This Land is Your Land, This Land is My Land: An Historical Narrative of an
Intergenerational Controversy over Public Use Management of the
San Francisco Peaks
by
Maren Mahoney

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Graduate Supervisory Committee:

Paul Hirt, Chair
Rebecca Tsosie
Dave White

ARIZONA STATE UNIVERSITY

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ABSTRACT

The sacred San Francisco Peaks in northern Arizona have been at the center of a series of land development controversies since the 1800s. Most recently, a controversy arose over a proposal by the ski area on the Peaks to use 100% reclaimed water to make artificial snow. The current state of the San Francisco Peaks controversy would benefit from a decision-making process that holds sustainability policy at its core. The first step towards a new sustainability-focused deliberative process regarding a complex issue like the San Francisco Peaks controversy requires understanding the issue's origins and the perspectives of the people involved in the issue. My thesis provides an historical analysis of the controversy and examines some of the laws and participatory mechanisms that have shaped the decision-making procedures and power structures from the 19th century to the early 21st century.
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## TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>CHAPTER</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>1</strong> INTRODUCTION ......................................................... 1</td>
</tr>
<tr>
<td><strong>2</strong> HOW THE SAN FRANCISCO PEAKS BECAME PART OF THE COCONINO FOREST ............................................. 14</td>
</tr>
<tr>
<td>Hopis, Navajos and the sacred Peaks .................................. 14</td>
</tr>
<tr>
<td>The Doctrine of Discovery and the Marshall Trilogy ............... 16</td>
</tr>
<tr>
<td>Manifest Destiny on Dinetah and Hopitutskwa ....................... 20</td>
</tr>
<tr>
<td><strong>3</strong> 20TH CENTURY MANAGEMENT OF THE PEAKS ......................... 28</td>
</tr>
<tr>
<td>Snowbowl’s Origins: Everything Ready Now for Ski Sports .......... 29</td>
</tr>
<tr>
<td>Policy and the Peaks .......................................................... 32</td>
</tr>
<tr>
<td>Public Participation and Stakeholders 1970s-1980s ................. 38</td>
</tr>
<tr>
<td>A Substantial Burden .......................................................... 55</td>
</tr>
<tr>
<td><strong>4</strong> THE SNOWMAKING CONTROVERSY ....................................... 59</td>
</tr>
<tr>
<td>Snowbowl’s 2002 Expansion Proposal and NEPA ....................... 60</td>
</tr>
<tr>
<td>Navajo Nation v. U.S. Forest Service ...................................... 72</td>
</tr>
<tr>
<td><strong>5</strong> CONCLUSION ..................................................................... 86</td>
</tr>
<tr>
<td>Overall Lessons Learned ....................................................... 86</td>
</tr>
<tr>
<td>How This Case Study Contributes to Sustainability and Policy Studies ................................................................. 89</td>
</tr>
<tr>
<td>REFERENCES ............................................................................. 92</td>
</tr>
</tbody>
</table>
Chapter 1

INTRODUCTION

On the horizon, *Nuvatukwiovi* is an eye-catching focal point from the Walpi Pueblo, First Mesa, on the Hopi Reservation. Walpi itself is perched near the southwestern tip of the mesa’s edge, at a point that spans only about 120 feet across (Ahlstrom, Dean, & Robinson, 1991, p. 629). The apartment-like structures made of mud, stone and wood that stand today were first built here in approximately 1680; today, families still share these spaces (Ahlstrom et al., 1991, p. 631). There have, of course, been some changes between 1680 and the present. In the past few years, the tribe webbed wires across the sky to bring electricity into some of the homes, and community members reinforced the shared family homes, and also built a new community center featuring showers, a kitchen and a communal space for get-togethers and village meetings. In August 2010, I met a young family using their ancestral home as a refuge while awaiting repairs to their newer home below the Walpi Pueblo. Two doors down from them, an 84-year old Hopi woman who also lived below Walpi, but often came up to her ancestral home to tend to the place, sold me a Corn Kachina carved out of wood by her son. It is in the shape of an ear of corn, but out of the middle of the husk emerges one big Kachina Spirit adorned with feathers, painted dots that look like turquoise beads, and several smaller Kachina spirits. Just a few paces from the woman’s ancestral home, the abode of the Kachina Gods – *Nuvatukwiovi* – is clearly visible on the horizon.

*Nuvatukwiovi* is the highest point in Arizona, and thus can be seen from many parts of Arizona. It also presents itself to you as you drive north from Phoenix on the I-17 highway and round the bend just past the Exit 333, Kachina Boulevard. Slate grey and
purple, from this view on the highway it stretches up into three peaks,¹ the tallest of which reaches to 12,633 feet above sea level (USDA, 2004, p. ES-1; U.S. Geological Survey, 2011). As a whole, these peaks are variously called *Nuvatukwiiovi (Hopi); Doko’oo’sliid (Dine); Montañas Sin Agua (Spanish); the San Francisco Peaks (Anglo)*. The Peaks sit in the Coconino National Forest, about 14 miles north and west of historic downtown Flagstaff, Arizona.

These Peaks are sacred to thirteen Native American tribes, including the Hopi Tribe, Navajo Nation, Havasupai Tribe, White Mountain Apache Nation, Yavapai-Apache Nation, and the Hualapai Tribe.² The importance of the Peaks reaches back to the past and stretches into the future: while its sacredness is wrapped up in these tribes’ identities since time immemorial, the Peaks continue to be a guiding force in the daily life of many tribal members.

Down in Flagstaff, the mountain provides a sense of place and community to the town. Since Flagstaff’s founding it has provided economic opportunities with its grazing lands and timber yields. Throughout the 20th century the mountain has increasingly become a place for recreation and respite. Summertime brings the bulk of recreational visitors to Flagstaff, who come to escape the heat of the desert and to view the immense biodiversity in the area³ (USDA, 2004).

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¹ The San Francisco Peaks are variously referred to as having three (USDA, 2004, p. ES-1), four (Coconino National Forest FAQ) and six peaks – Humphreys Peak (12,633 ft.), Agassiz Peak (12,345 ft.), Fremont Peak (11,696 ft.), Doyle Peak (11,447 ft.), Aubineau Peak (11,821 ft.), Rees Peak (11,453 ft.) (U.S. Geological Survey, 2011). The latter two peaks, though taller than Doyle Peak, are generally considered not distinguishable enough from the other peaks to warrant popular acknowledgement.

² In order to contain the focus of the thesis, I concentrate on the Hopi and Navajo tribes’ relationships with the mountain. This mountain is sacred to at least eleven other tribes.

Ecologically, the peaks house seven different life zones, or ecosystems shaped by climatic gradients (USDA Division of Ornithology and Mammalogy, 1890, p. 29). On this mountain lives the yellow-flowered San Francisco Peaks Groundsel, found nowhere else in the world and currently designated threatened under the Endangered Species Act (USDA, 2004, p. 3-258). A portion of the Peaks, (18,616 acres), is federally-protected as the Kachina Wilderness Area (USDA, 2004, p. ES-1). A Wilderness Area designation prohibits roads, motorized use, and most development. A 777-acre ski area splits the Kachina Wilderness Area on the western slope of the Peaks, which is currently run by the privately-owned Arizona Snowbowl Ski Resort. The Forest Service allows the ski resort to operate via a 40 year, renewable Special Use Permit (USDA, 2004, p. ES-1).

In 2002, Snowbowl proposed expanding its infrastructure and developing the capacity to make artificial snow. The snow would be made with 100% treated wastewater, purchased from the City of Flagstaff (USDA, 2004). Pursuant to the National Environmental Policy Act of 1969 (NEPA), the Forest Service would review the development plans to identify potential harmful environmental impacts. This was not the first post-NEPA expansion proposed by the ski resort (though the previous attempts were made by different corporate owners). In 1979, Snowbowl’s owners proposed an expansion of the ski area infrastructure and the development of a ski “village” on the Hart

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4 In 1889 C. Hart Merriam conducted a biological study of the Peaks at different elevations and found a wide range of biodiversity. He determined the seven different life zones were: the desert zone at below 6,000 feet; Piñon belt zone, from 6,000 to 7,000 feet; the Pine, from 7,000 to 8,200 feet; Douglas Fir zone from 8,200 to 9,200 feet; Engelmann’s Spruce zone, from 9,200 to 11,500 feet; a narrow Dwarf Spruce zone above that, and then the “bare rocky summit, snow covered the greater part of the year” (USDA Division of Ornithology and Mammalogy, 1890, p. 6-7). Merriam concluded that these zones with such varying diversity of life were supported by the successive altitudes and corresponding climatological aspects; “Climates which usually characterize widely remote regions are brought near together, appearing in successive strata from the desert levels to the summits of the mountains, thus permitting their several effects to be comprehended at a glance, and their differences contrasted” (USDA Division of Ornithology and Mammalogy, 1890, p. 29).
Prairie that is just below the ski area.\(^5\) Both the 1979 and 2002 proposals provoked protest and division in Flagstaff and on the Hopi and Navajo reservations. Snowbowl had successfully expanded its ski infrastructure throughout the 1940s, 1950s and early 1960s because NEPA and its public participation mechanisms were not in place. The permitting process before NEPA did not require extensive environmental reviews or public comments, so the Snowbowl owners could negotiate their permits and expansions directly with the local Forest Service office without much scrutiny from the public or potential opponents. At the same time, the people to whom the San Francisco Peaks were sacred and culturally and personally significant—including the Hopi, Navajo and other tribes as well as snowshoers, sledders, snow skiers (both cross-country and downhill), campers, hikers, and environmentalists—had few means of articulating their perspectives regarding the Peaks’ development for commercial downhill skiing. NEPA’s public participation requirements changed this.

Land use controversies such as the San Francisco Peaks controversy can be considered the result of an incremental progression towards greater participatory democratic processes that the federal government began implementing in the mid-to-late-20\(^{\text{th}}\) century. Individually, environmental laws such as NEPA, the National Forest Management Act and freedom of religious expression laws such as the American Indian Religious Freedom Act of 1978 and the Religious Freedom Restoration Act of 1993 have varying influence on who gets to join in land use decision-making, and on the decision-

\(^5\) During this time, the Hart Prairie was privately owned by the same company that owned Snowbowl. Because the ski village development plans required a rezoning classification by Coconino County, the Snowbowl owners had to go through two separate approval processes to achieve their development plans of both the Hart Prairie and Snowbowl. For Hart Prairie, they had to obtain approval from the Coconino County Planning and Zoning Commission, and for the Snowbowl they had to obtain approval from the Forest Service.
making process itself. Taken as an aggregate, however, these laws have decidedly opened up conversations about public lands and given greater voice to previously disenfranchised people and perspectives. While these laws constitute greater progress toward a more democratic and fair society, they also inevitably lead to lengthier decision-making processes and a more complex view of problems without clear resolutions. When decision-making processes are opened up to new groups of people with different perspectives, the older, less inclusive decision-making processes are no longer effective. New policies and procedures are needed to address contemporary problems with complex social, environmental and economic facets. The current state of the San Francisco Peaks controversy would benefit from a decision-making process that holds sustainability policy at its core – a long-term perspective that encompasses

precepts...held by most people concerned with the American West...that western resources generally ought to be developed but that development ought to be balanced and prudent, with precautions taken to ensure sustainability, to protect health, to recognize environmental values, to fulfill community values, and to provide a fair return to the public (Wilkinson, 1992, p. 17).

A fundamental aspect of sustainability is intergenerational equity. Incorporating concerns about intergenerational equity requires deciding whether a proposed action would “likely preserve or enhance the opportunities and capabilities of future generations.” Intergenerational equity also requires looking to past generations to assess past actions and resulting inequities. This is an often ignored yet crucial element in sustainability research; without historical understanding, pieces of the intergenerational puzzle are missing. Historical assessment provides contemporary stakeholders and decision-makers with identifiable conditions, actions and outcomes. A researcher can trace the development of inequitable policies to their current consequences, both foreseen
and unforeseen, as I have in this thesis. Without concrete knowledge of historical conditions for past generations and their relation to both present and future generations, sustainability research and decision-making could become empty exercises in speculation and attempts at utopia for future generations (W. Cronon, lecture, April 13, 2011).

Procedural equity, too, is important to sustainability. Stakeholder equity in the decision-making process is more likely to lead to equitable outcomes than a closed-door, authoritative decision-making process. Participatory stakeholders are also more likely to accept the end decisions as legitimate. Socio-ecological civility and democratic governance is a process that “builds the capacity, motivation and habitual inclination of individuals, communities and other collective decision-making bodies to apply…greater attention to fostering reciprocal awareness and collective responsibility” and requires that stakeholders have widespread opportunity for deliberation and effective participation in governance (Gibson, 2006, p.174). As this thesis will show, the Snowbowl controversy originates out of unjust, violent circumstances. Despite some legislative advancement in the 20th century toward a more open, participatory decision-making process over the San Francisco Peaks, technocrats and the “scientification” of environmentalism have perpetuated this controversy over the course of several generations. A new approach that incorporates these substantive considerations for intergenerational equity as well as procedural applications that supports sustainability decision-making could lead to policies that responsibly address the inequitable basis of this controversy, and that can contribute to a healthier, more just community.

As previously noted, the first step towards a new sustainability-focused deliberative process regarding a complex issue like the San Francisco Peaks controversy
requires understanding the issue’s origins and the perspectives of the people involved in
the issue. This thesis provides a historical analysis of the San Francisco Peaks
controversy and examines some of the laws and participatory mechanisms that have
shaped the decision-making procedures and power structures from the 19th century to the
eyear 21st century.

Chapter Two attempts to answer questions about the significance of the San
Francisco Peaks to the groups of people who currently live near them and the legal
arrangements that formed the basis of today’s political landscapes in the area. Wilkinson
points out that in order to understand the contemporary legal rights of tribes, it is often
necessary to revisit the legal agreements (or lack thereof) created in the eighteenth and
nineteenth centuries (Wilkinson, 1987, p. 13). When the U.S. government first met with
the tribes on the Colorado Plateau

…the difficulties far outstripped the fact that the negotiations usually were
required to be conducted through interpreters. Well beyond that, these negotiators
were people with radically different world views. They had fundamentally
divergent ways of conceptualizing the very things that had forced them together:
land, religion, trade, political power, family, and natural resources (Wilkinson,
1987, p. 15).

These “fundamentally divergent ways” persist and have arisen in the form of the present
controversy surrounding the Peaks.

Similar controversies, with similar origins, have occurred throughout the
American West. In Taos, New Mexico, the Taos Pueblo Indians waged a 64-year battle
with the U.S. Forest Service over control and use of Blue Lake (Gordon-McCutchan,
1995). The Forest Service returned management of the sacred site of Blue Lake to the
Pueblo Indians after lawsuits, protests, appeals, and eventually via a federal law signed
by President Nixon in 1970. In Wyoming, several Native American tribes compromised
with the U.S. Forest Service and recreational mountain climbing groups over the use of Bear Lodge, also known as the Devil’s Tower National Monument (Dustin, Schneider, McAvoy, Frakt, 2002; Rex-Atzet, 2003). These controversies, like the Snowbowl controversy, all began in the 1800s and emerged from the European-American “Doctrine of Discovery” of North America, which claimed the lands from the indigenous people based on the fact that they were not Christians and other concepts of nation-state land claims and private property ownership (Williams, 2006). The Doctrine of Discovery provides the legal foundations for laws that claim the San Francisco Peaks for the U.S. government and “prevents Indian nations from enforcing their rights to tangible and intangible cultural property” (Tsosie, 1997, p. 5). By looking at the origins of contemporary control of the Coconino National Forest, which began in the 1880s, we can better understand the conceptual foundations of the current legal relationships between the U.S. government and the indigenous tribes in the southwest.

Chapter Three studies the growth and evolution of the legal landscape pertaining to Snowbowl’s existence and expansion. It delves into the laws that shaped the public debates about Snowbowl’s expansion proposal in 1979 and the more recent 2002 proposal. It looks at how NEPA, AIRFA, RFRA, the Wilderness Act and local zoning ordinances affected the citizens of northern Arizona and their ability to meaningfully participate in government decision-making. These laws had significant immediate and long-term effects on stakeholder participation, environmental concerns, and private enterprise; thus, this chapter traces what Ferguson and Hirt call the “inseparable link between environmental reform and democratic reform” (Ferguson & Hirt, unpublished manuscript, 2011, in the authors’ possession, p. 3).
Chapter Four examines stakeholder participation in the environmental impact assessment process of the 2002 Snowbowl expansion proposal. While public participation was robust, six Native American tribes, three environmental groups and several individuals filed a lawsuit, arguing that the Forest Service had ignored their perspectives in its ultimate decision approving the proposal (*Navajo Nation v. U.S. Forest Service*, 2006). Throughout this recent iteration of the Snowbowl controversy, several key groups of stakeholders have charged that the Forest Service did not adhere to the spirit of NEPA; that is, they were effectively left out of the decision-making process despite the agency’s appearance of complying with the NEPA requirements.

