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NE. STATE OF NEBRASKA
OFFICIAL
JUN 28 1994
DEPT. OF JUSTICE

DATE: June 24, 1994

SUBJECT: Constitutionality of Open Burning Ban As Applied to Ceremonial Sweat Lodge Fires

REQUESTED BY: Michael R. Durst
State Fire Marshal

WRITTEN BY: Don Stenberg, Attorney General
Steve Grasz, Deputy Attorney General

You have requested an Attorney General's Opinion concerning the applicability of Nebraska's statewide open burning ban to "an open fire which heats stones for an Indian ceremonial sweat lodge."

Question Presented

Whether Neb. Rev. Stat. § 81-520.01 may be applied, under the Free Exercise Clause of the First Amendment or other applicable law, to prohibit open fires used to heat stones for Native American sweat lodges.

Discussion

Nebraska law provides for a "statewide open burning ban on all bonfires, outdoor rubbish fires and fires for the purpose of clearing land." Neb. Rev. Stat. § 81-520.01 (1994 Neb. Laws LB 408, § 1). The statute provides that the "fire chief of a local fire department or his or her designee may waive an open burning ban . . . for an area under his or her jurisdiction by issuing an open burning permit to a person requesting permission to conduct

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open burning." § 81-520.01(2). The statute further provides that the "fire chief of a local fire department or his or her designee may waive the open burning ban in his or her jurisdiction when conditions are acceptable to the chief or his or her designee." §81-520.01(3).

Since Neb. Rev. Stat. § 81-520.01 provides that "[t]here shall be a statewide open burning ban on all bonfires, outdoor rubbish fires, and fires for the purpose of clearing land." (emphasis added), a sweat lodge fire must, therefore, be a "bonfire" in order to come under the open burning ban.

Definition of Bonfire

The open burning ban statute contains no definition of the word "bonfire." Webster's Encyclopedic Unabridged Dictionary of the English Language (1989 ed.) defines "bonfire" as "1. a large fire in the open air, for warmth, entertainment, or celebration, to burn leaves, garbage, etc., or as a signal. 2. any fire built in the open." (Emphasis added). Webster's Third New International Dictionary (1981 ed.) defines "bonfire" as "1. a large public fire in which bones or bones and wood were traditionally burned," "a funeral pyre," "a fire in which heretics or officially proscribed articles . . . were publicly burned," "2. a great open-air fire kindled to mark a religious anniversary . . . or to highlight some public event," "3. an open-air fire in which waste paper, leaves, brush, or other rubbish is burned." (Emphasis added).

Two legislative bills formed what was codified as Neb. Rev. Stat. § 81-520.01 prior to its amendment in 1994. On January 31, 1980, Senator Hefner introduced LB 810, which gave the State Fire Marshall the authority to prohibit bonfires, outdoor rubbish fires, and fire for clearing land by issuing a statewide or regional ban when atmospheric or local conditions made such fires dangerous. In his testimony before the committee, Fire Marshall Barnett was asked by Senator Merz for an explanation of "open burning," to which Mr. Barnett replied,

> Well, I don't know if I have a definition, I know what it is, but I wouldn't know how to define it. Open burning is where it's not involved with an incinerator containment. Open burning could be a bonfire, it could be classified as trash fire, ditches. . . .

Committee Records on LB 810, 86th Neb. Leg., 2nd Sess. p.5 (January 30, 1980).

On February 11, 1982, LB 790 was introduced to create a statewide ban on opening burning and leave it to local fire

districts to waive the ban at their discretion. It was seen as a needed modification of the system enacted with the passage of LB 810. During questioning before the Government, Military and Veteran's Affairs Committee, the following exchange took place between Senator Goll and Fire Marshall Wally Barnett:

> SENATOR GOLL: For my information, would you tell me what an outdoor rubbish fire, what makes that up?
>
> WALLY BARNETT: It could be stump clearing. It could be land clearing. It could be any type of burning, you clean out maybe three or four barns and you clean up some land around the house and stuff like that.
>
> SENATOR GOLL: What about burning leaves in the fall?
>
> WALLY BARNETT: It would be the same thing, be the same thing. But usually a leaf burning situation is nothing as serious as your open land or your rubbish burning that they have.

Committee Records on LB 790, 87th Neb. Leg., 2nd Sess. p.9, (Feb. 11, 1982).

