The Winnemem Wintu Indians Fight to Preserve Their Sacred Sites: Damned If They Do, Dammed If They Don't

By Rebecca Bland

The hollow thud of a half-buried wooden drum calls to the spirit world. Hand-strung ceremonial necklaces adorn bare chests as the men circle a small pit fire. Black stripes paint their faces and eagle feathers crown their heads. The Winnemem Wintu Indian tribe is at war.

On September 12, 2004, for the first time since 1887, the Winnemem Wintu Indians performed their traditional war dance, known as Hu'p Chonas. The four-day ancient ritual involved dancing, singing, praying, and fasting on acorn water as a sacred offering to the gods for support in their uphill battle against a formidable enemy: the Shasta Dam.

The Winnemem Wintu Indians are a dwindling tribe of only 122 remaining members who reside in northern California along the McCloud River. The tribe lost 90 percent of its land, including hundreds of sacred sites, ancient villages, and burial grounds, to the building of Shasta Dam. Since then, the tribe has held on with both hands to what little they have left. But now, with the threat of the raising of the dam another six to 18.5 feet, the tribe fears that all of its land, including its remaining sacred sites, will be flooded and lost forever. The tribe equates the flooding to cultural genocide.

Since the 1970s, the Winnemem Wintu Indians have faced problems with federal recognition as a tribe. Federal recognition provides eligibility for the tribes to receive assistance from various governmental departments and agencies. As early as 1851, the

tribe had been federally recognized by the Bureau of Indian Affairs when it entered into treaties with the U.S. government. However, in 1978, when the Department of the Interior established its official list of 562 federally recognized Indian tribes, the Winnemem Wintu Indian tribe was omitted. For decades, the tribe has been struggling to regain its status as a federally recognized tribe so it can effectively fight for its right to protect its sacred sites from complete destruction by the raising of Shasta Dam.

Shasta Dam was initiated in 1937 and furthered when Congress approved legislation for the Central Valley Project Indian Land Acquisition Act in 1941. At its completion in 1944, the dam was the largest man-made reservoir ever built, towering 602 feet with a capacity of holding up to 15 million tons of water within its concrete barriers. The dam was initially designed to rise as high as 800 feet, but strains on resources during World War II stopped the dam construction at its current height. For over sixty years, the 602-foot dam has provided massive amounts of water for California residents, agricultural needs, and recreational activities. Today, according to the U.S. Bureau of Reclamation, Shasta Dam provides about 30 percent of the state's water supply.

But demand for water in California is ever-increasing. Since 1980, the U.S. Bureau of Reclamation has considered enlarging the dam by as much as 200 feet. In 2004, Congress appropriated $395 million to study the feasibility of raising the dam by 18.5 feet, increasing storage by 636,000 acre-feet, which would supply enough water to accommodate approximately 2.5 million people per year. The results of the feasibility study should be completed in 2008.

If the government decides to raise the water level of Shasta Dam, California and the Winnemem Wintu Indian tribe will clash, with state residents, government officials, environmental groups, and preservationists taking sides. On one hand, the state of California has the responsibility to supply its residents and agricultural businesses with adequate amounts of water to sustain their daily existence and way of life. On the other hand, the Winnemem Wintu Indian tribe has the right to protect its sacred sites from complete destruction if the water level is raised. What should be the outcome when a tribe's right to protect its sacred sites is in direct conflict with a state's responsibility to provide needed water to its citizens? Should the Bureau of Indian Affairs be required to acknowledge the Winnemem Wintu Indians as a federally recognized tribe so they can effectively challenge the issue? What claims could the Winnemem Wintu Indians assert to preserve their sacred sites in court?

This article focuses on the Winnemem Wintu Indian tribe and its fight to protect the remaining sacred sites from the raising of Shasta Dam. Part I provides background information about the Winnemem Wintu Indian tribe, Shasta Dam, and the conflict between the tribe and dam. Part II discusses the tribe's struggle for federal recognition with the Bureau of Indian Affairs and current legislative action that may aid in the struggle. Part III provides an analysis of various claims the Winnemem Wintu Indian tribe may assert to preserve its sacred sites in court, including challenges under the First Amendment, National Historic Preservation Act, National Environmental Policy Act, and California Wild and Scenic Rivers Act.

I. BACKGROUND

A. The Winnemem Wintu Indian Tribe

The Winnemem Wintu Indian tribe's history is proud but troubled. For over 2,000 years, the tribe has lived in northern California along the McCloud River, known as the "middle river" because it flows between the Sacramento and Pitt Rivers, which all three flow into Shasta Lake. Their ancestral homeland runs from volcanic Mount Shasta in the north, down the McCloud River watershed, to Bear Mountain in the south. The tribe inhabited the area long before Europeans settled in the colonies, long before California was a state of the United States, and long before there was a need for water appropriation for a population of millions.

