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)

ATTORNEY PLAINTIFFS'/APPELLANTS' PETITION FOR REHEARING EN BANC

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I. STATEMENT

Plaintiffs/Appellants respectfully petition for rehearing *en banc*, pursuant to Fed. R. App. P. 35 and Ninth Circuit Rule 35-1. The panel decision conflicts with a decision of the U.S. Supreme Court and with decisions of the Ninth Circuit Court of Appeals. Consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions. As discussed in greater detail herein, this proceeding also involves one or more questions of exceptional importance.

In this case, Plaintiffs pursued an unresolved and meritorious claim of significant public and environmental importance. Plaintiffs filed within the applicable statute of limitations and over two-years before Snowbowl even received its final approvals to begin construction. They sought the assistance of an attorney who was knowledgeable about the issue and who was willing to represent them *pro bono*. There is no evidence of bad faith or improper motive and no such findings in the lower court. Indeed, the allegations of wrongdoing that support the instant panel's imposition of sanctions on Plaintiffs' counsel were first asserted by the instant panel itself. There is no support in the record for such findings, no findings of such facts by the lower court, and no impropriety or vexatious behavior or filings on the part of Plaintiffs' counsel. If this scenario gives rise to sanctions, the result is not only an injustice, but the chilling effect this decision will have on

parties otherwise willing to pursue public interest litigation will be substantial and obvious.

II. BACKGROUND

In 2005, in order to ensure Snowbowl a "consistent operating season," the Forest Service issued the Final Environmental Impact Statement ("FEIS") that was at issue in this case. The selected alternative included, in part, using reclaimed sewer water to make snow at the Snowbowl ski area – located on federal land that, according to the Forest Service, is sacred to 13 of the tribes in the southwestern United States. Shortly after the approval of the Snowbowl project, a number of Indian Tribes and environmental organizations sued the Forest Service 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. *See, Navajo Nation et al. v. U.S. Forest Service et al*., 408 F.Supp.2d 866 (D. Ariz. 2006).

On appeal, a three judge panel of the Ninth Circuit ruled in favor of the tribes on their religious and cultural claims. The three judge panel also unanimously found, in part, that the Forest Service failed to adequately consider the possibility of human ingestion of snow made from reclaimed sewer water for purposes of NEPA. *Navajo Nation et al. v. U.S. Forest Service et al,*. 479 F.3d

1024, 1048-1054 (9th Cir. 2007) (*Navajo Nation I*). According to the three judge panel, in part:

> [t]he Forest Service has not provided a "reasonably thorough discussion" 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 "candid acknowledgment" of any such risks, and has not provided an analysis that will "foster both informed decision-making and informed public participation." We therefore hold that the FEIS does not satisfy NEPA with respect to the possible risks posed by human ingestion of the artificial snow.

Id at 1053-1054. This was the only prior ruling that substantively addressed the issue of whether or not the agency failed to adequately consider the impacts of ingesting snow made with reclaimed sewer water.

This Court granted defendants' petition for rehearing *en banc*. In 2008, a majority of the *en banc* panel in *Navajo Nation et al. v. U.S. Forest Service et al.*, 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] Petitioner Indian Tribes sought review of the *en banc* decision in the U.S. Supreme Court on

[1] The instant panel asserts that *Navajo Nation I* was "vacated" by the *en banc* panel. *Save the Peaks Coalition*, 669 F.3d at 1030. In the Ninth Circuit, however, such cases are not "vacated," but rather rendered "non-precedential" thereby maintaining their informational value. *See, Navajo Nation*, 506 F.3d 717; *Animal Legal Defense Fund v. Veneman*, 490 F.3d 725 (9th Cir. 2007).

religious grounds only – the NEPA/ingestion issue was not part of the petition for *certiorari*. The Supreme Court subsequently denied *certiorari* on June 8, 2009.

In June 2009, the Ninth Circuit issued its mandate in the *Navajo Nation* case. In September 2009, (approximately three months after the mandate was issued) *Save the Peaks Coalition* Plaintiffs filed the instant case reasserting, in part, the "ingestion" issue. Howard Shanker, the same attorney for a number of the tribes and environmental organizations in the *Navajo Nation* cases, represented the *Save the Peaks Coalition* Plaintiffs. *See, e.g.*, *Southwest Voter Registration Education Project v. Shelley*, 344 F.3d 882, 904 (9th Cir. 2003); *South Cent. Bell Tel. Co. v. Alabama*, 526 U.S. 160, 168, 119 S.Ct. 1180, 1185 (1999) (Representation by common counsel "created no special representational relationship between the earlier and the later plaintiffs."); *Green v. City of Tucson*, 255 F.3d 1086, 1101 (9th Cir. 2001) ("earlier 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.").

