Navajo Nation v. United States Forest Service: Defining the Scope of Native American Freedom of Religious Exercise on Public Lands

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TABLE OF CONTENTS

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INTRODUCTION

The framers of the Constitution recognized that free exercise of religion was an unalienable right and secured its protection in the First Amendment.[1] Early cases concerning religious freedom established that the Free Exercise Clause was to be read as requiring accommodation of an individual's sincerely held religious beliefs and conduct, except where the government could show a compelling interest and no less burdensome means to achieve such interest.[2] While *Employment Division v. Smith* abandoned this strict scrutiny test,[3] Congress attempted to resurrect the test through the enactment of the Religious Freedom Restoration Act ("RFRA").[4]

The interaction between religious exercise and RFRA becomes very complex when a government action involves public land use and regulations. The most recent case dealing with this issue is *Navajo Nation v. United States Forest Service*.[5] There, the Ninth Circuit read an expansive view of RFRA, conflicting with an earlier Supreme Court decision concerning religious liberty and federal land use, *Lyng v. Northwest Indian Cemetery Protective Association*.[6]

This Note argues that the Ninth Circuit incorrectly decided *Navajo Nation*.[7] Part I of this Note discusses early judicial interpretations of the Free Exercise Clause and establishment of the strict scrutiny test. Part II provides a brief history of the Congressional response to the Supreme Court's interpretations of religious liberty under the Free Exercise Clause and RFRA. Part III outlines the Snowbowl litigation history, leading up to and including the Ninth Circuit's opinion. Part IV argues that the Ninth Circuit's expansive reading of RFRA creates conflict with judicial precedent, legislative intent, and with the Establishment Clause. The section discusses the profound impacts this interpretation will have on religious liberty analysis, especially in cases concerning government management of public lands.

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[1] U.S. CONST. amend. I.

[2] *See generally* Wisconsin v. Yoder, 406 U.S. 205 (1972); Sherbert v. Verner, 374 U.S. 398 (1963).

[3] Employment Div., Dep't. of Human Res. v. Smith, 494 U.S. 872 (1990).

[4] 42 U.S.C. §§ 2000bb to bb-4 (1993).

[5] Navajo Nation v. U.S. Forest Serv., 479 F.3d 1024 (9th Cir. 2007).

[6] *Id.*; Lyng v. Nw. Indian Cemetery Prot. Ass'n, 485 U.S. 439 (1988).

[7] *See* discussion *infra* Part IV.

I. EARLY HISTORY

A. Sherbert *and* Yoder: *Establishing the Strict Scrutiny Test*

In 1963, the Supreme Court articulated a strict scrutiny test for governmental action as applied to the exercise of religion in *Sherbert v. Verner*.[8] Adeil Sherbert, a Seventh-Day Adventist, was fired from her job for refusing to work on Saturday.[9] In *Sherbert*, the Court held that South Carolina could not deny unemployment benefits on the basis of an individual's beliefs, and that to do so would effectively impede her free exercise of religion.[10] Justice Brennan, writing for the majority, stated, "to condition the availability of benefits upon this appellant's willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties."[11]

The Court established four criteria to determine if an individual's right to free exercise of religion has been violated.[12] First, a court must determine if the claim involves a sincere religious belief.[13] Second, a court must determine whether the government action imposes a substantial burden on the free exercise of the individual's religion.[14] If the individual succeeds on the first two steps, the burden is shifted to the government. In order to prevail, the government must prove first, that it is acting in furtherance of a compelling government interest, and second that it has pursued that interest in the manner least restrictive to religion.[15]

The Court reaffirmed this standard in *Wisconsin v. Yoder*.[16] In *Yoder*, three Amish families challenged a school attendance law on the grounds that forcing their children to attend school until the age of sixteen was against their religious

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[8] Sherbert v. Verner, 374 U.S. 398 (1963).

[9] *Id.* Seventh-Day Adventists believe, "the fourth commandment of God's unchangeable law requires the observance of this seventh-day Sabbath as the day of rest, worship, and ministry in harmony with the teaching and practice of Jesus, the Lord of the Sabbath." Seventh-day Adventist Church, Fundamental Beliefs, http://www.adventist.org/beliefs/fundamental/index.html (last visited Mar. 30, 2008).

[10] *Sherbert*, 374 U.S. at 410.

[11] *Id.* at 406.

[12] Commonly referred to as the "Sherbert Test."

[13] In *Sherbert*, "no question ha[d] been raised in th[e] case concerning the sincerity of [the] appellant's religious beliefs." *Sherbert*, 374 U.S. at 401, n.1.

[14] The Court concluded that disqualification for benefits clearly imposed a burden on Sherbert. The Court illustrated Sherbert's predicament as forcing "her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship." *Id.* at 404.

[15] The Court ultimately concluded that South Carolina did not meet its burden. *Id.* at 406-10.

[16] Wisconsin v. Yoder, 406 U.S. 205 (1972).

beliefs.[17] The Court applied the *Sherbert* test and determined that the Wisconsin Compulsory Attendance Law[18] violated the Free Exercise Clause of the First Amendment.[19]

These two cases firmly established that the Free Exercise Clause was to be read as requiring accommodation of an individual's sincerely held religious beliefs and conduct, except where the government could show a compelling interest and no less burdensome means to achieve such interest.

B. The Smith *Revolution*

The "compelling interest" doctrine set forth in *Sherbert* and *Yoder* experienced a grave transformation in 1990. In *Employment Division v. Smith*, the Court greatly narrowed the doctrine.[20] The Court held that the *Sherbert* test did not apply to neutral laws of general applicability and such laws did not violate the Free Exercise Clause.[21]

Smith involved the firing of two men from their jobs as counselors at a drug rehabilitation center after it was discovered they ingested peyote for sacramental purposes during a ceremony at the Native American Church.[22] The men filed for unemployment compensation, which was denied as both men were determined to be ineligible for benefits because they had been "discharged for work-place misconduct."[23] Oregon law prohibits the intentional possession of a controlled substance[24] unless a medical practitioner has prescribed that substance.[25] The Court found that Oregon law made no exception for the sacramental use of peyote and noted that, "although it's constitutionally permissible to exempt sacramental peyote use from the operation of drug laws, it is not constitutionally required."[26] The Court distinguished earlier cases, including *Sherbert*, on the ground that law did not prohibit the conduct at issue

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[17] The Amish object to formal education beyond the eighth grade. The Court explained, "formal high school education beyond the eighth grade is contrary to Amish beliefs, not only because it places Amish children in an environment hostile to Amish beliefs with increasing emphasis on competition in class work and sports and with pressure to conform to the styles, manners, and ways of the peer group, but also because it takes them away from their community, physically and emotionally, during the crucial and formative adolescent period of life." *Id.* at 210-11.

