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Forest
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Date: June 8, 2005

Rex Tilousi
Chairman
The Havasupai Tribe
P.O. Box 10
Supai, AZ 86435

**CERTIFIED MAIL – RETURN
RECEIPT REQUESTED
NUMBER: 70002870000011350600**

Re: Appeal #05-03-00-0026-A215, **Havasupai Tribe Appeal**, Arizona Snowbowl Facilities Improvement Decision, Peaks Ranger District, Coconino National Forest

Dear Rex Tilousi, Chairman;

This is my review decision concerning the appeal you filed regarding the Record of Decision and Final EIS, which approves snowmaking using reclaimed water as a source, additions and modifications to the Snowbowl's lift and terrain network, improvements to day lodges and parking, and a lift-served snowtubing facility. This decision includes a Forest Plan amendment to update the Snowbowl Ski Area Master Plan.

BACKGROUND

Forest Supervisor Nora Rasure issued a decision on March 11, 2005 for the Arizona Snowbowl Facilities Improvement Decision as described above. The Forest Supervisor is identified as the Responsible Official, whose decision is subject to administrative review under 36 CFR 215 appeal regulations.

Pursuant to 36 CFR 215.17, an attempt was made to seek informal resolution of your appeal. The record indicates that informal resolution was not reached.

My review of this appeal has been conducted in accordance with 36 CFR 215.18. I have reviewed the appeal record and the recommendation of the Appeal Reviewing Officer. My review decision incorporates the appeal record.

APPEAL REVIEWING OFFICER'S RECOMMENDATION

The Appeal Reviewing Officer concluded:

- 1) The purpose and need was clear and the Proposed Action was appropriate and consistent with the purpose and need.
- 2) The project record shows that the environmental analysis was thorough, reasoned and in line with environmental laws and regulations.
- 3) The scoping and public involvement process was appropriate and effective in developing alternatives and evaluating effects.



- 4) The analysis and decision documented in the project record are consistent with national policy, direction and agency objectives.
- 5) The proposed project is consistent with the Coconino Forest Plan as amended with the exception of cutting eleven trees in a Mexican spotted owl (MSO) Protected Activity Center (PAC).
- 6) Several documents utilized and referenced in the record and in the analysis and decision-making process were not included in the project record.

APPEAL DECISION

At the onset, I wish to recognize the importance of the values and issues raised in your appeal. During my review, I gave them utmost consideration. After a detailed review of the record and the Appeal Reviewing Officer's recommendation, I affirm with instructions the Responsible Official's Arizona Snowbowl Facilities Improvement Decision with the following instructions:

- 1) The eleven trees scheduled for cutting in the PAC along the pipeline must be left in place in accordance with Plan direction.
- 2) Supplement the Project Record with the following documents and any other documents not included in the record that were used in the project analysis and decision-making process:
 - Coconino National Forest Plan
 - ISA & Report 1987-104-W White Vulcan Mine Settlement Agreement, in which San Francisco Peaks are formally determined eligible for the National Register.
 - July 14 and 28, 1998 letters to tribes informing them of CNF intent to nominate Peaks to National Register.
 - December 7, 1998 and January 28, 1999 letters to Havasupai and Hualapai attempting to set up meeting to discuss National Register nomination.
 - January 28, 1999 and November 22, 1999 annual consultation letters to San Juan Southern Paiute Tribe on National Register nomination process.
 - September 13, 1999 letters to tribes about proposal for snowplay area.
 - February 17, 2000 letters to tribes about feasibility work being conducted on Arizona Snowbowl.
 - June 20, 2002 pre-proposal letter to tribes.
 - December 2002 Arizona Snowbowl Scoping Response- Preliminary Issue Themes, meeting summary and second copy with notes.
 - May 12, 13, and 19, 2003 letters to tribes enclosing preliminary drafts of National Register nomination form.
 - Big Game status report for GMU 17, from Arizona Dept of Fish and Game, 2003.

- April 26, 2004 letters to ACHP, SHPO, Snowbowl and tribes with first MOA draft.
- August 9, 2004 letters to tribes advising them of a determination of adverse effect for all Snowbowl alternatives and request for MOA consultations.

My decision constitutes the final administrative determination of the Department of Agriculture [36 CFR 215.18(c)].

Sincerely,

HARV FORSGREN
Appeal Deciding Officer, Regional Forester

2 enclosures: Technical Review and Findings, ARO letter

cc: Mailroom R3 Coconino, Clifford Dils, Nora Rasure, Judy Levin, Judy Yandoh, Constance J Smith, Mailroom R3, Sandra Nagiller

REVIEW AND FINDINGS

of the

The Havasupai Tribe's Appeal**#05-03-00-0026-A215****Arizona Snowbowl Facilities Improvement Record of Decision****ISSUE 1: The EIS violates the American Indian Religious Freedom Restoration Act and the American Indian Religious Freedom Act.**

Contention: The approved action will result in the loss of cultural aesthetic and soils resources, as well as watershed, vegetation and wildlife resources, and will disproportionately adversely affect to Native Americans who hold the Peaks sacred. The decision violates the rights of the tribes to observe their traditional religious heritage.

Response: The Religious Freedom Restoration Act states that the government shall not substantially burden a person's exercise of religion without a compelling reason. AIRFA states that it is the policy of the United States to protect and preserve the inherent right of Native Americans to believe, express, and exercise their traditional religion, including access to religious sites, use and possession of sacred objects, and the freedom to worship through ceremonies. In *Boerne v. Flores* (521 U.S. 507), the Supreme Court found that the Religious Freedom Restoration Act (RFRA) exceeded Congress's power and reversed the judgment of the Fifth Circuit Court of Appeals which had affirmed RFRA's constitutionality (73 F.3d 1352). The constitutionality of RFRA as applicable to federal law remains questionable.

However, even if RFRA has continued applicability, the Forest Supervisor's decision does not substantially burden tribal members' exercise of religion in terms of the First Amendment to the Constitution (*Wilson v. Block*, 708 F. 2nd 735, cert. denied, 104 S. Ct. 371, 1983; *Northwest Indian Cemetery Protective Association v. Peterson*, 485 U.S. 439). The DEIS (PR #93, pp. 3-14 through 3-20) and FEIS (PR #199, pp. 3-16 through 3-30; PR # 200, pp. 25-39) document and disclose the sincere beliefs of many tribal members that the Snowbowl improvements, particularly the use of reclaimed water for snowmaking, will have a devastating impact on the spiritual values of the Peaks and will contaminate natural resources needed to perform ceremonies.

The decision to implement these improvements, however, does not prohibit individuals from practicing their religion. Nor does it coerce them into acting contrary to their religious beliefs or penalize them for practicing their religion. Tribal members have not identified any specific shrines or locations for ceremonies that will be impacted by the Snowbowl improvements (PR

#199, p. 3-8) and have not identified any plants, springs, or natural resources within the SUP (Special Use Permit) area that will be affected (PR #199, p. 3-12; #200, Comment 5.8, p. 27). Religious practitioners will still have access to the SUP area and the remaining 73,000 acres of the Peaks for religious purposes. The FEIS (#199, p. 3-18) and the MOA (Memorandum of Agreement, PR #199, Appendix D) provide that the FS will work with the tribes to assure continued access to special places on the Peaks and to natural resources needed for ceremonies and medicinal purposes and to assure that ceremonial activities conducted on the Peaks continue uninterrupted. The Forest will continue to consult with the tribes to accommodate religious practices.

In the ROD (PR #201, pp. 22-28), the Forest Supervisor acknowledges that the decision was a very difficult one. In making her decision she considered the purpose and need, the environmental and cultural effects, and the significant differences in cultural beliefs and perspectives regarding how the Peaks should be managed. The decision authorizes improvements within the existing ski area to provide a more consistent and safer recreation experience for the public and community while 1) mitigating the adverse effects identified by the tribes to the extent practical and possible, and 2) continuing to accommodate tribal cultural and religious use of the Peaks, recognizing that most of the Peaks are managed in a way much more closely aligned with tribal values. The Forest will continue to work with the tribes to attempt find ways to address tribal concerns.

Finding: While many tribes and tribal members have stated that the Snowbowl improvements will have an adverse impact on their religion, in terms of RFRA and the First Amendment to the Constitution, these impacts do not substantially burden the free exercise of religion.

ISSUE 2: Project violates the National Historic Preservation Act and Executive Order 13287 - Preserve America.

Contention A: The site of the proposed improvements was nominated as a historic site in 2000 and the FS decision fails to take this into account. The nomination requires consideration of the comment by Advisory Council on Historic Preservation and identifies the area as having great value to the public other than monetary value. There is nothing in the record to indicate that the FS provided the ACHP with an opportunity to comment or considered such. The EO 13287 is violated and this decision does not adhere as it fails to protect or preserve this sacred site which is eligible for inclusion on the national historic registry.

