Case Nos. 06-15371, 06-15436, 06-15455 (Consolidated)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NAVAJO NATION, et al.,	)	
Plaintiffs/Appellants,	)	
	)	Nos.: 06-15371
and	)	06-15436
	)	06-15455
HUALAPAI TRIBE, et al.,	)	
Plaintiffs/Appellants,	)	Dist. Ct. Nos.: CV-05-1824-PGR
	)	CV-05-1914-PGR
and	)	CV-05-1949-PGR
	)	CV-05-1966-PGR
HOPI TRIBE,	)	
Plaintiffs/Appellants,	)	Appeal from
	)	District of Arizona, Phoenix
v.	)	
	)	
UNITED STATES FOREST	)	**APPELLANT HOPI TRIBE'S**
SERVICE, et al.,	)	**RESPONSE TO PETITION FOR**
Defendants/Appellees, and	)	**REHEARING AND PETITION**
	)	**FOR REHEARING EN BANC**
ARIZONA SNOWBOWL	)	
RESORT LIMITED	)	
PARTNERSHIP,	)	
Defendant-Intervenor/Appellee.	)	
	)	

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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. <u>REHEARING IS NOT WARRANTED.</u>

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

[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

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[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

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[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*

[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

[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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