



## 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).<sup>1</sup> The trial court judgment was reversed by a three judge panel of the Federal District Court.<sup>2</sup> Subsequently, the full Ninth Circuit Court, en banc, reversed the three judge panel.<sup>3</sup>

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<sup>1</sup> *Navajo Nation v. U.S. Forest Serv.*, 408 F. Supp. 2d 866, 907 (D. Ariz. 2006).

<sup>2</sup> *Navajo Nation v. U.S. Forest Serv.*, 479 F.3d 1024, 1029 (9th Cir. 2007).

<sup>3</sup> *Navajo Nation v. Us Forest Serv.* No. 06-15455, (9<sup>th</sup> Cir. *en banc*, 2008, W. Fletcher dissenting), found at: [http://www.narf.org/sct/navajonationvusfs/9th\\_circuit\\_en\\_banc\\_opinion.pdf](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 9<sup>th</sup> 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.”<sup>4</sup>

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.

<sup>4</sup> Fn. 2, *Navajo Nation v Forest Service*, No. 06-15455 slip opinion at p. 2838 (9<sup>th</sup> Cir. 2007), found at: [http://www.narf.org/sct/navajonationvusfs/9th\\_cir\\_opinion.pdf](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.**”<sup>5</sup> (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.<sup>6</sup>

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

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<sup>5</sup> 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.

<sup>6</sup> 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 9<sup>th</sup> 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.”<sup>7</sup>

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.<sup>8</sup>

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

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<sup>7</sup> 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.

<sup>8</sup> 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."<sup>9</sup>

In an Urgent Action/Early Warning Decision<sup>10</sup> 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."<sup>11</sup> 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

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<sup>9</sup> 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.

<sup>10</sup> 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.

<sup>11</sup> Fn, 9 Supra, Para. 19.

Nations Declaration on the Rights of Indigenous Peoples<sup>12</sup> 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.<sup>13</sup> 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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<sup>12</sup> United Nations Declaration on the Rights of Indigenous Peoples (2007). UN Doc. A/RES/61/295 (Hereinafter "the Declaration").

<sup>13</sup> 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