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Native Americans' Access to Religious Sites: Underprotected Under the Free Exercise Clause?

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NATIVE AMERICANS' ACCESS TO RELIGIOUS SITES: UNDERPROTECTED UNDER THE FREE EXERCISE CLAUSE?

The Supreme Court has interpreted the free exercise clause of the first amendment[1] as the guarantor of the widest possible exercise of religious practices consistent with ordered liberty.[2] The purpose of the free exercise clause is to guarantee a degree of freedom of action in religious affairs.[3] Its scope, however, is curtailed by the breadth of government regulation and action.[4] In addition, the scope of its protection is contingent upon interpretations of the term "religion." To analyze claims brought under the free exercise clause, the Supreme Court formulated a balancing test, enunciated in *Wisconsin v. Yoder*[5] and *Sherbert v. Verner*.[6] The test for evaluating challenges to government actions under the free exercise clause requires a court first to determine whether a burden on religion has been established and second, once a burden has been established, to weigh the government interest served by the challenged action against the degree of impairment to the religious practice.[7] Only if the governmental interest is so compelling that it outweighs the relatively slight impairment to the religious practice will the challenged action be upheld.[8]

Recently, Native Americans have brought a number of claims challenging the government's use of public lands as violations of the first amendment's free exercise clause.[9] At issue in these cases is the extent to which the first amendment protects Native Americans from government management of public lands when such management interferes with Native American religious practice.[10] In the majority of these cases, the courts

[1] U.S. CONST. amend. I, provides in relevant part: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof . . . ."

[2] *See generally* United States v. Ballard, 322 U.S. 78, 86-87 (1943).

[3] *See generally* Gianella, *Religious Liberty, Nonestablishment and Doctrinal Development*, 80 HARV. L. REV. 1381, 1388 (1967) [hereinafter cited as Gianella].

[4] *Id.* at 1382-83.

[5] 406 U.S. 205 (1972).

[6] 374 U.S. 398 (1963).

[7] *See* Wisconsin v. Yoder, 406 U.S. 205, 215 (1972).

[8] *Id.*

[9] *See* Sequoyah v. Tennessee Valley Authority, 480 F. Supp. 608 (E.D. Tenn. 1979), *aff'd*, 620 F.2d 1159 (6th Cir. 1980), *cert. denied*, 452 U.S. 954 (1981); Badoni v. Higginson, 455 F. Supp. 641 (D. Utah 1977), *aff'd*, 638 F.2d 172 (10th Cir. 1980), *cert. denied*, 452 U.S. 954 (1981); Crow v. Gullet, 541 F. Supp. 785 (D.S.D. 1982), *aff'd*, 706 F.2d 856 (8th Cir. 1983) (per curiam), *cert. denied*, 104 S. Ct. 413 (1983); Inupiat Community of Arctic Slope v. United States, 548 F. Supp. 182, 188-89 (D. Alaska 1982), *aff'd*, 746 F.2d 570 (9th Cir. 1984) (per curiam); Hopi Indian Tribe v. Block, 8 I.L.R. 3073 (D.D.C. June 15, 1981), *aff'd sub nom.* Wilson v. Block, 708 F.2d 735 (D.C. Cir. 1983), *cert. denied sub nom.* Wilson v. Block, 104 S. Ct. 371 (1983), Navajo Medicinemen's Association v. Block, 104 S. Ct. 739 (1983); Northwest Indian Cemetery Protection Association v. Peterson, 552 F. Supp. 951 (N.D. Cal. 1982); Northwest Indian Cemetery Protection Association v. Peterson, 565 F. Supp. 586 (N.D. Cal. 1983). See also N.Y. Times, Aug. 5, 1984, at 21 for a discussion of a suit underway brought by the Jemez tribe and an association of New Mexico pueblo tribes, among others, against the United States Forest Service.

[10] This note is confined to a discussion of the free exercise clause. The establishment clause, however, is also implicated in several of the cited cases. *See* U.S. CONST amend. I. For a regulation or action to overcome an establishment clause challenge, it must meet three criteria. First, the purpose of the statute must reflect a legitimate secular interest. Second, the effect of the statute must neither advance nor inhibit religion in general. Third, the statute must not result in excessive government entanglement with religion. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

have upheld the constitutionality of congressional or administrative decisions to alter lands holy to Native Americans.[11] The Native Americans have unsuccessfully challenged the completion of a dam,[12] the exploration of waters,[13] the flooding of a natural bridge,[14] the construction of roads and parking lots,[15] and the placement of a ski resort[16] on lands sacred to them. Courts have held that all of these government actions were constitutionally permissible. In one case, however, the United States District Court for the Northern District of California found that the first amendment precluded the government's proposed activity and protected the Native Americans' access to religious sites.[17] In *Northwest Indian Cemetery Protective Association v. Peterson*, the court held that the completion of a logging road through Native Americans' sacred lands was impermissible under the free exercise clause of the first amendment.[18] In light of the Supreme Court's treatment and interpretation of the first amendment, as well as the American Indian Religious Freedom Act (AIRFA),[19] the outcome and analysis of the *Peterson* case alone was proper.

With the exception of *Peterson*, all the Native American challenges to governmental use of land failed. The majority of these holdings are inconsistent with the Supreme Court's treatment of religion. In all but one of the cases in which the Native Americans' claims failed, the balancing test enunciated in *Sherbert* and *Yoder* was improperly applied.[20] In two cases, the courts failed to find a religious interest that warranted applying the balancing test.[21] These cases indicate the court's difficulty in defining "religion." In two other cases, the courts found religious interests that potentially warranted protection, but

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The relief sought is highly relevant to an establishment clause analysis. *See, e.g.*, Inupiat Community of Arctic Slope v. United States, 548 F. Supp. 182, 189 (D. Alaska 1982) (relief sought by the tribe creates establishment clause problems because "a free exercise claim cannot be pushed to the point of awarding exclusive rights to a public area"). *But cf.* Wilson v. Block, 708 F.2d 735, 747 (D.C. Cir. 1983) (where government action violates the free exercise clause, the establishment clause should not bar judicial relief).

[11] *See* Sequoyah v. Tennessee Valley Authority, 480 F. Supp. 608 (E.D. Tenn. 1979), *aff'd*, 620 F.2d 1159 (6th Cir. 1980), *cert. denied*, 452 U.S. 954 (1981); Badoni v. Higginson, 455 F. Supp. 641 (D. Utah 1977), *aff'd*, 638 F.2d 172 (10th Cir. 1980), *cert. denied*, 452 U.S. 954 (1981); Crow v. Gullet, 541 F. Supp. 785 (D.S.D. 1982), *aff'd*, 706 F.2d 856 (8th Cir. 1983) (per curiam), *cert. denied*, 104 S. Ct. 413 (1983); Inupiat Community of Arctic Slope v. United States, 548 F. Supp. 182, 188-89 (D. Alaska 1982), *aff'd*, 746 F.2d 570 (9th Cir. 1984) (per curiam); Hopi Indian Tribe v. Block, 8 I.L.R. 3073 (D.D.C. June 15, 1981), *aff'd sub nom.* Wilson v. Block, 708 F.2d 735 (D.C. Cir. 1983), *cert. denied sub nom.* Wilson v. Block 104 S. Ct. 371 (1983), Navajo Medicinemen's Association v. Block, 104 S. Ct. 739 (1983).

[12] Sequoyah v. Tennessee Valley Authority, 620 F.2d 1159, 1165 (6th Cir. 1980).

[13] Inupiat Community of Arctic Slope v. United States, 548 F. Supp. 182, 189 (D. Alaska 1982).

[14] Badoni v. Higginson, 638 F.2d 172, 177 (10th Cir. 1980).

[15] Crow v. Gullet, 706 F.2d 856, 858 (8th Cir. 1983).

[16] Wilson v. Block, 708 F.2d 735, 741 (D.C. Cir. 1983).

[17] Northwest Indian Cemetery Protective Association v. Peterson, 565 F. Supp. 586, 591 (N.D. Cal. 1982).

[18] *Id.* at 591.

[19] 42 U.S.C. § 1996 (1982) [hereinafter cited as AIRFA] reads:

> On and after August 11, 1978, it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.

[20] *See infra* notes 150-441 and accompanying text.

[21] Sequoyah v. Tennessee Valley Authority, 520 F.2d 1159, 1165 (6th Cir. 1980); Inupiat Community of Arctic Slope v. United States, 548 F. Supp. 182, 189 (D. Alaska 1982).

held that the government action involved did not burden that interest.[22] In one case, the court erred when it evaluated the government interest alone to determine that no burden on religion was created rather than evaluating both the government and religious interests.[23] In the other, the facts and analysis supported a finding that no burden was imposed on religion rendering the outcome proper.[24] Finally, in another case, the court neglected to analyze the nature of the religious interest.[25] Misapplying the balancing test, the court concluded that the government interest overrode any religious interest.[26] The court in *Northwest Indian Cemetery Protection Association v. Peterson* alone properly applied all parts of the *Yoder* and *Sherbert* balancing test and found the Native Americans' claims to be valid.[27]

This note will focus on the line of cases involving free exercise claims of Native Americans and the governmental use of public property. The note first will discuss the free exercise clause and the balancing test developed by the Supreme Court to analyze claims under the clause. Following that discussion, the note will examine how this balancing test has been applied in the context of Native American challenges to governmental use of public property. It will argue that potentially valid claims have failed because courts have applied the test improperly. Further, the note will assert that the Native Americans' claims in *Peterson* succeeded because that court properly applied the test. Although factual differences among the cases may have affected their outcomes, the courts' interpretations of what constitutes a religious practice and an infringement on a practice have been the critical factors in determining whether the Native Americans or the government prevailed. This note will conclude that the majority of these courts have misconstrued *Sherbert*, *Yoder*, and other cases interpreting the first amendment. In addition, the note will suggest that courts have not given sufficient weight to the American Indian Religious Freedom Act (AIRFA) in deciding these cases. AIRFA may be useful in clarifying the meaning of the term "religion" and in helping define the limits of government action regarding the religious practices of Native Americans. The note will suggest that the reasoning of the *Peterson* court is promising in its sensitivity to Native Americans' religious interests and in its accuracy in interpreting and applying the free exercise balancing test. Finally, this note will assert that Native Americans' claims continue to face stumbling blocks in the form of the heavy weight accorded to the government's interest in land management and establishment clause concerns that can frustrate fashioning remedies to accommodate Native American religions.

I. The Constitutional and Statutory Context

A. *The Free Exercise Clause*

The first amendment provides that Congress shall make no law prohibiting the free exercise of religion.[28] In protecting the practice of religion, the free exercise clause prohibits the proscription of any religious belief.[29] Moreover, the clause requires the

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[22] Wilson v. Block, 708 F.2d 735 (D.C. Cir. 1983); Crow v. Gullet, 706 F.2d 856 (8th Cir. 1983).

[23] *Wilson*, 708 F.2d at 744.

[24] *Crow*, 706 F.2d at 858.

[25] Badoni v. Higginson, 638 F.2d 172, 177 (10th Cir. 1980).

[26] *Id.*

[27] *Peterson*, 565 F. Supp. at 591.

[28] *See supra* note 1. The free exercise clause is applicable to the states as well. *See* Cantwell v. Connecticut, 310 U.S. 296 (1940).

[29] *See* Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

government to accommodate the practice of religious beliefs when the government incidentally burdens religious practices.[30] Like any first amendment right, however, the right to free exercise of religion is not absolute.[31] Courts have distinguished the freedom of *belief* from the freedom of *practice* to allow burdens on the latter.[32] Burdens on the practice of religion are permissible only when they are incident to regulation of secular activities and the state interest is so great that it overrides claims for a religious exemption or accommodation.[33]

In addition to forbidding the prohibition of a religion and requiring accommodation of religious interests that outweigh state interests, the free exercise clause forbids the government from conferring benefits or imposing burdens on individuals because of their religious beliefs.[34] Government action may burden religion when it inhibits or prohibits activity important to the practice of a particular religion.[35] A burden may be "direct," prohibiting essential religious activities,[36] or "indirect," inhibiting the practice of a religion.[37] Both direct and indirect burdens are reviewed under the same standard[38] — a balancing test weighing the infringement on religion against the state's interest in the regulation or activity.[39]

Although courts have formulated a test for establishing when a law or action burdens the practice of religion, they have not enunciated explicit guidelines for meeting the test's requirements.[40] Generally, the courts have concluded that to establish a burden on religion, a plaintiff must show that the burden on religion is substantial and coercive, forcing him to forego the practice of his religion.[41] Any regulation substantially impeding the practice of religion is, therefore, sufficiently "coercive" to warrant review under the balancing test.[42] After determining the degree of burden on the religious practice, the courts assess the state interest by evaluating the importance of the interest and the extent to which an exemption for the religious practice would impair that interest.[43] A truly compelling state interest requires no exemption.[44] In cases involving a lesser state interest,

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[30] *See, e.g., Yoder*, 406 U.S. at 214-15.

[31] *See* Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

[32] *See, e.g.*, Reynolds v. United States, 98 U.S. 145, 166-67 (1878) (the prohibition of polygamy was upheld).

[33] *See* Thomas v. Review Board, Ind. Employment Sec. Div., 450 U.S. 707, 718-19 (1981).

[34] *See, e.g.*, Torcaso v. Watkins, 367 U.S. 488 (1961) (requirement that a person take an oath attesting to belief in God as prerequisite to public employment was unconstitutional).

[35] *See Sherbert*, 374 U.S. at 406.

[36] *See, e.g.*, Reynolds v. United States, 98 U.S. 145 (1878) (the prohibition of polygamy has a direct effect on the Mormons' religious practices).