[18] WIS. STAT. § 118.15 (1969).

[19] *Yoder*, 406 U.S. at 234-36.

[20] Employment Div. v. Smith, 494 U.S. 872 (1990).

[21] *Id.*

[22] *Id.* at 874.

[23] *Id.*

[24] The law defines "controlled substance" as a drug classified in Schedules I through V of the Federal Controlled Substances Act, 21 U.S.C. §§ 811-812 (2006), as modified by the State Board of Pharmacy. ORE. REV. STAT. § 475.005(6) (1987).

[25] ORE. REV. STAT. § 475.840(3) (2007).

[26] *Smith*, 494 U.S. at 873.

in the earlier cases. It pointed to the fact that the Court has never held that an individual's religious beliefs excuse him or her from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate.[27]

The Court concluded that the Oregon law was not directly targeted at a specific religious group and was thus a "neutral law of general applicability."[28] As such, the government did not need to show a compelling interest even if the law had the incidental effect of burdening a particular religious practice.[29] Furthermore, the Court held that the Free Exercise Clause did not bar Oregon from enforcing its blanket ban on peyote possession with no allowance for sacramental use of the drug.[30] Accordingly, the government could deny unemployment benefits to persons dismissed from their jobs because of their religiously inspired peyote use.[31] The Court suggested that the political branches could shield religious exercise through legislative accommodation, for example, by making an exception to proscriptive drug laws for sacramental peyote use.[32]

II. THE CREATION OF RFRA AND RLUIPA

A. RFRA: A Quick Congressional Response

It is well established that Congress enacted the Religious Freedom Restoration Act largely as a response to the *Smith* decision.[33] Three years after the Supreme Court's decision in *Smith*, Congress responded with RFRA,

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[27] *Id.* at 878-79.

[28] *Id.* at 879.

[29] *Id.* at 878. Interestingly in *Yoder*, the Supreme Court seemed to expressly reject the interpretation it adopted in *Smith*:

> [O]ur decisions have rejected the idea that religiously grounded conduct is always outside the protection of the Free Exercise Clause. It is true that activities of individuals, even when religiously based, are often subject to regulation by the States in the exercise of their undoubted power to promote the health, safety, and general welfare, or the Federal Government in the exercise of its delegated powers. But to agree that religiously grounded conduct must often be subject to the broad police power of the State is not to deny that there are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, *even under regulations of general applicability*.

Wisconsin v. Yoder, 406 U.S. 205, 219-20 (1972) (emphasis added, citations omitted). The Court went on to say that a regulation may be neutral on its face but still offend the requirement of government neutrality in its application. *Id.* at 220.

[30] *Smith*, 494 U.S. at 890.

[31] *Id.*

[32] *Id.*

[33] Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act is Unconstitutional*, 69 N.Y.U. L. REV. 437, 437 (1994).

declaring its purposes as "to provide a claim or defense to persons whose religious exercise is substantially burdened by government," and specifically to "restore the compelling interest test as set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder*."[34] RFRA enjoyed great bipartisan acclaim and "sailed through both houses of Congress, passing unanimously in the House of Representatives and drawing only three votes in opposition in the Senate."[35]

Under RFRA, the federal government is forbidden to "substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b)."[36] Subsection (b) provides that, "Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person (1) is in furtherance of a compelling government interest; and (2) is the least restrictive means of furthering that compelling governmental interest."[37]

B. City of Boerne: *The Tug of War Continues*

Four years after its enactment, the Supreme Court found RFRA unconstitutional as applied to state and local governments in *City of Boerne v. Flores*.[38] In 1993, the Catholic Archbishop of San Antonio applied for a building permit to enlarge a church in Boerne, Texas.[39] The permit was denied under a local zoning ordinance governing historic preservation in the district where the church was located.[40] Shortly thereafter the Archbishop brought suit, challenging the city's denial of the building permit.[41] The Archbishop's complaint contained various claims, but litigation focused on RFRA and the question of its constitutionality.[42] The Court ultimately found RFRA unconstitutional as applied to state and local governments because it exceeded Congress's authority under section five of the Fourteenth Amendment.[43] It did not, however, find RFRA unconstitutional as applied to the federal government.[44]

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[34] Religious Freedom Restoration Act (RFRA) of 1993, Pub. L. No. 103-141, § 2(b), 107 Stat. 1488 (1993) (citations omitted).

[35] Eisgruber & Sager, *supra* note 33, at 438.

[36] 42 U.S.C. § 2000bb-1(a) (1993).

[37] *Id.* § 2000bb-1(b).

[38] City of Boerne v. Flores, 521 U.S. 507 (1997).

[39] *Id.* at 512.

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] *Id.* at 536.

[44] Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 424 (2006).

C. RLUIPA and the Amendments to RFRA

Three years later, Congress responded once again. Outraged by the Court's decision in *City of Boerne*, Congress enacted the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA").[45] RLUIPA prohibits state and local government actions that impose a substantial burden on religious exercise, unless the government can prove these actions are the least restrictive means of furthering a compelling government interest.[46] However, RLUIPA is narrower in scope than RFRA and only applies to governmental actions affecting land use and institutionalized persons.

