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Government Action Does Not Violate Free Exercise Clause of First Amendment When It Neither Coerces Action Contrary to Religious Beliefs Nor Prohibits Access to Practice Those Beliefs, but Merely Imposes an Incidental Burden on Religious Practice.

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CONSTITUTIONAL LAW—First Amendment—Government Action Does Not Violate Free Exercise Clause Of First Amendment When It Neither Coerces Action Contrary To Religious Beliefs Nor Prohibits Access To Practice Those Beliefs, But Merely Imposes An Incidental Burden On Religious Practice.

Lyng v. Northwest Indian Cemetery Protective Association, __ U.S. __, 108 S. Ct. 1319, 99 L. Ed. 2d 534 (1988).

The United States Forest Service planned to construct a six mile paved roadway through Six Rivers National Forest connecting two California cities.[1] This area had historically been used by American Indians for religious rituals that required undisturbed natural settings.[2] Rejecting their own study which advised that the road not be completed,[3] the Forest Service

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1. Lyng v. Northwest Indian Cemetery Protective Ass'n, __ U.S. __, __, 108 S. Ct. 1319, 1321, 99 L. Ed. 2d 534, 542 (1988). This action originally contested plans of the United States Forest Service to construct a road and to permit timber harvesting in the Blue Creek Unit of the Six Rivers National Forest. Northwest Indian Cemetery Protective Ass'n v. Peterson, 565 F. Supp. 586, 590 (N.D. Cal. 1983). Approximately 67,500 acres of the Blue Creek Unit is located within the Siskiyou Mountains and is situated in Del Norte and Humboldt counties in the northwestern corner of California. *Id.* In 1977, the Forest Service prepared an environmental impact statement that discussed alternatives for constructing a paved six-mile stretch of road to link the existing Summit Valley and Dillon-Flint segments. The proposed construction site traversed the Chimney Rock section of the Blue Creek Unit. At about this same time, the Forest Service adopted a management plan providing for the harvesting of 733 million board feet of timber, over approximately 80 years, in the Blue Creek Area. *Id.*

2. *Lyng*, __ U.S. at __, 108 S. Ct. at 1322, 99 L. Ed. 2d at 542. The Chimney Rock area of the Blue Creek Unit is considered sacred by Yurok, Korok and Tolowa tribe members. *See Northwest*, 565 F. Supp. at 591. Members of these tribes have made use of the "high country" for religious rituals since the early nineteenth century. *Id.* Individuals use "prayer seats" to seek religious guidance and personal "power" by engaging in "spiritual exchanges" with nature and their gods. The success of these exchanges depends upon the solitude, quietness and pristine environment of the Chimney Rock area. Key tribe members must visit the high country prior to religious ceremonies to purify themselves and make "preparatory medicine." *Id.* This preparation gives meaning to tribal ceremonies which provide a type of renewal that is essential to the Indians' belief system. *Id.* at n.4. Medicine women in the tribe also use Chimney Rock to gather medicines which are administered to the sick. *Id.* at 592. It is estimated that between 110 and 140 members of these three tribes make use of Chimney Rock. *Id.* at 591 n.3. This number does not include the larger group of tribe members who participate in rituals involving medicines and powers brought down from the high country. *Id.*

3. *Lyng*, __ U.S. at __, 108 S. Ct. at 1322, 99 L. Ed. 2d at 543. In 1977, the Forest Service prepared an initial impact statement which outlined proposed routes for the G - O Road. *Id.* at __, 108 S. Ct. at 1321-22, 99 L. Ed. 2d at 542-43. Comments on the draft

selected a route as far removed as possible from the sacred sites.[4] The Indians and others[5] filed a complaint with the Forest Service, alleging that the construction would destroy the natural state of the site and make it impossible for the Indians to practice their religious ceremonies.[6] After exhausting their administrative remedies,[7] the Indians filed suit in federal district court[8] claiming that the government's construction project violated their first

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statement led the Forest Service to commission a study of American Indian religious sites in the Blue Creek Unit. *Id.* at __, 108 S. Ct. at 1322, 99 L. Ed. 2d at 543. The study concluded that Indian religious rituals depended upon and were facilitated by the privacy, silence and undisturbed natural settings of the Chimney Rock area. *Id.* Accordingly, the report recommended that the road not be built. *Id.*

4. *Lyng*, __ U.S. at __, 108 S. Ct. at 1322, 99 L. Ed. 2d at 542. After rejecting its commissioned study in 1982, the Forest Service prepared a final environmental impact statement containing its plans for construction. *Id.* The Regional Forester had selected a route which was designed to avoid the sacred sites as much as possible. Alternative routes were considered but later rejected because: 1) they required the Forest Service to purchase private land, 2) serious soil stability problems existed, and 3) they would traverse the Chimney Rock area. The Forest Service also issued an environmental impact statement which provided for a one-half mile protective zone around religious sites for the timber-harvesting plan. *Id.*

5. Lyng v. Northwest Indian Cemetery Protective Ass'n, __ U.S. __, __, 108 S. Ct. 1319, 1322, 99 L. Ed. 2d 534, 542 (1988). The Indians were joined by the following organizations and individuals: 1) the Northwest Indian Cemetery Protective Association, 2) the Sierra Club, 3) the Wilderness Society, 4) California Trout, 5) the Redwood Region Audubon Society, 6) Northcoast Environmental Center, 7) four individuals of Native American descent including Jimmie Jones, Sam Jones, Lowana Brantee, and Christopher H. Peters, and 8) two Sierra Club members, Timothy McKay and John Amadio. Northwest Indian Cemetery Protective Ass'n v. Peterson, 565 F. Supp. 586, 590 (N.D. Cal. 1983).

6. *Northwest*, 565 F. Supp. at 592. The basis of the complaint was that construction in the Chimney Rock area would destroy the sacred characteristics of the high country. *Id.* The Indians alleged that: 1) the road would destroy the pristine visual conditions found in Chimney Rock which were indispensable for religious use, 2) the increased audio disturbances from both construction and use would make worship impossible, 3) the physical intrusion of the road would remove the religious significance, and 4) the increased recreational use would further hamper the Indians' efforts to practice religion in the absence of tourists. *Id.*

7. *Lyng*, __ U.S. at __, 108 S. Ct. at 1322, 99 L. Ed. 2d at 543. The Indians appealed the Forest Supervisor's selection of the timber-harvesting plan to the Regional Forester, who denied their claim. *See* Brief for Appellee at 7, Northwest Indian Cemetery Protective Ass'n v. Peterson, 795 F.2d 688 (9th Cir. 1986)(No. 86-1013). The Forester's denial was appealed to the Chief of the Forest Service, R. Max Peterson. *Id.* Peterson denied the appeal and affirmed the decision to implement the plan. *Id.* at 8. The Indians also appealed the Forest Supervisor's adoption of the plan for the G - O Road. *Id.* The Chief of Forest Services denied the appeal and affirmed the Forest Supervisor's plan. *Id.* at n.10. Subsequently, the Secretary of Agriculture issued a memo refusing further review. *Id.*

8. *See Northwest*, 565 F. Supp. at 590. The defendants were R. Max Peterson in his capacity as Chief of the United States Forest Service and John R. Block in his capacity as Secretary of the United States Department of Agriculture. *Id.* Later, Richard E. Lyng replaced John R. Block as Secretary of the Department of Agriculture. *See Lyng*, __ U.S. at __, 108 S. Ct. at 1319, 99 L. Ed. 2d at 534.

amendment right to free exercise of religion.[9] The government defended its proposed project by alleging a compelling interest in completion of the road.[10] The federal district court held that the government failed to prove existence of a compelling interest[11] and issued a permanent injunction prohibiting further implementation of the construction project.[12] The United States Court of Appeals for the Ninth Circuit affirmed the district court's decision.[13] The United States Supreme Court granted certiorari to

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9. *Lyng*, __ U.S. at __, 108 S. Ct. at 1322, 99 L. Ed. 2d at 543. The Indians challenged the road construction and timber-harvesting plans in the United States District Court for the Northern District of California. *Id.* In addition to the constitutional issue, the plaintiffs alleged that the decisions to develop the Blue Creek Unit of the Six Rivers National Forest violated: 1) the Federal Water Pollution Control Act, 2) the National Environmental Policy Act of 1969, 3) governmental trust responsibilities to Indians living on the nearby Hoopa Valley Reservation, and 4) other federal statutes. *Id.*

10. Northwest Indian Cemetery Protective Ass'n v. Peterson, 565 F. Supp. 586, 595 (N.D. Cal. 1983). The government claimed a compelling need in construction of the G - O Road because: 1) the road would increase accessibility to large quantities of timber for harvesting, 2) linking the cities of Gasquet and Orleans would provide employment to members of the surrounding communities in the timber industry, 3) increased recreational access to the area was needed, 4) the road would increase the efficiency of the Forest Service's administration of the Six Rivers National Forest, 5) the cost of hauling timber to mills in Del Norte County would be decreased, resulting in an increase in profits on future sales of timber, and 6) the road would stimulate the timber industry which would result in an increase in revenues to the Forest Service. *Id.*

11. *Id.* After hearing the evidence, the district court found no compelling interest in construction of the G - O Road because: 1) the government had conceded that construction of the road would not improve accessibility to timber resources, 2) the timber was being adequately harvested using existing roads, 3) the road would not increase employment, but merely transfer jobs from Humboldt County to Del Norte County, 4) the Forest Service's own estimates projected a usage increase of only eight vehicles per day for recreational purposes, 5) the resulting environmental impact would have a negative effect to the area's suitability for recreational use, 6) construction of the road would not increase efficiency of the administration of the high country because the Forest Service was adequately providing many services on a district-wide, rather than forest-wide, basis, 7) projections as to increased timber activity and resulting profits were speculative, 8) past investments of resources on the project would not justify future spending because the existing segments of road provided adequate access to Chimney Rock, and 9) the timber industry would not suffer if access to the Blue Creek Unit was denied and the land management plan abandoned. *Id.* at 595-96.

