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What's in the Water? Climate Change, Waterborne Pathogens, and the Safety of the Rural Alaskan Water Supply

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**SEEING THE FREE EXERCISE FOREST FOR THE TREES:
NEPA, RFRA and Navajo Nation**

*Ruth Stoner Muzzin**

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I. Introduction

In *Navajo Nation v. United States Forest Service*¹ the Ninth Circuit sitting *en banc* overturned an earlier three-member panel holding.² Plaintiffs' ensuing petition to the Supreme Court for writ of *certiorari* was recently denied.³ The initial circuit panel's decision held that plaintiffs – five federally-recognized Indian tribes, several individual tribal leaders and medicine men, the Sierra Club, the Center for Biological Diversity and the Flagstaff Action Network – established during an eleven-day bench trial that the proposed expansion of a privately-operated ski resort on federal land, including plans for snowmaking from reclaimed wastewater, constituted an impermissible prohibition on the Indian plaintiffs' free exercise of religion.⁴ The U.S. Forest Service had approved the ski resort expansion, located on a mountain in the Coconino National Forest in Arizona that is held deeply sacred according to each of the Indian plaintiffs' tribal religions.⁵ *Navajo I* also held that the proposed expansion violated the National Environmental Policy Act⁶ ("NEPA") due to the Forest Service's failure to adequately address potential dangers posed to children and others who might ingest artificial snow that is made entirely from reclaimed wastewater.⁷

This comment examines both the Indian plaintiffs' free exercise claims, brought under the Religious Freedom Restoration Act ("RFRA"),⁸ and the NEPA challenge, and then views the case in the broader context of ongoing cultural misperceptions. Beyond the immediate conflict over snowmaking with reclaimed wastewater on the San Francisco Peaks, *Navajo II* marks another prolonged episode in centuries of confusion among the courts, Congress and the administrative agencies concerning Indian religious use of public lands, lands usually obtained by the United States in the first place

1. 535 F.3d 1058 (9th Cir. 2008), *cert. denied*, ___ U.S. __; 129 S.Ct. 2763 (2009) (hereinafter "*Navajo II*").

2. *Id.* at 1080.

3. 129 S.Ct. 2763 (2009).

4. *Navajo Nation v. U.S. Forest Serv.*, 479 F.3d 1024, 1029 (9th Cir. 2007) (hereinafter "*Navajo I*"), *aff'd in part, vacated in part by* 535 F.3d 1058 (9th Cir. 2008).

5. *Id.*

6. 42 U.S.C. §§ 4321-4370f (1969).

7. 479 F.3d at 1060. However, construction of a fourteen-mile pipeline and pumping operation to move wastewater up the mountain for use in snowmaking is by no means certain to proceed, since the EIS approved by the Forest Service covers only the ski resort property, close to the summit of the Peaks. Upon the Court's denial of plaintiffs' petition, their attorney indicated that opposition to the project would likely continue. Associated Press/Felicia Fonseca, *Court Won't Hear Sacred Mountain Case*, RezNetNews, June 8, 2009, <http://www.reznetnews.org/article/court-wont-hear-sacred-mountain-case-35140> (last visited June 16, 2009).

8. 42 U.S.C. §2000bb (1993).

from the tribes seeking to exercise their religious freedom. Besides clarifying the application of RFRA and its First Amendment jurisprudence to the use of traditionally significant Indian lands now held by the federal government, the Court could have taken up this case as an opportunity to note the need for a concrete legislative remedy that ensures tribes will have meaningful consultation and participation in federal land use decisions that affect their historically important religious and cultural sites.

The modern experience is not devoid of federal agency consultation with affected tribes, but neither is there any law that ensures consultation on religious land use issues will occur at all. A federal policy favoring harmonious construction of statutes relating to religious freedom and environmental policy could form the basis of such legislation. Environmentally precautionary land use strategies that comply with existing environmental statutes are often compatible with traditional tribal religious uses of that land.⁹ The new law codifying such a policy could work to apply this approach to federal land management decisions that affect traditionally significant Indian lands. Existing executive orders, though not currently binding,¹⁰ could serve as a starting point for crafting the new law, as could the draft Native American Sacred Lands Act (“NASLA”)¹¹.

In the specific case of *Navajo II*, the Court could have granted certiorari for several reasons. First, the appeal was decided on rehearing using a narrow, coercion-based analysis of the plaintiffs’ religious freedom claims that pre-dates RFRA.¹² In addition, and as the three-member panel correctly held, plaintiffs’ NEPA claim concerning the danger posed by ingestion of artificial snow made from recycled wastewater was sufficiently addressed at the trial court to merit substantive review on appeal and that claim should prevail.¹³ Above all, this case would afford an opportunity for the Court to clarify for the circuits the proper application of its standards post-RFRA as applied to federal land use challenges that concern Native American religious freedom, and to highlight the need for a comprehensive policy solution. I believe the Court had grounds to reverse the *en banc* decision on these bases, though its religious freedom analysis would have to hew to a particularly narrow path to successfully navigate the statute, the spirit of the

9. See, e.g., *Bear Lodge Multiple Use Ass’n v. Babbitt*, 175 F.3d 814 (10th Cir. 1999), *cert. denied*, 529 U.S. 1037 (2000); *Wyo. Sawmills, Inc. v. U.S. Forest Serv.*, 383 F.3d 1241 (10th Cir. 2004), *cert. denied*, 546 U.S. 811 (2005).

10. See *Navajo Nation v. U.S. Forest Serv.*, 408 F. Supp. 2d 866, 882 (D. Ariz. 2006) (*citing* Exec. Order Nos. 12,898; 13,007; 13,175); *aff’d on reh’g*, 535 F.3d 1058 (9th Cir. 2008).

11. H.R. 5155, 107th Cong. (2002).

12. 535 F.3d at 1069-1073. Indeed, the decision compounds confusion concerning interpretation of RFRA. See, e.g., Eric D. Yordy, *Fixing Free Exercise: A Compelling Need to Relieve the Current Burdens*, 10 Hastings Const. L. Q. 191 (2008).

13. 479 F.3d at 1049, 1059.

First Amendment and all of the Court's own precedents.

II. Factual Background

Since time immemorial all of the Indian tribal plaintiffs have held the San Francisco Peaks (hereinafter "the Peaks") to be sacred.¹⁴ According to the culture and religion of the 225,000 member Navajo Nation, the Peaks are considered to be the "Mother of the Navajo People;" the whole of the Peaks is the holiest of shrines in the Navajo way of life.¹⁵ Plaintiff Norris Nez creates medicine bundles for individual Navajo tribal members, using plants and soil he collects on the Peaks; these bundles are central to tribal members' daily religious practice.¹⁶

Spiritual deities of the Hopi, called Kachina, bring water, snow and life to the Hopi people; the Hopi direct their prayers and thoughts to the Peaks, a point in the physical world that defines the Hopi universe.¹⁷ Certain plaintiffs testified that the Peaks have already been desecrated by the Snowbowl ski resort operations, and that the desecration will intensify if the expansion is carried out.¹⁸ Plaintiff Bill Bucky Preston testified that the presence of the Snowbowl on the Peaks presently prevents him from conducting religious activities in the area, although he does currently collect plants and wildlife on the Peaks.¹⁹

For the Havasupai, the Peaks are the origin of the human race.²⁰ They believe, though the trial court did not find, that the proposed use of reclaimed wastewater at the ski resort would contaminate water in Havasu Creek and desecrate ceremonial items, food, water and fallen trees that they currently gather from the Peaks, as they have done for hundreds of years.²¹ The Hualapai plaintiffs believe that water travels down the mountain from the Peaks to areas where they collect water for ceremonial purposes and for healing the sick.²²

Some plaintiffs testified to their belief that the ongoing operation of the ski resort desecrates the Peaks and has caused many disasters and conflicts in the world, both man-made and natural.²³ Some plaintiffs testified to their belief that it is their spiritual obligation to care for their

14. *Id.* at 1048.

15. 408 F. Supp. 2d at 888-89.

16. *Id.*

17. *Id.* at 894.

18. 535 F.3d at 1064.

19. 408 F. Supp. 2d at 890-91.

20. *Id.* at 892.

21. *Id.* at 892-93.

22. *Id.* at 891.

