

THE HOPI AND THE BLACK MESA: AN ARGUMENT FOR
PROTECTION OF SACRED WATER SITES

BY

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Abstract

Numerous studies have documented the dropping water levels in Hopi sacred springs. From 1966 to 2005, Peabody Coal Mining Company has continually used the water located directly under the Hopi reservation. The use of water for religious and cultural purposes represents more than symbolism, for without water the Hopi cannot perform their rituals to keep the water regenerating. The term “sacred water site” is introduced to capture the essence of the sacred springs and water sources that are central to the Hopi religion. Currently, Peabody Coal has filed for a Life in Mine with the Office of Surface Mining to re-open the use of the N-aquifer. Under current U.S. policy, little to no protection is available for protection of Hopi sacred water sites. Through binding international law and current declarations, an argument will be made for the protection of the Hopi’s sacred water sites.

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Introduction

Due to the continual destruction of Tribal Nations' sacred sites throughout the United States, a question is raised of whether sacred sites can be protected. Within United States policy are limited mechanisms for protection of sacred sites for Tribal Nations. Remedies set out in U.S. policy offer little more than words in providing for proper protection of sacred sites from possible or further destruction. Increasingly over the years, the United States has produced document after document presenting a false sense of protection for sacred sites. The connection between Tribal Nations' culture and land is one that is not easily translated into the European idea of religion. Imagine the practice of Catholicism without the Bible, one cannot exist without the other. Without the availability of sacred sites, Tribal Nations cannot practice some of the most important ceremonies crucial to their cultures. U.S policy fails in providing, therefore international law principles need to be explored to develop an argument to be presented to the U.S. Congress for protection of sacred sites.¹

A sacred and traditional way of life for the Hopi people is on the brink of drying up. Hopi culture centers around water which teaches the danger that mismanagement of water will ultimately lead to the end of their people. Water is not only a means of survival, but is also at the core of Hopi culture. Each Hopi village is centered around sacred springs which are fed by the N-aquifer. The Hopi throughout the year use the sacred springs for ceremonies. The Hopi believe that the springs are

¹ U.S. Congress creates and passes legislation in regards to Tribal Nations. In order to protect sacred site, U.S policy needs to be evaluated and changed to offer real remedies and protection of sacred sites in accordance with the laws and customs of Tribal Nations.

living entities in which hold their ancestors. Water is central to the Hopi creation story and thus they hold water sacred.

The N-aquifer is located directly under the Hopi reservation. Not only does the N-aquifer feed the sacred springs, but it also provides the only means of drinking water for a number of Hopi villages. Currently, the Peabody Coal Mining Company has depleted a major source of water valuable to the Hopi. The water has been used to transport coal from the Peabody Coal stripmine on Black Mesa to the Mohave Desert Power Plant, 273 miles away. Water levels in the sacred springs have dropped due to the continual use by Peabody Coal Mining Company. Studies have shown that if the water continues to be pumped out of the underground aquifer by the year 2010, one or more Hopi villages will be without water.

Recent efforts to stop the depletion of water by the Peabody Coal Mining Company have been successful at present with the closure of the Mohave Desert Power Plant. The Hopi Tribe mandated the stop of the N-aquifer by the year 2005. Although the use of water from the N-aquifer has stopped as of 2005, Peabody Coal Mining Company has filed for a Life in Mine with the Office of Surface Mining, which could ultimately lead to the use or the re-use of the N-aquifer. Currently, the Office of Surface Mining has drafted an Environmental Impact Statement to evaluate the potential damage that would be caused should the Life in Mine be granted.

U.S. policy fails to support the concept of both time and space having cultural meaning. Tribal Nations cannot practice their culture and religion in any random location. Rather, U.S. policies aim to accommodate Tribal Nations in practicing their

culture rather than offering real protections of sacred sites which are crucial to culture. Culture and religion of Tribal Nations are practiced at the originating locations. The act of removing the practice from its origination location renders the practice meaningless.

It is shameful that the Hopi are left with few options in protecting their sacred sites under U.S. policy. Ideally, the Hopi should be able to protect their sacred sites without the intrusion of any other sovereign. Thus, international law principles are explored to gain protection for sacred water sites. Indigenous peoples throughout the world have sought refuge in the international arena for protection of their basic human rights.

It is important to understand international law principles that could be used in developing an argument against the United States for violation of religious and cultural human rights. Human rights are established and recognized in international law principles, thus it is important to know which ones the United States is a party to and/or supports. After exhausting U.S. remedies, the next logical step for the Hopi to protect sacred water sites is through international law. An argument needs to be made on behalf of the Hopi to the U.S. Congress that cultural significance of the sacred water sites at Hopi require protection based on international law principles and customary law.

The three areas of international law principles that protect sacred sites will be explored in this thesis will establish an argument for the Hopi. The three will be: United Nations general principles of self-determination, International legal principles

and regional organization support of Indigenous rights. Contained within the UN general principles of self-determination are the UN Charter, International Bill of Rights and Convention on the Elimination of All Forms of Racial Discrimination. The International Indigenous Legal Principles area includes the Convention Concerning Indigenous and Tribal Peoples in Independent Countries No. 169 and the UN Declaration on the Rights of Indigenous Peoples. Finally, the Regional System is composed of the Organization of American States.

Indigenous peoples have entered the international arena to safeguard basic human rights using the above mentioned international law principles. International principles recognize that cultural significance to land is reason enough for protection. In the landmark case decision of the *Mayayna Awas Tingni*, in which Indigenous rights to land was upheld, the Hopi can look at their success as a model for protection of sacred water sites.²

² Research from both primary and secondary sources were used in the composition of this work. The majority of research is library based. Sources used in this thesis included journal articles, legislation, treaties, and reports. All sources were accessed via the library, internet and LexisNexis. Less traditional methods were also used in collecting resources. In using both traditional and non-traditional methods of research, I was able to collect and analytically assess each source and how the source could be applied to the Hopi sacred water site situation. The Black Mesa issue based on legal issues prompted the use of library-based sources as the best way of assessing and analyzing documents regarding Hopi legal interests.

Methods associated with conducting interviews and oral history were not necessary in conducting research for this thesis. My primary focus of the thesis was to examine international and U.S. national principles and argue that application to the Hopi situation may help resolve the sacred water issues.

CHAPTER 1

History of Hopi and the Black Mesa

The Hopi people have consistently resided on the Black Mesa dating back as far as thirty-eight thousand years ago.³ Known for its shape of a human hand, the Hopi reservation contains three mesas and thirteen Hopi villages.⁴ Each village is built around the most sacred aspect of the Hopi culture - water.⁵ Beneath the Hopi land lay underground aquifers, which are responsible for feeding the sacred springs that are present in each village. The Hopi reservation is located in the remote desert of Arizona which annually receives twelve inches of rain in a good year.⁶ The Hopi developed agricultural techniques of using water which have been instrumental in their survival thus far. From an early age, Hopi children are taught the importance of preserving these springs for cultural purposes and survival.⁷

According to their origin story, “the Hopi believe that they climbed from an underground world to this one where a Deity gave them all they would need to survive. Included were maize seeds, a planting stick, and a gourd filled with water.”⁸ Each gift given to the people represented aspects of Hopi culture. The seeds were given as a representation of their soul, the stick as a mechanism to survive and finally

³ Charles Wilkinson, “Home dance, the Hopi, and Black Mesa Coal: Conquest and endurance in the American Southwest,” *Brigham Young University Law Review*, no. 2 (1996): 449, <http://www2.lib.ku.edu:2048/login?URL=http://search.ebscohost.com/login.aspxdirect=true&db=aph&AN=9608071774&site=ehost-live> (accessed January 25, 2008).

⁴ Id at 3.

⁵ Tim Folger, “A Thirsty Nation,” *Oearth* 26, no. 3 (Fall 2004): 3.

⁶ Black Mesa Water Coalition, “Sacred Water,” Energy and Water, <http://www.blackmesawatercoalition.org/energyWater.html> (accessed January 24, 2008).

⁷ John Dougherty, “Dark Days of Black Mesa,” *Phoenix New Times*, 2000: 1.

⁸ Katosha Nakai, “When Kachinas and Coal Collide: Can Cultural Resources Law Rescue the Hopi at Black Mesa?,” *Arizona State Law Journal* 35 (Winter 2003): 1286.

the gourd represented “the environment – the land and all its life-forms- as well as the sign of the Creator’s blessing.”⁹ It is in conjunction with these beliefs that water is the central point of their entire religion and cultural way of life. The Hopi creation story is the foundation for their tribal identity, cultural practices, beliefs and daily lives.

Each year, the Hopi perform ceremonies for and in honor of water. It is through ceremonies such as the Kachina dances that the Hopi give thanks for water. Although the Hopi perform other ceremonies throughout the year, the Kachina dance is thought to be the most sacred and crucial. It is through ceremonies that the Hopi believe they communicate with their ancestors and call forth the water.¹⁰ “Not only are their dead buried throughout the area near the streams and washes, but death allows them to become one with the clouds. When the clouds arrive, they are returning ancestors, their rain both communicates with and is a blessing of the living.”¹¹

The water in the sacred springs is used for both practical and ceremonial purposes,¹² only certain ceremonies are used both in and with the aid of the springs.¹³ The use of water for religious and cultural purposes represents more than symbolism, for without water the Hopi cannot perform their rituals to keep the water regenerating.¹⁴ These rituals that the Hopi sustain are inextricably linked to water in

⁹ Id.

¹⁰ Nakai, 1288.

¹¹ Id.

¹² Folger, 34.

¹³ Nakai, 1288.

¹⁴ Id.

the sacred shrines. “Each shrine and sacred place contains an irreplaceable life essence that prohibits any relocation or altering of the shrine.”¹⁵ In essence, each shrine is unique and considered sacred.¹⁶ The desecration of these shrines would put an end to some of the most sacred ceremonies necessary to the Hopi culture.

In addition to using water for sacred ceremonies, the Hopi use water for agricultural purposes. The Hopi people have cultivated an invaluable form of agriculture. This form of agriculture is called “dry farming.” As stated by Wall and Masayesva, dry-farming in the high desert of northern Arizona, relying only on precipitation and runoff water, requires almost miraculous levels of faith and is sustained by work, prayer, and an attitude of deep humility. Dry farming relies strictly on precipitation and runoff water.¹⁷ It is through this form of farming that the Hopi show a deep humility for the earth and the water the Hopi use. The Hopi knowledge of hydrology coupled with agriculture, hard work, and prayer is what has kept the Hopi surviving in desert conditions. The Hopi’s precise and respectful way of practicing agriculture is a great example of their stewardship of the land.

The Hopi villages are located on three mesas which contain pristine natural resources. Although the two other mesas contain natural resources as well, this thesis will only focus on Black Mesa. The first major resource is water from Black Mesa.

¹⁵ T.J. Ferguson, Leigh Jenkins and Kurt Dongoske, “Managing Hopi Sacred Sites to Protect Religious Freedom,” *Cultural Survival Quarterly* 19 (January 1996): 36.

¹⁶ Vernon Masayesva and Peter Whiteley, “The Use and Abuse of Aquifers: Can the Hopi Indians Survive Multinational Mining? *In Water, Culture, and Power: Local Struggles in a Global Context.* John M. Donahue and Barbara R. Johnson, eds. (Washington DC: Island Press, 1998):16.

“Springs attach the rain and snow to themselves and thus serve as powerful foci of value in Hopi thought. Indeed, this is why they are sacred places, if much of Hopi religious thought celebrates life, than springs are self-evident indexes of the dynamic process that produces and sustain life.”

¹⁷ Masayesva and Wall, 435.

The Navajo (N) aquifer is located under the Black Mesa. The N-aquifer directly feeds the sacred springs located in each Hopi village which are places of worship for the Hopi.¹⁸ The water is not only used by the Hopi for ceremonial purposes and drinking water, but is also used by the Peabody Coal Mining Company.

Water is not the only natural resource that is embodied in Hopi lands. In addition to water, there are rich coal deposits. Beneath the mesa is “one of the richest deposits, coal seams up to 18 feet thick.”¹⁹ In the eyes of the Hopi, “the Hopi did not own the land or minerals – no one did – and therefore they could only lease them to someone else.”²⁰ Through their beliefs about their relationship to land, the Hopi believe that it can only be leased out and that ultimate responsibility of the land is upon the Hopi. This ideology of land ownership contrasted with the mainstream U.S. ideology of land use has directly led to the predicament that the Hopi are currently in. The Hopi must protect their sacred lands and the water underneath.

The drastic difference in ideology of what makes land sacred needs to be addressed further. The term “sacred site” is limited in its scope in that the first thing that comes to mind is land. In the case of the Hopi, land is not the only area held sacred, in addition is water. In order to address this stereotypical cognition of land, a new phrase must be introduced. The term “sacred water site” captures the essence of what is sacred and central to Hopi religion.

¹⁸ Marilyn Snell, “The Rainmaker,” *Sierra* 92, no.1 (Jan/Feb 2007): 18. <http://www2.lib.ku.edu:2048/login?URL=http://search.ebscohost.com/login.aspx?direct=true&db=aph&AN=23581530&site=ehost-live> (accessed January 27, 2008).

¹⁹ Id.

²⁰ Wilkinson, 451.

