Howard M. Shanker (#015547)
Tamera C. Shanker (#016016)
THE SHANKER LAW FIRM, PLC
600 East Baseline Road, Suite C-8
Tempe, Arizona 8583-1210
Phone: (480) 838-9448
Facsimile: (480) 838-9433
howard@shankerlaw.net
tcs@shankerlaw.net

Attorneys for Plaintiffs Navajo Nation, Sierra Club Yavapai-Apache Nation, White Mountain Apache Tribe, Center for Biological Diversity, and FAN

William C. Zukosky (#020084)
Laura Berglan (#022120)
Terence M. Gurley (#019805)
DNA - People's Legal Services, Inc.
201 East Birch Avenue, Suite 5
Flagstaff, AZ 86001
Tele: (928) 774-0653 ext. 4800
Fax: (928) 773-4952
wzukosky@dnalegalservices.org
lberglan@dnalegalservices.org
tgurley@dnalegalservices.org

Attorneys for Plaintiffs Hualapai Tribe; Norris Nez; and Bill Bucky Preston

Lynelle K. Hartway (#020486)
A. Scott Canty (#010575)
Office of General Counsel
The Hopi Tribe
P.O. Box 123
Kykotsmovi, AZ 86004
(928) 734-3140
(928) 734-3149 fax
lkhart@yahoo.com
scanty0856@aol.com

Attorneys for Hopi Tribe

Alysia LaCounte
Richard Monette
Troy Klarkowski
BROWN & LaCOUNTE,LLP
3001 W. Beltline Hwy, Suite 304
Madison, WI 53713
(608) 227-3100

(608) 227-3115
alacounte@brownlacounte.com
tklarkowski@brownlacounte.com
rmonette@brownlacounte.com

Attorneys for Havasupai Plaintiffs

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

NAVAJO NATION et al.,

Plaintiffs,

v.

U.S. FOREST SERVICE, et al.,

Defendants.

No. CV 05-1824 PCT PGR
No. CV 05-1914 PCT EHC
No. CV 05-1949 PCT NVW
No. CV 05-1966 PCT JAT

PLAINTIFFS CONSOLIDATED [PROPOSED] FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiffs in this action hereby present their consolidated Proposed Findings of Fact and Conclusions of Law.

1. Plaintiffs in this consolidated case include the Navajo Nation, the Hopi Tribe, the Yavapai-Apache Tribe, the White Mountain Apache Tribe, the Hualapai Tribe, the Havasupai Tribe, Bill Bucky Preston (a member of the Hopi Tribe), Norris Nez (a member of the Navajo Nation), Rex Tilousi (a member of the Havasupai Tribe), Dianna Uqualla (a member of the Havasupai Tribe), the Sierra Club, the Center for Biological Diversity, and the Flagstaff Activist Network.

THE SHANKER LAW FIRM, PLC.
600 EAST BASELINE ROAD, SUITE C-8 • TEMPE, AZ 85283-1210
TELEPHONE (480) 838-9448 • FACSIMILE (480) 838-9433
HOWARD@SHANKERLAW.NET

2. Defendants are the U.S. Forest Service, Nora Rasure, the Forest Supervisor, and Harv Forsgren, who was the appeal deciding officer and Regional Forester. Both Ms. Rasure and Mr. Forsgren were named in their official capacity.

3. Arizona Snowbowl Resort Limited Partnership ("ASR") moved to intervene in these proceedings on or about June 27, 2005. The Court received briefing on ASR's motion and heard oral argument. ASR's Motion to Intervene was granted on or about July 18, 2005.

4. As set forth in greater detail below, ASR operates the Snowbowl ski area which is located on federal land on the San Francisco Peaks. At ASR's request, the Forest Service recently approved, in part: (a) approximately 205 acres of snowmaking coverage throughout the area, utilizing reclaimed waste sewage effluent; (b) a 10 million-gallon snowmaking reclaimed waste water reservoir near the top terminal of the existing Sunset Chairlift and catchments pond below the Hart Prairie Lodge; (c) construction of a reclaimed water pipeline between Flagstaff and Snowbowl with booster stations and pump houses; (d) construction of a 3,000 to 4,000 square foot snowmaking control building; (e) construction of a new 10,000 square foot guest services facility; (f) an increase in skiable acreage from 139 acres to approximately 205 acres – an approximate 47% increase; and (g) approximately 47 acres of thinning and 87 acres of grading/stumping and smoothing. Trial Ex. 2781 (Record of Decision "ROD") at 32-36**.**

5. The parties filed Cross-Motions for Summary Judgment on, in part, claims brought pursuant to the Administrative Procedure Act, 5 U.S.C. §§ 701-706 ("APA"). These

THE SHANKER LAW FIRM, PLC.
600 EAST BASELINE ROAD, SUITE C-8 • TEMPE, AZ 85283-1210
TELEPHONE (480) 838-9448 • FACSIMILE (480) 838-9433
HOWARD@SHANKERLAW.NET

claims were based on the alleged failure of the Forest Service to comply with the requirements of the National Environmental Policy Act, 42 U.S.C. §§ 4321-4370d ("NEPA"), the National Historic Preservation Act, 16 U.S.C. §§ 470 et seq. ("NHPA"), and the National Forest Management Act, 16 U.S.C. §§ 1600-1687 ("NFMA"). An alleged failure of the government to comply with its trust responsibility to the tribes was also included in these motions. These claims, seeking declaratory and injunctive relief, were taken under advisement by the Court on Cross-Motions for Summary Judgment.

6. The San Francisco Peaks in Arizona are "extensively documented and widely recognized as a place of extreme cultural importance to the Hopi, Navajo," and the other tribes that are plaintiffs in this case. Trial Ex. 1034 (National Register Bulletin 38: *Guidelines for Evaluating and Documenting Traditional Cultural Properties*). The Forest Service has, for years, recognized the cultural and religious significance of the Peaks to the tribes of the southwestern United States.

7. The plaintiff tribes, as well as the individually named members of some of those tribes, also challenged the Forest Service action under the Religious Freedom Restoration Act, 42 U.S.C. 2000bb to 2000bb-4 ("RFRA"). Cross-Motions for Summary Judgment on plaintiffs' RFRA claims have also been submitted and argued before the Court and taken under advisement.

8. Pursuant to RFRA, plaintiffs are seeking declaratory and injunctive relief that would: (1) declare that the selected alternative, as approved, violated RFRA; and (2) stop the

THE SHANKER LAW FIRM, PLC.
600 EAST BASELINE ROAD, SUITE C-8 • TEMPE, AZ 85283-1210
TELEPHONE (480) 838-9448 • FACSIMILE (480) 838-9433
HOWARD@SHANKERLAW.NET

Forest Service and ASR from taking steps in furtherance of the selected alternative. i.e., the ski area, as currently configured, would be left in place and the *status quo* would be maintained.

9. RFRA prohibits government from substantially burdening a person's exercise of religion, even if the burden results from a rule of general applicability, unless the government can demonstrate the burden: (a) is in furtherance of a compelling governmental interest; and (b) is the least restrictive means of furthering that compelling governmental interest.

10. This Court held a Bench trial, including approximately 11 days of testimony on the RFRA issue. The following Findings of Fact and Conclusions of Law set forth the Court's reasoning for its decision on the RFRA aspect of this case.

11. The Court notes that so long as one of the plaintiff tribes can demonstrate a "substantial burden" under RFRA, the burden shifts to the government to demonstrate a "compelling governmental interest." If the government carries the "compelling governmental interest" burden, it must then demonstrate that it used the "least restrictive means" of accomplishing that interest.

12. In other words, the Court need not be placed in the unenviable position of finding that the San Francisco Peaks may or may not be more sacred to some of the plaintiff tribes than to others – so long as at least one of the tribes carries their burden of showing a

THE SHANKER LAW FIRM, PLC.
600 EAST BASELINE ROAD, SUITE C-8 • TEMPE, AZ 85283-1210
TELEPHONE (480) 838-9448 • FACSIMILE (480) 838-9433
HOWARD@SHANKERLAW.NET

"substantial burden," that is sufficient to shift the burden to the government for purposes of the compelling interest test under RFRA.

I. FINDINGS OF FACT

A. HISTORIC BACKGROUND INFORMATION

13. The San Francisco Volcanic field covers approximately 1,800 square miles in northern Arizona. The field lies along the southern perimeter of the Colorado Plateau, defined by the Mogollon Rim to the south of Flagstaff. The most prominent peak within the field is Humphreys Peak. At 12,633 feet, Humphreys Peak is the highest point in Arizona. Trial Ex. 2780 (FEIS at 1-2).

14. Collectively, Humphreys Peak, Agassiz Peak (12,356 feet), Doyle Peak (11,460 feet), and Fremont Peak (11,696 feet) are identified on USGS maps as the San Francisco Mountain. However, the mountain is more commonly referred to as the San Francisco Peaks and is identified as such herein. Trial Ex. 2780 (FEIS at 1-2).

15. The Arizona Snowbowl is located entirely on the Coconino National Forest on the western flank of the San Francisco Peaks. Skiers have been using the Snowbowl since 1938, when the ski area's original base area was established in Hart Prairie. The foundation of the base lodge (which was destroyed by fire in 1952) can still be seen just above the first tower of the Hart Prairie Chairlift. Originally a dirt road, the Snowbowl Road was constructed by the Civilian Conservation Corps. A rope tow, powered by a car engine, was the only means of uphill transport. In 1954, the road was extended to the site of the Agassiz

THE SHANKER LAW FIRM, PLC.
600 EAST BASELINE ROAD, SUITE C-8 • TEMPE, AZ 85283-1210
TELEPHONE (480) 838-9448 • FACSIMILE (480) 838-9433
HOWARD@SHANKERLAW.NET

Lodge and in 1956, the Agassiz Lodge was constructed. A Poma surface lift was installed in 1958 and part of that lift line is now the Blackjack (trail #17). The original Agassiz Chairlift was installed by the Riblet Corporation in 1962. Trial Ex. 2780 (FEIS at 1-2 to 1-3).

16. In the early 1970s, the ski area was purchased by Summit Properties. In April 1977, the Forest Service transferred the permit to operate the Snow Bowl skiing facilities from Summit Properties, Inc., to the Northland Recreation Company. Trial Ex. 2780 (FEIS at 1-3); *see also, Wilson v. Block*, 708 F.2d 735, 738 (D.C. Cir. 1983).

1. The 1979 NEPA Process and Resulting Legal Challenges

17. In July 1977, Northland submitted a "master plan" to the Forest Service for the future development of the Snow Bowl. The plan contemplated the construction of additional parking, ski slopes, new lodge facilities, and ski lifts. The Forest Service, pursuant to NEPA, identified six feasible alternatives that ranged from complete elimination of artificial structures in the Snow Bowl, to full development as proposed by Northland. *Wilson v. Block,* 708 F.2d at 738.

18. In 1979, the Forest Service issued an Environmental Impact Statement ("EIS") for the Arizona Snow Bowl Ski Area Proposal and Snow Bowl Road**.** Trial Ex. 2757 (1979 EIS at 1)**.**

19. Snowmaking was not part of the 1979 EIS. Indeed, according to the 1979 EIS:

> many persons felt that snowfall records for the area indicated marginal conditions to support proposed development. The Forest Service finds there are at least 3 considerations which override this opinion.

THE SHANKER LAW FIRM, PLC.
600 EAST BASELINE ROAD, SUITE C-8 • TEMPE, AZ 85283-1210
TELEPHONE (480) 838-9448 • FACSIMILE (480) 838-9433
HOWARD@SHANKERLAW.NET

> 1. Existence of the area over a long period of time . . . the San Francisco Peaks has supported some type of ski facilities since the late 1930's . . . During this time, the area has certainly had lean economic times, but good business management practices by the present permittee have ensured its continuance.
>
> 2. Prior to institution of further development, the permittee will be required to submit more detailed economic feasibility studies. These studies must take into consideration the certainty of poor snow years and their impact upon the development being a realistic economic venture. . .

Trial Ex. 2757 (1979 EIS at 177-178)**;** *see also, e.g*., *Id.* at 68 ("Winter sports sites developed primarily for skiing will not be developed unless snow and weather records show that dependable, safe skiing can reasonably be expected at the site. . .").

20. In the 1979 EIS, the Forest Service recognized and discussed, in great detail, the religious significance of the San Francisco Peaks to the Navajo Nation and the Hopi Tribe in particular, and acknowledged that the Peaks were sacred to other tribes as well. Trial Ex. 2757 (1979 EIS at 57-61).

21. With regard to the Navajo, the 1979 EIS found, in part, that:

> *Doko'o-sliid* (The San Francisco Peaks) in general, and Mount Humphrey in particular, are sacred to members of the Navajo Tribe of Indians. *Doko'o-sliid* has a unique religious significance on their daily religious lives; it has complete bearing on their daily personal lives and the longevity of existence for these members of the tribe, and has complete connection with daily songs and prayers to their super-natural beings.

Id. at 57.

22. The Forest Service also recognized, in part, that "the Mountain is the mother of the Navajo people." *Id*. at 58.

THE SHANKER LAW FIRM, PLC.
600 EAST BASELINE ROAD, SUITE C-8 • TEMPE, AZ 85283-1210
TELEPHONE (480) 838-9448 • FACSIMILE (480) 838-9433
HOWARD@SHANKERLAW.NET

23. With regard to the Hopi Tribe, the Forest Service found, in part, that:

> Nuvatukya'ovi (the San Francisco Peaks) or the Snow Peaks is, for the Hopis, the most sacred of all such places. The entire Mountain is a sacred place because it is the residence of the Kachinas, supernatural beings important to the Hopi people, and all other people who know of them. . .

Id. at 59.

24. On February 27, 1979, the Forest Supervisor for the Coconino National Forest issued his decision to permit moderate development of the Snow Bowl under a "Preferred Alternative," which was not one of the six alternatives previously identified. *Wilson v. Block,* 708 F.2d at 739. The Preferred Alternative envisioned the clearing of 50 acres of forest for new ski runs, instead of the 120 acres requested by Northland. It also authorized the construction of a new day lodge, improvement of restroom facilities, reconstruction of existing chair lifts, construction of three new lifts, and the paving and widening of the Snow Bowl road. *Id*.

