
Centre for International
Governance Innovation

UNDRIP Implementation Comparative Approaches, Indigenous Voices from CANZUS

SPECIAL REPORT

About CIGI

We are the Centre for International Governance Innovation: an independent, non-partisan think tank with an objective and uniquely global perspective. Our research, opinions and public voice make a difference in today's world by bringing clarity and innovative thinking to global policy making. By working across disciplines and in partnership with the best peers and experts, we are the benchmark for influential research and trusted analysis.

Our research initiatives focus on governance of the global economy, global security and politics, and international law in collaboration with a range of strategic partners and have received support from the Government of Canada, the Government of Ontario, as well as founder Jim Balsillie.

À propos du CIGI

Au Centre pour l'innovation dans la gouvernance internationale (CIGI), nous formons un groupe de réflexion indépendant et non partisan doté d'un point de vue objectif et unique de portée mondiale. Nos recherches, nos avis et nos interventions publiques ont des effets réels sur le monde d'aujourd'hui car ils apportent de la clarté et une réflexion novatrice pour l'élaboration des politiques à l'échelle internationale. En raison des travaux accomplis en collaboration et en partenariat avec des pairs et des spécialistes interdisciplinaires des plus compétents, nous sommes devenus une référence grâce à l'influence de nos recherches et à la fiabilité de nos analyses.

Nos projets de recherche ont trait à la gouvernance dans les domaines suivants : l'économie mondiale, la sécurité et les politiques internationales, et le droit international. Nous comptons sur la collaboration de nombreux partenaires stratégiques et avons reçu le soutien des gouvernements du Canada et de l'Ontario ainsi que du fondateur du CIGI, Jim Balsillie.

Credits

Director, International Law **Oonagh E. Fitzgerald**

Program Manager **Heather McNorgan**

Publications Editor **Susan Bubak**

Senior Publications Editor **Nicole Langlois**

Graphic Designers **Melodie Wakefield and Brooklynn Schwartz**

Copyright © 2020 by the Centre for International Governance Innovation

The opinions expressed in this publication are those of the authors and do not necessarily reflect the views of the Centre for International Governance Innovation or its Board of Directors.

For publications enquiries, please contact publications@cigionline.org.

Cover image: *Pisonia with acidification graph*, Judy Watson



This work is licensed under a Creative Commons Attribution — Non-commercial — No Derivatives License. To view this license, visit (www.creativecommons.org/licenses/by-nc-nd/3.0/). For re-use or distribution, please include this copyright notice.

Printed in Canada on Forest Stewardship Council® certified paper containing 100% post-consumer fibre.

Centre for International Governance Innovation and CIGI are registered trademarks.

67 Erb Street West

Waterloo, ON, Canada N2L 6C2

www.cigionline.org



Religious Freedoms, Sacred Sites and Human Rights in the United States



Kristen A. Carpenter

Introduction

Among Indigenous peoples, certain places in the natural landscape — mountains, lakes, rivers and rock features — have significance as sacred sites. These sites may identify places of creation or migration, where human beings interacted with their creator, or where they engage in religious and cultural activities today. Often, however, in the United States, these sites are located on lands now owned by the federal government, which purports to use them for recreation, development, or other practices that impede or even destroy Indigenous religions. Guarantees of religious freedom, articulated in the First Amendment of the US Constitution and federal statutes, have failed to protect American Indian religious practitioners in cases involving sacred sites on federal public lands.¹ Understanding the complexity of the situation, this paper nevertheless ventures to suggest one approach to the issue of American Indian religious freedom at sacred sites — and that is interpretation of the First Amendment and religious freedoms statutes through the lens of human rights law and, in particular, the United Nations Declaration on the Rights of Indigenous Peoples (UN Declaration).²

1 A note about terminology: In the United States, members of federally recognized tribes usually refer to themselves by their tribal designations, such as Navajo or Cherokee. Collectively, they use various terms, including American Indian and Native American. This paper uses these terms, as well as “Indigenous peoples,” which is more common in the international human rights movement.

2 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/RES/61/295, 46 ILM 1013 (2007) [UNDRIP].

