

TRANSCRIPT OF PROCEEDINGS

IN THE SUPREME COURT OF THE UNITED STATES

In the Matter of:

RICHARD E. LYNG,
SECRETARY OF AGRICULTURE, et al.,)

Petitioners,)

v.)

NORTHWEST INDIAN CEMETERY
PROTECTIVE ASSOCIATION, et al.)

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SUPREME COURT, U.S.
WASHINGTON, D.C. 20543

No. 86-1013

Pages: 1 through 51

Place: Washington, D.C.

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 -----X
3 RICHARD E. LYNG, SECRETARY OF :

4 AGRICULTURE, ET AL., :

5 Petitioners, :

6 v. :

7 NORTHWEST INDIAN CEMETERY : No. 86-1013

8 PROTECTIVE ASSOCIATION, ET AL. :
9 -----X

10 Washington, D.C.

11 Monday, November 30, 1987

12 The above-entitled matter came on for oral argument
13 before the Supreme Court of the United States at 10:05 a.m.

14 APPEARANCES:

15 ANDREW J. PINCUS, ESQ., Assistant to the Solicitor General,

16 Department of Justice, Washington, D.C.; on behalf of the

17 Petitioners.

18 MARILYN B. MILES, ESQ., Eureka, California; on behalf of the

19 Respondent.
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C O N T E N T S

ORAL ARGUMENT OF:

PAGE:

ANDREW J. PINCUS, ESQ.

On behalf of the Petitioners

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MARILYN B. MILES, ESQ.

On behalf of the Respondent

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ANDREW J. PINCUS, ESQ.

On behalf of Petitioners - Rebuttal

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1 P R O C E E D I N G S

2 (10:05 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear for argument
4 first this morning, Number 86-1013, Richard E. Lyng v.
5 Northwest Indian Cemetery Protective Association.

6 Mr. Pincus, you may proceed whenever you're ready.

7 ORAL ARGUMENT OF ANDREW J. PINCUS, ESQ.

8 ON BEHALF OF THE PETITIONERS

9 MR. PINCUS: Thank you, Mr. Chief Justice, and may it
10 please the Court:

11 The question presented in this case is whether the
12 free exercise clause bars the Government from constructing a
13 road on government land in a national forest and from
14 harvesting timber in that forest.

15 The site of these proposed Government actions is the
16 northern part of the Six Rivers National Forest, which is
17 located in Northern California.

18 It is important to note at the outset that this land
19 was never contained within an Indian reservation, is not the
20 subject of Indian treaty, and is not otherwise impressed with
21 any Indian trust obligation.

22 Let me begin by briefly discussing the history of the
23 Forest Service's decision to construct the road.

24 Since at least the 1930s, a series of unpaved roads
25 through Six Rivers National Forest has linked the California

1 towns of Gasquet and Orleans. The Forest Service concluded in
2 the 1960s that an improved road network was necessary both for
3 its timber harvesting program and for other purposes, and it
4 embarked upon a plan to construct a paved road linking the two
5 towns.

6 Two separate segments of the road totalling forty-
7 nine miles have now been completed. All that remains is the
8 construction of a six-mile paved segment that will link up the
9 two completed segments and complete the road.

10 In 1977, Forest Service issued a draft environmental
11 impact statement discussing alternative proposals for the
12 construction of the remaining segment of the road. The
13 comments received by the Forest Service indicated that the area
14 had religious significance for several Indian tribes.

15 The Forest Service accordingly deferred its decision
16 on whether or not to construct the road and commissioned a
17 comprehensive ethnographic study of the Indian cultural and
18 religious sites that were located in the area. The 423-page
19 report, prepared at the Forest Service's direction, revealed
20 that a portion of the Six Rivers National Forest is known to
21 the Yurok, Karok and Tolowa Indian tribes as the "high country"
22 and that many of these tribes' religious beliefs and rituals
23 focus upon that area.

24 Journeys to the high country are an important part of
25 the Indians' religious practices, and these journeys frequently

1 include the performance of rituals at specific sites in the
2 high country.

3 The report stated that a successful spiritual --

4 QUESTION: Would that include the strip where the
5 six-mile road would be built?

6 MR. PINCUS: Yes. The entire --

7 QUESTION: Within it are sites used by the Indians
8 for their practices?

9 MR. PINCUS: Your Honor, it's not clear from the
10 record, I don't think, whether specific sites -- I don't think
11 that the report purported to document every exact site where a
12 ritual is performed.

13 For example, part of the ritual is the way one acts
14 when -- at any time one is in the high country. So, I think
15 from the Indians' point of view, it is leading to distinguish
16 between the sites at which actual rituals are performed and the
17 other sites, because I think from their point of view, the
18 entire area is sacred.

19 I don't think that any of the sites, at least the
20 principal sites, of greatest spiritual significance, those are
21 not located where the road would be built. Those are located
22 away from the road.

23 QUESTION: No, but if actually the site included the
24 site of the six-mile road, that might have a bearing, might it
25 not, on the extent of the burden on their free exercise rights?

1 MR. PINCUS: Well, Your Honor, as I said, from the
2 Indians' point of view, I don't think they would distinguish in
3 any way between the site. I think, as a matter of fact, the
4 sites where rituals are performed are not -- the road is not
5 going to go over those particular sites.

6 The report stated that a successful spiritual use of
7 the high country is dependent upon and facilitated by certain
8 qualities of the physical environment. The most important of
9 which are privacy, silence and an undisturbed natural setting.

10 The Forest Service consultants concluded that
11 construction of the road would eliminate the required natural
12 conditions and would, therefore, seriously damage the Indians'
13 religious beliefs.

14 That's why, in further answer to your question,
15 Justice Brennan, the Indians, if they are on a site where they
16 are conducting a ritual, the fact that another part of the high
17 country has been disturbed or changed from its natural state is
18 as much of a burden as if that actual site that they were
19 standing on had been disturbed. So, they just don't make a
20 distinction.

21 After considering the consultants' report, the Forest
22 Service announced its decision regarding the construction of
23 the road. The Service found that the completion of the road was
24 very significant to the development of timber and recreational
25 resources in the area and that the road would enhance the

1 efficiency of administrative services, such as fire control.

2 At the same time, the Forest Service recognized the
3 importance of the Indians' religious interests in the area. It
4 reconciled these two opposing interests by determining to go
5 ahead with the construction of the road, but to do so in a
6 manner that minimized the intrusion upon the Indians' religious
7 interests.

8 The Service emphasized that construction of the road
9 would not deprive any believer of access to the sacred area,
10 and it adopted the route alternative that was located farthest
11 away from significant spiritual sites.

12 Finally, it specified mitigation measures in
13 connection with the design of the road that would reduce the
14 audio and visual impact of the road on the surrounding area.

15 QUESTION: Mr. Pincus, can I ask one factual question
16 I was a little unclear on?

17 There is now an unpaved segment that joins the two
18 roads, is that right?

19 MR. PINCUS: Well, it's the remaining unpaved segment
20 that was left from the original when the entire road was
21 unpaved, yes.

