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HUMAN RIGHTS COUNCIL**

Mandate of the Special Rapporteur on the rights of indigenous peoples

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Excellency,

I have the honour of addressing you in my capacity as Special Rapporteur on the rights of indigenous peoples, pursuant to Human Rights Council Resolution 15/14.

In this connection, I would like once again to refer your Excellency's Government to the situation regarding the **proposed use of recycled wastewater for commercial ski operations in the San Francisco Peaks in Arizona – a site considered sacred by several Native American tribes**. This was the subject of a letter sent to your Government on 10 January 2011, which referred to the religious significance of the mountainous area known as the San Francisco Peaks (or the "Peaks") to several Native American tribes, and to the opposition of these indigenous peoples to the United States Forest Service's approval of a permit for a private company to use recycled wastewater for making artificial snow for its ski operation in the Peaks.

I regret that I have not received a response from your Government to my letter as requested. Nonetheless, on the basis of the information I have received and gathered, which I believe to be credible and in material respects undisputed, I am offering below observations about the situation. These observations, which include a series of recommendations, are made in a continuing attempt to establish a constructive dialogue with your Excellency's Government regarding the human rights issues raised in my earlier communication, within the terms of my mandate from the Human Rights Council.

Observations on the situation

The extensive documentation by the Government and federal courts in relevant proceedings makes clear that the San Francisco Peaks are sacred to several Native American tribes, and that the presence of the ski operation and now the initiative to make artificial snow from recycled wastewater on the Peaks offend the religious beliefs and practices of members of these tribes. Apart from the provisions of domestic law that have been applied by the courts to examine this situation, international standards,

including those based on human rights treaties to which the United States is a party and the Declaration on the Rights of Indigenous Peoples, require adequate consultation and close scrutiny for any action that affects the sacred sites and religious practices of indigenous peoples. The United States should engage in a comprehensive review of its relevant policies and actions to ensure that they are in compliance with these international standards in relation to the San Francisco Peaks and other sacred sites of Native Americans, and should take appropriate remedial action. In the paragraphs below, I will elaborate upon these points.

The effects of the planned snowmaking on Native American religion

I am aware that the development of the ski operation known as Snowbowl and its recent plans for expanded facilities, including for artificial snowmaking with recycled wastewater, have proceeded with extensive examination and documentation by the Government and federal courts on the impacts on Native American culture and religion. Required environmental impact studies and the legal challenges to the federal permits for Snowbowl's expansion on the San Francisco Peaks have prompted this examination and documentation, which make abundantly clear the sacred character of the Peaks to the tribes, the affront on their religious beliefs and the tribes' opposition to the planned snowmaking.

The Final Environmental Impact Statement (FEIS) compiled by the U.S. Forest Service to assess the proposal for artificial snowmaking and other additions to Snowbowl's operations on the Peaks includes the following observations:

The San Francisco Peaks are sacred to at least 13 formally recognized tribes that are still actively using the Peaks in cultural, historic, and religious contexts. A central underlying concept to all tribes for whom the Peaks are especially important is the recognition that the San Francisco Peaks are a source of water in the form of rain, springs, and snow. It is believed that the Peaks were put there for the people and it is therefore the peoples' duty to protect it for the benefit of the world [...] nine significant qualities... characterize the Peaks for the tribes. These qualities include:

- They are the abode of deities and other spirit beings.
- They are the focus of prayers and songs whereby humans communicate with the supernatural.
- They contain shrines and other places where ceremonies and prayers are performed.
- They are the source of water.
- They are the source of soil, plant, and animal resources that are used for ceremonial and traditional purposes.
- They mark the boundaries of traditional or ancestral lands.
- They form a calendar that is used to delineate and recognize the ceremonial season.

- They contain places that relate to legends and stories concerning the origins, clans, traditions, and ceremonies of various Southwestern tribes.
- They contain sites and places that are significant in the history and culture of various tribes.

[...]

Two examples of the cultural significance of the San Francisco Peaks are the Hopi and Navajo peoples' religious and spiritual connections to the Peaks, as discussed below.

