

American Indian Private Religious Preserves on Public Lands: The Legal Issues

Introduction

The 1980s gave birth to a new variety of legal conflicts that mixed the religion clauses of the First Amendment to the United States Constitution with the aspirations of certain American Indian tribes. In such cases, the Indian plaintiffs generally alleged that land-management decisions of various federal agencies violated Indians' religious freedom. The Indians (or their interests) were defeated in each case, including the most recent, *Bear Lodge Multiple Use Association v. Babbitt* (1996), which involved a controversy over whether recreational rock climbing should be banned at Devil's Tower National Monument during a period deemed sacred by Indians.

The federal courts have painted a fairly bright line regarding federal land-management decisions and Indian religious claims. The courts have found that closing federal lands to members of the public, or forcing them to refrain from activities on federal lands that are legal otherwise, expressly for the purpose of protecting Indian religious activities, clearly violates the First Amendment's Establishment Clause, which prohibits government actions that establish a religion, or religion generally.

Nonetheless, some tribes continue to insist that federal agencies manage parts of federal land as private preserves for Indian religious purposes. Increasingly, federal land managers, motivated by good intentions, accede to such requests.

Most federal land managers are unaware of court decisions pertaining to the First Amendment's Free Exercise of Religion and Establishment clauses. Without such knowledge, managers may cross the legal line and do harm to the First Amendment. Incidentally, they invite a new class of litigants: those members of the public who have been denied access or use of federal lands because of Indian religious claims.

This article presents the pertinent Indian religion cases within the context of general First Amendment religion decisions.

First Amendment Principles

Several basic principles apply to religion under the First Amendment:

- ◆ First Amendment rights of free

dom of speech, assembly, and *religion* are possessed by persons on federal lands, including National Park System areas. See, for example, *A Quaker Action Group v. Morton* (1975).

- ✦ First Amendment rights, including the right of Free Exercise of Religion, are not *absolute rights*, free from all government regulation.
- ✦ Governmental actions that specifically target religious conduct must “advance [governmental] interests of the highest order.”
- ✦ Governmental actions that *incidentally* result in restricting free exercise of religion are constitutional as long as such actions are neutral in content, generally applicable, and crafted narrowly to serve a compelling governmental interest.
- ✦ Governmental land-management decisions that do not prohibit religious conduct or coerce someone into acting contrary to his or her religion need not demonstrate a compelling governmental interest.

Next, we explore the meaning and origins of these principles and how they affect Indian religious claims.

Free Exercise of Religion and NPS Prohibitions

Religious conduct is not immune to regulation. The United States Supreme Court has long recognized that the Free Exercise Clause of the First Amendment does not exempt religious practitioners from legitimate

governmental regulation. In *Braunfield v. Brown* (1961) the court prescribed a balancing test which weighs governmental regulation against “free exercise.” The court said: “If the State regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the State’s secular goals, the statute is valid despite its indirect burden on religious observance unless the State may accomplish its purpose by means which do not impose such a burden.”

In *Sherbert v. Verner* (1963) the Supreme Court illuminated the *Braunfield v. Brown* standard and developed a two-part test—which is still applicable—to determine if governmental regulation violates free exercise of religion. First, a court must find that the *purpose* or *effect* of a regulation infringes upon religious exercise, whether by coercion or by impeding practice. If so, the court then determines whether a “compelling state interest” outweighs the “infringement.”

After *Sherbert*, the Supreme Court fashioned a standard that made it easier for general laws and regulations that indirectly burden religious conduct to pass constitutional muster. That standard was short-lived and is discussed in the endnotes only.¹

First Amendment scrutiny applies to more than simple outright prohibitions. The Supreme Court, in *Bowen v. Roy* (1986), made clear that the Free Exercise Clause “affords an individual protection from certain forms of governmental compulsion.”

Such compulsion may involve either forcing an individual to act contrary to his or her religious beliefs, or forcing an individual, under threat of sanctions, to refrain from religiously motivated conduct. Thus, the federal courts hold that governmental acts that may violate free exercise of religion include those which force an individual to refrain from religious conduct.

In *Lyng v. Northwest Indian Cemetery Protective Association* (1988), the Supreme Court, referring to the 1986 decision in *Roy*, pointed out that indirect coercion or penalties² on free exercise of religion are subject to First Amendment scrutiny just as much as are outright prohibitions. The court said: "This Court has repeatedly held that indirect coercion or penalties on the free exercise of religion, not just outright prohibitions, are subject to scrutiny under the First Amendment."

