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## PEYOTE CRISIS CONFRONTING MODERN INDIGENOUS PEOPLES: THE DECLINING PEYOTE POPULATION AND A DEMAND FOR CONSERVATION

James D. Muneta

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# PEYOTE CRISIS CONFRONTING MODERN INDIGENOUS PEOPLES: THE DECLINING PEYOTE POPULATION AND A DEMAND FOR CONSERVATION

*By James D. Muneta\**

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\*\*Note: The terms “American Indian” and “Native American” will be used interchangeably throughout this paper to refer to “indigenous Native Americans” or “indigenous American Indians.”

## I. INTRODUCTION

To many indigenous Native Americans, peyote,<sup>1</sup> or *Lophophora williamsii*,<sup>2</sup> is a sacred cactus plant that is consumed as a sacrament within religious tribal ceremonies for worshiping and healing purposes.<sup>3</sup> Peyote is a cactus plant containing the hallucinogenic drug “*mescaline*” in its pure pharmaceutical form.<sup>4</sup> The National Council of Native American Churches (NCNAC) delineated that:

[w]hile peyote plays a central role in the [NAC] service, it is not to induce visions (per the common misunderstanding), but to bring people closer to their creator and to facilitate healing and fellowship. . . . Participation in the NAC is known to be effective in the treatment of drug and alcohol addiction, as well as in facilitating the other values of the religion . . . . The religion is facilitated and expressed through a rich aesthetic of symbols, songs, and, art, that expresses a life lived according to the direction of the Peyote Spirit also known as the ‘Peyote Road,’ . . .<sup>5</sup>

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<sup>1</sup> The term “*peyote*” is derived from the Aztec Indian word “*peyotl*.” WESTON LA BARRE, *THE PEYOTE CULT* 193 (5th ed., Univ. Okla. Press 1989); OMER C. STEWART, *THE PEYOTE RELIGION: A HISTORY* 7 (Univ. Okla. Press 1987).

<sup>2</sup> The scientific biological name for peyote is “*Lophophora Williamsii*.” EDWARD F. ANDERSON, *PEYOTE: THE DIVINE CACTUS* xv-xvi (2<sup>nd</sup> ed., Univ. Ariz. Press 1988). Peyote is also known by numerous other tribal names. LA BARRE, *supra* note 1, at 14. “*Ázeé diyini*” is one Navajo term for peyote. DAVID F. ABERLE, *THE PEYOTE RELIGION AMONG THE NAVAJO* 377 (2d ed., Univ. Okla. Press 1991). See also *State v. Pedro*, 1971-NMCA-145, ¶1 (“*Ahhalonium [williamsii]*, commonly known as peyote or pellote.”). “*Lophophora diffusae*,” is a related species that is also called peyote and contains a maximum of 1.3% mescaline. J. Šnicer, J. Bohata & V. Myšák, *The Littlest Lophophora*, 81 *CACTUS & SUCCULENT J.* 294, 296 (2009).

<sup>3</sup> *People v. Woody*, 61 Cal. 2d 716, 721 (Cal. 1964); *Employment Div. v. Smith*, 494 U.S. 872, 902 (1990) (*overruled by statute*- RFRA, 42 U.S.C. ‘2000bb *et seq.* (1993)); *Toledo v. Nobel-Sysco, Inc.*, 892 F.2d 1481, 1484-1485 (10th Cir. 1989); *Native Am. Church of N.Y. v. United States*, 468 F. Supp. 1247 (S.D.N.Y. 1979); *Whitehorn v. State*, 1977 OK CR 65, ¶6 (Okla. Crim. App. 1977); *State v. Big Sheep*, 75 Mont. 219, 224 (Mont. 1926). See also HUSTON SMITH & RUBEN SNAKE, *ONE NATION UNDER GOD: THE TRIUMPH OF THE NATIVE AMERICAN CHURCH* 18 (Clear Light Pub. 1996) (“God endowed [peyote] with his love and compassion.”); Weston La Barre et al., *Statement on Peyote*, 114 *SCIENCE* 582-583 (Nov. 30, 1951) (“The belief is that God put some of his holy Spirit into peyote, which he gave to the Indians. And by eating the sacramental peyote the Indian absorb God’s Spirit, in the same way that the white Christian absorbs that Spirit by means of the sacramental bread and wine.”); Rima Krisst, ‘*The road of a good life*’: *Champion for Azee* Recognized for *Life’s Work*, *NAVAJO TIMES* (July 11, 2019) (“[P]eyote was created by the Holy People . . . . It’s a spiritual connection from a person to the Holy People, to nature. . . . We pray to one Holy Spirit, which is the same as God-almighty, the Creator.”).

<sup>4</sup> LA BARRE, *supra* note 1, at 720. Mescaline is popular as an illicit recreational drug but is legally prescribed as supplement medication to reduce the anxiety and depression of terminally ill patients. See Lauren Slater, *How Psychedelic Drugs Can Help Patients Face Death*, *N.Y. TIMES* (April 20, 2012), <https://www.nytimes.com/2012/04/22/magazine/how-psychedelic-drugs-can-help-patients-face-death.html> [<https://perma.cc/S6MQ-A6DL>]. Mescaline is also prescribed in modern mental health therapies. See also, Alan Moses, *Psychedelic Drugs As Treatment For Anxiety*, *CBS NEWS* (Sept. 9, 2015, 2:17 pm), <https://www.cbsnews.com/news/psychedelic-drugs-as-treatment-for-anxiety-addiction/> [<https://perma.cc/A4F5-NSFJ>]; Jade Scipioni, *Magic Mushrooms to treat depression This Peter Thiel-Backed startup just got FDA okay to begin trials*, *FOX BUS.* (Aug. 23, 2018), <https://www.foxbusiness.com/features/magic-mushrooms-to-treat-depression-this-peter-thiel-backed-startup-just-got-fda-okay-to-begin-trials> [<https://perma.cc/2UU4-DL9K>].

<sup>5</sup> Brief for the Nat’l Council of Native Am. Churches et al., as Amici Curiae supporting Appellees, *Oklevueha Native Am. Church of Hawaii, Inc. v. Holder*, 828 F.3d 1012 (9th Cir. 2014), at 14 (submitted by Prof. Kristen A. Carpenter, Univ. of Colo. Law School)(hereinafter *Brief*).

According to scientists and medical researchers, “[t]here are no ill after-effects, and peyote is not known to be habit-forming.”<sup>6</sup> A Harvard University medical research study concluded that “[w]e found no evidence of psychological or cognitive deficits among Native Americans using peyote in a religious setting.”<sup>7</sup> However, Indian Health Services physicians have determined that “[t]he use of peyote for religious or recreational purposes is not without risks.”<sup>8</sup> The only place in the world where peyote cactus plants grow naturally is in the desert regions of Southern Texas and Northern Mexico.<sup>9</sup> Pursuant to the Federal Controlled Substance Act (CSA), peyote is classified as a Schedule I controlled substance that imposes a one-year jail sentence, a one-thousand-dollar fine, or both for possession.<sup>10</sup> However, the American Indian Religious Freedom Act (AIFRA) provides a federal peyote exemption for NAC members to legally use peyote for religious purposes.<sup>11</sup> Peyote continues to be illegal in several states, while other states have promulgated peyote exemption laws similar to the federal statute.<sup>12</sup> In 1994, twenty-eight states enacted peyote exemption laws, but twenty-two states did not. This lack of uniformity posed a hardship on NAC

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<sup>6</sup> LA BARRE, *supra* note 1, at 7; *Study Finds No Psychological or Cognitive Deficits Among Native Americans Who Use Peyote Regularly in Religious Settings*, HARV. GAZETTE (Nov. 4, 2005), <http://news.harvard.edu/gazette/story/2005/11/study-no-psychological-or-cognitive-deficits-from-peyote/> [<https://perma.cc/UW4S-7ZTB>]. *See also* Sean Alfano, *Peyote Not Linked to Brain Damage*, CBS NEWS (Nov. 3, 2005), <http://www.cbsnews.com/news/peyote-not-linked-to-brain-damage/> [<https://perma.cc/8888-M7GK>]; Randy Dottinga, *Peyote Won't Rot Your Brain*, WIRED (Nov. 4, 2005), <http://www.wired.com/medtech/health/news/2005/11/69477> [<https://perma.cc/MR6Y-G5UY>]; John Horgan & Jennifer Tzar, *Peyote on the Brain, Is the secret to alcoholism and other addictions locked up in hallucinogenic drugs?*, DISCOVER MAG., Feb. 1, 2003, <https://www.discovermagazine.com/mind/peyote-on-the-brain> [<https://perma.cc/B6VM-2RXT>].

<sup>7</sup> John H. Halpern, Andrea R. Sherwood, James I. Hudson, Deborah Yurgelun-Todd, & Harrison G. Pope Jr., *Psychological and Cognitive Effects of Long-Term Peyote Use Among Native Americans*, 58 BIOLOGICAL PSYCHIATRY 624-31 (Oct. 15, 2005). *See also* Robert L. Bergman, *Navajo Peyote Use: Its Apparent Safety*, 128 AM. J. PSYCHIATRY 6, 695-699 (April 1, 2006); Shaun D. Carstairs & F. Lee Cantrell, *Peyote and Mescaline Exposures: A 12-year Review of a Statewide Poison Center Database*, 48 CLINICAL TOXICOLOGY 1-4 (DEC. 23, 2009), published online (Feb. 20, 2010), [https://www.researchgate.net/publication/41507178\\_Peyote\\_and\\_mescaline\\_exposures\\_A\\_12-year\\_review\\_of\\_a\\_statewide\\_poison\\_center\\_database](https://www.researchgate.net/publication/41507178_Peyote_and_mescaline_exposures_A_12-year_review_of_a_statewide_poison_center_database).

<sup>8</sup> Kurt B. Nolte & Ross E. Zumwalt, *Fatal Peyote Ingestion Association with Mallory-Weiss Lacerations*, 170 W. J. MED. 328 (June 1999). *See also* Hirofumo Hashimoto, Victor J. Clyde, & Karen L. Parko, *Botulism from Peyote (Letter)*, 339 NEW ENG. J. MED. 203, 203-04 (July 16, 1998).

<sup>9</sup> *United States v. Boyll*, 968 F.2d 21, 26 (10th Cir. 1992); ABERLE, *supra* note 2, at 5.

<sup>10</sup> SCHEDULE OF CONTROLLED SUBSTANCES, 21 U.S.C. §812(c)(12)(2018); PENALTIES FOR SIMPLE POSSESSION, 21 U.S.C. §844(a)(2010).

<sup>11</sup> NATIVE AMERICAN CHURCH, 21 C.F.R. §1307.31 (1973)(“Federal Peyote Exemption”). *See also* PROTECTION AND PRESERVATION OF TRADITIONAL RELIGIONS OF NATIVE AMERICANS, 42 U.S.C. §1996 (1994).

<sup>12</sup> *See, e.g.*, 17 NAVAJO NATION CODE §394(C)(2005)(“Aze᠑ is lawful on the Navajo Nation.”); §30-31-6(D) N.M. STAT. ANN. 1978 (2019); TEX. CODE ANN. §481.111(a)(2019); WIS. STAT. ANN. §961.115 (1995); UTAH CODE ANN. §58-37-4(2)(a)(iii)(2020); ARIZ. REV. STAT. ANN. §13-3402 (1981); COLO. REV. STAT. §18-18-418(3)(2019); S.D. CODIFIED LAWS §34-20B-14(17)(2019); OR. REV. STAT. §475.752(4)(9)(a)(2017)(effective Feb. 1, 2021); Nev. Rev. Stat. '453.541 (2014); IDAHO CODE '37-2732(A)(2014); WYO. Stat. '35-7-1044 (1997). *See also* Dana Larsen, *Natives Kept Sacrament Legal*, CANNABIS CULTURE (May 28, 2001), <http://www.cannabisculture.com/articles/1981.html> (“peyote is completely legal in Canada, as it has always been . . . Although peyote does not grow naturally in Canada, native tribes in Alberta and Saskatchewan had been importing peyote buttons from Arizona and other arid locales in the American Southwest, and using them in peyote ceremonies, for at least a few hundred years. Some believe peyote has been imported into Canada for thousands of years.”).

members to practice their religion.<sup>13</sup>

Because peyote contains hallucinogenic properties, it is very sought-after by narcotics users worldwide, causing the wild growing cactus population to drastically dwindle in its natural habitat.<sup>14</sup> Like a number of other threatened plant and animal species worldwide,<sup>15</sup> peyote cactuses have been designated as a threatened species by the International Union for Conservation of Nature and Natural Resources (IUCN)<sup>16</sup> and was placed on the Mexican government's protected species list.<sup>17</sup> The declining peyote cactus population in Mexico has been caused by a number of factors, including: land development, poaching, psychedelic tourism, incorrect harvesting techniques, and other factors.<sup>18</sup> Like the effects on other plant and animal species, global warming also contributes

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<sup>13</sup> TRADITIONAL INDIAN RELIGIOUS USE OF PEYOTE, 42 U.S.C. §1996a(a)(3)(1994).

<sup>14</sup> S. Lynne Walker, *Mexico Peyote Site Suffers Onslaught of Tourist, Mining*, BANDERAS NEWS COM (Dec. 10, 2007), <http://www.banderasnews.com/0712/eden-luredbypeyote.htm> [<https://perma.cc/9JZ5-QLUW>]; Jeff Franks, *Trouble Times for Texas Hallucinogen Harvesters*, REUTERS.COM (Dec. 16, 2007), <http://www.reuters.com/article/us-texas-peyote-idUSN2861718520071217> [<https://perma.cc/LWE3-YRG3>].

<sup>15</sup> William K. Stevens, *Plant Survey Reveals Many Species Threatened with Extinction*, N.Y. TIMES (Apr. 9, 1998), at A-1 (“At least one of eight plant species in the world - and nearly one of three in the United States – is under threat of extinction, according to the first comprehensive worldwide assessment of plant endangerment.”); Rebecca Sato, *The Extinction of Animals and Plant Species*, GLOBAL RES. (Mar. 31, 2009), <http://www.globalresearch.ca/the-extinction-of-animal-and-plant-species/12965> [<https://perma.cc/4WBB-EM34>] (“It is likely that some species will become extinct before they are even discovered, before any medicinal use of other important features can be assessed.”); Marlowe Hood, *One Million Species Risk Extinction Due to Humans: Draft UN Report*, AFP (Apr. 23, 2019), <https://news.yahoo.com/one-million-species-risk-extinction-due-humans-drft-131407174.html> [<https://perma.cc/WJ8A-EAX9>]; Darryl Coote, *Study: Almost 600 Plant Species Have Gone Extinct in Last 250 Years*, UPI SCI. NEWS (June 11, 2019), [https://upi.com/science\\_news/2019/0/11/study-almost-600-plant-species-have-gone-extinct-in-last-250-years/9941560243038/](https://upi.com/science_news/2019/0/11/study-almost-600-plant-species-have-gone-extinct-in-last-250-years/9941560243038/) [<https://perma.cc/YA72-FAA4>] (“the study states that 571 plants have been wiped from the face of the Earth and plant species are going extinct 500 times faster than the normal rate of loss without human intervention.”); Dan Olson, *Species Extinct Rate Speeding Up*, MINN. PUB. RADIO (Feb. 1, 2005), [http://www.news.minnesota.publicradio.org/features/200501/31\\_olsond\\_biodiversity/](http://www.news.minnesota.publicradio.org/features/200501/31_olsond_biodiversity/) [<https://perma.cc/E7AJ-R8DL>] (“Each year as many as 50,000 species disappear.”); Damian Carrington, *‘Frightening’ Number of Plant Extinctions Found in Global Survey*, THE GUARDIAN (June 10, 2019) (“Human destruction of the living world is causing a frightening number of plant extinctions, according to scientists who have completed the first global analysis”), <https://www.theguardian.com/environment/2019/jun/10/frightening-number-of-plant-extinctions-found-in-global-survey> [<https://perma.cc/9SUY-E2UM>].

<sup>16</sup> THE IUCN RED LIST OF THREATENED SPECIES, <https://www.iucnredlist.org> (listing “*Lophophora Williamsii*” and “*Lophophora Diffusa*” as “vulnerable” species and the population trend is decreasing).

<sup>17</sup> NORMA OFICIAL MEXICANANA, NOM-059-SEMARNAT-2002 (“*Environmental Protection- Mexican Native Species of Wild Flora and Fauna- Risk Categories and Specifications for their Inclusion, Exclusion or Change – List of Species at Risk*”) updated as NORMA OFICIAL MEXICANA NOM-059-SEMARNAT-2010. See also Martin Terry & Keeper Trout, *Cultivation of Peyote: A Logical and Practical Solution to the Problem of Decreased Availability*, 95 PHYTOLOGIA 314, 316 (Nov. 2013).

<sup>18</sup> Assoc. Press, *Huichol Indians Trek to Sacred Site to Oppose Mine*, BOSTON COM. (Feb. 23, 2012), [http://archive.boston.com/news/world/latinamerica/articles/2012/02/23/huichol\\_indians\\_trek\\_to\\_sacred\\_site\\_to\\_oppose\\_mine/](http://archive.boston.com/news/world/latinamerica/articles/2012/02/23/huichol_indians_trek_to_sacred_site_to_oppose_mine/) [<https://perma.cc/K9A8-MNXC>]; Lourdes Garcia-Navarro, *Mexico’s Peyote Endangered by ‘Drug Tourists’*, NPR (Sept. 3, 2007), <http://www.npr.org/templates/story.php?storyID=14064806> [<https://perma.cc/2DQZ-7VVE>]; Will Weisser, *Scarcity of Peyote Means Hard Times for Dealers*, UT SAN DIEGO.COM (Nov. 10, 2010), <http://utsandiego.com/news/2010/nov/10/scarcity-of-peyote-means-hard-times-for-dealers/> [<https://perma.cc/P3F3-7672>]; Hilary Hylton, *Cactus Thieves Running Amok*, TIME (Aug. 29, 2008),

to the decline of peyote. In the United States, “[o]ver the past quarter century peyote has become progressively less available, due in part to improper harvesting techniques and excessive harvesting.”<sup>19</sup> Contributing to this problem is the fact that peyote is a slow-growing cactus species requiring ten or more years to grow from a seed to a size that can be consumed.<sup>20</sup> Thus, peyote cultivation in the wild is difficult when it is threatened by ongoing harmful human activities. Both the NAC and Indian tribes of Mexico, who have historically relied on the plant for medicinal and religious use, have become increasingly concerned about the availability of peyote for future generations. This paper will discuss the historical use of peyote by indigenous people, provide an overview of the NAC establishment plus peyote exemption law, examine recent court decisions granting non-Indians the religious use of peyote, highlight the dwindling peyote population crisis, and make recommendations to address the declining peyote issue for future generations.

## II. HISTORY OF PEYOTISM AND THE NATIVE AMERICAN CHURCH

### A. Origin, Outlawing, and Dissemination of Peyotism

The indigenous peoples of North America have used peyote for thousands of years. Recently scientists unearthed ancient peyote buttons (the edible crown portion of the peyote plant) at an archeological site in Texas, which radiocarbon dating (also referred to as “carbon dating” or “carbon-14 dating”) revealed to date back to 4,220 B.C. (approximately 6,000 years ago).<sup>21</sup> The first known western recording of Native Americans using peyote was made by a Franciscan Missionary, Bernradino de Sahagun, during the Spanish conquest of Mexico in 1577.<sup>22</sup> In 1620, the Roman Catholic Church considered peyote “an evil to be rooted out in the New World” and promulgated ecclesiastical laws that forbade the religious use of peyote.<sup>23</sup> Because the Viceroyalty of New Spain prohibited peyote use in Mexico, the Inquisition often levied severe punishments, including torture and death.<sup>24</sup> Spanish conquistadors ventured into North America with the intent to capture, enslave, and convert indigenous people to Christianity in addition to searching for

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<http://content.time.com/time/health/article/0,8599,1837633,00.html> [https://perma.cc/36GV-YSHG ] (“According to wildlife conservationist,

cactuses are being dug up and smuggled away at an alarming rate by over-zealous collectors looking for rare species and ‘narco-tourists’ mining the desert for the small, psychotropic peyote plant.”).

<sup>19</sup> Martin Terry, Keeper Trout, Bennie Williams, & Norma Fowler, *Limitations to Natural Production of Lophophora Williamsii (Cactaceae) I. Regrowth and Survivorship Two Years Post Harvest in a South Texas Population*, 5 J. BOTANICAL RSCH. INST. TEX. 661 (2011).

<sup>20</sup> Kevin Feeney, *Peyote as Commodity: An Examination of Market Actors and Access Mechanisms*, 76 HUMAN ORG. 59, 60 (2017).

<sup>21</sup> Terry Martin, Karen L. Steelman, Tom Guilderson, Phil Dering, & Marvin W. Rowe, *Lower Pecos and Coahuila Peyote: New Radiocarbon Dates*, 33 J. ARCHAEOLOGICAL SCI. 1017-20 (2006).

<sup>22</sup> STEWART, *supra* note 1, at 18; RICHARD EVANS SCHULTES & ALBERT HOFMANN, *PLANTS OF THE GODS: ORIGINS OF HALLUCINOGENIC USE* 132 (McGraw-Hill 1979). Mayans, Aztecs, Olmecs, Incas, and other Indian tribes also kept written records. See Steven Russell, *Early Indigenous Peoples and Written Language: Written language for early indigenous peoples included wampum belts, codices, and khipu*, INDIAN COUNTRY TODAY (July 19, 2017), <https://indiancountrymedianetwork.com/history/traditional-societies/early-indigenous-peoples-written-language/>.

<sup>23</sup> *Id.* at 20-21. See also SCHULTES, *supra* note 22, at 133-34.

<sup>24</sup> Pedro Nájera Quezada, Jovana Jaime Hernández, Claudia López Martínez, & Sandy Karina Neri Cardona, *About the Use and Abuse of Peyote (Lophophora Williamsii (Lem. Ex Salm-Dyck) J.M. Coult.)*, 2 XEROPHILIA 4, 9 (2013).

mythological kingdoms of gold and silver.<sup>25</sup> When Spanish rule ceased in the American Southwest and Mexico, the indigenous peoples resumed their religious and traditional use of peyote.<sup>26</sup>

In 1883, U.S. Congress passed the “Indian Religious Crime Code of 1883” that imposed ninety-day imprisonment and the withholding of government rations upon Indians found possessing peyote.<sup>27</sup> This statute also established the “Court of Indian Offenses” specifically to punish Indians who participated in indigenous religious ceremonies.<sup>28</sup> Furthermore, this law specifically targeted the Lakota Sioux Sun Dance and Ghost Dance ceremonies including any other religious and cultural practices of American Indians.<sup>29</sup> The Commissioner of Indian Affairs, W.A.

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<sup>25</sup> JACK D. FORBES, *APACHE, NAVAHO, AND SPANIARD* 41-49 (Univ. Okla. Press, 4<sup>th</sup> ed. 1979) (“The practice of Indian slavery was very common on the northern frontier. . . who could tell whether an expedition was a campaign or a raid for slaves? In form and results they differed but little from each other.”). See also Simon Romero, *Indian Slavery Once Thrived in New Mexico. Latinos Are Finding Family Ties to It*, N.Y. TIMES, Jan. 28, 2018, <http://nytimes.com/2018/01/28/us/indian-slaves-genizaros.html> [<https://perma.cc/GW3C-VX96>]; Joseph J. Heath, *The Doctrine of Christian Discovery: Its Fundamental Importance in United States Indian Law and the Need for its Removal*, 10 ALBANY GOV. L. REV. 112, 120 (2017) (“In 1455, Pope Nicholas V has issued the Bull *Romanus Pontifex*, to King Alfonso V of Portugal, which declared war against all non-Christians throughout the world, and specifically sanctioned and encouraged the conquest, colonization, and exploitation of non-Christian nations and peoples.”).

<sup>26</sup> STEWART, *supra* note 1, at 30-42.

<sup>27</sup> Donald Brown, *Indians, Feathers, and the Law in Western Oklahoma*, 33 EXPEDITION MAG. 2 (1991). See also Letter of M. Teller & Hiram Price to the U.S. Dep’t of the Interior, Office of Indian Affairs (Dec. 2, 1882), H. Exec. Doc. No. 1, 48<sup>th</sup> Cong., 1<sup>st</sup> Sess. Serial 2190, at x-xiii. See also Chas. H. Burke, Commissioner, Dep’t of the Interior Off. of Indian Affairs, Circular No. 1665 (April 26, 1921 and Feb. 14, 1923) (prohibiting all forms of Indian dancing); 1883 – Congress passes Religious Crimes Code, SAVAGES & SCOUNDRES, <http://www.savagesandscoundrels.org/flashpoints-conflicts/1883-congress-passes-religious-crimes-code/> [<https://perma.cc/7BRQ-3VYL>] (“The religious Crimes Code passed by Congress formally denied Indians First Amendment protections for ‘freedom of religion.’ . . . This odious piece of legislation was not repealed until the 1970s. . . Enforcement of this law would eventually lead to the massacre of Big Foot’s band at Wounded Knee in 1890.”); Gabriella Treglia, *Using Citizenship to Retain Identity: The Native American Dances Bans of the Later Assimilation Era, 1900-1933*, 47 J. AM. STUDIES 777-800 (Aug. 2013) (From the 1880s until the early 1930s the U.S. federal government adopted a formal policy of intolerance towards Native American cultures and religions).

