Have American Indians Been Written Out of the Religious Freedom Restoration Act

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HAVE AMERICAN INDIANS BEEN WRITTEN OUT OF THE RELIGIOUS FREEDOM RESTORATION ACT?

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Haiya naiya yana,
I have come upon it, I have come upon blessing,
People, my relatives, I have come upon blessing,
People, my relatives, blessed.
—Navajo Blessingway Song**

I. INTRODUCTION

The San Francisco Peaks rise in dramatic isolation nearly a mile above the surrounding grasslands and pine forests of Northern Arizona to a height of over 12,000 feet.1 The Peaks consist of four separate summits, Humphrey's Peak, Agassiz Peak, Doyle Peak, and Fremont Peak, which together form a single mountain visible on the horizon for over 100 miles in any direction.2 No fewer than 13 American Indian tribes including the Hopi, Navajo, Hualapai, Havasupai, Yavapai, Zuni, Southern Paiute, Acoma, and five Apache Tribes ("the Tribes") hold the Peaks to be sacred and an integral part of their religion.3 Yet the San Francisco Peaks are owned by the federal government as part of the Coconino National Forest, not by any American Indian tribe.4

A controversy currently centers on the most sacred or holy of the Peaks—Humphrey’s Peak.5 Humphrey’s is the highest point in the State of Arizona at 12,633 feet6 and is not only important to American Indians, but also to a myriad of other interests, such as sheep and cattle grazing, timber harvesting, mining, mountain biking, hiking, camping, and downhill ski-

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3. Hardy, supra n. 2, at 1.
4. Navajo Nation, 535 F.3d at 1064 (majority).
5. Id. at 1082, 1098 (Fletcher, J., dissenting).
ing.\textsuperscript{7} Humphrey’s Peak is also home to one of the longest continuously operated ski resorts in the country, the Arizona Snowbowl (“Snowbowl”), established in 1938.\textsuperscript{8} The Snowbowl operates under a special use permit from the United States Forest Service (“Forest Service”).\textsuperscript{9}

American Indian tribes and the Snowbowl developers have been at odds over development on the Peaks for over 20 years.\textsuperscript{10} All the while, the Forest Service has been in a tough balancing act between competing interests including tribal religious concerns, various recreational uses, and economic development.\textsuperscript{11} Although each side has had its successes,\textsuperscript{12} each has also had its failures.\textsuperscript{13} The latest disappointment for American Indians was the Forest Service’s approval of the Snowbowl developers’ preferred alternative and planned expansion of the resort in a February 2005 Final Environmental Impact Statement and Record of Decision.\textsuperscript{14}

In this decision, the Forest Service approved the Snowbowl’s proposal to make artificial snow using treated sewage effluent, euphemistically named “reclaimed water.”\textsuperscript{15} The treated sewage effluent would be pumped uphill nearly 14 miles from the town of Flagstaff and stored in a ten million

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\item \textsuperscript{7} Navajo Nation, 535 F.3d at 1064 n. 4 (majority).
\item \textsuperscript{8} Daniel Kraker, \textit{On Sacred Snow: Culture and Commerce Clash Over Development on Arizona’s San Francisco Peaks}, 20 Am. Indian Rep. 6 (Apr. 2004).
\item \textsuperscript{9} Navajo Nation, 535 F.3d at 1064.
\item \textsuperscript{11} Kraker, supra n. 8, at 7 (quoting Gene Waldrip, district ranger within the Coconino National Forest, as stating “We have perspectives all the way from a religious and spiritual viewpoint, to the skier, or to the hiker, and all the other thousands of people who want to use the Peaks.”).
\item \textsuperscript{12} Id. (stating that in the 1970s, the Tribes managed to defeat a proposal to build luxury condos, a golf course, swimming pools, and trout ponds at the base of the ski resort).
\item \textsuperscript{13} Id. (stating that less than a year after the Tribes defeated the building of luxury condos the Forest Service approved the first major expansion of the Snowbowl); see also Wilson v. Block, 708 F.2d 735, 739 (D.C. Cir. 1983) (a failed 1981 lawsuit brought by the Navajo Medicinemen’s Association, the Hopi Tribe, and nearby ranchers under the Free Exercise Clause of the First Amendment to halt further development of the Snowbowl and to remove existing ski facilities); see also Klara Bonsack Kelley & Harris Francis, \textit{Navajo Sacred Places} 170 (Indiana U. Press 1994) (stating that after the defeat in Wilson, the Navajo Nation acquired a Forest Service grazing lease for nearly all the land around the Peaks themselves to keep development at a minimum, but this strategy has hardly worked due to increased tourism, the construction of a natural gas pipeline, and fiber-optic buried cables).
\item \textsuperscript{14} Navajo Nation v. U.S. Forest Serv., 408 F. Supp. 2d 866, 871 (D. Ariz. 2006) (stating “The Forest Service’s ROD approved, in part: (a) approximately 205 acres of snowmaking coverage throughout the area, utilizing reclaimed water; (b) a 10 million-gallon reclaimed water reservoir near the top terminal of the existing chairlift and catchments pond below Hart Prairie Lodge; (c) construction of a reclaimed water pipeline between Flagstaff and the Snowbowl with booster stations and pump houses; (d) construction of 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 – an approximate 47% increase; and (g) approximately 47 acres of thinning and 87 acres of grading/stumping and smoothing.”).
\item \textsuperscript{15} Id. at 877.
\end{itemize}
gallon holding tank near the top of the ski lifts.16 The purpose of the project, according to the Forest Service, is "to ensure a consistent and reliable operating season, thereby maintaining the economic viability of the Snowbowl, and stabilizing employment levels and winter tourism within the local community," as well as improving the safety of skiing conditions.17 To the tribes who consider the mountain to be sacred, spraying up to 1.5 million gallons of treated sewage effluent per day on the Peaks would be nothing short of sacrilege.18

In response, the Tribes, several individual tribal members, and environmental groups sued the Forest Service.19 The plaintiffs, however, did not use the typical environmental law approach to challenging such agency actions (e.g. filing a lawsuit under the National Environmental Policy Act.20 Instead, they petitioned for an injunction against the Snowbowl under the Religious Freedom Restoration Act ("RFRA"), among other claims.21 RFRA is a federal law enacted in 1993 to prevent government actions that would substantially burden a person's free exercise of religion.22 The Tribes asserted that the use of reclaimed water to make artificial snow for skiing was a substantial burden on the free exercise of their religion.23 Specifically, the Tribes argued that the physical and spiritual contamination of the Peaks would restrict their ability to perform particular religious ceremonies and to maintain daily and annual religious practices on the mountain.24 The original three-judge Ninth Circuit panel determined that the use of the treated wastewater was a violation of RFRA, but an eleven-judge en banc

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16. Id. at 871; see also Kraker, supra n. 8, at 6.
18. Kraker, supra n. 8, at 6; Navajo Nation, 535 F.3d at 1081 (Fletcher, J., dissenting).
19. Navajo Nation, 535 F.3d at 1063 n. 2 (majority).
20. Greg Guedel, Native American Legal Update, Can Spirituality (And the Law) Save the Environment?, http://www.nativelegalupdate.com/tags/snowbowl/ (Jan. 27, 2009); see also Navajo Nation, 535 F.3d at 1063 (listing Tribal plaintiffs as Navajo Nation, Havasupai Tribe, White Mountain Apache Nation, Yavapai-Apache Nation, Hualapai Tribe, and the Hopi Tribe. Tribal member plaintiffs include Rex Tilousi, Dianna Uqualla, Norris Nez, and Bill Bucky Preston and environmental plaintiffs as the Flagstaff Activist Network, the Sierra Club, and the Center for Biological Diversity).
panel of the Ninth Circuit reversed the decision. 25 The Tribes petitioned the Supreme Court for review but were denied certiorari in June 2009. 26

The Ninth Circuit en banc panel held that the use of treated sewage effluent to make artificial snow on land sacred to the Tribes would not force the Tribes to choose between following tenets of their religion and receiving government benefit, or coerce them to act contrary to their religious beliefs by threat of civil or criminal sanctions. 27 Therefore, the Forest Service’s actions did not “substantially burden” the Tribes’ religious beliefs within the meaning of RFRA. 28

This Note argues that the Ninth Circuit’s holding is unduly restrictive because it limits the interpretation of “substantial burden” to only two narrow situations and is in conflict with the purpose and plain language of RFRA. Section II examines the early history of the U.S. Constitution’s Free Exercise Clause, the development of the Supreme Court’s strict scrutiny test for Free Exercise cases, and how the Court failed to apply its own test in Employment Division, Department of Human Resources of Oregon v. Smith. 29 Section III discusses Congress’s reaction to the Smith decision and the enactment and purpose of RFRA. Section IV explains the procedural history of Navajo Nation v. U.S. Forest Service from the district court through the Ninth Circuit’s three-judge panel decision. Section V analyzes the Ninth Circuit en banc opinion and its drastic narrowing of RFRA. Finally, section VI concludes that by significantly narrowing RFRA, the Ninth Circuit effectively wrote American Indian religious claims out of RFRA, contrary to the purpose of the statute. Ultimately, the Ninth Circuit has undermined the ability of American Indians to freely exercise their rights on public lands.