With the above testimony and definitions in mind, it is necessary to examine the nature of sweat lodge fires. The Handbook of American Indians North of Mexico, Part 2, Frederick Webb Hodge ed. (1912) at 660-661, describes the traditional sweat lodge fire in this way:

> Few practices were so nearly universal among the Indians as the sweat-bath, probably known to every tribe N. of Mexico, although along the N.W. coast of S. of the Eskimo territory it seems to have been superseded by bathing in the sea. The sweat-lodge is to this day common in most Indian villages and camps.
>
> The type of the ordinary sweat-house seems to have been everywhere the same. Willow rods or other pliant stems were stuck into the ground and bent and fastened with withes into a hemispherical or oblong framework, which generally was large enough to accommodate several persons. A hole was dug conveniently near the door into which stones, usually heated outside, were dropped by means of forked sticks. These were sprinkled with water to generate steam. A temporary covering of blankets or skins made the inclosure tight. This was the sweat-house in its simplest form. The Delawares of Pennsylvania, according to Loskiel (Hist. Miss. United Breth,, pt. 1, 108-9, 1794) in the 18th century had "in every town an

> oven, situated at some distance from the dwellings, built either of stakes and boards covered with sods, or dug in the side of a hill and heated with some red-hot stones."

See also Handbook of North American Indians, Volume 11, Warran D'Azevedo ed. (1986) at 350 ("A sweat house was heated with rocks carried from a fire outside.").

Based on the above definitions and descriptions, we conclude that a Native American sweat lodge fire is a "bonfire" for purposes of Neb. Rev. Stat. § 81-520.01. Consequently, it is necessary to examine whether § 81-520.01 may be applied to prohibit sweat lodge fires.

The Free Exercise Clause

The refusal of local fire authorities to allow open sweat lodge fires, pursuant to Neb. Rev. Stat. § 81-520.01, would clearly implicate the Free Exercise Clause of the First Amendment. The First Amendment prohibits government from making any law "prohibiting the free exercise" of religion. U.S. Const. Amend. I. The Free Exercise Clause, like the Establishment Clause, applies not only to the federal government but also to the states and their political subdivisions via the Fourteenth Amendment.

Free Exercise Clause analysis was performed, until recently, under a test derived from ***Wisconsin v. Yoder***, 406 U.S. 205 (1972). The test which emerged from ***Yoder*** includes the following elements: (1) the nature of the belief or conduct motivated by the belief, (2) the nature of the burden imposed by the state regulation on the exercise of such belief or conduct, (3) the nature of the interest that is promoted by the regulation, and (4) the nature of the harm to the state's interest if the asserted free exercise claim is allowed. ***Id.*** at 215-21.

Under the ***Yoder*** test, if a state statute or regulation is to survive a challenge that it interferes with the exercise of a legitimate religious belief, the state must show either (1) that the statute or regulation does not deny the free exercise of religious belief, or (2) that the state's interest is sufficiently compelling to override the claimed religious interest. ***Id.*** at 214.

In ***Employment Division v. Smith***, 494 U.S. 872 (1990), the U.S. Supreme Court drastically altered the landscape of free exercise jurisprudence. In ***Smith***, two members of the Native American Church were denied unemployment benefits after being fired from their jobs as drug counselors because they used the illegal drug peyote during a church ceremony. The church members claimed that the denial of unemployment benefits was an unconstitutional burden on the free

exercise of their religion. ***Smith***, 494 U.S. at 874-76. The Oregon Supreme Court said it could not, under the first amendment, prohibit the use of peyote during a religious ceremony or withhold unemployment benefits from those who were fired for doing so. ***See Smith v. Employment Division***, 763 P.2d 146 (Ore. 1988); ***Michael v. McConnell***, Free Exercise Revisionism and the Smith Decision, 57 U. Chi. L. Rev. 1109, 1110 (1990). The United States Supreme Court, however, reversed the Oregon court and thereby rejected the application of the compelling interest test for most first amendment free exercise challenges.

The critical language in ***Smith*** is found in the Court's reference to laws that are "neutral" and "generally applicable."

> [I]f prohibiting the exercise of religion . . . is not the object of the [law] but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended. . . . We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the state is free to regulate.

Smith, 494 U.S. at 878-79.

The Court, in ***Smith***, found that the Oregon statute was not specifically directed at religious practice (i.e. the law was "neutral") and was deemed constitutional as generally applied to others who used peyote for nonreligious purposes (i.e. the law was "generally applicable"). ***Id.*** at 878. The plaintiffs contended that it was impermissible to require an individual to observe a generally applicable law that requires or forbids him to perform an act that his religion forbids or compels. ***Id.*** The Court, however, disagreed, citing decisions that "have consistently held that the right of free exercise does not relieve an individual of the obligation to comply with a `valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)'". ***Id.*** at 879, ***citing U.S. v. Lee***, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring).

