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)**

PLAINTIFF'S OPPOSITION TO NON-PARTY ARIZONA SNOWBOWL RESORT LIMITED PARTNERSHIP'S PROPOSED MOTION TO DISMISS

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I. INTRODUCTION

Non-party Arizona Snowbowl Resort Limited Partnership ("the Snowbowl") has moved to dismiss with prejudice Plaintiff the Hopi Tribe's complaint in this action for lack of subject matter jurisdiction. Such a motion is clearly premature as the Snowbowl has not been granted the right to intervene in this matter; in fact the Hopi Tribe has opposed its motion to intervene. *See* Docket Number ("Dkt.") 35. Nevertheless, the Hopi Tribe provides this response to make clear both that it has standing to bring this action and that it provided adequate notice to confer federal court jurisdiction to resolve Defendants' violations of the Endangered Species Act ("ESA"). Neither of the Snowbowl's jurisdictional arguments have any merit; both must be rejected.

As explained in detail below, the Hopi Tribe has standing to bring this action because the Forest Service's failure to halt snowmaking in violation of Section 7 of the ESA is a concrete and particularized injury in fact to a legally protected interest that is actual and imminent. The Hopi Tribe has a legally protected interest in the purity of the San Francisco Peaks and the health of its ecosystem. This interest has been discussed at length in numerous judicial decisions, and forms the basis for the nation-to-nation consultation that occurs between the Hopi Tribe and the United States whenever threats to the health of this ecosystem arise. The Forest Service, not some other third party, has caused the injury here because it has the power to suspend the snowmaking operations, but has not done so. The Hopi Tribe's injury would be redressed by a favorable decision in this case because the relief sought is an injunction which would preserve the status quo, stop snowmaking until all federal laws are complied with, and require the Forest

Service to ensure the protection of the threatened species and habitat in question. The Snowbowl's challenge to the Hopi Tribe's standing is thus without merit.

Moreover, the Snowbowl's claim that this Court lacks jurisdiction because the Hopi Tribe's notice to Defendants was inadequate is also baseless. The Hopi Tribe provided notice to the Defendants of its intent to file suit for violations of Section 7 of the ESA in June 2012, far more than sixty days from the date the Hopi Tribe filed this lawsuit. The Snowbowl's motion to dismiss is groundless and should be expeditiously denied if it is even considered by this Court.

II. STANDARD FOR MOTION TO DISMISS

"In deciding a motion to dismiss for lack of subject-matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1), a court must accept all factual allegations in the complaint as true." *Coal. for Mercury-Free Drugs v. Sebelius*, 725 F. Supp. 2d 1, 7 (D.D.C. 2010) *aff'd,* 671 F.3d 1275 (D.C. Cir. 2012) (internal quotation omitted). But the Court "is not limited to the allegations set forth in the complaint when assessing a Rule 12(b)(1) motion, [and] may consider materials outside of the pleadings in deciding whether to grant a motion to dismiss for lack of jurisdiction." *Id*. (internal quotations omitted). Based on the pleadings before the Court as well as publicly available records, it is clear that the Hopi Tribe has standing to bring this case. The Snowbowl also argues that the Court lacks jurisdiction because the Hopi Tribe failed to provide the requisite 60-day notice prior to bringing a suit under Section 7 of the ESA. As this argument also goes to the Court's jurisdiction over this action, the standards set forth above apply for this argument as well. *See Ctr. for Biological Diversity v. U.S.E.P.A.,* 794 F. Supp. 2d 151, 153-54 (D.D.C. 2011) .

III. THE HOPI TRIBE HAS STANDING

The Snowbowl's claim that the Hopi Tribe lacks standing to protect the threatened San Francisco Peaks Groundsel and its critical habitat is wrong. To establish standing under Article III of the Constitution, the Plaintiff must show: (1) an injury-in-fact that is (a) concrete and particularized and (b) actual and imminent, (2) causation, and (3) redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). The injury-in-fact inquiry "reflects the statutory requirement that a person be 'adversely affected' or 'aggrieved,' and it serves to distinguish a person with a direct stake in the outcome of a litigation-even though small-from a person with a mere interest in the problem." *United States v. Students Challenging Regulatory Agency Procedures ("SCRAP")*, 412 U.S. 669, 689 n. 14 (1973). The United States Supreme Court has expressly recognized that threats to the natural environment can cause injury-in-fact to both individuals and associations. In its words, "environmental well-being, like economic well-being, [is an] important ingredient[] of the quality of life in our society, and . . . [is no] less deserving of legal protection through the judicial process." *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972). When seeking to vindicate environmental interests, "plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity." *Friends of the Earth, Inc. v. Laidlaw Envtl. Services (TOC), Inc.*, 528 U.S. 167, 183 (2000) (quoting *Sierra Club*, 405 U.S. at 735). This low threshold is easily met by the Hopi Tribe in this case; indeed, the Snowbowl's arguments to the contrary are nothing more than willful blindness to the long-standing efforts by the Hopi Tribe to safeguard the ecological health of the San Francisco Peaks and the many plant and animal species living in this fragile alpine system.