When the Winnemem Wintu Indians first made contact with explorers and trappers, their tribe was 14,000 members strong. But, as with many Indian tribes in the Americas, deadly epidemics, such as malaria, flu, and smallpox, greatly reduced their numbers. By 1910, after an onslaught of disease and violence, the tribe was reduced to fewer than 400 members. Today, only 122 members of the Winnemem Wintu Indian tribe still inhabit the region.

The tribe's relationship with the federal government is tattered by broken promises. The federal government entered into treaties with the Winnemem Wintu Indian tribe as far back as August 16, 1851, when the Cottonwood Treaty was signed by tribal chiefs and government agents at Readings Ranch. The treaty agreed that the United States would purchase a 35-mile-square reservation of land along the McCloud River for the Winnemem Wintu Indian tribe. However, the Senate refused to ratify the agreement.

Later, in 1889, the Winnemem Wintu Indian tribe, along with the Yana tribe, made a direct plea to President Benjamin Harrison in the Wintu/Yana Petition, attempting to correct the conditions that followed the Senate's failure to ratify the Cottonwood Treaty and to demand better treatment for tribe members who were being violently and inhumanely harmed. The petition was a catalyst in assuring that California tribes were represented in the Dawes Act.

Under the Dawes Act, in 1893, President Grover Cleveland authorized the issuance of land allotments to non-reservation Indian tribes for up to 160 acres. This allotment allowed the Winnemem Wintu Indians to remain on the McCloud River.

However, in 1937, the federal government reclaimed the allotted land and more, and began the removal of the Winnemem Wintu Indians from the McCloud River in preparation for the construction of Shasta Dam. The Winnemem Wintu Indian tribe was promised like-land in exchange for the relinquishment of 4,480 acres of land at the site of the proposed dam. The tribe never received any like-land – or any land at all – to fulfill the promise.

In 1941, the Central Valley Project Indian Land Acquisition Act was signed into law, which provided for the establishment of a cemetery to be held in trust for the Winnemem Wintu Indian tribe. On January 5, 1942, the U.S. Bureau of Reclamation created the Shasta Reservoir Indian Cemetery, held in trust by the United States, where the tribe relocated 183 interred bodies of their ancestors from the traditional cemetery in the McCloud River valley, which was scheduled for flooding by the Shasta Dam.

In 1943, the Winnemem Wintu Indians were removed from their homelands on the lower McCloud River to make way for the filling of the dam. In total, the tribe lost twenty-two miles of river and hundreds of sacred sites, ancient villages, and burial grounds.

If the raising of Shasta Dam is approved, the massive waters will claim another three to five miles of the McCloud River and twenty-six sacred sites that hold great religious significance for the Winnemem Wintu Indian tribe and date back thousands of years. As described in Executive Order 13007, Indian sacred sites are "any specific, discrete, narrowly delineated location of Federal land that is identified by an Indian tribe . . . as sacred by virtue of its established religious significance to, or ceremonial use by, an Indian religion." But, the Winnemem Wintu Indians know that a sacred site is much more.

Indian sacred sites are the core that links the tribe to their ancestral past as they move forward through the phases of life; that unifies the individual members and gives them strength and identity as a tribe; that connects the land, the people, the gods, and the universe to make the tribe feel whole. The sacred sites fill up the senses with the aroma of fragrant sage as the tribesmen walk in religious processions through the tall grasses. The warmth of the manzanita wood that was gathered by the elders as it burns glows as a focal point of the ceremonial circle. Sights of rock formations have remained constant since the rituals began thousands of years ago and still project a powerful presence.

Puberty Rock is one such sacred site. On July 9, 2006, the Winnemem Wintu Indian tribe practiced its coming-of-age ceremony as it has for the past 2,000 years. At

Puberty Rock, fourteen-year-old Waimem Sisk-Franco, daughter of tribal chief Caleen Sisk-Franco and headman Mark Franco, was ushered into womanhood in the age-old rite of passage. Waimem spent four days and nights on one side of the McCloud River where she walked upriver by day, listening to aunts, friends, and elders pass on female knowledge, and slept in a bark hut by night. On the last day, a proud Waimem swam back across the McCloud River to join the ceremony on the opposite bank under a full moon as an adult member of the tribe.