A “sacred water site” may be defined as a hydrological area embedded with spiritual and cultural significance by a people through an on-going stewardship relationship. The next question is at what point does a “sacred water site” need to be protected. In the Hopi example, once the sacred water springs begin to show significant water depletion due to external causes other than their own uses, protection needs to be enforced.

The Coal Mining Threat to Black Mesa

In 1966, the Hopi and Navajo people entered into a leasing contract with the Peabody Coal Mining Company to extract coal from Black Mesa. The same contract allowed for the pumping of water from an underground aquifer called the Navajo (N) aquifer.²¹ Coal is mixed with the water from the N-aquifer in a process called slurry to transport it in an underground piping system²² to the Mohave General Station Power Plant over 270 miles away. The coal from Black Mesa delivers over 1,500 megawatts of energy to the Mohave General Station Power Plant which in turn uses the energy to provide electricity to Southern California, Arizona and Nevada residents.²³ Each week the Peabody Coal Mining Company pumps two million dollars into the Hopi and Navajo economy.²⁴

Originally, the Hopi and Navajo people entered this contract feeling compelled to strengthen their economy for their people. Yet, as history has played out before, once Indigenous peoples are found to own something valuable, every

²¹ Folger, 32.

²² Id at 33.

²³ Black Mesa Water Coalition.

²⁴ Brenda Norrell, “Interior urged to opt for escape clause on Black Mesa: Resource council says it could rescue water for future generations,” *Indian Country*, July 4, 2001: A1.

measure is taken to strip them of it for unfair compensation. The Hopi and Navajo put their trust in an attorney by the name of John Boyden. Unknown to either Tribe, Boyden was an employee of Peabody Coal Mining Company.²⁵

The lease signed in 1966 did not reflect the best interests of the Hopi, Boyden made every effort to create an environment that would best serve the Peabody interest and not that of the Hopi. He suggested a formal government as opposed to Hopi traditional government by creating a constitution in order to gain federal recognition of the unofficial Tribal council he was working with. Many traditional Hopi leaders opposed the constitution and did not vote. He suggested voting on the lease as opposed to a Tribal discussion and finally he promised a great economic boost. Yet, from 1966 to 1989 the Hopi only received a little over one dollar and fifty cents for each acre-foot of water taken by Peabody when in reality it was worth between thirty and fifty dollars per acre-foot at market value.²⁶

Boyden told the Hopi that there was a great lake under them and that Peabody would only be taking a small amount of that out. They now know this was not the truth. In the end, it was never the intent of the Hopi to deplete their water to the magnitude it has been today.²⁷

Every day from 1966 to 2005, 3.3 million gallons of water were pumped from the N-aquifer under the Hopi reservation. The continual taking of copious amounts of water from the aquifer not only impacts the daily lives of the Hopi, but also has had a

²⁵ Dougherty, 1.

²⁶ Folger, 34.

²⁷ Peter Coyote and Tantoo Cardinal, *In the Light of Reverence*, DVD, Bullfrog Films, produced by Christopher Mcleod (2003).

direct impact on their cultural practices. Water from the N-aquifer is the sole source of water for some of the Hopi villages.²⁸ Studies have shown that the depletion of this enormous amount of water has led to the drying up of Hopi sacred springs. Due to the vastly negative effects of coal mining and depletion of the water, the Hopi have been fighting to stop these actions. In 2005 due to persistent efforts, the Mohave Power Plant was closed after “refusal to install modern pollution control equipment as required by a Clear Air Act Consent Decree.”²⁹

In follow-up to the closure of the Mohave Power Plant, the Hopi created internal legislation to help safeguard against the continual taking of water by Peabody by mandating that the usage of the N-aquifer cease by 2005.³⁰ Thereafter, Peabody created reports providing detailed arguments for the reopening of Black Mesa waters and/or the use of another aquifer.

According to the U.S. Geology Survey Open-File Report 2006-1068³¹ (Geology Report), since the opening of the Peabody Coal Mining Company over sixty percent of the water extracted from the N-aquifer was solely for industrial uses. The equivalent of sixty percent of water extracted is 267,240 acre feet of the N-aquifer.

²⁸ Natural Defense Council, *Drawdown: An Update on Groundwater Mining on Black Mesa*, by David Beckman and Tim Grabel (2006): 3.

²⁹ Black Mesa Water Coalition, “Sacred Water,” Energy and Water, <http://www.blackmesawatercoalition.org/energyWater.html> (accessed January 24, 2008).

³⁰ *Id.*

³¹ Margot Truini and J.P. Macy, Department of Geological Survey, *Ground-Water, Surface-Water, and Water-Chemistry Data, Black Mesa Area, Northeastern Arizona 2004-05* (2006).

One acre-foot represents 325,851 gallons of water and that is comparable to the area of a football field and one foot deep.³² The Geology Report also shows that the N-aquifer table is dropping as a direct result of the removal of water by Peabody. The Geology Report states, “water levels have declined in most of the confined area. Large declines are near municipal pumping centers or near industrial pumping centers.”³³ The Geology Report defines the Black Mesa as a confined area. Ultimately, the Geology Report provides evidence in rebuttal to the Peabody claim that the company’s taking of water has led to no major decline in the water level of the N-aquifer.

In addition to mining the Black Mesa, Peabody also mines various locations throughout the United States. Other forms of transportation of coal have been used at the other sites such as railroad, barge and truck, yet Peabody insists on wasting pristine drinking water to transport coal through a slurry line from Black Mesa to the Mohave General Station.³⁴ Peabody’s use of more than fifty percent of water extracted for industrial purposes is preposterous. “People of the Black Mesa region and beyond have been outraged by the unwise use of an only drinkable water source considering an area where water is already limited; the use of potable water to transport coal should be outlawed.”³⁵

³² Black Mesa Water Coalition, “Sacred Water,” Energy and Water, <http://www.blackmesawatercoalition.org/energyWater.html> (accessed January 24, 2008).

³³ Truini, Margot and J.P. Macy, 1.

³⁴ Irl Engelhardt, *Peabody Energy Corp Annual Report 10-K For 12/31/02* (Dallas: 2003) <http://www.secinfo.com/dsvrp.23Fu.htm> (accessed February 28, 2008), 10.

³⁵ Black Mesa Water Coalition, “Sacred Water,” Energy and Water, <http://www.blackmesawatercoalition.org/energyWater.html> (accessed January 24, 2008).

The National Resources Defense Council (NRDC) also issued a report called “Drawdown Mining Water on Black Mesa and an Update on Groundwater Mining in Black Mesa.”³⁶ Findings of this report also indicated that the N-aquifer has dropped by over 100 feet, leading the Hopi to expect at least one village to be out of water by 2011.³⁷ Furthermore, the NRDC cited various recommendations that the federal government should take in response to the Black Mesa situation. According to the report, “not only are there signs of material damage to the aquifer, but that the government’s failure to adequately monitor the damage can be attributed to a flawed modeling system that obscures on-site evidence of physical damage.”³⁸ A major recommendation made by the NRDC is for the U.S. Environmental Protection Agency to classify the sole aquifer as protectable by the government.

In spite of findings of the NRDC and the Geology Report, Peabody is still fighting to regain usage of the aquifers claiming that studies have shown no significant harm due to their abundant extraction of water.³⁹ According to the findings by Peabody, “long term water use will not pose any permanent or significant impacts to the aquifer or other water sources.” The Peabody Report called A Three-Dimensional Numeric Model on the N and D Aquifers states that the study was conducted by two hydrologic firms and reviewed by an independent expert. Over the past 30 years, Peabody has prepared over 11 major studies that confirm that their use

³⁶ Beckman and Grabiell, 1.

³⁷ Amy Corbin, “Black Mesa,” Sacred Land Film Project, http://www.sacredland.org/endangered_sites_pages/blackmesa.html (accessed January 18, 2008): 1.

³⁸ Beckman and Grabiell, 3.

³⁹ Beth Sutton, “Peabody Releases Latest Black Mesa Aquifer Study; Confirms Prior Studies Showing No Significant Harm,” <http://phx.corporate-ir.net/phoenix.zhtml?c=129849&p=irol-newsArticles&ID57926&hi> (accessed January 18, 2008).

of water from the N-aquifer has little to no impact. The studies range from 1972-1999 according to Beth Sutton of Peabody.⁴⁰

Although Peabody does provide other studies with the majority done by Peabody and dating back to 1972,⁴¹ the technology was not well-equipped to provide as accurate results as those found in recent studies. Despite the fact that Peabody has presented this information, it is clear through other studies that the water level in the N-aquifer has indeed dropped and there is a need to preserve what is left by discontinuing the extraction of water from the aquifer. There is obvious damage done by the continual taking of water and it is shown in the continually dropping water lines in the Hopi sacred springs.

In efforts to continue the production of coal, Peabody has filed a lease extension application with the Federal Office of Surface Mining. Specifically, Peabody hopes to obtain a “Life in Mine” which would allow them to extract coal until it is no longer available.⁴² The U.S. Department of Interior in conjunction with The Office of Surface Mining Reclamation and Enforcement in 2006 released a Draft Environmental Impact Statement⁴³ in response to Peabody’s proposal. According to the Stop Peabody Coalition, the Impact Statement does not adequately study alternative mechanisms for transporting coal. Three alternatives were presented by

⁴⁰ Id.

⁴¹ Id.

⁴² Stop Peabody, “Stop the Black Mesa Project- Stop Peabody Coal!” Stop Peabody, <http://www.stoppeabody.org> (accessed January 18, 2008).

⁴³ Klein, Allen, U.S. Department of Interior, *Black Mesa Project: Draft Environmental Impact Statement, DOI DES 06-48, OSM-EIS-33*, Prepared by The Office of Surface Mining Reclamation and Enforcement (November 2006) <http://www.wrcc.osmre.gov/WR/deis/front.pdf> (accessed February 28, 2008).

the Draft Environmental Statement and of the three, two including the continual use of the N-aquifer including the use of the additional aquifer, the C-aquifer.

The first alternative is called Alternative A: Agencies' Preferred Alternative-Approval of the LOM Revisions and All Associated Components of the Black Mesa Project. Alternative A includes granting the Life of Mine and the continual use of the N-aquifer including the additional use of the C-aquifer.⁴⁴ The second alternative is called Alternative B "Conditional Approval of the LOM Revision without Approval of the Black Mesa Mining Operations, Coal-Slurry Pipeline, and C-Aquifer Water Supply System."⁴⁵ Alternative B only approves the Life of Mine until 2026 with the reduced continual use of the N-aquifer. The final alternative, Alternative C is "Disapproval of the LOM Revision- No Action."⁴⁶ Alternative C would not grant the Life of Mine. If Alternative A is granted, not only will the continual depletion of sacred waters continue, but pollution and the displacement of at least seventeen Black Mesa residents is guaranteed.⁴⁷

The current research presented above illustrates the negative effects on both the environment and culture of the Hopi people. The research indicates a clear reduction of water on the Hopi and Navajo reservations. Recent efforts made to stop the usage of water by the Peabody Company have been successful for the immediate future with the closure of the Mohave Desert Power Plant. Without proper mechanisms for protection, "the drive to sacrifice pristine desert groundwater for

⁴⁴ Id at 5.

⁴⁵ Id at 7.

⁴⁶ Id at 7-8.

⁴⁷ Id at 11.

cheap energy”⁴⁸ will not disappear. It is imperative that Hopi sacred water sites are protected. In the Hopi belief system without the sacred waters for ceremonies, it is believed that their ceremonies and prayers will have little effect and thus, a great tragedy will befall the Hopi and all mankind.⁴⁹

United States policies and acts need to be evaluated to find successful remedies for the Hopi to protect their sacred lands for cultural purposes. The majority of reports currently conducted addressed specific environmental damage occurring and not the cultural damage to the Hopi way of life. Black Mesa water should not only be protected through environmental mechanisms but also for its cultural significance. Few have ventured to make such an argument that cultural damage should be equivalent to environmental damage in terms of protection.

In the following chapters, both U.S. and international principles will be examined in terms of providing protection for the sacred water sites of the Hopi. The biggest battle the Hopi face is educating the United States and the Peabody Coal Mining Company on their concept of what is a sacred water site and how the destruction of one would be very detrimental to the Hopi. The next chapter will examine U.S. trust responsibility, policies, acts, and executive orders and demonstrate how the U.S. perspective of what is sacred versus the Hopi perspective has led to minimal protection of the Hopi sacred springs.

⁴⁸ Corbin, 1.

⁴⁹ *Lomayaktewa v. Hathaway*, 520 F.2d 1324 (9th Cir. 1975). Brief of Plaintiff, Exhibit A.

CHAPTER 2

Failure of United States Remedies

The United States has historically offered Tribal Nations protection through treaties, legislation, policies, acts and the trust doctrine, but time after time failed to uphold these protections when Tribal Nations attempt to enforce them. Five areas of law specifically have offered little more than words for Tribal Nations in their pursuit to protect their sacred sites. Those areas include: treaties, the trust doctrine, the National Historical Preservation Act,⁵⁰ the American Indian Religious Freedom Act⁵¹ and Executive Order 13007.⁵² Each of these areas of law will be discussed in reference to the Hopi fight to protect their sacred water and lands. This chapter will examine how the use of any U.S. remedy will only offer minimal, if any protection.

