Western Environmental Law Update

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The 25th Annual Environmental Law Conference will take place March 1-4, 2007 at the University of Oregon School of Law (1515 Agate St.). The oldest and largest conference of its kind promises to live up to its reputation as the world’s premier gathering for environmental attorneys and activists. For more information, including keynoter biographies, panel and workshop schedules, housing, travel, and registration forms, please see our website at: www.pielc.org.
25 Years of Inspiration, Activism, and Spirit: The Legacy of the Public Interest Environmental Law Conference

By Brianna Tindall

For a first time attendee (or even a repeat participant), the annual Public Interest Environmental Law Conference (“PIELC”) in Eugene, OR can seem overwhelming. With a steady annual attendance of at least 2,000 people, over 100 panels and workshops, eight to ten keynote speeches, and numerous other events, the PIELC is the largest and oldest conference of its kind. Its devoted attendees and student organizers also maintain that it is unique in spirit and design; it is a truly public conference, welcoming lawyers, activists, students, and community members in equal measure.

The conference has attained an energy and momentum that, as its organizers in Land Air Water will tell you, drives it as much as the students who put it together each year. A large proportion of the participants who return each year contribute some time and effort towards putting the conference together; many organize panels, recruit up-and-coming environmental professionals as speakers, and volunteer their time as presenters. The number of quality panel suggestions received each year is now so great that the organizers struggle each year to keep the conference to a manageable size.

Given its current size, it is strange to think that it began as a gathering of merely fifteen speakers and a hundred participants for a day’s worth of panel discussions. In its inaugural year in 1983, the conference was originally known as the Pacific Northwest Public Interest Environmental Law Conference. Co-directed by third year law students Jay Manning, Will Weigand, and Bob Irvin from the environmental law society Land Air Water (“LAW”), the conference was born out of the urging and cajoling of Professor John Bonine. “Professor Bonine was our advisor and had been after LAW to organize an environmental conference since my first year,” says Manning, now the Director of the Washington State Department of Ecology. “In the fall of 1983, Bob, Willie and I finally gave in and started organizing.”

In a recent interview with Professor Bonine, he discussed the initial goals and purposes of the conference:

“It’s not real clear where the idea originated, but I can tell you what my ideas were at the time. We needed to network, and we needed to find environmental public interest lawyers, and expose law students to them, and also bring in activists, so that if the lawyers needed more cases the activists would be there with them. The activists could help remind the lawyers why they went into law, in terms of spirit and so forth. The law students could see the lawyers as role models, and maybe the law students could get a job.

Mike Axline, the other driving force behind the founding of the conference, explained that the conference was also intended to be a support network for isolated attorneys. “[O]ne of the biggest reasons for organizing the conference initially was to provide an opportunity for ‘lone wolf’ environmental attorneys working in small Western communities, where their work engendered community hostility, to gather, share stories and practice tips, and realize that there were others doing similar work,” says Axline. It was clear from the beginning that the conference was not a simple academic exploration of the minutia of environmental law; its organizers and promoters had a greater goal in mind – building the public interest environmental movement.

To achieve their goals, the organizers had to find a way to attract both speakers and attendees, without the benefit of an existing reputation. To Professor Bonine the solution seemed simple: ask them to speak on a panel. If enough speakers came, they would at least be an audience for each other. With only about twenty pre-registered attendees and fifteen panelists on the morning of the conference however, the students were nervous. “As we had several concurrent sessions, we were cringing thinking about sessions with three speakers and four to five people in the audience,” remembers Jay Manning. Manning stated further that:
But then something wonderful happened. On a beautiful spring day in Eugene, carloads of students from Lewis & Clark, Willamette and UW started showing up. Folks from around Eugene, lawyers and nonlawyers, arrived by the dozens. We ended up with about 100 folks attending. We were so relieved! The day went well, with no major glitches and lots of good information presented. We slept well that night, with the stress of potential disaster off of our shoulders.

The activists and professionals in the environmental movement clearly needed little encouragement to come together to share knowledge, strategy, and enthusiasm. Co-Director Bob Irvin remembers that the students were “thrilled” when the local television station showed up to cover the first conference.

Over the next several years, the conference began to fulfill its desired role as the hub of a large network of public interest environmental attorneys, advocates, and activists. In the initial years, a complete registration list was compiled and distributed to all conference attendees to facilitate networking after the conference. Attendance grew steadily and the conference’s length tripled by 1986, going from one day to three. The organizers experimented with different names, calling it the Western Public Interest Law Conference for a time, while they considered whether to widen its scope to other areas of public interest law, and even proclaiming it the International Public Interest Environmental Law Conference for a few years. Eventually, they settled on the Public Interest Environmental Law Conference, which, as Professor Bonine says, “covers just about everything.”

When questioned about their experience organizing the conference, most former co-directors are quick to lay the credit at the door of Professor Bonine. “We were merely acolytes for Professor Bonine’s inspiration,” says Irvin. Though the conference owed much to the influence of Bonine and co-conspirator Mike Axline, it began and remained a conference organized entirely by students. This aspect was central to its mission of building an environmental movement by connecting the next generation of environmental lawyers with the grizzled veterans, and also served to maintain the PIELC’s independence. As it was sponsored, run, and financed by a student organization, rather than a division of the University, no authorities within the institution could dictate who could speak or what could be said. A fresh crop of volunteers each year also guaranteed fresh ideas and energy; “volunteers have more enthusiasm than any paid employee,” quips Bonine. This model has since been adopted by students at other institutions. “Just yesterday,” stated Bob Irvin, “I spoke at the University of Florida School of Law and the PIELC was described as the inspiration for their own conference. It is nice to have helped create that legacy.”

More than just a forum to promote ideas and discuss strategy, the conference has also served as the birthplace of several important organizations and initiatives. In the initial years, a complete registration list was compiled and distributed to all conference attendees to facilitate networking after the conference. Attendance grew steadily and the conference's length tripled by 1986, going from one day to three. The organizers experimented with different names, calling it the Western Public Interest Law Conference for a time, while they considered whether to widen its scope to other areas of public interest law, and even proclaiming it the International Public Interest Environmental Law Conference for a few years. Eventually, they settled on the Public Interest Environmental Law Conference, which, as Professor Bonine says, “covers just about everything.”

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More than just a forum to promote ideas and discuss strategy, the conference has also served as the birthplace of several important organizations and initiatives. Many PIELC regulars are aware that the Environmental Law Alliance Worldwide (“ELAW”), an international network of public interest environmental attorneys, was founded at the 1989 conference. Started by only ten lawyers, the organization has grown to more than 300 public interest environmental advocates in sixty countries. Every two years, ELAW’s annual meeting is held in conjunction with the PIELC in Eugene, which allows students and conference attendees to rub elbows with dozens of prominent international environmental attorneys. In fact, the connection between ELAW and the conference is so strong that many attendees mistakenly call the PIELC the “ELAW conference.”