Because Puberty Rock is on federal land in a popular area along the McCloud River, the Winnemem Wintu Indian tribe had to get a special use permit from the Shasta-Trinity National Forest Service to perform the ceremony. Forest Service officials requested that the public respect a voluntary closure of the area around Puberty Rock to accommodate the tribe's ancient religious practice. The regulations do not allow for exclusive use of the area for the free exercise of religion, but the voluntary closure is a compromise between the tribe's religious rights and the rights of those using the area for recreational purposes.

Sacred site accommodation through voluntary closure has been commonly employed by the National Park Service to balance the rights of Indian tribes and recreational users. In *Bear Lodge Multiple Use Association v. Babbit*, the Indians used Devil's Tower National Monument, a 600-foot butte located in northeastern Wyoming, as a sacred site during the month of June for their annual pilgrimage for vision quests. Devil's Tower was a popular site for rock climbers, but the Park Service requested that rock climbers voluntary refrain from climbing during the month of June. In addition, the

government used the voluntary closure as an opportunity to educate about the religious and cultural significance of the site to the many American Indian tribes. The climbers sued, but lacked standing because they had no injury in fact.

Other important sacred sites for the Winnemem Wintu Indian tribe include Kaibai, an ancient village site; Children's Rock, an initiation ceremonial site where children are taught to climb the rock to gain confidence; Hamaleokus, a coming-of-age ceremonial site for boys of the tribe; Dekkas, a steep hillside near the McCloud River used in a spring ceremony to honor those elders who survived the winter; and a solemn burial ground where seventeen of their ancestors are buried.

The Winnemem Wintu Indians are fighting the raising of Shasta Dam to protect the remaining sacred sites that they cherish for the practice of their religion and as a bond to their past. The raising of Shasta Dam would have a cataclysmic effect on their existence as individuals and as a tribe. The tribe refuses to let that happen.

B. SHASTA DAM

Shasta Dam was built from 1938 to 1945 as part of the federal Central Valley Project. As it now stands, Shasta Dam rises to 602 feet high and has storage of 4.5 million acre-feet of water, making it the eighth highest dam in the United States and the largest reservoir in California by a million acre-feet. The dam is only five-sixths the height of Hoover Dam, the largest dam in the United States, but its crest of 3,460 feet is nearly three times as wide. Now, the size of Shasta Dam could be increasing.

Shasta Dam is the spigot for more than 22 million water users in the state of California and, with 700,000 to one million new residents entering the state every year,

the demand for water is constantly on the rise. According to experts, one of the most cost-effective ways for the state to increase its water supply is by raising the water level of Shasta Dam.

Since 1980, the U.S. Bureau of Reclamation has been considering ways to increase the capacity of Shasta Dam. For instance, a six-foot raise would increase storage capacity in Shasta Dam by 290,000 acre-feet, which would add enough water to supply approximately 1.1 million people per year. An 18.5-foot raise would increase capacity by 636,000 acre-feet, which would add enough water for 2.5 million people per year. And a 200-foot raise would add 14 million acre-feet with enough water to supply an additional 56 million people per year at a price tag of $6 billion, making it technically but not economically feasible.

In 2003, Democratic Senator Diane Feinstein of California introduced key legislation to fast track a federal feasibility study for increasing California's water supply. The Senate passed the legislation in 2004, appropriating $395 million for the study. On October 6, 2004, the House of Representatives approved the bill and President George W. Bush signed it into law, known as the CalFed Bay-Delta Authorization Act. In addition, the Senate has already approved $5.25 million for design work on the expansion of Shasta Dam.

In a private effort to facilitate the decision to raise Shasta Dam, Westlands Water District, a 600,000-acre farm water agency and the largest agricultural user of northern California water, recently spent nearly $35 million in a bidding war to purchase 3,000 acres of land on the McCloud River. The property is the private Bollibokka fishing club

that was built by the founders of Hills Brothers Coffee in 1904. According to the Westlands general manager, the land was purchase solely to ensure that no additional impediments would exist if the U.S. Bureau of Reclamation decides to raise the dam, so more water would be available to the 600 farmers that Westlands Water District serves.

The Winnemem Wintu Indian tribe attempted to purchase the 3,000 acres of land, but the $11,600 an acre price was far from in its budget. In fact, the purchase price was nearly $5 million higher than the asking price.

Plans to raise the water level of Shasta Dam top the list of potential projects for additional water storage because, at its full potential, the added water capacity of the dam would accommodate more than 56 million Californians per year. Along with added water storage, proponents point to greater flood control, cold water for salmon, and hydropower production as advantages to the raising of Shasta Dam.

Yet, many question the wisdom of the plan. Raising Shasta Dam only six feet will completely submerge more than 780 acres of land along the McCloud River. As a result, wildlife habitats will be drowned, forests and beaches along the river will be obliterated, the Bollibokka fishing club will be washed away, and the sacred sites of the Winnemem Wintu Indian tribe will be lost forever.

