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Religious Freedom and Restoration Act tested

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by: **Tanya Lee**

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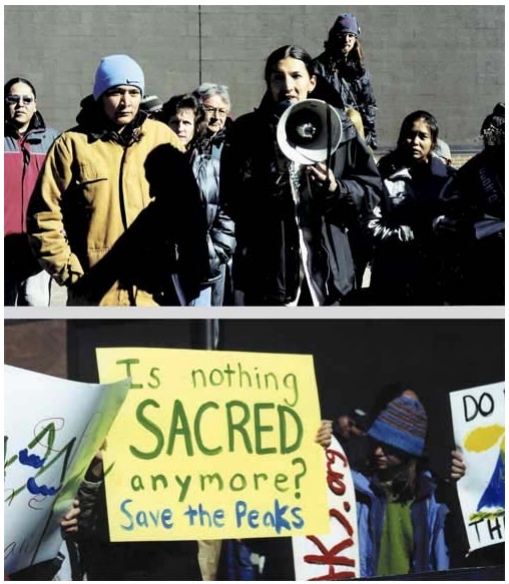

Brenda Norrell Indian Country -- Navajos Roberto Nutlouis and Clayson Benally greeted medicine men and student marchers calling for the protection of sacred San Francisco Peaks at a demonstration in front of Flagstaff City Hall. On Jan. 11, a federal judge rejected a lawsuit brought against the U.S. Forest Service by numerous tribes and conservation groups to prevent the use of reclaimed wastewater at the Snowbowl Ski Resort. *Bottom photo* -- Marchers and local businessmen held their signs high as American Indians from many tribes urged the city of Flagstaff and the U.S. Forest Service to protect the sacred San Francisco Peaks.

FLAGSTAFF, Ariz. - In a stunning Jan. 11 opinion, U.S. District Court Judge Paul Rosenblatt rejected every argument American Indians presented to prevent further desecration of the San Francisco Peaks in northern Arizona. The Peaks, sacred to 13 tribes, are federal lands managed by the U.S. Forest Service. Despite decades of protests, a ski resort has operated there since 1938.

"This is another slap in the face," said Rex Tilousi, tribal council member and former chairman of the Havasupai Tribe, who testified during the trial on religious freedom issues raised by the lawsuit.

The suit, brought against the Forest Service by six tribes and three environmental groups, was filed in June 2005 after the Forest Service approved Arizona Snowbowl owners' 2002 application to make changes at the ski resort. The most controversial is a plan to use recycled wastewater to make snow.

The application triggered an Environmental Impact Statement under provisions of the National Environmental Policy Act. In February 2005, Coconino National Forest Supervisor Nora Rasure approved snowmaking and the construction of related infrastructure. Tribes filed an appeal, and Southwestern Regional Officer Harv Forsgren affirmed Rasure's decision.

Nine days later, the tribes filed suit.

The judge consolidated the lawsuits and ordered an October bench trial to hear arguments on the matters related to the Religious Freedom and Restoration Act of 1993.

The six tribal plaintiffs - Navajo, White Mountain Apache, Yavapai-Apache, Havasupai, Hualapai, and Hopi - were joined by plaintiffs Norris Nez, Navajo, Bill "Bucky" Preston, Hopi, Rex Tilousi, Havasupai, Dianna Uqualla, Havasupai, and three environmental groups.

Defendents were the Forest Service, Rasure and Forsgren. Rosenblatt allowed Snowbowl's current owner and operator to intervene. Attorney and former Secretary of the Interior Bruce Babbitt represented the owners.

The case is one of the first legal challenges to RFRA and as such has set an important precedent.

Yavapai-Apache Nation Tribal Chairman Jamie Fullmer and Apache Historian Vincent Randall said in a Jan. 12 statement: "Recent history has shown the federal courts are not supportive of Native American sensibilities and traditions when it comes to issues concerning the landscape and spiritual health of our People."

The plaintiffs argued that the EIS was based on an "impermissibly narrow" premise - "to ensure a consistent and reliable operating season, thereby maintaining the economic viability of the Snowbowl."