Notably, the federal Defendants in this case do not assert that the Hopi Tribe lacks standing to maintain its claims.

A. The Hopi Tribe Will Suffer Injury In Fact

It cannot seriously be questioned that the purity and sanctity of the San Francisco Peaks ("the Peaks") is integral to the Hopi way of life. Judicial determinations (even those against the Hopi Tribe's interests) have consistently held that "[t]he Peaks are of central importance to the Hopi tradition, culture and religion." *Navajo Nation v. U.S. Forest Serv.*, 408 F. Supp. 2d 866, 894 (D. Ariz. 2006); *see also Wilson v. Block*, 708 F.2d 735, 744 (D.D.C. 1983) (recognizing the "*indispensability* of the Peaks to the practice of" the Hopi religion) (emphasis added). "The Hopi Tribe's spiritual and physical connection to the Peaks goes back as far as their oral traditions — at least as long as the Hopi and their ancestors have lived in northern Arizona," *Navajo Nation*, 408 F. Supp. 2d at 894, which pre-dates the formation of the United States by several centuries, *Navajo Nation v. U.S. Forest Service*, 535 F.3d 1058, 1099 (9th Cir. 2008) (Fletcher, J. dissenting) (recognizing the "Hopi have been making pilgrimages to the Peaks since at least 1540, when they first encountered Europeans, and probably long before that"); *see also Wilson*, 708 F.2d at 738 (the Peaks "have for centuries played a central role" in the Hopi religion and culture).

The Peaks "are known to the Hopi as Nuvatukya'ovi - the 'Place of Snow on the Peaks,'" *Navajo Nation*, 408 F. Supp. 2d at 894. These summits that tower over the Northern Arizona plateau "mark a cardinal direction defining the Hopi universe, the spiritual boundaries of the Hopi way." *Id.* "The Peaks are where the Hopi direct their prayers and thoughts, a point in the physical world that defines the Hopi universe and serves as the home of the [Hopi deities, called] Kachinas, who bring water, snow and life to the Hopi people." *Id.* The Kachinas "serve as

intermediaries between the Hopi and the higher powers, carrying prayers from the Hopi villages to the Peaks on an annual cycle." *Navajo Nation*, 535 F.3d at 1099 (Fletcher, J. dissenting). "[F]or about six months each year, commencing in late July or early August and extending through mid-winter, the Kachinas reside at the Peaks. During the remaining six months of the year the Kachinas travel to the Hopi villages and participate in various religious ceremonies and practices." *Wilson*, 708 F.2d at 738. Not only does the Hopi calendar "connect[] the months and seasons in the Hopi year . . . [by recording] the coming and going of the Kachina from the Peaks," *Navajo Nation*, 408 F. Supp. 2d at 895, but this annual cycle is central to the very survival of the Hopi Tribe because "[t]he Hopis believe that the Kachinas' activities on the Peaks create the rain and snow storms that sustain the villages." *Wilson*, 708 F.2d at 738.

To honor their deities, and respect and observe their long-standing traditions, the Hopi make regular pilgrimages to the Peaks and conduct ceremonies in and around the Snowbowl area as a part of their very way of life. The Hopi "have many shrines on the Peaks and collect herbs, plants and animals from the Peaks for use in religious ceremonies." *Wilson,* 708 F.2d at 738*;* Dkt. 8-2 at 125; *see also Navajo Nation,* 535 F.3d at 1064 (recognizing that the Hopi and other tribes "collect plants, water, and other materials from the Peaks for medicinal bundles and tribal healing ceremonies"). Defendant Forest Service has publicly acknowledged the need to facilitate Tribe members' "access to the Peaks for the purposes of collecting plants, visitation to shrines, and other religious activities," Dkt. 8-2 at 124, and noted "that trails lead from the Hopi Mesas to the San Francisco Peaks and are traditionally used as part of annual pilgrimages and collecting expeditions," *id.* at 126.[1] Thus it is clear that the Peaks are not only revered from afar as a

