9th Cir. No. 10-17896

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SAVE THE PEAKS COALITION *et al.*,

Plaintiffs/Appellants,

v.

U.S. FOREST SERVICE, *et al.*,

Defendants/Appellees,

and

ARIZONA SNOWBOWL RESORT LIMITED PARTNERSHIP,

Intervenor/Defendant/Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
(No. 3:09-CV-08163-PCT-MHM)

PLAINTIFFS'/APPELLANTS' REPLY BRIEF

Howard M. Shanker (AZ No. 015547)
THE SHANKER LAW FIRM, PLC
700 East Baseline Road, Bldg. B
Tempe, Arizona 85283
Telephone: (480) 838-9300
Facsimile: (480) 838-9433
Email: howard@shankerlaw.net

Attorneys for Plaintiffs/Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules & Regulations

I. INTRODUCTION

A. Clarification of Procedural Facts (Laches)

In 2005, after an exhaustive review of the EIS at issue herein, a three judge panel of the Ninth Circuit found that:

> [t]he Forest Service has not provided a ñreasonably thorough discussionò 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 ñcandid acknowledgmentò of any such risks, and has not provided an analysis that will ñfoster both informed decision-making and informed public participation.ò 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 v. U.S., 479 F.3d 1024,1053-1054 (9th Cir. 2007) ("*Navajo Nation I*") Defendants and the lower court assert that, because Plaintiffs did not file suit asserting that "the FEIS does not satisfy NEPA with respect to the possible risks posed by human ingestion of artificial snow" (*id*.) while *Navajo Nation I* was still in place, Plaintiffs lacked diligence in pursuing their claim. In 2008, a majority of the *en banc* panel in *Navajo Nation v. U.S.*, 535 F.3d 1058 (9th Cir. 2008) (*Navajo Nation II)* held that the "ingestion" claim was not properly raised in a complaint to the lower court and therefore waived - it never addressed the merits of this issue. *Id*. at 1079-1080.[1] In June 2009, the Ninth Circuit issued its mandate in the *Navajo*

[1] The ruling of the *en banc* panel was incorrect. *See, e.g., Apache Survival Coalition v. U.S.*, 21 F.3d 895, 910-911(9th Cir. 1994) ("*Apache Survival I*") ("The complaint . . . does not control the issues properly before this court . . . "); 10A

Nation case. In September 2009, approximately three months later Plaintiffs (who are not in privity with any of the *Navajo Nation* plaintiffs) filed the instant case.

Plaintiffs' initial complaint was accompanied by a motion for a temporary restraining order. This motion was withdrawn at the request of the Federal Defendants. According to Defendants, ñno ground-disturbing work has been or may be undertaken in 2009 to construct the reservoir, catchment pond, pipeline, or snowmaking control building that is referenced in Plaintiffs' motion." Further Excerpts of Record ("FER") 19-20.

On July 7, 2010, after receiving a cryptic notice of a permit approval, Plaintiffs once again filed an Emergency Motion for a Temporary Restraining Order. Dckt. 110. Defendants' response included a Declaration from Earl Stewart, the Forest Supervisor who stated, in part, that ñ[a]s of July 8, 2010, the Coconino National Forest has not received any project-specific implementation plans.ò FER 21-22. In light of the foregoing, Plaintiffs agreed to withdraw this second Emergency Motion in exchange for a stipulation that no ground clearing activities could proceed. Dckt. 121. On July 7, 2010, the lower court approved the stipulated

---

Wright & Miller, § 2721, at 43-46 ("The formal issues framed by the pleadings are not controlling on a motion for summary judgment; the court must consider the issues presented in other material offered by the parties. . ."). In the *Navajo Nation* case the "ingestion" issue was fully briefed and argued at summary judgment.

motion staying ground clearing activities and withdrawing the Emergency Motion for a Temporary Restraining Order. Dckt. 123.

Construction plans were submitted to the FS by ASR on May 2, 2011. The FS approved them and provided Snowbowl with a Notice to Proceed on May 16, 2011- approximately two years after the instant suit was filed. FER 23. Plaintiffs were not laying in wait in the bushes. Plaintiffs had no nefarious delay/litigation tactics. To the contrary, Plaintiffs were diligent in pursuing this claim. Even, however, assuming, *arguendo*, that Plaintiffs somehow lacked diligence, as discussed *infra*, there is no "undue prejudice" sufficient to support the lower court's finding of laches.