22 QUESTION: But is it possible today to drive from one
23 -- from the point of origin to the point of destination by just
24 going over six or seven miles of unpaved road?

25 MR. PINCUS: Well, it's not because Congress

1 designated after the District Court proceedings in this case,
2 Congress designated a large segment of this area as a
3 wilderness, and what the wilderness designation does is to
4 close the area to traffic, and the site of the paved road was
5 preempted from the wilderness designation.

6 The site of the unpaved road is included in the
7 wilderness designation. So, it can't be used anymore.

8 QUESTION: I see.

9 QUESTION: I don't understand. Do you mean if it's
10 paved, then it isn't part of the wilderness designation?

11 MR. PINCUS: No. Congress specifically exempted,
12 drew the boundaries of the wilderness designation so as to
13 permit the construction of the road. It drew the wilderness
14 boundaries so that they did not include the site that the
15 Forest Service had designated for the road.

16 So, Congress made the decision.

17 QUESTION: Well, then, why couldn't a car drive today
18 over the unpaved portion?

19 MR. PINCUS: Well, the paved road --

20 QUESTION: That's on a different location?

21 MR. PINCUS: It's on a different site.

22 QUESTION: I see.

23 MR. PINCUS: The route alternative that the Forest
24 Service selected was actually farther away from the specific
25 spiritual sites than the unpaved road was, and, so, it's a

1 different site in that the site of the unpaved road is in the
2 wilderness designation.

3 QUESTION: Mr. Pincus, while you're interrupted, I
4 think the courts below held that the Government had failed to
5 comply with the National Environmental Policy Act and the Clean
6 Water Act.

7 MR. PINCUS: Yes, they did.

8 QUESTION: Now, what about that? I suppose you
9 didn't appeal on that?

10 MR. PINCUS: No, Your Honor. We only sought review of
11 the constitutional determination. What the courts did below put
12 us in a little bit of a pickle.

13 We did not believe that the adverse rulings on the
14 NEPA and the Clean Water Act questions warranted review by this
15 Court, and we believed that we could comply with those rulings.
16 In fact, we don't intend to challenge them.

17 QUESTION: Are proceedings going forward to comply
18 with those two acts?

19 MR. PINCUS: Well, the Forest Service internally is
20 working to revise its plans to comply. I don't think any
21 public proceedings have taken place pending this Court's
22 decision on the case.

23 QUESTION: And how is it that the courts below dealt
24 with the constitutional issue in view of the fact that they had
25 these statutory ones to rely on?

1 MR. PINCUS: Well, Your Honor, I can't speak for them
2 as to why they went ahead to reach -- actually, the way they
3 wrote their opinions --

4 QUESTION: So, do you think we should reach the
5 constitutional issue, Mr. Pincus?

6 MR. PINCUS: Well, Your Honor, we think, as we said
7 in our certiorari petition, we believe that we can comply and
8 we have every intention of complying with the rulings on the
9 statutory grounds and that, really, the only --

10 QUESTION: Well, should we just vacate the opinion
11 and judgment below and say you've done enough when you decided
12 the statutory issue?

13 MR. PINCUS: Well, Your Honor, that is one option for
14 the Court. We think since the issue -- in our certiorari
15 petition, we suggest it as an alternative to granting plenary
16 reviews. The Court might want to take that step and let the
17 lower courts reinstate their constitutional rulings after
18 compliance was shown.

19 We think now that the issue has been briefed, it
20 would be perfectly appropriate for the Court to go ahead and
21 decide it, and as I say, we think there is still a lot of
22 controversy because the Government has every intention of
23 complying with those rulings and believes it can comply, and
24 that the only obstacle to completion of the road is, in fact,
25 the injunction on constitutional grounds.

1 Let me just turn to the proceedings in the District
2 Court and specifically the District Court's findings with
3 respect to the free exercise issue.

4 What the District Court found, and this finding is at
5 pages 64-A and 65-A of the appendix to the certiorari petition,
6 was as follows: communication with the Great Creator is
7 possible in the high country because of the pristine
8 environment and opportunity for solitude found there.
9 Construction of the Chimney Rock section of the road and/or the
10 harvesting of timber in the high country, including clear
11 cutting, would seriously damage the salient visual, oral and
12 environmental qualities of the high country.

13 And in that effect, the Court concluded, was the
14 burden on the free exercise of religion that implicated the
15 guarantee in the First Amendment.

16 QUESTION: That timber cutting can no longer occur,
17 though. The wilderness designation made that impossible,
18 didn't it?

19 MR. PINCUS: Yes, Your Honor, to a large --

20 QUESTION: When did that occur? That occurred after
21 the District Court decision, but before what? Before we got
22 it? Before the Court got it?

23 MR. PINCUS: There are two administrative decisions
24 before the Court, the road decision and then the separate
25 decision to adopt the management plan that provided for cutting

1 in this area of a forest.

2 After the District Court rendered its decision,
3 Congress passed the statute that designated the area as
4 wilderness and that really covers the great bulk of the area
5 that the Court set aside under the First Amendment. So, as a
6 practical matter, that issue is gone.

7 QUESTION: Well, maybe the District Court wouldn't
8 have found the way it did concerning the degree of interference
9 with the Indians' religious observance had it known that there
10 was not going to be substantial logging operations in this
11 area.

12 Is it clear that it would have found that without the
13 timber?

14 MR. PINCUS: Well, Your Honor, I think what the
15 District Court said, really, was that anything that changed the
16 area from its natural pristine state was an interference with
17 the Indians' religious beliefs.

18 QUESTION: Surely not.

19 MR. PINCUS: It didn't indicate that there was any
20 cumulative effect.

21 QUESTION: Well, you know, I think the timber -- I
22 think logging is a lot more intrusive than just a road, and I
23 wonder whether the District Court would have reached the same
24 result, just the one and not the both. You're not sure.

25 MR. PINCUS: It's possible. Certainly one option for

1 this Court would be to vacate the decisions below and to remand
2 them to let the District Court reconsider its decision, but I
3 think that the tenor of the opinion of the District Court and
4 of the Court of Appeals, which, of course, was decided after
5 the wilderness designation and took account of the wilderness
6 designation, is that the wilderness designation didn't make any
7 difference.

8 The Court of Appeals, in fact, specifically said in
9 its opinion that it recognized that logging would become much
10 less significant because of the wilderness designation on page
11 9-A of the appendix to the certiorari petition, but it
12 indicated that that did not alter its conclusion that the
13 adverse impact from construction of the road was sufficient to
14 constitute a burden on free exercise rights.

15 I guess that discussion is at 9-A and 10-A of the
16 opinion.

17 QUESTION: It's also true, just noticing on page 8-A,
18 that they talk about the activity of the logging and all as
19 part of what is destructive, the very core of the Indian
20 practices.

