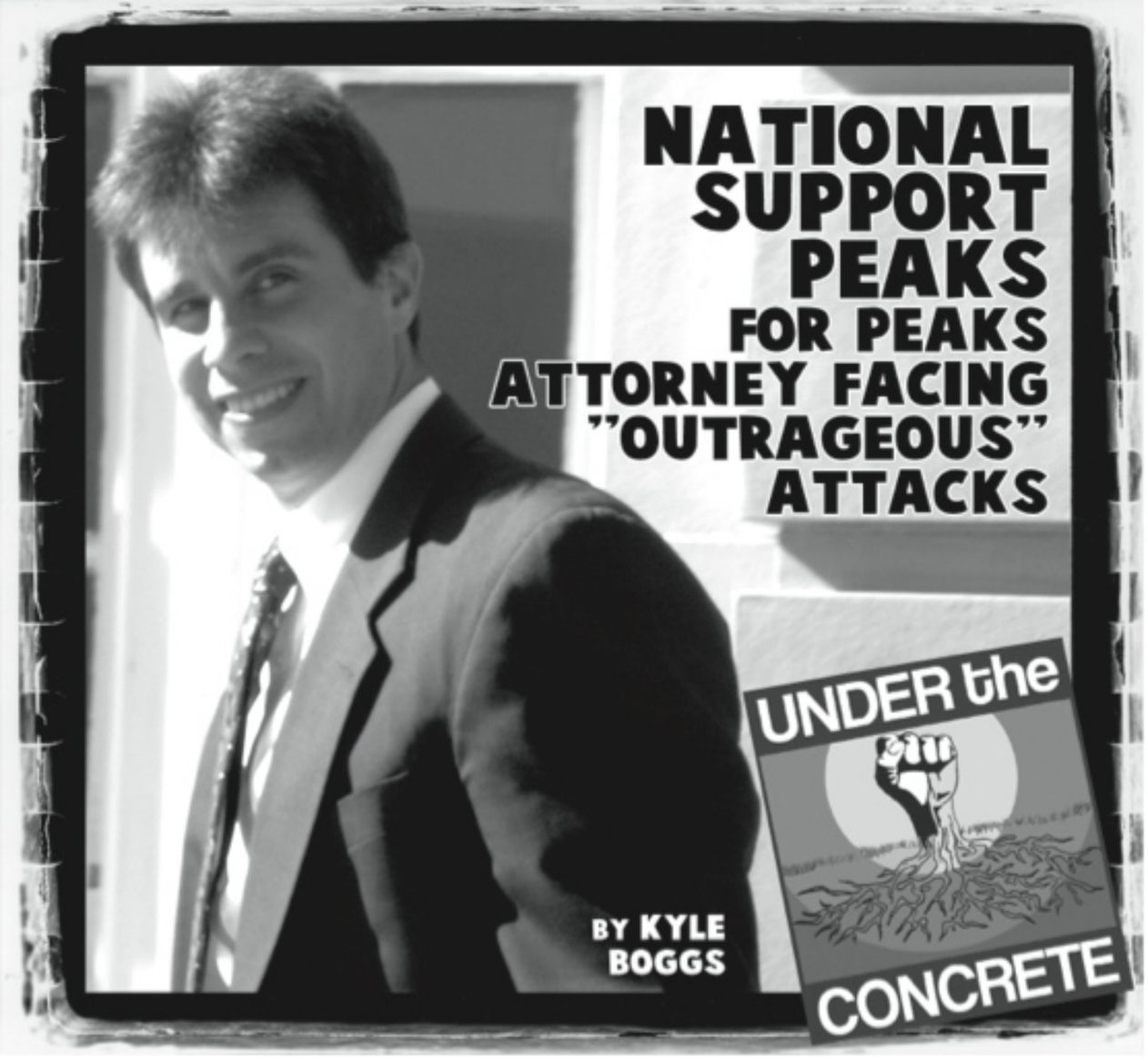

NATIONAL SUPPORT PEAKS FOR PEAKS ATTORNEY FACING "OUTRAGEOUS" ATTACKS

BY KYLE BOGGS

When attorney **Howard Shanker** first filed a case against the Forest Service in 2010, he could not have known that it would turn out this way. Not only were the merits of the case virtually ignored throughout judicial proceedings, but an appointed three-judge panel of the Ninth Circuit is also holding Mr. Shanker personally financially responsible for reimbursing Snowbowl for some of its expenditures in the case.

