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Paths in the Wilderness?: The Politics and Practices of Hopi Religious Freedom in *Hopitutskwa*

JUSTIN B. RICHLAND*

ABSTRACT

This paper considers how U.S. federal laws, policies, and practices concerning the exercise of religious freedom are met by the efforts of Hopi people to practice their religious obligations on their aboriginal lands. Despite the longstanding recognition that Hopi religion demands an ethic, practice, and commitment toward stewardship of lands both on and off the contemporary Hopi Reservation, repeated attempts by Hopi to practice their religion on U.S. National Forest lands have been thwarted by U.S.

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officials. To explore why this is so, and how it is possible that the very laws and policies designed to protect Hopi religion may in fact hinder it, I take up two recent examples of conflict among Hopi and federal officials over the use of public lands. One involves the litigation initiated in the last decades of the twentieth century by Hopi and other tribal nations in the region to stop the U.S. Forest service from approving artificial snowmaking at a ski resort in the Coconino National Forest, outside Flagstaff, Arizona.

Another considers the circumstances surrounding the 2013 sale of lands in the Tonto National Forest near Payson, Arizona, and the efforts by the Hopi tribe to consult with U.S. Forest Service officials about the significance of archaeological sites discovered within the sale lands. In both examples I explore how, even after passage of various statutes and protocols designed to protect religious expression generally as well as those protecting the rights of Native Americans to the cultural property that their religions often require, Hopi continue to find themselves stymied in their efforts to observe the full breadth of their religious beliefs, beliefs in which nature, culture, and the paths of human life in which they are joined are seemingly always thrown off course. Beyond a consultative role, this paper argues that federal agencies should consider processes that give tribal nations active co-management authority, at least on a case-by-case basis, consistent with principles outlined in the Tribal Self-Governance Act of 1994, Pub. L. No. 103-413, and regulations promulgated pursuant to it, but which currently apply only to Department of Interior agencies.

INTRODUCTION

Trudging up a small rise on the dusty, unmarked chaparral trail we had just taken across the Payson Ranger District of the Tonto National Forest in Arizona, my Hopi colleagues, who had been joking with each other just moments before, had now grown silent. Though it was early morning, it was already hot in central Arizona, even in the higher elevations of what locals call the “Rim Country” at the Southern edge of the Colorado Plateau.

I remember thinking that it must be the heat and the exertion from the hike that was quieting everyone down. And while that might have been the case, it was also true that when we made it to our destination—a ridge with a commanding view of the spruce pine fields in valley below, interspersed with roughhewn sandstone blocks and red, rocky outcrops reminiscent of the more spectacular mesas of nearby Sedona, Arizona—that the silence may have also been a kind of reverence. For it was followed by my colleagues' whispers of *kwaakwhá* (“thanks”), punctuated with an occasional *Is uti!* (“Oh my!”).

As it turned out, we had arrived at and were standing amidst what archaeologists have identified as a site of human occupation, and one that they dated to the late Pre-Classic (A.D. 750–950) and Classic Periods (A.D. 1200–1450) of the archaeological record of the area, a period of human occupation dating from between AD 1600–1875, accompanied as it was by artifact scatters that bore the typical characteristics of what they called Tonto Plain Ware and Tonto Red Ware ceramics.¹

But my Hopi colleagues had a different name for our destination on that day. They call it *itaakuku* (“our footprints”). Because for them, this place, and the other archaeological sites that can be found all over central and northern Arizona, mark not just the passage through the area of those ancestors they call *Hoopq'yaqam* (“Those who went to the Northeast”), but also, more generally, the ongoing paths of commitment that Hopi make to the deity who first occupied this world, the Fourth World.² That deity is *Maasaw*, and it is he who first promised them this land and the greater Hopi homeland of which it is a part, but only so long as they continued to move across it, learning from and caring for the many beings who crowd what Euro-Americans continue to see as otherwise empty, desert wilderness.³

These sites then are not just places, but spaces, marks on a path of ethical living that the Hopi today are working hard to continue to follow. It is this idea of a *path*, what the Hopi call *Hopivewat*, that makes up the complex and ever unfolding cycle of prayer and practice that constitutes what non-Hopi call the Hopi religion, but which Hopi

1. See generally JEFFERY J. CLARK, TRACKING PREHISTORIC MIGRATIONS: PUEBLO SETTLERS AMONG THE TONTO BASIN HOHOKOM viii, 33, 66–71 (2001); J. Scott Wood, *Checklist of Pottery Types for the Tonto National Forest*, 21 ARIZ. ARCHEOLOGICAL SOC'Y 7–9 (1987).

2. See HAROLD COURLANDER, THE FOURTH WORLD OF THE HOPIS 22 (1987).

3. Kurt E. Dongoske et al., *Archeological Cultures and Cultural Affiliation: Hopi and Zuni Perspectives in the American Southwest*, 62 AM. ANTIQUITY 600, 603 (Oct. 1997).

simply refer to as *their* path, their *qatsi* (“life”).⁴ Indeed, this path tracks a trail across the expanse of the Southeast corner of the Colorado Plateau that is their aboriginal homeland and the center of the Hopi universe. This life mandates that the Hopi undertake, every year, certain ceremonial obligations to acknowledge and care for those beings encountered by those who had taken these paths before them, those whose footprints dot the land, and whose spirits also return to these places.⁵ Indeed, as we walked along the trails encountering these various sites, my Hopi colleagues kept pointing to all the people (*Hisatsinom*, or “ancestors”) that had come to greet us as we approached their homes: the gray hawk who eyed us from above, the hummingbird who hovered and zipped across our path, and the fawn who bolted from the underbrush when one of us strayed too close.

While I should have probably anticipated that Hopi ceremonialism would break out on that hike, the nominal reason we were trudging in the backcountry of central Arizona was for something somewhat different. My colleagues had been invited down to the area, about 130 miles south from their villages on the Hopi Reservation, as part of an effort by the U.S. Forest to undertake what is known as a “Traditional Cultural Properties” investigation⁶ on the lands of the Tonto National Forest. As members of the Hopi Cultural Preservation Office’s (HCPO) cultural resource advisory team, they served as the Hopi Tribal Nation’s cultural resource management arm. As such they were authorized by the Hopi tribal government to meet with representatives of non-Hopi private and public institutions and organizations to consult and/or negotiate the terms of use, maintenance, or repatriation of Hopi material and immaterial cultural property.⁷

This was not the first time the HCPO and its cultural resources advisory team had conducted such consultations. Indeed, they had been regularly doing so since the mid-1990s, shortly after the passage

4. PETER WHITELEY, *DELIBERATE ACTS: CHANGING HOPI CULTURE THROUGH THE ORAIBI SPLIT* 22 (1988).

5. See T.J. FERGUSON & CHIP COLWELL-CHANTHAPHONH, *HISTORY IS IN THE LAND: MULTIVOCAL TRIBAL TRADITIONS IN ARIZONA’S SAN PEDRO VALLEY* 95 (2015).

6. U.S. DEP’T OF INTERIOR NAT’L PARKS SERV., *GUIDELINES FOR EVALUATING AND DOCUMENTING TRADITIONAL CULTURAL PROPERTIES 1*, NAT’L REG. BULL. (1998) [hereinafter *GUIDELINES FOR EVALUATING AND DOCUMENTING TRADITIONAL CULTURAL PROPERTIES*].

