

NAVAJO NATION

HUMAN RIGHTS COMMISSION

2014 SHADOW REPORT

Regarding the United States of America report submitted by States parties under Article 9 of the International Convention on the Elimination of All Forms of Racial Discrimination.



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On behalf of the Navajo Nation, the Navajo Nation Human Rights Commission (“Commission”), we thank you for the opportunity to present the Commission’s shadow report (“Report”) regarding the United States of America (“United States”) report¹ submitted by States parties under Article 9 of the International Convention on the Elimination of All Forms of Racial Discrimination (“Convention”) as it relates to the protection of the San Francisco Peaks (“Peaks”) located near Flagstaff, Arizona. In addition, this Report will provide specific examples of where the Commission provided recommendations to the United States to reflect its commitment to international human rights standards to the United Nations Committee on the Elimination of Racial Discrimination (“Committee”).

I. INTRODUCTION

In December 1965, the United Nations General Assembly passed the Convention, which commits its parties to promote and encourage universal respect for and observance of human rights and fundamental freedoms for all, without distinction as to race, color, sex, language or religion. In addition, the Convention sets the standards for the United States to take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations that have the effect of creating or perpetuating racial discrimination wherever it exists. This includes matters that affect the indigenous peoples and nations (“Native Americans”) within in the United States to protect their sacred places.

The Committee expressed its concern of the potential impact of the Arizona Snowbowl Resort Limited Partnership (“Snowbowl”) on Native Americans’ spiritual and cultural beliefs, and the process by the United States to obtain free, prior and informed consent of Native Americans with regard to this project. In addition, the Committee requested the United States to provide information on concrete measures taken to ensure the sacred character of this site for Native Americans is respected.² To date, the United States has not taken concrete measures to protect sacred places from business developments that directly affect Native American interests; including the Peaks, which constitute one of the six sacred mountains.³

In August 2012 and February 2013, the Commission provided the Committee with two one-page updates regarding the on-going desecration of the Peaks months after the Commission and International Indian Treaty Council filed and submitted an Early Warning and Urgent Action in August 2011. The United States failure to implement the Committee’s recommendations on taking concrete measures to guarantee the protection of Native American sacred places by means of “free, prior and informed consent” is unmeant and summarized in this Report. The Commission urges the Committee to reference

¹ *Reports submitted by States parties under article 9 of the Convention*, Rep. U.N. Comm. on the Elimination of Racial Discrimination, U.N. Doc. CERD/C/USA/7-9 (Oct. 3, 2013) [hereinafter *USA Report*]

² *Report of the Committee on the Elimination of Racial Discrimination Eightieth Session*, Rep. U.N. CERD, General Assembly 76th Sess, Feb. 13, 2012—March 9, 2012, U.N. Doc. A/67/18 (May 22, 2012).

³ 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).

this Report to ensure concrete measures are taken to protect and preserve sacred places, including the Peaks.

II. THE SAN FRANCISCO PEAKS LITIGATION

Since 1937, the Navajo Nation and Navajo people have opposed the development of the Snowbowl on the Peaks and filed a federal lawsuit to halt the skiing activities. However, the Navajo Nation and Navajo people lost the federal lawsuit case. In 1960s and 1981, the Navajo Nation again filed federal lawsuits to halt the construction and development of the Snowbowl. The Navajo Nation again lost the federal lawsuit cases. All three federal lawsuit cases were argued under the United States Constitution's religious freedom claim.⁴ In 2004, the Navajo Nation filed its fourth federal lawsuit with the United States Ninth Circuit Courts of Appeals ("Ninth Circuit") to prevent the Snowbowl, who has a special use permit that allows it to operate a ski area on federal land by the United States Department of Agriculture Forest Service ("Forest Service"), from using recycled wastewater to produce artificial snow on the Peaks⁵ pursuant to the American Indian Religious Freedom Act of 1978, the National Historic Preservation Act of 1966, the National Environmental Policy Act of 1969, and the Religious Freedom Restoration Act of 1993. Unfortunately, these acts failed to protect the Peaks from desecration and economic exploitation.

