ARIZONA COURT OF APPEALS

DIVISION 1

THE HOPI TRIBE, a federally recognized Indian Tribe, Plaintiff/Appellant, v. THE CITY OF FLAGSTAFF, ARIZONA, Defendant/Appellee. and ARIZONA SNOWBOWL RESORT LIMITED PARTNERSHIP, Third-Party Defendant/Appellee	Court of Appeals Division One No. 1 CA-CV 16-0521 Coconino County Superior Court No. S0300CV201100701

CITY OF FLAGSTAFF'S ANSWERING BRIEF

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STATEMENT OF CASE AND OF THE FACTS

The City of Flagstaff adds to the statement of facts by Snowbowl the following description from *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1065 (9th Cir. 2008):

> The Snowbowl Ski area ("the Snowbowl") is located on federally owned public land and operates under a special use permit issued by the United States Forest Service ("the Forest Service") *Navajo Nation v. U.S. Forest Serv.*, 408 F. Supp. 2d 866, 883–84 (D. Ariz. 2006). Specifically, the Snowbowl is situated on Humphrey's Peak, the highest of the San Francisco Peaks ("the Peaks") located within the Coconino National Forest in Northern Arizona. *Id.* at 883. The Snowbowl sits on 777 acres or approximately one percent of the Peaks. *Id.* at 883–84.

In addition, the City of Flagstaff objects to the Hopi's inclusion of references to settlement discussions which are incomplete, misleading, and irrelevant.

STATEMENT OF THE ISSUES

The Statement of the Issues in the Snowbowl Answering Brief accurately state the issues on appeal.

ARGUMENT

Issue 1. The Court properly dismissed the public nuisance claim.

Public nuisance had its inception as an infringement on the rights of the Crown, comment b of Restatement (Second) of Torts § 821C (1979). The remedy could be addressed by suits brought by the King. (*Id.*) It was originally a criminal offense which allowed public officials acting in the place of the sovereign to prosecute individuals, *William L. Prosser, Private Actions for Public Nuisance*, 52 Va. L. Rev. 997, 999 (1966).

In *Prosser & Keeton on Torts* § 90, at 646 (5th ed. 1984), he explains:

> Tort liability for public nuisance originated in an anonymous case in 1536, which is one of two instances since the days of the old action of trespass in which a crime has become per se a tort. In that case it was first held that the action would lie if the plaintiff could show that he had suffered damage particular to him, and not shared in common by the rest of the public. This qualification has persisted, and it is uniformly held that a private individual has no action for the invasion of a purely public right, unless his damage is in some way to be distinguished from that sustained by other numbers of the general public.

This qualification of a special injury has continued through the centuries and is at the core of this appeal.

The courts have consistently held that a plaintiff asserting a public nuisance claim must assert a special injury different not only in degree but also different in kind than that suffered by the public at large. As a consequence, the law regarding standing to assert public nuisance has evolved from being reserved solely to public

officials to now applying to members of the public who could demonstrate a special injury from the public nuisance.

Armory Park Neighborhood Ass'n v. Episcopal Cmty. Services in Arizona, 148 Ariz. 1, 6, 712 P.2d 914, 919 (1985) recognizes this qualification:

> However, the individual bringing the (public nuisance) action was required to show that his damage was different in kind and quality from that suffered by the public in common.

The court explained that the rationale was twofold. It relieved defendants from being sued by every member of the public. It also supported that public harm should be handled by public officials.

The core issue on this appeal is whether the Hopi Tribe has asserted a special injury different in kind from that suffered by the public at large.

In *Hopi Tribe v. City of Flagstaff*, 1 CA-CV 12-0370, 2013 WL 1789859 (App. Apr. 25, 2013) this court addressed the preclusive effect of the *Navajo Nation* litigation in reversing dismissal of the public nuisance claim. The Court recognized the doctrine of claim preclusion but determined that "The Tribe's public nuisance claim arises out of a different transactional nucleus of facts than the Tribe's claims asserted in the *Navajo Nation* litigation." (*Hopi Tribe*, 2013 WL 1789859, at ¶ 29).

That difference was "the transactional nucleus of fact in the *Navajo Nation* litigation was the Forest Service's administrative procedures, not the underlying

environmental concerns." (*Hopi Tribe*, 2013 WL 1789859, at ¶ 30). As a consequence, the transactional nucleus of facts remanded to the trial court was the "environmental concerns."

