

IS NOTHING SACRED?



Corporate
Responsibility
for the
Protection of



Native American Sacred Sites

Produced by the Sacred Land Film Project

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About the Sacred Land Film Project

Earth Island Institute's Sacred Land Film Project produces a variety of media and educational materials — films, videos, DVDs, articles, photographs, school curricula materials and Web site content — to deepen public understanding of sacred places, indigenous cultures and environmental justice. Our mission is to use journalism, organizing, and activism to rekindle reverence for land, increase respect for cultural diversity, stimulate dialogue about connections between nature and culture, and protect sacred lands and diverse spiritual practices. For the last decade, led by Project Director **Christopher (Toby) McLeod**, we have focused on the production and distribution of the documentary film, *In the Light of Reverence*. We are currently developing a four-part series on sacred places around the world — *Losing Sacred Ground*.

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Contents



Foreword by Winona LaDuke 2

Executive Summary 4

SACRED SITES 7

An Introduction 8

Sacred Sites and the Public Interest 9

Corporations and Sacred Sites 10

Tools for Protecting Sacred Sites 11

CONFLICTS WITH CORPORATIONS OVER SACRED SITES 17

Introduction to Case Studies 18

Glamis Gold Ltd. and Indian Pass 19

Anschutz Exploration Corp. and Weatherman Draw 26

Calpine and Medicine Lake Highlands 31

Peabody Energy and Black Mesa's Navajo Aquifer 38

Salt River Project and Zuni Salt Lake 45

Access Fund, Cave Rock and Devils Tower 52

TOWARD CORPORATE GOOD PRACTICE 55

What Motivates Corporations? 56

Corporate Social Responsibility 58

What Is Good Corporate Practice on Sacred Land? 61

Conclusion 65

Bibliography 68

Appendix One: Principles for Environmental Responsibility 69

Appendix Two: Suncor Energy's Aboriginal Affairs Policy 70

Appendix Three: Calvert's Indigenous Peoples' Rights Policy 73

Appendix Four: U.S. Laws Regarding Sacred Sites 74

Endnotes 77

FOREWORD

Future Positive | Ji misawaabandaaming*by Winona LaDuke*

Corporations are increasingly finding that ethical behavior is also good business practice, and many are rising to the challenge of making that transition. Shareholders at Goldman Sachs, Calpine and Peabody Energy, along with major employee and pension funds like The California Public Employees' Retirement System and members of the Coalition of Environmentally Responsible Economies are demanding a higher standard for corporate behavior. Corporations are beginning to acknowledge that energy efficiency saves millions of dollars *and* protects the environment; water efficiencies reduce water bills and create ethical relationships with communities; redesigning production systems to recycle waste generates byproducts that create new revenue sources. Developing production systems that do not destroy the natural wealth upon which we all rely is the key to longevity.

Starbucks' rise to world dominance — one new store a day — comes at the same time as it purchases fair trade coffee and develops a worker benefit package that challenges those of corporations like Wal-Mart. CITGO's social investments strengthen rural and indigenous communities, and corporations like BP have seen the wisdom of "shedding their baggage" — in this case carbon — by moving into renewable energy, the fastest growing sector in the market. BHP Billiton, the largest mining corporation in the world, has negotiated with the Mole Lake band of Ojibwe in Wisconsin for return of their traditional territory rather than digging a zinc and copper mine that would have polluted *Mushgigagamongsebe* (The Little River of Medicines) and wild rice growing lakes downstream that are essential to cultural survival.

The terms of trade and relationship that led to the rise of the major corporate world powers are no longer intact. Civic society will not accept poisoning of water, spraying of schools, product malfunctions, or corruption in corporate management. Nor should civic society tolerate the destruction of sacred places. There are no more frontiers to exploit, because within all "frontiers" are civic societies — perhaps not always American suburbs, but societies and peoples with rights, aspirations and deep relationships to place.

In the Ojibwe language, *omaa akiing* means



Christopher McLeod

making a positive future, nurturing the health of future generations — which one would hope is a goal of our civic society.

Omaa akiing. From the past to the future this land has many stories: when the giant lay down to sleep, from whence the buffalo and first humans came, where the Great Tree of Peace stood. Each society, each community, each corporation has a different relationship to the land, and through these arise today's conflicts.

A society that consumes a third of the world's resources requires more land and makes bigger handprints each year in succession. Those handprints have caused a great loss of life — human, four-legged, winged, finned, and those with roots. We all must recognize that the land is the natural wealth that sustains our society, and its preservation is essential if civic society is to grow and survive.

Federal, state, county and corporate institutions all are relatively new on this land, and these institutions are mostly unfamiliar with the stories of the land as they are remembered and told by diverse indigenous communities. That is not surprising: Virtually none of these stories, which are facets of North American history, are taught in high school or college courses.

Corporations, governments and native communities may have different cultural

origins, yet we all rely on the same air, water and land for our sustenance. Protecting sites sacred to indigenous peoples offers corporate and government institutions an amazing opportunity to foster a truly multicultural, sustainable society.

What sort of future *oomaa akiing*, here on this land, will we make with our hands, our machines, our public policies, our minds?

Corporations and governments are part of civic society, and they need to play a vital and positive role. This report offers a starting place for fundamental change — one that can create a healthy, multicultural society *oomaa akiing*. The places and peoples on the following pages are an inspiration. Their stories will continue to be told, and we welcome new, positive characters.

Winona LaDuke (Anishinaabeg) lives on the White Earth Reservation in northern Minnesota and is Program Director of Honor the Earth and Founding Director of White Earth Land Recovery Project. A graduate of Harvard, her books include: *Last Standing Woman* (fiction), *All Our Relations* (non-fiction), *In the Sugarbush* (children's non-fiction), *The Winona LaDuke Reader* and *Recovering the Sacred: The Power of Naming and Claiming* (non-fiction). Winona is an advisor to the Sacred Land Film Project.



EXECUTIVE SUMMARY

Conflicts between Native Americans and U.S. corporations over threats to culturally significant places are escalating. Native American groups have been able to stop or mitigate the destructive effects of some corporate developments, but each battle is long and costly, and new threats continue to emerge. To raise the protection of sacred sites to the level of a social norm, innovations are needed — not only in law but also in corporate practice.

Part I of this report defines sacred sites — places that hold “significant spiritual value” for Native American tribes, nations and bands — and suggests that protecting such sites is in the public interest. It is part of our guarantee of freedom of religion; it reflects our cultural, historic and ecological values; it can be viewed as a restorative justice measure; and it is a good fit with the spiritual values of non-Indian Americans, especially those in faith-based and environmental groups.

Although four federal laws acknowledge the religious and historic significance of American Indians’ sacred sites, no laws actually mandate protection of those sites or Indians’ access to them.

Corporations and native groups often look at the same landscape and see different things. In conflicts, they typically sit on opposite sides with the government serving as arbiter, and only rarely do they conduct two-way consultations aimed at a win-win resolution both sides can live with.

Education and shaping society’s values are key in bridging the gap between sacred sites and property rights.

In the past decade, an emerging corporate social responsibility (CSR) movement is defining new values and norms for good practice in relation to social and environmental performance. The movement is composed of

investors, NGOs, faith-based groups, unions, business magazines, opinion makers, international environmental and human rights organizations, and companies themselves.

While leading CSR companies have instituted environmental management policies, few have adopted codes of conduct on human rights, and fewer still have policies that protect indigenous rights. Including sacred sites protection within a human rights framework would situate advocacy on this issue at the corporate social responsibility movement’s cutting edge.

Part II presents case studies of six conflicts between Native Americans and corporations. In several of the conflicts, the willingness of both sides to engage each other in dialogue generated mutually acceptable outcomes. Most of the cases stretch back decades, and all entail complex interactions between the participants. In brief:

- Twenty years ago, Glamis Gold began acquiring mining claims in Indian Pass in southeastern California, the desert homeland of the Quechan Indian Nation. Glamis’ open-pit, cyanide heap-leaching process can scar the landscape and pollute groundwater with cyanide. Clinton’s Department of the Interior (DOI) secretary denied Glamis’ mining proposals, but Bush’s secretary rescinded it. After a 2003 California law gave sites at Indian Pass some protection, Glamis filed suit against the U.S. government under the provisions of NAFTA, asking for \$50 million in damages. (A hearing is scheduled for March 2007.)

- Weatherman Draw in south-central Montana is a 1,000-year-old site sacred to many tribes for its cliff paintings. Anschutz Exploration Corp. acquired two leases to mineral rights there in 1994. After the Bureau of Land Management (BLM) approved an

exploratory well, leaders from 10 tribes plus allied non-Indian groups appealed the decision and launched an intensive media campaign. Anschutz dropped its plans and donated the leases to the National Trust for Historic Preservation.

- Various tribes have used Medicine Lake Highlands in northeastern California as a sanctuary and place of healing for 10,000 years. BLM granted Calpine Corp., the world's largest supplier of geothermal energy, 43 leases there starting in the mid-1980s. Between 2000 and 2004, one power plant project was denied, then rescinded; both sides filed suits and appeals; native coalitions dropped opposition to one project in exchange for a 5-year moratorium on other projects; the tribes found new allies in the socially responsible investment community. A May 2004 lawsuit brought by the Pit River Tribe and others against Calpine and the federal government is pending. Meanwhile, Calpine has filed for bankruptcy.

- Beneath the surface of Black Mesa in northeastern Arizona, home to 27,000 Navajos and 10,000 Hopis, are billion of tons of coal and a huge underground lake. In a deal brokered by DOI 35 years ago, the two tribes agreed to lease coal and water to Peabody Energy, the world's largest private-sector coal company. By 2001, Peabody had pumped 40 billion gallons of water from the aquifer to slurry the coal. Surface water is disappearing and the tribes' traditional lifestyle is threatened with extinction. In a hard-won consensus, the two tribes, formerly at odds with each other, demanded that Peabody shut down the Black Mesa coal slurry line by the end of 2005, and when the Mohave power plant was shut down for air quality violations, the slurry ceased operation.

- For the 1,500 years that the Zuni have lived near Salt Lake in northwestern New Mexico, they and other tribes have collected lake salt for religious ceremonies and used the area surrounding the lake as a sacred, neutral sanctuary zone. In 1985, the Zuni regained

control of the lake and some surrounding land from the federal government, which, along with the state of New Mexico and private owners, still controls 97 percent of the sanctuary area. The Salt River Project (SRP), the nation's third largest utility, got a permit to build Fence Lake Coal Mine 11 miles from Zuni Salt Lake. For 20 years, the Zuni built coalitions and challenged SRP legally to stop proposed groundwater pumping that threatened to dry up the lake. SRP dropped its mine plans in 2003, but two months later, BLM announced an auction of exploration rights for gas and oil on other land near Salt Lake.

- Cave Rock, an ancient volcanic remnant on Forest Service land on Lake Tahoe's eastern shore in Nevada, is sacred to the Washoe people, who have lived in the area more than 10,000 years. They want to ban sport climbing at the rock, which attracts climbers from all over the world. Unsuccessful voluntary bans on commercial climbing were followed by lawsuits filed on behalf of climbers by the Access Fund, a nonprofit climbers group. In 2003, the Forest Service issued a decision banning rock climbing as well as off-road motorized vehicle use at Cave Rock. Opponents appealed, lost, then filed a federal lawsuit, which the Federal District Court dismissed. The case currently is on appeal. A similar conflict on National Park Service land at Devils Tower in Wyoming has led 85 percent of climbers to refrain from climbing the sacred monolith during annual Indian ceremonies each June.

Part III uses the lessons learned in the case studies to define what corporate good practice might look like with regard to protecting sacred sites. At one time or another, the cases shared common threads, regardless of their outcome: unity among native groups; active partnerships between Indian and non-Indian allies; counterproductive laws; tribal grounding in spirituality; perseverance and vigilance; regulatory oversight of the area; strong

dependence on legal processes; legislative advocacy; economic sticking points; insistence that tribes had no right to say “no”; and lack of early consultation.

This last element is where the most change is possible regarding good practice. At the heart of fair dealing is “free, prior and informed consent” by indigenous communities to development on or near sacred places. Consultation is most productive when the involved parties adopt these goals:

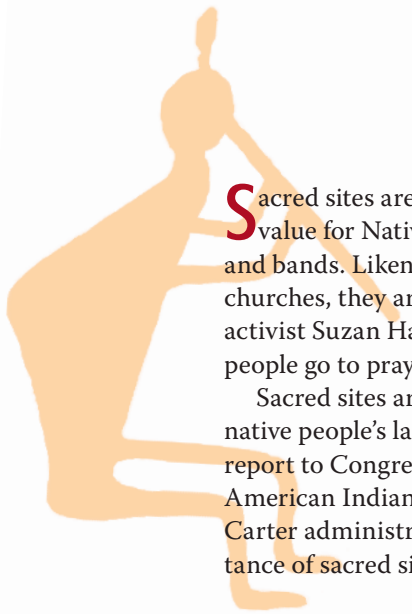
- Inform Native Americans about proposed plans for a corporate project and consult with both tribal government and traditional people as early as possible in the project planning process.
- Build ongoing relationships between corporations and traditional cultural leaders and tribal officials that transcend an individual project.
- Inform tribal peoples about the corporation and its goals, objectives, values and ways of decision-making.
- Ensure that sensitive, confidential information is treated with respect and not made public.
- Educate corporations about why and how sacred places are important to Native Americans and why it is in the public interest to protect such places.
- Stimulate ongoing dialogue between the involved indigenous groups, corporations and, where appropriate, federal, state and other agencies.
- Share long-range planning and monitoring of cultural and other resources at sacred sites and ensure adequate funding for monitoring.
- Involve all of the appropriate Native American leaders in decisions about management practices that appropriately protect sacred places and cultural resources.



PART ONE

Sacred Sites
An Introduction





Sacred sites are places of significant spiritual value for Native American tribes, nations and bands. Likened to naturally formed churches, they are, according to Indian rights activist Suzan Harjo, “lands and waters where people go to pray.”¹

Sacred sites are integral to the *practice* of native people’s land-based religions. In a 1979 report to Congress following passage of the American Indian Religious Freedom Act, the Carter administration described the importance of sacred sites:

The Native peoples of this country believe that certain areas of land are holy. These lands may be sacred, for example, because of religious events which occurred there, because they contain specific natural products, because they are the dwelling place or embodiment of spiritual beings, because they surround or contain burial grounds or because they are sites conducive to communicating with spiritual beings.

There are specific religious beliefs regarding each sacred site which form the basis for religious laws governing the site. These laws may prescribe, for example, when and for what purposes the site may or must be visited, what ceremonies or rituals may or must take place at the site, what manner of conduct must or must not be observed at the site, who may or may not go to the site and the consequences to the individual, group, clan or tribe if the laws are not observed.

The ceremonies may also require preparatory rituals, purification rites or stages of preparation. Both active participants and observers may need to be readied. Natural substances may need to be gathered. Those who are unprepared or whose behavior or condition may alter the ceremony are often not permitted to attend. The proper spiritual atmosphere must be observed. Structures may need to be built for the ceremony or its preparation. The ceremony itself may be brief or it may last for days. The number of

participants may range from one individual to a large group.²

Some sacred sites are discrete geological formations, such as Bear’s Lodge/Devils Tower in Wyoming, while others encompass entire landscapes, such as the Black Hills of South Dakota or the Indian Pass trails that span hundreds of miles from southern California to the Mexican border. The religious uses of sacred sites also vary — prayer circles, burials, visioning, purification and healing. In some cases, only religious practitioners or a tribe’s spiritual elders may use the sites.

Corporate leaders and government land managers often ask: Where is the sacred site? Can its boundaries be delineated? The answer is usually no. Furthermore, native activists themselves increasingly challenge the term sacred site as inadequate and inaccurate, because individual sites are usually part of a web of culturally significant spiritual locales spread across a larger ancestral landscape. This paper uses interchangeably the terms sacred site, sacred place, sacred land, cultural landscape and sacred landscape.

Sacred places are found on reservations, public lands and private lands. In the United States, many of the most visible and well-known sites are on public lands, especially in the West. When Indians were relocated or confined on reservations in the 19th century, ownership of their ancestral lands was claimed by the federal government to preserve future options for commercial development, especially mining, logging, damming and grazing.³ Also, public land comprises a substantial portion of the Western states — nearly 50 percent, for example, in California. If the sacred sites that existed prior to European colonization were distributed evenly over the U.S. landscape, half would be on public land.

To protect sacred places from vandalism and excessive use, native people are keen to shield them from publicity — even within native communities some sites are accessible

only to spiritual leaders. However, sites on public land are under the control of federal land managers whose agencies encourage public recreational access to those lands, along with logging and mining.

Sacred sites on public lands are subject to more stringent federal oversight than private lands, which offers some protection leverage. In several cases involving sites on public land, native leaders have set aside the cultural imperative to keep the sites secret and publicly advocated for their protection.

SACRED SITES AND THE PUBLIC INTEREST

Native Americans' struggle to protect sacred sites has become increasingly visible to the public. More support has followed that visibility. As native leaders reach out to educate the public and to partner with environmental, preservation and human rights groups — and, in some cases, with ranchers, hunters, fishermen and rock climbers — perception is shifting about who benefits

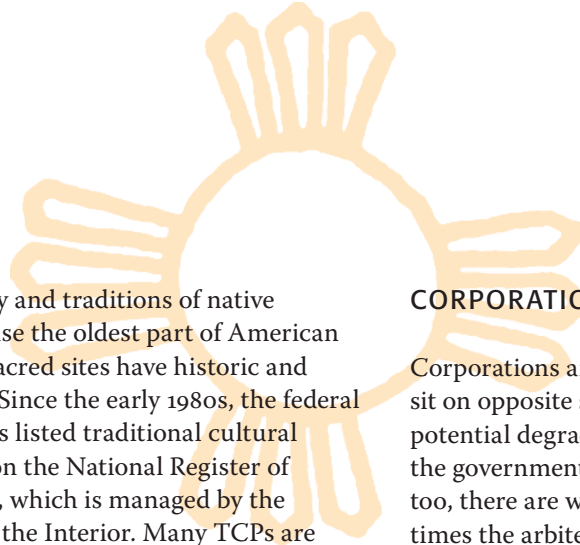
when sacred sites are protected. No longer is protection only in the interest of native groups, but also in the public interest.

- Sacred sites can be viewed as part of the guarantee of freedom of religion. The First Amendment to the Constitution provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...” Sacred places in nature are integral to the practice of the spiritual traditions of Native Americans whose land-based religions deserve no less protection under the law than other religions.

- Protecting sacred sites today is a restorative justice measure. Even though the Bill of Rights guarantees freedom of religion, Native Americans were not allowed to practice their traditional religions for more than 100 years. Draconian “civilization” laws banned ceremonies and visits to sacred places, and condoned confiscation of sacred objects. Protecting sacred sites is an ethical and legal stance that promotes justice and strengthens the principle of non-discrimination.



Christopher McLeod



- The history and traditions of native peoples comprise the oldest part of American history; their sacred sites have historic and cultural value. Since the early 1980s, the federal government has listed traditional cultural places (TCPs) on the National Register of Historic Places, which is managed by the Department of the Interior. Many TCPs are sacred sites. The National Trust for Historic Preservation, a private nonprofit organization, creates an annual list of the Eleven Most Threatened Historic Sites in the U.S., and in recent years has placed Zuni Salt Lake, the Missouri River, Ocmulgee Old Fields and Indian Pass, all Native American spiritual landscapes, on the list. Sacred sites are some of the country's most endangered historic sites.

- The protection of sacred sites has ecological value. Many sacred places are in pristine natural settings, tucked away from development and serving important ecosystem functions, such as watershed protection and biodiversity conservation. Others, such as Mt. Shasta, are in the public spotlight largely because of their spectacular geographical features. Environmentalists often ally with native groups to protect sacred sites.

- Sacred sites have spiritual value for many Americans, not only for Indian tribes. Central to native worldviews is the belief that long-term ecosystem and human survival depend on revering particular locales and nature in general. Non-Indian environmental and faith-based groups easily relate to the words of a Modoc elder working to protect the Medicine Lake Highlands in northern California: "Touch the hearts of the people... Let them know, if they keep going on and on like this all over the world, man will destroy man."⁴

CORPORATIONS AND SACRED SITES

Corporations and native groups typically sit on opposite sides in a conflict involving potential degradation of a sacred site with the government serving as arbiter. Typically, too, there are winners and losers, and sometimes the arbiter is not neutral. Only rarely do companies and native groups conduct two-way consultations aimed at a win-win resolution both sides can live with.

The large gap between the worldviews of the parties in conflict makes negotiation difficult. Most corporations believe in their right to profit from the private ownership of property. Some corporate managers give a nod to corporate social responsibility, but most are focused on generating short-term value to shareholders rather than long-term value to both shareholders and stakeholders. They define their mission as eliminating obstacles to development projects, whatever the social merits of the obstacles. They care about legal compliance. Social and ethical issues are generally considered outside of company purview. Most companies are blind-sided when confronted with demands to define an ethical stance toward sacred sites.

"The great majority of companies around the world have not thought carefully about their responsibilities in relation to human rights," says Mary Robinson, the former head of the U.N. Human Rights Commission.

