000 fine.\textsuperscript{39} Though the maximum fine is $25,000, it nonetheless is treated as a petty offense.\textsuperscript{40}

Fish and wildlife trafficked, sold, or received in violation of law are subject to forfeiture on a strict liability basis (without regard to fault and without a so-called “innocent owner” defense).\textsuperscript{41} Equipment, vehicles, vessels, aircraft and other means of transportation used to aid the commission of an offense where the government obtains a criminal conviction are subject to forfeiture, too.\textsuperscript{42}

2. Customs, Smuggling and Other General Criminal Laws Used in Wildlife Trafficking Cases.

Some Title 18 offenses are particularly well suited for prosecuting wildlife traffickers’ conduct. The smuggling statute,\textsuperscript{43} a Class D felony, is a charging option whenever wildlife is illegally imported into the country. Concealing contraband upon importation is one obvious smuggling violation, but the statute has a much broader reach. For example, all wildlife entering the United States must be cleared, and all persons entering the United States must accurately declare any wildlife in their possession.\textsuperscript{44} Violation of any of these requirements may trigger a smuggling charge.

The second paragraph of the smuggling statute\textsuperscript{45} sets forth two types of smuggling offenses commonly used in wildlife cases:

a. One offense is to import knowingly, or bring into the United States, merchandise (i.e., wildlife) contrary to law. The crime is complete if the defendant knowingly imports merchandise contrary to another United States law.\textsuperscript{46} “Contrary to law” means contrary to any U.S. law or regulation of general applicability.\textsuperscript{47} Even if it is only a misdemeanor or merely an agency regulation, it still supports a felony charge under § 545.\textsuperscript{48} False statements

\textsuperscript{39} Id.
\textsuperscript{40} United States v. Clavette, 135 F.3d 1308 (9th Cir.), cert. denied, 119 U.S. 151 (1998).
\textsuperscript{41} United States v. One Handbag of Crocodilius Species, 856 F. Supp. 128 (E.D. N.Y. 1994).
\textsuperscript{42} 16 U.S.C. § 1540b(4).
\textsuperscript{43} 18 U.S.C. § 545.
\textsuperscript{44} 50 C.F.R. § 14.61; 19 C.F.R. § 148.11.
\textsuperscript{45} 18 U.S.C. § 545.
\textsuperscript{46} United States v. Davis, 597 F.2d 1237 (9th Cir. 1979).
\textsuperscript{47} United States v. Mitchell, 39 F.3d 465 (4th Cir. 1994).
\textsuperscript{48} Id.; Duke v. United States, 255 F.2d 721 (9th Cir. 1958); Steiner v. United States, 229 F.2d 745 (9th Cir. 1956).
made in Customs entry documents have been considered contrary to the Customs laws which require the submission of accurate information to import merchandise, e.g., the importation was “contrary to 19 U.S.C. §§ 1481, 1484, or 1485.” The underlying law may be a CITES violation.

b. The other offense under that paragraph is knowingly to receive, conceal, buy, sell, or facilitate the transportation, concealment, or sale of merchandise, knowing the merchandise was imported or brought into the United States contrary to law. This, of course, allows prosecutors to follow the stream of smuggled merchandise to find culpable downstream parties. Proof of the defendant’s knowledge of the law violated upon importation is required.

The first paragraph of the smuggling statute, containing additional smuggling prohibitions, includes the phrase “intent to defraud,” which some courts have found troublesome. Courts have given it two interpretations, one helpful to wildlife prosecutions and another harmful, if not ruinous, to them. Many circuit courts have concluded that the phrase means nothing more than an “intent to avoid and defeat the United States Customs laws.” This interpretation supports wildlife prosecutions. The Third Circuit, however, has concluded that the phrase means to deprive the government of revenue. This is an interpretation that is probably fatal to most wildlife cases: duties are usually not owed on imported wildlife.

In cases involving the unlawful importation of fish or wildlife where the defendant violated both a foreign law and another U.S. law or regulation upon importation, a choice exists between prosecuting a defendant under 18 U.S.C. § 545 or the Lacey Act. Generally, the smuggling statute is preferable. Where the government charges smuggling, instead of Lacey Act, the law requires no specific proof of the applicable foreign law. A smuggling charge can support a money laundering charge. The money laundering statute defines “specified unlawful activity” to include smuggling offenses under 18 U.S.C. § 545, including those where

49. United States v. Cox, 696 F.2d 1294 (11th Cir. 1983).
51. Id.
52. United States v. Robinson, 147 F.3d 851 (9th Cir. 1998); United States v. Kurfess, 426 F.2d 1017 (7th Cir. 1970); United States v. McKee, 220 F.2d 266 (2nd Cir. 1955).
“merchandise” (i.e., fish or wildlife) is brought into the United States "contrary to law." Consequently, the government can charge money laundering, when appropriate, where smuggled wildlife comes into the United States. Money laundering charges arise most frequently in international trafficking cases where someone transfers, transports, or transmits funds from the United States to another country (or vice-versa), with the intent to promote wildlife smuggling. The maximum penalty is 20 years imprisonment and/or a $500,000 fine.

