Land & Water Law Review

Volume 20 | Issue 1 Article 5

1985

Constitutional Law - Religious Freedom and Public Land Use -Wilson v. Block

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CASE NOTES

Constitutional Law—Religious Freedom and Public Land Use. *Wilson v. Block,* 708 F.2d 735 (D.C. Cir. 1983).

The Navajo Indians believe the San Francisco Peaks in Arizona are a living deity and pray directly to them.[1] The mountains are the Hopi religion's most sacred shrine[2] and the home of the Creator's emissaries to mankind.[3] For centuries both tribes collected sacred medicines and performed religious ceremonies on the Peaks.[4]

Comprising an area of 75,000 acres, the Peaks are located in the Coconino National Forest and are managed by the United States Forest Service.[5] In 1937, a private corporation developed 777 acres of the Peaks as a downhill ski area known as the Snow Bowl.[6] In 1977, the ski area operator submitted a plan for future development of the Snow Bowl to the Forest Service, proposing to clear an additional 120 acres of forest for new ski runs, construct new facilities, upgrade existing structures, and improve the Snow Bowl road.[7]

The Forest Service identified six alternatives to the operator's plan.[8] These included removing all artificial structures from the Peaks, allowing full development proposed by the ski area operator,[9] or continuing operation of the ski area with minimum change.[10] In 1979, the Forest Service issued a permit allowing limited development of the Snow Bowl under a "preferred alternative" which had not been identified in the draft environmental impact statement.[11]

The Navajo Medicinemen's Association and the Hopi Indian Tribe sued the Secretary of Agriculture, the Chief Forester of the Forest Service, the United States Forest Service, and the United States, seeking to halt further development of the area and to remove existing facilities at the Snow Bowl.[12] The Indians claimed development of the area would profane the Peaks, dilute the Peaks' healing power, and offend the Creator.[13] Disrupting the use of the Peaks for prayer, religious ceremonies,

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1. Hopi Indian Tribe v. Block, 8 I.L.R. 3073, 3074 (D.D.C. 1981), *aff'd sub. nom.,* Wilson v. Block, 708 F.2d 735 (D.C. Cir. 1983), *cert. denied in part,* 104 S. Ct. 371 (1983), *cert. denied in part,* 104 S. Ct. 739 (1984).
2. Brief for Appellant Hopi Indian Tribe at 3, Wilson v. Block, 708 F.2d 735 (D.C. Cir. 1983), *cert. denied,* 104 S. Ct. 371 (1983) [hereinafter Hopi Brief].
3. Wilson v. Block, 708 F.2d at 738.
4. *Id.*
5. *Id.*
6. *Id.* In addition to the ski area, structures such as natural gas, electrical and telephone lines were on the Peaks. Cinder extraction and mining was conducted on the Peaks for thirty years prior to the instant litigation. *Id.* at 745 n.6.
7. *Id.* at 739.
8. *Id.* at 738. These alternatives were identified pursuant to the National Environmental Policy Act, 42 U.S.C. §§ 4321-4370 (1982).
9. *Id.*
10. Hopi Brief, *supra* note 2, at 7.
11. The acreage was reduced from 120 acres to 50. Expansion and upgrading of the facilities was authorized. Wilson v. Block, 708 F.2d at 739.
12. *Id.*
13. *Id.*

and the collection of sacred objects, the Indians argued, violated their first amendment right to free exercise of religion.[14]

The suits were consolidated with a complaint brought by Mr. and Mrs. Wilson, owners of a local ranch.[15] Cross-motions for summary judgment were filed, and the district court granted summary judgment to the government.[16]

The United States Court of Appeals, District of Columbia Circuit, affirmed the lower court.[17] The court held that plaintiffs seeking to restrict uses of public land in the name of religious freedom must show that the government's proposed land use impairs a religious practice which can not be performed at any other site.[18]

BACKGROUND

Free Exercise of Religion

The first amendment enjoins Congress from making laws "respecting an establishment of religion or prohibiting the free exercise thereof."[19] A two part analysis determines whether governmental action impermissibly restricts religious tenets.[20] First, the challenged regulation must burden religion. Second, the government must fail to show a compelling interest justifying the impediment.

