IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE HOPI TRIBE, a federally recognized Indian Tribe, Plaintiff, vs. UNITED STATES DEPARTMENT OF AGRICULTURE – FOREST SERVICE and the Honorable THOMAS J. VILSACK, its Secretary; THOMAS L. TIDWELL, Chief of the United States Forest Service; and M. EARL STEWART, in his official capacity as Forest Supervisor for the Coconino National Forest, Defendants.	Civil Case No. **1:12-cv-01846 (RJL)**

STATEMENT OF POINTS AND AUTHORITIES IN SUPPORT OF
PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

Located in the Coconino National Forest, the San Francisco Peaks in northern Arizona are home to the only population on the planet of the *Packera franciscana,* commonly known as the San Francisco Peaks groundsel. The groundsel survives on the harsh tundra, in and adjacent to the Snowbowl Ski Resort ("Snowbowl"). In 1983, the U.S. Fish & Wildlife Service ("USFWS") listed the groundsel as "threatened" under the Endangered Species Act (the "ESA"), thereby triggering federal protection under the Act. *See* Final Rule to Determine *Senecio franciscanus* To Be a Threatened Species and Determination of Its Critical Habitat, 48 Fed. Reg. 52743-01 (Nov. 22, 1983) (codified at 50 C.F.R. Part 17).

As the trustee for the natural resources located in National Forest System lands, the U.S. Department of Agriculture-Forest Service ("Forest Service") is responsible for sustaining the health, diversity, and productivity of the United States' Forests. That responsibility includes

managing forest resources to promote the recovery of threatened and endangered species and their habitats, conservation of sensitive species and their habitats, and providing for the diversity of plant and animal communities on National Forest System lands.

The Snowbowl has operated a ski area in the Coconino National Forest since 1938. In 1979, the Forest Service reviewed and approved several proposed upgrades to the Snowbowl, including the installation of new lifts, and the expansion of trails and facilities. Over the past several years, most of the projects originally proposed in 1979 have been implemented. In September 2002, 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. The Forest Service approved the proposal in 2005. While there has been prior litigation under the National Environmental Policy Act and the Religious Freedom Restoration Act, this case presents a different and narrower issue under the ESA. Specifically, this case concerns whether a federal agency may allow a potentially damaging action to go forward prior to the completion of mandated endangered species consultation.

Throughout 2012, the Plaintiff Hopi Tribe has presented new information to the Forest Service regarding the potentially ruinous consequences on the San Francisco Peaks groundsel of allowing snowmaking with reclaimed wastewater to go forward. Recognizing that its earlier decision-making process did not take into account the deposition of reclaimed wastewater on both the critical habitat and the plants themselves, the Forest Service agreed to re-initiate consultation with the USFWS. *See* Declaration of Kathleen J. Udo ("Udo Declaration"), ¶ 9 & Ex. 8. That consultation is ongoing.

Plaintiff filed this suit on November 14, 2012, when it became apparent that the Forest Service does not intend to comply with the ESA, but will instead allow the Snowbowl to begin to make snow with reclaimed wastewater on National Forest System lands prior to the completion of the ongoing consultation. As Snowbowl began to publicly announce plans to make snow with reclaimed wastewater this winter, on October 8 and November 13, 2012, the Plaintiff requested that the Forest Service confirm to Snowbowl the prohibition on the making of such snow until at least such time as the Section 7 consultation has been completed. By this motion, the Hopi Tribe asks that the Court require the Forest Service to do so and maintain the status quo during the consultation process. It is expected that the consultation process will take another 45-90 days.

In the past weeks, Plaintiff has received reports produced by Snowbowl which indicate a change in the proposed snowmaking regimen that reduces the area expected to be covered with the reclaimed wastewater for this 2012-2013 winter season. This smaller application area, of course, neither obviates the need for consultation, which is plainly realized by both the Forest Service and the USFWS, nor excuses the continued action before that consultation has reached its statutorily-mandated conclusion. This most recent recommendation, made after the presentation of new information by the Plaintiff to the Forest Service, would allow activity which has potentially devastating effects on the only known population of a protected species and is an obvious attempt to avoid the required compliance with the ESA.

Accordingly, Plaintiff requests a preliminary injunction that requires the Forest Service to take all actions necessary to halt any proposed snowmaking with reclaimed wastewater until the ongoing consultation with the USFWS has been completed and a determination has been reached regarding whether those actions jeopardize the San Francisco Peaks groundsel. As explained below, a preliminary injunction is appropriate because the Plaintiff is likely to succeed on the

merits and, if unrestrained, the actions to be allowed by the Forest Service on National Forest System lands will create irreparable harm to San Francisco Peaks groundsel in violation of the ESA. An Order granting the preliminary relief would ensure protection of the groundsel during the consultation process consistent with the mandate of the ESA.

