

**COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION
85th SESSION**

EXAMINATION OF THE UNITED STATES 7TH, 8TH AND 9TH PERIODIC REPORTS

ALTERNATIVE REPORT REGARDING LACK OF IMPLEMENTATION BY THE UNITED STATES OF RECOMMENDATION 29 OF THE COMMITTEE'S 2008 CONCLUDING OBSERVATIONS:

“While noting the position of the State party with regard to the United Nations Declaration on the Rights of Indigenous Peoples (A/RES/61/295), the Committee finally recommends that the declaration be used as a guide to interpret the State party’s obligations under the Convention relating to indigenous peoples.”

Submitted jointly by The International Indian Treaty Council (IITC)*, Oglala Lakota Nation, Western Shoshone Defense Project and the Indigenous World Association (IWA)*

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**IITC is an Indigenous Peoples Non-Governmental Organization in General Consultative Status to the UN Economic and Social Council. See attached for a list of IITC affiliated Tribal Nations, governments, organizations, Networks, Organizations, societies and communities based in the United States*

*** IWA is an Indigenous Peoples Non-Governmental Organization in Special Consultative Status with the UN Economic and Social Council*

We also express appreciation for the contributions of the Navajo Nation Human Rights Commission, Lipan Apache Women Defense and United Confederation of Taino People to this Report

I. EXECUTIVE SUMMARY

The International Indian Treaty Council (IITC) and its affiliates, the Oglala Lakota Nation, Western Shoshone Defense Project and Indigenous World Association call the attention of the Committee on the Elimination of Racial Discrimination (the Committee or CERD) to the lack of implementation by the United States of America (US) of the *Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America*, issued after its 72th session in February 2008. The Co-submitters of this Alternative Report are particularly concerned about the serious impacts of the US failure to implement the Committee's recommendations regarding the rights of Indigenous Peoples contained in paragraphs 19, 29 and 30. This failure allows continuing racial discrimination and pervasive violations of rights that are affirmed in the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).

The US, through its ratification of the ICERD and other international human rights treaties, has legal and moral obligations to treat those within its jurisdiction in a manner consistent with the provisions of these internationally recognized human rights standards. The US position of selective implementation of treaty body recommendations, and of denying their legally binding standing, undermines the effectiveness and viability of this process to hold any States party accountable for implementing its human rights obligations. This is also an issue of access to justice which is an integral part of customary international law.

The US position has broad implications and calls into question the shared obligations of all UN members contained in the UN Charter "to promote universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion".¹

After 6 years, the US has failed to implement specific recommendations from the CERD's Concluding Observations, including paragraphs 19 addressing the Western Shoshone; 30 regarding implementation of measures to prevent corporations registered in the US from impacting the human rights of Indigenous Peoples in other countries; and the first part of paragraph 29 regarding the protection of areas of spiritual and cultural significance and the right to participate in relevant decision-making. These matters are addressed extensively in other Alternative Reports submitted to the 85th Session of the CERD Review of the US. We encourage the Committee to carefully consider those Alternative Reports and their recommendations in its review of the US Periodic Reports during this session, and to strongly encourage US compliance in that regard.

This Alternative Report will therefore focus specifically on the US' failure to implement or even to accept the very important and overarching recommendation in the final sentence of paragraph 29, below. This has resulted in a wide range of serious ongoing violations of the human rights of Indigenous Peoples which are safeguarded by ICERD Articles 2, 5, 6, and 9, CERD General Recommendation XXIII and other International Human Rights instruments. The Committee's recommendation to the US stated:

While noting the position of the State party with regard to the United Nations Declaration on the Rights of Indigenous Peoples (A/RES/61/295), the Committee finally

¹ United Nations Charter, Articles 55 (c).

recommends that the declaration be used as a guide to interpret the State party's obligations under the Convention relating to indigenous peoples.²

In fact, the United States, in its 7th, 8th and 9th Periodic Reports submitted to the Committee on June 30th, 2014 challenged the validity of this recommendation and rejected it out of hand:

“Concerning the Committee’s recommendation that the Declaration be used as a guide to interpret CERD treaty obligations, the United States does not consider that the Declaration – a non-legally binding, aspirational instrument that was not negotiated for the purpose of interpreting or applying the CERD – should be used to reinterpret parties’ obligations under the treaty.”³

The Co-submitters therefore respectfully request that the Committee question and challenge the United States about its position regarding selective implementation, acceptance and legal standing of the CERD’s recommendations during this review.

In addition, we make the following suggestions for recommendations to the US by the Committee in its Concluding Observations for this session.

- 1. The Committee reiterates and renews its previous recommendation that the UN Declaration on the Rights of Indigenous Peoples be used as a guide by the US to interpret its obligations under the Convention relating to Indigenous Peoples;**
- 2. That the US fully implement the UN Declaration on the Rights of Indigenous Peoples without any attempted qualifications that seek to diminish the inherent rights of Indigenous Peoples if affirms to *inter alia* Self-Determination, Free, Prior and Informed Consent, Land and Territories, cultural rights and Sacred Areas, and the Rights Affirmed in Nation to Nation Treaties;**
- 3. That the United States fully implement its obligations with regard to Treaties it has entered into with Indigenous Peoples - in keeping with its own Constitution and the UN Declaration on the Rights of Indigenous Peoples – including through its laws, policies, judicial proceedings and executive/administrative decisions on all levels. This includes the establishment, in conjunction and partnership with Indigenous Peoples, of a just, fair and participatory process for redress, remedy and restitution for violations of such Treaty rights;**
- 4. That the US be reminded of its legally binding commitment as a State Party to comply with this treaty body process to monitor State Party compliance; and to therefor make every effort in good faith to implement the Committee’s recommendations regarding Indigenous Peoples and other victims of racial discrimination.**

² Committee on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America*, 72nd Sess., UN Doc. CERD/C/USA/CO/6 (2008) para. 29.

³ PERIODIC REPORT OF THE UNITED STATES OF AMERICA TO THE UNITED NATIONS COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION CONCERNING THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION, June 12, 2013, para. 176

II. THE COMMITTEE'S CONCLUDING OBSERVATIONS REGARDING INDIGENOUS PEOPLES ISSUED IN FEBRUARY 2008

The Co-submitters call the attention of the Committee at this session to the lack of implementation by the United States of the *Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America*, issued at its 72nd Session published in February 2008. Of particular concern is the lack of implementation of the Recommendations regarding the rights of Indigenous Peoples contained in paragraphs 19, 29 and 30 as follows.

