

The public can join the meeting to provide public comment. Please notify Jessica Vigorito at Jessica.Vigorito@flagstaffaz.gov if you need any assistance joining the meeting.

ATTENTION
IN-PERSON AUDIENCES AT COMMISSION MEETINGS HAVE BEEN SUSPENDED UNTIL FURTHER NOTICE

[Click here to participate in the online meeting](#)

NOTICE AND AGENDA

**COMMISSION ON DIVERSITY AWARENESS
TUESDAY
SEPTEMBER 21, 2021**

**VIRTUAL TEAMS MEETING
1:30 P.M.**

1. **Call to Order**

2. **Roll Call**

NOTE: One or more Commission Members may be in attendance telephonically or by other technological means.

Robert "Dan" Duke
Christine Tucci
Mandy Martinez Gebler
Claire Hardi

Marcela Pino
Jean Toner, Vice Chair
DeAnn Wegwert, Chair

3. **Public Comment**

The Commission cannot act upon items presented during the Public Participation portion of the Agenda. Individual Commission members may ask questions of the public but are prohibited by the Open Meeting Law from discussion or considering the item among themselves until the item is officially placed on the Agenda. Each public comment or presentation will be limited to five (5) minutes.

4. **Approval of Minutes**

- A. **Consideration and Approval of Minutes:** Commission on Diversity Awareness Meeting of August 17, 2021.
Approve the minutes of the Commission on Diversity Awareness Meeting of August 17, 2021.
- B. **Consideration and Approval of Minutes:** Commission on Diversity Awareness Special Meeting of September 2, 2021.
Approve the minutes of the Commission on Diversity Awareness Special Meeting of September 2, 2021.

5. **Date of Next Meeting-** October 19, 2021 at 1:30pm

6. **Action Items**

7. **Reports/Discussion Items**

A. **Liaison Update on Virtual Board and Commission Meetings**

The Re-Entry team met August 30th and determined with the limited opening of City Hall in Phase 3 of the City's Re-Entry Plan the we should remain virtual with the Commission meetings. This may be revisited at the time City Hall returns to regular hours. Please keep all Board and Commission Meetings virtual at this time.

B. **Proclamations Work Group Update**

Discuss any upcoming Proclamations for the Work Group to focus on.

i. **Liaison Update on Proclamations**

Native American Heritage Month - is scheduled to be read at the November 2nd City Council meeting.

Hispanic Heritage Month - read at the September 7, 2021 Council meeting and can be [viewed online](#) beginning at 12:23 into the video.

C. **Recommendations to Council**

i. **Updates on Recommendations**

Recommendation to the Flagstaff City Council for a city ordinance regarding equitable restroom availability - Received support for this FAIR item. Liaison will follow up once the item is listed on a Council agenda for discussion.

ii. **Recommendations for Consideration**

Anti Camping Ordinance - Update from the Workgroup

D. **Current Commission Priorities**

i. **Workgroup Update**

Land Acknowledgment and Involvement with the Renaming of the Peaks and Snowbowl expansion plans

Discuss any updates from the Workgroup.

E. **Future Priorities**

- Criminal Justice conversation with Flagstaff Police Department
 - Discussion of the ARM project/proposal/RFP/town hall, etc.
- Conversation with DBA including literature to distribute
- Civil Rights

8. **Agenda for Future Meeting(s)**

A. **Future Proclamations**

Black History Month February

B. **Partnerships/Presentations**

Discuss potential presentations to Inclusive and Adaptive Living Commission, Indigenous

Commission, 3 County Diversity Councils, NAU (Diversity Fellows), CCC

9. **Adjournment**

CERTIFICATE OF POSTING OF NOTICE

The undersigned hereby certifies that a copy of the foregoing notice was duly posted at Flagstaff City Hall on _____,
at _____ a.m./p.m. This notice has been posted on the City's website and can be downloaded at www.flagstaff.az.gov.

Dated this _____ day of _____, 2021.

Jessica Vigorito, Human Resources Analyst



Commission on Diversity Awareness

4. A.

From: Jessica Foos, Human Resources Analyst

DATE: 09/21/2021

SUBJECT: Consideration and Approval of Minutes: Commission on Diversity Awareness Meeting of August 17, 2021.

STAFF RECOMMENDED ACTION:

Approve the minutes of the Commission on Diversity Awareness Meeting of August 17, 2021.

Executive Summary:

Minutes of the Commission meetings of the Commission on Diversity Awareness are a requirement of Arizona Revised Statutes and, additionally, provide a method of informing the public of discussions and actions being taken by the Commission.

Attachments

August 2021 meeting minutes draft

The public can join the meeting to provide public comment. Please notify Jessica Vigorito at Jessica.Vigorito@flagstaffaz.gov if you need any assistance joining the meeting.

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DRAFT MINUTES

NOTICE AND AGENDA

COMMISSION ON DIVERSITY AWARENESS
Tuesday
August 17, 2021

VIRTUAL TEAMS MEETING
211 WEST ASPEN AVENUE
1:30 P.M.

1. Call to Order

Vice Chair Wegwert called the meeting to order at 1:34 PM.

