

1 Howard M. Shanker (#015547)
2 THE SHANKER LAW FIRM, PLC.
3 700 E. Baseline Road, Bldg. B
4 Tempe, Arizona 85283
5 Phone: (480) 838-9300
6 Facsimile: (480) 838-9433
7 howard@shankerlaw.net

8 *Attorneys for Plaintiffs*

9 **UNITED STATES DISTRICT COURT**
10 **DISTRICT OF ARIZONA**

11 The Save the Peaks Coalition; Kristin
12 Huisinga; Clayson Benally; Sylvan Grey;
13 Don Fanning; Jeneda Benally; Frederica
14 Hall; Berta Benally; Rachel Tso; Lisa Tso,

15 Plaintiffs,

16 v.

17 U.S. Forest Service; Nora Rasure (in her
18 official capacity as Forest Supervisor for the
19 Coconino National Forest),

20 Defendants.

No.

COMPLAINT

**(DECLARATORY AND
INJUNCTIVE RELIEF)**

21 Plaintiffs, by their undersigned attorneys, allege upon personal knowledge, and upon
22 information and belief, as for their Complaint as follows:

23 **NATURE OF THE ACTION**

24 1. Plaintiffs are seeking declaratory and injunctive relief for violations of the
25 National Environmental Policy Act, 42 U.S.C. §§ 4321 - 4370d (öNEPAö), and the
26 Administrative Procedure Act, 5 U.S.C. §§ 701-706 (öAPAö).

2. The Arizona Snowbowl ski area (öSnowbowlö) is owned and operated by
Arizona Snowbowl Resort Limited Partnership. Snowbowl is located entirely on the

1 Coconino National Forest. Specifically, the ski area is located on Mount Humphreys, on the
2 western flank of the San Francisco Peaks, i.e., on federal land. The ski area is operated
3 under a Special Use Permit (SUP) that is issued by the U.S. Forest Service (FS).

4
5 3. Because of, in large part, inconsistent snowfall and limited demand, Snowbowl
6 has allegedly been experiencing financial difficulties. To help provide Arizona Snowbowl
7 Resort Limited Partnership with a consistent/reliable operating season, the FS undertook to
8 expand the ski area and to introduce the use of reclaimed sewer water for snowmaking.

9
10 4. The area impacted by the project is sacred to thirteen of the tribes in the
11 southwestern United States. It is also environmentally sensitive and valuable in its natural
12 state. The FS will be altering the face of the mountain and its ecosystem to make it
13 amenable to skiing and snowmaking.

14
15 5. Of particular importance to the instant proceeding, the FS failed to do an
16 adequate analysis of the impact that ingestion of snow made from reclaimed sewer water
17 could have on skiers and children using the proposed snow-play area.

18
19 6. The FS decision: (a) was based on inaccurate and/or incomplete information;
20 (b) is not supported by the record; (c) was arbitrary and capricious; and (d) was improper as
21 a matter of law. Plaintiffs seek injunctive and declaratory relief that requires the FS to stop
22 the construction and implementation of the selected alternative until such time as the FS
23 decision is properly informed and in compliance with applicable law and regulations.
24
25
26

1 **JURISDICTION AND VENUE**

2 7. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331
3 (Federal Question); 5 U.S.C. §§ 701-706 (judicial review provisions of the Administrative
4 Procedures Act); and is authorized to provide the relief sought under 28 U.S.C. §§ 2201 and
5 2202.
6

7 8. Venue in this Court is proper under 28 U.S.C. § 1391(e).
8

9 **PARTIES**

10 9. Each of the below listed plaintiffs have exhausted their administrative remedies
11 by filing, *inter alia*, comments on the Draft Environmental Impact Statement, and by filing
12 administrative appeals of the final decision with defendant, U.S. Forest Service.
13

14 10. If the proposed project were to go forward it would negatively impact and
15 impede each of the below listed plaintiffs' use and enjoyment of the site.

