
Spatial Justice and Indigenous Peoples' Protection of Sacred Places: Adding Indigenous Dimensions to the Conversation

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In 2009, Indigenous Peoples in New Mexico and elsewhere celebrated the designation of Mt. Taylor (known as *Tsibiina* to Laguna People, *Kaweshtima* to Acoma people, *Dewankwi Kyabachu Yalanne* to Zuni People, *Tsoodziit* to Diné People, and *Tsiipiya* to Hopi People) as a Traditional Cultural Property (TCP) under the New Mexico Cultural Properties Act (1980). Mount Taylor, at 11,305 feet (3,446 meters) in elevation stands prominently in northwestern New Mexico. Visible from up to 100 miles (160 km) away, the mountain is featured in creation stories of many Indigenous Peoples in the region, and has been an important pilgrimage site for millennia. The Mt. Taylor TCP covers over 380,000 acres (153,780 hectares), which include surrounding mesas and volcanic plugs. Five Native Nations¹ - Acoma Pueblo, Laguna Pueblo, Zuni Pueblo, the Hopi Tribe and the Navajo Nation - coordinated efforts to secure this designation for over two years, to provide some measure of protection for this sacred cultural landscape in the face of proposed development, including uranium mining. This was a hard-fought victory in the courts of the colonizer, but is only the beginning of efforts to protect the mountain.

The entire landscape is the aboriginal territory of Indigenous Peoples in the region. Despite over a century of dispossession of these lands by government and private entities, the relationship between Indigenous Peoples and the mountain has never ended. Today, most of the TCP is managed by the U.S. Forest Service as part of the Cibola National Forest. Thus, access, in privacy, to various sites around the mountain remains a challenge for local Indigenous peoples. The primary motivation of the five tribes and others in the TCP process was to preserve a sacred cultural landscape for present and future generations; this requires continued relationship with the mountain through various religious and traditional observances such as pilgrimages and harvesting of flora and fauna. The TCP designation essentially ensured that consultation would be required with stakeholders including the five tribes, in the event of proposed state undertakings (NMSA 1978 § 18-6-8.1), but did not give the tribes veto power over proposed development.

To ensure the protection of sacred places within the legal scheme of the United States Indigenous Peoples must negotiate their way through U.S. laws and policies that were primarily designed to protect private property owners and to promote development of minerals in the American west. Attempts to regain aboriginal territories through the U.S. legal system have largely meant monetary compensation and not repossession of lands. Despite the TCP

¹ "Tribe," "Pueblo," "Native Nation," and "People" are here used interchangeably; they all refer to sovereign native nations in the United States. In New Mexico, "Pueblo" is a term commonly used to describe any of the 20 Pueblo tribes or Native Nations, e.g. Pueblo of Laguna and Pueblo of Acoma.

designation, the U.S. Forest Service maintains that forest lands, as public lands, remain subject to the dictates of laws such as the 1872 Mining Act (30 U.S.C. §§ 22-42) and therefore it is obliged to issue mining permits. Given this state of affairs, Indigenous Peoples have begun to look beyond domestic laws to protect sacred landscapes and now seek protection through international fora, citing international human rights standards and instruments. Rather than rely solely on U.S. statutes and arguments based on the U.S. Constitution, e.g., freedom of religion, they build their case on the right to practice their life ways and beliefs in their aboriginal territory even if they do not currently occupy the land, under human rights standards such as those provided in the UNCERD, the ICCPR, and Articles 12 and 26 of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP).

Where Indigenous Peoples do not exercise control over management of these areas, they seek a place-based justice, not grounded solely on rights, but on human responsibility to protect places important for survival. Thus, rather than try to contort Indigenous knowledge and practice to fit domestic laws and policies, is it practicable to use human rights standards, coupled with Indigenous knowledge, to provide substantive protection for sacred places? To what extent do or can spatial justice concepts help in this process? Can Indigenous Peoples' fights to protect sacred areas be described as claims for spatial justice? And where Indigenous Peoples might occasionally prevail under domestic legal systems, as in the case of Mt. Taylor, is spatial justice achieved? This article explores concepts of spatial justice through the lens of Indigenous Peoples' fights to protect sacred places in the U.S.

Using the Mt. Taylor TCP to illustrate this quandary, I begin with a brief overview of the land status and history, followed by the examination of two U.S. laws often cited by Indigenous Peoples in their-efforts to protect sacred sites and landscapes: the National Historic Preservation Act (1966), and the National Environmental Protection Act (1970). I then use selected cases as a window to view the last 30 years of judicial and legislative battles to protect sacred areas in the United States. This foregrounds a discussion on fundamental differences between Indigenous lifeways/epistemologies/ontologies and Euro-American notions of conservation and preservation, and how spatial justice concepts might provide a helpful middle ground to discuss differences. The call is for a meaningful discussion that begins with recognition of possibly irreconcilable differences. Finally, I suggest that Indigenous peoples, who have been spatial people for millennia, can contribute new dimensions to a conversation that has primarily been grounded in Western paradigms.