"The situation is unbelievable," said Mr. Shanker of the sanctions against him. There is nothing in the record to support any of the allegations against me. The panel and Snowbowl's lawyers have accused me of all sorts of unprofessional behavior. It's outrageous. If the judges didn't have immunity, I'd sue them for slander or liable."

On the day Mr. Shanker filed his response to Snowbowl's presumptive demand that the court order him to pay over $32,000, he explained how it all came to this.

In 2005, upon hearing the **Coconino National Forest** approved snowmaking with reclaimed water at the Arizona Snowbowl, several tribes and environmental groups sought pro bono legal support from Mr. Shanker. They filed suit against the US Forest Service on the grounds that using reclaimed wastewater violates religious freedoms. "The lower court ruled against us on everything, said Mr. Shanker. "So we appealed it."

The following year, a three-judge panel of the **Ninth Circuit Court of Appeals** ruled with Mr. Shanker and the tribes, affirming that Arizona Snowbowl could not use reclaimed wastewater to make snow artificially. "We won on both the religious and cultural issues and then we also won on this one NEPA (National Environmental Policy Act) issue, that the Forest Service didn't adequately consider the issue of human ingestion of reclaimed sewer water in their Environmental Impact Statement."

In October 2007, the Ninth Circuit Court of Appeals granted the Justice Department and Snowbowl's request for appeal to rehear the case *en banc*. "It went to the full 11-judge panel and in an 8 to 3 decision, I think, breaking along party lines — 8 Republican [appointed by Pres. Nixon/Reagan/Bush] judges that voted against us, and 3 Democrats [appointed by Pres. Kennedy/Carter/Clinton] in our favor — the Republican majority ruled there was no substantial burden on the exercise of religion," explained Mr. Shanker of the August 2008 decision allowing Snowbowl to make snow from reclaimed wastewater. "So they reversed on the merits of the religious and cultural issues. On this issue of 'ingestion' though, they held that it was never properly raised in the lower court. So it was an open issue; it was never decided on the merits according to this *en banc* panel."

In January of 2009, the tribes appealed to the US Supreme Court. In June of that year, the Supreme Court announced it would "not hear" the case, thus upholding the 2008 Ninth Circuit *en banc* decision.

But there remained the unresolved NEPA claim never fully decided *en banc*, a claim the first three-judge panel provided a thorough analysis for and one that held the Forest Service failed to verify in its Environmental Impact Statement. What if people ingest the artificial snow? Surely, skiers would "face-plant" and children would be tempted to eat the snow, not realizing it being made from reclaimed wastewater. What would happen to them? How much exposure is considered safe? Nothing in the EIS quantified this valid argument, like any decent scientific study would.

In Flagstaff, posted signs warn against coming in contact with reclaimed wastewater directly. During the windy months, it recently came to light that workers who spray reclaimed wastewater over construction areas to keep the dust down are required to take hepatitis B shots as a precaution against this exposure. What are the affects of this kind of exposure on skiers, on workers? There are no answers to these questions because the Forest Service hasn't followed through with the National Environmental Policy Act, as a matter of procedure, in answering these questions.

Regarding this "open claim," explained Mr. Shanker, "the Save the Peaks Coalition and 9 concerned citizens that were not party to the *Navajo Nation* case approached me and said, 'look, we want to bring this claim.'" So in 2010, another suit was filed with different plaintiffs. "The claim was so meritorious; the only thing out there was this three-judge panel decision saying the Forest Service didn't adequately consider it; it was unresolved on the merits," said Mr. Shanker. "So we brought it back to the district court and I assumed it would be a no-brainer; I thought we would win easily."

Instead of delving into the details of Mr. Shanker's NEPA claim, it was quickly dismissed without meaningful discussion. A district court ruled against him under the doctrine of laches, a procedural rule which declares a party has "slept on its rights," or failed to act in a timely manner. "So I was kinda shocked with the result. So we appealed it, assuming we would prevail on the merits and on the laches issue, and we drew this hostile panel."

In January of this year, the three-judge panel — all of whom were appointed by Nixon/Reagan/Bush — ignored the merits of Mr. Shanker's NEPA claim and continued to hammer him with procedural issues. When he argued how the claim was left unresolved from the *Navajo Nation* case, he was told that the case "didn't exist" anymore. "What their saying, and their mistaken, is that the *en banc* panel vacated that case. *En banc* review, however, does not result in *automoatice vacatour,* the *en banc* panel simply provided that the prior decision could not be cited as precedent," Mr. Shanker continued. "It could, however, be discussed as informative. That is, the court does not have to make believe it never happened."

