Lyng v. Northwest Indian Cemetery Protective Association: Bulldozing First Amendment Protection of Indian Sacred Lands*

Donald Falk**

INTRODUCTION

The United States Supreme Court's decision in Lyng v. Northwest Indian Cemetery Protective Association¹ dramatically curtailed the ability of American Indians to preserve sacred sites on federally owned public lands.² A five to three majority reversed lower court decisions that had enjoined construction of the Gasquet-Orleans Road (G-O Road)³ through sacred mountain territory and held that the development of public lands cannot implicate the first amendment's free exercise clause. The Court's decision limits the application of the free exercise clause to government actions that penalize religious activity or otherwise coerce individual behavior contrary to religious belief. It allows the government, unconstrained by the clause, to prevent religious activity from taking place.

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** Candidate for J.D. 1990, School of Law (Boalt Hall), University of California at Berkeley; M.A. 1977, University of Chicago; B.A. 1976, University of California at Berkeley. The author thanks Theodoratus Cultural Research, California Indian Legal Services, and the Sierra Club California/Nevada field office for help in gathering documents, Christopher Peters and Julian Lang for clarifying the Indian plaintiffs' point of view, Andrew Pincus, formerly Assistant to the Solicitor General, for once again pressing the government's case, and Professor John Dwyer for his instant sifting of this Note's title from the convoluted draft title.

2. “Public lands” most properly refers to lands managed by the Bureau of Land Management. This Note refers to all federal lands open to the public (as distinguished from, e.g., military reservations) as public lands, whether the managing agency is the Forest Service, Bureau of Land Management, National Park Service, or Fish and Wildlife Service.

This Note uses the terms “American Indian” or “Indian” to refer to the indigenous peoples of the contiguous 48 states and coastal Alaska. Most of the legal and factual principles discussed in this Note apply with equal relevance to other Native American peoples such as Eskimos, Inuits, and Native Hawaiians.

3. The small towns of Gasquet and Orleans are the sites of the district ranger stations for the two northernmost of the four ranger districts in the Six Rivers National Forest. See FOREST SERVICE, U.S. DEP’T OF AGRICULTURE, SIX RIVERS NATIONAL FOREST MAP (1982) [hereinafter SIX RIVERS MAP].
The first Part of this Note sets out the complex cultural and administrative background of the G-O Road, reviews the four lower court opinions in the case, and summarizes the Supreme Court opinion and dissent. The second Part examines the evolution of free exercise jurisprudence and how other courts have applied free exercise standards to sacred lands cases. Although Northwest Indian presented the Supreme Court with a new context for the free exercise clause, lower courts had considered similar cases.

The third Part criticizes the Court's opinion. This Note contends that the Northwest Indian majority took a giant step backward in free exercise interpretation. The Court's narrow reading of the free exercise clause threatens to ossify the constitutional protection of religion. Deferring to the executive branch, the Court placed most land management beyond free exercise review. It refused to view land as potentially sacred in itself and therefore worthy of protection. This Note argues that the Court should have placed government impairment of the sacred sites of site-specific religions squarely within the reach of the traditional balancing of religious burdens and government interests under the free exercise clause.

This Note concludes by examining the options left for Indian tribes whose religions depend on the wild character of federal land. Developing new doctrines for the courts may be futile: Northwest Indian frees the executive branch from any enforceable duty not to destroy such sacred lands at will. Congress can protect Indian religions, however, by giving Indians a statutory cause of action to bar the unjustified development of sacred sites.

I
BACKGROUND

The High Country of the Siskiyou Mountains (High Country) is a series of peaks ranging from about 4500 to 5700 feet in elevation, approximately twenty miles east of the Pacific Ocean and thirty miles south of the Oregon-California border. The Siskiyou Mountains are remote and


rugged; the wild landscape, aided by indistinct motion pictures and huge footprints, fuels the legend of Bigfoot.6

The area lies within the Six Rivers National Forest, which stretches for approximately 175 miles on a north-south axis in the Coast Ranges of California. Like all National Forest lands not specially restricted, the High Country is and has been accessible to the public for recreational and other uses.7 It is marked by steep mountainsides and plunging canyons, thickly forested by a remarkable mix of Douglas, white, and Shasta fir, sugar, western white, and Jeffrey pine, and incense cedar.8 Dense brush makes passage through many forested areas impossible even on foot, while thickets of manzanita spread across much of the exposed ridges. Prominent rocky outcrops dot the ridges, ranging from the isolated forty-foot cleft boulder of Doctor Rock to the sawtooth cirque that peaks at Chimney Rock.

Although much of the Six Rivers National Forest has been clearcut,9 many relatively unspoiled areas remain. Among these are the gorge of the Smith River, proposed as the country’s first wild river national park,10 and parts of several congressionally protected wilderness areas.11 Most of the High Country now lies within the Siskiyou Wilderness.12

Three California Indian tribes, the Yurok, Karuk, and Tolowa, use

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6. See Matthiessen, Stop the GO Road, AUDUBON, Jan. 1979, at 48, 55.
7. See 36 C.F.R. §§ 251.50(c), (d) (1988).
8. See CHIMNEY ROCK FEIS, supra note 4, at 18-19.
the High Country for religious purposes. Their religions, though differing in many details, focus on concepts of world renewal and an endless search for spiritual power. They believe their religious practices and ceremonies renew the world, stabilizing the earth and protecting human-kind. Believers go to the High Country to communicate with the pre-human spirits who ordained these world renewal ceremonies, and, through the spirits, with the Origin of healing and spiritual power.

Individual medicine people go to the High Country to communicate with the spirits and attain personal spiritual power and curative power through fasting and solitude. The High Country is the principal source of healing power for northwestern California Indians. Practitioners also gather plants used for healing and in ceremonies. Tribal leaders visit the area to prepare for ceremonies involving an entire tribe or group of tribes, such as the Brush Dance, Jump Dance, and White Deerskin Dance. The power derived from the High Country invests the ceremonies with spiritual significance and efficacy. Thus, whole communities depend on the healing powers and the ceremonial preparation achieved by those who use the High Country.

Spiritual use of the area depends on the ability to achieve an inner spiritual state akin to meditation or a trance. Physical deprivation and the difficult journey to the High Country help prepare believers for the religious experience there.


This Note refers to the people whose traditional territory ran along the Klamath River upstream from Yurok country as "Karuk," following the usage of the organized Karuk Tribe of California, among others. See, e.g., S. REP. No. 564, 100th Cong., 2d Sess. 2 (1988).

14. Theodoratus Report, supra note 5, at 12, 45.


17. Reporter’s Transcript, supra note 15, at 238-40 (testimony of Sam Jones, Jr.); Theodoratus Report, supra note 5, at 70.


20. Id. at 237-39 (testimony of Sam Jones, Jr.).

21. Id.; see also Theodoratus Report, supra note 5, at 46-49.


23. Theodoratus Report, supra note 5, at 61-62, 420. Spiritual training in the mountains may also be intrinsic to the training of social leaders in the stratified Yurok society. See Pillinger, Yurok, in 8 HANDBOOK OF NORTH AMERICAN INDIANS (CALIFORNIA) 137, 141-43 (R. Heizer ed. 1978) [hereinafter HANDBOOK].


25. See Reporter’s Transcript, supra note 15, at 124 (testimony of Christopher Peters) (ten days of fasting and abstinence at site usually needed before gaining power); id. at 311
Country, free from almost all visual or aural distraction, allows an individual to achieve the state necessary to communicate with the spirits. 26

Doctor Rock, 27 Chimney Rock, and Peak 8 28 are the most spiritually significant peaks in the High Country. Their importance to traditional Indians has grown as other mountains that were formerly used have been developed and desecrated. 29 Particular prayer sites are not independent; the entire High Country forms an interrelated complex of spiritual power. 30 The Golden Stairs Trail climbs the ridge of the sacred mountain range, leading past lesser known sites where novices begin their High Country training and more accomplished practitioners make trailside prayers on their way to Doctor Rock, Chimney Rock, or Peak 8. 31

The G-O road as currently proposed by the Forest Service would bisect this physical manifestation of the spiritual path with a ribbon of blacktop, over which dozens of logging trucks would rumble every day. 32 The Forest Service first envisioned a paved road connecting Gasquet and Orleans in the late 1940's. 33 The route originally planned would have dipped into the valley east of Doctor Rock, running thousands of feet

(testimony of Florence Shaugnessy) (sexual abstinence before praying for good health at the ritual site); Theodoratus Report, supra note 5, at 83 (difficult journey is part of spiritual test). 26. See Theodoratus Report, supra note 5, at 101-02, 419. 27. Doctor Rock imparts curative power to women; men seek hunting and gambling power at another "Doctor Rock" located just up the ridge. See Theodoratus Report, supra note 5, at 81-82; Reporter's Transcript, supra note 15, at 238-40 (testimony of Sam Jones, Jr.). 28. According to some traditional beliefs, the spiritual power of Chimney Rock and Peak 8 is beyond the strength and preparation of women and almost all men. Theodoratus Report, supra note 5, at 86-87. An individual spiritual leader's failure to withstand the challenges of the spirits could harm the entire community that depends on both the leader and the power. Id. at 62. 29. Reporter's Transcript, supra note 15, at 230-31 (testimony of Lowanna Brantner); Theodoratus Report, supra note 5, at 70. 30. See Reporter's Transcript, supra note 15, at 90 (testimony of Christopher Peters); Theodoratus Report, supra note 5, at 73-74; see also Affidavit of Charlie Thom, Sr., filed in Donahue v. Butz (N.D. Cal. June 11, 1976) (No. C-76-0922 LHB) (sites must be protected "in their entire spirit land, not just the rocks themselves and a few acres around . . . . [A]ll that can be seen must be saved . . . . "). 31. See Wylie & Heffner, A Synopsis of Supernatural Indian Properties in and Adjacent to the Eightmile-Blue Creek Planning Units, reprinted in CHIMNEY ROCK DES, supra note 4, App. T at 459, 467 (1977); Theodoratus Report, supra note 5, at 62, 73, 88; see also maps cited supra note 5. 32. See CHIMNEY ROCK FEIS, supra note 4, at 34; Record of Decision, Blue Creek Unit Plan, Six Rivers National Forest (Dec. 1981) [hereinafter Blue Creek Record of Decision], reprinted in Joint Appendix at 106-09, Lyng v. Northwest Indian Cemetery Protective Ass'n, 108 S. Ct. 1319 (1988) (No. 86-1013) [hereinafter Joint Appendix]. Compare Helkau District Map, supra note 5 (showing Golden Stairs Trail) with SIX RIVERS MAP, supra note 3 (showing road corridor through Siskiyou Wilderness). 33. CHIMNEY ROCK FEIS, supra note 4, at 12; CHIMNEY ROCK DES, supra note 4, at 215. Gasquet is on California Highway 199, while Orleans is on California Highway 96; the G-O Road was seen as a north-south link between the highways.
below the range of sacred peaks. After a creekside section of road was washed out by floods in 1964, the Forest Service chose a higher route passing near Chimney Rock on the ridge leading to Peak 8. The Forest Service had built a low standard jeep road past Chimney Rock in 1962-63, which was to be incorporated in the rerouted G-O Road.

The north and south ends of the G-O Road were upgraded and paved piecemeal. In 1971, the Summit Valley section from the northwest was paved almost as far as the ridge one-half mile from Peak 8. From the other direction, the Dillon-Flint section was paved in 1976 to a point in Elk Valley within two miles of Chimney Rock, after an unsuccessful appeal by several Indians and environmental organizations.

The Blue Creek Unit Plan, adopted in 1976, proposed linking the two paved dead-ends with a section of paved road closely following the 1962 four-wheel drive route, which came within one-half mile of Chimney Rock. The Plan also called for clearcutting and otherwise developing the vast majority of the Blue Creek Unit, including substantially all of the High Country.

Indian individuals and several conservation groups appealed the Blue Creek Unit Plan, allegiing violations of the National Environmental Policy Act of 1969 (NEPA), the Multiple-Use Sustained-Yield Act (MUSYA), the California Porter-Cologne Water Quality Control Act.
(Porter-Cologne Act), the Endangered Species Act of 1973, and the Federal Water Pollution Control Act (Clean Water Act). The appeal charged that insufficient attention had been given to endangered wildlife and plant species, cultural values, and water quality, and that alternatives to the proposed action had not been adequately considered.

The Regional Forester denied the appeal after delaying his decision until 1981 because he thought wilderness legislation covering the area was imminent. He found that the completion of a commissioned report on cultural values (the Theodoratus Report) and the planned creation of protective zones around eleven identified sites sufficiently preserved the rights of the Indians.

The Indians and environmental groups thereupon appealed to the Chief of the Forest Service. This appeal alleged violations of the National Forest Management Act of 1976 (NFMA) and the American Indian Religious Freedom Act (AIRFA), in addition to the original grounds for appeal. The appeal also asserted that building the G-O Road and clearcutting much of the Blue Creek Unit would infringe on the Indians' first amendment right to the free exercise of religion.

48. See Letter from Zane G. Smith, Jr., Regional Forester, to Julie McDonald and Henry Sockbeson 3-4 (Feb. 19, 1981) (decision of the Regional Forester, Region Five, on the Appeal of Citizen Groups and Individuals from a Decision to Adopt the Blue Creek Unit Plan).
49. Id. at 6.
50. See id. at 1.
51. See generally Theodoratus Report, supra note 5. This report exhaustively surveyed the ethnography and archaeology of the High Country. The authors recommended unequivocally that the last section of the G-O Road not be built, as the adverse effects on religious practice could not be mitigated if the road were completed. Id. at 412-13, 419-23.
52. Letter from Zane G. Smith, Jr., supra note 48, at 5-6.
53. See Letter from R. Max Peterson, Chief of the Forest Service, to Julie McDonald 1 (Nov. 17, 1981) (Decision on Appeal of the Regional Forester's Decision Affirming the Blue Creek Unit Plan) [hereinafter Chief Forester's Decision, Blue Creek].
54. 16 U.S.C. §§ 1601-1614 (1982) (outlining procedures for management of national forests and requiring consideration of wilderness values). The appeal claimed that the Blue Creek Unit Plan, although drafted before the passage of NFMA, did not qualify as an existing plan because it was not implemented before NFMA and thus had to conform to NFMA standards regarding consideration of wilderness values. Appellants' Statement of Reasons, In re: Blue Creek Unit Plan, Six Rivers National Forest, Before the Chief Forester 53-54 (June 22, 1981) [hereinafter 1981 Statement of Reasons: Blue Creek Plan].
57. Id. at 51-53; see U.S. CONST. amend. I ("Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof . . . ").
Chief Forester rejected the appeal. The Chief commended the decision to create one-quarter mile wide protective zones and implicitly found these sufficient. He required only that the Forest Supervisor issue a new Record of Decision to incorporate these and other changes made to the Plan during the pendency of the appeal.

In 1977, while the Blue Creek appeal was pending, the Forest Service issued a separate Draft Environmental Statement for the Chimney Rock Section of the G-O Road; a Final Environmental Impact Statement was completed in 1982. Both considered various alternate routes for the road, including one that avoided the High Country altogether. The Regional Forester selected a route that traversed the High Country within a mile of Chimney Rock. Indians and environmental groups appealed this decision to the Chief Forester on grounds similar to those alleged in the Blue Creek Unit appeal. The Chief Forester denied the Chimney Rock Section appeal as well.

Four Indian individuals, six conservation groups, two individual conservationists, and the Northwest Indian Cemetery Protective Association then filed suit in United States District Court to enjoin construction of the road and clearcutting of the High Country forest. The State of California filed a separate suit on similar grounds. The cases were consolidated for trial as the causes of action were virtually identical.