Years of advocacy to protect indigenous lands and sacred places have positioned me to write this article. In doing so I bring the perspective of a member of a community heavily impacted by mineral development and a Laguna Pueblo/Diné (Navajo) indigenous attorney and scholar, having recently completed a doctorate in Justice Studies with a cohort of indigenous Pueblo scholars in a program focused on our own lifeways and core values.

Between 1959 and 1983, large scale uranium mining was the primary source of economic development in the areas surrounding Mt. Taylor, known as the Grants Mineral Belt. Significant extraction occurred on Indigenous lands, including that of the Pueblo of Laguna and the Navajo Nation, without many of the benefits that non-Indigenous communities enjoyed. This mineral

extraction pre-dated environmental laws or historical preservation laws, enacted in the 1960's and 1980's. Decades later, I worked on the Mt. Taylor TCP designation and the litigation that followed, as legal counsel for the Pueblo of Laguna and later as a human rights advocate before United Nations and Organization of American States mechanisms.

The land is our relative

First, it is incumbent on me to describe the manner in which our people speak of land. The land is understood and experienced as a relative for many peoples. In our Laguna language, Keres, a commonly used term for the land – "*stra Naiyashéh*" – means "Our Mother." Most Pueblo peoples view the land and all its resources as gifts from the Creator, so that our role is one primarily of stewardship not ownership. Traditional teachings and practices constantly remind us to honor this relationship. We are taught values such as never to take more than we need from the land when harvesting flora and fauna and always to give back something to the land to keep a balance. A myriad of songs and stories have been handed down for generations to remind us that it is our responsibility to maintain a respectful, balanced relationship. We honor this relationship because we are taught that it is essential to our survival - our physical and cultural survival and our survival as peoples.

This is not unique to Pueblo peoples (Milholland, 2010; Pepion, 2009) and not unique to North America. Inter-tribal exchanges and ample literature reveal similar relationships with the land by Indigenous Peoples in other regions of the world, including Latin America (Neihart, 2013-2014, p. 80), Africa (Babalola, Lawal, Opii, & Oso, 2014), and the Pacific (Brown M. A., 2016; Valadakis, 2013). Thus, for most Indigenous Peoples our epistemologies, which connect us to "place," tell us that the Earth – our Mother - is a living being, that we must always be respectful, and mindful of where we came from, and that continued relationship is central to a peaceful and just world. For example, the Preamble of the Universal Declaration of the Rights of Mother Earth (2010) issued by Indigenous Peoples from every continent gathered in Bolivia, states that "we are all part of Mother Earth, an indivisible, living community of interrelated and interdependent beings with a common destiny." Articulating this common understanding of indigenous peoples is not participating in neocolonial essentializing impositions, but engaging in what Vizenor terms "postIndian warrior" simulations of "survivance" in tribal literature (Vizenor, 1994).

History has demonstrated the contrast between this orientation toward land and that of European colonizers who perceived land as something to be exploited for economic benefit. Exploiting what is now known as the Doctrine of Discovery, European colonizers dispossessed Indigenous Peoples of their lands, beginning in the late 1400's (Frichner, 2010), and established governmental and legal systems to support their actions. Thus, Indigenous Peoples in the United States and other colonized lands have inherited a body of law that has continued to manifest the Doctrine of Discovery through legislation, case law and domestic policies regarding land (Permanent Forum on Indigenous Issues, 2014).

A History of Land Loss

Most National Forests in the United States were created by dispossessing Indigenous Peoples of thousands of acres of Indigenous lands. Only a small portion of these lands have been restored to native control. The Forest Reserve Act of 1891 authorized the President of the United States to set aside forest reserves from land in the public domain. In New Mexico and Arizona alone, 21 million acres (8,498,398 hectares) of public lands, almost one-eighth of the surface area of these states, were taken without due process or compensation. In 1906, Cibola National Forest, which includes Mt. Taylor, was established, taking aboriginal lands of Laguna and Acoma pueblos and other tribes.

Decades later, both Laguna and Acoma Pueblos made legal claims for the return of these lands, but they were never completely restored to either Pueblo. Following most other native land claims in the U.S., they litigated under the process created by the Indian Land Claims Commission Act of 1946 (25 U.S.C.A. §§70-70v-3 (1976) (repealed 1978) - for a full discussion of Indian Land Claims in the United States see Barsh, 1982 and Lorenzo, 2002). Claims were based on the doctrine of aboriginal or original Indian title. It essentially meant that European sovereigns held "ultimate dominion" in the land subject only to the "Indian right of occupancy" (Cohen, 1982). To demonstrate original Indian title, a tribe had to prove actual, continuous and exclusive possession (Cohen, p. 492). The Indian Claims Commission and the Court of Claims interpreted the Act to limit relief to monetary compensation (*Osage Nation v. United States*, 1948), and not restoring native title to the land. The Commission was adjourned in 1978 by Public Law 94-465 (90 Stat. 1990) which terminated the Commission and transferred its pending docket of 170 cases to the United States Court of Claims on September 30, 1978.