Response: The project record demonstrates that the Forest Service followed NHPA and 36 CFR 800 with regard to Advisory Council comment. The Council was notified of the adverse effect determination and invited to be a consulting party in the resolution of adverse effects (PR #99). The Council participated during development of the draft (PR #175) and signed the final MOA (Memorandum of Agreement, PR #212), documenting that the Forest Service had complied with NHPA. E.O. 13287 does not require complete preservation of historic properties but states that it is the policy of the federal government to advance the protection and continued use of historic properties, where consistent with agency missions, law and where appropriate. The ROD's decision rationale (PR #201, pp.22-30) addresses how impacts to the Peaks were considered in making the decision, along with other factors.

Finding: The record provides documentation that the Forest Service complied with NHPA and the regulations of the Advisory Council on Historic Preservation. The decision does not violate E.O. 13287.

Contention B: The “tribes” are referred to as a monolithic group, with the Hopi and Navajo Tribes as examples. The generic categorization by the federal government consultation process fails to uphold the government-to-government standard mandated in consultation requirements.

Response: The record (PR #190) and the ROD (PR #201, pp.8-9) clearly demonstrate that consultation was carried out with individual tribes on a government-to-government basis. Tribal responses were necessarily summarized in the ROD and FEIS discussions; however, individual tribal comments are preserved in the record (PR #39; #98; #200, Appendix B).

Finding: The record demonstrates that consultation with the tribes was carried out on a government-to-government basis.

ISSUE 3: Project violates the National Environmental Policy Act.

Contention A: The No Action Alternative is the environmentally preferred alternative. The agency should select the environmentally preferred action or consider other alternatives, such as designation of the San Francisco Peaks as a United Nations World Heritage Site.

Response: 40 CFR 1505.2 (b) directs the agency to specify the environmentally preferred alternative. However, there is no requirement under NEPA that the agency select the environmentally preferred alternative. The ROD outlines the Decision Maker’s rationale for selecting Alternative 2 over the environmentally preferred alternative.

With respect to the designation of the San Francisco Peaks as a United Nations World Heritage Site. “[A]n agency must look at every reasonable alternative, within the range dictated by the ‘nature and scope of the proposed action’ and ‘sufficient to permit a reasoned choice.’” *Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1520 (9th Cir. 1992). For an alternative to be reasonable, it must meet the stated purpose and need and address one or more issues. The formulation of alternatives is driven by significant issues identified in scoping (40 CFR 1501.2 (c)).

The purpose and need is identified in the FEIS (PR #199, p.1-6) “...1) to provide a consistent/reliable operating season, and; 2) to improve safety, skiing conditions, and recreational opportunities by bringing terrain and infrastructure into balance with existing demand.” Two issues were identified during the scoping process: 1) The installation and operation of snowmaking infrastructure as described in the Proposed Action, and the use of reclaimed wastewater as a water source, will impact cultural and spiritual values associated with the San Francisco Peaks and 2) Proposed ground disturbances and vegetation removal may result in permanently evident, visible alternatives of the San Francisco Peaks’ landscape (PR #199, pp.1-14 through 1-15).

Designation of the San Francisco Peaks as a United Nations World Heritage Site is not within the scope of the decision to be made and does not address the issues identified through the scoping process.

It is relevant to note that the Forest is currently working in consultation with tribes on completing a National Register nomination for the Peaks as a Traditional Cultural Property. Implementing Alternative 2 will not prevent such designation, nor would it prevent future designation of the San Francisco Peaks as a United Nations World Heritage Site.

Finding: NEPA does not require the selection of the environmentally preferred alternative, rather, it requires the environmental effects be analyzed and disclosed for each alternative. The agency determined Alternative 1 to be the environmentally preferred alternative, and provided rationale in the ROD as to why it was not selected. Designating the San Francisco Peaks as a United Nations World Heritage Site is not within the scope of the decision to be made.

Contention B: The purpose and need has not been thoroughly explored. There is no explanation of the criteria for classification of issues as significant, tracking or non-issues. The issue of impact of using reclaimed water on tribal cultural and spiritual values associated with the San Francisco Peaks is given significant status, but is not treated as such. Water quality issues are not classified as significant though the FEIS noted the effects on the non-human health as unknown, and species protected by the Endangered Species Act may be adversely affected. The issue of impacts of snowmaking on the local/regional water supply is classified as “tracking” but should be given significant status as this is the tribe’s sole potable water source.

Response: The purpose and need is clearly identified in the FEIS (p.1-6) “...1) to provide a consistent/reliable operating season, and; 2) to improve safety, skiing conditions, and recreational opportunities by bringing terrain and infrastructure into balance with existing demand.”

A proposed action, addressing the purpose and need, was subsequently sent out for scoping. Based on the responses received during the scoping period, the Forest Service identified specific areas (resources) of concern and two issues emerged from the scoping process related to heritage resources (PR #77, p.23). These issues warranted the creation of Alternative 3. In addition to these issues, a number of “resources requiring additional analysis and disclosure” were identified (PR #199, p.1-14). Watershed resources requiring additional analysis and disclosure are described on pages 1-19 through 1-21 of the FEIS, including the effects of using reclaimed water for snowmaking on water quality within the receiving subwatersheds and on aquifer recharge. Both the issues and the “resources requiring additional analysis and disclosure” framed the environmental effects analysis.

Finding: The Forest Service clearly identified the purpose and need. The proposed action was identified and a scoping period was provided for the purpose of identifying issues related to the proposal. Heritage issues led to the development of an additional alternative and other issues helped frame the analysis of environmental effects.

Contention C: The ROD relies on future agreements between the adversely affected parties, FS and Snowbowl to mitigate the environmental harms. The MOA between the tribes and FS is used by the ROD to answer concerns; however the MOA is weak and does little in the ways of protecting the San Francisco Peaks and mitigating tribal concerns.

Response: The record demonstrates that the Forest Service followed the Advisory Council regulations in developing the MOA, Memorandum of Agreement (PR #7, 67, 99, 140, 171, 212).

The summary of tribal consultation (PR #190) documents two letters and several follow-up phone calls to the 13 tribes requesting participation in development of the MOA and possible mitigation measures. While agreement on mitigation measures among all consulting parties is desired, the Advisory Council regulations do not require this. They only require that all parties be invited to participate and that all views be considered. Four tribes signed the MOA as concurring parties. The ROD (PR #201, pp. 25-26) acknowledges that there may be no mitigative actions acceptable to many tribes, but states that the MOA does provide some assistance, securities and safeguards that will be valuable in guaranteeing continued access to the Peaks and protection of special places on the Peaks.

Finding: The execution of the MOA by the Forest Service, SHPO, and Council documents compliance with NHPA and the Advisory Council's regulations, and addresses the resolution of adverse effects to the extent possible.

Contention D: The ROD and FEIS fail to indicate any agency consultation outside of the EPA.

Response: Chapter 5 of the FEIS identifies the agencies, organizations, tribal governments, and individuals who were contacted in the development of the FEIS. A description of public involvement and tribal scoping and consultation is presented in the FEIS Chapter 1 (PR# 199, pp.1-10 through 1-13) and in the ROD (PR # 201, pp.8-9). The ROD notes completion of Section 106 consultation with the Advisory Council on Historic Preservation (PR # 201, p.31), informal consultation with the US Fish and Wildlife Service (PR # 201, p.32), and on-going government-to-government consultation with various affected tribes.

Finding: The ROD and FEIS indicate that required agencies were consulted.

Contention E: The FS is making an environmental determination which is outside of their area of expertise. The effects on the environment have not been fully fleshed out. An important though infrequent step is a referral to CEQ of environmentally unsatisfactory federal action. FS says it adhered to these CEQ regulations but their interpretation should not be given deference.

Response: The regulations at 40 CFR 1504 outline the procedures for predecision referrals to the Council related to proposed federal actions determined to be environmentally unsatisfactory. It is the responsibility of the federal agency making the referral to the Council to advise the lead agency at the earliest possible time that it intends to refer a matter. Furthermore, it is the responsibility of the federal agency making the referral to follow the criteria and procedures outlined in 40 CFR 1504.2 and 1502.3.

Finding: No referral to the Council was made by any federal agency nor was a referral necessary.

Contention F: The Havasupai Tribe received very little consultation.

Response: The regulations implementing the National Environmental Policy Act require agencies to invite the participation of any affected Indian tribe (40 CFR 1501.7 (a) (1)) as part of the scoping process and after preparing a draft environmental impact statement, and before preparing a final impact statement the agency shall request the comments of Indian tribes (40 CFR 1503.1 (a) (2)(ii)). The FEIS (PR #199), ROD (PR #201), and the project record (PR #190) indicate multiple efforts to involve the Havasupai in the planning process, including:

June 20, 2002 –Coconino National Forest (CNF) Forest Supervisor sends letter to 13 affiliated tribes requesting early input and participation in the Snowbowl Upgrade proposal process.

June 24-26, 2002 –Gene Waldrip (District Ranger, CNF) contacts by phone, tribal representatives from Cultural Preservation Offices of 13 affiliated tribes to discuss Snowbowl proposal and pre-proposal meetings.

