IS THIS THE END OF AMERICAN INDIAN SITE SPECIFIC FREE EXERCISE CLAIMS?: *LYNG V. NORTHWEST INDIAN CEMETERY PROTECTION ASSOCIATION*

I. INTRODUCTION

American Indians may bring three categories of claims based upon the first amendment free exercise clause. The first category ("category one") involves suits where compliance with the law would require American Indians to violate a tenet of their religion.[1] Suits in which Indians claim that they will be denied governmental benefits unless they alter an existing religious practice comprise the second category ("category two").[2] The third category, the subject of this Comment, involves instances where Indian religious land use conflicts with governmental land use. Actions arising under this category are referred to as "site specific."[3] In site specific cases, American Indian plaintiffs claim that

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[1] An example of a category one claim occurred when Chippewa Indians challenged a federal law which prohibited the hunting and poaching of eagles. United States v. Thirty Eight (38) Golden Eagles or Eagle Parts, 649 F. Supp. 269 (D. Nev. 1986), *aff'd*, 829 F.2d 41 (9th Cir. 1987). In *Golden Eagles*, Apache Indians were forced to violate the federal law in order to practice an indispensable, centuries old, sacred ritual that required eagle tail plumes. The eagle parts were returned to the Apache Indians after the court found that the statute violated the Indian's free exercise rights. *Golden Eagles*, 649 F. Supp. at 227. *See* 16 U.S.C. § 668(a) (1986) (protection of eagles contains exceptions for Indian religious practices). *See also* Frank v. Alaska, 604 P.2d 1068 (Alaska 1979) (allowing the taking of federally protected moose for funerary rights).

[2] An example of a category two claim involved a suit which challenged conditioning the receipt of food stamps upon the possession of social security numbers. Bowen v. Roy, 476 U.S. 693, 695-97 (1986). In *Bowen*, an Indian claimant stated that a social security number placed on an Indian child robbed that child of her identity, yet the food stamps were unavailable to the claimants if they refused to accept the designated number. *Id.* at 695-97, 711-12.

[3] For discussions of site specific cases and other articles focusing on American Indian Religious interests, see Michaelsen, *American Indian Religious Freedom Litigation: Promise and Perils*, 3 J.L. RELIG. 47 (1985) [hereinafter Michaelsen]; Page, *The Scope of the Free Exercise Clause*, 68 N.C.L. REV. 410 (1990) [hereinafter Page]; Stambor, *Manifest Destiny and American Indian Religious Freedom: Sequoyah, Badoni, and The Drowned Gods*, 10 AM. INDIAN L. REV. 59 (1982) [hereinafter Stambor]; Note, *Unjustified Interference of American Indian Religious Rights*: Lyng v. Northwest Indian Cemetery Protective Association, 22 CREIGHTON L. REV. 313 (1988-89); Note, *The First Amendment and the American Indian Religious Freedom Act: An Approach to Protecting Native American Religion*, 71 IOWA L. REV. 869 (1986) [hereinafter *Protecting Native American Religion*]; Note, *American Indian Sacred Religious Sites and Government Development: A Conventional Analysis in an Unconventional Setting*, 85 MICH. L. REV. 771 (1987)[hereinafter *American Indian Religious Sites*]; Comment, *Taking a Hard Look at Mitigation: The Case for the* Northwest Indian *Rule*, 59 UNIV. COLO. L. REV. 687 (1988) [hereinafter *Taking a Hard Look at Mitigation*]; Note, *Indian Worship v. Government Development: A New Breed of Religious Cases*, 84 UTAH L. REV. 313 (1984) [hereinafter *Indian Worship*]; Note, *Indian Religious Freedom and Governmental Development of Public Lands*, 94 YALE L.J. 1447 (1985) [hereinafter *Public Lands*].

governmental action or intervention violates their first amendment right to the free exercise of religion by placing an excessive burden upon a religious practice.[4] Typically, the government action involves roadway construction, deforestation, parks development, or government utility companies passing over grounds either used for religious practices or having some sacred attachment.[5]

The interplay between government land use and American Indians' exercise of first amendment rights has recently resulted in protracted litigation[6] in which governmental land use has prevailed over the Indians' claims under the free exercise clause of the first amendment.[7] The successful governmental responses to free exercise claims have generally been based upon two premises: the first amendment prohibits the government from giving preferential treatment to a particular religion and the government must protect compelling state or federal interests.[8] The results of such protracted litigation and the strategies involved have produced the development of new standards for American Indian site specific cases.[9] *Lyng v. Northwest Indian Cemetery Protection Association*,[10] the most recent case applying the new standards, held that the Indian plaintiffs, to meet their initial burden of proof, must show that the religious practice is (1) burdened, (2) central and indispensable to the religion itself, and (3) not outweighed by a compelling governmental interest.[11]

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[4] The first amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." U.S. CONST. art. I, cl. 1. Not everybody agrees that claims should be divided into three categories because they are all subject to the same first amendment standards. Justice Brennan, for example, maintains that the "distinction is without constitutional significance." Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 468 (1988). In the context of formal first amendment analysis, Justice Brennan continues, "the crucial word in the constitutional text . . . is "prohibit" . . . a comprehensive term that in no way suggests that the intended protection is aimed only at governmental actions that coerce affirmative conduct." *Id.*

[5] *See infra* notes 14-39 and 84-136 and accompanying text for explanations of sacred site concepts as well as common law examples of sacred site specific cases.

[6] This litigation began as an unrelated group of cases in the middle to late 1970's and reached the Supreme Court of the United States for the first time in *Northwest*. *See Indian Worship*, *supra* note 3, at 321-27 (discussing the cases leading up to *Northwest*).

[7] *See infra* notes 84-136 and accompanying text.

[8] *See infra* notes 40-74 and accompanying text (discussing analytic process courts use to resolve free exercise claims) and 84-136 and accompanying text (discussing specific application of first amendment tests to site specific cases).

[9] *See* Sequoyah v. Tennessee Valley Auth., 480 F. Supp. 608 (E.D. Tenn. 1979), *aff'd*, 620 F.2d 1159 (6th Cir.) (centrality must be pled for formal free exercise analysis to be performed), *cert. denied*, 449 U.S. 953 (1980).

[10] 485 U.S. 439 (1988).

[11] *Id.* at 447-58. Although two of *Northwest*'s predecessors had similar fact patterns, site specific fact patterns are potentially endless because of the number of Indian reli-

Part II of this Comment defines the term "site specific" by analyzing cases which exemplify the facts and conflicts. Part III examines the current first amendment judicial tests as they have been developed and applied *outside* of the site specific context in order to determine the viability of their application to site specific conflicts.[12] Part IV discusses the first amendment tests, their application to four site specific cases preceding *Northwest*, and their contradictory application in *Northwest* itself. Finally, Part V contains a litigation guide which, by synthesizing the tests, case law, and site specific history, creates a coherent guide for future site specific claimants.[13]

II. "SITE SPECIFIC" CLAIMS AND THEIR SIGNIFICANCE

American Indians bringing site specific claims, including those in *Northwest*, have lost every case.[14] Prior first amendment religious cases and site specific cases illustrate the judicial preference afforded government land use over the preservation of Indian sacred sites regardless of the context.[15] Despite this intimidating reality, American Indians *may* prevail with site specific claims if they surmount the judicially imposed obstacles established in *Northwest*. To succeed on such a free exercise claim, Indians and their counsel must formulate a comprehensive version of the words "site specific."

Several premises should be set forth in detail. First, American Indian religions differ from western religions because Indian religious beliefs are often rooted in a locale or a specific site.[16]

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gions, the variation of constituent religious practices, and the multitude of government land uses. In *Northwest*, however, the facts reveal a plethora of central practices and land traits relevant to the specific site.

12 *See infra* note 40-74 and 75-83 and accompanying text. Among these are the two-prong free exercise tests developed in Bowen v. Roy, 476 U.S. 693 (1986), and Wisconsin v. Yoder, 406 U.S. 205 (1972).

The various tests assess the extent of the government's imposition upon religious practices to determine whether the government has a sufficient interest in the land to warrant overriding the first amendment right of free exercise of religion. The government generally claims that granting either Indians rights to land or denying the government use creates an excessive government entanglement with religion and therefore violates the establishment clause.

13 *See infra* notes 199-224 and accompanying text. The litigation guide is based, in part, on Justice O'Connor's *Northwest* majority opinion and, in part, on Justice Brennan's dissent, concentrating on his preference for a centrality standard, both of which are discussed *infra* notes 185-98.

14 *Indian Worship*, *supra* note 3, at 313-14.

15 *Id.* *See infra* notes 84-136 and accompanying text.

16 Western religions usually pay deference to a founder or an event. *See* Michaelsen, *supra* note 3, at 59-62. Site specific claims are not inherent to one area of the United States, although the eastern tribes and Nations have yet to have a reported specific site claim. *See infra* notes 84-136 and accompanying text.

One way to conceptualize[17] the site specific notion is through examination of a recent site specific case, *Wilson v. Block*.[18] *Wilson* dealt with a land use controversy in northeast Arizona, where approximately 169,000 Navajo and Hopi Indians live on reservations.[19] The proposed government land uses were to expand a preexisting ski slope and its parking facilities, and to create new ski lodges.[20]

For hundreds of years, the San Francisco mountain peaks ("the Peaks") in the Coconino National Park have played an integral part in the lives of these two federally recognized Indian tribes.[21] Many Navajo and Hopi Indians believe healing powers, essential to tribal existence, flow directly from the Peaks.[22] As the *Wilson* court found, the Hopi and Navajo believe:

> the Peaks to be the home of specific deities and consider the Peaks to be the body of a spiritual being or god, with various peaks forming the head, shoulders and knees of a body reclining. . . . [T]he Navajos pray directly to the Peaks and regard them as a living deity.[23]

Additionally, the Hopi and Navajo collect herbs and plants, and hunt animals in the Peaks, as part of their medicinal, dietary, or religious practices.[24]

For these tribes, the Peaks are the only area where they engage in many of their religious practices.[25] Therefore, Indians perceive any threat to the religious site as an actual threat to the religion, its life, and its future because the site upon which Indians practice their religion is as important as the physical act of performance.[26] However, this may not present a situation which appears threatening to a westerner whose religion is considered "orthodox."[27] The practice

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17 The process of spatial comparison and analogy are both concepts that culturally differ for American Indians and westerners. Western efforts to "conceptualize" American Indian religions must be cautiously performed. *See* Michealsen, *supra* note 3, at 63-64.

