UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NAVAJO NATION, WHITE MOUNTAIN APACHE TRIBE, YAVAPAI-APACHE TRIBE, SIERRA CLUB, CENTER FOR BIOLOGICAL DIVERSITY, FLAGSTAFF ACTIVIST NETWORK, REX TILOUSI, DIANNA UQUALLA, HAVASUPAI TRIBE,

Plaintiffs/Appellants,

v.

UNITED STATES FOREST SERVICES, *et al.*,

Defendants/Appellees,

and

ARIZONA SNOWBOWL RESORT LIMITED PARTNERSHP,

Intervenor/Appellee.

HOPI TRIBE,

Plaintiff/Appellant,

v.

UNITED STATES FOREST SERVICE, *et al.*,

Defendants/Appellees,

and

Nos. 06-15371, 06-15455, 06-15436

D.C. Nos. CV-05-01824-PGR
CV-05-01914-PGR
CV-05-01949-PGR
CV-05-01966-PGR

District of Arizona, Phoenix

INTERVENOR/APPELLEE'S PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

ARIZONA SNOWBOWL RESORT LIMITED PARTNERSHP,

Intervenor/Appellee.

HUALAPAI TRIBE; Norris Nez; and Bill Bucky Preston,

Plaintiffs/Appellants,

v.

UNITED STATES FOREST SERVICE, *et al.,*

Defendants/Appellees,

and

ARIZONA SNOWBOWL RESORT LIMITED PARTNERSHP,

Intervenor/Appellee.

INTERVENOR/APPELLEE'S PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Pages

Cases

Statutes

Other Authorities

STATEMENT PURSUANT TO FRAP 35(b)

Rehearing en banc is appropriate. The panel decision conflicts with decisions of the United States Supreme Court (*Lyng v. Northwest Indian Cemetery Ass'n,* 485 U.S. 439, 450 (1988) and *Bowen v. Roy,* 476 U.S. 693 (1986)), decisions of this Court (*Guam v. Guerrero,* 290 F.3d 1210, 1222 (9th Cir. 2002) and *Goehring v. Brophy*, 94 F.3d 1294, 1299 (9th Cir. 1996)) and consideration by the full court is therefore necessary to secure and maintain uniformity of the Court's decision. In addition, the proceeding involves questions of exceptional importance. First, the panel's interpretation of the Religious Freedom Restoration Act ("RFRA") would allow anyone to challenge any federal action that causes them spiritual disquiet, including actions involving the management by the federal government of its own property, and force the government to defend the challenged action under strict scrutiny. Second, the panel decision undercuts the National Environmental Policy Act ("NEPA") by discouraging a federal agency, when conducting a NEPA analysis, from relying in part on other state or federal agencies with authority and expertise with respect to particular activities. Government agencies should be able to rely on determinations of other agencies in the NEPA disclosure process. Third, the panel decision conflicts with a contrary decision about the same Arizona Snowbowl Ski Resort rendered by the United

States Court of Appeals for the District of Columbia Circuit, *Wilson v. Block,* 708 F.2d 735 (D.C. Cir.), *cert. denied*, 464 U.S. 956 (1983).

I. INTRODUCTION.

This case is about snowmaking. From these mild facts came a panel decision that, if it stands, will fundamentally alter the law, for much the worse, in two critical areas: under the Religious Freedom Restoration Act (RFRA) and the National Environmental Policy Act (NEPA). The panel – or failing that, the Court sitting en banc – should rehear this unprecedented and erroneous decision.

After several years of administrative process, the United States Forest Service approved upgrades to the Arizona Snowbowl Ski Resort, which has operated for 69 years on federally-owned land in the Coconino National Forest near Flagstaff, Arizona. The approved upgrades included creating the capability to make snow at the Snowbowl. Various Indian tribes, individuals, and organizations challenged the Forest Service's decision in district court, alleging violations of RFRA, 42 U.S.C. § 2000bb *et seq*, NEPA, 42 U.S.C. § 4321 *et seq.*, and other statutes. Arizona Snowbowl Resort Limited Partnership ("ASR"), which owns and operates Arizona Snowbowl, intervened as a defendant. The district court rejected each challenge to the Forest Service's decision, and the plaintiffs appealed.

The panel reversed the district court's RFRA ruling. According to the panel, because the Snowbowl will use reclaimed, treated wastewater as the input for the artificial snow on Forest Service land, the snowmaking proposal imposes a "substantial burden" on certain Indian tribes' exercise of their religion by "contaminating" the San Francisco Peaks, thereby "undermin[ing]" the tribes' "spiritual connection" to the mountain. Slip Op. 2856. This perceived "burden," the panel concluded, was not justified by a sufficiently compelling interest furthered by the least restrictive means. *Id.* at 2868.

The panel also reversed the district court on one of its five NEPA rulings. Despite the Forest Service's diligent inquiry into and favorable resolution of the question whether reclaimed snow was appropriate for use in snowmaking – augmented by the findings of the Arizona Department of Environmental Quality to the same effect – the panel concluded that the Forest Service had not engaged in a sufficiently "thorough discussion" of potential risks posed by using reclaimed water to make snow. *Id.* at 2886.

Pursuant to Rules 35 and 40, F.R.A.P., ASR hereby seeks panel rehearing of this matter, together with a request for rehearing en banc. Rehearing is appropriate for two reasons, either of which alone warrants rehearing. First, the panel's opinion with respect to the RFRA claim applies the "substantial burden"

standard incorrectly and in a manner inconsistent with this Court's RFRA precedent, a Free Exercise Clause decision specifically about Arizona Snowbowl by another circuit, and the United States Supreme Court's pre-*Employment Division v. Smith,* 494 U.S. 872 (1990) Free Exercise Clause precedent (which Congress expressly intended to guide the courts' RFRA "substantial burden" analysis). The panel's erroneous RFRA analysis radically limits the government's ability to manage millions of acres of federally-owned land considered sacred by some Native American religious practitioners.

Second, the panel's opinion with respect to the NEPA claim substantially undercuts the NEPA process and discourages reliance on the expertise of other regulatory agencies. The panel decision will force the Forest Service to examine again the question whether snow generated from reclaimed water is safe if accidentally ingested. The Arizona Department of Environmental Quality – the state agency specifically vested with the authority and responsibility to analyze water safety issues – has concluded that reclaimed water is safe under the conditions proposed here; but the panel apparently found that insufficient. That is a dangerous precedent. Federal agencies should not – indeed, as a matter of basic resource allocation, they cannot – reinvent the wheel when questions within a state agency's bailiwick come before the federal agency in the course of a NEPA review.

The Forest Service should have been entitled to rely on the Arizona state agency's diligent and authoritative review of the issue, as well as its own thorough inquiry.

II. THE LEGAL ERRORS IN THE PANEL'S OPINION WARRANT REHEARING.

The panel clearly erred in reversing the district court with respect to both the RFRA and NEPA claims. Rehearing or rehearing en banc is warranted to correct these legal errors, and Intervenor/Appellee ASR requests rehearing and rehearing en banc.

A. The Panel's Opinion Incorrectly Applies RFRA's "Substantial Burden" Standard.

To counteract what it viewed as the Supreme Court's abandonment of the "compelling interest" test in *Employment Division v. Smith,* 494 U.S. 872 (1990), Congress enacted RFRA in 1993. RFRA provides that "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," unless it furthers a compelling interest using the least restrictive means. 42 U.S.C. § 2000bb-1. RFRA does not explicitly define the term "substantially burden." However, Congress in RFRA specifically found that the pre-*Smith* "compelling interest" test is a workable test, 42 U.S.C. § 2000bb(a)(5), and expressly stated that one of RFRA's purposes is to "restore"

that test. 42 U.S.C. § 2000bb(b)(1).[1]

In light of this clear Congressional intent to graft the pre-*Smith* Free Exercise Clause cases onto RFRA's substantial burden requirement, the panel clearly erred when it suggested that "RFRA goes beyond the constitutional language that forbids the 'prohibiting' of the free exercise of religion and uses the broader verb 'burden.'" (Panel Opinion at 2843.) It was clear long before RFRA's enactment that the Free Exercise Clause applies to both direct prohibitions and government actions that "substantial[ly] burden": "[T]his Court has repeatedly held that indirect coercion or penalties on the free exercise of religion, **not just outright prohibitions,** are subject to scrutiny under the First Amendment." *Lyng v. Northwest Indian Cemetery Ass'n,* 485 U.S. 439, 450 (1988) (emphasis added); *see also Thomas v. Review Board of the Indiana Employment Security Division,* 450 U.S. 707, 717-18 (1981) (when benefits are conditioned on conduct proscribed by religious beliefs, there is **"substantial** pressure on an adherent to modify his behavior" and "a **burden** upon religion exists."). The panel's analysis of the "substantially burden" requirement improperly rejects the Supreme Court's pre-*Smith* precedent, is inconsistent with

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[1] The Senate report similarly states that Congress "expects the courts will look to free exercise cases decided prior to Smith for guidance in determining whether the exercise of religion has been substantially burdened." S. Rep. 103-111 at 8

the pre-*Smith* decision of another circuit concerning the Snowbowl, and conflicts with this Court's prior RFRA decisions.

1. The panel improperly rejected the Supreme Court's pre-*Smith* precedent.

The Supreme Court's pre-*Smith* cases demonstrate that the government's management of its internal affairs or of its own property does not substantially burden religious practitioners in a way that gives rise to a cognizable claim under the Free Exercise Clause. The panel improperly rejected these cases.

In *Bowen v. Roy,* 476 U.S. 693 (1986), the Native American parent of a minor girl, Little Bird of the Snow, sought to enjoin the federal government from using his daughter's social security number; he believed such use would impede his daughter from gaining greater spiritual power and thereby violate his right to free exercise of religion. Soundly rejecting that claim, the Court stated:

> Never to our knowledge has the Court interpreted the First Amendment to require the Government *itself* to behave in ways that the individual believes will further his or her spiritual development or that of his or her family. The Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens. Just as the Government may not insist that appellees engage in any set form of religious observance, so appellees may not demand that the Government join in their chosen religious practices

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(1993), *as reprinted in* 1993 U.S.C.C.A.N. 1892, 1898.

> by refraining from using a number to identify their daughter.
>
> * * *
>
> The Federal Government's use of a Social Security number for Little Bird of the Snow does not itself in any degree impair [the parent's] "freedom to believe, express, and exercise" his religion.

Id. at 699-700 (emphasis in original; quotation omitted).

Similarly, in *Lyng v. Northwest Indian Cemetery Protective Ass'n,* 485 U.S. 439 (1988), certain Native American tribes challenged the Forest Service's decisions to allow timber harvesting in, and the construction of a road through, a portion of a National Forest traditionally used for religious purposes. The Ninth Circuit en banc upheld the tribes' Free Exercise claim, opining that the government's activities in an area "indispensable to a significant number of Indian healers and religious leaders as a place where they receive the 'power' that permits them to fill the religious roles that are central to the traditional religions," where "the unitary pristine nature of the high country is essential to this religious use," would "virtually destroy the... Indians' ability to practice their religion." *Northwest Indian Cemetery Protective Ass'n v. Peterson*, 795 F.2d 688, 692-93 (9th Cir. 1986). The Supreme Court reversed. The Court acknowledged that the Indians' "beliefs are sincere and that the Government's proposed actions will

have severe adverse effects on the practice of their religion;" however, with respect to the Indians' contention "that the burden on their religious practices is heavy enough," the Court disagreed. *Lyng* at 447. As the Court explained:

> The building of a road or the harvesting of timber on publicly owned land cannot meaningfully be distinguished from the use of a Social Security number in *Roy*. In both cases, the challenged Government action would interfere significantly with private persons' ability to pursue spiritual fulfillment according to their own religious beliefs. In neither case, however, would the affected individuals be coerced by the Government's action into violating their religious beliefs; nor would either governmental action penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens.
>
> * * *
>
> Whatever may be the exact line between unconstitutional prohibitions on the free exercise of religion and the legitimate conduct by government of its own affairs, the location of the line cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development.
>
> * * *
>
> Even if we assume that we should accept the Ninth Circuit's prediction, according to which the . . . road will "virtually destroy the . . . Indians' ability to practice their religion," . . . the Constitution simply does not provide a principle that could justify upholding respondents' legal claims. However much we might wish that it were otherwise, government simply could not operate if it were required to satisfy every citizen's religious needs and desires. A broad range of

> government activities — from social welfare programs to foreign aid to conservation projects — will always be considered essential to the spiritual well-being of some citizens, often on the basis of sincerely held religious beliefs. Others will find the very same activities deeply offensive, and perhaps incompatible with their own search for spiritual fulfillment and with the tenets of their religion. The First Amendment must apply to all citizens alike, and it can give to none of them a veto over public programs that do not prohibit the free exercise of religion.
>
> * * *
>
> Whatever rights the Indians may have to the use of the area, however, those rights do not divest the Government of its right to use what is, after all, *its* land.

Id. at 449-53 (emphasis in original).

Roy and *Lyng* should have been particularly persuasive in the panel's analysis; Congress relied specifically on them when it enacted RFRA. Under these pre-*Smith* cases, there was no need even to reach the "compelling interest" test because the government's management of its own property and its internal affairs did not impose a cognizable "burden" at all. As Congress explained in the Senate Report accompanying RFRA, "pre-*Smith* case law makes it clear that strict scrutiny does not apply to government actions involving only management of internal Government affairs or the use of the Government's own property or resources." S. Rep. 103-111 at 9 and n.19 (1993), *reprinted in* 1993 U.S.C.C.A.N.

1892, 1898 and n.19. Yet the panel rejected these cases and their teachings.

2. The panel's analysis is inconsistent with the pre-*Smith* decision of another circuit concerning the Snowbowl.

In 1983, the D.C. Circuit rejected similar claims related to the same Arizona Snowbowl under the Free Exercise Clause. *Wilson v. Block,* 708 F.2d 735 (D.C. Cir.), *cert. denied*, 464 U.S. 956 (1983). After the Forest Service had approved a proposed upgrade of the Arizona Snowbowl, a number of Indian tribes asserted – much like here – that "development of the Peaks would be a profane act, and an affront to the deities, and that, in consequence, the Peaks would lose their healing power and otherwise cease to benefit the tribes," and further asserted that "development would seriously impair their ability to pray and conduct ceremonies upon the Peaks." *Id.* at 740. The D.C. Circuit rejected the free exercise claims, concluding:

> Many government actions may offend religious believers, and may cast doubt upon the veracity of religious beliefs, but unless such actions penalize faith, **they do not burden religion.** . . . The construction approved by the Secretary [of Agriculture] is, indeed, inconsistent with the plaintiffs' beliefs, and will cause the plaintiffs spiritual disquiet, but such consequences do not state a free exercise claim.

Id. at 741-42 (emphasis added).

Accordingly, *Wilson* found that the Government's decisions as to the

management of its land did not "burden" the tribes' religious exercise at all – let alone substantially burden it. The panel's finding of substantial burden in this case is flatly inconsistent with *Wilson.*

3. The panel's analysis is contrary to this Court's prior RFRA decisions.

In its prior RFRA cases, this Court has clearly stated that "[t]o establish a prima facie case, [the plaintiff] must show that the statute at issue works a **substantial burden** on his ability to freely practice his religion." *Guam v. Guerrero,* 290 F.3d 1210, 1222 (9th Cir. 2002). Moreover, "[a] statute burdens the free exercise of religion if it puts substantial pressure on an adherent to modify his behavior and to violate his beliefs," but "[a] substantial burden must be more than an inconvenience." *Id.* (quotation omitted).

Guerrero relied on pre-*Smith* cases to determine whether a substantial burden exists. *Id.; see also Goehring v. Brophy*, 94 F.3d 1294, 1299 (9th Cir. 1996) ("In construing [RFRA], we look to our decisions prior to *Smith* . . .."). Similarly, this Court held that "[t]he Supreme Court's free exercise jurisprudence is instructive in defining a substantial burden" under the related Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc *et seq*. *Guru Nanak Sikh Society v. County of Sutter*, 456 F.3d 978, 988 (9th Cir. 2006) (citing *Thomas*, 450 U.S. at 717-18, and *Lyng*, 485 U.S. at 450-51). This panel did not follow

such precedents, making the panel opinion not only inconsistent with controlling pre-*Smith* decisions, but also contrary to this Court's own prior cases.