7. See Hopi Tribal Council Res. H-70-94 (1994) (on file with author) (“[N]ow therefore be it resolved that the Hopi Tribal Council . . . That it authorizes the Hopi Cultural Preservation Office to exercise administrative responsibilities to negotiate and enter into agreements as necessary to address the repatriation of sacred objects [and] objects of cultural patrimony . . .”).

of the Native American Graves Repatriation Act of 1990,⁸ legislation that ushered in a sea-change in the way in which Native American cultural property was managed by non-native institutions and agencies receiving federal funds.⁹

It is worth emphasizing, I think, that it was members of Hopi's *cultural* resource advisory team, of the Hopi *Cultural* Preservation Office, that were hiking those trails in Tonto, and meeting with U.S. Forest service representatives regarding aspects of Hopi life that are tied to public lands. While the HCPO is a branch of the Hopi Tribe's Department of Natural Resources, none of its other branches—not the Wildlife and Ecosystems management office, nor its Water Resources program, nor its Environmental Protection Office¹⁰—were present with us on that hike, though they certainly could have been. Because while it may be the case that for *non-Hopi*, the land, flora, and fauna we encountered in Tonto on that hot day were likely seen as wilderness of one kind or another, for the Hopi such meetings are something altogether more. The lands we were crossing in the Tonto are within the southern parts of *Hopitutskwa*, the aboriginal expanse of Hopi homeland that stretches from the confluence of the Verde and Salt Rivers in the South, meeting and following the Puerco River to the East, including the Grand Canyon and Lake Powell in the West and North, but arguably beyond.¹¹ For the Hopi, the lands that make up *Hopitutskwa* are anything *but* the open, wild, perhaps even empty, space that seem to be conjured by the concept of wilderness, public lands, or even National Forest. From a Hopi perspective these are crowded, busy, buzzing places. To that extent, we might follow French anthropologist Philippe Descola, Eduardo Kohn, and others who wonder whether the too-easy division between Nature and Culture even makes sense when describing how Hopi engage with places like

8. Native American Graves Protection and Repatriation Act of 1990, Pub. L. No. 101-601, 104 Stat. 3048 (codified as enacted at 25 U.S.C. §§ 3001-13, 1170 (1990)) (requiring Federal agencies and institutions receiving federal funding and in possession of Native American cultural items to inventory said items, and within 6 months of completion notify those Native American tribes or lineal descendants who can claim cultural affiliation, and if requested, to expeditiously return such cultural items).

9. As one USFS Archaeologist with over 30 years of experience explained, prior to the passage of NAGRPA, "Nobody in the federal government really consulted tribes . . . back then Once NAGPRA came in, the world changed, and we started doing things a lot differently." Interview with USFS Archaeologist (July 10, 2013).

10. *Tribal Services*, HOPI TRIBE, <http://www.hopi-nsn.gov/tribal-services> (last visited Apr. 8, 2016).

11. For a historical background on the delineation of *Hopitutskwa*, see LEIGH JENKINS ET AL., A REEXAMINATION OF THE CONCEPT OF HOPITUTSQWA (Nov. 11, 1994).

the Tonto.¹²

Indeed, when we understand that the very word *Hopi* signifies not only the ethno-national identity of the people who constitute members of the contemporary Hopi Tribal Nation, but even more fundamentally, is an expression of ethnical valuation, a marker of right behavior, used to describe those who “behave well.” We gain an insight into what they mean when they describe their land *Hopitutskwa*, and perhaps even the earth itself, as a space and place to which they owe ethical obligations, as they promised to *Maasaw*, the one who allowed them to reside there.¹³ These obligations, the Hopi will tell you, can only be fulfilled through adherence to certain religious and ritual practices that must be performed. As was artfully stated in a 1951 petition by the leaders of a Hopi village to the U.S. Indian Claims Commission, “The Hopi Tusqua [sic]... is our love and will always be, and it is the land upon which our leader fixes and tells the dates for our religious life. Our land, our religion, and our life are one...”¹⁴

It is no surprise then that the Hopi have long-standing claims to lands well beyond the 1.5 million acres that make up their current reservation, currently held by the U.S. government in the form of National Forest lands, and that many of those claims turn on the religious duties and obligations they are required to undertake in a very specific way according to strict rules of ritual performance. Even more importantly, these duties and obligations involve esoteric practices that must be performed out of sight and earshot of the uninitiated.¹⁵

12. See generally PHILIPPE DESCOLA, *BEYOND NATURE AND CULTURE* (Janet Lloyd trans., 2012); EDUARDO KOHN, *HOW FORESTS THINK: TOWARD AN ANTHROPOLOGY BEYOND THE HUMAN* (2013); EDUARDO DE CASTRO, *CANNIBAL METAPHYSICS: FOR A POST-STRUCTURAL ANTHROPOLOGY* (Peter Skafish trans., 2014). Others working with indigenous peoples of the Amazon, have argued that anthropology needs to go further than it currently does in understanding these people’s commitments to the beings of the non-human world and which they live—the plants, animals, rocks and rivers—so as to better appreciate the moral and ethical obligations that they claim to owe, and be owed, by these fellow beings. As such, they have helped usher in what some have called the “ontological turn” in anthropology more generally. See e.g., John Kelly, *The Ontological Turn: Where Are We?*, 4 J. ETHNOGRAPHIC THEORY 357 (2014).

13. See DONGOSKE, *supra* note 3, at 603.

14. Brief for Petitioner, *Hopi Village of Shungopavi v. United States*, No. 210 (Indian Claims Commission, Aug. 6, 1951). See also HARRY C. JAMES, *PAGES FROM HOPI HISTORY* 102 (1974); PETER M. WHITELEY, *HOPITUTSKWA: AN HISTORICAL AND CULTURAL INTERPRETATION OF THE HOPI TRADITIONAL LAND CLAIM 1* (1989).

15. SEVERIN FOWLES, *AN ARCHAEOLOGY OF DOINGS: SECULARISM AND THE STUDY OF PUEBLO RELIGION* 101 (2013); Justin B. Richland, *Hopi Sovereignty as Epistemological Limit*, 24 WICAZO SA REV. 89 (2009); PAUL V. KROSKRITY, *LANGUAGE, HISTORY, AND IDENTITY: ETHNOLINGUISTIC STUDIES OF ARIZONA TEWA* 15–6 (1993); Alfonso Ortiz, *Ritual Drama and the Pueblo World View*, in *NEW AMERICAN PERSPECTIVES ON THE PUEBLOS* 135 (Alfonso Ortiz

When viewed in this light, we have to ask, for whom are these lands wilderness? What effects, if any, does naming these lands “National Forests,” have on the capacity of Hopi people to exercise their religion? Moreover, how does such naming, and its effects, square with the presumptions of the First Amendment protections of religious freedom that Hopi, like all U.S. citizens, expect the right to enjoy, especially in public?

To ask these questions, I want to next track a trail of another sort, this one of the legal filings and decisions that occupied the Hopi and other American Indian tribes as they wrangled with the U.S. National Forest and others over a different sacred place, the San Francisco Peaks, or what the Hopi call *Nuvatukya’ovi*.¹⁶ After this brief detour I will once again return to the dusty hills of the Tonto, and the engagements between Hopi and Forest Service archaeologists as they explored the significance of the footprints there. In so doing, this paper considers how U.S. federal laws, policies, and practices concerning the exercise of religious freedom are met by the efforts of Hopi people to practice their religious obligations on their aboriginal lands. Despite the longstanding recognition that Hopi religion demands an ethic, practice, and commitment toward stewardship of lands both on and off the contemporary Hopi Reservation, repeated attempts by Hopi to practice their religion on National Forest lands have been thwarted by U.S. officials. I then will conclude with some final reflections on what this all might say about the politics of religious freedom for the Hopi and other native nations in the United States today.

I. NUVATUKYA’OVI, IN THE COCONINO NATIONAL FOREST.

Among the many footprints that both mark the thousands of years of history that the Hopi have occupied and traversed the lands we currently call central and northern Arizona, and which also continue to demand Hopi religious attention and stewardship, few are more significant or demand as much from the Hopi than *Nuvatukya’ovi*. Standing at 12,633 feet above sea level, what Euro-Americans call Mount Humphreys towers over the town of Flagstaff, with a population 67,468 in 2012.¹⁷

ed., 1972).

16. Maria Glowacka et al., *Nuvatukya’ovi—San Francisco Peaks: Balancing Western Economies with Native American Spiritualities*, 50 *CURRENT ANTHROPOLOGY* 547, 547 (Aug. 2009).

17. *Id.* at 555; *Our Town—Flagstaff*, <http://canyonchapel.org/about/about-our-town-flagstaff> (last visited Apr. 15, 2016).