3. Other Title 18 Offenses.

Of course, many other Title 18 offenses can apply. Lying on any declaration form or to government inspectors would also constitute a felony "false statement" offense. Conspiracies not only to commit substantive offenses, but also to defraud the United States, often arise. Where applicable, the government may bring tax violations against the wildlife smuggler who fails to report or otherwise conceals income derived from wildlife trafficking. Today, wildlife traffickers can expect to have the book thrown at them.

II. SENTENCING OF WILDLIFE TRAFFICKING CASES - SECTION 2Q2.1 OF THE SENTENCING GUIDELINES

All types of federal wildlife and wildlife-related crimes committed by an individual, Class A misdemeanors or felonies, including conspiracy to

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55. See Lee, 937 F.2d 1388.
57. Id.
60. See 26 U.S.C. § 7201 et seq.
61. See, e.g., United States v. Kloe et al., No. 96-131-CR-ORL-22 (M.D. Fla., Jan. 10, 1997) (defendant convicted of conspiracy, Lacey Act, Endangered Species Act, smuggling, and money laundering offenses connected with his illegal import of Malagasy reptiles, taken illegally in that country, and transported to the United States through Germany and Canada for pet sale; sentenced to 46 months imprisonment and fined $10,000); United States v. Silva, 122 F.3d 412 (7th Cir. 1997) (defendant convicted of conspiring to smuggle exotic birds into the U.S., and failing to report taxable income, sentenced to 82 months’ imprisonment and fined $100,000; co-defendant convicted of tax charges alone and sentenced to 27 months in jail); United States v. Wegner et al., Nos. 96-50015, 96-50022, 1997 WL 367901 (9th Cir. July 2, 1997) (defendant convicted of conspiracy and tax violations, after failing to report accurately illegal gains from the sale of smuggled cockatoos, sentenced to 5 years’ imprisonment and fined $10,000); United States v. Lee, 937 F.2d 1388 (ring leader of conspiracy to smuggle 500 metric tons of salmon into the U.S. convicted of conspiracy, Lacey Act, and money laundering charges, and sentenced to 70 months’ imprisonment).
violate wildlife laws (18 U.S.C. § 371) and smuggling violations involving wildlife (18 U.S.C. § 545), have a base offense level of 6, pursuant to U.S.S.G. Section 2Q2.1. Three groups of specific offense characteristics enhance the offense level:

1. Offenses committed for a pecuniary gain or involving a commercial purpose;

2. Offenses involving wildlife not quarantined as required by law or creating a significant risk of infestation or disease transmission potentially harmful to humans or wildlife; and

3. Offenses where either:

   - the wildlife’s market value (i.e., fair market retail price) exceeds $2,000 (resulting in an offense-level increase according to the table in Section 2F1.1 Fraud and Deceit Guideline); or
   - a depleted marine mammal population, or a species listed as endangered or threatened by the ESA or on Appendix I to CITES was involved, in which case a minimum four-level enhancement ensues.\textsuperscript{62}

**Points to Remember**

The Application Notes for Section 2Q2.1 define guideline terms expansively and tend to result in more offense levels than the language of the guideline alone.\textsuperscript{63} Do a rough guideline calculation using Section 2Q2.1 and Chapter Three adjustments soon after a case referral. Rank the wildlife referral against the others received. The results may surprise you. Another surprise awaits for organizational defendants: organizational fines are not calculated using the steps in Sections 8C2.2 through 8C2.9. They instead jump directly to Section 8C2.10.\textsuperscript{64} A complete description of the Sentencing Guidelines application to federal wildlife cases is too complex for presentation here, though the sentences described for cases and noted in this article illustrate that wildlife traffickers in the United States do receive lengthy terms of incarceration and stiff fines, especially when long-term commercial activity increases the overall market value (using both offense

\textsuperscript{62} U.S.S.G. § 2Q2.2(b)(1),(2),(3).
\textsuperscript{63} See United States v. Eyoum, 84 F.3d 1004 (7th Cir.1996).
\textsuperscript{64} U.S.S.G. §§ 8C2.1 comment. (background); 8C10.
and relevant conduct). Market value is the single guideline factor most likely to increase the total offense level computation.