Hopi

Hopi clans migrated through the San Francisco Peaks (called *Nuvatukyaovi*, "High Place of Snow"), made settlements nearby, and placed shrines on the Peaks. All of the religious ceremonies focus on *Nuvatukyaovi* and demonstrate the sacred relationship of the Peaks to the Hopi people. The history of clan migrations through the area continue to be related, discussed, and passed on from generation to generation. The Peaks contain clan and society shrines, and gathering areas for medicinal and religious use. Hopi religious leaders visit the Peaks annually. The San Francisco Peaks are the spiritual essence of what Hopis consider the most sacred landscapes in Hopi religion. They are the spiritual home of the *Katsinam*, significant religious beings that all Hopis believe in, and are therefore, sacred. The ceremonies associated with the Peaks, the plants and herbs gathered on the Peaks, and the shrines and ancestral dwellings located in the vicinity of the Peaks are of central importance to the religious beliefs and traditions that are the core of Hopi culture....

Navajo

The Navajo people believe that the Creator placed them on land between four sacred mountains: Blanca Peak in Colorado, Mount Taylor in New Mexico, the San Francisco Peaks in Arizona, and Hesperus Peak in Colorado. According to their own history, the Navajos have always lived between these mountains. Each of the four mountains is associated with a cardinal direction, symbolizing the boundaries of the Navajo homeland. For the Navajo, the Peaks are the sacred mountain of the west, *Doko'oo'sliid*, "Shining on Top," a key boundary marker and a place where medicine men collect soil for their medicine bundles and herbs for healing ceremonies. Navajo traditions tell that San Francisco Peak was adorned with *Diichilí*, Abalone Shell, Black Clouds, Male Rain, and all animals, besides being the home of *Haashch'éélt'i'í* (Talking God), *Naada'algaii* 'Ashkii (White Corn Boy), and *Naadá 'Altsoii 'At'ééd* (Yellow Corn Girl). The sacred name of the Peaks is *Diichilí Dzil* – (Abalone Shell Mountain). The Navajo people have been instructed by the Creator never to leave their sacred homeland. *Dook'o'osliid* and the other three sacred mountains are the source of curing powers. They are perceived as a single unit, such as the wall of a hogan, or as a particular time of a single day. *Dook'o'osliid* is seen as a wall made of abalone shell and stone, with mixed yellow and white bands....

Environmental Consequences [...]

The 1975 Hopi Tribal Resolution noted that there are numerous medicinal herbs and other plants at several levels of the Peaks that are used to treat the ailments of the Hopi people. The Forest Service is unaware of any plants or other natural resource material used by the Hopi within the Snowbowl ...area; however, the addition of new trails, increased parking, and the potential for additional annual visitation within the ... area and the San Francisco Peak themselves causes concern among the Hopi and other tribes that their areas of traditional use would be impacted. Specifically, the Hopi make pilgrimages to shrines and use the Peaks for religious reasons such as gathering evergreens and herbs and delivering prayer feathers.

Although the reclaimed water proposed for use in snowmaking fully meets both the Federal and Arizona state water quality standards, it is believed that trace levels of unregulated residual constituents within reclaimed water (e.g., pathogens, pharmaceuticals, hormones, etc.) could negatively impact the spiritual and medicinal purity of resident flora on the Peaks. Several specific concerns have been raised about the impact of snowmaking on the spiritual values of the Peaks.

[...]An additional concern is that some of the reclaimed water once passed through hospitals or mortuaries could carry the spirits of the dead with it. Those spirits, as part of the water draining from the Peaks, would then infiltrate plants, thus affecting their ritual purity.

From both a Hopi and Navajo perspective, any plants that would come into contact with reclaimed water would be contaminated for medicinal purposes, as well as for use in ceremonies needed to perpetuate their cultural values.

[...] The Hopi believe that the *Katsinam* are responsible for moisture and that the installation of snowmaking technology within the SUP area would alter the natural processes of the San Francisco Peaks and the responsibilities of the *Katsinam*.

The Hopi, Navajo, and other tribes have existed in the region of the San Francisco Peaks for thousands of years and have developed their cultures and religious institutions around the natural and cultural landscape of the San Francisco Peaks. Traditions, responsibilities, and beliefs that delineate who they are as a people, and as a culture, are based on conducting ritual ceremonies they are obligated to perform as keepers of the land. These obligatory activities focus on the Peaks, which are a physical and spiritual microcosm of their cultures, beliefs, and values. Snowmaking and expansion of facilities, especially the use of reclaimed water, would contaminate the natural resources needed to perform the required ceremonies that have been, and continue to be, the basis for the cultural

identity for many of these tribes.¹

The records of the proceedings in federal court litigation concerning Snowbowl's ski operations on the San Francisco Peaks reinforce the above assessment of the sacred character of the Peaks, and of the effects of the existing ski facilities, the planned artificial snowmaking and other modifications on Native American religion.² Even while holding that the Government's approval of the Snowbowl modifications did not violate federal law, the Ninth Circuit Court of Appeals, sitting en banc, acknowledged the sacred character of the San Francisco Peaks and that "to the [tribes] the [presence of recycled wastewater] will desecrate a sacred mountain and will decrease the spiritual fulfillment they get from practicing their religion on the mountain."³