23. 535 F.3d at 1064.

traditional lands, including the Peaks, and to ensure the continued health of those lands as well as the plants and animals found there.²⁴

The Forest Service recognizes the Peaks as Traditional Cultural Property, a place associated with the cultural practices or beliefs of a living community and eligible to be listed on the National Historic Register.²⁵ The 19,000-acre Kachina Peaks Wilderness area on the Peaks is managed by the Forest Service for wilderness values.²⁶ The Kachina Peaks Wilderness area surrounds the Snowbowl ski resort on three sides.²⁷

The Snowbowl is a private enterprise, currently operated on 777 acres of land managed by the U.S. Forest Service; the Peaks support other public recreational activities besides skiing.²⁸ The Snowbowl has been used as a ski area since 1938, with expansion following similar litigation upon approval of the then-owner's Environmental Impact Statement ("EIS").²⁹ In *Wilson v. Block*,³⁰ the D.C. Circuit applied the First Amendment to uphold the EIS and expansion against a challenge by the Navajo, the Hopi and local ranchers.³¹ That expansion did not include any use of reclaimed wastewater.³² The Snowbowl currently operates on the EIS that was approved in the *Wilson* litigation.³³ The current Forest Service plan provides for 205 acres of skiable terrain comfortably supporting up to 2,825 skiers at one time.³⁴

Snowfall in the desert climate of northern Arizona can be erratic; ski days in recent seasons have ranged from four days in 2001-2002 to 139 days in 2004-2005.³⁵ The trial court concluded that "snowmaking is needed to maintain the viability of the Snowbowl" as a recreational resource.³⁶ In the Peaks' high desert environment, the only viable source of water sufficient to provide the 1.5 million gallons per day required for commercial snowmaking is reclaimed wastewater from the city of Flagstaff.³⁷ Intervenor Arizona Snowbowl Resort (hereinafter "ASR") proposes to construct a fourteen-mile long pipeline to pump the wastewater thousands of feet uphill from Flagstaff

24. *Id.* at 1099 (Fletcher, J., dissenting).

25. 408 F. Supp. 2d at 883.

26. *Id.* at 870.

27. *Id.*

28. 535 F.3d at 1064.

29. *Id.*; 408 F. Supp. 2d at 902.

30. 708 F.2d 735 (D.C. Cir. 1983).

31. 535 F.3d at 1065.

32. *Id.* at 1065.

33. 408 F. Supp. 2d at 870 n.2.

34. *Id.* at 886.

35. 479 F.3d at 1030.

36. 535 F.3d at 1065; 408 F. Supp. 2d at 907.

37. 408 F. Supp. 2d at 874.

to the ski resort.³⁸

The treated sewage effluent meets Arizona's requirements for "reclaimed water" but it is not pure; treatment may remove up to 99.999% of fecal coliform bacteria, but there will be "detectable levels" of other bacteria, and the water will contain viruses and "many unidentified and unregulated residual organic contaminants."³⁹ The wastewater derives from private and public water customers in Flagstaff, including hospitals and mortuaries, sources of particular concern to plaintiffs due to strict religious guidelines concerning contact with the dead.⁴⁰ The effluent is approved for irrigation, but not for ingestion.⁴¹ Precautions must be taken to avoid human contact or consumption.⁴² However, the wastewater is approved by the Arizona Department of Environmental Quality ("ADEQ") for snowmaking.⁴³

If the tribes' sacred mountain is contaminated, they may still visit it, and they may still gather plants and water and other objects.⁴⁴ But, according to testimony concerning their accepted sincere beliefs, those objects will not be the same; they will no longer be sacred.⁴⁵ Consequently the plaintiffs' medicine and prayers will not be strong.⁴⁶ Certain Navajo and Hopi plaintiffs testified that if the snowmaking with recycled wastewater went forward, they would no longer be able to perform certain ceremonies.⁴⁷ Snowmaking with reclaimed wastewater would therefore "prevent them from engaging in religious conduct or having a religious experience," which the Ninth Circuit has held elsewhere establishes a prima facie case under RFRA.⁴⁸ Consequently, those plaintiffs would be prohibited from practicing their religion and from preserving it for future generations.

The tribes' religious need to keep their mountain in its uncontaminated natural state is compatible with the wilderness management criteria that apply to the federal land on the Peaks surrounding the Snowbowl. The trial court's findings included facts that the surrounding Kachina Peaks Wilderness is protected from further development, and that the Hopi Plaintiffs agreed that wilderness designation and management

38. *Id.* at 885-86.

39. 479 F.3d at 1038.

40. *Id.* at 1040.

41. *Id.* at 1038.

42. *Id.*

43. 535 F.3d at 1065.

44. *Id.* at 1063.

45. *Id.*; 408 F. Supp. 2d at 887.

46. 408 F. Supp. 2d at 890.

47. 479 F.3d at 1043.

48. *Id.* at 1042 (*citing Bryant v. Gomez*, 46 F.3d 948, 949 (9th Cir. 1995)); *Graham v. Commissioner*, 822 F.2d 844, 850-51 (9th Cir. 1987).

values had provided a benefit to Hopi culture.⁴⁹

III. Grounds for Reversal

A. NEPA Challenge Concerning Ingestion of Snow Made from Reclaimed Wastewater.

1. The Challenge Should Be Upheld on its Merits.

In *Navajo I*, Judge Fletcher's opinion explored in detail each of the NEPA claims raised by all plaintiffs,⁵⁰ and ultimately reversed the trial court's summary judgment orders to uphold one of those six claims: that the final EIS did not adequately address the danger presented by ingestion of snow made from reclaimed wastewater.⁵¹ The trial court had accepted the Forest Service's reliance on ADEQ's determination that the wastewater was permitted for direct reuse in snowmaking.⁵² However, the trial court's decision did not discuss the fact that ADEQ "specifically disapproved human ingestion of such water."⁵³ In fact, ADEQ requires conspicuous signage where such wastewater is in use, to guard against consumption.⁵⁴ Full immersion, ingestion and misting are all prohibited uses of the reclaimed wastewater.⁵⁵ *Navajo I* concluded that the Forest Service's response to comments on the draft EIS did not adequately address this issue⁵⁶ or ADEQ's apparently conflicting regulations.⁵⁷ The Forest Service did not explain what consideration ADEQ gave to the issue of ingestion or why it relied on ADEQ's consideration in making its decision to approve snowmaking with reclaimed wastewater on the Peaks.⁵⁸

The Administrative Procedure Act ("APA")⁵⁹ does not require a court to agree with an administrative agency's conclusions in reviewing a decision under NEPA.⁶⁰ However, the reviewing court is charged with the

49. 408 F. Supp. 2d at 899.

50. 479 F.3d at 1048-59.

51. *Id.* at 1054.

52. 408 F. Supp. 2d at 876.

53. 479 F.3d at 1050.

54. *Id.*

55. *Id.* (citing Ariz. Admin. Code § R18-9-704(G)(2) (2005)).

56. *Id.* at 1052-53 (citing the Forest Service's response that it assumed the danger was fully considered "[b]ecause ADEQ approved the use.").

57. *Id.* at 1054-55.

58. *Id.* at 1053-54.

59. 5 U.S.C. §§701-706.

60. *Ctr. for Biological Diversity v. U.S. Forest Serv.*, 349 F.3d 1157, 1166 (9th Cir. 2003) (an EIS must simply contain a "reasonably thorough discussion" of significant aspects of its action's environmental consequences).

responsibility for ensuring that the agency took “a hard look” at the likely environmental impact of the action, acknowledged any related risks and explained its reasoning in proceeding with its action.⁶¹ In this case, it is difficult to see how the Forest Service took a “hard look” when it apparently did not address the conflict in ADEQ regulations that simultaneously approve the wastewater for snowmaking but require precautionary measures to prevent human contact, immersion or ingestion. Nor did the Forest Service offer an explanation of its reasons for approving the proposal for snowmaking with wastewater, despite the lack of evidence that the operation would be safe for the public even if children or others should ingest the snow made with reclaimed wastewater, become immersed in that snow or its meltwater, or if workers at the Snowbowl facility or the public should breathe wastewater vapors or mist related to the snowmaking operation.

