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# The Indian Wars Continued - Lyng v. Northwest Indian Cemetery Protective Association

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# THE INDIAN WARS CONTINUED

## *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988)

### I. INTRODUCTION

The Indian Wars, those fought between the Native American Indians and the White Man, were over by the beginning of the twentieth century. Unfortunately, the Indians' fight for recognition and equal treatment from the United States Government, the same government which demoralized their race, stripped them of their land, and forced them into submission as a vanquished people, has never ended. The adversary is still the United States Government, but in its capacity as a lawmaker, not as an army. The same prejudice and insensitivity that caused and perpetuated the Indian Wars continues today, permeating laws which affect the Indians and the court decisions interpreting those laws.

*Lyng v. Northwest Indian Cemetery Protective Association*[1] illustrates the continuing conflict between the Indians and the United States Government, this time in the context of religion. The United States Constitution, applicable to all American Indians as citizens of the United States, states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ."[2] Prohibitions, however, may take many forms and need not be direct or express in order to effect prohibitive results. Such was the issue in *Lyng*, in which the United States Supreme Court made an attempt, albeit futile, to narrow the finite yet indeterminable definitions of what may, or may not, constitute an unconstitutional prohibition of religion.[3]

### II. FACTS

In 1972 the United States Forest Service began formulating a forest management plan and, pursuant to that plan, issued a Draft Environmental Statement (DES) for the Blue Creek and Eight Mile Planning Units of Six Rivers National Forest.[4] The DES was completed and circulated among Forest Service policy-makers for comment and discussion. In 1975 a Final Environmental Statement (FES), proposing various management plans for the Blue Creek Unit, was finished.[5] The Forest Service selected one variation of the plan and in 1981 completed the Blue Creek Implementation Plan which proposed harvesting 733 million board feet of Douglas fir from the Blue Creek Unit over an eighty-year period.[6]

In conjunction with the Blue Creek Project and to facilitate hauling large amounts of timber and to control fires, the Forest Service began planning for the upgrading, paving, and completion of the Gasquet-Orleans Road (G-O Road).[7] The finished project would be

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1. 485 U.S. 439 (1988).
2. U.S. CONST. amend. I.
3. 485 U.S. 439 (1988).
4. Northwest Indian Cemetery Protective Ass'n v. Peterson, 565 F. Supp. 586, 590 (N.D. Cal. 1983).
5. *Id.*
6. Northwest Indian Cemetery Protective Ass'n v. Peterson, 795 F.2d 690, 699 (9th Cir. 1985).
7. Petition for Writ of Certiorari at 2-3, Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988).

a seventy-five-mile stretch of road between Gasquet and Orleans, California. Fifty-five miles of the road was to lie within the Six Rivers National Forest. By 1977, forty-nine of those fifty-five miles were complete, with only a six-mile strip between the Summit Valley and Dillon-Flint sections unfinished.[8] This six-mile strip lay within the Chimney Rock Section of the Six Rivers National Forest. More specifically, Chimney Rock lay within the Blue Creek Unit.[9]

As part of the plan to complete the G-O Road, the Forest Service issued a Draft Environmental Impact Statement (EIS) on the unfinished portion of the road in 1977.[10] In response to comments on the EIS, the Forest Service commissioned a study by an independent group, headed by Dr. Dorthea Theodoratus, to evaluate the religious and cultural significance of specific sites within the Chimney Rock Section and their importance to the Yurok, Karok, and Tolowa Indians.[11] The group completed its study in 1979, and the subsequent report, *Cultural Resources of the Chimney Rock Section, Gasquet-Orleans Road, Six Rivers National Forest,* concluded that, in deference to the immense harm it would cause to the Indians' religion and culture, the road should not be built.[12]

This recommendation was rejected by the Forest Service, which issued a final EIS in 1982. In the final EIS, several proposals were made for the completion of the remaining six miles of road.[13] The options presented drew various paths for the road through the Chimney Rock Section. Options which circumvented the Chimney Rock Section altogether were rejected. Eventually, the Forest Service selected one of the plans which called for the construction of the road through the Chimney Rock Section of the forest.[14]

In its final plan the Forest Service proposed to limit timber harvesting to areas at least one-half mile away from all Indian religious sites identified in Dr. Theodoratus' study in order to reduce the impact of the road on those sites.[15] The Forest Service chose the path for the road that would affect those sites the least.[16]

The Indians, however, did not agree. They perceived both the timber-harvesting plan and the G-O Road plan as potentially destructive to their religion and its accompanying rituals as well as to the Indians' day-to-day existence and believed the only successful solution was to prevent either plan from being implemented. Having exhausted their administrative remedies, the Indians brought an action seeking to enjoin the construction of the G-O Road.

## III. BACKGROUND AND HISTORY

*Northwest Indian Cemetery Protective Association v. Peterson*[17] was a consolidation of *Northwest* and another action brought by the State of California regarding the Blue Creek

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8. Petition for Writ of Certiorari at 3, *Lyng*.
9. *Northwest*, 565 F. Supp. at 590.
10. Petition for Writ of Certiorari at 3, *Lyng*.
11. *Lyng*, 485 U.S. at 442; *see* Appendix, Appendix K to Defendant's Exhibit G, *Lyng*.
12. Appendix at 193, *Lyng*.
13. *Northwest*, 565 F. Supp. at 590.
14. Appendix at 95, *Lyng; see also Northwest*, 565 F. Supp. at 590.
15. Petition for Writ of Certiorari at 6, *Lyng*.
16. Appendix at 91-95, *Lyng*.
17. 565 F. Supp. 586 (N.D. Cal. 1983).

