

## \*1013 SNOWBOWL: NO GREEN DEED GOES UNPUNISHED

### INTRODUCTION

The litigation over artificial snowmaking on the San Francisco Peaks in Northern Arizona is one of the most hotly debated local environmental topics in recent memory. The controversy between the Arizona Snowbowl Resort Limited Partnership (“Snowbowl”) and the Indian Tribes relates to Snowbowl’s proposed use of reclaimed wastewater for the purpose of making artificial snow, as a part of the Snowbowl’s expansion plan. Snowbowl’s plan has encountered stiff resistance and has drawn extensive media and Internet coverage. The proposal has even prompted the production of a documentary,<sup>1</sup> and websites have sprung up dedicated to covering every political and judicial step of the parties.<sup>2</sup> If one searches for “Snowbowl and sewer,” the Google search engine will provide thousands of hits. The case is hardly limited to those interested in tribal advocacy, as it touches and concerns many other legal issues, including possible adverse harm on environment and public health, freedom of religion, scope of the agency action, violation of state law and public policy, tribal water rights, public nuisance, and even American adherence to international standards to which the United States has expressed its commitment.

The goal of Snowbowl, Northern Arizona’s primary ski resort, is to provide a quality recreation venue for local and out-of-state skiers and snow enthusiasts during the winter months. However, the unpredictable Arizona weather and unreliable snowfall has prompted Snowbowl to develop alternative methods to meet the expectations of patrons. To ensure that the skiers and snowboarders have plenty of snow, the business invested in an expansion plan calling for the production of artificial snow. Aware of the fact that environmental activists and coalitions fearlessly file for injunctive relief to draw attention to conservation **\*1014** problems, and given environmentalists’ mantra of promoting alternative energy and recycling, the Snowbowl decision initially appeared to be a “green” decision designed to avoid the use of precious wild or natural water resources for mere recreational purposes. The City of Flagstaff agreed to sell reclaimed water from one of its wastewater treatment plants to the resort for snow production.

Why should anyone oppose a program that *actually recycles* sewer water to make snow? Interestingly, regardless of business effort to “go green,” it nevertheless met vehement and widespread opposition on environmental and religious grounds from Native American Tribes who consider the peaks as sacred ground and consider the idea of dumping repurposed recycled wastewater on their cherished peaks to be grossly insensitive at best, and sacrilegious at worst.

This controversy has a number of players on the defense side. The first target was the United States Forest Service (“USFS”), which approved the permits for using reclaimed water.<sup>3</sup> Then, the Hopi Tribe independently sued the vendor, the City of Flagstaff (“the City”), which based its contract with Snowbowl on the USFS’s permit.<sup>4</sup> The City entered into a contract with Snowbowl to provide up to 1.5 million gallons of reclaimed water every day from November to February each year.<sup>5</sup> Denied any form of preliminary relief in the first round of litigation, the Tribes are pressing for extra-judicial relief on the executive level by formally requesting that President Obama suspend the permit issued by the USFS. Accordingly, the Tribes have pressed Snowbowl into a corner using three distinct tactics: pressuring against the vendor; litigating against the

administrative power (USFS); and invoking with the executive.

## **I. ROUND ONE. SAVE THE PEAKS VS. USFS**

The central piece of the controversy is the series of lawsuits known as *The Save the Peaks Coalition v. U.S. Forest Service*. The first round of cases, based largely on religious grounds, was lost in 2009 when the United States Supreme Court declined to hear the case.<sup>6</sup> The following year, the Save the Peaks Coalition and nine concerned citizens (“Save the Peaks” or “Plaintiffs”) filed another suit against the USFS, this time on environmental and human health grounds. Save the Peaks asserted that the USFS in its Final Environmental Impact Statement did not properly follow the National Environmental Policy Act with respect to addressing the potential human health concerns regarding the use of reclaimed \*1015 wastewater to make snow. On December 1, 2010, Plaintiffs lost their battle in the Arizona District Court, as the Court stated that laches was readily apparent due to the “near completion of the project.”<sup>7</sup> The Plaintiffs tried to stop further progress on the Snowbowl project pending appeal to the Ninth Circuit by filing for an injunction with the trial court, but the motion for relief was denied on the grounds that: (1) Plaintiffs were unlikely to suffer immediate and irreparable harm; and (2) the balance of hardships and public interest did not weigh in Plaintiffs’ favor.<sup>8</sup> On March 2, 2011, they filed another motion--this time for an injunction pending appeal with the Ninth Circuit--but on March 31, 2011, the circuit court declined to grant interim relief.<sup>9</sup> The briefing has been completed and the parties are now scheduled for oral argument on January 9, 2012.