12. Lyng v. Northwest Indian Cemetery Protective Ass'n, __ U.S. __, __, 108 S. Ct. 1319, 1322, 99 L. Ed. 2d 534, 543 (1988). Following a trial, the district court issued a permanent injunction forbidding the Forest Service from constructing the G - O road and from putting the Blue Creek timber harvesting plan into effect. *Id.* The court held that these governmental actions violated the Indians' first amendment right to practice their religious rituals in the Chimney Rock area by destroying the natural setting required for these practices. *Id.*

13. *Id.* While appeal was pending, Congress enacted the California Wilderness Act of 1984, Pub. L. No. 98-425, 98 Stat. 1619. *Id.* This statute classified certain areas of forest as wilderness area and prohibited commercial activities in these areas. *Id.* at __, 108 S. Ct. at 1322-23, 99 L. Ed. 2d at 543-44. The high country was classified as a wilderness area and consequently the Forest Service's plan to harvest timber was forbidden by statute. *Id.* This

determine whether the proposed construction of a road through a religious site located on public land violated the Indians' first amendment right to religious freedom.[14] Held: *Reversed*. Government action does not violate the free exercise clause of the first amendment when it neither coerces action contrary to religious beliefs nor prohibits access to practice those beliefs, but merely imposes an incidental burden on a religious practice.[15]

The United States Constitution prohibits undue burdens upon a citizen's religious practices and beliefs.[16] The first amendment to the Constitution

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rendered the injunction against the land management plan unnecessary. *Id.* at __, 108 S. Ct. at 1323, 99 L. Ed. 2d at 544. The California Wilderness Act excluded the strip of land which was the planned site of the G - O road. *Id.* at __, 108 S. Ct. at 1323, 99 L. Ed. 2d at 543. Legislative history indicated that this decision was to provide for the construction, if authorized by the proper authorities. *Id.* The court of appeals affirmed the district court's decision that the proposed construction violated the Indians' right to free exercise of religion by relying on the Forest Service's own study which concluded that the G - O road would adversely affect the Chimney Rock area. *Id.* at __, 108 S. Ct. at 1323, 99 L. Ed. 2d at 544. In the absence of a compelling governmental interest in completing the road, the decision to prohibit construction was affirmed. *Id.*

14. *See Lyng*, __ U.S. at __, 108 S. Ct. at 1324, 99 L. Ed. 2d at 545 (government petitioned for writ of certiorari on first amendment issue alone and informed Court it would not challenge statutory rulings of lower federal courts in this case).

15. *See Lyng*, __ U.S. at__, 108 S. Ct. at 1326, 99 L. Ed. 2d at 547. The majority opinion by Justice O'Connor was joined by Chief Justice Rehnquist and Justices White, Stevens and Scalia. *Id.* at __, 108 S. Ct. at 1321, 99 L. Ed. 2d at 542. Justice Brennan dissented and was joined by Justices Marshall and Blackmun. *Id.* at __, 108 S. Ct. at 1330, 99 L. Ed. 2d at 552 (Brennan, J., dissenting). Justice Kennedy did not participate in the opinion. *Id.*

16. *See* U.S. CONST. amend. I (religious freedom protected by United States Constitution); *see also* School Dist. of Abington Township v. Schempp, 374 U.S. 202, 223 (1963)(individual religious liberty secured by first amendment); U.S. CONST. amend. XIV, § 1 (extending first amendment protection to state action). The fourteenth amendment to the United States Constitution provides that "no state shall deny . . . to any person within its jurisdiction equal protection of the laws." *Id.* (equal protection guarantee mandates that state government treat all persons in manner similar to others); *see* City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 439 (1985)(all persons similarly situated should be treated alike by state); *see also* Plyler v. Doe, 457 U.S. 202, 216 (1982)(state has responsibility to ensure that similarly situated persons receive equal treatment). The equal protection guarantee of the fourteenth amendment applies specifically to state actions. *See* Bolling v. Sharpe, 347 U.S. 497, 499 (1954)(fourteenth amendment applicable strictly to state acts). The Supreme Court, however, has expanded this protection by recognizing an "equal protection component" in the due process clause of the fifth amendment. *See, e.g.*, Schweiker v. Wilson, 450 U.S. 221, 226 n.6 (1981)(federal government held to same standard through fifth amendment that states held to through fourteenth amendment); United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 173 n.8 (1980)(federal legislation valid under fourteenth amendment analysis is valid under fifth amendment due process clause); Bolby v. Valero 424 U.S. 1, 93 (1976)(analysis of equal protection is identical under fourteenth and fifth amendments). The equal protection component of the fifth amendment due process clause and the equal protection clause of the fourteenth amendment operate under the same analysis, thus guaranteeing that both state and federal actions are reviewable. *See* Weinburger v. Winsenfeld, 420 U.S. 636, 638 n.2

guarantees "that Congress shall make no law respecting an establishment of

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(1975)(although fifth amendment has no equal protection clause discrimination is forbidden by due process clause). Thus, if the government, whether state or federal, fails to treat similarly situated persons equally without adequate justification, such classification is subject to equal protection challenge. *See* F. J. Royster Guano Co. v. Virginia, 453 U.S. 412, 415 (1920)(similarly situated individuals must be treated similarly by state and federal taxation distribution plans); *see also* Wygant v. Jackson Bd. of Educ., __ U.S. __, __, 106 S. Ct. 1842, 1846, 90 L. Ed. 2d 260, 268 (1986)(race based decision of state school administrator is reviewable under equal protection analysis). To analyze classifications alleged to violate equal protection guarantees, the Supreme Court has developed three distinct tiers of review. *See City of Cleburne*, 473 U.S. at 439-42 (Court has three different equal protection analyses); *see also* Dittfurth, *A Theory Of Equal Protection*, 14 ST. MARY'S L.J. 829, 832 (1983)(Supreme Court created three tier approach dependent upon degree of suspectness of classification being challenged). The lowest level of review is the rational relationship test under which a social or economic classification must rationally relate to a legitimate governmental interest. *See City of Cleburne*, 473 U.S. at 440 (classification presumed valid if rationally related to state interest); *see also* Schweiker v. Wilson, 450 U.S. 221, 230 (1981)(economic classifications justified if rationally related to legitimate governmental interest); McGowan v. Maryland, 366 U.S. 420, 525-26 (1961)(states have wide discretion for matters such as Sunday closing laws which economically affect sale of merchandise). The rational relationship test is almost always proven by the government. *See City of Cleburne*, 473 U.S. at 440 (classification presumed valid if rationally related to state interest and easily established by governmental entity). The highest level of review is used for classifications which affect certain fundamental rights. *See* Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8-9 (1972)(inherently suspect classifications include voting rights, right of interstate travel and right to criminal appeals). Under strict scrutiny, the highest level of review, the classification is presumed unconstitutional and the government has the burden of proving that a compelling governmental interest exists for the classification. *See Wygant*, __ U.S. at __, 106 S. Ct. at 1846, 90 L. Ed. 2d at 268 (classification based upon race must be tailored to compelling state interest); *City of Cleburne*, 473 U.S. at 441 (strict scrutiny requires classification serve compelling state interest); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942)(marriage and procreation are fundamental rights for which government must prove compelling interest in achieving goal). The strict scrutiny analysis is the most difficult burden for the government to satisfy. *See generally* Ely, *Equal Protection and Affirmative Action in Job Promotions: A Prospective Analysis of* United States v. Paradise, 17 CUMB. L. REV. 205, 214 (1986)(in strict scrutiny analysis challenged classification presumed unconstitutional). The middle level of review, the "intermediate scrutiny" tier, requires that the classification serve an important governmental objective and substantially relate to the achievement of such objective. *See* Craig v. Boren, 429 U.S. 190, 197 (1976)(middle tier review used for gender and illegitimacy classifications); *see also City of Cleburne*, 473 U.S. at 439 (addresses middle tier scrutiny as applied to classification of retarded persons). Intermediate scrutiny is a more rigorous standard of review than the rational basis test but is less stringent than the strict scrutiny test. *Id.* at 442. American Indians have used a variety of equal protection arguments to fight allegedly unconstitutional classifications. *See, e.g.*, Washington v. Yakima Indian Nation, 439 U.S. 463, 501 (1979)(Indians challenged state statute which gave Washington partial jurisdiction of Indian lands on equal protection grounds); United States v. Antelope, 430 U.S. 641, 644 (1977)(Indians convicted of first degree murder alleged equal protection violation where disparity created between state and federal laws); Delaware Tribal Business Comm. v. Weeks, 430 U.S. 73, 84-85 (1977)(equal protection challenge to federal statute omitting certain Indians from fund distribution scheme); Fisher v. District Court of Montana, 424 U.S. 382, 385-86

religion, or prohibiting the free exercise thereof."[17] The United States Supreme Court has interpreted this guarantee to embrace an absolute right to believe[18] and a limited right to practice those beliefs so long as they do not endanger the health, safety, or welfare of society.[19] This interpretation becomes significant when the government, in the interest of society, places a burden on an individual's religious practice.[20] The Supreme Court has developed a two-prong test to determine whether a governmental action bur-

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(1976)(Indians claimed denial of access to state court in adoption proceeding an illegal race-based discrimination). *See generally* R. ROTUNDA, J. NOWAK & J. YOUNG, TREATISE ON CONSTITUTIONAL LAW 523-24 (1986)(equal protection clause applies to governmental actions which burden or benefit citizens).

17. U.S. CONST. amend. I (guarantees individual right to religious freedom); *see, e.g.*, Johnson v. Robinson, 415 U.S. 360, 375 n.4 (1974)(free exercise of religion is fundamental constitutional right); Cruz v. Beto, 405 U.S. 319, 322-23 (1972)(first amendment applicable to both federal and state actions which prohibit free exercise of religion); School Dist. of Abington Township v. Schempp, 374 U.S. 203, 223 (1963)(purpose of free exercise clause is to secure individual religious liberty). *See generally* R. ROTUNDA, J. NOWAK & J. YOUNG, TREATISE ON CONSTITUTIONAL LAW 1032 (1986)(values protected by first amendment are fundamental aspects of freedom in our society which must be guarded); Note, *The First Amendment and Our National Heritage*, 12 OKLA. CITY L. REV. 763, 766 (1987)(free exercise clause prevents government from prohibiting religious beliefs).

18. *See, e.g.*, Torcaso v. Watkins, 367 U.S. 488, 495 (1961)(government may not impose burden on individual because of religious beliefs); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940)(right to believe guaranteed); Reynolds v. United States, 98 U.S. 145, 166-67 (1878)(governmental regulations cannot interfere with religious beliefs). *See generally* Note, *Native Americans' Access to Religious Sites: Underprotected Under the Free Exercise Clause?*, 26 B.C.L. REV. 463, 465-471 (1985)(discusses practice of religion and Supreme Court treatment under free exercise clause); Note, *American Indians and the First Amendment: The Site-Specific Religion and Public Land Management*, 1987 UTAH L. REV. 673, 676-79 (1987)(Supreme Court has held religious beliefs receive special protection under first amendment).

19. *See, e.g.*, Amalgamated Food Employees v. Logan Valley Plaza, Inc., 391 U.S. 308, 320-21 (1968)(strong public interest in maintaining public safety and order proscribes certain religious activities); Cox v. Louisiana, 379 U.S. 536, 554-55 (1965)(constitutional guarantee of first amendment liberties implies existence of organized society maintaining public order); Niemotko v. Maryland, 340 U.S. 268, 280-89 (1951)(religious practice may be restricted where danger of public disturbance). *See generally* Note, *Constitutional Law — Religious Freedom and Public Land Use.* Wilson v. Block, *708 F.2d 735 (D.C. Cir. 1985)*, 20 LAND & WATER L. REV. 109, 111 (1985)(government's need for action must be compelling and only interests of highest order can overcome valid first amendment claim); Note, *Constitutional Law* — Northwest Indian Cemetery Protective Association v. Peterson: *Indian Religious Sites Prevail Over Public Land Development*, 62 NOTRE DAME L. REV. 125, 135-36 (1986)(courts have found compelling interests in areas of education, family, child welfare, and discipline).