For example, the National Park Service (NPS) regulation at Title 36, Code of Federal Regulations (CFR) 2.1, prohibits hunting and removing natural resources from National Park System areas. Certainly, the regulation, if applied to, say, an Indian hunter in Bandelier National Monument, would penalize the hunter for engaging in conduct that is putatively religious. Although, the regulation may indirectly burden Indian religious observance, that alone does not render the NPS regulation improper.³ Rather, the regulation is subject to First Amendment scrutiny under *Sherbert*.

Under the *Sherbert* test, the NPS regulation at 36 CFR 2.1 applies generally, and advances the secular purpose of preventing the taking of park resources by the least intrusive means available (i.e., via a "prohibition on take"). The regulation serves a compelling state interest of park protection. The NPS regulation at 36 CFR 2.1 meets the test in *Sherbert* for a governmental action that indirectly burdens religious conduct. No court has ever found otherwise.

Free Exercise and Federal Land Management

Managing federal lands to satisfy Indian religious claims. There is another, and larger, class of Indian religious claims that differ from those that a federal regulation (like 36 CFR 2.1) prohibits or penalizes Indian religious conduct. This other class of claims asserts that federal agency actions, and not simply prohibitions, also may violate the free exercise of religion by Indians. Such cases are at the heart of this article.

Indian religious practitioners have sought to halt the United States, or the public, from legitimately managing or using federal lands because such uses violate their free exercise rights. The federal courts have consistently rejected such claims, handing plaintiffs instead a long string of defeats. The most prominent of the cases is the Supreme Court decision in *Lyng v. Northwest Indian Cemetery Protective Association* (1988).

Lyng concerned the construction

of a road by the U.S. Forest Service in the Six Rivers National Forest in northern California. The Indians asserted, and the court recognized, that the road construction would interfere significantly with the Indians' religious practice. As noted above, the court pointed out in *Lyng* that indirect coercion or penalties on free exercise of religion are subject to First Amendment scrutiny just as much as are outright prohibitions or coercion.

The *Sherbert* test does not apply to government actions that are neither coercive nor prohibitive in nature. The *Lyng* court drew a sharp distinction between governmental actions (including indirect coercion and penalties) that must be scrutinized under *Sherbert*, and the building of a road on federal lands. *Lyng*, relying on *Bowen v. Roy* (1986), stated that the "Free Exercise Clause affords an individual protection from certain forms of governmental compulsion. It does not afford an individual a right to dictate the conduct of the Government's internal procedures." The *Lyng* court stated that its conclusion on indirect coercion and penalties, reviewed earlier in this article, "does not and cannot imply that incidental effects of government programs, which may make it more difficult to practice certain religions *but which have no tendency to coerce individuals into acting contrary to their religious beliefs, require government to bring forward a compelling justification for its otherwise lawful actions*" (emphasis added).

Thus, lawful government conduct, *or lawful public use of public lands*, that neither compels an individual to act contrary to his or her religion, nor prohibits an individual from engaging in religious behavior, are not subject to scrutiny under the *Sherbert* "compelling interest" test.

The court continued: "The crucial word in the constitutional text is 'prohibit': For the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government (*Sherbert, supra*, at 412 (Douglas, J., concurring))."

Justice Sandra Day O'Connor, writing for the majority, opined that even if the public program (in this case, the road construction) "would virtually destroy the Indians' ability to practice their religion, the Constitution simply does not provide a principle that could justify upholding respondent's [the Indians'] legal claim [of violation of free exercise rights]. However much we might wish that it were otherwise, government simply could not operate if it were required to satisfy every citizen's religious needs or desires." Justice O'Connor continued: "The First Amendment must apply to all citizens alike, and it can give to none of them a veto over public programs that do not prohibit the free exercise of religion."

In *Means v. Mathers*, a 1988 case, the Eighth Circuit Court contrasted governmental actions in administering federal lands and governmental regulation that compels or prohibits

conduct that violates free exercise of religion. The Eighth Circuit quotes *Roy* to state: "We cannot ignore the reality that denial of ... a benefit [a special use permit for an Indian applicant] from the Government is of a 'wholly different, less intrusive, nature than affirmative compulsion, or prohibition by threat of penal sanctions, for conduct that has religious implications' *Roy*, 476 U.S. at 704, 106 S. Ct. at 2154."

