IN THE ARIZONA SUPREME COURT

THE HOPI TRIBE, a Federally Recognized Indian Tribe, Plaintiff/Appellant, vs. THE CITY OF FLAGSTAFF, ARIZONA, Defendant/Appellee.	**No. CV-13-0180-PR** **NO. 1 CA-CV 12-0370** **Coconino County Superior Court No. S0300CV201100701**

The City of Flagstaff, Arizona's Petition for Review

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INTRODUCTION

This case presents important questions about the finality of judgments and the limits of the tort of public nuisance. For a decade, the Hopi Tribe (the "Tribe") has opposed the use of reclaimed water for snowmaking at the Snowbowl skiing facility near Flagstaff, Arizona. Beginning in 2002, the U.S. Forest Service conducted a thorough administrative review and, in 2005, approved the use of reclaimed water for snowmaking. The Tribe and others (collectively, the "*Navajo Nation* plaintiffs") then brought, and following extensive litigation lost, claims challenging the Forest Service's decision as well as a claim under the Religious Freedom Restoration Act ("RFRA"). *See Navajo Nation v. U.S. Forest Serv.*, 408 F. Supp. 2d 866 (D. Ariz. 2006), *aff'd*, 535 F.3d 1058 (9th Cir. 2008) (en banc), *cert. denied*, 129 S. Ct. 2763 (2009).

Despite receiving its day in court, the Tribe is now attempting to use a public nuisance claim to undo the *Navajo Nation* judgment. The Superior Court dismissed the Tribe's new suit based on claim preclusion, recognizing the suit simply rehashed claims that were or could have been brought in *Navajo Nation*. Opinion ¶ 26.[1] The Court of Appeals, however, reversed and ordered the parties to embark on costly further proceedings, thereby eviscerating the *Navajo Nation* final judgment. *Id.* ¶ 44.

This Court should grant review because important issues of law have been incorrectly decided and the Court of Appeals' decision conflicts with a recent

[1] "Opinion" refers to *Hopi v. City of Flagstaff, Arizona*, No. 1 CA-CV 12-0370, 2013 WL 1789859 (Ariz. Ct. App. April 25, 2013), attached as Appendix 1.

decision of the Ninth Circuit, *Turtle Island Restoration Network v. U.S. Dep't of State*, 673 F.3d 914 (9th Cir. 2012). If allowed to stand, the decision below would permit a party to assert a legal challenge to activities on federal lands, and if dissatisfied with the result, reassert the challenge via a public nuisance claim. This is improper. The Supreme Court "has consistently emphasized the importance of [claim and issue preclusion] in fulfilling the purpose for which civil courts ha[ve] been established, the conclusive resolution of disputes within their jurisdiction." *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 466 n.6 (1982). Therefore, there is a "vital public interest" in the finality of judgments, which reflects a "rule of fundamental and substantial justice" and "comports with common sense as well as public policy." *Federated Dep't Stores v. Moitie*, 452 U.S. 394, 401-02 (1981) (citations omitted). The Court of Appeals' erroneous holding inevitably leads to a lack of finality in judgments, costly duplicative litigation, and potential delay for activities already found beneficial.

Additionally, the Tribe's public nuisance claim is barred by laches because the Tribe delayed asserting it until after *Navajo Nation*, thereby prejudicing the City of Flagstaff (the "City") and others. Finally, public nuisance is unavailable because snowmaking at Snowbowl is comprehensively regulated and has already been approved by the responsible government agencies. *See* Restatement (Second) Torts § 821B cmt. f (1979), *cited with approval in Armory Park Neighborhood Ass'n v. Episcopal Cmty. Servs. in Ariz.*, 148 Ariz. 1, 8, 712 P.2d 914, 921 (1985).

This case further involves issues of statewide importance because, with the vast amount of federal land in Arizona, the issues presented are likely to be

repeated across the state by challengers who wish to undo adverse final judgments. Moreover, the parties to this high-profile lawsuit are a federally recognized tribe and the largest city in northern Arizona. This case therefore involves a conflict at high levels of government that will affect many people and could impact governmental budgets. *Cf. League of Ariz. Cities & Towns v. Martin*, 219 Ariz. 556, 558 ¶ 4, 201 P.3d 517, 519 (2009) (exercising jurisdiction in similar circumstances).