Indigenous Peoples lost millions of acres of aboriginal land through this process, including sacred sites and entire cultural landscapes that remain central to Indigenous cultures and lifeways. Especially problematic was the requirement that a tribe prove actual, rather than constructive possession (Cohen, p. 492). Places that are considered sacred to many Indigenous Peoples are often not places for human habitation so it proved difficult to demonstrate actual possession of these lands. Moreover, sacred places like Mt. Taylor feature prominently in the epistemologies of many Indigenous Peoples, and are not generally considered the property of any one Tribe, so the idea of exclusive occupancy was an unjust concept as applied to sacred places. Today hundreds of sacred areas are located on public lands classified as national forests, park lands and wilderness areas (Burnham, 2000).

U.S. conservation and preservation statutes: evaluating the sacred

In the mid 1960's, the U.S. Congress enacted statutes that reflected an American concern about the social costs of large scale development and urban renewal, including the construction of the national highway system. The intent was to limit destruction of historic places and structures that were often sacrificed in the name of modernization. Two of these statutes, the 1966 National Historic Preservation Act (NHPA), and the Environmental Protection Act of 1969 (NEPA), have featured prominently in efforts to protect sacred places. NHPA provides some measure of protection for areas of historical significance on public lands, and NEPA provides a process for

evaluation of potential adverse effects to the environment on public lands when a federal undertaking is proposed. On some levels the American public supported notions of preserving the environment and historical and cultural resources. However, indigenous sacred areas were not contemplated in the first rendition of either of these statutes and neither law was implemented to provide substantive protection for sacred sites and landscapes in practice.

The National Historic Preservation Act

Although the Act would appear to include Indigenous cultural heritage, Native peoples in the U.S. found it necessary to seek Congressional amendment of the Act in 1992 to explicitly refer to “properties of traditional religious or cultural significance to Native American tribes and Native Hawaiian organizations” (16 USC. §§ 470a (d)).

Section 106 of the Act requires federal agencies to consult with potentially affected parties prior to commencing a federal undertaking that may affect National Register eligible property and to consider the undertaking’s effect on such property. Federal agencies must consult with Indian tribes and Native Hawaiian organizations prior to granting permits for activities that may affect properties of traditional religious or cultural significance to Indigenous peoples (§ 470a (d) (6)(B) (2006) and 36 C.F.R. § 800.2(c)(2) (2011)); but it is an expensive process that may not always yield positive results.

Indian tribes and Native Hawaiians that nominate sacred areas for designation as eligible for listing on the National Register of Historic Places have a high burden of proof. They must demonstrate that a nominated site or area meets at least one of four criteria which are provided at 36 CFR Part 60.4:

National Register criteria for evaluation. The quality of significance in American history, architecture, archeology, engineering, and culture is present in districts, sites, buildings, structures, and objects that possess integrity of location, design, setting, materials, workmanship, feeling, and association and

(a) that are associated with events that have made a significant contribution to the broad patterns of our history; or

(b) that are associated with the lives of persons significant in our past; or

(c) that embody the distinctive characteristics of a type, period, or method of construction, or that represent the work of a master, or that possess high artistic values, or that represent a significant and distinguishable entity whose components may lack individual distinction; or

(d) that have yielded, or may be likely to yield, information important in prehistory or history.

These criteria are difficult to demonstrate as applied to Indigenous sacred sites and landscapes. In recognition of the challenges for evaluation of Native American sacred sites, the National Park service published “Bulletin 38” in 1990 to provide “guidelines to assist in the documentation of intangible cultural resources.” (King & Parker, 1990). Bulletin 38 did not change NHPA law or regulations but was meant to “clarify how to recognize and evaluate” traditional cultural properties (King T. F., 1993). One area of difference among those involved in evaluating sites has been whether specific practices, beliefs and oral history regarding a place are necessary for a traditional cultural property designation. An alternate view is that a property’s existence, known or unknown, is important to a community and therefore significant. (King T. F., 1993, pp. 62-63).

While the NHPA listing has been helpful in some regards, it is limited to sites and places that have made it through the cumbersome process of evaluation for eligibility under strict criteria. In practice this designation process is quite linear and still has a focus on historical, i.e. written, evidence. Many tribes do not have this information and are often placed in a difficult position when it comes to revealing traditional stories that were not meant to be disclosed outside their communities and should not be recorded. Also, loss of lands has often made it difficult to provide tangible evidence of the connection to places that generations have not been allowed to visit; this can be seriously problematic in an evaluation process.

The National Environmental Policy Act

Enacted in 1970, NEPA's stated purpose was to "declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality" (§ 4321). It is one of the most emulated statutes in the world, and has been called the modern-day equivalent of an "environmental Magna Carta" (Kinnison, 2011).

Although laudable, the stated policy of NEPA did not likely contemplate the protection of Indigenous cultural resources or the role of sovereign tribal governments in protecting resources. The policy highlights the role of local governments, but nowhere in the Act are Indian tribes explicitly mentioned.

