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ALTERNATIVE REPORT REGARDING THE CONTINUED DESECRATION OF THE SAN FRANCISCO PEAKS, A SACRED AREA

Submitted jointly by the Navajo Nation, Havasupai Tribe, Navajo Nation Human Rights Commission, and International Indian Treaty Council*;

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I. EXECUTIVE SUMMARY

On behalf of the Navajo Nation, Havasupai Tribe, Navajo Nation Human Rights Commission ("Commission") and International Indian Treaty Council (Co-Submitters), we thank you for the opportunity to present this Joint Alternative Report ("Report") for the review of the 7th, 8th and 9th periodic reports of the United States of America ("United States")[1] regarding the continued desecration of the San Francisco Peaks ("Peaks"), a sacred area located near Flagstaff, Arizona.

International Convention on the Elimination of All Forms of Racial Discrimination ("ICERD") Article 5 stipulates that State parties "guarantee the right to everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law notably in the enjoyment of the following rights… (d)(vii) the right to freedom of thought, conscience and religion", and "(e)(vi) the right to equal participation in cultural activities", is directly applicable in this case.[2]

The Committee on the Elimination of Racial Discrimination ("Committee") has taken a strong position on the discriminatory practices of the United States regarding the desecration of sacred places and areas, which are vital to the cultural and religious practices, identity, and survival of Indigenous Peoples and Nations within the United States ("Native Americans"). In paragraph 29 of its Concluding Observations to the United States [CERD/C/USA/CO/6] in 2008, the Committee addressed this ongoing and pervasive human rights violation and recommended that the "State party take all appropriate measures – in consultation with indigenous peoples concerned and their representatives chosen in accordance with their own procedures – to ensure that activities carried out in areas of spiritual and cultural significance to Native Americans do not have a negative impact on the enjoyment of their rights under the [ICERD]."

From August 17, 2011 through February 16, 2013, six submissions addressing this issue were made by the Navajo Nation, Havasupai Tribe, Commission, Save the Peaks Coalition, and the Arizona Inter-Tribal Council of Arizona representing 20 federally-recognized Native Americans to the Committee's Early Warming and Urgent Action Procedures. On March 9, 2012 the Committee sent a communication to the United States addressing this issue. The Committee expressed its concern about the potential impacts of the Arizona Snowbowl Resort Limited Partnership ("Snowbowl") on Native Americans spiritual and cultural beliefs. The Committee requested information by July 31, 2012 from the United States about the "process by the state party to obtain free, prior and informed consent of the Native Americans with regard to the project" (full text of this communication to the United States is enclosed as an attachment).

[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] International Convention on the Elimination of All Forms of Racial Discrimination, U.N. Gen. Ass. Resol. 2106 (XX), Dec. 21, 1965, at Art. 9.

In a follow-up communication to the United States sent on March 1, 2013 addressing several Native American sacred places and areas under threat, including the Peaks, the Committee noted that the United States had provided a response in a "note verbale of 29 August 2012" but again requested "information on any further measures envisioned to engage with the operator of the Arizona Snowball [sic] Ski area to encourage the use of sources others than reclaimed waste water to produce artificial snow." The Committee stated its understanding that further information would be provided in the United States periodic report, which was under development at that time for the current review. Unfortunately, this was not carried out.

To date, the United States has failed to halt implement the Committees recommendations in this regard. The development of the Snowbowl using contaminated snow on the Peaks continues. The detrimental and irreparable violations of the rights to cultural and religious practices for the Navajo, Havasupai and other Native American nations, as protected in Article 5 of the ICERD also continues. The Committee's previous recommendations through its Early Warning and Urgent Action to take action to prevent this ongoing human rights violation have been essentially disregarded by the State party. The Co-Submitters therefore request the Committee question the United States as follows:

1) Why has the United States failed to implement the Committee's previous recommendations regarding the protection of Native American's sacred places including the Peaks, although the development of the Snowbowl using contaminated wastewater to produce artificial snow will cause irreparable harm to the religious, cultural and spiritual rights and practices of several Native American nations?

2) Why does the United States carry out "consultations" and "listening sessions" with Native Americans regarding their Sacred Places when no action, change of policy or preventative/reparative action is required by the State party as a result of these sessions? Why does the United States fail to implement free, prior and informed consent as the accepted international standard affirmed in Committee General Recommendation XXIII and the United Nations Declaration on the Rights of Indigenous Peoples in this regard?

The Co-Submitters request the Committee, in its Concluding Observations, recommend the following:

1) That the United States take immediate action to halt the continuing desecration of the Peaks, a sacred area, and the construction of the Snowbowl using recycled wastewater to produce artificial snow in keeping with the United States' human rights obligations as a State party to the ICERD; and

2) That the United States implement an effective policy to ensure the right to free, prior and informed consent for Native Americans impacted by the continued desecration of the Peaks and other sacred places within the United States.

II. THE ICERD PROVIDES FOR PROTECTION FROM DISCRIMINATION REGARDING NATIVE AMERICAN'S RIGHTS TO CULTURE AND RELIGION

The ICERD commits all State 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 which the United States ratified in 1994. The ICERD 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 discrimination carried out against Native Americans, which negatively impacts their cultural and religious rights as a result of the destruction, desecration and/or contamination to their sacred places and areas.

In particular, ICERD Article 5 stipulates that State parties "guarantee the right to everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law notably in the enjoyment of the following rights… (d)(vii) the right to freedom of thought, conscience and religion", and "(e)(vi) the right to equal participation in cultural activities", is directly applicable in this case.[3] The Committee has taken a strong position on the discriminatory practices of the United States regarding the desecration of sacred places and areas, which are vital to the cultural and religious practices, identity, and survival of Native Americans. In its' 2008 Concluding Observations to the United States, the Committee addressed this ongoing and pervasive human rights violation:

> 29. The Committee is concerned about reports relating to activities – such as nuclear testing, toxic and dangerous waste storage, mining or logging – carried out or planned in areas of spiritual and cultural significance to Native Americans, and about the negative impact that such activities allegedly have on the enjoyment by the affected indigenous peoples of their rights under the [ICERD] (Articles 5(d)(v), 5(e)(iv) and 5(e)(vi)).
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> The Committee recommends that the State party take all appropriate measures – in consultation with indigenous peoples concerned and their representatives chosen in accordance with their own procedures – to ensure that activities carried out in areas of spiritual and cultural significance to Native Americans do not have a negative impact on the enjoyment of their rights under the [ICERD].

[3] International Convention on the Elimination of All Forms of Racial Discrimination, U.N. Gen. Ass. Resol. 2106 (XX), Dec. 21, 1965, at Art. 9.

> The Committee further recommends that the State party recognise the right of Native Americans to participate in decisions affecting them, and consult and cooperate in good faith with the indigenous peoples concerned before adopting and implementing any activity in areas of spiritual and cultural significance to Native Americans. While noting the position of the State party with regard to the United Nations Declaration on the Rights of Indigenous Peoples (A/RES/61/295), the Committee finally recommends that the declaration be used as a guide to interpret the State party's obligations under the [ICERD] relating to indigenous peoples.[4]

III. SUBMISSIONS FILED ADDRESSING THE DESECRATION OF THE SAN FRANCISCO PEAKS TO THE COMMITTEE'S EARLY WARNING AND URGENT ACTION PROCEDURES, 2011–2013

From August 17, 2011 through February 16, 2013, six submissions addressing this issue were made by the Navajo Nation, Havasupai Tribe, Commission, Save the Peaks Coalition, and the Arizona Inter-Tribal Council of Arizona representing 20 federally-recognized Native Americans to the Committee's Early Warming and Urgent Action Procedures. The submissions are included as attachments to this Report, along with the Committee's follow-up communications to the United States:

a. Submission to the Committee Urgent Action Procedure by the International Indian Treaty Council, Havasupai Tribe and Klee Benally, August 17, 2011
b. Letter of Endorsement submitted by the Arizona Inter-Tribal Council of Arizona, August 18, 2011
c. Submission to the Committee Urgent Action Procedure by the Commission, signed by the Navajo Nation Human Rights Commission chairperson, August 24, 2011
d. Updates to the Committee Early Warning and Urgent Action Procedures submitted by International Indian Treaty Council, February 10 and 12, 2012
e. Update to the Committee Early Warning and Urgent Action Procedures submitted by the Commission and International Indian Treaty Council, August 12, 2012
f. Update to the Committee Early Warning and Urgent Action Procedures submitted jointly by the Commission and International Indian Treaty Council, February 16, 2013

As a result of these submissions and updates, on March 9, 2012 the Committee sent a communication to the United States addressing this issue. The Committee expressed its concern about the potential impacts of the Snowbowl on Native Americans spiritual and cultural beliefs.

[4] Committee on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America*, 72nd Sess., UN Doc. CERD/C/USA/CO/6 (2008), at para. 29. [hereinafter *CERD 72th Session*]

The Committee requested information by July 31, 2012 from the United States about the "process by the state party to obtain free, prior and informed consent of the Native Americans with regard to the project" (full text of this communication to the United States is enclosed as an attachment).

In the follow-up communication to the United States sent on March 1, 2013 addressing several Native American sacred places and areas under threat, including the Peaks, the Committee noted the United States provided a response in a "note verbale of 29 August 2012" but again requested "information on any further measures envisioned to engage with the operator of the Arizona Snowball [sic] Ski area to encourage the use of sources others than reclaimed waste water to produce artificial snow." The Committee noted that further information would be provided in the United States periodic report, which was under development at that time for the current review. Unfortunately, this was not carried out.

To date, the United States' has failed to provide adequate information to the Committee in response to these questions. Neither has there been concrete measures taken to protect this sacred place from a business development that directly affect Native American's rights to freedom of religious belief and cultural practice as protected in Article 5 of ICERD. Nor has the United States implemented any process to ensure the free, prior and informed consent of impacted Native Americans is considered. In fact this project has continued to move forward with impunity. The Peak is one of the six mountains that are sacred to the Navajo Nation[5] as well as other Native Americans in the region. These include the Hopi, Zuni, Acoma, Apache, Havasupai, and Hualapai tribes. The widespread potential impact on seven distinct Native American nations and their members has been recognized by the United States Department of Agriculture Forest Service ("Forest Service").[6] The Peaks is of fundamental importance to the cultural and spiritual identity and religious practice of these Native Americans. Its desecration represents a profound violation and the source of irreparable and permanent harm for them.

IV. THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

On December 16, 2010, the United States committed to "lend its support" to the United Nations Declaration on the Rights of Indigenous Peoples ("the Declaration"), making it the last country to reverse its "No" vote at the United Nations General Assembly when the Declaration was adopted in September 2007. In the Committee's 2008 Concluding Observations regarding the United States, the Committee recommended "the [D]eclaration be used as a guide to interpret the

[5] 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).

[6] 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. [herein after *USDA Draft Land Report*]

State party's obligations under the Convention relating to indigenous peoples."[7] However, in this and number of other cases regarding the desecration of Native Americans' sacred places, the United States has failed to implement this recommendation, in particular Articles 11, 12 and 26 which state:

> Article 11
> 1. Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.
> 2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.
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> Article 12
> 1. Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.
> 2. States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned.
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> Article 26
> 1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
> 2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
> 3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

Furthermore, the Declaration affirms that "States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain

[7] *See* CERD 72nd Session, *supra* note 3, at para. 29.

their free and informed consent prior to the approval of any project affecting their lands or territories"[8] as the "minimum standards for the survival, dignity and well-being of the indigenous peoples of the world"[9]

V. RELAVENT RECOMMENDATIONS BY OTHER UNITED NATIONS BODIES AND PROCESSES ON SACRED PLACES AND AREAS IN THE UNITED STATES

The recommendation regarding the protection of sacred places and areas in the Committee's 2008 Concluding Observations and the Peaks from the Committee's Early Warning and Urgent Action procedures have been cited above. In addition, supplementary recommendations have been made to the United States by other United Nations bodies and process that are of particular relevance to this case, all the more so because of their lack of implementation. These include:

A. Recommendations by the United Nations Special Rapporteurs

In 1998, Mr. 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 the United States. In his report, Mr. Amor generally supported the idea of the "development of a coherent and comprehensive framework for interpreting and applying the two constitutional religion clauses [i.e., freedom of religion and non-establishment clauses].[10] In doing so Mr. Amor "wholly endorse[d] the approach of taking into account the traditions of other peoples as reflected in the main United Nations human rights instruments, namely, the International Covenant on Civil and Political Rights (article 18)… ."[11]

In Mr. Amor Conclusions and Recommendations, he highlighted his concern regarding freedom of belief of Native Americans, as "a fundamental matter and [which] requires still greater protection."[12] Even with the limitations provided in clause 2 of Article 18, Mr. Amor observed:

> *The expression of the belief has to be reconciled with other rights and legitimate concerns, including those of an economic nature, but after the rights and claims of the parties have been duly taken into account, on an equal footing (in accordance with each party's system of values).* ***As far as Native Americans' access to sacred sites is concerned, this is a fundamental right in the sphere of religion, the exercise of which must be guaranteed in accordance with the***

[8] The United Nations Declaration on the Rights of Indigenous Peoples, Adopted by the U.N. Gen. Ass., U.N. Doc. A/RES/61/295 (Sept. 13, 2007) at Art. 32.

