No. 10-17896

IN THE

United States Court of Appeals for the Ninth Circuit

SAVE THE PEAKS COALITION, et al.,

Plaintiffs-Appellants,

v.

U.S. FOREST SERVICE, et al.,

Defendants-Appellees,

ARIZONA SNOWBOWL RESORT LIMITED PARTNERSHIP,

Intervenor-Defendant-Appellee.

On Appeal from the United States District Court
for the District of Arizona, No. 3:09-CV-08163
District Judge Mary H. Murguia

BRIEF FOR INTERVENOR-DEFENDANT-APPELLEE ARIZONA SNOWBOWL RESORT LIMITED PARTNERSHIP

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May 17, 2011

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Arizona Snowbowl Resort Limited Partnership ("ASR") states that it has no parent corporation, nor has it issued shares or debt securities to the public. EGB Enterprises, Inc., the General Partner and an owner of ASR, is not a publicly traded entity. No publicly held entity owns ten percent or more of ASR.

/s/ Catherine E. Stetson
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BRIEF FOR INTERVENOR-DEFENDANT-APPELLEE ARIZONA SNOWBOWL RESORT LIMITED PARTNERSHIP

INTRODUCTION

For nearly ten years now, the Arizona Snowbowl ski resort ("Snowbowl") has been seeking to do something the vast majority of the nation's ski resorts have done for decades: make snow. The Snowbowl operates on federal land, so it needed U.S. Forest Service permission to implement snowmaking at the ski area. The Forest Service granted that permission in 2005 after a comprehensive review, approving the Snowbowl's plan to make snow using Class A+ reclaimed water.

Six years later, however, snowmaking still has not begun. Instead, opponents of the project have tied it up in an endless cycle of litigation.

It is time for that cycle to end. The plaintiff-appellants in this case participated in the Forest Service's decisional process in 2004-05, and they candidly admit they knew about, supported, closely followed, and could have joined an earlier lawsuit raising National Environmental Policy Act ("NEPA") issues nearly identical to those they raise now. Instead, appellants sat by while the first lawsuit wound its way through the courts for four years, waiting to file their follow-on suit until just weeks after the first lawsuit finally concluded. As the District Court recognized, this delay tactic plainly prejudiced the Snowbowl, which has invested massive resources in pursuing and defending its snowmaking plan in the expectation that the project could finally be completed once the first lawsuit was resolved. The District Court did not abuse its discretion in holding on these facts that appellants' NEPA claims are barred by laches.

And appellants' NEPA claims lack merit in any event. Their claims center on the fact that the Snowbowl plans to use "reclaimed water"—municipal wastewater that has been purified and approved for reuse—to make snow, as other ski areas have done. They argue that the Forest Service failed to undertake a "reasonably thorough" examination of whether that water could cause adverse health effects if frozen, made into snow, and subsequently ingested. But there is

substantial record evidence that the agency thoroughly considered the issue. As the District Court observed, the Forest Service devoted dozens of pages of its decision to "a thorough discussion regarding the safety of exposure to reclaimed water for humans sufficient to assess the safety of ingestion." ER34. The Forest Service separately recognized that expert regulators had approved the reclaimed water at issue here as safe for "direct reuse in snowmaking." SER302 (emphasis added). Appellants construct their NEPA argument by simply ignoring much of this evidence. That will not do. Appellants cannot establish a NEPA deficiency—much less can they overturn a District Court's considered decision against them on their NEPA claims—by sweeping the record under the rug.

The District Court's decision should be affirmed.

STATEMENT OF ISSUES FOR REVIEW

1. Whether the District Court abused its discretion by finding appellants' lawsuit barred by laches where the federal action of which appellants complain occurred six years ago, appellants opposed it at the time, and appellants could have joined an earlier lawsuit challenging the action and raising nearly identical issues.

2. Whether the District Court correctly concluded that the Forest Service gave adequate consideration under NEPA to the possibility of ingesting snow made from reclaimed water, where it (i) reviewed extensive academic literature on the issue; (ii) reviewed the health effects of contaminants that can be present in

reclaimed water; (iii) studied techniques used to treat the water; (iv) compared the water to state and federal drinking-water standards; and (v) recognized that regulators have approved the water as safe for snowmaking.

3. Whether the District Court correctly concluded that the Forest Service properly "insure[d] the scientific integrity of its NEPA analysis," where it conducted the thorough analysis described above.

4. Whether the District Court correctly concluded that the Forest Service provided "high quality" information to the public regarding the safety of exposure to reclaimed water, where all the findings and data described above were set forth in a 611-page decisional document.

Pursuant to Ninth Circuit Rule 28-2.7, an addendum containing pertinent statutes and regulations is attached at the end of this brief.

STATEMENT OF JURISDICTION

The Snowbowl agrees with appellants' Statement of Jurisdiction.

STATEMENT OF FACTS

A. The Snowbowl's Request for Snowmaking.

The San Francisco Peaks, a group of four mountains in northern Arizona, are located on federal land in the Coconino National Forest. SER243. The Snowbowl sits on a small portion of the Peaks' western flank and has been used as a ski area, under a Forest Service permit, since the 1930s. SER244. As one of two major

downhill ski facilities in Arizona, it is "an important public recreational resource." Navajo Nation v. U.S. Forest Serv., 408 F. Supp. 2d 866, 884 (D. Ariz. 2006) ("Navajo Nation I"). It also provides substantial economic benefits, including hundreds of jobs, to the local community. SER312.

The Snowbowl has experienced "highly variable" snowfall, including lengthy periods when there was not enough snow to support skiing. SER267; Navajo Nation I, 408 F. Supp. 2d at 884. That has caused extreme fluctuations in skier visits and revenues. SER269. For example, in 2004-05, when natural snowfall was plentiful, the Snowbowl had more than 193,000 visitors. In 2001-02, when much less snow fell, it had fewer than 3,000 visitors. SER109. Inadequate snowfall has beleaguered the Snowbowl in five of the last 13 winters, resulting in unprofitable seasons each time and making it impossible for the Snowbowl to serve the public by offering a full season of winter recreation. SER109. Without snowmaking, the Snowbowl will go out of business. SER114, SER271.

The vast majority of ski areas in the country have resorted to snowmaking to regularize their ski seasons, eliminate the financial risk of inadequate snowfall, and ensure visitor enjoyment (and local employment) across the ski season. SER267. Snowbowl sought to do the same. It began preliminary scoping work on a snowmaking plan in 2000, SER137, and in 2002, it filed an application with the Forest Service that included various upgrades to the ski area's physical plant,

including new ski lifts, as well as a snowmaking proposal. SER235-237. Because there is insufficient available surface or groundwater in the area for snowmaking, the Snowbowl sought to use reclaimed water to make snow. Using treated reclaimed water for various household and municipal tasks is a common practice throughout the United States and the world. Indeed, as of 2001, 4.8 billion gallons per day of reclaimed water were already being used in the United States alone. SER297. And the technology has grown quite sophisticated: Reclaimed water can be purified sufficiently to be sprayed on food crops and even used to replenish drinking water supplies. *See infra* at 8-10.

The Snowbowl sought permission in its Forest Service permit application to make snow with "Class A+" reclaimed water, the highest grade recognized under Arizona law. *See infra* at 11. The water is cleansed and purified at a Flagstaff treatment facility, called Rio de Flag, which employs a multi-step process using ultraviolet light, chlorine, and other agents to purify the water and minimize any risk associated with potential exposures. SER299-300. Water treated at the Rio de Flag facility is sufficiently purified that Flagstaff uses it to water city parks; athletic fields; elementary, middle, and high school grounds; and golf courses. SER301. Arizona regulations authorize Class A or better water for a wide variety of uses that implicate potential human ingestion, including spraying on food crops that are to be consumed raw. See Ariz. Admin. Code § R18-11-303(D) & Tbl. A;

7 Ariz. Admin. Reg. 877. The state regulations also specifically declare Class A or better water as safe "for direct reuse in snowmaking." SER302.

B. The Forest Service's Review.

The Forest Service received the Snowbowl's proposal in 2002 and released a Draft Environmental Impact Statement for public comment in 2004. The agency received several thousand comments on that draft.

The agency issued its 611-page Final Environmental Impact Statement ("EIS") in February 2005, along with a "Response to Comments" volume. SER233, SER311. One of the issues that received detailed discussion in the EIS was the effect of human exposure to reclaimed water. SER273-304. The Forest Service began by framing the concern to be addressed: "Prior to treatment, municipal wastewater contains many chemicals and microorganisms that, if released to the environment untreated, * * * may present known or potential health risks to humans, if ingested." SER273 (emphasis added). The agency then set out to analyze whether Class A+ reclaimed water had been sufficiently purified for the "planned reuse." Id.

That analysis was extensive. For starters, the Forest Service commissioned a 92-page expert report on potential health impacts. SER272. The agency excerpted that study at length in the EIS, see SER273-300, and made the full report available for public review. SER317. But it also conducted its own investigation:

Studies on Safety of Drinking Reclaimed Water. First, the Forest Service evaluated a wide range of peer-reviewed scientific literature—literally, hundreds of papers—on the health effects of reclaimed water. SER156-162. For example, the Forest Service evaluated an American Society of Civil Engineers study finding that water treated as thoroughly as Class A+ water can be used for "agricultural irrigation of crops consumed raw by people or brought raw into the kitchen." SER164. The Forest Service evaluated Environmental Protection Agency ("EPA") and other studies demonstrating that "a number of projects use reclaimed water indirectly for potable purposes," including "numerous groundwater recharge facilities that have operated successfully for many years to replenish public drinking water supplies." SER298. And the Forest Service analyzed the literature on using reclaimed water in snowmaking. It found that reclaimed water has been used to make snow for decades at a resort in Pennsylvania, that "[s]tudies and full-scale use of reclaimed water in snowmaking have been conducted in Colorado, Michigan, and Maine," and that those studies showed that the process of freezing and thawing the reclaimed water helped to further purify it. SER302.