21 MR. PINCUS: Yeah. The 8-A is a quote. That is a
22 quote of the District Court's finding.

23 QUESTION: Correct. And they agreed with that finding
24 as the basis for their analysis. It seems to me if you take
25 the logging out, you both lessen the impact on the Indians and

1 you lessen the Government justification. I mean, it kind of
2 helps both sides or hurts both sides, but it's a different case
3 without logging than it is with logging.

4 MR. PINCUS: Well, Your Honor, as I say, the Court is
5 certainly free to remand it. I think that really the basis of
6 the opinions below really was that any interference, the road
7 alone was enough, but that the Court --

8 QUESTION: Let me just ask this then. Before the
9 designation of the wilderness area, had an unpaved road that
10 went through here, was there traffic on that road from time to
11 time?

12 MR. PINCUS: Yes. There was.

13 QUESTION: So that if you have nothing but a road and
14 no logging, you've had it in an unpaved pasture and apparently
15 the Indian religion survived that, and the only difference,
16 according to your view, I guess, is you changed it from unpaved
17 to paved.

18 MR. PINCUS: Well, I don't want to speak for the
19 Indian Respondent, but I'm sure they can speak to that.

20 QUESTION: No.

21 MR. PINCUS: The record indicates that part of the
22 burden was at least that the paved -- the actual physical
23 changing of the landscape by paving, by having a paved road
24 there, and the increase in traffic, if the Court wants to
25 remand for reconsideration to the District Court, that's

1 certainly an option, although, as I say, the Court of Appeals
2 -- the wilderness designation happened before the Court of
3 Appeals issued its decision and it, with that fact before it,
4 upheld the determination that there was a burden on free
5 exercise rights.

6 Let me turn now to the constitutional --

7 QUESTION: Other Court of Appeals decisions on the
8 same point?

9 MR. PINCUS: The other Court of Appeals decisions
10 holding that land management activities --

11 QUESTION: The --

12 MR. PINCUS: Well, Your Honor, we think that the
13 Courts of Appeals really are in a bit of a disarray as to
14 exactly what the right legal approach is when confronted with
15 these questions. Some courts have held that an injunction in
16 favor of the Indian religious claim would constitute an
17 establishment of religion. Other courts have applied a test
18 that looks to whether the particular religious site -- well,
19 no, Your Honor, this is the only Court that has ever -- the
20 only Court of Appeals that has ever come out in favor of the
21 Indians.

22 The threshold question on the constitutional issue
23 presented in this case is whether the construction of the road
24 and the adoption of the management plan impose a burden on the
25 Indians' rights that calls the free exercise clause into play,

1 and viewed from the Indians' perspective, these government
2 actions obviously have an adverse effect on religious
3 interests.

4 They eliminate the conditions necessary for effective
5 spiritual use of an area that is very important to the Indians'
6 religion, but the free exercise clause is not implicated
7 whenever the Government acts in a manner that offends an
8 individual's religious beliefs.

9 A believer's conclusion that government action
10 impacts adversely upon his belief system is not by itself
11 sufficient to trigger constitutional protection, and that was
12 really the holding of this Court joined by eight members in
13 Bowen v. Roy.

14 The Plaintiffs in Roy challenged the Government's use
15 of the social security number to identify their daughter and
16 they asserted that the use of that number would rob their
17 daughter of her spirit and prevent her from attaining greater
18 spiritual power, and despite the undisputed assertion that the
19 Government's use of the number would cause severe spiritual
20 harm to the Plaintiffs, the Court found no burden on free
21 exercise rights.

22 We think that Roy makes clear that it's necessary to
23 look beyond the believer's subjective assessment of the effect
24 of government action. Some types of government actions do not
25 infringe upon the constitutional rights, even if they have a

1 devastating effect upon the believer's belief system.

2 QUESTION: Is it your position, Mr. Pincus, that the
3 Government need not make any concessions whatever to the
4 interests of the Indians in this case?

5 MR. PINCUS: Yes, Your Honor. It is our position that
6 under the Constitution, because the Constitution does not
7 require the Government to do anything, we think that it's
8 certainly appropriate to do exactly what the Forest Service did
9 in this case, which is to consider those interests heavily, to
10 investigate them fully, and to take account of them to the
11 greatest extent possible, consistent with the statutory
12 framework that Congress has set up, and that's precisely what
13 Congress mandated when it enacted the American Indian Religious
14 Freedom Act.

15 What Congress specifically did not do and expressly
16 did not do was to create an additional substantive right for
17 Indian religious claims of this sort, and we think that the
18 Constitution doesn't do that either.

19 Now, so, in addition to the believer's claim that
20 there is subjectively -- that he finds interference with his
21 belief system, there has to be an objective element to the
22 government action. It has to satisfy an objective test and we
23 think that the Court's decision in Bowen v. Roy sets forth what
24 that objective test is.

25 In concluding that the Government's use of the social

1 security number did not implicate the free exercise clause, the
2 Court said that the clause had not been interpreted to require
3 the Government itself to behave in ways that the individual
4 believes will further his or her spiritual development, and the
5 Court also observed that the clause is written in terms of what
6 the individual cannot do -- what the Government cannot do to
7 the individual, not in terms of what the individual can expect
8 from the Government.

9 QUESTION: That sounds good, but what do you do about
10 Sherbert, Thomas and Hobbie, all of which said that the
11 Government cannot use its money in a way that impinges upon an
12 individual's religious beliefs. So, you have to make welfare
13 benefits available to people who don't want to work on Saturday
14 or whatever.

15 Why is it any different when you're talking about not
16 the Government's money but the Government's land? Is that the
17 constitutional line between money and land?

18 MR. PINCUS: I don't think that's the line, Justice
19 Scalia. I think the line is that in those cases, what the
20 Government did was put an objective burden on the individual's
21 choice about what course of conduct he or she was going to
22 pursue.

23 The Government put a monetary price over choosing one
24 alternative or the other, and that is an objective indicia of
25 coercion, and that's exactly what the Court said in those

1 opinions. It analogized what the Government had done by
2 conditioning the benefit to direct coercive regulation, and we
3 don't think that there's anything in the land management
4 decisions that are at issue here that has those objective
5 indicia of coercion. It just doesn't say anything to these
6 individuals one way or the other about what they should do.

7 We think that's a very, very important line to draw
8 in the religion context because in the religion clauses -- let
9 me start differently.

10 Most of the protections of the Constitution, such as
11 the free speech clause or the Fourth Amendment, protect
12 objectively-identified interests. What is -- this Court can
13 decide what is speech and it can decide what reasonable
14 expectations of privacy are protected under the Fourth
15 Amendment, but the Court cannot decide what religion is because
16 the Constitution leaves that to each individual to decide for
17 himself or herself.

18 The problem that is really posed by the free exercise
19 clause is how the clause can be applied without sweeping every
20 kind of government action under its umbrella because an
21 individual is free to attach religious significance to anything
22 the Government does or anything the Government fails to do,
23 and, so, if there's no objective limit on what the clause
24 covers, everything can be converted into a free exercise claim
25 just by the individual believing very sincerely that that

1 action that the Government has taken infringes upon his or her
2 religious beliefs.

