PRESERVING SACRED SITES AND PROPERTY LAW

TROY A. RULE*

Should courts have the power to order the federal government to give land rights to particular groups based solely on their religious beliefs? Calls for legal rules requiring such effectual transfers have grown in recent years as Americans have started to confront the country's history of mistreatment of Native nations and other disadvantaged groups. Most recently, Indigenous claimants in a pending Ninth Circuit case want the court to interpret the Religious Freedom Restoration Act of 1993 to entitle them to a remedy resembling a perpetual easement on certain federal land. This would prohibit development on the land to protect a sacred site.

At first glance, a law requiring the federal government to give the equivalent of an easement in public land to a singled-out religious party might seem like an appealing way to further important reparative justice or religious freedom goals. However, legal rules requiring such uncompensated property transfers on the basis of religion would also contravene bedrock principles of constitutional and property law and threaten crucial climate change mitigation efforts. This Article is the first to rigorously examine the broader consequences of embracing rules that would compel governments to effectively forfeit public land rights to advance vital reparative justice or religious liberty objectives. It then outlines an alternative approach to preserving Indigenous sacred sites that would respect federal land rights and give Native nations a much stronger voice in site protection decisions.

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* Joseph Feller Memorial Chair in Law & Sustainability and Professor of Law, Arizona State University Sandra Day O'Connor College of Law. This Article benefited greatly from the valuable input of participants at the SRP Sustainability Conference of American Legal Educators, including Rhett Larson, Felix Mormann, J.B. Ruhl, Michael Wolf, and David Wright. I am also deeply grateful to Vanessa Casado-Perez, James Coleman, Zachary Gubler, Trevor Reed, and Amy Rule for their insights at various stages of this project.

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INTRODUCTION

Many Indigenous communities across the United States are already beginning to disproportionately bear the consequences of climate change.[1] The Navajo Nation's declaration of a state of emergency during Arizona's record-breaking 2023 heat wave exemplifies this reality.[2] While high temperatures approached one hundred degrees for several days in a row throughout much of the Navajo Nation, roughly 15,000 Navajos uncomfortably hunkered down in homes that lacked air conditioning or even electricity.[3] Such climate-related suffering is only the latest chapter in a broader, centuries-long history of oppression and mistreatment toward Native nations on this continent.[4] Only aggressive reductions in global greenhouse gas emissions are likely to significantly stem this newest form of Indigenous injustice.[5]

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1. This Article primarily uses the terms "Indigenous" and "Native" to refer to the highly diverse collection of groups and individuals it seeks to identify and generally avoids the term "Indian," recognizing that Europeans imposed the latter term upon Indigenous peoples and that many of them increasingly disfavor its use. Although out of practical necessity this Article often groups all Native nations under a single term, the author is fully mindful of and celebrates the fact that each Native Nation has its own distinct name, history, and identity.

2. *See* Shondiin Silversmith, *As Temperatures Soar, Navajo Nation Declares State of Emergency Due to Extreme Heat*, NAVAJO-HOPI OBSERVER (Aug. 1, 2023, 8:17 PM), https://www.nhonews.com/news/2023/aug/01/temperatures-soar-navajo-nation-declares-state-eme/ [https://perma.cc/EL92-E66R].

3. *Id.*

4. Academicians are finally beginning to more fully document the United States's vast and sordid array of historic and continuing abuses toward Indigenous people. Only a small sampling of this burgeoning and important literature is listed here. *See generally* William Bradford, *Beyond Reparations: An American Indian Theory of Justice*, 66 OHIO ST. L.J. 1 (2005); Wenona T. Singel & Matthew L.M. Fletcher, *Power, Authority, and Tribal Property*, 41 TULSA L. REV. 21 (2005); Rebecca Tsosie, *Accountability for the Harms of Indigenous Boarding Schools: The Challenge of "Healing the Persisting Wounds" of "Historic Injustice,"* 52 SW. L. REV. 20 (2023); Rebecca Tsosie, *Indigenous Peoples and the Ethics of Remediation: Redressing the Legacy of Radioactive Contamination for Native Peoples and Native Lands*, 13 SANTA CLARA J. INT'L L. 203 (2015); Mary G. Findling, Logan S. Casey, Stephanie A. Fryberg, Steven Hafner, Robert J. Blendon et al., *Discrimination in the United States: Experiences of Native Americans*, 54 HEALTH SERVS. RSCH. 1431, 1440 (2019) (finding "widespread, high levels of discrimination personally experienced by Native Americans today across many areas of life"); André B. Rosay, *Violence Against American Indian and Alaska Native Women and Men*, NAT'L INST. JUST. J., Sept. 2016, at 39, 39, https://www.ojp.gov/pdffiles1/nij/249822.pdf [https://perma.cc/R6PV-CHPQ] (reporting "alarmingly high rates" of violence against Indigenous men and women in the United States).

5. Many Native nations across the world readily recognize that climate change will disproportionately harm them and are strong advocates of climate mitigation policies and actions. *See* Cinnamon P. Carlarne, *Climate Courage: Remaking Environmental*

Tragically, Native nations also often have incentives to oppose the very domestic mining and clean energy projects needed to rapidly stem climate change and its devastating effects—effects that are likely to fall disproportionately on them.[6] Decarbonizing the U.S. energy system will require an unprecedented buildout of wind, solar, and electricity transmission infrastructure, and the development of new domestic mines for critical energy transition minerals such as lithium, cobalt, nickel, and copper.[7] Such projects often implicate raw federal land that is culturally or religiously significant to one or more Indigenous communities—many of which have faith systems that hold certain land areas to be highly sacred.[8] Federal agencies are legally obligated under Section 106 of the National Historic Preservation Act (NHPA) to consult with Native nations during the permitting process about ways to mitigate harms to cultural resources, but uncertainty about what constitutes adequate "consultation" can limit the efficacy of those discussions.[9] Dissatisfaction with this consultation process and its outcomes has prompted some Native nations to bring legal claims under the NHPA, but those claims have had only limited success.[10]

Justifiably exasperated after decades of slow progress in protecting Indigenous sacred sites on federal land through conventional channels, Native nations are increasingly considering alternative strategies—including some aimed at reshaping foundational legal structures to advance their cause.[11] Among them are a group of Indigenous claimants seeking to block a federal land exchange for a new Arizona copper mine

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Law, 41 STAN. ENV'T L.J. 125, 147 (2022) (noting that "Indigenous peoples have been at the forefront of environmental and climate activism for decades"). *See also* Rebecca Tsosie, *Indigenous People and Environmental Justice: The Impact of Climate Change*, 78 U. COLO. L. REV. 1625, 1630 (2007).

6. *See* Jamison Ervin, *Indigenous Peoples Least Responsible for the Climate Crisis*, INTER PRESS SERV. NEWS AGENCY (Aug. 9, 2018), http://www.ipsnews.net/2018/08/indigenous-peoples-least-responsible-climate-crisis/ ("[B]ecause their livelihoods and wellbeing are intimately bound with intact ecosystems, Indigenous peoples disproportionately face the brunt of climate change, which is fast becoming a leading driver of human displacement.").

7. *See infra* notes 60–71 and accompanying text.

8. Gregory R. Campbell & Thomas A. Foor, *Entering Sacred Landscapes: Cultural Expectations Versus Legal Realities in the Northwestern Plains*, 24 GREAT PLAINS Q. 163, 165 (2004).

9. As explained in detail later in this Article, Section 106 of the National Historic Preservation Act outlines these consultation obligations. *See infra* notes 193–95 and accompanying text.

10. *See infra* notes 94–113 and accompanying text.

11. *See* Angela R. Riley, *The Ascension of Indigenous Cultural Property Law*, 121 MICH. L. REV. 75, 75 (2022) ("Indigenous Peoples across the world are calling on nation-states to 'decolonize' laws, structures, and institutions that negatively impact them.").

on the theory that allowing it to proceed would substantially burden their religious exercise.[12] Such a remedy would effectively strip the federal government of its core rights as a landowner to exclude others from its land, manage its use, and convey the land to others.[13] Even though U.S. courts have historically rejected Religious Freedom Restoration Act (RFRA)–based challenges to federal land development projects,[14] the claimants in *Apache Stronghold v. United States*[15] are trying once again to leverage RFRA's provisions to acquire the functional equivalent of a valuable easement in certain federal land based on their religious beliefs.[16] Although converting RFRA into a tool for such transfers would create a useful new means of protecting Indigenous sacred sites, it would also undermine bedrock principles of constitutional and property law by entitling RFRA claimants to effectively secure federal land rights on the basis of their religious beliefs.

The potential hazards of empowering courts to transfer federal land rights to religious claimants are even greater in the climate change era. Federal land comprises roughly one third of all land in the United States and will thus be involved in much of the transmission, renewable energy, and mineral mine development needed to decarbonize the U.S. energy sector.[17] Legal rules mandating uncompensated transfers of federal land rights to discrete parties based on subjective religious significance claims could significantly impede that urgent movement. Because it's expected that *Apache Stronghold* will ultimately be appealed to the U.S. Supreme Court, the Court could soon be asked to analyze these questions about the appropriate balance between religious liberty protection and property protection on federally owned land.[18]

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12. *Apache Stronghold v. United States*, 38 F.4th 742, 748 (9th Cir.), *reh'g en banc granted*, *vacated*, 56 F.4th 636 (9th Cir. 2022). *See infra* Section I.D.2.

13. Edella Schlager & Elinor Ostrom, *Property-Rights Regimes and Natural Resources: A Conceptual Analysis*, 68 LAND ECON. 249, 250–51, 256 (1992) (classifying rights of access, withdrawal, management, exclusion, and alienation as types of "property rights").

14. *See infra* Section I.D.1.

15. 38 F.4th 742 (9th Cir. 2022).

16. *See infra* Section I.D.3.

17. Bruce R. Huber, *The Durability of Private Claims to Public Property*, 102 GEO. L.J. 991, 993 (2014).

18. Bernard Bell, *Land, "Sacred Spaces," and Free Exercise of Religion: Musings About* Apache Stronghold v. United States, YALE J. REGUL.: NOTICE & COMMENT (July 6, 2022), https://www.yalejreg.com/nc/land-sacred-spaces-and-free-exercise-of-religion-musings-about-apache-stronghold-v-united-states/ [https://perma.cc/WA5D-7E2L] ("Apache Stronghold apparently intends to seek *certiorari*, and so perhaps the Supreme Court will take up the case."); Eric Ledermann & Andrew Black, *Religious Freedom for All Means Sacred Indigenous Sites, Too*, THE HILL (Mar. 30, 2023, 5:30 PM), https://thehill.com/opinion/civil-rights/3926569-

Fortunately, it's entirely possible to significantly expand Indigenous ancestral land protections on federal land without undermining established property laws or unduly hindering the transition to a cleaner, lower-carbon energy system. This Article challenges recent arguments for interpreting RFRA or other laws to effectively require uncompensated transfers of land interests from the federal government to religious claimants and outlines an alternative approach to advancing important Indigenous reparations and religious freedom goals that would fit better within the country's age-old property system.

Part I of this Article recounts some of the United States's unflattering history of mistreatment toward Native nations and growing efforts to begin to repair the extensive harms caused by these misdeeds. Part I also describes efforts made at all levels of government to decarbonize the nation's energy system to mitigate climate change and the growing tension between these efforts and the push to advance Indigenous reparative justice and religious liberty by better protecting sacred sites on federal land. Part II of this Article applies established property law frameworks to analyze recent arguments by the *Apache Stronghold* claimants and others for empowering courts to effectively compel transfers of federal land rights to religious groups, ultimately arguing that such an approach would be unconstitutional under the Takings Clause and Establishment Clause. Part III then outlines an alternative approach to advancing reparative justice for Indigenous people throughout the United States that would result in more efficient and equitable outcomes for all stakeholders. This federally legislated approach would give Native nations monetary credit for use in acquiring protective easements covering sacred sites within their ancestral territories at fair market value in exchange for a commitment to generally not challenge new clean energy–related projects elsewhere within those ancestral areas for a specified period. The legislation would also entitle participating Native nations to a share of new federal lease revenues and minerals extraction royalties collected through such projects. Such an opt-in system would better treat Native nations as independent sovereigns, protect their privacy, and empower them to protect numerous sacred sites while also promoting more streamlined development of the mines and clean energy–related infrastructure needed for deep decarbonization.

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religious-freedom-for-all-means-sacred-indigenous-sites-too/ (quoting religion scholar Thomas Berg as calling the *Apache Stronghold* case "the most important Native American religious liberty case in 15 years").

I. ANCESTRAL LANDS AND THE ENERGY TRANSITION

Two vital policy movements are colliding with each other to fuel heated conflicts over federal land resources across the United States. On the one hand, Americans are beginning to acknowledge the country's history of mistreatment of Native nations and to support better protections for Indigenous cultural resources—including those situated on federal land.[19] On the other hand, Americans' century-long dependence on fossil fuels has spurred a global climate crisis requiring a rapid build-out of new domestic energy infrastructure. Efforts to confront both of these challenges necessarily implicate vast stretches of federally owned Indigenous ancestral lands—lands that Tribal nations claim to have occupied for centuries before European colonists arrived.[20]

Although Indigenous communities identify nearly all of North America's land as ancestral territory, today's most contentious battles over ancestral lands center on federal public lands.[21] The federal government currently manages more than 640 million acres of federal public lands comprising roughly twenty-eight percent of all land in the United States.[22] The federal government also holds roughly fifty-six million acres of Indian "trust lands" or "reservation lands" in trust for Native nations.[23] Most of this land resides in western states,[24] and most ordinary federal land is at least somewhat accessible to private entities and individuals.[25] An expansive administrative structure comprised of four main federal agencies manages most federal public land, oversees

19. *See* sources cited *supra* note 4.

20. As at least one relatively recent case showed, the geographic scope of an Indigenous community's "ancestral lands" is often difficult to definitively establish, and this uncertainty can weaken claims for broad protection of such areas. *See Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 205 F. Supp. 3d 4, 35 (D.D.C. 2016) (determining that the Standing Rock Sioux Tribe's definition of its ancestral lands as "wherever the buffalo roamed" was insufficiently clear to support a claim aimed at protecting culturally significant lands against a proposed pipeline project).

21. For an interactive map displaying Indigenous ancestral land claims across North and South America, visit NATIVE LAND, https://native-land.ca/ [https://perma.cc/9QVZ-AA3B].

22. CONG. RSCH. SERV., R42346, FEDERAL LAND OWNERSHIP: OVERVIEW AND DATA 1 (2020), https://sgp.fas.org/crs/misc/R42346.pdf [https://perma.cc/CXL8-2L36].

23. *Id.* at 1 n.1.

24. *Id.* at 1. ("[F]ederal land ownership is concentrated in Alaska (60.9%) and 11 coterminous western states (45.9%), in contrast with lands in the other states (4.1%).").

25. Huber, *supra* note 17, at 1000 ("Private entities are allowed to use nearly all federal land in various ways that depend on the land's classification.").

natural resource development and recreational activities on it, and seeks to preserve it for future generations.[26]

A. Growing Acknowledgment of Injustices against Native Nations

Popular support for protecting more Indigenous sacred sites on federal land has grown in recent years as Americans have started to recognize the grave injustices inflicted upon Native nations over the country's history. Signs of this reckoning are visible in a wide variety of contexts. After decades of protests, multiple professional sports franchises have finally started replacing Indigenous-related mascots and team names long viewed by many as Indigenous racial slurs.[27] Organizations throughout the United States are also increasingly using land acknowledgement statements to help educate others about the historic and continuing impacts of European colonialism on Native nations.[28] And for the first time in the country's history a Native American—Deb Haaland—is serving as U.S. Secretary of the Interior and overseeing a broad range of policies affecting federal public lands.[29]

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26. CONG. RSCH. SERV., *supra* note 22, at 1 (identifying the Bureau of Land Management, Forest Service, Fish and Wildlife Service, and National Park Service as the country's primary federal land management agencies).

