

COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION
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EXAMINATION OF THE UNITED STATES PERIODIC REPORT OF JUNE 2021

ALTERNATIVE REPORT ADDRESSING FAILURE BY THE UNITED STATES
OF AMERICA TO HONOR AND IMPLEMENT ITS LEGALY-BINDING
OBLIGATIONS UNDER THE TREATIES IT CONCLUDED WITH INDIGENOUS
PEOPLES AND NATIONS AS AN EXAMPLE OF ONGOING RACIAL
DISCRIMINATION

*Submitted by the International Indian Treaty Council (IITC), an Indigenous Peoples
Organization in General Consultative Status to the UN Economic and Social
Council
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***“Treaties between sovereign nations explicitly entail agreements which
represent “the supreme law of the land” binding each party to an inviolate
international relationship...”***

*-- from “The Declaration of Continuing Independence of the Sovereign Native
American Indian Nations”, IITC’s founding document,
June 1974, Standing Rock South Dakota, USA*

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**Maps included in Annex*

A. Executive Summary

1. The United States of America (US) continues to disregard its obligations to uphold the Treaty rights of Indigenous Peoples. The US concluded over 300 Treaties with the original Indigenous Nations which were legally ratified by the US Senate and not one has been fully upheld.
2. Many more Treaties were concluded with Indigenous Nations that that were left unratified. The exact number of the unratified Treaties negotiated between Indigenous Nations and the US is unknown due to the lack of a Treaty database within the US. This leaves Indigenous Peoples working to find those Treaties and to rely on original methods of maintaining historical memory including oral histories.
3. The IITC notes that the US has once again failed to address its Treaty obligations to Indigenous Peoples in its current report to the CERD, although the IITC raised this concern on several consultations held by the US State Department for the preparation of its report.
4. The IITC asserts to the CERD that the ongoing failure by the US to uphold its Nation-to-Nation legally binding Treaty obligations to Indigenous Peoples on the same level as the multi-lateral (UN) Treaties it has ratified is an example of racial discrimination, resulting in a range of discriminatory impacts on the Indigenous Peoples living in that State. It also represents a core failure by the US to fulfill its obligations and responsibilities to uphold international norms and standards.
5. The US Constitution Article 6 states that “**all Treaties** made, or which shall be made, under the Authority of the United States, shall be the **supreme Law of the Land**”.
6. In his final report for the UN Study on Treaties, Agreements and Other Constructive Arrangements Between States and Indigenous Populations (1999) Special Rapporteur Miguel Alfonso Martinez affirmed that treaties and other legal instruments concluded by the European settlers and their successors with indigenous nations “*continue to maintain their original status, and to be fully in effect and consequently, are sources of rights and obligations for all the original parties to them (or their successors), who shall fulfill their provisions in good faith;*”
7. As noted in the CERD’s 2008 report the US voted against the adoption of the UN Declaration on the Rights of Indigenous Peoples when it was adopted by the General Assembly in September 2007. President Barack Obama reversed this

opposition and stated US support for the Declaration in December 2010. This includes Article 37 which affirms Indigenous Peoples right “to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors” and States’ obligations to “honour and respect such treaties...”

8. Treaties rights have been consistently and unilaterally abrogated, diminished and undermined without the consent of the Indigenous Treaty Parties through decisions by the US Supreme Court and acts of the US Congress. Only an act of Congress can reverse such decisions. However, political action by the US Congress is not a reliable remedy due to the historic foundation of US Indian Law in the “Doctrine of Discovery” and the US political priority for “economic development”. This now includes the search for “rare metals” and other resources required by “green”, “low carbon” and/or “renewable” energy as well as the creation of “protected areas”.
9. Treaties such as the 1868 Ft. Laramie Treaty specially mandate consent. CERD General recommendation 23 also holds State Parties to this standard regarding the lands of Indigenous Peoples. However, the US implements a lesser standard called “consultation.” Consultation is used in practice as a “check box” administrative duty that “informs” Indigenous Peoples of the activities it intends to carry out.
10. US failure to uphold its Treaty obligations to Indigenous Nations, including Treaty Rights to Land, Resources and Free Prior and Informed Consent (FPIC) results in many other forms of racial discrimination that constitute violations of the rights protected under Article 5 of the ICERD. Violations and abrogations of these Treaties result in economic, cultural and environmental racism, religious discrimination, health disparities, repression of human rights defenders, and disproportionate levels of violence against Indigenous women and girls.
11. In particular, mining and other types of extractive industry are consistently carried out on Indigenous Treaty lands without the free, prior and informed consent of the Indigenous Peoples concerned, desecrating sacred sites, contaminating lands and waters, destroying food systems, and contributing to sexual violence, exploitation and trafficking associated with the “man camps” carried out these activities. The examples presented in this report are of direct relevance to the themes selected by the CERD as the focus of the US review including Lack of Free, Prior and Informed Consent; Extractive Industry and Other Activities; and Excessive Force During Protest that Targets Indigenous Women and uses of Private Security.