The Hopi Tribe alleges, and the trial court accepted as true in addressing the Motion to Dismiss, that there was environmental damage as a result of the use of reclaimed water which impacted the use and enjoyment of the Peaks. However, the Hopi Tribe failed to advance any well plead facts to support that the harm was a different kind for the Hopi Tribe than it was for the public at large.

Special injury is commonly recognized when a public nuisance interferes with the use of one's own property. But extending special injury for an alleged public nuisance on public property is a difficult step for a plaintiff.

The precise claim of special injury by The Hopi Tribe has been rejected by the courts, notably in *In re Exxon Valdez*, 104 F.3d 1196 (9th Cir. 1997) and other cases, but, more importantly, the Hopi Tribe cannot cite to a single case in which their claims of special injury has been adopted. While the Hopi Tribe extensively argues that it is entitled to have the Court accept as true on a Motion to Dismiss that the well plead factual allegations are true, the tribe fails to acknowledge that the trial court did accept as true the allegations of environmental damage:

The Court summarizes the alleged harm or injury alleged by the Hopi by the use of reclaimed water:

a) chemicals in the water would negatively impact the Hopi's use of the Snowbowl Resort Area would cause Hopi practitioners to stop using the areas they have traditionally used (Amended Complaint, p. 24,para. 141);

b) significant adverse impact on animal and plant species that are important to the Hopi (*Id.* para. 143);

c) forced Hopi people further outside the area they have used and visited or centuries (*Id.* para. 144);

d) unreasonable harm to the environment (*Id.* para. 148);

e) cause material annoyance, inconvenience and discomfort (*Id.* para. 151);

f) irreparable and substantial harm (*Id.* para. 157); and

g) negatively impact the Hopi's use of these areas for ceremonial practices, hunting and the gathering of natural resources (*Id.* para. 164).

(August 12, 2016, Under Advisement Ruling, Appendix p. 45)

While the tribe argues that its Motion to Amend should have been granted, it fails to acknowledge that the trial Court considered the Amended Complaint: "The Court used the proposed Amended Complaint in its consideration" (p.2 under II. FACTS). The City adopts the Snowbowl argument that the amendment was futile. (August 12, 2016, Under Advisement Ruling, Appendix p. 40)

Prosser (supra) and the Restatement (Second) § 821C address access to land as it relates to special injury.

The allegations of "the Impact of the Snowbowl Ski Area on the Hopi Tribe" are set out in paragraphs 114-132 of the Verified Complaint in the Appendix to the Opening Brief, (Appendix p.22-25). Note paragraphs 121 to 123 which do not allege that access is blocked nor that the ceremonies have been stopped. It should also be noted that the allegations refer to the existence of the ski area and not specifically to the claims of environmental damage from the use of reclaimed water.

The Hopi Tribe attempts to distinguish *In re Exxon Valdez,* supra because its test for special injury supposedly differs from Arizona law.

The claim that the "special injury" test differed from Arizona law is unsupported. *In re Exxon* Valdez applied the *Restatement* test:

> The Class therefore has failed to prove any "special injury" to support a public nuisance action. Restatement (Second) of Torts § 821c, cmt. b .

(*In re Exxon Valdez,* 104 F.3d at 1198)

Arizona also applies the Restatement test, as noted above, in *Armory Park Neighborhood Ass'n,* supra, at p. 6, 919 which specifically refers to the Restatement (Second) of Torts § 821C .

In re Exxon Valdez, supra, first separated the Class's claims which incorporated economic damages because the economic damages claims had been resolved.

> The settlement agreement reserved "the cultural claims" of the Class and only those claims are at issue here.

(*Id.* at 1198).

The cultural claims included "harvesting of natural resources damages by the spill but also with the exchange, sharing and processing of these resources as the foundation of an established economic, social and religious structure." The Court further explained the lack of special injury for the cultural claims:

> Admittedly, the oil spill affected the communal life of Alaska Natives, but whatever injury they suffered (other than the harvest loss), though potentially different in degree than that suffered by other Alaskans, was not different in kind. We agree with the district court that the right to lead subsistence lifestyles is not limited to Alaska Natives. *See* Alaska Const. art. VIII, §§ 3, 15 & 17; *Gilbert v. State Dep't of Fish & Game,* 803 P.2d 391, 399 (Alaska 1990); *McDowell v. State*, 785 P.2d 1, 11–12 (Alaska 1989). While the oil spill may have affected Alaska Natives more severely than other members of the public, "the right to obtain and share wild food, enjoy uncontaminated nature, and cultivate traditional, cultural, spiritual, and psychological benefits in pristine natural surroundings" is shared by all Alaskans. Order No. 150 at 6. The Class therefore has failed to prove any "special injury" to support a public nuisance action. *Restatement (Second) of Torts* § 821c, cmt. b. .