The conference’s international impact is not limited to ELAW; funds raised at the conference helped establish one of the first environmental law organizations in Tanzania, Lawyers’ Environmental Action Team (“LEAT”). Professor Bonine explained that at the early conferences, it was his habit to identify a certain worthy cause or organization and solicit donations for it at the lunch keynote events. One year, alumna Laura Hitchcock was successful in bringing a group of Tanzanian environmental lawyers to the conference, who had just founded a public interest organization. Bonine remembers:

I was so impressed by what they were trying to do and that they had nothing to do it with, they had no office, no computer, no money, just a name …. And so I told their story to the audience … and people contributed $1,100. And what I learned at the annual meeting of E-LAW in 2000, ... that’s why they got started. It was the money, for the first time they could open up an office for $1,100 if you can believe it, and hire someone…. But more importantly, they said, that show of faith by the people at this conference in them meant they could not return to Tanzania without succeeding.

LEAT now has annual budget of over $250,000 and employs lawyers throughout Tanzania.

At least two academic journals
trace their roots to the PIELC.

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Perhaps not surprisingly, the Journal of Environmental Law & Litigation at the University of Oregon was founded by Land Air Water volunteers. Students founded the journal and began publishing it two years before they gained official approval from the faculty, billing it as a mechanism to document the conference. It is now one of the most heavily cited environmental law journals on the West Coast, and has a staff of thirty student editors. In addition to JELL, the Center on Race, Poverty, and the Environment was inspired to publish its environmental justice journal after attending the 1990 PIELC. As their website explains:

The idea for the Race, Poverty and the Environment Newsletter grew out of a caucus of interested people at the University of Oregon’s Public Interest Law Conference, held March 1-4, 1990. Caucus participants recognized the importance of increased attention to the nexus of race, class and environmental issues and the need for a forum in which to continue their dialogue.

http://urbanhabitat.org/aboutrpe. Staff members from the Center on Race, Poverty, and the Environment are regular speakers at the conference, and are leaders in the growing environmental justice movement.

Along with its accomplishments, the PIELC has had its share of controversies. Each year there seems to be at least one speaker who is a bit too radical for the local press and some community members; most recently, the organizers of the 2005 conference drew some heat with their choice to present a recorded speech by incarcerated Jeffrey “Free” Luers, an eco-saboteur. Early in its history, the conference was painted as a training ground for eco-terrorists by a Coos Bay newspaper, who printed an article claiming that a video was shown that trained activists on tree-spiking. A retraction was printed after Professors Bonine and Axline sent a notice of intent to sue for libel to the newspaper, as such a video was never shown. In fact, the PIELC was instrumental in the decision of EarthFirst! to abandon tree-spiking as a tactic. In 1990, conference organizers brought together EarthFirst! activists and mill workers to discuss direct action tactics and the danger of tree-spiking to workers. Shortly thereafter, EarthFirst! officially abandoned the tactic. http://www.things.org/~jym/ef/tree-spiking-memo.html.

More troubling, however, was the controversy that surrounded the 1992 conference, whose theme was centered on indigenous people. Unfortunately, there were no indigenous persons in the organizing group, and the co-directors were accused of providing too few speaking spots for indigenous persons. A large protest denouncing the conference was organized by local activists and indigenous groups, who surrounded the law school. Though the 1992 conference was marred by the events, it served as a reminder to future organizers to highlight diversity as one of its key values in choosing speakers and planning events.

During its twenty-five years, the PIELC has been fortunate to acquire the participation of giants in the environmental movement, a considerable feat given that keynote speakers are generally not awarded honorariums. For decades, the grandfather of the conference was none other than David Brower, former executive director of the Sierra Club and founder of Friends of the Earth, EarthIsland Institute, and the League of Conservation Voters. Brower first attended in the mid 1980s, and continued to attend and speak each year until his death. During the movement to protect old-growth forests in the 1990s, when attendance at the conference reached its peak, speeches from Julia Butterfly Hill and other direct action advocates inspired new generations of activists. The opportunity to work with such giants proves to be quite the draw for potential student organizers. Amanda Freeman, one of this year’s co-directors, describes her experience:

Organizing PIELC is proving to be a joyous opportunity, as well as a serious challenge. As stewards of PIELC, we get to work with incredibly inspirational people. At the same time have the weighty responsibility to continue the proud history of stirring up the pot and providing tools to make great changes by putting on a great conference. It’s a balancing act. For example, last night at the end of a grueling four-hour meeting we found a confirmation fax from Vandana Shiva. Although coincidentally, PIELC tends to reenergize us just when we hit zero, and we’re grateful for that!

The spiritual renewal that Freeman spoke of is part of why 2000 people keep coming back to the PIELC. As the student organizers and sponsors of the conference look forward into the next twenty-five years, it will be important to remember this legacy and keep the spirit alive.
**Rapanos v. United States:**

**Muddying Enforcement of the Clean Water Act**

*By John Wilson*

Perhaps the most important environmental case decided by the United States Supreme Court during the past year was *Rapanos v. United States*, 547 U.S. __, 126 S.Ct. 2208 (2006). Many legal professionals and Court observers believed the case would be a bellwether of the Court’s position on environmental positions under newly appointed Chief Justice John Roberts. In the result, the Court produced a unique 4-1-4 constellation of votes that remanded the case for further deliberations. The unusual *Rapanos* plurality and its inconsistent progeny have resulted in head scratching by environmentalists, developers, and regulators alike. In the wake of *Rapanos*, at least four lower courts have applied a variety of creative interpretations, and as a result, many unanswered questions regarding the enforcement of the Clean Water Act remain.

**I. The “Headwaters” of the Issue: Rapanos v. United States**

In 1989, Michigan developer John Rapanos backfilled wetlands on a parcel of land he owned in preparation for the construction of a shopping mall. Rapanos failed to obtain a permit for such action, believing that his “saturated fields” were not “waters of the United States.” While the nearest navigable waterway was eleven to twenty miles away, regulators and Rapanos’ own environmental consultant disagreed with the developer and believed that the wetlands were subject to the Clean Water Act, 33 U.S.C. § 1251, et seq. When the United States brought civil enforcement proceedings against Rapanos, twelve years of litigation began.

When the case finally was argued before the Supreme Court, Justice Scalia wrote the plurality opinion. He was joined by the Chief Justice and Justices Thomas and Alito, and Justice Kennedy issued an important concurrence. The primary issue before the Court was whether the Michigan wetlands were considered “waters of the United States” within the meaning of the Clean Water Act (“CWA”). If the wetlands were “waters of the United States,” they were subject to the CWA and thus Rapanos’ backfilling was a punishable action under the terms of the Act. After reviewing an extensive body of CWA case law, the plurality held that only “relatively permanent” flows of water were subject to the statute, thus exempting those bodies of water that include only an intermittent or ephemeral flow. According to the plurality, the parcel of land at issue was not connected to “waters of the United States” by a relatively permanent body of water. In a tempered victory for the developer Rapanos, the plurality concluded that the circuit court applied the incorrect standard and remanded the case.

Justice Kennedy provided the crucial fifth vote to remand the case, but argued that a different test should be applied. A body of water constitutes a “navigable water” under the CWA, Kennedy argued, if it possesses a “significant nexus” to waters that are navigable in fact or could reasonably be so made. While the Sixth Circuit may have applied the correct standard, Justice Kennedy agreed that a remand was appropriate because the lower court had not properly considered all of the factors to determine whether such a requisite nexus existed.

Justices Stevens, Souter, Ginsburg and Breyer dissented, arguing that greater deference should be shown to the Army Corps of Engineers, as a regulatory agency, and their interpretation of the statutory phrase “waters of the United States.” The dissent further argued that the Corps’ conclusion that the Michigan wetlands were “waters of the United States” was a “reasonable interpretation of a statutory provision.”