27. Major League Baseball's Cleveland Guardians and the National Football League's Washington Commanders are two prominent examples of such recent mascot changes. *See* David Waldstein, *In Cleveland, Some Fans Are Guardians Only of the Past*, N.Y. TIMES (Apr. 16, 2022), https://www.nytimes.com/2022/04/16/sports/baseball/cleveland-guardians.html; Ken Belson, *With Commanders, the Washington N.F.L. Franchise Moves Past Old Name*, N.Y. TIMES (Feb. 2, 2022), https://www.nytimes.com/2022/02/02/sports/washington-football-team-commanders.html.

28. *See* Monika Batra Kashyap, *Unsettling Immigration Laws: Settler Colonialism and the U.S. Immigration Legal System*, 46 FORDHAM URB. L.J. 548, 575–76 (2019) ("Indigenous land acknowledgements can . . . force non-Indigenous students to confront their own complicities within settler colonialism and their resultant responsibilities on Indigenous lands."). It is worth noting that some Indigenous rights advocates have criticized land acknowledgments on the ground that it does little to actually repair past wrongs against Native nations. *See, e.g.*, Christine Zuni Cruz, *The Indigenous Decade in Review*, 73 SMU L. REV. F. 140, 145 (2020) (A "land acknowledgement, meant to be respectful, is not without its cruel irony . . . given that it is often acknowledged in places of most significance, forever lost to settler-colonials."); Sharally Munshi, *Dispossession: An American Property Law Tradition*, 110 GEO. L.J. 1021, 1023 (2022) ("Academic conferences now open with formal ceremonies acknowledging the Indigenous peoples on whose stolen land we convene, but these gestures of 'land acknowledgement' come at a moment when Indigenous peoples themselves demand 'land back.'").

29. Coral Davenport, *Deb Haaland Becomes First Native American Cabinet Secretary*, N.Y. TIMES (Mar. 15, 2021), https://www.nytimes.com/2021/03/15/climate/deb-haaland-confirmation-secretary-of-interior.html.

Supported in part by the United Nations Declaration on the Rights of Indigenous Peoples, a broader global movement toward greater reparative justice for Native nations is advancing across much of the rest of the developed world as well.[30]

Indigenous communities that have waited several decades, or even centuries, for reparations for the numerous atrocities they have suffered are understandably calling for swift and meaningful action today. Much of the turmoil Native nations have endured is ultimately traceable to the U.S. Supreme Court's controversial *Johnson v. M'Intosh*[31] decision, which applied the "doctrine of discovery" roughly two hundred years ago in a way that subsequently led to the displacement of hundreds of Tribal nations from their ancestral lands.[32] The *M'Intosh* Court's majority uncomfortably reasoned that "[c]onquest gives a title which the Courts of the conqueror cannot deny" and that this title supersedes any Indigenous land rights.[33] Although the Supreme Court later limited this right of conquest to lands acquired through "defensive" or "just cause" wars, the *M'Intosh* decision's impacts persisted: title to thousands of square miles of land formerly occupied by Native nations became firmly vested in the United States government.[34] Over the two centuries following *M'Intosh*, the United States has leveraged those land resources to flourish into a wealthy global superpower while most Native nations within the country have suffered under chronic poverty and systemically limited economic opportunities.[35] Further delaying reparative actions for

30. *See, e.g.*, G.A. Res. 61/295, annex, Declaration on the Rights of Indigenous Peoples, at 6 (Sept. 13, 2007) (declaring that "Indigenous peoples have the right to practice and revitalize their cultural traditions and customs," and that "[t]his includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature").

31. 21 U.S. (8 Wheat.) 543 (1823).

32. *Id.* at 603–05.

33. *Id.* at 588–89.

34. For more details and perspectives on use of the doctrine of discovery to justify the displacement of Tribal nations from their ancestral lands, see generally Jedediah Purdy, *Property and Empire: The Law of Imperialism in* Johnson v. M'Intosh, 75 GEO. WASH. L. REV. 329 (2007); STUART BANNER, HOW THE INDIANS LOST THEIR LAND: LAW AND POWER ON THE FRONTIER (2005); Angela R. Riley & Kristen A. Carpenter, *Owning Red: A Theory of Indian (Cultural) Appropriation*, 94 TEX. L. REV. 859, 875 (2016) (noting that the "decision in *Johnson* was foundational to the jurisprudence of American property law and Indian law alike, as subsequent courts built on the holding and dicta of *Johnson* to continue to diminish Indian property rights" (footnote omitted)); Munshi, *supra* note 28.

35. *See generally* Robert J. Miller, *The International Law of Colonialism: A Comparative Analysis*, 15 LEWIS & CLARK L. REV. 847 (2011) (arguing that the doctrine of discovery made it difficult for Native Americans to obtain full title to land and thereby accumulate wealth).

this painful history is likely to only exacerbate the disparities and hardships it created.

1. VOLUNTARY CONVEYANCES OF PRIVATE LAND TO NATIVE NATIONS

In recent years, the Indigenous "Land Back" movement has emerged as a significant feature of the broader effort to repair past wrongs toward Indigenous communities in the United States and beyond. The Indigenous Land Back movement advocates for transferring property interests to Tribal nations in some or all of their identified ancestral lands.[36] Although land interest transfers have been occurring in various forms for decades to address specific misdeeds or failures against Indigenous communities, landowners are increasingly making these transfers as expressions of support for broader reparative justice goals.[37]

Numerous private entities across the United States have recently participated in the Land Back movement by voluntarily conveying culturally significant land interests to Native nations. In many cases, the grantors of these interests are nonprofit conservation groups that invite Native nations to partner with them in preserving the ancestral resources involved.[38] In 2022, a nonprofit group conveyed more than 500 acres of California coastal land to the InterTribal Sinkyone Wilderness Council—a group representing ten different Native nations across that region—and enlisted the council to help protect these lands.[39] In that same year, a different nonprofit similarly helped the Bois Forte Band of Chippewa to acquire more than 28,000 acres of its ancestral land in northeastern Minnesota.[40] Such voluntary land transfers are impactful means of advancing Indigenous reparative justice.

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36. *See, e.g.*, Kekek Jason Stark, Autumn L. Bernhardt, Monte Mills & Jason Robison, *Re-Indigenizing Yellowstone*, 22 WYO. L. REV. 397, 445–46 (2022) (describing the Indigenous Land Back movement as a "rallying cry for a more just and equitable future of land and resource management").

37. Roxanne Dunbar-Ortiz, *Land Claims: An Indigenous People's History of the United States*, IN THESE TIMES (Sept. 12, 2015), https://inthesetimes.com/article/land-claims-an-indigenous-peoples-history-of-the-united-states [https://perma.cc/H9CJ-GEYD]; Dani Anguiano, *Native American Tribes Reclaim California Redwood Land for Preservation*, GUARDIAN (Jan. 25, 2022, 2:32 PM), https://www.theguardian.com/us-news/2022/jan/25/native-american-tribes-california-redwood-preservation [https://perma.cc/7AKL-9PGN].

38. *See* Melissa Olson & Matt Sepic, *Return of 28,000 Acres to Minnesota Tribe Is Likely Largest Land-Back Deal Ever*, MPR NEWS, https://www.mprnews.org/story/2022/06/08/return-of-28000-acres-to-minnesota-tribe-is-likely-largest-landback-deal-ever (June 9, 2022, 6:00 PM).

39. Anguiano, *supra* note 37.

40. Olson & Sepic, *supra* note 38.

Reparations-driven voluntary land conveyances to Native nations can admittedly complicate the reparative justice efforts of other historically disadvantaged groups. The ongoing controversy surrounding the central Los Angeles community of "Chavez Ravine" exemplifies these challenges.[41] Chavez Ravine once hosted three mostly Latino neighborhoods but now hosts the famed Dodgers Stadium.[42] The Federal Housing Authority (FHA) initially acquired most of Chavez Ravine through voluntary purchases and eminent domain proceedings in the 1950s with plans to build a public housing project in the area.[43] However, "red scare" activists portrayed the proposed project as an act of socialism and ultimately undermined its public support.[44] The City of Los Angeles then acquired the land from the FHA and eventually sold some of it to the Dodgers to build their baseball park.[45] Descendants of Latino families that once lived in Chavez Ravine have recently started calling for the Dodgers to convey the stadium's land to them as an act of reparation[46]—a move that would give these descendants a roughly $1 billion windfall.[47] These descendants have acknowledged that such a conveyance would ignore the interests of Native nations whose ancestors occupied Chavez Ravine long before Latino neighborhoods emerged there.[48]

Despite these complexities, the growing number of voluntary transfers of private land rights to Tribal nations—and other historically displaced or mistreated groups—is a positive step forward in the important effort to begin repairing historic wrongs against Indigenous communities. Because such transfers are strictly voluntary, they also

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41. *See* Jesus Jiménez, *The Land Beneath This Stadium Once Was Theirs. They Want It Back.*, N.Y. TIMES (May 7, 2023), https://www.nytimes.com/2023/05/07/sports/baseball/baseball-dodgers-reparations.html.

42. *Id.*; Matthew J. Parlow, *Unintended Consequences: Eminent Domain and Affordable Housing*, 46 SANTA CLARA L. REV. 841, 843–46 (2006).

43. Parlow, *supra* note 42, at 843–44.

44. Thomas S. Hines, *Housing, Baseball, and Creeping Socialism: The Battle of Chavez Ravine, Los Angeles, 1949–1959*, 8 J. URB. HIST. 123, 138–39 (1982).

45. *Id.*; *Arechiga v. Hous. Auth. of L.A.*, 7 Cal. Rptr. 338, 340 (Dist. Ct. App. 1960).

46. Jiménez, *supra* note 41. These advocates became emboldened in their idea after Los Angeles County gave the descendants of a Black couple $20 million worth of beachfront land the county had acquired from the couple by eminent domain about a century earlier. *See id. See also* Mike Ives, *L.A. County To Pay $20 Million for Land Once Seized from Black Family*, N.Y. TIMES, https://www.nytimes.com/2023/01/04/us/bruces-beach-la-county.html (Jan. 11, 2023).

47. *See MLB Team Valuations: Los Angeles Dodgers*, FORBES (Mar. 2023), https://www.forbes.com/teams/los-angeles-dodgers/?sh=14afba523aef (estimating the market value of Dodgers Stadium at $1.062 billion).

48. Jiménez, *supra* note 41 (quoting one Buried Under the Blue leader's statement that "[t]here can't be true land-back without the Indigenous people first").

respect existing property entitlements in land and thus pose no threat to the country's broader property system.

2. VOLUNTARY TRANSFERS OF PUBLIC LAND RIGHTS

Governments within the United States have also voluntarily conveyed millions of acres of *public* land to Native nations in recent decades in support of the Land Back movement. So long as there are clear rationales and sufficient public support for such conveyances, they can likewise play valuable roles in advancing Indigenous reparative justice.

Historically, most transfers of public land rights to Native nations have occurred pursuant to federal legislation or settlement agreements aimed at correcting specific government misdeeds. For instance, the federal government has transferred nearly three million acres in public land to Tribal nations since 2010 pursuant to the Cobell settlement, a $1.9 billion settlement to end a large class action lawsuit alleging decades of federal mismanagement of various tribal lands.[49]

However, governments in the United States have more recently begun voluntarily conveying land rights to Native nations simply to advance broader reparative justice goals. For example, in Tucson, Arizona, the city council announced plans in early 2023 to convey more than ten acres of ancestral lands to the Tohono O'odham Nation.[50] In one city official's words, the sole "purpose of the transaction [wa]s to recognize the sovereignty of the [Tohono O'odham] Nation and restore the Nation's stewardship over its ancestral lands."[51] Congress also recently enacted a pair of statutes transferring certain federal lands from the U.S. Forest Service or Bureau of Land Management to the U.S. Department of the Interior to be held in trust for the benefit of particular Indigenous communities.[52] Although these new federal statutes do not

49. Felicity Barringer, *Native American Land Return Movement Makes Gains, Faces Obstacles*, STAN. UNIV.: & THE W. (Nov. 22, 2022), https://andthewest.stanford.edu/2022/native-american-land-return-movement-makes-gains-faces-obstacles/ [https://perma.cc/FS58-C9NV].

50. Paola Rodriguez, *Tucson To Begin Returning Ancestral Lands to Tohono O'odham Nation*, AZPM, https://news.azpm.org/s/96509-tucson-to-begin-returning-ancestral-lands-to-tohono-oodham-nation/ [https://perma.cc/WA9C-F4XA] (Apr. 19, 2023) (describing the Tucson City Council's plan to return 10.6 acres of ancestral lands to the Tohono O'odham Nation).

51. Nicole Luden, *Tohono O'odham To Receive Ancestral Land near Tucson's 'A' Mountain*, ARIZ. DAILY STAR, https://tucson.com/news/local/tohono-o-odham-to-receive-ancestral-land-near-tucsons-a-mountain/article_c12f94d6-dfb1-11ed-bd08-478478db8fc2.html (May 26, 2023).

52. *See* Agua Caliente Land Exchange Fee to Trust Confirmation Act, Pub. L. No. 117-329, 136 Stat. 6112 (2023) (transferring about 2,500 acres of federal land to the

convey fee title to tribes, they do transfer valuable land-related control and possession rights to them to help protect sacred sites and better involve Indigenous communities in their management.

Like voluntary private land transfers, voluntary transfers of public land rights to Native nations can be an impactful feature of broader efforts to advance Indigenous reparative justice and religious freedom. So long as these conveyances are voluntary on the part of governments, they likewise respect existing property entitlements and longstanding principles of constitutional law.[53]

3. VOLUNTARY DEVELOPMENT RESTRICTIONS AT FEDERALLY OWNED SACRED SITES

In recent years, governments have also become more active in exercising their regulatory powers to preserve some Indigenous sacred sites on public land. These self-imposed restrictions on government land can protect sites from development and thereby benefit Native nations in ways that resemble grants of actual covenants or easements. Because these protections are voluntarily imposed, they also preserve longstanding property law regimes.

The federal government's recent establishment of new national monuments to protect Indigenous cultural resources exemplifies how governments can voluntarily use their regulatory powers to protect Indigenous sacred sites. For instance, in late 2022, the Biden Administration exercised its authority under the Antiquities Act to designate roughly 450,000 acres of federal land in Nevada as a national monument.[54] The designated land encompasses *Avi Kwa Ame*—also known as Spirit Mountain—an area that a dozen different southwestern

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Department of the Interior to be held in trust for the Agua Caliente Band of Cahuilla Indians); Katimiîn and Ameekyáaraam Sacred Lands Act, Pub. L. No. 117-353, 136 Stat. 6268 (2023) (transferring ownership of roughly 1,000 acres of U.S. Forest Service land in California to the Department of the Interior to be held in trust for the Karuk Tribe).

53. For a discussion of the costs of unilateral reallocations of property entitlements, see generally Troy A. Rule, *Entitlement-Shifting Rules*, 62 B.C. L. REV. 1193, 1215–19 (2021).

54. *See Biden To Establish Sacred Tribal Lands in Mojave Desert as National Monument*, NATIVE NEWS ONLINE (Dec. 7, 2022), https://nativenewsonline.net/environment/biden-to-establish-sacred-tribal-lands-in-mojave-desert-as-national-monument [https://perma.cc/5SZZ-WECH]. *See also* 54 U.S.C. § 320301(a) (empowering the President of the United States to "declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated on land owned or controlled by the Federal Government to be national monuments").

Indigenous tribes consider to be the "sacred center of creation."[55] Although multiple wind energy development projects had been proposed in the area, the new designation will prevent such development and keep the land pristine and preserved for future generations.[56] In August 2023, the Biden Administration then designated an additional site near the Grand Canyon, *Baaj Nwaavjo I'tah Kukveni*, that will protect nearly one million acres of land sacred to Native nations in that region.[57]

U.S. presidents have designated roughly 150 federal land areas as national monuments under the Antiquities Act, demonstrating that governments can relatively easily preserve certain federal land resources when motivated to do so.[58] Concededly, as former President Trump's administration illustrated, national monument designations under the Antiquities Act are not as permanent as congressional actions because future presidents can un-designate national monument sites.[59] Still, the act is a good example of how the federal government—as a property owner—can effectively protect Indigenous sacred sites on its land.