STATUTORY FRAMEWORK

The Supreme Court has called the Endangered Species Act the "most comprehensive legislation for the preservation of endangered species ever enacted by any nation." *Babbitt v. Sweet Home Chapter of Cmties. for a Great Or.*, 515 U.S. 687, 698 (1995) (quoting *TVA v. Hill*, 437 U.S. 153, 180 (1978) (hereinafter "*TVA*")). By its terms, the ESA "provide[s] a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] provide[s] a program for the conservation of such endangered species 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*, 437 U.S. at 184.

The enactment of the ESA was "an explicit congressional decision to require agencies to afford first priority to the declared national policy of saving endangered species . . . [and] reveals a conscious decision by Congress to give endangered species priority over the 'primary missions' of federal agencies." *Id*. at 185. Thus, regardless of an agency's primary mission, the agency has a statutory duty to conserve listed species. *Defenders of Wildlife v. Babbitt*, 130 F. Supp. 2d 121, 124-25 (D.D.C. 2001). "In furtherance of this purpose, the bill declares a policy that Federal agencies are to use the authorities that are available to them in carrying out the objectives of the bill." H.R. REP. NO. 93-142, at 145 (1973).

Section 4 of the ESA requires the USFWS to list species as either threatened or endangered based on the "best scientific and commercial data available," 16 U.S.C. § 1533(b)(1)(A), and to designate "critical habitat," which are those areas with physical or biological features essential to the conservation of the species and that may require special management or protection. 16 U.S.C. §§ 1532(5) and 1533(b)(2). A species is deemed "threatened" when it is "likely to become an endangered species within the foreseeable future . . . " 16 U.S.C. § 1532(20).

To fulfill the purposes of the Act, Section 7(a)(2) requires agencies to consult with the USFWS to "insure that any action authorized, funded, or carried out . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification" of its designated critical habitat. 16 U.S.C. § 1536(a)(2). An "action" includes "all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States . . . " 50 C.F.R. § 402.02.[1] An action jeopardizes a listed species if it reduces "appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species." 50 C.F.R. § 402.02.

[1] If an agency determines that action will affect a listed species or its critical habitat, it *must* engage in formal consultation with the USFWS, rather than the informal consultation that is now being done. 50 C.F.R. § 402.14(a). In a formal consultation, the Forest Service and USFWS would share information about the proposed project and the species likely to be affected. Formal consultation may last up to 90 days. *Id.* § 402.14(e). After that time, the USFWS produces a "biological opinion" stating whether the action is likely to "jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat" and "[f]ormulate[s] discretionary conservation recommendations" and a statement concerning incidental take. *Id.* § 402.14(g). The Service has 45 days after completion of formal consultation to write the opinion. *Id.* § 402.14(e).

STATEMENT OF FACTS

A statutorily-mandated process to evaluate effects of Snowbowl's proposed activities is currently being conducted based on the reinitiation of consultation on June 11, 2012 and USFWS's concurrence on June 19, 2012. Udo Declaration ¶¶ 9, 10 & Ex. 8 & 9. The Hopi Tribe's request is simple: to ensure that no protected species will be harmed by snowmaking at the Snowbowl. The consultation process must be completed before the Forest Service can allow snowmaking to proceed.

A. The San Francisco Peaks Groundsel

The San Francisco Peaks are the only place in the world where the San Francisco Peaks groundsel (the "groundsel") is known to exist. *See* Declaration of Dr. Steven W. Carothers ("Carothers Declaration"), ¶ 4. The known universe of this species is a population of plants existing on the alpine tundra on or near the summits of the San Francisco Peaks. Udo Declaration ¶ 5 & Ex. 4 at 6-7. All of the plants known to exist live on lands administered by the Forest Service. *Id*. On November 22, 1983, the USFWS listed the groundsel as a threatened species under the Section 4 of the ESA. Final Rule to Determine *Senecio franciscanus* To Be a Threatened Species and Determination of Its Critical Habitat, 48 Fed. Reg. 52743-01 (Nov. 22, 1983) (codified at 50 C.F.R. Part 17). Approximately 700 acres of tundra on and near the summits of the San Francisco Peaks was designated as the groundsel's critical habitat; the species' entire global population currently exists in approximately 211 acres in that area. Carothers Declaration ¶ 4; Udo Declaration Ex. 4 at 6. The species' protected status remains unchanged. Udo Declaration Ex. 4 at 13. The designated critical habitat for the groundsel surrounds the uppermost portions of the Snowbowl and even extends into the easternmost extent

of the Snowbowl's Special Use Permit area. Carothers Declaration ¶ 20. A number of ski trails are located directly in the critical habitat.

