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RFRA AND RELIGIOUS SERVITUDES ON PUBLIC LANDS

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§ 33A.01 Introduction*

Congress enacted the Religious Freedom Restoration Act of 1993 (RFRA)¹ to protect religious liberty from undue interference by the government. In recent years, however, some have invoked RFRA to challenge developments on public lands that they claim have religious significance, seeking essentially to impose “religious servitudes” over vast expanses of federal land.

These claims threaten to undermine the federal government’s ability to use and manage its own property for public purposes, including mining, energy, infrastructure, recreation, and conservation. The vision of RFRA advanced by modern claimants sets the statute on a collision course with other private and public interests that depend on the availability and predictability of federal land use. It is also in tension with the U.S. Supreme Court’s pronouncement that government does not improperly burden religious exercise when it uses and disposes of public lands.²

In this chapter, we first trace RFRA’s origins as a congressional reaction to the Supreme Court’s interpretation of the First Amendment’s Free Exercise

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¹Pub. L. No. 103-141, 107 Stat. 1488 (codified as amended at 42 U.S.C. §§ 2000bb to 2000bb-4).

²*Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439 (1988).

Clause. Next, we consider RFRA's contours, as informed by cases decided both before and after its enactment. Finally, we provide several case studies to examine what RFRA is, what it could be if interpreted broadly, and what an expanded RFRA might mean for the use and development of public lands.

§ 33A.02 Origins of the Religious Freedom Restoration Act (RFRA)

RFRA was enacted in 1993 as a legislative response to the Supreme Court's decision in *Employment Division v. Smith*.³ This landmark case held that neutral, generally applicable laws that incidentally burden religious practice do not violate the Free Exercise Clause.⁴ In Congress's view, *Smith* "virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion."⁵

In *Smith*, the Court considered whether an Oregon statute that broadly prohibited all use of peyote, even for religious purposes, violated the Free Exercise Clause.⁶ Because the prohibition itself was an otherwise lawful exercise of the state's police powers, and because it was not specifically targeted at restricting religious exercise, the Court upheld the law against the petitioners' free-exercise claims.⁷

RFRA, in turn, was an effort by Congress to revert to pre-*Smith* cases that held the government must justify *any* "substantial burden" on religious exercise by demonstrating that the challenged action is the least restrictive means to achieve a compelling governmental interest, regardless of whether the action is "neutral" and "generally applicable."⁸ In particular, Congress expressly sought to "restore the compelling interest test as set forth in *Sherbert v. Verner* . . . and *Wisconsin v. Yoder* . . . and to guarantee its application in all cases where free exercise of religion is substantially burdened."⁹

In *Sherbert v. Verner*,¹⁰ the Court considered whether South Carolina could deny unemployment benefits to a worker who was terminated for

³494 U.S. 872 (1990), *superseded by statute*, as stated in *Ramirez v. Collier*, 595 U.S. 411 (2022); see 42 U.S.C. § 2000bb(a)(4), (b)(1).

⁴See *Smith*, 494 U.S. at 878.

⁵42 U.S.C. § 2000bb(a)(4).

⁶*Smith*, 494 U.S. at 874.

⁷*Id.* at 890.

⁸42 U.S.C. § 2000bb-1.

⁹*Id.* § 2000bb(b)(1).

¹⁰374 U.S. 398 (1963).

refusing to work on Sundays pursuant to a religious objection. The Court held that forcing a person “to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand,” violates the Free Exercise Clause.¹¹ And in *Wisconsin v. Yoder*, the Court held that a compulsory public school attendance law unduly burdened the free exercise of religion as applied to Amish and Mennonite families who believed sending their children to public school after the eighth grade was contrary to their religious way of life.¹² In both cases, the Court reasoned that only those governmental interests “of the highest order” (i.e., “compelling” interests) and not achievable by other means can justify unduly burdening religious exercise.¹³

The precise effect of Congress’s decision to explicitly include *Sherbert* and *Yoder* in the text of the statute is the subject of significant controversy, but there is no doubt that Congress at least intended to codify the pre-*Smith* standard for judicial scrutiny in Free Exercise cases.¹⁴

A few years after its passage, the Supreme Court dealt RFRA a serious blow. In *City of Boerne v. Flores*, the City denied a building permit to enlarge a Catholic church, and the applicant claimed the denial substantially burdened its religious exercise in violation of RFRA.¹⁵ The Court held that RFRA exceeded Congress’s authority under Section 5 of the Fourteenth Amendment and so could not constitutionally be applied to state and local governments.¹⁶

The Court’s holding was an application of its broader Fourteenth Amendment jurisprudence, under which Congress’s authority to enforce the amendment against the states generally is limited to targeting laws enacted with discriminatory intent.¹⁷ Because RFRA applied to all laws regardless of their intent, the Court saw it as an improper attempt by Congress to expand the substantive provisions of the Fourteenth Amendment.¹⁸

¹¹*Id.* at 404.

¹²406 U.S. 205, 234–35 (1972).

¹³*Smith*, 494 U.S. at 895 (O’Connor, J., concurring) (quoting *Yoder*, 406 U.S. at 215).

¹⁴See 42 U.S.C. § 2000bb(a)(4), (b)(1).

¹⁵521 U.S. 507, 511–12 (1997), *superseded by statute, as stated in* *Ramirez v. Collier*, 595 U.S. 411 (2022).

¹⁶See *id.* at 532–36.

¹⁷See *id.*

¹⁸See *id.*

Congress responded by enacting the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA).¹⁹ RLUIPA creates special protections for individuals and religious institutions in the limited context of land-use regulations that may have discriminatory impacts, as well as for people who are incarcerated in state prisons that receive federal funding (among other defined “institutions”).²⁰ Congress navigated around the Supreme Court’s holding in *City of Boerne* by tying RLUIPA’s protections largely to federal funding and interstate commerce, rather than the Fourteenth Amendment.²¹

In *Yellowbear v. Lampert*, for example, the U.S. Court of Appeals for the Tenth Circuit (in an opinion written by then-Judge Gorsuch) held that the State of Wyoming may have violated an incarcerated person’s religious freedoms by denying him access to a sweat lodge for religious ceremony.²² Although the State articulated security concerns, it failed to show that its choice not to allow access was the least restrictive means to address those concerns.²³

Yellowbear demonstrates that the special contexts to which RLUIPA apply give rise to unique concerns about access to religious exercise—that is, where the government alone controls a religious claimant’s ability to exercise their beliefs, courts generally should be particularly sensitive to such claims.²⁴ As we will explain, however, there is significant tension between this view of religious freedom and the basic necessities of federal land management.