B. The Push for Decarbonization and Clean Energy Security

As the Indigenous Land Back movement continues to expand, tension grows between it and the country's urgent effort to slow climate change. After more than a century of heavy dependence on coal and petroleum, the United States is now aggressively transitioning away from carbon-heavy fuels and toward low-carbon energy resources such as wind

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55. Casey Harrison, *Southern Nevada's Spirit Mountain To Win Protection with U.S. Initiative*, L.V. SUN (Dec. 1, 2022, 2:00 AM), https://lasvegassun.com/news/2022/dec/01/nevadas-spirit-mountain-to-win-federal-protection/ [https://perma.cc/7F7L-NSY2].

56. *See id.* (noting that developers proposed the Crescent Peak Wind Project and Kulning Wind Energy Project in the monument area in preceding years).

57. Press Release, White House, FACT SHEET: President Biden Designates Baaj Nwaavjo I'tah Kukveni – Ancestral Footprints of the Grand Canyon National Monument (Aug. 8, 2023), https://www.whitehouse.gov/briefing-room/statements-releases/2023/08/08/fact-sheet-president-biden-designates-baaj-nwaavjo-itah-kukveni-ancestral-footprints-of-the-grand-canyon-national-monument/ [https://perma.cc/U42T-JB75].

58. *See Antiquities Act*, DEP'T INTERIOR, https://www.doi.gov/ocl/antiquities-act [https://perma.cc/876N-CYWG].

59. *See* Julie Turkewitz, *Trump Slashes Size of Bears Ears and Grand Staircase Monuments*, N.Y. TIMES (Dec. 4, 2017), https://www.nytimes.com/2017/12/04/us/trump-bears-ears.html. *See also* Claire Gaposchkin, *America's (Second) Best Idea: A Proposal for Major Expansion of the National Park System*, 47 WM. & MARY ENV'T L. & POL'Y REV. 545, 565–69 (2023) (describing the downsides of reliance on the president's Antiquities Act powers to preserve culturally or scientifically significant federal land resources).

and solar energy.[60] Building enough clean energy infrastructure to affordably and reliably meet the country's energy demand will require massive amounts of new land development.[61] Because of geopolitical risks involving China and certain other countries, strengthening domestic supply chains for the raw materials needed to support this transition is also a growing policy priority.[62]

Rapidly decarbonizing the U.S. energy sector will require countless new renewable energy projects,[63] massive expansion of the country's electric transmission grid,[64] and a major buildout of domestic supply

60. *See* Barry E. Hill, *Environmental Justice and the Transition from Fossil Fuels to Renewable Energy*, 53 ENV'T L. REP. 10317, 10319–20 (2023) (describing the Inflation Reduction Act of 2022 as legislation enacted to "encourage domestically produced or processed minerals for the country's energy transition from fossil fuels" and describing the Act as "the single largest investment in climate and energy in American history").

61. *See* Sara C. Bronin, *Curbing Energy Sprawl with Microgrids*, 43 CONN. L. REV. 547, 549 (2010) (describing the tens of millions of acres of U.S. land that will be required to support the energy transition).

62. *See, e.g.*, Hill, *supra* note 60, at 10322 (noting that, for full eligibility under the Inflation Reduction Act's electric vehicle tax credit provisions, "lithium-ion batteries cannot be sourced, processed, or recycled in a 'foreign country of concern,' such as China, which houses nearly 60% of the world's lithium processing capacity"); James T. Areddy & Sha Hua, *China Restricts Exports of Two Minerals Used in High-Performance Chips*, WALL ST. J., https://www.wsj.com/articles/china-restricts-exportsof-two-metals-used-in-high-performance-chips-a649402b (July 4, 2023, 3:25 AM) (describing China's imposition of new export restrictions on certain minerals, including gallium, which is important to the manufacture of electric vehicles).

63. *See* PAUL DENHOLM, PATRICK BROWN, WESLEY COLE, TRIEU MAI & BRIAN SERGI, NAT'L RENEWABLE ENERGY LAB'Y, EXAMINING SUPPLY-SIDE OPTIONS TO ACHIEVE 100% CLEAN ELECTRICITY BY 2035 xi (2022) (finding that growth rates of 43 to 90 gigawatts per year for solar and 70 to 145 gigawatts per year for wind would be required by 2030 to support the buildout of a one hundred percent clean energy system in the United States by 2035).

64. *See id.* (estimating that the development of between 1,400 and 10,100 miles of new high-capacity electric transmission lines per year by 2026 would be required to support full electrification of the U.S. energy system by 2035).

chains for copper,[65] lithium,[66] graphite,[67] cobalt,[68] nickel,[69] and certain rare earth metals.[70] All of these activities involve huge amounts of land resources and are likely to implicate federal public lands that Native nations consider part of their ancestral territories.[71]

65. Copper is an excellent conductor of electricity and is thus likely to be in increasingly heavy demand as the nation transitions to clean energy and to an electrified transportation system. *See* Jim Vinoski, *There's Not Enough Copper for Our Electrification Plans–and Biden Is Making It Worse*, FORBES (Apr. 28, 2023, 8:51 AM), https://www.forbes.com/sites/jimvinoski/2023/04/28/theres-not-enough-copper-for-our-electrification-plansand-biden-is-making-it-worse/?sh=2dde68091fbf [https://perma.cc/23C9-LVRU] (reporting that because of the energy transition global copper demand is projected to double by 2035).

66. Lithium is heavily used in the production of battery energy storage systems and devices and is thus expected to see large demand increases in the coming years. *See* Mike Lee & Hannah Northey, *Making the Entire U.S. Car Fleet Electric Could Cause Lithium Shortages*, SCI. AM. (Jan. 25, 2023), https://www.scientificamerican.com/article/making-the-entire-u-s-car-fleet-electric-could-cause-lithium-shortages/ [https://perma.cc/8BH4-9P3V].

67. Graphite is a main input in the manufacture of photovoltaic solar panels. Jinrui Zhang, Chao Liang & Jennifer B. Dunn, *Graphite Flows in the U.S.: Insights into a Key Ingredient of Energy Transition*, 57 ENV'T SCI. & TECH. 3402, 3402 (2023).

68. Cobalt is a key ingredient in electric vehicle batteries, and human rights advocates have criticized the United States's heavy importation of cobalt from countries with poor working conditions. *See* Jael Holzman & David Iaconangelo, *Cobalt Poses Human Rights Test for Biden on Clean Energy*, ENV'T & ENERGY NEWS (Mar. 15, 2022, 7:17 AM), https://www.eenews.net/articles/cobalt-poses-human-rights-test-for-biden-on-clean-energy/ [https://perma.cc/U77B-2JXA].

69. Nickel is an important input in the manufacture of electric vehicle batteries. Stephen Wilmot, *Nickel Shows How Russian Resources Fuel Clean Energy, Too*, WALL ST. J. (Mar. 9, 2022, 11:11 AM), https://www.wsj.com/articles/russian-resources-fuel-clean-energy-too-11646842303.

70. *See* Int'l Energy Agency [IEA], *The Role of Critical Minerals in Clean Energy Transitions*, at 8, 280 (May 2021), https://www.iea.org/reports/the-role-of-critical-minerals-in-clean-energy-transitions (projecting that an energy transition consistent with the U.N. Paris Agreement's goals would increase global demand for lithium by over forty times by 2040 and increase demand for graphite, cobalt and nickel by twenty to twenty-five times, with copper demand more than doubling over that period).

71. *See generally* Laura Berglan, Blaine Miller-McFeeley & Andrea Folds, *The Clean Energy Dilemma: How the Push for Clean Energy Could Threaten Indigenous Communities and Exploration of Potential Alternatives*, 33 COLO. ENV'T L.J. 285 (2022); Samuel Block, *Mining Energy-Transition Metals: National Aims, Local Conflicts*, MSCI (June 3, 2021), https://www.msci.com/www/blog-posts/mining-energy-transition-metals/02531033947 [https://perma.cc/NT8A-4EF5] (estimating that "97% of nickel, 89% of copper, 79% of lithium and 68% of cobalt reserves and resources in the [United States] are located within 35 miles of Native American reservations").

1. THE URGENCY OF THE CLEAN ENERGY TRANSITION

As the consequences of climate change become increasingly apparent, global calls for aggressive action are intensifying as well. As of March 2023, global average temperatures were already 1.1 degrees Celsius higher than pre-industrial levels and there were measurable increases in natural disasters attributable to that temperature rise.[72] Given the growing likelihood that the planet could reach a 1.5-degree temperature increase and face potentially much more devastating and irreversible impacts on human health, economies, and the natural environment, many experts are calling for urgent steps to reduce greenhouse gas emissions and thereby slow global warming trends.[73]

Aggressive global climate action—including a rapid transition away from fossil fuels—is among the most crucial means of protecting Indigenous communities and their cultural resources.[74] Even though non-Indigenous actors have been the primary contributors to the climate crisis, there is growing evidence that climate change will disproportionately harm Indigenous communities. Many Indigenous people in the United States reside in areas that are relatively more exposed to the consequences of coastal erosion, severe droughts, extreme heat events, or other climate-related risks.[75] Rapid and deep decarbonization borne out of compromise and cooperation from all major stakeholders—including Indigenous communities—will be needed to mitigate climate change and these disproportionate risks.[76]

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72. Intergovernmental Panel on Climate Change [IPCC], *Climate Change 2023 Synthesis Report*, at 14 (March 2023), https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_SPM.pdf [https://perma.cc/MA52-AP3N].

73. *See, e.g.*, *id.* at 24 ("Without urgent, effective, and equitable mitigation and adaptation actions, climate change increasingly threatens ecosystems, biodiversity, and the livelihoods, health and well-being of current and future generations.").

74. *See generally Climate Change and the Health of Indigenous Populations*, EPA, https://www.epa.gov/climateimpacts/climate-change-and-health-indigenous-populations [https://perma.cc/FG9P-GBHW] (Dec. 27, 2023) (describing potential adverse impacts of climate change on the physical and mental health of Indigenous communities in the United States).

75. *See* Christopher Flavelle & Kalen Goodluck, *Dispossessed, Again: Climate Change Hits Native Americans Especially Hard*, N.Y. TIMES, https://www.nytimes.com/2021/06/27/climate/climate-Native-Americans.html (June 22, 2023).

76. *See generally* ENV'T L. INST., LEGAL PATHWAYS TO DEEP DECARBONIZATION IN THE UNITED STATES (Michael B. Gerard & John C. Dernbach, eds. 2019).

2. THE CRITICAL NEED FOR DOMESTIC CLEAN ENERGY AND MINING DEVELOPMENT

Much of the new mining and renewable energy development needed to enable the United States to build a low-carbon domestic energy sector will necessarily involve federal land. The hazards of relying too heavily on imports for important materials were laid bare during early stages of the COVID-19 pandemic when the United States struggled to source many critical emergency medical supplies.[77] The United States's growing tensions with China have only intensified these risks by increasing instability in the flow of Chinese critical raw materials imports.[78] Accordingly, Congress and the Biden Administration have acted aggressively to promote domestic development within the country's growing clean energy sector—including the development of new domestic mines to supply the minerals needed to support it.[79]

Because wind and solar energy—the two key energy sources facilitating today's clean energy transition—are inherently difficult to transport and store, they are not importable from overseas and must be

77. *See generally* Beth Weinman, Gregory H. Levine, Jenna McCarthy & Grant Sims, *The American Medical Product Supply Chain: Will COVID-19 Drive Manufacturing Back Home?*, 76 FOOD & DRUG L.J. 235 (2021) (describing medical supply shortages occurring during the COVID-19 pandemic and discussing how the shortages might impact support for domestic supply chains for certain emergency supplies).

78. *See* RODRIGO CASTILLO & CAITLIN PURDY, CHINA'S ROLE IN SUPPLYING CRITICAL MINERALS FOR THE GLOBAL ENERGY TRANSITION 2 (2022) (reporting "growing concern that a high level of dependence on China" for nickel, copper, lithium, cobalt "and their derivative products may create energy security risks" in the United States). *See also* Nick Carey, *China Gallium Curbs Raise Chip Questions for Future EV Models*, REUTERS (July 10, 2023, 12:21 AM), https://www.reuters.com/markets/commodities/china-gallium-curbs-raise-chip-questions-future-ev-models-2023-07-11 (describing concerns that China's recently imposed limits on gallium exports could slow electric vehicle manufacturing in the United States).

79. *See* Press Release, White House, FACT SHEET: President Biden Takes Bold Executive Action to Spur Domestic Clean Energy Manufacturing (June 6, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/06/06/fact-sheet-president-biden-takes-bold-executive-action-to-spur-domestic-clean-energy-manufacturing/ [https://perma.cc/88DY-NS92] (describing Biden administration's actions to promote domestic investment in clean energy manufacturing infrastructure and facilities); Press Release, White House, FACT SHEET: Securing a Made in America Supply Chain for Critical Minerals (Feb. 22, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/02/22/fact-sheet-securing-a-made-in-america-supply-chain-for-critical-minerals/ [https://perma.cc/TNX7-C9JR].

generally harvested on or near American soil.[80] Major expansions of the country's electric transmission infrastructure and energy storage infrastructure are likewise needed to facilitate the transportation and storage of more wind- and solar-generated electricity to metropolitan areas and to strengthen grid reliability and resiliency.[81]

In addition to large numbers of new domestic wind and solar projects, the clean energy transition will require enormous increases in domestic supplies of energy transition minerals. As electric vehicles (EVs) become ever more common on America's roads over the next couple of decades, the demand for key minerals involved in EV production will likely soar.[82] As of early 2023, China controlled about 41% of the planet's supply of cobalt and 28% of the scarce global supply of lithium—two minerals that are critical inputs in EVs.[83] Because China has a recent history of "weaponizing" its supply chains of critical minerals to harm other countries, China's heavy presence in these markets presents a growing economic and national security risk for the United States—especially as the clean energy transition elevates the importance of and demand for these minerals.[84]

3. NO EASY FIXES ON THE OCEAN FLOOR OR IN RECYCLING PLANTS

Although many of the minerals that are key to the energy transition are found in relative abundance in undersea deposits, significant reliance on seabed mining to meet the country's burgeoning demand for those minerals is not realistic at this point and could significantly harm

80. *See generally* Alexandra Klass, Joshua Macey, Shelley Welton & Hannah Wiseman, *Grid Reliability Through Clean Energy*, 74 STAN. L. REV. 969, 983–85 (2022) (describing the important roles of transmission infrastructure and utility-scale energy storage infrastructure in supporting a reliable and clean energy system).

81. *See* Nadja Popovich & Brad Plumer, *Why the U.S. Electric Grid Isn't Ready for the Energy Transition*, N.Y. TIMES (June 12, 2023), https://www.nytimes.com/interactive/2023/06/12/climate/us-electric-grid-energy-transition.html (reporting that the United States would need to more than double its electric transmission capacity in roughly a decade to achieve the Biden Administration's goal of one hundred percent clean electricity generation).

82. *See* Pratima Desai & Zandi Shabalala, *Electric Vehicles Drive Up Nickel, Cobalt, and Lithium Prices*, REUTERS (Feb. 3, 2022, 10:54 AM), https://www.reuters.com/business/autos-transportation/electric-vehicles-drive-upnickel-cobalt-lithium-prices-2022-02-03/.

83. Agnes Chang & Keith Bradsher, *Can the World Make an Electric Car Battery Without China?*, N.Y. TIMES (May 16, 2023), https://www.nytimes.com/interactive/2023/05/16/business/china-ev-battery.html.

84. Ana Swanson, *The U.S. Needs Minerals for Electric Cars. Everyone Else Wants Them Too*, N.Y. TIMES, https://www.nytimes.com/2023/05/21/business/economy/minerals-electric-carsbatteries.html (May 23, 2023).

Indigenous peoples as well. Large concentrations of manganese, copper, nickel, cobalt, and other energy transition minerals lie on the ocean floor in a vast area between Mexico and Hawai‘i known as the Clarion-Clipperton Zone.[85] Unfortunately, Indigenous peoples and environmentalists have already begun challenging proposals to mine for these resources because of potential impacts on ocean ecosystems and on Native nations in the region that rely on those ecological resources.[86] The additional complexities of seabed mining and its potential to disproportionately harm the livelihoods and cultural resources of Native Hawai‘ians and Pacific Islanders make it an impractical means of satisfying the United States's burgeoning near-term demand for energy transition minerals.[87]

Greater reliance on the recycling of existing supplies of key energy transition minerals is also an impractical solution because it would not supply nearly enough minerals to meet the country's rapidly growing needs.[88] Although minerals recycling technologies are quickly improving, there is little hope that they will yield enough supplies to eliminate the need for massive increases in domestic mining.[89]

The United States has sufficient undeveloped reserves of most of the minerals needed to support its energy transition, but a large proportion of those reserves resides in undeveloped deposits so new onshore mining

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85. Laura Berglan, Blaine Miller-McFeeley & Andrea Folds, *supra* note 71, at 304.