Nuvatukya'ovi is the highest mountain in Arizona. On most days it is easily visible from the mesa-top villages where the Hopi have lived since at least 1200 A.D..¹⁸ As a now-extinct volcano, the mountain's steep slopes surge up from the relatively flat terrain beyond its foothills to its immediate north, casting a stark contrast, and a long rain shadow, across much of the Hopi and Navajo reservations. The result is that it also catches much of the moisture in this otherwise arid landscape, lending it robust pine forests and snowy peaks that attract outdoor enthusiasts from all over the region. Coupled with the Grand Canyon which sits less than a two hour drive to the north, *Nuvatukya'ovi* plays a big role in burnishing Flagstaff's reputation as a mecca for outdoor enthusiasts of all stripes. Among those who flock to "Flag," as the locals call it, invariably included are snowboarders and skiers who come to ride the slopes of Arizona Snowbowl, the only ski resort in the region, and one of the oldest in the West, operating on U.S. National Forest land since the 1930s.¹⁹

For the Hopi, however, *Nuvatukya'ovi* is a mecca of a different sort. They consider it the home of the *Katsinam*, the ancestor spirits who visit them and their villages for half of every year and who bring with them the bounties and beneficence of rain.²⁰ In exchange for this, the Hopi give thanks and prayers through an elaborate series of ceremonies that fill village nights and days from late December to mid-July.²¹ *Nuvatukya'ovi* also marks the Hopi southwest cardinal direction, providing both literal and figurative axis of orientation for *Hopivewat*, the path of a good life. No wonder then that sacred shrines dot the landscape leading to and including many different places on *Nuvatukya'ovi*, and on which Hopi footprints, both past and present, are regularly visible. Hopi priests are required to make pilgrimages to *Nuvatukya'ovi* during key moments in their annual ceremonial calendar.²² Various materials, including spruce boughs, eagle feathers, and various other plant and animal resources required for their observances must be gathered on and around *Nuvatukya'ovi*.²³

As the Hopi tell it, and even without revealing any of the esoteric information that they are prohibited from telling a non-initiate like me (or anyone else, including other Hopis), there are few phenomena more

18. Glowacka et al., *supra* note 16, at 552, 555.

19. *Id.* at 547.

20. *Id.* at 551.

21. *See id.* at 556.

22. *Id.* at 553, 555–8.

23. *Id.* at 553, 557–8; MISCHA TITIEV, OLD ORAIBI: A STUDY OF THE HOPI INDIANS OF THIRD MESA 246 (1944).

central to Hopi life, religion, culture, and its practice than *Nuvatky'a'ovi*. So it comes as little surprise that the Hopi tribe has been a regular opponent of repeat efforts by the Arizona Snowbowl Corporation to expand its ski resort capacity and have worked tirelessly to block the approval and permitting granted to such efforts by the U.S. Forest Service.²⁴ The Hopi have fought on many different fronts, from public protests, to the lodging of civic complaints, to petitioning the federal government.²⁵ They have done so whenever the Arizona Snowbowl has endeavored to broaden their impact on *Nuvatukya'ovi*, whether it be in requesting a permit to cut new ski trails, raising capital to renovate the ski lodge, or even adding new high-speed chair lifts to increase the number of skiers who can access the mountain at one time.²⁶ All of these efforts have been met with Hopi protests, in one form or another.

But for many Hopi, the most recent action by Arizona Snowbowl to expand its capacity is perhaps the most egregious affront to the culture and the religious obligations they owe to *Nuvatukya'ovi*. That is because the ski resort has introduced large scale artificial snowmaking operations on the mountain, an operation that is estimated to shower 1.5 million gallons daily of frozen reclaimed waste-water pumped from Flagstaff's sewage treatment centers.²⁷

Now, as Arizona Snowbowl representatives tell it, and as the U.S. Forest Service Environmental Impact Assessment that approved it explains, the use of wastewater that has been reclaimed from Flagstaff home and industrial sewage is both safe and clean and offers the only sustainable way of making snow in a manner that offsets the environmental impact that comes from using so much water for

24. See Justin B. Richland, *Dignity as (Self-)Determination: Hopi Sovereignty in the Face of US Dispossession*, 41 LAW & SOC. INQUIRY 917, 930–4 (2016); Glowacka, et al., *supra* note 16, at 547–50.

25. See, e.g., *Protests as Arizona Snowbowl Opens with 100% Treated Sewage Snow on Sacred Site*, PROTECT THE PEAKS (Dec. 1, 2014, <http://protectthepeaks.org/protests-as-arizona-snowbowl-opens-with-100-treated-sewage-snow-on-sacred-site> (last visited Apr. 15, 2016)); *Hopi Win Right to Continue Court Fight Against Snowbowl Wastewater on Sacred Peaks*, INDIAN COUNTRY TODAY MEDIA NETWORK (Jan. 8, 2014), <http://indiancountrytodaymedianetwork.com/2014/01/08/hopi-win-right-continue-court-fight-against-snowbowl-wastewater-sacred-peaks-153019>.

26. See Richland, *supra* note 24, at 930–4.

27. FOREST SERV., U.S. DEP'T OF AGRIC., ARIZ. SNOWBOWL FACILITIES IMPROVEMENTS FINAL EIS AND FOREST PLAN AMENDMENT #21, at 10 (2005); Robrt L. Pela, *How Arizona Snowbowl Fakes Flakes for a Longer Ski Season*, PHOENIX NEW TIMES (Feb. 2, 2016), <http://www.phoenixnewtimes.com/arts/how-arizona-snowbowl-fakes-flakes-for-a-longer-ski-season-8018927>.

recreational purposes.²⁸ This is especially important when we recall that the San Francisco Peaks, and the Flagstaff region more generally, are a small oasis of moisture in an otherwise parched corner of the southwestern United States. The Hopi, themselves agriculturalists who practice a kind of dry-farming relying on specially adapted corn seeds, count on nothing more than the average 8.5 inches of rain annually to water their crops.²⁹

So while the idea that the Arizona Snowbowl is attempting to mitigate the water usage normally involved in making snow seems a good one, it only does so if you ignore so many other tragic ironies that spraying waste-water on *Nuvatukya'ovi* has for Hopi and other tribes in the region, ironies that the Hopi are quick to point out. To list only the most obvious one, consider that in blowing dirty water onto the home of the very ancestor spirits who bring water to Hopi dry-farmed crops is really more than an injury. It's an insult. Indeed, in some sense, it is almost literally a large-scale act of pissing in the Hopi's pot.

In 2005, the Hopi Tribe, with the HCPO teams taking a lead role, joined with twelve other tribal nations in the region, as well as several well-known environmental advocacy groups (Sierra Club International, National Resource Defense Counsel, and others) in a lawsuit against the U.S. Forest Service.³⁰ This was actually the second round of litigation that the Hopi and other tribes had entered into against the Forest Service and the Arizona Snowbowl, the first beginning in the early 1980s after a planned expansion of the resort.³¹

In both the first and second rounds of litigation, the Hopi and other tribes had argued that the approvals that the U.S. Forest Service granted to the proposed actions of the ski resort constituted a violation of their rights, protected by the U.S. Constitution as enshrined in the language of the First Amendment, which holds that the government "shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."³² The Hopi and their co-petitioners lost in the first round of litigation, when Judge Lumbard of the U.S. Court of Appeals for the District of Columbia upheld the decision of the U.S. District Court judge that the actions of the U.S.

28. FOREST SERV., *supra* note 27, at 29–30.

29. Duane L. Johnson & Mitra N. Jha, *Blue Corn*, in NEW CROPS 228–30 (Jules Janick & James E. Simon eds., 1993); MICHAEL A. CRIMMINS ET AL., THE UNIV. OF ARIZ., HOPI CLIMATE: AN OVERVIEW TO SUPPORT DROUGHT MONITORING AND MANAGEMENT 2 (2015).

30. Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1063 (9th Cir. 2008).