As relevant here, RLUIPA also replaced RFRA’s original, narrower definition of “exercise of religion” with today’s broader statutory meaning. “Exercise of religion” now includes “any exercise of religion, whether or not compelled by, or central to, a system of religious belief.”²⁵ As discussed

¹⁹Pub. L. No. 106-274, 114 Stat. 803 (codified at 42 U.S.C. §§ 2000cc to 2000cc-5).

²⁰See 42 U.S.C. § 2000cc(a)(1) (“No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution”); *id.* § 2000cc-1(a) (“No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution”).

²¹See *id.* §§ 2000cc(a)(2), 2000cc-1(b) (restrictions apply where “the substantial burden is imposed in a program or activity that receives Federal financial assistance” or affects “commerce with foreign nations, among the several States, or with Indian tribes”).

²²*Yellowbear v. Lampert*, 741 F.3d 48 (10th Cir. 2014).

²³See *id.* at 56–64.

²⁴See, e.g., *id.* at 52 (“While those convicted of crime in our society lawfully forfeit a great many civil liberties, Congress has (repeatedly) instructed that the sincere exercise of religion should not be among them—at least in the absence of a compelling reason.”).

²⁵42 U.S.C. §§ 2000bb-2(4), 2000cc-5(7)(A).

further below, this definition largely abrogates the need to determine whether a given belief is “religious” or not.

§ 33A.03 Elements of a RFRA Claim

Claims against the government under RFRA require three elements. First, a party must show they are exercising (or seeking to exercise) a sincerely held religious belief. Next, the party must show that government action substantially burdens their religious exercise. At that point, the burden shifts to the government to show that its action (1) is in furtherance of a compelling interest, and (2) is the least restrictive means available to achieve that interest.²⁶

[1] “Religious Exercise”

RFRA and RLUIPA define “religious exercise” broadly. “The term . . . includes *any* exercise of religion, whether or not compelled by, or central to, a system of religious belief.”²⁷ This expansive definition indicates that RFRA is intended to protect a wide range of religious practices, even those not essential to or mandated by a particular faith. Thus, any person who believes their religion has been substantially burdened by the federal government can bring a RFRA claim, regardless of whether the person belongs to an organized religion.

Courts are extremely reluctant to probe what may constitute a religious belief or practice, considering that “a most delicate question.”²⁸ As the Supreme Court has said, the analysis does not “turn upon a judicial perception of the particular belief or practice in question.”²⁹ Accordingly, a person’s beliefs need not be “acceptable, logical, consistent, or comprehensible to others” to constitute religious beliefs under RFRA and RLUIPA.³⁰ “Religious experiences which are as real as life to some may be incomprehensible to others,” yet still protected.³¹ Thus, religious beliefs may be protected even if they overlap with other secular beliefs.³²

In the Ninth Circuit, courts consider only “whether the beliefs professed . . . are sincerely held and whether they are, in [a claimant’s] own scheme

²⁶See *City of Boerne v. Flores*, 521 U.S. 507, 515–16 (1997) (citing 42 U.S.C. § 2000bb-1), *superseded by statute*, as stated in *Ramirez v. Collier*, 595 U.S. 411 (2022).

²⁷42 U.S.C. §§ 2000bb-2(4), 2000cc-5(7)(A) (emphasis added); see *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 696 n.5 (2014) (“[T]he ‘exercise of religion’ under RFRA must be given the same broad meaning that applies under RLUIPA.”).

²⁸*Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972).

²⁹*Thomas v. Review Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 714 (1981).

³⁰*Id.*

³¹*United States v. Ballard*, 322 U.S. 78, 86–87 (1944).

³²*Callahan v. Woods*, 658 F.2d 679, 684 (9th Cir. 1981).

of things, religious.”³³ The focus is on whether beliefs are considered religious *by the claimant*, and whether that is a sincere conviction, but not on whether the beliefs are “religious” in some objective sense. But courts have nonetheless provided some basic guideposts—generally, religious beliefs are “those that stem from a person’s ‘moral, ethical, or religious beliefs about what is right and wrong’ and are ‘held with the strength of traditional religious convictions.’”³⁴

A person’s claim that a belief “is an essential part of a religious faith” is entitled to “great weight” in the “intensely personal area” of religious liberty.³⁵ A court’s inquiry into sincerity thus is a “modest one, limited to asking whether the claimant is (in essence) seeking to perpetrate a fraud on the court,”³⁶ which essentially would require a plaintiff to have beliefs “patently devoid of religious sincerity.”³⁷

Given the expanse of RFRA’s and RLUIPA’s definitions of “religious exercise,” RFRA poses a potentially significant hurdle to development on federal lands. The Ninth Circuit’s highly deferential standard has, in some cases, prompted litigation in which groups have asserted a broad range of religious claims to impede the development of infrastructure or natural resources on public lands, sometimes under seemingly strategic circumstances.³⁸ Some have argued, for example, that the generous application of the “religious exercise” standard may “incentivize[]” claimants “to amplify

³³United States v. Ward, 989 F.2d 1015, 1018 (9th Cir. 1992) (quoting United States v. Seeger, 380 U.S. 163, 185 (1965)).

³⁴*Id.* (quoting Welsh v. United States, 398 U.S. 333, 340 (1970)).

³⁵United States v. Seeger, 380 U.S. 163, 184 (1965).

³⁶Yellowbear v. Lampert, 741 F.3d 48, 54 (10th Cir. 2014).

³⁷Callahan, 658 F.2d at 683 (quoting Theriault v. Carlson, 495 F.2d 390, 395 (5th Cir. 1974)).