The ***Smith*** Court said it would not apply the compelling interest test announced in ***Sherbert v. Verner***, 374 U.S. 398 (1963), to require exemption from a generally applicable criminal law, and declared that the compelling interest test for infringement on religiously motivated conduct had "nothing to do" with "across-the-board criminal prohibition on a particular form of conduct." ***Smith***, 494 U.S. at 884.

The court's decision in ***Smith*** was recently revisited in ***Church of the Lukumi Babalu Aye v. City of Hialeah***, 113 S.Ct. 2217 (1993). In ***Hialeah***, certain city ordinances directed to prohibit the religious sacrifice of animals by members of the Santeria religion were declared to be invalid on free exercise grounds. Following its earlier decision in ***Smith***, the court declared that "a law that is neutral and of general applicability need not be justified by a compelling government interest even if the law has the incidental effect of burdening a particular religious practice. ***Id.*** at 2226. The court found that the Hialeah ordinances failed to satisfy the Smith requirements, were therefore subject to strict scrutiny, and held to be unconstitutional. ***Id.*** A law that fails to satisfy the ***Smith*** requirements of neutrality and general applicability, said the Court, may only be "justified by a compelling government interest and must be narrowly tailored to advance that interest. ***Id.*** Under ***Hialeah***, a law must be <u>both</u> neutral <u>and</u> generally applicable to escape free exercise strict scrutiny analysis, because "[n]eutrality and general applicability are interrelated, and . . . failure to satisfy one requirement is a likely indication that the other has not been satisfied. ***Id.*** ***Hialeah*** seems to define a law as "neutral" if it does not specifically target a religious belief or practice for distinctive treatment, officially disapprove of a particular religion or religion in general, or discriminate against some or all religious beliefs, regulate or prohibit conduct, solely because of belief or conduct is religiously motivated. Id. at 2226-27.

"General applicability" seems to be violated if society appears by law to impose restrictions on some which it is unwilling to require on all. ***Id.*** at 2233. In other words, a law cannot be "selective", by imposing burdens on religiously motivated conduct, but not on the same conduct which is not religiously motivated. ***See, id.*** at 2232. A law burdening religious practice that is not neutral or not of general application must undergo the "most rigorous of scrutiny", and will survive such scrutiny only rarely. ***Id.*** at 2233. Strict scrutiny in that instance "really means what it says." ***Id.***

Under ***Smith*** and ***Hialeah***, Neb. Rev. Stat. § 81-520.01 appears to be a neutral and generally applicable law, to which criminal penalties are attached. (Violation of Neb. Rev. Stat. § 81-520.01 is a Class IV misdemeanor). Neb. Rev. Stat. § 81-520.02 (1994 Neb. Laws LB 408, § 2). Under ***Smith*** and ***Hialeah***, if a law burdens the free exercise of religion, it may be subject to a strict scrutiny or compelling interest analysis in only three instances: (1) if the law is not "neutral", (2) if the law is not "generally applicable," or (3) if the free exercise interest involved is also contained with another constitutional interest such as freedom of speech, freedom of the press, the right of parents to direct the

upbringing of their children or freedom of association. ***Smith***, 494 U.S. at 881-82.

In ***Alabama and Coushatta Tribes of Texas v. Big Sandy School District***, 817 F.Supp. 1319 (E.D.Tex. 1993), the free exercise challenge of Native American students to a public school hair code was combined with both a free speech claim and a parental rights claim. The Court in ***Big Sandy*** concluded that since the Native American students had established a substantial likelihood of success on the merits of their case, they were entitled to a preliminary injunction against enforcement of the hair regulation. ***Id.*** at 1336. As applied to Indian sweat lodge fires, it is arguable that free speech and association claims are also implicated, which would remove the open burning ban from ***Smith*** and trigger a strict scrutiny analysis of the statute under the ***Smith*** "hybrid" exception. ***See also***, Richard F. Duncan, Who Wants to Stop the Church: Homosexual Rights Legislation, Public Policy, and Religious Freedom, 69 Notre Dame L. Rev. 393, 431 (1994).