25. On February 7, 1980, the Regional Forester overruled the Forest Supervisor and ordered maintenance of the *status quo*. The Chief Forester on December 31, 1980, reversed the Regional Forester and reinstated the Forest Supervisor's approval of the Preferred Alternative. *Wilson v. Block,* 708 F.2d at 739.

26. On March 2, 1981, the Navajo Medicinemen's Association filed suit in the District Court for the District of Columbia. The suit was consolidated with similar suits brought by the Hopi Tribe and Jean and Richard Wilson, owners of a ranch located a mile and a half below the Snow Bowl. *Id*. In the 1981 litigation, plaintiffs alleged, in pertinent

THE SHANKER LAW FIRM, PLC.
600 EAST BASELINE ROAD, SUITE C-8 • TEMPE, AZ 85283-1210
TELEPHONE (480) 838-9448 • FACSIMILE (480) 838-9433
HOWARD@SHANKERLAW.NET

part, that the expansion for the Snow Bowl facilities would violate the Indians' First Amendment right to the free exercise of religion, and the American Indian Religious Freedom Act. *Wilson v. Block,* 708 F.2d at 739.

27. On June 15, 1981, the District Court granted summary judgment in favor of the Forest Service on all claims except one brought under the National Historic Preservation Act. On May 14, 1982, the District Court for the District of Columbia ruled that the Forest Service achieved complete compliance and entered final judgment for the defendants on all issues. *Id*. at 739.

28. This decision was subsequently appealed to the D.C. Circuit Court of Appeals, which upheld the lower court ruling and issued an opinion on or about May 20, 1983. *Id.*[1]

29. In its deliberations, the D.C. Circuit Court of Appeals confirmed, in part, that:

> The Peaks . . . have for centuries played a central role in the religions of the two tribes. The Navajos believe that the Peaks are one of the four sacred mountains which mark the boundaries of their homeland. They believe the Peaks to be the home of specific deities and consider the Peaks to be the body of a spiritual being or god, with various peaks forming the head, shoulders, and knees of a body reclining and facing to the east, while the trees, plants, rocks, and earth form the skin. The Navajos pray directly to the Peaks and regard them as a living deity. The Peaks are invoked in religious ceremonies to heal the Navajo people. The Navajos collect herbs from the Peaks for use in religious ceremonies, and perform ceremonies upon the Peaks. They believe that artificial development of the Peaks would impair the Peak's healing power.
>
> The Hopis believe that the Creator uses emissaries to assist in communicating with mankind. The emissaries are spiritual

[1] A discussion of the legal analysis and conclusions of the *Wilson* case, and other potentially relevant court decisions, is reserved for the "Conclusions of Law" portion of this decision, *infra*.

THE SHANKER LAW FIRM, PLC.
600 EAST BASELINE ROAD, SUITE C-8 • TEMPE, AZ 85283-1210
TELEPHONE (480) 838-9448 • FACSIMILE (480) 838-9433
HOWARD@SHANKERLAW.NET

> beings and are generally referred to by the Hopis as "Kachinas." The Hopis believe that for 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 Hopi villages and participate in various religious ceremonies and practices. The Hopis believe that the Kachinas' activities on the Peaks create the rain and snow storms that sustain the villages. The Hopis have many shrines on the Peaks and collect herbs, plants and animals from the Peaks for use in religious ceremonies. The Hopis believe that use of the Peaks for commercial purposes would constitute a direct affront to the Kachinas and to the Creator.

Wilson v. Block, 708 F.2d at 738

30. Further, according to the D.C. Circuit, "[t]he parties have stipulated that the plaintiffs' beliefs are religious and are sincerely held, and the record contains abundant evidence supporting that stipulation." *Id*. at 740.

2. Developments at Snowbowl From Approximately 1982 Through Approximately 2002

31. In 1982, the Hart Prairie Chairlift was built. Trial Ex. 2780 (FEIS at 1-3).

32. Fairfield Communities purchased the ski area in November, 1982 and began an improvement program in 1983, including construction of the Hart Prairie Lodge, Sunset Chairlift and transfer of the rope tow back to Hart Prairie. In 1985, parking lots #5 and #6 were completed along with a new maintenance shop. In 1986, a new CTEC triple chairlift was installed on the site of the original Agassiz Chairlift; the rope tow and the Poma were removed and the Aspen Chairlift was installed in Hart Prairie. A two-year Snowbowl Road improvement and paving project began in 1988. Trial Ex. 2780 (FEIS at 1-3).

THE SHANKER LAW FIRM, PLC.
600 EAST BASELINE ROAD, SUITE C-8 • TEMPE, AZ 85283-1210
TELEPHONE (480) 838-9448 • FACSIMILE (480) 838-9433
HOWARD@SHANKERLAW.NET

33. Arizona Snowbowl Resort Limited Partnership ("ASR"), the intervenor/defendant in the instant case, purchased the ski area in December 1992. ASR operates the ski area under a 777-acre Forest Service-issued Special Use Permit ("SUP"), which is renewed on a 40-year basis. Trial Ex. 2780 (FEIS at 1-3; and 1-2).

34. After purchasing the area, ASR made improvements to the facilities and ski trails. In part, Hart Prairie Lodge was expanded by constructing a new guest service office, rental shop, and children's ski school. Logjam (trail #25) was widened and new trails – Lava (trail #43c) and Volcano (trail #43a) were constructed. Trial Ex. 2780 (FEIS at 1-3).

B. THE PROJECT AT ISSUE IN THE INSTANT CASE

35. In 2002, ASR initiated the process of having the Forest Service approve a significant, additional expansion to the Snowbowl Ski area, which required preparation of an Environmental Impact Statement under NEPA. A "scoping" letter, initiating the review process under the National Environmental Policy Act ("NEPA") for ASR's proposed expansion, was sent out by the Forest Service in September 2002. AR Vol. 3, Tab 37 (SOF Ex. at 20-25).

36. On February 2, 2004, the Forest Service issued its Arizona Snowbowl Facilities Improvements Draft Environmental Impact Statement ("DEIS").[2] The DEIS identified the "Purpose and Need" for the project as: (a) "to ensure a consistent and reliable

[2] The parties stipulated to the admission of the entire Draft Environmental Impact Statement ("DEIS") into evidence. It appears, however, that actual admission of the document may have been mistakenly overlooked. *See* Trial Transcript at 170 lines 1-7.

THE SHANKER LAW FIRM, PLC.
600 EAST BASELINE ROAD, SUITE C-8 • TEMPE, AZ 85283-1210
TELEPHONE (480) 838-9448 • FACSIMILE (480) 838-9433
HOWARD@SHANKERLAW.NET

operating season, thereby maintaining the economic viability of the Snowbowl, and stabilizing employment levels and winter tourism within the local community;" and (b) "to improve safety, skiing conditions, and recreational opportunities, bringing terrain and infrastructure into balance with current use levels." DEIS at 1-5 to 1-6; Trial Ex. 2780 (FEIS at 1-6 to 1-7).

37. A summary of the proposed action in the DEIS included, in part: (a) approximately 205 acres of snowmaking coverage throughout the SUP area utilizing reclaimed sewage effluent as a source; (b) a 10 million-gallon snowmaking reclaimed waste water reservoir near the top terminal of the existing Sunset Chairlift; (c) relocate the existing Sunset Chairlift as the Humphreys Chairlift, accessing a pod of proposed ski trails; (d) upgrade and realignment of the Aspen Chairlift; (e) approximately 74 acres of new trails; (f) approximately 47 acres of thinning; (g) approximately 87 acres of grading/stumping and smoothing; (h) enlarge the Hart Prairie Lodge by approximately 6,000 square feet to a total of 24,900 square feet; (i) construct a new 10,000 square foot guest services facility; (j) construct a 2,500 square foot Native American cultural and education center; (k) construct a 14.8-mile pipeline to transport reclaimed waste water from Flagstaff to Snowbowl; and (l) install snowmaking pipelines buried within existing and proposed trails. DEIS at 1-8 to 1-9; *see* Trial Ex. 2780 (FEIS at 1-9 to 1-10).

38. According to the DEIS, the "San Francisco Peaks are of traditional cultural and spiritual significance to several Indian Tribes, including the Hopi, Navajo . . . Hualapai,

THE SHANKER LAW FIRM, PLC.
600 EAST BASELINE ROAD, SUITE C-8 • TEMPE, AZ 85283-1210
TELEPHONE (480) 838-9448 • FACSIMILE (480) 838-9433
HOWARD@SHANKERLAW.NET

Havasupai, Yavapai-Apache . . . [and] White Mountain Apache."[3] DEIS at 3-6; *see* Trial Ex. 2780 (FEIS at 3-7); *see also, e.g.*, Trial Ex. 3(a) (DEIS at 1-11) ("The San Francisco Peaks are central to the cultures and religious practices of many Native American tribes. . .").

39. The Forest Service found, in the DEIS, that "[t]he San Francisco Peaks are associated with cultural practices and beliefs of living native American communities that are rooted in their history and are important in maintaining the continuing cultural identity of their community." Trial Ex. 3(b) (DEIS at 3-4); *see also, e.g.*, DEIS at 3-6 (Tribes "are still actively using [the Peaks] in both historic and religious contexts.").

40. Further, according to the DEIS, "Pilles identifies nine significant qualities that characterize the Peaks for the tribes. These qualities include: (1) they are the abode of deities and other spirit beings; (2) they are the focus of prayers and songs whereby humans communicate with the supernatural; (3) they contain shrines and other places where ceremonies and prayers are performed; (4) they are the source of water; (5) they are the source of soil, plant, and animal resources that are used for ceremonial and traditional purposes; (6) they mark the boundaries of traditional or ancestral lands; (7) they form a calendar that is used to delineate and recognize the ceremonial season; (8) they contain places that relate to legends and stories concerning the origins, clans, traditions, and ceremonies of various Southwestern tribes; and (9) they contain sites and places that are

[3] The studies of Peter Pilles, Coconino National Forest Archeologist, are extensively cited throughout the DEIS vis-à-vis the relationship of the Peaks to the Tribes. The Court notes that Mr. Pilles was not called as a witness by the Forest Service in this case.

THE SHANKER LAW FIRM, PLC.
600 EAST BASELINE ROAD, SUITE C-8 • TEMPE, AZ 85283-1210
TELEPHONE (480) 838-9448 • FACSIMILE (480) 838-9433
HOWARD@SHANKERLAW.NET

significant in the history and cultural practices of various tribes." DEIS at 3-6; *see* Trial Ex. 2780 (FEIS at 3-7 to 3-8).

41. With regard to each of the plaintiff tribes, the DEIS further provides that "[t]he entire earth is sacred; it is seen as the source of life. Some parts of the natural world, such as the San Francisco Peaks, are accorded special reverence. These special places may be where gods originated or where they live or where individuals or leaders may communicate with spiritual forces. Thus, the relationship between native people and their lands is central and indispensable to their religion, culture, and way of life." DEIS at 3-7; *see* Trial Ex. 2780 (FEIS at 3-7).

42. Specifically with regard to the Hopi, the DEIS provides, in part, that: "[a]ll of the religious ceremonies encompassed within Nuvatukyaovi demonstrate the sacred relationship of the Peaks to the Hopi people. . . The San Francisco Peaks are the spiritual essence of what Hopis consider to be among the most sacred landscapes in Hopi religion, the spiritual home of the Kachina . . . The ceremonies associated with the Peaks, the plants and herbs gathered on the Peaks, and the shrines and ancestral dwellings located on the Peaks are of central importance to the religious beliefs and practices of the Hopi People." DEIS at 3-8; *see* Trial Ex. 2780 (FEIS at 3-9).

43. Specifically with regard to the Navajo, the DEIS provides, in part, that: the Peaks are the sacred mountain of the west, Doko'oo'slid, 'Shining on Top,' a key boundary marker and a place where medicine men collect herbs for healing ceremonies. . . Pilles notes

THE SHANKER LAW FIRM, PLC.
600 EAST BASELINE ROAD, SUITE C-8 • TEMPE, AZ 85283-1210
TELEPHONE (480) 838-9448 • FACSIMILE (480) 838-9433
HOWARD@SHANKERLAW.NET

that some indication of the importance of the San Francisco Peaks to Navajo in their daily lives can be seen from study of Navajo uses of the National Forests of northern Arizona . . In other words, sacred places, preeminently the San Francisco Peaks, play an important role in the lives of at least 37 percent of the Navajo people living in northern Arizona." DEIS at 3-9 to 3-10; *see* Trial Ex. 2780 (FEIS at 3-11 to 3-12).

44. The Forest Service has also recognized, in part, with regard to the use of reclaimed wastewater, that:

> [f]rom both a Hopi and Navajo perspective, the plants within and down slope of the Snowbowl SUP area that would be affected by reclaimed water may no longer be viable for use in sacred ceremonies or for medicinal purposes, thus affecting Hopi and Navajo ability to perform ceremonies properly and keep their religion alive . . . Both groups strongly believe that wastewater cannot be purified in a way that does not impact the cultural and spiritual value of the Peaks, and that the use of reclaimed water on the Peaks would adversely affect the spirits that reside there. These concerns are focused on spiritual and cultural issues, not the actually biological purity of the water itself.

DEIS at 3-16; *see* Trial Ex. 2780 (FEIS at 3-17)

45. The Forest Service also opined as to the impact on the plaintiff tribes resulting from ground disturbing activities. Thus, according to the Forest Service:

> [i]f one regards the Peaks as a living entity, as believed by the Native American tribes that consider it sacred, any additional ground disturbances and vegetation removal would be considered as harming them. . . An example of the Hopi perspective on additional development within the SUP area can be gained from the December 2002 public meeting, in which Raleigh Pooyouma noted that these are the only sacred peaks the Hopis have . . . He stated, "Development is like cutting the heart and blood vessels of a living being."

DEIS at 3-19; *see* Trial Ex. 2780 (FEIS at 3-21).

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600 EAST BASELINE ROAD, SUITE C-8 • TEMPE, AZ 85283-1210
TELEPHONE (480) 838-9448 • FACSIMILE (480) 838-9433
HOWARD@SHANKERLAW.NET

46. According to the Forest Service, "[t]he Navajo consider the Peaks to be a living entity . . . To alter the landscape then would harm this living being. The amount of harm is not an issue; any harm to the Peaks will affect all the living things that reside there." DEIS at 3-22; Trial Ex. 2780 (FEIS at 3-23).

