

# **Sacred Claims and Environmental Struggle**

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## **Abstract**

Claims as to the sacredness of lands, or features of lands, as well as of objects, are increasingly part of the discourse in environmental struggles. These claims are frequently advanced by American Indian people, and by groups working in concert with American Indian people, but they are also invoked by other people and groups seeking to preserve or protect some specific site or set of environmental values. Claims as to the sacredness or spiritual significance of sites are also resisted, as is the legitimacy of invoking sacredness as a consideration in environmental decision making. These types of conflicts have important features in common including some very elastic meanings as to sacredness, and some specific constitutional restrictions on the use of criteria of sacredness as a basis in decision making. But sacredness as a decision-making criterion keeps getting invoked through the NEPA process (the requirement that environmental impact statements be part of environmental decision making) and through other complicated and fairly obscure legal requirements. The consequences of claims as to sacredness are quite unclear, but seem to represent a source of significant power for some native people on issues involving resources. This paper considers the emerging experiences with invoking sacred claims as part of environmental disputes. It considers some ongoing struggles, with one particular focus on a highly contested site in Georgia, where Creek Indians and some environmentalists are trying to resist the construction of a highway across an archeological and environmental site known as the Ocmulgee Oldfields.

## SACRED CLAIMS AND ENVIRONMENTAL STRUGGLE

Paul Friesema, Northwestern University

Prepared for the symposium "Language, Culture, and Understandings of the Environment: Lessons for Environmental Policy and Education". Northwestern University and Field Museum, April 16-18, 1999.\*

1. Environmentalists, historic preservationists, New Agers and wannabees, interest groups of various persuasions, and especially indigenous people are increasingly invoking claims of sacredness in efforts to protect and defend land and resources. There are some remarkable convergences among sites of sacred importance and of environmental sensitivity. Many, if not most claims about the sacredness of places are also claims for environmental preservation. Sometimes in the United States sacred claims have been central parts of major policy disputes and have received some note. Such cases include the Taos Pueblo-Blue Lake issue, the proposed basing of the MX missile system in the deserts of Nevada and Utah, the Sioux claim to the Black Hills, the Medicine Wheel controversy on the Bighorn National Forest, and the efforts to protect the Badger-Two Medicine area adjoining Glacier National Park from oil development. But often issues involving sacred site claims are more obscure. Indeed, policymakers often seem to be essentially unaware (and dubious) about the existence or importance of sacred sites, as they plan developments. It is true, of course, that the concept 'sacred' is often elusive. Carmichael, Hubert, and Reeves, in their influential edited volume *SACRED SITES, SACRED PLACES* (page 11) write:

The English word 'sacredness' is derived from Latin, and is defined as restriction through pertaining to the gods. The concept of sacred implies restrictions and prohibitions on human behavior—if something is sacred then certain rules must be observed in relation to it, and this generally means that something that is said to be sacred, whether it be an object or site (or person), must be placed apart from everyday things or places, so that its special significance can be recognized, and rules regarding it obeyed.

Although the translation of words and concepts in other cultures may be inexact, the concomitant concepts of separateness, respect and rules of behavior seem to be common to sacred sites in different cultures. But the nature of sacred sites themselves may be very different, and thus difficult for those outside the culture to recognize.

But many claims as to sacredness, at least in the United States, do not fit comfortably within this definition, or within any of the other attempts to define the essential qualities of a sacred claim. Some claims are very expansive, e.g. the sacred quality of Mother Earth, and some, which have ethnographic credibility, are still seemingly strange, e.g. a claim about the sacredness of gaming in many American tribal cultures. None the less, there is widespread sympathy with the idea of sacredness as a value to be protected in

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\* This paper grew out of an undergraduate seminar concerning the politics of cultural survival. I am particularly indebted to papers of Marjie Nielson and Peter Anderson.

the United States, particularly concerning sites and objects which are in some way sacred to American Indian people. So it should not be surprising that sacred claims are made. The surprise may be over the nature, extent and processes for such claims.