86. *See Indigenous Peoples from 34 Nations Call for Total Ban on Deep Sea Mining*, GREENPEACE USA (Mar. 20, 2023), https://www.greenpeace.org/usa/news/indigenous-peoples-from-34-nations-call-for-total-ban-on-deep-sea-mining/ [https://perma.cc/M9WB-NDQP] (stating activists from fifty-six Indigenous groups have signed a petition to ban deep sea mining because it has "proven to be deeply harmful for the environment"). *See generally* Marjo K. Vierros, Autumn-Lynn Harrison, Matthew R. Sloat, Guillermo Ortuño Crespo, Jonathan W. Moore et al., *Considering Indigenous Peoples and Local Communities in Governance of the Global Ocean Commons*, 119 MARINE POL'Y 104039 (2020).

87. *See* Julie Hunter, Pradeep Singh & Julian Aguon, *Broadening Common Heritage: Addressing Gaps in the Deep Sea Mining Regulatory Regime*, HARV. ENV'T L. REV. (Apr. 16, 2018), https://journals.law.harvard.edu/elr/2018/04/16/broadening-common-heritage/ [https://perma.cc/ZB8E-CQJZ].

88. *See* Chengjian Xu, Qiang Dai, Linda Gaines, Mingming Hu, Arnold Tukker & Bernhard Steubing, *Future Material Demand for Automotive Lithium-Based Batteries*, 2020 COMMC'NS MATERIALS no. 99, at 1, 6, https://www.nature.com/articles/s43246-020-00095-x (finding that only a small percentage of the global battery material demand could be met through closed-loop recycling over the next three decades).

89. *See* Nick Ferris, *Why Recycling Is No Golden Ticket to Endless Critical Minerals*, ENERGY MONITOR (Mar. 24, 2023), https://www.energymonitor.ai/tech/why-recycling-is-no-golden-ticket-to-endless-critical-minerals/?cf-view [https://perma.cc/MG5M-DMXK] (describing why "recycling will be no panacea to critical minerals concerns" related to the energy transition).

development will be crucial to the country's future energy independence.[90] Recognizing these challenges, the Biden Administration has sought to aggressively promote the development of domestic mines for key energy transition minerals in recent years.[91]

C. Growing Clashes with Native Nations over Energy and Mining Projects on Federal Land

As the federal government seeks to promote expanded domestic mineral mining and renewable energy development to support decarbonization and clean energy security, this push has increasingly faced resistance from Indigenous communities.[92] Wind farms, solar farms, transmission infrastructure, utility-scale energy storage projects, and the mines needed to domestically source their components tend to be land-intensive and are often sited in relatively undeveloped areas.[93]

Justifiably frustrated by decades of marginalization and mistreatment, Indigenous communities often view such new development on off-reservation ancestral lands as an additional threat to Indigenous interests and thus actively oppose it.[94] Recently, in upstate New York, strong objections from Iroquois Nation members concerned about potential impacts on cultural and religious resources significantly slowed the permitting process for the Horseshoe Solar Project.[95] And as of early

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90. *See* Morgan Bazilian & Simon Lomax, *The United States Needs a Shift in Perspective on Mining*, CTR. FOR STRATEGIC & INT'L STUDS. (June 1, 2023), https://www.csis.org/analysis/united-states-needs-shift-perspective-mining [https://perma.cc/LVP6-8BWT].

91. *See* White House, FACT SHEET: Securing a Made in America Supply-Chain for Critical Minerals, *supra* note 79.

92. *See, e.g.*, *Reno-Sparks Indian Colony v. Haaland*, No. 23-cv-00070, 2023 WL 3613201, at *1 (D. Nev. Mar. 23, 2023); *Colo. River Indian Tribes v. U.S. Dep't of the Interior*, No. ED CV14-02504, 2015 WL 13915982, at *1 (C.D. Cal. July 17, 2015); *Bartell Ranch LLC v. McCullough*, 558 F. Supp. 3d 974 (D. Nev. 2021).

93. *See* Bronin, *supra* note 61, at 549.

94. *See* Lawrence Susskind, Jungwoo Chun, Alexander Gant, Chelsea Hodgkins, Jessica Cohen & Sarah Lohmar, *Sources of Opposition to Renewable Energy Projects in the United States*, 165 ENERGY POL'Y 112922, 112922 (2022) (noting that renewable energy projects' "conflicts with Indigenous groups" are often a "by-product of long-standing unfair and inadequate policies and practices").

95. *See* Margret Lee, *Horseshoe Hearing Sparks Outcry About Placement on Seneca Lands*, LIVINGSTON CNTY. NEWS (May 4, 2022), https://www.thelcn.com/news/local/horseshoe-solar-hearing-sparks-outcry-aboutplacement-on-seneca-lands/article_a3723072-fee5-5202-96b9-f85e70cb9ca8.html [https://perma.cc/VE6M-3B9V] (reporting project opponents' assertions that the project site was a property of "cultural and religious significance"). Developers finally secured all required permits for the project in late 2022. Margret Lee, *Horseshoe Solar Receives Final Siting Permit; Construction Expected in 2024*, LIVINGSTON CNTY. NEWS (Jan. 5,

2023, members of the Northern Chumash Tribe were actively opposing proposed wind farm development off the California coast on similar grounds.[96] The religious beliefs of many Indigenous communities involve extraordinarily close connections to, and reverence for, specific land areas, which can intensify their opposition to development projects.[97]

Indigenous communities' challenges to development projects on federal land often center on claims that the federal government failed to adequately consult with Native nations prior to development regarding potential impacts on cultural resources as required under Section 106 of the NHPA.[98] Native nations sometimes also join other stakeholders to challenge proposed development projects on federal land under the provisions of the National Environmental Protection Act or other environmental statutes.[99] Increasingly, Native nations' opposition is obstructing the permitting of proposed mining projects for important energy transition minerals. In Nevada, which holds roughly ten percent of the world's lithium resources, members of the McDermitt-Paiute Shoshone Tribe and other tribes continue to oppose a large lithium mine project that has been fully permitted and was under construction as of early 2023.[100] General Motors has partnered with the developer of the

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2023), https://www.thelcn.com/news/local/horseshoe-solar-receives-final-siting-permitconstruction-expected-in-2024/article_5a54ef06-8bfe-5dd4-be35-1858d9d6d86f.html [https://perma.cc/AB6W-DAUY].

96. Louis Sahagún, *A Chumash Tribe and Conservationists Are Fighting a Controversial Offshore Wind Power Plan*, L.A. TIMES (Mar. 21, 2022), https://www.latimes.com/environment/story/2022-03-21/nobody-seems-to-like-this-california-wind-power-proposal [https://perma.cc/2Y4H-WZZW] (noting that tribal leaders have actively opposed the project because it could impact "submerged remains of sacred Chumash villages" in the area).

97. *See Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 460–61 (1988) (Brennan, J., dissenting) ("Native American faith is inextricably bound to the use of land. The site-specific nature of Indian religious practice derives from the Native American perception that land is itself a sacred, living being.").

98. *See* National Historic Preservation Act Amendments of 1992, Pub. L. No. 102-575, tit. XL, 106 Stat. 4600, 4753–69 (codified as amended at 54 U.S.C. §§ 300101–7107). *See also Quechan Tribe of Fort Yuma Indian Rsrv. v. U.S. Dep't of the Interior*, 755 F. Supp. 2d 1104, 1108 (2010); *Colo. River Indian Tribes v. U.S. Dep't of the Interior*, No. ED CV14-02504, 2015 WL 13915982, at *1 (C.D. Cal. 2015); Michael C. Blumm & Lizzy Pennock, *Tribal Consultation: Toward Meaningful Collaboration with the Federal Government*, 33 COLO. ENV'T L.J. 1, 14–20 (2022) (outlining the NHPA's Section 106 consultation requirements and describing the uncertainty surrounding what constitutes adequate tribal "consultation" under NHPA Section 106).

99. *See, e.g.*, *Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 33 F.4th 1202, 1213–14 (2022) (involving environmental protection claims brought by the Tohono O'odham Nation, Hopi Tribe, and Pascua Yaqui Tribe against a proposed copper mine project).

100. Amy Alonzo, '*Peaceful Protest' Staged at Thacker Pass To Halt Construction of Lithium Mine*, RENO GAZETTE J. (May 12, 2023, 10:01 AM),

Thacker Pass mine, which is expected to produce enough lithium for the manufacture of about one million electric vehicles per year.[101] The group of Native nations opposing the project claims some of its land is sacred because volunteer Nevada cavalry murdered dozens of Paiute members on it in 1865.[102] In northern Arizona, the Hualapai Tribe is similarly opposing the Big Sandy Lithium Project in that state, arguing that it could adversely impact a nearby medicinal spring the tribe holds sacred.[103]

D. Religious Freedom–Based Opposition to Federal Land Projects

Although Indigenous communities in the United States have been challenging energy-related development projects on federal lands for many years, they have recently started bringing these challenges as religious freedom claims. More specifically, they have argued that certain proposed projects on federal public land would substantially burden their religious exercise and thus trigger strict scrutiny review of associated federal actions under the Religious Freedom Restoration Act of 1993.[104]

Even though most courts have historically refused to apply RFRA to block development projects on federal land, Indigenous communities continue to try to bring RFRA claims against such projects. For decades, courts have generally found government actions to "substantial[ly] burden" religious exercise under RFRA "only when individuals are forced to choose between following the tenets of their religion and receiving a governmental benefit or coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions."[105] Development projects on federal land do not readily result in either of

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https://www.rgj.com/story/news/2023/05/12/peaceful-protest-staged-at-thacker-pass-tohalt-construction-of-lithium-mine/70209492007/ [https://perma.cc/S4Q7-VP2S].

101. Ernest Scheyder, *GM To Help Lithium Americas Develop Nevada's Thacker Pass Mine*, REUTERS (Jan. 31, 2023, 5:42 PM), https://www.reuters.com/markets/commodities/gm-lithium-americas-develop-thacker-pass-mine-nevada-2023-01-31/.

102. Susana Bledsoe, *Digging into a Massacre: Indigenous People Say a Lithium Mine Project in the West Will Desecrate a Sacred Site*, SACRAMENTO NEWS & REV. (Nov. 16, 2022), https://sacramento.newsreview.com/2022/11/16/digging-into-a-massacre-indigenous-people-say-a-lithium-mine-project-in-the-west-will-desecrate-a-sacred-site/ [https://perma.cc/2CSH-UYWT].

103. *See* Maya L. Kapoor, *Mining for Lithium, at a Cost to Indigenous Religions*, HIGH COUNTRY NEWS (June 9, 2021), https://www.hcn.org/issues/53-7/indigenous-affairs-mining-for-lithium-at-a-cost-to-indigenous-religions/ [https://perma.cc/8VLJ-NAQE].

104. 42 U.S.C. §§ 2000bb to bb-4.

105. *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1069–70 (9th Cir. 2008).

those things, so an expansive new theory of RFRA "coercion" has recently emerged.[106] If adopted, this theory would reverse decades of legal precedent and convert RFRA into a tool for effectively transferring federal land interests from the U.S. government to Native nations.

1. A HISTORY OF FAILED RFRA CLAIMS

Over the past half century, Indigenous communities have unsuccessfully tried on multiple occasions to use religious freedom–based claims to unilaterally acquire property interests in federal land. The U.S. Supreme Court rejected such an attempt in 1988 in *Lyng v. Northwest Indian Cemetery Protective Association*.[107] The claimants in *Lyng* were a group of Native nations who opposed the U.S. Forest Service's proposed construction of a logging road on federal land in northern California, arguing that the project would cause "serious and irreparable damage" to certain areas sacred to the claimants.[108] Writing for the majority, Justice Sandra Day O'Connor pointed out that a holding for the claimants would have given Native nations "*de facto* beneficial ownership of some rather spacious tracts of public property."[109] "Whatever rights the Indians may have to the use of the area," Justice O'Connor explained, "those rights do not divest the Government of its right to use what is, after all, its land."[110] This principle of relative priority between religious freedom and property rights was applicable even if the Court were to assume the new road would "virtually destroy" the claimants' "ability to practice their religion."[111]

Twenty years after *Lyng*—and after Congress's enactment of RFRA—the Ninth Circuit ruled against Native nations in another case weighing religious freedom against federal land rights. In *Navajo Nation v. United States Forest Service*,[112] a group of Native nations sought to block the U.S. Forest Service from using recycled wastewater to produce artificial snow for a ski resort situated on federal land in northern Arizona.[113] The Native nations who brought the claim considered the mountain where the resort resided to be sacred and asserted, among other things, that a decision to authorize the snowmaking would "desecrate[] the entire mountain" and "deprecate[] their religious ceremonies,"

106. *See infra* Section I.D.3.
107. 485 U.S. 439 (1988).
108. *Id.* at 442.
109. *Id.* at 453.
110. *Id.* (emphasis omitted).
111. *Id.* at 451–52.
112. 535 F.3d 1058 (9th Cir. 2008).
113. *Id.* at 1064.

substantially burdening their religious exercise in violation of RFRA.[114] However, the *Navajo Nation* majority on the Ninth Circuit was not persuaded. In the court's words, if it were to hold for the claimants:

> [A]ny action the federal government were to take . . . on its own land would be subject to the personalized oversight of millions of citizens. Each citizen would hold an individual veto to prohibit the government action solely because it offends his religious beliefs . . . or fails to satisfy his religious desires. Further, giving one religious sect a veto over the use of public park land would deprive others of the right to use what is, by definition, land that belongs to everyone. . . . [N]o government—let alone a government that presides over a nation with as many religions as the United States of America—could function . . . .[115]

Finding *Lyng* "on point" and "consistent" with the "standard codified in RFRA" in the intervening years, the *Navajo Nation* Court allowed the snowmaking to proceed.[116] Multiple courts have since similarly applied *Navajo Nation* to dismiss RFRA claims against federal land use projects.[117] At least one court has likewise affirmed that other recent U.S. Supreme Court religious freedom cases, such as *Burwell v. Hobby Lobby Stores, Inc*.[118] and *Holt v. Hobbs*,[119] have not altered that analytic approach.[120]

2. THE *APACHE STRONGHOLD* LITIGATION

The most recent high-profile case involving a RFRA claim against a development project on federal land is *Apache Stronghold v. United States*.[121] The dispute in *Apache Stronghold* centers around the Resolution

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114. *Id.* at 1063.

115. *Id.* at 1063–64.

116. *Id.* at 1071, 1073, 1080.

117. *See, e.g.*, *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 239 F. Supp. 3d 77, 87–88 (D.D.C. 2017); *Snoqualmie Indian Tribe v. FERC*, 545 F.3d 1207, 1210 (9th Cir. 2008); *Slockish v. U.S. Dep't of Transp.*, No. 21-35220, 2021 WL 5507413, at *1 (9th Cir. Nov. 24, 2021).

118. 573 U.S. 682 (2014).

119. 574 U.S. 352 (2015).

120. *See Standing Rock Sioux Tribe*, 239 F. Supp. 3d at 100 (determining *Lyng*'s analytic approach to the type of fact pattern present in the case remained intact after *Hobby Lobby* and *Holt*).

121. 38 F.4th 742, 749 (9th Cir.), *reh'g en banc granted*, *vacated*, 56 F.4th 636 (9th Cir. 2022).

