Ninth Circuit Decides "*Snowbowl*" Case, Drawing Ascertainable Lines Under Religious Freedom Restoration Act and NEPA

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On August 8, 2008, a divided U.S. Court of Appeals for the Ninth Circuit issued its *en banc* decision in *Navajo Nation v. United States Forest Service*, 535 F.3d 1058 (9th Cir. 2008), rejecting the claims of several Indian tribes that the use of reclaimed water for snowmaking purposes on the San Francisco Peaks north of Flagstaff, Arizona would spiritually contaminate those mountains and devalue the Tribes' religious experience and religious uses of the peaks in violation of the Religious Freedom Restoration Act ("RFRA"). The opinion is significant because it draws an objectively identifiable line between activities that burden Native Americans' exercise of religion and those that do not. The opinion also adopts a 3-member panel's remarks concerning NEPA analysis of cultural and historic properties involving tribal religious beliefs and practices.

Physical Effects Versus Impacts to Subjective Religious Experiences under RFRA

The 9-member majority opinion rejects the Tribal plaintiffs' claims of interference with religious practice. 535 F.3d at 1063. As the opinion explained, the Tribal plaintiffs "contend that the use of recycled waste water to make artificial snow for skiing on the Arizona Snowbowl, a ski area that covers approximately one percent of the San Francisco Peaks, will spiritually contaminate the entire mountain and devalue their religious exercises." *Id.* The district court had determined that the Plaintiffs' beliefs were sincere and the Ninth Circuit found no reason to challenge that finding. *Id.*

> The district court also found, however, that there are no plants, springs, natural resources, shrines with religious significance, or religious ceremonies that would be physically affected by the use of such artificial snow. No plants would be destroyed or stunted; no springs polluted; no places of worship made inaccessible, or liturgy modified. The Plaintiffs continue to have virtually unlimited access to the mountain, including the ski area, for religious and cultural purposes. On the mountain, they continue to pray, conduct their religious ceremonies, and collect plants for religious use.

Id. In light of those findings, the Ninth Circuit reasoned that the "sole effect of the artificial snow is on the Plaintiffs' subjective spiritual experience. *Id.* That is, the presence of the artificial snow on the Peaks is offensive to the Plaintiffs' feelings about their religion and will decrease the spiritual fulfillment Plaintiffs get from practicing their religion on the mountain." *Id.* The majority opinion found that was not a sufficient basis to support the Tribal plaintiffs' claims under RFRA. *Id.* at 1063-64.

The Ninth Circuit explained that to establish a *prima facie* claim under RFRA, "a plaintiff must present evidence sufficient to allow a trier of fact rationally to find the existence of two elements. First, the activities the plaintiff claims are burdened by the government action must be an 'exercise of religion' . . . . Second, the government action must 'substantially burden' the plaintiff's exercise of religion . . . if the plaintiff cannot prove either element, his RFRA claim fails." *Id.* at 1068. The defendants did not contest the district court's holding that the plaintiffs' religious activities on the Peaks constitute an "exercise of religion" within the meaning of RFRA. *Id.* "The crux of this case, then, is whether the use of recycled wastewater on the Snowbowl imposes a 'substantial burden' on the exercise of the Plaintiffs' religion." *Id.* The Ninth Circuit concluded that it does not. *Id.* at 1070.

> The use of recycled wastewater on a ski area that covers 1% of the Peaks does not force the Plaintiffs to choose between following the tenets of their religion and receiving a governmental benefit…. The use of recycled wastewater to make artificial snow also does not coerce the Plaintiffs to act contrary to their religion under the threat of civil or criminal sanctions…. The Plaintiffs are not fined or penalized in any way for practicing their religion on the Peaks or on the Snowbowl. Quite the contrary: the Forest Service "has guaranteed that religious practitioners would still have access to the Snowbowl" and the rest of the Peaks for religious purposes….
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> The only effect of the proposed upgrades is on the Plaintiffs' subjective, emotional religious experience. That is, the presence of recycled wastewater on the Peaks is offensive to the Plaintiffs' religious sensibilities. To Plaintiffs, it will spiritually desecrate a sacred mountain and will decrease the spiritual fulfillment they get from practicing their religion on the mountain. Nevertheless, under Supreme Court precedent, the diminishment of spiritual fulfillment – serious though it may be – is not a "substantial burden" on the free exercise of religion.

Id.

As the majority explained, a government action that "decreases the spirituality, the fervor, or the satisfaction with which a believer practices his religion is not what Congress has labeled a 'substantial burden' – a term of art chosen by Congress to be defined by reference to Supreme Court precedent – on the free exercise of religion." *Id.* at 1063. Where there is no showing the government has "coerced the Plaintiffs to act contrary to their religious beliefs under the threat of sanctions, or conditioned a governmental benefit upon conduct that would violate the Plaintiffs' religious beliefs, there is no 'substantial burden' on the exercise of their religion. *Id.*

> Were it otherwise, any action the federal government were to take, including action on its own land, would be subject to the personalized oversight of millions of citizens. Each citizen would

> hold an individual veto to prohibit the government action simply because it offends his religious beliefs, sensibilities, or tastes, or fails to satisfy his religious desires. Further, giving one religious sect a veto over the use of public park land would deprive others of the right to use what is, by definition, land that belongs to everyone.
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> "[W]e are a cosmopolitan nation made up of people of almost every conceivable religious preference." *Braunfeld v. Brown*, 366 U.S. 599, 606 (1961). Our nation recognizes and protects the expression of a great range of religious beliefs. Nevertheless, respecting religious credos is one thing; requiring the government to change its conduct to avoid any perceived slight to them is quite another. No matter how much we might wish the government to conform its conduct to our religious preferences, act in ways that do not offend our religious sensibilities, and take no action that decreases our spiritual fulfillment, no government – let alone a government that presides over a nation with as many religions as the United States of America – could function were it required to do so.