[9] *Id.* at Art. 43.

[10] *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,U.N. Doc.E/CN.4/1999/58/Add.1(Dec. 9, 1998) at para.71.

[11] *Id.* at para 71.

[12] *Id.* at para. 82.

above- mentioned provisions of international law on the matter.[13] (Emphasis added)

Notably, Mr. Amor also concluded the legislative framework that exists in the United States for the protection of Native America freedom of religion and belief (applies only to "federally recognized tribes") was lacking:

> *80. 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.*[14]

Mr. Amor further 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."[15] The case presented in this report and in previous submissions to the Committee's Urgent Action procedures confirms that Mr. Amor's recommendations have not been implemented.

Professor S. James Anaya, then-Special Rapporteur on the Rights of Indigenous Peoples, also noted this. During his official country visit to the United States from April-May 2012, Mr. Anaya heard from many Native Americans involved in current struggles to protect their sacred places and cultural practices. This included representatives of the Navajo Nation addressing their struggle to protect the Peaks when Mr. Anaya visited the state of Arizona from April 26 – 27 at the University of Arizona James E. Rogers College of Law as the second stop on his official visit across the United States.

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[13] *Id.* at para. 82. Mr. Amor was the second Special Procedure to visit the U.S. Agreeing with earlier observations made by Mr. BacreWalyNdiaye, Special Rapporteur on extrajudicial, summary or arbitrary executions (see E/CN.4/1998/68/Add.3), in his 1997 visit to the U.S, Mr. Amor observed the following: "In general, it appears that international human rights law, including treaties ratified by the United States, is seen as belonging solely to foreign affairs and not to domestic affairs and that domestic law de facto takes precedence over international law." (*Id.* at paras. 28 and 73).

[14] *Id.* at para. 80.

[15] *Id*. at para. 81.

Mr. Anaya, in this report to the United Nations Human Rights Council in September 2012 on his visit took note of Mr. Amor's report and affirmed that the basic situation of desecration and lack of access for Native Americans to their sacred places, as a result of extractive activities or other types of imposed development, had not been alleviated in the 13 years that separated their country visits:

> *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.*[16]

B. Recommendations by other United Nations Treaty Bodies

From March 13–14, 2014, the United Nations Human Rights Committee, the treaty body monitoring compliance of the State parties to the International Covenant on Civil and Political Rights, received reports from over 30 Native Americans and indigenous peoples' organizations and societies addressing the ongoing desecration of sacred places within the United States. Two reports in particular addressed the case of the Peaks from the Commission and International Indian Treaty Council et al (with 28 Co-Submitters).

As a result, the Human Rights Committee made the following recommendation to the United States:

> **Rights of indigenous people**
>
> 25. The Committee is concerned about the insufficient measures being taken to protect the sacred areas of indigenous peoples against desecration, contamination and destruction as a result of urbanization, extractive industries, industrial development, tourism and toxic contamination. It is also concerned about restricted access of indigenous people to sacred areas essential for preservation of their religious, cultural and spiritual practices and the insufficiency of consultation conducted with indigenous peoples on matters of interest to their communities (art. 27).
>
> **The State party should adopt measures to effectively protect sacred areas of indigenous peoples against desecration, contamination and destruction and ensure that consultations are held with the communities that might be adversely affected by State party's development projects and**

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

exploitation of natural resources with a view to obtaining their free, prior and informed consent for the potential project activities.[17]

The failure of the United States to implement such recommendations, whether from the Committee or other United Nations special procedures and human rights bodies, has created an ongoing human rights crisis for Native Americans facing blatant discrimination and irreparable harm to their cultural and religious rights and practices.

VI. THE SAN FRANCISCO PEAKSLITIGATION

Since 1937, the Navajo Nation and Navajo people have opposed the development of the Snowbowl on the Peaks. They filed a federal lawsuit to halt the skiing activities and development of this sacred ceremonial area. 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.[18] 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 Forest Service, from using recycled wastewater to produce artificial snow on the Peaks[19] pursuant to the American Indian Religious Freedom Act of 1978 ("AIRFA"), National Historic Preservation Act of 1966, National Environmental Policy Act of 1969, and Religious Freedom Restoration Act of 1993. Unfortunately, these acts have 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").[20] 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 snow[21] 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 using wastewater, an action that threatens an extreme level of desecration according to the teachings of the Navajo Nations and other Native Americans, which hold the Peaks as sacred. 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

[17] International Covenant on Civil and Political Rights, *Concluding observations on the fourth periodic report of the United States of America*, U.N. Doc.CCPR/C/USA/CO/4 (April 23, 2014)at para. 25.

[18] 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).

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

[20] *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.

[21] N*avajo Nation v. U.S. Forest Serv.*, *cert. denied*, 129 S. Ct. 2763 (2009).

States legal system continues to rule in favor of the Snowbowl, placing economic development of private corporations above its constitutional and international commitments to ensure freedom of religious without discrimination.

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.[22] 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 way to the [Supreme Court], 'new' plaintiffs appeared."[23] The Ninth Circuit declared that the Save the Peaks lawsuit rehashed the first lawsuit with the same attorney and some of the same plaintiffs. This court decision was submitted as an update to the Committee's Urgent Action Procedure by the International Indian Treaty Council on February 10, 2012.

VII. THE UNITED STATES FAILED TRUST AND TREATY RESPONSBILITY TO PROTECT NATIVE AMERICAN SACRED PLACES INCLUDING THE SAN FRANCISCO PEAKS

Despite the fact that the United States has a general trust responsibility as well as treaty obligations towards Native Americans, it has not protected the cultural properties and sacred areas of vital importance to Native Americans. 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 businesses 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."[24] Despite these statements, the current laws and policies of the United States fail to uphold trust and treaty obligations for the protection and preservation of sacred places. A good example of these shortcomings is the AIRFA. The language in the AIRFA allows for loose interpretations that cannot be enforced.

The AIRFA 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

[22] Gale CoureyToensing, *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).
[23] *Id.*
[24] *See* USA Report,*supra* note 1, at 55.

but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites."[25] The AIFRA directs the United States federal agencies to consult with Native Americans traditional religious leaders to determine what changes need to occur within the federal policy.[26] One change made to the federal policy was Executive Order 13007, which encourages agencies to "preserve and protect" Native Americans' religion and practices.[27] However, the Executive Order creates no substantive rights or remedies to protect Native American's religious practice.[28] 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."[29] Unfortunately, due to the history of treaty violations, appropriation and encroachment upon Native Americans' lands, many sacred places now are in the hands of third parties (individuals or corporations) and are under the legally-recognized jurisdiction of United States federal agencies such as the Forest Service or United States Department of the Interior's National Parks Service and Bureau of Land Management.

Despite the fact that the United States may have intended for the AIRFA to provide protection for sacred sites, the Supreme Court, the highest judicial authority in the country consistently finds against Native Americans' efforts to protect and preserve places located on federal public land.[30] Furthermore, although the AIFRA suggests Native Americans "enjoy protection of sacred sites beyond the Constitution; the reality is that they enjoy less protection and freedom than other American individuals and groups"[31] because the statute is void of legal rights enforceable against any person or entity.[32] It does not provide for free, prior and informed consent by Native Americans regarding the protection of their sacred places. As a result, the AIFRA is routinely referred to as having "no teeth."[33]

Furthermore, 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.[34] In addition, Executive Order 13175 mandates that all federal agencies have a process to ensure

[25] 42 U.S.C. § 1996 (2011).
[26] *Id.*
[27] Exec. Order No. 13007, Fed. Reg. 26771 (May 24, 1996).
[28] Sandra B. Zellmer, *Cultural and Historic Resources, Sacred Sites and Land Management in the West*, Rocky Mountain Law Special Institute, Ch. 3 (2003).
[29] Exec. Order No. 13007,*supra* note 26, at § 4.
[30] *SeeNavajo 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 Ass'n*, 485 U.S. 439, 477 (Brennan J. Dissenting) (stating majority makes a mockery of Indian religious freedom federal policy.").
[31] Kristen A. Carpenter, *Real Property and Peoplehood*, 27 STAN. ENVTL. L.J. 313, 362 (2008).
[32] Zellmer, *supra* note 14, at 10, n. 161.
[33] Rebecca W. Watson, *Managing Cultural Resource Issues on Indian Lands*, Rocky Mountain Mineral Law Foundation (2011). *See alsoLyng*, 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.").
[34] *See* USA Report,*supra* note 1, at 57.

meaningful and timely input by tribal officials in the development of certain policies that have tribal implications.[35]

While the United States has numerous federal laws and policies that require consultation with Native Americanson matters that affect them – i.e. the Archaeological Resources Protection Act of 1979, National Historic Preservation Act, and AIFRA – 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 leaders[36] 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,"[37] no substantive actions have been taken by the Obama Administration or United States.

VIII. THE FAILED UNITED STATES "CONSULTATION" POLICY

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.[38] 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."[39]

The Commission appealed to the Forest Service[40] and Indian Affairs[41] 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 Native Americans are not limited to specific landmarks or sites. Sacred places encompass places such as, but not limited to, federal

[35] *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).
[36] *See* USA Report,*supra* note 1, at 57.
[37] President Barack H. Obama, Remarks by the President at the White House Tribal Nations Conference (December 16, 2010).
[38] 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).
[39] 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).
[40] Letter from Ben Shelly, President, Navajo Nation, to Thomas James Vilsack, Secretary, U.S. Department of Agriculture (December 12, 2011) (on file with author).
[41] Joint Resolution of the Diné Hataałii 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).

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.

The Commission has requested that the Forest Service, Indian Affairs and United States government abandon the terminology of "consultation" and replace it with the Declaration's provision of "free, prior and informed consent." The Co-Submitters understand that communication is important in strengthening the government-to-government relationships to protect sacred places, but the terminology "consultation" limits the rights of Native Americans when a proposed and executed project is carried out over the objections of the concerned Native Americans. The current consultation policy mandated by Executive Orders 13007 and 13175 does not provide for consent. Providing Native Americans 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 that are essential for the religious and cultural practices, identity and survival.

Unfortunately, the Forest Service stated in its final report[42] 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."[43] 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"[44] because "sacred sites are limited to discrete, specific locations, while a sacred place might be larger scale geographic feature."[45] The definition limiting sacred sites to "specific, discrete, narrowly delineated locations"[46] of "religious significance"[47] is narrow and inconsistent with Native Americans view and understanding 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.

[42]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
[43]*Id.* at1.
[44]*Id.* at 18.
[45]*Id.* at 18.
[46] Exec. Order No. 13007, Fed. Reg. 26771 (May 24, 1996).
[47]*Id.*

IX. ADVERSE IMPACTS ON SACRED VEGETATION AND CEREMONIAL PRACTICES ON THE SAN FRANCISCO PEAKS

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,[48] the Ninth Circuit failed to grasp how artificial snow from recycled wastewater will impact the vegetation and sequentially Navajo people's ceremonies, or how construction of a large ski resort hosting hundreds of skiers and tourists on a regular basis would severely limit the right of Native Americans to have "access in privacy" to this sacred area in accordance with Article 12 of the Declaration.