The Religious Freedom Restoration Act

In light of the virtual emasculation of the Free Exercise Clause by the Supreme Court, the most important consideration in determining whether Neb. Rev. Stat. § 81-520.01 may be used to prohibit sweat lodge fires is a new federal statute. On November 16, 1993, President Clinton signed the Religious Freedom Restoration Act of 1993 (RFRA). 42 U.S.C. §§ 2000bb to 2000bb-4 (Supp. 1994). It was enacted in direct response to the Court's decision in ***Smith***, and it seeks to "restore the compelling interest test set forth in ***Sherbert v. Verner***, 374 U.S. 398 (1963) and ***Wisconsin v. Yoder***, 406 U.S. 205 (1972) and to guarantee its application in all cases where the free exercise of religion is substantially burdened. RFRA, 42 U.S.C. § 2000bb(b) (Supp. 1994).

Specifically, the statute requires that government "shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, and the government may only do so "if it demonstrates that the application of the burden to the person (1) is in furtherance of a compelling government interest; and (2) is the least restrictive means of furthering that compelling government interest." RFRA, 42 U.S.C. § 2000bb-1(a),(b).

RFRA is expressly intended to legislatively "overrule" the ***Smith*** decision. Professor Douglas Laycock notes that RFRA was "an effort [on the part of Congress] to enact the theory that free exercise of religion is a substantive civil liberty", and "an attempt to create a statutory right to the free exercise of religion, pursuant to Congress' power under Section 5 of the

Fourteenth Amendment to enforce the Fourteenth Amendment and therefore presumably to enforce all the rights incorporated in the Fourteenth Amendment. Douglas Laycock, Free Exercise and the Religious Freedom Restoration Act, 62 Fordham L. Rev. 883, 895 (1994). In contrast, the Court in ***Smith*** has adopted a "non-discrimination, formal-equal-treatment view of religious liberty. ***Id.*** at 896.

It remains to be seen how the U.S. Supreme Court will respond to free exercise challenges under RFRA. It also remains to be seen under RFRA how the Court will interpret what kind of burden on the free exercise of religion will be "substantial" enough to require a compelling interest justification.

A handful of lower courts have addressed free exercise challenges under RFRA, and none have overruled the Act or challenged its validity. ***See Rust v. Clarke***, ___ F.Supp. ___, 1994 WL 157662 (D.Neb. 1994) (prison inmate at Nebraska State Penitentiary); ***Lawson v. Dugger***, 844 F.Supp. 1538 (S.D.Fla. 1994) (prison inmate); ***Allah v. Menei***, 844 F.Supp. 1056 (E.D.Pa. 1994) (prison inmate); ***Western Presbyterian Church v. Board of Zoning Adjustment***, ___ F.Supp. ___, 1994 WL 145033 (D.D.C. 1994) (Zoning); ***Campos v. Coughlin***, ___ F.Supp. ___, No. 94 Civ. 1057(SS) (S.D.N.Y. 1994) (prison inmate); ***In Re Faulkner***, 165 B.R. 644 (Bankr. W.D. Mo. 1994) (bankruptcy); ***Rodriguez v. Couglin***, 1994 WL 174298 (S.D.N.Y. 1994) (prison inmate); ***Scarpino v. Grosshiem***, ___ F.Supp. ___, 1994 WL 200781 (S.D. Iowa 1994).

In ***Canedy v. Boardman***, 16 F.3d 183 (7th Cir. 1994), the court stated in a footnote,

> While a religion-based allegation does not appear in his complaint, in Canedy's brief he asserts that having his naked body exposed to female guards particularly burdens him because he is a Muslim, and Islam has a very strong nudity taboo. He therefore indicates that he may seek to amend his complaint to assert a violation of his rights under the free exercise clause of the First Amendment. We note that until recently, such a complaint would appear to challenge a religiously "neutral, generally applicable" practice, and therefore be doomed to fail under ***Employment Division v. Smith***, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990). But the President recently signed into law the Religious Freedom Restoration Act (RFRA), Pub.L. No. 103-141, 107 Stat. 1488 (1993). That legislation purports to reverse ***Smith***, declaring that "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," unless it

> "is in the furtherance of a compelling government interest" and "is the least restrictive means of furthering that compelling interest." [42 U.S.C. § 2000bb-1(a), (b) (Supp. 1994). The constitutionality of this legislation-surely not before us here-raises a number of questions involving the extent of Congress's powers under Section 5 of the Fourteenth Amendment.

Canedy, 16 F.3d at 187 n.2.

Conclusion

We conclude the application of Neb. Rev. Stat. § 81-520.01 to Native American sweat lodge fires must be analyzed under the compelling interest standard announced in the Religious Freedom Restoration Act of 1993. One court, for example, stated in ***Lawson v. Dugger***, 844 F.Supp. 1538, 1542 (S.D. Fla. 1994): "In the absence of a constitutional challenge to the Act, this Court finds no legitimate reason to not apply RFRA to this case." RFRA, by its very terms, "applies to all Federal and State law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after the enactment of this Act." RFRA, 42 U.S.C. § 2000bb-3 (Supp. 1994) (emphasis added).