<sup>28</sup> COURTS OF INDIAN OFFENSES & LAW AND ORDER CODE, 25 C.F.R. §11.100 – ‘11.1214 (2008). See also Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 197 n.7 (1978); Russel Lawrence Barsh & J. Youngblood Hendsen, *Tribal Courts the Model Code and the Police Idea in American Indian Policy*, 40 LAW & CONTEMP. PROB., 35 (1976); Chas. H. Burke, DEP’T OF THE INTERIOR, OFF. OF INDIAN AFFAIRS, Circular No. 1665 & Supp. (Apr. 26, 1921 & Feb. 14, 1923) (sun-dance and Indian religious ceremonies are “*Indian Offenses*”); FRANCIS PAUL PRUCHA, *THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIAN* 218-219 (Univ. Neb. Press. 1984) (In 1882, Secretary of the Interior, Henry Teller, stated “a great hindrance to the civilization of the Indians, viz, the continuance of the old heathenish dances, such as the sun-dance, scalp dance, etc.”); NAT’L CONF. OF NATIVE AM. CHURCHES, *Statement of the National Council of Native American Churches Concerning the Proliferation of Organizations Appropriating the “Native American Church” Name With No Ties to the Indigenous Worship of the Holy Sacrament Peyote* (Feb. 13, 206) (“Back in our history, there was a time when our spiritual beliefs were outlawed. People were jailed, put in insane asylums and killed for participating in the Sun Dance and other ceremonies. This, too, includes taking peyote as our sacrament.”).

<sup>29</sup> Henry M. Teller, Sec’y of Indian Affairs, Ct. of Indian Offenses, *Annual Report of the Secretary of Interior*, XI-XII (Nov. 1, 1882) (Letter of Dec. 1st to Hiram Price, Comm’n of Indian Affairs). See also Hiram Price, *Report of the Commissioner of Indian Affairs*, IV-V, VI-VII (Oct. 10, 1882); Theodore H. Haas, U.S. Indian Serv., U.S. Dep’t of the Interior, *The Indian and the Law* (1946); WILLIAM T. HAGAN, *INDIAN POLICE AND JUDGES: EXPERIMENTS IN ACCULTURATION AND CONTROL* 107-09 (Univ. Neb. Press 1966); *Committee Report To Protect Native American Cultures and to Guarantee the Free Exercise of Religion by Native Americans*, 103d Cong., S. Rep. 103-411, S. 2269 (1994) (statement of Sen. Daniel K. Inouye: “[a]n integral part of the Federal government’s assimilation policies in the 1800s and early 1900s was the replacement of traditional Indian religions with Christianity.”).

Jones, warned the Indian tribes that the “‘sun-dance,’ and all other similar dances and so-called religious ceremonies, shall be considered ‘Indian offenses,’ . . . The usual practices of so-called ‘medicine men’ shall be considered ‘Indian offenses’ cognizable by the court of Indian offenses[.]”<sup>30</sup> In 1888, Special Indian Agent Eugene E. White urged Congress to pass legislation outlawing the trafficking and possession of peyote by Native Americans.<sup>31</sup> In 1890, the Federal government classified peyote as an intoxicant and ordered Indian agents to destroy any peyote confiscated.<sup>32</sup>

Oklahoma, once considered “Indian Territory,”<sup>33</sup> has a similar history of peyote prohibition. In 1899, the Oklahoma legislature promulgated laws prohibiting the use and possession of peyote within the Territory of Oklahoma.<sup>34</sup> The Oklahoma anti-peyote law subjected violators to a two-hundred dollar fine and six-month imprisonment, and resulted in the incarceration of several Comanche and Kiowa Indians for the possession of peyote in 1907.<sup>35</sup> According to anthropologist and ethnobotanist Weston La Barre, “[a]fter the famous Comanche Chief Quanah Parker testified before the legislature, the anti-peyote law of Oklahoma was repealed in 1908, and failed of re-enactment in 1909 and again in 1927.”<sup>36</sup>

However, not all federal government officials were hostile to American Indians. A group of Kiowa, Apache, Comanche, and Cheyenne Indians testified before Congress in 1907 against the Bureau of Indian Affairs’ (B.I.A.) anti-peyote law with the assistance of Smithsonian Institute

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<sup>30</sup> WILLIAM A. JONES, COMM’R OF INDIAN AFFAIRS, REGULATION OF THE INDIAN OFFICE, 102-03 (Apr. 1, 1904); TELLER & PRICE, *supra* note 27, at XII (Henry M. Teller sought to eradicate traditional Indian culture and religion on all Indian reservations and replace it with Christianity and western culture). See also JAMES S. SLOTKIN, THE PEYOTE RELIGION: A STUDY IN INDIAN-WHITE RELATIONS 50-51 (Free Press 1956); STEWART, *supra* note 1, at 129-130 (At the Carlisle Indian School, in 1879, U.S. Army Lieutenant Richard Henry Pratt’s idea for non-prisoner Indian students was “to make Indians into white men as quickly as possible. He saw no virtue in Indians preserving any of their own culture- their language, their customs, styles of dress, religions. The sooner they became civilized and forgot all about being Indians, the better. And to some extent he was quite successful.”); Margaret D. Jacobs, *Making Savages of Us All: White Woman, Pueblo Indians, and the Controversy over Indian Dances in the 1920s*, Faculty Publ’n, Dep’t of History, UNIV. OF NEB. 178, 179 (Dec. 1996)(In 1921, Commissioner of Indian Affairs Charles Burke signed Circular 1665 that ban Indian dances and in 1923 he issued a supplement circular.).

<sup>31</sup> *Id.* at 45. See also ABERLE, *supra* note 2, at 18-19; STEWART, *supra* note 1, at 129-30; LA BARRE, *supra* note 1, at 223; James S. Slotkin, *Peyotism, 1521-1891*, 57 AM. ANTHROPOLOGIST 202, 217 (1955).

<sup>32</sup> ABERLE, *supra* note 2, at 128-133; Russell Cobb, *Texas’ Peyote Hunters Struggle to Find a Vanishing, Holy Crop*, DALLAS OBSERVER (Feb. 14, 2008), <https://www.dallasobserver.com/news/texas-peyote-hunters-struggle-to-find-a-vanishing-holy-crop-6398356> [<https://perma.cc/WG3W-8MG6>] (“In 1909, a U.S. special officer named William ‘pussyfoot’ Johnson bought up all the peyote in South Texas and burned it. According to [geographer George] Morgan, the operation worked for almost a year, until Johnson ran out of money. The Bureau of Indian Affairs convinced the post office to ban peyote send by mail in 1917[.]”).

(Act of January 30, 1897, prohibited sale of intoxicating liquor to Indians and included penalties).

<sup>33</sup> *Ex parte Adair*, 5 Okla. Crim. 374, 375(Okla. Crim. App. 1911) (Indian territory prior to statehood); *Hoover v. Kiowa Tribe*, 1998 OK 23, &16 (The [Oklahoma] Organic Act divided Indian Territory into Oklahoma Territory and Indian Territory. It established a territorial government for Oklahoma Territory); Indian Trade and Intercourse Act, 4 Stat. 729, 23 Cong. Ch. 161 (1834).

<sup>34</sup> STEWART, *supra* note 1, at 131; LA BARRE, *supra* note 1, at 223. In 1909, without legal backing the B.I.A. agents raided peyote meetings and confiscated peyote buttons. SMITH & SNAKE, *supra* note 3, at 127.

<sup>35</sup> STEWART, *supra* note 1, at 131. See also SMITH & SNAKE, *supra* note 3, at 127 (“In 1911, a federal Indian agent rounded up South Dakota peyotist and jailed them with no legal authority whatsoever”).

<sup>36</sup> LA BARRE, *supra* note 1, at 223.

ethnologist, James Mooney, and Indian Commissioner, John Collier.<sup>37</sup> Commissioner Collier, once a New York social worker and sociologist, permitted American Indian tribes to practice their traditional culture and religion<sup>38</sup>, which “turned official policy toward peyotism entirely around, from conservative prohibition to liberal permissiveness.”<sup>39</sup> Ethnologist Mooney researched peyote as a participant-observer in Kiowa peyote meetings and conducted government research studies and authored several reports and books on American Indian culture.<sup>40</sup> “Suppressive measures against Indian culture were finally repealed by Indian Commissioner John Collier in 1934.”<sup>41</sup> Although the Indian tribes were successful in repealing the federal bill, several states subsequently enacted anti-peyote laws resulting in these governments continued harassment, arrests, and incarceration of Indian peyotist.<sup>42</sup> An American government that was initially founded on a basis of religious freedom was denying religious freedom to indigenous American Indians.

### *B. Formation of the Native American Church*

In 1914, the Native American Church (NAC) became the first intertribal peyote church to be officially established by charter and incorporated pursuant to Oklahoma State law (although some informal and unrecognized Indian peyote churches existed prior this time).<sup>43</sup> NAC’s establishment arose pursuant to James Mooney’s recommendations to the Oklahoma Indian tribes to form a state charter organization as means of fending off white regressive measures.<sup>44</sup> Today, “[t]he NAC is the present-day embodiment of one of the oldest religious traditions in the Western Hemisphere.”<sup>45</sup> Subsequently, NAC branches were formed by a number of tribes across the United

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<sup>37</sup> *Id.* at 294-95.

<sup>38</sup> See KENNETH R. PHILP, JOHN COLLIER’S CRUSADE FOR INDIAN REFORM 1920-1954 (Waterton Book Co. 1977). John Collier, Commissioner of Indian Affairs (1933 to 1945), was responsible for implementing the Indian Reorganization Act (IRA) of 1934 (“Indian New Deal”), 25 U.S.C. ‘14, that reversed federal policies of cultural assimilation of Native Americans. See also ABERLE, *supra* note 1, at 18.

<sup>39</sup> LA BARRE, *supra* note 1, at 289.

<sup>40</sup> STEWART, *supra* note 1, at 34-39.

<sup>41</sup> Beth Dodd, *Who Was Henry M. Teller?*, THE MOUNTAIN JACKPOT NEWS (Nov. 30, 2012), <https://www.mountainjackpot.com/2012/11/30/who-was-henry-m-teller/> [<https://perma.cc/8A8Q-43BB>].

<sup>42</sup> LA BARRE, *supra* note 1, at 223-24. See also, Hearings Before a Subcommittee of the Committee on Indian Affairs of the House of Representatives on H.R. 2614, To Amend Sections 2139 and 2140 of the Revised Statutes and the Acts Amendatory Thereof, and For Other Purposes, 3-4 (Feb. 21, 1918)(Hon. John N. Tillman presiding), <https://catalog.hathitrust.org/Record/100773819> (digitized by Cornell Univ.)(any person who possesses peyote “shall be punished by imprisonment for more than sixty days, but less than one year and by a fine of not less than \$100 or more than \$500 for the first offense . . .”).

<sup>43</sup> Other peyote churches included -- the Union Church Society, Koshiway’s Oto Church of the First Born, American Indian Church of Brother Association, and Kiowa United American Church. See STEWART, *supra* note 1, at 224-26; ABERLE, *supra* note 2, at 19; LA BARRE, *supra* note 1, at 167-70 (“Negro Church of the First-born, formerly existing near Tulsa, Oklahoma”); see also *Peyote Way Church of God, Inc. v. Thornburgh*, 922 F.2d 1210, 1212 (5<sup>th</sup> Cir. 1991); *Stately v. Indian Cmty. Sch. of Milwaukee Inc.*, 351 F. Supp. 2d. 858, 866 (E.D. Wis. 2004) (“Native Americans tend to place a greater emphasis on oral rather than written tradition. They place far less emphasis on the structure of a church and more emphasis on nature, community, and the individual. Thus, Native American religions often do not have an identifiable hierarchical structure”).

<sup>44</sup> STEWART, *supra* note 1, at 34-36; ABERLE, *supra* note 2, at 19.

<sup>45</sup> Introduction of Legislation Protecting the Religious Use of Peyote by Indians in Traditional Ceremonies, H. Res. 4230, 103d Cong., 140 Cong. Rec. 41 (Apr. 15, 1994)(statement by N.M. Congressman Bill Richardson), <https://www.govinfo.gov/app/details/CREC-1994-04-15> [<https://perma.cc/S6U8-S52N>].

States, and these disparate branches sought to unite as a unified national federation under one governing body.<sup>46</sup> This led to the establishment of the “Native American Church of the United States” in 1944.<sup>47</sup> However, in 1955, church membership expanded into Canada, which prompted the church to change its name to the “Native American Church of North America” (NACNA).<sup>48</sup> The NACNA served as an international umbrella organization for some regional and smaller NAC chapters.<sup>49</sup> Other regional NAC groups currently include the Azee’ Bee Nahaghá of Diné Nation (formerly known as the “Native American Church of Navajoland”), the Native American Church of Oklahoma, and Native American Church of South Dakota.

Today the Native American Church of North America has eighty chapters and members belong to some seventy Native American Nations. In the continental United States, every state west of the Mississippi has at least one chapter. The steady proliferation of its membership among diverse North American tribes has made it Native America’s largest religious organization. Its total membership is estimated to be around 250,000.<sup>50</sup>

During the 1990s, the National Council of Native American Churches (NCNAC) was formed to repeal the *Employment Division v. Smith* decision, which was “a decision that severely limited the religious freedom of Native Americans who practice the peyote religion.”<sup>51</sup> According to the Native American Rights Fund, “the Supreme Court went to extraordinary lengths to deny protections for NAC members, including the complete abandonment of the ‘compelling interest’ test and the weakening of religious liberty for all Americans.”<sup>52</sup> In 1994, the NCNAC efforts were instrumental in the enactment of AIRFAA.<sup>53</sup> For the last three decades, the NCNAC has collaborated with the various NAC chapters to litigate and politically lobby to address nationwide issues affecting the church and peyotism.<sup>54</sup>

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<sup>46</sup> STEWART, *supra* note 1, at 239-43; LA BARRE, *supra* note 1, at 167-71; Brief, *supra* note 5, at 3-6; ABERLE, note 2, at xxxix-xlvii.

<sup>47</sup> STEWART, *supra* note 1, at 239-43 (the “Native American Church of the United States” was formed in 1944 and the “Native American Church of North American” was established in 1955).

<sup>48</sup> ABERLE, *supra* note 2, at 19. *See also*, O Centro Espirita Beneficente Uniao Do Vegetal v. Ashcroft, 282 F. Supp. 2d 1236, 1268 (D.N.M. 2002) (Texas peyote exported to Canadian NAC); People v. Woody, 61 Cal. 2d 716, 720 (Cal. 1964).

<sup>49</sup> ABERLE, *supra* note 2, at 19 (“At the present time the international organization is a very loose federation. . . Not all Peyotist groups are affiliated. Some affiliates are state organizations, others are denominational associations (i.e., based upon some Peyotist variant), and many are local groups”).

<sup>50</sup> SMITH & SNAKE, *supra* note 3, at 172; *see also* Brief, *supra* note 5, at 6 (“Today, across the country, there are over 300,000 Native Americans who are NAC members and for whom the ritual harvest and ceremonial ingestion of peyote serve as the central sacrament of a religion devoted to maintaining strong families and communities, traditional Indian culture, sobriety, and other spiritual values. Accordingly, the NAC is recognized and studied as a significant world religion by scholars”).

<sup>51</sup> Brief, *supra* note 5, at 2.

<sup>52</sup> Robert M. Peregoy, Walter R. Echo-Hawk, & James Botsford, *Congress Overturns Supreme Court’s Peyote Ruling*, 20 NARF LEGAL REV. 1, 15 (1995).

<sup>53</sup> Brief, *supra* note 5, at 2.

<sup>54</sup> *Id.*

Since the formation of NAC, its members have been harassed, prosecuted, and incarcerated for their religious use of peyote.<sup>55</sup> For example, in 1926, Big Sheep was convicted for peyote possession under Montana state law, but appellate arguments before the Montana Supreme Court focused on state-tribal jurisdiction and the case was remanded to determine whether the defendant was an “emancipated Indian” or a ward of the United States.<sup>56</sup> During the 1960s, Mary Attakai was incarcerated for religious peyote possession in Arizona and Jack Woody was arrested for conducting a NAC ceremony in California.<sup>57</sup> In both cases, the NAC members cases were overturned with the assistance of ACLU attorneys and anthropologist Omer C. Stewart who testified as an expert witness on NAC history.<sup>58</sup> A Wisconsin federal district court concluded that “[t]hough they are not subject to the same boundaries as traditional western religions, Native American religions typically satisfy any constitutional test for ‘religion.’ Native Americans perform rituals, celebrate ceremonies, and observe sacred beliefs and practices, but their religions are less formal than many western religions.”<sup>59</sup>

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<sup>55</sup> See e.g. *Native Am. Church & Iron Rope v. TSA et al.*, No.17-CV-00108-OLG, Settlement Agreement, at 2 (W.D. Tex., Jan. 26, 2018) (unpublished agreement)(TSA disrespectful screening of NAC religious items); *Salt Lake City Corp. v. Salt Lake City Civil Serv. Comm’n*, 2006 UT App. 47, 2006 UT App. 47, at \*1 (Utah Ct. App. 2006) (police officer terminated for religious use of peyote); *Smith v. Emp’t Div.*, 301 Or. 209, 211 (Ore. 1990); *Employment Div. v. Smith*, 494 U.S. 879 (1990)(“discharged Smith because he ingested peyote while off duty during a ceremony of the Native American Church”); *Toledo v. Nobel-Sysco, Inc.*, 892 F.2d 1481, 1483 (10th Cir. 1989) (trucking company employer refused to hire NAC member); *Warner v. Graham*, 845 F.2d 179, 180 (8th Cir. 1988) (school employee fired after admitting she used peyote religiously); *Golden Eagle v. Johnson*, 493 F.2d 1179, 1180-81 (9th Cir. 1974) (Navajo Indian arrested for peyote possession); *State v. Soto*, 21 Or. App. 794 (1975); *State v. Whittingham*, 19 Ariz. App. 27, 27-29 (Ariz. Ct. App. 1973) (Indians convicted for religious use of peyote at NAC marriage ceremony) *Native Am. Church of Navajoland, Inc. v. Ariz. Corp. Com.*, 405 U.S. 901, 902 (1972) (State refused to issue a certificate of incorporation to NAC); *State v. Pedro*, 1971-NMCA-145, &1(Arapahoe Indian convicted for traditional medicinal use of peyote); *Woody*, 61 Cal. 2d at 717-18 (Navajo Indian prosecuted for conducting a peyote ceremony); *Oliver v. Udall*, 306 F.2d 819, 820-21 (D.C. Cir. 1962) (Navajo Tribe prohibits religious use of peyote); *Whitehorn v. State*, 1977 OK CR 65, &&1-2, 561 P.2d 539(NAC member prosecuted for possession of peyote); *State v. Attakai*, Crim. No. 4098, Coconino Cty. (Ariz. Super Ct., July 26, 1960)(Indian prosecuted for peyote possession).

<sup>56</sup> *State v. Big Sheep*, 75 Mont. 219, 230-33 (Mont. 1926) (State law does not apply to Indians living on and maintaining relations with their reservations since they are subject to the exclusive jurisdiction of the United States); *LA BARRE*, *supra* note 1, at 224.

<sup>57</sup> *Attakai*, Crim. No. 4098, Coconino Cty. (a judicially created exemption); *LA BARRE*, *supra* note 1, at 224-25; *STEWART*, *supra* note 1, at 308-11; *Woody*, 61 Cal. 2d at 722.

<sup>58</sup> See, *Woody*, 61 Cal. 2d 716; *STEWART*, *supra* note 1, at 308-10 (“No non-Indian knew the Native American Church and its history better than he [Omer C. Stewart].”). See also *United States v. Boyll*, 774 F. Supp. 1333, 1335 n.2 (D.N.M. 1991) (Omer Stewart testified for defendant at evidentiary hearing). During the 1960’s, anthropologists sided with American Indian defendants who were prosecuted for possession of peyote.

<sup>59</sup> *Stately v. Indian Cmty. Sch. Of Milwaukee*, 351 F. Supp. 2d. 858, 867 (E.D. Wis. 2004) (citing report of Univ. of Colo. Anthropology Professor Deward E. Walker Jr.).

### C. The American Indian Religious Freedom Act of 1978

Similar to the American civil rights movement, indigenous Native Americans (American Indians, Alaskan Natives, and Native Hawaiians) have long struggled to secure adequate protections for their basic right to religious freedom.<sup>60</sup> Historically, Native American religious activities were disrespected and even outlawed by the federal government, frequently resulting in Native Americans being prosecuted and incarcerated for practicing their indigenous religious beliefs.<sup>61</sup> In 1978, after Congress determined that American Indian culture and religion was endangered and hindered by federal policies, Congress enacted the American Indian Religious Freedom Act of 1978 (AIRFA) that would initiate a policy to:

*protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonial and traditional rites.*<sup>62</sup>

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<sup>60</sup> See Civil Rights Act of 1964, 42 U.S.C. §§1981-2000h (1964). See, e.g., *Badoni v. Higginson*, 638 F.2d 172, 175-76 (10th Cir. 1980) (Bureau of Reclamation flood Navajo sacred shrine); *Wilson v. Block*, 708 F.2d 735, 738-739 (D.C. Cir. 1983) (U.S. Forest Service permit ski area development on sacred mountain); *Crow v. Gullet*, 706 F.2d 856, 857-58 (8th Cir. 1983) (State construction on sacred Bear Butte); *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 441-45 (1988) (construction & timber harvest on Indian religious grounds); *Natural Arch & Bridge Soc'y v. Alston*, 209 F. Supp. 2d 1207, 1209-15 (D. Utah 2002), *aff'd*, 98 F. App'x 711 (10th Cir. 2004) (Feds permit Navajo religious site to be desecrated); *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1062-64 (9th Cir. 2007)(Forest Service permit contamination of sacred mountain); *Snoqualmie Indian Tribe v. FERC*, 545 F.3d 1207, 1210-12 (9th Cir. 2008) (hydroelectric plant desecrate sacred site); *Slockish v. U.S. Fed. Highway Admin.*, 682 F. Supp. 2d 1178, 1186-87 (D. Or. 2010) (FHA bulldoze sacred site – moot case); *Titman v. Clovis Unified School Dist.*, No. 15CECG 01717 (Cal. Super. Ct., Jun. 2, 2015) (Indian student's right to wear eagle feathers at graduation); *Mauna Kea Anaina Hou v. Bd. of Land & Nat. Res.*, 136 Haw. 376, 415 (Haw. 2015) (state permit construction of telescope facility on sacred mountain), *aff'd*, 2016 Haw. LEXIS 302, 2016 WL 7048038 (Haw. Dec. 2, 2016); *Battle Mt. Band of the Te-Moak Tribe of W. Shoshone Indians v. United States BLM*, 302 F. Supp. 3d 1226, 1240 (D. Nev. 2018) (Tribe's TRO against powerline construction on traditional cultural land denied); *Hopi Tribe, et al., v. Trump, et al.*, No. 17-cv-2590 (TSC), No. 17-cv-2605 (TSC), No. 17-cv-2606, 2019 U.S. Dist. LEXIS 106244, at \*\*11-12 (D.D.C. Mar. 20, 2019) (Feds seek to reduce Bear Ears Nat. Monument); *Hopi Tribe v. Arizona Snowbowl Resort Ltd. P'ship*, 244 Ariz. 259, 409-10 (Ariz. 2018)(ski resort wastewater pollute special cultural and religious sites – court dismiss tribes' public nuisance claim); *Gwich'in Steering Committee et al. v. Bernhardt*, No. 3:20-cv-00204-JWS, at 3-37 (D. Alaska, Aug. 24, 2020)(Tribes and environmentalist seeks injunction against Fed permitting drilling in the Alaska Wildlife Refuge); see also Editor Report, *Anti-Indian Sovereignty Movement and Its Politicians*, INDIAN COUNTRY TODAY (Feb. 22, 2002) (The anti-Indian movement “directly oppose Indian tribes’ control of natural resources, including water, timber and minerals. The legal concept of tribal sovereignty is just not acceptable to these groups, who essentially seek to terminate tribal America.”), <https://indiancountrytoday.com/archive/anti-indian-sovereignty-movement-and-its-politicians-OcfSJXgUbkiRmeM2VBKIaw>.

<sup>61</sup> See Joint Resolution American Indian Religious Freedom Act, Pub. L. No. 95-341, 92 Stat. 469 (1978).

<sup>62</sup> 42 U.S.C. §1996 (emphasis added).

