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PREVIEW

INDIGENOUS PEOPLE, LAND AND SPACE: THE EFFECTS OF LAW  
ON SACRED PLACES, THE BEAR BUTTE EXAMPLE

by

Kari Forbes-Boyte

A DISSERTATION

Presented to the Faculty of  
The Graduate College at the University of Nebraska  
in Partial Fulfillment of Requirements  
For the Doctorate of Philosophy

Major: Geography

Under the Supervision of Professor David Wishart

Lincoln, Nebraska

April, 1997

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DISSERTATION TITLE

Indigenous People, Land and Space: The Effects of Law on

Sacred Places, the Bear Butte Example

BY

Kari Forbes-Boyte

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GRADUATE COLLEGE  
UNIVERSITY OF NEBRASKA

INDIGENOUS PEOPLE, LAND AND SPACE: THE EFFECTS OF LAW ON  
SACRED PLACES, THE BEAR BUTTE EXAMPLE

Kari Forbes-Boyte, Ph.D.

University of Nebraska, 1996

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Conflicts over access to and utilization of Native American sacred sites is an ongoing dilemma. Although the American Indian Religious Freedom Act (AIRFA) was passed by the United States Congress in 1978 in recognition of Indian rights to religious freedom, this Act has done little to actually protect sacred sites. AIRFA can be described as a cooptation technique. Cooptation occurs in a power system when the power holder intentionally extends some form of political participation to those considered a threat to the existing state. But, this political participation never leads to the empowering of the people considered threatening. In fact, Indian oppression continues today through due process and federal and state statutes.

This study addresses the "politicized" nature of AIRFA. Bear Butte, a Lakota holy ground was chosen to illustrate AIRFA as a cooptation tool. Bear Butte is at the forefront of contested realities of space between the Lakota Sioux and South Dakota Game, Fish and Parks. The Lakota contend that they have legal sovereign rights to the Butte and feel that any activity, other than religious, desecrates the site. The battle over control of this sacred place has occurred at the judicial level, with the case *Fools Crow vs. Gullett*. It

continues, after Lakota lost their case, at the administrative level, with the Lakota questioning multiple-use policies that equate tourism and the construction of a water pipeline with their religious freedom.

Through a critique of litigation and mitigation strategies surrounding Bear Butte, this study demonstrates that society and society's laws are not consensual and justice is not always the end result. The study concludes that without adequate Congressional, judicial, and administrative protection, Indian people will continue to be victims of cultural genocide and remain a marginalized minority within the United States.

## Acknowledgements

This dissertation would have been a more formidable task if not for the help of numerous individuals.

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I am grateful to certain talented people for their contribution to this dissertation, namely Scott and Amy Richert for the beautiful maps they produced. I also would like to thank the Chadron State students who worked with me



either as research assistants or as interns on this project. Thanks to Jamie Bell, Christine Maloney, and June Dempsey for helping with the interview process. I am especially grateful to my research assistants, Jolene Montileux and Brian Swallow who were willing to introduce me to their culture and their families. A special thanks goes to research assistant Gale Streff who amiably chased down materials at various law libraries and helped produce the diagrams.

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On a personal note, I would like to thank my family. Thanks Nicole, Taylor, Tristen, and Maisa for your support throughout my graduate schooling and thanks for being understanding when "Mom was busy." A heartfelt thanks to my husband, Steve, for his continued love and support and his willingness to leave his California home and accompany me to the Great Plains. Also, thanks for tirelessly reading and re-reading the drafts and for listening to endless dialogues about the Lakota and Bear Butte.

Last, but certainly not least, I would like to thank the Lakota people who spent time with me and shared their concerns and beliefs about Bear Butte. This dissertation would have been impossible without their help and encouragement. I would like to acknowledge each by name, but will refrain from doing so to protect their anonymity. I hope that I was able to

capture their views regarding this sacred place. I dedicate this dissertation to them in hopes that it might prove useful in their struggle to attain what is rightfully theirs.

PREVIEW

## Table of Contents

Chapter One: Introduction. . . . .	1
Chapter Two: A Definition of Sacred Space. . . . .	35
Chapter Three: The Legal Context. . . . .	59
Chapter Four: Traditional Lakota Perceptions of Bear Butte. . . . .	90
Chapter Five: Litigation and <i>Fools Crow v. Gullett</i> . . . .	118
Chapter Six: Current Administrative Strategies and Cultural Conflicts . . . . .	162
Chapter Seven: Strategies for the Protection of Sacred Places . . . . .	208
References Cited . . . . .	232

PREVIEW

## Chapter One: Introduction

Conflicts over access to, and utilization of, indigenous sacred sites is an emerging global problem. The issue of how indigenous peoples' sacred sites can be protected when they are increasingly subjected to other uses by dominant societies is one of paramount concern to cultures around the world. Indigenous people throughout the world are asking for their rights to be heard and addressed, including within the United States.