## **II. ROUND TWO. THE SUPPLY CHAIN IN THE CROSSHAIRS**

Despite the resounding defeats against the USFS, opponents sought other grounds for judicial relief. In August 2011 the Hopi Tribe filed a separate lawsuit against the City in Coconino County Superior Court, challenging the City’s decision in September 2010 refusing to *amend* or *cancel* the contract for the sale of reclaimed wastewater to the ski resort.<sup>10</sup> The Hopi Tribe asked for the permanent injunction of the contract for sale of reclaimed water to Snowbowl based on three claims: (1) violation of the Arizona law and public policy, (2) infringement of the Tribe’s water rights, and (3) public nuisance.<sup>11</sup> Interestingly, the Hopi Tribe’s position in this current litigation is narrowed to an objection to the use of the reclaimed water on the Peaks, whereas the Tribe’s traditional position was to prevent Snowbowl from operating a ski area.<sup>12</sup>

The City entered into a contract with the Snowbowl for the sale of the reclaimed water for the first time in 2002.<sup>13</sup> The contract sat dormant for many years and was extended a few times subject to federal and state environmental approvals of the specific snowmaking activity.<sup>14</sup> In July of 2010 the USFS completed its permitting process and issued an Amendment to the Special Use Authorization<sup>15</sup> to allow the Snowbowl expansion project to \*1016 move forward.<sup>16</sup> Later that month the City Water Commission held a public hearing to decide whether or not to approve a contract to sell potable water to Snowbowl in lieu of reclaimed wastewater. Following a series of public hearings, the City Council voted to proceed with the contract for sale of reclaimed wastewater.<sup>17</sup>

Interestingly, this lawsuit was triggered by the City’s final decision not to amend the contract for a drinking water substitute. A cynical outside observer might charge the Tribe with assuming this position as a matter of strategic convenience given that the use of the drinking water was not a viable alternative for the Tribe in the first place. In fact, one of the websites covering the controversy had posts of the flyers with a heading of “*Our Drinking Water is Up For Sale*” before the last public hearing that called for people “to stand for our future and respect” and ultimately oppose the use of drinking water for snowmaking.<sup>18</sup> Arguably, the Tribes are simply adamant against any advancement of the project, regardless of the nature of the water being used.

Additionally, the Hopi Tribe allege that some of the springs in the Coconino National Forest that may be recharged by snowmelt from the Snowbowl ski area are used as a domestic drinking water supply.<sup>19</sup> It is for the court to decide whether this claim is made in good faith; however, it seems unlikely that the water percolated into the ground, which by itself removes a lot of chemicals, will not be “cleaned up” by the soil and come back up in the same condition. This lawsuit, as is the case in the Ninth Circuit, is pending. The City filed a motion to dismiss on September 30, 2011, with the Hopi Tribe filing its response to the motion the following month. The briefing on the City’s motion has been completed, with the parties currently awaiting oral argument.

## **III. ROUND THREE. APPEAL TO POTUS**

On August 22, 2011, James Anaya, U.N. Special Rapporteur of the Rights of Indigenous Peoples, made recommendations regarding the controversy to the U.N. Human Rights Council in Geneva, Switzerland.<sup>20</sup> Anaya essentially takes the position that U.S. Government should reopen the case for consideration of compliance with the international **\*1017** human rights standards.<sup>21</sup> In September 2011, the Navajo Nation Human Rights Commission passed legislation that formally placed the issue before the Navajo Nation Council.<sup>22</sup> On September 23, 2011, the human rights legislation passed the Navajo Nation Council.<sup>23</sup> That said, a formal request would be issued to President Obama--from sovereign to sovereign--seeking an executive suspension of the USFS permit authorizing the use of reclaimed water. As to how the Obama Administration would treat such request, we do not know. As the U.N. Special Rapporteur, Anaya is currently arranging with the Government to do an "official visit" next year, which will be an opportunity to engage in discussions about sacred sites and other issues in the United States.