ISSUES PRESENTED FOR REVIEW

1. Did the Superior Court correctly dismiss the Tribe's public nuisance claim based on claim preclusion, where the Tribe has already lost another lawsuit arising from the same facts against a party in privity?

2. Is the public nuisance claim barred by laches, where the contract for the City to supply reclaimed water was entered into years earlier, and the Tribe delayed asserting this claim until after it lost *Navajo Nation*?

3. Is a public nuisance claim unavailable as a matter of law, where the government has approved snowmaking at Snowbowl and the activity is subject to continued monitoring and administrative remedies under state and federal law?

FACTS MATERIAL TO THE ISSUES PRESENTED

Snowbowl has operated since the 1930s. *Navajo Nation*, 408 F. Supp. 2d at 870. Because of variable snowfall, the Snowbowl Partnership (the "Partnership") entered into a contract with the City in 2002 to purchase reclaimed water to use for snowmaking (the "Contract"). *See id.* at 873; App. 2 ¶ 49; App. 3 at 1. Under federal law, the Partnership could not conduct artificial snowmaking without prior

Forest Service approval. App. 2 ¶ 28. In May 2002, the Partnership requested an amendment to its Special Use Permit ("SUP"), specifically laying out the manner in which it would conduct snowmaking. *Navajo Nation*, 408 F. Supp. 2d at 885. The Forest Service began its review under the National Environmental Policy Act ("NEPA") and other federal laws. *Id.* at 870-71. The "extensive" multi-year review considered Arizona law allowing reclaimed water for snowmaking and involved "public participation, tribal consultation and input, and analysis." *Id.* at 870. The Forest Service balanced the competing needs and public uses for the forest and considered artificial snowmaking's environmental impact. *See id.* at 872. In 2005, the Forest Service approved the request. *Id.* at 871; App. 4 at 3.

The Tribe and others sued. *Navajo Nation*, 408 F. Supp. 2d at 866. As the real party in interest, the Partnership successfully intervened as a defendant. The District Court granted summary judgment against many claims and after a nine-day bench trial also rejected the RFRA claim, finding in part:

- Snowmaking will occur on only one quarter of one percent of the San Francisco Peaks;
- "[T]ribal members have not identified any specific plants, springs, natural resources, shrines or locations for ceremonies in the SUP area that will be impacted – much less substantially burdened – by the Snowbowl improvements"; and
- Even "use of fresh water for snowmaking would not alleviate the tribes' religious concerns."

Id. at 886, 900, 901. The *Navajo Nation* plaintiffs appealed, the Ninth Circuit affirmed, and the U.S. Supreme Court denied certiorari. *Navajo Nation*, 535 F.3d 1058, *cert. denied* 129 S. Ct. 2763.

PROCEDURAL HISTORY AND THE DECISIONS BELOW

After losing *Navajo Nation*, the Tribe filed this lawsuit in Superior Court, which simply continued its challenge. This suit contained three claims: the Contract violates Arizona law and public policy, the Tribe's water rights were infringed, and the Contract constitutes a public nuisance. Opinion ¶ 10. The Superior Court dismissed all three. The dismissal of public nuisance was based on claim and issue preclusion and failure to comply with notice of claim requirements. *Id.* ¶ 11.

The Tribe appealed, challenging dismissal only of public nuisance. The Court of Appeals reversed in part and remanded for further proceedings. *Id.* ¶¶ 13, 44. With respect to laches, it held that based solely on the Complaint, the Tribe had not unreasonably delayed and the City had not suffered prejudice. *Id.* ¶¶ 24-25. The court reversed on claim preclusion, concluding that the transactional nuclei of facts in the two cases are distinct. *Id.* ¶ 32. And it declined to consider whether a claim for public nuisance is unavailable in light of the prior Forest Service approval, stating this was "raised for the first time on appeal." *Id.* ¶ 37. The City unsuccessfully moved for reconsideration on claim preclusion.

ARGUMENT

I. The Court of Appeals Has Created An Unprecedented Opportunity for a Second Bite at the Apple, Undermining the Finality of Judgments Statewide.