16 11. Plaintiff, Save the Peaks Coalition, is a non-juridic entity headquartered in
17 Flagstaff, Arizona, with over 500 volunteer members including individuals, organizations,
18 and Tribes. The primary mandate of the Save the Peaks Coalition (the "Coalition") is to
19 protect and preserve the San Francisco Peaks and to help inform and educate its members
20 and the community by, in part, the dissemination of information on cultural, environmental,
21 and environmental justice issues deriving from the development and utilization of the Peaks.
22 Members of the Coalition live near and use the San Francisco Peaks, including the SUP area,
23 for recreational, aesthetic, educational, religious, and cultural purposes. The Coalition and
24 its members seek to preserve the environmental, cultural, and historic integrity and aesthetic
25
26

1 value of the land the FS is proposing to turn into a ski area, i.e., *inter alia*, clear trees and
2 habitat, construct infrastructure, and spray with reclaimed sewer water. The interests that the
3 Coalition seeks to protect are germane to the organization's purpose.
4

5 12. Plaintiff, Kristin Huisinga, is a resident of Flagstaff, Arizona. She has used the
6 Peaks, including the SUP area, as an outdoor classroom both as a student and teacher of
7 botany since 1992. She also uses, and has used, the Peaks and the area around Snowbowl for
8 recreational purposes such as hiking and snowboarding. Ms. Huisinga also relies on the
9 aesthetic values offered by the views of Mount Humphreys from the surrounding area. The
10 proposed project would negatively impact Ms. Huisinga's ability to utilize the Peaks and the
11 SUP area for educational, recreational, and aesthetic purposes. The failure of the FS to
12 consider and discuss the potential impacts of reclaimed sewer water on skiers and others, in
13 part, denies Ms. Huisinga access to important information regarding the project.
14
15

16 13. Plaintiff, Clayson Benally, is a resident of Flagstaff, Arizona and a member of
17 the Navajo Nation. Mr. Benally has snowboarded and hikes within the SUP area. Mr.
18 Benally's young daughter plays in the snow in the SUP area. Mr. Benally also uses the
19 Peaks, including the SUP area, for educational purposes as he is an apprentice to his father,
20 Jones Benally, who is a member of the Dine's Medicine Man's Association and a Traditional
21 Cultural Practitioner at the Winslow Indian Health Clinic. For Mr. Benally, the Peaks,
22 including the SUP area, are a sacred and holy area that he prays to, collects plants from, and
23 which he utilizes in various mandatory religious ceremonies. For religious and cultural
24 purposes, Mr. Benally bathes in the snow in the SUP area. Mr. Benally also values and
25
26

1 utilizes the Peaks, including the SUP area, for aesthetic purposes. The proposed project
2 would negatively impact Mr. Benally's ability to utilize the Peaks, including the SUP area
3 for educational, recreational, cultural, religious, and aesthetic purposes. Mr. Benally is also
4 involved in educating the public and disseminating information regarding the impacts of the
5 proposed project on the human environment. Mr. Benally is a member of the Save the Peaks
6 Coalition. The failure of the FS to consider and discuss the potential impacts of reclaimed
7 sewer water on skiers and others, in part, denies Mr. Benally access to important information
8 regarding the project.
9
10

11 14. Plaintiff, Sylvan Grey, is a resident of Flagstaff, Arizona. Ms. Grey values and
12 utilizes the Peaks, including the SUP area, for aesthetic purposes. Ms. Grey has been using
13 the Peaks, including the SUP area, for educational purposes, studying the potential impacts
14 of snowmaking with reclaimed sewer water on human and plant health and on the
15 environment in general. Ms. Grey has been active in her opposition to the project on cultural
16 and environmental grounds and as a matter of principle as well. The proposed project would
17 negatively impact Ms. Grey's ability to use the Peaks, including the SUP area, for aesthetic
18 and educational purposes. The failure of the FS to consider and discuss the potential
19 impacts of reclaimed sewer water on skiers and others, in part, denies Ms. Grey access to
20 important information regarding the project.
21
22