4. The panel's decision has grave and substantial implications for future RFRA challenges to the government's management of its own property.

The impact of the panel's decision in this case should not be underestimated. The panel held that the Forest Service's decision to permit snowmaking *on federal property* violated various Tribes' right to free exercise of their religion. This unprecedented holding carries profound national implications. Until now, free exercise cases have involved challenges to a government action that penalized, restricted, or compelled the worshipper's own behavior. This panel, however, reasoned that the Tribes were denied free exercise in circumstances in which the Government did not restrict their behavior in any way. The Tribes were not prevented from engaging in sacred rituals, nor were they penalized for practicing their religion. SER 1949-1953 (¶¶ 66, 69, 71, 77, 84, 85, 89, 103, 104, 130, 132, 137). Rather, the panel found that the Forest Service's own behavior, on its own property, is religiously offensive to certain Tribes, is likely to anger their supernatural entities, and may cause the Tribes to lose confidence in their rituals. It is an understatement to call this decision surprising. The panel's unprecedented reading of RFRA would allow anyone to challenge any federal action that (as the

D.C. Circuit put it in rejecting the Tribes' earlier claims) causes them "spiritual disquiet," *Wilson*, 708 F.2d at 742, and force the Government to defend that action under strict scrutiny.

This problem is made more acute by the panel's conflation of the Snowbowl ski area – where no Tribal religious activities take place – with the *entire San Francisco Peaks*, based on the Tribe's subjective belief that the entirety of the Peaks is "an indivisible living entity." (Panel Opinion at 2858.) As a result, activities on government land constituting less than one percent of the Peaks are subject to Tribal concerns that may involve completely different, and remote, areas of the Peaks. The panel's decision thus flouted both legal and geographical bounds.

When the United States Supreme Court rejected the claim of Native American religious practitioners in *Lyng* that permitting timber harvesting in, or constructing a road through, a portion of National Forest that has traditionally been used for their religious purposes violated the Free Exercise Clause – despite admittedly "severe adverse effects on the practice of their religion" – the Court noted that such claims could easily lead to *"de facto* beneficial ownership of some rather spacious tracts of public property." 485 U.S. at 453. That is precisely the result of the panel's decision. Millions of acres of federal lands are

considered sacred by Native American religious practitioners, including, to name a few, the entire Grand Canyon, the entire length of the Colorado River, Sunset Crater, Mount Graham, Lake Powell, and scores of other federal properties. In the Southwest Region of the Forest Service alone, there exist over forty sacred mountains and in excess of between 40,000 and 50,000 other sacred sites, some old and others quite new. Appellee's Selected Excerpts of Record ("SER") 1954 (¶¶ 151-160); *see also* SER 1218-20, 1224-26, 1236-39, 1245-49, 1263, 1270-79, 1298-1304, 1312-15, 1322-27, 1447-56, 1623-24.

The panel's opinion effectively gives Native American religious practitioners "a veto over public programs." *Lyng*, 485 U.S. at 452, 108 S. Ct. at 1327. The Court should take no comfort in the supposition that the panel's ruling might be limited to the use of reclaimed water to make snow for a ski resort; nothing in the panel's opinion "would distinguish this case from another lawsuit in which . . . similarly situated religious objectors[] might seek to exclude all human activity but their own from sacred areas of the public lands." *Lyng*, 485 U.S. at 452-53. The panel decision should be reheard or reheard en banc.

B. The Panel's Opinion Undercuts the NEPA Process and Discourages Reliance on the Expertise of Other Agencies.

This Court's review of district court decisions on NEPA issues is "extremely narrow," *U.S. Postal Service v. Gregory,* 534 U.S. 1, 6-7 (2001); the reviewing

court "is not to substitute its judgment for that of the agency," *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). In this regard, the panel erred in reversing the district court on the issue whether the Forest Service had satisfied its obligations under NEPA when assessing the impact of possible human ingestion of snow made from reclaimed water. The Forest Service dealt with the issue of human ingestion more than sufficiently in the Environmental Impact Statement ("EIS"), and conducted an independent evaluation. The Forest Service addressed the issue in the EIS, hired experts to assist in its evaluation, and conducted an extensive literature review. SER 0748-51, 0764-95, 0419-20, 0130-33 (biological references), 0602, 0991-92, 1000-23, 1040. The source of the Class A+ reclaimed water proposed for snowmaking is the Rio de Flag WRF, a state-of-the-art tertiary water treatment facility that uses activated sludge, ultraviolet disinfection and chlorine to treat the water. SER 1415-18, 1423-24, 1431-32. The Class A+ reclaimed water to be used at Snowbowl is the safest category of water recognized by the Arizona Department of Environmental Quality ("ADEQ"), the responsible Arizona State agency. It meets all applicable state and federal water quality standards. SER 1000, 1055-56, 1074, 1881.

In addition to performing its own evidentiary inquiry and analysis, the Forest

Service also properly relied on the ADEQ, which has approved for snowmaking the type of reclaimed water that Snowbowl proposes to use. Ariz. Admin. Code R18-11-309 Tbl. A. The district court properly held that the Forest Service reasonably relied on the ADEQ's determination – as the Arizona agency responsible for making these determinations – that use of Class A+ water is safe and acceptable. SER 1940, 1947-48 (¶¶ 40-46). *See Friends of the Payette v. Horseshoe Bend Hydroelectric Co.*, 988 F.2d 989, 993 (9th Cir. 1993) (Corps of Engineers properly relied on certification of compliance with state water quality standards granted by Idaho Department of Environmental Quality in issuing environmental assessment and finding of no significant impact under NEPA); *see also Border Power Plant Working Group v. Dep't of Energy*, 260 F. Supp. 2d 997, 1020-21 (S.D. Cal. 2003) (reliance on standards of another agency designed to protect human health is appropriate in the NEPA process). The Class A+ water Snowbowl proposes to use actually exceeds in quality the Class A water which ADEQ approved for snowmaking. Ariz. Admin. Code R18-11-309 Tbl. A (approving Class A or higher for snowmaking); SER 1055-56.

The panel thought all this insufficient. That, too, was a critical error. The Forest Service and other federal agencies must be able, when conducting NEPA assessments, to rely on other agencies, federal or state, with the authority and

expertise to regulate various activities. Otherwise, the NEPA process, which already can be time-consuming and expensive, will become even more so. Government agencies rely on others to regulate a wide range of activities potentially involved in a NEPA process, including building and equipment safety, waste treatment, fuel storage, and power systems, to name only a few. Government agencies similarly should be able to rely on the determinations of other agencies in disclosing the potential impacts of actions under NEPA. The Forest Service properly dealt with the issue of snow ingestion in the EIS, relying in part on ADEQ which had previously approved for snowmaking lesser quality water than the Arizona Snowbowl proposed to use.

III. CONCLUSION.

For all of the foregoing reasons, Intervenor/Appellee Arizona Snowbowl Resort Limited Partnership respectfully requests panel rehearing and rehearing en banc.

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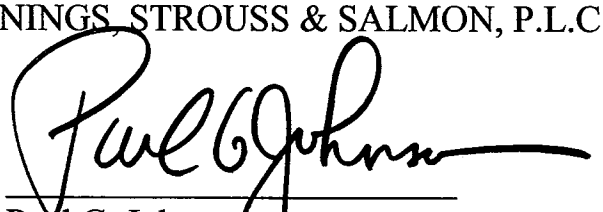
DATED this 25th day of May 2007.

JENNINGS, STROUSS & SALMON, P.L.C.

By 

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NAVAJO NATION, *et al.*, HOPI TRIBE, and
HUALAPAI TRIBE, *et al.*,
Plaintiffs-Appellants

v.

UNITED STATES FOREST SERVICE,
NORA RASURE, Forest Supervisor, Coconino National Forest, and
HARV FORSGREN, Regional Forester, in their official capacities,
Defendants-Appellees

and

ARIZONA SNOWBOWL RESORT LIMITED PARTNERSHIP,
Intervenor-Defendant-Appellee

FEDERAL APPELLEES' PETITION FOR PANEL REHEARING AND FOR REHEARING EN BANC

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STATEMENT

The Federal Appellees respectfully petition for panel rehearing and rehearing en banc, pursuant to Fed. R. App. P. 35 & 40, and 9th Cir. R. 35-1. The panel's opinion in this case directly conflicts with the Supreme Court's opinions in *Bowen v. Roy*, 476 U.S. 693 (1986), *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988), and others, establishing that a government action can impose a "substantial burden" on religious exercise only when an individual is coerced to act contrary to his religious beliefs, or a government benefit is withheld or penalties imposed for acting in accordance with his religion. Indeed, the Supreme Court in *Lyng* specifically *rejected* the contention that the compelling interest test of *Sherbert v. Verner*, 374 U.S. 398 (1963) – which the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb-1, was intended to restore and codify – applied to the very context at issue in this case: the government's use of or authorization of activities on its own land.

The panel's opinion in this case nonetheless permits plaintiffs to proceed under RFRA solely on the grounds that the proposed governmental action on its own land offends the plaintiffs' religious beliefs or may impact their religious practices. The panel invalidates a proposed government project because Plaintiffs believe that it will render their sacred mountain spiritually impure and weaken their

spiritual connection to the mountain as they conduct their prayers to it, often from miles away.

This decision also conflicts with this Court's prior application of RFRA's "substantial burden" test, *Guam v. Guerrero*, 290 F.3d 1210 (9th Cir. 2002), and creates a conflict with the D.C. Circuit, which previously reviewed similar free exercise claims brought by many of the same plaintiffs against an expansion of the the same ski area on a National Forest as is challenged in this case, *Wilson v. Block*, 708 F.2d 735 (D.C. Cir. 1983). This case should be reheard en banc to resolve these clear conflicts.

Moreover, the practical effect of the panel decision is of exceptional importance. The panel would impose rigorous compelling interest review on any government action when that action undermines a religious practitioner's belief in the purity of the lands affected, or his spiritual connection to those lands, even if he never even visits the affected property. This would unduly burden federal agencies charged with managing public lands. Much of the land in the American West is held sacred by religious practitioners, and the government cannot manage lands for the public interest generally based on potential offense to others' personal religious beliefs.

BACKGROUND

RFRA was enacted "to restore the compelling interest test as 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 free exercise of religion is substantially burdened." 42 U.S.C. § 2000bb(b). The statute provides that:

> Government may substantially burden a person's exercise of religion only if it demonstrates 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 governmental interest.

42 U.S.C. § 2000bb-1(b). The "exercise of religion" means "the exercise of religion under the First Amendment to the Constitution." *Id.* at §§ 2000bb-2(4), 2000cc-5.

The Arizona Snowbowl ("Snowbowl") ski resort area lies just north of Flagstaff, Arizona, on the western flanks of the San Francisco Peaks. Snowbowl has been used as a ski area since 1938, and is located within the Coconino National Forest, managed by the United States Department of Agriculture, Forest Service ("Service"). Snowbowl is currently operated by the Intervenor-Appellee Arizona Snowbowl Resort Limited Partnership ("ASR") pursuant to a Special Use Permit ("SUP") issued by the Forest Service. (SER 0016.)

The Coconino Forest Plan designates the Snowbowl SUP area as an area where the Service should "emphasize developed recreation." (SER 0013.)[1/] Congress established a permitting system to encourage development of ski areas and facilities on National Forest System lands, 16 U.S.C. § 497b; 36 C.F.R. § 251.53(n), and the Forest Service now plays a "major role" in the provision of snow skiing opportunities nationwide. (SER 0013.)

In recent years, snowfall at Snowbowl has been sporadic, causing broad fluctuations in annual visitation and endangering Snowbowl's continued operation. (SER 1049.) The area has become increasingly popular, causing concerns about safety and overcrowding when it is open. As a result, ASR submitted a formal proposal in September 2002 to improve its facilities. (SER 0077.) The Forest Service consulted extensively with potentially affected tribes on the proposal, making more than 500 contacts with tribal members and holding between 40 and 50 meetings with the tribes. After reviewing the proposal pursuant to the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321, *et seq.*, the Forest Supervisor issued a final Environmental Impact Statement ("FEIS") and Record of Decision ("ROD") in February 2005 authorizing the selected alternative, including

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[1/] "SER" refers to the Supplemental Excerpts of Record filed jointly by the Federal Appellees and ASR.

all of ASR's proposal except for night lighting. (SER 0559-1083.)

The authorized project included the use of reclaimed waste water for artificial snowmaking. The making of artificial snow would permit Snowbowl to substantially increase the number of days per season that it could stay open. The Service approved the use of Class A-plus water, the highest quality of reclaimed waste water categorized by the Arizona Department of Environmental Quality. This reclaimed water is heavily treated, *see* SER 0764–65, and is approved by the State for snowmaking as well as for "schoolground landscape irrigation," "irrigation of food crops," and other beneficial uses. Ariz. Admin. Code R18-11-309 Tbl. A.

Plaintiff tribes and environmental groups filed suit in the United States District Court for the District of Arizona. After an 11-day bench trial on RFRA issues, the district court found that Plaintiffs "failed to present any objective evidence that their exercise of religion will be impacted by the Snowbowl upgrades," and that the decision "does not bar Plaintiffs' access, use, or ritual practice on any part of the Peaks." *Navajo Nation v. Forest Serv.*, 408 F. Supp. 2d 866, 905 (D. Ariz. 2006). Plaintiffs provided no evidence that the decision would impact any religious ceremony, gathering, pilgrimage, shrine, or any other religious use of the Peaks. *Id.* at 889-92, 895-96. The district court concluded that

the Snowbowl Project did not "substantially burden" Plaintiffs' exercise of religion. *Id.* at 906. The district court also granted summary judgment to the Service and ASR on Plaintiffs' numerous NEPA claims.

The panel reversed in relevant part, holding that the Service's approval of the use of reclaimed water violated both RFRA and NEPA.[2/] The panel did not overturn any of the district court's factual findings, but nevertheless found a "substantial burden" on the Plaintiffs' religious exercise because Plaintiffs believed that their prayers to the Peaks would no longer be answered if the Snowbowl project went forward. *See, e.g.,* Slip op. at 2862. The panel discusses at length the testimony of several Plaintiffs to support its holding, but not one of those Plaintiffs testified that he went to or gathered materials from the Snowbowl area for religious purposes. *Id.* at 2846-62. The panel did not find that the project would actually contaminate any religious resources or sacred areas, *id.* at 2858, but relied instead on testimony that, to certain practitioners, the Snowbowl project would be "something you can't get out of your mind when you're sitting there praying" to

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[2/] The Federal Appellees disagree with the panel's application of NEPA and invalidation of the FEIS with respect to the evaluation of the use of reclaimed water, but do not seek panel rehearing or rehearing en banc on this issue. Because the panel's reversal of the judgment after trial on the RFRA issue prevents the Snowbowl project as proposed from going forward regardless of additional NEPA review on remand, rehearing or rehearing en banc is appropriate.

the mountain. *Id.* at 2860.

ARGUMENT

I. The Panel's Expansion of RFRA Conflicts with Supreme Court Precedent

A. Supreme Court Precedent Holds that a "Substantial Burden" Must Coerce an Individual into Violating His Religion or Penalize a Religious Exercise

To establish a *prima facie* case under RFRA, a plaintiff must show that the challenged government action imposes a "substantial burden" on religious exercise. Only if the plaintiff first makes such a showing does the statute require a compelling interest and a demonstration of least restrictive means. 42 U.S.C. § 2000bb(b).