The complaints alleged violations of the first amendment, AIRFA, NEPA, 

58. See Chief Forester’s Decision, Blue Creek, supra note 53, at 4.
59. Id. at 3-4.
60. CHIMNEY ROCK DES, supra note 4.
61. CHIMNEY ROCK FEIS, supra note 4.
62. CHIMNEY ROCK DES, supra note 4, at 16-17; CHIMNEY ROCK FEIS, supra note 4, at 13, 15.
63. Record of Decision, Gasquet-Orleans Road, Chimney Rock Section (Mar. 2, 1982), reprinted in Joint Appendix, supra note 32, at 100; see also CHIMNEY ROCK FEIS, supra note 4, at 12, 14.
64. See Letter Decision on Appeal of Regional Forester’s Decision, Chimney Rock Section, Gasquet-Orleans Road, Six Rivers National Forest (July 26, 1982), reprinted in Joint Appendix, supra note 32, at 91, 93-95 [hereinafter Chief Forester’s Decision, Chimney Rock].
65. Id. at 98.
66. Complaint for Declaratory Judgment and Injunctive Relief, Northwest Indian Cemetery Protective Ass’n v. Peterson, 565 F. Supp. 586 (N.D. Cal. 1983) (No. C-82-4049 SAW), reprinted in Joint Appendix, supra note 32, at 5 [hereinafter Indian/Conservation Complaint]. The Northwest Indian Cemetery Protective Association is a nonprofit corporation dedicated to preserving Indian cultural, historical, and religious sites. Members are northwestern California Indians from several tribes. Id. at 7-8.
68. See Joint Appendix, supra note 32, at 3; Northwest Indian Cemetery Protective Ass’n v. Peterson, 552 F. Supp. 951, 953 (N.D. Cal. 1983).
69. 42 U.S.C §§ 4321-4370a (1982 & Supp. IV 1986). Plaintiffs attacked the Chimney Rock Section draft and final environmental impact statements, supra note 4, on the grounds of (1) inadequate discussion of the impact of road construction on soil stability, Indian cultural resources, and water quality, and (2) inadequate discussion of alternatives. Indian/Conservation Complaint, supra note 66, at 36-37. They attacked the Blue Creek FES,
the National Historic Preservation Act, the Clean Water Act, the Porter-Cologne Act, reserved fishing and water rights pertaining to the Hoopa Valley Indian Reservation, the federal government's trust responsibilities to the Indians of the Hoopa Valley Indian Reservation, the Wilderness Act of 1964, the Administrative Procedure Act, NFMA, and MUSYA.

supra note 40, on the grounds of (1) economic distortion, (2) inadequate description of mitigation measures for impacts on water quality, (3) inadequate assessment of the impact on the wilderness potential of the area, and (4) failure to issue a supplemental Environmental Impact Statement covering information that became available during the five years between issuance of the FES and the decision to implement the plan. See Indian/Conservation Complaint, supra note 66, at 34-38; Complaint for Declaratory and Injunctive Relief and Mandamus, California v. Block, 565 F. Supp. 586 (N.D. Cal. 1983) (No. C-82-5943 SAW), reprinted in Joint Appendix, supra note 32, at 47, 58-61 [hereinafter California Complaint].


Plaintiffs alleged that the proposed development would violate California standards for turbidity, sediment, and non-degradation of the Klamath River Basin promulgated under the Clean Water Act and the Porter-Cologne Act. Indian/Conservation Complaint, supra note 66, at 40-41; California Complaint, supra note 69, at 63.

The plaintiffs claimed that the government, by creating the reservation, had reserved fishing rights along the Klamath River for the Indians. As Blue Creek is a tributary to the Klamath, impairment of the water quality in Blue Creek allegedly would injure the reserved fishery. Indian/Conservation Complaint, supra note 66, at 31-32.

The plaintiffs claimed that the damage to Indian fisheries and the infringement of their religious rights would violate the trust responsibility of the federal government to the Indians. Id. at 32. For a discussion of the government's general trust responsibility toward American Indians, see infra notes 385-87 and accompanying text.

See supra note 11. This claim, related to the NEPA claim, supra note 69, alleged that the Forest Service inadequately assessed the impact of the proposed development on the wilderness potential of the Blue Creek area. Indian/Conservation Complaint, supra note 66, at 36. The Forest Service evaluated the wilderness qualities of the Blue Creek area in isolation, rather than treating Blue Creek as part of a larger contiguous roadless area that included parts of the neighboring Eightmile and Siskiyou units. Id.; California Complaint, supra note 69, at 57-58.

5 U.S.C. §§ 551-559, 701-706 (1982 & Supp. III 1985). Plaintiffs claimed that all of the alleged violations of law by the Forest Service amounted to an injury entitling them to relief under the Administrative Procedure Act and that the agency's conduct was arbitrary and capricious in direct violation of the Act. Indian/Conservation Complaint, supra note 66, at 41-42; California Complaint, supra note 69, at 63.

Plaintiffs alleged that NFMA required stricter standards and guidelines in forest management plans, resulting in a greater consideration of environmental values than that given by the Forest Service. Indian/Conservation Complaint, supra note 66, at 39-40; California Complaint, supra note 69, at 61-62.

16 U.S.C. §§ 528-531 (1982); see supra note 44. The complaints alleged that the For-
The first amendment free exercise claim, the only issue ultimately presented to the Supreme Court, alleged that proposed development of the High Country would "rob Indian plaintiffs . . . of their most important place of worship" and deny them the ability to practice their religion. The Indian plaintiffs also charged that the development denied them useful access to their sacred sites in violation of AIRFA. Plaintiffs claimed that these violations, along with the prospective injury to Indian fishing rights caused by degradation of water quality, breached the federal government's trust responsibility to the Indians. The other claims dealt in detail with procedural shortcomings and environmental consequences.

In defense, the Forest Service claimed that its review, consultation, and evaluation procedures complied with environmental laws, that actions taken in Blue Creek upstream from the reservation would not affect Indian fishing rights, and that no cognizable first amendment injury to the Indian plaintiffs existed. The Service characterized the construction of the twenty-four-foot wide paved road as simply a "reconstruction" of the four-wheel drive trail. The Service also claimed that the road construction would confer administrative, recreational, and economic benefits that would outweigh the Indians' religious interests. Finally, the Service argued that acting in deference to the Indians' religious practices (that is, not building the road) would violate the establishment clause of the first amendment.

The trial court denied plaintiffs' motion for a preliminary injunction.
against construction of the Chimney Rock Section. The court rejected the plaintiffs’ free exercise claim, apparently treating the case as an attempt to limit public (i.e. non-Indian) access to the High Country rather than to prevent physical impairment of the ritual quality of the area. However, the court based its denial of a preliminary injunction on the government’s assurance that it would not build the road prior to a final ruling on the merits.

After a ten-day trial, Federal District Judge Weigel issued a permanent injunction against building the Chimney Rock Section or any other route through twenty-seven sections of the High Country, and against any timbering or logging road construction in that area. The court found that the development scheme threatened serious impairment of plaintiffs’ religious practices. It noted that intrusions on the “salient visual, aural, and environmental qualities of the high country” were “potentially destructive of the very core of [plaintiffs’] religious beliefs and practices.”

The court concluded that the government’s interest in building the road did not outweigh the Indians’ free exercise interest. First, timber could be cut without building the road. Second, the road would not increase the number of jobs regionally, at most transferring some jobs from Humboldt County in the south to Del Norte County in the north by making some inland timber more accessible to coastal lumber mills in Del Norte. Third, the Forest Service would not necessarily realize any pecuniary benefit from the supposedly increased competition for logging contracts, as there already was competition between the Humboldt County mills. Fourth, any improvement in vehicle access for recreation would be offset by environmental degradation that would make the area less suitable for primitive recreation. Fifth, past investment in the paved portions of the G-O Road did not justify constructing the Chimney Rock Section, as the existing portions of the road improved access to forest resources. Sixth, the government’s interest in cutting the timber

88. See id. at 954.
92. Id. at 594-95.
93. Id. at 595 (citing Theodoratus Report, supra note 5, at 420).
94. Id.
95. Id. at 595-96.
96. Id. at 596.
97. Id.
98. Id. The Forest Service admitted that the paved segments were useful without completion of the G-O Road. Answer, Northwest Indian Cemetery Protective Ass’n v. Peterson,
in the Blue Creek Unit was weak, given the ample amount of timber elsewhere on the Six Rivers National Forest.\textsuperscript{99} Seventh, the road's slight contribution to administrative efficiency did not amount to a compelling interest.\textsuperscript{100} Finally, the court rejected the Forest Service claim that protecting the area implicated the establishment clause: "Actions compelled by the Free Exercise Clause do not violate the Establishment Clause."\textsuperscript{101}

Following previous courts, the Northwest Indian trial court found that AIRFA did not create a cause of action for the Indian plaintiffs; at most it imposed procedural requirements on the government.\textsuperscript{102} The court did, however, enjoin any logging or road construction in the entire 31,100-acre Blue Creek Unit until the Forest Service complied with the Wilderness Act, NEPA, and the Clean Water Act, and demonstrated that the proposed activities would not impair the Hoopa Valley Reservation's fishing rights.\textsuperscript{103}

The Ninth Circuit affirmed in most respects,\textsuperscript{104} vacating only those portions of the original order relating to the Hoopa Valley Reservation\textsuperscript{105}

\begin{itemize}
  \item \textsuperscript{99} 565 F. Supp. 586 (N.D. Cal. 1983) (No. C-82-4049 SAW), reprinted in Joint Appendix, supra note 32, at 67, 73.
  \item \textsuperscript{100} Id. Individual ranger districts conducted administrative activities. The common border of the Gasquet and Orleans ranger districts is the High Country ridge, including the sites of Doctor Rock, Peak 8, and Chimney Rock. \textit{Six Rivers Map}, supra note 3.
  \item \textsuperscript{101} 565 F. Supp. at 597.
  \item \textsuperscript{102} Id. at 597-98; \textit{see infra} note 124. The court found that the government complied with these procedural requirements. 565 F. Supp. at 597.
  \item \textsuperscript{103} See 565 F. Supp. at 606-07. The court found that the Forest Service had violated NEPA by inadequately disclosing the impact of the proposed development on water quality, failing to discuss the cumulative impact on water quality, and inadequately describing measures to mitigate the impact on water quality. Id. at 599-601. For a discussion of NEPA issues raised in this case, as modified by the appellate opinion, \textit{Northwest Indian Cemetery Protective Ass'n v. Peterson}, 795 F.2d 688 (9th Cir. 1986), \textit{see Comment, Taking a Hard Look at Mitigation: The Case for the Northwest Indian Rule}, 59 U. COLO. L. REV. 687 (1988).
  \item \textsuperscript{104} The degradation of water quality in the Blue Creek drainage would impair fishing rights reserved to the Indians of the Hoopa Valley Reservation downstream. The resulting injury to the fisheries would violate the federal government's trust obligation to the Indians. 565 F. Supp. at 605.
  \item \textsuperscript{105} \textit{Id.} at 589 n.5; 795 F.2d at 697 n.10 (Hoopa Valley Tribe not a party and relief thus inappropriate). This standing determination, while probably technically correct at the time it was rendered, is questionable. Enrolled members of the Hoopa tribe would not be the only, or even the principal, persons affected by the degradation. While the Hoopa tribe was not a party, Lowanna Brantner and Sam Jones, individual plaintiffs, were residents of the Hoopa Valley Reservation and arguably had standing to assert the trust responsibility. Trial Record at 227 (Brantner), 236 (Jones); \textit{see infra} note 386 (trust duty runs to individual Indians). The Hoopa Valley Reservation, in fact, is as much Yurok as Hoopa. The part of the reservation downstream on the Klamath River from Blue Creek, and whose fisheries would be affected by sediment in Blue Creek, was and remains Yurok territory. \textit{Handbook}, supra note 23, at 139; \textit{see also} S. REP. No. 564, 100th Cong., 2d Sess. 2-3, 17 (1988).
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FIRST AMENDMENT AND SACRED LANDS

and the Wilderness Act. The Wilderness Act issues had been rendered moot by the California Wilderness Act of 1984.

The Ninth Circuit then withdrew its original unanimous opinion, apparently to clarify its establishment clause analysis and to address the then recently decided case of Bowen v. Roy. The Ninth Circuit reaffirmed the judgment on rehearing, with Judge Beezer dissenting. The Supreme Court granted the government's petition for certiorari of the free exercise question.

The Supreme Court reversed by a five to three vote. Justice O'Connor's opinion for the Court found the case controlled by Bowen v. Roy, which exempted purely internal procedures of government from free exercise scrutiny. In Roy, the Court permitted the government to assign and use a Social Security number for an Indian plaintiff's daughter despite plaintiff's belief that the daughter's spiritual development would be thereby endangered. The Northwest Indian Court declared, "[t]he building of a road or the harvesting of timber on publicly owned land cannot meaningfully be distinguished from the use of a Social Secur-

106. 764 F.2d at 589, withdrawn and aff'd on rehearing, 795 F.2d at 697-98 (parties agree issue rendered moot by California Wilderness Act of 1984, designating 26,000 acres of Blue Creek Unit as wilderness). The new Siskiyou Wilderness included most of the High Country, yet Congress left a 1200-foot wide corridor through the wilderness to allow for the possible construction of the G-O Road. H.R. REP. No. 40, 98th Cong., 1st Sess. 32 (1983); S. REP. No. 582, 98th Cong., 2d Sess. 29 (1984). Both reports recognized the "critical importance . . . [of the area] for cultural and religious purposes." H.R. REP. No. 40, 98th Cong., 1st Sess. 32 (1983); S. REP. No. 582, 98th Cong., 2d Sess. 29 (1984). As the proposed route for the Chimney Rock Section deviates from the path of the current four-wheel drive trail by up to one-half mile, much of the existing trail is now within the Siskiyou Wilderness. See SIX RIVERS MAP, supra note 3.


108. Compare 764 F.2d at 586 with 795 F.2d at 693-94.


110. 795 F.2d 688. Judge Canby, a recognized authority on and professor of Indian law, wrote for the majority.

111. Northwest Indian Cemetery Protective Ass'n v. Peterson, 795 F.2d 688 (9th Cir. 1986).


113. Id. at 1325. For a more complete discussion of Bowen v. Roy, 476 U.S. 693 (1986), see infra notes 195-207 and accompanying text.

114. 476 U.S. 693.
The Court refused to differentiate the perceived danger to the spiritual development of the daughter in "Roy" from the vitiation of traditional rituals in the High Country. "In both cases, the challenged government action would interfere significantly with private persons' ability to pursue spiritual fulfillment according to their own religious beliefs." Distinguishing the two cases, the Court concluded, would require an impossible determination of the truth of the underlying beliefs in each case.

In Northwest Indian, the Court held that the free exercise clause is implicated only by government actions that coerce individuals into violating their beliefs, either through direct penalties or through withholding benefits or privileges afforded other citizens. Consequently, as long as the government does not penalize the religion or coerce irreligious behavior, it is free to impede severely the Indians' ability to practice their religion. The majority reasoned that a contrary holding would grant Indian plaintiffs an illegitimate "veto over public programs that do not prohibit the free exercise of religion."

The Northwest Indian Court became the first appellate court in a sacred lands case to defer entirely to the federal government's property rights: "Whatever rights the Indians may have... those rights do not divest the Government of its right to use what is, after all, its land." The Court believed that restricting federal land development on free exercise clause grounds was a substantial "diminution of the Government's property rights" and a "concomitant subsidy of Indian religion." Invoking the possibility of future Indian demands (not made in the instant case) for the exclusion of other visitors, the Court raised the specter of groups of Indians gaining de facto ownership of large amounts of public property.

According to Justice Brennan's dissent, the Court's narrow reading
of the free exercise clause violated the meaning of the first amendment and eviscerated AIRFA's protection of Indian religious practices. The dissent rejected the majority's "fine distinctions between types of restraints on religious exercise," arguing that the effect of a government action, rather than its form, should control free exercise analysis. The dissent noted that development of the High Country "will restrain religious practice to a far greater degree" than the government actions held unconstitutional in the cases cited by the majority and that "to prevent from doing something" is one of two standard definitions of "prohibit."

Justice Brennan distinguished Roy by noting that the Roy Court found no impairment of Roy's "freedom to believe, express, or exercise" his religion, while the plaintiffs in Northwest Indian made an uncontroverted showing that the road construction and logging would "impair their freedom to exercise their religion in the greatest degree imaginable." Justice Brennan further distinguished Roy's internal government information system from federal land management, in that the public may be directly affected by land management and is guaranteed participation in the management process. Finally, the dissent argued that AIRFA expressed a "congressional determination that federal land management decisions are not 'internal' government 'procedures,' but are instead governmental actions that can and indeed are likely to burden Native American religious practices."

The dissent would have balanced government and religious interests whenever "any form of governmental action ... frustrate[d] or inhibit[ed] religious practice." Brennan found the centrality-indispensability analysis used by the Ninth Circuit and other lower courts to be a workable balance of "fundamentally incompatible" government and Indian interests. The dissent believed that courts would not have to determine the centrality of a particular belief, beyond assessing the sincerity

125. 108 S. Ct. at 1340 (Brennan, J., dissenting).
126. Id. at 1330.
127. Id. at 1334.
128. Id. at 1334-35; see also infra notes 176-210 and accompanying text.
129. 108 S. Ct. at 1335 n.4 (quoting WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 940 (1983)).
130. Id. at 1337 (Brennan, J., dissenting).
131. Id. at 1336.
132. Id. at 1337. Brennan agreed that AIRFA did not create an independent private cause of action. Id.
133. Id. at 1330; see also id. at 1333 (discussing how the appellate court balanced the government and Indian religious interests); id. at 1339 (discussing how the dissent would balance the government and Indian religious interests).
134. See id. at 1338 (Brennan, J., dissenting). The test also "limits the potential number of free exercise claims ... forestall[ing] the possibility ... [of] a host of lilliputian lawsuits." Id. The majority found that the test requires the Court to engage in an inappropriate evaluation of the importance of particular elements of a religion. Id. at 1329-30.
of an adherent's testimony that a belief was central.\textsuperscript{135} Claimants would then have the burden of showing that the challenged government action "poses a substantial and realistic threat of undermining or frustrating their religious practices."\textsuperscript{136}

Once claimants have satisfied their showing, Justice Brennan believed that the government should have to justify the infringement of religious practice by presenting a sufficiently compelling state interest.\textsuperscript{137} He concluded that the government's interest in building a "6-mile segment of road that two lower courts found [of] . . . the most marginal and speculative utility" was not compelling.\textsuperscript{138}

II
THE FREE EXERCISE CLAUSE BEFORE NORTHWEST INDIAN

Northwest Indian is the first United States Supreme Court case to address the free exercise rights of American Indians who worship on public land. Indeed, no previous Supreme Court free exercise case concerned either public land management or the deprivation of the physical means of religious practice. The jurisprudential background for the Northwest Indian decision thus consists of the Court's treatment of free exercise challenges to government actions (discussed in the first section of this Part) and lower federal court cases in which Indians have challenged the development of public lands on the grounds that the development would impede the practice of site-centered religions (discussed in the second section of this Part).