II. The recognition of sacred claims of American Indians is reflected in relatively recent statutory law, notably the 1978 American Indian Religious Freedom Act (a joint resolution of Congress), and NAGPRA-the Native American Graves Protection and Repatriation Act, passed in 1990. Both seek to recognize and protect the traditional sacred practices of American Indian people. Perhaps the primary feature of AIRFA is not only to acknowledge the legitimacy of tribal spiritual practices, but to give sites important to such practices protection from federal government activities, absent some compelling national need. The Act, in general, enunciates a national policy to acknowledge, protect and preserve the rights of American Indians to practice their traditional religions. The emphasis on protecting sites and landscapes is evident in the comments of the floor manager for the bill, Representative Morris Udall. He said, as part of the legislative history of the Act:

For many tribes, the land is filled with physical sites of religious and sacred significance to them. Can we not understand that? Our religions have their Jerusalems, Mount Calvarys, Vaticans, and Meccas. We hold sacred Bethlehem, Nazareth, the Mount of Olives, and the Wailing Wall. Bloody wars have been fought because of these religious sites.

NAGPRA, of more recent vintage, is probably best known for the ongoing struggles of tribal people concerning human remains in museums and other archeological repositories. Those struggles clearly have a critical spiritual quality. But the Act also provides explicitly for the return, under proper circumstances, of objects which are sacred to traditional Indians practicing tribal religions. NAGPRA also mandates that museums and repositories undertake extensive consultation with tribal people over the items in their collections. As the title of the Act implies, these are rights which go to American Indians, but not to other people whose ancestors' human remains, sacred objects, or religious artifacts are housed in museums and other repositories.

These two pieces of legislation represent and demonstrate some significant political skill and success on the part of American Indian people. They also represent and illustrate some underlying support of Americans for the sacred claims of Indian people. The acts themselves, in turn, help to create venues where specific claims over specific resources can be raised. But, as it turns out, despite widescale sympathy with sacred claims, there are constitutional and legal difficulties which need to be surmounted, in struggles to protect sacred sites and values.

III. The attempts to protect sacred sites from destruction, desecration, improper visitation etc. and to assure Indian access for spiritual purposes seem to fail quite often when sacred claims are contested in court. For example, Rainbow Bridge is a small national park area, now along the shores of the reservoir of the Glen Canyon Dam ("Lake Powell"). The natural bridge is a sacred site of much importance to Navajos, Hopis and Southern Paiute people. But the acknowledged connection of the site with tribal beliefs does not insure any special protection. As the National Park Service brochure for the unit reports:

In 1974, Navajo tribal members who live in the vicinity of Rainbow Bridge filed suit in U. S. District Court against

the Secretary of the Interior, the Commissioner of the Bureau of Reclamation, and the Director of the National Park Service. The suit was an attempt to preserve important Navajo religious sites that were being inundated by the rising waters of Lake Powell. The court ruled against the Navajo, saying the need for water storage outweighed their concerns. In 1980, the Tenth District Court of Appeals ruled that to close Rainbow Bridge, a public site, for Navajo religious ceremonies would violate the U. S. Constitution which protects the religious freedom of all citizens.

A somewhat parallel case arose in Wyoming over access to Devils Tower, another small National Park unit. The legal case is still wending its way through the courts (*Bear Lodge Multiple-Use Association v. Babbitt*). The Devils Tower (a.k.a. the Bear Lodge) is sacred to many plains Indian people. The large mountainous plug is the basis for origin stories, and the geographical place of many tribal tales. In the last decade or so there have been Sun Dances and other rituals at the base of the tower, following decades in which traditional ceremonial activities were essentially invisible to Park Service employees and visitors alike. By the late 1990s there is a lot of ceremonial activity at the site. While ceremonial activity can occur throughout the year, the central time is around the summer solstice.