CONCLUSION

The United States now has a framework of laws, penalties, and dedicated investigators and prosecutors in place, with all the necessary tools to interdict illegal wildlife and punish wildlife traffickers, both domestic and international. But how aggressively will we apply our interdiction tools? To say that our Earth’s wildlife bounty is at stake is not hyperbole. Shipment by shipment, some species move ever closer to the most dire consequence: extinction. That may be the true cost of failure.
CULTURAL CONFLICTS REGARDING LAND USE: THE CONFLICT BETWEEN RECREATIONAL USERS AT DEVIL’S TOWER AND NATIVE AMERICAN CEREMONIAL USERS

Allison M. Dussias

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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, some of whom refer to the Tower as "Bear (or Bear's) Lodge." In *Bear Lodge Multiple Use Ass'n v. Babbitt*, the plaintiffs, who were interested in access to the Tower for recreational and commercial rock climbing activities, 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 Tower (known as the "Tower Trail"). The plaintiffs alleged that the management plan promoted religion in violation of the Establishment Clause.

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. Certain Native American tribes see the Tower as having a deeper, sacred significance, and travel to the Tower to engage in traditional

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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").


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).


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. 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. 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.

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. The Tower received widespread exposure in the 1977 film Close Encounters of the Third Kind. 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. 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.

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. 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.”

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

14. See Bruce Westbrook, Spielberg Has Another Video Encounter with His Hit Film, HOUSTON CHRON., May 13, 1998, at 1.
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.”
on public lands.\textsuperscript{20} The Act also provided penalties for injury to, or destruction of, ruins, monuments, and objects of antiquity located on such lands.\textsuperscript{21} Devils Tower National Monument (a 1,347 acre park consisting of the Tower and surrounding land)\textsuperscript{22} was the first national monument declared under the Act.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{25} Thus the NPS is charged with protecting human and animal interests in the monuments, and managing them for current and future generations.\textsuperscript{26} The NPS’s management policies also provide that activities may be restricted or prohibited because they conflict with other allowed uses.\textsuperscript{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”).\textsuperscript{28} “Traditional,” as used in the phrase “traditional cultural

\begin{footnotesize}
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\item[20.] 16 U.S.C. § 431. The provision covers “lands owned or controlled by the Government of the United States.” \textit{id.}
\item[21.] See \textit{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).
\item[24.] Proclamation No. 658, 34 Stat. 3236 (1906), \textit{quoted in FCMP-Purpose, supra note 13, at 7}.
\item[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).
\item[26.] See \textit{id.}
\item[27.] See FCMP-Purpose, \textit{supra} note 13, at 15.
\item[28.] See \textit{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, \textit{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.” 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.” 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.

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. This must be done prior to approving the expenditure of federal funds or the granting of a license for the project. The NHPA now provides specifically that properties of traditional religious and cultural importance to a tribe may be eligible for listing. 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. It was the activities of climbers, however, that necessitated a
specific management plan. Recreational climbing at the Tower dates to the 1890's, when two area ranchers became the first Americans to complete the climb, 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. The first climb using modern rock climbing techniques occurred in 1937. From 1937 to 1973, 51 routes reaching the summit of the Tower were established. In 1974, climbers began making shorter climbs that did not reach the summit, and by 1981 such climbers outnumbered summit climbers. During the 1980s, 177 new climbing routes were established. Today there are approximately 220 named routes. 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.

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. Crack climbers wedge their hands and feet into the natural fractures in the surface in order to support their climb. Face climbing, in which climbers use natural hand and foot holds on the smooth rock surface between the cracks, has become increasingly popular at the Tower. 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.
47. See id. at 34 (defining “face route/face climbing”).
48. See FCMP-Purpose, supra note 13, at 29.
to protect themselves during their climb.\footnote{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”).}

Finally, aid climbing, a traditional method of climbing using iron spikes called “pitons” that are hammered into cracks in the rock surface\footnote{See id. at 34 (defining “face route/face climbing”).} and sometimes connected with chains or slings,\footnote{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”).} is also practiced but is decreasing in popularity at the Tower.\footnote{See id. at 70. This chalk is sometimes noticeable to viewers below on the more popular climbing routes.}

Both the placement and the removal of bolts and pitons permanently damage the Tower’s surface.\footnote{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).} As of 1992 there were 580 bolts on the Tower, and there are currently several hundred pitons.\footnote{See id. at 36.} 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.\footnote{See id. at 56. The first two practices are banned under federal regulations.} Climbers also mark the Tower with the chalk that they use on their hands.\footnote{See id. at 70.}

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.\footnote{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).}