18 708 F.2d 735 (D.C. Cir.), *cert. denied*, 464 U.S. 956 (1983). *Wilson* and *Northwest* were before the courts at the same time. In fact, *Wilson* relied on and distinguished the *Northwest* court of appeals decision which was in favor of the plaintiff Indians. *Id.*

19 *Id.* at 738.

20 *Id.* at 739.

21 *Id.* at 738.

22 *Id.*

23 *Id.*

24 *Id.*

25 *Id.* at 738, 740.

26 *Id.* at 740.

27 "Orthodox," as used by courts, refers to the religions commonly practiced by western nations. Although extensively practiced throughout the United States, courts consider American Indian religions and Eastern religions unorthodox. *See infra* notes 40-60.

of many orthodox religions can proceed in numerous places and is physically practicable without the locale or site, whereas it is not possible for a Navajo or Hopi Indian, either physically or spiritually, to practice their religion without a specific site.[28] Consequently, the Navajo and Hopi Indians consider the Peaks to be of the highest order of importance because the sacred site is often the center of the Indian universe and thus, there exists no other possible "alternate" site.[29] In identifying the Hopi and Navajo interests, the *Wilson* court does distinguish traditional western thought regarding use and possession from those of American Indians.[30]

In 1978, the United States Congress officially recognized the sacred site facet of Indian religions in the American Indian Freedom of Religion Act ("AIFRA").[31] In fact, Congress stated that "to deny Indians access to a particular site is analogous to preventing a non-Indian from entering his church or temple."[32] Although this congressional recognition was a diligent effort to enlighten the public regarding American Indian religions, Congress' observation fell short because AIFRA grants no right to a judicial cause of action.[33] Consequently, AIFRA has rendered little assistance to Indians because westerners are still unable to conceptualize the magnitude specific sites hold for Indians. Although every temple and church may seem equally important to westerners, westerners can practice in various temples or churches.[34] While westerners may opt to prac-

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28 *See* Michaelsen, *supra* note 3, at 54 and 58-64; *Public Lands*, *supra* note 3, at 1448-53. In fact, the third (site specific) category arose in first amendment free exercise litigation due to the failure of categories one and two to address site specific categories. Prior to the site specific claims in the 1970's, Indians brought two categories of free exercise claims. Category one claims were brought when Indian compliance with a law required Indians to violate a tenet of their religion. Category two claims were brought when Indians faced denial of governmental benefits unless they altered an existing religious practice. *See supra* note 1 and accompanying text. Category three focuses on sacred sites. The distinction between the three categories is subtle, with the third limited to sacred sites that have been threatened or altered by government land use. Category one and two focus on governmental intrusions not tied to land use. *Compare* Sequoyah v. Tennessee Valley Auth., 620 F.2d 1159, 1163 (6th Cir.), *cert. denied*, 449 U.S. 953 (1980), *with* Northwest Indian Cemetery Protective Ass'n v. Peterson, 565 F. Supp. 586, 591 (N.D. Cal. 1983).

29 *Wilson*, 708 F.2d at 738.

30 *Id.*

31 Pub. L. No. 95-341, 92 Stat. 469 (1978) (codified at 42 U.S.C. § 1996 (1982 & Supp. V 1987). The State of California created the American Heritage Committee expressly to help protect Indian cultures and their historical locations. Brief for Respondent Petitioner State of California at 2, Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988).

32 H.R. REP. No. 1308, 95th Cong., 2d Sess. 1 *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 1262, 1263.

33 *Id. See supra* notes 219-21 and accompanying text.

34 This does not in any way minimize the importance of each and every temple or church to their respective religions. Yet, even if only one church or temple remained for each religion, the religions themselves would not be threatened *per se* by the buildings'

tice in one locale, practice does not become impossible if access to that locale is denied. Additionally, to Indians, site specific cases often represent their final attempt to save the practice, belief, or the religion itself.[35] For example, in *Wilson*, Abbot Sekaquaptewa, chairman of the Hopi tribe, testified:

> It is my opinion that in the long run if the [government] expansion [over sacred land] is permitted, we will not be able successfully to teach our people that this is a sacred place. If the ski resort remains or is expanded, our people will not accept the view that this is the sacred Home of the Kachinas. The basis of our existence as a society will become a mere fairy tale to our people.[36]

While various elements contribute to the sacredness of a site, listing such elements is misleading because it creates artificial security in the belief that a finite list represents all that is sacred. Courts have held rock and landscape formations, plants, animals, and water elemental to a sacred site.[37] Furthermore, legal recognition of only the physical elements which contribute to the sacredness of a site will not clarify the definition of a sacred site. The ideas and beliefs that each element represents determine their importance to each particular tribe so that courts must recognize these as well.[38] As the lack of recognition destroys the central or tangential spiritual elements of certain Indian religions, precedent serves as no more than a reminder that more and more Indian religions are being dismantled.[39]

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destruction because, theoretically, others could be built. In fact, assuming no other church or temple could be built, it is clear that the adherents would suffer greatly. *See supra* notes 25-33 and accompanying text. On the other hand, for the plaintiff Indians in *Wilson*, the San Francisco Peaks provide the only place to practice their religion. *Wilson*, 708 F.2d at 738. *See, e.g.*, Brief for Respondent Petitioner State of California at 2, Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988).

35 *See, e.g.*, *Northwest*, 485 U.S. at 465-66 (Brennan, J., dissenting).

36 *Wilson*, 708 F.2d at 740 n.2.

37 *Id.* at 738.

38 Due to the diversity of significance and the relative frequency of claims, some site specific commentators have incorrectly likened the San Francisco Peaks in *Wilson* and the Chimney Rock Section in *Northwest* to American Indians, just as one might incorrectly liken Mecca solely to Moslems or specific sites in Jerusalem to both Christians and Jews. *See, e.g.*, Michaelsen, *supra* note 3, at 60. Therefore, to generalize that all Indian religions are similar in their attachment of value or meaning to land would be as incorrect as attaching identical significance to the Old Testament for Catholics and the Torah for Jews. *See, e.g.*, *Public Lands*, *supra* note 3, at 1449 (citing A. HULKRANTZ, THE RELIGIONS OF THE AMERICAN INDIANS (M. Setterwell trans. 1979)).

39 Reliance on precedent only reinforces the callousness, contempt, and lack of understanding westerners have exemplified in their treatment of Indians and Indian religions. *See* Michaelsen, *supra* note 3, at 50-51.

III. First Amendment Tests

A. *Free Exercise of Religion*

Another misconception about site specific cases is that Indians possess no right to practice their religions when the land in question is not owned by them, but rather by the government.[40] The fact that the land is recognized as public property does not mean that the government land use prevails over an individual's right to free exercise of religion.[41] A uniform and comprehensive application of the first amendment and its judicial tests must be applied to the religious beliefs and practices of Indians if the first amendment is to protect American Indians as it does other citizens.

1. The Free Exercise "Pre-Test"

Religious *beliefs* receive absolute constitutional protection.[42] Nevertheless, the free exercise clause of the first amendment does not offer the same absolute protection to religious *practices*.[43] Specifically, the Supreme Court permits legislative restrictions on religious practices when public interests are substantially threatened.[44] However, before the Court will graciously protect a religious *practice*, the practice must concern or relate to a religious *belief*.[45] Differentiation between *belief* and *practice* is essential because a plaintiff must satisfy this "pre-test"[46]

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[40] Sequoyah v. Tennessee Valley Auth., 620 F.2d 1159, 1163 (6th Cir. 1980).

[41] Northwest Indian Cemetery Protective Ass'n v. Peterson, 565 F. Supp. 586, 594 n.8 (N.D. Cal. 1983).

> [T]he government must attempt to accommodate the legitimate religious interests of the public when doing so threatens no public interest, even when those religious interests involve use of public property. . . . This is especially true when government action threatens religious conduct *per se* rather than merely inconveniencing that conduct through imposition of restrictions reasonable as to time, place or manner.

Id. See also Northwest, 485 U.S. at 470-71 (Brennan, J., dissenting).

[42] *See* Wisconsin v. Yoder, 406 U.S. 205, 234 (1972) (state mandatory preschooling burden upon Amish religious beliefs held as first amendment violation); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) (state restriction upon Jehovah's Witness' religious belief held as constitutional violation).

[43] *See* Sherbert v. Verner, 374 U.S. 398, 403 (1963) (government denial of Seventh Day Adventist's unemployment benefits violated free exercise clause, although the Court recognized protection of practices as less than absolute).

[44] *Id.*

[45] *Yoder*, 406 U.S. at 215.

[46] "Pre-test" is a term of art created for the purposes of this Comment to differentiate between the traditional free exercise tests and the burden of proof required of a plaintiff who practices an unorthodox religion. For example, since certain religious practices are known only to those who practice and not to the reasonably prudent person or to courts, the practices need to be verified as part of the claimed religion. Courts often require such proof, in some cases to prevent a false claim of religious justification. *See* United States v. Thirty Eight (38) Golden Eagles or Eagle Parts, 649 F. Supp. 269 (D.

before a court applies the traditional two-pronged first amendment free exercise of religion test.[47]

The religious belief pre-tests are not measured by whether the belief or sincerity goes to the "central" core of a faith.[48] Rather, a practice need only be (1) found to exist and (2) sincerely performed.[49] Although an orthodox religious adherent would have little or no problem proving the authenticity of a given practice,[50] he must first prove the sincerity of his belief.[51] As a practical matter, courts will normally accept an Indian plaintiff's assertion that a given practice is part of the established tribal religion because courts generally recognize their own limitations as religious interpreters.[52] However, there are instances when the Supreme Court has found itself capable of deciding whether certain religious beliefs are considered crucial tenets of either the life or daily practice of the religion.[53]

The Court fashioned this second "pre-test" to determine whether the plaintiffs are sincere in their claims, *i.e.*, whether the plaintiffs sincerely adhere to the beliefs claimed to be worthy of absolute protection.[54] Sincerity may be questioned, for example, when a previously unheard of practice is allegedly offered as part of an established religion.[55]

Nev. 1986), *aff'd*, 829 F.2d 41 (9th Cir. 1987) (Indians claimed they were forced to violate law to perform religious practice). *See also supra* notes 1-2.

47 *See infra* notes 61-68 and accompanying text.