II. ESTABLISHMENT OF THE STRICT SCRUTINY TEST UNDER SHERBERT AND YODER

In 1963 and 1972 the Supreme Court decided two cases, Sherbert v. Verner 30 and Wisconsin v. Yoder, 31 respectively, which established the strict scrutiny test for governmental actions that interfere with the free exercise of religion. 32 In Sherbert, Adell Sherbert, a member of the Seventh-

27. Id. at 1070.
28. Id.
32. Sherbert, 374 U.S. at 403; Yoder, 406 U.S. at 214.
day Adventist Church was fired from her job for refusing to work on Saturday, the Sabbath day of her faith. The Court held that South Carolina could not deny her unemployment benefits because this would force 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." In addition, the Court held that forcing her to make this choice by conditioning unemployment benefits upon her willingness to violate her religion effectively penalized the free exercise of her constitutional liberties, and, thus, the State of South Carolina had violated her right to freely exercise her religion.

In finding a violation of the Free Exercise Clause, the Court set forth what is commonly referred to as the "substantial burden test." The test consists of two steps. First, a court must determine whether the plaintiff's religious belief is sincerely held and, if so, whether the government action imposes a substantial burden on the free exercise of the plaintiff's religion. Second, the court must determine whether the burden imposed by the government action is outweighed by a compelling government interest and whether the government has pursued that interest in the least restrictive means possible.

The Court reaffirmed the substantial burden test in Yoder. Yoder involved a Free Exercise Clause claim brought by members of the Old Order Amish religion who appealed their conviction under a Wisconsin law that required them to send their children to school until the age of 16 in violation of the Amish religion and way of life. The Court held that the

33. Id. at 399.
34. Id. at 404.
35. Id. at 406.
36. Eloise H. Bouzari, The Substantial Burden Test's Impact on the Free Exercise of Minority Religions, 2 Tex. Forum on Civ. Liberties & Civ. Rights, 123, 123 (1996) (stating that the balancing tests in Sherbert and Yoder have come to be called the "substantial burden test"). The test is also known as the compelling interest test, and some scholars use the term interchangeably. Id. at n. 9.
37. Sherbert, 374 U.S. at 403 (stating "If, therefore, the decision of the South Carolina Supreme Court is to withstand appellant's constitutional challenge, it must be either because her disqualification as a beneficiary represents no infringement by the State of her constitutional rights of free exercise, or because any incidental burden on the free exercise of appellant's religion may be justified by a 'compelling state interest in the regulation of a subject within the State's constitutional power to regulate.'"). For analysis of the two-step process, see Bouzari, supra n. 36, at 129.
38. Sherbert, 374 U.S. at 403. No question was raised in this case concerning the sincerity of Adell Sherbet's religious beliefs. Id. at 401 n. 1.
39. Id. at 406; see also Bouzari, supra n. 36, at 129; Douglas Laycock & Oliver S. Thomas, Interpreting the Religious Freedom Restoration Act, 73 Tex. L. Rev. 209, 222 (1994) (stating that the "application of the burden to the person" must be the "least restrictive means" of furthering a compelling interest); Brucker, supra n. 23, at 276.
40. Yoder, 406 U.S. at 214.
41. Id. at 207. The Amish objection to formal education beyond the eighth grade is firmly grounded in the central religious principles of the Amish. Id. at 210. Testimony at trial stated that high
Wisconsin law violated the Free Exercise Clause because the burden on their sincere religious belief could not be overcome by any compelling state interest. In essence, the Court determined that the government violates the Free Exercise Clause when it "affirmatively compels [members of the Old-Order Amish Mennonite Church], under threat of sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs."

The Sherbert and Yoder substantial burden test established that a government action that impinges on fundamental rights and interests protected by the Free Exercise Clause must be balanced against a compelling state interest. Moreover, the strict scrutiny standard of review required by the compelling state interest test is not easily met because "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." Thus, together, Sherbert and Yoder firmly establish that under the Free Exercise Clause the government cannot burden an individual's sincerely held religious beliefs and conduct, except where the government can show a compelling state interest imposed in the least restrictive means.

III. THE CREATION OF RFRA

A. The Smith Decision

In 1990, the Supreme Court decided Employment Division, Department of Human Resources of Oregon v. Smith, which significantly narrowed the application of the substantial burden test. Congress, however, quickly stepped in to restore Sherbert and Yoder by enacting RFRA. Smith involved the firing of two men from a private drug rehabilitation organization because they used peyote for sacramental purposes at a ceremony of the Native American Church, of which they were members. When the two men applied for unemployment benefits, the Department of Human Resources of Oregon denied the applications because it determined school attendance could result in great psychological harm to Amish children and could ultimately result in the destruction of the Old Order Amish community. Id. at 212.

42. Id. at 235.
43. Id. at 218; see also Navajo Nation, 535 F.3d at 1069.
44. Yoder, 406 U.S. at 214.
45. Id. at 215.
46. Sherbert, 374 U.S. at 403; Yoder, 406 U.S. at 235; see also Brucker, supra n. 23, at 277.
47. Smith, 494 U.S. 872.
48. 42 U.S.C. § 2000bb-b ("The purposes of this chapter are—(1) to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.").
49. Smith, 494 U.S. at 874.
that they had been discharged for work-related misconduct.\textsuperscript{50} The Oregon Supreme Court concluded that the use of peyote for religious purposes was prohibited by the State but held that this prohibition was in violation of the Federal Free Exercise Clause.\textsuperscript{51} In so doing, the Oregon Court used the Sherbert substantial burden test.\textsuperscript{52} The Court determined the plaintiffs' religious beliefs were sincerely held and that the state action imposed a burden on the exercise of their religion; thus, the government had to show a compelling government interest to justify its action.\textsuperscript{53} The Oregon Court found no compelling governmental interest in insuring the financial integrity of the state employment compensation fund, and thus held the state could not deny unemployment benefits to the two men for engaging in their religious practice.\textsuperscript{54}

The U.S. Supreme Court reversed the Oregon Court's decision by distinguishing Smith from the Sherbert line of cases.\textsuperscript{55} The Court determined that the Oregon law prohibiting the use of peyote was a neutral law of general applicability because it was not targeted at any specific religious practice.\textsuperscript{56} Rather, it was a criminal law that was generally applicable to all people and was constitutional as applied to those who use the drug for other reasons.\textsuperscript{57} The Court held that as a neutral law of general applicability, the government did not need to show any compelling interest.\textsuperscript{58} The Court determined, however, that if a challenge involved a "hybrid" claim, that is, if more than one constitutional right were impacted by a single statute or practice, the compelling interest test would remain applicable.\textsuperscript{59} The Court stated that "[t]he only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections," such as the freedom of speech, the freedom of press, or the rights of parents to direct the education of their children.\textsuperscript{60} Thus, the Court nar-

\begin{thebibliography}{999}
\bibitem{Id.} \textit{Id.}
\bibitem{Sherbert} Smith, 494 U.S. at 875.
\bibitem{Id. at 876.} Id.
\bibitem{Id. at 876.} Id. at 876.
\bibitem{Id. at 883–884, 890.} Id. at 883–884, 890.
\bibitem{Id. at 878.} Id. at 878.
\bibitem{Id.} Id.
\bibitem{Id. at 885} Id. at 885 (stating "To make an individual’s obligation to obey such a law contingent upon the law’s coincidence with his religious beliefs, except where the State’s interest is “compelling”— permitting him, by virtue of his beliefs, “to become a law unto himself,” contradicts both constitutional tradition and common sense.”) (citation omitted).
\bibitem{Id. at 881} Id. at 881.
\bibitem{Cantwell v. Conn.} Cantwell v. Conn., 310 U.S. 296, 304–307 (1940) (invalidating a licensing system for religious and charitable solicitations under which the administrator had discretion to deny a license to any cause he deemed nonreligious); Murdock v. Pa., 319 U.S. 105 (1943) (invalidating a flat

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rowed the circumstances under which the government must show a compelling interest before imposing a burden on religious practices and even suggested that the Sherbert test applied only in denial of unemployment compensation cases. In essence, after Smith, a neutral law of general applicability must be complied with regardless of whether it infringes on a religious practice. The Court suggested the political process, regardless of its pitfalls for minority religions and practices, should be used to shield religious exercise. Indeed, Congress would quickly act in response to the Smith decision, but not in the way the Court had suggested.