In the end, the construction of the government road on federal lands sacred to Indians was not deemed to violate their free exercise of religion. Many similar cases involving government management of or public access to lands have found no violation of Indian free exercise.⁴ Among the most prominent cases in which the courts have found no infringement on Indian free exercise are: *Se-quoyah v. TVA* (1980, Sixth Circuit Court); *Badoni v. Higginson* (1980, Tenth Circuit Court); *Hopi Indian Tribe v. Block* (1981, D.C. Circuit Court); *Crow v. Gullet* (1982, Eighth Circuit Court); *Lyng v. Northwest Indian Cemetery Protective Association* (1988, U.S. Supreme Court); *Means v. Mathers* (1988, Eighth Circuit Court); *Manybeads v. U.S.* (1989, D.C., Arizona); *Havasupai Tribe v. U.S.* (1992, U.S. Supreme Court); *Native Americans for Enola v. Forest Service* (1996, D.C., Oregon). *Bear Lodge Multiple Use Association v. Babbitt* (1996, D.C., Wyoming).

Federal Lands, Indian Religion, and the Establishment Clause

The First Amendment's religion language is two-sided. The Establishment Clause is the other side of the coin in the First Amendment. The First Amendment language on religion states: "Congress shall make no law *respecting an establishment of religion*, or prohibiting the free exercise thereof..." (emphasis added). While *Lyng* concerned the construction of a logging road on public land, the Supreme Court anticipated other cases where Indian religious claimants would seek to limit public uses of public lands. The court stated:

Nothing in the principle for which they [the Indians] contend ... would distinguish this case from another lawsuit in which they (or similarly situated religionists) might seek to exclude all human activity but their own from sacred areas of the public lands.... No disrespect for [Indian religious] practices is implied when one notes that such beliefs could easily require *de facto* beneficial ownership of some rather spacious tracts of public property. Even without anticipating future cases, the diminution of the Government's property rights, and the concomitant subsidy of the Indian religion, would in this case be far from trivial.

One need not search widely to find an instance where Indian religious practitioners sought to halt federal agency actions or to regulate public

conduct on federal (or state) lands deemed sacred by Indians: the 1980 case of *Badoni v. Higginson*, which involved Rainbow Bridge National Monument.

Several Navajo medicine men, "religious leaders of considerable stature among the Navajo," and three Navajo chapters brought suit against the NPS and Bureau of Reclamation. They contended, among other things, "that the presence of tourists" prevented them from holding ceremonies near the bridge in the Monument. This, they asserted, violated their right of free exercise of religion. The Navajo did not seek total exclusion from the Monument of non-Navajo, but did want the NPS to issue rules and regulations to prevent desecration of the Rainbow Bridge area by tourists, and to temporarily close the park to tourists for the conduct of religious ceremonies.

First, the Tenth Circuit Court found that by allowing tourists at Rainbow Bridge, the NPS "had not prohibited plaintiff's religious exercises." The court acknowledged that tourist presence at such exercises may "give rise to plaintiff's complaint of interference with exercise of their religion. We are mindful of the difficulties facing plaintiffs in performing solemn religious ceremonies in an area frequented by tourists. *But what plaintiffs seek is affirmative action by the government which implicates the Establishment Clause of the First Amendment. They seek government action to exclude others from the Monument, at least for short periods, and*

to control tourist behavior" (emphasis added).

The court stated that exercise of "First Amendment freedoms may not be asserted to deprive the public of its normal use of an area." The court continued that "we find no basis in law for ordering the government to exclude the public from public areas to insure privacy during the exercise of First Amendment rights." Thus, the presence of non-Indians at Rainbow Bridge did not violate Indian free exercise rights. More importantly, the court found that restricting public access to the federal lands in Rainbow Bridge National Monument on behalf of Navajo religious claims would violate the Establishment Clause of the First Amendment.

Similarly, courts have found that if the Forest Service had desisted from building a ski area in the San Francisco Peaks of Arizona (*Hopi v. Block*) or the logging road in the Six Rivers National Forest (*Lyng v. Northwest Indian Cemetery Protective Association*), based solely on Native American religious objections, the agency would likely commit an affirmative act to protect a religion—an act which is constitutionally impermissible. The Department of the Interior's Field Solicitor in Santa Fe, New Mexico, when confronted with issues of restricting access to park sites (at Chaco Culture National Historical Park) because of Indian religious objections, has also raised Establishment Clause objections.⁵

