BE IT RESOLVED, That the American Bar Association supports in principle the enactment of federal legislation such as HR_1546 to amend the American Indian Religious Freedom Act to require that federal lands containing specific, authenticated sites historically used by Native Americans for religious purposes be reasonably managed to minimize impacts which would impair Native Americans in the exercise of their religion, absent a substantial federal interest. Where there is such an interest, the least intrusive means of satisfying the federal interest should be required.
REPORT

In 1980 the ABA took a position on the protection of Indian rights when it adopted a resolution urging: "... the federal government to continue to recognize the special relationship between the United States and the American Indian Tribes and their members and the federal responsibility to Indian people by following a policy of strict adherence to Indian treaty obligations and exercising powers of abrogation or modification only under the most compelling circumstances of national security or emergency."

There is a need for the ABA to take another step in the protection of rights of Native Americans; to require the federal government to refrain from actions on federal lands which would destroy Native American religious sites and areas or impair the ability of Native Americans to exercise their religion.

The recent decision of the United States Supreme Court in Lyng v. Northwest Indian Cemetery Protective Association, et al., 485 U.S. ______, 99 L.Ed.2d 534, 108 S.Ct. 1319 (1988), has created the necessity for Congressional legislation to protect Native Americans against harm to their religious sites and areas on federal lands.

II. Background

(A) Special character of Native American Religions.

Native American religions, in contrast to traditional Western religions, do not rely on doctrines, creeds, or dogmas. Rather, Native American faiths are inextricably bound to the use of land. Indian religious practice is thus often site-specific in nature. Rituals are performed in prescribed locations, not merely as a matter of traditional orthodoxy, but because land like all other living things, is unique and specific sites possess different spiritual properties and significance. See, Lyng, supra at 542, 554. Some of these Indian sacred sites are located on federal lands. Traditional Indian religious practices at such sites include prayer, meditation, ceremonial functions and collection of natural products for religious activities.

(B) The American Indian Religious Freedom Act.

In 1978, Congress recognized the need for special measures to protect such religious practices and enacted the American Indian Religious Freedom Act. The Act, codified at 45 U.S.C. § 1996, provides:

On and after August 11, 1978, it shall be the policy of
the United States 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.

§ 2 of the Act required the President to direct the various federal departments, agencies and other instrumentalities responsible for administration to evaluate their policies and procedures in consultation with traditional religious leaders to determine changes necessary to preserve Native American religious cultural rights and practices.

(C) Need for Additional Statutory Protection.

Unfortunately, the statute created no cause of action and has been held to create no enforceable rights in Indians. Wilson v. Block, 708 F.2d 735 (D.C. 1983) cert. den. 104 S.Ct. 371, 739, 464 U.S. 1056, 79 L.Ed.2d 107; New Mexico Navajo Ranchers’ Association v. ICC, 850 F.2d 729 (D.C. 1988); Lyng, supra.

III. THE LYNG DECISION

The Lyng case decided last year by the Supreme Court, made it clear that the language of the American Indian Religious Freedom Act contains an empty promise and that further implementing legislation is needed.

The facts of the Lyng case were egregious. At issue was the U.S. Forest Service desire to build a six mile paved segment of road through the Chimney Rock section of the Six Rivers National Forest in northern California. The area has historically been used for religious purposes by Yurok, Karok, and Tolowa Indians. The District Court made a finding that the area involved was "indispensable" to the religious lives of the approximately 5,000 tribal members who resided in the area and concluded "that the proposed government operations would virtually destroy the Indians' ability to practice their religion." The court granted a permanent injunction forbidding construction of the road segment. While an appeal was pending, Congress enacted the California Wilderness Act of 1984, PL 98-425, 98 Stat. 1619, which designated most of the area covered by a Forest Service Timber Management Plan a wilderness area. That designation meant that commercial activity such as timber harvesting was forbidden. The statute exempted a narrow strip of land to coincide with the proposed route of the road from the wilderness designation to enable the completion of the road if the Forest Service so decided, but the existing unpaved section of the road lay within the wilderness area and was closed.
to general traffic.

The Supreme Court, in a 6-3 opinion, held that because the Forest Service chose a route farthest removed from contemporary spiritual sites, it had complied with the American Indian Religious Freedom Act. The Court held that the Act did not create any cause of action or any judicially enforceable individual rights.

The Court then proceeded to make its determination on the merits wholly on First Amendment grounds. The Court ruled that the Free Exercise clause provides no support for the plaintiffs because governmental programs which may make it more difficult to practice certain religions, "... but which have no tendency to coerce individuals into acting contrary to their religious beliefs" do not require government to bring forward compelling justification for its otherwise lawful actions. The majority opinion said, in effect, that if the Indians claims were to be upheld, that task would have to fall to the legislature.

The minority opinion, written by Justice Brennan took strong issue with the majority's treatment of the finding of the lower court that the government action "would virtually destroy the Indians' ability to practice their religion". The minority argued that the land use decision would restrain the respondents from practicing their religion as completely as any governmental actions struck down in the past.