[1] While the Hopi Tribe has not publicly "identified any shrines, trails or cultural resources" within the Snowbowl Special Use Permit area, *Navajo Nation*, 408 F. Supp. 2d at 888, the Hopi Tribe's unwillingness to reveal to the wider public its most sacred places should not be viewed as any indication that such areas do not exist. To the contrary, Defendant Forest Service has expressly noted that the Hopi and other tribes are "reluctant to identify them

defining point in the Hopi universe and the place where their deities reside, but that Tribe members regularly visit this land and use the environmental resources there as an integral part of their spiritual practice and cultural heritage.

Decades ago, the United States Congress memorialized the vital role of the Peaks in the Hopi way of life and belief system by renaming the San Francisco Peaks Wilderness Area, which surrounds the Snowbowl Resort on three sides, "the Kachina Peaks Wilderness." Arizona Wilderness Act of 1984, Pub. L. No. 98-406, §101(a)(22), 98 Stat. 1485 (1984). This change was specifically made "to reflect the deep Hopi religious significance of the area," 130 Cong. Rec. H8908 (Aug. 10, 1984) (Statement of Rep. Udall), and signifies federal recognition both of the religious and cultural significance of this area, and the need to preserve its unique heritage as a wilderness sanctuary.

The purity of the natural environment of the Peaks, and preservation of the plants and animals that have lived there (as have the Hopi) for centuries, is indispensable to the Hopi identity and well-being. The "direct relationship between the Hopi way of life and the environment, including the Peaks," *Navajo Nation*, 408 F. Supp. 2d at 894, has been recognized time and again. The Hopi Tribe shares the view of many tribes "that the Peaks were put there for the people and it is therefore the peoples' duty to protect it for the benefit of the world." Dkt. 8-2 at 123. Specifically, the Hopi believe "that they owe a duty to the deities to maintain the San Francisco Peaks in their natural state [and that] breach[ing] that duty will lead to serious adverse consequences," *Wilson*, 708 F.2d at 740, including that "the Peaks would lose their healing power and otherwise cease to benefit" the Hopi Tribe, *id*.

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for fear they will be disturbed or desecrated, as well as the fact that such places should not be visited by people unless they have the sufficient religious training and have made the appropriate preparations to go there." Dkt. 8-2 at 124.

Among other unique attributes, the "[t]he 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," Dkt. 1 ¶ 11, which live in "an elongated area of approximately 2.6 square kilometers at the top of the Peaks. This elongated area extends into the Snow Bowl permit area." *Wilson*, 708 F.2d at 747. The present action is not the first time the Hopi Tribe has acted to safeguard the fragile alpine ecosystem of the Peaks and these threatened plants. *Id*. at 747-51. In the 1980s, the Hopi Tribe attempted to protect the groundsel and its habitat from encroachment by the Snowbowl under the Endangered Species Act. *Id*. However, at the time the Hopi Tribe brought its claim, the groundsel "was neither listed nor proposed for listing" by the United States. *Id*. at 748. Approximately one month after appellate arguments in that case, however, the United States proposed the groundsel for listing as a threatened species, *id*. at 751, and the groundsel and its habitat has been federally protected ever since, Dkt. 1 ¶ 12 (citing 48 Fed. Reg. 52743-47 (November 22, 1983)). The D.C. Circuit took no action to further protect the groundsel at that time, however, because it was "confident that the Forest Service will, in good faith, implement such measures" as are necessary to comply with the Endangered Species Act and protect this vulnerable species. *Wilson*, 708 F.2d at 751.

Now that the groundsel has been specifically designated as a threatened species under the Endangered Species Act, preserving this plant and preventing its extinction is not only more compelling, it is required as a matter of federal law. As stated in the Hopi Tribe's Complaint, if snowmaking using treated effluent is allowed at the Snowbowl, the overspray and drifting will be transported to the groundsel's critical habitat, resulting in irreparable harm. *Id*. ¶¶ 20, 22, 36. The Hopi Tribe's Complaint explains exactly how snowmaking with reclaimed wastewater will harm the San Francisco groundsel:

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

Dkt. 1 ¶¶ 22-24. Given these facts, it is beyond question that the Hopi Tribe has standing to assert claims under the Endangered Species Act for the protection of the groundsel, and that the Hopi Tribe has alleged an injury in fact that is concrete and particularized, and actual and imminent. *Lujan*, 504 U.S. at 560-61. As shown above, the Hopi Tribe's injury in this case easily surpasses the minimal requirement that some type of "'aesthetic and recreational values of the area will be lessened by the challenged activity." *Friends of the Earth, Inc.*, 528 U.S. at 183 (quoting *Sierra Club*, 405 U.S. at 735). Indeed, if through silence and inaction the Hopi Tribe allowed snowmaking with reclaimed wastewater to coat these threatened plants and alter the fundamental chemistry of their critical habitat in a way that jeopardizes their very existence, the Hopi Tribe would violate its recognized "duty to the deities to maintain the San Francisco Peaks in their natural state." *Wilson*, 708 F.2d at 740. Quite obviously, the Hopi Tribe has "a direct stake in the outcome of . . . [this] litigation," *SCRAP*, 412 U.S. at 689 n. 14, sufficient to confer standing in this case.

B. The Actions of the Forest Service will Cause the Hopi Tribe's Injuries

It is equally clear in this case that there is a "causal connection between the injury and the conduct complained of" and that the injury is "fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." *Lujan*, 504 U.S. at 560 (internal quotation omitted). As set forth in Plaintiff's Complaint, Defendants are required by Section 7(a) of the ESA 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 [critical habitat] of such species," 16 U.S.C. § 1536(a)(2), and by not halting snowmaking with reclaimed wastewater, the Forest Service has failed to meet this requirement, Dkt. 1 ¶¶ 22-24, 33. Moreover, "[t]he 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)." Dkt. 1 ¶ 36.

It is Defendants, and not some other third party, that have the power to order snowmaking to stop at the Snowbowl. Indeed, Defendants have both the right and duty under the Special Use Permit ("SUP") issued to the Snowbowl to order an "immediate temporary suspension of the operation" – the precise relief requested by the Tribe – when it is "necessary to protect the public health or safety, *or the environment*." Dkt. 10-5 at 9, Section III. F (emphasis added). The SUP also contains a specific section titled "Protection of Habitat of Endangered, Threatened, and Sensitive Species." Dkt. 10-5 at 22, Section IX. J. This section expressly provides authority to order "protective and mitigative measures" to safeguard federally-protected

species and their habitats under the ESA. Moreover, whenever "protection measures prove inadequate . . . the [Forest Supervisor] may specify additional protection regardless of when such facts become known." *Id.* at 23, Section IX.J. Thus, the Forest Service has complete and independent ability to temporarily suspend the operation under the SUP for, among other reasons, the protection of federally protected species.

The Complaint makes clear that the Hopi Tribe's cause of action is based on the Defendants' failure to ensure that their action (i.e., allowing the snowmaking operations to proceed) adequately protects threatened natural resources and allowance of destructive activities to go forward. Dkt. 1 ¶ 38. In other words, the Defendants' action will *cause* irreversible harm to the groundsel because Defendants' action, allowing nitrogen-rich effluent to be sprayed onto or drift into the groundsel's critical habitat, will result in the loss of plants. Dkt. 1 ¶¶ 22-24. As set forth above, irreversible harm to the groundsel is harm to the Hopi Tribe and its interest in protecting the purity and sanctity of the Peaks, and conserving the unique resources located in this fragile alpine system. *Wilson*, 708 F.2d at 740.

C. The Hopi Tribe's Injury would be Redressed by a Favorable Decision

The redressability element of Article III standing asks whether it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Lujan*, 504 U.S. at 561 (internal quotation omitted). The Hopi Tribe's prayer for relief seeks a "mandatory injunction requiring" the following:

- 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;

- 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; and

- Defendants to ensure 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.

Dkt. 1 at 10. A favorable decision would result in the above-described injunction, which would clearly preserve the Hopi Tribe's legally protected interest in the purity of the San Francisco Peaks and the health of its ecosystem. Because it is certain that the injury would be redressed by a favorable decision, *Lujan*, 504 U.S. at 561, the Hopi Tribe has standing to bring this action.[2]

IV. THE HOPI TRIBE PROVIDED THE REQUISITE 60 DAYS NOTICE

The Snowbowl wrongly contends that the Hopi Tribe failed to provide the United States with adequate notice of the lawsuit as required by 16 U.S.C. § 1540(g)(2)(A), the Citizen Suit provision of the ESA. That provision states that "[n]o action may be commenced under subparagraph (1)(A) of this section prior to sixty days after written notice of the violation has been given to the Secretary, and to any alleged violator of any such provision or regulation." The Hopi Tribe has fully complied with this requirement.