A. The Free Exercise Jurisprudence of the United States Supreme Court

I. The Mormon Cases—Beliefs, Not Acts, Are Protected

The Court first ruled on a claim that government action impermissibly infringed upon the free exercise of religion in Reynolds v. United States,\textsuperscript{139} an appeal by a Mormon convicted of bigamy under a federal statute.\textsuperscript{140} The Reynolds Court ruled that the defendant's belief that practicing polygamy was a religious duty did not exonerate him from

\textsuperscript{135} Id. at 1339.
\textsuperscript{136} Id.
\textsuperscript{137} Id.
\textsuperscript{138} Id. Justice Brennan also attacked the majority's unorthodox refusal, in the absence of clear error, to defer to the trial court's factual findings regarding the impact of the road on the Indians' religion, id. at 1333 n.3, and the independent utility of the completed segments of road; id. at 1332-33, 1333 n.2; see also supra note 98 and accompanying text (discussing the lower court's view regarding the independent utility of the road segments).
\textsuperscript{139} 98 U.S. 145 (1879).
\textsuperscript{140} Revised Statutes § 5352. Utah was still a territory under the exclusive jurisdiction of the United States. See 98 U.S. at 153.
criminal conviction.\textsuperscript{141} The Court held that the free exercise clause protected “mere opinion” only, and that Congress “was left free to reach actions which were in violation of social duties or subversive of good order.”\textsuperscript{142} Criminal statutes against polygamy, a practice repugnant to mainstream views,\textsuperscript{143} enforced a social duty; they could not be attacked on free exercise grounds, lest religious belief become superior to the law of the land and every citizen become her own law.\textsuperscript{144} The government was thus free to make a law prohibiting the free exercise of religion if the outlawed practice offended the sensibilities of Congress and the Court. By refusing free exercise protection to religious conduct,\textsuperscript{145} the Court participated in the legislative persecution that succeeded in changing the Mormons’ religious beliefs.\textsuperscript{146}

\textit{Reynolds} and other cases involving Mormons\textsuperscript{147} crudely foreshadow themes that reappear in \textit{Northwest Indian}: (1) ethnocentric preconceptions appearing to inform the Court’s interpretation; (2) the government’s wide discretion to affect the practice of religion so long as it does not directly prohibit belief; and (3) the Court’s acquiescence to the knowing (or purposeful) impairment or eradication of religious conduct by minorities through government action.

\textbf{2. Protection of the Act as well as the Belief}

Half a century after \textit{Reynolds}, in \textit{Cantwell v. Connecticut},\textsuperscript{148} the Court rejected the crabbed reading given the free exercise clause in the Mormon cases and gave religious conduct a greater measure of constitutional protection. A unanimous Court reversed the convictions of several Jehovah’s Witnesses for soliciting money for a religious cause without

\begin{footnotes}
\item 141. 98 U.S. at 166-67.
\item 142. \textit{Id.} at 164.
\item 143. The Court noted that polygamy had been banned by common law and by statute in every one of the colonies and “was almost exclusively a feature of the life of Asiatic and of African people.” \textit{Id.} at 164-65.
\item 144. \textit{Id.} at 166-67. In a particularly florid parade of horribles, the Court asserted that democracy, as well as the moral purity of innocent women and children, depended on the enforcement of laws against polygamy. \textit{Id.} at 165-68; \textit{see also} Davis v. Beason, 133 U.S. 333 (1890) (upholding laws preventing practitioners or advocates of polygamy from voting or holding public office); Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1 (1890) (recognizing the power of Congress to repeal the charter of the Mormon Church and to seize its property).
\item 145. In \textit{Davis}, the Court limited the scope of religion protected by the free exercise clause to “one’s views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will,” as distinct from the “form of worship of a particular sect.” 133 U.S. at 342.
\item 146. The Mormon hierarch disavowed polygamy in 1890. \textsc{J. Noonan}, \textit{The Believer and the Powers That Are} 207 (1987). Congress returned the Church of Latter Day Saints’ property four years later and admitted Utah as a state in 1896. \textit{Id.}
\item 147. \textit{See} cases cited \textit{supra} note 144.
\item 148. 310 U.S. 296 (1940).
\end{footnotes}
prior government approval and common law breach of the peace.149 The Court held that legislation could not permissibly inhibit either beliefs or the “chosen form of religion.”150 The first amendment thus embraced both the freedom to believe and the freedom to act.151 As Justice Roberts noted in a much-cited phrase, “[t]he first is absolute but, in the nature of things, the second cannot be.”152 Deprivation of a religion’s means of survival was impermissible “censorship of religion.”153 Cantwell marked the first time the Court struck down a law as an infringement of the free exercise of religion.154

Cantwell balanced citizens’ interest in the free exercise of their religion against the state’s legislative prerogative.155 States could not place the physical means of a religion’s continued existence at the discretion of public officers.156 Further, general regulations that might infringe on religious practice had to have a permissible motive and could not inhibit free exercise more than was necessary to protect a substantial state interest.157

Cantwell’s protections were sharply but briefly limited in Minersville School District v. Gobitis.158 Gobitis rejected a free exercise challenge by Jehovah’s Witnesses to a statute requiring all schoolchildren to salute the American flag and recite the Pledge of Allegiance daily.159 The Court exempted any “general law not aimed at the promotion or restriction of

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149. Id. The Court held that the first amendment religion clauses applied to the states by virtue of the fourteenth amendment. Id. at 303.
151. Cantwell, 310 U.S. at 303.
152. Id. at 303-04. A state’s regulatory power “must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom.” Id. at 304. The Court reversed the breach of the peace conviction on both free exercise and free speech principles, id. at 307, holding that application of the common law offense to Cantwell punished conduct and speech protected by the first amendment. Id. at 309-10. Such expressive activity could not be criminalized unless it constituted “a clear and present danger to a substantial interest of the State.” Id. at 311. Cantwell had greeted the residents of a 90% Catholic neighborhood with literature and a recorded harangue specifically denouncing the Catholic church. Id. at 301.
153. See id. at 305. The Connecticut statute allowed a public officer to determine whether a cause was religious and to withhold a solicitation license if the officer decided the cause was not religious. Id. The Court acknowledged in dictum that a state could “protect its citizens from fraudulent solicitation by requiring a stranger . . . to establish his identity and his authority to act for the cause which he purports to represent.” Id. at 306.
154. J. NOONAN, supra note 146, at 234.
155. Cantwell, 310 U.S. at 304.
156. Id. at 305.
157. Id. at 306-07.
159. Basing their aversion on the biblical proscription of idolatry found in Exodus 20:3-5, Jehovah’s Witnesses believe the salute and pledge are forbidden by scripture. Gobitis, 310 U.S. at 591-92, 592 n.1. When the children refused to participate, they were expelled from public school, forcing their parents to place them in private school in order to comply with Pennsylvania compulsory education laws. Id. at 592.
religious beliefs” from free exercise scrutiny.160

The Gobitis Court limited free exercise protection to three narrow rights: subjective belief, conversion of others, and assembly in a chosen place of worship.161 The government thus could justify a broad range of burdens on religion unless the offended parties could show clearly that the government action lacked any rational basis.162

West Virginia State Board of Education v. Barnette,163 decided three years after Gobitis on essentially identical facts, overruled Gobitis and refined the test originated in Cantwell v. Connecticut.164 Barnette rejected the toothless “rational basis” test for legislation, holding instead that the first amendment religious rights of the individual limited the scope of state power.165 The Court ruled such rights could be restricted “only to prevent grave and immediate danger to interests which the state may lawfully protect.”166

Second, the Court found that its constitutional role prevented it from deferring to the judgment of legislative majorities and government officials where freedoms protected by the Bill of Rights were implicated.167 These freedoms were to be protected by the courts whenever any governmental body infringed them: “[N]one who acts under color of law is beyond reach of the Constitution.”168

Barnette established three principles relevant to free exercise analysis. First, infringements upon the free exercise of religion could be justified only if the government is safeguarding a legitimate state interest from grave and immediate danger. Second, the Court would not defer to legislative or executive judgment on Bill of Rights issues. Action by other branches of government was always subject to judicial scrutiny when that action conflicted with freedoms guaranteed by the Bill of Rights. Third, the Court found that the government has no inherent power to act contrary to the Bill of Rights; all levels of government must respect the freedoms guaranteed therein.169

160. Id. at 594.
161. See id. at 593.
162. Id.
163. 319 U.S. 624 (1943).
164. 310 U.S. 296 (1940); see supra notes 149-57 and accompanying text. Two new justices and the lone Gobitis dissenter, Chief Justice Stone, were joined by three members of the Gobitis majority (Justices Murphy, Black, and Douglas). Among the reasons for their change of heart may have been (1) Congress endorsed a voluntary flag salute in 1942, 36 U.S.C. § 172 (1942), cited in West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 638 n.17 (1943); and (2) Gobitis was widely criticized. J. NOONAN, supra note 146, at 250-51.
165. Barnette, 319 U.S. at 639. Like Cantwell, Barnette concerned a mixture of free exercise and free speech issues.
166. Id. The Court in Barnette found the state interest served by a compulsory flag salute “relatively trivial to the welfare of the nation.” Id. at 638.
167. Id. at 638-40.
168. Id. at 638.
169. Id. at 638-40.
3. *Balancing Indirect Burdens and Compelling Government Interests*

In the 1960's the Court began to consider government actions that burdened free exercise less directly than did the laws in *Reynolds* or *Barrett*. The challenged actions took the form of economic incentives to act contrary to religious tenets or general social requirements tending to undermine religious communities.

In *Braunfeld v. Brown*,170 the Court first established a framework for evaluating laws that impose indirect burdens171 on the free exercise of religion. A law would be invalid if its purpose or effect was to impede a religious observance or to discriminate between religions.172 Absent such an impermissible purpose, a law of general application could impose an indirect burden unless the secular purpose could be accomplished without imposing the burden.173 The Court held that economic disadvantage imposed on believers was an indirect burden not amounting to compulsion.174 The dissent, on the other hand, focused on the compulsory effect of forcing plaintiffs to choose between religious belief and economic survival.175

Two years later, in *Sherbert v. Verner*,176 the Court applied a more stringent analysis to indirect burdens on the free exercise of religion. After flatly rejecting the rational basis test,177 the Court held that government action that created even an incidental burden on the free exercise of religion had to be justified by a "compelling state interest in the regulation of a subject within the State's constitutional power to regulate."178 Once the state demonstrated such an interest, it then had to show that "no alternative forms of regulation would combat such abuses without

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170. 366 U.S. 599 (1961) (affirming that a state's imposition of a Sunday closing law does not interfere with the free exercise of religions that observe a day of rest other than Sunday).
171. According to the plurality opinion, the free exercise clause provides absolute protection against direct burdens on religious freedom, which include criminalizing a belief, forcing a belief on an unwilling citizen, or forcing a believer to say something conflicting with her religious beliefs. See id. at 603 (Warren, C.J., plurality opinion).
172. Id. at 607.
173. Id.
174. Id. at 605-06.
175. Id. at 611 (Brennan, J., concurring and dissenting) (pointing out that the complaint alleged that the plaintiffs would be forced out of business if required to close both days); id. at 616 (Stewart, J., dissenting). Justice Frankfurter rejected the free exercise claim, but proposed that the case be remanded so that the plaintiffs might try to prove that the law was irrational or arbitrary. Id. at 542-43 (separate opinion of Frankfurter, J.).
176. 374 U.S. 398 (1963) (state could not deny unemployment benefits to Seventh-Day Adventist who refused to work on her sabbath).
177. Id. at 406 ("It is basic that no showing merely of a rational relationship to some colorable state interest would suffice.").
178. Id. at 403 (quoting NAACP v. Button, 371 U.S. 415, 438 (1963)). The state could regulate religiously motivated conduct only if the conduct "posed some substantial threat to public safety, peace, or order." Id. Sherbert's objection to Saturday labor posed no such threat. Id.
infringing First Amendment rights."

Sherbert also gave more weight to indirect economic burdens than had Braunfeld. A state-imposed choice between adhering to a religious practice and losing benefits, or abandoning the practice in order to receive benefits, amounted to "the same kind of burden upon the free exercise of religion as would a fine imposed . . . for . . . Saturday worship."

Thus, under Sherbert, analysis of free exercise challenges proceeded as follows. First, the plaintiff had to show an infringement of her freedom to exercise a religious practice. Next, a direct or purposeful infringement was unconstitutional unless the religious practice posed an immediate and grave threat to society. Finally, an incidental infringement was unconstitutional unless the state had shown (1) a "compelling" or "paramount" state interest, (2) that was within the state's legislative competence, and (3) that could not be served by alternative means that would not restrict free exercise.

The Court clarified the Sherbert analysis in two subsequent cases, Wisconsin v. Yoder, and Thomas v. Review Board of the Indiana Employment Security Division. Yoder allowed the exemption of Old Order Amish children from compulsory secondary education because high school attendance is contrary to Amish beliefs. The Court held that a facially neutral statute pursuing a substantial state interest was subject to a balancing test if the statute unduly burdened fundamental free exercise rights. Under the Yoder approach, a plaintiff established a prima facie free exercise clause claim by demonstrating that practices sincerely rooted in religious belief were infringed. Given such a showing, "only those interests of the highest order and those not otherwise served can

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179. Id. at 407. Sherbert appeared to overrule Braunfeld v. Brown, 366 U.S. 599 (1961). The Sherbert majority attempted to distinguish Braunfeld on the grounds that (1) the burden in Braunfeld was less direct; (2) the state interest in providing a uniform day of rest in Braunfeld was strong; and (3) the entire statutory scheme would have been unworkable owing to either greater administrative problems or a competitive advantage available to those merchants allowed to remain open on Sunday. Sherbert, 374 U.S. at 408-09. But see id. at 417-18 (Stewart, J., concurring in the result), and id. at 421 (Harlan and White, J.J., dissenting) (arguing that Braunfeld had been overruled).

180. 374 U.S. at 404. The Court also rejected arguments that benefits were a mere privilege, reasserting that conditioning benefits on a willingness to violate religious principles penalized the free exercise of a constitutional right. Id. at 405-06.

181. The balancing test applied only to incidental restrictions of religious practice; direct or purposeful infringement was conclusively unsound. Id. The Sherbert majority, by overturning an impermissible state action, put teeth into the requirement that "no alternative forms of regulation" be available to accomplish the goal without infringing religious practices. Sherbert, 374 U.S. at 407.


184. 406 U.S. at 214, 220.

185. Id. at 217-19. The majority thus excluded claims based on a philosophical preference such as Thoreau's rejection of social values. Id. at 215-16. But see id. at 247-49 (Douglas, J.,
overbalance legitimate claims to the free exercise of religion."\textsuperscript{186}

In finding for the Amish claimants, the Court stressed the harmful
effect of the challenged state action on the Amish community and culture.\textsuperscript{187} Noting the length and continuity of Amish practice, the Court emphasized (1) the interrelationship of the religious beliefs and the way of life of the Amish, (2) the threat to that way of life posed by compulsory education of the Amish teenagers, (3) the adequacy of Amish home education in achieving the state's goals of universal education, and (4) the difficulty most groups would face in making equivalent showings.\textsuperscript{188}

The Court in \textit{Thomas} clarified the test applied to state actions that indirectly or incidentally infringed upon a religious practice. An infringement could be justified only if it were the least restrictive means of achieving a compelling state interest of the highest order.\textsuperscript{189} The Court declared that to trigger free exercise analysis it was not necessary for the religious beliefs of a group to be acceptable or comprehensible to non-believers.\textsuperscript{190} Furthermore, to invoke first amendment protection, a belief need not be articulated with precision or shared by all members of a religious sect.\textsuperscript{191}

4. \textit{Leading up to Northwest Indian—The Compelling Interest Standard Survives Increasing Deference}

Between \textit{Thomas} and \textit{Northwest Indian}, the Supreme Court exempted the military and "the Government's internal procedures" from "compelling interest" balancing. The Court seemed to retain the compelling interest test as a general principle to be applied to indirect or incidental infringements on free exercise. In \textit{Goldman v. Weinberger},\textsuperscript{192} the Court dispensed with the usual balancing test and excused the Air Force from review of its rational justification.\textsuperscript{193} The Court held that "the military's \textit{perceived need} for uniformity," reasonably and even-handedly applied, legitimized the infringement of Goldman's religious practice.\textsuperscript{194}

dissenting in part) (noting that the Court's view regarding philosophical preferences was at odds with its previous decisions involving conscientious objectors).