The Navajo Nation then petitioned for Writ of Certiorari in the United States Supreme Court ("Supreme Court").⁶ On June 8, 2009, the Supreme Court declined certiorari and upheld the Ninth Circuit en banc ruling, which authorized the use of recycled wastewater to produce artificial snow⁷ and on May 24, 2011 the Snowbowl began construction on installing two water pipelines for producing artificial snow. The first pipeline is for human use and the second pipeline is for artificial snowmaking. To date, the legal battle to halt the use of recycled wastewater to produce artificial snow and protect the Peaks continues. It is disappointing to know the United States legal system continues to rule in favor of the Forest Service and Snowbowl. On February 9, 2012, the Ninth Circuit upheld a district court decision dismissing the lawsuit filed by the Save Peaks Coalition against the Forest Service and Snowbowl to protect the Peaks from artificial snow making from recycled wastewater.⁸ Ninth Circuit Judge Milan D. Smith, Jr. wrote, "[t]his case represents a gross abuse of the judicial process. Just when Defendants-Appellees [Forest Service] and Joseph P. Stringer [Forest Service], and Intervenor-Defendant [Snowbowl] had successfully defended an agency decision to allow snowmaking at a ski resort on federal land all the

⁴ 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).

⁵ *Navajo Nation v. U.S. Forest Serv.*, 479 F.3d 1024, 1025-26 (9th Cir. 2007).

⁶ *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058 (9th Cir. 2008), *petition for writ filed*, WL 355746, U.S. Feb. 6, 2009 (No. 08-846), at 12.

⁷ *Navajo Nation v. U.S. Forest Serv.*, *cert. denied*, 129 S. Ct. 2763 (2009).

⁸ Gale CoureyToensin, *Ninth Circuit Allows Recycled Sewage on Sacred San Francisco Peaks*, Indian Country Today Media Network.com, <http://indiancountrytodaymedianetwork.com/2012/02/10/ninth-circuit-allows-recycled-sewage-on-sacred-san-francisco-peaks-97013> (last visited on April 5, 2012).

way to the [Supreme Court], ‘new’ plaintiffs appeared.”⁹ The Ninth Circuit declared that the Save the Peaks lawsuit rehashed the first lawsuit with the same attorney and some of the same plaintiffs.

III. THE FAILED TRUST RESPONSIBILITY TO PROTECT SACRED PLACES

Despite the fact that the United States possesses a general trust responsibility towards its Native Americans, it has not protected the cultural properties important to the Navajo people. In fact, the United States frequently allows for the desecration and economic exploitation of Native Americans’ sacred places for the financial and recreational benefit of non-Native American business owners and the non-Native American public. While the United States’ report to the Committee states, “[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.”¹⁰ However, these statements and the current laws and policies fail to protect and preserve sacred places. A good example of these shortcomings is the American Indian Religious Freedom Act (“Freedom Act”) or the Religious Freedom Restoration Act where the acts language allows for loose interpretations that cannot be enforced.

The Freedom Act provides a federal policy to “protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions. . . including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.”¹¹ The Freedom Act directs the federal agencies to consult with Native Americans traditional religious leaders to determine what changes need to occur within the federal policy.¹² One change made to the federal policy was Executive Order 13007, which encourages agencies to “preserve and protect” Native Americans’ religion and practices.¹³ However, the Executive Order creates no substantive rights or remedies Native American’s religious practice.¹⁴ The Executive Order states that it may not be used to “impair enforceable rights to use Federal land that have been granted to third parties.”¹⁵

Despite the fact that the United States intended for the Freedom Act to provide protection for sacred sites, the Supreme Court consistently finds against Native Americans’ efforts to protect and preserve places located on federal public land.¹⁶ Furthermore, the Freedom Act suggests that Native Americans

⁹*Id.*

¹⁰*See* USA Report,*supra* note 1, at 55.

¹¹42 U.S.C. § 1996 (2011).

¹²*Id.*

¹³ Exec. Order No. 13007, Fed. Reg. 26771 (May 24, 1996).

¹⁴ Sandra B. Zellmer, *Cultural and Historic Resources, Sacred Sites and Land Management in the West*, Rocky Mountain Law Special Institute, Ch. 3 (2003).

¹⁵ Exec. Order No. 13007, *supra* note 13, at § 4.

