OWE AKU
INTERNATIONAL JUSTICE PROJECT

Oyuhpa Tiyospaye of the Oglala Lakota Oyate, a band of the Lakota Nation within the Oceti Sakowin (the Seven Council Fires)

\- submittal to -

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International Covenant on Civil and Political Rights
Human Rights Committee

Consideration of reports submitted by States parties under article 40 of the Covenant

re: Fourth periodic report
United States of America

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A. Introductory Statement

1. Owe Aku International Justice Project (hereinafter, "Owe Aku") submits this report for consideration by the United Nations Human Rights Committee ("HRC") on behalf of the Oyuhpa Tiyospaye of the Oglala Lakota Oyate, a band of the Lakota Nation within the Oceti Sakowin (the Seven Council Fires). The tiyospaye is the most basic form of traditional government within the Lakota, Dakota and Nakota nation.

2. While Owe Aku has observed countless US violations of Indigenous rights in the United States, especially in light of the adoption of the Declaration on the Rights of Indigenous Peoples (the "Declaration"), Owe Aku's report to the HRC will address its two central concerns: (1) the United States' consistent failure to recognize, honor and enforce Indigenous treaty and self-determination rights, both as a matter of its municipal law and in its international positions, and (2) the propriety need for an international mechanism for vindicating Indigenous sovereign and treaty rights.[1] The Rights set forth in the Declaration are consistent with those set forth in the ICCPR.

3. The United States' report to the HRC is replete with notes on process reform, increases in "consultations" with Indigenous peoples, and with welfare disbursements to Indian country. The United States has also voiced its "support" for the Declaration. None of these measures, however, honor, ensure or effectuate the self-determination and sovereignty of Indigenous peoples as laid down in the International Covenant on Civil and Political Rights ("ICCPR"), the Declaration, and common international law. The rights of sovereignty and self-determination are not merely rights to process or "consultation," they represent rights to determine and preserve traditional ways of life. Moreover, and as stated by Professor Martinez in the Study on Treaties, Agreements and Other Constructive Arrangements Between States and Indigenous Peoples (the "Treaty Study"), "[i]ndigenous peoples, like all peoples on earth, are entitled to that inalienable right" of self determination. E/CN.4/Sub.2/1990/20 ¶ 260.

4. The Treaty Study accurately reported on how settler colonial powers have sought to "divest" Indigenous peoples of their international standing and of the enforceability of their treaties by a process of "domestication," subsuming Indigenous concerns under their domestic law. E/CN.4/Sub.2/1990/20 ¶ 112. This process has diminished the effective self-determination of Indigenous peoples, and threatened our cultural traditions through, *inter alia*, environmental racism and genocide wrought by degradation and contamination of land, water and other resources vital to the survival of Indigenous culture. "Domestication" is a blatant violation of the human rights of the Lakota, and other Indigenous peoples, and is contrary to the accepted position that Indigenous rights to self-determination are not dependent, but "inalienable."

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[1] As noted below, the rights set forth in the Declaration are substantially similar to those provided for under the ICCPR, particularly those addressing the right to self-determination.

5. The United States' "support" for the Declaration does nothing to reverse the campaign of domestication. Rather the United States continues its historical pattern by declaring that the Declaration is neither "legally binding or a statement of current international law." *See* "Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples" *available at* http://www.state.gov/documents/organization/184099.pdf. Further, the United States seeks to perpetuate a view of human rights that is contradictory to the spirit of the Declaration, the ICCPR and generally accepted norms of international law as evidenced in its bizarre, self-serving statement that "[t]he Declatation's call is to promote the development of a concept of self-determination for Indigenous peoples that is different from the existing right of self-determination in international law," *id.* – The United States view represents patronizing, inequitable and racist views of Indigenous peoples and their entitlements.

6. The United States distinguishes Indigenous rights to self-determination in order to falsely prop up and justify their treaty breaches and land taking. *See* Treaty Study, E/CN.4/Sub.2/1990/20 ¶¶ 186 – 198 (Explaining the historical and unilateral use of "juridical instruments" by colonizing forces to deprive Indigenous peoples of sovereignty and justify expansion and territory-takings contrary to international law. Generally, how the "rule of law" became "the law of rulers"). The patronizing view of Indigenous peoples held by the United States helps explain why they deem the inadequate consultation procedures – which are not absolute but subject to the whims of Congress – adequate protection for and implementation of self-determination and robust rights to "free, prior and informed consent." We stress that so long as we lack a neutral arbitration mechanism – preferably within an international forum and with the power to enforce its judgment - our rights will be meaningless.

7. The United States' failure to honor the self-determination of the Lakota and other Indigenous peoples has led to additional human rights and treaty violations that are prohibited under the ICCPR and the Declaration. These abuses include: (1) pollutants introduced into the environment, (2) water poisoning and contamination, and (3) permitting private industry and local jurisdictions to use and access sacred sites. These human rights violations compound the risk of cultural annihilation, because our ability to pass on our traditions and culture to future generations depends on our connection to un-spoiled land, water and ancestral sites.

8. Without a clear rebuke of the position advocated by the United States, the Declaration provides "paper" rights, without meaning. And, without actual rights with means of enforcement, the process of "domestication" and environmental degradation that has been so-well documented will continue, culminating with the genocide of Indigenous peoples. As reported by the Expert Mechanism for the Rights of Indigenous People, "[o]ne of the objectives of international standards is to fill the gap between [the rights of Indigenous

peoples] and their implementation on the other hand." A/HRC/18/42 ¶ 14. We seek a commitment from the HRC to reaffirm the bridge between principle and implementation.

B. Prior Reviews of the United States and Issues Raised for Present Review

9. During the prior review of the United States, the HRC recommended that the United States "take further steps to secure the rights of all Indigenous peoples, under Article 1 and 27 of the Covenant, so at to give them greater influence in decision-making affecting their natural environment and their means of subsistence as well as their own culture." CCPR/C/USA/CO/3/Rev.1 ¶ 37. The Committee has, again, requested "information on measures taken to **guarantee** the protection of indigenous sacred areas, as well as to ensure that indigenous peoples are consulted **and** that their **free, prior and informed consent is obtained** regarding matters that directly affect their **interests**." CCPR/C/USA/Q/4 ¶ 27. The HRC has also, and specifically, requested information on the implementation of Executive Order 13175 ("EO 13175"). Executive Order 13175 – Consultation and Coordination with Indian Tribal Governments § 2(c) *available a*t http://www.gpo.gov/fdsys/pkg/WCPD-2000-11-13/pdf/WCPD-2000-11-13-Pg2806-2.pdf.

10. Owe Aku welcomes increased scrutiny of the measures that the United States has held out as sufficient for complying with its international obligations. Owe Aku would like to highlight three important contextual points which are implicit in the HRC's prior review and present request for information.

11. First, as the language of the Committee's own statement makes clear, the United States is obliged to protect the sacred areas of Indigenous peoples. The duty is not aspirational but obligatory, a fact that implies a mechanism for vindicating US failure to satisfy the "guarantee."

