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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

The Save the Peaks Coalition; Kristin Huisinga; Clayson Benally; Sylvan Grey; Don Fanning; Jeneda Benally; Frederica Hall; Berta Benally; Rachel Tso; Lisa Tso, Plaintiffs, v. U.S. Forest Service; Nora Rasure (in her official capacity as Forest Supervisor for the Coconino National Forest), Defendants.	**No.** **PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER, OR, IN THE ALTERNATIVE, PRELIMINARY INJUNCTION**

Pursuant to Rule 65, Fed. R. Civ. P., plaintiffs hereby move this Court for a Temporary Restraining Order, or, in the alternative, a Preliminary Injunction. A copy of the summons, the Complaint and this Motion were served via hand delivery to the Office of the U.S. Attorney for the District of Arizona on September 21, 2009. Copies of the same were sent via certified mail to: (1) the Attorney General of the United States; and (2) to the employees of the Forest Service named in their official capacity, pursuant to Rule 4(i), Fed. R. Civ. P.

On approximately June 26, 2009 the Ninth Circuit Court of Appeals issued a mandate that allows, in part, clearing, grading, and construction activities on Mount Humphreys, part of the San Francisco Peaks, to begin. These activities will have an immediate impact on the *status quo,* will result in irreparable injury to plaintiffs and the environment, and will likely destroy the subject matter of this litigation. *See, Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981) (injunction should issue if necessary to preserve the relative positions of the parties until the merits can be decided). Plaintiffs are requesting that an injunction be put in place to preserve the relative positions of the parties until the merits of this case can be decided.

A. Brief Background and Facts

The Arizona Snowbowl ski area (õSnowbowlö) is owned and operated by Arizona Snowbowl Resort Limited Partnership. Snowbowl is located entirely on the Coconino National Forest on the western flank of the San Francisco Peaks, i.e., on federal land. The ski area is operated under a Special Use Permit that is issued by the U.S. Forest Service (õFSö). To help provide Arizona Snowbowl Resort Limited Partnership with a õconsistent/reliable operating season,ö the FS undertook to expand the ski area and to introduce the use of reclaimed sewer water for snowmaking.

Plaintiffs are seeking declaratory and injunctive relief for violations of the National Environmental Policy Act, 42 U.S.C. §§ 4321 - 4370d (õNEPAö), and the Administrative Procedure Act, 5 U.S.C. §§ 701-706 (õAPAö). Plaintiffsø claims are based, in large part, on

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the FS failure to adequately consider the fact that people will ingest snow made from non-potable, reclaimed sewer water at the ski area and in the proposed snow play area.

The possibility that children (and others) might ingest snow is acknowledged in only two places in the project record. First, the FS created õStrategic Talking Pointsö in October, 2002. The õobjectiveö of the talking points was to õanticipate perceptions and accusations critical of the Snowbowl Proposal, and to create messages to explain the USFS point of view. . .ö Strategic Talking Point 3 (identified incorrectly as õ2ö in the document) provides: õWill my kids get sick if they eat artificial snow made from treated wastewater?ö scripted Response õAlthough the Snowbowløs proposal states that the water to be used in snowmaking would be treated to ADEQøs highest treatment standard, this question is really one that will be thoroughly answered in the NEPA analysis process.ö

The FS, however, fails to provide the promised analysis in the NEPA process or anywhere else. The only other mention of the fact that humans will intentionally or inadvertently ingest snow made from reclaimed sewer water appears only in the Response to Comments section of the Final Environmental Impact Statement (õFEISö). Thus, according to the FS:

> [t]here will be signs posted at Snowbowl informing visitors of the use of reclaimed water as a snowmaking water source. . . it is the responsibility of the visitor or the minorøs guardian to avoid consuming snow made with reclaimed 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.

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

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The above statement does not meet the obligations of a federal agency to: (1) õ[f]ully consider the impacts of [its proposal] on the physical, biological, social, and economic impacts of the human environmentö (40 C.F.R. § 1508.14); (2) ensure the õscientific integrityö of its environmental analysis (40 C.F.R. § 1502.24); and/or õ. . . insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken. . . ö (40 C.F.R. § 1500.1(b); *see also, e.g.,* 40 C.F.R. § 1500.2(d) (obligation to facilitate public involvement in decisions).

As discussed below, the Ninth Circuit previously held that:

> [t]he Forest Service has not provided a õreasonably thorough discussionö of any risks posed by human ingestion of artificial snow made from treated sewage effluent or articulated why such a discussion is unnecessary, has not provided a õcandid acknowledgmentö of any such risks, and has not provided an analysis that will õfoster both informed decision-making and informed public participation.ö We therefore hold that the FEIS does not satisfy NEPA with respect to the possible risks posed by human ingestion of the artificial snow.

