

# Navajo Nation Human Rights Commission

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## Shadow Report on the Universal Period Review of the United States of America

November 6, 2014

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The Navajo Nation Human Rights Commission (“Commission”) would like to thank the United Nations Human Rights Council (“Council”) for the opportunity to present the Commission’s shadow report (“Report”) regarding the United States of America’s (“United States”) lack of implementation on their Universal Periodic Review (“UPR”) accepted recommendations on indigenous peoples. This includes the failure to implement concrete measures consistent with the International Covenant on Civil and Political Rights<sup>1</sup> and implementation of the United Nations Declaration on the Rights of Indigenous Peoples<sup>2</sup> as it relates to the protection of the sacred places and sites. This Report will provide the Council with specific examples where the Commission provided recommendations to the United States on implementing their accepted UPR recommendations and the United States failure to comply.

## I. INTRODUCTION

The UPR is a nation-state driven process, under the auspices of the Council, which provides the opportunity for each nation-state to declare what actions they have taken to improve the human rights situations in their country and to fulfill their human rights obligations. One of the main features of the UPR is to remind nation-states of their responsibility to fully respect and implement all human rights and fundamental freedoms. When the United States underwent its first review in 2010, the United States supported nine UPR recommendations on indigenous issues<sup>3</sup> by the Council either wholly or in part. With 2015 approaching, the United States will undergo its second review by the Council at its 22nd Session.

For the United States second review, the Commission calls upon the Council to address the human rights violations of the Navajo people regarding the lack of implementation and protection for their sacred places and sites as part of the United States accepted UPR recommendations, and recommendations by United Nations organism that are relevant to the UPR process. The Commission is worrisome of the United States alarming practice of picking and choosing which recommendations to implement by any United Nation organism in charge of monitoring implementation of its legally binding human rights obligations, and deciding which are valid. The United States stated position under President Barack H. Obama is selective implementation or dissent, which undermines the effectiveness and viability of the UPR process, and erodes the accountability of nation-state parties to their legally binding obligations.

Since May 2010, the Commission expressed its concern and human rights violations of the potential impact of the Arizona Snowbowl Resort Limited Partnership (“Snowbowl”) on Navajo spiritual and cultural beliefs by allowing the use of artificial snow making from recycled wastewater on the San Francisco Peaks (“Peaks”), a sacred place, for recreational purposes.<sup>4</sup> For the Navajo people their

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<sup>1</sup> United Nations International Covenant on Civil and Political Rights, U.N. G.A. Res 2200A (XXI), U.N. H.R.C. (Dec. 16, 1966) [hereinafter *ICCPR*].

<sup>2</sup> United Nations Declaration on the Rights of Indigenous Peoples, U.N. G.A. Res 61/295, U.N. H.R.C., 61st Sess., U.N. Doc. A/RES/61/295 (2007) [hereinafter *Declaration*].

<sup>3</sup> Rep. of the Working Group on the Universal Periodic Review: United States of America, U.N. H.R.C., 16th Sess., U.N. Doc. A/HRC/16/11/Add.1 (March 9, 2011) [hereinafter *UPR*].

<sup>4</sup> Resolution of the Navajo Nation Human Rights Commission, NNHRCMAY-03-10 (05/07/2010) (Approving and Adopting the Communication to Professor S. James Anaya, Special Rapporteur of the United Nations, on the Human Rights Violations

cultural, spiritual and religious practice and the sacred responsibilities that provide life and identity are inextricably linked to places of ceremonial practice, emergence and renewal. From the point of view of the Navajo people, a sacred place is understood to include but not limited to landscapes, ceremonial grounds and structure, burial grounds, waterways, sacred items and places essential for the collection of ceremonial and culturally important animal and plant foods and medicines. The impact of tourism, extractive industries, industrial development, toxic contamination and urbanization continue to manifest in the desecration, contamination and destruction of these sacred places.

When the United States underwent its first UPR review, it accepted Recommendation “206: Guarantee the full enjoyment of the rights on natives of America in line with the United Nations Declaration on the Rights of Indigenous Peoples” by the Council. By accepting this recommendation, the United States should have known that the Peaks cultural and spiritual integrity is to remain pure after several years of litigations from the Navajo Nation.<sup>5</sup> “Guarantee[ing] the full enjoyment of the rights” of the Navajo people means not to disregard, desecrate, contaminate and destroy sacred places and sites as it hinders any “full enjoyment of the rights” of indigenous peoples. In the United Nations Committee on the Elimination of Racial Discrimination (“CERD”) 2008 review of the United States, CERD’s Concluding Observation addressed the United States failure to uphold the rights of indigenous peoples concerning the protection of their sacred places and areas of cultural importance, and made strong recommendations in that regard.<sup>6</sup> In the United Nations Special Rapporteur on the Rights of Indigenous Peoples (“Rapporteur”) 2011 review of the United States, the Rapporteur addressed the United States failure and lack of indigenous people’s agreement or consent to artificial snowmaking on the Peaks, and also made strong recommendations in that regard.<sup>7</sup> To date, the United States has not taken concrete measures to protect sacred places from business developments that directly affect the Navajo people interests; including the Peaks, which constitute one of six sacred mountains.<sup>8</sup>