*Navajo Nation v. U.S. Forest Service* is also a good example of Laitos and Carr’s prediction of a “looming conflict in public land use... between two former allies – recreation and preservation interests” (Laitos & Carr, 1999, p. 144). In *Navajo Nation*, this conflict came to a head. During the mid-20th century, as extractive uses of public lands declined, recreational and preservationist interests grew increasingly influential. This added a new dimension to the debate over the control, purpose and proper use of public lands (Laitos & Carr, 1999). Further complicating matters is the messy reality that recreationists and preservationists often cannot be neatly split into separate camps. The Access Fund is a membership organization of rock climbers that lobbies for preservation of mountains and boulders from building developments. The Public Lands Campaigns Director of the preservationist group Center for Biological Diversity is a snowboarder and cyclist (Taylor McKinnon, personal communication, Feb. 5, 2010). These contradictions can turn former allies into opponents on specific issues, but this also
indicates potential for finding common ground amongst opposing parties in similar land use conflicts.

The Conclusion in Chapter Five addresses the need for a progression beyond the current public participation mechanisms such as those provided in NEPA to new sustainability-based legislation that grants greater heft to historically disenfranchised and disadvantaged stakeholders in land use decision-making and that allows for respect of scientific uncertainty and precaution. It summarizes some promising legal theories recently posited by legal scholars, such as the cultural rights doctrine, that could lead to more resilient and inclusive societies and less environmental vulnerability.
Chapter 2

HOW THE SAN FRANCISCO PEAKS BECAME PART OF THE COCONINO FOREST RESERVE

These are the things that I don’t know if you people that have just been here a short time are aware of. I don’t think a lot of the Anglo people present here today have spent as much time as I have here in Flagstaff. Sure, they might be older, but they might not know as much as I do about the San Francisco Peaks. (Hubert Lewis, elective Governor of the Upper Village of the Moenkopi Village on the Hopi Reservation, speaking at the Coconino County Board of Supervisors hearing on April 24, 1974, Reporter’s Transcript Vol. II, p. 265). 6

Hopi|Navajo|and the sacred Peaks

Dook’o’osliid, or the San Francisco Peaks, marks the western part of Diné Bikeyah, the ancestral homeland for the Diné (Navajo) people (Iverson, 2002, p. 11). After traveling through four worlds, First Man and First Woman entered the fifth world and made the four sacred directional mountains: Sisnaajini in the east, Dook’o’osliid in the west, Tsoodzil in the south, Dibé nitsaa in the north (for Anglos, Sierra Blanca Peak, San Francisco Peaks, Mount Taylor, and Big Mountain Sheep, respectively) (Zolbrod, 1984, p. 90; Bingham, Bingham, & Arthur, 1984, p. 2; Iverson, 2002, p. 11). The Diné, like many indigenous people, have an oral tradition and convey history and their culture through song and poetry. George Blueeyes relates the Navajo relationship with their sacred mountains in the following song:

Our Navajo Laws are represented by the Sacred Mountains which surround us.

Sis Naajini/Blanca Peak/
Tsoodzil/Mount Taylor/

6 This public hearing took place in 1974 during a Coconino County Zoning Committee meeting. The transcripts are a rich source of information from Hopi and Navajo elders who shared their cultures’ histories, traditions and beliefs in such a public setting in order to protect their sacred mountain from further desecration. The 1974 hearing will be discussed further in Chapter 2.
Dook’ó’oosliidd /San Francisco Peaks/
Dibé Nitsaa/Hesperus Peak/
Dzil Ná’oodilií/Huerfano Mountain/
Ch’óol’í’í/ Gobernador Knob

They were placed here for us./
We think of them as our home/

….The Sacred Mountains have always been/
where they are now./
They have been like that from the beginning./
They were like that in worlds before this./
They were brought up from the Underworld/
And were put back in their respective places/

… These mountains and the land between them /
Are the only things that keep us strong./
From them, and because of them we prosper./
It is because of them that we eat plants and/good meat./

We carry soil from the Sacred Mountains in a/
prayer bundle that we call dah niílyééh./
Because of this bundle we gain sheep, horses./
and cattle./
We gain possessions and things of value,/turquoise, necklaces, and bracelets./
With this we speak, with this we pray./
This is where the prayers begin.
(Bingham, et al., 1984, p. 2).

Doko’oo’slíd, “Shining on Top,” also known as the San Francisco Peaks, is “‘the
Mother of the Navajo people,’ their essence and their home. The whole of the Peaks is
the holiest of shrines in the Navajo way of life.” They are the place for pilgrimage; they
are where young Navajo women celebrate their kinaalda, a celebration similar to that of a
Christian confirmation or Jewish bat mitvah. Medicine bundles are collected from the
Peaks. These bundles “have ‘embedded’ within them the ‘unwritten way of life’” and
thus function like the Christian Bible for the Christian way of life. These practices have
continued for them since time immemorial. They connect the Diné to the land and to their

The Diné ancestral land Diné Bikeyah, overlaps with the Hopi ancestral lands Hopitutskwa (Whiteley, 2009, p. 171; Ruble & Torres, 2004, p. 106-107). The Hopi have lived on the Plateau for generations upon generations, reaching back to beyond 1200 C.E. (Glowacka, Washburn & Richland, 2009, p. 552). The Hopi built their villages leading out in the four directions from Nuvatukya’ovi, the “Snow-Capped Peaks,” or, the San Francisco Peaks (Reporter’s Transcript Vol. II, 1974, p. 245). The Kachina Gods are spiritual messengers who live in Nuvatukya’ovi from July through February (Reporter’s Transcript Vol. II, 1974, p. 264; Nabokov, 2006, p. 127). In February the Kachinas travel from Nuvatukya’ovi to the world of the living in the form of clouds and rain to revitalize the Hopi people and give new life to the land. According to Emory Sekaquaptewa, the Hopi recognize that the katsinam – that is, the rains – are a power greater than they are able to comprehend. (Glowacka, et al., 2009, p. 556).

Unlike the Navajo who lived as semi-nomadic hunters, gatherers, and herders, the Hopi were mainly agriculturalists and adapted their growing techniques to the desert dryness by planting in sandy soils and locating their fields to best capture and store winter precipitation and summer monsoons. Because Hopi growing techniques rely on winter snows, the snow is crucial to Hopi health and way of life, and “in Hopi belief, snow is a form of moisture that has a sacred quality because it insures the feeding of and thus the continuity of the Hopi” (Glowacka, et al., 2009, p. 559).

**The Doctrine of Discovery and the Marshall Trilogy**

The United States’ ownership claims to much of its land rests on the Doctrine of Discovery, which developed in Europe during the time of the Crusades, and derived from
the notion of Christian supremacy (Miller, 2006, p. 10-12; Bradford, 2002-2003, p. 20). Under this doctrine, European Christian nations could claim any lands they “discovered,” thereby exerting governmental sovereignty over the indigenous people living on the lands and holding property rights against all other European nations (Miller, 2006, p. 10; Singer, 1994, p. 491-492). The doctrine benefited the colonizing nations by protecting each nation’s claims against other colonizing nations, while effectively whisking property rights and values out from under the tribes that lived on the land (Miller, 2006, p. 10-11). The colonizing nations could “even sell or grant this interest, this ‘title’ in the property, to others while the lands were still in the possession and use of the natives” (Miller, 2006, p. 11). After the American Revolution, the United States obtained the European title by succession from England (Worcester v. Georgia, 1832, p. 31-33).

In the early-to-mid 1800s, Supreme Court Justice John Marshall authored a series of decisions commonly known as the Marshall Trilogy, which articulated the uncomfortable nature of the Doctrine of Discovery as well as incorporated the doctrine into common law (Klein, 1996, p. 205). Together, the three cases, Johnson v. M’Intosh, Cherokee Nation v. Georgia and Worcester v. Georgia, addressed issues of U.S. federal sovereignty, tribal sovereignty, and federal and tribal relationships. The Marshall Trilogy also left behind a complex legal legacy. While the Marshall Court found that the Doctrine of Discovery established the overarching power of the federal government over tribes and their lands, it “also imposed legal limits on the future conduct of the ‘conqueror’” (Singer, 1994, p. 489). Even though it was cloaked in terms of legality, Chief Justice Marshall noted that the doctrine had a measure of “extravagant…pretension” (Johnson v. M’Intosh, 1823 p. 591). Later, Justice Story, a member of the Marshall court, pointed to
the true nature of the doctrine when he “recognized that the ‘rights’ of discovery were required to be ‘maintained and established… by the sword’” (Miller, 2006, p. 12).

The Marshall Trilogy’s holdings

In *Johnson v. M’Intosh*, the plaintiffs had purchased title to land in the area now known as southern Illinois and Indiana from the United Illinois and Wabash Land Companies. These commercial enterprises had purchased the title directly from the Illinois and Piankashaw Indian tribes in 1773 and 1775 (Kades, 2001, ¶ 36). In 1823, the United States contested that title in the Supreme Court. The U.S. argued that title could not be passed from the tribes to any entity or individual other than the U.S. federal government, and based its claim to superior title on the Doctrine of Discovery. Chief Justice Marshall’s opinion established that the Indians had title of occupancy. This title allowed them to continue living on their land and constituted a valid property interest against all claims except claims by the U.S. federal government (Singer, 1994, p. 492). The Court stated that the U.S. government could (and did) exert its claim and extinguish the Indians’ title through purchase or conquest (Wilkinson, 1987, p. 39).

In 1831, Chief Justice Marshall further elaborated on the nature of the tribal and federal relationship in *Cherokee Nation v. Georgia*. In his decision, Marshall carved out a special status for the tribes. He stated that the Doctrine of Discovery recognized tribes as sovereign nations, with the power to make treaties with the federal government, but they were not foreign states. Instead, they were Domestic Dependent Nations – entities dependent on the United States federal government (Klein, 1996, p. 210-211). The relationship between the domestic dependent nations and the United States was “marked
by peculiar and cardinal distinctions which exist nowhere else” (*Cherokee Nation v. Georgia*, 1831, p. 16).

The third case in the Marshall trilogy, *Worcester v. Georgia*, came to the Supreme Court the following year. In *Worcester*, the Court looked at whether tribes have jurisdiction over their own reservations. The Court determined that the Doctrine acknowledged the tribes’ power of self-government and self-determination, but they were under the exclusive control of the superior sovereign, the United States, via plenary power derived from the constitution’s Commerce Clause (*Worcester v. Georgia*, 1832, p. 561; Bradford, 2002, p. 33-34).

Throughout the 19th century the United States continued its reliance on the Doctrine of Discovery and incorporated it into the political theory of Manifest Destiny (Bradford, 2002, p. 35). Senator Thomas Hart Benton in 1846 provided a common articulation of the theory when he said God ordained the United States to expand westward and cultivate the land through the mandate of Manifest Destiny:

> It would seem that the White race alone received the divine command, to subdue and replenish the earth, for it is the only race that has obeyed it – the only race that hunts out new and distant lands, and even a New World, to subdue and replenish (as cited in Grinde & Johansen, 1995, p. 10).

The force of Manifest Destiny dispossessed Native Americans first of their ancestral lands and then, not accidentally, weakened their political structures and cultural and religious beliefs. The Anglo-Americans were not the first migrants to push onto Diné Bikeyah, Hopitutskwa, Apache, and other tribal lands, but through comprehensive cultural and legal approaches they have been the most successful at gaining and keeping control of indigenous lands.
Manifest Destiny on Dinétah and Hopitutskwa

In the 1848 Treaty of Guadalupe Hidalgo, Mexico ceded control of its northern territories to the United States, and the United States officially claimed control of the San Francisco Peaks and surrounding lands (Iverson & Denetdale, 2006, p. 28). The United States legal system thus recognized that the United States now held superior title to this land. The legal theories set forth in the Marshall Trilogy provided a basis for dealing with the indigenous tribes that lived in these territories. But the reality on the ground was more complicated, and turned bloody.

The Hopi and Diné tribes had been dealing with intruders onto their lands for generations. The Spanish conquistadors on behalf of Spain and the later Mexican governments formally recognized and tolerated the Hopis on their ancestral lands, and the Anglo-Americans arriving in the area in the mid-century generally steered clear of the Hopi settlements and farmland (Mohawk Nation Council, 1979).

The Diné, however, had been warring with Comanche Indians, Ute Indians, and the Spanish and then the Mexican governments since at least the 18th century (Young, 1978, p. 28). As Anglo-Americans arrived on the Colorado Plateau in larger numbers, tensions grew between the Navajos and the newcomers (Iverson & Denetdale, 2006, p. 27, 30-31). These tensions led to outright war in the late 1850s that ended in a purported treaty signing in 1861 (Iverson & Denetdale, 2006, p. 30-31). The treaty, however, was not ratified by the U.S. Senate and left an open-ended relationship between the Navajo and the U.S. This then led to a second, much more brutal campaign by U.S. military forces against the Navajo and Apache tribe just a few years later (Iverson, 2002, p. 48).
In 1862 General Carleton took over control of the New Mexico Territory (which then included Arizona). He was determined to end Apache and Navajo resistance in the Territory, and to open the region up to Anglo development. He was also a proponent of moving Indians onto reservations, which was a commonly held plan of Anglo-Americans at that time. Forcing Indians to live on reservations was considered an acceptable alternative to killing them. Many Americans believed that on the reservations, the Indians would learn to live in “civilization.” Once this was accomplished the reservations would be abolished and the Indians would fully assimilate into Christian, Anglo-American culture (Iverson & Denetdale, 2006, p. 33-34; Iverson, 2002, p. 49).

General James Carleton and his commanding officer, Christopher “Kit” Carson, were driven by the theory of Manifest Destiny and the belief that “Providence who has watched over us in our tribulation, and who blesses us, lifts a veil, and there, for the whole country, lies a great reward” (U.S. Congress, 1865, p. 137). A consequence of Manifest Destiny was General Carleton’s determination to remove the Navajos from their land in order to establish gold mines and settlements for Anglo miners and their families.

On June 14, 1863, General Carleton wrote to his commander, Major General Halleck, requesting more troops. He asserted, “there is every evidence that a country as rich if not richer in mineral wealth than California, extends from the Rio Grande, northwesterly [sic], all the way across to Washoe. If I could have but one first-rate regiment more of infantry I could brush the Indians away from all that part of it east of the Colorado river” (U.S. Congress, 1865, pp. 113-114). In later letters to the War Department and Major General Erastus Wood, General Carleton waxed poetic about “a real, tangible El Dorado, that has gold that can be weighed by the steelyards – gold that
does not vanish when the finder is awake” and exulted of “that oasis upon the desert out of which rise the San Francisco mountains, and in and beside which are found these extraordinary deposits of gold” (U.S. Congress, 1865, pp. 136-137).

General Carleton’s plan was to round up the Navajos and Apaches and imprison them at a place called Bosque Redondo in southeastern New Mexico, near the Pecos River (Iverson & Denetdale, 2006, p. 34). In the center of Bosque Redondo was Fort Sumner, a military center. General Carleton believed this would be an ideal location to completely rework the Navajos’ entire culture and force them to become a more agricultural society:

The purpose now is never to relax the application of force with a people that can be no more trusted than you can trust the wolves that run through their mountains; to gather them together, little by little, on to a reservation, away from the haunts, and hills, and hiding-places of their country, and then to be kind to them; there teach their children how to read and write; teach them the arts of peace; teach them the truths of Christianity. (U.S. Congress, 1865, p. 134)

In this same letter General Carleton explained that he was moving the Navajos to Bosque Redondo, far from their home and on an open plain, because that would place them at a great distance from Anglo settlers. He requested that a 40 square mile area be set aside for the Indians, with Fort Sumner at the center. He argued that there was “no place in the Navajo country fit for a reservation; and even if there were, it would not be wise to have it there; for, little by little, the Indians would steal away into their mountain fastnesses again, and then as of old, would come a new war, and so on ad infinitum.” (U.S. Congress, 1865, p. 134).

General Carleton ordered his commanding officer at Los Pinos, New Mexico, Captain Samuel Archer, to send thirty soldiers to scout for Navajo and Apache Indians

7 Called Hwéelde by the Navajos (Kelley & Whiteley, 1989, p.43).
and to kill all the male Indians they met or found (U.S. Congress, 1865, p. 138). In a separate order, Carleton wrote to Colonel Carson, “there is to be no other alternative but this: say to them ‘Go to the Bosque Redondo, or we will pursue and destroy you. We will not make peace with you on any other terms.” He also noted that the troops would have better luck with the Navajos as winter approached (U.S. Congress, 1865, p. 139).

In orders to his subordinate officers, Carleton’s reason for the war on the Navajo people was that they had “deceived [Anglo-Americans] too often and robbed and murdered [Anglo-American] people too long to trust [the Navajos] again at large in [their] own country” (U.S. Congress, 1865, p. 139). But in his letters to his commanding officers, he wrote most often of gold in the San Francisco Peaks and surrounding land. In a letter to General Erastus Wood, on the day after Carleton gave orders to tell the Navajo they would be destroyed if they did not surrender and move to Bosque Redondo, he wrote only of “the newly-discovered gold fields” and “that there is a large and rich mineral region between the San Francisco mountains and the Colorado river there can be no doubt” (U.S. Congress, 1865, p. 139). General Carleton was wrong, however; no gold in any significant quantity has ever been found in or near the San Francisco Peaks (V. Murray, personal communication, April 11, 2011; San Francisco Mountain mineral list, 2011). This conflicted reasoning is reflected in a letter from October 1863, when General Carleton demanded that all Navajos go to Bosque Redondo “or remain in their own country, at war” even when Navajo chiefs had attempted to make peace (U.S. Congress, 1865, p. 141).