31. Wilson v. Block, 708 F.2d 735, 739 (1983).

32. U.S. CONST. amend. I; Wilson, 708 F.2d 735; Navajo Nation, 535 F.3d 1058, 1063.

Forest Service did not constitute a violation of petitioner's free exercise of religion.³³

In coming to his decision Judge Lumbard followed a long line of case law to explain that the free exercise clause of the First Amendment “proscribes government action that burdens religious beliefs or practices, unless the challenged action serves a compelling governmental interest that cannot be achieved in a less restrictive manner.”³⁴ He explained that the First Amendment recognizes the absolute right to hold religious beliefs and that the free exercise clause prohibits both direct and indirect burdening of religion.³⁵ The former generally concerns governmental actions “regulating, prohibiting, or rewarding religious beliefs as such.”³⁶ The latter concerns governmental actions that through some sort of general benefit, prescription, or proscription “penalize adherence to religious beliefs.”³⁷ In either case, the court explained, it is not enough that some governmental action merely offends religious believers or even casts doubt on their beliefs, for “unless such actions penalize faith, they do not burden religion.”³⁸

The court then applied these rules to the claims presented by the plaintiff tribes.³⁹ Judge Lumbard found that the practices and beliefs described by the Hopi and other tribes were rooted in religion and that they had provided sufficient evidence “to establish the indispensability of the Peaks to the practice of [their] religion.”⁴⁰ However, he went on to hold that the indispensability of the peaks alone does not establish that the U.S. Forest Service imposed an “impermissible burden” on the tribes’ religious beliefs and practices when it approved the development plan, primarily because the tribes were not prohibited from accessing the peaks to conduct their ceremonies, nor did they establish that they must access the actual sites on the land occupied and being developed under the proposed plan.⁴¹

33. *Wilson*, 708 F.2d at 739–740.

34. *Id.* at 740.

35. *Id.*

36. *Id.* at 741.

37. *Id.*

38. *Id.*

39. *Id.* at 743–44.

40. *Id.* at 744.

41. *Id.* (noting that “The Forest Service, however, has not denied the plaintiffs access to the Peaks, but instead permits them free entry onto the Peaks and does not interfere with their ceremonies or the collection of ceremonial objects. At the same time, the evidence does not show the indispensability of that small portion of the Peaks encompassed by the Snow Bowl permit area. The plaintiffs have not proven that expansion of the ski area will prevent them

Based on these and other findings of fact and conclusions of law, the court affirmed the summary judgment decision of the district court in favor of the defendants.⁴² Instead of understanding the larger cultural surroundings within which Hopi religious practices and beliefs regard *Hopitutskwa* generally, and their duties and obligations to *Nuvatukya'ovi* specifically, the court instead attempted to find a solution that cut and sliced up the mountain into areas and places in which some parts could be considered more important and indispensable than others to the practice of Hopi religion.⁴³ Rather than seeing the total way in which “Nature” and “Culture” are indivisible in Hopi worldviews, Judge Lumbard and the others deciding this case imported a spatial and temporal understanding of *Hopitutskwa* that saw it in much the way certain secular worldviews would have it, as easily divisible between cultured and wild, sacred and secular.⁴⁴ In this distinctively secularist orientation, the court smuggles in a view of the mountain that engages in as metaphysical and “cultured” a read on its character as “de-cultured” and “wild” as was the Hopi’s view of it as filled with ritual significance.⁴⁵ When the court erases the cultural particular qualities of its sense of the mountain, treating its “wild” character instead as “natural” and “neutral” vis-à-vis the opposing parties and interests in this case, it gives itself the space to argue that it can then “split the difference” between Hopi and non-Hopi uses of *Nuvatukya'ovi*.⁴⁶ Which is what it does when it finds that the U.S. Forest Service, in approving the use of only a portion of land of the peaks for the Snowbowl operation, engaged in a constitutionally admissible burden, one that the federal government can impose on the Hopi and other tribes without running afoul of their First Amendment rights to religious freedom.⁴⁷

The decision came as a serious, if not entirely surprising blow to the Hopi and their fellow tribal petitioners. As a result, they would eventually mount another legal challenge, based on a similar concern that their religious freedoms were being impermissibly impinged upon. When they returned to federal court in 2005, they actually thought that they had a stronger case.⁴⁸ First, they believed that they could make the

from performing ceremonies or collecting objects that can be performed or collected in the Snow Bowl but nowhere else.”)

42. *Wilson*, 708 F.2d at 739.

43. *Id.* at 735.

44. *See generally id.* at 735.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Navajo Nation*, 535 F.3d 1058, 1066.

strong factual argument that the proposed snowmaking using reclaimed wastewater would involve a kind of intrusion on their religious practices that would, with the coming of Spring, and the inevitable snowmelt, spread out beyond the boundaries of the ski resort to directly impact the whole of *Nuvatukya'ovi* and the Hopi shrines and material resources located on it.⁴⁹ But secondly, they believed that they had new federal laws that would work in their favor. In the intervening years between the two rounds of litigation, the U.S. Congress passed the Religious Freedom and Restoration Act of 1993 (RFRA).⁵⁰ This legislation was enacted to reinstate the requirements that the Federal government must prove that it has a “compelling interest” when it imposes a “substantial burden” on a petitioner’s free exercise of religion and that this imposition is by the “least restrictive” manner possible.⁵¹

Based on this change in the law, the Hopi and other tribes thus went back to court arguing that the Forest Service’s approval of Snowbowl’s snowmaking plan imposed a substantial burden on their free exercise of religion, and moreover that it did so for reasons that did not constitute a compelling government interest, nor did so in the “least restrictive manner,” thereby violating the new standards established by Congress through RFRA.⁵²

At first, the Hopi and their co-petitioners met with the same result in District Court, albeit this time in Arizona.⁵³ Indeed, the District Court in the 2005 case even cited the 1983 opinion with approval, writing “the same decision is warranted here.”⁵⁴ Moreover, the court held, even if there was a substantial burden on the free exercise of the Hopi and other tribes’ religions, the U.S. Forest Service’s decision would nonetheless be valid insofar as it was made pursuant to a compelling governmental interest “to provide the type of ‘out-door recreation’ mandated by” the federal legislation creating the Service and its Forest lands.⁵⁵

However, when the Hopi and other tribes appealed, they were met

49. Megan Finnerty, *Compromise Complicated in Debate Over Faith, Water, Land*, REPUBLIC, (Mar. 16, 2015), <http://www.azcentral.com/story/travel/2015/03/13/navajo-nation-files-human-rights-protest-snowbowl-snow-making/70214892>.

50. Religious Freedom Restoration Act (RFRA) of 1993, Pub. L. No. 103-141, 1993 U.S.C.A.N. (107 Stat.) 1488, *invalidated by City of Boerne v. Flores*, 521 U.S. 507 (1997).

51. *Id.*

52. *Navajo Nation*, 535 F.3d at 1066.

53. *Navajo Nation v. U.S. Forest Serv.*, 408 F. Supp. 2d 866, 873 (D. Ariz. 2006).

54. *U.S. Forest Serv.*, 408 F. Supp. 2d at 905.

55. *Id.* at 906.

with a surprisingly sympathetic panel of three Ninth Circuit judges.⁵⁶ In what was a remarkable victory, Judge Fletcher's opinion for the panel, issued on March 12, 2007, found in the Hopi and other tribes' favor and in the strongest of terms.⁵⁷ Among other things, the panel found that through RFRA, Congress had intended to substantially expand the protections far beyond what the district court held in relying largely on case law interpretations of the free exercise clause from before RFRA's enactment.⁵⁸ As part of this reasoning, it explained that the amended RFRA defines the exercise of religion in ways that do not require that the protected beliefs be "compelled by, or central to, a system of religious belief."⁵⁹ It held that the District Court erred when it did not consider this amended definition of religious exercise and then required the tribes to prove that the snowmaking plan as approved by the U.S. Forest Service prevented them from "engaging in conduct or having a religious experience *which the faith mandates*."⁶⁰ Instead, the court explained, under RFRA, a burden on religious faith is "substantial" enough where, as with the snowmaking proposal, it would "undermine their entire system of belief and the associated practices of song, worship, and prayer that depend on the purity of the Peaks."⁶¹ It then went on to find that the Forest Service's actions did not meet the "compelling interest" test of RFRA, explaining that the district court shouldn't have construed the government's interest in broadly providing recreational opportunities, but rather more specifically in assisting the ski resort in increasing its snowmaking capacities, and with it, arguably, its economic bottom line.⁶² For these reasons, the three-judge panel of the Ninth Circuit reversed the decision of the District Court as it applied to RFRA.⁶³

This was a victory for the tribes, and the Hopi and their co-petitioners were right to celebrate it. It stood as the closest thing to a true "win" that the Hopi have experienced in their long battle to protect *Nuvatukya'ovi*. More importantly, it seemed to offer an interpretation of the religious freedom protections offered by Congress in RFRA in a manner that, at least to a certain extent, tracked their own understandings of their religious obligations. Recognizing that the importance of *Nuvatukya'ovi* and its purity to Hopi religion reaches

56. *Navajo Nation v. U.S. Forest Service*, 479 F.3d 1024 (2007).