B. Clarification of Substantive Facts

ASR has been authorized by the FS to make snow using 100% reclaimed sewer water ï something that is not done at any other ski area in the world. FER 5-7; 9-10. This project is taking place on federal land that is environmentally sensitive and sacred to the tribes in the Southwestern United States. ER 179-180.

The ramifications of this great experiment, however, go beyond those considered by Native Americans and people of conscience. The health impacts on children (and adults) ingesting snow made from reclaimed sewer water are not

known. Defendants assert that the reclaimed wastewater is safe and that it meets drinking water standards. *E.g.* ASR Resp. at 19; Fed. Resp. at 7. This is not true.

According to the EIS, reclaimed water "has detectable levels of enteric bacteria, viruses, and protozoa, including Cryptosporidium and Giardia . . . [Indeed,] most documented outbreaks of waterborne disease in the United States are caused by protozoan and viral pathogens in waters that have met coliform standards. . ." ER 188. Significantly, there are a host of pharmaceuticals and personal care products ("PPCPs") including chemicals that disrupt normal endocrine functions that persist in treated effluent. According to the EIS:

> [s]tudies indicate that between 50 to 90 percent of a typical drug dosage can be excreted and introduced unchanged into the environment. . . Chemicals found in both non-prescription and prescription medications have been detected in municipal wastewaters and may act as endocrine disruptors. In addition to prescribed human drugs, other PPCPs of potential concern include veterinary and illicit drugs and such common substances as caffeine, cosmetics, food supplements, sunscreen agents, solvents, insecticides, plasticizers, and detergent compounds.

ER 184-185; *see*, *also*, *e.g.*, ER 191 ("There 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 minor's guardian to avoid consuming snow made with reclaimed water.").

According to the EIS, ñlimited data is available to assess potential public health effects from concentrations and combinations of chemical constituents that occur in wastewater." ER 181. Indeed, although the EIS acknowledges that endocrine disrupting chemicals may persist in treated sewage effluent - ñ[municipal wastewater contains a variety of PPCPs that are pharmaceutically active and known to act on the endocrine system at therapeutic dosesò (ER 184) - it contains no discussion or analysis relevant to ingestion of snow made from effluent.

In 2007, the U.S. EPA, Office of Research and Development ("ORD") issued a draft of a Multi-Year Plan for Endocrine Disruptors (FY 2007-2013) focused on ñidentify[ing] the key factors that influence human exposures to EDCs [endocrine disrupting chemicals] and major sources of EDCs entering the environment, such as from wastewater treatment plants . . . " FER 17. According to ORD, endocrine disrupting compounds can have devastating effects to reproductive tracts and neurological functions and that ñincreases in certain cancers that may have an endocrine-related basis (breast, prostate, testicular) have led to speculation about environmental etiologies.ò FER 14. According to the report:

> [d]espite the identified potential hazard, we know little about specific toxicity pathways that lead to the identified effects nor the factors influencing environmental exposures and the environmental concentrations of endocrine disrupting chemicals that would be required to induce effects at the population level.

FER 14.

For the federal government to be complicit in a scheme to expose children (and others) to potentially hazardous contaminants before the potential health and environmental impacts are understood is unconscionable. NEPA is intended to, *inter alia:*

> assure for all Americans safe, healthful, productive, and aesthetically and culturally pleasing surroundings [and to] attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences.

42 U.S.C. § 4331(a). Defendants have failed to comply with the intent and the letter of the law.

II. THE LOWER COURT ABUSED ITS DISCRETION IN APPLYING "LACHES" TO THE INSTANT CASE

As discussed, *supra*, ASR received final approvals from the FS to proceed on May 16, 2011. The instant public interest/environmental case was filed in 2009 - well within the applicable statute of limitations and before any ground disturbing activities in furtherance of the project took place. This is not a case for laches.