19. While noting the explanations provided by the State party with regard to the situation of the Western Shoshone indigenous peoples, considered by the Committee under its early warning and urgent action procedure, the Committee strongly regrets that the State party has not followed up on the recommendations contained in paragraphs 8 to 10 of its decision 1(68) of 2006 (CERD/C/USA/DEC/1) (Article 5).⁴

The Committee reiterates its Decision 1 (68) in its entirety, and urges the State party to implement all the recommendations contained therein.

29. The Committee is concerned about reports relating to activities – such as nuclear testing, toxic and dangerous waste storage, mining or logging – carried out or planned in areas of spiritual and cultural significance to Native Americans, and about the negative impact that such activities allegedly have on the enjoyment by the affected indigenous peoples of their rights under the Convention. (Articles 5 (d) (v), 5 (e) (iv) and 5 (e) (vi)).

The Committee recommends that the State party take all appropriate measures – in consultation with indigenous peoples concerned and their representatives chosen in accordance with their own procedures – to ensure that activities carried out in areas of spiritual and cultural significance to Native Americans do not have a negative impact on the enjoyment of their rights under the Convention.

The Committee further recommends that the State party recognise the right of Native Americans to participate in decisions affecting them, and consult and cooperate in good faith with the indigenous peoples concerned before adopting and implementing any activity in areas of spiritual and cultural significance to Native Americans. While noting the position of the State party with regard to the United Nations Declaration on the Rights of Indigenous Peoples (A/RES/61/295), the Committee finally recommends that the declaration be used as a guide to interpret the State party's obligations under the Convention relating to indigenous peoples.⁵

30. The Committee notes with concern the reports of adverse effects of economic activities connected with the exploitation of natural resources in countries outside the United States by transnational corporations registered in the State party on the right to land, health, living

⁴ Committee on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America*, 72nd Sess., UN Doc. CERD/C/USA/CO/6 (2008) para. 19.

⁵ Committee on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America*, 72nd Sess., UN Doc. CERD/C/USA/CO/6 (2008), Advance Unedited Version, para. 29

environment and the way of life on indigenous peoples living in these regions. (Articles 2 (1) (d) and 5 (e))

In light of article 2, paragraph 1 (d), and 5 (e) of the Convention and of its general recommendation no. 23 (1997) on the rights of indigenous peoples, the Committee encourages the State party to take appropriate legislative or administrative measures to prevent acts of transnational corporations registered in the State party which negatively impact on the enjoyment of rights of indigenous peoples in territories outside the United States. In particular, the Committee recommends that the State party explore ways to hold transnational corporations registered in the United States accountable. The Committee requests the State party to include in its next periodic report information on the effects of activities of transnational corporations registered in the United States on indigenous peoples abroad and on many measures taken in this regard.⁶

The far-reaching implications of these recommendations addressing US obligations under the Convention, and the multitude of egregious human rights violations suffered by Indigenous Peoples both within and outside the United States as a result, cannot be minimized.

III. THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES: THE INTERNATIONALLY ACCEPTED “MINIMUM STANDARD”

The adoption of the UN Declaration on the Rights of Indigenous Peoples (The “UN Declaration”) by the UN General Assembly on September 13th, 2007, represented a historic step forward for Indigenous Peoples. Its provisions provide the internationally accepted minimum standard. These include, inter alia, the rights to self-determination, free prior and informed consent, Treaties with Indigenous Peoples, and a just and participatory framework for redress, restitution, settlement, repatriation and dispute resolution affecting lands and resources, subsistence, environment and cultural heritage.

With the adoption of the UN Declaration on the Rights of Indigenous Peoples, as well as other international standards such as General Recommendation XXIII of the UN Committee on the Elimination of Racial Discrimination (CERD), the 2005 UN General Assembly’s Plan of Action for the 2nd International Decade of the Worlds’ Indigenous Peoples, Free Prior and Informed Consent (FPIC) is now a universally recognized human rights principle and framework.

No provision contained in of the UN Declaration on the Rights of Indigenous Peoples or the Committee’s 2008 recommendations to the US can be interpreted as authorizing the US to unilaterally interpret its relevant human rights obligations in order to limit or qualify them based on existing federal laws and policies. Rather than lower its interpretation of its international human rights obligations to fit its own existing laws and policies, the US has an obligation to review and amend US laws and policies which perpetrate discrimination, based on Article 2 (c) of the ICERD:

⁶ Ibid Paragraph 30

Article 2

1. States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end:

(c) Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists;

The Co-submitters underscore the Committee's 2008 recommendation as contained in paragraph 29 that the Declaration be used as a "guide to interpret the State Party's (i.e. the US') obligations under the Convention" notwithstanding the State's position vis a vis the Declaration. This ties the Declaration and the implementation of its provisions **as they are written** directly to the US' obligations for implementing the ICERD. This applies, *inter alia*, to its legally binding obligations under ICERD Article 2 (c) as above.

IV. US QUALIFIED SUPPORT AND SELECTIVE IMPLEMENTATION OF THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

On December 16, 2010, President Barack Obama announced that the US would change the position it took at the UN General Assembly on September 13th 2007, and would now "lend its support" to the Declaration.

The initial positive response by many Indigenous Peoples in and outside the US was immediately tempered by the significant qualifications contained in the US State Department's written statement entitled "Announcement of US Support for the United Nations Declaration on the Rights of Indigenous Peoples"⁷ distributed immediately following the President's statement. The US qualifications and limitations placed on the application of the now internationally-recognized "minimum standard for the dignity, survival and well-being"⁸ of Indigenous Peoples has serious and discriminatory impacts on Indigenous Peoples' full enjoyment of the rights in the UN Declaration as well as those affirmed in legally binding International Standards to which the US is a State party including the ICERD.

These qualifications include, in particular:

1) Limiting the right to Free, Prior and Informed Consent to "Consultation"

For Indigenous Peoples, Free Prior and Informed Consent (FPIC) is a requirement, prerequisite and manifestation of the exercise of their fundamental right to self-determination as defined in international law.

FPIC is a fundamental underpinning of Indigenous Peoples' ability to conclude and implement valid Treaties and Agreements with State parties, to exert sovereignty over their lands and natural resources, to develop and participate in processes that redress and correct violations, to accept any

⁷ US Dep't of State Announcement of US Support for the United Nations Declaration on the Rights of Indigenous Peoples (December 16, 2010), available at <http://www.state.gov/documents/organization/153223.pdf>, distributed immediately after President Obama's statement at the Tribal Leaders Meeting in Washington DC

⁸ United Nations Declaration on the Rights of Indigenous Peoples Article 43

results that emerge from these processes, and to establish the terms and criteria for negotiations with States over any and all matters affecting them.