Also in 2000, Congress amended RFRA, replacing the constitution-based definition of exercise of religion, with the broader RLUIPA definition. Post-amendment RFRA now defines "exercise of religion" to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief."[47]

D. Affirmation of Gonzales *and* Cutter

The constitutionality of both RFRA and RLUIPA has been challenged in two recent cases: *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal* and *Cutter v. Wilkinson*.[48] In *O Centro*, the Court appeared to uphold RFRA as applied to the federal government.[49] In *Cutter*, the Court upheld the RLUIPA institutionalized persons provision as constitutional on its face, but choose to not address the constitutionality of the land use provisions.[50]

O Centro concerned the seizure of a shipment of hoasca, which contains dimethyltryptamine (a Schedule I drug) to a branch of the Brazilian church Unaio do Vegetal.[51] The church brought action under RFRA, claiming the seizure was an illegal violation of its members' rights.[52] The Court found that the government failed to meet its burden under RFRA that barring the substance served a compelling government interest.[53] The defendants argued that the uniform application of the Controlled Substances Act did not allow for exceptions for hoasca.[54] The Court disagreed and noted that Native Americans

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[45] 42 U.S.C. §§ 2000cc to cc-5 (2000).

[46] § 2000cc-1(a).

[47] § 2000cc-5(7)(A).

[48] *O Centro*, 546 U.S. at 418; Cutter v. Wilkinson, 544 U.S. 709 (2005).

[49] *O Centro*, 546 U.S. at 418. In footnote one, majority writer Chief Justice Roberts discussed *City of Boerne*'s holding that RFRA was unconstitutional as to the States only. *Id.* at 424 n.1.

[50] *Cutter*, 544 U.S. at 709.

[51] *O Centro*, 546 U.S. at 425.

[52] *Id.* at 423.

[53] *Id.*

[54] *Id.*

have received exceptions for peyote, another Schedule I drug.[55]

In *Cutter v. Wilkinson*, the Court rejected the argument that RLUIPA improperly advanced religion in violation of the Establishment Clause of the First Amendment.[56] *Cutter* involved a claim by five Ohio prisoners that prison officials failed to accommodate the inmates' exercise of their "nonmainstream" religions.[57] The defendant officials argued that RLUIPA improperly advanced religion and thus violated the Establishment Clause.[58] The Court upheld RLUIPA's institutionalized persons provision on its face as constitutional.[59] The Court left open the possibility that as applied RLUIPA may be unconstitutional and stated it was not expressing an opinion on the constitutionality of the statute's land use provision.[60]

III. *NAVAJO NATION V. UNITED STATES FOREST SERVICE*

The interaction between religious exercise and RFRA becomes much more complex when the government action involves public land use and regulations. The most recent case dealing with this issue is *Navajo Nation v. United States Forest Service*.[61] There, the Court of Appeals for the Ninth Circuit read an expansive view of RFRA, thus creating conflict with an earlier Supreme Court decision concerning religious liberty and federal land use, *Lyng v. Northwest Indian Cemetery Protective Association*.[62]

A. Early History of Navajo Nation: Snowbowl *and* Wilson v. Block

In 1938, a ski resort known as the Arizona Snowbowl ("Snowbowl") opened, providing the public with organized skiing and other snow activities.[63] A 1952 fire destroyed the original ski lodge, prompting the construction of a new building in 1956.[64] Two years later Snowbowl installed a poma lift, and further installed a chair lift in 1962.[65] The facilities changed very little between 1962

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[55] *Id.* at 433.

[56] Cutter v. Wilkinson, 544 U.S. 709, 713 (2005).

[57] The inmates included: Gerhardt, an ordained minister of the white supremacist Church of Jesus Christ Christian; Miller, follower of Asatru religion a polytheistic religion originating with the Vikings; Hampton, a Wiccan; and Cutter, an avowed Satanist. Gerhardt v. Lazaroff, 221 F. Supp. 2d 827 (S.D. Ohio 2002).

[58] *Cutter*, 544 U.S. at 713.

[59] *Id.* at 714.

[60] *Id.* at 716 n.3.

[61] Navajo Nation v. U.S. Forest Serv., 479 F.3d 1024 (9th Cir. 2007).

[62] Lyng v. Nw. Indian Cemetery Prot. Ass'n, 485 U.S. 439 (1988).

[63] Wilson v. Block, 708 F.2d 735, 738 (D.C. Cir. 1983).

[64] *Id.*

[65] *Navajo Nation*, 479 F.3d at 1030.

and 1977.[66]

In 1977, the United States Forest Service ("Forest Service") transferred the permit to operate Snowbowl from Summit Properties, Inc. to the Northland Recreation Company ("Northland").[67] Northland quickly created a "master plan" for the development of the facilities, including construction of additional parking, ski slopes, and ski lifts.[68] The Forest Service adhered to the requirements of the National Environmental Policy Act ("NEPA") and identified six different plans that represented the spectrum of public opinion.[69] On February 27, 1979, the Forest Service issued its decision to allow moderate development.[70] The Environmental Impact Statement issued by the Forest Service authorized the clearing of fifty acres for new ski runs, construction of a new lodge, widening and paving of the Snowbowl road, and various other facility improvements.[71]

Located in the Coconino National Forest, the ski resort is settled in Arizona's San Francisco Peaks ("Peaks"), an area the Forest Service has acknowledged as sacred to at least thirteen formally recognized Indian tribes.[72] In 1981 the Navajo Medicinemen's Association, the Hopi tribe and nearby ranch owners brought suit under the Free Exercise Clause of the First Amendment.[73] In the case, entitled *Wilson v. Block*, the plaintiffs sought "a halt to further development of the Snow Bowl and the removal of existing ski facilities."[74] Both the Navajo Medicinemen and Hopi argued, "development of the Peaks would be a profane act, and an affront to the deities and that, as a consequence, the Peaks would lose their healing power and otherwise cease to benefit the tribes."[75]

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[66] *Wilson*, 708 F.2d at 738.

[67] *Id.*

[68] *Id.*

[69] *Id.*

[70] *Id.* at 739.

[71] *Id.* Northland requested that a total of one hundred and twenty acres be cleared for the construction of new ski runs.

[72] Navajo Nation v. U.S. Forest Serv., 479 F.3d 1024 (9th Cir. 2007).