B. Suggested Questions for the United States

1. What is the United States doing to ensure that its Treaty obligations to Indigenous Peoples are upheld, including through the establishment of bilateral processes to ensure implementation, and as needed, to address abrogations and resulting human rights violations?
2. How does the US justify the different status and standing it gives to bi-lateral Treaties it concluded with the original sovereign Indigenous Nations of what is now the US, and the multi-lateral Treaties it concluded through the United Nations?
3. What is the US doing to ensure that the political sovereignty of Indigenous Nations as affirmed in Treaties is fully respected and upheld under Federal Indian Law especially given the recent decision in *Oklahoma v. Castro-Huerta*?
4. What is the US doing to ensure that Free Prior Informed Consent is upheld regarding the use and development of lands, resources and cultural practices recognized in Treaties with Indigenous Nations, in particular when extractive industry and mining threatens and undermines the political, social, cultural, health and environmental rights of Indigenous Peoples?

C. Proposed Recommendations for the US Review

1. The CERD recommends that the US upholds and fully implements its legal, Constitutional, moral and ethical obligations to Indigenous Nations with whom they concluded Treaties in accordance with US Constitution and Article 37 of the UN Declaration on the Rights of Indigenous Peoples.
2. The CERD reiterates its concerns from past Concluding Observations regarding US desecration of sacred sites and environmental pollution impacting Indigenous Peoples, highlighting relevant Treaty violations.
3. The CERD expresses its concern regarding the erosion of Indigenous Nations' sovereignty and the lack of free, prior and informed consent concerning those erosions which includes abrogation of Treaties concluded by the US with Indigenous Nations without effective recourse.
4. The CERD reiterates its concern for the lack of free, prior and informed consent mechanisms as proscribed in para. 24(a) of its Concluding Observations in 2014.
5. The CERD, again, calls on the United States to adhere to General Recommendation No. 23 (1997) as stated in bolded para. 24(a)-(c) in its Concluding Observations in 2014.

6. The CERD recommends that the US, in collaboration with Indigenous Treaty Parties, implement fair, transparent, bilateral processes to resolve and redress Treaty violations with equal participation and standing by both the US and Indigenous Treaty Parties, including a provision for international oversight and redress if the process does not produce results that are satisfactory for both parties.

D. Report Narrative: Treaty Violations and Discriminatory Impacts on Indigenous Peoples in the United States

Violations of Treaties Concluded by the US with the Očhéthi Šakówiŋ Oyáte (“the Great Sioux Nation”)

1. Indigenous Treaty violations are widespread throughout the US. An ongoing egregious example, which the IITC first presented to the United Nations (UN) in 1977, are violations of the Treaties concluded between the US and the Očhéthi Šakówiŋ Oyáte (“the Great Sioux Nation”). These Treaties continue to be legally binding on the US to this day, as further confirmed by a US Supreme Court decision *United States v. Sioux Nation of Indians*, 448 U.S. 371 at 388 (1980).
2. In the final report of the UN Study on Treaties, Agreements and Other Constructive Arrangements Between States and Indigenous Populations [E/CN.4/Sub.2/1999/20], paragraph 271, Special Rapporteur Miguel Alfonso Martinez addressed “*the issue of whether or not treaties and other legal instruments concluded by the European settlers and their successors with indigenous nations currently continue to be instruments with international status in light of international law*”. He concluded “*that said instruments indeed continue to maintain their original status, and to be fully in effect and consequently, are sources of rights and obligations for all the original parties to them (or their successors), who shall fulfill their provisions in good faith;*” In paragraph 272 he continued to confirm this conclusion stating “*the legal reasoning supporting the above Conclusion is very simple and the Special Rapporteur is not breaking any new ground in this respect. Treaties without an expiration date are to be considered as continuing in effect until all the parties to it decide to terminate them, unless otherwise established in the text of the instrument itself, or unless, its invalidity is declared.*”
3. The 1851 Treaty recognized an Indigenous land base of over 50 million acres. Nevertheless, the Lakota are currently confined to much smaller reservations. The Oglala Lakota Pine Ridge Reservation was established under the authority of the

U.S. Secretary of War and was known as “Prisoner of War Camp No. 344.” It now consists of 2,220,160 acres.¹

4. The U.S. engages in ongoing failure to recognize, honor or implement its legally binding obligations under these Treaties, including the land and water rights and jurisdiction of the Lakota and the other Indigenous Nations of the Očhéthi Šakówiŋ Oyáte. The 1868 Ft. Laramie Treaty stipulated the requirement to obtain consent from the Indigenous Treaty Parties before any incursions could take place by non-Indigenous persons into the recognized Treaty territory boundaries in Article 16 as follows:

*The United States hereby agrees and stipulates that the country north of the North Platte River and east of the summits of the Big Horn Mountains shall be held and considered to be unceded Indian territory, and also stipulates and agrees that no white person or persons shall be permitted to settle upon or occupy any portion of the same; or **without the consent of the Indians first had and obtained**, to pass through the same.*

5. The Pahá Sápa in Lakota are unceded Treaty territory. The 1851 Fort Laramie Treaties between the United States and the “Great Sioux Nation” (the Lakota, Dakota and Nakota of the Očhéthi Šakówiŋ Oyáte) recognized an Indigenous land base of over 50 million acres. Nevertheless, the Tribal Nations of the Očhéthi Šakówiŋ Oyáte are currently confined to much smaller “federally recognized” reservations such as the Oglala Lakota Pine Ridge Reservation originally established under the authority of the U.S. Secretary of War as “Prisoner of War Camp No. 344.” It now consists of 2,220,160 acres and is considered to be the poorest county in the United States with a life expectancy lower than in many “developing” countries.
6. The 1868 Ft. Laramie Treaty stipulated that Treaty lands could never be ceded unless there were signatures of three-quarters of the adult male members of the Oyáte. It also stipulated in Article 16 that consent would be required for any non-Indigenous person to enter or pass through these lands, let alone settle, appropriate lands or impose developments such as mining.²

¹ [see enclosed maps showing the originally recognized Treaty territories and the currently recognized reservations including Pine Ridge].