As set forth in its Complaint, the Hopi Tribe provided a Sixty-Day Notice of Intent to Sue for Violations of Section 7 of the Endangered Species Act ("the Notice") to Defendants June 4, 2012. Dkt. 1 ¶ 4. *See* Declaration of Kathleen J. Udo, Dkt. 8 ¶ 8 and Exhibit 7, Dkt. 8-7 at 3. As required by 16 U.S.C. §1540(g)(2)(A)(i), the Notice was provided to Secretary of the Interior Ken Salazar, Secretary of Agriculture Tom Vilsack and the alleged violator, Mr. M. Earl Stewart, Forest Supervisor for the Coconino National Forest. Dkt. 8-7 at 3. The subject line of the Notice expressly stated the Tribe's intent to sue for violations of Section 7: "Sixty-Day Notice of Intent to Sue for Violations of Section 7 of the Endangered Species Act." *Id*. The

[2] If, despite the Hopi Tribe's clear demonstration that it has standing to pursue the claims it has raised, the Court is in any way inclined to grant the Snowbowl's motion on this issue, the Hopi Tribe requests leave to amend its Complaint to more fully plead its basis for standing in this case.

Notice is clear that the Hopi Tribe seeks to compel the Forest Service to comply with Section 7 of the ESA. The Notice states the Hopi Tribe's intent in two places: "[T]his letter serves as the Hopi Tribe's sixty-day notice of its intent to sue for violations of § 7 of the ESA that may impact the San Francisco Peaks groundsel and its critical habitat." *Id.* "[T]he Hopi Tribe is notifying the Forest Service that it will file suit to enforce the provisions of Section 7 of the ESA." *Id.* at 6. The claims brought by the Hopi Tribe in its Complaint assert violations under Section 7 of the ESA, Dkt. 1 ¶¶ 33, 35, 36, and thus are clearly within the scope of the Notice.

The Snowbowl argues that since the Forest Service reinitiated consultation on June 19, 2012, as requested by the Tribe, that the Hopi Tribe's Notice was ineffective to notify the Forest Service of the Hopi Tribe's intent to sue if snowmaking with reclaimed wastewater is allowed to proceed during the consultation period. This argument is wrong. "Consultation 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." *Defenders of Wildlife v. Jackson ("Jackson")*, 791 F. Supp. 2d 96, 100 (D.D.C. 2011) *(quoting Lujan,* 504 U.S. at 603 (Blackmun, J., dissenting)) (emphasis added). Numerous courts have recognized that the very purpose of the consultation process is to prevent later substantive violations of the ESA, *Sierra Club v. Marsh,* 816 F.2d 1376, 1389 (9th Cir. 1987), and it is "well-settled that a court can enjoin agency action pending completion of section 7(a)(2) requirements," *Jackson*, 791 F. Supp. 2d at 110 (quoting *Wash. Toxics Coal. v. EPA*, 413 F.3d 1024, 1034 (9th Cir. 2005)); *see also Fla. Key Deer v. Paulison*, 522 F.3d 1133, 1147 (11th Cir. 2008) (court may enjoin agency from "noncompliant action pending satisfaction" of ESA requirements); *Defenders of Wildlife v. Martin ("Martin")*, 454 F. Supp. 2d 1085, 1099 (E.D. Wash. 2006) (enjoining agency from authorizing snowmobiling in a protected area until completion of consultation).

The Hopi Tribe's Notice clearly apprised Defendants that the harm to be avoided was that "snow made from reclaimed wastewater will be transported through drift associated with the snowmaking equipment and prevailing winds beyond the Special Use Permit area boundary and into the San Francisco Peaks groundsel's critical habitat and into areas of known plant populations," Dkt. 8-7 at 5. Thus Defendants cannot claim they lacked notice that the Hopi Tribe would seek injunctive relief under ESA Section 7 to prevent that very harm from occurring.