[73] *Wilson*, 708 F.2d at 739. The Navajo Medicinemen Association, Hopi tribe and the nearby ranch owners also brought claims under the American Indian Religious Freedom Act, the Endangered Species Act, the National Historic Preservation Act, the Multiple-Use Sustained Yield Act, the Wilderness Act, the National Environmental Policy Act, the Administrative Procedure Act, the fiduciary duties owed the Indians by the government, and two statutes regulating private use of national forest land. The district court granted the defendant's summary judgment on all claims except the National Historic Preservation Act claim. The Court of Appeals considered the plaintiff's claims under: the Free Exercise Clause, the American Indian Religious Freedom Act, the Establishment Clause, the Endangered Species Act, the Wilderness Act, the National Historic Preservation Act, and 16 U.S.C. §§ 497, 551 (2006). *Wilson*, 708 F.2d at 739. For the purpose of this paper, I will focus on the Free Exercise claim.

[74] *Wilson*, 708 F.2d at 739.

[75] *Id.* at 740.

The Court of Appeals for the D.C. Circuit found that the government had not impaired the Indians access to the Peaks or their ability to gather sacred objects and perform ceremonies.[76] Thus, the court concluded the government had not burdened their beliefs or religious practices.[77] The court further held that individuals seeking to restrict government land use in the name of religious freedom must, *at a minimum*, demonstrate that the government's proposed land use would impair a religious practice that could not be performed at any other site.[78] The court clarified that such proof would not necessarily establish a burden on free exercise but that the First Amendment, at minimum, required such proof.[79]

B. A New Battle: Navajo Nation *in the District Court*

Following the *Wilson* decision, the owners of the Snowbowl implemented many of the approved developments.[80] In 1987, the Forest Service designated the Snowbowl as a public recreation facility under the Coconino Forest Service Plan.[81] By doing so, the Forest Service recognized "the Snowbowl represented an opportunity for the general public to access and enjoy public lands in a manner that the Forest Service could not otherwise offer in the form of a major facility anywhere in Arizona."[82] In addition to downhill skiing, numerous activities are conducted on the Peaks, including sheep and cattle grazing, timber harvesting, road building, mining (including cinder pit mining), gas and electric transmission lines, water pipelines, cellular towers, motorcross, mountain biking, horseback riding, hiking and camping.[83] All are consistent with the Coconino Forest Service Plan and multiple-use requirements.[84]

In 1992, Arizona Snowbowl Resort Limited Partnership ("ASR") purchased the Snowbowl for $4 million.[85] In September 2002 ASR sought to finish the earlier approved developments and submitted a proposal for snowmaking using treated sewage effluent, or "A+ reclaimed water."[86] In February 2005 Forest Supervisor Nora Rasure issued a Final Environmental Impact Statement and a

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[76] *Id.*

[77] *Id.*

[78] *Id.* at 744.

[79] *Id.* at 744 n.5.

[80] Navajo Nation v. U.S. Forest Serv., 408 F. Supp. 2d 866, 870 (D. Ariz. 2006).

[81] *Id.* at 884.

[82] *Id.* The Snowbowl is the only area dedicated as a downhill ski resort within the Coconino National Forest.

[83] *Id.*

[84] *Id.*

[85] Navajo Nation v. U.S. Forest Serv., 479 F.3d 1024, 1030 (9th Cir. 2007).

[86] "A+ reclaimed water" is the highest grade of reclaimed water recognized under Arizona statutes and regulations. Class A+ reclaimed water has been approved for use in snowmaking by the Arizona Department of Environmental Quality. *Id.* at 1050.

Record of Decision, approving, in part: (a) approximately 205 acres of snowmaking coverage, utilizing reclaimed water; (b) a ten million-gallon reclaimed water reservoir near the existing chairlift; (c) construction of a 14.8 mile reclaimed water pipeline between Flagstaff and the Snowbowl with booster stations and pump houses; (d) construction of a 3,000 to 4,000 square foot snowmaking control building; (e) construction of a new 10,000 square foot guest services facility; (f) an increase in skiable acreage from 139 to 205 acres; and (g) approximately forty-seven acres of thinning and eighty-seven acres of grading, stumping and smoothing.[87] Shortly after, the plaintiffs, in *Navajo Nation v. U.S. Forest Service*, filed their complaints alleging that the Forest Service failed to comply with the requirements of, inter alia, RFRA.[88]

The district court found that the Snowbowl upgrades would not interfere with or inhibit any religious practice of the plaintiffs.[89] The court noted that the Peaks cover approximately 74,000 acres of public land, with the ski area constituting about one percent of the mountain.[90] The area proposed for snowmaking was only approximately one quarter of one percent of the Peaks.[91] Although the court found that the witnesses generally testified that the Peaks were central and indispensable to their way of life, no witness provided evidence that they used the actual Snowbowl area for any religious purpose.[92] In fact, the plaintiffs acknowledged that the Snowbowl area was not the exclusive site of any of their religious activities and all plants and wildlife used by the plaintiffs for religious purposes were available outside the Snowbowl area.[93]

The defendants argued that the upgrades to existing trails and other features, including snowmaking, would improve safety conditions and minimize the potential for accidents at the Snowbowl.[94] The Forest Service determined that the improvements, specifically including snowmaking, would enable the ski area to provide a safe, reliable and consistent operating season.[95] The court found that the evidence adduced at trial demonstrated that snowmaking was needed to maintain the viability of the Snowbowl as a public recreational resource.[96]

The court acknowledged "if the facts alleged by plaintiffs were enough to establish a substantial burden, the Forest Service would be left in a precarious

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[87] *Navajo Nation*, 408 F. Supp. 2d at 871.

[88] *Id.* The plaintiffs also alleged violations of NEPA, NHPA, ESA, Grand Canyon National Park Enlargement, National Forest Management Act, and Forest Service to comply with its trust responsibility to the tribes. For the purposes of this paper, I will focus on the RFRA claim.

[89] *Id.* at 889.

[90] *Id.* at 883.

[91] *Id.* at 886.

[92] *Id.* at 888-97.

[93] *Id.* at 889.

[94] *Id.* at 886.

[95] *Id.* at 907.