48 *See* Stambor, *supra* note 3, at 68 and cases cited therein.

49 United States v. Kuch, 288 F. Supp. 439, 444-45 (D.D.C. 1968).

50 For example, a court would probably not require proof that Holy Communion is a religious practice involved in Catholicism or Protestantism. Because many religions practiced in the United States are considered "unorthodox," courts, at least for efficiency reasons, become less willing to question the sincerity of a religion. Sequoyah v. Tennessee Valley Auth., 620 F.2d 1159, 1163 (6th Cir.), *cert. denied*, 449 U.S. 953 (1980).

> There is no requirement that a religion meet any organizational or doctrinal test in order to qualify for [f]irst [a]mendment protection. Orthodoxy is not an issue. The fact that Cherokees, [for example,] have no written creeds and no man-made houses of worship is of no importance. The Cherokees have a religion within the meaning of the Constitution and the sincerity of the adherence of individual plaintiffs to that religion is not questioned.

Id.

51 *Kuch*, 288 F. Supp. at 443-44.

52 For example, the district court judge in Northwest Indian Cemetery Protective Ass'n v. Peterson, 565 F. Supp. 586 (N.D. Cal. 1983), stated that "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit [f]irst [a]mendment protection." *Id.* at 591 (quoting Thomas v. Review Bd. of Indiana Employment Security Div., 450 U.S. 707, 714 (1981)).

53 Reynolds v. United States, 98 U.S. 145 (1878) (Mormon polygamy prohibited because not central to practice).

54 Wisconsin v. Yoder, 406 U.S. 205, 215-17 (1972).

55 *See* People v. Woody, 61 Cal. 2d 716, 394 P.2d 813, 817-19, 40 Cal. Rptr. 69, 73-74 (1964). As with the first pre-test, a plaintiff satisfies this second pre-test, more often than not, without much effort. *See* Lyng v. Northwest Indian Cemetery Protective Ass'n,

A court applied the two "pre-tests" in *United States v. Kuch*,[56] where a Native American Church member claimed that the sincere, regular use of LSD and marijuana were tenets of his religion.[57] The court denied the relief on the ground that the practice was insincerely held.[58] On the other hand, these "pre-tests" are *not* normally difficult for Indian claimants to meet.[59] In *Northwest*, for example, Justice O'Connor took the Indians at their word regarding both their sincerity and belief, and proceeded to the free exercise tests.[60]

2. The Two-Pronged Free Exercise Test

The traditional free exercise test, applied after the pre-tests have been met, is divided into two prongs. Under the first prong, a court must determine whether the religious *practice* has been (1) infringed upon or burdened, or (2) subject to coercive effect.[61] The burdensome, infringing, or coercive effect need not prohibit a practice altogether.[62] The plaintiff may, in limited circumstances, merely demonstrate an *indirect*, coercive effect to establish infringement of free exercise.[63] Once infringement, burden, or coercion has been found, the second prong of the free exercise test is triggered.

Under the second prong, a court must weigh or balance the governmental interest against the private religious interest.[64] In

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485 U.S. 439, 447 (1988). However, a plaintiff will not satisfy the pre-test if members of the same congregation or tribe repudiate the plaintiff's claim of sincerity.

[56] 288 F. Supp. 439 (D.D.C. 1968).

[57] *Id.* at 442.

[58] *Id.* at 444-45.

[59] People v. Woody, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964) (use of peyote in Native American Church allowed).

[60] Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 447 (1988). The defense also conceded the Indians' sincerity. *Id. See infra* notes 183-193 and accompanying text.

[61] The coercive effect test is based in part on the holding of School Dist. of Abington Township v. Schempp, 374 U.S. 203 (1963). In *Schempp*, the Court said that "it is necessary, in a free exercise case for one to show the coercive effect of the enactment [government use] as it operates against him in the practice of his religion." *Id.* at 223.

[62] *Id. See also* note 1 and accompanying text.

[63] *See Northwest*, 795 F.2d at 691. *See also* Braunfeld v. Brown, 366 U.S. 599, 607 (1961). In *Braunfeld*, orthodox Jewish clothing merchants were denied relief under their claim which stated that the forced closing of business on Sunday was a violation of the free exercise clause.

> Of course, to hold unassailable all legislation regulating conduct which imposes solely an indirect burden on the observance of religion would be a gross oversimplification. If the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate individiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect.

Id.

[64] *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 214-15 (1972).

balancing these interests prior to *Northwest*, courts relied upon the free exercise test to uphold government action when the state was found to have a compelling interest.[65] However, even when a court found a compelling state or government interest the government was still required to narrowly tailor its actions to avoid unnecessary restriction of the religious practices.[66] Further, if the interest of the religious practice outweighed the governmental interest, the government was still able to protect its interest through the establishment clause because the protections offered under the clauses may differ.[67] Consequently, if governmental interests and actions did not outweigh an Indian's claim under the free exercise clause, the governmental interest could still prevail if protecting the Indian's religious practice would violate the establishment clause.[68]

B. *The Establishment Clause*

Courts determine establishment clause protection by applying a three-prong test.[69] The first and second prongs of the test are referred to as the secular purpose and primary effect tests, respectively.[70] Under the secular purpose test, the first prong, governmental action which either advances or inhibits a religious practice violates the establishment clause.[71] The primary effect test, the second prong, is similar to the first prong in that a violation occurs if the primary effect of the action neither advances nor inhibits religious practice.[72] Under the third prong, the excessive entanglement prong, government action which is exces-

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65 *See, e.g.*, Wilson v. Block, 708 F.2d 735, 740 (D.C. Cir.), *cert. denied*, 464 U.S. 956 (1983); Sequoyah v. Tennessee Valley Auth., 620 F.2d 1159, 1165 (6th Cir.), *cert. denied*, 449 U.S. 953 (1980).

66 *See, e.g.*, *Wilson*, 708 F.2d at 739; *Taking a Hard Look at Mitigation*, *supra* note 3, at 688-702 (discussing Ninth Circuit's analysis of National Environmental Policy Act).

67 Northwest Indian Cemetery Protective Ass'n v. Peterson, 565 F. Supp. 586, 597 (N.D. Cal. 1983). *See, e.g.*, Hunt v. McNair, 413 U.S. 734, 741-49 (1973); Lemon v. Kurtzman, 403 U.S. 602, 609-10 (1971).

68 *See, e.g.*, *Northwest*, 565 F. Supp. 586, 597 (N.D. Cal. 1983). In site specific cases, defendants typically argue that the court is creating a "government-managed religious shrine." Badoni v. Higginson, 638 F.2d 172, 179 (10th Cir. 1980), *cert. denied*, 452 U.S. 954 (1981).

69 Lemon v. Kurtzman, 403 U.S. 602 (1971).

70 *Id.* at 612.

71 *Id.* at 613.

72 *Id.* The three part test has recently been reaffirmed as the proper standard to analyze establishment clause claims. *See, e.g.*, Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481, 484-85 (1986) (vocational student allowed federal aid for deteriorating eye condition); Widmar v. Vincent, 454 U.S. 263, 271 (1981) (allowance of student religious group to use state university speaking forum not a violation of establishment clause).

sively entangled with religion violates the establishment clause.[73]

Although the free exercise and establishment clause tests have been actively used to analyze Indian first amendment claims which are not site specific, courts have not approved the use of these tests in cases involving site specific claims because courts have found the tests incomplete in the site specific context.[74] Another test was destined to appear in first amendment analysis.

C. *The Centrality Test*

The centrality test has recently been applied to first amendment claims regardless of the category. Although never formally delineated as a test for site specific protection, due to the nature and recency of site specific claims, the centrality test is the most useful. The centrality test requires that the more connected and central a religious practice is to the religion itself, the more likely it is that the practice will receive first amendment protection.[75]

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[73] School Dist. of Abington Township v. Schempp, 374 U.S. 203, 294 (1963), presented one example of the manner in which government action violated the establishment clause. The Court found that a statute making morning prayer mandatory violated the establishment clause because the prayer program had the foundations of a religious program carried on by the government. There was excessive governmental involvement with religion. *See also supra* notes 56-59 (discussing whether laws prohibiting drug use constitute excessive government entanglement with religion).

[74] *See infra* notes 75-83 and 84-117 and accompanying text.

[75] Wisconsin v. Yoder, 406 U.S. 205 (1972), Frank v. Alaska, 604 P.2d 1068 (Alaska 1979), and People v. Woody, 394 P.2d 813, 40 Cal. Rptr. 69 (1964), laid the groundwork for the centrality test. *Woody* fell within the first category of free exercise cases where Indian compliance with a law required Indians to violate a tenet of their religion. Members of the Native American Church used and depended upon peyote, a natural hallucinogen, to perform religious practices which were in violation of section 11500 of the California Health and Safety Code. *Woody*, 394 P.2d at 814-15, 40 Cal. Rptr. at 70-71. Peyote grows naturally on a specific spineless cactus and its main component is mescaline. The effects it induces upon oral injestion are largely hallucinatory. 394 P.2d at 815, 40 Cal. Rptr. at 70-71. Several states have amended their narcotics laws to allow for peyote consumption by religious adherents. Other states have done so by judicial decree. 394 P.2d at 819, 40 Cal. Rptr. at 76. One of the many issues that surfaced in *Woody* was whether the taking of peyote was a "central" element of the religion, i.e. whether it was a central religious practice. 394 P.2d at 820, 40 Cal. Rptr. at 76.

In deciding that the peyote practice was central to the Native American Church, the court stated that both free exercise tests were influenced. The first test, whether there is an undue burden on the practice, then becomes sensitive to the importance of the central practice being burdened. Upon a defendant showing that peyote was central, the government's imposition of a burden was shown and thus, the government had outlawed a central religious practice. 394 P.2d at 816, 40 Cal. Rptr. at 74. The second test weighs the government interests against the private interests and only permits government interests of the highest priority to defeat the religious practice. *See* Wisconsin v. Yoder, 406 U.S. 205, 215 (1972).

Curiously, in *Yoder*, although the Court seemingly relied on the centrality test to afford the plaintiff's relief, the practices for which the Amish defendants were seeking free exercise protection were debatably central. *See American Indian Religious Sites*, *supra* note 3, at 774-76. This centrality test has only recently left category one and two first amendment cases, and entered the site specific arena. *See also infra* note 79. Most recently, Justice Scalia, in Employment Div., Dep't of Human Resources of Oregon v.