FPIC it is now affirmed as the internationally accepted minimum standard for the survival, dignity and well-being of Indigenous Peoples. Many of the relevant provisions of the UN Declaration directly refer to FPIC as the context, framework and criteria for the implementation and realization of a number of rights and provisions. Article 10 on forced relocation; Article 11 addressing the restitution of cultural property; Article 19, addressing adoption of legislative and administrative measures; Article 29 addressing the disposal and storage of hazardous materials on Indigenous lands; and Article 32 on development activities affecting Indigenous Peoples lands, territories and natural resources all contain broad affirmations of the right to FPIC for Indigenous Peoples.

Experts at the first United Nations Seminar on Treaties, Agreements and other Constructive Arrangements between States and Indigenous Peoples (2003), stressed the vital importance of consent in paragraph 2 of their final conclusions and recommendations:

*Treaties, agreements and other constructive arrangements constitute a means or 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.*⁹

However, the “Announcement of US Support” issued by the US State Department redefined and diminished the right to FPIC for Indigenous Peoples to a “process of consultation with tribal leaders which does not require, in the US view “the agreement of those leaders, before the actions addressed in those consultations are taken.”¹⁰

On September 13th, 2013 a “Consolidated Indigenous Peoples Alternative Report” was submitted to the UN Human Rights Committee by IITC with 28 co-submitters and contributors consisting of Traditional and Tribal governments, organizations, Treaty Councils, Indigenous Peoples organizations and traditional societies.¹¹ It cited the Navajo Nation Human Rights Commission report to the same body. Representing the federally recognized Navajo Nation, the NNHC addressed the shortfalls of “consultation” as defined in the US Announcement of Support for the UN Declaration, as well as in Executive Order 13007 and Executive Order 13175 referenced in the questions to the US by the Committee:

“The Commission has asked not only the Forest Service and Indian Affairs, but the United States government, to abandon the terminology of “consultation” and replace it with the Declaration’s standard of “free, prior and informed consent.” The Commission agrees and understands that communication is important in strengthening the government-to-government relationships to protect sacred sites, circumvent the relocation of Navajos, and the development and use of the lands, territories and resources, but the terminology

⁹ Conclusions and Recommendations of the Seminar on Treaties, Agreements and Other Constructive Arrangements between States and Indigenous Peoples, held in Geneva from 15 to 17 December 2003. E/CN.4/2004/111, paragraph 3.

¹⁰ Ibid, page 5

¹¹ The Indigenous Peoples’ Consolidated Alternative Report to the UN Human Rights Committee can be downloaded from the Human Rights Committee web site: <http://www2.ohchr.org/english/bodies/hrc/>. The Indigenous Peoples’ Consolidated Alternative Report is also available on IITC’s web site: www.treatycouncil.org.

*“consultation” limits the Navajo Nation and its people... because the current consultation policy mandated by Executive Orders 13007 and 13175 does not provide for consent. Providing the Navajo Nation and Navajo people with information about a proposed decision and gathering and taking into account their points of view is not sufficient in the context of their sacred places, forced relocation, and the development and use of lands, territories and resources.*¹²

The Co-submitters finally emphasize in this regard the strong affirmation of FPIC as a core principle for redress and restitution of Indigenous Peoples’ lands, territories and resources contained in CERD General Recommendation XXIII:

*“The Committee especially calls upon States parties to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories.”*¹³

2) **Promoting Discrimination in the application of International Standards: US assertion of a “Different” Right of Self-Determination for Indigenous Peoples**

The US also stipulated in its “Announcement of Support” that it did not intend to recognize for Indigenous Peoples the same right of Self-determination as recognized in Article 1 in Common of the International Covenants for **all** Peoples. Instead, the US has repeatedly asserted its recognition for “a new and distinct international concept of self-determination specific to Indigenous peoples... which is “different from the existing right of self-determination in international law.”¹⁴

This position contradicts the US Treaty relationship with Indigenous Nations as well as numerous principles of the ICERD which affirm non-discrimination. The definition of Self-Determination for Indigenous Peoples in Article 3 of the UN Declaration on the Rights of Indigenous Peoples is consistent with the right affirmed for ALL Peoples in Article 1 of the International Covenant on Civil and Political Rights to which the US is also a State party.

The US has continued to reassert this discriminatory position in international bodies. For example, on May 22, 2013, at the 12th session of the UN Permanent Forum on Indigenous Issues, US State Department representative Laurie Shestack Phipps, Advisor for economic and social affairs at the United States Mission to the United Nations presented a statement for the US’ that “reiterate[d] the U.S. government’s view that self-determination, as expressed in the Declaration, is different from self-determination in international law.”¹⁵

¹² Navajo Nation Human Rights Commission “2013 Shadow Report to the UN Human Rights Committee regarding the US 4th periodic report to the UN Human Rights Committee as it related to Indigenous Peoples Sacred Areas and Free Prior and Informed Consent,” pages 6 -7.

¹³ CERD General Recommendations XXIII, para. 5, 1997

¹⁴ US Dep’t of State Announcement of US Support for the United Nations Declaration on the Rights of Indigenous Peoples (December 10, 2010), page 3, UN Permanent Forum on Indigenous Issues 12th session, agenda item 6, “Discussion on the World Conference on Indigenous Peoples”

¹⁵ Link to the State Department’s statement: <http://usun.state.gov/briefing/statements/209946.htm>

The International Indian Treaty Council (IITC) and two other Indigenous delegations took the floor in response. The IITC intervention, presented by Mr. Roberto Borrero of the IITC Board of Directors, strongly objected to the US position, calling it “blatantly discriminatory”:¹⁶

“Discrimination must not be tolerated in any body or process of the United Nations which is based on the fundamental principles of International human rights law and the tenants of the UN Charter which include non-discrimination.

The IITC statement recalled that “the US government tried but failed over a number of years to include this discriminatory distinction in the actual text of the UN Declaration itself during the development of the text in Geneva. Although they were not able to achieve the inclusion of such racially discriminatory language in the Declaration itself, the US resurrected it when they decided to “lend their support to the Declaration in December 2010.” It affirmed that “the over 300 legally binding Nation to Nation Treaties concluded by the US with Indigenous Nations, identified by the US Constitution as the “Supreme Law of the Land”, are both the evidence and affirmation of US recognition of this right from the beginning of their contact with the Indigenous Nations of this land.”