July 11, 2002 – Cooper (Peaks Ranger District Archaeologist, CNF) calls Manakaja (Havasupai Cultural Preservation Office) to discuss pre-proposal meeting with Hualapai and Havasupai.

September 23, 2002 – Forest Supervisor (CNF) sends a letter and Proposed Action to the 13 affiliated tribes.

October 17, 2002 – Waldrip (CNF) sends a letter to tribal members stating comments will be accepted beyond the 45-day comment period and throughout the process.

February 2, 2004 – Cooper (CNF) telephones tribal representatives from Cultural Preservation Offices of 13 affiliated tribes to discuss release of DEIS, tells them that she can set up any meetings or answer questions, and tells them to expect a Fed Ex copy of the DEIS today – if they do not receive it, please call.

February 2, 2004 – Cooper (CNF) faxes tribal representatives from Cultural Preservation Offices of 13 affiliated tribes the news release addressing DEIS release.

March 8, 2004 – Manakaja (Havasupai) contacts Cooper (CNF) and informs her that he has just received the DEIS (carried down by Andy Bessler - Sierra Club). Says he wants to request a comment period extension.

March 9, 2004 – Cooper (CNF) telephones Manakaja (Havasupai) and tells him that he received a call/fax informing him that the DEIS should arrive that day and to call if it didn't. Additionally, there is still 1 month left in the comment period. Said if he still wanted to, he could officially request an extension from Rasure (Forest Supervisor, CNF) in writing.

March 11, 2004 – Manakaja (Havasupai) contacts Ken Fredericks (CNF) and requests a public meeting and more copies of the DEIS.

March 11, 2004 - Waldrip (CNF) leaves a message with Manakaja (Havasupai) that we would be happy to accommodate a meeting

March 11, 2004 – Manakaja (Havasupai) leaves message for Cooper (CNF) stating that Havasupai would like to set up a public meeting.

March 22, 2004 – Cooper (CNF) leaves message for Manakaja (Havasupai) requesting a public meeting date.

March 24, 2004 – Cooper (CNF) called Manakaja (Havasupai) and gave CNF available dates for community meeting. Reminded Manakaja that comment period will end 4/13.

April 9, 2004 – Cooper (CNF) calls 13 tribes...reminding them that comment period for DEIS ends 4/13 and that to have appeal status they must respond.

In addition to these tribal contacts, open public meetings were held in Flagstaff on October 3, 2002, October 26, 2002, and February 2, 2004, and in Cameron on April 3, 2004

Finding: The FEIS, ROD, and the project record document efforts were made to involve the Havasupai in the planning process as required under 40 CFR 1500-1508.

Contention G: ROD says the need for snowmaking infrastructure will stabilize Snowbowl's investment, increase local employment levels, and boost winter tourism within the community. This is speculation by the FS and cannot be substantiated by the data. The FS has no obligation to ensure that a private entity remain financially solvent. There is no concrete economic proof that snow made from treated effluent will stabilize Snowbowl investment, increase local employment, or boost winter tourism.

Response: The FEIS analyzed the relationship between natural snowfall and skier visits (PR#199 pp. 3-106 through 3-107). Figure 3E-2 compared natural snowfall and skier visits over the last 22 ski seasons at Snowbowl. The analysis showed variation in snowfall at Snowbowl resulted in a similar variation in skier visits. When natural snowfall was low, so were skier visits. Table 3F-1 (PR#199 p.3-130) compared annual snowfall, ski area operating days and visitation at Snowbowl for the last 22 ski seasons. The analysis documented that operating days and resulting skier visits at Snowbowl were dependent on natural snowfall. Low snowfall years resulted in a low number of operating days at Snowbowl and low skier visits. Annual snowfall was recognized as a useful statistic in predicting skier visitation 79.6 percent of the time. Clearly snowmaking will allow for a consistent snow season and higher annual skier visitation that will stabilize Snowbowl's investment.

Volume 2 of the FEIS addresses comments related to the economic effects of Snowbowl and the proposed action on the Flagstaff area economy (PR#200 pp.94-151). Chapter 3 of the FEIS contains an indepth socio-economic analysis of the effects of Snowbowl and the proposed action on the Flagstaff area economy (PR#199 pp.3-73 through 3-128). The major conclusions of the analysis were the proposed action would result in a significant increase in total visitation to Snowbowl with a resulting impact of an additional 564 FTEs (full time equivalents) at Snowbowl and outside the ski area in Coconino County, and \$17.23 million in economic output in the Flagstaff area at the end of a ten-year planning period. The proposed action would also result in substantial increases in fees and taxes paid the public-sector. Short-term impacts of construction of the proposed action's ski area improvements would create 232 FTEs and \$21.24 million in economic output in Coconino County (PR#199 pp.3-85 through 3-86). The FEIS recognizes Snowbowl would still not be a major driver in the Flagstaff area economy but also recognizes Snowbowl would be a positive contributor.

The ROD, (PR#201 pp. 22-24 states Snowbowl provides a valuable public recreation experience to many people. The Coconino NF recognizes and values the social and recreational function the area serves in Flagstaff and other communities. Snowbowl provides a valuable service the Forest Service could not offer. The ROD recognizes that to continue to provide this service, the area's economic viability needs to be stabilized.

Finding: The FEIS adequately addresses the need for snowmaking at Snowbowl and the economic effects of the proposed action.

Contention H: There is no clear justification of the purpose and need for the project except to provide the permit holder a consistent and reliable season through snowmaking.

Response: As identified in the FEIS: “The overall Purpose and Need responds to two broad categories: 1) to provide a consistent/reliable operating season, and; 2) to improve safety, skiing conditions, and recreational opportunities by bringing terrain and infrastructure into balance with existing demand” (PR #199, p.1-6). While the first broad category speaks to the existing situation of inconsistent annual snowfall and addresses a need for a more consistent and reliable operating season, the second category is not based on economics. Rather, it responds to the existing situation as described in the FEIS (#199, pp.1-7 through 1-9) with respect to limited recreation opportunities, lack of infrastructure, and safety concerns.

Finding: The purpose and need was appropriately established and clear justification of the purpose and need, including a discussion of the existing condition, is presented in the FEIS.

Contention I: There is no nexus between expanding the ski season and increasing the carrying capacity of the day lodges, chairlifts and other ski area infrastructure for proper balance with current use levels. The selected alternative still does not meet Snowbowl’s needs of accommodating all patrons. Peak day visitation is in excess of 3,400 skiers at one time while the CCC is 2,835 skiers at one time. About 20 percent of the skiers on a peak day are unable to fully enjoy Snowbowl due to wait times and other issues.

Response: The FEIS (PR#199 pp. 1-7 through 1-10, pp. 3-129 through 3-149) addresses two purposes and needs for the proposed action. Purpose #1 is to ensure a reliable and consistent operating season at Snowbowl. Figure 1-2 compares natural snowfall at Snowbowl and skier visits over the last 22 seasons. It clearly shows low snowfall results in low skier visits. The proposed action will allow for a consistent and expanded ski season that will provide for the economic stability of Snowbowl.

Purpose #2 addresses the lack of balance between terrain and infrastructure at Snowbowl and current use levels. The lack of intermediate and beginner terrain results in overcrowded ski runs. The resort facilities are designed for a comfortable carrying capacity (CCC) of 1880. Skier visits though have grown significantly over the last twenty years resulting in crowded conditions in the area’s lodges and chairlifts. The proposed action will create more beginner and intermediate terrain, and expand the area’s CCC to the 2,825 skiers that was approved in the 1979 Environmental Statement. The FEIS (PR#199 p. 3-138) states average peak day attendance, 3,400 skiers, under the proposed action, will resemble historic trends of the past ten ski seasons. With the increased CCC of 2,825 skiers, peak day crowds that currently overburden the ski area’s infrastructure would be more comfortably accommodated.

Finding: The FEIS adequately addressed the effect of the proposed action on Snowbowl’s comfortable carrying capacity (CCC).

Contention J: Overcrowding in the past has resulted in environmental damage to the area from trash, refuse, trampling vegetation, noise and air pollution. The FS glosses over these concerns.

Response: The FEIS identifies overcrowding and associated environmental damage as part of the existing condition (PR #199, p.1-8). Furthermore, the purpose and need identifies the need to bring terrain and infrastructure into balance with existing demand (PR #199, p.1-6). Actions

proposed to address environmental damage resulting from overuse of certain areas include: developing/constructing a managed snowplay/tubing facility that would include parking, restrooms, and trash receptacles, reconstructing existing parking lots, and expanding existing lodges.

Finding: Overcrowding and associated environmental damage is clearly acknowledged as an existing condition and is identified as part of the purpose and need. Elements of the proposed action address this overcrowding.