Treaties

Historically the United States has entered into treaties with Tribal Nations offering protection for various things such as natural resources, fishing rights and water rights in return for large cessions of land. Ironically, former President Richard Nixon once stated, a communist country like Russia is bad due to its failure to keep and enforce treaties that it has signed.⁵³ Yet, the U.S. continues to abrogate treaty after treaty signed with Tribal Nations, on the pretext that U.S. interests outweigh

⁵⁰ National Historical Preservation Act of 1966, 16 U.S.C § 470.

⁵¹ American Indian Religious Freedom Act of 1978, Public Law 95-341, 42 U.S.C. § 1996.

⁵² Presidential Document, Executive Order no. 13007, "Indian Sacred Sites," *Federal Register* 61, no. 104 (May 29, 1996).

⁵³ Vine Deloria Jr., *Custer Died for Your Sins: An Indian Manifesto* (New York: Macmillan, 1969): 28.

tribal interests.⁵⁴ Therefore the U.S. is no better than any other country that abrogates treaties and should not hold themselves above them.

Needless to say, the Hopi have not entered into a treaty with the U.S. If they had, it is doubtful that the United States would uphold their obligations. As long as Tribal Nations, such as the Hopi, own valuable resources [coal] on their lands, the United States will continue to find in favor of exploitation of those resources on grounds that the benefit to the majority of the U.S. outweighs the concerns of a small tribal community.

U.S Property Law versus Tribal Property Law

The first problem to be addressed before discussing U.S remedies for the Hopi is the conflict associated with different perspectives of property. All of the available remedies are based on the U.S. eurocentric ideology of property rights. This comes into question because if the Tribal Nation does not “own” their land then they have a minimal legal right to ask for protection of it. Tribal Nations are only viewed as mere occupants of land and do not own them under U.S. federal Indian law.⁵⁵ This ideology came from the eurocentric viewpoint of property law.

Property law differs greatly for Tribal Nations versus the federal government. U.S. property law is based on the notion of ownership of land and with that land comes rights. The best way to describe U.S property rights is through the bundle of

⁵⁴ U.S. Constitution, art. 3, sec 2 and art. 6. The constitution and the the laws and treaties of the United States made in accordance with it, are the “supreme law of the land.” However in the cases of *Lone Wolf v. Hitchcock* and *South Dakota v. Bourland* treaties made with Native American tribes have been abrogated by the United States on the basis of plenary power doctrine.

⁵⁵ *Johnson v. McIntosh*, 21 U.S. 543 (1823): 591. The court held “that the Indian inhabitants are to be considered merely as occupants, to be protected, indeed, while in peace, in the possession of their lands.” Id.

sticks analogy. The bundle of sticks represents the ownership interests held by the owner such as the ability to exclude others, to lease the land or to enjoy the property. The idea is that all the rights come in a bundle and can be separated. “Indians did not aggregate the specific land use rights into a single bundle and identify with this bundle a new concept of absolute or full ownership. For these Indians, these sticks were unknown and fully alien to their system.”⁵⁶

In the concept of bundle of sticks, the rights associated are only assured through ownership of the land. As Erica Irene Daes explains, “Indigenous peoples do not view their heritage in terms of property at all - that is, something which has an owner and is used for the purpose of extracting economic benefits - but in terms of community and individual responsibility. For Indigenous peoples, heritage is a bundle of relationships rather than a bundle of economic rights.”⁵⁷

Thus, the United States used their ideology of property law and imposed it upon tribal communities to take their land and “hold it in trust” for Tribal Nations and individuals. The notion of putting land into trust was developed in the General Allotment Act of 1887⁵⁸ and later extended in the Indian Reorganization Act of 1934.⁵⁹ Reservations were reserved in treaties and then the Allotment Act broke up tribal lands held in trust, which was a violation of treaties between the U.S and tribal communities.

⁵⁶ Michael Blumm and Judith V. Royster, *Native American Natural Resources Law: Cases and Materials*, (Durham: Carolina Academic Press, 2002), 4.

⁵⁷ Sub-Commission on Prevention of Discrimination and Protection of Minorities, Commission on Human Rights, UNESCO: *Study on Protection of the Cultural and Intellectual Property Rights of Indigenous Peoples*, prepared by Erica Irene Daes E/CN.4/Sub.21/1993/28, 1993: para 22.

⁵⁸ General Allotment Act of 1887, 24 Stat. 388, 25 U.S.C. § 331.

⁵⁹ Indian Reorganization Act of 1934, 48 Stat. 984.

The idea of holding land in trust from a U.S viewpoint was to protect that land for the Tribal Nations. Upon entering the land into trust, the United States held the deed to the land and had management authority over the land through the Department of Interior. In 1882 by Executive Order from President Chester A. Arthur, the Hopi reservation was established.⁶⁰ With the establishment of a reservation, the land was put into trust by the United States for the Hopi. Therefore, the Hopi must appeal to the U.S Department of Interior for any changes to the land, land use, or for further protections for Hopi lands.

In addition to differences in ideologies of property, Tribal Nations are at a difficult point for protecting sacred sites because of cultural views different from that of the U.S. The basic differentiation in thought centers on religion as a direct influence on the creation of law. The U.S. system is based on a eurocentric mindset that religion and place of practice can be separated whereas the Tribal mindset is that religion and place of practice cannot be separated. The idea of protecting a specific piece of land solely for practices and spiritual survival⁶¹ is a foreign concept in U.S. law.⁶²

The Tribal theory of culture and religion is based on both space and time.⁶³ Religions not similar to Tribal Nations focus on the time of the event that is religious to them as opposed to the space in which it happened. As an example, Christian

⁶⁰ Eric Cheyfitz, "The Navajo-Hopi Land Dispute: A Brief History," *Interventions International Journal of Postcolonial Studies* 2, no. 2 (July 2000): 258-259.

⁶¹ Currently under the National Historical Preservation Act cultural sites are protected but not for spiritual purposes.

⁶² Coyote and Cardinal (DVD).

⁶³ Vine Deloria Jr., *God is Red: A Native View on Religion* (Golden, CO: Fulcrum Publishing, 1994), 64.

denominations view particular places such as Jerusalem as a place that Jesus was resurrected from the dead⁶⁴ yet they can worship him from any location. Tribal spiritual culture is focused on the place of the occurrence. The idea of practicing a culture and religion devoid of the location it originated from is a foreign concept to Native Americans. The fact that culture and religion are based on the relationship to land⁶⁵ further supports absolute need for Natives to practice at the originating location.

The Hopi culture is based upon the “sacred springs” in which irreplaceable life essences live, they cannot practice their culture/religion if this place is destroyed. “With out them, the Hopi people cannot fulfill their religious obligation to serve as stewards of the land”⁶⁶ and protect water. The reason for providing a comparative background on U.S and Hopi religious foundations is to provide a means for understanding the often different values of religion that underlie United States policy toward Native American pursuit of protection of sacred sites. It is these differences that make it nearly impossible for Tribes such as the Hopi to find remedies in U.S. law.

⁶⁴ Paul V. M. Flesher, “Official Christianity Glossary for Introduction to Religion,” University of Wyoming, <http://uwacadweb.uwyo.edu/religionet/er/christ/Cglossry.htm#ltr.j> (accessed February 27, 2008).

⁶⁵ Deloria, *God is Red*, 62-77.

⁶⁶ Ferguson, Jenkins and Dongoske, 36.

Trust Doctrine

Originating out of the *Cherokee Nation v. Georgia*⁶⁷ case, the trust doctrine was established by creating a guardian-to-ward relationship between the United States and Tribes. The notion of guardian-to-ward in relationship to land was codified in the General Allotment Act of 1887 through creation of trust land status. This Act as mentioned earlier provided guidelines for the U.S. federal government to take Tribal land into trust and in return the U.S. held the deed to the land. In addition to holding the deed to Tribal land, the U.S. through the trust doctrine also had management authority over the land. Thus, if Tribes want to make any changes to land such as entering into a contract for extraction of coal from tribal lands, the federal government must give approval.

In accordance with the law, the trust doctrine is the first line of defense the Hopi could argue for protection of their “sacred water site.” The extension of fiduciary duties of the United States to Hopi religious freedom and protection of their sacred water site is arguable under the trust doctrine.

In establishing a relationship of ward to guardian, it would be presumed that the United States would always act in the best interest of its ward. The Department of Interior (DOI) has the authority to preside over matters involving a trust responsibility between the U.S. and Tribes. Since the Secretary of Interior must handle all matters involving the Tribes and their lands, the Hopi may make strong arguments to the

⁶⁷ *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831), 17. “Their relations to the United States resemble that of a ward to his guardian. They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the President as their great father.” Id.

Secretary citing a violation of fiduciary responsibilities. The Secretary of the Interior is responsible for approving any type of contract made between a Tribe and an outside company.

As the Secretary oversees and signs off on all contracts, the Hopi have a viable argument to find the Secretary of Interior in violation of his/her fiduciary duties. In the contract between the Hopi and Peabody, an escape clause is present that states, “if Peabody’s pumping causes adverse affects to the aquifer or its users, it should trigger the clause.”⁶⁸ As shown earlier, numerous studies have shown significant adverse affects, yet Peabody has fended off the Hopi’s attempts to enforce the escape clause.

This blatant disregard for the escape clause by the Secretary of Interior only proves that relying on the trust doctrine to protect Tribal resources, including sacred sites, is an endless road with no results. Ultimately, it becomes a game of who has the most money to pay for reports to support their claim. As long as the U.S. government continues to support wealthy companies like Peabody, the Hopi are hopeless in their efforts.

U.S. Supreme Court Decisions on Native American Religious Freedom

One of the major cases affecting Tribes’ ability to protect their sacred sites using the First Amendment of the U.S. Constitution was *Lyng v. Northwest Indian Cemetery Protective Association of 1988*.⁶⁹ The *Lyng* case is highly similar to the situation of the Hopi. The *Lyng* case involved the paving of a 75 mile roadway in the

⁶⁸ Nakai, 1290.

⁶⁹ *Lyng v. Northwest Indian Cemetery*, 485 U.S. 439 (1988).

Chimney Rock area of Six Rivers National Park to allow for timber harvesting on lands that have historically been used by Tribes for cultural/religious purposes.⁷⁰

The Tribes⁷¹ associated with the area filed an injunction against Richard Lyng, Secretary of Agriculture, to stop the Department of Forest Services from building the road and considering timber harvesting. Arguments on behalf of the Tribes stated that the construction of the road would cause “irreparable damage grounds”⁷² that are considered sacred and invaluable.

The Tribes claimed their rights under the Free Exercise Clause of the First Amendment would be violated with the construction of the road. The case was first heard in the Federal District Court of California and was appealed to the U.S. Supreme Court after the tribal claims were upheld by the Federal District Court. The U.S. Supreme Court found that the construction of the road would not violate the Tribes’ right to free exercise of religion.⁷³ The Hopi, like the Tribes of *Lyng*, are fighting to protect sacred sites for desecrations caused by development. Development in terms of building a road or mining a mountain for resources to build that road.

The most damaging effect of the *Lyng* case was justification for disregarding the centrality of Tribal religious sites to Tribal religion. According to Justice O’Connor of the U.S. Supreme Court, “the [U.S.] government could not operate if we

⁷⁰ Id at 439.

⁷¹ Id.

⁷² Id.

⁷³ Id at 442. “The case requires us to consider whether the First Amendment’s Free Exercise Clause prohibits the Government from permitting timber harvesting in, or constructing a road through, a portion of a National Forest that has traditionally been used for religious purposes by members of three American Indian tribes in northwestern California. We conclude that it does not.” Id.

were required to satisfy every citizen's religious needs and desires."⁷⁴ Thus, resorting back to the balancing game of which interest outweighs the other, a public timber logging road or Tribal religious access. In other words, the Court found that the building of a road would not cause the Native Americans to act in violation of their beliefs.

The prominent problem from this case was explaining a need for protection of religious sites for a group and not an individual. The U.S. Constitution contains rights for individuals and not for groups. Due to this separation of group to individual, Justice O'Connor pointed out that there needs to be a unanimous⁷⁵ belief of all tribal members to protect a site they call sacred. The testimony of one individual tribal member leads the Court to believe that the site cannot be "sacred" and thus, the destruction of the said site is not dooming the religion into extinction. Ultimately, the *Lyng* case has put to bed any further attempts for Tribes to use the First Amendment for protection of their sacred sites.

As stated best by Fisher, "only in recent decades has the national government taken steps to secure the religious heritage of Indians, and that initiative has come largely from the political branches, not the courts."⁷⁶ The judiciary branch repeatedly fails to provide tribes with remedies; rather they are left to depend on the legislative and executive branches to create acts and executive orders for protection. Therefore

⁷⁴ Id at 452.

⁷⁵ Id at 451. "To be sure, the Indians themselves were far from unanimous in opposing the G-O road, see App. 180, and it seems less than certain that construction of the road will be so disruptive that it will doom their religion."

⁷⁶ Louis Fisher, "Indian Religious Freedom: To Litigate or Legislate?," *American Indian Law Review* 26, no. 1 (2001/2002): 1.

the Hopi must seek protection from federal acts and executive orders for their sacred water sites. In the next section, federal acts and executive orders will be examined as means for providing protection including arguments as to why they offer little more than words in terms of protection.

