

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

THE HOPI TRIBE, a federally recognized Indian  
Tribe,

Plaintiff,

vs.

UNITED STATES DEPARTMENT OF  
AGRICULTURE – FOREST SERVICE and the  
Honorable THOMAS J. VILSACK, its Secretary;  
THOMAS L. TIDWELL, Chief of the United States  
Forest Service; and M. EARL STEWART, in his  
official capacity as Forest Supervisor for the  
Coconino National Forest,

Defendants.

**Civil Action No. 12-1846 (RJL)**

**SETTLEMENT AGREEMENT AND STIPULATION OF DISMISSAL**

WHEREAS, on June 4, 2012, Plaintiff, the Hopi Tribe, sent notice of its intent to file suit pursuant to 16 U.S.C. § 1540(g), alleging violations of Section 7 of the Endangered Species Act (“ESA”), 16 U.S.C. § 1536.

WHEREAS, on June 11, 2012, the United States Forest Service requested reinitiation of ESA Section 7 consultation with the U.S. Fish and Wildlife Service.

WHEREAS, on November 14, 2012, Plaintiff filed a Complaint for declaratory and injunctive relief against the United States Department of Agriculture – Forest Service (“Forest Service”), Thomas J. Vilsack, in his official capacity as Secretary of the Department of Agriculture, Thomas L. Tidwell, in his official capacity as Chief of the U.S. Forest Service, and M. Earl Stewart, in his official capacity as Forest Supervisor for the Coconino National Forest (collectively “Federal Defendants”), alleging violations of the ESA, 16 U.S.C. § 1536, related to

the alleged effects of artificial snowmaking at the Snowbowl Ski Area on the San Francisco Peaks ragwort. Dkt. No. 1.

WHEREAS, on November 20, 2012, Plaintiff filed a motion for preliminary injunction seeking to enjoin snowmaking which is set to begin on December 14, 2012. *See* Dkt. No. 5-1

WHEREAS, on December 3, 2012, Federal Defendants filed their opposition to Plaintiff's motion for preliminary injunction. *See* Dkt. No. 30.

WHEREAS, on December 3, 2012, as part of the ESA Section 7 consultation process, the Forest Service issued a supplemental Biological Assessment analyzing the potential effects of snowmaking on the ragwort. *See* Dkt. No. 34-1.

WHEREAS, in its Biological Assessment, the Forest Service concluded that the snowmaking was not likely to adversely affect the ragwort or its designated critical habitat, and the Forest Service has asked for the U.S. Fish and Wildlife Service's concurrence in this determination. *See* Dkt. No. 34-1.

WHEREAS, Plaintiff does not agree with the Forest Service in its conclusion that the snowmaking is not likely to adversely affect the ragwort or its designated critical habitat.

WHEREAS, on December 3, 2012, the Forest Service issued a determination that snowmaking planned for the 2012-2013 ski season would not adversely modify critical habitat of the ragwort, or jeopardize the continued existence of the ragwort, or make an irreversible or irretrievable commitment of resources that would foreclose implementation of a reasonable and prudent alternative as contemplated by Section 7 of the ESA.

WHEREAS, Plaintiff does not agree with the Forest Service in its conclusion that the snowmaking planned for the 2012-2013 ski season will not adversely modify the critical habitat of the ragwort, or jeopardize the continued existence of the ragwort or make an irreversible or

irretrievable commitment of resources that would foreclose implementation of a reasonable and prudent alternative as contemplated by Section 7 of the ESA.

WHEREAS, on December 6, 2012, Plaintiff filed its reply to Federal Defendants opposition to Plaintiff's motion for preliminary injunction. *See* Dkt. No. 39.

WHEREAS, Plaintiff continues to oppose the planned snowmaking, and has requested completion of modeling and monitoring, enhanced consultation with the Forest Service and direct consultation with the U.S. Fish and Wildlife Service on this matter.

WHEREAS, by joint motion filed on December 6, 2012, Plaintiff and Federal Defendants jointly moved to continue the hearing on the motion for preliminary injunction until December 21, 2012. *See* Dkt. No. 38, which the Court granted on December 7, 2012.

WHEREAS, Plaintiff and Federal Defendants, through their authorized representatives and without any admission or final adjudication of the issues of fact or law with respect to Plaintiff's claim, have reached a settlement that they consider to be a just, fair, adequate, and equitable resolution of the disputes set forth in Plaintiff's Complaint.

WHEREAS, Plaintiff and Defendants agree that settlement of this action in this manner is in the public interest and is an appropriate way to resolve the dispute between them at this time;  
NOW, THEREFORE, IT IS STIPULATED BY AND BETWEEN THE PARTIES AS FOLLOWS:

1. Federal Defendants agree to request from U.S. Fish and Wildlife Service and provide Plaintiff a draft letter of concurrence or draft biological opinion within five (5) days of receipt of such document from the U.S. Fish and Wildlife Service. Plaintiff will have fifteen (15) days from the Federal Defendants' transmittal of the document to provide comments on the draft letter of concurrence or draft biological opinion.