A long line of Supreme Court precedent establishes that governmental actions can impose a "substantial burden" on religious exercise only in a circumscribed set of circumstances. The Supreme Court has found a substantial burden only when individuals were pressured to act contrary to their religious beliefs, or choose between following the tenets of their religion and receiving a government benefit or facing criminal sanctions. *See Sherbert v. Verner*, 374 U.S. 398, 404 (1963) (burden exists when an individual is required to "choose between following the precepts of her religion and forfeiting benefits, on the one hand, and

abandoning one of the precepts of her religion * * * on the other"); *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972) (burden exists when government action forces individuals to choose between criminal sanctions and "acts undeniably at odds with fundamental tenets of their religious beliefs"); *Thomas v. Review Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 718 (1981) (burden is "substantial" when government puts "substantial pressure on an adherent to modify his behavior and to violate his beliefs"); *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 141 (1987) (same).

The Supreme Court has explicitly rejected the idea that spiritual injury from the Government's own actions may constitute a "substantial burden" for purposes of free exercise challenges (and therefore, for purposes of RFRA). In *Bowen v. Roy*, 476 U.S. 693 (1986), two applicants for welfare benefits challenged a federal statute requiring the States to use Social Security numbers in administering certain welfare programs. The plaintiffs contended that using a Social Security number to identify their 2-year-old daughter would "'rob the spirit' of [their] daughter and prevent her from attaining greater spiritual power." *Id.* at 696. Recognizing that its Free Exercise Clause cases had always been about the government acting *upon an individual* to constrain, limit, or prohibit that individual's religious exercise, the Court held that it had never "interpreted the First Amendment to require the

Government *itself* to behave in ways that the individual believes will further his or her spiritual development or that of his or her family." *Id.* at 699. The Court held that, despite the serious harm that Roy believed would occur, Roy could "no more prevail on his religious objection to the Government's use of a Social Security Number for his daughter than he could on a sincere religious objection to the size or color of the Government's filing cabinets." *Id.* at 700.

The Supreme Court reaffirmed that principle in *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988). In that case, a number of Indians challenged the Service's approval of construction of a road through a section of National Forest System land in California. *Id.* at 442. The affected area was "significant as an integral and indispensable part of Indian religious conceptualization and practice." *Id.* Its spiritual value to the plaintiffs depended on "privacy, silence, and an undisturbed natural setting," and a Forest Service study concluded that construction of a road "would cause serious and irreparable damage to the sacred areas which are an integral and necessary part of the belief systems and lifeway of Northwest California Indian peoples." *Id.* It was undisputed that construction of the road would have "severe adverse effects on the practice of their religion." *Id.* at 447.

Nevertheless, the Supreme Court held that the government's project on its

own land did not burden the Indian plaintiffs' exercise of religion in the sense necessary to require the government to advance a compelling interest to justify its action. *Id.* In so holding, the Court relied on *Roy*, finding the two cases analogous. *Id.* at 449. Even though the Government's proposed actions on National Forest System lands "would interfere significantly with private persons' ability to pursue spiritual fulfillment according to their own religious beliefs," *id.* at 449, the government project did not substantially burden the plaintiffs' free exercise of religion. "Incidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs," do not require the application of the compelling interest test. *Id.* at 450-51.

Most importantly for the present case, in *Lyng* the Supreme Court categorically rejected the application of the compelling interest test to the government's management of its own land. "Whatever rights the Indians may have to the use of the area, . . . those rights do not divest the Government of its right to use what is, after all, *its* land." *Id.* at 453 (emphasis in original). The Court rejected the "religious servitude" the plaintiffs sought over the National Forest because "such beliefs could easily require *de facto* beneficial ownership of some rather spacious tracts of public property." *Id.*

Roy and *Lyng* remain controlling, following the enactment of RFRA. Congress expected "that the courts will look to free exercise cases decided prior to [*Employment Div., Dept. of Human Res. of Oregon v.*] *Smith*[, 494 U.S. 872 (1990)] for guidance in determining whether the exercise of religion has been substantially burdened." S. Rep. 103-111 at 8-9 (1993). The text of RFRA itself establishes that its purpose is to "restore the compelling interest test" set out in *Sherbert* and *Yoder*, 42 U.S.C. § 2000bb(b), and *Lyng* makes clear that *Sherbert* and *Yoder* did *not* require a compelling interest in a case involving the government's management of its own property. 485 U.S. at 452 (describing the plaintiffs' position as a "proposed extension of *Sherbert* and its progeny" and holding that "the analysis in *Roy* . . . offers a sound reading of the Constitution.").

Congress enacted RFRA on the understanding that *Sherbert* and *Yoder* do not trigger the compelling interest test in the precise context of this case and that *Roy* and *Lyng* would continue to control. Thus, the Senate Report states that "pre-*Smith* case law makes it clear that strict scrutiny does not apply to government actions involving only management of internal Government affairs or the use of the Government's own property or resources." S. Rep. 103-111, at 9 & n. 19 (citing *Roy* and *Lyng*). Thus, the panel's holding that "*Lyng* does not control the result in this case," slip op. at 2869, is plainly incorrect, and contrary to the express text and

legislative history of RFRA.

The panel attempts to distinguish *Lyng* on the ground that "it is easier for a plaintiff to prevail in a RFRA case than in a pure free exercise case." (Slip op. at 2870.) The panel cites what it regards as RFRA's broader definition of "exercise of religion," as well as the inclusion of a least restrictive means component in the compelling interest test. *Id.* Those distinctions are irrelevant to the threshold inquiry of whether the government action imposes a "substantial burden." The panel also claims that *Lyng* is dependent on the First Amendment's use of the term "prohibited," and that a "burden" is something less than a prohibition. *Id.* However, *Lyng* clearly evaluates the impact of the challenged agency action in terms of its "burden" on the plaintiff's exercise of religion, 485 U.S. at 447, consistent with the Supreme Court's longstanding practice of construing "prohibit" to mean the imposition of a "burden" on religious exercise. *See Yoder*, 406 U.S. at 220 ("A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion."); *Sherbert*, 374 U.S. at 403, 404, 408. Congress's addition in RFRA of the modifier "substantial" hardly counsels in favor of the panel's significantly broader definition of religious "burden." *Lyng* thus controls this case.

The panel also sought to distinguish *Lyng* on the ground that "Appellants in this case do not seek to prevent use of the Peaks by others." (Slip op. at 2870.) But that was also true in *Lyng*. And as in *Lyng*, while Plaintiffs did not advocate elimination of all human activity except theirs in the area in question on this particular appeal, "[n]othing in the principle for which they contend . . . would distinguish this case from another lawsuit in which they (or similarly situated religious objectors) might seek to exclude all human activity but their own from sacred areas of the public lands." 485 U.S. at 452-53. It would require only that a religious practitioner believe that any human activity anywhere on the Peaks is a desecration. Indeed, some of the Plaintiffs testified in this case that they opposed any development at all at Snowbowl and that it should be shut down completely. *Navajo Nation*, 408 F. Supp. 2d at 900.

Although the Supreme Court in *Lyng* noted that the project there had been tailored to minimize its impact on the plaintiffs' religious beliefs or practice, that discussion was not part of the Court's Free Exercise Clause ruling, which held categorically that a compelling governmental interest is not required to justify the government's use (or authorization of use by others) of its own land, even though the government's action may have a severe impact on religious beliefs and practices of private individuals. *See* 485 U.S. at 448-53. Rather, the passages in

Lyng the panel cited were part of a separate portion of the Court's opinion in which it stressed that its constitutional holding should not be understood to discourage voluntary accommodations by the government, which had occurred in that case. *See id.* at 453-55.

B. The Panel's Opinion Conflicts Directly with Supreme Court and Ninth Circuit Precedent

The panel's opinion is contrary to the Supreme Court's holding in *Lyng* that a government action involving the use of its own land does not "substantially burden" individuals' exercise of religion because the individuals are not "coerced by the Government's action into violating their religious beliefs," unless the "governmental action penalize[s] religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens." 485 U.S. at 449. Moreover, in this case, aside from the absence of any coercion or penalizing of religious activity, the Plaintiffs are free to continue the various practices described by the panel's opinion, all of which occur outside the Snowbowl area using resources gathered from outside the Snowbowl area. *Navajo Nation*, 408 F. Supp. 2d at 899-92, 895-96. The panel did not find error with any of the district court's factual findings to this effect. In fact, the approved project included provisions to ensure that religious practitioners would have continuous access to

the 777-acre SUP area (as well as the approximately 74,000 remaining acres of the Peaks) for religious purposes. (SER 0963.) Just as in *Roy* and *Lyng*, the proposed action of the government on its own land may be offensive to the religious believers who challenge it or affect their religious experience in using or deriving spiritual value from the government's land, but that does not establish a "substantial burden" on their religious exercise under the Free Exercise jurisprudence codified in RFRA.

Prior to the present case, this Court's own case law has followed that of the Supreme Court, holding that

> a statute burdens the free exercise of religion if it "put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs," *Thomas*[, 450 U.S. at 718], including when, if enforced, it "results in the choice to the individual of either abandoning his religious principle or facing criminal prosecution." *Braunfeld v. Brown*, 366 U.S. 599, 605 [. . .] (1961). A substantial burden must be more than an "inconvenience." *Worldwide Church* [*of God v. Phila. Church of God, Inc.*, 227 F.3d 1110, 1121 (9th Cir. 2000)].

Guam v. Guerrero, 290 F.3d 1210, 1222 (9th Cir. 2002). Although the panel's opinion cites this statement of the law, the panel's recitation omits the critical aspect of the rule that a "substantial burden" must force the religious adherent to violate his beliefs or be penalized for his religious practice. (Slip op. at 2845.)

C. The Panel's Opinion Specifically Conflicts with the D.C. Circuit on the Precise Issue of "Burden" Raised Here

The panel's opinion cannot be reconciled with *Wilson v. Block*, 708 F.2d 735 (D.C. Cir. 1983), in which a number of Indian plaintiffs challenged a 1979 EIS and ROD approving an upgrade and expansion of Snowbowl. The plaintiffs argued in that case that "development of the Peaks would be a profane act, and an affront to the deities, and that, in consequence, the Peaks would lose their healing power and otherwise cease to benefit the tribes." *Id.* at 740. Additionally, "development would seriously impair their ability to pray and conduct ceremonies upon the Peaks." *Id.* The D.C. Circuit applied the compelling interest test of *Sherbert*, the same test that Congress expressly incorporated into RFRA, and concluded that the Snowbowl project did not burden the tribes' exercise of religion. "The construction approved by the Secretary is, indeed, inconsistent with the plaintiffs' beliefs, and will cause the plaintiffs spiritual disquiet, but such consequences do not state a free exercise claim under *Sherbert*, *Thomas*, or any other authority." *Id.* at 741-42.

II. The Panel's Expansion of RFRA Presents an Issue of Exceptional Importance for Federal Land Management Agencies

The panel's abrupt departure from precedent is of exceptional importance. It

will require federal land management agencies to justify a great number of proposed actions with a compelling governmental interest and demonstrate that the action is "the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b). This test "is the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). And, requiring federal land management agencies to determine whether a proposed action complies with RFRA using the panel's standard will be unworkable. "Whatever may be the exact line between unconstitutional prohibitions on the free exercise of religion and the legitimate conduct by government of its own affairs, the location of the line cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development." *Lyng*, 485 U.S. at 451.

Approximately 122 million acres of National Forest System land, or 64% of the total system, lie within the boundaries of the Ninth Circuit. The Circuit also contains large percentages of land managed within the National Park System, as well as land managed by the Bureau of Land Management. The Southwestern Region of the Forest Service consults with tribes on 900 to 1,000 projects each year, and in Arizona and New Mexico alone there are at least 40 to 50 mountains held sacred by tribes. *Navajo Nation*, 408 F. Supp. 2d at 897. The Navajo consider the entire Colorado River basin to be sacred, and the Service has

inventoried at least 40,000 shrines, gathering areas, pilgrimage routes and prehistoric sites in the Southwestern Region, all of which are held sacred. *Id.* at 897-98. The panel's holding that use of reclaimed water on only one-quarter of one percent of the Peaks injures the whole of the Peaks and imposes a substantial burden on religious exercise has extraordinary implications for the management of other large tracts of public lands. Moreover, although this case involves claims by Indian tribes, the provisions of RFRA on which the panel relied are of general application. The panel's decision therefore exposes federal land management agencies to a requirement to show a compelling interest for actions affecting a location on public lands that any individual holds sacred or utilizes in his or her religious practice.

It is precisely for these reasons that the Supreme Court rejected the imposition of a "religious servitude" over public lands in *Lyng*. *Id.* at 452. Previously, the government's administration of its own affairs (including construction projects on National Forests) did not constitute a substantial burden triggering application of the compelling interest test, even if the project had severe effects on a person's religious beliefs or practice. *See, e.g., Lyng*, 485 U.S. at 453. In a situation where the public lands in question are considered sacred by an individual, the panel's opinion could permit RFRA challenges to routine land

management decisions and actions such as permitting grazing, timber harvest, road construction, reforestation, fire management, or recreation, and require a compelling interest and a least restrictive means analysis for such activities. Congress explicitly preserved this aspect of *Lyng* in enacting RFRA to prevent just such a situation. S. Rep. 103-111 at n. 19 (1993).

CONCLUSION

Federal Appellees request that this petition for panel rehearing and request for rehearing en banc be granted.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Circuit Rule 40-1, the attached petition for panel rehearing and petition for rehearing en banc is:

☒ Proportionally spaced, has a typeface of 14 points or more and contains 4,137 words.

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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of May, 2007, I served one copy of the foregoing Federal Appellees' Petition For Rehearing or upon each of the following counsel of record by electronic mail and by First-Class U.S. Mail, postage prepaid, addressed to:

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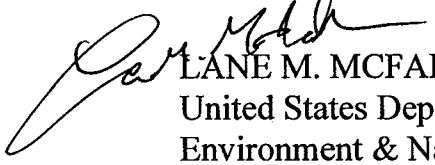

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Nos. 06-15371, 06-15436 & 06-15455

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HUALAPAI TRIBE; NORRIS NEZ; and BILL BUCKY PRESTON, Plaintiffs-Appellants, v. UNITED STATES FOREST SERVICE, et al., Defendants-Appellees, and ARIZONA SNOWBOWL RESORT LIMITED PARTNERSHIP, Defendant-Intervenor-Appellee.	D.C. Nos. CV-05-1824-PCT-PGR CV-05-1914-PCT-EHC CV-05-1949-PCT-EHC CV-05-1966-PCT-JAT Appeal From The United States District Court For The District Of Arizona Honorable Paul G. Rosenblatt, Judge Presiding

JOINT RESPONSE OFAPPELLANTS HUALAPAI TRIBE, NORRIS NEZ, AND BILL BUCKY PRESTON TO PETITIONS FOR REHEARING AND PETITIONS FOR REHEARING EN BANC

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Table of Contents

Table of Authorities

Cases **Page**

Statutes

Other Authorities

Law Review Articles

INTRODUCTION

Panel rehearing or rehearing en banc is not warranted. The Panel's unanimous decision does not conflict with Supreme Court precedent or create an intercircuit or intracircuit conflict. It also does not present an issue of exceptional importance for this Court to address. *See* FED. R. APP. P. 35(a); *see also* Circuit Rule 35-1. Rather, the Panel properly applied the law as set forth by Congress to the unique facts before it and found a violation of the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq* ("RFRA").[1] Specifically, the Panel found that the daily use of 1.5 million gallons of undiluted treated sewage effluent ("sewage effluent") to make artificial snow at a ski resort in the desert would contaminate—spiritually, physically, or both—the resources required to perform particular religious ceremonies. As a result, Plaintiffs would be prevented from engaging in religious conduct or having a religious experience. Slip Op. at 2861.

The Panel made an extensive review of the record, finding numerous ways in which the religious practices of Plaintiffs were burdened. For example, the

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[1] The Panel also held that the Forest Service violated the National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq*, "because it neither reasonably discusses the risks posed by the possibility of human ingestion of artificial snow made from treated sewage effluent nor articulates why such discussion is unnecessary." Slip Op. at 2899. This NEPA claim was raised by Plaintiff Navajo Nation et al. and is a separate ground for en banc review suggested only by Intervenor Snowbowl, not the Forest Service. In response, Plaintiffs Hualapai Tribe et al. hereby incorporate by reference the Navajo Nation's response.