**II. The Circuit Split**

Following the *Rapanos* decision, the Ninth Circuit had the first opportunity to interpret the plurality opinion. In a victory for environmentalists, the Ninth Circuit applied Justice Kennedy’s “significant nexus” test.

The city of Healdsburg discharged sewage into a former gravel quarry pit without first obtaining a National Pollutant Discharge Elimination System (“NPDES”) permit. The pit, known as ‘Basalt Pond,’ had filled with water to the level of the local water table and sat adjacent to the Russian River. Basalt Pond was separated from this clearly navigable water by only a manmade levee, and the distance between the two bodies of water ranged between fifty to several hundred feet. The city operated a nearby sewage treatment plant, and from 1998 to 2000 they discharged between 420 to 455 million gallons of sewage per year into Basalt Pond. Scientific evidence showed that significant amounts of the Basalt Pond’s water seeped into the Russian
River each year. Northern California River Watch, an environmental group, brought suit against Healdsburg for violating the CWA. Their legal representation included Charles Tebbutt of Eugene’s Western Environmental Law Center.

The primary issue before the court was whether Basalt Pond was subject to the CWA because the pond contained wetlands adjacent to a navigable river of the United States. The Ninth Circuit rejected the reasoning of the Rapanos plurality by applying the rule set forth in Marks v. United States, 430 U.S. 188, 193 (1977) (“When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.”). Based on the Marks rule, the Ninth Circuit applied Kennedy’s “significant nexus” test and held that Basalt Pond and its wetlands possessed a “significant nexus” to the Russian River, and that as such, the pond was subject to the CWA.

Little more than a month after the Ninth Circuit’s River Watch decision, the Seventh Circuit weighed in on the issue. Adopting a similar position, the panel of Judges Posner, Easterbrook, and Evans found that Marks v. United States required the application of Justice Kennedy’s “significant nexus” test from Rapanos. In Gerke Excavating, the United States had charged the company with violating the CWA for discharging pollutants without first obtaining a permit. Because application of the “significant nexus” test required additional factfinding, the case was remanded.

The most recent circuit court statement on the issue arose after a group of Massachusetts cranberry farmers was charged with illegally discharging pollutants into federally-regulated waters. The farmers challenged the CWA’s jurisdiction over their cranberry bogs and the First Circuit was confronted with the question of what Rapanos standard to apply. After carefully analyzing all four post-Rapanos interpretations of CWA jurisdiction (While this article describes three of these decisions, it does not discuss United States v. Evans, 2006 WL 2221629 (M.D.Fla. Aug. 2, 2006)), the First Circuit took a slightly different approach. The court focused on Justice Stevens’ dissent, where he argued for CWA jurisdiction wherever either of the tests is satisfied. This instruction, the court noted, “provides a simple and pragmatic way to assess what grounds would command a majority of the Court.” Based on this standard, the First Circuit remanded the case and instructed the district court to allow the United States to establish CWA jurisdiction over the sites at issue if it can meet either the plurality’s “relatively permanent” test or Justice Kennedy’s “significant nexus” test.

In a starkly contrasting interpretation of Rapanos, the Texas district court deciding United States v. Chevron Pipe Line Co. ruled that neither the plurality’s “relatively permanent” nor Justice Kennedy’s “significant nexus” test controlled or was adequate. The court took issue with Justice Kennedy’s test for “[giving] no guidance on how to implement its vague, subjective centerpiece. That is, exactly what is “significant” and how is a “nexus” determined?” In the alternative, the court looked to the Fifth Circuit’s jurisprudence for guidance. The court held that the term “waters of the United States” has been interpreted narrowly in the Fifth Circuit and thus rejected Justice Kennedy’s “significant nexus” test. Because this was a district court opinion, it remains to be seen how the Fifth Circuit will rule on the issue.

III. Conclusion

Litigation challenging and defending the Clean Water Act is unlikely to conclude in the near future. However, based upon Rapanos and its conflicting progeny, the opportunity for effective lawyering is clearly present. Legal practitioners will find precedent supporting Scalia’s “relatively permanent” test as well as courts that have followed Kennedy’s “significant nexus” test. In his Rapanos concurrence, Chief Justice Roberts prophesied that “lower courts and regulated entities will now have to feel their way on a case-by-case basis.” 126 S.Ct. at 2236. Such a prediction seems accurate until the legal turbidity settles in this critical area of environmental law.
Defining Recovery: Controversy over Proposed Gray Wolf Delisting in the Northern Rockies

By Jermaine Brown

What a difference thirty years makes. In 1979, the Fish & Wildlife Service could find only two wolves in Idaho, Montana, and Wyoming. U.S. Fish & Wildlife Serv. et al., Rocky Mountain Wolf Recovery 2005 Annual Report tbl.4a (2006). Yet, in January 2007, the agency announced plans to remove gray wolves throughout the northern Rockies from the endangered species list. Predictably, the move was widely welcomed by state officials and ranchers, and quickly denounced by environmentalists. The wolf population has grown tremendously over the last twenty-eight years. In 2005, the FWS estimated that there were 1020 wolves throughout the Northern Rocky Mountain (NRM) states. Id. at 1 (The NRM states are Idaho, Montana, and Wyoming).

This number represents a five-fold increase since 1996. In 2005, out of approximately 134 packs, seventy-one met the definition of breeding pair; this was the third consecutive year there had been more than thirty breeding pairs. According to the FWS, this statistic renders the NRM wolves eligible for delisting. Id. Delisting would remove the gray wolf’s “endangered” designation and declare the species “fully recovered.” Press Release, Larry Craig, United States Senator, Idaho Leaders Respond to Wolf Delisting (Jan. 29, 2007), http://craig.senate.gov/releases/pr012907a.cfm. Should such a final declaration occur, management of the gray wolf would be transferred from the FWS to individual state wildlife management agencies. For the most part, the media and public treated the news of the gray wolf’s impending delisting as a cause for celebration, proof that this generation corrected the shortsightedness of previous generations. However, this is not necessarily so.

Since taking office, the Bush administration has made gray wolf delisting a top priority. In 2005, federal courts in Oregon and Vermont overturned rules that would have delisted the gray wolf. The Oregon court held that while the Secretary of the Interior had determined that the wolf was not in danger of extinction in any “significant portion of its range,” her interpretation of that statutory language was unreasonable. Defenders of Wildlife v. Sec’y, U.S. Delisting would remove the gray wolf’s “endangered” designation and declare the species “fully recovered.” Press Release, Larry Craig, United States Senator, Idaho Leaders Respond to Wolf Delisting (Jan. 29, 2007), http://craig.senate.gov/releases/pr012907a.cfm. Should such a final declaration occur, management of the gray wolf would be transferred from the FWS to individual state wildlife management agencies. For the most part, the media and public treated the news of the gray wolf’s impending delisting as a cause for celebration, proof that this generation corrected the shortsightedness of previous generations. However, this is not necessarily so.

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Another goal of the administration has been the transfer of federal management responsibility to various state wildlife management agencies whenever possible. To that end, the administration has already transferred management of several wolf packs to various states over the last few years. While the surprising health of the gray wolf population in the NRM is cause for celebration, the administration’s attempts to delist the species has been met with skepticism from environmentalists, and not without good reason. This suggests that the proposed delisting of the gray wolf may be delayed by controversy and litigation.