Background: Sacred Sites in the United States

The US federal government has, over several centuries, claimed ownership over many lands that are sacred to Indigenous peoples.³ Federal agencies often permit natural resource development or recreational activities that negatively impact Indigenous religious and cultural practices, for example, by making it difficult or impossible to access sacred sites for prayer or ceremonies, contaminating spiritual plants and waters, or destroying the physical integrity of the site itself.⁴ Indigenous peoples in the United States have tried a number of strategies to deal with this problem, including litigation under the federal constitutional and statutory law framework protecting religious freedom for all citizens. The First Amendment of the US Constitution provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise.”⁵ In a number of cases, American Indian tribes and individual religious practitioners have argued that federal activity infringes on their free exercise of religion. The courts have rejected these claims in a series of cases revealing that, as a matter of federal law, American Indians do not enjoy freedom of religion when it comes to prayers and ceremonies that take place at sacred sites now located on federal public lands. Most notably, the US Supreme Court held in *Lyng v Northwest Indian Cemetery Association* (1988) that the federal government may develop Indian sacred sites even if it would “virtually destroy the Indians’...religion.”⁶ More than 30 years later, the *Lyng* case has never been overturned, and the federal government continues to sell, develop and desecrate sacred sites, in many cases making it difficult or impossible for Indigenous peoples to practise their religions.⁷

For decades, American Indian religious practitioners and advocates have tried various means to address this problem, including invoking provisions of the National Historic Preservation Act (NHPA), which requires federal agencies to consult with tribes regarding federal undertakings that may adversely impact “traditional cultural properties”; the passage of the Religious Freedom Restoration Act (RFRA) of 1993, which restores government limits on burdening free exercise; and the Religious Land Use and Institutionalized Persons Act of 2000, which extends certain protections for religious properties and prisoners’ rights.

Advocacy under these and other statutes has produced some success stories. In the two cases discussed below, *Bear Lodge Multiple Use Assn v Babbitt* (1999) and *Wyoming Sawmills v US Forest Service* (2004), agencies and tribes were able to engage in inclusive consultation processes leading to negotiated agreements with the relevant tribes, and these accommodation plans were upheld against judicial challenges. Under the authority granted to him by the Antiquities Act of 1906, in 2016, President Barack Obama approved Bears Ears National Monument, a 1.3-million-acre landscape sacred to the Navajo,

3 See generally Andrew Gulliford, *Sacred Objects and Sacred Places: Preserving Tribal Traditions* (Louisville, CO: University Press of Colorado, 2000); Jack Page, ed, *Sacred Lands of Indian America* (New York: Harry N Abrams, 2001).

4 This paper is based, in part, on the author’s earlier writings on American Indian sacred sites. For a more detailed account of the background of US religious freedoms and property law jurisprudence in this context, see e.g. Kristen A Carpenter, “A Property Rights Approach to Sacred Sites Cases: Asserting a Place for Indians as Non-Owners” (2005) 52 UCLA L Rev 1061; Kristen A Carpenter, “Real Property and Peoplehood” (2008) 27:313 Stan Envtl LJ; Kristen A Carpenter, Sonia Katyal & Angela Riley, “In Defense of Property” (2009) 118:6 Yale LJ 1022; Amy Bowers & Kristen A Carpenter, “Challenging the Narrative of Conquest: The Story of *Lyng v. Northwest Indian Cemetery Protective Association*” in Carole Goldberg, Kevin K Washburn & Philip P Frickey, eds, *Indian Law Stories* (New York: Foundation Press, 2010) 489; Kristen A Carpenter, “Limiting Principles and Empowering Practices in American Indian Religious Freedoms” (2012) 45:2 Conn L Rev 387 [Carpenter, “Limiting Principles”]; Kristen A Carpenter, “Individual Religious Freedoms in American Indian Tribal Constitutional Law” in Kristen A Carpenter, Matthew LM Fletcher & Angela R Riley (Los Angeles: UCLA American Indian Studies Center Press, 2012) 159; Angela R Riley & Kristen A Carpenter, “Owning Red: A Theory of Indian (Cultural) Appropriation” (2016) 94:5 Tex L Rev 859.

5 US Const amend I.

6 *Lyng v Northwest Indian Cemetery Protective Association*, 485 US 439 (1988) at 447–51 [Lyng].