The Forest Service also evaluated "several detailed studies" that specifically examined "potential human health hazards associated with drinking reclaimed water." SER 275 (emphasis added). Those studies "suggested that no adverse health effects should be anticipated from the direct reuse of reclaimed water for

drinking water purposes at these sites." Id. The agency likewise reviewed "[t]wo major studies [that] have evaluated the health effects associated with ingestion of groundwater that has commingled with [wastewater] in the subsurface as a result of wastewater recharge operations" in California. Id. (emphasis added). It wrote:

> In these counties, recharge of secondary wastewater effluent had occurred for more than 30 years, resulting in populations being exposed to as much as 38 percent effluent in their drinking water supplies. [T]he comprehensive epidemiologic evaluation concluded there were no adverse health effects in populations exposed to the effluent compared to unexposed populations in the area.

Id.; see also SER187-204 (text of studies relied upon in EIS). And the agency examined a third study that measured the association between adverse birth outcomes and residence in an area with reclaimed water in the drinking water supply. The study found that rates for all types of birth defects were the same in the reclaimed water and control groups. SER275.

Rio de Flag Water and EPA Drinking Water Standards. The Forest Service next undertook to analyze the Rio de Flag facility and evaluate whether exposure to its treated water, in particular, would be safe. The EIS described the facility's water-treatment system in some detail. SER299-302. It recognized that Rio de Flag water must "comply with extensive treatment and monitoring requirements under three separate permit programs" and must undergo "frequent microbiological testing to assure pathogens are removed." Navajo Nation v. U.S. Forest Service, 535 F.3d 1058 (9th Cir. 2008) (en banc) ("Navajo Nation IV"); see SER301-303.

The EIS also reviewed "all monitoring data compiled from approximately January 2000 to June 2002" to determine what contaminants remained in the Rio de Flag water after treatment. SER275. And it then conducted a detailed analysis of whether the Rio de Flag water met Arizona's surface-water standards and the EPA's national drinking water standards. SER275-285. The EIS's charts comparing the reclaimed water at issue here with the Arizona and EPA standards are reproduced at SER276-284. They revealed a significant fact: The Rio de Flag water "met established numerical limits" for "all regulated parameters." SER304 (emphasis added). Put another way: The City of Flagstaff tested the water at issue in this case to see if it complied with applicable federal and state limits for dozens of different chemicals, and the water complied with "all State surface water quality standards and Federal primary and secondary drinking water standards for which it [was] tested." SER209.[1]

ADEQ Regulations. The Forest Service next looked to a separate benchmark—Arizona's reclaimed-water regulations—to help determine whether

[1] With respect to some chemicals, the testing process checked for concentrations that did not perfectly track the state or federal standards. See SER275. Because the testing did not allow the Forest Service to say with certainty that the water met every applicable standard for those particular chemicals, the agency listed those results in green, reflecting that the "analytical detection limit cannot measure to level of one or more numeric criteria." SER283. Notably, however, even within that subset of chemicals, the vast majority demonstrably met EPA drinking-water standards. See SER282-283 (results in green). And none was detected in concentrations that exceeded any state or federal limit. See SER275; see also infra at 15 & n.4.

exposure to Rio de Flag water would be safe. This was appropriate, the agency explained, because the EPA delegates authority to the states to promulgate Clean Water Act and Safe Drinking Water Act standards, and Arizona's regulations "governing reclaimed water reuse have been developed in a risk-based framework to protect public health and minimize the hazards associated with potential exposures." SER301.

The regulations, codified at Ariz. Admin. Code § R18-11-301 et seq.,[2] set forth several classifications of reclaimed water. Id. §§ R18-11-303 et seq. Class A+ water, the highest quality, is reclaimed water that "has undergone secondary treatment, filtration, nitrogen removal treatment, and disinfection," and that meets a number of specific purity standards. Id. § R18-11-303.

In deciding whether reclaimed water is safe for a new kind of direct reuse, the Arizona Department of Environmental Quality ("ADEQ") considers "human exposure to the reclaimed water," "[t]he risk to public health," and "[t]he potential for improper or unintended use of the reclaimed water." Id. § R18-11-309(C). By "human exposure," ADEQ has explained, it is referring to "ingestion, inhalation, or conjunctival exposure." 7 Ariz. Admin. Reg. 884 (emphasis added). Applying those standards, ADEQ approves the use of Class A or better reclaimed water for "irrigation of food crops" and orchards—as well as for "snowmaking." Id. § R18-

[2] Citations are to the current administrative code. The regulations have not changed since the EIS issued in 2005.

11-309, Table A. The Class A+ water produced by Rio de Flag—a step above Class A—is thus even more thoroughly purified than required by regulators for safe use in snowmaking. See SER301 (describing ways in which Class A+ purification standards exceed those of Class A).

The Forest Service recounted the ADEQ's standards and findings in the EIS. SER301-302. It observed that Class A or A+ water is used for watering the grounds at Flagstaff schools and "is considered acceptable for unrestricted recreational use." SER302. And it recognized that these facts were significant precisely because ADEQ considers likely human exposures to the water before it approves a given use: "The level of treatment and water quality criteria are based on the expected degree of contact with reclaimed water by the public." SER303.[3]

Data Regarding Specific Contaminants. Finally, the Forest Service spent some 15 pages of the EIS listing contaminants that can be present in untreated wastewater and analyzing the potential risks they presented and the degree to which treatment removed them. SER283-297. The agency found conflicting science with respect to some of the contaminants. SER287-289. With respect to "endocrine disruptors," a category of chemicals that had drawn a number of public comments, the agency observed that a "definitive" 2002 World Health

[3] The EPA itself also signed off on the Forest Service's EIS, indicating that it had no objections to the agency's environmental analysis. See SER229-232 (reviewing the draft EIS and rating it "Lack of Objections").

Organization report had found no evidence of a direct causal association between low-level exposure and adverse health outcomes. SER288. In any event, the agency found that various categories of contaminants it studied "can be removed efficiently from wastewater." SER285.

The Forest Service underscored in the accompanying "Response to Comments" volume that a primary focus of its analysis has been the safety of exposure to reclaimed water. The agency discussed the "comprehensive analytical testing" of Rio de Flag water and its comparison of that water to national drinking water standards. SER315. It stated that it had reviewed "[a] great deal of literature" on the effects of wastewater chemicals "on humans and wildlife." SER320. And it explained that when it evaluated the risks of exposure to reclaimed water, it considered "[p]otential exposure pathways" including "inhalation, <u>ingestion</u>, and dermal contact." SER321 (emphasis added).

The Forest Supervisor reviewed this analysis and concluded in February 2005 that the snowmaking project should be approved. She stated that she "ha[d] reviewed the EIS, and based on the best scientific information available * * * the use of reclaimed water poses minimal risks to human health[.]" SER337. A number of opponents—including many of the appellants in this case—appealed that decision to the Forest Service. The Regional Forester upheld that decision on appeal in June 2005. <u>See</u> <u>Navajo Nation I</u>, 408 F. Supp. 2d at 886.

C. The First Lawsuit.

A number of tribes, individuals, and environmental groups filed several lawsuits in the District of Arizona in June 2005, soon after the ROD was upheld on administrative appeal. The plaintiffs raised a host of claims under NEPA, the Religious Freedom Restoration Act ("RFRA"), and other statutes. The lawsuits were consolidated. The District Court rejected six of the claims on summary judgment. The court held a bench trial on the RFRA claim and then rejected it, too, in a January 2006 opinion. Navajo Nation I, supra.

A panel of the Ninth Circuit reversed in part, finding that the District Court had erred with respect to the RFRA claim and one NEPA claim—the human-ingestion claim. The panel concluded that the Forest Service had not taken the required "hard look" at the risks of ingesting snow made with reclaimed water. Navajo Nation v. U.S. Forest Service, 479 F.3d 1024, 1053 (9th Cir. 2007) ("Navajo Nation II") (subsequently vacated and reversed as described below). The panel, however, reached this conclusion by ignoring the EIS itself and focusing (at the plaintiffs' urging) almost entirely on the Forest Service's Responses to Comments. Id. at 1051-53. The panel made no mention of the many studies the Forest Service reviewed, including those showing no ill effects from reclaimed water in the drinking supply. And it made no mention of the fact that the Rio de Flag water met all state and federal water quality standards against which the water

was tested.[4] The panel instead asserted, incorrectly, that "the EIS does not * * * discuss * * * the health risks resulting from ingestion of the treated sewage effluent." Id. at 1051.

The Forest Service and the Snowbowl sought rehearing on the panel's RFRA and NEPA rulings, arguing that the panel's decision was deeply flawed. The Ninth Circuit sitting en banc agreed. The Court of Appeals vacated the panel decision and ordered that the panel opinion "shall not be cited as precedent." Navajo Nation v. U.S. Forest Serv., 506 F.3d 717 (9th Cir. 2007) ("Navajo Nation III"). And in August 2008, by an 8-3 vote, the en banc Court reinstated the District Court's decision rejecting the plaintiffs' RFRA claims. Navajo Nation IV, 535 F.3d 1058. On the human-ingestion issue, the en banc court did not reach the merits. It instead left the District Court opinion intact, affirming on the ground that the plaintiffs had failed to properly raise the claim below. Id. at 1080. The en banc court so concluded because the plaintiffs had sought belated leave to amend their complaint to allege the human-ingestion issue, the District Court had denied the request, and the plaintiffs had failed to appeal from that decision. See id.