The Commission urges the Council to reference this Report to ensure concrete measures are finally taken to protect and preserve sacred places for the Navajo people at the second UPR of the United States in April-May 2015. The position expressed by the United States is neither legally accurate nor morally acceptable. The United States failure to implement, or even accept, the recommendations put forth by the Council, CERD, Rapporteur, or the United Nations Human Rights Committee (“Committee”) results

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and Fundamental Freedoms of Navajos and Other Indigenous Peoples as it Pertains to the Proposed Desecration of the San Francisco Peaks).

<sup>5</sup> E-mail from Tony Joe, Supervisory Anthropologist, Navajo Nation Historic Preservation Department, Traditional Culture Program, to Rodney L. Tahe, Policy Analyst, Office of Navajo Nation Human Rights Commission (Dec. 19, 2011, 10:21 a.m. MST).

<sup>6</sup> *Consideration of Reports Submitted by States Parties Under Article 9 of the Convention: Concluding observations of the Committee on the Elimination of Racial Discrimination*, Rep. U.N. Comm. on the Elimination of Racial Discrimination, 72nd Sess., ¶ 29, U.N. Doc CERD/C/USA/CO/6 (2008).

<sup>7</sup> *Report by the Special Rapporteur on the rights of indigenous peoples*, Rep. of Human Rights Council, 18th Sess., Aug. 22, 2011, U.N. Doc. A/HRC/18/35/Add.1 [hereinafter *Anaya Report*].

<sup>8</sup> Resolution of the Navajo Nation Council, CN-69-02 (11/08/2002) (stating that Navajo (Diné) Natural Law recognizes the six sacred mountains of the Navajo Nation: Mount Blanca near Alamosa, Colorado; Mount Taylor near Grants, New Mexico; the San Francisco Peaks near Flagstaff, Arizona; Mount Hesperus near Durango, Colorado; and Huerfano Mesa and Gobernador Knob, both near Bloomfield, New Mexico).

in the ongoing discrimination and human rights violations for the Navajo people. Various examples are cited and reference in this Report.

## II. INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

Despite the fact that the United States possesses a trust responsibility towards the Navajo people, it has not protected sacred places to the greatest extent. In fact, the United States frequently allows for the desecration and economic exploitation of the Navajo people's sacred places for the financial and recreational benefit of non-Navajos. The ability of the Navajo people to protect their sacred places and sites is severely restricted by the United States legal system, evidenced by the decision of the United States Ninth Circuit Courts of Appeals ("Ninth Circuit") en banc ruling, which authorized the Snowbowl to use recycled wastewater to produce artificial snow on the Peaks<sup>9</sup> despite extensive testimony opposing the desecration by spiritual and religious leaders from number indigenous peoples in the states of Arizona and New Mexico.

While the United States' fourth periodic report<sup>10</sup> to the Committee states, "the [Obama] Administration has taken a number of steps to strengthen the government-to-government relationships between the United States and federally recognized tribes"<sup>11</sup> or the signed "Memorandum directing every federal agency to develop plans to implement fully Executive Order 13175 on '*Consultation and Coordination with [Indian] Tribal Governments*,' which mandates that all [federal] agencies have a process to ensure meaningful and timely input by tribal officials in the development of certain policies that have tribal implications,"<sup>12</sup> none of these measures include implementing the recommendations from the Council and Committee. The Commission in its 2013 Shadow Report regarding the United States fourth periodic report on the International Covenant on Civil and Political Rights ("ICCPR") as it relates to Navajo people's sacred places and free, prior and informed consent<sup>13</sup> demonstrated and provided specific examples of where the United States' laws and policies contradict the United States fourth periodic report to the Committee.

One specific example bears repeating as it relates to sacred places. In November 2010, the United States Department of Agriculture Forest Service ("Forest Service") held public listening sessions across the United States with the indigenous peoples, which included leaders, culture-keepers, and traditional practitioners as part of the Executive Orders No. 13007<sup>14</sup> and 13175<sup>15</sup> consultation process to help review existing policies and procedures, and examine the effectiveness of current United States laws and regulations to ensure a consistent level of protection for sacred sites located on National Forest System

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<sup>9</sup> *Navajo Nation v. U.S. Forest Serv.*, cert. denied, 129 S. Ct. 2763 (2009).

<sup>10</sup> *Consideration of reports submitted by States parties under article 40 of the Covenant*, Rep. U.N. Human Rights Comm., 109th Sess., Oct. 14, 2013—Nov. 1, 2013, U.N. Doc. CCPR/C/USA/4 (May 22, 2012) [hereinafter *USA Fourth Report*]

<sup>11</sup> *Id.* at 3.