Therefore, a burden on a *practice* central to a religion is a burden in violation of the first amendment free exercise right.[76]

Thus, centrality is one of the most important analytic elements of site specific cases because the standards used to define centrality depend on the actual facts of the case.[77] If the claimant proves that the site in question is central to an Indian tribe's religious practice *and* is burdened, the site is more likely to receive free exercise protection because the claimant has satisifed the first prong of the two-prong free exercise test with an additional showing of centrality.[78] Only the strongest government interests are sufficient to outweigh a showing that the government has imposed an undue burden on a practice central to the religion.[79]

Prior cases have never measured the importance or centrality of a belief due to the notion that courts were neither interpreters of scripture nor capable of probing the merits of practices established long ago.[80] This lack of assessment ability has been accepted because free exercise protection "does not turn on the theological importance of the disputed activity."[81] If one assumes that first amendment protection is contingent upon a finding of centrality, the plaintiff's burden has then been unjustifiably increased because the centrality of the plaintiff's claim is never in issue.[82] Upon a finding of centrality, a court

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Smith, 58 U.S.L.W. 4433, 4457 (1990), although minimizing the importance of a finding of centrality, noted that the compelling interest must be applied regardless of a showing of centrality. *Id.* (citing and quoting Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988).

76 *Woody*, 394 P.2d at 820, 40 Cal. Rptr. at 76.

77 *Id.*, 394 P.2d at 816, 40 Cal. Rptr. at 72.

78 Sequoyah v. Tennessee Valley Auth., 620 F.2d 1159, 1164 (6th Cir.), *cert. denied*, 449 U.S. 953 (1980).

79 Justice Brennan, in *Northwest*, suggested that the centrality test came into site specific consideration through circuit court extensions of *Yoder* and other first amendment site specific cases. Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 474-75 (1988). The genesis of centrality seems to be as follows. First, from *Yoder*, came the phrases "inseparable from the way of life," and "rooted in religious belief." *Yoder*, 406 U.S. at 215-16. The centrality test involved a standard which the *Frank* court interpreted as "cornerstone of their religious observance." *Frank*, 604 P.2d at 1070. Next came the *Woody* notion of "plays a central role" in their religious ceremonies and practices. *Woody*, 394 P.2d at 817, 40 Cal. Rptr. at 73. All of this then seems to be an offshoot of Wisconsin v. Yoder, 406 U.S. 205, 215 (1972).

The actual *Yoder* standard was that a practice must be rooted in religious belief to be afforded "religion clause" protection. The centrality test appears to have arisen from this. In *Sequoyah*, the court questionably pitted "rooted in religious belief" against "personal preference." If the practice is no more than personal preference, it is not central and consequently, not protected. *Sequoyah*, 620 F.2d at 1164. *See supra* note 75.

80 *See supra* notes 61-68 and accompanying text.

81 Wilson v. Block, 708 F.2d 735, 743 (D.C. Cir. 1983) (quoting Unitarian Church West v. McConnell, 337 F. Supp. 1252, 1257 (E.D. Wis. 1972)).

82 *See* Sherbert v. Verner, 374 U.S. 398, 402-04 (1963) (the burden was not increased even though the religious beliefs were not examined for centrality). Likewise, the cen-

may allow a religious practice despite the existence of a contrary state interest.[83]

IV. Applying First Amendment Tests to Site Specific Cases

The *Northwest* decision should have extinguished many of the misconceptions concerning first amendment standards, centrality, and other site specific concerns. However, *Northwest* provides future claimants with no additional understanding of how to prevail on site specific claims because it leaves many unanswered questions and ambiguities.

The resulting ambiguities about site specific claims and the appropriate test for their proper evaluation include: whether (1) a showing of centrality alone is sufficient or whether Indian claimants must also show indispensability; (2) American Indians can ever protect a sacred site, whether private or public; and (3) any government land use is ever considered coercive or burdensome when Indian religious rights are in question. The fundamental issue which remains unanswered is whether Indians have any remaining first amendment rights to sacred sites worthy of protection. To address this fundamental issue and the various ambiguities, one must first examine the development of the standards as applied in the four pre-*Northwest* site specific cases.

A. *First Amendment Analysis of Pre-*Northwest *Site Specific Cases*

In *Sequoyah v. Tennesee Valley Authority*,[84] one of the first site specific decisions, the state action at issue concerned the building of the Tellico Dam on the Little Tennessee River. The controversy arose when the Tennessee Valley Authority ("TVA") planned to flood the valley basin to form a reservoir after closing the dam flood gates.[85] Various Cherokee groups and tribespeople sought to enjoin the completion of the dam because the valley basin, in addition to being Cherokee burial ground, was also the site where medicinal herbs grew which the Indians used in

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trality test has never been the standard for a prima facie category one, two, or three case. *Woody*, 394 P.2d at 814-18, 40 Cal. Rptr. at 70-74.

[83] *Id.*, 394 P.2d at 821, 40 Cal. Rptr. at 72.

[84] 620 F.2d 1159 (6th Cir. 1980).

[85] The problems surrounding the Tellico Dam construction became nationally known during the "snail darter" litigation. The snail darter was a small animal that was indigenous to the valley. The building of the dam was to wipe out not only the Indian religious practices but this species as well. *See* Tennessee Valley Auth. v. Hill, 437 U.S. 153, 156-59 (1978).

religious healing practices.[86] The dam flood gates, if closed, would have rendered the burial grounds and medicinal plants inaccessible.[87] Despite the Cherokee's claims, the dam was eventually built, the gates closed, and the valley flooded.[88]

From the Indians' perspective, *Sequoyah* is not the best case with which to begin litigating site specific claims because the government had an extremely strong interest in the electricity, employment, and recreational capacities the dam was to furnish. Moreover, Congress and the executive branch supported the dam project.[89] Although the court could have recognized the burden on the religious practice and still have weighed the government interest against it to defeat the private claim, the court invalidated the Indians' claim because the Indians failed to demonstrate centrality.[90] The court reasoned that the Cherokee Indians had shown nothing more than that the flooding of the valley was a burden on the "cultural history" of the tribe.[91] Thus, although the courts had never before articulated centrality as the standard for site specific case law, the Sixth Circuit established centrality as the determinative standard.

Finding no centrality, the court then applied the two-prong free exercise test.[92] The court altered the first prong to include only a determination of whether there was a burden on a *central* religious practice.[93] By altering the first prong, the court misinterpreted first amendment precedent[94] by making the first, or burden, prong of the test dependent on centrality.[95] Although the *Sequoyah* court found a compelling state interest, it never applied the second prong, balancing the private religious interest

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86 *Sequoyah*, 620 F.2d at 1160.

87 *Id.* at 1161.

88 *Id.* at 1165. *See* Stambor, *supra* note 3, at 63-67.

89 *Sequoyah*, 620 F.2d at 1161.

90 *Id.* at 1164. Pleading centrality is the second check in the litigation guide: plead centrality at all costs. *See infra* notes 199-207 and accompanying text (discussing indispensability of cedar wood to the Salish).

91 *Sequoyah*, 620 F.2d at 1165.

92 *Id.* at 1163.

> First it must be determined whether the governmental action does in fact create a burden on the exercise of the plaintiff's religion. If a burden is found, it must be balanced against the governmental interest, with the government being required to show an overriding or compelling reason for its action.

Id.

93 *Id.* at 1164-65 (emphasis added).

94 *Id.*

95 Influences or burdens upon religion may be indirect and still be found in violation of the free exercise clause. *See* Thomas v. Review Bd. of Indiana Employment Security Div., 450 U.S. 707, 717-18 (1981).

against the governmental interest.[96] Thus, by not accepting the plaintiffs' belief as central, the court prematurely and incorrectly aborted the two-prong analysis.[97] Instead, the court held that unless a practice was central to the religion, it could never survive the first amendment test.[98]

Including centrality in the first prong of the first amendment analysis was an improper formulation of the free exercise test, courts never having done so before.[99] Contrary to the *Sequoyah* court's application, the centrality test was not intended to be used to determine whether a plaintiff meets the first prong of the free exercise test.[100] It was neither meant to be used as part of the balancing process,[101] nor to supplant the balancing process.[102] The centrality standard was to be used solely as a condition which places the importance of the practice itself in context.[103]

In a similar case, *Badoni v. Higginson*,[104] Navajo tribe members sought to enjoin the continued flooding and development of Utah's Rainbow Bridge National Monument because their reservation bordered the Monument area.[105] After its completion in 1963, waters behind the Glen Canyon Dam had been allowed to inundate several Navajo sacred sites and burial grounds to allow boat access to the Monument.[106] As in *Sequoyah*, prior litigation

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96 *Sequoyah*, 620 F.2d at 1164. In fact, had the court weighed the private interest against the government interest, it was almost certain to have favored the TVA because of the congressional and executive support and the strong TVA interest. Relief under the AIFRA, the National Historic Preservation Act, and the laws of Tennessee was impossible because President Carter signed a bill which granted immunity to the TVA construction of the Tellico Dam. *Id.* at 1161.

97 *Id.* at 1164.

98 *Id.* at 1164-65.

99 In Wisconsin v. Yoder, 406 U.S. 205 (1972), where the free exercise two prong test was allegedly created, there was no mention of centrality. However, in *Sequoyah*, the court interpreted the *Yoder* case as if it fully encompassed notions of centrality. *Sequoyah*, 620 F.2d at 1164.

100 *See, e.g.*, People v. Woody, 394 P.2d 813, 816-18, 40 Cal. Rptr. 69, 72-74 (1964).

101 *Id.* In *Woody*, the court decided that no compelling state interest supported the prohibition of peyote use. This satisfied the second prong of the free exercise test. However, the court did not so conclude by reasoning that first a plaintiff must prove centrality before a proper weighing of private versus governmental interest can proceed. *Id.*, 394 P.2d at 820, 40 Cal. Rptr. at 76.

102 In *Sequoyah*, the plaintiffs' counsel could have argued that the area behind the Tellico Dam was central to the religion. Although not expressly referred to as "central," the burial grounds in *Sequoyah* were of the utmost importance to the daily lives of the Cherokee Indians and impliedly assumed the central place in their religion. *Sequoyah*, 620 F.2d at 1162.

103 *Id.*

104 638 F.2d 172 (10th Cir. 1980), *cert. denied*, 452 U.S. 954 (1981).