57. *Id.*

58. *Id.* at 1033.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

beyond any specific ritual conduct or experience on the mountain itself, Judge Fletcher and his fellow panelists seem to recognize, rightly, that the Hopi view their entire way of life as an unfolding path deeply imbricated in the woof and weave that bind them to their lands through their multitude of cultural practices, past, present, and future that constitute the on-going fulfillment of their agreement to *Maasaw*.⁶⁴

Alas, the victory, however real, was short lived. In response to the panel's judgment, Arizona Snowbowl and the U.S. Forest Service petitioned for a rehearing by the full panel of judges of the Ninth Circuit. On October 17, 2007, their petition was granted. The Order of Chief Judge Mary Schroeder explained, "Upon a majority vote of the nonrecused regular active judges of this court, it is ordered that the case be reheard by the en banc court . . . The three judge panel opinion shall not be cited as precedent by or to this court or any District Court of the Ninth Circuit."⁶⁵

In December 2007, eleven judges reheard the matter and, in a 10-1 judgment, the court reversed Judge Fletcher and his fellow judges' prior analysis and affirmed the judgment of the District Court.⁶⁶ In this reversal and affirmation, the opinion of Judge Carlos T. Bea held that even though RFRA had expanded the kinds of religious practices that cannot be substantially burdened by government actions, it did not change the *kinds* of burdens that would be considered substantial.⁶⁷ As a result, the court held, while the proposed snowmaking violated the Hopi and other petitioners' sincerely held religious beliefs, "the diminishment of spiritual fulfillment – serious though it may be – is not a 'substantial burden' on the free exercise of religion" as defined either in Supreme Court precedents interpreting the First Amendment or in the language of RFRA itself.⁶⁸ Once again the Hopi found themselves on the losing side of their courtroom battle to exercise their religious freedoms in and to *Nuvatukya'ovi*.

Interestingly, while the U.S. Forest Service has sided with the Arizona Snowbowl throughout these proceedings, it is notable that in other contexts the Forest Service has identified *Nuvatukya'ovi* and all of the San Francisco Peaks as a "traditional cultural property."⁶⁹

64. PETER M. WHITELEY, *RETHINKING HOPI ETHNOGRAPHY* (1998).

65. *Navajo Nation et. al. v. United States Forest Service*, No. 06-15455 D.C. No. CV-05-01824-PGR Order of October 17, 2007.

66. *Navajo Nation et. al. v. United States Forest Service*, 535 F.3d 1058 (9th Cir. 2008).

67. *Id.* at 1070.

68. *Id.*

69. *Navajo Nation v. United States Forest Serv.*, 408 F. Supp. 2d 866 D. Ariz. (2006).

“Traditional cultural property” has been defined in the National Register Bulletin 38: Guidelines for Evaluating and Documenting Traditional Cultural Properties as being associated 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.”⁷⁰ The U.S. Forest Service has not only acknowledged that the San Francisco Peaks are sacred to the 13 tribes⁷¹ but also determined that the peaks are eligible for inclusion in the National Register of Historic Places.⁷²

What to make of this seemingly contradictory commitment of the U.S. Forest Service is an ongoing question not just for the academically interested but from a policy perspective with questions regarding of the meaning of the free exercise of religion for Native Americans like the Hopi.⁷³ Equally, and arguably more fundamentally, it is a question for the members of the Hopi tribe themselves, those who must take up these matters every time they wonder about their many and varied obligations to the lands with which their everyday lives are deeply intertwined.

II. *ITAAKUKU* IN TONTO NATIONAL FOREST.

Such considerations were almost certainly on the minds of members of the HCPO that I was with on that hot dusty hill who were being asked to consult with the U.S. Forest Service archaeologist at Tonto about the traditional cultural properties that were in its control and the proposed sale of some of the lands surrounding the Payson Ranger Station, on which certain traditional cultural properties were located.

Just like in the Arizona Snowbowl case, this engagement with the U.S. Forest Service was happening as the result of the agency’s plan to take action it knew would impact those resources. In this case, the action to be taken was the sale of a part of the Forest in which we were now hiking to a group of local investors who had plans to develop it. Pursuant to the National Environmental Protection Act, Council on

70. PATRICIA L. PARKER & THOMAS F. KING, GUIDELINES FOR EVALUATING AND DOCUMENTING TRADITIONAL CULTURAL PROPERTIES 28 (1998).

71. Brenda Norrell, *Lawsuit Filed to Halt Peaks Desecration*, INDIAN COUNTY TODAY, July 11, 2005.

72. *Navajo Nation v. United States Forest Serv.*, 408 F. Supp. 2d 866, 905 D. Ariz. (2006).

73. See PATRICIA L. PARKER AND THOMAS F. KING, GUIDELINES FOR EVALUATING AND DOCUMENTING TRADITIONAL CULTURAL PROPERTIES 28 (1998).

Environmental Quality Regulations,⁷⁴ federal agencies are required to conduct an environmental assessment of the impact that any proposed action is likely to have on both natural and cultural resources that occur on lands under their control.⁷⁵ The Hopi were there because the HCPO responded to a request for consultation from the U.S. Forest Service that was sent to a number of regional tribes. To hear the Forest Service Archaeologist tell it, Hopi is one of the few tribes to have a coordinated cultural resources office, and thus one of the few to respond when such invitations are put out there.⁷⁶

But given the history of its engagements, the HCPO's decision to participate was anything but unequivocal. As HCPO Director Leigh Kuwanwisiwma told me two days earlier, he really wondered what interests such consultations actually served. "Are we just helping them to do what they were gonna do anyway?"⁷⁷ he asked, acknowledging how Hopi involvement was treated as a step in an environmental assessment process that, though required by federal law, always seemed to come at a time when the federal action already seemed to be at or near completion. The Director's comments suggest the possibility that the decisions by other tribes not to respond to U.S. Forest Service requests for consultation were motivated by something other than the lack of organizational competence that the archaeologists claim it was. Perhaps it was a form of much more present absence, a refusal, or a deferral, that holds open certain possibilities (maybe freedoms) for later engagement in a way that cannot so easily be appropriated to the ends of the state. Such a possibility is entirely consistent with other instances of tribal engagement with federal authorities, such as what occurred with the controversial approval of the Hopi tribal constitution in 1936, which the federal government rightly claimed was approved by a majority of Hopi who voted, but which only can count as a true endorsement of the constitution if you choose to ignore (as the federal government chooses to do) the fact that only a third of the eligible Hopi voters—755 of 2,538—even showed up to cast a ballot.⁷⁸ Against this long history of nonperformance as a sign of dissent and/or disagreement, the decision by other tribes not to respond to the request for consultation can be understood as a kind of silent protest, and one that,

74. 40 CFR 1508.9 (2016).

75. *Id.*

76. (Personal Communication, Interview of 7-10-13).

77. *Id.*

78. Justin B. Richland, *Hopi Tradition as Jurisdiction: On the Potentializing Limits of Hopi Sovereignty*, 36 *LAW & SOCIAL INQUIRY* 201–34 (2016).

from the Director's words, may soon be the response of the Hopi tribe to such invitations as well.