23 15. Plaintiff, Don Fanning, is a resident of Flagstaff, Arizona. Mr. Fanning hikes
24 in the watershed which would be affected by snow made from reclaimed sewer water and
25 from the run-off from the treated effluent. Mr. Fanning observes and studies the flora and
26

1 fauna on the Peaks, including the SUP area, and seeks to preserve the environmental,
2 cultural, and historic integrity and aesthetic value of the land the FS is proposing to clear,
3 grade, and spray with reclaimed sewer water. The proposed project would have a negative
4 impact on Mr. Fanning's use of the area for recreational, educational, and aesthetic purposes.
5 Mr. Fanning is involved in educating the public and disseminating information regarding the
6 impacts of the proposed project on the human environment. Mr. Fanning is a member of the
7 Save the Peaks Coalition. The failure of the FS to consider and discuss the potential impacts
8 of reclaimed sewer water on skiers and others, in part, denies Mr. Fanning access to
9 important information regarding the project.
10
11

12 16. Plaintiff, Jeneda Benally, is a resident of Flagstaff, Arizona and a member of
13 the Navajo Nation. Ms. Benally hikes within the SUP area. Ms. Benally's young daughter
14 plays in the snow in the SUP area. Ms. Benally also uses the Peaks, including the SUP area,
15 for educational purposes ó she is an apprentice to her father, Jones Benally, who is a member
16 of the Dine's Medicine Man's Association and a Traditional Cultural Practitioner at the
17 Winslow Indian Health Clinic. For Ms. Benally, the Peaks, including the SUP area, are a
18 sacred and holy area that she prays to, collects plants from, and which she utilizes in various
19 mandatory religious ceremonies. Ms. Benally also values and utilizes the Peaks, including
20 the SUP area, for aesthetic purposes. The proposed project would negatively impact Ms.
21 Benally's ability to utilize the Peaks and the SUP area for educational, recreational, cultural,
22 religious, and aesthetic purposes. Ms. Benally is also involved in educating the public and
23 disseminating information regarding the impacts of the proposed project on the human
24
25
26

1 environment. She is a member of the Save the Peaks Coalition. The failure of the FS to
2 adequately consider and discuss the potential impacts of reclaimed sewer water on skiers and
3 on the ecosystem, in part, denies Ms. Benally access to important information regarding the
4 project.
5

6 17. Plaintiff, Frederica Hall, lives near the base of Mount Humphreys. She uses
7 the Peaks, including the SUP area, for educational purposes. Ms. Hall teaches and practices
8 healing arts and brings students to the Peaks for meditation ó practices that require the area
9 to be in as pristine and natural a state as possible. Ms. Hall also uses the SUP area for skiing
10 and hiking. Ms. Hall is also an artist who relies on the Peaks and Mount Humphreys for
11 much of her work. The passage of the proposed project would have a direct negative impact
12 on Ms. Hall's utilization of the Peaks, including the SUP area, for business, aesthetic,
13 education, recreational and meditational purposes. The failure of the FS to consider and
14 discuss the potential impacts of reclaimed sewer water on skiers and on the ecosystem, in
15 part, denies Ms. Hall access to important information regarding the project.
16
17

18 18. Plaintiff, Berta Benally, resides in Flagstaff, Arizona. Mrs. Benally uses the
19 Peaks, including the SUP area, for recreational purposes such as hiking and viewing the flora
20 and fauna. Mrs. Benally is involved in the dissemination of information regarding the
21 treatment of sites, such as the one in the instant matter, that are considered holy or sacred by
22 Native Americans. Mrs. Benally is a member of the Save the Peaks Coalition. The FS
23 failure to adequately discuss the impacts of the project directly impacts Mrs. Benally's
24 ability to access and distribute information. Mrs. Benally's grandchildren play in the snow
25
26

1 in the SUP area. Mrs. Benally, who is married to a traditional Navajo healer and medicine
2 man, uses the Peaks for cultural, religious, aesthetic, and educational purposes.