In February 2012, the instant panel held, in part, that the Forest Service had adequately considered the "ingestion" issue in the FEIS. Significantly, however, the panel, in making this determination, also found that the Plaintiffs, and their attorney (Howard Shanker), had "grossly abused the judicial process." *Save the Peaks Coalition v. U.S. Forest Service*, 699 F.3d 1025, 1028 (9th Cir. 2012). Based

solely on the language of the panel opinion, attorneys for Snowbowl filed a motion to impose sanctions on Plaintiffs and their counsel.

In June, 2012, the panel provided, *inter alia*, that:

> we hold Shanker 'personally liable for excessive costs for unreasonably multiplying proceedings.' *Gadda*, 377 F.3d at 943 n.4. Because this entire case was designed to harass Snowbowl, we conclude that Snowbowl is entitled to an award of all costs other than attorney's fees that it incurred in litigating *Save the Peaks Coalition v. U.S. Forest Service* before both the district court (D.C. No. 3:09-cv-08163-MHM) and our court (No. 10-17896). We hereby award these costs to Snowbowl against Shanker personally.

Slip Op. at 7299-7300. In short, the panel has impugned the professional reputation of an attorney in good standing, for filing a meritorious and timely case and appeal – based solely on the subjective, unsubstantiated, opinion of the panel – that the case was intended to harass the private intervenor in a case seeking compliance of the U.S. Forest Service with a federal statute.

III. ARGUMENT

A. The Panel Decision Conflicts with Ninth Circuit and Supreme Court Precedent

1. Contrary to the Panel Decision, Precedent Allows the Imposition of Sanctions Only When Counsel has "Unreasonably and Vexatiously Multiplied the Proceedings"

To be subject to sanction under 28 U.S.C. § 1927, a lawyer must multiply "the proceedings in any case unreasonably and vexatiously. . ." *See*, 28 U.S.C. § 1927. Such sanctions "apply only to unnecessary filings and tactics once a lawsuit

has begun." *In re: Keegan*, 78 F.3d 431, 435 (9th Cir. 1996). In imposing sanctions on Shanker, the instant panel does not identify, or even allege the existence of, any specific brief, motion, and/or action within the confines of the appeal/litigation that "unreasonably and vexatiously" multiplied the proceedings. *See, e.g.*, Slip Op. at 7298-7299. The panel's ruling is directly contrary to *In re: Keegan*, *supra* and 28 U.S.C. § 1927; *see also, e.g., Chambers v. NASCO*, 501 U.S. 32, 45-46 (1991) (Court's "inherent power [to impose sanctions] extends to a full range of litigation abuses" – none of which are present in the instant case); *Fink v. Gomez*, 239 F.3d 989, 991-992 (9th Cir. 2001) (Discussing requirement for "bad faith" in the exercise of Court's inherent power to apply sanctions – ". . . bad faith by delaying or disrupting the litigation or by hampering enforcement of a court order. . . disobedience, bad faith, and vexatious wanton, or oppressive actions.").

2. The Panel's Finding of "Subjective Bad Faith" is Contrary to Precedent and Not Supported by the Record in the Instant Case

Sanctions, whether pursuant to the Court's inherent authority or 28 U.S.C. § 1927, "must be supported by a finding of subjective bad faith." *In re: Keegan*, 78 F.3d at 436. "Bad faith is present when an attorney knowingly or recklessly raises a frivolous argument, or argues a meritorious claim for the purpose of harassing an opponent." *Id*; *see, also, e.g., Protect Lake Pleasant, LLC v. Connor*, 2011 WL

11414, *2 (D. Ariz. 2011) ("This is a high threshold . . . [n]egligent or inadvertent conduct does not constitute bad faith, nor does mere recklessness.").

In the instant case, the panel found the existence of subjective "bad faith" because, according to the panel, the suit was brought to "further delay and forestall development at Snowbowl." Slip Op. at 7299. Even assuming, *arguendo*, that such a finding can provide the basis for the imposition of sanctions (it cannot), there is no support in the record for such an allegation. This case, including the instant appeal, was filed to ensure the federal government's compliance with NEPA. It was pursued in good faith, was meritorious, and not intended to "delay" or "harass." *See*, e.g., Ex. 2 (Declaration of Howard Shanker) at ¶¶ 2&4. Whether the instant panel (which was not sitting in a fact-finding capacity when it issued its opinion) shares this belief or not, there was no way for the panel to make the "subjective finding of bad faith" necessary to support the sanctions imposed. *See*, *In re: Keegan*, 78 F.3d at 436.[2]