The result of the majority ruling, said Justice Brennan, was to

"... effectively [bestow] on one party to this conflict the unilateral authority to resolve all future disputes in its favor, subject only to the court's toothless exhortation to be 'sensitive' to affected religions. In my view, however, Native Americans deserve - and the Constitution demands - more than this."

Lyng, at 562.

IV. PROPOSED LEGISLATION

The Lyng decision produced great consternation among Native Americans throughout the United States. In the 1989 session Congressman Udall of Arizona introduced HR.1546 to amend the American Indian Religious Freedom Act of 1978. The bill provides in Section 3 that:

Absent a compelling federal interest, federal lands that have historically been either part of, or necessary to, or been used by, a traditional Native American religion
shall not be managed in a manner that will pose a substantial and realistic threat to undermine and frustrate any traditional Native American religious practices.

The bill further provides that any party challenging agency action has a burden of proving that the action will pose a substantial and realistic threat as prohibited by Section 3 and once that is established, the burden shifts to the federal agency to demonstrate the compelling interest. If the federal interest is found to be compelling, the federal agency shall have the duty to select the course of action which is least intrusive on Native American religious practices.

While the bill as drawn will require refinement to ensure that its language is not overbroad, the principle should be unexceptionable.

Indians have never claimed exclusive use rights of sacred lands and areas, but only the right to have these areas remain undisturbed. Given the virtually unfettered discretion which federal agencies have after the Lyng decision, it is clearly necessary to provide some statutory standards which apply to proposed land use actions.

V. Resolution is in Keeping with Existing Constitutional Law

The proposed recommendation reads:

BE IT RESOLVED, that the American Bar Association supports in principle the enactment of federal legislation such as HR 1546 to amend the American Indian Religious Freedom Act to require that federal lands containing sites historically used by Native Americans for religious purposes be managed to avoid impacts which would impair Native Americans in the exercise of their religion, absent a compelling federal interest. Where there is such an interest, the least intrusive means of satisfying the federal interest should be required.

The legislation endorsed by the proposed resolution is necessary to provide protection for Native American religions which, due to their use of natural outdoor areas, require statutory measures.

The principle endorsed by the proposed legislation is consistent with existing constitutional law. Sherbert v. Verner, 374 U.S. 398, 10 L.Ed.2d 965, 83 S.Ct. 1790 (1963) (striking down a state statute which barred unemployment benefits to one discharged because of refusal to work on the Sabbath day); Wisconsin v. Yoder, 406 U.S. 205, 32 L.Ed.2d 15, 92 S.Ct. 1526
(1972) (striking down a state compulsory school attendance law because of the impact on continued survival of Amish communities); and Hobble v. Unemployment Appeals Commission of Florida, 480 U.S. 294, 94 L.Ed.2d 190, 107 S.Ct. 1046 (1987) (denying unemployment benefits to one refusing to work on the Sabbath).

VI. CONCLUSION

The Native American people have long been an embattled minority. Their ability to exercise their religious freedom has often been destroyed or impaired by ethnocentric bureaucratic action. Congress recognized this in 1978, by enacting the American Indian Religious Freedom Act. However, it is abundantly clear that the Act is, as Justice Brennan observed, "a toothless exhortation". Because the Act provides no enforceable rights by Indians, there is a need for additional legislative implementation. The ABA should lend its support to Native Americans whose religions require use of natural sites and areas so that they can enjoy the same fundamental rights as other Americans.

Respectfully submitted,

Richard K. Donahue
Chairperson, Section of Individual Rights and Responsibilities

February, 1990
1. Summary of Recommendation

Resolves that the American Bar Association support in principle legislation to require federal lands be managed to avoid impacts on natural sites or areas historically used by Native Americans for religious purposes, in the absence of a compelling federal interest and where there is such compelling federal interest, land use actions should be those least intrusive on Native American religious practices.

2. Approval by Submitting Entity

Recommendation was approved by the council of the section of Individual Rights and Responsibilities on November 3, 1989, at a regular meeting.

3. Previous submission to the House or relevant Association position.

In 1980 the ABA took a position on the protection of Indian rights when it adopted a resolution urging: "... the federal government to continue the recognize the special relationship between the United States and the American Indian Tribes and their members and the federal responsibility to Indian people by following a policy of strict adherence to Indian treaty obligations and exercising powers of abrogation or modification only under the most compelling circumstances of national security or emergency."

4. Need for Action at This Meeting

HR.1546 has been introduced in Congress to accomplish the purposes encompassed by the resolution and will be acted upon either in this session of Congress or in the next session.

5. Status of Legislation

HR.1546 has been introduced and referred to the House Committee on Interior and Insular Affairs. Hearings have been held.
6. **Cost to the Association**

None

7. **Disclosure of Interest**

This recommendation and report were written by Alvin Ziontz, Chairperson of the IRR Sections Committee on Problems of American Indians. Mr. Ziontz’s law practice is devoted in part to the representation of Native Americans.

8. **Referrals**

A copy of this recommendation was submitted to the chairs and staff liaisons of all ABA Sections and Divisions on December 15, 1989.

9. **Contact Person** (Prior to Meeting)

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10. **Contact Person** (Who will present the report to the House)

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