

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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No. 12-15412

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TE-MOAK TRIBE OF WESTERN SHOSHONE INDIANS OF NEVADA,  
TIMBISHA SHOSHONE TRIBE,  
WESTERN SHOSHONE DEFENSE PROJECT,  
GREAT BASIN RESOURCE WATCH,

Appellants,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL.,

Appellees,

AND

BARRICK CORTEZ, INC.,

Defendant-Intervenor-Appellees,

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BRIEF OF AMICI CURIAE AMERICAN INDIAN  
LAW SCHOLARS IN SUPPORT OF APPELLANTS

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to FRAP 26.1, Amici Curiae American Indian Law Scholars are not a corporation and have no parent companies, no subsidiaries or subordinate companies, and no affiliate companies that have issued shares to the public.

## IDENTITY AND INTEREST OF AMICUS CURIAE

This brief is filed on behalf of a group of fifteen legal scholars (“American Indian Law Scholars”) who study and write about American Indian Law, including authors of the leading casebooks, treatises, and articles in the field. Several of these scholars devote their research specifically to legal matters involving American Indian sacred sites and natural resources on the public lands.

The amici are authorized to state that Appellants consent to the filing of this brief. Via email correspondence on June 10-11, 2012, the amici endeavored to obtain the consent of the other parties. The United States consented and Barrick Cortez, Inc., declined to consent. The American Indian Law Scholars therefore contemporaneously submit a Motion for Leave to File this brief.

The interest of the American Indian Law Scholars is in ensuring that cases in the field of American Indian Law are decided in a uniform and cohesive manner, consistent with law and policy regarding religious freedoms at sacred sites on the public lands. Toward that end, the brief is intended to provide specialized expertise and perspectives that may be of assistance to the Court in considering this case.



## ARGUMENT

For many Western Shoshone people, Mt. Tenabo is a sacred site. The term “sacred site” encompasses a variety of places on the natural landscape, including certain mountains, lakes, and canyons, with religious significance for particular American Indian tribes. Vine Deloria, Jr., God is Red: A Native View of Religion 270-285 (2003). Often sacred sites mark the place of creation or emergence for a tribe; they may be locations where deities are believed to reside, where contemporary prayers and ceremonies take place, and where burial sites exist. *See id.* Mt. Tenabo is all of these things to the several Western Shoshone tribes whose religious identity and practice are closely tied to the mountain.

Religious values and duties are deeply and specifically inscribed in the Western Shoshone creation story, which articulates the significance of Mt. Tenabo to the religion of the Shoshone people. *See* Meredith Rucks, An Ethnographic Study Completed for the Cortez Gold Mines Pediment Project 23-24 (January 2004). When the world was covered with water, the ancient Shoshone people lived on the peaks of the mountain, eventually descending to the slopes, and leaving burial sites on the mountain. Spiritual forces, known as *puha*, flow through the caves of the mountain, and its springs contain powerful spiritual energies. *See id.* Today, the Te-Moak Tribe and Timbisha Shoshone Tribe (the “Tribes”), along with other Western Shoshone people, conduct ceremonies and prayers on Mt.

Tenabo, revere the *puha* in its caves and waters, visit its Pediment Area for ceremonies, and acknowledge ancestral burial sites and spirits on the mountain.

While the Tribes' beliefs about Mt. Tenabo are unique to them, many American Indian religions are grounded in a particular sacred site. As one prominent scholar explains, "Many Native Americans do not consider themselves as people of the book (i.e., Bible) but rather as people of the land, whose central religious rituals and practices take place at particular sacred places." Frank Pommersheim, Broken Landscape: Indians, Indian Tribes, and the Constitution 189 (2009). In this regard, American Indian beliefs resemble other religions that have a concept of sacred geography, including Christianity, Judaism, Hinduism, Islam, Buddhism, and Shintoism:

[Sacred] mountains have an important place in the symbolic geography of religious traditions the world over, although the ways in which the mountains are significant have differed. Some have been seen as cosmic mountains, central to an entire worldview; others have been distinguished as places of revelation and vision, as divine dwelling places, or even as geographical manifestations of the divine.

10 Encyclopedia of Religion 130-33 (1987).

As a matter of federal Indian law, the facts of this case follow a familiar pattern in which a sacred mountain, located within a tribe's aboriginal territory, is now managed by the United States as part of the federal public lands. *See* Robert T. Anderson et al., American Indian Law: Cases and Commentary 811-16 (2010). Because this is a common occurrence, Congress and the Executive Branch have

developed an extensive body of law and policy instructing federal land management agencies to protect the physical integrity of those sites and ensure tribal access to them, in furtherance of American Indian religious freedom and tribal self-determination. *See id.* (summarizing federal statutes, regulations, and executive orders directing agencies to accommodate American Indian religious needs at sacred sites).

Both the district court and 9th Circuit correctly noted, for example, that Executive Order 13007 imposes a duty on the Bureau of Land Management (“BLM”) to “accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners” and “avoid adversely affecting the physical integrity of ... sacred sites.” *See South Fork Band v. U.S. Dept of Interior*, 2010 WL 3419181 at \*8 (D. Nev. 2010) (citing South Fork Band Council v. U.S. Dept. of Interior, 643 F.Supp.2d 1192, 1211 n. 9 (D. Nev. 2009), *aff’d*, South Fork Band Council v. U.S. Dept. of Interior, 588 F.3d 718, 724 (9th Cir. 2009)).