The enactment of AIRFA modified the Federal Controlled Substance Act to include a section entitled “Native American Church Peyote Exemption.”<sup>63</sup> The 5<sup>th</sup> Circuit Court of Appeals explained that “Congress intended to exempt religious use of peyote only by NAC members.”<sup>64</sup> Under AIRFA, in 1978, the Federal peyote exemption did not apply to individuals with less than 25% Indian blood<sup>65</sup> since “Congress did not intend a broad exemption for the religious use of peyote by non-Native American Church Members or non-Indians.”<sup>66</sup> Several states complied with AIRFA by enacting laws permitting Native Americans peyote possession for religious purposes while other states refused to grant an exemption.<sup>67</sup>

#### D. The AIRFA Amendment of 1993

Congress later found that AIRFA was ineffective in protecting the religious rights of American Indians, Native Alaskans and Hawaiians, and especially the rights of NAC members to legally possess and use peyote religiously.<sup>68</sup> After the U.S. Supreme Court’s *Employment Division v. Smith* decision, which effectively held that the Free Exercise Clause permitted states to prohibit even the sacramental use of peyote,<sup>69</sup> Congressional hearings revealed that there was a lack of adequate and clear legal protection for Indian religious use of peyote that increased a risk for discriminatory treatment.<sup>70</sup> Furthermore, the *Smith* decision eliminated a longstanding federal

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<sup>63</sup> 21 C.F.R. §1307.31 (“The listing of peyote as a controlled substance in Schedule I does not apply to the nondrug use of peyote in bona fide religious ceremonies of the Native American Church, and members of the Native American Church so using peyote are exempt from registration.”); *see also* *Peyote Way Church of God, Inc. v. Thornburgh*, 922 F.2d 1210, 1214 (5th Cir. 1991).

<sup>64</sup> *Thornburgh*, 922 F.2d at 1214.

<sup>65</sup> *Id.* (“NAC is made up of approximately 36 chapters, each separately incorporated by a different tribe and that all NAC members are of 25% Native American ancestry.”); *see also* *Peyote Way Church of God, Inc. v. Smith*, 556 F. Supp. 632, 634 (N.D. Tex. 1983) (“[T]estimony at trial by a distinguished member of the Native American Church is that a person must have 25% Indian blood to be a member of the Native American Church.”); *Kennedy v. Bureau of Narcotics & Dangerous Drugs*, 459 F.2d 415, 416-18 (9th Cir. 1972); *Whitehorn v. State*, 1977 OK CR 65, 561 P.2d 539, 541.

<sup>66</sup> *Warner v. Graham*, 845 F.2d 179, 183 (8th Cir. 1988) (School employee was fired for admitting she used peyote religiously and she brought a 42 U.S.C. §1983 civil rights action against her supervisors, but the 8th Circuit denied relief pursuant to the *Employment Div. v. Smith* decision.).

<sup>67</sup> *Id.* at 182.

<sup>68</sup> H.R. 4230, 103d Cong., 140 Cong. Rec. 41 (1994) (statement of N.M. Congressman Bill Richardson: “NAC members who have lawfully acquired the sacrament in Texas can still be arrested and subjected to felony prosecution and imprisonment in those 22 states, States in which they may live or through which they must travel on their way home from Texas after lawfully acquiring the sacrament.”).

<sup>69</sup> 42 U.S.C. §1996a(a)(4)(1994)(“the First Amendment does not protect Indian practitioners who use peyote in Indian religious ceremonies, and also raised uncertainty whether this religious practice would be protected under the compelling State interest standard[.]”); *see also* American Indian Religious Freedom Act Amendments of 1994, Pub. L. No. 103-344, 108 Stat 3125, (1994); *Employment Div. v. Smith*, 494 U.S. 872, 890 (1990)(*overruled by statute* – RFRA, 42 U.S.C. '2000bb *et seq.* (1993)); *Smith v. Employment Div.*, 310 Or. 376, 379 (1990) (“Because [claimants’] ingestion of peyote was prohibited under Oregon law, and because that prohibition is constitutional, Oregon may, consistent with the Free Exercise Clause, deny [them] unemployment compensation when their dismissal results from use of the drug.”).

<sup>70</sup> 42 U.S.C. §1996a(a)(5); *see also* GARRETT EPPS, TO AN UNKNOWN GOD: RELIGIOUS FREEDOM ON TRIAL 10 (1<sup>st</sup> ed., St. Martin’s Press 2001) (“When Americans in 1990 talk about religious freedom, they are, whether they know it or not, talking about Al Smith.”).

policy requiring the “compelling interest” test (*Sherbert* test) used to determine government infringement on religious freedom.<sup>71</sup> Under the *Sherbert* balancing test, a plaintiff is required to show that the government’s action has substantially burden his or her free exercise of religion and the government must prove strict scrutiny (that its action is furthering a compelling state interest and it has pursued the least restrictive means of furthering its interest).<sup>72</sup> Congress also found that NAC members were frequently arrested for transporting peyote across state boundaries due to local criminal laws that prohibited peyote possession.<sup>73</sup> In 1993, in response to the *Smith* decision, Congress enacted the Religious Freedom Restoration Act (RFRA) but “the Act left endangered the very religious practice, the traditional use of peyote by Indians, which was impaired in the *Smith* case.”<sup>74</sup> In 1997, the U.S. Supreme Court, in the *City of Boerne v. Flores* decision, determined that RFRA was unconstitutional as applied to states (but not to the federal government) and it was not the proper exercise of Congress’s enforcement power.<sup>75</sup> Subsequently several states enacted RFRA like laws that applied to the state and municipal governments.\* In 2000, Congress passed the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) that fixed problems with RFRA and expanded the definition of “religious exercise” to include any exercise of religion.<sup>76</sup>

On October 6, 1994, Congress passed American Indian Religious Freedom Act Amendment (AIRFAA), which provided that “the use, possession, or transportation of peyote by an Indian for bona fide traditional ceremonial purposes in connection with the practice of a traditional Indian religion is lawful and shall not be prohibited by the United States or any State.”<sup>77</sup> A subsection of AIRFAA entitled the “Traditional Indian Religious Use of Peyote”<sup>78</sup> states:

Notwithstanding any other provision of law, the use, possession, or transportation of peyote by an Indian for bona fide traditional ceremonial purposes in connection

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<sup>71</sup> 42 U.S.C. §2000bb(a)(1)-(5)(1993); *see also* *Sherbert v. Verner*, 374 U.S. 398, 403-407 (1963) (*Sherbert* test).

<sup>72</sup> *City of Boerne v. Flores*, 521 U.S. 507, 533-34 (1997); *Smith*, 494 U.S. at 883-885.

<sup>73</sup> 42 U.S.C. §1996a(b)(1)-(7).

<sup>74</sup> 140 CONG. REC. 41, 7 (1994)(statement of N.M. Congressman Bill Richardson); *see also* 42 U.S.C. §§2000bb(a)(4)(1993); *Holt v. Hobbs*, 574 U.S. 352, 135 S. Ct. 853, 859-60 (2015) (“Following our decision in *Smith*, Congress enacted RFRA in order to provide greater protection for religious exercise that is available under the First Amendment.”); *Flores*, 521 U.S. at 512; (“Congress enacted RFRA in direct response to the Court’s decision in *Employment Div., Dept. of Human Resources of Ore. v. Smith*[.]”); *Knight v. Thompson*, 723 F.3d 1275, 1282 (11th Cir. 2013); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 693-694 (2014); Luke W. Goodrich, *Sex, Drugs, and Eagle Feathers: An Empirical Study of Federal Religious Freedom Cases*, 48 SETON HALL L. REV. 1, 49 (2017) (RFRA’s “main effect has been to provide protection for religious minorities like the Native Americans who won the right to use eagle feathers in *McAllen*” [v. Jewell]).

<sup>75</sup> *Flores*, 521 U.S. at 536 (“Broad as the power of Congress is under the Enforcement Clause of the Fourteenth Amendment, RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance. The judgment of the Court of Appeals sustaining the Act’s constitutionality is reversed.”), *superseded by statute* – Protection of Land Use as Religious Exercise Act, 42 U.S.C. ‘2000cc (2000).

<sup>76</sup> *See* 42 U.S.C. §§2000cc-2000cc-5(3),(7)(A) (“The term ‘Free Exercise Clause’ means that portion of the first amendment to the Constitution that proscribes laws prohibiting the free exercise of religion. . . . The term ‘religious exercise’ includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.”).

<sup>77</sup> 42 U.S.C. §1996a.

<sup>78</sup> 42 U.S.C. §1996a.

with such practice of a traditional Indian religion is lawful, and shall not be prohibited by the United States or any State. *No Indian shall be penalized or discriminated against on the basis of such use, possession or transportation, including, but not limited to, denial of otherwise applicable benefits under public assistance programs.*<sup>79</sup>

Most importantly, AIRFAA protected “*the right of Indians to practice their religion under any Federal or State law.*” (emphasis added).<sup>80</sup> AIRFAA also provided that prison authorities could permit Native American prisoners to have legal access to peyote for religious purposes, for such requests are usually denied for security reasons.<sup>81</sup> Pursuant to AIRFAA and a new federal military law, Native Americans serving in the U.S. military could now practice the NAC religion with the authorization and consent of their commanding officers.<sup>82</sup>

#### *E. Expansion of the NAC Membership*

Historically, the first Indian tribes who used peyote religiously and medicinally were the Indian tribes of Mexico and southern Texas, including the Aztecs, Huichol, Tarahumari, Lipan Apaches, and Mescalero Apaches.<sup>83</sup> Eventually, the peyote religion disseminated from Mexico to tribes throughout North America.<sup>84</sup> Currently, NAC has established chapters and membership in almost all American states and throughout Canada.<sup>85</sup>

During the last two decades NAC membership increased and placed a greater demand for

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<sup>79</sup> 42 U.S.C. §1996a(b)(1) (emphasis added).

<sup>80</sup> 42 U.S.C. §1996a(d)(4) (emphasis added).

<sup>81</sup> 42 U.S.C. §1996a(b)(5); *see also* Native American Counseling Act, §33-10-4(B)(2) NMSA 1978 (2017) (“Native Americans religions shall be afforded by the corrections department the same standing and respect as Judeo-Christian religions.”); *Indian Inmates of Neb. Penitentiary v. Grammer*, 649 F. Supp. 1374, 1379 (D. Neb. 1986), *aff’d sub nom. Indian Inmates of Neb. Penitentiary v. Grammer*, 831 F.2d 301 (8th Cir. 1987) (indigenous Indian inmates religious use of peyote prohibition based on prison security reasons; Stephanie Beran, *Native Americans in Prison: The Struggle for Religious Freedom*, 2 NEB. ANTHRO. 46, 51 (2005).

<sup>82</sup> 42 U.S.C. 1996a(b)(7); News Briefs, *Native American Soldiers Will Be Allowed to Use Peyote for Religious Ceremonies Under Pentagon Draft Rule*, NAT’L DRUG STRATEGY NETWORK (May-June 1997), <http://ndsn.org/mayjun97/peyote.html> [<https://perma.cc/7DMW-EEA7>]; *see also* Religious Liberty in the Military Services -- Additional Guidance Regarding the Use of Peyote, DoD Directive Instruction §1300.17, 3.4 (Sept. 1, 2020), <https://www.esd.whs.mil/Directives/issuances/dodi/> [<https://perma.cc/329M-VXP5>].

<sup>83</sup> *See* STEWART, *supra* note 1, at 17-18; ANDERSON, *supra* note 2, at 2-8.

<sup>84</sup> LA BARRE, *supra* note 1, at 109-123.

<sup>85</sup> *People v. Woody*, 61 Cal. 2d 716 (Cal. 1964).

more peyote<sup>86</sup> on the Texas peyote dealers.<sup>87</sup> At the present time, an estimated 400,000 or more NAC members purchase peyote from Texas peyote dealers.<sup>88</sup> Meeting this growing demand has compelled the Texas peyote dealers to raise the cost of peyote buttons, which has resulted in the peyoteros (the name for peyote harvesters) harvesting smaller-sized peyote buttons.<sup>89</sup> According to recent scientific studies on peyote, “[i]t is now abundantly clear that the current rate of harvesting peyote from wild populations is not sustainable[.]”<sup>90</sup> Scientists researching peyote reduction have concluded that a major cause of peyote reduction is habitat destruction and overharvesting of the plant for ceremonial use.<sup>91</sup> A peyote botanist, Dr. Martin Terry, noted that “[he has] personally witnessed [peyote] species becoming scarce in places where I previously found them to be abundant.”<sup>92</sup>

#### F. *United States v. Boyll*

In 1992, a federal district court paved the way for granting non-Indians bona fide NAC membership and access to peyote in the *United States v. Boyll* decision.<sup>93</sup> *Boyll* involved an Anglo NAC member who mailed peyote from Mexico to his post office box in the United States and was

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<sup>86</sup> Molly T. Klien, Md Abul Kalam, Keeper Trout, Norma Fowler, & Martin Terry, *Mescaline Concentrations in Three Principal Tissues of Lophophora Williamsii (Cactaceae): Implications for Sustainable Harvest Practices*, 20 HASELTONIA 34, 35 (2015) (“Total membership of the NAC has been repeatedly reported at 250,000 members for several decades (e.g. Anderson 1995), although there is no published evidence that census has ever been conducted to determine the number of NAC members. It should be noted that to speak of ‘the NAC’ is actually misleading, as the NAC is not a single entity, but rather a highly heterogeneous collection of individual churches and multi-church ‘chapters’ that span the continental U.S. and Canada. Churches that identify themselves as NAC vary geographically, culturally, linguistically, socio-economically, in the content and format of their religious ceremonies, and even in their legal status . . . The only thing that all NAC groups have in common is their ceremonial use of peyote. All peyote plants so used are harvested from wild populations”).

<sup>87</sup> TERRY & TROUT, *supra* note 17, at 315-16; S.E. Ruckman, *Tribe Seeks Easier Access to Peyote Plants*, NATIVE AM. TIMES (Jan. 2, 2012), <https://www.nativetimes.com/life/culture/6569-tribe-seeks-easier-access-to-peyote-plants> [<https://perma.cc/CJW2-JNQK>].

<sup>88</sup> FRANKS, *supra* note 14.

<sup>89</sup> COBB, *supra* note 32; *see also* Bill Donovan, *NAC May Talk to Mexico to Avoid High Prices*, NAVAJO TIMES, Dec. 4, 2003, at A-3; Bill Donovan, *ID Cards Won’t Aid Peyote Gatherers*, NAVAJO TIMES (Nov. 23, 2011), <https://navajotimes.com/news/2011/1111/112311peyote.php> [<https://perma.cc/JKH6-B8EZ>]; Bill Donovan, *Feds Explain Feathers, Peyote Rules to NAC Assemblage*, NAVAJO TIMES (June 25, 2009), <https://navajotimes.com/news/2009/0609/062509peyote.php> [<https://perma.cc/ZH2X-GL9N>]; WEISSERT, *supra* note 18.

<sup>90</sup> TERRY ET AL., *supra* note 19, at 542.

<sup>91</sup> Md Abul Kalam, Molly T. Klien, Diana Hulsey, Keeper Trout, Paul Daley, & Martin Terry, *A Preliminary Report of Mescaline Concentrations in Small Regrowth Crowns vs. Mature Crowns of Lophophora Williamsii (Cactaceae): Cultural, Economic, and Conservation Implications*, 7 J. BOTANICAL RES. INST. TEX. 435, 436 (2013) (“The largest part of the reduction in peyote population size is clearly habitat destruction is associated with urban sprawl and adverse agricultural practices, notably root-plowing, which uproots and kills peyote along with native brush, effectively exterminating the peyote along with the associated plants of its natural habitat, so that the damage to peyote in a root-plowed tract is absolute and permanent. Another major cause of the decline of peyote is overharvesting of the plant for ceremonial use by the NAC.”); Terry & Trout, *supra* note 85, at 315.

<sup>92</sup> *See* COBB, *supra* note 32.

<sup>93</sup> *United States v. Boyll*, 774 F. Supp. 1333 (D.N.M. 1991) (the judge making no distinction between Indian and non-Indian NAC members), *appeal dismissed*, 968 F.2d 21 (10th Cir. 1992)). *See also* *United State v. Boyll*, No. 91-2235, 1992 U.S. App. LEXIS 14537 (10th Cir., June 16, 1992)(unpublished opinion – appeal dismissed).

arrested and prosecuted for violating federal drug laws.<sup>94</sup> At trial, Defendant Boyll argued the federal peyote exemption as his case-in-chief although he was not a Native American. Surprisingly, the federal court interpreted the peyote exemption law as not being exclusively limited to Native Americans. Rather, it also included protections for any NAC member regardless of race, and the court emphasized that “[t]o exclude individuals of a particular race from being members of a recognized religious faith is offensive to the very heart of the *First Amendment*.”<sup>95</sup> The federal prosecutors failed to present any evidence of compelling governmental interest that justified the government’s actions pursuant to the Sherbert test.<sup>96</sup> Furthermore, the court held that the Federal Controlled Substance Act did not apply to NAC members pursuant to the Federal peyote exemption regardless of their race and dismissed the case.<sup>97</sup> According to legal scholar Michael E. Connelly:

[T]he court neglected to address the indictment against Boyll for peyote importation, and his failure to register as a peyote importer as required by law. By not addressing his failure to register, the court suggests that mere membership in a particular religion protects members of that religion from having to comply with neutral and generally applicable laws. The court thus transformed this simple criminal case into one raising grave constitutional issues.<sup>98</sup>

In an unpublished opinion, the U.S. Tenth Circuit Court of Appeals dismissed the appeal because the government failed to challenge any constitutional issues and only argued its interpretation of the federal peyote exemption statute.<sup>99</sup> A constitutional argument was essential for the appeal since the district court dismissed the indictment primarily on constitutional grounds.<sup>100</sup> Thus, the high court concluded that “[b]y choosing only to challenge the lower court’s ruling on the interpretation of 21 C.F.R. 1307.31 (1990), it leaves us with no choice but to dismiss this appeal, thereby leaving the lower court’s dismissal of this indictment intact.”<sup>101</sup>

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<sup>94</sup> *Boyll*, 774 F. Supp. at 1335-37 (defendant charged with the following: importation of peyote, possession with intent to distribute peyote, and unlawful use of a communication facility in causing and facilitating the importation of peyote).

<sup>95</sup> *Id.* at 1340 (referring to *Walz v. Tax Comm’n of New York*, 297 U.S. 664, 668-69 (1970)).

<sup>96</sup> *Id.* at 1341-42; *See also* *Sherbert v. Verner*, 374 U.S. 398 (1963) (Under the *Sherbert* test, governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest.); *Holt v. Hobbs*, 135 S. Ct. 853, 859 (2015) (*Sherbert* test is “a balancing test that considered whether a challenged government action that substantially burdened the exercise of religion was necessary to further a compelling state interest.”); *Hernandez v. Comm’r*, 490 U.S. 680, 699 (1989); *Wisconsin v. Yoder*, 406 U.S. 205, 220 (1972); *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 418 (2006); Michael E. Connelly, *Constitutional Law - New Mexico Federal Court Rejects Government’s Attempt to Determine Membership Eligibility in a Religion: United States v. Boyll*, 23 N.M. L. REV. 211, 214 (1993).

<sup>97</sup> *Id.* at 1342.

<sup>98</sup> CONNELLY, *supra* note 96, at 215.

<sup>99</sup> *Boyll*, 1992 U.S. App. LEXIS 14537, at \*3.

<sup>100</sup> *Id.* at \*5.

<sup>101</sup> *Id.* at \*17. *Cf.*, *McAllen Grace Brethern Church v. Salazar*, 764 F.3d 465 (5<sup>th</sup> Cir. 2014) (granting non-Indian access to eagle feathers for religious purposes); NAT’L CONG. OF AM. INDIANS, *Calling on the U.S. Fish & Wildlife to Deny the Petition for Rulemaking Seeking to Revise the Petition for Non-Indians to Possess and Use Eagle*

The *Boyll* decision opened the floodgates for non-Indians to claim NAC membership and acquire legal access to peyote for religious use under the federal peyote exemption.<sup>102</sup> American Indians who were not members of a federally recognized Indian tribe<sup>103</sup> due to tribal membership politics and dubious government regulations<sup>104</sup> were also effectively granted full NAC membership. The *Boyll* decision made it possible for non-Indians to establish their own NAC churches.<sup>105</sup> Currently, the annual peyote harvest in the United States has reached around 2,000,000 buttons and the federally-licensed Texas peyote dealers sell them to NAC members.<sup>106</sup> The broadly written federal peyote exemption law now includes virtually anyone who desires to ingest peyote.

### G. Legal Developments After *Boyll*

Subsequently, other federal and state courts have followed the *Boyll* decision in reaching similar conclusions. This includes *State of Utah v. Mooney*<sup>107</sup> and the U.S. Supreme Court decision in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*.<sup>108</sup> Just as in the *Boyll* case, the *Mooney* case involved non-Indians and non-federally-recognized Indians who established their own church entitled the “Oklevueha Earthwalks NAC.”<sup>109</sup> Mooney and his followers were arrested for possession and distribution of peyote in violation of the Utah Controlled Substance Act.<sup>110</sup> At trial, defendant Mooney used both the federal peyote exemption law and the *Boyll* decision as a

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*Feathers for Religious Purposes*, Res. REN-19-019 (June 2016); Luke W. Goodrich, *Sex, Drugs, and Eagle Feathers: An Empirical Study of Federal Religious Freedom Cases*, 48 SETON HALL L. REV. 36 (2017).

<sup>102</sup> *United States v. Boyll*, 774 F. Supp. 1333 (D.N.M. 1991).

<sup>103</sup> Indian Entities Recognized & Eligible to Receive Services from the U.S. Bureau of Indian Affairs, 82 Fed. Reg. 2,915 (Jan. 17, 2017)(to be codified at 2 C.F.R. §25.433).

<sup>104</sup> See, e.g., Tabitha Minke, Note: *Christman v. Confederated Tribes of Grand Ronde: A Chapter in the Disenrollment Epidemic*, 41 AM. INDIAN L. REV. 201, 217 (2016).

<sup>105</sup> See, e.g., *Oklevueha Native Am. Church of Haw., Inc. v. Holder*, No. 09-00336 SOM/BMK, 2013 U.S. Dist. LEXIS 181624, 2013 WL 6892914 (D. Haw., Dec. 13, 2013); PEYOTE WAY CHURCH OF GOD, <https://peyoteway.org/> [<https://perma.cc/DRQ4-N49M>] (this church was established pursuant to Ariz. Rev. Statute Ann. '13-3402B indicating that peyote is legal for religious purposes and under the federal peyote exemption, 21 CFR '1307.31. Anyone can become a member).

<sup>106</sup> Dana M. Price & Martin Terry, *A Tale of Two Cacti – The Complex Relationship Between Peyote (Lophophora Williamsii) and Endangered Star Cactus (Astrophytum Asterias)*, (2007), Sw. Rare & Endangered Plants: Proceedings of the 4th Conf., Las Cruces, NM (Mar. 22-26, 2004), <https://cactusconservation.org/a-tale-of-two-cacti/> [<https://perma.cc/N4FD-K844>]. During 2016, the Texas Department of Public Safety reported that peyote button sales have dwindled (from 1,163,120 buttons in 2015 to 867,674 in 2016) perhaps due to the cost and smaller button sizes. See also Joe Ben Walker, *An Analysis of Peyote Sales and Experiment Data from the Texas Department of Public Safety and the Cactus Conservation Institute*, Proposed for the J. BOTANICAL RSCH. INST. TEX., 4 (2016).

<sup>107</sup> *State v. Mooney*, 2004 UT 49 (2004).

<sup>108</sup> *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 433-434 (2006). See also *O Centro Espirita Beneficente Uniao Do Vegetal v. Ascroft*, 282 F. Supp. 2d 1271, 1270-1271 (D.N.M. 2002).

<sup>109</sup> *Mooney*, 2004 UT 49, ¶1 & ¶7 (“James Mooney claims to be a descendent of Native Americans, but is not a member of any federally recognized tribe.”); Brief, *supra* note 5, at 8 (“Mr. Mooney is, by his own admission, not a member of a federally-recognized tribe . . .”); *Oklevueha Native Am. Church of Haw, Inc. v. Holder*, 2013 U.S. Dist. LEXIS 181624, at \*4 and \*26 (“Plaintiffs allege that Mooney is a Native American of Seminole ancestry[.]”).

<sup>110</sup> *Mooney*, 2004 UT 49, ¶1 (violation of the UTAH CONTROLLED SUBSTANCE ACT, UTAH CODE ANN. §58-37-2(1)(e)(i)(2002)).

shield to his prosecution.<sup>111</sup> Similar to the *Boyll* court, the Utah Supreme Court interpreted the peyote exemption law to include anyone claiming to be a NAC member. Therefore, the law was not limited to only members of federally recognized Indian tribes.<sup>112</sup> Because the court believed Mooney’s church to be a part of the NACNA, although it was not, the Church and its members could not be prosecuted for peyote possession.<sup>113</sup> The *Mooney* case relied heavily on the *Boyll* decision in reaching its decision.

In 2006, after a Utah NAC group protested the *Mooney* decision, the Utah legislature limited the state’s peyote exemption law to only members of a federally recognized American Indian tribe.<sup>114</sup> This was largely done in the interest of preventing peyote from being exploited as a recreational drug.<sup>115</sup>

In 2009, a branch of the Utah Oklevueha church, entitled the “Oklevueha Native American Church of Hawaii, Inc.,” moved to Hawaii and modified its theology to include the use of cannabis and several other illicit drugs as its sacraments in addition to peyote.<sup>116</sup> In June of that year, federal agents seized a FedEx package containing a pound of marijuana that was mailed to the

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<sup>111</sup> *Id.* ¶4.