2. The Issue was Sufficiently Raised at Trial.

Navajo I explained that defendants alleged the plaintiffs had not exhausted their administrative remedies with regard to their NEPA claim concerning ingestion of snow made with reclaimed wastewater, and that the claim was not properly raised in the complaint.⁶² But, as noted above, the *Navajo I* decision held that the plaintiffs were among those who raised these dangers during the administrative process.⁶³ Moreover, as *Navajo I* correctly held, under the notice pleading requirements of Federal Rule of Civil Procedure 8(a), the NEPA issue of use of reclaimed wastewater was adequately raised by the Navajo plaintiffs⁶⁴ in their complaint⁶⁵ and the specific danger of ingestion was briefed and argued by the parties at summary judgment.⁶⁶

Despite the fact that the issue was addressed on the administrative record and in trial court proceedings, the Ninth Circuit held in *Navajo II* that because the Navajo plaintiffs had not amended their complaint to specifically allege that the final EIS did not adequately address the danger of ingestion, it was improperly raised in their summary judgment motion; that

61. *Nat'l Audubon Soc'y v. Dep't of the Navy*, 422 F.3d 174, 185 (4th Cir. 2005); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349.

62. 479 F.3d at 1048.

63. *Id.* at 1050, 1052-53.

64. “Navajo plaintiffs” include the Sierra Club, the Flagstaff Activist Network and the Center for Biological Diversity; *see* First Amended Complaint for Declaratory and Injunctive Relief, No. CV 05 1824 PCT PGR (D. Ariz. June 23, 2005).

65. *Id.* at ¶¶ 74-80 (Count 8, FOREST SERVICE FAILED TO TAKE THE REQUISITE “HARD LOOK” AT THE IMPACTS OF INTRODUCING RECLAIMED WASTE WATER TO THE ECOSYSTEM).

66. 479 F.3d at 1050.

the trial court declined to rule on it; and that therefore it could not be raised in their appeal. *Navajo II* appears to be at odds with the facts of the case and the law in the Ninth Circuit.

Generally, a claim that is not raised in dispositive proceedings before a district court may not be raised on appeal.⁶⁷ But that does not mean that a complaint in federal court must necessarily rise to the level of factual specificity required by procedural rules in many states, or even that an appellate court may never consider an issue that was not raised at trial.⁶⁸ In fact, in certain instances, an appellate court may even elect to hear arguments that were not presented to a district court.⁶⁹ But, in this case, the Navajo plaintiffs met their pleading burden, received a decision from the trial court and properly appealed that decision to the circuit.

While the trial court's decision does not use the word "ingest," it does indeed reach a decision on the merits of the claim by Navajo plaintiffs and others that the final EIS did not adequately address the environmental impacts of snowmaking using reclaimed wastewater.⁷⁰ Furthermore, the *Navajo I* opinion quoted extensively from the parties' administrative and trial court positions on this issue.⁷¹ Evidently those materials were part of the record before the Ninth Circuit, and there is no indication in the trial court decision, the three-member panel decision or the *en banc* ruling that any party moved to exclude them from the trial court's or the circuit's consideration.

Prevailing on their NEPA challenge would not necessarily enable the plaintiffs to prevent the Forest Service from ultimately permitting snowmaking with reclaimed wastewater at the Snowbowl. But it would require the Forest Service to revisit its EIS process and take the requisite hard look⁷² at the significant environmental impacts presented by using

67. *Calabretta v. Floyd*, 189 F.3d 808, 818 (9th Cir. 1999) (claim not presented to district court in summary judgment proceedings cannot be raised for the first time on appeal).

68. See, e.g., *Hormel v. Helvering*, 312 U.S. 552 (1941) ("Rules of practice and procedure are devised to promote the ends of justice, not to defeat them.") *Accord*, *Bolker v. Commissioner*, 760 F.2d 1039 (9th Cir. 1985) (exceptions exist to the general rule that an appellate court will not hear issues not presented at trial).

69. *Marx v. Loral Corp.*, 87 F.3d 1049, 1055 (9th Cir. 1996) ("Generally, an appellate court will not consider arguments not first raised before the district court," absent exceptional circumstances (citation omitted)).

70. 408 F. Supp. 2d at 876. However, the trial court noted that some plaintiffs' contentions under NEPA that the Forest Service did not consider a reasonable range of alternatives to the proposed upgrades must be barred from judicial review, because those plaintiffs did not properly raise their proposed alternatives in the administrative process. *Id.* at 875. These claims were also denied in both *Navajo I* (479 F.3d at 1054-56) and *Navajo II* (535 F.3d at 1079).

71. 479 F.3d at 1050-54.

72. *Robertson*, 490 U.S. at 349.

wastewater. In this instance, as in other situations where Indians' free exercise of religion is dependent upon the undisturbed quality of their traditionally significant federal lands, the NEPA review process does not necessarily result in the outcome most protective of the land or the Indians' religious freedom. But it contributes to a complete investigation of the government's interests in the proposed conflicting use, and affords some measure of respect for traditional religious land use by considering alternatives that, by virtue of their environmentally precautionary nature, can be compatible with the continuation of a tribe's religious use. The EIS should have been remanded to the Forest Service so that the agency could demonstrate on a sufficient record that it took a hard look at ASR's proposal for snowmaking with reclaimed wastewater on the Peaks.

B. Snowmaking with Reclaimed Wastewater Substantially Burdens the Indians' Free Exercise of Religion; the Forest Service Has Not Identified a Sufficiently Compelling Interest to Justify that Burden.

"Congress shall make no law respecting the establishment of a religion, or prohibiting the free exercise thereof."

-*Const. amend. 1*

As with most societies in the developed world, the prevailing concept of freedom in the United States is a personal one: a moveable, individual feast of freedom where personal liberties are paramount and wealth is perceived materially. But for Indians, the ability to exercise their personal liberties, their right to be themselves, to live and worship freely includes the need to be part of a living community in a particular place, to care for ancestral lands and ancestors' bones.⁷³ It encompasses a need to treat all of the living and dead relatives with respect - the two-footed ones as well as those with fins and wings and hooves.⁷⁴ It includes the recognition that even trespassers on their group's traditional lands are still their brothers and friends.⁷⁵ Identity is tied to land and group spiritual practice, within an overarching understanding of the sacred nature and interrelatedness of all things.⁷⁶ No matter the tribal affiliation, Indian spiritual values and social customs tend to be deeply invested in each group's identity as people of a

73. See, e.g., William Bradford, *Beyond Reparations*, 66 Ohio St. L.J. 1 (2005) at 84 n. 409; VINE DELORIA, JR., *GOD IS RED: A NATIVE VIEW OF RELIGION* 121 (Fulcrum Publ'g (2003) (1973).

74. DONALD A. GRINDE & BRUCE E. JOHANSEN, *ECOCIDE OF NATIVE AMERICA* 264 (1995) (*citing* Onondega Chief Oren Lyons, "We see it as our duty to speak as caretakers for the natural world . . . all life is equal, including the four-legged and the winged things. . . they too have rights.")

75. See Deloria, *supra*, at 200-201, 210-211.

76. Deloria, *supra*, at 121, 294-295.

particular place.⁷⁷

Justice Brennan addressed this problem of opposing perceptions in his dissent (joined by Justices Blackmun and Marshall) in *Lyng v. Northwest Indian Cemetery Protective Association*, a challenge by northern California Indians to Forest Service plans to build a logging road through the Chimney Rock area of the Six Rivers National Forest that holds special religious significance for them.⁷⁸ In that case, the Court overturned the Ninth Circuit, holding that the government restriction imposed by the logging road on the Indians' free exercise of religion was a permitted infringement, because the government's interest was not outweighed by the burden the road placed on the Indians' free exercise.⁷⁹ In dissent, Justice Brennan opined that the majority decision "incorrectly assumes that Native American belief systems ascribe religious significance to land in a traditionally western hierarchical manner."⁸⁰

It is frequently the case in constitutional litigation . . . that courts are called upon to balance interests that are not readily translated into rough equivalents. At their most absolute, the competing claims that both the Government and Native Americans assert in federal land are fundamentally incompatible, and unless they are tempered by compromise, mutual accommodation will remain impossible.⁸¹

In 1970, Taos Pueblo member Paul Bernal testified in Congress concerning the return of Taos Pueblo's sacred Blue Lake, then under Forest Service control, to exclusive tribal control. He contrasted the government and Indian outlooks:

In all of its programs the Forest Service proclaims the supremacy of man over nature; we find this viewpoint contradictory to the realities of the natural world and to the nature of conservation. Our tradition and our religion require people to adapt their lives and activities to our natural surroundings so that men and nature mutually support the life common to both. The idea that man must subdue nature and bend its processes to his purposes is repugnant to our people.⁸²

77. Deloria, *supra*, at 121.

78. *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 474 (1988)(Brennan, J., dissenting).