47. Further, with regard to the tribal plaintiffs, the Forest Service notes in the DEIS, that: "[a]lthough there is no evidence for the presence of any plants of traditional importance within the Snowbowl SUP area, the removal of 76 acres of vegetation would affect the integrity of the Peaks and therefore impact its sacred values. Ground disturbance within the SUP area, especially the 10 acres of permanent ground disturbance, would impact the sacred values of the Peaks and their spiritual nature." DEIS at 3-20; *see* Trial Ex. 2780 (FEIS at 3-21).

48. The Final Environmental Impact Statement ("FEIS") was issued in February 2005. Trial Ex. 2780.

49. The selected alternative was generally the same as the proposed alternative, with some minor modification. The selected alternative included, in part: (a) approximately 205 acres of snowmaking coverage throughout the area, utilizing reclaimed sewage effluent; (b) a 10 million-gallon snowmaking reclaimed waste water reservoir near the top terminal of the existing Sunset Chairlift and catchment pond below the Hart Prairie Lodge; (c) construction of a reclaimed water pipeline between Flagstaff and Snowbowl with booster stations and pump houses; (d) construction of a 3,000 to 4,000 square foot snowmaking

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600 EAST BASELINE ROAD, SUITE C-8 • TEMPE, AZ 85283-1210
TELEPHONE (480) 838-9448 • FACSIMILE (480) 838-9433
HOWARD@SHANKERLAW.NET

control building; (e) construction of a new 10,000 square foot guest services facility; (f) an increase in skiable acreage from 139 acres to approximately 205 acres – an approximate 47% increase; and (g) approximately 47 acres of thinning and 87 acres of grading/stumping and smoothing. Trial Ex. 2781 (ROD at 10-15).

50. Essentially all of the discussion and findings regarding the religious significance of the Peaks to the plaintiff tribes set forth in the DEIS, are reiterated in the FEIS. Trial Ex. 2780 (FEIS at 3-7 to 3-13; FEIS at 3-15 to 3-17; FEIS at 3-23).

51. In selecting Alternative Two, the Forest Service sums up the impact to the religious practices of the tribes as follows:

> the additional ground disturbance and use of reclaimed water that would result from Alternative 2 would further contaminate the spiritual purity of the entire Peaks beyond the historic and existing levels. The Hopi, Navajo, and other tribes have existed in the region of the San Francisco Peaks for thousands of years and have developed their cultures and religious institutions around the natural and cultural landscape of the San Francisco Peaks. Traditions, responsibilities, and beliefs that delineate who they are as a people, as a culture, are based on conducting ritual ceremonies they are obligated to perform as keepers of the land. These obligatory activities focus on the Peaks, which are a physical and spiritual microcosm of their cultures, beliefs, and values. Snowmaking and expansion of facilities, especially the use of reclaimed water, would contaminate the natural resources needed to perform the required ceremonies that have been, and continue to be, the basis for the cultural identity for many of those tribes.

Trial Ex. 2780 (FEIS at 3-18).

52. On April 25, 2005, plaintiffs administratively appealed the Forest Service decision approving the project as was set forth in Alternative 2 of the FEIS. In their appeals,

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plaintiffs asserted, in pertinent part, that the Forest Service failed to comply with RFRA. There were approximately 30 formal appeals filed with the Forest Service – many representing multiple parties.

53. On June 8, 2005, the Forest Service, and particularly defendant Mr. Forsgren as the appeal deciding officer and Regional Forester, responded to and, essentially, rejected/denied these appeals. In pertinent part, Mr. Forsgren denied plaintiffs claims that the project would have a "substantial burden" on their ability to practice their religion. Trial Exs. 1049, 1050, 1051, and 1052.

1. Procedural Background in the Instant Litigation

54. The Complaint for the Navajo Nation and the Sierra Club was initially filed on June 17, 2005. On June 23, 2005, before the Complaint was served, the Navajo plaintiffs filed a First Amended Complaint that added the White Mountain Apache Tribe, the Yavapai-Apache Tribe, the Center for Biological Diversity and the Flagstaff Activist Network as additional plaintiffs.

55. Shortly thereafter, three separate Complaints were filed by: (1) Hualapai Tribe, Norris Nez, and Bill Bucky Preston; (2) Rex Tilousi, Dianna Uqualla, and the Havasupai Tribe; and (3) Hopi Tribe. On unopposed motion, these matters were transferred and consolidated to the instant action.

56. The Court heard argument on plaintiffs' motions for preliminary injunction on or about July 13, 2005. At the close of arguments, defendants agreed to stay any work on the

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project pending resolution of this matter pursuant to an agreed upon expedited briefing schedule.

57. The Court heard oral argument on Cross-Motions for Summary Judgment regarding the APA-based claims and the RFRA claims on October 6, and October 7, 2005. At that time, the Court took these matters under advisement.

58. A Bench trial was held between October 12, 2005 and November 15, 2005, on the RFRA Claims.

C. TRIAL TESTIMONY ON THE IMPACT OF THE PROJECT AND THE RELIGIOUS SIGNIFICANCE OF THE SAN FRANCISCO PEAKS TO THE PLAINTIFF TRIBES

59. The Tribes and the Forest Service provided witnesses that attested to the religious significance of the Peaks.

1. Testimony of General Application to All the Plaintiff Tribes

60. The Forest Service called two archeologists as witnesses, Dr. Judith Propper and Heather Provencio, who discussed, in part, the impacts of the project on Native American religious practices and the significance of the Peaks to the tribes.

61. Dr. Propper is the Forest Service, Regional Archeologist for the Southwestern Region.

62. Dr. Propper confirmed that the Peaks are central and indispensable to the tribes' religious practices. Trial Transcript at 1608 lines 15-17. Dr. Propper agreed that the tribes view the San Francisco Peaks: (a) as a home of spiritual beings; (b) a place where

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significant mythological events occurred; (c) a place where spirits of the dead went to be changed into bringers of rain; (d) a personification of gods and goddesses; (e) an area where important societies originated; and (e) as a source of life. Trial Transcript at 1627 lines 19-25; 1628 lines 1-11.

63. Dr. Propper confirmed that the tribes view the San Francisco Peaks as a single being or entity. She also confirmed the tribes' belief that you cannot hurt or harm a piece of the Peaks without affecting the whole entity. Trial Transcript at 1610 lines 20-22; 1611 lines 8-14; 1611 lines 23-25; 1612 lines 1-7.

64. Dr. Propper further confirmed that the Tribe's believe that the project at issue will have a "devastating impact on their culture and religion." Trial Transcript at 1615 lines 14-17.

65. Heather Provencio is the Forest Service Zone Archeologist for the Peaks and Mormon Lake Districts. She was the lead archeologist for tribal consultation on the Snowbowl proposal. Trial Transcript at 1181 lines 1-3; 1182 lines 23-25.

66. Ms. Provencio testified that the types of Native American religious practices that occur on the San Francisco Peaks range from the collection of traditional plants, both for ceremonial and traditional, medicinal use, to members actually conducting healing ceremonies and religious ceremonies on the Peaks. Trial Transcript at 1220 lines 13-18.

67. Ms. Provencio testified that she would have selected Alternative 3, which did not include snowmaking. This was based on her analysis of effects to tribal values and on

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her experience with NEPA. Ms. Provencio stated that she believed that Alternative 3, "meets the purpose and need, but at the same time recognizes the tribal concerns." Trial Transcript at 1233 lines 21-25; 1234 lines 1-11; 1239 lines 11-22.

68. Ms. Provencio confirmed that the region's Indian tribes are opposed to the concept of creating snow by artificial means, particularly through the use of reclaimed water, because it would negatively affect the spiritual values of the entire San Francisco Peaks. Trial Transcript at 1270 lines 18-25; 1271 lines 1-2; 1271 lines 9-11.

69. Ms. Provencio also confirmed that the proposed ground disturbances within the SUP area associated with the project would, from the Native American perspective, scar the entire sacred mountain which is believed to be a living entity. Trial Transcript at 1271 lines 19-25; 1272 lines 1-4; 1272 lines 8-10.

70. Plaintiff Tribal members expressed concerns that the sources of waste for the Rio De Flag wastewater treatment plant included water that may contain spirits of the dead. *See e.g.* Trial Transcript at 247 lines 8-14; Trial Transcript at 31 lines 21-23.

71. Robin Harrington, City of Flagstaff Industrial Waste Supervisor, testified that mortuaries and morgues discharge human blood and formalin into the sanitary sewer for the City of Flagstaff. Trial Transcript at 71 line 23; 72 line 1; *see also* Trial Ex. 17a-d.

72. Ron Doba, City of Flagstaff Utilities Director, testified that the sources for the Rio de Flag wastewater treatment plant include: SCA Tissue, Gore, Flagstaff Medical Center, the City Morgue, and Norvel Owens Mortuary. Trial Transcript at 1464 line 15;

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1471 lines 21-25 to 1472 line 1; 1524 lines 21-25 to 1525 lines 1-2; *see also* Trial Ex. 42, 42a-d.

a. The San Francisco Peaks, Including the SUP Area, Have been Identified as a Traditional Cultural Property ("TCP").

73. The Forest Service has identified the San Francisco Peaks as a Traditional Cultural Property ("TCP") as defined in National Register Bulletin 38: *Guidelines for Evaluating and Documenting Traditional Cultural Properties* (Trial Ex. 1034). The Peaks have also been determined eligible for inclusion on the National Register of Historic Places. Trial Ex. 2780 (FEIS at 3-6).

74. "A TCP is a place that is associated with the cultural practices or beliefs of a living community. Those practices or beliefs must be rooted in the history of the community and be important in maintaining the continuing cultural identity of the community. While not all TCPs are eligible for the National Register, a TCP is eligible if the property plays a role in a community's historically rooted beliefs, customs, and practices and meets one of four National Register Criteria for significance: (A) associated with significant events; (B) associated with a significant person; (C) is an outstanding example of a type; or (D) is associated with information contained in an archeological site." Trial Ex. 2780 (FEIS at 3-6), *quoting* Trial Ex. 1034 (Bulletin 38 of the National Historic Preservation Act).

75. Ms. Provencio confirmed that the Special Use Permit area or SUP area, where Snowbowl is located, is part of the TCP and that when the TCP is being discussed, that includes the SUP area. Trial Transcript at 1274 lines 21-25; 1275 line 1; 1275 lines 16-19.

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76. Bulletin 38 (Trial Ex. 1034) provides that "[t]raditional cultural values are often central to the way a community or group defines itself, and maintaining such values is often vital to maintaining the group's sense of identity and self respect. Properties to which traditional cultural value is ascribed often take on this kind of vital significance, so that any damage to or infringement upon them is perceived to be deeply offensive to, and even destructive of, the group that values them." *See also*, Trial Transcript at 1276 lines 3-10.

77. Ms. Provencio testified that she agreed with the above description of cultural values and the role of properties to which traditional cultural value is ascribed. She also confirmed that she believed this to be applicable to the instant case and how the tribes perceive any damage to or infringement upon the San Francisco Peaks. Trial Transcript at 1277 lines 3-14.

78. Ms. Provencio also testified that she agreed with the statements made about ethnocentrism in Bulletin 38 as they apply to this case. Bulletin 38 provides, in part, that, "[e]thnocentrism means viewing the world and the people in it from the point of view of one's own culture and being unable to sympathize with the feelings, attitudes, and beliefs of someone who is a member of a different culture. It is particularly important to understand, and seek to avoid, ethnocentrism in the evaluation of traditional cultural properties . . . For example, there may be nothing observable to the outsider about a place regarded as sacred by a Native American group. Similarly, such a group's belief that its ancestors emerged from the earth at a specific location at the beginning of time may contradict Euroamerican

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science's belief that the group's ancestors migrated to North America from Siberia. These facts in no way diminish the significance of the locations in question in the eyes of those who value them; indeed, they are irrelevant to their significance. . . It is vital to evaluate properties thought to have traditional cultural significance from the standpoint of those who may ascribe such significance to them, whatever one's own perception of them, based on one's own cultural values may be." Trial Transcript at 1276 line 25; 1277 lines 1-25; 1278 lines 1-5.

79. Bulletin 38 actually identifies the San Francisco Peaks as an example of a well known traditional cultural property. Thus, according to the Bulletin, "[t]he San Francisco Peaks in Arizona, for example, are extensively documented and widely recognized as a place of extreme cultural importance to the Hopi, Navajo, and other American Indian people of the Southwest. . ."

80. Ms. Provencio concurred that the extreme cultural significance of the Peaks to the tribes of the southwest has been extensively documented and widely recognized. Trial Transcript at 1279 lines 3-14.

81. Ms. Provencio also confirmed that the Peaks, including the SUP area, should be recognized and preserved because of their significance to the Native American communities in the area. Trial Transcript at 1279 lines 9-25; 1280 lines 1-9.

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82. It is well settled, and the Forest Service admits, that "[t]he San Francisco Peaks are sacred to at least 13 formally recognized tribes (including plaintiffs) that are still actively using the Peaks in cultural, historic, and religious contexts." Trial Ex. 2780 (FEIS at 3-7).

2. Tribe-Specific Testimony Regarding the Importance of the Peaks and the Impacts of the Project

a. Testimony on the Impacts on the Navajo Religion

83. Plaintiffs collectively produced four witnesses to testify about the importance of the Peaks to the Navajo religion and the impact of the project. These included: (a) Steven Begay (Assistant Department Director of the Historic Preservation Department for the Navajo Nation and Navajo Medicine Man); (b) Larry Foster (member of the Navajo Nation, practitioner of the Navajo religion, assistant to a Navajo Medicine man); (c) Norris Nez (Navajo Medicine Man and named Plaintiff in this case) – through a Navajo interpreter; and (d) Joe Shirley, Jr. (President of the Navajo Nation).

84. Larry Foster, Steven Begay, and President Joe Shirley, Jr. testified that the San Francisco Peaks are one of four sacred mountains for the Navajo people. Trial Transcript at 191 lines 8-9; 738 line 25 to 739 line 2; 824 line 11.

85. Steven Begay and Larry Foster both testified that the four sacred mountains mark the land created for the Navajo people to live, and each sacred mountain represents a religious principle. Trial Transcript at 739 lines 3-23; 197 lines 11-16.