The administration’s first attempt to delist the gray wolf occurred in 2003, when FWS issued a final rule which reduced the wolf’s protection by classifying the species as “threatened” instead of “endangered” in some regions of the country. A coalition of environmental organizations, including the Defenders of Wildlife, filed suit in the District of Oregon charging that the rule violated the Endangered Species Act (“ESA”), the ESA’s implementing regulations, and the Administrative Procedure Act (APA). Defenders of Wildlife, 354 F. Supp. 2d at 1159. Prior to the issuance of the rule, the gray wolf was listed as endangered throughout the lower forty-eight states. Id. The rule created three Distinct Population Segments (DPSs)—Western, Eastern, and Southwestern—and downlisted the wolf in the Western and Eastern DPSs.

Of critical importance was the FWS’s interpretation of the following statutory phrase: “significant portion of its range.” The phrase comes from section 3(6) of the Endangered Species Act, which classifies a “species which is in danger of extinction throughout all or a significant portion of its...
range” as an endangered species. 15 U.S.C. § 1532(6) (2006). The FWS interpreted the phrase to mean that “area that is important or necessary for maintaining a viable, self-sustaining, and evolving representative population or populations in order for the [species] to persist into the foreseeable future.” Defenders of Wildlife, 354 F. Supp. 2d at 1164. Areas outside this so-called “core area” were not included in the FWS’s definition. See id. (noting the Secretary’s contention that “the presence or absence of gray wolves outside of core recovery areas is not likely to have a bearing on the long-term viability of the three wolf populations”).

Logically, such a definition would allow the FWS to designate the significant portion of a species’ range in order to avoid an Endangered Species Act listing or to facilitate a species’ removal from the endangered species list. The Defenders of Wildlife brought suit, arguing that the FWS had violated the ESA by: 1) failing to assess threats to the wolf in a significant portion of its range, 2) improperly applying the five statutory factors for downlisting, 3) improperly basing its decision to downlist on factors Congress did not intend for it to consider, 4) designating DPSs that violate the Act, and 5) abandoning its ESA-mandated conservation duty. Id. at 1159.

In reaching its decision, the court accepted the Secretary’s assertion that the term “significant portion of its range” was ambiguous and entitled to deference if reasonable. Id. at 1158-59. The Secretary argued that her interpretation was entitled to deference because it was “firmly grounded in the principles of conservation biology.” Id. at 1159. The plaintiffs disagreed, and argued that the Secretary’s interpretation was contrary to previous Ninth Circuit precedent. In Defenders of Wildlife v. Norton, the Ninth Circuit held that a species could be “extinct ‘throughout ... a significant portion of its range’ if there are major geographical areas in which it is no longer viable but once was.” Defenders of Wildlife v. Norton, 258 F.3d 1136, 1145 (9th Cir. 2001).

The environmental groups noted that there were vast areas of habitat where the gray wolf had historically existed, but was no longer found. Despite the existence of suitable wolf habitat, but not wolves, the FWS intended to downlist the wolf in these areas. The plaintiffs also observed that in another action, the District Court for the District of Columbia held that “significant portion of [a species’] range” includes major historical areas where the species had once been viable, but no longer is. Defenders of Wildlife v. Norton, 239 F. Supp. 2d 9, 20 (D.D.C. 2002), vacated on other grounds 89 Fed. Appx. 273 (D.C. Cir. 2004); but see Ctr. for Biological Diversity v. Norton, 411 F. Supp. 2d 1271, 1281 (D.N.M. 2005) (criticizing the approach of considering an area’s raw size, instead of focusing on the area’s biological significance and/or habitat suitability).

The Defenders of Wildlife also argued that the ESA’s legislative history indicated that Congress intended the FWS to consider the health of a species throughout its range, not the overall status of a species. Defenders of Wildlife, 354 F. Supp. 2d at 1166. In sum, the environmentalists argued that downlisting the wolf over all of its historic range, while the wolf existed in only a small portion of that historic range, was illegal. The court accepted this argument. By considering only the core area needed for wolf viability, while ignoring viable habitat where the wolf had once ranged, the FWS had violated the ESA. Id. at 1168-69.

This setback did not alter administration effort’s to place the gray wolf under the jurisdiction of state management agencies for long. In response to a Wyoming petition for delisting the gray wolf, the FWS announced in late 2005 that there may be “substantial scientific ...
information” to warrant the gray wolf’s delisting. Ninety-day Finding on Petitions to Establish the Northern Rocky Mountain Distinct Population Segment of Gray Wolf (Canis lupus), 70 Fed. Reg. 61,770, 61,774 (Oct. 26, 2005).

Additionally, in January 2006, then-Secretary of the Interior Gail Norton and then-Idaho Governor Dirk Kempthorne signed a memorandum of agreement, under which Idaho took control over the experimental wolf populations in the NRM. (Experimental populations of endangered species may be managed in a more flexible manner under the ESA). 16 U.S.C. § 1539(j) (2006). Under the agreement, Idaho assumed many of the FWS’s wolf management duties, including the implementation of control actions for problem wolves, relocation of wolves to avoid human conflicts, taking wolves for scientific and other purposes, and other functions related to the experimental, non-essential population. Press Release, U.S. Dep’t of the Interior, Norton, Kempthorne Sign Agreement Turning Over Most Management of Wolves In Idaho to the State (Jan. 5, 2006), http://www.doi.gov/news/05_News_Releases/060105b.htm. One of the primary rationales for the handover was to provide wolf-management experience to Idaho before the species was delisted. Press Release, U.S. Dep’t of the Interior.

FWS announced plans in February 2006 to delist the gray wolf in the NRM contingent on submission of a state management plan that met with FWS’s approval. Removing the Northern Rocky Mountain Distinct Population Segment of Gray Wolf From the Federal List of Endangered and Threatened Wildlife, 71 Fed. Reg. 6634, 6634 (Feb. 8, 2006). While Idaho and Montana submitted adequate plans, the FWS refused to approve the Wyoming plan, citing three flaws. First, the plan did not adequately regulate and limit human take of wolves. Second, the Wyoming plan did not commit to maintaining a minimum of ten breeding wolf pairs and 100 wolves in mid-winter. Finally, the agency found that the Wyoming plan failed to define a wolf pack for management purposes using accepted scientific standards. Given these problems, the agency decided in July 2006 to keep the gray wolf listed. See generally Twelve-Month Finding on a Petition To Establish the Northern Rocky Mountain Gray Wolf Population (Canis lupus) as a Distinct Population Segment To Remove the Northern Rocky Mountain Gray Wolf Distinct Population Segment From the List of Endangered and Threatened Species, 71 Fed. Reg. 43,410 (Aug. 1, 2006).

Nevertheless, the agency reversed course earlier this year and announced that it would delist the gray wolf without waiting for the approval of Wyoming’s plan. The agency’s action seems to be intended to force the Wyoming to offer an adequate plan. If Wyoming fails to offer an adequate plan, the FWS intends to designate the Wyoming wolves found outside national parks as non-essential, experimental wolves and manage them as such. Id. Hence, while the wolf would no longer be protected by the ESA in Idaho and Montana, the law’s protections would apply in Wyoming. Press Release, U.S. Dep’t of the Interior, Interior
The revelation that the FWS plans to remove the ESA’s protections from the gray wolf sparked immediate controversy. Environmentalists complained that the government had shirked its responsibility to ensure a full recovery for the wolf. Rob Edward, director of carnivore restoration for a Colorado-based advocacy group for wolves and predators said, “The brown pelican, the American alligator and the peregrine falcon are prime examples of recovered species that now occupy nearly all of their historic range. Yet, because the livestock industry refuses to tolerate wolves, the government has set the bar much lower and moved much slower.” Kim McGuire, Delisting Planned for Gray Wolves, DENVER POST, Jan. 30, 2007, at A5.

