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

D.C. Nos. CV-05-01824, CV-05-01914, CV-05-1949, CV-05-01966-PGR

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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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.

DATED: June 21, 2007.

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CERTIFICATE OF COMPLIANCE

I certify, pursuant to Ninth Circuit Rule 35-4 and 40-1, that the attached Plaintiffs'/Appellants' Response to Petitions for Rehearing and 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, certificate of compliance and statement of related cases is 3,520. The Response does not exceed 25 pages.

DATED: June 21, 2007.

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CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the foregoing Plaintiffs'/Appellants' Response to Petitions for Rehearing and Rehearing *En Banc* were served via U.S. Mail on June 21, 2007, addressed to the following:

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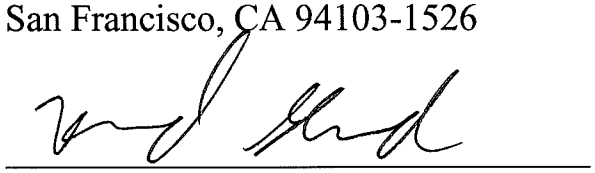

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