B. The Alpine Environment of the San Francisco Peaks

Alpine talus slopes provide the habitat for the San Francisco Peaks groundsel. Carothers Declaration ¶ 9 & Ex. 7 at 3. Alpine plant communities, such as those of the groundsel, evolve under low-nutrient conditions and are particularly sensitive to adverse ecological changes posed by excess nutrients in the soil. Carothers Declaration ¶¶ 9, 11 & Ex. 7 at 1-2. As a result, increasing deposition of nitrogen in these areas is of great concern. *Id.*

Currently, atmospheric nitrogen deposition is at or very near critical loads for a number of alpine ecosystems in the western United States. Carothers Declaration ¶¶ 9, 12 & Ex. 7 at 7. Critical load is the level at which there will be a negative impact to the continued existence of the threatened San Francisco Peaks groundsel and which will result in adverse modification of its critical habitat. *Id.* Increases in nitrogen can greatly enhance the growth of certain competing species in alpine tundra systems, reducing available habitat for plants adapted to low-nutrient alpine environments. Carothers Declaration ¶ 13. For example, nitrophilic grasses, which have strategic advantages in more nutrient-enriched environments, are likely to competitively exclude rare perennials like the groundsel. *Id.* Adding nutrients to those already in these environments is likely to jeopardize long-term survival of certain members of the San Francisco Peaks alpine vegetation community, including the groundsel. Carothers Declaration ¶ 12.

Based on the available science, it is reasonable to assume that the critical load threshold is 4 kilograms per hectare per year ("kg/ha/yr") of nitrogen for the San Francisco Peaks groundsel. Carothers Declaration ¶ 16. On the San Francisco Peaks nitrogen deposition has been measured at between 3 and 4 kg/ha/year. Carothers Declaration ¶ 17. Modeling conducted

of the area estimated that the current deposition is 3.9 kg/ha/year. *Id.* Because the background levels of nitrogen deposition on the San Francisco Peaks is already very near the critical load, even relatively small increases can result in the critical load being exceeded. Carothers Declaration ¶ 18. And, because nitrogen is the main driver effecting change for alpine plant species, it is critical that nitrogen levels be maintained as close as possible to baseline conditions in the alpine environment. Carothers Declaration ¶ 26.

Average wind velocities of 20-30 mph are common in the upper Snowbowl area; speeds exceeding 60 mph are not uncommon. Carothers Declaration ¶ 19. The Forest Service's Final Environmental Impact Statement agreed that ". . . high winds frequently occur on the Peaks due to their high elevation in relationship to the predominant elevation of the surrounding terrain." Udo Declaration ¶ 4 & Ex. 3, at 3-231.

C. Background on Snowbowl's Proposed Activities

The Forest Service completed a Biological Assessment and Evaluation ("BAE") for the Arizona Snowbowl Facilities Improvement Project in March 2004. Udo Declaration ¶ 2 & Ex. 1. A new BAE is expected from the Forest Service as a result of the reinitiated consultation. The BAE was meant to evaluate the potential effects of the Snowbowl's proposal "on Federally-listed and Forest Service sensitive plant and animal species." Udo Declaration Ex. 1 at 1. The BAE included an evaluation of potential effects of the proposal on the groundsel. Udo Declaration Ex. 1 at 29-31. Among the findings in the BAE, the Forest Service stated:

> Five distinct populations of *Senecio franciscanus* have been located within the [Snowbowl] permit area. Three of these occur in the immediate vicinity of Agassiz Peak, two are located downslope. The nearest location, consisting of 10 plants, is about 500 feet upslope of the top terminal of the Agassiz chairlift, immediately adjacent and uphill of the Upper Bowl Catwalk. Designated critical habitat includes the eastern-most extent of the permit area, above the old Agassiz chairlift top terminal…

Id. at 29.

In analyzing the potential effects on the groundsel, the BAE considered *only* construction activities taking place under the plan, and an increase in "pedestrian activity on the lower slopes of Agassiz Peak." *Id.* No consideration was given to the possibility that manmade snow would be deposited on both the San Francisco Peaks groundsel and its designated critical habitat. *Id.* at 29-31.