The party asserting a free exercise violation must demonstrate that the challenged regulation burdens the practice of religion.[21] In *Wisconsin v. Yoder*,[22] the Court held that beliefs, to be religious, must be sincere and "rooted in religion," not merely matters of personal preference or lifestyle.[23]

The governmental action must have a coercive effect against the practice of religion.[24] In *Sherbert v. Verner*,[25] and *Thomas v. Review Board of Indiana Employment Security Division*,[26] the Court noted two ways in which regulations impair religion. A direct burden compels a violation of conscience[27] or regulates, prohibits, or rewards religious beliefs.[28] An

14. *Id.* at 739-40.
15. *Id.* at 739. The district court ruled that Wilson did not have standing to assert the Navajo and Hopi religious claims. Wilson v. Block, 708 F.2d at 740 n.1.
16. *Id.* at 739.
17. *Id.* at 760.
18. *Id.* at 744.
19. U.S. CONST. amend. I.
20. Crow v. Gullett, 541 F. Supp. 785, 790 (D. S.D. 1982), *aff'd*, 607 F.2d 856 (8th Cir. 1983), *cert. denied*, 104 S. Ct. 413 (1983).
21. School Dist. of Abington Township v. Schempp, 374 U.S. 203, 223 (1963).
22. 406 U.S. 205 (1972).
23. *Id.* at 215-16.
24. *Abington Township*, 374 U.S. at 223.
25. 374 U.S. 398, 403 (1963).
26. 450 U.S. 707 (1981).
27. Sherbert v. Verner, 374 U.S. at 403.
28. McDaniel V. Paty, 435 U.S. 618, 626 (1978).

enactment imposes an indirect burden if its purpose or effect impedes or discriminates between religions.[29]

The second step of the analysis is to determine whether the objective advanced by the regulation outweighs the abridged right.[30] For example, free exercise claims have been rejected when the challenged law regulates conduct threatening public health or safety.[31] The government's need must be compelling,[32] and only interests of the highest order can overcome legitimate free exercise claims.[33] Even if the interest is compelling, an enactment is invalid if it burdens religion more than necessary to achieve the desired goal.[34]

Indian Free Exercise Claims

In a series of cases beginning in 1980, Native Americans challenged public land uses on free exercise grounds. The courts, while generally recognizing the sincerity of the religious claims, have refused to limit uses of public land on the basis of first amendment religious rights.

In cases not relating to public lands, Native Americans asserted first amendment protection of traditional religious practices in *People v. Woody*[35] and *Frank v. State*.[36] In *Woody*, a Navajo Indian was convicted for using the drug peyote during a religious ceremony.[37] On appeal, the court held that the first amendment protected Woody's use of peyote for religious purposes.[38] The court found that peyote played a central role in the defendant's religion,[39] and that it was an object of worship to which the defendant prayed.[40] The religion could not be practiced without peyote.[41] Criminal sanctions prohibiting the use of peyote inhibited the defendant's practice of religion.[42] Because the state's interest did not outweigh the first amendment right,[43] the conviction was reversed.[44]

An Athabascan Indian was convicted of transporting a moose killed out of season in *Frank*. The meat was used in a funeral potlatch for a

29. Sherbert v. Verner, 374 U.S. at 404.
30. Wisconsin v. Yoder, 406 U.S. at 214.
31. Sherbert v. Verner, 374 U.S. at 403.
32. *Id.*
33. Wisconsin v. Yoder, 406 U.S. at 215.
34. Thomas v. Review Bd. of Indiana Employment Security Div., 450 U.S. at 718.
35. 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964).
36. 604 P.2d 1068 (Alaska 1979).
37. People v. Woody, 61 Cal. 2d at 717, 394 P.2d at 814-15, 40 Cal. Rptr. at 70-71. (At trial the defendant contended his use of peyote was religious and prosecution would abridge his free exercise rights).
38. *Id.* at 717, 394 P.2d at 815, 40 Cal. Rptr. at 71.
39. *Id.* at 720, 394 P.2d at 817, 40 Cal. Rptr. at 73.
40. *Id.* at 721, 394 P.2d at 817, 40 Cal. Rptr. at 73.
41. *Id.* at 725, 394 P.2d at 820, 40 Cal. Rptr. at 76.
42. *Id.* at 722, 394 P.2d at 818, 40 Cal. Rptr. at 74.
43. *Id.* at 722-23, 394 P.2d at 818-19, 40 Cal. Rptr. at 74-75.
44. *Id.* at 728, 394 P.2d at 822, 40 Cal. Rptr. at 78.