[37] *See, e.g.*, Braunfeld v. Brown, 366 U.S. 599 (1961) (Sunday closing laws have indirect effect of economic costs to those whose Sabbath is not on Sunday).

[38] *Compare* Braunfeld v. Brown, 366 U.S. 599 (1961), *with* Reynolds v. United States, 98 U.S. 145 (1878).

[39] *Yoder*, 406 U.S. at 221; *Sherbert*, 374 U.S. at 407. *Sherbert* required that the state interest must be compelling, 374 U.S. at 406. *Yoder* merely required that the state interest be more important than the religious interest. *But see* Thomas v. Review Bd., Ind. Employment Sec. Div., 450 U.S. 707, 718-19 (1981) (reiterating *Sherbert*'s standard).

[40] *See, e.g., Yoder*, 406 U.S. at 214.

[41] *See* Walsh v. Louisiana High School Athletic Ass'n, 616 F.2d 152, 158 (5th Cir. 1980), *cert. denied*, 449 U.S. 1124 (1981). *See also* School District of Abington v. Schempp, 374 U.S. 203, 223 (1963).

[42] *See Sherbert*, 374 U.S. at 407.

[43] *Id.*

[44] *Id.* Examples of compelling state interests include the state's interest in a day of rest, Braun-

courts require the state to accommodate the religious interest by examining less restrictive means for effecting the states' goals.[45]

The balancing test for evaluating free exercise claims was enunciated by the Supreme Court in two cases, *Sherbert v. Verner*[46] and *Wisconsin v. Yoder*.[47] In *Sherbert*, the Supreme Court held that a Seventh Day Adventist could not be denied state unemployment benefits because she refused to work on Saturday, her Sabbath.[48] The plaintiff in *Sherbert* was discharged from her employment for refusing to work on Saturday.[49] Subsequently, she was unable to obtain other employment and the state denied her unemployment benefits.[50] The state argued that she had failed to accept suitable work without good cause.[51] The State Employment Security Commission's action was sustained by the South Carolina Supreme Court.[52] Employing a two-part balancing test, the Supreme Court of the United States reversed the state court's decision, asserting that the denial of benefits "must be either because her disqualification as a beneficiary represents no infringement by the state of her constitutional rights of free exercise, or because any incidental burden on the free exercise of appellant's religion may be justified by a 'compelling state interest in the regulation' . . . ."[53]

The Court in *Sherbert* set forth requirements for establishing the existence of an impermissible burden in violation of the first amendment.[54] First, a plaintiff must establish that the regulation imposes a burden on the exercise of her religion.[55] Second, once a burden is established, the state's interest must outweigh the degree of infringement on free exercise rights.[56] The importance of the state interest and the possibility of using alternative means that do not burden religion to accomplish the same end are factors in such a review.[57] Employing this analysis the Court ruled that the denial of benefits in *Sherbert* was impermissible under the free exercise clause of the first amendment.[58] According to the Court, the plaintiff had proved that the state regulation impermissibly burdened her exercise of religion[59] because it forced her to choose between following the precepts of her religion and forfeiting employment benefits, or abandoning the precepts of her religion to accept work.[60] The Court ruled that such proof of a burden on the

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feld v. Brown, 366 U.S. 599 (1961) (upholding Sunday closing laws); the health and safety of minors, Prince v. Massachusetts, 367 U.S. 488 (1961) (upholding a child labor law applied to children distributing religious materials); and the preservation of morality, Reynolds v. United States, 98 U.S. 145 (1878) (upholding laws prohibiting polygamy).

[45] Examples of state interests requiring accommodation of religious interests include protecting an unemployment fund from fraudulent claims, Sherbert v. Verner, 374 U.S. 398 (1963) and education, Wisconsin v. Yoder, 406 U.S. 205 (1972).

[46] 374 U.S. 398 (1963).

[47] 406 U.S. 205 (1972).

[48] *Sherbert*, 374 U.S. at 402.

[49] *Id.*

[50] *Id.*

[51] *Id.* at 399-401.

[52] *Id. See* 240 S.C. 286, 125 S.E.2d 737 (1962).

[53] *Sherbert*, 374 U.S. at 403 (quoting NAACP v. Button, 371 U.S. 415, 438 (1963)).

[54] *Id.* at 403-09.

[55] *Id.* at 403.

[56] *Id.* at 406.

[57] *Id.* at 406-07.

[58] *Id.* at 409.

[59] *Id.* at 403.

[60] *Id.* at 404.

exercise of religion required the state to prove a compelling or overriding interest in the regulation.[61] The state's contention that the regulation deterred fraudulent claims was insufficient, according to the Court, to establish a compelling or overriding interest.[62]

The Supreme Court reiterated and elaborated the balancing test set forth in *Sherbert* in *Wisconsin v. Yoder*.[63] In *Yoder*, a group of Amish were convicted of violating a state compulsory education requirement.[64] They challenged the conviction on first amendment grounds.[65] The Amish believed that integration into the religious community must be effected through vocational training at the home and on the farm.[66] The root of this belief is the idea that salvation requires life in a church community apart from the world and worldly affairs.[67] They argued therefore that compulsory education abridged their free exercise rights by removing children from the home.[68] The Court ruled in favor of the Amish and allowed them a religious exemption to the mandatory education requirements.[69]

In analyzing the validity of the Amish groups' claims, the Court first evaluated the sincerity of their religious beliefs.[70] Convinced of such sincerity,[71] the Court stated that claims must be "rooted in religious belief" to invoke the protection of the first amendment.[72] The Court asserted that the first amendment does not afford protection to nonreligious — ethical or cultural — challenges to state regulations,[73] but did not specify the criteria for determining whether a belief is "rooted in religion." It did, however, note that factors to be considered in this determination include whether the practice is held by an organized group, related to lifestyle, and grounded in Biblical interpretation.[74] The Court noted that the Amish lifestyle was a direct response to their interpretation of the Biblical command of "be not conformed to this world."[75] Furthermore, it noted that religion pervades their entire way of life.[76] The Court then concluded that the Amish practice was rooted in religion.[77]

In addition to requiring that plaintiffs establish that the belief is rooted in religion, the *Yoder* Court required the plaintiffs to establish that the challenged government action burdened their religious practice in order to prove a first amendment violation.[78] The Amish effectively established that the compulsory education requirement imposed a

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[61] *Id.* at 403.

[62] *Id.* at 407. Furthermore, by noting that the plaintiff was a potentially productive member of society despite her religious beliefs, the Court suggested that the state is not required to accommodate every religious practice if such accommodation means abandoning the ends of its program. *Id.* at 410.

[63] 406 U.S. 205 (1972).

[64] *Id.* at 205.

[65] *Id.* at 207-09.

[66] *Id.*

[67] *Id.* at 212.

[68] *Id.*

[69] *Id.* at 234-35.

[70] *Id.* at 216-18.

[71] Moreover, the state had stipulated that respondents' religious beliefs were sincere. *Id.* at 210.

[72] *Id.* at 215.

[73] *Id.* at 216.

[74] *Id.* at 217.

[75] *Id.*

[76] *Id.*

[77] *Id.* at 219.

[78] *Id.* at 214.

burden on their religious practice because it forced them either to act contrary to their religious tenets or to risk criminal sanctions.[79] More importantly, the Court noted that compulsory school attendance infringed on first amendment rights of the Amish by threatening to undermine the Amish community and religious practice.[80]

Under the test enunciated in *Yoder*, once the plaintiff has established a burden on his exercise of religion,[81] the government has the burden of proving that an "interest of sufficient magnitude to override the interests claiming protection under the Free Exercise Clause" exists or that its requirement does not deny the free exercise of religion.[82] In employing the balancing test, the Court asserted that "only those interests of the highest order and those not otherwise served" can outweigh free exercise claims.[83] The Court concluded that despite a strong interest in education, the state's interest did not outweigh the religious interest of the Amish.[84] Furthermore, the Court found that the goals of the state would not be impaired by the religious exemption.[85]

The Court reaffirmed its reasoning and the prohibition of indirect religious infringement in *Thomas v. Review Board, Indiana Employment Security Division*[86] In *Thomas*, Indiana denied unemployment benefits to a factory worker who had resigned for religious reasons.[87] Relying on *Sherbert* and *Yoder*, the Court held that the state's interest in protecting its unemployment program was insufficient to justify the burden on plaintiff's religious liberty.[88] The case affirmed *Sherbert's* assertion that the first amendment sometimes requires that the government refrain from acting unless it actively protects a religious interest.

Sherbert and *Yoder* established a test for evaluating free exercise claims.[89] First, to qualify for first amendment protection, religious beliefs must be held in good faith.[90] Second, the practice must be rooted in religious belief and must further this belief.[91] Finally, the plaintiff must establish the import or centrality of the practice to his religion.[92] Once such a burden is met, the focus of the court's examination shifts to the government

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[79] *Id.* at 218-19.

[80] *Id.*

[81] *Id.* at 215.

[82] *Id.*

[83] *Id.*

[84] *Id.* at 230-34.

[85] *Id.* at 236.

[86] 450 U.S. 707 (1981).

[87] *Id.* at 709.

[88] *Id.* at 718-19.

[89] For a more detailed discussion of the differences between the tests, see Note, *Religious Exemptions Under the Free Exercise Clause: A Model of Competing Authorities*, 90 YALE L.J. 350 (1980) [hereinafter cited as Note, *Religious Exemptions*]. These differences are not significant for purposes of this note. *Sherbert*, *Yoder* and *Thomas* are used interchangeably.

[90] *See Yoder*, 406 U.S. at 216-19. *See also Sherbert*, 374 U.S. at 399 n.1. Although the sincerity of belief may be examined, the courts have noted that the truth of a claimant's belief may not be. *See* United States v. Ballard, 322 U.S. 78 (1944).

[91] *See Yoder*, 406 U.S. at 216-19; *see, e.g.*, Thomas v. Review Bd., Ind. Employment Sec. Div., 450 U.S. 707 (1981); *see also* Callahan v. Woods, 479 F. Supp. 621 (N.D. Cal. 1979) (plaintiff's refusal to disclose social security number was found to be rooted in religious belief because he believed the number to be the "mark of the beast").

[92] This centrality requirement, though implicitly required by the Court, has not been explicitly stated. *See, e.g.*, *Yoder*, 406 U.S. at 216; People v. Woody, 61 Cal. 2d 716, 720-22, 394 P.2d 813, 817-18, 40 Cal. Rptr. 69, 73-74 (1964).

act or regulation.[93] In applying the test, the Court must weigh the degree to which the challenged regulation interferes with an important religious practice against the importance of the regulation or action.[94] Finally, the courts must analyze the impact of the exemption from compliance with the regulation on the state program and the availability of a less restrictive alternative.[95] An important state interest, therefore, will not justify an infringement of first amendment rights unless a religious exemption would impede the furtherance of the government interest.[96]

B. *Judicial Approaches to "Religion"*

In *Sherbert* and *Yoder*, the Supreme Court enunciated a test for first amendment violations. Vague standards, however, have made this test difficult for lower courts to apply. The Supreme Court has offered little guidance to the lower courts in interpreting the terms "religion" and "religious" for purposes of first amendment analysis. In fact, the Court has avoided restrictive definitions of these terms.[97] The Court has consistently recognized the religious nature of unorthodox creeds and has never imposed ideological requirements for first amendment protection.[98] Instead, the Court has focused on whether the belief or practice at issue fulfills a religious function.[99]

Although the Supreme Court has never interpreted the terms "religion" or "religious" in a constitutional context, it has done so in a statutory one. In *United States v. Seeger*[100] and *Welsh v. United States*,[101] the Court concluded that the unconventionality of a religious practice could not preclude first amendment protection.[102] In interpreting the Selective Service Act[103] which exempts from the draft individuals who object to fighting on "religious" grounds, the Court adopted a broad reading of religion.[104] The Court in *Seeger* asserted that the belief in a Supreme Being included any belief that "occup[ied] the same place in the life of the objector as an orthodox belief in God holds in the life of one clearly qualified for exemption."[105] Similarly, in *Welsh*, the Court extended its definition of religious belief to encompass all beliefs the petitioner characterized as religious as long as

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[93] *See, e.g.*, School Dist. of Abington v. Schempp, 374 U.S. 203, 223 (1963) ("it is necessary in a free exercise case to show the coercive effect of the enactment as it operates against . . . the practices of religion"). The requirement of establishing a burden by demonstrating that a government act has a tendency to impair a religious practice represents an elaboration on the concept of coercion. *See Yoder*, 406 U.S. at 214, 219.

[94] *Yoder*, 406 U.S. at 214.

[95] *See Sherbert*, 374 U.S. at 407.

[96] *Id.*

[97] *See, e.g.*, Thomas v. Review Bd. Ind. Employment Sec. Div., 450 U.S. 707, 714 (1981) ("religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection").

[98] *See, e.g.*, Fowler v. Rhode Island, 345 U.S. 67, 70 (1953). The Court noted that "it is no business of the courts to say what is a religious practice or activity for one group is not a religion under the protection of the First Amendment." *Id.*

[99] *See* United States v. Seeger, 380 U.S. 163, 184 (1965). *See also* Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056, 1072-75 (1978).

[100] 380 U.S. 163 (1965).

[101] 398 U.S. 333 (1970).

[102] *Seeger*, 380 U.S. at 184-85; *Welsh*, 398 U.S. at 340.

[103] The Military Selective Service Act, 50 U.S.C. app. § 456 (1982).

[104] *Seeger*, 380 U.S. at 184-85.