[96] *Id.*

situation as it attempted to manage the millions of acres of public lands in Arizona, and elsewhere, that are considered sacred to Native American tribes."[97] The court concluded that the plaintiffs failed to present any objective evidence that their exercise of religion would be impacted by the Snowbowl upgrades.[98] Furthermore, they did not identify any plants, springs or natural resources within the Snowbowl area that would be affected by the upgrades.[99] They identified no shrines or religious ceremonies that would be impacted by the Snowbowl decision.[100] Testimony by two archeologist witnesses showed that "although practitioners sincerely felt that the Forest Service decision would impact their beliefs and exercise of religion, the impacts [were] not a substantial burden."[101]

The court also found that the plaintiffs failed to demonstrate that the Snowbowl decision coerced them into violating their religious beliefs or penalized their religious activity.[102] In fact, the Forest Service had guaranteed that religious practitioners would still have access to the Snowbowl and the approximately 74,000 acres of the Coconino National Forest that comprise the Peaks for religious purposes.[103] Therefore, the court held as a matter of fact and law that the Forest Service's decision to authorize the upgrades to the facility was not a violation of RFRA.[104]

C. Navajo Nation: *The Ninth Circuit Opinion*

The Ninth Circuit did not overturn any of the district court's factual findings, but nevertheless found a "substantial burden" on the plaintiffs' free exercise of religion.[105] The court identified two burdens on the plaintiffs' religious practices, finding both to be substantial burdens for the Hopi and Navajo plaintiffs.[106] First, "the inability to perform a particular religious ceremony, because the ceremony requires collecting natural resources from the Peaks that

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[97] *Id.* at 905.

[98] *Id.*

[99] *Id.*

[100] *Id.*

[101] *Id.* at 888.

[102] *Id.* at 905. This "coercion" requirement was articulated in pre-*Smith* case law. The Legislature intended for courts to look to pre-*Smith* cases when applying RFRA and thus the court's finding of no coercion was tantamount to its holding that there was no substantial burden here. S. REP. NO. 103-111 (1993), *as reprinted in* 1993 U.S.C.C.A.N. 1892, 1898; *see also* Lyng v. Nw. Indian Cemetery Prot. Ass'n, 485 U.S. 439, 450-51 (1988).

[103] *Navajo Nation*, 408 F. Supp. 2d at 905.

[104] *Id.* at 907.

[105] Navajo Nation v. U.S. Forest Serv., 479 F.3d 1024, 1043 (9th Cir. 2007).

[106] *Id.* The Court concluded that the use of sewage effluent on the Peaks would impose a substantial burden especially for the Navajo and Hopi plaintiffs. The Court stated that since the Navajo and Hopi plaintiffs had shown a substantial burden, the Court did not need to reach the closer question of whether the Hualapai and the Havasupai had also established a substantial burden. *Id.* at 1034.

would be too contaminated — physically, spiritually, or both — for sacramental use."[107] Second, "the inability to maintain daily and annual religious practices comprising an entire way of life, because the practices require belief in the mountain's purity or a spiritual connection to the mountain that would be undermined by the contamination."[108]

The district court emphasized the fact that not one of the plaintiffs provided evidence that they used the Snowbowl area for any religious purpose and all plants and wildlife used for religious purposes were found outside the Snowbowl area. Describing in great detail the religious practices of the Hopi, Navajo, Hualapai, and Havasupai, the Ninth Circuit emphasized that the plaintiffs' religious beliefs dictate that the mountain be viewed as a whole living being and because of such belief, the treated sewage effluent would, in their view, contaminate the natural resources throughout the Peaks.

The Ninth Circuit went much more into depth in discussing the details of the treated sewage effluent to support its finding of a substantial burden. The court noted that the treatment of the sewage effluent does not produce pure water. After treatment the water contains "fecal coliform bacteria," "detectable levels of enteric bacteria, viruses, and protozoa, including Cryptosporidium and Giardia," and "many unidentified and unregulated residual organic contaminants."[109] Such treated sewage effluent is commonly used in irrigating food crops and schoolyards, toilets, fire fighting, commercial air conditioning units, and full service car washes.[110] The Arizona Department of Environmental Quality requires precautions to be taken to ensure against human ingestion.[111] The Ninth Circuit failed to discuss, as the lower court did, the fact that reclaimed water was being used and medical wastes were being dumped by many of the plaintiff tribes onto lands they hold sacred.[112]

Finding a substantial burden of the plaintiffs' religious exercise, the court moved on to the last two steps of RFRA's compelling interest test. The court rejected the Forest Service's argument that the Snowbowl upgrades were in furtherance of a compelling governmental interest achieved by the least

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[107] *Id.* at 1039.

[108] *Id.*

[109] *Id.* at 1038.

[110] *Id.*

[111] *Id.*

[112] A point discussed in the Ninth Circuit opinion was that waters that had touched death or sickness would harm the purity of the Peaks. Navajo practitioner Larry Foster stated, "once water is tainted and if the water comes from mortuaries or hospitals, for Navajo there's no words to say that that water can be reclaimed." *Id.* at 1039-40. But the lower court had noted that, "[w]astes from medical clinics on the reservation are disposed in lagoons or on the ground at the Navajo reservation, which is considered sacred." Navajo Nation v. U.S. Forest Serv., 408 F. Supp. 2d 866, 898 (D. Ariz. 2006). The Ninth Circuit did not address the seeming dichotomy between the findings of fact of the lower court and the opposing fact it relied on in their holding.

restrictive means.[113] The court stated that they were "unwilling to hold that authorizing the use of artificial snow at an already functioning commercial ski area . . . is a governmental interest 'of the highest order,'" and noted that even if Snowbowl was forced to shut down there would still be continuing recreational activities on the Peaks.[114]

IV. ANALYSIS OF THE NINTH CIRCUIT'S OPINION

The Ninth Circuit stated,

> [w]e uphold the RFRA claim in this case in part because otherwise we cannot see a starting place. If Appellants do not have a valid RFRA claim in this case, we are unable to see how any Native American plaintiff can ever have a successful RFRA claim based on beliefs and practices tied to land that they hold sacred."[115] The court is correct in stating that the current interpretation of RFRA provides little protection for Native American religious exercise.

This case evokes a most appalling reaction. The image of 1.5 million gallons per day of treated sewage effluent, containing such things as "fecal coliform bacteria," "Cryptosporidium," "Giardia," and other "unidentified and unregulated residual organic contaminants," being sprayed over sacred lands, is disturbing at best.[116] The general public may not know exactly what such "contaminants" are or what harms they could cause, but they certainly have an idea and it is not pretty. While the plaintiffs' claims are clearly compelling, there are issues concerning whether, based on RFRA, the Ninth Circuit's decision is legally reckless. These concerns most notably include legislative intent, judicial precedent, and Establishment Clause issues.