Devils Tower attracts tourists, of course, but it is world renowned as a place for very challenging and spectacular technical rock climbs. Climbing equipment does deface the monument, and there are tribal concerns about that. But the major issue is that the tribes want climbing to be banned during June, the time of intense spiritual activity. The National Park Service initially tried to comply with the Indian requests, but climbers, climbing guides, and some local people opposed the June climbing prohibition, and they were successful in their legal challenge. The National Park Service then created a 'voluntary' period in June, during which climbers were encouraged to stay off the mountain, as a mark of respect for the Indians. But a climbing guide and his supporters argued that such a 'voluntary' moratorium amounted to a financial burden to his legitimate business when potential clients were steered away, and that the NPS action amounted to an unconstitutional support of a religion. That is the issue currently on appeal.

The constitutional limitation on providing any special protection for Indian sacred places was fairly clearly spelled out in a decision written by Justice Sandra Day O'Connor. The case is *Lyng v. Northwest Indian Cemetery Protection Association*, also known as the G-O case (1988). The issue concerned a planned timber road across a national forest, which would seriously degrade a site of special ceremonial value, as well as disrupting some important natural areas. Indians invoked the AIRFA, among other claims, in an effort to stop or reroute the road. They were joined by environmental groups and the state of California, because of the environmental damages from the road. Justice O'Connor, writing for the court gave a very narrow interpretation to AIRFA in deciding that because the road had a national purpose—providing timber for the economy—therefore such a legitimate governmental purpose overcame any special rights for protecting American Indian religious activities. Governmental activity was only prohibited if it was purposely aimed at the destruction of a sacred site, not if such destruction was just incidental to an activity conducted for some different purpose. To offer a higher level of protection to Indian sacred sites would be a violation of the separation of church and state. The *Lyng* decision has been widely interpreted as a devastating blow to attempts to provide protection for American Indian religious practices and sites. The American Indian Religious Act has been called

'toothless'. There have been legislative attempts to remedy this decision, but so far without much success.

While there is much less case law on NAGPRA, to date, there are likely to be similar limitations on special Indian sacred rights both on equal protection grounds and on the prohibition of supporting a particular religion. To convey the possible flavor of such potential issues, consider the Pactola-Lee archeological collection which, until recently, was located at Capitol Reef National Park in Utah. This collection includes many items that have a sacred aspect for some American Indians. The origin of the collection is in the efforts of two avid local collectors and pot hunters, now deceased, who were also Mormon elders. They believed that the collected materials demonstrated the truth of passages in THE BOOK OF MORMON. For a while, the collection was on loan to the Mormon museum in Salt Lake City. But then it was conveyed to the Capitol Reef National Park, to be nearer to where it originated and, so far as the collectors were concerned, so local (Mormon) people could see for themselves. In this instance the possible repatriation rights for American Indians can be seen as a governmental policy favoring one religion over another.\*

So there seem to be some sharp legal/constitutional limitations to the capacity of advocates to claim sacredness as a basis for protecting sites, and for agencies to positively respond to sacred claims. Nonetheless, there are creative attempts to find a politically and constitutionally satisfactory basis for protecting sites and resources.

IV. While there is some resistance, there is a clear commitment on the part of many governmental decisionmakers to find a way to specially recognize and protect sites and objects of spiritual significance for American Indians. These efforts are pretty clearly not explicitly designed to avoid the Supreme Court decisions, but they may well have such consequences. As much research on the impact of Supreme Court decisions has noted, such an outcome would not be unusual. The National Park Service has clearly taken the lead in finding protective alternatives, partly because of legislative obligations (e.g., as keepers of the National Register of Historic Places, and as the implementing agency for NAGPRA), and partly because so much of the agency mission in managing national park units involves them in obligations and mutual dependence with American Indians. The National Park Service is extremely important for American Indian people, and the reverse is also true. Indian matters are of great importance for the agency.