12. Second, the right of "free, prior and informed consent" is distinct from and in addition to the right to consultation. Thus, the right to "free, prior and informed consent" is not satisfied by the existence of a process for simply informing Indigenous peoples of decisions, or allowing for perfunctory comment periods.

13. Finally, the right of "free, prior and informed consent" applies broadly to "matters that directly affect their **interests**." The interests of Indigenous peoples have been widely recognized as requiring special protection within the legal structures of colonizing nations. *Infra* ¶ 51. There is also consensus that Indigenous "political" rights, *i.e.* rights of self-determination and FPIC, are intrinsically linked to Indigenous traditional lands and resources. Thus, the scope of the "political" rights and the adequacy of their protection within the United States' domestic law must be determined in light of both their special need for protection and the intrinsic link to the environment and natural resources. *Infra* ¶ 36.

14. Owe Aku is concerned, however, that the HRC has focused too much on the municipal law of the United States and its domestic efforts with regard to the rights of Indigenous peoples and has ignored the need for effective international adjudication of Indigenous rights. In light of the Declaration of the Rights of Indigenous Peoples, Owe Aku calls on the HRC to clarify that US dealings with the Lakota, particularly its treaty breaches, are subject to international adjudication. *See infra* ¶¶ 54-56.

15. For example, in its prior review, the HRC focused on whether land "takings" were "without due process and fair compensation," terms locked into the domestic laws of the United States, rather than whether the land "taking" breached international law principles or existing treaty obligations. CCPR/C/USA/CO/3/Rev.1 ¶ 37. Similarly, the HRC has requested that the United States "review its policy towards indigenous peoples . . . and grant them the same degree of judicial protection that is available to the non-indigenous population." *Id*. Equality of status, while laudable, fails to recognize that Indigenous people are a distinct and sovereign collective within the state and that special protections are needed given the history of colonization and domestication. Owe Aku asks that the Committee clarify this statement so that it is clear that Indigenous peoples: (1) have rights independent of **and** in addition to those generally available under the municipal law of the United States, and (2) that those rights are internationally enforceable.

C. U.S. Policy for the Self-Determination of Indigenous Peoples – Executive Order 13175

16. The United States has stated that it "supports" the Declaration. However, its statements of support and its policies are contradictory. For example, Executive Order 13175 ("EO 13175") recognizes "the rights of Indian tribes to self-government and supports tribal sovereignty and self-determination." Executive Order 13175 – Consultation and Coordination with Indian Tribal Governments § 2(c) available at http://www.gpo.gov/fdsys/pkg/WCPD-2000-11-13/pdf/WCPD-2000-11-13-Pg2806-2.pdf. However, within the very same order, the President declares that Indian tribes are "domestic dependent nations," a term that goes hand-in-hand with the United States self-assumed "plenary" authority over Indian tribes. *Id*. § 2(b). *See also* Lone Wolf v. Hitchcock, 187 U.S. 553 (1903). Tribal sovereignty and self-determination are in diametric opposition to such "plenary" authority and to the patronizing "domestic dependent" description, a legal concept invented as part of the domestication process discussed in paragraphs 4 and 5 above.

17. EO 13175 does not satisfy the United States' international human rights obligation, which is unsurprising given the United States unexplained statement that the "concept of self-determination specific to indigenous peoples" is "different from the existing right of self-determination in international law." The United States provides no content for its self-serving vision of the right to self-determination of Indigenous peoples under international law nor does it offer any credible explanation for how EO 13175 protects that

right of self-determination. To echo Mrs. Antoanella-Iulia Motoc's report to the UN Commission on Human Rights, recognizing a right is only a first step; the next step, and as importantly, is "the need [ ] for mutually agreed processes of interaction." E/CN.4/Sub.2/AC.4/2005/WP.1 ¶ 55. Here, the United States has provided no details regarding how it plans to navigate conflicts between United States, third-party, and Indigenous peoples' rights when those rights collide; nor has the United States disclosed how any non-disclosed practice would protect Indigenous human rights as required by applicable international law.

18. The United States' "support" under EO 13175 is more likely placation, without commitment. Owe Aku finds this conclusion inescapable in light of: (1) the United States' failure to provide any substantive content for indigenous rights; and, (2) the absence of any forum within the United States system to adequately define the scope of Indigenous rights under EO 13175 or more generally.

19. The illusory support of the United States is clear upon inspection of EO 13175, which provides perfunctory process, lacks any defined substantive limitations on administrative agencies, and fails to afford Indigenous peoples with a particularized right for judicial review. At its essence, the order only requires that executive agencies provide certain Indian tribal representatives with notice of an impending decision and some unspecified period of comment and consultation. *See* EO 13175 §§ 5(a) – (c). The only substantial requirement for an executive agency planning action that affects Indian nations is to report on that consultation to the President's Office of Management and Budget. *Id*. § 5(b)(2). Further, "consultations" only apply to the federally ordained tribal council whose authority is within the U.S.-defined reservations that are, in fact, branches of the United States government under the Indian Reorganization Act of 1934. There is absolutely no room for input by the traditional, non-colonial government of the Lakota nation under EO 13175.

20. While it is true that EO 13175 § 5(d) instructs executive agencies to "explore" using consensual mechanisms for developing their regulations that deal with "tribal self-government, tribal trust resources, or Indian tribal treaty and other rights," EO 13175 does not mandate that executive agencies actually engage in consensual rule-making nor does it provide any benchmarks for determining when such consent-based process is "appropriate." *Id.* § 5(d). So, while consensual rule-making and actual Indigenous consent would move the United States closer to fulfilling its international obligations, Section 5(d) does not suffice because it merely expresses a wish, a hope, and, as discussed below, in practice consensual rule-making does not exist.

21. Executive agencies have, generally speaking, implemented EO 13175 by developing agency-specific procedures for carrying out consultations with Indigenous peoples. See EO 13175 § 5(a) ("Each agency shall have an accountable process to ensure meaningful and timely input by tribal officials in the development of

regulatory policies that have tribal implications.").[2] However, on inspection, these implementing processes have not improved upon the perfunctory process discussed in EO 13175. They have also failed to provide any additional guidance regarding the need for or processes by which consensus-based rule-making will be undertaken.

22. For example, the Environmental Protection Agency identified by the United States as part of the "new era in the United States' relationship with tribal governments" has issued a policy that is little more than a reiteration of EO 13175. *See* Agency-wide Tribal Consultation Policy available at http://www.epa.gov/tp/pdf/cons-and-coord-with-indian-tribes-policy.pdf. Like EO 13175, the EPA's policy begins with platitudes about Indian sovereignty, but relegates actual participation to some non-descript consultation process. EPA's four-step "Consultation Process," at its core, requires EPA only to solicit input from affected Indian tribes and then report back to the Indian tribe on how "their input was considered in the final action." *Id.* § V.