2. Roll Call

NOTE: One or more Commission Members may be in attendance telephonically or by other technological means.

<u>PRESENT</u>	<u>ABSENT</u>
Mandy Martinez Gebler	Robert "Dan" Duke, Chair
Claire Hardi	Christine Tucci
Marcela Pino	
Jean Toner	
DeAnn Wegwert, Vice Chair	

3. Public Comment

The Commission cannot act upon items presented during the Public Participation portion of the Agenda. Individual Commission members may ask questions of the public but are prohibited by the Open Meeting Law from discussion or considering the item among themselves until the item is officially placed on the Agenda. Each public comment or presentation will be limited to five (5) minutes.

- Audra Travelbee from Culture Connection AZ introduced self and stated their group is attending various diversity meetings to gather information, so the organization can be responsive.
- Jessica Vigorito (Staff Liaison)

4. Approval of Minutes

- A. **Consideration and Approval of Minutes:** Commission on Diversity Awareness Meeting of July 26, 2021.

Vice Chair Wegwert motioned for the July 26, 2021 minutes to be approved. The motion passed unanimously.

5. **Date of Next Meeting** - September 21, 2021

- Commissioner Pino asked about meeting in person, Jessica Vigorito (Staff Liaison) informed that Council was meeting today to discuss further. The Commission would need to wait until Council direction changes or move to stage 4 of re entry plan.
- Jessica Vigorito (Staff Liaison) Reminded that virtual will be offered ongoing and to use the link in the agenda for that meeting date.

6. **Action Items**

- A. **Review and Approve:** Proclamation for Native American Heritage Month and Hispanic Heritage Month.

- Commissioner Gebler noted that the verbiage includes Native American and Indigenous verbiage to be more inclusive.
- Commissioner Toner requested to have the extra “and” in first statement removed.
- Commissioner Pino motioned to approve the edited Native American Heritage Month proclamation. Commissioner Toner seconded the motion, the motion passed unanimously.
- Commissioner Pino motioned to approve the Hispanic Heritage Month proclamation. Commissioner Toner seconded the motion, the motion passed unanimously.

7. **Reports/Discussion Items**

- A. **Proclamations Work Group Update**

Commissioner Toner stated that the next Proclamation the workgroup would focus on is Black History Month which is in February.

- B. **Workgroup Update**

Land Acknowledgment and Involvement with the Renaming of the Peaks and Snowbowl expansion plans.

Based on the City Attorney’s calendar, Jessica Vigorito (Staff Liaison) suggested the following dates for the Executive Session: August 30th at 3pm or September 2nd 2pm. Jessica Vigorito (Staff Liaison) will ask the two commissioners not present if either date works for them. Commissioner Toner reminded the group that Land acknowledgement topic tabled until it was discussed as a FAIR item on Council’s agenda. Jessica Vigorito (Staff Liaison) asked if sharing the memo to the Legal department would be beneficial for the Commission to review prior to the Executive Session. Commissioner Toner agreed to and read aloud the memo to all of Commission. Jessica Vigorito (Staff Liaison) recommended sending the Dr. Silver report to the Commissioner and many members agreed that would be helpful.

- C. **Recommendations to Council**

a. Updates on Recommendations

Recommendation to the Flagstaff City Council for a city ordinance regarding equitable restroom availability - .

- Commissioner Toner added additional an update that the Aquaplex had updated their restroom signs at the Aquaplex “Casitas” to non gender on their own.
- Liaison will send the Council agenda for September 7th to the Commission members once it is posted.

b. Recommendations for Consideration

Anti Camping Ordinance

- Commissioner Toner stated that there would be presentation/discussion regarding Alternative Response model from Adam Shimoni on August 24th.
- Commissioner Gebler talked about the issues with individuals not feeling safe in the Shelter
- Commissioner Hardi sent information to the workgroup and once they can discuss, the workgroup will follow up.
- Public participant offered to share the information on the presentation/discussion noted above.
- Commissioner Gebler left the meeting at 2:33pm.

D. **Commission Priorities**

1. Criminal Justice conversation with Flag PD
 2. Conversation with DBA including literature to distribute
 3. Land Acknowledgment and Involvement with the Renaming on the Peaks and Snowbowl expansion plans
 4. Civil Rights
- Commissioner Pino recommended retitling the “Commission Priorities” to “Future Priorities” and “Current Priorities” to identify which items are in progress and which ones are for future focus.
 - Vice Chair Wegwert and Commissioner Toner will be meeting with Deputy City Manager Shannon Anderson regarding Alternative Response Model RFP and will be asking about Commission participation.

8. **Agenda for Future Meeting(s)**

A. **Partnerships/Presentations**

Discuss potential presentations to Inclusive and Adaptive Living Commission, Indigenous Commission, 3 County Diversity Councils, NAU (Diversity Fellows), CCC

B. **Diversity Survey** - next steps, workgroups, recommendations

9. **Adjournment**

Vice Chair Wegwert adjourned the meeting at 2:43 PM.



Commission on Diversity Awareness

4. B.

From: Jessica Foos, Human Resources Analyst

DATE: 09/21/2021

SUBJECT: Consideration and Approval of Minutes: Commission on Diversity Awareness Special Meeting of September 2, 2021.