However, with so much money already having gone into the study and design of the raising of the dam, the probability of acceptance of the raising of the level of Shasta Dam seems likely. Senator Feinstein believes “it is a God-given right as Californians to be able to water gardens and lawns” and many like-minded Californians are supporting her effort to raise Shasta Dam.

II. FEDERAL RECOGNITION

For decades, the Winnemem Wintu Indian tribe has been struggling to restore its status as a federally recognized tribe. Federal recognition provides the legal framework for a tribe to protect its religious freedom and cultural heritage, require consultation on federal projects that might cause an adverse impact, and qualify for special government programs and services. Under the Federally Recognized Indian Tribe List Act of 1994, "the United States has a trust responsibility to recognized Indian tribes, maintains a government-to-government relationship with those tribes, and recognizes the sovereignty of those tribes." The Winnemem Wintu Indians should be treated with such recognition under the Act since the tribe was originally recognized as early as 1851 when it entered into treaty negotiations with the federal government.

However, when the Department of the Interior published its first official list of federally recognized Indian tribes in 1978, the Winnemem Wintu Indians were not on the roster. Under the Act, the Department of the Interior is required to publish a list of federally recognized tribes annually on or before January 30 of each year, and the Winnemem Wintu Indian tribe has never made an appearance on the list.

Seven mandatory criteria exist for federal acknowledgment as an Indian tribe. The criteria require that the group has been identified "on a substantially continuous basis since 1900"; has existed as a community since historical times; holds political influence over its members; has a governing document describing its membership and procedures; maintains a list of its members; has never been acknowledged as a different tribe; and has

never had its federal relationship with the government terminated by the legislature. The Winnemem Wintu Indians qualify as a tribe under all seven criteria.

During the 1980s, the tribe was notified that it was no longer a federally recognized tribe when it was denied all previously allowed benefits. Tribe members who were attending college on Bureau of Indian Affairs higher education grants were suddenly denied assistance. Indian health services were terminated, housing assistance was cut off, and access to all federal laws specifically relating to Indian tribes were no longer applicable to the Winnemem Wintu Indian tribe, including archeological resource claims for tribal items over 100 years old under the Archaeological Resources Protection Act and, later, repatriation rights of human remains, funerary objects, sacred objects, or objects of cultural patrimony under the Native American Graves Protection and Repatriation Act. The Bureau of Indian Affairs flatly denies that the Winnemem Wintu Indians are a tribe and, thus, the agency has no trust responsibility or fiduciary duty to the group since they do not exist.

Unlike the Bureau of Indian Affairs, California state agencies and even other federal agencies, including the U.S. Forest Service, do recognize the Winnemem Wintu Indians as a legitimate tribe. The California Native American Heritage Commission includes them on its list of California tribes, and the tribe has been issued numerous state and federal use permits that are reserved for federally recognized tribes, including a permit for the war dance in 2004, a permit for the Puberty Rock ritual in 2006, and a permit for the right to possess eagle feathers.

Four methods exist that would allow the Winnemem Wintu Indians to regain their status as federally recognized. First, the president of the United States could grant recognition of the tribe by executive order, which would immediately take effect. Second, the Bureau of Indian Affairs could made a technical correction and simply add the Winnemem Wintu Indian name to the list as inadvertently omitted. Third, Congress could create federal recognition for the tribe through legislation. Or fourth, the tribe could seek judicial remedy by suing the Bureau of Indian Affairs in federal court.

Under the Federally Recognized Indian Tribe List Act, if any one of these methods occurred to bestow federal recognition on the Winnemem Wintu Indian tribe, that recognition would not be allowed to be terminated except by an act of Congress. The legislation limits the right to terminate status by stating that "Congress has expressly repudiated the policy of terminating recognized Indian tribes, and has actively sought to restore recognition to tribes that previously have been terminated." Yet still, the Winnemem Wintu Indian tribe is without recognition.

In 2004, under the third method for allowing federal recognition, Republican Senator Ben Nighthorse Campbell of Colorado sponsored legislation to give the Winnemem Wintu Indians the opportunity to regain recognition. Senator Campbell introduced the Winnemem Wintu Tribe Clarification and Restoration Act on September 30, 1994, laying out the tribe's historic relationship with the federal government and acknowledging that the Secretary of the Interior made an administrative oversight or inaction when he overlooked the trust status of the tribe.