Like NHPA's Section 106, NEPA requires federal agencies to consult with parties that may be affected by proposed federal projects, except that NEPA applies to the environment rather than historic sites. Regulations require that all federal government agencies prepare environmental assessments (EA's) and environmental impact statements (EIS's), the latter being required in the event of a significant impact on the environment (40 CFR Parts 1500-1508). Hence the first hurdle is to prove that a proposed development project will present a significant impact, so as to require a more thorough evaluation in an EIS. NEPA requires agencies to evaluate environmental and social impacts, and this assessment includes analysis of "ecological ... aesthetic, historic, cultural, economic, social, or health [impacts] whether direct, indirect, or cumulative" (40 C.F.R. § 1508.8 (1977)). NEPA's sole reliance on a Western scientific materialist evaluation of environmental impacts often means a failure to consider and incorporate Indigenous perspectives of, values about, and relationships with the environment (Dongoske, Pasqual, & King, 2014).

Although NHPA and NEPA seek to provide procedural safeguards by requiring consultation with Indigenous Peoples, they do not necessarily change the substantive evaluation of mining projects on public lands (Kinnison, 2011). NEPA does not require agencies to adopt the least environmentally or culturally harmful alternative, and thus has been labeled by some as mere "window dressing" since Indigenous people cannot use NEPA to stop the imminent destruction of their land and sacred sites, or to force the abandonment of a project which threatens significant historic property (Bluemel, 2005).

NHPA works in concert with NEPA, which assumes that all factors are equal in value and can be weighed against each other in a review process. But for Indigenous Peoples there is no weighing of interests when it comes to protection of sacred sites and places. In our management of these areas, balance is the norm. Aside from all these considerations, fundamental core values guide us and are often in direct conflict with non-native values. Plainly stated, some of these basics are: leave archaeological sites alone because they have spirits, do not waste water because it is a limited resource and we must protect it for generations to come; don't disturb our Mother Earth by extracting minerals from the ground because it will upset the balance she is working on our behalf to achieve. In this way, we are seeking protection and justice for our relative, our Mother. This is not a goal contemplated by preservation statutes.

Additionally, Executive Order 12,898 (1994) on Environmental Justice, Executive Order 13,007 on Sacred Sites (Clinton P. W., 1996), and federal guidance documents call for evaluating impacts on Indigenous communities and their cultural resources during this process (Kinnison, 2011). However, they are

"intended only to improve the internal management of the executive branch and [are] not intended to, nor do [they], create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity by any party against the United States, its agencies officers, or any person" (Sec. 4; Sec. 6-609).

Thus, their value to Indigenous Peoples is dependent on a given agency's policy and practices on consultation.

Litigation on Sacred Sites and Places: An Arduous Journey

Beginning in the 1980s, more Indigenous Peoples in the United States began to pursue sacred site or sacred place protection in the court system (Yablon, 2004). In this process, they invoked laws and policies used for protection of non-Indigenous religious sites and structures, but with limited success. Two cases exemplify the difficult journey tribes have traveled over the last four decades.

The Yurok, Karuk and Tolowa tribes of Northern California invoked the Free Exercise Clause of the U.S. Constitution (US Const. amend. 1, cl. 1.) in *Lyng v. Northwest Indian Cemetery Protective Association* (1988), which provides that "Congress shall make no law ... prohibiting the free exercise [of religion]." They challenged a U.S. Forest Service decision to pave a road and allow timber harvesting through a forest area which had historically been used for religious rituals that depend upon privacy, silence, and an undisturbed natural setting. The U.S. Supreme Court rejected the argument that the Forest Service actions placed burdens on their right to practice their religion and held that these "incidental effects" of government programs "may make it more difficult to practice certain religions" but did not "coerce individuals into acting contrary to their religious beliefs" (p. 451).

In response to *Lyng*, and strong advocacy from U.S. tribes, the U.S. Congress passed the Religious Freedom Restoration Act (RFRA) (42 U.S.C. §§ 2000bb-2000bb-4 (2006) in 1993. RFRA provides that the government shall not substantially burden the free exercise of religion, with an exception made only if the government can demonstrate that it is acting "in furtherance of a compelling governmental interest" and that its actions are the least-restrictive means of

furthering that interest (§ 2000bb-1(b)). Indigenous Peoples' attempts to use this law to protect sacred areas have had limited success.

In *Navajo Nation v. U. S. Forest Service* (2008), the Navajo Nation, Havasupai Tribe, White Mountain Apache Nation and Yavapai-Apache Nation used RFRA to argue that the use of sewage effluent to make artificial snow on the sacred San Francisco Peaks placed a substantial burden on the free exercise of their Indigenous religions. The Ninth Circuit Court of Appeals held that the Forest Service did not substantially burden the Indigenous Peoples because it did not threaten criminal sanctions or deny a government benefit (p. 1078), thus rendering RFRA ineffectual in this context (Edwards, 2010). This case appeared once again to affirm the suspicions of Indigenous Peoples that their religions are not taken as seriously by the courts as Judeo-Christian religions and are therefore seen as less deserving of protection. As one scholar put it,