[105] *Id.* at 184.

he embraced them with the strength of traditional religious convictions.[106] The *Welsh* decision eliminated the requirement of belief in God for exemption from the statute.[107] The Court suggested that strength and fundamentality of belief, rather than orthodoxy of belief, are determinative of religious character.[108]

The first amendment then protects a broad range of religious interests. *Sherbert* and *Yoder* require that before a religious abridgement as a result of a governmental act is permitted by the courts, an important government interest must be served.[109] In outlining the balancing test, the Court required close scrutiny of the government program.[110] The government's burden in challenging a free exercise claim is not merely to show that the practice interferes with an important policy interest, but also to show that accommodation of the religious interest would specifically harm its interests.[111] Finally, the government must demonstrate that it could not implement its policy without adopting less intrusive means.[112]

Various cases have applied the balancing test to Native Americans' free exercise claims in general. In addition to these cases, this note will examine how a Congressional act, the American Indian Religious Freedom Act, may aid the courts in applying the test to these claims. Finally, it will focus on Native Americans' claims involving the public use of land and will demonstrate how the difficulties evidenced in the Native American cases in general recur in this context and how AIRFA may be useful in alleviating these problems.

II. Native Americans and the Free Exercise Clause

A. *The Balancing Approach Adopted by the Lower Courts*

Courts have purported to use the free exercise analysis of *Sherbert* and *Yoder* in a number of cases involving claims by Native Americans. Three major areas of claims illustrate how courts have applied this approach: peyote use; hair length; and animal protection.[113] The discrepancy in the outcome of such cases suggests the lack of a coherent method of applying the Supreme Court's balancing test to Native American claims, as well as flaws in the test itself. In the context of Native American claims, problems of delineating what constitutes a religion within the meaning of the first amendment become problems of determining what constitutes a burden on religion and of according the appropriate weight to the interests involved. These problems also appear in the context of Native American land claims.

Recent cases involving peyote, an hallucinogenic used in religious ceremonies, under the free exercise clause have protected not only users who are members of the Native American Church but also users who are not affiliated with a formal religious organiza-

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[106] *Welsh*, 398 U.S. at 343.

[107] *See, e.g.*, *Welsh*, 398 U.S. at 342-44.

[108] *Id.* at 343.

[109] *See Yoder*, 406 U.S. at 215.

[110] *Id.*

[111] *Id.* at 236.

[112] *See Sherbert*, 374 U.S. at 407.

[113] *See generally* Note, *Native Americans and the Free Exercise Clause*, 28 Hastings L.J. 1509 (1977) [hereinafter cited as *Native Americans*].

tion.[114] In *People v. Woody*, the California Supreme Court held that peyote use for religious purposes was protected activity under the free exercise clause.[115] In *Woody*, Navajos were arrested while engaging in a peyote ritual and convicted of violating drug laws.[116] The California Supreme Court overturned their convictions.[117] Relying heavily on *Sherbert*, the Court concluded that the statute prohibiting drug use in this context burdened the Navajos' free exercise of religion and the state interest in preventing drug use did not justify the infringement.[118] The Court found that the proscription of peyote use was tantamount to prohibiting the religion itself.[119] The plaintiffs therefore established a burden on their free exercise, according to the Court.[120] The Court rejected the state's argument that peyote use was deleterious to the Native American community and burdened the state's enforcement of drug laws.[121]

In *Whitehorn v. State*, however, the Oklahoma Court of Appeals held that religious use of peyote is permitted only if an individual can show formal membership in the Native American Church.[122] In *Whitehorn*, the court reviewed a defendant's conviction for illegal use of peyote.[123] Despite testimony attesting to his membership, the defendant could not convince the court of his membership because the Church did not keep formal records.[124] The court then suggested that the Native American Church maintain membership rolls to protect its members from drug convictions.[125] In imposing this requirement, the court departed from the traditional protection afforded unorthodox religion as well as the focus on personal beliefs rather than organizational attributes.[126] The decisions in *Woody* and *Whitehorn* indicate the inconsistent interpretations of *Sherbert* and *Yoder* in affording protection to the religious use of peyote.

Courts have also been inconsistent in applying the principles of *Sherbert* and *Yoder* in cases involving regulation of hair length. For Native Americans who assert that uncontrolled hair length is a necessary component of their religious practice, courts are in disagreement as to what extent the first amendment protects the practice and exempts Native Americans from hair length regulations.[127] The source of the conflict is whether hair length constitutes a religious practice[128] and if so, how much first amendment

[114] *Id.* at 1518. *See, e.g.*, State v. Whittingham, 19 Ariz. App. 27, 504 P.2d 950 (1973), *cert. denied*, 417 U.S. 946 (1974); People v. Woody, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964). *But see* Golden Eagle v. Johnson, 493 F.2d 1179 (9th Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975) (holding that a Native American in possession of peyote is still subject to temporary incarceration despite the law's recognition of the right to the religious use of peyote); United States v. Warner, 595 F. Supp. 595 (D.N.D. 1984).

[115] 61 Cal. 2d 716, 717, 394 P.2d 813, 815, 40 Cal. Rptr. 69, 71 (1964).

[116] *Id.*

[117] *Id.*

[118] *Id.* at 718-26, 394 P.2d at 816-20, 40 Cal. Rptr. at 72-76.

[119] *Id.* at 722, 394 P.2d at 818, 40 Cal. Rptr. at 74.

[120] *Id.*

[121] *Id.* at 722-23, 394 P.2d at 818-19, 40 Cal. Rptr. at 74-75.

[122] 561 P.2d 539, 544 (Okla. Crim. 1977).

[123] *Id.*

[124] *Id.* at 542-46.

[125] *Id.* at 458.

[126] *See supra* notes 97-108 and accompanying text.

[127] *See infra* notes 128-40 and accompanying text.

[128] *See, e.g.*, New Rider v. Board of Education, 480 F.2d 693 (10th Cir.), *cert. denied*, 414 U.S. 1097 (1973). In dissenting in the denial of certiorari in *New Rider*, Justice Douglas argued that hairlength may be protected by free speech guarantees if not free exercise guarantees. 414 U.S. at 1101 (Douglas, J., dissenting). This argument points to the difficulty our legal system has in applying constitutional protection to alien value systems and divergent religions.

protection it warrants.[129] The Court of Appeals for the Eighth Circuit ruled that the first amendment requires exemption from hair length regulations for Native Americans with religious beliefs about long hair.[130] The Tenth Circuit Court of Appeals, however, held that any infringement on first amendment rights regarding hair length is insubstantial.[131]

In *New Rider v. Board of Education*, three Pawnee students challenged a junior high school regulation prohibiting long hair.[132] The Court of Appeals for the Tenth Circuit affirmed the lower court's decision, holding that the regulation did not violate any of the plaintiffs' religious rights.[133] In analyzing the claims, the court inquired whether the beliefs about hair length were generally recognized by Native Americans.[134] The court reasoned that because hair length was not a fundamental liberty, the regulation did not impinge on religious interests and no need existed to apply the *Sherbert* and *Yoder* balancing test.[135] In any case, the court asserted, maintaining school discipline was an important state interest outweighing an individual's religious interest in hair length.[136]

The Eighth Circuit Court of Appeals reached a different result on the same issue. In *Teterud v. Burns*, a warden of a state penitentiary appealed a lower court decision holding that the prison's prohibition against long hair violated the first amendment rights of a Native American inmate.[137] Unlike the *New Rider* court, the *Teterud* court stressed that the orthodoxy of the individual's beliefs was not open to judicial determination.[138] Furthermore, the court found that the health and safety interests in the prison did not outweigh the individual's religious interest.[139] Thus, the court concluded that the Native Americans asserted a protectable first amendment interest.[140]

Finally, courts are also inconsistent in cases in which Native Americans have invoked the first amendment as a defense to prosecutions for sales of protected animal parts. Animal parts are often an essential part of Native American religious ceremonies.[141] Where such religious practices involve endangered species, courts have agreed that the first amendment does not afford Native Americans protection because of the overriding state interest in protecting endangered species.[142] Courts have disagreed, however, on the degree of protection Native Americans may receive in cases involving the taking and possession of non-endangered species in connection with religious ceremonies.[143] The balance between the weight accorded to competing interests of religion on the one hand, and curtailing dissemination of animal parts on the other, therefore, is unresolved.

The cases on peyote use, hair length, and animal parts illustrate the difficulty the courts have had in applying the balancing test to an unfamiliar religion. Courts have employed different approaches in ascertaining whether the claims are religious and have

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[129] *See, e.g.*, Teterud v. Burns, 522 F.2d 357 (8th Cir. 1975).
[130] *Id.* at 362.
[131] *New Rider*, 480 F.2d at 695.
[132] *Id.*
[133] *Id.* at 696.
[134] *Id.*
[135] *Id.* at 698.
[136] *Id.*
[137] *Teterud*, 522 F.2d at 359.
[138] *Id.* at 360.
[139] *Id.* at 361.
[140] *Id.*
[141] *See Native Americans*, *supra* note 113, at 1530-33.
[142] *See, e.g.*, United States v. Bushyhead, Magistrate's No. 74-117M (W.D. Okla. June 18, 1974).
[143] *See* Wisconsin v. Funmaker No. 003042 (Juneau County, Wis. Cir. Ct. 1976).

accorded different weights to the same interest. These inconsistencies in approach and outcome, and misinterpretations of *Sherbert* and *Yoder* recur in the specific context of Native American challenges to government use of lands. To understand better the religious basis for these claims and the weight to be accorded these religious interests in land, this note will examine AIRFA before examining the land claims.

B. *American Indian Religious Freedom Act*

In recognition of its past insensitivity to American Indian religious rights, Congress passed the American Indian Religious Freedom Act in 1978.[144] AIRFA reaffirms Native Americans' free exercise rights by recognizing that their "inherent right to . . . exercise . . . their religion" includes, among other rights, the right of access to sites.[145] The act's legislative history indicates that denying access to sites is not merely a cultural affront to Native Americans, but also "analogous to preventing a non-Indian from entering his church or temple."[146] Although AIRFA does not seem to confer a right of action on American Indians,[147] it does impose a duty on administrative agencies to implement policies and procedures consistent with the end of the act: avoiding government interference with American Indian religious practice.[148]

AIRFA, then, should bolster the Native Americans' claims that their practices are religious and that access to certain lands is central to their religion. Not only does it recognize the import of access to sites, but also it recognizes that religion is an "integral part" of Indians' traditional culture.[149] AIRFA thus gives substance to the free exercise clause in the context of relations between the government and Native American and the administration of public lands.

C. *Claims Involving Government Use of Public Lands*

Since 1977, Native Americans have invoked the first amendment's free exercise clause in cases involving governmental land use.[150] In all but one case, the Native Americans

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[144] 42 U.S.C. § 1996 (1982).

[145] *See* H.R. REP. No. 1308, 95th Cong., 2d Sess. 2, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 1262, 1263.

[146] *Id.* at 1263. The legislative history stipulates that "there is no overriding reason to deny Indians the right to inter their dead in sanctified ground." *Id.* Congress refers to the fact that Indians were denied access to lands placed under federal supervision specifically *because* they were Indian cemeteries. *Id.*

[147] *See* 42 U.S.C. § 1996 (1982). Congress intended the act to provide administrative remedies. AIRFA has been construed narrowly as requiring administrative agencies to consider and attempt to accommodate Native American religious interests but not to defer to them. *See* Wilson v. Block, 708 F.2d 735, 747 (D.C. Cir. 1983). *See also* Crow v. Gullet, 541 F. Supp. 785, 793 (D.S.C. 1982) (AIRFA "does not create a cause of action in federal courts for violation of rights in religious freedom"); *accord* Oneida Indian Nation of New York v. Clark, 593 F. Supp. 257 (N.D.N.Y. 1984). Under this reading of the AIRFA, the *Peterson* court found a violation of the first amendment but no violation of AIRFA. 565 F. Supp. at 597. For a slightly broad construction of AIRFA, *see* Peyote Way Church of God, Inc. v. Smith, 556 F. Supp. 632 (N.D. Tex. 1983); *see also* United States v. Warner, 595 F. Supp. 595 (D.N.D. 1984) ("Congress has a power or duty to the Indians to preserve their dependant nations as a cohesive culture . . . . In the American Indian Religious Freedom Act, 42 U.S.C. § 1996, Congress has recognized this duty").

[148] H.R. REP. No. 1308, 95th Cong., 2d Sess. 2, *reprinted in* U.S. CODE CONG. & AD. NEWS 1262, 1262.

[149] *Id.* at 1265.

[150] *See supra* note 9.

have failed to obtain first amendment protection.[151] The inconsistencies and difficulties in interpreting the *Yoder* and *Sherbert* balancing tests and applying the tests to Native American claims are accentuated in this context. In five cases where claims failed, two courts reasoned that the practices the Native Americans sought to protect were not within the ambit of religion;[152] two courts reasoned that the infringement on religion was inconsequential;[153] and one court held that the government interest involved outweighed any religious interest.[154] In most of these cases, the courts improperly applied the *Yoder* and *Sherbert* test.[155] Only in *Northwest Indian Cemetery Protection Association v. Peterson*[156] did the court properly apply the *Yoder* test and hold that the first amendment protected the Native Americans from the proposed government activity.[157]

1. Failure to Find a Religious Interest

In *Sequoyah v. TVA*[158] and *Inupiat Community of Arctic Slope v. United States*,[159] Native American challenges to government management of public property failed because the interests asserted by the Native Americans were not religious, according to the courts.[160] Both courts overlooked evidence pointing to a religious interest and therefore warranting evaluation under the *Sherbert* and *Yoder* test. In *Sequoyah*, the United States Court of Appeals for the Sixth Circuit held that flooding of the Little Tennessee Valley did not abridge Cherokee religious rights,[161] finding that the Indians failed to establish the religious significance of the area to be flooded.[162] In *Sequoyah*, Cherokees sought an injunction prohibiting the completion of the Tellico Dam, a project authorized by Congress in 1966.[163] Bringing a class action on behalf of "all those present or future Cherokee Indians who practice the traditional Cherokee religion and adhere to Cherokee Indian tradition and culture,"[164] the plaintiffs claimed that completion of the dam and the consequent flooding of the Little Tennessee Valley would destroy sacred sites, ceremonial medicine gathering sites, holy places, and cemeteries.[165] Furthermore, the Cherokees alleged additional infringements on their religious interests because they believed that the waters would preclude contact with the supernatural world by making worship sites inaccessible in the Little Tennessee Valley.[166]

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[151] *See supra* note 11.