A. Public Land Management and RFRA: Does Lyng *Really Not Control?*

The district court's decision to deny the Navajo plaintiffs' claim relied partly on *Lyng*. The Ninth Circuit's opinion struggled with trying to distinguish *Lyng* from *Navajo Nation*. As explained below, the congressional intent in creating RFRA did not include overturning *Lyng*.

Lyng concerned the United States Forest Service's proposal to build a six mile paved segment of road through the Chimney Rock section of the Six Rivers National Forest.[117] The Forest Service commissioned a study of the Native American cultural and religious sites in the area and determined the entire area

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[113] *Navajo Nation*, 479 F.3d at 1044.

[114] *Id.* at 1044-45.

[115] *Id.* at 1048.

[116] *Id.* at 1038.

[117] Lyng v. Nw. Indian Cemetery Prot. Ass'n, 485 U.S. 439, 442 (1988).

was "significant as an integral and indispensible part" of Native American "religious conceptualization and practice."[118] The study concluded that constructing the road would cause serious and irreparable damage to the sacred areas that were a necessary part of the belief systems and lives of the tribes and should not be constructed.[119] The Forest Service declined to adopt the study's recommendation and determined a route as far removed as possible from the sacred sites.[120]

After exhausting their administrative remedies, several Native Americans brought suit challenging the road building and associated timber harvesting, claiming the Forest Service's decision violated, inter alia, the Free Exercise Clause.[121] The district court issued a permanent injunction prohibiting the construction and timber harvest.[122] On appeal, the Ninth Circuit affirmed in part, concluding that the government had failed to demonstrate a compelling interest in the completion of the road.[123] The Supreme Court reversed. The Court acknowledged that the Native Americans' beliefs were sincere and that the government's proposed actions would have severe adverse effects on the practice of their religion, but the Court disagreed that the burden on their religious practices was "heavy enough."[124] Rather the Court stated that earlier cases have not held "that incidental effects of government 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, require government to bring forward a compelling justification for its otherwise lawful actions."[125]

The Court commented that to limit the government's use of its own land to avoid disrupting religious ceremonies might well violate the Establishment Clause as it would impose a "religious servitude" on the property and subsidize the religion in question.[126] Justice O'Connor, writing for the majority, held that, "[w]hatever rights the Indians may have to the use of the area, however, those rights do not divest the Government of its right to use what is, after all, *its* land."[127] The Court continued, "[h]owever much we might wish it were otherwise, government simply could not operate if it were required to satisfy every citizen's religious needs and desires."[128] The Court emphasized that the

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[118] *Id.*

[119] *Id.*

[120] *Id.* at 443.

[121] *Id.*

[122] *Id.*

[123] *Id.* at 445.

[124] *Id.* at 447.

[125] *Id.* at 450-51.

[126] *Id.* at 453.

[127] *Id.*

[128] *Id.* at 452.

First Amendment must apply to all citizens alike, stating "it can give to none of them a veto over public programs that do not prohibit the free exercise of religion."[129] Such claims could easily lead to "*de facto* beneficial ownership of some rather spacious tracts of public property."[130]

By restoring pre-*Smith* case law, RFRA seems to leave the *Lyng* standard intact. In fact, Congress explained in the Senate Report for RFRA, that case law prior to *Smith* clearly held that only governmental action which placed a substantial burden on religious exercise had to meet the compelling interest.[131] The Report noted, "This bill is not a codification of the result reached in any prior free exercise decision but rather the restoration of the legal standard that was applied in those decisions. Therefore, the compelling interest test generally should not be construed more stringently or more leniently than it was prior to *Smith*."[132] The Report continued, "while the committee expresses neither approval nor disapproval of that case law, pre-*Smith* case law makes it clear that strict scrutiny does not apply to government actions involving only management of internal Government affairs or the use of the Government's own property or resources."[133] The Report specifically points to *Lyng* to uphold this statement.[134] In footnote nineteen the Report states that earlier case law, including *Lyng*, held, "that the manner in which the Government manages its internal affairs and uses its own property does not constitute a cognizable 'burden' on anyone's exercise of religion."[135] The Report described *Lyng* as holding that the construction of mining and timber roads over public lands held sacred by the Native Americans did not constitute a burden on their religious exercise rights, and thus did not trigger the compelling interest test.[136]

Congressional silence concerning specifically federally-owned sacred sites allows the *Lyng* analysis to remain controlling in many disputes between government owned lands and Native American's religious free exercise. Staff Attorney Walter Echo-Hawk of the Native American Rights Fund acknowledged such in his testimony before the United States Senate Committee on Indian Affairs.[137] "Committee reports and floor statements in RFRA's

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[129] Lyng v. Nw. Indian Cemetery Prot. Ass'n, 485 U.S. 439, 452 (1988).

[130] *Id.* at 453.

[131] S. REP. NO. 103-111 (1993), *as reprinted in* 1993 U.S.C.C.A.N. 1892, 1898.

[132] *Id.* at 1898.

[133] *Id.*

[134] *Id.* at 1912. The Report also discussed *Bowen v. Roy*, 476 U.S. 693 (1986). The Report described *Bowen* as holding that the statutory requirement that a State use a Social Security number in administering food stamps and American Families with Dependent Children programs, did not burden the religious exercise rights of Native Americans who believed the use of the Social Security number would harm their daughter's soul.

[135] S. REP. NO. 103-111 (1993), *as reprinted in* 1993 U.S.C.C.A.N. 1892, 1912.

