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Wilson v. Block

Mary H. Smith

NOTES

WILSON V. BLOCK

Hesperus Peak and San Francisco Peak speak to one another.
Where they have placed their feet, I also will place my feet.
With its shoes I will go about,
With its legs I will go about,
With its power I will go about,
With its body I will go about,
With its mind, its voice, I will go about.
That which extends out from the top of its head, that also extends out from the top of my head as I go about.
The things that extend around it are also being extended around me, by these in blessing I go about.
Blessing is also extended around other mountains, with that in blessing I go about.
I am long life-happiness, in blessing I go about.
Behind me it is blessed as I go about.
Before me it is blessed as I go about.
I have become blessed again, I have become blessed again.[1]

STATEMENT OF THE CASE

The Snow Bowl is a government-owned ski area located on the San Francisco Peaks in the Coconino National Forest near Flagstaff, Arizona. The 777-acre Snow Bowl has been a downhill ski area since 1937. The San Francisco Peaks, which comprise an area 75,000 acres in size, are a predominant physical feature visible from portions of both the Hopi and Navajo Indian reservations in northern Arizona.

Both the Navajo and the Hopi Indians consider the Peaks an important part of their cultures.[2] The Navajos believe that the Peaks are one of the four sacred mountains and are the home of certain deities.[3] The Navajos believe the Peaks possess healing powers; thus, the Indians collect ceremonial herbs from, and perform religious rites on, the mountains.[4] The Hopis believe that their Kachinas, spiritual emissaries from the Creator,

1. L. WYMAN, BLESSINGWAY 613 (1970) (reciting a version of Blessingway, a Navajo ceremonial, as told by River Junction Curly).
2. *See generally* Wilson v. Block, 708 F.2d 735, 738 (D.C. Cir.), *cert. denied,* 464 U.S. 956 (1983), 464 U.S. 1056 (1984).
3. *Wilson,* 708 F.2d at 738.
4. *Id.*

live on the Peaks and create the precipitation which sustains the Hopi Villages.[5] The Hopis collect plants and animals from the Peaks for ceremonial uses.[6] The Navajos and the Hopis consider the Peaks a sacred area vital to the practice of their respective religions.

In July 1977 Northland Recreation Company, which operated the Snow Bowl under a permit from the United States Forest Service, submitted to the Forest Service a "master plan" to expand the Snow Bowl by adding new ski slopes, ski lifts, and lodge facilities.[7] The Forest Service conducted public workshops pursuant to the National Environment Policy Act[8] and fashioned six alternatives to Northland's master plan. In June 1978 the Forest Service filed a draft environmental impact statement evaluating the six alternatives and solicited input from the public, including the Navajo and Hopi Indians. In February 1979 the Coconino National Forest Supervisor issued his Preferred Alternative[9] for the expansion of the Snow Bowl. He was overruled in February 1980 by the Regional Forester, but the Preferred Alternative was reinstated by the Chief Forester in December 1980.[10]

In March 1981 the Navajo Medicinemen's Association filed suit in the District Court for the District of Columbia against the Secretary of Agriculture, John Block; the Chief Forester, R. Max Peterson; the Forest Service; and the United States.[11] Plaintiff sought a gradual removal of the existing ski facilities on the Peaks, or an injunction against the further development of the Snow Bowl.[12] The Hopi Tribe and Richard Wilson, the owner of a ranch in the vicinity of the Snow Bowl, filed similar suits.[13] The three suits were consolidated by the district court.[14] The plaintiffs alleged that the development of the Snow Bowl as described by the Preferred Alternative would violate, *inter alia,* the Indians' first amendment rights to the free exercise of their religions and the American Indian Religious Freedom Act.[15]

5. F. WATERS, BOOK OF THE HOPI 165-66 (1963).

6. *Wilson,* 708 F.2d at 738.

7. *Id.*

8. 42 U.S.C. §§ 4321-4370a (1983).

9. *Wilson,* 708 F.2d at 739. The Preferred Alternative called for the construction of a new lodge and ski lifts, the clearing of land for additional runs, and the widening and paving of the Snow Bowl access road.

10. *Id.*

11. *Id.*

12. *Id.* at 740.

13. Hopi Indian Tribe v. Block, No. 81-0481 (D.D.C., June 15, 1981), Wilson v. Block, No. 81-0558 (D.D.C., June 15, 1981).

14. The suits consolidated were Hopi Indian Tribe v. Block, No. 81-0481 (D.D.C., June 15, 1981); Navajo Medicinemen's Assn. v. Block, No. 81-0493 (D.D.C., June 15, 1981); and Wilson v. Block, No. 81-0558 (D.D.C., June 15, 1981). The court consolidated these because questions of law or fact were common to all three suits.

15. American Indian Religious Freedom Act, 42 U.S.C. § 1996 (1983). The plaintiffs also alleged violations of the National Historic Preservation Act, 16 U.S.C. §§ 470-470w-6 (1983); the National

The district court granted the defendants' motions to dismiss Wilson's complaint as to the first amendment and the American Indian Religious Freedom Act claims because Wilson lacked standing to assert the constitutional rights of the third party Indian plaintiffs.[16] The parties filed cross-motions for summary judgment and, after a hearing, the district court in June 1981 granted summary judgment to the defendants on all issues except the National Historic Preservation Act claims.[17] The case was remanded to the Forest Service for additional proceedings. In May 1982 after finding the Forest Service in compliance with the requirements of the National Historic Preservation Act, final judgment was entered for the defendants on all issues.[18] The plaintiffs appealed, and the defendants agreed to stay their development until the case was resolved.