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8 According to historian Vincent Murray, Carleton was geographically incorrect, and mistook the Bradshaw mountains for the San Francisco Peaks (V. Murray, personal communication, April 11-13 2011).
The Long Walk and the Navajo and Hopi Reservations

Over 8,000 Diné were forced to walk several hundred miles (depending on the route) to Bosque Redondo in southeastern New Mexico from 1863 until the end of 1866 (Iverson, 2002, p. 52). Thousands of other Diné fled west into the remote Grand Canyon region over this same time period, successfully evading the U.S. military forces. The Diné’s imprisonment at Bosque Redondo lasted four years, until their leadership was able to negotiate an end to the imprisonment and a return to a fraction of Diné Bikeyah, which was designated as their reservation in 1868 (Iverson & Denetdale, 2006, p. 39). Iverson summarizes “the generally well-established conclusions” about the Long Walk and the Navajo imprisonment as follows:

1. the non-Indians in the Southwest did have reason for grievances against the Navajos for their continual pattern of raiding, even if not all the Diné participated in such ventures; 2. the Carson campaign and the Long Walk to Fort Sumner inflicted enormous suffering and trauma on the Diné; 3. the years spent by some of the Diné at Hwéeldi and the years spent by other Diné apart from Hwéeldi had a powerful effect on Navajo identity and the Navajo future; and 4. the ability of the Navajo leadership to succeed in their negotiations with the American commissioners so that the Diné were able to return to a portion of their homeland marked a major turning point in Navajo history (Iverson, 2002, p. 54).

The Diné reservation was situated near outlying Hopi farmlands, and Diné sheepherders often grazed their flocks on Hopi lands. There was some competition over grasslands and water supplies – as there was all over the West – and some have asserted that the U.S. government created the Hopi reservation to alleviate tensions over this dispute (Seig, 1976, p.4). However, others note there was little evidence of sustained tension between the tribes and argue that the U.S. government, urged by the Bureau of Indian Affairs, created the Hopi reservation, and placed it in the middle of the Navajo reservation, to exercise jurisdiction over groups of Anglo-Americans who were

**Flagstaff and Coconino National Forest’s origins**

In 1882, the Atlantic & Pacific railroad company built a rail line through the town of Flagstaff. The railroad (a purposeful product of Manifest Destiny) significantly transformed the demographics and land use practices of the Arizona Territory. To take advantage of this new means of mobilization of timber yields, in 1883 brothers Timothy and Michael Riordan established the Riordan sawmill. The mill alone employed 250 workers and the Flagstaff population exploded from a total of 31 in 1880 (12 men, 4 women and 15 children) to a total of 963 in 1890 (Cline, 1994, p. 27-28). In marked contrast to the Diné and Hopi concepts of property, which focused on communal ownership, the expanding Anglo-American population implemented the current system with its emphasis on individual ownership rights. These rights are inseparable from concepts of profit and utility in American property law (Tsosie, 1997, p. 7). These “great shapers of American values,” such as individual property rights, and the mental and spiritual ideals of individuality and autonomy, persist as both frontier mythology and in contemporary notions of western culture (Cline, 1994, p. 29).

In 1891, the Congress passed the Forest Reserve Act, authorizing the President to set aside large tracts of Western land to make “forest reservations” (Hirt, 1994, p. 29). However, the Forest Reserve Act failed to include why the lands were to be held in reserve. The Organic Administration Act of 1897 fixed that omission. It defined the
purpose of the reserves as being “to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States…” (Hirt, 1994, p. 30).

The San Francisco Mountains Forest Reserve, which included the San Francisco Peaks, was created just one year later in 1898. After a 1905 change in name to San Francisco Mountains National Forest, in 1908 President Theodore Roosevelt combined the San Francisco Mountains National Forest with nearby reserves, including parts of the Grand Canyon National Forest south and east of the Colorado River. Thus the modern boundaries of the Coconino National Forest were drawn, and through the development of the National Forest system, the sacred San Francisco Peaks came under the control of the United States Forest Service (Coconino National Forest, 2010).

The first Chief of the Forest Service, Gifford Pinchot, indelibly shaped the Forest Service’s land management strategies. Pinchot theorized that the public good is the sum of aggregated individual interests, and established this concept as the Forest Service’s overarching mission for national forest management (Wilkinson, 1992, p. 127). This mission has guided the Forest Service’s management of the San Francisco Peaks throughout the 20th century and continues to shape forest management policy and decision-making today. It also created the framework for future conflict between the federal government and the tribes over the sacred San Francisco Peaks.
Conclusion

Together, the Doctrine of Discovery and Manifest Destiny provided the legal and political basis for forcing the Navajos off their ancestral land and establishing the Navajo and Hopi reservations. Wrestling control over the San Francisco Peaks and the surrounding lands from Indian nations began with a military campaign and was established by force. The U.S. government created the current tribal holdings during this period of military campaigns. It is little wonder that the Navajo and Hopi people do not fully accept the political boundaries, or the land use and management approaches that the U.S. government and private enterprise attempt to enforce today on the San Francisco Peaks.
During the 20th century, American society went through great social, economic and political upheaval. Citizen participation in governance and democratic reform grew significantly, and they grew hand-in-hand with environmental and civil rights legislation and activism. Legislation such as the National Environmental Policy Act (NEPA) and the National Historic Preservation Act (NHPA) helped open up democratic participation
in federal agency decision-making to previously disenfranchised cultural and environmental concerns. Gifford Pinchot shaped the Forest Service’s mission when he famously wrote "Where conflicting interests must be reconciled, the question shall always be answered from the standpoint of the greatest good of the greatest number in the long run” (Wilkinson, 1992, p. 128). The Forest Service continues to reiterate this philosophy in the 21st century, but has yet to adequately or directly address the question of what constitutes “the greatest good of the greatest number in the long run” when conflicting environmental, cultural, and economic interests come to a head. NEPA, NHPA, and a host of other federal legislation, along with local efforts at land-use management collaboration such as zoning boards, combined to help the Forest Service answer this question on a case-by-case basis throughout the 20th century.

Snowbowl’s origins: Everything Ready Now for Ski Sports (Coconino Daily Sun, 1939)

The San Francisco Peaks did not yield the wealth of gold heralded by General Carleton in the 19th century, but they provided an abundance of other resources, especially timber, to the United States and to the Anglo-Americans who settled at the Peaks’ foot. Carleton’s military campaign was supported by the federal government’s embrace of the Doctrine of Discovery, and was brutally effective in isolating and nearly breaking the indigenous tribes’ societies. By the early 20th century the Coconino National Forest was functioning under the umbrella of the United States’ government and the nearby town of Flagstaff was an established mill town with timber yields from the Coconino National Forest. The Diné and the Hopi tribes, as well as many other tribes in the area, had been placed on reservations and were in the midst of “a half-century of
twilight operations by the tribes, a time when the essence of the measured separatism – tribal self-rule – was debilitated nearly to the ultimate degree (Wilkinson, 1987, p. 215).

During the 1920s, snow skiing increased in popularity throughout the United States, and much of the skiable terrain in the West was on public lands like national forests. The American middle-class expanded, along with automobile ownership and interest in outdoor leisure activities. The Great Depression stalled leisure activities for the working and middle class while tire and gas rationing during World War Two continued to put a damper on outdoor recreation. But after the end of the Great Depression and the resource rationing of World War II, the American public had a resurgent interest in recreational use of public lands. Wealthy Americans who had skied during their European travels and Norwegian, Swedish, Swiss and other European immigrants to the United States imported downhill skiing and encouraged its growth into a popular sport (Coleman, 1996, p. 587-588). People in the American West, in particular, embraced the sport, as “the ski industry combined the sport of skiing with the business of tourism as never before, encouraging the growth of new ski resorts across the West and a new culture of consumption to go along with them” (Coleman, 1996, p. 588). Skiing gained in popularity in part because it “offered a way to personally achieve the strong sense of individual control over raw nature that American travelers craved” (Rothman, 1998, p. 168).

In Flagstaff, three high school boys had gained access to skis or built their own in woodshop class, and began to climb the Hart Prairie and skied down on Sundays. They formed the 20-30 Club and rented skis to other Flagstaff residents for 50 cents. A Forest Service ranger, Ed Groesbeck, became interested in skiing and encouraged the
development of Snowbowl on the Hart Prairie. Eventually, the 20-30 Club became the Flagstaff Ski Club, which raised money from local businessmen to purchase a rope tow to serve as a rudimentary ski lift. The Flagstaff Ski Club charged admission to fellow skiers on weekends. A dirt road to the Hart Prairie ski lift was added, which the Civilian Conservation Corps made into the paved Snowbowl Road during the federal public work relief programs of the late 1930s and early 1940s. In the mid-1940s, Al Grasmoen, a local businessman, bought the ski operation from the Flagstaff Ski Club (Rogers, 1976; Key dates in Snowbowl history, 2007).

From the earliest days of snow sport in Flagstaff, skiers were persistent in the face of erratic snowfall on the low-latitude, high altitude San Francisco Peaks. Al Grasmoen and his wife Venna bought and sold the ski operation four times (Kraker, 2006).

Every time that [Al] sold it, it wouldn’t snow anymore and the new owner would go bankrupt and not be able to pay him, and he’d get the area back again. And as soon as [Al] got the area back, it would snow tremendously for a couple a years, and he’d have a big profit so he could double the price and sell it again (Kraker, 2006).

In the fall of 1941, the Agassiz ski lodge was built, but then burnt to the ground in 1952 (Skiing Lodge at Snow Bowl Nearly Ready, 1941). Snowbowl continued to grow in somewhat ad hoc fashion, with the Snowbowl Road extended to the intended site of a new Agassiz Lodge in 1954, with the lodge itself rebuilt in 1956. Additional ski lifts were added in 1958. (Key Dates, 2007). The Snowbowl owners added more ski lifts in 1962. These would be the last additions Snowbowl made that were unregulated by federal law and unchallenged in court.
Policy and the Peaks

In 1960 the U.S. Congress passed the Multiple Use Sustained Yield Act (MUSY) in response to pressure from the increasingly competitive timber and recreation interests (Rothman, 1998; Hirt, 1994). During the drafting of the bills that would eventually combine into MUSY, the timber industry, water developers, conservationists, wilderness advocates, and recreationists all weighed in on the debates over the definition of “multiple use” and “sustained yield,” with varying levels of influence. Though the record indicates that the timber and water resource industry had great impact on Congress’ crafting of MUSY, the Chief of the Forest Service at the time, Richard McArdle, “admitted that recreation pressures provided the strongest single motivation for the legislation” (Hirt, 1994, p. 189).

The Organic Act of 1897 had established that timber yields and water resource developments were the primary concerns in National Forest management. Predictably, the timber industry and water developers preferred that this hierarchy remain intact in MUSY. At the timber industry’s urging, Section 1 of the Act provides that the purposes of MUSY “are declared to be supplemental to, but not in derogation of, the purposes for which the national forests were established” in the Organic Act of 1897 (Forest Service Organic Administration Act of 1897; Hirt, 1994, p. 188). Moreover, according to Edward Cliff, Chief of the Forest Service from 1962-1972, the ultimate meaning of “sustained yield” meant “sustained production of resources at a high level” which aligned with the timber industry’s wishes (Hirt, 1994, p. 183). The same year MUSY passed, the Forest Service began implementing its management plan called “Operation Multiple Use” which “embodied an unequivocal commitment to maximum production and full
utilization” (Hirt, 1994, p. 192). MUSY and “Operation Multiple Use” supported what Hirt calls “a conspiracy of optimism” about the Forest Service’s ability to maximize uses of the forests without damaging the environment or causing social conflict. During this Cold War era there was an unquestioned belief by the decision-making authorities that “expanding jobs and production meant saving democracy,” and that technology could overcome the inevitable natural resource limitations threatening “the American way of life” (Hirt, 1994, p. 191-192).

MUSY’s passage into law did not change the status quo of “full utilization” of natural resources in the National Forests in any significant manner (Hirt, 1994, p. 190). However, the struggle over definitions espoused by MUSY and the ambivalence expressed by concerned interest groups regarding the Act’s passage are important indicators of the pressures that built over the purpose and the future of the National Forests. These pressures continue to impact the National Forest management approaches. Thus far, the only truly significant legislative outlets for these pressures are the participatory democracy mechanisms provided by NEPA. Other historic federal laws passed after MUSY, such as the Wilderness Act and the American Indian Religious Freedom Act (AIRFA), also provided opportunities for environmental and cultural concerns to participate in shaping the direction and use (or non-use) of the national forests. These acts were important steps to including previously ignored perspectives. However, the Wilderness Act and AIRFA sometimes failed to act as effective counterweights in cases where economic interests dominate – and this is in part because these laws are (necessarily) inherently reactive rather than proactive. Land use policies operate within our “economic culture” and are largely designed to support commercial
interests and private property laws (Hirt, 1994, p. xlviii). The concept of wilderness and its codification into law protects specific pieces of land from human settlement and commercial exploitation. In this formulation, humans and wilderness operate in separate systems (Cronon, 1996, p. 80). Beyond the wilderness’ boundaries, then, it is acceptable and encouraged to exploit land and natural resources – lumber companies can clear-cut old growth forests, as in the Gifford Pinchot National Forest, and the Forest Service can build roads for logging projects, causing irreparable damage to sacred sites, as in *Lyng v. Northwest Indian Cemetery Protective Association* (Hirt, 1994, p. 289; *Lyng v. Northwest Indian Cemetery Protective Association*, 1988). Maintaining this false division “thereby leave[s] [us] little hope of discovering what an ethical, sustainable, *honorable* human place in nature might actually look like” (Cronon, 1996, p.81).

**The Wilderness Act of 1964**

In 1964, with the help of one of the strongest preservation voices in the American environmental movement, Howard Zahniser of the Wilderness Society, Congress passed the National Wilderness Preservation Act (“Wilderness Act”). The Wilderness Act allows Congress to set aside certain “untrammeled” federal lands for preservation, places “where man himself is a visitor who does not remain” (16 U.S. C. 1131(2)(c)). The passage of the Act was a significant victory for environmentalists concerned with the rampant resource use occurring within the national forests. It “is a practical, legal zoning tool” that protects areas of forests from the “full utilization” allowed by MUSY and the “Operation Multiple Use” management plan (McClosky, 1999, p. 371). Congress is the sole arbiter of wilderness designations, although government land use agencies and environmental organizations often recommend an area to Congress for designation.
The protections started out small; just 9.1 million acres out of 800 million acres of federal land in 1964 were initially designated wilderness areas (Glicksman & Coggins, 1999, p. 385). Wilderness areas throughout federal lands have grown to 109,505,482 total acres in the United States by 2011 (Wilderness.net, 2011). In 1984, Congress designated approximately 18,200 acres of the Coconino National Forest, including the areas surrounding the Snowbowl, as the Kachina Peaks Wilderness area.

**NEPA**

Not long after the enactment of the Wilderness Act came the National Environmental Policy Act (“NEPA”) of 1969, with its sweeping, largely unforeseen impacts on decision-making approaches. NEPA, as stated in its Purpose clause (Sec. 2 [42 USC § 4321]), “declare[d] a national policy which…encourage[d] productive and enjoyable harmony between man and his environment.” NEPA was also a manifestation of the growing concern for quality-of-life issues found in the growing urban areas of American society, and, through its environmental impact statement requirements, the law “became a very direct means of managing environmental impact according to contemporary scientific standards” (Kirk, 2007, p. 93).

The Wilderness Act and NEPA are complementary laws, both of which can be viewed as significant steps in a slow corrective process of the anti-democratic and violence-ridden Doctrine of Discovery through federal legislation. Whereas present-day control over the Coconino National Forest was gained through military force and policy, the Wilderness Act and NEPA provide counterpoints in the case of the Coconino National Forest and the San Francisco Peaks. The Wilderness Act establishes spaces intended to protect ecosystems from construction or development on the Peaks, which
counters the original, development-oriented purpose of taking the land from the Hopi and the Navajo. NEPA requires that the Forest Service provide a measure of transparency in its land development projects on the Peaks and offers greater opportunity to citizens to participate in the management of the Coconino National Forest through mandated public commenting periods and hearings.

NEPA’s practical accomplishments included establishing a Council on Environmental Quality, mandating creation of the Environmental Protection Agency, and requiring either a preliminary environmental assessment or a more detailed and thorough environmental impact statement for all federal agency projects deemed likely to significantly impact the human environment. NEPA requires government agencies to consider environmental impacts in their natural resource and land management decisions, and this may be its most significant success: “the testimony of participants is consistent: NEPA’s action-forcing mechanism forced agencies to think about environmental consequences” to a greater extent than agencies had previously considered the environment (if at all) in its land use projects and decision-making (Culhane, 1990, p. 690). On the other hand, as an individual from the Interior Department once pointed out, “You could write an environmental impact statement that said the consequence of an action would be to destroy the world and that there were better alternatives than that action, and the action could still go forward” (Rothman, 2000, p. 141).