³⁸As Professor Troy A. Rule has noted: “At least two [San] Carlos Apache Tribe members have published op-eds in Arizona’s largest newspaper suggesting that such amplification of sacredness has occurred in connection with the Apache Stronghold litigation.” Troy A. Rule, “Preserving Sacred Sites and Property Law,” 2024 Wis. L. Rev. 129, 170 n.200 (2024) (citing Dale Miles, “Oak Flat Is a Sacred Site? It Never Was Before,” *Ariz. Republic* (Feb. 16, 2018) (attesting that there was no long history of ceremonial activities at Oak Flat before discovery of a major copper deposit there and that “[i]t wasn’t until recent years that the site of Oak Flat was called sacred in any kind of way”); Karen Kitcheyan Jones, “Don’t Believe the Hype. Most Members of My Tribe Support the Resolution Copper Mine,” *Ariz. Republic* (Sept. 15, 2023) (“Oak Flat is not the only place where sunrise ceremonies can be held. In fact, the only time they started happening at Oak Flat was because of the Apache Stronghold founder’s lies to the world that this was the only place the ceremony can happen.”)). *But see, e.g.*, Reply to U.S. Forest Service’s Response to the San Carlos Apache Tribe’s Motion for Preliminary Injunction at 10, *San Carlos Apache Tribe v. United States*, No. 2:21-cv-00068 (D. Ariz. May 30, 2025), ECF No. 88 (asserting “the entire area [of] Oak Flat is a holy place of great cultural significance”).

or even overstate the sacredness” of a given site “to strengthen their position” in RFRA litigation.³⁹

[2] “Substantial Burden”

“Congress legislates against the backdrop of existing law.”⁴⁰ Consequently, while the term “substantial burden” is not defined by RFRA, courts often interpret it consistent with pre-RFRA Free Exercise case law—including *Sherbert* and *Yoder*—to mean any government action that coerces a person to act contrary to their religious beliefs, or that conditions a government benefit or privilege on conduct that would violate a person’s religious beliefs.⁴¹ A burden may be “substantial” even if a claimant’s beliefs are not objectively reasonable.⁴²

In analyzing the term “substantial burden”—for purposes of RFRA and RLUIPA as well as the Free Exercise Clause—the Ninth Circuit has stated that it includes situations where the government:

- (1) “requires the plaintiff to participate in an activity prohibited by a sincerely held religious belief,”
- (2) “prevents the plaintiff from participating in an activity motivated by a sincerely held religious belief,” or
- (3) “places considerable pressure on the plaintiff to violate a sincerely held religious belief.”⁴³

In the Ninth Circuit, RLUIPA and RFRA are interpreted uniformly, such that preventing access to religious exercise—as in the case of an incarcerated

³⁹Rule, *supra* note 38, at 170. Professor Rule suggests that “[a] more functional system would let Native nations initiate steps toward affirmatively protecting particular sites at any time rather than requiring them to wait until development projects are proposed on those sites and endlessly challenge such proposals.” *Id.*

⁴⁰*McQuiggin v. Perkins*, 569 U.S. 383, 398 n.3 (2013).

⁴¹*See, e.g., Apache Stronghold v. United States*, 101 F.4th 1036, 1062 (9th Cir. 2024) (en banc).

⁴²*See, e.g., Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 724 (2014) (“whether the religious belief asserted in a RFRA case is reasonable” is a “very different question that the federal courts have no business addressing”); *Emp. Div. v. Smith*, 494 U.S. 872, 887 (1990) (“Repeatedly and in many different contexts, we have warned that courts must not presume to determine . . . the plausibility of a religious claim.”), *superseded by statute, as stated in Ramirez v. Collier*, 595 U.S. 411 (2022).

⁴³*Apache Stronghold*, 101 F.4th at 1091 (Nelson, J., concurring) (quoting *Yellowbear v. Lampert*, 741 F.3d 48, 55 (10th Cir. 2014)). RLUIPA, in turn, applies to “substantial burdens” only in the two contexts noted above: (1) “impos[ing] or implement[ing] a land use regulation,” and (2) restrictions on “a person residing in or confined to an institution” affiliated with a government. *Id.* at 1062 (majority op.) (alterations in original) (quoting 42 U.S.C. §§ 2000cc(a)(1), 2000cc-1(a)); *see Cutter v. Wilkinson*, 544 U.S. 709, 715 (2005). Both involve coercive restrictions in line with the first two RFRA prongs.

person, for example—is one example of a substantial burden.⁴⁴ There is an important exception or clarification to this rule, discussed further below: the government does not impose a “substantial burden” when it disposes of its *own property*, even if it prevents a claimant’s access to religious exercise.⁴⁵

[3] “Least Restrictive Means”

If a religious claimant meets the first two elements of the test—sincere religious exercise and substantial burden—the analysis flips to whether the government can satisfy the “strict scrutiny” test. In short, this standard requires the government to show that it “lacks other means” to achieve the challenged action without imposing a substantial burden on the plaintiff.⁴⁶ “[I]f a less restrictive means is available for the Government to achieve its goals, the Government must use it.”⁴⁷ This is an “exceptionally demanding” standard.⁴⁸

“[I]f there are other, reasonable ways to achieve [the compelling interest] with a lesser burden on . . . protected activity, [the government] may not choose the way of greater interference.”⁴⁹ Thus, “[t]he inquiry at this stage ‘focus[es] on the context of the religious objectors, and considers[s] whether and how the government’s compelling interest is harmed by granting specific exemptions to particular religious claimants.’”⁵⁰ In order to meet its burden, the government must actually refute alternative schemes proposed by plaintiffs.⁵¹ This is a high bar, and if claims reach this part of the analysis, the government frequently loses.

⁴⁴This aspect of substantial burden, adopted in *Apache Stronghold*, 101 F.4th at 1091, overruled the narrower definition in *Navajo Nation v. U.S. Forest Service*, 535 F.3d 1058 (9th Cir. 2008) (en banc).

⁴⁵See *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439 (1988).

⁴⁶*Holt v. Hobbs*, 574 U.S. 352, 364–65 (2015).

⁴⁷*Id.* at 365 (alteration in original) (quoting *United States v. Playboy Ent. Grp.*, 529 U.S. 803, 815 (2000)).