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.\footnote{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.} Climbers also disturb the natural quiet of the Tower
when they hammer in new bolts and pitons or shout to each other while on the Tower.\textsuperscript{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.”\textsuperscript{61} Prairie falcon nesting sites on the Tower’s crags and ledges have been recorded since the early 1970’s.\textsuperscript{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.\textsuperscript{63} Rock climbing begins to increase in May and generally peaks in June and August.\textsuperscript{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.\textsuperscript{65} The falcons have demonstrated their disturbance from climbing activities by screaming and diving at climbers in the vicinity of nests.\textsuperscript{66} The stress caused by the proximity of humans can cause raptors’ nesting efforts to be unsuccessful,\textsuperscript{67} and this is likely to have happened to falcons at Devils Tower in recent years.\textsuperscript{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

\textsuperscript{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.

\textsuperscript{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.

\textsuperscript{62} See FCMP–Environmental, supra note 14, at 14.

\textsuperscript{63} See id.

\textsuperscript{64} See id.

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


\textsuperscript{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).

\textsuperscript{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. 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. The NPS has authorized several commercial climbing guide companies to operate at the Tower under NPS licenses.

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, 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. 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. In addition, as many as 23 other tribes have been identified as having a cultural affiliation with the Tower. The NPS has identified traditional Native American activities at the Tower which predate the existence of the United States. These include the leaving of prayer bundles, prayer offerings, the Sun Dance, sweat lodge rites, and vision quests. 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.
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. 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.

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. Some Lakota have held the Sun Dance at Devil’s Tower since 1984 though it was banned by the federal government during the nineteenth century. They have also held sweat lodge ceremonies and left offerings there.

Many Northern Plains tribes refer to the Tower in their oral traditions, and Native Americans have offered a number of different explanations for how the Tower was created. The Lakota refer to the Tower as “Bear’s Lodge,” a name that commemorates its creation. 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

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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 MNT. 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. Arvol Looking Horse, the keeper of the sacred White Buffalo Calf Pipe, has described the Tower as "the heart of everything that is." 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." 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." Momaday's grandmother told him a story of the creation of the Tower that is similar to the Lakota tradition. 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.

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. 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 objectionable because these activities can be disrupted by the climbers' disturbance of the natural quiet. 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).
91. Id.
92. See id.
93. See supra notes 86–87 and accompanying text (describing the Lakota tradition).
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 worshipers).
climbing equipment, which is in effect litter, on the sacred site.\textsuperscript{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. . . .”\textsuperscript{99} Some Native Americans have likened climbing Devil’s Tower to climbing a church and putting holes in it,\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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. . . .”\textsuperscript{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.\textsuperscript{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.

\textsuperscript{98} See Hughes, supra note 85.
\textsuperscript{99} Id. (quoting Charlotte Black Elk).
\textsuperscript{100} See Loftus, supra note 89, at 12.
\textsuperscript{101} See Chris Welsch, A Conversation With Jerry Flute, Advocate for Indian Sacred Sites, STAR-TRIBUNE (Minneapolis), Apr. 13, 1997, at 5G.
\textsuperscript{102} See FCMP–Purpose, supra note 13, at 44.
\textsuperscript{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).
\textsuperscript{104} FCMP–Purpose, supra note 13, at 49.
\textsuperscript{105} See id. at 50.
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"). 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. 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. The resulting FCMP then was adopted in March 1995.

The FCMP sought to accommodate Native American cultural practices by providing for a voluntary halt to climbing in the month of June. 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 Tower as a sacred site and as a recreational resource." The closure was to extend to all lands within the Tower Trail. 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." 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."


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.


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).
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.” 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.

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. To facilitate achievement of this goal, no new face climbing routes requiring new bolt installation would be permitted. Climbers will be allowed, however, to replace existing bolts and related equipment. Further, climbers were encouraged to stay on trails, which will be rehabilitated to mitigate damage to vegetation and soil erosion.

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. Finally, the FCMP included provisions designed to protect raptors’ nesting activities from disruption by climbers. 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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{135} In addition, the Supreme Court has been supportive of government accommodation of Native American worshipers. In \textit{Lyng v. Northwest Indian Cemetery Protective Ass'n} (1988), the Supreme Court rejected the Act as a basis for relief in the Native American free exercise case \textit{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).


\textsuperscript{131} \textit{See id. at 32.}

\textsuperscript{132} \textit{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.}

\textsuperscript{133} \textit{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 \textit{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).}


\textsuperscript{135} \textit{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.” Finally, the NPS’s adoption of the FCMP is consistent with the federal government’s trust relationship with tribes.

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. 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. 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.