7 Lydia Millet, “Selling Off Apache Holy Land”, *The New York Times* (29 May 2015), online: <www.nytimes.com/2015/05/29/opinion/selling-off-apache-holy-land.html>.

Hopi, Ute, Paiute, Apaches and others, for cultural uses, and created an innovative co-management program between federal land management agencies and the tribes.

Recently, however, there has been a disappointing turn away from meaningful accommodations of Indigenous peoples' religious needs on public lands — in most cases because of pressure to keep such lands open for various types of development. Interests in oil and gas development, for example, were said to underlie President Donald Trump's decision to roll back protections for Bears Ears National Monument.⁸ The stakes in these cases are quite high, and when the law fails, Indigenous religious practitioners put their lives on the line to protect sacred sites.⁹ At Standing Rock, North Dakota, for example, when the federal government approved construction of an oil pipeline on treaty-guaranteed lands, thousands of protesters gathered to protect the lands and waters from destruction. Indigenous religious practitioners and their allies were attacked with dogs, mace and water cannons.¹⁰ They continued to protest until they were evicted and jailed by authorities.¹¹ Ultimately, the land was bulldozed and the pipeline was built through gravesites, under sacred waters and over treaty lands.¹² A similar scene is unfolding at Mauna Kea, Hawaii, where Indigenous religious practitioners have occupied the sacred mountain to prevent construction of a giant telescope, approved by the state over their objections.¹³

The destruction of Indian sacred sites, and oppression of Indian religious practitioners, is a troubling reality in a country where the freedom to worship is a foundational value, deeply enshrined in the US Constitution. Americans generally believe in the right to worship one's God and believe that this right should not be limited by race, ethnicity, economics or other factors. When it comes to American Indians, however, we cannot seem to put this belief into practice. There are myriad reasons. The Indian sacred sites cases reveal the doctrinal limits of religious freedom, at least when it comes to minority religious practices of Indigenous peoples. These cases also reveal the doctrinal excesses of protection for land ownership, at least for the federal government as owner.

In addition, there are challenges of world view, such that Indigenous spirituality and ceremonialism around sacred sites may transcend categorization in Anglo-American legal terminology. There are also broader problems of history, including the unremedied aspects of conquest and colonization, continuing racial discrimination, and the entrenchment of a capitalist economy that privileges economically profitable land uses over spiritual or sustainable ones.

A Human Rights Approach to the Problem of Sacred Sites

To advance understanding and resolution of Indigenous peoples' religious freedoms in sacred sites cases, advocates might consider using international human rights law as one tool in a multi-pronged advocacy strategy. The UN Declaration has a number of substantive and procedural provisions relevant

8 Eric Lipton & Lisa Friedman, "Oil Was Central in Decision to Shrink Bears Ears Monument, Emails Show", *The New York Times* (2 March 2018), online: <www.nytimes.com/2018/03/02/climate/bears-ears-national-monument.html>.

9 Kristen A Carpenter & Angela R Riley, "Standing Tall: The Sioux's battle against a Dakota oil pipeline is a galvanizing social justice movement for Native Americans", *Slate* (23 September 2016), online: <<https://slate.com/news-and-politics/2016/09/why-the-sioux-battle-against-the-dakota-access-pipeline-is-such-a-big-deal.html>>.

10 Alleen Brown, "Medics Describe How Police Sprayed Standing Rock Demonstrators with Tear Gas and Water Cannons", *The Intercept* (21 November 2016), online: <<https://theintercept.com/2016/11/21/medics-describe-how-police-sprayed-standing-rock-demonstrators-with-tear-gas-and-watercannons/>>.

11 See Greg Johnson & Siv Ellen Kraft, "Indigenous protective occupation and emergent networks of spirited refusal", *The Immanent Frame* (21 July 2017), online: <<https://tif.ssrc.org/2017/07/21/indigenous-protective-occupation-and-emergent-networks-of-spirited-refusal/>>; Greg Johnson & Siv Ellen Kraft, "Standing Rock Religion(s)" (2018) 65:5-6 Brill 499, online: <https://brill.com/view/journals/nu/65/5-6/article-p499_4.xml?lang=en>.

12 See Troy A Eid, "Beyond Dakota Access Pipeline: Energy Development and the Imperative for Meaningful Tribal Consultation" (2018) 95:3 Denv UL Rev 593 at 599.

