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Save the Peaks Coalition v. United States Forest Service

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***Save the Peaks Coalition v. United States Forest Service*, 683 F.3d 1140 (9th Cir. 2012).**

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ABSTRACT

The United States Court of Appeals for the Ninth Circuit imposed personal sanctions upon plaintiffs' attorney for needlessly litigating an adjudicated NEPA claim and misrepresenting the merit of that claim to his clients. The court held that plaintiffs, though aware of the initial suit involving the claim, were misled by counsel into pursuing the claim in the instant suit, and therefore should not be sanctioned with an award of defendants' attorneys' fees. The court found plaintiffs' counsel acted in bad faith, and intended to harass defendants and cause delays in development. Consequently, the court awarded defendants all litigation costs through trial and appeal. The court imposed sanctions under 28 U.S.C. § 1927 and through its inherent powers.

I. INTRODUCTION

In *Save the Peaks Coalition v. United States Forest Service*,[1] a three-judge panel of the Court of Appeals for the Ninth Circuit held plaintiffs' counsel personally responsible for re-litigating an adjudicated National Environmental Policy Act (NEPA) claim in bad faith.[2] Accordingly, the court sanctioned plaintiffs' attorney for abuse of the judicial process, yet spared plaintiffs themselves.[3] The court awarded defendants all litigation costs incurred through trial and appeal, to be paid personally by plaintiffs' counsel.[4] The court imposed the sanction via

[1] 683 F.3d 1140 (9th Cir. 2012).
[2] *Id*. at 1141-1142.
[3] *Id*.
[4] *Id.* at 1141.

Federal statute,[5] as well as through exercise of its inherent powers, after finding plaintiffs' attorney acted in bad faith.[6]

II. FACTUAL AND PROCEDURAL BACKGROUND

This sanction levy arises out of the second of two lawsuits concerning the United States Forest Service's (USFS) 2005 decision to permit Arizona Snowbowl Resort Limited Partnership (Snowbowl) to upgrade its operation with snowmaking equipment utilizing Class A+ reclaimed wastewater.[7] Snowbowl experiences tremendous variability in its annual natural snowfall accumulation and, consequently, high fluctuation in visitor numbers.[8] The snowmaking proposal acted as a hedge against that variability and was consistent with other recreational uses of Class A+ reclaimed wastewater in the nearby city of Flagstaff. The USFS vetted the proposal in a Draft Environmental Impact Statement (DEIS) published on February 2, 2004.[9] After receiving over 5,000 comments on the DEIS, the USFS issued a Final Environmental Impact Statement (FEIS) in February 2005.[10] The FEIS included a specific analysis of snowmaking water quality and a discussion of potential health effects resulting from the water's use.[11]

In June 2005, four groups of plaintiffs, including several Native American tribes, filed suit in the United States District Court for the District of Arizona challenging the USFS's decision in the FEIS. The suits were subsequently consolidated into a single action under *Navajo Nation v. United States Forest Service*.[12] In *Navajo Nation*, plaintiffs alleged, in part pursuant to the Administrative Procedure Act, USFS violations of the Religious Freedom Restoration Act of 1993 (RFRA), NEPA, the National Historic Preservation Act, the Endangered Species Act, the

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[5] 28 U.S.C. § 1927 (2012).
[6] *Save the Peaks*, 683 F.3d at 1141-1142.
[7] *Save the Peaks Coalition v. United States Forest Service*, 2010 WL 4961417 at **1-2 (D. Ariz. 2010).
[8] *Save the Peaks Coalition v. United States Forest Service*, 669 F.3d 1025, 1029 (9th Cir. 2012).
[9] *Save the Peaks*, 2010 WL 4961417 at *2.
[10] *Save the Peaks*, 669 F.3d at 1029.
[11] *Id*.
[12] *Navajo Nation v. United States Forest Service*, 408 F.Supp.2d 866 (D. Ariz. 2006).