<sup>112</sup> *Id.* ¶22 (citing *Boyll*, 774 F. Supp. at 1338) (“Because the text of the exemption is devoid of any reference to tribal exemption is devoid of any reference to tribal status, we find no support for an interpretation limiting exemption to tribal members. . . . The term ‘members’ in the exemption clearly refers to members of the ‘Native American Church’—not to members of federal recognized tribes. Therefore, so long as their church is part of ‘the Native American Church,’ the Mooneys may not be prosecuted for using peyote in bona fide religious ceremonies.”).

<sup>113</sup> *Id.* See also Christopher Parker, *A Constitutional Examination of the Federal Exemptions for Native American Religious Peyote Use*, 16 *BYU J. PUB. L.* 89, 110 (2001) (“This broad use of peyote . . . does nothing to further the congressional goal of preserving traditional Native American culture. Given that it does not fulfill that goal, the use by churches such as Oklevueha falls under Smith’s general Free Exercise jurisprudence, which empowers states to prohibit peyote use.”); Daphne A. Oberg, *The Utah Controlled Substances Act Incorporates into State Law the Federal Regulation Exempting Use of Peyote in Native American Religious Ceremonies*, 2005 *UTAH L. REV.* 321, 325-326 (2005) (the Court rejected the State’s equal protection argument because “the federal government’s duty toward Native Americans would not necessarily be enough to validate a state attempt to limit the Exemption to federally recognized tribes” and “restricting the Exemption to certain members of the Native American Church could fall under that portion of the Utah Constitution which prevents the State from making any ‘law respecting an establishment of religion or prohibiting the free exercise thereof.’ ”).

<sup>114</sup> Controlled Substance Amendments, H.B. 60, 2006 Utah Gen. Sess. (2006); UTAH CONTROLLED SUBSTANCE ACT, UTAH CODE ANN. §58-37-2(v)-(x)(2015) (definition of “Indian” and “Indian Religion”, and “Indian Tribe”). See also Geoffrey Fattah, *Native Americans Seeking Backing For Bill to Limit Peyote Use*, *DESERET NEWS* (Jan. 19, 2006), <http://www.deseretnews.com/article/635177429/Native-Americans-seeking-backing-for-bill-to-limit-peyote-use.html> [<https://perma.cc/V6VG-8EMT>]; Rebecca Walsh, *Peyote Limit Advances in Senate*, *SALT LAKE TRIB.* (Feb. 7, 2006), [http://archive.sltrib.com/story.php?ref=/utah/ci\\_3483222](http://archive.sltrib.com/story.php?ref=/utah/ci_3483222); Mark Green, *Religious Liberty Rally At State Capital Calls On Utah To End Ban On Peyote Use In Sacrament*, *FOX13 NOW* (July 23, 2015), <http://fox13now.com/2015/07/23/religious-iberty-rally-at-state-capital-calls-on-utah-to-end-ban-on-peyote-use-in-sacrament/>.

<sup>115</sup> *United States: Utah Attempts to Close Loophole in Peyote Law*, *CULTURAL SURVIVAL Q. MAG.* (2007), <https://culturalsurvival.org/news/united-states-utah-attempts-close-loophole-peyote-law> [<https://perma.cc/SRD3-W9UD>]. See also Editorial: *Keep Peyote in its Proper Place*, *DESERET NEWS* (Jan. 24, 2006, 12:00 am), <http://www.deseretnews.com/article/635178577/keep-peyote-in-its-proper-place.html> [<https://perma.cc/HU4Y-BTBC>].

<sup>116</sup> *Oklevueha Native Am. Church of Haw. v. Holder*, No. 09-00336 SOM/BMK, 2010 U.S. Dist. LEXIS 16123, 2010 WL 649753 (D. Haw. Feb. 23, 2020).

Hawaiian Oklevueha NAC, but the agents did not arrest any of the church members.<sup>117</sup> In response, the Hawaiian Okleveha NAC filed a civil action in federal magistrate court seeking a declaratory judgment to permit their church members “to grow, use, possess, and distribute cannabis free from federal drug crime prosecution.”<sup>118</sup> They asserted that their use of cannabis was religious and their religious freedom was infringed upon by the Federal Controlled Substance Act.<sup>119</sup> Furthermore, Mooney and the Oklevueha Church members testified “that they ‘honor and embrace all entheogenic naturally occurring substances, including Ayahuasca, Cannabis (aka Rosa Maria and Santa Rosa), Iboga, Kava, Psilocybin, San Pedro, Soma, Teonanacetyl, Ts-Ahga, and many others.’”<sup>120</sup> The Hawaiian Okleveha claimed that they were associated with NAC as a chapter.<sup>121</sup> However, the NACNA denied this claim, and its *amicus curiae* brief stated that:

*Amici* NAC organizations do not recognize Oklevueha as a chapter, nor do they recognize Mr. Mooney as a member. In addition, *Amici* organizations do not recognize, condone, or allow the religious use of marijuana, or any other substance other than peyote, in any of its religious ceremonies. To the contrary, the only plant that serves as a sacrament in the NAC is peyote, and without peyote, the NAC services could not take place. The *Amici* organizations fully reject Appellants’ contention that marijuana serves as a substitute for peyote in services of any Native American Church.<sup>122</sup>

The Hawaiian Okleveha NAC plaintiffs could not verify their legal relationship to NACNA nor present any supporting evidence proving that Native Americans actually use cannabis when peyote is in short supply.<sup>123</sup> When the plaintiffs were served with interrogatories to explain how the federal drug laws substantially burdened their religious beliefs, fearing prosecution, they raised the Fifth Amendment privilege against self-incrimination and refused to answer the interrogatories.<sup>124</sup> The appellate federal district court held that the plaintiffs were not entitled to the Fifth Amendment privilege as a corporation and ordered them to answer the interrogatories to establish their RFRA

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<sup>117</sup> *Oklevueha Native Am. Church of Hawaii, Inc. v. Holder*, 676 F.3d 829, 834 (9<sup>th</sup> Cir. 2012).

<sup>118</sup> *Oklevueha*, 2010 U.S. Dist. LEXIS 16123, at \*1.

<sup>119</sup> *Id.*

<sup>120</sup> *Oklevueha Native Am. Church of Hawaii, Inc. v. Lynch*, 828 F.3d 1012, 1014 (9<sup>th</sup> Cir. 2016), *cert. denied*, 137 S. Ct. 510 (2016). *See also* *Oklevueha Native Am. Church v. Holder*, Civil No. 09-00336 SOM/BMK, 2013 U.S. Dist. LEXIS 181624, at \*\*9-10, 2013 WL 6892914 (D. Haw. Dec. 31, 2013) (citing Mooney’s deposition).

<sup>121</sup> *Oklevueha Native Am. Church of Haw., Inc. v. Holder*, Civil No. 09-00336 SOM/BKM, 2012 U.S. Dist. LEXIS 182979, at \*4, 2012 WL 6738532 (D. Haw. Dec. 31, 2012).

<sup>122</sup> Brief, *supra* note 5, at 8 (“The Appellants here invoke the ‘NAC’ name, history, and religious practices, all in support of their claim regarding marijuana . . . As the District Court noted, however, the record contains no evidence with the NACNA in particular, and mere use of the ‘NAC’ name does not entitle Appellants to the claimed legal exemption.”).

<sup>123</sup> *Oklevueha Native Am. Church of Haw. v. Holder*, 2012 U.S. Dist. LEXIS 182979, at \*6. *See also* Brief, *supra* note 5, at 20 (“The [peyote exemption statute] does not mention ‘marijuana’ and courts have unanimously declined to read a protection for marijuana into the statute.”).

<sup>124</sup> *Oklevueha Native Am. Church of Haw., Inc. v. Holder*, No. 09-00336 SOM/BMK, 2013 U.S. Dist. LEXIS 89740, at \*2, 2012 WL 3243371 (D. Haw., June 26, 2013).

claim.<sup>125</sup> Because the plaintiffs could not provide the court with sufficient evidence to establish their RFRA claim, the court granted summary judgment to the government.<sup>126</sup> On appeal to the Ninth Circuit, the high court affirmed the district court's granting of summary judgment to the government.<sup>127</sup> The plaintiffs also argued that AIRFAA protected their rights; however, the court held that AIRFAA "does not create a cause of action or any judicially enforceable individual rights."<sup>128</sup>

Before the Ninth Circuit rendered the Hawaiian Oklevueha NAC decision, NCNAC issued an official statement declaring that it did not condone the activities of illegitimate NAC organizations that use cannabis and other illicit drugs.<sup>129</sup> The NCNAC statement indicated that:

[s]ome of these illegitimate organizations, comprised of non-Native people, are now claiming that marijuana, ayahuasca and other substances are part of Native American Church theology and practice. Nothing could be further from the truth. We, the National Council of Native American Churches are now stepping forward to advise the public that we do not condone the activities of these illegitimate organizations.<sup>130</sup>

The NCNAC has stated "[i]t is important to note that never, in the long history of the struggle for religious freedom have members of the *Amici* NAC organization, or their constituent members, sought legal protections for the religious use of marijuana . . . the Peyote Religion does not recognize marijuana as a religious sacrament."<sup>131</sup> Moreover, regarding centrality of religious practice,<sup>132</sup> "the Peyote Religion centers around only one sacrament, peyote, which is taken in a high ritualized, structured manner, toward a set of clearly identified religious values that guide the

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<sup>125</sup> *Id.* at \*\*11-18.

<sup>126</sup> Oklevueha, 2013 U.S. Dist. LEXIS 181624, at \*\*36-38 ("But the court, despite seeking evidence linking Plaintiffs' cannabis use to a Native American religion, finds nothing in the record actually providing such a link.").

<sup>127</sup> *Oklevueha*, 828 F.3d at 1017-1018.

<sup>128</sup> *Id.* at 1017 (citing *Lyng v. Northwest Indian Cemetery Protective, Ass'n*, 485 U.S. 439, 455; *U.S. v. Mitchell*, 502 F.3d 931 (9<sup>th</sup> Cir. 2007)).

<sup>129</sup> NAT'L COUNCIL OF NATIVE AM. CHURCHES, *Statements of the National Council of Native American Churches Concerning the Proliferation of Organizations Appropriating the "Native American Church" Name with No Ties to the Indigenous Worship of the Holy Sacrament Peyote* (Feb. 13, 2016), <https://lastrealindians.com/news/2016/4/19/feb-19-2016-national-council-of-native-american-churches-calls-for-ending-appropriation-of-native-ceremony/> [<https://perma.cc/XR2V-FUUW>]. See also <https://www.narf.org/national-council-of-native-american-churches-speak-out-against-illegitimate-organizations/>.

<sup>130</sup> *Id.*

<sup>131</sup> Brief, *supra* note 5, at 9. See also NCNAC, *supra* at note 127 ("We oppose the attempts of non-Natives to come in and misuse government protection of traditional Native American religion to conduct illegal activity that has nothing to do with our traditional ways. We do not recognize, condone, or allow the use of marijuana, or any other substance other than peyote, in any of our religious services. To the contrary, the only plant that serves as a sacrament is peyote, and without peyote, our ceremonies cannot take place. We reject and condemn any claim by these illegitimate organizations that marijuana or any other plant serves or has ever served as a sacrament in addition to peyote in indigenous Native American Church ceremonies.").

<sup>132</sup> *Employment Div. v. Smith*, 494 U.S. 872, 906 (1990).

lives of many thousands of Native American people today.”<sup>133</sup> The *Boyll, Mooney, Oklevueha NAC of Hawaii, O Centro Espirita Beneficente Uniao do Vegetal*, and other recent court decisions have entailed a non-Indian movement in the United States toward decriminalization of peyote and other controlled substances mainly for recreational use.<sup>134</sup>

### III. ANALYSIS OF THE *BOYLL* DECISION

Like numerous other court opinions involving Native American rights and privileges where an incorrect or unfair decision was rendered,<sup>135</sup> the *Boyll* case ignored federal precedent and fundamental tenets of federal Indian law.<sup>136</sup> *Boyll* was essentially analyzed strictly as a First Amendment issue while focusing exclusively on the so-called “plain meaning” of the federal peyote exemption statute.<sup>137</sup> Admittedly, courts do generally follow the principle that if the language of the statute is clear and unambiguous, it does not need to delve any further into the meaning of the statute.<sup>138</sup> However, as a federal Indian law issue, ambiguity exists as to the meaning of the peyote exemption statute, requiring courts to examine other primary and secondary sources.<sup>139</sup>

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<sup>133</sup> Brief, *supra* note 5, at 14.

<sup>134</sup> See, e.g., NAT’L COUNCIL OF NATIVE AM. CHURCHES, *Statement from National Council of Native American Churches and the Indigenous Peyote Conservation Initiative Regarding Decriminalization of Sacred Plants Ordinances at the City of Other Jurisdictional Level, As They Pertain to Peyote* (March 30, 2020), <https://chacrana.net/wp-content/uploads/2020/03/DecrimStatementNCIPCIBOD.pdf>; Elizabeth Weise & Marco Dela Cava, *Oakland in California Decriminalizes Magic Mushrooms and Peyote*, USA TODAY (June 5, 2019), <https://www.usatoday.com/story/news/2019/06/05/oakland-california-legalizes-magic-mushrooms-and-peyote/1347888001/> [<https://perma.cc/83WJ-EWY3>]. See also *O Centro*, 546 U.S. 418 (legalized the sacramental use of hoasca plants for religious purposes); Annelises M. Wright, Note: *Dude, Which Religion Do I Have to Join to Get Some Drugs? How the Supreme Court Got It Wrong in Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418 (2006), 86 NEB. L. REV. 987, 1000 (2008); Cleve R. Wootson Jr. & Jaclyn Peiser, *Oregon Decriminalizes Possession of Hard Drugs, as Four Other States Legalize Recreational Marijuana*, WASH. POST (Nov. 4, 2020), <https://www.washingtonpost.com/nation/2020/11/04/election-drugs-oregon-new-jersey/> [<https://perma.cc/HH5U-BXS2>]. See also Marijuana Opportunity Reinvestment and Expungement Act of 2020, H.R. 3884, 116<sup>th</sup> Cong. 2<sup>nd</sup> Sess. (Dec. 7, 2020).

<sup>135</sup> See, e.g., DAVID E. WILKINS & K. TSAININA LOMAWAIMA, *UNEVEN GROUND: AMERICAN INDIAN SOVEREIGNTY AND FEDERAL LAW* 144-145 (Univ. Okla. Press 2001) (“In several cases, however, the U.S. Supreme Court has quashed or dramatically modified Indian treaty rights without congressional authorization or tribal consent.”); Ryan Gabrielson, *It’s a Fact: Supreme Court Errors Aren’t Hard to Find*, PRO PUBLICA (Oct. 17, 2017), <https://www.propublica.org/article/supreme-court-errors-are-not-hard-to-find> [<https://perma.cc/KHA2-H28J>] (“The justices can botch the truth, sometimes in cases of great import.”).

<sup>136</sup> See, e.g., CONNELLY, *supra* note 94, at 218 (“The court was incorrect, in insisting that ‘the legislative history clearly support[s] this Court’s findings that Congress intended the exemption to apply to all members of the Native American Church, Indian and non-Indian alike.’”).

<sup>137</sup> *United States v. Boyll*, 774 F. Supp. at 1338-1339 (“The plain language of the federal peyote exemption applies to all members of the Native American Church, regardless of race.”). See also *Boyll*, 1992 U.S. App. LEXIS 14537, at \*\*9-11. Cf. Brief, *supra* note 5, at 19 (“As the plain language of the AIRFA Amendments make crystal clear, this statutory exemption applies only to members of federally-recognized Indian tribes who use peyote in traditional Indian religious practices.”).

<sup>138</sup> *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 98 (2003) (“Our precedent make clear that the starting point for our analysis is the statutory text . . . And where, as here, the words of the statute are unambiguous, the ‘judicial inquiry is complete.’”).

<sup>139</sup> See, e.g., *Peyote Way Church of God v. Thornburgh*, 922 F.2d 1210, 1217(5<sup>th</sup> Cir. 1991)(“The federal Native American Church exemption as to peyote use represents the government’s protection of the culture of quasi-

Pursuant to the doctrine of *stare decisis*,<sup>140</sup> the *Boyll* court should have examined existing federal judicial opinions that previously analyzed and interpreted the same federal peyote exemption statute.<sup>141</sup> According to the U.S. Supreme Court, “any departure from the doctrine of *stare decisis* demands special justification.”<sup>142</sup> Under federal Indian law, the courts have consistently reiterated that “statutes passed for the benefit of dependent Indian tribes . . . are to be liberally construed to favor Indians.”<sup>143</sup>

Most American Indian rights have derived from a long and complex history of tribal-federal government relationships via treaties and other federal Indian policies.<sup>144</sup> “Indian tribes are unique aggregations possessing ‘attributes of sovereignty over both their members and their territory.’”<sup>145</sup> American Indian tribes retain a unique status and an enduring relationship with the Federal government, unlike other ethnic groups and governmental entities within the United

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sovereign Native American tribes and as such, does not represent an establishment of religion in contravention of U.S. Const. amend. I.”); *Peyote Way Church of God v. Smith*, 556 F. Supp. 632, 637 (N.D. Tex. 1983); *Peyote Way Church of God v. Meese*, 698 F. Supp. 1342, 1348 (N.D. Tex. 1988)(AIRFA protect and preserve American Indian religion); *Warner v. Graham*, 845 F.2d 179, 183 (8<sup>th</sup> Cir. 1988).

<sup>140</sup> See *Kimble v. Marvel Entm’t, LLC*, 576 U.S. 446, 455(2015) (“*Stare decisis*—in English, the idea that today’s Court should stand by yesterday’s decisions—is ‘a foundation stone of the rule of law . . . Application of that doctrine, although ‘not an inexorable command,’ is the ‘preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliable on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.’ . . . It also reduces incentives for challenging settled precedents, saving parties and courts the expense of endless relitigation . . . What we can decide, we can undecide. But *stare decisis* teaches that we should exercise that authority sparingly.”).

<sup>141</sup> See, e.g., *Meese*, 698 F. Supp. at 1342; *Smith*, 556 F. Supp. at 632; *Thornburgh*, 922 F.2d at 1210; and *Warner*, 845 F.2d at 179; *CONNELLY*, *supra* note 94, at 218 (The court “ignored that at the time this regulation became law, virtually all members of the NAC were Indian. And as the court itself pointed out, the regulation came about to prevent non-Indian ‘hippies’ from abusing the drug.”).

<sup>142</sup> *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1988) (“Our precedents are not sacrosanct, for we have overruled prior decisions where the necessity and propriety of doing so has been established.”).

<sup>143</sup> *Bryan v. Itasca Cnty.*, 426 U.S. 373, 392 (1976). See also *Mont. v. Blackfoot Tribe*, 471 U.S. 759, 766 (1985) (“The basic Indian law canons of construction require that treaties, agreements, statutes, and executive orders be liberally construed in favor of the Indians”); *Carcieri v. Salazar*, 555 U.S. 379, 414-415 (2009) (Justice Stevens’ dissent) (the “principle deeply rooted in [our] Indian jurisprudence” that “statutes are to be construed liberally in favor of the Indians.”).

<sup>144</sup> *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 206 (1978) (“‘Indian law’ draws principally upon treaties drawn and executed by the Executive Branch and legislation passed by Congress.”). See, e.g., *Williams v. Lee*, 358 U.S. 217 (1959) (tribal court jurisdiction derived from treaty); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *McClanahan v. Ariz. State Tax Comm’n*, 411 U.S. 164 (1973) (State cannot tax reservation Indian whose income derived wholly from reservation sources); *Menominee Tribe v. United States*, 391 U.S. 404 (1968) (Indian right to hunt and fish on tribal land free of state regulation); *United States v. Antoine*, 318 F.3d 919 (9<sup>th</sup> Cir. 2002) (Tribal members legal access to eagle feathers for religious purposes).

<sup>145</sup> *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 332 (1983).

States.<sup>146</sup> Moreover, “Indian tribes are not states. They have a status higher than states.”<sup>147</sup> According to the U.S. Supreme Court, “States do not enjoy this same unique [trust] relationship with Indians” tribes.<sup>148</sup> Court cases involving American Indian rights and privileges are analyzed by the federal courts pursuant to a backdrop of federal Indian law policies.<sup>149</sup> Federally-recognized American Indian tribes enjoy a unique “government-to-government relationship” with the U.S. government<sup>150</sup> since these tribes possess an inherent quasi-sovereign governmental status.<sup>151</sup> Frequently the Federal government refers to Indian tribes as being “domestic dependent nations”<sup>152</sup> that exist in a state of pupilage.<sup>153</sup> Regarding the state of pupilage, a federal district court stated that:

[t]he Congress has a power or duty to the Indians to preserve their dependent nations until such a time as they may become so assimilated so as to not be ‘a people apart.’ The exercise of power or duty is not over or to Indians as legalistic ‘tribes’ but as people who have a distinctive culture. Congress in the American Indian

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<sup>146</sup> See, e.g., *Rice v. Cayetano*, 528 U.S. 495, 537 (2000) (“we recognize that States generally do not have the same special relationship with Indians that the Federal Government has”); *Washington v. Confederate Bands & Tribes of Yakima Indians Nation*, 439 U.S. 463, 500-501 (1979) (“It is settled that ‘the unique legal status of Indian tribes under federal law’ permits the Federal Government to enact legislation singling out tribal Indians, legislation that might otherwise be constitutional offensive.”); *Woods Petroleum Corp. v. Dep’t of the Interior*, 47 F.3d 1032, 1042 (10<sup>th</sup> Cir. 1995) (“the relationship between the Indians and the federal government ‘is marked by peculiar and cardinal distinctions which exist nowhere else’ and ‘resembles that of a ward to his guardian.’”); *Mudarri v. State*, 147 Wn. App. 590, 614 (Wash. Ct. App. 2008).

<sup>147</sup> *Native Am. Church v. Navajo Tribal Council*, 272 F.2d 131, 134 (10<sup>th</sup> Cir. 1959); *Saroli v. Agua Caliente Band of Cahuilla Indians*, No. 10-CV-1748-BEN(NLS), 2011 U.S. Dist. LEXIS 64675, at \*6 (S.D. Cal., June 10, 2011) (“It is well-established that federally recognized Indian tribes are not citizens of any state.”); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 154 (1980) (tribal sovereignty is subordinate only to the federal government, not to the states).

<sup>148</sup> *Meese*, 922 F.2d at 1218; *Thornburgh*, 922 F.2d at 1218.

<sup>149</sup> *McClanahan*, 411 U.S. at 172 (“The Indian sovereignty doctrine is relevant, then, not because it provides a definitive resolution of the issues in this suit, but because it provides a backdrop against which the applicable treaties and federal statutes must be read.”); *Narragansett Indian Tribe v. Rhode Island*, 449 F.3d 16, 42 (1<sup>st</sup> Cir. 2006) (“It is ‘with these considerations of Indian sovereignty as a backdrop against which the applicable federal statute must be read’”); *Santa Clara Pueblo*, 436 U.S. at 60; *State ex rel. May v. Seneca-Cayuga Tribe of Okla.*, 1985 OK 54, ¶14; *Rice v. Rehner*, 463 U.S. 713, 719 (1983); *Baker v. John*, 982 P.2d 738, 754 (Alas. 1999); *Washington*, 447 U.S. at 179.

<sup>150</sup> Exec. Order No. 13,175 (May 2, 1994) (signed by President Bill Clinton).

<sup>151</sup> *United States v. Wheeler*, 435 U.S. 313, 320-21 (1978); *United States v. Kagama*, 118 U.S. 375, 380 (1886); *Worcester v. Georgia*, 31 U.S. 515(6 Pet.515), 559 (1832).

<sup>152</sup> *Cherokee Nation v. Georgia*, 30 U.S. 1 (5 Pet. 1), 17 (1831). See also *McBride v. Shawnee Cnty.*, 71 F. Supp. 2d 1098, 1102 (D. Kan. 1999) (“Native American tribes occupy a unique political position in the federal system and are considered domestic dependent nations. . . Under the doctrine of trust responsibility, the federal government is required to promote tribal self-government and cultural integrity of Native Americans . . . As ‘guardian-ward’, the federal government may grant Native Americans special rights and status under trust responsibility.”).

<sup>153</sup> *United States v. Rickert*, 188 U.S. 432, 436 (1903) (“These Indians are yet wards of the Nation, in a condition of pupilage or dependency, and have not been discharged from that condition.”); *Cherokee Nation*, 30 U.S. at 17 (“Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.”); *United States v. Sandoval*, 231 U.S. 28 (1913); *Baker v. Carr*, 369 U.S. 186, 215 (1962); *Elk v. Wilkins*, 112 U.S. 94, 99 (1884); *Porter v. Hall*, 34 Ariz. 308, 324 (Ariz. 1928) (“[A]ll Indians are wards of the federal government, and as such are entitled to the care and protection due from a guardian to his ward.”).

