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Kennecott Eagle Mineral Project and the Need for a Michigan Religious Freedom Restoration Act

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> "The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial…"[1]

Nearly 200 years ago, Supreme Court Chief Justice John Marshall spoke of the importance of Indian nations to retain their natural rights to the land. However, over and over these rights have been ignored by various levels of government and private companies. On January 14, 2010, these rights were ignored once again, when the Michigan Department of Environmental Quality issued a press release announcing the approval of permits for a mining project, Kennecott Eagle Mineral Project, near Marquette.[2] There are many concerns about this project, led by the London based company Rio Tintos. Environmental concerns aside, the rights to religious freedom of the Keweenaw Indian Bay Community are in jeopardy.

The Kennecott decision is proof that without a firm state commitment to protect religious freedom, it is easy for lower courts and agencies to make economic development decisions with little regard to the burden it places on practitioners of American Indian Religion. The first part of this paper will discuss the Kennecott Eagle Project in Michigan's Upper Peninsula and the administrative decision to issue the permits. The second part of this paper will focus on recent Supreme Court cases and the uphill battle for religious freedom even under the Religious Freedom Restoration Act (RFRA). The third part of the paper will discuss how one of those decisions, *City of Boerne v. Flores*[3], has impacted state legislation by prompting statutes and constitutional amendments aimed at protecting religious freedom. Finally, the paper will

[1] *Worcester v. Georgia*, 31 US 515, 530 (1832).
[2] Press Release, Mich. Dep't of Envtl. Quality, DEQ Issues Final Decision on Kennecott Mining Permits (Jan. 14, 2010) (on file with author).
[3] 521 U.S. 507 (1997).

conclude by discussing how, by adopting a state version of RFRA and adding a "least restrictive means" requirement to the current "compelling interest" standard, Michigan can prevent future Kennecott type disputes and continue to maintain a strong tribal-state relationship.

Part I

On August 2, 2009, a group of over 170 people gathered to walk from the Yellow Dog River to Eagle Rock, to hear speakers discuss the significance of the site and the destructive results of proposed mining projects.[4] A few weeks later, on August 18, Judge Patterson, an administrative law judge for the State of Michigan, issued a 178 page Proposal for Decision (PFD). The record shows that Judge Patterson heard testimony from a variety of individuals about the sacredness of Migi Zii Wan Sin (Eagle Rock).[5] The mining company, Kennecott, argued that the State's mining statute (MCL 324.632) does not define a "place of worship" and that the only fitting way to define the term is as a structure or building.[6] Judge Patterson rejected that definition and used testimony in combination with Wikipedia and Webster's dictionary to determine that Eagle Rock is indeed a place of worship because a "place" is a space as well as a building.[7] In concluding his decision, Judge Patterson stated:

> Based on the above Findings of Fact, and Conclusions of Law, it is proposed that a Final Determination and Order be entered allowing the Part 31 permit as issued. Regarding the Part 632, it should be allowed with the exception that provision be made to avoid direct impacts to Eagle Rock that may interfere with the religious practices thereon.[8]

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[4] Michele Bourdieu, Judge Upholds DEQ Permits for Mine, Recommending Protection For Eagle Rock (2009), http://lakesuperiorminingnews.net/2009/08/19/616/

[5] *In the Matter of The Petitions of the Keweenaw Bay Indian Community, et. al. on Permits Issued to Kennecott Eagle Minerals Company, Proposal for Decision*, Mich. Dep't of Envtl. Quality, 170-171 (August 18, 2009) (on file with author), *available at* http://lakesuperiorminingnews.files.wordpress.com/2009/05/judge-patterson-08-18-09-eagle-project-contested-case-decision.pdf

[6] *Id.*

[7] *Id.* at 171-172.

[8] *Id.* at 177.

Judge Patterson was essentially indicating there was a "least restrictive means" option, discussed later in the paper. Unfortunately, the state agency did not agree with the judge's reasoning.

Former Department of Environmental Quality (DEQ) Director Steven Chester remanded the PFD back to Judge Patterson in November 2009 and the department later rejected the definition of "place of worship" and issued the final order themselves on January 14, 2010.[9] In November, the director had remanded the decision back to Judge Patterson to ask for clarification the religious impacts the project would have on area American Indians, but Judge Patterson had never issued that clarification.[10] The agency took a different stance on the matter.