105 *Badoni*, 638 F.2d at 175-76. The Rainbow Bridge is known to many because its 278-foot, all natural sandstone span has been a favorite western motif. *Id.* at 175.

106 *Id.* at 175-76.

concerning the dam resulted in the finding of a compelling state interest due to the power generated and water supplied by the dam.[107] In fact, the appellate court in *Badoni* stated that because "the government's interest in maintaining the level of Lake Powell is compelling; [there was no need to] reach the question whether the government action involved infringe[d] plaintiffs' free exercise of religion."[108]

The two-prong free exercise test was therefore as incorrectly transformed into a single step in *Badoni* as it was in *Sequoyah*.[109] The court did not consider the religious interests strong enough to warrant inclusion in the weighing of private versus governmental interests.[110] However, unlike the plaintiffs' counsel in *Sequoyah*, the plaintiffs' counsel in *Badoni* did not fail to plead centrality.[111] Despite the showing of centrality, the court relied on the compelling interest test and found that, due to the results of a prior case evaluating the impact of the Glen Canyon Dam, the government interest outweighed the private interest.[112] In essence, *Badoni* not only perpetuated the *Sequoyah* mistakes,[113] but compounded them by failing to consider the flooding of sacred Navajo lands as a burden on a central religious practice.[114] Although the *Badoni* court relied on *Sequoyah*, it also relied on *Crow v. Gullet*[115] which found a violation of the establishment clause on different grounds.[116] Because the plaintiffs in *Badoni* had claimed exclusive use or, in the alternative, police surveillance of the area, the court was able to hold that granting the request would result in a "government-managed religious

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107 *See infra* note 112. However, the *Badoni* court rejected the federal government's claim that the Indians' lack of property interest (title) entitled the Indians to no relief. *Id.* at 176. *See supra* note 40-68 and accompanying text (discussing property interest and free exercise claims). *See also* Stambor, *supra* note 3, at 76-77.

108 *Id.* at 177 n.4.

109 *See id.* at 176-77 and *supra* notes 90-103 and accompanying text.

110 *Id.* at 177 and n.4.

111 *Id.* at 177.

112 The importance of the Glen Canyon Dam and Reservoir as a regional source of power and water had been previously litigated in Friends of the Earth v. Armstrong, 485 F.2d 1 (10th Cir. 1973), *cert. denied*, 414 U.S. 1171, *reh'g denied*, 416 U.S. 952 (1974). The *Badoni* court relied on the results of *Friends* when deciding against the plaintiffs for the second time. *Badoni*, 638 F.2d at 177.

113 The court failed to acknowledge that there were separate categories of religious claims. *Id.* In presenting a case, a plaintiff must explicitly articulate the three genres of American Indian free exercise cases. This is step one in the litigation guide. *See infra* notes 202-05 and accompanying text. This will alert the court to possible misapplications.

114 *Badoni*, 638 F.2d at 177-78.

115 541 F. Supp. 785 (D.S.D.), *aff'd*, 706 F.2d 856 (8th Cir. 1982), *cert. denied*, 464 U.S. 977 (1983).

116 *Badoni*, 638 F.2d at 179. *See* Stambor, *supra* note 3, at 79.

shrine."[117]

In *Wilson v. Block*,[118] the Circuit Court for the District of Columbia appeared to correct first amendment analysis when it stated that "[f]irst [a]mendment protection of religion 'does not turn on the theological importance of the disputed activity.' "[119] However, that promise was illusory because the court proceeded to state that owing to the site specific nature of the case, "[i]f the plaintiffs cannot demonstrate that the government land at issue is *indispensable* to some religious practice . . . they have not justified a First Amendment claim."[120] This particular standard, previously nonexistent, became the holding,[121] and was only supported by a reference to *Crow*.[122] Plaintiffs now "seeking to restrict government land use in the name of religious freedom must, at a minimum, demonstrate that the *government's proposed land use would impair a religious practice that could not be performed at any other site*."[123]

Although the standard set by the *Wilson* court lends a hard and fast component to centrality in site specific cases, it also unnecessarily increases the burden on plaintiffs to prove absolute impairment of their religious practices. In turn non-western religions suffer from prejudice because Indian claimants must either prove centrality or give up a specific religious practice. Previously, when centrality quantified the religious practice, there was no indication that it would lead to an "all or nothing" proposition.[124] In fact, in the two non-site specific categories of Indian

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117 *Badoni*, 638 F.2d at 179.

118 708 F.2d 735 (D.C. Cir.), *cert. denied*, 464 U.S. 956 (1983).

119 *Id.* at 743 (quoting Unitarian Church West v. McConnell, 337 F. Supp. 1252, 1257 (E.D. Wis. 1972), *aff'd*, 474 F.2d 1351 (7th Cir. 1973), *vacated and remanded on other grounds*, 416 U.S. 932 (1974)) (city may not prevent church-sponsored sex education program). Recall that the *Wilson* court had *Sequoyah*, *Badoni*, and *Crow* to rely upon as precedent. In fact, the *Northwest* district court decision had already been reported in the plaintiff Indians' favor. *Northwest*, 552 F. Supp. 951 (N.D. Cal. 1982). The *Wilson* court relegated the *Northwest* district court opinion to a footnote. *Wilson*, 708 F.2d at 742-43 n.4.

It is interesting to note that *Northwest* was being litigated at the same time as *Wilson* and several other principal cases. *See supra* note 6 and accompanying text. This may explain the surprise entrance of indispensability into *Wilson*, since, in the final years of adjudication, Congress was discussing possible amendments to AIFRA and the words "central and indispensable" were being used as possible grounds for a district court cause of action. *Wilson*, 708 F.2d at 742-43. *See also supra* note 206.

120 *Wilson*, 708 F.2d at 743 (emphasis added).

121 *See supra* notes 18-39 and accompanying text (discussing *Wilson* and congressional recognition of sacred sites in AIFRA).

122 *Wilson*, 708 F.2d at 743 n.4.

123 *Id.* at 744 (emphasis added).

124 People v. Woody, 394 P.2d 813, 820, 40 Cal. Rptr. 69, 76 (1964). *See supra* notes 75-83 and accompanying text (discussing centrality test with regard to non-site specific claims).

claims,[125] findings of "no centrality" did not unequivocally preclude decisions in favor of the Indian plaintiffs.[126] However, in site specific cases, application of the *Wilson* indispensability standard means failure to show centrality will result in the dismissal of the claim. Therefore, *Wilson* represents an unprecedented extension of centrality.[127]

In *Crow v. Gullet*,[128] the most recent site specific case before *Northwest*, the government constructed state roads, bridges, parking lots, and other facilities to allow and improve tourist access to view Indian rituals and sites at the Bear Butte at the eastern edge of the Black Hills of South Dakota.[129] This area has been a regular tourist stop since the days of the early American West. The untrammelled tourist presence has reduced some Indian practices to a banality.[130] The plaintiffs, members of the Lakota and Tsistsistas Indian Nations, claimed that the government facilitated tourist access was destroying the sanctity and power of the Bear Butte making the practice of certain religious ceremonies impossible.[131] The Indian nations also argued that the spectators interfered with their ritual Vision Quest and sweat lodge ceremonies, central practices which consume a great deal of energy and time.[132]

The *Crow* court held that the additions to Bear Butte did not violate the Indians' right of free exercise of religion.[133] The court broke away from the *Wilson* rationale by examining whether specific government action had a coercive effect on the practice of religion.[134] Since the government had neither interfered with nor unduly burdened the plaintiffs' religion, the court required no further analysis.[135]

Had there been uniformity in pleading among the four pre-

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125 *See supra* notes 1-2 and accompanying text (discussing the two other non-site specific categories of Indian claims).

126 *See, e.g.*, Sequoyah v. Tennessee Valley Auth., 620 F.2d 1159, 1161-62 (6th Cir.), *cert. denied*, 449 U.S. 953 (1980); Badoni v. Higginson, 638 F.2d 172, 176-77 (10th Cir. 1980), *cert. denied*, 452 U.S. 954 (1981). Both cases held that it was enough for plaintiffs to establish that the government action created a burden on the exercise of religion.

127 *Wilson*, 708 F.2d at 743-44.

128 541 F. Supp. 785 (D.S.D. 1982), *aff'd*, 706 F.2d 856 (8th Cir.), *cert. denied*, 464 U.S. 977 (1983).

129 *Id.* at 788-89.

130 *Id.* at 789.

131 *Id.* at 788-89.

132 *Id.*

133 *Id.* at 791.

134 *Id.* at 790.

135 *Id.* at 791 ("[T]he free exercise clause places a duty upon a state to keep from prohibiting religious acts, not to provide the means or the environment for carrying them out.").

Northwest cases, these cases may have been more internally consistent. However, the results would probably not have differed because there was not one uniform test with respect to either centrality or the manner in which the first amendment tests were applied.[136] In addition, new standards like "indispensibility" were developed. The lower courts' decisions in *Northwest* resolved the disparity among these cases and their analyses.

B. Lyng v. Northwest Indian Cemetery Protective Association

The differing analytic approaches of the majority and the dissent in *Northwest*, are indicative of not only the phraseology of the issues in site specific cases, but also the manner in which courts conceptualize Indian sacred sites. Justice O'Connor, the author of the majority opinion in *Northwest*, phrased the issue as "whether the First Amendment's Free Exercise Clause forbids the Government from permitting timber harvesting in, or constructing a road through, a portion of a National Forest that has traditionally been used for religious purposes by members of three American Indian tribes in northwestern California."[137] Four members of the Supreme Court agreed with Justice O'Connor's phrasing of the issue and with her response that the Free Exercise Clause does not forbid the governmental action.[138] In his dissent, Justice Brennan, referring to *Wilson*, framed the issue as "whether [the Native American claimants] have discharged their burden of demonstrating . . . that the land use decision poses a substantial and realistic threat of undermining their religious *practice*."[139] Justice Brennan concluded that the claimants had discharged their burden.

The land in question in *Northwest* was the Six Rivers National Forest ("Six Rivers"), an expanse of land in northwest California.[140] More specifically, one 67,500 acre section, the Blue Creek Unit, was the area of controversy in *Northwest*.[141] The Blue

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136 *Id.* at 789-91.

137 Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 441-42 (1988). Justice O'Connor formulated the issue in the case using language, almost verbatim, from the petitioner's brief. Brief for Petitioner at 3, Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988).

138 *Id.* at 441. Justices White, Stevens, Scalia, and Chief Justice Rehnquist joined Justice O'Connor's opinion.