Devil's Tower Climbing Plan.
The most recent case in this string of

precedents arose in February 1995 when the NPS adopted a Climbing Management Plan for Devil's Tower National Monument. The NPS plan requested that climbers voluntarily refrain from climbing the tower in the month of June "in respect for the reverence that many American Indians hold for Devil's Tower as a sacred site...." No one objected to this part of the plan. However, the plan also threatened a compulsory closure of the tower to climbing each June, as one possible result, *if* a voluntary closure did not succeed. Moreover, in 1996 the NPS began placing conditions on Incidental Business Permits (formerly known as Commercial Use Licenses) so that commercial guide services could not lead climbs during the month of June. The NPS adopted this plan despite advice that parts of it had grave Establishment Clause implications. Perhaps the NPS managers believed that legal thinking on the issue raised in *Badoni* had evolved and could now be overturned, or simply toned down. Instead, in June 1996 the NPS received a stinging rebuke that reaffirmed *Badoni* in a clear and forceful manner.

In *Bear Lodge Multiple Use Association v. Babbitt*, the U.S. District Court for Wyoming declared the mandatory climbing restrictions aspect of the plan to be unconstitutional, and issued a preliminary injunction against enforcing that portion of the plan. The court said "affirmative action by the NPS to exclude legitimate public use of the

tower for the sole purpose of aiding or advancing some American Indians' religious practices violates the First Amendment's Establishment Clause."

Bear Lodge relied heavily upon *Badoni* and *Lyng* and specifically applied the "Lemon test." This three-part test examines whether governmental actions may violate the Establishment Clause. Slowly maturing in the Supreme Court cases of *School District of Abington v. Schempp* (1963) and in *Walz v. Tax Commission* (1970), the test fully emerged in *Lemon v. Kurtzman* (1971).⁶ The Lemon test holds that for governmental actions to comply with the Establishment Clause, they must have a secular purpose, neither advance nor inhibit religion as their principal or primary effect, and not foster an excessive governmental entanglement with religion.

When Massachusetts enacted a statute to permit religious bodies to veto the issuance of liquor licenses within 500 feet of a church or synagogue to protect such religious sites from the hurly-burly of liquor outlets, the Supreme Court found the law violated the Establishment Clause (*Larkin v. Grendel's Den, Inc.* {1982}).

Similar to the Massachusetts law, the NPS Climbing Management Plan for Devil's Tower National Monument partially yielded to Indian religious claimants who sought to exclude certain activities that interfere with, or desecrate, a place sacred to them. As we have seen, the U.S. Dis-

trict Court for Wyoming declared these aspects of the plan to be unconstitutional.

In the *Larkin* case, the unconstitutional Massachusetts law sought to protect houses of worship from the proximity of liquor-licensed businesses. It makes little difference if the religious body being given veto power over the public conduct of others is a church or an Indian religious authority. Nor does it make any difference whether the place of spiritual worship protected by governmental action is a structure, traditional to Western religions, or a geographic feature, traditional to Indian religions. The same principle applies. The *Larkin* principle is that the exclusion of legal public uses because they offend religious believers, or violate sacred or consecrated places, also violates the government's neutrality and thus the Establishment Clause.

More to the point, the courts have found that closures of federal lands to protect Indian spiritual or religious conduct do not meet the Lemon test. First, restricting public use to protect Indian spiritual or religious conduct is not "secular in purpose." Such closures as a "principal or primary effect" do indeed advance religion. Such closures, like the Massachusetts statute on liquor licenses, foster an "excessive governmental entanglement with religion."

Some may argue that since the closures do not officially establish Indian religions, then there is no Establishment Clause question here. But, the Establishment Clause applies to a far

broader range of governmental actions than simply granting official status to one specific religion, or to religion generally. As Justice David Souter wrote in *Board of Education of Kiryas Joel Village School District v. Grumet* (1994), "this Court has long held that the First Amendment reaches more than classic 18th century establishments."

The very purpose for proposed federal land closures of sacred sites is to protect certain forms of spiritual or religious practice. That is not a "secular" purpose.

The Establishment Clause and Accommodation

The Free Exercise Clause and the Establishment Clause of the First Amendment are, at times, a difficult fit. The two clauses of this proscription inevitably overlap, and the Supreme Court is occasionally faced with drawing a perplexing boundary between the two. If, for example, the government protects the right of free exercise too vigorously, that protection may well violate the Establishment Clause.

