

# RECENT DEVELOPMENT

## RFRA LAND-USE CHALLENGES AFTER NAVAJO NATION V. U.S. PARKS SERVICE

### I. INTRODUCTION

On August 8, 2008, the Ninth Circuit Court of Appeals, in an en banc hearing in the case *Navajo Nation v. U.S. Forest Service*, held that the U.S. Forest Service did not violate the Religious Freedom Restoration Act of 1993 (“RFRA”) when it allowed Snowbowl—a ski resort that operates on federal lands—to utilize recycled wastewater on Arizona’s San Francisco Peaks, even though Navajo and other tribes considered these mountains sacred lands.<sup>1</sup> In its determination, the court concluded that creating the artificial snow only constituted a “subjective” impact rather than a “substantial” impact on the Navajo spiritual experience. Because the court did not identify a “substantial burden” on the Navajo’s spiritual experience, the court held the Navajo failed to establish a RFRA violation.<sup>2</sup>

This article will first address the specifics of the *Navajo Nation* decision in Part II before turning to the question in Part III of the extent to which the Ninth Circuit’s ruling closes the door to any future RFRA land use claims against the federal government.

### II. NAVAJO NATION V. U.S. FOREST SERVICE

#### A. Background

In 2002, Snowbowl submitted a proposal to the Forest

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1. *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1063 (9th Cir. 2008). Note that the Circuit Court also rejected a challenge under the National Environmental Policy Act of 1969 (“NEPA”). That challenge is not addressed here.

2. *Id.* at 1063, 1067.

Service in an effort to decrease challenges related to variable snowfall by supplementing it on an as-needed basis with “A+” recycled wastewater on the peaks as artificial snow.<sup>3</sup> As part of the Forest Service’s review of the project, it met with Indian leaders and agreed to allow the tribes’ continued access to the peaks, to work with the tribes to protect cultural shrines, and to allow religious practices to continue uninterrupted.<sup>4</sup> Following the Forest Service’s acceptance of Snowbowl’s proposed expansion, the Navajo appealed the decision administratively within the Forest Service.<sup>5</sup> In June of 2005, the Forest Service issued its final administrative decision, affirming the approval of Snowbowl’s upgrades.<sup>6</sup>

The Navajo filed an action in federal court alleging a number of claims, including a violation of RFRA.<sup>7</sup> The Navajo’s claim under RFRA was that it is sacrilegious to use recycled wastewater on sites the tribe considers sacred. The District Court granted summary judgment for the Forest Service on all claims except the alleged RFRA violation and conducted an eleven-day bench trial to determine whether the artificial snow constituted such a violation.<sup>8</sup> Though the Navajo found use of the wastewater offensive, because the Navajo’s “access, use, and ritual practice” remained uninterrupted by the proposed artificial snow, the District Court held the Navajo failed to demonstrate the snow would coerce the tribe to violate their religious beliefs or penalize their religious activity.<sup>9</sup> Therefore, the District Court found the Navajo failed to establish a substantial burden and therefore ruled in favor of the Forest Service.<sup>10</sup>

On March 12, 2007, the District Court was partially reversed by a three-judge panel on the Ninth Circuit.<sup>11</sup> The Ninth Circuit, in its reversal, held that the use of recycled wastewater did violate RFRA because in at least one respect the Forest Service had violated the National Environmental Policy Act (“NEPA”) by failing to consider human ingestion of the wastewater in its Final

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3. See *id.* at 1065 (“A+ recycled wastewater is the highest quality of recycled wastewater recognized by Arizona law and may be safely and beneficially used for many purposes, including irrigating school ground landscapes and food crops.”). See also ARIZ. ADMIN. CODE § R18–11–309 (Supp. 2008).

4. *Navajo Nation*, 535 F.3d at 1065-66.

5. *Id.* at 1066.

6. *Id.*

7. *Id.*; see *Navajo Nation v. U.S. Forest Serv.*, 408 F. Supp. 2d 866 (D. Ariz. 2006).

8. *Navajo Nation*, 535 F.3d at 1066.

9. *Id.* at 1066–67; *Navajo Nation*, 408 F. Supp. 2d at 883, 907.

10. *Navajo Nation*, 535 F.3d at 1066; *Navajo Nation*, 408 F. Supp. 2d at 883, 907.