¹⁶*See Navajo Nation*, 535 F.3d at 1058 (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*

“enjoy protection of sacred sites beyond the Constitution; the reality is that they enjoy less protection and freedom than other American individuals and groups”¹⁷ because the statute is void of legal rights enforceable against any person or entity.¹⁸ In fact, the Freedom Act is routinely referred to as having “no teeth.”¹⁹ The United States continues to produce policies that are procedural with no substantive rights such as the signed memorandum on the implementation of Executive Order 13175, *Consultation and Coordination with Indian Tribal Governments*, which directs all federal agencies to develop detailed plans of action to implement the Executive Order.²⁰ In addition, Executive Order 13175 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.²¹

While the United States has numerous federal laws and policies that require consultation with Native Americans on matters that affect them – i.e. the Archaeological Resources Protection Act of 1979, the National Historic Preservation Act, and Freedom Act – none of these acts, as demonstrated in the Peaks litigation, have protected sacred places. Although President Obama has held four high-level conferences with Native American leaders²² from 2009 to 2013 and said at the 2010 White House Tribal Nations Conference, “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,”²³ no substantive actions have been taken by the Obama Administration or United States.

IV. THE FAILED AGENCY CONSULTATIONS AND OUTREACH

In November 2010, the Forest Service held public listening sessions across the United States with the Native American communities, which included leaders, culture-keepers, and traditional practitioners as part of the Executive Orders 13007 and 13175 consultation process to help review existing policies and procedures, and examine the effectiveness of current laws and regulations to ensure a consistent level of protection for sacred sites located on National Forest System lands for Native Americans.²⁴ In July 2012, the United States Department of the Interior Bureau of Indian Affairs (“Indian Affairs”) followed

Ass’n, 485 U.S. 439, 477 (Brennan J. Dissenting) (stating majority makes a mockery of Indian religious freedom federal policy.”).

¹⁷ Kristen A. Carpenter, *Real Property and Peoplehood*, 27 STAN. ENVTL. L.J. 313, 362 (2008).

¹⁸ Zellmer, *supra* note 14, at 10, n. 161.

¹⁹ 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 [Freedom Act] is there so much as a hint of any intent to create a cause of action or any judicially enforceable right.”).

²⁰ *See* USA Report, *supra* note 1, at 57.

²¹ *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).

²² *See* USA Report, *supra* note 1, at 57.

²³ President Barack H. Obama, Remarks by the President at the White House Tribal Nations Conference (December 16, 2010).

²⁴ Letter from Harris D. Sherman, Under Secretary, Natural Resource and Environment, and Thomas L. Tidwell, Chief, U.S. Forest Service, Office of the Secretary, U.S. Department of Agriculture, to Interested Tribal Participant (November 3, 2010) (on file with author).

suit and held public listening sessions to “address tribal concerns regarding sacred sites... [and develop] practices or policies to protect sacred sites.”²⁵

The Commission appealed to the Forest Service²⁶ and Indian Affairs²⁷ to abandon and replace the words “sacred sites” with “sacred places.” By abandoning and replacing the words “sacred sites” with “sacred places,” both federal agencies acknowledge that “sacred places” encompasses both sacred sites and surrounding area. By using a more comprehensive language like “sacred places,” both federal agencies recognizes that places sacred to the Navajo Nation and 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 aboriginal territory. All sacred places on and off the current boundaries of aboriginal territories are entitled to protection as a matter of trust responsibility and international indigenous human rights policy.

In addition, the Commission asked not only the Forest Service and Indian Affairs but the United States government to abandon the terminology of “consultation” and replace it with the United Nations Declaration on the Rights of Indigenous Peoples standard of “free, prior and informed consent.” The Commission agrees and understands that communication is important in strengthening the government-to-government relationships to protect sacred places, but the terminology “consultation” limits the Navajo Nation and Navajo people concerns when a proposed and executed project is carried out because the current consultation policy mandated by Executive Orders 13007 and 13175 does not provide for consent. Providing the Navajo Nation and Navajo 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.

Unfortunately, the Forest Service stated in its final report²⁸ 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.”²⁹ The final report further said, the “Forest Service does not intend for the concept of sacred places to replace sacred sites in [Executive Order] 13007”³⁰ because “sacred sites are limited to discrete, specific locations, while a sacred place might be larger scale geographic feature.”³¹ The definition limiting sacred sites to “specific, discrete, narrowly delineated locations”³² of “religious

²⁵ Letter from Donald E. Laverdure, Acting Assistant Secretary – Indian Affairs, Office of the Secretary, U.S. Department of the Interior, to Tribal Leader (July 27, 2012) (on file with author).