Implementation Plan. In *Northwest*, the plaintiffs alleged nine violations of constitutional and federal statutory rights.[18]

Approaching the first amendment issue, the district court stated that the unorthodox character of a religion does not form a basis for denial of free exercise clause rights; therefore, the religious importance of the land to the Indians was not in issue.[19] The district court did give considerable discussion to the character and nature of the disputed area. The court found that the entire northeast corner of the Blue Creek Unit, known to the Indians as the "high country," was sacred to the Indians.[20] The court further noted that the Indians regularly used the "high country" for numerous religious purposes which could be characterized as the quest for religious power and guidance through spiritual exchange with the creator.[21] Vital to receiving power from the creator were the "prayer seats," specific sites within the disputed territory which had to be used in conjunction with the solitude, peace, and pristine conditions of the Chimney Rock Section if power was to be attained.[22] The district court, in making its finding of facts regarding the Indians' religion, relied heavily on Dr. Theodoratus' report which the Forest Service had commissioned.

After discussing the nature of the Indians' religion and its relationship to the land at issue, the court addressed the Indians' specific allegations regarding the potential harmful effects of the proposed project. Those allegations were (1) that the visibility of "the road from religious sites would damage visual conditions" essential for religious use, (2) that the "increased aural disturbances" accompanying the road would impair the religious and medicinal quests in addition to the attainment of power, and (3) that the Indians' religious use would be impaired by increased recreational use.[23]

In ruling on the allegations, the court noted that the Forest Service had conceded that the Indians' use of the "high country" was entitled to first amendment protection even though the Indians had no property interest in the disputed territory.[24] The court found evidence which established that construction of the Chimney Rock Section and/or implementation of the Management Plan would seriously impair the Indians' use of the high country for religious purposes.[25] The court emphasized that the high country was central and indispensable to the Indians' religion since it represented the center of their spiritual world and, as such, was irreplaceable.[26] The court, citing the Forest Service's own report,

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18. The claims were that the projects: (1) violated the Indians' first amendment rights, U.S. CONST. amend. I; (2) violated the American Indian Religious Freedom Act, 42 U.S.C. § 1996 (Supp. II 1979); (3) violated the National Environmental Policy Act, 42 U.S.C. §§ 4321-4361 (1976); (4) violated the Wilderness Act, 16 U.S.C. §§ 1131-1136 (1976); (5) violated the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1376 (1976); (6) violated the water and fishing rights reserved to American Indians on the Hoopa Valley Reservation; (7) violated the Administrative Procedure Act, 5 U.S.C. § 706 (1976); (8) violated the Multiple Use Sustained Yield Act, 16 U.S.C. §§ 528-531 (1976); and (9) violated the National Forest Management Act, 16 U.S.C. §§ 1600-1614 (1976).

Only the constitutional issues are to be discussed in this note. By the time the case reached the Supreme Court, the Forest Service had conceded that it could cure the statutory defects and would not challenge the statutory rulings.

19. *Northwest*, 565 F. Supp. at 591.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.* at 592.

24. *Id.* at 594.

25. *Id.* at 594-95.

26. *Id.* at 594.

found the planned projects potentially destructive of the " 'very core' " of the Indians' religion.[27]

By establishing their right to first amendment protection by proving an unconstitutional "prohibition" of their religion, the Indians shifted the burden of proof to the government to prove a compelling governmental interest. The government offered the following justifications: (1) the increase in the quantity of timber accessible to harvesting in the Blue Creek Unit; (2) the stimulated employment in the regional timber industry that would result; (3) the increased recreational access to the Blue Creek Unit; (4) the increased efficiency of the Forest Service in caring for the forest; and (5) the increased price of bids on future timber sales.[28] In responding to the government's statements, the court noted: (1) that the Forest Service had conceded that the construction of the Chimney Rock Section would not improve access to timber resources; (2) that no net increase in jobs would result, but only a transfer of existing jobs from Humboldt County to Del Norte County; (3) that recreational access could not support a violation of the Indians' first amendment rights; (4) that the road would not make servicing the park any more efficient; and (5) that the supposed increase in bids was too speculative.[29] The court also concluded that the establishment clause would not be violated by granting the Indians' request for relief since the Indians were not seeking, nor would relief result in, the exclusion of others from the forest.[30] Based upon these findings, the court issued a permanent injunction forbidding the Forest Service from pursuing either the Blue Creek Management Plan or the G-O Road project.[31]

While appeal to the Ninth Circuit was pending, Congress enacted the California Wilderness Act of 1984.[32] The Act designated almost the entire disputed area as a wilderness area and, as a result, banned logging and all other environmentally desecrating actions in order that the area would be left in its pristine condition.[33] The Act left a 1200-foot-wide strip unprotected to allow for the completion of the G-O Road if the Forest Service decided to complete the project.[34] Congress thus seemed to be taking a neutral position regarding the road's completion.

With the passage of the California Wilderness Act, the case had taken on a different dimension by the time it reached the Ninth Circuit Court of Appeals. In *Northwest Indian Cemetery Protective Association v. Peterson*,[35] the court of appeals followed the decisions of other courts of appeal and held that the Indians had the initial burden of demonstrating that the government's actions unconstitutionally violated their first amendment rights.[36] The court noted that the Indians were required to show that the area at issue was an indispensable part of and central to their religious practices and that the proposed government actions would seriously impair or prohibit the practice of their religion.[37] Upon review, the court

27. *Id.* at 595.

28. *Id.*

29. *Id.* at 595-96.