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[4] The panel instead characterized the EIS as making only a "partial comparison" of the reclaimed water "to the national drinking water standards." Id. at 1051. That recitation fails to mention (i) that the reclaimed water did meet EPA drinking water standards for no fewer than 62 tested chemicals and minerals, SER282-284; (ii) that it met Arizona water-quality standards for dozens more chemicals, SER276-281; and (iii) that it violated the tested limit with respect to exactly zero chemicals. See SER283 (red text); supra at 10 & n.1.

The Navajo Nation plaintiffs sought a writ of certiorari from the Supreme Court on their RFRA claim, which was denied. The mandate issued in late June 2009, ending four years of litigation.

D. The Second Lawsuit.

Three months later, in September 2009, these appellants filed a second lawsuit. Represented by the same counsel who represented the plaintiffs in the lead Navajo Nation case, appellants raised the human-ingestion claim the original plaintiffs had failed to preserve, along with several derivative claims.

On November 30, 2010, the District Court issued a decision and order finding that the lawsuit was barred by laches and, alternatively, rejecting all claims on the merits. On the first point: The District Court found that appellants had "participat[ed] in the comments and administrative appeal process" before the Forest Service in 2004-05 but then "completely dropped communications with the Forest Service after 2005 until initiating this lawsuit in 2009." ER23. The District Court likewise found that appellants "do not deny that they were aware of" the earlier litigation or that they "could have joined it." ER21, ER24. Indeed, the District Court found that many of the current appellants "were actively supporting" the Navajo Nation litigation "through fundraising or generating awareness." ER25. They nonetheless "declined" to join that suit; instead, they chose to "s[i]t by for years while the lawsuit challenging the Forest Service decision on similar

bases was initiated and litigated." ER21, ER24. Finally, the court found that the Snowbowl had been deeply prejudiced by the delay because it "had expended a great deal of resources" on the facility upgrade but now had to wait still longer as it was forced to "repeatedly litigat[e] serial and similar claims." ER25. On these facts, the court found that laches barred appellants' suit.[5]

The District Court went on to hold in the alternative that appellants' NEPA argument was meritless. The court found it "clear" that the agency thoroughly considered the health impact of exposure to snow made from reclaimed water, "including the possibility of ingestion." ER29 (citation omitted). The court held that it had been appropriate for the Forest Service to rely in part on ADEQ's approval of Class A+ reclaimed water for snowmaking. ER30. But it also found that "this was not the extent of the agency's investigation and discussion regarding the safety of ingesting snow made from reclaimed water." ER31-32. On the contrary, the Forest Service also had compared the Rio de Flag water to drinking

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[5] Snowbowl also had argued that appellants' claims were barred under the doctrine of unclean hands. At the request of the U.S. Department of Agriculture ("USDA"), which had sought to resolve this matter, SER11, Snowbowl in 2010 approached the City of Flagstaff about using a different source of water for snowmaking—a source that would moot this lawsuit. ER26. Yet some of these appellants publicly opposed that plan, telling the City Council "that they did not want the use of potable water approved for snowmaking because they wanted the lawsuit to go forward." ER26 (emphasis added). The District Court declined to rest its decision on that ground, but it noted that "the history of this case together with some of the Plaintiffs' comments * * * create an inference" that their claims "are a pretext for different aims." ER26.

water standards; evaluated many relevant studies; "discussed at length the process for treating the water" at Rio de Flag; analyzed "the various means of removing most bacteria and pollutants from the water"; and reviewed "studies on the impact of full immersion of animals in the water to be used for snowmaking." ER32-33. The court thus concluded that the Forest Service engaged in the requisite "reasonably thorough" review of potential effects of ingestion. ER33. It rejected appellants' subsidiary NEPA claims for the same reason: It found that because the agency had engaged in thorough review and recorded its results in detail, it had neither "fail[ed] to ensure the scientific integrity of its environmental analysis" nor "fail[ed] to disseminate quality information related to the potential impact of ingesting snow made from reclaimed water." ER34.

Appellants subsequently sought an injunction pending appeal to block the Snowbowl from beginning construction on the snowmaking system. The District Court denied that motion, finding that there is "an important public interest in moving forward a project with important economic and recreational benefits for the Flagstaff area." SER5. Appellants then sought the same relief from this Court. The Court denied the motion. See Order at 1-2 (Mar. 31, 2011) (Docket No. 28).

SUMMARY OF ARGUMENT

1. The District Court properly found appellants' claims barred by laches. Appellants could have brought suit to challenge the snowmaking project in 2005,

after their administrative appeals were denied. Instead they sat on the sidelines for four-and-a-half years, holding their fire until the Navajo Nation plaintiffs lost. That strategy—"waiting to bring suit until the challenges launched by other parties have failed"—has been recognized as a lack of diligence that satisfies the first prong of the laches test. Apache Survival Coalition v. United States, 118 F.3d 663, 666 (9th Cir. 1997) ("Apache II"). And there is no question that the Snowbowl was prejudiced as a result. The Snowbowl has been forced into a second round of litigation over the same project first challenged years ago. It also has invested massive resources in its upgrade as a whole and in the snowmaking project in particular. Every month of delay devalues that investment, raises completion costs still further, and denies the Snowbowl revenues it could have been earning were the snowmaking project complete. The District Court did not abuse its discretion by applying laches on these facts.

2. In any event, appellants' NEPA claims are meritless. Without ever mentioning the detailed EIS analysis described above at 7-13, appellants assert that the Forest Service violated NEPA because there is "no real discussion or analysis of potential impacts of human ingestion" in the EIS. Br. 19. That is not true. The Forest Service identified as a concern the question whether reclaimed water would pose "health risks to humans * * * if ingested," SER273 (emphasis added), and proceeded to examine data relevant to that question for dozens of pages. It also

properly recognized the determination by ADEQ—the state agency tasked with setting water standards to protect public health—that the water at issue is safe for snowmaking. SER302. The Forest Service's analysis easily meets the requirement of a "reasonably thorough discussion of the significant aspects of the probable environmental consequences" of a challenged action. Oregon Envtl. Council v. Kunzman, 817 F.2d 484, 492 (9th Cir. 1987).

3. Appellants argue that the Forest Service's "scientific integrity" is compromised because its ingestion analysis was "based on * * * an assumption" that ADEQ examined the effects of ingestion before it approved snowmaking with reclaimed water. Br. 22. But the Forest Service's analysis was not "based on" any assumption; it was based on the broad array of studies and data that appellants choose to ignore. In any event, the Forest Service was quite justified in relying in part on Arizona's regulatory approval. ADEQ, after all, is the state agency tasked with implementing the federal Clean Water Act and Safe Drinking Water Act in Arizona, see 33 U.S.C. § 1313(c); 42 U.S.C. § 300g-2; Ariz. Rev. Stat. § 49-202(A), and it approved snowmaking with reclaimed water after a review process that includes examining the potential risks of "human exposure." Ariz. Admin. Code § R18-11-309(C)(2) (emphasis added). No assumptions were needed to recognize that ADEQ would not, and could not, have approved snowmaking with reclaimed water if it deemed such exposure to be unsafe.

4. Appellants' argument that the Forest Service failed to make "high quality" information available to the public, Br. 25, was not preserved in the District Court and therefore is waived. Even if it had been properly preserved, the argument is simply a restatement of appellants' claim that the agency made improper assumptions about ADEQ, and it fails for the reasons already discussed.

STANDARD OF REVIEW

This Court reviews the District Court's laches finding "for abuse of discretion." Toyota Motor Sales, U.S.A., Inc. v. Tabari, 610 F.3d 1171, 1183 (9th Cir. 2010). Abuse-of-discretion review is "limited and deferential." Earth Island Inst. v. Carlton, 626 F.3d 462, 468 (9th Cir. 2010) (quotation marks & citations omitted). "[A]s long as the district court got the law right, it will not be reversed simply because the appellate court would have arrived at a different result if it had applied the law to the facts of the case." Id.

The Court's review of NEPA issues, likewise, is "extremely narrow." U.S. Postal Serv. v. Gregory, 534 U.S. 1, 6-7 (2001). The Court reviews solely to be sure that the EIS contained a "reasonably thorough discussion of the significant aspects of the probable environmental consequences." Idaho Conservation League v. Mumma, 956 F.2d 1508, 1519 (9th Cir. 1992). If it does, the inquiry is at an end. The Court "is not empowered to substitute its judgment for that of the agency." Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971).

ARGUMENT

I. THE LACHES RULING SHOULD BE AFFIRMED.

The District Court's decision may, and should, be affirmed on the laches ruling alone. This is a classic laches case: Appellants knew about their claim for years, knew of the prior litigation challenging the Snowbowl improvement project, intentionally slept on their rights, and prejudiced Snowbowl and the Government as a result. The arguments appellants now conjure to avoid laches are to no avail. Some are waived; the rest are erroneous. The District Court did not abuse its considerable discretion in finding appellants' claims barred by laches.

A. The District Court Properly Applied Laches On These Facts.

The doctrine of laches "is based upon the maxim that equity aids the vigilant and not those who slumber on their rights." In re Beaty, 306 F.3d 914, 927 (9th Cir. 2002) (quoting Black's Law Dictionary 875 (6th ed. 1990)). "[L]aches is not, like limitation, a mere matter of time; but principally a question of the inequity of permitting the claim to be enforced." Holmberg v. Armbrecht, 327 U.S. 392, 396 (1946) (quotation marks & citation omitted). The defense is available in cases involving environmental statutes such as NEPA. Apache Survival Coalition v. United States, 21 F.3d 895, 905 (9th Cir. 1994) ("Apache I"); accord Preservation Coalition, Inc. v. Pierce, 667 F.2d 851, 854 (9th Cir. 1982). "[W]hether laches bars an action in a particular case depends upon the facts and

circumstances of that case and is a question addressed primarily to the discretion of the trial court." Lathan v. Brinegar, 506 F.2d 677, 692 (9th Cir. 1974) (en banc) (quoting Costello v. United States, 365 U.S. 265, 282 (1961)).