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."[49] 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 Native Americans 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, especially for the Navajo people. The use of recycled wastewater, which contains fecal matter, blood, toxins, and other waste matter, will have a direct effect on the "ritual purity" of all Navajo traditional healing ceremonies.

Then-Special Rapporteur 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."[50] 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. 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

[48] *See* USA Report,*supra* note 1, at 61.
[49] *See* USDA Draft Land Report, *supra* note 5,at 121.
[50] 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).

American.[51] The eighty-seven percent of plant life and ecosystem are the Mixed Conifer Types, Spruce-Fir and in the Alpine Tundra.[52] 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 and ecosystem of the Peaks because high winds and snow melt 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 and other Native American's ceremonies and will prevent an indigenous medicine person from effectively treating their patient and carrying out other traditional ceremonies because the emetic, curing and purifying herbs that are used require ingesting. Medicine persons are presently cautious in gathering plant life to treat their patients because the recycled wastewater contaminates are on the Peaks, further curtailing vital cultural and religious practices.

X. CONCLUSIONS AND RECOMMENDATIONS

Since the last update submitted to the Committee's Urgent Action Procedure on February 16, 2013 and last communication sent by the Committee to the United State on March 1 2013 on the Peaks, the Co-Submitters regret to inform the Committee that no action has been taken by the United States to implement the relevant recommendations by Committee and Human Rights Committee as included above. No serious actions have been taken or halted the project or entered into good faith negotiations with impacted Native Americans in order to obtain their free, prior and informed consent. In fact, 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 continues, as demonstrated and summarized in this Report.

The United States has failed to halt the continued development of the Snowbowl from using contaminated snow on the Peaks, a sacred place. The detrimental impacts on the rights to cultural and religious practices as protected in Article 5 of the ICERD for the Navajo, Havasupai and other Native Americans is well documented, well known to the United States government, and confirmed in writing by at least two United States federal agencies. The Committee's previous recommendations through its Early Warning and Urgent Action to take action to prevent this ongoing human rights violation have been essentially disregarded by the State party to date. The Co-Submitters therefore request the Committee question the United States as follows:

[51] *See* USDA Draft Land Report, *supra* note 5, at 58-71.
[52] *Id.*

1) Why has the United States failed to implement the Committee's previous recommendations regarding the protection of Native American's sacred places including the Peaks, although the development of the Snowbowl ski resort using contaminated wastewater to produce artificial snow will cause irreparable harm to the religious, cultural and spiritual rights and practices of several Native American nations?

2) Why does the United States carry out "consultations" and "listening sessions" with Native Americans regarding their sacred places when no action, change of policy or preventative/reparative action is required by the State party as a result of these sessions? Why does the United States fail to implement free, prior and informed consent as the accepted international standard affirmed in the Committee's General Recommendation XXIII and the Declaration in this regard?

The Co-Submitters request the Committee, in its Concluding Observations, recommend:

1) That the United States take immediate action to halt the continuing desecration of the Peaks sacred area and the construction of the Snowbowl ski resort using recycled wastewater to produce artificial snow in keeping with the United States' human rights obligations as a State party to the ICERD;

2) That the United States implement an effective policy to ensure the right to free, prior and informed consent for Native Americans impacted by the continued desecration of this and other sacred places within the United States.

XI. ATTACHMENTS

Please review the following attachment as referenced in the body of this report, including the previous submissions on the case submitted to the Committee's Early Warning/Urgent Action Procedures.

Thank you.

INTERNATIONAL INDIAN TREATY COUNCIL
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August 17, 2011

To the Committee on the Elimination of Racial Discrimination
Palais Wilson,
Geneva, Switzerland
Via email:

RE: Urgent Action/Early Warning Complaint, the United States of America and San Francisco Peaks, Arizona.

Dear CERD Committee,

Please receive our respectful greetings.

The International Indian Treaty Council, in ECOSOC Consultative Status since 1974, now in General Consultative Status, the Havasupai Tribe, and Klee Benally, Diné (Navajo) youth and arrested protester, submit this request under the CERD Committee's Urgent Action/Early Warning Procedures based upon the following information:

Since May 25, 2011, the owners of Arizona Snowbowl, a ski resort, with the support of the US Forest Service and the Flagstaff, Arizona, City Council, have laid over five miles of a 14.8 mile waste water pipeline and have clear cut over 40 acres of rare alpine forest, in furtherance of a government sanctioned plan allowing a privately owned ski resort to use artificial snow made out of sewage on Sacred San Francisco Peaks, in Northern Arizona.

Up to 1.5 million gallons of treated sewage effluent would be sprayed on Holy San Francisco Peaks every day, or more than 100 million gallons over the course of the winter ski season. And the city of Flagstaff, Arizona, would profit by selling 180,000,000 gallons of its treated sewage to Arizona Snowbowl for this purpose.

On Sunday, August 7, 2011, more than one hundred people, including families with children and elders, marched through downtown Flagstaff, Arizona, in protest of the destruction and desecration of the San Francisco Peaks by Arizona Snowbowl, the ski resort. Demonstrators first gathered at Wheeler Park where they were immediately ordered to leave the public park by the Flagstaff Police Department. As the march wound through downtown Flagstaff demonstrators were met with positive responses and support while dozens of police – many out of uniform — harassed the demonstrators. Police cars drove alongside the marchers. As the protesters passed out flyers and carried banners through Flagstaff's Southside, police violently disrupted the march, grabbing those who were closest to the street and arresting them. As six marchers were handcuffed, the remaining demonstrators continued their demands for an end to the Peaks' desecration and destruction.

This direct action by Save the Peaks Coalition and others has begun a series of protest and blockades of the waste water pipeline and the clear-cutting of pristine forest. This initial action on Sunday, August 7, resulted in the harassment by police and the arrest of several individuals, Native, and Non Native. 26 arrests have been made since July 16th, 2011 in actions protesting the desecration of the Holy San Francisco Peaks, including 17 young people, some Navajo and Tohono O'odham and two young female Dine' - both 16 years of age.

Request for Urgent Action

The immediacy of the desecration and destruction of Sacred San Francisco Peaks and the violent reaction of police against peaceful protest require preventive measures which include early-warning aimed at preventing this existing situation from escalating into conflicts, and urgent measures requiring immediate attention to prevent or limit the scale or number of serious violations of the Convention on the Elimination of all forms of Racial Discrimination.

The CERD Committee is urged to exercise its mandate and address this urgent and important human rights issue. Specifically the Committee is asked to communicate these human rights concerns to the United States and urgently recommend that these acts of desecration of Sacred San Francisco Peaks, the environmental and spiritual vandalism inherent in the clear cutting of pristine forest, and the aggression and harassment of peaceful protesters cease, and that the United States comply with its legally binding obligations under the International Convention on the Elimination of All forms of Racial Discrimination (ICERD).

Exhaustion of Local Remedies and Background

In 2006, the Navajo Nation, the Hopi Tribe, the Havasupai Tribe, the Hualapai Tribe, the Yavapai-Apache Nation, the White Mountain Apache Nation, Bill Bucky Preston (of the Hopi Tribe), Norris Nez (of the Navajo Nation), Rex Tilousi (of the Havasupai Tribe), Dianna Uqualla (of the Havasupai Tribe), the Sierra Club, the Center for Biological Diversity, and the Flagstaff Activist Network, filed suit challenging the United States Forest Service approval of a permit allowing Arizona Snowbowl Resort Limited Partnership to expand their ski resort, located on "federally owned public land" allowing *inter alia*, the use of recycled sewage to make artificial snow.

The Federal District Court denied their claims under the then recently amended Religious Freedom Restoration Act (RFRA).[1] The trial court judgment was reversed by a three judge panel of the Federal District Court.[2] Subsequently, the full Ninth Circuit Court, en banc, reversed the three judge panel.[3]

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[1] *Navajo Nation v. U.S. Forest Serv.*, 408 F. Supp. 2d 866, 907 (D. Ariz. 2006).
[2] *Navajo Nation v.U.S. Forest Serv.*, 479 F.3d 1024, 1029 (9th Cir. 2007).
[3] *Navajo Nation v. Us Forest Serv.* No. 06-15455, (9th Cir. *en banc*, 2008, W. Fletcher dissenting), found at: http://www.narf.org/sct/navajonationvusfs/9th_circuit_en_banc_opinion.pdf, last visited 08/15/2011. Justice Fletcher, joined in dissent by two other judges, called the *en banc* majority decision a "perverse" reading of the law: "The majority's attempt to read *Lyng* into RFRA is not just flawed. It is perverse. In refusing to apply the compelling

As described by the 9th Circuit 3 Judge Panel:

> "Humphrey's Peak, Agassiz Peak, Doyle Peak, and Fremont Peak form a single large mountain commonly known as the San Francisco Peaks, or simply the Peaks. The Peaks tower over the desert landscape of the Colorado Plateau in northern Arizona. At 12,633 feet, Humphrey's Peak is the highest point in the state. The Peaks are located within the 1.8 million acres of the Coconino National Forest." And …,
>
> "The Forest Service has described the Peaks as "a landmark upon the horizon, as viewed from the traditional or ancestral lands of the Hopi, Zuni, Acoma, Navajo, Apache, Yavapai, Hualapai, Havasupai, and Paiute." The Service has acknowledged that the Peaks are sacred to at least thirteen formally recognized Indian tribes, and that this religious significance is of centuries' duration. Though there are differences among these tribes' religious beliefs and practices associated with the Peaks, there are important commonalities. As the Service has noted, many of these tribes share beliefs that water, soil, plants, and animals from the Peaks have spiritual and medicinal properties; that the Peaks and everything on them form an indivisible living entity; that the Peaks are home to deities and other spirit beings; that tribal members can communicate with higher powers through prayers and songs focused on the Peaks; and that the tribes have a duty to protect the Peaks."[4]

Local legal remedies have been exhausted. Although continuing health concerns with regard to the use of sewage in the artificial snow are again in litigation, the spiritual and religious nature of San Francisco Peaks, its spiritual significance to Federally Recognized and unrecognized Tribes as well as to individual Native Americans and the Aboriginal traditional use, the collective and individual human rights to manifest religion or belief, all have been effectively nullified.

> "It became evident early on in the process that the federal authorities were ignoring the deeply felt concerns of the Hopi Tribe and all native nations," Hopi Chairman Wayne Taylor said in a statement. "It is our duty and obligation to protect and preserve the spiritual integrity of Nuvatukyaovi, and we will never give up in our efforts to do so."

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interest test to the "severe adverse effects on the practice of [plaintiffs'] religion" in *Lyng*, the Court reasoned that the protections of the First Amendment "cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development." 485 U.S. at 447, 451. The Court directly incorporated this reasoning into *Smith*. *See* 494 U.S. at 885. Congress then rejected this very reasoning when it restored the application of strict scrutiny "in all cases where free exercise of religion is substantially burdened." 42 U.S.C. § 2000bb(b)." Slip opinion at 10093.

[4] Fn. 2, *Navajo Nation v Forest Service*, No. 06-15455 slip opinion at p. 2838 (9th Cir. 2007), found at: http://www.narf.org/sct/navajonationvusfs/9th_cir_opinion.pdf.

The Human Rights Nullified or Impaired

The International Covenant on Civil and Political Rights (ICCPR)

ICCPR Article 18, the right to freedom of thought, conscience and religion, the right to manifest religion or belief

In 1998 Mr. Abdelfattah Amor, the then Special Rapporteur on Religious Intolerance applied ICCPR Article 18 (the right to practice and manifest religion or belief) to Indigenous Spiritual Practice and land based religion in the United States. Mr. Amor, the first Special Procedure to address Native American spiritual concerns, applied the requirements of Article 18 to the forced relocation of the Sovereign Dine (Navajo) Elders from their homes on account of the expansion of a coal mine.