#### **IV. TRADEOFF ISSUES: CLEAN WATER VS. RECLAIMED WASTEWATER**

The primary health issue comes down to whether the use of reclaimed water for snowmaking is hazardous for human ingestion. Unfortunately, no one has answered this question definitively. Although the reclaimed water proposed for use in snowmaking meets both federal and Arizona state water-quality standards, it indisputably contains trace levels of unregulated residual constituents whose impact on humans or environment is unknown. Given the frequent and significant physical contact Snowbowl patrons would have with the reclaimed water, and given the likelihood of repeated ingestion of snow,<sup>24</sup> the question is clearly germane. Reclaimed water also will be discharged to the slopes of the San Francisco Peaks by snowmelt. Studies done on treated sewer water by Dr. Catherine Propper, Professor of Biological Sciences at Northern Arizona University, have concluded that the wastewater contains pharmaceuticals, hormones, endocrine disruptors, industrial pollutants such as pesticides and herbicides, and even narcotics.<sup>25</sup> Additionally, according to biologist Dr. Paul Torrence, the treated sewage effluent may also contain antibiotics, such as triclosan **\*1018** and triclocarban, which can break down into bio-accumulating cancerous dioxins when exposed to the high altitude sunlight.<sup>26</sup> There have also been documented cases of treated sewage released into the Colorado River that has caused numerous outbreaks of norovirus among Grand Canyon rafters.<sup>27</sup> David Norris, Ph.D, an integrative physiology professor at the University of Colorado at Boulder, found that pharmaceutical ethinylestradiol (an orally active semisynthetic steroidal estrogen) made it through the Boulder Wastewater Treatment Plant and into Boulder Creek.<sup>28</sup> He reported that the percentage of native male fish in Boulder Creek decreased and that numerous intersex fish were found downstream of the wastewater treatment plant.<sup>29</sup> An additional concern of the Tribes is that some of the reclaimed water once passed through hospitals or mortuaries could carry the spirits of the dead with it, which would then infiltrate plants affecting their ritual purity.<sup>30</sup>

The key to resolving the controversy may be a national study of the Environmental Protection Agency ("EPA") that will presumably be completed in 2013.<sup>31</sup> The study investigates the effects of reclaimed water on human health. Preliminary findings have detected previously unknown levels of potentially harmful agents, which suggest that more stringent regulations will be implemented in the way reclaimed water is used by municipalities in the near future.<sup>32</sup> Meanwhile, Snowbowl is proceeding with the construction of pipelines and underground network of water lines. If Plaintiffs' allegations are true, the impact of reclaimed water on the environment and humans will be troubling.

In the light of the Plaintiffs' argument, there are two readily apparent options that may resolve the controversy. One notion involves the exercise of eminent domain--purchasing Snowbowl at its fair market value and putting the park out of service, which would serve as an end to the lawsuits. Another possibility is to switch to the exclusive use of drinking water for the next few years until (1) the study by the EPA is finished as to the impacts of the reclaimed water on the human health, and (2) one of the battles the Plaintiffs started produces a dispositive and final legal outcome.

According to the North Central Arizona Water Supply Study published in 2006 by the U.S. Department of the Interior Bureau of Reclamation, the City will run out of drinking water by the year 2050.<sup>33</sup> That said, the City's water resource is not just precious--it is priceless. The absurdity of using drinking water instead of reclaimed water can be demonstrated emphatically with the following points:

**\*1019** • The contract with the City calls for 1.5 million gallons of reclaimed water per day or in average 45 million gallons per month. About 65% of the City's residential customers living in single-family homes on average consume 5,000 gallons per month.<sup>34</sup> Therefore, just one month of business operation at Snowbowl will utilize drinking water that otherwise would be enjoyed by up to 9,000 families.

- If the City signs off on switching to the drinking water for the next few years until the EPA’s comprehensive studies are completed (which in turn equals to eight months of delivery period for the resort), the Snowbowl will use up drinking water equal to the two-year water use of 72,000 families.

- The City’s current water use is about 12 million gallons per day.<sup>35</sup> It follows that one day of the private business operation will “eat up” about 12.5% of the City’s daily drinking water use.