NEPA certainly changed the Forest Service’s approach to forest management decision-making. After NEPA, the Forest Service included more interdisciplinary contributions and public participation in its decision-making process than it had in any of its previous decision-making procedures (Ackerman, 1990, p. 708). Public participation
allowed groups such as environmental organizations, Native American tribes, and individually concerned citizens who were traditionally shut out of the decision-making process to influence the focus of the decision-making process. “Before NEPA, these groups were, at best, underrepresented in agencies’ constituency networks” (Culhane, 1990, p. 692). The public participation requirement provided the Forest Service with opportunities to gain public support for projects, but also exposed the “previously insulated” agency to “public scrutiny, involvement and challenge” (Ackerman, 1990, p. 707). In fact, “often the very information made available by NEPA and NFMA [National Forest Management Act of 1976] procedures supplies the ammunition to challenge the decisions”—which is exactly what occurred in the multiple lawsuits brought against the Forest Service and the various Snowbowl owners (Ackerman, 1990, p. 710, fn 12).

The Forest Service’s public participation process typically allows for participation at the beginning and middle of the environmental impact statement process. First, letters from stakeholders and the concerned public help determine what issues should be analyzed in the draft environmental impact statement (DEIS) (the “scoping process”). After the DEIS is published, the Forest Service accepts more letters and holds public hearings and other meetings during which specific comments and concerns about the DEIS are discussed. Critics charge, however, that public input is infrequently used in constructive, meaningful ways due to the often contentious nature of the public commentary combined with the sheer volume of comments (Ackerman, 1990, p. 709).
The Hart Prairie is on the western base of the San Francisco Peaks, just below the Snowbowl ski area that straddles the Humphrey and Agassiz Peaks. In 1969, Summit Properties owned 327 acres of Hart Prairie and also the lease for the Snowbowl ski area. The controversy surrounding Snowbowl in the 1970s-1980s had two parts and operated on two separate governance levels: county and federal.

The first part of the controversy took place mainly on the local, county level. Zoning laws, such as the one adopted by Coconino County in 1964, opened up corporate and government land development plans to public scrutiny. These laws in particular empowered key stakeholders, such as the landowners adjacent to the proposed development. When Summit wanted to develop the Hart Prairie in a manner that would
change the character of the town of Flagstaff and outlying lands, citizens now had opportunity to weigh in on these development plans.

The second part of the controversy took place on the federal level under NEPA. In addition to developing its Hart Prairie property, Summit wanted to expand the Snowbowl ski area infrastructure. Under NEPA, Summit’s plan now had to undergo the Forest Service’s environmental impact assessment and public commentary. In this case, NEPA helped the Forest Service take a step in determining what “the greatest good of the greatest number in the long run” was on the San Francisco Peaks.

**Contested zoning changes on the Hart Prairie**

In late 1969, Summit submitted development plans to the Coconino County Planning and Zoning Commission for its Hart Prairie property. The plans included a gated ski village with condominiums and a ski lift to the top of the Snowbowl. The development was touted as a future playground for America, similar to the ski resort areas at Vail and Aspen, and the Tres Vidas resort for the super-rich in Mexico owned by Post, Summit’s parent company (Kraker, 2006; Fink, 1998).

The new development plans required a zoning reclassification, from a General “A” zoning classification (which allowed subdivision plats, but required a minimum of 1 acre for every structure) to commercial, mixed use zoning (Prairie Subdivision Owners Support Rezoning Request, 1974). The Coconino zoning ordinance required that more

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9 In a public hearing for Summit’s rezoning request in 1974, statements regarding Tres Vidas suggest what was in store for Summit’s development on the Hart Prairie. Tres Vidas was described by a Summit official involved with the Mexican property as a project developed from three miles of sand dunes, uninhabited and in large measure uninhabitable for a variety of reasons; no water, insect control and so forth. After the expenditure of twenty-five million dollars there is there today one of the loveliest pieces of God’s green earth, and I have got to believe with religious conviction that these efforts are applauded from Him who perhaps made the Heavens and the Universe (Reporter’s Transcript, Vol. II, p. 237).
than 50% of adjacent land be owned by approving landowners. There were 6 adjacent
landholders, 3 of whom lived out-of-state and approved of Summit’s development plans.
70% of the adjacent land, however, was owned by Jean and Richard Wilson, who had a
ranch on the Hart Prairie, and the Forest Service, which “owned” Coconino National
Forest (Hart Prairie Hearing Monday, 1971).

The development plans for Hart Prairie alarmed the Wilsons. Driving up from
Tucson one day, Jean saw Summit’s sign notifying the public of its rezoning request.
Jean realized that neither Summit nor the Coconino County Planning and Zoning
Commission had given her or her husband accurate notification of the rezoning request
(Richard Wilson, personal communication, 2010). Summit’s original rezoning request,
and the December 12, 1969 published notice, required by law, provided that a public
hearing would be held in front of the Coconino County Planning and Zoning Commission
on December 30, 1969. The requested zoning was for 3 types of classifications: R-1-
6000; C-1-6000 (motels, hospitals, offices, and churches); R-SD (single family dwellings,
duplexes, and multiple family dwellings, and which required each phase or stage of a
building proposal be submitted to a planning staff for evaluation and comparison with the
original plan before permits were granted). However, after the December 30, 1969
Planning and Zoning Commission public hearing, the Commission recommended to the
Coconino County Board of Supervisors (which had the final decision regarding rezoning)
only one of the originally published zoning classifications (R-1-6000) and recommended
an additional two classifications that were substantially different from the original
classifications the Planning and Zoning Commission was supposed to consider. Instead of
the original requested classification allowing motels, hotels, hospitals, etc, the
Commission recommended a C-2 rezoning. C-2 allowed zoning for warehouses, petroleum bulk plants, auto repair shops, laundries, public garages, manufacturing plants and mortuaries. Also, instead of single family dwellings, duplexes, and multiple family dwellings zoning classification, the Commission recommended a classification allowing these types of dwellings in addition to office buildings, with the option to obtain use permits for motels, hotels, retail spaces, and parking lots (Summit Properties v. Wilson et al., 1976).

Jean Wilson was “a spitfire,” and, “once she got her teeth into something she didn’t let go” (Richard Wilson, personal communication, 2010). Jean and Richard catalyzed opposition to Summit’s development plans. The Wilsons, NAU professor John Dunklee, and other local Flagstaff residents started the first “Save the Peaks” campaign during this time. Jean and Richard Wilson filed suit against Summit Properties, the Coconino County Board of Supervisors, the Planning and Zoning Commission, the clerk of the Board of Supervisors and the county and planning director for failure to provide adequate public notice for Summit’s rezoning requests (Rainey, 1972). Soon after, Frank Goldtooth, Sr., Tsinniginnie Singer as individuals and on behalf of their fellow Navajo

10 After the Coconino County Planning and Zoning Commission granted Summit’s rezoning request and preliminarily approved the ski village layout in December 30, 1969, local opposition grew, and community members began to participate in public hearings. The Forest Service held a meeting for public comment on future management of the Peaks in October of 1971. Summit’s rezoning request and development plans repeatedly came up as a concern. Speakers from the public overwhelmingly opposed development and spoke in favor of preservation (Stone, 1971). Several speakers supported the inclusion of Hopis and Navajos on the Forest Service management team for the Peaks. The Chairperson of Citizens for a Better Flagstaff, a grassroots opposition group, argued against development for the sake of financial profit of one private entity because “Flagstaff citizens also have a duty to leave for future generations the best possible environment” (Stone, 1971).

While the controversy at this time was primarily about the Hart Prairie development, the notion of artificial snowmaking, which would eventually be the focus of controversy in the 21st century, was first bandied about during these public hearings. At the Forest Service meeting, William Beaver, operator of the Sacred Mountain Trading Post, spoke at the hearing. He characterized the snowmaking idea as “making a Disneyland” of the Peaks and “pointed to the comparison of making snow for skiing, while on the other side of the mountain, people must haul water long distances to maintain life and livestock” (Stone, 1971).
Nation members, and Earl Numkena as an individual and on behalf of his fellow Hopi tribe members, also filed a lawsuit against Summit Properties, the Coconino County Board of Supervisors, and the Planning and Zoning Commission. This lawsuit was on the same basis as the Wilson suit, but included additional claims relevant to Navajos and Hopis as a plaintiff class. Their first claim was that defendants’ actions violated Plaintiffs’ First Amendment right to freedom of religion; second, that publication of notice of meetings exclusively in English violated the 14th Amendment requirements of due process and equal protection; and third, that publication of those notices exclusively in the Arizona Daily Sun violates Plaintiffs’ statutory and constitutional rights. (Summit Properties, Inc., v. Wilson, Plaintiffs’ Motion for Summary Judgment and Response to Defendants Motion for Summary Judgment, February, 1973). These claims underscore the continued disenfranchisement of the Navajo and Hopi perspective regarding the San Francisco Peaks. In their suit, the plaintiffs pointed out that many Navajos and Hopis did not read English, and, furthermore, the Arizona Daily Sun was not distributed on the reservations. For efficiency, the Wilson and Goldtooth lawsuits were consolidated into one.

Both the trial and appellate courts in Summit Properties v. Wilson decided in favor of the Wilsons on the grounds that the defendants had failed to comply with Arizona state law Ariz. Rev. Stat. § 11-829. This law required both the notice and the hearing before the Commission be restricted to the zoning reclassification request contained in the

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11 The court held in favor of the Wilsons and found that the zoning commission had to provide new notice and hold new hearings in order to comply with the relevant law, Ariz. Rev. Stat. §11-829. The trial court found for the Hopi and Navajo tribes, and that decision remained as the appellate court found it had no jurisdiction over the Hopi and Navajo tribes due to Summit’s procedural error in its appeal (Summit Properties, Inc. v. Wilson et al., 1976).
original petition for rezoning. The Coconino County Planning and Zoning Commission would have to restart the rezoning process, including publishing a new notice of a public hearing and holding a public hearing on the rezoning classifications actually being considered.

Legal procedures such as public zoning notice and hearing requirements may be yawn-inducing for the general public, but they are crucial to a functioning democracy. In the 1960s, these procedural mechanisms opened up decision-making at all levels, including decision-making about development on private land. As Ferguson and Hirt assert,

effective implementation of the new laws often depended on citizens “watchdogging” government or industry. Most reforms involved some re-distribution of costs and benefits, or restraint of someone’s liberty or authority, or inserted new stakeholders, rights, or privileges into the decision arena. Consequently, every such reform had advocates and opponents. When a law restructured the status quo, usually the newly enfranchised had to actively assert and defend their gains against resistance from those who preferred the old regime. (2011, p. 6).

Here, the Wilsons and the Navajo and Hopi tribes exercised their legal empowerment by holding the government agency accountable to the rule of law. The lawsuit put the agency and Summit Properties on notice that from now on they would be held publicly accountable for their decision-making actions.

Try, try again.

Pursuant to the Ariz. Rev. Stat. § 11-829, after the Planning and Zoning Commission evaluates a rezoning request, it holds a public hearing on the matter, and then either denies the request or makes a recommendation. If a recommendation is made, the County Board of Supervisors reviews the recommendation. The Board is also
required to hold a public meeting on the matter before casting votes on the recommendation.

As the lawsuit regarding the legality of the Planning and Zoning Commission’s approval of the unpublished classification recommendations was pending, on January 3, 1972 the Coconino County Board of Supervisors held a public hearing on the substance of the Planning and Zoning Commission’s rezoning recommendation for warehouses, manufacturing plants, petroleum bulk plants, and dwellings and office buildings, among other structures (Tachias, 1972). The Board voted 2-1 in favor of the recommendation; however, passage required a unanimous vote (Stone, 1972). Board member Tio Tachias voted against the rezoning proposal in large part because the ski village’s intended residents would not be “ordinary people” from Flagstaff but rather “the very rich” from outside Coconino County (Stone, 1972). Tachias also questioned Summit’s claims that the Hart Prairie development was necessary to the future viability of Snowbowl and to Flagstaff’s economic vitality (Stone, 1972). In a letter to the editor of the Arizona Daily Sun a few days after the hearing, Tachias further explained his concerns about the legality of the Planning and Zoning Commission’s recommendation due to lack of sufficient landowner support, as well as whether there were adequate water sources to support the existing Flagstaff community as well as Summit’s proposed 2 golf courses, 680 dwelling units and accompanying commercial establishments. He noted the Hopi and Navajo perspectives that were represented at the hearing and wrote that “I think we have shown too little respect and disregarded their feelings and values for too long” (Tachias, 1972).

In April 1972, even as Wilson v. Coconino County Planning and Zoning Commission was proceeding through the courts, Summit again tried to obtain a zoning
reclassification from the Planning and Zoning Commission. The Planning and Zoning Commission again recommended rezoning, and the Board of Supervisors then approved the recommendation. However, they approved the rezoning with the stipulation that Summit must show it could provide safe and adequate water for the ski and golf village (Rainey, 1972).

Throughout the next two years, Summit drilled wells throughout the Hart Prairie property to locate sufficient water sources for the proposed development pursuant to the Board’s stipulation, to no avail. James Perry, a recreational supervisor for the Coconino National Forest at the time, said “On one well, they were pumping 130 gallons a minute, but then it quickly went down to much less than that…The mountains are a huge pile of cinders” — ash from the volcanic activity of yore. According to Perry and water surveyors, the cinders absorb the water until it hits bedrock, where it is trapped. Once the water is pumped it is completely depleted, as the trapped water is not replenished often (Rainey, 1972).

On May 22, 1972, the Coconino County Board of Supervisors approved Summit’s preliminary subdivision layout and golf course and ski lift permits, again with the condition that Summit must show it could provide enough water for its development. After this decision, the Forest Service affirmatively opposed the Hart Prairie development in a letter to Douglas Wall, Jean and Richard Wilsons’ attorney. Up until the mid-1970s, the Forest Service had been toeing the line regarding Summit’s development plans, by taking a “hands-off approach” to the original rezoning proposal, even though the Coconino National Forest was a major portion of adjacent land to Summit’s plat (Coconino County Planning and Zoning Commission, 1972, p. 6).
Coconino County Planning and Zoning Commission and the Board of Supervisors held a series of public hearings on Summit’s rezoning request (which Summit revised and resubmitted several times) and water sufficiency and development plans. These hearings grew progressively longer, with greater numbers of citizens participating each time. For one such public hearing held in January 1974, more than 1400 people attended (1400 Jam zone hearing, 1974). The main point in contention at this hearing was whether Summit had obtained the requisite approval from 51% of Hart Prairie’s adjacent landowners. Rather anti-climactically, the Planning and Zoning Commission again rejected Summit’s plans on a technicality (County Planners Reject Hart Prairie Rezoning, 1974).

The next Planning and Zoning Commission hearing on Summit’s plans attracted an even larger crowd than the January meeting. In late March, more than 1800 attendees endured 6 hours of testimony during Summit’s next attempt at rezoning the Hart Prairie property. The attendees were “clearly in opposition to Summit’s proposed development and numerous speakers substantiated that the majority of Flagstaff had similar feelings” (Patrick, 1974). The Commission again rejected Summit’s proposal.

With two strikes behind it, Summit appealed to the Coconino County Board of Supervisors in April 1974 (Patrick, 1974). Five hundred attendees sat through a marathon 16-hour hearing. Many of the proponents for the rezoning request spoke of private property rights, free enterprise, and land development as land improvement. They argued that the Hart Prairie was already zoned for development and that the question was not whether it would be developed, but how. They appealed to private property rights and argued that restrictions should not be placed on a man’s “inherent right to develop and use his property” (Reporter’s transcript, Vol. II, 1974, p. 230).
Opponents to development appealed to the Board for a vote signaling respect — respect for the San Francisco Peaks, respect for tribal history and elders’ teachings, and respect for future generations. Bahoshone Begay, a Diné medicine man from Tuba City, explained,

You have laws and regulations, which you obey and you abide by and we also obey and abide by your rules and regulations. We, too, have laws and regulations… You helped break these laws. You develop this mountain…it is against our laws that any type of development of this extent take place on the mountain (Reporter’s transcript, Vol. II, 1974, p. 301-302).

In rebuttal, Mr. Warren Ridge, attorney for Summit, argued

…the law of the land, I hope and I trust, is still that no person has the right to insist that others in the pursuit of their own interests must conform their conduct to that person’s religious beliefs. (Reporter’s transcript, Vol. II, 1974, p. 397).

Proponents of development did not question the validity of the Hopi, Navajo, and other tribal members’ beliefs as to the sacredness of the San Francisco Peaks. At least one posited, though, that the mountain was possibly more sacred to him than to the tribes (Reporter’s transcript, Vol. II, 1974, p. 224).

