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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

NAVAJO NATION, et al., Plaintiffs, v. UNITED STATES FOREST SERVICE, et al., Defendants.	Case No. CV 05-1824-PCT-PGR Case No. CV 09-8163-PCT-MHM

DEFENDANTS' MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO TRANSFER TO THE HONORABLE PAUL G. ROSENBLATT

Defendants hereby move to transfer *Save the Peaks Coalition, et al. v. U.S. Forest Service, et al.*, case number CV 09-8163-PCT-MHM, to this Court pursuant to Local Rule 42.1(a)(1) on the grounds that the case is related to *Navajo Nation, et al. v. U.S. Forest Service, et al.* (Nos. CV 05-1824-PCT-PGR, CV 05-1914-PCT-EHC, CV 05-1949-PCT-NVW, CV 05-1966-PCT-JAT), 408 F.Supp.2d 866 (D.Ariz. 2006), *aff'd* 535 F.3d 1058 (9th Cir. 2008), *cert. denied* 129 S.Ct. 2763 (2009). *Save the Peaks* arises from the same transaction or event as *Navajo Nation*, involves substantially the same parties or property, calls for determination of substantially the same questions of law, and would entail substantial duplication of labor if not heard by this Court.

Plaintiffs in *Save the Peaks* challenge the Forest Service's decision to authorize certain upgrades to facilities at the Arizona Snowbowl (''Snowbowl''), an existing ski area on the western flank of the San Francisco Peaks in the Coconino National Forest. This Court has a deep familiarity with the issues presented in the *Navajo Nation* case. For the reasons explained in detail below, the Court should grant Defendants' motion and transfer *Save the Peaks* to its Court.

BACKGROUND

The Snowbowl has been used as a ski area since 1938. In 1979, the Forest Service conducted an extensive process pursuant to the National Environmental Policy Act ("NEPA"), 42 U.S.C. §4321, *et seq.*, to evaluate proposed upgrades to the Snowbowl, which included the installation of new lifts, trails and facilities. Shortly after the Forest Service approved the proposed upgrades, several Indian tribes challenged the decision on the grounds that development of the San Francisco Peaks would be a profane act and an affront to their deities. *Wilson v. Block*, 708 F.2d 735, 738 (D.C. Cir. 1983), *cert. denied* 464 U.S. 956 (1983). The District of Columbia Court of Appeals upheld the Forest Service's decision to approve the upgrades. *Id.* at 760. Many, but not all, of the improvements authorized by the Forest Service in 1979 and upheld in *Wilson* have been implemented over the past thirty

years.

In September of 2002, Snowbowl sought to implement the remaining previously authorized upgrades, build additional facilities, and submitted a formal proposal to use Class A+ reclaimed water for snowmaking at the facility. *Navajo Nation*, 408 F.Supp.2d at 870-71. The Forest Service conducted an extensive environmental review of the Improvements Project under NEPA that spanned several years and sought input from both the public and tribal entities. In February of 2005, Defendant Nora Rasure issued a Final Environmental Impact Statement ("FEIS") and a Record of Decision ("ROD"). The ROD approved the use of snow made from Class A+ reclaimed water to cover approximately 205 acres in the area.[1/] *Id.* at 871.

Shortly after issuance of the FEIS and ROD, several Indian nations and tribes, along with individuals and non-governmental organizations, challenged the Forest Service's actions in *Navajo Nation*, a case decided by this Court. *See Navajo Nation*, 408 F.Supp.2d 866. The *Navajo Nation* plaintiffs asserted that the Forest Service's actions were arbitrary, capricious, and not otherwise in accordance with NEPA because the Forest Service allegedly failed to scrutinize the environmental consequences of the proposed action, including the impacts of snowmaking using reclaimed water. This Court granted summary judgment in favor of the Forest Service on the NEPA claims. Among other findings, the Court held that the Forest Service properly scrutinized the effects of using Class A+ reclaimed water to make artificial snow at the Snowbowl in accordance with NEPA. *Navajo Nation*, 408 F.Supp.2d at 876. The

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[1/] The ROD also approved a 10 million-gallon reclaimed water reservoir near the top terminal of the existing chairlift and a catchment pond below Hart Prairie Lodge; construction of a reclaimed water pipeline between Flagstaff and the Snowbowl with booster stations and pump houses; construction of a 3,000 to 4,000 square foot snowmaking control building; construction of a new 10,000 square foot guest services facility; an increase in skiable acreage from 139 to 205; and approximately 47 acres of thinning and 87 acres of grading/stumping and smoothing. *Navajo Nation*, 408 F.Supp.2d at 871.

Court did not reach a decision on whether the FEIS adequately considered the risk posed by human ingestion of artificial snow because this claim was not properly pleaded by the one party who raised it. *See* 408 F.Supp.2d at 873-78 and 908; 535 F.3d at 1079. The Ninth Circuit affirmed this Court's decision on the NEPA claims, and the Supreme Court denied *certiorari*. 535 F.3d at 1079; 129 S.Ct. 2763.

In *Save the Peaks*, Plaintiffs base their complaint on the one NEPA claim not addressed in *Navajo Nation*. Since *Save the Peaks* is related to the *Navajo Nation* case previously litigated before this Court, the more recent case should be transferred pursuant to Local Rule 42.1.

ARGUMENT

I. The Court Has Broad Discretion to Transfer under Local Rule 42.1

Pursuant to the Local Rules for the District of Arizona,

> Whenever two or more cases are pending[2/] before different Judges and any party believes that such cases (A) arise from substantially the same transaction or event; (B) involve substantially the same parties or property; ... (D) calls for determination of substantially the same questions of law; or (E) for any other reason would entail substantial duplication of labor if heard by different Judges, any party may file a motion to transfer the case or cases involved to a single Judge.

