DIVISION ONE
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RUTH A. WILLINGHAM, CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

THE HOPI TRIBE, a federally recognized Indian Tribe, Plaintiff/Appellant, v. CITY OF FLAGSTAFF, ARIZONA, Defendant/Appellee.	1 CA-CV 12-0370 DEPARTMENT C **MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Coconino County

Cause No. S0300CV201100701

The Honorable Joseph J. Lodge, Judge

AFFIRMED IN PART, REVERSED IN PART AND REMANDED

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T H U M M A, Judge

¶1 The Hopi Tribe appeals from the superior court's judgment dismissing the Tribe's complaint against the City of Flagstaff (the City) on various grounds and awarding the City attorneys' fees. The Tribe argues the court erred by dismissing the public nuisance claim and by awarding attorneys' fees to the City. For the reasons that follow, the judgment is affirmed in part, reversed in part and remanded.

FACTS AND PROCEDURAL HISTORY[1]

¶2 This case involves the Tribe's challenge to the City's agreement to supply reclaimed wastewater to the Arizona Snowbowl Resort for use in making artificial snow on ski runs in the San Francisco Peaks (the Peaks). This case is the latest iteration of a long-standing dispute –- tracing back decades –- regarding the use of the Peaks.

¶3 In March 2002, the City and Snowbowl executed a "Reclaimed Wastewater Agreement" (the Contract) under which Snowbowl would purchase reclaimed wastewater from the City to make snow. Reclaimed wastewater is "treated sewage effluent" that has been processed through the City's wastewater treatment

[1] On appeal from a dismissal under Arizona Rule of Civil Procedure 12(b)(6), this court assumes the truth of all well-pleaded factual allegations and considers all reasonable inferences in the light most favorable to the non-moving party. *Coleman v. City of Mesa*, 230 Ariz. 352, 356, ¶ 9, 284 P.3d 863, 867 (2012).

plants and that meets certain standards defined by the Arizona Department of Environmental Quality (ADEQ). According to the Tribe's verified complaint, reclaimed wastewater retains certain "recalcitrant chemical components that are not degraded or removed in the wastewater treatment process," some of which are harmful to animals.

¶4 The Contract was contingent on Snowbowl "obtaining all necessary federal and state environmental approvals to proceed with snowmaking with Reclaimed Wastewater." In September 2002, Snowbowl submitted a proposal -- including a request for snowmaking with reclaimed wastewater -- to the United States Forest Service, which then began the complex administrative investigation necessary to authorize upgrades to Snowbowl's operations. As particularly relevant here, the Forest Service's key undertaking was a years-long study of Snowbowl's proposed upgrades and a Final Environmental Impact Statement pursuant to the National Environmental Policy Act (NEPA).

¶5 In March 2004, while this investigation was ongoing, the Tribe contacted the City's Water Commission to express opposition to the Contract and request a hearing. The City denied the Tribe's request for a hearing, but "indicated it would take no action" until the Forest Service made a final decision after completing the NEPA process.

¶6 In June 2005, the Forest Service reached a final administrative decision approving Snowbowl's requested upgrades, including snowmaking with reclaimed wastewater. *See Navajo Nation v. U.S. Forest Service* (*Navajo Nation I*), 408 F. Supp. 2d 866, 870-71 (D. Ariz. 2006). The Tribe and several other plaintiffs promptly filed suit in federal court challenging the Forest Service's decision. *Id.* at 869-70. In that litigation, the Tribe alleged, pursuant to the Federal Administrative Procedure Act, that the Forest Service's investigation and administrative decision process failed to comply with the requirements of NEPA, the National Historic Preservation Act (NHPA), the Endangered Species Act (ESA), the Grand Canyon National Park Enlargement Act (GCEA), the National Forest Management Act (NFMA), the Religious Freedom Restoration Act (RFRA) and the Forest Service's trust responsibility to the Tribes. *Id.* at 871. Although Snowbowl intervened in that litigation, the City was not a party. *See id.* at 869-70.