79. *Id.* at 450-51.

80. *Id.* at 474.

81. *Id.*

82. Hearing Before the Subcomm. on Indian Affairs of the S. Comm. on Interior and Insular Affairs, 91st Congr. (July 9, 1970) (Statement of Mr. Bernal, Secretary & Interpreter, Taos Pueblo Council). *See also* New Mexico Office of the State Historian, <http://newmexicohistory.org/filedetails.php?fileID=363>. Eventually, after

In short, the U.S. government's square hole of land use, bounded by conquest, treaty, statute and a resource-extractive multiple use policy, fails to accommodate the round peg that is the integrated native view of person, property, religion and community. Without gaining some sort of sympathy for each other's outlook, these fundamental differences will continue to frustrate any effort to reconcile U.S. and native interests.

Navajo II asked whether the approved expansion to the ASR operation is forbidden by the First Amendment's Free Exercise of Religion Clause, as articulated in RFRA.⁸³ The Ninth Circuit overturned *Navajo I* relying in large part on the pre-RFRA holding in *Lyng*,⁸⁴ and contrary to developments in the Tenth Circuit and elsewhere in recent years. When the Ninth Circuit decided *Navajo II*, its narrow reliance on *Lyng* was misplaced. This reliance caused it to undervalue the emphasis that RFRA places on the two specific cases that constitute the Supreme Court's bedrock Free Exercise framework, *Sherbert v. Verner*⁸⁵ and *Wisconsin v. Yoder*.⁸⁶

Aside from the new ASR proposal to manufacture artificial snow from reclaimed wastewater, the approved Snowbowl expansion is similar to the 1980s expansion, and most of the proposed upgrades other than snowmaking were already addressed in the current EIS.⁸⁷ Therefore, the primary Free Exercise focus of this comment will be the proposed snowmaking operation. However, because RFRA prescribes a more exacting test for permissible restrictions on free exercise than the test employed by the *Lyng* court and followed in *Navajo II*, as discussed below, it is conceivable that the Indian plaintiffs could perhaps have prevailed on their free exercise objections to other aspects of the expansion if those claims were also properly evaluated under RFRA.

Before proceeding further it is worth noting that, aside from *Lyng*, the Supreme Court's modern Free Exercise cases prior to the enactment of RFRA served to apply the Constitutional term "prohibit" to factual situations where sincere individual believers were faced with a choice between following their religion and either receiving a generally available benefit (such as unemployment compensation) or avoiding criminal prosecution,⁸⁸

more than sixty years' effort by the Taos Indians (following their agreement to renounce title to the town of Taos in exchange for recognition of the validity of their title to the lake and the forest lands surrounding Taos Pueblo), Congress granted the tribe trust title to its sacred Blue Lake and the entire watershed. H.B. 471, 91st Cong. (1969) (enacted).

83. 535 F.3d at 1063.

84. *Id.* at 1071-73.

85. 374 U.S. 398 (1963).

86. 406 U.S. 205 (1972).

87. 535 F.3d at 1065.

88. See, e.g., *Sherbert*, 374 U.S. 398; *Yoder*, 406 U.S. 205; *Bowen v. Roy*, 476 U.S. 693 (1986).

rather than any situation where a tribe's religion was entirely prohibited. Nonetheless, dissenting in *Lyng*, Justice Brennan wrote that land use decisions like the Forest Service's proposed logging road through spiritually significant land constituted the "gravest threat" to Native religious practices, one that would effectively "destroy" the Indians' religion.⁸⁹

In enacting RFRA Congress sought to prevent the Court's limits on protection against governmental prohibition on free exercise from contracting any further than the Court had set that limit in its cases before *Lyng*.⁹⁰ Under RFRA, the federal government may not "substantially burden" the free exercise of religion, whether or not that exercise is compelled by or central to the adherent's system of beliefs.⁹¹ Yet, as Justice O'Connor observed for the majority in *Lyng* "[p]rohibit" is still the "crucial word in the constitutional text."⁹²

In the instant case, Petitioners face a situation even more dire than that confronting the religious practitioners in *Lyng*, a situation that would effectively prohibit their religious practice. If reclaimed wastewater is dispersed on the Peaks, that unique and primary shrine will be defiled and as a consequence many of the Indians' important daily ceremonies will lose their significance.⁹³ The *Navajo II* Petitioners do not have the ability to worship elsewhere. Their faith is bound to the particular land of the San Francisco Peaks.⁹⁴

1. The Court's Religious Freedom Decisions.

Recognizing the fundamental liberty at stake in a religious freedom claim, the Court's significant twentieth century Free Exercise cases initially applied a strict scrutiny test, whereby the government – once its actions are demonstrated to restrict free exercise – must show a compelling interest in accomplishing or continuing its restrictive action and must demonstrate that it is using the least restrictive means possible to achieve its legitimate objective in order for a restrictive law to stand. Applying this test, the Court invalidated state laws in both *Sherbert* and *Yoder*.

Sherbert v. Verner held a state's denial of unemployment compensation unconstitutional.⁹⁵ The applicant was refused benefits because she would not accept employment that required her to work on her Sabbath.⁹⁶ The

89. 485 U.S. at 458-59 (Brennan, J., dissenting).

90. 42 U.S.C. §2000bb(b)(1).

91. 42 U.S.C. §§2000bb-1(a), 2000bb-2(4), 2000cc-5(7)(A).

92. 485 U.S. at 451; *see also Navajo I*, 479 F.3d. at 1032.

93. 535 F.3d at 1063.

94. 408 F. Supp. 2d at 890-91.

95. 374 U.S. at 410.

96. *Id.* at 399.

Court decided that the Free Exercise Clause prevented the state from forcing the applicant to violate her sincere beliefs in order to qualify for unemployment benefits, despite its interest in discouraging unemployment fraud.⁹⁷

In *Wisconsin v. Yoder* the Court upheld an Amish family's challenge to compulsory education laws.⁹⁸ The family's sincerely held beliefs prevented them from complying with state law that required them to send their teenagers to public school after the eighth grade.⁹⁹ The Court found it a violation of the First Amendment for the state to hold them criminally liable for adhering to their beliefs, in spite of the state's interest in the education of its children.¹⁰⁰

But later, in two challenges to federal government actions by Native Americans, the Court upheld restrictions on free exercise without applying a strict scrutiny test, because it did not find any government "coercion" to act contrary to beliefs like the coercion it saw in *Sherbert* and *Yoder*.¹⁰¹ As detailed below, Congress apparently saw prohibition on free exercise in those cases, because it did not agree with the Court's outcome. Although Congress did not explicitly disapprove any of the Court's prior decisions, it took legislative countermeasures against the Court's results in those two cases and indicated its approval of the compelling interest test as articulated in *Sherbert* and *Yoder*.¹⁰²

Against a Free Exercise challenge, in *Lyng* the Court upheld Forest Service plans to build a logging road through an area of the Six Rivers National Forest in northern California that was central to respondent Indians' religious beliefs and ceremonies.¹⁰³ The Court held that in religious challenges to federal land use, plaintiffs must first demonstrate a substantial restriction of their religious practice before the Court will subject the government's interests to its customary strict scrutiny test, and it did not find that the plaintiffs had met that burden.¹⁰⁴

In a 5-3 decision, although the Court acknowledged that the burden the logging road could impose on the *Lyng* plaintiffs' religious practice was "severe," it did not find coercion and thus concluded that the burden was not heavy enough to trigger the "compelling interest" test previously

97. *Id.* at 407, 410.

98. 406 U.S. 205.

99. *Id.* at 207, 209.

100. *Id.* at 236.

101. *Lyng*, 485 U.S. 439; *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872 (1990).

102. 42 U.S.C. §2000bb(a)(5).