Plaintiffs and their counsel neither knowingly nor recklessly raised any frivolous argument. *See*, Ex. 2 (Declaration of Howard Shanker) at ¶¶ 2&4. Indeed, Plaintiffs and their counsel still maintain a good faith belief in the merits of

[2] As a practical matter, Snowbowl began construction as soon as it received its permits and was not in any way hindered by this action from continuing construction during the appeal. No stay or injunction was in place during the pendency of the appeal. Plaintiffs did not name Snowbowl as a defendant. Snowbowl voluntarily intervened in this case.

their claim(s). *Id*. Plaintiffs prevailed on the laches issue on appeal and had a valid and good faith belief in the merits of their NEPA claim. Notwithstanding the lack of precedential value of *Navajo Nation I*, the fact that a prior panel of this court found that the Forest Service violated NEPA on the same law and the same facts should, at least, be sufficient to demonstrate that Plaintiffs and their counsel had a legitimate basis for their good faith belief in the validity of their claim. Even if non-precedential, this is a significant, valid indicator that Plaintiffs' NEPA claim was not without merit. Plaintiffs filed nothing that was frivolous. Neither Plaintiffs nor their counsel submitted any briefs or motions that could even be remotely construed as having been filed to "harass" Snowbowl or to "delay" the proceeding. *See, In re: Keegan*, 78 F.3d at 436.

a. The Panel's Unsupported Assertion That "Snowbowl Could Not Have Anticipated Litigation" is Not a Legitimate Element in the Court's Finding of Bad Faith on the Part of Plaintiffs' Counsel

The panel found that "the USFS and the ASRLP [Snowbowl] had good reason to believe that the issues involved in the case had been fully and fairly litigated, and that their legal nightmare had ended. Little did they know what awaited them." *Save the Peaks Coalition*, 669 F.3d at 1030. Whether or not Snowbowl anticipated litigation, however, has no relevance as to whether Plaintiffs' (and their counsel's) actions were taken in bad faith. Snowbowl was

never dragged into court, it chose to intervene in the proceeding(s) even though its interests were more than adequately represented by the Forest Service. i.e., it chose to participate in the "legal nightmare."

More significantly, with regard to the ingestion issue, the majority of the *en banc* panel in *Navajo Nation II* found that:

> the specific allegations at issue were not included in the complaint. . . Rather, the Navajo Plaintiffs assert this NEPA claim was adequately presented to the district court because the claim "was briefed at summary judgment by all parties and presented at oral argument to the district court". . . raising such claim in a summary judgment motion is [however] insufficient to present the claim to the district court.

Navajo Nation II, 535 F.3d at 179-1080.

Based on the foregoing it is not readily apparent that Snowbowl would have had "good reason to believe that the issues involved in the case had been fully and fairly litigated." *See*, *Save the Peaks Coalition*, 669 F.3d at 1030.

b. The Panel's Remaining *Ad Hominem* Attacks on Plaintiffs' Counsel are Made Up From Whole Cloth and Cannot Provide Support for the Panel's Finding of Bad Faith and Imposition of Sanctions

The panel found that, "[t]he 'new' parties in this litigation appear to be little more than a vehicle for the Navajo Nation Plaintiffs' counsel to evade *res judicata* and *collateral estoppel*." *Save the Peaks Coalition,* 669 F.3d at 1032. This assertion is simply not true. The Plaintiffs in this case had legitimate, unresolved

claims and were not otherwise precluded from attempting to vindicate their rights and the public interest in NEPA compliance. The lower court ruled that *res judicata* did not apply. Plaintiffs were not surrogates or agents of the Navajo Nation or any other prior plaintiff. Snowbowl did not appeal the lower court's ruling on this issue. Plaintiffs, and their counsel, pursued the instant case (including the appeal) to ensure compliance with NEPA and had a good faith basis for doing so. *See, e.g.*, Ex. 2 at ¶¶ 1-9.

The panel also asserted that "the 'new' plaintiffs and their counsel have grossly abused the judicial process by strategically holding back claims that could have, and should have, been asserted in the first lawsuit . . ." *Save the Peaks Coalition*, 669 F.3d at 1025. There is, however, no legal or ethical obligation for all potential and prospective plaintiffs, whether related or not, to file whatever claims they may have, at the same time. Indeed, the implication that such an obligation exists runs contrary to fundamental notions of due process.