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. In June 1995, 1996, 1997, and 1998, only 193, 185, 241, and 190


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 AMERICANS, 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.\textsuperscript{142} The voluntary closure has also received support from the Access Fund, a non-profit climbing organization.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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.\textsuperscript{146} The remainder of the FCMP, however, remained intact, including the provision establishing a voluntary June closure for recreational climbing,\textsuperscript{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,\textsuperscript{148} challenged several provisions

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\textsuperscript{143} See Legal Fight, supra note 138, at 5.

\textsuperscript{144} See Native Rites, supra note 71, at 4 (quoting Andy Petefish).


\textsuperscript{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.

\textsuperscript{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, alleging that the FCMP violated the First Amendment’s Establishment Clause by promoting religion. 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, by proselytizing children who visited the Tower during school outings. 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. The defendants challenged the plaintiffs’ standing, arguing that they had failed to sufficiently allege injury from the interpretive program.

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, 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.

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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. 1.

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”).

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. at 1451.
men. 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]heology 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.

reservations. 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. 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. 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. 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. 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. 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.” 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 plaintiff’s 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, 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 Devil's Tower, were banned in 1883, and government officials used a number of techniques to suppress the dances. 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. Even in the early twentieth century, the government continued to limit, and periodically prohibit, traditional dances. In contrast, at Devil's 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. As with their objection to the cultural interpretive program, the plaintiffs failed to establish that they had been injured by the NPS’s decision to install the signs. They had not claimed that they had been hindered from approaching the Tower. 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. However, they did not allege that they themselves were BLMUA members. 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, 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 and that the voluntary climbing ban violated the Establishment Clause. In addressing the merits of this claim, the court first noted the Supreme Court's holding in _Lemon v. Kurtzman_. 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. In a later case, Justice O'Connor tried to clarify the _Lemon_ analysis by focusing on whether the government action endorsed religion. 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. The _Bear Lodge_ defendants contended that the voluntary ban was an appropriate accommodation for Native American worshipers that did not violate the Establishment Clause. 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.

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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." 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. 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." 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. 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. In the FCMP, the NPS emphasized the cultural aspect of its provisions, but the *Bear Lodge* court was "not persuaded" that a legitimate distinction could be drawn between religious and cultural practices at the Tower. 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.

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
people into its support. 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. The court declared the Supreme Court’s decision in Lyng v. Northwest Indian Cemetery Protective Ass’n “largely irrelevant.” 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. 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).

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. 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.” 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. Thus, neither of the plaintiffs’ concerns changed the FCMP’s voluntary climbing ban into a coerced one.

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, 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." Consequently, there was much less danger that the NPS's actions would provide excessive support for solely religious activities. 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. Therefore, the kind of "custodial function" performed by the NPS did not create "excessive entanglement" between the government and religion.

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. 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.

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. 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, which has received so little protection in the past.

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).

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INTRODUCTION

Due to the alarming numbers of animals from many species that have been found with gross morphological abnormalities, the topic of endocrine disruption, or "hormone-mimicking" chemicals in the environment, has attracted great attention in recent years. Animals as diverse as mammalian species like the Florida panther, avian species, and even reptilian species such as alligators have all been reported with defects, particularly in reproductive organs. Frog populations across the country and here in Vermont have been rapidly declining, and the numbers of deformities being

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reported are also on the rise. Because exposure to these chemicals has such serious implication for both wildlife populations and for human health, research directed at identifying endocrine disrupting chemicals and their biological effects is at the forefront of active research efforts.

I. ENDOCRINE DISRUPTING COMPOUNDS (EDCs)

Endocrine disrupting compounds (EDCs) are synthetic compounds found in pesticides, herbicides, nonionic surfactants, environmental pollutants, and common plastics, as well as natural compounds derived from plants that have deleterious effects on the development of a wide range of species by disrupting hormone-sensitive processes. Many studies have shown that exposure to EDCs during early development induces abnormalities in peripheral reproductive organs and in reproductive behaviors, as well as disruption of limb development. In addition to causing infertility and fetal malformations, EDCs have also been shown to act as carcinogens in mammalian populations.