139 *Id.* at 1325 (emphasis added). Justice Brennan was joined by Justices Blackmun and Marshall.

140 The land is located in Del Norte and Humboldt Counties. *Northwest*, 565 F. Supp. 586, 590 (N.D. Cal. 1983).

141 *Id.* The Six Rivers, over 900,000 acres in size, is broken into units for administrative purposes. *Id.*

Creek Unit contains high mountain peaks, natural rivers and streams, and approximately 31,100 acres of Douglas Fir trees that the forest service included as a part of a roadless area.[142] The town of Gasquet borders on the northwest and Orleans borders on the southeast boundary of the Blue Creek Unit. The towns have parallel highways which do not intersect.

In 1974, the Forest Service proposed several forestation plans for the Blue Creek Unit.[143] The Gasquet-Orleans ("G-O") road was proposed to facilitate the harvesting of timber and vehicular recreational travel between the parallel highways.[144] Although the forest service suggested various routes[145] for the G-O road between 1977 and 1981, all of the routes lay within the Blue Creek Unit.[146] The chosen route ran directly through the Chimney Rock area, adjoining the northernmost point above the Hoopa Valley Indian Reservation.[147]

The Yurok, Karok, and Tolawa Indians all consider the Chimney Rock area to be sacred land and refer to it as "high country."[148] For the Indians, the words "high country" are comparable to "sacred site" and indicate a sacred site of the highest order.[149] In fact, "[n]o other geographic areas or sites hold an equivalent religious significance for these tribes."[150] The Indian groups protested the construction, claiming that the G-O road "would violate the sacred qualities of the high country and im-

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142 *Id.* *See* California v. Bergland, 483 F. Supp. 465, 471-73 (E.D. Cal. 1980), *modified*, 690 F.2d 753 (9th Cir. 1982).

143 *Northwest*, 565 F. Supp. at 590.

144 *Id.* The G-O road connects the parallel highways at the Summit Valley on the Gasquet side and the Dillion and Flynt sections on the Orleans side.

145 All of these alternate routes were located within the Blue Creek Unit.

146 *Northwest*, 565 F. Supp. at 589-92.

147 *Id.*

148 *Id.* at 594.

149 *Id.* at 591. The Indians claimed first that:

> visibility of the road from religious sites would damage the pristine visual conditions found in the high country that are essential for its religious use. . . . Second, increased aural disturbances from construction and use of the road would similarly impair the success of religious and medicinal quests into the high country. Third, environmental degradation of the high country resulting from construction of the road would erode the religious significance of the areas. Finally, religious use of the area would be impaired by increased recreational use resulting from construction of the Chimney Rock Section.

Id.

150 *Id.* at 594. For example, the three tribes perform their "World Renewal" ceremonies in the Chimney and Doctor Rock areas. Peak Eight, the summit of the Unit, is the specific site where tribe members communicate with the creator. As Dr. Theodoratus found in her report, and the Supreme Court chose to deny, the natural solitude and pristine nature of the Unit alone makes these practices possible. *Id.* *See supra* note 147.

pair its successful use for religious purposes."[151]

After exhausting administrative remedies,[152] the Indian groups, the State of California, and others,[153] sued the United States Forest Service and the United States Department of Agriculture.[154] The Indian plaintiffs sought a preliminary injunction against the building of the road, filing their claim in the Federal District Court of Northern California.[155] The injunction was denied because the defendants agreed to postpone construction until there was a hearing on the merits of the case.[156] However, in noting the applicability of the first amendment tests to orthodox as well as unorthodox religions,[157] the court guaranteed that the Indian claim would not fail the first amendment pre-tests.[158]

After examining *Sequoyah*, *Crow*, *Wilson,* and *Badoni*, the district court held that the Indian plaintiffs had satisfied the pre-tests because the high country was a sacred site and the beliefs and practices occurring in and around the area were sincere.[159] Furthermore, the court found the high country, with its pristine and peaceful conditions, "*central* and *indispensable*" to the Indians' religions.[160] The court's determination that the Chimney Rock area was both "the center of the [plaintiffs'] spiritual world"[161]

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151 *See Northwest*, 565 F. Supp. at 592. *See also Northwest*, 552 F. Supp. 951, 954-55 (N.D. Cal. 1982); *Taking a Hard Look at Mitigation*, *supra* note 3, at 690.

152 *Taking a Hard Look at Mitigation*, *supra* note 3, at 690-99. *See also Northwest*, 565 F. Supp. at 590.

153 *See* Brief for Respondents State of California at 2, Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988). California appeared "through the Native American Heritage Commission, the State agency charged with the protection of the right to practice Native American Religion on public land and the protection of ceremonial sites for irreparable damage." *Id.* Other plaintiffs included The Sierra Club, The Wilderness Society, and Redwood Region Audubon Society. *Northwest*, 565 F. Supp. at 590.

154 The alleged violations and causes of action are:

> (1) The First Amendment of the Constitution of the United States; (2) The American Indian Freedom of Religion Act of 1978 (AIFRA), 42 U.S.C. § 1996; (3) The National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq.* and the Wilderness Act, 16 U.S.C. § 1131 *et seq.*; (4) The Federal Water Pollution Control Act, 33 U.S.C. § 1251 *et seq.*; (5) water and fishing rights reserved to American Indians on the Hoopa Valley Indian Reservation, and defendants' trust responsibility towards those rights; (6) the Administrative Procedure Act, 5 U.S.C. § 706; (7) The Multiple Use Sustained-Yield Act, 16 U.S.C. §§ 528-31; and (8) the National Forest Management Act of 1976, 16 U.S.C. § 1600 *et seq.*

Id. at 590-91.

155 *Northwest*, 552 F. Supp. 951, 954 (1982).

156 *Id.* at 957.

157 *Northwest*, 565 F. Supp. 586, 591 (N.D. Cal. 1983). *See supra* notes 27-28 and 46-53 and accompanying text (discussing the orthodox/unorthodox disinction).

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

159 *Id.* at 593-94.

160 *Id.* at 594.

161 *Id.*

and indispensable for the performance of ceremonies that comprise the core of their religious system, led it to conclude that any degradation of the high country would impair the training of young persons in tribal beliefs and would "carry a very real threat of undermining the [tribal] communit[ies] and religious practice[s] as they exist today."[162] Therefore, the G-O road imposed an undue burden on religion.

Much of the information accepted as fact in the *Northwest* proceedings was taken from the Theodoratus Report.[163] The report was a feasibility study commissioned by the Forest Service to determine where the G-O road should be placed.[164] It concluded that the road *should not be completed* through the Chimney Rock section or through any of the other alternate routes presented because the three tribes' religious practices far outweighed any benefits the road could bring to the area.[165] The report also stated that there were no compelling economic or social reasons to complete the road.[166] Both the Forest Service and the Highway Commission disregarded the results of this study.[167]

Pursuant to traditional free exercise litigation, the district court then balanced the governmental interests against the private interests. Relying in part on the Theodoratus Report, the court concluded that the G-O road would not: 1) improve access to timber resources; 2) stimulate employment in the area; 3) provide access for a sufficient number of additional vehicles; or 4) increase the area's utility for primitive recreational use.[168] In fact, the district court found no compelling government interest because "[s]uch speculative and diffuse goals as these cannot provide the basis for denying plaintiffs' free exercise claim."[169]

The district court avoided the *Badoni* and *Wilson* conflict over the application of centrality by first finding centrality and then

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[162] *Id.* (quoting Wisconsin v. Yoder, 406 U.S. 205, 218 (1972)).

[163] Brief for the Indian Respondents on Writ of Certiorari, Joint Appendix, Appendix K to Defendant's Exhibit G. at 110 (D. Theodoratus, et al.) *Cultural Resources of the Chimney Rock Section, Gasquet-Orleans Road, Six Rivers National Forest* (1979), Lyng v. Northwest Indian Cemetery Protective Ass'n, 795 F.2d 688 (9th Cir. 1986) [hereinafter *Theodoratus Report*].

[164] *Id.* at 110-11.

[165] *Id.* at 197.

[166] *See Theodoratus Report, supra* note 163, at 111-84.

[167] *Id.* at 594. *See* Brief for Respondents-Indians at 5-6, Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988) (explaining the relationship between the Indians' religions and the high country). *See also Northwest*, 565 F. Supp. at 592 (describing the visibility damage and pristine visual conditions).

[168] However, District Judge Weigel implied that had the Indians not claimed centrality and indispensability, the balancing test would have been applied only to a religious practice, not a central religious practice. *Northwest*, 565 F. Supp. at 595.

[169] *Id.* at 596.

proceeding with the first prong of the first amendment test, thereby keeping the tests distinct. As a result, the court properly confined centrality to influencing the first prong of the free exercise test.[170] Having found the G-O road a burden on a central practice of the Indians' religion, the district court applied the establishment clause test.

The district court, citing *Badoni* and *Wilson*, applied the three-prong establishment test and stated that an injunction preventing the G-O road would *not* be "excessive governmental entanglement with religion."[171] Consequently, the court granted a permanent injunction against the defendants' commercial harvesting of *any* timber from the 31,000 acre area.[172] Furthermore, the court prohibited any further building of logging roads in the high country until a feasibility study and plan comporting with the guidelines set forth by the court were presented and subjected to public comment.[173]

The court of appeals affirmed the district court.[174] However, before the decision was handed down, Congress passed the California Wilderness Act of 1984 ("the Wilderness Act").[175] Under the Wilderness Act, a narrow strip of land conforming to the G-O road was exempted from the otherwise all-encompassing harvestation prohibition in the wilderness areas of the Six Rivers.[176] The legislative history reveals that the exemption was incorporated "to enable the completion of the [G-O] Road project *if the responsible authorities so decide*."[177]

On rehearing, the court of appeals affirmed in part and vacated in part the district court's holding.[178] The court held that

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170 *Id.*

171 *Id.* at 597.

172 *See supra* note 28 and accompanying text.

173 *Northwest*, 565 F. Supp. at 606.

174 *Northwest*, 764 F.2d 581 (9th Cir. 1985).