² “The United States hereby agrees and stipulates that the country north of the North Platte River and east of the summits of the Big Horn Mountains shall be held and considered to be unceded Indian territory, and also stipulates and agrees that no white person or persons shall be permitted to settle upon or occupy any portion of the same; or **without the consent of the Indians first had and obtained**, to pass through the same;”, Article 16, TREATY WITH THE SIOUX -- BRULÉ, OGLALA, MINICONJOU, YANKTONAI, HUNKPAPA, BLACKFEET, CUTHEAD, TWO KETTLE, SANS ARCS, AND SANTEE-- AND ARAPAHO 15 Stat., 635. Ratified, Feb. 16, 1869. Proclaimed, Feb. 24, 1869, emphasis added.

7. Nevertheless, beginning soon after the Treaty's legal ratification by the U.S Senate, mining interests, particularly gold mining using mercury for ore extraction, was allowed to begin in the sacred Black Hills without such consent ever being sought or obtained. Gold and uranium mining, along with other mineral extraction, has continued to this day in violation of these Treaties, causing high levels of contamination of rivers and water tables, with devastating impacts to the health of the Lakota.
8. There have been a total of 1368 gold and uranium mines in the Black Hills, all established in violation of the 1851 and 1868 Treaties and all lacking the stipulated consent of the Indigenous Treaty parties. Recent data set shows that only 4% of those mines have been reclaimed whereas the remaining 96% are left unclaimed and continue to be sources of toxic contamination. Currently there are 13 pending permits for new mining sites (both gold and uranium) and the Northern part of Black Hills is claimed by gold mining companies. Mining is expected to rise within the next few years with pending mining sites further contaminating and limiting access to Treaty lands, waters, sacred sites and safe drinking water.
9. In 1871, the U.S. Congress unilaterally legislated an end to Treaty making with Indigenous Nations. However, in 1877, the US Congress ratified a treaty obtained in violation of the three-quarters signatures provision of the 1868 Ft. Laramie Treaty. The 1877 treaty purportedly ceded the western one-half of Oyáte territory in South Dakota, roughly 7.3 million acres which included the Black Hills. In 1980, the U.S. Supreme Court admitted that the 1877 treaty was fraudulent and authorized monetary compensation as redress. The respective Tribal Nation governments refused to accept the monetary award, maintaining to this day the united position that "the Black Hills area not for sale."
10. In their decision, the Supreme Court described the situation as with the following words, which were also cited by Special Rapporteur Miguel Alfonso Martinez in the final report of the UN Treaty Study in 1999: "... a more ripe and rank case of dishonorable dealing will never, in all probability, be found in the history of our nation" and considered that "President Ulysses S. Grant was guilty of duplicity in breaching the Government's treaty obligations with the Sioux relative to ... the Nation's 1868 Fort Laramie Treaty commitments to the Sioux." The Court also concluded that the U.S. Government was guilty of "... a pattern of duress ... in starving the Sioux to get them to agree to the sale of the Black Hills."³ Despite this clear acknowledgement of wrongdoing by the U.S. Supreme Court over 40 years ago, to this day none of these illegally confiscated Treaty Lands have been returned, no participatory process for restitution, redress and remedy has been established, and gold mining continues in the Black Hills.

³ *United States v. Sioux Nation*, 207 Ct. Cl. 234 at 241, 518 F.2d 1298 at 1302 (1975), cited in *United States v. Sioux Nation of Indians*, 448 U.S. 371 at 388 (1980).

11. Nevertheless, beginning soon after the Treaty's legal ratification by the U.S Senate, mining interests, particularly gold mining using mercury for ore extraction, was allowed to begin in the sacred Black Hills without such consent ever being sought or obtained. Gold and uranium mining, along with other mineral extraction, has continued to this day in violation of these Treaties, causing high levels of contamination of rivers and water tables, with devastating impacts to the health of the Lakota and other original Nations of the area.
12. The Oglala Lakota are among the Očhéthi Šakówiŋ Oyáte Nations that concluded the 1868 and 1851 Fort Laramie Treaties with the United States of America. The Oglala Lakota (with a population of approximately 30,000) reside on the Pine Ridge Indian Reservation which is recorded to be the poorest county in the US. Approximately 80% of tribal citizens are unemployed and average \$8,678 per capita income. There is an extreme shortage of housing on the Reservation where more than additional 2,500 houses are needed to address such a crisis. There are as many as 18 family members living in single trailers between 600 and 1,300 sq. feet.⁴
13. These Treaty violations result in severe and well documented health disparities. The Oglala Lakota have the lowest life expectancy of any group in the US. In a 2017 study, the average life expectancy for a Lakota person was recorded to be 46 years, 33 years less than the average American. By comparison, in Haiti, considered to be the poorest country in the hemisphere, the average life expectancy is 47 years old. This is also lower than for Sudan, India and a number of other "developing" counties.
14. The Pine Ridge Lakota reservation is extremely rural and lacks access to adequate healthcare, experiences severe food deserts and lacks access to clean potable running water. Pine Ridge currently experiences the highest rates of alcoholism, diabetes, and heart disease. According to a study published in 2017 by the Red Cross using Indian Health Service data "Lakota Indians die at higher rates than other Americans from alcoholism (552% higher), diabetes (800% higher) all American Indians (182% higher), infant mortality (300% higher), unintentional injuries (138% higher), homicide (83% higher), suicide (74% higher) teenage suicide rate is (150% higher), cervical cancer (500% higher), and tuberculosis (800% higher)."⁵