Officials in Wyoming proposed that all wolves found outside federal enclaves be classified as predators to be shot without a permit. The Hunters and the Hunted, U.S. NEWS & WORLD REPORT, Feb. 12, 2007. Most controversially, the governor of Idaho, Butch Otter, has proposed that 85% of the state’s wolves be eliminated once the state assumes control of wolf management, reducing the amount of wolves in the state to 10 breeding pairs and 100 animals. See Editorial, Leader of the Packs: Otter Needs Measured Approach to Wolf Control, SPOKESMAN-REVIEW (Spokane, Wash.), Feb. 2, 2007.

While the FWS would like the wolf delisted by year’s end, there is no indication that the gray wolf can be delisted quickly. The National Wildlife Federation has indicated that it will challenge the delisting if Wyoming is not included, or its final management plan is not sufficiently protective. The environmental group’s wolf expert has argued that the ESA prevents the FWS from delisting a species’ DPS in one state, but not in the other. Rocky Barber, Plan to Delist Wolves Still Faces Obstacles, IDAHO STATESMAN (Boise), Feb. 12, 2007.

“...without any discernable proof, was responsible for killing twenty-five elk per year. If true, then over 16,000 elk are killed in Idaho each year, a sizable fraction of the state’s 20,000 elk. Id. While these numbers can be dismissed as simple hyperbole, they point to a deeper problem: fear and resentment of wolves.

This data will likely provide more ammunition to those who are upset about wolf reintroduction. In arguing for a hunt on wolves, one Idaho resident complained that wolves “kill to kill; they don’t kill for food,” and accused them of “breed[ing] like dogs.” Jared S. Hopkins, Capitol in Kimberly: Otter Offers Candid Answers to Residents, TIMES-NEWS (Twin Falls, Idaho). Each wolf, he argued (without any discernible proof), was responsible for killing twenty-five elk per year. If true, then over 16,000 elk are killed in Idaho each year, a sizable fraction of the state’s 20,000 elk. Id. While these numbers can be dismissed as simple hyperbole, they point to a deeper problem: fear and resentment of wolves.

This fear and resentment is troublesome as restoration of the wolf threatens to fundamentally affect wildlife management in the West. Managers will be forced to make harder decisions in order to maintain wildlife balance. Hunters will have to get used to more limited hunts for elk, deer and other game. Ranchers will have to learn to tolerate the loss of some of their livestock. It is unclear is any of those parties are willing to accept these difficulties. What is clear is that the wolf will never again be considered a pest and hunted to near extinction as it was only five decades ago. It remains to be seen if humans will learn to share nature’s bounty with animals they find distasteful.
By Justin Denham

I. Introduction

The Native American Graves Protection and Repatriation Act (NAGPRA) became law on November 16, 1990. By enacting the law Congress intended that any uncovered human or cultural remains found on federal or tribal lands after 1990 remain in control of the lineal descendant of human remains, or of the tribe in the case of cultural objects. 25 U.S.C. § 3002(a) (2006). The Ninth Circuit has stated, “NAGPRA vests ‘ownership or control’ of newly discovered Native American human remains in the decedent’s lineal descendants……” Bonnichsen v. United States, 367 F.3d 864, 875 (9th Cir. 2004). If there is no lineal descendant, then the tribe controlling the land on which the item was discovered, or whose land historically encompassed the area, would take control of the objects. 25 U.S.C. § 3002. NAGPRA also addresses human remains and items of cultural significance discovered before 1990.

The Act establishes a repatriation process for certain classes of items. See id. § 3005. Museums and institutions receiving federal funding are required to create lists of objects that are classified as human remains, funerary objects, associated funerary objects, unassociated funerary objects, sacred objects, or objects of cultural patrimony. 43 C.F.R § 10.2 (2006).

Objects associated with specific Indian tribes must be returned to the tribes if requested. 25 U.S.C. § 3005(a)(2). Tribes can claim items without clearly identified cultural affiliation if they show cultural affiliation based on a preponderance of the evidence. Id. § 3005(a)(4).

A. Kennewick Man and the Court’s Interpretation of NAGPRA

Courts have recognized that on the question of repatriation, NAGPRA requires a two-step analysis. Bonnichsen, 367 F.3d at 875. The first concerns whether the object is Native American in origin. Id. This question attempts to ascertain whether the object has a “significant relationship to a presently existing ‘tribe, people, or culture,’ a relationship that goes beyond features common to all humanity.” Id. at 877. If so, NAGPRA applies. The second question asks which person or tribe is most closely affiliated with the object. Id. at 875.

The seminal NAGPRA case concerned skeletal remains found on the Washington banks of the Columbia River. The skeleton unearthed in 1996, and popularly known as Kennewick Man, dated to roughly 9000 years before present. Its features were unlike modern Native Americans, appearing more akin to south Asian morphology. Furthermore the skeleton was nearly intact, a rarity in North America. The skeleton’s age, unusual morphology, and relative completeness made it highly desirable in the scientific community. Soon after discovery, the Smithsonian Institute made arrangements to take possession of the skeleton and move it to Washington, D.C. Four Native American tribes in the Northwest immediately objected and filed for repatriation to gain control of the skeleton so that it might be reburied. The Secretary of the Interior concluded that the preponderance of the evidence, NAGPRA’s required standard, showed the skeleton belonged to the Tribes and should be repatriated. A group of scientists appealed, asking the courts to consider what constitutes a “Native American” under NAGPRA. Id. at 871.

In Bonnichsen, the Ninth Circuit concluded that NAGPRA’s definition of “Native American” was clear. NAGPRA states “‘Native American’ means of, or relation to a tribe, people,
or culture that is indigenous to the United States.” 25 U.S.C. § 3001(9). Because the statutory definition refers to tribes or cultures that are indigenous to the United States, the court held that, to make a valid claim under NAGPRA, the tribe must show that the objects claimed were directly related to the tribe as it exists today. Bonnichsen, 367 F.3d at 875. The court justified its conclusion by defining one of NAGPRA’s goals as protecting burial traditions of modern-day American Indians. Id. at 876. Objects and human remains with no link to existing Tribes exhibit a lesser need for repatriation because their exhumation infringes no known burial practices or cultural rights. Because of the skeleton’s age the court believed any link between the skeleton and modern Tribes too attenuated. Allowing repatriation would grant Tribes a general stewardship over Native American remains without considering cultural relationships. Id. at 879.

B. Practical Problems of Repatriation

As evidenced by Bonnichsen, hurdles to regaining control of cultural objects and human remains exist within NAGPRA’s framework. However, there are significant practical hurdles resulting from preservation methods used by museums and other institutions over the past 200 years.