Copper Project—a proposed copper mine project on roughly 2,400 acres of federal land in Arizona that Congress has expressly authorized for transfer to a private mine developer through a land exchange.[122] Upon completion, the Resolution Copper Project would be the largest copper mine in the United States and would produce an estimated forty billion pounds of copper and supply about twenty-five percent of all projected U.S. copper demands for several decades.[123] However, a group of Native nations has vehemently opposed the project on the theory that it would destroy *Chi'chil Bildagoteel*, or Oak Flat—an off-reservation site the claimants consider to be sacred.[124]

A three-judge Ninth Circuit panel initially upheld a district court's rejection of a preliminary injunction petition against the Oak Flat land exchange, but in late 2022 the court voted to vacate that panel opinion and rehear the case en banc.[125] As of February 2024, the parties were still waiting for the eleven-judge panel to issue a new opinion.[126] Given the nature of the case, it is quite likely that—regardless of how the Ninth Circuit rules—the case will be appealed to the U.S. Supreme Court.

Although *Apache Stronghold*'s relevant facts mirror those in *Lyng* and *Navajo Nation*, the *Apache Stronghold* claimants' arguments closely track the arguments rejected in those prior cases. In short, the claimants argue that a government decision allowing copper mining at Oak Flat would substantially burden their religious exercise by making it "impossible" for them to worship there.[127] The claimants assert this

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122. *Id.* at 749 (citing 16 U.S.C. §§ 539p(b), (c)).

123. Clifford Krauss, *A Copper Mine Could Advance Green Energy but Scar Sacred Land*, N.Y. TIMES (Jan. 27, 2023), https://www.nytimes.com/2023/01/27/business/energy-environment/copper-minearizona.html; Emily Bregel, *Resolution Copper Mine: Venturing 7,000 Feet Below Earth's Surface*, TUCSON.COM (June 4, 2016), https://tucson.com/news/resolutioncopper-mine-venturing-7-000-feet-below-earths-surface/article_44ca18f8-7a29-5562-9833-dd6611c968fc.html [https://perma.cc/J6FF-FL2N].

124. *See Apache Stronghold v. United States*, 519 F. Supp. 3d 591, 596–97 (D. Ariz. 2021), 38 F.4th 742, 749 (9th Cir.), *reh'g en banc granted*, *vacated*, 56 F.4th 636 (9th Cir. 2022); Debra Utacia Krol, *Federal Court Allows International Mining Giant To Oppose Tribes in Oak Flat Lawsuit*, ARIZ. REPUBLIC, https://www.azcentral.com/story/news/local/arizonaenvironment/2023/05/31/resolution-copper-defendant-in-oak-flat-lawsuit/70273753007/ [https://perma.cc/K9Z5-6N3B] (Nov. 22, 2023, 5:40 PM).

125. *Apache Stronghold*, 56 F.4th 636, 636 (9th Cir. 2022).

126. *See Status of Pending En Banc Cases*, U.S. CTS. 9TH CIR., https://www.ca9.uscourts.gov/en-banc/ [https://perma.cc/8E2T-KMC2] (Jan. 31, 2024); Anita Snow, *Oak Flat Timeline: Native American vs. Pro-Mining Interests*, AP (June 28, 2023), https://apnews.com/article/oak-flat-sacredapache-copper-mine-26fa76965cf75a4addb4108c4818af09 [https://perma.cc/7TBT-RA3U].

127. *Apache Stronghold*, 38 F.4th at 756.

theory even though they have no legally cognizable property interest in the federally owned project site.[128]

3. FRAMING PROPERTY OWNERSHIP AS COERCION OF NON-OWNERS

If the U.S Supreme Court were to grant certiorari in *Apache Stronghold*, the Court would have to weigh property right protection against religious exercise protection in a novel way. A majority of justices on today's relatively conservative Supreme Court likely favor both the protection of basic property rights and the protection of religious freedom for Native nations and others.[129] However, these two ideals are at odds in *Apache Stronghold*, which asks whether RFRA should be interpreted to entitle religious claimants to control activities on others' land—a type of remedy that is difficult to reconcile with basic property law principles.

In a recent article and an amicus brief filed in *Apache Stronghold*, Professors Stephanie Barclay and Michalyn Steele implicitly argued for elevating religious freedom protection over property protection at Indigenous sacred sites on federal land.[130] Barclay and Steele assert that, because colonists drove Native nations out of lands they had historically occupied, "the very reality of government ownership" of Indigenous ancestral lands today is passively coercive against Native nations.[131] Accordingly, they argue that any government action that excludes

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128. *Id.* at 772 ("Oak Flat belongs to the government, a fact that Apache Stronghold does not presently contest.").

129. *See, e.g.*, *City of Tulsa v. Hooper*, 143 S. Ct. 2556 (2023); *Haaland v. Brackeen*, 143 S. Ct. 1609, 1661 (2023) (upholding the federal Indian Child Welfare Act, which prohibits the forcible adoption of Native American children by non-Native families); *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2476 (2020) (finding that, for purposes of the Major Crimes Act, much of eastern Oklahoma that was reserved for the Creek Nation more than a century ago is still Native American territory). Over the past decade, the Court has also shown a strong penchant for expanding religious freedom. *See A Fight in Arizona over Sacred Land and a Mine Raises Big Issues*, ECONOMIST (Mar. 19, 2023), https://www.economist.com/united-states/2023/03/19/a-fight-in-arizona-over-sacredland-and-a-mine-raises-big-issues ("Of 22 religious-freedom cases brought before the court since 2012, 21 decisions have expanded those freedoms, 18 of them unanimously."). The conservative Court has also continued to strongly defend real property rights. *See, e.g.*, *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2074 (2021) (finding that a state regulation entitling labor organizations to access a private agricultural employer's land affected a compensable regulatory taking).

130. *See generally* Stephanie Hall Barclay & Michalyn Steele, *Rethinking Protections for Indigenous Sacred Sites*, 134 HARV. L. REV. 1294 (2021); Amicus Brief of the National Congress of American Indians, a Tribal Elder, and Other Federal Indian Law Scholars and Organizations, *Apache Stronghold*, 38 F.4th 742 (No. 21-15295), 2021 WL 1256582.

131. Barclay & Steele, *supra* note 130, at 1359.

Indigenous communities or individuals from federal land thereby coerces them under RFRA by interfering with their "voluntary choice" to access the land.[132] Under this tenuous theory, RFRA's "substantial burden" requirement for triggering strict scrutiny would automatically be met wherever an Indigenous religious claimant asserts it on federal land "unless the government affirmatively acts to lift its coercive power through a religious accommodation."[133]

If courts embraced Barclay and Steele's expansive interpretation of RFRA, Native nations could unilaterally acquire the equivalent of highly valuable conservation easements across federal land for free merely by asserting that they consider the land sacred.[134] Such a leap in RFRA interpretation would supercharge the Landback movement, but it would do so by transforming a religious freedom statute into an instrument for unilaterally shifting land rights from the federal government to Native nations—a function Congress never intended for it to serve.[135] Henceforth, the specter of RFRA confiscation would hang over all federal land.[136] Debilitating instability and uncertainty would cloud all federal land ownership, chill federal land leasing and development activity, and ultimately hinder the country's pressing climate mitigation efforts highlighted above.[137] Fortunately, there are less costly and disruptive ways to advance important Indigenous reparative justice and religious freedom goals.[138]

II. BALANCING RELIGIOUS LIBERTY AND PROPERTY ON FEDERAL LAND

Apache Stronghold highlights the inherent tension that has always existed between religious freedom protection and property protection. Acceptance of the fact that neither of these two core constitutional interests is absolute and that legal rules must therefore balance them is necessary to productively analyze the active debate over RFRA and Indigenous sacred sites.

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132. *Id.* at 1323, 1339 (claiming that "coercive power exists where the coercer is interfering with the voluntary choice of the coercee" and that a "baseline of interference with voluntary choice exists in the context of sacred sites, at least with respect to the desired access and use of those sites by Indigenous peoples").

133. *Id.* at 1333 & n.210.

134. For a basic primer on conservation easements, see Jessica Owley, *Keeping Track of Conservation*, 42 ECOLOGY L.Q. 79, 98–100 (2015).

135. *See infra* note 196 and accompanying text.

136. *Cf. Kelo v. City of New London*, 545 U.S. 469, 503 (2005) (O'Connor, J., dissenting) ("The specter of condemnation hangs over all property.").

137. *See generally supra* Section I.B.

138. *See generally infra* Sections III.B–F.

A. Age-Old Limits on Religious Freedom

As the Founders clearly understood, recognizing and enforcing core property rights is essential to the long-term stability and prosperity of any democratic state. John Locke famously listed property alongside life and liberty as fundamental natural rights, and many of the nation's Founders embraced this view.[139] James Madison similarly considered "the rights of the persons and the rights of property" to be the "two cardinal objects of government."[140] Viewing property rights as indispensable, the Founders incorporated strong property protections into the U.S. Constitution. The Due Process Clause provides that no citizen shall be "deprived of life, liberty or property, without due process of law."[141] The Takings Clause prohibits the government from taking "private property . . . for public use, without just compensation."[142] The Property Clause also ensures strong protection of certain property rights, expressly empowering Congress to "dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States" and adding that "nothing in [the] Constitution shall be so construed as to Prejudice" federal property claims.[143]

The most useful analyses of conflicts between competing constitutional principles openly acknowledge and seek to honestly reconcile these tensions, even when doing so complicates advocacy objectives. Even though the three core Lockean natural rights that undergird the U.S. Constitution—life, liberty, and property—are sometimes characterized as "absolute," in reality they sometimes conflict with each other in ways that require compromise.[144] As other prominent scholars have noted, protection of liberty and protection of property are inherently at odds such that it is impossible to perfectly protect both.[145]

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139. *See* JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT (1689), *reprinted in* THE SELECTED POLITICAL WRITINGS OF JOHN LOCKE § 124 (Paul E. Sigmund ed., 1st ed. 2005) (referring to "the preservation of . . . property" as the "great and chief end" of government).

140. James Madison, Observations on Jefferson's Draft of a Constitution for Virginia (Oct. 15, 1788), https://founders.archives.gov/documents/Madison/01-11-02-0216.

141. U.S. CONST. amends. V, XIV.

142. U.S. CONST. amend. V.

143. U.S. CONST. art. IV, § 3, cl. 2.

144. *See Wellness Int'l Network, Ltd. v. Sharif*, 575 U.S. 665, 713 (2015) (Thomas, J., concurring) (citing 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 119 (1765)).

145. *See, e.g.*, Richard A. Epstein, *Liberty Versus Property? Cracks in the Foundations of Copyright Law*, 42 SAN DIEGO L. REV. 1, 19 (2005) (noting that "[w]ith both property and liberty there are limitations that may well make sense" (emphasis

A murderer cannot use their religious beliefs as a defense against criminal liability.[146] Conversely, someone who crosses onto another person's land while running from a dangerous assailant is generally not liable for trespass.[147] In each of these noncontroversial examples, protecting life—a countervailing constitutional interest—justifiably constrains religious liberty or property rights. Disputes over Indigenous sacred sites on federal land similarly involve an unavoidable conflict between two competing core rights—religious liberty and property—and genuine conciliation will be needed to strike an appropriate balance in this context as well.

Unfortunately, most of the current theory and rhetoric related to Indigenous sacred sites on federal land ignores or seeks to radically reshape established property laws to advance religious liberty and reparative justice goals. Barclay and Steele's theory outlined above takes this approach, attempting to recast federal property ownership as "passive coercion" of Indigenous communities to shoehorn it into RFRA's narrow framework.[148] Professor Kristen Carpenter has sought to characterize the country's longstanding system of property laws as a readily modifiable "ownership model" that courts could replace with an expansive "social relations" conception of property that "[r]ecogniz[es] the rights of Indians as nonowners of sacred sites."[149] And Professor Patrick Reidy has argued that courts should recognize new "quasi-easements" at sacred sites on federal land and then imply new "sacred easements" from those quasi-easements that empower Native nations to control land development activities.[150] Although such "progressive property" theories and approaches are increasingly popular within the legal academic literature, more plausible paths forward for protecting

omitted)); John J. Infranca, *(Communal) Life, (Religious) Liberty, and Property*, 2017 MICH. ST. L. REV. 481, 492 (noting John Locke's observation that individuals in civil societies "surrender a certain degree of their liberty so as to better secure . . . property").

146. *See* Richard A. Epstein, *The Classical Liberal Constitution Vindicated*, 8 N.Y.U. J.L. & LIBERTY 743, 751 (2014) ("[T]he defense of the free exercise of religion would not include the right to murder individuals from a rival church or to engage in ritual slaughter of any human being in order to propitiate the gods above or below.").

147. *See Ploof v. Putnam*, 71 A. 188, 189 (1908) ("Noting that the 'doctrine of necessity applies with special force to the preservation of human life' and that '[o]ne assaulted and in peril of his life may run through the close of another to escape from his assailant' without incurring trespass liability" (citing 37 Hen. VII, pl. 26)).

148. *See supra* Section I.D.3.

149. Kristen A. Carpenter, *A Property Rights Approach to Sacred Sites Cases: Asserting a Place for Indians as Nonowners*, 52 UCLA L. REV. 1061, 1085–89, 1148 (2005).

150. *See* Patrick E. Reidy, *Sacred Easements*, 110 VA. L. REV. (forthcoming 2024).

Indigenous sacred sites in the near term would do so while keeping property law principles intact.[151]

B. The Realities and Implications of Federal Land Ownership

Legal and policy ideas that acknowledge the realities of federal land ownership—as unjust as it may be in some instances—are more likely to generate progress in preserving Indigenous sacred sites than strategies aimed at subverting or overhauling the U.S. property system. Naturally, Indigenous communities whose ancestors held land in communal ownership structures and were dispossessed of it centuries ago would prefer to operate under their traditional property systems on that land today. However, one of the many consequences of the much-maligned *M'Intosh* decision is that property laws incompatible with Indigenous communal ownership structures now govern that land.

While well-intended, arguments that ignore the property interests of others—including the federal government—are less likely to promote meaningful progress toward stronger sacred site protections.[152] Interior Secretary Deb Haaland's visit to New Mexico's Chaco Culture National Historical Park showcased the complicated relationship many Indigenous communities have with Western property laws. Secretary Haaland hoped her visit would positively highlight the Biden Administration's recent twenty-year moratorium on new oil and gas extraction on public lands near the park in order to preserve its sacred Indigeneous resources.[153] Instead, dozens of Navajo landowners whose nearby "allotment" lands became ineligible for lucrative oil and gas leases under the moratorium blocked roads and protested, compelling Haaland to scale back the

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151. *See generally* Gregory S. Alexander, Eduardo M. Peñalver, Joseph William Singer & Laura S. Underkuffler, *A Statement of Progressive Property*, 94 CORNELL L. REV. 743–44 (2009); Ezra Rosser, *The Ambition and Transformative Potential of Progressive Property*, 101 CALIF. L. REV. 107, 121–26 (2013).

152. *See, e.g.*, Eric Ledermann & Andrew Black, *Religious Freedom for All Means Sacred Indigenous Sites, Too*, THE HILL (Mar. 30, 2023, 5:30 PM), https://thehill.com/opinion/civil-rights/3926569-religious-freedom-for-all-means-sacred-indigenous-sites-too/.

153. *See* Susan Montoya Bryan, *Protest Derails Planned Celebration of 20-Year Ban on Oil Drilling near Chaco National Park*, AP (June 11, 2023, 9:51 PM), https://apnews.com/article/chaco-canyon-protections-deb-haaland-tribes-celebrate-286e326193fe42a6ac2a70948bbd2523 [https://perma.cc/E84R-XCK5]; Morgan Lee, *Biden Orders 20-Year Ban on Oil, Gas Drilling To Protect Tribal Sites Outside New Mexico's Chaco*, AP (June 2, 2023, 5:30 PM), https://apnews.com/article/chaco-oil-development-native-american-culture-4ac49c2f59c452cab80f95199851bf71 [https://perma.cc/CGY9-M4MT].

event.[154] Many of these protesters appealed heavily to property law principles, holding signs that read "No Trespassing on Allottee Land"[155] or characterizing the new ten-mile buffer as a "land grab," even though its development restrictions apply only to public land.[156]

As outlined in Part III below, it is possible to meaningfully advance Indigenous reparative justice and religious liberty goals on government land through structures that uphold established property laws. Time and resources spent trying to recast or sidestep property law are likely to only delay Native nations' progress on this critical front and to delay clean energy, mining, and infrastructure projects that are essential to the clean energy transition. The following are three specific truths that are key to building constructive dialogue toward better protection for Indigenous sacred sites.