The statute dealing with mining required Kennecott to perform an Environmental Impact Assessment (EIA) as part of the application process.[11] In explaining Rule 202 requirements within the EIA in the Final Order, signed by Senior Policy Advisor Frank Ruswick, the order states:

> The PFD alludes to Eagle Rock as having a cultural significance. An EIA must identify "[c]ultural, historical, or archeological resources." R 425.202(2)(ee). However, to qualify as such a resource, the feature must be listed on either a state or federal registry. R 425.102(1)(g). Since Eagle Rock is not listed on any of the enumerated registries, it is not a cultural, historical or archaeological resource that must be identified and described by the EIA.[12]

The final order goes on to reject the way the PFD defined "place of worship," stating "[w]hether Eagle Rock is a 'place of worship' must be ascertained under the principles of statutory construction, which apply equally to the construction of administrative rules."[13] The final order

[9] Press Release, Mich. Dep't of Envtl. Quality, DEQ Issues Final Decision on Kennecott Mining Permits (January 14, 2010) (on file with author).
[10] *Id.*
[11] *In the Matter of The Petitions of the Keweenaw Bay Indian Community, et. al. on Permits Issued to Kennecott Eagle Minerals Company*: *Final Determination and Order*, Mich. Dep't of Envtl. Quality, (Jan. 14, 2010) [hereinafter *Final Determination and Order*] (on file with author) *available at* http://turtletalk.files.wordpress.com/2010/01/kennecott-fdo.pdf
[12] *Id.* at 6 n. 4.
[13] *Id.* at 8.

reflects the agency's determination that because Eagle Rock was not a building, it cannot be considered a place of worship and will not be protected under the statute.[14]

This case is far from over and as the project goes forward, other concerns are sure to arise. On February 10, 2010, a public hearing was held at Westwood High School in Ishpeming, Michigan to discuss the construction of a road linked to the Kennecott Project.[15] The meeting consisted of participation from both supporters and objectors to the project as well as participation from the Department of Natural Resources and Environment.[16] There is no indication that anyone at the hearing was asserting that the road would impede on religious freedom, but even if they were, the Supreme Court is not on their side.

Part II

In 1988, the Supreme Court decided *Lyng v. Northwest Indian Cemetery Protective Ass'n*, a case originally brought by individual Indians, organizations representing Indians, and organizations representing environmental concerns who were attempting to stop a road from being built in the Six Rivers National Forest area.[17] In conducting an environmental impact statement for a road they were proposing, the United States Forest Service determined "[t]his area, as reported in a study commissioned by the Service, has historically been used by certain American Indians for religious rituals that depend upon privacy, silence, and an undisturbed natural setting," but rejected any alternative location of the road.[18] This case arose after respondents exhausted their administrative remedies, filed for an injunction in a Federal District Court in California and won.[19] In a decision written by Justice O'Connor, the Supreme Court

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[14] *Id.*
[15] Noel McLaren, *Kennecott Woodland Public Hearing*, FoxUP, Feb. 10, 2010, *available at* http://www.uppermichiganssource.com/news/story.aspx?id=414741.
[16] *Id.*
[17] *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988).
[18] *Id.*
[19] *Id.*

overturned the Federal Court's decision, holding the "free exercise clause did not prohibit government from permitting timber harvesting and road construction in area in question."[20]

Two years later, in 1990, the Supreme Court again denied religious freedom rights to practitioners of American Indian religion. *Employment Division v. Smith*, involved two members of the Native American Church who were fired from their jobs after using peyote.[21] In this case, the court held "The Free Exercise Clause permits the State to prohibit sacramental peyote use and thus to deny unemployment benefits to persons discharged for such use."[22] It is perhaps important to note about this case is the fact the individuals involved in this case were employees at a private drug rehabilitation facility.[23] It was probably not the best case for the Supreme Court to hear on the issue of peyote, but it nevertheless sparked legislative action.

In an effort to move away from the neutrality approach to religion and instead protect free expression, Congress reacted to the Supreme Court's *Employment Division v. Smith* decision by passing the Religious Freedom Restoration Act (RFRA) in 1993.[24] This statute prohibits the government from burdening an individual's exercise of religion unless the government has met a two part test under the exceptions of the act.[25] The first exception mandates that the burden "is in furtherance of a compelling interest of the government.[26] This has been, generally speaking, the easier exception for the government to meet. The second exception stipulates that the burden "is the least restrictive means of furthering that compelling interest."[27] While this is not an

[20] *Id.* at 340.
[21] *Employment Division v. Smith*, 494 U.S. 872 (1990).
[22] *Id.*
[23] *Id.*
[24] 42 U.S.C. 2000bb.
[25] 42 U.S.C. 2000bb-1(b).
[26] 42 U.S.C. 2000bb-1(b)(1).
[27] 42 U.S.C. 2000bb-1(b)(2).

impossible exception for the government to meet, if the government loses a case, it is usually because they are unable to show that they met the "least restrictive means" exception.[28]