23. The Department of Energy mandates a substantially similar policy of consultation – notice of a proposed activity and an opportunity to comment. *See* Department of Energy American Indian & Alaska Native Tribal Government Policy available at http://www.lm.doe.gov/Office_of_Business_Operations/Solicitations/RFP_Support/DOE_Guides_and_Handbooks/DOE_Indian_Policy2006.aspx?__taxonomyid=791. This Consultation Process supposedly designed to protect the Lakota right to self-determination is, however, substantively no different than the general comment right available to any citizen in the United States under its municipal law.

24. The inclusion of notice, targeted at indigenous peoples, however, does not come close to effectuating rights of sovereignty and self-determination under international law, as discussed below. Again, to borrow the words of Ms.. Motoc, the right to self-determination "in order to be meaningful, must include the right to withhold consent to certain development projects or proposals." E/CN.4/Sub.2/AC.4/2005/WP.1 ¶ 44. *See also id.* ¶¶ 15-31 (collecting cases of and arguing that actual consent by Indigenous people to decisions affecting their lands exists and has been recognized by many international bodies and within the domestic law of many nations).

25. The meager restrictions on United States executive agencies are made all the more toothless because Executive Order 13175 is not judicially enforceable, rather it is guidance from the President for management of executive agencies. Section 10 of Executive Order 13175 clearly states that it "is intended only to improve

[2] The National Congress of American Indians generated a report in 2012 that details executive agency efforts to comply with EO 13175. This report is available at http://www.ncai.org/attachments/Consultation_hxjBLgmqyYDiGehEwgXDsRIUKvwZZKjJOjwUnKjSQeoVaGOMvfl_Consultation_Report_-_Jan_2012_Update.pdf.

the internal management of the executive branch, and **is not intended to create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law by a party against the United States** . . . ."

26. As reported by the Special Rapporteur on the Rights of Indigenous People, Professor James Anaya, inadequate remedies for Indigenous peoples for vindicating violations of their human rights is a substantial impediment to the realization of those rights. *See* A/HRC/21/47 (noting that "he has found, across the globe, deficient regulatory frameworks such that in many respects Indigenous peoples' rights remain inadequately protected" and further noting the need for "[m]ajor legislative and administrative reforms" for remedying violations of Indigenous rights in connection with extractive industries.) The HRC itself has found and criticized States for not providing "an effective remedy to persons whose rights under the Covenant have been violated." *See* CCPR/CO/69/AUS.

27. The Lakota and other Indigenous peoples lack a forum to dispute the adequacy of agency consultations required by Executive Order 13175 – they are left, simply, to accept what process an Agency gives. This is precisely the situation that concerned the Special Rapporteur: a paper right, without means of enforcement. *See also* A/61/L/67, Art. VIII, ¶ 2 (requiring States to develop "effective mechanisms" for remedying and redressing deprivations of land, resources or efforts that threaten viability of Indigenous people as distinct entities).

28. In addition to the absence of a forum to judge the adequacy of the consultation **procedure**, there is no forum to vindicate the merits of an Agency decision, beyond the very cabined opportunities for judicial review generally available within United States administrative law.[3] This mode of judicial review does not provide effective protection of Indigenous rights, and such a state of affairs does not satisfy the US' obligations. To the contrary, and as reported by the Inter-American Commission on Human Rights, because of the historical and inequitable treatment of Indigenous peoples by colonizing forces, "[s]pecial measures for securing indigenous human rights" are needed beyond those widely available under domestic law. *Maya Indigenous Communities cases*, Report No. 40/04, ¶¶ 95-97 (2004).

[3] *See generally*, Allan Kanner, Ryan Casey and Barrett Ristroph, *New Opportunities for Native American Tribes to Pursue Environmental and Natural Resource Claims*, 14 Duke Envir. L. & Policy Forum 155 (2003) (noting the ineffectiveness of enforcement of Indigenous rights in tribal courts and the spotty effectiveness of tribes proceeding via generally applicable citizen law suits in the United States courts); Kyle W. La Londe, *Who Wants to be an Environmental Justice Advocate?: Options for Bringing and Environmental Justice Complaint in the Wake of Alexander v. Sandoval*, 31 Boston College Envir. Affairs L. Rev. 27, 53 (2004) (noting the insufficiency of the present environmental justice framework for recognizing particularized injuries to Indigenous populations, particularly harms to culture and traditions).

D. The Rights of the Lakota People Under International Law

29. The Lakota have enforceable human rights to sovereignty, self-determination, land and water, and to the protection of their traditional way of life. These rights derive, in part, from the Fort Laramie Treaties, entered into between the United States and the Lakota in 1851 and 1868, the ICCPR, the Declaration, and common international law.

i. Ft. Laramie Treaties and Enforceability

30. The Fort Laramie Treaty creates internationally enforceable rights to Lakota land. Article II of the Treaty provides, in no uncertain terms, that Lakota lands are "set apart for the **absolute and undisturbed** use and occupation of the Indians herein named." Treaty with the Sioux-Brule, Ogala, Miniconjou, Yanktonai, Hunkapa, Blackfeet, Cuthead, Two Kettle, San Arcs, Santee and Arapaho, 4/29/1868; General Records of the United States available at http://www.ourdocuments.gov/doc.php?flash=true&doc=42&page=transcript.

31. Similarly, Article XVI provides that "[t]he 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 . . . ." *Id.*

32. While it has become a common theme for colonizing nations to assert that the treaties signed between them and Indigenous peoples are not subject to international enforcement, see Treaty Study, E/CN.4/Sub. 2/1999/20 ¶¶ 112-114, this position is contrary to international law. The Ft. Laramie treaty remains enforceable and continues to bind the United States. *See id. ¶ 271* ("those instruments indeed maintain their original status and continue fully in effect, and consequently are sources of rights and obligations for all the original parties to them . . . ."). The position of settler-colonial nations derives from antiquated themes left over from the so-called Age of Discovery, the Christian supremacy, and the Papal Bulls of the 15th and 16th centuries. [For example, the language of the papal bull issued by Pope Nicholas V to King Alfonso V of Portugal authorized the king to "invade, capture, vanquish, and subdue. . .all Saracens and pagans, and other enemies of Christ. . .to reduce their persons to perpetual slavery. . .and. . .to take away all their possessions and property."]

33. The United States has asserted that treaties with Indigenous peoples, including the Fort Laramie Treaties, are subject to the "plenary" authority of Congress to justify their unilateral abrogation because they deem Indigenous peoples to be "domestic dependents" and "wards" of the United States. *See* Lone Wolf v.