<sup>12</sup> *Id.* at 3.

<sup>13</sup> Resolution of the Navajo Nation Human Rights Commission, NNHRCAUG-34-13 (08/02/2013) (Approving the Navajo Nation Human Rights Commission's Shadow Report to the United Nations Human Rights Committee on the United States of America submitted Fourth Periodic Report on the International Covenant on Civil and Political Rights).

<sup>14</sup> Exec. Order No. 13007, Fed. Reg. 26771 (May 24, 1996) [hereinafter *EO 13007*].

<sup>15</sup> Exec. Order No. 13175, Fed. Reg. 67249 (Nov. 9, 2000).

lands for indigenous peoples. In July 2012, the United States Department of the Interior Bureau of Indian Affairs (“Indian Affairs”) followed suit and held public listening sessions to “address tribal concerns regarding sacred sites... [and develop] practices or policies to protect sacred sites.”

The Commission, on behalf of the Navajo Nation President and Diné Hataalii Association, Inc., Diné Medicine Men Association, Inc., and Azee’ Bee Nahaghá of Diné Nation, provided recommendations to the Forest Service<sup>16</sup> and Indian Affairs<sup>17</sup> to abandon the words “sacred sites” and replace it with “sacred places.” The Commission explained by abandoning the words “sacred sites” and replacing it with “sacred places,” both federal agencies acknowledge that “sacred places” encompasses both sacred sites and the surrounding area. By using a more comprehensive language like “sacred places,” both federal agencies recognizes that places sacred to the Navajo people are not limited to specific landmarks or sites. Sacred places encompass places such as, but not limited to, federal or state public lands, landmarks, mountain ranges, water areas, canyons, and other places located on indigenous nations and aboriginal territories. All sacred places located on and off the current boundaries of indigenous nations are entitled to protection, which both federal agencies must provide to indigenous peoples as a matter of federal trust responsibility and especially international indigenous human rights obligations.

Unfortunately, in December 2012, the Forest Service stated in its final report<sup>18</sup> the “Forest Service does not intend for the concept of sacred places to replace sacred sites in [Executive Order No.] 13007”<sup>19</sup> because “sacred sites are limited to discrete, specific locations, while a sacred place might be larger scale geographic feature”<sup>20</sup> such as the Peaks. The definition limiting sacred sites to “specific, discrete, narrowly delineated locations”<sup>21</sup> of “religious significance”<sup>22</sup> is too narrow and inconsistent with the Navajo people’s view of sacredness. The use of “sacred places” is the appropriate terminology when referring to areas identified by indigenous peoples as having a religious, spiritual and cultural significance. The terminology “sacred places” does not diminish the size and element of a sacred location like the terminology of “sacred sites;” and is an accurate way of referring to places in their entirety such as the Peaks. The narrowness and inconsistency of the definition of a sacred site jeopardizes the sacred places for the Navajo people.

This ongoing human rights violation was reflective in the Committee’s 2014 concluding observations on its review of the fourth periodic report of the United States regarding its compliance and obligations as a

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<sup>16</sup> Letter from Ben Shelly, President, Navajo Nation, to Thomas James Vilsack, Secretary, U.S. Department of Agriculture (December 12, 2011) (on file with author).

<sup>17</sup> Joint Resolution of the Diné Hataalii Association, Inc., Diné Medicine Men Association, Inc., and Azee’ Bee Nahaghá of Diné Nation (10/16/2012) (Approving the Communication to the United States Department of [the] Interior Regarding the Listening Sessions on Sacred Sites and Authorizing the Submission of the Same).

<sup>18</sup> U.S. Dep’t of Agric. Forest Serv. Office of Tribal Relations, *Report to the Secretary of Agriculture. USDA Policy and Procedures Review and Recommendations: Indian Sacred Sites*, December 2012, available at <http://www.fs.fed.us/spf/tribalrelations/documents/sacredsites/SacredSitesFinalReportDec2012.pdf> [hereinafter *USDA FS Report*]

<sup>19</sup> *Id.* at 18.

<sup>20</sup> *Id.* at 18.

<sup>21</sup> See EO 13007, *supra* note 14.

<sup>22</sup> *Id.*

nation-state party to the ICCPR.<sup>23</sup> The ICCPR provides the fundamental right of self-determination: “All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”<sup>24</sup> This includes the need to exercise appropriate rights to lands, territories and resources, including that of sacred places and sites, which constitute the beating heart and core aspect of indigenous peoples’ identity and self-determination. This includes the Peaks for the Navajo people. The Committee’s concluding observations contain recommendations<sup>25</sup> that are also directly relevant to the United States implementation of the UPR recommendations regarding free, prior and informed consent<sup>26</sup> and the full implementation of the United Nations Declaration on the Rights of Indigenous Peoples (“Declaration”).<sup>27</sup>