Unfortunately, the legislation was part of a larger Omnibus Bill that related to all Native American tribes, and Senator Campbell was concerned that the Winnemem Wintu Indian tribal status put the bill at risk. Thus, the Winnemem Wintu Indians disappointedly agreed to allow Senator Campbell to withdraw the federal recognition issue from the final bill. Once again, the Winnemem Wintu Indians were not validated in their quest for tribal recognition.

But, the Winnemem Wintu Indian tribe still has hope. On August 23, 2007, Democratic Assembly Member Jared Huffman of San Rafael, California, introduced Assembly Joint Resolution 39 in Congress in an effort to restore federal recognition to the tribe. Like Senator Campbell's 1994 legislation, the resolution calls on Congress to comply with federal law to correct the injustice done by the Bureau of Indian Affairs and provide deserved recognition to the Winnemem Wintu Indian tribe. However, Huffman's resolution details a precise history of the tribe's involvement with the federal government from the Cottonwood Treaty negotiations in 1851 to the problem with the land allotments in 1915 to the current denial of federal services and programs to the tribe.

Interestingly, the resolution contains no mention of the conflict between the Winnemem Wintu Indian tribe and the raising of Shasta Dam.

The Winnemem Wintu Indian tribe anxiously awaits the Congressional decision to regain their status as a federally recognized tribe under Assembly Joint Resolution 39. The tribe has been disappointed before but hopes that this latest attempt at federal recognition will achieve the acknowledgement the tribe needs to restore the benefits that

the tribe once had, for consultation rights regarding adverse impact from the raising of Shasta Dam, and to fight for the right to preserve the tribe's sacred sites.

III. SACRED SITE CLAIMS

Freedom of religion is a fundamental right that embraces the very heart of the U.S. Constitution. Americans cherish the right to believe in God as they perceive God to exist, to worship with the rituals that their faith prescribes, to pass down those religious beliefs to their children. And American Indians are like all other Americans in this regard. Yet, often times, Indian religions are not viewed with the same due respect accorded to other faiths.

Unlike many Christian religions, which have the same ritual practiced on the same day in churches and cathedrals from coast to coast, Indian religious beliefs are tied closely to the land. The same Indian ritual cannot be practiced on the same day at various locations from coast to coast. A particular religious ritual can only be performed at a specific sacred site on a particular day because the sacred site and the religious ritual are interconnected as one. The land of the sacred site possesses spiritual properties and is alive with religious significance. Once that sacred site and religious ritual are severed, the ritual ceases to exist on its own. For that reason, the preservation of sacred sites is essential to the preservation of Indian religious beliefs and practices.

For instance, the Winnemem Wintu Indian tribe's coming-of-age ceremony at Puberty Rock can only be performed at that particular sacred site. Only at Puberty Rock can a young woman walk along the familiar riverbank in the footsteps of her ancestors.

Only at Puberty Rock can a young woman experience the sacred connection between the land, the sky, the river, and the spirit of the women who came before her. Only at Puberty Rock can a young woman swim the McCloud River to the opposite bank where she is welcomed back as an adult member of the tribe.

The Winnemem Wintu Indian tribe is fighting fiercely to preserve the remaining sacred sites still existing above water in their tribal homeland. Those twenty-six sacred sites are all that remain of their ancient religion and the beliefs that they, as Americans, hold dear.

A. First Amendment

The First Amendment of the U.S. Constitution expressly permits all Americans to exercise their religious freedoms. "Congress shall make no law . . . prohibiting the free exercise [of religion]." Americans embrace the fundamental right to worship as they believe and, for most Americans, the right to free exercise of religion and government interference with that right never come into conflict. But, conflict is more common for American Indian religious practices.

Over the past few decades, American Indian tribes have presented numerous First Amendment challenges in court to protect sacred sites located on federal land. Though the preservation of religious sacred sites would seem to fit squarely under the Free Exercise Clause of the First Amendment, these challenges have met with little success.

In 1963, in *Badoni v. Higginson,* members of the Navajo Indian tribe challenged whether Lake Powell, which was formed subsequent to the completion of Glen Canyon Dam on the Colorado River, should be permitted to fill to its full capacity and flood

Rainbow Bridge National Monument, a sacred site with special religious significance to the Navajo Indian tribe. Glen Canyon Dam was built in 1963 but, by 1970, Lake Powell had entered the acreage surrounding the sacred site and had water at a depth of 20.9 feet directly under the bridge, with a potential depth of 46 feet at maximum capacity.