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86. Larry Foster, Steven Begay, and Norris Nez all testified that in the Navajo religion, the creation of the Navajo people took place at the San Francisco Peaks. Trial Transcript at 198 line 22 to 199 line 15; 747 lines 16-20; 883 lines 22-25.

87. President Joe Shirley, Jr. in his testimony confirmed that the testimony of Steven Begay was an accurate depiction of the Navajo belief system, and further testified that the San Francisco Peaks are considered in Navajo culture and religion to be the "Mother to Navajo People." Trial Transcript at 799 lines 2-5; 802 line 18.

88. Norris Nez testified that the Navajo people were "created and we were made to live around the base of [the San Francisco Peaks]. And from [the Peaks] came our medicine to have good health, good water and to live a good life." The Peaks hold "medicine and things to make us well and healthy. We suckle from [the Peaks] and get well when we consider [them] our Mother." Trial Transcript at 883 lines 7-10; 894 lines 8-10.

89. President Joe Shirley, Jr. testified that the San Francisco Peaks are an integral part of Navajo life. The Peaks are their essence, their home, their mother. The whole of the Peaks is the holiest of shrines in the Navajo way of life. Trial Transcript at 799 lines 14-17; 802 lines 16-17; 804 lines 18-20.

90. Steven Begay testified that the San Francisco Peaks in the Navajo religion represent a person's ability to provide for one's self and family, and represents the procreation of all living things (humans, animals, plants, etc) – the life pattern. Trial Transcript at 741 lines 3-7.

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91. Steven Begay testified that the San Francisco Peaks are home to many of the Navajo people's deities. He listed some of the deities that, according to the Navajo religion, exist on the San Francisco Peaks as White Corn Girl, White Corn Boy, Twilight Girl, and Twilight Boy, and Yellow Wind. Trial Transcript at 739 lines 6-18; 747 line 25 to 748 line 5.

92. Steven Begay testified that it is the belief of the Navajo people that medicine plants on the San Francisco Peaks are all connected. The Navajo belief is that they are all part of the mountain and the mountain cannot be separated. Trial Transcript at 756 line 6 to 757 line 2.

93. Norris Nez testified that all of the San Francisco Peaks are holy. "[The Peaks are] like a body. It is like our body. Every part of it is holy and sacred." Trial Transcript at 913 lines 6-7.

94. Larry Foster testified that Changing Woman's puberty ceremony occurred at San Francisco Peaks. Trial Transcript at 198 lines 1-3; 197 lines 17-19.

95. Steven Begay testified that the deity known as Changing Woman is "the Mother of the People." Trial Transcript at 746 lines 7-10.

96. Larry Foster testified that the Changing Woman and the Creator, Sun god, were the parents of twins that were born on the San Francisco Peaks. "Changing Woman instructed [the twins] to go back to the Peaks to retrieve the [medicine bundles] to take them to offer prayers, ceremonies. From that point on then they would go on their journey, their quest to find their [Creator]." Trial Transcript at 199 lines 3-15.

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97. Larry Foster testified that the medicine bundle tradition is continued to this day by Navajo medicine people. Trial Transcript at 200 lines 5-9.

98. President Joe Shirley, Jr. testified that the Blessingway ceremony "is the main ceremony that ties … all ceremonies together. And that's very much a part of … the San Francisco Peaks." Trial Transcript at 799 line 24 to 800 line 2.

99. Steven Begay testified that medicine bundles are an integral part of the Blessingway ceremony. "The prayer is said while the person is holding the medicine bundle… [T]hose prayers specifically request from … the four mountains, strength and to restore themselves, restore their mind, and make them live in harmony." Trial Transcript at 745 line 23 to 746 line 6.

100. Larry Foster testified that in their ceremonies, the Navajo medicine bundle sits to the west, representing the San Francisco Peaks. Trial Transcript at 198 lines 24-25.

101. Larry Foster testified that the medicine bundles consist of several parts that come from the San Francisco Peaks. These parts include sacred soils, herbs called medicine, and sacred stones, and are put together in a four-day purification ceremony performed by Medicine people and the keeper of the bundle. Trial Transcript at 210 line 10 to 211 line 5.

102. Steven Begay testified that the Navajo people use the medicine bundles in order to "pray the prayers of the mountains". To facilitate these prayers, "the soil from the mountain is in [the bundle so that] we are speaking directly to the mountain." Trial Transcript 744 lines 17-23.

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103. Norris Nez testified that the medicine bundles "are like conduits to the heavens so our prayers can be heard." Trial Transcript at 889 lines 16-17.

104. Larry Foster testified that in the Navajo culture, "[people] live in the blessingway, in harmony. We try to walk in harmony, be in harmony with all of nature. And we go to all of the sacred mountains for protection. We go on pilgrimage similar to Muslims going to Mecca. And we do this with so much love, commitment and respect. And if one mountain – and more in particularly with the San Francisco Peaks – which is our bundle mountain, our sacred, bundle mountain, were to be poisoned or given foreign materials that were not pure, it would create an imbalance – there would not be a balance among the sacred mountains… We just wouldn't be able to exist. I wouldn't be able to do pilgrimages anymore." Trial Transcript at 205 line 22 to 207 line 5.

105. Norris Nez testified that soil from the San Francisco Peaks is central to the Blessingway ceremony. It represents good health, good weather and plants, and symbolizes happiness. The proposed project will create imbalance and a major disturbance that will ruin the soil from the San Francisco Peaks. This project will ruin the Blessingway ceremony and *hoz ho* (healthy state, being complete) because "bad is going to be put on [the Peaks]." The manmade snow will ruin the plants, the water, and the earth on the San Francisco Peaks. "It will have ill effects on everything." Trial Transcript at 890 lines 19-20; 891 line 7; 896 lines 2-7; 896 line 17 to 897 line 16.

106. Larry Foster testified that the current development on Snowbowl is equivalent to a scar, however, if the Facilities Improvement Project is allowed to go forward, it would

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be akin to "a prick … from a contaminated needle, it doesn't matter what the percentage is, your whole body would then become contaminated." Trial Transcript at 205 lines 2-16; 214 lines 15-18.

107. Larry Foster testified that if the San Francisco Peaks were poisoned, it would create an imbalance and he would no longer be able to obtain herbs or medicines for these ceremonies, as the mountain would be impure. The imbalance caused by the project will cause the entire Navajo culture to come out of balance. The Navajo would lose their culture, identity, language, songs, ceremonies, and their protection, as well as cause past traditional medicine bundles to have no further religious, cultural, or historical meaning. Any use of artificial snow under the proposed project would make the mountain unusable for Navajo religious purposes, because the mountain is a living entity. The Navajo would be unable to create the medicine bundle if this project went forward because the mountain would be contaminated and the sacred soils, herbs, and sacred stones from that mountain would not be usable. Trial Transcript at 206 lines 3-10; 206 lines 22-25; 208 lines 19-22; 209 lines 12-20; 211 lines 1-12; 214 line 21 to 215 line 2.

108. Steven Begay testified that the proposed use of reclaimed wastewater to make snow "will significantly impact Navajo life. We don't separate our religion from our daily lives and this project will contaminate what we as Navajos in our teaching and in our minds believe the peaks to be a pristine environment. And so ripping out more trees and creating artificial snow will definitely impede and impact our beliefs in what that mountain means to our people." Trial Transcript at 753 lines 13-19.

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109. President Joe Shirley, Jr. testified that the use of the reclaimed water on the San Francisco Peaks would be a desecration of the Mother of the Navajo people, and would be like a child watching her mother be raped. Trial Transcript at 802 lines 11-21.

110. Larry Foster testified that water from the San Francisco Peaks is used in the kinaalda ceremonies performed as a rite of passage for Navajo women and practiced for the purpose of continued life for the Navajo people. This water would be contaminated if the proposed project was allowed to go forward, and this integral part of the Navajo religion could no longer be practiced. Trial Transcript at 207 line 6 to 208 line 2; 197 line 17 to 198 line 3.

111. President Joe Shirley, Jr. testified that his mother, the whole of the San Francisco Peaks, might not be able to help him if this project went forward. Trial Transcript at 802 lines 24-25; 803 lines 1-2.

b. Testimony on the Impacts on the Hopi Religion

112. Plaintiffs collectively produced five witnesses to testify about the importance of the Peaks to the Hopi tradition, culture, and religion, and the impact of the proposed expansion project on their tradition, culture and religion. These witnesses included: (a) Leigh Kuwanwisiwma; (b) Wilton Kooyahoma; (c) Antone Honanie; and (d) Emory Sekaquaptewa; and (e) Bill Bucky Preston (named Plaintiff in this case).

113. Leigh Kuwanwisiwma is a 55 year old member of the Hopi Tribe, a member of the Greasewood Clan, a lifelong practitioner of Hopi culture and religion, a member of the

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Kachina Society, and the Hopi Tribe's Cultural Preservation Officer. Trial Transcript at 413, lines 24-25; 414, lines 4-25; 415, line 1; 416, lines 18-25.

114. Wilton Kooyahoma is a 69 year old member of the Hopi Tribe, a member of the Fire Clan, and a member of the Kachina and One Horn Societies and a lifelong practitioner of Hopi culture and religion. Trial Transcript at 535, lines 7-8, 11-15, 19-20; 536, lines 20-21; 537, line 6.

115. Antone Honanie is a 33 year old member of the Hopi Tribe, a member of the Water Clan, a member of the Kachina society, a resident of the Village of Kykotsmovi and a lifelong practitioner of Hopi culture and religion. Trial Transcript at 555, lines 5-16; 556, lines 4-8; 557, lines 2-11.

116. Emory Sekaquaptewa is a 77 year old member of the Hopi Tribe, a member of the Eagle Clan, a member of the Kachina society, a Professor of Anthropology at the University of Arizona, and a lifelong practitioner of Hopi culture and religion. Trial Transcript at 572, lines 4-15; 573, lines 1-2, 6-7, 11-24; 575, lines 3-7.

117. Mr. Kuwanwisisma's employment with the Hopi Tribe requires his understanding of Hopi culture generally, as well as interaction with members of the Hopi Tribe from various clans, villages, ages, and understandings of Hopi traditional, religious, and cultural practices. Trial Transcript at 416, lines 12-15; 417, lines 1-25; 418, lines 1-11. Mr. Kuwanwisiwma also participated on behalf of the Hopi Tribe in consultations with the United States Forest Service regarding the proposed expansion of the Snow Bowl. Trial Transcript at 421, lines 1-10.

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118. Mr. Kuwanwisiwma testified in general regarding the Hopi traditional matrilineal clan system, the nature of the Kachina Society and initiation into its practices, and the nature and purpose of Hopi kivas as the background of Hopi traditional cultural and Kachina religious practices. Trial Transcript at 418, lines 14-25; 419, lines 9-25; 420, lines 11-19; 429, lines 4-13, 20-25; 430, lines 1-7.

119. Mr. Kooyahoma testified about how he was initiated into Hopi religious and cultural practices starting in 1948, and spent his life training to perform his cultural duties to his farm, his religion, and the Kachina. He has been prepared to someday be a priest in the One Horn Society. He is a caretaker and father to the Kachinas. Trial Transcript at 538, lines 6-15; 539, lines 12-20; 543, lines 9-10.

120. Mr. Honanie testified to the process of how Hopis learn about the Kachinas, what they mean to the Hopi, and how they relate to Hopi religion and culture. Trial Transcript at 558, lines 17-24; 559, lines 14-19; 560, lines 2-11.

121. Mr. Sekaquaptewa explained the significance of Hopi songs taught to all Hopis and their relation to the Kachinas. He testified to the connection between the Kachina practices, the Hopi way, and the everyday life in Hopi Villages. Trial Transcript at 583, lines 20-25; 584, lines 1-10, 19-22.

122. The San Francisco Peaks are known to the Hopi as Nuvatukya'ovi - the "Place of Snow on the Peaks." Trial Transcript at 423, lines 2-8.

123. There are more than 40 kivas located throughout the 12 Hopi Villages. The kivas are the focal point of all religious activity in the Hopi Villages and the central place to

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which the Kachina gather during their annual pilgrimage to and sojourn among the Hopi. Trial Transcript at 429, lines 4-25; 430, lines 1-7.

124. The San Francisco Peaks are of central importance to Hopi tradition, culture, and religion. There is a direct relationship between the Hopi way of life and the environment, including the Peaks. This relationship may be traced back for thousands of years. Trial Transcript at 423, lines 9-14, 20-25; 426, lines 13-25.

125. The San Francisco Peaks mark a cardinal direction defining the Hopi universe, the spiritual boundaries of the Hopi way. Trial Transcript at 580, lines 15-17; 581, lines 3-9.

126. To the Hopi, the Peaks are the residence of the Kachina, spiritual deities of the Hopi who travel from the Peaks to the Hopi Reservation to participate in traditional Hopi kiva practices and dances in response to petitions and prayers from the Hopi who are members of each kiva. Trial Transcript at 428, lines 9-13; 432, lines 12-16; 436, lines 1-9.

127. The Kachinas serve many purposes, among them is to teach lessons to the Hopi and warn them of the consequences of their improper actions. The teachings of the Kachina form the basis of the basic beliefs and mores of the Hopi people as lived out in their daily lives. Trial Transcript at 434, lines 12-24.

128. Kachina songs teach messages on the principals that a community must live by to stay viable, and for the Hopi, to achieve their destiny. Trial Transcript at 576, lines 17-25; 577, lines 1-4. Hopi children are taught these songs, "So that they can remember the words as they do their work and play in life." Trial Transcript at 577, lines 11-12.

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129. The Kachinas are teachers to the Hopi, teaching the Hopi life values, respect, how to be industrious, and teaching through song, dance, and prayer that are learned and heard by all Hopis. The Kachinas teach and show Hopis how to be better people and how to lead a good life. Trial Transcript at 443, lines 1-25; 444, lines 12-13; 558, lines 17-24; 559, lines 14-19; 560, lines 2-11.

130. The Hopi calendar connects the months and seasons in the Hopi year, the coming and the going of the Kachina from the Peaks, and the ceremonies performed in the kivas on the Hopi Reservation. Thus the Kachina define the passing of the months and the continuity of the Hopi culture. Trial Transcript at 434-8.

131. The Kachinas bring the blessing of rain in answer to Hopi daily and seasonal prayers. Trial Transcript at 558, lines 17-24; 559, lines 14-19; 560, lines 2-11.