\textsuperscript{186} \textit{Id.} at 215.
\textsuperscript{187} \textit{Id.} at 216-18, 235-36.
\textsuperscript{188} \textit{Id.} at 235-36.
\textsuperscript{189} \textit{Thomas v. Review Bd.}, 450 U.S. 707, 718 (1981); \textit{cf. supra} notes 176-88 and accompanying text (discussing the previous tests regarding state actions violating the free exercise clause). \textit{Thomas} combined the most protective elements of previous tests.
\textsuperscript{190} \textit{Thomas}, 450 U.S. at 714.
\textsuperscript{191} \textit{Id.} at 715-16. Thomas's struggle with his belief that he was forbidden by the scriptures to work as a sheet-metal fabricator of tank turrets did not lessen the free exercise clause protection of that belief. \textit{Id}.
\textsuperscript{192} 475 U.S. 503 (1986) (upholding application of Air Force regulation that barred an Orthodox Jewish psychologist with a religious duty to wear a yarmulke from wearing any headgear indoors.)
\textsuperscript{193} \textit{See id.} at 509-10.
\textsuperscript{194} \textit{Id.} at 510 (emphasis added).
In *Bowen v. Roy*, the Court rejected an Abenaki Indian's suit to prevent the use of a Social Security number to process welfare benefits for his daughter. Roy claimed that use of the number would rob his daughter of her spirit and prevent her from attaining greater spiritual power. The Court held that the free exercise clause "does not afford an individual a right to dictate the conduct of the Government's internal procedures." An individual could not use the clause as a sword to make the government "behave in ways that the individual believes will further his or her spiritual development." Second, the Court concluded that "[t]he federal Government's use of a Social Security number for [Roy's daughter] does not in itself in any degree impair Roy's freedom to believe, express, and exercise his religion." The plaintiff's failure to show infringement on his beliefs or mode of worship would appear to dispose of the case under traditional free exercise analysis, making the Court's "internal procedures" analysis unnecessary and hence dicta.

The Court was divided on whether the government could require Roy to use his daughter's Social Security number to receive benefits. A portion of Chief Justice Burger's opinion, joined by Justices Powell and Rehnquist, distinguished the case from *Sherbert* and claimed that "mere denial of a governmental benefit by a uniformly applicable statute does not constitute infringement of religious liberty." This portion of the

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196. Payments on the child's behalf had been terminated because Roy refused to obtain a Social Security number for her. *Id.* at 695, 698.  
197. *Id.* at 696. Certain facts made *Roy* a less than ideal test case for the issue of Social Security number assignment and use as an infringement of free exercise. For example, both of the child's parents and her older sister already had Social Security numbers. *Id.* at 696 n.2. Furthermore, Roy originally claimed that merely assigning a number would injure his daughter's spirit, *id.* at 697, although the child in question had been assigned a Social Security number at birth. *Id.* at 718 n.8 (Stevens, J., concurring in part and in the result) (citing the trial record). Roy subsequently altered his claim, stating that his daughter would encounter harm if the number were used. *Id.* at 697.  
198. *Id.* at 700 (comparing Roy's demand to an attempt to dictate the size or color of government filing cabinets); see *id.* at 713 (Blackmun, J., concurring in part); *id.* at 716-17 (Stevens, J., concurring in part and in the result); and *id.* at 724 (O'Connor, J., concurring in part and dissenting in part) (all joining the quoted part of the Burger opinion). White's dissent found *Sherbert* v. *Verner*, 374 U.S. 398 (1963), and *Thomas* v. *Review Bd.*, 450 U.S. 707 (1981), controlling on all issues. 476 U.S. at 733 (White, J., dissenting).  
199. 476 U.S. at 699.  
200. *Id.* at 700 (footnote omitted).  
201. See, e.g., supra notes 181, 185 and accompanying text.  
202. 476 U.S. at 704, 708. But see *Sherbert*. 374 U.S. at 404-06 (denial of unemployment benefits under statute refusing benefits to those unavailable for work was unconstitutional as applied to Seventh Day Adventist refusing to work on Saturday sabbath). Burger argued that the statute involved in *Sherbert* created a mechanism for individualized exemptions, whose application suggested a discriminatory intent. 476 U.S. at 708. *Roy*, in contrast, involved a "uniformly applicable statute" that was "neutral on its face." *Id.* at 704, 708. Thus, Burger
opinion advocated “substantial deference” to government decisions to ignore religious needs and a lowered standard of free exercise clause analysis in benefits cases. Government benefits programs would withstand scrutiny as long as the government’s scheme was neutral and uniform in its application and was a “reasonable means of promoting a legitimate public interest.”

Justice O’Connor, joined by Justices Brennan and Marshall, concurred in part and dissented in part. Justice O’Connor found the Sherbert balancing test applicable to the question of whether Roy had to provide the number despite his beliefs and that the government had available less restrictive means to prevent welfare fraud. Justice O’Connor noted the lack of precedent for the reasonable means test, which would relegate free exercise claims to “the barest level of minimal scrutiny.” She believed such a lax interpretation of the clause would enfeeble the Constitution’s “express limits upon governmental actions limiting the freedoms of . . . society’s members.”

The last free exercise case decided before Northwest Indian was Hobbie v. Unemployment Appeals Commission of Florida, which reaffirmed the traditional free exercise analysis of incidental burdens on religious practice. The Court expressly rejected Burger’s attempt in Roy to apply a reasonable means test to some “incidental neutral restraints on the


The Northwest Indian Court perpetuated the notion of the free exercise clause as prohibiting religious discrimination rather than interference with religion. According to the Court, the government could destroy sacred sites but might not be able to discriminate against the adherents of religions that used them. See 108 S. Ct. at 1327.

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free exercise of religion.”

Thus, prior to *Northwest Indian*, the Court’s free exercise clause doctrine stood as follows: Direct criminalization of religious activity and compulsion to act in a manner contrary to religious belief (direct burdens) were forbidden unless justified by a grave danger to a substantial government interest. Indirect burdens on religious practice had to be justified by a government interest of the highest order that could not be served by less restrictive means.

**B. Lower Court Indian Sacred Lands Cases**

Before *Northwest Indian*, the Supreme Court had never considered whether development of federal land could injure the free exercise rights of American Indians. Lower federal courts, however, had considered several such claims.

The first appellate opinion on an Indian free exercise challenge to public lands development was *Sequoyah v. Tennessee Valley Authority*. Cherokee Indians challenged the impoundment of the reservoir behind the Tellico Dam in Tennessee, claiming that the planned flooding would destroy sacred sites and render them spiritually ineffectual.

The Sixth Circuit affirmed summary judgment against the Indian plaintiffs. The trial court had found that the plaintiffs’ free exercise claim was precluded on the grounds that the Cherokees lacked a property interest in the site. However, the Court of Appeals chose to balance the burden on religion against the government’s interest. The absence of a

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210. *Id.* at 141; Bowen v. Roy, 476 U.S. at 712 (opinion of Burger, C.J.).


213. *Id.* at 1160, 1162.

214. *Id.* at 1160, 1162.

215. This analysis was based on *Sherbert* and *Yoder*. 620 F.2d at 1163.
property interest was not conclusive in view of the history of Cherokee expulsion from the area at issue and the importance of geographic sites to the Cherokee religion.216

Before this balancing could proceed, however, the Sixth Circuit required that the Cherokees prove the “centrality or indispensability” of the area to be flooded to their religious practice.217 The court ruled that the plaintiffs’ affidavits did not show that the sites at issue were “central or indispensable to religious practice,” and that the affidavits reflected “personal preference” unprotected by the first amendment.218

In Badoni v. Higginson,219 the Tenth Circuit focused on the govern-

216. Id. at 1164. In what is known as the Trail of Tears, the U.S. Army forcibly removed the Cherokee from Appalachia to Oklahoma in 1838-39; several thousand died on the journey. F. PRUCHA, THE GREAT FATHER 233-42 (1984).

217. 620 F.2d at 1164. This threshold requirement was based on language in Yoder, 406 U.S. 205, 215-16 (1972) (religious faith and lifestyle of the Amish were “inseparable and interdependent”) and two state court cases dealing with American Indian religious freedom, Frank v. State, 604 P.2d 1068, 1071, 1073 (Alaska 1979) (reversing conviction for killing moose out of season because moose meat was “centerpiece to the most important ritual in Athabaskan life,” the funeral potlatch), and People v. Woody, 61 Cal. 2d 716, 720-22, 394 P.2d 813, 817-18, 40 Cal. Rptr. 69, 73-74 (1964) (peyote possession and use by Native American Church members was protected from criminal prosecution because peyote is “theological heart” and “sine qua non” of the religion).

218. 620 F.2d at 1164-65. The Sixth Circuit noted that medicine gathered by plaintiffs in the Little Tennessee Valley could be gathered elsewhere and that plaintiffs established use of the area only by a few individuals. But see id. at 1165 (Merritt, J., dissenting) (case should be remanded to allow plaintiffs to prove claim under newly established standard); Stambor, supra note 211, at 66-67 (criticizing the court’s characterization of the evidence). The court thus emphasized that plaintiffs must present the objectively demonstrable importance of an area to the outward practice of a religion. Conceivably, the court wanted to forestall claims based on subjective belief alone, which not only could not be proven or disproven, but could be claimed by any person. The cases from which the Sixth Circuit derived the centrality-indispensability analysis had not required plaintiffs to show centrality or indispensability as a threshold to establishing a burden on religion. See Yoder, 406 U.S. at 215-16; Frank, 604 P.2d at 1071, 1073; Woody, 61 Cal. 2d at 720-22, 394 P.2d at 816-18, 40 Cal. Rptr. at 72-74. These earlier opinions assessed the centrality or indispensability of a practice at the next stage of analysis, weighing the importance of the restricted practice against the government’s interest in the regulation or action. See Yoder, 406 U.S. at 217-29; Frank, 604 P.2d at 1071-73; Woody, 61 Cal. 2d at 722-24, 394 P.2d at 818-19, 40 Cal. Rptr. at 74-75. The threshold in the earlier cases had simply been a showing of infringement upon any religious practice. See Yoder, 406 U.S. at 215-16; Frank, 604 P.2d at 1071-73; Woody, 61 Cal. 2d at 722, 725, 394 P.2d at 818, 820, 40 Cal. Rptr. at 74, 76.

The higher threshold established by the Sequoyah court can probably be explained by the significance of the government’s property interest in the affected land. After acknowledging the relevance of the plaintiffs’ lack of a property interest, the court, in the same paragraph, introduced the centrality-indispensability analysis. Sequoyah, 620 F.2d at 1164. The court did not, however, explicitly connect the two ideas.

Certain facts weakened the plaintiffs’ case in Sequoyah. For one thing, the dam was complete or nearly so. See id. at 1162. Also, while Cherokee objections based upon cultural concerns had been raised as early as 1965, free exercise issues were raised for the first time upon plaintiffs’ filing of the complaint in 1979. Id. Finally, many sites, including the ancient city of Chota, had only been discovered in the course of archaeological investigations in preparation for the dam project. Id. at 1163.

219. 638 F.2d 172 (10th Cir. 1980).
ment's compelling interest in pursuing particular land management objectives. Plaintiffs sought to prevent the flooding and desecration of sacred sites in Rainbow Bridge National Monument by enjoining the continued filling of Lake Powell and by forcing the government to institute stricter controls on tourist activities in the area. The court decided in favor of the government, but subjected federal land management policies to free exercise clause scrutiny. To establish a burden on free exercise, the court required that the plaintiffs show the "coercive effect" of government action on their religious practice. The court appeared to acknowledge that plaintiffs had alleged such a coercive effect based upon their religious interest in maintaining the sacred sites.

The Badoni court then applied Yoder's compelling interest analysis to the reservoir-filling claim, without requiring any threshold showing of centrality or indispensability. The court concluded that the government's interest in multistate water and power projects was of the highest order and could not be served if Lake Powell was kept at a level low enough to protect plaintiffs' religious sites.

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221. 638 F.2d at 176 ("The government must manage its property in a manner that does not offend the Constitution.").
222. Id. (quoting School Dist. v. Schempp, 374 U.S. 203, 223 (1963)).
223. See id. at 176-77.
224. Id.
225. Id. at 177. The Court found that the presence of tourists, even of those who defaced Rainbow Bridge, did not constitute coercion in violation of the free exercise clause. Id. at 177-78. Plaintiffs did not have a free exercise right to exclusive use of the monument at any time, id. at 178-79; any such interest was overridden by the government's interest in keeping the monument open to the public. Id. at 178-80.

Tourists could not be excluded even on a limited basis, nor could their behavior be more closely controlled, without implicating the establishment clause. Id. at 179; see also Crow v. Gullet, 706 F.2d 856 (8th Cir. 1983) (per curiam) (management of Bear Butte State Park in South Dakota did not unconstitutionally burden the religious practice of the Lakota and Tsistsistas Indian plaintiffs). Notably, the trial court in Crow eschewed the centrality-indispensability threshold analysis, and instead required a showing of coercive effect on the Indians' practices. 541 F. Supp. at 790. A coercive effect had to include some restriction of conduct, which apparently could include actions damaging particular religious practices. Id. at 790-91. The court gave considerable, but not controlling, weight to the Indians' lack of a property interest in the park. Id. at 791. The court remarked that the state's duty not to prohibit religious acts did not impose a duty to provide the means or environment for carrying them out. Id. (citing Clark v. Wolff, 347 F. Supp. 887 (D. Neb. 1972), aff'd 468 F.2d 252 (8th Cir. 1972)). The court found that the Indians failed to establish that construction activities in the park had damaged their religious practices. Id. Furthermore, the access road and parking lot construction to which plaintiffs objected had been requested by several other groups of Indians who used the park for religious purposes. Id.

Crow held that the state was not required to police tourist activity to protect the Indians' solitude. Id. at 791-92. The court found that tourist activity did not impose a burden on religious practice in any event because one plaintiff testified that he had successfully completed his Vision Quest in the past year despite the distraction of tourists. Id. at 792. The court also felt that the inconvenience of the park's permit system and the partial restriction of access during construction were justified by the state interest in ensuring visitor safety and preserving the park environment. Id. at 792-94.
In *Wilson v. Block*, the District of Columbia Circuit returned to the *Sequoyah* burden analysis but modified the standard to exclude judicial evaluation of the centrality of religious beliefs. The court agreed with the opinion in *Sequoyah* that the standard for showing free exercise burdens in land management cases was stricter than that required in other indirect burden cases. However, the *Wilson* court required only that the particular land threatened be "indispensable to some religious practice."

Based on this approach, the *Wilson* court rejected Hopi challenges to the expansion of a ski resort in the San Francisco Peaks within the Coconino National Forest. While the plaintiffs established the indispensability of the San Francisco Peaks as a whole, they failed to establish "the indispensability of that small portion of the Peaks encompassed by the Snow Bowl permit area" or the site of the proposed expansion. While plaintiffs might have believed that the sacred quality of the Peaks was impaired by the ski resort development, they had not shown a cognizable burden on religious practice.

227. *Id.* at 742-44. The D.C. Circuit rejected the emphasis placed on government property rights by other courts. Noting that the Constitution "nowhere suggests that the Free Exercise Clause is inapplicable to government land," the Court found "no basis for completely exempting government land use from the Free Exercise Clause." *Id.* at 744 n.5.
228. *See id.* at 743-44.
229. *Id.* More specifically, the court required that "plaintiffs seeking to restrict government land use in the name of religious freedom must, at a minimum, demonstrate that the government's proposed land use would impair a religious practice that could not be performed at any other site." *Id.* at 744.
230. *Id.* at 739. The court also rejected the plaintiffs' attempt to remove existing ski facilities.
231. *Id.* at 744. The court emphasized that the "permit area comprise[d] only 777 of the 75,000 acres of the Peaks, and that prior construction on the Peaks ha[d] not prevented the plaintiffs from practicing their religions." *Id.* at 744-45. In addition, the proposed expansion encompassed an area of only 50 acres. *Id.* at 739.

The court also emphasized that plaintiffs' religious practices had managed to coexist with the ski area for nearly 50 years. *Id.* at 745. Elsewhere on the Peaks were various roads and power lines, and mining had been conducted for 30 years. *Id.* at 745 & n.6.

