

PETITION
to the
INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

submitted by
THE NAVAJO NATION

against
THE UNITED STATES OF AMERICA

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SUMMARY OF PETITION

The Navajo Nation (whose members live primarily in and around the Navajo Nation reservation covering portions of the states of Arizona, New Mexico and Utah) submit this petition against the United States of America to seek redress for violations of the Navajo people's rights to religious freedom, right to culture and right to judicial protection, rights affirmed in the American Declaration of the Rights and Duties of Man (in its articles III, XIII and XVIII, respectively). The violations arise from recent actions by the City of Flagstaff, Arizona that, adding to prior official authorizations, extend permission for a commercial ski facility to use treated sewage effluent, or "reclaimed wastewater" to produce artificial snow on the San Francisco Peaks in northern Arizona. The San Francisco Peaks are a place of great religious and cultural significance to the Navajo people and at least thirteen other indigenous peoples.

Members of the Navajo Nation and other indigenous peoples have had a special relationship with the San Francisco Peaks since time immemorial involving religious, cultural, ceremonial and other traditional practices. The San Francisco Peaks are one of the four most sacred places to the Navajo people, a traditional boundary marker of their ancestral territory, and a source of soil, plant and other natural resources used for ceremonial and traditional purposes, among other religious and cultural attributes. When one of these mountains and its elements is desecrated, it throws the Navajo Life Way out of balance. The effective exercise and enjoyment of the Navajo people's religion and culture depends on the physical and spiritual purity and integrity of the San Francisco Peaks and the plants, animals, soil and water sources contained therein. The Navajo regard the artificial snowmaking activities on the San Francisco Peaks as incompatible with the sacred character and ecology of the mountain.

The federal government administers the area encompassing the San Francisco Peaks through the United States Department of Agriculture, Forest Service. The Forest Service has permitted the use of the area by Snowbowl ski resort and the Navajo Nation and other indigenous peoples have responded in opposition to these commercial ski activities including the use of reclaimed wastewater for snowmaking on the San Francisco Peaks. The most recent violation of the Navajo people's human rights results from a decision by the City of Flagstaff, Arizona to enter into a new agreement in August 2014 for the provision of reclaimed wastewater to the commercial ski operations from the existing 5 year term to 20 years and to raise the cap on the volume of water delivered to Snowbowl. This would substantially increase the amount of reclaimed water to the San Francisco Peaks and result in further violations of the Navajo people's religious and cultural rights. Plans are also underway to sell the commercial ski operations to a new private owner who has expressed his intentions to expand facilities and increase artificial snowmaking.

The Navajo Nation did not receive notice from the City of Flagstaff about the new agreement to provide reclaimed wastewater and was not afforded any public consultation or other opportunity to intervene and seek the prevention of further violations of their religious and cultural rights. The Navajo Nation does not have any reasonable prospect of success for challenging the actions taken by the City of Flagstaff before domestic courts. This is due to United States Supreme Court and lower federal court precedents that set a very restrictive standard for determining a "substantial burden" on religious exercise under the U.S. Constitution – a standard that has been impossible to meet in cases related to indigenous peoples' sacred places. Other domestic federal

legislation providing religious freedom protections against government actions (specifically, the Religious Freedom Restoration Act or “RFRA”) pertains only to the actions of the federal government and not those of the states of the United States or their political subdivisions such as the City of Flagstaff. In any case, the interpretation and application of this legislation by the federal courts provides evidence of a lack of legal protection against the type of government action at issue here. This was demonstrated by the Navajo Nation’s own experience in using the RFRA to challenge the Forest Service’s original permitting of artificial snowmaking from treated sewage on the San Francisco Peaks.

Prior determinations by domestic tribunals related to indigenous sacred sites indicate that there is no reasonable prospect of success for the Navajo Nation to protect their human rights with the First Amendment of the U.S. Constitution or the RFRA. Despite federal policy pronouncements calling for respect of indigenous sacred sites, there is a lack of specific and effective administrative or other mechanisms by which indigenous peoples can legally protect their sacred places. Therefore, there are no domestic remedies that can conceivably be exhausted by the Navajo Nation to challenge the actions of the City of Flagstaff to prevent further violations of Navajo religious and cultural rights. This situation represents not only an exception to the exhaustion of domestic remedies requirement but also results in a violation of the Navajo people’s right to judicial protection.

As a result of the above, the Navajo Nation requests that the Inter-American Commission of Human Rights declare the United States responsible for the violations of the rights to religion, culture and judicial protection under the American Declaration of the Rights and Duties of Man. The Navajo Nation further urges the Commission to direct the State to provide reparations including, *inter alia*, the immediate cancellation of the permit that allows commercial ski operations and the use of reclaimed wastewater for artificial snowmaking in the San Francisco Peaks; remediation measures for the effects of the use of treated sewage effluent on the physical and cultural integrity of the San Francisco Peaks; the implementation of appropriate mechanisms by which indigenous peoples in the United States can be consulted, with a view to obtain their free, prior and informed consent on State actions that affect their sacred sites; and to undertake the necessary legal, administrative or other reforms to ensure indigenous peoples’ ability to protect their sacred places.

Finally, due to the serious and urgent nature of the situation posed by the imminent expansion of artificial snowmaking activities in the San Francisco Peaks, and the irreparable harm this would have on its religious and cultural rights, the Navajo Nation requests that precautionary measures be issued, calling upon the State to suspend artificial snowmaking and any further permitting of related activities. As requested, this suspension is to be in effect until an agreement can be achieved with the Navajo Nation regarding commercial ski operations in the San Francisco Peaks or until a written determination by a competent government authority that the ski operations comply with the United States’ international human rights obligations.

I. Introduction

1. The Navajo Nation, on its own behalf and on behalf of its members, hereby submits this petition to the Inter-American Commission on Human Rights (“Commission”) against the United States of America. The Navajo Nation seeks redress for recent action by the City of Flagstaff that violates the Navajo people’s right to religion, culture, and judicial protection. Adding to prior official authorizations, the City has permitted the use of treated sewage effluent, often referred to as “reclaimed water,” by a commercial ski facility for artificial snowmaking on the San Francisco Peaks. The artificial snowmaking from treated sewage, along with the presence of the ski facility itself, is a desecration of one of the most sacred places to the Navajo Nation and its members and to other indigenous peoples.

2. The approval of Snowbowl operations over consistent Navajo objections is part of a historic pattern of the United States’ failure to protect indigenous peoples’ sacred lands, religions, and cultures throughout the country. Unsuccessful administrative and judicial appeals¹ made by the Navajo Nation, other affected indigenous peoples, and concerned citizens reveal an express preference by the United States to allow recreational use of the San Francisco Peaks over indigenous religious and cultural uses. Domestic laws, such as the Religious Freedom Restoration Act (“RFRA”),² have proved to be inadequate for indigenous peoples in the United States to obtain redress for rights violations involving their sacred places through the courts or administrative procedures.