132. Every Hopi is initiated into the Kachina Society. Trial Transcript at 441, lines 4-6.

133. The residents of one Hopi Village – Kykotsmovi - only have the Kachina Society and religion as part of their traditional practices. Trial Transcript at 556, lines 8-16.

134. The Kachinas respond to Hopi prayers - if the Hopi show the proper humility - by bringing water to the Reservation and to the world. Trial Transcript at 445, lines 2-25.

135. The practice of the Hopi way of life includes daily morning prayers to the Peaks and prayers to the Kachina on the Peaks for water for crops and to sustain daily life. Trial Transcripts at 542, lines 9-14.

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136. As Hopis grow and learn within the Kachina Society, they take on responsibilities as the teachers of the younger children, responsible for relaying the information taught them about the Kachina to the next generation. Trial Transcript at 561, lines 11-25.

137. The Kachinas are the bringers of the "gift burden" to the Hopi of rain and life, and serve to tie together the Hopi culture – the kinships and clanships tying all members of the community into one group. Trial Transcript at 576, lines 8-17; 586, lines, 20-25; 587, lines 1-11; 588 10-12.

138. The Hopi faith in Kachinas directly relates to their daily life of work in the fields, evidenced by the songs they sing of the Kachinas while working. This faith has been a characteristic of Hopi religion forever. Trial Transcript at 583, lines 20-25; 584, lines 1-10, 19-22.

139. The Kachinas come to the Hopi in response to prayers only if the peoples' hearts are in the right place. Trial Transcript at 582, lines 15-21.

140. The making of snow by artificial means, "is so contrary to what the beliefs of the Hopi people are about, what the Katsina beliefway is all about, and what the mountains represent to us." Artificial snowmaking such as is included in the proposed expansion of the Snow Bowl will defile the Peaks and profoundly affect the Hopi, their spiritual values, and will be a burden the Hopi carry forever. Trial Transcript at 451, lines 20-23; 453, lines 8-9, 13; 459, lines 18-20; 460, lines 13-14.

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141. Snowmaking will negatively affect the daily worshipping practices and will make the Kachinas unhappy. Trial Transcripts at 544, lines 1-15.

142. The proposed expansion of the Snow Bowl and the use of snowmaking with reclaimed water will effect the preparation for religious ceremonies and the mind set of the practitioners as they pray. Trial Transcript at 562, lines 19-25.

143. The proposed expansion of the Snow Bowl will result in difficulty in passing along to children the Hopi faith and harm to that faith in the minds of the practitioners. It will undermine their ability to carry out their religious and cultural duties to pass that faith and knowledge to the children. Trial Transcript at 563, lines 14-20; 564, lines 9-13; 565, lines 17-25; 566, lines 1-5.

144. The use of snowmaking on the Snow Bowl further undermines the integrity in which the Hopi hold the San Francisco Peaks. Trial Transcript at 600, lines 15-17.

145. Snowmaking at Snow Bowl is a profane activity – the use of the Peaks without conscience – which will undermine the cultural integrity, faith, and religion of the Hopi people, rendering the practice of the Kachina religion meaningless, "a performance for performance sake." Trial Transcript at 601, lines 6-25; 602, lines 3-5, 11-12.

146. Bill Bucky Preston testified that if the Snowbowl Facilities Improvement Project was allowed to go forward, it will destroy everything that Hopi people are because the mountain is so sacred. Trial Transcript at 133 lines 1-10.

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c. Testimony on the Impacts on the White-Mountain and Yavapai-Apache Religion

147. Plaintiffs collectively produced three witnesses to testify about the importance of the Peaks to the Navajo religion and the impact of the project. These included: (a) Ramon Riley (Cultural Resource Director for the White Mountain Apache Tribe, Native American Graves Protection and Repatriation Act representative for the White Mountain Apache Tribe, practitioner of the Apache religion); (b) Dallas Massey (Chairman of the White Mountain Apache Tribe); and (c) Vincent Randall (former Chairman of the Yavapai-Apache Nation, Council member for the Yavapai-Apache Nation, Apache historian).

148. Ramon Riley, Dallas Massey, Vincent Randall all testified that there are four sacred mountains to the Apache people. Ramon Riley testified that these four sacred mountains to the White Mountain Apache are the Black Mountain (Mount Baldy), the Turquoise Mountain (Mount Graham), the Red Mountain (Four Peaks), and the White Mountain (the San Francisco Peaks). Vincent Randall testified that the four sacred mountains to the Yavapai-Apache are the San Francisco Peaks, the Red Mountain just south of Fort McDowell, Pinal Mountain, and eastern Mount Baldy in New Mexico. Trial Transcript at 614 lines 16-22; 665 lines 7-9; 723 lines 23-25.

149. Ramon Riley testified that the San Francisco Peaks are where creation of the Apache people originated, stemming from the White Painted Lady landing on the San Francisco Peaks. Trial Transcript at 615 line 9.

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150. Dallas Massey testified that the testimony of Ramon Riley on the Apache belief system was accurate. Trial Transcript at 660 lines 23-25.

151. Ramon Riley testified that one of the important dieties, or Gaan, lives on the San Francisco Peaks. The "White Gaan" comes from the "Holy White Mountain" giving "everlasting life." Trial Transcript at 617 lines 10-12; 618 lines 10-11.

152. Vincent Randall testified that there are four groups of Gaan. "Depending on which ceremony[,] … which [G]aans … were called upon, those groups would come [from the San Francisco Peaks]." Trial Transcript at 696 lines 1-10.

153. Vincent Randall testified that the San Francisco Peaks is "a conduit[,] … the top of the Peaks is like a catapult for our prayers. That as we pray, that these prayers go to these four [sacred] mountains and shoot into space, so to say, to God." Trial Transcript at 694 lines 12-16.

154. Ramon Riley testified that two of the religious ceremonies in which the San Francisco Peaks play a role are the Sunrise Ceremony and the ceremonies performed by Crown Dancers. The "Sunrise Ceremony is the rights of passage for young ladies that go from adolescen[ce] to womanhood." The Crown Dancers perform healing ceremonies "used to heal people." "[W]hat we call polio today [was] healed by these Crown dancers." Trial Transcript at 615 line 12 to 617 line 12.

155. Ramon Riley testified that each of the four sacred mountains contain plants, called medicine, that are important to Apache culture. One of these medicines is white medicine, which can only be found on the San Francisco Peaks. The white medicine does

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not grow in one specific place every year, "it moves around." Trial Transcript at 619 lines 8-24; 638 lines 20-21.

156. Vincent Randall testified that holy herbs, medicines and tobacco used in religious rituals are collected on the San Francisco Peaks. "The [San Francisco Peaks] are holy, and that's the reason why the medicine is holy – more holy than any place else." Trial Transcript at 694 lines 17-22; 715 lines 21-22.

157. Ramon Riley testified that an Apache's spirit ends up going home to reside with its maker on the San Francisco Peaks. Trial Transcript at 619 lines 4-7.

158. Vincent Randall testified that the San Francisco Peaks is a holy Mountain, and that the proposed project "would make the holy place impotent." "Once something is desecrated and … God leaves that holy place, then it is no longer powerful as an intermediary to God himself." Trial Transcript at 700 lines 21-22; 701 lines 7-12.

159. Ramon Riley testified that the proposed project will have a large negative impact on the ability of the Apache people to perform the Sunrise Ceremony allowing a young lady to pass into womanhood and the Crown dancer ceremonies. "Some of the medicine people, including myself, will lose focus. Our medicine [and] our prayers [are] not going to be strong." Trial Transcript at 620 lines 11-21.

160. Ramon Riley testified that the proposed project "will probably destroy our people, our way of life." Trial Transcript at 624 lines 4-5.

161. Dallas Massey testified that the proposed project would "cause massive, continuing, and largely unmitigated damages to the physical and spiritual integrity of a

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widely recognized American Indian sacred site, National Register-eligible historic property, and fragile, already highly stressed ecosystem." Trial Transcript at 662 line 22 to 663 line 3, quoting Trial Ex. 1076 (his letter to the U.S. Forest Service regarding the DEIS).

3. Sunrise Ski Resort

162. Ramon Riley and Dallas Massey both testified that the Sunrise Ski Resort area on the White Mountain range is not a sacred area to the Apache people. Trial Transcript at 622 lines 10-16; 675 lines 6-11.

163. William London, Senior Manager of Mountain Operations and Business Development at the Sunrise Ski Resort, testified that he was not know of any religious or ceremonial significance of the area to the White Mountain Apache Tribe on which the Sunrise ski facilities are located. He also testified that he did not know of any opposition to snowmaking based on religious or spiritual beliefs. Trial Transcript at 1914 lines 9-14; 1913 line 24 to 1914 line 8.

164. Dean Cramblitt, Infrastructure Manager at the Sunrise Ski Resort, testified that the water treatment plants at the Sunrise Ski Resort receives waste stream the kitchens in the day lodge and the Cyclone lodge, and waste stream from bathrooms from the day lodge, Cyclone lodge, rental shop, ticket building, and an unoccupied cabin, which includes one shower. Trial Transcript at 1921 line 19 to 1923 line 25.

165. Doreen Ethelbah-Gatewood, Director of Environmental Programs for the White Mountain Apache Tribe, testified that Sunrise treatment plant processed water is

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discharged onto the ground. Some of that water discharges into East Becker Creek. Some of the water from East Becker Creek reaches Ono Lake and some does not. When asked if it is commonly understood that the water from Ono Lake can include the treated or reclaimed water, Ms. Ethelbah-Gatewood testified that there is no way of telling. Trial Transcript at 1918 lines 19-25; 1919 line 22 to 1920 line 8.

d. Testimony on the Impacts on the Havasupai Religion

166. Rex Tilousi, a plaintiff, is the Chairman of the Havasupai Tribe and a resident of the Northern District of Arizona, is a traditional practitioner of the Havasupai Religion. Trial Transcript at 233 lines 13-14.

167. Dianna Sue Uqualla, a plaintiff, is the Vice-Chairwoman of the Havasupai Tribe and a resident of the Northern District of Arizona, is a traditional practitioner of the Havasupai Religion. Trial Transcript at 291 lines 8-17.

168. The Havasupai Tribe is a federally acknowledged tribe maintaining a relationship with the United States of America with a reservation established by the Grand Canyon Enlargement Act, 16 U.S.C. §§ 228i which is within the Northern District of Arizona.

169. The Havasupai Tribe's main village is Supai. It is located in the bottom of the Grand Canyon and a majority of the tribal members reside in Supai. Trial Transcript at 233 lines 5-10.

170. The San Francisco Peaks were included within the Havasupai's traditional territory and traditionally exercised caretaker responsibility for the San Francisco Peaks,

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which the other Tribes in the region acknowledged. Trial Transcript at 244-5 lines 17-25 and 5-10.

171. The San Francisco Peaks are central to the Havasupais' traditional religion. Trial Transcript at 254 lines 20-25 and testimony of Rex Tilousi, Dianna Uqualla, and Roland Manakaja.

172. For the Havasupai Tribe the San Francisco Peaks are the origin of the human race, it is the point of their creation. Specifically, they believe that the water from the Peaks impregnated their Grandmother by the Sun Father melting the snow on the San Francisco Peaks. From the San Francisco Peaks comes life. Trial Transcript at 238-40 lines 22- 25, 1-25, and 1-12 and at 297 lines 7-14.

173. The Havasupai traditional practitioners pray to the San Francisco Peaks and visit them spiritually daily. Trial Transcript testimony of Rex Tilousi, Dianna Uqualla, and Roland Manakaja.

174. Mr. Tilousi, Ms. Uqualla, and the Havasupai traditional practitioners believe that the San Francisco Peaks are their connection to the Universe and the Peaks carry their prayers to the Creator or to Spirit. Trial Transcript testimony of Rex Tilousi, Dianna Uqualla, and Roland Manakaja.

175. The traditional practitioners of Havasupai religion deem the entirety of the San Francisco Peaks as one living being and that portions of the mountain cannot be carved out from the whole. Trial Transcript at 302 lines 9-22.

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176. The Havasupai traditional practitioners have gathered from the San Francisco Peaks ceremonial items, water, food, and fallen trees for fuel for hundreds of years and still use such article today. Trial Transcript at 264 lines 5-16 and at 248-9 lines 6-25 and 1-2 and at 250-1 lines 24-25 and lines 1-2 and at 296-7 lines 11-25 and 1-2 and at 302 lines 5-7.

177. The act of making snow and modifying the seasons is considered a profane act by the Havasupais. Trial Transcript at 246-7 lines 21 -25 and 1-2 and at 303-4 lines 20-25 and lines 1-7.

178. The Havasupai traditional practitioners believe that the reclaimed water which will be utilized by the Snowbowl will not be spiritually clean nor will be fit for humans in any form. It is their understanding that humans cannot cleanse the spirits of the dead from the reclaimed water which will flow from the Peaks. Trial Transcript at 247 Lines 8-14.

179. The Havasupais' religion utilizes water from the springs, seeps, and grips(sic) from the Grand Canyon water which they believes flows from the San Francisco Peaks for most if not all ceremonies. Trial Transcript at 263 lines 4-7 and at 299 lines 18-23.

180. Furthermore, the Havasupai traditional practitioners use spring water in their sweat lodges which is their purification ritual. It is there belief that their sweat lodges will no longer be effective for purification. Trial Transcript at 300-1 lines 13-25 and lines1-15 and at 361-2 lines 1-25 and -1-21.

181. The Havasupai traditional practitioners believe that the steam which carries the prayers and blessings to the Creator and humanity from the sweat lodge will be desecrated

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and ineffective because of the impurity in the water. Trial Transcript at 300-1 lines 13-25 and lines1-15 and at 361-2 lines 1-25 and -1-21.

182. The Havasupai traditional practitioners utilize the rocks from the San Francisco Peaks in their ceremonies including their sweat lodge. Trial Transcript at 250-1 lines 24-25 and lines 1-2 and at 302 lines 5-7.

183. The Havasupai believe that the water from snowmelt and rain from the San Francisco Peaks flows northwesterly into Cataract Canyon and into Supai Village. Trial Transcript at 263 lines 5-7, at 311-2 lines 18-25 and line 1, and at 341-2 lines 22-25 and lines 1-9.

