

CIVIL COVER SHEET

JS-44 (Rev. 5/12 DC)

I. (a) PLAINTIFFS The Hopi Tribe, a federally recognized Indian Tribe (b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF <u>88888</u> (EXCEPT IN U.S. PLAINTIFF CASES) (c) ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER) Michael D. Goodstein and David Askman, Hunsucker Goodstein PC, 5335 Wisconsin Ave NW Suite 260, Washington, DC 20015 (202) 895-5380	DEFENDANTS U.S. Department of Agriculture - Forest Service; Honorable Thomas Vilsack, Secretary of the Department of Agriculture; Thomas Tidwell, Chief of the United States Forest Service; M. Earl Stewart, Forest Supervisor for Coconino Nat'l Forest + COUNTY OF RESIDENCE OF FIRST LISTED DEFENDANT _____ (IN U.S. PLAINTIFF CASES ONLY) <small>NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED</small>																								
II. BASIS OF JURISDICTION (PLACE AN X IN ONE BOX ONLY) <div style="display: flex; justify-content: space-between;"> <div style="width: 48%;"> <input type="radio"/> 1 U.S. Government Plaintiff </div> <div style="width: 48%;"> <input type="radio"/> 3 Federal Question (U.S. Government Not a Party) </div> </div> <div style="display: flex; justify-content: space-between;"> <div style="width: 48%;"> <input checked="" type="radio"/> 2 U.S. Government Defendant </div> <div style="width: 48%;"> <input type="radio"/> 4 Diversity (Indicate Citizenship of Parties in item III) </div> </div>	III. CITIZENSHIP OF PRINCIPAL PARTIES (PLACE AN X IN ONE BOX FOR PLAINTIFF AND ONE BOX FOR DEFENDANT) FOR DIVERSITY CASES ONLY! <table style="width: 100%; border: none;"> <thead> <tr> <th></th> <th style="text-align: center;">PTF</th> <th style="text-align: center;">DFT</th> <th></th> <th style="text-align: center;">PTF</th> <th style="text-align: center;">DFT</th> </tr> </thead> <tbody> <tr> <td>Citizen of this State</td> <td style="text-align: center;"><input type="radio"/> 1</td> <td style="text-align: center;"><input type="radio"/> 1</td> <td>Incorporated or Principal Place of Business in This State</td> <td style="text-align: center;"><input type="radio"/> 4</td> <td style="text-align: center;"><input type="radio"/> 4</td> </tr> <tr> <td>Citizen of Another State</td> <td style="text-align: center;"><input type="radio"/> 2</td> <td style="text-align: center;"><input type="radio"/> 2</td> <td>Incorporated and Principal Place of Business in Another State</td> <td style="text-align: center;"><input type="radio"/> 5</td> <td style="text-align: center;"><input type="radio"/> 5</td> </tr> <tr> <td>Citizen or Subject of a Foreign Country</td> <td style="text-align: center;"><input type="radio"/> 3</td> <td style="text-align: center;"><input type="radio"/> 3</td> <td>Foreign Nation</td> <td style="text-align: center;"><input type="radio"/> 6</td> <td style="text-align: center;"><input type="radio"/> 6</td> </tr> </tbody> </table>		PTF	DFT		PTF	DFT	Citizen of this State	<input type="radio"/> 1	<input type="radio"/> 1	Incorporated or Principal Place of Business in This State	<input type="radio"/> 4	<input type="radio"/> 4	Citizen of Another State	<input type="radio"/> 2	<input type="radio"/> 2	Incorporated and Principal Place of Business in Another State	<input type="radio"/> 5	<input type="radio"/> 5	Citizen or Subject of a Foreign Country	<input type="radio"/> 3	<input type="radio"/> 3	Foreign Nation	<input type="radio"/> 6	<input type="radio"/> 6
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IV. CASE ASSIGNMENT AND NATURE OF SUIT

(Place an X in one category, A-N, that best represents your Cause of Action and one in a corresponding Nature of Suit)