11. *Navajo Nation*, 535 F.3d at 1067; *Navajo Nation v. U.S. Forest Serv.*, 479 F.3d 1024, 1029 (9th Cir. 2007).

Environmental Impact Statement (“FEIS”).<sup>12</sup> The Forest Service requested reconsideration, and the Ninth Circuit agreed to take the case en banc to clarify the circuit’s “substantial burden” test under RFRA.<sup>13</sup> In an 8-3 decision, the Ninth Circuit in its en banc rehearing held there was no substantial burden under RFRA and in fact no RFRA violation.<sup>14</sup>

### B. RFRA

The Ninth Circuit set out the elements of a RFRA claim as follows: (1) claimed activities burdened by the government must be a free exercise of religion, and (2) the government’s action must “substantially burden” a plaintiff’s exercise of religion.<sup>15</sup> When a plaintiff can prove these two elements, the government entity must then prove the proposed activity furthers a compelling governmental interest and is the least restrictive means of furthering that governmental interest.<sup>16</sup> While the enforcement clause of the Fourteenth Amendment invalidated RFRA’s reach to individual states, the Ninth Circuit held RFRA remained in force when applied to the federal government.<sup>17</sup>

Because the central question facing the Ninth Circuit hinged on whether the proposed upgrades at Snowbowl presented a “substantial burden,” the court looked to the language of RFRA and several pre-RFRA cases to define this standard.<sup>18</sup> Relying on *Sherbert v. Verner* and *Wisconsin v. Yoder*, the court concluded that a “substantial burden” exists “only when individuals are forced to choose between following the tenets of their religion and receiving a government benefit,” or when individuals are coerced to act contrary to their beliefs by threat of civil or criminal sanctions.<sup>19</sup> Accordingly, the Ninth Circuit concluded that any lesser burden than those described in *Sherbert* and *Yoder* would fail to meet the requirements of a “substantial burden,” and those cases would not require the application of the strict scrutiny standard.<sup>20</sup>

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12. *Navajo Nation*, 479 F.3d at 1029, 1059.

13. *Navajo Nation*, 535 F.3d at 1067.

14. *Id.* at 1063.

15. *Id.* at 1067; Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1(a) (2008).

16. 42 U.S.C. § 2000bb-1(b).

17. *City of Boerne v. Flores*, 521 U.S. 507 (1997); *Navajo Nation*, 479 F.3d at 1067 n.10; *Guam v. Guerrero*, 290 F.3d 1210, 1220-22 (9th Cir. 2002) (holding RFRA remained valid as applied to the federal government).

18. *Navajo Nation*, 535 F.3d at 1068.

19. *Id.* at 1069-70. *See Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972); *Sherbert v. Verner*, 374 U.S. 398, 404 (1963).

20. *Navajo Nation*, 535 F.3d at 1070.

*C. The Ninth Circuit's Ruling*

While recognizing the effect on the Navajo's subjective religious experience, the Ninth Circuit majority held the use of treated sewage to produce artificial snow alone did not constitute a substantial burden under RFRA.<sup>21</sup> The court emphasized the Navajo retained free access to the mountains for religious purposes.<sup>22</sup> In support of this ruling, the court relied heavily on *Lyng v. Northwest Indian Cemetery Protective Ass'n*, which addressed a pre-RFRA free exercise of religion claim.<sup>23</sup> In *Lyng*, a tribe challenged the Forest Service's approval of a logging highway that would cause "serious and irreparable" harm to land sacred to the tribes.<sup>24</sup> Despite finding that the plan would "diminish the sacredness" of the area, the Supreme Court refused to find the necessary substantial burden to trigger a free exercise of religion claim as outlined by *Sherbert* and *Yoder*.<sup>25</sup> The court quotes from *Lyng*, emphasizing this passage: "Whatever rights the Indians may have to the use of the area, however, those rights do not divest the Government of its right to use what is, after all, its land."<sup>26</sup> The majority further stated that:

Were it otherwise, any action the federal government were [sic] to take, including action on its own land, would be subject to the personalized oversight of millions of citizens. Each citizen would hold an individual veto to prohibit the government action solely because it offends his religious beliefs, sensibilities, or tastes, or fails to satisfy his religious desires. Further, giving one religious sect a veto over the use of public park land would deprive others of the right to use what is, by definition, land that belongs to everyone.<sup>27</sup>

While recognizing the need to respect religions, the court emphasized that no government could function if it was required to not take any action that runs afoul of the spiritual fulfillment or religious preferences of its diverse citizenry.<sup>28</sup> In addition to affirming the district court's summary judgment on the RFRA claim, the majority reversed its 2007 decision by holding that

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21. *Id.*

22. *Id.*

23. *Id.* at 1071; see *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988).