⁴ Kalima Rose, *Strengthening the Pine Ridge Economy: A Regional Equity and Opportunity Assessment*, KIRWAN INSTITUTE RESEARCH REPORT (Feb. 2015), https://www.policylink.org/sites/default/files/PineRidge_FINAL.pdf

⁵ Kenneth Wienski, *Leading Health Challenges Pine Ridge Reservation, South Dakota Oglala Lakota Sioux*, JUNIPER ONLINE J. OF PUB. HEALTH (Apr. 28, 2017), <https://juniperpublishers.com/jojph/pdf/JOJPH.MS.ID.555574.pdf>.

15. Approximately 33% of Tribal members live without running water or electricity. Water use on the Reservation is highly contaminated. In public drinking water supplies on the Pine Ridge Indian Reservation, mercury is recorded to be 8 times above accepted EPA limit. The majority of the surface waters analyzed and described in a 2020 study provided by Dr. LaGarry claims, “Mní Wičhóni intake from the Missouri River and the Mní Wičhóni tap water at Potato Creek, closely approach, equal, or exceed the EPA MCL for mercury.”⁶ Mercury is known to be an extremely fatal neurotoxin which can lead to renal failure and has continued debilitating effects on the nervous system. Mercury is also known to bioaccumulate in animals and childbearing mothers, ultimately leading to irreversible intergenerational impacts such as infertility, spontaneous abortion, and congenital deficits or abnormalities.
16. Furthermore, water supplies across the state of South Dakota are contaminated with uranium and exceed the EPA maximum contaminant level for mercury and uranium. Additionally, 5 other toxic metals are near the EPA health advisory levels for children weighing 22 pounds. Currently, there are 13 pending Black Hills mining permits pending all in which are on Treaty territory and will drain down towards Očhéthi Šakówiŋ Oyáte Reservations. Under the 1868 and 1851 Fort Laramie Treaties healthcare, housing, and protection of land and water rights are protected and recognized rights. According to these recent reports, the Treaties are being continuously violated and the public health crisis continues unattended.
17. In an additional, current example, the IITC has been notified of a new large-scale gold mining site that has been approved in the sacred Black Hills, inside the 1851 and 1868 Treaty Territory. The Jenny Gulch Gold Exploration Drilling Project (Jenny Gulch Project) has gone through a final Environmental Assessment which gave a “no significant impact” determination. A “no significant impact” determination means that a full, in-depth analysis of the environmental impacts in the form of an Environmental Impact Statement will not occur. The finding is alarming given that it has been shown time and time again that gold mining in particular is harmful to the environment and to human life.
18. The Jenny Gulch Project will be carried out in “the Black Hills National Park”. National Parks are federal lands and given that designation for “preservation”, however the creation of this National Park by the US in their Treaty Territory was never consented to by the Očhéthi Šakówiŋ Oyáte. The Jenny Gulch Project proposes “drilling 47 exploration drilling pads” and is accompanied by two staging areas “resulting in 3.3 acres of temporary surface disturbance.” The drilling and

⁶ <https://docs.google.com/document/d/1iFPiSBkZRdN-A5kPGnno4Ywa6s5gT40YqFutukjpkY/edit?usp=sharing>.

stages areas will be accompanied by road and trail construction as well that will create surface disturbance over several acres.

19. There are discrepancies between Draft Decision Notice and the Environmental Assessment. For example on page 10 of the Draft Decision Notice it states that “casing will be use, when necessary, to protect groundwater in unconsolidated, surficial geologic units...the need for casing is expected to be minimal as most drilling is proposed directly on bedrock, whereas, on page 20 of the Environmental Assessment it states, “the Project has the potential for soil compaction and erosion and geologic hazards through equipment use and drilling activities. The Project could affect groundwater quality through drilling activities. Furthermore, again on page 20, the Environmental Assessment states, “the Project would require subsurface drilling which could indirectly affect...[the] quality of the water supply...the Project could affect water quality in local surface waters.”
20. There are plant species in the Black Hills and directly in proposed drilling site that are on the endangered species list and protected under the Endangered Species Act which directly contradicts the determination of “no significant impact.”
21. Most concerning about the Jenny Gulch Project is the lack of “consultation” with Indigenous Nations. As discussed previously, “consultation” is *not* sufficient for effective engagement with Indigenous Peoples regarding activities and interferences that affect them. The internationally-recognized minimum standard is FPIC which is also affirmed in the text of the 1868 Treaty.”
22. During “Government-to-Government” processes, the US Forest Service sent 16 Indigenous Nation solicitation to being “consultation” processes. The Cheyenne River Sioux Tribe, the Oglala Sioux Tribe, Standing Rock Sioux Tribe, and the Yankton Sioux Tribe specifically requested consultation meetings with the Forest Service; however, due to COVID-19, the Forest Service stopped consultation processes and only resumed them beginning in 2022. According to the Environmental Assessment on page 42, only two of the four original requesters of consultation processes actually were able to engage in those processes.
23. It is also important to note, that Indigenous Nations are not well-equipped to engage with large “document dumps” by US federal government agencies when preparing for consultation processes. Tribal Historic Preservation Officers or Offices are often under-staffed and under-funded. Moreover, many do not have all the expertise needed to fully engage with these processes.
24. For example, the Environmental Assessment for the Jenny Gulch Project is nearly 440 pages long. These documents are prepared by governmental administrative offices that have lawyers, scientists, and other experts working towards producing these documents and approving projects. Even so, Indigenous Nations receive little