Despite such acknowledgment, the federal appellate court held that this impact on religion is not of the kind that could lead to finding a violation of the federal Religious Freedom Restoration Act (RFRA). For the Ninth Circuit Court of Appeals, RFRA only protects against government action that actively coerces Native American religious practitioners into violating their religious beliefs or that penalizes their religious activity with loss or threat loss of government benefits. Along with finding the absence of such conditions, the court pointed to the lower court determination that in fact no plants or religious shrines would be physically affected by the snowmaking and that practitioners would continue to have access to the mountain, including the ski area, to conduct religious activities.⁴ Neither the appellate nor lower court questioned, however, that for Native American religious practitioners from several tribes, snowmaking with recycled wastewater in Snowbowl would be a desecration of a sacred mountain, even if federal and state environmental standards are met and they continue to have access to the mountain along with skiers.

It is not my purpose to review or challenge the application of domestic law by the United States judicial system. Rather, I mean to draw attention to the relevant international standards that bind the United States and that should guide action by Government actors, even when certain decisions may be permissible under domestic law. I respectfully remind the United States that the judicial applications and interpretations of the legal protections for Native American religion available under domestic law do not pose any legal barrier to Government action in accordance with a higher standard.

The lack of indigenous agreement or consent to artificial snowmaking on a sacred mountain

¹ USDA Forest Service, Arizona Snowbowl Facilities Improvements Final Environmental Impact Statement, Vol. 1 (2005), pp. 3-7 to 3-11, 3-16 to 3-18 (hereinafter "FEIS").

² See *Navajo Nation v. United States Forest Service*, 408 F. Supp. 2d 866 (D. Ariz., 2006), *aff'd in part and rev'd in part*, 479 F.3d 1024 (9th Cir. 2008); *aff'd on rehearing*, 535 F.3d 1058 (9th Cir. 2008), cert. denied, 129 S.Ct. 2763 (2009); *Wilson v. Block*, 708 F.2d 735 (D.C. Court of Appeals, 1983), cert. denied 463 U.S. 958 (1983).

³ *Navajo Nation v. United States Forest Service*, 535 F.3d 1058, 1070 (9th Cir. 2008) (en banc), cert. denied, 129 S.Ct. 2763 (2009).

⁴ See *Ibid.*, pp. 1063, 1070.

In its Record of Decision to permit snowmaking from recycled wastewater and other modifications to the ski operation on the San Francisco Peaks, the United States Forest Service acknowledged that “over the years the tribes have continued to state their opposition to development at Snowbowl”, as they did in 1979 when the Forest Service was considering the option of closing down the ski operation but decided instead to allow it to expand.⁵ The Forest Service reported extensive consultations with the tribes about the most recent plans for Snowbowl enhancements. “In all 200 phone calls were made, 41 meetings were held, and 245 letters were sent to Tribal officials, tribal historic preservation offices, traditional tribal leaders/practitioners, and the general tribal public.”⁶

The Forest Service confirms that “As with the decision in 1979, the proposal to improve the facilities at the Snowbowl has been met with adamant opposition from the tribes, even though there have been changes in laws, improvements in working relationships and successes in working together on other projects ...”.⁷ Despite this adamant opposition by the tribes based on their religious practices and beliefs, the Forest Service decided to approve the artificial snowmaking and other ski area modifications, bringing into question the United States’ adherence to international standards to which it has expressed its commitment.

Article 19 of the Declaration on the Rights of Indigenous Peoples provides:

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free prior and informed consent before adopting and implementing any legislative measure that affects them.

This standard of consultation and consent is a corollary of the right to self-determination and the cultural rights of minorities that are affirmed, respectively, in articles 1 and 27 of the International Covenant on Civil and Political Rights, as manifested by the jurisprudence of the Human Rights Committee.⁸ Additionally, it is instrumental to implementing the principles of non-discrimination found in the International Convention on the Elimination of All Forms of Racial Discrimination, as instructed by the Committee on the Elimination of Racial Discrimination (CERD).⁹ In its General Recommendation 23, CERD calls upon State parties to “Ensure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent ...”¹⁰

⁵ USDA Forest Service, Record of Decision – Arizona Snowbowl Facilities Improvements Final Environmental Impact Statement and Forest Management Plan #21 (February 2005), p.3 (hereinafter “FEIS-Record of Decision”).