<input type="radio"/> A. Antitrust <input type="checkbox"/> 410 Antitrust	<input type="radio"/> B. Personal Injury/Malpractice <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Medical Malpractice <input type="checkbox"/> 365 Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Product Liability	<input type="radio"/> C. Administrative Agency Review <input type="checkbox"/> 151 Medicare Act <u>Social Security</u> <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) <u>Other Statutes</u> <input type="checkbox"/> 891 Agricultural Acts <input checked="" type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 890 Other Statutory Actions (If Administrative Agency is Involved)	<input checked="" type="radio"/> D. Temporary Restraining Order/Preliminary Injunction Any nature of suit from any category may be selected for this category of case assignment. *(If Antitrust, then A governs)*
<div style="display: flex; justify-content: space-between;"> <input type="radio"/> E. General Civil (Other) OR <input type="radio"/> F. Pro Se General Civil </div>			
<u>Real Property</u> <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent, Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property <u>Personal Property</u> <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<u>Bankruptcy</u> <input type="checkbox"/> 422 Appeal 27 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 <u>Prisoner Petitions</u> <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Conditions <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement <u>Property Rights</u> <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark <u>Federal Tax Suits</u> <input type="checkbox"/> 870 Taxes (US plaintiff or defendant) <input type="checkbox"/> 871 IRS-Third Party 26 USC 7609	<u>Forfeiture/Penalty</u> <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other <u>Other Statutes</u> <input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 430 Banks & Banking <input type="checkbox"/> 450 Commerce/ICC Rates/etc. <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions <input type="checkbox"/> 470 Racketeer Influenced & Corrupt Organization	<input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Satellite TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes <input type="checkbox"/> 890 Other Statutory Actions (if not administrative agency review or Privacy Act)

<input type="radio"/> G. Habeas Corpus/ 2255 <input type="checkbox"/> 530 Habeas Corpus – General <input type="checkbox"/> 510 Motion/Vacate Sentence <input type="checkbox"/> 463 Habeas Corpus – Alien Detainee	<input type="radio"/> H. Employment Discrimination <input type="checkbox"/> 442 Civil Rights – Employment (criteria: race, gender/sex, national origin, discrimination, disability, age, religion, retaliation) *(If pro se, select this deck)*	<input type="radio"/> I. FOIA/Privacy Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 890 Other Statutory Actions (if Privacy Act) *(If pro se, select this deck)*	<input type="radio"/> J. Student Loan <input type="checkbox"/> 152 Recovery of Defaulted Student Loan (excluding veterans)
<input type="radio"/> K. Labor/ERISA (non-employment) <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 740 Labor Railway Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act	<input type="radio"/> L. Other Civil Rights (non-employment) <input type="checkbox"/> 441 Voting (if not Voting Rights Act) <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 445 Americans w/Disabilities – Employment <input type="checkbox"/> 446 Americans w/Disabilities – Other <input type="checkbox"/> 448 Education	<input type="radio"/> M. Contract <input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholder's Suits <input type="checkbox"/> 190 Other Contracts <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	<input type="radio"/> N. Three-Judge Court <input type="checkbox"/> 441 Civil Rights – Voting (if Voting Rights Act)

V. ORIGIN
☒ 1 Original Proceeding
 ☐ 2 Remand from State Court
 ☐ 3 Remanded from Appellate Court
 ☐ 4 Reinstated or Reopened
 ☐ 5 Transferred from another district (specify)
 ☐ 6 Multi-district Litigation
 ☐ 7 Appeal to District Judge from Mag. Judge

VI. CAUSE OF ACTION (CITE THE U.S. CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE A BRIEF STATEMENT OF CAUSE.)
 16 U.S.C. sec. 1531 and 5 U.S.C. sec. 702: failure to insure Federal action will not jeopardize a listed plant

VII. REQUESTED IN COMPLAINT	CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23 <input type="checkbox"/>	DEMAND \$	Check YES only if demanded in complaint YES <input type="checkbox"/> NO <input checked="" type="checkbox"/>
VIII. RELATED CASE(S) IF ANY	(See instruction)	YES <input type="checkbox"/> NO <input checked="" type="checkbox"/>	If yes, please complete related case form

DATE: _____	SIGNATURE OF ATTORNEY OF RECORD _____
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INSTRUCTIONS FOR COMPLETING CIVIL COVER SHEET JS-44
 Authority for Civil Cover Sheet

The JS-44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and services of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. Listed below are tips for completing the civil cover sheet. These tips coincide with the Roman Numerals on the cover sheet.