Historically, in the United States, Native American religions have been suppressed. The American Indian Religious Freedom Act (AIRFA) was passed by Congress in 1978 in recognition of this repression. AIRFA, however, is nothing more than a policy statement; as pronounced by Congressman Udall, "AIRFA has no teeth in it", and is, therefore, unenforceable (Moore 1991). Thus, although AIRFA was established to "protect and preserve for American Indians their inherent right of freedom to believe, express and exercise their traditional religions," it contains no measures to protect these beliefs, and if a person is caught infringing upon the religious rights of Native Americans that individual (or organization) cannot be prosecuted for wrongful actions. In effect, the law is a mere cooptation tool used to further control and subjugate the indigenous population of the United

States.<sup>1</sup>

One area addressed by AIRFA is Native American access to sacred sites. AIRFA has been notably unsuccessful in protecting sacred sites in the court system; all of the cases brought forth utilizing AIRFA have been lost (Michaelson 1983). One of the more significant cases was *Frank Fools Crow v. Gullet* (*Fools Crow v. Gullet*, 541. Supp. 785 [D.S.D., 1982]) in which the Lakota and Cheyenne sought a declaration of their right to unrestricted and uninterrupted religious use of Bear Butte. (See Figure 1). In addition, they sought an injunction against all construction projects that were occurring at the site which were altering Bear Butte's natural topography. The primary issue sought by the court was one of centrality and indispensability. This means the court demanded that the Indians prove Bear Butte to be both central and indispensable to their religion; that without the site, their religion would die.

According to court documents, the judge determined that the Cheyenne and Lakota did not demonstrate centrality. Thus,

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<sup>1</sup> Cooptation, generically speaking refers to the disempowerment of a threat to a power holder. It occurs in a system of power when the power holder intentionally extends some form of political participation to those considered a threat, with the hope that this political offering will neutralize the threat. The primary tenet in cooptation is the idea of threat; cooptation does not occur unless the actors brought into participation represent a potential or actual source of resistance to society as a whole and are deemed to be "hostile." The United States considers Native Americans a threat because Indians recognize their tribes as sovereign nations. If the tribes are sovereign nations the political unity of the United States is threatened (Lacy 1985).