3 We think that's why it's especially important in this
4 context to make clear that there's an additional objective
5 standard that the government actions have to be measured
6 against before the free exercise clause protections are
7 triggered, and that objective standard, I think, is the
8 distinction that the Court was driving at in Roy.

9 It's the distinction between government interference
10 with individual conduct on one hand and individual control of
11 government action on the other, and, really, what the clause
12 does is shield the individual and his person and his property
13 against government reaching in and coercively affecting his
14 individual decisions about how to order his life and to order
15 his property, and when the Government does that, either
16 directly with regulation or indirectly by conditioning
17 government benefits in a way that has the effect of regulation,
18 then there's a free exercise violation.

19 But if the Government doesn't do that, if it doesn't
20 say anything about what the individual should do or what the
21 individual shouldn't do with his property or just does
22 something with its own property, we don't think that that's a
23 free exercise burden that calls the Constitution into play.

24 Let me just briefly say that the contrary conclusion,
25 acceptance of Respondent's contention, would just work in

1 dramatic, dramatic effect upon the Government's authority to
2 regulate and control its own land. Hundreds, if not thousands,
3 of Indian sacred sites are located on federal land. The
4 boundaries of those sites are very amorphous and under
5 Respondent's theory, any action taken with respect to those
6 sites would be subject to a free exercise challenge.

7 The important thing is that it's not just Indian
8 claims because the Constitution can't prefer Indian claims,
9 Indian religious claims over other religious claims. Any
10 individual can decide that any federal property or any federal
11 action is significant to him and --

12 QUESTION: Is there anything in the record to show
13 how long the Indians have been using this land?

14 MR. PINCUS: There is testimony in the record
15 indicating the use is quite -- has been quite long, but, Your
16 Honor, I think, --

17 QUESTION: Weren't they using it before we arrived?

18 MR. PINCUS: I don't think that the record evidence
19 goes back that long, Your Honor. I'm not sure. It certainly
20 goes back to the 1800s.

21 QUESTION: It could be so, couldn't it?

22 MR. PINCUS: It certainly could be, but let me say
23 that any rule that makes the protections of the free exercise
24 clause depends on how long a religion has been in existence is
25 the very type of government preference for religion really that

1 the clause is specifically designed to prevent.

2 It would elevate a traditional religion over a new
3 religion and give it more protection against government action.

4 QUESTION: Mr. Pincus, how does your theory apply to
5 this situation? Suppose the Court retained federal ownership
6 in whole quantities of land which it allows people to settle on
7 but it retains title, and it simply adopts a rule that no
8 places of worship may be built on this federal land.

9 Now, that's just the Federal Government's use of its
10 own land. It's not coercing anybody to do one thing or
11 another. Do you think that would be constitutional?

12 MR. PINCUS: In your hypothetical, --

13 QUESTION: Let's assume the whole state of Nevada
14 were still federally owned and that the Federal Government just
15 says we just don't want any churches. Churches or other places
16 of worship.

17 MR. PINCUS: Well, but, Your Honor, in your
18 hypothetical, if there were people living on the land -- I
19 assume that what would happen is there would be tenancies and
20 people would have a lease and the lease would say you can't
21 build -- I think that's a very different case because those are
22 people with rights in the particular land. It may be a right
23 that's limited, but I think that that limitation might be
24 subject to constitutional scrutiny.

25 But it's a very different case, I think, where there

1 are people who have absolutely no right in the land, and that's
2 what we are talking about here.

3 QUESTION: So, you are limiting your principles.
4 It's not the Government can do anything with its land; the
5 Government can do anything with its land so long as it doesn't
6 give individuals rights in the land?

7 MR. PINCUS: Well, no, Your Honor, I am not limiting
8 my principle because my principle is again this protection of
9 an individual and his own resources, and part of those
10 resources would include the property rights that he has by
11 virtue of his agreement with the Government.

12 QUESTION: Wouldn't Widmark v. Vincent and that line
13 of cases prevent the Government from saying that we'll allow
14 any sort of building to be built on these leased lands except a
15 church?

16 MR. PINCUS: I think you're right, Your Honor.
17 That's probably the more logical way to take care of that
18 problem, that there would be a discrimination against religion.

19 Anyway, just to conclude, I think what's important to
20 note is that this is not -- the claim that's asserted here is
21 not a claim that can constitutionally be limited to traditional
22 Indian religions. It really would be a claim that would be
23 available to anyone.

24 I just want to briefly touch upon our alternative
25 argument, that if the Court disagrees with our principal

1 submission and believes that there is a cognizable burden on
2 the free exercise of religion here, we think that the
3 compelling interest test has to be applied in a dramatically
4 different way to take account of the very different interests
5 that are presented here.

6 First, as we've been discussing, to the extent that
7 Respondent has stated the free exercise claim, it's a very
8 different kind of a claim than those previously recognized by
9 this Court, and we think, because it does intrude less into
10 individual autonomy, is deserving of somewhat less protection.

11 Second, as the Court has recognized in the free
12 speech context, the Government is entitled to somewhat more
13 constitutional leeway when it acts in its capacity as a
14 landowner, and we think that principle is especially weighty
15 here because what we're talking about is not simply access,
16 which is what is at issue in the public forum cases, but
17 control of the management and the physical development of the
18 land and, really, we're talking about using the Constitution to
19 impose a much greater limitation on the Government, and we
20 think that when those interests are factored together, the
21 appropriate way for the test to be applied is to say that the
22 Government's general interest in managing its land, combined
23 with the particularized showing that the challenged decision is
24 reasonable, should permit the government action to go forward.

25 We think that that standard was satisfied --

1 QUESTION: May I ask just one -- maybe it's kind of a
2 silly question, but we talk about the Government interest in
3 building land. Congress has kind of delegated the problem, I
4 guess, to the Court to decide whether -- it hasn't really taken
5 a position on whether the -- what is the highest official who
6 has actually made the decision to build this road?

7 MR. PINCUS: The Chief of the Forest Service.

8 QUESTION: The Chief of the Forest Service. It
9 hasn't even gone to the Secretary. Is he in the Interior
10 Department?

11 MR. PINCUS: The Secretary intends to review that
12 decision.

13 QUESTION: But is he in the same department that the
14 Bureau of Indian Affairs is in, the Interior Department?

15 MR. PINCUS: No. This is Agriculture.

16 QUESTION: This is Agriculture. Thank you.

17 MR. PINCUS: I'd like to reserve the balance of my
18 time.

19 CHIEF JUSTICE REHNQUIST: Very well, Mr. Pincus.
20 We'll hear now from you, Ms. Miles.

21 ORAL ARGUMENT OF MARILYN B. MILES, ESQ.

22 ON BEHALF OF THE RESPONDENT

23 MS. MILES: Mr. Chief Justice, and may it please the
24 Court:

25 While I will be addressing two specific points this

1 morning, I would first like to clarify some of the factual
2 discussion that preceded my presentation.