Indeed, in many ways the Director's express fears would be confirmed when the Hopi arrived at the Tonto Ranger Station in Payson on the first day of the consult. At that briefing, which occurred the day before our hike, the Hopi were told by the Archaeologist that the U.S. Forest Service was already committed to selling the land in question, in part because it was surrounded on all sides by the growing town of Payson, making it impossible to efficiently manage.⁷⁹ As a result, he explained, any recommendations made by the Hopi Tribal representatives regarding how to manage the eleven archaeological sites they were going to visit on the consultation could not include a recommendation of "avoidance"—a category of practice described in federal guidelines as one possible recommendation for cultural resource management and which requires the service to leave the traditional property in situ. Avoidance, I would later be told by HCPO staff, is the preferred recommendation that HCPO representatives make when consulting with agencies, including the U.S. Forest Service on such matters. It did seem that the Archaeologist almost expected that to be the recommendation the Hopi were going to make. As a result, the perfunctory and unprompted manner in which the Forest Service Archaeologist raised the option of avoidance, only to take it off the table, led two of the Hopi representatives to pointedly ask him why, if this is not an option, they were even being invited to consult. "If this has already been decided, what is there left for us to do," one man asked. "For us, the whole point is to leave these things in the ground." He then explained, "We call them *'itaakuku*, footprints,' because they show where our people have been. And when we encounter them we leave offerings to the people that are still there, we apologize for disturbing them, and we thank them for what they have given us."

It is, I would argue, important to understand the Hopi preference for avoidance of such sites by understanding what exactly these places mean to them. Significantly, a literal translation of "*'itaakuku*" ("*our footfalls*") suggests the close connection that contemporary Hopi lives have with such sites, pointing to the deeply held religious covenant that

79. HCPO-USFS Traditional Cultural Property Consultation Meeting, Payson Ranger District, USFS Tonto National Forest, July 10-11, 2013 (Audio recording and transcriptions on file with author), see also Saul Hedquist and Stuart Koyiyumptewa, *Hopi Traditional Cultural Preservation Investigation for the Proposed Payson Ranger District Administration Site Sale*, Submitted to Tonto National Forest, US Dept. of Agriculture, Phoenix Arizona, August 2, 2013, pg. 2.

Hopi made with *Maasaw* and which they still see themselves as engaged in fulfilling. For *Maasaw* instructs them, “*ang kutota*” (“Go along, making footfalls”),⁸⁰ and it is an obligation they continue to fulfill to this day. The obligation was/is not just to travel to the places where the Hopi had been, but also, along the way, to acquire the secret knowledge that informs their ceremonial obligations, obligations whose continuous correct performance are critical to the wellbeing of their community, both in the past and today. Indeed, as others have described, an important element of these ceremonies is precisely the enactment again (not reenactment, but rather the constitutive doing-still) of these migrations, both ritualistically on the Hopi reservation and also by going out to the relevant places that are marked by *itaakuku*, as the places that Hopi were/are. Such places are active and alive for them: they demand special treatment and that they be maintained as undisturbed markers of Hopi presence.

But avoidance was not an option, they were told. Instead, the Forest Service Archaeologist then explained, the consultation was to assist the Archaeologists in determining what (if any) kind of mitigation could be possible to the anticipated impacts that the sale of the land would have on the cultural properties. “Mitigation” also has its specific meaning within federal regulations and refers to the kinds of actions that U.S. Forest Service personnel, including these Archaeologists, can take with regard to impacted cultural properties, but only once the properties have been deemed “eligible” for inclusion in the National Register of Historic Places.”⁸¹ In short, what the Forest Service archaeologist was requesting was a consultation that would provide evidence sufficient to justify expenditure of federal funds for excavating the sites.

It turns out that the eligibility criteria for including traditional cultural properties in the National Registry, though they are described as turning on their “significance” in the “cultural practices or beliefs of a living community”⁸² in fact turn more on what they can reveal about a community’s past, than what they mean for a community’s religious present/presence.

80. Leigh J. Kuwanwisiwma & T. J. Ferguson, *Hopitutskwa and Ang Kuktota; The Role of Archaeological Sites in Defining Hopi Cultural Landscapes*, in *THE ARCHAEOLOGY OF MEANINGFUL PLACES* 90–106 (Brenda J. Bowser & María Nieves Zedeño, eds., 2009).

81. Section 106 of the National Historic Preservation Act of 1966 (16 USCA 470), and 36CFR800, which implement section 106. PATRICIA L. PARKER AND THOMAS F. KING, *GUIDELINES FOR EVALUATING AND DOCUMENTING TRADITIONAL CULTURAL PROPERTIES* 1 (1998).

82. *Id.*

The National Registry's eligibility criteria are outlined in 36 CFR 60.4. They read, in relevant part:

The quality of significance . . . is present in districts, sites, buildings, structures, and objects . . . that are associated with events that have made a significant contribution to the broad patterns of our history; or
(b) that are associated with the lives of persons significant in our past; or
(c) that embody the distinctive characteristics of a type, period, or method of construction, or that represent the work of a master, or that possess high artistic values, or that represent a significant and distinguishable entity whose components may lack individual distinction; or
(d) that have yielded, or may be likely to yield, information important in prehistory or history.⁸³

Though implicit in these criteria is the notion that an eligible site or object is worth preserving because what it tells us about the past is important to communities of the present (and future), the explicit orientation to what such sites tell us largely about historical persons or events makes problematic an evaluation of their importance by virtue of their current meaningfulness, whether as a site of religious observance or otherwise. This double bind echoes of what Elizabeth Povinelli calls the “cunning” of the politics of multiculturalism and recognition, insofar as they require indigenous peoples to prove their indigeneity in a way that meets non-indigenous expectations of what it means to be “native,” and doing so in a way which most indigenous peoples have a difficult time meeting.⁸⁴ Similarly, for an archaeological site to be sufficiently “significant” to be eligible as a traditional cultural property for the National Register, it must have importance as a site of historico-cultural significance, but only in a way that is legible to the scientists who evaluate such things.⁸⁵ By making their contemporary meaningfulness as scientific evidence of the past the presumptive

83. 36 CFR 60.4 (2016).

84. ELIZABETH POVINELLI, *THE CUNNING OF RECOGNITION: INDIGENOUS ALTERITIES AND THE MAKING OF AUSTRALIAN MULTICULTURALISM* 180 (2002).

85. 36 CFR 60.4 (2016), *but see* Parker and King 1998, *discussing* the need to consider traditional cultural properties in terms of their ongoing relevance to living indigenous communities. Despite this, the USFS archaeologists here, and the justices in the Arizona Snow Bowl litigation, failed to appreciate this significance in a way that took note of the totalizing nature of Hopi cultural and religious commitments to their sacred spaces. *See also* Kuwanwisiwma & Ferguson, *supra* note X, at X; Brenda J. Bowser and Maria Nieves Zedeño ed., *in* *THE ARCHAEOLOGY OF MEANINGFUL PLACES* 90–106.

ground of any petition for entry in the National Register (that is, why else would someone want to protect a site, except that he or she finds it meaningful), the possibility for discerning precisely how such a site holds meaning is something that is presumed to be understood in the unstated mode of the modern secularist worldview. This is a significance that can be explained as historical memorialization, or even sociocultural veneration, but not contemporary, and on-going, indigenous religious belief or practice.

