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LEGAL BATTLE TO PROTECT THE SAN FRANCISCO PEAKS



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REVEALS FLAWS IN LEGAL SYSTEM

It was nine days into the new year when a panel of three judges heard oral arguments in the Ninth Circuit appeal of *The Save the Peaks Coalition, et al. v. US Forest Service* at the **James R. Browning United States Courthouse in San Francisco**. The hearing itself comes more than a decade since **majority owner of Arizona Snowbowl Limited Partnership, Eric Borowsky**, first came to the City of Flagstaff and US Forest Service with plans to further develop the ski area.

Among many proposed developments, like new lifts, ski runs, and trails, the most controversial aspect of Snowbowl's proposal includes buying the City's reclaimed wastewater to make snow artificially. While it is true that a number of resorts use a percentage of reclaimed water to make snow artificially, Snowbowl would be the only place on Earth to use 100% of this water to make snow. This has prompted many concerns in the Northern Arizona community regarding human health.

Last year the lower District Court ruled in favor of Snowbowl and the Forest Service. The ruling, however, had more to do with false claims related to a procedural issue called "laches" than the merits of the case. "Laches doesn't even apply unless construction is nearly complete," explained **attorney Howard Shanker**. "The lower court found that construction was nearly complete, when in fact we filed two years before they even had authorization to begin construction; it's just absurd what's going on." Both the lower court and the Ninth Circuit Court rejected Mr. Shanker's request for an injunction pending appeal, which would have halted previously approved construction while the case was still active in the courts. Snowbowl began construction late last spring, clear-cutting trees for new runs, and laying sections of the wastewater pipeline along the road leading to the resort.

In the year leading up to the Ninth Circuit appeal, Mr. Shanker was optimistic, recalling in 2006 that the court ruled in his favor when he represented the Navajo Nation on this same issue, but on religious grounds. The court ruled that Snowbowl's developments and proposed use of reclaimed wastewater does, in fact, infringe on the religious free-

doms of those native people he represented. "We had a three-judge panel on this exact same issue rule in our favor," reiterated Mr. Shanker. "And the *en banc* court in an 8-3 decision vacated it on a technicality that wasn't even right."

When Mr. Shanker learned of the panel he would be facing this time around in San Francisco — judges appointed by Richard Nixon, another by Ronald Reagan, and the third judge appointed by George W. Bush — he was less optimistic. Most of the time given to Mr. Shanker to make his case was, once again, dedicated more to procedural issues than the merits of the case.

"Frankly the lower court laches decision was so outrageous and so bad, I assumed I wouldn't have to spend much time on it, and that seems to be how they used all my time up." Mr. Shanker was also forbidden from citing details related to the *Navajo Nation* case that went in his favor in 2006; because it was overturned in the *en banc* court, the judges said the ruling "no longer exists." "The rule that I read to them said I was allowed to cite cases that aren't precedential, but these guys were afraid to hear anything about it; I couldn't even mention it."

"Under the **National Environmental Policy Act (NEPA)**, the Forest Service needed to provide a "reasonably thorough" discussion of the impacts of development in their **Environmental Impact Statement (EIS)**. Thumbing through this 611 page made-for-public document, one will indeed see reclaimed wastewater mentioned. The document recognizes that the use of reclaimed water is offensive to at least 13 regional tribes of people. The EIS explains how the introduction of this water to the Snowbowl area constitutes a likely increase in nitrogen levels. The document further outlines a tested and acceptable level of bacteria present in the water and attempts to explain where the water will go after it melts.

"Not one of those studies," cited in the EIS, however, said Mr. Shanker in court, "has anything to do with using reclaimed sewer water for recreational purposes. What we've got here is Snowbowl and the federal government not going through the process that is required by NEPA. They do not do adequate

analysis."

The defendants argued that NEPA is simply a disclosure tool, which forces their discussion in the EIS to disclose any adverse effects of a project that is known. Mr. Shanker disagrees. "NEPA is a decision making tool; it is not necessarily a disclosure tool. It creates a process to make informed and reasoned decisions. It's not just disclosure, it's supposed to make sure the government is reaching well-thought out and well-informed decisions. And instead, they don't even understand the purpose and what these people do is regard NEPA simply as a hurdle they have to get over to implement the plan the thought of in the first place. Using NEPA in this way subverts the whole process and the whole meaning behind the statute," explains Mr. Shanker.

