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Fake snow out for Snowbowl

Appeals court overturns ruling that OK'd treated effluent to extend skiing

by Michael Kiefer

A federal appeals court on Monday struck down a lower-court decision that would have allowed the Arizona Snowbowl in Flagstaff to use treated sewage water to make artificial snow to prolong its season.

The 68-year-old ski resort in the San Francisco Peaks, just outside Flagstaff, is popular among Arizonans and generates about \$10 million a year for the Flagstaff economy. But, in recent years, the resort has had less-than-average snowfall and wanted to pipe in the reclaimed water to be able to stay open in dry winters.

The peaks are held sacred by several Native American communities and, in its ruling, the 9th U.S. Circuit Court of Appeals said the reclaimed water would pollute the sites and violate the rights of four Native American tribes under the Religious Restoration Act of 1993.

Andy Bessler, a Sierra Club representative, said the ruling will have “national repercussions.”

“I just think justice has been served,” Bessler said. “The tribes have said this was a problem, and the court agreed. The reclaimed water would have polluted the peaks.”

Eric Borowsky, principal owner of the ski area, said he will pursue further legal recourse.

“While Snowbowl respects the decisions of the 9th Circuit, we believe that the decision reached today is wrongly decided,” he said. “Snowbowl intends to vigorously pursue further judicial review.”

Cultural victory

Monday's decision reversed and remanded portions of a January 2006 ruling in U.S. District Court, which said that the U.S. Forest Service had reached correct decisions in allowing the snowmaking at Snowbowl. The court also ruled that the Forest Service had not adequately investigated the project under requirements of the National Environmental Protection Act.

The 9th Circuit panel referred to "reclaimed water" as a "euphemism" for treated sewage effluent.

Leigh Kuwanwisiwma, director of the Hopi Cultural Preservation Office, called the decision "a humble victory."

"I think all the Hopi people have a vested interest in the sanctity of the peaks," he said.

Several Arizona Native communities hold the San Francisco Peaks sacred in their religions. The judges wrote on behalf of the Hopi and Navajo, whose creation stories and other beliefs center on the peaks, and to a lesser extent on behalf of the Hualapai and Havasupai tribes.

The tribes objected to making snow in general as disruptive to the deities on the mountains and to the treated water in particular because it came from sewage and may even include water reclaimed from mortuaries.

"To get some sense of equivalence," Judge William A. Fletcher wrote for the panel, "it may be useful to imagine the effect on Christian beliefs and practices — and the imposition that Christians would experience — if the government were to require that baptisms be carried out with 'reclaimed water.'" "

The Forest Service argued that improving the quality of skiing fulfilled its mandate to provide "multiple uses" to the public on the federal land.

But the judges said the government had no obligation to help a commercial ski area extend its skiing.

“We are struck by the obvious fact that the Peaks are located in a desert,” the judges wrote. “It is (and always has been) predictable that some winters will be dry.”

The judges doubted that the lack of snowmaking would put the ski area out of business but said that, even so, there was plenty of other recreational activity available in the forest.

Snowbowl was open for 44 days this season, serving 32,000 skiers, as opposed to an average year of more than 100 days and 120,000 skiers. Last year, the chair lifts ran for only 11 days.

“For these judges to say we’ll stay open, they haven’t got a clue,” Borowsky said.

The Religious Freedom Restoration Act was passed to make sure government did not place an unfair burden on the practice of religion.

It did not specify Native American religions in particular.

Use of new law

But Phoenix attorney Howard Shanker, lead attorney for the tribes, said this was the first use of the law.

“My clients are ecstatic,” he said. “This religious issue was extremely important to them. It gives them an avenue to protect their religious rights.”

And the Sierra Club’s Bessler said, “The courts now have precedence. That will help future courts determine when federal actions impact tribal beliefs.”

Nora Rasure, supervisor of the Coconino National Forest, who signed off on the Forest Service study that approved the snowmaking in the first place, said it is too early to tell if the national forest will appeal the case to the U.S. Supreme Court or what the future implications of the decision are.

Borowsky had some ideas.

“If they can get away with this at Snowbowl, basically all federal property is now off-limits,” he said.

“If a Native American says it’s religiously significant, nobody can use it.”

However, Rasure said, “it’s too soon to tell that; the decision is very much focused on the reclaimed water at Snowbowl.”