STAFF RECOMMENDED ACTION:

Approve the minutes of the Commission on Diversity Awareness Special Meeting of September 2, 2021.

Executive Summary:

Minutes of the Commission meetings of the Commission on Diversity Awareness are a requirement of Arizona Revised Statutes and, additionally, provide a method of informing the public of discussions and actions being taken by the Commission.

Attachments

September 2021 special meeting minutes

DRAFT MINUTES

NOTICE AND AGENDA

COMMISSION ON DIVERSITY AWARENESS
SPECIAL MEETING (EXECUTIVE SESSION)
THURSDAY, SEPTEMBER 2, 2021

VIRTUAL TEAMS MEETING
2:00 P.M.

1. **Call to Order**

Chair Duke called the meeting to order at 2:01 PM.

2. **Roll Call**

NOTE: One or more Commission Members may be in attendance telephonically or by other technological means.

PRESENT	ABSENT
Robert "Dan" Duke, Chair	
Mandy Martinez Gebler joined at 2:06pm	
Marcela Pino	
Jean Toner	
DeAnn Wegwert, Vice Chair	
Christine Tucci	
Claire Hardi	

Others present: City Attorney Sterling Solomon, Assistant City Attorney Christina Parry, Staff Liaison Jessica Vigorito

Vice Chair Wegwert Motioned to go into Executive Session, seconded by Commissioner Toner. Executive session began at 2:03pm.

3. **Executive Session:**

- A. Discussion or consultation for legal advice with the attorney or attorneys of the public body, pursuant to A.R.S. §38-431.03(A)(3).
 - i. Legal advice and discussion regarding Dr. Silver Report.

4. **Adjournment**

Chair Duke adjourned the meeting at 3:14 PM.



Commission on Diversity Awareness

7. B.

From: Jessica Foos, Human Resources Analyst

DATE: 09/21/2021

SUBJECT: Proclamations Work Group Update

STAFF RECOMMENDED ACTION:

Discuss any upcoming Proclamations for the Work Group to focus on.

Executive Summary:

Proclamations are made by the Mayor of Flagstaff. The Commission on Diversity Awareness is drafting proclamations to suggest to the Mayor to further promote diversity in the City of Flagstaff.



Commission on Diversity Awareness

7. C. i.

From: Jessica Foos, Human Resources Analyst

DATE: 09/21/2021

SUBJECT: Updates on Recommendations

STAFF RECOMMENDED ACTION:

Recommendation to the Flagstaff City Council for a city ordinance regarding equitable restroom availability - Received support for this FAIR item. Liaison will follow up once the item is listed on a Council agenda for discussion.

Executive Summary:

Commission recommendations are important to the City Council and they are taken under consideration for possible action. The City Council has several options and may:

- Accept the recommendation and give further direction.
- Change the provisions of a recommendation before giving further direction.
- Send a matter back for further consideration.
- Not accept the recommendation.

Previous Council Decision on This:

FAIR item for September 7th Council meeting



Commission on Diversity Awareness

7. C. ii.

From: Jessica Foos, Human Resources Analyst

DATE: 09/21/2021

SUBJECT: Recommendations for Consideration

STAFF RECOMMENDED ACTION:

Anti Camping Ordinance - Update from the Workgroup

Executive Summary:

Commission recommendations are important to the City Council and they are taken under consideration for possible action. The City Council has several options and may:

- Accept the recommendation and give further direction.
- Change the provisions of a recommendation before giving further direction.
- Send a matter back for further consideration.
- Not accept the recommendation.

Previous Council Decision on This:

This was listed as a FAIR item on Council's July 9th agenda.



Commission on Diversity Awareness

7. D. i.

From: Jessica Foos, Human Resources Analyst

DATE: 09/21/2021

SUBJECT: Workgroup Update

Land Acknowledgment and Involvement with the Renaming of the Peaks and Snowbowl expansion plans

STAFF RECOMMENDED ACTION:

Discuss any updates from the Workgroup.

Executive Summary:

Informal Working Groups

Informal working groups may be created to research, gather information, and provide recommendations back to the commission on various matters. No official appointments are made to a working group by the commission. Working groups may consist of members of the public and/or less than a quorum of commission members. Unlike subcommittees, working groups are not required to have formal agendas or minutes.

All information and recommendations from the work group must be provided and presented to the commission in an open meeting for public discussion. Informal working groups do not have any powers, duties, or responsibilities of the parent commission. No actions, statements, or recommendations can be made or provided by the working group on behalf of the commission

Attachments

Dr. Silver Report

CITY OF FLAGSTAFF “DENIES” HOPI RELIGIOUS BELIEFS in SNOWBOWL LEGAL FILINGS

City compares harm to Hopi religion by use of City’s reclaimed wastewater on sacred area as similar to recreational boat owners being “deprived of no more than their occasional Sunday piscatorial [fishing] pleasure.”

Excerpted quotations from the City of Flagstaff’s legal filings in *The Hopi Tribe v. Flagstaff* (with **Emphasis Added**) follow.