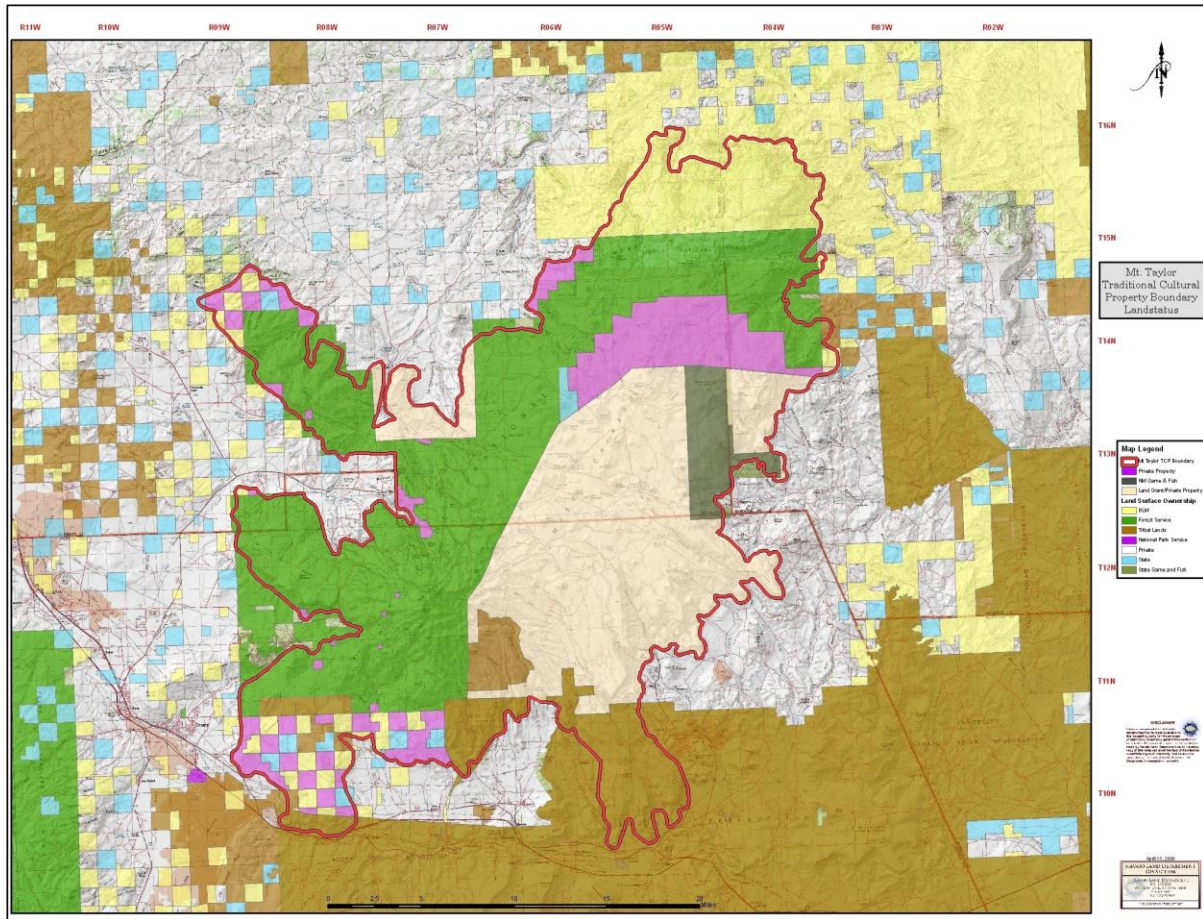
"The procedural logic of American law thus ensconces as substantive, and controlling, interpretations of Native religions that are cooked up under very different legal issues than the ones in play under RFRA." (McNally, 2015, pp. 61-62).

Other Indigenous Peoples have attempted to use NHPA and NEPA in sacred sites protection cases, without much success either.

Mount Taylor TCP Designation: Applying Lessons Learned

In 2007, the five Indigenous Peoples who sought the designation of Mt. Taylor as a Traditional Cultural Property took serious note of the case law and the setbacks for the San Francisco Peaks case. Rather than litigate a U.S. Constitutional religious freedom claim to seek protection for the mountain, they opted to use the National Historic Preservation Act and the New Mexico Cultural Properties Act to obtain some measure of protection. They began consultations with the U.S. Forest Service, which in 2008 issued a determination that Mt. Taylor was eligible for listing on the National Register of Historic Places under the NHPA, a designation that applies to federal lands only. Because the area proposed for protection included New Mexico state land, and because the New Mexico Mining and Minerals Division is the permitting agency for uranium mining permits in this area, the five tribes decided to pursue a TCP designation under New Mexico state law as well.

Map 1: Mount Taylor TCP Boundary Land Status



Source: Application file for the permanent listing of Mt. Taylor as a TCP.

This was a long and expensive process. Acoma, Laguna, Navajo Nation, Zuni and Hopi spent months gathering information to satisfy the stringent criteria required for a nomination under the New Mexico Cultural Properties Act, which uses the same criteria as the NHPA (36 CFR Part 60.4). Each of the five tribes, with the help of hired experts, provided a description of their multi-faceted ancestral relationship to the mountain through ethnographic reports and explained why it was important to maintain this relationship. Using modern mapping technology, they mapped out their overlapping areas of traditional use and justified the proposed boundary for the TCP. Private land is excluded from the TCP. This meant the tribes had to identify private property owners within the proposed TCP boundary; 119 were identified. This process took nearly two years from start to finish, including public hearings and re-hearings.² The New Mexico Cultural

² Mt. Taylor was approved for a temporary one-year listing in June 2009, after an earlier temporary listing, in February 2009, was determined to be procedurally invalid by the New Mexico Attorney General.