U.S. Legislation and Protection of Sacred Sites

The National Historical Preservation Act of 1966

The National Historical Preservation Act of 1966 was created to protect historical sites that are culturally significant, educational, aesthetic, inspirational, economic, or energy based.⁷⁷ By means of protection, the NHPA merely provides a procedural mechanism to evaluate and review a proposal that may affect a Tribe's sacred site that are members to the National Registrar. The Act is limited only to evaluation of government-funded construction plans that would have an impact on National Register sites. In the NHPA is a detailed system of criterion under Section 101 for listing a site in the National Register and for "providing grants to be used for preservation efforts."⁷⁸

The process of listing a site on the National Register (NR) requires various steps. First, only certain agencies may place a nomination for a site to be listed on the National Register. Only a State Historical Preservation Officer (SHPO), a Federal Preservation Officer (FPO) or a Tribal Preservation Officer (TPO) can submit a nomination to the NR. Anyone can prepare a nomination but it must go through the

⁷⁷ National Historical Preservation Act of 1966, 16 U.S.C § 470, sec 1 (b) (4).

⁷⁸ Robert Ward, "The Spirits will leave: Preventing the desecration and destruction of Native American Sacred Sites on Federal Lands," *Ecology Law Quarterly* 19 (1992): 818.

SHPO, FPO or TPO. In addition to the type of agency, the type of land the site is located on must fall within the registers criteria. For example, if a Tribal Preservation Officer submits a nomination the site must be located on tribal lands. Nominations go to the National Park Service for determination of eligibility.

Eligibility is determined by the “quality of significance in American History, architecture, archeology, engineering, and cultural is present in districts, sites, buildings, structures, and objects that possess integrity of location, design, settings, materials, workmanship, feeling, and association.”⁷⁹ If the site is listed or determined to be eligible for the National Register list, the Advisory Council on Historic Preservation is afforded the opportunity to make comments on any federal project that might affect the listed or eligible listed site.⁸⁰ Each type of site has specific guidelines for eligibility. Specifically for sites associated with cultural significance for Tribes, Bulletin 38⁸¹ provides guidelines for eligibility.

The major problems associated with the Hopi using the National Historical Preservation Act contains are twofold. First, the Hopi must fit within very tight criteria to obtain membership within the NHPA. As mentioned above, a site must be on the National Register list to be protected under the NHPA. Sites specific to Native

⁷⁹ Department of Interior, National Park Service, *How to Apply the National Register Criteria for Evaluation bulletin*, by Patrick W. Andrus, 1995: 2

<http://www.nps.gov/nr/publications/bulletins/nrb15/nrb15.pdf> (accessed February 28, 2008)

⁸⁰ National Register of Historical Places, “Listing a Property: Some Frequently Asked Questions,” National Park Service, <http://www.nps.gov/nr/listing.htm> (accessed February 28, 2008).

⁸¹ Department of Interior, National Park Services, National Register, *Guidelines for Evaluating and Documenting Traditional Cultural Properties*, by Patricia Parker and Thomas King, 1990, <http://www.nps.gov/history/nr/publications/bulletins/nrb38/nrb38.pdf> (accessed February 28, 2008).

Americans are listed as “Traditional Cultural Properties (TCP).”⁸² The term TCP is not directly listed in the NHPA but the National Park Service has published guidelines for inclusion as a TCP. These guidelines are commonly referred to as Bulletin 38.⁸³ “Bulletin 38 defines TCP’s in general terms as National Register eligible properties that are associated with cultural practices, beliefs, and identities of a community.”⁸⁴

Bulletin 38 for TCP’s contains 4 areas for consideration to be put on the NR. The step is to “ensure that the entity under consideration is a property.”⁸⁵ Second is to look at the property integrity.⁸⁶ Third is evaluation of the property “with reference to the National Register criteria.”⁸⁷ Lastly, the site is looked at to “determine whether any of the National Register criteria considerations make the property ineligible.”⁸⁸

Second, the Act has no enforceable mechanism to actually protect the registered site beyond consideration of impacts. The mere existence of membership within the National Register does not guarantee the protection of the sacred site. Nowhere in the NHPA are enforceable remedies for desecration of an identified NHPA site. Once the area is listed on the Register list, it is protected under section 106 which requires that “federal agencies take into account the impact of their actions

⁸² Id.

⁸³ Id.

⁸⁴ Id at 1.

⁸⁵ Id at 11.

⁸⁶ Id at 12.

⁸⁷ Id at 12-14. “A. Association with events that have made a significant contribution to the broad pattern of history. B: Association with the lives of persons significant to our past. C: (1) Embodiment of the distinctive characteristics of a type, period, or method of construction (2) Representation of the work of a master (3) Possession of high artistic values.”

⁸⁸ Id at 14-19. “A: Ownership by a religious institution or use of religious purpose B: Relocated Properties C: Birthplace and graves D: Cemeteries E: Reconstruction F: Commemoration G: Significance achieved with in the past 50 years.” Id.

on the property and provide the Advisory Council of Historic Preservation an opportunity to comment on the federal project before implementation.”⁸⁹ Tribes are, at most, guaranteed the right to partake in a section 106 consultation process when a federal action would affect a TCP. Section 106 does not guarantee the halting of a project that would destroy a TCP, it only insures that federal agencies have fully considered the “historical preservation issues in planning of the project.”⁹⁰

The Hopi’s sacred water sites obviously meet the appropriate definitions of a TCP that qualifies them for the National Register. “They relate to the traditions, beliefs, practices, lifeways, arts, crafts, and social institutions of the community.”⁹¹ However despite the sacred significance of the springs to the Hopi, NHPA offers protection only for the historical significance of the site and not for its religious significance.

In the past, the Hopi have tried to enforce the NHPA and have failed. In the case of *Wilson v. Block*,⁹² the Hopi challenged the Department of Agriculture and Forestry service for allowing a permit to create a parking lot through the San Francisco Peaks, which the Hopi and Navajo Tribe regard as sacred.⁹³ The Hopi brought their claim under the NHPA to stop the development of a ski facility on the Peaks. Although the U.S. Court of Appeals acknowledged that the Peak was central

⁸⁹ Elizabeth Pianca, “Protecting American Indian Sacred Sites on Federal Lands,” *Santa Clara Law Review* 45, no. 2 (2005): 466.

⁹⁰ National Historical Preservation Act of 1966, sec. 106.

⁹¹ Nakai, 1320.

⁹² *Wilson v. Block*, 708 F.2d 735 (D.C. Cir.), cert. denied, 464 U.S. 956 (1983).

⁹³ *Id.* at 740. “The Navajo and Hopi plaintiffs contend that development of the Snow Bowl is inconsistent with their First Amendment right freely to hold and practice their religious beliefs. Believing the San Francisco Peaks to be sacred...” *Id.*

to the Hopi and Navajo religions, they failed to find on behalf of the Tribes. The court stated that the government did not burden their ability to believe.⁹⁴ In weighing the economic advantages against the religious deprivation and desecration of sacred sites, the economic reward carried a higher advantage in the eyes of the court.

The *Wilson* case is not unlike the *Lyng* situation. Both presented arguments for protecting sacred sites under religious freedom. If the Hopi file suit using the NHPA once again it is certain that they will face the same result as the *Wilson* case. The cases above show precisely why it is important to educate the legal system as to the importance of cultural significance to a specific piece of land in order to protect sacred sites from destruction.

American Indian Religious Freedom Act

The American Indian Religious Freedom Act (AIRFA) of 1978 was created to protect and preserve Tribes inherent rights to exercise their traditional religions, including, but not limited to, access to their sacred sites.⁹⁵ The AIRFA itself contains strong language for protection of sacred sites but offers no remedies if the Act is violated. As stated by Ward, the AIRFA provides no remedies and fails to make any specific procedural demands on governmental decision-making.⁹⁶

At most, the AIRFA would mandate that the President of the U.S. and federal agencies evaluate their current policies and procedures with the help of Hopi traditional religious leaders to determine appropriate means of preservation and

⁹⁴ Id at 742-746.

⁹⁵ American Indian Religious Freedom Act, sec 1.

⁹⁶ Ward, 816.

protection. Beyond outlining proper mechanisms for protection, no other action is required by law. Without enforcement mechanisms under the AIRFA, the Hopi would have no enforceable remedy. AIRFA follows in the U.S. customary history of dealing with Tribes in creating Acts that merely state the issue but do not provide means for protection or remedies.

Executive Order 13007

Executive Order 13007 was created in an effort to force federal agencies to evaluate their policies towards Tribal sacred sites. Section One of the order requires agencies to “accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and avoid adversely affecting the physical integrity of such sacred sites.”⁹⁷ Order 13007 requires federal agencies to develop procedures for proper notification to Tribes of actions that would adversely affect a sacred site.⁹⁸ Although the order mandates accommodating access, nowhere does it state specific protection of a sacred site.

Section four⁹⁹ of the order states that the order is only intended for internal purposes and is not intended to be enforceable by law. Due to its intention, the Hopi have no mechanism for enforcement and can only trust that each federal agency is abiding by Order 13007. Thus, leaving the Hopi to look beyond this Order and other U.S remedies for protection of their sacred water sites.

⁹⁷ Presidential Document, Executive Order 13007, sec 1.

⁹⁸ Pianca, 6-7.

⁹⁹ Presidential Document, Executive Order 13007, sec. 4.

Under current U.S. law, little to no protection is available for Tribal sacred sites. After reviewing the failure of the U.S. to uphold treaties, the failure of the U.S. legislation to provide enforcement mechanisms and the weakness of the trust doctrine, there is little left in U.S. law for Tribes to assert.

The continual battle of bringing claims under these in the U.S. court system has proven time after time to have more of a negative affect on protection of sacred sites rather than upholding protection. The United States historically has abrogated treaties with Tribes and thus, relying on protection through treaties is not a recommended route. Cases brought to the U.S. Supreme Court such as *Lyng* and *Wilson* have created negative opinions for failure to protect sacred sites. Acts such as the NHPA, AIRFA and Executive Order 13007 only provide literature on recommendations for protecting sacred sites, but continually fail in providing enforcement and remedies when violated. In this harsh environment of fighting for protection, the Hopi need to look toward international principles as a means for refuge and protection. The next chapter will explore the remedies available in International principles for the Hopi to use in protecting their sacred sites.

Chapter 3

International Law Principles as Remedies for the Hopi

Indigenous peoples have entered the international arena to safeguard their basic human rights. As indicated in Chapter 2, the U.S. fails to provide protection for sacred sites and offers unsuitable protection for sacred sites in danger of being destroyed. As best said by Andrea Carmen of the International Indian Treaty Council,

The U.S. presents itself as the bastion and defender of religious freedoms internationally. But the original peoples and nations of this land continue to be treated with blatant disregard and to suffer violations of our most basic human rights, including our right and obligation to maintain the religious practices and traditional ceremonies given to us by our Creator, and to protect our sacred sites and land.¹⁰⁰

The Hopi are among thousands of Indigenous peoples whose basic human rights have been violated by their home countries, known as nation-states. Through binding international law and current declarations, such as the UN Declaration on the Rights of Indigenous Peoples (Indigenous Declaration), an argument will be made for the protection of the Hopi's sacred water sites. This chapter will examine current international principles that may offer relief to the Hopi.

Customary international law principles are emerging and establishing obligations on states to "respect and protect Indigenous peoples' sacred sites, their right to access and use their sacred sites, and their cultural, spiritual and religious

¹⁰⁰ American Indian Program, Cornell University, "United Nations Calls into Question United States' Tolerance of Native Spiritual Practices, *Native Americas* 14, no. 4 (December 1997): 11. <http://www2.lib.ku.edu:2048/login?url=http://proquest.umi.com/pqdweb?did=581259311&Fmt=3&clientId=42567&RQT=309&VName=PQD> (accessed January 27, 2008).

practices.”¹⁰¹ The development of these principles derives from self-determination and well-established rules concerning religious freedom, human rights, land rights and cultural heritage. International principles of self-determination support legal action for Indigenous peoples to protect their sacred sites and culture. In order to have a greater understand of the applicability of international principles to the Hopi situation, a background on the United Nations and international principles will be provided.

Indigenous people can draw upon several sources of international principles. This section will discuss the UN System, UN general principles of self-determination, the International Bill of Rights, the Convention on the Elimination of all Forms of Racial Discrimination, International Indigenous legal principles, and regional organization support of Indigenous rights. Each section will then be applied to the Hopi situation of protecting sacred water sites.

Introduction of International Law Principles - United Nations System

International law principles are derived from the fundamental notion that every human being on earth is entitled to basic human rights.¹⁰² For Indigenous peoples this notion has not always applied to them as a people, but solely on an individual level. Protection of human rights, such as religious freedom to protect sacred sites, under international law principles is created in two ways: by treaties and

¹⁰¹ Robert T. Coulter, Andrea Page and Leonard Crippa, “International Human Rights Law Relating to Indigenous Sacred Sites” (memorandum, Indian Law Resource Center, Washington D.C., October 16, 2006) <http://www.indianlaw.org/pdf/dpa/bb/Sacred%20sites%20mmo.pdf> (accessed March 4, 2008).