3 I think it's first important to realize that it is
4 one site in regards to whether or not the government action is
5 actually occurring on the site. It's one site that the record
6 shows is used in a general sense. Different trails are used.
7 People progress from one focal point to another, but it is not
8 like different pews in a church. It's one area and you go from,
9 for example, from Chimney Rock, you have to travel to the other
10 area, and it isn't that they're independent and you can say you
11 didn't destroy this pew and you didn't destroy this one.

12 I think it's clear to understand that the record
13 establishes one area, one generalized use, and a particular
14 pattern of religious conduct that requires a progression --

15 QUESTION: Does the record show, Ms. Miles, how many
16 square miles or square feet there are involved or how long a
17 trail in miles or yards of progression would be?

18 MS. MILES: The Court -- yeah. I think the record
19 does, Your Honor, yes. In terms of evidence was established as
20 to what constitutes this one area, and admittedly it's a large
21 area in this particular instance, principally because
22 geographically --

23 QUESTION: May I ask, Ms. Miles? Are you suggesting
24 that if the intrusion is limited only to a mile, nevertheless,
25 since the area is twenty-five miles, it's an intrusion against

1 the whole?

2 MS. MILES: What I am suggesting is that you have to
3 look at where the government action is occurring and what
4 conduct is it impacting.

5 QUESTION: Well, now, it's occurring, I gather, only
6 at the six-mile strip, isn't it?

7 MS. MILES: Right.

8 QUESTION: But that's an invasion of the whole site
9 or twenty-five miles, is it?

10 MS. MILES: Not necessarily. Having it occurred --
11 sacredness, yes. Yes. That bothers and seriously goes against
12 what they believe, but what we're proposing here is not that
13 that's the test at all or the idea that it's disturbing the
14 sacredness, but you've got the road going between particular
15 sites where religious activity has to go through.

16 So, you have to look at where the conduct is
17 occurring and where the government action is occurring,
18 although any intrusion in there does offend them, but that's
19 not the position, that's not what the court below held in terms
20 of what you look at. You look at the serious impact that the
21 activity will have on the conduct.

22 QUESTION: Well, what is the area again? Is it in
23 square miles or linear miles or linear feet?

24 MS. MILES: Yeah. I think it boils down to around --
25 well, about 13,500 was put into the district and 17,000 is

1 what the Forest Service has reached.

2 QUESTION: 17,000 what?

3 MS. MILES: Square -- no. Acres. I'm sorry.

4 QUESTION: 17,000 acres?

5 MS. MILES: Yes.

6 QUESTION: Okay.

7 MS. MILES: It's made up in terms of a geographic

8 area. It's the acreage that comes from the fact that you have

9 a multitude of religious areas and that's why it became a

10 national district because it is so different than --

11 QUESTION: Well, Ms. Miles, would your clients take

12 the position that any use that might interfere with the

13 religious practices of your clients would mandate the kind of

14 constitutional view that you are urging? For example,

15 proceedings by Forest Service rangers in connection with fire

16 protection or a Boy Scout encampment or the uses by other

17 people of the forest area.

18 MS. MILES: No, Your Honor, and that claim has never

19 been made in this case.

20 QUESTION: Well, wouldn't that burden the religious

21 practices in the same way, by creating noise and disturbance

22 and --

23 MS. MILES: Certainly not to the degree that the road

24 does.

25 QUESTION: But it would?

1 MS. MILES: It would --

2 QUESTION: It would be a burden?

3 MS. MILES: It would to some degree, Your Honor. But

4 we are not claiming. That is not a request for the relief here,

5 and --

6 QUESTION: But I suppose the claim could be made in

7 the future, that any use, including that by other non-Indians,

8 of the Forest Service land would constitute a sufficient burden

9 that it must be prohibited?

10 MS. MILES: We don't believe that if you adopt the

11 test that is used by the 9th Circuit and the D.C. Circuit and

12 the 6th Circuit that that would necessarily establish a claim.

13 It is a very narrow one.

14 QUESTION: But it could?

15 MS. MILES: If --

16 QUESTION: Your clients might make that kind of --

17 MS. MILES: -- you could show that there was serious

18 interference of the nature that is shown in this case, and I

19 don't think that necessarily you could in the facts that you

20 propose, Your Honor.

21 QUESTION: Would you help me with one other factor?

22 We've got the logging out of the case now, but what about the

23 situation that existed when they hit an unpaved road? Was

24 there traffic through there that had an adverse impact on the

25 religious practices involved?

1 MS. MILES: Your Honor, the unpaved road as the
2 record shows is a jeep trail, very rarely used. While it could
3 have some impact on it, it is not used the same way that this
4 two-lane paved road with eighty-four logging trucks would be
5 used. It was used primarily for administrative purposes once
6 in awhile.

7 QUESTION: Well, they won't be using logging trucks
8 in the future as I understand it.

9 MS. MILES: Excuse me? What?

10 QUESTION: There will be no logging trucks on the
11 paved road in the future, will there?

12 MS. MILES: Well, certainly not to the extent perhaps
13 because the wilderness bill has affected that, but the --

14 QUESTION: How do we know that there will be any more
15 traffic on the paved road than there was on the unpaved road,
16 and if it didn't harm the religion sufficiently when it was
17 unpaved, why, without any logging in the case, why is there
18 such a big difference?

19 MS. MILES: Well, I don't think that the assumption
20 is correct that this road by itself, which will have some
21 traffic or else I don't know why the Forest Service would be
22 planning to build this road if it wasn't going to be used by
23 anybody, it seems to be not much of a purpose, but what I would
24 like to explain is what I tried to clarify before, that you've
25 got practitioners, religious practitioners, under the tenets of

1 their religion traveling from the Doctor Rock area and if you
2 understand the particular types of activities that they
3 undertake, it's getting into trance-like states. It's a
4 conduct that's different than most practices, and they have to
5 journey across to Chimney Rock, which is up above on the other
6 side of the road.

7 Just having the road there will take them out of
8 being able to have that practice. When you come across the
9 road and it just is a physical interference and you have to
10 stop and look to see if there are trucks coming right now or it
11 just physically interferes with their ability to continue what
12 has been going on for hundreds of years in that area.

13 QUESTION: Didn't they have to cross the unpaved road
14 and look before they cross?

15 MS. MILES: The unpaved road, Your Honor, --

16 QUESTION: It seems to me that the difference is in
17 the amount of traffic.

18 MS. MILES: The amount of traffic partly, is partly
19 it. The other thing would come into the belief system with
20 regards to the fact that the road is a natural road. It is a
21 dirt road that is very rarely used and it's just part of that
22 natural environment.

23 It is totally different than a road --

24 QUESTION: Well, it just didn't happen. The jeep
25 trail had to be built, didn't it? I mean, the jeep trail is a

1 prehistoric existing.

2 MS. MILES: It used to be a trail, an Indian trail.

3 QUESTION: It had to be substantially graded, I would
4 think, to make it a jeep trail.

5 MS. MILES: It has been somewhat improved, Your
6 Honor.

7 QUESTION: Ms. Miles, suppose the Federal Government
8 were to set aside a whole tract of federal land, say this land
9 is dedicated to the use of the Mormons and no one shall make
10 any use of this land that would offend Mormon beliefs, would
11 that be constitutional?