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

1. Project/NEPA Background

A Draft Environmental Impact Statement (õDEISö) for the Arizona Snowbowl Facilities Improvements proposal was released by the FS in February 2004. In response to the DEIS, a total of 9,887 comments were submitted to the FS. In February 2005, the FS issued the õFinal Environmental Impact Statement for Arizona Snowbowl Facilities

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Improvementsö (õFEISö) and the õRecord of Decision ó Arizona Snowbowl Facilities Improvements Final EIS and Forest Plan Amendment #21.ö (õRODö). The ROD documents the Selected Alternative and rationale for the decision. The ROD was signed by defendant Nora Rasure on approximately February 18, 2005.

The DEIS and FEIS identified three alternatives that were addressed in detail: (1) Alternative 1 ó the No Action Alternative; (2) Alternative 2 ó The Proposed Action; and Alternative 3 ó No Snowmaking or Snowplay. The ROD identified Alternative 2, the Proposed Action, as the Selected Alternative. Alternative Two requires, in part: (a) approximately 205 acres of snowmaking coverage throughout the area, utilizing reclaimed wastewater; (b) a 10 million-gallon snowmaking reclaimed wastewater reservoir near the top terminal of the existing Sunset Chairlift and catchment pond below the Hart Prairie Lodge; (c) construction of a reclaimed water pipeline between Flagstaff and Snowbowl with booster stations and pumphouses; (d) construction of a 3,000 to 4,000 square foot snowmaking control building; (e) construction of a new 10,000 square foot guest services facility; (f) an increase in skiable acreage from 139 acres to approximately 205 acres ó an approximate 47% increase; and (g) approximately 47 acres of thinning and 87 acres of grading/stumping and smoothing.

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

(and numerous other parties) filed timely administrative appeals with the Appeal Deciding Officer for the project.

On approximately June 8, 2005, the Appeal Deciding Officer issued the final administrative determination for the agency. The final decision approved the selection and implementation of Alternative Two, including the 47% expansion of the ski area and the introduction of reclaimed sewer water for Snowmaking.

2. Prior Litigation

Shortly after the June 8, 2005 approval for the expansion of the Snowbowl ski area, a number of Indian Tribes and environmental organization sued the FS to stop the project. In January, 2006, the U.S. District Court for the District of Arizona ruled against the Tribes and environmental organizations on all counts. *Navajo Nation et al., v. U.S. Forest Service et al*. 408 F.Supp.2d 866 (D. Ariz. 2006). The district court did not specifically address the issue of possible human ingestion of snow made from reclaimed sewer water.

On appeal, however, the Ninth Circuit found, in part, that the FS failed to adequately consider the possibility of human ingestion for purposes of NEPA. *Navajo Nation*, 479 F.3d at 1048-1054. According to the Ninth Circuit:

> [t]he Forest Service has not provided a õreasonably thorough discussionö of any risks posed by human ingestion of artificial snow made from treated sewage effluent or articulated why such a discussion is unnecessary, has not provided a õcandid acknowledgmentö of any such risks, and has not provided an analysis that will õfoster both informed decision-making and informed public participation.ö We therefore hold that the FEIS does not satisfy NEPA with respect to the possible risks posed by human ingestion of the artificial snow.

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Id. at 1053-1054.

The Ninth Circuit granted a petition for rehearing *en banc* and vacated, in part, the earlier panel decision. On the issue of human ingestion of snow made from reclaimed sewer water, the *en banc* panel found that the plaintiffs in the case never properly raised the issue in the lower court, and declined to address the merits. *Navajo Nation et al. v. U.S. Forest Service*, 535 F.3d 1058, 1079-1080 (9th Cir. 2008) (*en banc*); *see also, e.g., id.* at 1108 (Fletcher, Pregerson and Fisher dissenting) (õThe majority concludes that Appellants failed properly to plead a violation of NEPA in their complaint. The violation in question is an alleged failure by the Forest Service to analyze the risks posed by human ingestion of artificial snow made with treated sewage effluent. Because of the asserted pleading mistake, the majority declines to reach the merits of the claimed violation.ö); *id*. (dissent) at 1111 (õThe FEIS does not contain a reasonably thorough discussion of the risks posed by possible human ingestion of artificial snow made from treated sewage effluent, and it does not articulate why such discussion is unnecessary.ö).