Back on that dusty trail, when we finally crested the hill on which sat what the Forest Service Archaeologist called AR-03-12-04-2046,⁸⁶ the expressions of reverence, exclamation, and thanks offered by the Hopi representatives seemed to fall on ears even more deaf than mine. When the archaeologist finally asked them, “What do you think, is this place significant?” the answer that was provided sounded at once incredulous and resigned. “Well, yeah,” one Hopi man said. “This place would be an important outlook to see anyone coming.” After a long pause, but before the archaeologist could respond, the man quickly added, “There’s– there’s ceremonies at Hopi that still recount the path ah– to Hopi. And this is still very much alive. And these places that they have left you know, people are still– we believe that...spirits are still there. So [if] we disturb that, or somehow allow that to be disturbed is a form of taboo, I guess.”⁸⁷

After taking some time to try to explain this more, but seeming to fail, a few of the Hopi representatives fell silent again as they began pulling leather pouches from their backpacks. The pouches each had different markings I recognized as various clan symbols. I had seen similar ones before at village ceremonies and thus suspected they carried *homa*, sacred corn meal that had been ritually blessed. But before opening them, a Hopi man asked the non-Hopis present, including me, if we wouldn’t mind moving on to the next site. They would then catch up to us, he explained, but only after doing “some things,” which I imagine meant leaving offerings. But I never got to confirm this because I obliged their request and didn’t ask them about it afterward.

86. Saul Hedquist and Stuart Koyiyumptewa, *Hopi Traditional Cultural Preservation Investigation for the Proposed Payson Ranger District Administration Site Sale*, Submitted to Tonto National Forest, US Dept. of Agriculture, Phoenix Arizona. August 2, 2013, pg. 2.

87. Audio recorded exchange, July 10, 2013. Recording and Transcript on Record with author. See also Saul Hedquist and Stuart Koyiyumptewa, *Hopi Traditional Cultural Preservation Investigation for the Proposed Payson Ranger District Administration Site Sale*, Submitted to Tonto National Forest, US Dept. of Agriculture, Phoenix Arizona 2 (August 2, 2013).

The pattern would continue throughout the day, until all the sites had been visited and commented upon. We then left Payson and the Tonto Forest Archaeologist with the promise that the HCPO would be providing a report of their traditional cultural property investigation and its recommendations for how the U.S. Forest Service should proceed with regard to the sites they saw.

As promised, on August 2, 2013, the HCPO submitted its report to the U.S. Forest Service, a thirty page document commenting on all the sites and making recommendations for avoidance, where possible, and archaeological mitigation where necessary.⁸⁸ One week earlier, on July 26, 2013, the U.S. Forest Service entered into a Memorandum of Agreement with the State Historic Preservation Office to undertake the mitigation efforts the Service recommended in dealing with the traditional cultural properties, efforts that included “data recovery excavation...developed in consultation with . . . Tribes . . . [including] an ethnohistoric study...undertaken by the Hopi Tribe.”⁸⁹ On August 9, 2013, the Forest Service Supervisor issued its finding of No Significant Impact and Decision Notice, approving the sale of the land. Despite the HCPO team’s willingness to travel the many miles from their reservation to consult with the U.S. Forest Service on the proposed sale, and their express concerns, offered orally and in writing, that the sale of the lands in question would substantially impact on going ceremonial and other religious obligations, the Forest Service went ahead with the sale anyway. Just as they experienced with the Arizona Snow Bowl case, the good faith efforts that Hopi made to consult with their counterparts regarding the value and import of their *itaakuku* were treated more as a procedural hurdle rather than anything else. As such, a genuine opportunity was missed—and the chance to reach a compromise to the relevant satisfaction of all the communities and cultures, Hopi and non-Hopi, native and otherwise—whose “footprints” dot this landscape.

Despite these setbacks the Hopi have continued to press their claims to protect their *itaakuku* on a variety of different fronts. They have even continued their fight against the expansion of the Arizona Snowbowl and the planned use of reclaimed wastewater. After losing in the Ninth Circuit, the Hopi joined with tribal petitioners and, in January of 2009, petitioned for a writ of certiorari to have the case heard by the U.S. Supreme Court. The Supreme Court, however,

88. Hedquist & Koyiyumptewa, *supra* note 80.

89. (US Forest Service, Tonto National Forest, Findings of No Significant Impact, Decision Notice, Payson Ranger District Site Sale, 2013, pg.3).

denied certiorari on June 8, 2009. The Hopi tribe shifted tactics and filed an action in the state courts of Arizona against the city of Flagstaff, claiming that their 2002 agreement to sell reclaimed wastewater to Arizona Snowbowl created a public nuisance that violated state law. Those efforts initially stumbled as well, when the trial judge dismissed their case. But on appeal the dismissal was overturned by the Arizona Court of Appeals, and the Arizona Supreme Court upheld the appellate decision in 2014, allowing the Hopi's case to proceed.

III. OPTIONS?

On a recent trip back to the Hopi Reservation, where I am again working closely with the HCPO, I found myself speaking with one of the HCPO staff, a non-Hopi who, after a decade of work with the U.S. Forest Service, left the job to go work with the Hopi Tribe as a legal researcher. This was thirty years ago. As we talked, he wondered aloud about what effects, if any, the current makeup of the U.S. Supreme Court might have for Hopi and other Native American's rights to the free exercise of their religions. In particular, he was at once intrigued, but ultimately pessimistic by what he saw in the Court's recent decision in the *Burwell v. Hobby Lobby Stores, Inc.*,⁹⁰ and its interpretation of RFRA. In that case, decided on June 30, 2014, the Court in a 5-4 split decision held that the Affordable Care Act imposed a "substantial burden" on the Holly Lobby Corporation's religious liberty when it required employers to provide health insurance to employees that included a provision for included no-cost access to birth control.⁹¹ The Court went on to conclude that insofar as that "substantial burden" was not pursuant to a "compelling government interest" undertaken in the "least restrictive way" possible, it constituted a violation of RFRA and was thus illegal.⁹²

What seemed most striking to my colleague was the possibility that this Court, whose conservatives were otherwise proving themselves overtly antagonistic to other types of Tribal Nation rights,⁹³

90. 134 S. Ct. 2751 (2014)

91. *Id.*

92. *Id.*

93. See, e.g., *Plains Commerce Bank v. Long Family Land and Cattle Company*, 554 U.S. 316 (2008); see also *Carcieri v. Salazar*, 555 U.S. 379 (2009) (providing a general discussion); Sarah Krakoff, *Undoing Indian Law One Case at a Time: Judicial Minimalism and Tribal Sovereignty*, 50 AM. U. L. REV. 1177, 1214 (2001) (explaining that, even before the appointments of Justices Roberts and Alito shifted the Court's politics decidedly rightward, had already been issuing opinions hostile to established principles of tribal sovereignty and

were maybe finding themselves in *Hobby Lobby* on a side in which they stood with, not against, tribal nations. The only explanation for the reversal that my friend could come up with was that tribes could maybe simply draft along behind the clear passes this Court wants to give to corporations. As he said, after his best gallows-tinged guffaw, it perhaps made sense, once the Justices found “that there are all sorts of personhood in corporations, they don’t need to find it in Indians anymore.”

The sharper edge of this irony is only felt when we recall that the rather dim view taken by the Ninth Circuit of the Hopi’s RFRA rights, and the more general view of the Supreme Court toward the rights and privileges of tribal nations more generally, is all taking place against a period of federal policy that is still sometimes referred to as the era of “Indian Self-Determination.”⁹⁴ It is named after the Indian Self-Determination and Educational Assistance Act of 1975 (ISDEAA),⁹⁵ whose passage is understood to have ushered it in, and with it, what many consider to be the most successful period of Indian governance, economic growth, and general wellbeing since the onset of U.S. colonial oversight.⁹⁶

That Act, especially after further amendments made in 1994 under the title of the Indian Self-Governance Act of 1994,⁹⁷ allows tribal nations that have applied for and opted into what is called the “Indian Self-Governance Program” to contract and compact with the Bureau of Indian Affairs, other agencies within the Department of Interior, and with Indian Health Services, to take over the planning, implementation, and on-going management of tribal government operations that had heretofore been largely directed by the federal government back in Washington, DC.⁹⁸

Of course, with reference to the interactions described in this paper, and the general frustrations felt by the Hopi at the hands of

self-governance).

94. CHARLES WILKINSON, *BLOOD STRUGGLE: THE RISE OF MODERN INDIAN NATIONS* 192 (2006); *see also* ERIC C. HENSON, *THE STATE OF THE NATIVE NATIONS: CONDITIONS UNDER U.S. POLICIES OF SELF-DETERMINATION* (2008).