"The expression of the belief has to be reconciled with other rights and legitimate concerns, including those of an economic nature, but after the rights and claims of the parties have been duly taken into account, **on an equal footing (in accordance with each party's system of values). As far as Native Americans' access to sacred sites is concerned, this is a fundamental right in the sphere of religion, the exercise of which must be guaranteed in accordance with the above-mentioned provisions of international law on the matter."**[5] (Emphasis supplied)

Mr. Amor found then, as is the case now, that consideration of Native American spiritual values, on an equal footing with economic interests had not been taken.[6]

ICCPR Articles 1, the right to self determination,
And, 27, the right to practice culture and religion

In its 2006 examination of the United States under the International Covenant on Civil and Political Rights (ICCPR) the Human Rights Committee (HRC) noted its concern over the "extinguishment" of aboriginal title and violations of the right to decision making by Indigenous Peoples over activities affecting their traditional territories. The HRC recommended that the United States, "… should review its policy towards indigenous peoples as regards the extinguishment of aboriginal rights on the basis of the plenary power of Congress regarding Indian affairs and grant them the same degree of judicial protection that is available to the non-indigenous

[5] Report submitted by Mr. Abdelfattah Amor, Special Rapporteur, in accordance with Commission on Human Rights resolution 1998/18,Addendum, Visit to the United States of America, E/CN.4/1999/58/Add.1, 9 December 1998, para. 82. Mr. Amor was the second Special Procedure to visit the United States. In agreement with the first, Mr. Bacre Waly Ndiaye, then Special Rapporteur on extrajudicial, summary or arbitrary executions (see, E/CN.4/1998/68/Add.3) Mr. Amor concluded: "In general, it appears that international human rights law, including treaties ratified by the United States, is seen as belonging solely to foreign affairs and not to domestic affairs and that domestic law de facto takes precedence over international law. As one academic said: 'It partly reflects the American sense of superiority on human rights issues. Congress thinks we do just fine on religious liberty issues, and the rest of the world should not be telling us how to get it right.'" Para. 28, 72 - 74. This attitude also has not changed.

[6] Id, para. 83. Mr. Amor's report also contained an excellent analysis of US law on religious freedom and the *Smith* and *Lyng* Supreme Court decisions wrongfully applied in this case by the 9th Circuit en banc decision (see fn. 3). Amor report, paras. 10 – 17, and specifically to Native Americans, paras. 55 – 56.

population. It should take further steps in order to secure the rights of all indigenous peoples under articles 1 and 27 of the Covenant to give them greater influence in decision-making affecting their natural environment and their means of subsistence as well as their own culture."[7]

ICCPR Article 1 refers to the right of all peoples, including Indigenous Peoples, to Self Determination and, "that by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." There is no doubt that the actions taken by the US government and its agency, the US Forest Service impeded if not nullified this right with regard to Sacred San Francisco Peaks and the recognized and unrecognized Tribes who hold it Sacred and continue their traditional spiritual practices on it.

Article 27 recognizes the right to practice language, culture and religion. The HRC determined that for Indigenous Peoples, their right to practice their cultures includes the right to use the lands and natural resources necessary for the maintenance of these cultures. Positive measures to ensure the effective participation of communities in decisions which affect them must also be ensured.[8]

Under US law, the Forest Service is the "owner" of San Francisco Peaks. As an agency of the United States it is the "custodian" of Sacred Areas in the so-called "US trust relationship with Indian Tribes." It continues to allow the destruction, depletion and desecration of ancestral lands of Indigenous Peoples without regard to Aboriginal Title and the traditional spiritual and cultural use of the millennia. These include areas of profound religious, spiritual and cultural significance as well as lands and waters essential for subsistence and spiritual ways of life. Corporations and private interests are regularly issued permits to extract uranium, coal, oil, timber, gas and other resources and to release and use all types of persistent and deadly pollutants on or near Indigenous lands and communities causing detrimental impacts, and in some cases, irreversible damage to their spiritual, cultural, social and physical health and survival. In this case a privately owned ski resort, Snowbowl, was issued a permit in the normal course of business and the government defended throughout the litigation, the destruction of forest and desecration of Sacred San Francisco Peaks without regard to the religious and cultural beliefs and practices of numerous Indian Tribes and hundreds if not thousands of Indigenous individuals.

The International Convention on the Elimination of all forms of Racial Discrimination (ICERD)

Article 5, the right to be free of discrimination in all its forms, including the Civil Right to own property alone as well as in association others 5(d) (v); and the Economic, Social and Cultural Rights to health, 5 (e) (iv); and the right to cultural activities, 5 (e) (vi)

The CERD Committee made recommendations to the United States, similar to the HRC, regarding their failure to uphold and consider the rights of Indigenous Peoples concerning the protection of Sacred Sites and areas of cultural importance. US practices continue to threatened, desecrated and

[7] Human Rights Committee, Concluding Observations, United States of America, Eighty-seventh session, 10-28 July 2006, UN Doc. CCPR/C/USA/CO/3, 15 September 2006 Para. 37.
[8] Human Rights Committee General Comment 23.7 (Article 27).

destroy Sacred Areas by imposed development carried out without their consent. In their 2008 examination of the United States' compliance with the ICERD) the CERD Committee voiced concern "… about reports relating to activities, such as nuclear testing, toxic and dangerous waste storage, mining or logging, carried out or planned in areas of spiritual and cultural significance to Native Americans, and about the negative impact that such activities allegedly have on the enjoyment by the affected indigenous peoples of their rights under the Convention (arts. 5 (d) (v), 5 (e) (iv) and 5 (e) (vi))."

> "The Committee recommends that the State party take all appropriate measures, in consultation with indigenous peoples concerned and their representatives chosen in accordance with their own procedure, – to ensure that activities carried out in areas of spiritual and cultural significance to Native Americans do not have a negative impact on the enjoyment of their rights under the Convention. The Committee further recommends that the State party recognize the right of Native Americans to participate in decisions affecting them, and consult and cooperate in good faith with the indigenous peoples concerned before adopting and implementing any activity in areas of spiritual and cultural significance to Native Americans."[9]

In an Urgent Action/Early Warning Decision[10] the CERD made recommendations to the United States regarding the Western Shoshone's rights to their lands and resources, specifically calling upon the United States to "Freeze any plan to privatize Western Shoshone ancestral lands for transfer to multinational extractive industries and energy developers and desist from all activities planned and/or conducted on the ancestral lands of Western Shoshone or in relation to their natural resources, which are being carried out without consultation with and despite protests of the Western Shoshone peoples." In its 2008 examination of the United States the CERD regretted the lack of compliance with its decision: "The Committee reiterates its Decision 1 (68) in its entirety, and urges the State party to implement all the recommendations contained therein."[11] According to the Western Shoshone, the United States has not complied and has in fact confiscated all of the complainants' livestock and imposed fines of millions of dollars in grazing fees and penalties, reducing them to poverty.

The Declaration on the rights of Indigenous Peoples (2007)

Articles 12 and 24

In light of these persistent and ongoing violations, it is of particular importance that CERD, in its 2008 Concluding Observations, while noting the position of the United States on the United

[9] Committee on the Elimination of Racial Discrimination Seventy-second session Geneva, 18 February - 7 March 2008, Concluding observations, United States of America, UN Doc. CERD/C/USA/CO/6, 8 May 2008, para. 29. See also, CERD General Recommendation XXIII (1997), particularly paragraphs 3, 4, and 5.
[10] Committee for the Elimination of Racial Discrimination, Sixty- eighth session Geneva, 20 February – 10 March 2006 Early Warning and Urgent Action Procedure, Decision 1 (68). United States of America, UN Doc. CERD/C/USA/DEC/1.
[11] Fn, 9 Supra, Para. 19.

Nations Declaration on the Rights of Indigenous Peoples[12] recommended that the UN Declaration on the rights of Indigenous Peoples, notwithstanding its stated position on the matter, be used as a guide to interpret the State party's obligations under the Convention relating to Indigenous Peoples.[13] The Declaration is a standard that the United States is thus required to comply with in its obligations under the ICERD.

A range of rights recognized by the HRC and CERD are affirmed in the Declaration including the right of Self Determination (article 3); the recognition, observance and enforcement of Treaties concluded with States (article 37); and the right of Free Prior and Informed Consent, recognized in a number of articles.

Of particular note in this case:

> *"Article 12*
> 1. Indigenous peoples have the right to manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.
>
> *"Article 25*
> Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard."

In a statement issued to the Federal District Court as early as 1983, Abbott Sekaquaptewa, then-chairman of the Hopi tribe, stated in "Narrative Direct Testimony" submitted to the district court:

> "It is my opinion that in the long run if the expansion is permitted, we will not be able successfully to teach our people that this is a sacred place. If the ski resort remains or is expanded, our people will not accept the view that this is the sacred Home of the Kachinas. The basis of our existence as a society will become a mere fairy tale to our people. If our people no longer possess this long-held belief and way of life, which will inevitably occur with the continued presence of the ski resort ... a direct and negative impact upon our religious practices [will result]. The destruction of these practices will also destroy our present way of life and culture." (Wilson v. Block, 708 F. 2d 735 (1983).

These rights as recognized by the Declaration, particularly article 25, by the actions of the United States and its agency, the US Forest Service, have been nullified with regard to Sacred San Francisco Peaks and the many Indigenous Peoples and individuals who recognize it as a Sacred Place and practice their traditional spiritual and cultural ceremonies among its forests, upon its sacred ground.

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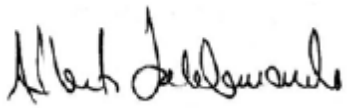
[12] United Nations Declaration on the Rights of Indigenous Peoples (2007). UN Doc. A/RES/61/295 (Hereinafter "the Declaration").
[13] Fn. 9, Supra.

Conclusion

For the above stated reasons, petitioners herein request that the CERD Committee take preventive measures aimed at preventing this situation from escalating into conflicts, and urgent measures to respond to the situation described herein, to prevent or limit the scale or number of serious violations of the Convention on the Elimination of all forms of Racial Discrimination.

If the Committee has any questions or comments we would be most willing to immediately respond.

For all our relations,



Alberto Saldamando, General Counsel,
International Indian Treaty Council

cc: Via Email:

Havasupai Tribe, Ms. Bernadeen Jones, Chairwoman
Mr. Klee Benally
Andrea Carmen, IITC Executive Director

20 TRIBES

INTER TRIBAL COUNCIL of ARIZONA

MEMBER TRIBES
AK-CHIN INDIAN COMMUNITY
COCOPAH TRIBE
COLORADO RIVER INDIAN TRIBES
FORT McDOWELL YAVAPAI NATION
FORT MOJAVE TRIBE
GILA RIVER INDIAN COMMUNITY
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QUECHAN TRIBE
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SAN CARLOS APACHE TRIBE
TOHONO O'ODHAM NATION
TONTO APACHE TRIBE
WHITE MOUNTAIN APACHE TRIBE
YAVAPAI APACHE NATION
YAVAPAI PRESCOTT INDIAN TRIBE

August 18, 2011

International Indian Treaty Council
2940 16th St, Suite 305
San Francisco, CA 94103-3688

Dear Mr. Anquoe,

This letter is to confirm the Inter Tribal Council of Arizona, (ITCA) as a co-signer on to the Urgent Action/Early Warning Complaint the United States of American and San Francisco Peaks, Arizona.

Please contact Mr. John Lewis, if you have any questions at (602) 258-4822, email john.lewis@itcaonline.com

Sincerely,

Shan Lewis,
Vice Chairman, Fort Mojave Tribe

President
Inter Tribal Council of Arizona

2214 North Central Ave. • Suite 100 • Phoenix, Arizona 85004 • (602) 258-4822 • Fax (602) 258-4825

OFFICE OF THE NAVAJO NATION HUMAN RIGHTS COMMISSION

P.O. Box 1689
Window Rock, AZ 86515
Phone: (928) 871-7436
Fax: (928) 871-7437

August 24, 2011

Sent Via Fax

Committee on the Elimination of Racial Discrimination (CERD)
Human Rights Treaties Division (HRTD)
Office of the United Nations High Commissioner for Human Rights (OHCHR)
Palais Wilson - 52, rue des Pâquis
CH-1201 Geneva, Switzerland

RE: Urgent Action/Early Warning Complaint, the United States of America and San Francisco Peaks, Arizona

Dear Committee Members:

The Navajo Nation Human Rights Commission, on behalf of the Navajo Nation, respectfully requests the Committee on the Elimination of Racial Discrimination ("CERD") take Urgent Action against the United States of America. The United States of America through its agent, the United States Forest Service authorized the desecration of a Navajo sacred site, known as, Dook'o'ooslíid, the San Francisco Peaks (herein referred to as the "Peaks").