Laches " 'requires proof of (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense.' " In re Beaty, 306 F.3d at 927 (quoting Kansas v. Colorado, 514 U.S. 673, 687 (1995)). The District Court correctly found both elements present here.

1. Appellants' Strategic Delay Is A Classic "Lack Of Diligence."

The first element, lack of diligence, "requires an examination both of the length of the delay" before appellants filed suit "and of the circumstances surrounding that delay." In re Beaty, 306 F.3d at 927.[6] Both factors favor a laches finding. Appellants participated in the Forest Service's EIS process, including the administrative appeal, and admit they knew of the agency's 2005 decision. And yet they filed suit in September 2009—a delay of four-and-a-half years. As the District Court correctly observed, "[i]nexcusable delay has been found for shorter periods than the four year delay in this case." ER23. See, e.g., Apache II, 118

[6] Courts have sometimes articulated a slightly different set of factors, examining "whether [plaintiff] attempted to make its position known to the [agency] before filing suit; the [agency's] response to [plaintiff's] efforts; and whether developments, such as construction or other visible changes, motivated [plaintiff] to investigate whether any legal basis existed for challenging the project." Ocean Advocates v. U.S. Army Corps of Engineers, 402 F.3d 846, 862 (9th Cir. 2005). These factors also uniformly cut in favor of laches, as discussed infra at 31.

F.3d at 665 (two-and-a-half years); Jicarilla Apache Tribe v. Andrus, 687 F.2d 1324, 1338-39 (10th Cir. 1982) (three years); City of Rochester v. U.S. Postal Serv., 541 F.2d 967, 977 (2d Cir. 1976) (less than two years); National Parks & Conservation Ass'n v. Hodel, 679 F. Supp. 49, 53 (D.D.C. 1987) (same).

As for "the circumstances surrounding that delay," In re Beaty, 306 F.3d at 927, the District Court correctly found that they cut strongly in favor of finding this follow-on NEPA action barred by laches. Appellants, after all, testified that they were aware of the Navajo Nation litigation, that they "could have joined it," and that they were disappointed with the outcome. ER24; see, e.g., SER18, SER26-27, SER29-31, SER38-39, SER45, SER59, SER65-66, SER69, SER74-75, SER101. All but two appellants testified that they actively supported that litigation, either by participating in demonstrations, attending court proceedings, or fundraising. ER24-25; see, e.g., SER17, SER38-39, SER63-64, SER75, SER78-79, SER94-95. Indeed, one appellant, the Save the Peaks Coalition, referred to the Navajo Nation litigation as its "prior court case" on its Web site. SER13. They nonetheless waited until the Supreme Court denied certiorari and then filed this suit in 2009. And as the District Court observed, "[t]he only answer offered by the Plaintiffs for their failure to bring the lawsuit earlier is that they were not needed." ER25.[7]

[7] Actually, that was not the only answer. Two appellants squarely admitted that they got involved in the current litigation only because the plaintiffs in Navajo Nation lost. SER77, SER101.

That is just the sort of "tactical decision" that this Court has held to warrant laches. Apache II, 118 F.3d at 665. In Apache II, a tribal coalition sat by while other plaintiffs sued the Forest Service to block construction of an observatory. Id. The plaintiffs won an injunction against construction. Two years later, however, the District Court dissolved the injunction in response to a change in law. Id. Only then did the tribal coalition file suit, asserting essentially the same legal wrongs and harms that the earlier plaintiffs had asserted. Id. The District Court found the second suit barred by laches, and this Court affirmed, singling out for special disapprobation the "tactical decision[ ]" of "waiting to bring suit until the challenges launched by other parties have failed." Id. at 666. Explained the Court: "Any other view would encourage successive challenges, where one plaintiff awaits the outcome of another plaintiff's injunction before bringing its own claim." Id. at 666 n.5 (emphasis added). That is just what happened here. The District Court's finding that appellants lacked diligence is fully justified.

2. Appellants' Tactics Prejudiced The Snowbowl.

The District Court's finding of prejudice is equally well-grounded. This Court has explained that a defendant may demonstrate prejudice "by showing that it took actions or suffered consequences that it would not have, had the plaintiff brought suit promptly." Danjaq LLC v. Sony Corp., 263 F.3d 942, 956 (9th Cir. 2001). That can include economic or financial prejudice. Id. For example, the

Court has found prejudice where defendants demonstrated that they "invested enormous resources" in a project, believing no litigation to be on the horizon, see Jarrow Formulas, Inc. v. Nutrition Now, Inc., 304 F.3d 829, 837 (9th Cir. 2002); see also Danjaq, 263 F.3d at 956, or that " 'the value of the subject-matter involved' " changed during the period of delay. TransWorld Airlines, Inc. v. American Coupon Exch., 913 F.2d 676, 696 (9th Cir. 1990) (citation omitted). Moreover, while increased cost due to delay cannot establish prejudice standing alone, it can contribute to a prejudice finding. Apache I, 21 F.3d at 912 & n.18 (finding prejudice in part because "the cost of delay [to defendant] was estimated at almost $11,000 per day").

The District Court correctly concluded that the Snowbowl demonstrated prejudice here. The Snowbowl submitted evidence that it has invested "significant financial and human resources to plan and develop its proposal * * * and to engage in litigation defending the selected alternative." SER113-114. It demonstrated that the long, expensive series of steps it was required to take to complete the project—the detailed initial submission seeking Forest Service approval, continually providing updated data in response to Forest Service requests, responding to agency and public comments, and, of course, spending some $3.5 million to litigate the Navajo Nation case for years on end—was finally nearing completion. SER114-115. It was only at that point—when the Snowbowl had shouldered all

the burdens that could be reasonably required of it, and had waited seven years to begin its upgrade—that the appellants filed a second lawsuit raising claims that could have been, and should have been, litigated years earlier. The Snowbowl submitted evidence that the second lawsuit prevented it from obtaining $12 million in financing it needs to buy required snowmaking equipment. SER115. Finally, the Snowbowl demonstrated that the additional delay caused by the second lawsuit sharply increased its upgrade costs and robbed it of substantial revenues:

> Every year of delay imposes an estimated additional $600,000 to $700,000 in price escalation [for a planned new chairlift and lodge facility]. * * * In addition to these costs, the lost opportunity cost of not making snow at the facility is an estimated additional $2 million or more a year[.]

SER116. The Snowbowl, in short, demonstrated that it "suffered consequences that it would not have, had the plaintiff brought suit promptly," Danjaq LLC, 263 F.3d at 956; that it "invested enormous resources," thinking the end of litigation was in sight, Jarrow, 304 F.3d at 837; and that it has seen "increased cost[s]" and decreased revenues due to the delay. Apache I, 21 F.3d at 912 n.18. The District Court agreed, finding that "Snowbowl had expended a great deal of resources on the Snowbowl upgrade project before this action was filed"; that that was particularly problematic because the lengthy process of seeking permission for and planning the upgrade "is almost complete"; and that the Snowbowl was prejudiced by "the burden * * * of repeatedly litigating serial and similar claims." ER25.

These findings are supported by the record and aligned with this Court's precedent. There is no basis to disturb them.

B. Appellants' Contrary Arguments Are Meritless.

Appellants raise a handful of arguments challenging the District Court's laches finding. None has merit.

1. Appellants' Statute-of-Limitations Argument Is Both Waived And Incorrect.

Appellants first argue that the District Court erred by not "recogniz[ing]" that courts sometimes apply a "strong presumption" against laches where the statute of limitations has not yet run. Br. 12. It is unsurprising, however, that the District Court did not "recognize" this point, since appellants never argued for such a presumption below. "Because this argument was not raised below, it is waived." Holland Am. Line Inc. v. Wartsila N. Am., Inc., 485 F.3d 450, 457 (9th Cir. 2007).

In any event, appellants are wrong on the law. The "strong presumption" they identify has been applied primarily in Lanham Act cases.[8] The Lanham Act has no statute of limitations, and so the courts assess the timeliness of Lanham Act claims by choosing an "analogous limitations period" from other areas of law, Jarrow, 304 F.3d at 836, and using it to conduct a laches analysis. See id.; see also

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[8] See, e.g., Au-Tomotive Gold Inc. v. Volkswagen of Am., Inc., 603 F.3d 1133 (9th Cir. 2010); Internet Specialties West, Inc. v. Milon-DiGiorgio Enters., 559 F.3d 985 (9th Cir. 2009); Tillamook Country Smoker, Inc. v. Tillamook County Creamery Ass'n, 465 F.3d 1102 (9th Cir. 2006); Jarrow, supra.

Au-Tomotive Gold Inc. v. Volkswagen of Am., Inc., 603 F.3d 1133, 1139-40 (9th Cir. 2010). In such cases, given that laches is just a proxy for limitations analysis, it makes sense to presume no laches (i.e., no limitations bar) where the analogous statute of limitations has not run, and laches (i.e., a limitations bar) where it has. It makes no sense to employ the same "strong presumption" in a NEPA case—which, no doubt, is why this Court appears never to have mentioned such a presumption when applying laches to NEPA or similar environmental claims, even though it should have done so under appellants' theory since those statutes carry limitations periods. See, e.g., Apache II, 118 F.3d at 665; cf. Huseman v. Icicle Seafoods, Inc., 471 F.3d 1116, 1126 (9th Cir. 2006) (recognizing that while courts have at times applied a presumption in favor of laches in suits filed beyond the analogous limitations period, the presumption is "weak" because "[i]n the laches analysis, the statute of limitations is not given decisive weight") (citation omitted). Indeed, if appellants were correct, laches rarely if ever would be found in any case with a statute of limitations, because a limitations bar would apply instead. That is clearly not how the cases have played out. See Apache II, 118 F.3d at 665. Appellants' argument would fail even if it were not waived.