20. *See Cantwell*, 310 U.S. at 304 (individual conduct regulated to safeguard peace, good order and comfort of citizens); *see also* Prince v. Commonwealth of Mass., 321 U.S. 158, 165 (1944)(government has authority to safeguard community from threatening religious practice); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 633 (1943)(limitation on religious practices justified where religious exercise presents clear and certain danger to community).

dens religious freedom in the cases of *Sherbert v. Verner*[21] and *Wisconsin v. Yoder*.[22] The first prong, as developed in *Sherbert*,[23] requires a plaintiff to show the challenged action coerced him to violate his religious beliefs or penalized him for his religious practice.[24] The *Yoder* decision[25] created the second prong of the test by requiring proof that the plaintiff's religious beliefs are sincere, deeply felt, and shared by others of the same denomination.[26] If the two prong test is satisfied, the Court shifts the burden to the

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21. *See* Sherbert v. Verner, 374 U.S. 398, 402-09 (1963)(denial of unemployment benefits to Seventh Day Adventist burdened religious practice). *See generally* Note, *The First Amendment and the American Indian Religious Freedom Act: An Approach to Protecting Native American Religion*, 71 IOWA L. REV. 869, 879-83 (1986)(discussing possible methods of establishing burden on religion under traditional *Sherbert/Yoder* test); Note, *Constitutional Law* — Northwest Indian Cemetery Protective Association v. Peterson: *Indian Religious Sites Prevail Over Public Land Development*, 62 NOTRE DAME L. REV. 125, 129-31 (1986)(tracing development of traditional free exercise test used by court when analyzing first amendment claims).

22. *See* Wisconsin v. Yoder, 406 U.S. 208, 217 (1972)(mandatory education law burdened Amish religious practice of home education). *See generally* Suagee, *American Indian Religious Freedom and Cultural Resources Management: Protecting Mother Earth's Caretakers*, 10 AMER. INDIAN L. REV. 1, 3-6 (1982)(discussing *Yoder* decision and its application to tribal religions and belief systems); Note, *Indian Worship v. Government Development: A New Breed of Religion Cases*, 1984 UTAH L. REV. 313, 315 (1984)(under *Yoder* analysis, religious practice must be based on religious belief or belief must be important to plaintiff's religious lifestyle).

23. *See Sherbert*, 374 U.S. at 404-06 (first amendment analysis places burden on claimant to show governmental coercion or penalty). In *Sherbert*, the Court set forth a test that a free exercise claimant must meet to establish a burden on religion based on a first amendment claim. *Id.* at 403; *see also* Hatch, *The First Amendment and Our National Heritage*, 12 OKLA. CITY L. REV. 763, 776 (1987)(possibility that broad reading of establishment clause may conflict with Court's approach to first amendment analysis). The author reasoned that if a free exercise claimant meets the burden of showing the governmental action has penal or coercive results, and if the Court grants the claimant exemption from this law, there may be a violation of the establishment clause. *Id.* The violation may arise because the government is now providing a benefit to religion over non-religion. *Id.*

24. *See Sherbert*, 374 U.S. at 403-06 (requiring first amendment free exercise claimants to establish burden on religious practice by proving government action coerced or penalized religious practices). In *Sherbert*, the state denied unemployment benefits to a Seventh Day Adventist because she refused, in accordance with her religious practices, to work on Saturday. *Id.* at 399. The United States Supreme Court ruled that the denial of unemployment benefits placed a burden on Sherbert's religious practice. *Id.* at 410. The Court found that Sherbert had been denied benefits which were enjoyed by other citizens. *Id.* at 406. Therefore, because she had established a burden in the form of a penalty, the state was required to prove a compelling need existed for its action. *Id.*

25. *See Yoder*, 406 U.S. at 216 (first amendment claimant must prove that governmental action burdens central religious practice which is sincere, deeply rooted in religion and shared by others).

26. *Id.* In *Yoder*, the Court considered whether Amish parents were exempt from a state law requiring children to attend public schools through age sixteen. *Id.* at 207. The Court required the plaintiffs to prove that educating their children at home was a central religious practice. *Id.* at 216. To establish centrality, the Court stated that the claimant must prove that his belief is sincere, deeply rooted in religion and shared by others of the same denomina-

government to show a compelling need for its action that outweighs the claimant's practice of religion.[27]

The Court has traditionally applied this two-prong test when the claimant seeks exemption from a federal or state law that restricts religious practices.[28] Native Americans initially claimed free exercise protection from restrictive state statutes such as peyote drug laws[29] and animal protection

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tion. *Id.* A sincere belief is one not of personal preference, but of strongly felt religious conviction. *Id.* Generally, the Court will not question the depth of a religious belief unless objective evidence indicates a sham. *See* United States v. Kuch, 288 F. Supp. 439, 444-45 (D.D.C. 1968)(evidence must demonstrate legitimate religion). In *Kuch*, the Court refused to exempt first amendment claimants from drug laws where the church symbol was a three-eyed toad, members called themselves Boo-Hoos and the church motto was "Victory Over Horseshit." *Id.* at 445.

27. *See, e.g.*, United States v. Lee, 455 U.S. 258, 259 (1982)(compelling governmental interest in maintaining tax system outweighs burden on Amish religious practice of resisting taxation); Braunfeld v. Brown, 366 U.S. 599, 606-07 (1961)(compelling governmental interest in maintaining Sunday closing law for purpose of providing universal day of rest); State *ex rel.* Swann v. Peck, 527 S.W.2d 99, 111 (Tenn. 1975)(court sustained prohibition on holding venomous snakes or drinking poison as part of religious practice because government has compelling interest in safeguarding society), *cert. denied*, 424 U.S. 954 (1976). *But see* McDaniel v. Paty, 435 U.S. 618, 628-29 (1978)(government interest in separation of church and state not sufficiently compelling to uphold law barring minister from holding elected office).

28. *See, e.g.*, Hobbie v. Unemployment Appeals Comm'n of Fla., __ U.S. __, __, 107 S. Ct. 1046, 1049, 99 L. Ed. 2d 190, 197 (1987)(claimant sought exemption from regulation denying unemployment benefits because Sabbath conflicted with work schedule); Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707, 709 (1981)(claimant sought exemption from denial of unemployment benefits where employer required fabrication of weapons in violation of beliefs); Sherbert v. Verner, 374 U.S. 398, 399-400 (1963)(claimant sought exemption from law which denied unemployment benefits for refusal to work on Saturday). *See generally* Note, *Constitutional Law* — Northwest Indian Cemetery Protective Association v. Peterson: *Indian Religious Sites Prevail Over Public Land Development*, 62 NOTRE DAME L. REV. 125, 135 (1986)(courts have found compelling governmental interests in education, family unity, elimination of discrimination, child welfare and discipline).

29. *See* People v. Woody, 394 P.2d 813, 815 (Cal. 1964)(free exercise claim upheld upon proof by Indian defendant that peyote drug law burdened religious practice in absence of compelling need to prevent drug use by Indians). In *Woody*, a Navajo Indian was convicted for using the drug peyote during a religious ceremony. *Id.* at 814-15. The Supreme Court of California applied the *Sherbert/Yoder* test and found that peyote was an object of worship which played a central role in Navajo religion. *Id.* The court also found that Woody would have been coerced into acting contrary to his beliefs if he were subject to the anti-drug law. *Id.* at 817. The court weighed the burden on religion against the government's interest in preventing drug use and found the interest strong, but not compelling enough to justify an infringement on religious practice. *Id.* at 821. *But see* Whitehorn v. State, 561 P.2d 539, 544-48 (Okla. Crim. 1977)(free exercise claim not upheld because defendant did not prove he was Native American Church member). The Oklahoma court of appeals held that religious use of peyote is permitted only if an individual can show formal membership in a Native American Church and thereby establish that his first amendment claim is in good faith. *Id.* at 545. The court affirmed the defendant's conviction, despite oral testimony attesting to his church affiliation, because the church did not keep membership roles. *Id.* at 547-48. *See generally* Note,

laws.[30] Generally, lower federal courts applied the two-prong *Sherbert/Yoder* test as a threshold requirement before an Indian claimant could seek redress.[31] The *Sherbert/Yoder* test requires proof that the law is coercive or penalizing[32] and that the religious practices play a central role in the tribe's spiritual life.[33] Once the *Sherbert/Yoder* test is satisfied, the government must demonstrate that a compelling need exists to regulate the Indians' behavior which outweighs the burden on their religious freedom.[34] Prior to

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Constitutional Law — Religious Freedom and Public Land Use. Wilson v. Block, *708 F.2d 735 (D.C. Cir. 1983)*, 20 LAND & WATER L. REV. 109, 111 (1985)(discussing history of Indian first amendment claims prior to 1980); Note, *Indian Religious Freedom and Governmental Development of Public Lands*, 94 YALE L.J. 1447, 1462 n.71 (1985)(problems for Indians when first amendment claims arise out of non-traditional beliefs).

30. *See* Frank v. State, 604 P.2d 1068, 1073-75 (Alaska 1979)(free exercise claim upheld upon proof by defendant that animal protection law burdened religious practice in absence of compelling need to protect endangered species of animals). In *Frank*, an Athabiscan Indian was convicted of violating an Alaska statute that prohibited the killing and transporting of moose except during certain hunting seasons. *Id.* at 1069. The Supreme Court of Alaska determined that the moose meat was used in a funeral potlatch, which was the most important ceremony of the Athabiscan religion, and that the state interest in the protection of game was strong, but not compelling. *Id.* at 1073-74. *See generally* Rannow, *Religion: The First Amendment and the American Indian Religious Freedom Act of 1978*, 10 AM. INDIAN L. REV. 151, 152 (1983)(laws not intended to directly affect Indians have been amended to permit use of certain controlled substances as result of successful first amendment claims).

31. *See* Wisconsin v. Yoder, 406 U.S. 208, 215 (1972)(establishes centrality prong of first amendment free exercise analysis used by Court); Sherbert v. Verner, 374 U.S. 398, 403-06 (1963)(establishing coercion or penalization prong of modern free exercise analysis). *See generally* Note, *Native American's Access to Religious Sites: Underprotected Under the Free Exercise Clause?*, 26 B.C.L. REV. 463, 463 (1985)(to analyze claim brought under first amendment free exercise clause, Court established balancing test to weigh governmental interest against religious burden); Note, *The First Amendment and the American Indian Religious Freedom Act: An Approach to Protecting Native American Religion*, 71 IOWA L. REV. 869, 871-72 (1986)(lower courts have consistently relied upon Supreme Court's opinion in *Yoder* when analyzing free exercise claims).

32. *See Frank*, 604 P.2d at 1073-75 (court found animal protection law penalized Frank's religious beliefs under *Sherbert* by forcing him to choose between religious practice or criminal penalty); People v. Woody, 394 P.2d 813, 815-18 (anti-drug law burdens Woody's practice of religion by placing penalty on religious practices).