A. The Lower Court Applied an Erroneous Legal Standard

It is undisputed that Plaintiffs filed suit well within the applicable six-year statute of limitations. 28 U.S.C § 2401(a). Although not recognized by the lower court, there is a strong presumption that laches does not apply if a case is filed

within the applicable statute of limitations. *Jarrow Formulas, Inc. v. Nutrition Now, Inc*., 304 F.3d 829, 835-836 (9th Cir. 2002) (ñIf the Plaintiff filed suit within the analogous limitations period, the strong presumption is that laches is inapplicable. . .ò); *In re Beaty*, 306 F.3d 914, 926 (9th Cir. 2002) (same); *Shouse v. Pierce County*, 559 F.2d 1142, 1147 (9th Cir. 1977) (same). The lower courtôs failure to recognize this ñstrong presumptionò results in the application of an erroneous legal standard and is grounds for reversal.

It is also well settled that ñlaches is strongly disfavored in environmental cases . . . The doctrine is to be invoked sparingly in environmental cases because the plaintiff is not the only party to suffer harm by alleged environmental damage." *Ocean Advocates v. U.S. Army*, 402 F.3d 846, 862 (9th Cir. 2005). Although this admonition is noted by the lower court (ER 21), the lower court fails to apply it properly in this case.

In response, Defendants argue that laches is available as an affirmative defense in a NEPA case (Fed. Resp. at 13-14; ASR Resp. at 22).[2] Plaintiffs,

[2] Defendants also assert that Plaintiffs raised the existence of the "strong presumption" against laches for the first time on appeal. Fed. Resp. at 14. In the Ninth Circuit, alternative arguments to support issues previously raised are not new issues. *E.g.*, *U.S. v. Pallares-Galan*, 359 F.3d at 1088, 1095 (9th Cir. 2004) (ñ[I]t is claims that are deemed waived or forfeited, not arguments.ò); *Lebron v. Nat'l Railroad Passenger Corp.*, 513 U.S. 374, 379 (1995) (ñ[O]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties

however, do not dispute that laches may be applied in the context of NEPA. Here, the lower court failed to acknowledge, let alone apply, the "strong presumption" that laches does not apply when, as in the instant case, suit is brought within the applicable statute of limitations. The lower court also failed to comply with the admonition that laches is strongly disfavored in environmental cases and should be invoked sparingly. The lower court applied an erroneous legal standard in applying laches to the instant case.

B. The Elements Necessary to Support a Finding of Laches are Not Present in This Case

The party seeking to invoke laches bears the burden of demonstrating that: (1) the opposing party lacked diligence in pursuing its claim; and (2) undue prejudice resulted from that lack of diligence. *Neighbors of Cuddy Mountain, v. U.S. Forest Service*, 137 F.3d 1372, 1381 (9th Cir. 1998). There has been no ñundue delayò or ñundue prejudiceò in this case.

1. There is No "Undue Prejudice" to the Party Asserting the Defense

Defendants have not been unduly prejudiced. The lower court held ñthat the near completion of the project coupled with the burden of serial and similar

---

are not limited to the precise arguments they made below.ò). Plaintiffs present no new claim or issue on appeal.

litigation is sufficient to establish prejudice for a laches defense here.ò ER 25-26. The lower court abused its discretion.

a. The Lower Court Based Its Finding of "Prejudice" On An Erroneous Finding of Fact - That "Construction Was Nearly Complete"

It is well settled that delay may become prejudicial if, ñin large measure, the harm Appellants fear has become irreversible.ò *Apache Survival I*, 21 F.3d at 913; *Preservation Coalition, Inc. v Pierce*, 667 F.2d 851, 855 (9th Cir. 1982) (ñDelay may be prejudicial if substantial work has been completed before the suit was brought, but even substantial completion is sometimes insufficient to bar suit.ò). In the instant case, no work had, however, even begun. Indeed, Federal Defendants properly concede that the lower court finding, that "construction was near completion," was erroneous. Fed. Resp. at 25 ("We concede that Save the Peaks is correct that construction of the Project is not 'almost complete'."). The lower courtôs finding that, the project is ñnear completionò is clearly erroneous. i.e., an abuse of discretion.

b. The Lower Court Based Its Finding of "Prejudice" on the Application of an (Additional) Erroneous Legal Standard - the Alleged Burden of "Serial and Similar Litigation" is, as a Matter of Law, Not an Element of "Undue Prejudice"

The lower court found "prejudice" based on: (1) "the near completion of the project"; and (2) "the burden of serial and similar litigation." ER 25-26. As discussed, *supra*, the project was not, and indeed is not, near completion. Even assuming, *arguendo*, the existence of the "burden of serial and similar litigation," such a burden is, as a matter of law, not a recognized element of "undue prejudice" for purposes of laches. It is well settled that "undue prejudice":

> must be measured by "what Congress defines as prejudice." The primary concern is whether the harm that Congress sought to prevent through the relevant statutory scheme is now irreversible . . . Thus, courts evaluating prejudice in analogous contexts have focused not solely on the amount of money spent in dollar terms on a project, but on "the degree to which construction is complete" . . .