The District of Columbia Court of Appeals affirmed the district court's conclusions.[19] The court of appeals denied the plaintiff Indians' first amendment claim, saying that they had failed to prove that the Snow Bowl expansion would impair their right to the free exercise of their religions. The court held that the Snow Bowl permit area was not indispensable to the plaintiffs' religious practices because the Indians could continue to use other areas on the Peaks. The court further held that the plaintiff Indians' right under the American Indian Religious Freedom Act (AIRFA) to practice their religions was not burdened by the Snow Bowl's development. The court found the Forest Service in compliance with the dictates of AIRFA because the agency had consulted with Indian leaders and considered their views prior to the selection of the Preferred Alternative authorizing the ski area expansion.[20]

Environmental Policy Act, 42 U.S.C. §§ 4321-4370 (1983); the Endangered Species Act, 16 U.S.C. §§ 1531-1543 (1983); the Multiple-Use Sustained Yield Act, 16 U.S.C. §§ 528-531 (1983); the Wilderness Act, 16 U.S.C. §§ 1131-1136 (1983); the Administrative Procedure Act, 5 U.S.C. §§ 551-559 (1983); two statutes, 16 U.S.C. §§ 497, 551 (1983), governing land use permits for national forest land; and the fiduciary duty owed the Indians by the federal government.

16. Hopi Indian Tribe v. Block, 8 INDIAN L. REP. 3073, 3073-74 (No. 81-0481, D.D.C., June 15, 1981), *aff'd sub nom.* Wilson v. Block, 708 F.2d 735 (D.C. Cir.), *cert. denied,* 464 U.S. 956 (1983), 464 U.S. 1056 (1984).

17. *Id.*

18. *Wilson,* 708 F.2d at 739.

19. *Id.*

20. The court also considered the plaintiffs' other claims. First, the court held that because a rare alpine plant was not formally listed as threatened or endangered under the Endangered Species Act, then the Forest Service did not violate the Act when it failed to evaluate the impact of the proposed development on the plant's continued existence on the Peaks. Second, the court held that the Forest Service complied with the National Historic Preservation Act when it conducted partial archeological surveys of the permit area, consulted with the State Historic Preservation Officer, determined that the Peaks themselves were ineligible for inclusion in the National Register of Historic Places, and concluded that the development would not adversely affect the historical quality of the area. Third, the court held that the Wilderness Act claim failed because although the Act authorized the president to recommend as wilderness those lands contiguous to areas designated "primitive" by the Secretary of Agriculture, no part of the Peaks had ever been designated primitive, and thus the Act did not

This note will focus on the Hopis' and the Navajos' religious claims. The first amendment free exercise clause as it applies to Native American religions will be examined. The historical background of the American Indian Religious Freedom Act and claims of religious infringement under that statute will be explored. The impact of this case on attempts by Native Americans to stop development on public lands by asserting first amendment and American Indian Religious Freedom Act violations will then be analyzed.

BACKGROUND

1. Native American First Amendment Free Exercise Claims

The first amendment guarantees the free exercise of religion. The amendment reads in part, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[21] The government may not regulate or prohibit an individual's religious freedom.[22] The freedom to believe is absolute within the meaning of the first amendment,[23] but the freedom to practice one's religion may be subject to governmental regulation.[24] A practice rooted in religion triggers constitutional protection,[25] but that protection may be overcome by compelling governmental interests "of the highest order."[26] Once an individual proves his practice is religious, the burden shifts to the government to justify actions infringing upon the individual's religious freedom.[27]

In cases where an infringement of the free exercise of religion has been alleged, courts have applied a two-step analysis in determining the validity of the infringement claim. This analysis first appeared in *Sherbert v. Verner*,[28] in which the plaintiff, fired because she refused to work on the Sabbath Day of her religion, was denied unemployment compensation because state law barred benefits to those who refused, without good cause, to accept suitable work. The United States Supreme Court found first, a burden on the free exercise of plaintiff's religion because the South Carolina state law denying her financial benefits forced her to choose

apply. Fourth, the court held that 16 U.S.C. §§ 497, 551 constituted congressional authority for land use permits issued to ski resort operators using national forest lands, and thus the Forest Service did not violate these statutes when it issued land use permits to the Snow Bowl operators. With respect to the plaintiffs' other claims, the court affirmed the opinion of the district court. *See supra* note 15.

21. U.S. CONST. amend. I.
22. McDaniel v. Paty, 435 U.S. 618, 626 (1978).
23. Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).
24. *See* Braunfeld v. Brown, 366 U.S. 599, 603 (1961).
25. Wisconsin v. Yoder, 406 U.S. 205, 215 (1972).
26. *Id.*
27. *See* Sherbert v. Verner, 374 U.S. 398, 403 (1963).
28. *Sherbert*, 374 U.S. 398.

between following her religious teachings and abandoning those teachings in order to accept work. Second, the Court found that the state interest in preventing fraudulent claims was not so compelling as to justify the infringement of the plaintiff's constitutionally protected choice.[29]

This constitutional balancing test, oftentimes referred to as the *Sherbert* analysis, consists of two findings by the court. First, a threshold determination is made as to whether the governmental action or regulation complained of burdens the plaintiff's religious practices. The plaintiff must show the "coercive effect of the [action] as it operates against the practice of [his] religion.[30] Second, if there is such a burden, then only if the government's action is the least restrictive means of accomplishing a compelling governmental interest will the burdensome action be upheld.[31] The government must show that its interest outweighs the interest claiming protection under the first amendment.[32] Such an analysis suggests that although one's religious belief is immune from infringement under the Constitution, the practice of that belief may not be so protected.[33] This two-step analysis has been applied by courts faced with evaluating claims by Native Americans that their religious freedom has been interfered with by governmental action.[34]

The application of the *Sherbert* analysis has resulted in findings that certain governmental actions did not burden Indian religious practices. In *Sequoyah v. TVA*,[35] the Cherokee Indian plaintiffs sought to enjoin the completion of Tellico Dam, claiming that their first amendment right to the free exercise of religion would be infringed upon by the flooding of a valley sacred to their religion. The Sixth Circuit Court of Appeals denied the relief sought after the court found no burden on the plaintiffs' religion. The court found no showing that religious practices in the valley were the "cornerstone" of, or played a "central role" in, the plaintiffs' religion.[36] In *Northwest Indian Cemetery Protective Association v. Peterson*,[37]

29. *Id.* at 403-09.