To the contrary, the Hopi Tribe's letter clearly notified Defendants that the Hope Tribe "will file suit to enforce the provisions of Section 7 of the ESA," Dkt. 8-7 at 6. The Notice letter also contained a "Legal Background" section articulating what those requirements are, including expressly the Section 7(a) requirement "to insure that actions authorized, funded or carried out . . . are not likely to jeopardize the continued existence of a listed species, or result in the destruction or adverse modification of . . . critical habitats," Dkt. 8-7 at 4 (citing 16 U.S.C. § 1536(a)(2)), and the Section 7(d) prohibition against "any irreversible or irretrievable commitment of resources . . . which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures during the consultation process," *id.*, citing 16 U.S.C. § 1536(d).

The Forest Service quite clearly understood that it had been provided notice under both Section 7(a) and Section 7(d) through the Hopi Tribe's June 4, 2011 Letter. One week later, on June 11, 2012, Forest Supervisor M. Earl Stewart assured the U.S. Fish and Wildlife Service in writing that during consultation "there will be no irreversible or irretrievable commitment of resources associated with . . . [c]ontinued construction of the supply pipeline, distribution system, and additional ski runs. . . because this work is outside of the area that could affect" the

threatened groundsel. Dkt. 8-7 at 118. In so doing, Defendant Stewart manifested the Forest Service's understanding that its compliance with Section 7(d) was at issue. However, the Forest Service has failed to suspend actual snowmaking with reclaimed wastewater, which the Hopi Tribe alleges is a violation of both Section 7(a) and Section 7(d). Dkt. 1 ¶¶ 32-38.

The Forest Service also cannot claim to be unaware of the interplay between the requirements of Section 7(a) and Section 7(d). As shown above, these legal requirements were clearly articulated in the Hopi Tribe's Notice letter. Dkt. 8-7 at 4. In addition, in numerous cases, including cases specifically involving the Forest Service, "courts have consistently stated that the purpose of § 7(d) is to 'ensur[e] that the status quo will be maintained during the consultation process.'" *Pacific Rivers Council v. Thomas*, 936 F. Supp. 738, 745 (D. Idaho 1996) (quoting *Conner v. Burford*, 848 F.2d 1441, 1455 n. 34 (9th Cir. 1988)); *see also Wash. Toxics Coal.*, 413 F.3d at 1034; *Pacific Rivers Council v. Thomas*, 30 F.3d 1050, 1056 n. 14 (9th Cir. 1994). "In light of the protective purpose of the ESA, [preservation of the] status quo necessarily contemplates the absence of action" if such action might jeopardize a protected species. *Pacific Rivers Council*, 936 F. Supp. at 745. Indeed, the Forest Service has repeatedly been enjoined by federal courts from allowing challenged activities from going forward until consultation under Section 7(a) is complete. *Center for Biological Diversity v. U.S. Forest Service*, 820 F. Supp. 2d 1029, 1039 (D. Ariz. 2011) (holding that "authorization of the logging project during reinitiated consultation is almost assuredly a section 7(d) violation"); *Pacific Rivers Council*, 30 F.3d at 1057 (barring Forest Service from proceeding with "all ongoing or announced activities that may affect the Snake River chinook" without first complying with the consultation requirements of the ESA); *Thomas v. Peterson,* 753 F.2d 754, 764 (9th Cir. 1985) (holding that the proper remedy against the Forest Service "must be an injunction of the project

pending compliance with the ESA"); *Martin*, 454 F. Supp. 2d at 1099 (prohibiting all snowmobiling and snowmobile trail grooming inside Nation Forest until the completion of formal consultation).

This Court has specifically rejected the same type of jurisdictional issue that the Snowbowl seeks to raise. In *American Rivers v. U.S. Army Corps of Engineers*, plaintiffs provided a 60-day notice letter of their intent to sue under the ESA because a draft plan failed to comply with a Biological Opinion (the "BiOp"). 271 F. Supp. 2d 230, 246 (D.D.C. 2003). Subsequent to the plaintiffs' notice, the Army Corps issued a final plan which still did not comply with the BiOp. *Id.* This Court concluded that plaintiffs had "put the Federal Defendants on adequate notice that Plaintiffs would seek, through litigation, to make them comply with ESA requirements." *Id.* Like the notice provided in *American Rivers*, the Tribe's Notice put Defendants on notice that the Tribe would seek, through litigation, a Court Order to ensure that the Forest Service took no action that would jeopardize the continued existence of the groundsel or its critical habitat. Rejection of Snowbowl's arguments in this case is consistent with *American Rivers*, and numerous other cases rejecting hyper-technical readings of notice requirements. *See, e.g.*, *Water Keeper Alliance v. U.S. Dept. of Defense,* 271 F.3d 21, 30 (1st Cir. 2001) (acceptance of argument that federal agency was not on notice of ESA claims "would be setting the bar for adequacy of notice too high"); *Marbled Murrelet v. Babbitt*, 83 F.3d 1068, 1073 (9th Cir. 1996) (holding that 60-day notice letter where "section 7 was referenced in only one part of the letter" nevertheless provided sufficient notice).