33. *See Frank*, 604 P.2d at 1071 (funeral potlatch plays central role in Athabascan religious practices); *Woody*, 394 P.2d at 817 (peyote plays central part in Native American Church). *See generally* Note, *Constitutional Law: Dubious Intrusions? Peyote, Drug Laws, and Religious Freedom*, 8 AM. INDIAN L. REV. 79, 95 (1980)(author argues centrality approach to free exercise analysis encourages court intervention into religious values).

34. *See Frank*, 604 P.2d at 1073 (government asserted compelling interest in game protection laws which maintained public order). The court stated that it was not enough to conclude that the government's interest in promoting a healthy moose population rose to the level of a compelling state interest. *Id.* The question is whether the asserted governmental interest would suffer if an exception to the law was granted. *Id.* The court concluded that governmental fear of a general non-observance of game laws is insufficient to justify a limit on Indian religious practice. *Id.* at 1074; *see also Woody*, 394 P.2d at 819 (government asserted compel-

1980, the *Sherbert/Yoder* analysis was used primarily in cases involving restrictive governmental statutes.[35]

In 1980, however, the *Sherbert/Yoder* analysis was applied to a new area when the American Indians began challenging, on free exercise grounds, the government's development of public land which the Indians believed to be sacred.[36] Although no existing statute was relied upon by the government to develop public land,[37] courts applied variations of the *Sherbert/Yoder* test,[38]

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ling interest in preventing drug use). In *Woody*, the government alleged a compelling interest in drug use prevention and the enforcement of narcotic laws. *Id.* The court disagreed and found no compelling interest, ruling that the Indians' limited use of peyote presented only a slight danger to the enforcement of anti-drug laws. *Id.* at 821.

35. *See, e.g.*, Teterud v. Burns, 522 F.2d 357, 360 (8th Cir. 1975)(inmate of state penitentiary challenged prison regulation prohibiting long hair on free exercise grounds); United States v. Abeyta, 632 F. Supp. 1301, 1307 (D.N.M. 1986)(Indian who killed eagle in violation of animal protection law sought exemption from punishment under free exercise clause); State v. Soto, 537 P.2d 142, 142-43 (Or. App. 1975)(defendant challenged drug law as unconstitutional restriction on Indian religious practices).

36. *See, e.g.*, Wilson v. Block, 708 F.2d 735, 739 (D.C. Cir. 1983)(claimants seeking to prevent construction of roads, bridges and parking lot in national forest on ground asserted burden on religious practices in violation of free exercise clause); Badoni v. Higginson, 638 F.2d 172, 175 (10th Cir. 1980)(Indian claimant alleged completion of dam project and resulting increase in tourism violative of first amendment right to freely exercise religious practices at sacred site); Sequoyah v. Tennessee Valley Auth., 620 F.2d 1159, 1160 (6th Cir. 1980)(first amendment claim by Indians seeking to prevent expansion of government-owned ski resort); Crow v. Gullet, 541 F. Supp. 785, 787-88 (D.S.D. 1982)(Indians sought to prevent construction of roads, bridges and parking lot in National Forest on free exercise grounds).

37. *See Sequoyah*, 620 F.2d at 1161 (Indian sought injunction to prevent governmental construction). The *Sherbert/Yoder* analysis had traditionally been used by the Court in cases where the claimant sought exemption, for religious reasons, from a law which regulated the claimants' behavior. *See, e.g.*, Braunfeld v. Brown, 366 U.S. 599, 600 (1961)(law prevented claimant from selling retail items on Sunday); Prince v. Commonwealth of Mass., 321 U.S. 158, 161 (1944)(law prevented parents from allowing minor children to sell literature); Reynolds v. United States, 98 U.S. 145, 146 (1878)(statute prevented claimant from engaging in bigamy). In land development cases, however, the claimants are generally not seeking exemption from a law which is directed at the claimant's behavior, but rather are seeking injunctive relief to prevent government activity. *See, e.g.*, Wilson v. Block, 708 F.2d 735, 739 (D.C. Cir. 1983)(Indians seek injunction preventing expansion of government-owned ski area); Crow v. Gullet, 706 F.2d 856, 857 (8th Cir. 1983)(plaintiffs seek declaratory and injunctive relief from development of state park); *Badoni*, 638 F.2d at 175 (Indians seek relief from governmental construction or dam and reservoir project). Therefore, the claimants are not challenging the constitutionality of a law under the first amendment, but rather are seeking judicial relief from the government's power to develop federal land. *Cf.* U.S. CONST. art. IV, § 3 (Congress has power to make rules with respect to all property belonging to United States).

38. *See, e.g.*, *Wilson*, 708 F.2d at 740 (court required Indians to prove mountain peaks central to religious practice); *Badoni*, 638 F.2d at 176 (court found compelling interest in already operating dam project); *Sequoyah*, 620 F.2d at 1161 (court required Native Americans to prove site central to religious practice); *Crow*, 541 F. Supp. at 790 (temporary restriction by construction equipment not permanently burdensome on religion).

and, generally refused to enjoin the government from their proposed developments.[39] In *Sequoyah v. Tennessee Valley Authority*,[40] Cherokee Indians sought to prevent completion of a dam which would flood significant religious sites.[41] Using the centrality prong of the *Sherbert/Yoder* test,[42] the Tenth Circuit found that, while their beliefs were sincere, the Cherokees had failed to prove that worship at the dam site played a central role in their religious practices.[43] The court concluded that cultural impairment represented only an incidental burden on religious practices which is not protected by the first amendment.[44] Thus, the government was not required to

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39. *See, e.g.*, *Wilson*, 708 F.2d at 744-45 (governmental expansion of ski resort not prohibited on first amendment grounds); *Badoni*, 638 F.2d at 178 (court allowed state to complete dam project partially in operation at time suit filed); *Sequoyah*, 620 F.2d at 1164 (court refused to enjoin government from construction of dam project); *Crow*, 541 F. Supp. at 791 (first amendment does not prohibit state from improving tourist area).

40. 620 F.2d 1159 (6th Cir. 1980).

41. *Sequoyah*, 620 F.2d at 1160. The Cherokee Indians sought an injunction to prevent completion of the Tellico Dam on the Little Tennessee River in Monroe County, Tennessee. *Id.* Their complaint alleged that a rise in the water level, causing flooding along the river, would desecrate sacred sites. *Id.* In a similar case, the Navajo and Hopi tribes claimed that the government would burden their religious freedom by expanding a federally-owned ski resort. *Wilson*, 708 F.2d at 737-38. The Indians alleged that the construction would make it impossible to worship without interference from tourists and visitors to the ski area. *Id. See generally* Stambor, *Manifest Destiny and American Indian Religious Freedom: Sequoyah, Badoni and the Drowned Gods*, 10 AM. INDIAN L. REV. 59, 62-72 (1982)(tracing history of Indian free exercise claims to modern court decisions concerning development of public land).

42. *See* Sequoyah v. Tennessee Valley Auth., 620 F.2d 1159, 1163-64 (6th Cir. 1980)(court required Indians to satisfy centrality prong of *Yoder*). The court specifically required the Indians to prove worship at the dam site was sincere, deeply rooted in religion and central to the tribe's spiritual life. *Id.; see also Wilson*, 708 F.2d at 743 (court required Indians to prove site central and indispensable to practices). The *Wilson* Court stated that, if the Indians could not show that the mountain peaks were indispensable to some religious practice, they have not justified a free exercise claim. *Id.*

43. *See Sequoyah*, 620 F.2d at 1163 (sincere religious belief will not alone support first amendment claim because plaintiff must also establish belief deeply held and shared by others). In *Sequoyah*, the court found that the Indians' beliefs were sincere, but did not find that the practice of worshipping at the dam site was a deeply rooted religious practice. *Id.* at 1164. The court reasoned that the two plaintiffs had established use of the site for religious purposes; but had not established that other members of the tribe practiced these particular rituals or visited the site as part of their religion. *Id.*

44. *Id.* at 1165 (complaint asserting irreparable loss to culture and history important but unprotected by free exercise clause of first amendment). The court held that, at most, the claimants had shown that a few tribal members had made use of the area, with their visits being prompted not by religion, but by a desire to learn more about their heritage. *Id.* at 1164. Additionally, the court held that the evidence demonstrated a particular personal belief rather than a belief which was shared by other members of an organized congregation. Finally, the court concluded that the claimants had not established a burden on religion, but rather had established a burden on an historical and cultural area, which is not protected by the first amendment. *Id.*

prove a compelling interest.[45]

In *Badoni v. Higginson*,[46] the United States Court of Appeals for the District of Columbia addressed the coercive element of the *Sherbert/Yoder* analysis, but ultimately decided the case based on a compelling interest argument.[47] The Navajo Indians sued the United States Government alleging that a dam construction project and its resulting recreational activity made it impossible to conduct their religious rituals.[48] Although the court intimated that the Indians should be required to prove coercion or a penalty under *Sherbert/Yoder*, the court found it unnecessary to reach its decision on that basis.[49] Instead, the court found a compelling governmental interest in the existing dam and reservoir, reasoning that the project was crucial to multi-state water and power operations.[50]

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45. *Id.* at 1165 (absent cognizable first amendment right no need for determination of whether government has compelling interest in dam construction). The court concluded that because the Indians lacked a central religious concern, they had failed to establish a burden on their religion. *Id.* at 1164. Consequently, there was no need to balance the Indians' free exercise claim against the government's interest in Tellico Dam. *Id.*

46. 638 F.2d 172 (10th Cir. 1980).

47. *See Badoni*, 638 F.2d at 176-77 (issue of whether governmental action burdens religious practices not reached because court found government's interest in partially completed water storage project compelling). Lake Powell was formed when the government built Glen Canyon Dam on the Colorado River. *Id.* at 177. The resulting rise in the water level flooded parts of Rainbow Bridge National Monument, a natural rock formation which was used by the Indians for religious rituals. The Navajos claimed that the rise in water level had flooded sacred sites and that the increase in tourism made uninterrupted tribal worship impossible. The government asserted a compelling interest in maintaining the water level of Lake Powell. The court ruled in favor of the government, holding that the importance of the dam and reservoir project outweighed the Navajo's religious interest. *Id.*

48. *See id.* at 175-76 (Navajo Indians brought suit to enjoin further construction of dam and reservoir on free exercise challenge). The Indians complained that the increase in tourism frustrated their attempt to worship in private. *Id.* at 177. The court refused to recognize tourism in terms of a burden on the Indians' religious practice. *Id.* at 179. In fact, the court asserted that it was the Indians who attempted to create a burden on the tourists. According to the court, the injunction would penalize tourists by denying them access to a national monument. *Id.*

49. *See id.* at 178 (court recognized that free exercise claim involves two-step analysis). The court set forth the traditional two prong test which required the claimant to prove a coercive governmental act and religious beliefs which are central to worship. *Id.* at 176. The court did not decide if the plaintiffs had met this burden of proof, however, but rather found that the government had proven a compelling interest in the operation of the dam. *Id.* at 177. According to the court, this interest justified any infringement on the claimants' religious practices. *Id.*

50. *See Badoni*, 638 F.2d at 177 (court did not decide whether Navajo Indians had proven governmental coercion but found compelling state interest). Rather than deciding whether the Navajos had met their burden of proof, the court found a compelling governmental interest in the dam. *Id.* at 177 n.7. The court reasoned that removing a multi-state water system which was already operating and planned for completion was not a viable consideration. *Id.* Additionally, the court found the government had a compelling need to assure public

In *Lyng v. Northwest Indian Cemetery Protective Association*,[51] the United States Supreme Court addressed the conflict between the Indians' right to practice religion and the State's need to develop public land.[52] In rejecting the Indians' claim, the Court concluded that the proposed construction did not burden their religious practices to the extent required for first amendment protection.[53] The Court found that the claimant must establish a burden by proving that the governmental action had a coercive or penalizing effect on religious practice.[54] The majority reasoned that the Indians could not establish coercion because the proposed construction did not require them to act contrary to their religious beliefs.[55] Justice O'Connor, writing for the majority, stated that the Indians could not establish a penalty because the government did not prohibit the Indians' access to the site.[56] Consequently, the majority concluded that the Indians had established only an incidental burden on religion which was not protected by the first

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access to the natural monument and a duty to provide for the health and safety of citizens. *Id.* at 179.