Religious Freedom Act has recognized this duty owed.<sup>154</sup>

In limited situations, states and municipalities could be authorized by Congress to implement the federal trust responsibility for Indian tribes.<sup>155</sup>

Historically, the federal government established a “guardian-ward relationship” with American Indian tribes that imposed a fiduciary trust responsibility upon the federal government towards Indian tribes.<sup>156</sup> This federal-tribal relationship resembles that of a trustee-beneficiary relationship.<sup>157</sup> Overall “the [federal-tribal government] trust relationship is one of the primary cornerstones of Indian law.”<sup>158</sup> This “unique guardian-ward relationship between the federal government and Native American tribes precludes the degree of separation of church and state ordinarily required by the First Amendment.”<sup>159</sup> The “reservation of Native American religion is fundamental to the federal government’s trust relationship with tribal Native Americans.”<sup>160</sup>

American Indian tribal governments have always been treated as a separate people by the federal government for the reason that they derived from a separate inherent sovereign source.<sup>161</sup> Hence, the federal government treating American Indians racially different for particular and special treatment is not invidious racial discrimination in violation of the *due process clause of the Fifth Amendment* since it is deemed to be a political classification “tied rationally to the fulfillment

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<sup>154</sup> *Peyote Way Church of God v. Smith*, 556 F. Supp. 632, 639 (N.D. Tex. 1983).

<sup>155</sup> *Id.*, at 1219.

<sup>156</sup> *Id.* (“Meanwhile they are in a state of pupillage. Their relation to the United States resembles that of a ward to his guardian.”); *McClanahan*, 411 U.S. at 173 (“doubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith.”); *Oklahoma Tax Comm’n. v. United States*, 319 U.S. 598, 607-608 (1943); *Cobell v. Norton*, 283 F. Supp. 2d 66, 145 (D.D.C. 2003) (“the court reiterated the existence of a ‘general trust relationship’ which imposes ‘distinctive obligations’ in addition to those established by statute.”); *Peyote Way Church of God, Inc. v. Thornburgh*, 922 F.2d 1210, 1217 (5<sup>th</sup> Cir. 1991).

<sup>157</sup> *See, e.g., United States v. Candelaria*, 271 U.S. 432, 439 (1926) (“they shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States are to be determined by Congress and not by the courts.”). *See also* 1 N.N.C. '4, at 8 (2005) (“the Navajo Nation Council finds that the acknowledgment, recognition and teachings of these [Foundation of the Din9] laws do not contravene 1 N.N.C. '4; the incorporation of these fundamental laws into the Navajo Nation Code is not governmental establishment of religion nor is it prohibiting the free exercise of religion[.]”).

<sup>158</sup> FELIX S. COHEN, FELIX S. COHEN’S HANDBOOK OF FEDERAL INDIAN LAW 221 (RENNARD STRICKLAND ET AL., 1992 eds.)(Michie Co. 1941). *See also McBride*, 71 F. Supp. 2d at 1103 (“The trust relationship between the United States and the Indians is broad and far reaching . . . [t]rust responsibility encourages both tribal self-government and cultural integrity.”).

<sup>159</sup> *Thornburgh*, 922 F.2d at 1217.

<sup>160</sup> H.R. Res. 4230, 103d Cong., 140 Cong. Rec. 41 (1994) (enacted).

<sup>161</sup> *Williams v. Lee*, 358 U.S. 217, 218-219, (1959); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55, (1978) (“Although no longer ‘possessed of the full attributes of sovereignty,’ they remain a ‘separate people, with the power of regulating their internal and social relations.’”); *United States v. Wheeler*, 435 U.S. 313, 322 (1978) (“Although physically within the territory of the United States and subject to ultimate federal control, they nonetheless remain ‘a separate people, with the power of regulating their internal and social relations.’”); *United States v. Wilgus*, 638 F.3d 1274, 1287 (10<sup>th</sup> Cir. 2011); *United States v. Kagama*, 118 U.S. 375, 1112-1113 (1886) (“They were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as States, not as nations, not possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations[.]”). *See also* U.S. CONST. ART. I, §8, CL. 3 (congress power to regulate commerce with foreign nations, states, and Indian tribes).

of Congress' unique obligation toward the Indians" and "rationally designed to further Indian self-government."<sup>162</sup> Thus, "[p]rograms for members of Indian tribes have never been understood to be based on race. Indian tribes and their members occupy 'a unique legal status.'"<sup>163</sup> "In other words, tribes predate the Constitution, and Federal recognition and regulation of them does not make them part of the Federal Government for fifth amendment purposes."<sup>164</sup>

In *Peyote Way Church of God, Inc. v. Meese*, the federal court held that "[t]he interpretation of the Native American Church being *sui genesis* should be viewed as a statement that the Native American Church 'is of its kind or class, that is, the only one of its own kind.'"<sup>165</sup> Unlike in other religion cases, the Fifth Amendment grants Indian and non-Indian people an equal-protection right to practice the NAC religion, but this equal-protection analysis has limited access to peyote under the federal peyote exemption statute to individuals who have a minimum of a quarter percent Native American blood and who are members of an Indian tribe.<sup>166</sup> In the *Boyll* case, the sympathetic federal district court considered "NAC membership" to be key to acquiring lawful access to peyote under the exemption statute. While avoiding to address the criminal charges and past interpretation of 21 C.F.R. § 1307.31, the court emphasized that only the NAC religious group could determine its membership and not the court.<sup>167</sup> In this cause of action the federal government had two primary duties, or wore two different hats: first a duty to prosecute the defendant for criminal violations (21 U.S.C. §§ 952, 960(b)(93), 843(b)-(c), 841(a)(1)) and second a fiduciary duty to protect the religious interest of American Indian people by showing a compelling interest. Moreover, the federal peyote exemption statute requires persons who distribute or dispense controlled substances to register, and no information was provided if the defendant was registered.<sup>168</sup> In sum, the *Boyll* court should have been analyzed pursuant to the back-drop of federal Indian law.<sup>169</sup>

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<sup>162</sup> *Morton v. Mancari*, 417 U.S. 535, 554 (1974) (Indian preference is not racial but is a political classification); *Peyote Way Church of God, Inc. v. Meese*, 698 F. Supp. 1342, 1349 (N.D. Tex. 1988) (Peyote exemption does not extend to non-Indians, but to federally recognized Indian tribes); *Peyote Way Church of God v. Smith*, 556 F. Supp. 632, 638 (1983) ("[T]he Court found that preference was not racial in nature but political in nature as it was not directed at Indians as a race but members of 'federally recognized' tribes."); *Thornburgh*, 922 F.2d at 1214-1219 (the preservation of Native American culture and religion "is fundamental to the federal government's trust relationship with tribal Native Americans").

<sup>163</sup> *United States v. Eagleboy*, 200 F.3d 1137, 1138 (8<sup>th</sup> Cir. 1999) (citing *Morton v. Mancari*, 417 U.S. 535, 551).

<sup>164</sup> U.S. COMM'N ON CIVIL RIGHTS, THE INDIAN CIVIL RIGHTS ACT: A REPORT OF THE UNITED STATES COMMISSION ON CIVIL RIGHTS 4 (Wash. D.C., U.S. Comm. Civil Rights June 1991).

<sup>165</sup> *Meese*, 698 F. Supp. at 1347. See also *O Centro Espirita Beneficente Uniao Do Vegetal v. Ashcroft*, 282 F. Supp. 2d, 1236, 1276 (D.N.M. 2002); *McBride v. Shawnee Cnty.*, 71 F. Supp. 2d 1098, 1100 (D. Kansas 1999) ("Several federal and state courts have held the peyote exemption is constitutional because the NAC is not similarly situated with other religions.").

<sup>166</sup> *Thornburgh*, 922 F.2d at 1212-1214.

<sup>167</sup> *Boyll*, 774 F. Supp. at 1340 ("The decision as to who can and who cannot be a member of the Native American Church is an internal church judgment which the First Amendment shields from government interference. . . [i]t is one thing for a local branch for the Native American Church to adopt its own restrictions on membership, but it is entirely another for the Government to restrict membership in a religious organization on the basis of race.").

<sup>168</sup> 21 C.F.R. '1307.31 (2011); 21 U.S.C. '822 (1970). See also TEX. HEALTH & SAFETY CODE ANN. '481.111 (West 2019) ("An exemption granted to a member of the Native American Church under this section does not apply to a member with less than 25% Indian blood.").

<sup>169</sup> See CONNELLY, *supra* note 96, at 224 ("Yet, the court's hyperbolic assertion that Congress 'clearly' meant the

Prior federal and state court decisions have analyzed the NAC membership issue according to federal Indian law policies. Before the *Boyll* decision, NAC membership qualifications were strictly limited to American Indians who had 25% Native American ancestors or blood-quantum.<sup>170</sup> In *Peyote Way Church of God, Inc. v. Meese*, a non-Indian church attempted to acquire a declaratory judgment permitting its non-Indian members the right to legally consume peyote religiously under the federal peyote exemption, but the federal court held that AIRFA was specifically enacted to protect and preserve American Indian religious freedom and the federal peyote exemption could not be expanded to include non-Indians use of peyote.<sup>171</sup> The federal court further stated that “Congress’ intent to exempt the Native American Church is not meant to extend to other churches which use peyote, the Court finds that Peyote Way’s claim for violation of the free exercise clause and establishment clause of the First Amendment must fail.”<sup>172</sup> Furthermore, the court held that “[t]he federal exemption is a political classification, not a racial one, and therefore does not violate the Equal Protection clause.”<sup>173</sup>

On appeal to the Fifth Circuit, in the case now titled *Peyote Way Church of God, Inc. v. Thornburgh*, the court referenced AIRFA by stating that “the federal exemption allowing tribal Native American members to continue their centuries-old tradition of peyote use is rationally related to the legitimate governmental objective of preserving Native American culture. Such preservation is fundamental to the federal government’s trust relationship with tribal Native Americans.”<sup>174</sup> The court further stated that “[u]nder *Morton*, Peyote Way’s members are not similarly situated to those of the NAC for purposes of cultural preservation and, thus, the federal government may exempt NAC members from statutes prohibiting peyote possession without extending the exemption to Peyote Way’s membership.”<sup>175</sup> The *Thornburgh* case reached a similar decision as the *Meese* and *Smith* cases by interpreting the federal peyote exemption to not include non-Indians. The Eighth Circuit also “concluded that *Congress did not intend a broad exemption for the religious use of peyote by non-Native American Church Members or non-Indians.*”<sup>176</sup>

In *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, a case deciding whether a church (UDV) could legally import and consume a hallucinogenic *hoasca* (DMT) tea for

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religious use exemption to apply to all races fails to consider fully the historical context in which the exemption was enacted, and it misinterprets legislative history.”) *See, e.g., Rice v. Rehner*, 463 U.S. 713, 732-733 (1983) (“We give this [canons of construction] rule [resolving ambiguities in favor of Indians] the broadest possible scope, but it remains at base a canon for constructing the complex treaties, statutes, and contracts which define the status of Indian tribes.”) (quoting *DeCoteau v. District County Court*, 420 U.S. 425, 447 (1975)); *Three Affiliated Tribes of Ft. Berthold Reservation v. Wold Engineering*, 476 U.S. 877, 884 (1986); *McClanahan v. Ariz. State Tax Comm’n*, 411 U.S. 164, 172 (1973); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 333 (1983).

<sup>170</sup> *Kennedy v. Bureau of Narcotics and Dangerous Drugs*, 459 F.2d 415, 416 (9<sup>th</sup> Cir. 1972).

<sup>171</sup> *Peyote Way Church of God v. Meese*, 698 F. Supp. 1342, 1348 (N.D. Tex. 1988); *Peyote Way Church of God v. Smith*, 556 F. Supp. 632, 637 (N.D. Tex. 1983); *Thornburgh*, 922 F.2d at 1219.

<sup>172</sup> *Id.* (NAC by-laws required members to be at least one-quarter Native American blood).

<sup>173</sup> *Id.* *See also Morton v. Mancari*, 417 U.S. 535 (1974).

<sup>174</sup> *Thornburgh*, 922 F.2d at 1216.

<sup>175</sup> *Id.* (Referring to *Morton v. Mancari*, 417 U.S. 535).

<sup>176</sup> *Warner v. Graham*, 845 F.2d 179, 183 (1988) (emphasis added). *See also CONNELLY, supra* note 94, at 218 (“A more careful reading of the exemption history, however, reveals that it came about less to protect the religious liberties of all NAC members than to preserve the cultural heritage of Native Americans.”).

religious purposes, the U.S. Supreme Court's de novo review of the peyote exemption did not go far enough when it stated:

The [U.S.] Government responds that there is a “unique relationship” between the United States and the Tribes, . . .; see *Morton v. Mancari*, 417 U.S. 535, 94 S. Ct. 2474, 41 L. Ed. 2d 290 (1974), but never explains what about that unique relationship justifies overriding the same congressional findings on which the Government relies in resisting any exception for the UDV's religious use of *hoasca*. In other words, if any *Schedule I* substance is in fact *always* highly dangerous in any amount no matter how used, what about the unique relationship with the Tribes justifies allowing their use of peyote? Nothing about the unique political status of the Tribes make their members immune from the health risks the Government asserts accompany any use of a *Schedule I* substance, nor insulates the *Schedule I* substance the Tribes use in religious exercise from the alleged risk of diversion.<sup>177</sup>

At the Supreme Court level, the Federal government failed to mention how AIRFA was enacted to protect and preserve American Indian religion, and the government also failed to mention other federal Indian law polices such as inherent tribal sovereignty and the guardian-ward relationship fiduciary responsibility to Indian tribes.<sup>178</sup> The U.S. Supreme Court has yet to rectify this situation and render a correct decision. Indeed, contemporary American Indian tribal members marry members of other Indian tribes and/or other racial groups, and the offspring of these couples may now seek NAC membership. Some full-blooded Native people cannot become enrolled tribal members due to tribal government politics or dubious federal bureaucratic technicalities.<sup>179</sup> Using the federal Indian law backdrop to analyze *Boyd* would involve examining prior federal and state court decisions plus federal statutes such as AIRFA and the federal-tribal fiduciary trust relationship.<sup>180</sup>

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<sup>177</sup> *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 433-434 (2006) (emphasis added).

<sup>178</sup> *Id.* See also *O Centro Espirita Beneficente Uniao Do Vegetal v. Ashcroft*, No. CIV. No. 00-1647 JP/RLP, Mem. Op. & Order, at 8 (D.N.M., Feb. 25, 2002) (“According to the Government, one ‘crucial difference between Plaintiff’s situation and that of Native American peyote users lie in the unique relationship between the federal government and Indian tribes.”); CONNELLY, *supra* note 96, at 218 (“A more careful reading of the [Federal Peyote] exemption’s history, however, reveals that it came about less to protect the religious liberties of *all* NAC members than to preserve the cultural heritage of Native Americans.”).

<sup>179</sup> See, e.g., *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) (tribe denying membership to children of female tribal members who married outside the tribe); *Alto v. Black*, 738 F.3d 1111, 1116 (9<sup>th</sup> Cir. 2013) (disenrollment of adopted tribal members); *Jeffredo v. Macarro*, 599 F.3d 913, 915 (9<sup>th</sup> Cir. 2010); *Aguayo v. Jewell*, 827 F.3d 1213 (9<sup>th</sup> Cir. 2016); *Cahto Tribe of the Laytonville Rancheria v. Dutschke*, 715 F.3d 1225 (9<sup>th</sup> Cir. 2012) (tribal ordinance dispute); *Cherokee Nation v. Nash*, 267 F. Supp. 3d 86 (D.D.C. 2017) (disenrolled Cherokee Freedman descendants granted tribal membership); *Rabang v. Kelly*, 328 F. Supp. 3d 1164 (W.D. Wash. 2018).

<sup>180</sup> See e.g., *Peyote Way Church of God v. Smith*, 556 F. Supp. 632, 635; *Peyote Way Church of God v. Meese*, 698 F. Supp. 1342, 1344; *Thornburgh*, 922 F.2d at 1214; *Kennedy v. Bureau of Narcotics and Dangerous Drugs*, 459 F.2d 415, 418 (1972); *Whitehorn v. State*, 1977 OK CT 65, ¶8 (Okla. Crim. App. 1977); *Warner*, 845 F.2d at 183; *United States v. Warner* 595 F. Supp 595, 598 (D.N.D 1984); *State v. Whittingham*, 504 P.2d 950, 951 (1973) (“The Native American Church has always been primarily an ‘Indian religion’ by reason of its origin and in the context that substantially all of its members are American Indians.”).

#### IV. PEYOTISM IN THE 21ST CENTURY: DECIMATION AND DEPLETION

##### A. Depletion and Decimation of the Mexican Peyote Gardens

In Mexico, land development activities such as mining and agriculture have caused massive damage and destruction to the peyote habitat. In 1994, the North American Free Trade Agreement (NAFTA) eased restriction on foreign corporations operating in Mexico, and the Mexican government signed “away the land rights of indigenous campesinos to foreign corporations,” which resulted in “damaging the environment and destroying ancient indigenous culture.”<sup>181</sup> The Zapatista Army of National Liberation (EZLN) was formed, consisting partially of rural indigenous people, protesting the signing of NAFTA and seeking local control of land. Their uprising became a bloody war with about 300 people killed, and later a peace agreement was entered into with the Mexican government in February 1996.<sup>182</sup> Some foreign corporations still remain in control of the indigenous lands in Mexico and continue to exploit it. In Real De Catorce, Mexico, mountain silver mining operations have disposed toxic metals like lead, mercury and arsenic on the soil where peyote cacti grow.<sup>183</sup> The Huichol Indian tribe of Mexico opposes the large scale mining operations and development on their ancestral land because these activities are destroying their sacred religious sites at Cerro del Quemado on the Wirikuta reserve near Real de Catorce, Mexico.<sup>184</sup> According to investigative journalist S. Lynne Walker, at Rancho Las Vegas, Mexico, a large greenhouse tomato industry deposits saline soil on the peyote habitat which causes the peyote cactus plants to perish.<sup>185</sup> These greenhouse “agricultural companies have planted hundreds of acres in the past five years, a dramatic increase for the fragile desert ecosystem.”<sup>186</sup> Scientists in Mexico studying the declining peyote problem concluded that “[p]eyote’s greatest threats are in ascending order: the induction of cattle pastures, conventional farming and modern agriculture greenhouses, also population growth and development that entails, such as roads, dams and levees, etc., and mining and exploitation materials such as sand quarries, lime kilns and

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<sup>181</sup> *Huichol Pilgrimage Becomes Fight for Spiritual Survival*, THE TEQUILA FILES (Feb. 18, 2012), <https://thetequilafiles.com/2012/02/18/1587/> [<https://perma.cc/M9K7-FJQZ>] (Huichol tribal ancestral homeland in danger of destruction at the hands of a Canadian mining company). See also North Am. Free Trade Act (NAFTA), Pub. Law 103-182, H.R. 3450.

<sup>182</sup> *Zapatista Uprising*, WIKIPEDIA, [https://en.wikipedia.org/w/index.php?title=Zapatista\\_uprising&oldid=980193316](https://en.wikipedia.org/w/index.php?title=Zapatista_uprising&oldid=980193316) [<https://perma.cc/97Z6-3AFC>]; *Zapatista Army of National Liberation*, WIKIPEDIA, [https://en.wikipedia.org/w/index.php?title=Zapatista\\_Army\\_of\\_National\\_Liberation&oldid=980885755](https://en.wikipedia.org/w/index.php?title=Zapatista_Army_of_National_Liberation&oldid=980885755) [<https://perma.cc/6QD8-5R6S>].

<sup>183</sup> WALKER, *supra* note 14 (“Outside Real de Catorce, a Canadian company, Minera Real Bonanza, is searching for new veins of silver. The mine closed in 1990, when silver prices fell to \$2.50 an ounce. With prices at 13 an ounce, the company hopes to mine 1,000 tons of ore a day.”).

<sup>184</sup> ASSOC. PRESS, *supra* note 18 (“Huichol Indians believe the sun was born in a spot high in the arid Sierra de Catorce Mountain range of northern Mexico.”). See also Tracy Barnett, *Medicine Stories, Wixarika Medicine Under Siege* (May 28, 2018), <https://intercontinentalcry.org/wixarika-medicine-under-siege/> [<https://perma.cc/ST7H-BMH9>].

<sup>185</sup> WALKER, *supra* note 14.

<sup>186</sup> *Id.* (“[i]t’s a massive destruction of the natural habitat . . . [b]ig firms rent the land, they use it and they deplete it and they leave behind saline soil.”).

quarries.”<sup>187</sup>

Currently, several internet websites advertise “psychedelic tourism” operated by tour guides who take tourists to the Mexican peyote gardens specifically to ingest peyote, which is a very lucrative business and supported by economically challenged rural Mexican communities.<sup>188</sup> This type of tourism is commonly referred to as “psychedelic tourism,”<sup>189</sup> drug tourism,<sup>190</sup> or narcotourism.<sup>191</sup> According to journalist Alasdair Baverstock, “[u]p to 5,000 tourists a year visit north Mexico to take peyote cactus.”<sup>192</sup> Many of these foreign drug tourists and their tour guides lack knowledge about peyote conservation and are not concerned about harvesting peyote correctly so that the plant could rejuvenate, but instead they dig up the entire cactus so that the plant is completely terminated.<sup>193</sup> (A properly harvested peyote crown permits the stem portion remaining in the ground to rejuvenate within a few years and eventually grow more crowns.<sup>194</sup>) A local Mexican tour guide concluded that most drug tourists are interested in experiencing peyote as a recreational drug, so they consume as many plants as they can locate.<sup>195</sup> As a result of psychedelic tourism, utilization of incorrect harvesting techniques, and a lack of peyote conservation has caused a massive decline in the desert peyote population in Mexico.<sup>196</sup>

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<sup>187</sup> QUEZADA et al., *supra* note 24, at 16.

<sup>188</sup> See e.g., Alasdair Baverstock, *It Can Make People Try to Get Completely Naked, or Even Try to Kill Each Other: The Tourist Toying With Insanity by Taking Powerful Hallucinogenic Cactus For Fun in Mexico*, DAILY MAIL (Dec. 24, 2014), <http://www.dailymail.co.uk/news/article-2883812/It-make-people-try-completely-naked-try-kill-tourists-toying-insanity-taking-powerful-hallucinogenic-cactus-fun-Mexico.html> [<https://perma.cc/QNN5-M3DU>]. See also WALKER, *supra* note 14 (“Some people are desperate. They run around the desert looking for peyote because they’re in a hurry to get high.” said Jeep driver Emilo Hernandez, who make his living taking *peyotos* into the desert. . . [t]hese hippies consume a lot of peyote. That is why it has been running out little by little.”); Shannon Firth, *Cactus Thieves Prickle Conservationists*, FINDING DULCINEA (Sept. 6, 2008), <http://www.findingdulcinea.com/news/Americas/September-08/Cactus-Thieves-Prickle-Conservationists.html> [<https://perma.cc/E5EK-U5KL>] (“In Mexico, poor villagers often sell rare cacti to smugglers for a little money; smugglers then sell the treasures to collectors at a high cost. In the United States, the greater problem appears to be souvenirs and hallucinogens.”).

<sup>189</sup> WALKER, *supra* note 14.

<sup>190</sup> Lulu Garcia-Navarro, *Mexico Peyote Endangered by Drug Tourists*, NPR (Sept. 3, 2007), <http://www.npr.org/templates/story/story.php?storyId=14064806> [<https://perma.cc/A4AK-T888>].

<sup>191</sup> Martin Terry, *Stalking the Wild Lophophora: Part 2 Zacatecas, San Luis Potosí, Nuevo León, and Tamaulipas*, 80 CACTUS & SUCCULENT J. 222 (2008).

<sup>192</sup> BAVERSTOCK, *supra* note 188. See also HYLTON, *supra* note 18 (“Real de Catorce’s website advertises the town as the place of the ‘pilgrimage of people of all ages and nationalities . . . [who] travel thousands of miles to arrive at this sacred site and experience a mystical communion with the magical cactus.’”).

<sup>193</sup> WALKER, *supra* note 14 (“People come down here and don’t know how to harvest it.”). See also Martin Terry, *Stalking the Wild Lophophora: Part 3, San Luis Potosí (central), Querétaro, and Mexico City*, 80 CACTUS & SUCCULENT J. 310, 311 (Nov. 2008) (“There was evidence that plants were being dug up entire . . . [t]he landscape had been devastated. Massive quantities of whole plants had been dug up and removed. Seedlings and small juveniles had been dug up, discarded, and left to die. The poachers had been careless and dropped a few of the uprooted adult plants along the trail on the way out.”); Martin Terry & James D. Mauseth, *Root-Shoot Anatomy and Post-Harvest Vegetative Clonal Development in Lophophora Williamsi (Cactaceae: Cactaceae): Implications for Conservation*, 22 SIDA, CONTRIBUTIONS TO BOTANY 565, 566 (2006).

<sup>194</sup> Dana M. Price & Martin Terry, *A Tale of Two Cacti*, CACTUS CONSERVATION INST., <https://cactusconservation.org/a-tale-of-two-cacti/commercial-peyote-harvest/> [<https://perma.cc/2MBK-XSPA>].