Though the conservative judges in the Ninth Circuit Court of Appeals hardly considered the case's merits doesn't change the fact that the jury is still out on reclaimed wastewater. Every year of the last decade saw more scientific studies on this water than the year before. Scientists and community members are concerned with what is in the water and the impact it might be having on those plants and animals that come in contact with it.

By now, most people in Northern Arizona are aware of studies done by **Northern Arizona University biological sciences professor Catherine Propper** on endocrine disrupting compounds which "disrupt physiological processes including development, reproduction, general metabolism and behavior." While one could make the argument that all water is "reclaimed," Dr. Propper's analysis considers the rapid changes to the content of our water. "In the last 100 years, humans have introduced hundreds of new, synthetic compounds into the environment," says Dr. Propper. "How these compounds ultimately influence physiology and fitness of individual organisms, dynamics of populations, and ultimately functioning of ecosystems, is not well understood."

Studies of wastewater across the country have discovered the persistence of the following industrial wastes: **antimony, mercury, chromium, cadmium, lead, dioxins,**

flame-retardants, antifreeze, insecticides, and pesticides. Scientists like **Dr. Paul Torrence**, former Northern Arizona University professor and renowned expert in the field of bio-organic and medicinal chemistry, have done studies related to other compounds found in industrial waste, pharmaceuticals, household products, and other chemicals, some of which have only been introduced into the water supply within the last ten to twenty years. One compound in particular, triclosan, is found in many household products like antibacterial soaps, deodorant, and toothpaste. **When triclosan reacts with chloride, it becomes chloroform, which is a carcinogen. When it reacts with ultra-violet rays, it forms different, mega-carcinogens, in the form of poisonous dioxins.**

The concern here lies in the fact that the law is slow to catch up to the science. The Environmental Protection Agency is currently involved in a multi-year study of this water, to be completed in 2013, which could lead to federal standards. For now, however, there are no federal regulations regarding wastewater. Many of the most troubling compounds are either not tested for regularly, or are not tested for at all. "According to the Arizona Department of Environmental Quality regulations, treated sewer water can be graded A+ even when it contains fecal matter in three out of every ten samples." According to **Dr. Abraham Springer**, Northern Arizona Professor and director of the School of Earth Science and Environmental Sustainability, "The treated wastewater can meet all applicable water quality standards, but still not be as high of quality as precipitation."

In December of last year, **Dr. Robin Silver**, a medical doctor and co-founder of the Center for Biological Diversity took the issue of bacteria in the water even more seriously in a panel discussion on the topic. Silver pointed to a growing number of studies across the country related to "super bugs." A lab in Virginia has demonstrated that bacteria exposed to anti-biotics on a regular basis develop characteristics that ensure they're survival. "Super-bugs," they are called, are bacteria that are essentially resistant to anti-biotics. Because antibiotics are the only way to cure serious bacterial infections, this poses a potential human health risk. **Dr. Michael Gray**, a medical doctor and toxicologist, recently gave a talk at Northern Arizona University called "Reclaimed Water and Public Health," voicing a distilled version of many concerns outlined above.

Some Flagstaff City Council members were concerned about this, but don't have the resources to do the studies. "In a perfect world, I'd like to see a more robust set of studies and eventually a question for the voters on tertiary treatment to get us up to the highest level of treatment but those don't come for free," three-term Councilman Art Babbott said to the *Arizona Daily Sun*.

The case before the Ninth Circuit Court of Appeals calls upon the Forest Service to do these studies, to ensure that exposure to concentrated reclaimed wastewater poses no human health risks; not doing the necessary scientific analysis is a violation of the NEPA process.

In the months leading up to the appeal, in an obvious effort to avoid arguing the merits of the lawsuit, Mr. Borowsky held private talks with tribal members of the Navajo Nation in an effort to get them to agree to using potable (drinking) water over reclaimed wastewater, as a safer, "less offensive" option. Though the topic has reached the tribal council's agenda at least twice in the last six months, they have yet to vote to use drinking water. **Both Hopi, who have just filed their own appeal in court on the issue, and the Navajo Nation have been consistently against any development on the San Francisco Peaks in every generation of lawsuits. The Hopi assert that Snowbowl's proposed use of reclaimed wastewater actually violates several state laws regarding how the water is to be used.**

"I'm not in a hurry to hear from them," says Mr. Shanker regarding the outcome of the case and his frustration with not being able to meaningfully address the merits. "I assume they're going to rule against us. What they're saying is that they did all the scientific work and [the plaintiffs] just disagree with it. We're saying, no, we're not disagreeing with it; it's not in there." ☐

| Kyle Boggs is currently doctoring it up in Tucson.
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