Judge Milan D. Smith, Jr. expressed his opinion when he handed down the panel's decision in February, writing that Mr. Shanker "Grossly abused the judicial process," by bringing this second case against the resort after losing a "virtually identical" case with a different client; even though the NEPA claim was never fully vetted by the *en banc* panel.

"It's extremely frustrating. I've been pretty cynical before, but our judicial system is obviously broken. I mean, here you have the exact same law and facts that a prior three-judge panel ruled in our favor on and now they're ruling against it on the merits and accusing me of abusing the judicial process," Mr. Shanker continued. "It just makes no sense."

When Mr. Shanker petitioned to rehear the case, he was denied by the very same presiding judge who ruled in the overturn of the original 2006 Ninth Circuit decision — Chief Judge **Alex Kosinski**, an appointment of the Reagan years.

Snowbowl's lawyers then used the language of Judge Smith's decision to petition the court for sanctions against Mr. Shanker and the plaintiffs, originally seeking over $280,000. In providing an opinion for that motion, Judge Smith went even further, accusing Mr. Shanker not only of "bad faith" and abusing the judicial process, but of actually "misleading his clients." "They based their motion for sanctions on the panel's language," said Mr. Shanker. "There are now these two Ninth Circuit published opinions that say I 'grossly abused the judicial process.' Smith and the other two judges on the panel have attacked my credibility and professionalism without cause. There is nothing in the record on appeal or in any findings of fact in the lower court to support any of these inaccurate factual accusations raised for the first time on appeal by an actual panel of judges.

Mr. Shanker finds it curious that Snowbowl would seek sanctions, as they were a "private intervener" in the case. "So essentially the court is finding me in 'bad faith' because we were trying to insist the Federal Government comply with federal law. We never sued Snowbowl," said Shanker. "They filed briefs so they could intervene in the case as a defendant. They wanted to be in the case. It's just remarkable what's going on."

Amicus Curiae is a Latin phrase that means "friend of the court." An *Amicus Brief* is the legal document that is prepared by individuals or groups of individuals who, although not party to a given case, have a strong interest in or views on the subject of a court's decision."

Such a document was filed on July 16 in support of Mr. Shanker, pro-bono attorney for the Save the Peaks Coalition et al. The brief was submitted on behalf of consumer advocate and social critic **Ralph Nader**, Arizona State University professors of law **Myles V. Link** and **Gary Marchant,** as well as the **Association on American Indian Affairs, Native American Rights Fund, Women's Earth Alliance, The Morning Star Institute**, and **Center for Biological Diversity**. For many reasons outlined in the brief, the signees of the *Amicus Brief* support Mr. Shanker's appeal of this decision.

The prevailing sentiment among those who support Shanker's appeal stem from concerns that such actions by the court, whether intentionally or not, might deter legal involvement in similarly politically-charged environmental and human rights-related cases. As Mr. Marchant points out, this implication has nothing to do with the merits of the case. "While taking no position on the merits of the underlying case in this matter … applying sanctions in a case such as this would deter attorneys from bringing controversial cases on matters of public policy, and would impede the important role of courts in providing a public forum for hearing and resolving such matters."

Groups like the Native American Rights Fund are concerned that sanctions against Mr. Shanker will impact what they do, that holding pro-bono attorneys like Shanker personally responsible for Snowbowl's costs "will seriously and negatively impact NARF's ability to take up claims that may be particularly difficult or unpopular." Similarly, The Morning Star Institute "is concerned that sanctioning the attorney in this case will serve to dampen the enthusiasm of other attorneys who are requested to help tribes, nations, pueblos and other Native American peoples who have no other way to seek justice."

The formal support provided by the signatories of the *Amicus Brief* echo the concerns of many who were outraged upon hearing sanctions had been ordered against Mr. Shanker. So wrote **Bennet Kelley**, in an article for the *Huffington Post*, "Imagine an America in which lawyers dared not challenge the mightiest, no matter how egregious their offenses may be for fear of financial ruin. No Thurgood Marshalls, no Ralph Naders and no Howard Shankers."

"The message from the Ninth Circuit Court of Appeals was clear," wrote **Stephen Brittle**, president of **Don't Waste Arizona**, defending Mr. Shanker. "If you are concerned about the environment; if you want to protect Native American sacred areas; or even if you simply want to make sure that the federal government complies with its own environmental obligations, go home. You are not welcome in the Ninth Circuit. You have no right to due process."

| Kyle Boggs may soon be adding three funny letters to his name.
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