The Tenth Circuit Court of Appeals applied a two-prong test. First, the court determined whether the governmental action created a burden on the Navajo Indian tribe's exercise of free religion. Second, the court balanced that burden against the government's compelling interest for its action. As a result, the Circuit Court held that the sacred site was not of central importance to the religion of the Navajo people so that the federal government's interest in maintaining the capacity of Lake Powell outweighed the tribe's religious interest. The excess water in the lake provided an ample water supply for availability to the states of Colorado, New Mexico, Utah, and Wyoming on a permanent or long-term basis for irrigation, development of natural resources, industrial use, and municipal water supply. Thereafter, the waters of the Colorado River at the site of Rainbow Bridge were allowed to continue to rise.

The conflict between the flooding of a federal dam and the preservation of sacred sites also played out in *Sequoyah v. Tennessee Valley Authority* in 1980. Here, members of the Cherokee Indian tribe sought an injunction to prevent the flooding of the Tellico Dam on the Little Tennessee River to prevent complete destruction of its sacred sites, holy grounds, medicine gathering places, and burial cemeteries.

However, a federal statute was passed to assure that no other law, specifically the Endangered Species Act, would interfere with the completion of the dam. Thus, only a

constitutional violation could override the statutory declaration to save the Cherokee sacred sites from flooding. The Cherokee Indian tribe argued that the flooding of Tellico Dam created a burden on its free exercise of religion, but the Sixth Circuit Court of Appeals denied the claim. The court found that the Cherokee Indian tribe failed to adequately demonstrate the central importance of the sacred sites in the Tennessee Valley to the overall practice of its religion. As a result, the Tellico Dam was flooded and the Cherokee sacred sites were drowned.

Still, even following these sacred site cases, American Indian tribes held fast to the belief that the First Amendment Free Exercise Clause could protect their religious interests. Then, the U.S. Supreme Court landed a devastating blow to any future religious exercise arguments with its decision in *Lyng v. Northwest Indian Cemetery Protective Association.*

In *Lyng*, the Yurok, Karok, and Tolowa Indian tribes in northwestern California challenged a Forest Service project to create a paved logging road through the Chimney Rock area of the Six Rivers National Forest. The Forest Service had commissioned a study of the sites of religious and cultural significance in the area as part of its environmental impact statement. The study found that the entire "high country" area held indispensible significance to Indian religious practices with specific ritual sites that depended on privacy, silence, and a natural physical setting that would be seriously and irreparably damaged by construction of the road. The study recommended that the road not be built. Nevertheless, the Forest Service decided to disregard the study

recommendation and prepared a final environmental impact statement for construction of the road.

The U.S. Supreme Court admitted that the road construction would "virtually destroy the Indians' ability to practice their religion" but held that the government's building of the road would not coerce the tribes to abandon their religious beliefs in violation of the First Amendment. The Court seemed to view the conflict as a property dispute rather than a fight for religious freedom. In the majority opinion, the Court stated that "[w]hatever rights the Indians may have to the use of the area . . . those rights do not divest the Government of its right to use what is, after all, its land." The U.S. Supreme Court had spoken and the road was built.

In the aftermath of these First Amendment challenges, it seems quite unlikely that the Winnemem Wintu Indian tribe would succeed in a religious exercise claim for preservation of its sacred sites in federal court. The Winnemem Wintu Indians would have a difficult time proving the centrality element that was required in the Circuit Court cases. Each of the twenty-six sacred sites is important to the religious beliefs of the Winnemem Wintu Indian tribe – and each may be even more cherished by the tribe since so few are remaining – but no single sacred site holds the centrality of the Winnemem Wintu Indian religion as is required. As a result, the tribe's interest in preserving the sacred sites to protect its religious beliefs would be outweighed by the governmental interest in increasing the water storage capacity of Shasta Dam.

Then, with the *Lyng* precedent looming large over the sacred site argument, the Winnemem Wintu Indians would have a struggle proving that the raising of Shasta Dam

would coerce the tribe to abandon its religious beliefs in violation of the First Amendment. As Justice Brennan discussed in the dissent, the *Lyng* decision "essentially leaves Native Americans with absolutely no constitutional protection against . . . threat to their religious practices."

The Winnemem Wintu Indian tribe would not succeed in a First Amendment challenge to preserve its remaining sacred sites.

B. National Historic Preservation Act

Following the *Lyng* decision, in 1992, Congress passed amendments to the National Historic Preservation Act as a clear mandate that land management agencies must take into account the concerns of Indian tribes in preserving their religious practices and protecting their sacred sites. The National Historic Preservation Act authorized the Secretary of the Interior to designate land for inclusion on the National Register and required that agencies provide an Indian tribe with "reasonable opportunity to identify its concerns about historic properties, advise on the identification and evaluation of historic properties, including those of traditional religious and cultural importance, articulate its views on the undertaking's effects on such properties, and participate in the resolution of adverse effects." In addition, the National Historic Preservation Act required that agencies make a "reasonable and good faith effort" to gather information about sacred sites to evaluate their eligibility for preservation on the National Register.