When Board member Tachias assured the Hopis and Navajos in attendance that “We don’t want the elders or the traditionalists to think that everybody is opposed to their religious beliefs. So much of the testimony has been submitted to us has been based on primarily the rights of the Indians,” Robert Lomafidakie pointedly replied, to laughter and applause, “Yes, some have. We also respect your rights to worship in the way that you do, whether it be in the LDS churches or the Presbyterian churches or the Valley National Bank or wherever” (Reporter’s transcript, Vol. II, 1974, p. 259).
At the end of this ordeal, the Board came up with a creative resolution of sorts: they placed a one year moratorium on rezoning or use permits in the areas around the San Francisco Peaks, in order to provide time for people who wanted to organize a purchase or federal land exchange to get the Hart Prairie property protected from development. Jean and Richard Wilson had offered Summit $860,000 for the Hart Prairie acres and the Snowbowl facility (Land swap planned if Summit oks sale, 1974). If no one took action to purchase the Hart Prairie for preservation during the year-long moratorium, the Board stated it would finally approve Summit’s rezoning request (Reporter’s transcript, Vol. II, 1974).

Over the course of the next year, the Forest Service tried to make a deal with Summit on a federal land trade that would put the Hart Prairie property into the hands of the Forest Service, but there was much wrangling over the price. At around the same time, Summit filed a $40 million conspiracy lawsuit against the Wilsons, their attorney Douglas Wall, Board member Tio Tachias, Don Seaman of the Coconino National Forest and several other defendants, including the Tuba City School District and the Museum of Northern Arizona. Summit alleged the Wilsons, their attorney and the other defendants interfered with plaintiff’s use and development of [Hart Prairie] and have engaged in a massive, concerted and purposeful series of acts which have deprived the plaintiff of its [14th Amendment right]…and has chilled and depressed the value of plaintiff’s property on Hart Prairie and has resulted in an actual taking of plaintiff’s property” (Summit Properties v. Wilson et al., Complaint for conspiracy suit, July 2, 1974).

The Forest Service refused to continue land exchange negotiations until the conspiracy suit was dropped against the Forest Service and Don Seaman. By April 1975, Summit had dropped them from the suit, and the Forest Service returned to negotiations, though with dragging feet (Berman, 1976).
In 1976, Summit, pressured by a foreclosure suit from one of its creditors, sold its Snowbowl lease to Northland Recreation, and dropped the conspiracy suit against all defendants (Black, 1976). Also in 1976, the Forest Service agreed to a purchase price for the Hart Prairie (Shafer, 1976). Hart Prairie was safe from development, and Summit ended its efforts to develop the San Francisco Peaks. But Northland’s efforts to develop Snowbowl were just beginning.

**NEPA and the San Francisco Peaks**

In July of 1977, the Forest Service announced that, pursuant to NEPA, Northland had submitted a new development plan for Snowbowl. The plans included building 7 new chairlifts and opening up several hundred additional acres of skiing terrain within the leased area, adding parking spaces and a parking lot, expanding and paving the Snowbowl Road, and doubling the vehicle/day peak weekend traffic to the Snowbowl. Some powerful local interests supported the plan, including the Flagstaff Chamber of Commerce. Many of the same opponents to the Hart Prairie development, however, were very much opposed to further development of Snowbowl, and the San Francisco Peaks development controversy continued anew.

The Forest Service considered 7 alternatives for the Northland proposal. One of the alternatives included the possibility of Snowbowl’s closure and removal from the mountain. On the other end of the spectrum was Northland’s proposal, and in the middle was the Forest Service’s Preferred Alternative, which included building 5 new chairlifts and opening up 117 additional acres of skiing terrain within the leased area, adding parking spaces and a parking lot, expanding and paving the Snowbowl Road, and doubling the vehicle/day peak weekend traffic to the Snowbowl. In accordance with
NEPA, the Forest Service held workshops with the public before the environmental impact assessment process to determine the alternatives to consider. They also held several public hearings and “listening” meetings regarding the proposal and the alternatives.

Then, in August 1978, President Carter signed the American Indian Religious Freedom Act (AIRFA) into law. AIRFA’s stated purpose was to set federal policy for the protection and preservation of Native American religious beliefs, expressions and practices. Section Two of AIRFA requires federal agencies “to evaluate their policies and procedures in consultation with native traditional religious leaders in order to determine appropriate changes necessary to protect and preserve Native American religious cultural rights and practices” (American Religious Freedom Restoration Act, § 1996, sec. 2). Unfortunately, courts have since interpreted AIRFA as providing no actionable rights. At the time of its passage through the U.S. House of Representatives, the bill’s sponsor Representative Morris Udall from Arizona, stated “it has no teeth in it” (Miller, 1990, p. 1044).12 The law provided no real protective measures for Native American religions or from development on the San Francisco Peaks, but did bring more public and judicial attention to the question of religious freedoms for Native Americans. The Forest Service waited to determine its responsibilities regarding AIRFA and the

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12 The Wilsons had been in contact with both Rep. Morris Udall and Senator Barry Goldwater asking for assistance in preventing development on the San Francisco Peaks throughout this controversy. In one letter, Senator Goldwater exclaimed to the Wilsons, “Thank the Lord, the people of Flagstaff are finally getting to work to do something to preserve those Peaks. If you want a perfect example of what can happen through citizen neglect of natural beauty, just come to Phoenix and look around at the mountains. We who were born there never realized that the mountains were slowly being purchased by individuals, and if we hadn’t gotten on the ball when we did in 1965, all of Camelback Mountain would not be covered with homes with a restaurant on top, which was planned” (Goldwater letter to Jean and Richard Wilson, May 21, 1974).
Peaks, and so the Act delayed completion of the Coconino National Forest’s environmental impact statement regarding Snowbowl development until 1979.

The Coconino National Forest Supervisor, Michael Kerrick, issued his final decision in February 1979 allowing the modified Snowbowl expansion described in the Preferred Alternative (USDA, 1979). By the end of 1980 the decision had been appealed to H. J. Hassell, the Regional Forester in Albuquerque, New Mexico. Hassell essentially overturned the Forest Supervisor’s approval and modified the FEIS decision to allow only repairs and “improvements” for safety reasons. He based his decision on a “balancing act between Constitutional issues.” The expansion approved in the FEIS “may go too far and would result in a tilt toward development and infringement on the free exercise of religion.” But he also found that removal of Snowbowl would go too far in the other direction. Hassell also based his decision on his observation that “it is obvious…that no amount of development would make the Snowbowl into a topnotch area” (USDA, February 7, 1980, p.11). Hassell was likely referring Snowbowl’s amount and variability of snowfall (USDA, December 31, 1980, p. 3). Throughout Snowbowl’s history, the snowfall received on the Peaks has been highly variable due to its high elevation and low latitude and its location on a high desert plateau (Kraker, 2006; USDA, 2004, p. 3-160). As the Forest Service noted in its 2004 DEIS,

> The wintertime climate within the San Francisco Peaks frequently exhibits periods of dry weather with persistent sunshine, interspersed with periodic snowstorms. Meanwhile, high winds frequently occur on the Peaks due to their high elevation in relationship to the predominant elevation of the surrounding terrain. These factors can contribute to substantial snowpack loss via atmosphere sublimation (USDA, 2004, p. 3-207).

With the onset of climate change, moreover, Snowbowl is subject to even greater periods of snowfall variability. A “broad consensus” of climatology models indicates that “within
a time frame of years to decades,” the southwest United States will regularly experience extreme droughts (Seager et al., 2007, p. 1181). Models also “predict declining snowpack, shorter and more variable snow seasons, warmer winter temperatures with increased evidence of snowpack melt and sublimation loss, earlier spring snowmelt, and higher elevations for seasonal snowpack” (Bark, Colby & Dominguez, 2010, p. 688). Given the combination of historical and forecasting data, Snowbowl’s economic sustainability is inherently uncertain even with snowmaking capabilities.

During the 1979 Snowbowl EIS process and appeal, however, climate change was not a topic of consideration. Instead, the historical quality of Snowbowl’s snowfall sufficiency and variability was a point of contention within the Forest Service. After Regional Forester Hassell alluded to Snowbowl’s snowfall uncertainty, the Chief of the Forest Service, Max Peterson, overturned Hassell’s decision and upheld the Preferred Alternative proposal. Peterson cited the historical record as showing that 13 out of the previous 18 years had produced sufficient snowfall for full skiing operations at Snowbowl, and that the 5 years of insufficient snow had allowed at least “diminished” skiing, though he did not define what sufficient snowfall or diminished skiing meant in this context. He did, however, note that Snowbowl’s snowfall variability was “part of the risk weather-dependent businesses must bear. Most ski area operators accept this type of financial risk to varying degrees” (Peterson, 1980, p. 3-4). This sentiment was notably absent from the Forest Service’s handling of Snowbowl’s development proposal over two decades later.

The Navajo Medicine Men’s Association filed suit in the Washington D.C. Circuit Court in 1981 against the Secretary of Agriculture, the Chief Forester of the U.S.
Forest Service, and the United States. Northland Recreation intervened as a defendant later in the proceedings. The Medicine Men’s Association argued that Snowbowl’s proposal and the Forest Service’s approval violated their constitutional right to free exercise of religion, the government’s fiduciary duty to the Native tribes, AIRFA, the Establishment Clause of the U.S. Constitution, the ESA, the Wilderness Act, the National Historic Preservation Act, MUSYA, NEPA, the Administrative Procedure Act (APA), and 16 U.S.C. Secs. §§ 497 and 551, which regulate private use of public lands. Around the same time as the Navajo Medicine Men, the Hopi tribe and Jean and Richard Wilson filed similar suits; these suits were eventually consolidated into one lawsuit. The Navajo Medicine Men’s Association, the Hopi tribe and Jean and Richard Wilson all sought an order from the court prohibiting Snowbowl’s expansion plans.

The trip through the court system was relatively quick. Soon after the case consolidation and after the parties filed the facts of the controversy into record via affidavits and a Joint Stipulation of Material Facts, all parties filed motions for summary judgment. District Court Judge Richey heard the plaintiffs’ and defendants’ arguments as to the merits of the respective parties’ claims, and on June 15, 1981 granted summary judgment to defendants on all the claims except for the National Historic Preservation Act (NHPA). Judge Richey found that the Forest Service had failed to follow certain NHPA requirements during its environmental review process. First, he found that the Forest Service had failed to examine the development area to identify any properties that may be eligible for inclusion in the National Register of Historic Places. Second, Judge Richey found the Forest Service had failed to consult with the Arizona State Historic Preservation Officer (SHPO) about the effect of the Preferred Alternative on Fern
Mountain Ranch, owned by Jean and Richard Wilson, and the C. Hart Merriam Base Camp, both of which are National Register properties. Third, the Forest Service had not consulted with the SHPO over whether the San Francisco Peaks were eligible for listing in the National Register (Wilson v. Block, 1983, p. 753).

Judge Richey directed Northland to postpone development and gave the Forest Service another chance to comply with the NHPA requirements. After the Forest Service’s second attempt at compliance with the NHPA, Chief Forester reviewed the efforts and issued his findings in September 1981. The project area contained no properties either listed in or eligible for listing in the National Register, the ski area expansion would not affect the National Register properties, and that the San Francisco Peaks were not eligible for listing in the National Register. Then, on May 14, 1982 Judge Richey found that the Forest Service had fully complied with the NHPA over the course of the postponement (Wilson v. Block). Consequently, Judge Richey found in favor of the defendants and allowed Northland to proceed with the Snowbowl development, which was the Forest Service’s preferred alternative in the EIS process (Wilson v. Block, 1983). The plaintiffs appealed Judge Richey’s decision but on May 20, 1983 Senior Circuit Judge Lumbard of the D.C. Circuit Court of Appeals upheld the lower court’s decision.

After the victory in court, Northland built the Hart Prairie chairlift in 1983, but sold the ski area to Fairfield Communities in November of that year. Fairfield, safe from court challenges to Northland’s Snowbowl development plans, built Hart Prairie Lodge and the Sunset chairlift (Key Dates, 2007). These expansions constituted about two-

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13 About 18 years later, the Forest Service identified the Peaks as eligible for both a Traditional Cultural Property listing and a listing on the National Register of Historic Places, as noted below.
thirds of the number of new chair lifts allowed by the FEIS, about one-half of the new ski run clearing allowed, and the completion of the new day lodge allowed on the Peaks (USDA, 2004, p. 1-2; USDA, 1979).

**A Substantial Burden**

Fairfield Communities sold the Snowbowl lease and the ski operations to the Arizona Snowbowl Limited Partnership in 1992. The new owners continued to build some of the infrastructure development allowed by the FEIS, though not all: they expanded Hart Prairie Lodge by adding a new guest service office, a rental shop and a children's ski school, built two new trails, and widened an existing trail (USDA, 2004).

During Snowbowl’s changes and expansion, the Supreme Court decided two seminal constitutional cases involving the free exercise of religion clause: *Lyng v. Northwest Indian Cemetery Protective Association* in 1988 and *Employment Division v. Smith* in 1990 (*Smith* was superseded by the Religious Freedom Restoration Act of 1993). The *Lyng* and *Smith* decisions clearly demonstrated that the Constitutional right to free exercise of religion and the AIRFA act were insufficient protections for Native Americans’ religious beliefs threatened by government actions. In *Lyng*, the Supreme Court found that building a road and continuing logging operations in close proximity to sacred Indian sites in northern California was not a violation of the tribes’ free exercise of religious rights. Since there were no outright coercive acts that forced the tribes to violate their religious beliefs, the Court reasoned, there would be no violation of Constitutional rights, even though the Court conceded that the building of the road and the logging operations could have “devastating effects” on those religious beliefs (*Lyng v. Northwest Indian Cemetery Protective Association*, 1987, p. 451; Miller, 1990, p. 1038).
In *Smith*, the Court upheld Oregon State’s decision to fire two state employees and deny them unemployment compensation because they had ingested peyote while participating in a religious ceremony at the Native American Church. Again, the Court found there was no coercion in the government’s actions, and therefore, the government had not violated the plaintiffs’ rights of religious freedom (*Employment Division v. Smith*, 1990). The *Lyng* and *Smith* decisions showed that “neutral and generally applicable laws can be applied to suppress religious practices”; the government’s actions “need only have a rational basis, even when they cause severe effects on religions” (Laycock & Thomas, 1994, p. 210; Zellmer, 2002, p. 481).

In 1993, Congress passed the Religious Freedom Restoration Act (RFRA). RFRA was a direct legislative response to the Supreme Court’s 1990 decision *Employment Division v. Smith*. RFRA prohibited the government from “‘substantially burden[ing]’ the free exercise of religion,” except in cases where the government “demonstrates the application of the burden to the person (1) is in the furtherance of a compelling government interest; and (2) is the least restrictive means of furthering that compelling governmental interest” (RFRA § 2000bb.1(b); Muzzin, 2010). The Supreme Court later struck down this law as it relates to state governments, but upheld it for federal government actions. After the ineffectiveness of AIRFA, Native American tribes hoped RFRA would have the teeth required to protect sacred sites. Additionally, the Forest Service identified the Peaks as eligible for a Traditional Cultural Property (TCP) listing under the NHPA of 1966 (USDA, 2004, p. 3-4). In 2000, in accordance with the White Vulcan Mine Settlement Agreement and Mine Closure, the Forest Service also

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14 The White Vulcan Mine was a pumice mine on the other side of the Peaks as Snowbowl that was closed after much public protest. The mine and the protest will be covered further in Chapter 4.
determined the Peaks were eligible for inclusion in the National Register of Historic Places (USDA, 2004, p. 3-4). A property nominated for inclusion on the National Register has the same status as listed properties, and the Forest Service was required to proceed as though the Peaks were formally listed (USDA, 2004, p. 3-4). Would the Forest Service’s acknowledgment of the Peaks as sacred to the Navajo, Hopi and other tribes be cause for hope that the federal government would protect the Peaks from further desecration? Or would the Peaks’ nomination for listing as a Traditional Cultural Property and for listing on the National Register of Historic Places be yet another empty gesture? Such questions would be answered during the next court battle over Snowbowl and the San Francisco Peaks.

**Conclusion**

NEPA and the zoning ordinance mandating public hearings for rezoning requests changed the way private land development took place. The Wilderness Act provided other types of protection to ecosystems and species against unbridled development on public lands. AIRFA and RFRA also provided previously disenfranchised Native Americans the opportunity to have their day in court to defend against threats to their cultural and religious beliefs. The controversy surrounding the Peaks grew more complex in the 20th century as more people (Hopis, Navajos, environmentalists) had more opportunities to speak out about land management. At the same time, the economic interests who had more to gain from the status quo pushed back, in public forums and in the courts.

This controversy illustrates how some of the environmental and civil rights acts opened up decision-making to non-economic interests and led to greater citizen
engagement and government transparency. Social and environmental concerns gained a foothold in the public policy discourse, and real strides were made protecting these concerns. However, the discourse as well as administrative and judicial decisions continues to be lopsided in favor of the economic interests.
Chapter 4

THE SNOWMAKING CONTROVERSY

*Water is important to people who do not have it, and the same is true of control* (Joan Didion, 1979, p. 65).