Notwithstanding, Plaintiffs did not "hide in the bushes" waiting to file suit. Plaintiffs did not retain counsel until April, 2009 – shortly after they made the decision to pursue litigation. *See, e.g.*, Ex. 2 at ¶ 3; Ex. 3 at 47-48 (Deposition Excerpt of Jeneda Benally); Ex. 4 at 19-21, 22, 59-60, 61 (Deposition Excerpt of Berta Benally). It is incomprehensible that Plaintiffs' counsel can be charged with

bad faith stemming from any alleged delay in filing. He did not even represent Plaintiffs during this time.[3]

The procedural facts of this case also do not support any finding of improper motive or bad faith. In 2005 a three judge panel of the Ninth Circuit found that, "[t]he 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. The suggestion that Plaintiffs should, or even could have filed suit, or that they were somehow conspiring to file suit – asserting that the Forest Service failed to comply with NEPA with respect to risks posed by human ingestion – while *Navajo Nation I* was in place makes no sense.

In 2008, a majority of the *en banc* panel 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. *Navajo Nation II*, 535 F.3d at 1079-1080. In June 2009, the Ninth Circuit issued its mandate in the *Navajo Nation* case. In September 2009, approximately three months later, Plaintiffs filed the instant case. Plaintiffs did not lay in wait to ambush Snowbowl for a number of years. *See, e.g.*,

[3] The panel also founds that "Plaintiffs-Appellants appear to have been misled by their counsel concerning the issues that remained part of the appeal. . ." Slip. Op. at 7298. This allegation is a complete fabrication with no support in the record. Indeed, it appears, for the first time, in the panel's decision to impose sanctions.

Ex. 2 at ¶¶1-9; Ex. 3 at 47-48 (Deposition Excerpt of Jeneda Benally); Ex. 4 at 19-21, 22, 59-60, 61 (Deposition Excerpts of Berta Benally).

Plaintiffs did not conspire to not file suit in 2005. They simply made a decision to pursue meritorious, unresolved, claims in 2009 – within the applicable statute of limitations and over two-years before Snowbowl even received its final approvals to begin construction. Plaintiffs' actions were not made in bad faith. They were not made to "delay" the litigation or "harass." Certainly, Plaintiffs' counsel – who did not represent Plaintiffs until 2009 – cannot be found to have acted with subjective bad faith.

B. The Panel's Actions Raise Issues of Exceptional Importance

Not only does the panel's imposition of sanctions tend to politicize and marginalize the adjudicatory process – at its essence, the panel's decision "stifle[s] the enthusiasm [and] chill[s] the creativity that is the very life blood of the law." *See, Mone v. C.I.R.*, 774 F.2d 570, 574 (2d Cir. 1985). If this decision is allowed to stand it will have a chilling effect on the willingness and ability of attorneys to bring otherwise meritorious claims on behalf of environmental, public interest, and Native American organizations for fear of reprisal from the Court. Contrary to the instant panel's actions, it is well settled that the power to assess sanctions "is a power that must be strictly construed and utilized only in instances evidencing a

serious and standard disregard for the orderly process of justice." *Dreiling v. Peugeot Motors*,768 F.2d 1159,1165 (10th Cir. 1985); *Mone*, 774 F.2d at 574 ("We recognize this power carries with it the potential for abuse, and therefore the statute should be construed narrowly and with great caution . . ."). The panel's imposition of sanctions in the instant matter will have broad reaching impacts of exceptional importance.

C. Conclusion

As set forth above, the panel decision is in direct conflict with precedent of both this U.S. Court of Appeals for the Ninth Circuit and of the U.S. Supreme Court. This case is also one of unique and exceptional importance.

As a practical matter, the accusations the panel makes against Plaintiffs' counsel are simply not true: (1) this was a legitimate/meritorious case and a legitimate appeal – neither Plaintiffs nor their counsel abused the judicial process; (2) there was no bad faith on the part of Plaintiffs or their attorney; and (3) and there was no claim for sanctions made in the lower court, or even on appeal – until after the panel decision fabricated a basis. The panel, however, was not in a fact finding position. It also never raised any of these concerns with counsel at oral argument.

Plaintiffs' counsel was mortified by the language and assertions included in the panel decisions. The "legal nightmare" here has become that of the Plaintiffs' counsel, who will have to live with the panel's statements for the balance of his life/career. Recourse is limited to a petition for rehearing en banc because the notion of impropriety was first alleged by the instant panel in its opinion. Surely, however, the Court must be amenable to doing justice and redressing some of the damage the panel has done to Mr. Shanker's reputation, as well as the harm to all attorneys willing to do public interest *pro bono* work going into the future. Appellants/Plaintiffs respectfully request that this petition for rehearing or rehearing *en banc* be granted.

DATED: July 5, 2012.

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Circuit Rule 40-1, this Petition for Rehearing or Rehearing *en banc* is: Proportionally spaced, has a typeface of 14 points and does not exceed 15 pages. It also contains only 4,015 words, less than the alternative length limitation of 4,200 words.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Petition for Rehearing *en banc* with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system on July 5, 2012.

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.

By: s/Howard M. Shanker