The Tribe's public nuisance claim is barred by claim preclusion because it arises from the same facts as *Navajo Nation*, and the Tribe could have asserted the same claim against the Partnership, which was a defendant in *Navajo Nation* and is in privity with the City. The Court of Appeals incorrectly held that the "public nuisance claim arises out of a different transactional nucleus of facts." Opinion ¶ 29. It misapplied the standard for determining whether two claims arise from the same set of facts, and it created a conflict with *Turtle Island*, 673 F.3d 914, which squarely rejected the same argument. If the court's conflicting approach stands, plaintiffs may bring environmental and religious challenges in federal court, while holding back a vague public-nuisance claim to collaterally attack any adverse decision.

A. The Public Nuisance Claim Arises From the Same Transactional Nucleus of Facts as *Navajo Nation*.

"[W]hether two suits involve the same claim or cause of action depends on factual overlap, barring 'claims arising from the same transaction.'" *United States v. Tohono O'Odham Nation*, 131 S. Ct. 1723, 1730 (2011) (citing *Kremer*, 456 U.S. at 482 n.22; Restatement (Second) of Judgments § 24 (1980)).[2] This "is the

[2] While preclusion for federal judgments is a question of federal law, federal and Arizona law both look to the Restatement. *Maricopa-Stanfield v. Robertson*, 211 Ariz. 485, 488-89 ¶¶ 37, 44, 123 P.3d 1122, 1128-29 (2005) (federal law); *see, e.g., Chaney Bldg. Co. v. City of Tucson*, 148 Ariz. 571, 573, 716 P.2d 28, 30 (1986) (state law). Therefore, this Court may apply principles from the (continued...)

most important consideration." Opinion ¶ 28 (citing *Turtle Island*, 673 F.3d at 918).

1. The Public Nuisance Claim Arises From the Same Transactional Nucleus of Facts as the RFRA Claim.

The "public nuisance claim alleges interference . . . caused by the City's sale of reclaimed wastewater to be used for snow." Opinion ¶ 29. Likewise, the RFRA "claim involved . . . burdens allegedly placed on the Tribe's religion by using reclaimed wastewater to make snow on the Peaks." *Id.* ¶ 31; *see also Navajo Nation*, 408 F. Supp. 2d at 882 (RFRA claim alleges "the use of reclaimed water to make snow, will have negative, irreversible, and devastating effects"). Both claims therefore arise from the same transaction.

The Court of Appeals, however, focused on the differences between the legal theories and rights invaded in the RFRA and public nuisance claims. Opinion ¶¶ 29, 31; *contra* Restatement § 24 cmt. c (claim preclusion is not based on similarity or differences of the rights invaded or legal theories advanced).[3] Because the correct question is whether the two claims ***arise from*** the same transaction of facts, the court made an important legal error.

(...continued)
Restatement, and its decision will be important precedent both for federal and state law.

[3] The court's error is clear from the Restatement. Under the outdated "primary rights" test, a person could bring different actions to vindicate different rights. Restatement § 24 cmt. a. This is no longer the law. In the Restatement's illustrations, both personal injury and property damage arise from an underlying car accident, so claim preclusion applies. *Id.* at Illustrations 1 & 2. Nor may a second suit be based on different legal theories. *Id.* at Illustrations 3 & 4.

2. The Public Nuisance Claim Also Arises From the Same Transactional Nucleus of Facts as the NEPA Claim.

The Court of Appeals stated that "the transactional nucleus of facts at issue in the [NEPA claim] was the Forest Service's administrative procedures, not the underlying environmental concerns." Opinion ¶ 30. In *Turtle Island*, however, the Ninth Circuit squarely rejected this cramped interpretation:

> Technically, the earlier litigation was about the promulgation of the Guidelines, not the certification process in practice. But . . . TIRN cares about NEPA and ESA compliance in the certification process only to help ensure that sea turtles aren't harmed. If TIRN were concerned only about the procedural harm . . . it would lack standing.

673 F.3d at 919 (citation omitted). This shows that the transactional nucleus of facts is not simply the procedures at issue, but also the underlying harm. Here, the alleged harm from reclaimed water for snowmaking at Snowbowl underlies both the NEPA and public nuisance claims.