Panel analyzed the impact upon Navajo medicine bundles which are a part of every Navajo healing ceremony. Slip Op. at 2848. It found that:

> The Peaks are represented in the Navajo medicine bundles found in nearly every Navajo household. The medicine bundles are composed of stones, shells, herbs, and soil from each of four sacred mountains.

Id. The San Francisco Peaks ("the Peaks") are one of the four sacred mountains in Navajo religion. *Id.* at 2848. If wastes from mortuaries and hospitals are dumped on the Peaks, there was undisputed testimony that it would "ruin" the medicine and the Navajo "would no longer be able to go on the pilgrimages to the Peaks that are necessary to rejuvenate the medicine bundles..." *Id.* at 2857. Numerous impacts similar to this example presented such an egregious picture that the Panel ultimately concluded:

> If Appellants do not have a valid RFRA claim in this case, we are unable to see how any Native American plaintiff can ever have a successful RFRA claim based on beliefs and practices tied to land that they hold sacred.

Slip Op. at 2871.

RFRA was passed in response to a series of Supreme Court decisions that refused to apply the compelling interest test in a variety of contexts and culminated in Justice Scalia's opinion in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990). In *Smith*, the Court held that laws of general applicability need not be justified by the compelling governmental interest test. In response to this holding, Congress passed RFRA for the explicit

purpose of "restor[ing] the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) ("*Yoder*") and to guarantee its application **in all cases where free exercise of religion is substantially burdened**." 42 U.S.C. 2000bb(b)(1) (emphasis added); *Accord, Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 415, 431 (2006) ("*O Centro*") ("RFRA expressly adopted the compelling interest test" found in *Sherbert* and *Yoder*"). As seen in the plain language of the statute, there are no categories of governmental action that are exempt from RFRA's scope.

The initial question under RFRA is whether the governmental action imposes a substantial burden upon the free exercise of religion. Under any common-sense definition of the terms, the burden caused by the use of sewage effluent for artificial snow in the present case is nothing short of substantial.

The Panel found it significant that the Forest Service ("FS") "acknowledged and described at length" the impact the use of effluent would have on the Tribes, stating in the Final Environmental Impact Statement that:

> Snowmaking and expansion of facilities, especially the use of reclaimed water, would contaminate the natural resources needed to perform the required ceremonies that have been, and continue to be, the basis for the cultural identity for many of these tribes. Further, the use of reclaimed water is believed by the tribes to be impure and would have an irretrievable impact on the use of the soil, plants, and animals for medicinal and ceremonial purposes throughout the entire Peaks, as the whole mountain is regarded as a single, living entity.

Slip Op. at 2856. As the Panel discussed, the fact that the effluent is treated is inconsequential for the Plaintiffs' religious claims. See Slip Op. at 2856-57 ("once water is tainted and if water comes from mortuaries or hospitals, for Navajo there's no words to say that that water can be reclaimed.") (quoting testimony). Moreover, treated sewage effluent is anything but pure. Slip Op. at 2853-55.

Having found that there was a substantial burden, the Panel concluded that there was no compelling governmental interest served by the use of sewage effluent for snowmaking in the desert.

> Even if there is a substantial threat that the Snowbowl will close entirely as a commercial ski area, we are not convinced that there is a compelling *governmental* interest in allowing the Snowbowl to make artificial snow from treated sewage effluent to avoid that result. We are struck by the obvious fact that the Peaks are located in a desert. It is (and always has been) predictable that some winters will be dry.

Slip Op. at 2865. Despite the Panel's straightforward application of RFRA, the FS and Arizona Snowbowl Resort Limited Partnership ("Snowbowl") argue that the Panel's decision conflicts with Supreme Court, Ninth Circuit, and D.C. Circuit precedent and presents an issue of exceptional importance for the Court. As discussed below, each of these arguments lack merit and do not justify en banc review.

ARGUMENT

I. THE PANEL'S UNANANIMOUS DECISION DOES NOT CONFLICT WITH SUPREME COURT, NINTH CIRCUIT, OR D.C. CIRCUIT PRECEDENT.

A. The Panel's Decision Does Not Conflict With Any Supreme Court Precedent.

The FS and Snowbowl assert that the Panel decision is inconsistent with *Bowen v. Roy,* 476 U.S. 693 (1986) and *Lyng v. Northwest Indian Cemetery Protective Assn.*, 485 U.S. 439 (1988). These arguments ignore important factual and legal distinctions between these cases and the present case and reveal a fundamental misunderstanding of RFRA—and how RFRA relates to previous First Amendment case law.

1. There Are Significant Factual Distinctions Between *Roy* And *Lyng* And The Present Case.

Neither FS nor Snowbowl address the critical factual distinctions between the cases upon which they rely and the specific facts that were before the Panel. The facts in *Bowen v. Roy* are dissimilar to the facts present here. *Roy* involved a plaintiff's belief that the government's use of a Social Security number to identify the plaintiff's two-year-old daughter would "rob the spirit" of his daughter. *Roy,* 476 U.S. at 696. The case did not involve an impact upon any religious practices engaged in by the plaintiff or his daughter. However, in the present case, Plaintiffs demonstrated that the use of sewage effluent for snowmaking will place serious

and substantial burdens upon their free *exercise* of religion, have a devastating impact upon specific and important religious ceremonies and prevent them from engaging in religious conduct or having a religious experience.

Similarly, the Panel found that the facts in *Lyng,* the case upon which the FS and Snowbowl primarily rely to support their argument "were materially different from those in this case". Slip Op. at 2870. As the Panel explained, "[t]he Court in *Lyng* denied the Free Exercise claim in part because it could not see a stopping place. We uphold the RFRA claim in this case in part because otherwise we cannot see a starting place." Slip Op at 2871. Furthermore, the Panel noted that "[i]n *Lyng* the Court was unable to distinguish the plaintiffs' claim from one that would have required the wholesale exclusion of non-Indians from the land in question." Slip Op. at 2870. Here, even if Plaintiffs prevail, there will be no impact on the current uses of the Peaks; in fact, every single activity, even skiing, will continue. As a witness for the Plaintiffs testified, the existing development on the Peaks is like a "scar" that can be lived with, but the dumping of sewage effluent on the sacred mountain is tantamount to injecting the body with a foreign substance that will contaminate the whole. See Slip Op. at 2856-57.

Moreover, as the Panel concluded, the FS in *Lyng* considered the adverse impact of its actions and tried to minimize them, but the FS in the present case failed to do so:

> The equivalent in this case to "abandoning the project entirely" in *Lyng* would be abandoning the ski area altogether. The equivalent of the Forest Service's minimizing the adverse impact of the road in *Lyng* by carefully choosing its location would be minimizing the adverse impact of the Snowbowl by restricting its operation to that which can be sustained by natural snowfall.

Slip Op. at 2871.

Because RFRA demands a case-by-case analysis, these factual distinctions show that neither *Roy* nor *Lyng* are in conflict with the Panel's opinion. In addition, the factual distinctions between this case and *Lyng* show that when RFRA is applied the court is able to strike a sensible balance between protecting religious liberty and acknowledging compelling governmental interests.

2. There Is No Legal Conflict Between Prior Supreme Court Cases And This Case.

The very first page of the FS petition illustrates the Petitioners' lack of understanding of the meaning of RFRA. To support its claim that there is a conflict between *Lyng* and this case, the FS states that "the Supreme Court in *Lyng* specifically *rejected* the contention that the compelling interest test of *Sherbert v. Verner*, 374 U.S. 398 (1963) – which the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb-1, was intended to restore and codify – applied to the very context at issue in this case..." FS Pet. at 1. Yet, this refusal to apply the *Sherbert v. Verner* (*"Sherbert"*) compelling interest balancing test in a number of First Amendment cases, culminating in *Employment Division, Department of*

Human Services of Ore. v. Smith, 494 U.S. 872 (1990) ("*Smith*") was exactly what Congress explicitly rejected when it enacted RFRA – a fact that the FS and Snowbowl fail to acknowledge despite the plain language of RFRA. The position of the FS and Snowbowl seems to be that *every* pre-*Smith* First Amendment case remains in force and is binding on any claim that is now made under RFRA. This position is indefensible for a number of reasons.

As recognized by the Panel, "RFRA provides greater protection for religious practices than did the Supreme Court pre-*Smith* free exercise cases" as there are important textual differences between the First Amendment and RFRA. Slip Op. at 2843. First, the Panel noted that the First Amendment test is whether free exercise is "prohibited"—a fact greatly emphasized in *Lyng*[2],—whereas the RFRA test is whether there is a "substantial burden" placed upon the exercise of religion, an easier test. The Government's response is that *Lyng* applied the "burden" test, notwithstanding its explicit emphasis on the word "prohibited". FS Pet. at 12. An examination of *Lyng* refutes this assertion. The *Sherbert* balancing test had been applied in the case that *Lyng* overruled.[3] In reviewing the Ninth Circuit's decision, *Lyng* never directly responded to the Ninth Circuit's application of the balancing test. Instead, it adopted the Government's arguments derived from property rights-

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[2] The Court in *Lyng* stated that "[t]he crucial word in the constitutional text is 'prohibit'..." 485 U.S. at 451.

[3] *Northwest Indian Cemetery Protective Assn. v. Peterson*, 795 F.2d 688, 691-695 (9th Cir. 1986), *reversed*, 485 U.S. 439 (1988).

based legal theories, as opposed to arguments based on the compelling interest test. 485 U.S. at 435. The word "burden" appears only once in the Court's decision in *Lyng*—when describing the plaintiff's arguments—and never again. Indeed, as discussed in more detail below, the Court in *Smith* explicitly found that the *Sherbert v. Verner* burden/compelling interest balancing test had not been applied in *Lyng*. 494 U.S. at 883.

The Panel also recognized:

> [A]s the Supreme Court noted in *City of Boerne*, RFRA provides stronger protection for free exercise than the *First Amendment* did under the pre-*Smith* cases because "the Act imposes in every case a least restrictive means requirement—a requirement that was not used in the pre-*Smith* jurisprudence RFRA purported to codify. 521 U.S. at 535 (emphasis added).

Panel Op. at 2843-44. The FS considers this change to be irrelevant to the issue of "substantial burden". FS Pet. at 12. In so doing, it ignores the rationale for the Panel's citation to this provision in RFRA—namely, to support the legal conclusion "RFRA provides stronger protection for free exercise than the First Amendment did under the pre-*Smith* cases ..." Panel Op. at 2843. Thus, variances between RFRA and pre-*Smith* First Amendment case law are to be expected. See H.R. Rep. No. 103-88, at 6-7 (1993) ("hereinafter "House Report 108-88") ("This bill is not a codification of any prior free exercise decision...") Such variances are not "legal inconsistencies" that would support *en banc* review.

Third, the Panel correctly found:

> RFRA provides broader protection for free exercise because it applies *Sherbert's* compelling interest test "in all cases" where the free exercise of religion is substantially burdened. Prior to *Smith*, the Court had refused to apply the compelling interest analysis in various contexts, exempting entire classes of free exercise cases from such heightened scrutiny.

Slip Op. at 2844. This is a fundamental point that the FS and Snowbowl ignore in making their argument that *Lyng* and *Roy* are controlling.

RFRA was a bipartisan response to *Smith* which, based upon a number of previous decisions including *Lyng* and *Roy*, held that the First Amendment burden/compelling interest balancing test should not be applied to generally applicable neutral laws. *Smith*, 494 U.S. at 883-884. Of specific relevance, the *Smith* Court emphasized: "In *Lyng* we declined to apply *Sherbert* analysis to the Government's logging and road construction activities on land used for religious purposes by several Native American Tribes, even though it was undisputed that the activities 'could have devastating effects on traditional Indian religious practices.'" (citation omitted) *Id.* at 883. As Snowbowl noted in its petition (Snowbowl Pet. at 9), the Court in *Lyng* also held that "[w]hatever may be the exact line between unconstitutional prohibitions on the free exercise of religion and the legitimate conduct by government of its own affairs, the location of the line cannot depend on measuring the effects of a governmental action upon a religious objector's spiritual development". *Lyng*, 485 U.S. at 451. In *Smith*, the Court cited this exact language to support its holding that the "government's ability to

enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy" is not constrained by the compelling interest test.[4] *Smith*, 494 U.S. at 885.

In short, cases like *Sherbert* and *Yoder* utilized a compelling interest balancing test that was triggered by a finding that the government had burdened the free exercise of religion. RFRA endorsed and adopted this approach by mandating that the compelling interest test would be applied to "all cases" where there is a "substantial burden". 42 U.S.C. 2000bb(b)(1). Cases such as *Lyng* and *Smith*, however, utilized an entirely different approach – positing circumstances (in the case of *Lyng* – government land management decisions, in the case of *Smith* – generally applicable neutral laws) where the compelling interest balancing test could never be triggered.[5] Thus, although the reasoning in *Lyng* is relevant to post-*Smith* First Amendment law, its property-based analysis which (like *Smith*)

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[4] This same language was quoted in *City of Boerne v. Flores*, 521 U.S. 507, 513 (1997) as an explanation of the rationale for the Court's refusal in *Smith* to apply the *Sherbert* burden/compelling interest test. Of note, *Smith* further justified its use of *Lyng* as precedent for its decision by stating that "[i]t is hard to see any reason in principle or practicality why the government should have to tailor its health and safety laws to conform to the diversity of religious belief (the issue in *Smith*), but should not have to tailor its management of public land, *Lyng, supra*..." 494 U.S. at 885, n.2.

[5] The only opinion that applied the *Sherbert/Yoder* compelling interest balancing test in *Lyng* was the dissent. Of note, Justice Brennan authored both the *Lyng* dissent and the opinion in *Sherbert*.

led to a categorical exclusion of an entire class of cases from the application of the compelling interest balancing test is not relevant to the interpretation of RFRA. [6]

Fourth, the Panel notes that the definition of "exercise of religion" in RFRA was expanded to include any exercise of religion regardless of whether it is compelled by or central to "a system of religious belief". Pre-*Smith* First Amendment cases frequently included a requirement that plaintiffs show that the burdened practices were central to the practice of their religions. *See, e.g., Graham v. Commissioner*, 822 F.2d 844, 850-851 (9th Cir. 1987), *affd. sub. nom. Hernandez v. Commissioner*, 490 U.S. 680 (1989). As a result, many RFRA cases included the same requirement, based upon these pre-*Smith* cases. *See e.g., Goehring v. Brophy*, 94 F.3d 1294, 1299 (9th Cir. 1999). Congress' response was to adopt the 2000 amendment stating that "religious free exercise...need not be compulsory or central to the claimant's religious belief system. This is consistent with RFRA's legislative history, but much unnecessary litigation resulted from the failure to resolve the question in statutory text." 146 Cong. Rec. E1564 (September 22, 2000). This amendment once again illustrates that Congress' intent was that pre-RFRA case law could provide guidance only when consistent with an approach that broadly safeguards the free exercise of religion.

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[6] FS and Snowbowl also assert a conflict with *Bowen v. Roy*, 476 U.S. 693 (1986). This is another case which *Smith* specifically cited as a case that did not apply the *Sherbert/Yoder* burden/compelling interest balancing test. 494 U.S. at 883. Thus, it is likewise inapposite.