One initiative of the National Park Service which is surely relevant to the protection of sacred sites, and the access of Indian people to such sites, is the effort moving toward co-management of national park units connected to particular tribes, as between the tribes and the National Park Service. Formalizing and finalizing such co-management agreements is very difficult. The first such agreement has (apparently) been completed between Death Valley National Park and the Timbasha Shoshones, who live within the park. While formalizing such agreements is very difficult, there is momentum in this direction. Less formalized efforts giving tribal people a bigger stake in park decisionmaking are occurring. For example, the consultation requirements at Rainbow Bridge National Monument have evolved into a process in which tribal representatives have a major impact on management at that park unit. A consequence is that management activities concerning

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\* In this instance the Park more or less finessed the issue by deciding that the Pactola-Lee collection was only loaned by the collectors, so it was returned to the heirs. The (Washington) NAGPRA staff of the NPS was very opposed to this decision. But individual park superintendents have considerable autonomy. It might be noted that many individual parks have needs to be particularly responsive to Indian communities. Capitol Reef has, instead, some special relationships involving the Mormon people of Utah.

I rely for the facts of this matter on two currently unpublished papers by Lee Ann Kreutzer, the archeologist at Capitol Reef National Park

Rainbow Bridge are very oriented toward protecting the site in ways satisfactory to the religious practitioners, despite the earlier litigation.

Beyond the incorporation of tribal people into park management, there are also at least three useful euphemisms from the National Park Service repertoire of management concepts which can be used for offering protection to sacred areas, sidestepping any first amendment problems.

(A) One of the Park Service initiatives which can serve to facilitate giving special recognition and protection to sacred sites is an NPS systemwide program to identify, study, and protect what the agency calls “cultural landscapes.” Areas identified as cultural landscapes, or as part of cultural landscapes, are certainly worth special care, whether or not they are also of spiritual importance.

(B) Another effort is to give the broadest possible legal interpretation to the repatriation and consultation requirements of NAGPRA, particularly when it comes to the materials and archeological sites within national park units. This tendency may put the agency at some odds with much of the archeological community upon occasion, and also may seem to skirt the legal requirements and definitions in NAGPRA and the Act’s implementing rules. This opportunity comes about over things maintained in park control that might be identified as “sacred”. National parks hold many such items. According to NAGPRA, such items should be repatriable under certain conditions, but these repatriations might have First Amendment problems if challenged in court. One way to avoid the issues of the First Amendment might be to repatriate items as if they were “items of cultural patrimony”—another category of repatriable materials—rather than “sacred objects.” This works if the agency gives a very broad operational definition and a sympathetic response to repatriation requests for items of cultural patrimony. Operationally, items of cultural patrimony are almost, by definition, also sacred objects, but it is harder to make the case that some things identified as sacred are necessarily objects of cultural patrimony. Items of cultural patrimony are supposed to be materials that should never have been ‘owned’ by an individual tribal member, and thus should never have been possible to be removed from tribal control. (See appendix to illustrate this point.)

(C) While these attempts to be both protective of sites and sympathetic to tribal claims are important, the matter that will be explored as a case in the rest of this paper is still another option: the creation and implementation of a special type of listing for the National Register for Historic Places. This listing option is called a “Traditional Cultural Property.” A “Traditional Cultural Property” (TCP) is one among many types of property that might be eligible for listing on the National Register. The key to eligibility is in the role the site plays ‘in a community’s historically rooted beliefs, customs and practices’, which is surely broad enough to encompass sacred sites.

One can begin to see the value of a TCP designation by looking at a site discussed earlier. The National Park Service is currently trying to compel the FAA to restrict air traffic around Devils Tower National Monument in Wyoming. The effort is in connection with an airport proposal for Hulett, Wyoming. In the environmental assessment for that proposal (FAA, February, 1999) the NPS demands restrictions on flights around the park because Devils Tower is a TCP, not because it is sacred or because it is a National Monument. They seek the intervention of the Advisory Council on Historic Preservation in the issue. A property either formally listed on the National Register, or even determined to be eligible for listing does gain some protective status, although whether the Park Service

will ultimately prevail on the issue at Devils Tower remains to be seen. But the potential for such a possible listing seems clear. A more detailed case study might be revealing. It might demonstrate not only how a TCP designation process can offer protection for a sacred site, but also suggest how American Indians have emerged as effective political advocates.