The cases upon which Snowbowl relies do not compel a different result. The notice letters in those cases were either addressed to the wrong parties, *Research Air, Inc. v. Norton*, No. Civ. A. 05-623 (RMC), 2006 WL 508341 *10 (D.D.C. Mar. 1, 2006), "made no mention of

the claim" that was dismissed, *Common Sense Salmon Recovery*, 329 F. Supp. 2d 96, 104 (D.D.C. 2004), failed to give any notice aside from a "'comment,' submitted to an agency in the course of a rule-making," *The Humane Soc. of U.S. v. Lujan*, 768 F. Supp. 360, 362 (D.D.C. 1991), or failed to give the federal agency "a litigation-free window" to take corrective action, *Conservation Force v. Salazar*, 811 F. Supp. 2d 18, 33-34 (D. D.C. 2011). Moreover, the Eastern District of California's analysis in *Natural Resources Defense Council v. Kempthorne*, 539 F. Supp. 2d 1155 (E.D. Cal. 2008), which purports to require separate 60-day notices for violations of ESA Section 7(a) and ESA Section 7(d), *id*. at 1179, is clearly at odds with the recognition of the Ninth Circuit that "section 7(d) clarifies the requirements of section 7(a), ensuring that the status quo will be maintained during the consultation process," *Conner*, 848 F.2d at 1455 n.34; *Pacific Rivers Council*, 30 F.3d at 1056 n.14, and has not been followed in any subsequent case. To the contrary, other district courts within the Ninth Circuit have allowed Section 7(d) claims to proceed where the 60-day notice letter was filed prior to the initiation of consultation under Section 7(a). *See Center for Biological Diversity*, 820 F. Supp. 2d at 1033 (after April 2010 notice letter, June 2010 reinitiation of consultation and July 2010 suit, holding that "authorization of the logging project during reinitiated consultation is almost assuredly a section 7(d) violation, and as such the Court is well within its authority to issue the preliminary injunction against the project").

However, even if the Snowbowl's arguments concerning *Kempthorne* were fully credited, they would not require dismissal of this suit. Specifically, *Kempthorne's* erroneous analysis of the notice required for a violation of Section 7(d) nevertheless recognized that "Plaintiffs' sixty-day notice is valid for their § 7(a) claims." 539 F. Supp. 2d at 1177. The same is true here. The Hopi Tribe clearly placed Defendant Forest Service on notice that under Section 7(a) of the ESA

it was legally required "to insure that actions authorized, funded or carried out by them are not likely to jeopardize the continued existence of a listed species, or result in the destruction or adverse modification of their critical habitats." Dkt. 8-7 at 4 (citing 16 U.S.C. § 1536(a)(2)). This Court has previously recognized that "§ 7(a)(2) of the ESA contains *both* a substantive *and* procedural requirement." *Jackson*, 791 F. Supp. 2d at 113 (original emphasis). Substantively, Section 7(a)(2) "requires that agencies ensure that their actions are not likely to jeopardize the existence of an endangered species" and "courts have enforced § 7(a)(2) without recourse to § 7(d)." *Id*. (citing cases). The availability or unavailability "of section 7(d) is no reason to hold that an injunction to enforce section 7(a)(2) should not be kept in force until consultation is completed." *Id*. As such, even if the Court credited the Snowbowl's argument that the Hopi Tribe did not adequately provide notice that it would bring claims pursuant to ESA § 7(d), the Court would nevertheless have jurisdiction to rule under ESA § 7(a) that the Hopi Tribe is entitled to the preliminary injunction it seeks.

V. CONCLUSION

As shown above, the Hopi Tribe clearly has standing to bring this action to protect and preserve the threatened San Francisco groundsel, and provided the notice of its claims to the Defendants as required by 16 U.S.C. §1540(g)(2)(A)(i). Accordingly, if the Snowbowl's motion to dismiss is even considered by this Court, it must denied because these jurisdictional requirements are fully satisfied.

Respectfully submitted this 5th day of December, 2012.

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