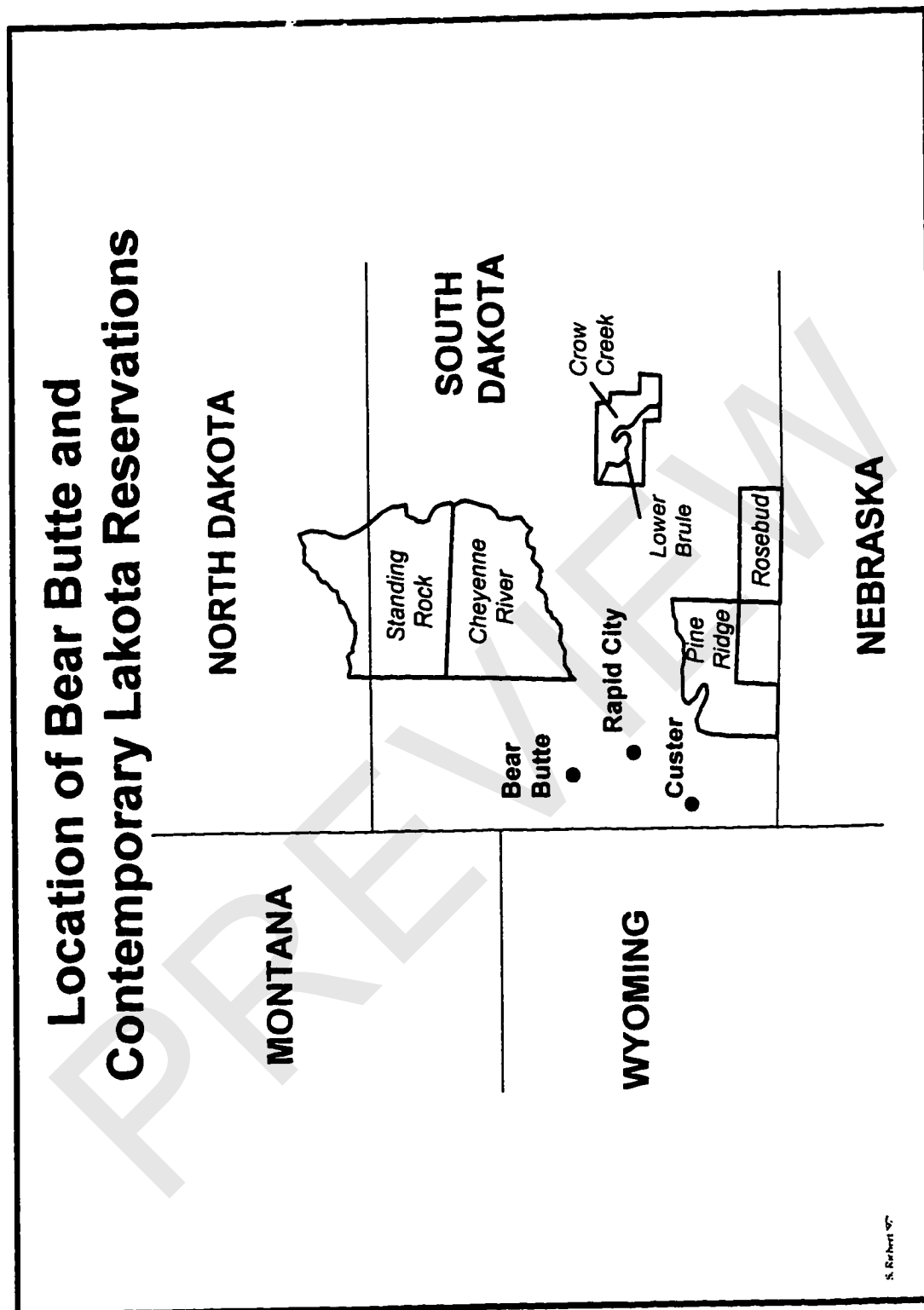


Fig. 1: Location of Bear Butte and Contemporary Lakota Reservations in South Dakota and North Dakota

the court ruled in favor of the state of South Dakota and the Department of Game, Fish and Parks (*Fools Crow vs. Gullet* 541 F. Supp. 785 [D.S.D., 1982]).

The court's decision demonstrated the ineffectiveness of AIRFA as a judicial tool. First, the court determined that AIRFA does not govern infringements by state agencies. Second, the court concluded that AIRFA cannot create a cause of action in federal court for violations of the rights of religious freedom. Third, the court stated that compliance with AIRFA requires nothing more than compliance with the First Amendment, meaning that the government is only required not to "deny total access to religious sites." (Craven 1983, 143).

Subsequently, the case was taken to the United States Court of Appeals, citing both the AIRFA and the Free Exercise clause of the First Amendment as being violated by the South Dakota Game, Fish and Parks Department and the State of South Dakota. The Court of Appeals upheld the decision of the district court (*Fools Crow vs. Gullet* 706 F.2d 856 [8th Circuit, 1983. cert. denied, 52 U.S. L. W. 3370 [U.S., Nov. 8, 1983]]). The plaintiff lawyers, Mario Gonzalez and Russell Barsh, also appealed to the Supreme Court, but the Supreme Court denied them a hearing (Memorandum Decision, Supreme Court Reporter, No. 83-434).

Because Bear Butte could not be protected in the judicial arena, the Lakota must address issues of concern at the local

administrative level, resulting in conflicts between native peoples and land managers on how best to manage the site. Some native people are requesting complete jurisdiction over the site, while land managers are required to consider multiple-use policies.

### **Statement of Problem**

The purpose of this study is to provide a critical legal analysis of AIRFA by addressing its impact (or lack of) at one site, Bear Butte. Central to Western law and legal practice is the idea of "legal closure." This means that law is essentially a closed system, believed to be rational, benign, and necessary (Blomley 1994, 7-9). On the other hand, critical legal theory dismisses these claims and sees law as "simply politics in a different garb" (Hutchinson and Monahan 1984, 206). In other words, law is socially construed and cannot be divorced from its cultural and political relations (Blomley 1994, 11). Critical legal theory, much like critical social theory, is embedded in studies that search for practical understanding of the world as a means of emancipation rather than maintenance of the status quo. While traditional social theories rationalize existing conditions and promote the continuation of established social practices, critical social theory analyzes the results of these conditions, behaviors and social practices with a



discriminating eye (Soja 1989, 14).