30. *Id.* at 597.

31. *Id.* at 606.

32. Pub. L. No. 98-425, 98 Stat. 1619 (1984) (codified at 16 U.S.C. § 1132 (Supp. IV 1985)).

33. *Northwest*, 795 F.2d at 691.

34. *Id.*

35. 795 F.2d 688 (9th Cir. 1986).

36. *Id.* at 691.

37. *Id.* at 692.

of appeals deferred to the district court's findings concerning the nature of the Indians' religion, their use of the disputed territories, and the project's potentially destructive effects.[38]

The court recognized that there was considerable evidence in the record indicating the indispensable character of the territory to the Indians.[39] It noted that the Indian tribal and religious leaders went to the high country to receive the spiritual power which permitted them to fulfill the duties central to Indian life.[40] The court characterized the high country as "essential" and the government's projects as "utterly inconsistent" with the Indians' religion.[41]

The effect of the G-O Road in particular, the court said, was not as clear. That the project would adversely affect the Indians was certain, but the burden seemed to be of an indirect nature.[42] Despite this indirect burden, the court determined that the Indians had met their burden of proof regarding the road's adverse effects and its resulting interference with the free exercise of their religious freedom.[43]

In addressing the establishment clause issue, the court reiterated that the Forest Service had acknowledged that the Indians were entitled to at least some first amendment protection.[44] The court held the district court's injunction was not a violation of the establishment clause since the Forest Service remained free to administer the park as it saw necessary regarding all activities except logging, which issue had been substantially reduced in importance as a result of the California Wilderness Act and the completion of the G-O Road.[45]

The court also found that the government had failed to show a compelling governmental interest adequate to justify a first amendment infringement. According to the court, the government had sought to justify its position based upon its prerogative to manage its forests in the usual manner within the statutory guidelines. As a result the court affirmed the district court's holding in part, vacating the parts of the injunction concerning the Management Plan and the G-O Road since they had been rendered moot by the California Wilderness Act.[46]

*Lyng v. Northwest Indian Cemetery Protective Association*[47] undoubtedly appealed to the interest of the United States Supreme Court because the case presented novel facts involving an old but vital issue which the Court wished to address. The Supreme Court decision represented an attempt to further refine what constituted an unconstitutional first amendment prohibition of the free exercise of religion. The case also represented the convergence of two distinct lines of cases. The first line of cases is a group of factually related cases decided by the Court within the last twenty years. The majority of the cases involved the state government's denial of employment benefits to individuals who were fired because they would not work on their Sabbath and who were subsequently unable to secure

38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.* at 693.
43. *Id.*
44. *Id.*
45. *Id.* at 694.
46. *Id.* at 698.
47. 485 U.S. 439 (1988).

other employment.[48] The Court consistently ruled in favor of the plaintiffs—the unemployed—noting that a state could not compel an individual to act in a manner inconsistent with his religious beliefs nor discriminate against those who held religious views contrary to those of the authorities.[49] The Court viewed the denial of benefits to the unemployed as penal and coercive since the denial forced plaintiffs to choose between violating their religious beliefs by working on their sabbaths or remaining unemployed and uncompensated.

Another case involving similar principles, but not involving unemployment benefits, was *Wisconsin v. Yoder.*[50] The case dealt with an Amish family who refused to send their child to public or private school past the eighth grade, in direct violation of a Wisconsin compulsory school-attendance law which carried criminal sanctions for such violation. The parents' refusal to send their child to school past the eighth grade was based on historically and religiously founded beliefs that conventional education beyond the eighth grade exposed children to many facets of life that were inconsistent with and in direct opposition to those values taught and held indispensable to the Amish religion.[51]

The Court noted that there was nothing inherently wrong with the Wisconsin statute or the penalties imposed on those who did not comply. But, with regard to the plaintiffs, the Court said: "A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion."[52] The Court held that the statute as applied to the Amish was an unconstitutional burden upon their freedom of religion, since to comply with it, and thereby avoid criminal sanctions, would require a violation of their religious tenets.[53] That kind of compulsion, the Court stated, was the very type of violation the first amendment was designed to prohibit.[54] The Court further recognized that Wisconsin had a compelling state interest in enacting and enforcing a compulsory attendance law.[55] Nevertheless, that interest could not override those of the Amish since it could not be proven that the Amish children's education suffered as a result of the Amish practice.

Another case presenting similar issues was heard by the Court the year before the instant case. In *Bowen v. Roy,*[56] the Roys applied for and received benefits under the Aid to Families with Dependent Children program and the Food Stamp program. However, the Roys refused to comply with the statutory requirement that they furnish a Social Security number for each household member to the state agency which administered the pro-

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48. *See* Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136 (1987); Thomas v. Review Bd., Ind. Empl. Sec. Div., 450 U.S. 707 (1981); Sherbert v. Verner, 374 U.S. 398 (1963).

49. *See Hobbie*, 480 U.S. at 144 ("[T]he forfeiture of unemployment benefits for choosing the former [fidelity to religious beliefs] over the latter [continued employment] brings unlawful coercion to bear on the employee's choice."); *Thomas*, 450 U.S. at 717-18 ("Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists."); *Sherbert*, 374 U.S. at 410 ("South Carolina may not constitutionally apply the eligibility provisions [of its unemployment compensation act] so as to constrain a worker to abandon his religious convictions respecting the day of rest.").

50. 406 U.S. 205 (1972).

51. *Id.* at 207-09.

52. *Id.* at 220.

53. *Id.* at 218.

