

1 Defendants hereby move to transfer *Save the Peaks Coalition, et al. v. U.S. Forest*
2 *Service, et al.*, case number CV 09-8163-PCT-MHM, to this Court pursuant to Local Rule
3 42.1(a)(1) on the grounds that the case is related to *Navajo Nation, et al. v. U.S. Forest*
4 *Service, et al.* (Nos. CV 05-1824-PCT-PGR, CV 05-1914-PCT-EHC, CV 05-1949-PCT-
5 NVW, CV 05-1966-PCT-JAT), 408 F.Supp.2d 866 (D.Ariz. 2006), *aff'd* 535 F.3d 1058 (9th
6 Cir. 2008), *cert. denied* 129 S.Ct. 2763 (2009). *Save the Peaks* arises from the same
7 transaction or event as *Navajo Nation*, involves substantially the same parties or property,
8 calls for determination of substantially the same questions of law, and would entail
9 substantial duplication of labor if not heard by this Court.

10 Plaintiffs in *Save the Peaks* challenge the Forest Service's decision to authorize
11 certain upgrades to facilities at the Arizona Snowbowl ("Snowbowl"), an existing ski area
12 on the western flank of the San Francisco Peaks in the Coconino National Forest. This Court
13 has a deep familiarity with the issues presented in the *Navajo Nation* case. For the reasons
14 explained in detail below, the Court should grant Defendants' motion and transfer *Save the*
15 *Peaks* to its Court.

16 **BACKGROUND**

17 The Snowbowl has been used as a ski area since 1938. In 1979, the Forest Service
18 conducted an extensive process pursuant to the National Environmental Policy Act
19 ("NEPA"), 42 U.S.C. §4321, *et seq.*, to evaluate proposed upgrades to the Snowbowl, which
20 included the installation of new lifts, trails and facilities. Shortly after the Forest Service
21 approved the proposed upgrades, several Indian tribes challenged the decision on the grounds
22 that development of the San Francisco Peaks would be a profane act and an affront to their
23 deities. *Wilson v. Block*, 708 F.2d 735, 738 (D.C. Cir. 1983), *cert. denied* 464 U.S. 956
24 (1983). The District of Columbia Court of Appeals upheld the Forest Service's decision to
25 approve the upgrades. *Id.* at 760. Many, but not all, of the improvements authorized by the
26 Forest Service in 1979 and upheld in *Wilson* have been implemented over the past thirty

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1 years.

2 In September of 2002, Snowbowl sought to implement the remaining previously
3 authorized upgrades, build additional facilities, and submitted a formal proposal to use Class
4 A+ reclaimed water for snowmaking at the facility. *Navajo Nation*, 408 F.Supp.2d at 870-71.
5 The Forest Service conducted an extensive environmental review of the Improvements
6 Project under NEPA that spanned several years and sought input from both the public and
7 tribal entities. In February of 2005, Defendant Nora Rasure issued a Final Environmental
8 Impact Statement (“FEIS”) and a Record of Decision (“ROD”). The ROD approved the use
9 of snow made from Class A+ reclaimed water to cover approximately 205 acres in the area.^{1/}
10 *Id.* at 871.

11 Shortly after issuance of the FEIS and ROD, several Indian nations and tribes, along
12 with individuals and non-governmental organizations, challenged the Forest Service’s actions
13 in *Navajo Nation*, a case decided by this Court. *See Navajo Nation*, 408 F.Supp.2d 866. The
14 *Navajo Nation* plaintiffs asserted that the Forest Service’s actions were arbitrary, capricious,
15 and not otherwise in accordance with NEPA because the Forest Service allegedly failed to
16 scrutinize the environmental consequences of the proposed action, including the impacts of
17 snowmaking using reclaimed water. This Court granted summary judgment in favor of the
18 Forest Service on the NEPA claims. Among other findings, the Court held that the Forest
19 Service properly scrutinized the effects of using Class A+ reclaimed water to make artificial
20 snow at the Snowbowl in accordance with NEPA. *Navajo Nation*, 408 F.Supp.2d at 876. The

21 _____
22 ^{1/}The ROD also approved a 10 million-gallon reclaimed water reservoir near the top
23 terminal of the existing chairlift and a catchment pond below Hart Prairie Lodge;
24 construction of a reclaimed water pipeline between Flagstaff and the Snowbowl with
25 booster stations and pump houses; construction of a 3,000 to 4,000 square foot
26 snowmaking control building; construction of a new 10,000 square foot guest services
27 facility; an increase in skiable acreage from 139 to 205; and approximately 47 acres of
28 thinning and 87 acres of grading/stumping and smoothing. *Navajo Nation*, 408 F.Supp.2d
at 871.