The Navajo Nation and Navajo people hold the Six Sacred Mountains sacred as a foundation for Navajo Life Ways. The Peaks constitute one of the six mountains sacred to Navajos. Though the United States government possesses a general trust responsibility towards indigenous peoples in the United States it has not sought to protect the cultural property important to indigenous peoples. In fact, the United States frequently allows for the desecration and economic exploitation of indigenous peoples' sacred sites for the benefit of non-Indian business owners and non-Indian public to the detriment of Indigenous Peoples.

This letter serves as a formal request for international recognition and protection of the Peaks as a sacred site to Navajos and many other indigenous nations. The United States is bound by the International Convention on the Elimination of All forms of Racial Discrimination ("ICERD"), the International Covenant on Civil and Political Rights ("ICCPR") and issued an Announcement of Support for the United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP"). Therefore, the United States must be held accountable for the multiple human rights violations occurring against Navajos and other Indigenous Peoples.

This letter provides a brief background of the Peaks, legal action taken by the Navajo Nation to protect the Peaks, and description of the indigenous human rights being violated by the United States.

A. The San Francisco Peaks

Protection of the Peaks, located in Flagstaff, Arizona, greatly concerns Indigenous Peoples in the states of Arizona, Colorado, New Mexico and Utah because the Peaks is revered as a sacred ”single living entity.” The significance of the Peaks to Navajos is equivalent to Mount Sinai in the Judeo–Christian community because the sacred sites serve as the foundation to the Navajo way of life. Navajos believe we have a responsibility to remain on and care for the land where the Creator placed us. Knowledge of sacred places carries with it the obligation to care for them through the appropriate ceremonies, prayers and songs. Sacred places also offer a place for ceremonies and promote healing for Navajos.

Such ceremonies require regular, sometimes daily, access to sacred places and plants. For Navajos, respect for the sacredness of the land requires use and occupancy rights which are not afforded to us on public lands. The essence of the Navajo culture and religion is the relationship between the people and the land, and can only be practiced on the land held sacred for generations. By permitting the Arizona Snowbowl Resort Limited Partnership (herein referred to as the “Snowbowl”) to produce artificial snow from recycled wastewater designated Class A+ for economic and recreational purposes on the Peaks the United States through the United States Forest Service will permanently disrupt and change the relationship between Navajos to the sacred site. Due to the impending damage to the Peaks, the Navajo Nation and other indigenous nations sought protection of the sacred site under federal law.

B. Litigation by the Navajo Nation to Protection of the San Francisco Peaks

The Navajo Nation already undertook efforts to protect the Peaks which failed domestically. The case entitled *Navajo Nation v. United States Forest Service* involved a group of indigenous peoples effort to block the United States Forest Service’s (“Forest Service”) plans to produce artificial snow on the Peaks from recycled wastewater for economic and recreation purpose. The Navajo Nation argued the use of “dirty” artificial snow desecrates the Peaks and violates their culture and religion, and rights under the Religious Freedom Restoration Act (herein referred to as “RFRA”) The Navajo Nation lost at the Arizona Federal District Court and appealed to the Ninth Circuit Courts of Appeals.

A three-judge panel of the Ninth Circuit ruled in favor of the Navajo Nation and barred the Forest Service from allowing the use of recycled wastewater to produce artificial snow under RFRA. Snowbowl then petitioned the Ninth Circuit for Reconsideration. The Navajo Nation then reargued the case in front of an eleven judge en banc panel of the Ninth Circuit, which overturned the three-judge panel ruling by eight to three (8-3)

holding that there was no violation of RFRA because the Navajo Nation did not show a *substantial burden* to the practice of religion.

In response to the Ninth Circuit en banc decision, the Navajo Nation Petition for Writ of Certiorari in the United States Supreme Court. On June 8, 2009 the United States Supreme Court declined certiorari. In effect, the Ninth Circuit en banc ruling, which authorizes the Snowbowl to use recycled wastewater to produce artificial snow was upheld.

C. CURRENT HUMAN RIGHTS VIOLATIONS

On May 24, 2011, the Snowbowl began construction to install a water pipeline for producing artificial snow. The Navajo Nation continues its opposition of the Snowbowl efforts because the use of recycled wastewater will contaminate the soil and medicinal vegetation needed to perform ceremonies and prayers. Moreover, the cultural integrity of the Navajo depends on the Peaks remaining pure. The Navajo Nation found that the Six Sacred Mountains, including the Peaks, must "respected, honored, and protected for they are the foundation of the Navajo Nation."[1] Also, the ceremonies and prayers must be "preserved, taught, maintained and performed in their original forms"[2]

Also on August 7, 2011, many indigenous protestors marched through the streets of Flagstaff, Arizona to protest the desecration of this sacred site. However, the protestors were met with a violent reaction from the police when the police began blindly arresting participants of the peaceful protest.

The Navajo Nation's way of life is at risk of irreversible damage because United States law and policy failed to protect the Peaks. Internationally, however, the Committee possesses the authority to recognize and protect the Peaks on behalf of the Navajos and other Indigenous peoples who hold the Peaks sacred. The United States is bound by the International Covenant on Civil and Political Rights, International Convention on the Elimination of all forms of Racial Discrimination. Most recently, the United States issued support of the United Nations Declaration on the Rights of Indigenous Peoples.

The Navajo Nation urgently requests that the United States be held accountable to all applicable International standards incorporated within the ICERD, ICPR, and the UNDRIP of recognizing the human rights of Indigenous Peoples. The international authority expressly acknowledges Indigenous People individual and collective rights. One purpose of the ICERD, ICPR, and the UNDRIP is to protect the culture, religion and sacred sites of Indigenous Peoples.[3]

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[1] Resolution of the Navajo Nation Council, CN-69,02, Amending Title 1 of the Navajo Nation Code to Recognize the Fundamental Laws of the Dine (11/08/2002) §5(B).
[2] Resolution of the Navajo Nation Council, CN-69,02, Amending Title 1 of the Navajo Nation Code to Recognize the Fundamental Laws of the Dine (11/08/2002) §3(H).
[3] See generally the Declaration's preamble (recognizing the that respect for indigenous knowledge, cultures, and traditional practices contributes to sustainable and equitable development and proper management of the environment).

The ICCPR Articles 1[4] and 27[5] and the UNDRIPD Articles 11[6] and 12[7] proclaims the right to practice, revitalize, maintain and protect their cultures and ceremonies while accessing past, present and future cultural, ceremonial and religious sites. The Peaks constitute one of six main sacred sites to Navajos. Six sacred mountains surround and located on the Navajo Nation.[8] The cultural integrity rests on the six sacred mountains remaining pure. If one mountain is contaminated it negatively impacts the quality of Navajo life.

The Declaration's Articles 24[9] and 25[10] further recognizes the right to traditional medicines and medicinal plants, and the right to maintain and strengthen the distinctive spiritual relationship with the land. Navajos gather traditional medicine on the Peaks; however, the same traditional medicines and medicinal plants may not exist in the future due to the contamination.[11]

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[4] Right to self-determination – Article 1: 1. 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. 2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence. 3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations

[5] Right to practice culture and religion – Article 27: In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

[6] The United Nations Declaration on the Rights of Indigenous Peoples, Article 11, 1: **"**Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature."

[7] The United Nations Declaration on the Rights of Indigenous Peoples, Article 12, 1: "Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains."

[8] (NN council resolution CN-69-02) 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.

[9] The United Nations Declaration on the Rights of Indigenous Peoples, Article 24, 1: "Indigenous peoples have the right to their traditional medicines and to maintain their health practices, including the conservation of their vital medicinal plants, animals and minerals. Indigenous individuals also have the right to access, without any discrimination, to all social and health services."

[10] The United Nations Declaration on the Rights of Indigenous Peoples, Article 25: "Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard."

[11] United States Forest Service EIS (recognizing that snowmaking and the expansion of facilities, especially the use of reclaimed water, would contaminate the natural resources needed to perform the required ceremonies that have been, and continue to be, the basis for the cultural identity for many of the tribes.)

Each international recognition for Indigenous human rights is also supported by the Navajo Natural Law states and teaches that all life, including Mother Earth, is sacred and recognizes the obligation Navajos have "to respect, preserve and protect" all that was provided by the Holy People.[12] Furthermore, Navajo Natural Law expresses that the rights and freedoms of the people to use the sacred elements of life, the land and sacred sites must be used with the proper protocol of respect and offering, and that such practices must be protected and preserved since it serves as the foundation of religious ceremonies and the Navajo way of life.[13] Finally, the Navajo Natural Law states, "it is the duty and responsibility of the [Navajo people] to protect and preserve the beauty of the natural world for future generations."[14]

The ICERD Article 5 also provides that Indigenous peoples be free from all forms of discrimination.[15] The United States continues to discriminate against Indigenous peoples through the economic, social, and cultural rights to health and cultural activities because the United States implements law and policy that detrimentally impacts Indigenous Peoples without recourse. The United States has authorized itself with unilateral plenary authority over Indigenous Peoples. Also, the United States has also taken dubbed itself as guardian over Indigenous Peoples who are the wards. Moreover, the United States has dispossessed Indigenous Peoples of their traditional and aboriginal lands. Furthermore, the United States finds against Indigenous Peoples in Native efforts to protect cultural property, preserve the environment, assert criminal and civil jurisdiction, and to hold the United States accountable to the fundamentals of the trust relationship. Now, the United States stands idly by while the sacred site of the Navajo and multiple other Indigenous Peoples is being desecrated.

D. CONCLUSION

Therefore, for all the above stated reasons in this letter and the reasons incorporated by referenced through the Request for Urgent Action the Navajo Nation Human Rights Commission, on behalf of the Navajo Nation, calls upon this Committee to take any and all steps to end the discriminatory treatment suffered by the Navajo Nation and its people and to protect the Peaks.

Should you have any questions or concerns, please do not hesitate to contact the Navajo Nation Human Rights Commission.

Sincerely,

Duane H. Yazzie, *Chairperson*
Navajo Nation Human Rights Commission

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[12] Id.
[13] Id.
[14] Id.
[15]

INTERNATIONAL INDIAN TREATY COUNCIL
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San Francisco, CA. 94103
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Fax (415) 641-1298
email: alberto@treatycouncil.org

February 4, 2012

To the Committee on the Elimination of Racial Discrimination
Palais Wilson,
Geneva, Switzerland
Via email:

RE: **Update and Follow-up** - Urgent Action/Early Warning (UA/EW) the United States of America and San Francisco Peaks, Arizona,

Dear CERD Members,

Please receive our respectful greetings,

With the expectation that our original UA/EW communication to you of August 17, 2011 will be addressed by the Committee at its next, 80th Session, along with the separate UA/EW Navajo Nation communication filed on or about the same day, we would update that communication:

As we noted in that communication, since May 25, 2011, the owners of Arizona Snowbowl, a ski resort in Northern Arizona, with the support and permit of the US Forest Service and the Flagstaff, Arizona, City Council, have laid several miles of a 14.8 mile waste water pipeline and have clear cut acres of rare alpine forest, in furtherance of a government sanctioned plan allowing a privately owned ski resort to use artificial snow made out of sewage on Sacred San Francisco Peaks, in Northern Arizona. Up to 1.5 million gallons of treated sewage effluent would be sprayed on Holy San Francisco Peaks every day, or more than 100 million gallons over the course of the winter ski season in order to extend that season. The city of Flagstaff, Arizona, plans to sell 180,000,000 gallons of its treated sewage to Arizona Snowbowl for this purpose.

In spite of the proud official pronouncements on their respect for religious freedom including the right to manifest religion, the United States has participated actively in opposition to litigation raised by many Arizona and New Mexico Tribes and Tribal Governments. Local police have arrested many who have demonstrated against the desecration of the Sacred Peaks.

Petitions filed by numerous Arizona and New Mexico Tribes, raising religious freedom issues were denied by the federal Courts and the Supreme Court of the United States. Work on the pipeline was stopped for the winter snowfall, and is expected to resume in the early spring of 2012. A separate federal court suit based on the threat to health posed by sewage effluent snow was denied by the federal district court and is now on appeal at the 9th Circuit Court.

