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File Code: 1570-1/2300

Date: June 8, 2005

Wayne Taylor Jr.
Chairman
The Hopi Tribe
P.O. Box 123
Kykotsmovi, AZ 86039

**CERTIFIED MAIL – RETURN
RECEIPT REQUESTED
NUMBER: 70002870000011350570**

Re: Appeal #02-03-00-0018-A215, Hopi Tribe Appeal, Arizona Snowbowl Facilities Improvement Decision, Peaks Ranger District, Coconino National Forest

Dear Wayne Taylor Jr., 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 Hopi Tribe's Appeal**#05-03-00-0018-A215,****Arizona Snowbowl Facilities Improvement Record of Decision****ISSUE 1: The EIS violates the American Indian Religious Freedom Restoration Act.**

Contention: The Religious Freedom Restoration Act was not considered in the decision. The desecration that will occur on Nuvatukyaovi will visit extreme and irreversible harm on the ability of the Hopi to maintain their sacred relationship with Nuvatukyaovi and the Kachina who live there. These harms and desecrations constitute burdens on Hopi religious practices. The government does not have a compelling interest here.

Response: The Religious Freedom Restoration Act states that the government shall not substantially burden a person's exercise of religion without a compelling reason. 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 member's 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 plants, springs, natural resources, shrines or locations for ceremonies within the SUP area that will be impacted by the Snowbowl improvements (PR #199, pp. 3-8 and 3-12; PR #200, Comment 5.8, p. 27). Religious practitioners will continue to have access to the SUP (Special Use Permit) area and the remaining 73,000 acres of the Peaks for religious purposes. The FEIS (#199, p. 3-18), the ROD

(PR #201, p. 28) 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.

Contention A: The Forest Service failed to provide the Hopi Tribe a reasonable opportunity to participate in resolution of adverse effects as required by the regulations of the Advisory Council on Historic Preservation. The Hopi Tribe views the MOA as a flawed process that fails to recognize that there are no mitigation measures associated with Alternative 2 that are acceptable to the Hopi. The fact that an MOA exists between the Forest Service, Arizona SHPO and the Advisory Council does not establish that consultation with the tribes was adequate.

Response: The record demonstrates that the Forest Service followed the Advisory Council regulations in developing the MOA (PR # 7, 67, 99, 140, 171, 212, and 199 Appendix D). The summary of tribal consultation (PR #190, pp. 11, 13) documents two letters to the 13 tribes requesting participation in development of the MOA and mitigation measures plus several follow-up phone calls and meetings. In a June 2, 2004, letter (PR #148), the Hopi Tribe accepted the invitation to participate in the MOA consultation and indicated the tribe would set up an appointment to continue the dialogue. The record documents that the Forest followed up on June 29, 2002 with a phone call (PR #190, p.12) giving possible meeting dates, then with an e-mail on October 20, 2002 (PR #190, p. 13) inviting Hopi officials to talk with the CNF about the MOA, but there is no evidence of a reply from Hopi. While agreement on mitigation measures among all consulting parties is desired in an MOA, the Advisory Council regulations do not require this. They only require that all parties be invited to participate and that all views be considered (36 CFR 800.6(b)(2)). The execution of the MOA by the Forest Service, SHPO, and Council documents compliance with NHPA and the Council's regulations, including tribal consultation requirements, even though only four tribes signed the MOA as concurring parties. The ROD (PR #201, p. 25-26) acknowledges that, from the perspectives of many tribes, there may be no acceptable mitigating actions.

Finding: Although all tribes did not sign the MOA, the Forest Service provided the tribes a reasonable opportunity to participate in the resolution of adverse effects as required by the Advisory Council's regulations.

Contention B: The *Wilson v. Block* court of appeals decision did not approve the concept of ski area development on the San Francisco Peaks, contrary to a letter from Forest Supervisor Jim Golden to Tribes on June 20, 2002. The inaccurate description of and misplaced reliance on this decision demonstrates a lack of good faith. The numbers of tribes and individuals that are appealing this decision are different and have distinct claims from this earlier case.