184. Mr. Manakaja testified that he feared the induction of the reclaimed water into the Tribes water sources would burden his practice of his ceremonial sweat lodge, specifically: "It's going to impact mentally my spiritually. Every time I think about sprinkling that water on the rocks, I'm going to always think about this sewer that they're using to recharge the aquifer. That should never be that way." Trial Transcript at 360 lines 22-25.

185. Mr. Manakaja also testified that the use of reclaimed water will prevent certain ceremonies from being performed, including the "Baby Ceremony". Trial Transcript at 342, line 18-25 and at 343 lines 1-6.

186. During his testimony, Mr. Manakaja asked for forgiveness from the Creator for speaking about things that "the U.S. Courts are forcing me to speak about, but it is not time to do so." Trial Transcript 348 lines 6-11.

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187. Mr. Tilousi testified that Havasupai traditional religious practitioners are unable to discuss certain religious events until the seasons change. Trial Transcript 246, lines 21-25 and 247, lines 1-4.

188. Mr. Manakaja also testified that he anticipated the decline in the ceremonial aspect of the Havasupai religion, specifically "I'm concerned that if this proposal goes through, that our people may cease using the sweat lodge because of the impact and the effects that we may get from the breathing the organisms or the chemicals that may come off the stem which is going to be recharged much more." Trial Transcript at 362 lines 9-13.

189. Mr. William Victor testified that because of the geologic formations of volcanic rock which composes the San Francisco Peaks, the run off from rain and snow would directly filter into the ground water system. Trial Transcript at 1315-6 lines 22-25 and lines 1-3.

190. Mr. Victor testified that within the San Francisco Peaks Volcanic field there are a number of aquifers. There are shallow perched aquifers sporadically existing underneath the surface. Trial Transcript at 1324 lines 13-16.

191. Beneath the perched aquifers exists the Coconino Aquifer, or commonly referred to as the "C aquifer." Trial Transcript at 1324 lines 17-25.

192. Mr. Victor also testified that beneath the C-aquifer is the deep regional Redwall-Mauv Aquifer which is present throughout the Coconino Plateau. Trial Transcript at 1325 lines 3-11.

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193. Mr. Victor testified that much of the snow that the Snowbowl proposes to make will be lost to sublimation and turn into atmospheric gas. Trial Transcript 1316 lines 10-13.

194. He further testified that the gas would be subject to the weather currents prevalent within the region. Trial Transcript at 1388 lines 3-5.

195. Mr. Victor testified that a large fault existed with the region of the Snowbowl, referred to as the Mesa Butte Fault, served as a barrier to the flow of water from the San Francisco Peaks in a Northwesterly direction and directed water either in a Northeasterly direction to the Blue Spring or Southwesterly direction to the Verde Valley. Trial Transcript at 1336 lines 2-6.

196. Mr. Victor testified that intersecting fault can serve as conduits to flow in the directions of the intersecting fault. Trial Transcript at 1377 lines 11-14.

197. Mr. Victor testified that the Gray Mountain faults intersected with the Mesa Butte fault and were northwesterly trending faults. Trial transcript at 1376 lines 9-20.

198. Mr. Donald Bills testified that he co-authored a report regarding the flooding in Havasu Canyon, "When the Blue-Green Waters Turn Red." Trial Transcript at 1449 lines 4-7.

199. Mr. Bills indicated that the report included information from the flooding of 1910, which reported the flooding into Havasu Canyon to be from west and southern slopes of the San Francisco Mountains. Trial Transcript at 1453 lines 7-14.

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e. Testimony on the Impacts on the Hualapai Religion

200. Frank Mapatis, spiritual leader for the Hualapai Tribe, testified that through the Hualapai creation story, children are taught that the San Francisco Peaks are sacred, the water is sacred, and the plants are sacred. Trial Transcript, at 16 lines 9-13; 15 lines 14-25; 16 lines 1-25; and 17 lines 1-6.

201. Frank Mapatis testified that, as a spiritual leader, he uses the San Francisco Peaks to pray, collect plants and water, and to place childrens' placentas. Trial Transcript at 21 lines 2-13.

202. Frank Mapatis testified that there are no other sacred places to gather water to treat head illnesses, other than the San Francisco Peaks. Trial Transcript at 31 lines 21-23.

203. Frank Mapatis testified that people would get ghost sickness if they came in contact with the artificial snow made from reclaimed water or if they consumed animals that had been in contact with the reclaimed water. Trial Transcript at 43 lines 5-24.

204. Frank Mapatis testified that he would not be able to get the water from the San Francisco Peaks if the Snowbowl Project was allowed to go forward. He would not be able to practice his religion. Trial Transcript at 44 lines 16-25.

205. Frank Mapatis testified that if the Snowbowl Project was allowed to go forward, he would not be able to teach the water songs to the next generation. Trial Transcript at 46 lines 11-24.

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206. Hualapai Tribal Chairman Charles Vaughn testified that Frank Mapatis' testimony was consistent with the general beliefs of the Hualapai People. Trial Transcript at 88 lines 1-4.

D. DEFENDANTS HAVE NOT PROVEN A COMPELLING INTEREST IN THIS PROJECT

1. 'Multiple Use' Does Not Require a Ski Resort with Artificial Snowmaking on the Coconino National Forest

207. Coconino National Forest Peaks District Ranger Gene Waldrip testified that there is no mandate for skiing on the San Francisco Peaks. Mr. Waldrip testified that there was a mandate for recreation on the San Francisco Peaks under the Multiple Use Sustained Yield Act. Trial Transcript at 1159 lines 1-6; 1177 lines 21-25; 1175 lines 1-3.

208. Nora Rasure, Coconino National Forest Supervisor, testified that the Forest Service is mandated to provide outdoor recreation under the Multiple-Use Sustained Yield Act. Trial Transcript at 1641 lines 13-14; 1675 lines 20-22.

209. Nora Rasure testified that if she felt that her approval of the project was not supportable under RFRA that she could withdraw her decision. Ms. Rasure further testified that if she withdrew the Record of Decision in this case, she would not be concerned that it would run afoul of the multiple-use mandate. Trial Transcript at 1710-1711 lines 24-8.

210. Ms. Rasure also testified that there were approximately 1.8 million acres in the Coconino Forest and that the 777 acres in the SUP area make up only a very small percentage of the Forest. Ms. Rasure confirmed that whatever her decision on the project, it

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would not impact the Forest Service's ability to manage the remaining Forest. Trial Transcript at 1711-1712 lines 9 to 3.

211. Ms. Rasure testified that even if the proposed project was not allowed to go forward, that Snowbowl (which is located in Management Area 15) could still be managed as a ski area by the Forest Service. Trial Transcript at 1712 lines 4 to 8.

2. Skier Safety Issues are Not Adequately Addressed in this Project to Prove a Compelling Interest

212. John R. Murray testified that he believes that Snowbowl facilities, as they currently exist, accommodate guests' basic needs. Trial Transcript at 1830 lines 1-3.

213. John R. Murray testified that, compared to other ski resorts, trails at Snowbowl are narrow and steep. Trial Transcript at 1740 lines 3-5.

214. Gene Waldrip testified that he has safety concerns for skiers at Snowbowl skiing recklessly and the lack of visibility of Ski Patrol. Mr. Waldrip further testified that the EIS did not address reckless skiing or lack of Ski Patrol. Trial Transcript at 1055 lines 14-18; 1083 lines 6-9 and 18-25; Trial Ex. 1059.

215. However, Mr. Waldrip confirmed that the 2001 season was one of the safer seasons on record at Snowbowl with the number of collisions down. Trial Transcript at 1086 line 18-20; Trial Ex. 2001 C.

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216. There are more issues than skiers and snowboarders acting in an unsafe manner at Snowbowl. Other issues include counterfeit tickets, theft, drunk and disorderly, domestic violence, 'slope' rage. There are cultural changes where individuals are not acting responsibly and not understanding the assumption of risk inherent in the sport. These issues are not addressed in the EIS. Trial Ex. 2001 C at FS00033; Trial Transcript at 1087 lines 14-20; 1088 lines 3-15.

217. Gene Waldrip also testified that skiing is a dangerous activity, and that the inherently steep slopes at Snowbowl can cause safety risks. Trial Transcript at 1075 lines 16-19.

3. The Arizona Snowbowl's Contribution to the City of Flagstaff's Economy Does Not Constitute a Compelling Interest in this Case

218. Eric Borowsky testified that the fees paid to the Coconino National Forest for the Special Use Permit are deposited into the U.S. Treasury and do not go into the Coconino National Forest. Trial Transcript at 1985 lines 1-5; 15-17; Trial Ex. 1047 at 15.

219. Skier visitation is not a major contributor to the City of Flagstaff's economy. Trial Ex. 2780 at 3-119, 3-120, and 3-82; Trial Transcript at 2019 lines 6-25; 2022 lines 3-6.

E. DEFENDANTS HAVE NOT PROVEN THAT THEY USED THE LEAST RESTRICTIVE MEANS

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220. Nora Rasure confirmed that Alternative 2 would have the most significant and irreconcilable impacts on cultural values, when compared to the other alternatives. Trial Transcript at 1716 lines 7-11.

221. Ms. Provencio testified that Alternative 3 – which did not include snowmaking – would have been consistent with the purpose and need for the project and would have had less of an impact on Native American religion. Trial Transcript at 1233 lines 21-24; 1234 lines 10-11.

222. A snowplay area at an alternative location was not considered by the Forest Service. Trial Transcript at 1831 lines 5-25; 1832 lines 1-13.

223. Gene Waldrip testified that Snowbowl could have submitted an application for a test well to search for potable water for snowmaking and the Forest Service could have evaluated it, but Snowbowl did not submit that application. Trial Transcript at 1037 lines 16-18; 1038 lines 4-8.

224. Mr. Donald Bills a hydrologist with the United States Geologic Survey testified as the availability of water on the Coconino Plateau. Mr. Bills recently completed a science investigation report of the groundwater resources of the Coconino Plateau, the San Francisco Peaks are included within the ground water resources of the Coconino Plateau. Trial Transcript at 1419 lines 3-5.

225. William Victor testified that both the R-Aquifer and C-Aquifer provide reliable water supplies. Trial Transcript at 1325 lines 23-25; 1326 lines 4-8.

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226. William Victor testified that he estimated the cost to drill a well to supply water for snowmaking in a dry year would be more than a million dollars. Trial Transcript at 1356 lines 24-35; 1357 lines 1-6.

227. Donald Bills testified that an aggregate from a couple of wells in the Inner Basin of the San Francisco Peaks could supply a thousand gallons per minute. Trial Transcript at 1422 lines 10-12.

228. Donald Bills testified that it would cost between $500,000 to $1,000,000 to drill a large-capacity well in the Fort Valley area. He also testified that you would be guaranteed to find water if you drilled deep enough. Trial Transcript at 1430 lines 23-25; 1431 lines 1-3 and 21-22.

229. Donald Bills testified that a well could be drilled into the R-Aquifer in the San Francisco Peaks area and that would cost about $3 million. Trial Transcript at 1434 line 25; 1435 lines 1-7.

230. Donald Bills confirmed that there are presently wells in the R-aquifer that produce several hundred gallons per minute and wells in the C-aquifer that produce more than a thousand gallons per minute. Trial Transcript at 1452 lines 14-22; Trial Ex. 1186 at 134.

231. Ron Doba testified that out of the ten or eleven wells that the City of Flagstaff has drilled, nine have been successful. Trial Transcript at 1503 lines 17-21.

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232. Eric Borowsky confirmed that he received an estimate from United Drilling to drill a well in Ft. Valley into the C-aquifer for approximately $963,550. Trial Transcript at 2004 lines 13-25; 1-5.

II. CONCLUSIONS OF LAW

233. As an initial matter, it is well settled that the courts are prohibited from inquiry into the truth or falsity of religious beliefs. So long as those beliefs are sincerely held, the court's inquiry is at an end. *See e.g. U.S. v. Ballard*, 322 U.S. 78, 86-88, 64 S.Ct. 882, 88 L.Ed. 1148 (1944); *Thomas v. Review Bd. of the Ind. Emp. Sec*., 450 U.S. 707, 714**,** 716, 101 S.Ct. 1425, 1431, 67 L.Ed.2d 624 (1981) (**"**religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment Protection … Courts are not arbiters of scriptural interpretation").

234. There does not appear to be any basis for challenging the sincerity of plaintiffs' beliefs in this case. Nobody in the instant matter has questioned or challenged the sincerity of the beliefs held by the members of the plaintiff tribes and the individually named religious practitioners. Indeed, in the *Wilson* decision, the Forest Service stipulated that the Navajo and Hopi beliefs are religious and are sincerely held with respect to the San Francisco Peaks, and that the record contained abundant evidence supporting that stipulation. *Wilson v. Block*, 708 F.2d 735, 740 (D.C. Cir. 1983).

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A. RFRA AND THE "SUBSTANTIAL BURDEN" TEST

235. In *Emp. Division, Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990), the Supreme Court held that the First Amendment's Free Exercise Clause does not inhibit enforcement of otherwise valid laws of general application that incidentally burden religious conduct. The Court recognized, however, that the political branches could shield religious exercise through legislative accommodation. 494 U.S. at 878-890.

236. In direct response to *Smith*, Congress enacted the Religious Freedom Restoration Act of 1993 ("RFRA"), 107 Stat. 1488, 42 U.S.C. §§ 2000bb to 2000bb-4. *See Cutter v. Wilkinson*, 125 S.Ct. 2113, 2118, 73 USWL 4397, 161 L.Ed.2d 1020 (2005).

237. The stated purpose of RFRA was to "restore the compelling interest test as set forth in *Sherbert v. Verner,* 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened." 42 U.S.C. § 2000bb(b).

238. RFRA provides that, "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b)." Subsection (b) provides that, "Government may substantially burden a person's exercise of religion only if it demonstrates that the application of the burden to the person – (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. §2000bb-1(a),(b).

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239. Thereafter, in *City of Boerne v. Flores*, 521 U.S. 507, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997), the Supreme Court ruled that certain provisions of RFRA, as applied to state and local governments (not the federal government), were unconstitutional. In finding that Congress had exceeded its authority as to the states, the court in *City of Boerne* found, *inter alia*, that:

> [t]he stringent test RFRA demands of state laws reflects a lack of proportionality or congruence between the means adopted and the legitimate end to be achieved. . . . Claims that a law substantially burdens someone's exercise of religion will often be difficult to contest. *See Smith*, 494 U.S. at 887 ("What principle of law or logic can be brought to bear to contradict a believer's assertion that a particular act is 'central' to his personal faith?") . . .