54. *Id.*

55. *Id.* at 221.

56. 476 U.S. 693 (1986).

grams.[57] The Roys argued that obtaining a number for their two-year-old daughter, Little Bird of the Snow, would "rob her of her spirit."[58] At trial it was divulged that Little Bird had already been assigned a number. Upon re-call to the stand, Mr. Roy testified that it was the use of the number which would rob Little Bird of her spirit.[59] The district court subsequently enjoined the state from using the number and denying the Roys' benefits.[60]

The Supreme Court vacated the judgment and remanded the case. Chief Justice Burger noted that some religious beliefs must yield to the common good of all and that the statute in question was not only neutral on its face but served a legitimate public interest.[61] He also noted that preventing fraud was a significant compelling interest and that the Social Security number served that purpose.[62] Most importantly, however, Chief Justice Burger stated that "[t]he Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens."[63]

The other line of cases which were factually similar were heard by courts of appeal in different circuits and yielded surprisingly consistent results until *Lyng*. Each case involved a government land project to which the plaintiffs, in each case Indians, objected on the ground that the project would impair the practice of their respective religions.[64] Each time, the courts applied a compelling-interest analysis, the same one used in the instant case, which stated (1) that the Indians must demonstrate that the government action created an unconstitutional burden on the exercise of their religion, and (2) that if the Indians met their burden of proof, the burden would then shift to the government to demonstrate a compelling governmental interest.[65] In each case the court held that the Indians had not met their burden of proof. Whether a compelling interest existed, therefore, was never really at issue.[66]

In *Northwest Indian Cemetery Protective Association v. Peterson*,[67] a court of appeals for the first time ruled in favor of the Indians under a factual situation nearly identical to those cases in which the Indians had not been successful in their free exercise claim. As the Ninth Circuit stressed, "[t]he adoption of a balancing test [presents] the distinct possibility that, on a different record [*e.g.*, *Northwest*], the Indians may prevail."[68] The Indians had

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57. *Id.*

58. *Id.* at 697.

59. *Id.* at 696-97.

60. Roy v. Cohen, 590 F. Supp. 600, 612-13 (M.D. Pa. 1984).

61. Bowen v. Roy, 476 U.S. at 702 (citing United States v. Lee, 455 U.S. 252, 259 (1982)).

62. *Bowen*, 476 U.S. at 709.

63. *Id.* at 699.

64. *See* Wilson v. Block, 708 F.2d 735 (D.C. Cir. 1983) (Hopi Indians sought to prevent further development of a recreational ski area in the San Francisco Peaks region of Coconimo National Forest.); Badoni v. Higginson, 638 F.2d 172 (10th Cir. 1980), *cert. denied*, 452 U.S. 954 (1981) (Navajo Indians challenged the government's operation of Glen Canyon Dam and the management of the Rainbow Bridge National Monument on the grounds that flooding denied them access to sacred areas and tourists desecrated sacred areas.); Sequoyah v. Tennessee Valley Auth., 620 F.2d 1159 (6th Cir.), *cert. denied*, 449 U.S. 953 (1980) (Cherokee Indians sought to enjoin the completion of the Tellico Dam alleging it would flood sacred land.); Crow v. Gullet, 541 F. Supp. 785 (D.S.D. 1982), *aff'd*, 706 F.2d 856 (8th Cir. 1983) (Lakota and Tsistsistas Indians argued that construction had interfered with Bear Butte, an area of religious significance in the Black Hills, and that the restrictions and regulations regarding visitation to the area interfered with their religious practice.).

65. *See Wilson*, 708 F.2d at 740; *Badoni*, 638 F.2d at 176; *Sequoyah*, 620 F.2d at 1163; *Crow*, 541 F. Supp. at 789.

66. *See Wilson*, 708 F.2d at 744; *Badoni*, 638 F.2d at 177; *Sequoyah*, 620 F.2d at 1164; *Crow*, 541 F. Supp. at 791, 793.

67. 795 F.2d 688 (9th Cir. 1986).

68. *Id.* at 695.

met their burden of proof, and the government had failed to meet its. Because of the seemingly inconsistent courts of appeals' rulings and the opportunity to further define a first amendment prohibition, the case was obviously ripe for consideration by the Court.

## IV. INSTANT CASE

The Court granted certiorari[69] on the constitutional issue alone. As previously noted, the government had conceded that all the statutory issues could either be resolved or would not be challenged. *Lyng v. Northwest Indian Cemetery Protective Association*[70] was decided on April 19, 1988, with Justice O'Connor delivering the majority opinion in favor of the government.

After reviewing the record and discussing the nature of the Indian religion, Justice O'Connor once again noted that the sincerity of the Indians in their belief was not in dispute.[71] Before undertaking any further explanation, she also acknowledged that the proposed actions of the government would have "severe adverse effects on the practice of their religion."[72]

In her opinion Justice O'Connor emphasized the correlation between the instant case and *Roy,*[73] stressing Chief Justice Burger's observation that the free exercise clause could not be understood to require the government to conduct its own internal affairs in ways that would be consistent with individual religious beliefs.[74] Based on this, she concluded that "[t]he building of a road or the harvesting of timber on publicly owned land cannot meaningfully be distinguished from the use of a Social Security number in *Roy.*"[75]

Justice O'Connor found no government coercion nor any action by the government which could be characterized as a penalty against the individual's religious activity either in *Roy* or in the instant case, despite the possible "devastating effects on traditional Indian religious practices."[76] As Justice O'Connor emphasized, the crucial word in the free exercise clause is "prohibit."[77]