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1 Court did not reach a decision on whether the FEIS adequately considered the risk posed by
 2 human ingestion of artificial snow because this claim was not properly pleaded by the one
 3 party who raised it. *See* 408 F.Supp.2d at 873-78 and 908; 535 F.3d at 1079. The Ninth
 4 Circuit affirmed this Court's decision on the NEPA claims, and the Supreme Court denied
 5 *certiorari*. 535 F.3d at 1079; 129 S.Ct. 2763.

6 In *Save the Peaks*, Plaintiffs base their complaint on the one NEPA claim not
 7 addressed in *Navajo Nation*. Since *Save the Peaks* is related to the *Navajo Nation* case
 8 previously litigated before this Court, the more recent case should be transferred pursuant to
 9 Local Rule 42.1.

10 ARGUMENT

11 **I. The Court Has Broad Discretion to Transfer under Local Rule 42.1**

12 Pursuant to the Local Rules for the District of Arizona,

13 Whenever two or more cases are pending² before different Judges and any
 14 party believes that such cases (A) arise from substantially the same transaction
 15 or event; (B) involve substantially the same parties or property; ... (D) calls for
 16 determination of substantially the same questions of law; or (E) for any other
 17 reason would entail substantial duplication of labor if heard by different
 18 Judges, any party may file a motion to transfer the case or cases involved to a
 19 single Judge.

20 L.R. 42.1(a)(1). Local Rule 42.1 does not require that each of the subsections be shown
 21 before a transfer is proper. *Gagan v. Estate of Sharar*, 2008 WL 2810978, at *2 (D.Ariz.
 22 July 18, 2008) (unreported). The standard for transfer is similar to the standard for
 23 consolidation under Rule 42(a) of the Federal Rules of Civil Procedure, and district courts
 24 have broad discretion in determining whether to grant such motions. *See Investors Research*

25 ² At least one Court in this District has transferred a pending case to one that was
 26 previously closed based on the prior judge's familiarity with the substantially similar
 27 matters involved in the two cases. *See Gagan v. Estate of Sharar*, 2008 WL 2810978 (D.
 28 Ariz. July 18, 2008) (transferring CV 08-0018 to CV 99-1427, the latter of which was
 closed on March 27, 2003).

1 *Co. v. U.S. Dist. Ct. for Cent. Dist. of Cal.*, 877 F.2d 777 (9th Cir. 1989); 9A C. Wright &
2 A. Miller, *Federal Practice and Procedure* 3d ed., § 2383 (2009); *Pangerl v. Ehrlich*, 2007
3 WL 686703 (D. Ariz., Mar. 2, 2007) (unreported) (Murguia, J.).

4 As Defendants establish below, the present case is substantially related to *Navajo*
5 *Nation* and should be transferred to this Court.

6 **II. Defendants Meet the Requirements of Local Rule 42.1(a)(1)**

7 **A. *Save the Peaks* Arises from the Same Event as *Navajo Nation***

8 In *Save the Peaks*, Plaintiffs challenge the Forest Service's 2005 FEIS approving
9 previously authorized upgrades to Snowbowl and the formal proposal to use Class A+
10 reclaimed water for snowmaking at the facility. The complaint explicitly names the FEIS
11 and ROD as the challenged administrative actions. (Docket #1, at ¶24). Since the same FEIS
12 and ROD were at issue in *Navajo Nation*, the two cases arise from the same event. *See*
13 *Navajo Nation*, 408 F.Supp.2d at 871, 876.

