Conflicting Perspectives Regarding the Holy Mountain Called "San Francisco Peaks," and Other Sacred and Significant Places of Original Nations and Traditional Healers

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Prefatory Note: The Free Existence of Original Nations:

Mentally picture the free and independent existence of all the Original Nations and Peoples on this continent, extending back to the beginning of time through their oral histories and oral traditions, before the Christian Europeans had invasively arrived. Throughout that timespan, our ancestors lived free from the words and mental world of Western Europe. Our ancestors lived entirely free from the clever Euro-American metaphors, ideas, and arguments now used on a daily basis by the United States government against our nations and peoples.

Our original nation ancestors understood mountains and other geographical areas as living beings imbued with spiritual energy. Our spiritual people knew and still know how to spiritually attune and align themselves with that energy in a ceremonial manner, by means of our languages and ceremonial ways. This has always been the central purpose of our Spiritual Way of Life.

Our traditional healers and medicine people knew and still know why it is necessary to conduct ceremonies, especially in Sacred and Significant Places of concentrated spiritual energy. Even today our traditional spiritual people continue to carry on their ways, to fulfill the sacred responsibilities that our peoples have to care for our rightful place on Mother Earth.

However, invading and colonizing peoples from Western Europe eventually arrived to this continent more than five centuries ago. They showed no respect for the Life-Ways and free existence of the original nations and peoples because they had carried with them across the ocean, a mental world of domination. Based on the Bible, the invading nations of Christendom mentally claimed that their "God" had "given" them the lands where our Ancestors were living,[2] and where our spiritual people carry out their authority and sacred responsibilities.

The invading peoples assumed that their "God" had given them the right to use *their ideas and arguments* as a means of depriving our nations and peoples of our original free existence. They assumed that their "God" had chosen them as a people with whom "He" would make a divine "covenant" or treaty.[3] And on that basis they further assumed their "God" had

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[2] Steven T. Newcomb, *Pagans in the Promised Land*, Chapter 4, "Colonizing the Promised Land," pp. 37-50. For example, Genesis 17:2-8: The "God" of the Bible said: "And I will give unto thee, and to thy seed [sperm] after thee, the land wherein thou art a stranger, all the land of Canaan, for an everlasting possession."

[3] And the "Lord" said: "And I will establish my covenant between me and thee and thy seed after thee in their generations for an everlasting covenant, to be a God unto thee and to thy seed after thee. And I will give unto thee, and to thy seed after thee, the land wherein thou art a stranger, all the land of Canaan [by analogy, all the lands of "North America," including the so-called "San Francisco Peaks"] for an everlasting possession."

"given them" the right to name and claim as their own,[4] the lands and Sacred Places with which our original nations and peoples already had and still have a well-established spiritual relationship that has lasted millennia, to use Western time-frame language.

The difference between our original-free-existence perspective, and the claim-of-a-right of-domination perspective of the dominating society, invariably produces conflict. That difference gives rise to competition between those who carry these two distinctive perspectives over questions of power and decision-making. Given the existence of these two opposing perspectives, both of which are competing to make final decisions regarding the use of a particular geographical area, the question becomes: which perspective will end up in the final decision-making position? Now apply this question to a dispute between the United States government and traditional ceremonial Native people regarding a Sacred and Significant Place of original nations — so-called San Francisco Peaks, a place for which our original nations have our own name in our own respective languages.

On Redundancy and the Domination Translator

A cardinal rule of writing is don't repeat yourself. Clearly state what you have to say and move on. Once you've stated something, there's no need to say it again. This essay intentionally violates this rule. To write about a system of domination it becomes necessary to use the word domination in what appears to be an obsessively repetitious manner. Additionally, we use what we call "The Domination Translator." It's a simple technique: place the word domination inside brackets after a synonym for domination. An example is: "property [domination]."

Some Clarification on Terminology

This essay is being written for the orientation of an English-speaking audience that lives in the *mental world* and thus the *reality system* of the dominating society of the United States. For this reason, we need to make some preliminary comments concerning the terminology used herein.

In the U.S. Supreme Court ruling *Johnson* v. *McIntosh* of 1823,[5] Chief Justice Marshall (1755-1835) says of the "Indians": "Their rights to complete sovereignty, as independent nations, were necessarily diminished by the *original fundamental principle* that discovery gave title to those who made it [the discovery]."[6] (emphasis added) This implies that the invading Christian Europeans are the ones who are "original" and "fundamental" to this continent. To

[4] For example, Psalms 2:8 "Ask of me and *I shall give to thee the heathen* for thine *inheritance*, and the uttermost parts of the earth for thy possession." This conceives of the original nations and peoples, and their lands, as being the inherited property of the "chosen people" as per "God's will." This expresses the claim of a divine right of domination pursuant "God's mandate" and thus "His will." This matches a sentence in Pope Alexander VI's *Inter Caetera* papal bull of May 4, 1493: "We trust in Him from whom empires, and dominations, and all good things proceed."

[5] 21 U.S. (8 Wheat.) 543 (1823).

[6] Ibid.

correct this wrongful impression, we refer to the nations and peoples of this continent and this hemisphere as "original" nations and peoples, meaning the ones already living here on this continent *before* the invasion by Christendom.

The terms "Christian" and "Christian European" and "Christendom" are used in this essay because they match the historical record of Vatican papal documents, royal charters of Great Britain (England), and the 1823 U.S. Supreme Court ruling *Johnson* v. *McIntosh*. Those documents illustrate the claim, made in the name of Christianity, of *a right of domination* over non-Christian peoples and their lands, a claim which is now a feature of the body of anti-Indian ideas and arguments now called "federal Indian law."[7]

Most scholars of the subject do not write about the anti-Indian ideas of federal Indian law as a system of "domination." They also tend to change the word "Christian," which appears in the earliest documents, to the word "European" which is not found in those documents. In our view, this change in particular prevents an accurate understanding of the historical record. Take, for example, a rather common way of explaining the "doctrine of discovery":

> The doctrine of discovery came into existence with the rapid expansion of *European* empires in the fifteenth century. Its basic tenet- that the *European* nation which first 'discovered' and settled lands previously unknown to *Europeans* thereby gained the exclusive right to acquire those lands from their occupants-became part of the early body of international law dealing with aboriginal peoples."[8] [emphasis added]

This is a secular non-religious explanation of what the ancient documents reveal to be a biblically premised and theological (religious) basis for the Claim of a Right of Christian Domination. Key terminology found in the documents of that period reveal why the terms "European" and "non-European" are not accurate. Additionally, at that early period, *religion* (Christian/non-Christian) rather than *race* was the basis for how Christian powers classified and dealt with other nations and peoples. The words Europe and European do not appear in papal and royal those documents. Pope Alexander VI, for example, issued several papal documents to the monarchs of Spain shortly after Columbus's first voyage to the Bahamas and never uses the terms Europe and Europeans.

The first papal bull in the series is dated May 3, 1493.[9] The pope's scribes used the phrases "Christian lords" ("*dominorum Christianorum*"), "Christian king or prince" ("*Christiano principi*"), and "Christian people" or "Christendom" ("*populi Christiani*"). Not surprisingly, popes

[7] See generally Peter d'Erricio, *Federal Anti-Indian Law*, Praeger, 2022.
[8] Robert T. Coulter and Steven M. Tullberg, *Indian Land Rights*, in *The Agressions of Civilization*, pp. 185, 190 (Sandra L. Cadwalder & Vine Deloria, Jr., eds., 1984).
[9] *European Treaties Bearing on the History of the United States*, ed., Francis Gardner Davenport, Carnegie Institution, 1917, pp. 64-70.

of the Catholic Church distinguished between the Christian world and peoples that Christians called "heathen," "pagan," "infidel," "savage," and "barbarous."

Three hundred and thirty-three years later, in 1823, the members of the United States Supreme Court, such as John Marshall and Joseph Story (1779-1845), looked back to those ancient documents of Christendom when deciding how to write a landmark decision in the case *Johnson & Graham's Lessee* v. *McIntosh*.

It appears that most people of our current generation have failed to realize that Chief Justice John Marshall wrote the *Johnson* ruling, *on* behalf of a unanimous Court, by following Christendom's ancient tradition of distinguishing between Christians and non-Christians. This is demonstrated by Marshall's repeated use of the phrase "Christian people," which he distinguished from "natives, who were heathens." And it is demonstrated by Marshall's documentation of the Christian claim of a right of domination over non-Christians, which is now a permanent feature of U.S. federal Indian law, otherwise known as U.S. anti-Indian law.

The Biblical Framework and Context of Federal Anti-Indian Law

Marshall included the phrase "Christian people" in the *Johnson* ruling in specific imitation of that phrase being expressed in a number of royal charters of England, such as the John Cabot Charter of 1496, which King Henry VII issued in imitation of the Alexandrian papal bulls of 1493. *The Oxford English Dictionary* explains that "heathen" is a word "of Christian origin,"[10] which means "heathen" is a linguistic carrier of the context of the Bible, the source of Christianity. It is a part that stands for the whole.

This leads to an important insight about the linguistic and intellectual tradition of the United States with regard to the Sacred and Significant Places of original nations and peoples, including San Francisco Peaks. The Christian (biblical) context of the body of ideas and arguments called "federal Indian law" begins with a distinction between what the Supreme Court called the "ultimate dominion" (a right of domination) of "Christian people" and the mere "occupancy" of "heathens," with no presumed property right of domination.