Contention K: The FEIS notes that permanent scarring of the Peaks will occur. Permanent scarring cannot be undone in the future when the full impact of this decision is realized. The FEIS acknowledges irretrievable effects to visual resources for the useful life of Snowbowl. The permanent scarring of the mountain as depicted in the computer-generated virtual images is not acceptable (page 9 appeal).

Response: The regulations at 40 CFR 1502.16 (d) direct agencies to analyze the environmental effects of alternatives, including the proposed action. An effects analysis specific to aesthetic resources is presented in Chapter 3 of the FEIS (PR #199, pp. 3-57 through 3-72). Mitigations were developed as part of the alternatives to help minimize some of the effects related to aesthetics, they include:

- construct new structures with materials that blend with the landscape character,
- strategically locate and camouflage or screen all proposed fuel and water tanks, and
- straight edges in forest canopy will be avoided by feathering the layouts of proposed trails and by selectively removing trees of different species and ages to the extent possible (PR #199, p.2-29).

However, even with the implementation of mitigations, the FEIS discloses there will still be some effect to aesthetic resources. Table 2-5 (PR #199, p.2-43) notes with respect to Issue #2: *Proposed ground disturbance and vegetation removal may result in permanently evident alterations of the San Francisco Peaks landscape.* The table notes: “the peaks are viewed as a living entity, where any ground disturbances would be harmful.” Additional information on the effects of scarring is disclosed in the Heritage and Cultural Resources section in Chapter 3 (PR #199, p.3-21). The FEIS acknowledges the tribal perspective of the effects of scarring on the sacred landscape and that the associated spiritual and cultural impacts may in fact be considered irreversible in nature (PR #199, p.3-30).

Finding: The environmental effects associated with aesthetic resources were appropriately considered and disclosed in the FEIS.

Contention L: The FS Response to Comments (Vol. 2 p.6) refers to the 1983 Court of Appeals decision which affirmed the FS determination in 1979 to allow improvements at Snowbowl. The Agency contends that this is precedent setting. The circumstances under review in the current decision are distinct from those at issue now. The 1979 action involved only natural, wholesome God-given snow while this action uses wastewater without fully understanding the effects that it will have on the environment. There are two differences from the 1983 era. First the federal law has increased its recognition and understanding of Indian concerns over their cultural patrimony.

Second, this decision is far more sensitive a matter. We recognize that based on the 1983 decision, “The Forest Plan specifically refers to the Snowbowl in managing activities in Management Area 15.” But, it is disingenuous for the agency to conclude that a judicial determination addressed no different land management concerns from the instant case.

Response: The FS Response to Comment (PR#200, p.6 Comment 1.13) is in response to a comment requesting the removal of all Snowbowl facilities and restoration of the SUP Special Use Permit) area. In reference to the court ruling and previous EIS it states, “Therefore, because the alternative analyzing removal of the ski area was not selected, this decision was regarded as precedence setting and was followed by adoption of the Forest Plan for the CNF [1987], which directs continued operation of the Snowbowl. The Forest Plan specifically refers to the Snowbowl in managing activities in Management Area 15. Therefore, considering an alternative that calls for removal for the ski area would not be consistent with CNF management direction”.

Forest efforts to involve tribes and individuals have not cited the appeals court decision as a basis for approval of the proposed action without further analysis. The NEPA and scoping processes for the new 2005 EIS analysis considered and analyzed these new activities. The current project proposal of 2005 includes snowplay area development, snowtubing development, parking lot additions and snowmaking, which are not mentioned in the 1979 analysis. A new EIS, and a new decision has been issued and this appeal is part of the new process.

Finding: The new activities are disclosed and analyzed in the 2005 FEIS and Record of Decision which reviews the action in relation to requirements of NHPA, NEPA, NFMA and other laws governing the actions of the Forest Service.

Contention M: The actions of the decision makers reveal their bias and carries out the wishes of private business and associations (cites to National Ski Area Association MOU with FS and Forest Supervisor participation in Forest Service’s 100th anniversary celebration) for immediate gain without proper consideration of the detriment of the public and long-term effects on the environment.

Response: The decision maker is required to consider the alternatives described in the environmental impact statement (40 CFR 1505.1(e)). The decision to approve implementation of the selected alternative was made by Nora Rasure, Forest Supervisor on the Coconino National Forest. The ROD (PR #201, pp.22-30) presents the rationale behind the decision. While Rasure considered all resource issues and concerns described in the FEIS, she acknowledged focusing on three particular areas: The Purpose and Need for the improvements, the potential effects on cultural resources, and the affects and risks associated with using reclaimed water for snowmaking. A thorough discussion of rationale is presented for these areas.

Finding: The decision is based on the analysis of various resource issues and concerns presented in the FEIS and the rationale behind the decision is clearly presented in the ROD.

Contention N: Recent research has shown that global warming will continue to make it difficult for ski resorts to remain economically viable. The research theorizes that warmer temperatures will make artificial snowmaking increasingly inefficient and expensive if not impossible.

Response: The FEIS and Volume 2 of the FEIS addressed climate change and the possible effect on snowmaking at Snowbowl (PR#199 pp.3-225 through 3-228, pp.3-354 through 3-356, PR#200 pp. 211-217).

The feasibility study conducted to determine the sustainability of snowmaking at Snowbowl found even if regional temperatures warmed by as much as six degrees, the ability to produce 189 acre feet of snow for the Christmas holiday period would warrant the proposed investment in a snowmaking system.

The FEIS (PR#199 p.3-354) listed the potential implications of climate change for Snowbowl as shorter winters, warmer winter temperatures, faster and sooner snowpack melt, and increased elevation where snowpacks could be maintained. An increase in average temperatures would have more of an effect on ski areas at lower elevations. Snowbowl's base elevation of 9,800 feet offers a comparatively cold existing temperature and there would be less of an impact by temperature warming.

Finding: The FEIS adequately addressed the effects of warmer temperatures on the proposed action.

Contention O: Two issues relating to heritage concerns requiring additional analysis warranted the creation of an additional alternative. The issues are 1) the installation and operation of snowmaking infrastructure and use of reclaimed wastewater as impacting cultural and spiritual values, and 2) ground disturbances and vegetation removal may result in evident visible alterations (scarring). The tribes' concerns (Heritage and Cultural Resources) were disregarded and not addressed by the FEIS determination (that their concerns were addressed in the NEPA process). These issues are identified and acknowledged and are then dismissed, not addressed by the decision to approve the proposed action.

Response: The FEIS identifies the two issues noted above (PR #199, pp.1-14 through 1-15). The anticipated environmental consequences resulting from implementation of the three alternatives were evaluated with respect to these two issues (PR #199, pp.3-16 through 3-30). Volume 2 of the FEIS (PR #200) responds to comments on the DEIS (PR #93) that were submitted by various tribes. The decision rationale presented in the ROD (PR #201) documents consideration of potential effects on cultural resources, and the effects and risks associated with using reclaimed water for snowmaking.

Finding: Issues related to heritage concerns were not dismissed. Rather, the issues framed the discussion of environmental consequences and were thoroughly considered in making the final decision.

Contention P: The proposed impacts to the physical, cultural and spiritual qualities of the Peaks should be regarded as irreversible. Concerns of Native American Tribes are not addressed, they are dismissed as being purely spiritual sentiment.

Response: An irreversible commitment is a permanent or essentially permanent use or loss of resources; it cannot be reversed, except in the extreme long term (FSH 1909.15, 05). Concerns of Native American Tribes were identified as issues and subsequently framed the analysis of the environmental consequences. The Forest Service acknowledges the tribal perspective of the

effects of scarring on the sacred landscape and that the associated spiritual and cultural impacts may in fact be considered irreversible in nature (PR #199 p.3-30).

Finding: The FEIS, ROD, and project record demonstrate consideration of concerns raised by Native American tribes. The Forest Service acknowledges impacts associated with the selected alternative could be irreversible.

Contention Q: Contrary to requirements of law, cultural values of the tribes were not given any weight in the 1979 ROD (refers to Coconino National Forest's Collaborative Stewardship of the San Francisco Peaks document) and have not been considered in this 2005 ROD.

Response: The 2005 ROD (PR #201, pp. 8-9) reflects considerable tribal involvement in the planning process. The cultural values of various tribes were considered in the decision making process as reflected in the decision rationale (PR # 201, pp. 22-30). The Forest Service consulted with the Advisory Council on Historic Preservation as required by the National Historic Preservation Act of 1966 (PR #201, p.31). The decision also considered the American Indian Religious Freedom Act of 1978 and Executive Orders 13007 and 12898.

Finding: Legal requirements as well as the cultural values of tribes were considered in the decision making process for the 2005 ROD.

Contention R: The action will result in significantly increased cumulative effects of increased noise and traffic on Snowbowl road affecting natural resources. This will have a negative effect on Native people's traditional uses of natural resources.