However, the district court incorrectly held that the BLM had discharged those duties when it decided to permit mining on Mt. Tenabo. The court wrote:

Despite the clear applicability of the executive order here, BLM did not violate the order in approving the site. The order requires agencies to “accommodate access” to religious sites and requires agencies to “avoid adversely affecting the physical integrity” of sacred sites. Here, the BLM has implemented mitigation procedures to minimize harm to the mountain. Moreover, the BLM has concluded that the Project will not adversely harm the areas Plaintiffs identified as important to the Western Shoshone religion (the Shoshone Wells,

the top of Mt. Tenabo, the White Cliffs, and Horse Canyon). Thus, it does not appear that BLM has violated Executive Order 13007.

*See id.* The BLM decision apparently relied on a 2004 Cultural Resources Report recommending that only certain features of Mt. Tenabo, namely those enumerated above, were “properties of religious and cultural importance,” eligible for inclusion in the National Register of Historic Places under the National Historic Preservation Act (“NHPA”). Bureau of Land Management, Cultural Resources Report: Mount Tenabo Properties of Cultural and Religious Importance Determinations of Eligibility to the National Register of Historic Places (April 1, 2004) (“BLM Cultural Resources Report”).

Whether or not the 2004 recommendation was correct under the NHPA, an issue that is not under review here, it is clear that the BLM’s later decision to permit mining on Mt. Tenabo did not meet Executive Order 13007’s requirements on sacred sites. *See* Executive Order 13007, “Indian Sacred Sites.” 61 Fed. Reg. 26771 (May 29, 1996). While the Executive Order does not provide a separate cause of action, *see id.* at Sec. 4, it nevertheless guides agency action, and provides content to whether the BLM has complied with its enforceable statutory duties. The Federal Land Policy Management Act of 1976 (“FLPMA”), 43 U.S.C. § 1701 *et seq.*, and the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 704-706, require that the BLM avoid “unnecessary or undue degradation” of public land resources, and that the agency’s decisions with respect to that mandate are not

arbitrary and capricious. Executive Order 13007 provides clear direction to the agency that, if wholly ignored or merely given lip service, amounts to arbitrary and capricious action by the BLM. The BLM's decision to substitute its own judgment about the location and scope of the sacred site, ignoring the Tribes' own clear comments and conclusions, violated its duty under the Executive Order, and therefore was arbitrary and capricious.

From 2000-2008, the Tribes made many formal submissions to the BLM indicating and substantiating that the entire mountain, specifically including the Pediment Area, is a sacred site, with religious significance to the Tribes under Executive Order 13007. This and other evidence attesting to the sacred quality of the entire mountain, and to the Pediment Area in particular, was part of the record when the BLM issued its decisions to permit mining at Mt. Tenabo. It is uncontested that the mining project will severely limit access to, and affect the physical integrity of, the Pediment Area of Mt. Tenabo. Viewed in this light, the BLM's decision to approve the project violates FLPMA and the APA, and contravenes current federal policy on American Indian religious freedoms at sacred sites on public lands. For these reasons, amici American Indian Law Scholars urge this court to reverse the district court's orders denying the Tribe's motions for summary judgment.

I. Federal Indian Law and Policy Require Agencies to Accommodate American Indian Religious Practices and Avoid Adversely Affecting Sacred Sites on Federal Public Lands.

In the decisions below, the district court denied the Tribes' motion for summary judgment regarding the BLM's failure under FLPMA and Executive Order 13007 to protect Mt. Tenabo. South Fork Band Council v. U.S. Dept. of Interior, 2012 WL 13780 at \*2 (D. Nev. 2012) (citing South Fork Band, 2010 WL 3419181). By allowing the BLM to destroy a site that is integral to Western Shoshone religious practices, this decision disregards nearly twenty-five years of developments in federal law and policy requiring agencies to accommodate American Indian religious practices and avoid adversely affecting sacred sites on the federal public lands.

a. History of Federal Policy on American Indian Religious Practices and Sacred Sites

The United States did not always accommodate, or even tolerate, American Indian religious practices. Rather, "past federal policy was to assimilate American Indians into United States society, in part by deliberately suppressing, and even destroying, traditional tribal religions and culture in the 19th and early 20th centuries." Bear Lodge Multiple Use Ass'n v. Babbitt, 175 F.3d 814, 817 (10th Cir. 1999).

The 19th and 20th century policy of "assimilation" sought to eradicate the traditional subsistence and religious practices of American Indians and replace

them with farming and Christianity. *See* Allison M. Dussias, Ghost Dance and Holy Ghost: The Echoes of Nineteenth-Century Christianization Policy in Twentieth-Century Native American Free Exercise Cases, 49 Stan. L. Rev. 773 (1997). Federal policymakers believed that encouraging Indians to “put aside all savage ways” would help them achieve “salvation” through Christianity. Report of Commissioner of Indian Affairs W.A. Jones, October 16, 1902, *reprinted in* Wilcomb E. Washburn, The American Indian and the United States: A Documentary History, Volume II, 727 (1973).

Indian agents around the country, including at Western Shoshone Agency, implemented these policies by training Indians to raise crops and livestock and encouraging their children to attend federal boarding schools that taught English, Christianity, farming, and other manual labor skills. *See, e.g.*, Report of John S. Mayhugh, U.S. Indian Agent, Western Shoshone Agency, Nev., August 18, 1898, *in* Annual Report of the Commission of Indian Affairs 202-205 (1898).