Because "heathen" is a word *of Christian origin*, and because the *Johnson* v. *McIntosh* ruling is still an active Supreme Court precedent, this means that the United States government is *still using this distinction* between Christian domination and "heathen occupancy" as the basis of its decision-making regarding the Sacred and Significant Places of our original nations and peoples. In other words, whether they know it or not, U.S. government officials are using a conceptual framework that is premised on language from the Bible. Whenever we see a Sacred and Significant Place being referred to as "federal property," contrasted with an "aboriginal interest" of "occupancy," which has been declared as "not a property right," the distinction between Christian domination and non-Christians occupancy is actively being used.

[10] See Steven Newcomb, "The Evidence of Christian Nationalism in Federal Indian Law," N.Y.U. Review of Law & Social Change, Vol. 20, No. 2, 1993, p. 304.

U.S. government officials apply to the Sacred and Significant places of original nations, this categorical difference between a right of domination ("property") for Christian people," along with their descendants and successors, and a non-domination right of "occupancy" for non-Christian original nations. As we shall demonstrate below, the U.S. claim of a right of domination is the biblical and historical context for American Indian religious freedom cases having to do with the Sacred and Significant Places of the original nations and peoples of this continent.

Religious Freedom arguments made on behalf of Native spiritual practitioners have proven ineffective as a means of stopping the desecration and destruction of their Sacred Places. The reason should be clear: "Free Exercise of Religion" arguments are not able to effectively counter the presumption that the U.S. government has the sole and exclusive right of domination over places that are being deemed "federal property."

As a result of our investigation of ancient documents from Western Christendom and the overall historical record, we know that the invading colonizers sailed their ships to this continent with *a specific intention*. It was their intention to *identify the geographical location of* lands which until then had remained unknown to the Christian world. The word "discovery" is a shorthand way of referring to this new form of geographical knowledge.

The Intention to Establish Domination Where It Did Not Already Exist

It was Christendom's intention to identify non-Christian lands across the ocean so that a right of Christian domination ("*dominio*" and "*dominium*") could be claimed in relation to those newly located lands, and in relation to the original nations and peoples living there. A key example is wording found in the *Prerogatives* that the monarchs of Spain issued to Columbus: Columbus (Cristobal Colón, "Christ-bearing Colonizer") was authorized to "discover and conquer" and "discover and subdue" whatever lands he was able to locate across the ocean that had not been previously identified and dominated. The words "conquer" and "subdue" are two synonyms for domination.

Centuries later, as a result of its international treaties with different countries from Europe—such as, for example, England, France, and Spain--the U.S. government became the political successor to *the Christian world's claim of a right of domination* that had been initially made by those monarchies of the Christian European world. By means of the *Johnson* v. *McIntosh* ruling, the United States have consistently claimed and continue to claim a right of Christian domination over the lands and territories of our original nations, including over our Sacred and Significant Places, such as "San Francisco Peaks," on the basis of a biblical distinction between "Christian people" and "heathens."

Mental Competition between the Traditional Ceremonial People of Original Nations and U.S. Government Officials who Use the United States' Claim of a Right of Domination

Let us return now to the context for this discussion. Our Native ancestors stood on the belief of the Sacredness of All Life. Our ancestors had no knowledge of the language spoken by the invading colonizers, and, conversely, the invading colonizers had no knowledge and no idea of our worldview that all Creation is Sacred. It was not possible for them to comprehend what the foreigners were saying. Nor did our ancestors have the ability to read the documents of the foreigners, such as Vatican papal decrees or royal charters.

Even the everyday European person back in those days probably had no ability to get their hands on such documents, let alone accurately read and interpret their text. Those documents were highly specialized and handled at the very highest level of the Church and the State. They were drafted by an extremely small number of Christian European men, or scribes, who had been taught the unique set of skills needed for writing such documents, which were modeled after documents of the Roman Empire.[11] Remarkably, we as the Native people of this generation now have the ability to read and learn what those ancient documents are able to teach us about persistent and chronic patterns of domination in today's world.

Now, centuries after the invading colonizers first arrived here to this continent, there are those of us as Native people who have learned how to read a number of ancient documents that were created by Christian Europeans to the East across the Atlantic Ocean. We have learned to interpret those documents and other specialized writings that are part of the organic law tradition of the United States, with its linguistic and behavioral tradition of domination, an organic law tradition that is woven into the writings of U.S. Supreme Court rulings.

Some of us have dedicated decades to acquiring the necessary skills to do such interpretive work.[12] And this work has involved a certain amount of risk. For there was always the possibility that this intellectual activity would result in our minds becoming so absorbed, so to speak, into the dominating society's consciousness that we would be left with only the ability to accept rather than reject the Christian European claim of a right of domination over our nations and peoples, and over our Sacred and Significant Places. Fortunately, this has not happened.

The Benefit of Traditional Ceremonies

Some of us who have been fortunate enough to participate in the liberating experience of ceremonial life, especially in our Sacred and Significant Places, have thereby gained a heightened appreciation of the original and spiritually grounded free existence of our nations and peoples. We have how now learned to think, speak, and write with a view-from-the-shore perspective, envisioning the invading ships sailing toward our ancestors on shore.

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[11] *Christopher Columbus Book of Privileges: 1502 The claiming of a New World*, Library of Congress, eds., John W. Hessler, Daniel De Simone, and Chet Van Duzer, Delray Beach, Florida: Levenger Press, pp. 30-31.

[12] For example, my friend Peter d'Errico (professor emeritus at the University of Massachusetts) and I, have been studying this field of knowledge for some fifty years. We have been engaged in conversation and collaboration together for more than thirty years.

That view-from-the-shore perspective enables us to unequivocally oppose the claim of a right of domination over our nations and peoples, over our women and children, over our traditional territories, including our Sacred Places, and over Life itself. By contrast, U.S. government officials operate on the basis of a well-accepted but unstated assumption that the U.S. federal government has the right, consistent with the ancient language patterns and mentality of Christendom, to claim, on behalf of the United States, a right of domination over our original nations and peoples.

Identifying the Linguistic Patterns of Domination

A view-from-the-ship-of-state perspective results in the use of euphemistic vocabulary that draws attention away from the system of domination. We as Native people need to learn to identify the linguistic carriers of the domination system. An excellent example of that system is the Tennessee Supreme Court ruling *State* v. *Foreman*.[13] In his ruling, Judge John Catron provides an excellent example of the kind of language that has been used by the United States officials in relation to our original nations and peoples and our Sacred and Significant Places:

> We maintain, that the principle declared in the fifteenth century as the law of Christendom, that discovery gave title to assume sovereignty over and to govern the unconverted natives of Africa, Asia and North and South America, has been recognized as a part of the national law [the law of nations], for nearly four centuries, and that it is now so recognized by every Christian power, in its political department and its judicial . . . That, from Cape Horn to Hudson Bay, it [this principle] is acted upon as the only known rule of sovereign power, by which the native Indian is coerced [dominated]. . . Our claim [to a right of domination] is based on the right to coerce obedience. The claim may be denounced by the moralist. We answer, it is the law of the land. Without its assertion and vigorous execution, this continent never could have been inhabited by our ancestors. To abandon the principle now, is to assert that they were unjust usurpers; and that we, succeeding to their usurped authority and void claims to possess and govern the country, should in honesty abandon it, return to Europe, and let the subdued [dominated] parts again become a wilderness and hunting ground.[14]

It is notable that Judge Catron was eventually appointed to the U.S. Supreme Court by President Andrew Jackson. In other words, he reached the highest strata of the legal profession in the United States. In the above quote, he claims that "discovery" (new geographical knowledge) "gave" the discoverers a "title" to assume sovereignty [i.e., a "right of domination"] over and to govern [dominate] the non-Christian ["unconverted"] natives of Africa, Asia and North and South America" by coercing them into obedience to a system of domination.

[13] *State* v. *Foreman*, 16 Tenn. (8 Yer.) 256, 277 (1835).
[14] Ibid.

This tells us that when the representatives of a Christian monarch reached a region where non-Christians were already living, and where Christian domination had never been previously established, the monarchs of Christendom had already agreed amongst themselves that the "discovering" monarch would have the right to claim a right of Christian domination ("title" and "sovereignty") over any area that had been identified for the very first time by a monarch of Christendom.

In keeping with the previously mentioned papal and royal documents, "discovery" meant sailing by ship across the ocean with the *intention* of identifying any geographical location where non-Christians were living, and to create a Christian system of domination where such a system had never been previously established. And this intention was fulfilled by coercing the original nations into obedience to the reign of the dominators. This reveals the linguistic and behavioral basis for the claim of a right of domination that the U.S. government is now claiming in relation to San Francisco Peaks and other Sacred and Significant Places of Original Nations, such as Oak Flat and the Black Hills, as well as over our sacred holdings such as Eagle Feathers.

Traditional Native People

Traditional Native people, especially Elders who are fluent in their own non-English language, despite the effort to kill our languages, have tended to avoid the specialized knowledge of the dominating society. They have focused instead on learning from their Elders the highly specialized knowledge, sacred language, and ceremonial ways, which the U.S. government has worked so diligently to destroy. There is a need for a collaboration between those traditional Native people who still wholeheartedly maintain and uphold the ceremonial practices of their people, and those Native scholars who have studied the documents, ideas, and arguments of the dominating society.