Studies demonstrating that early EDC exposure leads to aberrant reproductive behaviors in adult life suggest that these compounds affect not only the formation of peripheral reproductive structures, but also the developing central nervous system (CNS). Endogenous hormones (i.e.,

gonadal steroids: androgens, estrogens and progestins) are known to have significant and widespread effects on the development of the nervous system, providing a myriad of potential targets for disruption by EDCs. Determining how EDCs alter nervous system development, however, is a complicated affair since the endpoints of assessment for nervous system abnormalities are often less easily defined than with assessments for limb malformation or tumor formation. Moreover, the EPA has identified over 87,000 chemicals that need to be screened for potential EDC effects. This overwhelming number of chemicals, coupled with the fact that effects on nervous system development may be both hard to categorize (changes in cognitive function or affect) and variable (different in individuals with different genetic backgrounds), makes for a daunting task. Finally, assessments of which EDCs pose a health danger and at what level are controversial and, at this time, unresolved. For example, it has been estimated that ~60% of the greater than 300,000 tons of alkylphenol polyethoxylates end up in the water supply each year. At the source (e.g., sewage treatment plants, mills, and factories), these compounds are detected at ~0.1 to 1 mg/litre or $10^{-6}$ M. However, the metabolites of alkylphenol polyethoxylates are highly stable and accumulate in sediment and sludge at concentrations that exceed those of the parent EDC. Compounding this physical accumulation, EDCs bioaccumulate in fatty animal tissues. TCDD (dioxin), a contaminant that derives from the


commercial preparation of certain herbicides, has been measured at up to 6 ppt per mL serum in human adults. The EDC metabolites that are consumed by bottom feeding fish become increasingly concentrated as fish become eaten by birds and so on up the food chain.

What are the concentrations of EDCs required to elicit significant biological effects? Studies of how EDCs can activate estrogen-sensitive ("reporter") genes in isolated cells in culture indicate that concentrations from $10^{-8}$ to $10^{-5}$ M induce significant effects. Hypothalamic neurons maintained in dissociated cell culture are highly sensitive to EDCs, and significant effects in neurotransmitter uptake can be elicited by concentrations of alkylphenol polyethoxylates as low as $10^{-11}$ M. In addition, it should be noted that assays of cultured cells or reporter gene constructs do not take into account a number of critical parameters including metabolism of EDCs, bioaccumulation, or bioavailability (that is, whether they are free or bound to proteins in serum that preclude them from having a biological effect at intracellular steroid receptors). Moreover, these simple assays do not take into account steroid-receptor independent mechanisms of action, or cell-cell interactions that may induce effects in an intact animal that would not be evident in cultured cells. Finally, differences in genetic background and developmental age (see below) will impose significant differences in the ability of EDCs to elicit biological effects.

II. CELLULAR AND MOLECULAR MECHANISM UNDERLYING EDC EFFECTS

EDCs cause adverse effects by interfering with endogenous hormonal signaling mechanisms. Endogenous steroid hormones, such as testosterone or the estrogen 17β-estradiol, are small hydrophobic molecules that easily diffuse through the plasma membrane of a cell and into the cytoplasm where they then bind to a specific target receptor (androgen or estrogen receptors). This steroid/receptor complex then travels to the nucleus where its actions ultimately alter the biological response of the targeted cells and the organism. The overall mechanism of these steroid effects is relatively well understood. Once in the nucleus, the steroid/receptor complex directly regulates the expression, or "transcription," of specific genes by binding to discrete regulatory sequences of these genes called hormone response elements. These steroid-dependent changes in gene expression result in changes in the synthesis, or "translation," of specific proteins. It is the actions of these proteins which determine the biological responses of the targeted cells, and therefore of the organism.

EDCs could have potential deleterious actions in either of two ways: (1) if they interfere with the normal activation of a specific receptor by the natural hormone (i.e., act as an antagonist); or (2) if they act in the same way as the endogenous hormone (i.e., act as a hormone mimic or agonist), but at an inappropriate developmental time, or if they are present at the wrong concentration. Recent studies indicate that both mechanisms come into play. Many of the EDCs are known to exert their effects by acting as weak estrogens. For example, alkylphenolic polyethoxylates were shown to bind to estrogen receptors over twenty years ago, and more recent studies have demonstrated that putative EDCs can mimic the molecular effects of estrogen. Specifically, EDCs produce transcriptional activation of reporter gene constructs containing consensus estrogen response elements

In the past few years, however, it has also become clear that a number of EDCs exert their effects not as weak estrogens, but rather by acting as anti-androgens. Specifically, the fungicide, vinclozolin, the ubiquitous pesticides 1,1,1-trichloro-2, 2-bis (p-chlorophenyl) ethane (DDT) and its major metabolite, \( p, p'-\text{dichlorodiphenyldichloro-ethylene} \) (\( p, p'-\text{DDE} \)), and bisphenol A and butyl benzyl phthalate all interfere with androgen-dependent activation of reporter constructs and alter sexual differentiation in male rodents in a manner consistent with anti-androgenic activity.