¶7 In January 2006, the district court granted summary judgment in favor of the Forest Service on all claims except those under RFRA; after a bench trial, the district court found that the Forest Service's decision did not violate RFRA. *See generally id.* The district court reviewed the Forest Service's NEPA process -- but not the substantive results -- to determine whether "the agency ha[d] taken a hard look at the environmental

effects of the proposed action" and whether the environmental impact statement "contained a 'reasonably thorough discussion of the significant aspects of the probable environmental consequences.'" *Id.* at 872 (citations omitted). The court's RFRA analysis, in relevant part, assessed whether the authorized Snowbowl upgrades would result in a "substantial burden" to the Tribe's religious beliefs, requiring "a showing that [the governmental conduct] coerces someone into violating his or her religious beliefs or penalizes his or her religious activity." *Id.* at 904.

¶8 The Tribe and other plaintiffs appealed to the Ninth Circuit Court of Appeals, which initially reversed in part and affirmed in part, but on later en banc review affirmed the district court's decision on all counts. *Navajo Nation v. U.S. Forest Service* (*Navajo Nation II*), 479 F.3d 1024 (9th Cir. 2007), *modified in Navajo Nation v. U.S. Forest Service* (*Navajo Nation III*), 535 F.3d 1058, 1063 (9th Cir. 2008) (en banc) (8-3 decision), *cert denied*, 129 S. Ct. 2763 (2009). The Tribe continued to "actively oppose" use of reclaimed wastewater throughout the federal litigation.

¶9 On July 2, 2010, the Forest Service issued its final authorization to allow the Snowbowl upgrades to move forward. Although the Contract remained in effect, the City Water Commission held a public hearing in late July 2010 -- at which

the Tribe participated -- to consider providing Snowbowl with potable water, rather than reclaimed wastewater. The City continued to consider alternatives to the Contract through August and into September 2010, including public hearings where the Tribe presented its opposition. The City made a final decision to move forward with the Contract on September 2, 2010, and declined to reconsider that decision on September 7, 2010.

¶10 The Tribe served a notice of claim on the City on February 23, 2011 and filed its complaint in this case on August 19, 2011. The Tribe's complaint asserts three counts against the City: (1) a claim that the Contract violated Arizona law and public policy, (2) a claim for infringement of the Tribe's water rights and (3) a public nuisance claim.

¶11 On deciding the City's motion to dismiss pursuant to Arizona Rule of Civil Procedure 12(b)(6), which the Tribe opposed, the superior court abstained from considering the water rights claim in deference to the ongoing Little Colorado River general stream adjudication pending in the Apache County Superior Court and dismissed the illegal contract and public nuisance claims on the basis of claim and issue preclusion and failure to comply with notice of claim requirements. The court found the Tribe's "Complaint arose from contract" and awarded the City its reasonable attorneys' fees as the successful party

on all claims pursuant to Arizona Revised Statutes (A.R.S.) section 12-341.01.[2]

¶12 The Tribe timely appealed from the entry of final judgment. This court has jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and A.R.S. § 12-2101(A)(1).

DISCUSSION

I. General Principles.

¶13 The Tribe appeals from the dismissal of its claim for public nuisance and from the award of attorneys' fees and seeks clarification that the grounds for dismissal do not apply to the court's order abstaining from consideration of the Tribe's water rights claims; the Tribe does not challenge the judgment dismissing the claim that the Contract violated Arizona law and public policy. The Tribe argues dismissal of the public nuisance claim was improper because that claim was timely filed and is not barred by issue or claim preclusion.

¶14 A dismissal for failure to state a claim is reviewed de novo, assuming the truth of all well-pleaded factual allegations and considering all reasonable inferences in the light most favorable to the non-moving party. *Coleman v. City of Mesa*, 230 Ariz. 352, 355-56, ¶¶ 7, 9, 284 P.3d 863, 866-67

[2] Absent material revisions after the relevant dates, statutes cited refer to the current version unless otherwise indicated.