14 **B. *Save the Peaks* Involves Substantially the Same Property as *Navajo Nation***

15 Both *Navajo Nation* and *Save the Peaks* challenge proposed actions at the Snowbowl
16 in the Coconino National Forest. The property in question in the two cases is identical.

17 **C. *Save the Peaks* Calls for Determination of Substantially the Same**
18 **Questions of Law as *Navajo Nation***

19 In both *Save the Peaks* and in *Navajo Nation*, the parties alleged violations of NEPA.
20 Indeed, both actions expressly challenge the Forest Service's environmental analysis and
21 disclosures relating to the use of Class A+ reclaimed water to make artificial snow. Although
22 the Court in *Navajo Nation* did not consider the sub-issue of whether the FEIS adequately
23 considered the risk posed by human ingestion of artificial snow, it did conduct a thorough
24 review of the Forest Service's obligations under NEPA. The absence of the ingestion claim
25 from *Navajo Nation* does not undermine the present case's essential similarity with that case.
26 *See Parra v. Bashas' Inc.*, 2009 WL 1024615, at *5 (D. Ariz. Apr. 15, 2009) (slip copy)

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1 (inclusion of an additional claim does not undermine essential similarity of claims presented
2 in two cases considered for transfer). Since the question of law is whether the Forest Service
3 violated NEPA in its analysis of the Improvements Project, *Save the Peaks* calls for
4 determination of substantially the same question of law as *Navajo Nation*.

5 **D. There Would Be a Substantial Duplication of Labor If Heard by Different**
6 **Judges**

7 In *Navajo Nation*, this Court recently considered the voluminous administrative record
8 of the Forest Service's FEIS. This record included technical scientific reports from
9 hydrogeologists, chemists, and waste water specialists, as well as those from economists,
10 wildlife biologists, and other experts. The record also included almost ten thousand
11 comments submitted in response to the draft environmental impact statement and the Forest
12 Service's consideration of these comments. Based on the recent adjudication of *Navajo*
13 *Nation*, this Court already has an intimate knowledge of the same facts that form the basis
14 of this complaint. If another Court were to hear this case, it would entail a substantial
15 duplication of labor and consume scarce judicial resources.

16 Based on the preceding four paragraphs, Defendants have shown that they meet the
17 conditions to transfer this case. L.R. 42.1(a)(1).

18 **II. *Save the Peaks* Should Be Assigned To This Court**

19 Once a party demonstrates that a case could be transferred to a single judge, the Court
20 considers the following four factors to determine which Judge should be assigned: (a)
21 whether substantive matters have been considered in a case; (b) which Judge has the most
22 familiarity with the issues involved in the cases; (c) whether a case is reasonably viewed as
23 the lead or principal case; and (d) any other factor serving the interest of judicial economy.
24 L.R. 42.1(a)(4).

25 All four factors favor transferring the case to this Court. First, this Court previously
26 ruled on the merits of all NEPA claims properly asserted in *Navajo Nation*, including one
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1 pertaining to the use of Class A+ reclaimed water to make artificial snow. Judge Murguia
2 has not yet considered any substantive matters. Second, this Court's consideration of all
3 other claims in *Navajo Nation* gives it great familiarity with the issues involved in the two
4 cases even though he did not consider the sub-issue of ingestion of artificial snow.
5 Conversely, Judge Murguia has no familiarity with the issues presented in this case. Third,
6 *Navajo Nation* is reasonably viewed as the lead case since it adjudicated claims related to
7 those raised in *Save the Peaks*. Indeed, the claim presented in *Save the Peaks* is the only one
8 *Navajo Nation* did not decide since it was not properly pleaded to the Court. Finally, the
9 interest of judicial economy is best served by transferring this case to this Court since it is
10 already familiar with the voluminous administrative record.

11 **CONCLUSION**

12 For the foregoing reasons, the Court should grant Defendants' motion and transfer
13 *Save the Peaks* to this Court.

14 Respectfully submitted this 16th day of October, 2009.

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CERTIFICATE OF SERVICE

I hereby certify that on October 16, 2009 I electronically filed the foregoing DEFENDANTS' MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO TRANSFER TO THE HONORABLE PAUL G. ROSENBLATT with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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