⁴⁸*Id.* at 364 (quoting *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 728 (2014)).

⁴⁹*Dunn v. Blumstein*, 405 U.S. 330, 343 (1972).

⁵⁰*March for Life v. Burwell*, 128 F. Supp. 3d 116, 131 (D.D.C. 2015) (second and third alterations in original) (quoting *Priests for Life v. U.S. Dep’t of Health & Hum. Servs.*, 772 F.3d 229, 264 (D.C. Cir. 2014), *vacated*, *Zubik v. Burwell*, 578 U.S. 403 (2016)).

⁵¹*Smith v. Owens*, 13 F.4th 1319, 1326 (11th Cir. 2021); *United States v. Christie*, 825 F.3d 1048, 1061 (9th Cir. 2016) (“At a minimum, the government must address those alternatives of which it has become aware during the course of this litigation,” and “must show that each proposed alternative either is not ‘le[ss] restrictive’ within the meaning of RFRA, or is not plausibly capable of allowing the government to achieve all of its compelling interests” (citation omitted) (alteration in original) (quoting 42 U.S.C. § 2000bb-1(b)(2))); *United States v. Wilgus*, 638 F.3d 1274, 1289 (10th Cir. 2011) (government “must refute the alternative schemes offered by the challenger”).

§ 33A.04 RFRA and Public Lands

Although, as noted, “preventing access” to religious exercise is generally an example of a “substantial burden” under RFRA and the Free Exercise Clause,⁵² the Supreme Court has recognized an important exception for public lands.

The Property Clause allows public lands to be disposed of with congressional authorization.⁵³ This power has been described as being “without limitations.”⁵⁴ Congress’s authority over public land includes the power “to prescribe the times, the conditions, and the mode of transferring this property, or any part of it, and to designate the persons to whom the transfer shall be made.”⁵⁵ The application of RFRA to public lands has been a contentious issue, particularly when it involves land that is considered sacred by Native Americans. The Supreme Court’s pre-RFRA decisions, especially in *Lyng v. Northwest Indian Cemetery Protective Association*, are pivotal in understanding the limitations of RFRA in this context.

[1] *Lyng v. Northwest Indian Cemetery Protective Association*

In *Lyng*, the Court held that the government’s decision to permit timber harvesting and road construction in a National Forest area traditionally used for religious purposes by Native American tribes did not violate the Free Exercise Clause.⁵⁶ The Court reasoned that development of the area did not coerce tribal members into violating their beliefs, even if they had devastating effects on religious practice—including preventing access to sacred areas.⁵⁷

The Court further explained that the disposition of the government’s own real property—over which Congress has plenary power—does not impose a cognizable substantial burden on religious exercise when it has “no tendency to coerce individuals into acting contrary to their religious beliefs,” does not “discriminate” against religious adherents, does not “penalize” them, and does not deny them “an equal share of the rights,

⁵²*Apache Stronghold v. United States*, 101 F.4th 1036, 1141 (9th Cir. 2024) (en banc) (Murguia, J., dissenting); see *id.* at 1043 (per curiam) (explaining that Judge Murguia’s holding about preventing access to religious exercise, although in dissent, is a majority holding of the court).

⁵³U.S. Const. art. IV, § 3, cl. 2.

⁵⁴*Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976) (quoting *United States v. City of San Francisco*, 310 U.S. 16, 29–30 (1940)).

⁵⁵*Gibson v. Chouteau*, 80 U.S. (13 Wall.) 92, 99 (1872).

⁵⁶485 U.S. 439, 452–53 (1988).

⁵⁷*Id.* at 447–48.

benefits, and privileges enjoyed by other citizens.”⁵⁸ So even though the burden on the claimants in *Lyng* was undoubtedly “substantial” in the colloquial sense, the Court held the law does not “require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens.”⁵⁹

In an oft-quoted passage, the Court summarized its holding this way: “Whatever rights the Indians may have to the use of the area, however, those rights do not divest the Government of its right to use what is, after all, its land.”⁶⁰ Thus, the Court was unwilling to grant what it saw as a request by the tribal respondents to establish a “veto” right against development on public lands, affecting a “religious servitude” over those lands.⁶¹

[2] *Badoni v. Higginson*

Badoni v. Higginson, an earlier district court case from 1977, demonstrates a similar point.⁶² At issue there was Glen Canyon Dam in northern Arizona, which holds back Lake Powell, one of a pair of reservoirs that supplies millions of acre-feet of water and thousands of megawatts of electricity to consumers throughout the Southwest.⁶³

In the 1970s, shortly after Glen Canyon Dam was constructed and Lake Powell was beginning to fill, the lake was the subject of religious controversy.⁶⁴ Individuals and groups associated with the Navajo Nation claimed that the water was encroaching upon, and would soon inundate, an area called Rainbow Bridge.⁶⁵ As such, the plaintiffs alleged, the lake would “result[]

⁵⁸*Id.* at 449–50, 453. There is no doubt that the burden in *Lyng* was substantial because “the logging and road-building projects at issue in [the] case could have devastating effects on traditional Indian religious practices.” *Id.* at 451.

⁵⁹*Id.* at 448 (quoting *Bowen v. Roy*, 476 U.S. 693, 699 (1986)).

⁶⁰*Id.* at 453.

⁶¹*Id.* at 452; *see also* *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1063–64 (9th Cir. 2008) (en banc) (“[G]iving one religious sect a veto over the use of public park land would deprive others of the right to use what is, by definition, land that belongs to everyone. . . . No matter how much we might wish the government to conform its conduct to our religious preferences, act in ways that do not offend our religious sensibilities, and take no action that decreases our spiritual fulfillment, no government—let alone a government that presides over a nation with as many religions as the United States of America—could function were it required to do so.”).

⁶²455 F. Supp. 641 (D. Utah 1977).

⁶³*See* Bureau of Reclamation, “Glen Canyon Unit,” <https://www.usbr.gov/uc/rm/crsp/gc/>.

⁶⁴*See Badoni*, 455 F. Supp. at 642–43.