The remaining argument of FS and Snowbowl rests upon a statement in the legislative history of RFRA that pre-*Smith* case law had held that "strict scrutiny does not apply to governmental actions involving...the use of the Government's own property". FS Pet. at 11; Snowbowl Pet. at 10-11. This isolated statement cannot override the actual language of the statute that Congress enacted. *See, e.g., Negonsett v. Samuels*, 507 U.S. 99, 104 (1993) (When interpreting any statute, the actual statutory language, when expressed "in reasonably plain terms... must ordinarily by regarded as conclusive."); *John Hancock Mut. v. Harris Trust and Savings Bank*, 510 U.S. 86, 94-95 (1993) (Each statutory provision must be read by "looking to the provisions of the whole law and to its object and policy."). The application of the substantial burden/compelling interest balancing test "to all cases," as opposed to adopting pre-*Smith* iterations of the First Amendment test that excluded significant areas from application of the test, was an explicit decision by Congress. 42 U.S.C. 2000bb(b)(1); House Report 103-88 at 15; *See also Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 126 S.Ct. 1211, 1220 (2006) ("*O Centro*"). In fact, Congress specifically rejected the "rule" that FS attempts to extract from *Lyng*, namely that a person must be penalized or coerced in order to be "substantially burdened" in the exercise of their religion. *See* House Report 108-88 at 6 ("All governmental actions which have a substantial external

impact[7] on the practice of religion would be subject to the restrictions in the bill" regardless of whether the governmental activity "coerce(s) individuals into violating their religious beliefs...[or] penalize(s) religious activity by denying any person an equal share of the rights, benefits and privileges enjoyed by any citizen.") Thus, the reference in the legislative history cited by FS and Snowbowl cannot override the unambiguous statutory mandate in RFRA. *See Conroy v. Askinoff*, 507 U.S. 511, 519 (Scalia, J. concurring) ("[t]he law as it passed is the will of the majority of both houses *and the only mode in which that will is spoken is the act itself.*") (emphasis in original, citation omitted).

The position of the FS and Snowbowl would essentially mean that federal land management decisions can *never* substantially burden the free exercise of religion within the meaning of RFRA. Applying the FS and Snowbowl approach would mean that prisoners would be able to mount successful religious freedom claims against prison officials, *see, e.g. Warsoldier v. Woodford*, 418 F.3d 989 (9th Cir. 2005)[8], religious practitioners using hallucinogenic drugs would be able to mount successful RFRA claims against the Drug Enforcement Administration, *see, e.g., O Centro, supra*, but traditional Native religious practitioners would *never* be

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[7] Applying RFRA to actions with a "substantial external impact" is consistent with the analysis in the dissent in *Lyng*. 485 U.S. at 470.

[8] *Warsoldier v. Woodford* was actually brought under the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc *et seq.*, a companion statute to RFRA that applies to state governments.

able to challenge a federal land management decision—no matter how egregious. The fact that Congress can ultimately overturn an excessive RFRA ruling helps explain why Congress was willing to give more leeway under RFRA for religious claims like those in this case as compared to the extremely restrictive Lyng approach, which was clearly driven by fear of the effects that an unreviewable Constitution-based court ruling might have on federal land management. Had Congress wanted to exempt land management decisions, it certainly would have done so explicitly in RFRA's text.

In short, there are significant differences between the explicit wording of the First Amendment and the statutory language of RFRA, and the protection that each provides. Slip Op. at 2869-70. The explicit purpose of RFRA was to reject the refusal of the Supreme Court to apply the *Sherbert/Yoder* balancing test in religious freedom cases and to apply that test "in all cases where free exercise of religion is substantially burdened." 42 U.S.C. 2000bb(b)(1). *See also O Centro,* 546 U.S. at 435-438. The refusal by the Panel to find *Lyng* and *Roy* as controlling was entirely appropriate, indeed mandated by the language and intent of RFRA. Accordingly, there is no conflict between the Panel's decision and the Supreme Court precedent cited by FS and Snowbowl.

B. The Panel's Opinion Is Not In Conflict With Ninth Circuit Precedent.

FS and Snowbowl claim that the Panel's opinion is in direct conflict with Ninth Circuit precedent regarding the definition of substantial burden. FS Petition at 14-15; Snowbowl Petition at 12-13. This is not accurate. The Panel's opinion sets forth the following test for determining what constitutes a substantial burden in non-statutory governmental action cases:

> To establish a prima facie case under RFRA, a plaintiff must show that the government's proposed action imposes a substantial burden on the plaintiff's ability to practice freely his or her religion. *Guerrero*, 290 F.3d at 1222. Although the burden need not concern a religious practice that is "compelled by, or central to, a system of religious belief," 42 U.S.C. §§ 2000bb-2(4), 2000cc-5(7)(A), the burden "must be more than an 'inconvenience,' " *Guerrero*, 290 F.3d at 1222 (quoting *Worldwide Church of God*, 227 F.3d at 1121). The burden must prevent the plaintiff "from engaging in [religious] conduct or having a religious experience." *Bryant*, 46 F.3d at 949 (quoting *Graham*, 822 F.2d at 850-51).

Slip Op. at 2861-2862. The FS argues that when the Panel referred to the definition of substantial burden found in *Guam v. Guerrero*, 290 F.3d 1210, 1222 (9th Cir. 2002), it failed to include "the critical aspect of the rule that a 'substantial burden' must force the religious adherent to violate his beliefs or be penalized for his religious practice." FS Petition at 15.[9] What the FS is trying to do here is the same thing that it attempts to do with *Lyng*, i.e., to assert that prior case law (*Guam*) creates a threshold rule that there must be a finding of coercion or penalty

[9] The FS cites to the panel opinion's recitation of the test on page 2845 of the slip opinion; however, the panel's in-depth discussion of the substantial burden test is the one quoted above, which is found on page 2861-62 of the slip opinion.

to satisfy the definition of substantial burden under RFRA. But this mischaracterizes *Guam*, which does not mandate a threshold coercion/penalty rule for all RFRA cases. The language about penalizing religious practice in *Guam* is provided as an example of a type of action that substantially burdens free exercise of religion – an example specifically tied into the fact pattern at issue in *Guam*, which involved a criminal statute.

The interpretation of what constitutes a "substantial burden" on free exercise is very fact specific, requiring some variations on the tests applied, corresponding to the different types of burdens at issue. For cases involving criminal penalties, a coercion/penalty approach can easily be used. But not all substantial burdens involve coercion. *See Mockaitis v. Harcleroad*, 104 F.3d 1522 (9th Cir. 1997) (taping a confession between a prisoner and a Catholic priest constituted a substantial burden on the priest's ability to practice his religion even though he was not coerced into taking action contrary to his belief, penalized for religious activity, or deprived of a government benefit). Indeed, as discussed above, Congress specifically rejected the idea that an individual must be subject to coercion or penalized before RFRA can be applied. *See supra,* at 13. Therefore, although a coercion/penalty test may be sufficient to establish a RFRA claim, it is certainly not necessary.

The Panel's opinion is simply a straightforward application of RFRA. It is the use of sewage effluent to make artificial snow on the sacred mountain that imposes the substantial burden in this case because it prevents the plaintiffs from engaging in religious conduct or having a religious experience.

C. The Panel's Opinion Is Not In Conflict With *Wilson v. Block*

The FS and Snowbowl argue that the Panel's opinion conflicts with the D.C. Circuit on the issue of burden. FS Pet. at 16; Snowbowl Pet. at 11. However, the D.C. Circuit's opinion in *Wilson v. Block*, 708 F.2d 735 (D.C. Cir. 1983), *cert. denied*, 464 U.S. 956 (1983) and 464 U.S. 1056 (1984), which dealt not with RFRA but with a First Amendment challenge to the 1979 proposed expansion of Snowbowl, is legally and factually distinguishable from this case.[10]

The FS contends that the *Wilson* court applied the compelling interest test of *Sherbert*. This is inaccurate. The D.C. Circuit found that *Sherbert* was not "factually analogous" and specifically rejected using *Sherbert* as "a benchmark against which to test all indirect burden claims." *Wilson*, 708 F.2d at 741-44. This rejection taints the entire *Wilson* analysis. Moreover, the court's reliance on the "indispensability" standard cannot be reconciled with the 2000 RFRA amendment

[10] Applying *Wilson* to this case also improperly conflates the claims of different Tribes and individuals. For example, Plaintiff Hualapai Tribe was not involved in *Wilson*. Their religious traditions and claims are different than those of the Hopi or Navajo and are entitled to be considered specifically, not subsumed into some general category of "tribal claims."

of the definition of the "exercise of religion", i.e. "religious exercise" need not be "compelled by, or central to, a system of religious belief". 42 U.S.C. 2000bb-2(4).

The most important distinction between *Wilson* and the present case is that the holding in *Wilson* did not even address the central part of the Plaintiffs' claims in the present case—the use of sewage effluent for making artificial snow. This issue did not exist in 1983. As the Panel recognized, the testimony showed that the impact of the use of sewage effluent upon religious practice is far greater than other proposed activities at the Snowbowl, past or present. *See* Panel Op. at 2856. The limited geographic scope of the 1979 Project was a critical part of *Wilson's* reasoning as the court found that, although the Peaks were indispensable to the practice of Plaintiffs' religions, the Snowbowl SUP area itself was not. *Wilson*, 708 F.2d at 744-745. Here, the evidence is that dumping sewage effluent anywhere on the mountain will affect the entire mountain (physically, spiritually or both) and that the Plaintiffs have reason to be concerned about the potential impact of the sewage effluent well beyond the SUP area—into the very areas that *Wilson* recognized as indispensable to the Tribal religions.

II. THE PANEL'S OPINION DOES NOT PRESENT ANY ISSUES OF EXCEPTIONAL IMPORTANCE FOR THE COURT.

The essence of FS and Snowbowl's final plea for en banc review—that the decision will have a substantial impact on the government's ability to manage public lands—is a policy-based argument for Congress to address, not the courts.

In the unlikely event that Congress ultimately concludes that the unambiguous text of RFRA creates an unworkable standard, it can redress the situation by amending the statute. Thus, contrary to the FS and Snowbowl contentions, this issue is not of exceptional importance for this Court.

Notwithstanding the inappropriateness of this argument as a basis for en banc review, it is erroneous because 1) the Supreme Court has refused to allow such generalized concerns to preclude RFRA claims; and 2) the impact on land management is greatly overstated.

A. The Supreme Court Has Specifically Rejected Attempts By The Government To Bar RFRA Claims On The Basis Of Generalized Bureaucratic Concerns.

Consistent with *O Centro*, the Panel carefully evaluated the government's interests and balanced them against those of the religious practitioners. After finding that the project would prevent Plaintiffs from engaging in specific religious practices, the Panel concluded:

> [T]he Forest Service's interests in managing the forest for multiple uses, including recreational skiing, are, in the words of the Court in O Centro Espirita, "broadly formulated interests justifying the general applicability of government mandates" and are therefore insufficient on their own to meet RFRA's compelling interest test. 546 U.S. at 431. Appellants argue that approving the proposed action serves the more particularized compelling interest in providing skiing at the Snowbowl, because the use of artificial snow will allow a more "reliable and consistent operating season" at one of the only two major ski areas in Arizona, where public demand for skiing and snowplay is strong. We are unwilling to hold that authorizing the use of artificial snow at an already functioning commercial ski area in order to expand and improve its facility, as well as to extend its ski season in dry

> years, is a governmental interest "of the highest order." *Yoder*, 406 U.S. at 215.

Panel Op. at 2864-65. Petitioners present no legal reason why this holding should be revisited.

Instead, Petitioners assert broad-based land management concerns. These concerns are just another version of the bureaucratic slippery-slope argument—if you do this here, you will have to do it everywhere—and the Supreme Court has soundly rejected such arguments in the context of RFRA. In *O Centro*, the Supreme Court addressed governmental concerns pertaining to the enforcement of drug laws. Chief Justice Roberts' reaction to the Government's parade of horribles there is equally applicable here, *viz.*

> [T]he Government's argument...rests not so much on the particular statutory program at issue as on slippery-slope concerns that could be invoked in response to any RFRA claims for an exception to a generally applicable law. The Government's argument echoes the classic rejoinder of bureaucrats throughout history: If I have to make an exception for you, I'll have to make one for everybody, so no exceptions...Congress determined that the legislated test 'is a workable test for striking sensible balances between religious liberty and competing government interests.' This determination finds support in our cases; in *Sherbert*, for example, we rejected a slippery-slope argument similar to the one offered in this case...We [have] 'no cause to believe' that the compelling interest test 'would not be applied in an appropriately balanced way' to specific claims for exemption as they [arise]... (citations omitted).

546 U.S. 435-436. The Supreme Court recognized that it had "no cause to pretend that the task assigned by Congress to the Courts is an easy one." *Id.* at 1225.[11] However, it was apparent to the Court in *O Centro* that Congress did not intend for the Courts to interpret RFRA in a manner that would exclude a case-by-case determination in a whole range of cases simply because it would be difficult. Courts must apply the test to each case "in an appropriately balanced way" and enjoin the Government when RFRA requires. The generalized and exaggerated fear found in the bureaucrat's lament is not a sufficient reason to fail to apply RFRA as intended and written.

B. The FS And Snowbowl Overstate The Impact The Panel's Decision Will Have On The Management Of Public Lands.

The FS and Snowbowl greatly overstate the impact of the Panel's decision on the ability of the government to manage public lands. The fact is that most RFRA plaintiffs have not won their cases, regardless of the context. Through 2001, RFRA plaintiffs prevailed in only 33 out of 207 cases.[12] With the Panel's careful

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[11] Citing *City of Boerne v. Flores,* 521 U.S. 507, 534 (1997), the FS describes the compelling interest test as "'the most demanding test known to constitutional law.'" FS Pet. at 17. However, during the nine years after *Boerne* federal courts have routinely applied RFRA in a variety of contexts. *See O Centro*, 546 U.S. at 431-432 ("context matters in applying the compelling interest test" and the test is not so severe as to preclude the application of RFRA in a straight forward, case-by-case manner) (quotation and citation omitted).

[12] *See* Thomas C. Berg, *The New Attacks on Religious Freedom Legislation and Why They are Wrong*, 21 CARDOZO L. REV. 415, 422, n. 29 & 34; *see also* Gregory P. Magarian, *How to Apply the Religious Freedom Restoration Act to Federal Law*

focus on specific religious practices, this trend will not be reversed by the Panel's decision.

The Panel's decision is grounded in the unique and egregious nature of the government's interference with Native religions in this case. Contrary to the FS's and Snowbowl's assertions, the Panel's decision *does not* open the door for any person who experiences "spiritual disquiet" from governmental action to force the Government to go through the paces of the compelling interest test. The Panel's decision makes clear that RFRA plaintiffs must show that governmental action impacts specific religious practices. *See* Slip Op. at 2845-2863.[13] This emphasis on specific practices protects the government from future RFRA claims that rest merely on "religiously offensive" behavior or on the plaintiff's "spiritual disquiet." This emphasis is the heart of the Panel's decision and the basis upon which it found that Plaintiffs met the high standard imposed by RFRA, namely that the government action prevents them "from engaging in [religious] conduct or having a religious experience." Slip Op. at 2862 (citations omitted).

Furthermore, insofar as RFRA provides for the accommodation of religious exercise on public land, it is nothing new. The federal government currently

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Without Violating the Constitution, 99 MICH. L. REV. 1903, 1962-1963, n. 266 & 267.

[13] Importantly, the sincerity of these religious practices and the impact the project will have on those practices were never challenged in trial; and in fact, the FS admitted to them. Slip Op. at 2846.

manages many religious properties and activities on public land every day without problems. *See, e.g.,* Eric W. Treene, *Religion, the Public Square, and the Presidency*, 24 HARV. J.L. & PUB. POL'Y 573, 588 (2001). And in regard to Native Americans, federal policy specifically requires the FS to already account for sacred sites in its land management decisions.[14]

The present case is a prime example of the fact that the Petitioner's policy argument is grossly overstated. What the FS and Snowbowl strategically ignore when voicing their generalized land management concerns is the fact that the FS will still be able to manage the Coconino Nation Forest for multiple uses even if Plaintiffs' religious claims prevail. In fact, the Panel's opinion will not change

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[14] *See* Executive Order 13007 on Indian Sacred Sites, 61 Fed. Reg. 26771 (May 24, 1996)("In managing Federal lands, each executive branch agency with statutory administrative responsibility for the management of Federal lands shall, to the extent practical, permitted by law, and not clearly inconsistent with essential agency functions, (1) accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and (2) avoid adversely affecting the physical integrity of such sacred sites."); American Indian Religious Freedom Act, 42 U.S.C. § 1996 ("it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions ..., including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites."); *see also* National Register Bulletin 38 – Guidelines for Identifying and Documenting Traditional Cultural Properties, available at http//www.cr.nps.gov/nr/publications/bulletins/nrb38/ (sacred sites are eligible for inclusion in the National Register of Historic Places as a "traditional cultural property" and afforded protections provided by the National Historic Preservation Act, 16 USCA § 470 et. seq, if they meet the criteria of 36 CFR 60.4. Notably, the Bulletin cites the San Francisco Peaks as a well-known example of such a property).

this: every single activity currently occurring on the Peaks will continue, including *skiing,* motorcross, mountain biking, horseback riding, hiking, and camping, snowshoeing, cross-country skiing and snowplay. Slip Op. at 2866.