member of the tribe who died.[45] The Supreme Court of Alaska reversed the conviction.[46] The court first determined the ceremony was a religious practice.[47] The potlatch was the most important institution of the Athabascan religion.[48] Although the court disagreed with the lower court's finding that moose was not essential to the ceremony, it held that absolute necessity is not required for a belief to acquire first amendment protection, if the practice is deeply rooted in religion.[49]

Sequoyah v. Tennessee Valley Authority[50] was the first case brought by Native Americans challenging public land use on free exercise grounds. Cherokee Indians sought to prevent completion of a dam which would flood sites of religious significance.[51] The court of appeals affirmed a district court ruling granting the Authority's motion to dismiss.[52] Relying on *Yoder*, *Woody*, and *Frank*, it held that the Cherokees had failed to demonstrate an infringement of a first amendment right.[53] The court held that to state such a claim requires a showing that worship at a site is inseparable from a traditional way of life, is a cornerstone of religious observance, or plays a central role in religious ceremonies and practices.[54] Granting that the Indians sincerely adhered to their religion, the court concluded the Indians' claims were personal preferences rather than convictions shared by an organized group, and that the element of centrality or indispensability of the area as a place of worship was missing.[55] Medicines collected in the valley could be obtained at other locations.[56] The area was not used for religious purposes by Cherokees other than the plaintiffs.[57] Concluding that a substantial burden on the free exercise of religion had not been shown, the court did not examine whether the Authority's interest was compelling.[58]

Subsequent cases underscored the reluctance to accept Indian free exercise claims asserting the right to control public lands. These cases focused on the conflicting interests in access to public lands. Two questions

45. Frank v. State, 604 P.2d at 1069. The lower court found the ceremony was an integral part of the Athabascan religion, and that the defendant's beliefs were sincere, but that moose was not specifically required for the potlatch. Thus, the court reasoned, the defendant was not denied his religious rights.

46. *Id.* at 1070.

47. *Id.* at 1072.

48. *Id.* at 1071.

49. *Id.* at 1072-73. The court held that the competing state interest was strong but not compelling. Questioning whether the state's interest would suffer from an exemption to the game laws, the court concluded that the burden of showing a compelling interest had not been met by the state. *Id.* at 1074.

50. 620 F.2d 1159 (6th Cir. 1980), *cert. denied*, 449 U.S. 953 (1980).

51. *Id.* at 1160.

52. *Id.* at 1164. The lower court granted the motion to dismiss because the plaintiffs lacked a property interest in the site. The court of appeals noted that this issue was not dispositive of the case.

53. *Id.* at 1165.

54. *Id.* at 1164.

55. *Id.*

56. *Id.*

57. *Id.* at 1163.

58. *Id.* at 1165.

are involved. The first is whether government has denied access to sites of worship, thus impairing the free exercise of religion. The second is whether religious practitioners may restrict the public's access to public land in the name of religion.

The plaintiffs in *Badoni v. Higginson*[59] sought to enjoin the Bureau of Reclamation from flooding a sacred site in Rainbow Bridge National Monument and to order the National Park Service to regulate tourists at the Monument to prevent its desecration.[60] The court of appeals first held that the government's interest in water storage outweighed the Indians' religious claims and upheld the decision not to enjoin flooding of the site.[61] Next the court affirmed denial of an injunction to prevent tourists from desecrating the site and interfering with the Indians' religious ceremonies. It concluded that this form of relief would violate the establishment clause, and the government had a strong interest in assuring public access to the National Monument.[62] The court held that exercise of first amendment freedoms may not be used to deprive the public of its normal use of an area.[63] Finally, the court noted that the Indians had not been denied access to the area to conduct religious ceremonies.[64]

In *Crow v. Gullett,*[65] members of the Lakota and Tsistsistas Nations attemped to halt construction of facilities and to remove roads, parking lots, and buildings at Bear Butte State Park, South Dakota.[66] The Indians claimed that construction projects denied them access to religious sites and allowed tourists to interfere with religious ceremonies. The court found no infringement on the first amendment, because the Indians' right of access was restricted only temporarily by the construction projects.[67] The court concluded that the free exercise clause forbids prohibiting religious acts, but does not require states to provide the means to carry them out.[68]

In *Inupiat Community of the Arctic Slope v. United States,*[69] the Inupiat people challenged an oil exploration lease granted by the United

59. 638 F.2d 172 (10th Cir. 1980), *cert. denied*, 452 U.S. 954 (1981).

