How religious conservatives unwittingly laid the groundwork to help Native Americans save their land

Fun fact: Native Americans have religious freedom too.

Jack Jenkins, Think Progress 12/8/16

https://thinkprogress.org/standing-rock-religious-liberty-d0a6aacef81c#.aiqqhwc0h

Much has been written about the success of the Standing Rock protests, where a sustained campaign launched by self-described "water protectors" hailing from more than 300 indigenous tribes managed to pressure the Army Corps of Engineers into reevaluating its support for the construction of the controversial Dakota Access Pipeline. Although it remains unclear whether the decision will withstand a Donald Trump administration, many commentators and environmental advocates have heralded the victory as a bellwether for the power of activism.

Michael McNally, a professor of religion at Minnesota's Carleton College and an expert on sacred land disputes, saw the Army's decision as both energizing for indigenous rights advocates and a deterrent against businesses who want to build on sacred land. "Standing Rock is oxygen to the activists who can see the effects of prayer and ceremony," he told ThinkProgress in an interview. "But it also serves as a cautionary tale to developers, that it may be cost effective to take seriously when a tribe has concerns over cultural and sacred sites—it's better to try to negotiate something before there are camps and roadblocks."

But as the "protectors" dig in for the winter to make sure the Army maintains its position under the Trump administration, McNally suggests there is a another way for indigenous groups to win victories for the preservation of their sacred lands *without* months of exhausting activism: argue cases on religious freedom grounds by citing the Religious Freedom and Restoration Act (RFRA), the same law used to great effect by conservative Christian groups and companies such as Hobby Lobby to win "religious liberty" fights.

Native American claims to sacred land have a long and fraught legal history, with tribes often losing cases when they cite religious freedom—including the Standing Rock Sioux, who actually lost their legal battle to protect the land in North Dakota. The tribe accused the U.S. Army Corps of Engineers of violating the National Historic Protection Act (NHPA) and National Environmental Policy Act (NEPA) when it issued permits allowing for the construction of the pipeline, arguing companies and the government did not adequately consult with tribes beforehand about the religious, cultural, and environment impact of a potential spill (as is required by law).

But a D.C. District Court judge did not agree, and the Army's recent decision to reevaluate building at Standing Rock appears to be more influenced by environmental concerns and the unprecedented wave of native activism than any religious claims.

The legal battle over Arizona's Oak Flat region, which pits the Resolution Copper company against the Apache tribe, is also centered around NHPA and NEPA—an ominous sign for its legal future.

"NHPA and NEPA are procedural in nature, but their legal teeth…is pretty weak," McNally said. "That is probably one of the reasons why [Standing Rock advocates] lost in federal court for the preliminary injunction."

McNally suggests that tribes could avoid what he called the "he-said-she-said" nature of these and many other future cases by reframing them under RFRA, a law passed in 1993 to correct a controversial Supreme Court decision that failed to protect the religious rights of two Native Americans.

Native Americans have filed suit using RFRA before, with less-than-inspiring results. In 2008, the Navajo Nation and other tribes sued the U.S. Forest Service for allowing a ski resort to use artificial snow created with treated sewage on Arizona's San Francisco peaks, a mountain the tribe deem sacred. The tribes contended that fake snow defiled their religious site and constituted a "substantial burden" on their spiritual beliefs under RFRA, but the Ninth Circuit ruled against them anyway, arguing that the bar for a "burden" on faith is much higher.

But as McNally points out in a February 2015 article in the Journal of Law and Religion, the legal understanding of religious liberty—and the threshold for "substantial burden"—shifted after the landmark 2014 Supreme Court case *Burwell v. Hobby Lobby*, when justices granted the craft giant's evangelical Christian owners an exemption from the Affordable Care Act's contraception mandate, citing their faith. The deeply controversial case radically expanded the legal definition of "religion"—specifically as contained within RFRA—in ways many believe to be deeply problematic. But it may also have the unintended consequence of giving Native Americans and Native Hawaiians a new legal mechanism for defending land they deem to be sacred.

"The *Hobby Lobby* decision clearly opens the door for rethinking the Ninth Circuit's interpretive posture in *Navajo Nation*," McNally writes, explaining that the new decision has the potential to overturn previous lawsuits where judges deemed RFRA to be inadequate for sacred land claims. "An ember of possibility for RFRA protection of Native American sacred sites has begun to glow again, oxygenated by the Supreme Court's recent holding in *Burwell v. Hobby Lobby*."

"RFRA expands the definition of religion," McNally added in an interview with ThinkProgress. "*Hobby Lobby* says that RFRA is bigger [than] the First Amendment."

To be sure, many progressives are wary of the newly expanded interpretation of RFRA since the law could enhance the ability of right wing religious groups to use it for their own purposes. Moreover, it's not entirely clear that such a defense would hold up in court, as Native Americans have thus far only made use of the *Hobby Lobby* decision in a dispute between two tribes.

But tribes are running out of legal options, and it's worth repeating that RFRA was originally created *specifically* to help protect the religious claims of Native Americans, among other groups. And while environmental activists may prefer to win what they consider to be environmental cases on environmental terms, the outlook for climate-related fights under a Trump administration looks increasingly bleak. More to the point: Native Americans and Native Hawaiians often see no distinction between the

categories of “environmental” and “religious”—for many who gathered at Standing Rock, the two concepts are theologically inextricable, which is why the protest was often called a “prayer camp.”

McNally and others argue that courts have spent decades ignoring the validity of Native religious claims, misunderstanding indigenous faith as an amorphous form of “spirituality” that is difficult to parse legally. But perhaps now—thanks in large part to the media attention drawn by Standing Rock demonstrators, who often listed their religious concerns in public speeches—Native American tribes can make inroads, using RFRA as their vehicle.

As McNally notes, while the Standing Rock protests were a triumph for prayerful activism, it’s always preferable to have legal precedent on your side.

“It would be a lot nicer if a federal judge had just decided [in favor of the tribes],” he said.