[136] *Id.*

[137] *Implementation of American Indian Religious Freedom Act: Hearing Before the S. Comm.*

legislative history indicate that this law is not intended to apply to the government's use of its own property which ensures that Native American holy places located on federal land are not protected by this statute."[138] He further pointed out that RLUIPA "protects the religious use of a 'church' only if the claimant has an ownership, leasehold, easement, servitude, or other property interest in the regulated land."[139]

The implications of the requirement of property rights are most profound for Native Americans. Once in "possession" of their sacred sites, these groups have been systematically dispossessed throughout American history. Many of these religious sites are now owned and managed by the government. Mr. Echo-Hawk has stated, "[f]or 'second class' Native American holy places, existing federal law affords only an inadequate patchwork of unenforceable policies and limited procedural protections."[140] He noted that, "federal statutes do protect religious property, such as church buildings, but each of those exclude protection for Native American holy places because they are natural landmarks which are not owned by dispossessed Native Americans."[141]

It hardly seems fair that the government need not consider Native American religious concerns when managing its own land, land it took from these same Native Americans years before. *Lyng* seems to hold such.[142] And perhaps *Lyng*'s insensitive response, while not fair, is a more workable interpretation of the law than *Navajo Nation*'s broad holding.

Millions of acres of public land are considered sacred by the *Navajo Nation* plaintiffs.[143] In fact, much of the American West is held sacred by various religious practitioners.[144] For example, some followers of the Church of Latter Day Saints would like to preserve places associated with the Mormon migration to Utah.[145] On National Forest lands within Arizona and New Mexico alone, there are between forty and fifty mountains that are held sacred by various Native American tribes.[146] In the Coconino National Forest, nearly a dozen mountains have been identified by tribes as being sacred.[147] The Navajo consider the entirety of the Colorado River, from the headwaters to Mexico, and

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On Indian Affairs, 108th Cong. (2004) (statement of Walter Echo-Hawk, Staff Attorney, Native American Rights Fund).

[138] *Id.*

[139] *Id.*

[140] *Id.*

[141] *Id.*

[142] *See generally* Lyng v. Nw. Indian Cemetery Prot. Ass'n, 485 U.S. 439 (1988).

[143] Navajo Nation v. U.S. Forest Serv., 408 F. Supp. 2d 866, 897 (D. Ariz. 2006).

[144] *See generally* Kevin Holdsworth, *Why Martin's Cove Matters*, 83 DENV. U. L. REV. 1003 (2006).

[145] *Id.* at 1003.

[146] *Navajo Nation*, 408 F. Supp. 2d at 897.

[147] *Id.*

the Little Colorado River, sacred.[148] The Forest Service has inventoried at least 40,000 sacred shrines, gathering areas, pilgrimage routes and prehistoric sites in the Southwestern Region alone.[149]

The Ninth Circuit's holding that use of reclaimed water on one quarter of one percent of the Peaks injures the entirety of the Peaks and imposes a substantial burden on religious exercise will have large implications on government management of public lands.[150] The Supreme Court seemed to attempt to protect against such issues in their reasoning in *Lyng* when they rejected the "de facto beneficial ownership" the plaintiffs sought.[151] Furthermore, Congress appears to have explicitly preserved this aspect of *Lyng* to protect against such.[152]

B. Under the Expansive View of RFRA: New Outcomes for Old Cases?

Under *Navajo Nation*'s expansive view of RFRA, many earlier RFRA and Establishment Clause cases may have had different outcomes. To understand what the implications of the Ninth Circuit's opinion may be, it would be helpful to look at how it could impact past cases.

In *Sequoyah v. Tennessee Valley Authority*, Cherokee practitioners brought suit to halt construction of the Tellico Dam on the Little Tennessee River.[153] Plaintiffs alleged that the dam would flood their sacred homeland and destroy sacred sites, medicine gathering sites, holy places and cemeteries.[154] The plaintiffs also argued, similarly to *Navajo Nation*, that the flooding would disturb the sacred balance of the land.[155] The court held that to establish a burden on free exercise the plaintiffs had to prove that the valley that would be flooded was *indispensable or central* to their ceremonies and practices.[156] The plaintiffs' proof was found to be insufficient, as the evidence indicated that medicines obtainable in the valley could be obtained elsewhere, and that the flooding would not prevent the plaintiffs from engaging in any particular religious observances.[157] This would certainly impose a substantial burden under the *Navajo Nation* "exercise of religion" definition. And if, like *Navajo Nation*, the court accepted that the land as a whole was a living entity and any disruption of the whole was a substantial burden, even the government's

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[148] *Id.* at 897-98.

[149] *Id.* at 897.

[150] Navajo Nation v. U.S. Forest Serv., 479 F.3d 1024, 1043 (9th Cir. 2007).

[151] Lyng v. Nw. Indian Cemetery Prot. Ass'n, 485 U.S. 439, 453 (1988).

[152] S. REP. NO. 103-111 (1993), *as reprinted in* 1993 U.S.C.C.A.N. 1892.

[153] Sequoyah v. Tenn. Valley Auth., 620 F.2d 1159, 1160 (6th Cir. 1980).

[154] *Id.*

[155] *Id.* at 1160.

[156] *Id.* at 1164.

[157] *Id.*

compelling interest in damming the river might not be enough to tip the scales.

Badoni v. Higginson concerned a natural bridge held sacred by the Navajo in Rainbow Bridge National Monument.[158] The Navajo complained that a government reservoir and noisy tourists desecrated the site.[159] The court held that to allow plaintiffs' requests to inhibit public access would violate the Establishment Clause.[160] In *Crow v. Gullet*, Lakota plaintiffs objected to construction and park regulations at Bear Butte State Park.[161] The court denied relief, holding that "the free exercise clause places a duty upon a state to keep from prohibiting religious acts, not to provide the means or the environment for carrying them out."[162] *Inupiat Community of Arctic Slope v. United States*, concerned oil leases in Alaska.[163] The plaintiffs argued development would burden their right to freely practice their religion.[164] The court held that the plaintiffs failed to show impairment and that the government had a compelling interest in developing energy sources.[165] Furthermore, the court determined that the establishment clause barred relief.[166] Under the *Navajo Nation* framework all of these cases would arguably concern a substantial burden of exercise of religion. While some may involve compelling government interests, most of the government actions were probably not pursued in "the least restrictive means of furthering that compelling governmental interest."[167]

These cases, viewed together, beg the question as to whether this is even a workable approach. Since the Ninth Circuit has significantly lowered the threshold of what "exercise of religion" means, they may be opening the floodgates to litigation to protect an individual's right to a religious activity, one that perhaps lies at the outer boundaries of a person's religious belief system, whenever government attempts to manage public lands. The courts may now be exposed to lengthy litigation occurring with each movement of the government on public lands. Granted, like those discussed above, many cases will likely fail in the compelling state interest step, but is this an efficient use of our judicial and economic resources?