(2012). Dismissal is proper only if the claim fails "under any interpretation of the facts susceptible of proof." *Id.* at 356, ¶ 8, 284 P.3d at 866 (citation omitted).

¶15 A public nuisance "encompasses any unreasonable interference with a right common to the general public," and must affect "a considerable number of people." *Armory Park Neighborhood Ass'n v. Episcopal Cmty. Servs.*, 148 Ariz. 1, 4, 712 P.2d 914, 917 (1985); *see also* Restatement (Second) of Torts (Restatement) § 821B (1979); *cf.* A.R.S. § 13-2917(A) (defining public nuisance for misdemeanor criminal liability as, in part, something "that interferes with the comfortable enjoyment of life or property by an entire community or neighborhood or by a considerable number of persons."). As both parties acknowledge, the contours of a public nuisance claim are necessarily imprecise. A claim for public nuisance requires showing both a substantial interference with a right held collectively by the public and that the substantial interference is unreasonable under the circumstances. *Armory Park*, 148 Ariz. at 7-8, 712 P.2d at 920-21. Reasonableness is assessed using a balancing test, considering "the utility and reasonableness of the conduct and balanc[ing] these factors against the extent of harm inflicted and the nature of the affected [area]." *Id.*; *see also* Restatement § 821B(2) (factors weighing on reasonableness

include significance of interference, legality of conduct complained of and duration of interference or effect).

II. Timeliness.

A. Notice Of Claim.

¶16 The superior court dismissed the Tribe's complaint on timeliness grounds for failure to comply with Arizona's statutory notice of claim requirement for claims against a public entity. The court found that the Tribe's claim accrued, at the latest, on July 29, 2010, when the City's Water Commission reapproved the plan to sell reclaimed wastewater to Snowbowl in the wake of the federal litigation. The Tribe served the City with a notice of claim on February 23, 2011, 209 days later and therefore outside of the 180-day deadline for serving a notice of claim.

¶17 As a prerequisite to suit, persons with claims against a public entity must serve that entity with a notice of claim "within one hundred eighty days after the cause of action accrues." A.R.S. § 12-821.01(A). A cause of action accrues under the statute "when the damaged party realizes he or she has been damaged and knows or reasonably should know the cause, source, act, event, instrumentality or condition that caused or contributed to the damage." A.R.S. § 12-821.01(B). The notice of claim requirement does not apply to claims seeking injunctive or declaratory relief as opposed to damages. *State v. Mabery Ranch,*

Co., 216 Ariz. 233, 244-45, ¶¶ 47-53, 165 P.3d 211, 222-23 (App. 2007) (injunctive relief); *Martineau v. Maricopa County*, 207 Ariz. 332, 337, ¶ 24, 86 P.3d 912, 917 (App. 2004) (declaratory relief).

¶18 The Tribe's public nuisance claim seeks injunctive relief and, in the alternative, damages that "will be caused" in the absence of an injunction. Addressing first the alternative damages claim, the Tribe's complaint alleged prospective harm that would occur in the event Snowbowl in fact used reclaimed wastewater provided by the City to create snow. On the record before the court, the City has not yet provided any reclaimed wastewater to Snowbowl under the Contract (or, apparently, otherwise) and Snowbowl thus had not used such reclaimed wastewater to create snow.[3] On this record, any harm stemming from the City's sale and Snowbowl's use of reclaimed wastewater could not yet have occurred. Accordingly, and again on this record, to the extent the Tribe seeks damages for the public nuisance, that claim has not yet accrued.

[3] At oral argument, counsel for the Tribe stated that the City had started providing reclaimed wastewater to Snowbowl in December 2012, with allegedly deleterious consequences. The district court in the *Navajo Nation* litigation noted that the reclaimed wastewater to be used "is the highest quality of reclaimed water classified by ADEQ" and "must comply with extensive treatment and monitoring requirements under three separate permit programs." *Navajo Nation I*, 408 F. Supp. 2d at 887. Nevertheless, neither the allegation of current use nor any supporting evidence was presented to the superior court and is not part of the record properly considered by this court.