Hitchcock, 187 U.S. 553 (1903).[4] However, "unilateral termination of a treaty, or non-fulfillment of the obligation[s] contained therein, 'has been and continues to be unacceptable behavior according to both the Law of Nations and more modern international law." E/CN.4/Sub.2AC.4/2005/WP.1 ¶ 48 (quoting the Treaty Study ¶ 279). It is a generally accepted principal of international treaty law that arrangements entered into by the consent of both parties continue under that principle of consent, and terminate only according to the same principle. *See id.* "Under the traditional rules governing treaty relationships, a party cannot unilaterally abrogate from a treaty unless treaty provisions are duly declared null and void," Jeremie Gilbert, Indigenous Peoples' Land Rights under International Law: From Victims to Actors Brill, (1st Ed. 2006).[5]

33. Colonizing nations have also attempted to denude Indigenous treaties in advocating that "domestication" has changed the present status of Indigenous peoples. This argument is contrary to the "criterion of intertemporal law" recognized under international law. *Id.* As stated in the Treaty Study, the fact that Indigenous peoples entered into the treaties as independent nations, and were recognized as such by the colonizing nations, preserves the vitality of Indigenous treaties. *See* Treaty Study ¶ 108 (colonizing nations "were clearly aware that they were negotiating and entering into contractual relations with sovereign nations, with all the international legal implications of that term.").

34. Even if the recognition of Indigenous treaties was not incorporated into the corpus of common international law, which it is, such recognition is explicitly provided for under Article 37 of the Declaration, which states that "[i]ndigenous peoples have the right to the recognition, observance and enforcement of treaties, agreement and other constructive arrangements concluded with States or their successors . . . ." A/61/L/67, Art. 37.

ii. The Rights of the Lakota To Self-Determination

35. The Lakota have rights of self-determination under the Declaration, the ICCPR and common international law. Rights of self-determination go beyond mere political autonomy or the quasi-sovereignty recognized by the United States. Rather, the right is comingled and understood only through the goal of

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[4] It is worth noting that scholars have questioned the legitimacy of the United States' position that Indian tribes and treaties are subject to the "plenary" authority of the federal government, as a matter of United States constitutional law. Professor Savage, for instance, has argued that the Constitution and debates surrounding its ratification contradict a notion that the United States would have such authority. *See* Mark Savage, *Native Americans and the Constitution: The Original Understanding*, 16 Am. Indian L. Rev. 57, 115-116 (1991). Rather, Professor Savage exposes the basis of the authority in the racist presumption of "manifest destiny." *Id*. at 118. A reversal of this position, therefore, would not require an elemental change to United States law.

[5] This principle has been accepted by a number of UN bodies and treaty organizations. *See* E/CN.4/Sub.2/AC.4/2005/WP.1 ¶ 50 (noting that UN Treaty bodies, including the Committee on the Economic, Social and Cultural Rights, the Committee on the Elimination of Racial Discrimination, and the Human Rights Committee have all criticized the unilateral abrogation of Indigenous treaties, stressing that such agreements continue to provide substantive protections that can only be undone via mutual informed consent).

cultural preservation: it is a right to **pursue** and **maintain** a way of life consistent with our culture and traditions.

36. As stated in both the ICCPR and the Declaration, the right to self-determination is a right to "freely determine [ ] political status and freely pursue [ ] economic, social and cultural development" and "to maintain and strengthen [ ] distinct political, legal, economic, social and cultural institutions." ICCPR, A/6316, Art. III, Declaration, A/61/L/67, Art. V. The ICCPR further explicates the right to self-determination recognizing that "[a]ll peoples may, for their own ends, freely dispose of their natural wealth and resources" and that "[i]n no case may a people be deprived of its own means of subsistence." A/6316, Art. I.

37. As Ms. Motoc artfully puts it, "[t]he core of a people's right to self-determination in international law is the right to freely determine the nature and extent, (if any), of their relationship with the state and other peoples, as well as to maintain its culture and social structures, to determine its development in accordance with its own preferences, values and aspirations, and to freely dispose of its natural wealth and resources." E/CN.4/Sub.2/AC.4/2005/WP.1 ¶ 34.

38. Self-determination, properly understood, then, is a confluence of rights. It includes: (1) the right for Indigenous peoples to determine their own governing structures for both internal management and external affairs; (2) and, "the essential right of permanent sovereignty over natural resources." E/CN.4/Sub.2/AC.4/2005/WP.1 ¶ 36. These substantive rights – to political freedom, natural resource use – are necessary for the cultural survival of Indigenous peoples. *See* Jeff Corntassel, *Toward Sustainable Self-Determination: Rethinking the Contemporary Indigenous-Rights Discourse*, 33 Alternatives 105, 117 (2008) (Arguing that "political autonomy, governance, the environment, and community" are not "separate concepts," rather they are intrinsically linked.").

39. Upon recognizing the substantive right to self-determination, and the basis and importance of environmental/natural-resource sovereignty to that "inalienable" right, the question is what rules govern the interaction of those rights with colonizing authorities. The "key principle" governing that interaction is "free, prior and informed consent." E/CN.4/Sub.2/AC.4/2005/WP.1 ¶ 55 (noting "free, prior and informed consent" has developed as a means for delineating "spheres of territorial authority" as between multiple sovereign or governing entities).

iii. The Right To Traditional Governance and Law

40. It is essential for effective self-determination that Indigenous modes of governance and decision-making are consistent with Indigenous practice. This principle is enshrined in the Declaration, which

provides that Indigenous peoples are entitled to act "through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions." A/61/L/67, Art. XVIII.

41. The domestic law and practice of colonizing nations cannot define how Indigenous peoples choose to represent themselves or who those representatives are. Without independently choosing the mode of representation, Indigenous peoples cannot meaningfully exercise other rights, notably that of free, prior and informed consent. Representation "must enable and guarantee the collective decision-making of the concerned indigenous peoples and their communities through legitimate customary and agreed processes, and through their own institutions." E/CN.4/Sub.2/AC.4/2005/WP.1 ¶ 44.

42. This principle is at work in the holding of the Inter-American Commission, which recognized that the Maya community's traditional and collective mode of property ownership was a cognizable and internationally protected right irrespective of its status under the domestic law. This principle cannot be underplayed: Indigenous rights "are not defined exclusively by entitlements within a state's formal legal regime, but also include [those arising from] indigenous custom and tradition." *The Maya Indigenous Communities Cases*, Report No. 40/04, ¶ 117 (2004).

iv. Natural Resource Sovereignty

43. Human rights bodies within the Americas have pointedly articulated the connection between land and natural resources and the realization of indigenous human rights. For example, in *The Maya Indigenous Communities Cases*, the Inter-American Commission noted that "indigenous peoples enjoy a particular relationship with the lands and resources traditionally occupied and used by them" that is integral to the "physical and cultural survival of the indigenous communities and the effective realization of their human rights more broadly." Report No. 40/04, ¶ 114. The Inter-American Human Rights Court has similarly recognized the relationship between traditional Indigenous lands, "cultural legacy" and the "trasmi[ssion]" of that heritage. *See Mayagna (Sumo) Community of Awas Tingni v. Nicaragua*, Inter-Am. Ct. H.R., (Ser. C) No. 79 (2001) ¶ 149. And, this principle was further expounded by the by the Inter-American Commission, notably, while addressing the United States' taking of the lands of the Western Shoshone people of Nevada, inf *Mary and Carrie Dann v. United States*. In that case, the Commission recognized:

- the "particular connection between communities of indigenous peoples and the lands and resources they have traditionally occupied and used" as well as how that interplays with human rights generally;

- "that the relationship with the land is not merely a question of possession and production but has a material and spiritual element that must be fully enjoyed to preserve their cultural legacy and pass it on to future generations;" and,
- "that continued utilization of traditional collective system for the control and use of territory are in many instances essential to the individual and collective well-being, and indeed the survival of, indigenous peoples." Report No. 75/02 ¶ 128.[6]

44. As the Special Rapporteur concluded in the Treaty Study, there can be no durable solution to the problematic interactions between Indigenous peoples and colonizing states without "recognition of indigenous peoples' right to their lands." ¶ 256. The right to those lands means that Indigenous peoples have "permanent sovereignty" over ancestral lands and resources. E/CN.4/Sub.2/2004/30 ¶ 55 ("Though indigenous peoples' permanent sovereignty over natural resources has not been explicitly recognized in international legal instruments, this right may now be said to exist. That is, the Special Rapporteur concludes that the right exists in international law by reason of the positive recognition of a broad range of human rights held by indigenous peoples . . . .").

45. "Permanent sovereignty" over natural resources comes with "all the normal incidents of ownership," including "the right to use or conserve the resources, the right to manage and control access to the resources, the right to freely dispose of or sell the resources, and related interests." *Id.* ¶ 41. In other words, it is "the right to manage, govern, or regulate the use of the resources by the indigenous people itself, by individuals, or by others." *Id.* ¶ 46. In practical effect, this right should provide Indigenous peoples with authority to approve, monitor and enforce compliance with the conditions imposed on natural resource use by those Indigenous peoples (a right that entails provision to the Indigenous peoples by colonizing states sufficient resources to affect those roles).[7]

v. Free, Prior and Informed Consent

46. As observed by the Special Rapporteur on the rights of Indigenous Peoples, "free, prior and informed consent" ("FPIC"), is a means of effectuating the substantive rights of indigenous peoples, including self-determination, natural resource determination, subsistence, and the preservation of cultural traditions. A/HRC/21/147 ¶¶ 48-51. The scope of FPIC, then, is defined in light of the effects of a given action (by state or

[6] Special Rapporteur, Erica-Irene A. Daes, reported fully on this connection and the growing recognition of this connection within the corpus of human rights law in her Final Report on "Indigenous peoples' permanent sovereignty over natural resources." E/CN.4/Sub.2/2004/30 ¶¶ 32-37.

[7] Permanent sovereignty, it is important to note, does not affect the territorial integrity of existing states. *See* E/CN.4/Sub.2/2004/30 ¶ 46. Rather, it delineates Indigenous human rights. Both Indigenous and colonizing state rights are limited by common principles of international law. "Free, prior and informed consent" is a means by which these, potentially, conflicting international rights are negotiated. *See* E/CN.4/Sub/2/AC.4/2005/WP.1 ¶ 54.

third parties) on those Indigenous rights. In determining whether an action effects or injures Indigenous rights, and to what extent, due respect and attention must be paid to Indigenous traditions, values and customs.

47. There is near consensus that mere consultation and participation does not suffice for the protection of Indigenous human rights where there are substantial effects on Indigenous peoples. *Id.* ¶ 65 ("[W]here the rights implicated are essential to the survival of the indigenous groups as distinct peoples and the foreseen impacts of the exercise of the rights are significant, **indigenous consent to the impacts is required, beyond simply being an objective of consultations.").**

48. As discussed above, given the existential link between the exercise of Indigenous human rights and access and control over traditional land and resources**, actual** Indigenous consent is "presumptively" required for "any extractive operation" on Indigenous traditional lands, sacred areas or that might affect "natural resources that are traditionally used by indigenous peoples in ways that are important to their survival." *Id. See also* A/HRC/24/41, Report of the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, Extractive Industries and indigenous peoples, ¶¶ 81-84.[8] This conclusion is also supported by Ms. Motoc in her "Legal Commentary on the Concept of Free, Prior and Informed Consent," wherein she stated that "in order to be meaningful, [the right to FPIC] must include the right to withhold consent to certain development projects or proposals." E/CN.4/Sub.2/AC.4/2005/WP.1 ¶ 44.

49. As discussed above, self-determination must respect the traditional governing and decision-making processes of Indigenous peoples. So, in order for FPIC to effectively protect the human rights of Indigenous peoples, "fully informed and mutual consent" must be sought from the "indigenous community as a whole." *Mary and Carrie Dan v. United States*, Report No. 75/02 ¶ 140. This is true, particularly, where the group identified to represent has dubious or a contested "mandate" to represent the Indigenous peoples. *Id.* A "dubious" or "contested mandate" clearly exists within the historical and modern use of Indian Reorganization Act governments which are the only representatives used by the US in "consultation" or "consent" processes.

50. It is important to note that recognizing Indigenous sovereignty and rights including the withholding of consent to a proposal or "development" project is "compatible with the principle of state sovereignty." *Id.* ¶

[8] This position is consistent with the finding of the Expert Mechanism, which noted with approval that "a number of United Nations human rights treaty bodies have established that States have a duty, within the framework of their treaty obligations, to effectively consult indigenous peoples on matters affecting their interests and rights and, in some cases, to seek to obtain the consent of indigenous peoples." A/HRC/EMRIP 2011/2, ¶ Paragraph 11, and that consultation procedures must enable indigenousIndigenous peoples to "affect the outcome" and seek "consensus," *id.* ¶ Paragraph 8.

51. Every State is, of course, limited in its actions by common international law, including human rights law, and their valid and consensually made treaties. *Id.* Therefore, to the extent that a colonizing state fails to honor the human rights of Indigenous peoples, they are simply acting *ultra vires* and outside of their sovereign capacity.[9]

vi. Right to Remedies for Violations of Self-Determination and FPIC

51. One of the most important rights for Indigenous peoples is the right to effective remediation and/or reparation for violations of their substantive human rights. This principle is recognized in the Declaration and the ICCPR.

52. The Declaration establishes duties for States that are directed at the maintenance of the substantive right to self-determination under the Declaration. Article VIII mandates that:

> "States shall provide effective mechanisms for prevention of, and redress for:
>
> (a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;
>
> (b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources. . . ." A/61/L/67, Art. VII.

53. Similarly, Article 2 of the ICCPR creates a right to effective remedy for breaches of the rights and freedoms secured therein. A/6316, Art. II. This right is expounded upon in General Comment 31, which states, in part, that: (1) "remedies should be appropriately adapted so as to take account of the special vulnerability of certain categories of person[s]," and (2) the "appropriate judicial and administrative mechanisms for addressing claims of rights violations under domestic law" are integral to the fulfillment of State obligations. CCPR/C/21/Re.1/Add.13.