103. 485 U.S. at 442.

104. *Id.* at 450.

employed in *Sherbert* and *Yoder*.¹⁰⁵ Turning a stunningly blind eye to the manner in which plaintiffs' sacred lands came into the government's possession in the first place, Justice O'Connor wrote for the majority:

The Constitution does not permit government to discriminate against religions that treat particular physical sites as sacred Whatever 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.¹⁰⁶

Finding parallels to its recent decision in *Bowen v. Roy*,¹⁰⁷ where Native American plaintiffs' Free Exercise challenge to the government's conduct of its "own internal affairs" (requiring that they obtain a social security number for their daughter) was denied, the Court also declined to apply strict scrutiny to its evaluation of the Forest Service decision in *Lyng*.¹⁰⁸ Shortly thereafter, in *Employment Division, Dept. of Human Resources of Oregon v. Smith* the Court again declined to apply a strict scrutiny test and rejected the Free Exercise claims of Native American plaintiffs who lost their jobs and were denied unemployment benefits because of religious use of peyote.¹⁰⁹

The Court has not had occasion to consider a Free Exercise claim pertaining to Native American religious freedom on federal land since it decided *Lyng* and *Smith*. Despite some similarities between *Navajo II* and *Lyng*, certain key facts are distinguishable: *Navajo II* concerns land held sacred by many tribes and affects those tribal members' daily religious practice,¹¹⁰ rather than affecting occasional religious use by a few practitioners which was the issue in *Lyng*. In addition, the primary beneficiary of the government's interest in promoting skiing on this mountain is a private business enterprise, not the federal government itself through its ability to carry out the Forest Service multiple use policy by building a road to harvest timber as was the issue in *Lyng*.¹¹¹ Thus, the Ninth Circuit's reliance on *Lyng* led it to a result in *Navajo II* that Congress did not intend, evidenced by the legislative actions that followed *Lyng* and *Smith*, as well as the plain language of RFRA and the First Amendment.

2. Congressional Reaction to *Lyng* and *Smith*.

In recent decades, Congress and the judiciary would appear to have switched ideological hats from the days when Chief Justice Marshall's 1832

105. *Id.* at 447.

106. *Id.* at 453.

107. 476 U.S. at 693.

108. 485 U.S. at 448.

109. 494 U.S. 872.

110. *See, e.g.*, 408 F. Supp. 2d at 889.

111. 535 F.3d at 1064.

opinion affirmed Cherokee treaty rights in *Worcester v. Georgia*,¹¹² only to have Congress enact the Indian Removal Act.¹¹³ In response to *Lyng*, Congress passed the California Wilderness Act, preserving much of the affected area of Six Rivers National Forest from logging or related development.¹¹⁴ In a separate bill, Congress de-funded the proposed logging road.¹¹⁵ Finally, after *Smith* was decided Congress enacted RFRA.¹¹⁶ It also legalized religious use of peyote in the Native American Church.¹¹⁷

RFRA explicitly approves the *Sherbert/Yoder* compelling interest test, seeking to guarantee its application in all cases where free exercise is substantially burdened.¹¹⁸ Though RFRA did not specifically disapprove any of the Court's past decisions, it related to the Court that Congress found the *Sherbert/Yoder* compelling interest test to be a "workable test for striking sensible balances between religious liberty and competing prior governmental interests."¹¹⁹ Taking RFRA together with the California Wilderness and Smith River National Recreation Acts and the legalization of religious peyote use, Congress changed the Court's resolution of both *Lyng* and *Smith*, to the benefit of Native Americans' free exercise of religion. In the case of *Lyng*, the California Wilderness Act also preserved thousands of acres of northern California wilderness from environmentally destructive logging.¹²⁰

3. Current Appellate Court Interpretations.

Meanwhile, since *Smith* and the enactment of RFRA, the circuits have interpreted Court precedent and Congress' instructions in different ways. With *Navajo II*, the Ninth Circuit retains *Lyng* as its strict guidepost in federal land management decisions that affect free exercise, and declines to apply the compelling interest test where it does not find that plaintiffs specifically demonstrate coercion into actions contrary to their beliefs.¹²¹

Other courts have taken a different route. In the Tenth Circuit, a district court recently considered that circuit's earlier RFRA cases in support

112. 31 U.S. 515 (1832).
113. Indian Removal Act of May 28, 1830, Ch. 148, 4 Stat. 411 (1832).
114. California Wilderness Act of 1984, Pub. L. No. 98-425.
115. Smith River National Recreation Area Act, 16 U.S.C. §460bbb.
116. 42 U.S.C. §2000bb.
117. American Indian Religious Freedom Act of 1978, Pub. L. No. 95-341 (*as amended by* Native American Free Exercise of Religion Act of 1994, Pub. L. No. 103-344).
118. 42 U.S.C. §2000bb(b)(1).
119. 42 U.S.C. §2000bb(a)(5).
120. Pub. L. No. 98-425.
121. 535 F.3d at 1071. *See also Snoqualmie Indian Tribe v. FERC*, 545 F.3d 1207 (9th Cir. 2008).

of its decision not to require “coercion” in order to find a substantial burden, when it preliminarily enjoined construction of a building on military land that plaintiffs allege would burden their free exercise of religion.¹²² Other recent cases in both the Ninth and Tenth Circuits have successfully survived Establishment challenges by commercial and recreational interests where the Forest Service worked together with tribes to protect sacred sites, even to the extent of enforcing some restrictions on public access to the sites, as discussed below.¹²³

It is interesting to note that the *Wilson* trial court decision (permitting the earlier expansion of Snowbowl operations) actually cited to the *Lyng* trial court decision (that upheld an injunction *prohibiting* construction of the Six Rivers logging road) for the proposition that the First Amendment does not obligate the government to “control or limit public access to public lands in order to facilitate” religious practices.¹²⁴ Although this statement may not entirely resolve the effluent problem in the current case, it seems to be a reading of the First Amendment that fits comfortably with the resolution of *Wilson*, the Court’s holding in *Lyng* and the ultimate preservation of the Six Rivers forest as well as RFRA, in approaching the problem from the Establishment Clause end of the spectrum.

Government lands are “public lands,” belonging to the government in trust for all the people, and, as the *Wilson* trial court pointed out, the Forest Service is not obligated to restrict non-Indians’ access. But it is also obligated to ensure that it does not prohibit the Indians’ free exercise. Of course, plaintiffs here are not necessarily asking for a limitation on public access. What they are seeking is to avoid a government-imposed limit on the nature of their own religious use.

4. The Burden/Compelling Interest Analysis.

Because the Ninth Circuit’s narrow inquiry into the burden in *Navajo II* is in conflict with law in the Tenth Circuit, as discussed above, I believe it was ripe for review. While this narrow construction of *Sherbert/Yoder* may not necessarily be flawed in the Court’s opinion, the Court’s guidance on the proper application of the *Sherbert/Yoder* compelling interest test post-RFRA could provide valuable instruction for federal agencies faced with future land

122. *Comanche Nation v. U.S.*, 2008 U.S. Dist. LEXIS 73283 (W.D. Okla. Sept. 23, 2008). See also *Nulankeyutmonen Nkihtaqmikon v. Impson*, 503 F.3d 18 (1st Cir. 2007) (reversing dismissal of Passamaquoddy tribal members’ NEPA and other challenges to BIA approval of lease of tribal beach lands of traditional religious significance for development of a liquefied natural gas terminal).

123. *Bear Lodge*, 175 F.3d 814; *Wyo. Sawmills*, 383 F.3d 1241; *Natural Arch & Bridge Soc’y v. Alston*, 98 Fed. Appx. 711 (10th Cir. 2004), cert. denied sub nom. *DeWaal v. Alston*, 543 U.S. 1145; *Access Fund v. United States Dep’t of Agric.*, 499 F.3d 1036 (9th Cir. 2007).

124. *Nw. Indian Cemetery Protective Ass’n v. Peterson*, 552 F. Supp. 951, 954 (N.D. Calif. 1982).

use decisions that involve First Amendment rights.

a. Plaintiffs' Beliefs

The Ninth Circuit's failure to discern a substantial burden in this case rests on two slim points: its narrow, active coercion-based interpretation of "substantial burden" and its improper characterization of the Indian plaintiffs' sincere religious beliefs as "feelings and emotions." But if plaintiffs' beliefs were properly viewed as sincerely held, rather than subjected to the court's characterization as "feelings and emotions," the substantial burden inquiry would likely be satisfied in this case under any construction.