Properties Review Committee, largely composed of archaeologists, architects and historians, determined that the application met criteria (a), (b) and (d). (New Mexico Cultural Properties Review Committee, 2009, pp. 5-8).

In the course of public hearings, some non-Indigenous residents of the area accused the tribes of land-grabbing and being an impediment to economic development. (Paskus, 2009). It is not an exaggeration to say that latent racism rose to the surface (Robinson, 2010). Residents of the county appeared to ignore the fact that a TCP designation would not give the Indigenous Peoples veto power but would at the most require a higher level of scrutiny by New Mexico state reviewing agencies as well as consultation with the Indigenous Peoples to determine if a proposed development would harm cultural resources.

On June 5, 2009, the New Mexico Cultural Properties Review Committee voted in favor of the designation; they issued their final decision on September 14, 2009. This victory was short lived; later that year several uranium mining companies, private landholders and an affected Spanish land grant³ community challenged the designation in New Mexico courts, arguing, *inter alia*, that it constituted a violation of the establishment clause of the New Mexico Constitution, as well as myriad procedural defects. The trial court overturned the TCP designation. Laguna Pueblo joined Acoma Pueblo as an intervenor party in the appeal, in which the New Mexico Supreme Court reversed and upheld the TCP designation (Rayellen Resources, Inc., et.al. v. New Mexico Cultural Properties Review Committee, et.al., 2014).

In the meantime, Roca Honda Resources, a uranium mining company, applied for an underground uranium mining permit within the boundaries of the TCP in 2010. A draft environmental impact statement (DEIS) was issued in February 2013 by the Forest Service (Cibola National Forest, 2013). The Preface states that Roca Honda "has the right to exercise their rights under U.S. mining laws to develop and remove the mineral resources as set forth by the General Mining Law of 1872, as amended." (2013, p. 3).

All five tribes submitted comments on the DEIS in 2013. Laguna Pueblo's response set forth international human rights obligations of the United States, including the right to free prior and informed consent under the UNDRIP. Consultations are ongoing with affected tribes and other parties. The Forest Service has taken the position that it is obliged to grant mining permits under the 1872 Mining Act and that all it can do is mitigate any damage to cultural resources (Furlow, 2013). It has not yet published a Final DEIS, in part due to issues surrounding water discharge plans for the mine.

The San Francisco Peaks case and the Mt. Taylor TCP have generated nationwide and international concern among Indigenous Peoples and allies about the inefficacy of US laws to protect sacred sites and landscapes. Navajo Nation and other tribes have brought these cases to the attention of international bodies such as the UN Human Rights Council (HRC), the United

³ Land grants are considered political subdivisions of the state (NMSA 1978, Section 49-1-1 (2004)0). Seboyeta Land Grant challenged the treatment as public lands for purposes of the Cultural Properties Act. While the case was pending, the NM legislature passed legislation that essentially made it clear that land grants would not henceforth be treated as public lands in determinations of cultural properties.

Nations Committee on the Elimination of Racial Discrimination (UNCERD)⁴. They join a growing number of Indigenous Peoples who are invoking human rights instruments and standards that recognize collectively held rights. The United States has signed only a handful of human rights conventions. However, the 2007 UN General Assembly adoption of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP)—and the 2010 statement of support by the United States—have propelled more Indigenous Peoples to seek support in international fora, using the standards articulated in the UNDRIP.

Closer to home, the Inter-American system under the Organization of American States has proven to be an important forum for protection of sacred areas as well. The Inter-American Court of Human Rights has determined in several cases that Inter-American human rights instruments protect the right of the members of indigenous and tribal peoples to enjoy their distinctive spiritual relationship with the territory they have traditionally used and occupied.

Rather than contorting arguments to fit the paradigms of colonial laws not meant to protect our lifeways, Indigenous Peoples have begun to articulate arguments that incorporate Indigenous ontologies and epistemologies, many of which are embodied in the UNDRIP. Its preamble provides that

“Indigenous individuals are entitled without discrimination to all human rights recognized in international law, and Indigenous Peoples possess collective rights which are indispensable to their existence, well-being and integral development as peoples.”

Articles 11, 12 and 13 set forth cultural rights and Article 26 sets forth a right to “lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.” So too, the recently adopted American Declaration on the Rights of Indigenous Peoples (Organization of American States, 2016) contains provisions regarding protection of (Article XVI) and access to sacred and ceremonial sites (Article XX). These rights are connected and interdependent, so it is not a matter of choosing between, rights to practice lifeways and rights to access to traditional territory.