On June 8, 2009, the U.S. Supreme Court denied a petition for certiorari that was filed by petitioner Indian Tribes. The petition sought review of the FS approval of reclaimed sewer water to make snow, on religious grounds. Any activity in furtherance of the project was stayed pending the Supreme Courtøs determination on the petition for certiorari. The Supreme Courtøs denial of certiorari and the subsequent issuance of the Mandate from the Ninth Circuit on June 26, 2009, mean in part, that clearing, grading, and construction activities on Mount Humphreys, part of the San Francisco Peaks, can begin immediately.

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These activities will have an immediate impact on the *status quo,* will result in irreparable injury to plaintiffs and the environment, and will likely destroy the subject matter of this litigation.

B. Standard for Granting Preliminary Injunctive Relief

In the Ninth Circuit, a court may grant a temporary restraining order (õTROö) or preliminary injunction if the plaintiff õdemonstrates *either* a combination of probable success on the merits and the possibility of irreparable injury *or* that serious questions are raised and the balance of hardships tips sharply in his favor.ö *Earth Island Institute v. U.S. Forest Service*, 351 F.3d 1291, 1298 (9th Cir. 2003) (emphasis in original); *Save Our Sonoran v. Flowers*, 408 F.3d 1113, 1120 (9th Cir. 2005). These tests õare not separate but rather represent the outer reaches of a single continuum.ö *Lopez v. Heckler*, 713 F.2d 1432, 1435 (9th Cir. 1983).

In *Winter v. Natural Resources Defense Council*, 129 S.Ct. 365 (2008), however, a majority of the Supreme Court found, in part, that the Ninth Circuitøs õpossibilityö of irreparable harm standard is too lenient. According to the Court, in order to obtain injunctive relief the plaintiff must õdemonstrate that irreparable injury is likely in the absence of an injunction.ö Id. at 375. In the instant case, plaintiffs can demonstrate that irreparable injury

is likely in the absence of an injunction.[1] Indeed, in the instant case, irreparable injury is certain without an injunction.

1. Plaintiffs Can Demonstrate a Strong Likelihood of Success on the Merits and that Irreparable Injury is Likely in the Absence of an Injunction

As indicated above, the applicable test in the Ninth Circuit has historically been a continuum. Thus, for example, if plaintiffs can demonstrate a relatively high degree of possible irreparable harm, the requisite showing of probability of success decreases, and visa-versa. *Idaho Sporting Congress, Inc., v. Alexander*, 222 F.3d 562, 565 (9th Cir. 2000); *see also, e.g., Earth Island Institute*, 351 F.3d at 1298 (õpreliminary injunction only requires plaintiffs to show *probable* success on the merits and the *possibility* of irreparable harmö) (emphasis in original).

Whether or not the õcontinuumö test historically applied to determine if an injunction should issue has any efficacy after *Winter v. Natural Resources Defense Council*, need not be decided here. Plaintiffs in the instant case can demonstrate a strong likelihood of success on the merits and that irreparable injury is likely in the absence of an injunction.

[1] It is not clear what impact *Winter v. Natural Resources Defense Council* will have on the õcontinuumö test historically applied by the Ninth Circuit. As indicated above, however, in the instant case, plaintiffs can meet the apparently heightened *Winter* standard.

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a. Plaintiffs Can Demonstrate a Strong Likelihood of Prevailing on the Merits

- The FS Failed to Take the õHard Lookö Required by NEPA

NEPA requires that a federal agency contemplating action "consider every significant aspect of the environmental impact" of the proposed action, and "inform the public that it has indeed considered environmental concerns in its decision-making process." *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council*, 462 U.S. 87, 97 (1983); *see also* 42 U.S.C. § 4331. NEPA's purpose is to ensure that federal agencies take a "hard look" at environmental consequences before committing to action. *Robertson v. Methow Valley Citizens Council,* 490 U.S. 332, 350 (1989). In order to take a hard look, the Forest Service must õ[f]ully consider the impacts of [its proposal] on the physical, biological, social, and economic impacts of the human environment.ö 40 C.F.R. § 1508.14.

As discussed *supra*, and as previously held by the Ninth Circuit, the Forest Service failed to adequately consider impacts on people who might ingest snow made from reclaimed sewer water while skiing or playing in the snow-play area. *See, Navajo Nation*, 479 F.3d at 1048-1054 (õ. . . the FEIS does not satisfy NEPA with respect to the possible risks posed by human ingestion of the artificial snow.ö). The FS failed to take the requisite õhard lookö at the environmental consequences of its actions. *E.g., Oregon Natural Resources Council Fund v. Goodman*, 505 F.3d 884, 889 (9th Cir. 2007) (õif an agency fails to consider an important aspect of a problem . . . its action is arbitrary and capriciousö).