30. School Dist. of Abington v. Schempp, 374 U.S. 203, 223 (1963).

31. *See* Thomas v. Review Bd., Indiana Empl. Security Div., 450 U.S. 707, 718 (1981).

32. *Yoder*, 406 U.S. at 214-15. *Yoder* said that "only those interests of the highest order" outweighed a legitimate free exercise claim. *Id.* at 215.

33. *See Sherbert*, 374 U.S. at 403.

34. *See* Badoni v. Higginson, 638 F.2d 172 (10th Cir. 1980), *cert. denied*, 452 U.S. 954 (1981); Sequoyah v. TVA, 620 F.2d 1159 (6th Cir.), *cert. denied*, 449 U.S. 953 (1980); Northwest Indian Cemetery Protective Assn. v. Peterson, 552 F. Supp. 951 (N.D. Cal. 1982); Crow v. Gullet, 541 F. Supp. 785 (D.S.D. 1982), *aff'd*, 706 F.2d 856 (8th Cir.), *cert. denied*, 464 U.S. 977 (1983); People v. Woody, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964).

35. 620 F.2d 1159 (6th Cir.), *cert. denied*, 449 U.S. 953 (1980).

36. *Id.* at 1164. The court noted that other Indian religious freedom cases had given protection to those rituals which were the "centerpiece" or "cornerstone" of the religions. *See, e.g.*, Frank v. Alaska, 604 P.2d 1068 (Alaska 1979), People v. Woody, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964).

37. 552 F. Supp. 951 (N.D. Cal. 1982).

the plaintiffs sought to prevent the Forest Service from completing a road in the Chimney Rock area of the Six Rivers National Forest, alleging that the intrusions caused by logging and traffic were incompatible with the sacredness of the area. Although the plaintiffs submitted evidence of the centrality of the region to their religious practices, the District Court for the Northern District of California denied the injunction sought after finding that the road was not an impermissible burden on the plaintiffs' religion so long as the Forest Service provided them with access to the religious sites.[38] In these cases, in the absence of a finding of a burden on the free exercise of religion, the courts found no need to determine whether the government had a compelling interest in infringing upon the Indians' first amendment rights. These courts ended their constitutional analyses with step one of the *Sherbert* test.

In other cases, courts have found it necessary to apply step two of the *Sherbert* balancing test in evaluating Indian plaintiffs' claims of a first amendment violation. In *Crow v. Gullet,* [39] the Lakota and Tsistsistas Indians sought declaratory and injunctive relief, and damages, from the State of South Dakota, alleging that the state's management of Bear Butte State Park for the benefit of the general public destroyed the religious sanctity of Bear Butte and violated the plaintiffs' constitutional rights. The District Court for South Dakota applied the *Sherbert* test. The court found no burden on the plaintiffs' religious freedom because restrictions on access to the Butte were only partial and temporary, unnecessary interference by tourists with religious rites was prevented, and requiring camping permits and registration did not force the plaintiffs to violate their religious beliefs. To the extent that the plaintiffs were temporarily denied access to a ceremonial area, the court determined that the state's limitation on the use of Bear Butte was the least restrictive means of protecting both the welfare of park visitors and the park environment, and thus this state interest outweighed the plaintiffs' interest in unrestricted access to the Butte. Absent proof of a first amendment violation, the court refused to enjoin the state action.[40]

In *Badoni v. Higginson,*[41] the Navajo Indian plaintiffs sought declaratory and injunctive relief against the Department of the Interior, alleging that the management of Rainbow Bridge National Monument and Glen Canyon Reservoir interfered with the plaintiffs' religious practices in two ways: (a) maintaining the water level of the reservoir drowned Navajo

38. The court also said that the Forest Service had a statutory responsibility to manage its property for the public's benefit and the desire of a "relatively few" people to use the national forest for religious purposes did not obligate the Forest Service to limit the public's access to the public lands. *Id.* at 954.

39. 541 F. Supp. 785 (D.S.D. 1982), *aff'd,* 706 F.2d 856 (8th Cir.), *cert. denied,* 464 U.S. 977 (1983).

40. *Id.* at 793.

41. 638 F.2d 172 (10th Cir. 1980), *cert. denied,* 452 U.S. 954 (1981).

deities and a prayer spot at Rainbow Bridge and (b) the sacredness of the monument was desecrated when the National Park Service allowed an influx of tourists. The Tenth Circuit Court of Appeals recognized the religious significance of the monument and, by applying the second step of the *Sherbert* analysis first, determined that the government's interest in maintaining the level of the reservoir for "water storage and power generation" and in assuring public access to Rainbow Bridge justified the burden on the plaintiffs' religious practices.[42] Because the governmental interest was so compelling, the court found it unnecessary to determine if the government's actions actually burdened the plaintiffs' religion and concluded that no infringement upon the plaintiffs' first amendment rights existed which justified granting the relief sought.[43] The court made no mention of the *Sherbert* requirement that the government's action be the least restrictive means of achieving a compelling governmental objective. In both *Badoni* and *Crow,* the courts determined that compelling governmental interests justified the alleged infringements upon the plaintiffs' religious practices.