Rosenblatt disagreed: "The Court concludes that the Forest Service's statement of purpose ... is not unreasonable ... [T]he goal of providing a reliable ski season is consistent with the Forest Service's multiple-use mandate."

Once this premise was accepted, other arguments fell by the wayside.

Phoenix attorney Howard Shanker, who represented the Navajo, Yavapai-Apache and White Mountain Apache tribes and the environmental groups, said in a statement Jan. 12: "[T]he federal government felt, and the court affirmed, that the economic viability of the Arizona Snowbowl Resorts Limited Partnership was more of a priority than the beliefs of hundreds of thousands of Native Americans."

NEPA requires that federal agencies consult with tribes on projects that could impact them. According to the judge, the Forest Service fulfilled that obligation:

"[T]he Forest Service made over 200 phone calls, held 41 meetings, and exchanged 245 letters with tribal representatives. Although the consultation process did not end with a decision the tribal leaders supported, this does not mean that the Forest Service's consultation process was substantively and procedurally inadequate."

This conclusion jives with what Heather Cooper (now Heather Provencio) said in 2002: that there was no provision in NEPA by which a tribe could state an adverse effect serious enough so that the Forest Service supervisor would be required to deny an application.

The most far-reaching element of this case is the challenge to RFRA. At issue is whether RFRA protects American Indians' religious rights as they themselves define those rights and the necessary circumstances for practicing their religions, or whether it simply extends to American Indians the right to practice their religion in a way and to an extent that the federal government deems appropriate and adequate.

Rosenblatt's opinion strongly favored the federal government, though tribal leaders and religious practitioners testified at length about how the use of reclaimed wastewater to make snow would negatively impact the very foundations of their religious beliefs.

Hopi Cultural Preservation Office Director Leigh Kuwanwisiwma testified for seven hours on Oct. 17, 2005. "[The proposal] violates the basic principle of what the mountain stands for in the spiritual life of the Hopi people. To make snow on the mountain does not just desecrate the mountain; it defiles it."

Under RFRA, the government may not impose a "substantial burden" on the practice of religion without a compelling reason to do so. So two issues must be decided - whether a substantial burden exists and, if it does, whether the government has an interest sufficient to allow imposition of such a burden.

After the Native witnesses testified, two Forest Service archaeologists, Judith Propper and Heather Provencio, were asked to evaluate whether tribes would suffer a substantial burden.

Read the opinion, "Propper testified that although practitioners sincerely felt that the Forest Service decision would impact their beliefs and exercise of religion, the impacts did not amount to a substantial burden."

Speaker of the Navajo Nation Council Lawrence T. Morgan said in a statement, "The sanctity of our cultural and spiritual relevance has been violated. The U.S. District Court has now seemingly underscored this without hesitation."

"This is a devastating tragedy for all those who value environmental health, culture and religious freedom." said Save the Peaks Coalition's Klee Benally in a press release.

"The tribe is devastated," said Alicia LaCounte, an attorney for the Havasupai Tribe, on Jan. 13. "The San Francisco Peaks are part of every religious ceremony the Havasupai perform. Every aspect of my clients' religion is related to that mountain. It is the equivalent of the Garden of Eden in the Judeo-Christian tradition."

Shanker said in a statement, "This decision further eviscerates the rights of Native Americans to protect sacred lands that are essential to their belief systems."

He continued, "It seems to me that requiring 'objective' proof that something is sacred makes no sense. Short of producing God at the trial, it is not clear how this could be accomplished ... Based on the reasoning by the court, no substantial burden can ever be demonstrated by Native American practitioners under similar circumstances."

According to Shanker, Navajo Nation President Joe Shirley Jr. has said, "[The] Navajo Nation will do whatever it takes to try to stop the use of reclaimed sewer water to make artificial snow on the sacred San Francisco Peaks."

Kuwanwisiwma said on Jan. 16 that he had been assured the Hopi Tribe would appeal.