Most do so only in response to a crisis. As William Miller, the vice-president of Anschutz Exploration Corporation said at the conclusion of a consultation in which the company withdrew from Weatherman Draw, an oil project in Montana's sacred Valley of the Shields: "We're happy to get it behind us."⁵

Companies and native groups often look at the same landscape and see different things. A company may see a gold mine, the potential for garnering resources and company growth;

a native group sees its history, identity and spirituality. Corporate managers typically believe and argue that using the land's resources is in the public interest. It is a view that resonates deeply in the American psyche. A recent article in the *Yale Law Review* argued against sacred sites legislation on the grounds that, by increasing Indian control over public lands, large tracts of the West would be "locked away" and vulnerable to "under-use."⁶

Is there a way to bridge the gap between sacred sites and property rights? Education and shaping society's values are key. "It was a cultural resource we learned a lot more about and one that merits some level of protection," said William Miller of Anschutz Corp.'s concession at Weatherman Draw.⁷

Another hope for bridging the gap is that corporate behavioral norms are fluid. Companies are influenced not only by the broad values of the societies in which they operate, but also by benchmarks and market conditions within their industry. Company managers watch what industry leaders are doing. A perceived risk to a company's competitive advantage and broader "license to operate" will propel voluntary action to change faster than regulatory, legal and political catalysts.

In the past decade, an emerging corporate social responsibility (CSR) movement has articulated new values and defined new norms for corporate good practice in relation to environmental and social performance on issues ranging from toxic emissions and biodiversity protection to child labor, worker health, product safety, lobbying and corruption. The movement — made up of responsible investors, NGOs, faith-based groups, unions, business magazines, opinion makers, international environmental and human rights organizations, and companies themselves — is particularly active in the extractives industry, largely because of its legacy of substantial environmental and social harms. A number of extractive companies have embraced corporate

social responsibility and found it gives them a competitive advantage. Still, many companies lag far behind in terms of understanding what it takes to attain a social "license to operate."

While leading CSR companies have developed substantive environmental management policies, few have adopted codes of conduct or policies on human rights. Fewer still have policies that protect indigenous rights. On the other hand, many human rights organizations and other NGOs in the United States and globally are pressing corporations to explicitly embrace human rights. Including sacred sites protection within a human rights framework would situate advocacy on this issue at the corporate social responsibility movement's cutting edge.

TOOLS FOR PROTECTING SACRED SITES

Native American groups have used four tools to protect sacred sites: laws, policies and regulations; the consultation process; alliances and public education; and harnessing traditional ways and knowledge.

1 *The Law*

The most commonly used set of tools, though far from adequate, is the law. (Please see Appendix Four for a full discussion of existing legislation and legal tools.) The main problem is that, unlike several other countries, such as Australia and Canada, the United States has no substantive federal sacred site legislation, and what exists lacks teeth:

▪ **The American Indian Religious Freedom Act (AIRFA)** of 1978 states forcefully that it is the "policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise... traditional religions... including but not limited to access to sites..."⁸

However, the Act does not mandate any procedures that federal agencies must use to protect Indian access and prevent damage to sacred sites. Because it imposes no penalties on violators and doesn't provide a "cause of action" enabling native people to go to court, the Act is more a statement of intent than a practical tool for either Indians or federal agencies. According to Jack Trope, executive director of the Association on American Indian Affairs, every government agency dealing with Indian tribes from the Defense Department to the Park Service has its own policy on sacred lands.⁹

Ten years after the passage of AIRFA, the Supreme Court ruled that the construction of a Forest Service logging road through a Native American sacred area in northern California was a dispute about government property, not religion.¹⁰ The Court, however, asserted that federal agencies could choose to "accommodate" Native American religious practices and protect sacred sites.

▪ **National Historic Preservation Act (NHPA)** of 1966 requires federal agencies that issue licenses or have jurisdiction over a federal project to consider the effect of their actions on any site in the National Register of Historic Places or that might be eligible for inclusion in it.¹¹ The federal agency must consult with the relevant State Historic Preservation Office and give the Advisory Council on Historic Preservation, a federal agency, the opportunity to comment.

NHPA was amended in 1992 to clarify that "properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization" can be eligible for inclusion on the National Register; that federal agencies consult with Indian tribes or Native Hawaiian organizations about such sites; and that federal agencies establish historic preservation programs in consultation with Indian tribes and Native American organizations. The review process established by NHPA is open to interpretation and is subject to the political

and economic pressures of the administration in power. A sympathetic administration in the White House can — and Bill Clinton did — lean toward protection. When George W. Bush came into office in 2001, things quickly leaned the other way.

▪ **The Federal Land Policy and Management Act** of 1976 is another law relevant to sacred site protection. It allows for the designation of "Areas of Critical Environmental Concern" where "special management attention is needed to protect and prevent irreparable damage to important historic, cultural and scenic values," as well as to wildlife and the environment generally. The directive applies to the Bureau of Land Management (BLM), which has jurisdiction over millions of acres of public land, and BLM policies affect corporations seeking to extract resources on those federal lands.

▪ **International Labor Organization (ILO) Convention No. 169** is the only binding international treaty focused exclusively on indigenous rights. One of its general principles states: "The people concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use..."¹² The ILO is an agency of the United Nations. Its conventions are binding in countries that ratify them and are "guidelines" for countries that do not. The United States has not ratified ILO Convention 169.

▪ **California's SB 18**, enacted in 2004, requires local governments to include Native Americans in their municipal growth planning processes, allows tribes to hold conservation easements, and calls for sacred areas to be considered and protected in open space planning. In 2005, California also enacted SB 922, which expressly protects the confidentiality of site and consultation records from public disclosure.

Using existing laws to protect sacred sites has shortcomings. The lack of a federal government mandate, and the inability to go to court to enforce it, means that there is no true and lasting protection for sacred sites. An administrative decision to reject a particular development proposal can be reversed, and even when one proposed project is quashed, the site remains vulnerable to a new one.

There has been an ongoing effort to pass new national legislation to protect sacred places, but the political obstacles are huge. Mining interests, developers, private property rights groups, and even federal land management agencies such as the National Park Service are resistant. On the tribal side, the great variety of circumstance and cultural practice and the need for confidentiality makes one-size-fits-all national legislation difficult to write, let alone pass.

Total reliance on legal mechanisms also has drawbacks. The legal system is inherently adversarial: There are winners and losers. Laws tend to be rigid and discourage negotiation and engagement. It is doubtful that a law could be written to cover all types of sacred sites. Enforcement of law requires vigilance and resources. The key to social — and corporate — acceptance of the legitimacy of Indian claims to protect sacred sites is respect. Laws help to *build* respect — but they cannot mandate it.

2 Consultation

Federally recognized Indian tribes are sovereign nations, and all consultations and communications between them and the U.S. government are considered to be government-



Christopher McLeod

to-government relations. This unique status of holding sovereignty over tribal members and lands gives native peoples a potentially powerful tool for protecting their sacred sites.

Over the last 20 to 30 years, many tribes have created Cultural Preservation Offices and Tribal Historic Preservation Offices to conduct research and mapping, create policies and issue permits, and take the lead in managing sacred sites and consulting about their importance as cultural resources.

Education is a by-product of consultation. The consulting federal oversight agency, such as the Bureau of Land Management, the Forest Service or National Park Service, or in a few cases the consulting private company, has an opportunity to learn about a sacred site or the depth of an Indian community's concern about potential harm to it. For Indian advocates, the consultation process also provides an opportunity to educate and mobilize their own communities. Education of the general public is often an indirect outcome as well, due to media coverage of the conflict and consultation process.

Despite the fact that federal agencies must consult with sovereign tribal governments and native communities, the lack of a stronger legal backbone reduces the native people's relative bargaining power in a consultation process.

The highly asymmetrical power relations between the parties also can have the undesired effect of wearing down, rather than building understanding and accommodation of native concerns. In consultations with corporations, which are motivated by short-term demands, native people find themselves facing adversaries that often are impatient for results. Even with strong consultation protocols, such as those being developed by the Lawyer's Advisory Committee to the Sacred Lands Protection Coalition, underlying power imbalances are likely to impede the emergence of a just outcome to a consultation process (see Table 1.1). The credible threat of a lawsuit, however, can even out the imbalances, making negotiations more successful.

Additional reflections on consultation appear in the Conclusion (see pages 65–66).

3 *Alliances and Public Education*

To protect sacred sites, Indian advocates are reaching out to build unity among themselves and to gain the support of the wider public by organizing conferences and workshops; lobbying state and federal lawmakers; building partnerships with environmental and preservation

groups; producing radio and film documentaries; and using the Internet and the media to publicize threatening development projects.

Of note are Zuni Salt Lake Coalition, Mt. Graham Coalition, SAGE Council and Black Mesa Trust in the Southwest, and Native American Rights Fund, Sacred Lands Protection Coalition, Seventh Generation Fund and Honor the Earth at the national level.

4 *Harnessing Traditional Ways and Knowledge*

Native peoples feel a community responsibility to care for land and life. Continuing the age-old cultural practices that reflect that responsibility provides them with the motivation to protect their sacred sites. The practices include prayer, ceremony, medicinal plant gathering, hunting, runs, feasts, community deliberation and dialogue, tribal councils, vision quests, storytelling, and language retention and revitalization programs. Northern Cheyenne attorney and activist Gail Small succinctly captures this cultural imperative when she says, "Our spiritual connection to the land is the basis of our resistance."

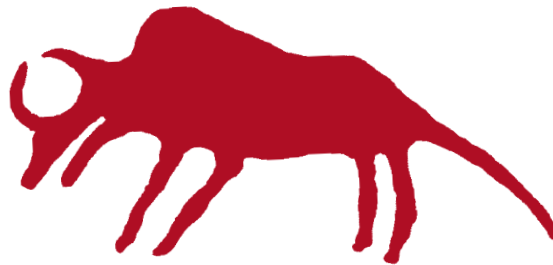


Table 1.1

DRAFT PRINCIPLES FOR FEDERAL AGENCIES FOR CONSULTATION TO PROTECT NATIVE AMERICAN SACRED PLACES

- ① Become informed about the tribes and other native organizations that have historical and/or ongoing ties to the land under the agency's jurisdiction.
- ② Build ongoing consultative relationships.
- ③ Make special efforts to establish relationships with native religious leaders.
- ④ Fully engage tribes, Native Hawaiian organizations, and native religious practitioners in planning processes.
- ⑤ Help the tribes understand the federal agency.
- ⑥ Institutionalize consultation procedures.
- ⑦ Contact tribes, Native Hawaiian organizations and native religious practitioners early and often.
- ⑧ Provide financial assistance if possible and appropriate.
- ⑨ Provide for sensitive information to be treated with confidentiality.
- ⑩ Maintain honesty and integrity in consultation processes.
- ⑪ Establish training programs on consultation with tribes, Native Hawaiian organizations and also native religious practitioners.
- ⑫ View consultation as an integral and essential element of the agency's mission.

SOURCE: "Consultation Protocols for Protecting Native American Sacred Places," draft developed by attorneys consulting to the Sacred Lands Protection Coalition, October 28, 2003



PART TWO

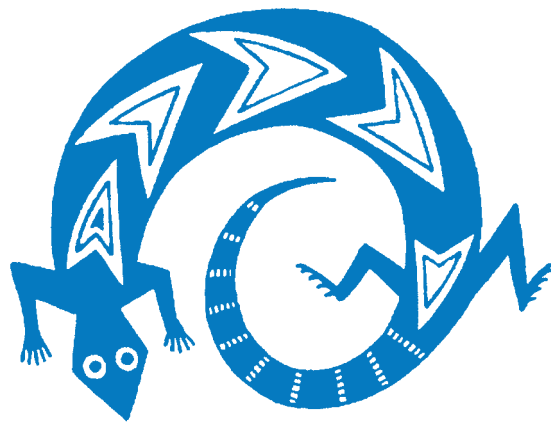
Conflicts
With
Corporations
Over Sacred
Sites



INTRODUCTION TO CASE STUDIES

Conflict between corporations and native groups over sacred sites has grown dramatically and become more visible in recent decades. Given that the entire continent was populated by a multitude of distinct native cultures for millennia prior to European colonization, there are perhaps thousands of sacred sites in the United States. In 2002, the National Congress of American Indians identified 23 ongoing disputes over sacred lands.¹³ Many involved conflicts with corporations.

This section presents six case studies of corporate conflicts with native groups over sacred sites. Five are presented in detail: Glamis Gold at Indian Pass in southern California; Anschutz at Weatherman Draw in Montana; Calpine at Medicine Lake Highlands in northern California; Peabody Energy at Black Mesa in Arizona; and Salt River Project at Zuni Salt Lake in New Mexico. An additional case study, Access Fund at Cave Rock in Nevada and Devils Tower in Wyoming, is summarized in a sidebar.



CASE STUDY #1



Bill Evans

Glamis Gold Ltd.
and Indian Pass

INDIAN PASS

Indian Pass, homeland of the Quechan Indian Nation in the southeastern California desert, is owned by the federal government and managed by the Bureau of Land Management. Glamis Gold Inc., which began acquiring gold mining claims in the area in 1987, does open-pit, cyanide heap-leaching, a process that can scar the landscape and pollute groundwater with cyanide. After protesting for years, the Quechan compromised and agreed to allow a limited portion of its land to be protected under National Register standards. In 2001, Secretary of Interior Bruce Babbitt denied the Glamis proposal for mining in Indian Pass; a year later, President George W. Bush's new interior secretary, Gale Norton, rescinded Babbitt's denial. In 2002, California legislators passed a bill to protect Indian sacred sites and another bill to mandate backfill and other environmental mitigation measures in gold mining operations. Governor Gray Davis vetoed the first bill but signed the second. In October 2003, Glamis filed suit against the U.S. government under the provisions of NAFTA, asking for \$50 million in damages. A hearing is scheduled in March 2007, with a decision months (or years) later.

THE SACRED SITE

In the southeastern desert of California, straddling the borders of Arizona and Mexico, lies the traditional homeland of the Quechan Indian Nation. Archaeological evidence suggests that tribes have used the Indian Pass area and lived off the bounty of the Colorado River for at least 10,000 years.

Originally spanning some 880 square miles, Quechan homelands were seized by the United States and inundated by gold mining interests in the 19th and 20th centuries. Today, some 3,000 Quechan live on a 45,000-acre reservation, and make their living largely by leasing lands for agriculture and sand mining and through gaming and recreational support enterprises.

To the mountainous north and west of the reservation lies the spiritual heartland of the Quechan, including the "Trail of Dreams" in what the Bureau of Land Management (BLM) has designated the "Indian Pass-Running Man Area of Traditional Cultural Concern." Geographical and cultural features around Indian Pass, and the desert trails that connect

them, are integral to contemporary Quechan religious ceremonies and pilgrimages, providing guidance through the spirit world as well as knowledge of Quechan origin, history and destiny. This area is also considered sacred to other Colorado River tribes, including the Mojave, Colorado River Indian Tribes and Cocopah.

The Indian Pass area holds what the Quechan describe as "prayer circles, ceremonial places, shrines, ceramic scatters, petroglyphs, and spirit breaks linked by ancient trails."¹⁴

"If these sites are destroyed," says Willa Scott of the Quechan Tribe's Culture Committee, "we will lose our ability to pass down our beliefs ... our cultural gatherings, funeral rituals, singing, storytellings and teachings. Without these practices, our people will lose the most important part of who we are."¹⁵

Non-indigenous Americans also recognize the cultural riches of the area. The National Register of Historic Places lists 55 archaeological sites at Indian Pass. In June 2002, the National Trust for Historic Preservation listed Indian Pass as one of the Eleven Most

Endangered Historic Places in America. Indian Pass is today owned by the federal government and managed by the BLM. It is part of the Indian Pass Area of Critical Environmental Concern, the Indian Pass and Picacho Wilderness Areas, and is adjacent to areas designated as Critical Habitat for the endangered desert tortoise. It also falls within areas protected by the California Desert Conservation Area and California Desert Protection Act, passed in the 1980s and 90s respectively.

THE COMPANY

Glamis Gold Ltd., a Canadian gold mining corporation based in Vancouver, British Columbia, describes itself as a “premier intermediate gold producer with low-cost production, large reserves, and a consistent, strong growth profile.” In 2005, the company’s market capitalization amounted to \$2.6 billion. Focused on the Americas, the company’s business growth strategy entails the expansion of mines in California, Nevada, Honduras, Guatemala and Mexico.¹⁶ In 2005, Glamis aimed to establish and operate new mines as “efficient low-cost producers,” bringing the cost

of gold production to under \$150 an ounce.¹⁷

In 1987, Glamis began acquiring gold mining claims in the Indian Pass area. To get around the requirement in the 1872 Mining Law that only U.S. citizens can mine on federal lands, Glamis established a wholly owned subsidiary, Glamis Gold Inc., incorporated in Nevada. In turn, Glamis Gold Inc. established Glamis Imperial, which owns the Indian Pass claims as well as other claims in the Imperial Valley.

“Glamis Gold Ltd. and its operating subsidiaries are dedicated to providing environmental stewardship, while maintaining sound business practices,” the company stated in information provided to the New York Stock Exchange in 1996.¹⁸ However, unlike other mining companies, Glamis has never made public an environmental audit or sustainability report. No environmental, social or human rights policy is posted on the company’s Web site, and none of the corporation’s press releases or other public information relate to social or environmental issues.

Moreover, Glamis does not belong to either the Mining Association of Canada or the International Council on Mining and Metals, both of which have developed principles for sustainable mining, including relationships

GLAMIS GOLD IN HONDURAS

SAN IGNACIO, Honduras –

Several hundred residents of a Honduran town last week protested against an open-pit mine run by a unit of Canada’s Glamis Gold Ltd., saying it was damaging their environment.

“It must go! It must go!” some 700 protesters chanted outside the gates of the San Martin gold and silver mine

that has operated in San Ignacio in central Honduras since 1999.

The protesters said Thursday’s demonstration was the start of a movement they hoped would lead to the mine’s closure. They said the open-pit mine was destroying their forests, and threatening local water supplies.

Jose Sierra, head of the govern-

ment’s Department of Mining Promotion, said, however, the mine was meeting all environmental requirements set out in the 10-year concession granted in 1999.

SOURCE: *Reuters News Service, October 21, 2002*



with indigenous peoples (see Table 3.4). Glamis' operations in Central America have been the target of intense community criticism on both environmental and human rights grounds (see sidebar on page 21).

THE IMPACT

Glamis mines gold using what it describes as "simple, highly productive technology" — open-pit, cyanide heap-leaching. The process entails digging up tons of ore, grinding it into fine earth, heaping it onto open-air leach pads on a lining of plastic or asphalt, and spraying the heap with a solution of dilute cyanide. The cyanide percolates down through the heap for several weeks, leaching out particles of gold, which drain into a pond and are then pumped to a recovery plant.

The development of open-pit, cyanide heap-leaching technology in the 1970s opened up ore bodies with a low gold content to economically viable mining. However, environmental concerns have been raised on many counts.

First, the process yields a small amount of gold for a large amount of mined ore. A ton of ore can yield as little as .015 ounces of gold, requiring hundreds of tons of ore to produce one wedding band. Unless companies are required to restore the land through measures

such as back-filling, the open-pit mines leave a deeply and permanently scarred and devastated landscape, a reality well-documented in Nevada, Montana, California and elsewhere.¹⁹ Moreover, even if sites are back-filled, original land features, cultural sites and ecosystems may be lost forever.

Second, cyanide is highly toxic when dissolved in water, producing cyanide gas. Generally, mining companies work hard to keep cyanide heaps from leaking, since leakage entails loss of gold. However, leaks and spills do occur. A cyanide spill from an overflowing tailings dam at a gold mine in Romania in 2000 killed thousands of tons of fish and other marine life, effectively rendering the Tisza River dead.²⁰ In Montana, cyanide heaps leaking into local groundwater prompted passage of a voter initiative in 1998 that banned cyanide heap leaching in the state.²¹

As originally proposed by the company, the Glamis Imperial project at Indian Pass entailed three open pits on 1,650 acres with, on average, about one ounce of gold retrieved for every 422 tons of ore extracted. The largest of the open pits would have been about 850 feet deep, with waste rock piles as high as a 30-story building. Glamis did not propose to backfill it. The ore body at Indian Pass is of a lower-than-average grade, requiring a higher-than-average ratio of material disturbed to metal recovered. A low grade of ore means a low profit margin, suggesting that environmental protection or mitigation measures could make the venture unprofitable.

The combination of a large open pit, related mine roads, power lines, waste rock piles, and water wells draining the desert aquifer, as well as potential cyanide pollution of groundwater, would effectively mean the obliteration of Indian Pass as a place of spiritual practice and archaeological significance for the Quechan people. In a report prepared at the request of the BLM, the Advisory Council on Historic Preservation concluded that, even with mitigation measures proposed by the company, "the

project would be so damaging to historic resources that the Quechan Tribe's ability to practice their sacred traditions as a living part of their community life and development would be lost."²²

THE CONFLICT

From 1987 to 2004, the Glamis Imperial Project wended its way through a virtual hurricane of tribal, NGO, community and government opposition. The first hurdle was the California Desert Protection Act (CDPA). Glamis asserts the company held off substantial investment in Indian Pass until 1994, when the implementation of the Act was finalized. Glamis claims it then became clear that the project was outside the wilderness areas designated by the Act. Glamis filed a "plan of operation" in December 1994 with both the BLM and the state of California to obtain approval of its proposed gold mines.²³

BLM spent six years reviewing the Imperial Project, a process that included several public hearings, many cultural resource reports, two drafts of an Environmental Statement/Environmental Impact Report (DEIS) in 1996 and 1997, and a final EIS/R in 2000. Extensive public comment was received during each step, with the vast majority of comments in opposition to the mining proposal.