[152] Sequoyah v. TVA, 620 F.2d 1159 (6th Cir. 1980); Inupiat Community of Arctic Slope v. United States, 548 F. Supp. 182 (D. Alaska 1982). *See infra* notes 158-246 and accompanying text.

[153] Wilson v. Block, 708 F.2d 735 (D.C. Cir. 1983). *See infra notes* 301-65 and accompanying text.

[154] Crow v. Gullet, 706 F.2d 856 (8th Cir. 1983). *See infra* notes 277-305 and accompanying text.

[155] *See infra* notes 158-382 and accompanying text.

[156] 565 F. Supp. 586 (N.D. Cal. 1982).

[157] *Id.* at 591.

[158] 620 F.2d 1159 (6th Cir. 1980).

[159] 548 F. Supp. 182 (D. Alaska 1982).

[160] *Sequoyah*, 620 F.2d at 1164-65; *Inupiat*, 548 F. Supp. at 189.

[161] *Sequoyah*, 620 F.2d at 1164.

[162] *Id.*

[163] *Id.* at 1160-61.

[164] *Id.* at 1160.

[165] *Id.* In addition, the plaintiffs based their claims on the fifth and ninth amendments to the United States Constitution, AIRFA, the National Historic Preservation Act, 16 U.S.C. § 470 - 470(w)-6, and various laws of the state of Tennessee. *Id.*

[166] *Id.* at 1162.

Holding that the free exercise clause does not create a right to use government property to advance a religious purpose, the United States District Court for the Eastern District of Tennessee dismissed the suit.[167] The Sixth Circuit rejected this reasoning, holding that first amendment protection does not require a property interest.[168] The court also asserted that the Cherokees' lack of standard organizational and doctrinal manifestations of religion did not preclude a first amendment claim.[169] Consequently, the court found that the Cherokees had a "religion" within the meaning of the Constitution,[170] and that the Cherokees' religious beliefs were sincere.[171]

With a religion and sincerity of belief established, the court applied the *Yoder* analysis to evaluate the "quality of claims."[172] In applying the *Yoder* test, however, the Sixth Circuit found that the plaintiffs' affidavits failed to establish the indispensability or centrality of the Little Tennessee Valley to the Cherokee religion.[173] Because *Yoder* requires that before first amendment protection is considered by the court a practice must be shown to be "rooted in religious belief,"[174] the *Sequoyah* court sought to ascertain whether the Cherokees' land-related practices were religious.[175] The court found no substantial religious interest that warranted preserving the sites.[176] In making this determination, the court noted that worship of the geographical location in question was not inseparable from the Cherokees' way of life,[177] was not the cornerstone of their religious observance,[178] and was not central to their religious ceremonies.[179] The *Sequoyah* court asserted that the flooding of the Little Tennessee Valley would result in cultural impairment rather than religious impairment.[180] Cultural impairment, the court correctly concluded, is not protected by the Constitution.[181] It therefore denied the Cherokees relief.[182] Because it found no religious interest, the court never applied the remainder of the *Yoder* test to determine whether the interests burdened outweighed the state interest involved.

In *Inupiat Community of Arctic Slope v. United States*,[183] the United States District Court for the District of Alaska employed similar reasoning. The *Inupiat* court held that the federal government's leasing of seas which a Native American tribe claimed were sacred did not burden the free exercise of the plaintiffs' religion.[184] The Inupiat tribe sought to quiet title to an area lying three to sixty-five miles offshore in the Beaufort and Chucki Seas, which the government had leased to oil companies.[185] One of the theories on which the Inupiats rested their case was that their religious beliefs and practices, inextricably

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[167] *Id.* at 1161. *See* Sequoyah v. TVA, 480 F. Supp. 608 (E.D. Tenn. 1979).
[168] 620 F.2d at 1164.
[169] *Id.* at 1163.
[170] *Id.*
[171] *Id.*
[172] *Id.*
[173] *Id.* at 1163-64.
[174] *Yoder*, 406 U.S. at 215.
[175] *Sequoyah*, 620 F.2d at 1163-64.
[176] *Id.* at 1164.
[177] *Id.*; *see, e.g.*, *Yoder*, 406 U.S. at 215-16.
[178] *Sequoyah*, 620 F.2d at 1164; *see, e.g.*, Frank v. Alaska, 604 P.2d 1068 (Alaska 1979).
[179] *See, e.g.*, People v. Woody, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964).
[180] *Sequoyah*, 620 F.2d 1164.
[181] *Id.* at 1164-65.
[182] *Id.* at 1165.
[183] 548 F. Supp. 182, 188-89 (D. Alaska 1982).
[184] 548 F. Supp. at 188-89.
[185] *Id.* at 185.

linked to their hunting and gathering lifestyle, would be abridged by offshore exploratory activities.[186] The Inupiat sought injunctive relief, damages, and a declaration of their title to the area based on immemorial use and occupancy.[187]

The court found that neither of the two elements required by the *Yoder* decision — a burden on religion and a religious interest which outweighs a state interest — were present in the Inupiat first amendment claim.[188] The claim, according to the court, was therefore without foundation.[189] Because the plaintiffs offered no explanation of the significance of the religious sites at issue, the court saw no basis for the claim that the defendant's activity interfered with the plaintiffs' exercise of religion.[190] The court also noted that the plaintiffs failed to define how the government activity would disrupt appeasement ceremonies.[191] Such "non-specific"[192] claims, the court held, were inadequate to establish that the government's action constituted a "serious obstacle" to religious exercise under the *Yoder* test.[193] Furthermore, the court rejected the plaintiff's claim that exploratory activities should be prohibited on free exercise grounds.[194] The court reasoned that the result of such a prohibition, carried to its extreme, would be "a vast religious sanctuary over the Arctic seas beyond the state's territorial waters."[195] The court weighed the government's interests — specific needs of energy resources and treaty obligations to keep the high seas open for passage and fishing — against the generalized claims of the Inupiat and concluded that the Inupiat's claims were insufficient to outweigh the government interests.[196] Consequently, the court held that the Inupiat's claims failed to meet not only the burden on religion requirement of *Yoder*, but also the balancing test requirements of *Yoder*.[197]

The *Sequoyah* and *Inupiat* courts failed to apply the *Sherbert* and *Yoder* balancing test properly because they failed to find a valid religious interest. The *Sequoyah* court characterized the Cherokees' religious practices as "cultural" rather than religious.[198] Consequently, the court found that these practices were precluded from first amendment protection.[199] Similarly, the *Inupiat* court found the Inupiats' claims too generalized to constitute a religious interest.[200] An examination of the facts of these cases in light of the claimants' beliefs,[201] Supreme Court interpretations of religion,[202] and AIRFA[203] suggest that the *Sequoyah* and *Inupiat* courts should have found the Native Americans' practices to be "religious" within the meaning of the first amendment.

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[186] *Id.* at 188-89.
[187] *Id.* at 185.
[188] *Id.* at 188.
[189] *Id.* at 188-89.
[190] *Id.*
[191] *Id.* at 188.
[192] *Id.* at 189.
[193] *Id.*
[194] *Id.*
[195] *Id.*
[196] *Id.*
[197] *Id.*
[198] *Sequoyah*, 620 F.2d at 1164-65.
[199] *Id.*
[200] *Inupiat*, 548 F. Supp. at 188-89.
[201] *See infra* notes 204-31 and accompanying text.
[202] *See supra* notes 28-112 and accompanying text.
[203] *See supra* notes 144-49 and accompanying text.

The *Sequoyah* court cites a number of affidavits filed by the plaintiffs.[204] Information contained in these affidavits demonstrates that the site was not only of cultural significance as the birthplace of the Cherokees, but of religious significance as an ancestral burial ground. Statements included prose by medicine men referring to the Little Tennessee Valley as "our connection with the Great Spirit."[205] According to the statements, the medicine men believed that "if these lands are flooded they will destroy the spiritual strength of the Cherokee people."[206] In addition, several anthropologists testified regarding the significance of these places to the Cherokee Indian tradition and religion and the importance of their remaining undisturbed.[207] The court itself conceded that specific geographic sites, because of belief in the transmission of spiritual and cultural knowledge, as well as ancestor worship, figure more prominently in Indian religions than in other religious.[208] Nevertheless, despite the extrinsic documentation of the significance of the region to the Cherokees, and the conceded sincerity of their beliefs, the court found that the Cherokees had no religious interest in the religious sites.[209] The court found that the affidavits submitted failed to establish the centrality or indispensability of the sites to Cherokee religious practices.[210] The court deemed the sanctity of the sites to be a "personal preference" rather than convictions "shared by an organized group."[211] The court found that the flooding of the sites would impair "tribal and family folklore and traditions" — Cherokee culture which is not constitutionally protected — rather than Cherokee religion.[212] This artificial and arbitrary dichotomy imposed by the court reflects a misunderstanding of, and insensitivity to, Native American beliefs and lifestyle. One dissenting judge highlighted the fallacy of the court's reasoning, arguing that the standard for establishing centrality had never been clearly articulated.[213] For this reason, he continued, the case should have been remanded to afford the Cherokees an opportunity to establish the centrality of the land-related practices to their religion.[214]

The *Sequoyah* court's conclusion that the Cherokees had no religious interest in the sites at issue directly contradicts the broad definition and protection traditionally accorded religion by the courts.[215] The courts have consistently determined that religion encompasses almost every ideology having a relation to an individual's fundamental beliefs.[216] Under constitutional analysis, spiritual practice need not be organized to be characterized as religious.[217] The *Sequoyah* court itself recognized that a group need not meet organizational or doctrinal standards to invoke first amendment protection.[218] Organization is often a factor in ascertaining whether a practice is religious, but it is not a

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[204] *Sequoyah*, 620 F.2d at 1162.

[205] *Id.*

[206] *Id.*

[207] *Id.*

[208] *Id.* at 1163.

[209] *Id.* at 1164.

[210] *Id.*

[211] *Id.* (quoting *Yoder*, 406 U.S. at 216).

[212] *Id.* at 1164.

[213] *Id.* at 1165 (Merritt, J., dissenting).

[214] *Id.*

[215] See *supra* notes 28-112 and accompanying text for a discussion of the free exercise right.

[216] See *supra* notes 97-112 and accompanying text for a discussion of judicial approaches to religion.

[217] *See, e.g.*, *Sequoyah*, 620 F.2d at 1163.

[218] *Id.* at 1163.

determinative factor,[219] nor is conventionality a requirement for religious protection under the first amendment.[220] Although tribes do not generally convene for services in the traditional, organized manner, they are unified by common spiritual traditions.[221] Oral tradition preserves beliefs and practices over time and hierarchical religious structures exist in many tribes.[222] These aspects of tribal life, along with evidence linking Cherokee practices and ritual to their beliefs, should have convinced the *Sequoyah* court of the religious character of the Cherokee's beliefs.

Cherokees believe that communication with the Great Spirit is achieved by worship at sacred places.[223] With Little Tennessee Valley sacred to the Cherokees, and survival of the communities contingent on worship,[224] the *Sequoyah* court's failure to find worship at these sites to be central to the plaintiff's religion is startling. The *Sequoyah* court based this conclusion on language in *Yoder*.[225] Because it did not find an intimate relation between belief and daily conduct as the *Yoder* court had, the court ruled that the requisite centrality was lacking.[226] Nothing in *Yoder*, however, suggests that finding such a relationship is the appropriate test for centrality. Rather, the focus of a centrality test is the importance of a practice to a larger religious system.[227] Under this test, the inference can be made that the practices of the Cherokees are fundamental to their religion.[228] The threat of undermining the Cherokee community and religious practice as a result of the government's abridgement of Cherokee land use was as great as it was for the Amish as a result of compulsory education.[229] Even if the language in *Yoder* did constitute a test for centrality the Cherokee beliefs arguably met that standard; the impact of the Cherokee ceremonies is felt daily.[230] Because the Cherokee religious practices are essential to the continued survival of their religion and are an integral part of their culture,[231] the court erred when it failed to find the practice central or indispensable to Cherokee religion.

Additional support for the argument that the practices and access to land were central to the Cherokee religion is found in the American Indian Religious Freedom Act.

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[219] *See, e.g., Yoder*, 406 U.S. at 215-16 (Amish beliefs were "shared by an organized group" and could therefore be construed as religious). *See also* Washington Ethical Society v. District of Columbia, 249 F.2d 127, 128 (D.C. Cir. 1957) (in evaluating nontheistic practice, organization is considered).