to no funding from the US government to ensure that Tribal Historic Preservation Offices have everything they need to effectively engage in consultation processes, let alone give their consent, thereby limiting Indigenous Nations' ability to effectively engage in preventing activities that *will* harm their Peoples, ecosystems, sacred areas and way of life. When viewed in this light, it is clear that "consultation" in the US for Indigenous Peoples is a far cry from FPIC.

Violations of the US Treaty with the Hawai'ian Kingdom (Kānaka Maoli)

25. The United States continues to assert control, with no redress, over the citizens of the Hawai'ian Kingdom (Kānaka Maoli) despite issuing a formal apology acknowledging that the US overthrew the Hawai'ian Kingdom and stole the Hawai'ian Peoples' lands in 1893. This action was carried out in violation of the 1849 Peace, Friendship and Navigation Treaty with the Hawai'ian Kingdom ratified by the U.S. Congress.
26. Hawai'i was forcibly annexed by the US in 1898 and became a U.S. territory in 1900. In 1959, the Hawai'ian Kingdom became the 50th state of the US in a process which violated the provisions for decolonization stipulated in article 73 of the UN Charter. Since then, the Kingdom of Hawai'i has been used as a major US military base and a global tourist destination. Native Hawai'ians have been pushed off their ancestral lands by encroachment and gentrification, and account for 51% of homelessness on the island of Oahu even though they only make up 10% of the population.
27. As a result of these Treaty violations, Native Hawai'ians have lost the ability to protect their ancestral homelands and watersheds. In December 2021, the US Navy spilled 14,000 gallons of jet fuel into an aquifer that provides 20% Honolulu's drinking water. The petroleum level was 350 times the safe drinking limit and gasoline range organics were 66 times the safe drinking level. The Navy also spilled 27,000 gallons of jet fuel, allowed to seep into groundwater, in 2014.
28. In 1993, the US Congress adopted a law (US Public Law 103-150), which was then signed by President Clinton, formally apologizing to the Hawai'ian People. It acknowledged that the overthrow of the Kingdom of Hawai'i was illegal and that its inherent sovereignty has been suppressed. The Resolution goes on to "commend efforts of reconciliation initiated by the State of Hawai[i] and the United Church of Christ with Native Hawai[i]ns." Further, the Resolution "expresses its commitment to acknowledge the ramifications of the overthrow of the Kingdom of Hawai[i], in order to provide a proper foundation for reconciliation between the US and the Native Hawai[i]an people;". It called on the "President of the United States to also acknowledge the ramifications of the overthrow of the Kingdom of Hawai[i] and to support reconciliation efforts between the United States and the Native Hawai[i]an people."

29. Nevertheless, to date, the US has failed to engage in any bilateral redress, reconciliation, or restitution process to initiate this healing process based on their Treaty recognizing the sovereign rights and jurisdiction of the Kingdom of Hawai'i.

Increased violence against Indigenous women and girls tied to Extractive Industry operations in Indigenous Territories

30. Over 35 corporations extract oil on the Fort Berthold Indian Reservation in North Dakota, home of the Mandan, Hidatsa and Arikara Tribal Nations whose original boundaries were set aside in the 1851 Ft. Laramie Treaty. These extraction projects have brought over 100,000 men, who reside in man camps, as employees. As a result, crime has skyrocketed, with a 10% increase in 2015.⁷ Areas surrounding the man camps, primarily the Fort Berthold Reservation, “now have some of the highest rates of sex trafficking in the United States”⁸

31. In January 2020, First Peoples Worldwide published a paper called “Violence from Extractive Industry 'Man Camps' Endangers Indigenous Women and Children”⁹ published by the University of Colorado at Boulder. The article noted the already disproportionately high levels of violence, including sexual assaults and murders carried out, primarily by non-Indigenous perpetrators, against Indigenous women and girls in the US. It also highlighted the increased levels of sexual violence and trafficking that occurs when hundreds or even thousands of men arrive in Indigenous territories to carry out extractive industries. FPW Staff Attorney was an expert witness for the Yankton Sioux Tribe at a hearing in South Dakota for the DAPL pipeline permitting process. She testified that “studies have shown that man camps bring violence and localize violent crime in places where it would not otherwise be. The camps by nature create a rapid increase in the population of the area, which can strain community infrastructure, such as law enforcement and human services, especially in rural areas where law enforcement is charged with providing services to extensive swaths of land. The increase in population can lead to an increase in physical and sexual violence, including rape, sexual assault, sexual assault of minors, and sex trafficking in the affected communities.”

32. In 2019, the U.S. Bureau of Justice Statistics completed a study on violent victimization known to law enforcement in the Bakken oil-producing region of

⁷ 96-104. John Vibes, *Oil Company “Man Camps” in ND Terrorizing and Sex Trafficking Native American Kids and Adults*, *ACTIVIST POST* (Dec. 6, 2017), <https://www.activistpost.com/2017/12/oil-company-man-camps-nd-terrorizing-sex-trafficking-native-american-kids-adults.html>.