Despite the general reluctance of the judiciary to find infringements by governments upon Native American first amendment rights, two state courts have held that the Indians' freedom to practice their religions outweighed the government's interest in infringing upon those practices. In *People v. Woody,*[44] the California Supreme Court held that the state statute proscribing the possession of peyote was an improper infringement of the constitutional rights of the defendants, members of the Native American Church. The court applied the *Sherbert* test and determined first, that the prohibition on peyote burdened the free exercise of the defendants' religion. The court said that the use of peyote in the ceremonies of the church was the "central event" and the "cornerstone" of the religion.[45] The use of peyote in the religious rites was so critical that the statute proscribing such use denied the defendants the opportunity to practice their religion. Second, the court concluded that the state's interest in enforcing its narcotic laws and in preventing peyote's harmful effects on the Indian community was not so compelling as to justify the burden on the defendants' religion.[46] The court balanced the values held by the church and the state on a "symbolic scale of constitutionality" and con-

42. The court found support for the government's interest in the Colorado River Storage Project Act, 43 U.S.C. §§ 620-620o (1982), the National Park Service Organic Act, 16 U.S.C. §§ 1, 3 (1983), and the act establishing Glen Canyon National Recreation Area, 16 U.S.C. § 460dd (1983). *Badoni,* 638 F.2d at 177, 178-81.

43. *Badoni,* 638 F.2d at 177-79.

44. 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964).

45. The court noted that members of the church believed that "peyote embodies the Holy Spirit and that those who partake of peyote enter into direct contact with God." *Id.* at ___, 394 P.2d at 817, 40 Cal. Rptr. at 73.

46. *Id.* at ___, 394 P.2d at 818-20, 40 Cal. Rptr. at 74-76.

cluded that the free exercise of religion outweighed the state's interests.[47]

In *Frank v. State*,[48] the Alaska Supreme Court held that the first amendment protected the Athabascan Indian defendant who, in violation of state game laws, killed a moose for a funeral potlatch. The court reversed the defendant's conviction below saying that the potlatch was a religious ceremony and obtaining fresh meat for the feast was a "cornerstone of the ritual."[49] The court implicitly applied *Sherbert* and found that although the state had a strong interest in regulating hunting, it failed to demonstrate that state laws justified infringing upon defendant's deeply rooted religious practices.[50] The court concluded that the defendant's conduct was the type of religious practice accorded protection under the first amendment as applied to the states by the fourteenth amendment.[51]

The first amendment free exercise analysis has resulted in judicial decisions that governmental action must be weighed against the interests of Indian people in practicing their religions. At least in the federal courts, judges have been reluctant to protect Indian religious practices which conflict with governmental objectives.[52] This suggests that the judiciary's general lack of knowledge about Native American religions is the reason why the first amendment analysis invariably results in a defeat for the Indians.

Courts recognize that Native American religious practices are not clearly understood by the Anglo-American judiciary.[53] A problem all courts must face in deciding if an Indian plaintiff has a valid first amendment free exercise claim is determining whether the practice which is the subject of the alleged infringement is religious. If a court perceives that Indian religious practices parallel those of Anglo religions, the court is sympathetic to the Indians and more likely to find that their constitutional rights have been violated by governmental actions. In *People v. Woody*,[54] the California Supreme Court reversed the defendants' conviction of illegal possession of peyote after it analogized the use of peyote to the use of bread and wine in Christian rites. A similar analogy was employed by the Alaska Supreme Court in *Frank v. State*,[55] after witnesses stated that

47. *Id.* at ___, 394 P.2d at 821, 40 Cal. Rptr. at 77.
48. 604 P.2d 1068 (Alaska 1979).
49. *Id.* at 1071.
50. *Id.* at 1073-74.
51. *Id.* at 1070-71.
52. *See, e.g.*, Badoni v. Higginson, 638 F.2d 172 (10th Cir. 1980), *cert. denied*, 452 U.S. 954 (1981); Sequoyah v. TVA, 620 F.2d 1159 (6th Cir.), *cert. denied*, 449 U.S. 953 (1980); Northwest Indian Cemetery v. Peterson, 552 F. Supp. 951 (N.D. Cal. 1982); Crow v. Gullet, 541 F. Supp. 785 (D.S.D. 1982), *aff'd*, 706 F.2d 856 (8th Cir.), *cert. denied*, 464 U.S. 977 (1983).
53. *See, e.g.*, Frank v. Alaska, 604 P.2d 1068; People v. Woody, 61 Cal. 2d, 394 P.2d 813, 40 Cal. Rptr. 69.
54. 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964).
55. 604 P.2d 1068.

fresh moose meat at a funeral potlatch was similar to the bread and wine in Christianity.[56] In *Woody,* peyote was deemed to be "an object of worship" to which prayers were offered much like prayers to the Holy Ghost.[57]

These decisions suggest that if an Anglo court perceives a Native American religious practice as similar to an Anglo religious practice, the court will protect it from unnecessary governmental interference. Conversely, if Anglo courts have difficulty in analogizing Indian religious practices to those of Anglo religions, then the Indians are less likely to prove that their religious freedom has been abridged. In those cases where the Indian plaintiffs alleged that their use of sacred areas was infringed upon by the government, the courts failed to draw an analogy to the sacredness of Anglo religious sites, and the first amendment protection claimed by the Indians was not forthcoming.[58] If a court is unable to understand and accept a Native American practice as religious, the court is not apt to accord that practice the protections of the first amendment.

2. *The American Indian Religious Freedom Act*

The American Indian Religious Freedom Act[59] was passed by Congress in 1978 in recognition of the uniqueness of Native American religions and to ensure that the practice of these religions was protected by the first amendment of the Constitution.[60] Congress recognized that ignorance about the traditional cultures of Native Americans was reflected in the long history of federal actions which unnecessarily interfered with the religious freedom of these Indians.[61]

The legislative history of the American Indian Religious Freedom Act (AIRFA) indicates that many past infringements upon Native American religious practices occurred because the governmental agency involved was "unaware of the nature of traditional native religious practices."[62]

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56. *Id.* at 1072.

