

Mandate of the Special Rapporteur on the rights of indigenous peoples

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Excellency,

I have the honour to address you in my capacity as Special Rapporteur on the rights of indigenous peoples pursuant to Human Rights Council resolution 24/9.

In this connection, I am writing to follow up on our correspondence regarding the **efforts of the Pueblo of Jemez to assert ownership and secure access to lands located within the Valles Caldera National Preserve in New Mexico**. As you are aware, I first contacted your Government about this situation on 13 January 2014. I would like to thank your Excellency's Government for its response of 29 April 2014 to my letter.

From the information provided, it appears that the Valles Caldera Trust, which administers the Valles Caldera National Preserve on behalf of the Government, is taking steps to address the concerns of the Pueblo of Jemez regarding access to and protection of sites of cultural and religious significance within the preserve. In particular, I take note of the information provided that there is a policy and process in place to allow for tribal access to the national preserve for religious and cultural purposes. Regarding the plan to increase public access to the national preserve for unstructured hiking, I note the information provided that the Valles Caldera Trust is developing measures, in consultation with neighboring tribes including the Pueblo of Jemez, to address their concerns over the possible impacts of the plan's implementation on the religious and cultural practices and sites. I encourage your Government to ensure that the plan for increased public access for hiking within the national preserve continues on hold until an agreed-upon solution is found.

In this regard, I would like to again draw the attention of the United States to the United Nations Declaration on the Rights of Indigenous Peoples, which the United States has endorsed and declared will inform United States policy toward the indigenous peoples of the country. Article 25 of the Declaration affirms that "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.” I hope that, in addition to relevant domestic laws like the American Indian Religious Freedom Act, this provision guides the development of measures to ensure access to and protection of areas of cultural and religious significance to the Jemez Pueblo and other indigenous peoples within the Valles Calderas National Preserve.

With respect to Jemez Pueblo’s claim of ownership of lands within the national preserve on the basis of traditional use and occupancy, your Government noted that the pueblo has filed a lawsuit on this issue, which is currently pending before the United States Court of Appeals for the Tenth Circuit, and stated that the Government cannot comment on cases under litigation. It is a matter of public record, however, that during litigation in this case, the United States has strongly opposed the Jemez Pueblo’s request for a judicial declaration that the pueblo has “exclusive right to use, occupy and possess the lands of the Valles Caldera National Preserve pursuant to its continuing aboriginal Indian title to such lands.” In its motion to dismiss before the United States District Court for the District of New Mexico, the Government set forth a number of jurisdictional, procedural and substantive challenges to the Jemez Pueblo’s claim and argued that any aboriginal title the pueblo may have had in the area was extinguished by the United States Congress, under its “plenary” authority, when it established the Valles Calderas National Preserve.

Without providing specific views on the arguments presented by the United States in this case and notwithstanding the eventual decision by the Court of Appeals for the Tenth Circuit, I urge your Government to reconsider its position in this situation, in light of its international human rights obligations as informed by the Declaration on the Rights of Indigenous Peoples. As pointed out in my earlier letter, the Declaration affirms that indigenous peoples have the right to lands that they have traditionally owned, occupied or otherwise used (article 26), reflecting a standard that is implicit in human rights treaties to which the United States is a party and that are binding upon it, in particular the International Convention on the Elimination of All Forms of Racial Discrimination and the International Covenant on Civil and Political Rights. The United Nations Committee on the Elimination of Discrimination (CERD), in authoritatively interpreting the obligations of States parties under the convention against discrimination, has called upon States parties to the convention to “recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources” (CERD General Recommendation 23, article 5). In a similar vein, the United Nations Human Rights Committee has instructed that the right to culture that States are to protect under article 27 of the Covenant on Civil and Political Rights includes the right of indigenous peoples to maintain all the aspects of their distinctive cultural identities, including their historical and ongoing connections with land resources (Human Rights Committee, General Comment 23, para. 7).

It bears emphasizing that the extinguishment theory espoused by the United States in the ongoing litigation is squarely at odds with the contemporary international standards grounded in universal human rights of equality, cultural integrity and property. As stated by the Committee on the Elimination of Racial Discrimination in relation to States’ obligation to refrain from discrimination in relation to property, “where [indigenous

peoples] have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent,” the State has an obligation to “take steps to return those lands and territories” (CERD, General Recommendation 23, para. 5). Further “Only when this is for factual reasons not possible, the right to restitution should be substituted by the right to just, fair and prompt compensation. Such compensation should as far as possible take the form of lands and territories” (Ibid.). This standard is reiterated by the Declaration on the Rights of Indigenous Peoples in the following terms: “Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent” (article 28). I urge all relevant United States authorities, including executive and judicial authorities, to interpret the applicable federal law in this case in a manner consistent with the United States’ international human rights obligations and policy commitments.

Whether or not United States domestic law compels return of lands within the Valles Calderas National Preserve to the Jemez Pueblo or other tribes that can demonstrate traditional use and occupancy within the preserve, there is nothing in domestic law that impedes the United States from doing so, through appropriate executive or legislative action, in compliance with the international standards to which it has committed. In fact, as I pointed out in my 2012 report on the Situation of Indigenous Peoples in the United States (A/HRC/21/47.Add.1), there are already important precedents in this regard, including the return of the sacred Blue Lake to Taos Pueblo and the restoration of land to the Timbisha Shoshone Tribe (paragraph 90). Similar to what could be the case within the Valles Caldera National Preserve, both land areas were restored from land under federal administration, with no consequence for any individual property interests.

I would like to stress that a position that promotes indigenous peoples rights and interests in lands to which they maintain a cultural or religious attachment, rather than opposes them, could go a long way in promoting the much-needed reconciliation and healing. As I noted in my 2012 report, “What is now needed is a resolve to take action to address the pending, deep-seated concerns of indigenous peoples, but within current notions of justice and the human rights of indigenous peoples” (paragraph 78).

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.

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

James Anaya
Special Rapporteur on the rights of indigenous peoples