12 MS. MILES: I think that would be inappropriate, but
13 what I think you're --

14 QUESTION: I didn't ask would it be inappropriate.
15 Would it be unconstitutional?

16 MS. MILES: It would run most likely afoul of the
17 establishment clause, but what I'd like to clarify, there is no
18 set-aside in this area. This is not a set-aside. The
19 Government is attempting to say that there's some kind of one
20 use only by the Indian people and that is not true.

21 We have, in fact, in this very case, there are more
22 non-Indian Plaintiffs who use the area.

23 QUESTION: My example wasn't one use only but do a
24 lot of things, just nothing that offended Mormons.

25 MS. MILES: Well, this is -- if they showed that that

1 area was central and indispensable, that is the only place in
2 that particular --

3 QUESTION: Salt Lake City, Salt Lake City. The
4 Mormons really venerate that as a very special place.

5 MS. MILES: Yes, but --

6 QUESTION: Could the state say that henceforth, Salt
7 Lake City shall --

8 MS. MILES: No, Your Honor, but I don't think that
9 that's what the 9th Circuit rule does. You have to take a look
10 at what you're doing, you have to show factually that the
11 particular area where the government action is occurring -- it
12 isn't a set-aside. There's got to be an action that is
13 interfering with the ability, seriously interfering with the
14 ability to carry on a practice in a particular area, and your
15 factual setting doesn't have any of those factors, Your Honor.

16 QUESTION: I am puzzled by one of the -- you
17 mentioned a large number of non-Indians who also are able to
18 come and go in this area, even during --

19 MS. MILES: I shouldn't say that.

20 QUESTION: Isn't that correct?

21 MS. MILES: No, that's not correct. Other people do
22 use the area. It is a very rugged area. It's a wilderness
23 area. There are people that use it.

24 QUESTION: And isn't it true that those people may be
25 spiritually unacceptable to the people around their religious

1 missions at the time because of their condition?

2 MS. MILES: That's true, Your Honor.

3 QUESTION: And what about -- is that a greater burden
4 than the use of the road? I mean, it seems to me that's the
5 same sort of thing.

6 MS. MILES: No. The number of people -- if you knew
7 the geography and -- you're really talking about a place that
8 people don't go to much. It's a very remote place. That's why
9 the Indian people chose it partly so far away from the
10 reservation, you know, where they live along the river. It's
11 because it's an area that it just a remote rugged area that
12 people do not utilize on the way that we would think of
13 recreationally.

14 So, in that area, once in awhile, there will be
15 people and that would have some interference, but it is not of
16 the impact of what the Government proposes in this case.

17 QUESTION: You wouldn't suggest the Government could
18 exclude citizens from that area who would be offensive to the
19 Indians? I mean, --

20 MS. MILES: No, that is not a part of this case.

21 QUESTION: But you said that potentially it could be
22 in another case. You said it wasn't raised here, but it
23 certainly could constitute a burden, depending upon the nature
24 and extent of the use by non-Indians of that property.

25 MS. MILES: Yes, but it may be a burden that we would

1 have no relief for in a sense.

2 QUESTION: So, you say that the Government must keep
3 loggers out?

4 MS. MILES: I'm sorry? Excuse me?

5 QUESTION: You say that the Government must at least
6 keep loggers out?

7 MS. MILES: We say that the Government cannot
8 undertake certain actions that would have the effect of --

9 QUESTION: So, you say that the place be reserved for
10 your use rather than logging use.

11 MS. MILES: No, that's not true, Your Honor.

12 QUESTION: Would you mind if loggers came in there?

13 MS. MILES: And cut the trees down as proposed?

14 QUESTION: Yes.

15 MS. MILES: We say that that would interfere with the
16 conduct of religious practices occurring there.

17 QUESTION: Well, that certainly is a substantial
18 restriction in favor of religion on what the Government can do
19 with its property.

20 MS. MILES: The Government -- we are asking the
21 Government itself not to take an act that will take away from
22 these people a religious practice that has been occurring.

23 QUESTION: Well, the act that you're talking about is
24 whether loggers can come in. So, this twenty-five miles is
25 sealed off from logging.

1 MS. MILES: No, that's not true, Your Honor. If you
2 take a look at the management plan, what you're talking about
3 is not all of that area was going to be logged. That area is a
4 multiple use area.

5 QUESTION: Well, wouldn't you have the same objection
6 to logging going on in any part of the twenty-five miles?

7 MS. MILES: Yes, Your Honor.

8 QUESTION: Well, why isn't that reserving -- why
9 isn't that excluding loggers from twenty-five square miles?

10 MS. MILES: It is excluding the Government from
11 undertaking certain types of activities in that area.

12 QUESTION: Well, you say that the free exercise
13 clause forbids the Government permitting loggers to come in to
14 that area.

15 MS. MILES: We say that the free exercise clause,
16 when you show it in an area, the only place that you could
17 practice your religion under the tenets of your religion, --

18 QUESTION: So, you're saying yes, that twenty-five
19 miles is sealed off from loggers because the area is central to
20 the practice of religious beliefs.

21 MS. MILES: And that the Government's act -- it would
22 be spread out to other -- it is not that it is aimed at
23 loggers, that the government action that is proposed when you
24 show that it's going to seriously impact the physical ability
25 to carry on your practice, we submit the Government cannot do

1 that to these people.

2 QUESTION: I suppose if the Government decided to
3 improve some back-packing trails or build some overnight cabins
4 in that high country, you would have the same problem?

5 MS. MILES: Not necessarily. That may not be the
6 serious interference that the court found below.

7 Your Honor, I'd like to address --

8 QUESTION: But if it were, I take it that you would
9 think the same result should be. If the Indians said the
10 building of these overnight cabins also offends our traditional
11 religion, you would think the results should be the same.

12 MS. MILES: Your Honor, not that it offends them. If
13 we could demonstrate to the Court that whatever that government
14 activity is, seriously interferes with the ability to conduct
15 the practice -- this is not just a belief case. While belief is
16 part of it, you can't separate out. It's physical interference
17 with the ability to conduct practices in an area where they
18 have been conducting them long before the Federal Government
19 even came into existence.

20 QUESTION: What about hunting? How about hunting by
21 non-Indians? Is that area open in some hunting seasons to hunt
22 deer?

23 MS. MILES: Yes, it is, Your Honor.

24 QUESTION: And I suppose that might that not
25 seriously disturb Indian religious practices?

1 MS. MILES: That would be a factual determination
2 that --

3 QUESTION: Well, if it were, then you would say the
4 Government must prevent hunters from entering that area.

5 MS. MILES: I think what we're saying is when the
6 Government is undertaking its action, that it's taking away
7 from the ability to exercise your religion. That is different
8 than when you are affirmatively asking them to do something.
9 It may be a slight distinction, but we're asking that the
10 Government itself --

11 QUESTION: If they let somebody else build the road,
12 it would be okay. It's only that they're building the road, is
13 that it?

