



## THE NAVAJO NATION

OFFICE OF THE PRESIDENT & VICE PRESIDENT

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# Navajos leaves San Francisco Federal courthouse optimistic following appeal arguments in *Dook'o'osliid* desecration case



**Navajo President Joe Shirley, Jr., addresses the press and a group of supporters of the San Francisco Peaks on the steps of the James R. Browning Federal Courthouse following oral arguments before the 9<sup>th</sup> Circuit Court of Appeals in San Francisco. Also attending was Navajo Nation Council Speaker Lawrence T. Morgan and several council delegates. At the left is the Navajo Nation's attorney Howard Shanker.**

**SAN FRANCISCO, Calif.** – Navajo Nation leaders, medicine people, their attorneys and their supporters left the James R. Browning United States Courthouse feeling jubilant today following oral arguments in the appeal of the San Francisco Peaks lawsuit against the U.S. Forest Service and the Arizona Snowbowl Resort.

Just outside on the courthouse steps, they met the press and about 100 supporters and members of the Navajo, Hopi, Hualapai and Havasupai tribes who traveled here to catch a glimpse of the proceedings before the 9<sup>th</sup> Circuit Court of Appeals.

Navajo Nation President Joe Shirley, Jr., expressed his appreciation to Navajo Nation Council delegates, the tribes' lawyers, and the people who came to offer support and prayers.

"I also want to express my appreciation to all of the medicine people who are also represented here sending up prayers as we go before the courts of the United States of America defending our way of life and our herbs and our mountain and our medicine people," President Shirley said.

The Navajo Nation and several other tribes seek to halt expansion of the ski area and the planned use of treated wastewater to make artificial snow.

Attorney Howard Shanker, who represents the Navajo Nation, was pleased with the hour-long proceeding.

"I think it went pretty well in there," he told an impromptu press conference. "I think we have a good chance and hopefully this will be one of those days that what's right and what's moral is the same as what's legal and, unfortunately, that doesn't always happen but hopefully this will be one of those cases."

He described the case as one that could decide the future of American Indian religious freedom and the ecological integrity of the San Francisco Peaks. The development plan was approved by the U.S. Forest Service and has been allowed to go forward by a Jan. 11, 2006, decision issued by U.S. District Court Judge Paul Rosenblatt.

For instance, in the portion of the case dealing with compliance with the National Environmental Policy Act and the environmental impact statement done on the proposed development area, the justices wanted to know why, if artificial snow made with reclaimed sewage is supposed to be safe if eaten by children or a skier who may do a "face plant" into the snow, does the Arizona Department of Environmental Quality require signs be posted saying the snow is made with reclaimed water?

And whether, for that matter, everyone skiing would know that reclaimed water actually meant reclaimed sewage, rain runoff, and wastewater from hospital and mortuaries?

Mr. Shanker told the court that while children are more susceptible to contaminants that would be found in artificial snow made with reclaimed water, the Forest Service did not consider it at all in its EIS. He argued that potential impacts to human health from exposures to the contaminants found in the reclaimed water have not been adequately assessed as required by the National

Environmental Policy Act.

"Telling kids not to eat snow doesn't meet the needs of NEPA," he said. "We're saying they didn't follow the process."

The court noted that what was missing from the court record and EIS was any study that would indicate how often skiers would come into contact with snow made from reclaimed water.



**Several dozen supporters, joined by members of the press, await tribal leaders as they leave the federal courthouse following oral arguments in the San Francisco Peaks appeal in San Francisco.**

Also expressing appreciation was Navajo Nation Council Speaker Lawrence T. Morgan. He came with Council delegates Willie Greyeyes, Leroy Thomas, Ray Berchman, Young Jeff Tom, Rex Lee Jim, Tom LaPahe and newly crowned Miss Navajo Nation Jocelyn Billy.

Each side was told they would have only 25 minutes to present their arguments but numerous questions from the three judge appeals court stretch that a bit. Fielding the most questions were attorneys for the U.S. Forest Service and Arizona Snowbowl Resort.

And while the Snowbowl says warning signs would be posted, the court noted no number of signs was included in the record. Snowbowl attorneys also could not say if the meaning of "reclaimed water" would be explained.

When the Snowbowl's attorney said findings showed that reclaimed water quality improved slightly through the freezing process, the court asked for a thorough explanation of how.

At one point, the court asked if the state required the Catholic Church to use only reclaimed water in its baptismal fonts whether the church would object. Explaining she is not Catholic, the attorney for the Snowbowl, declined to answer.

One of the justices asked the Forest Service's attorney the whether the Forest Service had a financial interest in approving the Snowbowl's expansion. At first the attorney said no but upon further questioning acknowledged it received 90 cents per skier per day.

The justice then asked if he was aware of another court's opinion that a government agency that has a financial stake should be looked at with suspicion. The attorney said yes.

When it was explained that Snowbowl has existed on the Peaks for 70 years, the court asked why that was a compelling interest for the Forest Service when businesses fail all the time.

Scott Canty, general counsel for the Hopi Tribe, noted that Hopis, by contrast have been spiritually using the mountain since before the Magna Carta was signed in 1215.

In his concluding remarks, Mr. Shanker said the case for using artificial snow does not consider that pharmaceutical and health care product residue are in the water, that Snowbowl is a non-destination ski area in a location that does not get enough natural precipitation sufficient to sustain a ski area, and that the planned development using reclaimed water would impact 13 tribes that need to perform their traditional spiritual ceremonies in order to maintain their cultural identity.

What more could you to demonstrate a burden as required by the Religious Freedom Restoration Act? he asked.

In its appeal, the Navajo Nation, Hopi, Hualapai, Havasupai, Yavapai Apache and White Mountain Apache tribes argue that:

- The U.S. Forest Service's approval of the expansion and use of treated sewage effluent to make snow violates the Religious Freedom Restoration Act.
- The U.S. Forest Service failed to disclose and discuss the scientific viewpoints submitted by Dr. Paul Torrence.
- The U.S. Forest Service failed to consider the fact that children might eat snow made from treated sewage effluent, and
- The U.S. Forest Service refused to consider the impacts associated with withdrawal of 1.5 million gallons each day of reclaimed water that is currently used to recharge the regional aquifer near Flagstaff.

Mr. Shanker also represents Rex Tilousi, Dianna Uqualla, the Sierra Club, the Center for Biological Diversity, and the Flagstaff Activist Network in the case. In addition, the Hopi Tribe and the Hualapai Tribe have separate legal counsel representing them in this case.

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