Apache Survival I, 21 F.3d at 912. Here, it is undisputed that construction did not even begin until approximately two-years after Plaintiffs filed suit. Allegations of "serial" or "similar" litigation cannot, without more, support a finding that "the harm Congress sought to prevent through [NEPA] is now irreversible." *Id.; see, also, e.g., Preservation Coalition, Inc. v. Pierce*, 667 F.2d 851, 855 (9th Cir. 1982) ("increased cost from delay is alone not sufficient to establish prejudice"); *Apache Survival I*, 21 F.3d at 912 n. 18 (same); *Neighbors of Cuddy Mountain*, 137 F.3d at

1381 n. 9 ("We know of no case in which a private company's economic loss was considered pertinent to the analysis of a laches defense.").

c. Defendants' Remaining Assertions of "Undue Prejudice" Misstate the Record and Generally Make No Sense

The lower court in the *Navajo Nation* case never addressed the ingestion claim. *Navajo Nation II,* 535 F.3d at 1079-1080. The *en banc* panel in *Navajo Nation II* expressly declined to address the ingestion issue. *Id*. Indeed, the only prior decision on the merits of this claim was from the vacated Ninth Circuit decision in *Navajo Nation I*, which found that, "the FEIS does not satisfy NEPA with respect to the possible risks posed by human ingestion of the artificial snow." *Navajo Nation I, 479 F.3d* at 1053-1054.

Notwithstanding the foregoing, Defendants assert that "the district court did not abuse its discretion in finding that obligating the Service and ASR to expend additional time and resources to defend a claim on which this Court has already issued a final judgment justifies dismissal of the Save the Peaks' complaint." Fed. Resp. at 25; s*ee, also, id*. ("While the Service does not appeal here the district court's ruling that Save the Peaks' claims are not barred by *res judicata*, the finality of this result nevertheless has bearing on the burden imposed by serially litigating this same claim."). Defendants' assertion makes no sense. The lower court, again,

abused its discretion in finding "undue prejudice" sufficient to warrant an application of laches in the instant case.

2. There Was No "Undue" or "Inexcusable" Delay

Although the lack of ñprejudiceò is dispositive as to laches, there also has been no ñundue delay.ò Defendants' accusations of delay resulting from "litigation tactics" are not supported by the record. As discussed, *supra*, the FS approved ASR's construction plans and provided Snowbowl with a Notice to Proceed on May 16, 2011. FER 23. The instant action was commenced in 2009.

Notwithstanding the foregoing, the lower court (and defendants) assert that the instant case is analogous to the *Apache Survival* Cases. *E.g*., ER 24-26. In *Apache Survival I*, however, it was elemental to the finding of "undue delay" that: (1) plaintiff "ignored the very process that its members now contend was inadequate." i.e. refused to participated in the administrative process (21 F.3d at 907); (2) the potential harm asserted by plaintiff was isolated. i.e., only plaintiff would suffer the harm (*id*. at 908); and (3) plaintiff "did not move for injunctive relief until eight months after filing of the complaint, long after construction was underway." (*id*. at 910). It was also important to the Court that the completed construction had already permanently altered the character of the mountain and that Congress had legislated the process. Thus, according to the Court, "in large

measure, the harm Appellants fear has become irreversible." *Id*. at 912-913. None of these factors are present in the instant case.

The instant Plaintiffs exhausted their administrative remedies. ER 13-16. Defendants aver that the lower court determination of "exhaustion," "is not conclusive as to whether the comments were sufficient for purposes of laches." Fed. Resp. at 16. There is, however, no legal support for the proposition that there are varying standards of administrative exhaustion for purposes of laches. Plaintiffs' comments clearly stated their concern regarding the ingestion of snow made from reclaimed sewer water. ER at 15 ("The comments highlighted by the Plaintiffs plainly alert the Forest Service to their concern regarding the health effects of exposure to snow from reclaimed water, including concerns about the effects of ingestion."); *see, also* Dckt. 95 at 12 of 29 - 16 of 29.