232. *See id.* at 744-45. Some testimony indicated that the traditional Hopi religion might die out because of the continued presence of the ski facilities, but the danger seemed to be due to the difficulty of convincing the young that the San Francisco Peaks were still sacred despite the presence of the ski resort. *Id.* at 740 n.2. Thus, the ski development might only affect the strength of plaintiffs' belief in the Peaks' sacredness, rather than foreclose any particular practice.

Two other cases have examined Native American free exercise claims involving public territory. In *Inupiat Community of the Arctic Slope v. United States*, 548 F. Supp. 182 (D. Alaska 1982), *aff'd per curiam*, 746 F.2d 570 (9th Cir. 1984), the court rejected an attempt to quiet title to huge portions of the Chukchi and Beaufort seas which the plaintiffs claimed were necessary to the Inupiat hunting and gathering lifestyle, which in turn was inextricable from their religious beliefs. *Id.* at 188. The court found that the only identified sacred sites were on land and located well outside the contested area. *Id.* at 188-89.

Wilson v. Block thus focused free exercise inquiry on the link between a particular geographic area and a particular religious practice that could not be performed elsewhere. Though land development might erode religious beliefs, the free exercise clause was not implicated unless the mode of worship was irreparably injured as well.

The Ninth Circuit's opinion in Northwest Indian was consistent with the analysis developed by the other circuit courts in sacred lands cases, particularly Sequoyah and Wilson. The Ninth Circuit's standard required plaintiffs to show both that particular practices would be seriously impaired by the challenged development and that the impaired practices and the beliefs related to them were central to their religion as a whole.\textsuperscript{233}

The Ninth Circuit found "abundant evidence that the unitary pristine nature of the high country is essential" to religious use, and that the religious lives of many other Indians depended on the services of those who received power from the High Country.\textsuperscript{234} The court relied on trial court findings that the High Country was essential for training religious leaders, preparing for ceremonies, and for the practice of healers and lay individuals seeking spiritual expression.\textsuperscript{235}

Having found that the government's proposed development burdened plaintiffs' free exercise of religion, the Ninth Circuit reviewed For-

1988), ordered the Forest Service to issue a special use permit for the Yellow Thunder religious camp in the Black Hills National Forest on the basis of the central-indispensable analysis. Means involved access to, not government development of, public lands. The central-indispensable test was again modified to avoid qualitative evaluation of a religion. "[P]ractices should not be judged as essential or not; rather, the question is whether a particular site is essential to some religious practice." \textit{Id.} at 261. The court disposed of the government's establishment clause objections by holding that accommodation to Indian religious practices was necessary under the free exercise clause and by noting the number of Christian churches on National Forest land. \textit{Id.} at 264.

The Means trial court opinion revealed the disingenuous tactics of government lawyers attempting to deny American Indian religious rights; the Forest Supervisor testified, "I found the Lakotas do consider the Black Hills to be sacred, I can't explain why my attorneys are saying that this is only a recent position of the Lakotas." \textit{Id.} at 252. The trial court found Forest Service policy "skewed such that it discriminates against Indian [use permit] applicants." \textit{Id.} at 269. Declining to defer to the Service, the court found the Forest Supervisor to be biased in favor of the Forest Service's interpretation of multiple use policy, see supra note 44, which caused him to reject uses inconsistent with that interpretation.

The Eighth Circuit Court of Appeals reversed Means, citing the Supreme Court decision in Northwest Indian to support its finding that the Forest Service had not infringed free exercise rights. 858 F.2d 404, 407 (8th Cir. 1988). The court of appeals also challenged the trial court's findings of discrimination and deferred to the Forest Service's interpretation of its multiple use mission. \textit{Id.} at 408-10.


\textsuperscript{234} \textit{Id.} at 692. The court noted the government had produced "virtually no evidence" contradicting the nature and scope of the religious significance of the High Country. \textit{Id.}

\textsuperscript{235} \textit{Id.; see also} Northwest Indian Cemetery Protective Ass'n v. Peterson, 565 F. Supp. 586, 594 (N.D. Cal. 1983).
est Service claims of a compelling governmental interest in building the G-O Road and logging the High Country. The Ninth Circuit did not find an interest of sufficient magnitude to override the Indians' claims. Moreover, the court refused to defer to the executive branch to determine the order of interest the road served. The court noted that judicial balancing was intrinsic to free exercise jurisprudence.

The court distinguished the then-recent Roy case on the grounds that the road "would virtually destroy the plaintiff Indians' ability to practice their religion." Furthermore, said the court, "logging and roadbuilding on public lands, to which the public has access, is not the kind of internal governmental practice that the court found beyond free exercise attack in Roy."

The court also rejected the government's claim that maintaining the area as wilderness amounted to the maintenance of a religious preserve in violation of the establishment clause. The court found, rather, that management accommodating the free exercise of religion properly manifested a policy of neutrality. Furthermore, the court noted that the Forest Service could manage the High Country so as not to infringe plaintiffs' religion, while fulfilling other statutorily mandated purposes of National Forests.

Prior to the Supreme Court decision in Northwest Indian, all five circuits that had considered the issue under review in Northwest Indian recognized the validity of American Indian free exercise challenges to federal land management actions. Each had applied a difficult balancing test. Some had required a high threshold showing of burden. Plaintiffs had to prove that the lands in question were indispensable to a religious practice or that the challenged management activity impaired religious practice. The Ninth Circuit additionally required plaintiffs to show that the practice affected was central to their religion. This requirement, in effect, denied relief unless the religion was threatened with extinction by the proposed development. Even if a cognizable infringement on religion

236. 795 F.2d at 694-95.
237. Id.; see supra notes 94-100 and accompanying text.
238. 795 F.2d at 694-95. The court cited Justice O'Connor's opinion in Roy, 476 U.S. 693, 727 (1986), for the proposition that the executive branch must show a compelling governmental interest to justify infringements of the free exercise of religion. 795 F.2d at 695 n.9.
239. 795 F.2d at 695.
240. Id. at 693; see supra notes 195-207.
241. 795 F.2d at 693.
242. Id. at 694.
243. Id.
244. Id. These purposes included preservation of outdoor recreation, fish and wildlife habitat, watershed, wilderness, and range. Id. (citing 16 U.S.C. § 1604(e)(1) (1982)). The only foreclosed purpose would be timber cutting.
245. See supra note 233 and accompanying text.
was shown, the government still could justify the development by demonstrating that it served a compelling public interest.

III
ANALYSIS
A. Critique

From Cantwell to Hobbie, the Court’s interpretation of the free exercise clause went progressively beyond a mere prohibition against criminalizing religion. The Court’s focus shifted from the type of governmental restriction to the effect of governmental action. To withstand scrutiny, even indirect and incidental impediments to the free exercise of religion had to be justified by a compelling interest of the highest order and achieved by means minimally restrictive of the free exercise of religion. This was the general rule until the Court heard Northwest Indian.

The Northwest Indian Court advanced two intertwined reasons for rejecting claims that developing the High Country would infringe free exercise rights. First, the government action under challenge did not resemble the forms of coercion employed in actions the Court overturned in previous cases. The Court found that the free exercise clause forbade only those types of coercion aimed at individual believers, as through a penalty or the withholding of benefits. Second, the Court identified the type of government action before it as an “internal government procedure” exempt from free exercise review, presumably because an internal procedure could not coerce citizens.

1. Excessive Formalism—The Government May Prevent Religious Observance as Long as Individuals Are Not Punished

The Northwest Indian Court exempted from free exercise scrutiny government action that would make a series of religious practices impossible and effectively destroy a group of religions and the communities depending on them. The form of the challenged action did not match the form of actions previously addressed by the Court. The Court limited free exercise scrutiny to the compulsion of behavior contrary to religious belief and to the punishment of behavior consistent with religious

247. Id.
248. Id.
249. It is unclear if the internal procedures doctrine applies to government procedures that appear to infringe the religious practices of government employees. So far the doctrine has been applied only to information systems, see Bowen v. Roy, 476 U.S. 693 (1986), and property management, see Northwest Indian, 108 S. Ct. 1319 (1988). Government procedures influencing employee behavior would appear to coerce individuals in a way cognizable under the Court’s limited coercion analysis.
belief. 250

This formal approach to constitutional review, however, is at odds with normal Supreme Court analysis. "[I]n passing upon constitutional questions the court has regard to substance and not to mere matters of form." 251 Constitutional analysis should examine the "operation and effect" of government actions. 252 The Northwest Indian majority's own paraphrase of free exercise precedents recognizes the primary significance of the inhibiting effect of government action: "[T]his Court ... sustained free exercise challenges to government programs that interfered with individuals' ability to practice their religion." 253 The National Forest System is surely a government program, a planned and organized action of government in a particular sphere. 254 Interference by such a program with the "ability to practice ... religion," rather than the form of that interference, should trigger the free exercise clause.

The Northwest Indian opinion countenances restrictions on religious practice unless they are in the form of a criminal penalty applied to individual religious conduct or, apparently, government-related economic coercion to act contrary to belief. 255 Indirect compulsion or proscription appears to be limited only in the criminal or public benefits context; 256 general taxes have been exempted from free exercise analysis in previous cases. 257

The Court arrived at its interpretation of the free exercise clause by emphasizing the factual contexts while glossing over the underlying principles of previously decided cases. This technique makes it unnecessary to overturn precedent while guaranteeing that constitutional restraints on government action will not apply to novel situations. 258 In effect, the

252. Id.
253. 108 S. Ct. at 1326.
254. Free exercise protection is not limited to infringements that result from programs rather than isolated government actions. See, e.g., Cantwell v. Connecticut, 310 U.S. 296 (1940) (discussed supra notes 148-57 and accompanying text).
255. See 108 S. Ct. at 1326.
256. The Court unanimously reaffirmed free exercise protections in the unemployment compensation context in Frazee v. Illinois Dep't of Employment Sec., 57 U.S.L.W. 4397 (U.S. Mar. 29, 1989) (No. 87-1945) (state could not withhold benefits from individual who refused to work on Sundays due to personal religious beliefs even though not following tenet of organized sect).
257. See United States v. Lee, 455 U.S. 252, 260 (1982). Lee used compelling interest balancing, but gave conclusive weight to the government's interest in uniform Social Security tax administration; part of the Court's rationale was that requiring religion-based exemptions to the Social Security program would ultimately, and undesirably, interfere with other general tax programs. Id.
258. The Court's attempt to analogize Northwest Indian to Bowen v. Roy, 476 U.S. 693 (1986), reflects an unwillingness to analyze a new situation. See infra notes 271-74, 285-97 and accompanying text for a discussion of some obvious differences between the two cases.
factual situations previously presented to the Court define and limit the extent of free exercise clause protection. Thus the Court need engage in free exercise balancing only if the government has compelled individual activity contrary to religious belief, or penalized activity connected with religious belief, by imposing a criminal sanction or withholding a government benefit. Previously, the Court made similar, ultimately unsuccessful attempts to hold the line on the free exercise clause by defining the limits of the clause in terms of the particular situations that had already triggered the clause's protections. The rationale of the *Northwest Indian* formulation is another fact-based hodgepodge masquerading as a rule.

Supreme Court precedent stresses the inhibiting effect of government action on religion; it does not restrict analysis to the form of the inhibition. Secular government programs cannot be “misuse[d] . . . to impede the observance of [a] . . . religion,” even indirectly. For example, *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in North America* invalidated a state ejection ruling that transferred the right to use a cathedral from one faction of the Orthodox Church to another. Neither belief nor ritual were affected, as there was no spiritual schism, and state property law dictated the transfer. Without referring to any coercive aspect, the Court found a violation of the free exercise clause through excessive state intrusion into the religious sphere.

The Court found that the state was powerless to control the cathedral property without invading religious freedom “because it is a Cathedral

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major difference is that the Court found that Roy’s ability to express his religion was not impaired, 476 U.S. at 700, whereas in *Northwest Indian* the Court found that the G-O Road would have “devastating effects on traditional religious practice.” 108 S. Ct. at 1326.

259. *Braunfeld v. Brown*, 366 U.S. 599, 603-09 (1961), limited the scope of free exercise protection as follows: (1) compelled acceptance of a creed or worship practice is forbidden; (2) criminal or quasi-criminal compulsion to act contrary to one’s belief is forbidden (accounting for *Barnette*); and (3) economic compulsion to act contrary to one’s beliefs is within the legislative prerogative unless less restrictive means are available. The last prong, the main effect of which was to exempt indirect compulsion from a compelling interest analysis, was largely undercut by *Sherbert*, 374 U.S. 98 (1963). See supra notes 176-81 and accompanying text. The Court’s acknowledgement of protection of conversion activity in *Gobitis*, 310 U.S. 586 (1940), implicitly accepts *Cantwell*. See supra note 164 and accompanying text.

260. *Gillette v. United States*, 401 U.S. 437, 462 (1971) (draft exemption case). *Gillette* warned against the misuse of government programs to impede religious observance. *Id.* In *Northwest Indian*, the “misuse” of a government program arguably occurred when the Forest Service proceeded with the G-O Road despite knowledge that the effects on Indian religion could not be mitigated and used the EIS to give the misleading impression that the effects had been mitigated. See Reporter’s Transcript, supra note 15, at 203-06, 215-18 (testimony of Joseph Winters, Six Rivers National Forest Archaeologist, 1977-79).


262. *Id.* at 119-20.

263. *Id.* at 120-21. The authority to determine the use of the cathedral depended on the identity of the ruling hierarch for the American churches; the Court held that the Russian Orthodox Church’s determination of the proper patriarch controlled, although the other patriarch’s faction held title to the property under New York law. *Id.* at 95, 96 & n.1, 97.
and devoted to religious uses." 264

Kedroff suggests that coercion should not be a required element in proving a violation of the free exercise clause. The only coercive element involved in Kedroff was the attenuated, indirect effect of requiring one group to find another building. Even if coercion is to be required, the "coercive effect," not the form of coercion, should govern the analysis. 265 Under this standard, Northwest Indian should have had a different result. The proposed government action in Northwest Indian undeniably impeded the observance of plaintiffs' religions. 266 By destroying the physical conditions necessary to engage in practices, the government would indirectly force the abandonment of those religions. This has at least as much coercive effect as withholding certain government benefits, which imposes an economic burden on religious observers. 267 One may choose to forgo an economic benefit. However, if a religious practice has become physically impossible through the degradation of sacred sites, an adherent has no choice but to abandon the religion.

In Wisconsin v. Yoder, the Court focused on the destructive effects that two extra years of high school might have on the beliefs and practices of children of the Amish community, distracting them from the austere and pious Amish ethos. 268 The survival of the Amish way of life was the key element in the Court's analysis. However, the Court in Northwest Indian held that compulsion of the individual was necessary, claiming that Yoder did not indicate that impact without narrowly defined compulsion would implicate the free exercise clause. 269 That Yoder did not decide cases not before it does not bolster the Northwest Indian Court's restriction of free exercise relief. Neither Yoder nor the other free exercise cases explicitly limit the free exercise clause to actions reflecting particular forms of coercion.

The free exercise clause should be implicated whenever the effects of government actions cross the line from offending belief to causing perceptible harm to religious conduct, which is a physical expression of the spirit. Developing the High Country in Northwest Indian infringed free exercise rights not because plaintiffs believed the spiritual purity of the area would be impaired, but because they proved that ritual practices would be impeded by the aural distraction caused by frequent vehicle traffic and the visual distraction caused by a scarred landscape. 270

264. Id. at 129 (Jackson, J., dissenting) (emphasis added).
266. 108 S. Ct. at 1326.
269. 108 S. Ct. at 1329.
In *Roy,* the government merely offended the plaintiffs' beliefs but did not impede their religious practice. Properly considered, *Roy* is a no-injury case. Use of a Social Security number had no effect on Roy beyond his subjective belief system, as it did not impair any objectively manifested practice. Neither did it affect the range of religious tenets in which he might believe. The government's use of the number only caused him to believe that his daughter's spiritual development might be limited. The government's practice conflicted with Roy's religious belief, but did not prevent him from believing that Social Security numbers impair spiritual development. Constitutional safeguards do not reach intangible ill effects in the spiritual world. Roy's daughter could express her religion in the same manner with or without a Social Security number, though she or her father might believe that the expression was less spiritually efficacious if the number was used.

Effect-based free exercise burden analysis does not restrict neutral government actions that merely conflict with citizens' religious beliefs. While some actions may offend the subjective religious beliefs of individuals, the government is simply incapable of making subjective belief more difficult or impossible. Interference with the physical practice of a religion is a matter of a different order. Here, a believer is actually restricted from worshipping as she wishes, perhaps as her sect has worshipped for generations. Such interference is both easier to prevent and to judge. It does not deal with subjective belief that is beyond reach and evaluation by an objective observer or judge; rather, it lies in the realm of demonstrable physical activity that comes within the purview of courts and law.