III. CRITICAL PERIODS IN DEVELOPMENT

For most biological processes, but especially those related to hormone effects on the nervous system, there is incontrovertible data indicating that neural processes are significantly more susceptible to steroid effects during embryonic and early postnatal development than in adulthood. In particular, it is known that naturally-occurring hormones can induce significant changes in neurogenesis (the birth of nerve cells or neurons), neuronal survival, neuronal migration, the connections neurons make with one another, as well in the expression of specific proteins that determine neuronal function during these early developmental "critical periods."

Moreover, these changes are permanent and do not require continued presence of high levels of hormones. As development proceeds, however, many facets of this hormone-sensitivity are lost, and the adult brain is far less malleable with respect to these "organizational" actions of steroid hormones. While there is far less known about the organizational actions of EDCs, several studies suggest that they, too, induce more deleterious effects in early development than in adulthood. For example, abnormalities in the reproductive system are induced by EDCs when animals are exposed embryonically or as neonates, but not when they are exposed as adults. Epidemiological studies have also shown that children exposed to EDCs early in life, even for a highly restricted period of time, may suffer significant and long-term consequences that arise later in life. Thus caution must be taken in assessing if particular EDCs (or EDCs at particular levels) are harmful if data is taken from adult populations (whether human or animal). Exposure to these compounds may be relatively benign in adults. However, even if present only transiently during a critical period of development, EDCs may induce significant detrimental effects that may not emerge until later in life.

IV. EXPERIMENTAL MODELS FOR TESTING EDC EFFECTS

Given the expansive number of chemicals that need to be screened for EDC activity, what is the best experimental system to use? Several laboratories have utilized rapid screens in cell lines or in yeast to assess estrogen or androgen binding activity. These tests are fast, but they do not adequately address how EDCs will alter development of complex tissues, such as those comprising the central nervous system.

Numerous studies designed to investigate the effects of EDCs on development of peripheral reproductive structures have been carried out in

rodents, and mammals provide an excellent system in which to assess how EDC exposure may interfere with human development. However, rodents and other mammals have limitations as an experimental system. Specifically, the number of pups obtained with each mating is small, the EDCs have to be administered by methods that do not mirror how organisms are exposed under natural conditions, and rodent development is relatively slow. Therefore, using rats and mice to screen the thousands of chemicals that are on the list of potential EDCs would necessitate a very long period of study.

Finally, while rodents provide arguably the best system in which to model EDC effects in humans, they may not provide the best system in which to address EDC effects on wildlife populations, in particular those that are aquatic. For example, it has been estimated that greater than 60% of the alkylphenol polyethoxylates that are ingredients of nonionic detergents, paints, herbicides, and pesticides (which are produced at a rate greater than 300,000 tons per year) end up in aquatic environments where they may accumulate in both sediment and biological material. Moreover, environmental studies indicate that aquatic species are particularly sensitive indicators of the deleterious effects of EDCs.

An excellent model system, which provides both the ability to rapidly screen a large number of chemicals and to assess the effects of EDCs on complex vertebrate development, is the African clawed frog, *Xenopus laevis* ("Xenopus"). There are many advantages to using *Xenopus* as the experimental model. First, these frogs are totally aquatic, so the EDCs under study can be added directly to the water that the frogs live in, a situation that simulates how many wildlife populations are exposed to EDCs in the environment. Second, mating on a daily basis can be induced year round, thus a large number of embryos can be obtained: on the order of 100 -1000 with each mating. Third, early development in these frogs is rapid with respect to other vertebrates: animals develop from a single-celled fertilized egg to a freely swimming tadpole in only 2.5 days. Finally, *Xenopus* is arguably the best understood preparation for studying molecular

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mechanisms underlying vertebrate development\textsuperscript{39} and is particularly amenable to studies of neurogenesis and neuronal differentiation.\textsuperscript{40}

V. BIOLOGY OF THE DEVELOPING NERVOUS SYSTEM IN XENOPUS LAEVIS

The developmental events that underlie formation of the nervous system are extraordinarily well characterized in \textit{Xenopus}. Neurogenesis begins approximately thirteen hours after fertilization.\textsuperscript{41} As development proceeds, more new neurons are born, and they undergo a complex and highly regulated set of developmental changes that include: migration to appropriate places within the nascent nervous system; elongation of the processes called axons and dendrites that transmit and receive the electrical signals that are the coinage of information transfer in the nervous system; formation of chemical contacts called synapses between individual nerve cells and; expression of selective sets of neural-specific genes that allow specific subclasses to perform their appropriate functions (e.g., sensory neurons that receive information from the environment versus motoneurons that control muscle cells and movement).\textsuperscript{42} In particular, the generation and differentiation of primary sensory neurons that innervate the skin,\textsuperscript{43} primary motoneurons that provide efferent control of axial (trunk) musculature,\textsuperscript{44} the formation of neuromuscular synapses,\textsuperscript{45} and the relationship of


\textsuperscript{41} P.D. Nieuwkoop & J. Faber, \textit{NORMAL TABLE OF XENOPUS LAEVIS (DAUDIN)} (1967).