From the **City of Flagstaff’s October 10, 2014, VERIFIED ANSWER AND THIRD-PARTY COMPLAINT** in *The Hopi Tribe, Plaintiff, vs. The City of Flagstaff, Defendant.*; NO. CV2011-00701; in the Superior Court of the State of Arizona in and for the County of Coconino:

“...Without any evidence to support its [the Hopi’s lawsuit Complaint’s] inflammatory claims, Plaintiff [the Hopi Tribe] asks this Court to grant it relief that has broad-reaching, and, frankly, disastrous, implications upon Arizona’s comprehensive statutory scheme of water use. There is no public nuisance here [by the City’s reclaimed wastewater contaminating of Hopi sacred sites on the San Francisco Peaks].”...

115. Defendant [the City of Flagstaff] lacks knowledge or information sufficient to form a belief regarding the truth of the allegations in paragraph 115 of the complaint [that “The Peaks have played a central and essential role in Hopi culture, traditions, and way of life for centuries. The Peaks, known as Nuvatukya’ovi to the Hopi, are the single most important sacred place the Hopi have. Every month Tribe members go to the Peaks for prayers, and during some months tribe members collect water, greens, and herbs for the ceremonies.”], and therefore [the City of Flagstaff] denies the same [that “The Peaks have played a central and essential role in Hopi culture, traditions, and way of life for centuries. The Peaks, known as Nuvatukya’ovi to the Hopi, are the single most important sacred place the Hopi have...”].

116. Defendant [the City of Flagstaff] lacks knowledge or information sufficient to form a belief regarding the truth of the allegations in paragraph 116 of the complaint [that “The Hopi have been making regular pilgrimages and trips to the Peaks since before recorded history as a central part of their culture and the Hopi way of life. The various Hopi ceremonies conducted during the year, particularly Powamuya in the winter and Niman in the summer, require visits and offerings to specific shrines on the Peaks.”], and therefore [the City of Flagstaff] denies the same” [that “The Hopi have been making regular pilgrimages and

trips to the Peaks since before recorded history as a central part of their culture and the Hopi way of life...”]...

122. Defendant [the City of Flagstaff] lacks knowledge or information sufficient to form a belief regarding the truth of the allegations in paragraph 122 of the complaint [that “There are Hopi sacred areas, including shrines, in the immediate vicinity of the Snowbowl Resort Area.”], and therefore [the City of Flagstaff] denies the same [that “There are Hopi sacred areas, including shrines, in the immediate vicinity of the Snowbowl Resort Area.”]...

125. Defendant [the City of Flagstaff] lacks knowledge or information sufficient to form a belief regarding the truth of the allegations in paragraph 125 of the complaint [“The Hopi collect water from springs on the Peaks and use the water for a variety of ceremonial activities. Several of the springs on the Peaks are associated with specific ceremonies and religious societies.”], and therefore [the City of Flagstaff] denies the same [that “The Hopi collect water from springs on the Peaks and use the water for a variety of ceremonial activities. Several of the springs on the Peaks are associated with specific ceremonies and religious societies”]...

135. Defendant [the City of Flagstaff] lacks knowledge or information sufficient to form a belief regarding the truth of the allegations in paragraph 135 of the complaint [“Artificial snow made with reclaimed wastewater will introduce numerous chemicals that are not degraded or removed in the wastewater treatment process to the San Francisco Peaks, in particular to the areas in the Snowbowl Resort Area and its vicinity that have been a part of Hopi use for ceremonial pilgrimages and hunting and gathering trips for centuries.”], and therefore denies the same [that “Artificial snow made with reclaimed wastewater will introduce numerous chemicals that are not degraded or removed in the wastewater treatment process to the San Francisco Peaks, in particular to the areas in the Snowbowl Resort Area and its vicinity that have been a part of Hopi use for ceremonial pilgrimages and hunting and gathering trips for centuries”], except [the City of Flagstaff] avers [asserts as fact]...upon information and belief, that the ceremonial significance of the San Francisco Peaks to the Hopi Tribe (among others [Navajo, Havasupai, Hualapai, Yavapai Apache, and White Mountain Apache]) was fully litigated in the eleven-day Religious Freedom Restoration Act Trial conducted in *Navajo Nation v. US Forest Serv.*, 408 F. Supp. 2d 866 (D. Ariz. 2006), *aff’d*, 535 F.3d 1058 (9th Cir. 2008).”¹

¹ *Navajo Nation v. US Forest Serv.* directly resulted from the City of Flagstaff’s decision to defer and refer to the Forest Service the decision to respect Tribal cultural and religious concerns regarding use of reclaimed wastewater on the Peaks. The City made this decision to defer and refer in spite of the fact that the Forest Service decision would inevitably be preordained to reject Tribal concerns. In *Navajo Nation v. US Forest Serv.*, the Navajo, Hopi, Havasupai, Hualapai, Yavapai Apache, and White Mountain Apache challenged in federal court the Forest Service decision to reject Tribal concerns regarding the use of reclaimed wastewater on the Peaks.