14 MS. MILES: No, that's not true, Your Honor.

15 QUESTION: What about motorcycles and jeeps in that
16 area? Do you object to any kind of vehicular traffic that
17 could get into that place?

18 MS. MILES: Again, if, under a factual showing, you
19 showed that that seriously interfered with the practice, then
20 the problem is there may be no remedy for some of that because
21 you would then be affirmatively asking for the Government to
22 take action. We're not. We're saying in this very limited
23 circumstance, do not take action that takes away from the
24 Indians.

25 QUESTION: How about organized camping trips into the

1 high country, with horses and tents, where packers bring in
2 large numbers of people?

3 MS. MILES: Again, I think there would be -- there
4 may be a burden but no remedy for the Indian people when it
5 comes to doing affirmative -- requesting that type of
6 affirmative relief.

7 Your Honor, -- excuse me?

8 QUESTION: Don't you think that the opinion of the
9 Court in Bowen v. Roy addresses itself rather specifically to
10 your free exercise claim here?

11 MS. MILES: Not at all, Your Honor, and that was my
12 first point. That this case is not Bowen v. Roy, that unlike
13 Roy, you have here government action directly reaching out
14 where a religious conduct is occurring, and the only place that
15 it can --

16 QUESTION: Well, the Roy opinion says that the First
17 Amendment does not require the Government itself to behave in
18 ways the individual believes will further his or her spiritual
19 development.

20 MS. MILES: And I don't quarrel with that. This is
21 not just of that belief. You've got the Government taking
22 action that interferes with the actual practice, conduct.

23 QUESTION: Well, I think that is rather the
24 implication of that language in Bowen v. Roy, and I just wonder
25 how you get around that. The thrust of it is that the

1 Government needn't use its own property in such a way as to
2 account for the religious activities or beliefs of others.

3 MS. MILES: I don't think activities was involved in
4 there at all, Your Honor.

5 QUESTION: In Roy, certainly it was. The Government
6 was giving this individual a social security number and
7 circulating it, you know, throughout wherever social security
8 numbers go. That was an activity by the Government.

9 MS. MILES: No. I am speaking about the believer's
10 activity. I'm sorry. That there -- in that case, you had a
11 subjective thing.

12 Here, you've got actual physical conduct. There was
13 no nexus with practice in that case at all in the opinion and
14 here you've got actual conduct that is being interfered with by
15 the government act, and it's not an internal act, such as that
16 that was found in Roy, but it is an act that is occurring.

17 A road-building out on public land is not of the same
18 nature of act as was found in Roy.

19 QUESTION: Well, if anything, the consequence
20 asserted in the Bowen v. Roy case was perhaps more severe than
21 in yours because the allegation was that the daughter had been
22 deprived and robbed of her spirit by this government activity,
23 and I would think that might even be a more serious claim.

24 MS. MILES: What is happening in this case, Your
25 Honor, which is equally serious, is that these practices go to

1 the very core of the religion for a substantially-large number
2 of people, and if they cannot be conducted, if they have that
3 same type of belief, but you physically would be terminating
4 this particular religion for these people by allowing the
5 government act out in a very public way, not in any sense the
6 way it is in the Roy case.

7 Your Honor, we do admit that this case is different
8 than the other cases, but I think there has been a principled
9 way that the Court has approached free exercise cases, and that
10 is by looking in each particular case whether or not the
11 particular act that is being questioned is intended to
12 interfere or has the effect of interfering with the ability to
13 practice their religion.

14 QUESTION: What is it that you -- now that the area
15 is a designated wilderness area, what specifically does the
16 Government propose to do that you disagree with?

17 MS. MILES: Construction of the Chimney Rock section
18 of the road.

19 QUESTION: Paving?

20 MS. MILES: Paving this two-lane road, building that
21 road. That's correct, Your Honor.

22 QUESTION: And what does the Government -- why does
23 the Government want to do -- go forward with that now that the
24 surrounding area has been designated a wilderness area?

25 MS. MILES: Well, I suppose you have to ask the

1 Government, but my understanding is that the -- although the
2 trial court made very specific findings about the interest that
3 would be advanced, was to increase some access for the area and
4 --

5 QUESTION: Increased access to a wilderness area?

6 MS. MILES: Well, it was not wilderness at the time
7 the road was proposed, Your Honor.

8 QUESTION: Well, I know, but if they still propose to
9 build it, I suppose that's what it is.

10 MS. MILES: But the trial court specifically found
11 that there is all the access that one needs to get to that
12 particular area. So, that was a factual finding that had been
13 made in this case.

14 If you adopt the position of the Government in this
15 case, it would mean that native American site-specific
16 practices, which Congress has expressly recognized in the
17 American Indian Religious Freedom Act, will receive no
18 constitutional protection when the Government is physically
19 planning an act that prevents these types of practices from
20 continuing.

21 We submit, Your Honor, that if the First Amendment
22 means anything, it means that the Government cannot take away
23 the very ability of an individual to practice his religion at
24 the only place that it can be practiced under the tenets of
25 their religion. If, indeed, you protect all religions under

1 the Constitution, then this type of site-specific religion is
2 entitled to protection when it is seriously threatened by
3 governmental action.

4 QUESTION: Ms. Miles, do you rely at all on the
5 American Indian Religious Freedom Act?

6 MS. MILES: We feel that that does provide
7 substantive rights and it also provides the understanding of
8 what Congress --

9 QUESTION: How does it help you?

10 MS. MILES: Well, we think it's a cause of action
11 that this case could turn on, that it is a substantive right
12 that has been violated in this case.

13 QUESTION: Ms. Miles, out of curiosity, how numerous
14 are these tribes or the Indians that practice?

15 MS. MILES: Excuse me?

16 QUESTION: How numerous are these tribes or how
17 numerous are the Indians that practice these rituals? Does the
18 record show that at all?

19 MS. MILES: Yes. The record does show that, and
20 approximately the trial court's findings that probably a 100 to
21 a 140 people physically are undertaking the rituals on behalf
22 of a larger community of about 4500 religious adherents. The
23 tribes themselves are --

24 QUESTION: What do you mean on behalf of?

25 MS. MILES: Well, much as a priest does it on behalf

1 of the larger communities, the people that go there do it on
2 behalf of more than themselves. They are the spiritual leaders
3 that do this on behalf of the religious community.

4 QUESTION: They are about a 140 and the whole
5 community is how many?

6 MS. MILES: No. There are about a 140 that
7 physically go there and undertake these practices on behalf of
8 a larger religious community which is approximately 4500.

9 Now, as to the Indian people over all, if that was
10 your question, there's about 10,000 involved.

11 QUESTION: You've answered the question.

12 MS. MILES: Your Honor, we don't contend that the
13 right to practice the religion here is absolute, but only that
14 it is subject to the same balancing of interests that is the
15 touchstone of the First Amendment, when you have shown a
16 serious interference with the ability to practice and a threat
17 to the religion itself.