(*In re Exxon Valdez*, 104 F.3d at 1198).

Special injury was addressed in *Oppen v. Aetna Ins. Co.*, 485 F.2d 252 (9th Cir. 1973). After the oil spill in the Santa Barbara Channel, boat owners sought redress for public nuisance claiming that the spill interfered with their navigation rights. The court rejected the claims because the injury was no different in kind

than that suffered by the public in general. In a footnote, the Court compared it to *Prosser's* example of interference with use of a public road.

While *In re Exxon Valdez*, supra, is directly on point, there are other cases which also address the requirement of "special injury."

The issue has been comprehensively addressed by the Florida courts. In *U.S. Steel Corp. v. Save Sand Key, Inc.*, 303 So. 2d 9 (Fla. 1974), USSC commenced construction of a condominium project on Sand Key which Save San Key sought to enjoin because the construction interfered with the public's use and enjoyment of the soft sand beach area of the Key. The Supreme Court held:

> We adhere resolutely to our holding in *Sarasota County Anglers Club, Inc. v. Kirk, supra*, and other decisions of this Court relative to the concept of special injury in determining standing. p.14

Sarasota County Anglers Club, Inc. v. Burns, 193 So. 2d 691 (Fla. Dist. Ct. App. 1967) was the Supreme Court's decision upon certification of *Sarasota County Angler's Club, Inc. v. Kirk*, 200 So. 2d 178 (Fla. 1967), which had been certified by the Floridian First District Court of Appeals.

The case involved fill operations at Longboat Key which plaintiffs contended would interfere with the public's right to use the Key for fishing, boating, bathing, navigation and other public uses. The Supreme Court adopted the District's opinion holding that a special injury not shared by the public at large

was required. The injury was not "special" even though it affected different groups (boaters, fishermen, sun bathers, swimmers) in a different way.

The same rationale applies in the present appeal. While the Hopi may enjoy the Peaks in different manner than hikers, photographers, bird watchers, hunters, or other uses, the use and enjoyment of the Peaks which they claim is no different than that of any other group or the public at large.

The court explained that the public nuisance was to the Delaware River not the tract of land causing the pollution which PECO had to remedy. PECO did not suffer "particular damage" in the exercise of a right common to the general public.

Similarly, in this case, the Hopi have not alleged an economic injury or other injury distinct from the public at large. The case is instructive because it does recognize a form of damage "different in kind" in its discussion of clean-up costs.

The Hopi claim that alleged environment damage from the use of reclaimed water has interfered with their use of the public land of the Peaks. That interference is shared by all members of the public. The Hopi acknowledge that the alleged harm is shared by the public in its Verified Complaint attached to the Opening Brief Appendix (hereinafter "Complaint") paragraph 185 through 197. In particular, the Hopi allege that

> This release of various pollutants… will harm the environment. (¶ 186).

> The release of their pollutants will significantly interfere with the public use and enjoyment of the San Francisco Peaks. (¶ 187).
>
> The harm to the Hopi Tribe, its members, the unique environmental resources and the public from the role of reclaimed wastewater… outweigh any benefit. (¶ 193).
>
> These permanent alterations will affect the use and enjoyment of the Peaks by the Hopi and other direct users, as well as the public at large. (¶ 194).
>
> The risk of additional harm… will be borne by the Tribe and other users of these unique and important ecosystems, including the Wilderness Area. (¶ 196).

The Complaint then attempts to identify "specific injury" to the Hopi Tribe in paragraphs 200 to 203 claiming damage to the environment (¶ 200), effects on ceremonial practice, hunting and the gathering of natural resources (¶ 201), unnatural noise (¶ 203). However, these "specific injury" claims are not the "specific injury" necessary to justify a private claim for a public nuisance.

ATTORNEY FEES

The Hopi Tribe raises three issues as to the award of attorney fees. They contest whether A.R.S. § 12-341.01 applies, whether the amounts are reasonable, and whether there is duplication between the City's fee claims and that of Snowbowl. In addition, to the Argument submitted by Snowbowl, the City submits the fee award was proper.