⁶⁵*See id.*

in the destruction and desecration of many Navajo gods and sacred areas in the vicinity,” in violation of their Free Exercise rights.⁶⁶

The plaintiffs asked the court, in essence, to turn off the tap and halt the filling of Lake Powell. The court declined, explaining that “[t]o hold that a person may assert First Amendment rights to the disruption of the property rights of others, even if the other person is a government, could and likely would lead to unauthorized and very troublesome results.”⁶⁷ The court suggested a hypothetical:

A person might sincerely believe that he or a predecessor encountered a profound religious experience in the environs of what is now the Lincoln Memorial in Washington, D. C., and that experience might cause him to believe that the Lincoln Memorial is therefore a sacred religious shrine to him. That person, however, could hardly expect to call upon the courts to enjoin all other visitors from entering the Lincoln Memorial in order to protect his constitutional right to religious freedom. The weakness in plaintiffs’ claim is apparent.⁶⁸

Badoni and *Lyng* were Free Exercise cases, and they were decided before RFRA or RLUIPA were enacted. But as the Ninth Circuit has recognized, *Lyng*’s “substantial burden” exception for the use and management of public lands survives post-RFRA.⁶⁹ Indeed, the Senate Report on RFRA explicitly states that “pre-*Smith* case law makes it clear that strict scrutiny does not apply to . . . the use of the Government’s own property.”⁷⁰ Similarly, Senator Hatch (R-Utah) stated that “RFRA does not affect *Lyng*.”⁷¹

This interpretation is consistent with the Supreme Court’s holding in *Lyng*, which emphasized the manner in which the government uses its own property does not constitute a cognizable burden on anyone’s exercise of religion, let alone a substantial one.⁷² It also aligns with the principle that,

⁶⁶*Id.* at 643.

⁶⁷*Id.* at 645.

⁶⁸*Id.*

⁶⁹As the Ninth Circuit noted in *Apache Stronghold*, “Justice O’Connor’s separate opinion in *Smith* confirms that the ‘substantial burden’ rule established in the Court’s caselaw is consistent with, and does not abrogate, the Court’s decision in *Lyng* (which she wrote).” *Apache Stronghold v. United States*, 101 F.4th 1036, 1060 (9th Cir. 2024) (en banc).

⁷⁰S. Rep. No. 103-111, at 9 (1993).

⁷¹139 Cong. Rec. S26193 (daily ed. Oct. 26, 1993) (statement of Sen. Hatch); *see id.* at S26416 (daily ed. Oct. 27, 1993) (statement of Sen. Hatch); *accord id.* (statement of Sen. Inouye, D-Haw.) (*Lyng* and the Senate Report “indicate[] that native American worship at sacred sites on Federal land will not be protected by the act”).

⁷²*Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 453 (1988).

when Congress uses a term with a settled meaning (“substantial burden”), it intends that meaning.⁷³

[3] Post-RFRA Public Lands Cases

Courts have applied *Lyng*’s reasoning in numerous cases, often to reject Indian tribes’ RFRA claims against development on public lands. Likely the highest-profile example in recent years is the *Apache Stronghold* litigation, discussed below.

Rewinding a few years, *Navajo Nation v. U.S. Forest Service* was a landmark decision until the Ninth Circuit partially overruled it in *Apache Stronghold* last year.⁷⁴ In *Navajo Nation*, the Ninth Circuit rejected RFRA claims brought by the Navajo Nation opposing development of the “Snow Bowl” ski resort outside Flagstaff, Arizona.⁷⁵ The Tribe claimed the use of reclaimed wastewater to create artificial snow would substantially burden their exercise of religion, which involved collecting plants and performing religious ceremonies on the mountain.⁷⁶

Expressing concerns about the broad scope of potential tribal objections to development on federal land in Arizona and the southwest, the court found “nothing to distinguish” *Lyng* from the case before it.⁷⁷ As the court put it:

In the Coconino National Forest alone, there are approximately a dozen mountains recognized as sacred by American Indian tribes. The district court found the tribes hold other landscapes to be sacred as well, such as canyons and canyon systems, rivers and river drainages, lakes, discrete mesas and buttes, rock formations, shrines, gathering areas, pilgrimage routes, and prehistoric sites. Within the Southwestern Region forest lands alone, there are between 40,000 and 50,000 prehistoric sites. The district court also found the Navajo and the Hualapai Plaintiffs consider the entire Colorado River to be sacred. New sacred areas are continuously being recognized by the Plaintiffs.⁷⁸

In a similarly contentious case revolving around the Dakota Access Pipeline in North Dakota and South Dakota, the Standing Rock Sioux

⁷³See, e.g., *George v. McDonough*, 596 U.S. 740, 746 (2022) (“Where Congress employs a term of art ‘obviously transplanted from another legal source,’ it ‘brings the old soil with it.’” (internal quotation marks omitted) (quoting *Taggart v. Lorenzen*, 139 S. Ct. 1795, 1801 (2019))).

⁷⁴See *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058 (9th Cir. 2008) (en banc), *overruled in part by Apache Stronghold*, 101 F.4th at 1043.

⁷⁵See *id.* at 1062–67.

⁷⁶See *id.* at 1063, 1067.

⁷⁷*Id.* at 1072 (“Like the Indians in *Lyng*, the Plaintiffs here challenge a government-sanctioned project, conducted on the government’s own land, on the basis that the project will diminish their spiritual fulfillment.”).

⁷⁸*Id.* at 1066 n.7 (citations omitted).