Although not from the Supreme Court, a recent case from the Ninth Circuit involving the Navajo Nation, demonstrates that on a federal level, RFRA is ineffective in protecting American Indian religious freedom against the government. *Navajo Nation v. United States Forest Service*, is a case where American Indians were asking the courts to restrict the government from using artificial snow on a sacred site, San Francisco Peaks in Northern Arizona.[29] The snow was made from recycled wastewater that contained trace amounts of human waste.[30] Despite the pre-RFRA timing of the *Lyng* decision, the Ninth Circuit nevertheless draws parallels with that case in refusing to depart from the pre-RFRA jurisprudence.[31] It is almost as if the court is ignoring RFRA altogether. In concluding his dissent, Judge William Fletcher said:

> RFRA was passed to protect the exercise of all religions, including the religions of American Indians. If Indians' land-based exercise of religion is not protected by RFRA in this case, I cannot imagine a case in which it will be. I am truly sorry that the majority has effectively read American Indians out of RFRA.[32]

This case will not be heard by the Supreme Court, as cert was denied in the case. Regardless of what the Supreme Court says on religious freedom in the future, tribes have an even tougher obstacle to overcome when they are dealing with state or local action, because of a post-RFRA case from the Supreme Court.

Part III

In one of the first cases challenging RFRA, the statute was declared unconstitutional. The 1997 Supreme Court case *City of Boerne v. Flores*, centered on the denial of a building permit

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[28] See *United States v. Hardman*, 297 F.3d 1116 (10th Cir. 2002).
[29] *Navajo Nation v. United States Forest Service*, 535 F.3d 1058, 1062-1063 (9th Dist. 2008).
[30] *Id.* at 1062.
[31] *Id.* at 1072-1074.
[32] *Id.* at 1113-1114.

for a church in Texas by local zoning authorities.[33] The Court held that the "statute exceeded Congress' power."[34] In its analysis, the Court stated:

> Congress' discretion is not unlimited, however, and the courts retain the power, as they have since Marbury v. Madison, to determine if Congress has exceeded its authority under the Constitution. Broad as the power of Congress is under the Enforcement Clause of the Fourteenth Amendment, RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance.[35]

States have reacted to this decision by adopting their own version of RFRA either in a statute or a constitutional amendment.

According to the Religious Institutions Group, there are thirteen states with Religious Freedom Restorations Acts.[36] Out of those thirteen states, (Alabama, Arizona, Connecticut, Florida, Idaho, Illinois, Missouri, New Mexico, Oklahoma, Rhode Island, South Carolina, Tennessee, and Texas), twelve of them are modeled after the federal version of the statute with both the "compelling interest" and "least restrictive means" requirement for governmental exceptions. Missouri is the only state that does not include that exception in the statute.

According to the Home School Legal Defense Association website, seven states use a "compelling interest" test.[37] Those states are Kansas, Massachusetts, Minnesota, Ohio, Vermont, Washington, Wisconsin, and Michigan. The problem with a compelling interest test is that the government does not usually have a problem arguing a compelling interest. In the Kennecott permit case, it is not difficult to see that the compelling interest is to provide jobs for a depressed state. However, Judge Patterson's original concern in the Proposal for Decision was the permits be granted, but with care to "avoid direct impacts to Eagle Rock that may interfere with the

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[33] *City of Boerne v. Flores*, 521 U.S. 507, 511 (1997).
[34] *Id.*
[35] *Id.* at 536.
[36] The RJ&L Religious Liberty Archive, http://churchstatelaw.com/statestatutes/religiousfreedom.asp (last visited March 1, 2010).
[37] Home School Legal Defense Association, http://www.hslda.org/docs/nche/000000/00000083.asp (last visited February 27, 2010).

religious practices thereon."[38] Essentially, Judge Patterson was laying out a least restrictive means argument. Unfortunately, because Michigan does not have a statute that requires the government use the least restrictive means to achieve a compelling interest, this did not sway the agency director. With a state RFRA, however, this may be different.

Conclusion

If agreements are any indication, Michigan has a relatively good history and relationship with Michigan tribes, both at the state and local level. Michigan Court Rule 2.615 grants comity to tribal rulings.[39] Memorandums of understanding between local law enforcement and tribes exist as a way for communities to work together for the good of the whole. It follows then, that Michigan should go beyond the current use of the "compelling interest" standard and adopt a "least restrictive means" standard to protect the religious rights of the state's tribal nations who, borrowing the words of Chief Justices John Marshall, are "the undisputed possessors of the soil, from time immemorial."[40]

[38] *Supra* note 4.
[39] *See The First Tribal/State Court Forum and the Creation of MCR 2.615*, Michigan State University College of Law Indigenous Law & Policy Center, Working Paper 2007-16, at 3 (2007).
[40] *Supra* note 1.