CONCLUSION

The Panel's unanimous opinion does not conflict with Supreme Court precedent or create an intracircuit or intercircuit conflict. Moreover, the Panel's opinion does not present an issue of exceptional importance. Panel rehearing or rehearing en banc is therefore not warranted. *See* Fed. R. APP. P. 35(a); *see also* Circuit Rule 35-1. Instead, the Panel's opinion presents a straightforward application of RFRA to the facts at issue in this case. FS and Snowbowl's disappointment with the result is not a sufficient reason to revisit these issues.

Dated this 20th day of June, 2007

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CERTIFICATE OF COMPLIANCE

I certify, pursuant to this Court's order dated June 1, 2007 and Ninth Circuit Rule 35-4, 40-1, 32-3, that the attached Plaintiffs' Response to Appellants' Petitions for Rehearing *En Banc* is double-spaced in 14-point, proportionally spaced Times New Roman typeface. The word count, excluding the cover page, table of contents, table of authorities, certificate of service, and certificate of compliance is 6470.

DATED: June 20, 2007.

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NAVAJO NATION, et al.,
Plaintiffs/Appellants,

and

HUALAPAI TRIBE, et al.,
Plaintiffs/Appellants,

and

HOPI TRIBE,
Plaintiffs/Appellants,

v.

UNITED STATES FOREST SERVICE, et al.,
Defendants/Appellees, and

ARIZONA SNOWBOWL RESORT LIMITED PARTNERSHIP,
Defendant-Intervenor/Appellee.

Nos.: 06-15371
06-15436
06-15455

Dist. Ct. Nos.: CV-05-1824-PGR
CV-05-1914-PGR
CV-05-1949-PGR
CV-05-1966-PGR

Appeal from
District of Arizona, Phoenix

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

I. INTRODUCTION

This unique case concerns the San Francisco Peaks ("Peaks") in Northern Arizona, which are the most sacred religious site to the Hopi Tribe, as well as the other Tribal Plaintiffs in this case. Panel Opinion ("Op.") at 2846-53. The United States Forest Service ("Forest Service") approved a plan to authorize Arizona Snowbowl Resort Limited Partnership ("ASR") to spray a portion of this singularly important religious site with millions of gallons of artificial snow made from non-potable, recycled sewage effluent – an undertaking which would be the first of its kind in the United States. Op. at 2855. A unanimous panel of this Court found that this Forest Service decision violated the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. §§2000bb *et seq.*, as well as the National Environmental Protection Act ("NEPA"), 42 U.S.C. §§4321 *et seq.* Op. at 2856-59, 2862, 2880. In so doing, the panel relied upon recent Ninth Circuit decisions to set forth the appropriate test for a "substantial burden" on religious exercise under RFRA. Op. at 2861-62 (quoting and applying the "substantial burden" test from *Guam v. Guerrero*, 290 F.3d 1210, 1222 (9th Cir. 2002) and *Bryant v. Gomez*, 46 F.3d 948, 949 (9th Cir. 1995)); *infra* at §II.A. The panel also adhered to RFRA's strict scrutiny mandate – recently reaffirmed by the Supreme Court in *Gonzales v. O Centro Espirita Beneficiente Uniao do Vegetal*, 546 U.S. 418 (2006) (unanimous opinion by Roberts, J.) – to look at each RFRA case according to its own particular

circumstances. *Infra* at §II.A.3. The panel determined that the proposed artificial snowmaking from sewage effluent would substantially burden the Tribal Plaintiffs' exercise of their religions – particularly for the Hopi and Navajo Tribes – both by interfering with specific religious practices and rites through the contamination of natural resources and by undermining the Tribes' "religious faith, practices, and way of life by desecrating the Peaks' purity." Op. at 2956-2862.

The Forest Service and ASR, the Appellees in this case, request rehearing of this unanimous panel decision.[1] Both Appellees challenge the test the panel used to determine that the artificial snowmaking on the sacred Peaks would pose a "substantial burden" on the Tribes' religious exercise under RFRA. In presenting their challenge, the Appellees rely on Free Exercise clause cases which pre-date RFRA and which RFRA – as amended by subsequent legislation – has now made obsolete. In addition, the Appellees charge that the panel's decision will have profound effects on the government's ability to manage any land of importance to tribes all across the Southwest and beyond. However, this line of reasoning – based on the fear of broad and general consequences – was rejected by Congress in enacting RFRA's strict scrutiny test, which instead requires case-by-case analysis

[1] *See* Federal Appellees' Petition for Panel Rehearing & for Rehearing En Banc ("Fed. Appellees Pet."); Intervenor/Appellee's Petition for Rehearing & Petition for Rehearing En Banc ("ASR Pet.").

of challenged government actions, and by the Supreme Court in *Gonzales*, 546 U.S. 1220-21.

In sum, a rehearing by this Court, which is "not favored" and "ordinarily will not be ordered," Fed. R. App. P. 35(a), would be inappropriate here – where the panel set forth the proper test under RFRA and applied that test to the unique facts of this case. The panel decision does not lead to the severe consequences that the Appellees portend. *See infra* at sec. II.A.3.

Finally, the NEPA portion of the decision – which is challenged only by ASR – also does not merit rehearing, because the panel's limited holding on the NEPA issue is in accord with existing case law and is fact-specific to this case.

II. REHEARING IS NOT WARRANTED.

A. The panel applied the appropriate test under RFRA for "substantial burden" on the exercise of religion.

The panel, relying upon recent decisions of this Court, *Guam v. Guerrero*, 290 F.3d 1210, 1222 (9th Cir. 2002) and *Bryant v. Gomez*, 46 F.3d 948, 949 (9th Cir. 1995), held that a prima facie RFRA case must show a "substantial burden on the plaintiff[s]' ability to practice freely his or her religion," and that the government's action challenged in the case prevents the plaintiff(s) "from engaging in religious conduct or having a religious experience." Op. at 2861-62. This is the appropriate test, which is much broader and more protective of religious practice than the Appellees argue.

1. RFRA, as amended by RLUIPA, expanded the protection of religious exercise beyond pre-*Smith* cases.

As the panel correctly explained, RFRA now provides greater protection to the exercise of religion than pre-*Smith*[2] cases, particularly those decided shortly before *Smith*, such as *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988), a case which is relied upon heavily by the Appellees in their current Petitions. The clear and unambiguous text of the RFRA statute turns the clock back before *Smith* to the strict scrutiny test set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972), acknowledged as the "zenith" of Free Exercise clause jurisprudence. *See* 42 U.S.C. §2000bb; *Gonzales*, 546 U.S. at 1220-21; H.R. Rep. No. 103-88 (1993). In addition, by opting for a single compelling interest test, Congress *de facto* eliminated the various classes of exemptions from strict scrutiny that had arisen in the case law subsequent to *Sherbert* and *Yoder* – including exceptions for government land,[3] unemployment

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[2] RFRA's stated purpose was to undo the majority decision in *Employment Div., Dep't of Human Res. of Ore. v. Smith*, 494 U.S. 872 (1990), which wholly eliminated strict scrutiny from Free Exercise clause cases that did not also claim burden of another constitutional right. 42 U.S.C. §2000bb.

[3] *See Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988); *see also infra* at §II.A.2.

compensation,[4] prison regulations,[5] welfare programs,[6] and military regulations.[7] Op. at 2844.

The potential for a more limited interpretation of RFRA's scope was essentially eliminated by Congress in 2000. In that year, the addition of an expanded RFRA definition of "exercise of religion" through the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), 42 U.S.C. §§2000cc *et seq.*, broadened the reach of the original statute. Op. at 2844-45. Prior to RLUIPA, RFRA's protected "exercise of religion" was defined by the constitutional baseline. *See* Pub. L. No. 103-141, at §5(4) (Nov. 16, 1993) (defining "exercise of religion" as the exercise of religion under the First Amendment to the Constitution). Through the passage of RLUIPA, RFRA was amended to incorporate instead RLUIPA's broader definition of "religious exercise" – "any exercise of religion, whether or not compelled by, or central to, a system of religious belief."[8] This broader and more recent definition now informs all RFRA challenges. *See, e.g., DiLaura v. Township of Ann Arbor*, 471 F.3d 666,

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[4] *See, e.g., Employment Div., Dep't of Human Res. of Ore. v. Smith*, 494 U.S. 872 (1990).

[5] *See, e.g., O'Lone v. Estate of Shabazz*, 482 U.S. 342, 349 (1987).

[6] *See, e.g., Bowen v. Roy*, 476 U.S. 693, 707 (1986).

[7] *See, e.g., Goldman v. Weinberger*, 475 U.S. 503, 506-7 (1987).

[8] Congress also mandated that the provisions of RLUIPA "be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution." 42 U.S.C. §2000cc-3(g).

669 (6th Cir. 2006); *Adkins v. Kaspar*, 393 F.3d 559, 567 & n.34 (5th Cir. 2004); *Kikimura v. Hurley*, 240 F.3d 950, 960 (10th Cir. 2001).

The Forest Service argues that the RLUIPA-based definition should have been found irrelevant to the "substantial burden" inquiry under RFRA. Fed. Appellees Pet. at 12. On the contrary, a showing of the religious exercise that is claimed to be burdened is obviously a prerequisite to the determination of a "substantial burden." In other words, a court must necessarily first determine what is the "exercise of religion" before analyzing whether that religious exercise is burdened substantially. *See* Op. at 2845 (setting forth the four steps of RFRA analysis). Therefore, rather than being irrelevant, the RLUIPA definition is so central to RFRA analysis that pre-RLUIPA case law on RFRA is only mildly useful as precedent today. Op. at 2844. This is to say nothing of pre-*Smith* case law (other than the explicitly-referenced *Sherbert* and *Yoder* cases), which has become even more obsolete due to the passage of RLUIPA.

2. The panel correctly held that the *Lyng* case, decided shortly before *Smith*, is no longer useful precedent, and that post-RFRA analysis includes no exception regarding governmental land.

Contrary to the argument made by the Appellees based upon *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988), RFRA includes no

exception regarding decisions affecting government land.[9] The starting and ending point in any statutory construction is the plain language of the statute. *See, e.g., Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004); *Nuclear Info. & Res. Svc. v. U.S. Dep't of Transp. Research & Special Programs Admin.*, 457 F.3d 956, 960 (9th Cir. 2006). RFRA's plain language is clear: the United States is a "government" whose actions are subject to the statute, *see* 42 U.S.C. §2000bb-2(1), and a "government" is prohibited from substantially burdening "a person's exercise of religion." 42 U.S.C. §2000bb-1. A qualification to this prohibition exists if the application of the burden furthers a compelling government interest and is the least restrictive means to do so. *Id.* That limitation, however, is the only exception. The statute does not provide for any government land exception, but rather that all actions of the United States are challengeable. *See* 42 U.S.C. §2000bb(b)(1) (Application of the strict scrutiny test is "guarantee[d] in all cases."). Moreover, the *Sherbert* and *Yoder* cases, which are explicitly cited in the RFRA statute as the sources for the appropriate test, mention no government land exception. *See Sherbert*, 374 U.S. 398; *Yoder*, 406 U.S. 205.

Considering the clarity of the statute, any reference by the panel to legislative history to resolve ambiguities would have been inappropriate. *See, e.g.,*

[9] The *Lyng* majority held that "Whatever rights the Indians may have to the use of the area, . . . those rights do not divest the Government of its right to use what is, after all, *its* land." *Id.* at 453 (emphasis in original); *see* Fed. Appellees Pet. at 8-10.

Nuclear Info. & Res. Svc., 457 F.3d at 960. Even if the statute were ambiguous, however, RFRA's legislative history fully supports the panel's interpretation. The House Report makes clear that the "substantial burden" analysis is not limited to coercion or imposition of penalties through loss of benefits:

> Government activity need not coerce individuals into violating their religious beliefs nor penalize religious activity by denying any person an equal share of the rights, benefits and privileges enjoyed by any citizen. Rather, the test applies *whenever* a law or an action taken by the government to implement a law burdens a person's exercise of religion.

H.R. Rep. No. 103-88 (1993) (emphasis added). This statement of Congressional intent could hardly be a more direct repudiation of the Appellees' argument that *Lyng* still applies.[10]

Additionally, the legislative history of RFRA indicates that Congress truly meant to turn the clock back to the era of *Sherbert* and *Yoder*, not merely to the day before *Smith*, when *Lyng* might have been considered more persuasive precedent. The House draft of the bill which became RFRA, for example, had deleted the explicit references to *Yoder* and *Sherbert*. *See* H.R. Rep. No. 103-88. The "Additional Views" of several Representatives in the House Committee Report make the point that because these citations were deleted in that draft, the bill would simply reinstate the law as it was prior to *Smith*. *Id.* However, the bill

[10] *See, e.g.,* Fed. Appellees Pet. at 7, part IA (entitled "Supreme Court Precedent Holds that a 'Substantial Burden' Must Coerce an Individual into Violating His Religion or Penalize a Religious Exercise").

that ultimately was enacted into law re-inserted the explicit reference to the compelling interest test in *Yoder* and *Sherbert*. *See* 42 U.S.C. §2000bb (citing these two cases by name). The conclusion to be drawn is that Congress knew what it was doing, and in fact chose to reinstate the broad protection of religious exercise to its "zenith" point in those seminal cases. *See also Russello v. United States*, 464 U.S. 16, 23-24 (1983) (holding that where Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it can be presumed that the limiting language was not intended); *accord Nuclear Info. & Res. Svc.*, 457 F.3d at 962.

Finally, Congress' explicit overturning of the *Smith* case through the RFRA statute is one further demonstration that *Lyng* is no longer valuable precedent. One of the key passages of the *Smith* case relies on *Lyng* for support. *See* S. Rep. No. 103-111, at 6 (1993) (quoting *Smith*, 494 U.S. at 885). By repudiating *Smith*, which relied heavily on *Lyng* for its key passages, RFRA repudiated *Lyng* as well.

Appellees' argument that RFRA's legislative history supports their view that the language of *Lyng* continues in effect is based upon a truncated quotation which, when read in full, states that the Committee expresses neither approval nor disapproval of that case. Fed. Appellees Pet. at 11 (quoting S. Rep. No. 103-111,

at 9 & n.19 (citing *Lyng* and *Bowen*)); *see also* ASR Pet. at 10.[11] In any event, this Senate Committee note is ambiguous at best and does not outweigh the plain language of the statute that the application of the strict scrutiny test applies "in all cases," 42 U.S.C. §2000bb(b)(1), or the corresponding language in the House Committee Report ("All governmental actions which have a substantial external impact on the practice of religion would be subject to the restrictions of this bill."). H.R. Rep. No. 103-88, at 5.