The compelling interest inquiry under RFRA consists of two parts: (1) whether Neb. Rev. Stat. § 81-520.01 as applied to prohibit Indian sweat lodge fires, even under adverse atmospheric conditions, is in furtherance of a compelling government interest, and (2) whether it is the least restrictive means of furthering that compelling government interest. RFRA, 42 U.S.C. § 2000bb-1(b) (Supp. 1994). RFRA should also be read in conjunction with ***Wisconsin v. Yoder***, 406 U.S. 205 (1972), and the four-part balancing test announced there, and approved in RFRA.

The Indian sweat lodge ceremony is obviously motivated by a sincerely held religious belief. The sweat lodge ceremony is central to the religion of the plains Indians, and it has been observed for many years. In ***Indian Inmates of Nebraska Penitentiary v. Gunter***, 660 F.Supp. 394 (1987), ***aff'd*** by ***Sapa Najin v. Gunter***, 857 F.2d 463 (1988), the Court, per Urbom, J., gave the following description of the sweat lodge ceremony, as it is celebrated by the plains Indians.

> The Sioux people are divided linguistically into the Dakota, Nakota and Lakota, and politically into the seven tribal fires. The sun dance, vision quest, and sweat lodge are among the seven sacred rites common to the Dakota, Nakota, and Lakota. Sapa-Najin is a sincere

> follower of the Nakota ways, and believes that God is the "great mystery" who gave the sacred pipe and the sacred rites. He seeks to follow the "good red road" or sacred way, viewing life as a purification ceremony for the after-life.
>
> The sweat lodge ceremony was the first rite given to the Nakota; it is preparation for all other rites as well as a rite in itself. During sweat lodge ceremonies, participants experience physical and spiritual purification and are "reborn" into harmony through the use of gifts from the helpers and powers that aid in prayer to the great mystery.

660 F.Supp. at 395 (emphasis added).

By denying permission to burn the fire which is essential to its observance, the State would be effectively prohibiting its Native American adherents from observing the ceremony at all. This burden on the free exercise of religion would appear to be clearly "substantial" under RFRA and under the balancing test in ***Yoder***.

The nature of the State's asserted interest in banning the sweat lodge fire, especially under certain atmospheric conditions, is arguably that of preventing serious and potentially catastrophic damage to persons or property from an open fire that escapes and spreads uncontrollably to its surrounding environs. This interest is surely significant, but in this case, it does not appear to be "compelling." The state's interest here is arguably not significantly harmed if the sweat lodge observance is allowed, because the fire used during the ceremony is carefully contained and closely watched. ***See Indian Inmates***, 660 F.Supp. 394, 395 (D.Neb. 1987), ***aff'd by Sapa Najin v. Gunter***, 857 F.2d 463 (8th Cir. 1988).

As the Court stated in ***Yoder***, 406 U.S. at 214, "The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion". This is the expression of the compelling interest test that RFRA seeks to affirm. RFRA, 42 U.S.C. § 2000bb(b) (Supp. 1994). ***See also Sherbert v. Verner***, 374 U.S. 398, 406 ("It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, `[o]nly the greatest abuses endangering paramount interests, give occasion for permissible limitation; ***Thomes v. Collins***, 323 U.S. 516, 530"). The ***Sherbert*** test is also cited with favor in RFRA. 42 U.S.C. § 2000bb(b) (Supp. 1994).

Even if the State interest is seen as compelling in this instance, there are still less restrictive means available to the State in furthering its interest in public safety and the environment. If the statute is to be applied at all, the local fire chief or his or her designee must adopt reasonable requirements, for use under dangerous weather conditions, that would not impair the free exercise rights of Native American religion adherents, while ensuring against the burning of an unreasonably dangerous fire. ***See*** 1994 Neb. Laws LB 408, § 1 (amending § 81-520.01 to authorize the local fire chief to adopt rules and regulations listing the conditions acceptable for issuing a permit to conduct open burning).

In summary, application of Neb. Rev. Stat. § 81-520.01 to prohibit Native American sweat lodge fires would violate the Religious Freedom Restoration Act. At most, local fire authorities could adopt reasonable requirements under the statute to ensure public safety during the use of such fires.[1]

Sincerely yours,

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[1]The assistance of Department of Justice law clerk Jeff Santema in preparing this opinion is gratefully acknowledged.