V. Ocmulgee National Monument, located on the edge of Macon, Georgia, is an archeological national park unit located within a larger archeological site known as the Ocmulgee Oldfields. The story told at Ocmulgee National Monument is primarily about the 'Mississippian' period, roughly 900 AD to the 1300s, after which there was a cultural decline of sorts. The name 'Mississippian' is because this complex culture first emerged along the Mississippi River, at such places as the great sites around St. Louis (Cahokia, etc.) and spread from there along the river systems of the southeast.

The Mississippians of the southeast had an extensive urban and agricultural economy, with parallels (and possibly connections) to the Mayan and Mesoamerican cultures of the time. They developed a spectacular religious system, sometimes known as the Southeastern Cultural Complex, or the "Southern Cult." The most obvious physical features of this are the very large platform mounds, scattered throughout the region. The mounds located within the national park are what visitors to Ocmulgee see and climb. There are other features within the monument too, such as a ceremonial earth lodge, and the remains of an English trading post, from a much later era.

While the NPS interpretation is about the Mississippian period, that is really only a small part of the American Indian story at Ocmulgee. After the decline of the Mississippians, in the 1300s, the Indian life in the area became village based, still having some agriculture (corn, squash, tobacco), but becoming much more dependent on hunting and gathering. These people were possibly the same people, linguistically and culturally, as the Ocmulgee Mississippians. They were proto-Creeks. After the New World was discovered by Europeans, these people became the Creeks (Muskogeans), and while they were spread throughout much of what is now Georgia and Alabama, they have viewed the Ocmulgee area as their place of origin. It was where they "first sat down," which is interpreted to mean where their federation was formed. Their first contact with Europeans was during the DeSoto entrada. An ethnohistorian, Charles Hudson has spent much of the last twenty years tracing the route of the DeSoto expedition, and has quite convincingly shown that DeSoto visited Ocmulgee, and negotiated with the people there. He also left some European diseases in his wake, which reduced the population. But the DeSoto contacts are not interpreted at the park, even though it is a most important story.

After the DeSoto expedition the Creeks had almost 150 years before the European presence became heavy. By then, English traders were coming from the colonies to visit the Creeks, to trade for deerskins, etc. The Muskogeans were in regular contact with St. Augustine. But after Spain was out of Florida, the Indians became more vulnerable to English and then American pressures. The Americans, interested in the Creek's fertile lands for settlement, played Creek villages and groups ("Upper Creeks" vs. "Lower Creeks") against each other, and ultimately defeated and cheated the Creeks out of their lands, including the so-called Ocmulgee Oldfields, which the Creeks tried very hard to retain because of its sacred importance. The "Ocmulgee Oldfields", very ancient farm fields, were and are clearly special for the Creeks. William Bartram, the famous American naturalist and explorer visited the area in the years just before the Revolution (1773-1776) and quoted the Muskogeans about its sacred character, in very much the same terms as expressed by contemporary Creeks.

Most of the Creeks were forced out of Georgia and Alabama, and moved to Oklahoma (Indian Territory), by way of the so-called Trail of Tears, during the Jackson

Presidency. Some Creeks do still exist in the Southeast—including a federally recognized group in Alabama (the Poarch Creeks), some federally unrecognized groups in Georgia, and the Seminoles and Miccosukees in Florida. But most of the Creeks were moved west. They reestablished themselves there, and were reconstructing their tribal lives until the Civil War, when most sided and fought for the Confederacy. The Civil War era disrupted the Creeks tremendously. But they have slowly recovered again. During all of their travails, they did not forget the Ocmulgee Oldfields area. Their capital in Oklahoma is named Ocmulgee. And tribal members now frequently return to the Georgia site.