- I.** COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF/DEFENDANT (b) County of residence: Use 11001 to indicate plaintiff if resident of Washington, DC, 88888 if plaintiff is resident of United States but not Washington, DC, and 99999 if plaintiff is outside the United States.
- III.** CITIZENSHIP OF PRINCIPAL PARTIES: This section is completed only if diversity of citizenship was selected as the Basis of Jurisdiction under Section II.
- IV.** CASE ASSIGNMENT AND NATURE OF SUIT: The assignment of a judge to your case will depend on the category you select that best represents the primary cause of action found in your complaint. You may select only one category. You must also select one corresponding nature of suit found under the category of the case.
- VI.** CAUSE OF ACTION: Cite the U.S. Civil Statute under which you are filing and write a brief statement of the primary cause.
- VIII.** RELATED CASE(S), IF ANY: If you indicated that there is a related case, you must complete a related case form, which may be obtained from the Clerk's Office.

Because of the need for accurate and complete information, you should ensure the accuracy of the information provided prior to signing the form.

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

THE HOPI TRIBE, a federally recognized Indian
Tribe,

1 Main Street
Kykotsmovi, AZ 86039

Plaintiff,

vs.

UNITED STATES DEPARTMENT OF
AGRICULTURE – FOREST SERVICE,
1400 Independence Ave., S.W.
Washington, DC 20250

The Honorable THOMAS J. VILSACK, Secretary
of the Department of Agriculture,
1400 Independence Ave., S.W.
Washington, DC 20250

THOMAS L. TIDWELL, Chief of the United States
Forest Service,
1400 Independence Ave., S.W.
Washington, DC 20250

M. EARL STEWART, in his official capacity as
Forest Supervisor for the Coconino National Forest,
1824 S. Thompson St.
Flagstaff, AZ 86001-2529
Defendants.

Civil Action No.: 1:12-cv-01846

COMPLAINT

COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

Plaintiff, the Hopi Tribe, a federally recognized Indian Tribe, by and through undersigned counsel, for its cause of action against the Defendants, the United States Department of Agriculture, the Honorable Thomas J. Vilsack, its Secretary, and M. Earl Stewart, the Forest Supervisor of the Coconino National Forest (collectively “USDA-Forest Service”), alleges the following:

INTRODUCTORY STATEMENT

1. This is a civil action arising from the imminent application of manmade snow from reclaimed wastewater to environmentally sensitive areas at and around the Arizona Snowbowl Ski Resort (“Snowbowl”) near Flagstaff, Arizona. The proposed snowmaking is going to occur even though the United States Forest Service (“Forest Service”) has initiated a consultation with the U.S. Fish & Wildlife Service (“USFWS”) under Section 7 of the Endangered Species Act, 16 U.S.C. §1536, in order to evaluate the potential impacts of the application of that snow on the endangered San Francisco Peaks groundsel. Nonetheless, the Snowbowl has announced plans to begin making and applying snow from reclaimed water this winter.

2. The Hopi Tribe brings this action under provisions of the Endangered Species Act (“ESA”), 16 U.S.C. § 1531 *et seq.* The Hopi Tribe seeks declaratory and injunctive relief, including: (a) to require Defendants to stop snowmaking at the Arizona Snowbowl Ski Resort unless and until such action complies with all federal law and requirements; (b) to require Defendants to take all other actions necessary to protect from endangerment any endangered or threatened species at or around the Arizona Snowbowl Ski Resort; (c) to require Defendants to take all actions necessary to comply with applicable federal laws and their implementing regulations; and (d) to require Defendants to reimburse the Hopi Tribe for all costs incurred or to be incurred by the Hopi Tribe in connection with this action.

JURISDICTION AND VENUE

3. This court has subject matter jurisdiction over this action pursuant to Section 11(g)(1) of the Endangered Species Act, 16 U.S.C. § 1540(g)(1).

4. By letter of June 4, 2012, the Hopi Tribe gave Notice to Defendants of the violations alleged herein, as required by Sections 11(g)(2)(A)(i) and 11(g)(2)(B)(i) of the Endangered Species Act, 16 U.S.C. §§ 1540(g)(2)(A)(i) and (g)(2)(B)(i). The filing of this action is more than sixty days after that Notice.

5. The USDA-Forest Service has not taken any of the actions described in Sections 11(g)(2)(A)(ii) or (iii), or 11(g)(2)(B)(ii) of the Endangered Species Act, 16 U.S.C. § 1540(g)(2)(A)(ii), (iii) and (g)(2)(B)(i).