The First Amendment does not operate to prevent government action from affecting an objector's "spiritual development," which may be impaired where the restriction is justified.¹²⁵ But the difference between beliefs and subjective experience is not always easily discerned. Justice Brennan succinctly summarized this problem in his *Lyng* dissent.¹²⁶ He noted that the government's requirement that Native Americans challenging land use decisions on religious grounds demonstrate that the restrictions affect important or central beliefs and an active coercion into contrary behavior assumed that land holds the same spiritual significance for Indian religions as it does for other, more widely-followed faiths – essentially, none.¹²⁷ This case is a typical example of such a misperception. Here, the plaintiffs have been compromising their religious practice to accommodate the government's expanding lease of land for ski resort operations for seven decades.

Perhaps it is this fundamental misunderstanding of world views that can lead courts to mischaracterize beliefs as feelings and emotions. But the Court is not permitted to evaluate a plaintiff's sincere beliefs.¹²⁸ In his *Lyng* dissent, Justice Brennan observed:

The question for the courts, then, is not whether the Native American claimants understand their own religion, but rather whether they have discharged their burden of demonstrating, as the Amish did with respect to the compulsory school law in *Yoder*, that the land-use decision poses a substantial and realistic threat of undermining or frustrating their religious practices.¹²⁹

The Ninth Circuit held in *Navajo II* that the plaintiffs are not restricted

125. *Lyng*, 485 U.S. at 451.

126. *Id.* at 474.

127. *Id.*

128. *Yoder*, 406 U.S. at 218-19; *Lyng*, 485 U.S. at 475; *Smith*, 494 U.S. at 906-07 (O'Connor, J. concurring.)

129. 485 U.S. at 475.

from access to the Peaks, or prohibited from conducting ceremonies or prayers there.¹³⁰ That is true. But it misses the point that, regardless of continued access, plaintiffs say that once the effluent is dispersed on the mountain, their prayers will no longer work and their ceremonies will not be effective.¹³¹ As Justice Brennan pointed out, it is not the judiciary's place to assume the role of cleric and tell the plaintiffs to the contrary that their prayers will still work.¹³²

Writing for the Ninth Circuit *en banc* in *Navajo II*, Judge Bea held that, based on factual findings, the Indian plaintiffs' "mental and emotional feelings" were offended by plans to use reclaimed wastewater on the Peaks and so reached the conclusion that it is merely the Indians' "subjective spiritual experience" that will be diminished, which would not constitute a coercion contrary to their beliefs as required in *Lyng* and thus – relying on the *Lyng* standard – would not trigger the compelling interest test.¹³³ In a footnote, his opinion acknowledges that *Lyng* was decided before RFRA and that RFRA restored the compelling interest test where there is a "substantial burden."¹³⁴ However, RFRA does not require "coercion" in order to find that a burden is substantial.¹³⁵

b. The Government's Interest

Aside from the substantial burden inquiry, there remain two major factual differences between this case and *Lyng*. The first goes to the nature of the burden and the other informs the compelling interest inquiry. First, as discussed above, plaintiffs here are challenging a government action that, because it would permit their holiest shrine to be blanketed in artificial snow made from reclaimed wastewater, will so defile that shrine as to amount to a total prohibition on their religion. The *Lyng* court held that the government's proposed road-building in the Six Rivers National Forest may have severely restricted, but would not necessarily *prohibit* plaintiffs' free exercise.¹³⁶ Second, the burdensome action in *Lyng* (as well as in *Smith* and *Yoder*) was an action by the government itself, whereas the proposed action in the Coconino National Forest in *Navajo II* is Forest Service approval of a private leaseholder's action in pursuit of its economic enterprise on public lands it leases from the government.

The second factual distinction informs a consideration of the

130. 535 F.3d at 1063.
131. *Id.*; 408 F. Supp. 2d at 887.
132. 485 U.S. at 474.
133. 535 F.3d at 1063.
134. *Id.* at 1072 n. 13.
135. 2 U.S.C. §2000bb(b)(2).
136. 485 U.S. at 447.

government's compelling interest in this case. True, the government has an interest in supporting recreational uses of public land, including skiing, as the Forest Service Plan for the Coconino National Forest mandates. But there is already skiing on the Peaks, albeit dependent on the natural snowfall. Skiing is just one of many recreational uses supported by the Peaks.¹³⁷ The Snowbowl is not the only downhill skiing facility in Arizona.¹³⁸ Skiing has been ongoing in the Coconino National Forest for seven decades,¹³⁹ so skiing will not necessarily stop if snowmaking with reclaimed wastewater does not go forward.

In light of these facts, the government interest in snowmaking at the Snowbowl could more realistically be viewed as the provision of a profitability guarantee, or at the least a subsidy, to a private business enterprise. Not surprisingly, the record in this case does not show that the Forest Service plan mandates such a use. If the current proprietor of the ski facility is not satisfied with its rate of return on investment relying on natural snowfall, it would not seem to be the government's responsibility to guarantee a better return, particularly at the expense of over a quarter of a million citizens' constitutional rights.

Consequently, it is difficult to view the government interest in a privately operated resort's reliable ski season at the Peaks on a par with the government's own resource management purposes in *Lyng*, its orderly administration of social security benefits in *Bowen* or the prohibition of a controlled substance at issue in *Smith*. Likewise, snowmaking with reclaimed wastewater would not seem to be the least restrictive means of achieving the government's stated interest of supporting recreational use of lands within the Coconino National Forest. Nor does the government's stated interest in recreational use approach the level of the state governments' interests in fraud prevention and compulsory education raised in *Sherbert* and *Yoder*. The Court did not hold the government interests in *Sherbert* and *Yoder* sufficiently compelling to outweigh those plaintiffs' challenges. Later, when the Court declined to apply the compelling interest test in *Lyng* and *Smith*, Congress ultimately affirmed those plaintiffs' Free Exercise rights. It would seem that the Court could have relied on *Sherbert* and *Yoder*, as Congress contemplated in RFRA, to protect the Indian plaintiffs' free exercise in this case as well.

IV. A Missed Opportunity to Clarify the Application of RFRA to Federal Land Use

The Tenth Circuit has taken a broader view than the Ninth in recent

137. 535 F.3d at 1064.

138. 408 F. Supp. 2d at 890.

139. 535 F.3d at 1064.

cases interpreting the nature of a “substantial burden” on free exercise under RFRA. The *Comanche* trial court declined to follow *Navajo II*, but rather relied on Tenth Circuit cases decided prior to the 2000 amendment of RFRA, which eliminated the requirement that a government restriction apply to a central belief of the practitioner’s faith in order to constitute a substantial burden.¹⁴⁰ That court held that the *Comanche* plaintiffs stated a *prima facie* case for a RFRA violation, that the government had not demonstrated that its land use plans were the least restrictive means of accomplishing its objective, and it preliminarily enjoined construction of a military training support facility on Fort Sill in Oklahoma that would be built within sight of the *Comanches*’ traditional sacred site at the Medicine Bluffs.¹⁴¹ In its conclusions of law, the trial court included the observation that “[t]he traditional religious practices of the *Comanche* people are inextricably intertwined with the natural environment.”¹⁴² On the other hand, the Ninth Circuit has since relied on its *Navajo II* analysis to deny other RFRA plaintiffs’ claims.¹⁴³ In light of this disagreement among the lower courts, the Court could have used *Navajo II* as an opportunity to clarify the proper application of RFRA in cases concerning federal land use.

A. The Establishment Side of the Coin: Access Restrictions Are Permissible and Can Serve to Preserve Religious Use While Facilitating Environmental Protection.

The lower courts’ treatment of Establishment Clause challenges provides additional perspective on federal agency consultation with Indian tribes concerning lands of traditional spiritual significance. In a number of cases, government agencies have cooperated with tribes to establish certain restrictions on public access so as to preserve the tribes’ free exercise of religion. In these cases, additional outcomes – whether intentional or incidental – have generally included increased environmental protection of the lands concerned.