3. The acts and omissions of the United States and its political subdivisions described in this petition violate the Navajo people’s rights to religious freedom and worship, the benefits of culture and judicial protection, rights affirmed by the American Declaration of the Rights and Duties of Man (“American Declaration”). The futility of pursuing judicial remedies against the recent action by the City of Flagstaff establishes an exception to the requirement that domestic remedies be exhausted, as well as a violation of the right to judicial protection. Thus the Navajo Nation turns to the Inter-American Commission on Human Rights and urges it to call upon the United States and its political subdivisions to reverse their acts and omissions and to protect the rights of the Navajo Nation and other similarly affected indigenous peoples.

II. Jurisdiction

4. The Inter-American Commission on Human Rights is competent to receive and act on this petition pursuant to articles 1.2(b), 18, 20(a), and 24 of the Commission’s Statute.

¹ *Navajo Nation v. United States Forest Service*, 408 F. Supp.2d 866 (D. Ariz. 2006) [Attached as “Appendix A”]; *Navajo Nation v. United States*, 479 F.3d 1024 (9th Cir. 2007) [Attached as “Appendix B”]; *Navajo Nation v. United States*, 535 F.3d 1058 (9th Cir. 2008) [Attached as “Appendix C”]; Petition for a Writ of Certiorari, *Navajo Nation v. United States Forest Service*, 2009 WL 46999, cert. denied, 129 S. Ct. 2763 (2009) [Attached as “Appendix D”].

² Religious Freedom Restoration Act of 1993 (H.R. 1308) 42 U.S.C. ch. 21B § 2000bb et seq. [Attached as “Appendix E”].

III. Absence of parallel international proceedings

5. The subject of this petition is not pending in any other international proceeding for settlement.

IV. The victims and the petitioner

6. The victims are the members of the Navajo Nation, an indigenous people whose rights to religion, culture, and judicial protection have been violated by the United States' actions and omissions. The members live primarily in and around the Navajo Nation reservation, which covers portions of southeastern Utah, northwestern New Mexico, and northeastern Arizona, proximate to the San Francisco Peaks. The Navajo Nation has approximately 338,773 members and is the largest indigenous Nation recognized by the United States.

7. The Navajo Nation is part of a larger tapestry of indigenous peoples comprising no less than 13 U.S.-recognized nations whose members live in the same geographic region and consider the Peaks sacred and vital to their cultural and religious identities.

8. This petition is submitted by the Navajo Nation through its Human Rights Commission. The Navajo Nation is governed according to treaties with the United States, the Navajo Nation Code, and Diné Fundamental Law. The Navajo Nation Human Rights Commission is a legislative branch entity of the Navajo Nation.

V. Facts

A. Recent action to permit use of recycled sewage water for artificial snowmaking on the San Francisco Peaks

9. The San Francisco Peaks are located just north of the City of Flagstaff in the Coconino National Forest in the State of Arizona in the arid southwestern region of the United States. The Peaks are located on land administered by the United States Department of Agriculture, Forest Service ("Forest Service"). The Arizona Snowbowl Resort Limited Partnership ("Snowbowl") has been using treated sewage effluent to produce artificial snow for recreational skiing since 2012, despite the objections of the Navajo Nation and other indigenous peoples. The City of Flagstaff provides the wastewater to the ski facility. The City of Flagstaff is an incorporated political subdivision (municipal corporation) of the State of Arizona in the United States.

10. On August, 8, 2014, the City of Flagstaff terminated its existing 5-year agreement with Snowbowl for the use of reclaimed wastewater and replaced it with a new 20-year agreement until 2034,³ the City's maximum extension.⁴ This new agreement allows for the transfer of

³ Direct Delivered Reclaimed Water Agreement between City of Flagstaff Utilities Director on behalf of the City of Flagstaff and Arizona Snowbowl Resort Limited Partnership, August 8, 2014 at para. 11 ("Water Agreement") [Attached as "Appendix F"]; Letter from J.R. Murray, Snowbowl General Manager to Brad Hill, City of Flagstaff Utilities Director, July 22, 2014 (requesting 20-year extension of reclaimed water agreement) ("Extension Request") [Attached as "Appendix G"].

⁴ Ryan Heinsius, "Reclaimed Water Ordinance on Tuesday's Flagstaff City Council Agenda", KNAU ARIZONA NEWS, February 3, 2015 [Attached as "Appendix H"].

reclaimed water from the City of Flagstaff to Snowbowl at a potential peak daily delivery rate of 2.25 million gallons, up from 1.5 million gallons a day, thereby substantially increasing the amount of reclaimed water already used on the Peaks.⁵

11. The City of Flagstaff Utilities Director made and entered the new agreement without engaging in any form of consultation with the public,⁶ let alone through an adequate process of notification and consultation with the Navajo people, with the view to obtaining their agreement or consent regarding this action that affects their religious and cultural rights. This accelerated action and significant extension of the permit was done to provide certainty to investors and owners regarding the long term viability of the ski operations and to take advantage of a recent city council ordinance giving executive decision-making authority over renewing water contracts to the Utilities Director.⁷ To date, the Navajo Nation have not received any form of notification - formal or informal - from the Forest Service or the City of Flagstaff about the extension of the wastewater permitting.⁸

12. The use of reclaimed wastewater on the San Francisco Peaks has been met with great resistance, not only from indigenous peoples but the broader community of concerned citizens. The Flagstaff City Council has considered objections to the lack of accountability and transparency in renewing wastewater contracts but voted against changing its current policy that allows the city's Utilities Director to approve renewals without the City Council's review.⁹ The Utilities Director explained that "any politically charged aspects of these sales aren't part of his decision making,"¹⁰ a statement that highlights the need for political oversight at a minimum.

13. The Navajo Nation recently learned of an impending sale of Snowbowl to a new owner who has expressed his intentions to expand the facilities and increase snowmaking.¹¹ Transfer of ownership requires the Forest Service to process an application for a "special use permit" to allow the new owner to operate the resort on Forest Service lands and for the City to transfer the new 20-year reclaimed wastewater agreement.¹² The administrative procedure for this transfer does not provide an opportunity for public hearing or comment.¹³ Both the permitting and the

⁵ Water Agreement, *supra* note 1, at para. 5; Reclaimed Wastewater Agreement between the City of Flagstaff and AZ Snowbowl, March 20, 2002 at para. 11 [Attached as "Appendix I"].

⁶ City of Flagstaff News Release, "City of Flagstaff Administratively Approves Snowbowl Agreement", August 8, 2014 [Attached as "Appendix J"]; "Reclaimed water snowmaking to continue on San Francisco Peaks", NAVAJO-HOPI OBSERVER, August 26, 2014 [Attached as "Appendix K"]. The language of the agreement and expressed intentions of Snowbowl suggest that the agreement was a new one. City officials, however, claim the agreement was an administrative renewal and not a new contract subject to public consultation. The agreement nonetheless speaks of "terminating and replacing in its entirety" the prior agreement, see Water Agreement, *supra* note 3.

⁷ See Extension Request, *supra* note 3; see also NAVAJO-HOPI OBSERVER *id.*

⁸ Affidavit of Tony H. Joe, Jr. Supervisory Anthropologist with the Traditional Culture Program of the Historic Preservation Department, Navajo Nation attesting to the lack of consultation regarding the new 20-year wastewater agreement, February 21, 2014 [Attached as "Appendix L"].

⁹ See Heinsius, *supra* note 4.

¹⁰ *Id.*

¹¹ Emery Cowan, "Arizona Snowbowl sells to Colo. Businessman," AZ DAILY SUN, October 30, 2014. [Attached as Appendix M"].