3) Limiting Implementation to “Federally Recognized Tribes”

Another highly discriminatory qualification made in the “Announcement of US Support” was the intent to implement the UN Declaration’s provisions only for “federally recognized tribes.” Professor Margo Tamez, Lipan Apache, states that “Although numbers vary from one reporting unit to another, on the average, there are between 200-300 unrecognized historical Indigenous nations living in political juridical limbo in the U.S.”¹⁷

This failure of recognition, based in many cases on US policies of Tribal termination over the last 100 years, constitutes extinguishment and perpetuates discrimination. It denies access to services guaranteed under Treaties (i.e. health and education) and US federal laws, for example for return of Indigenous Peoples’ ancestral remains and cultural items, as well as land rights and identity. This applies in many cases even to Indigenous Nations which concluded Treaties with the US.

“Unrecognized” Indigenous Peoples of U.S. territories, such as the Taíno of Puerto Rico, as well as Indigenous Peoples divided by international borders between the US and Canada or US and Mexico, suffer additional discrimination within the US legal system. Examples submitted by the United Confederacy of Taíno People (Boriken/Puerto Rico) and the Lipan Apache (US/Texas border) in other Alternative reports submitted to this session document the inability of many such Indigenous Peoples to protect their cultural heritage and sacred areas, or access the minimal safeguards provided by US laws such as the Native American Graves Protection and Repatriation Act (NAGPRA).¹⁸

¹⁶ Link to IITC’s Intervention, May 27th, 2013, UNPFII 12th session, agenda item 6: <http://www.iitc.org/iitc-speaks-out-at-the-unpfi-6th-session-in-response-to-us-statement-attempting-to-limit-the-right-of-self-determination-for-Indigenous-peoples-2/>

¹⁷ Margo Tamez, spokesperson and co-founder, Lipan Apache Women Defense, and professor of Indigenous Studies, University of British Columbia

¹⁸ The Committee has previously expressed concern over the hundreds of Tribes that were terminated under the US Dawes Act, and later, from 1953 to 1968, under the Termination Policy of the Congress. Many of these continue to seek recognition and have their status, lands and rights restored.

4) Failure to Recognize, Observe and Enforce Treaties with Indigenous Peoples

Article 37 of the UN Declaration on the Rights of Indigenous Peoples states:

1. Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements.

2. Nothing in this Declaration may be interpreted as diminishing or eliminating the rights of indigenous peoples contained in treaties, agreements and other constructive arrangements.

The US government entered into and ratified more than 400 treaties with Indian Nations from 1778 to 1871. These Treaties recognized and affirmed a broad range of rights and relationships including mutual recognition of sovereignty, peace and friendship, land and resource rights, rights to health, housing, education and subsistence rights (hunting, fishing and gathering) and consent. In some cases, such as the Treaty of Ruby Valley with the Western Shoshone in 1863, Treaties with Indigenous Nations were limited to permission for settlers to transit through Indigenous lands. The full recognition and observance of Treaties is directly relevant to the protection of and rights to many Sacred Areas in the US, including those located outside of currently-recognized “Reservation” lands.

From the perspective of Indigenous Treaty Nations, the US has not fully upheld even one of its Treaties. These Treaties have been violated, abrogated or ignored. US interactions with the Indigenous Peoples were recognized as sovereign equals through the Treaty-making process. The Treaty relationship, based on mutual consent, continues to be legally binding further to the US Constitution, international law and the original understandings of Indigenous Nations. Treaties were and are an exercise and validation of the inherent rights of Indigenous Peoples to self-determination free prior and informed consent, and traditionally owned, used and occupied lands and territories.

Even though the US Congress unilaterally ended Treaty-making with Indian Nations in 1871, pre-existing Treaties are still in effect and contain obligations which are still legally binding upon the US. Article Six of the US Constitution references Treaties as part of “the Supreme Law of the Land,”¹⁹.

Treaties, by definition, can be concluded only between two equally sovereign Nations. Treaties entered into by mutual consent continue to be legally binding as per the US Constitution, International Law and the sacred original understandings of Indigenous Nations. Their existence is a reaffirmation, exercise and validation of the inherent rights to self-determination of which mutual consent is an essential component as stated above. Nevertheless, the US has continued to assert sole jurisdiction to determine, decide and control the process for redress of Treaty violations and to unilaterally abrogate these legally-binding Treaties based on the “plenary power of Congress.”

¹⁹ Article 6, clause two reads as follows:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Consent is a fundamental Treaty Principle which predates any UN Standard. It is the foundation of the original Treaty relationship between the US and Indian Nations. For example, the Ft. Laramie Treaty concluded on April 29th, 1869 with the “Great Sioux Nation”²⁰ states in Article 16:

*“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;”*

Consent of both parties applies to any changes in the terms, conditions, interpretations or implementation and/or the development of processes for redress of violations of the original Treaty provisions as understood by the Indigenous Peoples when they were entered into.

Today, the US continues to make unilateral decisions to extract resources (gold, uranium, coal, timber, water, etc.), and to carry out development projects on Treaty lands with devastating impacts on the Sacred Areas, including waters and other resources, which were legally recognized as under the jurisdiction of the Indigenous Treaty Parties under the terms of these Treaties.

One current example of the pervasive and ongoing violations of Treaty Rights by the US is the proposed Keystone XL Pipeline. On September 19, 2008, TransCanada Keystone Pipeline, LP1 (“TransCanada”)²¹ filed an application for a Presidential Permit with the U.S. Department of State (“DOS”) to build and operate the Keystone XL Pipeline to bring crude oil produced in Northern Alberta Canada (the “tar sands” project) to the Gulf of Mexico for processing and transport. At that time, the proposed Keystone XL pipeline included both the northern segment from Canada to Nebraska and the southern segment from Oklahoma to Texas. The proposed route would run through the middle of the US over the Oglala Aquifer and through the Treaty and traditional lands of a number of Indigenous Nations. To date, no process for consent in accordance with the provisions of the UN Declaration, the 1868 Ft. Laramie Treaty or Treaties with other impacted Indigenous Nations who would be impacted along the proposed route has been proposed or put in place by the US.

