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

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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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.

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

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[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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