60. *Id.* at 176.

61. *Id.* at 177. The district court ruled against the plaintiffs because they had no property interest. The court of appeals, however, concluded that management of public lands must not offend the Constitution. *Id.* at 176.

62. *Id.* at 178.

63. *Id.* at 179. The court relied on Shuttlesworth v. Birmingham, 394 U.S. 147, 159 (1969) for the proposition that the first amendment may not be used to deny the public of its normal use of an area. *But see* Crow v. Gullett, 541 F. Supp. 785, 793 (1982), suggesting that *Shuttlesworth* holds permit systems controlling public land uses unconstitutional when they restrain first amendment rights without narrow, objective standards.

64. Badoni v. Higginson, 638 F.2d at 180.

65. 541 F. Supp. 785 (D. S.D. 1982), *aff'd*, 607 F.2d 856 (8th Cir. 1983), *cert. denied*, 104 S.Ct. 413 (1983).

66. *Id.* at 788. In Cantwell v. Connecticut, 310 U.S. 296, 303 (1940), the United States Supreme Court held that the free exercise clause applies to the states through the fourteenth amendment.

67. Crow v. Gullett, 541 F. Supp. at 792.

68. *Id.* at 791.

69. 548 F. Supp. 182 (D. Alaska 1982).

States to several oil companies.[70] Claiming the lease denied them access to sacred grounds, the Indians asserted a violation of the free exercise clause.[71] The court found that the lease did not seriously burden any religious practice, since the Indians had not identified sites of worship within the zone leased by the government.[72] The court noted the establishment clause precluded granting the relief sought, since to do so would create a religious sanctuary.[73] It held that a free exercise claim cannot be used to award religious groups exclusive rights to use a public area.[74]

Completion of a road by the Forest Service into a sacred area was found not to burden unduly Indians' free exercise rights in *Northwest Indian Cemetery Protective Association v. Peterson.*[75] The Indians claimed the road would lead to increased use of the site by the public, resulting in its desecration.[76] The court decided that Indians must be allowed reasonable access to public lands to conduct religious ceremonies, but that government is not required to restrict public access to facilitate those purposes.[77]

These cases examined the issue of whether Native Americans could limit governmental actions on public land in the name of religious freedom. The courts disposed of the issue by holding that the Indians had failed to state cognizable free exercise claims. In *Wilson v. Block*,[78] the court followed this trend and summarized the federal courts' view of when the first amendment limits public land uses.

THE PRINCIPAL CASE

The court in *Wilson* affirmed a district court ruling granting summary judgment to the United States.[79] The lower court found that the decision to expand the ski area did not deny the Navajo and Hopi plaintiffs access to the San Francisco Peaks, did not stop the Indians from gathering sacred objects and conducting ceremonies on the Peaks, and did not prohibit the practice of their religion.[80] Thus, the action did not burden the plaintiffs' religious beliefs and practices.[81] The district court concluded that to enjoin expansion of the ski area and to order removal of the

70. *Id.* at 185.
71. *Id.* at 188.
72. *Id.* at 188-89. The court held that the United States' interests in energy resources and in treaty obligations outweighed the plaintiff's free exercise claims, even if a substantial burden on religion had been shown.
73. *Id.* at 189.
74. *Id.*
75. 552 F. Supp. 951, 954 (N.D. Cal. 1982).
76. *Id.* at 954.
77. *Id.*
78. 708 F.2d 735 (D.C. Cir. 1983), *cert. denied in part,* 104 S. Ct. 371 (1983), *cert. denied in part,* 104 S. Ct. 739 (1984).
79. Wilson v. Block, 708 F.2d at 738.
80. Hopi Indian Tribe v. Block, 8 I.L.R. at 3074-75.
81. Wilson v. Block, 708 F.2d at 740.