After an informal consultation under Section 7 of the ESA, on July 8, 2004 the USFWS officially concurred with the Forest Service's determination that Snowbowl's proposed snowmaking would not likely adversely affect any threatened or endangered species. Udo Declaration ¶ 3 & Ex. 2. In its concurrence, the USFWS stated that "[n]o snowmaking using reclaimed water will occur where known plant populations exist." Udo Declaration Ex. 2 at 5. We now know that this is incorrect. The USFWS specifically noted that re-initiation of the consultation would be appropriate if "new information becomes[s] available that indicates that the action may affect the . . . San Francisco Peaks groundsel…" *Id.* at 6.

A Final Environmental Impact Statement ("FEIS") approving Snowbowl's proposal was issued in June 2005. Udo Declaration Ex. 3.

D. New Information Regarding Adverse Effects of Snowmaking on the Protected San Francisco Peaks Groundsel

On April 2, 2012, the Plaintiff Hopi Tribe provided to the Forest Service and the USFWS an analysis of the potential adverse effects of allowing snowmaking, based on new information about the transport and deposition of snow to areas outside those considered in the original BAE and concurrence. Udo Declaration ¶ 6 & Ex. 5. The analysis was based on reviews of the FEIS and the BAE, a review of available, relevant literature, a screening-level analysis of snow transport from wind and drift on and around the San Francisco Peaks, and the assessment

conducted by SWCA, a consultant working for the Hopi Tribe. Carothers Declaration Ex. 3. The report concluded that the Forest Service had failed to consider all potential impacts of using reclaimed wastewater on important biological resources on the San Francisco Peaks. Carothers Declaration Ex. 3 at 10-11. Furthermore, substantial evidence exists to conclude that the groundsel may be in jeopardy if reclaimed wastewater is used to make snow at the Snowbowl. *Id.* The report concluded that best available science supported not using reclaimed wastewater to make snow to address the potential threat to the groundsel. *Id.*

In response to specific questions posed by the USFWS, a supplemental assessment was provided on May 2, 2012. Carothers Declaration ¶ 6 & Ex. 4. On May 24, 2012, these findings were presented to Mike Elson of the Forest Service, Steve Spangle of USFWS, and several representatives of the Hopi Tribe. Carothers Declaration ¶ 7 & Ex. 5. Literature supporting the assessment was provided to the Forest Service and USFS on July 17, 2012. Carothers Declaration ¶ 8 & Ex. 6. Finally, on August 24, 2012, a Technical Memorandum was provided giving a comprehensive assessment of the impacts of using reclaimed wastewater on the San Francisco Peaks groundsel. Carothers Declaration ¶ 9 & Ex. 7. The assessment included additional analyses based, in part, on recent air dispersion modeling and analysis. *Id.*

On October 26, 2012, a contractor for Snowbowl provided to the Forest Service a report discussing the Plaintiff's analysis of manmade snow transport. A response to that report was provided to the Forest Service on November 2, 2012. Carothers Declaration ¶ 10 & Ex. 8.

The concentration of nutrients in treated effluent to be used in the snowmaking is at least an order of magnitude higher than the background concentrations of nutrients in the region's precipitation. Carothers Declaration ¶ 22. The FEIS found that Snowbowl's proposed snowmaking is likely to add 34.86 kg/ha/year of nitrogen above the historic natural deposition.

Carothers Declaration ¶ 22. Using samples of effluent from the Rio de Flag Wastewater Reclamation Plant, the Forest Service estimated that the effluent which will be used at Snowbowl will have total nitrogen concentrations of up to 6.6 mg/L. Udo Declaration Ex. 3 at 3-216. Arizona allows concentrations of nitrogen as high as 10 mg/L in reclaimed wastewater. Udo Declaration Ex. 3 at 3-203. These concentrations in the treated effluent are *at least* ten times higher than that measured in precipitation at the Snowbowl, and up to two orders of magnitude higher than the reference streams in the surrounding area.[2]

The results of the air dispersion analyses show that, under conditions which exist at the Snowbowl, the snowmaking operations will result in overspray from the ski area and onto the critical habitat of the San Francisco Peaks groundsel and known populations of the groundsel. *See* Declaration of Lyle R. Chinkin ("Chinkin Declaration") ¶¶ 2, 3, 6, 7, 12, 13, 15, 17, 20, 21 & Appendix B. This is so, in part, because of the high winds that are typical in the area and their prevailing direction toward designated critical habitat. Carothers Declaration ¶ 19; Udo Declaration Ex. 3 at 3-353. The deposition of manmade snow will result in increases in nitrogen deposition of up to six times the current background amount on critical habitat, and almost twice the annual deposition of nitrogen on populations of the groundsel. Chinkin ¶¶ 4 & 12. This will result in total nitrogen deposition values that exceed the critical load threshold on 48% to 99% of the groundsel's critical habitat, and 53% to 91% of the population. Carothers Declaration ¶ 24.