In the early 21st century, the private owners of Snowbowl again drafted expansion plans that prompted local opposition. Though the controversy that ended in the 1980s and the controversy that began in 2002 grew out of the same legislative and political origins that began in the 1880s, there were also some significant differences between these two disputes. By 2002 the Kachina Wilderness Area surrounding Snowbowl’s leased land was well-established, and NEPA and the EIS process had become a familiar requirement to developers. Moreover, Snowbowl’s expansion plans in 2002 included purchasing treated wastewater from the City of Flagstaff to make artificial snow, and building the requisite infrastructure for snowmaking. Unlike the previous expansionist disputes, laws such as NEPA, RFRA and the ESA became valuable tools that allowed previously disenfranchised or disempowered interests to voice their concerns about patterns of historic disrespect, to emphasize responsible natural resource planning and to ask for further scientific inquiry in the face of overriding economic interests. At the same time, those laws placed the burden on the challengers to show that Snowbowl’s infrastructure expansion and the use of treated wastewater for artificial snowmaking would result in substantial environmental and social justice impacts. Also, despite the public participation process in the EIS analysis and ongoing Forest Service consultation with the tribes, some key stakeholders continued to feel marginalized and disrespected. Thus, though laws enacted in the 1900s decentralized discussions regarding management
of the Coconino National Forest, they did not provide a complete procedural corrective or balance to the historical policies, societal norms and current power structures that created this juncture where economic expansionism, environmental and health concerns and social equity activism confronted each other.

Snowbowl’s 2002 expansion proposal and NEPA

In 1992, the Arizona Snowbowl Resort Limited Partnership purchased the Snowbowl ski area for $4 million (Navajo Nation v. U.S. Forest Service, 2007). The new owners immediately expanded Hart Prairie Lodge and one existing trail and created two new trails. Ten years later, Snowbowl submitted a proposal to the Forest Service to significantly expand its facilities and increase its infrastructure. Much of the 2002 infrastructure expansion proposal was similar to the infrastructure changes proposed and approved in the 1979 EIS but had not been built due to various financial woes of the previous Snowbowl owners (USDA, 2004). New regulations and the amount of time that passed since the 1979 EIS approval process required the Forest Service to take a fresh look at the proposal in its entirety (USDA, 2004). Additionally, the new Snowbowl proposal included the significantly new element of building artificial snowmaking capabilities and using 100% treated wastewater purchased from the City of Flagstaff as its water source. Snowbowl’s 2002 proposal also included new plans for expanding upon existing chairlift capacities, building new chairlifts and lodges, adding lights for night skiing, and widening ski runs (USDA, 2004). The snowmaking infrastructure proposal included the creation of a reservoir and catchment pond for the treated wastewater, the construction of a 14.5-mile water pipeline from the Flagstaff Rio de Flag water treatment facility and a snowmaking control building. Just as in the 1980s, Snowbowl argued that
these plans were necessary for the sustained economic viability of both the private Snowbowl ski area enterprise and the greater community of Flagstaff (USDA, 2004). And, just as in the 1980s, the expansion proposal provoked an uproar throughout northern Arizona.

In February 2004, the Forest Service published the Draft Environmental Impact Statement (USDA, 2004). According to the Forest Service, “the overall Purpose and Need for these projects responds to two broad categories: 1) to provide a consistent/reliable operating season, and; 2) to improve safety, skiing conditions, and recreational opportunities by bringing terrain and infrastructure into balance with existing demand.” (USDA, 2004, p. 1-5). The DEIS considered 3 alternatives in detail: the “Preferred Alternative,” which was Snowbowl’s proposal sans night lighting, a no snowmaking or snowplay area for sledding alternative, and a “no action” alternative, which would keep the status quo (USDA, 2004).

**Meaningful consultation and Forest Service decision-making**

There are a host of laws, executive orders, and common law doctrine that emphasize the inclusion of Native American tribal governments and members in management decisions regarding the Peaks, because of their historic relationship with this sacred site. In addition to MUSY and NEPA, the National Historic Preservation Act, National Register for Traditional Cultural Properties, and the American Indian Religious Freedom Act and the Religious Freedom Restoration Act identify the Native American tribes as stakeholders with whom the Forest Service must consult on management of public lands such as the Peaks. Thus the Forest Service was guided by legal doctrine from
multiple branches of the U.S. government to include the tribes in the analysis of the Snowbowl proposal.

In 2000 President Bill Clinton signed Executive Order 13175, which recognized a “unique legal relationship” between the United States and Indian tribal governments that requires “meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications” (2000, at §§2(a); 5(a)). Other relevant Executive Orders, such as Executive Order 12898, provide further evidence and support for special consideration of and consultation with tribal governments in public land use decisions that affect their health or cultural well-being.

Also, as the Forest Service proceeded with the environmental impact assessment, it nominated the Peaks for a Traditional Cultural Property National Registry listing (USDA, 2004). A designation of the San Francisco Peaks as a Traditional Cultural Property ostensibly legitimized the tribes’ cultural and religious beliefs regarding the sacredness of the Peaks in the eyes of the United States government. The Peaks were eligible for inclusion in the National Register of Historic Places, because they are “associated with cultural practices and beliefs of living Native American communities that are rooted in their history and are important in maintaining the continuing cultural identity of the community” (USDA, 2004). Eligibility for listing on the National Register grants the same rights to stakeholders as an actual listing. Once a place is determined to be eligible, “the Forest Service is required to protect the Peaks...and consult with Tribes and interested parties regarding the impacts of proposed actions upon the Peaks” (USDA, 2005, p. 26). In the Snowbowl proposal environmental impact assessment process, then,

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15 E.O. 12898, titled “Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations,” requires federal agencies to make achieving environmental justice part of their mission.
Indian tribal governments such as the Navajo Nation and the Hopi Tribe held special stakeholder status that required “meaningful consultation.”

**What does “meaningful consultation” mean?**

The directive to the government agency to include the tribes in “meaningful consultation” lacked specific guidance. The Coconino National Forest approached the mandate through relationship-building efforts (Farnsworth & Pilles, n.d.). The Forest Service traced its efforts to consult and work with tribes from the 1970s Snowbowl controversy in a document titled “Collaborative Stewardship with the San Francisco Peaks” (Farnsworth & Pilles, n.d.). It documented some significant missteps the Forest Service had made during that time, such as relying on a political science consultant who was unfamiliar with Navajo and Hopi cultures to organize public meetings with the tribes and assess cultural impacts. The public meetings turned into “political and media sideshows” and the consultant asserted that the Navajos and Hopis were “losing contact with their culture” and that the Navajos were “opportunists in their choice of sacred places” (Farnsworth & Pilles, n.d, p. 2). After the *Wilson v. Block* lawsuit opposing Snowbowl’s expansion in the 1980s, the Forest Service realized it did not understand the Navajo and Hopi cultures and their relationships with the Peaks.

In 1988, the Forest Service sponsored a conference where academics, tribal archeologists, ethnologists and planners and Forest Service officials drafted the current consultation process. The process requires the Forest Service to begin a consultation by sending a letter tailored to each tribe specifying a list of projects and activities that might be of concern or interest to the 13 tribes in the region and requesting information regarding traditional cultural places that might be affected, and suggesting a meeting to
discuss the projects. The Forest Service acknowledged the key to effective and meaningful consultation is developing personal relationships with people in the tribes, and letting them know the agency is committed to working with the tribes. The Forest Service, however, also identified some continuing problems with the current consultation process:

Many [in the Coconino National Forest Service] are still unwilling, or unable, or just don't know how, to develop personal relationships with members of another, ‘different’ culture. Federal agencies are trapped by the whims of changing administrations and political parties and are not able to truly focus on long term land-use planning that would give tribes a clear picture of what is envisioned for the future. Agencies are forced to make knee jerk responses, often through a series of unrelated projects, which confuse tribes. Many tribes are [sic] still do not have the resources, or are not organized in a way that they are able to effectively consult with federal agencies. (Farnsworth & Pilles, p. 11).

The Forest Service noted that the tribes took a people-oriented approach to consultation by emphasizing concerns of individuals in the tribe, whereas the Forest Service took a process-oriented approach by developing handbooks, policy statements, and Memorandums of Agreement that all emphasized meeting specific legal requirements (Farnsworth & Pilles, n.d., p. 11).

**Applying the consultation process to the 2004 Snowbowl DEIS.**

During the 2004 comment period on the Snowbowl proposal’s *DEIS*, the Forest Service felt it had made a sufficient outreach and consultation effort through the sheer quantity of public meetings, phone calls, and letters it sent to the 13 tribes. The Forest Service held a total of 41 meetings with tribal representatives and the general tribal public, and of those 41 meetings, 26 were held on reservation lands. (USDA, 2005, p. ES-5). Hard copies of the *DEIS* were distributed to all tribal governments and all members of tribes who requested copies. In a letter accompanying each compact disk, it was made clear that hard
copies could easily be obtained by request. However, very few requests for hard copies were made (USDA, 2005, p. 4).

The Forest Service also made over 200 phone calls to the tribes and sent 245 letters to the tribes. As the Forest Service pointed out, “there is no specific legal or procedural requirement for the agency to hold a certain number of public meetings” Moreover, the Forest Service had extended the comment period from the 45-day minimum to 60 days (USDA, 2005, p. 4).

As noted in Chapter 2, critics of the effectiveness of public participation mechanisms in NEPA and associated regulations argue that often opportunities to participate are constrained by time and distance and that participation does not necessarily translate into influence (Ackerman, 1990, p. 709; Taylor McKinnon personal communication, February 5, 2010). These two concerns, that stakeholder participation in decision-making is hampered by both logistics and lack of authority, were particularly relevant to the Forest Service’s outreach efforts to many stakeholders after it published the 2004 DEIS.

Logistical concerns.

The quantity of outreach efforts and the comment-period extension might have been effective if most of the stakeholders lived in Flagstaff. There are over 52,000\(^\text{16}\) residents of Flagstaff, who are all arguably stakeholders in this controversy (U.S. Census Bureau, n.d.). There are more than 200,000 Navajo Nation members, 7,000 Hopi tribe members, and thousands of Hualapai, Havasupai, Yavapai-Apache and White Mountain Apache tribal members who are also all stakeholders\(^\text{17}\) (Economic Research Development Research Program, n.d.). The Navajo reservation stretches over 40,000 square miles,

\(^{16}\) According the 2000 census.

\(^{17}\) Id.
spread out over Arizona and New Mexico (U.S. Geological Survey, 2011). Many stakeholders are traditional Navajo and Hopi elders who live on remote reaches of the Navajo and Hopi reservations. Other stakeholders, such as the Havasupai, live at the bottom of the Grand Canyon. The Forest Service sent DEIS’s to the Havasupai via FedEx; unfortunately the bottom of the Grand Canyon is not on the FedEx route. Andy Bessler from the Sierra Club hiked the 8 miles down to Supai to hand-deliver a hard copy of the DEIS, though there were only a couple of weeks left during the comment period. The CD copies of the DEIS, sent to many stakeholders, posed another problem. Jones Benally, a Navajo traditionalist medicineman, recalled that he had received a CD version, and, having no experience with computers, at first thought the CD was a mirror (Benally, 2006).

The hard copy of the DEIS is a thick and hefty 523 page document. It is written in English and laden with scientific jargon. Jones Benally explained that he asked for help understanding the document from English-educated, younger Navajo tribe members, but they were unable to fully comprehend the text of the DEIS (Benally, 2006). Though the Forest Service conducted outreach and consultation with the tribes, the agency failed to adequately recognize or to try to bridge the cultural, generational, and logistical divides between the Forest Service and some of its key stakeholders. Viewed from the perspective of these stakeholders, the Forest Service may have adhered to the letter of the law but certainly not the spirit.

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18 It is unclear why the Forest Service sent it by FedEx instead of by the U.S. Postal Service, which delivers mail to and from Supai on mules.
Lack of authority.

Two common characteristics of the NEPA public participation process that limited stakeholder influence on decision-making were apparent during the Forest Service’s EIS analysis of the Snowbowl proposal. The first characteristic was the Forest Service’s emphasis and reliance upon agency expertise over public input and knowledge. The Forest Service thus saw the public comment period as primarily an information exchange, rather than a chance for collaborative discussion (Poisner, 1996, p. 87-88). Moreover, the public participation process is often reactive, rather than cooperative (Poisner, 1996, p. 86). The second characteristic was the Forest Service’s handling of public comments as though they were the expression of purely private, equally valid interests competing for supremacy over the proper use of the Peaks (Poisner, 1996, p. 89; Carpenter, 2006b, p. 42). Sacred sites controversies such as this one, however, arise from the historical, cultural, and religious relationship between peoples and the land. These two limiting characteristics can often lead to tension over the federal agency’s final decision (Poisner, 1996, p. 85).

First limiting characteristic: the agency as expert.

Here, the Snowbowl and the Forest Service framed the problem and determined that “the overall Purpose and Need for [the Snowbowl development] responds to two broad categories: 1) to provide a consistent/reliable operating season, and 2) to improve safety, skiing conditions, and recreational opportunities by bringing terrain and

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19 Professor Kristen Carpenter explains “peoples” are “a body of persons that are united by a common culture, tradition, or sense of kinship, that typically have common language, institutions, and beliefs, and that often constitute a politically organized group (2006-2007, p. 39). The concept of peoplehood in decision-making about sacred sites “(1)...can expand the discussion beyond the power of the federal government to include the interests of subnational groups, and (2)...can inspire those groups to recognize and accept one another’s interests” (p. 40).
infrastructure into balance with existing demand” (USDA, 2004, p. ES-3). Because of the structure of the NEPA process, many key stakeholders are generally left out of the initial, issue-defining proposal drafting stage. However, imagine an alternative EIS structure that brings most key stakeholders to the table from the beginning of proposal drafting. In the case of the Snowbowl proposal, the Hopi and Navajo tribes would then be able to have hands-on participation in San Francisco Peaks land use management. The “purpose and need” for development on the mountain would be defined very differently. The Forest Service would act more as a mediator between key stakeholders, rather than the authoritative guide to land use decision-making. This approach would provide greater opportunities for community goal-setting and discussion: will Snowbowl’s development actually address Snowbowl’s economic concerns? How much does Snowbowl affect the economies and cultures of the towns and villages in the area? What, if any, natural resources should be expended to support Snowbowl? What do various stakeholders value in the Peaks? What do these stakeholders want the Peaks to look like in the future? All of these questions were asked at some point during the EIS process and resulting litigation, but there was no opportunity for all stakeholders to approach these questions analytically and to discuss the answers collaboratively at the beginning of the process. This missed opportunity is one of NEPA’s great shortfalls, particularly when a development proposal pops up for a sacred site in a National Forest.

As the EIS assessment process is currently structured, the first opportunity for many key stakeholders to participate is after the proposal is drafted, during the scoping process. During the scoping process the Forest Service only considers public comments that were responsive and substantive, defined by 36 CFR Part 215 as comments that are
“within the scope of the proposed action, are specific to the proposed action, have a direct relationship to the proposed action and include supporting reasons for the Responsible Official to consider.” Thus, public participation has to be limited to reactive responses on terms set out by the agency and the entity proposing the development. Several comments submitted by stakeholders were dismissed by the Forest Service as being outside the scope of the proposed action. These included comments about complex and long-term concerns – i.e. sustainability-focused comments - such as potential climate change effects on the proposal, and concerns about effects to the riparian habitats in the Rio de Flag, where the effluent then flowed. Sustainability issues are, by definition, complex (Gibson, 2006, p. 171). A government agency conducting an EIS assessment is generally ill-equipped to tackle such complexity but is pushed to make a timely decision based on sound science. Issues involving complexity and uncertainty have to be ignored in order for the agency to complete its job.

In the Snowbowl EIS assessment, the Forest Service regularly deferred to standards set by other government agencies on scientific and technical issues. Throughout the Forest Service’s analysis of the reclaimed wastewater quality and of the potential impacts to ecosystems and species, the agency relied primarily on legal standards for “class A+” wastewater set by the Arizona Department of Environmental Quality, and on records and permit reporting requirements set by the City of Flagstaff. For instance, a comment made in response to the DEIS posited that reclaimed wastewater could affect the physical and spiritual properties of plants used for medicinal purposes (USDA, 2005, p. 27). In its reply, the Forest Service reiterated that the reclaimed wastewater meets all state and federal standards for snowmaking, and that the tribes had not identified any
specific locations of their medicinal plants. The agency conceded that snowmaking with reclaimed wastewater “could result in some change in plant species composition (favoring early seral species) and some tree mortality may occur…” (USDA, 2005, p. 27).

State and federal wastewater treatment standards provide a sense of certainty to the Forest Service’s decision, whereas the underlying scientific uncertainty of a proposal’s environmental and public health effects may lead to agency paralysis. The Forest Service and other government agencies managing natural resources have not developed a systematic or transparent way to approach the uncertainty inherent in ecosystem management (Shultz, 2007, p. 265). Instead, “the prevailing regulatory approach in the United States is reactionary rather than precautionary” (President’s Cancer Panel, 2010, p. 16).