Response: Cumulative effects are the effects on the environment which result from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions (FSH 1909.15, 05). The Environmental Consequences section of the FEIS considered the potential direct, indirect, and cumulative effects of increased noise levels associated with the proposed snowmaking system (PR #199, pp.3-35 through 3-39), as well as how the proposed action could affect traffic volumes and/or congestion on U.S. Highway 180 and/or the Snowbowl road (PR #199, pp.3-45 through 3-51), taking into consideration other uses of the road. Based on the analysis presented in the FEIS, no significant effects related to increased noise levels of traffic congestion are anticipated. With respect to Native people's traditional uses of natural resources in the area, the FEIS discloses the spiritual and cultural impacts resulting from the implementation of activities associated with Alternative 2.

Finding: A cumulative effects analysis related to noise and traffic impacts is presented in the FEIS.

Contention S: The overall ski season length that was used by the FS to determine annual visitation projections is flawed. The early closing of Snowbowl this year in mid-April shows that the operating season Snowbowl really seeks is when snow is light, not the late winter season when the most snowfall occurs on the Peaks. The underlying assumption that more operating days will result in an increase in skier visits is erroneous.

Response: The Snowbowl season is addressed in Volume 2 of the FEIS (PR #200 pp. 99, 112) and FEIS (PR #199, p 3-112). During the past 12 ski seasons (1993-2003) with natural snowfall, Snowbowl operated an average of 86 days with a range from four days to 138 days of operation. The proposed action will maintain consistency and extend the ski season at both ends allowing

for a 125-day ski season. Historically Snowbowl has been open in December and rarely in November when snow conditions permitted. Typically, skier visits decline in April when the weather is warmer and other recreational opportunities are available.

Figure 3E-3 (PR#199 p.3-108) compared operating days (days open) at Snowbowl and skier visits to the area over eight ski seasons. Operating days and skier visits were clearly linked. When operating days were low, skier visits were low. Table 3F-1 (PR #199 p.3-120) compared annual snowfall, ski area operating days and visitation at Snowbowl for the last 22 ski seasons. The analysis documented that operating days and skier visits at Snowbowl were dependent on natural snowfall. High snowfall years resulted in a high number of operating days at Snowbowl and high skier visits.

Finding: The ski season length used to project annual visitation was supported by the FEIS. The FEIS clearly documented the relationship between operating days and skier visits.

Contention T: The FEIS should analyze the economic value of the tribal people to the City of Flagstaff and Coconino County. By stating this is outside the scope of the analysis, the tribes continue to be socioeconomically, as well as culturally, disenfranchised from the lands that are the source of their traditions.

Response: The socio-economic effects of Snowbowl and the proposed action were analyzed in the FEIS (PR#199 pp.3-73 through 3-128). Analysis of the effects of visitor spending on the Flagstaff area economy was limited to Snowbowl visitors. Spending by Snowbowl visitors was not broken down by racial category. The FEIS did not analyze non-Snowbowl visitor spending in the Flagstaff area.

Finding: The socio-economic effects of Snowbowl and the proposed action were adequately addressed in the EIS.

Contention U : The Supai Village is the primary community for the Havasupai Tribe and Havasu Creek is the tribe's primary source of domestic water. In recent years, Supai Village has experienced increased flooding each spring. The unfiltered sewage snow will melt and flow directly into Havasu Creek. This will increase the risk of flooding in Supai Village and deleterious health effects upon the Havasupai people. The tribe's sole water source will be adversely affected. (Appellant cites also to violation of the Federal Water Pollution Control Act.)

Response: Water yield was not identified as an issue in project scoping (PR# 199, p. 1-14 to 1-24) since there is little, if any, sustained runoff or surface water in the Snowbowl area (PR# 200, p. 48). It is more than 20 miles from the Snowbowl to the headwaters of Havasu Creek. From that point, it is another 60 miles to Supai Village. (PR# 199, p. 1-5) Snowmelt derived from artificial snow that is not sublimated will infiltrate into the permeable ground surface (PR# 200, p. 48), posing no threat to Havasu Creek or increased flooding in Supai Village.

Finding: The environmental effects of snowmelt were appropriately analyzed and disclosed. There is no indication that the tribe's sole source water supply will be adversely affected or any violation of the Federal Water Pollution Control Act.

Contention V: The tribe's territory including Supai Village has been recently designated a national disaster area and has committed funding relief through FEMA. FEMA requires a

prevention and mitigation plan for future flooding. By allowing more water into Havasu Creek, the FS works against future prevention plans.

Response: The project analysis included the modeling of the duration & intensity of annual snowmelt compared to historic natural levels. Table 3I-12 (PR# 199, p.3-245) indicates that snowmaking will increase the amount of snow over normal precipitation in an average year by 10 percent. Considering that 60 percent of any snow will be lost to sublimation and evaporation, the increase snow potentially available for runoff is about 6 percent greater than non-augmented snowmelt (PR# 199, p.3-245, Table 3I-13). As disclosed in the FEIS, virtually all the melted snow will infiltrate into the underlying aquifer (PR# 199, p.3-212) and, as discussed in the previous Contention, the distance to Havasu Creek headwaters is more than 20 miles.

Finding: The environmental effects of increased snowmelt contribution on flooding risks in Supai Village were appropriately analyzed.

Contention W: The Havasupai Tribe's concerns with the dangers posed by hospital waste, increased pathogens and pharmaceutical residue from fecal matter, and potential toxins and diseases with long term negative effects on plants and fauna, and contribute to the degradation of natural springs were not adequately addressed in the FEIS. The conclusions regarding environmental damage is merely speculative and it is unknown how chemical contaminants present in reclaimed wastewater will affect the environment.

Response: Detailed effects on vegetation (PR#199, pp.3-280 through 3-299), wildlife (PR#199, pp.3-300 through 3-334) and ground water, including springs (PR#199, pp.3-160 through 3-224) are discussed in the FEIS. Extensive analysis on the fate and transfer of water through the aquifer was conducted and is contained in the project record (PR# 113). Recent monitoring of the reclaimed water indicates that all regulated parameters in the water currently meet the established numerical limits for Aquifer Water Quality Standards, which are equivalent to EPA's Primary Drinking Water Standards, and that no enteric viruses or parasites have been detected (PR# 199, p.3-206).

Finding: The FEIS analyzes and discloses effects on plants, fauna and natural springs.

Contention X: The 10 million gallon on-mountain recycled wastewater impoundment will be used for snowmaking, non-potable water needs and firefighting. Use will spread the wastewater far outside the Special Use Permit area. Water and wastewater are treated as a combined category in the FEIS, yet cross contamination of the potable and recycled wastewater supplies is not addressed. Water line breaks and seepage, which would distribute recycled wastewater outside of the Special Use Permit Area are not addressed.

Response: The main pipeline which carries reclaimed water from Thorpe Park to the storage impoundment will be buried to provide protection against breakage (PR# 199, p.2-5) and will include booster stations and hydrants which can be used to assist the main valves in controlling any unexpected water flows (PR# 199, p.2-6). The waterlines transmitting water from the storage impoundment area to the snowmaking equipment have been designed to back drain after each snowmaking period (PR# 199, p.2-7); thus posing little risk if breakage should occur. The reclaimed wastewater impoundment area will be designed and managed using numerous safety mitigation, seepage and stability features (PR# 199, pp.2-30 and 2-31). In any event, the water

in the pipeline and impoundment poses minimal risks to human health or the environment (PR# 199, pp.3-201 through 3-205). Monitoring is completed quarterly and submitted to ADEQ. Current monitoring shows that all regulated parameters in the reclaimed water meet the established numerical limits for Aquifer Water Quality Standards, which are equivalent to EPA's Primary Drinking Water Standards (PR# 199, p.3-206).

Finding: The FEIS adequately addresses potential contamination connected with use of reclaimed water for snowmaking.

Contention Y: The FEIS acknowledges that signs will be posted to inform the public not to ingest the snow or melted snow, however the effects to plants and animals that will ingest the snow and runoff are not addressed. It is not known what type of effects using reclaimed water will have on the wildlife.

Response: The effects of reclaimed water on wildlife were disclosed in the FEIS (PR #199, pp. 3-206 to 224, pp. 3-326 to 328) and the Response to Comments (PR #200, pp. 42-49, 160-162, and 164-165). The summary of these impacts is as follows:

- Direct consumption of snowmelt and surface runoff is limited due to the rapid infiltration and percolation of surface water in the area.
- Where direct consumption would occur, the concentrations of contaminants would be diluted by natural precipitation or mixing of natural snowmelt with reclaimed water snowmelt.
- While sublimation of snow from reclaimed water could concentrate solutes, this increased concentration would be insignificant compared to the dilution from natural snow and precipitation.
- The reclaimed water would not contaminate natural springs used by wildlife.
- The reclaimed water reservoir would be fenced to exclude most wildlife.

In addition, it is noted in the response to Comment 6.4 (PR#200, pp. 43-47) that most of the contaminants present in the water do not bioaccumulate, and that water consumption is not the major transmission route for most compounds.

