PEYOTE AND THE DEPARTMENT OF ENERGY

ACCESS AUTHORIZATION CRITERIA

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EXECUTIVE SUMMARY

It is clear that peyote is a controlled substance. It is also clear that as they now exist, the Department of Energy's (DOE) Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Significant Quantities of Special Nuclear Material (DOE Criteria)[1] could be applied to deny access authorization to an individual who uses peyote. That individual could challenge the DOE Criteria under three theories: (1) the application to the individual would violate the free exercise of religion under the First Amendment; (2) if the individual is a Native American, the application would violate the individual's rights under the American Indian Religious Freedom Amendments Act (AIRFAA); and (3) the application would violate the individual's rights under the Religious Freedom Restoration Act (RFRA). The first theory has very little chance of success after the Supreme Court's decision in *Employment Division, Department of Human Resources of Oregon v. Smith*. The second theory, if asserted by a member of the Native American Church who uses peyote in a traditional religious ceremony, creates a much greater risk because presently the DOE Criteria do not address the express language of the AIRFAA regarding agency regulations and peyote. The third theory creates a risk similar to the second, but it could be asserted by **any** individual who claims the DOE Criteria impose substantial burden on the exercise of religion.

The three basic types of criteria that DOE could use are:

1. Leave the criteria as they are and resolve the issues regarding peyote in litigation if the current regulation is challenged either in a lawsuit filed in district court by a person seeking access authorization or raised by an individual as a defense.

2. Reissue the criteria so that a blanket exemption occurs for members of the Native American Church (or some other specific group) who use peyote in a traditional religious ceremony in a traditional religion.

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[1] 10 C.F.R. Part 710.

3. Reissue the criteria so that peyote use by a member of the Native American Church in traditional religious ceremonies is recognized as a factor that must be considered in light of the nature of the job, the actual access to special nuclear materials, the possibility of mitigating the risk posed by religious use of peyote, the willingness of the person to limit use to times that would have minimal impact on safety, and other relevant factors.

The first and second options do not adequately address DOE's legitimate security concerns. The first alternative creates the risk that a judicial challenge to the criteria would succeed and a judge would impose a rule on DOE telling DOE how to conduct its security program regarding peyote use. The second option, a blanket exemption for peyote use for specific religions, might go further than an adverse court decision. It is likely that a court would allow DOE to take into account job-related circumstances in making a decision of whether or not to grant an individual an access authorization.

The third option is flexible and fact-specific. It acknowledges DOE's obligations under both the RFRA and the AIRFAA but vests broad authority and discretion in the DOE officials who ultimately make the final decision. Courts are likely to give such a discretionary judgment great deference. Also, this type of DOE Criteria could be supported by persuasive legal and factual arguments and, thus, would have a strong chance of satisfying the "least restrictive means of fulfilling that interest" standard that is directly required under the RFRA and indirectly required by the AIRFAA. An argument very similar to this has been accepted by one United States District Court.

INTRODUCTION

Peyote (*lophophora williamsii*) is a "small, spineless cactus having psychedelic properties."[2] It is indigenous to the Rio Grande valley of Texas and to northeastern Mexico. The plant is carrot-shaped with a head that protrudes an inch or two above the ground.[3] Its ingestion is a central part of the religious and cultural ceremonies of many Native American tribes. They generally eat the "buttons" or dried tops (heads) of the cactus, the active ingredients of which are "nine narcotic alkaloids of the isoquinoline series, some of them strychnine-like in physiological action, the others morphine-like."[4] Its effects have been described as follows: "The physiological reaction usually is visual hallucinations (frequently color visions), as well as kinaesthetic, olfactory, and auditory derangements."[5] Another description of the effects of peyote is as follows:

> [Peyote] produces a sort of 'toxic delirium' that alters the senses and may cause dissociation of the intellectual part of the personality from the rest of the mind. This delirium may last up to ten hours.[6]

As is explained in this report, the legality of peyote use depends on the religion of the user and whether or not the user is a member of a federally recognized Native American tribe. In addition to the issue of legality of peyote under federal and state criminal laws, Congress has placed specific restrictions on federal and state agencies regarding the treatment of certain categories of peyote users. These facts have

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[2] Christopher Parker, Note and Comment: A Constitutional Examination of the Federal Exemptions for Native American Religious Peyote Use, 16 BYU J. Pub. L. 89, 91 (2001) (quoting, Omer C. Stewart, Peyote Religion: A History, 3 (University of Oklahoma Press, 1987).