B. The Enactment of RFRA in Reaction to Smith

Congress reacted to the Smith decision, not by making an exception to proscriptive drug laws for sacramental peyote use, but rather by nullifying the Smith decision and reinstating the Sherbert and Yoder substantial burden test. The unexpectedly broad holding in Smith was not well received by a large number of diverse religious groups and civil rights organizations. These groups gathered support and launched an attack on the Smith decision that culminated in the enactment of RFRA in 1993.

Many organizations and religious groups considered the Smith decision to be a fundamental assault on their constitutional right to freedom of religion and reacted with anger and shock. As recognized by the Court in its decision, it would be the small unpopular religions that would be most at

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61. Smith, 494 U.S. at 883–884. “Even if we were inclined to breathe into Sherbert some life beyond the unemployment compensation field, we would not apply it to require exemptions from a generally applicable criminal law.” Id. at 884. Additionally, the Court warned that the Sherbert rule, when applied to laws of general applicability, would produce “a private right to ignore generally applicable laws.” Id. at 886.

62. Id. at 878 (stating “if prohibiting the exercise of religion (or burdening the activity of printing) is not the object of the tax but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended.”).

63. Id. at 890 (“It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.”).


66. Drinan & Huffman, supra n. 64, at 531. Support came from a large and diverse group of religious and public interest organizations including the National Association of Evangelicals, the American Civil Liberties Union, and the Concerned Women for America, among others. Id. at 533.

67. Id. at 531.

68. Id. at 532.
risk under *Smith* because they would be at the mercy of the legislative majority. However, majority religions also saw a danger of increased vulnerability under *Smith*.

Initially, the groups petitioned the Supreme Court for re-hearing, but when that strategy failed, they focused their efforts on a legislative approach. Representative Stephen Solarz introduced the RFRA bill to the House of Representatives in July 1990. However, it did not pass both the House and the Senate until 1993, mainly due to concerns over abortion and prisoners’ rights issues. Eventually, the bill passed by wide margins and was signed into law by President Clinton.

C. Legislative Purposes Behind RFRA

The purpose of RFRA was

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69. *Smith*, 494 U.S. at 890 (stating “It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in.”); see also Diana D. Stithem, *Constitutional Law—The “Hollow Promise” of the Free Exercise Clause: Denying the Right of Peyote Use in the Native American Church*, 26 Land & Water L. Rev. 323, 335 (1990) (arguing “The *Smith II* majority left to the political process the fate of non-discriminatory religious practice exemptions, even though the Court acknowledged that the political process might place minority, non-traditional, religious practices at a disadvantage.”); Drinan & Huffman, *supra* n. 64, at 532.

70. Drinan & Huffman, *supra* n. 64, at 532 (“For example, a Christian wishing to take communion might not be granted an exemption from a generally applicable statute prohibiting the consumption of alcohol.”).

71. *Smith*, 494 U.S. 872 (1990), rehearing denied by, 496 U.S. 913 (1990). More than one hundred constitutional law scholars joined the petition for rehearing, many motivated by the fact that none of the briefs submitted to the Supreme Court had suggested that the Court change its free exercise doctrine. Drinan & Huffman, *supra* n. 64, at 533; see also Keith Jassma, *The Religious Freedom Restoration Act: Responding to Smith; Reconsidering Reynolds*, 16 Whittier L. Rev. 211, 218 n. 51 (1995). Oregon had conceded in its brief that the compelling interest test should be applied to the plaintiff’s claims, and a possible change in doctrine was not suggested during oral arguments. *Id.* Usually the Court will request additional briefing when it decides to reconsider precedents. *Id.*

72. H.R. Subcomm. on Civil and Constitutional Rights of the Comm. on the Jud., *The Religious Freedom Restoration Act of 1990: Hearings on H.R. 5377*, 101st Cong. (Sept. 27, 1990) (Testimony of Rep. Solarz speaking of the bill in the 101st Congress stated “It is perhaps not too hyperbolic to suggest that in the history of the Republic, there has rarely been a bill which more closely approximates motherhood and apple pie . . . . In fact, I know, at least so far, of no one who opposes this legislation.”).

73. Drinan & Huffman, *supra* n. 64, at 534–540. Among the concerns were pro-life groups that feared the bill could be used to argue that legislation restricting abortions infringes on a woman’s religious beliefs. *Id.* at 534. Additionally, a group of state attorneys general expressed fear that RFRA would give prisoners support in their fights for various religious-inspired privileges, and this would be expensive and raise security concerns. *Id.* at 539.

to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and to provide a claim or defense to persons whose religious exercise is substantially burdened by government.75

In short, the bill was designed to “restore free exercise law to its pre-Smith state.”76

In restoring the substantial burden test, Congress intended to prevent governmental restrictions of the free exercise of religion, unless a compelling interest can be shown.77 The statute explicitly states that the government shall not substantially burden a person’s exercise of religion, even if the burden results from a rule of general applicability, with only one exception.78 “The 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 governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.”79 Any person whose religious exercise has been burdened illegally can bring a claim under RFRA.80 Further, in enacting RFRA, Congress expressed particular concern about the effect of the *Smith* decision on minority religions.81 Congress decided that legislation was needed to protect the interests of minority religions because they generally lack the political power to obtain legislative accommodations for their religious exercise.82

It is important to note, however, that just because a claimant can show a burden on his or her religious freedom, this does not guarantee a successful suit.83 As one commentator noted, “The purpose of these statutes was to ensure that the exercise of religion was not burdened unnecessarily, not that the exercise wasn’t burdened at all.”84 Thus, RFRA was carefully worded to reinstate the compelling interest test that was in place prior to the *Smith* decision, and this test did not necessarily, or frequently, lead to a victory for

75. 42 U.S.C. § 2000bb(b) (emphasis added).
76. Drinan & Huffman, *supra* n. 64, at 531.
78. Id. at § 2000bb-1(a).
79. Id. at § 2000bb-1(b).
80. Id. at § 2000bb-1(c) (stating “A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.”).
83. Drinan & Huffman, *supra* n. 64, at 533.
Indeed, Congress concluded the compelling interest test "is a workable test for striking sensible balances between religious liberty and competing prior governmental interests."'

IV. NAVAJO NATION v. U.S. FOREST SERVICE: A CASE HISTORY

A final disposition in Navajo Nation v. U.S. Forest Service was decided by a Ninth Circuit en banc panel in 2008. To properly understand the Ninth Circuit’s en banc holding, it is important to understand the history of litigation over the development of the San Francisco Peaks in Wilson v. Block, as well as the holdings of the district court and original three-judge panel of the Ninth Circuit in the Navajo Nation case itself.


Litigation over development on the San Francisco Peaks began long before the current Navajo Nation suit, and this litigation, specifically the Wilson case, can be seen as a precursor to the current controversy. In 1981, the Navajo Medicinemen’s Association filed suit against John R. Block, the Secretary of the Department of Agriculture, along with the Chief Forester of the U.S. Forest Service, the Forest Service itself, and the United States. This suit was consolidated with similar suits brought by the Hopi Tribe, as well as the owners of a nearby ranch, Jean and Richard Wilson. The plaintiffs alleged, among other claims, that a proposed expansion of the Snowbowl violated the Free Exercise Clause of the First Amendment.

The suit was initiated by the tribes in reaction to a decision by the Forest Service to authorize a new development plan for the Snowbowl Development on the Snowbowl had been relatively light before this point.

85. Drinan & Huffman, supra n. 64, at 533; see e.g. Hernandez v. Commissioner of Internal Revenue, 490 U.S. 680 (1989) (Church of Scientology was not entitled to tax deductions for costs of training); U.S. v. Lee, 455 U.S. 252 (1981) (Amish employer not exempt from paying employer’s part of Social Security taxes).
87. Navajo Nation, 535 F.3d at 1058.
88. Wilson, 708 F.2d at 738.
89. Id.
90. Id. R. Max Peterson was the Chief Forester of the Forest Service. Id.
91. Id. The Wilson ranch was located one and a half miles below the Snowbowl. Id.
92. Id. (stating that the plaintiffs alleged a violation of the "American Indian Religious Freedom Act, the fiduciary duties owed the Indians by the government, the Endangered Species Act, two statutes regulating private use of national forest, the National Historic Preservation Act, the Multiple-Use Sustained Yield Act, the Wilderness Act, the National Environmental Policy Act, and the Administrative Procedure Act," in addition to the First Amendment claim).
93. Id. at 738–739.
94. Wilson, 708 F.2d at 738.
Skiing began in 1937 when the Forest Service built a road and a lodge. The lodge was destroyed by fire in 1952 and replaced in 1956. Subsequently, ski lifts were built in 1958 and 1962, but until 1977 facilities at the Snowbowl changed little. Then, in 1977 the Forest Service transferred the permit to operate the ski area to a new company, and that company quickly proposed a new master development plan.