²⁶ Letter from Ben Shelly, President, Navajo Nation, to Thomas James Vilsack, Secretary, U.S. Department of Agriculture (December 12, 2011) (on file with author).

²⁷ Joint Resolution of the DinéHataalii 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).

²⁸ U.S. Dep’t of Agric. Forest Service Off. 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>

²⁹ *Id.* at 1.

³⁰ *Id.* at 18.

³¹ *Id.* at 18.

³² Exec. Order No. 13007, Fed. Reg. 26771 (May 24, 1996).

significance”³³ is narrow and inconsistent with the Navajo Nation and Navajo people’s view of sacredness. The use of “sacred places” is the appropriate terminology when referring to areas identified by Native Americans as having a religious, spiritual and cultural significance. The terminology “sacred places” does not diminish the size and part of a sacred location like the terminology of “sacred sites.” The narrowness and inconsistency of the definition of a sacred site jeopardizes areas identified by Native Americans as sacred, especially when the sacred places are authorized to have recycled wastewater be used to produce artificial snow that desecrates the purity of the sacred place for winter recreation.

V. THE IMPACT ON THE VEGETATION AND CEREMONIES

Although 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 Native Americans would continue to have virtually unlimited access to the Peaks, including the ski area, for religious and cultural purposes,³⁴ the Ninth Circuit failed to grasp how artificial snow from recycled wastewater will impact the vegetation and sequentially Navajo ceremonies.

In October 2013, the Forest Service 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 a people. 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.”³⁵ 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.

The Special Rapporteur on the Rights of Indigenous Peoples, Professor S. James Anaya, reported in July 2011, “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.”³⁶ Any plant life that come in contact with

³³ *Id.*

³⁴ See USA Report, *supra* note 1, at 61.

³⁵ U.S. Dep’t of Agric. Forest Service 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.

³⁶ 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).

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. The Forest Service's *Draft Land and Resource Management Plan for the Coconino National Forest* states, eighty-seven percent of the plant life on the Peaks is used for traditional healing ceremonies and/or cultural uses by Native American.³⁷ The eighty-seven percent of plant life and ecosystem are the Mixed Conifer Types, Spruce-Fir and in the Alpine Tundra.³⁸ Two major plants from the Mixed Conifer Types and Spruce-Fir vegetation used in Navajo traditional healing ceremonies are the Spruce tree and Douglas-fir tree. Branches from these trees are utilized in a major Navajo winter ceremony, which lasts nine-nights. The firmness and rich purity of these branches must last the entire nine-night ceremony. The branches are carefully selected and taken with the assurances that its purpose is for healing and restoring mental and spiritual balance to the patient.

The uses of recycled wastewater will not only impact the plant life near the Snowbowl but also the entire plant life on the Peaks, especially when high winds carry the residual contaminates of the recycled wastewater snow from one area to another. This in turn affects the purity of the plant life that is used in Navajo ceremonies and will prevent a medicine person from effectively treating their patients because the emetic and curing herbs require ingesting. Medicine persons are presently cautious in gathering plant life to treat their patients because the recycled wastewater contaminates that are now on the Peaks.

VI. CONCLUSION

The Commission request the Committee take preventive measures aimed at preventing the continuing desecration of a sacred place by allowing the use of recycled wastewater to produce artificial snow for winter recreation on the Peaks. The Commission encourages the Committee to reference this Report in questioning the United States on its failure to implement its previous recommendations on taking concrete measures to guarantee the protection of Native American's sacred places and that consultation by means of "free, prior and informed consent" on matters that directly affect Native American's need to be considered. Furthermore, the Commission encourages the Committee to recommend the United States use the United Nations Guiding Principles on Business and Human Rights as a tool to "protect, respect and remedy" Native American's human rights on business matters that directly affect Native Americans. Finally, the Commission encourages the Committee to remind the United States of their international commitments to protect Native American's sacred places, especially when those international commitments are broken and have direct and indirect harm towards its' Native Americans.

³⁷ U.S. Dep't of Agric. Forest Service, *supra* note 35, at 58-71.

³⁸ *Id.*