175 Pub. L. No. 98-245, 98 Stat. 1619 (1984).

176 *Id.*

177 S. Rep. No. 98-582, 98th Cong., 2d Sess. 29 (1984) (emphasis added).

178 *Northwest*, 795 F.2d 688 (9th Cir. 1988). The government obtained a rehearing because it claimed that the appellate court had applied an incorrect standard of review in the initial appeal. Because the case presented a mixed question of law and fact, the government claimed the appellate court should have applied a *de novo* review of the legal principles involved instead of accepting the conclusory findings of the district court on the first amendment question. *Id.* at 699 n.1. The government contended that the district court did not make specific findings regarding the effects of the construction of the G-O road on the Indians' first amendment rights, but rather, relied exclusively on the conclusions of the *Theodoratus Report*, *supra* note 163. *Northwest*, 795 F.2d at 701. The government thus contended that a careful review of the record did not support the permanent injunction that was ordered. *Id.* at 699. Although the appellate court did not change the holding of the case, the rehearing opinion contains a lengthy dissent behind which the Supreme Court majority takes refuge.

the three Indian tribes had established a constitutionally valid claim that the government was creating a burden on their free exercise rights despite the Act's exemption.[179] The court also reviewed the centrality test and confirmed the centrality of the Chimney Rock area to the three tribes' religious practices.[180] In addition, it held that no compelling state interest was served by the completion of the G-O road[181] and that the G-O road would be an external burden because it would impede the Indians from practicing in the only spot possible for them.[182]

In the United States Supreme Court, Richard E. Lyng, the Secretary of Agriculture, as petitioner, conceded that the Indians 1) used the high country road for religious purposes; 2) were sincere; and 3) demonstrated veracity.[183] Regardless of these concessions, however, the Court determined that the religious practices were never in question. After holding that the government did not violate the Indians' right to free exercise of religion, the Court confirmed that because the government action was not giving preferential treatment to the three tribes, there could be no violation of the establishment clause.[184] The Court resolved this free exercise/establishment clause dilemma by stating that "where governmental action violates the Free Exercise Clause, the Establishment Clause ordinarily does not bar judicial relief."[185]

Furthermore, Justice O'Connor was unwilling to apply the first amendment tests. She found that "[i]n neither case . . . would the affected individuals be coerced by the Government's

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179 *Id.* at 691-92.

180 *Id.*

181 *Id.* at 694-95. *See Theodoratus Report, supra* note 163, at 115. To confirm this and other facts, the court relied heavily upon the *Theodoratus Report*. The court of appeals accepted the district court's conclusion that in the Chimney Rock section, the harvestation of timber would not create new jobs, nor would the road serve considerable new traffic. An estimated eight recreational vehicles a day were to pass over the G-O road. *Northwest*, 565 F. Supp. at 596. The court of appeals also distinguished another Indians' religious freedom case, Bowen v. Roy, 476 U.S. 693 (1986), the distinction seeming to be one of whether such a governmental action would coerce an individual into violating their religious beliefs. *Northwest*, 795 F.2d at 693. In *Bowen*, the assignment of a social security number to an individual was considered to be necessary to the internal functions of government and subsequently the assignment did not impair the Indians' free exercise of religion. "The Federal Government's use of a Social Security number . . . does not itself in any degree impair [plaintiff's father's] 'freedom to believe, express, and exercise' his religion." *Northwest*, 795 F.2d at 693 (quoting *Bowen*, 476 U.S. at 702). At most it "offended his religious sensibilities," which the Court found acceptable and not in violation of the free exercise clause. *Id.*

182 *Id.*

183 *Northwest*, 485 U.S. at 451-52.

184 *Id.*

185 *Northwest*, 795 F.2d at 694 (quoting Wilson v. Block, 708 F.2d 735, 747 (D.C. Cir. 1986)).

action into violating their religious beliefs; nor would either governmental action penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens."[186] According to Justice O'Connor, since there was no burden or coercive effect on the religion, there was no violation of the free exercise clause. In turn, centrality was irrelevant and there was no need to find a compelling governmental interest.[187] Justice O'Connor then concluded:

> Even if we assume that we should accept the Ninth Circuit's prediction, according to which the G-O road will virtually "destroy the Indians' ability to practice their religion[,]" . . . the Constitution simply does not provide a principle that could justify upholding respondents' legal claims. However much we might wish that it were otherwise, government simply could not operate if it were required to satisfy every citizen's religious needs and desires. . . . The First Amendment must apply to all citizens alike, and it can give to none of them a veto over public programs that do not prohibit the free exercise of religion.[188]

Recognizing that the Yurok, Karok, and Talowa had a bona fide pre-test religious practice and that the government had some interest, Justice O'Connor applied a compounded first and second prong form of the free exercise test, never used before, to validate the decision.[189] It is difficult to understand the reason for her analysis because she could have come to the same, albeit incorrect, conclusion by applying the pre-existing two-prong free exercise test. Justice O'Connor failed to make logical and formal application of site specific first amendment claims because the only result of this application is a categorical denial of unorthodox religions in American society. Justice O'Connor created further difficulty by attempting to distinguish, as part of traditional free exercise analysis, the words "violate" and "prohibit."[190] A distinction need only be made between "governmental actions that violate free exercise rights" and "governmental actions that prohibit free exercise rights" once there

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186 *Northwest*, 485 U.S. at 449. Justice O'Connor was unable to distinguish between the social security number in *Bowen* (category two) and the G-O road in the Blue Creek Unit (category three). *Id.* at 449-50. *See supra* note 1 and accompanying text.

187 *Northwest*, 485 U.S. at 450-51.

188 *Id.* at 451-52.

189 *Id.* As with the court's application in *Badoni*, *supra* notes 104-17 and accompanying text, when the two prongs are analyzed as one, the combination thus destroys the two-pronged test. *See supra* notes 61-68 and accompanying text.

190 *Northwest*, 485 U.S. at 450-51. Justice Brennan, in his dissent, examines Justice O'Connor's analysis of the words "violate" and "prohibit." *Id.* at 468 n.4.

has been a finding that a burden on religion exists.[191] Since the adverse governmental effects need only penalize or coerce free exercise rights to violate them, the importance was no longer to distinguish between "violate" and "prohibit" because the Court found that the religious practices of the three tribes *had* been burdened.[192] Although Justice O'Connor agreed that the G-O road would forever alter the character of the religious expression, she failed to recognize this violation as coercive or punitive.[193]

Justice Brennan, in dissent, recognized the majority's failure to address the first amendment coercion. First, he explicitly acknowledged the existence of site specific claims by stating that "[t]he site-specific nature of Indian religious practice derives from the Native American perception that land is itself a sacred, living being."[194] Justice Brennan then analyzed the majority's approach to the two-prong free exercise analysis. He argued that "the Court's coercion test turns on a distinction between governmental actions that compel affirmative conduct inconsistent with religious belief, and those governmental actions that prevent conduct consistent with religious belief. In my view, such a distinction is without constitutional significance."[195]

Although one of the central thrusts of this Comment has been to distinguish between site specific and non-site specific actions, Justice Brennan chose not to make such a distinction. However, his position does not imply that in analyzing free exercise claims brought by Indian plaintiffs the distinction is without merit. As he ultimately proposed a "centrality" standard concerning site specific cases,[196] Justice Brennan's approach signifies that site specific cases should join both prior non-site specific first amendment precedents by using centrality as the means to simultaneously accentuate religious practice and combat the opposing interest.[197]

Therefore, the more accurate phrasing of the issue for *Northwest* was that which Justice Brennan proposed. Because Justice Brennan argued that "centrality:"

> should not be equated with the survival or extinction of the religion itself . . . , adherents challenging a proposed use of federal land should be required to show that the decision

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191 *Id.*
192 *Id.* at 448-50.
193 *Id.* at 450-51.
194 *Id.* at 461.
195 *Id.* at 468.
196 *Id.* at 474.
197 *Id.* at 466-67.

> poses a substantial and realistic threat of frustrating their religious practices. Once such a showing is made, the burden should shift to the Government to come forward with a compelling state interest sufficient to justify the infringement of those practices.[198]

Justice Brennan's proposed centrality standard would be a natural extension of the current centrality test. The lines dividing the three categories of free exercise, although blurred, would still serve as a demarcation point for post-*Northwest* litigation.

V. THE POST-*NORTHWEST* LITIGATION GUIDE

Northwest does not signal the end of site specific cases. In fact, in Washington State, near Mount Baker in the Snoqualmie National Forest, the Salish Indians presently face problems almost identical to those of the Yurok, Karok, and Talowa Indians.[199]

To the Salish, cedar wood is indepensible because they use cedar in every part of their lives.[200] The Salish use cedar not only for religious purposes but also to build homes and boats, to make clothing and art works, and to meet many daily necessities.[201] As in *Northwest*, the Forest Service needs to build roads through the Snoqualmie National Forest to access the cedar trees in order to chop them down. Like the Yurok, Karok, and Talowa in *Northwest*, the Salish use part of a 450,000 acre area in the Snoqualmie National Forest for religious practices and perform central seasonal dances in these woods. As in *Sequoyah*, the Salish use the area for smokehouses and as in *Wilson*, the Salish gather ritual plants, roots and other paraphernalia in this area. The Salish, like all site specific cases, feel that their religion is nearing extinction. The following guide has been created to help Indian plaintiffs prepare for any similar site specific litigation.

1. Define the Claim as Category One, Two, or Three

An Indian plaintiff must first determine the category of first amendment claim in question. A claim may appear to be site specific when it is not. For example, *People v. Woody*[202] is a good ex-

198 *Id.* at 474-75.
199 Ervin, *Spirit Dancers and the Law*, SIERRA 106 (Nov.-Dec. 1988) [hereinafter Ervin].
200 *Id.*
201 *Id.*
202 394 P.2d 813, 40 Cal. Rptr. 69 (1964). Perhaps the better example of a category one case involving the use of peyote can be found in Employment Div., Dep't of Human Resources of Oregon v. Smith, 58 U.S.L.W. 4433 (1990) (Scalia J.). In *Smith I*, 485 U.S. 660, 673-74 (1988) (Stevens, J.), decided one week after *Northwest*, the Supreme Court

ample of a category one case.[203] In *Woody*, a California statute outlawed the use of peyote, a small spineless cactus whose principal component is mescaline.[204] Members of the Nature American Church use peyote for many purposes central to their religion.[205] In *Woody*, however, cultural history through a showing of centrality won the case. Therefore, had peyote been uniquely indigenous to a specific locale that was subject to adverse government land use, a site specific argument could have been made. To have categorized this claim as site specific and have proceeded on the grounds that cultural history was at stake would have almost assuredly guaranteed a victory under *Sequoyah*.