54. The need for "special" mechanisms for the protection of Indigenous rights has been recognized by many multinational bodies. *See e.g., Dann Case*, Report No. 75/02 ¶ 125-126 (the development of Indigenous human rights principles "has included identification of the need for special measures by states to compensate for the exploitation and discrimination to which these societies have been subjected at the hands of the non-indigenous peoples"). Therefore, in determining the adequacy of remedies and judicial or

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[9] "Human rights and humanitarian treaties involve no loss of sovereignty or autonomy of the new States, but are merely in line with general principles of protection that flow from the inherent dignity of every human being which is the very foundation of the United Nations Charter." Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro*)), Separate Opinion of Judge Weeramantry, p. 645 (1996) at http://www.icj-cij.org/docket/files/91/7361.pdf .

administrative processes, States and multi-national bodies must ensure that the process and resolution ensure adequate participation of Indigenous groups, effective recognition of the substantive human rights they seek to vindicate, and the availability of remedies to ensure that Indigenous rights are repaired to the utmost extent and future violations of those rights are deterred.

55. While the need for especially protective administrative and remedial structures is widely accepted in principle, in practice, such safeguards do not exist or suffice. *See* A/HRC/21/47 ¶ 58 (finding that "relevant State laws and regulations across the globe" provide "deficient regulatory" protection and that "reforms are needed in virtually all countries . . . in order to adequately define and protect [Indigenous] rights over lands and resources, including rights over lands not exclusively under their use or possession, such as rights related to subsistence practice or to areas of cultural or religious significance."). Special Rapporteur, Professor James Anaya, further found that such regulatory structures require "effective sanctions and remedies" for violations. *Id*. ¶ 82.

56. An example clearly demonstrating the inadequacy of municipal mechanisms in providing remedial structures can be found in the 1980 United States Supreme Court decision. *See United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980). In that case the Supreme Court stated that "a more ripe and rank case of dishonorable dealing will never, in all probability, be found in our history" referring to the US taking of the Black HIlls in violation of the 1868 Fort Laramie Treaty. However, "U.S. legislation empowers congress, as the trustee over Indian lands, to dispose of said property including its transfer to the U.S. Government. Since the return of lands improperly taken by the Federal Government is not within the province of the courts but falls only within the authority of the congress, the Supreme Court limited itself to establishing a $17.5 million award (plus interest) for the Sioux [Lakota]. The Indigenous part, interested not in money, but in the recovery of the lands – possessing a very special spiritual value for them, -- has refused to accept the monies, which remain undistributed in the U.S. Treasury. . ." Treaty Study, ¶281. The deck is stacked: US presidents make treaties, Congress approves them, Americans unilaterally violate the treaties, the Courts state there is no remedy unless Congress acts to undo its own activity – all done without any contact with Lakota people. Such compensation is not "just". Therefore, the domestic system is incapable of awarding effective relief to the Lakota people.

57. In order to be effective, the administrative or judicial processes established to protect Indigenous rights must accept Indigenous claims as human rights claims and honor the corpus of international law that accompanies and defines that law. This principle appears clearly in the *Dann Case*, where the Inter-American Commission rejected the notion that the United States' Indian Claim Commission process was sufficiently protective and expressed concern that "neither the courts nor the state itself regarded the matters raised in the

case as human rights issues, but rather as questions regarding land title and land use." Report No. 75/02 ¶ 164.

58. The concerns of the Inter-American Commission in the *Dann Case* offer other important insights, namely that: (1) any adjudicatory body must make good-faith inquiries into the adequacy of the person or body claiming to represent the Indigenous community; (2) where doubt exists regarding the adequacy of the representative, the process must provide mechanisms for the intervention or involvement of other interested Indigenous groups; and (3) a remedial scheme that "preclude[s] claimants from recovering lands" and only provides "monetary compensation" may well be inadequate. *Id.* ¶ 113

59. While most international bodies have recognized that the proper remedy for a human rights violation will vary according to the circumstances of the case, monetary compensation rarely suffices because it can scarcely substitute for the desecration or taking of sacred lands, the destruction of cultural traditions, or the deprivation of effective self-determination. As the depth of such injuries can rarely, if ever, be translated into a monetary damage award, injunctive or restitutionary relief is the presumptive remedy. *See "*Norms and Jurisprudence of the Inter-American Human Rights System" ¶ 376 ("restitution of claimed territory" is the preferred form of reparation in cases involving the "loss of possession of ancestral territory," because it "comes the closest to *restitutio in integrum*.") *available at* http://cidh.org/countryrep/Indigenous-Lands09/Chap.X.htm#X.C.

60. Finally, and in light of the present inadequacy of States' regulatory and judicial structures for protecting Indigenous rights, there is a growing consensus regarding the need for an effective international forum to hear Indigenous rights cases. As observed by the Special Rapporteur, Erica-Irene A. Daes, "[n]ew mechanisms and measures are needed at the international level, at least on an interim basis, to assist States in their efforts and to encourage, monitor, and examine their progress" in protecting Indigenous rights. E/CN.4/Sub.2/2004/30 ¶ 63.

E. United States Failure to Honor the Human Rights of the Lakota

i. Unilateral Abrogation and Violation of the Ft. Laramie Treaty

61. The United States has continually asserted authority to unilaterally abrogate its treaties with Indigenous peoples. Unilateral abrogation of the Fort Laramie Treaties, which govern the relationship between the United States and the Lakota, is contrary to international law. *See supra* ¶¶ 30-35. The United States continues to believe and legislate on the basis of the fact that Indian treaties do not constitute limitations on the authority of the United States government. *See Wolf v. Hitchcock*, 187 U.S. 553, 564-66 (noting that "[p]lenary authority over the tribal relations of the Indians has been exercised by Congress form

the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government" and that such authority creates "power [ ] to abrogate the provision of an Indian treaty.").

62. The United States Supreme Court attempts to disguise the complete lack of adherence to the Fort Laramie Treaties through the use of judicial "presumptions," namely that: (1) Indigenous treaties should be construed "in the sense in which they would naturally be understood by the Indians," *Washington v. Fishing Vessel Assn*., 443 U.S. 658, 676 (1979); and (2) "[a]bsent explicit statutory language," courts should not find United States law to abrogate treaty rights, *see Washington v. Washington Commercial Passenger Fishing Vessel Assn.*, 443 U.S. 658, 690 (1979). These presumptions, however, do little to protect the Lakota's treaty rights under the Fort Laramie Treaties because the Supreme Court does not hesitate to find them inapplicable.