In some cases where the courts are compelled to draw a fine line, the Supreme Court developed the principle of "accommodation."⁷ While governmental actions that accommodate religious practice are very often subject to Establishment Clause scrutiny, the Court has found that the state may constitutionally "accommodate" religious observance through laws that alleviate special burdens on a religion.⁸ But the

Supreme Court has found that “the principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause” (*Lee v. Weisman* {1992}). Nor is “accommodation ... a principle without limits” (*Kiryas Joel v. Grumet* {1994}).

There are instances of accommodation that are specific to Indian religious practices. For example:

- ♦ Regulations at 21 CFR 1307.31 exempt the use of peyote, an otherwise controlled substance, in *bona fide* religious ceremonies of the Native American Church. (Upheld as constitutional in *Peyote Way Church of God v. Thornburgh*, 922 F 2nd 1210 {5th Cir. 1991}).
- ♦ The Bald Eagle Protection Act, 16 U.S.C. 668(a) permits the Secretary of the Interior to allow the otherwise prohibited possession of eagle feathers for the “religious purposes of Indian tribes.” (Upheld as constitutional in *Rupert v. U.S. Fish and Wildlife Service*, 957 F. 2nd 32 {1st Cir. 1992}).
- ♦ American Indian Religious Freedom Act Amendments of 1994, 42 U.S.C. 1996, prohibit Federal or State law from interfering with Indian use of peyote for traditional ceremonial purposes.

Can closures be construed as accommodation? The Department of Justice, in a memo of May 21, 1993, to the Office of Management and Budget, examined whether closures

of public lands for the privacy of American Indian religious rituals could be construed as “permissible accommodation.” The memo was in response to proposed (and, as yet, unenacted) amendments to the American Indian Religious Freedom Act. The Department of Justice memo states that, while “allowing Native American practitioners access to religious sites would probably be viewed as a permissible accommodation of religions and religious practices,” “prohibiting the general public from certain areas might be held to be beyond the scope of permissible accommodation....”⁹

Private religious preserves. Proposed closures of federal lands to public use to protect Indian religious practices goes well beyond “accommodation.” Such closures abandon government neutrality, single out practitioners of Indian religion for special treatment, and restrict, on that basis alone, the conduct of other park users. Under 36 CFR 1.5, the NPS may close all or part of a park for a host of reasons. Protecting the privacy or sanctity of Indian religious sites is not among them.

Closures propose to modify, by mandatory rule, the conduct of others in society so as not to offend the particular Indians’ religiously grounded preferences. A “tourist” at Rainbow Bridge, the courts have found, does not coerce the Indians into violating their religion or acting contrary to their beliefs. Because the tourist’s presence is offensive to the Indian religion, even a desecration of a sacred

site, it does not follow that the NPS may restrict conduct on that basis alone. If so, there emerges a near-fusion of governmental and religious functions that is forbidden. (See *Larkin v. Grendel's Den, Inc.* {1982}).

The federal courts also addressed this issue in an Indian context with *Badoni* and *Bear Lodge*. The Tenth Circuit Court quotes from a 1953 Circuit Court decision¹⁰ that "the First Amendment protects one against action from the government, though even then, not in all circumstances; but it gives no one the right to insist that in the pursuit of his own interests others must conform their conduct to his own religious necessities.... Were it otherwise," the *Badoni* court concludes, "the [Rainbow Bridge National] Monument would become a *government-managed religious shrine*" (emphasis added).

Separation of church and state is an alien concept to some tribes. The notion of church-state separation may be alien to some Indian cultural beliefs. The Indian Civil Rights Act of 1968 (25 U.S.C. 1301, *et seq.*) requires that tribes protect the rights of tribal members—rights that other Americans possess. But, unlike the United States Constitution, the Indian Civil Rights Act does not prohibit tribal establishment of religion. This omission was deliberate because it recognized that, in many tribes, religion, government, and daily life are inextricable. However, the NPS is a federal agency whose fundamental nature differs from that of Indian

tribes. Nor do NPS and tribal interests always coincide. Unlike tribes, the NPS is governed by the First Amendment prohibition on establishment.

The "Traditional Cultural Practice" Strategy

Perhaps federal land managers can circumvent Establishment Clause questions by closing the lands to protect "traditional cultural practices" rather than to protect sacred sites. What a relief it would be to the courts, if we could avoid Establishment Clause scrutiny for religious activities because we labeled them as "traditional cultural activities" instead. Placement of nativity scenes or menorahs on courthouse steps, prayers at graduation ceremonies, and Bible reading in schools could all be classed as "traditional cultural activities."¹¹ No need to apply any First Amendment Establishment Clause test.