The National Park unit has become important to the contemporary Muskogee-led alliance of Creek related tribes. Activities of Ocmulgee National Monument draw tribal representatives to the area. The Park itself consists of two units, the main Ocmulgee Mounds area, and a detached archeological area known as the Lamar site. While the detached Lamar Site is rarely visited by tourists, it is a very important archeological site. On private land in between these two units, in part of the area identified as ‘Ocmulgee Oldfields’ there is an extensive, archeologically (and environmentally) rich area. Some of this intervening land is owned by the Archeological Conservancy, which has expected to convey the property to the National Park Service at some time in the future. But there are other plans for that area. Some local Macon realty interests, supported by many politicians and the state highway department are planning to put a divided highway through that area, actually bisecting the two park units and crossing the Conservancy-owned lands. This project, the so-called Eisenhower Parkway Extension, has been a long-sought public works project and has had much support. Planning for it goes back 30 years, and the announcement of its final form was made in 1995. Over the past decade, many of the formal procedures and approvals for this expressway were completed. Federal Highway Administration financial support was lined up. But plans for the Eisenhower Extension were disrupted when the Indians and their allies were able to get a nomination for a quite expansive Ocmulgee Oldfields area accepted as eligible by the Keeper of the National Register, under criteria for a “Traditional Cultural Property.” The still undefined boundaries for the TCP clearly included the area, which was the preferred route for the expressway. This nomination was, apparently, the first such TCP listing east of the Mississippi River, but it probably will not be the last.

The National Park Service and the professional staff at Ocmulgee National Monument need to be circumspect about the Eisenhower Extension proposal. After all, it is supported by many of the influential people in their vicinity, and the decision-making process is still underway. But it is clear that the proposal undercuts their mission and responsibilities. It also seems clear that their opposition to this intrusion, by itself, would not be successful. The Park Service can cheer on the Creeks and their allies, of course. And it is also the case that the agency has actively sought to re-engage the Creeks in the Ocmulgee area, for a variety of purposes. These actions may have had something of a catalytic effect in mobilizing the Creeks leading, among other things, to the TCP.

VI. There was a complex and fascinating process by which the TCP nomination was drafted, processed through the Georgia SHPO Office (State Historical Preservation Office), and ultimately accepted for the National Register. But that isn’t a story for this paper. Instead, some of the outwardly radiating political consequences of the TCP nomination will be described. It should be noted at the outset that a property listed on the National Register for Historic Places does not, thereby, achieve any absolute protection from governmental property destruction. But there are consequences.

(A) Once the interest of the Muskogee people in Oklahoma in this historical property in Georgia became manifest, there was a legal obligation for the proponent agency—in this case the Georgia Department of Transportation (essentially acting as the agent for the

Federal Highway Administration, which was the source of money for the project)—to confer and consult with the Tribe, and ultimately the other Creek-related tribes, about their views. These consultations needed to be conducted on a “government-to-government” basis of equality between the parties. Treaty rights and other land claims had to be considered. Tribal claims needed to be treated seriously and with respect. Perhaps most importantly, Creek Indians became legitimate players in the political process over the highway.

(B) Once there was a TCP nomination, the process for the proponents to satisfy NEPA (the National Environmental Policy Act) became far more difficult, costly, and complex. Prior to the nomination the project proponents hoped and planned to complete a nearly finished “environmental assessment” (EA), and thus fulfill their NEPA obligations. An environmental assessment is prepared to comply with the law that mandates that agencies consider the environmental consequences of proposed federal activities prior to undertaking such projects. It is a smaller and simpler version of the well-known “environmental impact statement” (EIS), supposed to be for projects with apparently less major potential consequences. An EA process is completed with the preparation of a “Finding of No Significant Impact”(a “FONSI”) asserting that a full-blown EIS is not necessary because the environmental consequences of the proposed activity do not reach the legal threshold of ‘major’.

In this case, the TCP nomination short-circuited the finalization of the EA. After the TCP it was apparent that the proposed highway would be above the legal threshold for requiring a full Environmental Impact Statement. In a full EIS, a whole lot more needs to be considered, probably including a much more in-depth examination of potential impacts on tribal values and claims. Reasonable alternatives to the project must be weighed. The process of preparing an EIS involves some intense politics, with many opportunities for public participation, and many prospects for project proponents to make legal missteps. The time necessary to complete a full EIS from the scoping through draft and final EISs, and then to a Record of Decision is quite high, meaning a number of years. And that is assuming that litigation doesn’t occur. All the knowledgeable actors are well aware that EIS processes have often created venues in which environmentalists, property protectors, and/or disadvantaged and dispossessed minorities have upset careful governmental plans and scuttled projects that had seemed to be on track. The EIS process for the Eisenhower Extension is, by now, long underway. It has a long way yet to go.