¹² Emery Cowan, "Snowbowl sale stalls out," AZ DAILY SUN, January 23, 2015 [Attached as "Appendix N"]

¹³ *Id.*

transfer are on hold until the sale is finalized.¹⁴ As negotiations over the sale remain pending, the Navajo Nation is seeking to stop the permitting and transfer of the wastewater by the new agreement, and thus are petitioning at this critical moment for the Commission to intervene and protect the human rights of the Navajo Nation's members to practice their religious and spiritual beliefs on this most sacred mountain.

14. With regards to the City's latest approval of a 20-year agreement, permitting increased use of treated sewage effluent for snowmaking, and the expansion and sale of Snowbowl, there are no legal, administrative or other mechanisms available to the Navajo Nation to prevent the further violation of their religious and cultural rights and judicial protection, as explained below.

B. Navajo Nation's relationship to the San Francisco Peaks

15. Although the Peaks are located on land designated as federal public land under the administration of the Forest Service, the Navajo, along with other indigenous peoples, have continuously accessed and used the area for the maintenance of their long-standing religious, cultural, ceremonial, and other traditional practices associated with the Peaks since time immemorial. The Navajo people have an on-going cultural and spiritual connection with the Peaks that cannot be severed, regardless of where they live.

16. The Navajo regard the Peaks as one of their four most sacred places and a traditional boundary marker of their ancestral territory.¹⁵ As explained by Navajo religious practitioners or "medicine people": "the sacred mountains - Mount Blanca to the East, Mount Taylor to the South, the Peaks to the West, and Mount Hesperus to the North - serve as the foundation of the Navajo Life Way and represents the elements of earth, fire, water, and air. Each element in, on, and of the mountains is inextricably linked to a Navajo person's mental, physical, and spiritual health ... when one of these mountains and elements is desecrated, it throws the Navajo Life Way out of balance and weakens Navajo traditional healing ceremonies and prayers."¹⁶ The medicine people explain the significance of the Peaks to the Navajo Blessing Way ceremony:

A prime example is the Navajo Blessing Way ceremony which requires physical elements from the sacred mountains. Together the elements, prayers, songs and chants are systematically arranged and recited in a clockwise fashion according to the six sacred mountains. Each bundle is individually tied according to the formation and placed in order of the sacred mountains. All Navajo ceremonies and prayers performed by a medicine person revere the sacred mountains and give strength and stability to one's thinking, planning and life way. The mountains and their elements serve as the basis for the fundamental and natural laws that guide the Navajo people. Any man-made disruption that manipulates this balance will lessen the healing and protection of a Navajo patient.¹⁷

¹⁴ *Id.*

¹⁵ U.S. Dep't of Agric. Forest Service Southwestern Region MB-R3-04-02, *Draft Land and Resource Management Plan for the Coconino National Forest: Coconino, Gila and Yavapai Counties, Arizona*, October 2013 at 1-11 to 1-13 ("Draft Plan") ["Attached as Appendix O"].

¹⁶ Statement by the Diné Medicine People Associations (Diné Statement) [Attached as "Appendix P"]. Diné is the term the Navajo use to refer to themselves. Diné means "The People" or "Children of the Holy People".

¹⁷ *Id.*

17. According to Navajo medicine people, they use two major trees in their traditional healing ceremonies, the Spruce tree (*Ch' oh*) and Douglas-fir tree (*Ch' oh dootl' iizh*). The firmness and ritual purity of branches from these trees are required for the *Yei Bei Cheii*, ceremony which lasts nine nights.¹⁸ The Navajo use the pine tree (*Nidishchii*) in at least eight traditional healing ceremonies: the Wind Way (*Nilch'iji*); Enemy Way (*Anaa'ji*); Evil Way (*Hochxo'iji*); Night Way Chant (*Tl'eeji na'akai*); Red Ant Way (*Wolachii'ji*); Big Star Way (*So'tsohji*); Mountain Top Way (*Dzil'k'iji*); and the Shooting Way (*Na'at'oyee*).¹⁹

18. The Forest Service, an agency of the United States government, itself acknowledged the sacred nature and importance of the San Francisco Peaks to the Navajo people, despite issuing a prior permit to allow expansion of Snowbowl's operations and artificial snowmaking. In its Final Environmental Impact Statement on the project, the Forest Service observed²⁰:

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... [N]ine 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.

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

¹⁸ *Id.* p. 3.

¹⁹ *Id.* p. 4.

²⁰ USDA Forest Service, Arizona Snowbowl Facilities Improvements Final Environmental Impact Statement, Vol. 1 3-7 to 3-30 (2005) ("FEIS") [Attached as "Appendix Q"]. Information in the FEIS is based on Forest Service discussions with indigenous representatives from Hopi, Navajo, Zuni, Acoma, Apache, Hualapai, Havasupai, Yavapai, and Southern Paiute.

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'éelt'i'í (Talking God), Naada'algaii 'Ashkii (White Corn Boy), and Naadá 'Altsoii 'At'éeéd (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....

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.²¹

C. Negative impact of artificial snowmaking on the Peaks and the Navajo Nation

19. The Navajo regard the artificial snowmaking activities on the San Francisco Peaks as incompatible with the sacred character and ecology of the mountain. Extensive documentation and examination by the United States²² on the sacred character of the Peaks to the Navajo people and the probable impacts of the use of wastewater for snowmaking detail numerous negative religious and cultural consequences.

20. The Navajo rely on the ritual purity of the Peaks for religious and cultural observance. The Navajo maintain the Peaks must remain in an original state of being, *át'é* or *ákót'é*,²³ without the negative influence of man. This includes purity of water, foliage, soil, and natural aesthetics. The Navajo consider snow in particular to be a deity that nourishes the soils and vegetation

²¹ *Id.* at 3-7, 3-11 & 3-18.

²² Draft Plan, *supra* note 15.

²³ According to spiritual and cultural leaders, in Navajo philosophy *át'é* or *ákót'é* means, "it is alive; it (has been) in existence for a very long time and predates mankind."

through snowmelt. Natural, unaffected, or “pure” snow is what enables ritual purity in the broader natural environment. Reclaimed water used in the production of artificial snow contains unregulated residual compounds from pathogens, pharmaceuticals, hormones, not to mention human waste.²⁴

21. The Forest Service reports that according to the Navajo, any plants that come into contact with reclaimed water are contaminated for medicinal purposes and for use in ceremonies²⁵ and that the Navajo use 87% of the plant life on the Peaks for traditional medicinal and/or cultural uses.²⁶ Snowmelt and wind will cause artificial snow to infiltrate through the Peaks, according to Navajo conceptions of ecology, thereby contaminating the broader environment. Such contamination disrupts the ability of Navajo medicine people to heal their patients. The Forest Service further acknowledges that the Navajo need medicinal and other ceremonies related to plant life to perpetuate their cultural values.²⁷ The Navajo Nation confirms what the Forest Service reports, that the use of reclaimed water destroys the purity of these plants and significantly impacts the cultural integrity of the Navajo people.²⁸

D. Recommendations made by the United Nations Special Rapporteur on the rights of indigenous peoples and treaty-monitoring bodies to avert or remedy rights violations as a consequence of artificial snowmaking on the San Francisco Peaks, which have been ignored by the United States

22. In 2011, the United Nations Special Rapporteur on the rights of indigenous peoples issued specific observations on the San Francisco Peaks situation in response to a complaint filed by the Navajo Nation Human Rights Commission in 2010. He based his observations on information he received and gathered, including extensive documentation by the Forest Service and federal courts in relevant proceedings. The Special Rapporteur’s examination included the Forest Service approval process and purported consultation regarding the use of sewage effluent for snowmaking, the effects of using sewage effluent for artificial snowmaking on the Navajo religion, and the ultimate rationale by the Forest Service and domestic federal courts for permitting the Navajo’s religious rights to be restricted (See *infra* paras. 44-54 on religious freedom standards, and *supra* paras. 11-13 on the absence of consent by the Navajo in this case). In his communications to the United States, the Special Rapporteur made a series of recommendations to the State based on his analysis of applicable international human rights standards. These included that the State:

- 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;

²⁴ FEIS, *supra* note 20, at 3-17.