Grand Canyon National Park Enlargement Act, and the National Forest Management Act, as well as a violation of Federal tribal trust responsibilities.[13] On motion for summary judgment, plaintiffs alleged, for the first time, a failure by the USFS to adequately address health risks resulting from *ingesting* snow made with the Class A+ wastewater. The district court denied plaintiffs' subsequent motion for leave to amend their complaint to include this new allegation.[14] The district court then denied plaintiffs' motions for summary judgment on all but the RFRA claim, which the court decided in favor of defendants following a bench trial.[15]

On appeal, a three-judge Ninth Circuit panel affirmed in part and reversed in part the district court's ruling in favor of the USFS.[16] Particularly, the court reversed the district court's grant of summary judgment on the NEPA claim related to manmade snow ingestion.[17] Thereafter, the Ninth Circuit, sitting en banc, vacated the panel's decision and affirmed the district court judgment on all claims.[18] The court's affirmation relative to the NEPA claim turned on procedure.[19] The court held that, because plaintiffs "failed sufficiently to present" the claim at the trial level, and because plaintiffs "failed to appeal the district court's denial of their motion to amend [their] complaint," it would not hear the NEPA claim.[20] Plaintiffs appealed the en banc Ninth Circuit decision to the United States Supreme Court; certiorari was denied.[21]

In *Save the Peaks Coalition*, plaintiffs filed the instant suit in the District of Arizona following this prior judgment in favor of the USFS.[22] The suit's NEPA claims hinged in large

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[13] *Id*. at 871.
[14] *Save the Peaks*, 2010 WL 4961417 at **3-4.
[15] *Id*. at *4.
[16] *Id*. (*see Navajo Nation v. United States Forest Service*, 479 F.3d 1024 (9th Cir. 2007), *vacated*, 506 F.3d 717(9th Cir. 2007).
[17] *Id*.
[18] *Id*.
[19] *Id*.
[20] *Id*.
[21] *Navajo Nation v. United States Forest Service*, 129 S.Ct. 2763 (2009) (cert. denied).
[22] *Id*.

part on the failed allegation implicating health risks from ingested man-made snow proffered and rejected in *Navajo Nation*. Plaintiffs claimed the USFS "failed to ensure the scientific integrity of its analysis" through its inadequate discussion of the impacts of treated-water snow ingestion.[23] Again finding for defendants on all claims, the district court held plaintiffs' claims were barred by the doctrine of laches, and the USFS took the "requisite hard look at the environmental effects of the proposed challenged action" as required by NEPA.[24]

On appeal, the Ninth Circuit levied strong criticism at plaintiffs and their attorney for pursuing claims against the USFS nearly identical to those fully adjudicated in *Navajo Nation*.[25] The court reversed the district court's holding regarding the applicability of laches, holding that, in light of the lack of prejudice experienced by the USFS, the elements of the doctrine were not fully met.[26] However, the court affirmed the district court's ruling in favor of defendants on the NEPA claims, and the USFS prevailed.[27] On the issue of plaintiffs' indiscretion, the Court opined that the alleged "new" parties in the instant litigation were familiar with, even secondarily involved in, the litigation in *Navajo Nation* and strategically declined to join that lawsuit.[28] The Court reasoned that, based on the similarity of the previous and instant claims, the instant suit seemed designed "for no apparent reason other than to ensure further delay and forestall development [of Snowbowl's snowmaking system]."[29] Further, the Court found the participation of Plaintiffs' attorney in both suits significant: "the 'new' plaintiffs and their counsel have grossly abused the judicial process by . . . holding back claims that could have, and should have,

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[23] *Id*.
[24] *Id*. at *25; *see Montana Wilderness Association v. Fry*, 310 F.Supp.2d 1127, 1143 (D. Mont. 2004) and *North Idaho Community Action Network v. United States Department of Transportation*, 545 F.3d 1147, 1154-1155 (9th Cir. 2008).
[25] *Save the Peaks*, 669 F.3d at 1028-1030.
[26] *Id*. at 1034-1035.
[27] *Id*. at 1035-1038.
[28] *Id*. at 1028.
[29] *Id*.

been asserted in the first lawsuit . . . but for counsel's procedural errors in raising those claims."[30]

III. ANALYSIS

The most recent Ninth Circuit court contemplating sanctions in this case was acutely familiar with the parties' protracted history; indeed the sanction panel consisted of the same Circuit judges who considered plaintiffs' second appeal.[31] With that history in mind, the court considered appropriate sanctions.