¹⁰² Richard Lillich, Hurst Hannum, S. James Anaya and Dinah L. Shelton, *International Human Rights: Problems of Law, Policy and Practice*, 4th ed. (New York: Aspen Publishers, 2006), 2.

by customary law.¹⁰³ Treaties, also known as conventions, are binding instruments on nation-states who sign and ratify the treaty.¹⁰⁴

In examining the treaty process, the first step in creating a treaty in the human rights area usually involves holding a conference on the specific issue. Next, the conference concludes with a non-binding instrument such as a declaration or action plan. Upon the introduction of the proposed instrument, language is drafted and circulated among the interested UN member states.¹⁰⁵ Following the creation of an instrument, an actor or collaborative group must come forward to propose the treaty to the United Nations (UN) through a UN Committee, UN agency or a Non-Governmental Organization.¹⁰⁶ The treaty may also originate from multilateral agreements of nation-states, regional organizations or others calling together nation-states on the international level.

After circulation of the finalized instrument, a conference may be held to sign the treaty by each interested nation-state.¹⁰⁷ At this stage each nation-state has the option to ratify or to not ratify the treaty. Ratification of the treaty binds the signatory nation-state to the terms and language of the treaty.¹⁰⁸ For the nation-state ratifying a treaty there are two options for incorporating the treaty provisions into the nation-state's legal system. Self-executing treaties automatically incorporate into the

¹⁰³ Id at 46.

¹⁰⁴ "Vienna Convention on the Law of Treaties," May 23, 1969, *United Nations Treaty Series* 1155 (1980): 3.

¹⁰⁵ Id art. 9.

¹⁰⁶ Id art. 7.

¹⁰⁷ Id art. 10.

¹⁰⁸ Id art. 2(b). Ratification means in that the State establishes on the international plane its consent to be bound by a treaty. Id.

nation-state's law and non-self-executing treaties require nation-states to pass laws implementing the provisions of the treaty.¹⁰⁹

Once a set number of nation-states ratify the treaty, it is said to enter into force and become effective. Each party bound must apply the treaty in good faith.¹¹⁰

Treaties contain language on monitoring nation-states fulfillment of treaty obligations. Most human rights treaties have an oversight committee which requires periodic reports from member states. Some treaties specifically designate dispute resolution over treaty terms to the International Court of Justice (ICJ) or a committee monitoring the particular treaty. Some nation-states have consented to the jurisdiction of the ICJ, however, the U.S. has taken the position that the ICJ only has jurisdiction if the U.S consents on a case-by-case basis.

Customary law offers the majority of sources for Indigenous peoples to draw upon for protection. In addition to treaties formulating international law for human rights, customary law may carry the same authoritative weight. Customary law becomes international law when "a preponderance of states from different regions of the world converge on a common understanding of the norm's consent and expect future behavior to conform to the norm."¹¹¹ In cases where a particular nation-state has not signed a treaty pertaining to a violated human right, an argument can be made

¹⁰⁹ Lillich, Hannum, Anaya and Shelton, 462.

¹¹⁰ Id art. 24. sec 3. "When the consent of a State to be bound by a treaty is established on a date after the treaty has come into force, the treaty enters into force for that State on that date, unless the treaty otherwise provides." Also see art. 26. "Pacta sunt servanda" Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

¹¹¹ Lillich, Hannum, Anaya and Shelton, 152.

that although not a party to the treaty, the recognition of the human right by many other states makes the law customary and thus must apply to the nation-state.

It is through customary law that Indigenous peoples such as the Hopi can make arguments that protection of sacred sites is mandatory and nation-states should abide by international principles that protect such sites. Protecting Indigenous rights through customary law and treaties is not an easy task. Indigenous peoples have fought for years to be heard on an international level concerning violations of their ability to protect their sacred sites. The next section will give a background on the struggle Indigenous peoples have endured to be heard on an international level and the human rights instruments that contain language for support of protection of sacred sites.

International Law Principles that Provide Support For Protection of Sacred Sites

International law principles, customary law and state practice establish the “rights of Indigenous peoples to their sacred sites and their cultural, spiritual and religious practices,”¹¹² through various human rights instruments such as declarations and authorities. The strongest documents that will provide an assertive argument for the Hopi using international principles are: the UN Charter Article 55 on self-determination,¹¹³ the International Bill of Rights,¹¹⁴ the Convention on the

¹¹² Coulter, Page and Crippa, 2.

¹¹³ United Nations Conference on International Organization, United Nations Charter, 59 Stat. 1031, T.S. 993 (San Francisco, 1945), art 15.

¹¹⁴ United Nations Office of the High Commissioner for Human Rights, “Fact Sheet No. 2 (Rev. 1), The International Bill of Human Rights,” <http://www.unhchr.ch/html/menu6/2/fs2.htm> (accessed March 3, 2008).

Elimination of All Forms of Racial Discrimination (CERD),¹¹⁵ the International Labor Organization's Convention Concerning Indigenous and Tribal Peoples No. 169,¹¹⁶ and the UN Declaration on the Rights of Indigenous Peoples (Indigenous Declaration).¹¹⁷ In this section, each document will be examined as a means of providing an argument for protection.

UN General Principles of Self-Determination

The right of self-determination is one of the strongest arguments that the Hopi can make in showing that the United States has violated their right to cultural self-determination by allowing the destruction of Hopi sacred water sites. The United States has promoted a self-determination policy since 1975 in a very limited way,¹¹⁸ but has fostered a system that continues to chip away at the ability of Tribes to enforce their sovereignty. Under a true self-determination policy, the Hopi should have the right to determine how to preserve their cultural way of life.

The Hopi passed internal legislation barring the further use of the N-aquifer after 2005. The fact that the Peabody Coal Mining Company has the ability to petition to continue using the N-aquifer and mine coal is a violation of current U.S. stated Indian policy evidencing the Hopi's right to self-determination. The U.S. government-to-government relationship with Tribal Nations is a relationship that is

¹¹⁵ "International Convention on the Elimination of all Forms of Racial Discrimination," December 21, 1965, *Treaties or Other International Act Series* 2106 (1969).

¹¹⁶ "International Labour Organization Convention No. 169 Concerning Indigenous and Tribal Peoples," June 27, 1989, 72 ILO Official Bull. 59, (1991).

¹¹⁷ UN General Assembly, Resolution 61/295, *UN Declaration on the Rights of Indigenous Peoples*, (2007).

¹¹⁸ U.S. passed the Indian Self-Determination and Education Assistance Act of 1975 25 U.S.C. § 450 which has led to the current era of U.S. federal Indian law commonly called the era of Tribal self-determination.

equal to a sovereign-to-sovereign relationship which recognizes Tribal Nations' sovereignty. The United States is violating its own policies that recognize Tribes have the right to self-determination.

The Hopi need to assert an argument to the U.S. Congress that a right to self-determination is being violated by the inability of the U.S. to recognize the Hopi tribal legislation barring the further use of the N-aquifer. The violation occurred as a result of the Office of Surface Mining's authorization to make the ultimate decision as to the future use of the N-aquifer rather than uphold the Hopi Tribes legislation barring the further use of the aquifers. In order to seek true protection of the sacred water sites, the Hopi must present their argument to the U.S. Congress using international principles that uphold protection, since the U.S. does not recognize the jurisdiction of any international court.¹¹⁹

The right of self-determination for Indigenous peoples is crucial in asserting any type of right. The right to be self-determined supports and reinforces Indigenous peoples like the Hopi's rights to define how to preserve their ways of life, culture and sacred water sites.¹²⁰ Article 55 of the United Nations Charter of 1945 recognizes the

¹¹⁹ The United States fails to recognize any International Court jurisdiction. The U.S. refuses to ratify the Rome Statute that established the International Criminal Court. Therefore, the U.S. does not recognize the jurisdiction of the International Criminal Court. The U.S. also fails to recognize the jurisdiction of the International Court of Justice. In the case of *Nicaragua v. United States* after the International Court of Justice determined it had jurisdiction over the U.S., the U.S. refused to appear and then terminated its declaration accepting the Court's compulsory jurisdiction (see Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 *Am. J. Int'l L.* 341, 345 (1995) (referencing the *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)* 1986 WL 522, 1986 I.C.J. 14, I.C.J., Jun 27, 1986)

¹²⁰ Coulter, Page and Crippa, 8.

rights of self-determination of peoples.¹²¹ Every nation-state member of the UN is bound by the UN Charter. The right to self-determination is highly important in that it recognizes the right for people to determine their political status and pursue their cultural, economic and social development. The Hopi have the right of self-determination as expressed in both U.S policies and International law principles.

International Bill of Rights

Prior to 1945, international law has little to say about how nation-states treated individuals within their own boundaries. The issue of individual rights was considered within the domestic jurisdiction of nation-states. Following the Second World War, a movement for international human rights was set in motion. In the creation of the UN Charter, the main focus was protection of human rights and certain obligations upon member states.¹²² As a result of the movement for protection of human rights, human rights treaties have been adopted. The fundamental three international documents for human rights are called the International Bill of Rights.

The International Bill of Human Rights is composed of three international documents: the Universal Declaration of Human Rights (Universal Declaration),¹²³

¹²¹ UN charter, Article 55. Article 55 states that “with a view to the conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principles of equal rights and self-determination of peoples, the UN shall promote (a) higher standards of living, full employment, and conditions of economic and social progress and development; (b) solutions of international economic, social, health, and related problems; and international cultural and educational co-operation; and (c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.” Id.

¹²² UN Charter, art.1.

¹²³ UN General Assemle, Resolution 217A, *Universal Declaration of Human Rights*, (1948).

the Covenant on Civil and Political Rights (CCPR),¹²⁴ and the Covenant on Economic, Social and Cultural Rights (ESCR)¹²⁵. Each of the three documents contains language that formulates what are considered the basic universal human rights. In speaking specifically about the Hopi situation, the U.S is a supporter of two of the three documents of the International Bill of Rights. The U.S. voted in favor of the Universal Declaration of Human Rights and is a party to the Covenant on Civil and Political Rights, but has not ratified the Covenant on Economic, Social and Cultural Rights.

Universal Declaration of Human Rights

The Universal Declaration of Human Rights (Universal Declaration) is a non-binding declaration on all members of the UN. Although a declaration, the Universal Declaration can be argued as having attained the status of customary international law. The Universal Declaration gives guidelines for human rights that should be afforded to every individual regardless of race, gender, language, religion, or nationality. Furthermore, it established a common standard for every nation-state to promote and respect the rights and freedoms of individuals through education and teaching. Within the Universal Declaration support is implied for recognition of Indigenous culture and protection of sacred sites.¹²⁶

¹²⁴ “International Covenant on Civil and Political Rights,” December 16, 1966, *Treaties or Other International Act Series* 2200A (March 1976).

¹²⁵ “International Covenant on Economic, Social and Cultural Rights,” December 16, 1966, *Treaties or Other International Act Series* 2200A (January 1976).

¹²⁶ Coulter, Page and Crippa, 3.

Article 18 speaks to the rights of every individual to “manifest his religion or belief in teaching, practice, worship and observance.”¹²⁷ The Hopi use the sacred water shrines in specific ceremonies. In addition, their cultural belief reinforces their responsibility to protect and preserve water through ceremonies. If sacred water sites are not protected for future generations, the ability of future generations to practice certain ceremonies will be nearly impossible. The issue here is that Article 18 specifies only individuals as opposed to peoples. Although it makes reference to individuals specifically, the continual mining if granted by the Office of Surface Mining¹²⁸ would greatly interfere with not only individual Hopi’s rights to practice his or her religion/culture, but to the Hopi people as a whole.

Covenant on Civil and Political Rights

The first of the two international covenants to give life to the Universal Declaration of Human Rights is the Covenant on Civil and Political Rights. The CCPR of 1966 recognized human rights associated with civil and political rights. As stated earlier, the United States is party to the CCPR but not a party to the ESCR. Since the U.S has not ratified the strongest covenant for protection of these types of religious rights, the CCPR is the next covenant that contains language for support of religious rights. With the U.S being a party to the CCPR, the Hopi have the ability to present an argument for protection using CCPR articles against the U.S.

Article 1 and 24 of the CCPR contain the language for support of protection of minority rights. Article 1 of the CCPR recognizes the rights of self-determination for

¹²⁷ Universal Declaration of Human Rights, art. 18.

¹²⁸ The Office of Surface Mining is contained with the federal agency of Department of Interior.

peoples. Article 1¹²⁹ was taken from the UN Charter and used in both the CCPR and the ESCR. The recognized right of self-determination is important for the Hopi. The U.S. is a party to the CCPR therefore the Hopi may argue that their right to self-determination is being infringed upon. The Hopi are hindered by U.S policy from protecting their sacred water sites in ways in which the Hopi feel will be the most beneficial for the survival of their cultural ways of life.

Article 27 is the next strongest that protects minority rights.¹³⁰ The Hopi would certainly numerically qualify as an ethnic minority within the United States.¹³¹ Article 27 of the CCPR provides that, “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.”¹³² The Hopi right to enjoy their culture is being violated by the United States. A central part of their culture is water. The depletion of water by Peabody Coal Mining Company, permitted by the U.S. through the Office of Surface Mining, has directly affected the Hopi’s right to enjoyment of their culture. Without water in the Hopi sacred springs, their cultural

¹²⁹ Covenant on Civil and Political Rights, art 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.” Id.

