ARIZONA SUPREME COURT
ORAL ARGUMENT CASE SUMMARY

THE HOPI TRIBE v. THE CITY OF FLAGSTAFF/AZ. SNOWBOWL RESORT
CV-18-0057-PR

PARTIES:

Petitioners: The City of Flagstaff
Arizona Snowbowl Resort Limited Partnership

Respondent: The Hopi Tribe

FACTS:

The Arizona Snowbowl Resort Limited Partnership ("Snowbowl") operates a ski resort on the San Francisco Peaks in the Coconino National Forest north of Flagstaff, Arizona ("Flagstaff"). The Hopi Tribe ("the Tribe") has legally challenged Snowbowl's activities on the San Francisco Peaks for many years. In 1981, several plaintiffs including the Tribe challenged the U.S. Forest Service's approval of upgrades to Snowbowl as a violation of the Free Exercise Clause of the First Amendment by impairing the Tribe's ability to pray and to conduct ceremonies upon the Peaks. *See* *Wilson v. Block*, 708 F.2d 735, 739-40 (D.C. Cir. 1983). The D.C. Circuit found the upgrades would not impose a substantial burden on the exercise of any religious practices. *Id.* at 742-45.

In 2002, Flagstaff contracted to sell reclaimed wastewater to Snowbowl for use in making artificial snow, and the Forest Service approved. Several tribes, including the Tribe, challenged the approval under federal statute. A federal district court ultimately resolved all claims in favor of the Forest Service, and the Ninth Circuit affirmed. *Navajo Nation v. U.S. Forest Serv. (Navajo Nation I)*, 408 F. Supp. 2d 866, 908 (D. Ariz. 2006); *Navajo Nation v. U.S. Forest Serv. (Navajo Nation III)*, 535 F.3d 1058, 1063 (9th Cir. 2008).

In 2010, the Tribe filed its complaint in this case, alleging a claim of public nuisance, i.e., that the use of reclaimed wastewater to make artificial snow harmed the environment and thus the public's use and enjoyment of the Peaks, because the water "contains recalcitrant chemical components . . . including pharmaceuticals, personal care products, legal and illicit drugs, veterinary drugs, hormones, caffeine, cosmetics, food supplements, sunscreen agents, solvents, insecticides, plasticizers, detergent compounds and other chemicals." The Tribe asserted that the wastewater runoff would enter the water supply and that winds would carry the artificial snow beyond the application area. The Tribe alleged that the resulting contamination of the Peaks would interfere with its cultural and religious practices.

Flagstaff successfully moved to dismiss the complaint, arguing it was precluded by the *Navajo Nation* cases. On appeal, the Arizona Court of Appeals reversed, finding that the *Navajo*

Nation cases did not preclude the Tribe's public nuisance claim. *See Hopi Tribe v. City of Flagstaff*, 1 CA-CV 12-0370, 2013 WL 1789859, at *8, ¶¶ 34-35 (Ariz. App. Apr. 25, 2013) (mem. decision).

Following remand, Snowbowl moved to dismiss the public nuisance claim under Arizona Rule of Civil Procedure 12(b)(6), arguing that the Tribe failed to sufficiently allege the type of damages necessary to maintain a public nuisance. The trial court, Judge Mark R. Moran, granted the motion to dismiss and denied the motion to amend the complaint because the amendment "would be futile, as it fails to allege the required element of special injury." In finding a failure to allege a special injury, Judge Moran extensively reviewed the issue of standing in public nuisance law as exemplified by *Armory Park Neighborhood Ass'n v. Episcopal Cmty. Servs.*, 148 Ariz. 1, 4 (1985), *Spur Industries, Inc. v. Del E. Webb Dev. Co.*, 108 Ariz. 178 (1972), and *In re Exxon Valdez*, 104 F.3d 1196, 1198 (9th Cir. 1997). He then concluded:

> Recognizing the long historical use by the Hopi of the Peaks Wilderness area for cultural and religious purposes, the Court nevertheless concludes that other members of the public share the same rights and concerns about preserving our environment, and keeping it free of pollution or being desecrated. The public also share the same right of access to and enjoyment of the Peaks wilderness area as the Hopi.
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> …[T]he Court specifically finds that the Hopi have failed to satisfy the standing requirement on the basis of special injury to religious or cultural practices in the Peaks wilderness area due to the sale and application of man-made snow. This conclusion is based upon the fact that the practical effect on the Hopi's ability to conduct ceremonies has not been substantially impacted, that the religious significance of The Peaks is not unique to the Hopi, and this claim is tied directly to the alleged environmental damage. (see: *Wilson v. Block*, 708 F.2d 735, 738, 740 (D.C. Cir. 1983) (cert. den. 464 U.S. 956, 104 S.Ct. 371, 78 L.Ed.2d 330 (1983); *Navajo Nation v. US. Forest Service*, 535 F.3d 1058, 1098-1100 (91h Cir. 2008). The Hopi may have modified the locations … in which they pursue their religious and cultural ceremonies, but there are no well pled facts which support a finding that the ceremonies have been … thwarted."

On appeal, however, the Court of Appeals concluded that the Tribe had successfully shown that the use of reclaimed wastewater caused it "a special injury, different in kind than that suffered by the general public, by interfering with places of special cultural and religious significance to the Tribe." The Arizona Supreme Court granted Snowbowl and Flagstaff's Petition for Review.

ISSUE:

> Did the court of appeals improperly create "interference with a place of special importance" as an entirely new category of "special harm" for purposes of public nuisance claims that may be brought by private parties, which category has never before been recognized by any court, and which is contrary to the intentionally-limited number of narrow categories previously recognized, particularly when it purports to control what public officials can and cannot do on public lands?