Response: The appellant mischaracterizes Golden's letter. The letter seeks to involve the tribes in developing the proposal and demonstrates the Forest Service's good faith. The letter from Jim Golden to the tribes dated June 20, 2002, requested tribal input into the Snowbowl planning process. It summarized the *Wilson v. Block* case as a legal decision that allows the development of the Arizona Snowbowl and the construction of a number of facilities, within the permitted area. The letter did not cite the appeals court decision as a basis for approval of the action without further analysis. The letter did not limit participation to those tribes or individuals involved in the earlier process. The NEPA and scoping processes for the new 2005 EIS analysis considered and analyzed these new and distinct claims and participants.

The *Wilson v. Block* court of appeals decision (May 1983, District of Columbia Circuit Court, 708 F.2d 735, 228 U.S. App. D.C. 166) considered in detail the claims raised under the First Amendment Free Exercise Clause, the American Indian Religious Freedom Act, and the National Historic Preservation Act for the 1979 master plan decision on the Snowbowl ski area. The 1979 preferred alternative included the clearing of 50 acres of forest for ski runs, construction of a new day lodge, improvement of restroom facilities, reconstruction of existing chair lifts, construction of three new lifts, and paving and widening of the Snowbowl road.

In the *Wilson v. Block* decision, regarding the Free Exercise Clause, the court found that the government did not regulate, prohibit or reward religious beliefs as such, nor did it directly burden the tribes in their beliefs. The proposed expansion was not shown to prevent tribes from engaging in any religious practices, as those practices and beliefs have managed to coexist with the diverse developments that have occurred in the past on the Peaks.

In the *Wilson v. Block* decision, in regard to the American Indian Religious Freedom Act, the court found that development of the Snowbowl under the 1979 EIS will not deny access to the Peaks or prevent people from collecting religious objects.

Finally, after remedy work was done, the court in the *Wilson v. Block* decision found that the Forest Service had complied with the National Historic Preservation Act in all respects.

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 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 C: The Forest Service's decision on the Snowbowl prior to completing the National Register nomination prevented the tribes from having a reasonable opportunity to participate in the resolution of adverse effects.

Response: The nomination of a property to the National Register is not required for compliance with the Advisory Council's regulations, only a determination of eligibility (PR #40; PR #93, pp 3-4; PR #199, pp 3-6 through 3-7; PR #200, Comment 5.2, p.25). The regulations require federal agencies to evaluate the significance of identified properties by applying the National Register criteria (36 CFR 800.4(c)). If determined eligible, the agency then applies the criteria of adverse effect in consultation with the SHPO and any tribe that attaches religious and cultural significance to the property (36 CFR 800.5). The regulations do not require that the property be nominated to the National Register. The Peaks were determined eligible in July 2000 (PR #40). Between April and November, 2004 the project record (PR # 190, pp.11-14) documents several letters to tribes, numerous phone calls, and several meetings with tribal officials to request input on the resolution of adverse effects and the MOA.

Finding: The fact that the National Register nomination was not completed prior to the decision did not preclude tribes from having a reasonable opportunity to participate in the resolution of adverse effects. The execution of the MOA by the Forest Service, SHPO, and Council documents compliance with NHPA and the Council's regulations, including tribal consultation requirements.

Contention D: Throughout the ROD and FEIS "the tribes" are referred to generally as a monolithic group, with the Hopi and Navajo Tribes sometimes presented as examples. The federal government consultation process does not comply with government-to-government consultation requirements, instead focusing on "tribes" as the consulting entity. The tribes are unique cultures and separate governments and should have been treated as such in the FEIS.

Response: The FS is required to consult with Indian tribes based on several different laws, regulations, and policies, including: the National Historic Preservation Act; Executive Order 13007, Indian Sacred Sites; Executive Order 12898, Environmental Justice; E.O. 13175, Consultation and Coordination with Indian Tribal Governments; and Forest Service Manual 1563, American Indian and Alaska Native Relations. The record (PR #190) and the ROD (PR #201, p. 8-9) clearly demonstrate that consultation regarding the proposed Snowbowl improvements 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, 70, 98, 109, 200, Appendix B).

Finding: The record demonstrates that consultation with the tribes was carried out on a government-to-government basis and that tribes were provided an opportunity for meaningful and timely input.