Potential effects of the reclaimed water and snowmaking on vegetation are disclosed in the FEIS (PR#199, pp. 3-291 to 294) and in the Response to Comments (PR#200, pp. 151-152, 154-156). The summary of these effects are that the additional nitrogen will increase plant growth, and this may alter plant community composition by increasing forbs at the expense of perennial cool-season grasses. However, these effects would be limited to the cleared ski-trail and the immediately adjacent areas. Effects outside of these areas would be limited by the rapid infiltration and run-off, as well as dilution from natural precipitation, of the artificial snow.

Finding: The effects of the reclaimed water in the pond were analyzed and disclosed.

Contention Z: Dr. Paul Torrence of Northern Arizona University states that the FEIS fails 1) to protect human health concerns, 2) to employ well-known and accepted science in the analysis of snowpack melt behavior, 3) confuses the rationale involved in the Arizona Dept. of Environmental Quality classification of Class A plus reclaimed water for irrigation and 4) is replete with errors of scientific fact. Coconino National Forest did not seriously consider Dr.

Torrence's or other experts' comments. Recycled wastewater is a new technology, the long-term effects of which are not known.

Response: 40 CFR 1503.4 (a) requires that an agency preparing a final environmental impact statement shall assess and consider comments and shall respond by one or more of the means listed below, stating its response in the final statement: (1) modify alternatives including the proposed action, (2) develop and evaluate alternatives not previously given serious consideration by the agency, (3) supplement, improve or modify its analysis, (4) make factual corrections, and/or (5) explain why the comments do not warrant further agency response citing sources, authorities, or reasons which support the agency's position and, if appropriate- indicate those circumstances which would trigger agency reappraisal or further response.

The agency received several comments from Dr. Torrence (email, petition, open house, and letter) and responded to those comments in Volume 2 of the FEIS (PR #200, see Comments: 1.1, 1.2, 1.3, 1.4, 1.5, 1.6, 5.2, 6.1, 6.2, 9.1, 9.3, 10.2, 13.0, and 18.0).

The project record contains a rigorous technical analysis conducted by experts in the field of hydrogeology (PR# 113). This report contains over 40 citations specifically related to snowpack melt behavior and reclaimed water chemistry, including fate and transport in the environment, pharmaceutical and personal product residues, and uses in snowmaking (PR # 113, pp. 93-102). In the analysis, the fate of chemical constituents in the reclaimed water was evaluated based on calculations of precipitation, snowmaking water use, watershed losses and groundwater recharge expected under dry, average and wet conditions. The analysis discloses the anticipated effects on groundwater quality and clearly describes the limitations of the predictions due to the various physical, chemical and biological processes that occur as water infiltrates below ground and mixes with other groundwater. It is clear that there will be substantial attenuation of solute concentrations as the reclaimed water in artificial snow combines with natural precipitation and blends with existing groundwater as it moves through the aquifer (PR# 113, pp.86-88).

Finding: The agency utilized accepted science in its analysis and appropriately considered and responded to comments submitted by Dr. Torrence as required under the implementing regulation for NEPA.

Contention AA: The FEIS fails to adequately consider impacts on soils, vegetation and wildlife. The grading of terrain will result in substantial potential increase in sediment yield and a risk of soil loss. The effect to vegetation should be considered irreversible as was the effect to soils. The impact to meadows should be considered significant since meadows are very important to wildlife and in maintaining the biodiversity on the mountain. Contaminants and increased nitrogen levels in the recycled wastewater may affect plants. Chemicals used in artificial snowmaking could alter soil structure or runoff into water supplies. The mitigation will not protect wildlife that will come and drink from the snowmaking pond. The standards for reclaimed water are untested for wildlife.

Response: Detailed effects to soils are discussed in the FEIS (PR#199, pp.3-251 through 279) and effects to vegetation are discussed (PR#199, pp.3-280 through 3-299) where some irreversible vegetation losses are disclosed (PR#199 p.3-299).

Existing grassland plant communities (meadows) are discussed in the FEIS (PR#199, pp.3-280 and 3-281) and anticipated effects are disclosed (PR#199, pp. 3-288 to 3-289). The proposed action would result in permanent loss of 2.7 acres of montane grassland, representing 7.3 percent of the grassland in the SUP area and 0.3 percent of the grassland in the San Francisco Peaks, and temporary disturbance of 18.2 acres represents 49.2 percent of the grassland in the SUP area and 1.7 percent of the grassland in the San Francisco Peaks (PR# 199, pp.3-286, 3-288 to 289). This disturbance would mostly occur in areas previously disturbed by management (PR#199, p.3-288).

Effects to wildlife using grasslands are disclosed in the FEIS (PR#199, pp.3-300 through 334). Specific effects are disclosed on pages 3-318 through 321 for the following grassland species: Black-footed ferret, Navajo mountain Mexican vole, elk, pronghorn, Ferruginous hawk, and Gunnison's prairie dog.

Testing of the recycled water indicates that both nitrate and nitrite levels are well below all the existing water quality standards- including those for drinking water (PR#199 p.3-181). In addition, soil column testing was performed using soils from the SUP and treated wastewater from the City of Flagstaff (PR#199, pp.3-260 through 3-269). Results from this test and other controlled experiments disclose that there could be increased nitrogen available to plants (PR#199, p.3-267) which could increase the biomass of existing vegetation and enhance the re-vegetation process on newly disturbed areas (PR#199, p.3-277). Other potential effects of increased nitrogen on plant species composition and mortality are also analyzed and disclosed in the FEIS (PR# 199, pp.3-291 through 3-294). There will be no chemical nucleating agents used in the snowmaking process (PR#200, pp.51, and 238).

The issue of wildlife use of the water is discussed in Contention Y, above. The impacts of the pond are discussed in the FEIS (PR#199, pp.3-326 to 328) and in the Response to Comments (PR#200, p.163). The concern of wildlife being attracted to the water in the pond and then trapped will be mitigated by the construction of a fence. This will exclude most wildlife which may be trapped in the pond (PR#200 p.163). The FEIS notes that the fence could cause collisions with some birds, but this impact could be reduced through the use of orange netting in the fence (PR#199 p.3-327). The FEIS notes that the pond may benefit some birds as an additional available water source and through increasing abundance of arthropods (PR #199 pp.3-327 and 3-328).

Finding: The agency appropriately addressed and considered the effects on soils, vegetation, wildlife, and meadow ecosystems.

Contention BB: The Environmental effects of the snowmaking pond have not been taken into consideration. Activities associated with construction of the pond and its location may significantly impact the Traditional Cultural Property and further scar the San Francisco Peaks.

Response: 40 CFR 1502.16 (d) directs agencies to analyze the environmental effects of alternatives, including the proposed action. Construction of a 10,000,000 gallon snowmaking pond is disclosed in the proposed action (PR #199, p.1-9). The anticipated environmental effects associated with this aspect of the proposed action are analyzed in Chapter 3 of the FEIS (PR #199). Table 2-4 (PR #199, p.2-41) indicates 2.4 acres would be disturbed associated with the

snowmaking water impoundment. Table 2-5 (PR #199, p.2-43) summarizes the direct and indirect environmental consequences. With respect to Issue #2: *Proposed ground disturbances and vegetation removal may result in permanently evident alterations of the San Francisco Peaks landscape*. The table notes: “*the peaks are viewed as a living entity, where any ground disturbances would be harmful.*” Additional information on the effects of scarring is provided in Chapter 3 (PR #199, pp.3-21 and 3-58 though 3-69).

Finding: The environmental effects associated with the snowmaking pond were appropriately considered and disclosed with respect to scarring of the landscape.

Contention CC: As noted in the EPA’s comment letter, the selected alternative may negatively affect soil resources as the erosion hazards are severe and re-vegetation potential is low to moderate. The proposed mitigation chart treats these concerns as being low and easily fixable despite an expert agency’s opposite position.

Response: In their comment letter dated April 2, 2004, EPA rated the Draft EIS as “Lack of Objections” which means the EPA review did not identify any potential environmental impacts requiring substantive changes to the proposal. EPA did not state that the project would negatively affect soil resources. Nor did EPA express an opinion that ran opposite to the effectiveness or feasibility identified for the Best Management Practices or mitigations listed in Table 2-2 of the FEIS. Rather, EPA commented that the cumulative effects of other projects in combination with the proposed action may negatively affect soil resources **if left unmitigated** (emphasis added). The FEIS outlines Best Management Practices and Mitigations for soil and water resources (PR #199, pp.2-25 through 2-28) that would be implemented under the action alternatives.

Finding: The FEIS outlines Best Management Practices and mitigation measures that will be implemented to address soil resources and erosion hazards associated with the facility improvement activities being proposed.

Contention DD: The statistics regarding the nearly 10,000 public comments are not disclosed. We understand a large majority of the public comments opposed the proposed action, and these numbers should be disclosed in the FEIS instead of a supportive comment section.

Response: 40 CFR 1503.4 requires an Agency preparing a final environmental impact statement shall assess and consider comments both individually and collectively, and shall respond to comments. 36 CFR 215.6 (b) requires that the Responsible Official consider all substantive written and oral comments. Comments shall be placed in the project file and shall become a matter of public record.