Of course, the National Historic Preservation Act does not require federal agencies to decide in favor of an Indian tribe, but it does require the agency to seriously consider and evaluate the tribe's concerns. The positive impact of the legislation was probably best

illustrated in the Tenth Circuit Court of Appeals decision in *Pueblo of Sandia v. United States*.

In *Pueblo of Sandia*, the Pueblo Indian tribe challenged that the Forest Service did not comply with the National Historic Preservation Act when it evaluated the impact of road construction through the Las Huertas Canyon in Cibola National Forest. Las Huertas Canyon is home to numerous sites of religious and cultural significance to the Pueblo Indian tribe where the members gather evergreen boughs for use in ceremonies, harvest plants and herbs for traditional healing practices, visit ancient shrines, and walk ceremonial paths.

When the Forest Service initiated its environmental impact statement for the region, the agency mailed letters to local Indian tribes, requesting detailed information about sites of particular significance, and addressed meetings of tribe members. However, the Pueblo Indian tribe did not respond with any details of the sites since many of the sites serve as gateways to the spiritual world and must not be disclosed. The Circuit Court found that the Forest Service should have known that tribal customs might keep the tribe from disclosing the information. The court held that the agency did not reasonably pursue the information necessary to evaluate the canyon's eligibility for inclusion on the National Register and did not make a good faith effort to identify the historic sites in Las Huertas Canyon in violation of the National Historic Preservation Act. The court reversed the district court's denial of declarative and injunctive relief and remanded the case.

The *Pueblo of Sandia* decision shows that the National Historic Preservation Act, while strictly procedural and not embodying any punitive provisions, does have the

"teeth" to get results for the Indian tribes. The judicial system, as an effective check on agency abuse of discretion, can enforce consultation provisions by requiring the agencies to listen to the tribe's concerns and take them seriously when making a final determination.

The consultation provisions of the National Historic Preservation Act might also have the teeth the Winnemem Wintu Indian tribe needs to be heard. The Winnemem Wintu Indians could definitely make a substantial case for preservation of their remaining sacred sites to the U.S. Bureau of Reclamation.

Unfortunately though, the Winnemem Wintu Indians do not have federal recognition as a tribe and, in all likelihood, the U.S. Bureau of Reclamation would not be required to consult with the tribe under the National Historic Preservation Act. And, if the U.S. Bureau of Reclamation does not acknowledge the Winnemem Wintu Indians as a legitimate tribe, the agency also acknowledges no trust responsibility to them for consultation purposes.

Thus, if the Winnemem Wintu Indian tribe can regain federal recognition status through Assembly Joint Resolution 39 or some other means, the National Historic Preservation Act would be valuable in the fight to preserve its sacred sites. If, however, the tribe cannot regain federal recognition, the National Historic Preservation Act would probably not work in its favor.

C. National Environmental Policy Act

The National Environmental Policy Act of 1969 would provide an alternative means for an Indian tribe to be heard through agency consultation requirements. Like the

National Historic Preservation Act, the National Environmental Policy Act requires federal agencies to consider the impact of governmental actions when preparing an environmental impact statement. Legislation specifically addresses cultural concerns by requiring that a federal agency coordinates its actions to "preserve important historic, cultural, and natural aspects of our national heritage" and "assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings."

In *Muckleshoot Indian Tribe v. U.S. Forest Service*, the Muckleshoot Indians challenged a land exchange deal in Washington state between Weyerhaeuser Company and the Forest Service as a violation of the National Environmental Policy Act. The Indian tribe asserted that portions of the federal land to be exchanged held ancient religious and cultural sites, including the Huckleberry Divide Trail, a 17.5 mile aboriginal transportation route, which was eligible for inclusion in the National Register.

Under the National Environmental Policy Act, "[w]hen an agency determines that a property is eligible for listing, it must assess the effects of any proposed undertaking on the eligible property, giving consideration to the views . . . of interested persons." Here, the Forest Service found that portions of the trail did satisfied the criteria for eligibility but, regardless, decided to transfer a portion of the trail to Weyerhaeuser Company for logging purposes, ultimately rendering it ineligible for listing. To mitigate the adverse effect, the Forest Service proposed to map the trail via a global positioning system and photograph significant features along the trail but refused to place conditions on the land to prevent logging.