While initial efforts encouraged Indians to abandon their religions and cultures voluntarily, federal policy turned increasingly coercive. In 1883, the Commissioner of Indian Affairs issued rules for the “Courts of Indian Offenses,” applicable on reservations nationwide. As reissued in 1892, the rules prohibited Indian religious dances (punishable by 10 days withholding of rations or 10 days imprisonment) and the practices of medicine men (10-30 days imprisonment for

the first offense, not more than 6 months imprisonment for subsequent offenses). *See* House Exec. Doc no. 1, 52d. Cong, 2d Sess., serial 3088, pp. 28-31, *reprinted in* Francis Paul Prucha, ed., Documents of United States Indian Policy 185-187 (3d. ed. 2000). In 1890, the Seventh Cavalry of the U.S. Army famously attacked and killed over 200 Indians engaged in a religious revival ceremony called the Ghost Dance. *See* James Mooney, The Ghost Dance Religion and Wounded Knee, *in* Fourteenth Annual Report of the Bureau of Ethnology, Part 2, 867-72 (1973 reprint). As late as 1921, the Commissioner of Indian Affairs stated, “The sun-dance and all other similar dances and so-called religious ceremonies are considered ‘Indian offences’ under existing regulations and corrected penalties are provided.” *See* David H. Getches, et al., Cases and Materials on Federal Indian Law 727 (6th ed. 2011) (citing Felix Cohen, Handbook of Federal Indian Law 175 (1942)).

In addition to these measures directly aimed to prohibit American Indian religious and cultural practices, the federal government’s acquisition of American Indian lands made it difficult for American Indians to practice their religions at sacred sites. *See, e.g.,* Lyng v. Nw. Indian Cemetery Protective Ass’n, 485 U.S. 439, 452 (1988) (upholding the government’s right to build logging road through Yurok, Karuk, and Tolowa sacred site that became part of the public domain in the 1850’s, after the United States failed to ratify treaties with California tribes). In



the present case, while the Western Shoshone never ceded ownership of Mt. Tenabo, the Indian Claims Commission held in 1966 that the Western Shoshone's aboriginal title to their traditional territory had been extinguished sometime in the 19th century. *See Shoshone Tribe v. U.S.*, 40 Ind. Cl. Comm. (1977), *aff'd Temoak Band of Western Shoshone Indians, Nevada v. U.S.*, 593 F.2d 994 (1979). As a result, the BLM now asserts management authority over the land where Mt. Tenabo is located.

b. Modern Federal Law and Policy on American Indian Religious Practices and Sacred Sites

In the 1960's and 1970's, federal law and policy shifted dramatically in favor of American Indian religious freedoms, including sacred sites practices. *See* Charles Wilkinson, Blood Struggle: The Rise of Modern Indian Nations 58-60, 177-89, 263 (2005). In 1970, President Richard M. Nixon announced a new policy in favor of Indian "self-determination," pledging "to strengthen the Indian's autonomy without threatening his sense of community." Richard M. Nixon, Special Message to Congress on Indian Affairs, 213 Pub. Papers 564 (July 8, 1970). President Nixon called for tribal self-determination over education, health care, economics, culture and religion. *Id.* Recognizing that "cultural pluralism is a source of national strength," President Nixon rejected the policy of terminating Indian tribes, and recognized the practice of traditional tribal religions as an aspect of self-determination. *See id.* *See also* Pub. L. No. 91-550, 84 Stat. 1437 (Dec. 15,

1970) (restoring sacred Blue Lake to Taos Pueblo for religious and other purposes).

In 1978 Congress passed the American Indian Religious Freedom Act (“AIRFA”), extending religious freedom, including the use of sacred sites, to all American Indians. Reflecting the aims of the self-determination era, AIRFA provides:

[I]t shall be the federal policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, *including but not limited to access to sites*, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.

42 U.S.C. § 1996 (1994). In the sacred sites context, AIRFA has been implemented largely through amendments to the National Historic Preservation Act and Executive Order 13007.

Under the National Historic Preservation Act Amendments of 1992, “properties of traditional religious and cultural importance to an Indian tribe ... may be determined to be eligible for inclusion on the National Register.” The protections of the NHPA are generally procedural. The 1992 amendments direct federal agencies, including the BLM, “to consult ... with any tribe ... that attaches

religious and cultural significance” to a site regarding federal “undertakings” that may affect it. 16 U.S.C. § 470a(d)(6)(A)-(B) (2012).<sup>1</sup>

In contrast to the NHPA, the guidance to agencies in Executive Order 13007 is substantive; the agencies are directed to take action, not merely to consult. Signed by President Clinton in 1996, Executive Order 13007 directs federal agencies to: “(1) accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and (2) avoid adversely affecting the physical integrity of such sacred sites.” Executive Order 13007, Sec. 1(a). The Executive Order 13007 defines a “sacred site” as “any specific, discrete, narrowly delineated location on Federal land that is identified by an Indian tribe, or Indian individual determined to be an appropriately authoritative representative of an Indian religion, as sacred by virtue of its established religious significance to, or ceremonial use by, an Indian religion; provided that the tribe or appropriately authoritative

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<sup>1</sup> Executive Order 13007 incorporates President Clinton’s 1994 Executive Memorandum, Government-to-Government Relations with Native American Tribal Governments, 59 Fed. Reg. 22951. *See* Executive Order 13007, Sec. 2(a). Upon issuing the Memorandum, the President affirmed his support for tribal sovereignty and singled out the religious freedom of American Indians, saying, “Our first principle must be to respect your right to remain who you are and to live the way you wish to live.... I pledge to continue my efforts to protect your right to fully exercise your faith as you wish.” William Jefferson Clinton, Remarks to Native American and Native Alaskan Tribal Leaders, 30 Weekly Comp. Pres. Doc. 941 (April 29, 1994). *See also* George W. Bush, Executive Order 13175, 65 Fed. Reg. 67249 (Nov. 6, 2000) (acknowledging the government-to-government relationship and agencies’ duty to cooperate and consult with tribal governments).

representative of an Indian religion has informed the agency of the existence of such a site.” *Id.* at Sec. 1(b).