The Forest Service itself concluded that the "[a]pplication of the machine-produced snow would result in an overall increase in moisture and nutrients available to plants and may change

[2] The amount of phosphorus in the designated critical habitat will also expected increase due to the application of treated effluent. Phosphorous concentrations at Rio de Flag are approximately 4 mg/L. Carothers Declaration ¶ 23. This is at least two orders of magnitude greater than phosphorus concentrations found in reference waters. *Id.*

plant species composition. . . " and that "[a]dditional water and nitrogen from snowmaking would increase plant growth and may change plant species composition. . ." Udo Declaration Ex. 3 at 3-291. While this conclusion applied only those areas within the ski area, the modeling makes clear that snow will overspray and drift onto the groundsel and its habitat. Carothers Declaration ¶ 27; Chinkin Declaration ¶¶ 3, 4, 6, 7, 12, 13, 17, 20, 21 & Appendix B.

The increased nutrient loading which will result from the proposed snowmaking with reclaimed wastewater will threaten the survival and recovery of the San Francisco Peaks groundsel. Carothers Declaration ¶ 29.

E. Reinitiation of Consultation

Based on the new information and the limitations in the original analysis discussed above, the Plaintiff Hopi Tribe requested that the Forest Service and USFWS reinitiate consultation. Udo Declaration Ex. 5. On June 11, 2012, the Forest Service agreed and requested that the USFWS re-initiate consultation. Udo Declaration Ex. 8. The USFWS reinitiated the consultation on June 19, 2012. Udo Declaration ¶ 10 & Ex. 9. As of this filing, no updated Biological Assessment has been completed. Nonetheless, despite numerous requests from the Plaintiff, the Forest Service apparently intends to allow limited snowmaking to go forward at the Snowbowl before consultation is completed. Such action is in direct conflict with the ESA, because maintaining the status quo is legally required under the ESA pending consultation. 16 U.S.C. § 1536(d).

F. Proposed Snowmaking

The FEIS states that Snowbowl will cover approximately 205.3 acres of skiable terrain with artificial snow made from reclaimed wastewater. Udo Declaration Ex. 3 at 1-9. Between the beginning of November and the end of February, Snowbowl is permitted to use 1.5 million

gallons per day of reclaimed wastewater to make snow. *Id.* at 2-5. During each season, the Snowbowl can receive up to 178 million gallons, or 548 acre-feet, of reclaimed wastewater for snowmaking. *Id.* at 2-7.

Snowmaking guns will be used throughout the ski area to convert the reclaimed wastewater into frozen snow and disperse it to the ski area and its surroundings. *Id.* at 2-6; Chinkin Declaration ¶ 9 & App. B at 3-4. The Forest Service has authorized snowmaking with reclaimed wastewater on all of the existing and new trails at Snowbowl. Udo Declaration Ex. 3 at 3-155. Even for the 2012-2013 Winter Season, under a "phased approach," Snowbowl intends to cover 60% of the resort, including all of the Hart Prairie and Sunset trails and portions of the intermediate trails off of Agassiz Lift in the upper parts of the ski area. *See* Snowbowl Press Release, October 10, 2012, www.arizonasnowbowl.com/news/press_releases.php (last visited Nov. 19, 2012). Even the reduced snowmaking plan on schedule for this winter season will adversely impact the groundsel's critical habitat and known plant locations. Chinkin Declaration ¶ 20.

ARGUMENT

In order to prevail on a motion for preliminary injunction for violations of the Act, a plaintiff must meet the traditional four-part test. *Am. Rivers v. U.S. Army Corps of Engineers*, 271 F. Supp. 2d 230, 248-49 (D.D.C. 2003).[3] A plaintiff must demonstrate "1) a substantial

[3] In *American Rivers*, Plaintiffs argued that in cases brought under the ESA, injunctive relief need only meet a two part test; whether when the moving party "1) has had or can likely show 'success on the merits,' and 2) makes the requisite showing of 'irreparable injury.'" *Am. Rivers*, 271 F. Supp. at 248 (quoting *Southwest Center for Biological Diversity v. United States Forest Service*, 307 F.3d 964, 972 (9th Cir. 2002)). Indeed, courts in at least three circuits have adopted that less stringent test, finding that Congress has, by the plain language of the statute, determined that the balance of hardships against the public interest weighs "heavily in favor of protected species." *Strahan v. Coxe*, 127 F.3d 155, 160 (1st Cir. 1997) (quoting *National Wildlife Federation v. Burlington N. R.R.*, 23 F.3d 1508, 1511 (9th Cir. 1994)); *see also Greenpeace v.*