¹³⁰ Article 27 is the strongest article in support for protection under minorities’ rights. Yet, the difference in minority rights and that of Indigenous rights is that Indigenous peoples have the right to self-determination and minorities do not.

¹³¹ Sub-Commission on the Promotion and Protection of Human Rights, *Study on the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities*, prepared by Francesco Capotorti U.N. Doc. E/CN.4/Sub.21, 1979. A minority is defined as “A group numerically inferior to the rest of the population of a state, in a non-dominant position, whose members – being nationals of the state – possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.” Id.

¹³² Covenant on Civil and Political Rights, art. 27.

distinction as a people is lost. In addition, their ability to practice their religion is hindered in that certain ceremonies can only be performed in the sacred water sites.

Covenant on Economic, Social and Cultural Rights

The Covenant on Economic, Social and Cultural Rights (ESCR) of 1966 is the final piece to the International Bill of Rights. The ESCR was “designed to ensure the protection of peoples as full persons, based on the perspective in which people can enjoy rights, freedoms, and social justice simultaneously.”¹³³ The ESCR contains strong language that supports protection of cultural rights. Unfortunately, the U.S. is not a party to the ESCR. In 1977, the U.S signed the ESCR¹³⁴, but has not yet ratified the covenant. Without ratification of the ESCR, the protection of cultural rights must be argued from customary law against the U.S.

Convention on the Elimination of All Forms of Racial Discrimination

The Convention on the Elimination on All Forms of Racial Discrimination (CERD) of 1969 was established to protect human rights associated with racial discrimination. The most important aspect of the CERD for the Hopi is that the U.S is a party to the Convention. Article 5 of CERD offers supporting language for protection of Hopi sacred water sites. Article 5 states that “[a]n end shall be put without delay to governmental and other public policies of racial segregation and especially polices of apartheid, as well as forms of racial discrimination and

¹³³ Covenant on Economic, Social and Cultural Rights, objective.

¹³⁴ There is a difference in signing and ratification of an international principle. The process of a nation-state to be signatory to a principle states that they agree to the language of the document. Nation-states that only sign and not ratify a treaty are not bound by the language of the treaty.

separation resulting from such policies.”¹³⁵ U.S. policies regarding protection of sacred sites are flawed with racial discrimination. Each policy era regarding Tribal Nations issued out of the fundamental notion that the U.S is superior and the Native American race is inferior.¹³⁶ If U.S policy truly recognized rights under Article 5 of the Convention, greater remedies for cultural protections of Tribal sacred places would exist.

According to a report titled, Consideration of Reports Submitted by State Parties Under Article 9 of the Convention¹³⁷ by the Committee on the Elimination of Racial Discrimination, the committee was concerned about reports of alleged U.S. activities such as mining that has been planned/carried out in areas of cultural/spiritual significance that have a negative impact on the enjoyment of Indigenous peoples to their rights under Article 5 of the CERD.¹³⁸ The Hopi like other Indigenous peoples are experiencing the negative impacts of mining impacting their sacred water sites. Appropriate measures need to be taken to ensure that the mining of Black Mesa with the use of water that also feeds the sacred water sites do not continue to have a negative impact on the Hopi’s rights under Article 5. That being said, U.S policies need continual evaluation and reconstruction to ensure that

¹³⁵ Covenant on Economic, Social and Cultural Rights, art. 5.

¹³⁶ David Getches, Charles Wilkinson and Robert Williams, *Cases and Materials on Federal Indian Law*, 5th Ed. (St. Paul: West, 2005): 140-216. U.S policy eras that affect Native Tribes are the Allotment and Assimilation Era (1887-1943), Termination and Relocation (1945-1960) Self-Determination.

¹³⁷ Committee on the Elimination of Racial Discrimination, *Consideration of Reports Submitted by United States Parties Under Article 9 of the Convention*, CERD/C/USA/CO/6, (Geneva, 2008).

¹³⁸ Committee on the Elimination of Racial Discrimination, 9.

Hopi can properly protect sacred sites without discrimination for being a tribal cultural/spiritual site.

International Indigenous Legal Principles

History of Indigenous Peoples Struggle to be heard on an International Level

The process of creating treaties to protect human rights is a lengthy and at times near impossible task. As mentioned above, only certain actors can be heard on the international level to introduce new treaties and raise awareness regarding a human right. Indigenous peoples for a long time were unable to have their voices heard because they were not viewed as independent nations or as non-governmental organizations. The process of being heard on an international level began in 1924 when the first Indigenous person, Chief Deskaheh of the Haudenosaunee, traveled to Geneva to speak to the League of Nations. His journey was to defend the rights of his people (Haudenosaunee) to live under their own laws on their lands which were being denied by the United States and Canada.¹³⁹ Although he was not allowed to speak, his efforts sparked encouragement for other Indigenous peoples to fight to be heard on an international level.

Following in the footsteps of Chief Deskaheh in 1974 the first International Indian Treaty Council (IITC) conference was held on the Standing Rock Sioux Reservation in South Dakota. This monumental meeting of over 97 Indian Tribes from across North and South American created and adopted the Declaration of

¹³⁹ United Nations Permanent Forum on Indigenous Issues, "About UNPFII and a brief history of Indigenous peoples and the international system," <http://www.un.org/esa/socdev/unpfii/en/history.html> (accessed March 10, 2008).

Continuing Independence of the Sovereign Native American Indian Nations.¹⁴⁰ In 1977, IITC became the first Indigenous organization to be recognized as a Non-Governmental Organization (NGO).¹⁴¹ The focus of IITC is to influence international law in areas pertaining to Indigenous peoples.

The status of NGOs are very important in that only NGOs, nation-states and committees can submit reports to the United Nations.¹⁴² The ability to have a NGO specifically for Indigenous peoples is an asset for the Hopi, allowing the Hopi representation on the international level. Current international principles recognize a connection between land and culture which is crucial for making an argument for protection for the Hopi. Usually international forums require individuals or groups to exhaust remedies through a nation-state before seeking an international solution. However, the Hopi have the ability to show that no U.S. remedies would be adequate to provide protection of their sacred water sites. With that in mind, below are human rights principles that support the protection of religious and cultural rights.

International Labour Organisation Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries

In 1957, the International Labour Organisation (ILO) adopted the Convention Concerning the Protection and Integration of Indigenous and other Tribal and Semi-

¹⁴⁰ International Indian Treaty Council, *Declaration on the Continuing Independence*, (1974).

¹⁴¹ International Indian Treaty Council, "About us: A Voice for Indigenous Peoples," <http://www.treatycouncil.org/about.htm> (accessed March 5, 2008).

¹⁴² Lillich, Hannum, Anaya and Shelton, 981. "Non governmental organizations play an important role in investigating and documenting human rights violations and bringing them to the attention of international institutions, states, and the public at large."

Tribal Populations in Independent Countries No. 107.¹⁴³ ILO No. 107 was the affirmation of basic human rights of Indigenous and Tribal peoples. ILO No. 107 originally contained articles supporting the rights of Indigenous and Tribal peoples but with the assumption that Indigenous peoples would assimilate into their colonizing societies.¹⁴⁴ It was not until 1989, that ILO No. 107 was replaced with the International Labour Organisation Convention Concerning Indigenous and Tribal Peoples in Independent Countries No. 169 (ILO 169). “The newer convention substituted the concept of integration for the notions of self-government, cultural identity and auto-denomination.”¹⁴⁵

These ILO conventions are the first conventions that recognize the rights of Indigenous peoples. The overall purpose of ILO No. 169 document is to uphold Indigenous peoples rights to “exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions.”¹⁴⁶ In introducing and creating this treaty, it calls upon nation-states to recognize and protect these rights. Two articles speak specifically to the Hopi situation: Article 4 and 5.

Article 4 of the ILO No. 169 creates the floor of protection for sacred sites by promoting adoption of appropriate safeguards for Indigenous culture. It states that

¹⁴³ “International Labour Organization Convention No. 107 Concerning the Protection and Integration of Indigenous and other Tribal and Semi-Tribal Populations in Independent Countries,” June 16, 1957. (1959).

¹⁴⁴ Angelique EagleWoman, “Re-establishing the Sisseton-Wahpeton Oyate’s Reservation Boundaries: Building a Legal Rational from Current International Law,” *American Indian Law Review* 29, no. 2 (2004-2005): 262.

¹⁴⁵ Paul Sillitoe, Alan Bicker and Johan Pottier, *Participating in Development: Approaches to Indigenous Knowledge* (London and New York: Routledge, 2002): 25.

¹⁴⁶ International Labour Organization Convention No. 169, intro.

“special measure shall be adopted as appropriate for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned.”¹⁴⁷

Although the U.S. has created legislation to accommodate Tribe’s access and protection of sacred sites, the legislation is not appropriate for truly safeguarding sacred sites. U.S. policy does not contain actual enforcement mechanisms for true safeguarding of the Hopi sacred water sites. At a minimum, the Hopi are guaranteed the right to be included in discussion of federal projects that would affect the sacred water sites. There is no guarantee that Hopi recommendations will change the outcome of a federal project. Without appropriate safeguards to protect their sacred water sites, the Hopi’s human rights are being denied.

Article 5 of the ILO No. 169 states, “[i]n applying the provisions of this Convention: (a) The social, cultural, religious and spiritual values and practices of Indigenous peoples shall be recognized and protected, and due account shall be taken of the nature of the problems which face them both as groups and as individuals”¹⁴⁸

U.S. legislation, such as AIRFA, recognizes the relationship Tribes have with the environment in relation to their religion and culture, but only to a certain extent. The extent to which the U.S. recognizes tribal viewpoints is in the framework of a eurocentric ideology of how religion should be practiced. The U.S. recognizes the rights of Tribes to freedom of religion but fails to protect sacred sites that are crucial to Tribes religious practices by failing to understand that one cannot exist without the

¹⁴⁷ International Labour Organization Convention No. 169, art. 4.

¹⁴⁸ International Labour Organization Convention No. 169, art. 5.

other. Unfortunately, the U.S is not a party to ILO No. 169 and therefore, the U.S. is not bound to its contents.

UN Declaration on the Rights of Indigenous Peoples

The UN Declaration on the Rights of Indigenous Peoples (Indigenous Declaration) is one of the most important and long awaited documents supporting the rights of Indigenous peoples. It took over 25 years for the Draft Indigenous Declaration to become adopted by the United Nations. On September 13, 2007, the Indigenous Declaration was adopted by the UN General Assembly. Unfortunately, four of the major states that continue to violate Indigenous human rights voted against the adoption of the Indigenous Declaration. The four were Australia, Canada, New Zealand and the United States.¹⁴⁹ Although the U.S. opposed the Indigenous Declaration, there was overwhelming support for the Indigenous Declaration by UN member-states.¹⁵⁰

Article 11¹⁵¹ of the Indigenous Declaration speaks specifically to the right to practice and revitalize cultural traditions and customs. In accordance with Article 11, the Hopi have the right to protect their sacred water sites. Hopi sacred water sites are manifestations of Hopi culture that should be afforded protection for past, present and future generations. Additionally, Article 11 states that nation-states provide remedies

¹⁴⁹ UN News Centre, "United Nations adopts Declaration on the Rights of Indigenous Peoples," UN News Service, <http://www.un.org/apps/news/story.asp?NewsID=23794&Cr=Indigenous&Cr1> (accessed March 3, 2008).

¹⁵⁰ The UN General Assembly vote on the UN Declaration on the Rights of Indigenous Peoples reflected the vote of 143 in favor to 4 against with 11 abstentions.

¹⁵¹ UN Declaration on the Rights of Indigenous Peoples, art. 11. "Indigenous peoples have the right to practice 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, artifacts, designs, ceremonies, technologies and visual and performing arts and literature."

for the taking of religious and spiritual property when taken without free prior and informed consent by the Indigenous peoples affected. The Hopi's rights under Article 11 were violated during their negotiation of the contract that granted the Peabody Coal Mining Company the right to use water from the N-aquifer. The Hopi were unaware of the detrimental outcome of granting water rights and were instead assured that continual taking of water would have a minimal affect.

Article 12 of the Indigenous Declaration states, "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."¹⁵² Article 12 supports the Hopi's right to protect and have access to sacred water sites. The fact that the water level in Hopi sacred springs is dropping and may eventually dry-up forever is a denial of the Hopi to their sacred sites. The ability to control the further depletion of water from the sacred water sites is not in the hands of the Hopi, but rather in the hands of the U.S. Without the ability to control the water level, the Hopi are denied their right to protect sites that are necessary for religious and cultural practices.

Article 25 contains the strongest language supporting the protection of Hopi sacred water sites. According to Article 25, "Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their owned or otherwise occupied and used lands, territories, waters."¹⁵³ As stated earlier in Chapter 1, the Hopi have a strong cultural and spiritual relationship with their sacred

¹⁵² UN Declaration on the Rights of Indigenous Peoples, art. 12.