(C) The most direct consequence of the Ocmulgee Oldfields listing as eligible for the National Register has to do with the need for the proponents to consider the effects of their project upon historic properties. Section 106 of the National Historic Preservation Act requires that the proponent not only consider these types of effects upon listed properties, but also to seek a review by the Advisory Council on Historic Places. This process can run in tandem with NEPA compliance. If a proposed action is determined to have an effect on a historic property, the agency must consult with the state SHPO with the aim of avoiding or mitigating the effects. This is to be formalized in a Memorandum of Agreement. The entire TCP is a historic place, of course. The Muskogees, as the constitutional equivalent of a state within the federal system, have their own professionally staffed SHPO (state historic preservation office), which gives them some leverage over these negotiations.

(D) Perhaps the most compelling consequence of the TCP upon the prospect for the highway project occurs because of what is referred to as the 4(f) requirement. This is a requirement of the national transportation law, which denies funding for state highway projects that will cross lands of national importance, as determined by a number of criteria, unless it is demonstrated that there are “no feasible and prudent alternatives” to crossing such property. Lands eligible for the National Register are lands for which 4(f)

requirements apply. The phrase "no feasible and prudent alternatives" is a term of art, and skilled agency proponents can often find a way to meet the requirement. But the 4(f) issue is also included in the Environmental Impact Statement, and so is open to challenge both in that process and in court.

The radiating institutional requirements flowing from the TCP designation offer many opportunities to seek to protect the cultural and natural values of the Ocmulgee Oldfields. The Muskogee Nation and their allies seem well positioned to contest the plans to bisect that region. It is still a contest, and a prolonged one at that. One thing notably absent from the claims over this sacred site are explicit claims based upon the spiritual rights of the Indians. It is possible, of course, that the Ocmulgee Oldfields doesn't really qualify as a 'sacred site.' But the Ocmulgee Oldfields seems to have qualities that make it a sacred site in the meaning of the American Indian Religious Freedom Act (AIRFA), at least on the basis of administrative interpretations of 'sacred.' Some of those qualities are: (1) places of origin (whether actual, mythical, or somewhere in between); (2) landscapes that are important in a tribe's or people's journeys through the world—again, whether actual demonstrable journeys, based on oral traditions, or something else; (3) places that appear in the important stories and myths of a tribe or people. On these criteria, the Ocmulgee Oldfields seems to be a sacred area. Moreover, the 'cultural landscape' of the Ocmulgee Oldfields includes the spectacular platform mounds from the Mississippian period. These are clearly ceremonial sites and they are almost the identifiers for the Ocmulgee Oldfields. The Muskogees are claiming a cultural affiliation with these Mississippian ancestors, for NAGPRA purposes, and that connection is being accepted by many federal agencies and museums. Archeologists and anthropologists note how the central ceremonial feature of contemporary Creek people, the Green Corn Dance is a fairly clear continuation of ceremonial practices of the Mississippians involved with the so-called 'Southern Cult.' This seems to be another basis for claiming the sacredness of the Ocmulgee Oldfields cultural landscape, and the importance of maintaining its integrity.

AIRFA has often been described as 'toothless,' at least since the Lyng decision. But the Act may have one tooth. AIRFA seems to require that federal decisionmakers, and their agents, consider impacts of their projects upon the spiritual needs of traditional practitioners of tribal religions. They may not need to base a decision on this evaluation, of course. But they are supposed to consult with spiritual and ceremonial tribal leaders in their considerations. The obvious way to do this is as part of the EIS process. While this requirement might seem redundant to the TCP requirements, it probably taps a different dimension of impacts. Anything which sheds light upon the spiritual value of the Ocmulgee Oldfields probably works to aid the Creeks in resisting the highway project.