From September 15 -16, 2011 Tribal Governments, Traditional Treaty Councils, Indigenous organizations and First Nation Chiefs from Canada held a “Tribal Emergency Summit” on the Rosebud Sioux Reservation in South Dakota, USA to discuss the potential impacts of TransCanada’s proposed Keystone XL pipeline. They adopted the “Mother Earth Accord,” which expressed a number of concerns including that *“construction of the Keystone XL pipeline will impact sacred sites and ancestral burial grounds, and treaty rights throughout traditional territories, without adequate consultation on these impacts.”* The Accord, which has been signed by over 70 Tribal and First Nation Governments, Treaty Councils and Indigenous organizations to date, concluded with an urgent collective request: *“We urge President Obama and Secretary of State Clinton to reject the Presidential Permit for the Keystone XL pipeline.”*

²⁰ 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

²¹ TransCanada Keystone Pipeline, LP is a subsidiary of the Canadian company TransCanada Corporation.

The National Congress of American Indians, representing over 400 Tribal Nations in the US adopted a consensus resolution at their midyear conference in June 2011 entitled “**Opposition to Construction of the Keystone XL Pipeline and Urging the U.S. to Reduce Reliance on Oil from Tar Sands and Instead, to Work towards Cleaner, Sustainable Energy Solutions.**”

The resistance of the Treaty Nations to the Keystone XL Pipeline continues. On May 13th, 2014 at the 13th Session of the United Nations Permanent Forum in New York Dr. Richard L. Zephier addressed the session on behalf of President Bryan V. Brewer of the Oglala Lakota Nations and on this matter, affirming that “the territory of the Oglala Lakota Nation was acknowledged and guaranteed by the Treaties of 1851 and 1868 between the United States of America and the Great Sioux Nation of Indians”. He also stated on behalf of his Nation stated that “*We stand together in the defense of our homeland by predatory corporations and governments, and against destructive and illegal projects such as the Keystone XL Pipeline*”.

5. US failure to provide effective and just redress for Treaty, land rights and other violations of the rights of Indigenous Peoples as stipulated by ICERD and the UN Declaration

One of the most important provisions of the ICERD is expressed in its mandate to State parties to establish mechanisms for protection and redress in Article 6:

“States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.”

As a State party to the ICERD, the US has a legally-binding obligation to establish such mechanisms beyond State-controlled courts and Land Claims processes established and controlled by only one Treaty party (the US). The UN Declaration’s provisions of partnership and consent should serve as the basis for the development of just, fair, bilateral mechanisms for redress and dispute resolution between the Indigenous and State Treaty Parties for the first time in the history of the US. Key elements of such bi-lateral mechanisms for Treaty- and land rights redress/restitution/conflict resolution/adjudication based on the provisions of the UN Declaration, include:

- The process be fair independent, impartial, open and transparent (Article 27)
- It be established and implemented in conjunction with the indigenous peoples concerned (Article 27)
- It gives due recognition to indigenous peoples’ laws, traditions, customs and land tenure systems (Article 27); and/or gives due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights (Article 40)
- It provides redress for Indigenous Peoples’ lands, territories and resources, including those which were traditionally owned or otherwise occupied or used and which were confiscated, taken, occupied, used or damaged without their free, prior and informed consent (Articles 27 and 28)
- Indigenous peoples shall have the right to participate in this process (Article 27)
- Redress can include restitution of their traditionally owned or otherwise occupied or used

- lands and resources unless this is not possible (Article 28)
- Compensation shall be just, fair and equitable (Article 28)
- If return of original lands (as per #6 above) is “not possible”, compensation shall take the form of lands, territories and resources equal in quality, size and legal status, unless otherwise freely agreed to by the peoples concerned (Article 28)
- Monetary compensation or other appropriate redress can also be provided according to the above criteria, but only with the free agreement of the affected Peoples (Article 28)
- Indigenous peoples have the right to have access to the process (Article 40)
- The process provides for prompt decisions (Article 40)
- It provides just and fair procedures to Indigenous Peoples for the resolution of conflicts and disputes with States or other parties (Article 40)
- The process shall provide effective remedies for all infringements of their individual and collective rights (Article 40)

The ongoing impacts of past failed “settlement” processes

The Indian Land Claims Commission, established by the US government in 1946 (and disbanded in 1978) was a failed process for Treaty abrogation “settlements” in violation of the FPIC of Indigenous Treaty Nations. It was established by the US government as a unilateral decision-making process. The same party (the United States) which had violated the Treaties was the sole arbitrator of the resulting claims by the violated parties (the Indigenous Treaty Nations). If and when the Commission determined that a violation had indeed occurred, only monetary compensation was offered, not the return of lands that were determined to have been illegally taken.²² In some cases, such as the Lakota, they have never accepted the monetary “settlement” for their sacred land that was not for sale in the first place.

In direct violation of ICERD Article 6 ensuring effective remedies, in many cases the Indigenous plaintiffs were not allowed to present their own case or to speak on their own behalf, but were represented by the proceeding by the US government. This has continued to have disastrous ongoing impacts for Indigenous Treaty Nations in the US, whose rights were doubly violated by this process. To this day, there has never been a just, participatory bilateral mechanism established to enable redress of Treaty, land rights or other human rights violations or to return lands determined to have been taken without FPIC.

This denial of due process has already been addressed by the CERD. In its 2006 recommendations to the US in response to a submission under the Early Warning and Urgent Action Procedure²³ by the Western Shoshone National Council et. al., stated that the Indian Claims Commission processes had

²² Common Core Document of the United States of America: Submitted With the Fourth Periodic Report of the United States of America to the United Nations Committee on Human Rights concerning the International Covenant on Civil and Political Rights”, December 30, 2011, para. 192: “As the United States grew and expanded into the American west, especially during the nineteenth century, there were conflicts over rights to use the land in various regions between American Indians on one hand, and the government and the new arrivals on the other. Recognizing that indigenous people in the United States were unfairly deprived of the lands they once habitually occupied or roamed, in 1946, the U.S. Congress established a special body, the Indian Claims Commission (ICC), to hear claims by Indian tribes, bands, or other identifiable groups for compensation for lands that had been taken in a variety of ways by private individuals or the government.... The relief provided by the ICC was monetary...”

²³ CERD/C/USA/DEC/1 11 April, 2006

denied due process and did not comply with contemporary human rights norms, principles and standards. The CERD expressed concerns regarding the US assertion that the Western Shoshone lands had been rightfully and validly appropriated as a result of “gradual encroachment” and that the offer to provide monetary compensation to the Western Shoshone, although never accepted, constituted a final settlement of their claim to restitution.²⁴

Regarding the response in the US report to this session regarding the Western Shoshone, the US report of a successful resolution via monetary settlement²⁵ is fundamentally challenged by the Western Shoshone themselves, who have also submitted an Alternative Report to this session.