3
4 19. Plaintiff, Rachel Tso, resides in Flagstaff, Arizona. Ms. Tso hikes in and
5 around the SUP area. Ms. Tso is married to a member of the Navajo Nation and her children
6 are members of the Navajo Nation. She and her family pick plants/herbs in and around the
7 SUP area for traditional uses. Ms. Tso home-schools her children and uses the Peaks,
8 including the SUP area, to teach them about ecology, science, and botany. Ms. Tso utilizes
9 and cherishes Mount Humphreys for aesthetic purposes. Ms. Tso is a member of the Save
10 the Peaks Coalition. The failure of the FS to consider and discuss the potential impacts of
11 reclaimed sewer water, in part, denies Ms. Tso access to important information regarding the
12 project and negatively impacts her ability to use the Peaks for educational, aesthetic, cultural,
13 religious, and recreational purposes.
14
15

16 20. Plaintiff, Lisa Tso, is a resident of Flagstaff, Arizona. Ms. Tso and her family
17 collect and ingest various medicinal plants, especially from the spring just below the SUP
18 area. She and her family collect plants from the Peaks, including the SUP area, for religious
19 and ceremonial purposes. Ms. Tso and her family use the SUP area to educate their children
20 about traditional Navajo culture. Ms. Tso and her children also play in the snow in the SUP
21 area. The failure of the FS to consider and discuss the potential impacts of reclaimed sewer
22 water, in part, denies Ms. Tso access to important information regarding the project and
23 negatively impacts her ability to use the Peaks for educational, aesthetic, cultural, religious,
24 and recreational purposes.
25
26

1 (2) to improve safety, skiing conditions, and recreational opportunities by bringing terrain
2 and infrastructure into balance with existing demand.ö FEIS at ES-1-2.

3
4 26. The DEIS and FEIS identified three alternatives that were addressed in detail:
5 (1) Alternative 1 ö the No Action Alternative; (2) Alternative 2 ö The Proposed Action; and
6 Alternative 3 ö No Snowmaking or Snowplay.

7 27. The ROD identified Alternative 2, the Proposed Action, as the Selected
8 Alternative. Alternative Two requires, in part: (a) approximately 205 acres of snowmaking
9 coverage throughout the area, utilizing reclaimed wastewater; (b) a 10 million-gallon
10 snowmaking reclaimed wastewater reservoir near the top terminal of the existing Sunset
11 Chairlift and catchment pond below the Hart Prairie Lodge; (c) construction of a reclaimed
12 water pipeline between Flagstaff and Snowbowl with booster stations and pumphouses; (d)
13 construction of a 3,000 to 4,000 square foot snowmaking control building; (e) construction
14 of a new 10,000 square foot guest services facility; (f) an increase in skiable acreage from
15 139 acres to approximately 205 acres ö an approximate 47% increase; and (g) approximately
16 47 acres of thinning and 87 acres of grading/stumping and smoothing.

17 28. Notification of the decision was published by the FS on March 11, 2005.
18 Pursuant to 36 C.F.R. Part 215, publication of the decision triggered a 45 day administrative
19 appeal period, ending on approximately April 25, 2005.

20 29. On approximately April 25, 2005 plaintiffs (and numerous other parties) filed
21 timely administrative appeals with the Appeal Deciding Officer for the project.
22
23
24
25
26

1 30. On approximately June 8, 2005, the Appeal Deciding Officer issued the final
2 administrative determination for the agency. The final decision approved the selection and
3 implementation of Alternative Two, including the 47% expansion of the ski area and the
4 introduction of reclaimed wastewater for Snowmaking. The appeal decision document
5 altered the decision set forth in the ROD in two respects: (a) eleven trees that were scheduled
6 to be cut down in a Mexican spotted owl Protected Activity Center, along the pipeline, were
7 to be left in place; and (b) the Project Record was supplemented with approximately 13
8 documents that were not previously part of the record and/or amenable to public review as
9 part of the record.
10

11
12 **The FEIS Ignores the Possibility of Human Ingestion of Snow Made from Reclaimed**
13 **Sewer Water.**

14
15 31. The fact that children (and others) will eat snow made from non-potable water
16 at the ski area, and in the proposed snow-play area, is a direct effect that should have been
17 analyzed in the FEIS. *See* 40 C.F.R. § 1508.8(a); *see also, e.g.*, 40 C.F.R. § 1502.16.