[3] "PEYOTE." The Handbook of Texas Online, www.tsha.utexas.edu/handbook/online/articles print/PP/tsp1.html. This source states "[peyote] is not known to be habit-forming."

[4] Id.

[5] Id.

[6] Christopher Parker, Note and Comment: A Constitutional Examination of the Federal Exemptions for Native American Religious Peyote Use, 16 BYU J. Pub. L. 89, 91 (2001) (quoting, Omer C. Stewart, Peyote Religion: A History, 92 (University of Oklahoma Press, 1987) (internal quotation marks omitted) (quoting Edward F. Anderson, Peyote: The Divine Cactus, 83 (University of Arizona Press, 1996). This source asserts that mescaline is the active ingredient of peyote that causes these effects.

resulted in conflicting statutes for peyote under federal law and uncertainty due to the unique issues peyote use presents under the DOE Criteria.

The DOE Criteria include the following as one category of derogatory information:

> (k) Trafficked in, sold, transferred, possessed, used, or experimented with a drug or other substance listed in the Schedule of Controlled Substances established pursuant to section 202 of the Controlled Substance Act of 1970 (such as marijuana, cocaine, amphetamines, barbiturates, narcotics, etc.) except as prescribed or administered by a physician licensed to dispense drugs in the practice of medicine, or as otherwise authorized by Federal law.[7]

Schedule I of the Controlled Substance includes peyote.[8] However, as the following discussion will demonstrate, the use of peyote by some people in limited circumstances is "otherwise authorized by Federal law" as that phrase is used in the DOE Criteria. The scope of the laws that authorize the use of peyote (or at least deny DOE authority to punish certain users of peyote) and the limitations on the authorization are analyzed in this report.

[7] 10 C.F.R. 710.8(k).

[8] 21 U.S.C. 812 Schedule I (c) (2).

FEDERAL LAWS THAT AUTHORIZE USE AND POSSESSION OF PEYOTE

There are two federal statutes and one constitutional provision that might be interpreted to authorize the use of peyote. The statutes are (1) the American Indian Religious Freedom Amendments Act of 1991 (AIRFAA)[9] and (2) the Religious Freedom Restoration Act of 1993 (RFRA).[10] In addition to these statutes, the free exercise clause of the United States Constitution[11] must be considered as a possible federal law that may authorize the use of peyote for religious purposes. The following discussion first considers the constitutional provision and then the two statutes.

The DOE Criteria and the Free Exercise Provision of the First Amendment

A person who uses or has used peyote in a religious ceremony as a central part of the religion could claim that denying that individual an access authorization under paragraph (k) of the DOE Criteria because of that use would infringe on the free exercise right under the First Amendment to the Constitution. This argument is not likely to be successful. The United States Supreme Court was faced with a related argument in *Employment Division, Department of Human Resources of Oregon v. Smith*.[12] In this case two members of the Native American Church were fired from their positions in a private drug rehabilitation organization because they ingested peyote for sacramental purposes at ceremonies of the church. They applied for unemployment compensation and were turned down because they had been discharged for work-related misconduct; using peyote was a crime under state (as well as federal) law at that time. They claimed that denying them unemployment benefits because of their religious use of peyote violated their constitutional right of free exercise of their religion. The Supreme Court characterized this position as follows:

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[9] 42 U.S.C. 1996a

[10] 42 U.S.C. 2000bb – 2000bb-4.

[11] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." First Amendment to the U.S. Constitution. This prohibition also applies to federal agencies' regulations.