[220] *See, e.g.*, Washington Ethical Society v. District of Columbia, 249 F.2d 127, 129 (D.C. Cir. 1957) (to construe exemptions so strictly that unorthodox or minority forms of worship would be denied the exemption benefits granted to those conforming to the majority beliefs might well raise constitutional issue); *see also* Callahan v. Woods, 479 F. Supp. 621 (N.D. Cal. 1979).

[221] *See generally* Casenote, *Native American Free Exercise Rights and the Federal Use of Public Land*, 63 B.U. L. REV. 141, 162 (1983) [hereinafter cited as Casenote, *Native American Free Exercise Rights*].

[222] *Id.* at 158-59.

[223] *Id.* at 161-62.

[224] *Id.* at 163 & n.12.

[225] The *Sequoyah* court relied on the following language: "the traditional way of life of the Amish is not merely a matter of personal preference but one of deep religious conviction, shared by an organized group, and intimately related to daily living." *Sequoyah*, 620 F.2d at 1164 (quoting *Yoder*, 406 U.S. at 215-16).

[226] *Sequoyah*, 620 F.2d at 1164.

[227] *See, e.g.*, Frank v. Alaska, 604 P.2d 1068, 1072-73 (Alaska 1979) (evaluating the role of consuming moose meat at a funeral potlatch); People v. Woody, 61 Cal. 2d 716, 720-22, 394 P.2d 813, 817-18, 40 Cal. Rptr. 69, 73-74 (1964) (evaluating role of peyote use in worship in the Native American Church). *See generally* Note, *Native Americans, supra* note 113, at 1509.

[228] *See generally* Casenote, *Native American Free Exercise Rights*, *supra* note 221, at 161-62.

[229] *See, e.g., Yoder*, 406 U.S. at 219.

[230] *See generally* Casenote, *Native American Free Exercise Rights*, *supra* note 221, at 161-63.

[231] *Id.*

AIRFA specifically recognizes access to sites as a significant religious right.[232] The court ignored this recognition in applying its centrality test to the Cherokees' situation. The *Sequoyah* court's distinction between religion and culture is erroneous and indicative of the "lack of knowledge, unawareness, insensitivity, and neglect [which] are keynotes of the federal government's interaction with traditional Indian [sic] religious and cultures."[233]

In light of AIRFA, judicial interpretations of religion, and the claimants' religious beliefs, the court's reasoning in *Inupiat* may be faulty as well. Like the *Sequoyah* court, the *Inupiat* court found centrality lacking. The court's finding the Inupiat claims "nonspecific" and "without definition"[234] perhaps reflects a lack of understanding about, and insensitivity to, Native Americans' religious needs. Evidence presented to the court stressed the sanctity of sites on sea-ice as well as land because of the presence of spirits.[235] The defendants' activities threatened both to preclude access to and to violate these sites.[236] Sacred sites are not limited to land as the court asserted, but include river mouths and sea-ice.[237] Because of the integration of religion with subsistance life for the Inupiat, the continued productivity of the sea-ice environment and the prosperity of animals who live there, in particular the whale, are indispensable to religious observances.[238] The *Inupiat* court's rejection of the claims on grounds of vagueness suggests a rejection on grounds of unconventionality — grounds explicitly rejected by the Supreme Court as unacceptable.[239]

Although the *Inupiat* court found no protectable religious interest, it nevertheless proceeded with a balancing of interests, the second part of the *Yoder* test.[240] In its analysis, the court confused free exercise analysis with establishment clause analysis.[241] Rather than focusing on the infringement of religious practices, the court focused on the required belief to conclude no burden on religion was established by the Inupiat claims: "[T]heir contention would result in the creation of a vast religious sanctuary over the Arctic seas beyond the state's territorial waters. A claim to such a large area based on such non-specific grounds cannot provide the sort of "serious obstacle" contemplated by *Yoder*."[242] The *Inupiat* court therefore misconstrued and misapplied *Yoder* when it initially found no religious interest and subsequently failed to analyze the degree of infringement against the government interest.

In finding no religious interest the *Sequoyah* and *Inupiat* courts reached results

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[232] *See supra* notes 143-148 and accompanying text.

[233] H.R. REP. No. 1308, 95th Cong., 2d Sess. 2, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 1262, 1265. The legislative history elaborates on this point: "This state of affairs is enhanced by the perception of many non-Indian officials that because Indian religious practices are different than their own that they somehow do not have the same status as a 'real' religion." *Id.* The *Sequoyah* court may be guilty of the same misperception.

[234] *Inupiat*, 548 F. Supp. at 188-89.

[235] Plaintiffs' Memo in Opposition to Defendants' Motions for Judgment on the Pleadings at 124-25, Inupiat Community of Arctic Slope v. United States, 548 F. Supp. 182 (D. Alaska 1982).

[236] *Id.* For these Native Americans, any area furnishing subsistence resources is sacred. *Id.* at 125. Defendants' activity allegedly threatened both the environment and animal life which are central to the Inupiat religious beliefs. *Id.* at 124.

[237] *Id.* at 125.

[238] *Id.* at 126.

[239] See *supra* notes 97-112 and accompanying text for a discussion of judicial treatment of religion.

[240] *Inupiat*, 548 F. Supp. at 189.

[241] *See supra* note 11.

[242] 548 F. Supp. at 189; *see supra* note 11.

inconsistent with prior judicial examinations and treatment of religion.[243] AIRFA also illustrates the inappropriateness of their findings.[244] Evidence in *Inupiat* indicates that a religious interest should have been found. Only after a religious interest is found should the courts have analyzed the burden on religion and balanced the interests involved. The *Yoder* test would have required the government in *Sequoyah* to prove that its interests in the Tellico Dam outweighed the Native Americans' religious interests in public lands and that less restrictive alternatives did not exist.[245] Applying *Yoder*, the *Inupiat* court should have first found a religious interest in the Arctic Seas and then balanced that interest against the government interest in leasing seas.[246]

2. Failure to Pass the Balancing Test

Unlike the *Sequoyah* and *Inupiat* courts, the Court of Appeals for the Tenth Circuit found a religious interest in the Navajos' claims in *Badoni v. Higginson*.[247] Although the court conceded that a religious interest existed in *Badoni*, the court held that the government interest in maintaining the water level of Lake Powell overrode the religious interest of the Navajos.[248] The *Badoni* court reached this result after failing to analyze the infringement on the interest. It also failed to afford due weight to the religious interests in its balancing needs as *Yoder* requires.[249]

In *Badoni*, religious leaders of the Navajos sought to enjoin the federal government from operating Glen Canyon Dam and Reservoir, on free exercise grounds.[250] According to the state, the dam was an integral part of the Colorado Water Storage Project for the development of power generation, irrigation, mineral exploration, and protection of municipal and industrial water supplies.[251] The plaintiffs objected to a plan which entailed the flooding of the Rainbow Bridge National Monument.[252] Rainbow Bridge, contiguous to the Navajo Reservation, housed an arch sacred to the Navajo.[253] Several of the gods who Navajos believed inhabited the natural formations had already been drowned by the creation of the reservoir.[254] The plaintiffs argued that their religious ceremonies would be ineffective if not held on the habitation site of the surviving spirits.[255] Additionally, the plaintiffs claimed that by desecrating the sacred site and denying Navajos access to the sacred prayer spot, the government had abridged their free exercise rights.[256]

The district court rejected the Navajo claims asserting that the plaintiffs had no property interest in the lands at issue.[257] Furthermore, the distict court found that no first amendment protection was available because the sites had no religious significance to an

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[243] *See supra* notes 46-112 and accompanying text.

[244] See *supra* notes 144-49 and accompanying text for a discussion of the American Indian Religious Freedom Act.

[245] *See Yoder*, 406 U.S. at 221, 226.

[246] *Id.*

[247] 638 F.2d 172, 177 (10th Cir. 1980).

[248] *Id.*

[249] *See Yoder*, 406 U.S. at 215.

[250] *Badoni*, 638 F.2d at 177.

[251] *Id.* at 176.

[252] *Id.* at 177.

[253] *Id.*

[254] *Id.*

[255] *Id.*

[256] *Id.* at 176.

[257] Badoni v. Higginson, 455 F. Supp. 641, 644 (D. Utah 1977).

organized group.[258] Finally, the district court reasoned that the government's interest in water supply outweighed any of the Navajo's interests.[259]

On appeal, the Tenth Circuit rejected the district court's conclusion that the plaintiff's lack of property rights in the National Monument was determinative of their claim,[260] but affirmed the lower court's holding.[261] Employing a centrality test to evaluate the quality of the claims,[262] the court recognized that Rainbow Bridge and the vicinity had long held positions of central importance in the Navajo beliefs: "[The] shrines are regarded as the incarnate forms of Navajo Gods, which provide protection and rain-giving functions."[263] The appeals court therefore found that the plaintiffs had a religious interest in the Glen Canyon Dam and reservoir.[264] The operation of the dam and Lake Powell, the court acknowledged, had submerged the sacred springs and prayer spot, and tourists had desecrated the bridge with noise and litter.[265] Nevertheless, the circuit court agreed with the district court that the government's interest was so compelling that it outweighed any religious interest.[266] In reaching this conclusion, the appeals court never addressed the question of whether the government action actually infringed on the plaintiff's free exercise rights.[267]

The Tenth Circuit in *Badoni* misapplied the *Yoder* test it purported to employ. Concerning the Navajo claim that impounding water to form Lake Powell violated their first amendment rights, the court ostensibly sought to apply the *Yoder* test by seeking to ascertain the quality of the religious claims and the nature of the infringement.[268] The court, however, abandoned the *Yoder* analysis when it asserted that the government's interest was so compelling that it overrode any religious interest of the plaintiffs.[269] The *Yoder* test insures that due weight be accorded government and religious needs. Assuming that the Glen Canyon project justified an abridgement of religious rights, the court still should have investigated the possibility of adopting alternative means. The court, how-

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[258] *Id.* at 645-46.

[259] *Id.* at 646-47.

[260] *Badoni*, 638 F.2d at 176.

[261] *Id.*

[262] *Id.* at 177.

[263] *Id.*

[264] *Id.*

[265] *Id.*

[266] *Id.* at 177, n.4.

[267] *Id.* The circuit court also denied relief to the Navajos regarding government management of the National Monument. *Id.* at 181. The plaintiffs sought "some measured accommodation to their religious interest, not a wholesale bar to use of Rainbow Bridge by all others." *Id.* at 178. Traditional free exercise claims, however, involve challenges to government actions that either compel practitioners to violate tenets of their religion or condition a benefit or right on renunciation of a religious practice. *Id.*; *see supra* notes 28-112 and accompanying text. Because the Navajos' claim resembled neither of these traditional forms, the court denied the plaintiffs relief. *Id.* at 178, 181. The court recognized the difficulties the plaintiffs would have in performing religious practices before tourists but noted that the government had done nothing to prohibit the performance of these acts to justify its holding. *Id.* at 178-79. Furthermore, the court reasoned that the government had an interest in and a statutory duty to assure public access to natural wonders. *Id.* at 178. The court, in addition, denied the relief of excluding tourists for short periods from the Monument on the basis that such affirmative action on the part of the government implicated the establishment clause. *Id.* at 179. The court further asserted that the plaintiffs do not have a constitutional right to have tourists act in a respectful manner. *Id.*

[268] *Id.* at 176.

[269] *Id.* at 177 n.4.

ever, never addressed the issue of whether the government action infringed on the plaintiff's religious interest,[270] or the possibility that the government might be able to use less intrusive alternatives — in short, whether Navajo interests in public lands could be protected. The *Badoni* court protected government interests it perceived as compelling because of the impact of the project on large numbers of Americans.[271] In protecting that interest, however, it overlooked the religious interest of a minority. This insensitivity to the Native Americans' claims is inconsistent with the high place religious liberty has maintained in our society as a fundamental value.[272]

3. Failure to Find Infringement Resulting from Governmental Action

Insensitivity on the part of the courts to unconventional religious practices reappears in two other cases involving Native Americans where no infringement on religion was found. In *Crow v. Gullet*[273] and *Wilson v. Block*,[274] courts found a religious interest that may have warranted first amendment protection, but concluded that the challenged government action did not burden that interest.[275] Had the government action infringed on the religious interest, the balancing test should have been applied and first amendment protection possibly invoked.[276] This section will suggest that in light of the facts of each case, the *Wilson* court should have proceeded to the balancing stage of the test, while the *Crow* court properly did not.

In *Crow v. Gullet* the United States Court of Appeals for the Eighth Circuit, in a per curiam opinion, upheld a lower court's ruling that the development, construction and regulatory actions of a State Park Manager did not burden Native Americans' religious exercises.[277] Specifically, the court found that the plaintiffs failed to establish that the government activity infringed on their first amendment rights.[278]

In *Crow*, spiritual leaders of the Lakota and Tsistsistas nations brought suit against the manager of Bear Butte State Park,[279] maintaining that the state, by its development, construction, and regulatory activity destroyed the sanctity of their religious ceremonies.[280] The defendants' activity, plaintiffs alleged, violated their constitutional and statutory rights on several grounds. First, the resulting increase in tourism impaired religious ceremonies.[281] Second, access to sites was restricted during construction.[282] Third, registration and camping permit requirements impermissibly burdened religious exercise. And fourth, the manager failed to control tourists during religious practices.[283] The Lakota and Tsistsistas nations sought to enjoin not only construction projects or

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[270] *See generally*, Gianella, *supra* note 3, at 1385-90. *Badoni*, 638 F.2d at 177.

[271] *Badoni*, 638 F.2d at 177.

[272] *See* People v. Woody, 61 Cal. 2d 716, 727, 394 P.2d 813, 821, 40 Cal. Rptr. 69, 77 (1964) ("the right to free religious expression embodies the precious heritage of our history.").