The BLM, however, consulted with the Quechan Tribal Council and the Quechan Cultural Heritage Committee on the surveys and environmental documents late in the process, only after the first DEIS/R was released. Upon learning directly from the tribe of the spiritual significance of the site, the tribe requested and BLM undertook a more intensive archaeological investigation and Native American consultation report, which led to designating Indian Pass-Running Man as an Area of Traditional Cultural Concern (ATCC). Although the Quechan view their entire traditional territory as continuous and without



Bill Evans

Indian Pass, cacti blooms

boundaries, they agreed to the more limited ATCC designation in order to more readily conform to National Register standards, and to try to protect the key areas under direct threat from the proposed gold mine.

At each step of the process, and during subsequent government-to-government consultation between the BLM and the tribe, the spiritual, cultural and archaeological values of Indian Pass were reaffirmed and immitigable environmental impacts were documented. In 1998, at the petition of the BLM, the Indian Pass-Running Man ATCC was withdrawn from further mining applications — but the then-existing Glamis claims were grandfathered in. In early 1999, the Advisory Council on Historic Preservation (ACHP) recommended that, "Interior take whatever legal means [are] available to deny approval for the project."²⁴ Tribal and other Native American groups joined with a broad spectrum of preservation and environmental groups to make the case with the government and the public.

Glamis remained unmoved, however. It first tried to mollify the tribe by offering a job and a pickup truck to a tribal member. It later, and to this day, tries to minimize the tribe's views by stating that its sacred area is too large. Quechan President Mike Jackson was often quoted as saying, "What part of 'no' don't they understand?"

In late 1999, then DOI Solicitor John Leshy

issued a legal opinion finding that the BLM could deny the mine, based upon the ACHP and other findings. Glamis filed suit in federal court against DOI claiming that Leshy's opinion was wrong. The tribe moved to intervene in the suit. The court dismissed Glamis' claim. Next, Glamis said it would not pay for the final EIS/R to be produced. BLM ultimately provided the funds and the final report was issued in November 2000.

Finally, in January 2001, Secretary of Interior Bruce Babbitt denied the Glamis Imperial proposal due to its cultural and environmental impacts — the first time a proposed mine project was denied under the 1872 Mining Law.

Two months later, Glamis filed suit against the Department of Interior in the Washington, D.C., District Court challenging Babbitt's decision on the grounds that it misinterpreted the law. Glamis' lawyers argued that, while the Department of Interior had followed its own policies, the mining law does not generally allow a mine to be denied and that special regulations required for the protected California desert had not been promulgated by DOI. In November 2001, the tribe's motion to intervene by right was granted by the court. Just days later, without public notice or consultation with the Quechan, George W. Bush's newly appointed interior secretary, Gale Norton, rescinded Babbitt's denial of the mine so that the mine could be reconsidered. Glamis quickly withdrew its lawsuit.

As a result of intense public outcry and Quechan-led organizing, California state senators introduced two state bills in 2002, one protecting Indian sacred sites and the other mandating backfill and other environmental mitigation measures to restore mining sites to pre-mining conditions. Largely due to multi-stakeholder consultations involving Indian and business leaders, both bills passed the California legislature.²⁵ However, bowing to pressure from developers and business groups, former Governor Gray Davis vetoed the sacred sites protection bill. The environmental

legislation requiring backfilling and recontouring, which specifically aimed to make mines in the desert more environmentally responsible, was signed into law by Gov. Davis in April 2003.

In October 2003, Glamis again filed a claim, this time against the U.S. government under Chapter 11 of the North American Free Trade Agreement (NAFTA). Glamis claims that it was expressly targeted by the California mining measures and, therefore, it asserts the California law breaches NAFTA's provision for Minimum Standard of Treatment for foreign investors. Moreover, Glamis claims that the legislation constitutes a measure "tantamount to expropriation," causing the company to lose \$68 million in preparatory investment and assessed value of the mine. NAFTA allows expropriation only for a public purpose and on a non-discriminatory basis. Still unwilling to concede that protection of a sacred site constitutes a public purpose and wanting to deliver shareholder value, Glamis is seeking \$50 million in damages.²⁶

LESSONS LEARNED

- Political climate can influence a tribal group's success in engaging with the government. When representatives of the government are willing to listen, tribal groups can intervene in government processes and protect a sacred site. Under the Clinton administration, the concept of sacred site protection made legal and moral headway, and protection of Indian Pass was defined as being in the public interest. The change of administrations essentially reversed this course at the federal level.

- Partnerships between Indian, preservation and environmental groups can effectively press for sacred site protection in both administrative processes and legislative action at the national and state levels. Intratribal cooperation — where the tribal government and its cultural or spiritual leaders work toward a common goal and invest resources in it — can



◀ View from Black Mountain

low-cost, low-profit margin companies, especially ones lacking a product that consumers can readily boycott. Companies like Glamis tend to reject voluntary initiatives because their reputation for social responsibility is unimportant. On the contrary, they generally do not take “no” for an answer, no matter how loudly and often they hear it. This makes it

be critical to successes. Intertribal cooperation — where leadership from many tribes pull together technical and political resources toward a common goal — also can be an important factor.

- Direct engagement between Indian and business leaders can be the key to drafting and passing legislation. With a longer and wider consultation process in California, business leaders who feared — and largely misunderstood — the implications of the sacred sites bill might have been persuaded to drop their opposition. Working with these diverse groups ultimately proved worthwhile when the later bills, SB 18 and SB 922, were passed and enacted through bipartisan support.

- The lack of national and state legislation that specifically protects sacred sites is a fundamental, structural weakness for sacred site protection advocacy. Without a legislative backbone, even high-level administrative decisions can be quickly overturned when political winds change. Moreover, national legislation with one overarching policy designed to protect sacred land would correct the current situation of inconsistent multiple-agency policies. Even Glamis Vice President Charles Jeannes argued, “There needs to be some coordination among... government entities as to how this is resolved.”²⁷

- National or state-level sacred site legislation is especially important in cases involving

considerably more difficult to devise advocacy strategies that are effective in exerting pressure on the corporation.

- New legislation or policies should, as much as possible, expressly extend to pre-existing claims and licenses; without them, no matter what level of protection is achieved for these places, the entitlement issues remain. More thought should be given to the feasibility and appropriateness of allowing land exchanges or establishing funds to retire claims and licenses. Any such policies, however, should assiduously avoid creating incentives to site industrial uses in culturally sensitive areas.

- The power of harnessing traditional knowledge and practices is key. The Quechan used gatherings, spirit runs, and seeking knowledge from the elders and ancestors to inform their strategy and sustain their effort. Bringing in knowledgeable, caring consultants and advisers to supplement these efforts is also helpful, though outsiders must respect the traditional ways and understand the need for confidentiality.

- When consultation is neglected, undertaken late, or intentionally avoided, conflict is guaranteed. This case study shows it would have been in everyone’s best interest to involve tribal entities early and often in both planning and project development processes. The viability of collaborative problem solving efforts also should be explored.

CASE STUDY #2



Scott Pinzing

Anschutz Exploration Corp.
and Weatherman Draw

WEATHERMAN DRAW

Weatherman Draw in south-central Montana, owned by the federal government and managed by BLM, is a 1,000-year-old cultural site sacred to many tribes for its cliff paintings of shields, animals and humans. Anschutz Exploration Corp. acquired two leases to mineral rights there in 1994, expecting drilling to yield 10 million barrels of oil over 20 years. The exploration work had the potential to increase vandalism in this remote location, destroy the canyon's serenity and irreparably damage "a living spiritual center." Leaders from 10 tribes plus environmental and preservation groups decided to fight the leases publicly after BLM approved one exploratory well. They appealed the decision to DOI, launched a media campaign and enlisted congressional help. After meeting with its opponents, Anschutz dropped its plans and donated the leases to the National Trust for Historic Preservation.

THE SACRED SITE

Nestled in south-central Montana is a small canyon that contains the largest collection of Native American rock art on the continent. Called the Valley of the Shields or the Valley of the Chiefs by native people, the canyon's walls feature paintings of large, multi-hued drawings of shields, animals and humans created by members of a dozen different tribes over the last thousand years. Some shields have hands and feet, perhaps representing specific individuals who can be traced to Mexico.

The canyon is sacred to many tribes, including the Crow, Blackfeet, Comanche, Northern Arapaho, Northern Cheyenne and Eastern Shoshone, and is historically a place of peace. In winter, tribal members still engage in vision quests, burials, prayers and the gathering of medicinal plants there. "This isn't just some place on a hill," says Jimmy Arterberry, a Comanche preservation leader. "This is a living spiritual center. The church is alive here."²⁸

The valley is known as Weatherman Draw to non-native people because it was named after the Weathermon family that immigrated from Germany and settled in the area. (A draw is a gully or ravine.) The area spans about 4,270 acres and once was part of the Crow

Reservation. Today, it is owned by the federal government and managed by the BLM. Until recently, when the area was thrust into the national spotlight, it was unknown to the general public. Indeed, the remoteness and wildness kept away even large concentrations of tribal members. In 1999, in recognition of its significant cultural values, the BLM designated Weatherman Draw as an Area of Critical Environmental Concern (ACEC).

THE COMPANY

The Anschutz Exploration Corp. is a Denver-based oil company owned by billionaire Philip Anschutz. Both the corporation and its owner shun publicity: Neither the corporation nor its parent company, Anschutz Co., has a Web site. Philip Anschutz has given no interviews since 1974.

What is known is that Philip Anschutz is one of the richest people in the United States — his net worth was estimated to be nearly \$9 billion in 2001. He is a strong supporter of the Republican Party, contributing \$300,000 to the party and the Bush campaign between 1997 and 2001.²⁹ Anschutz owns or has major stakes in high-profile companies including United Artists,

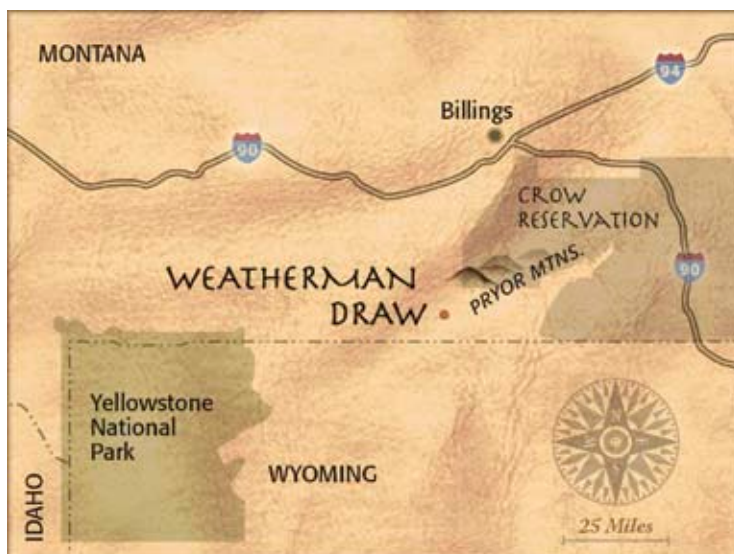
Qwest Communications and the Los Angeles Lakers. He is deeply involved in energy development and is one of the most active players in oil and gas exploration in the Rocky Mountain region. He also is an avid art collector.

In 1994, Anschutz Exploration Corp. acquired two leases, issued originally in 1985, to mineral rights in Weatherman Draw. The leases cost Anschutz \$1 per acre per year. If successful, the exploration was projected to yield about 10 million barrels of oil over 20 years. According to Anschutz estimates, the probability was one in seven that oil would be discovered through exploratory drilling.

THE IMPACT

Oil drilling, like any other commercial development of Weatherman Draw, would expose the area to a much higher level of publicity and public access. Anschutz planned to improve an abandoned cattle road that passes within a half mile of the canyon and the rock art. With increased public usage the potential for vandalism grows. At other sacred sites, and indeed in Weatherman Draw itself, non-native visitors have drawn graffiti on or near petroglyphs, and have even used them for target practice. Rock art panels are sometimes removed entirely and sold on the international black market.

Public access and commercial exploitation would also destroy the quietude and serenity of the site. Noisy road traffic, drilling equipment and oil workers would, from the Native American perspective, “disturb the power of the spirits.” In a statement to the BLM, the Northern Cheyenne Tribe pointed out that, “If the spirits that exist in the area were driven

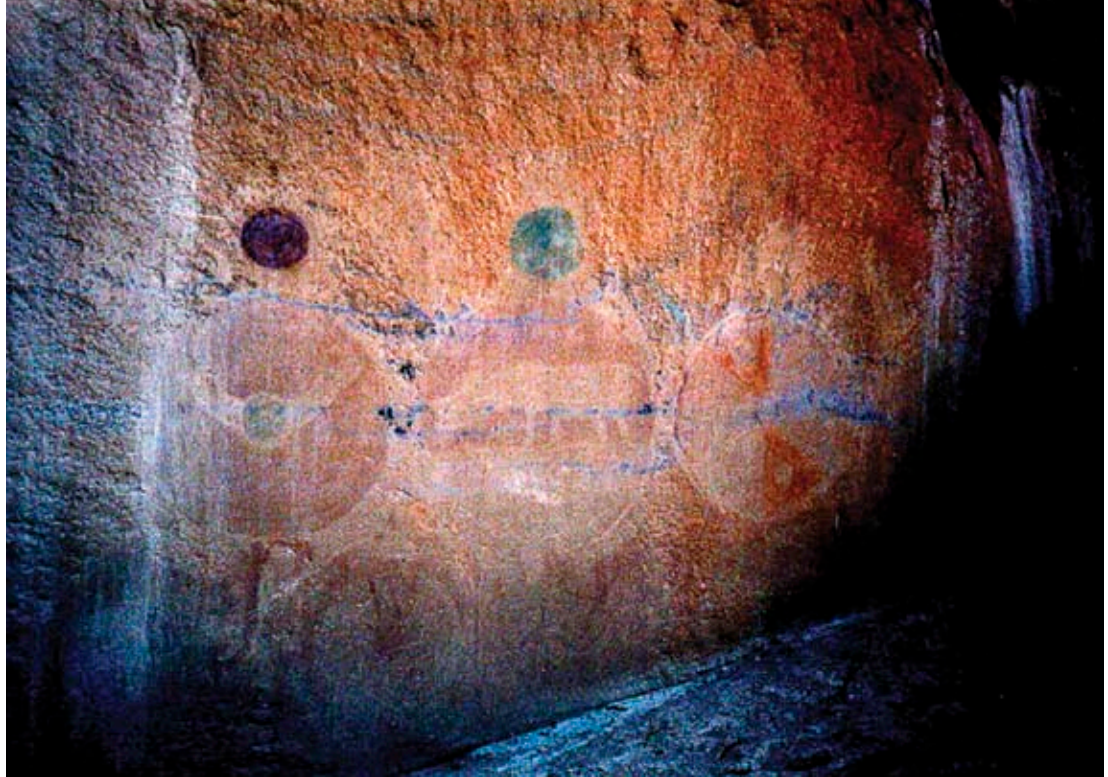


away, important Northern Cheyenne ties with the spiritual realm would be irreparably severed.” Disturbance of the site could affect non-native peoples as well. An Eastern Shoshone tribal member warned the BLM that Indian rock art is “spiritually potent” and “exposure to the power of these places can and will bring harm to people.”³⁰

THE CONFLICT

For six years, Anschutz’ application to drill for oil was kept in limbo while the BLM considered whether and how to protect the site. Tribal leaders made their concerns known quietly to the BLM. In an August 1999 letter to the BLM, Todd Kulstrom, the company’s land manager, warned that “Anschutz’ patience had ended.”³¹ Under the terms of the ACEC, oil, gas and mineral exploration is not allowed in Weatherman Draw. However, the leases were “grandfathered” because they pre-dated the tighter regulations.

In February 2001, 12 days after President Bush’s inauguration, the BLM approved a single exploratory well in Weatherman Draw. Permission to drill was based on an Environmental Assessment that considered only the



Scott Prinzing

Cliff painting of three shields in Weatherman Draw

impacts of exploration, rather than a more stringent Environmental Impact Statement, which would have had to consider the potential effect of full-blown oil development.

The BLM's decision catapulted Weatherman Draw into the national spotlight. Previously reluctant to reveal much about the site's location and sacred characteristics, tribal leaders decided to fight the decision, including launching a major media campaign, even if it meant exposing the site to more publicity. As Jimmy Arterberry said, "We decided to try to protect it at all costs."³²

Ten tribes joined together to appeal the BLM decision, along with environmental and preservation groups.³³ Their appeal was based on the limited scope of the Environmental Assessment, but the tribes also questioned whether the BLM had fulfilled its statutory obligation to consider the project's cultural impacts. Anschutz' land manager has acknowledged that the company "worked closely with BLM officials" to tailor the original proposal in a way that would allow BLM to avoid an environmental impact review, thus deliberately avoiding the issue of what would happen to cultural resources should oil be discovered.³⁴

For Anschutz, the BLM approval represent-

ed long overdue relief from regulatory limbo. "We understood this was a sensitive area," said the company's land manager, "and we wanted to work with the people in the area." But he found the Native American response "vague and without clarity."³⁵

In May 2001, the BLM upheld Anschutz' right to drill for oil in Weatherman Draw. With a nod to the opposition, the BLM stipulated that there should be a fence around the rock art areas and a security guard and locked gate on the company's access road. Tribal leaders, however, argued that the obscurity afforded by wilderness would protect the site far better than a modern sentinel and chain link fences. A Sierra Club organizer said the measures were like "putting lipstick on a pig — it's still a pig."³⁶

The tribes and their allies then took three steps: They appealed the decision to the Department of Interior, garnered media coverage pointing out the irony of a billionaire art collector threatening Native American art, and sought help from Congress. In June 2001, Representative Nick Rahall (D-WV), introduced HR 2085, Valley of the Chiefs Native American Site Preservation Act of 2001. Rahall likened Anschutz' Weatherman Draw project to placing an oil rig in the Sistine Chapel.

“Are we really that desperate? Are we really that greedy?” he asked his congressional colleagues.³⁷

Faced with a potentially lengthy and expensive legal challenge, as well as increasingly critical public exposure, Anschutz entered into direct negotiations with concerned tribes and the National Trust for Historic Preservation. The negotiations led to a precedent-setting agreement on April 23, 2002: Anschutz dropped its oil drilling plans for Weatherman Draw and donated the leases to the National Trust, which will hold them until they expire.

“Considering the size of the resource, the time and effort it would take to get it, and the value of the cultural resource, we chose to forego the opportunity,” said company Vice President William Miller. “It’s simply risk management.”³⁸

In February 2003, the National Trust for Historic Preservation publicly honored the Anschutz Exploration Corp. with a National

Trust President’s Award.

“Anschutz did the right thing, and thereby provided a model for other corporations to follow,” said Trust President Richard Moe. “The sensitivity and good citizenship that this company has demonstrated deserve the thanks of everyone who cares about preserving America’s heritage.”³⁹

LESSONS LEARNED

- The media is potentially a powerful and valuable tool. The decision by the tribes to go public was crucial in gaining widespread support and shining a critical spotlight on corporate behavior. While most companies are sensitive to having their reputation damaged, Anschutz — both the company and the man — is especially publicity-shy. However, publicity presents a dilemma to tribes seeking to protect sacred sites from vandalism through anonymity.

- A third party trusted and respected by both the corporation and the Native American stakeholders can help facilitate the process. The Anschutz-Weatherman Draw conflict was resolved through a direct negotiation between a corporation and tribes, mediated by the National Trust, in this case a mutual ally. Factors in this successful negotiation included: the large number of tribes and the unity they maintained as to the goals of the negotiation; strong, active partnerships and alliances with the environmental and preservation communities; the threat of a credible, well-grounded legal challenge; and the prospect of new protective legislation.

- Coalition-building and the ability to maintain the coalition’s unity are greatly enhanced by clearly articulated, focused goals reiterated throughout the process.



Scott Prinzing

CASE STUDY #3



Calpine
and Medicine Lake
Highlands

MEDICINE LAKE HIGHLANDS

Medicine Lake Highlands in northeastern California has been used by various tribes as a sanctuary and place of healing for 10,000 years. Calpine Corp. is the world's largest supplier of geothermal energy. In the mid-1980s, without consulting local tribes, the BLM granted geothermal developers 43 leases covering 66 square miles in the Highlands. In 1996, Calpine and CalEnergy (later purchased by Calpine) began consulting with tribes about their plans for two geothermal power plants at Medicine Lake, plants that the environmental impact statements said would forever damage native traditional uses as well as the pristine environment. In May 2000, one project, Telephone Flat, was denied by the federal agencies at the local level, but the denial was overturned in 2002 by the Bush administration after Calpine filed a \$100 million takings claim. The Fourmile Hill Project was approved with the condition that there be a five-year moratorium on further geothermal development in the Highlands. The Pit River Tribe and the Native Coalition for Medicine Lake Highlands Defense filed appeals and lawsuits. At the time of the reversal, the DOI set mitigation measures for the projects, and the tribes found new allies through grassroots organizing and the socially responsible investment community. Lawsuits filed in June 2002 and May 2004 by the Pit River Tribe and environmental groups against Calpine and the federal government are still pending. Meanwhile, Calpine has filed for bankruptcy.

THE SACRED SITE

Medicine Lake Highlands is a volcanic area in northeastern California, 30 miles east of Mt. Shasta, that encompasses forests, lakes, springs, caves and glass-like lava flows. The Medicine Lake Caldera is the continent's largest shield volcano — a volcano with broad, gentle slopes built by the eruption of fluid basalt lava.