Id. at 1063-64.

A dissent by three of the panel's members argued the majority's holding that the exercise of religion is not substantially burdened by "spraying 1.5 million gallons per day of treated sewage effluent on the most sacred mountain of southwestern Indian tribes" was a product of "misstated" evidence in the record below, the law under RFRA, and a misunderstanding of the "very nature of religion." *Id.* at 1081. The dissent stated that the proposed expansion of the Arizona Snowbowl violated RFRA because it imposed a substantial burden on the Indians' exercise of religion and was not justified by a compelling government interest. *Id.* at 1097.

The majority's distinction between activities that physically affect environmental elements related to religious practices and those that may be perceived as having a detrimental effect on practitioners' subjective religious experience doubtless will be analyzed by courts and scholars. However, it provides third parties seeking to predict the effect of the Religious Freedom Restoration Act objectively ascertainable indicia to guide their plans and actions.

NEPA Claims

The Plaintiffs complained of five causes under NEPA, four of which were summarily dismissed by the district court and upheld by a 3-member panel, *see Navajo Nation v. U.S. Forest Serv.*, 479 F.3d 1024, 1029 (9th Cir. 2007). The *en banc Snowbowl* panel affirmed, without further discussion, the panel's dismissal of the four NEPA claims by adopting the parts of the panel's opinion that affirmed the district court's grant of summary judgment to defendants on those claims. 535 F.3d at 1079.

The four dismissed NEPA claims alleged: (1) that the final environmental impact statement (FEIS) failed to consider a reasonable range of alternatives to the use of recycled wastewater; (2) that the FEIS failed to discuss and consider the scientific views of an expert; (3) that the FEIS failed adequately to consider the impact of diverting the recycled wastewater from Flagstaff's regional aquifer; and (4) that the FEIS failed adequately to consider the social and cultural impacts on the Hopi people. *Id.* The first NEPA claim was dismissed because the balance of the administrative record, albeit brief, sufficiently demonstrated that the Forest Service had not foreclosed all consideration of alternatives to the use of recycled wastewater. 479 F.3d at 1056. The second NEPA claim was dismissed because the scientific views of the expert at issue did not represent an undisclosed opposing viewpoint to which the Forest Service failed to respond openly in the FEIS. *Id.* at 1057. Rather, the district court found the expert's views were merely variations of the same allegation, namely, that recycled wastewater, which may contain unregulated contaminants such as prescription drugs and chemicals from personal care products in amounts not ordinarily found in drinking water, was disruptive to endocrine function. *Id.* The third NEPA claim was dismissed because the analysis in the FEIS was a reasonably thorough discussion of the issue and included a quantitative analysis of the net reduction in groundwater recharge to the regional aquifer, despite the "odd and backhanded way" in which it was presented. *Id.* at 1058.

In the fourth NEPA claim that was dismissed in the proceeding below, the Hopi Tribe argued that the FEIS analysis of the social and cultural impacts of the proposed action on the Tribe was inadequate. *Id.* at 1058-59. The 3-member panel noted that the FEIS acknowledged that "it is difficult to be precise in the analysis of the impact of the proposed undertaking on the cultural and religious systems on the Peaks, as much of the information stems from oral histories and a deep, underlying belief system of the indigenous peoples involved." *Id.* at 1059. Despite the difficulty conducting such an analysis, the court approved of the efforts of the Forest Service to comply with NEPA by discussing the effects of the proposed action on the human environment, which included "drawing from existing literature and extensive consultation with the affected tribes," and "describ[ing] at length the religious beliefs and practices of the Hopi and the Navajo and the 'irretrievable impact' the proposal would likely have on those beliefs and practices." *Id.* The panel opinion suggests that, in situations where the potential for an impact on cultural properties and tribal religious practices exists, a reasonable attempt by an agency that is preparing a NEPA analysis to thoroughly describe and assess the significance of cultural properties and religious practices from the perspectives of the users of the property and the practitioners of the religion will survive an administrative legal challenge despite (or, perhaps, because of) the fact that assessing the impact on cultural properties and tribal religious practices is universally difficult to measure.

The fifth NEPA claim, which was considered by the *en banc* panel, raised the issue of whether the FEIS failed adequately to assess the risks posed by human ingestion of artificial snow. 535 F.3d at 1079. The panel below held that Plaintiffs' complaint satisfied notice pleading requirements and that Plaintiffs' comments and appeals were sufficient to put the Forest Service on notice of the claim and to exhaust the Plaintiffs' administrative remedies. 479 F.3d at 1048. However, the *en banc* panel held that, because the Plaintiffs failed to include the claim in their complaint (the issue was first raised on their motion for summary judgment), and also failed

to appeal the district court's denial of their motion to amend the complaint to add the claim, the Plaintiffs waived the claim on appeal. 535 F.3d at 1079-80.

Plaintiffs filed a petition for *certiorari* on January 5, 2009. The case number is 08-846. The question presented is "[w]hether a governmental action cannot constitute a 'substantial burden' under RFRA unless it forces individuals to choose between following the tenets of their religion and receiving a governmental benefit or coerces them by threatening civil or criminal sanctions to act contrary to their religious beliefs." The NEPA issues were not appealed.