Yet, the traditional cultural practices being shielded by NPS closures are, in fact, Indian spiritual or religious ceremonies, rites, and rituals. The fact that Indian religious systems are not strictly analogous to traditional Western religions does not render the traditional cultural practices bereft of spiritual or religious significance. Even the proponents of this approach must acknowledge that the traditional cultural practices at issue here are deeply spiritual or religious.

Some may argue that it is a part of the "secular" NPS mission to con-

serve "the cultural resource" of Indian spiritual or religious practices. But so broad a mantle over Indian religion smacks precisely of that kind of "excessive entanglement" that should set off the alarm bells of *Lemon*. A similar argument could be made that it is the mission of the NPS to conserve the cultural resource of Roman Catholic religious practice at the San Antonio Missions National Historic Park. Would the NPS deem it appropriate to close Pecos National Monument to all but Roman Catholics during the celebration of the Mass in the old church? Is the Mass of the Roman Catholic Church a "traditional cultural practice" rather than a "religious ritual?"

If the NPS, an agency of the United States government, possessed a "duty" to protect a "cultural resource" known as "religious practice," does that NPS duty also include the responsibility to insure the resource's orthodoxy, integrity, and authenticity? This is a truly frightful thought.

The First Amendment guarantees to Indians, as to all other Americans, a qualified protection of their "free exercise" rights. So too, the Establishment Clause also applies to dealings of federal land managers with Indian religious claims.

Special Legislative Provisions

Congress addressed Indian tribal claims for privacy of religious activities in the act establishing El Malpais National Monument and National Conservation Area in New Mexico.

In Public Law 100-225, of December 31, 1987, Congress provided that: "the Secretary, upon the request of an appropriate Indian tribe, may from time to time temporarily close to general public use one or more specific portions of the monument or the conservation area in order to protect the privacy of religious activities in such areas by Indian people." (16 U.S.C. 460uu-47).¹²

Clearly conscious of the Establishment Clause implications of its language, Congress added the following: "Any such closure shall be made so as to affect the smallest practicable area for the minimum period necessary for such purposes." As if to highlight the extreme sensitivity involved with such closures, the law continues: "Not later than seven days after the initiation of any such closure, the Secretary shall provide written notification of such action to the Energy and Natural Resources Committee of the United States Senate and the Interior and Insular Affairs Committee of the House of Representatives."

Congress has enacted similar authority for the NPS to effect limited and temporary closures for Indian religious practices in P.L. 103-433, the California Desert Protection Act of 1994 (16 U.S.C. 410aaa-75). Congress has not provided the NPS the authority to make limited and temporary religious privacy closures except for El Malpais and the three parks of the California Desert.

The Department of Justice memorandum (referenced in endnote #9) seems to believe that such *congres-*

sional actions for temporary and limited closures might survive constitutional challenge. However, the June 1996 ruling in the Devils's Tower case may embolden a constitutional challenge to even these statutes that permit temporary closures. Perhaps authority for these closures may survive because they rest on law and not simply agency administrative action.

In any case, if the Indian religious closure provisions of the above laws were found to be constitutional, it would be imprudent for NPS managers to pursue Indian religious closures in parks where Congress did not provide for them. Such closures, such as the closure attempted at Devil's Tower, lack the most basic safeguards that Congress has imposed on federal agencies where Congress specifically authorizes such closures (for example: "smallest practicable area for the least amount of time"). The safeguard of committee oversight that Congress found imperative in El Malpais, where it authorized closures, was completely absent from the Devil's Tower Climbing Plan. It would be a peculiar outcome if an NPS-initiated religious closure should have to meet a less rigorous standard than a congressionally authorized closure.

The American Indian Religious Freedom Act (42 U.S.C. 1996)

Congress enacted the American Indian Religious Freedom Act (AIRFA) in 1978. The purpose of the law was "to insure that policies and procedures of various Federal agencies, as they may impact upon the exercise of traditional Indian re-

ligious practices, are brought into compliance with the constitutional injunction that Congress shall make no law abridging the free exercise of religion" (AIRFA Legislative History, House Report 95-1308).

AIRFA is an affirmation of American Indian First Amendment rights of worship. AIRFA does not establish the "free exercise" rights of Indians as absolute rights, exempt from any and all governmental burdens, direct or indirect. AIRFA does not confer more rights on Indian religions than are protected by the First Amendment. Consequently, when Navajo plaintiffs in *Badoni* raised AIRFA as a basis for modifying NPS management of Rainbow Bridge National Monument, the courts entirely dismissed the argument.