Strengthened by the knowledge we have accumulated, we as scholars need to advocate on behalf of our traditional ceremonial people, and on behalf of our fundamental birthright to live free from and to reject the claim of a right of domination from any source whatsoever, in honor of our original pre-invasion existence.

Let us now examine more specifically some of the ideas and arguments that have been used against our original nations and peoples with regard to our traditional territories and our Sacred and Significant places. In the next section we discuss the writings of Henry Wheaton (1785-1848) and Burke Aaron Hinsdale (1837-1900). Wheaton was a reporter for the U.S. Supreme Court, and Hinsdale was an eminent nineteenth century educator author who studied what he called "The Right of Discovery" that has been applied by the U.S. government to our Sacred and Significant places, such as the San Francisco Peaks.

Henry Wheaton's Elements of International Law and the Doctrine of Infidel Nonexistence

Henry Wheaton was a U.S. lawyer, jurist, and diplomat. He was the third reporter of decisions issued by the U.S. Supreme Court. He held that position when the Court issued the 1823 *Johnson* v. *McIntosh* ruling. In 1836, thirteen years after the *Johnson* decision, Wheaton published his *Elements of International Law*[15] in which he explained that, "The law of nations, or international law, as understood among civilized, Christian nations, may be defined as consisting of those rules of conduct which reason deduces, as consonant to justice, from the nature of the society existing among independent nations; with such definitions and modifications as may be established by general consent [of the civilized, Christian nations]."[16]

Given the importance of Wheaton's *Elements*, and his explanation of what we call the right of Christian discovery and domination pursuant to the "law of nations," we are including below several lengthy quotes from Chapter IV of *Elements*, titled "Rights of Property,"[17] while reminding the reader here in passing that "property" has been defined as, a right of "physical domination over some part of the natural world," such as San Francisco Peaks:

> The title [of domination] of almost all nations of Europe to the territory now possessed by them in that quarter of the world [the Western Hemisphere] was originally derived from conquest [domination] which has been subsequently confirmed by international compacts to which all the European states have successively become parties. Their claim to the possessions held by them in the New World discovered by Columbus and other adventurers, and to the territories which they have acquired on the continents of Africa and Asia, was originally derived from discovery [new knowledge] or conquest and colonization [domination], and has since been confirmed in the same manner by positive compact. Independent of these sources of title, the general consent of mankind has established the principle that long uninterrupted possession [of territory] by one nation excludes the claim of every other.[18]

If the Christian nations of Europe had been required to apply to our nations this principle of long "uninterrupted possession of territory," specifically, that our nations' long uninterrupted possession of our territories excludes the claim of every invading nation, then our nations would have been able to invoke that principle to exclude the invasive claims made by the monarchs of Christendom to this continent. The Christian monarchs, however, had agreed among themselves that only Christian nations could invoke the principle of long uninterrupted possession of territory by colonizing powers. The Christian world refused to apply that principle to peoples they deemed to be "barbarous" "heathens," and "infidels."

B. A. Hinsdale

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[15] Henry Wheaton, *Elements of International Law*: *with a Sketch of the History of the Science*, Vol. I, London: B. Fellowes, Ludgate Street, 1836.
[16] *Elements*, p. 46, § 11.
[17] Ibid., p. 137.
[18] Wheaton's *Elements*, § 5. "Conquest and discovery," p. 206-207.

Burke Aaron Hinsdale, in his 1888 essay "Right of Discovery,"[19] writes," "To the mind of Christian Europe in the fifteenth century the distinction between Christian and Infidel was ineffaceable [irremovable]." In other words, within the mental world of Christendom, the hatred Christians had toward non-Christians was considered permanent. Hinsdale continues: "Mr. Wheaton states the case thus: 'According to the European ideas of that age, the heathen nations of the other quarters of the globe were the lawful spoil and prey of their civilized conquerors.'"[20] This language exemplifies the claim of a right of domination.

Hinsdale puts an even finer point on the matter with a quote from H. H. Bancroft, to the effect that, what "never seems to have been questioned" during that era, "by either discoverer, adventurer, or ruler," was the assumption that the Native peoples were "fit subjects for coercion, treachery, robbery, enslavement, and slaughter."[21] Bancroft continues as follows: "However invalid might have been the argument of a housebreaker, that in the room he entered he discovered a purse of gold, and took it, Spaniards never thought of applying such logic to themselves in regard to the possessions of the natives in the new lands the Genoese [Columbus] had found."[22]

Hinsdale explains the trick of the mind that European scholars performed during the so-called Age of Discovery. The seafaring powers of Christian Europe, says Hinsdale, "had not seized the possessions of their enemies by force, but *had occupied what belonged to nobody*."[23] (emphasis added) "Nobody" is a category that serves to *negate* the original peoples by deeming (judging) them as *not existing*. It relegates non-Christians to a dimension, so to speak, of non-existence. Peoples deemed (judged) to not exist *conceptually* (even though they existed physically) could not compete with or block the Christian Europeans.

This suggests that the intellectuals of Western Europe created the *pretension* that our Native ancestors were *nonexistent* and thus not to be included in the allocation of rights of domination ("property"), meaning "a right of domination rightfully obtained over some object," such as the lands of the continent. Hinsdale notes that "the Roman law furnished a full legal justification for the appropriation of the New World by the Christian nations."[24] "They had but to hold the savages their enemies and to treat them accordingly. . . They chose another path," a path that was "more in accordance with the theological temper of the times."[25]

Proof of the Christian (Biblical) Basis for 'the Right' to Sail to and Identify Non-Christian Lands

[19] "The Right of Discovery," Ohio Archaeological and Historical Quarterly, Vol. II, Dec. 1988, No 3.
[20] Ibid., p. 4.
[21] Ibid., p. 4.
[22] Ibid.
[23] Ibid., p. 16.
[24] Ibid.,. p. 17.
[25] Ibid.

"Perhaps the strongest proof of the correctness of the view advanced," said Hindsdale, "is furnished by the commissions, charters, and patents granted to explorers by the Kings of England."[26] He continues:

> Henry VII, in 1496, commissioned John Cabot and his sons "to seek out and discover all Islands, regions, and provinces whatsoever that may belong to heathens and infidels" and "to subdue [dominate], occupy, and possess these territories as his vassals and lieutenants." The charter granted to Sir Walter Raleigh by Queen Elizabeth, in 1584, gave him full liberty and license "to discover, search, find out, and view such remote heathen and barbarous lands, countries, and territories not actually possessed of any Christian prince, nor inhabited by Christian people, as to him shall seem good," etc. Afterwards the words "heathen" and "barbarian" were omitted from this class of documents, but the phrase "not possessed of any Christian prince, nor inhabited by any Christian people" is found in charters of the next century, as in those of Virginia, 1606, and New England, 1620. The disappearance of the heathen qualification from the English charters after 1620 was due in part to the fact that the boundaries of claims had become more definite, but also in part because of the growing secularization of politics.
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> Such was the origin of the Right of Discovery, the criterion to which the nations that had divided the New World appealed in territorial controversies, and the ultimate ground of title [a right of domination] throughout the United States.[27]

Here, Hinsdale has identified the view that as soon as a Christian power had identified a non-Christian area, over which no Christian monarch had previously claimed a right of domination, as if by magic, the Christian monarch was considered to have come into possession, so to speak, of a right of domination over that non-Christian area. Hinsdale also reveals another key point: As the generations pass, negative Christian religious terminology (e.g., "heathen," "pagan" and "infidel") began to fall out of favor and the word "Christian" often ended up being replaced with the word "European." When this happens, the specifically Christian, and, thus, biblical basis for the U.S. government's claim of a right of domination in relation to San Francisco Peaks and other Sacred and Significant Places becomes veiled and thus more difficult to identify.

Consistent with what we may aptly term The Doctrine of Infidel Nonexistence, some Christian European intellectuals decided that they would pretend that non-Christian peoples did not even exist when it came to "property" and "property rights." This explains the basis upon which the U.S. government defines the terms "Indian title" and "aboriginal title" with regard to our Sacred and Significant Places, as "mere occupancy," and "not a property right."[28]

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[26] Ibid.

[27] Ibid., pp. 17-18.

[28] *White* v. *University of California*, No. 12-17489, August 27, 2014. At footnote 2, we find: Aboriginal interest in land generally is described as a tribe's right to occupy the land. It is not a property right, but "amounts to a right of

The original nations upon whom the categories "heathens," "pagans," and "infidels" were *mentally imposed*, have been excluded from Christendom's allocation and distribution of rights of domination ("property" rights) in newly identified non-Christian geographical areas. This explanation sheds light on what Wheaton said about the relationship between the idea of "discovery" and the creation of "rights of property." Hinsdale goes on to explain:

> Practically, discovery, when consummated [by possession], was conquest, but theoretically, it was something very different. An enemy overcome in battle was *nullus* according to the Roman law, but another definition, and one more consonant with the temper of the times, was now adopted. This definition was supplied by the Roman [Catholic] Church.
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> The new definition of *nullus* was, a heathen, pagan, infidel, or unbaptized person. "Paganism, which meant being unbaptized," says Dr. [Francis] Lieber, "deprived the individual of those rights which a true jural morality considers inherent in each human being." The same writer [Lieber] also states that the Right of Discovery is founded "on the principle that what belongs to no one [may] be appropriated by the finder," but this principle become effectual only when supplemented by the Church definition of *nullus*. That definition supplied the lacking premise in the demonstration. Grant that *res nullius* is the property of the finder; that an infidel is *nullus* [nonexistent]; that the American savage is an infidel [a nonexistent nobody], and the argument is complete. That the Church, one of whose great duties is to protect the weak and helpless, should have supplied one-half the logic that justified the spoliation and enslavement of the heathen, is one of the anomalies of history.[29]

This points out a specific pattern of reasoning applied to the Sacred and Significant Places of our original nations such as San Francisco Peaks, a pattern which is premised upon a Doctrine of Infidel Negation with regard to Christian claimed rights of domination over the lands of "heathen" and "Infidel" nations and peoples.