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- <u>The FS Failed to Ensure the õScientific Integrityö of Its Environmental Analysis</u>

The FS is obligated to ensure the õscientific integrityö of its environmental analysis. 40 C.F.R. § 1502.24. Further, an FEIS must õmake explicit reference . . . to the scientific and other sources relied upon for conclusions in the statement.ö *Id*. Indeed, an environmental analysis under NEPA must include reference to important scientific materials that both support and call into question its conclusions.ö *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1214 (9th Cir. 1998); 40 C.F.R. § 1500.1(b) (õAccurate scientific analysis, expert agency comments, and public scrutiny are essential in implementing NEPA.ö).

In the instant matter, the FS simply asserts (in its response to comments) that, õ[b]ecause 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.ö FEIS, Vol. 2 at 264 (Response to Comments). The FEIS neither ensures the õscientific integrityö of its environmental analysis as required by 40 C.F.R. § 1502.24, nor provides the requisite õaccurate scientific analysis, expert agency comments, and public scrutinyö required by 40 C.F.R. § 1500.1(b).

The FS failure to ensure the õscientific integrityö of its environmental analysis and to provide the requisite õaccurate scientific analysis, expert agency comments, and public scrutinyö was arbitrary, capricious, an abuse of discretion, and/or not otherwise in accordance with law.

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- The FS Failed to Make Environmental Information Available to the Public and Public officials.

õNEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken. The information must be of high quality. . .ö 40 C.F.R. § 1500.1(b); *see also, e.g.,* 40 C.F.R. § 1500.2(d) (obligation to facilitate public involvement in decisions).

In the instant case, the FS failure to provide information to the public on the potential impacts to children (and others) who might eat snow made from non-potable, reclaimed, sewer water results in a procedural injury that is actionable under NEPA and the APA. *See, Citizens for Better Forestry v. U.S. Dep't of Ag.*, 341 F.3d 961, 971 (9th Cir. 2003) (õ. . . environmental plaintiff was surely harmed when agency action precluded the kind of public comment and participation NEPA requires in the EIS process. . .ö).

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

In short, the plaintiffs can show a relatively high probability of success on the merits.

b. Plaintiffs Can Demonstrate That Irreparable Injury is Likely in the Absence of an Injunction

The Forest Service is proposing, *inter alia,* construction of: (a) a 10 million-gallon snowmaking reclaimed sewer water reservoir near the top terminal of the existing Sunset Chairlift; (b) a catchment pond below the Hart Prairie Lodge; (c) a reclaimed water pipeline

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between Flagstaff and Snowbowl with booster stations and pumphouses; and (d) a 3,000 to 4,000 square foot snowmaking control building on the mountain. This is to accommodate approximately 205 acres of snowmaking coverage throughout the area, utilizing reclaimed sewer water. The project also anticipates an increase in skiable acreage from 139 acres to approximately 205 acres ó including approximately 47 acres of thinning and 87 acres of grading/stumping and smoothing.

It is well established that there is no adequate remedy at law for the type and magnitude of injury to the environment that will result from the proposed project. It is similarly well settled that, barring some extremely unusual circumstance (which is not present in the instant case), an injunction should be issued. *E.g. Idaho Sporting Congress,* 222 F.3d at 569; *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 545, 107 S. Ct. 1369 (1987) (õenvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparableö).

Moreover, a violation of the processes required by these statutes generally results in irreparable harm, separate and distinct from the prospect of physical harm considered above. *See, e.g., Northern Cheyenne Tribe v. Hodel*, 851 F.2d 1152, 1157 (9th Cir. 1988) (the danger of bureaucratic commitment presents a type of irreparable harm that warrants an injunction.).[2]

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[2] Plaintiffs have also demonstrated the possibility of harm to their religious beliefs. õCourts have persuasively found that irreparable harm accompanies a substantial burden on an individualøs rights to the free exercise of religion . . . ö *Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996), *citing, in part, Luckette v. Lewis*, 883 F. Supp. 471, 483 (D. Ariz. 1995).

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Plaintiffs have demonstrated a strong likelihood of success on the merits and that irreparable injury is likely in the absence of an injunction. For the reasons set forth above, this Court should issue an injunction preserving the *status quo* pending the outcome of this litigation.