This is by no means a panacea; enforcement of decisions and implementation of recommendations remains an issue. Some believe that international tribunals still have an erroneous understanding of the concept of a way of life as they omit the relationship to the land (Farget, 2015, p. 258). The United States have been slow to respond. Nonetheless, Indigenous people will continue to pursue a growing recognition of these standards as international customary law (Bulkan, 2012, p. 853).

Rights *vis a vis* Responsibility: Is there space for responsibility in spatial justice?

As discussed in the first section, protection of sacred areas is key to protecting the relationship and continuing to practice Indigenous lifeways. For many Indigenous Peoples this is not viewed as a right, but as I have been taught, a responsibility of our people. Teachings remind us of the serious responsibility to ensure that the gifts of Creator are cared for, valued, and protected for

4 See <http://www.treatycouncil.org/PDF/Press%20Release%20CERD%20Complaint.pdf> and the Inter-American Commission on Human Rights (IACHR): see the video recording of Oct. 23, 2015 hearing at <http://www.oas.org/es/cidh/audiencias/Hearings.aspx?Lang=en&Session=138&page=3>.

future generations. This leads me to ask whether there is space for the concept of responsibility in rights-based advocacy.

I recall a moment during negotiations on the UNDRIP in Geneva, when we were working to finalize the wording of what is now Article 25. It captures the essence of what Indigenous Peoples, who live in diverse geographies, have in common: a distinctive spiritual relationship “with lands, territories, waters and coastal seas.” Many Indigenous representatives insisted on use of the word “responsibilities,” but some State representatives failed to understand its place in a rights-centered document. We insisted, and explained our understanding of our responsibility as stewards to provide for future generations so that they might continue this relationship. That day we prevailed on this issue; Article 25 of UNDRIP now reads: “Indigenous Peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters, and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.”

Perhaps what makes claims for protection of sacred areas a sensitive issue for the non-Indigenous world is the prospect of connected claims for return of Indigenous lands. (Giminiani, 2013). However, notwithstanding a history of dispossession of indigenous lands and territories by colonial powers, many claims for protection of sacred areas are not tied to claims for the land⁵. At no time during the Mt. Taylor TCP process, for example, did the five tribes suggest a legal claim for return of the lands. Of paramount importance was the responsibility to protect the mountain. Moreover, neither the UNDRIP nor the recently adopted American Declaration on the Rights of Indigenous Peoples (ADRIP) tie protection of sacred areas to return of lands.

So, is there a fundamental mismatch between this sacred responsibility and the rights-based approach to protection of sacred areas for Indigenous Peoples? Some scholars have warned of the danger of relying on a rights-based approach because it privileges the worldview of the dominant culture and restricts space for compromise (Hendry & Tatum, 2016, p. 359) or because of a misplaced reliance on the common law system (Bulkan, 2012). How can Indigenous Peoples secure protection of sacred areas in a manner authentic to who they are, based on their responsibility? In the case of Mt. Taylor, the five tribes opted to seek a TCP designation rather than litigate their “American” rights to freedom of religion. Thus, rather than asserting a right, they worked on designation of the TCP as way of inviting state and public entities to join them in efforts to protect a sacred cultural landscape for future generations of Native and non-Native people.

Related to this responsibility dimension is the sense that in seeking protection for sacred areas Indigenous Peoples are seeking justice not only for themselves, but for the sacred places themselves, which we believe are living beings, relatives. In the U.S. legal system, justice is commonly thought of as something to be accorded citizens, not geographies. It makes sense to seek justice to practice one’s religion, or maybe to access sacred places to practice religions, but the idea of seeking justice on behalf of sacred geographies moves out of the realm of protection

⁵ This is not to say that Indigenous Peoples have given up the notion of return of their traditional territories. In some cases, Native Nations have purchased portions of their lands from private owners.

intended by the U.S. law. This is where we run into difficulty. At this point in our advocacy for sacred areas, having worked for understanding of concepts of collectively held rights and the importance of access to sacred places that we do not occupy, it appears that we have reached a major gap in understanding, an ontological and epistemological divide.

Spatial Justice or Indigenous ontology?

As Indigenous Peoples, we know that sacred spaces and landscapes are not just neutral background but living, active participants in the lives of our peoples. Recent discourse on spatial justice as a “particular emphasis and interpretive perspective” (Soja E., 2011, p. 13) of justice may provide fertile ground for outsiders’ understanding of our struggle to protect sacred places. Indeed, the work of Soja and others reveal a new and growing understanding among non-Indigenous scholars that the geographies in which we live are

“not just dead background or a neutral physical stage for the human drama but are filled with material and imagined forces that affect events and experiences, forces that can hurt us or help us in nearly everything we do, individually and collectively.” (Soja E., 2011, p. 20).

This “spatial turn” may present an opportunity to bridge the ontological gap of understanding in our advocacy for protection of sacred places. In return, Indigenous Peoples can add some valuable dimensions to this discourse.

According to Soja

“the spatial dimension has traditionally been treated as a kind of fixed background, a physically formed environment that, to be sure, has some influence on our lives but remains external to the social world and to efforts to make the world more socially just.” (p. 21).

He observes that most people tend to be more historical than spatial, and posits that what he terms the “spatial turn” is key to moving away from this tendency (p. 34).