NAGPRA makes no reference to reporting chemical contamination when repatriating objects or allowing inspection of objects. However, the Code of Federal Regulations imposes such a requirement. 43 C.F.R. § 10.10(e). Such a requirement was necessary because many cultural objects eligible for repatriation had been treated by museums and other institutions with chemical pesticides or preservatives to prevent infestation and decay. These treatments were adept at protecting objects from insect infestation, but in many cases the chemicals applied to objects were as hazardous to humans as insects. Nat’l Park Serv., Publ’n No. 2/3, Conserve O Gram 1 (2000). These include arsenic, which has since been proven to cause cancer and respiratory irritation; chloroform, which affects liver, kidney and central nervous system function; cyanide, which can cause death; and mercuric chloride, which is corrosive to tissue. Nat’l Park Serv., Publ’n No. 2/17, Conserve O Gram 2-5 (2001). These practices are now proving problematic in light of repatriation.

Depending on the chemical and level of exposure, risk from contact breaks down into three categories: illness, chronic problems, or cancer. Thomas E. Kearney, Chemical Contamination of Repatriated Native Californian NAGPRA Materials: Principles of Risk Assessment for Acute and Chronic Health Effects, 17 Collection Forum 49 (2001). In museums exposure to objects treated with hazardous materials such as arsenic is closely controlled. Objects are stored in hazardous storage containers, work surfaces are thoroughly cleaned to remove hazardous residues, HEPA filters are used to clean the air, and individuals wear personal protective equipment including masks, gloves, safety glasses, and respirators. Nat’l Park Serv., Publ’n No. 2/10, Conserve O Gram 3 (1998). Though these practices protect against dangerous exposure in museums, when sacred objects are repatriated for continued use in cultural practices, museum safety protocols become impractical. Thus, before repatriation culturally significant objects must undergo a two-step procedure to ascertain possible human health risks.

First, if the methods of preservation used on the object are not well documented, the object must be tested to determine the types of contamination present. However, problems can arise in testing. In many cases, preservation measures were not well documented either because the museum did not consider retaining such information to be of paramount importance, or because archaeologists and anthropologists used field preservation techniques before returning objects to the museum environment. Kearney at 45. Furthermore, some chemicals emit particulates or gases into the air, cross-contaminating other objects stored nearby. In these cases, objects may have associated documentation detailing preservation methods but that documentation may not account for possible secondhand exposure over time. Objects which lack a clear record of treatment or were exposed to secondhand chemicals need to be tested to ascertain what chemicals are present.
Testing sacred objects presents two problems. Testing is expensive and few labs have the ability to run comprehensive tests. Additionally, testing is often an invasive procedure which destroys a small portion of the object tested. However, the future recipients of the objects often do not want them tested because destructive testing would affect the religious and cultural significance of the object. This catch-22 has no easy solution and will be addressed later.

The second procedural step taken after identifying possible contamination is cleansing objects of hazardous materials to the greatest extent possible. Many of the preservatives and pesticides applied to objects have properties that enable them to bond tightly to organic material. Nat’l Park Serv., Publ’n No. 2/3, Conserve O Gram, 1 (2000). It is possible that some compounds may never be fully removed from objects. Id. The goal then becomes reducing the level of toxicity so that exposure upon repatriation is not great enough to pose a health risk.

II. Analysis

As of 2006, there are no cases that address the issues raised by contaminated cultural objects. The 1996 addition of 43 C.F.R. § 10.10(e) created an administrative duty on the part of museum officials to inform tribes of known contaminants and health hazards associated with handling contaminated objects. Rebecca Tsosie, Contaminated Collections: An Overview of the Legal, Ethical and Regulatory Issues, 17 Collection Forum 16 (2001). A duty opens the possibility of tort actions based on improper contamination reporting. However, either because no institution has violated this duty, or no tribe has felt the need to bring such a tort action, the parameters of the duty under 43 C.F.R. § 10.10(e) have not been outlined. It is unclear whether the duty requires only actual knowledge of contamination, or whether reasonable extrapolation based on historical museum practices is enough to trigger the reporting requirement. Id. The relative lack of case law surrounding contamination issues within the NAGPRA structure opens a door for recommendations concerning improvements in the repatriation process.

III. Recommendations

What are NAGPRA’s goals as they relate to returning culturally significant objects to tribes? Does the statute simply contemplate the return of culturally significant objects to tribes so as to make the tribe whole in a strictly material sense? In other words, does NAGPRA strive to return “stolen” property to its original owner? Or is NAGPRA something more? Does the statute intend cultural objects to return to ritual and social use so that traditions, once injured by missing objects, can return to life? To begin answering these questions we must first turn to the idea of culture and perspective.

Two major cultures come to a head when addressing the question of repatriation and contamination: Indian culture and museum culture. Indian culture created objects and imbued them with ceremonial and social significance. These objects played significant, and often irreplaceable, roles in rituals which served to perpetuate Indian culture. Once these objects left the tribe and came to rest in museums, their existence and use changed.

Museums strive to preserve the past for study and education. To this end, objects are catalogued, treated with preservatives and stored or displayed for scientists or onlookers to see. When objects come to a museum, personnel often act under the assumption that the object is not returning to its former use and that it should be preserved for posterity. Though modern methods of preservation do not employ toxic substances, historical museum practices gave little thought to the possibility of repatriation. Therefore, deadly chemicals were often used to protect cultural objects.

NAGPRA requires the repatriation of “sacred objects” on a showing of actual use in cultural practices. 25 U.S.C. § 3001(3)(c). But actual use is often difficult or impossible when objects are contaminated. NAGPRA and associated administrative rules need to contain further guidance concerning testing objects, reporting known contaminants, and cleaning and storage of contaminated objects.

A. Testing Objects

Museums did not always keep thorough records concerning preservatives used in collections because object repatriation was not
an issue. Therefore, many objects eligible for repatriation may carry unknown contaminants. NAGPRA must better outline a testing process through which possible contamination can be ascertained. This process must place the responsibility for testing objects on a specific party, either Indian or institution; provide definitions for adequate testing; and designate a funding source for testing. Funding will play a key role in the testing process because many procedures are costly or difficult to perform.

One may argue that museums should be required to fund testing because they were the source of contamination. However, doing so would punish museums for acting in a reasonable fashion at the time of preserving many objects. Likewise, requiring that Tribes pay for testing would place an unfair burden on groups which have already been disadvantaged through the loss of cultural items. Because the government has placed importance on returning cultural objects to Tribes, the government should also supply funding adequate to fulfill the task of repatriation when safely repatriating objects requires expensive tests.

Testing objects must also take place under the eye of museum personnel and tribal members so as to ensure both scientific accuracy and cultural sensitivity. It beehoves both groups to continue working together while recognizing that, though the process is difficult, a positive outcome can be achieved. When testing is necessary it is important for scientists to fully understand the cultural significance of objects so they might properly remove portions without significant physical or cultural harm to the object.

**B. Reporting Known Contamination**

NAGPRA regulations require only that known contaminants are reported. To be comprehensive, additional reporting requirements geared at protecting the health of those who are receiving repatriation objects are required. Many culturally unassociated objects are examined by tribal members in a museum context so as to better understand cultural links. 43 C.F.R. § 10.10(e) does not specifically require known contaminants to be reported at this stage as the objects have not been repatriated. However, tribal members may be exposed to the objects and any chemicals associated therewith. Furthermore, when preparing a report on contamination there is no meaningful guidance as to the required thoroughness of investigation. If these components are integrated into the reporting requirement, NAGPRA will better protect tribal members from contaminated objects which might pose detrimental health risks.