likelihood of success on the merits, 2) that [plaintiff] would suffer irreparable injury if the injunction is not granted, 3) that an injunction would not substantially injure other interested parties, and 4) that the public interest would be furthered by the injunction." *Katz v. Georgetown University*, 246 F.3d 685, 687 (D.C. Cir. 2001). In determining whether to grant relief, "[n]o single factor is dispositive." *Hamilton Bank, N.A. v. Office of the Comptroller of the Currency*, 227 F. Supp. 2d 1, 7 (D.D.C. 2001). Rather, the four factors should be balanced against one another and evaluated "on a sliding scale." *Davenport v. Int'l Bhd. of Teamsters*, 166 F.3d 356, 361 (D.C. Cir. 1999). Thus, "[a] particularly strong showing on one factor may compensate for a weak showing on one or more of the other factors." *Dodd v. Fleming*, 223 F. Supp. 2d 15, 20 (D.D.C. 2002).

Actions under the ESA are not, however, like other equitable actions brought before the Court. Under the ESA, where an injury to a protected species is threatened, "only an injunction [can] vindicate the objectives of the Act." *Weinberger v. Romero–Barcelo,* 456 U.S. 305, 314 (1982). Thus, the Supreme Court has recognized that Congress has "foreclosed the exercise of the usual discretion possessed by a court of equity." *Id*. at 313. The Court must consider the Plaintiff's request in light of "Congress' determination that the balance of hardships and the public interest tips heavily in favor of protected species." *National Wildlife Federation v. Burlington N. R.R.*, 23 F.3d 1508, 1510-11 (9th Cir. 1994).

Courts have consistently recognized that, when presented with a request for injunctive relief under the ESA, special consideration must be given to protected species. *See, e.g*., *Hawksbill Sea Turtle v. FEMA*, 126 F.3d 461, 478 n.13 (3d Cir. 1997) (in actions under ESA, the

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Nat'l Marine Fisheries Serv., 106 F. Supp. 2d 1066, 1072 (W.D. Wash. 2000); *Defenders of Wildlife v. EPA*, 688 F. Supp. 1334, 1355 (D. Minn. 1988), *aff'd in part, rev'd in part on other*

court's discretion to consider equitable factors other than the interests of protected species is limited); *Defenders of Wildlife v. EPA*, 688 F. Supp. 1334, 1355 (D. Minn. 1988) ("When an injunction is sought under the ESA, the traditional balancing of equities is abandoned in favor of an almost absolute presumption in favor of the endangered species."), *aff'd in part, rev'd in part on other grounds*, 882 F.2d 1294 (8th Cir. 1989); citing *TVA*, 437 U.S. at 173; *Sierra Club v. Marsh*, 816 F.2d 1376, 1383 (9th Cir. 1987).

A. Plaintiff is Likely to Succeed on the Merits of the Claim

There can be no doubt, given the facts in this case, that preliminary injunction is warranted. By allowing snowmaking to go forward that may endanger the only population of the San Francisco Peaks groundsel, the Forest Service is violating the prime directive of the Endangered Species Act. The Snowbowl's plan to begin making snow with wastewater and applying it to the designated critical habitat of the groundsel must be subjected to the rigorous analyses envisioned by the statute. The Forest Service has failed to ensure that the snowmaking planned this winter season at Snowbowl will adequately protect the listed San Francisco Peaks groundsel. More importantly, the Forest Service is allowing a potentially destructive action to go forward without having completed an open and ongoing consultation. Consultation with the USFWS is "designed as an integral check on federal agency action, ensuring that such action *does not go forward* without full consideration of its effects on listed species." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 603 (1992) (Blackmun, J., dissenting) (emphasis added). As Representative Dingell emphasized in his remarks regarding the statute, the mandates in Section 7 of the ESA require that agencies take action to preserve protected species.

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grounds, 882 F.2d 1294 (8th Cir. 1989). Plaintiff believes that this is the correct application of the law.

> [Section 7] substantially amplifie[s] the obligation of [federal agencies] to take steps within their power to carry out the purposes of this act. . . . Once this bill is enacted, the appropriate Secretary, whether of Interior, Agriculture or whatever, *will have to take action* to see that this situation is not permitted to worsen, and that [threatened or endangered species] are not driven to extinction. The purposes of the bill included the conservation of the species and of the ecosystems upon which they depend, and *every agency of government is committed* to see that those purposes are carried out. . . . [T]he agencies of Government can no longer plead that they can do nothing about it. *They can, and they must. The law is clear.*"

TVA, 437 U.S. at 183-84 (quoting 119 Cong. Rec. 42913 (1973)) (emphasis in *TVA*).