²⁵ *Id.* at 3-17.

²⁶ Draft Plan, *supra* note 15, at 58-71.

²⁷ *Id.*

²⁸ Diné Statement, *supra* note 16.

- reinstantiate or continue consultations with the tribes whose religions practices are affected by the ski operations on the San Francisco Peaks and endeavor to reach agreement with them on the development of the ski area;
- 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;
- 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 American to practice and maintain their religious traditions;
- to build on existing government programs and policies to consult with indigenous peoples and take account their religious traditions in government decision-making with respect to sacred sites and ensure they conform to international standards.²⁹

23. The Navajo Nation Human Rights Commission also engaged the Committee on the Elimination of Racial Discrimination under its urgent action and early warning procedures on August 24, 2011, reporting on the continued rights violations and the United States' failure to take any action to implement the recommendations of the Special Rapporteur. The Committee responded on March 9, 2012 with a letter to the United States expressing concern over the potential impact of Snowbowl on indigenous peoples' spiritual and cultural beliefs, requesting information on the process to obtain free prior and informed consent and on measures taken to ensure the sacred character of the Peaks and the possibility of suspending the permit pending consultation.³⁰

24. The Navajo Nation Human Rights Commission raised the issue again with the Human Rights Committee during its review of the United States' implementation of the International Covenant on Civil and Political Rights. In its Concluding Observations, the Committee noted its concern over the "insufficient measures taken to protect the sacred areas of indigenous peoples against desecration, contamination and destruction as a result of urbanization, extractive industries, industrial development, tourism, and toxic contamination" and about the "restriction of access of indigenous peoples to sacred areas that are essential for the preservation of their religious, cultural, and spiritual practices, and the insufficiency of consultation with indigenous peoples on matters of interest to their communities (art. 27)."³¹

E. Background and history of efforts to protect the San Francisco Peaks

25. The latest actions by the City of Flagstaff follow an ongoing pattern of neglect and failure by the United States to respect and protect Navajo human rights as they pertain to the San Francisco Peaks.

²⁹ Annual Report of Special Rapporteur James Anaya to the UN Human Rights Council – 2011 (A/HRC/18/35/Add.1), Annex X (Communications and Cases examined) ("Special Rapporteur Report") [Attached as "Appendix R"].

³⁰ Letter from CERD Chairperson to US Ambassador, March 9, 2012 [Attached as "Appendix S"].

³¹ CCPR/C/USA/CO/4, at para. 25.

26. Commercial ski operations have existed in the Peaks since the 1930s with the permission of the Forest Service, and over time have expanded to include additional lodging facilities, paved roads and ski lifts. The Navajo Nation and other indigenous peoples have consistently expressed their opposition to these operations because of the sacred character of the mountain. The Navajo Nation and other indigenous peoples' earlier legal efforts to halt these operations were unsuccessful because federal courts found that the commercial ski activities did not interfere or substantially burden indigenous religions.

27. Arizona Snowbowl Resort Limited Partnership has owned and operated the ski resort within the western flank of the San Francisco Peaks since 1992 under a "special-use permit" granted by the Forest Service. In 2001, Snowbowl requested the Forest Service's approval for an expansion of its activities, including production of artificial snow using reclaimed wastewater. The request to purchase reclaimed wastewater from the City of Flagstaff was prompted by inconsistent snowfall affecting Snowbowl's commercial profitability.

28. In order to approve Snowbowl's request, the Forest Service performed a mandatory environmental impact assessment, which was opened up for public comment in 2004. In its Final Environmental Impact Statement and Record of Decision of February 2005, the Forest Service approved the use of treated sewage effluent for snowmaking on 205 acres in addition to the construction of a pipeline to carry the treated sewage effluent from the City of Flagstaff as well as the improvement of guest service facilities.³² The plans to use treated sewage effluent generated new opposition from the Navajo and other indigenous peoples. Following unsuccessful litigation efforts by the Navajo, other indigenous peoples, and concerned citizens, Snowbowl began using the reclaimed wastewater in December 2012.

29. The Navajo Nation have been involved in a decades long struggle to protect the San Francisco Peaks and their religious rights against the expansion of commercial ski facilities and the use of treated sewage effluent for artificial snowmaking. The Forest Service first approved the drastic expansion of the commercial ski facilities and roads in 1979. The Navajo and Hopi indigenous peoples filed suit which ultimately led to a decision in 1983 by the D.C. Circuit Court of Appeals in the case of *Wilson v. Block*. The D.C. Circuit upheld lower court rulings that the indigenous claimants' rights under the religious free exercise clause of the U.S. Constitution were not violated because the government did not deny them access to sacred sites or prevent them from conducting traditional ceremonies and thus did not "substantially burden" their religion.³³ The courts did not question the sincerity of the religious claims, but applied federal court jurisprudence that only considers explicit government coercion or prohibition of religious practice to be a substantial burden infringing on religious exercise.

30. After the Forest Service approved the production of artificial snow from reclaimed wastewater in 2005, the Navajo filed an administrative appeal to the Forest Service. The Forest Service denied the appeal on June 8, 2005 based on the reasoning in *Wilson v. Block*. In June 2005, the Navajo (along with other indigenous peoples including the Hopi, White Mountain Apache and Hualapai) filed a lawsuit against the Forest Service and Snowbowl before a federal

³² FEIS, *supra* note 20.

³³ *Wilson v. Block*, 708 F.2d 735 (D.C. Cir. 1983) [Attached as "Appendix T"].

district court for violations of their religious freedom under the Religious Freedom Restoration Act (“RFRA”), and for violations of the National Environmental Policy Act (“NEPA”), and the National Historic Preservation Act (“NHPA”). The RFRA is a federal law enacted in 1993 which mandates that “government shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability.”³⁴ The law provides two exceptions to the above: where the burden “(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling interest.”³⁵

31. In 2006, the federal district court dismissed the claim under the RFRA on the grounds that “[t]he 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. . . . Plaintiffs have failed to demonstrate that the Snowbowl decision coerces them into violating their religious beliefs or penalizes their religious activity.”³⁶ The district court granted summary judgment (a determination on the merits without trial) in favor of the defendants in relation to the claims made under the NEPA and NHPA.