13 Nick Bowlin, "Mauna Kea telescope project halted after months of protest", *High Country News* (28 January 2020).

to the sacred sites context.¹⁴ Adopted by the General Assembly in 2007,¹⁵ and supported by the United States in 2010,¹⁶ the UN Declaration is a standard-setting document that articulates a global consensus on human rights in the Indigenous peoples' context.¹⁷ In the United States, Canada, New Zealand, Australia and other countries around the world, government actors are in the process of assessing how to implement the declaration today, with an eye to meeting global norms on human rights. While New Zealand is working on a plan to implement the declaration nationwide,¹⁸ British Columbia recently passed legislation to bring its provincial laws in harmony with the declaration.¹⁹ In other places, such as Belize, national courts have referenced the declaration directly in cases concerning Indigenous peoples' land rights.²⁰

What are the options for using the UN Declaration in the United States?²¹ As in other countries, the declaration could inspire a legislative agenda, including aspects of religious and cultural freedoms for Indigenous peoples. Federal agencies, too, have the power to appeal to international law in their internal policy work. Indeed, of relevance to this paper, the Advisory Council on Historic Preservation has already adopted the UN Declaration as internal policy for its work on sacred sites.²² US courts, too, could look at the declaration for interpretive guidance.²³ Albeit in a different context, when the Supreme Court struck down the juvenile death penalty under the Eighth Amendment in *Roper v Simmons*, it wrote: "The opinion of the world community, while not controlling in our outcome, does provide significant and respected confirmation for our own conclusions."²⁴

The opinion and standards of the world community can be especially illuminating in an area, such as Indigenous peoples' religious freedoms, where the US courts have failed to resolve cases in a way that promotes justice for vulnerable individuals and groups. Moreover, US jurisprudence is both outdated and fraught on this issue. The Supreme Court last opined on American Indian religious freedoms in

14 See Philip P Frickey, "Domesticating Federal Indian Law" (1996-97) 81:31 Minn L Rev 31 at 75-80 (arguing that because the US Supreme Court originally decided the status of Indian nations in the context of international law, norms of international human rights law should continue to "provide an interpretive backdrop" in contemporary Indian law matters); see also Notes, "International Law as an Interpretive Force in Federal Indian Law" (2003) 116:6 Harv L Rev 1751 at 1756.

15 UNDRIP, *supra* note 2 at para 12; see also Walter R Echo-Hawk, *In the Light of Justice: The Rise of Human Rights in Native America and the UN Declaration on the Rights of Indigenous Peoples* (Golden, CO: Fulcrum, 2013) (describing the UN Declaration as "a landmark event that promises to shape humanity in the post-colonial age" at 3).

16 See Office of the Press Secretary, The White House, Press Release, "Remarks by the President at the White House Tribal Nations Conference" (16 December 2010) (announcing the United States' support for the UN Declaration).

17 See US, *Setting the Standard: Domestic Policy Implications of the UN Declaration on the Rights of Indigenous Peoples: Hearing Before the Committee on Indian Affairs*, 112th Cong (2011); Megan Davis, "Indigenous Struggles in Standard-Setting: The United Nations Declaration on the Rights of Indigenous Peoples" (2008) 9:2 Melbourne J Intl L 439 at 440 (discussing how adoption of the UN Declaration "provides an opportunity to expound upon indigenous peoples' experiences of standard-setting" in the United Nations).

18 Ministry of Māori Development, New Zealand Government, "UN Declaration on the Rights of Indigenous Peoples", online: <www.tpk.govt.nz/en/whakamahia/un-declaration-on-the-rights-of-indigenous-peoples>.

19 Simon Little, "British Columbia becomes 1st Canadian province to pass UN Indigenous rights declaration", *Global News* (26 November 2019), online: <<https://globalnews.ca/news/6222331/british-columbia-passes-undrip/>>.

20 See *Aurelio Cal v Belize*, Supreme Court of Belize (Claims No 171 and 172 of 2007) (18 October 2007), online: <<https://elaw.org/content/belizeaurelio-cal-et-al-v-attorney-general-belize-supreme-court-belize-claims-no-171-and-172>>.