Critical legal theory also recognizes that legal space occupies different levels simultaneously, with levels interacting in complex and contradictory ways (Santos 1987, 288; Blomley 1994, 45). Some of these levels are spatial and of interest to the geographer. The object of this study is to analyze Indian religious freedom at three different levels: the local, the national, and the personal levels.

According to the tenets of critical legal scholarship, laws must be understood in their local context--the effects of law on real people in real places is of fundamental interest. One line of inquiry is how law is interpreted by local legal agencies. To understand the impact of laws on sacred places, it is necessary to pick a location to analyze as a case study. The place chosen for this study is Bear Butte. Three criteria were utilized in this decision. First, Bear Butte is recognized as a sacred site by two tribal groups, the Lakota and the Cheyenne. Second, the Lakota and Cheyenne sought protection for this site utilizing AIRFA, but lost their court case. Third, these native groups are requesting that their views be heard regarding the protection and limitation of access to the site.

Understanding sacred sites at a national level is also a fundamental goal of this study. National policies, such as AIRFA, have structured, to some extent, the definition of what is deemed to be a sacred site. In addition, AIRFA has

determined how these sites will be managed. Specific legal cases which have affected the access of Native peoples to their sacred places will be discussed, including the Navajo case regarding Rainbow Bridge (*Badoni v. Higginson*, 455 F. Supp. 641 [D. Utah 1977; *Badoni v. Higginson*, 638 F.2d. 172 [10th Cir. 1980]), the Cherokee sites inundated by water as a result of a dam construction (*Sequoyah v. Tennessee Valley Authority* 480 F. Supp. 608 [E.D. Tenn. 1979]; *Sequoyah v. Tennessee Valley Authority* 620 F.2d 1159 [Sixth Cir. 1980]), and the landmark case which involved certain California Indian tribes' access to a vision quest site (*Northwest Indian Cemetery Protective Association v. Peterson*, 764 F.2d 581 [9th Cir. 1985] and 795 F.2d 688 [9th Cir.]; *Lyng v. Northwest Indian Cemetery Protective Association*, 108 S. Ct. 1319 (1988)).

The personal level encompasses an emic analysis of Lakota ordering of the world. The Lakota perceive Bear Butte to be holy ground, provided by *Wakan Tanka* and a place where specific rituals are performed. Their perception of Bear Butte and the activities that are performed at the locale are significantly different from that of the mainstream population living within the boundaries of the United States. The Lakota view the site through the lenses of a unique world view, with issues of "public" vs. "private" space coming to the forefront. To truly understand the contested realities that emerge at Bear Butte, it is essential to discuss Lakota

perceptions.

The study will answer the following questions. (1) What interconnections lie between laws and the protection of sacred sites at the national and local scale? (2) What impact has AIRFA had on the protection of sacred places on a national scale? (3) What are the native beliefs surrounding Bear Butte? (4) How are the native beliefs, values and customs being compromised by current land management practices, specifically in regards to Bear Butte? and (5) What arbitration, if any, is being undertaken in the management and protection of Bear Butte by native people?

## **Justification of Study**

There are three justifications for undertaking this study. First, it lies at the nexus between geography and legal studies. Second, there has been little research in the area of religious geography which specifically deals with the impact of law on indigenous peoples' religious values. Third, there is an advocacy nature to this study. Native people are tired of having their perceptions and claims ignored in land management strategies. This study is an attempt towards alleviating that.

It is unusual for geographers to analyze laws from a spatial perspective and, particularly, there has been little attempt to write a critical legal geography (Blomley, 1994)

Because law is socially construed it cannot be divorced from its cultural and political relations (Blomley 1994, 11). This is where a legal-geographic perspective is valuable. A critical legal geography opens up discussion regarding, not only the relationship between law and society, but also the relationship between ideology and space.

Geography adds to law by addressing issues surrounding the importance of place and situation on laws and the implementation of such laws. Furthermore, there are conflicting and contradictory ideologies which structure the concept of space in different ways (Delaney 1993, 63). This study will serve as a guide for explaining the effects of policy formation on the spiritual landscape, specifically in regards to Bear Butte.

Although the field of religious geography is vast and encompasses a large variety of subject types and approaches, very few geographers are writing about Native American religions, specifically in regards to sacred places. While anthropologists have extensively studied the realm of religion, they concentrate on rituals and beliefs rather than addressing the significance of place within many of these rituals and beliefs. Therefore, this geographic study is distinct in that the emphasis is on place and how place defines the religion.