For a municipality faced with long-term water security issues, this is clearly not a viable option. Note that the City’s population continues to grow at a steady rate. According to the statistical data, the population in Flagstaff grew by 32.75% during the last 10 years, to about 70,216 people.<sup>36</sup> Forecasted population change by 2014 will be another 11.43%, or 8,025 people. Balancing of the interest of the community as a whole, the possible temporary tradeoff of using clean water to accommodate the Plaintiffs would be economically and politically untenable.

## CONCLUSION

With no injunction in place, and having prevailed at the District Court level, Snowbowl is well within its legal rights to proceed with the expansion project using the reclaimed water. And notwithstanding the potential risks associated with reclaimed water as described above, the heavy use of reclaimed water is hardly novel to Arizona or its golf courses, parks, and playgrounds. For now, the expansion will go on, with Snowbowl assuming the risk of the adverse consequences in the future, including the possibility of a complete shutdown of the reclaimed water system if the EPA’s study discovers significant risks to humans. But, as we all know, assuming the risk is a part of doing business.

### Footnotes

<sup>a1</sup> Oksana P. Holder was born and raised in Riga, Latvia, EU. Oksana attended School of Business Administration Turiba, studying local and international law. Oksana graduated from Turiba in 2003 with a law degree, and immigrated to the United States with a goal of furthering her education in legal studies. For five years, Oksana worked in Phoenix, Arizona, as a paralegal, while also attending the University of Phoenix, earning her MBA in 2008. She currently attends the University of Arizona James E. Rogers College of Law, where she is in her second year of studies.

<sup>1</sup> *E.g.*, THE SNOWBOWL EFFECT (Indigenous Action Media 2006).

<sup>2</sup> *See* [www.truesnow.org](http://www.truesnow.org) and [www.indigenoussaction.org](http://www.indigenoussaction.org).

<sup>3</sup> *See* *The Save the Peaks Coal. v. U.S. Forest Serv.*, No. 10-17896 (9th Cir. filed Dec. 27, 2010) (briefing has been completed; Plaintiffs’ appeal is pending, with oral arguments before the Ninth Circuit scheduled for Jan. 9, 2012, in San Francisco, Cal.); *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058 (9th Cir. 2008) (en banc), *cert. denied*, — U.S. —, 129 S.Ct. 2763 (2009).

<sup>4</sup> *See* *The Hopi Tribe v. The City of Flagstaff*, No. CV2011-00701 (Ariz. Super. Ct. Aug. 18, 2011). Briefing on the City’s motion to dismiss is completed, with parties now scheduled for oral argument.

<sup>5</sup> *Id.* at 12.

<sup>6</sup> *See* *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058 (9th Cir. 2008) (en banc).

7 Kate Fort, *Order in Save the Peaks v. USFS*, TURTLE TALK (Dec. 2, 2010),  
<http://turtletalk.wordpress.com/2010/12/02/order-in-save-the-peaks-v-usfs/>.

8 *Save the Peaks Coal. v. U.S. Forest Serv.*, CV-09-8163-PCT-MHM, 2011 WL 671766 (D. Ariz. Feb. 18, 2011).

9 More than 150 people protested the court's decision. *See 150 Rally & March for Protection of Holy San Francisco Peaks*, UNDER  
THE CONCRETE (Apr. 23, 2011), <http://www.undertheconcrete.org/2011/04/>.

10 *Complaint, The Hopi Tribe v. The City of Flagstaff*, No. CV2011-00701 (Ariz. Super. Ct. Aug. 18, 2011).

11 *Id.* at 26-29.

12 *Id.* at 33-34.

13 *Id.* at 9.

14 *Id.*

15 Note that the initial USFS's approval of proposed artificial snowmaking from recycled wastewater was issued in February 2005.

16 *Complaint, The Hopi Tribe v. The City of Flagstaff*, No. CV2011-00701, at 11 (Ariz. Super. Ct. Aug. 18, 2011).

17 *Id.*

18 *Action Alert! Urge Flagstaff City Council to Vote NO Drinking water for Snowmaking!*, INDIGENOUS ACTION MEDIA (Aug.  
19, 2010), <http://www.indigenouaction.org/action-alert-urge-flagstaff-city-council-to-vote-no-drinking-water-for-snowmaking/>.