¶19 Under the notice of claim statute, a cause of action does not accrue until "the damaged party realizes he or she has been damaged." A.R.S. § 12-821.01(B). Because the Tribe had not yet suffered the prospective harm alleged at the time it filed this case, it was not a "damaged party" and had not yet "been damaged" as required for the cause of action to accrue. As such, the 180-day limitations period had not begun to run when the Tribe filed this case.

¶20 To the extent the Tribe seeks declaratory and injunctive relief, claims for such relief are not subject to the notice of claim requirements. *See Martineau*, 207 Ariz. at 337, ¶ 24, 86 P.3d at 917; *Mabery Ranch*, 216 Ariz. at 245, ¶ 53, 165 P.3d at 223. The City argues *Arpaio v. Maricopa County Board of Supervisors* demands a different result. 225 Ariz. 358, 362, ¶¶ 11-12, 238 P.3d 626, 630 (App. 2010). In *Arpaio*, although the complaint in form sought declaratory and injunctive relief, in substance, the declaration or injunction would mandate recovery of monies or reallocation of funding from a public entity. *Id.* As noted in *Arpaio*, the claim was in substance the functional "equivalent of a damages claim, seeking recovery of funds . . . inappropriately taken," and thus subject to the notice of claim statute. *Id.* at 362, ¶ 12, 238 P.3d at 630. Here, by contrast, the Tribe requests not an injunction ordering transfer or recovery of funds, but rather a declaration of public nuisance

or a traditional "injunction restraining conduct by a public entity," which is not within the notice of claim statute. *Mabery Ranch*, 216 Ariz. at 245, ¶ 53, 165 P.3d at 223; *see also Martineau*, 207 Ariz. at 337, ¶ 24, 86 P.3d at 917 (declaratory relief).

¶21 Because the Tribe's public nuisance claim for injunctive or declaratory relief is not subject to the notice of claim statute and because the Tribe's alternative claim for damages had not accrued when the complaint was filed, the Tribe's public nuisance claim is not barred by the Tribe's noncompliance with the notice of claim statute. *See Mabery Ranch*, 216 Ariz. at 245, ¶ 53, 165 P.3d at 223; *Martineau*, 207 Ariz. at 337, ¶ 24, 86 P.3d at 917; A.R.S. § 12-821.01(B).

B. Statute Of Limitations.

¶22 Apart from the notice of claim statute, the City also argues the Tribe's public nuisance claim is barred by the applicable statute of limitations. Claims against public entities "shall be brought within one year after the cause of action accrues." A.R.S. § 12-821. Accrual for purposes of the statute of limitations, however, is equivalent to accrual for notice of claim purposes: "when the damaged party realizes he or she has been damaged and knows or reasonably should know the cause, source, act, event, instrumentality or condition that caused or contributed to the damage." A.R.S. § 12-821.01(B); *see*

Mayer Unified Sch. Dist. v. Winkleman, 219 Ariz. 562, 566, ¶ 15, 201 P.3d 523, 527 (2009). As described above in addressing the notice of claim issue, the Tribe had not been damaged when it filed the complaint. Accordingly, the statute of limitations had not yet begun to run. *See* A.R.S. § 12-821 (one-year limitations period "after the cause of action accrues"). Therefore, the Tribe's public nuisance claim is not barred by the statute of limitations.

C. Laches.

¶23 The equitable doctrine of laches may bar a claim where a party unreasonably delays making a claim and "the delay result[s] in actual prejudice to the adverse part[y]." *Harris v. Purcell*, 193 Ariz. 409, 412, ¶ 16, 973 P.2d 1166, 1169 (1998). The City argues laches applies to bar the Tribe's public nuisance claim because the Tribe knew of and objected to the City's plan to sell reclaimed wastewater to Snowbowl at least by 2004 and waited without justification for seven years before bringing suit.