In *Bear Lodge Multiple Use Ass’n v. Babbitt*, a group of recreational rock climbers objected to the government’s institution of voluntary seasonal restrictions on climbing by visitors to the Devil’s Tower National Monument

140. 2008 U.S. Dist. LEXIS 73283 at *9-10.

141. *Id.* at *50.

142. *Id.*

143. *Snoqualmie*, 545 F.3d 1207 (FERC re-license of hydroelectric dam at site of spiritually significant falls on Snoqualmie River approved). Admittedly, the government’s case for establishing a compelling interest in continued operation of an existing hydroelectric dam appears significantly stronger than its interest in subsidizing new snowmaking at a ski resort, so the *Snoqualmie* plaintiffs’ RFRA claims may have failed even under the Tenth Circuit’s standards.

in Wyoming.¹⁴⁴ The monument, historically revered by numerous tribes and commonly called the Bear Lodge, is a site of tribal religious significance where ceremonies are conducted annually.¹⁴⁵ The Tenth Circuit held that plaintiffs did not have standing to challenge the government's policy as a violation of the Establishment Clause, and thus upheld the voluntary seasonal ban on climbing.¹⁴⁶

Wyoming Sawmills, Inc. v. U.S. Forest Service included an Establishment Clause challenge by a logging company to the Forest Service decision to exclude 23,000 acres of the Bighorn National Forest from logging in order to preserve several Plains tribes' traditional religious use of the Medicine Wheel National Monument within the preserved area, after extensive consultation with the tribes and other concerned individuals upon receipt of comments on the draft EIS.¹⁴⁷ The Tenth Circuit upheld the trial court's decision that the plaintiff did not have standing to pursue its Establishment Clause claim.¹⁴⁸ Against plaintiff's challenge under the National Forest Management Act ("NFMA") it affirmed that the government's decision not to log a portion of the forest was not arbitrary or capricious under the applicable multiple use policy, and therefore did not violate the NFMA.¹⁴⁹ *Wyoming Sawmills*, like *Bear Lodge*, illustrates successful cooperation between a government agency and affected tribes, where the agency action also resulted in preservation of natural resources.¹⁵⁰

144. 175 F.3d 814 (10th Cir. 1999).

145. *Id.* at 816.

146. *Id.* at 822.

147. 383 F.3d 1241 (10th Cir. 2004). The Medicine Wheel is an 80-foot diameter prehistoric stone circle with a large center cairn and 28 radiating rock spokes. Archeological evidence points to continuous human use of the site for at least 7,500 years. *Id.* at 1243.

148. *Id.* at 1249.

149. *Id.* at 1252.

150. See also *Access Fund*, 499 F.3d at 1047 (upholding Forest Service decision to ban technical rock climbing, but not hiking, and remove unauthorized climbing equipment that was installed at Cave Rock, east of Lake Tahoe, a site sacred to the Washoe, against an Establishment Clause challenge; the primary purpose of the decision was secular, for the preservation of a cultural and historical resource); and *Natural Arch*, 98 Fed. Appx. at 716 (relying on *Bear Lodge* to deny plaintiffs standing and uphold National Park Service policy requesting visitors to voluntarily refrain from standing under a natural arch within the Rainbow Bridge National Monument that is sacred to the Navajo). Decades earlier, members of the Navajo Nation failed in their attempt to constrain the Bureau of Reclamation's operation of Glen Canyon Dam and Lake Powell so as not to interfere with their free exercise, which they alleged was adversely affected by a rise in water level under the Rainbow Bridge site and a related increase in tourism (where both effects arguably resulted in significant environmental impact to the site as well). *Badoni v. Higginson*, 638 F.2d 172 (10th Cir. 1980), *cert. denied sub nom. Badoni v. Broadbent*, 452 U.S. 954 (1981).

B. In First Amendment Land Use Disputes - Unlike Other RFRA Cases - Appellate Courts Have So Far Upheld the Federal Government's Actions.

The government's "right to use what is, after all, its land"¹⁵¹ has so far remained intact whenever it is appealed on religious freedom grounds, regardless of whether the challenge comes in the guise of Free Exercise or Establishment, and regardless of whether the government's actions preserved tribes' religious access to sacred sites or restricted that religious access. Yet, considering the severity of the restriction in *Navajo II* and the arguably non-compelling nature of the government's interest in snowmaking with reclaimed wastewater at a privately run ski resort, this case could have been the situation where the Court decided that RFRA can apply to overturn a land use decision by a federal agency. Expressing doubt that such a day may ever come, Judge Fletcher's dissent in *Navajo II* echoes the concern Justice Brennan raised over twenty years earlier: "If Indians' land-based exercise of religion is not protected by RFRA in this case, I cannot imagine a case in which it will be."¹⁵²

In recent years, the Court revisited factual circumstances similar to *Smith*, when it applied RFRA in relation to another Free Exercise case concerning controlled plant substances that are used for religious purposes.¹⁵³ Referencing *Smith*, and relying primarily on *Sherbert*, *Yoder* and the text of RFRA, Chief Justice Roberts delivered a unanimous opinion holding that the government had failed to demonstrate a compelling interest in banning the religious practitioners' sacramental use of hoasca, a plant with hallucinogenic properties.¹⁵⁴ Similarly, the Court could have taken the opportunity presented by *Navajo II* to render its opinion concerning traditional religious use of sacred sites on federal land post-RFRA.

V. Protection of Traditional Tribal Uses on Lands of Cultural or Religious Significance

A generation ago, the United States enacted most of its major environmental protection laws, including NEPA,¹⁵⁵ the Endangered Species Act,¹⁵⁶ the Clean Air Act¹⁵⁷ and the Clean Water Act.¹⁵⁸ NEPA requires all

151. *Lyng*, 485 U.S. at 453.

152. 535 F.3d at 1113-14 (Fletcher, J., dissenting); *see* 485 U.S. at 476 (Brennan, J., dissenting) (stating that the majority opinion stripped Native Americans' land-based religious practices of any constitutional protection).

153. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2005).

154. *Id.* at 438.

155. 42 U.S.C. §§4321-4370f (1969).

156. 16 U.S.C. §§1531-1544 (1973).

157. 42 U.S.C. §§7401-7671q (1963).

federal agencies to consider the impact of their activities on the environment.¹⁵⁹ The Clean Water Act mandates the restoration and maintenance of the “chemical, physical and biological integrity of the Nation’s waters.”¹⁶⁰ With the Endangered Species Act, perhaps the most powerful of this quartet of legislation, Congress afforded the conservation of endangered plant and animal species and their habitats “the highest priority,”¹⁶¹ and granted any citizen the power to sue for enforcement.¹⁶²

Enforcement of these statutes can be complicated and contentious, and the specter of an economically crippling “wilderness servitude” is often raised,¹⁶³ similar to the *Lyng* court’s apparent concern that holding for the California Indians would have created a “religious servitude” on vast tracts of federal property.¹⁶⁴ Nonetheless, the people of the United States, through Congress’ enactment of our environmental protection laws such as the Endangered Species Act, have directed all federal agencies to use their authority in order to achieve virtually the same practical result: clean air, clean water and preservation of species and ecosystems on vast tracts of public land.¹⁶⁵

Perhaps these environmental statutes could be viewed as our nation’s secular codification of principles that also inform indigenous religious land use values. Thus, environmental protection laws, construed in combination with our constitutional guarantees of equal protection and personal freedom, which are also to be afforded paramount importance,¹⁶⁶ as well as in combination with specific statutes directed toward Native American religious and cultural freedoms, could provide a comprehensive framework for guidance in federal land use decisions. Viewing these statutory schemes

158. 33 U.S.C. §§1251-1387 (1972).

159. 42 U.S.C. §4332.

160. 33 U.S.C. §1251(a).

161. *TVA v. Hill*, 437 U.S. 153, 194 (1978).

162. 16 U.S.C. §1540(g)(1)(A).