Second, the potential for harm from exposure to snow made from reclaimed sewer water is not isolated to the instant Plaintiffs, but rather is a matter of public health and concern. Third, the Plaintiffs filed suit two years before construction began and sought injunctive relief immediately upon filing.

The lower court also found undue delay because "Plaintiffs have not been engaged in an alternative continued dialogue with the Forest Service since 2005." ER 23. According to Defendants:

> Save the Peaks provides no evidence to contradict the district court's finding that these Plaintiffs completely dropped communication with the Service for over four years. Save the Peaks states, without citation or explanation, only that 'subsequent communications with [Service] and USDA officials have been equally unavailing.' Op. Br at 15.

Fed. Resp. at 17. The relevant inquiry is, however, "whether the party attempted to communicate its position to the agency before filing suit." *Coalition for Canyon Preservation v. Bowers*, 632 F.2d 774, 779 (9th Cir. 1980). The manner by which that standard is met is determined on a case-by-case basis. In the instant case, it is beyond dispute that Plaintiffs communicated their position to the agency before filing suit.

Notwithstanding the foregoing, Plaintiffs' have voiced their concerns publicly and have addressed/confronted the FS on a relatively regular basis between 2005 and 2009 - the problem here is with the lower court stating that "Plaintiffs completely dropped communications with the Forest Service after 2005 until initiating this lawsuit in 2009." ER 23. In this administrative record case, the lower court had no evidence of activities conducted by Plaintiffs between 2005 and 2009 - after the record was closed. Indeed, the court fabricates this finding out of whole cloth. Plaintiffs provided "no support" because the issue was first raised in the lower court's opinion. As a result, Plaintiffs had no reason to attempt to submit extra record evidence during the pendency of the proceeding.

Finally, the lower court asserts that Plaintiffs lacked diligence because they knew about the *Navajo Nation* litigation and did not join. ER 24; *but, c.f., e.g.*, *Green v. City of Tucson*, 255 F.3d 1086, 1101 (9th Cir. 2001) (ñearlier litigation brought by parties with similar interests could not preclude subsequent plaintiffs from bringing their own lawsuit even though they were aware of the prior litigation and shared a lawyer with the earlier plaintiffs.ò), *citing*, *South Cent. Bell Tel. Co. v. Alabama*, 526 U.S. 160, 167-168 (1999). Notwithstanding applicable law and the facts of this case, according to the lower court "[i]n this respect, the Plaintiffs in this case are rather like the plaintiffs in *Apache Survival Coalition v. U.S.*, 118 F.3d 663 (9th Cir. 1997) ("*Apache Survival II")*. ER 24. In *Apache Survival II*, however, it was the same party ("the doctrine of *res judicata* looms large in the future of this case"), advancing the same claim that the Court had previously rejected. According to the Ninth Circuit, "we are at a loss to understand how the claims advanced in the present suit are any different from those we rejected in *Apache Survival I*." *Apache Survival II*, 118 F.3d at 666.

In the instant case, there are different plaintiffs. Indeed, the lower court expressly ruled that there was no privity and that *res judicata* does not apply. ER 19-21. Moreover, the only court to consider the claim(s) at issue held that, "FEIS

does not satisfy NEPA with respect to the possible risks posed by human ingestion of the artificial snow." *Navajo Nation I*, 479 F.3d at 1053-1054.

III. THE FS FAILED TO COMPLY WITH NEPA

NEPA is expressly intended to ensure that federal agencies, *inter alia*, "assure for all Americans safe, healthful, productive and aesthetically and culturally pleasing surroundings [and] attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences." 42 U.S.C. § 4331(b). Defendants failed to comply with the intent and the letter of the law.

A. The EIS Does Not Contain a "Reasonably Thorough Discussion" of the Impacts Associated with the Ingestion of Snow Made From Reclaimed Sewer Water

In response to the obligation to include a "reasonably thorough discussion" of the impact on people that will ingest snow made from reclaimed sewer water in the EIS, Defendants appear to argue that there is relevant discussion in the Watershed Resources section of the EIS. *E.g.*, ASR Resp. at 37.