1. THE FEDERAL GOVERNMENT OWNS FEDERAL LAND

One uncomfortable fact coloring many disputes over Indigenous sacred sites is that that the federal government owns its land—even land that was initially acquired more than century ago through forcible or oppressive means. Unless an Indigenous community is able to persuade a court that it holds more treaty-granted property rights in certain land than the federal government presently recognizes, lines of argument that ignore the reality of federal ownership rights are seldom productive. To the extent the federal government's land rights were acquired through coercive or unjust actions occurring in the past, principles embedded in common law doctrines such as laches and acquiescence likely prevent those actions from weakening federal title today.[157] Advocacy that calls upon courts to dismantle or restructure property law itself in various ways to address those historic wrongs is clearly well-intended but seldom fruitful in practice.

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154. *See* Arlyssa D. Becenti, *Interior Secretary Cancels Plans at Chaco Canyon After Opponents of Drilling Ban Block Roads*, ARIZ. REPUBLIC (June 12, 2023, 12:34 PM), https://www.azcentral.com/story/news/local/arizona/2023/06/12/interior-secretary-debhaaland-cancels-chaco-event-protests/70314019007/. Even though the Biden Administration's new mineral extraction restrictions applied only to federal public land, they greatly reduce the likelihood of oil and gas development on numerous landlocked private allotment parcels within the region. *See id. See generally* Katherine Florey, *Tribal Land, Tribal Territory*, 56 GA. L. REV. 967, 992–95 (2022) (accounting the history of allotment parcel creation under the General Allotment Act of 1887).

155. Becenti, *supra* note 154.

156. *Id.*

157. *See City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 214–20 (2005) (citing equitable principles evident in the laches, acquiescence, and impossibility doctrines in rejecting a Native Nation's argument for reestablishment of its sovereign control over certain land based on alleged wrongs occurring two centuries earlier).

Attempting to discredit the validity of federal land title based on historic wrongs against Native nations is an increasingly common strategy for trying to bolster Indigenous sacred sites claims. Professor Carpenter has characterized the robustness of federal land ownership rights under RFRA jurisprudence as "extreme," even though such rights are no more robust than those of private landowners.[158] Professor Reidy has similarly endeavored to delegitimize federal land rights, arguing that the historic mistreatment of Native nations "created a certain defect in title to sacred sites located on public land."[159] Barclay and Steele have likewise sought to undercut existing federal land rights, resting their theory of "passive coercion" under RFRA on the premise that the government does not legitimately own federal land.[160] They emphasize that most federal land "became government property only because Indigenous peoples were divested of *their* land . . . often by coercive means."[161] Implying that such actions against Indigenous communities centuries ago have forever tainted federal title, Barclay and Steele argue that any new federal land project that lacks Native nations' support is coercive and thus entitled to strict scrutiny.[162]

However, on multiple occasions, courts have affirmed that the federal government's property rights in federal land under the Property Clause of the U.S. Constitution are at least equivalent to those held by private property owners in private land.[163] Consistent with this principle, courts applying statutory laws—including RFRA—must interpret them as affording to federally owned property at least as many rights and protections as private property owners enjoy. If courts were to begin treating federal land ownership rights as defective to help advance Indigenous reparative justice, then equivalent defects would necessarily also cloud millions of private parcels across the country whose title

158. Carpenter, *supra* note 149, at 1064.

159. Reidy, *supra* note 150 (manuscript at 28).

160. Barclay & Steele, *supra* note 130, at 1335.

161. *Id.* at 1322.

162. *See id.* at 1359 ("[T]he very reality of government ownership of sites means that the government is always operating with a baseline of coercion, even if just passively," and that under this broader conception of coercion "tribal members and Indigenous practitioners should be able to prove a prima facie case under statutes like the Religious Freedom Restoration Act much more easily.").

163. *See, e.g.*, *Kansas v. Colorado*, 206 U.S. 46, 89 (1907) (describing the Property Clause as "a grant of power to the United States of control over its property"); *Kleppe v. New Mexico*, 426 U.S. 529, 540 (1976) (stating that the federal government "exercises the powers both of a proprietor and of a legislature over the public domain"); *United States v. City and County of San Francisco*, 310 U.S. 16, 29 (1940) (holding that "[t]he power over the public land . . . entrusted to Congress [by the Property Clause] is without limitations").

originated from a U.S. land patent.[164] Some such private parcels are owned by Indigenous individuals who would likely oppose such a diminution of their property rights.[165]

As the owner of federal lands, the federal government is legally entitled to engage in a wide variety of actions related to its property,[166] and all other individuals and groups—including Indigenous communities—have corresponding duties under longstanding property laws to respect those property entitlements.[167] Such federal property entitlements generally include not only rights to exclude but rights to "access or possess an asset, to manage its use, to claim any accessions or products of it, or to sell or lease it to others."[168] Notably, government landowners also hold general rights to destroy that are even more expansive than those afforded to private landowners.[169] As prominent legal scholars have noted, reliably upholding and enforcing such property interests is "crucial for the efficient use of resources" and for the continued health and stability of the nation's economic system.[170]

2. MERE LAND OWNERSHIP DOES NOT "COERCE" OTHERS

A second basic principle that follows from the reality of federal land ownership is that federal ownership of that land does not "coerce" others. Barclay and Steele argue that the federal government's mere ownership of lands that hold religious significance to Indigenous groups amounts to passive "coercion" because it interferes with group members' "voluntary

164. *See Land Entry Case Files and Related Records*, NAT'L ARCHIVES, https://www.archives.gov/research/land/land-records (providing public access to more than ten million records documenting transfer of public lands from the U.S. government to private owners across all thirty public land states).

165. *See supra* notes 152–56 and accompanying text.

166. *See* Schlager & Ostrom, *supra* note 13, at 250 (defining a "property right" as "the authority to undertake particular actions related to a specific domain" (citing JOHN COMMONS, LEGAL FOUNDATIONS OF CAPITALISM 18 (1968))).

167. *See* Rule, *supra* note 53, at 1216 n.116 ("The notion of an inherent relationship between property rights and the commensurate duties of others to honor those rights is generally attributed to Wesley Hohfeld.").

168. *Id.* at 1217. It is worth noting that navigable waters and a narrow set of other resources are non-alienable under the federal public trust doctrine. *See generally Ill. Cent. R.R. v. Illinois*, 146 U.S. 387 (1892). *See also* Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 484 (1970).

169. *See* Kellen Zale, *The Government's Right To Destroy*, 47 ARIZ. ST. L.J. 269, 272 (2015) (explaining that the "government has a broader right to destroy than private owners" and arguing how this comparatively broader right "can be justified on both doctrinal and normative grounds").

170. Schlager & Ostrom, *supra* note 13, at 256.

choice" to freely come onto such parcels to worship.[171] Based on this sprawling conception of coercion, Barclay and Steele then allege that courts' refusal to award Indigenous communities perpetual control of federal parcels they deem sacred—when contrasted against other court decisions requiring governments to accommodate religious prisoners' requests for scented oils or kosher meals—amounts to an "egregious double standard" in policing coercion under RFRA.[172] They further suggest that courts misapply RFRA in Indigenous sites cases because they simply "misunderstand[] . . . Indigenous people's unique spiritual traditions" and "religious practices," and thus conflate them with non-Indigenous belief systems.[173]

However, RFRA Indigenous sacred sites claims have repeatedly failed not because of an "egregious double standard" or courts' inability to understand Indigenous spiritual traditions but because the claimants in those cases are effectively seeking property interests in federal land.[174] Uncompensated transfers of established property entitlements are a distinct class of remedy that distinguishes RFRA sacred sites claims from all others. The essentiality of respecting property interests in land creates an enormous substantive difference between requiring a prison to offer a kosher meal option and requiring the federal government to permanently relinquish highly valuable land rights. Under Barclay and Steele's stunningly broad conception of "coercion," literally *any* exclusion of *any* would-be trespasser from *any* parcel or building would theoretically constitute coercion by interfering with the trespasser's "voluntary choice" to intrude.[175] If embraced by courts, this expansive theory would

171. *See* Barclay & Steele, *supra* note 130, at 1323 (citing other authorities as suggesting that "coercive power exists where the coercer is interfering with the voluntary choice of the coercee").

172. *Id.* at 1301, 1334 (citing *Nance v. Miser*, 700 F. App'x 629, 631–32 (9th Cir. 2017) and *Beerheide v. Suthers*, 286 F.3d 1179, 1191 (10th Cir. 2002)).

173. Barclay & Steele, *supra* note 130, at 1298. *See also* Elizabeth Hampton, *"Thus in the Beginning All the World Was* America*": The Effects of Anti-Protest Legislation and an American Conquest Culture in Native Sacred Sites Cases*, 44 AM. INDIAN L. REV. 289, 329 (2019) ("American courts fail to understand the differences between American and Native American conceptions of property and religion . . . .").

174. *See, e.g.*, Hampton, *supra* note 173, at 325 ("Courts struggle with the fact that granting land ownership to a tribe entitles property rights to federally owned land."); Kristen A. Carpenter, *In the Absence of Title: Responding to Federal Ownership in Sacred Sites Cases*, 37 NEW ENG. L. REV. 619, 624 (2003) ("[P]roperty law loses the case for the tribes.").

175. Barclay & Steele, *supra* note 130, at 1299, 1301. The basic in rem nature of property gives landowners exclusion rights against the world and treats unwelcome violations of those rights as actionable trespasses. *See* O. Lee Reed, *What Is "Property"?*, 41 AM. BUS. L.J. 459, 462 n.15 (2004) ("An in rem right is one that a person may exercise against the entire world—one can exclude all others from the object of an in rem right, which exclusion essentially defines property.").

erode age-old understandings about property in land and weaken the broader economic system.[176]

By definition, property ownership imposes duties on others—including duties that sometimes limit certain types of religious exercise.[177] James Madison expressly acknowledged centuries ago that the property rights of others constrained religious liberty, explaining that religious exercise should be safeguarded only to the extent that "it does not trespass on private rights or the public peace."[178] Supreme Court Justice Robert Jackson echoed this principle in a concurring opinion nearly eighty years ago, adding that "the limits [on religious freedom] begin to operate whenever activities begin to affect or collide with liberties of others or of the public."[179] Multiple state courts have reached similar conclusions in cases involving individuals' attempts to engage in religious activities on others' land without their permission.[180] Given their potentially sizable economic impact, legal rules that deviate from this age-old principle for the purpose of advancing reparative justice or some other policy goal would most appropriately originate in Congress and not the courts.

3. COURT-ORDERED TRANSFERS OF FEDERAL LAND INTERESTS TO GROUPS BASED ON THEIR RELIGIOUS BELIEFS ARE UNCONSTITUTIONAL

The realities of federal land ownership and of the fact that land ownership is not coercive against nonowners lead to one additional

176. Economists have long recognized the importance of strong and predictable enforcement of property rights to economic stability and growth. *See, e.g.*, Sarah Ludington, Mitu Gulati & Alfred L. Brophy, *Applied Legal History: Demystifying the Doctrine of Odious Debts*, 11 THEORETICAL INQUIRIES L. 247, 263 (2010) (noting that Chief Justice William Howard Taft viewed "the preservation of strong property rights" as "crucial to economic stability and growth"); John D. Sullivan, Jean Rogers & Kim Eric Bettcher, *The Importance of Property Rights to Development*, 27 SAIS REV. INT'L AFFS. 31, 31 (2007) (calling "a strong property rights regime" the "foundation for growth, opportunity, and overall well-being").

177. *See supra* note 167 and accompanying text.

178. Nelson Tebbe, *Religion and Marriage Equality Statutes*, 9 HARV. L. & POL'Y REV. 25, 36 (2015) (quoting Letter from James Madison to Edward Livingston (July 10, 1822), *in* JAMES MADISON: WRITINGS 786, 787–88 (Jack N. Rakove ed., 1999)).

179. Tebbe, *supra* note 178, at 35–36 (quoting *Prince v. Massachusetts*, 321 U.S. 158, 177 (1944) (Jackson, J., concurring)).

180. *Good v. Dow Chem. Co.*, 247 S.W.2d 608, 609 (Tex. Civ. App. 1952) (finding that a Jehovah's Witness's religious freedom rights did not include a right to practice religious expression on the private property of another). *See also State v. Martin*, 5 So. 2d 377, 380 (La. 1941) ("[G]uaranties of freedom of religious worship . . . do not sanction trespass in the name of freedom. We must remember that personal liberty ends where the rights of others begin.").

relevant truth: it would be unconstitutional to compel governments to effectively give land rights to certain groups or individuals based on their religious beliefs. A court decision interpreting RFRA or common property law in a way that prohibits all economically viable use of certain federal land an Indigenous community deems sacred would arguably violate the Takings Clause and Establishment Clause of the U.S. Constitution. Such a decision would create the equivalent of new implied "religious exercise servitude" over all affected federal land for the benefit of successful claimants, effectively transferring valuable land control and development rights to them. It would single out and favor a particular religious group, effectively shifting valuable property entitlements in certain federal land from the government to them and requiring no payment in return.[181]

Absent the payment of compensation to the federal government, a court decision empowering a Native Nation to indefinitely prevent development on federal land based on its religious beliefs would arguably constitute an unconstitutional "giving."[182] Professors Abraham Bell and Gideon Parchomovsky famously introduced the concept of chargeable "givings" in 2001.[183] Bell and Parchomovsky argue that principles embedded in the Takings Clause warrant courts' adoption of doctrines—analogous to regulatory takings laws—to govern instances when governments are compelled to transfer valuable *public* property interests to *private* parties without receiving payment in return. In these scholars' own words:

> The Takings Clause is meant, at least in part, to ensure that an organized "faction," in the Madisonian sense, does not use its power to enrich itself at the expense of the unorganized public. In the context of takings, the principal concern is that the faction will enrich itself by converting the private property of unorganized property owners and bringing it into the public domain. In the context of givings, the major concern is that the faction will *enrich itself from the public purse at the expense of the unorganized public*.[184]

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181. For a basic introduction to the concept of property entitlement shifting and its potential constitutional implications, see generally Rule, *supra* note 53.

182. *See generally* Abraham Bell & Gideon Parchomovsky, *Givings*, 111 YALE L.J. 547 (2001).

183. *See id.*

184. *Id.* at 553 (emphasis added) (footnotes omitted).

Fairness and justice are implicated as much in the context of "givings" as they are in regulatory takings jurisprudence. As Bell and Parchomovsky explain:

> The fairness principle embodied in the Takings Clause is that it is inequitable to "forc[e] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." By the same token, it is inequitable to bestow a benefit upon some people that, in all fairness and justice, should be given to the public as a whole. *In a giving, a small group is able to force the public as a whole to subsidize the group's preferential treatment*.[185]

Bell and Parchomovsky expressly single out givings to specific groups based on religious beliefs as being potentially unconstitutional, declaring: "Clearly, not all givings are permissible. For example, givings that violate the *Establishment*, Due Process, or Equal Protection Clauses by favoring a certain group *based on religion*, race, or gender should certainly be invalidated."[186]

A judicial "giving" of millions of dollars in federal land rights to an Indigenous community—based solely on broad interpretations of RFRA or on the recognition of a never-before acknowledged "sacred easement"—would fall squarely within the above statement. Such a court judgment would thus be unconstitutional unless the Indigenous community were to adequately compensate the federal government for its newly acquired interests—a requirement not contemplated by advocates of these novel legal theories.[187]

III. DESIGNING A FEDERAL SACRED SITES PROTECTION PROGRAM

Fortunately, it is possible to significantly expand protections for Indigenous sacred sites on federal land while also respecting property law and existing federal land rights. Congress could enact legislation that simultaneously advances Indigenous reparative justice, strengthens religious freedom, and reduces major obstacles to the clean energy transition. This Part describes some primary features of such a policy structure and why it would be far superior to a litigation-dependent

185. *Id.* at 554 (emphasis added) (footnote omitted) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

186. *Id.* at 616 (emphasis added).

187. In such situations, courts' only other available option would be to vacate the judgment that affected the giving. *See id.* at 615 ("[O]ne could propose that whenever the state engages in a 'chargeable giving' the government act should be invalidated.").

approach to Indigenous sacred sites protection under RFRA and other federal statutes.