95. 25 USC §450 et seq.

96. HARVARD PROJECT ON AMERICAN INDIAN ECONOMIC DEVELOPMENT, *THE STATE OF THE NATIVE NATIONS: CONDITIONS UNDER U.S. POLICIES OF SELF-DETERMINATION* (2008)

97. 25 USC §§458aa–hh.

98. 25 USC § 458cc, which provides, that funding agreements entered into between tribes and the Secretary of the Interior shall “authorize the tribe to plan, conduct, consolidate, and administer programs, services functions and activities, or portions thereof administered by the Secretary of the Interior that are otherwise available to Indian tribes or Indians for which appropriations are made to agencies other than the Department of the Interior

decisions made by the U.S. Forest Service, it is important to note that the ISDEAA doesn't apply to that agency, given that it is not a part of the Department of the Interior or Indian Health, but rather housed in the Department of Agriculture. So no effort to pursue a similar kind of contract or compact for managing the care and use of Hopi *itaakuku* or other cultural resources would have been possible, at least as it applies to *Nuvatukya'ovi* or the places we visited together in the Tonto.

Yet this may be the only viable option for tribal nations, given the current hostility of the federal judiciary. This at least was the impression I got from Richard A. Guest, when I heard him speak on March 6, 2008, to those of us who had gathered for a conference on tribal courts at American University's Washington College of Law. Guest is the managing attorney of the Washington, D.C., Office of the Native American Right's Fund and lead attorney of its Tribal Supreme Court Project, a project "which is based on the principle that a coordinated and structured approach to tribal advocacy before the U.S. Supreme Court is necessary to preserve tribal sovereignty."⁹⁹ His words of advice for the tribal officials who might want to press their legal claims in federal court were simple, if no less remarkable: "Don't do it." He went on to say that this was advice based not only on wanting tribes to appreciate how their specific economic, political, and territorial interests were likely to be met with skepticism, but also the fact that the string of negative decisions from the Supreme Court had, even by 2008, gotten so long that it seemed that any filing of federal litigation seemed to be an invitation to the Court to roll back any and all precedents that protected even a modicum of tribal self-governance. He finished by saying, "Right now, filing in federal court sets us all up to lose."¹⁰⁰

Given this, it seems that a tribal-friendly reading of RFRA, even after *Hobby Lobby*, is not likely to come any time soon. The sour sentiments of my colleagues at the HCPO thus would seem well-founded, or at least supported by other corners of the Federal Indian Law community, where the sense of federal judiciary's recognition of tribal sovereignty seems equally grim.

99. Richard A. Guest, *Native American Rights Fund* (2016), <http://www.narf.org/profiles/richard-guest>.

100. See Comments of Richard Guest, Native American Rights Fund, to the 2008 Founder's Celebration, American University Washington College of Law, *What Do We Know About Tribal Courts?* (March 6, 2008). Notes on File with Author.

IV CONCLUSION

Despite these challenges, the Hopi tribe has not given up their efforts to protect their *itaakuku* on a variety of different fronts. Indeed, they have even continued their now decades long fight against the expansion of the Arizona Snowbowl. After losing in the Ninth Circuit and having their petition for writ of certiorari denied by the Supreme Court a year later, the Hopi tribe shifted tactics and filed an action in the state courts of Arizona against the city of Flagstaff. There they claimed that the city's agreement in 2002 to sell reclaimed wastewater to Arizona Snowbowl, an agreement that wasn't activated until 2012 given the on-going litigation, created a public nuisance that violated Arizona state law.¹⁰¹ Here they seemed to gain some traction. Though the trial judge dismissed their claim in 2011, his opinion was reversed by the Arizona Court of Appeals in 2013.¹⁰² The Arizona Supreme Court then declined to hear the City's appeal in 2014, allowing the case to go forward.¹⁰³ Since then, proceedings have been ongoing, and in July 2015 reports emerged of efforts by the two sides to enter into settlement negotiations.¹⁰⁴ Then on March 11, 2016, a press release from the Hopi Tribe announced that it had approved the terms of a settlement with the city of Flagstaff and urged the Flagstaff City Council to do the same after it had tabled the matter on March 9.¹⁰⁵

Though it remains to be seen whether the City of Flagstaff and the Hopi Tribe can come to a workable settlement, it is interesting to note what at least some of the terms of the proposed settlement agreement provide. Most importantly, I would argue, at least for this paper and what might just be a workable solution for various efforts by the Hopi and other tribes to protect their religious freedoms, are those

101. Hopi Tribe v. City of Flagstaff, Coconino County Superior Court No. S0300CV201100201 (August 19, 2011)

102. Hopi Tribe v. City of Flagstaff, No. 1 CA-CV 12-0370 (April 25, 2013) (Ariz. Ct of Appeals, Div. 1, Dept C.) (Unpublished Opinion) pursuant to Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24) <http://www.legale.com/decision/In%20AZCO%2020130425009/HOPI%20TRIBE%20v.%20CITY%20OF%20FLAGSTAFF#> (Accessed March 15, 2016)

103. *Arizona High Court Lets Hopi Snowbowl Suit Continue*, AZ CENTRAL (Jan. 8, 2014), <http://www.azcentral.com/news/arizona/free/20140108pni-wir-arizona-hopi-snowbowl-lawsuit-reclaimed-water-flagstaff.html>

104. Katherine Locke, *Hopi Tribe and City of Flagstaff Try to Resolve Snowmaking Lawsuit*, NAVAJO-HOPI OBSERVER (July 21, 2015), <http://nhonews.com/main.asp?SectionID=1&SubSectionID=1&ArticleID=17018>.

105. Suzanne Adams-Ockrassa, *Settlement Tabled: Flagstaff Council Tables Hopi Snowmaking Settlement*, AZ DAILY SUN (Mar. 9, 2016), http://azdailysun.com/business/local/flagstaff-council-tables-hopi-snowmaking-settlement/article_1aa5bfcd-8311-5a23-8289-7a2dc6a85a97.html.

provisions that call for something like co-management of the wastewater treatment policies. Section 2 of the proposed “Settlement Agreement and Release,” requires that the City of Flagstaff “will provide the Hopi Tribe . . . quarterly reports . . . on water quality testing at the reclaimed treatment facility that delivers reclaimed water to Snowbowl,” as well as “annual reports that demonstrate that the City has reasonably exercised its discretion in maintaining additional treatment processes.”¹⁰⁶ Finally, failure to provide such reports 30 days after being notified by the Hopi tribe of their failure to be received shall constitute a breach of the Agreement.¹⁰⁷

Though the agreement is clear that it “creates no additional standing or entitlement to remedies for the Hopi Tribe before . . . any other governmental or administrative body to force the City to cure a reclaimed water quality issue.”¹⁰⁸ I would suggest that this nonetheless counts as a least a small victory in their ongoing fight for their religious freedoms and the *itaakuku* that they are obligated through their religion to protect. For while this agreement does not rise to the level of self-government of the sort that is enshrined and encouraged by the Indian Self-Determination and Educational Assistance Act, and other beneficial legislation, it goes a lot further in the direction of co-management and shared concern than anything that has been offered to the Hopi and other tribes through recent decisions of the federal judiciary.

Perhaps most importantly, the terms of co-management of the sort suggested by the terms of this settlement agreement actually have their echoes in Hopi traditions of governance, ones that they will tell you, turn less on coercion and more on cooperation, though without necessarily giving up one’s autonomy. As Emory Sekquaptewa, Chief Justice of the Hopi Appellate Court, once put it, “Hopi culture is cooperation without surrender.”¹⁰⁹ Perhaps then, in this way, the terms of co-management expressed in their settlement agreement with the City of Flagstaff, may actually provide a way for the Hopi to promote their cultural commitments, even in the face of the challenges posed by the federal agencies and courts described here.

106. SETTLEMENT AGREEMENT AND RELEASE, Section 2, Reporting. (On File with Author)

107. *Id.*

108. *Id.*

109. DAVID L. SHAUL HOPI TRADITIONAL LITERATURE 189 (2002) (quoting Emory Sekquaptewa).