### III. UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

On December 16, 2010 at the second White House Tribal Nations Conference, President Obama announced the United States would change its position on the Declaration that the United States took in September 2007 and would now “lend its support” to the Declaration. The President said, “I want to be clear: What matters far more than words -- what matters far more than any resolution or declaration -- are actions to match those words.”<sup>28</sup> The initial positive response was immediately tempered by significant qualifications contained in the United States Department of State’s written statement entitled, “*Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples*”<sup>29</sup> immediately following President Obama’s announcement. The United States qualifications and limitations placed on the Declaration with “where appropriate” or “as applicable” has serious and discriminatory impacts on the Navajo people’s full enjoyment of the existing rights recognized in the Declaration, as well as those affirmed in legally binding international covenants or conventions to which the United States is a nation-state party to including the International Convention on the Elimination of All Forms of Racial Discrimination (“ICERD”).

Most of the recommendations from the Council’s 2010 UPR report to the United States calls upon the United States to support and implement the Declaration,<sup>30</sup> taking into account the United States “no” vote in September 2007. Again, the United States support for the Declaration was tempered with the President stating the Declaration is only “aspiration[al]” and Department of State’s written statement of “not legally binding.” The recommendations put forth by the Council were either accepted in whole or

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<sup>23</sup> *Concluding observations on the fourth periodic report of the United States of America*, Rep. U.N. Human Rights Comm., ¶ 25, U.N. Doc CERD/C/USA/CO/4 (2014) [hereinafter *Concluding Observations*].

<sup>24</sup> See ICCPR, *supra* note 1, Art. 1(1).

<sup>25</sup> See *Concluding Observations*, *supra* note 23, para. 25.

<sup>26</sup> See UPR, *supra* note 3, para. 10. (Recommendation 202: Adopt and implement the United Nations Declaration on the Rights of Indigenous Peoples).

<sup>27</sup> See UPR, *supra* note 3, para. 10. (Recommendation 200: Guarantee the rights of indigenous Americans, and to fully implement the United Nations Declaration on the Rights of Indigenous Peoples).

<sup>28</sup> President Barack H. Obama, Remarks by the President at the White House Tribal Nations Conference (December 16, 2010).

<sup>29</sup> U.S. Dep’t of State, “*Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples: Initiatives to Promote the Government-to-Government Relationship & Improve the Lives of Indigenous Peoples*,” available at <http://www.state.gov/documents/organization/153223.pdf> (last visited June 14, 2013).

<sup>30</sup> See UPR, *supra* note 3, para. 10. (Recommendations 200, 202, 203, 205 and 206).

in part by the United States. In addition, Recommendation 204, in keeping with the CERD's 2008 recommendation to the United States "[t]hat the [Declaration] be used as a guide to interpret the State obligations under the [ICERD] relating to indigenous peoples" was not accepted by the United States. A key provision of the Declaration is the right to free, prior and informed consent, which is the accepted international minimum standard to protect, respect and remedy the rights of indigenous peoples.

Many of the relevant articles or provisions of the Declaration are directly linked to free, prior and informed consent either in context or framework. These includes, but are not limited to, Article 10 on addressing forced relocation, Article 11 on addressing the restitution of cultural property, Article 19 on addressing adoption and implementation of legislative and administrative measures, Article 28 on the right to redress, Article 29 on addressing the disposal of hazardous materials on indigenous lands and territories, and Article 32 on any propose development or development project affecting indigenous peoples lands, territories or resources. The Declaration's free, prior and informed consent is a requirement, prerequisite and manifestation of the exercise of indigenous peoples' fundamental right to self-determination as defined in international law. However, the President's Administration failed to grasp the fundamental understanding of free, prior and informed consent and believe consultation is on equal footing.

Quoting legal adviser Harold Hongju Koh, United States delegation to the UPR, stated "[t]he United States has a government-to-government relationship with over 560 federally recognized Indian tribes and promotes their tribal self-governance over a broad range of internal and local affairs... The importance of tribal consultation was repeatedly stressed during our UPR listening sessions with tribes and civil society, particularly those sessions held in Indian country... In 2010, President Obama also successfully directed that consultations with tribes be reinvigorated throughout all agencies of the U.S. government."<sup>31</sup> Unfortunately, this statement is neither legally accurate nor morally acceptable.

During the Forest Service and Indian Affairs public listening session on the protection of sacred sites, the Commission recommended not only to the Forest Service and Indian Affairs but the United States government to abandon the terminology "consultation" and replace it with the Declarations standard of free, prior and informed consent. The Commission does not dispute that the United States has a government-to-government relationship with the Navajo Nation and understands communication is important in strengthening the government-to-government relationships to protect and preserve sacred places or the Navajo Nation's lands, territories or resources, but the terminology "consultation" limits the Navajo Nation's concerns when a proposed and executed project is carried out because the current consultation policy mandated by Executive Orders No. 13007 and 13175 does not provide for free, prior and informed consent. Providing the Navajo Nation and its people with information about a proposed decision, and gathering and taking into account their points of views is not sufficient in the context of sacred places or lands, territories and resources.