In order to emphasize the grave importance of this issue to Indigenous Peoples of the multi-state area, we attach the Statements from various elders, healers and spiritual leaders describing in

their own words what this desecration means for their spiritual practice and traditional ways. Indigenous Peoples are normally reticent in describing their spiritual beliefs. It is on account of the extreme menace posed to these traditional spiritual practices and beliefs that these statements, including three excerpted from sworn court testimony are submitted.

The "Statement from the Diné Hataalii Association, Inc., Diné Medicine Man Association, and Azee Bee Nagaghá of Diné Nation to the Committee on the Elimination of Racial Discrimination" submitted by the Navajo Nation Human Rights Commission, as well as the Statement from Mr. Duane H. Yazzie, Navajo Community Member, were received from the declarants specifically for this Update and Follow-up. We also attach three excerpted testimonies from trial transcripts, of Mr. Frank Matapis, a Medicine Man from the Havasupai Tribe, Mr. Larry Foster, a Dineh, Navajo Practitioner, and Mr. Norris Nez, Medicine Man and a non-English speaking plaintiff and sworn witness in the federal litigation.

It is clear is that all of these spiritual leaders are profoundly concerned with the spiritual lives of their communities and see the desecration of San Francisco Peaks and the hundreds of millions of gallons of sewage effluent to be sprayed annually on the Sacred Mountain, as ominous, menacing to the continuation of their cultures and spiritual practice. We would urge CERD members to read these short 1 page statements and excerpts to fully understand the great importance attached to this matter by the declarants, as well as the many Indian Tribes, Nations and individuals joining in the litigation and now, in this UA/EW.

We request that the Committee urgently recommend to the United States that it immediately cease and desist from the irremediable desecration of San Francisco Peaks, Arizona.

For all our relations,

Alberto Saldamando, Counsel
International Indian Treaty Council

cc: via email:

Havasupai Tribe, Mr. Eddon Tilousi, Vice Chairman
Intertribal Council of Arizona, Mr. Shannon Rivers
Mr. Klee Benally
Navajo Nation Human Rights Committee, Mr. Leonard Gorman,
Mr. Duane H. Yazee
Andrea Carmen, IITC Executive Director

Statement from the Diné Hataalii Association, Inc., Diné Medicine Man Association, and Azee Bee Nagaghá of Diné Nation to the Committee on the Elimination of Racial Discrimination

The San Francisco Peaks ("Peaks") constitute one of the six Navajo sacred mountains. The sacred mountains serve as the foundation of the Navajo Life Way. Among the six mountains, the Peaks to the West, Mount Hesperus to the North, Mount Taylor to the South and Mount Blanca to the East represent the sacred elements of earth, fire, water and air. Also, each element symbolizes freedom, cultural integrity and dignity, language, and spirituality and ceremony. Moreover, the mountains serve as the original lands of the Navajo when first man and first woman emerged into this world. Furthermore, each mountain represents a time of day and light associated with the time dawn, midday, evening, and night. Each element of the six mountains is inextricably linked to a person's mental, physical, and spiritual health. When one of these elements is harmed it throws the Navajo Life Way out of balance and weakens Navajo ceremonies and prayers.

For example, the Navajo blessing way ceremony involves physical elements from the mountains, prayers, songs, and chants that are systematically arranged and recited in a clockwise fashion according to the six sacred mountains. Elements from each mountain are contained in a sacred medicine bundle. Each bundle is individually tied according to the formation and order of the sacred mountains. The ceremonies and prayers performed by a medicine person give strength and stability to one's thinking, planning, and life. The mountains serve as the basis for the Navajo fundamental and natural laws that guide the Navajo people and the Navajo Nation government. It is our responsibility to care for each sacred place because they are the home to our deities and they are the home to the Navajo people.

Our Life Way is jeopardized because the United States of America ("United States") has not exercised its legal, political, and moral responsibility towards its indigenous peoples to protect indigenous sacred places and cultural property. The United States Forest Service authorized the use of recycled wastewater to produce artificial snow for winter sports. The use of this type of water desecrates our sacred mountain because the water contains fecal matter, blood, toxins, and other waste matter which will spoil the purity of the mountain. Also, the man made snow, whether from recycled wastewater or potable water, is a manipulation of nature which should not be mimicked by man. The natural cycle of weather phenomena is strictly reserved for the deities and if allowed to be mocked it will create an imbalance between the sacred elements, thus harming the Navajo Life Way.

The harm caused by the United States has passed domestic challenges but should not pass international scrutiny when the law and policy discriminate against indigenous people. The United States discriminates against indigenous people like Navajos because it frequently commits sacrilege against indigenous sacred places strictly for the benefit of non-indigenous interests without consequence. Because non-indigenous interests usually prevail, indigenous ties to culture, religion, and spirituality become lost. As Navajos we do not want to lose our Life Ways. Therefore, we call upon the Committee on the Elimination of Racial Discrimination to take any and all necessary steps to help end the United States discriminatory actions against Navajos, the desecration of the Peaks, and the threat against Navajo Life Way.

Statement by Duane H. Yazzie, Navajo Community Member
Concerning the Proposed Desecration of the San Francisco Peaks
In Support of the Request for Urgent Action Submitted to the
United Nations Committee to Eliminate Racial Discrimination
by the International Indian Treaty Council

The proposed desecration of the San Francisco Peaks is an atrocity. It is brazenly contradictory to the tenets of creation. As humankind we were given our place on this earth with certain abilities and limitations. The "making" of snow is a manipulation of nature; it pretends to create a phenomenon of nature. It does not matter whether sewer water or fresh pristine ground water is used to "make" snow; the atrocity is in the desecration of creation and in the extreme disrespect of the tenets of creation. The abuse and misuse of nature and the earth are the direct cause of the current condition of the earth; the ebbing of the health and positive energy of the earth.

The equilibrium of the Earth is precariously out of balance. The increasing incidence of so-called natural catastrophe and climate change is no accident; they are undeniable messages from the Earth that she grows weary of the unrelenting abuse. Soon she may give us the ultimate disaster with a great convulsive shudder when she becomes no longer tolerant. The continued desecration of the Earth and its sacred sites contribute to and expedites the prophesied demise of the world.

The prophesies of the Indigenous peoples and peoples of the world's societies including the predictions contained in the Holy Bible, foretell of a future time when humankind and the planet earth itself would experience great trials and tribulations such as we see today. Indigenous peoples pray the life of five-fingered people will continue into the future; we do not wish the earth to come into a time of demise.

The damage has been done to the earth, the earth is hurting; we implore of the powers of the world to halt further damage and allow and support a time of healing so that the life of the earth and our human lives will be prolonged. As keepers of knowledge of the original intent of creation, indigenous peoples are gravely concerned with the health of our Earth Mother. Therefore we must continue the struggle to emphatically oppose the continued and proposed further desecration of the San Francisco Peaks.

FRANK MAPATIS, Hualapai Spiritual Leader, Excerpts from Federal District Court Testimony Transcripts

A lot of our creation stories relate to the San Francisco Peaks and of how the Third World had been, you know, covered with water and the Hualapai people back then had -- they got this young girl and put her into a log to -- so that she could survive that flood which covered the whole earth.

She landed on the Peaks and when she landed there she was there alone. And at that time she went to wash in the springs and she would sit in the sun. So she had become lonely. And at that time she -- in the water she had conceived a son which was a man born of water. And the next time she went, she went to the – she went to the springs, she washed again, she dried out in the sun, and then she had a -- also had another son for the sun. And those were known to be the twins, the Twin Warriors or Twin War Gods.

And in the story it talks about how one of the twins had become sick or hurt and the other twin had collected this plant and he had collected this water and he had healed his brother. And in the story it goes into songs about the water, it goes into songs about the plants, it goes into songs about the sun, the earth, and the air, all the elements of life that the humans can survive on.

These two warriors, twin warriors, they were sent to the people to clear the land of all the evil that the flood had not taken care of. And they were brought here to bring the Hualapai people back to the true God, because there was a false god that had been worshipped in that Third World, and the people had continued to do evil things and bad things with their lives and then the whole earth was covered with water.

Because I go to the mountain because of how the story was related to me that's telling me that every since, you know, that flood, that this is a sacred place, and there is where the twin war god had got the water. He was born from that water. He had -- he -- that water had a spiritual power that conceived this woman and that gave that life. So when we give that water to that patient, they get that life too, a second chance in life. And the story -- about the stories about the water, of what it does, and how they sing the songs with the water, about healing certain people. The twin war god not only healed his brother, but he also healed other people as more people came.

And so from childhood we're taught that this mountain is sacred and that this water has a spirit in it that could give life to people. [S]ee, when the water, the wastewater when *you* have all this urine, all this feces, it has parts of your blood in it. When *you* clean a hospital or a clinic or when somebody is there bleeding and something happens and they die, that blood is going into that water. And once that water is touched with blood of somebody that has died or something, and *you* go get it, get this water, and *you* pour it on a sacred site, it's like you're putting death onto that mountain… We can't go and use that water and give it to that sick person that has this ghost sickness. We can't give that plant to them.

It's something that is -- it's like a spiritual law. You do not mix death and then life; life and death. You don't mix the two.

It would deeply affect it more than it already is, because we're just barely getting back to our traditions and culture. And now this comes up and it's down almost to the last person that knows the medicine songs of this mountain. And right when we're getting back, it's like it's something is coming down to break it again.

It would have a great impact. I would have to stop[my healing ceremonies]. And I wouldn't be able to teach the water songs of collecting the water and the plants. There's four or five young men that are supposed to learn all these songs and learn these traditions and these cultures to carry them into the next generation. And those young boys that are waiting those – for those songs and ready to sing that water song or ready to sing about the plants and the feathers, and, you know, how to take care of the people and their lives, that that would have to stop too.

Mr. Larry Foster, Navajo Practitioner, Excerpts from Court Testimony Transcripts

I received my Bachelor of Arts in Business Administration from the University of California r University of California, los Angeles. [in]1976.

In our Navajo society we have keepers. We have practitioners. Then we have Medicine men. And I have been doing this for 45 years as a practitioner, a keeper and a practitioner. [W]e, as a dine -- we call ourselves nochoka dine. That means people of the earth, people put on the surface of the earth to take care of the lands.

In our traditional way we have our four sacred mountains, the cardinal directions. To the west we have the San Francisco Peaks, which is Dook'o osliid is the Dchitlaheal. And to the north we have Hesperus Mountain, which is the Jet Mountain, Black Mountain and that's Dibe Nitsaa. To the east we have Blanca Peak, Sisnaajini, White Shell Mountain. To the south we have Mount Taylor, and that's called Tsoodzil. That's Turqouise Mountain.

We also have two doorway mountains we called Huerfano Mountain, that's the home of the Changing Woman. We also have another pillar mountain called Doorway Mountain call Gobernador Knob. That's where we merged as the. nochoka dine as the people of the earth. As we were created as human beings and when the holy people were when we were created, the holy people then felt that there was time for them to go back to the holy lands.

[W]e emerged on the surface of the earth as keepers of the land to take care of the land within the sacred mountains, the holy ones then moved on and they put -- when Changing Woman was born, she was born at Huerfano Mountain, Dzilna'oodilii. And as Changing Woman grew into a young woman, the holy ones had already given the people direction that when she became a woman, it would have a puberty ceremony and there would be at least at the peaks, at to Dook'o osliid and that's what have happened [at the San Francisco Peaks].

The Peaks are probably more significant in that that's where Changing Woman -- it was chosen that that would be the mountain, our sacred mountain to the west, because that is where the sacred medicine bundles sit in our ceremonies. And she would have her ceremony there so she could become a woman now.

When she had her children, her twins -- And in our tradition, in our way of life, our stories, the father of the twins was the Creator, Sun god. And as they grew older, the twins grew older, they wanted to go find their father, just like any other child would. So Changing Woman instructed them to go back to the Peaks to retrieve the bundles… From that point on then they would go on their journey, their quest to find their father, which they did.

The medicine bundle is like I -- it is our Bible. It's the unwritten way of life for us, our songs, our ceremonies. It's all embedded. As these bundles are created, that's where we have all our songs, our mountain songs, our blessing way songs, healing songs.

And then we probably like we say we rededicate it or reconfirm it. We open it -- the medicine people open it back up. Then they put new herbs, fresh, you know, herbs. They revitalize it, give it life again. So in doing so, you know, it's been carried through the generations.