2. Appellants' "No Undue Delay" Arguments Are Specious.

Appellants press several arguments relating to their delay in filing suit. First, they argue that, despite all appearances, they really did not delay filing their

suit for four-plus years; instead, they say, there has been no "delay" in filing because the Forest Service has not yet approved groundbreaking for the snowmaking system and has not issued all the permits. Br. 13. This is a truly audacious argument. The reason the Snowbowl has not yet received all its permits and broken ground is because of appellants' pending lawsuit. See ER40-48 (stipulations delaying groundbreaking and construction pendente lite); SER9 (Snowbowl counsel: "[T]he reason, obviously, * * * this hasn't gone forward is not because the Snowbowl[ ] delayed, not because the Forest Service * * * delayed, but we've been [b]ogged down in the litigation, which is why the permit hasn't been issued. * * * We've been anxious and ready, willing and able to move forward on this project[.]"). In any event, appellants' argument is wrong on the law. Delay, for laches purposes, generally is judged from the date of the "relevant agency action"—here, the 2005 Forest Service decision. Apache I, 21 F.3d at 907.

Second, appellants say the District Court's application of the "three-part test" for undue delay was "clearly erroneous." Br. 15-17. This argument is doubly flawed. To begin with, this Court usually does not apply the "test" appellants identify. See In re Beaty, 306 F.3d at 927; Apache I, 21 F.3d at 907-910; Apache II, 118 F.3d at 665. Appellants' preferred test, taken from Ocean Advocates, is most relevant in cases where the plaintiff and the agency were in continuing negotiations prior to the initiation of litigation, which is not the case here. ER23.

The District Court alluded to the test primarily to address and distinguish Ocean Advocates, a case upon which appellants relied below. See ER22-23.

In any event, the District Court's application of the Ocean Advocates factors was correct and certainly did not constitute "clear error." Appellants say the first prong, "whether the plaintiff attempted to make its position known to the defendant before filing suit," cuts in their favor because they "filed comments during the administrative process." Br. 16. But those comments actually underscore the fact that appellants recognized their alleged injury in 2005 (if not sooner) and could have filed suit then—or joined the Navajo Nation suit—instead of in late 2009.

Appellants say the second prong, "Defendants' response to the plaintiffs," cuts in their favor because the Forest Service denied their appeal and "[s]ubsequent communications with the [Forest Service] * * * have been equally unavailing." Id. But the District Court found that appellants "have not been engaged in an alternative continued dialogue with the Forest Service"; on the contrary, "Plaintiffs completely dropped communications with the Forest Service after 2005 until initiating this lawsuit in 2009." ER23. Appellants' unsupported claim of ongoing "communications" hardly demonstrates that that finding was error.

Appellants claim that the third Ocean Advocates prong cuts in their favor because "developments" since 2005—developments they do not identify—helped them recognize that they had a legal basis to challenge the Forest Service's

decision. Br. 16. That is specious. The District Court correctly recognized that the Snowbowl project has not changed materially since 2005 and that appellants "have been aware of and opposed" to it all along. ER23. The District Court likewise recognized that these very appellants raised human-ingestion concerns in their filings with the Forest Service in 2004-05. ER13-16, ER23-24. There is nothing erroneous, much less clearly erroneous, in those findings.[9]

Third, appellants argue that even though they sat on their rights until the Navajo Nation lawsuit ran its full course, their strategic delay "is not one of the factors included by this Court in the test to determine whether there was undue delay." Br. 17. That is demonstrably incorrect. At least twice this Court has found a lack of diligence precisely because plaintiffs engaged in tactical delay. See Apache II, 118 F.3d 663; Apache I, 21 F.3d 895. Appellants' attempt to strictly cabin the inquiry to the Ocean Advocates factors flies in the face of those decisions.[10]

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[9] Presumably the "development" to which appellants refer is the Ninth Circuit's en banc rejection of the NEPA ingestion claim as improperly pled. This is not, however, a "development" justifying the initiation of a new lawsuit by dilatory plaintiffs seeking to correct what the prior plaintiffs had failed to put right.

[10] Appellants advance the related argument that there can be no laches here because they were merely "awaiting a change of previously unfavorable law." Br. 17 (quoting In re Beaty, 306 F.3d at 927). Nonsense. Appellants are referring to the rule that "delaying" until there is a change in unfavorable law is no delay at all, because there was no claim to bring unless the law changed. See, e.g., Wauchope v. U.S. Dep't of State, 985 F.2d 1407, 1411 (9th Cir. 1993). But that is not what

3. Appellants' Prejudice Arguments Are Wrong On the Law And The Facts.

Appellants also advance two arguments against the District Court's prejudice finding, but neither has merit. First, they suggest that prejudice may be found only if construction on the project has "become irreversible" or "substantial work has been completed." Br. 14 (citations omitted). To be sure, those are two types of prejudice that arise in laches cases, but they are not the only two. The many cases we cite above, finding prejudice based on economic losses and the investment of resources, demonstrate as much. See supra at 25-26. And so do this Court's own explanations of the doctrine. The Court has stated that "[l]aches is an equitable doctrine," Brown v. Continental Can Co., 765 F.2d 810, 814 (9th Cir.1985), that "[i]ts application depends upon the facts of the particular case," id., and that accordingly "the degree of completion is only one factor to be taken into consideration" in prejudice analysis. Apache I, 21 F.3d at 912 (emphasis added). Appellants' attempt to cabin laches prejudice into narrow and inflexible categories should be rejected.

Appellants next argue that the District Court's prejudice finding is clearly erroneous because the court stated that " 'the Snowbowl improvement project is almost complete.' " Br. 14 (quoting ER25). That cannot be, appellants say,

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appellants were doing here. There was no "unfavorable law" barring their way; instead, they simply waited until an earlier lawsuit ended—and when they found that result "unfavorable," they filed a second suit.

because Snowbowl has not broken ground on its snowmaking system. Br. 14-15. Appellants misunderstand the District Court's finding. The court was referring to the fact that the project as a whole—the multi-year process of seeking Forest Service permission, spending vast resources updating its application, engaging in public outreach, and filing permit applications—is almost complete. That is clear from the sentence just before the one to which appellants point: "Defendant Snowbowl had expended a great deal of resources on the Snowbowl upgrade project before this action was filed." ER25. The District Court was quite right about that. The Snowbowl, after all, has been facilitating agency review and permitting for nearly ten years, and has expended substantial resources in the process. SER113-114. To name just a few of the steps it has completed: It paid for and arranged multiple aerial and ground surveys of the ski area, as well as all of the other expensive and wide-ranging expert work required for the Forest Service's analysis, SER150-152, SER263, SER265-266; it negotiated a contract with and obtained required approvals from the City of Flagstaff, SER148-149, SER153-155, SER255; it and the Forest Service spent years discussing the project with members of tribal communities to solicit their input, SER238, SER246-248; it worked with engineers and manufacturers to design the snowmaking system, SER258-259, SER305-310; it spent millions to litigate Navajo Nation to its conclusion, SER113; it worked with the USDA to consider alternative water options, *see supra* at 17 n.5;

and it has reached the stage of final permitting. ER52. Only one substantive obstacle—the instant lawsuit—remains after all these years of effort. There was no error in the District Court's finding that this long process is almost complete.[11]

In short, the District Court made detailed findings supporting each prong of the laches test; the court's approach comports with the case law; and this Court has affirmed the imposition of laches on analogous facts. The laches finding was well within the District Court's discretion.

II. THE DISTRICT COURT CORRECTLY REJECTED APPELLANTS' NEPA ARGUMENTS.

The laches ruling alone suffices to dispose of this appeal; this Court need go no further to affirm. But in any event, appellants' NEPA claims fail on the merits. All of appellants' NEPA arguments depend on the premise that the Forest Service

[11] The District Court could not have meant "almost complete" in the sense appellants urge, because the court was well aware—and had been for months—that this lawsuit had blocked Snowbowl from breaking ground on its snowmaking project. The District Court signed off on multiple stipulations between the parties providing that the Snowbowl would neither break ground nor engage in any "construction of the snowmaking supply pipeline or snowmaking infrastructure" while the case below was pending. ER48; see also ER40-47. Counsel at the summary judgment hearing reaffirmed that "[t]he on-mountain infrastructure has [yet] to be constructed." SER12. And the District Court referenced the stipulations in its order denying appellants' injunction, making clear that it knew even after entering judgment that ground still had not been broken. SER2. To suggest, as appellants do, that the District Court understood these facts on day one, misunderstood them on day two, and understood them again on day three, is to ask this Court to abandon the "common sense" on which it is entitled to rely. United States v. Zolp, 479 F.3d 715, 719 (9th Cir. 2007).

did not consider the potential risks posed by ingestion of snow made from reclaimed water. That premise is false.

A. NEPA Law.

"NEPA is a purely procedural statute." Hapner v. Tidwell, 621 F.3d 1239, 1244 (9th Cir. 2010). It " 'does not mandate particular results, but simply provides the necessary process to ensure that federal agencies take a hard look at the environmental consequences of their actions.' " Id. (quoting High Sierra Hikers Ass'n v. Blackwell, 390 F.3d 630, 639 (9th Cir. 2004)). That "process" is encapsulated in the EIS. And this Court's "review of an EIS under NEPA is extremely limited." National Parks & Conservation Ass'n v. U.S. Dept. of Transp., 222 F.3d 677, 680 (9th Cir. 2000). The Court should "evaluate the EIS simply to determine whether it 'contains a reasonably thorough discussion of the significant aspects of the probable environmental consequences' " of a challenged action. Id. (quoting Oregon Envtl. Council, 817 F.2d at 492). If it does, the Court's review "is at an end." National Parks & Conservation, 222 F.3d at 680.