¹⁵³ UN Declaration on the Rights of Indigenous Peoples, art. 25.

water sites which cannot be replaced if destroyed. The fact that Article 25 recognizes water in addition to land marks a positive movement for recognition that sacred sites reaches further than the stereotypical idea of land, but may include water. The United States has narrowly recognized the existence of sacred sites for cultural purposes but has failed to recognize them for spiritual purposes.¹⁵⁴

Article 26 contains three subsections that establish property rights for Indigenous peoples in their lands.¹⁵⁵ Subsection two and three contain language specific to the right of Indigenous peoples to management and ownership of resources which should be afforded protection through legal recognition by nation-states. Current protection through the U.S. does not guarantee Tribes full management of tribal natural resources nor does it recognize full ownership. In the case of the Hopi, the U.S. recognizes that the Hopi own the land including the water which Peabody Coal is using. Yet, the U.S. fails to recognize that the Hopi should have full management authority over the water in the N-aquifer.¹⁵⁶

The Indigenous Declaration by far contains the most positive language for protection of the Hopi sacred water sites out of all current international principles. The fact that the U.S. voted against its adoption should not deter Indigenous peoples within the U.S. from applying its articles to current situations. For the Hopi, a case

¹⁵⁴ In accordance with the National Historical Preservation Act, the listing of site can happen through cultural significance and makes no reference to the ability to list a site for its spiritual significance.

¹⁵⁵ UN Declaration on the Rights of Indigenous Peoples, art. 26.

¹⁵⁶ Judith Royster, "Indian Water and the Federal Trust: Some Proposals for Federal Action," *Natural Resource Journal* 46, no. 2 (Spring 2006): 357-398. The U.S. through their trust responsibility to Tribal Nations have stated that they are the hold title to water rights, thus the Hopi are not in full management authority of their sacred springs, if the US holds the title to the water.

can be made using international principles within the Organization of American States which includes the U.S as a member.

Regional Organization Support of Indigenous Rights

Organization of American States and Human Rights Violations

A major organization that influences the treatment of Indigenous peoples in the western hemisphere is the Organization of American States (OAS). The focus of the OAS is to “bring together the nations of the Western Hemisphere to strengthen cooperation on democratic values, defend common interests and debate the major issues facing the region and the world.”¹⁵⁷ The OAS is comprised of 34 states within the western hemisphere, which includes the U.S. In accordance with applying a treaty in good faith, Indigenous peoples can file petitions against a member state that is party to particular conventions to seek recommendations and at times compensation.¹⁵⁸

Within the OAS are two crucial documents that may help the Hopi protect sacred waters sites, the American Convention on Human Rights,¹⁵⁹ which was signed by the United States, but has not been ratified and the American Declaration of the Rights and Duties of Man.¹⁶⁰ In addition there are two forums within the OAS. First, is the Inter-American Commission on Human Rights followed by the Inter-American Court of Human Rights.

¹⁵⁷ Organization of American States, “The OAS at a Glance,” Key OAS Issues, http://www.oas.org/key%5Fissues/eng/KeyIssue_Detail.asp?kis_sec=20 (accessed March 20, 2008).

¹⁵⁸ Lillich, Hannum, Anaya and Shelton, 750.

¹⁵⁹ “American Convention on Human Rights,” July 18, 1978, O.A.S Treaty Series 36 (1992).

¹⁶⁰ “American Declaration of the Rights and Duties of Man,” 1948, Ninth International Conference of American States (1992).

Inter-American Commission of Human Rights and Inter-American Court of Human Rights

The Inter-American Commission of Human Rights (IACHR) is responsible for receiving, analyzing and investigating alleged individual human rights violations pursuant to the American Convention on Human Rights.¹⁶¹ The Inter-American System was born out of the American Convention on Human Rights. The main focus was to educate the world about human rights of people in the Americas, including Indigenous peoples. Through on-site visits to analyze alleged human rights violations, the IACHR generates reports to address such violations with member states. Recommendations are also made to the violating member states to adopt measures that would avoid further harm to citizens or others in their country. The Commission has also developed a Proposed American Declaration on the Rights of Indigenous Peoples (Proposed Indigenous Declaration).¹⁶² The fact that the IACHR developed the Proposed Indigenous Declaration indicates a real understanding of unique Indigenous issues.

The IACHR works in conjunction with the Inter-American Court of Human Rights. The Court's purpose is to interpret and enforce the provisions of the American Convention on Human Rights (American Convention). The United States refuses to recognize the jurisdiction of the Inter-American Court although they are a member-state to the OAS.

¹⁶¹ Inter-American Commission on Human Rights, "What is the IACHR?," Inter-American Commission on Human Rights Organization of American States, <http://www.cidh.oas.org/what.htm> (accessed March 21, 2008).

¹⁶² "Proposed American Declaration on the Rights of Indigenous Peoples," February 26, 2007, Inter-American Commission on Human Rights (December 1997).

Inter-American Commission of Human Rights Opinion on Indigenous Situations

Indigenous peoples have brought claims of human rights violations to the Inter-American Commission of Human Rights. The best case scenario for Indigenous peoples approaching the commission is represented in the case of the *Awes Tingni Mayagna v. Nicaragua*.¹⁶³ Nicaragua is a party to the American Convention and consented to the jurisdiction of the Inter-American Court. The *Awes Tingni* case paved the way for other Indigenous peoples such as the Hopi to seek recommendations and reports finding nation-states in violation of Indigenous human rights.

Awes Tingni (Sumo) Mayagna Community v. Nicaragua

The case of *Awes Tingni Mayagna Community v. Nicaragua* (*Awes Tingni* case) of 1998 represents a monumental moment for Indigenous people world-wide. The IACHR took a historic step in recognition of rights of Indigenous peoples to their land.¹⁶⁴ The *Awes Tingni* case involved the granting of a major logging cession on *Awes Tingni* land without consent by the state of Nicaragua. The *Awes Tingni* claimed that Nicaragua failed to demarcate *Awes Tingni* communal lands and failed to protect ancestral lands and natural resources. Lastly, the claim stated that Nicaragua failed to provide an effective remedy for *Awes Tingni* claims regarding the

¹⁶³ The *Mayagna (Sumo) Awes Tingni Community v. Nicaragua*, Inter-Am. Ct. H.R., (Ser. C) No. 79 (2001).

¹⁶⁴ International Network of Economic, Social & Cultural Rights, “Case of the *Mayagna (Sumo) Awes Tingni Community v. Nicaragua*, ESCR-Net, http://www.escr-net.org/caselaw/caselaw_show.htm?doc_id=405047 (accessed March 19, 2008).

“cession of 62,000 hectares of tropical forest to be commercially developed by a company in communal lands.”¹⁶⁵

In the preliminary stages of the case, the Awas Tingni filed a petition in the IACHR. When Nicaragua, a party to the American Convention did not respond to the petition, the case was brought to the Inter-American Court. The court found in unanimous favor of the Awas Tingni people. The Court stated that the rights to property of the American Convention¹⁶⁶ protected Indigenous peoples’ right to land, therefore Nicaragua had no right to grant cessions of land to a third party in the Awas Tingni ancestral lands. As a result, the Court required Nicaragua to adopt necessary measures to “create an effective mechanisms for demarcation and titling of the Indigenous communities’ territory, in accordance with their customary law, values, and customs.”¹⁶⁷

The second case brought before the IACHR involved Indigenous peoples filing petitions against the United States. The case of *Mary and Carrie Dann v. the United States* set precedent for the Hopi in dealing with the United States. Unlike the *Awas Tingni*¹⁶⁸ case, the U.S. has not ratified the American Convention and does not accept the jurisdiction of the Inter-American Court. However, the commission held

¹⁶⁵ *Mayagna Awas Tingni Community v. Nicaragua*, sec 5 (b).

¹⁶⁶ American Convention: Article 21: recognizes the right to property. In this regard, it establishes: a) that “[e]veryone has the right to the use and enjoyment of his property;” b) that such use and enjoyment can be subordinate, according to a legal mandate, to “social interest;” c) that a person may be deprived of his or her property for reasons of “public utility or social interest, and in the case and according to forms established by law;” and d) that when so deprived, a just compensation must be paid. *Id.*

¹⁶⁷ ESCR-Net.

¹⁶⁸ *Mary and Carrie Dann v. United States*, Case 11.140, Report No. 75/02, Inter-Am. C.H.R., Doc. 5 rev. 1 at 860 (2002).

that the U.S. is bound by the American Declaration of the Rights and Duties of Man because they are a party to the OAS.

Mary and Carrie Dann v. United States

The Dann sisters of the Western Shoshone Tribe filed a petition in the IACHR in 2003, claiming the U.S. had unlawfully taken tribal lands. The case arose from the refusal of the Dann sisters to submit to a permit system¹⁶⁹ imposed by the U.S. for grazing on Western Shoshone ancestral lands.¹⁷⁰ The Dann sisters alleged that the U.S. violated of Article 2 (right to equal protection), 3 (right to religious freedom and worship), 4 (right to freedom of investigation), 14 (right to work), 18 (right to fair trial), and 23 (right to property) of the American Declaration. The U.S. conceded that the land was Western Shoshone ancestral lands but contended that the Western Shoshone's right to the land was extinguished through a series of judicial and administrative decisions.¹⁷¹

The IACHR rejected the U.S. claims of extinguishment of Western Shoshone ancestral lands. After reviewing the merits of the case, the IACHR found that the U.S. failed to ensure the Dannels' rights under articles 2, 18 and 23 of the American

¹⁶⁹ Permit system referred to is the Bureau of Land Management who enforces and grants grazing permits.

¹⁷⁰ Lillich, Hannum, Anaya and Shelton, 174.

¹⁷¹ *Mary and Carrie Dann v United States*, sec. 3. "In this regard, the State contends that the Dannels have title, ownership and possession of the lands constituting their ranch in Nevada which had been patented to their father, that there has never been an effort by the State to remove the Dannels from their ranch, and that as long as the Dannels comply with the requirements of the Bureau of Land Management they are eligible for a permit to graze their livestock on public lands. As to the traditional Western Shoshone territory more generally, the State submits that the Dannels and other Western Shoshone lost any interest in the lands in question in 1872 as a result of encroachment by non-Native Americans, and that this determination was properly made through fair proceedings before the ICC, a quasi-judicial body established by the United States for the very purpose of determining Indian land claims issues. Finally, the State argues that the ICC awarded the Western Shoshone \$26,145,189.89 in compensation for the loss of their lands based upon 1872 land values." *Id.*

Declaration in connection with the Dann's claims to property rights of the ancestral Western Shoshone lands.¹⁷² The IACHR extended the advanced interpretation of the right to property from the previous case of the *Awes Tingni* which had similar issues arising out of property rights claims. The IACHR relied on current trends and developments in the international legal system regarding rights of Indigenous peoples. IACHR examined its own Proposed American Declaration on the Rights of Indigenous Peoples. The use of the Proposed Indigenous Declaration had led to the articulation of "general international legal principles that are now applicable both within and outside the Inter-American system."¹⁷³ The decision of the *Dann sisters* case came in the form of an advisory opinion that the U.S. has ignored.

In the opinions of *Awes Tingni* and the *Dann sisters*, the recognition of the rights of Indigenous peoples to their ancestral lands were upheld. The decisions in both cases mark a major step for Indigenous peoples, such as the Hopi against historical subjugation of Indigenous people's rights. The Hopi, are not unlike the *Awes Tingni* and *Dann sisters*, in that all three are fighting to protect ancestral lands and natural resources. The IACHR and Court offer an avenue for the Hopi to pursue on behalf of protecting their sacred water sites.

¹⁷² Lillich, Hannum, Anaya and Shelton, 174.

¹⁷³ Id at 175.

Concluding Remarks and Recommendations

The Hopi have made successful attempts to stop the taking of their most vital natural resource, water from the N-aquifer. Water represents both life and culture for the Hopi. Water located in sacred water sites are used for ceremonial purposes and is believed to contain irreplaceable life essences. In some cases, the water from the N-aquifer is the only source of water for Hopi villages. Studies have shown that the continual taking of water from the N-aquifer have led to its lower water line, including the depletion of water in Hopi sacred water sites.

The closure of the Mohave General Station Power Plant, which stopped mining by Peabody Coal Mining Company, was a short-lived victory with the immediate response of Peabody requesting a Life in Mine for the Black Mesa. The Life in Mine if granted would lead to the continual diminishment of water.

Only minimal protection of the Hopi sacred waters sites lies within a flawed system of remedies offered by the U.S. The U.S. system is based on a eurocentric ideology of religion and thus, fails to protect tribal sacred sites.

The United States perpetuates a legal system that legitimizes discriminatory policies towards Indigenous peoples through failing to protect their rights to freedom of religion and the destruction of sacred sites.¹⁷⁴ The federal government through congressional legislation continues to uphold the taking of natural resources and destruction of sacred sites without providing legal remedies. The continual

¹⁷⁴ Committee on the Elimination of Racial Discrimination, *Examination of the United States 4th, 5th, and 6th Periodic Reports of April*, Consolidated Indigenous Shadow Report, submitted by Alberto Saldamando, 2007: 93.

discrimination against Indigenous peoples through U.S. policies has rendered Indigenous efforts minimally effective in protecting their sacred sites.

United States laws historically have not offered the protection they claim and thus arguably will not protect Hopi sacred sites in accordance with how the Hopi feel the sites should be protected. U.S. policy fails to recognize a paralleling importance of land and cultural significance. An argument needs to be made on behalf of the Hopi to the U.S. Congress that cultural significance of the sacred springs at Hopi classifies it for protection. The direct negative affect on a culture should hold the same significance as negative environmental affects.