Your question on the use on reclaimed water right? In my mind is far more serious because I can live with a scar as a human being. But if something is injected into my body that is foreign a foreign object -- and reclaimed water in my opinion could be water that's reclaimed through sewage wastewater comes from mortuaries hospitals there could be disease in the waters -- and that would be like injecting me and my mother my grandmother the Peaks with impurities foreign matter that's not natural.

And if one mountain -- and more in particularly with the San Francisco Peaks -- which is our bundle mountain, our sacred, bundle mountain, were to be poisoned or given foreign materials that were not pure, it would create an imbalance -- there would not be a balance among the sacred mountains. We would not be able to go there to obtain herbs or medicines to do our ceremonies, because that mountain would then become impure.

We -- if you leave one mountain out, you neglect one mountain and it's just like a family, you know. If you have four children and all of a sudden you start neglecting one child and you have three other children, it's our way of life of being in harmony, being respectful among all the people or individuals or things involved.2 And in this instance one mountain being -- that would be contaminated, if you will, would throw our whole culture out of balance. We just wouldn't be able to exist.

The -- the Peaks, as I mentioned earlier, is where Changing Woman had her puberty ceremony. She became a woman at that time. From that point on in our society women are the most important in our life. They are the positive forces in our life. They are the ones that give life to us. And for the Peaks, that's where the gift of the kinaalda was given to our people so that we would forever have life into our people, so that we would have continued life, generations after generations. And those would be shut down.

As we -- when my girls, my two daughters had their kinaalda, we got water from the sacred mountains, my wife and I. More particularly, from the Peaks, because that's our young women when they become a woman. We use that water in our ceremonies.

And should one of the mountains become out of balancer 1’m very afraid that it would lead us to extinction. We would lose our culture, our identity. We would lose our songs our ceremonies r because one mountain is out of balance and my grandson wouldn’t be able to take the bundles to the Peaks. When our young women become -- our girls become women, they wouldn't -- they won't be as pure as they should be because of this imbalance.

Testimony of Norris Nez, Navajo Medicine Man, Plaintiff in the case [non-english speaker, testified through and interpreter], Excerpts from Court Testimony.

I was born July 26, in '29. Yes. From other medicine men, I learned from them. I was taught by them. I gained my knowledge from them, From ten years on.

I know about their snowmaking plans to use sewer water, to build a bigger ski area. They want to freeze the sewer water, up there and have more ice and snow to ski on. I say no to that. Our way of life is there. As it has its nourishments there, the water will ruin that. It will ruin the medicine. The snow that they make up there will eventually melt and it will seer into the ground
18 and then it will go in different directions and it will ruin everything. It will ruin the plants, the water and the earth. Water we drink and it will affect our health.

The bundle is made up of the mountain. As 1 have said before, like, you know, it's like the mountain recreated in the medicine bundle. And all bundles will be affected and we will have nothing to use eventually. But if the project goes forward, as I have stated, it will make us sick. It will have ill effects on everything. It will affect all of us and we are doing this to get ourselves sick. It is causing -- it is causing my practice of my ways to go -- it's because of the bad water, there will be no more plants and this could affect me as a Medicine man, and then who will cure me? It will affect other Medicine men. Who will be curing us?

[The Mountains] I testify that they're tied together by the rainbow, that it is like a cord that ties them together. And they communicate, they talk to each other. Dok'osliid talks toTsoodzil and Sisnaajini talks to Dibe Nitsaa. Who will drink water that ·has excrete in it? This is water that has been used on ill people, dead bodies are washed in it, and there are vapors and fumes from it and with women and the menses, you know, we are told that is very dangerous.

[The Blessingway Ceremony] means hozho. It means traveling a straight path and observing all the ways of life, and from following that path in this translates into good health, mentally and physically. [The mountain soil bundle] is the blueprint for the future, future growth of not only mankind, but of the earth and everything on it. [The] mountain soil bundle in the Blessingway ceremony that is a main part of it. …it's like a blueprint for the future. It is -- represents growth and good health. And in good health, good weather and plants and also symbolizes happiness.

[San Francisco Peaks] is considered a leader, and because it is in the bundle and because it is in the dzit teezh. It will ruin it because bad is going to be put on it. It will affect all. It will affect everything and who -- you know, I don't know what the future will be then, but it will be ruined.

Hastai wan which is the dawn and following Bastai wan is Hastai yaal teeii. Hastai yaal teeii is the dawn, that is waking and Hastai wan is after when you awaken and. start moving around. Hastai wan moves and Hastai yaal teeii moves. And they're part of the Blessihgway. They will do what they will. They are called Neehootsoi dineh. They are holy people. And in Blessingway they are mentioned along with shan diin, sunshine. And in the Blessingway prayers Hastai wan and Hastai yaal teii are mentioned. It will affect them. That is all I know. If they are going to do something about it; they may.

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February 10, 2012

To the Committee on the Elimination of Racial Discrimination
Palais Wilson,
Geneva, Switzerland
Via email:

RE: 2nd **Update** - Urgent Action/Early Warning (UA/EW) the United States of America and San Francisco Peaks, Arizona, **results of litigation**

Dear CERD Members,

Please receive our respectful greetings,

We filed an Update and Follow-up electronically on or about February 4, 2011 that we hope the CERD will consider, with statements from spiritual leaders on the grave importance they attach to this issue.

This is to inform the Committee that on February 9, 2011, the Federal 9th Circuit Court of Appeals issued its opinion on *Save the Peaks Coalition et. al, v. the United States Forest Service and Snowbowl, Inc.*, raising environmental and health concerns on the use of treated sewage for artificial snow on Sacred San Francisco Peaks and its ingestion. (No. 10-17896, D.C. No. 3:09-cv-08163-MHN).

The Court denied the relief, stating that "the case represents a gross abuse of the judicial process" because the plaintiffs appellants did not raise these concerns in the prior litigation raising freedom of religion issues.

This judgment represents the racism and complete indifference to the rights of hundreds of thousands of Native Americans, reflecting the favoring of commercial, recreational and private interests of the few over the health, and the millennial spiritual beliefs and practices of the many. This Opinion was only condemnation of those seeking the protection of these rights.

We again urge the CERD to take Urgent Action before irreparable damage is done this Sacred Area.

For all our relations,

Alberto Saldamando, Counsel
International Indian Treaty Council

cc: via email:
Havasupai Tribe, Mr. Eddon Tilousi, Vice Chairman,
Intertribal Council of Arizona, Mr. Shannon Rivers,
Mr. Klee Benally,
Navajo Nation Human Rights Committee, Mr. Leonard Gorman
Mr. Duane H. Yazee,
Andrea Carmen, IITC Executive Director

August 2012 Update to the Committee on the Elimination of Racial Discrimination on the San Francisco Peaks in the United States of America

On behalf of the Navajo Nation, the Navajo Nation Human Rights Commission ("Commission"), we thank the Committee on the Elimination of Racial Discrimination ("CERD") for the opportunity to present the Commission's update on the on-going desecration regarding the San Francisco Peaks ("Peaks") by the Arizona Snowbowl Resort Limited Partnership ("Snowbowl") in the United States of America ("United States"). In 2011, the Commission communicated concerns with the International Indian Treaty Council ("IITC") of the human rights violation of Navajos. Today, the human rights violations continue.

On Thursday, February 9, 2012, the United States Ninth Circuit Courts of Appeals ("Ninth Circuit") upheld a district court decision dismissing the lawsuit filed by the Save Peaks Coalition against the United States Department of Agriculture Forest Service ("Forest Service") and Snowbowl to protect the Peaks from artificial snow making from reclaimed wastewater. 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 way to the [Supreme Court], 'new' plaintiffs appeared." The Ninth Circuit in the end said the Save the Peaks lawsuit rehashed the first lawsuit with the same attorney and some of the same plaintiffs.

On March 8, 2012, the City of Flagstaff ("City") renewed their contract to sell reclaimed wastewater to the Snowbowl. The City's Utilities Director administratively renewed the reclaimed wastewater agreement by way of history: the Reclaimed Water Agreement which was approved in March 2002 and City Council Ordinance No. 2002-07 which authorized the Utilities Director to approve, execute and enforce all Reclaimed Water Agreements. This is a clear example of the ongoing discrimination against Navajos through government entities within the United States. These government entities frequently commit sacrilege against indigenous religion by desecrating indigenous sacred sites strictly for the benefit of non-indigenous interest. However, these government entities are quick to prosecute individuals who vandalize churches but authorize water containing fecal matter, blood, toxins and other waste matter to spoil the purity of the mountain, which is basis of Navajo Life Way.

On May 24, 2011, the Snowbowl began construction to install a water pipeline for producing artificial snow. The Navajo Nation and Navajos continue to oppose the Snowbowl's efforts because the use of recycled wastewater will contaminate the soil and medicinal vegetation needed to perform ceremonies and prayers. The use of wastewater will prevent a Navajo traditional medicine person from effectively treating his or her patient. During the installation of the pipelines, Navajo and non-Navajo protestors were arrested, incarcerated and fined as they attempt to stop the construction project while exercising their United States First Amendment right of freedom of speech.

Finally, in an opinion issued on June 21, 2011, the Ninth Circuit imposed a sanction on Howard Shaker, attorney for Save the Peaks Coalitions by stating Shaker acted in "bad faith," that he "grossly abused the judicial process, " and that he "misled his clients." As a result, Shaker has to personally pay all the cost associated of the intervener-defendant Snowbowl. Because non-indigenous interests usually prevail, indigenous ties to culture, religion, and spirituality become lost. As Navajos we do not want to lose our Life Ways. Therefore, we call upon the Committee on the Elimination of Racial Discrimination to take any and all necessary steps to end the United States discriminatory actions against Navajos, the desecration of the Peaks, and the threat against Navajo Life Way.

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February 16, 2013

Ms. Gabriella Habtom, Secretary
UN Committee on the Elimination of Racial Discrimination
UNOG-OHCHR
1211 Geneva 10, Switzerland
Re: Additional information submitted to the CERD Early Warning and Urgent Action Procedures by IITC and the Navajo Nation Human Rights Commission regarding the continued desecration of San Francisco Peaks Sacred Mountain, Arizona United States

cc: Special Rapporteur on the Rights of Indigenous Peoples James Anaya

Please receive our respectful greetings. The International Indian Treaty Council (IITC), in ECOSOC Consultative Status since 1974, now in General Consultative Status, respectfully submits the enclosed update from the Navajo Nation Human Rights Commission (NNHRC). The NNHRC presents the urgent and worsening threat to sacred San Francisco Peaks though the continuing development of the Snowbowl resort, with severe discriminatory impacts on the Navajo Nation and in violation of the religious and cultural rights as well as the right to free prior and informed consent of the Navajo and several other Indigenous Nations.

This Urgent Action submission, originally submitted to the CERD in August 2011, and updates provided by the IITC since that time, was reviewed during the 80th CERD session from February-March 2012. A letter was sent by the CERD to the United States of America on March 9th, 2012 requesting information about "the concrete measures taken to ensure that the sacred character of this site for Indigenous Peoples is respected" and also regarding "the process by the State Party to ensure the free prior and informed consent of Indigenous Peoples with regard to the project".

We respectfully request the CERD's Urgent Action and Early Warming Procedures Working Group to take this information, as well as the specific responses provided by the United States, into account when it considers its next steps and recommendations to the State Party so that this urgent situation can be resolved with full respect for the rights of the Indigenous Peoples concerned under the Convention.

We sincerely thank the Committee and the Early Warning and Urgent Action Procedures Working Group for their attention to the enclosed information from the NNHRC, and to this most urgent matter at their current session.

With respectful regards,

Andrea Carmen,
Executive Director, International Indian Treaty Council

cc: Navajo Nation Human Rights Commission

February 2013 Update to the Committee on the Elimination of Racial Discrimination on the San Francisco Peaks in the United States of America

On behalf of the Navajo Nation, the Navajo Nation Human Rights Commission ("Commission"), we thank the Committee on the Elimination of Racial Discrimination ("CERD") for the opportunity to present the Commission's update on the on-going desecration regarding the San Francisco Peaks ("Peaks") by the Arizona Snowbowl Resort Limited Partnership ("Snowbowl") in the United States of America ("United States"). In 2011, the Commission communicated concerns with the International Indian Treaty Council ("IITC") of the human rights violation of Navajos. Today, the human rights violations continue.