The Executive Order’s provision that Indian tribes and Indian individuals identify sacred sites marks an important element of the self-determination era, in which the federal government now recognizes that tribes, and not federal officials, should articulate American Indian religious norms and values.<sup>2</sup> As President Obama recently explained: “History has shown that failure to include the voices of tribal officials in formulating policy affecting their communities has all too often led to undesirable and, at times, devastating and tragic results. By contrast, meaningful dialogue between Federal officials and tribal officials has greatly

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<sup>2</sup> Complying with Executive Order 13007 is a critical way for the Executive Branch to meet the mandate of the U.N. Declaration on the Rights of Indigenous Peoples (“UNDRIP”). *See* United Nations Declaration on the Rights of Indigenous Peoples, U.N. Doc. A/RES/61/295 (Sept. 13, 2007). Relevant provisions guarantee indigenous rights as follows: Article 11 (maintain, protect, and develop archaeological and historical sites), Article 12: (practice spiritual and religious traditions, customs and ceremonies; maintain, protect, and have in privacy religious and cultural sites) and Article 25 (maintain and strengthen distinctive spiritual relationship with traditional lands). *See also* President Barack Obama, Remarks by the President to the White House Tribal Nations Conference, Washington, D.C. (Dec. 16, 2010) (confirming the United States’ support for the UNDRIP). In the past, the federal government’s treatment of Mt. Tenabo has failed to comply with international human rights law. *See also* U.N. Committee for the Elimination of Racial Discrimination, Decision 1(68) (United States of America), 68th Sess., U.N. Doc. CERD/C/USA/DEC/1 (Apr. 11, 2006) (expressing concern about gold mining on Mt. Tenabo and recommending the U.S. “desist” from conducting such activities over the protests of the Timbisha Shoshone and other Western Shoshone tribes).

improved Federal policy toward Indian tribes. Consultation is a critical ingredient of a sound and productive Federal-tribal relationship.” Barack Obama, Memorandum on Tribal Consultation, 74 Fed. Reg. 57881 (Nov. 5, 2009).<sup>3</sup>

Agencies have taken seriously the dictates of Executive Order 13007 and, as required by the Order, developed internal policy to comply with it. These handbooks and guidelines call on land managers to implement both the procedural provisions of the NHPA and the substantive provisions of Executive Order 13007, along with other laws not at issue in this case. *See, e.g.*, Bureau of Land Management, Handbook H-8120-1 - General Procedural Guidance for Conducting Tribal Consultation, (Nov. 3, 2004); Bureau of Reclamation, Guidance for Implementing Sacred Sites Executive Order 13007 (Sept. 16, 1998); National Park Service, Management Policies, 8.5 (2000), and United States Forest Service, USFS Handbook 1509.13 – American Indian and Alaska Native Relations (2004).<sup>4</sup>

Within this framework, the vast majority of potential conflicts over sacred sites on the public lands have been resolved by the agencies and tribes themselves. For example, after learning of tribal concerns about logging in the Bighorn

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<sup>3</sup> Executive Memorandum, Tribal Consultation, 74 Fed. Reg. 57881 (Nov 5, 2009).

<sup>4</sup> The Secretary of Agriculture recently requested the Forest Service to review and evaluate its sacred sites policies. *See* Draft Report to the Secretary of Agriculture, USDA Office of Tribal Relations and Forest Service Policy and Procedures Review: Indian Sacred Sites (2011).

National Forest in Wyoming, the Forest Service consulted with American Indian religious practitioners and issued an accommodation plan “to ensure the Medicine Wheel and Medicine Mountain are managed in a manner that protects the integrity of the site as a sacred site and a nationally important traditional cultural property.” USDA Forest Service, Bighorn National Forest, Medicine Wheel/Medicine Mountain Historic Preservation Plan, § I (1996). The accommodation plan withdrew the Medicine Wheel and Medicine Mountain and surrounding areas from the logging bid process and was upheld on appeal. *See Wyo. Sawmills, Inc. v. U.S. Forest Service*, 383 F.2d 1241 (10th Cir. 2004) (citing Executive Order 13007 as a law that “guides” the Forest Service’s management of the Medicine Wheel sacred site). Other success stories include the Devils Tower National Monument (Wyoming) voluntary climbing ban in June of each year, *see Bear Lodge*, 175 F.3d at 815, 818 (upholding the accommodation plan against challenge by rock climbers and citing Executive Order 13007) and the Rainbow Bridge National Monument (Arizona) interpretative signage and public access limitations for American Indian sacred ceremonies. *See Natural Arch and Bridge Soc’y v. Alston*, 209 F.Supp.2d 1207, n. 11 (D. Utah 2002), *aff’d* 98 Fed. Appx. 711 (10th Cir. 2004) (upholding the accommodation plan against challenges by tourists and citing Executive Order 13007).<sup>5</sup>

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<sup>5</sup> *See also Access Fund v. U.S. Dept. Agric.*, 499 F.3d 1036, 1039-40 (9th Cir.