⁶ Ibid., p. 9.

⁷ Ibid., p. 3

⁸ See Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, A/HRC/12/34 (15 July 2009), paras. 40- 41 (hereinafter “2009 annual report of the Special Rapporteur”).

⁹ Ibid., para. 40.

¹⁰ CERD/C/51/Misc.13/Rev.4, para. 4(d).

Under the cited human rights treaties, to which the United States is a party, and the Declaration on the Rights of Indigenous Peoples, which the United States has endorsed, consultations should take place with the objective of achieving agreement or consent by indigenous peoples to decisions that may directly affect them in significant ways, such as decisions affecting their sacred sites. Simply providing indigenous peoples with information about a proposed decision and gathering and taking into account their points of view is not sufficient in this context. Consultation must occur through procedures of dialogue aimed at arriving at a consensus.¹¹

It is far from clear that the consultations with the tribes about the artificial snowmaking and other ski area modifications were undertaken through procedures involving negotiations toward an agreed-upon outcome. It appears instead that the consultations were more in the nature of dissemination of information about the Snowbowl development plans and gathering of views about those plans, within a process of government decision making that did not depend on agreement or consent on the part of the tribes.¹² In any case, it is beyond question that the tribes have not agreed or consented to the Snowbowl modifications; indeed they have actively opposed them.

In the absence of consent by indigenous peoples to decisions that affect them, States should act with great caution. At a minimum, States should ensure that any such decision does not infringe indigenous peoples' internationally-protected collective or individual rights, including the right to maintain and practice religion in relation to sacred sites. It is therefore necessary in this case to assess the nature of the right of Native Americans to practice their religious traditions under international human rights standards and the scope of permissible restriction of the right.

International standards protecting the right of Native Americans to maintain and practice their religious traditions

Under relevant sources of international law, the United States has a duty to respect and protect Native American religion, a duty that goes beyond not coercing or penalizing Native American religious practitioners. As was pointed out in my previous communication, the right of indigenous peoples to maintain and practice their distinctive religions, including in relation to sacred areas, is protected by the International Convention on Civil and Political Rights and the International Convention on the

¹¹ For a discussion of the duty of States to consult with indigenous peoples affecting them, see 2009 annual report of the Special Rapporteur, *supra*, paras. 36-74.

¹² The Forest Service did develop a Memorandum of Agreement (MOA) related to adverse effects of the proposed ski area modifications, as a result of the nomination of the San Francisco Peaks for inclusion in the National Register of Historic Places, and it invited the tribes to sign the MOA as concurring parties. The Forest Service reported that four of the affected tribes did sign, while the others (including Navajo and Hopi) declined to do so or did not respond. FEIS-Record of Decision, p. 26-27. The MOA does not embody or propose agreement to the ski area modifications but rather provides for a series of measures calculated to mitigate adverse effects of the development of the ski area and to protect the cultural values associated with the San Francisco Peaks. See FEIS, Appendix D. While most of the affected tribes did not sign the MOA, it is not clear that any of them were involved in developing its terms, other than indirectly through the consultations reported by the Forest Service.

Elimination of All Forms of Racial Discrimination. Further, it is recognized specifically by the United Nations Declaration on the Rights of Indigenous Peoples, which provides an authoritative statement of standards that States should follow in keeping with their obligations under these and other human rights treaties, as well as under the human rights clauses of the United Nations Charter. Any restriction on the right of indigenous peoples to maintain and practice their religious traditions, not just those involving active coercion or penalties, is subject to the most exacting scrutiny under these international instruments.

The right to practice or manifest religion or belief is protected under article 18(1) of the International Covenant on Civil and Political Rights, which states that “Everyone shall have the right to freedom of thought, conscience and religion [which includes] freedom ... either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.” State parties have a duty to take the measures necessary to ensure the effective enjoyment of this and other rights recognized the Covenant. (Art. 2(2)). In its article 27, which is also of relevance to indigenous peoples, the Covenant gives special consideration to the rights of minorities whose cultural and religious traditions differ from those of the majority. Article 27 states, “Persons belonging to 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 ...” In its interpretation of State parties’ obligations under article 27, the Human Rights Committee, in its General Comment 23 affirmed that “positive measures by States may also be necessary to protect the identity of a minority and the rights of its members to enjoy and develop their culture and language and to practice their religion, in community with other members of the group”.¹³

Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination provides that State parties are to “guarantee the right of everyone [...] to equality before the law, notably in the enjoyment of [...] the right to freedom of thought, conscience and religion.” In interpreting and applying this Convention, CERD has observed the need to take into account the particular characteristics of groups in order to achieving effective equality in the enjoyment of their human rights. Otherwise, “to treat in an equal manner persons or groups whose situations are objectively different will constitute discrimination in effect, as will the unequal treatment of persons whose situations are objectively the same.”¹⁴ Accordingly, in its General Recommendation 23, CERD has noted the distinctive characteristics of indigenous peoples in light of their histories and cultures, and has called upon States to take particular measures to protect their rights, including measures to “Ensure that indigenous communities can exercise their rights to practice and revitalize their cultural traditions and customs ...”¹⁵

The Declaration on the Rights of Indigenous Peoples, which reinforces the call to ensure for indigenous peoples the enjoyment of fundamental human rights historically denied to them, for its part affirms that “Indigenous peoples have the right to manifest, practice, develop and teach their spiritual and religious traditions, customs and

¹³ CCPR/C/21/Rev.1/Add.5, para. 6(2).

¹⁴ CERD General Recommendation 32: Special Measures, para 8.

¹⁵ CERD/C/51/Misc.13/Rev.4, para. 4(d)(e)).

ceremonies; the rights to maintain, protect, and have access in privacy to their religious and cultural sites” (Art. 12). Additionally, article 25 of the Declaration provides that indigenous peoples’ right to “maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories [...] and to uphold their responsibilities to future generations in this regard.” The Declaration thus recognizes that, for indigenous peoples, the ability to effectively practice and manifest their religion and beliefs depends many times on the protection of and access to sites of particular religious and cultural significance. Consequently, the duty of States to ensure on an equal basis the right to the free exercise of religion includes that duty to adopt safeguards for the exercise of indigenous religious traditions in connection with sacred sites.

Permissible limitations on the right to maintain and practice religion

The international law duty of States to ensure the exercise by indigenous peoples of their religious traditions extends to safeguarding against any meaningful limitations to that exercise, not just limitations that entail coercion to act against one’s religious beliefs or penalties for doing so. Article 18(3) of the Covenant on Civil and Political Rights states that the “freedom to manifest one’s religion or beliefs may be subject only to such limitations as prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.” With this standard there is no qualification on the kind of limitation or restriction that must undergo examination for justification on the basis of the stated purposes. Under the plain language of article 18 of the Covenant, *any* clearly observable limitation that makes for a meaningful restriction on the exercise of religion is subject to scrutiny.

The process of snowmaking from reclaimed sewage water on the San Francisco Peaks undoubtedly constitutes a palpable limitation on religious freedom and belief, as clearly indicated by the U.S. Forest Service’s FEIS. This limitation exists even assuming minimal physical environmental degradation as a result of the snowmaking. It bears remembering that the Ninth Circuit Court of Appeals acknowledged that the effect of the proposed use of reclaimed wastewater would constitute a desecration of the affected indigenous peoples’ religion.¹⁶ The religious freedom at stake is not simply about maintaining ceremonial or medicinal plants free from adverse physical environmental conditions or about physical access to shrines within the Peaks. More comprehensively, it is about the integrity of entire religious belief systems and the critical place of the Peaks and its myriad qualities within those belief systems.

Is the limitation on Native American religion necessary to achieve a valid public purpose or protect the human rights of others?

It may be concluded without much difficulty that the limitation on Native American religion resulting from the decision of the U.S. Forest Service to permit the artificial snowmaking is “prescribed by law”, in the sense that it is pursuant to the Forest Service’s authority and legally prescribed procedures for managing the lands around the

¹⁶ See Navajo Nation, 535 F. 3d at 1070.

San Francisco Peaks. The question remains, however, whether the limitation from that decision is “necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others”, as stipulated by article 18(3) of the Covenant on Civil and Political Rights. This question in turn entails two inquiries: first, whether an adequate purpose is being pursued and, second, whether the limitation on Native American religion is necessary to achieve that purpose.