Excerpts from *Navajo Nation v. US Forest Serv.* that the City of Flagstaff “avers” or asserts as factual include:

...5. The Ninth Circuit has clearly articulated the proper legal standard to be applied in this case: an action “burdens the free exercise of religion if it puts substantial pressure on an adherent to

modify his behavior and violate his beliefs, including *904 when . . . it results in the choice of an individual of either abandoning his religious principle or facing criminal prosecution." *Guam*, 290 F.3d at 1222. . .

7. The government's land management decision will not be a "substantial burden" absent a showing that it coerces someone into violating his or her religious beliefs or penalizes his or her religious activity. *Lyng*, 485 U.S. at 449-53, 108 S. Ct. 1319...see *Wilson*, 708 F.2d at 741 ("Many government actions may offend religious believers, and may cast doubt upon the veracity of religious beliefs, but unless such actions penalize faith, they do not burden religion."); see also *Havasupai Tribe*, 752 F.Supp. at 1484-1486 (finding Forest Service approval of plan for operations of uranium mine does not substantially burden exercise of religion because, although Havasupai Tribe's religious and cultural belief systems are "intimately bound up" in the site, "Plaintiffs are not penalized for their beliefs, nor are they prevented from practicing their religion."); *Means*, 858 F.2d at 406-07 (finding no substantial burden where "[t]he Forest Service has performed no act of compulsion to interfere with appellees' ceremonies or practices nor has it denied them access to [the Forest lands] for religious purposes").

8. Indeed, "Courts consistently have refused to disturb governmental land management decisions that have been challenged by Native Americans on free exercise grounds." *Means*, 858 F.2d at 407 (providing citations to numerous cases). . .

10. The evaluation of when the government's land management decisions cross the line from legitimate conduct to unconstitutional prohibitions on the free exercise of religion "cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development." *Lyng*, 485 U.S. at 451, 108 S. Ct. 1319. . .

13. Here, Plaintiffs have failed to demonstrate that the Snowbowl decision coerces them into violating their religious beliefs or penalizes their religious activity. *Cf. Lyng*, 485 U.S. at 449, 108 S. Ct. 1319. In fact, the Forest Service has guaranteed that religious practitioners would still have access to the Snowbowl and the approximately 74,000 acres of the CNF that comprise the Peaks for religious purposes. . .

15. Plaintiffs' assertions of perceived religious impact are near identical to those voiced by the Hopi Tribe and the Navajo Nation in *Wilson v. Block*. In that case, the plaintiffs [Navajo Nation] similarly asserted that "development of the Peaks would be a profane act, and an affront to the deities, and that, in consequence, the Peaks would lose their healing power and otherwise cease to benefit the tribes." 708 F.2d at 740. They [Navajo Nation] contended "that development would seriously impair their ability to pray and conduct ceremonies upon the Peaks." *Id.* Considering this information, the D.C. Circuit found the agency's decision did not substantially burden the tribes' exercise of religion. *Id.* at 745. The same decision is warranted here. The subjective views and beliefs presented at trial, although sincerely held, are not sufficient for the proposed project to constitute a substantial burden under RFRA [Religious Freedom Restoration Act] on the practice of religion by any Plaintiff or any members of any Plaintiff tribe or nation. . .

18. The Snowbowl decision does not bar Plaintiffs' access, use, or ritual practice on any part of the Peaks. The decision does not coerce individuals into acting contrary to their religious beliefs nor does it penalize anyone for practicing his or her religion. . .

28. ...*Lyng*, 485 U.S. at 453, 108 S. Ct. 1319 ("Whatever *907 rights the Indians may have to the use of the area . . ., those rights do not divest the Government of its right to use what is, after all, its land.")...

... *908 III. Conclusion

The Forest Service properly observed all of the procedural requirements during the various stages of approving the Snowbowl project, including preparation of an extensive EIS [Environmental Impact Statement]..."

This case, *Navajo Nation v. US Forest Serv.*, now cited by the City of Flagstaff, directly resulted from the City of Flagstaff's March 19, 2002, refusal to evaluate, on its own, Tribal concerns regarding the effects of the City's clearance to use its reclaimed wastewater on the Peaks. Instead of respecting Tribal concerns, the City of Flagstaff chose to defer and refer to the Forest Service the evaluation and the ultimate decision. This decision essentially guaranteed that Tribal concerns would be rejected based on (1) the Forest Service's history of consistently denying protection of sacred sites, and (2) the Forest Service's history of success in defending its consistent denials of sacred site protection in court.