The Medicine Lake Highlands region is sacred to many of the native people in northern California, including the Pit River, Modoc, Shasta, Karuk and Wintu, who recognize its strong healing energy. According to Gene Preston, former chairman of the Pit River Tribal Council, the Highlands "are a place where the full magnitude of the Creator's presence can be experienced, a place where the Creator left messages for the people on how to live."⁴⁰

Native people believe Medicine Lake's

waters have the power to heal and renew. For at least 10,000 years, they have used the Highlands for ceremony, vision questing, prayer, medicinal plant gathering, healing, hunting and obsidian trading — activities that continue today. Traditionally, the Highlands area was considered a sanctuary, a place of peace, where tribal members put down their weapons to be calmed and cleansed by the land and water.⁴¹ The area continues to have a powerful impact, felt by non-natives and natives alike. As Modoc elder Charlene Jackson put it, Medicine Lake "belongs to all people once they get to know what the spiritual part of life is all about."⁴²

Medicine Lake Highlands is located within the Modoc, Klamath and Shasta-Trinity National Forests and is 10 miles south of Lava Beds National Monument. In 1999, the Medicine Lake Caldera was designated as a Traditional Cultural District by the Interior

Department's Keeper of the National Register of Historic Places.

THE COMPANY

Calpine Corp., based in San Jose, California, is an energy company that develops and operates power plants utilizing natural gas and geothermal steam. Founded by CEO Peter Cartwright and a team of four in 1984, Calpine is one of the largest independent power producers in the United States. As of mid-2005, Calpine had 3,500 employees and operated 92 power plants with the capacity to generate 27,000 megawatts of electricity. With 19 plants in The Geysers region of northern California, Calpine is the world's largest supplier of energy from geothermal sources. In December 2005, Calpine filed for bankruptcy protection, but continued to operate after CEO Cartwright left the company.

According to the company's Web site and annual report, Calpine's business strategy is based on rapid growth as a supplier of "clean, reliable power." The company claims that it has the lowest emissions of all U.S. power companies. In 2002, the company increased its generating capacity by more than 70 percent. At the end of 2005, Calpine was constructing eight new facilities, expanding its capacity by an additional 3,500 megawatts.

However, financial analysts questioned Calpine's growth strategy, and in October 2003, Moody's downgraded Calpine's debt rating, citing among other factors that the company was financially over-leveraged.⁴³



In 2004, the company attempted to reduce its debt by selling oil and gas properties and natural gas power plants but not its geothermal leases.

Between the mid-1980s and 2001, Calpine obtained 43 leases covering some 66 square miles of the Medicine Lake Highlands. BLM initially granted the leases to various geothermal companies without consulting any local Native American tribes. By 1996, Calpine was seeking approval for a geothermal power plant project at Fourmile Hill, just outside the

Medicine Lake Caldera, while CalEnergy proposed another at Telephone Flat, in the heart of the caldera. The 48-megawatt Telephone Flat project would encompass eight square miles and occupy one-fourth of the Traditional Cultural District. The Fourmile Hill geothermal power plant project would encompass six square miles and be located just outside the Cultural District. Calpine purchased CalEnergy's leases in October 2001.

Calpine describes itself as "committed to fulfilling the continuing need for clean, efficient, reliable electricity in an environmentally responsible manner."⁴⁴ In March 2004, the University of Colorado selected Calpine for a sustainable business award for its environmental performance in Colorado.⁴⁵ In addition to environmental responsibility, Calpine's Code of Conduct emphasizes "integrity" and good community relations.

According to then-CEO Cartwright, "Calpine is committed to being regarded as a welcome member of every community where we have power plants, offices or other facilities."⁴⁶

THE IMPACT

The federal government reviewed the environmental and cultural impacts of geothermal development at Medicine Lake, and conducted consultations with local tribes starting in 1996. An environmental impact statement concluded that Native American traditional uses would suffer irreversible adverse effects from geothermal development, which led to Medicine Lake's 1999 designation as a Traditional Cultural District. However, before this designation was made, the BLM renewed Calpine's leases in 1998 without consulting local tribes.

To tribal practitioners, *any* drilling of the sacred Medicine Lake lands constitutes a desecration. According to Gene Preston, then-chairman of the Pit River Tribal Council, the

scale of Calpine's proposed development would turn the area into an industrial zone.⁴⁷ Calpine has publicly announced intentions to develop up to 1,000 megawatts of capacity at Medicine Lake. Approval of the first project would smooth the way for additional plants. Beyond the roads, clear cuts, drill rigs and transmission lines, each power plant would entail a 100-foot tower, operating 24 hours around the clock, lit by bright lights at night.

Despite its "clean, green" image, geothermal power can have significant environmental impacts, including disruption of wildlife, loss of medicinal and other plants, air emissions of toxic hydrogen sulfide, boron, mercury and arsenic, and groundwater contamination. Water pollution is of special concern. The pure waters of the Medicine Lake Highlands, including the Fall River and Pit River, flow into the California aqueduct system, which provides water to millions of users throughout the state as far south as San Diego, 650 miles away.⁴⁸

In addition to its spiritual and cultural impacts on native peoples, damage to the remote, pristine area would impair recreational uses and what environmental economists call "existence value" — the value that people place on the existence of wild places, pure water, animals, biodiversity and more. The environmental, social, cultural and historical impacts of the proposed power plants at Medicine Lake are so severe, according to Clancy Tenley of the U.S. Environmental Protection Agency, that "you could not by any stretch of the imagination call it green energy."⁴⁹

While environmental and cultural values are expected to be harmed, the power plants could bring local economic benefits. Calpine has promised jobs and college scholarships to local tribal members, as well as financial support to the Shasta Tribe in its lobbying of the Bureau of Indian Affairs for federal recognition.⁵⁰

THE CONFLICT

The conflict between native groups and Calpine over Medicine Lake erupted in 1996, when the Pit River Tribal Council and other Indian groups were first consulted by the BLM. The Pit River Tribal Council passed a resolution opposing geothermal development after the BLM had already begun a review of the two proposals. Since then, tribes have engaged in what former Pit River

Chairman Gene Preston calls “after-the-fact consultations” and environmental review.⁵¹

Many tribal councils and groups opposed development at Medicine Lake, though some favored it, concluding that economic benefits outweighed cultural concerns. More than 90 percent of public comment letters opposed the geothermal projects.⁵² In 1998, BLM renewed Calpine’s leases, again without consulting local native people.

In May 2000, during the final year of the Clinton administration, the BLM announced a compromise, approving the project at Fourmile Hill but imposing a five-year moratorium on further geothermal development in the Highlands and blocking the Telephone Flat project because of concerns about intrusions in the Traditional Cultural District.⁵³ In response, Calpine sued the federal government for \$100 million (for “taking” a private property right without compensation).

In June 2001, with a new administration setting policy, the BLM lifted the moratorium. In April 2002, the government settled the lawsuit with Calpine and agreed to reconsider the May 2000 compromise. On June 13, 2002, the Pit River Tribe, the Native Coalition for Medicine Lake Highlands Defense and environmental organizations filed a lawsuit chal-



Christopher McLeod

William (Jimbo) Simmons protests at Calpine headquarters in San Jose, California, January 2006

lenging the approval of the Fourmile Hill project in the 2000 decision. (This lawsuit was denied in February 2004 and was appealed to the Ninth Circuit Court of Appeals.)

In November 2002, the Bush administration officially overturned the compromise agreement. According to Mark Rey, an undersecretary in the Agriculture Department, the decision was heavily influenced by the Calpine lawsuit. The Justice Department had advised that Calpine had a strong legal position and “boatloads of taxpayer money” would be lost if the Clinton-era denial was not overturned.⁵⁴

With a nod to native concerns, a Record of Decision in 2002 approved the originally denied Telephone Flat project with new conditions. Calpine was required to realign a 13-mile power line to make it run parallel to an existing road, thus avoiding the Traditional Cultural District. Calpine also modified the plant design to reduce environmental impacts by re-injecting water into the underground geothermal pool to be reheated and re-used.⁵⁵

In spite of these mitigations, the Pit River Tribal Council sought help from Congress. In a public statement, Sen. Barbara Boxer (D-CA) wrote, “If the project were to proceed, the unique and sacred character of the Medicine Lake Caldera will forever be lost.”⁵⁶

In its official statements, the Interior Department claimed: “The increased national and state focus on renewable energy, along with the further mitigation measures required, justified approval of the project.” On the same grounds, the California Energy Commission provided nearly \$50 million in subsidies to the two projects. Opponents point out the irony that the electricity generated by the plants will be exported out-of-state to the Bonneville Power Administration — for use in Idaho, Oregon and Washington.⁵⁷

Subsequent actions taken by both parties further escalated the conflict. In October 2003, Calpine applied to the Forest Service for permission to conduct 200 surveys in the area around Medicine Lake in search of further geothermal potential.⁵⁸ Native American and environmental groups, on the other hand, reached out to a new ally, the socially responsible investment community. Calvert, the nation’s largest family of socially responsible mutual funds, filed a shareholder resolution requesting Calpine to “cease and desist development in the Medicine Lake Highlands and develop, implement and publish a written policy on the rights of indigenous peoples.”⁵⁹ Amid substantial publicity, the resolution received more than 8 million votes at Calpine’s May 2004 shareholders meeting. Representing 4.3 percent of the total number of votes, this was insufficient to pass the resolution. However, the effort made the company aware that investors placed value on the protection of sacred sites. Awareness did not translate into action. In June 2004, Calvert divested its share of Calpine, citing the fact that the company did not meet the requirements of the mutual fund’s policy on the rights of indigenous peoples.

In May 2004, the Pit River Tribe, the Native Coalition, the Mount Shasta Bioregional Ecology Center and a coalition of environmental organizations filed two lawsuits against the federal government and Calpine challenging approval of the Telephone Flat project.⁶⁰ In the suits, the plaintiffs alleged that the BLM and

the Forest Service violated federal laws pertaining to geothermal development, the environment, historic preservation, religious freedom and the Indian trust doctrine. The lawsuits are pending and have been stayed by Calpine’s Chapter 11 bankruptcy protection.

Grassroots organizing also continued to expand and gain momentum, targeted at monitoring Calpine’s compliance with the conditions of its 2002 project approval. The Telephone Flat Geothermal Project Oversight Committee was formed, comprised of representatives from the Pit River Tribe, Klamath Tribe, Shasta Nation, Native Coalition, Save Medicine Lake Coalition, Mount Shasta Bioregional Ecology Center, Medicine Lake Homeowners Association, and an administrator representing Siskiyou County. At a September 2005 meeting to review Calpine’s compliance with the 2002 Record of Decision, the U.S. Forest Service and BLM heard numerous strong objections from the committee regarding:

- Failure to involve Native American tribal members in the archaeology plans.
- Failure to adequately survey for endangered birds such as northern spotted owls and goshawks.
- Inadequate plans to control hazardous materials, monitor hydrology and reclaim native ecosystems.

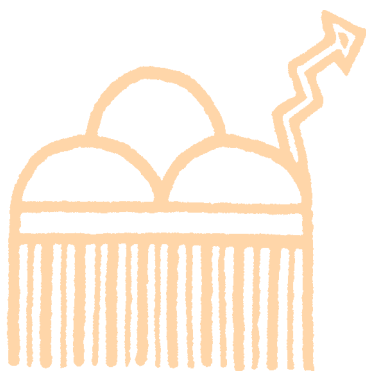
Beyond the inadequacy of Calpine’s compliance with the conditions of the Record of Decision, the Committee re-opened larger concerns about the project itself. In its defense, Calpine argued that geothermal energy is a cleaner alternative than nuclear or coal-fired plants. By the conclusion of the meeting, the Forest Service and BLM had decided to put further work on the geothermal project on hold.

“In light of the issues brought up by the Committee,” said BLM public affairs officer Jeff Fontana, “we felt further review was necessary.”⁶¹

LESSONS LEARNED

As of October 2006, the future of Medicine Lake remains uncertain, but it is possible to glean several lessons from the way the conflict has been handled:

- Compromises made by the government intended to soften the blow of sacred site degradation are not final until the legal process is over. Until judicial review is final, a change in administrations and governing philosophies can result in the unraveling of a compromise. Native groups felt deeply betrayed by the government's reversal of its original decision to deny the Telephone Flat project, and by its lifting of the five-year moratorium on further geothermal development. Calpine may or may not have had a strong legal case challenging the denial of the Telephone Flat project, but it should have been tested by the federal trustees and not used as an excuse to undo a decision with which the new administration disagreed.
- Early, prior consultation might have generated alternative locations for the proposed geothermal projects (most of northeastern California is volcanic and has geothermal potential) and a development plan acceptable to both Calpine and the Indian tribes, avoiding the intense ill will that has been associated with this conflict and that, as of mid-2006, continues to stall the project.
- Alliances with the corporate social responsibility (CSR) movement can result in more leverage on a company. The shareholder intervention of Calvert brought the issue of sacred sites to the foreground of investors' minds and conveyed to the corporate board the importance of protecting Medicine Lake Highlands. This also generated negative publicity for Calpine and undermined its green image, and is potentially an important new development. The alliance with Calvert may presage a larger alliance between indigenous people and the corporate social responsibility movement.
- Targeting company shareholders for education and advocacy efforts can be effective. In this case, if sustained, the activism and organizing may work to further undermine Calpine's reputation with investors. Calpine has been publicly linked with California's energy crisis, was fined for collusion with Enron and, as 2005's largest U.S. bankruptcy, is perceived by investors to be financially weak. Down the road, Calpine might find it easier to withdraw from Medicine Lake than to continue to generate bad publicity.
- Leading-edge investment funds such as Calvert can play an important role in advancing corporate awareness of indigenous issues (see Appendix Three — Calvert's Indigenous Peoples' Rights Policy).⁶²
- Persistence in building broad, community-based coalitions can be pivotal. Environmental and homeowner organizations can be key allies for Native American groups.



CASE STUDY #4



Christopher McLeod

Peabody Energy
and Black Mesa's
Navajo Aquifer

BLACK MESA

Black Mesa in northeastern Arizona is home to 27,000 Navajos and 10,000 Hopis. Beneath the surface, all on reservation land, are more than 20 billion tons of coal and a huge underground lake whose waters support both native cultures through desert springs that are especially sacred to the Hopi. In a deal brokered by DOI 35 years ago, the two tribes agreed to lease Black Mesa coal and water to Peabody Energy, the world's largest private-sector coal company. By 2001, Peabody had pumped 40 billion gallons of water from the aquifer to slurry the coal. Surface water is disappearing, springs are drying up, and the tribes' traditional lifestyles are threatened with extinction. The Indians blame Peabody. Armed with scientific data, Peabody blames a 20-year drought. Peabody pays the revenue-strapped tribal governments millions annually for the water and coal. In a hard-won consensus, the two tribes demanded that Peabody shut down the slurry line. The December 2005 closure of the Mohave power plant in Nevada for air quality violations forced the shutdown of one of Black Mesa's two coal stripmines and, along with it, the slurry line.

THE SACRED SITE

Black Mesa is an elevated landmass shaped like a human hand covering 5,400 square miles in northeastern Arizona. Lying completely on reservation lands, the arid, ginger-colored plateau is home to 27,000 Navajos and 10,000 Hopis.

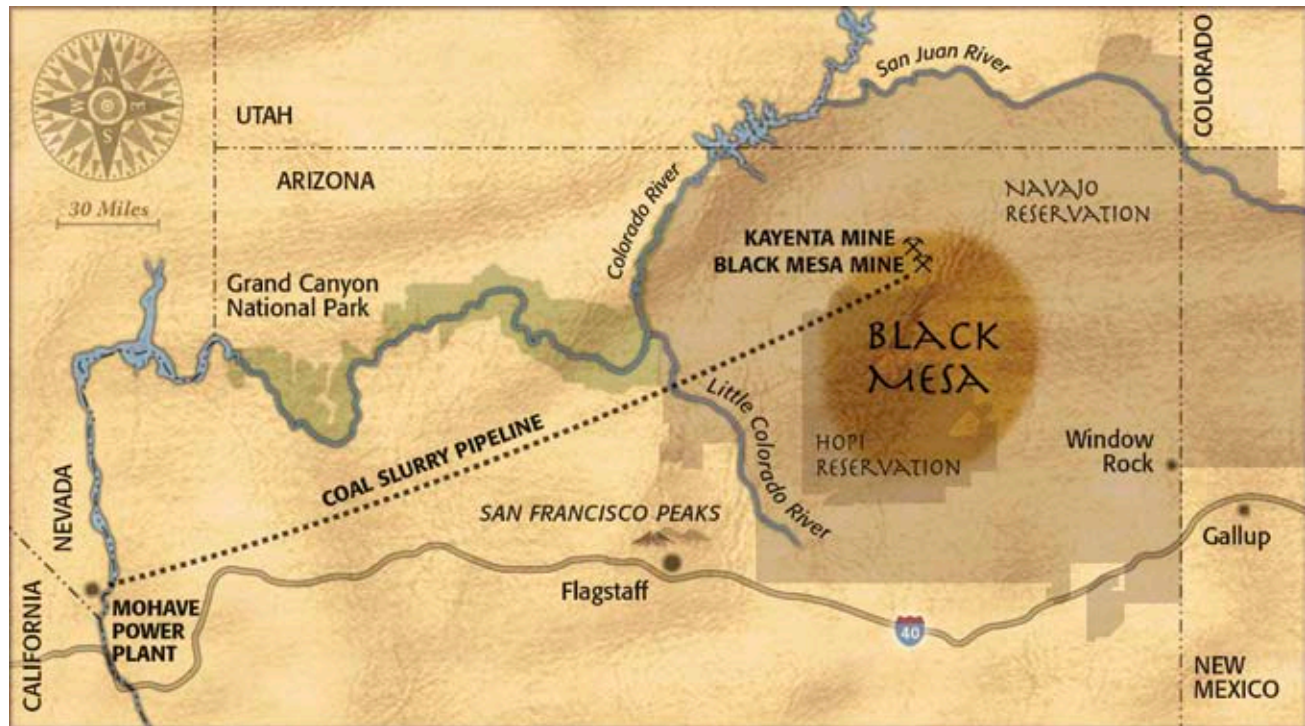
Millions of years ago, the Black Mesa area was a Pleistocene lake. Over time, the forests and plants supported by the lake decayed into a bog, and the organic riches slowly hardened into coal. With some 21 billion tons, the coal that now lies beneath the surface of Black Mesa is the largest coal deposit in the United States.⁶³

Deep in the mesa also lies the Navajo Aquifer, a large "underground lake" that for generations has supported the corn-centered agriculture of the village-based Hopi, as well as the sheep grazing and scattered homesteads of the Navajo. The aquifer stretches 7,500 square miles and holds about 17 times the amount of water in nearby Lake Powell. The pressure of overlying earth pushes the underground water into subterranean pools, percolating up to the surface through cracks in the sandstone and emerging as desert springs that flow intermit-

tently in sandy washes. Each of the Hopi villages is named after the spring that enables the village to exist. Both Oraibi and Shungopavi are more than 1,000 years old, and are the longest continuously inhabited towns in the United States.

The springs and surface waters support the traditional lifestyles of both native groups and are deeply sacred to the Hopis. According to Vernon Masayesva, former Hopi tribal council chairman and founder of Black Mesa Trust, "We have a sacred covenant with the person who was here a long time before our ancestors arrived. That person, a farmer and powerful spirit named Maasau, gave the Hopis permission to use the land, warning them: 'To survive here, you have to have a very strong spiritual life. But if you take care of this land and use its resources in the best possible way, you will be here a long time.'"⁶⁴

The water is important not only as the sole source of consumption and agriculture. Many of the springs fed by the Navajo Aquifer are themselves considered alive and sacred and figure prominently in Hopi spiritual and cultural life.



THE COMPANY

Peabody Energy is the world's largest private-sector coal company. Formerly Peabody Coal, the company, headquartered in St. Louis, Missouri, took in revenues of \$3.6 billion in 2004, and supplied 10 percent of U.S. electricity and three percent of the world's electricity. Peabody's coal operations are centered in Wyoming's Powder River Basin, Appalachia, the Midwest and Southwest, as well as in Queensland, Australia. The company also owns more than 25 percent of the Paso Diablo mine, Venezuela's largest coal mine.

In the mid-1960s, the Department of Interior brokered an agreement with the Navajo Nation and Hopi Tribal Council to stripmine Black Mesa for coal. Documents show that the Hopi Tribe's attorney, John Boyden of Salt Lake City, was being paid by Peabody at the time he advised the Hopi Tribe to lease Black Mesa coal and water. The mining operations, run by Peabody Western Coal Company, promised power to the rapidly growing Southwest and much-needed jobs and revenues to the Hopis and Navajos. The deal included using water from the Navajo Aquifer to transport coal from remote Black Mesa to a power station in southern Nevada via a slurry line, and a rail line to carry coal to a second power plant in Page, Arizona. Peabody has mined Black Mesa coal and used the aquifer's water to slurry it for 35 years.

Peabody describes itself as an "innovative, growing, low cost energy provider" and claims a commitment to "continuous environmental improvement in coal mining and coal use."⁶⁵ A video on the company's Web site demonstrates how it reclaims stripmined land, and highlights four awards for community and environmental stewardship from the U.S. Department of Interior.

However, Peabody does not publicly disclose substantive environmental, safety or social performance data through sustainability or annual reports. The company either has no formal code of conduct or does not make one public. A letter from the chairman, however, lists six "fundamental principles" that are part of the company's mission. One is that Peabody will "interact with customers, employees, suppliers, government entities, the public and the communities in which we operate in a responsible, ethical and constructive manner."