The Forest Service proposed and evaluated six alternatives under the National Environmental Policy Act ("NEPA") and in 1979 adopted a preferred alternative for moderate development that was not one of the six originally proposed alternatives. The approved alternative consisted, in part, of the clearing of 50 acres of forest for new runs, the construction of a new day-lodge, three new lifts, and the paving and widening of the Snowbowl road.

The tribes argued that the expansion of the Snowbowl facilities would violate their First Amendment right to freely practice their religion. The tribes felt that development of the Peaks "would be a profane act, and an affront to the deities, and that, in consequence, the Peaks would lose their healing power and otherwise cease to benefit the tribes." Despite insistence that development of the Snowbowl was grossly inconsistent with the tribes' beliefs, the Washington D.C. Court of Appeals held that the plaintiffs failed to show any burden on their religious beliefs or practices because there was no penalizing of a religion by the conditioning of government benefits, as was the case in Sherbert. In addition, the court determined that no burden was imposed on the plaintiffs' practice of their religion because the development would not prevent them from engaging in any religious practices, as the government had not impaired access to the Peaks or the tribes' ability to gather sacred objects or perform ceremonies. The court noted that government land use was not exempt from the

95. Id.
96. Id.
97. Id.
98. Id. (stating that the Forest Service transferred the permit to operate the Snowbowl skiing facilities from Summit Properties, Inc. to the Northland Recreation Company). Northland Recreation Company submitted a "master plan" for the future development of the Snowbowl to the Forest Service three months after being granted the permit. Id.
99. Id. at 738–739.
100. Wilson, 708 F.2d at 739. The preferred alternative also allowed improvement of restroom facilities, and the reconstruction of the existing chairlifts. Id.
101. Id.
102. Id. at 740.
103. Id. at 741–742 (stating "Many government actions may offend religious believers, and may cast doubt upon the veracity of religious beliefs, but unless such actions penalize faith, they do not burden religion").
104. Id. at 744–745 ("The plaintiffs simply have not demonstrated that development will prevent them from engaging in any religious practices."). Additionally, the court found: "The Forest Service . . .
Free Exercise Clause but that the status of the land as government land was taken into account in its holding. 105 The court held that government land uses could never burden the right to freedom of belief, and could only burden the right of freedom to practice if it was a site-specific religious practice. 106 Thus, because the court found no burden on the plaintiffs’ exercise of religion, it found no need to decide whether the government had a compelling governmental interest in expanding the ski area or whether the Forest Service’s preferred alternative was the least restrictive means of achieving that interest. 107

B. Navajo Nation v. U.S. Forest Service in the United States District Court

Since 1979, the Snowbowl has operated under the direction of the EIS and the preferred alternative upheld in Wilson and many of the authorized improvements have been implemented. 108 However, another change in the ownership of the Snowbowl in 1992 presented new issues and controversies over future development. 109 In 1992, the current owner and operator, Arizona Snowbowl Resort Limited Partnership ("ASR"), purchased the Snowbowl for $4 million and in 2002 ASR submitted a new Facilities Improvement Plan to the Forest Service for their approval. 110 After a lengthy NEPA analysis, in 2005 the Forest Service issued its Final Environmental Impact Statement ("FEIS") and Record of Decision ("ROD"), which approved "Alternative Two" of the FEIS. 111 That alternative included a proposal to make artificial snow for the ski resort using treated sewage effluent, among many other improvements. 112

105. Id. at 744 n. 5.
106. Wilson, 708 F.2d at 744 n. 5.
107. Id. at 745; see also Robert J. Miller, Correcting Supreme Court “Errors”: American Indian Response to Lyng v. Northwest Indian Cemetery Protective Association, 20 Env't L. 1037, 1053 (1990) (showing that the Court in Lyng did not find a burden on religion that the Constitution could protect under the First Amendment and thus, the Court did not move on to balance interests. Miller stated, “In the majority’s view, this was not a free exercise case because the Court did not find a constitutional burden on religion, even though the road would “virtually destroy” the religion . . . . The Court did not balance the interests because it did not find a burden.”).
108. Navajo Nation, 408 F.Supp.2d at 870.
109. Id. at 869–870.
110. Navajo Nation, 479 F.3d at 1030.
112. Navajo Nation, 479 F.3d at 1030–1031; Snowbowl EIS, supra n. 17, at 2–5. Other improvements include an area for snow-play and snow-tubing, a new high-speed ski lift, relocation and upgrade
In regard to the approval of the use of treated sewage effluent for snowmaking on the Peaks, the FEIS approved in part:

(a) approximately 205 acres of snowmaking coverage throughout the area, utilizing reclaimed water; (b) a 10 million-gallon reclaimed water reservoir near the top terminal of the existing chairlift and catchments pond below Hart Prairie Lodge; (c) construction of a reclaimed water pipeline between Flagstaff and the Snowbowl with booster stations and pump houses [and]; (d) construction of a 3,000 to 4,000 square foot snowmaking control building.

A lawsuit filed by six tribes, several individual tribal members, and environmental groups against the Forest Service soon followed, alleging the Forest Service failed to comply with the requirements of, among other things, RFRA. The district court denied relief to the plaintiffs and held that the spraying of treated sewage effluent on the Peaks was not a substantial burden on the exercise of the plaintiffs’ religion in violation of RFRA. Although the court concluded that the plaintiffs’ religious beliefs were sincere, the court also concluded that the plaintiffs had failed to show any objective evidence that the upgrades to the Snowbowl would impact the exercise of their religion. The court stated, “Plaintiffs have not identified any plants, springs or natural resources within the [special use permit] area that would be affected by the Snowbowl upgrades. They have identified no shrines or religious ceremonies that would be impacted by the Snowbowl decision.”

Furthermore, the court noted that the Forest Service had guaranteed that religious practitioners would still have access to the Snowbowl and approximately 74,000 acres of the Coconino National Forest for religious purposes.

Additionally, the court held that no substantial burden could be shown absent a showing that the government’s land management decisions coerce
someone into violating his or her religious beliefs or penalizes his or her religious activity.\textsuperscript{120} The court determined that not only does the Snowbowl decision not bar the plaintiffs' access, use, or ritual practice on the Peaks, but also that "the decision does not coerce individuals into acting contrary to their religious beliefs nor does it penalize anyone for practicing his or her religion."\textsuperscript{121} The court was concerned with the effects that such a holding would have on land management decisions, stating, "If the facts alleged by the Plaintiffs were enough to establish a substantial burden, the Forest Service would be left in a precarious 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."\textsuperscript{122} The court warned that "allowing a subjective definition of substantial burden would open the door to 'religious servitudes' over large areas of federal lands," which would limit the government's ability to manage lands for multiple uses as Congress had directed in the National Forest Management Act's multiple-use mandate.\textsuperscript{123} The Tribes appealed the district court decision to the Ninth Circuit Court of Appeals.\textsuperscript{124}

\textbf{C. The Three-Judge Panel of the Ninth Circuit Court of Appeals}

The Ninth Circuit three-judge panel unanimously reversed the district court and ruled in favor of the Tribes on their RFRA claim.\textsuperscript{125} The court determined a substantial burden existed on the Tribes' right to the free exercise of their religion due to the use of treated sewage effluent on the San Francisco Peaks.\textsuperscript{126} The burden determined by the court fell roughly into two categories.\textsuperscript{127} The first was the "inability to perform a particular religious ceremony, because the ceremony requires collecting natural resources

\textsuperscript{120.} Id. at 904. The court referenced the Free Exercise Clause case \textit{Lyng v. N.W. Indian Cemetery Protec. Assn.}, 484 U.S. 439, 449-453 (1988), which held that the law "does not and cannot imply 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." Id.

\textsuperscript{121.} Id. at 905.

\textsuperscript{122.} \textit{Navajo Nation}, 408 F. Supp. 2d at 905.

\textsuperscript{123.} Id. at 904 (finding that a substantial burden in a case such as this would lead to absurd results); \textit{see Lyng}, 485 U.S. at 452-453 (expressing concern that tribes may "seek to exclude all human activity but their own from sacred areas of the public lands").

\textsuperscript{124.} \textit{Navajo Nation}, 479 F.3d at 1029. The Tribes appealed on their RFRA, NEPA, and NHPA claims. Id.