Although the Court acknowledged that it should not pass judgment on the truth of the underlying religious beliefs of those asserting a free exercise right,[78] Justice O'Connor did "seem[ ] less than certain that construction of the road [would] be so disruptive that it [would] doom [the Indians'] religion."[79]

In the opinion, Justice O'Connor continually emphasized that the government could not operate in an efficient or sensible manner if it had to conform its activities to the individual religious requirements of the populace.[80] Coincident with this is the Justice's acceptance of the Forest Service's view that it is the government's prerogative to manage its forests in the standard manner outlined by the various relevant statutes.[81] Justice O'Con-

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69. 481 U.S. 1036 (1987).
70. 485 U.S. 439 (1988).
71. *Id.* at 447.
72. *Id.*
73. 476 U.S. 693 (1986).
74. *Lyng*, 485 U.S. at 448.
75. *Id.*
76. *Id.* at 449.
77. *Id.* at 451.
78. *Id.* at 449.
79. *Id.* at 451.
80. *Id.* at 452.
81. *Id.* at 453.

nor also pointed out the efforts made by the Forest Service to accommodate the Indians. Noting Judge Beezer's observation in his dissent in the Ninth Circuit that the Forest Service had provided a ten-step plan to alleviate the effects of the proposed projects,[82] Justice O'Connor concluded that the Forest Service had considered the Indians' welfare through its final choice of the proposed route for the G-O Road, choosing the route which would be the least disruptive. In the Court's opinion, the only other step was to terminate the projects altogether.[83]

Writing for the dissent, Justice Brennan found an obvious and blatant prohibition since he perceived that the inevitable results of the Forest Service's projects made the Indians' practice of their religion impossible.[84] Justice Brennan placed much more emphasis on the nature of the Indians' religion and its site-specific nature. Justice Brennan, unlike Justice O'Connor, considered the test previously employed by the courts of appeal in similar cases and used the district court's rationale in ruling in the Indians' favor in the instant case.[85] Whereas Justice O'Connor accepted the tenet that the government had a compelling interest in completing the projects, Justice Brennan found no such interest, especially in light of the California Wilderness Act.[86]

Nor did the dissent find the instant case comparable to *Roy*. Unlike the majority, the dissent saw no relationship between the two cases and was unable to join in the majority's characterization of the Forest Service's management of the Six Rivers National Forest as a purely "internal" procedure.[87] The dissent found that the Indians had proven an unconstitutional burden upon their religious freedom and that the government had presented no compelling interest to justify a first amendment infringement.[88]

## V. ANALYSIS

In *Thomas v. Review Board, Individual Employment Security Division*,[89] the Court noted that "religious beliefs need not be acceptable, logical, consistent or comprehensible to others in order to merit First Amendment protection."[90] If those beliefs are illogical or incomprehensible to the Court upon initial review, then the Court has a duty to undertake every effort to ascertain and understand those beliefs so that the effects of government action and the compelling interest of the government may be weighed accurately and objectively. Specifically, application of the courts of appeals' compelling-interest analysis used in free exercise cases necessitates this understanding. It is crucial in analyzing *Lyng*, as well as in

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82. *Northwest*, 795 F.2d at 703.

83. *Lyng*, 485 U.S. at 454.

84. *Id.* at 458-59 (Brennan, J., dissenting).

85. *Id.* at 473-74 (Brennan, J., dissenting).

86. *Id.* at 465 (Brennan, J., dissenting).

87. *Id.* at 470 (Brennan, J., dissenting).

88. *Id.* at 476-77 (Brennan, J., dissenting).

89. 450 U.S. 707 (1981).

90. *Id.* at 714.

any other alleged free exercise violation, to understand the nature, beliefs, and practice of the religion in question.[91]

In *Northwest Indian Cemetery Protective Association v. Peterson*,[92] the court of appeals restated the compelling-interest analysis which had been applied by the other appellate courts in factually similar cases: The Indians had the initial burden of demonstrating that the government's action created a burden on the free exercise of their religion.[93] As the United States Supreme Court had previously stated, " '[i]f the purpose or effect of a law is to impede the observance of one [religion] . . . , that law is constitutionally invalid.' "[94] The burden on a religion need not be a direct one, for indirect burdens " 'undoubtedly have the same coercive effect upon the exercise of First Amendment rights as imprisonment, fines, injunctions, or taxes.' "[95] Indeed, even Justice O'Connor acknowledged this point in the instant case.[96]

There can be no doubt that the implementation of the G-O Road proposal, even if its effects were indirect as the court of appeals hypothesized,[97] would impede and unduly burden the Indians' free exercise of their religion. Under Justice O'Connor's analysis, however, "impede" and "unduly burden" may be insufficient since, as she stressed, the crucial

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91. The Yurok, Karok, and Tolowa Indians all subscribe to the same general religious beliefs. Basic to their religion is the idea that the high country, generally the Chimney Rock Section of Six Rivers National Forest, was placed there by the Great Creator as a place where the Indians could go to communicate with the creator and to draw religious power. Brief for Respondents, State of California, at 3, Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988). At specific sites within the high country are "prayer seats." These seats are so specialized that there are specific seats designated for the reception of specific medicines or of specific power needed to perform a specific task. *Northwest*, 565 F. Supp. at 591. It is at the prayer seats, the Indians believe, that guidance and power are received. Petition for Writ of Certiorari at 4, *Lyng*.