In all of these cases, the agencies and tribes have arrived at mutually agreeable plans to accommodate American Indian sacred site needs on the public lands. The BLM, however, did not follow this course of action with respect to the Tribes' concerns at Mt. Tenabo and instead decided unilaterally to approve mining on Mt. Tenabo over the Tribes' objections. This decision ignores federal mandates on tribal self-determination and religious freedoms, as well as the special obligations of the United States stemming from its acquisition of Indian sacred sites.<sup>6</sup> In other cases where agencies have failed to follow the law on sacred sites consultation and accommodation, the courts have not hesitated to intervene. *See Pit River Tribe v. U.S. Forest Service*, 469 F.3d 768 (9th Cir. 2006) (BLM and other agencies made inadequate efforts to consider tribal religious practices at sacred sites pursuant to NHPA and NEPA); *Pueblo of Sandia v. U.S.*, 50 F.3d 856

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2007) (Forest Service closure of Cave Rock, a sacred site of the Washoe, to rock climbing) and *Fortune v. Thompson*, 2011 WL 206164 (D. Mont., Jan. 20, 2011) (prohibiting "motorized use" in most of the Badger-Two Medicine area of Lewis and Clark National Forest, a sacred area to the Blackfeet).

<sup>6</sup> In *Natural Arch*, the brief of the U.S. acknowledged, "Because the United States acquired lands containing Indian religious sites, it necessarily must make decisions regarding how to manage those areas in a way that complies with various laws that require the government to be sensitive to American Indian religious practices." Brief of Appellees, 2003 WL 24031937, at 45. Similarly, the government recognized in *Access Fund*, "any burden on the Washoe Tribe's religious exercise results from the government's conduct in taking ownership of Cave Rock and permitting a wide variety of recreational uses despite the Washoe Tribe's use of the site since time immemorial." Brief of Appellees, 2005 WL 3517404 at 29, n.5.

(10th Cir. 1995) (Forest Service failed to make reasonable or good faith efforts to identify American Indian sacred sites pursuant to NHPA).

**II. The BLM's Decision to Permit Mining on Mt. Tenabo was Arbitrary and Capricious Because it Disregarded Evidence in the Record Showing the Tribes Had Identified Mt. Tenabo, including the Pediment Area, as a Sacred Site Pursuant to Executive Order 13007**

Both the district court and the Ninth Circuit held correctly that the BLM had a duty to comply with the Executive Order as part of the agency's FLPMA mandate:

Executive Order No. 13007 ... imposes an obligation on the Executive Branch to accommodate Tribal access and ceremonial use of sacred sites and to avoid physical damage to them. *See* 61 Fed. Reg. 26771 (May 24, 1996). The district court expressly recognized that BLM was required to comply with the Executive Order. South Fork Band, 2009 WL 24911, at \*16 n. 9.

South Fork Band Council, 588 F.3d at 724. However, the district court held incorrectly that the BLM discharged those duties in its decision to approve the mining project. *See* South Fork Band Council, 2010 WL 3419181 at \* 8. The BLM appears to have relied on its 2004 determination that only certain features of Mt. Tenabo, namely the top, White Cliffs, and Horse Canyon, were “properties of religious and cultural importance” under the NHPA. *See* BLM Cultural Resources Report. Whether or not this determination was correct under the NHPA, an issue not under review in this case, the Executive Order clearly requires more of the agency. The Executive Order requires that the BLM “accommodate access to and



ceremonial use of Indian sacred sites by Indian religious practitioners” and “avoid adversely affecting the physical integrity of such sacred sites.” Executive Order 13007, Sec. 1.

The Executive Order guides agency action, and provides content to whether the BLM has complied with its enforceable statutory duties. FLPMA and the APA require that the BLM avoid unnecessary or undue degradation, and that the agency's decisions with respect to that mandate are not arbitrary and capricious. The Executive Order provides clear direction to the agency that, if wholly ignored or merely given lip service, amounts to arbitrary and capricious action by the BLM.

The Executive Order initially required agencies to develop an “implementation plan” for compliance with its sacred sites mandates. *See* Executive Order 13007, Sec. 2(b). The BLM submitted a draft, *See* Dept. of Interior, Implementation Report on Executive Order 13007, Appendix B (May 23, 1997), and later issued the agency’s current guidelines. *See* Bureau of Land Management, BLM Handbook H-8120-1, Guidelines for Conducting Tribal Consultation at III-2-III-9 (Dec. 3, 2004).

The Manual Section confirms that as a matter of BLM Policy, “Field Office Managers and staff shall ensure that information on tribal religious and cultural issues receives good faith consideration during decision-making, and that BLM

decisions do not unduly or unnecessarily burden the pursuit of traditional or cultural practices.” BLM Manual H-8120 at .06 (Dec. 3, 2004). The Handbook identifies two purposes of consultation under Executive Order 13007: (1) “to determine whether proposed land management actions would accommodate Indian religious practitioners’ access to and ceremonial use of sacred sites on Federal lands; and/or avoid adversely affecting the physical integrity of Indian sacred sites on Federal lands,” and; (2) “to seek alternatives that would resolve potential conflicts.” BLM Handbook H-8120-1 at III-9.