Contention E: The combined effect of increased noise, traffic, parking, ski area access and air quality issues were not adequately considered. The FEIS should have analyzed the application of noise control measures appropriate to places of solitude like the Grand Canyon. Without such controls it may be difficult for Hopis to practice their religion. The FEIS should have explored ways of mitigating these impacts.

Response: Noise (snowmaking and construction) created by the proposed action and alternatives was extensively analyzed in the FEIS (PR#199, pp.3-31 through 3-39) and addressed in Volume 2 of the FEIS (PR#200, pp.91-92, 185, 187). As there is no direction in policy, regulation or law on what noise standards should be used in this type of analysis, HUD (US Department of Housing and Urban Development) exterior noise standards were used. The potential effect of project-generated noise from snowmaking was investigated for Hart Prairie and Fort Valley (residential housing area). It was determined from Fort Valley the snowmaking system would not be audible. From a distance of 1.5 miles and closer (Hart Prairie) the snowmaking system would be audible and above ambient noise levels.

There is no wilderness standard or criteria for measuring the acceptability of noise effects from within a designated wilderness area. There is no Forest Service direction that management activities cannot be heard within a designated wilderness area. The FEIS documented the proposed snowmaking system would be audible, and would be above ambient noise levels immediately within the Kachina Peaks Wilderness. These noise levels would decrease with distance from the snowmaking systems. Most snowmaking would take place at night during the winter months when anticipated use of the Kachina Peaks Wilderness would be low.

Finding: The FEIS adequately evaluated and disclosed the effects related to noise of the proposed action.

ISSUE 3: Project violates the National Environmental Policy Act.

Contention A: FS failed to adequately consider the cultural interests of the Hopi Tribe. FS's decision is not supported by adequate scientific information concerning the cultural connection and relationship of the Hopi people to Nuvatukyaovi and the impacts on the Hopi people and their culture resulting from the despoiling and desecration of Nuvatukyaovi by the project. The FEIS gave short shrift to tribal cultural concerns and tout economic benefit to the owners of the Snowbowl as the guiding principle. Findings in the FEIS describing the adverse effects to the Hopi Tribe were not used in making the decision (see cites in appeal). The FEIS shows a superficial understanding of the importance of Nuvatukyaovi to the Hopi Tribe. The body of ethnographic literature that is available was not consulted (references given in appeal). The proposed impacts to the physical cultural and spiritual qualities of the Peaks should be regarded as irreversible.

Response: The FEIS (PR #199, p 3-9 through 3-11) specifically recognizes the sacred relationship of the Peaks to the Hopi people, notes the peaks are the spiritual home of the Katsinam (Kachinas), and clearly acknowledges the presence of shrines and ancestral dwellings that are of central importance to the religious beliefs and traditions that are at the core of Hopi Culture. These findings do not contradict the breadth of scientific literature supporting the

central importance of Nuvatukyaovi in Hopi culture. Rather, they support and confirm the sacredness of the peaks to the Hopi.

Tribal concerns related to use of reclaimed water and scarring of the Peaks were identified as issues and subsequently framed the analysis of environmental consequences. The FEIS analyzes and discloses that from a tribal perspective the effects of scarring on the sacred landscape and the associated spiritual and cultural impacts may in fact be considered irreversible in nature (PR #199, p. 3-30).

The Record of Decision (ROD) outlines the Decision Maker's rationale and documents consideration of potential effects on cultural and heritage resources including the reasoning behind selection of Alternative 2 rather than the environmentally preferred alternative.

Finding: The FEIS clearly acknowledges and describes the sacredness and extreme importance of the peaks to the Hopi. The analysis confirms that the resulting spiritual and cultural impacts could be irreversible. The decision maker considered this in the rationale presented in the ROD.

Contention B: The purpose and need are narrowly focused on a desire to improve Snowbowl's financial viability to the exclusion of other reasonable alternatives. The need is founded on growth in public demand at Snowbowl, which overlooks recent drops in skier visits (FEIS 1-8 and 3-120).

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 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.

The FEIS analyzed the relationship between natural snowfall and skier visits at Snowbowl (PR#199 pp.3-106 through 3-107). Figure 3E-2 compared natural 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. Clearly drops in skier visits at Snowbowl are linked to low natural snowfall.