Clearly, the Forest Service's failure to prohibit the initiation of snowmaking during the open consultation period violates the ESA's mandate that responsible agencies avoid action that is "likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by [the USFWS] . . . to be critical . . . " 16 U.S.C. § 1536(a)(2). These actions and omissions plainly violate Section 7(a) of the Endangered Species Act.

The Forest Service's failure to stop the proposed snowmaking also violates Section 7(d) of the Act. That section provides that, once consultation has begun, "the Federal agency and the permit or license applicant shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not" jeopardize an endangered or threatened species, or destroy or adversely modify its critical habitat. 16 U.S.C. § 1536(d). "This prohibition is in force during the consultation process and continues until the requirements of section 7(a)(2) are satisfied." 50 C.F.R. § 402.09. Once deposited on the critical alpine habitats, excess nutrients cannot be removed. And, even a modest increase in the amount of nitrogen deposited on the groundsel's habitat could jeopardize the continued existence of the species. Carothers Declaration ¶ 18. Given the tundra's proximity to the critical

load threshold, the Forest Service's failure to act to protect the groundsel and its habitat could irreversibly threaten the species' very existence.

B. The Forest Service's Failure to Comply with the Endangered Species Act will Cause Irreparable Harm to the Protected San Francisco Peaks Groundsel

To prevail on its motion, the moving party must also demonstrate irreparable injury if the injunction is not granted. In seeking a preliminary injunction for violations of the ESA, due to the extraordinary protection provided to endangered and threatened species by that statute, any threat of imminent harm to a protected species or critical habitat is *per se* irreparable. *See, e.g., Loggerhead Turtle v. Council of Volosia County, Fla.*, 896 F. Supp. 1170, 1178 (M.D. Fla. 1995) (recognizing that "any threatened harm is *per se* irreparable harm"). Furthermore, as here, corrective relief may not be possible later in a case because harm to a protected species and its habitat "is often permanent or at least of long duration, *i.e*., irreparable." *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 545 (1987).

Courts have recognized the important role of preliminary injunctions in preventing irreparable harm to protected species.[4] For example, in *National Wildlife Federation v. Burford*, the D.C. Circuit upheld this Court's finding of irreparable harm, even though the United States' actions in that case only lifted protective restrictions over some federal lands. 835 F.2d 305, 323-24 (D.C. Cir. 1987). The court reasoned that, just as in the present case, "the agency's actions leave no prohibitions on development in place . . . " *Id*. at 323. And, in *Fund for Animals, Inc. v. Turner*, this Court enjoined the United States from authorizing hunting of threatened grizzly bears. Civ. A. No. 91- 2201(MB), 1991 WL 206232 (D.D.C. Sept. 27, 1991). The Court found that, though there was not the "remotest possibility" that the limited hunting

[4] "A preliminary injunction is designed to *prevent* irreparable injury . . . " *Nat'l Wildlife Fed'n v. Burford*, 835 F.2d 305, 325 (D.C. Cir. 1987).

would eradicate the species while the preliminary injunction remained in place, "the loss even of the relatively few grizzly bears that are likely to be taken through a sport hunt during the time it will take to reach a final decision in this case is a significant, and undoubtedly irreparable, harm." *Id*. at *8.

The facts in this case compel the same conclusion. By failing to prohibit snowmaking until the statutory review process is completed, the Forest Service will threaten irreparable harm to the groundsel and its critical habitat. Because the effects of that snowmaking are potentially devastating to the species, a preliminary injunction is necessary to safeguard the future of the San Francisco Peaks groundsel.

C. Prohibiting Snowmaking will Avoid Jeopardy to the San Francisco Peaks Groundsel without Substantially Injuring other Interested Parties

Under the third prong of the traditional test for a preliminary injunction, this Court should ordinarily grant a preliminary injunction when such relief will not "substantially injure other interested parties." *Katz*, 246 F.3d at 687. However, where the continued survival a protected species is at stake, virtually no injury or cost to other interested parties can override the substantial public interest in the survival of that species. As the Supreme Court stated, "[t]he plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost." *TVA*, 437 U.S. at 184.

The Forest Service has provided no reason for allowing the proposed action at Snowbowl to go forward. Even assuming some claim of economic injury was put forth, it would not be sufficient to undermine enforcement of the ESA. In *TVA v. Hill*, the Supreme Court was faced with weighing the effects of a permanent injunction against the construction of the Tellico Dam. 437 U.S. at 187-88. The Court concluded that, even if such an exercise was possible, courts do not have the authority to weigh economic damages against the value of a potentially lost species.