The BLM Handbook recognizes that “only tribal representatives have the knowledge needed to identify a tribe’s sacred site” pursuant to Executive Order 13007. *Id.* This factor differentiates Executive Order 13007 from the NHPA in which the agency has the duty to determine the eligibility of “properties of cultural and religious importance” for the National Register. *Id.* In another internal document, the BLM cautioned agency personnel: “Care should be taken to listen to authoritative sources [regarding a tribe’s sacred sites] rather than to shop for the answers that you that prefer.” Bureau of Land Management, Exec. Order 13007 “Key Questions & Answers” (1997) (addressing the question of who can make a determination that a site is sacred) *in* U.S. Dept. of Interior, Implementation Report on Executive Order 13007, Appendix B (1997).

In this case, the BLM ignored a great deal of evidence provided by the Tribes and otherwise in the record showing that Mt. Tenabo, including the Pediment Area, is a sacred site. Instead, the BLM appears to have “shopped” for the only source – its own Cultural Resources Report pursuant to the NHPA – supporting the conclusion that the top, White Cliffs, and Horse Canyon of Mt. Tenabo, but not the Pediment Area or rest of the mountain, were sacred sites. Then it issued a decision that neither accommodates the Tribes’ access to, nor avoids affecting the physical integrity of, Mt. Tenabo. Pursuant to its own guidelines, then, the BLM failed to meet the requirements of Executive Order 13007.

#### A. Background on the Western Shoshone Landscape and Religion

The Western Shoshone have lived, since time immemorial, within the Great Basin in central and eastern Nevada, a semi-arid basin-and-range landscape. Rainfall averages between 5-10 inches a year, and elevations range from 4,000-6,000 feet in the valleys to near 10,000 feet in the surrounding, north-south, mountain ranges. Steven J. Crum, The Road on Which We Came: A History of the Western Shoshone 1 (1994). Traditional Western Shoshone life was closely tied to the land, with the people hunting and gathering as the seasons allowed, and living in small groups of extended families within particular valleys. *See id.* at 5; *see also* Inter-Tribal Council of Nevada, NEWE: A Western Shoshone History 5 (1976).

The landscape continues to define Western Shoshone life and many traditional elders believe that they cannot survive as a people apart from their ancestral land. Western Shoshone Sacred Lands Association, NEWE SOGOBIA: The Western Shoshone People and Lands 9 (1981). Although the Western Shoshone are now dispersed onto separate reservations, the profound significance and ties to their aboriginal landscape remain intact. Mt. Tenabo is critical to this relationship, and the Western Shoshone spiritual practices reflect the sacred nature of the entire mountain, including the waters running through it and the pinyon-juniper woodlands (Pediment Area).

In their creation story, when the Western Shoshone (“Newe”) became humans, the world was flooded and only the tops of some mountain peaks were above the water. *Id.* at 6. The Newe lived on the peaks until the water dried up, and then they moved down to the foothills where there were springs. *Id.* Mt. Tenabo, located in the heart of the Western Shoshone aboriginal territory and the tallest mountain in the area, was one of the mountains that remained above the water and where the Newe first lived. *See* Ethnographic Report at 24.

As the BLM’s own reports indicate, the Tribes continue to conduct prayer and renewal ceremonies on Mt. Tenabo. BLM Cultural Resources Report at 6. Western Shoshone people pray to the spirits of their ancestors who live on and within Mt. Tenabo and are said to watch over and guard the surrounding lands. *Id.*

Mt. Tenabo is thought of as a traditional source of energy, strength, and source of life. *Id.*

## B. Evidence in the Record Demonstrates that Mt. Tenabo, including its Pediment Area, is a Sacred Site

At the time the BLM made its decision to permit the mining project, there was ample evidence in the record showing that Mt. Tenabo, including its Pediment Area, is a sacred site. As required by the Executive Order, the Tribes and other authoritative individuals identified Mt. Tenabo as “sacred by virtue of its established religious significance to, or ceremonial use by, an Indian religion.” Executive Order 13007, Sec. 1(b)(3). They “informed the agency of the existence of such a site” through numerous formal submissions. *Id.* Finally, the record shows that the sacred site is “specific, discrete, [and] narrowly delineated,” pursuant to the Executive Order. *Id.* In the present case, the Tribes have specifically identified Mt. Tenabo as the sacred site. This is not a case about widespread objections to mining or other activities on the public lands; consistent with their tribal religion and culture, the Tribes only object to the BLM’s approval of mining on Mt. Tenabo in this case.<sup>7</sup>

### 1. The 2004 Ethnographic Report

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<sup>7</sup> *See, e.g.*, Michon Eben, Reno-Sparks Cultural Resource Manager, letter to BLM (Oct. 31, 2008) (Reno-Sparks Indian Colony is “not against mining or mining companies,” but is against destruction of “cultural resources and ancestral remains, as well as our spiritual and traditional practices.”).

The January 2004 Ethnographic Report was prepared to assist the BLM in identifying sites for the National Register as traditional cultural properties. The information in the Ethnographic Report clearly supports the conclusion that Mt. Tenabo, including the Pediment Area, is a sacred site.

The Ethnographic Report states: “It is clear that Mt. Tenabo is integral to contemporary ethnic and cultural persistence, and is eligible to the National Register as a TCP [traditional cultural property]. The question remains what is the extent of the Mt. Tenabo TCP.” Ethnographic Report at 38. The Ethnographic Report discussed, and rejected, an earlier approach of “segregating” the mountain into “discrete ‘study units.’” *Id.* at 38-39. The authors expressly rejected this approach after consultations with Western Shoshone tribal governments made clear that all of the areas were a part of a single sacred site, and the Tribes did not conceptualize certain features of the mountain apart from the whole. *Id.* As a result, the Ethnographic Report emphatically recommended the whole mountain as a “single ‘Mt. Tenabo’ ethnographic landscape, eligible in its entirety for the criteria and rationale described in those previous studies.” *Id.* at 39.