L.R. 42.1(a)(1). Local Rule 42.1 does not require that each of the subsections be shown before a transfer is proper. *Gagan v. Estate of Sharar*, 2008 WL 2810978, at *2 (D.Ariz. July 18, 2008) (unreported). The standard for transfer is similar to the standard for consolidation under Rule 42(a) of the Federal Rules of Civil Procedure, and district courts have broad discretion in determining whether to grant such motions. *See Investors Research*

[2/] At least one Court in this District has transferred a pending case to one that was previously closed based on the prior judge's familiarity with the substantially similar matters involved in the two cases. *See Gagan v. Estate of Sharar*, 2008 WL 2810978 (D. Ariz. July 18, 2008) (transferring CV 08-0018 to CV 99-1427, the latter of which was closed on March 27, 2003).

Co. v. U.S. Dist. Ct. for Cent. Dist. of Cal., 877 F.2d 777 (9th Cir. 1989); 9A C. Wright & A. Miller, Federal Practice and Procedure 3d ed., § 2383 (2009); *Pangerl v. Ehrlich*, 2007 WL 686703 (D. Ariz., Mar. 2, 2007) (unreported) (Murguia, J.).

As Defendants establish below, the present case is substantially related to *Navajo Nation* and should be transferred to this Court.

II. Defendants Meet the Requirements of Local Rule 42.1(a)(1)

A. *Save the Peaks* Arises from the Same Event as *Navajo Nation*

In *Save the Peaks*, Plaintiffs challenge the Forest Service's 2005 FEIS approving previously authorized upgrades to Snowbowl and the formal proposal to use Class A+ reclaimed water for snowmaking at the facility. The complaint explicitly names the FEIS and ROD as the challenged administrative actions. (Docket #1, at ¶24). Since the same FEIS and ROD were at issue in *Navajo Nation*, the two cases arise from the same event. *See Navajo Nation*, 408 F.Supp.2d at 871, 876.

B. *Save the Peaks* Involves Substantially the Same Property as *Navajo Nation*

Both *Navajo Nation* and *Save the Peaks* challenge proposed actions at the Snowbowl in the Coconino National Forest. The property in question in the two cases is identical.

C. *Save the Peaks* Calls for Determination of Substantially the Same Questions of Law as *Navajo Nation*

In both *Save the Peaks* and in *Navajo Nation*, the parties alleged violations of NEPA. Indeed, both actions expressly challenge the Forest Service's environmental analysis and disclosures relating to the use of Class A+ reclaimed water to make artificial snow. Although the Court in *Navajo Nation* did not consider the sub-issue of whether the FEIS adequately considered the risk posed by human ingestion of artificial snow, it did conduct a thorough review of the Forest Service's obligations under NEPA. The absence of the ingestion claim from *Navajo Nation* does not undermine the present case's essential similarity with that case. *See Parra v. Bashas' Inc.*, 2009 WL 1024615, at *5 (D. Ariz. Apr. 15, 2009) (slip copy)

(inclusion of an additional claim does not undermine essential similarity of claims presented in two cases considered for transfer). Since the question of law is whether the Forest Service violated NEPA in its analysis of the Improvements Project, *Save the Peaks* calls for determination of substantially the same question of law as *Navajo Nation*.

D. There Would Be a Substantial Duplication of Labor If Heard by Different Judges

In *Navajo Nation*, this Court recently considered the voluminous administrative record of the Forest Service's FEIS. This record included technical scientific reports from hydrogeologists, chemists, and waste water specialists, as well as those from economists, wildlife biologists, and other experts. The record also included almost ten thousand comments submitted in response to the draft environmental impact statement and the Forest Service's consideration of these comments. Based on the recent adjudication of *Navajo Nation*, this Court already has an intimate knowledge of the same facts that form the basis of this complaint. If another Court were to hear this case, it would entail a substantial duplication of labor and consume scarce judicial resources.

Based on the preceding four paragraphs, Defendants have shown that they meet the conditions to transfer this case. L.R. 42.1(a)(1).

II. *Save the Peaks* Should Be Assigned To This Court

Once a party demonstrates that a case could be transferred to a single judge, the Court considers the following four factors to determine which Judge should be assigned: (a) whether substantive matters have been considered in a case; (b) which Judge has the most familiarity with the issues involved in the cases; (c) whether a case is reasonably viewed as the lead or principal case; and (d) any other factor serving the interest of judicial economy. L.R. 42.1(a)(4).

All four factors favor transferring the case to this Court. First, this Court previously ruled on the merits of all NEPA claims properly asserted in *Navajo Nation*, including one

pertaining to the use of Class A+ reclaimed water to make artificial snow. Judge Murguia has not yet considered any substantive matters. Second, this Court's consideration of all other claims in *Navajo Nation* gives it great familiarity with the issues involved in the two cases even though he did not consider the sub-issue of ingestion of artificial snow. Conversely, Judge Murguia has no familiarity with the issues presented in this case. Third, *Navajo Nation* is reasonably viewed as the lead case since it adjudicated claims related to those raised in *Save the Peaks*. Indeed, the claim presented in *Save the Peaks* is the only one *Navajo Nation* did not decide since it was not properly pleaded to the Court. Finally, the interest of judicial economy is best served by transferring this case to this Court since it is already familiar with the voluminous administrative record.

CONCLUSION

For the foregoing reasons, the Court should grant Defendants' motion and transfer *Save the Peaks* to this Court.

Respectfully submitted this 16th day of October, 2009.

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CERTIFICATE OF SERVICE

I hereby certify that on October 16, 2009 I electronically filed the foregoing DEFENDANTS' MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO TRANSFER TO THE HONORABLE PAUL G. ROSENBLATT with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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