B. The EIS Provided The Required "Reasonably Thorough Discussion" Of Potential Health Effects From Ingesting Snow.

This brief recounts in some detail the analysis the Forest Service undertook to examine whether Rio de Flag reclaimed water had been sufficiently cleansed to avoid "potential health risks to humans, if ingested." SER273 (emphasis added). See supra at 7-13. The Court will look in vain for any mention of these facts in

appellants' brief. Instead, appellants simply pretend that that portion of the record does not exist: They state that "[t]here is * * * no real discussion or analysis of potential impacts of human ingestion in the EIS," and they then argue as if the only time the Forest Service considered human exposure to reclaimed water was in a few paragraphs in the Response to Comments. Br. 19-20. That is not accurate. Appellants cannot manufacture a NEPA violation by wishing away the record.

1. The Forest Service devoted an entire section of the EIS to the discussion appellants say never happened. The agency evaluated studies finding "no adverse health effects" from "drinking reclaimed water." See supra at 8-9; SER275. It evaluated studies finding that reclaimed water equivalent to Class A+ is safe to inject into drinking-water supplies and to spray on crops that are to be consumed raw. See supra at 7-10; SER164, SER298. It evaluated studies that examined the use of reclaimed water for snowmaking. See supra at 8; SER302. It reviewed Rio de Flag's water-treatment process and permitting requirements. See supra at 9-10; SER299-302. It analyzed whether Rio de Flag water met drinking-water standards, and found that it did for all parameters measured. See supra at 9-11; SER275-285, SER304. It examined at length the available science on risks posed by contaminants that can be present in reclaimed water. See supra at 2; SER156-206, SER280-297. And significantly, it found that the ADEQ—which is specifically tasked to consider "human exposure" and "[t]he potential for improper

or unintended use of the reclaimed water"—approved the type of reclaimed water at issue for direct reuse in snowmaking. See supra at 11-12; SER302.

This "extensive analysis * * * regarding the safety of exposure to reclaimed water," ER34, more than meets NEPA's requirement of a "reasonably thorough discussion." National Parks & Conservation, 222 F.3d at 680. As this Court explained after reviewing a similarly robust agency analysis: "We are not prepared to hold that this fairly exhaustive discussion is inadequate." Swanson v. U.S. Forest Serv., 87 F.3d 339, 344 (9th Cir. 1996).

2. Appellants ignore the above analysis altogether. They focus instead on "five paragraphs in the Response to Comments volume of the EIS," Br. 20, that (i) respond to concerns about ingesting snow and (ii) explain that when the Forest Service studied the effects of human exposure to reclaimed water, it considered "[p]otential exposure pathways" including "ingestion." SER321. But those five paragraphs are not the entirety of the agency's human-ingestion analysis, as appellants imply. Instead, as the District Court observed, they merely "confirm" the obvious: that when the EIS extensively examined studies and data on the safety of exposure to reclaimed water, it did so precisely because "the Forest Service was aware of and considered the fact that individuals * * * might ingest the snow." ER36. The approach the District Court took to these Responses to Comments—looking to them to underscore the approach the agency took, and the concerns the

agency considered, in the body of the EIS—is both sensible and in line with this Court's precedent. See, e.g., Native Ecosystems Council v. U.S. Forest Serv., 428 F.3d 1233, 1241 (9th Cir. 2005) (agency's point-by-point response to comments "underscores our conclusion that the Forest Service took a hard look and fairly considered the Reynolds Report habitat recommendations"); Okanogan Highlands Alliance v. Williams, 236 F.3d 468, 477 (9th Cir. 2000) (citing Response to Comments as part of EIS adequacy analysis); ER36 (citing cases).[12]

Appellants have suggested in the past—though they do not bother to spell out the argument in this Court—that the Forest Service's extensive human-ingestion analysis does not count because the agency engaged in much of that discussion within a larger EIS chapter entitled "Watershed Resources." SER272. But that approach to NEPA review makes no sense. The Forest Service was not required to proclaim on every page of its water-safety analysis that it was thinking about ingestion; nor was it required to create a subchapter title more to appellants' liking. It is enough that the agency identified "ingestion"[13] and "exposure"[14] as

[12] Appellants suggest that the Response to Comments volume "is not part of the EIS for purposes of analysis." Br. 20 n.3. That contention—supported only by citations to a handbook and a frequently-asked-questions list—is refuted by the cases cited immediately above, in which the Ninth Circuit looked to the Responses to Comments as part of a broader analysis of the EIS as a whole. The cases make clear that at the very least, courts can and do look to the Responses to Comments to confirm and underscore the approach taken by the main volume of the EIS.

[13] See SER273, SER275, SER313, SER324, SER328.

relevant concerns; "engaged in a thorough discussion regarding the safety of exposure to reclaimed water for humans sufficient to assess the safety of ingestion," ER34; and reiterated in the Response to Comments that it had conducted its extensive water-safety analysis with ingestion in mind. SER321. To require more would be to "fly speck" the EIS in search of trifling deficiencies of presentation—an approach this Court repeatedly has rejected. Swanson, 87 F.3d at 343-344; accord Oregon Nat. Res. Council Fund v. Goodman, 505 F.3d 884, 897 (9th Cir. 2007); Friends of Southeast's Future v. Morrison, 153 F.3d 1059, 1063 (9th Cir. 1998).

In the end, appellants would manufacture a NEPA violation by ignoring the relevant portions of the agency's EIS. This Court has rejected such attempts in the past. See National Parks & Conservation, 222 F.3d at 680 (explaining that "the dissent ignores entirely the analysis" on a relevant point and that this is improper because "[w]e review the EIS as a whole"). It should do so again here.

Finally, a word on appellants' incessant citations to the vacated panel opinion in the first Snowbowl case. Appellants quote that panel decision no fewer than three times in their brief, Br. 7, 10, 20, relying on it each time to argue that this Court should look only to the Response to Comments in analyzing whether the Forest Service completed a "reasonably thorough analysis." That argument is

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[14] See SER260-262, SER287, SER296, SER301-302.

mistaken for the reasons stated above. But the citations also are blatantly improper. This Court vacated the cited decision and ordered that it "shall not be cited as precedent by or to this court * * * except to the extent adopted by the en banc court." Navajo Nation II, 506 F.3d at 717 (emphasis added). And the vacated panel opinion was not adopted by the en banc court on the point for which appellants quote it; on the contrary, the en banc court reversed the panel on both of its core holdings. See Navajo Nation III, 535 F.3d at 1079-80. Appellants' attempt to evade this Court's vacatur order by repeatedly citing the panel opinion as precedent while simultaneously protesting that they are not doing so, e.g., Br. 20, should not be condoned.

C. The District Court Properly Rejected Appellants' "Scientific Integrity" Argument.

Appellants next argue that the Forest Service failed to "insure" the "scientific integrity" of its analysis, as required by 40 C.F.R. § 1502.24. But appellants once again construct their argument by cherry-picking from the EIS. Looking again to the Response to Comments volume, appellants quote the following passage: "Because ADEQ approved the use of reclaimed water, it is assumed different types of incidental contact that could potentially occur from use of class A reclaimed water were fully considered." Br. 22 (quoting ER191). Appellants argue that this means the Forest Service's decision to approve snowmaking with reclaimed water is "based on * * * an assumption," and that

making decisions based on assumptions is a failure of scientific integrity. Br. 22. Appellants made the same argument below, asserting that the Forest Service "abdicated" its EIS responsibilities by relying entirely on ADEQ. SER10.

The argument is doubly incorrect. First, it again relies on the fallacious notion that the Response to Comments is the place to look for the EIS' human-ingestion analysis (and therefore that the data discussed in those Responses provided the sole basis for the Forest Service's decision). That is inaccurate, as we have explained. The agency's decision was not "based on" its brief comments in the Response to Comments section; it was "based on" a wide-ranging scientific analysis in the body of the EIS itself that examined numerous academic studies and a wealth of empirical data. See supra at 7-13; see also ER31-32 (District Court finding that the Forest Service's discussion of ADEQ "was not the extent of the agency's investigation and discussion regarding the safety of ingesting snow made from reclaimed water"). Appellants have not even suggested that any of that research or data was lacking in "scientific integrity." This case therefore does not present the circumstances—misleading science and failure to discuss contrary evidence—that this Court has said can constitute a violation of the "scientific integrity" regulation. See Earth Island Inst., 626 F.3d at 472 (agencies can violate the scientific integrity requirement by failing to discuss "responsible opposing [scientific] view[s]"); Native Ecosystems Council v. U.S. Forest Serv., 418 F.3d

953, 964 (9th Cir. 2005) (failure of scientific integrity where EIS did not disclose that a key measurement was conducted improperly).

But in any event, appellants are quite wrong to argue that the Forest Service could not give weight to ADEQ's approval of snowmaking with Class A or better reclaimed water. ADEQ is designated as the expert agency for Arizona "for all purposes of the Clean Water Act," Ariz. Rev. Stat. § 49-202(A), and is authorized to promulgate water-safety standards in conjunction with EPA. Id.; ER30. This Court has long recognized that an EIS can look to the standards promulgated by such expert agencies, in conjunction with other data, to help assess the safety of a proposed action. See Friends of the Payette v. Horseshoe Bend Hydroelectric Co., 988 F.2d 989, 993 (9th Cir. 1993) (rejecting argument that an agency's EIS had "relied inappropriately on the Idaho Department of Environmental Quality's certification of compliance with state water quality standards"); Edwardsen v. U.S. Dept. of Interior, 268 F.3d 781, 789 (9th Cir. 2001) (rejecting argument that agency's EIS inappropriately relied on a project's compliance with EPA's National Ambient Air Quality Standards). Indeed, Congress requires agencies preparing EISs to consider the positions of other agencies with "special expertise with respect to any environmental impact involved." 42 U.S.C. § 4332(C). That makes sense. After all, "[t]he policy behind NEPA is to ensure that an agency has at its disposal all relevant information about environmental impacts of a project before

the agency embarks on the project." Salmon River Concerned Citizens v. Robertson, 32 F.3d 1346, 1356 (9th Cir. 1994). And the fact that an expert agency has deemed a proposed activity safe is certainly "relevant information." As one court explained in approving an EIS's reliance on the National Ambient Air Quality Standards: "If [the] standards are designed, as they are, to protect human health, then a finding that the projects do not violate those standards logically indicates that they will not significantly impact public health." Border Power Plant Working Grp. v. Department of Energy, 260 F. Supp. 2d 997 (S.D. Cal. 2003).