> They contend that their religious motivation for using peyote places them beyond the reach of a criminal law that is not specifically directed at their religious practice, and that is concededly constitutional as applied to those who use the drug for other reasons.[13]

The Supreme Court rejected this argument. It held that a neutral, generally applicable regulatory law that compels activity forbidden by an individual's religion did not violate the individual's First Amendment free exercise right. Moreover, the Supreme Court rejected the argument that before such a law could be upheld, the state must prove that the substantial burden the law places on the free exercise of religion is justified by a **compelling governmental interest**.[14] Instead, the individual must prove that the law has no reasonable basis—a burden that is almost impossible for the individual to meet.

The DOE Criteria appear to qualify as "a neutral, generally applicable regulatory" agency rule. Thus, under *Employment Division, Department of Human Resources of Oregon v. Smith*, the DOE Criteria should withstand a challenge based on the free exercise clause of the First Amendment.

After the Supreme Court's decision in *Employment Division, Department of Human Resources of Oregon v. Smith*, the only significant litigation regarding religious freedom and peyote use centers around the statutes Congress enacted in reaction to this decision. The following two sections will include a discussion of that litigation.

The DOE Criteria and the AIRFAA

Congress enacted the AIRFAA in direct response to the Supreme Court's decision in *Employment Division, Department of Human Resources of Oregon v. Smith*. Congress

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[12] 494 U.S. 872 (1990).

[13] Id. at 885.

[14] Id.

specifically referred to the decision in the statute itself.[15] This history is essential for understanding the relationship between the DOE Criteria and AIRFAA.

The relevant sections of AIRFAA are as follows:

> (b)(1) Notwithstanding any other provision of law, the use, possession, or transportation of peyote by an Indian for bona fide traditional ceremonial purposes in connection with the practice of a traditional Indian religion is lawful, and shall not be prohibited by the United States or any State. No Indian shall be penalized or discriminated against on the basis of such use, possession or transportation, including, but not limited to, denial of otherwise applicable benefits under public assistance programs.
>
> (b)(4) Nothing in this section shall prohibit any Federal department or agency, in carrying out its statutory responsibilities and functions, from promulgating regulations establishing reasonable limitations on the use or ingestion of peyote prior to or during the performance of duties by sworn law enforcement officers or personnel directly involved in public transportation or any other safety-sensitive position where the performance of such duties may be adversely affected by such use or ingestion. Such regulations shall be adopted only after consultation with representatives of traditional Indian religions . . . . Such regulations shall be subject to the balancing test [in the RFRA].
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> (b)(7) Subject to [RFRA], this section does not prohibit the Secretary of Defense from promulgating regulations establishing reasonable limitations on the use . . . of peyote to promote military readiness . . . .[16]

The removal of authority, expressed in paragraph (b)(1), from state and federal governments to punish the use, possession, or transportation of peyote is limited; it applies only to Indians for use in traditional Indian religious ceremonies.[17] The removal of authority is further limited by the definitions in the AIRFAA; "Indians" means members of a federally recognized Native American tribe.[18] Thus, states and the federal government can prohibit use, possession, or transportation of peyote by (1) a non-

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[15] "The Congress finds and declares that . . . the Supreme Court of the United States, in the case of *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), held that the First Amendment does not protect Indian practitioners who use peyote in Indian religious ceremonies, and also raised uncertainty whether this religious practice would be protected under the compelling State interest standard . . ." 42 U.S.C. 1996a(a).

[16] 42 U.S.C. 1996a.

[17] The inclusion of the modifier "bona fide" narrows the removal of authority.

[18] Id. at subsection (c).

Native American; (2) a Native American not a member of a federally recognized tribe; (3) by a member of a federally recognized tribe for any purpose other than in a traditional ceremony of a traditional religion.