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<sup>31</sup> List of 9 UPR Indigenous Issues: From US UPR Statement of March 18, 2011 on Indigenous [I]ssues, U.S. Dep't of State (on file with author).

Unfortunately, the Forest Service stated that after reviewing its existing policies and procedures that the Forest Service “does not, by itself, change policy or have any effects... and does not constitute final agency action.”<sup>32</sup> Consent is a fundamental principle which predates any United Nations standards. It is the original foundation and relationship between the United States and indigenous nations. For example, the Navajo Nation Treaty of 1868 states in Article 10: “No future treaty for the cession of any portion or part of the reservation herein described, which may be held in common, shall be of any validity or force against said Indians unless agreed to and executed by at least three-fourths of all the adult male Indians occupying or interested in the same; and no cession by the tribe shall be understood or construed in such manner as to deprive, **without his consent**, any individual member of the tribe of his rights to any tract of land selected by him as provided in article [5] of this treaty.”<sup>33</sup> (Emphasis Added)

Furthermore, the Fort Laramie Treaty of 1869 with the Great Sioux Nation states in Article 16: “The United States hereby agrees and stipulates that the country north of the North Platte River and east of the summits of the Big Horn Mountains shall be held and considered to be unceded Indian territory, and also stipulates and agrees no white person or persons shall be permitted to settle upon or occupy any portion of the same; or **without the consent of the Indians first had and obtained**, to pass through the same;”<sup>34</sup> (Emphasis Added) The word “consent” was an important element when these treaties were entered into with the United States as it protected indigenous peoples and their land, territories and resources. This includes the displacement of thousands of Navajos due to the Navajo-Hopi Land Settlement Act of 1974 which allow an extractive industry to exploit valuable subsurface minerals that belonged to the Navajo people<sup>35</sup> or allow the use of artificial snow making from recycled wastewater on the Peaks, a sacred place, for recreational purposes and economic exploitation. The displacement of Navajos from their homeland and use of recycled wastewater on a sacred place are actions of the United States where consent was never given by the impacted Navajo people.<sup>36</sup>

The Declaration’s articles and/or provisions of partnership and consent serve as the foundation for the development of a just, fair, bilateral mechanism for redress and dispute between the Navajo people and United States. The United States support of Recommendation “200: Guarantee the rights of indigenous Americans, and to fully implement the United Nations Declaration on the Rights of Indigenous Peoples” have not been met and/or implemented. These sentiments on the rights of indigenous peoples were echoed by the United Nations Special Rapporteur on Religious Intolerance and Rapporteur on their official country visit to the United States.

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<sup>32</sup> See USDA FS Report, *supra* note 18, at 1.

<sup>33</sup> *Indian Affairs: Laws and Treaties, Vol. II, Treaties*, Oklahoma State University Library Electronic Publishing Center, <http://digital.library.okstate.edu/kappler/Vol2/treaties/nav1015.htm> (last visited on Oct. 24, 2014).

<sup>34</sup> *Indian Affairs: Laws and Treaties, Vol. II, Treaties*, Oklahoma State University Library Electronic Publishing Center, <http://digital.library.okstate.edu/kappler/Vol2/treaties/sio0998.htm> (last visited on Oct. 24, 2014).

<sup>35</sup> *The Impact of the Navajo-Hopi Land Settlement Act of 1974, P.L. 93-531 et al., Public Hearing Report July 2012*, Navajo Nation Human Rights Commission, [http://www.nnhrc.navajo-nsn.gov/docs/NewsRptResolution/070612\\_The\\_Impact\\_of\\_the\\_Navajo-Hopi\\_Land\\_Settlement\\_Act\\_of\\_1974.pdf](http://www.nnhrc.navajo-nsn.gov/docs/NewsRptResolution/070612_The_Impact_of_the_Navajo-Hopi_Land_Settlement_Act_of_1974.pdf) (last visited on Oct. 24 2014).

<sup>36</sup> See Anaya Report, *supra* note 7, para. 14.

#### IV. THE UNITED NATIONS SPECIAL RAPPORTEURS

In the United States' 2012 report to the CERD, "[t]he United States recognizes the importance of understanding matters of spiritual or cultural significance to Native American[s]... and doing so in consultation with tribal leaders. As President Obama has said, the indigenous peoples of North America have invaluable cultural knowledge and rich traditions..." that "many facets of indigenous cultures – including religions, languages, traditions and arts – are respected."<sup>37</sup> In spite of this statement, the current laws, policies and executive orders have failed to protect and preserve sacred places. Good examples of these shortcomings are the American Indian Religious Freedom Act of 1978,<sup>38</sup> Native American Graves Protection and Repatriation Act of 1990, the Religious Freedom Restoration Act of 1993, and Executive Order No. 13007: Indian Sacred Sites where the language allows for loose interpretations by that cannot be enforced.