existing facilities would violate the establishment clause by forcing the government to manage the Peaks as a "religious shrine."[82]

In upholding the decision, the court of appeals relied on the Supreme Court's two-fold analysis for free exercise claims.[83] The parties stipulated that the Indians' beliefs were religious and sincere, thus meeting the requirement that the beliefs be rooted in religion.[84] The court noted that a plaintiff has the initial burden of demonstrating an infringement of first amendment rights[85] and held the Indians failed to make such a showing.[86]

The court concluded that no burden was placed on the Indians' free exercise of religion. No direct burden was found, since the government's action did not regulate or prohibit the Indians' beliefs. The decision to expand the ski area did not deny the Indians access to the San Francisco Peaks. While the Peaks as a whole were indispensable to the Indians' religions, the evidence failed to show the indispensability of the Snow Bowl itself, because ceremonies and collection of sacred objects could take place elsewhere.[87]

With regard to the existence of an indirect burden, the Indians argued that expansion of the ski area would desecrate their most sacred shrine. This, in turn, would impede their religious ceremonies, diminish their practices, and dilute their religious beliefs.[88] The decision of the Forest Service burdened the Indians' religions by compelling them to abandon their most sacred place or to modify their beliefs to conform to commercial uses.[89] The Indians argued that *Sherbert*[90] and *Thomas*[91] set the applicable constitutional standard, and that these cases condemn any action which encourages religious practitioners to modify their beliefs.[92] *Sequoyah*, according to the Indians, misinterpreted the first amendment. All religious practices, whether or not central to a religion, are protected.[93]

The court, however, found no indirect burden in the Forest Service's decision to expand the ski area.[94] The court interpreted *Sherbert* and *Thomas* to hold only that government may not, by conditioning public

82. Hopi Indian Tribe v. Block, 8 I.L.R. at 3075-76. The court of appeals did not address this issue. The establishment clause has, however, been used by other courts to deny Indian free exercise claims. *See supra* text accompanying notes 62-73. In *Yoder*, the Court specifically rejected the argument that relief under the free exercise clause would contravene the establishment clause. It stated that accomodating religious beliefs is not sponsorship of or active involvement with religion. Wisconsin v. Yoder, 406 U.S. at 234 n.22. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW, § 14-4, at 821-22 (1978).

83. Wilson v. Block, 708 F.2d at 740.

84. *Id.*

85. *Id.*

86. *Id.* at 745.

87. *Id.*

88. Hopi Brief, *supra* note 2, at 15.

89. *Id.* at 26-27.

90. Sherbert v. Verner, 374 U.S. 398 (1963).

91. Thomas v. Review Bd. of Indiana Employment Security Div., 450 U.S. 707 (1981).

92. Wilson v. Block, 708 F.2d at 741.

93. *Id.* at 743.

94. *Id.* at 741.

benefits, penalize adherence to a religious belief.[95] The court, choosing to follow its interpretation of *Sequoyah*,[96] held that no first amendment claim has been stated if a plaintiff fails to demonstrate that public land is indispensable to some religious practice, whether or not central to a religion itself.[97] Thus, the rule of law in *Wilson* is that plaintiffs seeking to restrict the use of public land in the name of religion must show, at a minimum, that the government's proposed land use impairs a religious practice which can not be performed at any other site.[98]

ANALYSIS OF THE COURT'S OPINION

The result in *Wilson* is consistent with those in the cases preceding it. The decision required that the land in question be the only place where religious practices can be conducted before the first amendment controls its use.[99] The court relied on *Sequoyah* as precedent for its holding.[100] The court in *Sequoyah* erred in two ways.

First, it misinterpreted *Wisconsin v. Yoder*.[101] *Yoder* did not require that a religious practice be central to a religion in order to acquire first amendment protection.[102] In *Yoder*, the issue was whether a belief was in fact religious and therefore protected by the first amendment.[103] The Court held that beliefs are religious when they are "rooted in religion." Indispensability is but one factor in determining whether a belief is rooted in religion.[104]

Second, the *Sequoyah* court used *Frank v. State*[105] as a basis for its holding. The *Frank* court, however, observed that the absolute necessity of a practice to a religion is not a requirement for first amendment protection.[106] Other courts have found that a belief rooted in religion is pro-

95. *Id.* Where receipt of a benefit is conditioned upon conduct proscribed by a religious belief, thus pressuring an adherent to violate his beliefs, a burden on religion exists. *Thomas*, 450 U.S. at 717-18.