More From Wheaton's *Elements of International Law*

Wheaton says the following with regard to Christendom's agreed upon principle, mentioned above, that long uninterrupted possession of territory by one invading ("civilized invaders") Christian European nation excludes the claim of every other:

> Whether this general consent be considered as an implied contract or as positive law, all nations [of Christian Europe] are equally bound by it, since all are parties to it; since none can safely disregard it without impugning its own title to its possessions; and since

occupancy which the sovereign grants and protects against intrusion by third parties." Tee–Hit–Ton Indians v. United States, 348 U.S. 272, 279 (1955). The right, which is residual in nature, comes from the legal theory that discovery and conquest gave conquerors the right to own the land but did not disturb the tribe's right to occupy it. See Johnson v. M'Intosh, 21 U.S. 8 Wheat 543, 588–91 (1823).

[29] Hinsdale, "Right of Discovery," pp. 16-17.

> it is founded upon mutual utility, and tends to promote the general welfare of mankind.[30]

Clearly, Wheaton's category "mankind" did not include the "heathen" and "infidel" nations of the globe. He makes this point even more clear as he continues with his explanation of Christian Rights of Property [Domination]:

> The Spaniards and Portuguese took the lead among the nations of Europe in the splendid maritime discoveries in the East and the West, during the fifteenth and sixteenth centuries. According to the European ideas of that age, the heathen nations of the other quarters of the globe were the lawful spoil and prey of their civilized conquerors [dominators], and as between the christian powers themselves, the Sovereign Pontiff was the supreme arbiter of conflicting claims. Hence the famous bull issued by Pope Alexander VI. [sic] in 1493, by which he granted to the crown of Castille and Arragon all lands discovered, and to be discovered, beyond a line drawn from pole to pole, one hundred leagues west from the Azores, or Western Islands, under which Spain has since claimed to exclude all other European nations from the possession and use, not only of the lands, but of the seas, in the New World west of that line. Independent of this papal grant, the right of prior discovery was the foundation upon which the different European nations, by whom conquests [dominations] and settlements were successively made on the American continent, rested their respective claims to appropriate [dominate] its territory to the exclusive use of each nation. Even Spain did not found her pretensions solely on the papal grant. Portugal asserted a title derived from discovery and conquest [domination] to a portion of South America, taking care to keep to the eastward of the line traced by the Pope by which the globe seemed to be divided between these two great monarchies.[31]
>
> On the other hand, Great Britain, France, and Holland, disregarded the pretended authority of the papal see, and pushed their discoveries, conquests, and settlements, both in the East and the West Indies, until conflicting with the paramount claims of Spain and Portugal, they produced bloody and destructive wars between the different maritime powers of Europe. But there was one thing in which they all agreed, that of almost entirely disregarding the right of the native inhabitants of these regions. Thus the bull of Pope Alexander VI. [sic] reserved from the grant to Spain, all which had been previously occupied by any other *christian* nation [Wheaton's emphasis]: and the patent granted by Henry VII. [sic] of England to John Cabot and his sons authorized them "to seek out and discover all islands, regions, and provinces whatsoever that may belong to heathens and infidels," and "to subdue, occupy, and possess these territories, as his [the king's] vassals and lieutenants." In the same manner the grant from Queen Elizabeth to Sir Humphrey Gilbert empowers him to "discover such remote heathen and barbarous

[30] Wheaton, Elements of International Law, p. 207.
[31] Ibid., at 219.

> lands, countries, and territories, not actually possessed by any Christian prince or people, and to hold, occupy, and enjoy the same with all their commodities, jurisdictions, and royalties."[32]

And how did Wheaton sum up this lengthy explanation of the theoretical framework that the nations of Christendom applied to the lands and lives of our original nations? In keeping with B. A. Hinsdale's explanation of *infidel non-existence ("nullus"), with regard to the claim of a right of domination, or sub-level existence* for non-Christian nations and peoples in comparison with Christian European powers, Wheaton further states:

> It thus became a maxim of policy and of law that the right of the native Indian was subordinate to that [right of domination] of the first christian discoverer, whose paramount claim [of a right of domination] excluded that of every other civilized nation, and gradually extinguished that of the natives. In the various wars, treaties, and negotiations, to which the conflicting pretensions of the different states of Christendom to territory on the American continent have given rise, the primitive title of the Indian [to maintain a free and independent existence] has been entirely overlooked, or left to be disposed of by the states within whose limits they happened to fall by stipulations of the treaties between the different European powers. Their [the Indians'] title has thus been entirely extinguished by force of arms, or by voluntary compact, as the progress of cultivation [i.e., colonization] gradually compelled the savage tenet of the forest to yield to the superior [dominating] power and skill of his civilized invader.[33]

Wheaton was playing a trick of the mind when he said the "Indians" "happened to fall" *within* "the limits" of "the states," as a result of agreements ("stipulations") "between the different European powers." After all, the original nations were living on the land long before the Christian nations of Europe ever arrived, and long before any lines of demarcation were *mentally created* by the colonizers.

How then could the original nations be said to "fall" "within" boundaries imaginatively created by the colonizing powers? One possible answer is that Wheaton used the word "fall" as a metaphorical device to make it seem *as if* Christian European boundaries were created *before* the Native peoples were ever existing on the land. By means of this imaginative technique, it was possible to leave the false impression that the original peoples arrived on the land *after* those imaginary Christian European boundaries were made and "fell" inside those boundaries.

However, there is another possible interpretation. A "fall" indicates a "descent" from a high level to a lower level, or "to fall in battle," which usually indicates a soldier who has died. Once Christian European "boundaries" had been created on maps, the result was to depict vast areas of Native lands as being "under or subject to the domination of" the colonizing invaders. The corollary of this is, of course, a depiction of the Native peoples as being subject to the

[32] Wheaton, pp. 207-210.
[33] Wheaton, p. 210.

invaders. This explains how the Native peoples ended up being depicted as existing "within" those mentally created Christian European boundaries. This is the result of highly skilled and inventive metaphorical framing.

It's Time to Identify the U.S. Government's Claim of a Right of Domination

The fact that the U.S. federal government has been claiming *a right of domination* over the lands of original nations has been seldom spoken of or written about. The people who work on behalf of the United States have had no reason to identify such a claim because to do so would reflect negatively on the United States. Federal government officials use synonyms for domination such as "federal property."

For their part, Native ceremonial people have not tended to focus on the U.S. government's *claim of a right of domination* over their Sacred and Ceremonial places. This is most likely because the attorneys and other advocates whom they have worked with have not explained why that specific wording is a powerful means of challenging the United States's desecration of those places. People who have never been taught a particular wording, such as "the U.S. claim of a right of domination," will not be able to use that style of wording because they have no knowledge of that. In any case, given the information provided in this essay, it is now possible to identify the claim of a right of domination that the U.S. government continues to use against our original nations.

Regarding the Sacred and Significant Places of our original nations, and the argument that Native peoples have the right to engage in a Free Exercise of Religion, it makes a great deal of sense to say the U.S. government has been claiming that it is entitled to a Free Exercise of Domination over any and all areas that have been designated as "federal property." Based on what Story, Wheaton, and Hinsdale documented during the nineteenth century, the papal bulls of the fifteenth Century are the basis upon which the U.S. government currently claims a right of domination over San Francisco Peaks and other Sacred and Significant Places of Native nations.

Everyone educated in the United States has been taught to believe there is a separation between church and state in American society. It is surprising to discover that it is on the basis of the Bible, and the related concept of "property" [domination], that the U.S. government claims a Free Exercise of Domination over our original nations, and over our lands, including our Sacred and Significant Places.

The Biblical Connection

Are we able to identify a biblical connection to the claim that our traditional lands are "federal property?" William Blackstone, the eminent British jurist and commentator on English Common Law, explained that the "right of property," in general, is defined as "that sole despotic dominion which one man claims and exercises over the external things of the world, in

total exclusion of the right of any other individual in the universe."[34] As we shall explain below, Blackstone pointed to Genesis 1:28 as the basis for that definition.

Once the federal government of the United States was able to use a biblical reasoning process to claim a right of domination over an area which is traditional to a particular original nation or people, the implication is that the United States government is the entity that has the "sole despotic dominion" ("property") over that entire area, "in total exclusion any Native nation or people, or traditional healers." And this claim is being made by the United States despite the fact that an original nation or people has had an ongoing cultural and spiritual relationship with that area extending back to the beginning of time.