Snowbowl's "future depends on artificial snow making."² On February 21, 2002, the Snowbowl formally asked the City of Flagstaff for a commitment to sell the City's reclaimed wastewater for use on the Peaks.³ By March 19, 2002, the City of Flagstaff swiftly agreed to sell its reclaimed wastewater to the Snowbowl contingent on the Forest Service's ultimate "decision" regarding its use.⁴

Predictably, the Forest Service would go through the motions to produce an outcome-preordained environmental study rejecting Tribal concerns. Ultimately and predictably, the Forest Service would then defend its "decision" in *Navajo Nation v. US Forest Serv.* **The outcome in *Navajo Nation v. US Forest Serv.* was completely predictable owing to the April 19, 1988, U.S. Supreme Court ruling, *Lyng v. Northwest Indian Cemetery Prot. Assn.*, 485 U.S. 439 (1988) ["*Lyng*"]. In *Lyng*, the U.S. Supreme Court ruled, that the Forest Service may destroy the sacred nature of its land as long as the government does not "coerce" one to violate their religious belief.**

Specifically, in *Lyng*, the U.S. Supreme Court rules,

"...Incidental effects of government programs, which may interfere with the practice of certain religions, but which have no tendency to coerce individuals into acting contrary to their religious beliefs, do not require government to bring forward a compelling justification for its otherwise lawful actions...Even assuming that the Government's actions here will virtually destroy the Indians' ability to practice their religion, the Constitution simply does not provide a principle that could justify upholding respondents' [Native American's] legal claims."

Since 1988, *Lyng* and its following legal rulings unfortunately have become the defining legal authority in obstructing protection of sacred sites on public lands. **Simply stated, *Lyng* summarily declares that (1) the Forest Service's right to use its land as it wishes overrides the claim of Native American religious practitioners, because the government is not**

² "Court rejects ski resort's snow plan for wastewater," Bruce Geiselman, Waste News, March 19, 2007 ("The operators of the Arizona Snowbowl said...the resort's future depends on artificial snow making."); See also: Draft Environmental Impact Statement for Arizona Snowbowl Facilities Improvements, Coconino National Forest, Coconino County, Arizona, February 2004.; and Final Environmental Impact Statement for Arizona Snowbowl Facilities, Volume 1, Coconino National Forest, Coconino County, Arizona, February 2005.

³ "Snowbowl files reclaimed water plan," Jeff Tucker, Arizona Daily Sun, February 19, 2002.

⁴ City of Flagstaff City Council Minutes, March 19, 2002.

literally outlawing Native American religion, and (2) the First Amendment protects belief, but not the ability to practice religion for Native Americans.

***Lyng* and its following legal rulings have been the controlling legal authorities governing non-protection of Native American sacred sites since 1988. In 2002, the City of Flagstaff would have certainly known of *Lyng* and of the pain and suffering *Lyng* has been causing in Indian Country.**

Nonetheless, on March 19, 2002, the Flagstaff City Council unanimously passed a motion to “enter into an agreement to sell reclaimed wastewater” to Arizona Snowbowl saying “that the purpose of the NEPA [National Environmental Policy Act Forest Service] process is to take all cultural, social, religious, and environmental issues into account as part of the body of information used to make a decision at the next level...”⁵

The City of Flagstaff’s ignoring the 1988, U.S. Supreme Court *Lyng* decision is obviously a lie by omission. Forest Service’ NEPA evaluations and decisions, subsequent to the 1988, *Lyng* decision, do not protect Native American sacred sites and religious practices on federal lands. The cultural and religious concerns of the Navajo, Hopi, Hualapai, Havasupai, Yavapai Apache and White Mountain Apache would not influence, would not affect, nor would these concerns change the predetermined Forest Service NEPA approval of the use of reclaimed wastewater on the Peaks resulting from the City’s deferral and referral to the Forest Service.

From the City of Flagstaff’s June 21, 2017, City of Flagstaff’s Answering [Appellate] Brief in 2017 WL 3198131, Court of Appeals of Arizona, Division 1.; The Hopi Tribe, v. The City of Flagstaff, Defendant/Appellee., and Arizona Snowbowl Resort Limited Partnership, Third-Party Defendant/Appellee.:

“While the Hopi may enjoy the Peaks in different manner than hikers, photographers, bird watchers, hunters, or other uses, the use and enjoyment of the Peaks which they claim is no different than that of any other group or the public at large.”...

“The City of Flagstaff submits that this Court should affirm the trial court and, in doing so, should award it fees and costs for this appeal.”

From the Appellate Court’s February 8, 2018, OPINION in the City of Flagstaff’s Appeal from the Superior Court in Coconino County in the Arizona Court of Appeals, Division One; The Hopi Tribe, Plaintiff/Appellant, v. ARIZONA SNOWBOWL RESORT LIMITED PARTNERSHIP, et al. [City of Flagstaff], Defendants/Appellees.; No. 1 CA-CV 16-0521, FILED 2-8-2018; Appeal from the Superior Court in Coconino County, No. S0300CV201100701:

⁵ These quotations come from the March 19, 2002, City Council minutes. City officials at the time included, Mayor Joseph Donaldson; Council Members Vice Mayor Karen Cooper, Allen Edgar, Bill Jeffery, Libby Silva, Penny Tovillion, and Al White, City Manager Dave Wilcox, and City Attorney Joe Bertoldo.

“Because we find the Tribe sufficiently alleged the use of reclaimed wastewater causes its members a special injury, different in kind than that suffered by the general public, by interfering with places of special cultural and religious significance to the Tribe, we reverse the trial court’s dismissal...

This emphasis on the emotional, cultural, and religious significance of the cemetery in *Beatty* supports the Tribe’s argument here that interference with a place of special importance can cause special injury to those personally affected, even when that place of special importance is upon public land.