21 Adam Liptak, "Justice Breyer Sees Value in a Global View of Law", *The New York Times* (13 September 2015), online: <www.nytimes.com/2015/09/13/us/politics/justice-breyer-sees-value-in-a-global-view-of-law.html>.

22 Advisory Council on Historic Preservation, "United Nations Declaration on the Rights of Indigenous Peoples", online: <www.achp.gov/indian-tribes-and-native-hawaiians/united-nations-declaration-rights-indigenous-peoples>.

23 See Hurst Hannum, S James Anaya & Dinah Shelton, *International Human Rights: Problems of Law, Policy, and Practice* (New York: Aspen, 2018) at 471-73 (citing *Roper v Simmons*, 543 US 551 [2005] and *Lawrence v Texas*, 539 US 558 [2003]).

24 *Ibid.*

1988, and the federal appellate courts appear split on how to apply RFRA in sacred sites cases.²⁵ Sources from outside the United States,²⁶ even if not binding law, could help to inform thinking on these issues by advocates and courts alike.²⁷ Indeed, one federal district court in the United States has cited the declaration in an Indigenous land rights case.²⁸ In this spirit, courts, as well as agencies and legislatures, could consider the following points of resonance between current issues in American Indian sacred sites and the declaration.

One of the challenges with free exercise clause jurisprudence affecting tribes is that legal decision makers have failed to see how applicable legal standards “fit” Indigenous religions. The *Lyng* case mentioned above was about Yurok ceremonies involving prayer at sacred rock outcroppings located in a dense national forest. But the available precedents were *Sherbert v Verner*, involving Seventh Day Adventist work/rest practices around the Sabbath, and *Wisconsin v Yoder*, regarding Amish rules on children’s education. In both cases, the Supreme Court held that the government’s proposed activity (denial of unemployment benefits in *Sherbert* and sanctions for non-attendance in *Yoder*) would “coerce activity” in violation of religious freedom. But, when it came time to apply those cases to the Indigenous peoples context in *Lyng*, the court could not see how building a road would coerce individuals to do anything in violation of their religion. The sacred sites could be destroyed, but Indigenous peoples could believe what they wanted about it: this would not violate the right to the free exercise of religion.

The attitude of the court — that destroying sacred sites did not violate the First Amendment’s protections for free exercise of religion — may reflect a struggle with the concept that gathering medicine or praying in a forest is, in fact, a religion at all.

How could the UN Declaration help advance both understanding and solutions to the challenge of Indigenous peoples’ religious freedoms involving sacred sites on US public lands?

First, as a general matter, article 2 of the UN Declaration provides that “Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination.”²⁹ Thus there is no justification for affording religious freedom to certain individuals and groups (white Christians, for example) while denying it to others (American Indians). In article 3, the declaration provides that “Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”³⁰ Religious and cultural freedom are critical components of Indigenous peoples’ self-determination.³¹ These rights are both individual and collective, such that harms to the

25 While the Ninth Circuit in *Navajo Nation v US Forest Service* reified *Lyng* by limiting RFRA claims on public lands to facts where the government “coerces” religious belief, see *Navajo Nation v US Forest Service*, 535 F (3d) 1058 (9th Cir 2008) [*Navajo Nation*], a federal district court in *Oklahoma Comanche Nation v United States* applied RFRA to protect an Indian sacred site, noting that the Tenth Circuit had declined to take the narrow view of “substantial burden” adopted by the Ninth Circuit in *Navajo Nation*. See *Comanche Nation v United States*, No CIV-08-849-D, 2008 WL 4426621 (WD Okla 2008).

26 See e.g. FSC United States, “FSC Global Projects”, online: <<https://us.fsc.org/en-us/what-we-do/fsc-global-projects>>.

27 The UN Declaration is a resolution of the UN General Assembly (UNGA) and not a convention or treaty subject to a ratification process by the United States. Yet nothing prevents US courts from citing UNGA resolutions or other sources as they see fit. The status of the declaration is a complex and evolving topic, in particular as courts, executives and legislatures in countries around the world work to understand and implement it.