\textsuperscript{45} F. Moody-Corbett, \textit{Formation of the vertebrate neuromuscular junction}, \textit{DEVELOPMENTAL BIOLOGY}, VOL 2, 605–35 (L.W. Browder ed., 1986); P. Brehm & L.P. Henderson, \textit{Regulation of
neuromuscular development to swimming behavior are all highly stereotypic developmental programs that have been thoroughly characterized at the level of the whole embryo. Moreover, the concomitant cellular and molecular changes that occur within single identified populations of neurons and muscle cells (myocytes) which underlie these developmental processes are just as reproducible and well-documented. This extensive understanding of normal development in *Xenopus* is of great advantage when trying to determine precisely which developmental processes are altered, deterred or aborted when animals are exposed to EDCs.

In addition to the wealth of literature describing development of the nervous system of intact *Xenopus* embryos, numerous studies have now shown that cells destined to become neurons or myocytes (but ones that have not yet adopted the defining characteristics of these specialized cells), can be isolated from the developing embryo and maintained in a dish as a dissociated cell culture (in vitro). Under these conditions, these cells will not only survive, but will go on to differentiate as neurons and faithfully reproduce many aspects of normal neural development, including elongation of processes, appropriate expression of ion channels that generate both electrical signals and transduce chemical signals at synapses, and the formation and maturation of synaptic contacts with appropriate targets (e.g., motoneurons will form synapses with muscle cells in vitro).

Thus, the *Xenopus* embryo provides the advantage of being able to observe effects of putative EDCs not only in the intact embryo, but also under in vitro conditions where the environment can be directly manipulated and controlled, and where the molecular actions of specific factors can be determined. For example, the conservation of developmental programs extends to understanding how specific trophic signals (compounds released by developing cells including other neurons, as well as nonneuronal target cells) promote neuronal survival, neuronal differentiation, guide axon outgrowth and govern synaptogenesis.

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Because steroid hormones are known to regulate the expression of neurotrophic factors and neurotrophin receptors, interference with neurotrophin signaling pathways may be a likely mechanism by which EDCs could disrupt neuronal differentiation and synaptogenesis. In particular, preliminary data from our laboratory indicates that early exposure (prior to formation of the nervous system) to both the endogenous estrogen 17β-estradiol, and to the EDCs, methoxychlor and nonylphenol, induces significant deficits in neural development, with the most notable changes observed in cells derived from part of the developing nervous system termed the neural crest. These neural crest cells require specific trophic factors for both survival and differentiation, and consistent with this requirement, we have also shown that the ability of these trophic factors to induce differentiation of neurons developing in vitro is inhibited by these EDCs.

**CONCLUSION**

These data suggest that *Xenopus* embryos can be used to rapidly and reliably screen for detrimental effects on vertebrate neural development, and that the ability to study neuronal differentiation both in whole embryos and in dissociated cell cultures makes *Xenopus* an excellent model system not only for screening potential EDCs for estrogenic and anti-androgenic activity, but for delineating the molecular mechanism of EDC action. With advances in this field, it is hoped that the dangers posed by EDCs to wildlife and to human populations will be fully realized so that further action can be taken to decrease environmental contamination.

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Photographs in panels a-c show representative examples of tadpoles exposed to normal saline environment alone (control) or those exposed to the naturally occurring estrogen, 17\( \beta \)-estradiol, or the EDC, nonylphenol. Animals were exposed at ~10 hrs after fertilization (a time before nervous system tissue begins to form) and maintained in the hormone treatment for ~2 days. Both 17\( \beta \)-estradiol and nonylphenol had significant deleterious effects on the development of these tadpoles. Panels d-f show representative cross-sections through the spinal cords of control animals and those exposed to steroids or EDCs. Large sensory neurons (RB) and motoneurons (MN) can be identified in all animals, suggesting that the gross development of the central nervous system is not disrupted, but some of the motoneurons in the 17\( \beta \)-estradiol- and the EDC-treated animals seem pale and not healthy. Panels g-i show representative examples of muscle cells (m) and neurons (n and arrowheads) obtained from dissociating the part of the embryo that contains the developing spinal cord and some of the tail musculature at an early stage. These dissociated cell cultures provide a convenient system in which to test directly the effects of EDCs on the ability of specific cell types to survive and differentiate.