Despite the fact that the United States intended for the American Indian Religious Freedom Act to provide protection for sacred sites, the United States Supreme Court consistently finds against the Navajo Nation and indigenous peoples' efforts to protect and preserve sacred places located on federal public land.<sup>39</sup> While the American Indian Religious Freedom Act suggests that indigenous peoples "enjoy protection of sacred sites beyond the Constitution; the reality is that they enjoy less protection and freedom than other American individuals and groups"<sup>40</sup> because the statute is void of legal rights enforceable against any person or entity.<sup>41</sup> In fact, the act is routinely referred to as having "no teeth."<sup>42</sup> This is not the only law, policy or executive order where the United States produces a statute or policy that is merely procedural with no substantive rights. For example, Executive Order No. 13007 creates no substantive rights or remedies for indigenous peoples' religious practice.<sup>43</sup> Executive Order No. 13007 states that it may not be used to "impair enforceable rights to use Federal land that have been granted to third parties."<sup>44</sup> These concerns were raised by the Special Rapporteur on Religious Intolerance in 1998 and Rapporteur in 2012 on their officially visiting to the United States.

In 1998, Abdelfattah Amor, then-Special Rapporteur on Religious Intolerance and the first Special Procedure to address Native American spiritual concerns in the context of international law, had visited

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<sup>37</sup> *Reports submitted by States parties under article 9 of the Convention: Seventh to ninth periodic reports of States parties due in 2011*, ¶ 168, Rep. U.N. Comm. on the Elimination of Racial Discrimination, U.N. Doc. CERD/C/USA/7-9 (Oct. 3, 2013) [hereinafter *USA CERD Report*].

<sup>38</sup> 42 U.S.C. § 1996 (2011).

<sup>39</sup> *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058 (9th Cir. 2008) (Fletcher, J. dissenting) (stating majority "misunderstands the very nature of religion . . . the religious significance [of the San Francisco Peaks] is of centuries' duration."); *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 477 (Brennan J. Dissenting) (stating majority makes a mockery of Indian religious freedom federal policy.).

<sup>40</sup> Kristen A. Carpenter, *Real Property and Peoplehood*, 27 STAN. ENVTL. L.J. 313, 362 (2008).

<sup>41</sup> Sandra B. Zellmer, *Cultural and Historic Resources, Sacred Sites and Land Management in the West*, Rocky Mountain Law Special Institute, Ch. 3 (2003).

<sup>42</sup> Rebecca W. Watson, *Managing Cultural Resource Issues on Indian Lands*, Rocky Mountain Mineral Law Foundation (2011). See also *Lyng*, 485 U.S. at 455 (ruling that "nowhere in [American Indian Religious Freedom Act] is there so much as a hint of any intent to create a cause of action or any judicially enforceable right.").

<sup>43</sup> Zellmer, *supra* note 41.

<sup>44</sup> See EO 13007, *supra* note 14.

the United States. In Mr. Amor's report to the United Nations Commission on Human Rights, in the Conclusions and Recommendations, he highlighted his concern regarding freedom of belief of indigenous peoples, as "a fundamental matter and [which] requires still greater protection."<sup>45</sup> Mr. Amor concluded the legislative framework that exists in the United States for the protection of indigenous peoples' freedom of religion and belief was lacking: "*As far as legislation is concerned, while noting advances in recent years in the instruments emerging from the legislature and the executive which are designed to protect Native Americans' religion in general (American Indian Religious Freedom Act) and in particular (Native American Graves Protection and Repatriation Act, Executive Order on Indian Sacred Sites, Executive Memorandum on Native American Access to Eagle Feathers), the Special Rapporteur identified weaknesses and gaps which diminish the effectiveness and hinder the application of these legal safeguards. Concerning the American Indian Religious Freedom Act, the Supreme Court has declared that this law was only a policy statement. As for the Executive Order on Indian Sacred Sites, unfortunately, it does not contain an 'action clause', leaving the tribes without the needed legal 'teeth.' Higher standards or the protection of sacred sites are needed and effective tribal consultation should be ensured.*"<sup>46</sup>

Mr. Amor recommended to the United States, "in the legal sphere Native Americans' system of values and traditions should be fully recognized, particularly as regards the concept of collective property rights, inalienability of sacred sites and secrecy with regard to their location."<sup>47</sup> The observation presented in Mr. Amor's report continues today and confirms that Mr. Amor's recommendations to the United States have not been implemented. In 2012, Professor S. James Anaya, then-Rapporteur, also noted this during his visit to the United States in April-May 2012. Professor Anaya heard from many indigenous peoples involved in current struggles to protect their sacred places and cultural practices. This included the Navajo Nation struggle to protect and preserve the Peaks. In Professor Anaya report to the Council in September 2012, he took note of Mr. Amor's report and affirmed that the basic situation of desecration and lack of access for indigenous peoples to their sacred places, as a result of extractive activities or other types of imposed development, had not been alleviated in the 14 years that separated their country visits. Professor Anaya noted, "*With their loss of land, Indigenous peoples have lost control over places of cultural and religious significance. Particular sites and geographic spaces that are sacred to Indigenous peoples can be found throughout the vast expanse of lands that have passed into government hands. The ability of Indigenous peoples to use and access their sacred places is often curtailed by mining, logging, hydroelectric and other development projects, which are carried out under permits issued by federal or state authorities. In many cases, the very presence of these activities represents a desecration.*"<sup>48</sup>