¶24 The Tribe's complaint, however, alleges that upon receiving the Tribe's objection in 2004, the City "indicated it would take no action unless and until the U.S. Department of Agriculture and the U.S. Forest Service completed the [NEPA] process." When that process was completed in July 2010, the City held hearings to reconsider the decision to sell reclaimed

wastewater to Snowbowl and only reached a final decision to proceed with the Contract in September 2010. The Tribe filed suit within one year after that final decision. Assuming the truth of these factual allegations, *Coleman*, 230 Ariz. at 355, ¶ 7, 284 P.3d at 866, the City has not established the Tribe delayed unreasonably in light of the City's assurances and public actions reconsidering the Contract.

¶25 Moreover, this appeal is from the grant of a motion to dismiss for failure to state a claim pursuant to Arizona Rule of Civil Procedure 12(b)(6). In the context of such a motion, where the well-pleaded factual allegations in the Tribe's complaint are assumed to be true, the City has not shown actual prejudice in any delay by the Tribe. On this record, for these reasons, the City has made neither of the two showings required for laches to apply. *See Prutch v. Town of Quartzsite*, 655 Ariz. Adv. Rep. 32, ¶ 13 (App. Feb. 26, 2013) (noting *defendant* must show unreasonable delay and prejudice for laches to apply).

III. Preclusive Effect Of The *Navajo Nation* Litigation.

¶26 The superior court ruled both claim and issue preclusion barred the Tribe's public nuisance claim based on the claims asserted and issues decided in the *Navajo Nation* litigation.[4] On appeal, this court considers claim and issue

[4] The superior court's decision and the parties' arguments on appeal address the claim and issue preclusive effect of the

preclusion de novo as questions of law. *See Howell v. Hodap*, 221 Ariz. 543, 546, ¶ 17, 212 P.3d 881, 884 (App. 2009) (claim preclusion); *Corbett v. ManorCare of Am., Inc.*, 213 Ariz. 618, 623, ¶ 10, 146 P.3d 1027, 1032 (App. 2006) (issue preclusion). Federal law governs the preclusive effect of the federal court's judgment. *Howell*, 221 Ariz. at 546, ¶ 17, 212 P.3d at 884 (claim preclusion); *Corbett*, 213 Ariz. at 623, ¶ 12, 146 P.3d at 1032 (issue preclusion); *see also Semtek Int'l, Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 507 (2001).

A. Claim Preclusion.

¶27 The superior court concluded that the Tribe's "Complaint is barred by the doctrine of claim preclusion," reasoning that the Tribe's claims were factually related to the claims raised and decided in the *Navajo Nation* litigation. Claim preclusion bars relitigation of "the same cause of action" asserted in prior litigation. *Hells Canyon Preservation Counsel v. U.S. Forest Service*, 403 F.3d 683, 686 (9th Cir. 2005). Although "[a] plaintiff need not bring every possible claim," a plaintiff must bring all related claims arising from the same factual circumstances or "forfeit the opportunity to bring any

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Navajo Nation litigation, not the Forest Service's administrative determination. Although quasi-adjudicative agency action may be entitled to such preclusive effect, as applicable here, there is no indication the Forest Service undertook such quasi-adjudicative action. *See Smith v CIGNA Healthplan of Ariz.*, 203 Ariz. 173, 179, ¶ 21, 52 P.3d 205, 211 (App. 2002).

omitted claim in a subsequent proceeding." *Turtle Island Restoration Network v. U.S. Dep't of State*, 673 F.3d 914, 918 (9th Cir. 2012).

¶28 Claim preclusion "applies only where there is (1) an identity of claims, (2) a final judgment on the merits, and (3) privity between parties." *Turtle Island*, 673 F.3d at 917 (citation omitted). "Identity of claims" hinges primarily on "whether the two suits arise out of the same transactional nucleus of facts." *Id.* at 917-18 (citation omitted). Four factors are used to help determine whether the identity of claims requirement is met:

> (1) whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts.