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 C: Economic forecasts for tourism and spending in Flagstaff are without sound basis. There is no relationship between winter tourism in Flagstaff and skier visits (cites to FEIS at 3-119). The FEIS also does not link tourism and precipitation (FEIS 3-122) but concludes that snowfall and skier visits do have impacts on winter tourism in Flagstaff area (FEIS 3-120).

Response: An analysis of five years of tourist data determined an average of 35 percent of the area's tourism occurred during the winter months. An attempt was made in the FEIS to determine if there was a statistical relationship between winter tourism in Flagstaff, annual

snowfall and annual skier visits at Snowbowl. It was found neither snowfall nor skier visits were useful in projecting total winter tourism in the Flagstaff (PR#199 pp.3-117 through 3-122). The FEIS (PR#199 pp.3-83, 3-116) states, “The Arizona Snowbowl is a positive contributor to area tourism and the Flagstaff area economy. Snowbowl draws visitors to the Flagstaff area who spend dollars at the ski area and other area businesses. However, in an economy of this size, and with countywide tourism drawing over eight million visitors annually, it is unrealistic to think that Snowbowl would be a significant driver of tourism activity or the economy.”

Finding: The FEIS analysis adequately documents the effects of the proposed action on the Flagstaff area economy.

Contention D: The FEIS fails to consider a reasonable range of alternatives. FS must look at alternatives which not only emphasize differing factors, but lead to differing results. The FEIS repeatedly links together the effects analysis for the action alternatives (Alternatives 2 and 3) showing that they are really only slight variations of the same alternative. Appellant contends that FS failed to consider Alternative 3 a viable alternative (FEIS 3-111, DEIS 3-112, and Response to Comments Volume 2 at 24). 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. FS should have considered other alternatives such as designation of the San Francisco Peaks as a UN World Heritage Site or revocation of the Snowbowl Special Use Permit and removal of the ski facilities from Nuvatukyaovi.

Response: “[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 (FSH 1909.15 14.2) 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) as: “....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). The identification of these issues led to the development of Alternative 3, which eliminated snowmaking and eliminated the development of a snowplay area.

Three alternatives were analyzed and considered in detail: Alternative 1-No Action, Alternative 2 – Proposed Action, and Alternative 3 – No Snowmaking or Snowplay. Twelve additional alternatives were considered but not analyzed in detail for reasons described in the FEIS as required by 40 CFR 1502.14 (a).

Revocation of the Snowbowl Special Use Permit and removal of the ski facilities does not meet the stated purpose and need, nor does designation of the San Francisco Peaks as a United Nations World Heritage Site. Neither alternative is within the scope of the decision to be made.

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: The Agency considered a range of reasonable alternatives driven by the significant issues identified through scoping.

Contention E: FEIS failed to adequately consider impacts on aesthetic resources. The clearing and scarring of the land for additional ski slopes would further disfigure Nuvatukyaovi, a living entity. There was no specific response to our comment on aesthetic resources in the FEIS. The computer-generated virtual images showing scarring on the mountain are not acceptable and cannot be mitigated in a MOA.

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 alteration 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). And, 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).

Responses to comments related to aesthetic resources are presented in Volume 2 of the FEIS (PR #200, pp. 200-204.)

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

Contention F: The FEIS does not offer convincing evidence the proposed action is economically feasible.

Response: The Forest Service reviewed proprietary information concerning Snowbowl's total capital investments including purchase price of the ski area and other related businesses. The Forest Service completed a review of the financial requirements for the implementation of the proposed action and found the proposal sufficiently profitable for Snowbowl (PR#200, p. 122).

Finding: The proposed action is economically feasible.

Contention G: The tribe requested that a complete reclamation plan with appropriate financial bonds from the proponent be included to assure that impacts from the ski area development will not be abandoned, which was not addressed.

Response: As addressed in Volume 2 of the FEIS (PR#200, p.107), the authorizing officer determines if a performance bond is required for ski area construction during the process to amend Snowbowl's Special Use Permit (SUP) for construction of the proposed new infrastructure. The terms of Snowbowl's SUP state that upon termination of the SUP by the Forest Service, the holder is required to remove all improvements and return the site to a condition satisfactory to the authorizing officer.

Finding: The need for a performance bond will be determined by the authorizing officer during the SUP process.