Meanwhile, the intent of government and private interests to access Indigenous Peoples’ lands for mineral development continues to be a primary force behind the illegal acquisition and appropriation of many of the Treaty Lands in the US which continues to this day. One of many examples was the US response to the discovery of gold in the sacred Black Hills only 6 years after they were recognized by the 1868 Fort Laramie Treaty between the US and Sioux Nation as belonging to the Lakota (Sioux) in perpetuity.

In 1980, the US Supreme Court stated, referring to the illegal confiscation of the Treaty Lands in the Black Hills of South Dakota that “... 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 US Government was guilty of “... a pattern of duress ... in starving the Sioux to get them to agree to the sale of the Black Hills.”²⁶

Despite this clear acknowledgement of wrongdoing by the US Supreme Court over 30 years ago, none of these illegally-confiscated Treaty Lands have been returned, and gold mining continues to this day in the Black Hills.

V. RELEVANT RECOMMENDATIONS BY UN AND REGIONAL BODIES AND MECHANISMS SINCE THE 2008 CERD REVIEW OF THE UNITED STATES

A. In response to submissions by Indigenous Peoples as well as US Government agencies and representatives during his country visit to the United States in April-May 2012, UN Special

²⁴ “The Committee is concerned by the State party’s position that Western Shoshone peoples’ legal rights to ancestral lands have been extinguished through gradual encroachment, notwithstanding the fact that the Western Shoshone peoples have reportedly continued to use and occupy the lands and their natural resources in accordance with their traditional land tenure patterns. The Committee further notes with concern that the State party’s position is made on the basis of processes before the Indian Claims Commission, “which did not comply with contemporary international human rights norms, principles and standards that govern determination of indigenous property interests”, as stressed by the Inter-American Commission on Human Rights in the case *Mary and Carrie Dann versus United States* (Case 11.140, 27 December 2002)”. Ibid para 6.

²⁵ PERIODIC REPORT OF THE UNITED STATES OF AMERICA TO THE UNITED NATIONS COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION CONCERNING THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION, June 12, 2013, para. 178

²⁶ *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).

Rapporteur on the Rights of Indigenous Peoples James Anaya submitted a report to the 21st session of United Nations Human Rights Council titled “The situation of indigenous peoples in the United States of America” [A/HRC/21/47/Add.1, 30 August 2012]. It contained the following observations, conclusions and recommendations which are directly relevant to achieving the full and effective implementation of the Committee’s 2008 Concluding Observations in a number of areas:

III. The disadvantaged conditions of indigenous peoples: The present day legacies of historical wrongs, C. Lands, resources and broken treaties

38. Many Indian nations conveyed land to the United States or its colonial predecessors by treaty, but almost invariably under coercion following warfare or threat thereof, and in exchange usually for little more than promises of government assistance and protection that usually proved illusory or worse. In other cases, lands were simply taken by force or fraud. In many instances treaty provisions that guaranteed reserved rights to tribes over lands or resources were broken by the United States, under pressure to acquire land for non-indigenous interests. It is a testament to the goodwill of Indian nations that they have uniformly insisted on observance of the treaties, even regarding them as sacred compacts, rather than challenge their terms as inequitable.

41. In addition to millions of acres of lands lost, often in violation of treaties, a history of inadequately controlled extractive and other activities within or near remaining indigenous lands, including nuclear weapons testing and uranium mining in the western United States, has resulted in widespread environmental harm, and has caused serious and continued health problems among Native Americans. During his visit, the Special Rapporteur also heard concerns about several currently proposed projects that could potentially cause environmental harm to indigenous habitats, including the Keystone XL pipeline and the Pebble Mine project in Alaska’s Bristol Bay watershed. By all accounts the Pebble Mine would seriously threaten the sockeye salmon fisheries in the area if developed according to current plans.

V. The significance of the Declaration on the Rights of Indigenous Peoples

81. By its very nature, the Declaration on the Rights of Indigenous Peoples is not legally binding, but it is nonetheless an extension of the commitment assumed by United Nations Member States – including the United States – to promote and respect human rights under the United Nations Charter, customary international law, and multilateral human rights treaties to which the United States is a Party, including the International Covenant on Civil and Political Rights, and the International Convention on the Elimination of All Forms of Racial Discrimination.

84. As part of United States domestic and foreign policy, an extension of its international human right commitments, and reflecting a commitment to indigenous peoples in the United States, the Declaration should now serve as a beacon for executive, legislative and judicial decision-makers in relation to issues concerning the indigenous peoples of the country. All such decision-making should incorporate awareness and close consideration of the Declaration’s terms. Moreover, the Declaration is an instrument that should motivate and guide steps toward still-needed reconciliation with the country’s indigenous peoples, on just terms.

VI. Conclusions and recommendations

The need to build on good practices and advance toward reconciliation

90. **Measures of reconciliation and redress should include, inter alia, initiatives to address outstanding claims of treaty violations or non-consensual takings of traditional lands to which**

indigenous peoples retain cultural or economic attachment, and to restore or secure indigenous peoples' capacities to maintain connections with places and sites of cultural or religious significance, in accordance with the United States international human rights commitments...

The federal judiciary

105. Accordingly, the federal courts should interpret, or reinterpret, relevant doctrine, treaties and statutes in light of the Declaration, both in regard to the nature of indigenous peoples' rights and the nature of federal power.

B. On March 27th, 2014 the United Nations Human Rights Committee issued its Advance Concluding Observations on its review of the Forth report of United States regarding its compliance with its legally binding obligations as a State party to the International Covenant on Civil and Political Rights. It contained the following recommendations from the UN Human Rights Committee which are also directly relevant to the lack of US implementation of the Committee's 2008 Concluding Observations by the CERD:

C. Principal matters of concern and recommendations

25. The Committee is concerned about the insufficient measures being taken to protect the sacred areas of indigenous peoples against desecration, contamination and destruction as a result of urbanization, extractive industries, industrial development, tourism and toxic contamination. It is also concerned about restricted access of indigenous people to sacred areas essential for preservation of their religious, cultural and spiritual practices and the insufficiency of consultation conducted with indigenous peoples on matters of interest to their communities (art. 27).