\textsuperscript{125.} Id. ("We reverse the decision of the district court in part. We hold that the Forest Service's approval of the Snowbowl's use of recycled sewage effluent to make artificial snow on the San Francisco Peaks violates RFRA, and that in one respect the Final Environmental Impact Statement prepared in this case does not comply with NEPA. We affirm the grant of summary judgment to Appellees on four of Appellants' five NEPA claims and their NHPA claim.").

\textsuperscript{126.} Id. at 1043.

\textsuperscript{127.} Id. at 1039.
from the Peaks that would be too contaminated—physically, spiritually, or both—for sacramental use.”

The second burden was the “inability to maintain daily and annual religious practices comprising an entire way of life, because the practices require a belief in the mountain’s purity or a spiritual connection to the mountain that would be undermined by the contamination.”

Rather than focusing, as the district court did, on the fact that the religious practitioners had access to most of the Peaks and could collect resources outside of the area proposed for the spraying of effluent, the Ninth Circuit focused on the beliefs of the practitioners themselves. The court took an in-depth look at the beliefs of the Hopi, the Navajo, the Hualapai, and the Havasupi, finding that although beliefs among the tribes were somewhat different in nature, the use of treated sewage effluent on the Peaks would impose a substantial burden on the religious exercise of all four tribes. Additionally, the court determined that the burden fell most heavily on the Navajo and the Hopi. It concluded those tribes’ religious practices had revolved around the Peaks for centuries, their practices required pure natural resources from the Peaks, and because their religious beliefs dictate that the mountain be viewed as a whole living being, the treated sewage effluent would contaminate the resources throughout the Peaks.
Additionally, the three-judge panel, unlike the district court, focused on the particulars of the treated sewage effluent used on the Peaks, emphasizing the contaminating effect of the proposal to further its finding that a substantial burden existed on the Tribes’ exercise of religion. The court emphasized that although the treated sewage effluent would satisfy the requirements of Arizona law for reclaimed water, the water was by no means pure. In fact, the resulting effluent still contained “detectable levels of enteric bacteria, viruses, and protazoa [sic], including Cryptosporidium and Giardia” after treatment. Further, “According to Arizona law, the treated sewage effluent must be free of ‘detectable fecal coliform organisms’ in only ‘four out of the last seven daily reclaimed water samples,’” yet many unidentified and unregulated residual organic contaminants are still contained in the water. The court emphasized that the Snowbowl would be the only and first resort in the country to make artificial snow exclusively out of undiluted sewage effluent, which although it has been approved for snowmaking in other locations, is not approved for full-immersion water activities in which there is a potential for ingestion of the water. Further, the Arizona department of Environmental Quality requires that users of this water, for permissible uses such as flushing toilets, fire protection, and non-self-service car washes, take precautions to avoid human ingestion. The court noted that the proposed action, depending on weather conditions, would allow the spraying of more than 100 million gallons of effluent to be deposited on the Peaks over the course of a winter season.

Taking into account a detailed description of the Tribes’ beliefs of the mountain as a single living entity, along with the proposed action to spray large amounts of sewage effluent on the Peaks, the court concluded the action would impose a substantial burden on their exercise of religion. The court then addressed the next two prongs of the test: (1) whether the government’s action was in furtherance of a compelling governmental interest and (2) whether the action constituted the least restrictive means of fur-
thering that compelling governmental interest. The court determined that authorizing the use of artificial snowmaking at an already functioning ski area to expand and improve its facilities or to extend its ski season in dry years was not a governmental interest “of the highest order.” The court concluded that the Snowbowl would continue to exist if the planned expansion did not go forward, and that the purpose of the expansion was to make the ski resort more profitable, which is not a compelling governmental interest. Further, the court determined that a governmental interest in public recreation did not justify the proposed expansion because even without the Snowbowl, the public would continue to enjoy many recreational activities on the Peaks. The court did acknowledge a compelling governmental interest in ensuring public safety on federal lands, but concluded that there was no showing that approval of the proposed development advanced that interest in the least restrictive means.

Additionally, the court did not find a compelling governmental interest in avoiding a conflict with the Establishment Clause of the First Amendment, which states “Congress shall make no law respecting an establishment of religion.” This is because not allowing the use of treated sewage effluent on the Peaks would not favor the Tribes’ religious beliefs and practices over all other interests, but instead it would permit an accommodation to avoid “callous indifference.” To support its finding of a substantial burden and to give a sense of the harm caused to the Tribes by the Forest Service’s approval of the use of treated sewage effluent on the Peaks, the court put forth the following example: “To get some sense of equivalence, it may be useful to imagine the effect on Christian beliefs and practices—and the imposition that Christians would experience—if the government were to require that baptisms be carried out with ‘reclaimed water.’” Thus, the court held that there was a substantial burden on the Tribes’ free exercise of religion, and that the Forest Service’s authorization failed both prongs of RFRA’s compelling governmental interest test.

Lastly, the court addressed the slippery slope concerns of the district court as well as the chief case relied upon by the district court, Lyng v. Northwest Indian Cemetery Protective Assn. In Lyng, the Forest Service
planned to build a six-mile section of road connecting two preexisting roads in the Six Rivers National Forest in northern California.\(^{153}\) The planned road would cut through an area that had historically been used by several Indian tribes for religious purposes.\(^{154}\) An Indian organization and individual tribal members sued the Forest Service claiming the construction of the road violated the Free Exercise Clause because their religious practices required undisturbed naturalness of the area.\(^{155}\) Despite the fact that the tribes' religious practices would be severely impacted, the U.S. Supreme Court held that building the road did not violate the Free Exercise Clause.\(^{156}\) The Court was concerned that if the challenge was upheld, tribal members "might seek to exclude all human activity but their own from sacred areas of the public lands."\(^{157}\)

The district court and the Court in \textit{Lyng} were concerned that if a challenge to government land actions was to be upheld, there would be no restrictions on the Tribes' ability to control the use of government land.\(^{158}\) The Ninth Circuit distinguished the situation in \textit{Lyng} from the current challenge for two reasons.\(^{159}\) First, the challenge in \textit{Lyng} was brought under the Free Exercise Clause, but here the challenge was under RFRA, which has a more demanding standard that must be satisfied to justify a burden on the exercise of religion.\(^{160}\) "Second, the facts in \textit{Lyng} were materially different from" the facts in \textit{Navajo Nation}.\(^{161}\) In \textit{Lyng}, the government had made significant efforts to reduce the burden by locating the planned road so as to reduce the auditory and visual impacts as much as possible.\(^{162}\) The Court in \textit{Lyng} found that aside from abandoning the project entirely so as to leave "the two existing segments of road to dead-end in the middle of a National Forest," it was "difficult to see how the government could have been more solicitous."\(^{163}\) The equivalent to "abandoning the project entirely" in \textit{Lyng} would be abandoning the ski area altogether, which the Tribes did not

\(^{154}\) Id. at 443.
\(^{155}\) Id. at 443, 453.
\(^{156}\) Id. at 451.
\(^{157}\) Id. at 452–453.
\(^{158}\) \textit{Lyng}, 485 U.S. at 452–453 (determining that the Tribes were seeking to exclude all human activity but their own from the sacred areas of public lands); \textit{Navajo Nation}, 408 F. Supp. 2d at 904.
\(^{159}\) \textit{Navajo Nation}, 479 F.3d at 1047–1048.
\(^{160}\) Id. at 1047 (determining that the "exercise of religion" is defined more broadly under RFRA than under the Free Exercise Clause of the First Amendment, among other differences). Thus, "The net effect of these changes is that it is easier for a plaintiff to prevail in a RFRA case than in a pure free exercise case." \textit{Id}.
\(^{161}\) Id. (arguing "A developed commercial ski area already exists, and Appellants do not seek to interfere with its current operation. There are many other recreational uses of the Peaks, with which Appellants also do not seek to interfere.").
\(^{162}\) Id.
\(^{163}\) Id.
seek. Additionally, in *Lyng* the government made significant efforts to reduce the burden by shifting the location of a proposed road. The equivalent in this case would be restricting the operation of the Snowbowl to that which could be sustained by natural snowfall.

Hence, in *Lyng*, the Court "denied the Free Exercise claim in part because it could not see a stopping place." In contrast, the Ninth Circuit panel upheld the RFRA claim in part because otherwise it did not see a starting place for tribes, stating "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." The decision was well received by the Tribes, but the Government and the Snowbowl petitioned for and were granted a rehearing en banc by the Ninth Circuit.