All comments received in response to scoping as well as those made during the official comment period for the Arizona Snowbowl project are contained in the project record and are available for review. Volume 2 of the FEIS (PR #200) contains responses to comments received on the Draft Environmental Impact Statement. The “Supportive Comments” section is one of 26 categories of comments presented in Volume 2. Comments opposed to the proposed action may be found in the other 25 categories.

Finding: The Agency appropriately considered comments. Responses to comments are presented in Volume 2 of the FEIS. All comments received are contained in the project record and are available for public review.

Contention EE: Havasupai Tribe contends that FS failed to consider Alternative 3 a viable alternative. The FEIS responds to this comment by stating the FS has the ability to create a new alternative out of components of the alternatives, but this was not done. The ROD acknowledges the environmentally preferred alternative, no action and then dismisses it.

Response: 40 CFR §1502.14 requires agencies to evaluate the environmental impacts of the proposed action and alternatives, sharply defining the issues and providing a clear basis of choice among options. Section 1505.2 (b) directs the agency to identify all alternatives considered by the agency in reaching its decision and to specify the environmentally preferred alternative. There is no requirement under NEPA that the agency select the environmentally preferred alternative.

Chapter 3 of the FEIS presents a thorough evaluation of the environmental impacts anticipated for the three alternatives studied in detail. A summary of the direct and indirect environmental consequences associated with the implementation of each alternative is provided in Table 2-5 (PR #199, pp.2-43 through 2-61). This information supports the identification of Alternative 1 (No Action) in the ROD as the environmentally preferred alternative (PR #201, p.33). The ROD outlines the Decision Maker's rationale for selecting Alternative 2 over the environmentally preferred alternative.

Finding: The agency appropriately evaluated the environmental impacts of each alternative, including Alternative 3. The agency identified the environmentally preferred alternative (Alternative 1), and provided rationale for selecting an alternative other than the environmentally preferred.

Contention FF: This violates the Federal Clean Air Act as concerns expressed by EPA comment letter have not been adequately addressed.

Response: In their comment letter dated April 2, 2004, EPA rated the Draft EIS as "Lack of Objections" which means the EPA review did not identify any potential environmental impacts requiring substantive changes to the proposal. Rather, EPA recommended that the Final EIS evaluate air quality impacts from construction equipment emissions and mitigation measures to reduce these impacts. Specifically, EPA recommended evaluating the use of particle traps and other appropriate controls to reduce emissions of diesel particulate matter and other air pollutants. In response to EPA's comment, the Forest Service added the following mitigation measures:

- The primary contractor shall be responsible to ensure that all construction equipment is properly tuned and maintained.
- Idling time and construction-related trips will be minimized as appropriate.
- In order to minimize emissions and particulate matter, existing power sources and/or clean fuel generators will be utilized rather than temporary power generators.

Finding: The Forest Service appropriately responded to EPA suggestions by adding mitigation measures to address their comments.

ISSUE 4: The project decision violates Executive Order 12898 Environmental Justice.

Contention A: The Coconino National Forest did not consult with the Havasupai Tribe during the development of the DEIS on Environmental Justice so that the tribe could identify Environmental Justice issues. Also the analysis was reconstructed between DEIS and FEIS and made without the Coconino National Forest consulting with the Havasupai.

Response: The record (PR #190) indicates multiple attempts were made to involve the Havasupai in the planning process (refer to response under ISSUE 3, Contention F). Agencies are not directed or required to consult on “*Environmental Justice*” per se; rather, it is through appropriate use of existing public participation and consultation processes that agencies are alerted to potential issues/effects related to proposed activities that may result in disproportionately high and adverse environmental effects to low-income or minority populations.

In the memorandum (February 11, 1994) to heads of departments and agencies that accompanied EO 12898, President Clinton emphasized the importance of NEPA’s public participation process, directing that “each federal agency shall provide opportunities for community input in the NEPA process.”

It is through such input that agencies are alerted to actions that may have environmental justice implications. In the case of Snowbowl, during pre-proposal discussions and the formal scoping period, the Native American community and individual Tribes expressed significant concern related to the use of reclaimed water for snowmaking and the increased ground disturbance associated with additional ski area development. These issues were treated as significant, and an alternative was subsequently developed to address the concerns.

In February 2004, the DEIS was released to the public for comment. Included in the DEIS was an analysis and disclosure of the anticipated environmental impacts of the proposed action and alternatives. The previously identified heritage issues helped frame the discussion of environmental consequences.

During the official comment period, thousands of comments were received (PR #200); among them were questions related to Environmental Justice and EO 12898. The regulations at 40 CFR 1503.4 (a) require that an agency preparing a final environmental impact statement shall assess and consider comments and shall respond by one or more of the means listed below, stating its response in the final statement: (1) Modify alternatives including the proposed action. (2) Develop and evaluate alternatives not previously given serious consideration by the agency. (3) Supplement, improve or modify its analysis. (4) Make factual corrections. (5) Explain why the comments do not warrant further agency response, citing sources, authorities, or reasons which support the agency’s position and, if appropriate; indicate those circumstances which would trigger agency reappraisal or further response.

With respect to comments specifically related to Environmental Justice, the agency concluded a reconsideration of the Environmental Justice analysis presented in the DEIS was warranted. As

such, the section on this topic was improved and the analysis modified to address the concerns/comments received on the DEIS. Information presented in the Environmental Justice section of the FEIS (PR #199, pp 3-362 through 3-371) and Volume 2 of the FEIS (PR #200, pp 244-259) offer clarification regarding the intent of EO 12898.

Finding: There is no requirement to consult on Environmental Justice. The agency fulfilled the requirements of EO 12898 through NEPA's public participation processes. Opportunities for community input during project planning were provided and environmental justice concerns related to the proposed project and alternatives were appropriately identified.

Contention B: FS has failed to consider innovative measures that would provide opportunities for broader community input.

Response: In the context of EO 12898, CEQ recognizes the importance of NEPA's public participation processes and directs agencies to improve the accessibility of meetings, crucial documents, and notices (Environmental Justice – Guidance Under the National Environmental Policy Act, p 1). And, while there is no standard formula for how to carry this out, CEQ provides general guidance with respect to public participation including: *“Agencies should, as appropriate, acknowledge and seek to overcome linguistic, cultural, institutional, geographic, and other barriers to meaningful participation, and should incorporate active outreach to affected groups”* (Environmental Justice – Guidance Under the National Environmental Policy Act, p 9). As such, agencies are encouraged to explore various methods to enhance their outreach. Such methods may include but are not limited to: translating documents, providing translators at meetings, providing opportunities for public participation through means other than written communication, adjusting meeting sizes and formats, and/or using facilities that are local, convenient, and accessible (Environmental Justice – Guidance Under the National Environmental Policy Act, p. 130).

Methods employed for the purpose of gaining meaningful input on the Snowbowl project are summarized in the FEIS (PR #199, pp. 1-10 through 1-13). They included: sending scoping letters to 350 individuals and organizations, issuing press releases to key local and regional media outlets, publishing notices in the Federal Register, and hosting three open houses at the Flagstaff High School.

Throughout the planning process, special emphasis was placed on ensuring communication with Native American groups. In addition to standard types of information dispersal that included making multiple phone calls to alert/inform tribes of various phases of the planning process, sending formal letters, and hosting public information meetings on the Hopi and Navajo reservations, the agency explored other means to disseminate information and gain valuable input. Numerous government-to-government meetings were held at various locations including Tuba City high school, Kykotsmovi Community Center, and several Navajo Chapter houses; and an information booth was set up at the Tuba City flea market as part of the Western Navajo Fair. A Navajo translator was present at a public meeting in Cameron. With respect to Tribal involvement, a total of 219 phone/emails were made, 41 meetings held, and 245 letters exchanged, many within the context of government-to-government relationship (PR #190).

Finding: The project record shows creative means of outreach were used as deemed appropriate. The numerous comments received through these processes indicate broad community input was achieved.

Contention C: In the MOA the FS concludes that the determination of adverse effects applies to all the alternatives. The identification of an effect on environmental justice should heighten agency attention to alternatives according to CEQ, but this apparently had no effect on this decision.

Response: During pre-proposal discussions and the formal scoping period, the Native American community and individual tribes expressed significant concern related to the use of reclaimed water for snowmaking and the increased ground disturbance associated with additional ski area development. These issues were treated as significant, and an alternative (Alternative 3) was subsequently developed to address the concerns. Alternative 3 eliminated the snow play area and snowmaking using reclaimed water. While it was recognized that this alternative would have less effect than the proposed action, the continued presence of the ski area and the limited improvements proposed under Alternative 3 would still result in some level of impact. Thus, based on the Heritage and Cultural Resource analysis provided in the FEIS (PR #199, pp 3-3 through 3-30), a determination was made that each of the alternatives carry with them some level of disproportionately high and adverse environmental effect to Native Americans who hold the Peaks sacred (PR #199, p. 3-367).