[273] 706 F.2d 856 (8th Cir. 1983).

[274] 708 F.2d 735 (D.C. Cir. 1983).

[275] *Crow*, 706 F.2d at 858; *Wilson*, 708 F.2d at 741.

[276] See *supra* notes 46-112 and accompanying text for a discussion of the balancing test.

[277] *Crow*, 706 F.2d at 858.

[278] *Id.*

[279] *Id.* at 857.

[280] *See* Crow v. Gullet, 541 F. Supp. 785, 787-88 (D.S.C. 1982).

[281] *Id.* at 787.

[282] *Id.*

[283] *Id.* at 788.

other alterations of the natural features of the butte, but also to remove roads, parking lots, and buildings presently in place.[284]

The district court in *Crow* applied the two part balancing test enunciated in *Sherbert* and *Thomas*.[285] Under the test, a court must first ascertain whether a law, conduct or regulation burdens the free exercise of religion.[286] Second, the restriction on religion must be balanced against the state's interest in the restriction.[287] Finally, less restrictive alternatives must be explored.[288] According to the court, the plaintiffs met the preliminary requirements of the test by demonstrating that their practices at Bear Butte were based on a religious system of belief and the beliefs were genuinely held.[289] The district court began its analysis by examining the alleged infringement on the plaintiff's practice.[290] Relying on the defendant's contentions that worshippers in the past had urged the state to improve access to the site, the district court found that the plaintiffs failed to establish that construction impinged on their free exercise rights.[291] Furthermore, the court concluded that the free exercise clause does not require that the government shirk its duty to the public nor provide an environment conducive to religious acts.[292]

The district court also found the Native Americans' other claims without merit.[293] For example, the court found that restrictions on overnight camping in ceremonial ways during construction did not constitute a burden on religion because the restrictions were merely partial and temporary.[294] Furthermore, the court found no evidence in the record of any person's being denied access to Bear Butte for religious purposes.[295] The court compared the alleged burden on religion to the burden in the *Sequoyah* and *Badoni* cases where flooding barred access to sites permanently and totally. The *Crow* court thus concluded that no burden on religion was present in the case at bar.[296]

According to the *Crow* court, the plaintiffs failed to establish that overnight camping was an indispensable part of their religion.[297] Nevertheless, the court applied the first part of the balancing test and found that the state met its burden of proof by demonstrating a compelling interest in the construction, based on environmental and administrative reasons.[298] In addition, the court found this public and religious exclusion to be the least restrictive means of completing the project.[299]

The Eighth Circuit affirmed the judgment of the district court, finding that despite the presence of a religious interest, no burden was imposed on that interest.[300] Construc-

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[284] *Id.*

[285] *Id.* at 790.

[286] See *supra* notes 48-88 and accompanying text for a discussion of *Sherbert*.

[287] *See supra* notes 48-88 and accompanying text.

[288] *See supra* notes 48-88 and accompanying text.

[289] *Crow*, 541 F. Supp. at 790.

[290] *Id.*

[291] *Id.* at 791.

[292] *Id.* In fact, defendants maintain the park in part to serve Indian worshippers. Sensitivity to this purpose is indicated by the fact that educational facilities impart information about Indian religions. *Id.* at 789.

[293] *Id.* at 792-93.

[294] *Id.* at 792.

[295] *Id.*

[296] *Id.*

[297] *Id.*

[298] *Id.*

[299] *Id.*

[300] *Crow*, 706 F.2d at 859.

tion and development in this context was constitutionally permissible, according to the court.[301]

Similarly, in *Wilson v. Block*, the United States Court of Appeals for the District of Columbia Circuit found that although the plaintiffs had a valid religious interest, government action did not impinge on the free exercise of that religious interest.[302] The District of Columbia Circuit affirmed the district court's grant of summary judgment.[303] In the lower court opinion of *Hopi Indian Tribe v. Block,* [304] the district court, relying largely on *Sequoyah* for reasoning and factual similarities, had upheld two administrative decisions which allowed private interests to expand a government-owned ski area.[305] In a consolidated suit, the plaintiffs, the Hopi Tribe and the Navajo Medicine Men's Association, had brought suit against administrative officials and the United States.[306] Challenging the action on first amendment grounds, the plaintiffs sought not only to halt development of a ski resort on peaks sacred to them, but also to remove existing facilities.[307] The plaintiffs argued that government actions were destroying the character of a most sacred shrine, and were therefore forcing adherents of the religion to modify their religious doctrine to conform to changed circumstances.[308] Thus, the Indians claimed that these government actions constituted a burden on their free exercise rights under *Sherbert* and *Thomas*.[309]

The court found that the plaintiffs met both the centrality and sincerity tests.[310] The Navajos believed artificial development of the peaks would impair the peaks' healing powers.[311] For the Hopis, use of the peaks for commercial purposes meant a direct affront to their gods.[312] Reviewing the claim that the Indians had a religious interest in the area and applying the centrality test of *Sequoyah*, the court then found that the peaks played a central role in both the Navajo and Hopi religions.[313] Because the parties had stipulated that the Indians' beliefs were both religious and sincere,[314] the court proceeded directly to its examination of the free exercise claims. Finding even less of an infringement on first amendment rights than the denial of total access in *Sequoyah*, the court found no protectible religious interest.[315] The District of Columbia Circuit affirmed the lower court's ruling that the expansion did not violate first amendment rights of Navajo and Hopi tribes.[316] Specifically, the District of Columbia Circuit ruled that because Native Americans were

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[301] *Id.* at 858.

[302] 708 F.2d 735, 741 (D.C. Cir. 1983).

[303] *Id.* at 739.

[304] 8 INDIAN L. REP. (AM. INDIAN LAW. TRAINING PROGRAM) 3073 (D.D.C. June 15, 1981).

[305] *Id.* at 3076.

[306] *Id.* at 3073.

[307] *Wilson*, 708 F.2d at 738. Plaintiffs alleged that the expansion of the ski area violated their rights on several grounds. The court considered the following: AIRFA, 42 U.S.C. § 1996 (1982); the Endangered Species Act, 16 U.S.C. §§ 1536-1543 (1982); the National Hist. Preservation Act, 16 U.S.C. § 470-470(w)-6 (1976); the Wilderness Act, 16 U.S.C. §§ 1131-1136 (1976) and 16 U.S.C. §§ 497, 551 (1976); as well as the free exercise clause. *Wilson*, 708 F.2d at 739.

[308] *Wilson*, 708 F.2d at 741.

[309] *Id.*

[310] *Id.*

[311] *Id.* at 744-45.

[312] *Id.* at 738, 740.

[313] *Id.*

[314] *Id.* at 738.

[315] *Id.* at 746.

[316] 8 INDIAN L. REP. (AM. INDIAN LAW. TRAINING PROGRAM) at 3076.

not denied access to the peaks nor impaired in their ability to gather sacred objects or conduct religious ceremonies, no impermissible burden on religion was demonstrated.[317] In an unusual analysis, the court first considered whether the beliefs were burdened and then if religious practices were burdened.[318]

In examining the impact of the ski resort development on the Navajos' and Hopis' beliefs, the court rejected the applicability of the *Sherbert* and *Thomas* decisions.[319] The court reasoned that *Sherbert* and *Thomas* were not factually analogous to the case at bar because those cases held that the government may not, by conditioning benefits, penalize religious beliefs.[320] Although the court recognized that the construction of the proposed facilities was inconsistent with the plaintiff's beliefs, the court ruled that spiritual disquiet does not comprise a free exercise claim under *Sherbert* and *Thomas*, or under *Pillar of Fire v. Denver Urban Renewal*, where the Colorado Supreme Court held that a church group whose building, imbued with religious and historic significance, was condemned by urban renewal, was entitled to a court hearing to weigh the interests involved.[321] Relying on *Pillar of Fire*, the court in *Wilson* acceded that "religious faith and tradition can invest certain structures and land sites with significance which deserves first amendment protection."[322] The court distinguished *Pillar of Fire* from the case at hand, however, on the grounds that "a governmental taking of privately-owned religious property . . . involves different considerations than does a claimed first amendment right to restrict the government's use of its own land."[323]

Finding no burden on belief, the court of appeals considered whether expansion of the ski resort burdened the practice of the Navajo and Hopi religions.[324] The plaintiffs argued that the destruction of natural conditions in the peaks would impair the performance of ceremonies and the collection of religious objects through desecration of sacred shrines.[325] The plaintiffs objected to the lower court's reliance on *Sequoyah* on two grounds. First, the plaintiffs argued that *Sherbert* and *Thomas* provided the appropriate standard to evaluate the burden on religion.[326] The plaintiffs asserted that the burden on their religion was even greater than the burdens in *Sherbert* and *Thomas*, because in those cases the plaintiffs could simply forego government benefits and continue to practice their religion.[327] A broad reading of those cases, the plaintiffs argued, would condemn governmental actions which force adherents either directly or indirectly, to modify their beliefs and practices; the expansion of the ski area, by effectively prohibiting the practice of their religion, would be such an action.[328] The *Wilson* court, however, reiterated its rejection of the applicability of the *Sherbert* and *Thomas* decisions, which involved government benefits, stating, "those cases did not purport to create a benchmark against which to test all indirect burden claims."[329]

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[317] *Wilson*, 708 F.2d at 741.

[318] *Id.* at 744-45.

[319] *Id.* at 746.

[320] *Id.* at 741.

[321] *Id.* at 741, 742 n.3 (citing Pillar of Fire v. Denver Urban Renewal, 181 Colo. 411, 509 P.2d 1250 (1973)).

[322] *Wilson*, 708 F.2d at 742 (citing *Pillar of Fire*, 181 Colo. at 419, 509 P.2d at 1254).

[323] *Wilson*, 708 F.2d at 742 n.3.

[324] *Id.* at 742.

[325] *Id.*

[326] *Id.* at 743.

[327] *Id.*

[328] *Id.*

[329] *Id.*

Second, the plaintiffs argued that the court's reliance on the *Sequoyah* decision was misplaced because the *Sequoyah* court misinterpreted the first amendment by requiring proof of centrality.[330] Although the *Wilson* court rejected the centrality doctrine, it asserted that *Sequoyah* required a showing of indispensability, rather than centrality, of a geographic site to the plaintiff's religion.[331] The focus in an indispensability test is on the importance of a geographic site to the practice of the plaintiffs' religion regardless of its centrality, according to the court.[332] Relying on the analysis of the *Sequoyah* court, the *Wilson* court enunciated a standard for establishing a burden on religion under the free exercise clause when the use of government land is involved.[333] In light of the importance of the government's property rights and its duties to manage land for the public benefit,[334] the court required that the plaintiffs demonstrate at a minimum that the government's proposed land use would impair a religious practice that could not be performed elsewhere.[335]

The plaintiffs argued that, even under this standard that accords heavy weight to the governmental interest, they had established a violation of first amendment rights.[336] Despite evidence that all of the peaks were sacred and indispensable to their religious practices, however, the court held that the plaintiffs failed to establish that development of the area would impede the practice of their religion,[337] reasoning that a guarantee of access to the peaks ensured the plaintiff's free exercise rights.[338] The court did not consider whether the ski area expansion constituted a compelling government interest.[339]

The claims of Native Americans in *Wilson v. Block* and *Crow v. Gullet* failed not because the courts found no religious interest but because the courts found that no religious impairment would result from the challenged government action.[340] The problem with the Native American claims in these cases was not in meeting the criteria of "religion" but in meeting the criteria for establishing a burden on religion.[341] As with the *Sequoyah* and *Inupiat* decisions, AIRFA and Supreme Court precedents are useful in

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[330] *Id.* A variety of interpretations of centrality relating to Native Americans' first amendment claims have been employed by the courts. *See, e.g.*, Teterud v. Gilman, 385 F. Supp. 153 (S.D. Iowa 1974), *aff'd sub nom.* Teterud v. Burns, 522 F.2d 357 (8th Cir. 1975) (practice of wearing hair in braids found to be central to religion because "it was an important aspect of the spiritual life of Indians and a fundamental spiritual custom."); Frank v. Alaska, 604 P.2d 1068 (Alaska 1979) (moose meat found to be an essential requirement of a religious ceremony). Courts, however, have rejected the centrality test because they are not equipped to "dictate which practices are or are not required in a particular religion." Geller v. Secretary of Defense, 423 F. Supp. 16, 17 (D.D.C. 1976). *See also* Dayton Christian Schools v. Ohio Civil Rights Commission, 578 F. Supp. 1004, 1032-33 (S.D. Ohio 1984) ("What is *not* involved in the determination of centrality is an evaluation of which beliefs asserted by the plaintiffs are more important or form the 'real' tenets of the plaintiffs' faith"). The danger of the centrality test is the natural tendency to use familiar criteria to evaluate a practice (*e.g.*, in *Woody*, peyote is likened to the Host). Courts then end up evaluating the substantive worth of beliefs asserted in terms of their own. *See* Note, *Religious Exemptions*, *supra* note 89 at 360-62.

[331] *Wilson*, 708 F.2d at 743.

[332] *Id.* at 744.

[333] *Id.*

[334] *Id.*

[335] *Id.*

[336] *Id.* at 744-45 n.7.

[337] *Id.* at 744.

[338] *Id.* at 745.

[339] *Id.*

[340] In both cases, parties stipulated that plaintiffs' beliefs were both religious and sincerely held.