32. In January 2006, the Navajo Nation appealed the dismissal of their case to federal appellate court. A three judge panel of the Ninth Circuit Court of Appeals reversed the lower court on March 12, 2007, holding that the Forest Service’s actions violated the RFRA as they constituted a “substantial burden” on the religious exercise of the indigenous peoples concerned. Further, the Court determined that under the RFRA, the Forest Service did not demonstrate that the proposed action by Snowbowl served a “compelling governmental interest” by the “least restrictive means,” since the purpose was to increase the profitability of a recreational facility.³⁷ In addition, the Court found that the Forest Service’s environmental impact assessment did not meet environmental requirements under NEPA with regards to the proper assessment of the risks of human ingestion of artificial snow made from reclaimed water.

33. The above decision was again reviewed by an *en-banc* panel of 11 judges of the Ninth Circuit Court of Appeals in order to revisit the three-judge panel’s decision and its interpretation of the “substantial burden” test under the RFRA. The 11-judge *en-banc* panel reversed the three-judge panel’s ruling. In its decision, the *en-banc* panel of the Ninth Circuit Court of Appeals acknowledged the sacred character of the San Francisco Peaks and that “[t]o the [Navajo], the [presence of reclaimed wastewater] will desecrate a sacred mountain and will decrease the spiritual fulfillment they get from practicing their religion on the mountain.” In its holding, the court went on to say, “[n]evertheless, under Supreme Court precedent, the diminishment of spiritual fulfillment—serious though it may be—is not a ‘substantial burden’ on the free exercise of religion.” The Court also pointed to the portions of the lower court decision that determined that the snowmaking would not physically affect plants or religious shrines and that practitioners would still have access to the mountain and ski area to conduct religious activities.³⁸ Consequently, the final Ninth Circuit decision held that there was no substantial burden and that the RFRA was not violated because: (1) the Navajo and other indigenous peoples affected were

³⁴ Religious Freedom Restoration Act of 1993, *supra* note 2, at s. 3(a).

³⁵ *Id.* at s. 3(b).

³⁶ *Navajo Nation v. United States Forest Service*, 408 F. Supp. 2d 866, *supra* note 1, at 904, 905.

³⁷ *Navajo Nation v. United States*, 479 F. 3d 102, *supra* note 1.

³⁸ *Navajo Nation v. United States*, 535 F. 3d. 105, *supra* note 1, at 1063, 1070.

not forced to choose between the tenets of their religion and receiving a government benefit; and (2) they were not coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions. The Court threw out further claims under the NEPA on procedural grounds.

34. The Navajo Nation filed a *writ of certiorari* to the United States Supreme Court in January 2009 for review of the issue of whether the artificial snowmaking would spiritually contaminate the San Francisco Peaks, thus imposing a substantial burden on the exercise of the Navajo Nation's religious rights.³⁹ The Supreme Court responded in brief: "Petition ... denied."⁴⁰ Having been denied access to the highest domestic court, and after lengthy and costly lawsuits at the lower federal court levels, it is now clear that the Navajo have no legal, administrative, or judicial remedy under domestic law for the desecration of their sacred mountain.

VI. Exception to Exhaustion of Domestic Remedies

35. The requirement of exhaustion of domestic remedies under Article 31(1) of the Commission's Rules of Procedure does not apply to the present effort for redress against the actions of the City of Flagstaff that infringe the rights of the Navajo people. Article 31(2) provides an exception to the exhaustion requirement, which applies when domestic remedies are ineffective and therefore exhaustion would be impossible or futile. The Commission has explained that "remedies may be considered ineffective when it is demonstrated that any proceedings raising the claims before domestic courts would appear to have no reasonable prospect of success, for example because the State's highest court has recently rejected proceedings in which the issue posed in a petition had been raised."⁴¹

36. Under relevant domestic law and judicial precedents, the Navajo Nation does not have any reasonable prospect of success for challenging, in domestic court, on religious or cultural grounds, the decision taken by the Flagstaff Utilities Director on August 8, 2014 to extend the City's wastewater permit. Hence, the Navajo Nation has not taken, and need not take, any domestic judicial action to challenge that decision before submitting this petition.

37. The United States Supreme Court and lower federal courts have taken a restrictive view of the protection provided under federal law for religious freedom or related cultural rights. Under Supreme Court precedent, the First Amendment to the U.S. Constitution only protects against government actions that specifically target and are intended to suppress particular religions or religious practices,⁴² a standard that could not be met here, as made clear by numerous judicial decisions denying protection of Native American sacred sites under the First Amendment.⁴³ No law of the state of Arizona provides protection for religious freedom greater than that provided in federal statutes, such as the RFRA, *infra*, or the First Amendment, which

³⁹ Petition for a Writ of Certiorari, *Navajo Nation v. United States Forest Service*, 2009 WL 46999, *supra* note 1.

⁴⁰ *Navajo Nation v. United States*, 129 S. Ct. 2763 (denying certiorari), *supra* note 1.

⁴¹ Report No. 26/06, Petition 434/03, Admissibility, *Isamo Carlos Shibayama et al. vs. United States* (March 16, 2006), para. 48 & 53.

⁴² *Employment Div. v. Smith*, 485 U.S. 660 (1988) [Attached as "Appendix U"]

⁴³ See, e.g., *Lyng v. Northwest Indian Protective Cemetery Ass'n*, 485 U.S. 439 (1988) [Attached as "Appendix V"]; *Badoni v. Higginson*, 638 F.2d 172 (10th Cir. 1980) [Attached as "Appendix W"].

states that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...”⁴⁴

38. The federal Religious Freedom Restoration Act (RFRA), 42 U.S.C. ch. 21B § 2000bb et seq., provides a somewhat more generous scope of protection than the First Amendment, but applies only to acts of the federal government and not to acts of the states or their political subdivisions, such as the City of Flagstaff.⁴⁵ In the RFRA’s application to federal action, the federal courts have interpreted it not to guard against government action of the type at issue here, as shown by the Navajo Nation’s own experience challenging the federal permitting of artificial snowmaking from treated sewage on the San Francisco Peaks (see supra, paras. 29-34 above). The protections outlined in the State of Arizona’s Free Exercise of Religion Act, A.R.S. § 41-1493.01-.02, are substantially identical to those outlined in the RFRA.

39. The situation faced by the petitioners not only warrants an exception to the exhaustion of domestic remedies due to the absence of effective domestic legal protection of the rights violated,⁴⁶ but also speaks to the merits of the claim as it relates to judicial protection under Article XVIII of the American Declaration (See infra, paras. 58-67).

VII. Timeliness

40. Article 32 (2) of the Rules of Procedure of the Commission states that “In those cases in which the exceptions to the requirement of prior exhaustion of domestic remedies are applicable, the petition shall be presented within a reasonable period of time, as determined by the Commission. For this purpose, the Commission shall consider the date on which the alleged violation of rights occurred and the circumstances of each case.”

41. The circumstances are such that submission of the petition today is reasonable with respect to the August 2014 extension and expansion of the use of wastewater for snowmaking to 2034. The Navajo Nation was never notified of the extension, nor the proposed expansion of snowmaking operations on the San Francisco Peaks. The Nation only recently became aware of the activities through newspaper reports that were brought to their attention. Furthermore, the persistent violation of the Navajo people’s religious and cultural rights are not only continuing and ongoing without possibility for redress, but are now escalating.