Appellants do not squarely contest this principle. Instead, their objection seems to be that the Forest Service did not know whether ADEQ considered the possibility of human ingestion before ADEQ approved snowmaking with reclaimed water. See Br. 22. But in fact ADEQ's own rules make plain that it had to consider ingestion. When ADEQ decides on appropriate uses for Class A water, it is required by rule to consider the risk to public health from "human exposure"—including "ingestion"—and from "[t]he potential for improper or unintended use of the reclaimed water." Ariz. Admin. Code § R18-11-309; 7 Ariz. Admin. Reg. 884. ADEQ's decision to approve snowmaking with Class A or better reclaimed water therefore means ADEQ considered the potential for human exposure and determined it is not unduly risky. The Forest Service recognized as much, writing that ADEQ's standards were "developed in a risk-based framework to protect

public health" and that "[t]he level of treatment and water quality criteria" specified by ADEQ "are based on the expected degree of contact with reclaimed water by the public." SER301, SER303. Appellants cannot upend this reasoned reliance—a reliance indistinguishable from those approved in the Ninth Circuit cases discussed above—by combing through the agency's 426-page Response to Comments and picking out the word "assumed." That is just the sort of "fly speck[ing]" this Court warns NEPA litigants to avoid. See Swanson, 87 F.3d at 343-344.

Finally, appellants argue that the ADEQ regulations actually should have led the Forest Service to reject snowmaking with reclaimed water, because other sections of those regulations "prohibit the use of reclaimed wastewater for human consumption and/or any activity with the potential for ingestion." Br. 23. This argument misconstrues the regulations. They do not prohibit the use of reclaimed water for any activity with the potential for ingestion; they prohibit it for "full-immersion water activity with a potential of ingestion." Ariz. Admin. Code § R18-9-704(G) (emphasis added). ADEQ was entitled to make the judgment that full immersion creates risks of high-volume exposure not present in snow recreation. The Forest Service was no more required to look behind the ADEQ's line-drawing than the agencies in cases like Edwardsen were required to deconstruct the EPA's National Ambient Air Quality Standards. In the end, it was perfectly reasonable

for the Forest Service to deem relevant (but not dispositive) the fact that an expert agency approved the water at issue in this case as safe for the exact use proposed. The notion that this constitutes a failure of "scientific integrity" is baseless.

D. Appellants' "Quality Information" Argument Is Both Waived And Meritless.

Appellants next argue that because the Forest Service's decision was based on a supposed "assumption," it failed to provide the public with high-quality information, as required by 40 C.F.R. § 1500.1(b). Br. 25. This largely unexplained, one-paragraph argument fails for two reasons. First, it is waived. The District Court held that "because the Plaintiffs failed to respond to Defendants' motion for summary judgment on this point, they have abandoned this claim." ER34 n.5. And when a plaintiff "abandon[s] his claim" below, he "cannot raise it on appeal." Walsh v. Nevada Dep't of Human Res., 471 F.3d 1033, 1037 (9th Cir. 2006).

Second, and in any event, the argument has no merit. The Forest Service's decision was not based on an assumption, as already discussed. Instead, the agency spent dozens of pages discussing the risks of exposure to reclaimed water, SER273-SER304, reviewing expert studies and making its own expert study available for review,[15] SER317, and reprinting extensive data on Rio de Flag water

[15] The agency did not, of course, have to reprint the entire expert study in the EIS to meet the "high quality information" requirement. The NEPA guidelines

quality. SER275-284. That detailed presentation fulfilled its responsibility under Section 1500.1(b) "to make available to the public high quality information, including accurate scientific analysis, expert agency comments and public scrutiny, before decisions are made and actions are taken." Center for Biological Diversity v. U.S. Forest Serv., 349 F.3d 1157, 1167 (9th Cir. 2003). As the District Court held in the alternative: "[T]he Court finds that the Forest Service did disseminate quality information on the potential impact of ingesting snow made from reclaimed water because it was appropriate for it to rely on the ADEQ and because the additional information it provided related to the additional inquiry it made regarding the safety of exposure to reclaimed water was quality information." ER34 n.5.[16]

Appellants' NEPA arguments, in short, proceed without exception from a false premise. The Forest Service did consider the potential health effects of

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approve "incorporation by reference" and require only that underlying scientific information be made "available for review." City of Sausalito v. O'Neill, 386 F.3d 1186, 1213 (9th Cir. 2004).

[16] Finally, to the extent appellants are arguing that the Forest Service should have reprinted any underlying rulemaking documents ADEQ generated years ago when it was developing its reclaimed-water standards, the argument is meritless. Appellants point to no decision—and we are aware of none—that has ever required an agency to investigate the genesis of air- or water-quality standards, or to copy and paste the underlying rulemaking dockets, before referring to those standards in an EIS. To impose such a requirement would defy common sense and create unnecessary burdens on federal agencies. As the Court of Appeals explained in rejecting a similar argument: "Congress did not enact the National Environmental Policy Act to generate paperwork or impose rigid documentary specifications." Colorado Envtl. Coalition v. Dombeck, 185 F.3d 1162, 1173 (10th Cir. 1999).

ingesting snow made from reclaimed water, and it did so at length and with reference to probative scientific evidence. NEPA requires no more. The NEPA arguments should be rejected.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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May 17, 2011

NINTH CIRCUIT RULE 28-2.6 STATEMENT

Pursuant to Ninth Circuit Rule 28-2.6, counsel for Arizona Snowbowl Resort Limited Partnership states that it is not aware of any related case pending in this or any other court.

/s/ Catherine E. Stetson____
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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I hereby certify that the attached Brief for Intervenor-Defendant-Appellee Arizona Snowbowl Resort Limited Partnership is proportionally spaced, has a typeface of 14 point, and contains 11,714 words.

/s/ Catherine E. Stetson
Catherine E. Stetson

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief, along with the Addendum, were electronically filed with the Clerk using the appellate CM/ECF system on May 17, 2011. I certify that all counsel of record in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Four copies of Defendants' Supplemental Excerpts of Record were sent on May 17, 2011 via Federal Express to the Clerk of the Court. In addition, paper copies of the Excerpts were served via Federal Express upon the following:

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33 U.S.C. 1313(c)

(c) Review; revised standards; publication

(1) The Governor of a State or the State water pollution control agency of such State shall from time to time (but at least once each three year period beginning with October 18, 1972) hold public hearings for the purpose of reviewing applicable water quality standards and, as appropriate, modifying and adopting standards. Results of such review shall be made available to the Administrator.

(2)(A) Whenever the State revises or adopts a new standard, such revised or new standard shall be submitted to the Administrator. Such revised or new water quality standard shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses. Such standards shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of this chapter. Such standards shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation.

(B) Whenever a State reviews water quality standards pursuant to paragraph (1) of this subsection, or revises or adopts new standards pursuant to this paragraph, such State shall adopt criteria for all toxic pollutants listed pursuant to section 1317(a)(1) of this title for which criteria have been published under section 1314(a) of this title, the discharge or presence of which in the affected waters could reasonably be expected to interfere with those designated uses adopted by the State, as necessary to support such designated uses. Such criteria shall be specific numerical criteria for such toxic pollutants. Where such numerical criteria are not available, whenever a State reviews water quality standards pursuant to paragraph (1), or revises or adopts new standards pursuant to this paragraph, such State shall adopt criteria based on biological monitoring or assessment methods consistent with information published pursuant to section 1314(a)(8) of this title. Nothing in this section shall be construed to limit or delay the use of effluent limitations or other permit conditions based on or involving biological monitoring or assessment methods or previously adopted numerical criteria.

(3) If the Administrator, within sixty days after the date of submission of the revised or new standard, determines that such standard meets the requirements of this chapter, such standard shall thereafter be the water quality standard for the applicable waters of that State. If the Administrator determines that any such

revised or new standard is not consistent with the applicable requirements of this chapter, he shall not later than the ninetieth day after the date of submission of such standard notify the State and specify the changes to meet such requirements. If such changes are not adopted by the State within ninety days after the date of notification, the Administrator shall promulgate such standard pursuant to paragraph (4) of this subsection.

(4) The Administrator shall promptly prepare and publish proposed regulations setting forth a revised or new water quality standard for the navigable waters involved—

(A) if a revised or new water quality standard submitted by such State under paragraph (3) of this subsection for such waters is determined by the Administrator not to be consistent with the applicable requirements of this chapter, or

(B) in any case where the Administrator determines that a revised or new standard is necessary to meet the requirements of this chapter.

The Administrator shall promulgate any revised or new standard under this paragraph not later than ninety days after he publishes such proposed standards, unless prior to such promulgation, such State has adopted a revised or new water quality standard which the Administrator determines to be in accordance with this chapter.