51. __ U.S. __, 108 S. Ct. 1319, 99 L. Ed. 2d 534 (1988).

52. *See Lyng*, __ U.S. at __, 108 S. Ct. at 1324, 99 L. Ed. 2d at 544-46 (Indians claimed first amendment protection to practice religion at Chimney Rock while government claimed compelling need for construction project). The Indians sought to prevent the National Forest Service from completing the road by enjoining construction of a connecting segment which would traverse a religious site. *Id.* at __, 108 S. Ct. at 1322, 99 L. Ed. 2d at 543.

53. *Lyng*, __ U.S. at __, 108 S. Ct. at 1325-27, 99 L. Ed. 2d at 546-49. The Court utilized the two prong *Sherbert/Yoder* test under which a plaintiff must prove coercion/penalty and centrality, before requiring proof of a compelling interest. *Id.*

54. *See Lyng*, __ U.S. at __, 108 S. Ct. at 1325, 99 L. Ed. 2d at 546 (governmental action coercing or penalizing individuals because of religious beliefs is burden on religious practice). A coercive burden on religion is established by proving governmental action has coerced a person into violating his religious beliefs. *Id.* Alternately, a penalty on religious practices is established by proving denial of governmental benefits or privileges because of religious practices. *Id.* Once a coercive or penalizing action has been established, the plaintiff has shown that the government action violates the free exercise clause by burdening his religious practices. *Id.* at __, 108 S. Ct. at 1326-27, 99 L. Ed. 2d at 547-48.

55. *Id.* at __, 108 S. Ct. at 1325, 99 L. Ed. 2d at 546 (governmental construction has no coercive effect on Indians' religious practices). A coercive burden is a type of governmental action which coerces the individual into violating his religious beliefs. *Id.* The court found that the challenged construction would significantly hamper the Indians' ability to worship at Chimney Rock, but it did not coerce the Indians into violating their beliefs. *Id.*

56. Lyng v. Northwest Indian Cemetery Protective Ass'n, __ U.S. __, __, 108 S. Ct. 1319, 1325, 99 L. Ed. 2d 534, 546 (1988)(governmental construction has no penalizing effect on Indians' religious practices). A penalizing burden is one which prohibits the practice of religion by denying the claimant economic benefits enjoyed by others. *Id.* at __, 108 S. Ct. at 1326, 99 L. Ed. 2d at 547 (citing *Sherbert v. Verner*, 374 U.S. 398, 404 (1963)). A penalizing burden may also subject the claimant to a criminal penalty for adhering to religious tenets. *See* Frank v. State, 604 P.2d 1068, 1073-75 (Alaska 1979). The Court reasoned that the Indians could not establish a penalty on their religion because the government did not deny them access to the area. *See Lyng*, __ U.S. at __, 108 S. Ct. at 1327, 99 L. Ed. 2d at 549.

amendment.[57]

Additionally, the Court foreclosed the Indians' claim on the basis that the government is not required to conduct its internal procedures in a way that conforms with particular religious beliefs.[58] The Court reasoned that the government's construction of a road is an internal procedure[59] and the free exercise clause does not give an individual the right to tell the government how to conduct its internal procedures.[60] Therefore, because the religious sites were on public land[61] and the development of this land was an internal governmental procedure, the Court concluded that the first amendment was not violated.[62]

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57. *See Lyng*, __ U.S. at __, 108 S. Ct. at 1326, 99 L. Ed. 2d at 547 (Court found Indians established incidental burden on religion). The Court found that governmental programs which make it difficult to practice religion only incidentally burden religious practice. *Id.* In the absence of coercion or penalization, the government is not required to prove a compelling interest. Consequently, any effect the construction may have had on the Indians' ability to practice religion in the Chimney Rock area is incidental and unprotected by the Constitution. *Id. See generally* Comment, *American Indians and First Amendment: Site Specific Religion and Public Land Management*, 1987 UTAH L. REV. 673, 686-91 (1987)(discussing federal court rulings in free exercise claims where Indians oppose development of federal land).

58. *Compare Lyng*, __ U.S. at __, 108 S. Ct. at 1324-27, 99 L. Ed. 2d at 545-548 (claimant has no right to demand government conduct matters in way which furthers religious practices) *with* Bowen v. Roy, 476 U.S. 693, 699-700 (1986)(free exercise clause does not afford individual right to dictate actions of government when conducting internal procedures). The Court refused to distinguish *Lyng* from *Bowen*. *See Lyng*, __ U.S. at __, 108 S. Ct. at 1325-26, 99 L. Ed. 2d at 545-48 (citing *Bowen v. Roy*, 476 U.S. 693, 695 (1986)). In *Bowen*, the Court considered whether a federal statute which required use of a social security number when requesting welfare benefits violated the free exercise clause. *Bowen*, 476 U.S. at 695. The parents of a two year old child contended that their daughter's religious practice was burdened by the use of a numerical identifier that robbed the child of her spirit. *Id.* at 696. The Court held that issuance of a social security number was part of an internal governmental procedure which promoted legitimate state goals. *Id.* at 700. Therefore, the claimant had no right to ask that the government adjust its internal affairs in ways which accommodated his religious beliefs. *Id.* at 699-700.

59. *See Lyng*, __ U.S. at __, 108 S. Ct. at 1325, 99 L. Ed. 2d at 546 (building road cannot be distinguished from government's decision to issue welfare benefits using social security numbers).

60. *See Lyng*, __ U.S. at __, 108 S. Ct. at 1325, 99 L. Ed. 2d at 546 (individual has no right to oversee internal governmental procedures). The Court reasoned that the free exercise clause protects an individual from certain forms of governmental compulsion, but does not afford citizens a right to dictate the conduct of the government's internal matters. *Id.* (quoting *Bowen*, 476 U.S. at 699-700).

61. *See* Lyng v. Northwest Indian Cemetery Protective Ass'n, __ U.S. __, __, 108 S. Ct. 1319, 1321, 99 L. Ed. 2d 534, 542 (1988)(project to create road linking Gasquet and Orleans involved federal land).

62. *See Lyng*, __ U.S. at __, 108 S. Ct. at 1327, 99 L. Ed. 2d at 548 (first amendment gives no citizen power to veto internal governmental programs). The Court quoted *Sherbert v. Verner*, stating that the Constitution is written not in terms of what an individual can take from the government, but in terms of what protection the individual is entitled to receive from

Justice Brennan, joined by Justices Marshall and Blackmun, dissented, stating that the Court should have considered not whether the action coerced or penalized an individual,[63] but whether it burdened a sincere religious belief by making it too difficult to practice that belief.[64] Justice Brennan also disagreed with the majority's classification of road construction as an internal governmental procedure.[65] The dissent reasoned that federal land use, as opposed to filing cabinets and other record keeping apparatus, was subject to public scrutiny.[66] Justice Brennan argued that the decision to build a road through the Indians' religious grounds has a substantial external effect, not only on native Americans, but on society in general.[67]

Lyng indicates that free exercise protection is not extended to Native

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the government. *Id.* at __, 108 S. Ct. at 1326, 99 L. Ed. 2d at 548 (citing *Sherbert*, 374 U.S. at 412).

63. *See Lyng*, __ U.S. at __, 108 S. Ct. at 1339, 99 L. Ed. 2d at 563 (Brennan, J., dissenting) (Court should consider whether construction proposal threatened to frustrate religious practices). The majority disagreed with the dissent's interpretation of *Yoder*. *Id.* at __, 108 S. Ct. at 1329, 99 L. Ed. 2d at 551. The dissent stated that the *Yoder* decision found a burden on the Amish religion because the plaintiffs established that the impact of the education law threatened a sincere, deeply rooted and central religious practice. *See id.* at __, 108 S. Ct. at 1334, 99 L. Ed. 2d at 557-58. The majority asserts that the *Yoder* Court first found a coercive governmental action, and then established the centrality of the practice to the Amish religion. *Id.* at __, 108 S. Ct. at 1329, 99 L. Ed. 2d at 551-52. Accordingly, the impact of the governmental action, in the absence of coercion or penalization, is not an issue. *Id.*

64. *Lyng*, __ U.S. at __, 108 S. Ct. at 1339, 99 L. Ed. 2d at 563 (Brennan, J., dissenting). Justice Brennan argued that road construction would have a destructive impact on the Indians' ability to worship at Chimney Rock. *Id.* at __, 108 S. Ct. at 1334, 99 L. Ed. 2d at 557-58. Therefore, physical impact should be considered a form of governmental penalization which burdens the Indian religious practice. *Id.*

65. *See Lyng*, __ U.S. at __, 108 S. Ct. at 1336, 99 L. Ed. 2d at 559-62 (Brennan, J., dissenting) (building road distinguishable from internal governmental procedures). Justice Brennan would distinguish *Bowen* from *Lyng*. *Id.* In *Bowen*, the Court likened the issuance of a social security number to other internal governmental procedures, including the selection of filing cabinets and record keeping apparatus. According to Justice Brennan, these matters are internal because they deal with the processing of information. The decision to develop federal land, however, is likely to have substantial external effects on society, unlike decisions concerning office equipment. *Id.*

66. Lyng v. Northwest Indian Cemetery Protective Ass'n, __ U.S. __, __, 108 S. Ct. 1319, 1336, 99 L. Ed. 2d 534, 559-62 (1988)(Brennan, J., dissenting) (public challenges to federal land use decisions nonexistent for purely internal procedures like office equipment purchases).

67. *See Lyng*, __ U.S. at __, 108 S. Ct. at 1336-37 n.5, 99 L. Ed. 2d at 560-61 n.5 (Brennan, J., dissenting) (federal land use decision has external effect of constitutional magnitude). *Compare* Bowen v. Roy, 406 U.S. 693, 697 (1986)(objection to use of social security number for welfare purposes was objection to internal governmental process over which claimant had no first amendment right) *with Lyng*, __ U.S. at __, 108 S. Ct. at 1325, 99 L. Ed. 2d at __ (building of road cannot be distinguished from use of social security number by government).