The State party should adopt measures to effectively protect sacred areas of indigenous peoples against desecration, contamination and destruction and ensure that consultations are held with the communities that might be adversely affected by State party's development projects and exploitation of natural resources with a view to obtaining their free, prior and informed consent for the potential project activities.²⁷

C. On April 20th, 2012, Article 37 of the UN Declaration was reaffirmed, expanded and further strengthened by the adoption of Article XXIII of the proposed America Declaration on the Rights of Indigenous Peoples. The American Declaration will be applicable in the 35 member States of the Organization of American States, including the US, Article XXIII as adopted includes all of the language in Article 37 of the UN Declaration on the Rights of Indigenous Peoples, as follows:

Article XXIII, Treaties, agreements and other constructive arrangements

1. Indigenous peoples have the right to the recognition, observance, and enforcement of the treaties, agreements and other constructive arrangements concluded with states and their successors in accordance with their true spirit and intent, in good faith, and to have the same

²⁷ Concluding observations on the fourth report of the United States of America, UN Committee on Human Rights 110th session, Advance Unedited Copy, March 28th, 2014

be respected and honored by the States. States shall give due consideration to the understanding of the Indigenous Peoples in regards to treaties, agreements and other constructive arrangements. When disputes cannot be resolved between the parties in relation to such treaties, agreements and other constructive arrangements, these shall be submitted to competent bodies, including regional and international bodies, by the States or indigenous peoples concerned.

2. Nothing in this Declaration may be interpreted as diminishing or eliminating the rights of indigenous peoples contained in treaties, agreements and other constructive arrangements

The progress made through this adoption at a regional body in which the US a member and participant further underscores the importance of the UN Declaration as the minimum standard in future standard setting and the need to put in place effective processes to resolve disputes over Treaty violations between the parties regionally and internationally.

VI. THE US RESPONSE: REJECTION OF THE COMMITTEE'S RECOMMENDATION

In its 7th, 8th and 9th Periodic Reports Submitted to the Committee in June 2013, the US recognizes the Committee's recommendation in paragraph 29, but openly disagrees with it:

176. Regarding the recommendation in **paragraph 29 of the Committee's Concluding Observations**, the United States, in announcing its support for the United Nations Declaration on the Rights of Indigenous Peoples, went to great lengths to describe its position on various issues raised by the Declaration, <http://www.state.gov/documents/organization/153223.pdf>. Concerning the Committee's recommendation that the Declaration be used as a guide to interpret CERD treaty obligations, the United States does not consider that the Declaration – a non-legally binding, aspirational instrument that was not negotiated for the purpose of interpreting or applying the CERD – should be used to reinterpret parties' obligations under the treaty. Nevertheless, as stated in the United States announcement on the Declaration, the United States underlines its support for the Declaration's recognition in the preamble that indigenous individuals are entitled without discrimination to all human rights recognized in international law, and that indigenous peoples possess certain additional, collective rights.²⁸

The Co-submitters express profound concern that the United States has in fact stated at least twice at public meetings in the presence of representatives of the International Indian Treaty Council and many others that it “does not consider the CERD recommendations to be legally binding”²⁹.

²⁸ PERIODIC REPORT OF THE UNITED STATES OF AMERICA TO THE UNITED NATIONS COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION CONCERNING THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION, June 12, 2013, para. 176, pages 90-91

²⁹ This position was stated by representatives of the US State Department on April 20th, 2010 at the US Permanent Mission to the UN in New York City during a meeting with Indigenous representatives regarding the US announcement that day at the 9th Session of the UNPFII of its intent to consider a change of position on the UN Declaration on the Rights of Indigenous Peoples; and on April 24, 2014 at the State Department consultation at the University of Oklahoma School of Law with Indigenous Tribes, Nations and organizations in preparation for the United States second review by the UN Universal Periodic Review Process (2015).

The creation of the CERD as a treaty monitoring body is included in the text of the ICERD, Articles 8 and 9 as ratified by the United States in 1996. Implementation in good faith of the Committee's recommendations and reporting on measures taken in that regard are required and essential aspects of State compliance with the Convention.

VII. THE BROADER SIGNIFICANCE OF US NON-IMPLEMENTATION

The CERD fulfills a number of vital functions in the human rights system. The CERD supervises State parties' compliance with their obligations under the treaty, monitors progress, and provides public scrutiny on realization efforts. The CERD assists States in assessing achievements and identifying implementation gaps. It provides guidance on the measures needed to realize rights at a national level, and also inform national human rights dialogue.

Most significantly, the CERD plays an important role in establishing the normative content of human rights and, by extension, the rights of Indigenous Peoples, and contributes to the concrete meanings of individual and collective rights and State obligations therein. In clarifying and developing human rights law and resulting State obligations, the CERD's 2008 Concluding Observations regarding the US, as discussed above, are of utmost significance.

The ICERD does not exist in a vacuum. The treaty must be understood in relation to customary international law as well as other UN Standards and instruments. We draw the attention of the CERD to the fifth preambular paragraph of the 1969 Vienna Convention on the Law of Treaties³⁰: "Recalling the determination of the peoples of the United Nations to establish conditions under which justice and respect for the obligations arising from treaties can be maintained." Article 26 of the Vienna Convention sets out the basis of international law respecting treaties - *pacta sunt servanda*: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith."

Further, the Vienna Convention states in Article 27 that a party to a treaty "may not invoke the provisions of its internal law as justification for its failure to perform a treaty." In fact, the United States itself has acknowledged to the CERD that their federalist system cannot be an excuse for its failure to apply the ICERD domestically. In the Addendum to its third periodic report, the US stated that federalism "does not condition or limit the international obligations of the United States. Nor can it serve as an excuse for any failure to comply with those obligations as a matter of domestic or international law."³¹

With regard to interpretation of treaties, the Vienna Convention requires in Article 31 that:

"there shall be taken into account, together with the context ... (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties."

³⁰ The CERD interprets the ICERD treaty largely in lieu of states – the states would be bound by the Vienna Convention rules, so the treaty bodies have to adhere to them as well.

³¹ Government of the United States, Third Periodic Reports of States Parties (1999), CERD/C/351/Add.1, Addendum, Para.167

The Co-submitters of this Report affirm that the role of a UN treaty monitoring body is to provide such interpretations and ensure that the treaty is properly understood in the context of evolving international law respecting the obligations of states parties to such treaty, and not diminished based on the provisions of existing domestic laws of each State party.