42 U.S.C. § 300g-2

§ 300g-2. State primary enforcement responsibility

(a) In general

For purposes of this subchapter, a State has primary enforcement responsibility for public water systems during any period for which the Administrator determines (pursuant to regulations prescribed under subsection (b) of this section) that such State—

(1) has adopted drinking water regulations that are no less stringent than the national primary drinking water regulations promulgated by the Administrator under subsections (a) and (b) of section 300g-1 of this title not later than 2 years after the date on which the regulations are promulgated by the Administrator, except that the Administrator may provide for an extension of not more than 2 years if, after submission and review of appropriate, adequate documentation from the State, the Administrator determines that the extension is necessary and justified;

(2) has adopted and is implementing adequate procedures for the enforcement of such State regulations, including conducting such monitoring and making such inspections as the Administrator may require by regulation;

(3) will keep such records and make such reports with respect to its activities under paragraphs (1) and (2) as the Administrator may require by regulation;

(4) if it permits variances or exemptions, or both, from the requirements of its drinking water regulations which meet the requirements of paragraph (1), permits such variances and exemptions under conditions and in a manner which is not less stringent than the conditions under, and the manner in which variances and exemptions may be granted under sections 300g-4 and 300g-5 of this title;

(5) has adopted and can implement an adequate plan for the provision of safe drinking water under emergency circumstances including earthquakes, floods, hurricanes, and other natural disasters, as appropriate; and

(6) has adopted authority for administrative penalties (unless the constitution of the State prohibits the adoption of the authority) in a maximum amount—

(A) in the case of a system serving a population of more than 10,000, that is not less than $1,000 per day per violation; and
(B) in the case of any other system, that is adequate to ensure compliance (as determined by the State);

except that a State may establish a maximum limitation on the total amount of administrative penalties that may be imposed on a public water system per violation.

(b) Regulations

(1) The Administrator shall, by regulation (proposed within 180 days of December 16, 1974), prescribe the manner in which a State may apply to the Administrator for a determination that the requirements of paragraphs (1), (2), (3), and (4) of subsection (a) of this section are satisfied with respect to the State, the manner in which the determination is made, the period for which the determination will be effective, and the manner in which the Administrator may determine that such requirements are no longer met. Such regulations shall require that before a determination of the Administrator that such requirements are met or are no longer met with respect to a State may become effective, the Administrator shall notify such State of the determination and the reasons therefor and shall provide an opportunity hereforeic hearing on the determination. Such regulations shall be promulgated (with such modifications as the Administrator deems appropriate) within 90 days of the publication of the proposed regulations in the Federal Register. The Administrator shall promptly notify in writing the chief executive officer of each State of the promulgation of regulations under this paragraph. Such notice shall contain a copy of the regulations and shall specify a State's authority under this subchapter when it'is determined to have primary enforcement responsibility for public water systems.

(2) When an application is submitted in accordance with the Administrator's regulations under paragraph (1), the Ad'inistrator shall within 90 days of the date on which such application is submitted (A) make the determination applied for, or (B) deny the application and notify the applicant in writing of the reasons for his denial.

(c) Interim primary enforcement authority

A State that has primary enforcement authority under this section with respect to each existing national primary drinking water regulation shall be considered to

have primary enforcement authority with respect to each new or revised national primary drinking water regulation during the period beginning on the effective date of a regulation adopted and submitted by the State with respect to the new or revised national primary drinking water regulation in accordance with subsection (b)(1) of this section and ending at such time as the Administrator makes a determination under subsection (b)(2)(B) of this section with respect to the regulation.

42 U.S.C. § 4332

§ 4332. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall--

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop’methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on--

(i) the environmental impact of the proposed action,
(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
(iii) alternatives to the proposed action,
(iv) the relationship between local short-term uses of man's environment and the maintenance and enh’ncement of long-term productivity, and
(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on

Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes;

(D) Any detailed statement required under subparagraph (C) after January 1, 1970, for any major Federal action funded under a program of grants to States shall not be deemed to be legally insufficient solely by reason of having been prepared by a State agency or official, if:

(i) the State agency or official has statewide jurisdiction and has the responsibility for such action,
(ii) the responsible Federal official furnishes guidance and participates in such preparation,
(iii) the responsible Federal official independently evaluates such statement prior to its approval and adoption, and
(iv) after January 1, 1976, the responsible Federal official provides early notification to, and solicits the views of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement on such impacts, prepares a written assessment of such impacts and views for incorporation into such detailed statement.

The procedures in this subparagraph shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire statement or of any other responsibility under this chapter; and further, this subparagraph does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction.

(E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(F) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(G) make available'to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(H) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(I) assist the Council on Environmental Quality established by subchapter II of this chapter.

Ariz. Rev. Stat. § 49-202(A)

§ 49-202. Designation of state agency

A. The department is designated as the agency for this state for all purposes of the clean water act, including § 505, [FN1] the resource conservation and recovery act, including § 7002, [FN2] and the safe drinking water act. [FN3] The department may take all actions necessary to administer and enforce these acts as provided in this section, including entering into contracts, grants and agreements, the adoption, modification or repeal of rules, and initiating administrative and judicial actions to secure to this state the benefits, rights and remedies of such acts.

Ariz. Admin. Code § R18-11-303

R18-11-303. Class A+ Reclaimed Water

A. Class A+ reclaimed water is wastewater that has undergone secondary treatment, filtration, nitrogen removal treatment, and disinfection. Chemical feed facilities to add coagulants or polymers are required to ensure that filtered effluent before disinfection complies with the 24-hour average turbidity criterion prescribed in subsection (B)(1). Chemical feed facilities may remain idle if the 24-hour average turbidity criterion in (B)(1) is achieved without chemical addition.

B. An owner of a facility shall ensure that:

1. The turbidity of Class A+ reclaimed water at a point in the wastewater treatment process after filtration and immediately before disinfection complies with the following:

a. The 24-hour average turbidity of filtered effluent is two NTUs or less, and
b. The turbidity of filtered effluent does not exceed five NTUs at any time.

2. Class A+ reclaimed water meets the following criteria after disinfection treatment and before discharge to a reclaimed water distribution system:

a. There are no detectable fecal coliform organisms in four of the last seven daily reclaimed water samples taken, and
b. The single sample maximum concentration of fecal coliform organisms in a reclaimed water sample is less than 23 / 100 ml.

c. If alternative treatment processes or alternative turbidity criteria are used, or reclaimed water is blended with other water to produce Class A+ reclaimed water under subsection (C), there are no detectable enteric virus in four of the last seven monthly reclaimed water samples taken.

3. The 5-sample geometric mean concentration of total nitrogen in a reclaimed water sample is less than 10 mg / L.

C. An owner of a facility may use alternative treatment methods other than those required by subsection (A), or comply with alternative turbidity criteria other than those required by subsection (B)(1), or blend reclaimed water with other water to produce Class A+ reclaimed water provided the owner demonstrates through pilot

plant testing, existing water quality data, or other means that the alternative treatment methods, alternative turbidity criteria, or blending reliably produces a reclaimed water that meets the disinfection criteria in subsection (B)(2) and the total nitrogen criteria in subsection (B)(3) before discharge to a reclaimed water distribution system.

D. Class A+ reclaimed water is not required for any type of direct reuse. A person may use Class A+ reclaimed water for any type of direct reuse listed in Table A.

Ariz. Admin. Code § R18-11-309

R18-11-309. Reclaimed Water Quality Standards for an Unlisted Type of Direct Reuse

A. The Department may prescribe in an individual reclaimed water permit issued under 18 A.A.C. 9, Article 7, reclaimed water quality requirements for a type of direct reuse not listed in Table A. Before permitting a direct reuse of reclaimed water not listed in Table A, the Department shall, using its best professional judgment, determine and require compliance with reclaimed water quality requirements needed to protect public health and the environment.

B. Department may determine that Class A+, A, B+, B, or C reclaimed water is appropriate for a new type of direct reuse.

C. The Department shall consider the following factors when prescribing reclaimed water quality requirements for a new type of direct reuse:

1. The risk to public health;

2. The degree of public access to the site where the reclaimed water is reused and human exposure to the reclaimed water;

3. The level of treatment necessary to ensure that the reclaimed water is aesthetically acceptable;

4. The level of treatment necessary to prevent nuisance conditions;

5. Specific water quality requirements for the intended type of direct reuse;

6. The means of application of the reclaimed water;

7. The degree of treatment necessary to avoid a violation of surface water quality standards or aquifer water quality standards;

8. The potential for improper or unintended use of the reclaimed water;

9. The reuse guidelines, criteria, or standards adopted or recommended by the U.S. Environmental Protection Agency or other federal or state agencies that apply to the new type of direct reuse; and

10. Similar wastewater reclamation experience of reclaimed water providers in the United States.

Ariz. Admin. Code § R18-11-309, Table A

Table A. Minimum Reclaimed Water Quality Requirements for Direct Reuse

Type of Direct Reuse	Minimum Class of Reclaimed Water Required
Irrigation of food crops	A
Recreational impoundments	A
Residential landscape irrigation	A
Schoolground landscape irrigation	A
Open access landscape irrigation	A
Toilet and urinal flushing	A
Fire protection systems	A
Spray irrigation of an orchard or vineyard	A
Commercial closed loop air conditioning systems	A
Vehicle and equipment washing (does not include self-service vehicle washes)	A
Snowmaking	A
Surface irrigation of an orchard or vineyard	B
Golf course irrigation	B
Restricted access landscape irrigation	B
Landscape impoundment	B
Dust control	B
Soil compaction and similar construction activities	B
Pasture for milking animals	B
Livestock watering (dairy animals)	B
Concrete and cement mixing	B
Materials washing and sieving	B
Street cleaning	B
Pasture for non-dairy animals	C
Livestock watering (non-dairy animals)	C

Irrigation of sod farms	C
Irrigation of fiber, seed, forage, and similar crops	C
Silviculture	C

Note: Nothing in this Article prevents a wastewater treatment plant from using a higher quality reclaimed water for a type of direct reuse than the minimum class of reclaimed water listed in Table A. For example, a wastewater treatment plant may provide Class A reclaimed water for a type of direct reuse where Class B or Class C reclaimed water is acceptable.