Next we need to point out Blackstone's explanation of the *basis* of "property," which he said is the Book of Genesis: "In the beginning of the world," he says, "we are informed by Holy Writ [of the Bible], the All-bountiful Creator gave to man 'dominion over all the earth, and over the fish of the sea, and over the fowl of the air, and over every living thing that moveth upon the earth."[35] "This," says Blackstone, "is the only true and solid foundation of man's dominion over external things."[36]

Judge Blackstone's explanation of the relationship between the idea of "property" in English common law and the Old Testament of the Bible, means that whenever and wherever the U.S. government has unilaterally claimed that the Sacred and Significant Places of Native peoples is "federal property" [domination] belonging to the United States, it has been using Genesis 1:28 against Native nations. For the federal government to claim a right of "ultimate dominion" [domination] and "property" [domination] over the traditional lands of a Native nation, including a Sacred and Significant Place such as San Francisco Peaks, is to use what Blackstone termed "the only true and solid foundation of man's dominion [domination] over external things," i.e., Genesis 1:28 in the Bible.

What this means is that the U.S. government has been tacitly using the Old Testament of the Bible to claim it has a right of domination ("property") over the Sacred and Significant Places of Native nations and peoples. The federal government has been using a Christian claim against those peoples it has labeled "heathens" and "infidels" as a basis for claiming an ultimate right of decision-making in relation to those Sacred Places. By that means, the traditional and ceremonial people of Native nations have thereby been excluded from their rightful position as the final decision-makers with regard to places such as San Francisco Peaks and the Black Hills of the *Oceti Sakowin*.

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[34] Marshall D. Ewell, *A Review of Blackstone's Commentaries with Explanatory Notes for the Use of Students at Law,* Second Edition, Albany, New York: Matthew Bender & Company, 1915. "Book the Second," "Of the Rights of Things," Chapter I, "Of Property in General," p. 137.
[35] Ibid.
[36] Ibid.

In order for U.S. government officials to escape the implications of this framework of analysis, they must explain on what non-biblical and constitutional basis they, on behalf of their government, are claiming a right of "property" and domination over Native nations and peoples. Or, alternatively, those officials would need to demonstrate that the U.S. government has not previously claimed, and is not now claiming, a right of domination over Native nations, over their traditional lands, and over their sacred and significant places, such as San Francisco Peaks.

American Indian Religious Freedom Legal Cases and the U.S. Claim of Property Over the Traditional Lands of Our Original Nations

Political activism in Indian Country in the late 1960s and early 1970s resulted in the U.S. Congress passing the 1978 American Indian Religious Freedom Act (AIRFA), as a joint resolution of Congress.[37] To grasp the historical and mental context for Congress's passage of the AIRFA legislation, which the Supreme Court stated in Lyng "has not teeth,"[38] we need to trace Christendom's Christian-heathen distinction forward to nineteenth century U.S. Indian policy.

In 1883, during his annual report to Congress, Secretary of Interior Henry M. Teller explained why he believed a Code and Court of "Indian Offenses" was needed. Pay attention to his denigrating and demeaning language in the statement below about the traditional ceremonial practices of Native peoples:

> If it is the purpose of the Government [Domination System] to civilize [dominate] the Indians, they must be compelled to desist from the [free and independent] savage and barbarous practices that are calculated to continue them in [a free way of life] savagery, no matter what exterior influences are brought to bear on them. Very many of the progressive [dominated] Indians have become fully alive to the pernicious influences of these [free] heathenish practices indulged in by their people, and have sought to abolish them; in such efforts they have been aided by their missionaries, teachers, and agents, but this has been found impossible even with the aid thus given. The Government [Domination System] furnishes the teachers, and the charitable people, contribute to the support of the missionaries, and much time, labor, and money is yearly expended for their elevation [reduction], and yet a few [free and independent minded] non-progressive, degraded Indians are allowed to exhibit before the young and susceptible children all the debauchery, diabolism, and savagery of the worst state of the Indian race. Every man familiar with Indian life will bear witness to the pernicious influence of these savage [ceremonial] rites and heathenish [non-Christian] customs.[39]

The Code and Court of Indian Offenses resulted in Native ceremonial leaders and traditional healers being jailed for performing ceremonies and for engaging in traditional

[37] Public Law No. 95-341, 92 Stat. 469 (August 11, 1978).
[38] Lyng
[39] U.S. *Documents of United States Indian Policy*, ed., Francis Paul Prucha, 1990, p. 160.

spiritual practices. Non-Christian Native spirituality had to go "underground" to be performed in secret, hidden from Bureau of Indian Affairs officials. This is a clear example of the animosity and hatred that Christian European society expressed toward traditional ways, deeming them "heathen," "pagan," "infidel," and "savage."

Christian preachers and missionaries helped to define the "Indian Offenses," by targeting ceremonies and ceremonial items. Traditional items were burned or otherwise destroyed. The people were prevented from interacting freely with their ceremonially ways in their Sacred and Significant Places. This was all a direct consequence of the Christian European tradition of claiming a right of domination against Native peoples and enforcing that claim by destroying teachings, languages, and lines of communication that held the free existence of our nations and peoples together.

Despite this clear record of Christian bigotry toward original nation spirituality, to my knowledge legal briefs involving what are called American Indian Religious Freedom cases have never quoted Secretary Teller's language or cited the American society's record of hatred for, and destructive behavior toward, non-Christian Native ceremonial ways. Nor have attorneys for Native people in religious freedom cases focused on the U.S. government's claim of *a right of domination* against our original nations and peoples.

The U.S. Government's Reasoning Process Regarding Our Sacred and Ceremonial Places

Let us now combine the above pieces of information and see what sort of holistic picture is revealed with regard to our Sacred and Significant places. The claim by "Christian people" that they have an exclusive right of domination (otherwise known as "property"), based on Genesis 1:28 in the Bible, as acknowledged by William Blackstone, has resulted in a specific form of argumentation used by the United States government against our original nations and peoples, and against our Sacred and significant places. On that biblical basis, Christian European intellectuals regarded our non-Christian Native ancestors as "nullus" (non-existent) with regard to allocation of rights of property, as explained by Wheaton, Hinsdale, Lieber, and Story.

In the 1823 *Johnson* v. *McIntosh* ruling, for example, Chief Justice John Marshall acknowledged what is aptly called the Doctrine of Infidel Non-Existence when he said the following, "So far as respected the authority of the [British] crown, *no distinction was taken between vacant lands and lands occupied by the Indians*."[40] Here, Marshall for the U.S. Supreme Court has pinpointed a powerful piece of the puzzle: The intellectuals of Christendom were able to *mentally conceive of* lands where our Native peoples were living as vacant lands by *mentally negating* our ancestors who were living there. In his book *The International Law of John Marshall*, Benjamin Munn Ziegler says, "the term 'vacant lands' refers of course to lands in

[40] 21 U.S. (8 Wheat.) (1823) at 596.

America which when discovered were occupied by Indians but unoccupied by *Christians*."[41] (emphasis added)

The most immediate conclusion for us to reach is that Christendom considered the lands they had newly identified as being "vacant" because no Christians were living there. But specific language from the Vatican papal bulls provides us with an additional insight: those lands were considered vacant because no right of Christian domination had ever been asserted there. This insight follows from language found in the papal bull *Dudum siquidem*, issued by Pope Alexander VI on September 26, 1493.[42] The opening of the English translation reads:

> A short while ago of our own free will, out of our own certain knowledge, and the fullness of our apostolic power, we gave, transferred, and assigned forever to you and your heirs and successors, the kings of Castile and Leon, all islands and lands, discovered and to be discovered, toward the west and south, that were not under the temporal rule of any Christian powers.[43]

In keeping with the Latin wording of *Dudum siquidem*, however, there is a less pleasant way of translating "not under the temporal rule of any Christian powers," which in the original Latin refers to "insulas" (islands) and "terra firmas" (firm lands) "*que sub actuali dominio temporali aliqurorum dominorum Christianorum constitute non essen*t," or, in English: islands and firm lands "that are not under the actual temporal domination ("dominio") of any Christian dominators" ("dominorum Christianorum").[44] No right of Christian domination ("property") had ever been claimed over and in relation to that non-Christian place where "barbarous" peoples were living. This is the reasoning process that the United States government is now applying to San Francisco Peaks, and other Sacred and Significant Places.

That Was Then, and Its Still Operational Now

There are those who might respond "Well, that was then this is now," as if to say that the claim of a right of domination is no longer being used by the United States against our original nations. In addition to the fact that the claim of domination in the *Johnson* v. *McIntosh* ruling is still regarded as "good law" by the United States, we are also able to point to decisions such as *City of Sherrill* v. *Oneida Indian Nation*[45] from 2005. In that decision, Justice Ruth Bader Ginsberg[46] placed "the doctrine of discovery" in the first footnote of her ruling against the

[41] Benjamin Munn Ziegler, *The International Law of John Marshall*, p. 45-46 (1939).
[42] European Treaties Bearing on the History of the United States and Its Dependencies to 1648, Vol. I, ed., Francis Gardner Davenport, pp. 79-83.
[43] Ibid., p. 82.
[44] Ibid.
[45] *City of Sherrill* v. *Oneida Indian Nation of N.Y.* 544 U.S. 197 (2005).
[46] Many people find it surprising that the person who was regarded as one of the most "liberal" justices on the Supreme Court would use the "doctrine of discovery" against the Oneida Nation.