¶13 Adopting this position, we find that within its complaint, the Tribe sufficiently alleges special injury. ... the Tribe alleges:

131. The purity of the ceremonial objects collected by members of the Hopi Tribe during pilgrimages is of particular importance. These objects cannot be used for ceremonial purposes if they become tainted or impure. ...

138. ... Natural resources that the Hopi collect, as well as shrines, sacred areas, and springs on the Peaks will come into contact with the blown reclaimed wastewater ... This negatively impacts the Hopi’s use of the Snowbowl Resort Area, the Wilderness Area, and surrounding areas, and causes Hopi practitioners to stop using the areas they have traditionally used. ...

201. The Hopi Tribe suffers specific injury ... because the prevailing winds will blow the artificial snow outside the boundaries of the application area thus negatively impacting Hopi’s use of these areas, including for ceremonial practices. ...

202. The Hopi Tribe will suffer specific injury ... because the artificial snow will blow towards, and melting snow will runoff into, springs and water bodies the Hopi Tribe uses for ceremonial and utilitarian purposes. ...

¶14 We are not persuaded by the City’s reliance upon *Oppen v. Aetna Insurance Co.*, 485 F.2d 252 (9th Cir. 1973). There, the Ninth Circuit held that boat owners seeking to recover damages following an oil spill were not specially injured when “deprived of no more than their occasional Sunday piscatorial pleasure.” *Id.* at 253, 260 (internal quotations omitted). Unlike *Oppen*, where the boat owners’ loss of navigation rights was no different in kind from that suffered by the public generally, *see id.* at 260, here, the Tribe distinguishes its cultural and religious interest in the Peaks from the recreational interests of the public at large. ...

CONCLUSION

¶19 The trial court’s order dismissing the Tribe’s complaint is reversed...”

The City of Flagstaff appealed the appellate court ruling to the Arizona Supreme Court. From the City of Flagstaff’s March 12, 2018, PETITION FOR REVIEW IN THE SUPREME COURT STATE OF ARIZONA; The Hopi Tribe, Plaintiff/Appellant, v. The City

of Flagstaff, Arizona, Defendant/Appellee, and Arizona Snowbowl Resort Limited Partnership, Third-Party Defendant/Appellee.; Arizona Supreme Court No. CV-18-0057-PR:

“The City of Flagstaff, Arizona hereby petitions that this Court review the decision rendered by the Court of Appeals, Division One, dated February 8, 2018 in the above-captioned matter. ...

The “injury” alleged by the Complaint is the environmental damage of using reclaimed water for snowmaking. That injury is common to all of the public who frequent or utilize the area for many different purposes. ...”

From the **City of Flagstaff’s May 29, 2018, SUPPLEMENTAL MEMORANDUM in the State of Arizona Supreme Court; The Hopi Tribe, Plaintiff/Appellant, v. The City of Flagstaff, Arizona, Defendant/Appellee.; and Arizona Snowbowl Resort Limited Partnership, Third-Party Defendant/Appellee; No. CV-18-0057-PR.:**

“The Hopi Tribe lacks standing to bring a public nuisance claim because it has no “special injury” different than the environmental injury suffered by the public who use the Peaks.”...

“...The Hopi cite to no case which supports their position that environmental damage to religious objects is a “special injury...The injury that is alleged as public nuisance is environmental damage common to all who use the San Francisco Peaks” ...”

The City of Flagstaff’s appeal to the Arizona Supreme Court to reverse the appellate court’s ruling in favor of the Hopi was successful. The Arizona Supreme Court ruled in favor of the City of Flagstaff against the Hopi. From HOPI TRIBE, *Plaintiff/Appellant*, v. ARIZONA SNOWBOWL RESORT LIMITED PARTNERSHIP, ET AL [City of Flagstaff]., *Defendants/Appellees.*; No. CV-18-0057-PR, Filed November 29, 2018, in the Supreme Court of the State of Arizona; Appeal from the Superior Court in Coconino County, **AFFIRMED;** Opinion of the Court of Appeals, Division One, 244 Ariz. 259 (App. 2018), **VACATED AND REMANDED:**

“...opinion of the Court:

¶1 Private parties may bring public nuisance claims in Arizona if the alleged nuisance caused the plaintiff special injury, meaning “damage [that is] different in kind or quality from that suffered by the public in common.” *Armory Park Neighborhood Ass’n v. Episcopal Cmty. Servs. in Ariz.*, 148 Ariz. 1, 5 (1985). Today we hold, as a matter of law, that environmental damage to public land with religious, cultural, or emotional significance to the plaintiff is not special injury for public nuisance purposes.” ...