Americans who protest development of public land.[68] However, the rationale applied by the Court raises doubts about the validity of its holding. The majority's analysis frustrates the Indians' first amendment challenge to governmental construction by failing to recognize a legal relationship between the government's action and its impact on the religious interests at stake.[69] In his dissent, Justice Brennan, although recognizing the need to provide access to and protection of sacred sites on federal land, enunicated a test which did not contain sufficient constraints.[70] In the alternative, more focus upon centrality and less focus upon governmental proof of compelling need would allow access to the courts for the Indians, yet not constitute an ex-

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68. *See Lyng*, __ U.S. __, 108 S. Ct. at 1325-26, 99 L. Ed. 2d at 546-47 (Indians have failed to prove burden on religion which falls under protection of free exercise clause). The court stated that the government's decision to build the G-O road did not coerce the Indians into actions which were contrary to their religious beliefs. *Id.* The court reasoned that the construction would not penalize religious practices because the Indians were not denied an equal share of the rights enjoyed by other citizens. Being unable to prove either coercion or penalty, any infringement on the Indians' religion was incidental and unprotected by the first amendment. *Id.* at __, 108 S. Ct. at 1326, 99 L. Ed. 2d at 547. Therefore, because Indians cannot meet the coercion/penalty test, they do not have a judicially recognizable claim. *Id.*

69. *See Lyng*, __ U.S. at __, 108 S. Ct. at 1325, 99 L. Ed. 2d at 546 (physical destruction of religious site not protected by first amendment in absence of coercive or penalizing governmental action). The majority would recognize a religious burden only upon proof that the claimant himself had been coerced or penalized by governmental action. *Id.* The Court held that the Indians did not meet this burden of proof because the governmental construction did not coerce acts contrary to their religious beliefs or prohibit access to the site. *Id.* The fact that the site would be substantially altered by construction was recognized by the majority, but dismissed as an incidental burden on religion which was unprotected by the first amendment. *Id.* at __, 108 S. Ct. at 1326, 99 L. Ed. 2d at 547. Therefore, by refusing to find a constitutional link between the government's action and the religious site itself, the majority essentially leaves the Indians without protection against the physical destruction of their traditional worship site. *Id.* at __, 108 S. Ct. at 1330, 99 L. Ed. 2d at 553 (Brennan, J., dissenting). *Compare Lyng*, __ U.S. at __, 108 S. Ct. at 1325-26, 99 L. Ed 2d at 546-47 (majority bars no protection if neither coerced nor penalized by the government's action) *with Lyng*, __ U.S. at __, 108 S. Ct. at 1329, 99 L. Ed. 29 at 547 (dissent recognizes traditional worship site may be physically destroyed by roadway construction).

70. *See Lyng*, __ U.S. at __, 108 S. Ct. at 1330, 99 L. Ed. 2d at 550 (Brennan, J., dissenting) (Native Americans should be protected from governmental development of federal land upon proof that sincere belief threatened). Justice Brennan would require the government to present a compelling state interest upon proof by the Indian claimant that his belief was sincere and that the governmental construction posed a substantial and real threat to the ability to physically practice religious rituals. *Id.* This test is too permissive in that it incorporates only the sincerity element of the *Yoder* centrality analysis. *See* Wisconsin v. Yoder, 406 U.S. 205, 215-16 (1972). Under the *Yoder* first amendment analysis, the claimant must prove his belief is sincere, deeply rooted in religion and shared by others of the same denomination. *Id.* Justice Brennan's focus on sincerity weakens the test and would allow a claimant access to first amendment protection upon the mere proof that his personal belief is genuine. *See Lyng*, __ U.S. at __, 108 S. Ct. at 1330, 99 L. Ed. 2d at 553 (Brennan, J., dissenting).

treme limitation on the development of public land.[71] As another possibility, American Indians may consider challenging the development of public land on equal protection grounds rather than the first amendment free exercise grounds rejected in *Lyng*.[72]

Initially, the majority asserted that it would recognize a burden on religious practice only in the presence of governmental coercion or penalty.[73] The majority disagreed with Justice Brennan's contention that a penalty can be shown by proof that the governmental action makes the practice of religion more difficult.[74] The majority maintains that a burden on the practice

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71. *Compare* Lyng v. Northwest Indian Cemetery Protective Ass'n, __ U.S. __, __, 108 S. Ct. 1319, 1339, 99 L. Ed. 2d 534, 563 (1988)(Brennan, J., dissenting) (claimants challenging development of federal land should be required to show sincere and genuine beliefs) *with Yoder*, 405 U.S. at 416 (claimants challenging governmental action must prove threatened religious practice is sincere, deeply rooted in religion and shared by others of same denomination). The centrality test would raise the burden of proof and ensure that the threatened religious practice is participated in by others. *Id.* In addition, the government's burden of proof would be lowered to compensate for the reduction in the Indians' requirements to bring a claim. *Compare Lyng*, — U.S. at __, 108 S. Ct. at 1339, 99 L. Ed. 2d at 563 (Brennan, J., dissenting) (upon proper showing by claimant burden shifts to government to prove compelling interest justifying act) *with* Craig v. Boren, 429 U.S. 190, 197 (1976)(upon proper proof by claimant government must prove action serves important governmental objective). This lower standard of proof would prevent the claimants from enjoining important construction projects. *Id.*

72. *See* City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 439 (1985)(Constitution mandates that all persons similarly situated should be treated alike). The Supreme Court has recognized an equal protection component in the fifth amendment which applies to the federal government. *See* Schweider v. Wilson, 450 U.S. 221, 226 n.6 (1981)(federal government held to same standard through fifth amendment as fourteenth amendment requires of states). Native Americans are similarly situated with other traditional religious adherents in that both have long-standing religious beliefs and customs. *See* Worchester v. Georgia, 31 U.S. 515, 561 (1832)(Indians entitled to same protections as other citizens). The location of worship is not vital to most religions, whereas Native Americans believe it is essential. *See* Note, *Indian Religious Freedom and Governmental Development of Public Land*, 94 YALE L.J. 1447, 1448-50 (concept that belief may be divorced from specific site of worship is not applicable to Indian religions). The discrimination arises because, although the governmental construction project would not harm most religions, it would physically destroy Indian religious practices. *See Lyng*, __ U.S. at __, 108 S. Ct. at 1331, 99 L. Ed. 2d at 553-54 (land itself possesses spiritual significance which will be destroyed by road construction).

73. *See Lyng*, __ U.S. at __, 108 S. Ct. at 1325, 99 L. Ed. 2d at 546. Claimant must prove the opposed action coerces him to violate religious beliefs or that the government act penalizes religious practice through deprivation of benefits enjoyed by others. *Id.*

74. *See Lyng*, __ U.S. at __, 108 S. Ct. at 1326, 99 L. Ed. 2d at 547 (court unwilling to consider impact of governmental act in absence of coercion or penalty). The majority stated that the line between religious freedom and governmental conduct cannot depend upon the impact that the state action has on a claimant's religious practice. *Id.* To show a burden which penalizes religious practices, the plaintiff must prove a deprivation of rights, benefits and privileges which others are free to enjoy. *Id.* at __, 108 S. Ct. at 1325, 99 L. Ed. 2d at 546. Consequently, the majority asserts that the dissent would improperly rely on a factual inquiry

of religion exists only where the government has taken action directed at regulating the claimant's behavior.[75] Therefore, a claimant can only protest government regulation where it burdens religion through its coercive or penalizing effect.[76] It is unclear whether a claimant must also satisfy the centrality test of *Yoder*.[77] If the claimant satisfies *Sherbert*, however, it is clear that the government will be forced to prove a compelling need for the action.[78]

The majority's analysis in *Lyng* relegates the centrality prong of the *Sherbert/Yoder* test to an incidental consideration.[79] As a result, the entire focus

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as to the degree the claimant's practices would be rendered ineffective if the "G - O Road" were built. *Id.*

75. *Id.* (coercion or penalty by governmental action required). The Supreme Court has required first amendment free exercise claimants to prove that the opposed governmental action has a coercive or penalizing effect on the claimant. *See, e.g.*, Hobbie v. Unemployment Appeals Comm'n of Fla., __ U.S. __, __, 107 S. Ct. 1046, 1050-51, 94 L. Ed. 2d 190, 197-200 (1987)(Court required claimant to prove denial of unemployment benefits penalized religious practices where claimant refused to work on Saturday); Thomas v. Review Bd. Ind. Employment Sec. Div., 450 U.S. 707, 717-18 (1981)(denial of unemployment benefits CsCto applicant whose religion forbade fabrication of weapons penalized claimant by burdening religious practice); Wisconsin v. Yoder, 406 U.S. 205, 213 (1972)(compulsory education law had coercive effect on Amish children whose religious practice required educating children at home); Sherbert v. Verner, 374 U.S. 398, 403-06 (1963)(state law denying unemployment benefits unlawfully penalized Seventh Day Adventist who refused to work on Sabbath); Braunfeld v. Brown, 366 U.S. 599, 607-08 (1961)(Court required Jewish claimant to prove Sunday closing law coerced or penalized religion).

76. *See Sherbert*, 374 U.S. at 403-04 (government action unlawfully burdens religion by compelling individual to act contrary to beliefs or penalizing individual for practicing religion); *see also* Lyng v. Northwest Indian Cemetery Protective Ass'n, __ U.S. __, __, 108 S. Ct. 1319, 1326, 99 L. Ed. 2d 534, 547 (1988)(no burden on religious practices in absence of governmental coercion or penalty).

77. *Compare Lyng*, __ U.S. at __, 108 S. Ct. at 1329, 99 L. Ed. 2d at 551-52 (nothing in *Yoder* to support proposition that "impact" on Amish religion would have been at issue had statute not been coercive) *with* Wisconsin v. Yoder, 406 U.S. 205, 216 (1971)(record abundantly supports claim that traditional life of Amish not merely matter of personal preference but central to belief). It appears that the Court, upon a finding of coercion by a governmental entity, will continue to assess the impact of that coercion on the religious practice before determining the compelling nature of the governmental act. *See Lyng*, __ U.S. at __, 108 S. Ct. at 1329, 99 L. Ed. 2d at 551-52. The majority, however, in its criticism of the dissent's alternative to solely apply centrality in cases similar to the instant case, thereby intimates that the majority would relegate its first amendment analysis to the issue of whether coercion or a penalty exists, without addressing the centrality issue created by *Yoder*. *See id.*

78. *Compare Braunfeld*, 366 U.S. at 603-04 (religious practices may be restricted where government established compelling interest in protecting health, safety and welfare of society) *with Lyng*, __ U.S. at __, 108 S. Ct. at 1327, 99 L. Ed. 2d at 548 (burden shifted to government to prove compelling need for action where claimant established governmental coercion or penalty).