A. A Legislated Program that Empowers Native Nations

As popular support for Indigenous justice grows across the United States,[188] the potential for Congress to enact new federal Indigenous sacred sites protection legislation is likely to increase as well. If designed thoughtfully, such legislation could give Native nations unprecedented power to choose and protect many of the sites on federal land they hold most sacred while simultaneously reducing barriers to renewable energy and mineral mine development.

To date, Congress has never authorized uncompensated transfers of federal land rights to Native nations based solely on findings of cultural or religious significance. Congress did agree in 1971 to transfer nearly $1 billion and 40 million acres of land in Alaska to certain Alaskan Native nations in exchange for their agreement to relinquish claims on the balance of the state's land.[189] Congress also enacted legislation in the 1940s creating the Indian Claims Commission, which made about $1.3 billion in monetary compensation payments to Native nations for dispossessed lands before it dissolved in 1978.[190] However, neither of these programs was focused on protecting Indigenous sacred sites. The Native American Graves Protection and Repatriation Act (NAGPRA) creates numerous valuable repatriation rights in physical objects for Indigenous groups in the United States, but it likewise fails to authorize transfers of culturally or religiously significant real property to Native nations.[191] And the only significant federal statute focused specifically on

188. *See* Chris Jackson, Annaleise Azevedo Lohr & Talia Wiseman, *Majority of Americans Agree the U.S. Should Honor Treaties with Native Americans*, IPSOS (Oct. 13, 2021), https://www.ipsos.com/en-us/news-polls/Native-American-Land-Treaties-2021.

189. *See generally* Robert T. Anderson, *Alaska Native Rights, Statehood, and Unfinished Business*, 43 TULSA L. REV. 17 (2007) (describing the history of the Alaska Native Lands Claims Settlement Act and its lingering impacts on Native nations in that state).

190. Adeel Hassan & Jack Healy, *America Has Tried Reparations Before. Here Is How It Went*, N.Y. TIMES (June 19, 2019), https://www.nytimes.com/2019/06/19/us/reparations-slavery.html.

191. *See, e.g.*, Marina F. Rothberg, *Indiana Jones and the Illicit Excavation and Trafficking of Antiquities: Refining Federal Statutes To Strengthen Cultural Heritage Protections*, 63 B.C. L. REV. 1555, 1571 (2022) (citing 25 U.S.C. § 3002(a)) (noting that NAGPRA requires federally funded institutions such as museums and universities "to repatriate objects upon request from a descendent or affiliated tribe, regardless of whether the museum receives compensation" and adds that the statute's provisions can

safeguarding Indigenous religious freedom is the American Indian Religious Freedom Act of 1994 (AIRFA), which merely requires federal agencies to "consider" Native nations' religious interests when developing federal land and creates no enforceable sacred site protections.[192]

With nowhere else to turn, Native nations in recent decades have relied heavily on provisions in Section 106 of the National Historic Preservation Act when seeking to protect sacred sites on federal land and with fairly limited success.[193] The NHPA requires agencies to consult with Indigenous communities prior to taking any federal action that could impact culturally significant resources.[194] However, Section 106 does not require governments to transfer or negate title to lands based on their cultural or religious importance. Because Section 106 merely mandates that federal agencies "consult" with Native nations and does not demand that agencies follow all recommendations received through that consultation process, it has proven to be a relatively weak tool for protecting sacred sites on federal land as well.[195]

Given the lack of any express provisions under RFRA, AIRFA, NHPA, or NAGPRA empowering Indigenous communities to protect sacred sites, new federal legislation is necessary to advance this goal. Because RFRA's legislative history evidences clear congressional intent to *not* delegate such powers under that statute, attempts to persuade courts to interpret RFRA's provisions to do so are ultimately

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thereby "negate legal title to cultural items in federally funded institutions and provide ownership rights solely based on the tribal cultural affiliation of an item").

192. *See* 42 U.S.C. § 1996. *See also* Stuart R Butzier & Sarah M Stevenson, *Indigenous Peoples' Rights to Sacred Sites and Traditional Cultural Properties and the Role of Consultation and Free, Prior and Informed Consent*, 32 J. ENERGY & NAT. RES. L. 297, 307 (2014) ("The United States Supreme Court has relegated the AIRFA to relatively little significance beyond a policy statement."); Nathan Downey, *Burdened, but Not Burdened Enough: A Long-Term Solution to the Difficulties Posed by Religious Objections to Resource Development*, 8 OIL & GAS, NAT. RES., & ENERGY J. 85, 99 (2022) (noting that AIRFA "does not create rights that Native American claimants can enforce against the government's encroachment on their free exercise of religion").

193. 54 U.S.C. § 306108; 36 C.F.R. § 800.2(c)(2) (2022).

194. *See generally* James L. Noles Jr., *When Future Meets Past: Energy Developments and NHPA Compliance*, NAT. RES. & ENV'T, Summer 2016, at 38–39 (describing federal agencies' consultation obligations under Section 106 of the NHPA).

195. *See* Michael C. Blumm & Lizzy Pennock, *Tribal Consultation: Toward Meaningful Collaboration with the Federal Government*, 33 COLO. ENV'T L.J. 1, 52 (2022) ("Federal agencies can technically meet the consultation requirements under the NHPA . . . without actually consulting meaningfully with tribes."). For one set of scholars' ideas on how to improve the NHPA consultation process, see generally Elizabeth Kronk Warner, Kathy Lynn & Kyle Whyte, *Changing Consultation,* 54 U.C. DAVIS L. REV. 1127 (2020).

misguided.[196] A basic comparative institutional competence analysis likewise calls for legislative action in this context, because Congress is likely better equipped than courts to develop procedures for protecting sacred sites on federal land.[197] Although the structure of that legislation could take a wide variety of forms, some core features described in the next Section could make it much more effective at advancing its goals.

B. An Opt-In Structure that Respects Native Nations' Sovereignty and Privacy

Any new federal legislation aimed at protecting Indigenous sacred sites should respect Indigenous communities' sovereignty and rights of self-determination by making their participation entirely voluntary.[198] Legislation embracing this "nation-to-nation" posture would empower each federally recognized Native Nation to independently choose whether to seek new sacred site protections through the statute. Indigenous communities uninterested in participating would be free to abstain.

Federal legislation could also better respect Native nations' sovereignty in this context by ensuring that Native ations' own priorities and beliefs—not the development whims of non-Natives—drive site

196. *See* James E. Key, *This Land Is My Land: The Tension Between Federal Use of Public Lands and the Religious Freedom Restoration Act*, 65 A.F. L. REV. 51, 96 (2010) ("The absence of any discussion of public land use [in RFRA's legislative history] implies Congress did not intend RFRA to reach such cases. Hearings and debate over RFRA spanned three years and were silent on this matter."). Specific dialogue in the Senate report accompanying the bill and on the Senate floor prior to the enactment of RFRA further demonstrates that Congress did not intend for RFRA to restrict uses of federal land. *See* S. REP. NO. 103-111, at 9 (1993) (quoting the Senate Judiciary Committee's understanding that earlier case holdings "ma[de] it clear that strict scrutiny does not apply to government actions involving only management of internal government *affairs or the use of the government's own property or resources*" (emphasis added)). *See also* 139 CONG. REC. 26416 (1993) (quoting Senator Orrin Hatch assuring Senator Chuck Grassley that RFRA would not affect "the way in which government manages its affairs and *uses its own property*" because such activities "do[] not impose a burden on religious exercise" (emphasis added)).

197. This type of comparative institutional competence rationale for courts' deference to elected legislative bodies has a long history within modern jurisprudence. *See generally* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS 3–6 (William N. Eskridge, Jr. & Philip P. Frickey eds., Found. Press 2d ed. 1994) (1958) (introducing institutional competence analysis); Edward L. Rubin, Commentary, *The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions*, 109 HARV. L. REV. 1393, 1394–402 (1996) (discussing the valuable role of institutional competence analysis within jurisprudence).

198. *See* Maggie Blackhawk, *Legislative Constitutionalism and Federal Indian Law*, 132 YALE L.J. 2205, 2211 (2023) (observing that the "the modern framework of federal Indian law . . . recognizes tribal sovereignty and supports self-determination and collaborative lawmaking").

protection decisions. Under today's litigation-driven approach to protecting Indigenous sacred sites, developers' proposals to build wind farms, solar projects, mines, transmission lines, or other infrastructure on federal land largely determine which sites are considered for protection.[199] Even when a proposed location for such a project is not a particularly sacred site, the nature of NHPA Section 106 consultations and RFRA litigation likewise incentivizes Native nations to amplify or even overstate the sacredness of that site to strengthen their position.[200] And because of the inherently subjective nature of religious beliefs, discerning a site's true degree of sacredness has always been a challenge in RFRA litigation.[201] A more functional system would let Native nations initiate steps toward affirmatively protecting particular sites at any time rather than requiring them to wait until development projects are proposed on those sites and endlessly challenge such proposals.

Optimally structured sacred sites protection legislation would also enable Native nations to obtain protective rights without having to disclose sensitive details about why they hold particular sites to be sacred.

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199. The locations of proposed development projects on federal land currently drive site preservation discussions because Native nations presently have no significant statutorily established process for seeking robust protections for sacred sites within their ancestral areas. *See supra* Section III.A.

200. At least two Carlos Apache Tribe members have published op-eds in Arizona's largest newspaper suggesting that such amplification of sacredness has occurred in connection with the *Apache Stronghold* litigation. *See* Dale Miles, *Oak Flat Is a Sacred Site? It Never Was Before*, ARIZ. REPUBLIC, azcentral.com/story/opinion/op-ed/2015/07/23/oak-flat-sacred/30587803/ [https://perma.cc/2Y4K-S9Q7] (Feb. 16, 2018, 7:51 AM) (attesting that there was no long history of ceremonial activities at Oak Flat before discovery of a major copper deposit there and that "[i]t wasn't until recent years that the site of Oak Flat was called sacred in any kind of way"); Karen Kitcheyan-Jones, *Don't Believe the Hype. Most Members of My Tribe Support the Resolution Copper Mine*, ARIZ. REPUBLIC (Sept. 15, 2023, 5:00 AM), https://www.azcentral.com/story/opinion/op-ed/2023/09/15/resolution-copper-mine-most-san-carlos-apache-tribe-support/70854845007/ [https://perma.cc/662Z-YYEE] ("Oak Flat is not the only place where sunrise ceremonies can be held. In fact, the only time they started happening at Oak Flat was because of the Apache Stronghold founder's lies to the world that this was the only place the ceremony can happen.").

201. *See, e.g.*, Susan Phillips, *Catholic Nuns Fought Pipeline on Their Lancaster County Land. Now, Citing Religious Freedom, They Seek Damages in Court*, NPR (Sept. 15, 2022, 5:06 PM), https://stateimpact.npr.org/pennsylvania/2022/09/15/catholic-nuns-fought-pipeline-on-their-lancaster-county-land-now-citing-religious-freedom-they-seek-damages-in-court/ (describing a group of Catholic nuns' RFRA claim aimed at stopping the operation of a new natural gas pipeline on their land on the theory that the pipeline violates their religious beliefs). *See also* Alex Tallchief Skibine, *Towards a Balanced Approach for the Protection of Native American Sacred Sites*, 17 MICH. J. RACE & L. 269, 298 (2012) ("[O]nce you acknowledge that disturbance of sacred sites can impose a substantial burden on Native religious practitioners there is no stopping place, because virtually everything is sacred.").

Many Native nations consider their beliefs to be confidential and would prefer to not have to publicly disclose them.[202] When Native nations try to use RFRA claims or the NHPA Section 106 consultation process to secure protection for a sacred site, they typically must try to persuade non-Native factfinders of the site's sacredness to have any chance of protecting it.[203] This can put Indigenous communities in the difficult position of having to choose between preserving the confidentiality of their beliefs about certain sites and seeking to preserve the sites.[204] Although NHPA provisions seek to mitigate this problem by providing ways to prevent public disclosure of sensitive information revealed during consultations,[205] a governance regime that spared tribes from ever having to reveal such details in the first place would be much better.

C. Use of Artificial Budget Constraints to Promote Balanced Site Protection Decisions

By offering artificial "credit" budgets to Native nations for use in acquiring protective interests in sacred sites on federal land, Congress could respect Indigenous sovereignty and privacy while still motivating Native nations to weigh the full costs of site preservation decisions. Such an approach would rapidly accelerate the Land Back movement and lead to robust new property protections for hundreds of the most sacred Indigenous sites on federal land. It would also empower Indigenous communities to direct sacred site preservation efforts in unprecedented ways and spare them from having to disclose sensitive knowledge to prove sacredness in courts of law.

1. THE NEED FOR A SORTING MECHANISM

Prohibiting development on every acre of federal land that any Native Nation deems sacred is neither practical nor plausible, so some mechanism will be needed to identify the highest-priority sites so that most of them can receive protection. In the words of one scholar:

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202. Dean B. Suagee, *Tribal Voices in Historic Preservation: Sacred Landscapes, Cross-Cultural Bridges, and Common Ground*, 21 VT. L. REV. 145, 194 (1996) ("Information about traditional cultural properties tends to be quite sensitive. In many cases, the persons who have knowledge about the nature and location of such places may desire to keep such information secret, and in some cases they may be prohibited by their religious beliefs from revealing this information.").

203. *See generally* Audrey Mense, Note, *We Could Tell You, but Then We'd Have To Kill You: How Indigenous Cultural Secrecy Impedes the Protection of Natural Cultural Heritage in the United States*, 11 CHI.-KENT J. INT'L & COMPAR. L. 1 (2011).

204. *Id.* at 9.

205. 54 U.S.C. § 307103.

> There are literally tens of thousands of sacred sites. . . . An area extending as much as fifteen miles inland along the entire 1100-mile length of the California coast is . . . considered a sacred site. In fact, an expansive definition of sacred sites could encompass a sizeable portion of the undeveloped land in the United States.[206]

As Justice O'Connor observed in *Lyng*, the "diminution of the Government's property rights, and the concomitant subsidy of the Indian religion" that would result from interpreting RFRA to entitle religious claimants to protect all the land they deemed sacred "would . . . be far from trivial . . . ."[207] Because such a sweeping reallocation of property entitlements is unlikely to have sufficient political support in the foreseeable future, an ideal sacred site protection statute would feature some process for prioritizing near-term protection of the most deserving sites.

2. SELF-DETERMINATION IN PRIORITIZING THE PROTECTION OF SITES

It would be relatively easy to use artificial budgets to motivate Native nations to prioritize which federal land areas get protection as sacred sites. Such an approach—built upon basic microeconomics principles—would completely avoid public debates about sites' relative sacredness and would simultaneously prompt Native nations to more fully consider the broader social costs of their site protection decisions. Within such a system, Indigenous communities who opted to participate would receive discrete amounts of "Sacred Site Protection" (SSP) credit—expressed in dollars—from the federal government based on measurable objective factors such as the Native Nation's total population and the size of its recognized ancestral territory.[208] This nontransferable credit would only be usable to unilaterally "purchase" sacred site conservation and access easements in gross on federal land at fair market value, with valuations based on the easement's impact on the total value of the federal

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206. Marcia Yablon, *Property Rights and Sacred Sites: Federal Regulatory Responses to American Indian Religious Claims on Public Land*, 113 YALE L.J. 1623, 1625–26 (2004) (footnote omitted).

207. *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 453 (1988).

208. Various resources exist for identifying Indigenous ancestral areas. *See, e.g.*, *NAGPRA Native American Consultation Database*, FEDCENTER, https://www.fedcenter.gov/Bookmarks/index.cfm?id=16252 [https://perma.cc/FX2F-MSGS]; *MAPS: GIS Windows on Native Lands, Current Places, and History*, ABORIGINAL MAPPING NETWORK (Nov. 16, 2005), http://nativemaps.org/?p=1204. SSP Program legislation would ideally designate a single specific map or other resource for use within the program.

government's land holdings.[209] California Governor Gavin Newsom unsuccessfully proposed a comparable approach—but with $100 million in actual dollars—in 2022 in an effort to advance Indigenous reparative justice with respect to public land in that state.[210] In 2023, his administration then succeeded in establishing a similar $100 million grant program that is now available to California's Indigenous communities.[211] Because an SSP credit program would involve artificial credit rather than actual money, it could function without substantial new outlays of federal cash.