A.R.S. § 12-341.01 provides that in "any contested action arising out of a contract, express or implied, the court may award the successful party reasonable

attorney fees." Arizona courts "will look to the nature of the action and the surrounding circumstances to determine whether the 'claim is one arising under contact'" regardless of the form of the pleadings, *Marcus v. Fox*, 150 Ariz. 333, 335, 723 P.2d 682, 684 (1986). *Marcus* also holds that the phrase "arising under contract" is broadly interpreted and that awards are not limited to claims for breach of contact. *Assyia v. State Farm Mut. Auto. Ins. Co.*, 229 Ariz. 216, 221, 273 P.3d 668, 673 (App. 2012) explains "The relevant question is whether the underlying lawsuit is a 'contested action arising out of contract', not whether (defendant) in fact breached the … contract." Tort claims stemming from contractual issues justify fee awards as long as the contract served as the basis, source or origin of the dispute, *Marcus*, supra, at pp. 335-336 and *McKesson Chem. Co., a div. of Foremost-McKesson, Inc. v. Van Waters & Rogers*, 153 Ariz. 557, 563, 739 P.2d 211, 217 (App. 1987).

The Tribe's Complaint, at ¶ 14, clearly states the Nature of the Action:

> This action is brought by the Hopi Tribe to enjoin performance of, or in the alternative for damages due to, the contract between the City of Flagstaff and the Arizona Snowbowl Resort Limited Partnership ("the Snowbowl") to sell municipal wastewater for snowmaking at the Snowbowl ski area, because the contract violates various provisions of the Arizona Code and the public interest, will infringe upon the Hopi Tribe's water rights, and will cause a public nuisance.

They allege "the contract … will cause a public nuisance." The Third Claim for Relief (public nuisance) repeatedly alleges that "The contract for sale of

reclaimed water…" causes harm (Complaint ¶¶ 188, 189, 190, 191, 192, and 206) and repeatedly refers to "the sale of reclaimed water" (Complaint ¶¶ 185, 193, 194, 195, 196, 198, 200, 201, 202, 203, and 204).

Complaint ¶ 205 states specifically:

> Unless enjoined by the Court, the Contract with Snowbowl will result in a public nuisance.

Finally, the Hopi Tribe in their prayer for relief requested attorney fees and costs. The claim that A.R.S. § 12-341.01 does not apply to a public nuisance claim is refuted by plaintiff's Complaint.

The second objection is to the amount of the award. However, that objection was addressed solely to the Snowbowl application and not to the City's application. The City's application was for two phases of the case, those fees before remand and those fees after remand. As to the fees before remand, the Hopi Tribe did not contest in their appeal the sufficiency or basis for the fee award and only contested the City's entitlement to a fee award.

Having failed to challenge the computation of the prior award, the Hopi Tribe is barred from now contesting it, *Bogard v. Cannon & Wendt Elec. Co., Inc.*, 221 Ariz. 325, 333, 212 P.3d 17 (App. 2009), *Red Bluff Mines, Inc. v. Indus. Comm'n of Arizona*, 144 Ariz. 199, 205, 696 P.2d 1348 (App. 1984) and *Bike Fashion Corp. v. Kramer*, 202 Ariz. 420, 437, 46 P.3d 431 (App. 2002).

This Court affirmed the fee award as to the illegal contract claim but vacated and remanded as to the water rights claim and the public nuisance claim. The City reviewed its prior fee application and eliminated fees for the water rights claim. (Supplement to City of Flagstaff's application for attorney fees, filed December 14, 2016). Notably the Hopi Tribe appears to concede that the City is entitled to the fees incurred prior to remand in its discussion of "interwoven" claims"

> Even if the nuisance claim was "interwoven" with a contract claim prior to the first appeal and remand, that cannot be true post remand.

(Appellant's Opening Brief IR#55 at p. 47.)

The final objection is duplication of the present proceedings and the proceedings prior to remand. However, the issues presented in the prior appeal involved notice of claim, statute of limitations, laches, and preclusion. The issue now presented is the sufficiency of the allegations of public nuisance and is therefore not duplicative conduct.

ATTORNEY FEES OR APPEAL

Pursuant to Ariz. R. Civ. App. P. 21(a), the City claimed that it is entitled to attorney fees in this appeal under A.R.S. § 12-341.01 for claims arising from contrast, as argued above.

CONCLUSION

The City of Flagstaff submits that this Court should affirm the trial court and, in doing so, should award it fees and costs for this appeal.

Respectfully Submitted this 21st day of June, 2017.

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