VIII. State responsibility for violation of the Navajo Nation's rights to religion, culture and judicial protection under the American Declaration

42. The United States is internationally responsible for the official acts of government authorities operating within its federal system, including local municipal authorities, when those

⁴⁴ For comparison see the free exercise clauses of the Arizona Constitution art.2 s.12 and religious tolerance provision art. 20 p.1 and Arizona’s Free Exercise of Religion Act (“FERA”) A.R.S. § 41-1493.01-.02 which is modeled after the federal RFRA [Attached as Appendix “X”]

⁴⁵ In *City of Boerne v. Flores*, 521 U.S. 507 (1997), the U.S. Supreme Court held that RFRA was not valid federal legislation as applied to the states of the United States, finding it to be “a considerable congressional intrusion into the States’ traditional prerogatives and general authority to regulate for the health and welfare of their citizens...” [Attached as “Appendix Y”].

⁴⁶ Inter-American Commission on Human Rights, Rules of Procedure (2013), art. 31(2)(a).

acts infringe applicable international human rights standards. The United States is therefore responsible for the permitting of artificial snowmaking on the San Francisco Peaks, including by the City of Flagstaff in its recent action of August 2014, which violates article III (right to religion), article XIII (right to culture), and article XVIII (right to judicial protection) of the American Declaration of the Rights and Duties of Man.

43. The obligation that States have to respect and protect the rights of indigenous peoples, including their rights to religion and culture, carries with it the duty to consult with them, in order to obtain their free prior, and informed consent, prior to taking any action that may materially affect their rights, as established by, inter alia, article 19 of the Declaration and the jurisprudence of the inter-American human rights system.⁴⁷ Not only were the Navajo not consulted about the recent extension and expansion of the use of wastewater for snowmaking in an area that is of deep religious significance to them, they have consistently withheld their consent to this wastewater usage and have vigorously opposed it. Appropriate consultations with the objective of consent are important safeguards for the rights of indigenous peoples when those rights may be affected by government decisions. When consultations are nonexistent or deficient and consent is absent, indigenous peoples' rights are especially vulnerable to being violated, as has occurred here.

A. Article III: The right to practice religion in relation to sacred sites

44. Article III of the American Declaration of the Rights and Duties of Man provides: "Every person has the right to freely profess a religious faith, and to manifest and practice it in both public and private." The inter-American human rights system has recognized that indigenous peoples have a cultural connection with their ancestral territories and that certain places are sacred in accordance with their traditions and worldviews and require special protection.⁴⁸ In that regard, "States are under the obligation to secure indigenous peoples' freedom to preserve their own forms of religiousness or spirituality, including the public expression of this right and access to sacred sites whether or not on public or private property."⁴⁹ Consequently, the protection of sacred places is critical to the exercise by indigenous peoples of the right affirmed by the American Declaration to freely profess, manifest and practice a religious faith.⁵⁰

45. The United States has an obligation to respect and protect the rights of the members of the Navajo Nation to exercise their religious freedom and worship under Article III of the American Declaration by not taking or allowing any action that would cause interference with the spiritual and religious relationship the Navajo have with the San Francisco Peaks. This obligation, which runs to all of the United States political subdivisions such as the City of Flagstaff, is also derived from other international instruments to which the United States is a

⁴⁷ IACHR, *Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System*, OEA/Ser.L/V/II, Doc. 56/09, December 30, 2009 at paras. 329-334 ("Ancestral Lands Report").

⁴⁸ *Id.* at para. 150 citing IACHR, *Democracy and Human Rights in Venezuela*. Doc. OEA/Ser.L/V/II. Doc. 54, 30 December 2009, par. 1054.

⁴⁹ *Id.* at para. 151.

⁵⁰ IACHR, *Arguments before the Inter-American Court of Human Rights in the case of Sawhoyamaya v. Paraguay*. Cited in: I/A Court H.R., *Case of the Sawhoyamaya Indigenous Community v. Paraguay*, Merits, Reparations and Costs, Judgment of March 29, 2006, Series C No. 146, par. 113(a).

party or has endorsed, including the International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, and the United Nations Declaration on the Rights of Indigenous Peoples. The analysis of the obligations that the United States has acquired by virtue of these instruments is further informed by the interpretations provided by the relevant United Nations treaty monitoring bodies, as well as by the observations of the Human Rights Council's Special Rapporteur on the rights of indigenous peoples concerning the federal permitting of treated wastewater for snowmaking on the San Francisco Peaks. These interpretations and observations also inform the United States' obligations under the American Declaration on the Rights and Duties of Man and are consistent with the jurisprudence of the inter-American system.

46. Article 18(1) of the International Covenant on Civil and Political Rights provides for the right of everyone 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.” According to article 27 of the Covenant, “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 practise their own religion”. In interpreting State obligations under article 27, the UN Human Rights Committee 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 practise their religion, in community with other members of the group.”⁵¹

47. 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 ... [t]he right to freedom of thought, conscience and religion.” The Committee on the Elimination of Racial Discrimination, in its General Recommendation 23 interpreting the Convention, called upon States to take particular measures to protect the rights of indigenous peoples, in order to “[e]nsure that indigenous communities can exercise their rights to practise and revitalize their cultural traditions and customs”.

48. In 2010, the United States announced its endorsement of the UN Declaration on the Rights of Indigenous Peoples which had been adopted by the UN General Assembly in 2007. Consistent with the standards embodied in the American Declaration, the UN Declaration provides in its article 12 that “[i]ndigenous peoples have the right to manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies; the rights to maintain, protect, and have access in privacy to their religious and cultural sites.” Additionally, article 25 of the UN Declaration affirms the right of indigenous peoples 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.”

49. In his observations on the San Francisco Peaks situation, the UN Special Rapporteur on the rights of indigenous peoples provided an analysis of the United States' obligations under the Covenant on Civil and Political Rights in relation to the Forest Service's approval of the use of reclaimed wastewater for artificial snowmaking in the San Francisco Peaks. This analysis is equally relevant to an evaluation of whether or not the City of Flagstaff's actions in extending

⁵¹ CCPR/C/21/Rev.1/Add.5, para. 6(2).

the agreement for use of wastewater on the San Francisco Peaks complies with the American Declaration and the Inter-American system's jurisprudence.

50. As noted by the Special Rapporteur, the duty of States to ensure the exercise of religion by indigenous peoples consists of safeguarding not just against limitations that coerce one to act against one's religious beliefs or that impose penalties for doing so, but against any meaningful limitation to that exercise.⁵² According to the Special Rapporteur, "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."⁵³ The basis of that scrutiny is explained within article 18(3) of the Covenant which provides that "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." As signaled by the Special Rapporteur, "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."⁵⁴

51. Furthermore, according to the UN Human Rights Committee, article 18(3) which refers to the permissible limitations on religion, "is to be strictly interpreted: restrictions are not allowed on grounds not specified there, even if they would be allowed as restrictions to other rights protected in the Covenant, such as national security. Limitations may be applied only for those purposes for which they were prescribed and must be directly related and proportionate to the specific need on which they are predicated."⁵⁵ The Special Rapporteur analyzed standards of necessity and proportionality in relation to a valid public purpose deriving from the Covenant with regard to permitting the use of wastewater in this case and the consequent effects on indigenous religious practice:

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 Final Environmental Impact Statement. 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. 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[...]