On Monday, December 24, 2012, the Snowbowl started making artificial snow from recycled wastewater at the ski resort high atop the Peaks and surprised to find out the artificial snow was bright yellow. The Navajo Nation and Navajo people opposed the Snowbowl's efforts in making artificial snow from reclaimed wastewater for this reason because the use of recycled wastewater will contaminate the soil and medicinal vegetation needed to perform ceremonies and prayers. In addition, the use of recycled wastewater will prevent a Navajo traditional medicine person from effectively treating his or her patient.

In addition to the bright yellow snow, the Snowbowl violated its contract with the City of Flagstaff ("City") because of a lack of prominently placed signs notifying the general public that the ski resort used recycled wastewater in making artificial snow for recreational purposes. The signs had none of the required language as specified in the City's contract. In fact, the signs were more a proclamation of conservation efforts and not a warning of any kind. Even though the state of Arizona's law allows A+ wastewater to contain some fecal coliform organisms and enteric viruses, many people think that A+ treatment standards means that recycled wastewater is clean and safe to drink. This misconception of recycled wastewater is giving people a false sense of safety and is an example of the ongoing discrimination against the Navajo Nation and Navajo people's sacred place.

These government and business entities – the United States, state of Arizona, the City and Snowbowl – frequently commit sacrilege against indigenous culture and religion by desecrating indigenous sacred places strictly for the benefit of non-indigenous interest which include the authorization of water containing fecal matter, blood, toxins and other waste matter to spoil the purity of the Peaks, which is basis of Navajo Life Way. Because non-indigenous interests usually prevail in the United States courts systems, indigenous ties to culture, religion, and spirituality become lost. As Navajos we do not want to lose our Life Way. Therefore, we call upon the Committee on the Elimination of Racial Discrimination to take any and all necessary steps to end the United States discriminatory actions against Navajos, the desecration of the Peaks, and the threat against Navajo Life Way.

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REFERENCE:GH/SP

9 March 2012

Excellency,

I write to inform you that in the course of its 80th session, the Committee considered, on a preliminary basis, under its early warning and urgent action procedure, information submitted by non-governmental organisations concerning the Ski Resort project in San Francisco Peaks. The Committee has also considered the situation of Western Shoshone and particularly the implementation of its 2006 Decision 1 (68) taken under the same procedure.

The Committee recalls its recommendations to the State party (CERD/C/USA/CO/6 of March 2008), particularly paragraph 29 which urges the State party to take all appropriate measures, in consultation with indigenous peoples concerned and their representatives chosen in accordance with their own procedure, to ensure that activities carried out in areas of spiritual and cultural significance to Native Americans do not have a negative impact on the enjoyment of their rights under the Convention. The Committee has further recommended that the State party recognize the right of Native Americans to participate in decisions affecting them, and consult and cooperate in good faith with the indigenous peoples concerned before adopting and implementing any activity in areas of spiritual and cultural significance to Native Americans.

In light of the information at its disposal, the Committee remains concerned at the potential impact of the Ski Resort Project on indigenous peoples' spiritual and cultural beliefs. The Committee requests information about the process by the State party to obtain the free, prior and informed consent of indigenous peoples with regard to the project.

The Committee requests information on concrete measures taken to ensure that the sacred character of this site for indigenous peoples is respected, including the possibility of suspending the permit granted to the Arizona Snowbowl in order to further consult with indigenous peoples and take into account their concerns and religious traditions.

Her Excellency Mrs. Betty E. King
Ambassador, Permanent Representative
Permanent Mission of United States of America
to the United Nations Office and other international organizations in Geneva
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Regarding traditional rights to land of Western Shoshone, the Committee requests updated information on the implementation of its 2006 Decision 1 (68) and its request to the State party to send high-level representatives to meet with Shoshone peoples.

The Committee urges the State party to take urgent action to find a solution acceptable to all in accordance with its obligations under the Convention. It recalls its general recommendation No. 23 (1997) on the rights of indigenous peoples, in particular their right to own, develop, control and use their communal lands, territories and resources as well as the duty of the State party to ensure that indigenous communities can exercise their rights to practise and revitalize their cultural traditions and customs.

In accordance with Article 9(1) of the Convention and article 65 of its Rules of Procedure, the Committee would be grateful to urgently receive information on the issues and concerns as outlined above before **31 July 2012** or in its next periodic report overdue since 20 November 2011 in case the report is finalized before that date.

Allow me, Excellency, to reiterate the wish of the Committee to continue to engage in a constructive dialogue with the Government of the United States of America, with a view to promoting the effective implementation of the Convention.

Yours sincerely,

Alexei Avtonomov
Chairperson of the Committee
on the Elimination of Racial Discrimination

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REFERENCE: CERD/82nd/GH/CR/MN

1 March 2013

Excellency,

I write to inform you that in the course of its 82nd session, the Committee on the Elimination of Racial Discrimination considered, under its early warning and urgent action procedure, the **situation of the Kikapoo Traditional Tribe of Texas, the Ysleta del Sur Pueblo (Tigua) and the Lipan Apache (Ndé) indigenous communities in relation to the construction of the Texas-Mexico border wall.**

According to the information received by the Committee, as of 2005, the United States Congress began enacting legislation allowing the Government to build a wall along the border between the United States of America and Mexico, with the purported aim of preventing the entrance of alleged terrorists, undocumented immigrants, and drug traffickers. Pursuant to the adoption of the REAL ID Act and the Secure Fence Act in 2005 and 2006 respectively, the Department of Homeland Security has reportedly waived 36 Federal and State laws to proceed with the construction of the wall, including the National Environmental Policy Act, the Endangered Species Act, the Native American Graves Protection and Reparation Act, the American Indian Freedom Act, and the Administrative Procedure Act. Subsequently, the border wall has allegedly been built on sensitive environmental areas and lands inhabited by indigenous communities, without sufficient and effective prior consultation with the affected population, and apparently continues to damage the land, the ecosystem, and the cultural and traditional way of life of indigenous communities. It has also been reported that while the wall has been built on the lands of indigenous peoples, it has skipped border areas with lucrative properties owned by business, such as the River Bend Golf Resort.

The Committee expresses its concern regarding the potentially discriminatory impact that the construction of the border wall might have on the Kikapoo, Ysleta del Sur Pueblo and Lipan Apache indigenous communities, including their access to tribal lands located north and south of the border and to resources required for traditional ceremonies.

Her Excellency
Ms. Betty E. King
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In particular, the Committee is concerned by the situation of the Lipan Apache, a tribe which reportedly remains Federally unrecognized, given the information received that the construction of the wall through its land has allegedly damaged ancestral burial sites, reduced the tribe's access to elders and other knowledge keepers, led to severe decline in biodiversity, and may lead to the disappearance of the tribal identity altogether as the community may be forced to leave the land.

Moreover, the Committee is concerned that, based on the information before it, the border wall has been constructed without the free, prior and informed consent of the affected communities, and that no effective judicial remedies or compensation have been provided to date. With regard to the latter, it has been reported that the Government's use of eminent domain powers cannot be effectively challenged in court, and that courts have not allowed claims to be brought regarding the potentially discriminatory impact of the wall.

In addition to the aforementioned case, the Committee also considered the reply of the State party to its previous cases examined under the early warning and urgent action procedure concerning the impact of the **Ski Resort Project in San Francisco Peaks** on indigenous peoples' spiritual and cultural beliefs and the **situation of the Western Shoshone**. The Committee would like to thank the State party for its note verbale of 29 August 2012, in which it provided links to its response to the communication sent by the Special Rapporteur on the rights of indigenous peoples, the Annex to the State party report submitted to the Committee in 2007 regarding the Western Shoshone, as well as the 2009 follow-up report to the Committee reiterating the position of the State party in relation to the Western Shoshone. The Committee notes that further information will be included in the periodic report which is currently under preparation.

While welcoming the responses and clarifications provided, the Committee would like to request that the State party provide updated and detailed information in its periodic report, overdue since 20 November 2011, on the following:

(1) The impact of the Texas-Mexico border wall on the rights of indigenous communities to have access to their land and resources that their own, or traditionally use, and to holy places, in community with people belonging in the same tribe; any recent or future measures envisaged to consult with and consider the requests of the affected communities; information on any compensation provided to affected communities to date; and any measures envisaged to reverse the negative impact of the construction of the border wall;

(2) Information on any further measures envisaged to engage with the operator of the Arizona Snowball Ski area to encourage the use of sources other than reclaimed waste water to produce artificial snow; and information on the outcomes of the appeal submitted to the Ninth Circuit;

(3) Substantive responses to the issues raised by the Committee in its Decision 1 (68) of 11 April 2006 concerning the situation of the Western Shoshone, in particular those identified in paragraph 7 of the decision, namely:

- legislative efforts to privatize Western Shoshone ancestral lands for transfer to multinational extractive industries and energy developers;

- destructive activities which are conducted and/or planned on areas of spiritual and cultural significance to the Western Shoshone peoples, including federal efforts to open a nuclear waste repository at the Yucca Mountain, the alleged use of explosives and open pit gold mining activities on Mont Tenabo and Horse Canyon, and the alleged issuance of geothermal energy leases at, or near, hot springs;

- resumption of underground nuclear testing on Western Shoshone ancestral lands;

- conduct and / or planning of all such activities without consultation with and despite protests of the Western Shoshone peoples; and

- difficulties encountered by Western Shoshone peoples in appropriately challenging all such actions before national courts and in obtaining adjudication on the merits of their claims, due in particular to domestic technicalities.

The Committee looks forward to receiving the information requested above in the State party's periodic reports.

Allow me, Excellency, to reaffirm the wish of the Committee to continue to engage in a constructive dialogue with the Government of the United States of America, with a view to assist the State Party in the effective implementation of the Convention.

Yours sincerely,

Alexei Avtonomov
Chair
Committee on the Elimination of Racial Discrimination

International Indian Treaty Council (IITC) Affiliates in Lands and Territories currently part of or under the jurisdiction of the United States:

Indigenous Tribal and Traditional Nation Governments: Pit River Tribe (California), Wintu Nation of California, Redding Rancheria (California), Tule River Nation (California), Muwekma Ohlone Nation (California), Coyote Valley Pomo Nation (California), Round Valley Pomo Nation (California), Independent Seminole Nation of Florida (Florida), Native Village of Venetie Tribal Government/Arctic Village Traditional Council (Alaska), Chickaloon Village Traditional Council/Chickaloon Native Village (Alaska), Stevens Village Traditional Council (Alaska), Native Village of Eklutna (Alaska).

Indigenous Organizations, Networks, Communities and Societies: National Native American Prisoners' Rights Coalition, White Clay Society/Blackfoot Confederacy (Montana), Indigenous Environmental Network (National), Columbia River Traditional Peoples (Washington/Oregon), Rural Coalition Native American Task Force (Minnesota), Yoemem Tekia Foundation, Pascua Yaqui Nation (Arizona), Tohono O'odham Nation Traditional community (Arizona), Oklahoma Region Indigenous Environmental Network (Oklahoma), Wanblee Wakpeh Oyate (South Dakota), IEN Youth Council, Cactus Valley/Red Willow Springs Big Mountain Sovereign Dineh Community (Arizona), Leonard Peltier Defense Committee, Eagle and Condor Indigenous Peoples' Alliance (Oklahoma), Seminole Sovereignty Protection Initiative (Oklahoma) Mundo Maya (California), Los Angeles Indigenous Peoples Alliance (California) American Indian Treaty Council Information Center (Minnesota), Vallejo Inter-Tribal Council (California), Three Fires Ojibwe Cultural and Education Society (Minnesota), California Indian Environmental Alliance (CIEA), Wicapi Koyaka Tiospaye (South Dakota), Indigenous Peoples Working Group on Toxics (National), North-South Indigenous Network Against Pesticides (multi-regional based in US), the International Indian Women's Environmental and Reproductive Health Network (multi-regional based in US) and United Confederation of Taino People: Borikén (Puerto Rico/United States), Kiskeia, (Dominican Republic), Barbados, Guyana (Arawaks), Bimini (United States), Jittoa Bat Natika Weria (Yaqui Nation, US and Mexico.