57. 61 Cal. 2d at ___, 394 P.2d at 817, 40 Cal. Rptr. at 73.

58. *See, e.g.,* Badoni v. Higginson, 638 F.2d 172 (10th Cir. 1980), *cert. denied,* 452 U.S. 954 (1981); Sequoyah v. TVA, 620 F.2d 1159 (6th Cir.), *cert. denied,* 449 U.S. 953 (1980); Northwest Indian Cemetery v. Peterson, 552 F. Supp. 951 (N.D. Cal. 1982); Crow v. Gullet, 541 F. Supp. 785 (D.S.D. 1982), *aff'd,* 706 F.2d 856 (8th Cir.), *cert. denied,* 464 U.S. 977 (1983).

59. The Act 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 . . . , including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.

42 U.S.C. § 1996 (1983).

60. 124 CONG. REC. H21,444 (1978)(statement of Rep. Udall).

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

62. *Id.* at 1265.

Congress noted that "the traditional religions of the native American people are not our religions and we are unaware of practices . . . of these religions."[63] In discussing Indian religious sites and the significance of protecting such areas, it was stated that non-Indian religions "have their Jerusalems, . . . Vaticans, and Meccas."[64] Congress was cognizant of the fact that Native American religious practices were an "integral part" of the Indians' culture, and recognized the need to protect these irreplaceable aspects of Indian life.[65]

The infringements on the Indians' religions were the result of the failure of the federal government to specify a policy protecting the religious freedom of Native Americans.[66] Congress noted that federal protection for Indian religious freedom existed, but only in a general sense.[67] The congressional intent in enacting AIRFA was not to accord Indian religions favorable status. AIRFA was designed to avoid repetition of past wrongs committed against the Indians due to ignorance on the part of federal officials more familiar with Anglo-American religions.[68] AIRFA focused specifically on Indian religions and was designed to insure that federal policy was implemented and effectuated with minimal interference with the practice of these native religions.[69]

AIRFA requires federal agencies administering relevant laws to consult with Native American religious leaders prior to instituting any policy, procedure, or action in order to insure that traditional religious practices are not interfered with by the federal government.[70] Three areas of religious practice are specifically singled out by Congress as in need of protection, although AIRFA's language does not limit federal protection to those areas alone.[71] First, restrictions on access to sites sacred to Indians were to be avoided wherever possible under the new federal policy. The issue was not the public or private ownership of these areas, it was simply whether Indians were denied access to their traditional religious sites in their attempts to worship and perform ceremonies.[72] Second, prohibitions on the possession and use of substances and sacred objects[73] were to be

63. 124 CONG. REC. H21,444, *supra* note 60.

64. *Id.*

65. American Indian Religious Freedom Act, Pub. L. No. 95-341, 92 Stat. 469, 469 (1978).

66. H.R. REP. NO. 1308, *supra* note 61, at 1265.

67. Indian religious rights are protected by the U.S. Constitution, the 1968 Indian Civil Rights Act, and state and tribal constitutions. H. REP. NO. 1308, *supra* note 61 at 1262-63.

68. *See generally* H. R. REP. NO. 1308, *supra* note 61 at 1265.

69. *Id.* at 1263.

70. 42 U.S.C. § 1996 (1983); American Indian Religious Freedom Act, Pub. L. No. 95-341, § 2, 92 Stat. 469 (1978). "Relevant laws" include those concerning wilderness and endangered species preservation, and drug laws. H.R. REP. NO. 1308, *supra* note 61, at 1263-64. *See also* 124 CONG. REC. H21,444, *supra* note 60.

71. 42 U.S.C. § 1996 (1983).

72. H.R. REP. NO. 1308, *supra* note 61, at 1263.

73. Examples given of sacred objects include peyote, pine leaves, feathers, and medicine bundles. *Id.* at 1263-64.

curtailed where such materials were necessary to the practice of the Indians' religions. Many of the restrictions existed because of misunderstandings by non-Indian federal officials as to the religious significance of these materials.[74] Third, Congress noted that traditional Indian religious ceremonies had been interfered with or prohibited by federal actions, and concluded that although many of these intrusions were neither intentional nor malicious, such governmental interference was nonetheless a threat to the Indians' religious freedom.[75]

AIRFA is statutory support for the first amendment protection from interference with the Indians' free exercise of religion. There is a growing body of case law which states that statutes passed solely for the benefit of the Indians must be liberally construed in their favor.[76] AIRFA, however, as a relatively recent statute, has been interpreted by very few courts, none of which have held that the alleged governmental infringement with the Indians' religious freedom was prohibited by AIRFA.[77] AIRFA has been applied in conjunction with the first amendment free exercise clause. The courts have, as a general rule, applied the constitutional and statutory provisions separately in determining whether the governmental action at issue infringes upon the Indians' religious freedom.[78]

In cases where an alleged AIRFA violation has been analyzed, the courts have held that AIRFA requires only that federal officials evaluate their policies and actions to insure that Indian religious practices are not interfered with by federal agencies. In *Hopi v. Block,*[79] the District Court for the District of Columbia, the first court to interpret AIRFA, rejected the Indian plaintiffs' claims that AIRFA required the Forest Service to enjoin the alleged interference with the plaintiffs' religious practices on the San Francisco Peaks. The court held that the Forest Service complied with AIRFA's requirements when, prior to authorizing the expansion of

74. *Id.* Congress believed that it was possible to protect religious freedom while also upholding the intent of relevant laws. *See supra* note 70.

75. *Id.* at 1264.

76. *E.g.,* Bryan v. Itasca County, 426 U.S. 373 (1976).