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<sup>45</sup> Report submitted by Abdelfattah Amor, U.N. Special Rapporteur, in accordance with Comm. on Human Rights Resol. 1998/18, Addendum: Visit to the United States of America, ¶ 82, U.N. Doc. E/CN.4/1999/58/Add.1 (Dec. 9, 1998).

<sup>46</sup> *Id.* at para. 80.

<sup>47</sup> *Id.* at para. 81.

<sup>48</sup> Report of the Special Rapporteur on the Rights of Indigenous Peoples, *The situation of Indigenous Peoples in the United States of America*, at 12, S. James Anaya, U.N. Doc. A/HRC/21/47/Add.1 (Aug. 30 2012).

Professor Anaya observation of desecration is represented in the Peaks case. When the Navajo Nation petitioned for Writ of Certiorari with the United States Supreme Court<sup>49</sup> after the Ninth Circuit en banc ruling, the United States Supreme Court declined certiorari and upheld the Ninth Circuit en banc ruling on June 8, 2009.<sup>50</sup> By declining certiorari and upholding the ruling, the courts authorized the Snowbowl to use recycled wastewater to produce artificial snow on the Peaks while acknowledging that “the [presence of recycled wastewater] will desecrate a sacred mountain and will decrease the spiritual fulfillment [indigenous peoples] get from practicing their religion on the mountain.”<sup>51</sup> Even though the Ninth Circuit noted that no plants, springs, natural resources, shrines with religious significance, or religious ceremonies would be physically affected by the artificial snow in its ruling, and that indigenous people would continue to have virtually unlimited access to the Peaks, including the ski area, for religious and cultural purposes,<sup>52</sup> the courts fail to grasp how artificial snow from recycled wastewater will impact the vegetation and sequentially Navajo ceremonies. On May 24, 2011, the Snowbowl began construction on installing the wastewater pipelines.

The Forest Service’s own report entitled, *Draft Land and Resource Management Plan for the Coconino National Forest*, verifies “the [Peaks] are sacred to many American Indians as a significant religious landmark and traditional cultural place that contains many shrines and sacred places... [The Peaks] is an icon that gives [American Indians] their identity as [peoples]. The [Peaks] are one of several mountains that demarcate the boundaries of the traditional and sacred heartland of the Hopi, Navajo, Zuni, Acoma, Apache, Havasupai, and Hualapai. Many tribes continue to conduct centuries-old religious observances on the [Peaks] that are central to their culture and religion.”<sup>53</sup> The fact that the Forest Service acknowledges the Peaks sacredness and permits the use of recycled wastewater to produce artificial snow is not only sacrilegious, but a violation of the Navajo people’s human rights of ensuring that the Peaks remains pure. Even though the recycled wastewater meets the Forest Service water quality standard to produce artificial snow, the unregulated residual elements in the recycled wastewater will impact the spiritual and medicinal purity of plant life on the Peaks. The use of recycled wastewater, which contains fecal matter, blood, toxins, and other waste matter, will have a direct affect on the “ritual purity” of all Navajo traditional healing ceremonies. Professor Anaya reported to the Council in July 2011 that “some of the reclaimed [wastewater] once passed through hospitals or mortuaries could carry the spirits of the dead with it. Those spirits, as part of the water draining from the Peaks, would then infiltrate plants, thus affecting [Navajo] ritual purity.”<sup>54</sup> Any plant life that come in contact with recycled wastewater will be contaminated for medicinal purposes, as well as for use in traditional healing ceremonies needed to perpetuate the Navajo Life Way and cultural values.

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<sup>49</sup> *Navajo Nation v. U.S. Forest Serv.*, cert. denied, 129 S. Ct. 2763 (2009)

<sup>50</sup> *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, *passim* (9th Cir. 2008) (rehearing en banc), cert. den., 174 L.Ed. 2d 270 (2009).

<sup>51</sup> *Navajo Nation v. U.S. Forest Serv.*, 535 F. 3d 1058, 1070 (9th Cir. 2008) (en banc), cert. denied, 129 S.Ct. 2763 (2009).

<sup>52</sup> See USA CERD Report, *supra* note 37, at 61.

<sup>53</sup> U.S. Dep’t of Agric. Forest Serv. Southwestern Region MB-R3-04-02, *Draft Land and Resource Management Plan for the Coconino National Forest: Coconino, Gila and Yavapai Counties, Arizona*, October 2013, at 121.