City of Boerne, 521 U.S. at 533-534, 117 S.Ct. 2171. The Supreme Court further found that:

> the Act imposes in every case a least restrictive means requirement – a requirement that was not used in the pre-*Smith* jurisprudence RFRA purported to codify – which also indicates that the legislation is broader than is appropriate if the goal is to prevent and remedy constitutional violations.

City of Boerne, 521 U.S. at 535, 117 S.Ct. at 2171.

240. In short, the Supreme Court, in finding that RFRA went well beyond providing for protections afforded by the Constitution, recognized that the Act afforded even greater protections to the practice of religion than set forth in the pre-*Smith* cases. *Cf, e.g*, *Guam v. Guerrero*, 290 F.3d 1210, 1220-1222 (9th Cir. 2002) (holding that RFRA remains applicable to actions of the federal government); *O'Bryan v. Bureau of Prisons*, 349 F.3d 399, 400-401 (7th Cir. 2003) (same); *Kikumura v. Hurley*, 242 F.3d 950, 958-960 (10th Cir. 2001) (same); *In re Young*, 141 F.3d 854, 858-863 (8th Cir. 1998) (same).

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241. The evolution of RFRA did not end with *City of Boerne***.** Congress responded to the *City or Boerne* decision by enacting the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), 42 U.S.C. §§ 2000cc to 2000cc-5. *See Cutter v. Wilkinson*, 125 S.Ct. 2113, 2118, 73 USWL 4397, 161 L.Ed.2d 1020 (2005).

242. In RLUIPA, Congress, in pertinent part, amended the definition of "exercise of religion" in the RFRA statute, to ensure even more sweeping protections to religious practitioners.

243. Under RFRA as enacted November 16, 1993**,** the term "exercise of religion" meant the "exercise of religion under the First Amendment to the Constitution." 42 U.S.C. § 2000bb-2(4) (1993). With the enactment of RLUIPA in 2000, the definition of "exercise of religion" in RFRA was amended to mean, "religious exercise, as defined in section 8 of the Religious Land Use and Institutionalized Persons Act of 2000 [42 USCS § 2000cc-5]". 42 U.S.C. § 2000bb-2(4)(2000). The term "exercise of religion" under both the RFRA and RLUIPA since 2000 therefore means and includes, "any exercise of religion, whether or not compelled by, or central to, a system of religious belief". RFRA at 42 U.S.C. § 2000bb-2(4)(2000); RLUIPA at 42 U.S.C. § 2000cc-5(7)(A)(2000).

244. In other words, with the passage of RLUIPA in 2000, the RFRA definition of "religious exercise" has been substantially modified and relaxed. *See, Grace United Methodist Church v. City of Cheyenne*, 427 F.3d 775, 795, 796 (10th Cir. 2005); *Warsoldier v. Woodford*, 418 F.3d 989, 994 (9th Cir. 2005); *San Jose Christian College v. City of Morgan Hill*, 360 F.3d 1024, 1034 (9th Cir. 2004); *Kikumura v. Hurley*, 242 F.3d 950, 960

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(10th Cir. 2001); 42 U.S.C. § 2000cc-3(g) (stating that the RLUIPA shall be construed "in favor of a broad protection of religious exercise.").

245. It is in this context that the determination of whether or not a government action results in "substantial burden" on the exercise of religion must be made.

246. Under the current/applicable definition of "exercise of religion," the Ninth Circuit has established the following rule in determining whether or not a "substantial burden" exists as a result of government land use:

> [t]he government is prohibited from imposing or implementing a land use regulation in a manner that imposes a "significantly great" restriction or onus on "any exercise of religion, whether or not compelled by, or central to, a system of religious belief" . . . unless the government can demonstrate that imposition of the burden . . . is: (1) in furtherance of a compelling governmental interest; and (2) the least restrictive means of furthering that compelling governmental interest.

San Jose Christian College v. City of Morgan Hill, 360 F.3d 1024, 1034-1035 (9th Cir. 2004).

1. Plaintiffs Have Demonstrated That the Government Action at Issue Results in a Substantial Burden to Their Ability to Practice Their Religion

247. When the facts, as set forth extensively above, are applied to the rule articulated in *San Jose Christian College v. City of Morgan Hill*, 360 F.3d at 1034-1035, it is clear that the government action in the instant case imposes a significantly great restriction or onus on some exercise of religion, whether or not compelled by, or central to a system of religious belief.

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248. The plaintiff tribes and Native American practitioners have demonstrated that the government action at issue results in a substantial burden on their ability to practice their religion.

249. Indeed, in the instant case, the government repeatedly admits that the project as approved presents a significantly great onus or restriction on plaintiffs' exercise of religion. For example, in selecting Alternative 2, the Forest Service found, in part, that:

> snowmaking and expansion of facilities, especially the use of reclaimed water, would contaminate the natural resources needed to perform the required ceremonies that have been, and continue to be, the basis for the cultural identity for many of the tribes.

Trial Ex. 2780 (FEIS at 3-18); *see also, e.g*., Trial Ex. 3(a) (DEIS at 1-11) (Although the amended definition of RFRA specifically rejects a "centrality" test, the Forest Service recognizes that "[t]he San Francisco Peaks are central to the cultures and religious practices of many Native American tribes. . ."); Trial Ex. 3(b) (DEIS at 3-4) ("The San Francisco Peaks are associated with cultural practices and beliefs of living Native American communities that are rooted in their history and are important in maintaining the continuing cultural identity of their community.").

250. Without reiterating all of the facts set forth above, the Forest Service, for example, found, in part, with regard to the Navajo that:

> Doko'o-sliid (The San Francisco Peaks) in general, and Mount Humphrey in particular, are sacred to members of the Navajo Tribe of Indians. Doko'o-sliid has a unique religious significance on their daily religious lives; it has complete bearing on their daily personal lives and the longevity of existence for these members of the tribe, and has complete connection with daily songs and prayers to their super-natural beings.

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Trial Ex. 2757 (1979 EIS at 57-59).

251. Specifically with regard to the Hopi, the Forest Service has found, in part, that: "[a]ll of the religious ceremonies encompassed within Nuvatukyaovi demonstrate the sacred relationship of the Peaks to the Hopi people. . . The San Francisco Peaks are the spiritual essence of what Hopis consider to be among the most sacred landscapes in Hopi religion, the spiritual home of the Kachina . . . The ceremonies associated with the Peaks, the plants and herbs gathered on the Peaks, and the shrines and ancestral dwellings located on the Peaks are of central importance to the religious beliefs and practices of the Hopi People." DEIS at 3-8; *see* Trial Ex. 2780 (FEIS at 3-9).

252. Dr. Propper confirmed that the tribes view the San Francisco Peaks as a single being or entity. She also confirmed the Tribes' beliefs that you cannot hurt or harm a piece of the Peaks without affecting the whole entity. Trial Transcript at 1610 lines 20-22; 1611 lines 8-14; 1611 lines 23-25; 1612 lines 1-7.

253. Dr. Propper further confirmed that the Tribes believe that the project at issue will have a "devastating impact on their culture and religion." Trial Transcript at 1615 lines 14-17.

254. The testimony of the parties, as set forth above, is generally consistent with the Forest Service findings. The testimony demonstrates that the project will have a substantial burden on the plaintiffs' ability to practice their religion.

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2. Neither *Wilson v. Block*, 708 F.2d 735 (D.C. Cir. 1982), Nor *Lyng v. Northwest Indian Cemetery Assn.*, 485 U.S. 439 (1988) Have Any Application to the Instant Case

255. Defendants generally cite to *Wilson v. Block*, 708 F.2d 735 (D.C. Cir. 1982) and *Lyng v. Northwest Indian Cemetery Assn.*, 485 U.S. 439 (1988) as controlling, or at least informative, on the nature of the balancing test required under RFRA. These cases are, however, inapposite and do not control here.

256. As an initial matter, both *Wilson* and *Lyng* were First Amendment cases that predated the passage of RFRA, as amended. As a result, neither case considers the congressionally mandated definition of "exercise of religion" at issue in this case. No First Amendment claim was brought in the instant case. Both *Wilson* and *Lyng* are, however, further distinguishable.

257. In *Wilson*, the court held that plaintiffs had to demonstrate that "the government land at issue is indispensable to some religious practice. . ." Thus, according to the court, plaintiffs had to prove "that the religious practice could not be performed at any site other than that to be developed." 708 F.2d at 744.

258. Plaintiffs, in the instant case have, however, testified to, and the Forest Service has extensively documented, the sincerely held belief that the Peaks are a single living being or entity that cannot be carved up. By holding that the tribes can use other parts of the Peaks to pray and for their ceremonies, the D.C. Circuit has misconstrued the nature of the religion(s) at issue in this case. If, however, we properly consider the religions at issue (as we must) from the perspective of the believer, the SUP area is an "indispensable" part of the Peaks,

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just as the heart or other organ is an indispensable part of the body. *Cf, e.g*., *Muslim v. Frame*, 897 F.Supp. 215, 217 (E.D. Penn. 1995) ("Just as the government cannot justify restricting some forms of speech merely by pointing to other opportunities a person has to speak, so the government cannot limit particular exercises of religion by pointing to other religious practices that remain available. It would be curious to find that RFRA barred challenges to governmental restrictions on religion as long as the plaintiff could practice, say, two-thirds of his religion.").

259. Notwithstanding the foregoing, the "indispensable to" requirement applied by the *Wilson* court is contrary to the broad protections to "any exercise of religion, whether or not compelled by, or central to, a system of religious belief" contemplated by Congress in RFRA. *See* RFRA at 42 U.S.C. § 2000bb-2(4)(2000); RLUIPA at 42 U.S.C. § 2000cc-5(7)(A)(2000). Compliance with RFRA is what is at issue in the instant case.

260. It is also instructive that the *Wilson* court rejected plaintiffs' attempt to utilize *Sherbert* – indicating that *Sherbert* is only applicable in cases where the government penalizes adherence to religious belief by conditioning benefits. *Id*. at 741-742. This conclusion is contrary to the stated purpose of RFRA, which is, in pertinent part, to "restore the compelling interest test as set forth in *Sherbert v. Verner,* 374 U.S. 398 (1963) . . . and to guarantee its application in all cases where free exercise of religion is substantially burdened." 42 U.S.C. § 2000bb(b). Again, *Wilson* is at odds with the subsequently passed requirements of RFRA.

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261. Finally, even if the Court assumes, *arguendo*, that *Wilson* remains viable under RFRA, the inescapable fact remains that it was a decision from the D.C. Circuit. Here, the Ninth Circuit has provided a definition of "substantial burden" to the "exercise of religion" as defined in RFRA – in the context of government land use. *See*, *San Jose Christian College v. City of Morgan Hill*, 360 F.3d 1024, 1034-1035 (9th Cir. 2004). While decisions of other Circuits, like *Wilson*, can be instructive, the decisions of this Court are guided by the Ninth Circuit, which has not adopted the "indispensability" requirement of *Wilson*.

262. The Supreme Court in *Lyng v. Northwest Indian Cemetery Assn.*, 485 U.S. 439 (1988) is even further removed from the requirements of RFRA than *Wilson.*

263. The Supreme Court in *Lyng* expressly rejects the requirement to do any balancing. Indeed, according to the Court, "[e]ven if we assume that we should accept the Ninth Circuit's prediction, according to which the G-O road will 'virtually destroy the . . . Indians' ability to practice their religion,' the Constitution simply does not provide a principle that could justify upholding respondents' legal claims." *Id*. at 451-452.

264. The *Lyng* court does not apply the "compelling interest test" mandated by RFRA. Indeed, as stated in *Smith,* 494 U.S at 883, the case that RFRA sought to overturn, "we declined (in *Lyng*) to apply *Sherbert* analysis to the Government's logging and road construction activities . . . even though it was undisputed that the activities 'could have devastating effects on traditional Indian practices.'" It was this refusal of the Supreme Court to apply the *Sherbert* balancing test in *Smith*, and *Lyng* and other religious freedom cases

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brought under the Free Exercise Clause of the First Amendment, that Congress specifically rejected when it enacted RFRA.

265. In order to apply the reasoning of *Lyng* to the instant case the Court would have to ignore the express language of RFRA. It is obvious that *Lyng* implements neither the letter nor the intent of RFRA, as amended. *Lyng* cannot be applied to the instant case.

266. RFRA "applies to all Federal law and the implementation of that law . . . Nothing in this Act shall be construed to authorize any government to burden any religious belief." 42 U.S.C. § 2000bb-3(a), (c)(1993 as amended in 2000). *See also* H.R. Rep. No. 108-88, 103rd Cong., 1st Session (1993) at 6 ("[The] definition of government activity covered by the bill is meant to be all inclusive. All government actions which have a substantial external impact on the practice of religion would be subject to the restrictions of this bill.").

B. CONCLUSIONS OF LAW PARTICULAR TO THE "COMPELLING INTEREST" AND "LEAST RESTRICTIVE MEANS" REQUIREMENTS OF RFRA

267. RFRA prohibits government from substantially burdening a person's exercise of religion unless the government can demonstrate that the burden: (a) is in furtherance of a compelling governmental interest; and (b) is the least restrictive means of furthering that compelling governmental interest.

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1. The Forest Service has Not Demonstrated a Compelling Interest in the Expansion of Snowbowl as Proposed

268. The Court has determined that plaintiffs have met their burden of showing a "substantial burden." The burden now shifts to the government to demonstrate, in the first instance, the existence of a compelling governmental interest.

269. "Demonstrate" means to meet the burden of going forward with the evidence and of persuasion. Evidence which does not preponderate or is in equipoise fails to meet the required burden. 42 U.S.C. §§ 2000bb-1(b)(1), 200bb-2(3); *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 342 F.3d 1170, 1181 (10th Cir. 2003), *affd. en banc*, 389 F.3d 973 (10th Cir. 2004), *cert. granted*, 125 S. Ct. 1846, 73 U.S.L.W. 3619, 161 L.Ed.2d 723 (2005); *Kikumura v. Hurley*, 242 F.3d 950, 961, 962 (10th Cir. 2001); *Jolly v. Coughlin*, 76 F.3d 468, 477, 478 (2nd Cir. 1996).