96. Wilson v. Block, 708 F.2d at 743-44.

97. *Id.* at 743.

98. *Id.*

99. *Id.* At the same time, some aspects of the court's decision were less restrictive than earlier cases. The court in *Wilson* noted that the government's property interests and land management duties do not outweigh the free exercise clause. Public lands must be managed in a constitutional manner. The free exercise clause may control public land uses. Wilson v. Block, 708 F.2d at 744.

100. *Id.* at 743-44. The court maintained *Sequoyah* holds no first amendment claim is stated if a plaintiff is unable to demonstrate public land is indispensable to *some* religious practice, *whether or not* central to the religion. However, *Sequoyah* stated that a site must be central to the religion, be a cornerstone of the religion, or play a central role in religious ceremonies and practices. Sequoyah v. Tennessee Valley Authority, 620 F.2d 1159, 1164 (6th Cir. 1980), *cert. denied*, 449 U.S. 953 (1980).

101. 406 U.S. 205 (1972). *See supra* text accompanying notes 22-23.

102. Sequoyah v. Tennessee Valley Authority, 620 F.2d at 1164.

103. Wisconsin v. Yoder, 406 U.S. at 215-16.

104. *Id.* at 215.

105. 604 P.2d 1068 (Alaska 1979). *See supra* text accompanying notes 45-49.

106. Frank v. State, 604 P.2d at 1072-73.

tected by the first amendment regardless of the importance of the activity.[107] Thus, *Sequoyah* arrived at its holding by misinterpreting precedent.

In a correct analysis, plaintiffs asserting that public land uses violate the free exercise clause must show the abridged beliefs are rooted in religion,[108] and the government's land use has a coercive effect which substantially burdens religion.[109]

In *Wilson*, the court recognized the validity and sincerity of the plaintiffs' religious beliefs.[110] Those beliefs are therefore entitled to first amendment protection.[111] The next question is whether the Indians' beliefs were substantially burdened by the Forest Service. Absence of a direct burden is only the beginning, not the end, of a proper analysis.[112] That the plaintiffs were not denied access to the San Francisco Peaks and that sacred medicine was available at other locations is only one test of whether a burden was placed on religion. Freedom of expression in an appropriate place may not be abridged merely because it can be exercised elsewhere.[113]

Absent a compelling interest, if the effect of the government's action is to impede the practice of religion, it is invalid.[114] The district court found that the Indians believe cutting, digging, and other disturbances by humans cause the Deity to lose its power.[115] The evidence showed that the Peaks were indispensable to the Indians' religions.[116] The court held, however, that because the Snow Bowl itself was not indispensable, the Indians' free exercise rights had not been impeded. The court emphasized that prior development had not prevented the Indians from engaging in their religion,[117] despite their belief that development impaired the Peaks' spiritual power.[118]

This attempt to reconcile the interests involved suffers from two flaws. First, it ignores the fact that the Peaks were an *object*, as well as a place, of worship.[119] Second, this type of analysis places the court squarely in the position of deciding what the plaintiffs believed. The United States Supreme Court has held that courts are not competent to make determinations of religious orthodoxy.[120] Thus, the *Wilson* court should have found

107. Unitarian Church West v. McConnell, 337 F. Supp. 1252, 1257 (E.D. Wis. 1972), *aff'd*, 474 F.2d 1351 (7th Cir. 1973), *vacated and remanded on other ground*, 416 U.S. 932 (1974). For other cases rejecting the standard of indispensability, see Teterud v. Burns, 522 F.2d 357, 359-60 (8th Cir. 1975); Geller v. Secretary of Defense, 423 F. Supp. 16, 17 (D. D.C. 1976).