Id. (citation omitted). Whether the prior and current claims arise from the same "transactional nucleus of facts," however, is the most important consideration. *Id.* at 918 (focusing solely on transactional nucleus factor where "claims involve technically different legal challenges"); *Hells Canyon*, 403 F.3d at 690-91 (reciting standard and analyzing only transactional nucleus factor). The same transactional nucleus criterion depends on whether the prior and current claims "are related to

the same set of facts and whether they could conveniently be tried together." *Turtle Island*, 673 F.3d at 918.

¶29 The Tribe's public nuisance claim arises out of a different transactional nucleus of facts than the Tribe's claims asserted in the *Navajo Nation* litigation. The public nuisance claim requires proof of a right held by the general public, an interference with that right and that the interference is unreasonable when balanced against the utility of the conduct. *Armory Park*, 148 Ariz. at 7-8, 712 P.2d at 920-21. The Tribe's public nuisance claim alleges interference by the City with the public's use and enjoyment of the wilderness area on the Peaks to be caused by the City's sale of reclaimed wastewater to be used for snow, which allegedly will result in release of pollutants "harm[ing] sensitive and threatened species" and the environment at large. The Tribe alleges this threatened harm outweighs the "slight incremental economic benefit" or other utility of snowmaking with reclaimed water. Accordingly, the transactional nucleus of the Tribe's public nuisance claim focuses on a claim of threatened environmental harm when compared to the economic benefits of the Contract.

¶30 In the *Navajo Nation* litigation, by contrast, the Tribe brought procedural claims against the Forest Service under the Federal Administrative Procedure Act alleging the Forest Service's decision-making process failed to comply with NEPA,

NHPA, ESA, GCEA and NFMA and the resulting action violated RFRA. *Navajo Nation I*, 408 F. Supp. 2d at 871. As expressly noted by the district court in that litigation, the core question presented by the claims seeking judicial review of agency action was "whether evidence in the administrative record permitted the agency to render the decision it did." *Id.* The district court's NEPA review, for example, was process-oriented, "consist[ing] only of ensuring that the agency has taken a hard look at the environmental effects of the proposed action," not direct substantive review of the environmental effects themselves. *Id.* at 872. Although environmental concerns similar to those raised by the Tribe in the Arizona common law public nuisance claim in this case appear in the background of the district court's NEPA analysis, the transactional nucleus of fact at issue in the *Navajo Nation* litigation was the Forest Service's administrative procedures, not the underlying environmental concerns.

¶31 The Tribe's RFRA claim in the *Navajo Nation* litigation presents a closer question, as that claim involved judicial analysis of burdens allegedly placed on the Tribe's religion by using reclaimed wastewater to make snow on the Peaks (as opposed to the Forest Service's administrative procedures). *Navajo Nation III*, 535 F.3d at 1070-71; *Navajo Nation I*, 408 F. Supp. 2d at 904-05. The Ninth Circuit's analysis, however, did not focus on the anticipated environmental harm claimed in the

Tribe's public nuisance claim raised here. Instead, the Ninth Circuit assessed whether the use of reclaimed wastewater to make snow would "force the [Tribe] to choose between following the tenets of their religion and receiving a governmental benefit" or "coerce the [Tribe] to act contrary to their religion under the threat of civil or criminal sanctions." *Navajo Nation III*, 535 F.3d at 1070. At most, the transactional nucleus of the RFRA claim was the Tribe's "subjective, emotional religious experience" and "spiritual fulfillment," *id.*, not the environmental harm interfering with the public's use and enjoyment of the Peaks integral to the public nuisance claim made by the Tribe in this case.

¶32 As the City argues, in some respects, both the *Navajo Nation* litigation and the public nuisance claim made by the Tribe in this case challenge the propriety of using reclaimed wastewater in making snow in the Peaks. But the transactional nuclei of facts in the two cases -- the key consideration in assessing claim preclusive effect of a prior judgment, *Turtle Island*, 673 F.3d at 918 -- are distinct. Because the Tribe's public nuisance claim arises from a different transactional nucleus of fact than did its federal claims in the *Navajo Nation* litigation, the Arizona common law public nuisance claim alleged by the Tribe in this case is not barred by claim preclusion.