79. *See Lyng*, __ U.S. at __, 108 S. Ct. at 1325, 99 L. Ed. 2d at 546 (only incidental burden on religion shown). Because the majority focuses on the first prong of the *Sher-*

in a free exercise challenge will be on how the action affects the claimant individually,[80] instead of how the governmental action affects the claimant's religious practice.[81] Consequently, a federal land use decision may, in reality, obstruct an entire religion without being declared a burden on its practice.[82]

The Court could have achieved the same result by acknowledging that the Indians established a burden on their religion, and then concluding that a compelling interest by the government in completing the construction project through Chimney Rock was present.[83] This traditional first amendment approach would have forced the Court to place the burden on the government to prove a compelling interest in connecting these two California towns through the sacred land.[84] In subsequent cases, the Court would then be

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bert/Yoder test, their decision in effect bars the Indian claimant from ever reaching the second prong of the test, centrality. *Id.* The Court held that a first amendment claimant must prove coercion or penalty before it will recognize a principle which justifies upholding a free exercise claim. *Id.* at __, 108 S. Ct. at 1326, 99 L. Ed. 2d at 547-48. Applying this analysis to the *Lyng* case, the Court ruled that the claimants were unable to prove either coercion or penalty. *Id.* at __, 108 S. Ct. at 1325, 99 L. Ed. 2d at 546. Therefore, according to the majority, any burden on the Indians' religion was incidental and constitutionally unprotected. *Id.* at __, 108 S. Ct. at 1326, 99 L. Ed. 2d at 547. Having failed this burden of proof, the claimants did not have access to the centrality prong of the *Sherbert/Yoder* analysis. *Id.* Therefore, the centrality prong plays a very insignificant role in the majority's reasoning. *Id.*

80. *See id.* (first amendment claimant must prove governmental action coerced or penalized individual).

81. *See Lyng*, __ U.S. at __, 108 S. Ct. at 1326, 99 L. Ed. 2d at 548 (physical impact of road upon Indians' ability to practice does not provide justification for free exercise claim). The Court hypothetically assumed the worst scenario, that the road would destroy Chimney Rock's religious value, yet still refused to recognize a burden on religious practices. *Id.* at __, 108 S. Ct. at 1326-27, 99 L. Ed. 2d at 548.

82. *Compare* Lyng v. Northwest Indian Cemetery Protective Ass'n, __ U.S. __, __, 108 S. Ct. 1319, 1332, 99 L. Ed. 2d 534, 555 (1988)(Brennan, J., dissenting) (Forest Service report concluded construction would cause irreparable harm to sacred ground which is integral, necessary part of Indians' spiritual and social life) *with Lyng*, __ U.S. at __, 108 S. Ct. at 1325, 99 L. Ed. 2d at 546 (Constitution will not protect individual in free exercise claim in absence of governmental action coercing or penalizing individual).

83. *See Lyng*, __ U.S. at __, 108 S. Ct. at 1322, 99 L. Ed. 2d at 542-43 (court could have accepted recommendation of Forest Service's own study which advised against construction). The majority should have adopted Justice Brennan's dissent, which suggested that a destructive impact on religious practice burdens the free exercise of religion under the first amendment. *See id.* at __, 108 S. Ct. at 1339, 99 L. Ed. 2d at 563 (Brennan, J., dissenting). Once the Indians had established this burden, the Court would apply the compelling interest test to the construction project. *Id.*

84. *See Lyng*, __ U.S. at __, 108 S. Ct. at 1333, 99 L. Ed. 2d at 557 (Brennan, J., dissenting) (Court must test sufficiency of governmental interest). The Court did not suggest that the Forest Service had a compelling interest in the construction project. *Id.* at __, 108 S. Ct. at 1333, 99 L. Ed. 2d at 557 (Brennan, J., dissenting). Rather, the Court declined to find the Indians had proven a burden on religious practice. *Id.* at __, 108 S. Ct. at 1325, 99 L. Ed.2d at 546. Consequently, the Court did not reach this issue. *Id.*

forced to determine if the State had a compelling interest in similar situations of land development opposed by Native Americans (or other site-specific religious groups) on free exercise grounds.[85] By refusing to recognize that the project imposed a burden on the Indians' religious practices in the absence of coercion or penalty, and by classifying land development as an internal governmental function, the Court has effectively eliminated future claims based on similar development projects on government land.[86]

Justice Brennan's dissent suggests another analysis which the Court may have applied to the instant case.[87] Justice Brennan urged the Court to find a

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85. *See, e.g.*, Gillette v. United States, 401 U.S. 437, 461-62 (1971)(governmental interest in defending country outweighed religious objection to serving in particular war); Braunfeld v. Brown, 366 U.S. 599, 606-07 (1961)(compelling governmental interest in maintaining day of rest outweighed claimants religious interest); Prince v. Commonwealth of Mass., 321 U.S. 158, 167 (1944)(compelling interest in protecting children outweighed right of free exercise of religion). Several factors, not discussed by the Court, may have contributed to their decision. *See* Note, *The American Indian Religious Freedom Act — An Answer to the Indians Prayers?*, 29 S.D.L. REV. 131, 132-33 (1983). Contrary to the religion of western civilization, the Indians believe their deities reside in specific geographic sites. *Id.* Because their gods are not omnipresent, places of worship cannot be moved. *Id.* Second, to hold public use violative of the free exercise clause would force the Court to decide land management cases which traditionally have been addressed by other branches of government. *See* Note, *Constitutional Law — Religious Freedom and Public Land Use.* Wilson v. Block, *708 F.2d 735 (D.C. Cir. 1983)*, 20 LAND & WATER L. REV. 109, 118 (1985). Third, the Court avoids making an actual determination as to what is valuable to religious practice. *See* Lyng v. Northwest Indian Cemetery Protective Ass'n, __ U.S. __, __, 108 S. Ct. 1319, 1330, 99 L. Ed. 2d 534, 552.

86. *See* Sherbert v. Verner, 374 U.S. 378, 404-06 (1963)(first amendment claimant must show governmental coercion or penalization before burden shifted to government to show compelling need); *see also Lyng*, __ U.S. at __, 108 S. Ct. at 1325-26, 99 L. Ed. 2d at 546-47 (Indians unable to prove governmental construction was coercive or penalizing). Because the Indians were unable to prove a coercion or penalty on their religious practices which resulted from the government's decision to develop Chimney Rock, it appears that similar claimants will also fail the coercion/penalty test. *Id.* The impact of the majority's holding of *Lyng* lies not only in the majority's opinion, but also in the dicta of the decision. *See Lyng*, __ U.S. at __, 108 S. Ct. at 1328, 99 L. Ed. 2d at 550. The Court held that free exercise claimants must prove governmental coercion or penalization to establish a burden on religious practice. *See id.* at __, 108 S. Ct. at 1325, 99 L. Ed. 2d at 546. This language seems to create a bright-line rule which is universally applicable to free exercise plaintiffs. *Id.* Dicta in the case, however, indicates that the majority's decision was influenced by the particular factual situation in *Lyng*. *See id.* at __, 108 S. Ct. at 1328, 99 L. Ed. 2d at 550. The Court emphasized that the National Forest Service had taken numerous steps to minimize the impact that construction of the "G - O Road" would have on the Chimney Rock area. *Id.* It is unclear whether this emphasis creates a duty upon the government to consider alternative plans whenever Native Americans historically practice religion on public land which has been slated for development. *See id.*

87. *See* Lyng v. Northwest Indian Cemetery Protective Ass'n, __ U.S. __, __, 108 S. Ct. 1319, 1339, 99 L. Ed. 2d 534, 563 (1988)(Brennan, J., dissenting) (claimants challenging proposed use of federal land must show decision poses substantial threat to religious practice and sincere religious belief). Justice Brennan states that the Court's use of the coercion penalization test erroneously turns on a distinction between governmental action compelling conduct

burden on religion when land development threatens to physically frustrate religious practices.[88] The government would then be required to proffer a compelling interest in the action.[89] Justice Brennan's analysis, however, dismantles the centrality prong of the *Sherbert/Yoder* analysis, reducing the threshold for a free exercise violation.[90] Applying Brennan's reasoning, the claimant need only prove that a sincere religious practice is being threatened by State action to satisfy the *Sherbert/Yoder* test.[91] Consequently, the Indians would have a valid first amendment claim even though the threatened practice does not play a central role in their religion.[92]

A more judicially sensitive approach to *Lyng* is to utilize the entire centrality prong of *Yoder*, but reduce the level of scrutiny applied to the State's interest from a compelling interest standard to a more moderate standard.[93]

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which is inconsistent with religious beliefs and governmental action which prevents conduct that is consistent with religious beliefs. *See id.* at __, 108 S. Ct. at 1335, 99 L. Ed. 2d at 558-59.

88. *See Lyng*, __ U.S. at __, 108 S. Ct. at 1339, 99 L. Ed. 2d at 563 (Brennan, J., dissenting) (governmental action that makes religious practice more difficult necessarily penalizes practice and thereby eliminates ability to engage in religious belief). Justice Brennan believes that the majority's refusal to consider the physical effects of the road on the Indians is a less than adequate interpretation of first amendment analysis. *Id.*

89. *See Lyng*, __ U.S. at __, 108 S. Ct. at 1338, 99 L. Ed. 2d at 563 (Brennan, J., dissenting) (government must prove compelling need for action). Under Justice Brennan's analysis, upon proper proof of a religious burden by the claimant, the burden would shift to the government to prove a compelling need for the proposed action. *Id.* This is identical to the traditional *Sherbert/Yoder* first amendment analysis. *See* Sherbert v. Verner, 374 U.S. 400, 407 (1963)(justification for religious infringement by statute considered after proof by claimant of religious burden); *see also* Wisconsin v. Yoder, 406 U.S. 205, 219-20 (1972)(upon proof by Amish of religious burden, Court required government to prove interest in compulsory education law compelling).

90. *Compare Lyng*, __ U.S. at __, 108 S. Ct. at 1339, 99 L. Ed. 2d at 563(Justice Brennan suggests that Native Americans must prove genuine and sincere beliefs) *with Yoder*, 406 U.S. at 216 (first amendment claimants must prove centrality in that beliefs sincere, deeply rooted in religion and shared by others of same denomination). Justice Brennan would require the plaintiff to satisfy only the sincerity element of the traditional *Yoder* test. *See Lyng*, __ U.S. at __, 108 S. Ct. at 1339, 99 L. Ed. 2d at 563 (Brennan, J., dissenting).

91. *See Lyng*, __ U.S. at __, 108 S. Ct. at 1339, 99 L. Ed. 2d at 563 (Brennan, J., dissenting) (burden shifts to government to prove compelling interest upon showing by claimant of sincere belief).

92. Lyng v. Northwest Indian Cemetery Protective Ass'n, __ U.S. __-, __, 108 S. Ct. 1319, 1339, 99 L. Ed. 2d 534, 563 (1988)(Brennan, J., dissenting); *see also* Wilson v. Block, 708 F.2d 735, 740 (D.C. Cir. 1983)(court found Native Americans' belief in sanctity of mountain peaks sincere, but dismissed complaint based on lack of proof that worship at site essential part of religious life). If the *Lyng* majority had adopted Justice Brennan's sincerity test, it appears that the *Wilson* plaintiffs would have satisfied their burden of proof. *See Lyng*, __ U.S. at __, 108 S. Ct. at 1339, 99 L. Ed. 2d at 563 (Brennan, J., dissenting).