28 See *Pueblo of Jemez v United States*, 350 F Supp (3d) 1052, 1094, n 15 (“Both international law and other common-law countries’ law recognize aboriginal title”), citing *UNDRIP*, *supra* note 2; *Mabo v Queensland II* (1992), 175 CLR 1 (Austl) (holding that “native title” exists and that Australia’s common law recognizes native title).

29 *UNDRIP*, *supra* note 2, art 2.

30 *Ibid*, art 3.

31 Human Rights Council, *Promotion and protection of the rights of indigenous peoples with respect to their cultural heritage: Study by the Expert Mechanism on the Rights of Indigenous Peoples*, UNHRC, 30th Sess, UN Doc A/HRC/30/53, online: <www.ohchr.org/EN/Issues/IPeoples/EMRIP/Pages/Studyonculturalheritage.aspx>.

entire group (the Yurok, Karuk and Tolowa peoples in *Lyng*) must be considered alongside limitations on individual practitioners (for example, the medicine women who went to the High Country to pray).³²

More specifically under article 11, “Indigenous peoples have the right to practise and revitalize their cultural traditions and customs,”³³ and under article 12, “Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites.”³⁴ The recognition of these religious traditions in a standard-setting document as widely embraced as the UN Declaration can perhaps help to mitigate the skepticism so often expressed by judges who do not accept the legitimacy or understand the scope of Indigenous peoples’ religions.³⁵

In *Lyng*, for example, Justice Sandra Day O’Connor underscored that the Yurok, Karok and Tolowa Indians’ religion required “undisturbed naturalness” in the sacred High Country and that “[n]o disrespect for these practices is implied when one notes that such beliefs could easily require *de facto* beneficial ownership of some rather spacious tracts of public property.”³⁶ Her protestations of respect aside, this passage seems to reveal her view that the Indian claims had an aspect of pretext or at least indeterminacy about them, as if the Indians were reclaiming the entire national forest rather than trying to stop destruction of certain prayer sites.

In another case, *Badoni v Higginson*, a lower court considered Navajo medicine men’s attempts to protect Rainbow Bridge, a sacred site located in their territory, by analogizing them to hypothetical, idiosyncratic scenarios, as follows: “A person might sincerely believe that he or a predecessor encountered a profound religious experience in the environs of what is now the Lincoln Memorial in Washington, D.C., and that experience might cause him to believe that the Lincoln Memorial is therefore a sacred religious shrine to him. That person, however, could hardly expect to call upon the courts to enjoin all other visitors from entering the Lincoln Memorial in order to protect his constitutional right to religious freedom.”³⁷ According to the court, this might “lead to unauthorized and very troublesome results.”³⁸ The fact that Navajos would actually be burdened by flooding a prayer site in their own homeland, as proposed by the government, was completely lost in this reasoning and they lost the case.

Article 25 of the UN Declaration both confirms the place-based nature of some Indigenous religious traditions and locates them within their territories, stating: “Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.”³⁹ Moreover, article 24 makes clear that Indigenous peoples have the right to traditional medicines, including the conservation of medicinal plants,⁴⁰ a right that would have been relevant in the *Navajo Nation* case in which religious practitioners claimed the reclaimed water would contaminate medicinal plants.

32 *UNDRIP*, *supra* note 2, art 1.

33 *Ibid*, art 11.

34 *Ibid*, art 12.

35 See Carpenter, “Limiting Principles”, *supra* note 4 at 423–24.

36 *Lyng*, *supra* note 6 at 453.

37 *Badoni v Higginson*, 455 F Supp 641 at 645 (D Utah 1977) [*Badoni*].

38 *Ibid* at 647.

39 *UNDRIP*, *supra* note 2, art 25.

40 *Ibid*, art 24.

While federal ownership of sacred sites (or the past taking of Indian lands through conquest) has been treated as dispositive against Indigenous claims, the UN Declaration makes clear that the spiritual relationship continues despite formal title. Article 26 further provides: “States shall give legal recognition and protection to [Indigenous] lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.”⁴¹ Indeed, the Yurok Tribe,⁴² the Navajo Nation⁴³ and many other tribes have extensive documentation of the customs, traditions and land tenure systems identifying and regulating their sacred sites, as well as the intergenerational obligations of the Indigenous peoples to those sites. If courts are sincerely struggling to determine whether, for example, the San Francisco Peaks or the Lincoln Memorial is equally susceptible to Indigenous religious freedoms claims, as in one federal decision, these sources can provide authoritative guidance.⁴⁴