18 I would next like to talk about what the court below,
19 the specific rule that is used by the 9th Circuit, that has
20 been used also by the D.C. Circuit and the 6th Circuit, and it
21 requires that before you have a cause of action, that the
22 Respondent must show that the particular area where the
23 Government's action is going to occur is central and
24 indispensable; that is, they cannot practice this anywhere
25 else, and that the action will seriously impair the ability to

1 conduct these practices.

2 Only then is the Government required to show a
3 compelling state interest that can't otherwise be served. The
4 courts specifically held that showing that the area was sacred
5 was not enough. That would be the Roy notion as far as we can,
6 you know, believe.

7 Secondly, showing that the area is used for religious
8 purposes, that is not enough. You've got to show that it's the
9 only area that this can occur under the tenets of the religion
10 and that the government act will, in fact, seriously interfere
11 with the ability to conduct the practices at that area.

12 We submit that this is a proper balancing test for
13 what has been shown to be a very serious infringement on the
14 religious rights of a large number of people and would for
15 other native Americans who practice similar religions, and that
16 it sufficiently insulates the Government from claims of this
17 nature and would require only when those very unique factors
18 come together.

19 I wanted to clarify that. It does no good to say
20 there's a thousand sites because that has no meaning
21 whatsoever. One has got to look at the site being used, is it
22 being used for religious purposes, is the Government's action
23 occurring where the particular practice has to occur, and, so,
24 that's a scare tactic that has no meaning when you look at it
25 in terms of a factual case-by-case determination.

1 History, in fact, the cases show that while the
2 courts have said that Indians do have First Amendment rights on
3 those lands, it should be respected. Factually, the claims are
4 very difficult to sustain. Not all claims, as I've noted, will
5 be found to be religious, as in Sequoyah v. TVA. There was no
6 use being made of that area. Not all religious practices have
7 to be conducted at the particular site, and, so, it would not
8 interfere with the Government's proposal at all unless you
9 could show that, and not all land projects are going to
10 seriously interfere with it, Your Honor.

11 QUESTION: Except indispensability tests --

12 MS. MILES: We do not quarrel with that test. We
13 accept that test.

14 QUESTION: You do?

15 MS. MILES: Yes, we do.

16 QUESTION: I see.

17 MS. MILES: And we feel that the -- well, to lessen
18 the protection, the constitutional protection for what are core
19 religious practices and religious freedom here would be
20 contrary to the whole notion that the Bill of Rights does
21 protect this type of practice from governmental action.

22 In conclusion, Respondent submits that the rule used
23 by the court below strikes a proper balance and that the other
24 Circuit Courts have felt rather than just throwing this
25 religion totally out on the streets, that this was one way of

1 meeting both concerns, and we feel that it is an appropriate
2 way that should be affirmed.

3 Thank you.

4 CHIEF JUSTICE REHNQUIST: Thank you, Ms. Miles.

5 Mr. Pincus, you have three minutes remaining.

6 ORAL ARGUMENT OF ANDREW J. PINCUS, ESQ.

7 ON BEHALF OF PETITIONERS - REBUTTAL

8 MR. PINCUS: Just a few things, Your Honor.

9 First of all, with reference to the American Indian
10 Religious Freedom Act, as we discussed in our reply brief, we
11 don't believe that Congress created any substantive rights when
12 it passed that statute.

13 The second point I'd like to make is about the Roy
14 case and the distinction that Roy does not apply because no
15 practice was involved there.

16 We think that that's a little bit of a red herring.
17 The only link between what the Government has done in the
18 practice here, we think, is the link that Respondents believe
19 that their practices will just not be spiritually effective
20 anymore. But I don't think that there are -- there are no
21 findings of the courts below that those practices would be
22 physically prevented by what the Government is proposing to do.

23 And, finally, I'd like to discuss Respondent's
24 suggestion that the serious interference requirement will take
25 care of the line-drawing problems that came up in her colloquy

1 with the various members of the Court.

2 We think the problem with that test is it's really
3 not an objective test. If a religious believer asserts that a
4 government action has a serious interference with his beliefs
5 or with what he wants to do, then that acceptance has to be --
6 that assertion has to be accepted by the Court.

7 QUESTION: The Government still wants to go ahead
8 with this road?

9 MR. PINCUS: Yes, we do.

10 QUESTION: Paving this road?

11 MR. PINCUS: Yes, we do, Your Honor. The road would
12 not only serve -- first of all, it does not only serve logging
13 interests, it serves maintenance interests and recreational
14 interests.

15 Second of all, it will also provide a conduit for
16 logging trucks from other parts of this forest and neighboring
17 forests to enable the logs to get to the mills. So, it still
18 has purposes, and I note that forty-nine of the fifty-five
19 miles have already been built.

20 Anyway, the serious interference test is not a real
21 limitation, and a court can't look behind what the believer
22 said, and, so, any believer can come into court and say just
23 what the hypothetical posed by Justice O'Connor, that the entry
24 of non-believers into the area offends, will make their
25 practices impossible, and the court will have to accept that

1 and under Respondent's theory, we submit that would be a burden
2 on the free exercise of religion that would require the
3 Government to show a compelling interest.

4 We just don't think that the free exercise clause
5 stretches that far and we think that the Court's decision in
6 Roy disposes of Respondent's claim here.

7 QUESTION: May I ask one question? I gather that
8 you're going to have to prepare an environmental impact
9 statement to comply with the other part of the case.

10 MR. PINCUS: Yes, Your Honor.

11 QUESTION: Will that statement contain any analysis
12 of the extent, probable extent of use of the road and how much
13 it will affect the environment? Presumably perhaps even the
14 Indian practices here.

15 I wonder if we know enough about the facts to even
16 apply the test your opponent relies on. You say we don't want
17 to use that test.

18 MR. PINCUS: Well, Your Honor, as I said earlier, if
19 the Court --

20 QUESTION: I know you say it's okay with you, but I'm
21 just wondering, to what extent may there actually be more
22 enlightenment on this issue by the things that must be done
23 before you can build the road anyway?

24 MR. PINCUS: Well, Your Honor, there might be
25 enlightenment, but it's really only -- it will only be

1 effective if those changes will cause the Indian believers to
2 withdraw their claim because if they come into court and say
3 notwithstanding the change, these effects still burden our
4 religion, the District Court and this Court will have to accept
5 that claim. It can't be looked behind.

6 Thank you.

7 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Pincus.

8 The case is submitted.

9 (Whereupon, at 10:55 a.m., the case in the above-
10 entitled matter was submitted.)
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REPORTER'S CERTIFICATE

DOCKET NUMBER: 86-1013

CASE TITLE: Richard E. Lyng v. Northwest Indian Cemetery
Protective Association

HEARING DATE: November 30, 1987

LOCATION: Washington, D.C.

I hereby certify that the proceedings and evidence
are contained fully and accurately on the tapes and notes
reported by me at the hearing in the above case before the
Supreme Court of the United States,
and that this is a true and accurate transcript of the case.

Date: November 30, 1987

Margaret Daly
Official Reporter

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