THE NAVAJO NATION ET AL V UNITED STATES FOREST SERVICE ET AL

United States Court of Appeals for the Ninth Circuit (William A Fletcher, Johnnie B Rawlinson, Thelton E Henderson)
479 F 3d 1024

Facts:

The United States Forest Service ('the Service') administers the San Francisco Peaks ('the Peaks'), an area of land in Arizona sacred to a number of Native American tribes. The Service had previously identified the Peaks as eligible for inclusion in the National Register of Historic Places and as a 'traditional cultural property'. The Service acknowledged that the Peaks are sacred to at least 13 formally recognised Indian tribes.

Facilities for skiing have existed at the Arizona Snowbowl, a commercial skiing area within the Peaks, since 1938. In 2002 ASR, the current owner of the Snowbowl, submitted a development application to the Service. In 2005 the Service issued a Record of Decision ('ROD'), pursuant to a Final Environmental Impact Statement ('FEIS'), which approved the development application, and controversially approved the proposal to make artificial snow using treated sewage effluent.

At first instance the District Court held that the expansion did not violate the *Religious Freedom Restoration Act 42 USC §§ 2000bb et seq* ('*RFRA*'): *Navajo Nation v US Forest Serv, 408 F Supp 2d 866, 907 (D Ariz 2006)*.

The appellants challenged the District Court's findings pursuant to the *Administrative Procedure Act 5 USC §706*, which provides that courts shall 'hold unlawful and set aside agency action, findings and conclusions of law' that are either 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law' or 'without observance of procedure required by law'. The appellants alleged failure to comply with *RFRA*, the *National Environmental Protection Act 42 USC §§ 4321 et seq* ('*NEPA*'), and the *National Historic Preservation Act 42 USC §§ 470 et seq* ('*NHPA*').

Held, allowing appeal in respect of *RFRA* and one *NEPA* claim, affirming District Court grant of summary judgment to defendants in four *NEPA* claims and *NHPA* claim:

Religious Freedom Restoration Act

1. The *RFRA* provides greater protection for religious practices than the Constitutional guarantee of free exercise of religion*: Employment Division, Department of Human Resources of Oregon v Smith* 494 US 872, *United States v Bauer* 84 F3d 1549 (9th Cir 1996), *City of Boerne v Flores* 521 US 507, *Bryant v Gomez* 46 F3d 948 (9th Cir 1995) considered.

2. The *RFRA* protects 'any exercise of religion, whether or not compelled by, or central to a system of religious belief' (*42 USC §§2000bb-2(4), 2000cc-5(7)(A)*). The Peaks are religiously significant to all tribal claimants, particularly the Hopi and the Navajo: *Lyng v Northwest Indian Cemetery Assoc'n* 485 US 439 distinguished.

3. Claimants invoking the RFRA must prove that the burden on their religious exercise is 'substantial'. The burden must be more than an 'inconvenience'; it must prevent a plaintiff from engaging in religious conduct or having a religious experience. The evidence supports the conclusion that the use of treated effluent on the Peaks would impose a substantial burden on the exercise of religion by the Navajo and the Hopi. This finding made it unnecessary to consider whether the Haulapai and the Havasupai had also satisfied this threshold: *Guam v Guerrero* 290 F3d 1210 (9th Cir 2002), *Bryant v Gomez* applied.

4. Only interests of the 'highest order' constitute 'compelling government interest' for the purposes of *RFRA*. The interest asserted must be more than a 'categorical' or

general assertion of a compelling interest: *Yoder, Gonzales v O Centro Espirita Beneficiente* 546 US 418 considered.

5. The Forest Service's interests in managing the forest for multiple uses, including recreational skiing, are broadly formulated interests justifying the general applicability of government mandates and are therefore insufficient on their own to meet *RFRA*'s compelling interest test. Even if there is a risk of the Snowbowl ceasing to operate, there is not a compelling *governmental* interest in allowing the Snowbowl to make the artificial snow to avoid that outcome. There is no evidence that approving the proposed action advances the Service's general interest in ensuring public safety on federal lands: *Gonzales v O Centro Espirita Beneficiente* 546 US 418 applied.