Easements available for purchase under a federal SSP program would likely resemble what Professor Reidy has called "sacred easements"—easements in gross with conservation easement-like features and flexibility to fit specific preservation objectives—but they would also have some critically important differences.[212] Unlike Reidy's proposed easements, SSP easements would not be created by implication based on quasi-easements under a tenuous new extension of common property law.[213] Native nations would likewise not have to persuade courts or agencies that each of their targeted easement areas is truly sacred enough to warrant protection.[214] Instead, Native nations would request the easements they wanted and ultimately receive the ones they "purchased" under easement instruments executed by the federal government that conform with longstanding property laws.

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209. This is the most typical valuation method for easements in gross in the context of eminent domain and conservation easements. *See* Gerald Korngold, *Solving the Contentious Issues of Private Conservation Easements: Promoting Flexibility for the Future and Engaging the Public Land Use Process*, 2017 UTAH L. REV. 1039, 1081.

210. *See* Maya Yang, *California Plan Would Give $100m to Indigenous Leaders To Buy Ancestral Lands*, GUARDIAN (Mar. 18, 2022, 9:53 PM), https://www.theguardian.com/us-news/2022/mar/18/california-indigenous-tribes-purchase-land ("[F]unding would not function like a traditional state grant program, where the state decides who gets the money and how they can spend it. . . . [A state official] said the administration is 'committed to developing a structure or a process where tribes are deciding where these funds are going.'").

211. *See* Nik Altenberg, *$100 Million Grant To Assist California Native Tribes with Buying Back Land*, KQED (Aug. 4, 2023), https://www.kqed.org/news/11957413/100-million-grant-to-assist-california-native-tribes-with-buying-back-land.

212. *See* Reidy, *supra* note 150 (manuscript at 58–65) (describing the potential features of "sacred easements").

213. *See id.* (manuscript at 42–47) (suggesting that courts could find that Native nations held "quasi-easements" across federal land areas based on their religious activities prior to colonialization and further recognize the existence of implied "sacred easements" based upon the newfound quasi-easements).

214. *See id.* (manuscript at 57–58) (advocating for Congress to "create a statutory property right for tribes to claim an explicit ownership interest in their sacred sites" that "correspond[s] to their traditional religious practices").

A simple hypothetical example helps to illustrate how an SSP credit program might operate. Suppose that Congress enacted legislation formally authorizing the SSP program and that the U.S. Bureau of Land Management, Bureau of Indian Affairs, or some other federal agency then published a Federal Register notice declaring specific SSP credit amounts available to each federally recognized tribe upon enrollment in the program. Suppose further that the Shoshone-Bannock Tribes, a federally recognized Native Nation, decided to enroll and that its published allocation of SSP credit was $10 million.[215] The Tribes' leadership would then deliberate internally about which sites within its off-reservation ancestral territory it most wanted to seek to protect through expenditures of its SSP credit to "purchase" new easements from the federal government. After the Tribe agreed internally upon distinct sites it would most like to try to protect, it would formally request valuations for simple perpetual conservation easements in gross in favor of the Tribe covering specific legally described areas. These formal requests to the federal agency would trigger a formal proceeding to determine the fair value of each of the proposed easements.[216] After valuations of potential SSP easements were determined, the Tribe could use its SSP credit to "purchase" some or all of the easements at their set prices and the federal agency would then execute and record the new easements in the federal land records. To safeguard national security or other imperative national policy interests, provisions within the SSP program's authorizing legislation would likely allow the federal government to designate certain critical federal land areas as ineligible for inclusion in SSP easements.[217]

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215. To learn about the Shoshone-Bannock Tribes, visit *Welcome to Fort Hall*, SHOSHONE-BANNOCK TRIBES, https://www.sbtribes.com (last visited Feb. 23, 2024).

216. Valuations of SSP easements would likely be based on the difference in the federal land's value to the government before and after imposition of the easement—the most typical approach for valuating conservation easements and condemned easements on private land. *See, e.g.*, *United States v. Va. Elec. & Power Co.*, 365 U.S. 624, 630 (1961) ("The valuation of an easement upon the basis of its destructive impact upon . . . the servient fee is a universally accepted method of determining its worth."); Nancy A. McLaughlin, *Rethinking the Perpetual Nature of Conservation Easements*, 29 HARV. ENV'T L. REV. 421, 491–92 (2005) (observing that conservation easements are typically valued using the "before and after" method).

217. A similar balancing of policy interests exists between the sometimes-competing goals of national security protection and environmental protection. *See, e.g.*, Ekundayo B. George, *Whose Line in the Sand: Can Environmental Protection and National Security Coexist, and Should the Government Be Held Liable for Not Attaining This Goal?*, 27 WM. & MARY ENV'T L. & POL'Y REV. 651 (2003).

3. COST INTERNALIZATION IN THE SITE PROTECTION SELECTION PROCESS

By placing concrete limits on the aggregate value of easements attainable to each Native Nation through the SSP program, such a program would encourage more cost-efficient site protection decisions. In some instances, a Native Nation would deliberate after completing the easement valuation process to decide which site or sites to protect based on newly received valuation information. If a Native Nation has insufficient SSP credit to acquire all of the easements on its wish list, it might decide to acquire only its highest-priority easements or to reduce the size or scope of some easements to accommodate its budget. Native nations could also potentially seek and use actual funds from its own reserves or from other funding sources such as the Land and Water Conservation Fund to supplement their SSP credit expenditures.[218]

By infusing "liability rules" into its structure, an SSP credit program approach to protecting Indigenous sacred sites would respect federal land title and motivate Native nations to consider more of the broader societal costs of site protection decisions.[219] Under such an SSP program, certain federal land rights would have what Calabresi and Melamed famously called "liability rule" protection instead of "property rule" protection because Native nations would hold options to unilaterally "purchase" those rights at their fair value under certain conditions with SSP credit.[220] This structure is especially appealing in the context of protecting Indigenous sacred sites because it circumvents the need to place a dollar value on a site from the perspective of Indigenous communities—

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218. For a description of the Land and Water Conservation Fund and how it functions, see generally Hope C. Shelton, *Conservation in Texas: Bridging the Gap Between Public Good and Private Lands Using Landowner Incentive Programs*, 19 VT. J. ENV'T L. 273, 281–82 (2018).

219. Calabresi and Melamed's "Cathedral" model of property rules and liability rules is among the most impactful contributions within the law and economics literature. *See* George S. Geis, *Internal Poison Pills*, 84 N.Y.U. L. REV. 1169, 1197 (2009) ("Except for the ubiquitous Coase Theorem, there may be no more famous law and economics framework than Guido Calabresi and Douglas Melamed's 'view of the cathedral.'" (footnote omitted)); James E. Krier & Stewart J. Schwab, Essay, *Property Rules and Liability Rules: The Cathedral in Another Light*, 70 N.Y.U. L. REV. 440, 440 (1995) (calling the Cathedral model "perhaps the most widely known and influential contribution" to the law and economics literature building on the Coase Theorem). When a property entitlement is protected by a "liability rule," one or more parties have an option to purchase the entitlement from its holder at a price reflecting its objective value. *See* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1092 (1972).

220. When entitlements are protected by property rules, non-owners can purchase them only through a voluntary bargain with the entitlement holder. *See* Calabresi & Melamed, *supra* note 219, at 1092.

something they would understandably dislike.[221] Instead, such a structure places fair market valuations on those assets and then empowers Native nations—the best "choosers" in this context since their valuations are more subjective and difficult to quantify—to decide which sites to protect.[222]

Use of liability rules in an SSP program would also help ensure that its aggregate nonmonetary cost to the federal land portfolio stayed within politically tolerable bounds, making the program a more plausible approach than reliance on tenuous RFRA coercion arguments or open-ended "sacred easement" theories. If a Native nation were to seek an SSP easement across a remote federal land area that was not well suited for energy development, mineral mining, recreation, or other purposes, the easement's valuation would likely be relatively low. By contrast, if a sought-after easement would prevent the development of a large and valuable lithium deposit on federal land, its valuation and corresponding SSP easement price would be much higher.[223] Such price differences would cause Native nations deciding which ancestral areas to protect to internalize more of the social costs of those decisions and stay within a discrete budget, resulting in more predictable and efficient site protection outcomes than would be possible through a RFRA approach or reliance on NHPA Section 106 consultations.[224]

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221. Discomfort with the practice of placing an estimated dollar value on an area as a sacred site has been expressed in connection with the NHPA consultation process. *See, e.g.*, Derek C. Haskew, *Federal Consultation with Indian Tribes: The Foundation of Enlightened Policy Decisions, or Another Badge of Shame?*, 24 AM. INDIAN L. REV. 21, 65 (1999) ("[T]he value of a coal mine, no matter what its expected dollar output, cannot in any meaningful way be compared against the same area's value as a sacred site. Yet, federal agencies must make such decisions, and readily do so, using the consultation process . . . .").

222. *See* Bell & Parchomovsky, *supra* note 182, at 606 ("[T]he general rule should be that the person choosing to carry out the transaction should pay the full subjective value of the property in the hands of the nonchooser. . . . [S]ince the nonchooser has no choice in the matter, the chooser should have to internalize the full value to the nonchooser in order to ensure that the transaction is worthwhile."). For more details on "chooser" theory in within the Cathedral model, see generally Krier & Schwab, *supra* note 219, at 472–73.

223. In some instances, the valuations of certain federal land sites may be so high that an SSP easement's price would exceed a Native Nation's budget. *See, e.g.*, Ivan Penn & Eric Lipton, *The Lithium Gold Rush: Inside the Race To Power Electric Vehicles*, N.Y. TIMES (May 6, 2021), https://www.nytimes.com/2021/05/06/business/lithium-mining-race.html (noting that lithium deposits at Nevada's Thacker Pass site are valued at $3.9 billion). In such instances, Native nations could potentially pool their SSP credit together to protect the site or opt to spend their SSP credit elsewhere and allow development of the site to proceed.

224. Multiple legal scholars have cited similar cost internalization effects as a benefit of the just compensation requirement under takings laws. *See, e.g.*, RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 58 (4th ed. 1992) ("The simplest economic

D. Non-Disturbance of Clean Energy–Related Projects Elsewhere

Congress could additionally structure SSP program legislation such that it not only facilitated the protection of numerous Indigenous sacred sites but also advanced the country's pressing clean energy transition goals. As highlighted above, religion-based opposition from Indigenous communities has emerged as a significant obstacle to the development of wind and solar farms, transmission infrastructure, and energy transition minerals mines on federal land in recent years.[225] As human-induced climate change and its harms grow increasingly apparent, the urgency of the need to build such federal land projects to support domestic energy security and the clean energy transition is growing as well.[226] One potential way to aid such development would be to limit SSP program participants' ability to preemptively challenge new clean energy–related projects on federal lands on their off-reservation ancestral territories that are not encumbered by an SSP easement for some specified time period such as twenty or thirty years.[227]

As climate change worsens, calls for streamlining domestic clean energy–related project approval processes to accelerate decarbonization grow ever stronger. Professors J.B. Ruhl and James Salzman have been outspoken about this need, recently advocating for laws that would soften environmental regulations and other development restrictions when applied to renewable energy and climate mitigation projects to help facilitate their more rapid buildout.[228] However, they and others have

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explanation for the requirement of just compensation is that it prevents the government from overusing the taking power."); Michael A. Heller & James E. Krier, Commentary, *Deterrence and Distribution in the Law of Takings*, 112 HARV. L. REV. 997, 999 (1999) ("If the government were free to take resources without paying for them, it would not feel incentives, created by the price system, to use those resources efficiently."); Thomas J. Miceli & Kathleen Segerson, *Regulatory Takings: When Should Compensation Be Paid?*, 23 J. LEGAL STUD. 749, 758 (1994) ("[I]f compensation is zero, the regulator perceives the regulation as being costless and will overregulate.").

225. *See supra* Section I.C.

226. *See supra* Section I.B.

227. SSP Program participants could retain full rights to oppose non-clean-energy-related projects anywhere on their ancestral lands. Ideally, such non-disturbance commitments would also preserve participating Native nations' NHPA Section 106 consultation rights and their rights to oppose aspects of a project if certain types of cultural resources such as burial grounds are discovered during excavation or construction. For basic details about Section 106 consultation requirements, see *supra* notes 193193–95 and accompanying text.

228. *See generally* J.B. Ruhl & James Salzman, *What Happens When the Green New Deal Meets the Old Green Laws?*, 44 VT. L. REV. 693 (2020).

largely focused on environmental protection laws and avoided the more thorny question of how to prevent Indigenous communities' opposition from hindering domestic clean energy transition projects. Obtaining SSP credit program participants' agreement to largely refrain from opposing such projects would help to reduce this additional obstacle to the increasingly vital climate mitigation effort.

E. Sharing of New Federal Lease Revenues and Mining Royalties

Congress could also include provisions in SSP program legislation that entitled participating Native nations to a percentage share of all federally collected lease revenues or royalties generated from new clean energy–related projects within their recognized off-reservation ancestral areas. Even if the statutorily defined share percentage were only ten percent, the prospect of receiving those new revenue streams might further bolster some Native Nation's support for such projects. Applying that requirement, if the Bureau of Land Management were to execute a new wind energy lease on federal land within a participating Native Nation's ancestral territory that generated $1 million per year in lease revenues, then $100,000 per year of those revenues would be payable to the Native Nation.

Although the federal government has shared mineral and energy development project royalties and lease revenues with Native nations for decades, these SSP program provisions would be the first to provide revenue and royalty sharing for off-reservation projects.[229] Royalties sharing arrangements have historically involved only projects on Indian trust lands, not projects on ancestral lands situated off reservation, like those that would be eligible for sharing under these new provisions.[230] Including these new revenue sharing rights for participating Native nations would further strengthen incentives for them to participate in the SSP program and would add a potentially valuable source of monetary reparations to the program's land-based reparations.

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229. For a detailed history of the evolution of Native nations' receipt of royalties and lease revenues on Indian trust lands, see generally Judith V. Royster, *Mineral Development in Indian Country: The Evolution of Tribal Control over Mineral Resources*, 29 TULSA L.J. 541 (1994).

230. *See id.* at 565–67 (describing the Interior Department's creation of "a system of bonuses, rents, and royalties to ensure an income stream" for Native nations under the Indian Mineral Leasing Act).

F. An Iterative Structure Supporting Future Rounds of Reparations

One other potentially valuable feature of an SSP program statute would be provisions supporting subsequent iterations of SSP credit distributions over time. For instance, the legislation could encourage swift action by designating an initial three-year offer period during which Native nations could opt to participate and spend their credit and providing that all unclaimed SSP credit expires at the end of that period. Under the statute, subsequent offer periods and new SSP credit distributions could then automatically reemerge every thirty years absent affirmative congressional action providing otherwise. Such a structure would increase the political palatability of the SSP program in the short run by placing a ceiling on its initial cost to the federal land portfolio. At the same time, it would support the prospect of future rounds of sacred site protection under the program as political support for Indigenous reparations continues to grow.

CONCLUSION

It is possible to provide meaningful reparations for the country's history of mistreatment toward Indigenous communities and protect many Indigenous sacred sites on federal land while still respecting property rights and advancing climate change mitigation efforts. After decades of marginalization and oppression, Native nations are understandably seeking creative new ways to protect ancestral land resources through litigated claims. However, Congress never intended for the Religious Freedom Restoration Act to effectively require unilateral uncompensated transfers of federal land rights, and there are far more equitable and efficient means of advancing Indigenous reparations goals.

One such means would be a legislated sacred site protection credit program that empowers Native nations to identify and acquire actual land interests from the federal government within prescribed artificial budgets. If appropriately structured, such a program could incentivize Indigenous communities to weigh their internal preferences for preserving various federal land ancestral sites against the broader social costs of preserving each site, resulting in more efficient preservation decisions that better respected Native nations' sovereignty and privacy. By securing non-disturbance commitments from participating tribes on unacquired ancestral areas, the program could simultaneously make it easier for renewable energy projects, mines, transmission lines, and other important clean energy development on federal land to proceed. By working cooperatively, Native nations and the federal government can

meaningfully advance Indigenous reparations and protect numerous sacred sites on federal land without undermining property law or unduly sacrificing decarbonization goals.