⁸ Ibid

⁹ <https://www.colorado.edu/program/fpw/2020/01/29/violence-extractive-industry-man-camps-endangers-indigenous-women-and-children>

Montana and North Dakota,. The study also found that the rates of serious violent victimization – i.e., homicide, non-negligent manslaughter, rape and sexual assault, robbery and aggravated assault – increased 30% in the Bakken region, where it declined by 4% in the non-Bakken region. It also reported that women experienced a 54% increase in the rate of unlawful sexual contact, which was due to a rise in reports of statutory rape.

33. In 1978, the Supreme Court case *Oliphant v. Suquamish* stripped tribes of the right to arrest and prosecute non-Indians who commit crimes on Indian land. If both victim and perpetrator are non-Indian, a county or state officer must make the arrest. If the perpetrator is non-Indian and the victim an enrolled member, only a federally certified agent has that right. If the opposite is true, a tribal officer can make the arrest, but the case still goes to federal court. These complex jurisdictional issues between federal, state, and Tribal governments exacerbate the problem of man camps. Tribal police departments are often underfunded and lack resources to combat increased crime stemming from the man camps even when it is clear that they have the authority to pursue the perpetrators¹⁰.

Lack of Bi-lateral mechanisms to Redress and Resolve Treaty Violations

34. To this day, the US has failed to establish bilateral, just and transparent mechanisms for conflict resolution, redress and remedy regarding such violations of the Treaties concluded between Indigenous Nations and States. Domestic courts represent processes controlled and established unilaterally by one Treaty party (the State) and do not meet the minimum standard required for redress and conflict resolution in this regard. Neither do Commissions or other processes whose outcomes regarding the existence and extent of violations as well as the appropriate redress or restitution measures are controlled by the State Treaty party.
35. Effective, just, bilateral processes for redressing, resolving and providing restitution for Treaty violations, established bi-laterally with equal participation and decision-making authority by both State and Indigenous Treaty Parties, will be, in the words of the UN Declaration's preamble "the basis for a strengthened partnership between indigenous peoples and States."
36. The US Indian Claims Commission was an example of a unilateral, non-participatory and unjust process which utterly failed to effectively redress violations or provide for restitution based on the spirit and intent of Nation-to-Nation Treaties as understood by the Indigenous Treaty Parties. As noted by the CERD in 2006 in response to the Early Warning/Urgent Action submission by the Western Shoshone, it also failed to implement due process or "comply with contemporary international human rights norms, principles and standards." There was no consideration of Consent in either the

¹⁰ COALITION TO STOP VIOLENCE AGAINST NATIVE WOMEN, <https://www.csvanw.org/mmiw/> (last

process or the results. The same party which had violated the Treaties under review was the sole arbitrator of the resulting claims. This had disastrous impacts for Indigenous Treaty Nations, whose rights to FPIC were doubly violated by this process.

37. The UN Study on Treaties, Agreements and Constructive Arrangements between States and Indigenous Populations called for states to establish new processes to address Treaty violations and resolve related conflicts based on full participation. In his Final Report¹¹, Dr. Miguel Alfonso Martínez recommended that “in the light of the situation endured by indigenous peoples today, the existing mechanisms, either administrative or judicial, within non-indigenous spheres of government have been incapable of solving their difficult predicament” there was a need to establish an “entirely new, special jurisdiction independent of existing governmental (central or otherwise) structures, although financed by public funds, that will gradually replace the existing bureaucratic/administrative government branches now in charge of those issues.” The Special Rapporteur stressed the importance of the full and effective participation of Indigenous Peoples “preferably on a basis of equality with non-indigenous people” in their establishment and functioning.
38. The State and Indigenous Peoples delegates as well as UN experts who attended the 1st UN Treaty Seminar in 2003, following up on the Treaty Study’s final report, recommended that the UN Working Group on Indigenous Populations (which was replaced by the Expert Mechanism on the Rights of Indigenous Peoples -EMRIP- in 2006) “formulate guiding principles on the elaboration, negotiation and implementation of Treaties, agreements and other constructive arrangements,”¹² and to “develop a working paper to follow up on mechanisms for resolving conflicts arising from Treaties, agreements and other constructive arrangements.”¹³
39. The foundation for any processes and decision-making in which Treaties and Treaty rights are involved or affected must be Article 37 of the UN Declaration which is now supported by the US. Also of significance for this process are State obligations for the legal recognition and demarcation of Indigenous lands as stated in Article 26 of the Declaration. In addition, the UN Declaration, provides key elements for participatory mechanisms for redress, remedy, restitution, conflict resolution, and land rights adjudication in the following articles:

¹¹ Miguel Alfonso Martínez, Human Rights of Indigenous Peoples (June 22, 1999), E/CN.4/Sub.2/1999/20, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G99/137/73/PDF/G9913773.pdf?OpenElement>.

¹² Report of the Economic and Social Council on Indigenous Issues to the General Assembly, UN Doc. E/CN.4/2004/111 P. 5 ¶11, (Jan. 2, 2004).

¹³ Report of the Economic and Social Council on Indigenous Issues to the General Assembly, UN Doc. E/CN.4/2004/111 P. 5 ¶12, (Jan. 2, 2004).

Article 27: States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process. The process be fair independent, impartial, open and transparent, be established and implemented in conjunction with the indigenous peoples concerned and give due recognition to indigenous peoples' laws, traditions, customs and land tenure systems.