This thinking resonates with the message we, as Indigenous Peoples, try to convey about the importance of our relationship to place. It is not a message founded on Western logic but rather on systematic Indigenous thinking and millennia of experience; on traditional knowledge and indigenous science (Cajete, 2004).

The significance of the spatial turn, as described by Soja, is also to

“break down the tradition of privileging time and history as dynamic and developmental, while space and the making of human geographies were seen as mere physical background, container or stage for the human social drama” (Dufaux, 2011, p. 4).

Because so many US institutions are focused on a historical perspective, Indigenous Peoples have often been considered disconnected from sacred places that they no longer occupy. Yet we believe our relationship with these places, so critical to our ways of being (to our ontologies) and of thinking, continues despite centuries of dispossession. Part of the legacy of colonialism is precisely in privileging time and history over spaces and places. Linear historical written accounts of human history are privileged so that our oral histories occupy a lower rung on the ladder of human existence. (Pepion, 2009).

Advocacy for sacred place protection is putting theory into practice, and this is where I believe Indigenous Peoples make real what Soja and others write about. In a 2011 interview, Soja shared that his book, *Seeking Spatial Justice*, was aimed at “activists and progressive planning

practitioners as a way of encouraging the further translation of spatial theory into strategic political practice.” (Dufaux, 2011, p. 8). In seeking protection for sacred places, Indigenous Peoples, activists, and scholars connect beliefs with action, both informed from traditional teachings about the world in which we live, the places or geographies to which we are related, and our responsibility to continue this relationship and protect these places for present and future generations.

Soja identified the need to “foreground [...] a critical spatial perspective and see [...] the search for social justice as a struggle over geography” (Dufaux, p. 8). However, the right to the city is the focus of much spatial justice discourse. So outside the city is there space for concepts of responsibility in spatial justice discourse? Can this help Indigenous Peoples to articulate a justice for sacred places, based not so much on rights as on responsibility? If the heart of spatial justice is the importance of the spatial for human existence, then this may be helpful in bridging the ontological gap between Indigenous Peoples and those who fail or refuse to see the importance of protecting sacred places.

Conclusion: Thoughts on Added Dimensions to Spatial Justice Discourse

Indigenous Peoples have been “spatial” people for millennia, and are connected to bodies of knowledge that help us to live out what others might only theorize about. I believe our struggles to protect sacred places and landscapes on every continent do and can help to further conversations about the importance of responsibility in seeking justice for the land. One of the primary purposes behind these efforts is stewardship over these sacred places and not always a concomitant right to these lands. This is not to say that I disagree with Waziyatawin Angela Wilson when she says that “spatial justice for Indigenous people will require a return of stolen lands” (Brown, Griffis, Hamilton, Irish, & Kanouse, 2007, p. 20), and that anything less will be a compromise of justice. I believe that it is all part of a continuum. Thus, I propose adding this dimension to the spatial justice approach, especially in the case of sacred place protection.

First however there are several hurdles, or at least inquiries to make before we proceed with this “interpretive perspective of justice,” as Soja puts it. As mentioned before, much of the spatial justice discourse is about the right to the city, and therefore uses a rights-based approach. Is there room for a responsibility-focused approach in using spatial justice? Second, I could not locate any literature on the concept of justice for the geographies, as opposed to humans fighting for rights over geography. Can the spatial turn contemplate a justice for geographies as well? For Indigenous Peoples, we are one and the same with our lands and territories, so this is central. Third, it is not entirely clear that Soja would challenge the contemporary nation state’s prerogative to determine what is justice. Rather he opines that

“combining the terms spatial and justice opens up a range of new possibilities for social and political action, as well as for social theorization and empirical analysis, that would not be as clear if the two terms were not used together.” (Soja E., 2011, p. 28).

Perhaps a more concrete statement is that which he highlights from the *Critical Planning* journal as he recounts the genesis of spatial justice:

"Justice is therefore not abstract, and not solely something 'handed down' or doled out by the state, it is rather a shared responsibility of engaged actors in the socio-spatial systems they inhabit and (re)produce." (Soja E., 2011, p. 28).

In our efforts to protect sacred places, Indigenous Peoples seek a shared responsibility in managing these areas. Thus, if there is space in spatial justice discourse to push through these discussions, I believe there is potential to engage the spatial turn to help with protection of sacred areas.

Spatial justice can be helpful to articulate what Indigenous Peoples want while they/we in turn can contribute a lived-out dimension to spatial justice regarding protection of sacred lands. However, I would caution against using spatial justice to secularize what Indigenous people view as an ontological and epistemological conversation. Indigenous efforts to protect sacred places cannot focus solely on secular domestic preservation values or international human rights, but must always focus on the sacred relationship and concomitant responsibility to protect, rooted in Indigenous epistemologies. As my Onondaga friend and colleague and member of the UN Permanent Forum on Indigenous Issues, Tonya Gonnella Frichner, now in the Spirit world, said on several occasions,

"Part of the challenge in changing the way people treat the natural world is that many non-Indigenous people think the expression "Mother Earth" is a metaphor, but "it's not." (Toensing, 2014).

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