3. The panel correctly applied RFRA's strict scrutiny to the unique factual circumstances of this case.

Ultimately, cases depend on their own facts. *See, e.g., Gonzales*, 546 U.S. at 1220 (holding that harm under RFRA must be scrutinized based on the specific requests of particular religious claimants) (citing *Sherbert* and *Yoder*); *id.* at 1223-24 (citing *Cutter v. Wilkinson*, 574 U.S. 709 (2005)); S. Rep. No. 103-111, at 9 (stating that RFRA's single test "should be interpreted with regard to the relevant circumstances *in each case*") (emphasis added). The panel's application of RFRA to the unique facts before it was appropriate and correct. Nevertheless, Appellees raise the specter of unintended consequences, and a "parade of horribles" if the panel's decision stands. *See, e.g.,* ASR Pet. at 4 ("The panel's erroneous RFRA

[11] In addition, the Forest Service goes on to say that Congress "*explicitly* preserved this aspect of *Lyng* in enacting RFRA." Fed. Appellees Pet. at 19 (emphasis added). To back up this statement, the Forest Service quotes the Senate Report on RFRA – which is legislative history, and thus certainly not *explicit* in the statute.

analysis radically limits the government's ability to manage millions of acres of federally-owned land considered sacred by some Native American religious practitioners.").[12] This "parade of horribles" line of argument was rejected by Congress through the very enactment of RFRA to overturn *Smith*. The majority in *Smith* had determined that the original compelling interest test (*i.e.* from *Sherbert* and *Yoder*) would be inappropriate outside of certain limited contexts, or else "anarchy" would ensue from the "supposed inability of many laws to meet the test; and exemption from a variety of civic duties." S. Rep. No. 103-111, at 6 (citing *Smith*, 494 U.S. at 888). By enacting RFRA and overturning *Smith*, Congress rejected this slippery slope line of reasoning. The Supreme Court has confirmed this in the recent *Gonzales* case. *See Gonzales*, 546 U.S. at 1223-24 (rejecting the government's "slippery slope" argument as a "classic rejoinder of bureaucrats" that was inapplicable because Congress determined through RFRA that the strict scrutiny test "was a workable test").

Furthermore, the panel's decision is appropriate because of the unique circumstances of this case, which are self-limiting. The San Francisco Peaks are uniquely significant in the Hopi religion (as well as the religions of the other area Tribes), as the Forest Service, District Court, and Ninth Circuit panel have all recognized. *See, e.g.,* Op. at 2862 (noting that the Forest Service 's Environmental

[12] *See also id.* at 15 (noting several other sacred sites); Fed. Appellee Pet. at 17-18 (noting the many culturally important sites to tribes in the Southwest).

Impact Statement recognized the centrality of the Peaks to the Hopi and Navajo religions); *Navajo Nation v. U.S. Forest Service*, 408 F. Supp.2d 866, 894 (D. Ariz. 2006) (recognizing "central importance" of Peaks to "Hopi tradition, culture, and religion"); Op. at 2846-2853 (discussion of the Peaks' unique significance for all Tribal Plaintiffs). The panel was correct in noting the singular significance of the Peaks as a sacred site, much like Mecca in the Muslim faith. Op. at 2846-2853; 2857. Because of the Peaks' unique status, the panel's decision was correct to not be concerned about opening the floodgates to every last spiritually significant tribal site in the United States.

The governmental action disputed here by the Plaintiff Tribes is also extreme and unusual. The record demonstrates that the proposed use of 100% treated sewage effluent for artificial snow creation is unique in the United States. Op. at 2855.[13] Therefore, the panel's decision does not create a danger of disrupting a large set of "routine" land management decisions, despite the appellees' claims to the contrary. *See* Fed. Appellees Pet. at 18-19; ASR Pet. at 14-15. The facts themselves "distinguish this case from another lawsuit in which . . . similarly situated religious objectors[] might seek to exclude all human activity but their own from sacred areas of the public lands." ASR Pet. at 15 (quoting

[13] ASR curiously refers to the unprecedented artificial snowmaking proposal as "these mild facts." ASR Pet. at 2.

Lyng, 485 U.S. at 452-53). Indeed, as the panel pointed out, Op. at 2868, the Plaintiffs are not seeking even to curtail the ASR's existing activities.[14]

This case is also quite factually distinct from the prior case of *Wilson v. Block*, 708 F.2d 735 (D.C. Cir. 1983), in which earlier skiing upgrades to the Snowbowl were upheld against Free Exercise challenges. That case – from 1983 – pre-dates RFRA and RLUIPA and thus has questionable precedential value at best. However, even if RFRA and RLUIPA had not altered any of the underlying legal analyses between the time of *Wilson* and the current day, the factual distinctions between the two cases are noteworthy. Artificial snowmaking is different in kind from any of the proposed actions at issue in *Wilson* – which included various physical upgrades to the ski facility now operated by ASR. *Id.*; Op. at 2839. As fellow Appellants have argued in their pleadings, the difference is like that between a scar on the surface of the Peaks and the injection of poison into the Peaks. Op. at 2856-57.[15] Thus, the two cases could logically end in different results, even if the exact same "burden" test were applicable in both cases. *See*

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[14] *See also* Fed. Appellees Pet. at 13 (stating that "some of the Plaintiffs testified in this case that they opposed any development at all at Snowbowl and that it should be shut down completely."). That point is irrelevant because the Tribes' position in this case is to challenge the decision to allow artificial snowmaking from treated sewage effluent, not to challenge all human activity in the Snowbowl area. *See, e.g.,* Op. at 2868; Hualapai Reply Br. at 26.

[15] *See also* Hualapai Reply Br. at 4-5, 24; Hualapai Br. at 16.

Gonzales, 546 U.S. at 1221 (noting that the "fundamental purpose" of strict scrutiny is to take "relevant differences into account").

Each RFRA case must be considered on its own merits based on its own circumstances, *Gonzales*, 546 U.S. at 1220-21, and the panel did just that. In short, this proceeding does not involve a question of "exceptional importance" warranting rehearing by the panel or the full Circuit, Fed. R. App. P. 35(a)(2), if only because of the limitations inherent in the unique facts of this case.

4. Appellees' requests for rehearing are based on mischaracterizations of the panel's opinion.

Appellees mischaracterize in their Petitions the finding of "substantial burden" underlying the panel opinion. The Forest Service states that the panel's RFRA decision was made "solely" because the Plaintiffs "believe" that their spiritual connection to the mountain will be weakened as they conduct their prayers to it, "often from miles away." Fed. Appellees Pet. at 1-2.[16] On the contrary, the panel also found that specific rites and practices would be disrupted by the use of treated sewage effluent as artificial snow on the Peaks. *See* Op. at 2956-59; 2862. As several witnesses testified, certain practices of the various Plaintiff Tribes will be made essentially impossible – including the creation of

[16] *See also* Fed. Appellees Pet. at 6 (claiming the panel based its "substantial burden" finding on the Plaintiff's beliefs that their "prayers to the Peaks would no longer be answered"); ASR Pet. at 3 (characterizing the panel's decision as based solely on the "undermining [of] the tribes' spiritual connection to the mountain").

sacred medicine bundles and the collection of water, soil, and vegetation from the Peaks during sacred pilgrimages. *See, e.g.,* Op. at 2856-57 (describing that Navajo practitioners would no longer be able perform pilgrimages to the Peaks to rejuvenate the medicine bundles that are essential to Navajo ceremonies); *id.* at 2858 (describing that Hualapai practitioners would no longer be able to collect sacred water for certain ceremonies).[17] Thus, the panel decision is not based on "spiritual disquiet" alone, as the appellees intimate,[18] but on the disruption of practices integral to the Tribes' religious belief systems. The Appellees are correct that under RFRA a "substantial burden" must be more than an "inconvenience." ASR Pet. at 12 (citing *Guam v. Guerrero*, 290 F.3d 1210, 1222 (9th Cir. 2002)). But the Tribal Plaintiffs here will be more than inconvenienced: the most sacred of their sites will no longer yield pure water, soil, and vegetation for prayer and

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[17] The Hopi pilgrimages to the Peaks collect water for religious ceremonies and boughs of fir. Op. at 2847. The Navajo medicine bundles in every household consist of stones, shells, herbs, and soil from each of the four sacred mountains. Op. at 2848-49. The Hualapai ceremonies include drinking sacred water from the Peaks, steaming it on heated rocks, and brushing the water on their bodies. Op. at 2851. Arizona law prohibits use of treated sewage effluent for "evaporative cooling or misting," among other uses. Op. at 2855 (citing Ariz. Admin. Code § R18-9-704(G)(2). A traditional Havasupai practitioner testified that the water from the Peaks might cause the Tribe's sweat lodge ceremony to "die out altogether, if tribal members fear 'breathing the organisms or the chemicals that may come off the steam.'" Op. a 2861.

[18] *See, e.g.,* ASR Pet. at 1, 14.

collection. Op. at 2856-59.[19] The Forest Service's decision essentially forces involuntary abandonment of important religious tenets *and* practices. Op. at 2862.

The Appellees' Petitions do not challenge the panel's decision with regard to the nature of the government's compelling interest[20] and the least restrictive means factor. Understandably so, since the panel's decisions with regard to both of those issues are correct.

B. The panel correctly found that the Forest Service's evaluation of human ingestion of snow made from treated sewage effluent was lacking, in violation of NEPA.

With regard to NEPA, the panel ruled that the Forest Service violated that Act by not fully discussing the risks of human ingestion of snow made from treated sewage effluent. *See* Op. at 2876-2886. The panel found simply that the discussion on that point was insufficient, Op. at 2880, which does not merit

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[19] The record in the case demonstrates that the movement of groundwater at the Peaks is not entirely known. *See, e.g.,* Hualapai Br. at 40 (recalling the Forest Service hydrologist's testimony that once groundwater infiltrates into the land surface, one cannot be certain where it will wind up) (citing ER at 593-595). Therefore, the geographical limits of the snowmaking area are inconsequential to the "substantial burden" analysis. *Compare* ASR Pet. at 14 (claiming that the panel's decision flouts geography).

[20] The Federal Appellees do overstate in their Petition the potential bad effects on the Snowbowl. The Forest Service insinuates that the panel's decision could strike a mortal blow to the Snowbowl, claiming that the Snowbowl's "continued operation" is in danger. Fed. Appellees Pet. at 4. However, the Forest Service contradicts itself in the very next sentence, which states that the area has become "increasingly popular," with concerns of "overcrowding." *Id.* at 4. Moreover, the panel specifically found that the Snowbowl operation was not in danger of going out of business. Op. at 2865.

rehearing. The Forest Service itself does not even challenge the panel's NEPA decision in its request for rehearing, focusing instead on RFRA. *See* Fed. Appellees' Pet. Only ASR requests rehearing with regard to the NEPA portion of the decision. *See* ASR Pet. at 15-18. However, ASR does not even discuss the ingestion issue, much less present a showing that the panel's decision is inconsistent with Supreme Court or Ninth Circuit case law on NEPA or that the issue is of exceptional importance. *Id.* at 16-18; Fed. R. App. P. 35(a). Therefore, rehearing on the NEPA issue would be inappropriate and is not merited.

III. CONCLUSION

In accordance with RFRA, the panel arrived at a unanimous conclusion which was correct as a matter of law and appropriate to the unique factual circumstances of the case. Recent case law of this Circuit and the Supreme Court were relied upon by the panel and support the panel's decision. Therefore, the panel's decision does not "fundamentally alter the law" as claimed by Appellees. *See, e.g.,* ASR Pet. at 2. Because the panel's decision is consistent with RFRA case law, the ruling does not require modification to "secure or maintain uniformity of the Court's decisions." Moreover, the panel appropriately followed RFRA's admonition to base its decision on the particular facts of each case – and thus does not involve a question of exceptional importance that reaches beyond the circumstances of this case. Fed. R. App. P. 35(a)(1), (2). Therefore, rehearing of

this case by either the panel or the full Circuit sitting *en banc* is unnecessary and unwarranted under the rules of the Court.

RESPECTFULLY submitted this 21st day of June, 2007.

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NAVAJO NATION *et al.*,

Plaintiffs/Appellants,

v.

U.S. FOREST SERVICE, *et al.*,

Defendants/Appellees,

and

ARIZONA SNOWBOWL RESORT LIMITED PARTNERSHIP,

Intervenor/Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
(Honorable Paul G. Rosenblatt)

NAVAJO PLAINTIFFS'/APPELLANTS' RESPONSE TO PETITIONS FOR REHEARING AND REHEARING *EN BANC*

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES

STATUTES & REGULATIONS

This Response is filed on behalf of the Navajo Nation, the White Mountain Apache Tribe, the Yavapai-Apache Nation, the Havasupai Tribe, Rex Tilousi, Dianna Uqualla, the Sierra Club, the Center for Biological Diversity, and the Flagstaff Activist Network (hereinafter collectively referred to as "Navajo Plaintiffs").

I. NEITHER REHEARING NOR REHEARING EN BANC IS WARRANTED IN THE INSTANT CASE

> An *en banc* hearing or rehearing is not favored and ordinarily will not be ordered unless: (1) . . . necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance.

FRAP 35(a); *see also* Circuit Rule 35-1 ("When the opinion of a panel directly conflicts with an existing opinion by another court of appeals and substantially affects a rule of national application in which there is an overriding need for national uniformity, the existence of such conflict is an appropriate ground for suggesting a rehearing *en banc*.") (emphasis added).

Notwithstanding Defendants' assertions to the contrary, the elements that warrant either rehearing or rehearing *en banc* are not present in the instant case. As set forth herein, Defendants, in their respective petitions, simply reiterate the arguments they made to the lower court and to the panel, and misconstrue the law and facts at issue to bolster their procrustean bent. *See, e.g., Navajo Nation, et al., v. U.S. Forest Service*, 479 F.3d 1024, 1031-1048 (9th Cir. 2007) (addressing

Defendants' RFRA arguments); *Id.* at 1038, 1050-1053 (addressing Arizona Snowbowl Resort Limited Partnership's ("ASR") NEPA argument).

A. The Instant Case Does Not Conflict with Any of the Cases Relied on by Defendants – Rehearing of the Panel's Decision On the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb ("RFRA") is Not Warranted

Defendants argue that *Lyng v. Northwest Indian Cemetery Assn.*, 485 U.S. 439, 108 S.Ct. 1319 (1988); *Bowen v. Roy*, 476 U.S. 693, 106 S.Ct. 2147 (1986); and *Wilson v. Block*, 708 F.2d 735 (DC Cir. 1983), pre-*Smith* First Amendment cases that do not apply the compelling interest test mandated by RFRA, are controlling. As a result, according to Defendants, there is a direct conflict between the decision in the instant case and these prior decisions. *See,* Fed. Br. at 11; ASR Br. at 7-12.

RFRA, however, requires application of the compelling interest test in all cases where there is a substantial burden on the exercise of religion. The stated purpose of RFRA was to "restore the compelling interest test as set forth in *Sherbert v. Verner,* 374 U.S. 398, 83 S.Ct. 1790 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526 (1972) and to **guarantee its application in all cases** where free exercise of religion is substantially burdened." 42 U.S.C. § 2000bb(b)

(emphasis added).[1] The cases cited by Defendants are inapposite. There is no conflict between the instant case and any other matter. Neither rehearing, nor rehearing *en banc* is warranted.

1. RFRA Provides Broader Protections to the Exercise of Religion Than the First Amendment Cases Relied on by Defendants

In *Employment Division Dep't of Human Res. v. Smith*, 494 U.S. 872, 110 S.Ct. 1595 (1990), the Supreme Court held that laws that are neutral and generally applicable are not subject to strict scrutiny under the Free Exercise Clause. *Id.* at 879-882. In direct response to *Smith*, Congress enacted RFRA. As indicated above, RFRA requires application of "the compelling interest test . . . to all government acts . . . that substantially burdened religious exercise." 42 U.S.C. §§ 2000bb-1, 2000bb(b).

Thereafter, in *City of Boerne v. Flores*, 521 U.S. 507 (1997), the Supreme Court ruled that certain provisions of RFRA, as they applied to state and local governments (not the federal government), were unconstitutional. In finding that

[1] RFRA provides that, "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b)." Subsection (b) provides that, "[g]overnment may substantially burden a person's exercise of religion only if it demonstrates that the 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 governmental interest." 42 U.S.C. §2000bb-1(a),(b).