The Drug Enforcement Administration (DEA) of the Department of Justice has issued a regulation that further limits the removal of authority of states and the federal government to punish the use, possession, or transportation of peyote. This regulation states:

> The listing of peyote as a controlled substance in Schedule I does not apply to the nondrug use of peyote in bona fide religious ceremonies of the Native American Church, and members of the Native American Church so using peyote are exempt from registration. Any person who manufactures peyote for or distributes peyote to the Native American Church, however, is required to obtain registration annually and to comply with other requirements of law.[19]

The DEA regulation gives the benefit of the exemption for religious use of peyote only to one religious group—the Native American Church and its members. This regulation has been challenged by members of other religious groups that claim their religion includes the use of peyote as a part of their tradition. These religious groups argue that limiting the exemption to one religion by law (1) amounts to the establishment of that religion by the government in violation of the establishment clause of the First Amendment; (2) violates their right to equal protection under the Fifth Amendment; and (3) violates the rights under the Fifth Amendment to due process. All of these arguments were rejected in *Peyote Way Church of God, Inc. v. Smith*.[20] In a later case, a district court held the denial that the exemption to Peyote Way Church of God, Inc., did not violate the church members' constitutional rights because there is no constitutional right to use a controlled substance. The court further held that the exemption for one religion (the Native American Church) was meant by Congress as a grandfather clause, not a full-scale exemption for religious use of peyote.[21] This decision was upheld by the Court of

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[19] 21 C.F.R. 1307.31.

[20] 556 F.Supp. 632 (N.D. Tex., 1983).

[21] *Peyote Way Church of God, Inc. v. Meese*, 698 F.Supp. 1342 (N.D. Tex., 1988), affirmed, 922 F.2d 1210 (5th Cir., 1991).

Appeals for the Fifth Circuit. That court ruled that limiting the exemption to one religion was rationally related to a legitimate governmental objective of preserving Native American culture and was based on a political classification.[22] More recently, a United States District Court reached the same conclusions.[23] This opinion considered and rejected the arguments objecting to limiting the exemption to one church and the arguments objecting to limiting the exemption to one drug.[24]

This discussion of AIRFAA so far has been limited to paragraph (b)(1). The focus will now shift to paragraph (b)(4), which allows federal agencies to issue regulations limiting the use of peyote by members of Native American tribes in traditional ceremonies of a traditional religion. An agency can promulgate regulations establishing reasonable limits on the use or ingestion of peyote. However, there are severe limits on the agencies' authority. The regulations can only deal with use prior to or during job performance. The job must be a safety-sensitive one, it must directly involve safety, and the performance of the job must be adversely affected by the use or ingestion of peyote.[25] Moreover, agencies must consult with representatives of traditional Native American religions before issuing such regulations.

The final requirement in paragraph (b)(4) is that it incorporates the balancing test of RFRA.[26] This means that if an agency issues a regulation that imposes a substantial burden on a person's exercise of religion, and it is challenged in court, the agency must prove that the regulation is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that interest.[27] Putting the burden of proof on the government agency makes it more difficult to win such litigation; imposing such a high standard on the government agency reduces the chances even further.

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[22] *Peyote Way Church of God, Inc. v. Thornburgh*, 922 F.2d 1210 (5th Cir., 1991).

[23] *McBride v. Shawnee County*, 71 F.Supp.2d 1098 (D. Kan., 1999).

[24] Id. at 1100 – 1102.

[25] See 42 U.S.C. 1996a(b)(4).

[26] A discussion of RFRA is given in the following section of this report.

[27] 42 U.S.C. 2000bb-1.

One last point regarding AIRFAA should be made. Any thought that Congress might have intended a broad exemption for national security is dispelled by paragraph (b)(7), which is quoted above. That paragraph recognizes that the "Secretary of Defense is not prohibited from issuing regulations establishing reasonable limitations on the use, possession, transportation, or distribution of peyote to promote military readiness, safety . . . ."[28] The fact that Congress limited this paragraph to the Secretary of Defense implies that Congress rejected a similar exemption for other federal agencies. Moreover, even when the Secretary of Defense attempts to exercise this exemption, he must comply with RFRA. Thus, this is a doubly restricted exception.