2. Plaintiffs Have Raised Serious Legal Questions and the Balance of Hardships Tips Sharply in Plaintiffs' Favor

Notwithstanding the foregoing, plaintiffs are also entitled to the injunctive relief they seek if they can raise serious legal questions and they can demonstrate that the balance of hardships tips sharply in their favor.ö *E.g.*, *Earth Island Institute*, 351 F.3d at 1298. Plaintiffs have raised õserious legal questions.ö Indeed, the prior Ninth Circuit finding, that the FS failed to adequately consider the impact of human ingestion of snow made from reclaimed sewer water should, in-and-of-itself, demonstrate the existence of a serious legal question.

The balance of hardships in this case tips sharply in plaintiffsø favor. In a worst case scenario for Snowbowl, the ski area will have another ski season at current user capacity levels relying on natural snow. Defendants will suffer no irreparable harm. *See, e.g., Northern Alaska Envtl Ctr. V. Hodel*, 803 F.2d 466, 471 (9th Cir. 1986) (õmore than pecuniary harm must be demonstratedö in order to avoid a preliminary injunction).

Plaintiffs on the other hand, have raised the prospect of irreparable environmental, recreational, educational, scientific, historic, cultural, procedural, and religious harms. In these types of cases, it is generally accepted that, õif such injury is sufficiently likely . . . the

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balance of harms will usually favor the issuance of an injunction to protect the environment.ö *Id*. at 1299, *quoting Amoco production Co*., 480 U.S. at 545. For these same reasons, the question of õrelative hardship to the partiesö (the õcritical elementö in the analysis) also weighs heavily in favor of granting the requested injunction.

3. The Public Interest Tips Strongly in Favor of Granting an Injunction

The public has an interest in ensuring that proper scrutiny and analysis is provided by the government before an irreparable commitment of public lands is made. It would be imprudent for the defendants to commit public resources to the site while this case is pending. *See Sierra Club v. Bosworth*, 510 F.3d 1016, 1033 (9th Cir. 2007) (citations omitted) (õThe balance of equities and the public interest favor issuance of an injunction because allowing a potentially environmentally damaging program to proceed without an adequate record of decision runs contrary to the mandate of NEPA.ö)

The public interest in preserving nature and avoiding irreparable harm to the environment is also well established and applicable in the instant case. Indeed, in the context of granting injunctive relief that halts the proposed expansion of a ski area, the Ninth Circuit reiterated its well established position ó õthis Court has ÷held time and again that the public interest in preserving nature and avoiding irreparable injury outweighs economic concerns.øö *Oregon Natural Resources Council Fund v. Goodman*, 505 F.3d 884, 898 (9th Cir. 2007), *quoting, Lands Council v. McNair*, 494 F.3d 771, 780 (9th Cir. 2007); *see also, e.g., Sierra Nev. Forest Prot. Campaign v. Tippin,* No. 06-00351, 2006 WL 2583036, at *21 (E.D.Cal. Sept. 6, 2006) (õThe environment is a vital constituent public interest that must be

recognized and protected by federal law even in the face of adverse economic consequences.ö).

C. Conclusion

In the instant case: (1) the balance of hardships tips sharply in plaintiffsø favor; (2) plaintiffs will suffer irreparable injury if an injunction is not granted; (3) defendants will not suffer any irreparable harm; (4) plaintiffs have demonstrated a probability of success on the merits; and (5) plaintiffs have raised serious legal questions. Plaintiffs respectfully request that their motion for injunctive relief be granted so the *status quo* can be maintained pending the outcome of this litigation.[3]

Respectfully submitted September 21st, 2009.

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[3] The Court should not require the posting of a bond. Plaintiffs, who are acting in the public interest, do not have the economic resources to afford a substantial bond. If a bond is required it should be nominal. Under NEPA, Congress intended for private plaintiffs to aid in the enforcement of national environmental policy. Ordinarily, where a party is seeking to vindicate the public interest served by NEPA, a minimal bond amount, if any, should be considered. *Davis v. Mineta,* 302 F.3d 1104, 1126 (10th Cir. 2004*), citing, Friends of the Earth, Inc. v. Brinegar*, 518 F.2d 322, 322-323 (9th Cir. 1975); *see also, e.g., Wisconsin Heritages, Inc. v. Harris*, 476 F. Supp. 300, 303 (E.D. Wisc. 1979) (no bond); *Scherr v. Volpe*, 466 F.2d 1027 (7th Cir. 1972) (no bond); *Natural Resources Defense Council, Inc. v. Morton*, 337 F. Supp. 167 (D.D.C. 1971) ($100); *Environmental Defense Fund v. Corps of Engineers*, 331 F. Supp. 925 (D.D.C. 1971) ($1.00).

ORIGINAL and COPY
of the foregoing filed September 21st, 2009:

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