6. Venue is appropriate in this judicial district pursuant to 28 U.S.C. § 1391(e)(1), as the Defendants are an agency of the United States, and officers and employees of the United States, and a substantial part of the events or omissions giving rise to these claims have occurred herein.

7. Any sovereign immunity of the United States government has been waived by Section 11(g)(1)(A)-(C) of the Endangered Species Act, 16 U.S.C. § 1540(g)(1)(A)-(C).

PARTIES

8. Plaintiff the Hopi Tribe is a federally recognized Indian Tribe, recognized by the United States as a sovereign Indian Tribe with legal rights and responsibilities.

9. Defendants include the U.S. Department of Agriculture-Forest Service, which has the responsibility of protecting and managing the natural resources on the National Forest System, including the issuance of special use permits in the Coconino National Forest, within which the Snowbowl operates.

10. At relevant times, the Defendant has approved the operation and expansion of the Arizona Snowbowl Resort as a ski and recreation area and has issued permits for, among other things, snowmaking using reclaimed wastewater.

FACTS

A. The San Francisco Peaks groundsel

11. The San Francisco Peaks is the only known location of the San Francisco Peaks groundsel (*Packera franciscana*) in the world. The entire population of the groundsel consists of about 500 plants, existing on the alpine tundra of the San Francisco Peaks, all on lands administered by the Defendant USDA-Forest Service.

12. The San Francisco Peaks groundsel was listed as a threatened species under Section 4 of the ESA on November 22, 1983. 48 Fed. Reg. 52743-47 (November 22, 1983). The listing included the designation of over 700 acres of critical habitat on and near the summits of Humphreys and Agassiz peaks. The five-year review of the species' listing recommended that it retain its protected status. *San Francisco Peaks ragwort (Packera franciscana), 5-Year Review*, U.S. Fish and Wildlife Service, at 13 (October 22, 2010).

B. The Arizona Snowbowl Resort

13. The Arizona Snowbowl Resort ("the Snowbowl") operates on a portion of, and adjacent to, the designated critical habitat of the San Francisco Peaks groundsel. Located in the Coconino National Forest approximately seven miles north of Flagstaff, Arizona, the Snowbowl operates under a Special Use Permit issued by the Forest Service in 1992, which is renewable on a 40-year basis. The Snowbowl is surrounded on three sides by the Kachina Peaks Wilderness, which is designated as MA 1 and managed for wilderness values.

14. The Snowbowl has been used as a ski area since 1938. In 1979, the Forest Service approved several proposed upgrades to the Snowbowl, including the installation of new lifts, trails and facilities. Many, but not all, of these projects have been implemented over the

years. In September of 2002, Arizona Snowbowl Resort Limited Partnership, the owner and operator of the Snowbowl, sought to implement the remaining upgrades, and submitted a formal proposal to implement snowmaking at the facility using reclaimed wastewater from the City of Flagstaff's Rio de Flag Water Reclamation Plant.

C. The United States' Analyses of Potential Adverse Impacts

15. In March 2004, the Forest Service completed a Biological Assessment and Evaluation ("BAE") to assess the effects of the Snowbowl's proposed actions on populations of various threatened and endangered species, including the San Francisco Peaks groundsel. The BAE concluded that Snowbowl's proposed snowmaking is expected to cover over 205 acres of terrain, using up to 1.5 million gallons of reclaimed wastewater per day, between October and December each year, and throughout the winter season in some years. The BAE did not include the deposition of manmade snow in its consideration of direct, indirect, and cumulative effects of the proposed actions on the San Francisco Peaks groundsel, finding instead that "there will be no snowmaking in any areas where there are known plant populations."

16. On March 29, 2004, the Forest Service sought informal consultation with the USFWS under Section 7 of the ESA, seeking concurrence with the conclusion in the BAE that the proposed actions at the Snowbowl were not likely to adversely affect the Mexican spotted owl or the San Francisco Peaks groundsel, both "threatened" species under the law. On July 8, 2004, the USFWS concurred with the Forest Service's finding that snowmaking at the Snowbowl may affect, but will not likely adversely affect two threatened species and their designated critical habitat, including the San Francisco Peaks groundsel.

17. In its 2004 concurrence, the USFWS found that habitat for the San Francisco Peaks groundsel "occurs immediately above the top terminal elevation of the Agassiz chairlift." The USFWS relied specifically on the findings in the USDA-Forest Service's BAE, including that five distinct populations of the groundsel have been identified in the area covered by the

Snowbowl Special Use Permit, that the nearest was approximately 500 feet from the top of the chairlift and that the permit area includes designated critical habitat for the groundsel. Moreover, the USFWS based its concurrence on a finding that the proposed snowmaking activities would not occur in locations with known groundsel populations.