Oneida Nation.[47] In that footnote, Ginsberg quotes from *Oneida Indian Nation of N.Y.* v. *County of Oneida* 414: U.S. 661, 667 (1974): "It very early became accepted doctrine in this Court that, although fee title to the lands occupied by Indians when the colonists arrived became vested in the sovereign -- first the discovering European nation and later the original States and the United States -- a right of occupancy in the Indian tribes was nevertheless recognized. That right, sometimes called Indian title and good against all but the sovereign, could be terminated only by sovereign act."[48]

Later in that 1974 ruling, Justice White for a unanimous Court cited to *United States* v. *Santa Fe Railroad* (1941),[49] which acknowledges *Johnson* v. *McIntosh* as the starting point of the framework of an "Indian right of occupancy":

> "'Unquestionably it has been the policy of the Federal Government from the beginning to respect the Indian right of occupancy, which could only be interfered with or determined by the United States.' *Cramer v. United States,* 261 U. S. 219, 261 U. S. 227. This policy was first recognized in *Johnson v. M'Intosh,* 8 Wheat. 543, and has been repeatedly reaffirmed. *Worcester v. Georgia,* 6 Pet. 515; *Mitchel v. United States,* 9 Pet. 711; *Chouteau v. Molony,* 16 How. 203; *Holden v. Joy,* 17 Wall. 211; *Buttz v. Northern Pacific Railroad\[,* 119 U. S. 55]; *United States v. Shoshone Tribe,* 304 U. S. 111. As stated in *Mitchel v. United States, supra,* p. 34 U. S. 746, Indian 'right of occupancy is considered as sacred as the fee simple of the whites.'"[50]

Use of the word "whites" is a reference to *individuals* termed "white," which means that the so-called right of occupancy is deemed by the Court to be "as sacred as" *but not the same as* the fee simple property right of individual "white people."

McGirt v. Oklahoma (2020)

Additionally, in *McGirt* v. *Oklahoma*, Justice Neil Gorsuch references a property law treatise from the 1860's in the decision he wrote just three years ago. In the 5-4 decision, Justice Gorsuch states: "The federal government issued its own patents to many [non-Native] homesteaders throughout the West. These [federal] patents transferred legal title and are the basis for much of the private land ownership in a number of States today. But no one thinks any of this diminished the Unites States's claim to sovereignty over land. To accomplish that would require an act of cession, the transfer of a sovereign claim from one nation to another." Here

[47] Footnote 1 in *City of Sherrill* begins: "Under the 'doctrine of discovery,' *County of Oneida* v. *Oneida Indian Nation of N. Y.,* 470 U. S. 226, 234 (1985) (Oneida II) 'fee title to the lands occupied by Indians when the colonists arrived became vested in the sovereign—first the discovering European nation and later the original States and the United States, . . .'"

[48] *Oneida Indian Nation of N.Y.* v. *Country of Oneida* 414 U.S. 661, 667 (1974) at 667.

[49] United States v. Santa Fe Railroad

[50] Ibid., at 668-669.

he references "E. Washburn, *American Law of Real Property* *521-*524." Legal scholar Peter d'Errico found the Washburn treatise cited by Gorsuch, and the cited wording reads as follows:

> Nor has any title, beyond the right of occupation, been recognized in the native tribes by any of the European governments or their successors, the Colonies, the States, or the United States. The law in this respect seems to have been uniform with *all the Christian nations* that planted colonies here. They recognized no seisen [property ownership] of lands on the part of the Indian dwellers upon it…The sovereignty [domination] and general property [domination] of the soil . . . were claimed . . . by right of discovery.[51]

And d'Errico observes: "Washburn footnoted this sentence with a citation of *Johnson* v. *McIntosh*."[52] What is the significance of the most pro-Indigenous Justice on the U.S. Supreme Court harkening back to the "right of discovery" and to the patterns of domination expressed in the *Johnson* ruling? Rather than being up front and candid about the claim of a right of domination by the Christian nations of Europe, Gorsuch used a footnote to hide the fact that he was reaffirming the claim of a right of Christian domination which is at the root of the anti-Indian ideas and arguments called "federal Indian law."

A View-from-the-Ship Parsing of Johnson v. McIntosh

Let's now take a closer look at what Justice Gorsuch, on behalf of a majority of the Court, reaffirmed just three years ago by citing a passage from a mid-nineteenth century property law treatise which cites to the *Johnson* ruling. Because the view-from-the-ship-perspective treated the "Indians" as null and void ("nullus") with regard to "property" (the claim of a right of domination), the Christian Europeans would not allow the Native peoples to be, as Justice Joseph Story put it, deemed (judged) as possessing "the prerogatives belonging to absolute, sovereign, and independent nations." This wording was an effort on his part to explain away the original free existence of our nations and peoples.

In the *Johnson* ruling, Marshall explained how the Supreme Court had reached its decision. He said the U.S. government, including the Court, acknowledged that what he termed "civilized nations" possessed "perfect independence."[53] He said that acknowledgment was based on "principles of abstract justice," principles which "are admitted to regulate in a great degree the rights of civilized nations."[54] However, when it came to thinking about what he later termed "natives," who were defined as "heathens"[55] (non-Christians) Marshall cryptically said the Supreme Court had quite consciously not relied upon principles of "abstract justice," but

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[51] Emory Washburn, *American Law of Real Property* (Boston: Little, Brown, 1864), Book III, Ch. III, Title by Grant, § 1 Public Grant.
[52] Personal Correspondence, RedThought.org Presentation on *McGirt* v. *Oklahoma*, with Jode Goudy (Yakama Nation), Steven Newcomb (Shawnee/Lenape), and Peter d'Errico, professor emeritus at UMass Amherst.
[53] *Johnson* v. *McIntosh,* at 572.
[54] Ibid.
[55] Ibid., at 577.

"principles" other than those of "justice," "which our own government has adopted in" this "particular case and given us [the Court] as the rule for our decision."[56]

This was Marshall's acknowledgment that the Court and the rest of the government was quite conscious of the fact that the *Johnson* case was not being decided on the basis of principles of justice. Although people tend to be quick to claim that "conquest" is the basis of the *Johnson* ruling, Chief Justice Marshall later said that the "law which regulates and ought to regulate in general the relations between the conqueror and the conquered was incapable of application to" Native nations and peoples.[57] In other words, the Court did not apply the standard rules of conquest to the Indians. This is why Marshall went on to say that "[t]he resort to some *new and different rule* better adapted to the actual state of things was unavoidable…"[58] [emphasis added]

The phrase "resort to" means "to do something you do not want to do but you do it anyway because you cannot find any other means of achieving an objective." Marshall is saying that the United States had come up with a "new and different rule" that the Supreme Court was expressing in the *Johnson* ruling. He went on to say, "Every rule which *can be suggested* [by this Court] will be found to be attended with great difficulty"[59] because any such rule was, by the Court's admission, being based on principles of injustice directed at "heathen" nations and peoples.

Marshall expressed as follows the new rule of the United States: "However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it [the asserted principle]; if the property [domination] of the great mass of the community originates in it, it [the principle] becomes the law of the land and cannot be questioned."[60]

In other words, the United States government would *pretend* to "convert" the Christian "discovery" of the geographical location of a country already inhabited by non-Christians, into a position of domination ("conquest") toward that country, and toward the non-Christian nations and peoples living there. On the basis of the Supreme Court's "new and different" rule of "*pretended conquest*," a rule arrived at by applying to the case principles other than "abstract justice," the "Indians" would be regarded by the U.S. government as subject to U.S. domination ("ultimate dominion"). Once this way of thinking was fully adopted by the United States government, it was treated as "the law of the land," and as a U.S. domination/Native subordination reasoning process, fully accepted by the US government which Marshall claimed

[56] Ibid., at 572.
[57] Ibid., at 591.
[58] Ibid.
[59] Ibid.
[60] Ibid.

"cannot be questioned." That reasoning process is still being deployed today by the U.S. government against the Native nations.

The Accompanying Principle: An Indian Title of Occupancy

Marshall went on to say in the *Johnson* ruling, "So, too, with respect to the concomitant principle *that the Indian inhabitants are to be considered [thought of] merely as occupants*, to be protected, indeed, while in peace, in the possession of their lands, but to be deemed [judged] incapable of transferring the absolute title to others."[61] (emphasis added) That which is concomitant is something that "naturally accompanies or follows something else." Defining the Indians as being mere "occupants" of the land naturally followed from the Supreme Court's "extravagant pretension," or pretense, of *mentally* treating the idea of "discovery" *as if* it were literally the same as a physical "conquest."

The word "pretense" is derived from the Latin verb *praetendere*, and the past participle *praetensus,* both meaning, "to assume" without a supportive basis, "a claim made or implied," especially "one not supported by fact." A "pretension," the word Marshall used in the *Johnson* ruling, means, "an allegation of doubtful value: [a] PRETEXT." Marshall's use of "pretension" amounts to him "pretending something is true even though it isn't." This matches precisely the idea of a "model or metaphor," the use of which "involves the pretense that something is the case when it is not."

With regard to metaphor, Colin Turbayne states in *The Myth of Metaphor*: "Just as often, however, the pretense has been dropped, either by the pretenders or by their followers."[62] "There is a difference between using a metaphor and taking it literally, between using a model and mistaking it for the thing modeled. The one is to *make believe* that something is the case; the other is to believe that it *is* [the case]."[63] (emphasis added) What began as an extravagant pretense on the part of the Supreme Court eventually began to be treated or regarded as if it was a physical conquest of "the Indians."

What U.S. government officials have habitually called "conquest," and "the Indian title of occupancy," are two ideas that are the product or result of a body of *metaphorical pretensions* that those same government officials have mastered. They are words and ideas that are mentally and verbally *projected onto* our original nations and peoples, and which then end up being treated as if they are a fixed human reality.