C. RFRA: Running Afoul of the Establishment Clause?

An overly expansive reading of RFRA may in fact run afoul of the

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158 Badoni v. Higginson, 638 F.2d 172 (10th Cir.1980).

159 *Id.* at 176.

160 *Id.* at 179.

161 Crow v. Gullet, 541 F. Supp. 785 (D.S.D. 1982).

162 *Id.* at 791.

163 Inupiat Cmty. of Arctic Slope v. U.S., 548 F. Supp. 182 (D. Alaska 1982).

164 *Id.* at 188-89.

165 *Id.* at 189.

166 *Id.*

167 *Id.*

Establishment Clause, which requires neutrality towards religion.[168] In 2004, a Second Circuit case voiced similar concerns about RLUIPA stating, "a serious question arises whether it goes beyond the proper function of protecting the free exercise of religion into the constitutionally impermissible zone of entwining government with religion in a manner that prefers religion over irreligion and confers special benefits on it."[169] Though *Cutter* and *O Centro* upheld the constitutionality of RLUIPA and RFRA (as applied to the federal government) respectively, concerns still remain regarding RLUIPA's definition of exercise of religion amendment to RFRA.[170]

RLUIPA is much narrower in scope and only applies to governmental actions affecting land use and institutionalized persons.[171] RFRA applies to all government actions.[172] RLUIPA also includes several jurisdictional limitations not included in RFRA.[173] Very few courts have even acknowledged the 2000 amendment to RFRA's definition of religious exercise. *Navajo Nation* appears to be one of the first to provide such a lengthy analysis and perhaps, as applied, the Ninth Circuit's interpretation may be in violation of the Establishment Clause.

The Ninth Circuit's broad holding in *Navajo Nation* that "any exercise of religion" can stop public land projects from continuing and that private commercial projects may not constitute a valid governmental interest could impact how, or even if, public land agencies approve projects on public lands with any religious significance.[174] Furthermore, it will be very difficult to ascertain what lands have religious significance under the broad "whether or not compelled by, or central to, a system of religious belief" language. This language would require concerned public agencies to understand and consider not only the central practices of each religion but also all the outlier religious activities of each religious group.

This decision will certainly have wide implications on organizations that manage or do business on public lands. Religious group influence over decisions concerning public land use, including decisions of forest management, recreation, mining activities, and energy production, could be widely expanded by this Ninth Circuit opinion.

The Ninth Circuit opinion does little to explain the burden its interpretation of

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[168] 42 U.S.C. §§ 2000bb to bb-4 (1993).

[169] Westchester Day Sch. v. Vill. of Mamaroneck, 386 F.3d 183, 190 (2d Cir. 2004).

[170] Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal, 546 U.S. 418 (2006); Cutter v. Wilkinson, 544 U.S. 709 (2005).

[171] 42 U.S.C. §§ 2000cc to cc-5 (2000).

[172] 42 U.S.C. §§ 2000bb-3(a) (1993).

[173] §§ 2000cc-2(g).

[174] Navajo Nation v. U.S. Forest Serv., 479 F.3d 1024 (9th Cir. 2007).

RFRA will be putting on third party claims.[175] The court seems to focus exclusively on the government and the various tribes while ignoring any claims and concerns held by ASR (owner and operator of Snowbowl) and the skiers who frequent Snowbowl. Such a holding seems to weigh religious uses of public land heavier than public recreational use and private commercial use, arguably in violation of the Establishment Clause.

D. So, What Should We Do About It?

As argued above, the *Lyng* analysis seems too narrow, too insensitive to the complexity anticipated in cases involving Native American claims. Given the current legal framework, *Navajo Nation* seems too broad and too encouraging of inefficiency. Unfortunately, it will not be as easy as just amending federal laws to afford Native Americans with protection for the free exercise of their religion, as we could easily fall right back into an Establishment Clause issue. It has been suggested that we could amend RLUIPA to allow Native American worship at established or traditional religious places located on federal land and ensure that interest will constitute a sufficient "property interest" for the purposes of that statute.[176] It certainly is not going to be a smooth road but steps must be taken to ensure that federal law is inclusive of Native American religious practices, affording them with the same protections as federal law allows for other religions.

CONCLUSION

As Justice Brennan argued in his *Lyng* dissent, it is difficult to imagine conduct more insensitive than the Government's determination to assist a ski resort in the face of uncontroverted evidence that the action will seriously impair the religious exercise of many Native Americans.[177] The protections for Native Americans' religious freedom provided by *Lyng* are a hollow at best. But until Congress affirmatively acts to protect the unique needs of Native Americans to access public lands for religious exercise, the judiciary's hands are tied.

On October 17, 2007, the *Navajo Nation* Defendants' petitions for rehearing en banc were granted. Oral arguments were held on December 11, 2007.[178] The Ninth Circuit panel noted that the major issue for rehearing was how to balance the Appellants' RFRA rights and the government's undisputed right to manage

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[175] *Id.*

[176] *Implementation of American Indian Religious Freedom Act: Hearing Before the S. Comm. On Indian Affairs*, 108th Cong. (2004) (statement of Walter Echo-Hawk, Staff Attorney, Native American Rights Fund).

[177] Lyng v. Nw. Indian Cemetery Prot. Ass'n, 485 U.S. 439, 477 (1988).

[178] United States Court of Appeals for the Ninth Circuit, http://www.ca9.uscourts.gov/, (last visited Mar. 22, 2008).

public lands.[179] It will be interesting to see how the Ninth Circuit weighs religious liberty and public land regulation in this second viewing. We may even have a chance to see how the new makeup of the Supreme Court balances such issues.[180]

[179] Audio Recording: Oral Arguments, *Navajo Nation*, 479 F.3d 1024 (9th Cir. 2007), held en banc (Oct. 17, 2007), *available at* http://www.ca9.uscourts.gov/ (follow Audio Files link, then enter case number "06-15371EB").

[180] The only current Justices that opined in *Lyng* were Scalia and Stevens, both joining in the majority opinion. Kennedy took no part in the consideration or decision of the case.