24. *Lyng*, 485 U.S. at 442–43.

25. *Navajo Nation*, 535 F.3d at 1071–72. See *Lyng*, 485 U.S. at 449.

26. *Navajo Nation*, 535 F.3d at 1072 (quoting *Lyng*, 485 U.S. at 451).

27. *Id.* at 1063–64.

28. *Id.* at 1064.

because the Navajo's NEPA action was asserted only at the summary judgment level, it was inadequate to state a claim at the Ninth Circuit level.<sup>29</sup>

#### *D. Dissent*

In a dissenting opinion joined by two judges, Judge Fletcher re-emphasized many of the same points made in his original 2007 decision and accused the majority of misstating both the law under RFRA and the nature of religion generally.<sup>30</sup> Fletcher argued RFRA expands upon previous free exercise standards in four significant ways. First, Congress altered the constitutional language of "prohibiting" the free exercise to the broader term "burden."<sup>31</sup> Second, as defined in *City of Boerne v. Flores*, RFRA "imposes in every case a least restrictive means requirement" which is absent in traditional free exercise of religion cases.<sup>32</sup> Third, by passing the Religious Land Use and Institutionalized Person Act ("RLUIPA") in 2000, Congress amended the interpretation of the First Amendment's "exercise of religion" language in an effort to protect a broader range of religious practices.<sup>33</sup> Fourth, and most importantly in this particular dissenting opinion, Fletcher contended the "compelling interest" test in RFRA should be employed in all cases, rather than only those in which a plaintiff has established a "substantial burden"<sup>34</sup>—meaning, in this case the Ninth Circuit's parsing "substantial" burdens and "subjective" burdens represents an error in applying the law.

Judge Fletcher further argued the majority's definition of "substantial burden" is both restrictive and inaccurate.<sup>35</sup> He saw the majority's attempts to read *Lyng* as a RFRA case as not only flawed, but "perverse."<sup>36</sup> In his view, *Lyng's* central proposition was that the First Amendment "cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development."<sup>37</sup> The court applied this same precedent in *Employment Division v. Smith*, the case that directly led to the

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29. *Id.* at 1079-80.

30. *Id.* at 1081 (J. Fletcher, dissenting).

31. *Navajo Nation*, 535 F.3d 1058, 1081; *cf.* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .").

32. *City of Boerne*, 521 U.S. at 535; *Navajo Nation*, 535 F.3d at 1085.

33. *Navajo Nation*, 535 F.3d at 1085.

34. *Id.*

35. *Id.* at 1089-90.

36. *Id.* at 1090.

37. *Id.* (quoting *Lyng*, 485 U.S. at 447, 451).

creation of RFRA and the reinstatement of the standard developed in *Sherbert and Yoder*.<sup>38</sup>

Judge Fletcher contended the majority misunderstood the very nature of religion by comparing laws that would transform treated sewage into baptismal water, stating the only adverse effect would similarly be the “subjective spiritual experience.”<sup>39</sup> Fletcher emphasized that the Navajo religion not only requires access to water but also spiritual purity.<sup>40</sup>

### III. CLOSING THE DOOR ON LAND USE CHALLENGES UNDER RFRA?

Following the decision, Attorney Howard Shanker, representing the Navajo Nation, said the decision presented the “last best chance” for tribes’ protection under RFRA.<sup>41</sup> In addition to potentially precluding tribal protection, the *Navajo Nation* decision may propose a substantial roadblock to any Indian tribe attempting to use RFRA as an environmental shield in the Ninth Circuit.