2. Federal Defendants will transmit the comments submitted by Plaintiff, if any, to the U.S. Fish and Wildlife Service.

3. Federal Defendants will facilitate an opportunity for a government-to-government meeting between representatives of the Hopi Tribe and the Arizona Field Office Supervisor and staff of the U.S. Fish and Wildlife Service to discuss the Section 7 consultation on the San Francisco Peaks ragwort before the U.S. Fish and Wildlife Service issues a draft letter of concurrence or draft biological opinion for the Section 7 consultation.

4. Federal Defendants agree to implement the monitoring protocol as set forth in Exhibit A hereto.

5. Prior to the 2013-2014 ski season, Federal Defendants agree to complete an atmospheric modeling analysis of snow transport and deposition as described in Dkt. 33 Paragraph 7, and as planned by the Forest Service. Federal Defendants agree to provide Plaintiff with the modeling results and outputs including actual data and an assessment of data quality. Prior to Federal Defendants issuing any final report on the results of the modeling effort, Plaintiff will have a fifteen (15) day period in which to provide comments to the Forest Service on its draft monitoring report. Federal Defendants agree to provide an opportunity for a meeting between representatives of the Hopi Tribe and the Forest Supervisor for the Coconino National Forest after such comments, if any, are provided, to be held within fifteen (15) days of receipt of the comments, but before the issuance of any final report. Within fifteen (15) days of execution of this Settlement Agreement by Plaintiff and Federal Defendants, Plaintiff agrees to provide Federal Defendants with its snow transport and deposition modeling conducted to date related to Arizona Snowbowl Resort including modeling results, outputs, actual data, and an assessment of data quality. Plaintiff also agrees that if it or its consultants conduct any future modeling of

snow transport or deposition related to Arizona Snowbowl Resort, that it will provide Federal Defendants with the modeling results, outputs, actual data, and an assessment of data quality for such modeling efforts within fifteen (15) days of the completion of any future modeling.

6. Federal Defendants agree to provide Plaintiff with the 2013/2014 Arizona Snowbowl operating plan within three (3) days of its receipt. Plaintiff will then have a ten (10) day period in which to provide comments to the Forest Service. As provided in, and consistent with, the March 29, 2005 *Arizona Snowbowl Ski Area* Memorandum of Agreement, Federal Defendants agree to an opportunity for a meeting between representatives of the Hopi Tribe and the Forest Supervisor for the Coconino National Forest after such comments, if any, are provided.

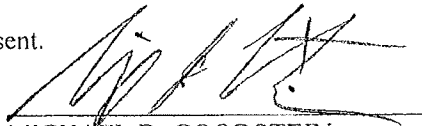
7. Within one business day of execution of this settlement agreement by the Plaintiff and Federal Defendants, Plaintiff shall move the District Court for a voluntary dismissal without prejudice of all counts of its Complaint filed in this case, with each party to bear its own costs.

8. In the event of an alleged breach of this settlement agreement, Plaintiff's sole remedy will be to reopen or reactivate the litigation in the District Court. Prior to reopening or reinitiating litigation, Plaintiff shall provide notice to Federal Defendants of any alleged breach and shall confer in good-faith to resolve any such dispute prior to reopening or reinitiating litigation. Federal Defendants expressly reserves all defenses and arguments, including but not limited to jurisdictional arguments, in any such action brought by Plaintiff. Nothing in this Agreement shall preclude Plaintiff from challenging any future final letter of concurrence or final biological opinion issued at the conclusion of the ESA Section 7 consultation on the impacts of the Arizona Snowbowl snowmaking upon the ragwort.

9. Nothing in this Agreement shall be interpreted as, or shall constitute, a requirement that the Federal Defendants are obligated to pay any funds exceeding those available, or take any action in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341, or any other appropriations law. No provision of this Agreement shall be interpreted as, or constitute, a commitment or requirement that Federal Defendants or U.S. Fish and Wildlife Service take action in contravention of the ESA, the Administrative Procedure Act (“APA”), or any other law or regulation, either substantive or procedural. Nothing in this Agreement shall be construed to limit or modify the discretion accorded to Federal Defendants or U.S. Fish and Wildlife by the ESA, the APA, or general principles of administrative law with respect to the procedures to be followed in making any determination required herein, or as to the substance of any final determination.

10. The parties agree that this Agreement was negotiated in good faith and that this Agreement constitutes a settlement of claims that were denied and disputed by the parties. By entering into this Agreement, the parties do not waive any claim or defense.

11. The undersigned representatives of each party certify that they are fully authorized by the party or parties they represent.