Article 28: 1) 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. 2) Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources.

Article 40: Indigenous peoples have the right to access to and prompt decisions through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.

40. The failure to implement rights affirmed in Treaties and to implement just processes for redress has resulted in a wide range of other forms of discrimination against Indigenous Peoples and Nations. Resulting human rights violations have been noted by UN bodies including the CERD and UN Special Procedures. For example on December 15th 2020, UN Special Rapporteurs on the Rights of Indigenous Peoples, the situation of human rights defenders, freedom of peaceful assembly and of association, contemporary forms of racism, and cultural rights reiterated this need in a UN press statement responding to IITC's urgent action submission addressing the case of a Lakota Human and Treaty Rights Defender Nick Tilsen, who was facing 17 years in prison for peacefully asserting Lakota rights to FPIC under the Ft. Laramie Treaty, with a "call on [US] authorities to initiate dialogue with the Great Sioux Nation for the resolution of treaty violations."

Excessive force used by both government law enforcement and private security against unarmed and peaceful Treaty rights defenders, including women who suffered permanent injuries, was also noted regarding the protests on the Standing Rock reservation within the 1851 and 1868 Treaty territory to the Dakota Access Pipeline (DAPL), which raised world attention to the ongoing Treaty rights violations caused by imposed development. In response to an urgent action submission by IITC detailing the brutal and life-endangering measures being carried out against these Treaty and human rights defenders and "water protectors" Maina Kiai, UN Special Rapporteur

on the rights to freedom of peaceful assembly and association, issued a UN Press release on December 15, 2016, stating that “***Law enforcement officials, private security firms and the North Dakota National Guard have used unjustified force to deal with opponents of the Dakota Access pipeline***”

41. Similarly, the need for bilateral mechanisms in which Indigenous Peoples continue to negotiate and reach agreements with the US on equal footing is desperately needed as during the current term of the US Supreme Court. For example, in June 2022, the Supreme Court of the United States (SCOTUS) issued an opinion that drastically diminished Indigenous Nation sovereignty. *Oklahoma v. Castro-Huerta* ruled that states now have concurrent jurisdiction to prosecute crimes committed by “non-Indians”¹⁴ against Indians in Indian Country¹⁵ with the US federal government. *Castro-Huerta* has overturned precedent that has been the foundations of Federal Indian Law and helped insulate Indigenous Nations from undue influence and interference from adverse interests since 1790.¹⁶
42. Since 1790, only the US federal government and the Indigenous Nations could prosecute crimes in which non-Indians perpetrated crimes against Indians; however, in 1881 and 1896 SCOTUS ruled that states *could* prosecute crime between non-Indians in Indian Country.¹⁷
43. Before June 29, it was presumed as a foundational principle of Federal Indian Law that unless Congress authorized state action in Indian Country, then jurisdiction was left the Indigenous Nation and the US federal government.
44. With the June 2022 decision, the UN Supreme Court overturned over 200 years of precedent. Indigenous Peoples in the US fear this is the precursor to the Indian Child

¹⁴ “Indian” is a legal term of art in Federal Indian Law and refers to Indigenous Peoples. When possible, this report refers to Indigenous Peoples rather than “Indian.”

¹⁵ Indian Country is defined as “a. all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation; b. all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state; and c. all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.” 18 U.S.C. § 1151 (2019); 40 C.F.R. § 171.3 (2017). See also, EPA, Definition of Indian Country, <https://www.epa.gov/pesticide-applicator-certification-indian-country/definition-indian-country> (last visited Nov. 13, 2018).

¹⁶ Matthew L.M. Fletcher, *In 5-4 ruling, court dramatically expands the power of states to prosecute crimes on reservations*, SCOTUSBLOG (June 29, 2022), <https://www.scotusblog.com/2022/06/in-5-4-ruling-court-dramatically-expands-the-power-of-states-to-prosecute-crimes-on-reservations/>.

¹⁷ Matthew L.M. Fletcher, *In 5-4 ruling, court dramatically expands the power of states to prosecute crimes on reservations*, SCOTUSBLOG (June 29, 2022), <https://www.scotusblog.com/2022/06/in-5-4-ruling-court-dramatically-expands-the-power-of-states-to-prosecute-crimes-on-reservations/>.

Welfare Act being overturned. The Indian Child Welfare Act (ICWA) (1978) was enacted by Congress to ensure that Indigenous children were not being systematically placed in non-Indigenous homes if child services became involved. ICWA works to ensure, whenever safe and possible, for Indigenous children to remain with relatives or other Indigenous individuals. The ruling in *Castro-Huerta* is a signal to Indigenous nations and tribal rights advocates that SCOTUS is directly averse to Indigenous interests. ICWA and our children are in peril.

45. Without a bilateral process that puts Indigenous Peoples on equal footing with the United States, Indigenous rights will continue to be eroded – even those that have foundational basis in Federal Indian Law and constitutional law in the United States with precedent spanning between decades and centuries.