163. See, e.g., *United States v. Adair*, 723 F.2d 1394, 1414 (9th Cir. 1983) (upholding a tribe’s 1864 treaty right to sufficient flow of water in the Klamath River to assure the tribe a “modest” living from fishing over a water rights challenge by local landowners). Of course, even sufficient water levels do not guarantee the health of the rivers and the salmon population, so the Klamath people (as well as commercial and recreational fishing interests) are increasingly threatened by the risk of environmental degradation and global warming. But the future may be brighter, since twenty-eight parties (including the operator of hydroelectric dams on the Klamath River, tribes, farmers and fishermen) have reached a tentative agreement on a dam-removal plan. Peter Fimrite, *Deal to Raze 4 Klamath Dams*, S.F. Chronicle, Sept. 30, 2009 at A1.

164. 485 U.S. at 452; *id.* at 476 (Brennan, J., dissenting).

165. 42 U.S.C. §7401(b); 33 U.S.C. §1251(a); 16 U.S.C. §1531(b).

166. *Yoder*, 406 U.S. at 218-219 (1972); *Lyng*, 485 U.S. at 475; *Smith*, 494 U.S. at 906-907 (O’Connor, J. concurring).

in piecemeal fashion has resulted in a number of instances of such narrow protection of Native Americans' rights that a tribe's existence is threatened.¹⁶⁷ But interpretation of environmental protection laws and laws designed to preserve Native Americans' fundamental freedoms could be harmonized in order to achieve outcomes in compliance with each of the statutory mandates. Because issues can arise concerning environment and natural resource use at any level of government,¹⁶⁸ policies implementing such a statutory harmonization could be effected on a national level as well as state and local levels where appropriate.¹⁶⁹

The essence of such a policy would be an instruction to apply environmental laws to all federal land management decisions, as required under NEPA since the Nixon Administration,¹⁷⁰ with concurrent tribal consultation regarding traditional religious and cultural practice and in conjunction with existing statutes that are directed toward that purpose. The policy could affirm that such construction, as to religious freedoms, would be conducted in fairness to all faiths under the First Amendment's Establishment and Free Exercise Clauses. At the same time, the policy would afford Native Americans' religious freedoms the respect and meaningful consultation that is easily lost under the current piecemeal application of the statutes.

NASLA was introduced in Congress in 2002, but stalled in committee.¹⁷¹ The proposed statute was based on an executive order issued by President Clinton toward the end of his second term that mandated federal agency consultation with affected tribes concerning land use.¹⁷² Although NASLA would provide a procedure to designate certain lands as "sacred" and thus protected in land use decisions, the measure does not specifically direct the departments with decision-making responsibility

167. See, e.g., *Navajo II*, 535 U.S. at 1063; see also *Havasupai Tribe v. U.S.*, 752 F. Supp. 1471 (9th Cir. 1990) (uranium mining permitted on federal lands of religious importance within traditional tribal territory); contrast *Alaska Wilderness League v. Kempthorne*, 2008 U.S. App. LEXIS 23861 (9th Cir. 2008) (relying on cases interpreting NEPA to find agency consultation was insufficient regarding the impact of proposed drilling leases in the Beaufort Sea on local people and wildlife, including Native Alaskan subsistence hunting and whaling activities.)

168. For example, the water rights controversy in *Adair* began at the state level. *Adair*, 723 F.2d at 1397.

169. In 2003, the California legislature came within three votes of enacting a comprehensive statutory scheme that covered both public and private lands, and would have provided a process to align protection of traditional tribal cultural and religious sites with administration of the California Environmental Quality Act. S.B. 18, 2003 Leg., 2003-2004 Sess. (Cal. 2003). See Hon. Barry Goode, *A Legislative Approach to the Protection of Sacred Sites*, 10 *Hastings W-Nw. J. Envtl. L. & Pol'y* 169 (2004).

170. 42 U.S.C. § 4332.

171. H.R. 5155 107th Cong. (2002).

172. Exec. Order No. 13,007, 3 C.F.R. 196 (1996).

under environmental statutes to coordinate their efforts in support of this goal, nor does it mandate tribal involvement beyond a “public-comment” style of provision for consultation with tribes.¹⁷³ The National Congress of American Indians (“NCAI”) and other organizations continue to work on drafts of NASLA, so it is possible the legislation may resurface in the future.¹⁷⁴ Adding provisions for construction in conjunction with statutory environmental protection goals and for meaningful tribal participation would bring NASLA within the scope of the policy proposed here.

As a baseline, lands of traditional religious significance to Native Americans, including entire ecosystems of plant and animal species, should remain sufficiently intact to permit traditional cultural and religious uses, or where such lands have been severely damaged they should be restored to the greatest degree practically possible. That is the policy the circuit courts have upheld in cases like *Bear Lodge* and *Wyoming Sawmills*. Although the Court acknowledged the importance of religious freedom with *Lyng* and *Smith*, it declined to extend protection to preserve Native Americans’ free exercise in those cases. But Congress stepped in, and it provided guidance by enacting RFRA. While the Court could have taken *Navajo II* as an opportunity to clarify RFRA’s application to federal land use, Congress could also provide concrete guidance with legislation that includes provisions for meaningful tribal consultation and harmonious construction of religious freedom and environmental laws in federal land use decisions.

VI. Conclusion

The Forest Service’s approval of the new Snowbowl EIS should have been reversed not only because it violates NEPA, but because snowmaking with reclaimed wastewater imposes a substantial burden on the Indian plaintiffs’ continued free exercise of religion that is prohibited under RFRA. The inadequacy of the new EIS was properly raised and argued at trial, and the final EIS was indeed inadequate as the three-member panel held in *Navajo I*. The matter should have been remanded to the Forest Service in order for it to take the required “hard look” at those dangers and update the EIS accordingly. Moreover, the Ninth Circuit’s holding that there is not a substantial burden on the tribes’ religious freedom in this case cannot be supported. Had the Indian plaintiffs’ sincere beliefs been accorded appropriate deference, the circuit may very well have found a substantial burden, even under its narrow, coercion-based construction of RFRA. But, under any construction of the Court’s compelling interest test, the government’s interest in subsidizing a private business operation would not appear sufficient to outweigh the Indians’ First Amendment rights to free

173. H.R. 5155 107th Cong. (2002).

174. NCAI Resolution No. ANC-07-020 (adopted June 10, 2007) (supporting current draft of NASLA).

exercise of their religion. Therefore, the Ninth Circuit's decision in *Navajo II* could have been overturned within the bounds of precedent to prohibit snowmaking with reclaimed wastewater on the Peaks.

Congress should provide clear direction that ensures administrative agencies engage in consistent land management policies concerning areas of traditional religious or cultural significance to Native Americans. But regardless of whether Congress acts, conflicts will continue to arise and primary responsibility to articulate the proper application of RFRA in federal land use challenges will ultimately rest with the Court. The Court could have used *Navajo II* to clarify that, while the First Amendment, and thus RFRA, does not obligate the government to "control or limit public access to public lands in order to facilitate" religious practices,¹⁷⁵ neither does it permit the prohibition of free exercise of religion absent a compelling prior government interest, as the Court explained in the law of *Sherbert*¹⁷⁶ and *Yoder*.¹⁷⁷ Thus, as in *Bear Lodge*, *Wyoming Sawmills* and other cases, some limits may be permissible under appropriate circumstances.

To ascertain the proper bounds of the government's compelling interest under RFRA, that interest must be balanced on a case-by-case basis against any substantial burden it creates.¹⁷⁸ Accordingly, in light of the substantial burden on the tribes' daily religious practice in this case, declining to approve snowmaking with recycled wastewater could constitute a reasonable restriction on the government's interest. With *Uniao do Vegetal*, the Court explained the post-*Smith* application of RFRA to controlled substances found in plants that are used for legitimate religious purposes.¹⁷⁹ The time is ripe for a similar lesson concerning RFRA's proper application to land use decisions. By denying plaintiffs' petition for *certiorari*, the Court leaves the puzzling impression that RFRA and the religious freedom guarantee of the First Amendment on which it is founded apparently do not apply to federal land use decisions.

175. *Nw. Indian Cemetery Protective Ass'n*, 552 F. Supp. at 954.

176. 374 U.S. at 403.

177. 406 U.S. at 221.

178. 42 U.S.C. § 2000bb(b)(1); see *Sherbert*, 374 U.S. at 406; *Yoder*, 406 U.S. at 235. See also *Bowen*, 476 U.S. at 730-31 (O'Connor, J., concurring); *Uniao do Vegetal*, 546 U.S. at 439.

179. 546 U.S. at 439.

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