V. The Ninth Circuit En Banc: A Drastic Narrowing

A Ninth Circuit en banc panel reversed the decision of the three-judge panel and held that spraying treated sewage effluent on the Peaks would not substantially burden the Tribes' exercise of religion. The court started its analysis by noting that the government does not have to demonstrate a compelling governmental interest or show that its action involves the least restrictive means to achieve its purpose unless the plaintiff first establishes there is a substantial burden on the free exercise of their religion. Thus, the court framed the issue in terms of whether there was a substantial burden on the Tribes' religious practices so as to trigger the compelling interest test. In holding there was no substantial burden on the Tribes' religion, the court did not reach the issue of whether the government could show a compelling interest or whether it achieved that interest using the least restrictive means.

The court looked to *Sherbert* and *Yoder* to define what kind of burden on the exercise of religion was sufficient to invoke the compelling interest
The majority did not dispute that under the plain meaning of the term, as defined in their own circuit's precedent, the Tribes would be able to show a substantial burden on the exercise of their religion. Instead the court determined that because RFRA specifically restored Sherbert and Yoder, those cases, along with other federal pre-Smith rulings, controlled the substantial burden inquiry. Sherbert and Yoder led the court to hold that "[u]nder RFRA a "substantial burden" is imposed only when individuals are forced to choose between following the tenets of their religion and receiving a governmental benefit (Sherbert) or coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions (Yoder)." Thus, because neither of the above two mechanisms were employed against the Tribes in this case (the use of treated sewage water does not force the Tribes to choose between following tenets of their religion or receiving a governmental benefit, nor does it coerce them to act contrary to their religion under threat of civil or criminal sanctions), the court concluded that no substantial burden existed.

The court justified its narrow interpretation of "substantial burden" by referring to the phrase as a "term of art" limited to the two types of burdens imposed in Sherbert and Yoder, and thus, the term could not be interpreted by reference to plain meaning. The court stated that "[t]he only effect of the proposed upgrades is on the Plaintiffs' subjective, emotional religious experience," and that "diminishment of spiritual fulfillment—serious though it may be—is not a 'substantial burden' on the free exercise of religion." Thus, because the majority failed to find that the spraying of treated sewage effluent on the Peaks was a substantial burden on the Tribes' exercise of their religion, it did not reach the question of whether there was

174. Id. at 1069.
175. The Ninth Circuit's own precedent requires an alleged burden prevent the plaintiff "from engaging in [religious] conduct or having a religious experience." Navajo Nation, 479 F.3d at 1042 (alteration in original) (quoting Bryant v. Gomez, 46 F.3d 948, 949 (9th Cir. 1995)).
176. Navajo Nation, 535 F.3d at 1069 (discussing the application of Sherbert and Yoder the court stated “Therefore, the cases that RFRA expressly adopted and restored—Sherbert, Yoder, and federal court rulings prior to Smith—also control the ‘substantial burden’ inquiry.”).
177. Id. at 1069–1070 (explaining that any burden imposed short of those described in Sherbert and Yoder is not a "substantial burden" within the meaning of RFRA and thus, does not require the application of the compelling interest test).
178. Id. at 1070. The court found that "the sole effect of the artificial snow is on the Plaintiffs' subjective spiritual experience . . . [t]hat is, the presence of artificial snow on the Peaks is offensive to the Plaintiffs' feelings about their religion and will decrease the spiritual fulfillment Plaintiffs get from practicing their religion on the mountain." Id. at 1063. “Nevertheless, a government action that decreases the spirituality, the fervor, or the satisfaction with which a believer practices his religion is not what Congress has labeled a ‘substantial burden”—a term of art chosen by Congress to be defined by reference to Supreme Court precedent—on the free exercise of religion.” Id.
179. Id. at 1074–1075.
180. Id. at 1070.
a compelling governmental interest and what would be a least restrictive
means of furthering that purpose. The court reached its decision due primarily to a slippery slope argu-
ment and concerns about restrictions on the government’s management of
its own federal lands. The court noted that if a substantial burden were
determined to exist in this case, then “any action the federal government
were to take, including action on its own land, would be subject to the
personalized oversight of millions of citizens.” The court was concerned
that such a holding would, in effect, give individual veto power to every
citizen to stop a “government action solely because it offends his religious
beliefs, sensibilities, or tastes, or fails to satisfy his religious desires.”
Thus, a principle concern for the court was that under a less restrictive inter-
pretation of substantial burden, the number of claims could multiply to a
point where the United States would cease to function.

The court concluded there was no substantial burden on the Tribes’
religious exercise and thus it did not reach the compelling government in-
terest test, in large part out of fear of a parade of horribles and a concern
that the government’s use of its own land would be hampered. The court
then affirmed the district court’s entry of judgment for the Defendants on
the RFRA claim. The Tribes petitioned the Supreme Court to grant certi-
orari but were denied review.

VI. THE NINTH CIRCUIT’S TEST: PROBLEMS AND EFFECTS

The issue of whether the use of treated sewage effluent for purposes of
snowmaking on the Snowbowl constitutes a substantial burden on the
Tribes’ exercise of religion raises many concerns for religious liberty advoca-
tes. The problem of defining what is a “substantial burden” is a neces-
sary, but extremely difficult task. This controversial phrase is what the parties and amicus curiae battled over in the briefs filed with the Supreme Court. However difficult the task, the Ninth Circuit’s interpretation of “substantial burden” has some flaws that tribes and other religious groups will have to contend with for years to come.

A. The Ninth Circuit Interpretation of Substantial Burden is Unduly Restrictive

The standard of what constitutes a substantial burden in the Ninth Circuit is unduly restrictive and is the narrowest interpretation of substantial burden by any federal circuit court. Under the Ninth Circuit’s interpretation, a substantial burden exists only when individuals are forced to choose between following the tenets of their religion and receiving a government benefit or when they are coerced to act contrary to their religious beliefs by the threat of civil or criminal sanction. By limiting the notion of substantial burden to only the two particular mechanisms by which the government impacted religious practices in Sherbert and Yoder, the Ninth Circuit has cut off claims arising from any other type of burden on religious practices before it ever triggers the compelling interest test that RFRA specifically established. This waters down religious protection by extinguishing RFRA claims before the protections of the statute are triggered.

The measure of a “substantial burden” on religious practices should not be judged by the way in which the government imposes the burden. Rather, courts should consider whether, from the point of view of the prac-
tioner, the government has in fact imposed such a burden that reaches the level of substantiality that RFRA was designed to protect. As Judge Fletcher points out in his dissent to the Ninth Circuit en banc decision, RFRA "does not describe a particular mechanism by which religion cannot be burdened[,] rather RFRA prohibits government action with a particular effect on religious exercise." Indeed, RFRA states, "Government shall not substantially burden a person's exercise of religion," with no mention of mechanism. The Ninth Circuit has changed the very nature of the question by focusing on form over effect in examining how the government imposes its burdens rather than on whether the government has in fact imposed a substantial burden.

In interpreting the term "substantial burden" to be a rule of form rather than of effect, the Ninth Circuit has taken away the flexibility needed in determining what constitutes a substantial burden on the exercise of religion. The government acts in myriad ways, and religious beliefs are offended in an equally vast number of ways. "Therefore, the important question from the standpoint of religious freedom is simply whether governmental action significantly interferes with religious practices, not whether it happens to do so by the same means as a prior Supreme Court case."

Due primarily to fears of a slippery slope, the Ninth Circuit has narrowed the scope of RFRA to apply only when the government imposes a substantial burden using two distinct mechanisms and thus has cut off claims imposed by any other mechanism before such claims trigger the RFRA mandated compelling interest test. The court feared that if the substantial burden test were construed using its plain meaning then "any action the federal government were to take, including action on its own land, would be subject to the personalized oversight of millions of citi-

198. Id.; see also Pet. for Writ of Cert., supra n. 193, at *27 (arguing "No other approach would make sense. The government acts in myriad ways. And religious belief, contrary to the Ninth Circuit's suggestion, is inherently 'subjective.' Some religions are offended by autopsies; some are not. Some are intimately tied to certain landmarks; some are not." (emphasis in original)).

199. Navajo Nation, 535 F.3d at 1086–1087 (emphasis in original).


201. Navajo Nation, 535 F.3d at 1086; see also Pet. for Writ of Cert., supra n. 193, at *27.

202. Navajo Nation, 535 F.3d at 1090 ("The express purpose of RFRA was to reject the restrictive approach to the Free Exercise Clause that culminated in Smith and to restore the application of strict judicial scrutiny "in all cases where free exercise of religion is substantially burdened."). Additionally, the Supreme Court has shown that it is entirely feasible to employ a case-by-case approach to challenged government action in the one case in which the Court applied RFRA to government action. Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal, 546 U.S. 418, 436 (2006).