The Supreme Court in *Lyng v. Northwest Indian Cemetery Protective Association* (1988) rendered its most definitive position on the extent to which AIRFA countermands federal agency policies and actions. The court quoted AIRFA's author, Representative Morris Udall, who "emphasized that the bill would not 'confer special religious rights on Indians,' would 'not change any existing State or Federal law,' and in fact 'has no teeth in it.'" Thus, public use of public lands in a park, even lands deemed sacred to Indians, is not contravened by AIRFA.

NPS Management and Native American Relationships Policies

Closures of NPS lands to protect Indian traditional or religious activities directly conflict with NPS Man-

agement Policies on Native American Use (Chapter 8, pp. 8-9). These policies state that "performance of [Native American] traditional activities at a particular place will not be a reason for prohibiting the use of that area by others except where temporary closings are authorized in law...." We have seen that such temporary closings are authorized in the laws governing Death Valley National Park, El Malpais National Monument, Joshua Tree National Park, and Mojave National Preserve.

Closures of NPS lands to protect Indian traditional or religious activities also directly conflict with NPS Native American Relationships Policy, adopted by notice in the *Federal Register* on September 22, 1987 (52 FR 183). The NPS Native American Relationships Policy states (section III. B. 2) that "performance of a traditional ceremony or the conduct of a religious activity at a particular place shall not form the basis for prohibiting others from using such areas."

Summary

The National Park Service, like other federal land-management agencies, is constitutionally enjoined from taking actions that subsidize American Indian religion and create private religious preserves on federally owned public lands, *except* as law or treaty specifically provide.

Congress may, if it wishes, single out American Indian tribes for special treatment. Because of the unique legal position of the tribes in federal law pursuant to the treaty and trust relationship, special legislation that singles them out may not violate the Equal Protection or the Establishment Clauses of the Constitution.

An NPS manager should not ignore American Indian religious rights—or any First Amendment rights of religion, speech, or assembly. The NPS obligation to preserve the resources of the National Park System should not discourage us from accommodating, where possible, the religious practices of American Indians, or any other Americans. Thus, NPS managers must insure that Indian have nonexclusive access to their sacred sites for religious ceremonies. The NPS Native American Relationships Policy even provides that visits to parks for such purposes by Native Americans are exempt from camping or entrance fees. Such accommodation of religious practice is possible, but it must not go too far. The courts have told us that agency actions to establish private religious preserves for Indians on public lands go too far. The Devil's Tower decision is a fresh reaffirmation of that rule.

Endnotes

1. The Supreme Court decision in *Employment Division v. Smith* (1990) partially abandoned the 1963 *Sherbert* test by establishing a lower threshold of constitutionality for neutral laws of general applicability that incidentally interfere with religious practice. Under *Smith*, a law need not serve a

"compelling state interest." Such a law must merely "advance a valid state purpose" to be constitutional.

Under *Smith*, only laws that were not neutral and that restrict practices "because of their religious motivation" need meet the strict "compelling state interest" test. Some justices of the Supreme Court, notably Justice David Souter, indicated discomfort with the low threshold established by *Smith*. Souter, in the 1993 case of *Church of the Lukumi* (see note #3 below), mused that a law which burdens one religion disproportionately must be held to a higher standard than just advancing a "valid state purpose" because such a law, though neutral on its face, may not be "substantively" neutral. However, Justice Souter's principle of "substantive neutrality" did not find a majority on the Court.

Justice Souter did not have to wait for a majority on the Supreme Court to revisit the threshold lowered in 1990 by *Smith*. Congress overturned the lower threshold in *Smith* and reinstated the *Sherbert* "compelling state interest" test even for neutral laws that indirectly burden religious exercise. Congress did so in Public Law 103-141, the Religious Freedom Restoration Act (42 U.S.C. 2000bb), on November 16, 1993.