93. *See Lyng*, __ U.S. at __, 108 S. Ct. at 1330, 99 L. Ed. 2d at 553 (Brennan, J., dissenting) (suggesting sincerity element of *Yoder* and compelling interest test); *see also* Comment, *American Indian and the First Amendment: Site-Specific Religion and Public Land Management*, 1987 UTAH L. REV. 673, 698-700 (incidental burdens imposed on religion by govern-

Once a claimant has established under the *Yoder* centrality prong that the religious practice is sincere, deeply rooted in religion and shared by others of the same denomination, the government should be required to show some justification for its proposed action.[94] The justification would be similar to equal protection "intermediate scrutiny" which requires the governmental act to be substantially related to an important governmental interest.[95] This reduced level of judicial review would force the Court to examine the effects of government construction projects on religion rather than rely on the coercion/penalization prong of *Sherbert* to forestall challenges.[96] Additionally, this approach would limit the extent to which first amendment claimants may spuriously prevent development of large tracts of government land.[97]

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ment should require less justification than compelling interest test). A reasonable test would require the means to be substantially related to an important governmental interest. *Id.*

94. *See* City of Cleburne v. Cleburne Living Center, Inc., 437 U.S. 432, 439-42 (1985)(discussing standards of judicial review for governmental action). The Supreme Court has used a lower standard than the compelling interest test to address governmental acts. *See* Trimble v. Gordon, 430 U.S. 762, 763 (1977)(held classifications based on illegitimacy not required to survive strict scrutiny test); *see also* Glona v. American Guarantee & Liability Ins. Co., 391 U.S. 73, 81-82 (1968)(Harlan, J., dissenting) (although classification based on illegitimacy need not be based on compelling state interest, more than mere rational relationship for classification required). *See generally* Comment, *Still Newer Equal Protection: Impermissible Purpose Review in the 1984 Term*, 53 U. CHI. L. REV. 1454, 1456-58 (1986)(middle tier analysis created for quasi-suspect classifications).

95. *See* Craig v. Boren, 429 U.S. 190, 199 (1976)(middle level scrutiny applied in equal protection cases under fourteenth amendment where gender-based classifications involved); *see also* R. ROTUNDA, J. NOWAK & J. YOUNG, TREATISE ON CONSTITUTIONAL LAW 127 (1986)(intermediate level of scrutiny serves as viable basis of review in equal protection challenges). The intermediate level of scrutiny allows the government to employ gender based classification so long as it is a reasonable means of achieving substantial government ends. *Id.*

96. *See Lyng*, __ U.S. at __, 108 S. Ct. at 1325, 99 L. Ed. 2d at 546 (requiring claimant to prove coerced into behavior contrary to religious beliefs or penalization for practicing belief under *Sherbert* test). Using only the *Sherbert* prong of the *Sherbert/Yoder* analysis, the Court found merely an incidental burden on religion which is not protected by the first amendment. *Id.* Consequently, despite evidence that petitioners were physically precluded from practicing their religion, the majority ruled that the government had done nothing to burden the Indians' religious practice under the first amendment. *Id.*

97. *See, e.g.*, Mills v. Habvetzel, 456 U.S. 91, 94 (1982)(government failed to prove statute requiring father of illegitimate child to establish proof of paternity before age of one relates to legitimate state interest); Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 723-24 (1981)(state failed to prove statute excluding males from state-supported nursing school relates to important governmental interest); Craig v. Boren, 429 U.S. 190, 191-92 (1976)(government failed to prove statute prohibiting sale of 3.2 percent alcohol to males under twenty-one years of age and to females under eighteen was substantially related to an important governmental objective). This intermediate standard of review is less burdensome on the government than the strict scrutiny standard of review. *Compare* City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 440 (1985)(strict scrutiny requires classification serve compelling state interest) *and* Palmore v. Sidoti, 466 U.S. 429, 432 (1984)(classification based upon race subject to exacting scrutiny) *with* Kirchberg v. Feenstra, 450 U.S. 455, 460 (1981)(gender-based classifi-

In the future, Native Americans should allege, in the alternative, an equal protection cause of action to oppose development of public land.[98] The United States Constitution mandates that the government treat similarly situated individuals in a similar manner.[99] Native Americans are similarly situated with non-Indians in their commitment to their religion.[100] They are not similarly treated, however, because they are, in fact, restricted in their religious activities.[101] Non-Indians are allowed to freely engage in their reli-

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cation must be tailored to further important governmental interest) *and* Glona v. American Guarantee Co., 391 U.S. 73, 81-82 (1968)(Harlan, J., dissenting) (classification based upon illegitimacy need not be based upon compelling interest). However, intermediate scrutiny places a burden on the government to show more than a rational relationship to a legitimate governmental interest. *Compare* Mills v. Habvetzel, 456 U.S. 91, 99 (1982)(illegitimacy classification must substantially relate to legitimate state interests) *and* Reed v. Reed, 404 U.S. 71, 76 (1971)(gender classification must be reasonable and substantially related to legislation) *with* Schweiker v. Wilson, 450 U.S. 221, 230 (1981)(economic classifications justified if rationally related to legitimate governmental interest) *and* United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 174-75 (1980)(Constitution not violated where economic or social act has reasonable relation to classification). Therefore, by using the intermediate scrutiny standard of review, as opposed to no standard, the first amendment claimant will not be able to prohibit development of large tracts of federal land for frivolous reasons. *Cf.* Petition for Writ of Certiorari at 25, Northwest Indian Cemetery Protective Ass'n v. Peterson, 795 F.2d 688 (9th Cir. 1986)(No. 86-1013) (government owns approximately 726 million acres of land within United States, 570 million within circuit where lawsuit originated). *Id.*

98. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 50 (1978) (fifth amendment equal protection shields Native Americans from discriminatory government actions); *see also* United States v. Antelope, 430 U.S. 641, 642 (1977)(federal government will treat Indians in same manner as all other persons under federal jurisdiction); Queets Band of Indians v. State of Washington, 765 F.2d 1399, 1403-06 (9th Cir. 1985)(governmental classification subject to strict scrutiny under equal protection clause when discriminatory effect on Native Americans).

99. U.S. CONST. amend V. The fifth amendment states that no person shall "be deprived of life, liberty, or property without due process of law." *Id.; see also* Shapiro v. Thompson, 394 U.S. 618, 642 (1969). While there is no equal protection language in the Constitution that is expressly applicable to the federal government, equal protection is implied by the due process clause of the fifth amendment. *Id.*; *see also* Schneider v. Rusk, 377 U.S. 163, 168 (1964)(federal statute that discriminates by status of citizen denies equal protection); Bolling v. Sharpe, 347 U.S. 497, 499 (1954)(due process and equal protection analysis mutually exclusive).

100. *See* Suagee, *American Indian Religious Freedom and Cultural Resources Management: Protecting Mother Earth's Caretakers*, 10 AMER. INDIAN L. REV. 1, 9-10 (1982)(religion is core of Indian culture with continuing welfare of people depending upon rituals being properly performed); Note, *Indian Religious Freedom and Governmental Development of Public Lands*, 94 YALE L.J. 1447, 1448-49 (1985)(Judeo-Christian worship focuses on a spiritual event; Indian worship focuses on place where event occurred).

101. *See Lyng*, __ U.S. at __, 108 S. Ct. at 1325, 99 L. Ed. 2d at 546 (free exercise clause of first amendment did not prohibit road construction through Native Americans traditional religious site). *See generally* J. CAMPBELL, THE MASKS OF GOD: CREATIVE MYTHOLOGY 5-6 (1968)(Native American religion may be destroyed when natural site upon which it is founded is physically altered); Note, *Indian Religious Freedom and Governmental Development of Public Lands*, 94 YALE L. REV. 1447, 1448-52 (1985)(discussing protection of access to sacred Indian sites on federal land).

gious activities because the location of worship is not crucial to their ability to practice their religion.[102] In contrast, Indians believe that the place where deities reside is of exclusive significance.[103] Consequently, the Indians cannot meet the *Sherbert/Yoder* test because of the form of their religion and are thereby denied the right to freely practice their religion.[104] Thus, Native Americans wishing to oppose development of federal land on religious grounds should allege an equal protection claim, in addition to a first amendment free exercise claim, in order to force the Court to weigh the interests under the compelling interest test.[105]

The majority's restrictive application of *Sherbert/Yoder* curtails Native Americans' opportunity to successfully litigate first amendment free exercise claims when opposing the development of federal land. The dissent's application of *Sherbert/Yoder* is not a viable alternative because it does not appropriately recognize state interests. The more judicially sensitive approach is to continue requiring that the plaintiff substantiate centrality by proving his belief is sincere, deeply rooted in his religion and a central part of his denomination's religious activity. To be successful in future opposition to development of federal lands, Native Americans should allege equal protection in addition to first amendment causes of action. Discrimination should be established by focusing on the disparate treatment afforded Native Americans in comparison to other worshippers because of the culturally distinct nature of their religious practice. This form of discrimination is tantamount to classifying Native Americans on grounds such as race and natural origin, and therefore, should be subject to strict scrutiny by the Court. Equal pro-

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102. *See generally* Note, *Indian Religious Freedom and Governmental Development of Public Lands*, 94 YALE L.J. 1447, 1448-49 (1985)(analyzing concept of supreme being and immortal deity worship).

103. *See Lyng*, __ U.S. at __, 108 S. Ct. at 1322, 99 L. Ed. 2d at 542 (Forest Service report conceded Indians believe gods resided in Chimney Rock and road construction would destroy spirits). *See generally* Suagee, *American Indian Religious Freedom and Cultural Resources Management: Protecting Mother Earth's Caretakers*, 10 AM. INDIAN L. REV. 1, 9-12 (1982)(tribal religion profoundly different from major religions because non-Indian religions commemorate sacred events rather than nature).

104. *See Lyng*, __ U.S. at __, 108 S. Ct. at 1332, 99 L. Ed. 2d at 545 (Court denied first amendment claim). The Court recognized that successful religious use of Chimney Rock depended upon the quiet solitude of a natural setting. *Id.* Additionally, the Court recognized that the construction would potentially destroy the Indians ability to worship at the site. *Id.* Yet, in the absence of coercion or penalization in the form of a government action, the claimant will not prevail. *See id.* at __, 108 S. Ct. at 1325, 99 L. Ed. 2d at 546.

105. *See* Yick Wo v. Hopkins, 118 U.S. 356, 369, 374 (1886)(when discrimination proven by circumstances, state must prove compelling interest for action); *see also* Wygant v. Jackson Bd. of Educ., __ U.S. __, __, 106 S. Ct. 1842, 1846, 90 L. Ed. 2d 260, 268 (1986)(violation of fifth amendment equal protection clause is arbitrary use of governmental power absent compelling interest).

tection may allow Native Americans to preserve their traditional heritage in a predominately non-Indian country.

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