The Snowbowl proposal coincided with a shifting concern from industrial water pollutants to growing awareness of pharmaceuticals and personal care products (PPCPs) in water and the potential harmful impacts those chemicals may have on normal functioning endocrine systems in wildlife and humans (USDA, 2004, p. 3-174). The proposal to use 100% reclaimed wastewater and build an accompanying 10 million gallon reservoir on the Peaks raised concern about the wastewater quality and impacts on the Peaks’ ecosystems, as well as on potential human ingestion of the artificial snow, that might not have occurred in a previous decade.20 The DEIS noted that the effects of “many classes of drugs, bioactive metabolites and transformation products and personal

20 In full disclosure, I am assisting, pro bono, plaintiffs’ attorney Howard Shanker on Save the Peaks v. U.S. Forest Service, 9th Cir. No. 10-17896. The cause of action in Save the Peaks is the Forest Service’s failure to adequately consider potential negative consequences of human ingestion of the artificial snow during the EIS process.
care products” on wildlife and human endocrine systems had yet to be examined in 2004. At the time the DEIS was published, an expert panel convened by the World Health Organization, the International Labour Organization, and the United Nations Environmental Programme issued the Global Assessment on the State-of-the-Science of Endocrine Disruptors (USDA, 2004). The DEIS emphasized the panel’s findings that the risks of PPCPs on endocrine systems were “suspect,” rather than “known” (USDA, 2004, p. 1-176).

Second limiting characteristic: public comments are assessed as equal and competing private interests.

The Forest Service, when deciding among the three alternatives it identified in the DEIS, assessed the various public comments and perspectives with equal import and balanced the perspectives against the others. For the Forest Service, recreational interests competed on equal ground against environmental preservation concerns and against traditional Hopi, Navajo and other tribal practices for use of the San Francisco Peaks. The multiple-use mandate of MUSY required that the Peaks be available for many uses, and since the Snowbowl operates on 1% of the Peaks, the rest of the Peaks were still available to all other interests, including environmental and cultural interests (Cole, 2005).

21 The DEIS also noted that NAU biologist Dr. Catherine Propper had begun working in 2002 on a two stage study with the United States Geological Survey (USGS), focusing on endocrine disrupting compounds in wastewater from City of Flagstaff wastewater treatment facilities. Her results were published just after the DEIS in 2004. Dr. Propper identified significant issues with the City’s treated wastewater:

While the City of Flagstaff wastewater screening and animal testing are merely the first step in an attempt by scientists to understand how the specific compounds in our wastewater may or may not affect wildlife and human health, the results are significant nonetheless. Pharmaceutical and industrial compounds have been found in Flagstaff’s wastewater and groundwater. Some of these compounds are known endocrine disrupters (Dr. Catherine Propper, NAU, March 25, 2004, cited by Grand Canyon Trust, public comment letter).
the Forest Service’s decision was announced in a teleconference with some members of the press, the Forest Service focused on the agency’s balancing act between recreational, environmental, and cultural concerns. Many of the press’ questions focused on how the Forest Service decided in favor of one particular stakeholder group over another. As National Forest Chief Supervisor, Nora Rasure, explained:

Certainly, there are Native Americans that use the Peaks and there are also people that use the Peaks for skiing and other recreational purposes. That's part of the mission of the Forest Service: to provide many different opportunities on national forest system lands (Teleconference with Coconino National Forest Service Supervisor Nora Rasure and Peaks District Ranger Gene Waldrip, March 8, 2005).

The formula weighing various uses (such as skiing) against the others (such as collecting plants for traditional medicinal bundles) and assessing measurements of infringement on each use may be tidy but can lead to outcomes where stakeholders feel marginalized during government decision-making processes (Carpenter, 2006, p. 38). In cases like this one, where a proposed development will impact a sacred site on public lands, the EIS approach needs to acknowledge and incorporate complexity in stakeholder relationships.

**Navajo Nation v. U.S. Forest Service**

In February 2005, the Forest Service issued its final decision selecting Snowbowl’s proposal (USDA, 2005). After pursuing administrative appeals and obtaining the same result, on June 23, 2005, opponents to Snowbowl’s proposal turned to federal district court for redress. The Navajo Nation, the Sierra Club, the White Mountain Apache Nation, the Yavapai Apache Nation, the Center for Biological Diversity, and the Flagstaff Action Network filed a total of four lawsuits against the U.S. Forest Service, Forest Supervisor Nora Rasure, and Regional Forester Harv Forsgen. Early in the proceedings the lawsuits were consolidated into one action, *Navajo Nation v. U.S. Forest*
Service (2007). Plaintiffs’ main counsel was Howard Shanker, from the Shanker Law Firm based in Tempe, Arizona, with legal support from the Hopi tribe, the Center for Biological Diversity, the nonprofit legal aid group DNA People’s Legal Services.

 Defendants were represented by attorneys from the Department of Justice. Later, Snowbowl Resort Limited joined the lawsuit as co-defendants of the Forest Service to provide solidarity and to present a united front in the face of plaintiffs’ challenge (Paul Johnson, personal communication, March 31, 2010). They brought with them the Arizona powerhouse law firm Jennings, Strouss, and Salmon and the politically-connected Washington D.C. law firm Latham and Watkins, with former U.S. Secretary of the Interior and son of prominent Flagstaff family Bruce Babbitt as lead attorney.22

 In their complaint, the plaintiffs argued that the Forest Service’s authorization of the use of recycled wastewater on the Snowbowl violated several federal environmental and cultural laws, including RFRA, NEPA, NHPA, the Endangered Species Act, and the federal government’s trust obligations to the tribes. They sought a declaration from the court that the Forest Service’s actions during the environmental impact statement process were “(1) arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law, (2) and/or without observance of procedure required by law” and also sought an

22 The involvement of Latham and Watkins particularly stung because Bruce Babbitt was chief counsel of the environmental litigation department. Just five years previous, Bruce Babbitt was considered an ally to those same Native American tribes and environmentalists in the fight to close White Mountain Vulcan pumice mine on the other side of the San Francisco Peaks from Snowbowl. Bruce Babbitt attended a victory celebration for the closing of the mine with various Native American leaders and environmentalists, and, during his celebration speech, he proclaimed “[t]his mountain is sacred in my religion. The first Franciscan missionaries saw this mountain from the Hopi mesas and named it after the founder of their order, after Saint Francis, who is the patron saint of ecology... What I see here today, in all of these different religions, is purely and simply a sacrilege.” In gratitude for his support in closing the pumice mine, tribal members gave Babbitt a pair of stonewashed jeans, which are made with pumice, signed by tribal youth. Since Babbitt’s about-face on the sacredness of the San Francisco Peaks, Snowbowl’s opponents have initiated a symbolic protest for him to “Give Back the Pants!” (Bennally, 2006; SavethePeaks, n.d)
injunction preventing the Snowbowl expansion, at least until the Forest Service complied with all applicable laws and regulations (First Amended Complaint, *Navajo Nation v. Forest Service*, June 23, 2005).

After the discovery phase, during which the parties dug for evidence, both plaintiffs and defendants filed Motions for Summary Judgment (MSJ). An MSJ is a commonly used procedural tool designed to avoid trials in cases where there are no challenges to material facts, and in which the moving party is entitled to win the lawsuit as a matter of law. The district court denied the plaintiffs’ MSJ and granted the defendants’ MSJ on all claims except the RFRA claim. With that decision, the court indicated it found that the law was on the defendants’ side for all the procedural and environmental laws except, perhaps, for RFRA. Under the RFRA claim, the plaintiffs and defendants would go to trial to determine two things: whether the Forest Service’s approval of the Snowbowl proposal placed a substantial burden on the exercise of the tribes’ religions, and, if it was a substantial burden, whether approving that proposal was enough of a compelling governmental reason to place that burden on their religions.

The trial was held in district court in front of Judge Rosenblatt in Prescott, Arizona, about 100 miles southwest of the San Francisco Peaks. During the 11-day bench trial which was spread out over the course of a month, tribal elders and leaders testified to the importance of the San Francisco Peaks to their worldviews and described the devastating impact snowmaking would have on their on religious and cultural beliefs (*Navajo Nation v. U.S. Forest Service*, 2006). Representatives for both plaintiffs and defendants later spoke of the “strong feelings” on both sides (Paul Johnson, personal

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23 The NEPA claims were revived on appeal but inexplicably left unaddressed in the en banc decision (*Navajo Nation et al. v. U.S. Forest Service*, 2008).
communication, March 31, 2010; Howard Shanker, personal communication, January 26, 2010).

Outside the ornate federal courthouse in the middle of downtown Prescott, Native American rights supporters arrived from the far reaches of the Southwest, such as Window Rock, Arizona, and Denver, Colorado to show their support for the plaintiffs’ claims. The courtroom filled to capacity with observers each day and the overflow of plaintiffs’ supporters stood outside the courtroom or gathered across from the courthouse in the Prescott Courthouse Square (Dodder, 2005; Hardeen, 2005).

**Did the government’s approval of the proposal place a substantial burden on plaintiffs’ religious beliefs?**

The courtroom showdown highlighted the continuing difficulties in cultural and linguistic communication between Native American tribes and the European-American cultural and legal system. Going to court meant the plaintiffs had to clearly and convincingly explain their religious and cultural practices and their relationship with the San Francisco Peaks in terms the European-Americans could understand and appreciate. Apache educator and plaintiffs’ witness Vince Randall, “testified that the word religion inadequately describes Native peoples’ spiritual connection to the Peaks. ‘If you want to call it a religion, that’s your language…It’s a way of life’” (Hardeen, 2006). Other plaintiffs’ witnesses needed hours to accurately translate the significance of the Peaks to their worldview, including the Hopi Cultural Preservation Office Director Leigh Kuwanwisiwma, who testified for seven hours on October 17, 2005 (Lee, 2006).

Echoing the linguistic and cultural interpretive difficulties from the 1970s and 1980s Snowbowl controversy, trial witnesses and other Indian tribe members struggled to
convey the impact that using treated wastewater to make snow would have on the Peaks and the tribes’ ways of life. Various metaphors have been utilized over the years in attempts to translate worldviews. In the 1970s, the Native peoples compared the Snowbowl ski area to a scar. During the *Navajo Nation v. US Forest Service* litigation, tribal members explained that using treated wastewater for artificial snow would be like urinating on the Sistine Chapel. Navajo Nation President Joe Shirley, Jr., testified at the district court trial in Prescott that allowing the Snowbowl proposal to proceed would be “like someone coming in and violating and raping our mother…It hurts me. She’s already got scars” (Hardeen, 2005). Activist Klee Benally, citing trial testimony from a tribal elder, offers a different metaphor,

> It’s like you taking a part of your heart, or, one of the best equations I’ve heard is, if you take a poison through a shot, that needle is going into your arm in an area that is way smaller than 1% of your body but that injection and the impacts go through your whole system and through your whole body. We view the San Francisco Peaks, or *Dook’o’oosliid*, as a single living entity in the same way we view our bodies, so her vital organs, the medicines that she shares, that she offers to us and all of these things that are part of this spiritual system if you will, will be impacted because that’s part of the ecosystem that can’t be differentiated or separated out from our beliefs. (Klee Benally, personal communication, April 2, 2010).

Tribal members also testified to their specific sacred practices on the Peaks, despite reluctance to discuss their personal relationships with and beliefs about the Peaks. Testifying was particularly difficult because their practices were questioned through the lens of the European-American perspective of religion and culture. The defense attorneys asked where the sacred shrines were located on the Peaks, and if they collected any medicinal herbs or conducted rituals within the Special Use Permit area that Snowbowl operated on (*Navajo Nation v. U.S. Forest Service*, 2006). The attorneys were attempting
to discern whether the tribal practices would be impacted by direct physical contact with the treated wastewater.

During their cross-examination of the witnesses for the plaintiff tribes, the defense attorneys stressed the federal government’s ownership of the Coconino National Forest and its sovereignty over management of the San Francisco Peaks. The following exchange between Snowbowl attorney Janice Schneider and plaintiffs’ witness Larry Foster, a Navajo Nation member and traditionalist and practitioner, illustrates the ahistorical aspect of current property law as applied to this controversy:

Q: And I want to talk about a --- a little bit about each of these [sacred] mountains. Mount Hesperus, that’s located in southwestern Colorado; is that right?
A: Yes.
Q: And is that federal property?
A: It became federal property after they took it away from us.
Q: So currently it is owned and administered by the federal Government (sic); is that right?
A: Yes. It’s a park or national forest.


After days of testimony and after the attorneys’ argument were made, Judge Rosenblatt decided that Snowbowl’s proposed expansion, including the use of treated wastewater to make artificial snow on the Peaks, did not violate RFRA. In order to violate RFRA, the development must impose the legal hurdle of a “substantial burden” on
plaintiffs’ religious beliefs or practice. To determine this legal burden, Judge Rosenblatt used the “coercion” test from *Lyng v. Northwest Indian Cemetery Protective Association*. This is a tough hurdle for plaintiffs to cross because the contested government decision must affirmatively coerce plaintiffs to act contrary to their religious beliefs. Judge Rosenblatt found that the proposed expansion did not “bar access, use, or ritual practice on any part of the Peaks.” The government’s decision, according to the court, would not amount to coercion and thus the plaintiffs failed to show there would be a substantial burden on their religion (*Navajo Nation v. U.S. Forest Service*, 2006, p. 905).

The legal requirements and process, even more so than the NEPA process, places the burden on the Plaintiffs to explain, translate and prove the negative impacts the Snowbowl proposal will impose on their worldviews in terms the federal government can understand and appreciate. As required by law, Judge Rosenblatt and the defendants relied on the framework provided by NEPA procedural requirements and the court systems’ checks and balances on federal agency action. This framework ensures a high likelihood that the courts will decide in favor of the parties operating within the same decision-making framework, and within the same worldview.

**Ninth Circuit Appeal**

The plaintiffs appealed the court decision to the Ninth Circuit Court of Appeals. The 3-judge panel hearing was held in San Francisco in September 2006 (*Navajo Nation v. U.S. Forest Service*, 2007). Again, plaintiffs’ witnesses and supporters arrived from the far reaches of Arizona, New Mexico, and Colorado in busloads to march in the streets and observe the legal proceedings. Again, testimony about the sacredness of the San Francisco Peaks was heard from tribal elders and other tribal leaders. As described in the
court opinion, the Hopi testified to the many connections they have with the Peaks, focusing on the physical interactions for western ears: “The Hopi believe that pleasing the Katsinam…is crucial to their livelihood…[t]he Hopi have at least fourteen shrines on the Peaks” and every year select members from each of the Hopi villages “make a pilgrimage to the Peaks. They gather from the Peaks both water for their ceremonies and boughs of Douglas fir worn by the Katsinam in their visits to the villages” (Navajo Nation v. U.S. Forest Service, 2007, p. 1035).

Members of the Navajo Nation also testified to their sacred activities on the Peaks, and the physical connections they have with the Peaks. They explained

[t]he Peaks are represented in the Navajo medicine bundles found in nearly every Navajo household. The medicine bundles are composed of stones, shells, herbs, and soil from each of four sacred mountains. One Navajo practitioner called the medicine bundles ‘our Bible,’ because they have ‘embedded’ within them ‘the unwritten way of life for us, our songs, our ceremonies…The Navajo believe that the medicine bundles are conduits for prayers; by praying to the Peaks with a medicine bundle containing soil from the Peaks, the prayer will be communicated to the mountain…The medicine bundles are also used in healing ceremonies, as is medicine made with plants collected from the Peaks. Appellant Norris Nez, a Navajo medicine man, testified that ‘like the western doctor has his black bag with needles and other medicine, this bundle has in there the things to apply medicine to a patient’ (Navajo Nation v. U.S. Forest Service, 2007, p. 1035).

In their oral arguments, attorneys for the plaintiffs also tried to translate the holistic worldview into the specific impacts required by the courts, and stressed the substantial burden that permitting the proposal would have on the impacted tribes’ religions. Plaintiffs’ attorney Howard Shanker stated, “from a spiritual perspective this water cannot be reclaimed [from places like] hospitals, [or] from mortuaries.” (Shanker, 2006).
Ninth Circuit 3-judge panel decision.

The 3-judge panel overturned Judge Rosenblatt’s decision and ruled against the Forest Service and Snowbowl. The 9th Circuit Judges Fletcher, Rawlinson and Henderson found that the Navajo and Hopi tribes’ religions would be substantially burdened by the snowmaking and expansion, that keeping Snowbowl financially profitable was not a “compelling government interest,” and, that defendants had not shown that the proposal was necessary to keep Snowbowl from closing. Judge Fletcher wrote the opinion, and held that the substantial burden presented by the approval of the Snowbowl proposal violated RFRA. The court also ruled that the Forest Service failed to comply with NEPA by failing to “reasonably discuss the risks posed by the possibility of human ingestion of artificial snow made from treated sewage nor articulates why such discussion is unnecessary” (Navajo Nation v. Forest Service, 2007, p. 1060).