[341] *See supra* notes 273-331 and accompanying text.

evaluating the appropriateness of the courts' reasoning in the *Crow* and *Wilson* cases. While the outcome of the *Crow* case is reasonable in light of these standards, the outcome of the *Wilson* case is not.[342]

Because the *Wilson* court found the plaintiffs' claims to be rooted in religion, it proceeded to the first part of the balancing test — determining whether plaintiffs had established a burden on a religious interest.[343] To analyze whether the expansion of a ski resort infringed on Navajo and Hopi free exercise rights, the *Wilson* court, in an unusual analysis, examined the effect of development on the plaintiffs' beliefs, and then the burden on their religious practices.[344] Nothing in *Sherbert* or *Thomas* on which the *Wilson* court relied, or in any other recent decision, requires this dichotomous analysis.[345]

Given the broad protection accorded religion by the courts and Congress in AIRFA,[346] the *Wilson* court's interpretation of *Sherbert* and *Thomas* was improper. The *Wilson* court's reading of "burden" was unduly narrow. The form of the burden in *Wilson* — where the plaintiffs were forced to modify their religious doctrine to conform to changed circumstances, was not factually identical to conditioning a benefit upon conduct proscribed by plaintiffs' beliefs — to the burden in *Sherbert* and *Thomas*.[347] Nevertheless, the difference in form of burden should not have precluded the finding of a burden in the instant case. In *Thomas*, where unemployment benefits were denied to a worker who had resigned for religious reasons, the burden was "substantial pressure on an adherent to modify his behavior . . . ."[348] Under *Yoder*, in which compulsory education was contrary to the Amish religion, the facts of the case would establish a burden by threatening the community and the religious practices.[349]

The *Wilson* court undermined its own analysis by citing *Pillar of Fire v. Denver Urban Renewal Authority*.[350] In the *Pillar of Fire* case, the burden on religion did not condition benefits upon conduct abhorrent to the plaintiff's religion as did *Sherbert* and *Thomas*.[351] Instead, it involved the possible destruction of a religiously significant structure and site.[352] The court in *Pillar of Fire* asserted that because of the unique religious significance of the condemned building, "[t]he loss of the Pillar of Fire would allegedly go far beyond the incidental burden of having to move to a new location which would occur if any church building were condemned."[353] The *Pillar of Fire* court then recognized a potential

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[342] *See supra* notes 54-112, 144-49 and accompanying text.

[343] *Wilson*, 708 F.2d at 740.

[344] This dichotomy between belief and practice has been recognized since the 19th century. *See* Reynolds v. United States, 98 U.S. 145 (1878). *See also* Cantwell v. Connecticut, 310 U.S. 296 (1940) (regulation of belief is prohibited; regulation of practice is permissible). The integration of religion with lifestyle, however, has diminished the validity of this distinction.

[345] Moreover, the *Wilson* court inexplicably failed to cite to or rely on *Yoder*.

[346] See *supra* notes 144-49 and accompanying text for a discussion of AIRFA.

[347] For the impact of the expansion on the Hopi's religion, *see* Brief for Appellant, Hopi Indian Tribe, at 25-27, Wilson v. Block, 708 F.2d 735 (D.C. Cir. 1983).

[348] *Thomas*, 450 U.S. at 718.

[349] *See Yoder*, 406 U.S. at 219.

[350] 181 Colo. 411, 509 P.2d 1250 (1973).

[351] *Id.* at 419, 509 P.2d at 1251.

[352] *Id.*

[353] *Id.* Another point of departure in the two courts' analyses is that while the *Wilson* court trivializes the plaintiffs' claims by asserting that spiritual disquiet does not suffice to state a free exercise claim, 708 F.2d at 742, the *Pillar of Fire* court stresses the need for judicial intervention to protect a small, politically weak minority's first amendment rights when administrative and legislative bodies have been insensitive to their interests. 181 Colo. at 419, 509 P.2d at 1251.

free exercise claim in a non-traditional context and the breadth of protection religion should be afforded.

In addition to applying *Pillar of Fire* improperly to the case, the *Wilson* court erroneously distinguished a government taking of private religious property, such as occurred in *Pillar of Fire*, from a restriction on the government's use of its own land.[354] In so doing, the court confused the weighing of interests with establishing the abridgement of religion; the latter must necessarily precede the former.[355] Furthermore, the interest to be considered should not be the government's use of the land generally, but rather the specific use of land. In *Wilson*, the proposed use of land was not for energy development or water supply purposes — purposes conceivably compelling because of the number of citizens affected[356] — but for the development of a ski resort, involving private commercial interests and benefiting a small population of skiers.[357]

The *Wilson* court's analysis of the burden on religious practices was as weak as its analysis of the burden on belief. Concerning the burden on religious practices, the *Wilson* court again improperly rejected the applicability of *Sherbert* and *Thomas* despite the plaintiffs' argument that the burden on their religion was greater than the burden in the *Sherbert* and *Thomas* cases.[358] In *Sherbert* and *Thomas*, the plaintiffs could have continued to practice their religion by foregoing benefits, whereas in *Wilson*, the ski area effectively prohibited the practice of the Native Americans' religion.[359] In grappling with ascertaining whether the government's action constituted a burden on religion, the *Wilson* court outlined a standard for challenging proposed land use: the proposed land use must impair a religious practice that could not be performed at any other site.[360] Using this standard, the *Wilson* court reached an erroneous conclusion. The court ignored that all of the peaks were sacred,[361] and that the religious practices were "site-specific" and required "natural conditions for their performance."[362] The standard itself is questionable because it weighs heavily the government's property rights and duties of public management before analyzing how the specific government act impinges on the religious interest.[363] Nothing, however, in the Supreme Court's reasoning in *Sherbert* and *Yoder*, or any other case, suggests that a different or higher standard be imposed on cases involving the federal use of public land. In fact, the Supreme Court has consistently held that the first amendment and the fourteenth amendment require states to allow religious proselytization on public streets.[364] These cases, as well as AIRFA, which recognizes access to sites as significant to Native Americans' religious freedom, suggest that access to public lands is an element of first amendment protection.[365]

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[354] *Wilson*, 708 F.2d at 742.

[355] See *supra* notes 28-96 and accompanying text, for a discussion of the balancing test.

[356] *See, e.g.*, Badoni v. Higginson, 638 F.2d 127 (10th Cir. 1980).

[357] *See* Wilson v. Block, 708 F.2d 735 (D.C. Cir. 1983).

[358] *See supra* notes 319-21 and accompanying text.

[359] *Compare Sherbert*, 374 U.S. at 401 and *Thomas*, 450 U.S. at 718, *with Wilson*, 708 F.2d at 742.

[360] *Wilson*, 708 F.2d at 742.

[361] *Id.* at 744.

[362] *Id.* at 742.

[363] *Id.* at 744. The court stated: "[i]n holding that government land uses can never burden the right to freedom of belief, and can burden the right to freedom of practice only if site-specific religious practices are significantly impaired, we pay due regard to the government's rights and duties on its land." *Id.*

[364] *See, e.g.*, Kemp v. New York, 340 U.S. 290 (1951) (impermissible to impose a license requirement on religious speech); *accord*, Cantwell v. Connecticut, 310 U.S. 296 (1940).

[365] *See supra* notes 144-49 and accompanying text.

The analysis in *Wilson* is also improper because it mixes elements of the balancing stage of the *Sherbert* and *Yoder* test with the finding of a burden on religion.[366] This analysis leads to circular reasoning that because the government interest is compelling, no infringement on the plaintiffs' religion occurs. The *Yoder* test, applied properly after a finding that a government action burdens the plaintiff's religion, would conclude that because the government's interest outweighs the religious in a given instance, no violation of the first amendment has occured.[367] Given the evidence, the *Wilson* court should have found an infringement on the plaintiffs' religion and then balanced the competing interests. The interest of the ski resort owners probably would have yielded to the religious interest had the court balanced the interests properly.

In contrast to *Wilson*, the court in *Crow v. Gullet* properly applied the two part balancing test of *Sherbert* and found no infringement on the plaintiffs' free exercise rights.[368] Unlike the court in *Wilson*, the *Crow* court did not offer separate analysis for religious belief and practice.[369] More significantly, in looking for a burden before applying the balancing test, the court gave a broad reading to "burden."[370] Not only could the plaintiffs have demonstrated that they were burdened because they were penalized by adherence to their religion, but they also could have demonstrated that "their conduct in the course of exercising their beliefs had been unduly restricted."[371] The *Wilson* court focused only on the former — a more restrictive analysis of burden.

The court's analysis in *Crow*, however, faltered in evaluating the plaintiffs' contention that the alteration of the natural features constituted a first amendment violation.[372] In reaching its conclusion that no first amendment violation resulted from the state action, the court relied on the fact that the plaintiffs had no property interest in Bear Butte or in the park.[373] Courts have consistently rejected the validity of this assertion relating to claims to public lands.[374] More dispositive of the claim, however, is the court's analysis of the evidence: construction did not constitute a burden because it was requested by the plaintiffs and initiated to accommodate their religious practices.[375] This evidence suggests that the court's conclusion was proper and reasonable. Employing an indispensability test, the *Crow* court also properly found no infringement on religious practices because the area traditionally used by plaintiffs for religious ceremonies was closed for overnight camping.[376] Unlike the restrictions in *Badoni*,[377] the restrictions to right of access in *Crow* were merely temporary and partial and no worshipper was ever denied access to the site.[378] The court properly based its finding of no burden on the plaintiff's failure to

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[366] *See supra* notes 28-96 and accompanying text.

[367] *Id.*

[368] *Crow*, 706 F.2d at 858.

[369] *See Crow*, 541 F. Supp. at 790.

[370] *See id.*

[371] 541 F. Supp. at 790-91 (citing Life Science Church v. IRS, 525 F. Supp. 399 (N.D. Cal. (1981)).

[372] *See id.* at 791.

[373] *Id.*

[374] *See, e.g., Sequoyah*, 620 F.2d at 1164.

[375] *Crow*, 541 F. Supp. at 791. Defendant Gullet testified the platforms were erected to restrict tourist traffic on the Butte and to provide greater privacy to worshippers. He also testified that Indian religious campers had for the past 3 years urged the state to improve access and safety to the ceremonial grounds. *Id.*

[376] *Id.* at 792.

[377] 455 F. Supp. 641 (D. Utah 1977), *aff'd*, 638 F.2d 172 (10th Cir. 1980).

[378] *Crow*, 541 F. Supp. at 792.

demonstrate the indispensability of overnight camping to their religion.[379] This fact alone should have been dispositive of the claim; before analyzing the degree of infringement, an infringement must be established. The court, however, proceeded to the next stage of the balancing test by assessing the state interest.[380] Finding this interest compelling, the court moved on to the final stage of the balancing test.[381] It then concluded that exclusion of the public and religious users for a short time from the area was the least restrictive means of completing the project.[382]

The *Wilson* and *Crow* courts both found a religious interest, but found that the government did not burden that interest. Despite similar outcomes based on the same conclusion, the courts diverged in their application and interpretation of the *Sherbert* and *Yoder* tests. Given the facts of the case, the finding of the *Crow* court was reasonable. Had the *Wilson* court, on the other hand, complied with the spirit of *Sherbert* and found a burden, the religious interest of the Indians probably would have been found to outweigh the state's interest in the private development of a small recreational facility.

4. *Northwest Indian Cemetery Protection Association v. Peterson:* A Successful Claim

Unlike the claims in *Badoni*, *Sequoyah*, *Inupiat*, *Wilson*, and *Crow*, Native American claims against the government in *Northwest Indian Cemetery Protection Association v. Peterson* were successful.[383] In *Peterson*, the United States District Court for the Northern District of California held that interests asserted by Indians were protected under the free exercise clause.[384] In *Peterson*, a group of Indian tribes challenged a forest service decision to complete construction of a paved logging road through a unit of national forest.[385] The tribes argued that the road, which passed through the sacred high country of Chimney Rock, brought disruptive intrusions of logging activity and traffic, thereby burdening their religion in violation of the first amendment.[386] A district court judge denied the plaintiffs' request for a preliminary injunction.[387] The plaintiffs submitted numerous affidavits attesting to the sanctity of the area and the centrality of the region to their religious beliefs and practices.[388] Nevertheless, the court held that because the defendants had allowed the plaintiffs reasonable access to the area they claimed was sacred, their duties under the first amendment had been fulfilled.[389] Furthermore, the court reasoned

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[379] *Id.*

[380] *Id.*

[381] *Id.*

[382] *Id.*

[383] 565 F. Supp. 586 (N.D. Cal. 1983).

[384] *Id.* at 591.

[385] *Id.* at 590. Plaintiffs, seven non-profit organizations and unincorporated associations, brought suit on a number of grounds in addition to the first amendment: AIRFA, 42 U.S.C. § 1996 (1982); National Environmental Policy Act, 42 U.S.C. § 4321-4370a (1982); Federal Water Pollution Control Act, 33 U.S.C. § 1251-1376 (1982); the Administrative Procedure Act, 5 U.S.C. § 706 (1982); the Multiple Use Sustained Yield Act, 16 U.S.C. §§ 528-531 (1982); the National Forest Management Act of 1976, 16 U.S.C. § 1600-1687 (1982); and general trust theories.

Plaintiffs challenged both the construction of the 6.02 mile road through the Chimney Rock section of the forest which would connect two other sections of road as well as the forest management plan providing for the harvesting of timber in the Blue Creek Unit in which Chimney Rock lies. *Peterson*, 565 F. Supp. at 589-90.

[386] *Peterson*, 565 F. Supp. at 592.

[387] 552 F. Supp. 951, 954 (N.D. Cal. 1982).