18. The USFWS analysis of the potential impacts to the San Francisco Peaks groundsel considered only those effects of the project from physical construction activities and increases in hikers from the Agassiz chairlift. Further, the USFWS concurrence concluded that “no snowmaking using reclaimed water will occur where known plant populations exist.” This finding is based on the understanding that the snowmaking blowers will not be located outside the boundaries of the ski area, nor will they be co-located on populations of San Francisco Peaks groundsel.

19. In February 2005, the Forest Supervisor for the Coconino National Forest issued a Final Environmental Impact Statement (“FEIS”) and a Record of Decision (“ROD”) addressing the actions proposed at the Snowbowl. The ROD approved, among other things: the use of reclaimed water for snowmaking on approximately 205 acres throughout the ski area; construction of a 10 million-gallon reclaimed water reservoir near the top terminal of an existing chairlift; construction of a reclaimed water pipeline, booster stations and pumphouses between Flagstaff and the Snowbowl; and construction of a snowmaking control building.

D. Effects of Snowmaking on the Threatened San Francisco Peaks groundsel

20. The proposed snowmaking at Arizona Snowbowl will result in overspray and drifting of snow made with reclaimed wastewater. Overspray and drift will transport snow beyond the area of impact analysis in the FEIS. Due to the wind conditions at the Snowbowl, manmade snow will be transported at least 1,000 meters, exposing vegetation to reclaimed wastewater in the form of contaminated snow. Neither the FEIS nor the BAE accounted for, or

analyzed, the potential for contaminated snow to go beyond the boundary of the Special Use Permit area.

21. The areas analyzed for vegetation by the USDA-Forest Service did not include all areas where manmade snow will be deposited. The FEIS included only the Special Use Permit area, the Snowbowl Road, and the area proposed for the pipeline between the City of Flagstaff and the Snowbowl. The area considered did not include lands surrounding the ski area. Air modeling shows that overspray from the Snowbowl's snowmaking equipment could be deposited more than 1,000 meters in winds of 1.1 miles per hour, the lowest wind speed needed to move snow. The Snowbowl often experiences significantly higher winds.

22. Snowmaking at the Snowbowl will have a direct impact on the threatened San Francisco Peaks groundsel and its critical habitat. Snow transport from the proposed snowmaking will cause an increase in nitrogen, phosphorus and moisture available to areas outside the ski area, increasing the potential for colonization by invasive plant species. Vegetation, including the San Francisco Peaks groundsel, would also be exposed to any contaminants in the reclaimed wastewater, both within and outside of the Special Use Permit area. Increasing the levels of nutrients will jeopardize the San Francisco Peaks groundsel, risking both the loss of individual plants and a reduction in total plant species.

23. The current background nitrogen deposition on the San Francisco Peaks is already very near critical load. The use of treated effluent for snowmaking at the Snowbowl would result in total nitrogen deposition in excess of the critical load on major portions of the known population of San Francisco Peaks groundsel, and major portions of its designated critical habitat. The maximum deposition of nitrogen in the critical habitat would increase substantially from current background deposition.

24. Once deposited on the critical habitat in the alpine tundra environment, the additional nutrients cannot be removed.

E. Reinitiation of Consultation under Section 7 of the Endangered Species Act

25. On April 2, 2012, the Hopi Tribe requested that the USDA-Forest Service and USFWS re-initiate consultation under Section 7 of the ESA because new information had been discovered regarding the potential effects of snowmaking on populations of the threatened San Francisco Peaks groundsel. That information was not considered by either the USDA-Forest Service in its BAE, FEIS, or ROD, or the USFWS in its 2004 concurrence.

26. On June 11, 2012, after reviewing the information provided by the Hopi Tribe, the USDA-Forest Service concluded that re-initiation of Section 7 consultation was prudent. On June 19, 2012, the consultation 22410-2002-I-0523-R002, with respect to claimed effects of drifting and overspray of artificial snow on the San Francisco Peaks groundsel and its designated critical habitat, was reinitiated.