19 *Complaint, The Hopi Tribe v. The City of Flagstaff*, No. CV2011-00701, at 19 (Ariz. Super. Ct. Aug. 18, 2011)

20 *See Rob Capriccioso, Obama Asked to Stop Snowbowl Sacred Site Desecration*, INDIAN COUNTRY (Sept. 22, 2011), <http://indiancountrytodaymedianetwork.com/2011/09/obama-asked-to-stop-snowbowl-sacred-site-desecration/>.

21 *See Special Rapporteur on the Rights of Indigenous Peoples, Annex X. United States of America: Situation of the Native Americans  
in relation to artificial snowmaking from recycled wastewater in the San Francisco Peaks*, U.N. Doc. A/HRC/18/35/Add.1 (Aug.  
22, 2011) (by James Anaya), available at, [http://  
unsr.jamesanaya.org/casos-2011/10-united-states-of-america-situation-of-the-native-americans-in-relation-to-artificial-snowmak  
g-from-recycled-wastewater-in-the-san-francisco-peaks](http://unsr.jamesanaya.org/casos-2011/10-united-states-of-america-situation-of-the-native-americans-in-relation-to-artificial-snowmaking-from-recycled-wastewater-in-the-san-francisco-peaks).

22 Capriccioso, *supra* note 20.

23 NAVAJO NATION HUMAN RIGHTS COMMISSION, *Naabik'iyati' Committee of the Navajo Nation Council passes legislation  
requesting President Obama to suspend the U.S. Forest Service Permit for Snowbowl*, NNHRC (Oct. 5, 2011),  
<http://www.nnhrc.navajo-nsn.gov/pressReleases/2011/100511%20NBY%20passes%20legislation%20about%20the%20United%20Nations%20report%20&%20a%20request%20to%20Obama%20to%20suspend%20USFS%20Permit.pdf>.

- 24 Note that the existence of *any* physical contact can be disputed. Once the initial two feet of snow is applied to each ski slope, it will be covered up by natural snow, so the manmade snow will be under the layers of natural snow. In an average year, the Snowbowl receives 250 inches of natural snow.
- 25 *District Court to Hear Arguments Over Sewage Effluent Snowmaking Scheme on Peaks*, INDIGENOUS ACTION MEDIA (May 19, 2010), <http://www.indigenouaction.org/district-court-to-hear-arguments-over-sewage-effluent-snowmaking-scheme-on-peaks/>.
- 26 *Id.*
- 27 *Id.*
- 28 Fort, *supra* note 7.
- 29 *Id.*
- 30 Special Rapporteur on the Rights of Indigenous Peoples, *supra* note 21.
- 31 *Resistance Continues for Snowbowl Opposition*, UNDER THE CONCRETE (Mar. 1, 2011), <http://www.undertheconcrete.org/2011/03/01/resistance-continues-for-snowbowl-opposition/>.
- 32 *Id.*
- 33 U.S. DEPT. OF THE INTERIOR BUREAU OF RECLAMATION, *North Central Arizona Water Supply Study*, (Oct. 2006), <http://www.usbr.gov/lc/phoenix/reports/ncawss/NCAWSSROFNOAPP.pdf>.
- 34 CITY OF FLAGSTAFF, *New Water and Sewer Rates Began January 1st, 2011*, <http://www.flagstaff.az.gov/index.aspx?nid=1275> (last visited Oct. 24, 2011).
- 35 Joe Ferguson, *Flagstaff City Council Mulls Stricter Watering Rules*, AZ DAILY SUN (June 16, 2011), available at [http://azdailysun.com/news/local/govt-and-politics/article\\_c92b3a7d-5d53-583b-be4c-25256eefddb6.html](http://azdailysun.com/news/local/govt-and-politics/article_c92b3a7d-5d53-583b-be4c-25256eefddb6.html) (last visited Oct. 24, 2011).
- 36 CLR SEARCH, *Flagstaff Population Growth and Population Statistics*, [http://www.clrsearch.com/Flagstaff\\_Demographics/AZ/Population-Growth-and-Population-Statistics](http://www.clrsearch.com/Flagstaff_Demographics/AZ/Population-Growth-and-Population-Statistics) (last visited Oct. 24, 2011).