With respect to consultation, here, too, the UN Declaration offers helpful guidance, both to agencies involved in consultation and to courts reviewing it. Both the NHPA and section 106 regulations require that federal agencies “consult” with any Indian tribe or Native Hawaiian organization that attaches traditional religious and cultural significance to historic properties that may be affected by an undertaking. Unfortunately, in many cases, including *Navajo Nation*, the courts have construed the consultation obligation quite narrowly — it is procedural in nature and requires only minimal process. However, in article 19, the UN Declaration makes clear that consultation must occur in a spirit of “cooperation” such that states must obtain the “free, prior, and informed consent” (FPIC) of Indigenous peoples “before adopting and implementing legislative or administrative measures that may affect them.”⁴⁵

Article 19 reveals that perfunctory consultation is inadequate under human rights standards. Most importantly, consultation regarding sacred sites must occur with full notice and participation, through an ongoing government-to-government relationship, and toward the negotiation of affirmative agreements regarding the substantive standard of care and treatment for sacred sites. If this sounds like a high bar, recall that there are several examples of good practices in this regard.

In *Bear Lodge Multiple Use Ass’n v Babbitt*,⁴⁶ referenced in the section entitled “Background: Sacred Sites in the United States,” the National Park Service supervisor and others engaged in sustained and meaningful consultation with tribal cultural practitioners and local stakeholders regarding the impacts of rock climbing and recreation on a rock tower known as the “Lodge of the Bear,” a sacred site to Plains peoples. The final management plan called for a voluntary ban on climbing during the month of June when the Lakota Sun Dance took place, as well as interpretive signage and programs educating tourists about sacred sites, so they would know to avoid disrupting sweat lodges or taking down prayer bundles. In *Wyoming Sawmills v US Forest Service*,⁴⁷ the US Forest Service took a similarly inclusive and effective approach to management of the Medicine Wheel, an ancient or historic prayer site for tribes, leading to a memorandum of agreement and management plan limiting forestry and road building in the sacred area, and provided for ongoing consultation with tribes regarding future developments.

41 *Ibid*, art 26.

42 Yurok Tribe, “Constitution”, online: <<http://yuroktribe.org/government/councilsupport/documents/Constitution.pdf>>.

43 Diné Bi Beenahaz’áanii (1 NNC §§ 201–206), online: <www.navajocourts.org/dine.htm>.

44 *Badoni*, *supra* note 37 at 645 (rejecting a Navajo religious claim at Rainbow Bridge National Monument, a site figuring in the Navajo creation story).

45 UNDRIP, *supra* note 2, art 19.

46 See *Bear Lodge Multiple Use Ass’n v Babbitt*, 175 F (3d) 814 (10th Cir 1999).

47 See *Wyoming Sawmills Inc v US Forest Service*, 383 F (3d) 1241 (10th Cir 2004) (upholding the memorandum of agreement and Historic Preservation Plan between the US Forest Service and American Indian religious practitioners, providing for protection of sacred lands and ongoing consultations before any additional undertakings in Medicine Wheel).

For additional guidance on the current standards for consultation with Indigenous peoples under the UN Declaration's FPIC provisions, legal decision makers could consult authoritative UN studies on this topic.⁴⁸ *Bear Lodge* and *Wyoming Sawmills*, with their advance notice, mutual respect, relational approach and management agreements, reflect major progress toward meeting the requirements for consultation under the declaration. These best practices contrast fully with the consultation in *Navajo Nation* and *Standing Rock*, wherein the agencies failed to reach any agreement with the tribes and went ahead with the developments anyway, a practice that fails to comply with the FPIC standard as envisioned by the declaration.⁴⁹

Consultation in sacred sites cases is conducted by federal agencies that, in some instances, seem well aware of the applicability and utility of the UN Declaration to their work. As mentioned above, the Advisory Council for Historic Preservation, which advises the president and Congress, expressly adopted the UN Declaration as a matter of international policy and has published extensive guidance on complying with its terms in the management of sacred sites.⁵⁰ The US Forest Service⁵¹ and the US Fish and Wildlife Service⁵² both reference the declaration in their policies.