<sup>54</sup> U.N. Off. of the U.N. High Comm’r for Human Rights, Letter dated July 6, 2011 from Special Rapporteur on the rights of indigenous peoples to the Special Procedures of the Human Rights Council, REFERENCE: AL Indigenous (2001-8) USA 10/2011 (July 6, 2011).

Furthermore, Professor Anaya goes on to state that stake holders' (i.e. the Navajo people) human rights to free, prior and informed consent have been violated regarding the desecration of the Peaks because the United States did not comply with the requirements under the ICCPR and ICERD, which the United States is a party. In addition, the Rapporteur reported that “[s]imply providing indigenous peoples with information about a proposed decision and gathering and taking into account their points of view is not sufficient in [the context of free, prior and informed consent].”<sup>55</sup> Consultation must occur through procedures of dialogue aimed at arriving at a consensus.<sup>56</sup> Professor Anaya recommended to the United States to “engage in a comprehensive review of its relevant policies and actions to ensure that they are in compliance with international standards in relation to the [Peaks] and other Native American sacred sites”<sup>57</sup> and “give serious consideration to suspending the permit for the modifications of Snowbowl until such agreement can be achieved... in accordance with the United States’ international human rights obligations.”<sup>58</sup> The United States support of Recommendation “83: Implement concrete measures consistent with the Covenant on Civil and Political Rights, to ensure the participation of indigenous peoples in the decisions affecting their natural environment, measures of subsistence, culture and spiritual practices” have not been met and/or implemented to date.

Although the United States rejected “Recommendation 201: Recognize the United Nations Declaration on the Rights of Indigenous Peoples without conditions or reservations, and implement it at the federal and state levels”<sup>59</sup> due to the following, “recognize ... without conditions” in the first UPR, this is now a matter of urgency. The Commission recommends to the Council that Recommendation 201 be included in the next recommendations to the United States based on the recommendation of the Rapporteur, “ensure that actions or decisions by [the United States] agencies are in accordance with, not just domestic law, but also international standards that protect the right of [indigenous peoples] to practice and maintain their religious traditions.”<sup>60</sup>

## V. CONCLUSION AND RECOMMENDATIONS

Since 2010, when the Commission first registered a formal complaint with Professor Anaya, then-Rapporteur, on the desecration of the Peaks, the Commission regrets to inform the Council that no action has been taken by the United States to implement, or even accept, the recommendations put forth by the Council, CERD, Rapporteur, or Committee as demonstrated in this Report. No serious actions have been taken or halted the Snowbowl project of using recycled wastewater to produce artificial snow on the Peaks or entered into good faith negotiations with impacted indigenous peoples in order to obtain their free, prior and informed consent.

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<sup>55</sup> *Id.* at 7.

<sup>56</sup> *Id.* at 7.

<sup>57</sup> *Id.* at 11.

<sup>58</sup> *Id.* at 11.

<sup>59</sup> See UPR, *supra* note 3, para. 11. (Recommendation 201: We cannot accept its first part (“recognize ... without conditions”), but its second part (“implement ...”) enjoys our support, consistent with the [Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples].)

<sup>60</sup> See Anaya Report, *supra* note 7, at para 28.

The Commission encourages the Council to reference this Report in questioning the United States on its failure to implement the accepted recommendations in the first UPR or implementing concrete measures (i.e. the Declaration's free, prior and informed consent standard) to guarantee the protection of the Navajo people's sacred places. Furthermore, the Commission requests the Council proposed the following questions and recommendations to the United States at its second UPR in April-May 2015:

1. Why has the United States failed to implement the Council, CERD, Rapporteur, or Committee's recommendations regarding the protection of indigenous peoples' sacred places, including the Peaks knowing the development of the Snowbowl using recycled wastewater to produce artificial snow will cause irreparable harm to the religious, cultural and spiritual rights and practices of the Navajo people?
2. Why does the United States carry out "consultations" and/or "listening sessions" with indigenous peoples regarding their sacred places when no action, change of policy or preventative/reparative action is taken? Why does the United States continue to avoid and/or fail to implement the Declaration's international standard of free, prior and informed consent as a concrete measure to protect indigenous peoples?

The Commission requests the Council recommend the following to the United States in its Conclusion and/or Recommendations:

1. That the United States take immediate action to suspend the permit allowing the use of recycled wastewater which will halt the continuing desecration of the Peaks, a sacred place, and the Snowbowl use of recycled wastewater to produce artificial snow for winter recreation, which has detrimental impacts on the rights to cultural and religious practices of the Navajo people, in keeping with the United States' human rights obligations as a State party to the ICCPR and ICERD; and
2. That the United States implements concrete measures and an effective policy without conditions or reservations to ensure the rights to free, prior and informed consent for indigenous people impacted by the continued desecration of this and other sacred places within the United States are reiterated with Recommendations 201 and 204.