63. *Montana v. United States* is emblematic of how United States courts will find ways to reduce Indigenous treaty rights. *See* 450 U.S. 544 (1981). At issue in the case was whether the Crow Indians could regulate hunting and fishing by non-Indians within the reservation lands under the Fort Laramie Treaties. According to the Supreme Court, the question was "whether the United States conveyed beneficial ownership of the riverbed to the Crow Tribe by the treaties . . . ." *Id.* at 551.[10]

64. In its decision, the Supreme Court utterly failed to address the treaty rights as questions of international or human rights law; and, in determining the rights under domestic law, the Supreme Court proceeded to ignore the presumptions protecting Indigenous treaty rights. Instead, the Supreme Court held that the "presumption that the beds of navigable waters remain in trust for future States and pass to the new States when they assume sovereignty" trumped the Indigenous claims and that ownership was not transferred as part of the Fort Laramie Treaties. *Id.* at 553.

65. In effect, the Supreme Court required explicit treaty language before they would recognize Indigenous control over such navigable waterways. As the dissenting justices argue, this holding is contrary to the interpretive presumptions that favor Indian tribes, particularly, that presumption requiring treaties be construed how Indigenous people would understand them. *Id*. at 577-78 (J. Blackmun dissenting) ("it defies common sense to suggest that the Crow Indians would have so understood the terms of the Fort Laramie Treaties"). Moreover, and as a matter of basic sense, it is illogical to believe that 19th century treaty drafters would include language so as to satisfy a test created by a court 100 years in the future.

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[10] As discussed below, through racist policies of assimilation, namely the Dawes Act, the United States has succeeded in alienating much of the reservation land provided for under the Fort Laramie Treaties, leaving the reservation land with several different types of property owners, including, direct tribal ownership, private Tribe-member ownership, private non-Tribe-member ownership, and State ownership. *See United States v. Montana*, 450 U.S. 544, 548 (1981).

66. It is well documented – and even accepted by the United States Supreme Court – that the United States has materially violated the terms of the 1868 Fort Laramie Treaty. *See United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980) (noting that "[a] more ripe and rank case of dishonorable dealings will never, in all probability, be found in our history" than those which culminated in the abrogation of the 1868 Fort Laramie Treaty and the theft of the Black Hills). The United States did not abrogate out of necessity or for any reason but greed – it was simply the existence of gold and the desire of settlers that led the United States to violate the treaty, unilaterally seize treaty land, and destroy herds of Buffalo in order to starve the Lakota into submission. *See* A/HRC/21/47/Add. 1 ¶ 40 (noting that "[f]ollowing the discovery of gold in the area, in 1877 Congress passed an act reversing its promise under the treaty and vesting ownership of the Black Hills to the Government.").

67. The Oglala Lakota Council Fire, as well as the other bands of the Lakota and Dakota nation – the traditional governing body of the Oglala Lakota Oyate made up of representatives from the different tiyospayes, *supra* ¶ 1 – has refused the monetary damages awarded by the United States judicial system. "Even if the $17.5 million awarded by the United States courts was a fair calculation of the Lakota's loss, money damages cannot make up for the abrogation of our treaties, the taking of Lakota land, or the injury to our heritage." [Taken from interview with Alexander White Plume].

ii. Failure to Respect Traditional Forms of Government

68. The United States, through the Indian Reorganization Act as well as EO 13175, continues to violate Indigenous rights to self-determination by taking on authority to recognize which groups will represent Indigenous peoples for purposes of interaction with the United States government. As Special Rapporteur James Anaya reported, while the Indian Reorganization Act provides some self-government for Indigenous peoples, such authority is subsumed under the Secretary of the Interior of the United States. A/HRC/21/47/Add.1 ¶ 23. The structure of such "reservation-based governments," was based on "the model constitutions that were developed **by the Secretary**," *id.*, and which had the identified purpose of preparing Indigenous peoples for "real assimilation." *Id.* The IRA system is contrary to Indigenous rights to self-determination and autonomy. Beyond the injury to Indigenous self-determination, the IRA process for recognition has impacts on many other Indigenous rights, because the United States only provides targeted consultation notice and monetary and other forms of assistance to recognized federally-recognized tribal councils. *See id.* ¶ 56.

69. The 1934 election held under the Indian Reorganization Act for the Lakota was crooked and rejected three times by the Lakota people. Eventually the United States simply imposed the present IRA government on the Lakota. The present IRA government and its process of top-down governing are directly contrary to the traditional Lakota tiyospaye and its focus on consensus-based decision-making. [Taken from Interview with Alexander White Plume].

70. One aspect of the IRA government that is particularly damaging to the Lakota is its insistence on the use of English during the course of governmental conduct and its inadequate support and appreciation for the preservation of the Lakota language. By conducting governing business in English, the present IRA government marginalizes traditional Lakota speakers and the Lakota language. The IRA government has adopted education programs, including Lakota language programs, which fail to include or seek the participation of traditional Lakota speakers – these programs, instead, focus on "Western," means of education and are entirely ineffective at preserving the Lakota language. The Lakota language is integral to customary Lakota culture, including how the Lakota would communicate and make governing decisions. The United States, through the un-representative IRA government, continues to violate Lakota human rights through policies that undermine the preservation of the Lakota language. [Taken from Interview with Rosalie Little Thunder (Sicangu Lakota and Lakota language expert)].

iii. Denial of Indigenous Authority over Property and Persons

71. The United States, while playing lip service to the sovereignty of Indigenous peoples, recognizes little to no effective authority. As discussed, Indigenous self-determination must include actual power and authority over natural resources and an ability to regulate its use by Indigenous and non-Indigenous peoples. *See supra* ¶¶ 38, 44-46.

72. United States courts continue to erode the authority of Indigenous peoples to regulate non-Indigenous persons and activities that occur on Indigenous lands. In *Montana v. United States*, the Supreme Court held that Indigenous peoples lacked the authority to regulate the activities and land use of non-Tribe members that owned land within the reservation. 450 U.S. at 564. Courts have also held that Indigenous peoples lack the civil adjudicatory authority over non-Tribe members for actions taking place on the reservation. *See Wilson v. Marchington*, 127 F.3d 805, 813 (9th Cir. 1997) (denying tribal court jurisdiction over an accident that took place between tribal member and non-tribal member on a State highway). And, finally, the United States Supreme Court has consistently rejected the authority of Indigenous peoples to assert criminal jurisdiction over non-Indigenous peoples. *See Duro v. Reina*, 495 U.S. 696 (1990), *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

73. By so holding, the United States fails to appreciate the breadth of Indigenous self-determination. The United States, rather, believes that "tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." *Montana v. United States*, 450 U.S. at 564.

74. The United States accepts an exceedingly narrow vision of Indigenous sovereignty that permits Indigenous governing/regulatory of non-Indigenous peoples only: (1) if those persons and/or activities occur on land owned by the Tribe; (2) when non-Indigenous peoples enter into "consensual relationships with the tribe," or (3) when non-Indigenous conduct "threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe." *See id.* at 565-66. There are two important issues to flag for understanding the true impact of the United States' position regarding limitations on Indigenous authority: (1) the land owned by Indigenous tribes has been drastically reduced by unilateral United States actions; and (2) United States courts, in practice, never recognize non-Indigenous conduct to be a "threat" to the "political integrity, the economic security, or the health and welfare of the tribe." *Infra* ¶¶ 78-79.