To summarize this discussion regarding AIRFAA, to deny an access authorization to a member of a federally recognized Native American tribe who is a member of the Native American Church due to the use of peyote in a traditional religious ceremony, DOE would have to prove a job-specific set of facts. This would include the safety-sensitive nature of the job, the relation of the use of peyote to the safe performance of the job considering the time lapse between use and performance, that safety is a compelling governmental interest, and facts that prove denying an access authorization is the least restrictive way to achieve the safety objectives. DOE would have none of these obligations if the person is not a member of a federally recognized Native American tribe, is not a member of the Native American Church, or did not use peyote in a traditional ceremony of a traditional Native American religion.

The DOE Criteria and RFRA

In response to the Supreme Court's decision in *Employment Division, Department of Human Resources of Oregon v. Smith*, Congress passed RFRA (by overwhelming majorities) in 1993. This statute enacted the "compelling interest" test that laws and regulations must meet if they substantially burden the exercise of a religion. This law states that "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability" unless the government

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[28] 42 U.S.C. 1996a(b)(7).

can prove that "application of the burden to the person: (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling interest."[29] The term "government" is defined to include "a branch, department, agency, instrumentality, or official (or other person acting under color of law) of the United States."[30]

If a person files a law suit[31] claiming that a law or regulation violates RFRA, the trial would proceed as follows. First the person would have the burden of presenting evidence that the law substantially burdened the individual's religion.[32] This would be factual inquiry; it would involve the person presenting evidence regarding the central tenets of the religion and the impact of the law on the exercise of that religion. If the person meets this burden of going forward, then the government would have to present evidence demonstrating it had a compelling interest for the law and that this law is in furtherance of that interest. If the government meets this burden, then it must offer evidence that proves the law is the least restrictive way of furthering that compelling interest.[33]

Before discussing the application of RFRA to the DOE Criteria, a review will be given of the cases in which the constitutionality of RFRA has been challenged. The only Supreme Court decision regarding this issue is *City of Boerne v. P.F. Flores*.[34] In this case the Catholic Archbishop of San Antonio applied for a building permit to enlarge a church in Boerne, Texas. The church was located in a historic preservation district, causing the modifications to be subject to state and local laws and ordinances. The application for the building permit was rejected based on these laws, and the Church

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[29] 42 U.S.C. 2000bb-1 (a) and (b).

[30] 42 U.S.C. 2000bb-2.

[31] The person could either file suit or assert RFRA as a defense in a process initiated by DOE. See 42 U.S.C. 2000bb(b)(2). The allocation of the burden of proof would be the same in both types of cases.

[32] *United States v. Meyers*, 95 F.3d 1475, 1482 (10th Cir., 1996).

[33] Id.

[34] 521 U.S. 507 (1997).

filed suit in federal court claiming that these laws substantially burdened the exercise of its religion and violated RFRA. When the case reached the Supreme Court, one issue was the constitutionality of RFRA. The state argued that Congress had exceeded its authority when it imposed this "compelling interest" standard **on the states**. The Supreme Court agreed and struck down RFRA to the extent that it purported to impose that **standard on state and local laws, regulations, and ordinances.**

It might be incorrect to interpret the decision in *City of Boerne v. P.F. Flores* as a blanket ruling that RFRA is unconstitutional no matter what level of governmental law or regulation is at issue. There is no Supreme Court decision regarding the constitutionality of RFRA when applied to a **federal law or regulation**. However, the following decisions of courts of appeals consider that issue.

The United States Court of Appeals for the Tenth Circuit has considered the constitutionality of RFRA when applied to federal law and held RFRA to be constitutional. This was first decided in *Kikumura v. Hurley*[35] in 2001 and reaffirmed in *Saenz v. Department of Interior*.[36] The *Saenz* opinion demonstrates how difficult it is for the government to meet the burdens of proof imposed by RFRA. First, the court was very reluctant to accept the two interests offered by the government in this case in which a Native American was arrested for possession of eagle parts in violation of the Bald and Golden Eagle Protection Act.[37] These interests were eagle conservation and the fulfillment of the United States government's trust and treaty obligations to Native American tribes. The court rejected the government's argument that these were compelling. The court went on to hold that even if it were to assume that either was a compelling government interest, it would reject the government's argument that the law was the least restrictive way of furthering that compelling interest. This case demonstrates how difficult it will be for the government to win RFRA cases.