204. Id.

205. Navajo Nation, 535 F.3d at 1063 (majority); Amar & Brownstein, supra n. 84, at 1.
zens.\textsuperscript{206} The court's concern of an individual veto power over government actions and the parade of horribles that follows is unfounded.\textsuperscript{207} Instead of giving every individual veto power over government actions, a plain meaning reading of substantial burden would allow a case-by-case, flexible determination of whether or not there has been a burden that rises to the level of substantiability needed to trigger the compelling interest test.\textsuperscript{208} Once the substantial burden requirement has been met, the government does not have to stop its actions.\textsuperscript{209} Instead, the finding of a substantial burden merely triggers the compelling government interest test.\textsuperscript{210}

When the compelling governmental interest test is triggered, the government must demonstrate a compelling governmental interest and show that it has adopted the least restrictive means of achieving that interest.\textsuperscript{211} Although the compelling interest test is the most demanding test known to constitutional law, a study has shown that the government satisfies the test in 72\% of the cases involving religious liberty interests.\textsuperscript{212} Far from creating an untenable situation for land management and government action, allowing a plain meaning of "substantial burden" simply requires the government to justify its actions, striking a workable balance between religious liberty and competing governmental interests.\textsuperscript{213} Application of the comp-

\textsuperscript{206.} \textit{Navajo Nation}, 535 F.3d at 1063.

\textsuperscript{207.} Br. of The Friends Comm. on Natl. Legis. et al., \textit{supra} n. 189, at 19 (stating after lengthy argument that "The \textit{en banc} majority's conclusion that to affirm a standard other than the sanction/benefit test would subject the government 'to the personalized oversight of millions of citizens' and that '[e]ach citizen would hold an individual veto to prohibit the government action,' is therefore unfounded. It does not comport with the realities of the application of the strict scrutiny test to religious liberty claims and there is no need to prevent legitimate claims of substantial (but not absolute) infringement of religious liberty from being reviewed under the strict scrutiny test.").

\textsuperscript{208.} Id. The compelling interest test will not overwhelm government activities because the test, "which requires that the substantial burden 'is in furtherance of a compelling governmental interest' and 'is the least restrictive means of furthering that compelling governmental interest,' " does not mean that any religious exercise must be free of government interference. Rather it provides a mechanism "for striking sensible balances between religious liberty and competing prior governmental interests." \textit{Id.} at 18.

\textsuperscript{209.} \textit{Id.}

\textsuperscript{210.} See Amar \& Brownstein, \textit{supra} n. 84, at 2. However, even when the compelling interest test is triggered, it does not automatically mean that any religious exercise must be free from government interference; rather, it strikes a workable balancing test. Br. of The Friends Comm. on Natl. Legis. et al., \textit{supra} n. 189, at 17-18; Pet. for Writ of Cert., \textit{supra} n. 193, at *29.

\textsuperscript{211.} \textit{City of Boerne v. Flores}, 521 U.S. 507, 533-534 (1997) (holding that RFRA was unconstitutional as applied to the States). RFRA, however, continues to apply to the operations of the federal government. \textit{O Centro}, 546 U.S. at 424.


\textsuperscript{213.} 42 U.S.C. § 2000bb(a); see also \textit{Smith}, 194 U.S. at 894 (O'Connor, J., concurring) ("To say that a person's right to free exercise has been burdened, of course, does not mean that he has an absolute right to engage in the conduct . . . we have respected both the First Amendment's express textual
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PELLING INTEREST TEST WILL NOT LEAD TO AN INABILITY OF GOVERNMENT TO FUNCTION, AS SUGGESTED BY THE NINTH CIRCUIT EN BANC PANEL WHEN IT NARROWED THE INTERPRETATION OF “SUBSTANTIAL BURDEN” TO TWO SPECIFIC GOVERNMENTAL MECHANISMS.214

B. THE NINTH CIRCUIT INTERPRETATION OF SUBSTANTIAL BURDEN IS INCONSISTENT WITH CONGRESS’S PURPOSES IN ENACTING RFRA

The Ninth Circuit’s interpretation of substantial burden effectively excludes claims Congress specifically targeted for protection in enacting RFRA and, as such, is inconsistent with the legislative purposes behind the Act.215 This restrictive interpretation of “substantial burden” places some injuries outside the coverage of RFRA simply because they are imposed by different mechanisms.216 In so doing, the court has formally excluded one kind of burden from coverage of RFRA, that of the state physically controlling and preventing the exercise of religion.217 As the dissent points out, “[A] court would surely hold that the government had imposed a ‘substantial burden’ on the ‘exercise of religion’ if it purchased by eminent domain every Catholic Church in the country.”218 Yet this hypothetical government action neither coerces Catholics to act contrary to their religious beliefs under the threat of sanctions nor conditions a governmental benefit upon conduct that would violate their religious beliefs and, thus, would fail to trigger the compelling governmental interest test mandated in RFRA.219

mandate and the governmental interest in regulation of conduct by requiring the government to justify any substantial burden on religiously motivated conduct by a compelling state interest and by means narrowly tailored to achieve that interest.”).


215. Br. of Amici Curiae Relig. Liberty L. Scholars, supra n. 189, at 10–16 (describing many of the situations that Congress specifically targeted for protection would not be protected under the Ninth Circuit’s test, including religious objections to autopsies, customs seizure of substances used in religious ceremonies, religious freedom in prisons, and restrictions on the use of land by religious groups); Amar & Brownstein, supra n. 84, at 2 (arguing specific religious liberties that Congress identified as the “reasons for enacting RFRA would fall outside of the statute’s coverage under the Ninth Circuit’s” interpretation of substantial burden).

216. Navajo Nation, 535 F.3d at 1091 (Fletcher, J., dissenting).

217. Amar & Brownstein, supra n. 84, at 2 (arguing that under the Ninth Circuit test “the state’s use of physical force and power to prevent the exercise of religion can never support a claim under RFRA”).

218. Navajo Nation, 535 F.3d at 1090.

219. Id. at 1091 (stating “However, the majority’s restrictive definition of ‘substantial burden’ places such injuries entirely outside the coverage of RFRA because they are imposed through different mechanisms than those employed in Sherbert and Yoder.”). Further, “Excluding such cases from the coverage of RFRA . . . contributes nothing to solving the real problem courts confront in interpreting RFRA—deciding when a burden is too attenuated or insubstantial to warrant review under the statute. Under the Ninth Circuit’s standard, those core issues remain unresolved for all the cases in which coercion can be alleged. All that the Ninth Circuit has accomplished is the rejection of one category of RFRA claims—
One example of minority religious beliefs that Congress specifically intended to protect but that would fall outside of the protection of RFRA under the Ninth Circuit’s interpretation of substantial burden deals with religious objections to the performance of autopsies.\textsuperscript{220} When Congress enacted RFRA it was aware that due to the United States Supreme Court’s decision in \textit{Smith}, the courts were regularly rejecting religious objections to autopsies.\textsuperscript{221} Some faiths believe that the performance of an autopsy violates the sanctity of the body and that if an autopsy is performed, the spirit of the deceased will never be free.\textsuperscript{222} Yet objections to government mandated autopsies would not satisfy the Ninth Circuit’s interpretation of “substantial burden.”\textsuperscript{223} This is because the state’s decision to perform an autopsy is not one in which the government has coerced families to act contrary to their religious beliefs under threat of sanctions or conditioned a government benefit upon conduct that would violate their religious beliefs.\textsuperscript{224} Under the standard set by the Ninth Circuit, “[T]he government’s rejection of religious objections regarding the handling of a deceased family member’s body would not be deemed to substantially burden religious exercise.”\textsuperscript{225} This result is contrary to the intent of Congress in enacting RFRA.\textsuperscript{226}

\textbf{C. Have American Indians Been Effectively Written Out of RFRA?}

American Indian religious concerns tied to sacred lands have also been left without protection under RFRA.\textsuperscript{227} Congress enacted RFRA “[t]o assure that all Americans are free to follow their faiths free from government-
Yet under the Ninth Circuit’s test, the beliefs of American Indians with regard to land they hold sacred have been left without any protection.229

Indeed, the Ninth Circuit three-judge panel concluded, “We 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.”230 The en banc Ninth Circuit’s narrow interpretation of substantial burden leaves no meaningful way for tribes to substantively protect sacred sites that are under control of the federal government.231

D. What Do Tribes Do Now?

There are several approaches that tribes can use to work toward more meaningful protection of their religious freedoms under RFRA.232 One of these is to educate the public, Congress, judges, lawyers, and courts as to the nature of American Indian religious beliefs. Generally, judges will tend to look at the burden on religious freedoms through their own religious lens.233 Most often this is a Judeo-Christian lens, which tends to view the practice of religion in a specific physical space, such as a church.234 It is, therefore, inherently difficult for those with Judeo-Christian beliefs to understand the beliefs of others.235 One such belief is at the center of this case: the belief that the San Francisco Peaks are a single, living entity and that the use of treated sewage effluent, even on one percent of the Peaks’ surface, would have an irretrievable impact on the use of the soil, plants, and animals for medicinal and ceremonial purposes throughout the entire Peaks.236