The Ethnographic Report focused on several aspects that constitute Mt. Tenabo’s religious significance, including its role in the Western Shoshone creation story, the *puha* or spiritual forces running through it, and contemporary religious activities occurring there. The Ethnographic Report noted, “Mt. Tenabo

is a locus of stories about the creation of the *Newe*, and of several cycles of cataclysm and world renewal,” and “Mt. Tenabo is one of a system of three mountains in the *pasiatekkaa* homeland, connected by *puha* ... it is also considered a traditional locus of power and source of life and figures in creation stories and world renewal.” *Id.* at 23-24 (citing Personal Communication with Carrie Dann, 2000, and Personal Communication with Bernice Lalo, August 2002). Mt. Tenabo is a part of a network of mountain peaks that concentrates and emanates *puha*, the animating power of the universe. *See Ethnographic Report* at 38. *Puha* exists throughout the Western Shoshone world, but is concentrated in certain locations, including Mt. Tenabo, and moves in “web-like currents linked to mountain peaks and water sources.” *Id.* at 22. At these locations, traditional doctors access *puha* for healing-power. *Id.* Mt. Tenabo maintains a network of caves that are associated with the creation story, world renewal, and other spiritual events. The caves are accessed from the surface by tiny or invisible openings, and are only open to certain people during certain times. *Id.* at 24. Within the underground network is said to lay a beautiful and wonderful world, teeming with life and water. *Id.* Stories of journeys to this underworld are associated with Mt. Tenabo, where agents of *puha* who take the form of animals or other beings provide access to Western Shoshone individuals. *Id.*

## 2. The 2008 and 2011 Environmental Impact Statements

The Draft and Final Environmental Impact Statements prepared for the mining project further attest to Mt. Tenabo, including its Pediment Area and waters, as a Western Shoshone sacred site. The documents recognize Mt. Tenabo's role in the Tribes' creation story, religious activities occurring in the Pediment Area, the burial sites located on the mountain, the sacred quality of the *puha* running through the mountain, and the religious significance of the mountain's springs and other waters.

In comments to the BLM Draft EIS, one tribal member explained: "Mt. Tenabo plays a key role in our creation stories and continues today to be a source of spiritual renewal and power." Declaration of Carlene Burton, ER 404. The Elko Band wrote: "As stated in the [EIS] our religion is an important way of life that we continue to this day, and it is known that Mt. Tenabo is an area of religious importance to the Shoshone people who pray there." Comment of Elko Band Tribal Chairman, 2008 FEIS, Appendix F, 38. Another tribe provided:

The entire range of Mount Tenabo and the White Cliffs is a Traditional Cultural Practice Area and is highly valued as a traditional and spiritual use for Native Americans. Furthermore, Mount Tenabo is forever an eternal resting place of ancestral remains and associated funerary cultural items.

Comments of Michon Eben, Cultural Resource Manager, Reno-Sparks Indian Community, 2008 FEIS.



The waters within Mt. Tenabo, imbued with *puha*, are also sacred a source of energy for the Western Shoshone. One tribal elder attested:

The water flowing underneath the Mt. Tenabo area is especially important to maintaining the balance and power of life I value as a central tenet of my religious beliefs as a Western Shoshone. Using the water from Mt. Tenabo is considered a sacrament. The elimination of the sacred springs [by dewatering of Mt. Tenabo] prevents this sacrament and destroys all life.

Under our religious beliefs, the water in Mt. Tenabo is unique and is connected to specific spirits that reside in the Mountain and in the water.”

Comment by Carrie Dann, 2010 FEIS, A-50-51. Mt. Tenabo’s sacred waters are known among several Western Shoshone tribes. As Timibisha Shoshone Tribal Chairman commented: “Of particular importance to me is the Project’s severe impacts to the sacred waters of Mt. Tenabo, which due to the Project’s massive dewatering operations, will cause the permanent loss of sacred springs, such as the Shoshone Wells Spring.” Comment by Joe Kennedy, 2010 FEIS, A-50-51. The strength of *puha* runs through the groundwater in Mt. Tenabo, making the entire mountain a sacred, energy and life-giving entity to the Western Shoshone.

### 3. Other Submissions by Tribal Governments

Under Executive Order 13007, it is the Indian tribe that identifies sacred sites on public lands, not the BLM. As the BLM’s own guidelines provide, “Only tribal representatives have the knowledge needed to identify a tribe’s sacred sites.” BLM Handbook H-8120-1 at III-9. Indeed, the Tribes followed the BLM’s

guidelines, submitting both tribal resolutions and the comments of elected tribal officials and others authorized to speak about religious matters. *See id.* (“A tribe may name an appropriately authoritative representative of an Indian religion to provide this information.”).

Since 2000, the Tribes and individuals authorized to speak about Western Shoshone religion have submitted many formal notifications to the BLM identifying the entire mountain, including the Pediment Area, as a sacred site with religious significance to the Tribes, pursuant to Executive Order 13007.

The Te-Moak Tribe passed a resolution in 2006 opposing the project on grounds that it:

includes Mt. Tenabo, the surrounding area and parks of Grass Valley and Crescent Valley – all of which are well known to have cultural and spiritual significance to Western Shoshone, including burial sites, spiritual areas, springs, and other water resources, food and medicinal plants, gathering areas, and hunting and fishing.