270. Requiring the government "to demonstrate a compelling interest and show that it has adopted the least restrictive means of achieving that interest is the most demanding test known to constitutional law." *City of Boerne*, 521 U.S. at 534.

271. Compelling interest was defined in *Sherbert v. Verner*, 374 U.S. 389, 403, 406, 407, 83 S.Ct. 1790, 1793, 1795, 10 L.Ed.2d 965 (1963) as an interest that poses, "… some substantial threat to public safety, peace or order . . . in this highly sensitive constitutional area, 'only the gravest abuses, endangering paramount interest, give occasion for permissible limitation,' *Thomas v. Collins*, 323 U.S. 516, 530, 65 S.Ct. 315, 323, 89 L.Ed. 430. No such abuse or danger has been advanced in the present case …"

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272. In *Wisconsin v. Yoder*, 406 U.S. 205, 215, 92 S.Ct. 1526, 1533, 32 L.Ed.2d 15 (1972), the Supreme Court declared, in defining compelling governmental interests, that, "[t]he essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."

273. Cases interpreting RFRA have ruled that the compelling interest test cannot be met through generalized assertions of government interest, but must be measured by the specific action that would apply to the affected individuals. *See, O Centro Espirita Beneficiente UniaoDo Vegetal v. Ashcroft*, 342 F.3d 1170, 1181 (10th Cir. 2003), *affd. en banc*, 389 F.3d 973 (10th Cir. 2004), *cert. granted*, 125 S.Ct. 1846, 73 U.S.L.W. 3611, 161 L.Ed.2d 723 (2005) (government's interest in banning hallucinogens in general is not enough; government must demonstrate that it has a compelling interest in banning all uses of the actual substance needed for the tea utilized in Plaintiff's religious ceremony; and that the application of the substantial burden to the particular Plaintiff furthers a compelling interest, not merely application of the law in general); *Kikumura v. Hurley*, 242 F.3d 950, 961, 962 (10th Cir. 2001) (under RFRA, a Court does not consider the regulation in its general application, but rather considers whether there is a compelling government reason, advanced by the least restrictive means, to apply the regulation to the individual claimant).[4]

[4] Courts have found a compelling governmental interest "of the highest order" in preserving Native American culture and religion. *U.S. v. Hardman*, 297 F.3d 1116, 1127-1129 (10th Cir. 2002); *U.S. v. Hugs*, 109 F.3d 1375, 1378 (9th Cir. 1997). *See also, e.g., United States v. Dion*, 476 U.S. 734, 741, 742, 106 S.Ct. 2216, 2221, 2222, 90 L.Ed.2d 767 (1986) (Interior Department noted that the golden eagle is important in enabling many Indian

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274. The government has not met its burden of establishing a compelling interest – "the most demanding test known to constitutional law" – in the proposed expansion of the Snowbowl Ski area, including the use of reclaimed waste water to make snow.

275. Indeed, it is still not completely clear what the compelling interest is that is being asserted.

276. The Forest Service and ASR have asserted that the compelling government interest at issue in this case is based on the government's "multiple use mandate."

277. Nora Rasure, the Forest Supervisor and a named defendant in this case, however, testified that if she felt that her approval of the project was not supportable under RFRA that she could withdraw the decision. She also testified that if she decided to withdraw her approval of the project, such withdrawal would not run afoul of the "multiple use mandate." Trial Transcript at 1710-1711 lines 24 to 8.

278. What is not clear to the Court is how, if the Forest Supervisor withdraws her decision, there is no resulting impact on the Forest Service's multiple use mandate. On the other hand, the Forest Service appears to be arguing that if the Court were to essentially grant the exact same relief, this decision would somehow implicate a compelling governmental interest in this same multiple use mandate. This position cannot be supported.

Tribes, particularly those in the Southwest, to continue ancient customs and ceremonies that are of deep religious or emotional significance to them); *Rupert v. Director, United States Fish And Wildlife Service*, 957 F.2d 32, 34, 35 (1st Cir. 1992)(special and preferential treatment towards Native Americans, who have a unique legal status under Federal law).

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279. Notwithstanding the foregoing, Ms. Rasure also testified that there were approximately 1.8 million acres in the Coconino Forest and that the 777 acres in the SUP area make up only a very small percentage of the Forest. Ms. Rasure confirmed that whatever her decision on the project, it would not impact the Forest Service's ability to manage the remaining Forest. Trial Transcript at 1711-1712 lines 9 to 3.

280. Ms. Rasure further testified that even if the proposed project was not allowed to go forward, that Snowbowl (which is located in Management Area 15) could still be managed as a ski area by the Forest Service. Trial Transcript at 1712 lines 4 to 8.

281. Even assuming, *arguendo*, that the government's reliance on the "multiple use mandate" was appropriate – which is not clear in this case – the government has not demonstrated a compelling interest in the proposed expansion of the ski area.

282. Here it appears that the application of the multiple use mandate championed by the Forest Service is not appropriate. The fact is that the Forest Service is not required or mandated to provide or even permit skiing and snowboarding resorts on any Forest lands including the Peaks. Ski area permits are instead issued at the discretion of the Forest Service and the Secretary of Agriculture and may be cancelled altogether in whole or in part for various reasons, including a determination by the Secretary in planning for uses of the Coconino National Forest and the Peaks that the special use permit area is needed for a higher purposes. 16 U.S.C. § 497b; 36 C.F.R. § 251.53(n); *See also Estate of Hartman v. Jackson Hole Mtn. Resort Corp.*, 200 F.Supp.2d 1329, 1333-1340 (in wrongful death action arising out of a snowboarding accident at a ski resort on national Forest land, the Forest

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Service's regulation and monitoring of the permittee's skiing operations and activities fell within the discretionary exception to the Federal Tort Claims Act).

283. The Forest Service and ASR also argued that the compelling government interest in this case involves the financial concerns and interests of ASR. Under the exacting requirements set to establish a compelling interest as outlined above, the Forest Service cannot establish a compelling *government* interest in ASR's (a private company) financial well-being.

284. ASR further argued that their contribution to the City of Flagstaff's economy constitutes a compelling interest. However, this argument also fails to meet the exacting requirements of compelling interest. Indeed, it is far from clear that ASR even plays a significant role in the City of Flagstaff's economy. Trial Transcript at 1985 lines 1-5; 15-17; Trial Ex. 1047 at 15; Trial Ex. 2780 at 3-119, 3-120, and 3-82; Trial Transcript at 2019 lines 6-25; 2022 lines 3-6.

285. The Forest Service and ASR additionally argued that safety concerns about the current operations at the Snow Bowl constitute a compelling government interest in this case. As testified to by the Defendant's witness Ms. Provencio, at least one other alternative expansion option existed that also addressed the safety concerns expressed by ASR – Alternative 3, the expansion option that did not include snowmaking. *See* Trial Transcript at 1233 lines 21-25; 1234 lines 1-11; 1239, lines 11-22. Therefore, if Alternative 3 could have been chosen and thereby addressed safety, multiple uses, and other parts of the "purpose and

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need," the USFS cannot have a compelling government interest in the choice of Alternative 2.

286. In the instant case, the Forest Service has not sufficiently demonstrated the existence of a compelling governmental interest in the proposed project. As a result, this Court need not address the "least restrictive means" element of the RFRA balancing test. Even assuming, *arguendo*, that a compelling interest had been demonstrated, however, the Forest Service did not use the least restrictive means of accomplishing its goal.

2. The Forest Service has Not Demonstrated That it Utilized the Least Restrictive Means Available of Accomplishing its Goal

287. Even if this Court were to find and conclude that the Proposed Project furthers a compelling governmental interest, the Forest Service and Snowbowl have failed to meet the government's burden to demonstrate that the Proposed Project is the least restrictive means of achieving a compelling governmental interest.

288. Under the third prong of RFRA the Government must demonstrate, and bears the burden of going forward with the evidence, that the Proposed Project is the least restrictive means of furthering the asserted compelling governmental interest. 42 U.S.C. §§ 2000bb-1(b)(2) & 2000bb-2(3).

289. The Forest Service cannot meet its burden to prove least restrictive means unless it demonstrates that it, not Snowbowl, has actually considered and rejected the efficacy of less restrictive measures before adopting the challenged practice. Conclusory statements that the Project is the least restrictive means of achieving the asserted compelling

THE SHANKER LAW FIRM, PLC.
600 EAST BASELINE ROAD, SUITE C-8 • TEMPE, AZ 85283-1210
TELEPHONE (480) 838-9448 • FACSIMILE (480) 838-9433
HOWARD@SHANKERLAW.NET

governmental interest does not suffice. *Warsholdier v.Woodford*, 418 F.3d 989, 998-1001 (9th Cir. 2005). *See also Jolly v. Coughlin*, 76 F.3d 468, 478-480 (2nd Cir. 1996) and *May v. Baldwin*, 109 F.3d 557, 563-565 (9th Cir. 1997) ("The legislative history of RFRA also makes clear, however, that 'inadequately formulated prison regulations and policies grounded on mere speculation, exaggerated fears, or post-hoc rationalization will not suffice to meet the act's requirements … our holding should not suggest that prison officials can satisfy the demands of RFRA with mere assertions of unfulfilled security objectives. Where a prisoner challenges their justifications, prison officials must set forth detailed evidence, tailored to the situation before the Court, that identifies the failings in the alternatives advanced by the prisoner …".).

290. Similarly, the Court in *United States v. Hardman*, 297 F.3d 1116, 1129, 1130 (10th Cir. 2002) stated, " … the burden of building a record for our review falls upon the United States. *Werner v. McCotter*, 49 F.3d 1476, 1480 n. 2 (10th Cir. 1995). Mere speculation is not enough to carry this burden. *Sherbert*, 374 U.S. at 407, 83 S.Ct. 1790 ('The [State] suggest[s] no more than a possibility that the filing of fraudulent claims by unscrupulous claimants feigning religious objections to Saturday work might not only dilute the unemployment compensation fund but also hinder the scheduling by employers of necessary Saturday work … [T]here is no proof whatever to warrant such fears of malingering of deceit as those which the [State] now advance[s]."); *Yoder,* 406 U.S. at 224-25, 92 S.Ct. 1526 (calling for 'specific evidence' of the interests advanced and how

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600 EAST BASELINE ROAD, SUITE C-8 • TEMPE, AZ 85283-1210
TELEPHONE (480) 838-9448 • FACSIMILE (480) 838-9433
HOWARD@SHANKERLAW.NET

accommodation would affect them); *Werner*, 49 F.3d at 1480 (stating that 'the state must do more than simply offer conclusory statements' to satisfy its burdens)(citation omitted) …".

291. Ms. Provencio testified that Alternative 3 – which did not include snowmaking – would have been consistent with the purpose and need for the project and would have had less of an impact on Native American religion. Trial Transcript at 1233 lines 21-24; 1234 lines 10-11.

292. Nora Rasure confirmed that Alternative 2 would have the most significant and irreconcilable impacts on cultural values, when compared to the other alternatives. Trial Transcript at 1716 lines 7-11.

293. The project would have been less restrictive if the Forest Service had, for example, located the snow play area someplace other than on the Peaks. This was never even considered by the Forest Service. Trial Transcript at 1831 lines 5-25; 1832 lines 1-13.

294. Further, neither the Forest Service nor ASR thoroughly considered a water source other than reclaimed water. Although old well logs were reviewed, a test well was never drilled. Indeed, an application to drill one was never submitted by ASR. Trial Transcript at 1037 lines 16-18; 1038 lines 4-8. This is despite the fact that fresh water sources may be available. In fact, ASR received an estimate for drilling a fresh water well. Trial Transcript at 2004 lines 13-25; 1-5.

295. Even assuming, *arguendo,* that the Forest Service has a compelling interest in this project, they did not use the least restrictive means available to them to accomplish their goal.

THE SHANKER LAW FIRM, PLC.
600 EAST BASELINE ROAD, SUITE C-8 • TEMPE, AZ 85283-1210
TELEPHONE (480) 838-9448 • FACSIMILE (480) 838-9433
HOWARD@SHANKERLAW.NET

Respectfully submitted November 30, 2005.

THE SHANKER LAW FIRM, PLC.

By s/Howard M. Shanker
Howard M. Shanker
Tamera C. Shanker
600 East Baseline Road, Suite C-8
Tempe, Arizona 8583-1210
Phone: (480) 838-9460
Facsimile: (480) 838-9433
(Attorneys for Plaintiffs)

s/ Laura Berglan authorized 11/30/05
Laura Berglan
One of Plaintiffs Hualapai Tribe et al.'s Attorneys
DNA - People's Legal Services, Inc.
P.O. Box 765
Tuba City, AZ 86045
Tele: (928) 283-3211
Fax: (928) 283-5460

s/Lynelle K. Hartway authorized 11/30/05
Lynelle K. Hartway
One of Plaintiffs Hopi Tribe's Attorneys

s/ Alysia LaCounte authorized 11/30/05
Alysia LaCounte
One of Plaintiffs Havasupai Tribe et al.'s Attorneys

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Clerk of the Court
U.S. District Court, Dist. Of Arizona
401 W. Washington
Phoenix, Arizona 85003

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be hand-delivered on December
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Judge Paul G. Rosenblatt
U. S. District Court, Dist. Of Arizona
401 W. Washington
Phoenix, Arizona

COPY of the foregoing sent via ECF system
On November 30, 2005 to the following:

Rachel Dougan
General Litigation Section
Environmental & Natural Resources Division
U.S. Department Of Justice
P.O. Box 663
Washington, D.C. 20044-0663
Facsimile (202)305-0506
rachel.dougan@usdoj.gov
Attorneys for Federal Defendants

Philip Robbins
Paul Johnson
ROBBINS & GREEN, PA
3300 N. Central Ave., Suite 1800
Phoenix, AZ 85012-2518
Facsimile (602) 266-5369
par@rglaw.com
pgj@rjlaw.com
Attorneys for Intervenor ASR

Janice Schneider
Bruce Babbit
LATHAM & WATKINS LLP
555 11th Street, NW Ste. 1000
Washington, DC 2004
Facsimile (202) 637-2201
Janice.schneider@lw.com
Bruce.babbit@lw.com
Attorneys for Intervenor ASR

By: s/Laura Berglan