The Ninth Circuit Court of Appeals held that the Forest Service failed to meet the requirements of the National Environmental Policy Act and the National Historical Preservation Act because the agency's attempt to mitigate the adverse effect of transferring portions of the Huckleberry Divide Trail by documenting the trail did not satisfy the agency's obligations to minimize the adverse effect. On remand, the Forest Service was required to reconsider the transfer of the land out of federal ownership, and the court enjoined Weyerhaeuser Company from any further destruction of the property.

Like the National Historic Preservation Act, the National Environmental Policy Act provided a means to consult with the agency and challenge the agency's abuse of discretion in court.

However, unlike the National Historic Preservation Act, the consultation process under the National Environmental Policy Act is open to public comment. As a result, environmental groups have the opportunity to be heard by federal agencies regarding government action that would impact their particular area of environmental concern.

Regardless whether the Winnemem Wintu Indian tribe regains federal recognition as a tribe or not, the National Environment Policy Act would be an effective vehicle for preservation of its sacred sites. Under this public participation statute, the Winnemem Wintu Indians could wisely align themselves with environmental groups, such as the Defenders of Wildlife, Sierra Club California, Coalition for Clean Air, and Trout Unlimited, whose interests are also in conflict with the raising of Shasta Dam. Such environmental groups may have the financial resources and clout necessary to fight on even footing with the powerful proponents of Shasta Dam.

D. California Wild and Scenic Rivers Act

The California Wild and Scenic Rivers Act provides that select rivers in the state of California should be allowed to flow freely. "[C]ertain rivers which possess extraordinary scenic, recreational, fishery, or wildlife values shall be preserved in their free-flowing state, together with their immediate environments, for the benefit and enjoyment of the people of the state." The designated rivers in the legislation are classified as wild rivers, scenic rivers, or recreational rivers, varying with their impoundments and accessibility.

In the California Wild and Scenic Rivers Act, the legislature specified the McCloud River as one of the most extraordinary wild trout fisheries in the state and declared that "maintaining the McCloud River in its free-flowing condition to protect its fishery is the highest and most beneficial use of the waters." In addition, the statute provides that no dam, reservoir, diversion, or impoundment may be built on the river. The California Wild and Scenic Rivers Act goes on to state that "no department or agency of the state shall assist or cooperate with . . . construction of any dam, reservoir, diversion, or other water impoundment facility that could have an adverse effect on the free-flowing condition of the McCloud River, or on its wild trout fishery."

The California Wild and Scenic Rivers Act directly supports the position of the Winnemem Wintu Indian tribe in its fight against the raising of Shasta Dam. Under the statute, the free-flowing sections of the McCloud River are unambiguously protected by the state, and the raising of Shasta Dam would be a clear violation of state law.

IV. CONCLUSION

The dancing, singing, and fasting of the traditional war dance has stopped for now, but the praying has not. The Winnemem Wintu Indians have much to lose. The tribe is still at war with the raising of Shasta Dam, and the battle to preserve the tribe's sacred sites is far from over.

However, the Winnemem Wintu Indian tribe is not in full control of its destiny. The tribe must await the findings of the federal feasibility study for increasing California's water supply. With so much funding already appropriated to the project, the result of the study tends to disfavor the Winnemem Wintu Indians. Also, Assembly Joint Resolution 39, which would provide federal recognition to the tribe, requires Congress to approve the federal recognition status. Unfortunately though, Congress has no mandate to act on the resolution.

The Winnemem Wintu Indians have limited claims available to them for preserving their sacred sites. Following the *Lyng* decision, a First Amendment challenge would not preserve the tribe's sacred sites because the Winnemem Wintu Indians could not prove that the government action on federal land would coerce the tribe from its right to its religious beliefs.

The Winnemem Wintu Indian tribe would have its best challenge in pursuing agency consultation requirements under the National Historic Preservation Act, if the tribe is federally recognized, or the National Environmental Policy Act. Under the National Environmental Policy Act, the tribe could align with environmental groups to strengthen its position against the raising of Shasta Dam. The agency would be required

to hear the Winnemem Wintu Indian tribe's concerns about its sacred sites and take those concerns seriously when the agency makes its final determination.

In addition, the Winnemem Wintu Indian tribe could fight the raising of Shasta Dam based on the statutory language of the California Wild and Scenic Rivers Act, including its provision for maintaining the free-flowing condition of the McCloud River and protecting its fishery as the highest and most beneficial use of the waters. The California Wild and Scenic Rivers Act would directly defeat the raising of Shasta Dam so long as federal law is not passed to trump the state statute.

The Winnemem Wintu Indians are fighting an uphill battle against a formidable enemy. Yet, the tribe members can imagine no greater reason to fight than for the preservation of their sacred sites and their fundamental right to free exercise of religion.