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## **Sampling Protocol for Nitrogen Deposition Monitoring – Arizona Snowbowl Approach**

Snow deposition will be monitored to determine snow mass, snow chemical concentrations, and chemical loading. The product of snow mass (snow water equivalence (SWE)) and chemical concentration, provides a value of chemical loading, which is ultimately the metric of interest.

Our approach will be to conduct a pilot monitoring campaign during the 2012/2013 season, with a possible expansion/reduction of monitoring the following winter consistent with the outcome of ESA consultation. Because of the late date this year, the resources and time are not available to initiate a comprehensive monitoring program. However, baseline monitoring can be accomplished this winter and will be set up as soon as practicable.

Equipment and protocol will follow industry standards for scientific and operational programs in North America.

### **Snow Water Equivalence**

Snow deposition will be measured at six sites along an east/west transect. Five of the sampling sites will be distributed along a line extending from the mid-mountain point where snowmaking is most prevalent, eastward extending into the ragwort critical habitat. Sampling sites will be linearly distributed with increasing distance from the snowmaking area, as it is expected that snow deposition will decrease with increasing distance from the source. Distances will be approximately 0 m, 100 m, 500 m, 1000 m, and 2000 m from the source area. At each distance, three samples will be collected from sites at 10m intervals along the perpendicular line intersecting the distance point. The approximate location of the sampling sites would be at the top of the uppermost snowmaking site along the Log Jam ski run continuing easterly from the source area. Sampling sites within the ski runs will be located on the margins to insure public

skier safety and maximize deposition. One control will be established and will be located at the lower end of the ski area and outside of the area of the influence of snowmaking. Meteorological records will be consulted to determine wind vectors and the effect of wind on deposition patterns.

Snow deposition will be measured using a snow water equivalent sampler and plastic snowboards (measuring 16" x 16"). Snow will be sampled periodically with a minimum of 3 samples taken of each of the following events (assuming 3 of each event occur over the course of the season): 1) during snow making events and, 2) after significant natural snowfall events (greater than 6 inches), as practicable considering access issues and worker safety. Deposition will also be measured during mixed events, where both artificial and significant natural snowfall deposition occurs.

A monitoring audit will be conducted after sampling.

### **Snow Chemistry**

Total Kjeldahl Nitrogen (TKN), total Kjeldahl phosphorus, dissolved orthophosphates, along with additional anions (fluoride, chloride, nitrate, phosphate, sulfate: US EPA Method 300.0 (A)) and cations (lithium, sodium, ammonium, potassium, magnesium, calcium) used for watershed and surface water quality monitoring will be analyzed on melted snow samples. All samples will be thawed gradually after collection. A portion of the sample will be then filtered (0.45  $\mu$ ) prior to analysis by ion chromatography. Total Kjeldahl Nitrogen (method 10-107-06-2-L; NPDES Equivalent 350.1), which covers most forms of nitrogenous compounds originating from biological sources minus nitrate are converted to ammonia and analyzed using a Lachat QuickChem 8000 Flow Injection Analyzer (FIA). The sample will be digested using concentrated sulfuric acid with a copper catalyst. An aliquot from this digestion will be injected

into the flow stream on the FIA, converted to ammonia, mixed with a color reagent and concentration measured on a spectrophotometer. Dissolved Orthophosphate (method 10-115-01-1-A), a molybdate method will also be performed on the Lachat QuickChem 8000 Flow Injection Analyzer. This method measures total dissolved orthophosphates in water that has been filtered. This method is NPDES/NPDWR accepted and follows Standard Methods (4500-P-G). Both anion (ASA4SC column) and cation (CS12A column) analysis will use isocratic methods with chemically suppressed conductivity detection to quantify concentrations. The alkalinity of snow samples will be measured on unfiltered subsamples by titration to a 3.2 pH endpoint using 0.01 N HCl (Gran, 1952). Titratable alkalinity is comprised predominantly of  $\text{HCO}_3^-$  and  $\text{CO}_3^{2-}$ , represents the acid neutralizing capacity (ANC) of natural surface waters (Stumm and Morgan, 1996; Neal et al., 1999). Electrical conductance (EC) and pH will be analyzed using a ThermoOrion pH-conductivity meter with appropriate electrodes. The Forest Service agrees to provide the Hopi an opportunity to confer with the Forest Service on appropriate detection limits for each sampling measurement.

### **Future Monitoring**

Sampling protocol will be revisited after the 2012/2013 season and conclusion of consultation to determine requirements and need for additional monitoring. Hopi will be provided input into the need for and design of any potential future monitoring through its involvement in the ESA consultation process as described in the Settlement Agreement. Any future monitoring would be consistent with the recovery plan and the outcome of consultation with USFWS. As described in the supplemental BA, the Forest Service intends to continue monitoring specified in the recovery plan.