Finally, legal decision makers in all branches of government, as well as Indigenous peoples, can consult the UN Declaration regarding remedies for the violation of rights to sacred lands. Here the declaration sets forth a hierarchy of remedies, from actual restitution of land to monetary compensation, reflecting the distinct nature of Indigenous spiritual relationships with lands. Article 10 provides that Indigenous peoples shall not be forcibly removed from their lands and that no relocation can occur without FPIC, with a right of return or compensation.⁵³ This article is relevant to ongoing threats to Indigenous peoples' access to their sacred sites, potentially including the US Congress decision to sell Oak Flats, an Apache sacred site, to a multinational mining company. Article 11 provides that states shall provide redress, including restitution, for "religious and spiritual property taken without free, prior and informed consent or in violation of their laws, traditions and customs."⁵⁴ A best practice includes Congress's legislative return of the sacred Blue Lake to the Taos Pueblo people in the 1970s. Article 26 provides that states shall give "legal recognition and protection to the lands, territories, and resources of indigenous peoples...with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned."⁵⁵ Here consider the sacred Black Hills of the Great Sioux Nation, famously guaranteed by treaty and then taken by the United States, which could be the subject of legal recognition and restitution today, whether by legislation or other means.⁵⁶

48 Human Rights Council, *Free, prior and informed consent: a human rights-based approach. Study of the Expert Mechanism on the Rights of Indigenous Peoples*, UNHRC, 39th Sess, UN Doc A/HRC/39/62 (2018), online: <<https://undocs.org/en/A/HRC/39/62>> (the Expert Mechanism is mandated by the Human Rights Council to provide expertise to states and Indigenous peoples on realizing the aims of the UN Declaration).

49 See *Navajo Nation*, *supra* note 25 (holding that the US Forest Service's consultation process concerning effects on historic properties to which Indian tribes attached religious and cultural significance was substantively and procedurally adequate under the National Historic Preservation Act [NHPA]); *Standing Rock Sioux Tribe v US Army Corps*, 205 F Supp (3d) 4, 13 (DDC 2016) (order denying the motion for preliminary injunction, in part, because tribes had not shown the government failed to meet the standard for consultation under the NHPA).

50 Advisory Council on Historic Preservation, "United Nations Declaration on the Rights of Indigenous Peoples", online: <www.achp.gov/indian-tribes-and-native-hawaiians/united-nations-declaration-rights-indigenous-peoples>.

51 Forest Service & Office of Tribal Relations, United States Department of Agriculture, *Report to the Secretary of Agriculture: USDA Policy and Procedures Review and Recommendations: Indian Sacred Sites* at 10 (recognizing article 12 of the UN Declaration), online: <www.fs.fed.us/spf/tribalrelations/documents/sacredsites/SacredSitesFinalReportDec2012.pdf>.

52 Fish and Wildlife Service, *Intergovernmental Activities*, ch 1 at para 2 ("The Service's Native American Policy"), online: <www.fws.gov/policy/510fw1.pdf>.

53 UNDRIP, *supra* note 2, art 10.

54 *Ibid*, art 11.

55 *Ibid*, art 26.

56 See *Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya: The situation of indigenous peoples in the United States of America*, UNGAOR, 21st Sess, UN Doc A/HRC/21/47/Add.1 (2012) at paras 72–84.

Conclusion

The concept and practice of religious freedom is generally cherished in US society, but currently denied to American Indians in cases where they seek to protect sacred sites located on federal public lands from destruction. Application of the UN Declaration has the potential to advance solutions, including paradigms of consensual relationships between tribal governments and the federal government regarding sacred sites management practices. Such an approach would advance democracy and pluralism by helping to ensure that all US citizens — not just some — enjoy the rights promised by the country's Constitution.

About the Author

Kristen A. Carpenter is the Council Tree Professor of Law and director of the American Indian Law Program at the University of Colorado Law School. She also serves on the United Nations Expert Mechanism on the Rights of Indigenous Peoples as its chair-rapporteur and member from North America. She is a graduate of Dartmouth College and Harvard Law School.

Centre for International
Governance Innovation

67 Erb Street West
Waterloo, ON, Canada N2L 6C2
www.cigionline.org