The FEIS further disclosed the proposed action (Alternative 2) would represent the highest degree of potential disproportionate environmental impact to Native American cultures (PR #199, p. 3-370). Under NEPA, this determination does not preclude a proposed agency action from going forward, nor does it compel a conclusion that a proposed action is environmentally unsatisfactory (Environmental Justice – Guidance Under the National Environmental Policy Act, p 10).

Finding: The Agency analyzed the effects of the proposed action and alternatives, and disclosed the potential for disproportionately high and adverse environmental effects to Native Americans as required under NEPA and EO 12898.

ISSUE 5: The project is inconsistent with National Forest Management Act and the Coconino Forest Plan as amended.

Contention A: The use of artificial snowmaking with recycled wastewater to address an existing condition of “unreliable snowfall” or to “stabilize Snowbowl’s investment” was not a consideration in the 1979 Plan decision. The selected action was not specifically approved in the 1979 ROD and cannot be said to remain within the scope of the 1979 approvals.

Response: Artificial snowmaking with recycled wastewater was not considered in the 1979 Snowbowl EIS. Rather, the effects associated with this activity is appropriately analyzed and disclosed in the 2005 FEIS. Furthermore, the 2005 FEIS acknowledges that while many of the projects analyzed in the current FEIS are consistent with the 1979 Master Plan, due to the length of time that has passed since approval, the advent of new procedural requirements, and potentially changed conditions, *these approvals are no longer valid* (PR #199 FEIS pp.1-3

through 1-4). It is for these reasons that the forest initiated and completed a new analysis for the ski area.

With respect to the contextual scope, the current FEIS clearly states, “From the selected alternative identified in the 1979 ROD, this analysis carries forward the size of the ski area (777 acres) and the comfortable carrying capacity (CCC) of 2,825” (PR# 199 FEIS p.1-4). The FEIS does not imply that the current selected action was approved in the 1979 ROD, nor is there a requirement that the selected action be previously approved as part of the 1979 ROD. The decision made in the 2005 ROD is based on the analysis presented in the 2005 FEIS.

Finding: The effects associated with artificial snowmaking using recycled wastewater are analyzed and disclosed in the 2005 FEIS.

Contention B: Snowmaking and snowtubing are inconsistent with the Coconino Forest Plan. Amending the Plan to make it consistent with these components is not a minor non-significant amendment, but instead a new, major and significant change.

Response: Snowbowl is located in Management Area 15 of the Coconino National Forest Plan. Emphasis in this management area is on developed recreation. The current plan states the following with respect to management of Snowbowl: “*Facility development at the Snow Bowl ski area is guided by the Final Environmental Impact Statement of 1979*” (page 188 of Coconino Forest Plan as referenced in FEIS p B-2, not in record). As part of the Snowbowl decision, the Agency has proposed to replace this guidance with the following: “*Facility development at the Snow Bowl ski area is guided by the Ski Area Master Development Plan as based on approved NEPA analysis.*” Making this change will allow current and potential future proposals at the Snowbowl to be in compliance with Forest Plan direction.

The process for amending a forest plan is outlined in 36 CFR 219.10 (f). In amending a forest plan, the Forest Supervisor must determine whether a proposed amendment would result in significant changes to the plan. In the context of amending a forest plan, significance is determined by examining the following factors (FSH 1909.12, 5.32); (a) timing, (b) location and size, (c) goals, objectives, and outputs, and (d) management prescription. Appendix B of the FEIS (pp.B-1 through B-3) clearly describes consideration of these factors in determining whether the proposed amendment would result in significant changes to the Forest Plan.

Finding: Updating management direction in the Coconino Forest Plan to allow current and potential future proposals (as approved by NEPA analysis) is not a significant change with respect to timing, location and size, goals, objectives, and outputs, and management prescriptions.

ISSUE 6: The project is in violation of the Endangered Species Act.

Contention: In response to the U.S. EPA comments to the DEIS, the FS said that a Biological Opinion is not required. This provides evidence to the arbitrary and capriciousness of this decision.

Response: A list of Threatened, Endangered, and Proposed species for the project area is in the project record (PR#21). This list showed that the Bald eagle, Black-footed ferret, Mexican

spotted owl, and San Francisco Peaks groundsel were the only federally listed species in the project area. The Forest Service met with representatives of the U.S. Fish and Wildlife Service on July 31, 2002 to discuss the draft proposal and potential effects to listed and proposed species (PR#22). Effects to listed species are discussed in the EIS (PR#199) on pages 3-317 to 3-334 (for animals) and pages 3-289 to 3-297 (for plants). Detailed analysis of effects is found in the Biological Assessment and Evaluation (BAE at PR#134). The BAE found that the project would have “No Effect” on the Bald Eagle, Black-footed ferret, and critical habitat for the Mexican spotted owl. The BAE found that the project “May Affect, but is Not Likely to Adversely Affect” the Mexican spotted owl, the San Francisco Peaks groundsel, and critical habitat for the San Francisco Peaks groundsel. The information contained in the BAE was submitted to the U.S. Fish and Wildlife Service for concurrence on the effected species and critical habitat, as required under Section 7(a)(2) of the Endangered Species Act of 1973, on March 29, 2004 (Request for Concurrence Letter, PR#125). The U.S. Fish and Wildlife Service concurred with the determinations made by the Forest Service on July 8, 2004 (Letter of Concurrence, PR#157).

Additional information on the effects to San Francisco Peaks groundsel and the informal consultation are found in the Response to Comments on pages 151 (PR #200 Comment 10.3) and 158 (Comment 10.22). Additional information on the effects to the Mexican spotted owl and informal consultation are found in the Response to Comment on pages 162 (PR#200 Comment 11.5) and 168 (Comment 11.21).

Because the project determined that the effects to Mexican spotted owl and the San Francisco Peaks groundsel and its critical habitat were a “May Affect, Not Likely to Adversely Affect,” informal consultation under Section 7(a)(2) of the Endangered Species Act was completed. This type of consultation requires written concurrence with the effect determination from the Fish and Wildlife Service, which was obtained as noted above. A Biological Opinion is obtained through formal Section 7 consultation, when the effect determination is “May Affect, Likely to Adversely Affect.”

Finding: The decision complied with Section 7(a)(2) of the Endangered Species Act of 1973, as amended.



United States
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Agriculture

Forest
Service

Santa Fe National Forest

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File Code: 1570-1/2300

Date: June 8, 2005

Route To: ()

Subject: ARO, Appeals of Snowbowl Facilities Improvement Project EIS, Peaks RD,
Coconino National Forest

To: Harv Forsgren, Regional Forester
Appeal Deciding Officer

This is my recommendation on the disposition of the appeals filed regarding the Arizona Snowbowl Facilities Improvement Record of Decision and Final Environmental Impact Statement, which approves snowmaking using reclaimed water as a source, additions and modifications to the Snowbowl's lift and terrain network, improvements to day lodges and parking, and a lift-served snowtubing facility. This decision included a Forest Plan amendment to update the Snowbowl Ski Area Master Plan.

Background

Forest Supervisor Nora Rasure issued a decision on March 11, 2005 for the Arizona Snowbowl Facilities Improvement Decision as described above. The Forest Supervisor is identified as the Responsible Official, whose decision is subject to administrative review under 36 CFR 215 appeal regulations.

Pursuant to 36 CFR 215.17, an attempt was made to seek informal resolution of these appeals. The record indicates that informal resolution was not reached.

Review and Findings

My review was conducted in accordance with 36 CFR 215.19 to ensure that the analysis and decision are in compliance with applicable laws, regulations, policies and orders. The appeal records, including the appellants' issues and requests for relief have been thoroughly reviewed. Having reviewed the Environmental Impact Statement (EIS), Record of Decision (ROD), and the project record file, as required by 36 CFR 215.19(b), I conclude the following:

- 1) The purpose and need was clear and the Proposed Action was appropriate and consistent with purpose and need.
- 2) The Project Record shows that the environmental analysis was thorough, reasoned, in line with laws, regulations and national policy, and appropriate for the decision to be made.
- 3) The scoping and public involvement process was appropriate and effective in developing alternatives and evaluating effects.



- 4) The analyses and decision documented in the Record are consistent with the Coconino National Forest Plan direction as amended with the exception of cutting eleven trees in a Mexican Spotted Owl Protected Activity Center (MSO PAC).
- 5) The project record does not include several documents utilized in the analysis and decision making process.

Recommendation

I recommend that the Responsible Official's decision relating to these appeals be affirmed with the following instructions:

1. Supplement the project record with all documents used in the analysis and decision-making process.
2. Any tree cutting in the MSO PAC must be consistent with the Coconino Forest Plan direction.

/s/ Clifford J. Dils
CLIFFORD J. DILS
Deputy Forest Supervisor
Appeal Reviewing Officer

cc: Constance J Smith