Properly categorizing claims has three advantages. It facilitates the correct application of precedent. It also allows an Indian plaintiff to plead two or more first amendment categories. Finally, categorizing may also lend greater coherence and order to the issues since claims pled as site specific can be distinguished from the remaining two categories.

2. Plead Centrality and Indispensability

An Indian plaintiff must plead centrality and indispensibility if the principal claim is site specific. Furthermore, centrality must be asserted. Under the combined reading of the holdings in *Wilson* and *Northwest*, an Indian plaintiff must also plead indispensability.[206] Centrality and indispensability may no longer be

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originally appeared to defer to the religious practices of the petitioners Smith and Black. However, in *Smith II*, the Court found that the state can, if it finds it appropriate, prohibit the use of sacramental peyote. *Employment Div.*, 58 U.S.L.W. at 4335-38.

203 *See supra* note 1 (discussing the protective Eagle Act). *See also* Ervin, *supra* note 198, at 107.

204 *Woody*, 394 P.2d at 814-15, 40 Cal. Rptr. at 72.

205 *Id.*, 394 P.2d at 815-18, 40 Cal. Rptr. at 73-74.

206 To show the extent to which indispensability has developed, one need only examine Senate Bill 2250, 100th Cong., 2d Sess., § 1996 (1988), introduced by Senators Cranston, Inouye, and DeConcini on March 31, 1988, just prior to the Supreme Court decision in *Northwest*. *See also* 134 CONG. REC. S3633 (daily ed. Mar. 31, 1988). Senate Bill 2250 was an attempt to put some teeth into the American Indian Freedom of Religion Act (AIFRA). Although it went to the Select Committee on Indian Affairs on May 30, 1988, no action was taken and at the close of the 100th Congress the bill died. The bill read:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* that Public Law 95-341 is amended by adding at the end thereof the following new section:
>
> Section 3(a) Except in cases involving compelling governmental interests of the highest order, Federal lands that have been historically indispensable to a traditional American religion shall not be managed in a manner that would seriously impair or interfere with the exercise of such traditional American Indian religion.
>
> (b) United States district courts shall have the authority to issue such orders as may be necessary to enforce the provisions of this section.

thought of as category one and two standards because *Northwest* has blurred the lines dividing the three classes of claims.

For example, the Salish Indians must plead that the cedar is central and indispensable to their religion.[207] If the Indian practice is not clearly delineated as central and indispensable, it is preferable to search deeply into the Indian beliefs and practices to find a central practice being burdened because the constitutional protection afforded the central practice is greater than that afforded a non-central practice.

3. Plead That No Other Sacred Site Exists: "Least Intrusive Alternative"

For the Indian plaintiffs to perform those practices they claim the government actions burden, it is necessary when possible for the plaintiffs to establish any practices that are totally unique to the area in dispute. An activity that (1) may only be performed in the disputed area and (2) is a practice of the religion, would technically overcome the *Wilson* indispensability standard. This would be the same as saying that there is no other available site. A court must be able to visualize the practice as bound to a specific site. Unfortunately, this seems not to be the case because the Salish Indians' cedar is not unique to the Puget Sound area.

If no practice is expressly tied to a particular location, litigants must be prepared to accept the government's offer of a less intrusive alternative.[208] The courts in *Sequoyah, Badoni, Wilson,* and *Northwest* considered whether the government had an alternative method that was less instrusive than the one in question.[209] In all four cases, the government had conducted environmental impact studies evaluating possible options. However, it is important to realize that such options are never the results the Indians desire.

S. 2250, 100th Cong., 2d Sess., 134 CONG REC. S3633 (daily ed. Mar. 31, 1988). *See infra* note 219 for the main text of the American Indian Religous Freedom Act of 1978, 42 U.S.C. § 1996 (1978).

207 Ervin, *supra* note 199, at 106.

208 *See generally Taking a Hard Look at Mitigation, supra* note 3 (discussing analysis of National Environmental Policy Act by the Ninth Circuit).

209 *See* Northwest Indian Cemetery Protective Ass'n v. Peterson, 764 F.2d 581, 588-89 (9th Cir. 1985); Wilson v. Block, 708 F.2d 735, 739 (D.C. Cir. 1983); Badoni v. Higginson, 638 F.2d 172, 175-76 (10th Cir. 1980); Sequoyah v. Tennessee Valley Auth., 620 F.2d 1159, 1160-61 (6th Cir. 1980).

4. Plead Nonexclusivity

Indian plaintiffs *cannot* request exclusive control and dominion over the specific site because the government will prevail by arguing that the establishment clause prevents such a "government-managed religious shrine."[210] *Sequoyah*, *Northwest*, and *Badoni* all held that a possessory interest is not necessary for a plaintiff Indian to prevail on a site specific claim. Although nonexclusivity may be a difficult idea to convey to prospective Indian plaintiffs, it must be done because, as *Crow* elucidates, a court will not apply the first amendment tests if the plaintiffs are requesting exclusive control.[211]

5. Plead Religious Practices as Religious Beliefs

Although a citizen's religious *beliefs* receive absolute constitutional protection, a citizen's *practices* do not.[212] Courts and commentators incorrectly categorize sacred sites as the locations where religious practices are performed.[213] Western comprehension of Indian religions may make this categorization incorrect.[214] If Indian plaintiffs plead their religious practices as religious beliefs, the site will receive absolute first amendment protection. For example, if the Salish were to argue that the cedar trees and their site were religious *beliefs* and the court accepted this, then the specific site would receive absolute protection.

6. Anticipate Compelling Government Interests

Indian plaintiffs should foresee the state or federal government's claim of compelling interests in the site. The Tellico and Glen Canyon Dams in *Sequoyah* and *Badoni*, respectively, were obviously of compelling interest to Congress and the President,[215] fierce opponents to the Indians' interests. Prior cases had already been litigated and lost, thus making the government's interests appear much stronger.

However, Indian plaintiffs must remember that neither immensity nor dollar value need be the focus of the compelling

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210 *See supra* notes 68-74 and accompanying text.
211 Crow v. Gullet, 541 F. Supp. 785, 792 (D.S.D. 1982).
212 *See supra* notes 42-46 and accompanying text.
213 *See supra* notes 14-39 and accompanying text.
214 *Id.*
215 *See supra* notes 84-88 and accompanying text (discussing government's interest in electricity, employment, and recreational capacities to be furnished by the dam) and 104-12 and accompanying text (discussing government's interest in utilities and water generated by the dam).

state interest. As *Wilson* and *Badoni* exemplify, ski slopes and boat launches have been sufficiently compelling to defeat Indian claims.[216]

7. Plead All Statutory Claims and Contact Indian Heritage Organizations

Although this Comment does not concentrate on the statutory claims offered by Indian plaintiffs, these statutory outlets should not be overlooked. Legislation such as section 4321 of the National Environmental Policy Act of 1969,[217] the Federal Water Pollution Control Act Amendment of 1972,[218] and various others may already protect areas surrounding or running through sacred sites.

Indian plaintiffs should always seek relief under AIFRA,[219] even though AIFRA does not provide a judicial remedy.[220] AIFRA's legislative history provides a concise attempt to define Indian religious practices and elucidates the reasons they merit protection. Additionally, although Justice Brennan stated that the majority in *Northwest* made a mockery of AIFRA, recent developments in Indian land repossession cases have highlighted AIFRA as an awareness raiser.[221]

Many states also have heritage commissions comparable to California's in *Northwest*.[222] These groups, which rely on such

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216 *See supra* notes 18-30, 104-12 and 118-23 and accompanying text.

217 42 U.S.C. § 4321 (1982).

218 33 U.S.C. § 1251 (1982).

219 The American Indian Freedom of Religion Act of 1978 ("AIFRA") states, in pertinent part,

> [i]t shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonial and traditional rites.

42 U.S.C. § 1996 (1982 & Supp. V 1987).

The majority opinion does not rely upon the AIFRA apparently because the Act itself does not create a cause of action in federal courts. Instead, the majority quotes Representative Udall, who stated that AIFRA "has no teeth in it." Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 455 (1988). To say that an act is toothless ridicules it. In fact, Justice Brennan, in his dissent, states that the decision handed down by the majority is a mockery of AIFRA. *Id.* at 477.

However, the legislative history of AIFRA reveals that Congress was aware of the site specific distinctions that set traditional American religions apart from their western counterparts. H.R. REP. NO. 1308, 95th Cong., 2d Sess. 1 *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 1262.

220 *See supra* notes 31-34 and accompanying text.

221 *See supra* notes 210 and 219.

222 *See supra* note 153.

acts as the National Historic Preservation Act (NHPA),[223] can be used as amicus support. Such groups, in their efforts to have certain areas listed as historical monuments, national monuments, or landmarks subject the land to increased public use but may also preserve the Indian claimants' interests in the long run.[224]

VI. Conclusion: The Future of Judicial Protection of American Indian Religions

The spectrum of problems American Indians face every time they enter a court-room may indicate the reasons Indian plaintiffs lost all four site specific cases before *Northwest*. Indian religious practices and customs often do not conform to contemporary western categorical approaches to politics, society, religion, or, for that matter, life in general.[225] After *Northwest*, tribes such as the Yurok, Karok, Tolawa, and the Salish face more than the loss of their religious sites and practices.

Although ignorance or cultural differences should not be an excuse to treat Indian claims leniently, cultural differences should not be used to apply precedent over-broadly against Indian claimants. Courts, Indian claimants, and attorneys are only now beginning to understand how to adjudicate and function in site specific cases. For example, the use of analogy can greatly increase the translation relevance of Indian testimony at the trial court level.[226]

In sum, the centrality test Justice Brennan proposed[227] is the logical way to reduce this translation and cultural confusion. It will neither burden courts by creating extraneous litigation or alter the current free exercise clause test because Indian plaintiffs must still meet the burden of proof and outweigh the compelling state interest requirements. The centrality test is simply an additional measure of analysis provided for judicial formulas that apply solely to western tradition.

Joseph Tomkiewicz

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223 16 U.S.C. § 470 (1970); Northwest Indian Cemetery Protective Ass'n v. Peterson, 565 F. Supp. 586, 604 (N.D. Cal. 1983).

224 *See* Michaelsen, *supra* note 3, at 75-76.

225 *Id.* at 62-63.

226 *Id.* at 65-68.

227 Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 474-75 (1988).