The Court's emphasis on the coercion of individual action in *Northwest Indian* appears to restrict free exercise remedies to those contexts in which the government can grant individual exemptions from the enforcement of laws or regulations. Under the *Northwest Indian* analysis, the free exercise clause does not entitle citizens to relief from religious burdens if the government would have to change its chosen course of action because individuals cannot be accommodated by personal exemptions.

The *Northwest Indian* majority incorrectly characterized the relief

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272. See supra note 200 and accompanying text.
273. If the free exercise clause required government to refrain from any action potentially offensive to an individual's religious beliefs, government could not act at all. Any type of government action could conceivably offend the belief system of an individual, without government having any way of recognizing or avoiding the infringement.
274. United States v. Ballard, 322 U.S. 78, 86 (1944), placed the truth or falsity of a religious belief beyond judicial examination.
sought as an "exaction" from government.\textsuperscript{275} The Indian plaintiffs asked only that the government \textit{refrain} from acting in a manner that would damage the Indian religions. The government has no right to damage religions, as the free exercise clause makes clear. The \textit{Northwest Indian} Court manufactures a principle that limits free exercise relief to individual exemptions from general regulations. However, the government is never empowered to violate constitutional guarantees;\textsuperscript{276} facial infringements of guaranteed rights may be permissible if the right is subject to balancing and the government's interest outweighs the individual interest in the balance. Sometimes the government simply cannot act in a particular way without having a good reason for doing so.

The Court's constricted reading of the free exercise clause in \textit{Northwest Indian} reflects a vision of a government whose powers are limited only by some inconsequential, narrow obstacles in the Constitution.\textsuperscript{277} At least with respect to powers withheld by the Bill of Rights, the Court implicitly rejects the concept of the federal government as holding only those powers granted by the people through the Constitution.\textsuperscript{278}

2. \textit{Internal Procedures}

The expanded "internal procedures" doctrine declared in \textit{Northwest Indian}\textsuperscript{279} exempts its beneficiaries, in this case the land management agencies, from undergoing a balancing test for those internal procedures that burden individuals' religious practices. Agencies are not even subject to the most basic balancing of government interest with constitutional right.\textsuperscript{280} Their principal realm of activity is virtually immune from free exercise review. However, this approach cannot fit into the basic concepts of the American governmental system. Because all power and

\textsuperscript{275} See 108 S. Ct. at 1326, 1327 (granting Indians' request would effectively divest Government of rights in its lands).

\textsuperscript{276} See, e.g., Reid v. Covert, 354 U.S. 1, 6 (1957) (plurality opinion).

\textsuperscript{277} The Court's zeal to limit the reach of constitutional protections places the burden on individuals to show why their free exercise of religion should be protected from facially neutral government actions. This view of free exercise as an exceptional right to be yielded by government only when necessary dates back to Braunfeld v. Brown, 366 U.S. 599, 606 (1961) (plurality opinion) (strict scrutiny of proposals to strike down, on free exercise grounds, laws that do not directly outlaw religious practice); see also Chief Forester's Decision, Chimney Rock, supra note 64, at 96 (appellants must show compelling reason to forgo public benefits of G-O Road). That approach appeared to be superseded by the recognition in \textit{Sherbert} and its progeny that unjustified indirect burdens on free exercise could be just as damaging to religious freedom as outright proscription. See 374 U.S. 398, 403-06.

\textsuperscript{278} See Reid, 354 U.S. at 5-6 ("The United States is entirely a creature of the Constitution. . . . It can only act in accordance with all the limitations imposed by the Constitution.").

\textsuperscript{279} 108 S. Ct. at 1325 (quoting Bowen v. Roy, 476 U.S. at 699-700).

right resides in the people except for what has been delegated to the government through the Constitution, a branch of the federal government cannot act absolutely unfettered by constitutional constraints.

_Northwest Indian_ extended the category of deference-based exemptions from the free exercise clause created in _Goldman v. Weinberger_ and _Bowen v. Roy_. In _Goldman_, the Court deferred to the professional judgment of the military, accepting that branch's claims of governmental interest at face value. In _Roy_, operations such as data retrieval systems and office furnishings were deemed to be "internal" and, accordingly, beyond the reach of the free exercise clause.

In effect, broadening this category of internal government operations emasculates the principle that the Constitution applies to all who act under color of law. If the executive branch can characterize its actions as internal, the action is beyond the scope of free exercise review. The Court will define any resulting religious burdens as being outside constitutional review.

The Court's position in _Roy_ that the Social Security numbering system was an internal procedure appeared to be rooted in common sense. The _Northwest Indian_ Court's attempt to analogize roadbuilding and clearcutting of public lands to the use of a Social Security number offends common sense. Management of the government's real property, literally one-third of the nation's territory, cannot be considered comparable to information distribution systems for the use of government employees. The characterization seems a rather clumsy attempt to force an easily distinguishable activity into an existing conceptual category. Even the management of public lands, which are administered through an extensive system of public participation, is a purely internal procedure according to the Court. Thus, trees become internal. Even mountains become internal.

A government practice ceases to be purely internal when it alters the physical environment of citizens, changing the character of places held sacred from "time out of mind."

By deciding that public land was internal and thus withdrawing most land management from free exercise
Northwest Indian could have ironic effects. After Northwest Indian, an individual may still seek judicial review of a land development decision that violated statutes by wrongly depriving her of the ability to enjoy a wilderness hike. However, she cannot appeal an agency decision that deprives her of the ability to use the same area to practice her religion, unless that deprivation took a heavy-handed form of "compulsion."

The determination that land management is an internal function of government constitutes excessive deference to the government's property rights. While the Court referred to the government's right to use "its land," a democratic government controls land only as an agent for its citizens. The public lands are open to casual entry by all, subject to

288. The Court did not decide whether barring access to sacred sites would implicate the free exercise clause. 108 S. Ct. at 1327.
290. Public forum principles, developed by the Court in the free speech context, see L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-24 (2d ed. 1988), can be applied in the sacred lands context as well. The government cannot unduly restrict the first amendment rights of the public in traditional public fora such as streets or parks, where from time immemorial the public has exercised a right to gather and communicate. E.g., Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969). Thus, the government's right to manage public areas is already restricted by the first amendment.

Transferring public forum doctrine to the free exercise context, Indian sacred sites on public land are arguably the free exercise analogue of the traditional public forum, as religious use of those lands by Indians antedates federal land tenure. While those exercising the first amendment cannot restrict the normal use of public property under public forum doctrine, see Adderly v. Florida, 385 U.S. 39, 47-48 (1966), one can argue that the normal use of undeveloped land is as undeveloped land. Furthermore, religious use is the longest running use. Finally, the obligation not to disrupt the normal use of public land is reciprocal; government has an obligation not to disrupt the normal exercise of first amendment rights. For a fuller application of public forum principles to Northwest Indian, see Brief of Amici Christian Legal Society at 17-20, Lyng v. Northwest Indian Cemetery Protective Ass'n, 108 S. Ct. 1319 (1988) (No. 86-1013); Comment, Indian Religious Freedom and Governmental Development of Public Lands, 94 YALE L.J. 1447, 1466-68 (1985); see also Brief for Indian Respondents at 27, 39-40, Lyng v. Northwest Indian Cemetery Protective Ass'n, 108 S. Ct. 1319 (1988) (No. 86-1013).
291. Northwest Indian, 108 S. Ct. at 1327. All circuit courts that had considered the problem of Indian free exercise challenges to the development of public land refused to remove public land management entirely from free exercise scrutiny. Even the amicus brief for various western mining interests assumed that some constitutional balancing applied to federal land, and merely asked the Court to articulate a narrow standard with a high threshold requirement. Brief for Amici Colorado Mining Association at 6, Lyng v. Northwest Indian Cemetery Protective Ass'n, 108 S. Ct. 1319 (1988) (No. 86-1013).

A lower court has already followed Northwest Indian in deferring to government land management in an urban, first amendment free expression context. Serra v. United States, 847 F.2d 1045, 1049 (2d Cir. 1988) (denying artist's first amendment challenge to the relocation of his sculpture).
292. 108 S. Ct. at 1327 (emphasis in original).
reservations for certain purposes and some exclusive special use permits given to individuals.294 Public participation in public land management has been established through statutes and regulations, taking the form of open hearings, written comments, administrative appeals, and judicial review.295 The Northwest Indian Court, however, implicitly equated the Forest Service to a private landowner who need not include other parties, even the beneficial owners, in his management decisions.296 Such a concept of government land ownership fits more properly in a system where nonprivate land belongs to the crown rather than the American system where common land belongs to the public.297

3. Flaws in the Court's Method

Northwest Indian injured more than the protections of the free exercise clause. The opinion compromised the integrity of the Court's judicial method of reviewing and representing facts. Seemingly eager to unfetter public lands for development, the Court misrepresented facts and violated a canon of appellate review by extensively second-guessing the factfinding of the trial court.298

The Court's statement of the posture of the case was both misleading and inaccurate. The circuit court opinion, as summarized by the Supreme Court, seemed primarily to overrule the trial court's judgment, although affirming some portions.299 Actually, however, the Ninth Circuit left the trial court's order almost entirely intact.300 Contrary to the Supreme Court's characterization, the Ninth Circuit did not find on the

294. See, e.g., Buford v. Houtz, 133 U.S. 320, 326 (1890) (public has implied license to use federal land when land is left open and unenclosed and no act of government forbids the use).


296. This position finds some justification in Camfield v. United States, 167 U.S. 518, 524 (1897) (United States has property rights of an ordinary proprietor), although the case reflects an outdated view of public land. Public land at that time was wide open for entry and open for permanent settlement. PUBLIC LAND LAW REVIEW COMM'N, supra note 286, at 27-28. The government sued to preserve the public's access to the land.

297. The Northwest Indian Court used the term "publicly owned land." 108 S. Ct. at 1325.

298. See 108 S. Ct. at 1333 n.3 (Brennan, J., dissenting).

299. See id. at 1323.

300. Compare 795 F.2d at 698 with 565 F. Supp. at 606-07. The vacated elements of the trial court order were either moot (study of wilderness potential) or largely duplicated by
merits that the trust responsibility to the Hoopa Valley Reservation was satisfied.\textsuperscript{301} Rather, the Ninth Circuit found that the case was not an appropriate one in which to decide the trust issue because a necessary party, the Hoopa Valley Tribe, was not represented.\textsuperscript{302}

Through innuendo, the Supreme Court questioned the objectivity of the Theodoratus study, relied on by the lower courts,\textsuperscript{303} although the government commissioned the report. Dr. Theodoratus and her colleague Clinton Blount noted that the Blue Creek study was the first time in their careers that they were unable to recommend an alternative method of land development that would adequately mitigate the damage to Indian culture.\textsuperscript{304} Internal and commissioned Forest Service reviews of the Theodoratus study did not challenge the study's conclusions.\textsuperscript{305} Moreover, two Forest Service cultural resource specialists independently reached the same conclusions as Theodoratus.\textsuperscript{306}

The Court directly questioned the trial court's findings, accepted by the Ninth Circuit on appeal, that the G-O Road would "virtually destroy" the Indians' ability to practice their religions.\textsuperscript{307} As the dissent noted,\textsuperscript{308} this reopening of a factual determination violates the basic rule of appellate review that courts defer to factual findings agreed on by a lower court, absent a "very obvious and exceptional showing of error."\textsuperscript{309}

*Northwest Indian* presents a good example of the reasoning behind the rule. The trial court alone had the opportunity to hear and examine surviving parts of the order (study of fish habitat not required but other water quality studies still mandated).

301. 108 S. Ct. at 1323.
302. 795 F.2d at 697 n.10. Even this determination may have been mistaken. See * supra* note 105.
303. The report was "so sympathetic to the Indians' interests that it has constituted the principal piece of evidence relied on by respondents' [sic] throughout this litigation." 108 S. Ct. at 1328. See generally Theodoratus Report, * supra* note 5. The Forest Service introduced the Theodoratus Report into evidence at the District Court trial. See 565 F. Supp. at 591; Joint Appendix, * supra* note 32, at 110.
307. Compare 108 S. Ct. at 1326 ("[I]t seems less than certain that construction . . . will doom their religion.") with 795 F.2d at 692 ("[T]he proposed . . . operation would virtually destroy the . . . Indians' ability to practice their religion . . . .")
308. 108 S. Ct. at 1333 n.3 (Brennan, J., dissenting).
the witnesses. It also had the dual advantages of firsthand contact with
the evidence at a comparatively leisurely pace, as well as the chance to
assess the credibility of those testifying. The procedural history of *North-
west Indian* demonstrates the significant difference between evidence pro-
vided by live witnesses and that provided on paper—even when the same
factfinder reviews both.\textsuperscript{310} District Judge Weigel, unconvinced by the
Indians' case on paper, denied a preliminary injunction.\textsuperscript{311} After hearing
the Indian and government witnesses testify, however, he granted all re-
quested first amendment relief.\textsuperscript{312}

The Supreme Court also second-guessed the finding that the two
existing spurs of paved road had independent utility. The existing road
segments would allow faster transportation throughout the Gasquet and
Orleans ranger districts and could serve as arterial routes for logging
projects, as would the G-O Road. The paved spurs could also bring rec-
reational users to the edge of the Siskiyou Wilderness.\textsuperscript{313} While six miles
of wild land between the road segments would prevent through travel,
the gap would not make the road sections useless.

The Court made much of the acquiescence of some Indians in the
road construction.\textsuperscript{314} As the trial court record shows, however, Indians
who did not object to the road did not believe in the sacredness of the
High Country.\textsuperscript{315} In any event, the inquiry into dissenting beliefs is irre-
levant to free exercise analysis.\textsuperscript{316} A practice or belief does not lose pro-
tection under the free exercise clause merely because it is not shared by
other members of a sect, much less other members of a broad ethnic
group with varying religions.\textsuperscript{317} The Court's position assumes that be-

\textsuperscript{310} Compare Northwest Indian Cemetery Protective Ass'n v. Peterson, 552 F. Supp. 951,
954 (N.D. Cal. 1982) (apparently assuming that plaintiffs objected to the G-O Road because it
would allow increased public access to the High Country) with Northwest Indian Cemetery
more sophisticated view of the problem).

\textsuperscript{311} 552 F. Supp. at 957.

\textsuperscript{312} 565 F. Supp. at 597. Compare id. at 606 (orders granting relief) with In-
dian/Conservation Complaint, supra note 66, at 42 (requests for relief) and California Com-
plaint, supra note 69, at 64 (requests for relief).

\textsuperscript{313} All-weather roads that dead-end in mountain ranges are not rare in the National
Forests and appear to have been built that way intentionally. Examples include: Road 2512,
Siskiyou National Forest, U.S. Dept't of Agriculture, Forest Service, Siskiyou National Forest
Map; State Route 168, Onion Valley Road, and Whitney Portal Road, Inyo National Forest.

\textsuperscript{314} "[T]he Indians themselves... far from unanimous in opposing the G-O Road...."
108 S. Ct. at 1326.

\textsuperscript{315} Joint Appendix, supra note 32, at 180.


\textsuperscript{317} Id. at 715. There were Indians on both sides of the issue. For example, Howonquet,
a Tolowa rancheria or small reservation (also known as the Smith River Rancheria), joined the
Pacific Legal Foundation amicus brief for the government. Brief Amicus Curiae of Howon-
quet Community Association, et al. in support of Petitioners at 6, Lyng v. Northwest Indian
cause nontraditional Indians may not object to the demolition of sacred areas, the traditionalists have a diluted right to free exercise, as if what one Indian thinks necessarily controls the religion of any other Indian of whatever tribe or faith.

In addition to mischaracterizing or rejecting the trial court’s findings of fact, the Court misrepresented the relief granted below. After narrowly restricting free exercise analysis to cases of governmental prohibition, the Court, in a somewhat circular fashion, determined that injunctive relief was unwarranted since no such direct or indirect prohibition was found.\textsuperscript{318} Indeed, they wrote that granting such relief would be tantamount to a “veto over public programs.”\textsuperscript{319} Yet free exercise clause relief for the impairment of religious practice does not confer veto power upon religious groups.\textsuperscript{320} Such relief merely affords a chance to balance first amendment rights against the preferences of the government.

4. The Proper Balancing Test for Free Exercise Claims for the Preservation of Sacred Lands in a Natural State

A fair interpretation of the free exercise clause should lead to a workable balancing test in the sacred lands context. Although the lower courts did develop such a test, their central-indispensable standard\textsuperscript{321} had many flaws, including its requirement that different beliefs within a religion be ranked in importance.

In developing a balancing test, it is difficult, but not impossible, to measure the impact of a government action on religious practice. Courts cannot judge the truth or falsity of beliefs held by plaintiffs in free exercise challenges to public lands management, but courts can evaluate the sincerity of such beliefs in the context of the whole religious practice.\textsuperscript{322}

\textsuperscript{318} See 108 S. Ct. at 1326-27.
\textsuperscript{319} Id. at 1327.
\textsuperscript{321} See supra note 245 and accompanying text.
\textsuperscript{322} See United States v. Ballard, 322 U.S. 78 (1944) (court may inquire into sincerity of alleged religious belief).