18 32. The entire discussion of this issue appears only in the Response to Comments.
19 It provides that:

20
21 [t]here will be signs posted at Snowbowl informing visitors of the use of
22 reclaimed water as a snowmaking water source. . . it is the responsibility of the
23 visitor or the minor's guardian to avoid consuming snow made with reclaimed
24 water. . . Because ADEQ approved the use of reclaimed water, it is assumed
different types of incidental contact that could potentially occur from use of
class A reclaimed water for snowmaking were fully considered.

25 FEIS, Vol. 2 at 264 (Response to Comments).

26 33. With regard to this same FEIS, the Ninth Circuit previously held that:

1 [t]he Forest Service has not provided a "reasonably thorough discussion" of
2 any risks posed by human ingestion of artificial snow made from treated
3 sewage effluent or articulated why such a discussion is unnecessary, has not
4 provided a "candid acknowledgment" of any such risks, and has not provided
5 an analysis that will "foster both informed decision-making and informed
6 public participation." We therefore hold that the FEIS does not satisfy NEPA
7 with respect to the possible risks posed by human ingestion of the artificial
8 snow.

9 *Navajo Nation et al. v. U.S. Forest Service*, 479 F.3d 1024, 1053-1054 (9th Cir. 2007),
10 (vacated in part on other grounds) *Navajo Nation et al. v. U.S. Forest Service*, 535 F.3d 1058
11 (9th Cir. 2008) (*en banc*).

12 COUNT 1

13 (VIOLATION OF NEPA)

14 **THE FEIS DOES NOT CONTAIN A "REASONABLY THOUROUGH DISCUSSION 15 OF THE SIGNIFICANT ASPECTS OF THE PROBABLE ENVIRONMENTAL 16 CONSEQUENCES" OF THE PROJECT – THE FEIS IGNORES THE POSSIBILITY 17 OF CHILDREN (AND OTHERS) EATING SNOW MADE FROM RECLAIMED 18 SEWER WATER**

19 34. Plaintiffs reallege and incorporate by this reference the allegations contained
20 above as though fully set forth herein.

21 35. NEPA requires that a federal agency contemplating action "consider every
22 significant aspect of the environmental impact" of the proposed action, and "inform the
23 public that it has indeed considered environmental concerns in its decision-making process."
24 *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council*, 462 U.S. 87, 97 (1983); *see also* 42
25 U.S.C. § 4331. NEPA's purpose is to ensure that federal agencies take a "hard look" at
26 environmental consequences before committing to action. *Robertson v. Methow Valley
Citizens Council*, 490 U.S. 332, 350 (1989).

1 36. In order to take a hard look, the FS must õ[f]ully consider the impacts of [its
2 proposal] on the physical, biological, social, and economic impacts of the human
3 environment.ö 40 C.F.R. § 1508.14.
4

5 37. One of the primary impacts and areas of concern that should have been
6 addressed in detail in the NEPA process was that children (and others) will ingest snow
7 made of reclaimed sewer water.
8

9 38. The FEIS is silent on the possibility that somebody will ingest snow made
10 from non-potable, reclaimed sewer water. It provides no analysis, no discussion, and no
11 mention of the prospect.
12

13 39. The FEIS fails to provide a õreasonably thorough discussion of the significant
14 aspects of the probable environmental consequences.ö *Center for Biological Diversity*, 349
15 F.3d at 1166. The decision to approve this project was neither õfully informed nor well-
16 considered.ö *See, Save the Yaak Committee v. Block*, 840 F.2d 714, 717 (9th Cir. 1988).
17