27. The consultation 22410-2002-I-0523-R002 is ongoing. On October 8, 2012, the Hopi Tribe requested that the USDA Forest Service prohibit snowmaking at the Snowbowl until the consultation process is completed. On November 13, 2012, the Hopi Tribe again requested that the USDA-Forest Service prohibit snowmaking at the Snowbowl until the consultation process is completed.

28. On information and belief, the Snowbowl intends to begin making snow with reclaimed wastewater in November or December 2012.

29. On information and belief, the Defendants have taken no action, and intend to take no action, to stop the planned snowmaking at the Snowbowl.

Claim for Relief

(Endangered Species Act – 16 U.S.C. § 1531, *et seq.*)

30. Plaintiff repeats and incorporates herein by reference each and every allegation contained in Paragraphs 1 through 29 as though fully set forth herein.

31. Section 11(g)(1) of the ESA authorizes any person to commence a civil suit “to enjoin any person, including the United States and any other governmental instrumentality or agency who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof;...” 16 U.S.C. § 1531(g)(1)(A).

32. The express purpose of the ESA is “to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered and threatened species.” 16 U.S.C. § 1531(b). “The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost. This is reflected not only in the stated policies of the Act, but in literally every section of the statute.” *TVA v. Hill*, 437 U.S. 153, 184 (1978).

33. Section 7 of the ESA directs all federal agencies, in consultation with the U.S. Fish & Wildlife Service, to use their existing authorities to conserve threatened and endangered species, 16 U.S.C. § 1536(a)(1), and to “insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical habitat] of such species.” *Id.* at § 1536(a)(2).

34. The San Francisco Peaks groundsel was listed as a “Threatened” species under the Endangered Species Act in 1983. 48 Fed. Reg. 52743-01 (November 22, 1983).

35. No exemption has been granted from complying with the requirements Section 7(a)(2) of the ESA pursuant to Section 7(h) of the Act, 16 U.S.C. § 1536(h).

36. The Defendants’ failure to prohibit the application of manmade snow onto the threatened San Francisco Peaks groundsel and its critical habitats will foreclose the formulation or implementation of any reasonable and prudent alternative measures and is, thus, an irreversible or irretrievable commitment of resources within the meaning of Section 7(d) of the ESA. 16 U.S.C. § 1536(d).

37. The implementing regulations define those agency actions which are subject to these requirements as “all activities or programs of any kind authorized, funded, or carried out, in whole or in part” by the agency, and “actions directly or indirectly causing modifications to the land, water, or air.” 50 C.F.R. § 402.02.

38. Defendants have failed to ensure that the snowmaking actions to be undertaken by Snowbowl – pursuant to the special use permit issued by the Defendants – will adequately protect the wildlife and natural resources of the Coconino National Forest and are improperly allowing a destructive action to go forward. Defendants’ actions and omissions violate the Endangered Species Act and its implementing regulations, and as such, are subject to injunctive relief to force compliance with the law. 16 U.S.C. § 1531(g).

PRAYER FOR RELIEF

WHEREFORE, the Hopi Tribe prays for entry of an Order and Judgment granting the following relief.

1. A mandatory injunction requiring Defendants to stop all snowmaking and snowmaking activities at the Arizona Snowbowl Ski Resort unless and until such actions comply with all federal laws and requirements;

2. A mandatory injunction requiring Defendants to ensure that no action go forward at the Arizona Snowbowl Ski Resort without full consideration of that action’s effects on listed species;

3. A mandatory injunction requiring Defendants to insure that all actions undertaken within the Arizona Snowbowl Ski Resort’s Special Use Permit area are not likely to jeopardize the continued existence of an endangered species or threatened species or result in the destruction or adverse modification of a listed species’ critical habitat;

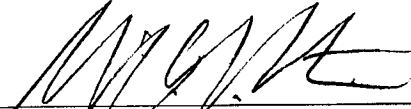
4. A declaratory judgment that the Defendants violated and are in violation of the Endangered Species Act by, among other things, failing to insure that any action authorized, funded, or carried out by such agency, is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of the critical habitat of such species;

5. An order requiring Defendants to pay the Hopi Tribe's costs in this action, including reasonable attorney's fees to the extent permitted by law; and

6. An order granting the Hopi Tribe such other and further relief as the Court may deem just and appropriate.

Respectfully submitted this the 14th day of November, 2012.

HUNSUCKER GOODSTEIN, PC

By 
Michael D. Goodstein (DC Bar No. 469156)
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