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[35] *Kikumura v. Hurley*, 242 F.3d 950, 958-59 (10th Cir., 2001).

[36] *Saenz v. Department of Interior*, 2001 U.S. App. LEXIS 17698, *15 (10th Cir., 2001).

[37] 16 U.S.C. 668.

It is beyond the scope of this report to attempt to resolve the issue of whether RFRA is constitutional when applied to a federal law or regulation. The following discussion assumes that it is.[38]

The first point to observe about RFRA is that, unlike AIRFAA, RFRA is **not** limited to Native Americans (and certainly not to members of federally recognized Native American tribes). Any person claiming to use peyote for religious purposes can claim the protection of RFRA.[39] Moreover, RFRA is **not** limited to one church. Any person, no matter what the individual's religious affiliation might be, can claim its protection.[40] Also, there is no requirement that the ceremony be "traditional" as is required under AIRFAA. A third major difference is that RFRA is **not** limited to peyote. A person could claim that use of cocaine was for religious purposes and thus invoke RFRA.[41] One characteristic RFRA has in common with AIRFAA involves the burden of proof—an issue of great practical importance. On the determinative issues of establishing a "compelling" governmental interest and proving "least restrictive means," the government has the burden of proof. The difficulty of scaling these twin peaks is

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[38] There is at least one United States District Court decision that held RFRA to be wholly unconstitutional even though the United States argued in that case that it was constitutional as applied to the United States. See *United States v. Sandia*, 6 F.Supp. 1278 (D.C.N.M., 1997). This decision, however has no weight as a precedent because the Court of Appeals for the Tenth Circuit (which includes New Mexico) held the opposite in *Kikumura v. Hurley*, 242 F.3d 950, 958-59 (10th Cir., 2001). The New Mexico decision does show that a serious argument can be made that RFRA is wholly unconstitutional.

[39] Any attempt by DOE to provide an exception, based on RFRA, to the DOE Criteria to Native American tribes or Native Americans in federally recognized tribes would raise equal protection or other constitutional problems. These issues, although serious, would not be serious as those in the following two footnotes. See *Morton v. Mancari*, 417 U.S. 535 (1974).

[40] Any attempt by DOE to provide an exception, based on RFRA, to the DOE Criteria to one church (for example, the Native American Church) would raise equal protection or other constitutional problems. The case of *McBride v. Shawnee County*, 71 F.Supp.2d 1098 (D. Kan., 1999) would be useful precedent in defending against such a claim.

[41] Any attempt by DOE to provide an exception, based on RFRA, to the DOE Criteria to one drug (for example, peyote) would raise equal protection or other constitutional problems. The case of *McBride v. Shawnee County*, 71 F.Supp.2d 1098 (D. Kan., 1999) would be useful precedent in defending against such a claim.

legendary; however, it is not impossible. The government was successful in proving both in a case involving the control of peyote.[42]

The application of RFRA to the DOE Criteria could arise in a case in which a person seeking an access authorization has used or uses peyote or any controlled substance in a religious ceremony.[43] If that person proved that the DOE Criteria significantly burdened the individual's practice of a religion, the burden would then shift to DOE to prove (1) that its Criteria serve a compelling interest and (2) that the Criteria are the least restrictive means of fulfilling that interest. On the first point, DOE will have a strong factual case. DOE would be able to offer evidence regarding the effect of peyote (if that is the controlled substance in the case) on the user and the resulting risk to health, safety, and national security of allowing a person under the influence of peyote to have access to special nuclear material. DOE, however, may have more difficulty on the second point. The person could offer to restrict the use of peyote to times when a day off is scheduled between drug use and work; that is, perhaps the individual would agree to limit use to vacations and holidays. The person could also agree to weekly drug tests. But note that the person would not have the burden of proving that there was an acceptable alternative to the DOE Criteria; DOE would have to prove the negative—that the Criteria were the least restrictive way to satisfy its compelling interest.