B. Issue Preclusion.

¶33 The superior court held that issues raised by the Tribe's public nuisance claim -- "that reclaimed wastewater would harm the environment and wildlife [and] that artificial snow would interfere with the public use and enjoyment of the surrounding land" -- were previously raised, litigated and decided against the Tribe in the *Navajo Nation* litigation, thereby precluding relitigation of those issues in this case and precluding the public nuisance claim. Issue preclusion bars "relitigation of issues actually litigated and necessary to the outcome" of a prior action where the party against whom preclusion would operate had a full and fair opportunity to litigate the issue in the prior case. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326-28 & n.5 (1979); *see also Corbett*, 213 Ariz. at 624, ¶ 16, 146 P.3d at 1033.

¶34 The core issues raised by the Tribe's public nuisance claim -- environmental harms expected and benefits associated with the City's sale of reclaimed wastewater for use in snowmaking at Snowbowl, *see Armory Park*, 148 Ariz. at 7-8, 712 P.2d at 920-21 -- were not actually litigated or decided in the *Navajo Nation* litigation. As described above, the federal NEPA claims, for example, did not directly address the environmental costs or economic benefits associated with the sale and use of reclaimed wastewater on the Peaks; the court only decided that

the Forest Service had complied with its obligations under the Federal Administrative Procedure Act to consider the underlying environmental issues. *See Navajo Nation I*, 408 F. Supp. 2d at 872-78. Stated differently, the *Navajo Nation* litigation considered the existence of evidence of environmental impacts of snowmaking using reclaimed wastewater (not any environmental impacts themselves) in reviewing the information considered by the Forest Service. *Id.*

¶35 The issue actually and necessarily determined in the *Navajo Nation* litigation was that "the Forest Service conducted a reasonable scientific analysis of the environmental impacts of the proposed snowmaking based on the best available scientific evidence," not a judicial determination of what any environmental impacts would be. *Id.* at 876, *aff'd by Navajo Nation III*, 535 F.3d at 1080. Although noting that "tribal members have not identified any specific plants, springs, natural resources, shrines or locations for [religious] ceremonies . . . that will be impacted" by the Snowbowl upgrades, *Navajo Nation I*, 408 F. Supp. 2d at 900 ¶ 192, none of the district court's findings of fact relevant to the Tribe on the RFRA claim directly addressed environmental harms related to the use of reclaimed wastewater. *See Navajo Nation I*, 408 F. Supp. 2d at 883-903. As such, the *Navajo Nation* litigation does

not provide the basis for issue preclusion of the Tribe's public nuisance claim in this case.

¶36 As the City acknowledged during oral argument, the City's issue preclusion position as adopted by the superior court sets forth an all-encompassing bar to the public nuisance claim at large, *not* that individual findings of fact in *Navajo Nation I* were issue preclusive in such a way as to render the Tribe unable to prevail on its public nuisance claim as a matter of law. Although reversing the dismissal of the Tribe's public nuisance claim, this decision need not and does not hold that findings of fact in the *Navajo Nation* litigation can have no preclusive effect on specific issues of fact, a matter that remains to be determined on remand.

IV. Failure To State A Claim For Public Nuisance.

¶37 In an argument raised for the first time on appeal, the City argues the Tribe's public nuisance claim fails as a matter of law because the alleged nuisance is authorized by law and comprehensively regulated. *See North Carolina ex rel. Cooper v. TVA*, 615 F.3d 291 (4th Cir. 2010). *But see Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 497-99 (1987) (savings clause in comprehensive environmental litigation act preserves state law nuisance actions). Generally, "[n]ew arguments may not be raised for the first time on appeal." *Paloma Inv. Ltd. P'ship v. Jenkins*, 194 Ariz. 133, 137, ¶ 17, 978 P.2d 110, 114 (App.