The prayer seats are positioned in ascending degrees of personal power. Brief for Respondents, State of California, at 4, *Lyng*. These ascending degrees directly correspond with the geographical hierarchy; the greater the power, the higher a prayer seat is on the particular slope or rock. *Id.* Each prayer seat is oriented to achieve an unobstructed view of the high country, facilitating concentration. *Id.* at 7. The success or failure of the individual attempting to receive guidance and power depends on his ability to concentrate and, eventually, to enter a trance. *Id.* at 8. While the individual is in that trance, visions and sounds may be received as signs from the spirits that the quest for power has been granted. *Id.* Absolutely essential to the quest and to the Indians' religious practice are privacy, peace, silence, and, ideally, a completely natural, pristine, and undisturbed setting. *Id.* at 5.

In the Chimney Rock Section, the prayer seats are all positioned on the high, steep, rock outcroppings within the area. *Id.* at 4 & n.2, *Lyng*. Those of the greatest significance are Chimney Rock, Peak 8, and Doctor Rock. The Chimney Rock seats face outward across a valley and down the slope. *Id.* Those seats are located near the very top of Chimney Rock, and it is there that the Indians believe great power is received. *Id.* Peak 8 is two to three miles down the slope and is considered to be the very center of the spiritual world. *Id.* Across the valley and up another slope is Doctor Rock. The prayer seats here face Chimney Rock and, more specifically, Peak 8. *Id.*

The exchange of power and guidance is vital for key tribal members since, in order to perform tasks beneficial to the entire tribe, and in their view, to the entire world, great power must first be attained. *Id.* at 3. Among these key individuals are the medicine women, who travel to the high country to pray, receive power, and gather medicines. *Id.* at 3-4. The Indians believe that, upon return to the tribe after a sabbatical to the high country, these women are able to heal the sick and to administer the power they have gained in the high country through ceremonies such as the Brush and Kick Dances. *Id.; see also Northwest Indian Ass'n*, 565 F. Supp. at 591-92.

Even more important to tribal life are those members who must gain power and guidance prior to participating in such dances as the White Deerskin and Jump Dances. *Id.* These two dances, as well as others, are part of the World Renewal process which stabilizes and preserves the earth and prevents catastrophe. *Id.* The prayer and power gained in the high country are essential to ensure success in the entire renewal process. *Id.*

92. 795 F.2d 690 (9th Cir. 1985).

93. *Id.* at 691.

94. *Sherbert*, 374 U.S. at 404 (quoting Braunfeld v. Brown, 366 U.S. 599 (1961)).

95. *Sherbert*, 374 U.S. at 404 n.5.

96. *Lyng*, 485 U.S. at 450-51.

97. *Northwest*, 795 F.2d at 693.

word in the free exercise clause is "prohibit."[98] Regardless of semantics, the net result is the same.

As previously noted, the practice of the religion, and therefore its success, depends on the practitioner's being able to participate and concentrate at the prayer seats. Necessary to the process of gaining power and guidance from the spirits and the creator are peace, silence, solitude, privacy, and an undisturbed, pristine setting.[99] The construction and completion of the road would have an adverse effect on these very qualities which are abundantly available in the disputed area and which make communication with the Great Creator, achievement of power, and the success of the various ceremonies certain. One need only recall that the prayer seats face outward and down the slope of Chimney Rock and Peak 8 and back across the valley from Doctor Rock toward these two areas, particularly Peak 8. The proposed G-O Road would be built in the valley between the two slopes. Few things can be considered more distracting and less pristine or natural than the construction of a state road and, upon its completion, the resulting stream of traffic.

The result of the area's development is the destruction of the conditions necessary for attainment of power. Without these conditions, those individuals who are vital to the survival of the Indian religion and way of life, those who participate in the World Renewal dances, and those who heal the sick, cannot gain the power needed to make their respective ceremonies effective. To one who devoutly believes in these ceremonies, the result is that the World Renewal process fails in its purpose to preserve and stabilize the earth and catastrophe becomes inevitable. The Brush and Kick Dances are meaningless as well, imparting no healing power or possible salvation to the sick.

As Dr. Theodoratus concluded in her report to the Forest Service:

> Field data indicate that the increased intrusion into this sacred region would adversely affect the ability and/or success of the individual's quest for spiritual power . . . [T]he Indian concept of World Renewal is inextricably related to religious practice in the high country. Intrusions on the sanctity of the Blue Creek high country are therefore potentially destructive of the very core of the Northwest religious beliefs and practices.[100]

While the government has not expressly "prohibited" the practice of the Indians' religion, one can think of nothing more prohibitive than making communication with the creator impossible. Without that communication, those ceremonies which determine the outcome of life and the preservation of the earth become ineffective, thereby making the onset of death and destruction certain in the minds of the devout believers.

Justice O'Connor recognized the "severe and adverse effects" that the government's projects would have on the Indians' religion no less than three times in the majority opinion.[101] Since the crucial word is "prohibit," the majority is able to avoid the obvious conclusion that an unconstitutional infringement on the Indians' religion had occurred by merely not using that specific term. The instant case hinges on whether the effect of the

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98. *Lyng*, 485 U.S. at 451.

99. Petition for Writ of Certiorari at 4, *Lyng*.

100. Appendix at 193, *Lyng*.

101. *Lyng*, 485 U.S. at 447 ("It is undisputed that the Indian respondents' beliefs are sincere and that the Government's proposed actions will have severe adverse effects on the practice of their religion."); *id.* at 451 ("We have no reason to doubt, that the logging and road-building projects at issue in this case could have devastating effects on traditional Indian religious practices."); *id.* ("Nevertheless, we can assume that the threat to the efficacy of at least some religious practices is extremely grave.").

government's action amounts to a "severe and adverse" prohibition of a group's religious observance.