The EIS, however, contains no discussion at all of any impacts associated with the ingestion of snow made from reclaimed sewer water. Indeed, according to the EIS:

> [a]lthough many studies have investigated the toxicology of specific chemical constituents that may be present in wastewater, limited data is

> available to assess potential public health effects from concentrations and combinations of chemical constituents that occur in wastewater.

ER 181.

1. Effluent from Rio de Flag Contains Enteric Bacteria, Viruses, and Protozoa, Including Cryptosporidium and Giardia

With regard to microbial constituents, for example, the EIS provides that:

> [a] wide variety of microbial pathogens may be found in wastewater, including enteric bacteria, enteric viruses, and enteric protozoan parasites. . . Advanced wastewater treatment may remove as much as 99.9999 percent of the fecal coliform bacteria; however, the resulting effluent has detectable levels of enteric bacteria, viruses, and protozoa, including Cryptosporidium and Giardia. These data suggest that wastewater discharges are contributing enteric pathogens to ambient surface waters, many of which may be used downstream for drinking purposes. It is now known that most documented outbreaks of waterborne disease in the United States are caused by protozoan and viral pathogens in waters that have met coliform standards. . .

ER 187-188.

2. The Health Impacts of Exposure to Pharmaceuticals and Personal Care Products ("PPCPs") Found in Reclaimed Water are Uncertain

The City of Flagstaff treated wastewater is not screened for many chemicals known to influence vertebrate physiological function. Recent findings demonstrate that agricultural, industrial, and pharmaceutical chemicals are found in wastewater output, and many of these compounds can disrupt the vertebrate endocrine system. These chemicals often go untreated and undetected.

According to the EIS:

> it has been recognized that a wide range of other synthetic organic chemicals originating from pharmaceutical drugs and personal care products may persist in the environment. These chemicals are continually released into the environment in large quantities through the manufacture, use (via excretion), and disposal of personal care products and drugs. Research has shown that these chemicals enter and disperse into the environment from municipal wastewater treatment effluent, and persist to a greater extent than originally anticipated. Studies indicate that between 50 to 90 percent of a typical drug dosage can be excreted and introduced unchanged into the environment.
>
> é Chemicals found in both non-prescription and prescription medications have been detected in municipal wastewaters and may act as endocrine disruptors. In addition to prescribed human drugs, other PPCPs of potential concern include veterinary and illicit drugs and such common substances as caffeine, cosmetics, food supplements, sunscreen agents, solvents, insecticides, plasticizers, and detergent compounds.

ER 183-185.

The EIS also cites a report from an expert panel on behalf of the World Health Organization, finding that, ñgenerallyé studies investigating endocrine disruption effects in humans have yielded inconsistent and inconclusive results and that more rigorous studies are recommended." ER 186.

3. Nothing in the EIS Addresses the Potential Impacts of People Ingesting Wastewater Snow – Even the Generalized Public Health Impacts of Exposure to Reclaimed Wastewater are Uncertain in the EIS

Nothing in the discussion included in the EIS indicates that people might ingest snow made from reclaimed sewer water. Nothing in the EIS analyzes the

risks associated with children or adults eating/ingesting wastewater snow. Indeed, as is evident from the discussion, the risks to public health posed by treated effluent, in general, are largely uncertain and/or unknown.

When an agency is evaluating significant adverse effects on the human environment and there are gaps in relevant information, if the information on the adverse impacts is essential and is not known and the overall costs of obtaining it are not exorbitant, the agency has to include the information in the EIS. It would not have been exorbitant to conduct tests on Rio de Flag water under conditions simulating snowmaking. This was never done by the FS. *See* 40 C.F.R. § 1502.22. In the instant case, the agency identifies some of the uncertainties vis-à-vis human health impacts stemming from exposure to some of the constituents found in treated wastewater. The FS, however, goes on to simply dismiss the uncertainties on the impacts to human health without conducting further analysis and/or weighing the need for the project in this context.

B. The FS Failed to "Insure the Scientific Integrity" of Its Analysis as Required by NEPA

According to the EIS:

> [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.

ER 191.

Defendants assert that they: (1) can rely on ADEQ's approval of the use of reclaimed sewer water for snowmaking (ASR Resp. at 41-46; Fed. Resp. at 10, 41-43); and (2) the FS evaluated a number of relevant studies. Fed. Resp. at 33-36; ASR Resp. at 8-10, 42, 46. Neither of these assertions is borne out by applicable law or the record.