[388] *Id.*

[389] *Id.*

that the use of public lands for religious purposes by a small section of the population does not require the government to abdicate its statutory duty to manage lands for the benefit of the public.[390]

The district court later reversed its decision when it held that completion of the logging road violated Native Americans' free exercise rights.[391] In reaching this decision, the court recognized that the government had a greater duty in upholding the first amendment than previously acknowledged. The court began its analysis of the first amendment claim by asserting that the unorthodox nature of a religion does not preclude first amendment protection.[392] Recognizing that the northeastern corner of the Blue Creek Unit was sacred to the Yurok, Karok and Tulowa tribes, and that the entire region was sacred to them,[393] the court noted that the tribes used the high country for religious purposes and emphasized that the pristine environment of the high country had allowed its continuous, regular use in this manner.[394] According to the court, construction of the Chimney Rock section of the logging road would, as the plaintiffs asserted, impair religious use of the area through increased recreational use, environmental degradation, and aural and visual disturbances.[395] Additionally, the court recognized that the government's proposed management plan, which entailed the construction of 200 miles of logging road in contiguous areas to Chimney Rock despite proposed "protective zones" around three sacred peaks, would have an equally adverse impact on religious practice.[396]

Because the defendants conceded that the Indians' use of the high country was entitled to first amendment protection, the court evaluated whether the challenged actions burdened the first amendment rights.[397] According to the court, both actions — construction of the road and implementation of the management plan — would seriously impair the plaintiffs' religious use of the high country.[398] This conclusion was based on the court's finding that the high country was "the center of the spiritual world" for the tribes; consequently, it was both central and indispensable to their religion.[399] The court recognized the vital role of the religious practice in the preservation of the tribe and the interaction of the religious and cultural life of the tribe: "use of the high country in training young persons in the tribes in traditional religious beliefs and ceremonies is necessary to preserve such practices and to convey them to future generations."[400] Applying the reasoning of *Yoder*, the court determined that "degradation of the high country

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[390] *Id.*

[391] 565 F. Supp. 589, 591 (N.D. Cal. 1983). The court denied preliminary injunctive relief based on defendants' assurances that they would not construct the road until the court ruled on the merits of the case at an early trial. *Id.*

[392] *Id.* (citing Thomas v. Review Bd., Ind. Employment Sec. Div., 450 U.S. 707, 714 (1981)).

[393] *Id.*

[394] *Id.* The court estimated that 110-119 members of the tribes make use of the high country. *Id.* at 591 n.3.

[395] *Id.* at 591-92. Individuals use the high country's prayer seats for spiritual exchanges with the creator. Participants in tribal religious ceremonies must make trips to the high country to purify themselves and to gather medicine. These acts enhance the spiritual well-being of the entire tribal community. *Id.*

[396] *Id.* at 592.

[397] *Id.*

[398] *Id.* The plan called for clear-cutting which entails the logging of all the trees in a given area.

[399] *Id.* at 594.

[400] *Id.*

and impairment of such training would carry a very real threat of undermining the tribal communities and religious practices as they exist today."[401]

Once the court had established that the plaintiffs' use of the high country was entitled to first amendment protection and the government's action would burden that use, it attempted to distinguish the facts of other cases involving Native American challenges to government land use from the instant case. In *Sequoyah*, according to the court, the plaintiffs had failed to demonstrate that the land to be flooded was central to their religious practices.[402] In *Hopi Indian Tribe v. Block*, the District Court for the District of Columbia had found that the plaintiffs failed to establish that development would impinge on their practice, according to the *Peterson* court.[403] Similarly, the *Peterson* court asserted, in *Crow v. Gullet* the plaintiffs failed to establish that government actions burdened their religion.[404] According to the *Peterson* court, the *Badoni* decision addressed the government interests of maintaining multi-state water and power generation projects and found them compelling.[405] Furthermore, the court continued, in *Badoni* tourists could not be prohibited from the area because of the strong government interest in ensuring public access to a natural wonder and a statutory duty to do so.[406]

The *Peterson* court therefore analyzed the infringement on religion by comparing the facts of its case to those of other cases involving Native American land claims. Furthermore, the court drew on other free exercise cases to reach its conclusions. Although the court in *Wilson v. Block* had found the reasoning of *Sherbert* and *Pillar of Fire*[407] inapposite, the *Peterson* court found these two cases useful in determining whether the government action created a burden on religion.[408] In its broad reading of burden, the court also relied on *People v. Woody*,[409] a case involving peyote use by Native Americans, to support its conclusion.[410]

Having distinguished this case from prior cases, and having determined that the construction of the logging road imposed a burden on the tribes' religion, the court turned to the issue of the state's interest.[411] The court scrutinized the five rationales offered by the government for the construction of the Chimney Rock section of the road and found that none of the claimed government interests would be materially served by the road and management plan.[412] According to the court, access to the timber resources would not be improved nor would the number of jobs in the area increase.[413] Additionally, the court found that recreational access was currently sufficient and would not increase dramatically, and that permitting motor vehicles in the area could contribute to environmental degradation.[414] The court determined that other interests asserted by the

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[401] *Id. See also Yoder*, 406 U.S. at 218.

[402] *Peterson*, 565 F. Supp. at 593.

[403] *Id.*

[404] *Id.*

[405] *Id.*

[406] *Id.*

[407] *See supra* notes 350-63 and accompanying text.

[408] *Peterson*, 565 F. Supp. at 595.

[409] 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964); *see supra* notes 115-121 and accompanying text.

[410] *Peterson*, 565 F. Supp. at 595.

[411] *Id.* at 595-96.

[412] *Id.*

[413] *Id.* at 595-96. Timber could be harvested without the Chimney Rock Section. *Id.* at 595. Positions would simply be transferred from one county to the next.

[414] *Id.* at 596.

government — fire protection, road maintenance, administrative services — did not justify an infringement on the plaintiffs' first amendment rights.[415] The court also found that claims that the Forest Service reserves of timber would be increased as a result of the construction were too speculative to warrant abridgement of free exercise rights.[416] According to the court, past investment of resources in paved sections of the road was not an interest sufficient to override the plaintiffs' first amendment rights.[417] Furthermore, the court noted that the harvesting of timber pursuant to the management plan was not compelling because, as a small fraction of the timber resources in the Six Rivers National Forest, the timber would not increase timber supplies significantly.[418] Finally, the court noted that the management plan was not the least restrictive means of accomplishing the government's ends. As an alternative, the court suggested that the protective zones around the religious sites be expanded.[419] The court therefore found that the decision of the forest service violated the free exercise rights of the Northwest Indians.[420]

In *Northwest Indian Cemetery Protection Association v. Peterson*, the court found not only an infringement on the plaintiffs' religion, but also that the government's action unconstitutionally burdened the plaintiffs' religion.[421] Although the outcome of the case and the application of the balancing test are proper, the court's reliance on the reasoning of the courts in *Sequoyah*, *Badoni*, *Wilson*, and *Crow* is misplaced. Its analysis of these cases is simplistic. For example, the *Peterson* court accepted the court's reasoning in *Sequoyah* that the claims failed because the government's action burdened cultural rather than religious interests.[422] The *Peterson* court also readily accepted the conclusion of the *Hopi Indian Tribe v. Block* court that development of the peaks did not impinge on the plaintiffs' religion.[423] The court did not criticize the reasoning in any of the cases.

After establishing sincerity and centrality of the religious practice, the *Peterson* court analyzed the burden.[424] In concluding that the logging road burdened the plaintiffs' religion, the *Peterson* court carefully evaluated the evidence that the high country was unique as the center of the spiritual world for the Northwest Indians.[425] Relying on the *Yoder* case, the court analogized the burden created by imposing public education on the Amish to the burden created by the degradation of the high country and the consequent impairment of religious training.[426] The court stated that both abridgements pose "a very real threat of undermining the [tribal] communit[ies] and religious practice[s] as they exist today."[427] The *Peterson* court further analogized the burden created by deprivation of peyote use as an integral part of Indian religious practices to the burden in the present case.[428] Using traditional first amendment "burden" cases in which a government action

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[415] *Id.*
[416] *Id.*
[417] *Id.*
[418] *Id.*
[419] *Id.*
[420] *Id.* at 596-97.
[421] *Id.* at 591.
[422] *Id.* at 595.
[423] *Id.* at 593.
[424] *Id.* at 594.
[425] *Id.* at 593.
[426] *Id.*
[427] *Id.* (quoting *Yoder*, 406 U.S. at 218).
[428] *Id.* at 595.

denies a benefit or forces an action against religious beliefs, the *Peterson* court expanded the notion of burden to include the destruction of irreplaceable religious sites.[429]

The *Peterson* court recognized the sanctity of the entire region, rather than just specific sites, just as the *Wilson* court had.[430] Unlike the *Wilson* court, however, the *Peterson* court demonstrated great sensitivity to the plaintiffs' religion by recognizing the impact on their religion which would result from the desecration of a small portion of the area.[431] The court's analysis of the burden on religion is based on a broad reading of burden derived from the *Sherbert*, *Yoder*, and *Pillar of Fire* decisions.[432] Unlike the *Wilson* court, the court in *Peterson* did not invoke a different analysis of the free exercise claim simply because the claim involved public lands; the court recognized that a lack of property interest did not release the government from constitutional responsibilities imposed by the first amendment.[433]

The *Wilson* court set out a standard by which to evaluate the "burden" requirement of claims involving public lands: the proposed land use would impair a religious practice which could not be performed elsewhere.[434] Without articulating the standard the *Peterson* court seemed to apply it.[435] The standard, however, presents difficulty in application; what degree of access must be precluded or how much alteration of natural features must occur before a burden is found is unclear. In *Wilson*, a 777 acre portion of a 75,000 acre sacred region was not shown to be central to the religion — therefore, the court concluded that no burden on religion was demonstrated. Implicit in its conclusion is that the religious practices could be performed in any area of the sacred region.[436] In *Peterson*, on the other hand, damage to the "visual, aural and environmental qualities of the high country" resulting from the road and clear cutting was deemed to be a burden.[437] Just as public education threatened the religion of the Amish in *Yoder*,[438] the intrusions on the high country threatened the Northwest Indians' religious beliefs and practices.[439] Accordingly, the *Peterson* court afforded the Native Americans first amendment protection just as the Amish had been afforded protection in *Yoder*.

Of those courts examining claims of Native Americans involving land, the *Peterson* court alone found a burden on religion and applied the final part of the *Sherbert* and *Yoder* tests — the balancing of interests. The Supreme Court has offered little in the way of guidance to assess values of competing interests. It has, however, stipulated that "only those interests of the highest order" can uphold a challenged government action once a burden on free exercise is established.[440] Implicitly this statement affords religious freedom a high value. Under this directive, the *Peterson* court carefully examined the claimed government interests and properly concluded that they did not justify infringement of the plaintiffs' free exercise rights. In coming to this conclusion, the court properly applied the final part of the balancing test: examining less restrictive alternatives.

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[429] *Id.*

[430] *Compare Peterson*, 565 F. Supp. at 594, *with Wilson*, 708 F.2d at 742.

[431] *Id.*

[432] *Peterson*, 565 F. Supp. at 595.

[433] *Compare Peterson*, 565 F. Supp. at 594, *with Wilson*, 708 F.2d at 744 & n.5.

[434] *See Wilson*, 708 F.2d at 744.

[435] *Peterson*, 565 F. Supp. at 594.

[436] *Wilson*, 708 F.2d at 794.

[437] *Peterson*, 565 F. Supp. at 595.

[438] *See supra* note 79 and accompanying text.

[439] *Peterson*, 565 F. Supp. at 594.

[440] *Yoder*, 406 U.S. at 216.

The value placed on religion by the *Peterson* court is reflected in Supreme Court cases involving the free exercise clause and, more specifically relevant to Native Americans, in AIRFA. Both constitutional precedent and AIRFA support the conclusion that the construction of a logging road which could be placed elsewhere and which would desecrate land sacred to a religious minority should not be permitted. The *Peterson* court's use of traditional constitutional analysis in a non-traditional context of government action and applied to a non-traditional religion is promising for future claims. Native Americans can more easily overcome the obstacles to their claims of establishing a religious interest and a burden on that interest if the *Peterson* decision is followed. The *Peterson* success was contingent not only upon the proper use of constitutional precedents but a favorable set of facts. The Native Americans were able to establish the radical impact this government act would have on the religious use of the land, and the government project was not site specific.

Conclusion

Because religion is inseparable from culture for Native Americans, the preservation of religion is crucial to their functioning as a cultural and distinct minority. The first amendment affords some degree of protection to religious practices and Native Americans have turned to the courts in their self-preservation and self-determination efforts.

This note has examined the way the state and federal courts have applied the *Sherbert* and *Yoder* balancing tests to Native American claims which challenge government projects interfering with access to sacred sites. Because of the unique character of their land-related religious practices, Native Americans have encountered stumbling blocks in attempting to convince the courts that they have a religious interest in certain lands and that government action imposes a burden on that interest. If Native Americans can establish these elements, they must prove that their religious interests outweigh competing government interests. Given the large scale implications of government land mangement projects, Native Americans may still encounter difficulties in passing the balancing test.

First amendment relief will be granted only if the value of Native American religion and culture is recognized. Congress has taken steps towards this recognition with the passage of AIRFA: "America does not need to violate the religions of her native peoples. There is room for and great value in cultural and religious diversity. We would be poorer if these American Indian religions disappeared from the face of the earth."[441] The courts must now recognize and comply with this statement in evaluating Native American religious claims.

Erica Rosenberg

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[441] H.R. Rep. No. 1308, 95th Cong., 2d Sess. 2, *reprinted in* 1978 U.S. Code Cong. & Ad. News 1262, 1264.