77. Hopi v. Block, 8 INDIAN L. REP. 3073 (No. 81-0481, D.D.C., June 15, 1981), *aff'd sub nom.* Wilson v. Block, 708 F.2d 735 (D.C. Cir.), *cert. denied,* 464 U.S. 956 (1983), 464 U.S. 1056 (1984) (holding that AIRFA failed to protect against the ski area expansion); Northwest Indian Cemetery v. Peterson, 552 F. Supp. 951 (N.D. Cal. 1982) (AIRFA did not prevent the building of a road through an area sacred to Indians); Crow v. Gullet, 541 F. Supp. 785 (D.S.D. 1982), *aff'd,* 706 F.2d 856 (8th Cir.), *cert. denied,* 464 U.S. 977 (1983) (AIRFA did not expressly apply to state actions which restricted Indian access to ceremonial areas).

78. The courts have analyzed the Indian plaintiffs' first amendment claims independently of the plaintiffs' alleged AIRFA violations. *See* Hopi v. Block, 8 INDIAN L. REP. 3073 (No. 81-0481, D.D.C., June 15, 1981), *aff'd sub nom.* Wilson v. Block, 708 F.2d 735 (D.C. Cir.), *cert. denied,* 464 U.S. 956 (1983), 464 U.S. 1056 (1984); Northwest Indian Cemetery v. Peterson, 552 F. Supp. 951 (N.D. Cal. 1982); Crow v. Gullet, 541 F. Supp. 785 (D.S.D. 1982), *aff'd,* 706 F.2d 856 (8th Cir.), *cert. denied,* 464 U.S. 977 (1983).

79. 8 INDIAN L. REP. 3073 (No. 81-0481, D.D.C., June 15, 1981), *aff'd sub nom.* Wilson v. Block, 708 F.2d 735 (D.C. Cir.), *cert. denied,* 464 U.S. 956 (1983), 464 U.S. 1056 (1984).

the Snow Bowl ski area, the Forest Service examined its plans and met with Indian leaders with the goal of safeguarding the Indians' religious freedom. The court found that AIRFA's purpose was to protect the Indians' constitutional rights, not to create religious rights in addition to the protections of the first amendment.[80] In *Northwest Indian Cemetery v. Peterson*,[81] the District Court for the Northern District of California cited *Hopi v. Block* and concluded that the Forest Service complied with AIRFA when it studied the plaintiffs' religious practices and selected a road through Six Rivers National Forest which minimized the impact on the Indians' sacred area.[82]

Other courts have been reluctant to either interpret AIRFA or apply the statute to the alleged religious freedom violations before the courts. In *Crow v. Gullet*,[83] the District Court for South Dakota stated that AIRFA's language expressly limited its application to federal agencies, thus implying that the Act was inapplicable to the state government defendants charged with managing Bear Butte State Park in such a way as to violate the Indians' constitutional rights.[84] In *Badoni v. Higginson*,[85] the Tenth Circuit declined to apply AIRFA to the plaintiffs' claim that the Department of Interior had restricted their access to Rainbow Bridge, stating that the plaintiffs had not alleged below that the defendant was in violation of AIRFA.[86] In *Sequoyah v. TVA*,[87] the Sixth Circuit refused to apply AIRFA to the plaintiffs' demands that Tellico Dam not be built because relief under the statute was barred by federal legislation which stated that no law was to prevent the completion of the dam.[88] The court believed that to apply AIRFA would have been contrary to the congressional mandate authorizing the dam.[89]

These cases demonstrate that while AIRFA signalled the need for protection of Native American religious freedom, the statute is nothing more than a policy statement. The statute is not meant to establish nor to convey rights to the Indians.[90] The statute reiterates the Indians' preexisting constitutional right to practice their religions on federal land.[91] In interpreting

80. *Id.* at 3076.

81. 552 F. Supp. 951 (N.D. Cal. 1982).

82. *Id.* at 954.

83. 541 F. Supp. 785 (D.S.D. 1982), *aff'd*, 706 F.2d 856 (8th Cir.), *cert. denied*, 464 U.S. 977 (1983).

84. *Id.* at 793.

85. 638 F.2d 172 (10th Cir. 1980), *cert. denied*, 452 U.S. 954 (1981).

86. *Id.* at 180.

87. 620 F.2d 1159 (6th Cir.), *cert. denied*, 449 U.S. 953 (1980).

88. The court held that relief under AIRFA was barred by the "Energy and Water Development Appropriation Bill, Pub. Law No. 96-69, signed by President Carter on September 25, 1979: 'notwithstanding . . . any other law, . . . TVA is . . . directed to complete . . . Tellico Dam.'" 620 F.2d at 1161.

89. *Id.*

90. 124 CONG. REC. H21,445 (1978)(statement of Rep. Roncalio).

91. *See, e.g.*, 124 CONG. REC. H21,446 (1978)(statement of Rep. Risenhoover).

AIRFA, the focus of the courts' inquiries has, for the most part, been on the three areas of past violations listed by the Act as in need of protection: access to religious sites, possession of sacred materials, and performance of religious ceremonies.[92] AIRFA has been interpreted to require no more than compliance with the first amendment.[93] Even a prime supporter of the bill enacting AIRFA referred to the Act as having "no teeth in it."[94]

DISCUSSION

The Hopis and the Navajos demanded a halt to the proposed expansion of the federally-owned Snow Bowl and the removal of the manmade structures on the San Francisco Peaks, claiming that the past and proposed development infringed upon their religious freedom in violation of the first amendment and AIRFA.[95] The District of Columbia Circuit found that the Snow Bowl expansion did not burden the plaintiffs' religious practices because those practices could theoretically be accommodated elsewhere on the Peaks. The court held that the 777-acre Snow Bowl was not indispensable to the plaintiffs' religions because they were not completely denied access to the Peaks, nor were their religious rites infringed.[96] The court implicitly applied the *Sherbert* free exercise analysis and determined that the plaintiffs had not proven that the expansion of the Snow Bowl was an impermissible burden on their religious practices.[97] The court found no need to balance the government's interest in expanding the ski area against any infringement upon the plaintiffs' religions, and declined to determine whether the expansion was the least restrictive means of satisfying the government's interest.[98]