1. The Responsible Federal Agency Cannot Abdicate its NEPA Obligations to a State Agency

Defendants construct an argument that reliance on an ADEQ certification somehow relieves them of their obligation to fully comply with NEPA. Fed. Resp. at 10; ASR Resp. at 12, 37-38, 43-47. The cases cited by Defendants to support this proposition are inapposite.[3] Indeed, it is well settled that:

> [a]n agency cannot delegate its NEPA responsibilities in this manner . . . NEPA mandates a case-by-case balancing judgment on the part of federal agencies. . .

[3] Defendants cite, for example, to *Friends of the Payette v. Horseshoe Bend Hydroelectric Co*., 988 F.2d 989, 993 (9th Cir. 1993) and *Border Power Plant Working Group v. Dep't of Energy*, 260 F.Supp.2d 997, 1020-1021 (S.D. Cal. 2003), for the proposition that reliance on standards of another agency designed to protect human health is appropriate in the NEPA process. ASR Resp. at 43-44. Neither of these cases, however, has anything to do with the adequacy and/or requisite content of an EIS. Indeed, both cases concern an agency decision not to prepare an EIS.

> Certification by another agency that its own environmental standards are satisfied involves an entirely different kind of judgment. Such agencies, without overall responsibility for the particular federal action in question, attend only to one aspect of the problem. . . Certifying agencies do not attempt to weigh environmental damage against the opposing benefits. Thus, the balancing analysis remains to be done.

State of Idaho, v. Interstate Commerce Commission, 35 F.3d 585, 595-596 (D.C. Cir. 1994), *quoting*, *Calvert Cliffs' Coordinating Comm. v. Atomic Energy Comm'n*, 449 F.2d 1109, 1123 (D.C. Cir. 1971); *see, also, e.g., Save Strawberry Canyon v. DOE*, 613 F.Supp.2d at 1188-1199 (N.D. Cal.) (ñNEPAôs stated purpose is to compel procedures that *inter alia* feed specified information into the federal policy process, steps Congress calculated will achieve certain goals, including environmental goals. A state process in which the Federal Government played little part is no substitute.ò); *North Carolina v. FAA*, 957 F.2d 1125, 1129 (4th Cir. 1992) (agency does not satisfy NEPA "by simply relying on another agency's conclusions about a federal action's impact on the environment."); *Citizens Against Toxic Sprays, Inc., v. Bergland*, 428 F.Supp. 908, 927 (D.C. Or. 1977) ("Nor can the Forest Service avoid its obligations under NEPA by arguing that any necessary scientific inquiry must be conducted by the EPA. . . The responsible agency may not attempt to abdicate to any other agency merely because that agency is authorized to develop and enforce environmental standards.").

Even under circumstances (not present here) where a state agency is authorized to do a NEPA analysis and draft an EIS, the responsible federal official must provide review, oversight, and independent evaluation. Indeed, even under such circumstances, the statute makes clear that,"[t]he procedures in this subparagraph shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire statement [EIS] or of any other responsibility under this Act. . ." 42 U.S.C. § 4332(D).

In the instant case, ADEQ was not involved in the NEPA process. The FS played no role in overseeing or monitoring ADEQ's approval of reclaimed sewer water for snowmaking. There is nothing in the administrative record that reflects what, if any, analysis ADEQ did in approving this use. The FS cannot simply abridge or abdicate its NEPA obligations because ADEQ approved the use of reclaimed sewer water for snowmaking.

2. None of the Studies Identified by Defendants Addressed the Use of Reclaimed Water to Make Snow for Recreational Purposes - Let Alone Reclaimed Water Treated to Arizona Standards

Defendants assert, *inter alia*, that:

> Save the Peaks alleges that 'not one study or report included in the administrative record and/or mentioned in the EIS has anything to do with snow made from reclaimed water for recreational purposes.' This is untrue.

Fed. Resp. at 33. Defendants go on to identify a number of studies - none of which discuss snow made from reclaimed water for recreational purposes. Fed. Resp. at 33-36; ASR Resp. at 8-10, 42. No such study is included in the record. Indeed, the studies discussed are of only marginal relevance.