This principle is cited in Felix Cohen's *Handbook of Federal Indian Law* "Conquest renders the tribe subject to the legislative authority of the United States."[64] This, however, is

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[61] Ibid., 591.

[62] Colin Turbayne, The Myth of Metaphor (Columbia, South Carolina: University of South Carolina Press), 1971, p. 3.

[63] Ibid.

[64] *United States* v. *Consolidated Indian Cases*, 389 F. Supp. 235 (D. Neb 1975) January 17 1975, at 237. Quoted from Cohen's *Handbook* by Judge Warren Urbom: "The whole course of judicial decision on the nature of Indian tribal

not referring to an actual physical "conquest." It is a figurative, poetic, and imaginative expression. It is a doubtful allegation made by the United States. It is a pretext that U.S. government officials have been using against our Native nations and peoples for two centuries by means of the *Johnson* ruling, and that U.S. officials continue to use to this day in relation to our Sacred and Significant Places, such as San Francisco Peaks and the Black Hills of the *Oceti Sakowin*.

That is the fictional premise that U.S. officials, such as Justice Gorsuch and the rest of the U.S. Supreme Court use as the starting point for an extended argument about "the concomitant principle" Marshall mentioned, meaning, the *mentally fabricated* idea of an "Indian title of occupancy," contrasted with the U.S. government's presumed right of Christian domination ("property"). This framing has been accepted as an unquestionable given by practitioners of federal anti-Indian law. And this unquestioned acceptance has prevented these mental fabrications from being fundamentally challenged by pointing out the fact that they are merely *mental and metaphorical constructions created by intellectuals* in the employ of the political experiment called the United States of America.

The Supreme Court's Use of the Doctrine of Christian Domination in Lyng

In *Lyng* v. *Northwest Indian Cemetery Protective Association*,[65] for example, we may assume that the attorneys for the Native plaintiffs never mentioned the U.S. government's *claim of a right of domination* over the Sacred and Significant Area of the Native peoples. But a close reading of Justice Sandra Day O'Conner's 1988 decision in *Lyng* shows how the Supreme Court relied on the U.S. government's claim of a right of domination (termed "property") over the traditional territory of the Native people, a location called the Chimney Rock area of a place now designated the Six Rivers National Forest, adjacent to the Hoopa Valley Indian Reservation.

In her majority ruling in *Lyng*, Justice O'Conner also quotes *Sherbert* v. *Verner*: "For the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government."[66] O'Conner further states: "Even if we assume that we should accept the Ninth Circuit's prediction, according to which the G-O road will 'virtually destroy the . . . Indians' ability to practice their religion,' 795 F.2d at 693 (opinion below), the Constitution simply does not provide a principle that could justify upholding respondents' legal claims. However much we might wish that it were otherwise, [the] government [the domination] simply could not operate if it were required to satisfy every citizen's religious needs and desires."[67] Justice O'Conner could have finished that last sentence

powers is marked by adherence to three fundamental principles: (1) An Indian tribe possesses, in the first instance, all the powers of any sovereign state. (2) Conquest renders the tribe subject to the legislative power of the United States . . . "

[65] *Sherbert* v. *Verner* 485 U.S. 439 (1988).

[66] Ibid., at 451.

[67] Ibid., at 451-452.

with: “such as the Native peoples’ need and their desire for the government to not engage in activities that will virtually destroy their religion.”

Toward the end of her decision, O’Conner said, “Whatever right the Indians may have to *the use* of the area, however, they and their rights do not divest the Government of its *right* to use what is, after all, *its land*”[68] (emphasis added). Here O’Conner is asserting a U.S. right of domination over the area in question. The word “its” is a possessive pronoun and is defined as “of or belonging to it,” whatever “it” might be. The word “belong” in this context means “to be the possession or rightful property of,” and, as we have repeatedly stated in this essay, “property” is a right of domination.

In other words, the United States has created *an ongoing conceptual system of domination* which accords to the Native peoples merely the “use” of the lands within their traditional homeland over which the U.S. government now claims a right of domination. But within that U.S. conceptual system, the first “Christian people” to have arrived to a non-Christian geographical location are portrayed within the U.S. system of ideas as being in “possession” of the land, and thus “vested” with the “property” right of domination. The idea-system of the United States does not acknowledge the original Native peoples as being vested with the right of domination because, within the U.S. conceptual system, that status is reserved for the first Christian monarch to have identified that particular location of non-Christian lands, and it is accorded to the political successors of that first Christian monarch, such as the individual “States” and the United States.

Given that orientation, Justice O’Conner was stating that “the [U.S.] Government can do what it wants with *its property*,” i.e., it’s right of domination, over that entire area in Northern California, including over an area where the original nations have never ceded or relinquished their lands by treaty. In other words, by means of the majority decision in *Lyng*, the Supreme Court asserted a *right of domination* over the Chimney Rock area, regardless of how many thousands of years the Native peoples had been living in cultural and spiritual relationship with that place. This matches the situation at San Francisco Peaks for the traditional spiritual people of various original nations.

From the viewpoint of those employed as intellectuals by the United States government, such as members of the U.S. Supreme Court, every American Indian Religious Freedom case is dealt with by the U.S. government as a *property law case*, in which the U.S. claim of a right of domination (“property”) is deemed to be potentially threatened by the spiritual priorities of the Native peoples in relation to the land.

In *Lyng*, Justice O’Conner acknowledged for the majority what it saw as a specific threat to the United States: the Native peoples might place lands deemed by the federal government to be “federal lands” in a form of “religious servitude” and “de facto beneficial ownership of . . .

[68] Ibid., 453.

public property [domination]."[69] ("Respondents attempt to stress the limits of the religious servitude that they are now seeking to impose on the Chimney Rock area of the Six Rivers National Forest").[70] As O'Conner states:

> No disrespect for these practices [of the Native peoples] is implied when one notes that such beliefs could easily require *de facto* beneficial ownership of some rather spacious tracts of public property. Even without anticipating future cases, the diminution of the Government's property rights, and the concomitant subsidy of the Indian religion, would in this case be far from trivial: the District Court's order permanently forbade commercial timber harvesting, or the construction of a two-lane road, anywhere within an area covering a full 27 sections (*i.e.* more than 17,000 acres) of public land.[71]

A view-from-the-shore assessment of the above language reveals that the majority would not decide in favor of the original nations of that Northern California region because a win for the original peoples might effectively challenge the federal government's *presumed right of domination* over the traditional lands of the nations and peoples of that part of the continent. Behind these concerns was the covert and ancient assumption, examined above, that the U.S. government has a right of domination over the lands of Native nations on the basis of Christendom's ancient distinction between Christians and non-Christian "heathens," "pagans," and "infidels," which, by means of the *Johnson* precedent, the Supreme Court relies upon as a basis for U.S. property law.

Justice Brennan's Dissenting Opinion in *Lyng* v. *Northwest Cemetery Protective Association*

In his dissent in *Lyng*, Justice Brennan (joined by Marshall and Blackmun), says that the Court majority "embraces the Government's contention that its prerogative as *landowner* should always take precedence over a claim that a particular use of federal *property* infringes religious practices."[72] (emphasis added) Brennan further notes that, "as the lower courts found, the proposed logging and construction activities" would "virtually destroy respondents' religion, and will therefore necessarily force them into abandoning those practices altogether."[73]

When written with a view-from-the-shore perspective, that sentence is accurately restated as follows: "The U.S. government's claim of a right of domination ["property"], will therefore necessarily force them [the Native peoples] into abandoning those practices altogether." Justice Brennan continues:

> Here the threat posed by the desecration of sacred lands that are indisputably essential to respondents' religious practices is both more direct and more substantial than that raised by a compulsory school law that simply exposed Amish children to an alien value

[69] Ibid., at 452.
[70] Ibid., at 453.
[71] Ibid.
[72] Ibid., at 465.
[73] Ibid., at 467.

> system. And of course respondents here do not even have the option, however unattractive it might be, of migrating to more hospitable locales; the site-specific nature of their belief system renders it nontransportable. . . .[74]
>
> In the final analysis, the Court's refusal to recognize the constitutional dimension of respondents' injuries stems from its concern that acceptance of respondents' claim could potentially strip the Government of its ability to manage and use vast tracts of federal property [domination]. [citation deleted] In addition, the nature of respondents' site-specific religious practices raises the specter of future suits in which Native Americans seek to exclude all human activity from such areas. *Ibid.* These concededly legitimate concerns lie at the very heart of this case, which represents yet another stress point in *the longstanding conflict between two disparate cultures -- the dominant Western culture, which views land in terms of ownership and use, and that of Native Americans, in which concepts of private property are not only alien, but contrary to a belief system that holds land sacred.*[75] [emphasis added]

When we reword the above sentence with a view-from-the-shore perspective, we see an acknowledgment of ". . .the longstanding conflict between two disparate cultures—the dominating Western culture, which views land in terms of domination ["property"] and use, and that of Native Americans, in which concepts of the domination of the land is not only alien, but contrary to a belief system that holds land sacred." The Brennan dissent continues:

> Rather than address this conflict in any meaningful fashion, however, the Court disclaims all responsibility for balancing these competing and potentially irreconcilable interests, choosing instead to turn this difficult task over to the Federal Legislature. Such an abdication is more than merely indefensible as an institutional matter: by defining respondents' injury as "nonconstitutional," the Court has effectively bestowed on one party to this conflict the unilateral authority to resolve all future disputes in its favor, subject only to the Court's toothless exhortation to be "sensitive" to affected religions. In my view, however, Native Americans deserve -- and the Constitution demands -- more than this.
>
> Today, the Court holds that a federal land use decision that promises to destroy an entire religion does not burden the practice of that faith in a manner recognized by the Free Exercise Clause. . . I find it difficult, however, to imagine conduct more insensitive to religious needs than the Government's determination to build a marginally useful road in the face of uncontradicted evidence that the road will render the practice of respondents' religion impossible. Nor do I believe that respondents will derive any solace from the knowledge that, although the practice of their religion will become "more difficult" as a result of the Government's actions, *they remain free to maintain their religious beliefs*. *Given today's ruling, that freedom amounts to nothing more than*

[74] Ibid., at 468.
[75] Ibid., at 473.