Tribe—which describes its ancestral homeland as “wherever the buffalo roamed”⁷⁹—argued that constructing the pipeline underneath Lake Oahe would “desecrate” the lake and render its waters “unsuitable for use in [the Tribe’s] religious sacraments.”⁸⁰ The U.S. District Court for the District of Columbia concluded that *Lyng* governed.⁸¹ Since the Tribe did not allege any “specific ban on their religious exercise” or any “sanction” or “collateral harm” as a result of a governmental mandate, they could not state a RFRA claim.⁸²

The Tribe in that case also faced a timing problem. RFRA has a four-year statute of limitations, yet the Tribe filed suit “long after” the Tribe learned about the project and raised “*other* specific environmental and cultural issues.”⁸³ Only after the construction of the pipeline was imminent did the Tribe raise its religious objections.⁸⁴ The court concluded this “delay” prevented the Tribe from raising those claims under the doctrine of laches.⁸⁵

Ultimately, when it comes to religious claims regarding the government’s use and disposition of its own property, courts have been clear that neither RFRA/RLUIPA nor the Free Exercise Clause gives religious believers the right to assert a “religious servitude” over public land.⁸⁶ Some have argued this view of the government’s power over its own land is inconsistent with the rationale in RLUIPA cases, likening tribes’ ability to access public lands for religious exercise to that of an incarcerated person’s access to certain religious activities in the prison system.⁸⁷ For the most part, this argument has been unsuccessful, although, as noted, the Ninth Circuit interprets RLUIPA and RFRA uniformly as to the definition of “substantial burden.”⁸⁸

⁷⁹Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’rs, 205 F. Supp. 3d 4, 35 (D.D.C. 2016).

⁸⁰Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’rs, 239 F. Supp. 3d 77, 81–82 (D.D.C. 2017).

⁸¹*Id.* at 94–96.

⁸²*Id.* at 94–96, 100.

⁸³*Id.* at 87.

⁸⁴*Id.* at 87–88.

⁸⁵*Id.*

⁸⁶E.g., *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 452 (1988).

⁸⁷See, e.g., Petition for Writ of Certiorari at 31–32, *Apache Stronghold v. United States*, No. 24-291 (U.S. Sept. 11, 2024) (citing Stephanie Hall Barclay & Michalyn Steele, “Rethinking Protections for Indigenous Sacred Sites,” 134 *Harv. L. Rev.* 1294, 1301, 1333–43 (2021)).

⁸⁸See *Apache Stronghold v. United States*, 101 F.4th 1036, 1091 (9th Cir. 2024) (en banc).

§ 33A.05 RFRA's Potential Reach

RFRA has the potential to significantly affect the management and use of public lands by requiring the federal government to satisfy strict scrutiny any time its land-use decisions impose a cognizable burden on religious exercise.

This could open the door to numerous claims by individuals or groups seeking to protect sites or practices that take place on federally managed lands, including National Parks, National Forests, and other public areas slated for development or resource extraction. Courts interpreting RFRA have, in fact, granted substantial protections to a wide variety of religious claimants in many contexts, meaning that government land-use decisions could be delayed, altered, or blocked altogether.

This section summarizes several typical RFRA cases. The claimants in each of these cases were unsuccessful. As a result, these cases suggest a counterfactual: If these cases were to come out differently under an expanded interpretation of RFRA, the consequences could be dramatic. Likewise, these cases should serve as benchmarks for project proponents who, regardless of the ultimate outcome of any RFRA-based litigation, may find themselves entangled in years of legal fights over the scope of the government's duty to accommodate religious exercise.

[1] *Apache Stronghold v. United States*

The Southeast Arizona Land Exchange and Conservation Act of 2014 (Land Exchange Act), which mandated the transfer of an area called "Oak Flat" to Resolution Copper Mining LLC, provides a contemporary example of the application of RFRA to public lands.⁸⁹ Some Western Apache people believe Oak Flat is central to the Apache religion.⁹⁰ Certain religious ceremonies and traditional cultural practices are sometimes conducted on the site.⁹¹

The Land Exchange Act directs the Secretary of Agriculture to transfer a 2,422-acre parcel of federal land in the Tonto National Forest to Resolution Copper within 60 days of publishing a final environmental impact statement, without exception for potential impacts on religious exercise.⁹² Resolution Copper plans to develop a large copper mine on the site.⁹³ In exchange, Resolution Copper will convey to the federal government 5,460

⁸⁹See 16 U.S.C. § 539p; *Apache Stronghold*, 101 F.4th at 1045–48.

⁹⁰See *Apache Stronghold*, 101 F.4th at 1044–45.

⁹¹See *id.*

⁹²See 16 U.S.C. § 539p(c)(10).

⁹³*Apache Stronghold*, 101 F.4th at 1045–48.

acres of private land in Arizona. The private lands the government will acquire include areas with high cultural and ecological value, including Apache Leap, a site with cultural and religious significance to the Apaches and other Indian tribes.⁹⁴ The statute requires the Secretary to consult with affected Indian tribes and to assess and minimize the effects of the mine on cultural and archaeological resources.⁹⁵

Apache Stronghold, a nonprofit organization representing various tribal and other interests, sued in 2021 to enjoin the land exchange.⁹⁶ Apache Stronghold claims that transferring Oak Flat to a private owner—together with the eventual construction of the mine—would “destroy” Oak Flat and make the exercise of the Apache religion there impossible, in violation of RFRA and the Free Exercise Clause.⁹⁷

The U.S. District Court for the District of Arizona denied Apache Stronghold’s request for a preliminary injunction preventing the land exchange. The en banc Ninth Circuit affirmed and upheld the transfer, ruling that RFRA does not apply because the Land Exchange Act did not impose a substantial burden on religious exercise, as defined by pre-*Smith* jurisprudence, including and especially *Lyng*.⁹⁸

The Ninth Circuit split into two majorities, one of which agreed with the petitioner’s request to partially overrule *Navajo Nation* and broaden what qualifies as a substantial burden under RFRA—to include actions that “prevent” religious exercise—and the other of which held that Apache Stronghold’s claims were nonetheless foreclosed by *Lyng*.⁹⁹

On May 27, 2025, the Supreme Court denied Apache Stronghold’s petition for a writ of certiorari. Justice Gorsuch and Justice Thomas dissented from the denial of certiorari. In Justice Gorsuch’s view, “[b]efore allowing the government to destroy the Apaches’ sacred site, this Court should have at least troubled itself to hear their case.”¹⁰⁰

The Ninth Circuit’s ruling—which now undoubtedly is the law of the Circuit—will have significant implications for the scope and application of RFRA and the Free Exercise Clause to development on public lands, and

⁹⁴See 16 U.S.C. § 539p(d)(1).

⁹⁵*Id.* § 539(c)(3).

⁹⁶See *Apache Stronghold*, 101 F.4th at 1044–45, 1048–49.