The treaty bodies' expectation and requirement for State party compliance is quite distinct from the role and function of, for example, the UN Human Rights Council's Universal Periodic Review (UPR) Process. The UPR process is not legally binding but is rather a "cooperative mechanism". States are able to accept or reject specific UPR recommendations, and regularly do so. The 2006 General Assembly resolution establishing the UPR process makes the distinction between this process and role of the UN treaty bodies clear.³²

It is apparent, in the open rejection of some and the selective implementation of other CERD recommendations, and its repeated statements that it does not consider them to be legally binding, that the US prefers to treat its legal obligations under the ICERD as if they were simply "cooperative" voluntary obligations such as those defined under the UPR process. However, they are not the same. Nor should State parties to the ICERD be permitted to conflate their obligations under these two processes when it is convenient for them to do so.

VIII. CONCLUSIONS AND RECOMMENDATIONS

The US, in its ratification of the ICERD and other international Human Rights Treaties, has given its word that it will treat those within its jurisdiction in a manner consistent with the provisions of internationally recognized human rights, and to work within the UN to ensure that other States Parties act as well in accordance to those same provisions. Failure by the US to comply with treaty body recommendations undermines a core commitment required by the Charter of the UN of all Member States, "*to promote universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion,*".³³

The alarming practice of the United States of picking and choosing which recommendations by the a UN treaty body charged with monitoring implementation of its legally binding human rights obligations, and deciding on its own which are valid, seriously undermines the role of CERD and other UN treaty bodies. It also erodes the accountability of State parties to their legally binding obligations and reduces the accountability of States to self-monitored, purely voluntary compliance.

From the point of view of Indigenous Peoples and others suffering from racial discrimination due to US policies and practices, the position expressed by the US is neither legally accurate nor morally acceptable. Its failure to implement, or even to accept in some cases, the Committee's

³² UN General Assembly Resolution (A/RES/60/251), 2006: "Decides that the Council shall, inter alia... 5. (e) Undertake a universal periodic review, based on objective and reliable information, of the fulfilment by each State of its human rights obligations and commitments in a manner which ensures universality of coverage and equal treatment with respect to all States; the review shall be a cooperative mechanism, based on an interactive dialogue, with the full involvement of the country concerned and with consideration given to its capacity-building needs; such a mechanism shall complement and not duplicate the work of treaty bodies; the Council shall develop the modalities and necessary time allocation for the universal periodic review mechanism within one year after the holding of its first session;"

³³ United Nations Charter, Articles 55 and 56.

recommendations in paragraphs 19, 29 and 30 is neither legally accurate or morally acceptable and results in ongoing discrimination and human rights violations for Indigenous Peoples. Many such examples have been presented in this Report.

The Co-submitters therefore respectfully request that the Committee question and challenge the United States about its position regarding selective implementation, acceptance and legal standing of the CERD's recommendations during this review.

In addition, we make the following suggestions for recommendations to the US by the Committee in its Concluding Observations for this session.

- 1. The Committee reiterates and renews its previous recommendation that the UN Declaration on the Rights of Indigenous Peoples be used as a guide by the US to interpret its obligations under the Convention relating to Indigenous Peoples;**
- 2. That the US fully implement the UN Declaration on the Rights of Indigenous Peoples without any attempted qualifications that seek to diminish the inherent rights of Indigenous Peoples if affirms to *inter alia* Self-Determination, Free, Prior and Informed Consent, Land and Territories, cultural rights and Sacred Areas, and the Rights Affirmed in Nation to Nation Treaties;**
- 3. That the United States fully implement its obligations with regard to Treaties it has entered into with Indigenous Peoples - in keeping with its own Constitution and the UN Declaration on the Rights of Indigenous Peoples - including through its laws, policies, judicial proceedings and executive/administrative decisions on all levels. This includes the establishment, in conjunction and partnership with Indigenous Peoples, of a just, fair and participatory process for redress, remedy and restitution for violations of such Treaty rights;**
- 4. That the US be reminded of its legally binding commitment as a State Party to comply with this treaty body process to monitor State Party compliance; and to therefor make every effort in good faith to implement the Committee's recommendations regarding Indigenous Peoples and other victims of racial discrimination.**

International Indian Treaty Council (IITC) Affiliates in Lands and Territories currently part of or under the jurisdiction of the United States:

Indigenous Tribal and Traditional Nation Governments: Pit River Tribe (California), Wintu Nation of California, Redding Rancheria (California), Tule River Nation (California), Muwekma Ohlone Nation (California), Coyote Valley Pomo Nation (California), Round Valley Pomo Nation (California), Independent Seminole Nation of Florida (Florida), Native Village of Venetie Tribal Government/Arctic Village Traditional Council (Alaska), Chickaloon Village Traditional Council/Chickaloon Native Village (Alaska), Stevens Village Traditional Council (Alaska), Native Village of Eklutna (Alaska).

Indigenous Organizations, Networks, Communities and Societies: National Native American Prisoners' Rights Coalition, White Clay Society/Blackfoot Confederacy (Montana), Indigenous Environmental Network (National), Columbia River Traditional Peoples (Washington/Oregon), Rural Coalition Native American Task Force (Minnesota), Yoemem Tekia Foundation, Pascua Yaqui Nation (Arizona), Tohono O'odham Nation Traditional community (Arizona), Oklahoma Region Indigenous Environmental Network (Oklahoma), Wanblee Wakpeh Oyate (South Dakota), IEN Youth Council, Cactus Valley/Red Willow Springs Big Mountain Sovereign Dineh Community (Arizona), Leonard Peltier Defense Committee, Eagle and Condor Indigenous Peoples' Alliance (Oklahoma), Seminole Sovereignty Protection Initiative (Oklahoma) Mundo Maya (California), Los Angeles Indigenous Peoples Alliance (California) American Indian Treaty Council Information Center (Minnesota), Vallejo Inter-Tribal Council (California), Three Fires Ojibwe Cultural and Education Society (Minnesota), California Indian Environmental Alliance (CIEA), Wicapi Koyaka Tiospaye (South Dakota), Indigenous Peoples Working Group on Toxics (National), North-South Indigenous Network Against Pesticides (multi-regional based in US), the International Indian Women's Environmental and Reproductive Health Network (multi-regional based in US) and United Confederation of Taino People: Borikén (Puerto Rico/United States), Kiskeia, (Dominican Republic), Barbados, Guyana (Arawaks), Bimini (United States), Jittoa Bat Natika Weria (Yaqui Nation, US and Mexico).