Active in the climate change debate, Peabody primarily emphasizes the abundance and cheapness of coal and encourages market-driven rather than regulatory approaches to reduce fossil fuel emissions.⁶⁶ In an October 2005, keynote address to a global coal conference in Paris, Peabody CEO Greg Boyce described progress toward zero emissions in coal use. "Coal is not the bridge to the future," he proclaimed. "Coal is the future."⁶⁷

THE IMPACT

Peabody's coal mining operations on Black Mesa have directly destroyed more than 2,000 ancestral and archaeological sites over the past 35 years. The indirect destruction of indigenous culture and livelihood through the impact on water has been even more devastating. In 1966, Peabody sank eight wells deep into the Navajo Aquifer to extract water for the coal slurry line.⁶⁸ In 1970, the water-propelled pipeline — the only one of its kind in the United States — began transporting coal 273 miles to Southern California Edison's Mohave Generating Station in Laughlin, Nevada. By 2005, Peabody had pumped 40 billion gallons from the aquifer, consuming water at the rate of 1.3 billion gallons per year.⁶⁹

Today, the surface water on Black Mesa is disappearing. Many Navajos must drive as far as 25 miles to water stations where they fill 55-gallon drums and drive them back home in their pickup trucks. The life-giving springs that gave the Hopi villages their names are shrinking. The disappearance of water has forced Hopis to abandon many farm terraces and many Navajos to give up sheep-herding. The ancient, traditional lifestyles of both groups are threatened with extinction.

No one disputes that the water is gone, or that its disappearance will have a devastating impact on the spiritual and cultural lives and assets of the Hopi and Navajo. There is great disagreement, however, between Peabody and native groups over the cause of the problem.

The Indians blame Peabody, claiming that depletion of the aquifer has disturbed the interconnected ecology of subterranean and above-ground waters. Marshalling scientific evidence, Peabody claims that surface waters and the aquifer form "separate hydrological basins" and have no relationship to each other. Instead, Peabody blames a 20-year drought.⁷⁰

The economic impacts of Peabody's mining operations, including the coal slurry line, have been substantial. Peabody paid the tribes \$4.3

million per year for the water. Annual mine revenues to the Navajo Nation totaled \$30 million per year, making up 25 percent of the Navajos' general operating fund and accounting for 10 percent of the \$300 million in revenue received by Peabody from the mine. The Hopis were paid \$12 million per year, accounting for one third of the Tribal Council's general fund. In addition, the mine has provided jobs to 228 Navajo and Hopi workers.⁷¹

THE CONFLICT

Conflict over the coal slurry line escalated over the past 15 years. Both Peabody and native groups used various tools to press their respective cases — Peabody, to continue and even expand the exploitation of underground aquifers, native groups and their allies to stop it completely.

A central axis of conflict revolves around



Christopher McLeod

Dragline at Black Mesa Mine

epistemology — the nature and basis of knowledge. On its Web site, the company claims that “eleven major public and private studies show that the operations will use less than one-tenth of one percent of the water stored in the aquifer.” The “most sophisticated” was a study, funded by Peabody, which developed a \$2 million three-dimensional computer model and reaffirmed the conclusion that the potential impacts to springs and streams are “too small to be measured.”⁷² Other studies, including “Drawdown: Groundwater Mining on Black Mesa,” by the Natural Resources Defense Council, have found, however, that the effects of the groundwater extraction are significant, including seepage of poor-quality water, a falling water table, and depletion of springs.⁷³

The knowledge systems of the Hopi and Navajo point to a different conclusion.

“In telling you the water on the surface is not connected to the aquifer, they are telling you your thumb is not connected to your toes,” says Hopi activist Vernon Masayevsa. “In our science, we know everything is interconnected.” Indeed, respect for the sacredness of life and the interconnectedness of nature is the central tenet of Hopi knowledge. Says Masayevsa, “When we turned something sacred, our water, into a commodity that you sell, this is where our problems began.”⁷⁴

Masayevsa founded Black Mesa Trust in 1998 and quickly began receiving help from

environmental groups, including the Natural Resources Defense Council, the Sierra Club and others. The grassroots-based Trust pursued many avenues. It challenged Peabody’s studies and staged a protest outside a shareholders’ meeting in St. Louis. It organized, lobbied, voted, and used the Internet to gain native and public support. Masayevsa participated in the production and distribution of the Sacred Land Film Project’s public television documentary, *In the Light of Reverence*, which highlighted the depletion of the aquifer and brought the issue into the national spotlight in August 2001. *Time Magazine* followed with a major story entitled “Indians vs. Miners” (November 5, 2001) focusing on criticism of Peabody. A key target of Black Mesa Trust’s campaign was the Hopi Tribal Council, which, along with the Navajo Nation, originally granted the leases and supported (and depended upon) the mining and slurry operations for more than three decades.

On the Navajo reservation as well, grassroots activists worked hard to educate and lobby Nation members. In June 2001, Nicole Horseherder invited Black Mesa Trust and environmental groups to a meeting to discuss water. Inspired, Horseherder and her husband, Marshall Johnson, began what would become a two-year project to talk to all the community members on Black Mesa about the impacts of Peabody’s use of the aquifer.

Masayevsa had earlier worked with the tribal government to try to stop the coal slurry line. As tribal chairman in 1990, he helped persuade the Secretary of Interior to withhold a permanent mining permit for Peabody. In an unexpected turn of events, Peabody’s application for the permit 11 years later would turn into a lightning rod and, potentially, a pivot point.

Peabody had to apply for the permit in 2001 as a condition of its agreement with Southern California Edison’s Mohave Generating Station. In the late 1990s, a successful environmental lawsuit brought by the Sierra Club, Grand Canyon Trust, Natural Resources Defense



Christopher McLeod



◀ Mohave Generating Station
in Laughlin, Nevada

Council and the National Parks and Conservation Association against the Mohave power plant — one of the largest sources of sulfur dioxide in the Western U.S. — resulted in a court ruling requiring Southern California Edison to retrofit the plant with pollution control equipment by the end of 2005. Before investing in the expensive retrofit, Edison wanted assurance of its coal supply and asked Peabody to obtain a permanent mining permit. Ignoring growing public opposition, Peabody's 2001 application sought permission to expand the mine site, raise coal production and, most significantly, *increase aquifer use* on Black Mesa by 32 percent.

Peabody's prior applications had been approved with little public attention. This time, with Black Mesa Trust organizing in Hopi and Navajo communities, DOI received nearly 7,000 public comments, all opposing the use of the aquifer for the coal slurry line.⁷⁵ For the first time, even the tribal governments spoke out. The Navajo Nation Council and the chairman of the Hopi Tribe demanded that Peabody stop pumping from the Navajo Aquifer by the end of 2005.⁷⁶

Faced with strong public and tribal opposition, Peabody agreed to disconnect the Black Mesa slurry from the Navajo Aquifer by the end of 2005 — provided that an alternative water source could be found. In 2003, Peabody applied for a new permanent permit, stipulating that the new slurry water would come from the Coconino Aquifer, 120 miles south of Black Mesa. However, environmental review and construction of a new pipeline to bring water north to the mine could not be completed by

the December 31, 2005, deadline.

The California Public Utilities Commission (CPUC) must approve the Mohave pollution control retrofit plans. As the deadline approached, Edison had not started work and CPUC

announced it would not allow Mohave to operate beyond the December 31, 2005, deadline without installing air pollution controls and securing an alternative source of water for the slurry line.

"In light of the issues surrounding the plant," said Alan J. Fohrer, Edison's CEO, "we have concluded it is probable that Mohave will be shut down at the end of 2005."⁷⁷

The Mohave Generating Station was indeed shut down on December 31, 2005, and with it, the Black Mesa Mine, one of Peabody's two stripmines on Black Mesa. Closure of the mine, in turn, stopped the pumps and eliminated the controversial slurry line.⁷⁸

The economic costs of the shutdown of the Black Mesa mine is substantial for the Hopi and Navajo Tribes. Both voted against gambling on their reservations in the 1990s. In a second referendum in May 2004, the Hopi again voted overwhelmingly against gaming, despite high unemployment and a looming revenue crunch. The Navajo recently approved gaming and are drawing up plans for six casinos.⁷⁹

The loss of coal mining revenue has sparked worry, desperate behind-the-scenes negotiations with Peabody Energy, and creativity. The utilities that own the Mohave power plant are now selling "pollution credits" valued at up to \$53 million per year to utilities in other parts of the country. Local activists have crafted a "Just Transition Proposal" calling for \$20 million per year of the pollution credit money to be invested in job retraining, community planning and sustainable energy development — to harness Black Mesa's abundant wind and sunshine.

LESSONS LEARNED

Five lessons emerge from the complex and ongoing Black Mesa conflict:

- Action grounded in a strong spiritual knowledge and belief system has staying power. The commitment of Hopi and Navajo activist-leaders has been sustained by their spiritual strength and their traditional knowledge systems. Even while working with partners to challenge Peabody's scientific evidence on its own terms, native groups have grounded their struggle in a different way of knowing and relating to the natural world.

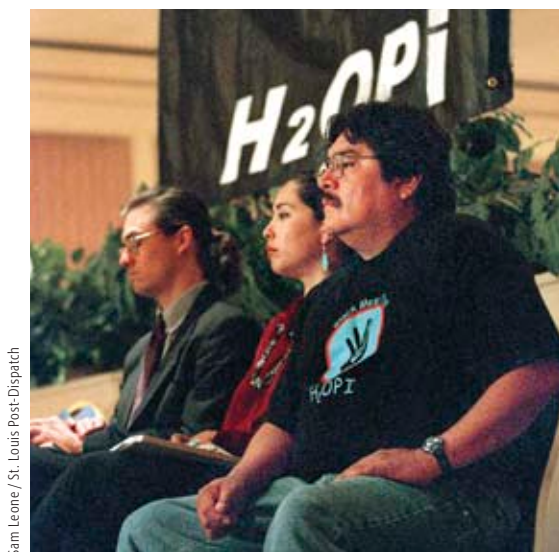
- Grassroots organizing of native people over many years is effective. Native activists struggling to address the Black Mesa conflict have been able to build upon a long trajectory of grassroots organizing. Traditional Hopi religious leaders, and their late spokesman, Thomas Banyacya, carried the struggle from the 1960s into the 1980s, using everything from lawsuits against the government to effective media campaigns and appearances at New Age

Whole Life Expos. In the 1990s, Black Mesa Trust took the lead, reaching out to change the hearts and minds of local native people, building partnerships with environmental groups, as well as educating tribal governments. The NRDC "Drawdown" study took a significant commitment of time and resources and was the result of 20 years of public education and outreach, first by traditional Hopi leaders and then by Black Mesa Trust.

- A multipronged strategy is needed to address these conflicts. Black Mesa Trust used various tools simultaneously to handle the conflict, including analysis and education, publicity and Internet communication, organizing and lobbying.

- Conflicts between traditional native groups like Black Mesa Trust and their own tribal governments should be acknowledged and better understood. The federal government is required to deal on a government-to-government basis with sovereign tribes. While this mandates consultation with tribal governments, those governments do not always represent traditional religious interests within their community. Thus, it is essential that federal agencies also consult with Native American traditional leaders and practitioners who have knowledge about sacred places. In some cases, non-governmental organizations (NGOs) may represent the traditional cultural concerns of communities, though they, too, are frequently ignored by federal agencies and corporations. Consultation with NGOs and traditional leaders and practitioners should supplement, not supplant, government-to-government consultation with tribes.

- Sustainable economic development alternatives are needed. Mining revenues are a lucrative source of much-needed capital for social and economic infrastructure — as well as employment. Saying no to mining operations that threaten sacred sites would be easier for elected tribal leaders if they were presented with viable alternatives.



Sam Leone / St. Louis Post-Dispatch

Black Mesa Trust activists (left to right) Andy Bessler, Enei Begaye and Leonard Selestewa at Peabody Energy shareholders' meeting in St. Louis, Missouri, May 2002

CASE STUDY #5



Christopher McLeod

Salt River Project
and Zuni Salt Lake

ZUNI SALT LAKE

For the 1,500 years or more that the Zunis have lived near Salt Lake in northwestern New Mexico, they and other tribes have made pilgrimages to the lake to collect salt for religious ceremonies. Surrounding the lake is “The Sanctuary” — burial grounds and a sacred, neutral zone for all tribes. In 1985, the Zuni regained control of the lake and a small portion of the surrounding land from the federal government; the remaining land is under the control of the state of New Mexico, private owners and the federal government. The Salt River Project (SRP) is the nation’s third largest utility, created in 1937 by the state of Arizona. SRP got BLM permission to explore for coal within The Sanctuary in 1985. In 1996, SRP was granted a permit to build Fence Lake Coal Mine just 11 miles from Zuni Salt Lake and to draw water from an aquifer that feeds the lake. Zuni concerns included lake depletion, pollution and disturbance of 5,000 sacred sites and 500 ancestral human burials. After 20 years of facing the Zunis’ intense legal and technical challenges, coalition-building and media efforts, SRP in a surprise move dropped its mine plans in 2003. Two months later, BLM announced an auction of exploration rights for gas and oil on other Sanctuary acreage, prompting the ever-vigilant Zuni Tribe to seek a larger protected buffer zone around the lake.

THE SACRED SITE

Sixty miles south of the Zuni Pueblo in northwestern New Mexico lies Salt Lake, home of the Zuni Salt Mother deity *Ma’l Oyattsiki’i*. Fed by mineral springs, the lake fills a small, shallow volcanic crater. In the summer, the lake’s water evaporates, leaving a crystalized layer of pure sodium chloride around an expanding shoreline. For Zunis, the sacred salt embodies the flesh of the Salt Mother.

Salt Lake is central to spiritual practices of the Zunis, who have lived in their nearby pueblo for at least 1,500 years.⁸⁰ Like umbilical cords, sacred trails run north, south, east and west, connecting Salt Lake to Zuni, Laguna, Acoma and other villages. For centuries, the men of Zuni, as well as Acoma Pueblo, Hopi, Navajo, Apache and others have made pilgrimages on these trails to the lake to collect salt for religious ceremonies. It is a journey that continues to this day.

Surrounding the lake is a 185,000-acre area

known as The Sanctuary, which contains burial grounds and is by tradition a neutral zone for all tribes in the area. Great respect is shown to all living beings in The Sanctuary and even hunting is forbidden. According to Zuni historian Jim Enote, the tribes “would all pretty much respect each other in here, each staying in their own camps, even if they were fighting.”⁸¹

In 1985, the Zuni Tribe regained control of Salt Lake and 5,000 acres of land surrounding it from the federal government. The remaining 180,000 acres of The Sanctuary remain under the control of the state of New Mexico, the federal government, and private owners.

THE COMPANY

The Salt River Project (SRP) is the nation’s third largest utility. Providing power and water to customers in central Arizona, SRP is made up of two entities: the Salt River Valley Water Users’ Association, a private

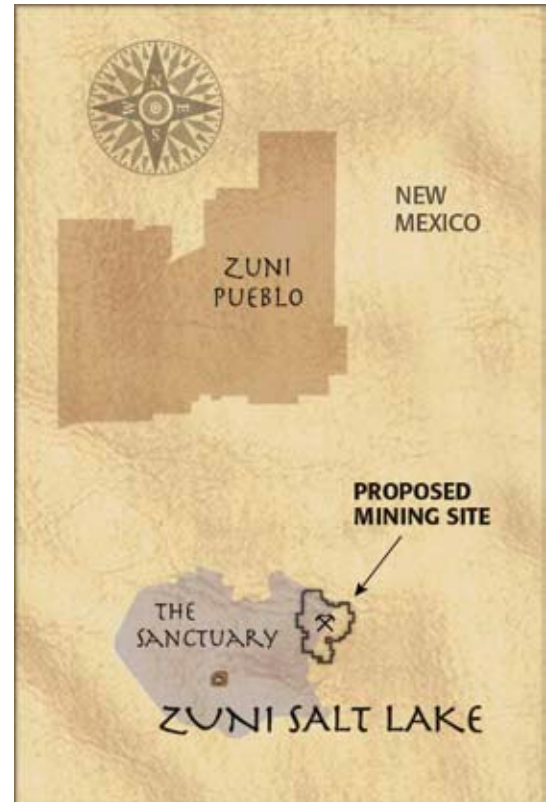
corporation founded 100 years ago by ranchers and farmers, and the public Salt River Project Agricultural Improvement and Power District, a political subdivision of the state of Arizona established in the 1930s.

The ability to harness water resources has been the foundation for modern-day industrial and urban development in the dry deserts of Arizona. The financing role of government, both federal and state, has been pivotal. A federal government loan financed the first big dam in Arizona, the Roosevelt Dam on the Salt River. To get the loan, local farmers and ranchers founded the Water Users' Association in 1903 and pledged 200,000 acres of their land as collateral.

Over the next 30 years, the Association built three more hydroelectric dams, generating not only water and electricity but also a large amount of red ink. Rescue came in 1937 when the state of Arizona created the SRP Agricultural Improvement and Power District, which, as a public entity, has the power to issue municipal bonds. By 2004, the Association and the District together managed six large dams and owned eight major power plants, six of them coal-fired, including two at the Coronado Generating Plant, west of the Zuni Pueblo in St. Johns, Arizona.

Combining the Association and the District, SRP's operating revenues in 2004 totaled \$2 billion. According to its Web site, "The District provides electricity to more than 825,000 retail customers in the Phoenix area... The Association delivers nearly 1 million acre-feet of water to a service area in central Arizona. An extensive water delivery system is maintained and operated by the Association, including reservoirs, wells, canals and irrigation laterals."⁸²

Though it falls, in part, within the public domain, SRP is governed by a unique system based on land ownership. SRP's president, vice president, two boards and two councils are elected by a proportionate system whereby a landowner with five acres casts five votes, while an owner with half an acre is entitled to half a



vote.⁸³ The system was challenged on constitutional grounds but upheld by the Supreme Court in 1981 and later by a U.S. Appeals Court.⁸⁴

In the early 1980s, SRP decided to expand its business operations into downstream activities, notably, coal mining. In 1985, SRP obtained Bureau of Land Management (BLM) permission to explore for coal within The Sanctuary, northeast of Zuni Salt Lake. In 1996, over the strenuous objections of the Zuni and other tribes, the state of New Mexico granted SRP a permit for an 18,000-acre Fence Lake Coal Mine, 11 miles from Salt Lake.

SRP proposed to stripmine 80 million tons of coal over 50 years and build a 44-mile rail line to transport the coal to the Coronado Generating Plant in Arizona. The electricity would be sold to 190,000 households in Phoenix. To settle the coal dust, SRP plans called for pumping 85 gallons of water per

minute from the Dakota (or another) Aquifer. SRP's water rights would have allowed it to pump up to 900 gallons per minute.

New Mexico mining regulations require that actual mining on state-leased lands begin by the third year of a five-year permit. In 1999, when three years had lapsed, the state waived this requirement and extended SRP's permit, and in July 2001, the state renewed the original five-year permit for another five years.



Suzanne Westerly

Zuni Salt Lake Coalition protests at Salt River Project in Tempe, Arizona in 2002

THE IMPACT

The overarching concern about the Fence Lake Coal Mine project was its potential impact on the water and salt levels at Zuni Salt Lake. At 85 gallons a minute, pumping from the underlying Dakota aquifer, which feeds directly into Salt Lake, would have drained some two billion gallons of water over the 50-year life of the mine. The Zunis worried that the entire springs-to-evaporation cycle in their sacred lake would be severely depleted or destroyed.

Hydrological studies reached conflicting conclusions. In determining whether to renew SRP's permit in 2001, the state of New Mexico's Coal Mine Program found that the draining of the Dakota aquifer would not affect the lake. The Tucson-based Center for Biological

Diversity, on the other hand, found that any mining activity near the lake, including extracting large amounts of underground water, would devastate the delicate ecosystem of what the Center called "the very rare high desert oasis."⁸⁵

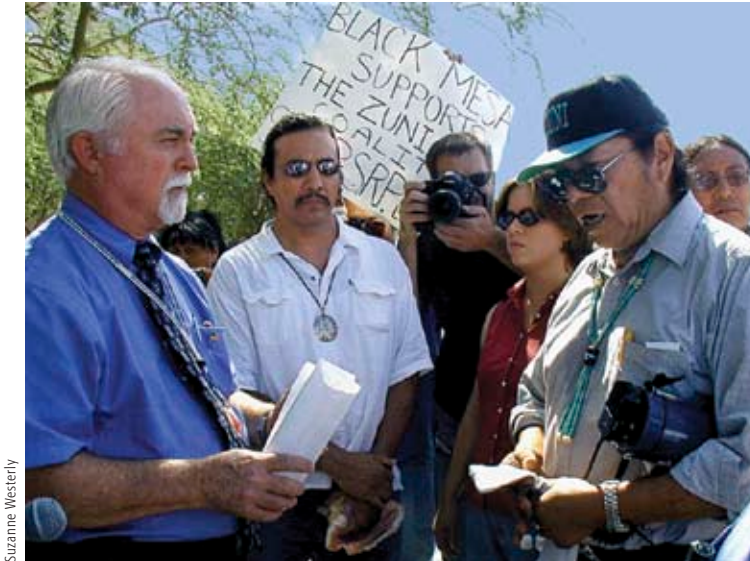
The Department of Interior (DOI), called upon to issue a federal "life of mine" permit, produced two conflicting studies. In 2001, the Bureau of Indian Affairs (BIA) released a report by an independent hydrologist that concluded that pumping would reduce the water and salt in the lake. The report also found that SRP's proposed monitoring plan would not be sufficient to detect reductions in the level of the Dakota aquifer.