Contention H: 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 Thanksgiving through Christmas 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 the FEIS (PR#199, p.3-112). During the past 12 seasons (1993-2004), Snowbowl has 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. Historically, Snowbowl has been open in December, and rarely in late November when the 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 in the FEIS (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 I: The FEIS should analyze the economic value of the tribal people to the City of Flagstaff.

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.

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

Contention J: 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, p. 2-30 to 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 to 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 K: The Hopi Tribe's concerns with the dangers posed by hospital waste, increased pathogens and pharmaceutical residue from fecal matter, potential toxins and disease, long term negative effects on plants and fauna, and degradation of springs used for ceremonial purposes were not adequately addressed in the FEIS. The FEIS uses an unfounded assumption that groundwater infiltration and dilution will solve all potential problems. 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.

Response: 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 the dilution from natural precipitation of the artificial snow. 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 adequately addresses potential contamination connected with use of reclaimed water for snowmaking.

Contention L: The FEIS fails to adequately consider impacts on soils, vegetation and wildlife. The effect to vegetation should be considered irreversible as was the effect to soils, since lost soil will impact vegetation. The amount of meadow impacted is a significant portion of the total meadow acres which are important to wildlife and 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.

Response: Detailed effects to soils are discussed in the FEIS (PR#199, pp. 3-251 to 279) and effects to vegetation are discussed at PR#199, pp. 3-280 to 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 to 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, 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 and 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 to 334). Specific effects are disclosed on pages 3-318 to 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 to 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 to 3-294). There will be no chemical nucleating agents used in the snowmaking process (PR#200, pp. 51, 238).

Finding: The FEIS adequately addresses the effects on soils, vegetation, wildlife and meadow.

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

Contention A: FS approved the alternative with the greatest negative impacts, which would have disproportionately high and adverse human health or environmental effects on the affected

13 tribes, but minimizes the conclusion by stating that this determination is the same for all the alternatives. A MOA would not mitigate or minimize the adverse effects of the action alternatives.

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.

Contention B: The Hopi Tribe was never consulted specifically on Environmental Justice.

Response: The record (PR #190) indicates multiple attempts were made to involve the Hopi tribe in the planning process. 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) 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.

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 C: 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 D: The effects on physical and cultural wellbeing of members of the tribe were not addressed adequately. Such factors as the integrity of the Hopi clan system, the relationship between the individual Hopi and Nuvatukyaovi, the efficacy of Hopi culture, and psychological wellbeing of Hopi individuals who look to Nuvatukyaovi and the Katsina were not addressed. Such factors are addressed in existing references (references listed in appeal).

Response: The FEIS (PR #199, pp. 3-9 through 3-11) specifically recognizes the sacred relationship of the Peaks to the Hopi people, notes the peaks are the spiritual home of the Katsinam (Kachinas), and clearly acknowledges the presence of shrines and ancestral dwellings that are of central importance to the religious beliefs and traditions that are at the core of Hopi Culture. These findings do not contradict the breadth of scientific literature supporting the central importance of Nuvatukyaovi in Hopi culture. Rather, they support and confirm the sacredness of the peaks to the Hopi.

Tribal concerns related to use of reclaimed water and scarring of the peaks were identified as issues and subsequently framed the analysis of environmental consequences. The FEIS analyzes and discloses that from a tribal perspective the effects of scarring on the sacred landscape and the associated spiritual and cultural impacts may in fact be considered irreversible in nature (PR #199, p. 3-30).

Finding: The FEIS clearly acknowledges and describes the sacredness and extreme importance of Nuvatukyaovi to the Hopi.

ISSUE 5: 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. The Hopi requests a Biological Opinion.

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 pp. 3-317 to 3-334 (for animals), and 3-289 to 3-297 (for plants). Detailed analysis of effects are found in the Biological Assessment and Evaluation (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 (PR#200) on pp. 151 (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 (PR#200) on pp. 162 (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: Section 7 consultation occurred as required; the Coconino NF received concurrence with a “May Affect, Not Likely to Adversely Affect” determination from the U.S. Fish and Wildlife Service for listed species affected by the action. All requirements of Section 7(a)(2) of the Endangered Species Act of 1973, as Amended, were met.



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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