⁹⁷See *id.*

⁹⁸*Id.* at 1043–44.

⁹⁹See *id.*

¹⁰⁰*Apache Stronghold v. United States*, 145 S. Ct. 1480, 1480 (2025) (Gorsuch, J., dissenting).

for the interests of regulated entities and other stakeholders that rely on the federal government's authority and discretion to manage its own land.

[2] *Adorers of the Blood of Christ v. FERC*

The *Adorers* case reflects a concerted effort to use RFRA as a post hoc tool to oppose the development of energy infrastructure.¹⁰¹ If courts were to interpret RFRA broadly in this context, it could impede routine permitting for project development on both public and private lands.

The *Adorers of the Blood of Christ* (*Adorers*) asserted RFRA claims against the Federal Energy Regulatory Commission's (FERC) decision to permit a gas pipeline running through the *Adorers'* Pennsylvania property. They claimed the pipeline would violate their religious freedoms because their order requires them to “protect, preserve and treasure the land.”¹⁰² Ultimately, the U.S. Court of Appeals for the Third Circuit held that the *Adorers'* claim under RFRA was an “impermissible collateral attack[]” on the Natural Gas Act, while the *Adorers* did not raise any objection with FERC during the years-long administrative proceedings that ultimately authorized the pipeline.¹⁰³ Nonetheless, it illustrates how plaintiffs have attempted to use RFRA to block developments.

From a public land management perspective, allowing broad RFRA claims, especially those raised late in the process, could provide a mechanism for opponents to challenge federal authorizations long after environmental reviews and stakeholder consultations are complete. This could deter development by introducing persistent legal uncertainty and enabling piecemeal religious objections. Pipelines and transmission lines that cross federal lands and rely on linear right-of-way approvals could face especially significant delays and high litigation risks.

[3] *Slockish v. U.S. Department of Transportation*

While RFRA was enacted to protect individuals from government interference with religious exercise, *Slockish* illustrates how an expansive RFRA test could unduly elevate individual or group religious preferences above environmental permitting, infrastructure development, and resource management.¹⁰⁴

¹⁰¹ *Adorers of the Blood of Christ v. FERC*, 897 F.3d 187 (3d Cir. 2018).

¹⁰² *Id.* at 191.

¹⁰³ *Id.* at 197 (quoting *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 341 (1958)).

¹⁰⁴ *Slockish v. U.S. Dep't of Transp.*, No. 21-35220, 2021 U.S. App. LEXIS 34963 (9th Cir. Nov. 24, 2021).

In *Slockish*, tribal members challenged a federal highway project in Oregon.¹⁰⁵ The project involved widening the highway to add a turn lane and clearing roadside hazards; this required the removal of trees and the alteration of a site the plaintiffs claimed was sacred. In fact, one claimant testified that the “entire state[s] of Washington and Oregon” were “very sacred” to him.¹⁰⁶ The plaintiffs argued that the federal government’s action imposed a substantial burden on their religious exercise.

The Ninth Circuit ultimately rejected the claim on mootness grounds,¹⁰⁷ but the sweeping RFRA standard (not to mention the mootness standard) the plaintiffs advanced in the litigation illustrates how RFRA claims can potentially complicate critical safety projects and introduce legal and operational uncertainty into basic governmental functions.

[4] *Crow Indian Tribe v. United States*

The *Crow Indian Tribe* case involved the delisting of grizzly bears under the Endangered Species Act (ESA).¹⁰⁸ In June 2017, Secretary of the Interior Ryan Zinke announced that he would remove grizzly bears in the Greater Yellowstone Ecosystem (GYE) from ESA protection. Tribes, environmental organizations, animal-welfare groups, and others brought actions alleging the delisting was unlawful under a litany of federal laws.¹⁰⁹

One group of tribal plaintiffs claimed that the delisting interfered with certain religious practices involving the grizzly bear. They claimed that “Defendants have placed a substantial burden upon Plaintiffs’ religious freedom by issuing a Final Rule that removes protections necessary for the GYE grizzly bears to repopulate their traditional homeland, threatening the continuity of Plaintiffs’ traditional religious practices—a threat which extends significantly beyond subjective spiritual fulfillment.”¹¹⁰

The Ninth Circuit affirmed the district court’s determination that the government acted arbitrarily and capriciously in delisting the grizzly bear in violation of the ESA, and thus did not consider the RFRA claim; but again, this case demonstrates RFRA’s potential reach.¹¹¹ If courts were to interpret RFRA to encompass decisions based on alleged spiritual or

¹⁰⁵See *id.* at *3.

¹⁰⁶*Id.*, Excerpts of Record at 716, ECF No. 18-5.

¹⁰⁷*Slockish*, 2021 U.S. App. LEXIS 34963, at *6.

¹⁰⁸*Crow Indian Tribe v. United States*, 343 F. Supp. 3d 999 (D. Mont. 2018).

¹⁰⁹See Complaint ¶ 14, *Crow Indian Tribe v. United States*, 343 F. Supp. 3d 999 (D. Mont. 2018) (No. 9:17-cv-00089).

¹¹⁰*Id.* ¶ 128.

¹¹¹See *Crow Indian Tribe v. United States*, 343 F. Supp. 3d 999, 1004 (D. Mont. 2018), *aff’d in part, remanded in part*, 965 F.3d 662 (9th Cir. 2020).

religious connections to wildlife or landscapes, it could hinder federal agencies' ability to manage natural resources under statutory mandates.

Such a precedent could paralyze public land management by elevating certain religious principles over scientifically driven, multiple-sustained-land-use principles. This could have profound implications on everything from timber harvesting and prescribed burns to mineral leasing and proven wildlife conservation strategies.