2. Examples of governmental acts that violate Free Exercise because they compel believers to act contrary to their religion include: mandatory school attendance laws for Amish school children (*Wisconsin v. Yoder* 406 U.S. 205 [1972]), and a New Hampshire law compelling auto license plates to bear the slogan "Live Free or Die" (*Wooley v. Maynard* 430 U.S. 705 [1977]). An example of a governmental act that violates the Free Exercise Clause because it penalizes religious belief is the denial of unemployment benefits to a Seventh Day Adventist who refused to accept a job that required her to work on, and thus violate, her Sabbath (*Sherbert v. Verner* 374 U.S. 398 [1968]). For similar findings, see *Thomas v. Review Board, Indiana Employment Security Division* 450 U.S. 707 (1981), in which unemployment benefits were denied to an applicant whose religion forbade him to work fabricating weapons; and *Hobie v. Unemployment Appeals Commission of Florida* 480 U.S. 136 (1987).
3. A different standard applies when the state enacts laws that are neither neutral, nor of general application, but burden specific religious conduct. Justice Anthony Kennedy wrote in *Church of the Lukumi Babalu Aye v. City of Hialeah* (1993) that such laws must "undergo the most rigorous of scrutiny. To satisfy the commands of the First Amendment, a law restrictive of religious practice must advance 'interests of the highest order' and must be narrowly tailored in pursuit of those interests." This is not the test applicable to 36 CFR 2.1, which is neutral and generally applicable but whose effect indirectly burdens religious conduct. Congress may soon adopt a law that prohibits in the United States the ritual of female circumcision. Such a law would likely have to meet the test enunciated by Justice Kennedy.
4. Advocates on behalf of Indian religious practitioners have been quick to understand that the courts do not apply the "compelling interest" test in *Sherbert* to legitimate government management of federal lands, or public use of such lands. Since such actions neither compel nor prohibit Indian religious conduct, *Sherbert* does not apply. Thus, Jack Trope, in an article in *Cultural Survival Quarterly* (Winter 1996), specifically advocates that before the government takes an action that affects Indian sacred sites, the government "ought to be required to justify that the need for an activity is *compelling* and that there is no less intrusive manner to achieve that end..." (emphasis added). That, of course, is the *Sherbert* test. And Congress (or the courts) have not yet applied such a standard to Federal land management decisions.
5. See Memorandum of December 12, 1990 from Field Solicitor, NPS Southwest Region, to NPS Regional Director, Southwest Region.
6. The Supreme Court recently (June 28, 1994) decided a New York case (*Board of Education of Kiryas Joel v. Grumet*) that afforded an opportunity to overturn or refine the "Lemon test." Justice Antonin Scalia, in particular, is not fond of the test, describing it as a "ghoul in some late-night horror show that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried..." (*Lamb's Chapel v. Center Moriches School District* [1993]). In a 6-3 decision with Chief Justice William Rehnquist and Justices Antonin Scalia and Clarence Thomas in the minority, the court essentially upheld the prongs of the Lemon test.
7. The Supreme Court's first mention of accommodation is in *Zorach v. Clausen*, 343 U.S. 306 (1952). In that case, the Board of Education of the city of New York instituted a program, known as

- “released time,” during which students would be released from attending class in their public schools so that the students could attend religious instructions at their churches. This practice was especially crafted for the large Roman Catholic population of New York City whose church maintained a vigorous program of religious instruction for Catholic children in public schools. The court said: “When the state cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and *accommodates* the public service to their spiritual needs” (emphasis added).
8. Some other examples of governmental accommodation of religion that the courts have found constitutional: The National Prohibition Act of 1920 that forbid the manufacture, sale, or transportation of alcohol for beverage purposes but specifically exempted “wine for sacramental purposes”; and the Civil Rights Act of 1964, which exempts religious organizations from Title VII’s prohibition on discrimination based upon religion (*Corporation of Presiding Bishops of Church of Jesus Christ of Latter-day Saints v. Amos* 483 U.S. 327 (1987)).
 9. The Department of Justice made the same comments in a letter dated August 4, 1993, to the Chairman of the Senate Committee on Energy and Natural Resources, in connection with language for the proposed California Desert Protection Act.
 10. *Otten v. Baltimore & O.R. Co.*, 205 F. 2d 58 (2d Cir, 1953).
 11. In *Kiryas Joel*, the Court held that a 1989 act by the state of New York to establish a separate school district to accommodate the disabled children of a community of Hasidic Jews (the Satmars) violated the Establishment Clause. The state law conferred authority not on the religious leaders of the community, but on the citizens of the village united by a common Satmar tradition and culture, thereby hoping to avoid Establishment Clause challenge. Yet even that effort did not provide an adequate shield.
 12. Congress has since enacted similar language for the Jemez National Recreation Area (administered by the Forest Service) in the state of New Mexico, created in 1993, and, as will be noted in the text, in the California Desert Protection Act (Section 705), enacted in 1994.



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