"[I]t would be difficult . . . to balance the loss of a sum certain – even $100 million – against a congressionally declared 'incalculable' value, even assuming we had the power to engage in such a weighing process, which we emphatically do not." *Id*. Here, the analysis is even more compelling. The Hopi Tribe asks only for a preliminary injunction until such time that the scrutiny demanded by the ESA has been completed. If this results in some pecuniary losses – though no such claim has yet been made and the Hopi Tribe's economist has concluded otherwise – it is certainly not sufficient to overcome the presumption in favor of the survival of a protected species. In weighing against potentially irreparable harm to a protected species, "[m]ore than pecuniary harm must be demonstrated." *N. Alaska Envtl. Ctr. v. Hodel*, 803 F.2d 466, 471 (9th Cir. 1986).

D. A Preliminary Injunction would Further the Public Interest

In evaluating the Plaintiff's motion, the Court must finally determine whether granting a preliminary injunction will further the public interest. The ESA identifies and establishes a specific public interest in protecting endangered and threatened species and the habitats on which they depend, and establishes the mechanisms through which that public interest can be served. The relief sought by the Hopi Tribe would unquestionably further that interest. In passing the Act, Congress recognized that the "value of this genetic heritage is, quite literally, incalculable." *TVA*, 437 U.S. at 178 (quoting H.R. REP. No. 93-412, at 4-5 (1973)).

Moreover, Courts have recognized repeatedly that the Endangered Species Act embodies a clear congressional declaration that protecting of endangered species is in the public interest. *See, e.g., Marsh,* 816 F.2d at 1383. Indeed, the Supreme Court has stated that, in enacting the ESA, Congress made clear that saving endangered species is a national priority. *TVA,* 437 U.S. at 185. Similarly, the district court in *NRDC v. Evans* found that:

> The public interest in the survival and flourishing of . . . endangered species . . . is extremely strong. Indeed, Congress enacted the . . . ESA in recognition of this compelling public interest, not only to the American public but to the international community, and not only to present generations but to future generations to come.

Natural Res. Def. Council. v. Evans, 232 F. Supp. 2d 1003, 1053-54 (N.D. Cal. 2002).

The public interest in preserving endangered species is compelling. In *National Wildlife Federation v. National Marine Fisheries Service*, the district court granted a preliminary injunction against dredging a navigation channel, though the defendants had argued that the action was "for national security, economic, and environmental reasons," and would result in substantial pecuniary losses. 235 F. Supp. 2d 1143, 1161-62 (W.D. Wash. 2002). The defendants' actions, the court found, could present an imminent harm to the critical spawning habitat of endangered salmon. While the court recognized that the interests put forth by the defendant agencies were, in fact, "valid public interest concerns," it nonetheless found the public interest in the protection of endangered species weighed in favor of protecting endangered species and their habitats. *Id.* at 1162.

The public has a substantial interest in the survival and health of the only population of this groundsel in the world. Because the Forest Service's refusal to ensure that the actions proposed by Snowbowl are "not likely to jeopardize the continued existence" of the protected groundsel and its habitat during consultation, a preliminary injunction requiring the Forest Service to prohibit any snowmaking with reclaimed wastewater until statutory consultation is completed would further the public interest in the survival of the species.

E. The Preliminary Injunction Sought By the Plaintiff Is Narrowly Tailored

Finally, any injunction granted by this Court must be "carefully circumscribed and tailored to remedy the harm shown." *Morgan Stanley DW Inc. v. Rothe*, 150 F. Supp. 2d 67, 73 (D.D.C. 2001). Here, the Hopi Tribe does not ask the Court to prejudge the environmental

effects of any acts or omissions of the Forest Service. Rather, the Plaintiff asks only that the Court enforce the Forest Service's existing legal obligations under the ESA by completing the consultation with the USFWS before allowing an action with potentially disastrous consequences to go forward. This preliminary relief is narrowly tailored in both duration and scope.

CONCLUSION

For these reasons, this Court should issue an Order requiring the Forest Service to take all actions necessary to halt any proposed snowmaking until the ongoing Section 7 consultation has been completed and a determination has been reached regarding whether those actions jeopardize the San Francisco Peaks groundsel.

DATED this 20th day of November, 2012.

HUNSUCKER GOODSTEIN PC

By /s/ Michael D. Goodstein

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CERTIFICATE OF SERVICE

I, Michael D. Goodstein, counsel of record for Plaintiff, The Hopi Tribe, hereby certify that on this 20th day of November, 2012, I electronically filed the foregoing document with the Clerk of the Court using the Court's electronic filing system, which provides electronic notice to the Defendants' counsel of record:

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