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 [under article 18(3)] – public safety, order, health or morals – or the human rights

⁵² See Special Rapporteur Report, *supra* note 29.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ Human Rights General Comment No. 22 (1993), CCPR/C/21/Rev.1/Add.4, para. 8.

of others. In its Record of Decision on the artificial snowmaking and other modifications to the ski area, the Forest Service explained that “[d]ownhill 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.” [...] 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”.

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 [...] 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 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 [...] 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. It is 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.⁵⁶

52. The above analysis by the Special Rapporteur is instructive and indicative of how the actions of the City of Flagstaff regarding the San Francisco Peaks do not meet international human rights standards, particularly under the International Covenant on Civil and Political Rights. The Covenant’s stated standards for ascertaining permissible limitations on religious rights are analogous and consistent with the inter-American system’s own standards on permissible restrictions on the rights of indigenous peoples. Regarding the admissible restriction to the enjoyment and exercise of rights related to indigenous peoples’ traditional lands, the Inter-American Court of Human Rights has held that these must be (1) established by law; (2) they must be necessary; (3) they must be proportional, and (4) their purpose must be to attain a legitimate goal in a democratic society.⁵⁷ According to the Court, the necessity of legally established restrictions “will depend on whether they are geared toward satisfying an imperative

⁵⁶ See Special Rapporteur Report, *supra* note 29.

⁵⁷ IACtHR, Case of the Yakye Axa Indigenous Community v. Paraguay, Merits, Reparations and Costs (June 17, 2005) at para. 144.

public interest, it is insufficient to prove, for example that a law fulfills a useful or timely purpose. Proportionality is based on the restriction being closely adjusted to the attainment of a legitimate objective, inferring as little as possible with the effective exercise of the restricted right. Finally, for the restrictions to be compatible.... They must be justified by collective interests that, because of their importance, clearly prevail over the necessity of full enjoyment of the restricted right.”⁵⁸

53. The City’s decision also fails the standards for permissible rights restrictions under the jurisprudence of the inter-American system in terms of necessity, proportionality and the legitimate goals in democratic society. It is noteworthy that with regard to the juxtaposition of collective indigenous and non-indigenous private property rights, the Inter-American Court has determined that restrictions of the private rights “might be necessary to attain the collective objective of preserving cultural identities in a democratic and pluralist society.”⁵⁹

54. The Special Rapporteur’s observations on this case indicate that, while the City’s action is permissible under domestic law in that the State did not coerce or penalize religious activity, the City’s action is nonetheless invalid according to the higher standard of international human rights law – that of the necessity, proportionality and valid public purpose. Consequently, the inobservance of this standard, and the limitations on the free exercise of religion resulting from the City’s preference for the recreational purposes of a private commercial enterprise has resulted in a violation of the right of the Navajo people to religion under Article III of the American Declaration.

B. Article XIII: Right to the benefits of culture

55. Article XIII of the American Declaration on the Rights and Duties of Man declares that “[e]very person has the right to take part in the cultural life of the community, to enjoy the arts, and to participate in the benefits that result from intellectual progress, especially scientific discoveries.” The Inter-American Court of Human Rights has identified a clear link between indigenous culture and the territories traditionally used or occupied by indigenous peoples: “for indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.”⁶⁰ The Inter-American Commission has recognized that “ancestral cemeteries, places of religious meaning and importance, and ceremonial or ritual sites linked to the occupation and use of physical territories constitute an intrinsic part of the right to cultural identity” under inter-American human rights instruments.⁶¹

56. According to the Inter-American Court of Human Rights, “recognition of the right to cultural identity is an ingredient and a crosscutting means of interpretation to understand, respect, and guarantee the enjoyment and exercise of the human rights of indigenous peoples and

⁵⁸ *Id.* at para. 145.

⁵⁹ *Id.* at para. 148.

⁶⁰ IACtHR, *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment of August 31, 2001, (Ser. C) No. 79 (2001), para 149.

⁶¹ Ancestral Lands Report, *supra* note 47, at para. 160.

communities.”⁶² Additionally, the Inter-American Court has identified the right to cultural identity as “a fundamental right - and one of a collective nature - of the indigenous communities, which should be respected in a multicultural, pluralistic society. This means that States have an obligation to ensure indigenous peoples are properly consulted on matters that affect or could affect their cultural and social life, in accordance with their values, traditional, customs, and forms of organization.”⁶³

57. As explained throughout this petition, the religious and spiritual attributes and traditional practices associated with the San Francisco Peaks are integral and inseparable from the Navajo people’s culture and identity. Having violated the Navajo peoples’ religious rights (see *supra* paras. 44-54) the State by extension, has also violated their right to culture. This violation follows from the lack of adequate consideration of the necessity, proportionality and valid public purpose of the use of reclaimed wastewater for snowmaking in the San Francisco Peaks, as well as the lack of adequate consultation to safeguard the special relationship the Navajo People have with the San Francisco Peaks.

C. Article XVIII: Right to judicial protection

58. Under Article XVIII of the American Declaration, “Every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights.” This article is consistent with general principles of the right to access to justice and judicial protection contained in other inter-American and international human rights instruments. The jurisprudence of the inter-American system further explains the rights of indigenous peoples to access justice to protect their rights.

59. According to the Inter-American Court of Human Rights, the mere existence of formal legal provisions recognizing rights is insufficient if there are no specific, effective, and accessible procedures by which indigenous peoples may protect their rights.⁶⁴ Furthermore, in accordance with the right to judicial protection, “as regards indigenous peoples, it is essential for the States to grant effective protection that takes into account their specificities, their economic and social characteristics, as well as their situation of special vulnerability, their customary law, values and customs.”⁶⁵ As recognized by the Court, “for indigenous peoples, access to a simple, rapid, and effective legal remedy is especially important in connection with the enjoyment of their human rights, given the conditions of vulnerability under which they normally find themselves for historical reasons and due to their current social circumstances.”⁶⁶

⁶² See IACtHR, *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador*, Merits and Reparations, (June 27, 2012), para. 213.

⁶³ *Id.* at para. 217.

⁶⁴ See, Ancestral Lands Report, *supra* note 47, at paras. 335, 336.

⁶⁵ Ancestral Lands Report, *supra* note 47, at para. 343, citing I/ACtHR, *Case of the Yakye Axa Indigenous Community v. Paraguay*, para. 63; and I/A CtHR, *Case of the Sawhoyamaya Indigenous Community v. Paraguay*, paras. 82, 83.

⁶⁶ Ancestral Lands Report, *supra* note 47, at para. 351, citing IACtHR, *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, para. 104(n).

60. In the present case, the Navajo Nation and other similarly situated indigenous peoples in the United States, have been seriously prejudiced by the lack of clear, specific and effective legal remedies duly taking into account their cultural, social, and economic specificities in order to protect their religious freedom especially in relation to sacred sites located outside present reservation boundaries and administered by federal and state authorities.