<sup>195</sup> WALKER, *supra* note 14 (“These aren’t tourists. These are people addicted to a hallucinogenic plant.” Statement by Jorge Quijano who operates a tourism office).

<sup>196</sup> *Id.*

There are numerous online cactus dealers who sell legal and illicit cactus plants worldwide.<sup>197</sup> Recently, “a Mexican study found nearly 4,000 websites selling cactuses, and 500 were run by illicit traders, who constantly switch Web servers and names to elude law enforcement.”<sup>198</sup> Several internet videos display tourists recklessly digging up entire peyote cactus plants in the Mexican desert and consuming peyote mostly for recreational purposes. Furthermore, peyote cactus plants and seeds can be purchased on several internet websites while some foreign countries and U.S. cities decriminalized peyote possession.<sup>199</sup> Psychedelic tourism will not disappear as long as there are people willing to pay for peyote tours and Mexican laws permit such activities.<sup>200</sup>

The Indian tribes of Mexico have become alarmed about the high rate of decimation of Mexican peyote gardens within their local communities since peyote is an essential component to their traditional religion, culture, and medicinal practices.<sup>201</sup> The aggrieved Mexican Indian tribes have acquired support from the National Commission for the Development of the Indigenous People (*Comisión Nacional para el Desarrollo de los Pueblos Indígenas*) (CDI), a Mexican government institution promoting Mexican indigenous rights and community development, for assistance in addressing the peyote crisis.<sup>202</sup> In response, the Mexican government promulgated a law, entitled “NOM-059-SEMARNAT-2002,” which classifies peyote as a threatened and protected species within Mexico.<sup>203</sup> This law prohibits exportation of peyote to foreign countries while permitting Mexican Indian tribes an exemption for the religious use of peyote.<sup>204</sup> Dr. Martin Terry indicated that:

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<sup>197</sup> HYLTON, *supra* note 18.

<sup>198</sup> *Id.* See, e.g., Buy Peyote Seeds, RARE EXOTIC SEEDS (2019), <https://www.rarexoticseeds.com/en/lophophora-williamsii-seeds-peyote-seeds.html>; Buy Lophophora Williamsii (Peyote), PRECIOUS CACTUS (2020), <https://precious-cactus.com/>; Peyote – Lophophora Williamsii – 10 Seeds, VANCOUVER SEED BANK (2019), <https://vancouverseedbank.ca/product/peyote-lophophora-williamsii-var-caespitosa/>. See also Matt Agorist, *After Denver Decriminalized Mushrooms, Oakland Does The Same With Ayahuasca, Peyote, Too*, FREE THOUGHT PROJECT (June 5, 2019), <https://thefreethoughtproject.com/oakland-decriminalizes-mushrooms-plants/> [<https://perma.cc/69HH-2EL3>]; Jon Murray, *Denver first in U.S. to decriminalize psychedelic mushrooms*, DENVER POST (May 8, 2019), <https://www.denverpost.com/2019/05/08/denver-psychedelic-magic-mushroom/> [<https://perma.cc/DDY9-DYWH>].

<sup>199</sup> Dave Palermo, *Rare Plants Pilfered in Mexico, Sold in U.S.: Cactus Smuggling – A Prickly Problem*, L.A. TIMES (Mar. 23, 1986, 12:00 AM), [http://articles.latimes.com/1986-03-23/news/mn-5529\\_1\\_rare-plant](http://articles.latimes.com/1986-03-23/news/mn-5529_1_rare-plant) [<https://perma.cc/7PVG-XJR7>] (“The Wildlife Fund says that unscrupulous dealers and collectors are smuggling as many as 20,000 rare and endangered Mexican cacti into the United States each year, and that several thousand more are illegally exported directly from Mexico to other countries where the demand is even greater.”).

<sup>200</sup> WALKER, *supra* note 14 (“Consuming peyote is legal in San Luis Potosi, a curious loophole that for decades has drawn thousands of druggies to the desert. As long as no one tries to take the cactus home - that would be trafficking and could lead to 10 years or more in prison[.]”).

<sup>201</sup> *Id.* See also QUEZADA et al., *supra* note 24, at 12.

<sup>202</sup> TERRY & TROUT, *supra* note 17, at 316 (explaining how the CDI supports Mexican Indian tribes by prohibiting exportation of Mexican peyote to foreign indigenous groups). See also NATIVE AM. CHURCH OF N. AMERICA, Resol. No. 20-01, *Preservation of the Wirikuta, The Sacred Site of the Wixarika Nation (Traditional People of Mexico)* (Feb. 12, 2011).

<sup>203</sup> *Id.* NOM-059-SEMARNAT-2002 (updated as “059-SEMARNAT2010”) (“This classification of peyote suggest that it is not considered endangered by SEMARNAT, but that it is considered to be at greater risk than most of the non-endangered species in the Cactaceae.”).

<sup>204</sup> See QUEZADA ET AL., *supra* note 24, at 11. See also TERRY & TROUT, *supra* note 17, at 316.

[t]his classification of peyote suggest that it is not considered endangered by SEMARNAT, but that it is considered to be at greater risk than most of the non-endangered species in the Cactaceae. This classification by SEMARNAT would surely raise red flags of regulatory caution in response to any proposal from a foreign entity, such as the NACNA, to increase the rate of exploitation of Mexican populations of peyote for the sole purpose of exportation to the U.S.<sup>205</sup>

Mexican Indian tribes condemn the exportation of Mexican peyote by foreigners, including NAC members, and strongly recommend that the U.S. government “encourage management plans for the collection of Peyote that are appropriate for the Texas region[.]”<sup>206</sup> Recently, some recreational peyote users demanded that the Huichol Indians cease harvesting peyote and threatened violence if the Huichol Indians continue to enter the Mexican peyote gardens.<sup>207</sup> To address their continued access to the Mexican peyote gardens, the Huichol Indians urged the Mexican government to create a federal protection area for their sacred territory and cultural-historical routes where peyote grows.<sup>208</sup> To further protect the Mexican peyote gardens, the Mexican people have demanded that the U.S. government legalize private peyote cultivation for NAC members.<sup>209</sup> Natural growing peyote plants are only found in the South Texas region and in northern Mexico, which American Indians in the United States can legally purchase peyote buttons from federally licensed peyote dealers in Texas.<sup>210</sup> Dr. Martin Terry, a peyote botanist who is researching the dwindling peyote population, indicated that:

[i]t is unlikely the Mexican government would make major legal and regulatory changes in order to permit exportation of peyote to groups of indigenous to the

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<sup>205</sup> *Id.* at 316 (explaining the effect of SEMARNAT on NACNA’s proposal to export Mexican peyote to the U.S. and Canada).

<sup>206</sup> QUEZADA ET AL., *supra* note 24, at 11-12 (“It is necessary and crucial for the continuity of the species to prohibit transportation of Peyote heads towards the U.S. by the Native American Church, consumption must be secured for the native Mexican tribes (Huichol, Tarahumara, Cora, etc.) in order to perpetuate their cultural and traditional customs, and only allow those who practice it for religious purposes.”) (“Although people generally don’t want to admit the impact of native cultures to the species, this happens and in various ways. . . [t]he ritual of Peyote medicinal use (the Native American Church) contributed to the decimation of plant populations in the U.S.[.]”).

<sup>207</sup> COBB, *supra* note 32 (“Frank Collum . . . says that Native Americans should back off the Mexican peyote gardens. ‘If this keeps going like it is,’ he says, ‘there’ll be a war with the Huichol. They eat an incredible amount of peyote.’”).

<sup>208</sup> QUEZADA ET AL., *supra* note 24, at 17-18 (“Since they have Peyote in Texas they do not have to cross over and affect biodiversity and put in risk populations of Peyote of another country only because their excessive consumption has decimated the populations of this plant in Texas.”).

<sup>209</sup> Pedro Nájera Quezada et al., *Lophophora Williamsii* (*Lem. ex Salm-Dyck*) *J.M. Coult., Descriptive Profile of the Species*, 2 *XEROPHILLIA* 56, 60 (2013) (“Another major cause of the decline of Peyote is overharvesting of the plant for ceremonial use by the Native American Church.”).

<sup>210</sup> *United States v. Boyll*, No. 91-2235, 1992 U.S. App. LEXIS 14537, at \*15(10<sup>th</sup> Cir. 1992) (“Peyote is grown only in northern Mexico and the Rio Grande Valley of southern Texas. Peyote is not grown anywhere else and its growth area, especially in the United States, is being considerably depleted.”); Martin Terry, Teodoso Herrera, Keeper Trout, Norma Fowler, & Bennie Williams, *Limitations to Natural Production of Lophophora Williamsii* (*Cactaceae*) *I. Regrowth and Survivorship Two-Years Post Harvest in a South Texas Population*, 5 *J. BOTANICAL RSCH. INST. TEX.* 661, 668-69 (2011).

United States when Mexican indigenous groups are experiencing a reduction in the population of Mexican peyote on which they rely for their own ceremonial use.<sup>211</sup>

Therefore, an essential priority is to devise a Texas peyote conservation plan that will ensure the availability of peyote to United States and Canadian NAC members for future generations.

### *B. Peyote Shortage in the United States*

Land development activities in the United States, specifically urban sprawl, ranching, and agriculture, have placed peyote in jeopardy.<sup>212</sup> Generally, most Texas cattle ranchers have no interest in protecting peyote and prohibit trespassers from entering their property.<sup>213</sup> Several cattle ranchers in South Texas have switched from cattle ranching to creating game hunting reserves and have erected high fences around their property.<sup>214</sup> Land owners protecting against trespassers helps conserve the peyote cactus but also prevents Indians from accessing their sacred plants.<sup>215</sup> Other ranchers have reserved their land specifically for oil drilling and land development since such use is more profitable than cattle ranching; plus, property values have significantly increased as a result of the growing oil industry.<sup>216</sup> Essentially, Texas land owners derive little or no benefit from allowing peyoteros access to their property to harvest peyote, therefore, they lack interest in utilizing their land for such activities.<sup>217</sup> Dr. Martin Terry has stated that:

[t]he other major source of depletion is chronic over-harvesting. Faced with steady to increasing demand for peyote by the NAC, and a decreasing number of ranchers willing to lease peyote harvesting rights, the peyoteros or their agents are returning too soon to harvest peyote from ranches where they harvested previously, without

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<sup>211</sup> Martin Terry, *The Peyote Trade of the Texas Borderlands: Religion, Commerce, Conservation, and Drug Regulation*, 20 J. BIG BEND STUDIES. 7, 14 (2008); TERRY & MAUSETH, *supra* note 193, at 566 (“There has been a decrease in the number, size, extent and density of peyote population in South Texas (Anderson 1995; Moreno 2005) over the past four decades. Much of the reduction in peyote numbers can be attributed to habitat destruction associated with urban development and agricultural practices such as rootplowing [sic] of native brush, and some adverse effects on population numbers may have been due to illicit harvesting.”); COBB, *supra* note 32 (According to peyotero Mauro Morales, “ranchers would rather plow their fields to plant grass for cattle feed than protect their native plants.”).

<sup>212</sup> TERRY & TROUT, *supra* at note 17, at 315 (“Loss of habitat through land development is the most significant element (Anderson 1995) but also the most difficult to control.”); TERRY & MAUSETH, *supra* note 193, at 566 (“Much of this reduction in peyote numbers can be attributed to habitat destruction associated with urban development and agricultural practices such as root plowing [sic] of native brush, and some adverse effects on population numbers may have been due to illicit harvesting . . . the decline of peyote in South Texas is the regulated commercial harvest of peyote by the licensed distributors for ceremonial use by the Native American Church. Approximately two million peyote buttons per year have been harvested by these distributors over the last two decades (Tex. Dep’t Pub. Safety, unpublished data).”).

<sup>213</sup> *Id.* See also COBB, *supra* note 32.

<sup>214</sup> *Id.* (“Ranchers want to protect against peyoteros getting in and deer getting out.”).

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> *Id.* See also COBB, *supra* note 32 (peyoteros are “people who make their living selling peyote buttons to the approximately 250,000 Indian members of the Native American Church”).

waiting for adequate regrowth to occur from plants that were properly harvested the last time. The visible results of this hurried reharvesting at ever-smaller time intervals is that the peyote buttons offered for sale by the peyoteros have markedly decreased in size in recent years. The more subtle result of this repeated too-frequent harvesting is that eventually the rootstocks of the peyote plants are exhausted, and no further regeneration of new sprouts occurs - the plants simply die.<sup>218</sup>

A peyote plant could rejuvenate if it is correctly harvested by severing off the crown portion with a sharp blade. Using an incorrect harvesting technique, such as digging up an entire peyote cactus plant with its roots, permanently destroys the plant.<sup>219</sup> Overharvesting reduces the size of peyote crowns and eventually destroys the peyote cactus plants.<sup>220</sup> Poachers generally do not harvest peyote cactus correctly, which contributes to eliminating the peyote population and lessens the availability of land for peyoteros to rotate their harvest to prevent overharvesting.<sup>221</sup>

This developing peyote shortage has increased prices and reduced the size of peyote buttons sold by Texas peyote dealers. In turn, this situation has compelled some NAC members to seek and acquire peyote from Mexico.<sup>222</sup> Several NAC members have been arrested and incarcerated for violating Mexican drug laws.<sup>223</sup> NAC officials have attempted to negotiate an international agreement with the Mexican government to permit NAC members a right to legally harvest or purchase peyote in Mexico and transport peyote back into the United States.<sup>224</sup> However, such efforts were terminated after the enactment of the North American Free-Trade Agreement (NAFTA) which prohibits exportation and importation of illegal items.<sup>225</sup> The recent

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<sup>218</sup> Martin Terry, *Peyote Population Genetics Study*, XIII MAPS 21 (2003) (Martin Terry is a botanist researching peyote and established the Cactus Conservation organization devoted to protecting and preserving peyote cactus and other rare cactuses). See also Will Weissert, *In Texas, Peyote Dealers Struggle With Dwindling Supply of Plants*, BOSTON GLOBE (Nov. 25, 2010), [http://archive.boston.com/news/nation/articles/2010/11/25/in\\_texas\\_peyote\\_dealers\\_struggle\\_with\\_dwindling\\_supply/](http://archive.boston.com/news/nation/articles/2010/11/25/in_texas_peyote_dealers_struggle_with_dwindling_supply/) [https://perma.cc/6B3T-586P].

<sup>219</sup> KLIEN, *supra* note 86, at 35-36.

<sup>220</sup> Martin Terry, Keeper Trout, Bennie Williams, Teodoso Herrera, & Norma Fowler, *Limitations to Natural Production of Lophophora Williamsii (Cactaceae) II. Effects of Repeated Harvesting At Two-Year Intervals in a South Texas Population*, 6 J. BOTANICAL RSCH. INST. TEX. 567, 568 (2012) (scientific citations excluded) (“A number of papers in the scientific literature have described the decline of peyote in its native habitat, apparently due to overharvesting . . . Despite such reports involving both Texas and Mexican populations, the species is not (yet) considered in danger of extinction . . . except in Texas[.]”).

<sup>221</sup> *Id.*

<sup>222</sup> DONOVAN, *supra* note 89, at A-3 (“[B]uying peyote in Mexico is increasingly popular since the prices are so much lower there and the supply seems to be dwindling from the few ranches in Texas that have a federal permit to grow peyote.”). See also *United States v. Boyll*, 774 F. Supp. 1333, 1337 (D.N.M. 1991).

<sup>223</sup> DONOVAN, *supra* note 89, at A-3 (“several years ago a Navajo family was stopped at the border and searched. When peyote was found, the family spent three or four months in a Mexican jail until NAC officials were able to convince the Mexican government to release them.”).

<sup>224</sup> *Id.* See NAT’L CONGRESS OF AM. INDIANS, PSP-09-056, *Support for Native American Church of North American and Their Ability to Harvest Peyote* (Oct. 11-16, 2009) (NCAI address issue of NAC access to Mexican peyote gardens).

<sup>225</sup> See AZ99 BEE NAHAGH< OF DIN9 NATION INC, <http://abndn.blogspot.com/p/navajo-nation-id-cards-peyote.html>.

passage of NOM-SEMARNAT-2010 prohibits exportation of Mexican peyote to foreign countries, including the United States, and makes no exemption for NAC members.<sup>226</sup>

In Texas, peyote access by the peyoteros is dependent upon land ownership and leasing of property rights for harvesting peyote. It is somewhat contradictory for the federal government to grant NAC members the exclusive right to purchase and use peyote religiously while simultaneously failing to provide any lands designated as federal or tribal peyote farms where peyoteros could harvest peyote specifically for NAC members. Few American Indian tribes or NAC organizations actually own property at the Texas peyote gardens, so they are completely dependent upon the current federally licensed Texas peyote distributor operation that is subject to shortages, high prices, and smaller buttons. According to attorney Kevin Feeney, “[t]he best avenue for preserving NAC peyote access would include a fee reduction for peyote distributors, through reclassification as dispensers, and clear regulations for cultivation by individual NAC chapters for a reasonable licensing fee.”<sup>227</sup>

### C. Advent of Illegitimate NAC Groups

Several illegitimate NAC groups in the United States have manifested in recent years alleging that they are genuinely-chartered NAC branches, but many groups have no actual ties to any bonafide NAC organization or federally-recognized American Indian tribe.<sup>228</sup> These groups mainly consist of non-Indians who are motivated to capitalize from peyote by charging customers enormous fees to partake of the herb.<sup>229</sup> A majority of these illegitimate NAC groups use other

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<sup>226</sup> TERRY & TROUT, *supra* note 17, at 316-17.

<sup>227</sup> FEENEY, *supra* note 20, at 70.

<sup>228</sup> *National Council Does Not Condone Faux Native American Churches or Marijuana Use*, INDIAN COUNTRY TODAY MEDIA NETWORK (Feb. 18, 2016), <http://indiancountrymedianetwork.com/history/events/national-council-does-not-condone-faux-native-american-churches-or-marijuana-use/> [<https://perma.cc/8N57-BWZF>]; *National Council of Native American Churches Speak Out Against Illegitimate Organizations*, NATIVE AM. RIGHTS FUND (Feb. 25, 2016), <http://www.narf.org/2016/03/national-council-of-native-american-churches-speak-out-against-illegitimate-organizations/> [<https://perma.cc/2V2L-Q8CY>]. See also Greg Kocher, *Berea Police Investigate Woman's Death at Native American Church*, LEXINGTON HERALD LEADER, <http://www.kentucky.com/news/local/counties/madison-county/article98671762.html> (woman dies after taking ayahuasca at Oklevueha NAC ceremony); *Suit: Woman's Collapse, Death Due to Negligence at Berea Church*, LEXINGTON HERALD LEADER (2017), <https://www.kentucky.com/news/local/counties/madison-county/article156151889.html> (“Suit names as defendants the Oklevueha Earthwalks NAC of Utah, Inc. and its ‘owner’ and spiritual leader, James W. ‘Flaming Eagle’ Mooney, as well as the Oklevueha Native American Church of the Peaceful Mountain Way in Berea and its ‘owners,’ Demian and Tina Gover of Richmond.”).

<sup>229</sup> See, e.g. Eric Tsetsi, *A Remote Arizona Church Offers Followers Peyote-Induced Psychedelic Trips*, VILLAGE VOICE (Jan. 8, 2014), <http://www.villagevoice.com/news/a-remote-arizona-church-offers-followers-peyote-induced-psychedelic-trips-6440619>. See also Eric Tsetsi, *Heavenly Trip: Inside The Peyote Way Church of God*, MIAMI NEW TIMES, (Jan. 9, 2014, 4:00 AM), <http://www.miaminewtimes.com/news/heavenly-trip-inside-the-peyote-way-church-of-god-6394529>; News, *Self-Proclaimed ‘Native’ Church Defends Drug Use and Sex Healing*, INDIANZ.COM (April 20, 2016), <http://www.indianz.com/News/2016/04/20/selfproclaimed-native-church-d.asp> (“The group claims marijuana as a sacrament. That irks genuine Native American Church practitioners who fought for years to protect their right to use peyote”); Greg Garrison, *Pro-Marijuana Church Active In Alabama: Members Tout ‘God and Cannabis’*, BIRMINGHAM REAL-TIME NEWS (Mar. 20, 2017), [https://www.al.com/news/birmingham/2017/03/pro-marijuana\\_church\\_active\\_in.html](https://www.al.com/news/birmingham/2017/03/pro-marijuana_church_active_in.html) (“‘I smoke cannabis on a daily basis for my pain,’ said Janice Rushing, president of the Oklevueha Native American Church of Inner Light in Alabama.”); Judith Prieve, *Native American Church in Antioch Ordered to Halt Marijuana Use For Healing*, EAST BAY TIMES.COM (Jan. 24, 2019),

drugs (beyond peyote) that are themselves illicit while misrepresenting and mocking traditional American Indian religion. Peyote is central to the NAC religion and it is regarded as a deity; thus, a peyote religion cannot exist without access to peyote.<sup>230</sup> Most legitimate NACs do not impose a fee upon their members or the public to attend ceremonies, but they may accept donations and gifts via a traditional indigenous customary manner.<sup>231</sup> Additionally, ceremonial helpers may receive contributions for their assistance and services.<sup>232</sup>

Foremost, the federal peyote exemption law was enacted with the intent to benefit American Indian tribes and tribal members,<sup>233</sup> but currently this law has been misconstrued to benefit non-Indians' illicit organizations that have no objective to protect and preserve American Indian religion and culture.<sup>234</sup> Various illegitimate NAC groups advertise their business enterprises on internet websites seeking to attract customers worldwide who may pay a fee to experience peyote within the United States under the cloak of the federal peyote exemption.<sup>235</sup> Thus, any willing individual could pay a fee online to become an "instant NAC member" and partake of peyote on the organization's property.<sup>236</sup> Such business enterprises attract a constant flow and a seemingly infinite number of customers who want immediate access to peyote. Most illegitimate organization's activities operate contrary to the AIRFAA's objectives and intended purpose. Some state governments grant these rogue organizations legal existence when they claim protection under AIRFAA and the federal peyote exemption law.<sup>237</sup>

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<http://www.eastbaytimes.com/2019/01/24/native-american-church-in-antioch-ordered-to-halt-marijuana-use-for-healing/>.

<sup>230</sup> See, e.g., *Native Am. Church of N.Y v. United States*, 468 F. Supp. 1247, 1251 (S.D.N.Y. 1979) ("Plainly the [Native American] Church was sui generis because it was the only religious organization then in existence that regarded peyote as a deity."); *People v. Woody*, 61 Cal. 2d 716, 722 (Cal. 1964) ("To forbid the use of peyote is to remove the theological heart of Peyotism."); *Whitehorn v. State*, 1977 OK CR 65, ¶6; *Kennedy v. Bureau of Narcotics & Dangerous Drugs*, 459 F.2d 415, 416 (9<sup>th</sup> Cir. 1972); *State v. Whittingham*, 19 Ariz. App.27, 29 (Ariz. Ct. App. 1973) ("Without it [Peyote] the sacraments of the Native American Church are obliterated."); *Toledo v. Nobel-Sysco, Inc.*, 651 F. Supp. 483, 487 (D.N.M. 1986) ("The use of peyote is central to the Native American peyote religion."); ABERLE, *supra* note 1, at 5.

<sup>231</sup> ABERLE, *supra* note 1, at 125-26.

<sup>232</sup> *Id.*

<sup>233</sup> 42 U.S.C. §1996 (1994); 42 U.S.C. §1996a (1994).

<sup>234</sup> See, e.g., TSETSI, *supra* note 229 ("Peyote Way, is, in fact, a church. It was founded based on the beliefs of Peyotism, Native American religion that uses the hallucinogen peyote as a sacrament and combines teachings from various other mainstream organized religions – including Christianity, Judaism, Buddhism, Mormonism, Hinduism, and Islam – in its doctrine."); OKLEVUEHA NAC MEMBERSHIP CARD SIGNUP, <https://nativeamericanchurches.org/membership-card-signup/> (basic membership fee \$200); VICTIMS OF OKLEVUEHA NAC ON FACEBOOK, <https://www.facebook.com/pages/category/Community/Victims-of-Oklevueha-Native-American-Church-1222864754413922/>; PEYOTE WAY CHURCH OF GOD MEMBERSHIP, <https://peyoteway.org/membership.php> (membership fee \$50.00 donation).

<sup>235</sup> *Id.* ("Each year, about 120 to 140 people visit the church, which requires visitors to become members with a suggested donation of \$200 to \$300 each, including a one-time membership fee of \$50 . . . The church's annual income totaled about \$60,000 for 2012, and the pottery business brought in about \$30,000[.]"). See also Greg Garrison, *Alabama Church Members Smoke Pot, Eat Mushrooms and Peyote: Those Are The Sacraments*, AL.COM (May 20, 2016 2:00 PM), [http://www.al.com/living/index.ssf/2016/05/alabama\\_church\\_members\\_smoke\\_p.html](http://www.al.com/living/index.ssf/2016/05/alabama_church_members_smoke_p.html) [<https://perma.cc/AZB4-LFBT>].

<sup>236</sup> See, e.g., TSETSI, *supra* note 229.