6. The proposed action does not serve a compelling government interest in avoiding conflict with the *Establishment Clause*. The Constitution 'affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any': *Lynch v Donnelly, 465 US 668, 673, 104 S Ct 1355, 79 L Ed 2d 604 (1984)*. Declining to allow a commercial ski resort in a national forest to put treated sewage on a sacred mountain is a permitted accommodation avoiding 'callous indifference' that falls far short of an *Establishment Clause* violation: *Estate of Thornton v Caldor, Inc* 472 US 703 considered, *Lynch v Donnelly* 465 U.S. 668 applied.

National Environmental Policy Act

7. The appellants sufficiently raised their claims as to concerns about human ingestion of the artificial snow at first instance, meaning that the Service's claim that the appellants had failed to exhaust the claim in administrative proceedings was rejected. While 'unjustified obstructionism' will not be tolerated (*Vt Yankee*, 435 US at 553-54) APA requirements are met if the appeal, taken as a whole, provided sufficient notice to the agency to afford it the opportunity to rectify the violations that the plaintiffs alleged*: Native Ecosystems Council v Dombeck* 304 F3d 886 (9th Cir 2002) applied, *Dep't of Transport v Pub Citizen* 541 US 752, *Idaho Sporting Cong, Inc v Rittenhouse* 305 F3d 957 (9th Cir 2002) cited.

8. The *FEIS* did not provide a reasonably thorough discussion of the risks posed by possible human ingestion of artificial snow made from treated sewage effluent. It did not articulate why such discussion was unnecessary. It did not provide a 'candid acknowledgment' of any such risks, and it did not provide an analysis that would foster informed decision-making and informed public participation. Consequently, the appellants' claim that the *FEIS* did not satisfy *NEPA* was successful: *Ctr for Biological Diversity v US Forest Service* 349 F3d 1157 (9th Cir 2002), *Nat'l Audubon Soc'y v Dep't of the Navy* 422 F3d 174 (4th Cir 2005) applied.

9. Although the Forest Service's discussion of alternative actions (specifically, the appellants' claim for a fresh water alternative to the use of treated sewage) was brief, it was not inadequate under *NEPA*. The Forest Service was entitled to have in mind a preferred course of action in advance. The appellants' claim on this ground therefore failed: *Ass'n of Pub Agency Customers Inc v Bonneville Power Admin* 126 Fd 1158 applied, *City of Carmel-by-the-Sea v United States DOT* 123 F3d 1142 (9th Cir 1997), *City of Sausalito v O'Neill* 386 F3d 1186 (9th Cir 2004) cited.

10. The *FEIS* sufficiently disclosed to the public (and made clear that the Forest Service considered) the risk posed by endocrine disrupters. The appellants' claim that the Service should have paid greater attention to specific scientific evidence therefore failed*: Ore Natural Res Council v Marsh* 832 F2d 1489 (9th Cir 1987) applied; *Ctr for Biological Diversity* distinguished.

11. While information as to the environmental impact of diverting the treated sewerage effluent from the regional aquifer was presented in an 'odd and backhanded way', the analysis of this issue in the *FEIS* was a reasonably thorough discussion of the issue. The appellants' claim therefore failed: *Ctr For Biological Diversity* applied.

12. The Forest Service satisfied its obligations under *NEPA* to discuss the effects of the proposed action on the human environment. The appellants' claim failed.

National Historic Preservation Act

13. If a proposed undertaking will have an effect on historic properties to which Indian tribes attach religious and cultural significance, *NHPA* requires the federal agency to consult with the affected tribes before proceeding.

14. The evidence does not support the Hopi appellants' claim that the Forest Service did not meaningfully

consult with them. Disagreement over the outcome of a consultation process does not mean that the process itself was substantively and procedurally inadequate: *408 F Supp 2d at 879 n 11.*

DIGEST