Indian religions present a special problem in that traditions of secrecy make practitioners highly reluctant to divulge any more about their practices and beliefs than is absolutely necessary. See, e.g., Theodoratus Report, supra note 5, at 70-71. The legal system, however, demands some sacrifices of privacy in exchange for legal relief; some disclosure is necessary to establish an infringement on the free exercise of religion. At times, Indians could be faced with the choice of revealing secret practices to their spiritual detriment or allowing the practices to
Specious claims by conservationists, neighboring property owners, or other challengers could be eliminated by identifying religious insincerity. Claims of doubtful authenticity, though not "so clearly nonreligious in motivation"\(^{323}\) to merit dismissal, would probably carry little weight in the dispositive balancing analysis.

Centrality analysis is inappropriate as a threshold screening device because it tends to limit relief to situations in which a religion is threatened with extinction.\(^{324}\) While the plaintiffs in *Northwest Indian* met the centrality standard under the trial court's analysis,\(^{325}\) such a standard conceivably would allow the government to continue developing sacred lands without having to produce a legitimate reason, up to the point that the last spark of a religion was about to be stamped out.\(^{326}\) Instead, the government should have to justify any development of sacred land.\(^{327}\)

Claimants should need to prove only that a particular piece of land occupied a place in their system of religious practice that could be occupied by no other site.\(^{328}\) Relatively peripheral site-specific practices might be easily outweighed by compelling government interests in the trial court's balancing.\(^{329}\)

The *Northwest Indian* Court declined to distinguish government actions causing adverse effects on religious beliefs and practices from actions merely offending religious beliefs.\(^{330}\) But the Court has repeatedly engaged in just such an exercise.\(^{331}\) Moreover, the consideration of such

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\(^{324}\) *See Northwest Indian*, 108 S. Ct. at 1338 (Brennan, J., dissenting).

\(^{325}\) 565 F. Supp. at 594.

\(^{326}\) *Improvement of the American Indian Religious Freedom Act of 1978: Hearings on S. 2250 Before the Senate Select Comm. on Indian Affairs, 100th Cong., 2d Sess. 13-23 (1988)* (statement of Steven C. Moore, Staff Attorney, Native American Rights Fund; and written statement of Dr. Deward Walker, Jr., Professor of Anthropology, University of Colorado, Boulder).

\(^{327}\) *Cf.* 565 F. Supp. at 594 n.8 (the government must try to accommodate legitimate religious interests involving the use of public property).

\(^{328}\) *See Wilson v. Block*, 708 F.2d 735, 743-44 (D.C. Cir. 1983) (rejecting the centrality analysis and requiring at a minimum a showing that the land is indispensable to the religion), *cert. denied*, 464 U.S. 956 (1983).

\(^{329}\) *See infra* notes 334-37 and accompanying text. Given the catastrophic consequences claimed by the *Northwest Indian* Court, a realistic attitude regarding relief is in order.

\(^{330}\) 108 S. Ct. at 1325 (stating that without the ability to judge the truth of each belief, the Court was unable to compare the effects).

\(^{331}\) The Court found that a religious work group's scruples against giving, and its adherents' scruples against accepting, monetary payment for religiously motivated labor did not
effects would not unduly endanger valid government interests. The Court could examine the protested action to gauge the significance of any effect on religious practice; it need not take a claim of burden at face value.

Furthermore, allowing relief for incidental government infringements on religious practice would not necessarily lead to a plethora of lawsuits for insignificant injuries of religious sensibilities. Although tort law allows recovery for assault through physical contact, not everyone who is jostled on a sidewalk sues the offender. Likewise, a plaintiff without a recognizable, perceptible injury to religious practice will not progress very far. Most significant public land development projects on sacred lands already attract secular challenges. The addition of religious challenges would not seriously burden land management agencies. Moreover, in cases such as Northwest Indian, allowing a free exercise cause of action may be a matter of life or death for an Indian religion.

Once claimants show that a threatened site is essential to a religious practice, the burden should shift to the government to prove that its chosen course of action narrowly serves a compelling interest, as in other free exercise cases. Determining what, under particular circumstances, constitutes a compelling interest of the highest order necessarily must be left to judicial discretion. In balancing the interests, the court might consider the length of time that religious adherents have used the

exempt them from the minimum wage laws. Tony and Susan Alamo Found. v Secretary of Labor, 471 U.S. 290 (1985). Because the payees could simply return their wages to the group or the group could account for the workers' room and board so as to meet the minimum wage requirement, no real burden would be placed on religious practice. Id. at 304-05; see also Bowen v. Roy, 476 U.S. 693 (1986) (finding no injury to ability to exercise religion despite belief that spiritual development would be impaired).

Northwest Indian plaintiffs included several conservation groups in the same action. See supra note 66 and accompanying text. The construction of the Tellico Dam, which was challenged on free exercise grounds in Sequoyah v. Tennessee Valley Authority, 620 F.2d 1159 (6th Cir. 1980), cert. denied, 449 U.S. 953 (1980), had been delayed by the famous snail darter case, Tennessee Valley Authority v. Hill, 437 U.S. 153 (1978) (involving secular challenges to the dam).

Northwest Indian, 795 F.2d 688, 692-93 (9th Cir. 1986).


If, in the time of war, the Catholic Church and Southern Baptist Convention proclaimed duties not to fight in wars, the Court might well find that a rescission of conscientious objector status for all was compelled by an overriding interest in providing manpower for the armed forces. Otherwise, the pool of eligible draftees might be severely limited. However, the same balance might not apply given the current status of religious doctrine and denominational composition of the United States. A compelling interest sufficient to override religious concerns may change from court to court and from circumstance to circumstance. Compare Sherbert v. Verner, 374 U.S. 398 (1963) (finding state interest in uniform administration of program and discouragement of fraud insufficiently compelling) and Wisconsin v. Yoder, 406 U.S. 205 (1972) (finding state interest in universal education through high school insufficient) with Braunfeld v. Brown, 366 U.S. 599 (1961) (state interest in uniform day of rest and recreation, with exceptions, is compelling) and United States v. Lee, 455 U.S. 252 (1982) (state interest in restricting further exemptions to tax is compelling).
public lands in question. This inquiry would contribute to proving that the site was necessary to the practice. Further, where continuous religious use precedes federal land ownership, land development by the government more clearly resembles an encroachment upon religion, whereas maintaining the status quo creates little intrusion on the government.  

Nothing indicates that judges would be less adept at balancing a religion against land development than they are in balancing other considerations involved in injunctive relief and constitutional rights. While the courts may have to examine the concrete practices of a religion more closely than is desirable, such contact between the judiciary and religion is preferable to the alternative. The result of unfettered executive discretion to make judgments about religious preservation is clear: Indian religions can be extinguished at the government's pleasure.

5. The Establishment Clause—Wilderness Management Does Not Establish A Religion

Forgoing development of public lands to accommodate religious practice does not violate the establishment clause. The Court applies a three-pronged test (the Lemon test) in establishment cases. Government action must have a secular purpose, produce a "primary effect...that neither advances nor inhibits religion," and avoid "excessive government entanglement with religion."  

Leaving land undeveloped fulfills "clearly secular" purposes. Generally, governmental accommodation that is compelled by the free exercise clause does not violate the establishment clause. The purpose of such accommodation is to comply with the free exercise clause, which is

336. Arguably, in such cases the government has always owned former Indian territory subject to religious use and preservation. Seen this way, aboriginal title, now a minimally enforceable right of occupancy, e.g., Tingit & Haida Indians of Alaska v. United States, 389 F.2d 778, 782, 787 (Cl. Cl. 1968), might impose a servitude on certain lands such that the lands could not be developed so as to impede their religious function.

It is perhaps more arguable that those Indians who signed cession treaties understood that their ceded sacred sites would remain pristine, particularly when those sites were on rugged terrain. While the tribes in Northwest Indian are not covered by any ratified treaty, Yurok and Karuk Indians signed an unratified treaty in 1851. B. Nelson, Our Home Forever 53-54 (1978); see also Treaty Made and Concluded at Camp Klamath (Oct. 6, 1851), reprinted in B. Nelson, supra, at 181-85.

337. E.g., Coastal Band of the Chumash Indians v. Ventura County, No. CV 86-7979 PAR (C.D. Cal. Dec. 24, 1986) (applying Ninth Circuit's Northwest Indian standard and dening relief where evidence of indispensability of site to religious practice was insufficient); see also supra notes 212-44 and accompanying text. Although the author does not necessarily endorse the results or factual conclusions of earlier sacred lands opinions, the opinions adequately demonstrate the balancing of free exercise principles in the sacred lands context.

338. L. Tribe, supra note 290, § 14-9, at 1205 & n.2.


a secular goal. Specific secular purposes for leaving public lands undeveloped could include protecting the Indian communities whose traditional cultures depend on religious practices, or preserving a multiplicity of competing sects to prevent domination by any religious faction. Furthermore, there is a clear public policy favoring the maintenance of some public lands as wilderness. Secular groups may seek, and the law may require, wilderness management on purely secular grounds. Thus a management policy that refrains from developing public land does not necessarily implicate the establishment clause.

The "primary effect" prong of the Lemon test is aimed at prohibiting the government itself from advancing religion through its own activities and influence. Leaving land undeveloped maintains the status quo; it does not advance or inhibit religion. Nor does leaving land undeveloped visibly endorse a particular sect. Declining to inhibit religious practice stops short of advancing it.

Finally, refraining from development does not lead to excessive entanglement with Indian religions. An absolute veto by Indian religions over proposed development projects would be impermissible entanglement, because a religious body would be supplanting the government decisionmaking process. But the proper free exercise analysis would not create such a veto. It would only require balancing government interests against religious interests. The final decision would be made by the government, possibly in the court system. Furthermore, consultation with American Indians to avoid inadvertent infringement of religion would not constitute excessive entanglement. Indeed, such consultation already is required by AIRFA.

Requiring the government to refrain from a new activity, as by not clearcutting an area and not building a road through it, cannot constitute an act "respecting the establishment of religion" unless the status quo

346. Id. at 2869 (for the founding fathers, establishment connoted "sponsorship, financial support, and active involvement of the sovereign in religious activities") (quoting Walz, 397 U.S. at 668).
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already establishes religion. De facto wilderness management of an area for centuries weighs against identifying continued wilderness management as somehow establishing a religion.349

An attempt to exclude nonbelievers from an area of public land would present different questions. Although the Northwest Indian plaintiffs made no request for the exclusion of others, the Supreme Court raised this possibility to buttress its rationale for overturning the Ninth Circuit.350 However, a complete exclusion (turning over public land for the sole benefit of a religious sect) might violate the establishment clause. The right to exclusive use is “one of the most essential sticks in the bundle” of traditional property rights,351 and thus approaches beneficial ownership by a religious sect.352 On the other hand, the prevalent practice of allowing Christian churches on public property makes even that violation less than absolutely certain.353

B. The Supreme Court, American Indians, and the Future

The Northwest Indian decision reflects the Court’s growing deference to other branches of government on questions of constitutional magnitude. The Court’s deference may be explicit, or it may defer indirectly by removing particular injuries from the sphere of constitutional protection. In Northwest Indian the Court abdicated its responsibility to enforce the first amendment rights of religious minorities. The Court’s readiness to place critical decisions within the nearly complete discretion of land management agencies may indicate an ill-placed trust in those agencies. This trust could have harmful effects if carried over into the interpretation of environmental statutes. Finally, the Court leaves Indians at the mercy of the majority culture: the Court’s reading of the religious rights guaranteed by the Constitution fails to protect Indians from a form of religious injury to which they are uniquely vulnerable.


352. See Badoni v. Higgenson, 638 F.2d 172 (10th Cir. 1980), cert. denied, 452 U.S. 954 (1981) (excluding tourists from the Rainbow Bridge National Monument would violate the establishment clause). But see L. Tribe, supra note 290, § 14-6, at 1186 n.57 (arguing that establishment clause findings in Badoni are indefensible); supra notes 219-25 and accompanying text.

1. Deference Envelops More of the Constitution

The Court's willingness to entrust questions of facially constitutional magnitude to an agency—even if under the guise of the internal procedures doctrine—by denying the constitutional implications of certain actions reflects the Court's continuing tendency to defer to executive expertise.\(^{354}\) The internal procedures doctrine effectively confers absolute discretion on land management agencies with respect to the effects of land development on religious rights.\(^{355}\)

This type of deference returns to the "reach of majorities and officials" a subject that the Bill of Rights was designed to withdraw from the legislative and executive sphere.\(^{356}\) The courts are charged with making sometimes difficult judgments when government clashes with religion and other fundamental rights.\(^{357}\) The courts have this responsibility because they are detached, their doctrines and procedures are flexible, and they are not responsive solely to the majority—not in spite of these conditions.\(^{358}\) The Court in *Northwest Indian* fears to tread exactly where the Constitution says it must, between the government and worshippers. The Court, by restricting the scope of its constitutional scrutiny through the device of excluding certain injuries, virtually implies that constitutional rights are just an impediment to efficient government.

The deference that *Northwest Indian* gives to land management agencies may bode ill not only for constitutional rights but for environmental protections as well. The Court substantially stretched logic to invoke a doctrine allowing land management agencies to decide whether development impairs a religion enough to matter.\(^{359}\) Since a reason is not needed even to exterminate a religion indirectly, the agencies need only take care not to be too direct or obvious when smashing Indian practices.

Judicial review of agency compliance with NEPA\(^ {360}\) and various environmental and land management statutes has been a cornerstone of the legal defense of the environment. Hollow, mechanical compliance has been a hallmark of agency attitudes not only toward Indian religious rights but toward environmental analysis. Courts often defer to agency

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\(^{355}\) Agencies that bar worshippers from all access to a sacred site may, however, be subject to review. *See Northwest Indian*, 108 S. Ct. at 1327.


\(^{357}\) *Id.* at 640.

\(^{358}\) *Id.* at 638-40.

\(^{359}\) "The building of a road or the harvesting of timber on publicly owned land cannot meaningfully be distinguished from the use of a Social Security number . . . ." 108 S. Ct. at 1325.

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but few areas have been removed entirely from judicial review, and then only when a statute specifically entrusts an issue to agency discretion.

The Court recently reversed two Ninth Circuit decisions that required meaningful compliance with NEPA in the preparation of environmental impact statements. *Robertson v. Methow Valley Citizens Council*\(^{363}\) and *Marsh v. Oregon Natural Resources Council*\(^{364}\) both found that the lower courts had insufficiently deferred to federal agencies. Some of the principles of environmental review overturned in *Methow Valley* and *Marsh* arose from the environmental sections of the Ninth Circuit opinion in *Northwest Indian*.\(^{365}\) As the Court trusts land management agencies to consider religious rights issues without the risk of legal accountability,\(^{366}\) it is unsurprising that agency judgment as to environmental protection continues to receive nearly equal deference.

2. The Future of Indian Cultures

Indian law and history weigh heavily on the *Northwest Indian* decision. *Northwest Indian* can be seen as another example of betrayed trust and another attempt to deprive Indians of their cultural identity.\(^{367}\)

While the ultimate reach of the internal procedures doctrine is not

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361. E.g., Sierra Club v. Clark, 756 F.2d 686 (9th Cir. 1985) (deferring to agency judgment to allow intensive offroad vehicle use in an environmentally sensitive area).


363. 57 U.S.L.W. 4497 (U.S. May 1, 1989) (agency need not formulate complete mitigation plan or conduct worst case analysis in EIS; court of appeals gave insufficient deference to agency interpretation of statute and regulation), rev'd Methow Valley Citizens Council v. Regional Forester, 833 F.2d 810 (9th Cir. 1987).

364. 57 U.S.L.W. 4504 (U.S. May 1, 1989) (court of appeals gave insufficient deference to agency decision not to issue supplemental EIS), rev'd Oregon Natural Resources Council v. Marsh, 832 F.2d 1489 (9th Cir. 1987).


366. 108 S. Ct. at 1327-28; see supra note 232.

367. For a discussion of the near-extinction of American Indians through conquest, disease, and the trail of broken treaties left in the wake of the westward expansion of the U.S. border, see, e.g., V. Deloria, Beyond the Trail of Broken Treaties (1974); F. Prucha, supra note 216; see also Federal Agencies Task Force, American Indian Religious Freedom Act Report 1-8 (August 1979) [hereinafter AIRFA Report] (detailing an organized effort to extirpate American Indian religion through the 1920's). The federal government pursued a succession of policies designed to separate Indians from their reservation lands. See generally C. Wilkinson, American Indians, Time and the Law (1986); Handbook, supra note 23, at 705-09.