The court then turned to the plaintiffs' contention that AIRFA prohibited "all federal land uses that conflict or interfere with traditional Indian religious beliefs or practices" unless the government had a very strong interest in permitting such uses.[99] The plaintiffs argued that the development of the Snow Bowl was not such an interest and that the ski area's expansion was proscribed by AIRFA. The court disagreed, stating that

92. *See Hopi v. Block*, 8 INDIAN L. REP. at 3076; *Northwest Indian Cemetery*, 552 F. Supp. at 954; *Crow*, 541 F. Supp. at 793. *See generally* 42 U.S.C. § 1996 (1983).

93. *See Hopi v. Block*, 8 INDIAN L. REP. at 3076.

94. 124 CONG. REC. H21,445 (1978) (statement of Rep. Udall).

95. *Wilson*, 708 F.2d at 739.

96. The Forest Service Final Environmental Impact Statement found that many locations on the Peaks were potential sites for religious practices. Two Indian religious experts testified that the Snow Bowl itself was not indispensable because religious practices could occur elsewhere on the Peaks. *Id.* at 744-45. The court relied primarily on *Sequoyah v. TVA*, 620 F.2d 1159 (6th Cir. 1980), a case in which no first amendment violation was found where the plaintiffs had not proved that a soon-to-be-flooded valley was indispensable or central to the plaintiffs' religion.

97. *Wilson*, 708 F.2d at 745.

98. *Id.*

99. *Id.*

AIRFA only required federal agencies to avoid unnecessary interference with the exercise of Indian religions, and held that the Forest Service had complied with AIRFA when it consulted with Indian religious leaders prior to deciding to expand the Snow Bowl.[100]

The Indians tried to convince the court that the 50-acre expansion of the Snow Bowl would be a serious infringement upon their religious freedom. The court was confronted with the conflict between the Indians' constitutional right to practice their religions and the Forest Service's statutory duty to administer federal lands for the benefit of the public.[101] The court, in interpreting the first amendment and AIRFA, examined the interests of the Indians and those of the Forest Service.

On one hand, since 1937, the Forest Service has administered the operation of the successful and popular Snow Bowl. The policy of the Forest Service is that, in the interest of the general public, outdoor recreation is to be promoted in the national forests.[102] On the other hand, for hundreds of years both the Hopis and the Navajos have lived in the vicinity of the San Francisco Peaks. The imposing presence of the mountains in an area otherwise devoid of predominant physical features suggests why the Indians consider the Peaks sacred.[103] To the Hopis, the mountains are alive and symbolize spirits which are "manifestations of the one supreme creative power."[104] The Navajos regard the mountains as deities and believe that parts of the earth's body are represented in the mountains.[105] The Peaks "have for centuries played a central role in the religions of the two tribes."[106]

The court's conclusion that the Snow Bowl was not indispensable to the practice of the plaintiffs' religions misinterpreted the significance of the Peaks to the Indians. The court assumed that the Hopis and the Navajos could perform ceremonies outside of the Snow Bowl and could collect sacred plants elsewhere on the Peaks. For the Anglo court to find that the Indians could use other areas of the Peaks for religious purposes was to be blind to the fact that the Indians saw the mountains as sacred. What

100. The court noted that the development would not interfere with the three areas identified by AIRFA as in need of protection. The Snow Bowl expansion would neither deny the plaintiffs access to the Peaks nor would it prevent them from gathering sacred objects. *Id.* at 747.

101. The national forests are set aside for the benefit of the public and the Forest Service has a duty to manage the forests for outdoor recreation. *See generally* Multiple-Use Sustained Yield Act of 1960, 16 U.S.C. § 528 (1983); 16 U.S.C. § 1609 (1983)(declaration of the national forest purpose).

102. Multiple-Use Sustained Yield Act of 1960, 16 U.S.C. § 528 (1983).

103. The Indians believed that the mountains held great spiritual wealth for their cultures. Navajo stories speak of the four sacred mountains, one of which is the San Francisco Peaks, and each of which is visible from somewhere on the reservation. C. KLUCKHORN & D. LEIGHTON, THE NAVAJO 133 (Nat. Hist. Libr. rev. ed. 1962). The Hopis consider the Peaks to be spiritual symbols. F. WATERS, BOOK OF THE HOPI 125 (1963).

104. WATERS, *supra* note 103, at 125.

105. G. REICHARD, NAVAJO RELIGION 14, 21 (U. Ariz. Press reprint 1983).

106. *Wilson*, 708 F.2d at 738.

the court failed to grasp was that, to the Indians, *any* displacement of them from any of their traditional sacred areas was disastrous because of the critical role the Peaks play in the cultures of the Hopis and the Navajos. To the Hopis, the Peaks are sacred shrines which symbolize the southern extent of Hopi lands.[107] To the Navajos, their world is inconceivable without their sacred mountains.[108]

The court's analysis of the significance of the Snow Bowl to the Indians gave short shrift to the utter centrality of the mountains to the cultures of the Hopis and the Navajos. It is impossible to separate religion from the culture of the Indians because they are so inextricably tied to one another.[109] It was improper for the Anglo court to decide whether the Snow Bowl was indispensable to the religious practices of the Hopis and the Navajos. That determination should have been left to the Indians because only they fully understand the religious significance of the Snow Bowl. The Hopis and the Navajos believed that their deities were being interrupted by the Snow Bowl skiers. The argument the Indians tried to make, and the court ignored, was that *all* of the Peaks were desacralized by the presence of the Snow Bowl. Whether the ski area encompassed 50 acres or 75,000 acres, the point was that the Indians' religions, so completely a part of their cultures, were sacrificed so that recreation on the mountains could be enhanced. The court, in ignoring or failing to note the inseparability of Indian religion and culture, perpetuated the precise attitude AIRFA sought to overcome: insensitivity toward Native American practices.