Where ASR claims the EIS "evaluated studies finding that reclaimed water equivalent to Class A+ is safe to inject into drinking-water supplies and to spray on crops that are to be consumed raw," (ASR Resp. at 37) there is only a summary of filtration effects in groundwater recharge facilities, and a study noting that treated sewer water used for irrigation of crops consumed raw is less risky compared to untreated sewage use in irrigation. The study also suggests "vegetables and fruit grown with such effluent should only be consumed by the local people that hopefully have developed some immunity to certain pathogens." SER 164. Again, however, the referenced studies do not look at potential health impacts of ingestion of snow made from reclaimed sewer water.

The EIS also references a study conducted by the U.S. Army Corps (SER 302) that concerned the safety of storing effluent - not skiing in it. Moreover, the Army Corps did not consider PCPPs. Notwithstanding, this study still found that ñ[o]ther species of bacteria survived the multiple freeze-thaw cycles and reproduced in the resultant snowmelt.ò SER 302. Another study considered snowmaking as a

means of storing effluent during winter when land application was not feasible. *Id*. There is nothing that analyzes the health impacts of human ingestion of snow made with reclaimed sewer water - let alone snow made from reclaimed water treated to Arizona standards.

C. The FS Failed to Make High Quality Information Regarding Impacts of Ingesting Snow Made From Reclaimed Sewer Water Available to the Public and/or Decision-Makers

As set forth above, and in Plaintiffs' Opening Brief, the FS failed to make high quality information regarding impacts of ingesting snow available to the public and/or decision makers as required by NEPA. 40 C.F.R. § 1500.1(b). ASR and the lower court assert that Plaintiffs have waived this claim because "Plaintiffs failed to respond to Defendants' motion for summary judgment on this point. . ." ASR Resp. at 46. This claim was, however, raised in Plaintiffs' motion for summary judgment. Dckt. 74 at 21. Plaintiffs do not waive such an argument whether or not it is included in a reply document. *See*, Rule 56(C), Fed. R. Civ. P.; LRCiv. 7.2(d) (not necessary to file a reply at all).

IV. CONCLUSION

As set forth above, the EIS does not contain the requisite ñreasonably thorough discussionò of the impacts associated with the ingestion of snow made from reclaimed sewer water. ñIf [as in the instant case] an agency fails to consider

an important aspect of a problem . . . its action is arbitrary and capricious.ò *Oregon Natural Resources Council Fund v. Goodman*, 505 F.3d 884, 889 (9th Cir. 2007). Moreover, as discussed above, the FS: (1) failed to insure the scientific integrity of its decision; and (2) failed to disseminate high quality information to the public and decision-makers regarding the impacts of ingesting snow made from reclaimed sewer water ï each of which is a separate violation of NEPA. Agency action in this case was: (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. . . and/or (D) without observance of procedure required by law. APA, 5 U.S.C. § 706(2).

DATED: June 16, 2011.

THE SHANKER LAW FIRM, PLC

By s/Howard M. Shanker
Howard M. Shanker
700 East Baseline Road, Suite C-8
Tempe, Arizona 85283-1210
Tel: (480) 838-9448

Attorneys for Plaintiffs-Appellants

CERTIFICATE OF COMPLIANCE

This reply brief complies with the typeface requirements of FRAP 32(a)(5) and the type style requirements of FRAP 32(a)(6) because this brief has been

prepared in a proportionally spaced typeface using Word 2007 and 14 point, Times New Roman typeface.

DATED: June 16, 2011.

THE SHANKER LAW FIRM, PLC

By s/Howard M. Shanker
Howard M. Shanker
700 East Baseline Rd., Suite C-8
Tempe, Arizona 85283-1210
(480) 838-9300

Attorneys for Plaintiffs-Appellants

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Reply Brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system on June 16, 2011.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Plaintiffsô Further Excerpts of Record were sent on June 16, 2011 via Federal Express to:

(4 sets) Clerk, U.S. Court of Appeals for the 9th Circuit
95 Seventh Street
San Francisco, CA 94103-1526

(1 set) Lane McFadden
U.S. Depôt of Justice
Appellate Section
Environment & Natural Resources Div.
PHB Mail Room 2121
601 D Street
Washington, D.C. 20004
(202) 353-9022

Counsel for Federal Defendants

(1 set) Catherine Stetson
Hogan Lovells LLP
553 13th Street, N.W.
Washington, D.C. 20004
(202) 637-5600

Counsel for ASR

By: s/Howard M. Shanker