DOI's Office of Surface Mining (OSM), however, contested the BIA conclusions and recommended that the mine be approved. Because of Zuni concerns about the Dakota Aquifer, the federal permit — granted in May 2002 by Interior Secretary Gale Norton — required that SRP take water from the Atarque Aquifer, which lies above the Dakota. However, no new hydrological studies supported the change, and the Zuni argued that depleting the Atarque Aquifer also would damage the lake.

In addition to lake depletion, the potential impacts of the Fence Lake Coal Mine on the Zuni Salt Lake sacred landscape included:

- Disturbing the trails leading to the lake due to construction, railroad tracks, roads and traffic.
- Polluting lake water and salt with coal dust and other airborne particles.
- Disturbing 5,000 sacred sites and ceremonial shrines, and 500 ancestral human burials in the area. (When construction of the rail line began in the fall of 2002, four human remains were disturbed within the first few weeks.)

In 1999, federal officials determined that the large Sanctuary area around the lake was eligible for listing on the National Register of Historic Places (Salt Lake itself was already



Suzanne Westerly

During the demonstration at Salt River Project headquarters, Cal Seciwa (right), Director of Arizona State University's American Indian Institute, presented SRP's Joe Smith with a sock full of coal and said: "This is the only coal you will get from the Zuni Salt Lake area."

on the Register). Recognizing the potentially devastating impact of the stripmine, the National Trust for Historic Preservation in May 2003 listed Zuni Salt Lake and The Sanctuary on its list of the Eleven Most Endangered Historic Places in America.⁸⁶

THE CONFLICT

The Zuni Tribe's opposition to the Fence Lake stripmine began when SRP obtained its exploration permit from the state of New Mexico in 1985. Zuni Pueblo leaders spent millions of dollars pursuing administrative, legal, technical, political and educational strategies to stop the SRP project.

In the 1990s, Zuni leaders consolidated support from Hopi and other Pueblo tribes and lobbied the federal government not to approve the project. They pushed the BIA to undertake

an independent hydrological assessment, which confirmed their fears about the mine's potential impact on the lake. The majority of New Mexico's congressional delegation also weighed in, writing to federal regulators to express their concern about damage to the lake. Environmental groups, notably the Center for Biological Diversity in Tucson, joined with the Zunis to challenge the original New Mexico operating permit of 1996 and its 2001 extension.⁸⁷

Federal approval for the mine languished during the Clinton administration, stalled by the conflict between the BIA and the OSM over hydrology analysis. In 2001, stepping up their opposition to what Zuni Tribal Council member Dan Simplicio called "cultural genocide," the Zunis reached out to non-native communities and formed the Zuni Salt Lake Coalition, which included Sierra Club, Friends of the Earth, Seventh Generation Fund, Citizens Coal Council, Water Information Network, Center for Biological Diversity and the Sacred Land Film Project (see sidebar on page 50). The coalition organized the People's Hearing on Zuni Salt Lake where 500 people gathered in Zuni to offer testimony for protecting the lake.

The Zuni Salt Lake Coalition dramatically raised national awareness of how the proposed coal stripmine might affect Zuni culture, their historic homeland, and the surrounding grasslands' wildlife and flora. In October 2001, the Department of Interior decided not to give SRP a mining permit, citing "fierce opposition" from the Zuni Tribe and the environmental community.

This decision was reversed in May 2002 by Gale Norton, the Bush administration's secretary of interior. In granting approval, DOI set six conditions — five on SRP and one on the Bureau of Land Management — that DOI said were the result of intense consultation sessions with Zuni leaders. The conditions on SRP were that the company monitor and report its water usage to the state of New Mexico, Interior and the Zuni Tribe; not draw water from certain sources; monitor the Dakota Aquifer; and

ORGANIZING TOOLS

WHAT A DIFFERENCE A FILM MAKES

A few months after the PBS national broadcast of *In the Light of Reverence*, our documentary on Native American sacred sites, the phone rang at the Sacred Land Film Project in California. The Zuni Tribe needed a copy of the film to show to a meeting of Zunis who would be traveling by bus to Grants, New Mexico, to testify at a public hearing on the Salt River Project's permit application to stripmine coal near Zuni Salt Lake. We FedExed the tribe a VHS copy of the film, which arrived the following day. Zuni friends reported later that the film fired up dozens of native viewers who went to the permit hearing and one after another presented compelling, emotional testimony.

Several months later, the phone rang again. The Zuni Governor wanted to know if we would make a short educational film about Zuni Salt Lake that the tribe could

use in its campaign against the proposed coal mine. A grant from the Ford Foundation had enabled us to start production of a DVD of *In the Light of Reverence*, and we agreed to produce a seven-minute film on Zuni Salt Lake and add it to the DVD as a special feature.

Both films were used, as Northern Arizona University scholar Gary Nabhan says, "to increase vigilance throughout the Southwest"—both in tribal communities and the general public. Many people reported that the films made a difference by portraying the problem of sacred site protection as visual, emotional, human and accessible to audiences of diverse cultural backgrounds. In the hands of teachers and activists, the films helped lead to understanding, respect and constructive action.

— Christopher McLeod, Project Director,
Sacred Land Film Project

consult with tribes to ensure that company employees respect the area. The BLM was instructed to develop a plan to protect Salt Lake and The Sanctuary.⁸⁸

In response, the Zuni Tribe and their coalition allies legally challenged New Mexico's approval of the project and, via public opinion, challenged SRP itself. Coalition members organized marches and postcard campaigns, and produced radio ads in English, Spanish, Zuni, Navajo, Hopi and Apache asking SRP to drop its plans to stripmine coal and instead develop renewable energy sources. A high-profile 300-mile run was organized for Columbus Day — October 14, 2002.

At the press conference following the run, Zuni Tribal Councilman and Coalition delegate Dan Simplicio said, "Stopping the mine is all the more imperative now, considering the fact that SRP has executed their mining plan operation. One of their gravest violations has been the removal of human remains. SRP has proven that they are unable to protect cultural resources."⁸⁹

Then the Coalition delivered a Declaration of Discovery to an SRP representative, stating that the Fence Lake stripmine "perpetuates the colonization of Indigenous territories" and that the "Sanctuary Zone and the Zuni Salt Lake are sacred sites for the Zuni and other Indigenous Nations, which must be protected for all humanity."⁹⁰

The Coalition also held 24-hour prayer runs

around SRP headquarters in Tempe. In one of its most creative actions, the Coalition put a message on a panel truck — which two billboard companies refused to accept — and drove around Phoenix with a megaphone informing and rallying the public.⁹¹

Zuni Conservation Program Director Roman Pawluk recalls, "The Coalition was one aspect of a broad effort by a core group under the leadership of the Zuni Tribe. Legal challenges, cultural explanations, technical analysis, lobbying efforts, interagency consultation, public testimony, federal mediation and many other coordinated tactics created strong pressure on the state and federal agencies that ultimately deterred SRP's plans."

In a surprise move, SRP announced in August 2003 that it was dropping plans for the Fence Lake Coal Mine and would relinquish all permits and leases. Citing economic factors, especially the low price of purchased coal relative to mined coal to supply its Coronado plant, SRP said it would instead buy "very competitive" coal from the Powder River Basin in Wyoming. Utility spokesman Scott Harelson said operating a mine wasn't as financially attractive as a long-term deal to buy coal at modest prices.⁹²

"We believe SRP's customers will not only save money, but that environmental and occupational benefits will be realized by entering into a new coal contract now instead of opening Fence Lake," said David Areghini,

SRP's associate general manager of Power, Construction and Engineering, thus bringing a 20-year dispute to a close.⁹³

Relieved and jubilant, the Zuni Tribe thanked its thousands of supporters.

Two months later, in October 2003, the Bureau of Land Management announced an auction of rights to explore for oil and gas on 125,000 acres of land east of Zuni Salt Lake. Some of the acreage is within The Sanctuary.⁹⁴ Other interests are exploring coal bed methane development in the area. These actions have renewed the efforts of the Zuni Tribe to seek permanent protection for a wider cultural landscape encompassing the lake and sanctuary.

LESSONS LEARNED

At least six lessons can be drawn from the Zuni-SRP conflict over Salt Lake:

- Protecting a sacred site may require delineating the entire ecosystem that supports it. In this case, Zuni ownership of Salt Lake and land immediately around it wasn't enough to ensure control over the lake's health. Even ownership of the entire Sanctuary area might not have provided a guarantee, if underground aquifers feeding the lake could be accessed beyond it. Moreover, even though the SRP stripmine was stopped, the BLM has offered new oil and gas exploration leases, and a new movement is forming to urge the BLM to "look before you lease."⁹⁵

- A company's threshold for deciding whether to continue with a project can be opaque to outsiders. SRP's withdrawal decision was a total surprise, not only to Zunis and their supporters, but to industry observers as well. It is likely that SRP's lack of experience in coal mining played a factor in determining that, given the vociferous opposition, the project had become too risky. A related lesson may be that in calculating the probability of success in a corporate dispute over a sacred site, Native

Americans and their allies should consider whether the project is in an established or new line of business for the corporation.

- Well-focused, creative, multi-faceted, mainstream-oriented strategies and tactics are essential factors in efforts to protect sacred sites. The Zuni Tribe left no stone unturned in scouting for tactical tools — lobbying, legal challenges, technical analysis, education, consultation, mediation, citizen demonstrations, permit hearing testimony by tribal members, effective use of media — and they used them with thoroughness, earnestness and humor. In the end, the Tribe spent more than \$3 million to safeguard their sacred lake.

- The Zunis were consummate networkers and coalition-builders, gaining support from other tribes and from native organizations such as the All-Indian Pueblo Council and the National Congress of American Indians. Not only the Zunis, but virtually all Native Americans who weighed in on the issue, spoke with one voice.

- The Zuni Tribe's decision to build a broad coalition of environmental and social justice groups — and their ability to lead it — was fundamental to success. The Zuni Salt Lake Coalition catapulted the issue into the mainstream in Arizona and nationally. A related lesson is that making common cause with environmental and other advocacy groups can generate what Brian Segee of the Center for Biological Diversity called "the power of unity of diverse interests."⁹⁶

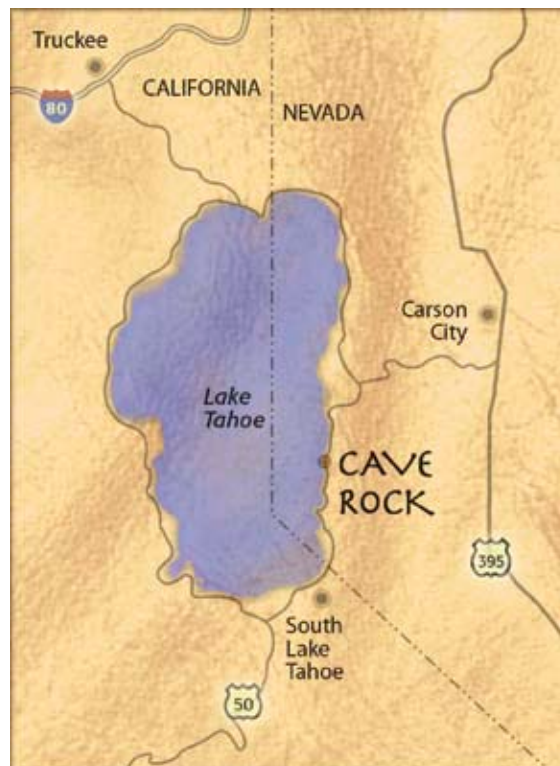
- The final lesson is the importance of constancy, patience and perseverance, as summed up by Zuni Pueblo head councilman Carlton Albert: "It has been a long 20-year struggle... but we have had our voices heard. I feel relieved and it sends shivers down my back to realize how long this struggle has been and now it has come to closure... If there is a lesson to be learned it is to never give up and stay focused on what you want to accomplish."⁹⁷

CLIMBING SACRED ROCKS?

CAVE ROCK



Eric Perlman



Sites sacred to Native Americans often have spectacular, protruding geographical features, such as those at Cave Rock, a remnant of an ancient volcano on the eastern shore of Lake Tahoe in Nevada. To the Washoe people, who have lived in the area for more than 10,000 years, Cave Rock is the domain of powerful spirits, and it is so sacred that only a few elders are allowed to visit it. Cave Rock is eligible for designation as a Traditional Cultural Property on the Department of Interior's National Register of Historic Places.

Located on U.S. Forest Service land, Cave Rock also appeals to recreational rock climbers. For nearly two decades, its year-round access and technical difficulty level have attracted sport climbers from all over the world. Forty-six different climbing routes, facilitated by bolts and other devices put in place by climbers, crisscross Cave Rock. Many routes are inside the culturally sensitive cave-face, where climbers have

DEVILS TOWER



Christopher McLeod

constructed a dirt, stone and gravel floor. Nearby, a highway cuts through the rock and cars whiz beneath the climbers.

Conflict over climbing at Cave Rock has simmered for years. Despite eight years of Forest Service-led consultation, the Washoe and the sport climbers, represented by the Access Fund, remained at an impasse. The nonprofit Access Fund is supported by contributions from rock climbers and by corporate sponsors in the recreation industry, including REI, Clif Bar, The North Face and Backpacker Magazine.

"For us, rock climbing trivializes the site for the sake of sport," says Washoe Tribal Chairman A. Brian Wallace.

The Washoe feel that permanent climbing hardware affects Cave

Rock's physical integrity, while the presence of climbers and their gear undermines its spiritual integrity. The Washoe want to ban sport climbing at Cave Rock.

Climber and photographer Eric Perlman counters that from his point of view the Washoe had essentially abandoned the site, as evidenced by the large trash pile that had accumulated when climbers first arrived and

cleaned up the area. "Rock climbing is a sacred activity that connects us with the earth," says Perlman. "It's not fair to deny us our connection and impose an exclusionary religion."

The Access Fund opposes a climbing ban and seeks a "feasible compromise where all parties can use the area without conflict." As a model, it points to the Park Service's "voluntary" ban on climbing



Will Parrinello

Lakota elder Elaine Quiver prays at a Devils Tower pipe ceremony with Oliver Red Cloud (right) in June 1997.

at Devils Tower in Wyoming during the month of June, when Lakota and other Plains Indians use the tower for spiritual ceremonies, and climbers are asked to voluntarily refrain from climbing. Although climbing has declined by 85 percent in June, many native people still want the Park Service to ban climbing altogether at Devils Tower.

In 1995, the superintendent at Devils Tower National Monument announced a ban on commercial climbing during June. But the decision was short-lived. The next year, the ban on commercial climbing was overturned in a lawsuit brought against the Park Service by the Mountain States Legal Foundation on the

grounds that it represented an inappropriate government entanglement with religion. Mountain States also challenged the voluntary ban on individual climbers during June, but that suit was thrown out in April 1998. The Access Fund filed briefs on behalf of climbers in both Devils Tower cases.

The Access Fund supports wilderness and habitat preservation as “crucial to the future of American climbing” but has no policy on sacred sites. However, it says it believes that most U.S. climbers “are empathetic to Native American concerns and will sacrifice climbing opportunities to respect Native American religion — without the burden of exclusionary regulations.”

In July 2003, the Lake Tahoe Basin management unit of the Forest Service issued a decision banning rock climbing as well as off-road motorized vehicle use at Cave Rock. The Access Fund appealed the decision but the Forest Service upheld it in December 2003. Fearing that the ruling would set a precedent for other climbing sites on public land, the Access Fund immediately filed a federal lawsuit alleging that the climbing ban violated the establishment of religion clause of the First Amendment. A Federal District Court dismissed the action in January 2005. The case currently is on appeal to the Ninth Circuit Court of Appeals.



Christopher McLeod

In spite of Native American concerns, many climbers still prefer ascending Devils Tower in June.

SOURCES: *Petition from the Washoe Tribe to Lake Tahoe Basin Management Unit*; Access Fund Web site, “Cave Rock Closed to Climbing,” Rick Curtis, “Cave Rock, NV—Sacred Site or Climbers’ Right,” *OutdoorEd.com Blog*; Ryan Slattery, “Climbing banned at Sacred Washoe site,” *Indian Country Today*, December 30, 2003; “Devils Tower,” *Sacred Land Film Project*, www.sacredland.org; News Release, USDA Forest Service, July 10, 2003.

PART THREE

Toward
Corporate
Good
Practice



Native Americans increasingly are fighting for — and winning — the protection of sacred sites. As the case studies illustrate, however, these struggles are long, costly, and subject to reversal and new threats. In addition to fighting for particular sites, native peoples are fighting to codify the principle of protection within the law and, increasingly, within business norms.

This section considers how to define corporate “good practice” with regard to sacred sites by using the case studies to shed light on what motivated corporations to modify or drop development plans that threatened sacred sites; defining corporate social responsibility (CSR) and considering why and how sacred sites advocates might usefully engage the CSR movement; and describing norms for corporate good practice that are emerging from indigenous groups, faith-based organizations, environmental NGOs and companies regarding indigenous rights. Finally, we propose some initial principles on corporate good practice toward sacred sites.

WHAT MOTIVATES CORPORATIONS?

The case studies are snapshots of the character and dynamics of U.S. corporate-indigenous conflicts over sacred land. Of the six cases, five were “victories,” at least partially or temporarily, by indigenous people and their allies (Indian Pass, Weatherman Draw, Black Mesa, Zuni Salt Lake and Cave Rock), and one resulted in a decision against tribal interests, which is being challenged in court (Medicine Lake).⁹⁸

What accounted for the victories? What motivated companies to withdraw from development plans? Why did some corporations choose to continue to resist change despite external pressures? What are the implications for promoting a greater corporate sense of social and moral responsibility? While each case is unique, they share several common threads:

- **Unity within native groups** When the tribes and groups most affected had a unified stance, they were more likely to get a fair hearing by government and garner public support, and they made it more difficult for companies to “divide and conquer” by offering compensation or mitigation.

- **Partnerships and public support** Active partnerships between Native Americans and large NGOs — particularly NGOs concerned with environmental, historic preservation and human rights issues — along with effective media campaigns, worked to increase public awareness, scrutiny of corporate practice, and support for sacred site protection and preservation. Besides helping to sway legislators and federal administrators, a public spotlight can cast a shadow on a company’s reputation. In at least one case (Anschutz at Weatherman Draw), negative publicity was clearly a motivating factor for negotiation.

- **Perseverance and vigilance** All of the cases required years of organizing and lobbying. Protection was sometimes won and then lost, as high-level decisions were reversed. Consistently demanding close environmental and cultural scrutiny, the perseverance of indigenous opponents delayed approvals and raised costs to companies. Moreover, proving the adage, “It’s not over ’til it’s over,” perseverance allowed for surprising twists, such as the air quality lawsuit against Mohave Generating Station (see Black Mesa) and the sudden withdrawal from the Fence Lake Coal Mine by the Salt River Project, which was influenced, if not wholly driven by, changes in the market price of coal (see Zuni Salt Lake). Staying vigilant and active, however, is emotionally and financially costly.

- **Lack of early consultation** In each case, the company project that threatened a sacred site was approved or undertaken without adequately consulting the appropriate native



Christopher McLeod

political and religious leaders in the early planning stages prior to the issuance of permits. By the time companies consulted Indian communities, they already had invested significant resources in project planning, which only increased their resistance to changing course. Dialogue between native people and those proposing a project that threatens a sacred site is the only way to ensure that project sponsors understand potential harm and might consider less damaging alternatives.

▪ **Regulatory oversight and the public interest**

Three of the sacred sites (Weatherman Draw, Indian Pass and Zuni Salt Lake/Fence Lake) are on public lands managed by the Department of Interior; two others (Cave Rock and Medicine Lake) are on public land managed by the Forest Service; and one (Black Mesa) is wholly on reservation land, though DOI's Office of Surface Mining is responsible for regulation. Though convoluted, federal oversight on public lands requires both companies and indigenous groups to make their case in terms of serving the public interest. Such oversight mandates input from multiple stakeholders, including native groups.

▪ **Strong legal case and effective use of legal processes** In three of the four cases where native groups achieved at least a short-term

positive outcome, conflicts were handled within the existing U.S. legal framework. Companies were strongly influenced by legal action. The credible threat of a federal lawsuit propelled Anschutz to negotiate and eventually withdraw oil exploration plans at Weatherman Draw. At Black Mesa, the combination of a lawsuit against Mohave Generating Station, the threat of a lawsuit by Black Mesa Trust, and the rejection of continued groundwater extraction by the Navajo government moved Peabody to consider ending use of the Navajo Aquifer, and ensured the shutdown of the power plant. The Zuni Tribe allocated a large legal budget, and through court-ordered mediation was able to communicate their position and delay the SRP project long enough for market forces to take over. In the case of Cave Rock, advocacy by the Washoe Tribe and its allies within the Forest Service administrative process resulted in a decision by the Forest Service to ban climbing at Cave Rock.

▪ **Legislative advocacy** The campaign to protect Indian Pass and other sacred places in California resulted in the enactment of broader, state-level legislation advocating the protection of sacred places and keeping cultural information confidential. The new legislation prompted Glamis to abandon its Indian Pass gold mine

project. This shows that a specific case may galvanize public officials, tribes, citizens, and the media, and result in a growing perception that protecting cultural resources has a broad benefit and is in the public interest.