If a physical feature, such as a church or a holy city or even a mountain, has always been an integral part of one's religious practices, the mere threat of an alteration of, or an intrusion upon, that property is considered a serious violation of the sacredness of that feature. The Peaks are sacred to the Indians. The Hopis and the Navajos are being forced to surrender a physical entity critical to their cultures as a whole. The Forest Service wanted but a small portion of the sacred mountains for its ski area. However, by taking the Snow Bowl, the government, supported by the court, took much more in the sense that it deprived the Indians of an area critical to their religious autonomy. The Snow Bowl is indispensable to the religious integrity of the Peaks, and in turn that religious integrity is indispensable to the Indians' cultural survival.

Neither the first amendment nor AIRFA accorded protection to the religious practices of the Hopis and the Navajos. Although the Indians said that the Snow Bowl expansion would affront their deities who lived

107. WATERS, *supra* note 103, at 111.

108. REICHARD, *supra* note 105, at 452.

109. *See* WATERS, *supra* note 103, at ix-xiv; KLUCKHORN & LEIGHTON, *supra* note 103, at 178-79. *See also Wilson*, 708 F.2d 735, 741 n.2.

in the mountains and would cause the tribes spiritual discomfort,[110] the court was unable to understand the exact nature of the impact of the development. The court failed to recognize that the issue was not simply the protection of the Indians' religions, it was a question of avoiding cultural genocide.

CONCLUSION

The Hopis and the Navajos were unable to convince the court that the Snow Bowl was critical to the Indians' religions and that *any* expansion of the ski area would adversely affect the cultures of their people. The Navajos consider all mountains, including the Peaks, to be holy people.[111] "These [sacred] mountains are our father and our mother. We came from them; we depend upon them. . . . Each mountain is a person. The water courses are their veins and arteries. The water in them is their life as our blood is to our bodies."[112] The court refused to acknowledge the Indians' belief that to infringe upon their religion was to interfere with Indian life itself. The Navajo language includes no word which translates as "religion" because the Navajo world is a whole, and religion cannot be separated from daily life.[113] The interference with the Indians' use of the Peaks is a direct blow to the Indians' cultural integrity.

The differences between Anglo and Native American religions are such that the principles and practices of Indian religions are virtually incomprehensible to Anglo courts.[114] The decisions have shown that ignorance about Native American religions is likely to result in a defeat for the Indian who claims a freedom of religion violation.[115] The first amendment and AIRFA have not been helpful in safeguarding Indian religious practices, and thus there seems to be no real religious freedom protection for Native Americans. The courts must accept the Indian definition of religious practices and must accord protection to these practices.

If the American Indian Religious Freedom Act is but a statement of federal policy affirming the need to protect Native American religions, then it is not surprising that courts are reluctant to apply AIRFA in such a way as to insure that Indians will be successful in challenging governmental action allegedly infringing upon their religious practices. AIRFA has yet to be construed by a court as support for an Indian's claim of a

110. *Wilson*, 708 F.2d at 740.

111. REICHARD, *supra* note 105, at 452.

112. *Id.* at 19-20 (quoting from A.M. Stephen, manuscript).

113. KLUCKHORN & LEIGHTON, *supra* note 103, at 179.

114. *See* KLUCKHORN & LEIGHTON, *supra* note 103, at 133; REICHARD, *supra* note 105, at xxxiii.

115. *See, e.g.*, Badoni v. Higginson, 638 F.2d 172 (10th Cir. 1980), *cert. denied*, 452 U.S. 954 (1981); Sequoyah v. TVA, 620 F.2d 1159 (6th Cir.), *cert. denied*, 449 U.S. 953 (1980); Northwest Indian Cemetery v. Peterson, 552 F. Supp. 951 (N.D. Cal. 1982); Crow v. Gullet, 541 F. Supp. 785 (D.S.D 1982), *aff'd*, 706 F.2d 856 (8th Cir.), *cert. denied*, 464 U.S. 977 (1983).

violation of religious freedom, and unlikely will be so construed until its language expressly gives a court the power to apply it forcefully. In these days of continuing ignorance and insensitivity toward Native American cultures, it is a difficult task indeed to prove that infringement of religious freedom has occurred. AIRFA, a "simple little resolution,"[116] must be amended by Congress and given the teeth necessary to create a cause of action for Indian plaintiffs seeking relief from federal actions which interfere unnecessarily with Indian religious practices. AIRFA must be more than a policy statement.

In the meantime, Native Americans who believe that their religious freedom has been violated should steer away from the first amendment and AIRFA as means to redress those alleged infringements. The Indians might be more successful if they argue that they are being denied equal protection of the laws with regard to the exercise of their religions. The Indians should argue that their religious practices are not accorded the same sort of protection that Anglo religious practices are. Native American religions are improperly discriminated against because they are generally not understood by Anglo governments and courts.

For the Hopis and the Navajos to be forced to surrender the Snow Bowl despite the absolute sacredness of the Peaks is to treat the Indians' religions and cultures with disrespect. To compel those people who pray outdoors to accept the desecration of the Peaks by those who play outdoors is to ignore the uniqueness of the Hopi and the Navajo religions.

MARY H. SMITH

116. 124 CONG. REC. H21,445 (1978) (statement of Rep. Udall).