Te-Moak Tribal Resolution (2006), ER 506-07.

The Shoshone-Paiute Tribe submitted: the “[project area] lies within the aboriginal territory of the Western Shoshone and the project area is ‘culturally significant,’ within the meaning of the legal mandates that guide treatment of such irreplaceable cultural resources.” Letter from Shoshone-Paiute Tribes to BLM (Feb. 22, 2008) (citing Executive Order 13007 and other laws), ER 470-73.

Appellants' brief describes and quotes many formal statements by Western Shoshone individuals, *see* Appellants Br. at 11-14, who are "appropriately authoritative representatives of an Indian religion." Executive Order 13007, Sec. 1(b)(iii). For example, Carlene Burton, a traditional tribal member and religious practitioner, provided the following comments:

Mt. Tenabo plays a key role in our creation stories and continues today to be a source of spiritual renewal and power.... Only non-Indians would consider only the top of the Mountain to be a 'sacred site.' The spiritual significance of Mt. Tenabo is not just the 'site' at the top of the Mountain. The spirits reside throughout the Mountain and can reach us as we pray on its slopes as well as its top. The Cortez Hills mine pit and dumps are proposed in the same area as we use for our prayer ceremonies.

Declaration of Carlene Burton, ER 404. Sandy Dann, a traditional tribal member and religious practitioner, stated:

I use Mt. Tenabo, the site of the proposed Project, especially the Cortez Hills mine pit and related dumps, ground water pumping and dumps, to practice my religion.... I travel to the Mountain to pray and conduct sacred sweat ceremonies and to gather sacred food and medicinal plants.

When Western Shoshone consider "Mt. Tenabo" as a unique sacred landscape, they mean the entire Mountain, not just the top and cliff-face declared a cultural site by the BLM. I and others use the slopes of the Mountain to conduct these prayers and other religious ceremonies. Sacred prayer areas such as Shoshone Wells and other locations within and adjacent to the Project's disturbed lands will be irrevocably damaged by the construction of the Project, especially the new mine pit and related facilities.

Mt. Tenabo is the source of our creation stories and is a central part of our spiritual world view. Although all life, water, and land is sacred

to the Western Shoshone, Mt. Tenabo is a unique landscape. It holds the Puha, or life force, of the Creator. We pray to the Mountain for renewal, which comes from Mt. Tenabo's special place in Western Shoshone religion.

This is due to many things, including the resting place of many of our ancestors. The spirits of these beings still reside within the Mountain .... The Mountain is a pathway for the Puha, which has been utilized by Western Shoshone travelers for countless years.

Due to Mt. Tenabo's spiritual importance in the lives of traditional Western Shoshone, the proposed mining is completely incompatible with the continuation of my, and others, religious practices. It will be impossible for me and others to pray, conduct ceremonies on the Mountain in view of, and hearing, the proposed operations. Could one pray at an altar while the Church was being destroyed?

Declaration of Sandy Dann, ER 412-13.

In short, the Tribes, their elected leaders, and other authorized representatives made repeated and consistent statements identifying Mt. Tenabo, including the Pediment Area where the mining project will take place and the waters running through it, as a sacred site. In light of this evidence, it is difficult to see how the BLM could conclude that the mining project would not adversely affect a sacred site. *See* FEIS Vol. III at 122, ER 382 ("BLM knows of no Western Shoshone uses that would be prevented or uses or resources that would be destroyed by the proposed project."). If, as the BLM appears to have done here, agencies can comply with the Executive Order by substituting their own conclusions for that of the tribes concerning the content of tribal religion, then Executive Order 13007 itself is meaningless.

## Conclusion

Federal Indian law and policy confirm the federal government's support for American Indian religious freedom. Administrative agencies are bound to implement this policy through laws such as FLPMA and Executive Order 13007, requiring them to accommodate access to, and avoid adversely affecting the physical integrity of, sacred sites on the public lands. In this case, the BLM's conclusion that the mining project would not adversely affect a sacred site is contrary to the evidence in the record, including many submissions made by the Tribes, and therefore arbitrary and capricious. For these reasons, the district court's decision denying the Tribes' summary judgment motion should be reversed.

Dated: June 12, 2012

Respectfully submitted,

*BY: /s/ Kristen A. Carpenter*

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CERTIFICATION OF COMPLIANCE  
PURSUANT TO FED. R. APP. P. 29 AND 32(a)(7)

I certify that pursuant to Federal Rule of Appellate Procedure 29 and 31(a)(7), the attached Brief of Amici Curiae American Indian Law Scholars in Support of Appellants is proportionally spaced, has a typeface of 14 point Times New Roman, and contains fewer than 7,000 words. No counsel for a party has authored the brief in whole or in part. No counsel for a party, or any person other than amici, has made a monetary contribution to the preparation or submission of the brief.

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28.2-2.6(b), Amici state that there is one related case that has been before this Court (although none that are pending currently): South Fork Band Council v. U.S. Dept. of Interior, 588 F.3d 718 (9th Cir. 2009) (per curiam) (decision on preliminary injunction) (Judges Shroeder, Tashima, and Berzon).

CERTIFICATE OF SERVICE

I hereby certify that on June 12, 2012, I electronically filed the foregoing Motion for Leave to file Brief of Amici Curiae American Indian Law Scholars with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit by using the Court's CM/ECF system. I further certify that all parties are represented by counsel registered with the CM/ECF system, so that service will be accomplished by the CM/ECF system.

BY: /s/ Kristen A. Carpenter

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