1998); *Trantor v. Fredrikson*, 179 Ariz. 299, 300, 878 P.2d 657, 658 (1994). The City has offered no explanation for its failure to present this argument to the superior court and no justification for departure from this general rule. *See Maricopa County v. State*, 187 Ariz. 275, 281-82, 928 P.2d 699, 705-06 (App. 1996). Accordingly, this court declines to consider this argument made by the City for the first time on appeal.

V. Water Rights Claim.

¶38 On appeal, the Tribe seeks clarification that the superior court did not dismiss the water rights claim on claim preclusion, issue preclusion or notice of claim grounds but, rather, because the court was abstaining from consideration of that claim. The superior court's minute entry states, and the parties agree, that the court abstained from consideration of the Tribe's water rights claim in deference to the Little Colorado River Adjudication addressing the same subject matter and dismissed that claim on that ground only. Accordingly, the judgment is amended to clarify that the superior court abstained from consideration of the water rights claim and, accordingly, dismissed that claim but in doing so did not rule on the merits of that claim.

VI. Attorneys' Fees.

¶39 The superior court awarded the City its attorneys' fees as the successful party under A.R.S. § 12-341.01 on all of

the Tribe's claims. Under A.R.S. § 12-341.01(A), the superior court is authorized to "award the successful party reasonable attorney fees" "[i]n any contested action arising out of a contract." The Tribe argues on appeal that the court erred by awarding the City's attorneys' fees because the claims did not arise out of contract.

¶40 The Tribe's first count sought a permanent injunction of the Contract, alleging "[t]he Contract with the Snowbowl for sale of reclaimed wastewater for use in making artificial snow violates a number of provisions of Arizona law and public policy." Although the Tribe contends this count alleges only a violation of a duty imposed by law, a claim that a contract is illegal cannot exist but for the contract and thus arises out of contract. *See Dooley v. O'Brien*, 226 Ariz. 149, 152-53, ¶ 12, 244 P.3d 586, 589-91 (App. 2010). The Tribe does not dispute that the City -- by prevailing on its motion to dismiss the illegal contract claim, from which the Tribe has not appealed -- was the successful party on this claim. Accordingly, pursuant to A.R.S. § 12-341.01, the City properly could obtain from the Tribe an award of attorneys' fees related to count one.

¶41 The Tribe's second count alleged infringement of the Tribe's water rights. Assuming without deciding that this claim could support a fee award under A.R.S § 12-341.01(A), the City is not the successful party on this claim. The superior court

did not decide the merits of the claim but, rather, abstained from ruling on the claim, leaving final resolution of the claim to the Little Colorado River Adjudication. Because the City is not yet (and may never be) a successful party on this claim, the award of attorneys' fees related to the water rights claim is vacated.

¶42 Given this court's reversal of the superior court's decision dismissing the Tribe's public nuisance count, the City is no longer the successful party for that claim and the fee award related to this claim is vacated.

CONCLUSION

¶43 The City seeks an award of its attorneys' fees expended on appeal pursuant to A.R.S. § 12-341.01(A). That request for fees is denied.

¶44 The superior court's judgment dismissing the Tribe's public nuisance claim is reversed. Although reversing, this decision does not address the merits of the public nuisance claim but, instead, addresses only the issues properly presented and decided on this appeal from the dismissal of the complaint pursuant to Arizona Rule of Civil Procedure 12(b)(6).

¶45 The judgment is amended to clarify that the superior court abstained from consideration of the water rights claim in deference to the Little Colorado River Adjudication addressing

the same subject matter and dismissed that claim on that ground only and, in doing so, did not rule on the merits of that claim.

¶46 The superior court's attorneys' fees award is affirmed as to the illegal contract claim, but vacated as to the water rights claim and public nuisance claim. Accordingly, the case is remanded for recalculation of attorneys' fees awarded and for further proceedings consistent with this decision.

/S/_____
SAMUEL A. THUMMA, Presiding Judge

CONCURRING:

/S/_____
MICHAEL J. BROWN, Judge

/S/_____
LAWRENCE F. WINTHROP, Chief Judge