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[42] *Peyote Way Church of God, Inc. v. Meese*, 698 F.Supp. 1342 (N.D. Tex., 1988) (stating: "the Controlled Substances Act of 1970 and the Texas statutes prohibiting the possession and distribution of peyote are essential to accomplish the governmental purpose of regulating the use of substances found to be harmful to the public at large. These statutes were enacted by Congress and the Texas legislature in an effort to regulate those items deemed to pose a threat to individual health and social welfare. The Court further finds that . . . accommodating Peyote Way's religious practices would unduly interfere with the fulfillment of the federal and state governments' overriding concern for the protection of the public welfare. The parties are not in dispute that peyote is a psychotropic drug. Such drugs have long been the subject of legislative action. Both federal and state legislative bodies have concluded that it is in the interest of the public to control and regulate such drugs. This Court cannot invade the legislative province to so act. This Court's inquiry must be limited to determining whether the legislative acts prohibiting the possession and distribution of peyote are constitutional as applied to Peyote Way."), affirmed on different grounds without deciding this issue, 922 F.2d 1210 (5th Cir., 1991).

The discussion of RFRA above stresses that on its face RFRA is not limited to one drug or one religion. Thus, there is the possibility that if the DOE Criteria were modified to provide specific consideration for peyote use by members of the Native American Church in traditional religious ceremonies other religious groups who use other drugs in their traditional religious ceremonies could prevail in a constitutional challenge to the modified DOE Criteria. The case of *McBride v. Shawnee County*[44] considers these constitutional issues in the context of state law. In this case McBride had been convicted of cultivation of marijuana in Kansas court under Kansas law.

McBride claimed that he was a member of the Rastafarian[45] religion and that marijuana was an essential part of its religious practice. In state appeals court he argued (1) the trial court had violated the RFRA when it excluded his defense of cultivating marijuana for religious purposes; and (2) allowing members of the Native American Church to use peyote but prohibiting members of the Rastafarian faith from using marijuana violates the First Amendment (free exercise of religion) and Fourteenth Amendment (equal protection). The state appeals court rejected both of these arguments and McBride filed a petition for a writ of habeas corpus in United States District Court of Kansas. In this action McBride claimed that the peyote exemption in Kansas law violates the First

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[43] The statute authorizes the person who believes his or her rights have been violated to file either a claim or a defense. See 42 U.S.C. 2000bb (b)(2).

[44] *McBride v. Shawnee County*, 71 F.Supp.2d 1098 (D. Kas., 1999).

[45] The United States Court of Appeals for the Third Circuit stated:

Rastafarianism is a religion which proclaims the divinity of Haile Selassie, former Emperor of Ethiopia, and anticipates the eventual redemption of its adherents from the "Babylon" of white oppression.

"[Rastafarianism] is a religion which first took root in Jamaica in the nineteenth century and has since gained adherents in the United States. See Mircea Eliade, Encyclopedia of Religion 96-97 (1989). It is among the 1,558 religious groups sufficiently stable and distinctive to be identified as one of the existing religions in this country. See J. Gordon Melton, Encyclopedia of American Religions 870-71 (1991). Standard descriptions of the religion emphasize the use of marijuana in cultic ceremonies designed to bring the believer closer to the divinity and to enhance unity among believers. Functionally, marijuana— known as ganja in the language of the religion— operates as a sacrament with the power to raise the partakers above the mundane and to enhance their spiritual unity." *United States v. Bauer*, 84 F.3d 1549, 1556 (9th Cir., 1996).

Steele v. Blackman, 136 F.3d 130,130n.2 (3rd Cir., 2001).