<sup>237</sup> See Christopher Parker, *Note and Comment: A Constitutional Examination of the Federal Exemption for Native American Religious Peyote Use*, 16 BYU J. PUB. L. 89, 111 (2001). See also Christopher Andrew Eason, *Note: O*

The Arizona Controlled Substance Act contains a broadly written peyote exemption that indicates:

it is a defense that the peyote is being used or is intended for use: 1) In connection with the bona fide practice of a religious belief, and 2) As an integral part of a religion exercise, and 3) In a manner not dangerous to public health, safety or morals.<sup>238</sup>

Arizona's earliest NAC cases were *Native American Church v. Navajo Tribal Council*, *State v. Attakai*, *Native American Church of Navajoland, Inc. v. Arizona Corporation Commission*, and *State v. Whittingham*.<sup>239</sup> Almost all of these cases involved American Indians, with the notable exception of *State v. Whittingham* that involved a NAC wedding ceremony held off-reservation where non-Indians were present.<sup>240</sup> For the most part, the history and origin of the Arizona peyote exemption law has been specifically based on Native American and NAC members.

#### *D. Peyote as Spiritual Healing Medicine for Native Americans*

A majority of Native American rural reservation communities have experienced high levels of economic and social stress as result of their living conditions and other psychosocial issues. Due to politics and other factors most rural Native American communities lack employment opportunities, economic development, basic infrastructures, and many modern amenities. According to the 2010 United States Census, around 5.2 million people in the United States identify as being American Indian and/or Alaska Native.<sup>241</sup> Several government statistics indicate that Native Americans suffer exceptionally high levels of economic stress, poverty, racial discrimination, violence, suicide, and other social problems within reservation and urban communities.<sup>242</sup> “About one-in-four American Indians and Alaska Natives were living in poverty

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*Centro v. Ashcroft: American Indians' Efforts to Secure Religions Freedom Are Paving the Way For Other Minority Religious Groups*, 28 AM. INDIAN L. REV. 327 (2003/2004); John Thomas Bannon, Jr., *Article: The Legality Of The Religious Use Of Peyote By The Native American Church: A Commentary On The Free Exercise, Equal Protection, And Establishment Issues Raise By The Peyote Way Church Of God Case*, 22 AM. INDIAN L. REV. 475, 505 (1998).

<sup>238</sup> ARIZ. REV. STAT. ANN. §13-3402 (2017).

<sup>239</sup> *Native Am. Church v. Navajo Tribal Council*, 272 F.2d 131 (10<sup>th</sup> Cir. 1959); *State v. Attakai*, Criminal No. 4098, Coconino Cnty. (D. Ariz., July 26, 1960)(unpublished opinion); *Native Am. Church of Navajoland, Inc. v. Ariz. Corp. Comm.*, 405 U.S. 901 (1972); and *State v. Whittingham*, 504 P.2d 950 (Ariz. Ct. App. 1973).

<sup>240</sup> *Whittingham*, 504 P.2d at 950-51.

<sup>241</sup> Tina Norris, Paula L. Vines, & Elizabeth M. Hoeffel, *The American Indian and Alaska Native Population: 2010, 2010 Census Briefs*, Report No. C2-1-BR-10, U.S. CENSUS BUREAU, 1 (Jan. 2012).

<sup>242</sup> Michael Landen et al., *Alcohol-Attributed Mortality Among American Indians and Alaska Natives in the United States, 1999-2009*, 104 AM. J. PUB. HEALTH 3 (2014); Mose A. Herne, Michael L. Bartholomew, & Rose L. Weahkee, *Suicide Mortality Among American Indians and Alasaka Natives, 1999-2009*, 104 AM. J. PUB. HEALTH 3 (2014); ANDRÉ B. ROSAY, NIJ RESEARCH REPORT, VIOLENCE AGAINST AMERICAN INDIAN AND ALASKA NATIVE WOMAN AND MEN: 201 FINDINGS FROM THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY, NAT'L INST. OF JUST., U.S. DEP'T OF JUST. (May 2016); Steven Flint, *Native American Crash Deaths – Time For Action*, DWI RES. CTR. (May 2015), <https://dwiresourcecenter.org/index.php/native-american-crash-deaths/> [<https://perma.cc/4YNF-MYU4>] (“New Mexico’s Native Americans die in motor vehicle crashes at a per capita rate 3.1 times higher than New Mexico non-Hispanic Whites[.]”); Fault Lines Documentary, *The Search: Missing and*

in 2012.”<sup>243</sup> The country’s current move away from usage of fossil fuels and the closure of several coal-fired electrical energy plants has greatly reduced mining activities on Indian reservations that has contributed to an economic downfall in such communities.<sup>244</sup> In 2013, the FBI crime statistics revealed that the Navajo Nation homicide rate was four times the national rate and higher than some major United States cities such as Seattle and Boston.<sup>245</sup> “American Indians experienced violence at a rate (101 violent crimes per 1,000 American Indians) more than twice the rate of the Nation (41 per 1,000 persons), 1992-2001[.]”<sup>246</sup> Between the years of 1972-1992, Native American suicide rates were 1.5 times higher than the United States national rates.<sup>247</sup> “[T]here are

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*Murdered Indigenous Women*, ALJAZEERA (May 8, 2019), <https://www.aljazeera.com/programmes/faultlines/2019/05/search-missing-murdered-indigenous-women-190506132615795.html> [https://perma.cc/QZ93-RFED] (“Indigenous women in the United States experience some of the highest rates of violence and murder in the country, according to federal data.”); INDIAN COUNTRY ED. TEAM, *United Nations Reports Drastic Increase of Violence Against Indigenous Peoples*, INDIAN COUNTRY TODAY (Aug. 28, 2018), <https://newsmaven.io/indiancountrytoday/news/united-nations-reports-drastic-increase-of-violence-against-indigenous-peoples-g1Cw15sS6Eq8t50ucRiOWA/>.

<sup>243</sup>Jens Manuel Krogstad, *One-in-Four Native Americans and Alaska Natives Are Living in Poverty*, PEW RES. CTR. (June 13, 2014), <http://www.pewresearch.org/fact-tank/2014/06/13/1-in-4-native-americans-and-alaska-natives-are-living-in-poverty/> [https://perma.cc/Q2QX-92X6]; Patrick Strickland, *Life on the Pine Ridge Native American Reservation*, ALJAZEERA, (Nov. 2, 2016), <https://www.aljazeera.com/indepth/features/2016/10/life-pine-ridge-native-american-reservation-161031113119935.html> [https://perma.cc/UR58-B8ND] (On the Pine Ridge reservation “life expectancy is the second-lowest in the western hemisphere and 80% of the people are unemployed.”).

<sup>244</sup>Terry Anderson & Shawn Regan, *The War on Coal is Punishing Indian Country, Washington Prevents Tribes from Developing Resources that Could Lift Them Out Of Poverty*, PERC (Oct. 13, 2013), <https://www.perc.org/2013/10/13/the-war-on-coal-is-punishing-indian-country/> [https://perma.cc/R8BK-B9PD] (“The war on coal is a war on our families and our children.”); James Rainey, *Lighting the West, Dividing a Tribe*, NBC NEWS (Dec. 18, 2017), <https://www.nbcnews.com/specials/navajo-coal/> [https://perma.cc/VG75-BU4J].

<sup>245</sup>Felicia Fonseca, *Navajo Murders Top National Rate*, ALBUQ. J. (Apr. 29, 2014), <http://abqjournal.com/391355/navajo-murders-top-national-rate.html> [https://perma.cc/XGF4-RGDL]; Felicia Fonseca, *Number of Navajo Homicides Tops Metro Areas*, ASSOC. PRESS (Apr. 28, 2014), <http://www.azcentral.com/story/news/nation.2014/04/28/navajo-homicide-tops-somemetro-areas/8425151/> [https://perma.cc/T2B2-HXB4]; Laurel Morales, *Navajo Nation, Feds Take On Overwhelming Violent Crimes*, FRONTERAS (Mar. 01, 2013), <http://www.Fronteradesk.org/content/navajo-nation-feds-take-overwhelming-violent-crime> [https://perma.cc/8ZCW-LSEH]; H.R. 958, 116<sup>th</sup> Cong. (1<sup>st</sup> Sess. 2019) (“The vast majority of American Indians and Alaska Native victims, 96% of female and 89% of male victims, report being victimized by a non-Indian . . . the Offices of the United States Attorneys decline to prosecute nearly 52% of violent crimes that occur in Indian country.”).

<sup>246</sup>STEVEN W. PERRY, U.S. DEP’T OF JUST., OFF. OF JUST. PROG., BUREAU OF JUST. STATISTICS, *A BJS STATISTICAL PROFILE, 1992-2002, AMERICAN INDIAN AND CRIME*, 1 (2004). See also EDUC. DEV. CTR., INC., *SUICIDE AMONG RACIAL/ETHNIC POPULATIONS IN THE U.S.: AMERICAN INDIAN / ALASKA NATIVES, SUICIDE PREVENTION RES. CTR.*, 1 (2013) (“American Indians experienced violence at a rate (101 violent crimes per 1,000 American Indians) more than twice the rate of the Nation (41 per 1,000 persons), 1992-2001[.]”); Anna Almendrala, *Native American Youth Suicide Rates Are At Crisis Levels: The Numbers Are Staggering*, HUFFPOST (Dec. 19, 2016), [https://www.huffingtonpost.com/entry/native-american-youth-suicide-rates-are-at-crisis-levels\\_us\\_560c3084e4b0768127005591](https://www.huffingtonpost.com/entry/native-american-youth-suicide-rates-are-at-crisis-levels_us_560c3084e4b0768127005591) [https://perma.cc/TG37-GFNE]; Vincent Schilling, *Center for Disease Control Release Suicide Stats. Native American Women Top the List With 139 Percent Increase*, INDIAN COUNTRY TODAY (June 24, 2019), <https://newsmaven.io/indiancountrytoday/news/centers-for-disease-control-release-suicide-stats-native-american-women-top-the-list-with-139-percent-increase-ivpVozlnc0eKs3iHX44V4Q/> [https://perma.cc/BQJ2-MXLC]; To Protect Native Children and Promote Public Safety in Indian Country, H.R. 958, 116<sup>th</sup> Cong. '6, 1<sup>st</sup> Sees. (2019) (“On some reservations, American Indian women are murdered at more than 10 times the national average.”).

<sup>247</sup>L.J. David Wallace, AD. Calhoun, K.E. Powell, J. O’Neil, & SP. James, , *Homicide and Suicide Among Native Americans 1979-1992, Violence Surveillance Summary, Series No. 2, iii*, CTR. FOR DISEASE CONTROL &

90,000 homeless or underhoused Indian families, and that 30% of Indian housing is overcrowded and less than 50% of it is connected to a public sewer.”<sup>248</sup> At the present time, like other Indian tribes, the Navajo people have greatly suffered from high fatalities caused by the COVID-19 pandemic that is partially due to Navajo homes lacking piped water and other essential resources.<sup>249</sup>

Historically, indigenous Native Americans have used peyote for religious purposes and as healing medicine.<sup>250</sup> Native Americans frequently turn to their traditional tribal elders and healers for assistance to address their personal problems associated with contemporary life because at various times, adequate answers to these problems are not found within the modern western world. Generally, modern science, technology, and medicine do not effectively address the health, spiritual and holistic needs of indigenous people. An answer to these problems is frequently found within the indigenous community itself through traditional Native American healing practices. NAC ceremonies have helped numerous suffering individuals recover from serious health conditions.<sup>251</sup> Peyote assisted numerous Native Americans recover from substance abuse issues

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PREVENTION, NAT'L CTR. FOR INJURY PREVENTION & CONTROL (1996); Mary Annette Pember, *Intergenerational Trauma: Understanding Natives' Inherited Pain*, INDIAN COUNTRY TODAY (2016), [https://www.academia.edu/31720368/Intergenerational\\_Trauma\\_Understanding\\_Natives\\_Inherited\\_Pain](https://www.academia.edu/31720368/Intergenerational_Trauma_Understanding_Natives_Inherited_Pain); H.R. 958, 116<sup>th</sup> Cong., '5 (1<sup>st</sup> Sess. 2019) (“According to the Center for Disease Control and Prevention, homicide is the third leading cause of death among American Indian and Alaska Native woman between 10 and 24 years of age and the fifth leading cause of death for American and Alaska Native women between 25 and 34 years of age.”).

<sup>248</sup> Living Conditions, NATIVE AM. AID, [http://www.nativepartnership.org/site/PageServer?pagename=naa\\_Living\\_conditions](http://www.nativepartnership.org/site/PageServer?pagename=naa_Living_conditions) [<https://perma.cc/MM68-APZH>]; Krista Allen, *Lineman who grew up without electricity installs it for others*, NAVAJO TIMES (June 6, 2019), <https://navajotimes.com/biz/lineman-who-grew-up-without-electricity-installs-it-for-others/> [<https://perma.cc/3RG3-SUNY>] (“It’s overwhelming when you see families turn on their switches and have power.”); Krista Allen, *Every last drop counts: Families in Navajo Mountain receive running water*, NAVAJO TIMES (June 27, 2019), <https://navajotimes.com/reznews/every-last-drop-counts-families-in-navajo-mountain-receive-running-water/> [<https://perma.cc/6U25-L5TR>].

<sup>249</sup> NATIVE NEWS ONLINE STAFF, *CDC Study Shows Disproportionate Impact of COVID-19 in Indian Country*, NATIVE NEWS ONLINE, <https://nativenewsonline.net/health/cdc-study-shows-disproportionate-impact-of-covid-19-in-indian-country> [<https://perma.cc/6A57-C3BP>]. See also NAVAJO DEP’T HEALTH, *Dikos Ntsaaígíí-19 (Covid-19)*, NAVAJO NATION, <https://www.ndoh.navajo-nsn.gov/COVID-19?fbclid=IwAR0qrwBZwZ12UvS7pDNIuL3IIc6uOV895buOAgqxWY6J0ed2mqFaBLESVkJ> [<https://perma.cc/DSJ9-Z737>] (Navajo COVID-19 data of positive and confirmed deaths).

<sup>250</sup> LA BARRE, *supra* note 1, at 43 (peyote ceremonies “may be held in gratitude for recovery from illness, on a child’s first four birthdays, for doctoring the sick, to pray for the successful delivery of a child, or for the health of the participants in general. Present too is the possibility of instruction and power through a peyote vision; in the Plains this is the primary motive, with doctoring second. In the last twenty years ‘holiday meetings’ have been introduced.”); ABERLE, *supra* note 2, at 183-187 (According to some peyotist, “peyote is a great power, not only for curing, but also for understanding the world and one’s place in it.”); Brief, *supra* note 5, at 3 (“the peyote sacrament promotes a set of clearly articulated religious values, including morality, sobriety, industry, charity, right living, self-respect, brotherly [and sisterly] love, and union among Indian tribes.”); George Morgan, *The Native American Church: Recollections of the Peyote Road*, UPCOUNSEL (Human Sci. Press 1983), <https://www.upcounsel.com/lectl-the-native-american-church-recollections-of-the-peyote-road> [<https://perma.cc/YK82-B2HA>] (“Some take refuge in the church as a last resort to cure a sickness after the white man’s medicine fails. Some start attending meetings out of sheer curiosity, and some want to escape the monotony of reservation life. Many come because they have heard that the Native American Church is a place where one can talk to God and feel His presence. They have heard that Peyote can change minds, habits, and lives for the better, or that Peyote can bring happiness to man in this life.”).

<sup>251</sup> See, e.g., THOMAS CONSTANTINE MAROUKIS, *PEYOTE AND THE YANKTON SIOUX: THE LIFE AND TIMES OF SAM NECKLACE* 218-19 (Univ. Okla. Press 2004) (“Peyote is the healer; the roadman is the facilitator”); SMITH & SNAKE,

plus enhanced their ability to pursue their own spiritual path.<sup>252</sup> For example, a NAC member shared that “[t]his Peyote has done me a world of good. It put me on the right road. It has caused me to put aside all intoxicating liquor; I now have no desire for whiskey, beer, or any strong drinks.”<sup>253</sup> “[M]ost anthropological authorities hold Peyotism to be a positive, rather than negative, force in the lives of its adherents . . . the church forbids the use of alcohol.”<sup>254</sup> NAC members stressed that “[t]he [peyote] religion teaches that those who use peyote must not use alcohol.”<sup>255</sup> Intoxicating alcoholic beverages are considered an antithesis to peyote, especially when Native Americans have a genetic predisposition to alcoholism<sup>256</sup>, because peyote heals while alcohol abuse usually promotes disharmony and destruction of the individual, family, and tribal community.<sup>257</sup> Peyote can be a significant asset if administered properly, but can be harmful if abused or misused against NAC teachings.<sup>258</sup> Indigenous people have had strong ties to the earth and environment by relying heavily on natural herbal and mineral medicines. In addition to other

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*supra* note 3, at 57-64 (“They told her that if she took the [Peyote] Medicine and prayed with all the faith she could manage, it might help her. She consumed it, prayed, and when the meeting was over she began to get well. Within a month she was walking.”) (“That Peyote cured me in a single night.”) (“[S]he says she’s living proof of the power of this [Peyote] Medicine, and why she tells me always to respect it.”).

<sup>252</sup> Bernard J. Albaugh & Philip O. Anderson, *Peyote in the Treatment of Alcoholism Among American Indians*, 131 AM. J. PSYCHIATRY 11, 1247-50 (Nov. 1, 1974) (“Although the authors do not propose that the peyote meeting is a cure for alcoholism, the feel that it offers some specific advantages in the treatment of the unique problems of the Indian alcoholic.”); Anthony Lee Sr., *Letter to the Editor: Some Have Healed Using Peyote*, NAVAJO TIMES, May 16, 2013; *Employment Div. v. Smith*, 494 U.S. 872, 915 (1990) (“religious use of peyote has been helpful in overcoming alcoholism.”); *Toledo v. Nobel-Sysco, Inc.*, 651 F. Supp. 1481, 485 (10<sup>th</sup> Cir. 1989) (“He joined the Church to seek help with an alcohol problem and has not had a drink since that time.”); John Horgan, *Mind, Curing Drug and Alcohol Addiction with Peyote: Is the Cure for Alcoholism and Other Addictions Locked Up In Hallucinogenic Drugs?*, DISCOVER MAG. (Jan. 11, 2009), <https://www.discovermagazine.com/mind/curing-drug-and-alcohol-addiction-with-peyote> [<https://perma.cc/E6UK-DA83>] (“Those in the Native American Church say their medicine helps keep them sober and healthy in body and mind, and Halpern suspects they are right.”).

<sup>253</sup> SMITH & SNAKE, *supra* note 3, at 49.

<sup>254</sup> *Employment Div.*, 494 U.S. at 915 (“[T]he philosophy, teachings, and format of the [Native American Church] can be of great benefit to the Indian alcoholic[.]”). See also H.R. 4230, 140 Cong. Rec. 41 (1994) (“[P]eyote is not injurious to the Indian religious user, and, in fact, is often helpful in controlling that scourge which afflicts many Indian people, alcoholism and alcohol abuse. All courts that have made factual findings regarding the religious use of peyote by Indians have correctly concluded that such is not harmful.”).

<sup>255</sup> *Toledo v. Nobel-Sysco, Inc.*, 651 F. Supp. 483, 485 (D.N.M. 1986) (The peyote religion “encourages love of parents and obedience to parents, fidelity to a spouse, and charity towards others. The peyote religion does not prohibit members from also practicing other religions.”).

<sup>256</sup> Cindy L Ehlers & Ian R. Gizer, *Evidence for a Genetic Component for Substance Dependence in Native Americans*, 170 AM. J. PSYCHIATRY 154 (Feb. 1, 2013), <https://ajp.psychiatryonline.org/doi/full/10.1176/appi.ajp.2012.12010113> [<https://perma.cc/M2NW-KSRM>]; *Alcohol and Native Americans*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Alcohol\\_and\\_Native\\_Americans](https://en.wikipedia.org/wiki/Alcohol_and_Native_Americans) [<https://perma.cc/5JHN-UBSN>].

<sup>257</sup> See Areahn Mtamonasa-Bennett, “*The Poison that Ruined the Nation*”: *Native American Men – Alcohol, Identity, and Traditional Healing*, 11 AM. J. MEN’S HEALTH 1142 (Mar. 2017); EHLERS & GIZER, *supra* note 256; John McClusky, *Native American Church Peyotism and the Treatment of Alcohol*, vii MAPS 3 (1997), [https://maps.org/news-letters/v07n4/v07n4\\_3-5\\_.pdf](https://maps.org/news-letters/v07n4/v07n4_3-5_.pdf) [<https://perma.cc/GS7L-AXGB>]; John F. Garrity, *Jesus, Peyote, and the Holy People: Alcohol Abuse and the Ethos of Power in Navajo Healing*, 14 MED. ANTHRO. Q. 521 (2001).

<sup>258</sup> See, e.g., *People v. Tso*, No. A134485, 2013 WL 4086324 (Cal. Ct. App., Aug. 12, 2013); *Lujan v. United States*, 209 F.2d 190 (10<sup>th</sup> Cir. 1953); *State v. Miller*, 51 Ore. App. 237 (Ore. Ct. App. 1981); *People v. Marbain*, No. A139387, 2014 Cal. App. Unpub. LEXIS 7012 (Cal. Ct. App., Sept. 29, 2014); *People v. Kubby*, No. C0386331, 2003 WL 21436984 (Cal. Ct. App., June 23, 2003).

traditional Native American healing ceremonies, peyote plays a vital role in strengthening and healing individuals, families, communities, and the tribe. Therefore, it is important that peyote continue to remain available for Native Americans now and into the distant future.

## V. CONSERVATION OF PEYOTE – GREEN HOUSE CULTIVATION

A viable alternative to exportation of Mexican peyote is to have NAC members cultivate their own peyote in greenhouses locally, which has been successfully accomplished in several different countries.<sup>259</sup> According to peyote botanist Dr. Terry, “[c]ultivation is the most obvious and the most readily achievable means of alternative production of peyote.”<sup>260</sup> The federal peyote exemption law requires that: “[a]ny person who manufactures peyote for or distributes peyote the Native American Church, however, is required to obtain registration annually and to comply with all other requirements of law.”<sup>261</sup> This language is presumed to permit Native Americans to manufacture peyote by growing it in a greenhouse or other method.<sup>262</sup> Greenhouse technology can produce peyote in the colder regions of North America.<sup>263</sup> Constructing and operating an ideal cactus greenhouse requires heating-cooling systems, LED or incandescent lights, high tech security systems complete with alarms and video cameras, durable security fencing, and other equipment. However, as another factor, most American Indian tribes generally lack basic resources and have high rates of poverty.<sup>264</sup> Several rural Indian tribes lack basic infrastructure necessities such as adequate roads, piped water, housing, electricity, government services, and other essential resources.<sup>265</sup> Therefore, many low-income tribes cannot afford greenhouses due to the expenses

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<sup>259</sup> Hannah Guttman, *An Outlook on the Future of Peyote – A Religious and Environmental Issue* 24 (2016) (unpublished manuscript) (on file with the Univ. of Heidelberg, Institut für Ethnologie, Heidelberg, Germany), <https://uni-heidelberg.academia.edu/HannahGuttman> [<https://perma.cc/W4TP-RDAT>].

<sup>260</sup> TERRY & TROUT, *supra* note 17, at 315.

<sup>261</sup> 21 C.F.R. § 1307.31; 42 U.S.C. 1996a(B)(2) (“This section does not prohibit such reasonable regulation and registration by the Drug Enforcement Administration of those persons who cultivate, harvest, or distribute peyote as may be consistent with the purpose of this Act [42 USCS 1996 et seq.]”).

<sup>262</sup> TERRY & TROUT, *supra* note 17, at 317.

<sup>263</sup> *Id.*

<sup>264</sup> See e.g., “More than one-third (38%) of the Navajo Nation tribal members are classified as ‘severely poor,’ with poverty ratios that ranges from below 0.5 to .99. These rates are more than twice as high as those of the State of Arizona (15%).”; RURAL POLICY INST., CTR. FOR BUS. OUTREACH, W.A. FRANKE COLL. OF BUS., N. ARIZ. UNIV., DEMOGRAPHICS ANALYSIS OF THE NAVAJO NATION USING 2010 CENSUS AND 2010 AMERICAN INDIAN SURVEY ESTIMATES, 36 (2010); OFF. OF THE SEC’Y INDIAN AFF., 2013 AMERICAN INDIAN POPULATION AND LABOR FORCE REPORT, U.S. DEP’T OF THE INTERIOR, 10-11 (Jan. 16, 2014) (“The highest estimated rate of poverty is in South Dakota, with 43%-47% of Native American families in 201 earning incomes below the poverty line.”); ARIZ. COOP. EXT. PROG., COLL. AGRIC. & LIFE SCI., THE NAVAJO NATION AND EXTENSION PROGRAMS, 3, UNIV. ARIZ. (2008) (“The Navajo Nation has the highest poverty rate in the U.S.; over 56% of Navajos live below the poverty level.”); Marley Shebala, Diné Bureau, *Navajo AG: Too Many Alcohol Deaths*, GALLUP INDEP., Apr. 2, 2018, at 1 & 5 (Navajo Epidemiology Center report “alcohol-related death impact of 95.13%”).