Judge Fletcher’s opinion thoroughly discusses Navajo, Hopi, Havasupai and Hualapai testimony, and gives weight to the evidence presented regarding their worldviews and the significance of the Peaks to their cultures. Judge Fletcher determined the proposal would constitute a substantial burden on the Navajo, Hopi, Hualapai and Havasupai people’s exercise of religion (Navajo Nation v. Forest Service, 2007, p. 1043). Judge Fletcher based his decision on the potential negative effects on the Indian’s relationship with the Peaks; he took into account metaphysical understandings of the sacred in the exercise of religion. Contamination from the treated wastewater would prevent Navajo Medicinemen from making medicine bundles in accordance with their tradition, for instance (Navajo Nation v. Forest Service, 2007, p. 1043). Judge Rosenblatt, however, noted that the proposal would not prevent the Medicinemen from actually
collecting the plants to make medicine bundles; he focused solely on the physical aspect of exercise of religion (*Navajo Nation v U.S. Forest Service*, 2006, p. 882).

Judge Fletcher also discussed the chemical uncertainty and as-yet unidentified risks associated with treated wastewater – “often euphemistically called reclaimed water” – and the possibility that “depending on weather conditions, substantially more than 100 million gallons of effluent could be deposited over the course of the winter ski season” (*Navajo Nation v. Forest Service*, 2007, p. 1038). The court was unable to find that government authorization of snowmaking with reclaimed wastewater for a fully operational ski area was a compelling interest, particularly when faced with the chemical and bacterial risks of “reclaimed water” combined with the significance of the Peaks to the Navajo and Hopi worldview (*Navajo Nation v. Forest Service*, 2007).

**Ninth circuit en banc appeal**

Now it was the Forest Service and Snowbowl’s turn to be dissatisfied with a court ruling. They appealed the panel’s decision, and, one year later an 11-judge *en banc* court (including, by happenstance, Judge Fletcher) overturned the earlier court’s decision. The majority held in favor of the Forest Service and Snowbowl. Judge Fletcher issued the lone dissent.

This hearing took place in Pasadena, California, and, for a third time, political leaders and traditionalist elders from the Navajo, Hopi, Apache and other tribes arrived to testify in court as to their deeply-held worldviews and explain the significance of the Peaks. Supporters came to observe and protest the appeal outside the Ninth Circuit courthouse (Howard Shanker, personal communication, January 26, 2010; Paul Johnson, personal communication, March 31, 2010).
En banc courts must rely on the same facts as determined by the previous court; the court may only review the previous court’s findings of law. Here, the court relied on the same facts as the earlier 3-judge panel in San Francisco, but came to very different conclusions about religious and cultural burdens, technology and scientific uncertainty, and control over land use decision-making.

The court opinion, written by Judge Bea, found that the “government–approved use of artificial snow on government-owned park land (did not) violate [RFRA], [NEPA], or [NHPA]” (Navajo Nation v. Forest Service, 2008, p. 1062). Judge Bea stressed the “public” nature of the Coconino National Forest and the federal government’s “ownership” of the land. The court was concerned with the idea that “giving one religious sect a veto over the use of public park land would deprive others of the right to use what is, by definition, land that belongs to everyone” (Navajo Nation v. Forest Service, 2008, p. 1063). By doing this, the court relied on the same perspective that the Forest Service had used during the public comment portion of the EIS process. Each forum assessed the varied interests communicated by stakeholders as equal and competing private interests. Sacred sites cases such as this one, however, illustrate how a “one-size fits all” approach to stakeholder participation can lead to cultural harm and result in an attack on cultural survival (Tsosie, 2007, p. 972, 974). Both the Forest Service and the court ignored the weight of history and the special relationship the Navajo and Hopi tribes have with the San Francisco Peaks. In doing so, these forums equated the interests of commercial enterprise and recreation with the non-fungible, collective interests of sovereign nations (Tsosie, 2007, p. 972; Carpenter, 2008, p. 315).
The Bea court, using the same standard as Judge Rosenblatt in the Arizona District Court, also dismissed any impacts from snowmaking on the tribes’ religions as insubstantial and purely subjective. Where there is no explicit coercion for a plaintiff to act contrary to religious beliefs or “condition a governmental benefit upon conduct that would violate…religious beliefs” there is no substantial burden and therefore no RFRA violation (Navajo Nation v. U.S. Forest Service, 2008). Additionally, the court found little reason to caution against treated wastewater’s use where there was no specific, hard data on harmful impacts to the environment. Judge Bea wrote that “[a]t the heart of [plaintiffs’] claim is the planned use of recycled wastewater, which contains 0.0001% human waste, to make artificial snow” (Navajo Nation v. U.S. Forest Service, 2008, p. 1062). He cited and affirmed the trial court’s finding that

no plants, springs, natural resources, shrines with religious significance, or religious ceremonies that would be physically affected by the use of such artificial snow. No plants would be destroyed or stunted; no springs polluted; no places of worship made inaccessible, or liturgy modified. Thus, the sole effect of the artificial snow is on the Plaintiffs' subjective spiritual experience (Navajo Nation v. U.S. Forest Service, 2008, p. 1062.)

**Supreme Court appeal and current status.**

The plaintiffs attempted their last possible appeal through the court system by applying to the Supreme Court for review. Unlike the lower courts, the Supreme Court has discretion over which cases to review. In June 2009, the Supreme Court declined to hear the appeal of Navajo Nation v. U.S. Forest Service. For now at least, the Snowbowl expansion and snowmaking proposal could proceed.\(^{24}\)

\(^{24}\) At the time of this writing, an appeal of an Arizona District Court judge’s August, 2010 decision in favor of the U.S. Forest Service and Snowbowl defendants and denial of request for an injunction is being appealed to the Ninth Circuit in the Save the Peaks v. U.S. Forest Service case.
Conclusion

There are federal statutes, executive orders, common law doctrine and treaties that are relevant to the San Francisco Peaks and that address the importance of “meaningful consultation” with the Native American tribes that have a historical, cultural and religious relationship with the sacred mountain. Though collective rights are not often recognized in U.S. property law, “Indian tribes are usually somewhat of an exception” (Carpenter, 2006b, p. 42). However, these collective rights have largely failed to affect the administrative policies of public land use agencies such as the Forest Service in sacred sites cases (Carpenter, 2006b, p. 43). Though the Forest Service has discretion over management of public lands, Forest Service officers are pressured by agency culture and policy to accommodate multiple uses, even if those uses are fundamentally at odds. As seen throughout the EIS process for the 2002 Snowbowl proposal, the stakeholder influence on the Forest Service’s decision-making process is limited by two concepts – the concept of the agency (and laws and regulations) as expert and the concept of public participation in decision-making processes as purely expressions of equal and competing private interests. The judicial system greatly defers to agency decision-making and therefore also relies on these concepts that limit meaningful stakeholder participation in public land use decisions.

The 2002 version of the Snowbowl controversy highlights the institutional obstacles facing Native Americans who attempt to assert collective rights during public land use decision-making involving sacred sites. NEPA and the public participation process and similar laws and regulations opened the door for a more engaged citizenry in both local and federal land use decisions. Citizens are now empowered to articulate
concerns about scientific uncertainty, risk, and cultural harm. After Snowbowl submitted its expansion proposal to the Forest Service and the proposal was evaluated for environmental and cultural impacts, skeptical stakeholders challenged the Forest Service on their decision and their process. They reviewed the science surrounding the quality of the reclaimed wastewater and questioned the amount of risk the wastewater’s effects might pose to ecosystems and humans. Then, through litigation, stakeholders challenged the environmental and cultural externalities they would have to bear due to the Forest Service’s decision. This level of participation, unavailable pre-NEPA, provides a necessary check on administrative decision-making.

However, “it is the altering of processes, making them more just, rather than addressing single cases of environmental inequality, that is likely to have the greatest social and environmental impacts” (Boone, 2008, p. 152). The Forest Service and the courts continue to operate in the same pre-NEPA framework that defers to economic interests over environmental or cultural. The Forest Service merely listens to stakeholders and merely lists environmental and cultural impacts; there are no direct consequences for the Forest Service when it approves a particularly burdensome expansion proposal such as Snowbowl’s on the San Francisco Peaks. Legislative bodies shaping public lands law should incorporate sustainability – with its emphasis on intergenerational equity, democratic governance, and acknowledgement of complexity and uncertainty – in order to overcome the inequity of burden inherent in the current decision-making structure.
Chapter 5

CONCLUSION

Overall lessons learned

Contemporary control over the San Francisco Peaks and the surrounding lands began in the 19th century and was shaped in part by the Doctrine of Discovery and Manifest Destiny. These policies led to the United States’ violent conquest of the Colorado Plateau and the people who lived there. And as Patricia Limerick eloquently explains, the end of the frontier did not pull people and events into the “sinkhole” of the past (1987, p. 213). The legacy of this era of conquest and marginalization has marred the relationship between the U.S. government and the Navajo and Hopi tribes and resulted in widespread mistrust of the U.S. government within the tribes. Many Navajo and Hopi people view the U.S. Forest Service’s control over the San Francisco Peaks as illegitimate. Meanwhile, the Forest Service struggles to determine and implement public land uses according to the mission set over 100 years ago in 1905.

In the 20th century, decision-making policies for land use proposals on national forests and other publicly-owned lands were reformed at federal and local levels. Legislation such as the Wilderness Act reversed the no-holds-barred expansionist development policies that were holdovers from the Manifest Destiny era. NEPA and local zoning codes required greater government transparency and increased opportunities for public participation. With this newfound transparency and public participation, calls for government accountability grew.

However, the legal and political structure requires energetic vigilance, dedication and activism just to give voice to cultural and environmental concerns. In the 1970s and
1980s, Navajo and Hopi tribe members, the Wilsons, and their attorney Douglas Wall, the Navajo Medicinemen’s Association, the Sierra Club, and many others consistently participated in public forums. During the second round of controversy in the 21st century, the Center for Biological Diversity, tribes including the Navajo Nation and the Hopi tribe and their attorneys including Howard Shanker and many others have also persisted in giving a voice to marginalized perspectives.

By the beginning of the 21st century, there were several legislative and policy-oriented attempts to protect environmental interests and Indian cultural rights to sacred sites like the San Francisco Peaks. Stakeholder participation was incorporated into land use decision-making procedures in the 1960s and 1970s, but institutional obstacles continue to prevent effective integration of these marginalized perspectives. Government agencies conducting the EIS process have yet to make the necessary leap from “meaningful consultation” to “meaningful empowerment” of key stakeholders. This leap is required, though, if government agencies want to act to correct unequal power relations that continue to plague decision-making and that perpetuate land use controversies such as this one. All stakeholder interests have to be presented and fairly considered when creating policy with a sustainability approach.

Sacred sites that are within the Forest Service’s jurisdiction, such as the San Francisco Peaks, are still subject to the forces that first shaped federal agency management of national forests, including the agency’s utilitarian mission and Anglo-American notions of property development (Carpenter, 2006a, p. 984). As Carpenter notes, “there is a structural element of federal law and policy that…sets up these battles over sacred sites” (2006b, p. 39). For instance, the Forest Service and the courts tend to
operate within an ahistorical vacuum when it comes to sacred sites protection due to the prevailing structural elements directing these institutions. Here, the Coconino Forest Service and some of the subsequent court decisions authorized both Snowbowl’s 1979 and 2005 expansion proposals because they viewed all interests in the proposal, opposing and supporting, as carrying equal historical weight. The fact that Snowbowl has been on the Peaks since the 1930s was approximately equally important to the Bea court, for instance, as the length and depth of the relationship between the Hopis and Navajos and the Peaks (Navajo Nation v U.S. Forest Service, 2008, p. 1064).

The current state of the Snowbowl controversy is also problematic because it perpetuates injustices of the past while ignoring future concerns about natural resource use and community development. Despite the statutes such as RFRA and the Executive Orders protecting sacred sites on public lands that stacked up over the years, the Forest Service still fails to meaningfully consult with the Hopis and Navajos regarding management of the sacred San Francisco Peaks – which the U.S. government took from the Hopis and Navajos in the first place. When asked about the state of intergenerational equity in the Snowbowl controversy, Taylor McKinnon of the Center for Biological Diversity (one of the plaintiff environmental organizations in Navajo Nation v. U.S. Forest Service) replied:

What is most salient to me is that the [Snowbowl expansion] proposal is so dismissive of Native American rights and it is revealing in a new context an old paradigm, and that is where the tribes and native people’s interests have been forced to be subservient to the dominant culture’s interests. Consistently time and time again from initial killing the people, to taking their land, to submarket leases of their resources, the manipulation of tribal government by corporations and lawyers…. it’s all been done in the name of manifest destiny. And what we have now is the manifest destiny of skiing in November. It’s the same thing but it’s dressed up in ski clothes and somehow that makes it okay for some people in Flagstaff (Taylor McKinnon, personal communication, February 5, 2010).
Meanwhile, government agencies from the City Council to the Forest Service missed several chances to encourage local deliberation about present and future water priorities. When the City Council approved the treated wastewater contract with Snowbowl in 2002, council members essentially stated it was none of their business what Snowbowl did with the water (Benally, 2006). The Forest Service ignored the potential impacts of climate change on the Peaks in the EIS process. The Forest Service thus precluded discussion about responsible water uses in the face of climate change in northern Arizona during the public comment period. As noted in Chapter 3, these are complex issues that the Forest Service was unable to grapple with, due to time, resources, and the procedural structure of public land use decision-making. Sustainability problems are complex, but can only be ignored by decision-makers for so long.

**How this case study contributes to sustainability and policy studies**

Sustainability approaches to problems are “a response to evidence that current conditions and trends are not viable in the long run, and that the reasons for this are as much social and economic as they are biophysical or ecological,” (Gibson, 2006, p. 171). Socio-ecological civility and democratic governance require a governing institution to build the capacity, motivation and habitual inclination of individuals, communities and other collective decision-making bodies to apply sustainability requirements through more open and better informed deliberations, greater attention to fostering reciprocal awareness and collective responsibility, and more integrated use of administrative, market, customary and personal decision-making practices. (Gibson, 2006, p. 174).

This case study uses a historical narrative to understand the complexity of the Snowbowl controversy in order to determine how to overcome the current social “conditions and trends that are not viable in the long run” (Gibson, 2006, p. 171).
Questions about past policies shape our present – such as, how did the Snowbowl controversy arise? Are there inequities inherent in the controversy? What are the government policies shaping the controversy? Do current policies and practices sustain inequity, socio-ecological incivility and anti-democratic governance? Seeking answers to those questions informs efforts to improve governance for the future.

By looking at the causes of the Snowbowl controversy, this case study illuminates current obstacles to integrating socio-ecological sustainability principles into public land use decision-making procedures. It identifies the obstacles that remain and that reproduce this controversy over the course of generations. It also shows how, by definition, sustainability cannot operate within an ahistorical context. The failure to achieve intergenerational equity and robust democratic governance in the Snowbowl controversy reveal how sustainability (in the normative sense) and deliberative democracy are interdependent. Normative sustainability means the content of sustainability is open to social debate, it “conceive[s] [of] democracy not as a device for the aggregation of preferences and interests, but as a dialogue within discursive communities” (Arias-Maldonado, 2000, p. 56). Normative sustainability provides opportunity for participation of marginalized concerns, including those of future generations, non-human beings and subcultures, and opportunity to place the discussion in historical context. The only way to incorporate those concerns into political decision-making is through equitable democratic processes. While these processes do not guarantee sustainable policy outcomes, “to conceive sustainability as open to public and dialogue definition through a deliberative model of democracy increases the possibilities” (Arias-Maldonado, 2000, p. 57).
Thus, in this conception of sustainability, stakeholders are empowered to determine common goals and public values and the means to achieve them. The meaning of sustainability is not enforced through scientifically or ideologically determined goals or means as in a technocratic form of sustainability (Arias-Maldonado, 2000, p. 45). In a technocratic conception of sustainability, decisions are utilitarian (Arias-Maldonado, 2000, p. 45). Snowmaking using 100% reclaimed wastewater falls within the realm of technocratic sustainability. Using wastewater provides a superficially “green” tool to help the low-latitude ski industry adapt to a predicted drier, warmer climate in the coming decades (Bark, Colby & Dominguez, 2010, p. 480-481; Dr. Rosalind Bark, personal communication, February 12, 2010). However, this technocratic approach maintains the systemic problems of this controversy: it ignores intergenerational inequities stemming from the past while also ignoring opportunities for communities in northern Arizona to address impending issues about water use. Artificial snow made from 100% treated wastewater, then, is an adaptation to climate change for sustaining the status quo.

A sustainable state for any system can never actually be reached; systems are dynamic (Gibson, 2006, p.170). Instead, sustainability is a process of striving toward a socio-ecological order that is resilient and equitable. Getting there is not simply a technical matter but involves deliberative, democratic decision making processes. As the Snowbowl controversy illustrates, it requires providing opportunities to correct socio-ecological inequities in our legal and cultural systems while preparing those systems for potential future disruptions.
REFERENCES


*Cherokee Nation v. Georgia*, 30 U.S. 1; 8 L. Ed. 25; 1831 U.S. Lexis 337 (1831).


Skiing lodge at Snow Bowl nearly ready. (1941, August 29). *The Coconino Daily Sun.*