- **Bad laws** In each case, bad laws, especially the 1872 Mining Law, stood in the way of stronger legal protections for sacred sites on public lands. The Mining Law allows mining to trump other uses of the land, creating a legal morass and costly buyouts when environmental and cultural protection laws are brought to bear. While companies benefit from easy, cheap access to mineral resources, the convoluted regulatory process leading to approval is lengthy and costly, particularly when projects would have a serious negative impact on environmental and cultural resources.

- **Lack of a sacred sites law** Depending on its specific provisions, a federal (or state) sacred sites protection law could have promoted early resolution of — and possibly even have aborted — many conflicts. Such a law could guide the myriad government agencies with their inconsistent policies, as well as companies planning future projects. For native groups, sacred sites legislation would enshrine in law the human right to freedom of religion when practiced at sites in nature.

- **Economics** The profit margin, which drives shareholder values, continues to be the bottom line for companies. Companies make adjustments in response to price changes for inputs or final products, as well as to changes in subsidies and energy demand. A focus on profitability means that those seeking to protect sacred places need to consider whether and how to make an economic or financial case. The most compelling argument may be that other companies in the industry actually do pay attention to sacred sites and cultural resources, consult with tribes and have human rights policies. Companies fear the bad public-

ity effects of “naming and shaming,” but they watch each other closely, too.

- **The difficulty of hearing “no”** In none of the cases were companies voluntarily willing to drop a development plan after consulting with indigenous people. While Anschutz and Salt River Project eventually changed their position, Calpine, Glamis and Peabody fought to the bitter end. Although he was referring to archaeologists, Jimmy Arterberry hit the nail on the head in a recent address to a conference on Consultation Protocols to Protect Native American Sacred Places: “What part of ‘no’ do you people not understand?”⁹⁹

- **Grounding actions in spirituality** When native peoples clearly articulate the spiritual underpinnings of a campaign to protect sacred lands and acknowledge those underpinnings as their primary motivation, they draw strength and courage for the struggle. There is power in giving voice to and trying to faithfully live out one’s core beliefs and spiritual values. Moreover, the communication of those values by native people to governmental agencies and corporations can cause non-Indians to think differently about the effect of their decisions on sacred places and to reconsider and change their positions.

CORPORATE SOCIAL RESPONSIBILITY

The rationale for protecting sacred sites rests ultimately on ethics. Regardless of the approach used to handle a conflict about sacred land — enactment and enforcement of law or direct negotiations with companies — native peoples and their allies press a moral case.

Generally, companies eschew the role of moral arbiter, leaving that to governments. However, companies differ in the extent to which they accept ethical, environmental, and social responsibility for their actions and voluntarily initiate steps to improve their ethical

performance. As in other aspects of business management, there are leaders and laggards.

Some companies embrace the mantle of corporate social responsibility because they fear becoming targets of NGO or consumer campaigns, exposing them and their brands to “reputation risk” or other forms of public opprobrium. Others have enlightened CEOs or a history of being good neighbors. Still others are pressed by investors who are worried about the company’s environmental or other liabilities or who are seeking socially responsible investment opportunities. There is also evidence that environmentally and socially responsible companies earn higher-than-average financial returns.¹⁰⁰

CSR leaders claim that a credible demonstration of social responsibility is fast becoming a norm of good business management. Skeptics charge that companies often take incremental or relatively easy initiatives, such as recycling office paper or reclaiming strip-mined land, while continuing more serious, ethically objectionable practices. They see social responsibility as “greenwash” — a shield from public criticism or a sword with which to attack critics.

Engaging the CSR and socially responsible investment (SRI) movements can be an effective way to advocate for the protection of sacred places:

- SRI shareholders have the power of money behind them and an inside track to question the activities of a particular company. Shareholder resolutions, like the Calvert resolution at Calpine (see Case Study #3 on Medicine Lake), capture company attention at the board level. The higher the resolution vote, the more impetus a company has to consult and negotiate with indigenous groups or withdraw from a destructive project. However, companies are not bound by law to honor shareholder resolutions, even if the resolution receives a majority vote.

- Companies that publicly brand themselves as environmentally or socially responsible are more vulnerable to public criticism. Once that brand is established and has consumer loyalty, the company is loath to lose such value (or goodwill, in accounting terms).

- Embedding the ethic of sacred sites protection within a CSR framework could eventually make it a norm for *all* companies, and potentially build support for federal sacred sites legislation. Companies are starting to develop indigenous peoples’ rights policies and showcase the ways in which communities have embraced their operations.

Norms for Good Practice

Corporate social responsibility is an evolving concept. While it lacks a uniform definition or practice, a CSR template is emerging at the global level that entails seven norms of good practice.¹⁰¹ These include:

- **Mission** The company defines a commitment to social responsibility as part of its fundamental corporate mission. In Europe, the mission often is expressed as triple bottom line goals — financial, environmental and social.

- **Principles** The company articulates fundamental principles to guide its CSR mission, often endorsing or borrowing from existing codes, such as the Global Compact, Global Sullivan Principles or the Environmental Principles of the Coalition of Environmentally Responsible Economies (CERES, see Appendix One). Sometimes companies refer to international legal covenants, such as the International Labor Organization’s core labor rights, or to guidelines developed on an industry basis, such as the “Toward Sustainable Mining — Guiding Principles” developed by the Mining Association of Canada (see Table 3.1).

▪ **Policies** The CSR mission and principles are expressed in substantive company environmental and social policies. Currently, best practice requires company policies to span the three pillars of social responsibility: environmental, social (including the protection of human rights and the promotion of economic development) and good corporate governance. However, few companies address social concerns. Only a handful of companies have a human rights policy and even fewer have a stand-alone indigenous peoples' rights policy.

▪ **Disclosure and reporting** Fundamental to CSR is a company's voluntary public disclosure of information about its social and environmental performance. Spurred by CERES, the reporting movement started with a focus on environment reports, but has since expanded to include reporting on social and economic parameters. Best practice in terms of reporting is the annual or biannual production of a sustainability report, often modeled on the template developed by the Global Reporting Initiative (GRI).¹⁰² To maximize public disclo-

sure, such reports, along with company principles and policies, are available on the Internet. (Currently, the GRI Guidelines address the rights of indigenous people in Part C, Number 5, Social Performance Indicators, Human Rights, HR 12-14, though there is no mention of sacred sites.)

▪ **Monitoring and verification** Disclosure of information about social and environmental performance is central to CSR. But how can investors, affected communities, customers, watchdog groups and other stakeholders trust that the information voluntarily provided by the company is truthful? Companies work with external third parties, such as auditing firms and NGOs, to monitor and verify the information they provide to the public. However, there are controversies over many of these verifications because rather than reviewing specific data, third parties usually consider the internal systems and how information is generated. In a sacred site conflict, fair and effective monitoring might best be provided by an independent oversight committee.

Table 3.1

MINING ASSOCIATION OF CANADA: TOWARD SUSTAINABLE MINING – GUIDING PRINCIPLES

In all aspects of our business and operations, we will:

- Respect human rights and treat those we deal with fairly and with dignity.
- Respect the cultures, customs and values of people with whom our operations interact.
- Recognize and respect the unique role, contribution and concerns of Aboriginal and indigenous peoples.
- Obtain and maintain business through ethical conduct.
- Comply with all laws and regulations in each country where we operate and apply the standards reflecting our adherence to these Guiding Principles and our adherence to best international practices.
- Support the capability of communities to participate in opportunities provided by new mining projects and existing operations.
- Be responsive to community priorities, needs and interests through all stages of mining exploration, development, operations and closure.
- Provide lasting benefits to local communities through self-sustaining programs to enhance the economic, environmental, social, educational and health care standards they enjoy.

SOURCE: *Mining Association of Canada, April 2004, <http://www.mining.ca/>*

▪ Stakeholder consultation

A crucial, perhaps central, part of CSR is a company's willingness to engage with and listen to its stakeholders. Some companies have created stakeholder feedback loops, such as surveys and community advisory councils. Others consult on a more ad hoc basis as the perceived need arises or as a stakeholder demands. Companies that are global CSR leaders participate in a variety of conferences, workshops and networks organized by governments and NGOs. Consultation and the good faith pursuit of communities' un-coerced, prior, informed consent are central in evaluating how well a company upholds human rights in general and indigenous peoples' rights in particular.

▪ **Performance** The bottom line for a company that has embraced CSR is its actual performance. Internal policies, external disclosure, and stakeholder consultation count for little if the company violates laws, spills toxics, files spurious lawsuits or destroys cultural resources. In terms of sacred sites, a company that does not yet have an indigenous rights policy still may demonstrate a willingness to change its investment or operational plans to protect a sacred place.

WHAT IS GOOD CORPORATE PRACTICE ON SACRED LAND?

Until the mid-1990s, the primary focus of the European and North American CSR movement was on the environment. Starting in the late 1990s, however, labor and human rights advocates began to press for a wider canvas. New research highlighted the relationship between human rights and the environment, often profiling corporate conflicts with indigenous peoples.¹⁰³



Christopher McLeod

Today, the articulation of substantive human rights principles and policies — including indigenous rights — is at the cutting edge of the CSR movement. The Global Reporting Initiative (GRI) process that defines reporting requirements has become a norm in the CSR movement, though the early GRI human rights templates did not require companies to report on their relations with indigenous peoples. However, the GRI template is being revised and the draft of the next version has a section on the rights of indigenous people that requires reporting all incidents involving indigenous communities, such as legal actions or complaints.

Norms for good corporate practice on sacred sites probably will be lodged in the larger framework of indigenous rights. Situated at the intersection of human rights and environmental sustainability, such a framework is emerging from: indigenous groups and NGOs; faith-based groups, socially responsible investors, and other groups pressing for corporate accountability; and also from corporations, especially in the mining and energy sector.

Indigenous groups and NGOs have begun to engage with the CSR movement at global and regional levels. At the 2002 World Summit on Sustainable Development in Johannesburg, South Africa, a coalition led by the Indigenous Environmental Network (IEN) criticized a partnership between the global mining

Table 3.2

PRINCIPLES FOR GLOBAL CORPORATE RESPONSIBILITY: BENCH MARKS FOR MEASURING BUSINESS PERFORMANCE

Section 1.4 — Indigenous Communities

PRINCIPLES

1. Where, in a specific national context, there exists constitutional legislation, or where recognized agreements exist, determining policies of reconciliation with indigenous peoples, nations or communities, the company seeks to develop its policies in accordance with that legislation or agreement.

2. The company where it operates in post-conflict and/or oppressive situations seeks to implement existing policies of reconciliation where they are in place.

3. The company respects the cultural, religious and social customs and traditional knowledge of members of indigenous communities.

4. The company strives to contribute to the long-term environmental, social, cultural, and economic sustainability of the indigenous peoples, nations or communities in which it operates.

5. The company respects the bio-cultural integrity of indigenous peoples and their lands and traditions.

6. The company only pursues economic development upon prior resolution and completion of the settlement of land claims between the indigenous people (or First Nation) and the appropriate government(s).

7. The development of joint working agreements between indigenous communities and companies is a prerequisite to building business relationships and commitments.

8. Indigenous peoples, by virtue of their inherent rights, are entitled to full participation in the business decisions which pertain to their ancestral lands and their way of life.

9. The company is committed to respecting fully the rights of indigenous peoples as they are recognized by the appropriate jurisdictions and laws.

10. The company respects indigenous medicines and medical practices.

CRITERIA

1. The company seeks to develop long-term business relationships in indigenous communities and does not terminate its operations without assessing the long-term environmental, social, cultural and economic sustainability impacts on the indigenous community.

2. The company communicates its business plans in a way that the local indigenous community can understand and seeks to be actively involved in the development of indigenous businesses.

3. The company seeks and receives approval from the legitimate local indigenous leadership prior to beginning any business activities.

4. The company, with the co-operation of the indigenous peoples concerned, performs a holistic, comprehensive study of its potential environmental, physical, social, economic, cultural and spiritual impact on the community and modifies its business plan to ameliorate potential harm.

5. The company negotiates a just and equitable economic settlement with the indigenous community(ies) involved, including adequate compensation where applicable.

6. The company's employment policies and practices fully accommodate the cultural, spiritual and social needs of employees who are members of indigenous communities.

7. The company develops a transparent process for the inclusion of indigenous peoples as full participants in business decisions.

8. The company provides employment and training opportunities for, and actively recruits from, indigenous communities for all levels of employment.

9. The company provides opportuni-

ties for all its employees to obtain an understanding of indigenous culture, treaties, history and current issues.

BENCH MARKS

1. The company, through its programmes, policies, practices, and communications implements the principles expressed in the International Conventions on Human Rights, Agenda 21 and the International Labour Organisation Convention Concerning Indigenous and Tribal Peoples in Independent Countries, Convention 169.

2. The company adheres to the International Convention on Bio-Diversity and ensures the protection of bio-cultural integrity and intellectual property rights of the indigenous community(ies).

3. The company, as a matter of policy, refrains from litigation that obstructs the implementation of the recognized rights of indigenous peoples and respect of local customs and traditions.

4. The company, as a matter of policy, refrains from using any imagery, which is offensive to the indigenous community in product marketing, advertising, endorsements, sponsorships and promotions.

5. The company's business plans, and its employment policies and practices are communicated clearly and are available in indigenous languages in both written and oral form.

6. The company, together with the legitimate representatives of the indigenous community, jointly establishes clear decision-making processes and structures with a recognized programme that monitors their implementation.

SOURCE: www.bench-marks.org/1_4.shtml

industry and the World Conservation Union (IUCN) that sought to protect biodiversity as “corporate greenwash.”¹⁰⁴ Endorsed by more than 70 groups, the IEN coalition’s statement called for:

- A moratorium on mining activities until governments and corporations respect indigenous peoples’ rights to self-determination and to free, prior and informed consent to all forms of mining.
- Downsizing the mining industry.
- A stop to environmentally damaging practices such as bulk mining and stripmining; the use of cyanide heap-leach open-pit mining; and sub-marine tailings disposal.

- Reparations to affected communities and restitution for past damages.
- A U.N. Convention on Corporate Accountability covering the mining, energy and chemical industries.

In June 2004, the International Indian Treaty Council presented a Declaration to the Trade Ministers of the Asia Pacific Economic Cooperation forum meeting in Chile. It stated, in part: “We would like to call your attention to Articles 6 and 7 of the ILO Convention No. 169 which establish that indigenous peoples and communities affected by a development project or proposal must be consulted in a broad and transparent way and they must participate in

Table 3.3

SUNCOR ENERGY INC. (CANADA): ABORIGINAL AFFAIRS POLICY *

Guidance & Standards

Communications and Public Affairs will promote the Suncor philosophy in regards to Aboriginal affairs in a manner meaningful to the communities, respecting language, social and cultural institutions.

Suncor will develop and implement initiatives and agreements between Suncor and the Aboriginal communities. These initiatives will:

- Contribute to the development and self-reliance of the Aboriginal peoples.
- Develop into long-term mutually supportive, interdependent relationships.

Suncor will work with Aboriginal communities in response to the social, economic and environmental issues that are of mutual concern in the areas in which the Company operates,

through the development of initiatives based on the following guiding principles:

- Suncor recognizes and values the Aboriginal peoples and communities as the original inhabitants and stewards of the land.
- Suncor respects the Aboriginal traditional ways and the political, social and cultural institutions of each community.
- Suncor acknowledges and accepts responsibility to conduct its operations such that Aboriginal communities and Suncor can co-exist in a safe and healthy environment.
- Suncor will work to support the self-reliance of Aboriginal communities.
- Suncor will deal with the communities within the context of its role as an energy company, and will not

accept the role or the responsibilities of government(s).

In support of this standard and guideline, each business unit within Suncor will develop specific initiatives to address issues of mutual concern to the Company and the Aboriginal communities in areas of its operations. The scope and intent of these initiatives will be consistent with the following guidelines:

- Provide lasting benefits to local communities through self-sustaining programs to enhance the economic, environmental, social, educational and health care standards they enjoy.

* The policy was developed in 1997 and revised in August 2003. See Appendix Two for the full policy.

SOURCE: *Suncor*, www.suncor.com

Table 3.4

INTERNATIONAL COUNCIL ON MINING AND MINERALS: SUSTAINABLE DEVELOPMENT PRINCIPLES

- | | | |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <ul style="list-style-type: none"> ❶ Implement and maintain ethical business practices and sound systems of corporate governance. ❷ Integrate sustainable development considerations within the corporate decision-making process. ❸ Uphold fundamental human rights and respect cultures, customs and values in dealings with employees and others who are affected by our activities. | <ul style="list-style-type: none"> ❹ Implement risk management strategies based on valid data and sound science. ❺ Seek continual improvement of our health and safety performance. ❻ Seek continual improvement of our environmental performance. ❼ Contribute to conservation of biodiversity and integrated approaches to land use planning. ❽ Facilitate and encourage responsible product design, use, re-use, recycling and disposal of our products. | <ul style="list-style-type: none"> ❾ Contribute to the social, economic and institutional development of the communities in which we operate. ❿ Implement an effective and transparent engagement, communication and independently verified reporting arrangements with our stakeholders. |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|

SOURCE: *International Mining and Minerals Council*, <http://www.icmm.org>

the decision-making at every step of the project or proposal.”¹⁰⁵

The Forest Stewardship Council, a global NGO eco-labeling and certification body, makes a commitment to Indigenous Peoples’ Rights one of 10 principles for sustainable forest management: “The legal and customary rights of indigenous peoples to own, use and manage their lands, territories, and resources shall be recognized and respected.” Another principle directly addresses environmental sustainability: “Forest management shall conserve biological diversity and its associated values, water resources, soils, and unique and fragile ecosystems and landscapes, and, by so doing, maintain the ecological functions and the integrity of the forest.”¹⁰⁶

A global coalition of faith-based and environmental groups recently developed a set of principles, criteria and benchmarks for corporate relations with indigenous communities, plus 15 other ethical concerns (see Table 3.2).¹⁰⁷ Ten years in the making, these principles for global corporate responsibility were developed to help major church groups shape their investment decisions, especially with regard to corporations that do business in developing countries.

Like the NGO statements, the global principles stress the importance of consultation and consent, which they formulate as the right of indigenous people to “full participation in the business decisions which pertain to their ancestral lands and their way of life.” Respect is

a central theme of the principles, which call for companies to respect indigenous social customs, traditional knowledge, bio-cultural integrity, medicines and medicinal practices, as well as laws protecting indigenous rights.

Company principles and policies on indigenous rights are in an early stage, emerging primarily in mining and energy industries, which are more likely to interact with indigenous communities. One leader is the Canadian mining company Suncor Ltd., whose Aboriginal Affairs Policy (see Table 3.3) is the most developed of the 20 energy companies and 19 mining companies that used the GRI framework to produce a public sustainability report in 2003. Of these 39 companies, only nine had any kind of indigenous policy at all.¹⁰⁸ However, Suncor’s policy has no specific guidelines for the protection of sacred sites (see Appendix Two for Suncor’s full Aboriginal Affairs Policy).

Mining industry associations also are setting guidelines relevant to indigenous rights. The Mining Association of Canada calls on its members to “Recognize and respect the unique role, contribution and concerns of Aboriginal and indigenous peoples” (see Table 3.1). The global mining industry, as represented by the International Council on Mining and Minerals, does not yet specifically address indigenous rights but encourages its members to “Uphold fundamental human rights and respect cultures, customs and values in dealings with employees and others who are affected by our activities” (see Table 3.4).

To guide big box retail companies such as Wal-Mart and Costco, Christian Brothers Investment Services and Domini Social Investments developed nine guidelines for retail store siting.¹⁰⁹ Regarding Native American and Hawaiian lands they recommend “companies should abide by indigenous peoples’ own definitions of sacred places and seek solutions in line with their wishes regarding the protection of cultural sites” (see Table 3.5).

What emerges from these various efforts? A complete definition of good corporate practice on sacred land is beyond the scope of this paper. However, four key principles can be gleaned from emerging norms and the six case studies:

Early, ongoing consultation Companies should conduct thorough, inclusive, substantive consultation with tribes and other indigenous community leaders in the earliest stages of a project, and before seeking a legal permit for exploration, scoping, etc. In conjunction with indigenous peoples, companies should develop protocols to ensure that the consultation is robust.

Consent – the right to say “no” The purpose of consultation is not limited to designing mitigation measures to avoid or minimize damage to a sacred site while a development project goes ahead. Indigenous groups must give “free, prior and informed consent” to development projects that affect sacred sites. If they do not give consent, the company

should desist from the project and not pursue legal actions or other measures to override the veto of indigenous communities.

Respect for bio-integrity Sacred sites are situated within living landscapes. Protection of sacred sites requires that companies respect and protect the ecological and biological systems — the cultural landscapes — within which the sites are located. Mitigation measures to fence off a site usually are insufficient.

Respect for indigenous knowledge systems Indigenous peoples have their own ways of understanding and describing the ecological, spiritual and cultural importance of sacred sites. Companies should respect and learn from indigenous knowledge systems and not harness Western science to undermine the protection of sacred sites. Building bridges between clashing cultures is a challenge we all face.

CONCLUSION

“In the final analysis, corporate culture must change and embrace the wisdom of disclosure, consultative arrangements and transparency when dealing with indigenous communities,” says Russel Barsh, Associate Professor of Native American Studies, University of Lethbridge, Canada. “Some successful companies have discovered that grassroots cooperation not only reduces the risks of political conflict and violence, but improves their bottom line.”