108. Wisconsin v. Yoder, 406 U.S. at 215.

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

110. Wilson v. Block, 708 F.2d at 740.

111. Unitarian Church West v. McConnell, 337 F. Supp. at 1257.

112. Sherbert v. Verner, 374 U.S. at 404-05.

113. Schneider v. New Jersey, 308 U.S. 147, 163 (1939).

114. Braunfeld v. Brown, 366 U.S. 599, 607 (1961).

115. Hopi Indian Tribe v. Block, 8 I.L.R. at 3074.

116. Wilson v. Block, 708 F.2d at 744.

117. *Id.* at 745.

118. *Id.* at 738.

119. *Id.*

120. United States v. Lee, 455 U.S. 252, 257 (1982).

a belief rooted in religion, determined that the belief was indirectly impeded, and proceeded to analyze whether a compelling governmental interest existed.

A government interest may overcome a free exercise claim if it is compelling.[121] But only interests of the highest order, and those not otherwise served, can outweigh such a claim.[122]

The United States Forest Service has a statutory interest in multiple use of public lands.[123] Yet the statute allows the Forest Service to consider the relative values of the resources, not only to emphasize those that provide the greatest economic return.[124] The interests of the United States in multiple use of its lands are not tied solely to development of the Snow Bowl. Forestalling expansion of the ski area in order to accomodate another use does not damage the government's interest. Thus, the Snow Bowl development is not a compelling interest.

Even if this interest is compelling, the statutory policy must be administered in its least restrictive manner.[125] In *Wilson*, two alternatives, to remove existing facilities or to continue operation of the ski area at a minimum level of development, were consonant with the Indians' religions.[126] The Forest Service had the statutory discretion to implement either option. By not exercising its discretion, the Forest Service failed to administer public lands in a manner which least burdens the free exercise of religion.

The federal courts in the line of cases from *Sequoyah* to *Wilson* applied a standard to Indian free exercise claims which is harsh and inconsistent with decisions of the United States Supreme Court. Several factors explain the use of this more stringent standard. First, the courts may be reluctant to expand litigation on this issue. The Constitution gives Congress the power to make all needful rules and regulations respecting the territory or other property belonging to the United States.[127] Congress mandated multiple use of public land.[128] To hold public land uses violative of the first amendment embroils the courts in land management policies which are more properly left to Congress and the interested regulatory agencies. The court in *Wilson,* however, recognized that public land management must not offend the Constitution.[129] The courts do have a role when public land management abridges religious freedom, and the possibility of a floodgate of litigation is inadequate justification for a miserly interpretation of constitutional rights. Second, the facts in *Wilson* cut against the Indians' claims. The ski area was developed forty-six years

121. Sherbert v. Verner, 374 U.S. at 403.
122. Wisconsin v. Yoder, 406 U.S. at 215.
123. 16 U.S.C. § 529 (1982).
124. 16 U.S.C. § 531(a) (1982).
125. Thomas v. Review Bd. of Indiana Employment Security Div., 450 U.S. at 718.
126. Hopi Brief, *supra* note 2, at 12.
127. U.S. CONST. art. IV, § 3.
128. 16 U.S.C. § 529.
129. Wilson v. Block, 708 F.2d at 744 n.5.

before the case reached the court of appeals, and the mountain had been used for other commercial purposes for at least thirty years.[130] The court probably felt that the Indians' failure to object to these uses weakened their religious claims. Viewed from a traditional Judeo-Christian perspective, this inference may be valid. The Indians point out, however, that it was impossible for them to raise these claims at the time the ski area was first developed.[131] Further, given that the sincerity of the Indians' belief that the mountain was a living deity was stipulated, the court should not have based its decision on the value-laden inference that the Indians' religion was reduceable to practices which could be conducted at one site and in one manner. The logical result of this theological judgment is that government may impede the free exercise of religion as long as it does not disturb mere visible forms of worship.

Plaintiffs should be required to establish that their use of the land is rooted in religion and that the government's proposed use has a coercive effect which substantially burdens the free exercise of religion either directly, by denying Indians access to a site, for example, or indirectly, by impeding the observance of their religion. Upon such a showing, government is required to demonstrate that its interest is compelling and no less restrictive means are available to manage the land in question. The first amendment protects all religious practices, not merely those which can be performed only at one site.

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130. *Id.* at 745 n.6.
131. Hopi Brief, *supra* note 2, at 26.