Furthermore, it is hard to understand how the majority can maintain that it is incapable of determining the truth of the Indians' religious beliefs,[102] and subsequently state that "it seems less than certain that construction of the road will be so disruptive that it will doom [the Indians'] religion."[103] The Court is either skeptical about those beliefs, or it is ruling on the case de novo.

Justice O'Connor also placed a great deal of emphasis on the fact that the Forest Service tried to minimize the impact of the project.[104] Noteworthy as those efforts might be, they are to no avail if they render the Indians' practice of their religion impossible.

Finally, with regard to the effect of the G-O Road project on the Indians, it is ironic that in all the discussion concerning *Roy* and its pertinence to the instant case, Justice O'Connor failed to mention that she dissented in part to Chief Justice Burger's conclusion that the only way a free exercise claim could defeat a "neutral and uniform" government proposal which promoted a legitimate public interest was if the opponent to the proposal was to prove discriminatory intent.[105] In response to this reasoning, Justice O'Connor stated: "I would apply our long line of precedents to hold that the Government must accommodate a legitimate Free Exercise claim unless pursuing an especially important interest by narrowly tailored means."[106]

The logical question to ask is whether there was an important government interest in seeing the G-O Road project completed. Both the district court and the court of appeals found none; therefore, it is surprising that the government's interest received elevated status upon the case's arrival in the Supreme Court. The interest in seeing the road completed and the perceived benefits it would bring were well documented. A primary benefit was the facilitation of timber harvesting and shipping in the area.[107] Other stated benefits included fire control, improved public access, administrative efficiency, fuel economy, creation of a scenic parkway, and improvement of the local economy.[108] Consideration of the logging issue as a compelling interest was moot since the California Wilderness Act[109] designated almost the entire disputed acreage as a wilderness area. As a result of such designation, no commercial enterprise such as logging could be maintained.[110] Congress did, of course, omit the proposed road route from the statute; but if logging were no longer possible in the surrounding area, the strength of the government's argument diminished proportionately with the usefulness of the road to the local timber business. Without that interest, which may have justified a first amendment infringement absent the California Wilderness Act,[111] the other benefits and interests the government claimed in the project ebb to insignificance. Without the increased logging, it was unlikely that new jobs within the local area would be forthcoming. In fact, the district court found that no new jobs

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102. *Id.* at 449.
103. *Id.* at 451.
104. *Id.* at 454.
105. *Roy*, 476 U.S. at 707-08.
106. *Id.* at 727 (O'Connor, J., concurring in part).
107. *Northwest*, 565 F. Supp. at 595.
108. Appendix at 100-01, *Lyng*.
109. Pub. L. No. 98-425, 98 Stat. 1619 (1984) (codified at 16 U.S.C. § 1132 (Supp. IV 1985)).
110. 16 U.S.C. § 1133 (1982).
111. Pub. L. No. 98-425, 98 Stat. 1619 (1984) (codified at 16 U.S.C. § 1132 (Supp. IV 1985)).

would be produced if the road were completed but that there would merely be a transfer of jobs already in existence.[112] As the court of appeals found and as the Forest Service admitted, administrative efficiency and fire control would remain unaffected.[113] Finally, public access, scenic driving, and fuel economy hardly justify the destruction of the Indians' religion.

The majority completely ignored the obvious and established compelling-interest analysis employed by the courts of appeal, preferring to use obscure logic and poor characterizations in order to avoid the seemingly inevitable conclusion derived from the compelling-interest analysis. As the majority viewed the case, "[i]ncidental effects of government programs, which make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs, [cannot] require the government to bring forward a compelling justification for its otherwise lawful actions."[114] This statement cannot be squared with Justice O'Connor's statement in *Roy.*[115] Rendering one's religious practices impossible is coercive, not merely incidental. There is nothing more contrary to one's devout religious beliefs than the inability to effectively pursue those beliefs.

Using a structural analysis, the majority expressly dismissed the idea of the necessity of showing a compelling governmental interest by stating that the Court "would . . . be required to weigh the value of every religious belief and practice that is said to be threatened by any government program,"[116] thereby representing the task as impracticable. By so doing, the Court failed to recall the requirement of previous cases that the government must demonstrate a compelling interest when the opposing party has proven that a constitutional violation of the free exercise clause has occurred.[117] The Court, in fact, had previously acknowledged that " 'only those interests of the highest order . . . can overbalance legitimate claims to the free exercise of religion.' "[118] Instead, the majority opted for the policy that the religious beliefs of individuals cannot require the government to conduct its internal affairs in a manner consistent with those beliefs.[119] In *Roy,* "internal affairs" meant the maintenance of records, the distribution of aid payments, the avoidance of duplicate or incorrect aid payments, and the prevention of fraud.[120] What the majority overlooked in *Lyng* was that there is nothing purely "internal" about the Forest Service's management of national forests. It is not, as the Court suggests, a case of a government's right to use, in any way it wishes, its land.[121] Regarding the G-O project, the Forest Service was con-

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112. *Northwest,* 565 F. Supp. at 595-96.

113. *Northwest,* 795 F.2d at 695; *see also* 565 F. Supp. at 596.

114. *Lyng,* 485 U.S. at 450-51.

115. *See supra* note 101 and accompanying text.

116. *Lyng,* 485 U.S. 457.