The cases cited by the Tribe at the Court of Appeals (Opening Brief at 35-36) all involved situations where the conduct giving rise to an earlier suit was different from the conduct challenged in a later suit. These cases have "nothing useful to say in a case . . . where plaintiffs could easily have brought all the claims during the course of the earlier lawsuit." *Id.* at 920. And here the Tribe has not alleged why the challenged conduct is both "new" and "different," *id.* at 919-20, such that it could not have brought its public nuisance claim in *Navajo Nation*.

B. The Other Elements of Claim Preclusion Are Met.

The other elements of claim preclusion – a final judgment on the merits and identity or privity between the parties – are met. *Navajo Nation* ended in a final judgment on the merits. 408 F. Supp. 2d 866. There is also identity or privity

between parties because the Tribe was a plaintiff in *Navajo Nation*, the Partnership was a defendant, and the City and the Partnership are sufficiently related. *Airframe Sys., Inc. v. Raytheon Co.*, 601 F.3d 9, 14, 17 (1st Cir. 2010); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 322 F.3d 1064, 1081 (9th Cir. 2003). Indeed claim preclusion is "especially implicated" where a plaintiff attempts to obtain a second bite at the apple by "bringing related claims against closely related defendants." *Airframe Sys.*, 601 F.3d at 14.

II. The Tribe Unreasonably Delayed in Waiting Until After *Navajo Nation* to Bring its Public Nuisance Claim and is Barred by Laches.

Dismissal by the Superior Court was also proper based on laches, which bars a claim when the filing of the claim is unreasonably delayed and results in prejudice to the opposing party or other interested parties. *Harris v. Purcell*, 193 Ariz. 409, 412, 973 P.2d 1166, 1169 (1998).

A. The Tribe Unreasonably Delayed.

Delay is unreasonable when plaintiff lacks a legitimate justification and had knowledge of the basis for the challenge for some time. *Mathieu v. Mahoney*, 174 Ariz. 456, 457, 851 P.2d 81, 82 (1993). Unreasonable delay is also present where the "history leading up to the filing of th[e] case" reveals "a clear case of parties sleeping on their rights." *Apache Survival Coal. v. United States* (*Apache Survival I*), 21 F.3d 895, 910 (9th Cir. 1994) (citation omitted).

The Tribe knew of the City's 2002 Contract with the Partnership, and voiced objections as early as 2004. App. 2 ¶ 55-59. Based just on the Tribe's allegations, the Court of Appeals held that the Tribe had not unreasonably delayed because the City indicated it would take no action until the NEPA process was complete, and

the City only reached a final decision to proceed with the Contract in 2010. Opinion ¶ 24; *see also* App. 2 ¶ 56. However, the court's conclusion is incorrect as a matter of law because the administrative actions were complete in 2005.[4] *See Navajo Nation*, 408 F. Supp. 2d at 870-71. All that occurred between 2005 and 2010 was extensive litigation with the Forest Service and the Partnership.

In factually similar cases, courts have upheld laches. *E.g.*, *Apache Survival I*, 21 F.3d at 898-99 (affirming laches where Apache Tribe raised concerns regarding its property, mineral, and grazing rights, then six years later sued based on religious rights); *see also Apache Survival Coal. v. United States* (*Apache Survival II*), 118 F.3d 663, 664 (9th Cir. 1997) (similar doubts when tribe sued again based on failure to comply with another federal law).

B. The Delay Substantially Prejudiced the City, Other Interested Parties, and the Administration of Justice.

The Tribe's unreasonable delay prejudiced the City, parties outside of this litigation, and the administration of justice. During the time that the Tribe pursued *Navajo Nation*, the City extended the Contract with the Partnership on two separate occasions. App. 2 ¶¶ 53-54; App. 5 at 14-15. The City also expended time, resources, and money in furtherance of the Contract, with the expectation to recover expenditures through the sale of reclaimed water. App. 5 at 14-15; *see*

[4] It is fundamental that courts review "final agency action" under the Administrative Procedure Act, 5 U.S.C. § 704, and this is what was challenged in *Navajo Nation*. *See* 408 F. Supp. 2d at 871. The Court of Appeals erred by focusing on ministerial activity of the Forest Service after the Tribe lost *Navajo Nation*. *See* Opinion ¶ 24.

also App. 2 ¶ 167 (The City is expending money "to connect the pipeline conveying reclaimed wastewater."). This Court should also consider the harm caused by the Tribe's delay to parties outside of this litigation, especially the Partnership. *See Harris*, 193 Ariz. at 412-14 ¶¶ 16, 24, 973 P.2d at 1169-71 (permitting defendants to demonstrate that other parties and the Court itself would be prejudiced by delay); *Mathieu*, 174 Ariz. at 460, 851 P.2d at 85 (same).