Historically, Indigenous peoples have entered the international arena to safeguard basic human rights. International principles recognize that cultural significance to land is reason enough for protection. In the landmark opinions from the IACHR on the *Awás Tingnis*, in which Indigenous rights to land were upheld and in the case of the *Dann sisters*, where the Proposed Indigenous Declaration was interpreted, the Hopi can draw upon these principles in the international arena to seek protection.

The Hopi have several options available on both the national and international level to form legal arguments for the protection of sacred water sites. In preparing a legal argument, the Hopi may draw upon international principles to encourage the U.S. Congress to provide remedies for their situation. The Hopi need to assert that developments affecting sacred water sites should only be allowed with the free, prior and informed consent of the Hopi and not that of the Office of Surface Mining. The

Hopi can draw upon international principles discussed within this thesis such as the UN Charter, the International Bill of Right, the CERD, ILO No. 169, Indigenous Declaration and the Proposed Indigenous Declaration from the OAS. Although the U.S. is not party to all of the international documents discussed, the documents can still be referenced as language that supports freedom of religion and culture for Indigenous peoples, such as the Hopi.

Another route available for the Hopi would be to file a petition seeking an advisory opinion from the Inter-American Commission. The Hopi can request advisory opinion of the Inter-American Commission in regard to violations of their rights in accordance with the American Declaration on the Rights and Duties of Man.¹⁷⁵ Although advisory opinions are non-binding and contain recommendations for nation-states to implement, these opinions influence international legal principles as customary law continues to form. Advisory opinions can also be used by the Hopi to bring international awareness to the issue of protecting sacred water sites. After exhausting U.S remedies, the next logical step for the Hopi to protect sacred water sites is through international law.

¹⁷⁵ United States is not a party to the American Declaration on the Rights and Duties of Man, but the Inter-American Commission has ruled that the U.S is subject to its contents through the U.S membership in the Organization of American States in accordance with the *Dann Sisters* case.

Bibliography

- American Indian Program, Cornell University. "United Nations Calls into Question United States' Tolerance of Native Spiritual Practices." *Native Americas* 14, no. 4 (December 1997): 11-14. <http://www2.lib.ku.edu:2048/login?url=http://proquest.umi.com/pqdwebdid=581259311&Fmt=3&clientId=42567&RQT=309&VName=PQD> (accessed January 27, 2008).
- Black Mesa Water Coalition. "Sacred Water." Energy and Water. <http://www.blackmesawatercoalition.org/energyWater.html> (accessed January 24, 2008).
- Blumm, Michael and Judith V. Royster. *Native American Natural Resources Law: Cases and Materials*. Durham: Carolina Academic Press, 2002.
- Capotori, Francesco. Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities, U.N. Doc. E/CN.4/Sub.21. Sub-Commission on the Promotion and Protection of Human Rights.
- Cheyfitz, Eric. "The Navajo-Hopi Land Dispute: A Brief History." *Interventions International Journal of Postcolonial Studies* 2, no. 2 (July 2000): 248-275.
- Committee on the Elimination of Racial Discrimination. *Examination of the United States 4th, 5th, and 6th Periodic Reports of April*. Consolidated Indigenous Shadow Report. submitted by Alberto Saldamando, 2007.
- Consideration of Reports Submitted by United States Parties Under Article 9 of the Convention. Committee on the Elimination of Racial Discrimination. CERD/C/USA/CO/6. Geneva: 2008.
- Corbin, Amy. "Black Mesa." Sacred Land Film Project. http://www.sacredland.org/angered_sites_pages/black_mesa.html (accessed January 18, 2008).
- Coulter, Robert T., Andrea Page and Leonard Crippa. "International Human Rights Law Relating to Indigenous Sacred Sites." Memorandum, Indian Law Resource Center, Washington D.C., October 16, 2006 <http://www.indianlaw.org/pdf/dpa/bb/Sacred%20sites%20mmo.pdf> (accessed March 4, 2008).
- Coyote, Peter and Tantoo Cardinal. In the Light of Reverence. DVD. Directed by Christopher Mcleod. Bullfrog Films, 2003.
- Daes, Erica Irene Study on Protection of the Cultural and Intellectual Property Rights of Indigenous Peoples, E/CN.4/Sub. 21/1993/28. Sub-Commission on Prevention of Discrimination and Protection of Minorities, Commission on Human Rights, UNESCO.

- Deloria Jr, Vine. *Custer Died for Your Sins: An Indian Manifesto*. New York: Macmillian, 1969.
- Deloria Jr. Vine, *God is Red: A Native View or Religion*. City: Fulcrum Publishing, 1994.
- Department of Interior. Ground-Water, Surface-Water, and Water-Chemistry Data, Black Mesa Area, Northeastern Arizona 2004-05, by Margot Truini and J.P. Macy. Prepared by the Department of Geological Survey in cooperation with the Bureau of Indian Affairs and the Arizona Department of Water Resources. Virginia, 2006.
- Department of Interior, National Park Service. *How to Apply the National Register Criteria for Evaluation bulletin*, by Patrick W. Andrus, 1995: 2. <http://www.nps.gov/nr/publications/bulletins/nrb15/nrb15.pdf> (accessed February 28, 2008)
- Department of Interior, National Park Services, National Register. *Guidelines for Evaluating and Documenting Traditional Cultural Properties*, by Patricia Parker and Thomas King, 1990, <http://www.nps.gov/history/nr/publications/bulletins/nrb38/nrb38.pdf> (accessed February 28, 2008).
- Dongoske, Kurt and T.J Ferguson and Mike Yeatts. "Working Together: Hopi Oral History and Archaeology: Part 1: The Consultation Process." *SAAbulletin/13-2/SAA9.html* (accessed January 21, 2008).
- EagleWoman, Angelique. "Re-establishing the Sisseton-Wahpeton Oyate's Reservation Boundaries: Building a Legal Rational from Current International Law." *American Indian Law Review* 29, no. 2 (2004-2005): 239-266.
- Ferguson, T.j., Leigh Jenkins and Kurt Dongoske. "Managing Hopi Sacred Sites to Protect Religious Freedom." *Cultural Survival Quarterly* 19 (January 1996).
- Fisher, Louis. "Indian Religious Freedom: To Litigate or Legislate?." *American Indian Law Review* 26, no. 1 (2001/2002): 1-39.
- Flesher, Paul. "Official Christianity Glossary for Introduction to Religion," University of Wyoming, <http://uwacadweb.uwyo.edu/religionet/er/christ/Cglossry.htm#ltr.j> (accessed February 27, 2008).
- Folger, Tim. "A Thirsty Nation." *Onearth* 26, no. 3 (Fall 2004).

General Conference of the International Labour Organisation. “International Labour Organization Convention No. 169 Concerning Indigenous and Tribal Peoples.” June 27, 1989, 72 ILO Official Bull. 59. (1991).

Getches, David, Charles Wilkinson and Robert Williams. *Cases and Materials on Federal Indian Law*. 5th Ed. St Paul: West, 2005.

Inter-American Commission on Human Rights. “What is the IACHR?,” Inter-American Commission on Human Rights Organization of American States. <http://www.cidh.oas.org/what.htm> (accessed March 21, 2008).

Inter-American Commission on Human Rights. “Proposed American Declaration on the Rights of Indigenous Peoples. Organization of American States (December 1997).

Inter-American System. “American Declaration of the Rights and Duties of Man.” 1948. Ninth International Conference of American States (1992).

“International Covenant on Civil and Political Rights.” December 16, 1966. *Treaties or Other International Act Series 2200A* (March 1976).

“International Covenant on Economic, Social and Cultural Rights.” December 16, 1966. *Treaties or Other International Act Series 2200A* (January 1976).

International Labour Conference. “International Labour Organization Convention No. 107 Concerning the Protection and Integration of Indigenous and other Tribal and Semi-Tribal Populations in Independent Countries.” June 16, 1957. (1959).

International Network of Economic, Social & Cultural Rights. “Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. ESCR-Net. http://www.escr-net.org/caselaw/caselaw_show.htm?doc_id=405047 (accessed March 19, 2008).

International Indian Treaty Council. “About us: A Voice for Indigenous Peoples.” <http://www.treatycouncil.org/about.htm> (accessed March 5, 2008).

International Indian Treaty Council. *Declaration on the Continuing Independence*. (1974).

Lillich, Richard, Hurst Hannum, S. James Anaya and Dinah L. Shelton. *International Human Rights: Problems of Law, Policy and Practice*. 4th ed. New York: Aspen Publishers, 2006.

- Masayesva, Virgil and Dennis Wall. "People of the Corn." *American Indian Quarterly* 28, no. 3 & 4 (Summer and Fall 2004): 435-453.
- Masayesva, Vernon and Peter Whiteley. "The Use and Abuse of Aquifers: Can the Hopi Indians Survive Multinational Mining?" *In Water, Culture, and Power: Local Struggles in a Global Context*. John M. Donahue and Barbara R. Johnson, eds. (Washington DC: Island Press, 1998).
- Nakai, Katosha. "When Kachinas and Coal Collide: Can Cultural Resources Law Rescue the Hopi at Black Mesa?." *Arizona State Law Journal* 35 (Winter 2003): 1283-1330.
- National Register of Historical Places. "Listing a Property: Some Frequently Asked Questions." National Park Service, <http://www.nps.gov/nr/listing.htm> (accessed February 28, 2008).
- Natural Resources Defense Council. *Drawdown: An Update on Groundwater Mining on Black Mesa*, by David Beckman and Tim Grabiell, 2006.
- Organization of American States. "American Convention on Human Rights." July 18, 1978. *O.A.S. Treaty Series* 36 (1992).
- Organization of American States. "The OAS at a Glance." Key OAS Issues. http://www.oas.org/key%5Fissues/eng/KeyIssue_Detail.asp?kis_sec=20 (accessed March 20, 2008).
- Pianca, Elizabeth. "Protecting American Indian Sacred Sites on Federal Lands." *Santa Clara Law Review* 45, no. 2 (2005): 461-492.
- Royster, Judith. "Indian Water and the Federal Trust: Some Proposals for Federal Action." *Natural Resource Journal* 46, no. 2 (Spring 2006): 357-398
- Sillitoe, Paul, Alan Bicker and Johan Pottier. *Participating in Development: Approaches to Indigenous Knowledge*: London and New York: Routledge, 2002.
- Snell, Marilyn. "The Rainmaker." *Sierra* 92, no. 1 (Jan/Feb 2007): 16-20. <http://www2.lib.ku.edu:2048/login?URL=http://search.ebscohost.com/login.aspx?direct=true&db=aph&AN=23581530&site=ehost-live> (accessed January 27, 2008).
- Stop Peabody. "Stop the Black Mesa Project – Stop Peabody Coal!" <http://www.stoppeabody.org> (accessed January 18, 2008).

- Sutton, Beth. "Peabody Releases Latest Black Mesa Aquifer Study; Confirms Prior Studies Showing No Significant Harm." <http://phx.corporate-ir.net/phoenix.zhtml?c=129849&p=irol-newsArticles&ID57926&hi> (accessed January 18, 2008).
- United Nations Conference on International Organization. *United Nations Charter*. 59 Stat. 1031, T.S. 993. San Francisco, 1945. art 15.
- United Nations General Assembly, Resolution 217A. *Universal Declaration of Human Rights*. 1948.
- United Nations General Assembly, Resolution 61/295. *UN Declaration on the Rights of Indigenous Peoples*. (2007).
- United Nations. "International Convention on the Elimination of all Forms of Racial Discrimination." December 21, 1965. *Treaties or Other International Act Series* 2106 (1969).
- United Nations Office of the High Commissioner for Human Rights. "Fact Sheet No. 2 (Rev. 1), The International Bill of Human Rights." <http://www.unhchr.ch/html/menu6/2/fs2.htm> (accessed March 3, 2008).
- United Nations Permanent Forum on Indigenous Issues. "About UNPFII and a brief history of Indigenous peoples and the international system." <http://www.un.org/esa/socdev/unpfii/en/history.html> (accessed March 5, 2008).
- United Nations Treaty Series. "Vienna Convention on the Law of Treaties." May 23, 1969.
- UN News Centre, "United Nations adopts Declaration on Rights of Indigenous Peoples," UN News Service, <http://www.un.org/apps/news/story.asp?NewsID=23794&Cr=Indigenous&Cr1> (accessed March 3, 2008).
- U.S. Department of Interior. *Black Mesa Project: Draft Environmental Impact Statement, DOI DES 06-48, OSM-EIS-33* (November 2006), by Allen Klein, Prepared by the Office of Surface Mining Reclamation and Enforcement. <http://www.wrcc.osmre.gov/WRdeis/front.pdf> (accessed February 28, 2008).
- Ward, Robert. "The Spirits will leave: Preventing the desecration and destruction of Native American Sacred Sites on Federal Lands." *Ecology Law Quarterly* 19 (1992): 795-843.

Wilkinson, Charles. "Home dance, the Hopi, and Black Mesa coal: Conquest and endurance in the American Southwest." *Brigham Young University Law Review*, no. 2 (1996). <http://www2.lib.ku.edu:2048/login?URL=http://search.ebscohost.com/login.aspxdirect=true&db=aph&AN=9608071774&site=ehost-live> (accessed January 25, 2008).