61. As evidenced by the previously mentioned efforts of the Navajo Nation, the Religious Freedom Restoration Act (“RFRA”), a statute of general application, is inadequate for addressing the particular concerns, circumstances and realities faced by indigenous peoples seeking protection of their sacred places. The interpretations of the RFRA by federal courts (see *supra* paras. 30-34) clearly indicate the current state of domestic United States law and its limitations as to the effective protection of the rights of indigenous peoples in accordance with international human rights standards.

62. The observations of the U.N. Special Rapporteur on the rights of indigenous peoples (*supra* para. 22) show that the legal analysis of domestic courts, by which a violation under the RFRA would only be found in cases of coercion or penalty for religious practice, is incompatible with international human rights law. The consequence of the outcomes in the San Francisco Peaks litigation means that, by virtue of the principle of *stare decisis* applied by courts in the United States, any attempt to challenge the new authorization of artificial snowmaking on the San Francisco Peaks on religious freedom grounds would be bound by prior precedent and would therefore be futile.

63. Similarly, the free exercise clause of the First Amendment to the U.S. Constitution also fails to protect indigenous religious rights in regard to sacred sites, because the prevailing jurisprudence interpreting the clause only considers explicit government coercion or prohibition of religious practice to be a substantial burden infringing on religious exercise.⁶⁷

64. The United States has issued policy pronouncements such as the American Indian Religious Freedom Act (“AIRFA”) and Executive Orders 13007 and 13175 that only apply to federal agency actions, not to state or local municipal actions. AIRFA was announced in 1978 as an official government policy of protecting and preserving the religious rights of indigenous peoples in the United States, including their right to access sacred sites, and directing federal government agencies to consult with indigenous traditional leaders about necessary policy changes to protect religious cultural rights and practices.⁶⁸ However, AIRFA has been interpreted to be a mere policy statement that does not give rise to a judicial cause of action.⁶⁹

65. Executive Order 13007 mandates federal agencies “(1) to accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and (2) avoid adversely

⁶⁷ See *Wilson v. Block*, *supra* note 33; *Employment Division v. Smith*, *supra* note 42.

⁶⁸ American Indian Religious Freedom Act, Public Law 95-341 (1978) (codified at 42 U.S.C. s. 1996 (2012) [Attached as “Appendix Z”].

⁶⁹ The United States Supreme Court interpreted AIRFA’s loose language to be merely a policy statement of the federal government and not judicially enforceable law. In *Lyng v. Northwest Indian Cemetery Protection Association*, *supra* note 43, the Court announced its belief that the Act “had no teeth in it” and determined that AIRFA did not allow a cause of action for Indians for protection of their religious sites from federal management decisions.

affecting the physical integrity of such sites.”⁷⁰ This Executive Order requires federal agencies to institute procedures for providing notice to indigenous nations about proposed actions that could restrict access and use to sacred sites and to inform the President about measures to consult with indigenous nations about issues affecting sacred sites.⁷¹ By signing Executive Order 13175, which directs federal agencies to develop a process to ensure consultation and coordination with tribal government, the United States continues to create policies that are primarily procedural and lack substantive rights for indigenous peoples.⁷²

66. These policies provide no rights that can be legally actionable before domestic courts so there is no way to enforce them.⁷³ Consequently, the recognition within these policies of the need to protect the religious rights of indigenous peoples connected to their sacred places is rendered without practical meaning when those policies are not followed.

67. The previously cited environmental impact assessments and federal court records clearly show an explicit government acknowledgement and admission of the sacred character of the San Francisco Peaks to the Navajo and other indigenous peoples, of the serious offense and desecration that artificial snowmaking represents to indigenous religions, and of the ultimate conscious decision to nonetheless rule in favor of purely commercial recreational interests. As the Special Rapporteur indicated in his observations, such a determination is not possible under international human rights law. It is therefore unavoidable to conclude that the current laws, policies, and legal mechanisms available to the Navajo people and other indigenous peoples for the protection of their sacred sites are simply ineffective and constitute a violation of their right to judicial protection in accordance with Article XVIII of the American Declaration.

IX. Request for relief

68. For the reasons set forth above, the Navajo Nation respectfully requests that the Inter-American Commission on Human Rights prepare a report setting forth all of the facts and applicable law, and declaring the United States in violation of its human rights obligations under the OAS Charter in relation to articles III, XIII and XVIII of the American Declaration of the Rights and Duties of Man, and instructing the United States to provide the following reparations:

- 1) Immediately nullify the City’s recent action extending its agreement with Snowbowl for the use of wastewater to produce artificial snow, by cancelling the Forest Service special use permit that allows Snowbowl to operate and make artificial snow on Forest Service lands on the San Francisco Peaks;
- 2) Implement measures for remediation of the effects of the use of wastewater for artificial snowmaking on the physical and cultural integrity of the San

⁷⁰ Executive Order 13007 of May 24, 1996, Sec. 2 [Attached as “Appendix Z1”].

⁷¹ *Id.*

⁷² Executive Order 13175: Consultation and Coordination with Indian Tribal Governments (2000) [Attached as “Appendix Z2”].

⁷³ For example Section 4 of Executive Action 13007 states: “This order is intended only to improve the internal management of the executive branch and is not intended to, nor does it, create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity by any party against the United States, its agencies officers, or any person.”

- Francisco Peaks, in consultation with Navajo and other affected indigenous traditional and spiritual practitioners;
- 3) Implement appropriate mechanisms by which indigenous peoples in the United States can be consulted with a view to obtain their free, prior, and informed consent about State actions that affect their sacred places, in accordance with international human rights standards;
 - 4) Enact the necessary administrative, judicial, or legislative mechanisms, in consultation with indigenous peoples, to effectively protect their sacred places under federal and state jurisdiction, taking into account their economic and social characteristics, their situation of special vulnerability, and their customary law, values, and traditional practices. Ensure that these mechanisms conform with international human rights standards on indigenous peoples such as the United Nations Declaration on the Rights of Indigenous Peoples, article 19, including evaluation of permissible restrictions on indigenous religion and other human rights; and
 - 5) Ensure that any actions or decisions of government agencies are in accordance with, not just domestic law, but also international standards such as the American Declaration of the Rights and Duties of Man protecting the right of the Navajo Nation to practice and maintain their religious traditions.

X. Request for precautionary measures

69. The new 20-year wastewater agreement and plans for expansion will result in a dramatic increase in the use of wastewater, causing permanent, irreparable damage to one of the most sacred places in the Navajo belief system, the San Francisco Peaks. The victims are threatened with ongoing rights violations with no domestic legal, administrative, or judicial recourse to obtain protection of their sacred mountain. As negotiations for the transfer of Snowbowl ownership proceed, the situation grows more urgent and the Navajo Nation faces further, imminent harm if the sale goes through and new ownership succeeds in prolonging and expanding snowmaking operations. Therefore, the Navajo Nation respectfully requests that the Commission issue precautionary measures calling upon the United States to:

Suspend artificial snowmaking and any further permitting of activities by Snowbowl or successive owners until an agreement can be reached with the Navajo Nation in relation to the operations and future development of the Snowbowl ski area. Or, in the absence of such agreement, suspend snowmaking operations and permits until a written determination is made by a competent government authority that the ski operations are in accordance with the United States' obligations in relation to the American Declaration on the Rights and Duties of Man and other international human rights instruments.