75. Through the Allotment Act – widely recognized as racist and assimilationist legislation – the United States has dramatically reduced the land on reservations that is directly owned by Indigenous peoples. The Acts provide for the division of Indigenous lands (previously held in common) into individual parcels, which then can be sold to non-Indigenous peoples or foreclosed upon in tax or debt proceedings in United States' courts. *See* General Allotment Act, 24 Stat. 388 (1887) (codified in part at 25 U.S.C. §§ 334 – 81 (2000)); *Montana v. United States*, 450 U.S. at 548 (noting that the United States reduced Crow reservation land from 38.5 million acres to 2.3 million acres **and** by virtue of the Allotment Acts reduced land owned by the Tribe to only 17 percent of that 2.3 million acres). The Allotment Acts violate Indigenous rights to recognition of traditional collective ownership structures and violates Indigenous treaties, including the Fort Laramie Treaty. The practical effect of this policy has been to effectively reduce the area where Indigenous governing authority exists: "the theory of inherent sovereignty (or its corollary principle, implied divestiture) necessarily means that once a tribe divests ownership of a piece of land (either through allotment or otherwise), it no longer retains the power to regulate non-member conduct on the land." Paul A. Banker and Cristopher Grgurich, *The Plains Commerce Bank Decision and Its Further Narrowing of the Montana Exceptions as Applied to Tribal Court Jurisdiction Over Non-Member Defendants*, 36 William Mitchell L. Rev. 566 (2010).[11]

76. United States courts have also restricted those cases where Indigenous peoples may regulate non-Indigenous peoples and non-tribally held land within reservation lands by limiting the second exception under the *Montana* case rule. As noted by Banker and Grgurich, the Supreme Court "has never applied [the second Montana exception] to find that a tribe had civil adjudicatory authority jurisdiction over a non-member defendant." *Id.* at 580-81. Instead, there is a near-insurmountable test for allowing Indigenous authority: the nonmember's conduct "must be demonstrably serious and must imperil the political integrity, the economic

[11] The United States Supreme Court has further limited tribal jurisdiction in holding that tribal jurisdiction over non-tribal members, even on tribal trust lands, is "only one factor to consider in determining whether regulation of the activities of nonmembers is 'necessary to protect tribal self-government or to control internal relations." *Nevada v. Hicks,* 121 S. Ct. 2304, 2310 (2001).

security, or the health and welfare of the tribe." *Brendale v. Confederated Tribes and Bands of Yakima Nation*, 492 U.S. 408, 431 (1989) *aff'd by Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001). As one observer notes, United States courts' "failure to detect a direct effect on tribal health and welfare ignores the unique nature of reservation social structures, and instead imposes a main-stream American perception of what effects the community." James R. Hintz, *Wilson v. Marchington: The Erosion of Tribal Court Civil Jurisdiction in the Aftermath of Strate v. A-1 Contractors*, 20 Pub. Land & Resources L. Rev. 145, 161 (1999).

77. As a result of these policies, the Lakota have been unable to, officially, prevent damaging non-Indigenous activities on Lakota land. For example, as part of the now infamous Keystone XL Pipeline, the TransCanada corporation attempted to bring truck big hauls through Lakota lands, along Reservation roads that were already in disrepair, for a pipeline promising to destroy access to clean drinking water. The Keystone XL Pipeline has been opposed by every governing authority of the Lakota nation including its IRA government. TransCanada's actions were taken without notice to the Lakota – via either the IRA government or the traditional Treaty Council of the Lakota nation – and were apparently not considered to be subject to any Lakota governing authority. In fact, when Lakota people themselves established a blockade to prevent the truck movement, it was the Lakota that were stopped and arrested by the IRA government, including a 94 year old grandmother. [Taken from Interview with Debra White Plume, *see also* http://allianceforajustsociety.org/5255/native-americans-train-to-defend-mother-earth/].

iv. Denial of Rights to Free, Prior and Informed Consent

78. Special Rapporteur, James Anaya, has reported to the HRC about the inadequacy of the United States' "highly developed body of law and government programmes concerning indigenous peoples," specifically, in relation to government decision-making "about lands that are outside of indigenous-controlled areas but that nonetheless affect their access to natural or cultural resources or environmental well-being." A/HRC/21/47/Add.1 ¶ 69.

79. Owe Aku seconds Professor Anaya's concerns as the United States continues to deprive the Lakota of their rights to "free, prior and informed consent," including:

- By failing to consult with any Lakota people before allowing the construction of a motorcycle bar near Mato Paha, also known as Bear Butte, a sacred Lakota site, in a South Dakota State Park. [Taken from Interview with Kent Lebsock].

- Through a completely perfunctory consultation process with Lakota, and other indigenous peoples, regarding authorization for the Keystone XL Pipeline. The proposed pipeline will pass through Lakota territory, over many sacred sites, and will involve the transportation of tarsands

bitumen, a highly toxic and dangerous substance, which will result in water contamination in surface waters and in the aquifer. The United States consultation process with indigenous peoples has been, at best, insulting. For example, the United States Department of State has sent two low-level bureaucrats to meet with representatives of the Pine Ridge Indian Reservation in Rapid City, South Dakota. These "representatives" had no authority to negotiate with the Lakota and the "consultation" was a farce. [Taken from Interview with Kent Lebsock].

F. Recommendations

80. We recommend that the HRC advise the United States to revise EO 13175 in order to satisfy the standards of international human rights law detailed above. Specifically, if the United States is to comply with the principles of "free, prior and informed consent," the executive order must include provisions mandating that agencies obtain consent before implementing regulations or approving projects that affect Indigenous peoples' interests and that "consent" includes the right to reject projects. Additionally, Indigenous peoples must have access to an effective and neutral forum to test the adequacy of those consent procedures in protecting Indigenous human rights.

81. We further recommend that the HRC advise the political bodies of the United States, *i.e.* the President and Congress, to adopt legislation, which would recognize the sovereignty of Indigenous peoples over those Indigenous peoples' lands, particularly those provided for by enforceable treaty. Such sovereignty must include authority to regulate the activities of non-Indigenous peoples on that land and the authority to use or limit the use of natural resources found on Indigenous lands. Such a recommendation is necessary in light of the substantial narrowing of the Lakota right to self-determination by the United States courts.

82. We seek a commitment from the HRC to reaffirm the bridge between principle and implementation.

83. In light of the Declaration of the Rights of Indigenous Peoples, Owe Aku calls on the HRC to clarify that US dealings with the Lakota, particularly its treaty breaches, are subject to international adjudication.

84. We recommend that the HRC support the establishment of a UN based international adjudicatory body, which could hear human rights claims brought by Indigenous peoples. Such a body needs to honor Indigenous rights to self-determination, and, therefore, be available to the representatives of Indigenous peoples that are chosen according to traditional modes of election and representation (not merely those recognized, for example, by United States law).