[5] *United States v. Grady*

The Plowshares Movement is a group of Roman Catholic activists opposed to nuclear weapons.¹¹² According to prosecutors, members of the Movement used a bolt cutter to break into Naval Submarine Base Kings Bay, where they splashed bottles of their own blood onto a wall, spray-painted anti-nuclear weapons messages on a sidewalk, hammered parts of a memorial, and hung protest banners, causing tens of thousands of dollars in damage.¹¹³

The protesters were convicted on charges of conspiracy, destruction of property on a naval installation, depredation of government property, and trespass.¹¹⁴ Several of them appealed their prison sentences by arguing they violated RFRA.¹¹⁵ Specifically, they contended “their actions at the Kings Bay naval base were ‘in accordance with their deeply held religious beliefs that nuclear weapons are immoral and illegal.’”¹¹⁶

Here, the U.S. Court of Appeals for the Eleventh Circuit held that the federal government had no obligation to find a reasonable alternative to prosecution because the government has a right to defend its interests related to national security.¹¹⁷ The court reasoned “it would be impossible” to achieve the government’s interests in the “safety and security” of the naval base while also accommodating the protestors’ “destructive religious exercise.”¹¹⁸ Though the court rejected the protestors’ RFRA defenses, *Grady* is a prototypical example of relatively frequent efforts by criminal defendants in a variety of cases to avoid prosecution on religious grounds. Unlike in *Grady*, sometimes these efforts are successful.

¹¹²United States v. Grady, 18 F.4th 1275, 1280 n.1 (11th Cir. 2021).

¹¹³*Id.* at 1280–83.

¹¹⁴*Id.* at 1283.

¹¹⁵*Id.*

¹¹⁶*Id.*

¹¹⁷*Id.* at 1287.

¹¹⁸*Id.* at 1288.

In *United States v. Hoffman*, for example, a court applied RFRA to reverse criminal convictions against members of a religious aid organization who left food and water along public foot trails often used by undocumented immigrants in Arizona in violation of wilderness littering laws.¹¹⁹ The court reasoned that the government asserted no compelling interest in prosecuting the members.¹²⁰

Hoffman underscores that RFRA may have materially different contours in the context of criminal enforcement as compared to the disposition of public lands. Whereas under *Lyng* the government does not impose a “substantial burden” when it *uses and disposes* of its own land, it may nevertheless violate RFRA when it *enforces its regulations* on public lands in a manner that burdens religious exercise.

The distinction is slight but important. RFRA was enacted in response to the Supreme Court’s decision in *Smith* which, like *Hoffman*, concerned the government’s enforcement of facially religious-neutral and generally applicable prohibitive laws.¹²¹ But while the government must articulate a compelling interest to enforce such laws against religious exercise, it need not conduct its “internal affairs”—including the “management and alienation of its own land”—to accommodate religious exercise.¹²² Still, cases like *Hoffman* may bolster claims that public land management can just as easily “prevent” religious exercise in violation of RFRA as can blanket enforcement of criminal statutes and regulations.

§ 33A.06 Conclusion

While RFRA was not enacted with natural resource development in mind, as the cases summarized here reflect, RFRA’s broad language and evolving judicial interpretations create real and growing uncertainty for projects on public lands. As courts continue to grapple with what constitutes a “substantial burden” on religious exercise—and what counts as the “least restrictive means” of furthering a compelling government interest—project proponents may face unforeseen delays, litigation risks, and the derailment of otherwise-permitted activities.

Because courts generally will not police the contours of “religious exercise,” a broad range of activities could form the basis for RFRA challenges

¹¹⁹436 F. Supp. 3d 1272, 1276–78 (D. Ariz. 2020).

¹²⁰*See id.* at 1283–89; *see also* Minute Entry, *United States v. Ortega*, No. 4:20-mj-08904 (D. Ariz. Jan. 19, 2022), ECF No. 57 (finding defendant not guilty of federal charges for protesting the construction of the border wall in southern Arizona based on a RFRA defense).

¹²¹*See* *Emp. Div. v. Smith*, 494 U.S. 872, 874 (1990).

¹²²*Apache Stronghold v. United States*, 101 F.4th 1036, 1109–10 (9th Cir. 2024) (en banc) (Nelson, J., concurring).

against public lands development. In the *Apache Stronghold* litigation, for example, Judge VanDyke questioned whether “environmentalism” might be “the favored religion du jour” among “modern judges.”¹²³ Co-counsel for Apache Stronghold, Professor Stephanie Barclay, has written that religious freedom laws should be particularly sensitive to Indigenous land-based religious exercise on public lands because such activity is “at the mercy of government permission to access sacred sites.”¹²⁴

Though the Supreme Court’s denial of certiorari in *Apache Stronghold* seems to close the book on that line of argument for now, a broad view of RFRA along the lines of that advanced by the claimants in the cases summarized above—coupled with a narrow view of *Lyng*’s public-lands exception—potentially could enable a huge number of potential claimants to assert novel objections to beneficial development on vast expanses of public lands. The difficulty may be compounded by the fact that adherents do not always agree about whether specific sites are critical to the same religious activities.¹²⁵

There are also potential Establishment Clause concerns. If agencies must accommodate particular religious beliefs that allegedly require access to public lands, they may have to “privilege[] forms of religious exercise that preserve the physical environment at the expense of other religious exercise that might arguably lack similar positive environmental externalities.”¹²⁶

Given the stakes involved, developers would be wise to assess RFRA risks early in the permitting process, especially where projects may intersect with lands of cultural or spiritual significance. For example, agencies and project proponents should be sure to engage rigorously with applicable consultation requirements to identify and understand tribal and other religious concerns at a time when consultation can still lead to more widely acceptable outcomes. In an already complex regulatory landscape, RFRA adds yet another layer of unpredictability that must be accounted for in project planning and stakeholder engagement.

¹²³*Id.* at 1122 (VanDyke, J., concurring).

¹²⁴Barclay & Steele, *supra* note 87, at 1301.

¹²⁵*See, e.g.,* sources cited *supra* note 37.

¹²⁶*Apache Stronghold*, 101 F.4th at 1122 (Nelson, J., concurring); *see also id.* at 1124 (“Grafting onto RFRA a special rule favoring religions that happen to require land would clearly discriminate against other religions. What makes real property special, particularly under RFRA? Is needing specific real property to conduct a ceremony different under RFRA from needing a bike to proselytize? Or needing a sweat lodge made from certain trees under government control? There is no logical or textual basis in RFRA for the dissent’s suggestion that land is somehow special. While certain tracts of government-owned land are religiously special for many Native Americans, other government property may be (or become) religiously special for other religions.”).