Yuroks might justifiably feel that the entire U.S. Government intends to dissolve the Yurok culture, in light of the *Northwest Indian* decision and the Hoopa-Yurok Settlement Act, Pub. L. No. 100-580, 102 Stat. 2924 (1988). Yuroks who renounce their tribal rights and interests will be paid $15,000, while those who choose official tribal enrollment will receive $7,500 (if over 50 years of age) or $5,000 (if under 50). Id. §§ 6(c)(3), 6(d).
yet clear, it has evolved under a thin mask of neutrality to permit the infringement of traditional (Northwest Indian) and more recent (Roy) American Indian religious beliefs and practices. The precise holding of Northwest Indian, placing most federal land management activity beyond free exercise scrutiny, is uniquely tailored to affect mainly, if not only, Indians. Northwest Indian disallows constitutional review of the action that can most hurt Indian religions, beyond direct proscription of ritual or belief—the impairment of the physical and environmental character of sacred sites. Particular land areas are crucial to Indian religions in a way foreign to the religious traditions of most European-Americans and incomprehensible to those whose cultural connections with American territory date from historic immigration rather than the beginning of

368. A cynical view could place Northwest Indian squarely within a long United States Supreme Court tradition of refusing free exercise claims made by certain minorities. While the merits differ from case to case, the consistent results invite skepticism that the weak protection the Court affords to minorities that are too different is purely coincidental. While Jehovah's Witnesses and other New Testament worshippers have been accorded some relief by the Court, three minorities have been denied relief consistently: Mormons, see supra notes 139-46 and accompanying text; Orthodox Jews, see Braunfeld v. Brown, 366 U.S. 599 (1961), Goldman v. Weinberger, 475 U.S. 503 (1986); and American Indians, Bowen v. Roy, 476 U.S. 693 (1986); see supra notes 195-207 and accompanying text. The effect of these limited first amendment protections is exacerbated by the dependence of Indians on executive branch government officials in general (as in the Bureau of Indian Affairs and the various welfare agencies) and on public land managers in particular. Many Indian religious sites are on non-reservation public land. E.g., McCool, Federal Indian Policy and the Sacred Mountains of the Papago Indians, 9 J. ETHNIC STUD. 57 (1981); Brief of Amici Confederated Salish and Kootenai Tribes at 22, Northwest Indian Cemetery Protective Ass'n v. Peterson, 795 F.2d 688 (9th Cir. 1986) (No. 83-2225).

Barely a week after Northwest Indian, the Court issued another opinion on American Indian free exercise rights in Employment Division v. Smith, 108 S. Ct. 1444 (1988). Claimants Smith and Black were fired from their jobs as rehabilitation counselors because of their ingestion of peyote at Native American Church ceremonies. Subsequently, their unemployment benefits were denied because Smith and Black had been fired for misconduct. The Oregon Supreme Court reinstated the benefits. 301 Or. 209, 721 P.2d 445 (1986) (citing Sherbert v. Verner, 374 U.S. 398 (1963) and Thomas v. Review Bd., 450 U.S. 707 (1981)). The U.S. Supreme Court reversed and remanded to the Oregon Supreme Court to determine if Smith's religious use of peyote was illegal under Oregon law. 108 S. Ct. at 1451-52.

By stressing the relevance of a state's criminal proscription of certain religious conduct in free exercise cases involving unemployment benefits, the Court appears to be returning to the days when the majority's judgment that a religious practice was immoral stripped the free exercise clause of power. See Reynolds v. United States, 98 U.S. 145 (1879) (polygamy not protected by the first amendment). More ominous for Native American Church members was the Court's open invitation to the state to appeal a further determination that the first amendment precluded criminalizing the religious use of peyote. 108 S. Ct. at 1451-52.

On remand, the Oregon Supreme Court held that Oregon criminal sanctions against peyote did not exempt religious use, but it also held that the first amendment barred criminal prosecution for bona fide religious use of peyote, and reaffirmed its original decision on that ground. Smith v. Employment Div., 307 Or. 68, 763 P.2d 146 (1988), cert. granted, 57 U.S.L.W. 3619 (U.S. Mar. 20, 1989) (No. 88-1213).

369. Cases where worshippers are harassed or excluded from a sacred site may still receive first amendment scrutiny. 108 S. Ct. at 1327.
FIRST AMENDMENT AND SACRED LANDS

societal memory. While a few modern splinter sects might be affected by Northwest Indian as well, the decision threatens most seriously the survival of all traditional Indian communities whose sacred sites are on public land and off Indian reservations.

Like a policeman who alternately scolds and winks, the Northwest Indian Court implores the land management agencies to be sensitive to Indian religious concerns while assuring the agencies that there will be no legal repercussions if they road, cut, and mine every last inch of sacred ground on publicly owned land. The Forest Service decided to build the G-O Road no matter what the consequences, and proceeded to ignore the recommendations of outside and Forest Service anthropologists alike. The Court approved of this lip service to religious accommodation and entrusted Indian religious rights to the agencies' tender mercies. While some land managers are indeed solicitous of Indian religious concerns, others have proven discriminatory against Indians. Putting the survival of Indian religions at the discretion of land managers jeopardizes those religions.

Traditional religion is crucial to the maintenance of tribal identity. Indeed, a continuing identity as a separate, culturally unified group is essential to official federal recognition of a tribe. Many Indian groups are only now seeking federal recognition to improve their status and clarify government responsibility towards them. If reli-

370. AIRFA REPORT, supra note 367, at 9-12, 51-54.
371. Indian reservations were generally created without regard to the sacred sites of the resident tribes; at least in the West, those sites are often on federal land holdings. See AIRFA REPORT, supra note 367, at 51; Barsh, The Illusion of Religious Freedom for Indigenous Americans, 65 OR. L. REV. 363, 396 (1986); McCool, supra note 368, at 57.
374. Id. at 188, 195; CHIMNEY ROCK DES, supra note 4, at 320; Theodoratus Report, supra note 5, at 413; Bright, Review of Certain Cultural Resource Management Documents Pertaining to the Gasquet-Orleans (G-O) Road, Six Rivers National Forest, California 17 (1977) (prepared under U.S. Forest Service contract); Recommendations of the Advisory Council on Historic Preservation on the Gasquet-Orleans Road, Six Rivers National Forest (1982), reprinted in Joint Appendix, supra note 32, at 203, 205.
375. 108 S. Ct. at 1328.
376. E.g., BUREAU OF LAND MANAGEMENT, U.S. DEP’T OF INTERIOR, CALIFORNIA DESERT DISTRICT, EL CENTRO RESOURCE AREA, TABLE MOUNTAIN AREA OF CRITICAL ENVIRONMENTAL CONCERN MANAGEMENT PLAN (1984) [hereinafter MANAGEMENT PLAN] (recommending against windmill development and closing road on mountain that is important to Indian religion but promulgating questionable policy governing archaeological disinterment).
379. 25 C.F.R. § 83.7 (1988).
gious traditions can be swept away by unjustified development, tribal identity can dissipate within a generation as practices lapse when the place that gave them definition lies desecrated. For Indians of tribes not yet organized, such an event could deprive them of a chance for federally recognized tribal rights.

The tribes represented in the *Northwest Indian* case are or soon will be federally recognized. Their cultural identities are in danger, however, as they have no legal right to the maintenance of their religions after the holding in *Northwest Indian*. The services of both the traditional healers and the dance leaders who initiate the ceremonies that bring tribe members together to affirm their identity depend on the unscarred condition of the High Country for training and event-specific preparation.\(^{381}\) Other sites formerly used by the Karuk and Yurok have already been developed and consequently are useless for religious purposes.\(^{382}\) One of the Indian plaintiffs remarked at trial, “We are standing on the last peak[s].”\(^{383}\) After the Court’s decision, another Indian plaintiff spoke bluntly of his tribe’s future if the G-O Road is built: “If this happens, we die.”\(^{384}\)

IV

REMAINING BASES FOR THE PROTECTION OF AMERICAN INDIAN SACRED LANDS IN FEDERAL TENURE

While *Northwest Indian* relegated the development of an appropriate first amendment standard for the protection of Indian sacred sites on public land to purely academic speculation, such sites are not entirely beyond the reach of effective preservation. Indian law could provide a legal theory for protection. However, the solution probably lies with Congress.

A. Indian Law Trust Responsibility

The Supreme Court has long recognized the general trust responsibility the federal government has towards American Indians.\(^{385}\) This trust responsibility includes a duty not to take actions that tend to extin-

\(^{381}\) *Northwest Indian*, 565 F. Supp. 586, 591-95; *Northwest Indian*, 795 F.2d 688, 692-93.

\(^{382}\) Reporter’s Transcript, *supra* note 15, at 230-34, 234-45 (testimony of Lowanna Brantner); Theodoratus Report, *supra* note 5, at 57, 70, 75.


\(^{384}\) Interview with plaintiff Christopher H. Peters, Yurok-Karuk, in Berkeley, California (Apr. 21, 1988).

guish an Indian culture.\textsuperscript{386}

This duty implies that the government should not impair religious sites on public land, where loss of the effective use of the sites could lead to the disappearance of a traditional religion and culture. The threshold of injury necessary to invoke this duty is perhaps even higher than the central-indispensable analysis given to the free exercise clause by some lower courts; a duty not to eradicate a culture by definition would not restrain government action until an Indian religion was threatened with extinction.\textsuperscript{387}

\section*{B. AIRFA Amendment and Site-Specific Legislation}

Senators Cranston, Inouye, and DeConcini introduced S. 2250, amending the American Indian Religious Freedom Act (AIRFA),\textsuperscript{388} shortly before the \textit{Northwest Indian} decision.\textsuperscript{389} The amendment adopted an indispensability test as a threshold for Indian religious challenges to land management, and would have required the government to justify actions that impair traditional religion.\textsuperscript{390} The bill provided a specific cause of action in the United States district courts, rather than leaving enforcement of this proposed new section of AIRFA to agency discretion.\textsuperscript{391} The proposed amendment would cure the acknowledged toothlessness\textsuperscript{392} of the current AIRFA.\textsuperscript{393}

The 100th Congress did not act on the proposed AIRFA amend-

\textsuperscript{386}. A United States district court recognized a federal duty to preserve the cohesive cultures of American Indians, at least until they are completely assimilated within the majority culture. Peyote Way Church of God v. Smith, 556 F. Supp. 632, 639 (N.D. Tex. 1983) (excluding federal religious discrimination in favor of Indians and rejecting claim that exemption from criminal prosecution for peyote use should be extended to plaintiff-church, which has many non-Indian members), \textit{rev'd on other grounds}, 742 F.2d 193 (5th Cir. 1984). The duty runs to individual Indians, "as people who have a distinctive culture," not to organized tribes. \textit{Id.}; \textit{cf.} People of Togiak v. United States, 470 F. Supp. 423, 428 (D.D.C. 1979).

\textsuperscript{387}. \textit{Cf. supra} notes 324-27 and accompanying text.


\textsuperscript{389}. S. 2250, 100th Cong., 2d Sess. (1988), was introduced on March 31, 1988; \textit{Northwest Indian} was decided on April 19, 1988. S. 2250 would have amended AIRFA by adding the following:

\begin{itemize}
  \item[(a)] Except in cases involving compelling governmental interests of the highest order, Federal lands that have been historically indispensable to a traditional American Indian religion shall not be managed in a manner that would seriously impair or interfere with the exercise or practice of such traditional American Indian religion.
  \item[(b)] United States district courts shall have the authority to issue such orders as may be necessary to enforce the provisions of this section.
\end{itemize}


\textsuperscript{390}. \textit{Id.}

\textsuperscript{391}. \textit{Id.}

\textsuperscript{392}. AIRFA's House sponsor, Representative Udall, stated on the House floor that the bill that became AIRFA had "no teeth in it." 124 CONG. REC. 21,444-45 (1978).

\textsuperscript{393}. \textit{But see} New Mexico Navajo Ranchers Ass'n v. ICC, 702 F.2d 227 (D.C. Cir. 1983) (finding inadequate consultation of Indians by ICC to be an AIRFA violation); a decision at a later stage of the same case called into question this finding of a consultation requirement
ment. The Senate Select Committee on Indian Affairs held hearings, however, at which various Indian and non-Indian witnesses testified. Some witnesses expressed dissatisfaction with the indispensability standard and proposed a standard measuring assaults to the “integrity” of a religion instead. An AIRFA amendment may be introduced again.

Some laws have conveyed specific interests in parcels of federal land to particular tribes for religious purposes. Congress transferred a 185,000 acre parcel to the Havasupai Reservation in 1975, subject to restrictions that guarantee some public recreational access. The need of the Havasupai to use those lands for religious purposes, free from interference or inappropriate development, was a primary reason for the transfer. In 1970, Congress transferred part of Carson National Forest to the Pueblo de Taos Reservation, explicitly restricting the Pueblo’s use to “traditional purposes only, such as religious ceremonies” and subsistence activity. Wilderness management was required, but nonmembers of the tribe were to be allowed access only with tribal consent.

The establishment clause would not be implicated if an AIRFA amendment or a parcel-specific bill focused on protecting objective practice without forcing a new use or preventing all other uses of the land. Land protected by such laws could almost certainly be used as well for wilderness, watershed, wildlife, or primitive recreation. Further, the Court in Northwest Indian stated that resolution of competing demands on government, including those rooted in religious belief, was best left to the legislature. This statement suggests that the Court might defer to a legislative attempt at religious accommodation through the protection based on the hostile language in Northwest Indian. New Mexico Navajo Ranchers Ass’n v. ICC, 850 F.2d 729, 733 (D.C. Cir. 1988).

394. Improvement of the American Indian Religious Freedom Act: Hearings on S. 2250 Before the Senate Select Comm. on Indian Affairs, 100th Cong., 2d Sess. (1988). 395. Id. at 70-73 (written testimony of Steven C. Moore, Staff Attorney, Native American Rights Fund); id. at 75 (written testimony of Deward Walker, Professor of Anthropology, University of Colorado, Boulder).

398. 16 U.S.C. § 228i(b)(1) (1982). The law also guaranteed the Havasupai access to areas within Grand Canyon National Park for religious purposes. Id. § 228i(c).
400. Id. Senator Bradley introduced the Sioux Nation Black Hills Act, S. 1453, 99th Cong., 1st Sess. (1985). The bill would have transferred the Black Hills and other lands to the Sioux. Id. § 4. National Parks in the area would have remained open to all persons, except that sacred sites could be closed to the public to the extent necessary to preserve their religious uses. Id. § 11.
401. Cf. supra notes 350-52 and accompanying text. Land use policies already protect cultural resources, including religious sites in contemporary use. See, e.g., MANAGEMENT PLAN, supra note 376.
402. 108 S. Ct. at 1327.
of sacred sites, were such an attempt subjected to an establishment clause challenge.

C. Conventional Wilderness Designation

Designation of sacred sites as wilderness areas, under the Wilderness Act of 1964, may protect these sites.\(^4\) By preventing commercial activity and the building of roads and structures, wilderness status would maintain the status quo and prevent the environmental degradation that could render traditionally sacred sites useless for religious practice.

Congress temporarily staved off construction by specifically denying funding for the G-O road in the Forest Service appropriation for fiscal year 1989.\(^4\) The G-O Road controversy would end permanently if the road corridor were simply added to a unified Siskiyou Wilderness.\(^4\)

V
CONCLUSION

The Supreme Court's decision in *Lyng v. Northwest Indian Cemetery Protective Association* strips first amendment protection of religious sites from many American Indians whose sacred lands have been removed from their control and put in the hands of the federal government. *Northwest Indian* evinces a monarchic rather than a democratic conception of government land management. After *Northwest Indian*, the federal government need not justify an action that will impair or even destroy an Indian religion by making its ritual sites useless. Land management decisions are immune from the balancing test that, until *Northwest Indian*, appeared to govern all who acted under color of law. Hundreds of years of tradition may be eradicated by a land management bureaucrat's whim, unless some unrelated statutory restriction prevents damage to the land.

The majority opinion in *Northwest Indian* whittled the protections of the free exercise clause with a narrow view of precedent that confined legal principles to the factual situations from which they arose. The Court instead elevated a principle properly limited to its facts, the *Roy

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405. See supra note 106.
internal procedures exception, into a legal principle with a potentially powerful appetite for limits on government action. The government received a license to find new, subtle ways to infringe on the exercise of religion, as long as the form of the infringement is not similar to that of previous disapproved actions.

The method of the Court in Northwest Indian is as disturbing as the result. Under the Northwest Indian approach, factual judgments based upon extensive oral testimony and a vast record, already approved by two lower courts, may be reopened according to the discretion of a Court perhaps uncomfortable with the actual implications of its preferred legal result.

As the continuing overdevelopment of public lands sweeps away the sacred places of America’s oldest cultures, some hope for protection remains. The traditional solicitude of Congress towards American Indians could lead to the legal preservation of the wild character of essential sacred lands, making the executive branch at least justify government intrusions on Indian religions. Until some protective law passes, however, the sacred sites await the onslaught of the bulldozers.