229. Navajo Nation, 535 F.3d at 1063.
230. Navajo Nation, 479 F.3d at 1048.
231. Toensing, supra n. 25, at 2.
233. Id.
234. Id. at 65, 75 (stating “unfortunately, review of the cases inevitably raises the question whether courts’ familiarity and comfort level with a religious practice or other cultural norms subconsciously influence the substantial burden analysis.”); see also Miller, supra n. 107, at 1041 (stating “Usually, the only Indian religious values that are upheld are ones that judges can analogize to Judeo-Christian precepts. In the few cases where Indians have been successful in using religious claims, the courts have analogized the Indian rites to more familiar Christian ones. This is an example of discrimination against Indian religions because it shows that only those practices that are similar to Judeo-Christian religions will be recognized as valid religious practices.”).
235. Navajo Nation, 479 F.3d at 1039.
236. Id.
Indeed the majority in the Ninth Circuit en banc opinion discounted the belief that the mountain is a single living entity.\textsuperscript{237} Throughout the court's opinion, it emphasizes that the ski area covers approximately one percent of the San Francisco Peaks, implying that the impact is so small that it would be absurd to claim a substantial burden on the Tribes’ religious exercise.\textsuperscript{238} This conclusion discounts the belief that the mountain is a single living entity. For instance, the court wrote, “According to the tribes, the presence of the Snowbowl desecrates for them the spirituality of the Peaks... Certain Indian religious practitioners believe the desecration of the Peaks has caused many disasters, including the September 11, 2001 terrorist attacks, the Columbia Space Shuttle accident, and increases in natural disasters.”\textsuperscript{239} Furthermore, the court implied that everything is sacred to tribes and that to recognize one place as sacred would lead to American Indian control over all federal land in the west, which would make the Forest Service's management task nearly impossible.\textsuperscript{240} The court noted “The district court found the tribes hold other landscapes to be sacred as well, such as canyons and canyon systems, rivers and river drainages, lakes, discrete mesas and buttes, rock formations, shrines, gathering areas, pilgrimage routes, and prehistoric sites.”\textsuperscript{241}

By failing to recognize the sacredness of the San Francisco Peaks, the majority undermined the findings of the district court and its own conclusion that the religious beliefs of the Plaintiffs were sincere.\textsuperscript{242} The court was concerned that if every natural feature were sacred to the Tribes they would have control over federal land management decisions.\textsuperscript{243} However, this argument discounts the degree to which the San Francisco Peaks are sacred to the Tribes and virtually forgets that the Tribes must show a substantial burden on their religion to trigger the compelling governmental interest test.\textsuperscript{244} The original Ninth Circuit three-judge panel determined a substantial burden existed in this case because the Peaks are the most holy of places and the center of the Tribes’ religious exercises.\textsuperscript{245} In the future, tribes contesting a land management decision over a mesa, gathering area,
shrine, prehistoric site, or any other sacred site, must also prove that their religious beliefs are sincere and that the burden on those beliefs rises to the level of substantiality needed to trigger the compelling governmental interest test.\(^{246}\) The inability of the court to recognize degrees of sacredness to the Tribes, and its emphasis on physical harm, ignores the nature of the Tribes’ religious beliefs, allowing the court to determine that no substantial burden results from the use of up to 1.5 million gallons of treated sewage effluent per day on the Peaks.\(^{247}\)

If courts, judges, lawyers, Congress, and the general public were better able to understand the nature of American Indian religious beliefs, a court would be more likely to find a substantial burden.\(^{248}\) Tribes may need to relate the burden seen by American Indians to something that is more readily understandable to the majority culture.\(^{249}\) That is what the three-judge panel tried to do by comparing the spraying of treated sewage water on the Peaks to requiring Christian baptisms to be carried out with ‘reclaimed water.’\(^{250}\) For better future determinations of what constitutes a substantial burden to the religious exercises of American Indians, it is important to continue educating the courts, Congress, judges, lawyers, and the public about the practices and tenets of American Indian spirituality.\(^{251}\)

Additionally, American Indians may need to look to the legislature for a fix or directly appeal to President Barack Obama to intervene.\(^{252}\) Further, tribes can support the concerned citizens group Save the Peaks Coalition in the group’s recent efforts to sue the Forest Service alleging, among other things, that the Forest Service failed to adequately consider the impacts of potential human ingestion of snow made from reclaimed sewer water as required under NEPA.\(^{253}\) Ground can also be gained by working with other

\(^{246}\) See Navajo Nation, 535 F.3d at 1063 (majority).
\(^{247}\) Id. at 1096–1098 (Fletcher, J., dissenting).
\(^{248}\) Id. at 1097 (stating “Perhaps the strength of the Indian’s argument in this case could be seen more easily by the majority if another religion were at issue. For example, I do not think that the majority would accept that the burden on a Christian’s exercise of religion would be insubstantial if the government permitted only treated sewage effluent for use as baptismal water, based on an argument that no physical harm would result and any adverse effect would merely be on the Christian’s ‘subjective spiritual experience.’ Nor do I think the majority would accept such an argument for an orthodox Jew if the government permitted only non-Kosher food.”).
\(^{249}\) Navajo Nation, 479 F.3d at 1048.
\(^{250}\) Id.
\(^{251}\) Millett & Bedonie, supra n. 232, at 65, 75.
\(^{252}\) Toensing, supra n. 25, at 2 (stating “If the high court denies a review, the tribes have the option of seeking a legislative fix . . . ’); see also Michael Kiefer, Tribes Lose Snowbowl Battle, Ariz. Republic (June 9, 2009) (available at http://www.azcentral.com/arizonarepublic/news/articles/2009/06/09/20090609snowbowl0609.html).
\(^{253}\) See Save the Peaks Coalition v. U.S. Forest Serv, Compl. at 11, (D. Ariz. Sept. 21, 2009) (available at http://www.savethepeaks.org/images/stories/documents/nepa_district_complaint.pdf) (complaint filed on behalf of Save the Peaks Coalition and nine citizens in the U.S. District Court for the District of Arizona against the U.S. Forest Service). The suit alleges the FEIS does not contain a reason-
religious groups such as the numerous groups that supported the Tribes’ petition for certiorari to the Supreme Court, as well as those groups that pressured Congress to adopt RFRA in the first place. Finally, working with other religious groups to find a common ground and flexible meaning of what constitutes a substantial burden may also help present religious concepts to the courts in a more familiar context.

VII. Conclusion

With Navajo Nation, American Indian religious practitioners have been effectively written out of RFRA. The Ninth Circuit’s interpretation of “substantial burden” under RFRA has made the question of what constitutes a substantial burden one of form rather than effect by refusing to look to the plain meaning of what constitutes a substantial burden on a religious practice. Furthermore, it allows the government to stop claimants at the threshold question of what constitutes a substantial burden, thereby preventing application of the compelling governmental interest test that Congress mandated in RFRA and has decided is the most workable balance between religious liberty issues and government actions. The Ninth Circuit’s interpretation of substantial burden also serves to exclude specific religious liberties that Congress identified as reasons for enacting RFRA, and thus is contrary to the purpose and intent of the statute. American Indian religious exercise claims in relation to their sacred lands are one of the types of claims that the Ninth Circuit’s interpretation has effectively exempted from RFRA, contrary to congressional intent.

Recently, the Navajo Nation was denied writ of certiorari to the Supreme Court. It is now up to American Indian religious practitioners and their advocates to educate the courts, Congress and the public about the

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254. See Br. of The Friends Comm. on Natl. Legis. et al., supra n. 189; Br. of Amici Curiae Relig. Liberty L. Scholars, supra n. 189; Br. of Amici Curiae Natl. Cong. of Am. Indians et al., supra n. 189. See also Drinan & Huffman, supra n. 64, at 531 (noting that support came for a large and diverse group of religious and public interest organizations including the National Association of Evangelicals, the American Civil Liberties Union, and the Concerned Women for America among others).
255. Id. at 1090; Br. of The Friends Comm. on Natl. Legis. et al. supra n. 189, at 17–19.
256. Id. at 1090; Br. of The Friends Comm. on Natl. Legis. et al. supra n. 189, at 17–19.
257. Amar & Brownstein, supra n. 84, at 2.
258. Navajo Nation, 479 F.3d at 1048 (stating “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 the land that they hold sacred.”).
nature of their spiritual beliefs in hopes that this will lead to a greater understanding of the burdens on their practice, and to work together with other religious interests to secure a possible legislative fix for such an unfortunate decision.