**C. Cleaning and Storing Contaminated Objects**

Once objects are tested and acceptable records of contamination have been established, they should be cleaned and/or returned to the tribe claiming them. However, contaminated objects present problems in that many can not be sufficiently cleaned based on current cleaning methods. Because of cleaning difficulties, objects intended for continued cultural use may not be safe for prolonged human contact. Science has not yet developed reliable and comprehensive cleaning techniques for removing all hazardous chemicals from organic objects, so cultural objects not suited for human contact must be relocated in the repatriation process. Oftentimes they cannot sit on a shelf or be handled on a regular basis, yet tribes have a right to their possession.

A possible solution to this problem is to create storage facilities on tribal land for safely holding contaminated objects in hopes that practical means of removing contaminants will soon be found. These storage facilities can be run by tribal members trained in proper handling techniques and who are aware of possible health risks posed by chemicals on the objects. Furthermore, tribal members utilizing appropriate gear and controlled exposures may be able to use some contaminated objects in cultural practices. Though this seems an awkward fix, it may allow some cultural practices to be revived while waiting for better contamination removal practices.

Returning cultural objects to tribal communities poses problems in that many objects are contaminated with chemical preservatives. However, repatriation is now a priority and if funding for testing and cleansing objects is an issue, the most equitable option may be to turn to the federal government. It was the source of NAGPRA and should fund its mandates. With the proper funding, testing, storing and cleaning of contaminated objects, we may arrive at a viable approach to working through contamination issues and returning culturally significant objects to their rightful owners.
The Dynamic Relationship of Indigenous Peoples and Protected Areas: Mutually Reinforcing or Mutually Destructive?

By Josh Kellermann

I. Introduction

Indigenous peoples around the world have spiritual, historical, and cultural links to lands currently managed as protected areas. Of the thousands of protected areas worldwide, however, few have integrated indigenous management and/ownership into the preservation model. Stan Stevens, Introduction, in Conservation Through Cultural Survival, 1, 1-7 (Stan Stevens ed., Island Press 1997). Indigenous groups are rarely granted unlimited access to these traditional lands, and some are even excluded completely. Current management practices reflect the Western ideal of a wild place; known as the “Yellowstone Model,” this preservation model idolizes the absence of permanent human occupation and finds ecological purity where the human use of resources is minimized.

This traditional environmental paradigm is increasingly inappropriate both ecologically and philosophically. Criticisms based on elitism, Western imperialism, and a misinterpreted notion of the “wild,” have turned many away from the environmental movement. Preserving a pristine island within a sea of toxicity is increasingly becoming a failed environmental philosophy. As we learn more about the importance of corridors and interconnection, we may need to seek a new paradigm for environmental protection revolving around the sustainable use of all resources, as opposed to the overuse of most resources and the strict preservation of a fraction of them. The basis of this new paradigm could include joint management of protected areas using a combination of indigenous and scientific knowledge, leading to the preservation of nature, as well as the preservation of indigenous culture.

Environmentalists should ally themselves with the indigenous rights movement for several reasons. Indigenous people have the benefit and burden of sitting at the nexus of environmental and human rights law, and the environmental and social justice movements, as their physical and cultural survival is rooted in the health of their immediate environment. The United Nations Conference on Environment and Development, Rio De Janeiro, Agenda 21, chapter 6; The International Convention on Civil and Political Rights, art. 6(1). This intersection of legal fields highlights the opportunities for their mutual reinforcement. Furthermore, indigenous and environmental activists have already begun to unite; as the globalization of capital increasingly exploits natural resources, biodiversity, and traditional knowledge, these counter-hegemonic social movements plainly see their parallel needs. Cesar Rodriguez-Garavito and Luis Carlos Arenas, Indigenous Rights, Transnational Activism, and Legal Mobilization: the Struggle of the U’wa People in Colombia, in Law and Globalization from Below, 241, 241-42 (Boaventura de Sousa Santos eds., Cambridge Univ. Press 2005). To unite these movements would create a singularly powerful alliance. Furthermore, indigenous cultures may be essential to the preservation of our environment.

Stevens, at 1 (quoting a Karen village leader, Northern Thailand). Yet, can the needs of both environmental preservation and indigenous people’s use and occupation be met within a protect area? What structures best facilitate the success of a multiple use undertaking such as this, given that not all indigenous peoples practice ecologically sustainable lifestyles? Joint management and indigenous ownership of protected areas coupled with scientific land management techniques can impart a highly sustainable system of use and protection. Stevens at 25. This requires a paradigmatic change in the way protected areas are conceived, especially since the world’s vision of nature preservation, ever since the creation of Yellowstone National Park, has viewed human use and inhabitation as antithetical to true environmental preservation.

II. The Yellowstone Model

The modern conception of the nature preserve as a wild place free from human encroachment is born of the genocide and removal of millions of indigenous peoples from their homelands. Colonial societies have preserved these vacant homelands in a historical snapshot
that fails to recognize that human cultures inhabited them since time immemorial. One result of this misconception is that many environmentalists view human inhabitation as incompatible with the wild.

In 1872, Yellowstone became one of the world’s first national parks. Id. at 13. The Tukarika Shoshone, Bannock, Crow, and Blackfoot peoples all lived on the land that became the Park, some year-round, others seasonally. Id. at 28. The U.S. government forced many of these peoples into reservations, and the creation of the Park finalized the end of their use and inhabitation of the area. Id. at 29. Because this Park was one of the earliest created worldwide, it became the ideal to which all countries strived. The Yellowstone Model has created a culture of distrust of environmental movements among indigenous peoples. Stevens at 33, 34. Environmentalists must reach out to indigenous groups to restore that trust. They can do this through proposed administrative plans for joint management, social movement solidarity, legal plans for recovering ownership of traditional lands, and an awareness and advocacy of indigenous rights when proposing new protected areas. The Lakota people of Wyoming have first-hand knowledge of the Yellowstone Model, and their story provides an important perspective on the relationship of environmentalism and indigenous rights.

Devils Tower National Monument in Wyoming is a popular tourist destination. For the Lakota people, it is a sacred site called Bear Lodge. Kristen A. Carpenter, Old Ground and New Directions at Sacred Sites in the Western Landscape, 83 Denv. U. L. Rev. 981, 988 (2006). The U.S. federal government owns the monument, gained through abrogating the Treaty of Fort Laramie of 1868, which had deeded Bear Lodge to the Lakota. Id. Today, the Lakota have limited rights to use Bear Lodge for ceremonies, and tourists and rock climbers frequently interrupt them. Id. at 989. The Park Service, attempting to manage these conflicting concurrent uses, first issued a ban on use of the area by tourists during the ceremonial month of June. This ban on the use of Bear Lodge was challenged legally, and in response the Park Service rescinded the mandatory ban in favor of a voluntary ban on use of the park during the month of June. Bear Lodge Multiple Use Ass’n v. Babbitt, 2 F. Supp. 2d 1448, 1450 (D. Wyo. 1998). This top down decision-making reflects the government’s ability to freely determine the preservation or destruction of sacred sites on public land, as long as it is not “coercive” of religion. In contrast, places of worship located on private land such as churches, mosques, synagogues, receive substantial constitutional protection. Lyng v. NW. Indian Cemetery Protective Ass’n, 485 U.S. 439 (1988).