As to the first question, whether there is a sufficient purpose within the terms of article 18(3) of the Covenant on Civil and Political Rights, the Human Rights Committee in its General Recommendation 22 has explained that this provision “is to be strictly interpreted: restrictions are not allowed on grounds not specified there [...] limitations may be applied only for those purposes for which they were prescribed”.¹⁷ It is far from apparent how the decision to permit snowmaking by a private recreational ski facility is in furtherance of one of the specified public purposes – public safety, order, health or morals – or the human rights of others. In its Record of Decision on the artificial snowmaking and other modifications to the ski area, the Forest Service explained that “downhill skiing is an important component of the recreation opportunities offered by National Forests, and the Forest Service and the ski industry have forged a partnership to provide recreational opportunities on [National Forest Service] lands.”¹⁸ In the view of the Forest Service, “the overall benefits of providing stable winter recreational opportunities for the public and the community... merits the selection” of the proposed use of recycled wastewater for snowmaking operations.¹⁹ In this connection, the Forest Service considered the financial viability of Snowbowl to be a factor: “Snowbowl’s ability to maintain or improve its current level of service and endure the business conditions caused by unreliable snowfall is questionable. [...] [Therefore] the installation and operation of snowmaking infrastructure... will enable a reliable and consistent operating season, thereby helping to stabilize the Snowbowl’s viability.”²⁰

Even assuming that a sufficient purpose could be discerned, it is left to be determined whether the limitation on religion arising from the artificial snowmaking is necessary for that purpose, necessity being in significant part a function of proportionality. As stated by the Human Rights Committee, “limitations [...] must be directly related and proportionate to the specific need on which they are predicated”.²¹ An assessment of necessity and proportionality requires examination of the nature and severity of the limitation on religion, in relation to the identified valid purpose and the manner in which the purpose is being pursued. In this respect as well, it is far from readily apparent how the limitation on Native American religion imposed by the planned snowmaking can be justified.

In determining necessity and proportionality, there must be due regard for the significance of the San Francisco Peaks in the religious traditions of the tribes, the

¹⁷ CCPR/C/21/Rev.1/Add.4, para. 8.

¹⁸ FEIS-Record of Decision, p. 23.

¹⁹ Ibid.

²⁰ Ibid., p. 24.

²¹ CCPR/C/21/Rev.1/Add.4, para. 8.

desecration that the artificial snowmaking signifies, and the cumulative effect of that desecration. The artificial snowmaking simply builds on what already was an affront to religious sensibilities: the installation of the ski area in the first place and its gradual expansion. In its FEIS, the Forest Service noted the past, present and potential future cumulative effects of the ski operation, with its expansion and upgrades, on the cultural resources in the area.²² The cumulative effects on Native American religion of the expansions and upgrades of the ski operation, and not just the added effects of the snowmaking, must be found necessary and proportionate in relation to some sufficient purpose. I find it highly questionable that the effects on Native American religion can be justified under a reasonable assessment of necessity and proportionality, if the purpose behind the Government decision to permit the enhancements to the ski operation is none other than to promote recreation.

Recommendations

On the basis of the foregoing, I respectfully recommend that your Excellency's Government engage in a comprehensive review of its relevant policies and actions to ensure that they are in compliance with international standards in relation to the San Francisco Peaks and other Native American sacred sites, and that it take appropriate remedial action.

In this connection, the Government should reinitiate or continue consultations with the tribes whose religions practices are affected by the ski operations on San Francisco Peaks and endeavor to reach agreement with them on the development of the ski area. The Government should give serious consideration to suspending the permit for the modifications of Snowbowl until such agreement can be achieved or until, in the absence of such an agreement, a written determination is made by a competent Government authority that the final decision about the ski area modifications is in accordance with the United States' international human rights obligations.

I wish to stress the need to ensure that actions or decisions by Government agencies are in accordance with, not just domestic law, but also international standards that protect the right of Native Americans to practice and maintain their religious traditions. I am aware of existing Government programs and policies to consult with indigenous peoples and take into account their religious traditions in Government decision-making with respect to sacred sites. I urge the Government to build on these programs and policies to conform to international standards and by doing so to establish a good practice and become the world leader that it can in the protection of the rights of indigenous peoples.

Allow me to conclude by saying that it is my sincere hope that your Excellency's Government will take these observations into consideration, in the spirit of constructive engagement in which they are offered. I welcome any comments your Government may have to these observations as well as any supplemental information. It is my intention to include the above observations in my report to the Human Rights Council. If comments

²² FEIS, *supra*, at 3-25.

by your Government are received by 10 August 2011, I can assure that they will be reflected in my next report to the Council along with my observations.

Please accept, Excellency, the assurances of my highest consideration.

James Anaya
Special Rapporteur on the rights of indigenous peoples