Though an award of attorney's fees is generally appropriate when an opposing party pursues an "unreasonable, frivolous, meritless, or vexatious" action,[32] the court held such an award "inequitable" in this instance because plaintiffs themselves were not primarily responsible for the conduct at issue.[33] The court declined to award defendants attorney's fees for two reasons: (1) plaintiffs' counsel appeared to have "misled" plaintiffs as to the "issues that remained part of the appeal;" and (2) plaintiffs' counsel served pro bono.[34]

However, the court found a statutory basis for imposing a litigation-costs sanction upon plaintiffs' attorney, personally, under 28 U.S.C. § 1927.[35] Federal law provides that any individual, attorney or otherwise, who "multiplies the proceedings in any case unreasonably and vexatiously" may be held personally responsible for reimbursement of costs and/or fees incurred as a result of that multiplication.[36] Concomitant with § 1927 sanctions must be a finding of subjective bad faith. Bad faith arises from purposeful pursuit of frivolous claims, pursuit of legitimate claims in order to oppress or annoy, or any other action specifically designed to delay

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[30] *Id*.
[31] *Save the Peaks*, 683 F.3d at 1141.
[32] *Vernon v. City of Los Angeles*, 27 F.3d 1385, 1402 (9th Cir. 1994).
[33] *Save the Peaks*, 683 F.3d at 1141.
[34] *Id*.
[35] *Id*.
[36] 28 U.S.C. § 1927.

or increase expenses.[37] The court held that the plaintiffs' attorney's actions warranted cost sanctions per § 1927. The court found subjective bad faith in counsel's intentional increase of costs, unreasonable multiplication of proceedings, and attempt "to ensure further delay and forestall development."[38] Ultimately, the court determined counsel intended to harass the ski resort following the loss in *Navajo Nation*.[39]

Similar to the conduct enumerated in § 1927, the court found justification for sanctioning a losing party under its inherent power, given the party's improper or oppressive purpose in litigating a claim.[40] Again, sanctions in this context require a finding of subjective bad faith by virtue of the party's purposeful, reckless conduct.[41] The court found that plaintiffs' attorney "willfully abused the judicial process by acting with the improper purpose of imposing delays and costs on Snowbowl." The Ninth Circuit court held costs sanctions appropriate under its inherent powers accordingly.[42]

IV. CONCLUSION

In *Save the Peaks Coalition v. United States Forest Service*, the Ninth Circuit sent a strong message that undue delay and expense, harassment, and oppression via litigation are never acceptable practices. The shield of allegedly compelling science and unaddressed public health concerns will not protect those who engage in such practices. By multiplying costs and delays over two separate lawsuits concerning the same proposal and FEIS, plaintiffs' attorneys knowingly and recklessly harassed both the USFS and Snowbowl. The Ninth Circuit's sanctions against plaintiffs reinforce the systemic distaste for such overt abuse of the judicial system.

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[37] *Save the Peaks*, 683 F.3d at 1141 (quoting *New Alaska Development Corporation v. Guetschow*, 869 F.2d 1298, 1306 (9th Cir. 1989)).
[38] *Id*. at 1141.
[39] *Id*.
[40] *Id*. (quoting *Fink v. Gomez*, 239 F.3d 989, 992 (9th Cir. 2001)).
[41] *Id*. (quoting *Primus Automotive Financial Services, Inc. v. Batarse*, 115 F.3d 644, 648-649 (9th Cir. 1997)).
[42] *Id*. at 1142.