> *the right to believe that their religion will be destroyed*. The safeguarding of such a hollow freedom not only makes a mockery of the "policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the[ir] traditional religions," *ante* at 485 U. S. 454 (quoting AIRFA), it fails utterly to accord with the dictates of the First Amendment. I dissent.[76] [emphasis added]

The U.S. Government's Free Exercise of Domination on the Basis of the Bible

An 1830 U.S. congressional report explains that "Christian and civilized nations" had laid the "foundations of the States which constitute this confederacy."[77] The report said that the nations from Western Europe "were instructed or misled as to the nature of their duties by the precepts and examples contained in the volume [the Bible] which they acknowledged as the basis of their religious rites and creeds."[78] Specifically, to "go forth, to subdue and replenish the earth, were received as divine commands or relied on as plausible pretexts to cover mercenary enterprises by the Governments which gave the authority and the adventurers who first discovered and took possession of the New World."[79]

The U.S. congressional report was referring of course to the "subdue and dominate" language from Genesis 1:28 in the Bible. The report was saying that the biblical language to "go forth" to other parts of the planet and "subdue" (dominate) the earth was either interpreted as a command from "God," or else biblical language was treated by "Governments" and "adventurers" as a basis for identifying geographical places that had been previously unknown to them, which they claimed to take possession of. This explains the basis upon which so-called Christian and civilized nations claimed a right of domination over (the right to subdue) whatever non-Christian lands they were able to identify. The report continues:

> Whether they were right or wrong in their construction [interpretation] of the sacred text [of the Bible], or whether their conduct can in every respect be reconciled with their professed objects or not, it is certain that possession, actual or constructive, of the entire habitable portion of this continent was taken by the nations of Europe, divided out, and held originally by the right of discovery as between themselves and by rights of discovery and conquest [domination] as against the aboriginal inhabitants."[80]

On the basis of the Christian Bible, specifically the passage Genesis 1:28, the U.S. federal government claims what William Blackstone called "the sole despotic dominion" (a property right of domination) over the Sacred and Significant Places of Native Nations and Peoples, including San Francisco Peaks.

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[76] Ibid.
[77] 21St Cong., 1st sess., H.R. Rep. No. 227, Feb. 24, 1830.
[78] Ibid.
[79] Ibid.
[80] Ibid.

The Ninth Circuit Court of Apeals applied this way of thinking in *Navajo Nation* v. *USFS*, when the Court said: "And Congress specifically noted that Roy and Lyng would apply in cases such as this one: '[P]re-Smith case law makes it clear that strict scrutiny does not apply to government actions involving only management of internal Government affairs or the use of the Government's own property or resources." Applying an apostrophe 's' to the word "Government," and the phrase "own property," are two means by which the Court maintains the framework of domination.

The complete phrase "*the Government's own property*" (emphasis added), demonstrates the U.S. Government's claim of a right of domination over the Sacred and Significant Places of Original Nations, such as San Francisco Peaks. Those were the places with which the Original Nations and Peoples of the continent continue to have a cultural and spiritual relationship. And that relationship extends back thousands of years prior to when the political system called the United States came into existence.

The claim of "property" that the United States government is presently asserting is traced back to Christendom's claim of a right of domination against all non-Christians. This explains why some framework such as the American Indian Religious Freedom Act was needed in the first place, to address the fact that a Christian/non-Christian bigotry had been applied to our original nations and peoples for generations. It is this Christian religious framework of domination that is still being used by the United States government at San Francisco Peaks against non-Christian spiritual and ceremonial practitioners in the name of the "property" (domination) rights of the United States.

Why Religious Freedom Arguments Are Not Designed to Defeat The U.S. Government's Claim Of A Right of Domination Against Original Nations and Peoples

We need to make clear and unambiguous our steadfast opposition to the U.S. government's claim of a right of domination over our lives as Native peoples. Our *original free existence* is and always will be the default position for our nations and peoples. We have the fundamental *right* to live free from domination. And, we now have the ability to clearly identify the system of domination being used against us.

The argument presented here is quite different than insisting that the human rights of *dominated* ("Indigenous") nations and peoples must be upheld. There is no international human rights framework that accords people the right to live free from the domination of "the State," which is considered a given, and not open to challenge.

When we do not openly name and oppose the domination system of the United States, it's *as if* we as Native people are accepting (which we are not) the idea that we, by our very nature, subject to a dominating political power. Because the United States was founded on the basis of a system of domination, it stands to reason that it's the very nature of the United States to dominate our nations and peoples. We are able to identify and oppose the system of domination by using the specific words "the claim of a right of domination."

The argument that the First Amendment of the U.S. Constitution accords traditional healers and spiritual leaders the right to pray and to conduct ceremonies is not an effective means of opposing the U.S. government's claim of a right of domination ("property"). Imagine a scenario in which federal government officials have stated to traditional spiritual people: "The federal government of the United States has the right to use its system of domination ("property") against you." Meekly responding "Well, we have the right to pray and conduct our ceremonies" based on the First Amendment of the U.S. Constitution does not in any way challenge the U.S. government's claimed right of domination over our lands and our lives as original nations.

A Three-Pronged Counter Argument to the U.S. Claim of a Right of Domination Against Our Original Nations and Peoples

There is, however, a way of responding that has yet to be advanced: 1) Our original nations are first in time, and therefore first in right. This is a response to the "first invaders in time, first invaders in right" argument; 2) Void when initiated, you cannot grant what you don't possess. This means the Vatican papal bulls and royal charters of England were null and void from the moment they were issued.

Why? For the simple reason that the Roman Catholic popes and the kings of England had no *rightful jurisdiction* beyond the immediate boundaries of their home country. This is illustrated by King Henry VII Instruction to the Cabots to "geting unto us" the "jurisdiction" ("*jurisdictionem*" in Latin) and "domination title" ("*titulum dominium*" in Latin), wording which contains the king's admission that he had neither of those two things at the time he issued his commission to John Cabot and his sons.

Christian popes and other monarchs certainly had no rightful jurisdiction thousands of nautical miles across the Atlantic Ocean. They could not rightfully send their own home-jurisdiction by proxy across an entire ocean, and rightfully claim a right of domination over the lands of the free and independent nations living in distant places.

And, lastly, 3) "Anything wrong from the beginning can never be made right, because it was wrong, and thus invalid, from its inception," as expressed by Western Shoshone Elder Glenn Wasson. Their claim of a right of domination will never become valid, because their claim was invalid from the outset. Threat, duress, and coercion do not give rise to or create any *valid* authority over those who have been wrongfully subjected to the claim of a right of domination.

Conclusion

These days, it is typical to hear the United States of America being portrayed as a "democracy" even though they (the "States") have operated for more than two centuries as a federal system of domination in relation to the original nations and peoples of this continent. This is especially true when it comes to our Sacred and Significant Places. Federal employees of the U.S. government, and even tribal government officials, are not likely to have known before

now the information about domination found in this essay. No one, however, who ends up reading this essay, will be able to feign ignorance about the U.S. claim of a right of domination.

As a model of a way forward for Traditional Healers and Ceremonial Leaders, a powerful challenge to the United States was presented by the Yakama Nation in the amicus legal brief that the nation submitted to the U.S. Supreme Court in the Cougar Den case in 2018. The Yakama Nation, guided by the leadership of Chairman JoDe Goudy, and influenced by the framework of domination found in this essay, decided upon that course of action. It marks the first time that an Original Nation of the continent has directly challenged the U.S. government's claim of a right of discovery and domination.

Anyone who might wish to make a counterargument to oppose what we have presented here, is going to have a difficult time crafting a meaningful and effective response to rebut the information we have provided. After all, it would be senseless for anyone to claim that the language of domination found in the Vatican papal bulls, or in the *Johnson* v. *McIntosh* ruling, and elsewhere does not actually exist. It does exist. Authoritative sources spanning centuries contain this information, even those documents which illustrate the organic laws of the United States.

Our responsibility is to have dialogue with U.S. government officials, including, when possible, members of the U.S. Supreme Court,[81] and hold them accountable to end their nefarious claim of a right of Christian domination over our spiritual people, over our Sacred and Significant Places, and over our Original Nations and Peoples and our Homelands. We need to transition to decision-making based on the Natural Laws of Creation that sustain all Life, which are the basis for our ceremonies. Those Laws of Creation guided our Ancestors and Spiritual Ways of Life before and after the invasive arrival of the ships of Christendom.

[81] https://ictnews.org/archive/what-justice-scalia-said-he-didnt-know-about-us-indian-law