Table 3.5

CHRISTIAN BROTHERS INVESTMENT SERVICES AND DOMINI SOCIAL INVESTMENTS GUIDELINES FOR SITING RETAIL STORES

The company will respect indigenous peoples’ inherited cultural rights to the lands they have traditionally used for subsistence and cultural activities

and will not deprive them of these rights. The company will not damage any archaeological, sacred, burial or historical sites, traditional cultural

properties, or artifacts of indigenous culture and will consult in appropriate ways with any indigenous peoples that may be affected by its projects.

SOURCE: <http://www.cbisonline.com/file/StoreSitingGuidelines.pdf>

It would be difficult to overstate the importance of consultation — and listening — where sacred places lay in the path of economic development. Consultation is a process that should continue throughout a project, from its earliest stages of consideration through its planning, implementation and evaluation. Both sides have responsibilities. Companies need to engage political and spiritual leaders, learn about their cultural values and practices, and acknowledge tribal people's history. Tribes need to commit to building bridges with corporate entities on an ongoing basis and, for specific projects, to share enough information about themselves to make consultation productive.

Many companies express frustration that the location of sacred sites is often kept secret, and withdrawal from site-threatening development projects may seem to be the only option. Sometimes, no mitigation is acceptable. But other times, moving or relocating project components and avoiding sensitive areas can eliminate the problem and the objections. Respecting the confidentiality of site locations and the cultural reasons underlying the importance of spiritually significant places are good practices.

Based on the case studies in this report and the growing international emphasis on disclosure, engagement and negotiation, consultation is most productive when the involved parties adopt these goals:

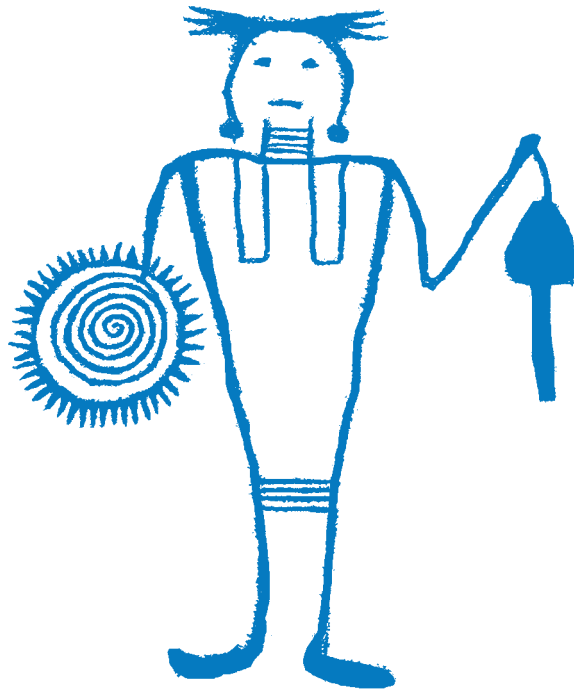
- Inform indigenous communities about proposed plans for a corporate project at the earliest possible stage of the planning process.
- Consult with Native Americans — both tribal government and traditional people and their representatives — at the earliest possible stage of the process.
- Build ongoing relationships between corporations and traditional cultural leaders and

tribal officials that transcend an individual project.

- Inform tribal peoples about the corporation and its goals, objectives, values and ways of decision-making.
- Ensure that sensitive, confidential information is treated with respect and not made public.
- Inform corporations about potential impacts to sacred sites and associated communities and identify resources needing protection and areas that should be avoided.
- Educate corporations about why and how sacred places are important to Native Americans and why it is in the public interest to protect such places.
- Stimulate ongoing dialogue between the involved indigenous groups and corporations, and in appropriate cases, federal, state and other agencies, including providing resources to facilitate this dialogue, where necessary.
- Share long-range planning and monitoring of cultural and other resources at sacred sites.
- Ultimately, draw Native Americans into decisions about management practices that appropriately protect sacred places and cultural resources.

As our case studies illustrate, communication based on mutual respect is a powerful process that can lead to appropriate and sustainable economic activity while protecting cultural resources. Making the protection of sacred sites a prominent agenda item will be an evolutionary step forward in the movement for socially responsible investment and corporate responsibility.

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APPENDIX ONE

CERES ENVIRONMENTAL PRINCIPLES*

Protection of the Biosphere We will reduce and make continual progress toward eliminating the release of any substance that may cause environmental damage to the air, water, or the earth or its inhabitants. We will safeguard all habitats affected by our operations and will protect open spaces and wilderness, while preserving biodiversity.

Sustainable Use of Natural Resources We will make sustainable use of renewable natural resources, such as water, soils and forests. We will conserve non-renewable natural resources through efficient use and careful planning.

Reduction and Disposal of Wastes We will reduce and where possible eliminate waste through source reduction and recycling. All waste will be handled and disposed of through safe and responsible methods.

Energy Conservation We will conserve energy and improve the energy efficiency of our internal operations and of the goods and services we sell. We will make every effort to use environmentally safe and sustainable energy sources.

Risk Reduction We will strive to minimize the environmental, health and safety risks to our employees and the communities in which we operate through safe technologies, facilities and operating procedures, and by being prepared for emergencies.

Safe Products and Services We will reduce and where possible eliminate the use, manufacture

or sale of products and services that cause environmental damage or health or safety hazards. We will inform our customers of the environmental impacts of our products or services and try to correct unsafe use.

Environmental Restoration We will promptly and responsibly correct conditions we have caused that endanger health, safety or the environment. To the extent feasible, we will redress injuries we have caused to persons or damage we have caused to the environment and will restore the environment.

Informing the Public We will inform in a timely manner everyone who may be affected by conditions caused by our company that might endanger health, safety or the environment. We will regularly seek advice and counsel through dialogue with persons in communities near our facilities. We will not take any action against employees for reporting dangerous incidents or conditions to management or to appropriate authorities.

Management Commitment We will implement these Principles and sustain a process that ensures that the Board of Directors and Chief Executive Officer are fully informed about pertinent environmental issues and are fully responsible for environmental policy. In selecting our Board of Directors, we will consider demonstrated environmental commitment as a factor.

Audits and Reports We will conduct an annual self-evaluation of our progress in implementing these Principles. We will support the timely creation of generally accepted environmental audit procedures. We will annually complete the CERES Report, which will be made available to the public.

* Coalition of Environmentally Responsible Economies. From www.ceres.org. As of October 2006, over 50 companies had endorsed the principles.

APPENDIX TWO

SUNCOR ENERGY INC. (CANADA) ABORIGINAL AFFAIRS POLICY*

Scope and Purpose

This policy guidance & standard (PG&S) applies to Suncor Energy Inc. and its subsidiaries world-wide (collectively “Suncor” or “Company”). References in this document to “Suncor Personnel” include directors, officers, employees, contract workers, consultants and agents of Suncor.

Suncor will adapt its Aboriginal Affairs PG&S to reflect legal, constitutional requirements and Aboriginal/Indigenous issues in all countries in which the Company operates.

The purpose of this document is to enable Suncor to develop and implement an effective company-wide approach to Aboriginal Affairs, reflecting its core purpose, values and beliefs.

Guidance & Standards

Communications and Public Affairs will promote the Suncor philosophy in regards to Aboriginal affairs in a manner meaningful to the communities, respecting language, social and cultural institutions.

Suncor will develop and implement initiatives and agreements between Suncor and the Aboriginal communities. These initiatives will:

- Contribute to the development and self-reliance of the Aboriginal peoples.
- Develop into long term mutually supportive, interdependent relationships.

Suncor will work with Aboriginal communities in response to the social, economic and environmental issues that are of mutual

concern in the areas in which the Company operates, through the development of initiatives based on the following guiding principles:

- Suncor recognizes and values the Aboriginal peoples and communities as the original inhabitants and stewards of the land.
- Suncor respects the Aboriginal traditional ways and the political, social and cultural institutions of each community.
- Suncor acknowledges and accepts responsibility to conduct its operations such that Aboriginal communities and Suncor can co-exist in a safe and healthy environment.
- Suncor will work to support the self-reliance of Aboriginal communities.
- Suncor will deal with the communities within the context of its role as an energy company, and will not accept the role or the responsibilities of government(s).

In support of this standard and guideline, each business unit within Suncor will develop specific initiatives to address issues of mutual concern to the Company and the Aboriginal communities in areas of its operations. The scope and intent of these initiatives will be consistent with the following guidelines:

Employment

Participation by Aboriginal people in employment opportunities throughout Suncor’s operations will be developed and supported. Demonstration of this support may include, but is not limited to:

- Proactive recruitment of Aboriginal people.
- Providing internships and cooperative work experience to qualified Aboriginal students.
- Ensuring that the Manager of Aboriginal Affairs is aware of job opportunities and required qualifications.

* From Suncor Web site, www.suncor.com. The policy was developed in November 1997, and revised in August 2003.

Cross Cultural Awareness & Understanding

Initiatives to promote a greater understanding among Suncor staff of Aboriginal culture, traditional ways, treaties, history and current issues will be developed and may include, but are not limited to the following:

- Awareness programs for staff to improve mutual understanding and create a culturally sensitive work environment.
- Staff participation in cultural and other events in Aboriginal communities.

Education

Encouragement and assistance will be provided to Aboriginal people to pursue educational studies and skill development in disciplines relevant to Suncor's operations. Demonstration of this assistance may include, but is not limited to:

- Scholarships/awards to Aboriginal students in pursuit of studies relevant to Suncor's operations.
- Participation in workshops, open houses and career fairs directed at Aboriginal communities.
- Support and promotion of educational and curriculum material which creates awareness of Aboriginal culture and issues.

Business Opportunities & Development

The development of Aboriginal business ventures and creation of opportunities for those businesses to participate in Suncor's operations will be supported. This support may include, but is not limited to:

- Inclusion of Aboriginal businesses in appropriate contract award processes.
- Segmenting such a contract awards into distinct services which Aboriginal business can undertake.
- Commercial relations with the communities will continue to be based on the principle of "value for money". Contracts will be awarded to businesses that can demonstrate ability to provide quality service and be

competitive. Suncor will establish initiatives to help the communities to do business with the Company.

Environment and Safety

Suncor will work in a safe and responsible manner in the communities in which it operates in order to mitigate any impact it may have upon the environment. Suncor will also respect the traditional lands and ways of Aboriginal people. In support of this Suncor will:

- Provide current and accurate information on environment and safety issues and inform the community of potential hazards in a timely manner.
- Reclaim the environment when operations cease.
- Incorporate respect for local traditions and culture in the completion of environmental assessments.

Public Consultation & Community Involvement

Suncor will take steps to ensure that Aboriginal communities and Suncor have a clear understanding of each other's plans and needs and to communicate these plans and needs on a timely basis. These steps will include, but are not limited to:

- Early involvement of Aboriginal people in business plans that impact them.
- Ongoing dialogue to keep informed of issues and trends and to update Aboriginal communities on Suncor's activities.
- Support programs and events organized by the Aboriginal community and support initiatives and partnerships that promote self-sufficiency.
- The communities will be accountable to the Company for the use of the support.
- The Company and the community recognize the need for direct and open two-way communication.

There can be no hidden or unexplained agendas between the Company and the communities.

Implementation

Suncor Management is accountable for establishing work processes which contribute to fulfilling Suncor's commitment to achieve long term, beneficial and interdependent relationships with Aboriginal peoples and their communities. There will be a long-term view of the relationships and the "quick fix" approach will be avoided. Initiatives will operate according to defined and measurable objectives,

which will be developed jointly by the Company and the communities. The Company will assign resources for its Aboriginal Affairs initiatives. The Company will educate its employees on interpretation and application of this standard and guideline. All employees will understand their responsibilities in support of this commitment.

Exceptions –none



APPENDIX THREE

CALVERT'S INDIGENOUS PEOPLES' RIGHTS POLICY

Calvert is concerned about the survival and security of indigenous peoples around the world.

Companies operating on or directly impacting the land of indigenous peoples should support appropriate development that respects indigenous territories, cultures, environment and livelihoods.

Calvert will challenge companies that have a pattern and practice of violating the rights of indigenous peoples. We will not approve companies that have a pattern of egregious practices toward indigenous peoples. We will also urge companies that have direct ongoing conflicts with indigenous communities to resolve concerns through dialogue with indigenous community representatives, shareholders and others.

We may invest in companies whose practices may impact indigenous communities.

Under these circumstances, Calvert will actively encourage companies, through shareholder dialogue and advocacy, to adopt and implement company-wide guidelines and policies that take proactive measures in dealing with indigenous communities, including:

- Respect land, sovereignty, natural resource rights and traditional homelands of indigenous peoples and communities.
- Respect cultural heritage, ceremonial and sacred indigenous sites.
- Negotiate agreements transparently with independent observers present, and uphold the self-governance of indigenous communities.
- Avoid exacerbating any tensions between indigenous communities and local or national governments.
- Contribute to community-driven development and environmental management plans.
- Hold ongoing consultations and meetings with indigenous communities and leaders in their area of operations.
- Respect self-determination and secure prior informed consent in any transaction including involving the acquisition and use of indigenous peoples' property, as well as intellectual property; provide mutually agreed upon restitution and/or compensation for any property used or acquired from indigenous peoples...

APPENDIX FOUR

THE LAW

The most commonly used set of tools for protecting Native American sacred places is U.S. law, which has proven to be far from adequate.

In 1988, the U. S. Supreme Court dismissed the possibility of using the First Amendment to protect sacred sites. In that case, the Court refused to halt the construction of a Forest Service logging road through a Native American sacred area in northern California — even though two lower courts had found that the construction of the road would virtually destroy the ability of the Native American plaintiffs to practice their religion. The Supreme Court reversed the lower courts, finding that because the government’s land management decision did not coerce the affected native practitioners into acting contrary to their religious beliefs, nor penalize religious activity by denying them an equal share of the rights (benefits and privileges enjoyed by other citizens), the First Amendment provided no basis for the native religious practitioners to challenge that decision. The clear effect of the ruling was to elevate the government’s property rights over the native practitioners’ religious rights, as the Court observed that “whatever rights Indians may have to the use of the area...those rights do not divest the Government of its right to use what is, after all, its land.”¹¹⁰ The Court, however, asserted that federal land management agencies could voluntarily choose to “accommodate” Native American religious practices and protect sacred sites.

Thus, native people have looked to federal legislation as a vehicle to protect sacred places. While no federal legislation provides judicially enforceable protection specifically for sacred sites, four acts of Congress acknowledge their religious and historic significance:

- American Indian Religious Freedom Act of 1978.
- Archaeological Resources Protection Act of 1979.
- Native American Graves Protection and Repatriation Act of 1990.
- National Historic Preservation Act of 1966, amended 1992.

The American Indian Religious Freedom Act (AIRFA) states in forceful language that it is the “policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise... traditional religions... including but not limited to access to sites...”¹¹¹

However, the Act did not create a mandatory procedural mechanism for federal agencies to protect Indian access and prevent damage to sacred sites. It contains neither a penalty provision that can be imposed on violators nor a “cause of action” enabling native people to go to court. As a result, the Act has been more of a statement of intent than a practical tool either for Indian or federal agencies. According to Jack Trope, executive director of the Association on American Indian Affairs, every government agency dealing with Indian tribes from the Defense Department to the Park Service has its own policy on sacred lands.¹¹²

In the absence of a sacred sites protection law with teeth, the laws that are generally utilized to protect sacred sites are primarily procedural in nature, not substantive. The Archaeological Resources Protection Act (ARPA) applies to sites that are archaeological in nature and requires that tribes must consent to archaeological excavations on tribal land and receive notice of excavation on federal land if the site is of religious or cultural importance. The Native American Graves Protection and Repatriation Act (NAGPRA) applies to grave

sites, which are often considered to be sacred. It requires the consent of tribes before burial sites on tribal land may be excavated and provides for notice to and consultation with tribes for grave sites located on federal land. If the tribe is culturally affiliated or the burial site is on land that has been judicially recognized as the tribe's aboriginal land, it is deemed to have ownership or control over all remains and objects that are found in the grave site (unless there are lineal descendants who can make a claim).

Probably the most frequently utilized procedural mechanism for avoiding damage to sacred sites is a review process within the National Historic Preservation Act (NHPA). The "Section 106 process" requires federal agencies that engage in undertakings — which includes all activities under the jurisdiction of the agency — as well as projects requiring a permit, or that receive funding from the agency, to consider the effect of their actions on any site or structure which is included, or might be eligible for inclusion, in the National Register of Historic Places.¹¹³ The federal agency must consult with the State Historic Preservation Office and give the Advisory Council on Historic Preservation (a federal agency) the opportunity to comment when it chooses to do so.

In 1992, the NHPA was amended to make clear that properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization can be eligible for inclusion on the National Register. Moreover, the amendment added the requirement that federal agencies consult with Indian tribes or Native Hawaiian organizations that attach importance to such sites. Regulations implementing these amendments indicate that Indian tribes and Native Hawaiian organizations should be specifically treated as consulting parties in the process when they request such a designation. The NHPA also requires that each federal agency establish a historic preservation program, carried out in consulta-

tion with Indian tribes and Native Hawaiian organizations.

The NHPA has helped to forge a strong partnership between preservation and native groups, which has promoted greater public awareness and support for the protection of sacred sites. The Advisory Council on Historic Preservation and State Historic Preservation Offices have also weighed in on occasion to recommend that approval be denied to development projects that threaten sacred sites. However, the NHPA specifies only a process; it does not dictate an outcome. That means that project approval decisions are subject to political and economic pressures and have in some cases been re-examined and changed. On at least a few occasions, decisions made during the Clinton administration to protect certain sites were reversed by the Bush administration as part of its resource development agenda.

Other federal laws may also have relevance to the protection of sacred sites laws pertaining to the environment or federal land management. One example is the National Environmental Policy Act (NEPA), which requires the preparation of Environmental Impact Statements and Environmental Assessments when federal actions will have a significant impact upon the environment. Studies done pursuant to NEPA routinely include an analysis of the cultural impacts of proposed federal actions and consultation with Indian tribes, and interested individuals are (or should be) part of the process. The Federal Land Policy and Management Act (FLPMA) is another example of a law that can be relevant to sacred site protection in a more indirect way. This act provides for the designation of Areas of Critical Environmental Concern (ACEC) on Bureau of Land Management (BLM) land. ACECs are areas where special management attention is needed to protect and prevent irreparable damage to important historic, cultural and scenic values, as well as to wildlife and the environment generally. The BLM has jurisdiction over millions of acres of public land and

BLM policies affect corporations seeking to extract resources on those federal lands.

Recently, another law, the Religious Freedom Restoration Act (RFRA), has been raised in court cases dealing with the protection of sacred lands. RFRA is a general law that seeks to protect the free exercise of religion by requiring the government to justify its actions by showing that it has a compelling interest and no less restrictive alternative whenever government action would substantially burden the free exercise of religion. RFRA does not specifically mention Indian religions or sacred sites and it is unknown at present to what extent this law will provide substantive protection to threatened sites.

The Clinton administration attempted to rectify the shortcomings of existing law by issuing Executive Order 13007. The order directed all federal agencies to: 1) accommodate Indian access to sacred sites, and 2) avoid damage to the physical integrity of such sites. It also instructed agencies to maintain confidentiality of sites. The Bush administration has kept the order in force, although questions have been raised about the level of commitment by federal agencies since the change in administrations.

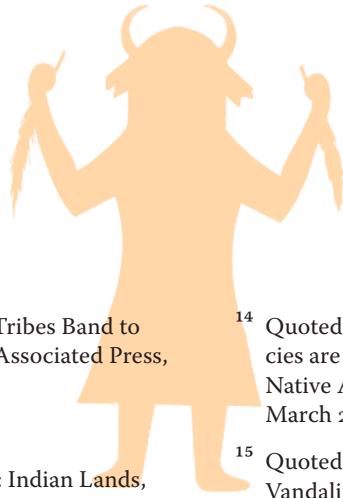
Norms relevant to the protection of sacred sites are also emerging at the international level within various human rights instruments. The only binding international treaty focused exclusively on indigenous rights, however, is International Labor Organization (ILO) No. 169. One of its general principles states: "The people concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use..."¹¹⁴

Using existing laws to protect sacred sites has shortcomings. The main problem is that, unlike several other countries, such as Australia and Canada, there is no substantive federal sacred site legislation in the United States. The lack of a government mandate, and the inability to go to court to enforce it, means that there is no true and lasting protection for sacred sites. An administrative decision to reject a particular development proposal can be, and often has been, reversed. Moreover, even when one proposed project is quashed, the site is vulnerable to a new one.

Thus, the legal set of tools must also include legislative advocacy. There has been an ongoing effort to pass new national legislation to protect sacred places, but the political obstacles are huge. Mining interests, developers, private property rights groups, and even federal land management agencies like the National Park Service are resistant. Meanwhile, on the tribal side, the great variety of circumstance, cultural practice and need for confidentiality makes one-size-fits-all national legislation very difficult to write, let alone pass.

Total reliance on legal mechanisms also has drawbacks. The legal system is inherently adversarial: There are winners and losers. Laws tend to be rigid and often cause over-reliance on litigation as opposed to negotiation and engagement. It is doubtful that a law could be written that would cover all possible types of sacred sites. Also, the letter of the law and the adequate enforcement of existing law are two separate matters. The key to social and corporate acceptance of the legitimacy of Indian claims to protect sacred sites is *respect*. Laws help to build respect but they cannot mandate it.

Thanks to Jack Trope for contributing to this section on the law.



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