<sup>265</sup> Alysa Landry, *Not Alone in the Dark: Navajo Nation’s lack of Electricity Problem*, NATIVE NEWS (Feb. 11, 2005), <https://indiancountrytoday.com/archive/not-alone-in-the-dark-navajo-nation-s-lack-of-electricity-problem-yO5P4y3H6k6kuxF-U5FvvQ> [<https://perma.cc/2FTK-833V>]. ARIZ. COOP. EXT. PROG., *supra* note 262, at 1 (“Most homes do not have electricity, running water, or telephones. The Navajo Nation has no urban center, and most roads remain unpaved (U.S. Census, 2007).”); Felicia Fonseca, *No Longer in the Dark: Navajo Nation Homes Get Electricity*, ABC NEWS (May 18, 2019), <https://abcnews.go.com/Technology/wireStory/longer-dark-navajo-nation-homes-electricity-63123992> [<https://perma.cc/48Q8-EQYG>]; Charlie Lapastpra, *Navajo Families Who’ve Never*

associated with building and operating the facility, plus security, unless it is operated communally or with the financial support of the government. A few tribes with successful casino gaming enterprises retain sufficient capital to sponsor a tribal peyote greenhouse project, but some tribes cannot afford a peyote greenhouse due to financial issues. For the Navajo Nation, even though it operates three casinos, the tribe has economic challenges due to its large population size of over 250,000,<sup>266</sup> extreme poverty issues,<sup>267</sup> enormous rural land base covering 27,000 square miles, and an infrastructure shortage.<sup>268</sup> These issues make greenhouse cultivation of peyote a challenge for the tribe.

Some NAC members strongly oppose and forbid the greenhouse cultivation of peyote, because their personal religious beliefs and perspectives necessitate them to consume only wild-grown peyote (which is considered divine).<sup>269</sup> As an example, some NAC members adhere to the belief that natural, wild-grown peyote is an infinite resource that will always be naturally available despite any environmental difficulties that may arise. This religious view is based on a belief that a supreme deity will always provide peyote to mankind.<sup>270</sup> These beliefs are incongruent with the reality facing peyote today; the species is definitely declining, and greenhouse cultivation is inevitable for future NAC survival.<sup>271</sup> Peyote botanist Dr. Terry warns the tribes that, “[c]ultivation

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*Had Electricity Are For The First Time Seeing the Light*, FOX NEWS.COM (June 18, 2019), <http://www.foxnews.com/us/electricity-navajo-power-utility-nation-native-american> [<https://perma.cc/YJ8Z-3FZL>]; *Statistics About Pine Ridge Reservation*, FRIENDS OF PINE RIDGE RESERVATION, <http://friendsofpineridgereservation.org/about-pine-ridge-reservation-and-fopr/satistics-about-pine-ridge-reservaton/> (“Pine Ridge Reservation is the poorest county in the United States . . . 97% of the population lives far below the U.S. federal poverty line with a median household income ranging between \$2,600 and \$3,500 per year.”).

<sup>266</sup> NAVAJO NATION, <http://www.navajo-nsn.gov/history.htm>. (“Din9 Bik9yah, or Navajoland, is larger than 10 of the 50 states in American.”). See also NAVAJO EPIDEMIOLOGY CTR., NAVAJO DIV. OF HEALTH, NAVAJO POPULATION PROFILE 2010 U.S. CENSUS, NAVAJO NATION, 5 (2013), <https://www.nec.navajo-nsn.gov/Portals/0/Reports/NN2010PopulationProfile.pdf>.

<sup>267</sup> 43% of the Navajo population lives below the poverty rate and the Navajo Nation has a 42% unemployment rate. DIV. OF ECON. DEV., NAVAJO NATION, FAST FACTS, <http://navajobusiness.com/fastFacts/Overview.htm> [<https://perma.cc/NA28-W62X>].

<sup>268</sup> See also *Casinos Not Paying Off for Indians*, ABC NEWS (Aug. 31, 2017), <https://abcnews.go.com/US/Story?id=95944&page=1> [<https://perma.cc/V9AR-X2NH>] (“And among the 130 tribes with casinos, a few near major population centers have thrived while most others make just enough to cover the bills[.]”); Dwanna L. Robertson, *The Myth of Indian Casino Riches*, INDIAN COUNTRY TODAY (Apr. 19, 2017), <https://indiancountrytoday.com/archive/the-myth-of-indian-casino-riches-3H8eP-wHX0Wz0H4WnQjwJA> (“Not every tribe has a casino.”); Nicholas K. Geranios, *Shutdown of Tribal Casinos Deals Blow to Indian Country*, AP (May 10, 2020), <https://apnews.com/article/91bc3be3e1b8bc6a1c4ace2064ea6f76> [<https://perma.cc/BAN4-CSBS>] (the COVID-19 pandemic has shut down numerous Indian casinos).

<sup>269</sup> COBB, *supra* at note 32 (“the biggest obstacle for conservation might be the Indians themselves. Many Indians are opposed to cultivating peyote in greenhouses. Their opposition stems from a mystical belief in the cactus as divinely planted.”).

<sup>270</sup> *Id.* (“Alden Naranjo, a Ute who’s been traveling to the peyote gardens from Colorado since the 1960s, isn’t too worked up about the disappearance of his sacrament. . . I don’t think it will disappear. We’ve used it for thousands of years, and it’s still here.”).

<sup>271</sup> Edward Anderson, *The “Peyote Gardens” of South Texas: A Conservation Crisis?*, 67 CACTUS & SUCCULENT J. (1995), <https://www.peyote.com/peyote/peyotegardens.html> [<https://perma.cc/739Y-72VV>] (“The plant grows well in cultivation, though few peyoteros and Native Americans have been inclined to propagate other than small backyard gardens of peyote, thinking that the wild populations will never be depleted. Unfortunately, this is not the case.”).

seems to be an inevitable undertaking in the future of the NAC if they envision a long-term future for the religious use of peyote.”<sup>272</sup>

For many years, NAC members intentionally avoided cultivating peyote due to fear of federal prosecution under the former law and past negative experiences with the government.<sup>273</sup> In 1994, the federal peyote exemption law was broadened to accommodate peyote manufacturing or greenhouse cultivation. The amendment mandated peyote distributors to obtain federal registration annually and comply with other legal requirements.<sup>274</sup> Recently, a few Indian tribes have worked cooperatively with the United States Drug Enforcement Agency (DEA) to legally construct greenhouses on Indian reservations to cultivate peyote for its NAC members. According to Dr. Terry, “[d]elaying implementation of cultivation compounds their challenges due to the lag time prior to the first large-scale harvest in a sustainable production stream.”<sup>275</sup>

## VI. PROPOSALS

With timely and well-constructed public policy, it will be possible to effectively conserve peyote for future generations of Indigenous peoples and the larger world. Over the course of history, several endangered plant and animal species have been successfully saved from the verge of extinction through timely intervention and proper conservation. As examples, bald eagles and the California condors were successfully brought back from endangered species status to self-sustaining populations.<sup>276</sup> Moreover, recovery programs have also been successfully established for the diminishing ginseng plant population in Canada<sup>277</sup> and the United States.<sup>278</sup> These efforts demonstrate that government conservation programs can help protect and restore the populations of threatened species. The challenge, of course, is to develop public policy that can accomplish these same results for peyote. I propose several.

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<sup>272</sup> 21 C.F.R. '1307.31 (1973); TERRY & TROUT, *supra* note 17, at 318.

<sup>273</sup> *Id.*

<sup>274</sup> 21 C.F.R. §1307.31.

<sup>275</sup> TERRY & TROUT, *supra* note 17, at 318.

<sup>276</sup> John R. Platt, *California Condor Population Hit Important Milestone, but Still Face Threats*, SCI. AM. (May 24, 2012), <https://blogs.scientificamerican.com/extinction-countdown/california-condor-milestone-threats/> [<https://perma.cc/784J-Q3U9>].

(reaching a high of 405 birds); U.S. FISH & WILDLIFE SERV., HISTORY OF BALD EAGLES DECLINE, PROTECTION AND RECOVERY, <https://www.fws.gov/midwest/eagle/recovery/index.html> [<https://perma.cc/EPV3-BQK3>] (Bald eagle “no longer needs the protection of the Endangered Species Act because its population is protected, healthy, and growing.”).

<sup>277</sup> ENV'T CANADA, *Recovery Strategy for the American Ginseng (Panax Quinquefolius) in Canada [Proposed]. Species at Risk Act Recovery Strategy Series*, GOV. CANADA (2015), <https://www.canada.ca/en/environment-climate-change/services/species-risk-public-registry/recovery-strategies/american-ginseng-2018.html> [<https://perma.cc/XT6R-JAW4>].

<sup>278</sup> Martha E. Van Der Voort et al., *Recovery of Populations of Goldenseal (Hydrastis Canadensis L.) and American Ginseng (Panax Quinquefolius L.) Following Harvest*, 149 AM. MIDL. NAT. 282-292 (2003), [https://www.researchgate.net/publication/232691828\\_Recovery\\_of\\_Populations\\_of\\_Goldenseal\\_Hydrastis\\_canadensis\\_L\\_and\\_American\\_Ginseng\\_Panax\\_quinquefolius\\_L\\_Following\\_Harvest](https://www.researchgate.net/publication/232691828_Recovery_of_Populations_of_Goldenseal_Hydrastis_canadensis_L_and_American_Ginseng_Panax_quinquefolius_L_Following_Harvest); COLL. AGRIC. SCI., RES. & COOP. EXT., NONTIMBER FOREST PRODUCTS (NTFPs) FROM PENNSYLVANIA, AMERICAN GINSENG (PANAX QUINQUEFOLIS L.), PENN. ST. UNIV. 8 (2004)(“Persons harvesting ginseng plants shall plant the seeds from the plants in the immediate vicinity of the collection site.”), <https://extension.psu.edu/american-ginseng> [<https://perma.cc/5T5Y-Y5S8>].

### *A. Legislating a Definition for “NAC Membership” and “Official NAC Chapter”*

Because of recent court decisions like *Boyll* and *Mooney*, it is recommended that the NAC define the term “NAC member,” in a manner that adequately addresses the federal peyote exemption loophole. NAC possesses the ultimate authority to define its specific composition of membership rather than have a court perform this task. Some NAC chapters are less formal, having few rules, while others have detailed bylaws. A final, specific definition could preclude non-Indians from illegitimately claiming an affiliation with NAC. Such a definition would be more consistent with the legislative intent behind AIRFAA and provide courts with a better understanding of the differences between legitimate and illegitimate NAC members.

NAC should also define the term “official NAC chapter” and delineate the protocol necessary to qualify as a bonafide NAC chapter. This recommendation is as essential as defining NAC membership in order to eliminate illegal and fraudulent NAC groups. For example, the main sacrament of NAC is peyote, not marijuana, heroin, methamphetamine, or any other illicit herb, chemical, mineral, or substance.<sup>279</sup> By incorporating this essential principle into the definition of an NAC chapter, the organization could help to ensure the integrity and legitimacy of all its constituent chapters.

### *B. Grants for NAC Peyote Greenhouses*

Because many NAC chapters and Indian tribes lack adequate resources and funding to construct and operate greenhouses for peyote cultivation, the federal government should provide grants designated specifically for constructing peyote greenhouses.<sup>280</sup> The availability of competitive grants would enable NAC chapters and members, as well as tribes, to cultivate peyote within their local communities. This initiative would support the conservation of peyote by reducing the strain on Texas peyote gardens. The proposal itself would have two policy bases: the conservation and protection of a species indigenous to the United States and the preservation of Native American religion.

### *C. Federal Peyote Farms*

Any federal peyote exemption law that does not provide for the manufacture and cultivation of peyote cannot address the decline of peyote in a serious way. Although it is not an enumerated duty within the federal statute, the federal government should purchase land in Texas containing a healthy peyote population in order to begin government cultivation of peyote. Such a plan would enable the Texas peyote dealers to control the harvest of peyote and support peyote conservation. It would also be in the best interests of the United States to protect an indigenous plant species.

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<sup>279</sup> See, e.g., *Oklevueha Native Am. Church of Haw., Inc. v. Holder*, 828 F.3d 829, 1016 (9<sup>th</sup> Cir. 2012).

<sup>280</sup> See, e.g., GRANTS.GOV, <https://www.grants.gov/web/grants/learn-grants/grant-policies.html> [<https://perma.cc/3NAK-A4JA>]; 25 U.S.C. '5306(a)(1) (2004) (grants to Indian tribes).

#### D. NAC Peyote Farms

Since real property rights are directly linked to ownership of real property<sup>281</sup>, NAC could invest in acquiring Texas real estate containing thriving peyote cactuses. Through the ownership of Texas land, the NAC could directly harvest and monitor its own peyote population existing on the land with only limited outside interference. While there is no a guarantee that peyote plants will prosper or continue to grow on these properties, such a strategy would indeed provide NAC greater control of the peyote population. The United States Department of Interior also has the ability and authority to acquire land for Indian tribes by holding the land in a trust for the tribes, and this mechanism could, and should, be used to protect peyote as a species.<sup>282</sup> Such property usage must be strictly designated for the limited purpose of peyote cultivation and with legal restrictions for no other uses.<sup>283</sup> A deviation from this purpose would defeat the objective of a peyote farm and the protection and conservation of the species.

#### E. Support from the International Community

American Indian tribes could gain additional support from the international community to adequately address the peyote issues on a world-wide basis. Founded in 1945, the United Nations (U.N.) is an international organization that “can take action on the issues confronting humanity in the 21<sup>st</sup> century, such as peace and security, climate change, sustainable development, human rights,” and more.<sup>284</sup> Creation of international law could inspire, promote, or compel various countries to promulgate laws and policies that protect and preserve peyote in addition to recognition of indigenous tribal human rights. NAC, in addition to the Indian tribes of Mexico and Canada, could submit recommendations to the U.N. via non-governmental organizations

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<sup>281</sup> Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315, 1317 (1993) (“Defenders of private ownership of land argue that it promotes individual liberty, political stability, and economic prosperity.”).

<sup>282</sup> See, e.g., OFF-RESERVATION ACQUISITION, 25 C.F.R. § 151.11; ACQUISITION OF LANDS, 25 U.S.C. § 465; *McAlpine v. United States*, 112 F.3d 1429 (10<sup>th</sup> Cir. 1997); *South Dakota v. U.S. Dep’t of Interior*, 69 F.3d 878, 882 (9<sup>th</sup> Cir. 1995) (“It is settled that the United States may purchase land by condemnation for an Indian reservation as a public use . . . That same power authorizes Congress to acquire non-reservation lands in trust for a public use that benefits Indians or Indian tribes.”); *Carcieri v. Norton*, 398 F.3d 22, 27 (1<sup>st</sup> Cir. 2005) (The Indian Reorganization Act of 1934, 25 U.S.C. §451 et seq., authorizes the Secretary of the Interior to acquire lands in trust for the purpose of providing land for Indians. 25 U.S.C. §465); *Upstate Citizens for Equality, Inc. v. United States*, 199 L. Ed. 2d 372 (2017) (“The Indian Reorganization Act (IRA), 48 Stat. 958, as amended, permits the Secretary of the Interior to take land into trust for individual Indians or Indian tribes. 25 U.S.C. ‘5108.’”); *Carcieri v. Salazar*, 555 U.S. 379, 381(2009).

<sup>283</sup> It is recommended that such lands not be used for other governmental purposes such as -- oil or mineral exploration and development, mining, military activities, Indian gaming enterprises, livestock grazing, housing development, or other activities devastating upon the peyote habitat.

<sup>284</sup> UNITED NATIONS, <http://www.un.org/en/sections/about-un/overview/index.html>. See also U.N. G.A. Res. 61/295, annex, U.N. DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES, ART. 24, &1 (Sept. 13, 2007) (“Indigenous peoples have the right to their traditional medicines and to maintain their health practices, including the conservation of their vital medicinal plants, animals and minerals.”); Hannah White, Comment, *Indigenous Peoples, the International Trend Toward Legal Personhood for Nature, and the United States*, 43 AM. INDIAN L. REV. 129, 133(2018) (“The Declaration [on the Rights of Indigenous Peoples] is now the most comprehensive instrument on the rights of indigenous peoples and sets a standard for protection of the dignity, well-being, and fundamental freedoms of native groups worldwide.”).

(NGO), indigenous rights organizations, human right groups, and various U.N. committees to seek international support for the preservation and protection of the traditional religious use of peyote.<sup>285</sup> Furthermore, NAC could collaborate with the National Congress of American Indians (NCAI), Canada's Assemble of First Nations (AFN), Mexico's National Commission for the Development of the Indigenous People (CDI), International Indian Treaty Council (IITC)<sup>286</sup>, and other major indigenous organizations to protect and preserve peyote plus promote their traditional religious rights.<sup>287</sup>

#### *F. Support for Continued Funding of Scientific Research on Peyote*

Peyote may yet be found to provide medicinal or other societal benefits to future generations,<sup>288</sup> as well as provide aesthetical value as a beautiful and unique plant. To ensure a greater chance of peyote species' survival into the future, continued scientific research on peyote is necessary and should be supported plus encouraged. Based on past experiences, Native Americans generally mistrust scientific research because they have been victims of negative

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<sup>285</sup> See, e.g., CTR. FOR WORLD INDIGENOUS STUDIES, <http://cwis.org/WhoWeAre/WhatWeDo.php.tr> (CWIS advocates for the rights of Indigenous Nations); WORLD CONF. ON INDIGENOUS PEOPLES, <https://www.un.org/development/desa/indigenouspeoples/about-us/world-conference.html>; INT'L COMM. FOR THE INDIGENOUS PEOPLES OF THE AM., <https://uia.org/s/or/n/1100042842>; INT'L WORK GROUP FOR INDIGENOUS AFFAIRS, <https://www.iwgia.org/en/>; MINORITY RIGHTS GROUP INT'L, <https://minorityrights.org>; CTR. FOR INT'L ENV'T LAW, <https://www.ciel.org>; and etc.

<sup>286</sup> INT'L INDIAN TREATY COUNCIL, <https://www.iitc.org> (The IITC is an organization of Indigenous tribes from the Americas, including the Caribbean and Pacific regions, "working for the sovereignty and self-determination of indigenous peoples and the recognition and protection of their rights, treaties, traditional cultures and sacred lands.").

<sup>287</sup> NAT'L CONGRESS OF AM. INDIANS ("founded in 1944, is the oldest, largest and most representative American Indian and Alaska Native organization serving the broad interests of tribal governments and communities."), <http://www.ncai.org/>; ASSEMBLY OF FIRST NATIONS ("The Assembly of First Nations (AFN) is a national advocacy organization representing First Nation citizens in Canada, which includes more than 900,000 people living in 634 First Nation communities and in cities and towns across the county."), <https://www.afn.ca/Home/>; NAT'L INST. OF INDIGENOUS PEOPLES ("INSTITUTO NACIONAL DE LOS PUEBLOS INDIPGENAS")(INPI)(formerly entitled "NAT'L COMM'N FOR THE DEVELOPMENT OF INDIGENOUS PEOPLES" (CDI)(English) or "LEY DE LAW COMISI. N NACIONAL PARA EL DESARROLLO DE LOS PUEBLOS INDIGENAS." In 2018, the INPI took on the responsibilities of CDI that "orients the public policies for the integral and sustainable development of the indigenous communities that promotes the respect for their cultures and the enforcement of their rights.").

<sup>288</sup> Kevin Feeney, *Peyote as Medicine: An Examination of Therapeutic Factors that Contribute to Healing*, 37 J. MED. ANTHRO. 195 (2014)("The notion that hallucinogenic compounds may have therapeutic applications, however, is increasingly supported by scientific research. Despite the heavy focus of allopathic medicine pharmacology, the therapeutic value of peyote must be understood in holistic terms."). See also Richard Evans Schultes, *The Appeal of Peyote (Lophophora Williamsii) as a Medicine*, 40 J. AM. ANTHRO. 698-715 (1938); John Horgan & Jennifer Tzar, *Peyote on the Brain: Is the Secret to Alcoholism and Other Addictions Locked Up in Hallucinogen Drugs?*, DISCOVER MAG. (Feb. 01, 2003), <http://discovermagazine.com/2003/feb/featpeyote/>; Tal Axelrod, *John Hopkins to Open Research Center Studying 'Magic Mushrooms,' Other Psychedelic Treatments*, THE HILL, 09/05/19, <https://thehill.com/blogs/blog-briefing-room/news/460063-johns-hopkins-to-open-research-center-studying-magic-mushrooms>; Daniel Oberhaus, *Motherboard: The Decline of American Peyote*, MAPS (Dec. 14, 2018), <https://maps.org/news/media/7589-motherboard-the-decline-of-american-peyote> ("peyote continues to be woefully under studied compared with other entheogens, such as ayahuasca."). See, e.g., Ede Frescka, Petra Bokor, & Micheal Winkleman, *The Therapeutic Potentials of Ayahuasca: Possible Effects against Various Diseases of Civilization*, 7 FRONTIERS IN PHARMACOLOGY 35, (Mar. 2016).

studies.<sup>289</sup> Scientific empirical research enhances the knowledge and understanding of the peyote plant species and that could advance the preservation, protection, and proliferation of peyote.<sup>290</sup> Therefore, the NAC (Indian tribes of the United States, Canada, and Mexico) could support positive scientific studies and research of peyote as a means of providing tangible benefits to future generations and ensuring the species' survival.

## VII. CONCLUSION

Ongoing scientific research studies confirms that the natural, wild-growing peyote cactus populations of Mexico and the United States are being significantly reduced as a result of ongoing harmful human activities. Peyote usage among indigenous Native Americans is deeply intertwined with their culture, health, and religion. Historically, the origins of the peyote religion began with Native Americans. Native Americans have long suffered for their religious use of peyote since Europeans have colonized America and mistreatment of peyotists persists to the present time. A significant challenge for indigenous Native Americans in the beginning of the Twenty-First Century is addressing this decline in the peyote cactus population. Some Native Americans strongly oppose current efforts to legalize and decriminalize peyote possession for the general public.<sup>291</sup> The protection and preservation of the species is of critical importance to Native American religion.

The problem of supply and demand is at the heart of this peyote crisis. Too many peyote consumers with too few peyote plants available has led to a dramatic decline in the species' health. A loophole in the federal peyote exemption law in the United States, created by the federal courts, has enabled illegitimate NAC groups to thrive and take wrongful advantage of the law. This loophole, and its resulting effect on the peyote population, presents an imminent threat to real NAC groups in their continued practice of their traditional religion. These problems can only be solved, and the peyote population can only be protected for the future, through a variety

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<sup>289</sup> Christina M. Pacheco, Sean M. Daley, Travis Brown, Melissa Filippi, K. Allen Greiner, & Christine M. Daley, *Moving Forward: Breaking the Cycle of Mistrust Between American Indians and Researchers*, 103 AM. J. PUB. HEALTH 2152-2159 (Dec. 2013), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3828980/>; NCAI POL'Y RSCH. CTR. & MONT. STATE UNIV. CTR. FOR NATIVE HEALTH P'SHIP, "Walk Softly and Listen Carefully": Building Research Relationships with Tribal Communities, (2012), [https://www.ncai.org/resources/ncai\\_publications/walk-softly-and-listen-carefully-building-research-relationships-with-tribal-communities](https://www.ncai.org/resources/ncai_publications/walk-softly-and-listen-carefully-building-research-relationships-with-tribal-communities); Erin Blakemore, *Why the Navajo Nation Banned Genetic Research*, HISTORY CHANNEL (Aug. 31, 2018), <https://www.history.com/news/why-the-navajo-nation-banned-genetic-research> (scientific studies used against Native Americans).

<sup>290</sup> KLEIN ET AL., *supra* note 86, at 38 (For example, scientific studies on "understanding of the difference in mescaline concentration between the peyote historically harvested in the Chihuahuan Desert and the peyote currently being commercially harvested in the United States portion of the Tamaulipan Thornsrb is crucial for managing the conservation of the species.").

<sup>291</sup> Louis Sahagun, *Why Are Some Native Americans Fighting Efforts To Decriminalize Peyote?*, L.A. TIMES (March 29, 2020), <https://www.latimes.com/environment/story/2020-03-29/native-americans-want-mind-bending-peyote-cactus-removed-from-efforts-to-decriminalize-psychedelic-plants>; NAT'L COUNCIL OF NATIVE AM. CHURCHES & INDIGENOUS PEYOTE CONSERVATION INITIATIVE, *Official Statement of National Council of Native American Churches & Indigenous Peyote Conservation Initiative on the 'Decriminalization' Efforts of Peyote and Other Sacred Plants*, J. NATIVE SCI. (Mar. 12, 2020), <https://www.nativesciences.com/wp-content/uploads/2020/03/DecrimStatementNCIPCIBODFinal3.pdf>.

of strategies and tools. NAC and tribal leaders are encouraged to revise their own definitions and membership guidelines, request assistance from the federal government in acquiring land for peyote cultivation, and seek increased federal protection for peyote as a species, among other strategies. Furthermore, Native Americans could retain support for the protection, conservation, and religious use of peyote from the international community via the United Nations. In the end, proper conservation methods are essential to protect the peyote plant population within Mexico and the United States and ensure its continued survival.