117. *See Hobbie,* 480 U.S. at 141 ("Such infringements [on the free exercise of religion] must be subjected to strict scrutiny and [can] be justified only by proof by the State of a compelling interest."); *Thomas,* 450 U.S. at 718 ("The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest."); *Sherbert,* 374 U.S. at 406 ("It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, '[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation[.]' "(quoting Thomas v. Collins, 323 U.S. 516, 530 (1945)).

118. *Hobbie,* 480 U.S. at 142 (quoting Wisconsin v. Yoder, 406 U.S. 205, 215 (1972)).

119. *Lyng,* 485 U.S. at 448.

120. 476 U.S. 693 (1986).

121. *Lyng,* 485 U.S. at 453.

cerned with expense to the taxpayer.[122] It held local meetings and promoted surveys to determine the local sentiment about the project.[123] The National Wilderness System[124] makes it clear that wilderness areas, the Chimney Rock Section in this case, are for the use and enjoyment of the American people.[125] Forest Service management priorities include such items as outdoor recreation and wildlife preservation.[126] In the courts below the creation of new jobs and of a scenic highway was put forth by the government as evidence of a compelling government interest. Certainly these considerations are not "internal" since they involve not only the formulation of management policies for national forests but also the effect of those policies on the surrounding areas and those who live there.

Notwithstanding the possibly purely internal nature of the government's land management policies, history shows that the Indian people were to be given special consideration with regard to such government policy. As the American Indian Religious Freedom Act states, "[The Act's purpose is] to protect and preserve for the American Indians their inherent right of freedom to believe, express, and exercise [their] traditional religions."[127] The Act's legislative history more emphatically points out that "[t]he purpose [of the Act] is to insure [sic] that the policies and procedures of various Federal agencies as they may impact upon the exercise of traditional Indian religious practices are brought into compliance with the constitutional injunction that Congress shall make no laws abridging the free exercise of religion."[128]

Does the government have unbridled control to do with "its land" as it pleases if the policies regarding that land are to be considered in light of the needs of the American people in general and, in this case, the effect those policies will have on the Indians and their religion in particular? Certainly the formulation of land management policy is not simply "internal" in nature. Furthermore, the Indians' religious needs were not given the consideration or deference required by the American Indian Religious Freedom Act.[129] No compelling governmental interest exists for completing the G-O Road. Consequently, no justifiable reason exists for the obvious violation of the free exercise clause of the first amendment as it applies to the Yurok, Karok, and Tolowa Indians.

## VI. CONCLUSION

With *Lyng* the Court constructed a nearly insurmountable barrier against free exercise claims based on peculiar religious practices and the consequential effects of government actions on those practices. Although the Court's rationale is difficult to understand, several themes permeate the majority opinion and help to clarify how the Court may have derived its conclusion. In *Lyng* the Court considered the nature of the Indians' religion. Express words to the contrary, the eccentricity of the Indians' religion in relation to the Judaeo-Christian "norm" apparently caused the Court some problem. The Court seemed unable, or unwilling, to fully appreciate the effect that the G-O Road project would have on the Indians' religion since their religion is site-specific with great emphasis placed on

122. Appendix at 101, *Lyng*.
123. Appendix at 104, *Lyng*.
124. 16 U.S.C. §§ 1131-1136 (1976).
125. 16 U.S.C. § 1131 (1976).
126. 16 U.S.C. § 528 (1976).
127. 42 U.S.C. § 1996 (1976).
128. H.R. REP. No. 95, 95th Cong., 2d Sess. 1, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 1262.
129. 42 U.S.C. § 1996 (1982).

the land and on the place of worship, as opposed to a more mainstream religion in which spiritual fulfillment is not necessarily dependent upon precise locations or geographic formations.

The Court found no need to resort to the courts of appeals' compelling-interest analysis nor the Court's own precedent of requiring the government to show a compelling interest which would justify a free exercise clause infringement, precedent Justice O'Connor had asserted should be followed in *Roy*.[130] In so doing, the Court did not have to balance the interests of the Indians against those meager interests of the government; therefore, the Court never had to consider the sufficiency of the overwhelming evidence in favor of the Indians, evidence which included the government's own report that stated conclusively that the G-O Road would lead to the destruction of the Indians' religion.

Finally, the Court implied that the government, whether regulating the payment of benefits or regulating a national forest, need not defer to the religious needs of anyone as long as the government action could be characterized as "internal." With such a vague standard, the Court established a nebulous sphere within which most government action could conceivably be characterized, thereby defeating any free exercise claim.

In surveying these considerations, the Court seemed willing to recognize the religious rights of others and to protect those rights from the oppressive effects of government conduct, but only within narrow bounds. The Court seemed less than willing to protect religious rights when the religion is, in the Court's opinion, an obscure, unorthodox one whose recognition would require some deference by the government regarding formulation of government policy and would therefore result in some degree of inconvenience to the government. The Indians must suffer greatly from this policy. The Indians' religious beliefs are perhaps the inverse of those beliefs held dear by most Americans, thereby making the Indians' faith difficult to truly understand and appreciate. If the Indians' religion is to be protected as vigorously as those faiths practiced by most Americans, the government would have to make great concessions, particularly in the area of land management, due to the site-specific nature of the Indians' religion. Unfortunately for the Indians, land is a finite commodity, a long-term investment with a great potential for profit through its exploitation. Neither the Court nor the government seems willing to allow an obscure tribal religion to interfere with such a valuable asset and revenue producer, even if unwillingness and insensitivity result in the complete disregard of the Yurok, Karok, and Tolowa Indians' first amendment rights as well as the possible destruction of their faith and way of life.

*W. Pemble DeLashmet*

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130. *See supra* note 101 and accompanying text.