III. The Tribe Cannot State a Claim for Public Nuisance Because the Alleged Nuisance Is Fully Authorized and Comprehensively Regulated.

The Tribe's public nuisance claim is also improper because it is nothing more than a collateral attack on the judgment of the Forest Service and the Arizona Department of Environmental Quality ("ADEQ") under statutes where Congress and the Arizona Legislature have delegated them authority.[5] Public nuisance simply is not available where, as here, the alleged nuisance is fully authorized or comprehensively regulated. Restatement (Second) Torts § 821B cmt. f, *cited with approval in Armory Park*, 148 Ariz. at 8, 712 P.2d at 921.

In *Armory Park*, the defendant argued that compliance with all applicable zoning and health laws constituted a complete defense to public nuisance. 148 Ariz. at 3, 712 P.2d at 916. Although the provisions at issue did not rise to the

[5] This Court may properly consider this issue, even though it was not specifically argued at Superior Court. *See City of Tucson v. Clear Channel Outdoor*, 209 Ariz. 544, 552 n.9, 105 P.3d 1163, 1171 n.9 (2005); *see also Ruth v. Industrial Comm'n*, 107 Ariz. 572, 573-74, 490 P.2d 828, 829-30 (1971). It is of statewide importance, involving separation of powers and the limits of public nuisance. And because it raises a question of law, it will serve judicial economy to decide the issue now rather than sending it to Superior Court. Moreover, it expands on issues that were argued at Superior Court. Answering Brief at 14.

level of a comprehensive scheme, this Court agreed that it ***would*** hesitate to find a public nuisance where there were comprehensive and specific laws governing the manner in which a particular activity was to be carried out. *Id.* at 8, 712 P.2d at 921 (citing Restatement § 821B cmt. f). Likewise, in *North Carolina ex rel. Cooper v. TVA*, the Fourth Circuit stated "[i]t is difficult to understand how an activity expressly permitted and extensively regulated by both federal and state government could somehow constitute a public nuisance." 615 F.3d 291, 296 (4th Cir. 2010).[6] The court cautioned against setting aside rules that reflect scientific expertise and "set in motion reliance interests and expectations on the part of those" who have complied. *Id.* at 301. Yet a claim for public nuisance in this situation is "nothing more than a collateral attack" on the administrative rules, and "risks results that lack both clarity and legitimacy." *Id.*

The Tribe's public nuisance claim is squarely barred by this prohibition. The Forest Service balanced the competing needs and public uses for the forest and considered the environmental impact before approving snowmaking with reclaimed water at Snowbowl. *Navajo Nation*, 408 F. Supp. 2d at 872-78. Moreover, ADEQ prescribes the maximum allowable levels of contaminants in various classes of reclaimed water and specifically allows snowmaking using Class A or A+ water. *Id.* at 876. ADEQ issued a permit for the City's sale of Class A+

[6] The Tribe misleadingly argued below that *Cooper* settled because of concerns about the decision's validity. Reply Brief at 3. The article the Tribe cited shows that the settlement was driven by the Clean Air Act, not public nuisance. App. 6 at 1. *Cooper* is good law and has been relied on by other courts. Additional cases are discussed in the City's Answering Brief at 16-17.

reclaimed water for reuse. *Id.* The Forest Service's approval, in conjunction with ADEQ's reuse permit, displaces any claim for public nuisance. *Armory Park*, 148 Ariz. at 8, 712 P.2d at 921.

The Tribe's public nuisance claim is particularly problematic because the Tribe already lost its challenge to the Forest Service's decision. The Tribe is not only asking the Arizona courts to substitute their judgment for the Forest Service and ADEQ's expertise, but also to undo a final judgment of the federal courts when any available public nuisance claim could have been considered in *Navajo Nation.*

CONCLUSION

For the foregoing reasons, the City respectfully requests that this Court grant review, vacate the Court of Appeals' decision in part, and affirm dismissal of the Tribe's public nuisance claim.

DATED this 17th day of July, 2013.

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