Since the Supreme Court’s decision in *Boerne*, RFRA’s land-use power has been severely restricted. In 2006, an attempt to use RFRA to contest a proposed expansion of an airport was found to be outside the current scope of RFRA.<sup>42</sup> The Court in that case held that even in instances where the federal government played a role, constitutional standards would not attach unless the government played a direct role.<sup>43</sup> *Navajo Nation* overcame this hurdle and seemed poised to utilize RFRA as a protection against land-use that interfered with religious belief. Speaking in response to the Ninth Circuit’s original 2007 holding, Shanker stated, “What we’ve done here is under [RFRA] we’ve created an avenue for tribes to protect those sites that are sacred to them[,] that impact their exercise of religion.”<sup>44</sup> Judge Fletcher’s 2007 opinion stated: “If Appellants do not have a valid RFRA claim in this case, we are unable to see how any Native American plaintiff can ever have a successful RFRA claim based

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38. *Navajo Nation*, 535 F.3d at 1090 (citing *Employment Div. v. Smith*, 494 U.S. 872 (1990)).

39. *Id.* at 1097.

40. *Id.* at 1096.

41. S.J. Wilson, *Forest Service, Snowbowl Win Right to Use Fake Snow*, NAVAJO HOPI OBSERVER, Aug. 12, 2008.

42. *Vill. of Bensenville v. FAA*, 457 F.3d 52, 57 (D.C. Cir. 2006).

43. *Id.*

44. Press Release, Navajo Nation, 9th Circuit Court of Appeals Rules for Navajo Nation, Hopi Tribe, in San Francisco Peaks Case, Sets Precedent for Sacred Sites (Mar. 12, 2007) (on file with journal).

on beliefs and practices tied to land that they hold sacred.”<sup>45</sup> Fletcher contrasted the issue in *Navajo Nation* with *Lyng*, saying that while *Lyng* was decided because the courts could not find a stopping place, without RFRA protection here, there would be no starting place for protecting religious liberty.<sup>46</sup>

In the wake of the Ninth Circuit’s actions, Judge Fletcher’s statements may have become a reality. If we are to believe the Ninth Circuit majority, RFRA can only apply the traditional strict scrutiny test when the federal government directly infringes on a plaintiff’s rights in such a way as to trigger the “substantial burden” test outlined by the *Sherbert* and *Yoder* courts.<sup>47</sup> The Ninth Circuit has already followed the precedent set forth in *Navajo Nation* to find no “substantial burden” in a decision relating to the relicensing of a hydroelectric project.<sup>48</sup>

If spraying 1.5 million gallons per day of treated sewage effluent on land sacred to dozens of tribes does not constitute a substantial burden, what will? Fortunately for tribes outside of the Ninth Circuit, the Tenth Circuit recently had the opportunity to follow the precedent set by *Navajo Nation*, and declined to do so.<sup>49</sup> This potential emerging rift among the Circuits may invite the Supreme Court to resolve the actual reach of RFRA.

#### IV. CONCLUSION

Absent a reversal by the Supreme Court, RFRA land challenges appear to be nearly impossible in the Ninth Circuit. In fact, it could be argued that the Ninth Circuit’s reading of RFRA is indistinguishable from the free exercise of religion claims found to be unsupported and led to the creation of RFRA.<sup>50</sup> Applying RFRA in the 9th circuit now requires direct federal action along with a finding of a substantial burden on a group’s free exercise of religion. Without a finding of a substantial burden, the 9th circuit has refused in *Navajo Nation* and subsequent cases to apply the compelling interest test. In the wake of *Navajo Nation*, it remains to be seen if any tribe may

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45. *Navajo Nation*, 479 F.3d at 1048.

46. *Id.*

47. *Navajo Nation*, 535 F.3d at 1069-70.

48. *Snoqualmie Indian Tribe v. FERC*, 545 F.3d 1207 (9th Cir. 2008).

49. *Comanche Nation v. United States*, No. CIV-08-849-D, 2008 U.S. Dist. LEXIS 73283, at \*10 (W.D. Okla. Sept. 23, 2008) (“The Tenth Circuit has not adopted that definition, and the Court declines to do so in this case”).

<sup>50</sup> 42 U.S.C. § 2000bb–(b)(1) (stating RFRA’s purpose is “to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened...).

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successfully use RFRA to bring a land-use case against the federal government. For now, the Navajo and other tribes in the 9th Circuit are left with one less tool to use when making environmental land-use claims against the Federal Government.

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