Congress had exceeded its authority as to the states, the Court in *City of Boerne* found, *inter alia*, that RFRA:

> **imposes in every case a least restrictive means requirement – a requirement that was not used in the pre-*Smith* jurisprudence RFRA purported to codify –** which also indicates that the legislation is broader than is appropriate if the goal is to prevent and remedy constitutional violations.

City of Boerne, 521 U.S. at 535 (emphasis added).

In short, the Supreme Court has already found that RFRA affords greater protections to the practice of religion than set forth in the pre-*Smith* cases that do not apply the compelling interest test. On this basis alone, the cases relied on as controlling by Defendants (all pre-*Smith* cases that do not apply the compelling interest test mandated by RFRA) are inapposite and rehearing is not warranted.[2]

The evolution of RFRA, however, does not end with *City of Boerne*. Congress responded to *City of Boerne* by enacting the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), 42 U.S.C. § 2000cc. In RLUIPA, Congress amended certain provisions of RFRA, including the definition of "exercise of religion," to ensure even more sweeping protections to religious practitioners. Under RFRA as enacted in 1993, the term "exercise of religion"

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[2] The sweeping reforms set forth by RFRA determined to be unconstitutional as to the States in the *City of Boerne* decision, remain applicable to federal actions. *See, Guam v. Guerrero*, 290 F.3d 1210, 1220-1222 (9th Cir. 2002).

meant the "exercise of religion under the First Amendment to the Constitution." 42 U.S.C. § 2000bb-2(4) (1993). With the enactment of RLUIPA in 2000, however, the definition of "exercise of religion" in RFRA was expanded to include, "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." RFRA at 42 U.S.C. § 2000bb-2(4)(2000); RLUIPA at 42 U.S.C. § 2000cc-5(7)(A)(2000); *Kikumura v. Hurley*, 242 F.3d 950, 960 (10th Cir. 2001); *but, c.f.* Fed. Br. at 3 (improperly defining "exercise of religion" under RFRA as "the exercise of religion under the First Amendment to the Constitution.").

2. The Cases Relied on by Defendants Do Not Apply the Compelling Interest Test Mandated by The Express Language of RFRA

In conducting its First Amendment analysis, the *Lyng* Court expressly rejects application of the compelling interest test mandated by RFRA. *Lyng*, 485 U.S. at 452 ("One need not look far beyond the present case to see why the analysis in *Roy*, but not respondents' proposed extension of *Sherbert* and its progeny, offers a sound reading of the constitution."). The Court in *Roy* similarly refused to apply the compelling interest test mandated by RFRA. *Roy*, 476 U.S. at 707 ("The test applied in cases like *Wisconsin v. Yoder*, 406 U.S. 205 (1972) is not appropriate in this setting.").[3] *Wilson* also rejected application of the compelling

[3] As stated in *Smith,* 494 U.S. at 883, the case that RFRA sought to overturn, "we declined (in *Lyng*) to apply *Sherbert* analysis to the Government's logging and road construction activities . . . even though it was undisputed that the

interest test mandated by RFRA. *Wilson*, 708 F.2d at 743 (The balancing utilized in *Sherbert* and *Thomas* apply only in cases regarding government benefits).

As indicated previously, the Supreme Court has already found that RFRA "imposes in every case a least restrictive means requirement – a requirement that was not used in the pre-*Smith* jurisprudence RFRA purported to codify." *City of Boerne*, 521 U.S. at 535. The cases relied upon by Defendants do not control in the instant matter.

a. The Relevant Portions of Wilson Have Been Overruled by Lyng – Wilson is No Longer Valid

As indicated above, *Wilson* rejects application of the compelling interest test mandated by RFRA. It should, however, also be noted that the *Wilson* court's analysis of the First Amendment rights of Native Americans, *vis-à-vis* government land use decisions, is at odds with *Lyng*. *Wilson* holds that the Free Exercise Clause can create a right to restrict government land use, but only when plaintiff can demonstrate that the specific site is "indispensable" to the practice of religion.

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activities 'could have devastating effects on traditional Indian practices.'" *Id.; see also, e.g., Lyng* 485 U.S. at 469 (Brennan, Marshall, Blackmun dissenting) (Tribe would have been entitled to First Amendment protection if *Sherbert* or *Yoder* was applied).

Wilson, 708 F.2d at 743-744.[4] In *Lyng*, the Supreme Court subsequently held that Native Americans cannot rely on the Free Exercise Clause to challenge government land use decisions. *Lyng*, 485 U.S. at 452. Thus, at best *Wilson* is of only marginal efficacy – indeed, the otherwise relevant portions of *Wilson* relied on by Defendants are no longer valid.

3. The Operable Language of the Free Exercise Clause is Distinguishable From the Operable Language of RFRA – There is No Conflict To Justify Rehearing

As the panel noted in the instant case (479 F.2d at 1032), the operable language under scrutiny in *Lyng, Roy*, and *Wilson*, was that "Congress shall make no law . . . prohibiting the free exercise of religion." *E.g., Lyng*, 485 U.S. 451 and 456. The statutory language at issue in the instant case provides, in part, however, that "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability . . ." 42 U.S.C. §2000bb-1(a),(b). Thus, as discussed *supra*, RFRA "goes beyond the constitutional language that forbids the 'prohibiting' of free exercise of religion

[4] Assuming, *arguendo*, that the *Wilson* analysis remained in tact after *Lyng*, the "indispensability" requirement used by the *Wilson* Court in its First Amendment analysis is directly at odds with RFRA, which defines "exercise of religion" to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000bb-2(4)(2000).

and uses the broader verb 'burden'. . ." *Navajo Nation*, 479 F.3d at 1032, *quoting U.S. v. Bauer*, 84 F.3d 1549, 1558 (9th Cir. 1996). Again, the Free Exercise cases cited by Defendants are not controlling.

4. The Panel Decision Does Not Conflict With Guam v. Guerrero, 290 F.3d 1210 (9th Cir. 2002)

Federal Defendants aver that the panel decision is inconsistent with *Guerrero* because of a reference in *Guerrero* to *Thomas v. Review Board of Indiana Emp. Sec. Div.*, 450 U.S. 707, 101 S.Ct. 1425 (1981). Specifically, that "[a] statute burdens the free exercise of religion if it 'puts substantial pressure on an adherent to modify his behavior and to violate his beliefs.'" Fed Br. at 15; *citing*, *Guerrero*, 290 F.3d at 1222.[5]

The quotation in *Guerrero* from *Thomas* is neither incorrect nor at odds with the instant case. Indeed, plaintiffs do not dispute that a "statute burdens the free exercise of religion if it puts substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Thomas*, 450 U.S. at 717-718. This language was, however, not exhaustive of what constitutes a substantial burden, either in

[5] ASR does not make this same assertion. Rather, according to ASR, the panel decision is in direct conflict with *Guerrero*, because "*Guerrero* relied on pre-*Smith* cases to determine whether a substantial burden exists." ASR Br. at 12. As discussed *supra*, a blanket reliance on pre-*Smith* cases is not appropriate. *See, e.g., City of Boerne*. . . The discussion of the applicability of pre-*Smith* cases, *supra*, is responsive to ASR's claim and incorporated herein, but not reiterated.

Thomas or in *Guerrero* – neither of which concerned government land use and/or religious practices holding land sacred. *Guerrero* is not adopting a rule of law by the reference at issue. The instant matter is not in conflict with *Guerrero*.

In the alternative, *Guerrero* simply provides a string citation to three Free Exercise cases. It provides no discussion or analysis of what constitutes a substantial burden under RFRA. There is no consideration of alternatives. The Court does not even mention the fact that the definition of "exercise of religion" was amended by RLUIPA. In the Ninth Circuit:

> [w]here it is clear that a statement is made casually and without analysis, where the statement is uttered in passing without due consideration of the alternatives . . . it may be appropriate to re-visit the issue in a later case. However, any such reconsideration should be done cautiously and rarely – only where the later panel is convinced that the earlier panel did not make a deliberate decision to adopt the rule of law it announced.

U.S. v. Johnson, 256 F.3d 895, 915 (9th Cir. 2001) (*en banc*).

Guerrero does not announce or adopt a rule of law, but assuming *arguendo* that it does, there is no discussion of and/or apparent "deliberate decision to adopt the rule of law it [purportedly] announced." *Id.* Again, neither rehearing nor rehearing *en banc* is warranted.

B. No Issue of Exceptional Importance Warranting Rehearing is Present in the Instant Case

Defendants assert that this matter is of exceptional importance because the "panel's decision . . . exposes federal land management agencies to a requirement to show a compelling interest for actions affecting a location on public lands that any individual holds sacred or utilizes in his or her religious practice." Fed. Br. at 18; ASR Br. at 13-14 ("The panel's unprecedented reading of RFRA would allow anyone to challenge any federal action that . . . causes them 'spiritual disquiet' and force the Government to defend that action under strict scrutiny.").

Notwithstanding Defendants' assertions to the contrary, both RFRA and the instant case actually require a plaintiff to establish a "substantial burden on the exercise of religion" before the government must show a compelling interest. *See, Navajo Nation*, 479 F.3d at 1031-1032. Even if stated in an inflammatory and not completely accurate way, Defendants generally appear to argue that review is warranted because this case impacts millions of acres of government land. *E.g.*, Fed. Br. at 10. Defendants' assertions are wrong.

The panel's analysis is fact specific and impacts only the special use permit area on the San Francisco Peaks. No other site or location is identified as sacred. No analysis of the burdens presented by specific projects at other locations is even

presented. Indeed, the panel is obligated to refrain from considering other sites and projects in its analysis. The type of far reaching review of unrelated impacts that Defendants appear to want is improper under RFRA. *E.g., Gonzales v. O Centro Espirita Beneficente*, 126 S.Ct. 1211, 1220 (2006) ("RFRA, and the strict scrutiny test it adopted, contemplate an inquiry more focused than the Government's categorical approach . . . [the court must look] beyond broadly formulated interests justifying the general applicability of government mandates and scrutinize the asserted harm of granting specific exemptions to particular religious claimants."). Defendants' attempt to define the government's broadly formulated interests in land management, so as to justify rehearing, are not supported by a proper application of the law. This case does not involve millions of acres of government land. Rehearing is not warranted.

II. ASR'S NEPA ARGUMENT IS NOT LEGALLY SUPPORTABLE – IT DOES NOT JUSTIFY REHEARING OR REHEARING EN BANC

ASR (not the Federal Defendants) appears to be unhappy with the Court's finding that Defendants failed to properly consider the impacts on children ingesting snow made from reclaimed sewer water under NEPA. ASR Br. at 15-18. ASR, however, fails to state an adequate legal basis for rehearing. *E.g., Hart v. Massanari*, 266 F.3d 1155, 1172 (9th Cir. 2001), *quoting EEOC v. Ind. Bell Tel.*

Co., 256 F.3d 516 (7th Cir. 2001) (*en banc*) (Posner, J., concurring) ("we do not take cases *en banc* merely because of disagreement with a panel's decision, or rather a piece of a decision . . . even in cases that particularly agitate judges. . ."). There is no conflict or question of exceptional importance at issue. Notwithstanding the foregoing, the panel made no legal or factual error in ruling on this issue. *See Navajo Nation*, 479 F.3d at 2884-2886.[6]

ASR also asserts that it was "critical error" for the Court to find that agency reliance on ADEQ's designation of Class A+ reclaimed water for snowmaking was not sufficient to satisfy its NEPA obligations. Assuming, *arguendo*, that "critical error" justifies rehearing, ASR is mistaken on the law. It is the federal agency responsible for the project that bears the non-delegable obligation to comply with NEPA. *See* 42 U.S.C. § 4332(2)(C); *Calvert Cliffs v. U.S. Atomic Energy Commission*, 449 F.2d 1109, 1117-1118 (D.C. Cir. 1971) (Section 4332(2)(C) indicates a congressional intent that "environmental factors, as compiled in the 'detailed statement,' be considered through agency review

[6] As an aside, Navajo Plaintiffs respectfully disagree with the Court's ruling on the adequacy of Defendants' consideration of the impacts of withdrawing 1.5 million gallons a day from recharging the aquifer at the Rio De Flag outfall. The aquifer impacts and other discussion in Chapter 3H of the EIS do not apply to the outfall, but rather to reclaimed water sprayed on the mountain. The assertion of minimal impact is based on faulty data. Even if the analysis was adequate, however, the agency's express refusal to consider these impacts, in-and-of-itself, violates NEPA.

processes."). Indeed, blanket reliance on state or local conclusions or reports rendered outside of the NEPA process is generally not allowed. *E.g., Trinity Episcopal School Corp. v. Romney*, 523 F.2d 88, 94 (2d Cir. 1975) ("HUD . . . simply adopts the conclusion of the New York City Housing Authority. ... This ... does not conform with HUD's [NEPA] responsibilities . . . the federal agency must itself determine what is reasonably available ...."); *Sierra Club v. Alexander*, 484 F.Supp. 455, 466-467 (N.D. NY 1980) (". . . while it is true that Corps officials cannot rely solely upon studies and reports prepared by Pyramid or even the decision of the State DEC, the officials are clearly not prohibited from utilizing material so long as they exercise independent judgment."); *Greene County Planning Board v. Federal Power Commission*, 455 F.2d 412, 420 (2d Cir. 1972) (Federal Power Commission has abdicated a significant part of its [NEPA] responsibility by substituting the statement of PASNY for its own.").[7]

ASR also appears to assert that there is a conflict between the instant decision and other cases. To that end, ASR cites to *Friends of the Payette v. Horseshoe Bend Hydroelectric Co.*, 988 F.2d 989 (9th Cir. 1993), and *Border*

[7] Even the Council on Environmental Quality regulation at 40 C.F.R. § 1506.2 (elimination of duplication with state and local procedures) does not allow for the wholesale adoption of state agency conclusions. It provides for cooperation, joint planning, joint research, joint studies, and even preparation of joint environmental assessments. *Id.* In the instant case, ADEQ designation of wastewater to make snow was accomplished completely outside of the NEPA process.

Power Plant Working Group v. Dep't of Energy, 260 F.Supp. 2d 997 (S.D. Cal 2003). ASR Br. at 17. These cases do not stand for the proposition for which they are cited.

Neither case involves the preparation or adequacy of an EIS, but rather the decision ***not*** to prepare an EIS. Notwithstanding the foregoing, in *Friends of Payette*, the Corps reviewed studies prepared by the state. It did not adopt state findings as its own. *Friends of the Payette*, 988 F.2d at 993. Indeed, in response to the Corps' reliance on an EA prepared by another federal agency, the Court found that, "[t]he Corps reviewed the studies and then conducted its own independent analysis of the project's environmental impacts."). *Id.* at 995.

In *Border Power Plant Working Group*, the agency, in pertinent part, analyzed the air emissions of the project and determined that the emissions were below the health based National Ambient Air Quality Standards set for particular pollutants by the U.S. EPA. *Id.* at 1020-1021. This is qualitatively different from failing to analyze health impacts on children who might eat snow, because a state agency approves reclaimed sewer water for snowmaking.

III. CONCLUSION

Neither rehearing nor rehearing *en banc* is warranted in the instant case. As set forth above, there is neither an internal conflict nor a conflict between the

Circuits. There is no addressable issue of exceptional importance that is raised by the instant decision. The U.S. Supreme Court has already determined that pre-*Smith* cases (such as those relied on by Defendants) that do not apply the compelling interest test mandated by RFRA are not controlling. Moreover, it appears that ASR is simply unhappy with the Court's holding *vis-à-vis* agency failure to comply with NEPA by not adequately considering potential health impacts on children who might ingest snow made from reclaimed sewer water. Disagreement with the Court is not a legitimate basis for the granting of rehearing – even if it was, the arguments made by ASR are not availing. Navajo Plaintiffs respectfully request that Defendants' respective Petitions for Rehearing or in the Alternative Rehearing *En Banc*, be denied.

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