“Protected Areas”: An emerging threat to Treaty Rights including the right to Free Prior and Informed Consent

46. It is essential to underscore that for both for non-sustainable development activities such as mining and projects undertaken in the name of conservation, the US is required to implement FPIC in full and equal partnership with Indigenous Peoples, based on the legal recognition of original territories and the rights recognized in Treaties, Agreements and other Constructive Arrangements.
47. State, Indigenous Peoples’ and UN experts at the 1st United Nations Seminar on Treaties, Agreements and other Constructive Arrangements between States and Indigenous Peoples which met in Geneva from December 15-17, 2003, underscored the vital importance of consent in para. 2 of their final conclusions and recommendations. They affirmed that “that treaties, agreements and other constructive arrangements constitute a means for the promotion of harmonious, just and more positive relations between States and indigenous peoples because of their consensual basis and because they provide mutual benefit to indigenous and non-indigenous peoples.”¹⁸
48. These conclusions highlight the consensual basis of Treaties and Agreements as an essential component upon which their original validity and ongoing viability is based. The failure of State parties to respect Indigenous Peoples’ Treaty right to FPIC is a primary cause of Treaty violations and abrogations, resulting in a wide range of pervasive human rights violations.
49. The full and unqualified Right to FPIC has continued to be challenged by States domestically and at times in international processes, impacting the rights of Indigenous Peoples including Treaty rights. However, significant advances have also been made in international bodies affirming the inextricable link between self-determination,

¹⁸ E/CN.4/2004/111, paragraph 3, emphasis added

consent and the rights in affirmed in Treaties, Agreements and Constructive Arrangements. For example, the recommendations of the 10th session of the UN Permanent Forum on Indigenous Issues (16 – 27 May, 2011) included the following: “As a crucial dimension of the right of self-determination, the right of Indigenous peoples to free, prior and informed consent is also relevant to a wide range of circumstances in addition to those referred to in the Declaration. Such consent is vital for the full realization of the rights of indigenous peoples and must be interpreted and understood in accordance with contemporary international human rights law and recognized as a legally binding treaty obligation where States have concluded treaties, agreements and other constructive arrangements with indigenous peoples. In this regard, the Permanent Forum emphatically rejects any attempt to undermine the right of indigenous peoples to free, prior and informed consent. Furthermore, the Forum affirms that the right of indigenous peoples to such consent can never be replaced by or undermined through the notion of “consultation.”¹⁹

50. In addition to continued imposition of unsustainable development activities such as mining, damming, deforestation and other extractive projects in Treaty Lands without consent, IITC is greatly concerned with a growing number of cases regarding the creation of so-called “Protected Areas” by the US, supported in many cases by large-scale conservation NGOs for preservation/conservation of biodiversity and mitigation of climate change. Many of the “Protected Areas” already in place, including National parks and wildlife preserves, as well as some that are being proposed are within the original and Treaty territories which Indigenous Peoples have safeguarded and used sustainably since time immemorial. In many cases, Indigenous Peoples are denied or have severely limited access to their traditional lands, foods, homes and water sources as well as ceremonial sites once these “Protected Areas” are established without the agreement, consent or even the advance knowledge of the Indigenous Peoples concerned.
51. The US Biden Administration has stated its plans to make the Black Hills National Forest, whose existence is itself a Treaty violation, a protected area under the “30x30 plan”²⁰ to “conserve” 30% of U.S. lands and oceans by 2030 to meet the framework set forth under the UN Convention on Biodiversity. Implementation of this proposal, even under the pretense of “co-management,” would severely undermine the rightful legal jurisdiction of the Očhéthi Šakówiŋ Oyáte over their Treaty lands in Black Hills.
52. Treaty Rights Attorney for the Očhéthi Šakówiŋ Oyáte Andy Reid reacted to this proposal in a letter submitted to the IITC on September 1, 2021:

The Black Hills National Forest is within the 1851 or 1868 Ft. Laramie Treaty territory which are claimed by the Očhéthi Šakówiŋ Oyáte. Until that claim is resolved, none of the lands within that territory, including Ĥe Sápa, should or can be considered or used

¹⁹ E/2011/43-E/C.19/2011/13, para. 36

²⁰ <https://www.leaderspledgefornature.org/>

by the United States for inclusion in US President Joseph Biden's 30x30 plan under which he commits to a goal of conserving at least 30 percent of US lands and oceans by 2030²¹ to meet the framework proposal set forth in the United Nation's Convention on Biological Diversity.²² That territory is that of the Očhéthi Šakówiŋ Oyáte, not the United States of America.

53. The current proposed creation of a "Protected Area" in the "Black Hills National Forest" is another example of the historic failure by the US Treaty party to respect the Treaty Right to FPIC, even when the Treaty in question specifically stipulates that consent must be sought and given before any entry or transit through the specified Treaty territories.

"Our word is sacred to us and so are these Treaties. The US government came to us, not the other way around. They asked us to lay down our arms and to live in peace and friendship with them in perpetuity. They said they would respect our traditional land rights in return. We have held up our end of the bargain. When can we expect the same from them?"

--- James Main Sr., White Clay Society Elder, Gros Ventre (White Clay) Nation, Montana, USA, presentation to the UN Expert Seminar on Treaties, Agreements and other Constructive Arrangements between States and Indigenous Peoples, December 2003

²¹ Executive Order No. 14008, Section 216 (January 27, 2021).

²² Open Ended Working Group on the Post-2020 Global Biodiversity Framework, First Draft of the Post-2020 Global Biodiversity Framework (July 5, 2021), CBD/WG2020/3/3, Part G.12.1, p. 6 (Target 3), <https://www.cbd.int/doc/c/abb5/591f/2e46096d3f0330b08ce87a45/wg2020-03-03-en.pdf>.

Annex: Maps of Očhéthi Šakówiŋ Oyáte Original Territories and Current Territory Boundaries