¶14 Primarily relying on *In re Exxon Valdez*, 104 F.3d 1196 (9th Cir. 1997), Snowbowl contends that the alleged injury here is to the Tribe's "desire to enjoy 'pristine natural surroundings,'" *see id.* at 1198, which "is a right shared by the public generally." Snowbowl argues that injury is not transformed into "special harm" "[j]ust because [the Tribe's] members . . . wish to access the Peaks for religious reasons" when "others' motivations are environmental or recreational." The Tribe counters that "the reclaimed wastewater has directly and significantly impeded [its] use and enjoyment of a place of special importance to the Tribe by thwarting [its] religious practices" on the Peaks. According to the Tribe, such "significant interference with its use of sacred places that have formed a central component of its cultural and religious life since before recorded history" constitutes "injury [that] is clearly different in kind [from] that suffered by the public." The Tribe maintains that recognizing its injury as "special" "fits squarely within long-established Arizona and other applicable precedent," including *Armory Park* and *Beatty*, and supports its public nuisance claim...

¶15 We [the Arizona Supreme Court justices] agree with Snowbowl. Contrary to the Tribe's assertion that the place-of-special-importance form of special injury is consistent with Arizona law, the only public nuisance cases in which we have recognized special injury involved property or pecuniary [monetary] interests not present here." ...

¶19 *Lyng* illustrates this well. There, various parties, including "an Indian organization, individual Indians, nature organizations and individual members of those organizations, and the State of California," brought a religious-freedom-based challenge to a proposed road upgrade and timber harvesting in California's Chimney Rock area. 485 U.S. at 443. The plaintiffs claimed that those projects violated their rights under the First Amendment's Free Exercise Clause and various federal statutes. *Id.*

¶20 The United States Supreme Court rejected the challenge, *id.* at 453 [*Lyng*], despite recognizing that "the logging and road-building projects at issue in th[e] case could have devastating effects on traditional Indian religious practices" that are "intimately and inextricably bound up with the unique features of the Chimney Rock area," *id.* at 451.

¶21 As the Court in *Lyng* observed, "[w]hatever rights the Indians may have to the use of the area, . . . those rights do not divest the Government of its right to use what is, after all, *its* land." ... Although this case does not involve First Amendment or federal statutory claims, it similarly illustrates how the place-of-special-importance category the Tribe urges (and the court of appeals embraced) would essentially empower a lone plaintiff to interfere with decisions by public officials (made here after extensive input from interested parties, including the Tribe) concerning the best use of public lands...

¶22 The reclaimed water contract at issue here went through a nearly decade long review process in which the Tribe participated and actively voiced its opposition. That process included a series of public hearings at which the City considered alternatives to reclaimed water. And after approving the contract

with Snowbowl, the City considered, held public comment on, and ultimately denied a motion to reconsider its decision. ...”

For the reasons stated above, we affirm the trial court’s judgment in favor of Snowbowl and the City on the Tribe’s public nuisance claim, vacate the court of appeals’ opinion, and remand the case to the court of appeals to determine whether the trial court’s fee award is supportable and appropriate...”

Quotations from media coverage of the Arizona Supreme Court ruling are instructive. From the November 29, 2018, Arizona Republic, in “Hopi lose arguments on Snowbowl snowmaking in state Supreme Court ruling,”:

“‘A sad comment on our law’

In their dissent, Chief Justice Bales and Justice Bolick argued that the majority’s ruling “largely ignores the distinctive harms alleged by the Hopi” and undermined the very purpose of the public nuisance law.

“The majority fails to appreciate that the wastewater will affect the Hopi’s use and enjoyment of ancestral lands that have played a central role in Hopi culture and religion since before the Coconino National Forest was of concern to the broader public,” the dissenters wrote...

“We may live in a material world,” they wrote, “but it is a sad comment on our law to suggest that other interests — such as religious traditions and practices manifest through millennia and recognized by federal law — cannot support a claim of special injury for purposes of the public nuisance doctrine.”⁶

From the November 30, 2018, Arizona Daily Sun and the Associated Press, in “High court rules against Hopi Tribe in snowmaking challenge,”:

“The city of Flagstaff declined comment on the ruling. ...

In a dissenting opinion, Chief Justice Scott Bales said the court has long recognized that special injury can extend beyond property and monetary rights. He said it’s ironic that if the Hopi sold pine boughs or pinon nuts gathered from the mountain, the majority would allow a special injury claim.

“The general public does not have millennia of religious practice in the area that will be covered in a fine film of reclaim sewage,” Bales wrote. “Nor does the general

⁶ “Hopi lose arguments on Snowbowl snowmaking in state Supreme Court ruling, Arizona Republic, November 29, 2018, <https://www.azcentral.com/story/news/local/arizona/2018/11/29/hopi-lose-arguments-snowbowlsnowmaking-state-supreme-court-ruling/1997219002/> .

public have rights of access and use, rooted in Hopi tradition and cultural practices, recognized by federal statutes."

"I'm disappointed and I'm frustrated," said Leigh Kuwanwisiwma, who retired as the Hopi's longtime cultural preservation director last year and was heavily involved in the case. "But I think indigenous people like Hopi people are always going to be at a legal disadvantage when they put something like that in a white man's court."⁷

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⁷ "High court rules against Hopi Tribe in snowmaking challenge," Felicia Fonseca, Associated Press, Arizona Daily Sun, November 30, 2018, https://azdailysun.com/news/local/high-court-rules-against-hopi-tribe-in-snowmakingchallenge/article_1cad9758-a74e-539a-872a-5fb3b939aaaa.html#tracking-source=home-top-story-1.