The Lakota are left without a legal method for asserting use rights over their traditional land, even where those rights in no way infringe on the land’s ecological character. At the same time that the Lakota have been seeking to assert their rights, international and foreign domestic law has been moving towards reconciling indigenous land claims in a way that acknowledges the historical discrimination of indigenous peoples. See Mary and Carrie Dann v. United States, Case 11.140 (United States), Inter-Am. C.H.R. (2002), Awas Tingni Community v. Nicaragua, Judgment of Aug. 31, 2001, Inter-Am. Ct. H.R. (Ser. C) No. 79 (2001), and Mabo v. Queensland, 175 C.L.R. 1 (1992). Predictably, the United States has been less than amenable to these international rulings. Id. Without legal recourse, social movement solidarity with environmentalists and other allies to apply pressure for legislative change may be the only option for the Lakota. Solidarity opportunities can help to rebuild trust between environmentalists and indigenous peoples; such a movement could have far-reaching implications beyond the uninterrupted use of traditional lands for ceremonial use. Joint management structures may provide a functional method for achieving environmental

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III. Joint Management and Ownership

Joint management of protected areas, also known as co-management, involves indigenous peoples, governments, and international organizations sharing a commitment to protect the environment and indigenous peoples’ right to self-determination within the protected area. Stevens at 24-25. These agreements necessarily include strict standards for environmental protection, as well as for indigenous self-determination. While some may view the two as contradictory, the opposite has been proven in theory and practice. Joint management is a process involving the integration of indigenous cultural and political norms into the Western norm of protected area management, and vice versa. Possible outcomes of a joint management process include use rights within the protected area like hunting, gathering, grazing of animals, ceremonial use, and inhabitation. Yet the impact of these uses must be constrained by scientific environmental standards. Trevor Power, Joint Management at Uluru – Kata Tjuta National Park, 19 Envtl. Plan. L.J. 284, 301 (2002). The benefits of environmental protection and joint management include the means to greater recognition of the legal status of indigenous peoples as distinct peoples, preservation of indigenous cultures and traditional knowledge, access to resources, and alternative job and income sources. Stevens, Lessons and Directions, at 266-67. Joint management requires compromise and commitment to the process, yet it ideally allows for the equal involvement of all stakeholders in the creation and implementation of such an agreement.

Yet joint management will only get indigenous people part way to the goal of self-determination: collective land ownership rights are also necessary. “The central question here, as in all issues concerning indigenous rights, is who is in a position to control resources. It is a question of land rights.” Lawrence Watters, Introduction, in Indigenous Peoples, the Environment and Law, xvii, quoting a Sami, Scandanavia (Lawrence Watters, ed., Carolina Academic Press 2004). One of the greatest injustices of modern society is its failure to respect indigenous forms of collective property ownership. S. James Anaya, Indigenous Peoples in International Law 142 (2d ed., Oxford Univ. Press 2004). Despite the growing indigenous rights movement, the status of indigenous lands varies greatly; some have gained communal land rights to part or all of their traditional lands, some are in the process of gaining it, and others have none. To complicate the picture, many conservationists are critical of the ability of traditional indigenous land use systems to protect the environment, especially when faced with the power of a global economy, corrupt governments, and the necessities of poverty. Stevens, at 24. The story of the Anangu people of Australia may help to counter some of these criticisms, and offer a prototype for similar systems we can apply in the Western U.S.

IV. Joint Management and Ownership The Anangu People of Australia

In 1976, the Australian government passed the Aboriginal Land Rights (Northern Territory) Act, allowing lands to be granted to Aboriginal Land Trusts if the aboriginal group could prove prior occupation and if no entity besides the Crown otherwise laid claim to the land. The Anangu, an aboriginal group, filed a claim to recover their traditional lands. This claim was denied because most of their traditional land had been granted to the Director of National Parks as Uluru Kata-Tjuta National Park, otherwise known as Ayers Rock. A sympathetic government, responding to national and international pressure, granted the Anangu title to the land through an amendment to the Land Rights Act of 1983. Id.

The contract that passed title of the Park to the Anangu required them to immediately lease it back to the Park Service for 99 years, appea
members of the public who were opposed to the land transfer. The Anangu receive a substantial sum for the lease, including twenty percent of park entrance fees. An Information Center explains Anangu culture and life-ways to their children and tourists. Similarly, the web site for the Park provides information both in the Anangu language and English. They also have included their creation story for the Park based on traditional knowledge. Uluru – Kata Tjuta Natl. Park, Home Page, at http://www.deh.gov.au/parks/uluru/. A voluntary ban on climbing Uluru (Ayers Rock) represents a compromise between Anangu cultural norms and Western tourism, reflecting a successful joint management process.

Passing on knowledge to future generations is exceedingly important to Anangu cultural survival, and to this end they have full access rights to enter, use, occupy, engage in traditional hunting and gathering activities, and to live in the park in a designated community. Nevertheless, only certain members of the Anangu who could prove a blood connection to the tribe were given ownership rights. Some Anangu who were unable to prove their connection to the group were excluded from ownership and have lost access to power and resources. It has divided the community, relegating some to a permanent economic and social periphery. This social and economic division could be countered through a more culturally sensitive land distribution process that allows for self-identification based on indigenous values and governed by indigenous power structures. Similarly, restructuring the idea of ownership to a collective rather than individual model might be more supportive of indigenous ownership structures.

Another problem encountered was that of culturally sensitive decision-making. During the early period of consultation regarding land rights for the Anangu, the government held several meetings on the subject, inviting the Anangu to attend. After excellent attendance at the first of such meetings, few Anangu attended the next several meetings. However, according to Anangu custom, consultation only occurs once because the Anangu expect to give their answer only once. Understanding these cultural norms and creating a process sensitive to them would facilitate indigenous involvement. Anangu disempowerment is still rampant, despite land ownership, joint management, and advocacy organizations. Some Anangu feel that the government still retains complete power, and any decision-making power given to the Anangu is purely symbolic. Language and educational barriers persist as well. Those Anangu that are in management positions may feel overpowered by experienced bureaucrats. Better representation may be achieved when the framework of the operation is jointly developed from the start. This means that there can be no universal template for joint management. Because Australia is one of the first nations to allow indigenous ownership and joint management over traditional lands, much can be learned and applied to similar processes in the future.

V. Conclusion

Many lessons can be learned from the Anangu, and other indigenous groups in similar situations. There are examples of joint-management and ownership schemes of protected areas in Panama, Nicaragua, Nepal, India, Canada, and more. Solidarity between social and environmental justice movements is a necessary ingredient to make this process work. Domestic courts seem unwilling to take drastic steps in favor of the restructuring of indigenous land ownership without legislative action. Similarly, states are generally unwilling to obligate themselves to international legal decisions unless there is sufficient economic or social imperative to do so. This evidences the need for social movements and public education alongside legal claims. The environmental movement must involve itself in the human rights movement of indigenous peoples and other such disenfranchised people to build trust and develop a radical new environmentalism. The idea that preservation equals the absence of human occupation and/or use is no longer consistent with either evolving principles of ecology or international norms of indigenous rights. Joint management models may provide an ideal mechanism for supporting ... both the environmental movement and indigenous sovereignty ....
Western Environmental Law Update

The Update is published annually by Land Air Water, the nation’s oldest student environmental law society.

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