18 40. The FS failure to consider the possibility of children (and others) ingesting
19 snow made from non-potable, reclaimed sewer water was arbitrary, capricious, an abuse of
20 discretion, and/or not otherwise in accordance with law. *See, Oregon Nat. Res. Fund v.*
21 *Goodman*, 505 F.3d 884, 889 (9th Cir. 2007) (õIf an agency fails to consider an important
22 aspect of a problem . . . its action is arbitrary and capricious.ö).
23
24
25
26

1 COUNT 2

2 (VIOLATION OF NEPA)

3 **BY FAILING TO ANALYZE IMPACTS OF EATING SNOW MADE FROM**
4 **RECLAIMED SEWER WATER, THE FS FAILED TO ENSURE THE “SCIENTIFIC**
5 **INTEGRITY” OF ITS ANALYSIS**

6 41. Plaintiffs reallege and incorporate by this reference the allegations contained
7 above as though fully set forth herein.

8 42. The FS is obligated to ensure the “scientific integrity” of its environmental
9 analysis. 40 C.F.R. § 1502.24. Further, an FEIS must “make explicit reference . . . to the
10 scientific and other sources relied upon for conclusions in the statement.” *Id.* Indeed, an
11 environmental analysis under NEPA must include reference to important scientific materials
12 that both support and call into question its conclusions.” *Blue Mountains Biodiversity*
13 *Project v. Blackwood*, 161 F.3d 1208, 1214 (9th Cir. 1998).

14 43. “Accurate scientific analysis, expert agency comments, and public scrutiny are
15 essential in implementing NEPA.” 40 C.F.R. § 1500.1(b).

16 44. In the instant matter, the FS simply asserts that, “[b]ecause ADEQ approved
17 the use of reclaimed water, it is assumed different types of incidental contact that could
18 potentially occur from use of class A reclaimed water for snowmaking were fully
19 considered.” FEIS, Vol. 2 at 264 (Response to Comments).

20 45. The FEIS neither ensures the “scientific integrity” of its environmental analysis
21 as required by 40 C.F.R. § 1502.24, nor provides the requisite “accurate scientific analysis,
22 expert agency comments, and public scrutiny” required by 40 C.F.R. § 1500.1(b).

1 *Better Forestry v. U.S. Dep't of Ag.*, 341 F.3d 961, 971 (9th Cir. 2003) (õ . . . environmental
2 plaintiff was surely harmed when agency action precluded the kind of public comment and
3 participation NEPA requires in the EIS process. . .ö).

4
5 51. The FS failure to provide the public with information regarding the potential
6 impacts on people who might eat snow made from reclaimed sewer water was arbitrary,
7 capricious, an abuse of discretion, and/or not otherwise in accordance with law.
8

9
10 **RELIEF REQUESTED**

11 WHEREFORE, plaintiffs respectfully request that judgment be entered in favor of the
12 plaintiffs and against defendants as follows:
13

14 1. Declaratory Judgment finding that defendants' actions were: (1) arbitrary,
15 capricious, an abuse of discretion, or otherwise not in accordance with law; and/or (2)
16 without observance of procedure required by law, as mandated by the APA. Further
17 declaratory relief finding that:
18

19 (a) The FEIS was inadequate as a matter of law;

20 (b) The FS violated NEPA in approving this project;

21 2. A Mandatory Injunction requiring the FS to:

22 (a) Stay all action in furtherance of this project until the FS can comply with all
23 applicable laws and regulations;
24

25 3. Hold that the FS action in approving the project was unlawful and set it aside.

26 *See, e.g.,* APA, 5 U.S.C. § 706.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

- 4. Award to plaintiffs their costs and reasonable attorneys' fees
- 5. Award such other and further relief as the Court deems just and equitable.

DATED this 21st day of September, 2009.

THE SHANKER LAW FIRM, PLC.

By s/Howard M. Shanker

Howard M. Shanker
700 E. Baseline Rd., Bldg. B
Tempe, Arizona 85283
Telephone: (480) 838-9300
Facsimile: (480) 838-9433
howard@shankerlaw.net

Attorneys for Plaintiffs