Amendment prohibition on the establishment of religion and the equal protection provision of the Fourteenth Amendment. The district court denied both arguments. The following statements by the court are essential to understanding its conclusion:

> Although Kansas can regulate religious conduct, it may not approve one religion's conduct and bar the same religious conduct of another religion if both religions are **similarly situated**. The Establishment and Equal Protection Clauses require state neutrality and prevent a state from passing laws which prefer one religion over another.[46]

The district court then concluded that the two religions were not similarly situated. The court focused on the differences in the two drugs, the differences in quantities of the two drugs each group consumed, the differences in structure of church and ceremonies in which drug use was included, and most importantly on the unique relationship between the federal government and Native American tribes and the consistency of the Kansas law with that relationship.[47] With these differences the court concluded the state law did not violate either the First Amendment establishment clause or the Fourteenth Amendment equal protection clause.

DOE would have these same arguments if it modified its Criteria to consider peyote use by members of the Native American Church only, and that modification were challenged based on establishment of religion or equal protection grounds.

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[46] *McBride v. Shawnee County*, 71 F.Supp.2d 1098, 1100 (D. Kas., 1999) (emphasis added).

[47] Id.

CONCLUSIONS

It is clear that peyote is a controlled substance. It is also clear that as they now exist, the DOE Criteria could be applied to deny an access authorization to an individual who uses peyote. The individual could challenge the DOE Criteria under three theories: (1) the application would violate the free exercise of religion under the First Amendment; (2) if the individual is a Native American, the application would violate the individual's rights under AIRFAA; and (3) the application would violate the individual's rights under RFRA. The first theory has very little chance of success after the Supreme Court's decision in *Employment Division, Department of Human Resources of Oregon v. Smith*. The second theory, if asserted by a member of the Native American Church who uses peyote in a traditional religious ceremony, creates a much greater risk because at present the DOE Criteria do not address the express language of AIRFAA regarding agency regulations and peyote. The third theory creates a risk similar to the second, but it could be asserted by **any** individual who claims the DOE Criteria impose substantial burden on the exercise of religion.

It appears that there are three basic choices for the DOE Criteria regarding peyote—that is, three basic types of criteria that DOE could use.[48] The first is to leave the Criteria as they are and resolve the issues regarding peyote in litigation if the current regulation is challenged either in a lawsuit filed in district court by a person seeking an access authorization or raised by an individual as a defense. The second option is to reissue the Criteria so there is a blanket exemption for members of the Native American Church (or some other specific group) who use peyote in a traditional religious ceremony in a traditional religion. The third alternative is to reissue the Criteria so that peyote use by a member of the Native American Church in traditional religious ceremonies is recognized as a factor that must be considered in light of the nature of the job, the actual access to special nuclear materials, the possibility of mitigating the risk posed by religious use of peyote, the willingness of the person to limit use to times that would have minimal impact on safety, and other relevant factors.

The first and second options do not adequately address DOE's legitimate security concerns. The first alternative creates the risk that a judicial challenge to the Criteria would succeed and a judge would impose a rule on DOE telling DOE how it must conduct its security program regarding peyote use. The second option, a blanket exemption for peyote use for specific religions, could go further than an adverse court decision might. That is, it is likely that a court would allow DOE to take into account job-related circumstances when making a decision of whether or not to grant an individual an access authorization.

The third option is flexible and fact-specific. It acknowledges DOE's obligations under both RFRA and AIRFAA but vests broad authority and discretion in the DOE officials who ultimately make the final decision. Courts are likely to give such a discretionary judgment great deference.[49] Also, this type of DOE Criteria could be supported by persuasive legal and factual arguments and, thus, would have a strong chance of satisfying the "least restrictive means of fulfilling that interest" standard that is directly required under RFRA and indirectly required by AIRFAA. An argument very similar to this has been accepted by one United States District Court.[50]

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[48] There are variations on each of these three basic types of criteria.

[49] See *Department of Navy v. Egan*, 484 U.S. 518 (1988) (holding that in an appeal pursuant to 5 U.S.C. 7513, the Merit System Protection Board does not have authority to review the substance of an underlying security clearance determination in the course of reviewing an adverse action).

[50] *Peyote Way Church of God, Inc. v. Meese*, 698 F.Supp. 1342 (N.D. Tex., 1988), affirmed on different grounds without deciding this issue, 922 F.2d 1210 (5th Cir., 1991) (see the discussion of this case in footnote 42 above).