VII. While there are legal/constitutional limits to the capacity of tribal people to claim protective status for lands and resources, based on their sacred character, there seem to be ways to achieve the same result. Under political pressure, but also reflecting agency values, governmental bodies such as the National Park Service are fashioning ways to both give protection to such places, and to be responsive to tribal demands. Some early case experience suggests the possible efficacy of these alternatives. The fact that there seem to be administrative ways to achieve goals apparently thwarted in court decisions is not a new finding. But the specific mechanisms by which it is occurring deserve note.

## APPENDIX

From: Report on Native American Graves Protection and Repatriation (NAGPRA) Related Workshop for Southeast Archeological Service Center. NPS. Edited by: J. Anthony Paredes. December 1997. Pages 258-259. This is from a workshop with tribal leaders in the Southeast about how the agency's implementation of NAGPRA would affect the tribes' claims. The reported discussion is between John Harrington, an attorney with the Department of Interior Solicitors Office, and Dr. Muriel (Micki) Crespi, a distinguished cultural anthropologist and longtime advocate for American Indian interests within the National Park Service. Micki Crespi is one of the key formulators of the agency's response to NAGPRA.

**John Harrington:** I don't know if there are any easy questions in this area of the law. I've been marking down questions on my paper, and I got about 15 so far, and I feel that a lot of them will eventually come to the solicitor's office for resolution. But for purposes of our workshop today, let me, let me pose this problem. "Objects of cultural patrimony:" I look at the definition of that in the regulations and I see that these are objects that are of such singular importance to the tribe that there is a tribal — I don't know if the law is the appropriate word — but there is a tribal tradition that they should not be alienated.

**Muriel Crespi:** Um Hmmm.

**John Harrington:** or cannot be alienated. Who makes that decision? "Because you might have someone from the tribe looking at it today who says "that should never have been alienated." And, you may have ethnographers within the National Park Service who say, "well surely that could have been alienated." So you're going to have a struggle between the tribe and the Park Service, perhaps, particularly on objects of cultural patrimony.

**Muriel Crespi:** I doubt very much that you will find a cultural anthropologist, an ethnographer, in the National Park Service who is going to override the considered, careful opinion of tribal cultural experts or elders. That is unlikely to happen. I think we are making every effort to work with the tribal cultural experts, with the tribal elders and accept the data, the evidence that they are providing. Obviously, again there is the preponderance of evidence that must be provided. But, uh...

**John Harrington:** Let me think for a moment with just my lawyer hat on. There are federal laws that prohibit employees of the government from giving away property that is owned by the government. And, so, if you start off from a position that some of this stuff is owned by the government then you may not give it away unless a statute passed by congress authorizes you to give away. And, "give away" perhaps is the wrong work; repatriate.

**Muriel Crespi:** Um Hmmm.

**John Harrington:** So, you have to follow the law in order to repatriate something and you look at the definition and it says that these are objects which at the time of separation from the tribe, the tribal tradition or tribal law says that they should not ever be separated or alienated or conveyed.

**Muriel Crespi:** Um Hmmm

**John Harrington:** and that's going, I think I can anticipate that you may have some problems with that.

**Muriel Crespi:** Hum Hmmm, Um Hmmm

**John Harrington:** You know, because there's a difference between, "this is an object that would look wonderful in our tribal museum and this is an object which is of such singular importance to our tribe that it could never have left the tribe."

**Muriel Crespi:** I know, OK... I just want to say one little thing. There may, sure there are tribal traditions that say "you shall not do this" and "you will not do this," "you will do this." Just like there are traditions among all groups that say "this is the behavior that is expected of you under these conditions and these circumstance." Nevertheless, there are individuals who from time to time depart from those expectations. It doesn't mean that the expectation no longer exists. And there have been times in the past when some materials that were indeed tribal cultural patrimony have in various ways and for various reasons passed out from the tribe to the commercial world to the market. It doesn't make them less patrimony.