This study is applied geography. Because the legislature in South Dakota has demanded that some kind of action be taken

in regards to Bear Butte, native voices must be heard. Some members of both the Lakota and Cheyenne communities continue to request jurisdiction over the site. Even as recently as the summer of 1994, protests were enacted at Bear Butte against management practices. There is an urgency to the Lakota and Cheyenne requests because they feel the site is becoming spiritually desecrated as a result of secular activities.

## Methodology

Two different methodologies were used in this study: narrative synthesis and ethnographic interviewing. Narrative-descriptive analysis, as promoted by Tuan (1991), Entrikin (1991) and, in more recent years, by many other historical and humanistic geographers, was used to describe and explain the relationship between law and sacred places at the national and local levels. The narrative-descriptive approach is particularly beneficial because it places texts within their geographical, political and socio-cultural contexts.

This methodology has become more integrated into geographic studies for a number of reasons. According to Miles and Crush (1993), narrative descriptive analysis can be seen as a corrective measure to the ethnocentrism of many positivist research studies; it allows for multiple voices to be heard. It also helps the researcher achieve a degree of

depth and richness that cannot be obtained in quantitative studies. And, it not only uncovers behavior, but also thoughts and beliefs. In addition, it can illuminate the logic of actions which may seem illogical at first glance.

In the narrative-descriptive approach "theories hover supportively in the background while the complex phenomena themselves occupy front stage," because as Tuan (1991, 686) argues, an over-arching theory often obliterates the subject it is supposed to reveal.

The primary methodological technique for the personal and local scale was ethnographic interviews (with documents backing data gathered whenever possible). The ethnographic interviews were elicited with Lakota community members and land managers involved in the implementation of policies regarding Bear Butte. Fourteen Lakota people and five land managers were interviewed, and a number of follow up phone calls were made from May 1996 to August 1996. Some of the individuals were interviewed more than once. Lakota interviewees varied in age from 16 to 82, with most considered the "traditionalists" or tribal elders. One individual who is considered a holy man was interviewed. Three of the fourteen Lakota individuals were women. Interviewees resided in Chadron, Nebraska, Rapid City, South Dakota, and at the Pine Ridge, Rosebud, and Cheyenne River Reservations.

Some interviews were conducted in the homes of the interviewees, three took place in the researcher's campus

office at Chadron State College, but the majority were conducted at the Cheyenne River Elder Center, in Eagle Butte, South Dakota. Interviews with land managers occurred at Bear Butte State Park or by phone.

The initial step in ethnographic interviewing is to identify informants or interviewees. In this study, anyone eighteen years or older who was interested in being interviewed could be. The initial contact with the Lakota community began with speaking to Lakota students at Chadron State College and contacting the tribal councils, specifically the Cultural Preservation Officers. Names of potential interviewees were solicited. The lists acquired and the names submitted by Lakota students were small because sacred knowledge cannot be shared by everyone within the community.

Then, the "snowballing, non-random" technique was utilized to acquire the names of other people to interview. When individuals were interviewed, they were asked to provide names of any others they knew of who would be interested in discussing Bear Butte. This technique is successful because it allows for the pre-existing network of friendship, kinship and community to guide choices (Miles and Crush 1993).

There were two other benefits to this procedure. First, only people willing to participate did so; thus the researcher was not alienating the cultural group. Second, the project became a group effort allowing for better rapport between the researcher and the informants and linked with the *tiyospe*

system (translated loosely it means extended family) which Lakota still adhere to. One disadvantage of the snowballing technique is that it is time-consuming. Allowances must be made for the traditional communication networks to operate. Therefore, the interviewing stage took much longer than originally anticipated.

Interviewing was structured on the Developmental Research Sequence Method as devised by the anthropologist James Spradley (1979). In this time-proven anthropological research procedure, the researcher employs a research protocol that will be used to guide the interviews, rather than following a strict survey questionnaire format (See Appendix One and Appendix Two). The interviews were based on a semi-structured format.

Although the protocol was utilized, informants were allowed to control the discussion. This method has proven to be beneficial in a number of similar studies because it testifies to the cultural sensitivity of the researcher. To use questionnaires, or any other strict interview schedule, gives the interviewer a superior and controlling role in the discourse which is considered disrespectful of the elders and medicine people who are being interviewed. The interviewer is requesting the "gift of valuable knowledge" and should subsume a more subordinate role within the interview itself (Kelly and Francis 1994, 63).

The limitations of this methodology are that it is