UNITED NATIONS HUMAN RIGHTS COMMITTEE

109TH SESSION (14 OCTOBER – 1 NOVEMBER 2013)

CONSIDERATION OF THE FOURTH PERIODIC REPORT OF THE UNITED STATES OF AMERICA UNDER ARTICLE 40 OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

INDIGENOUS PEOPLES CONSOLIDATED ALTERNATIVE REPORT

September 13, 2013

In recognition and appreciation for all those who have dedicated their lives to protect Indigenous Peoples' sacred places and ways of life

Co-submitted by the International Indian Treaty Council, Indigenous World Association, Native Village of Venetie (Gwich'in Nation), Chickaloon Native Village and Chickaloon Village Traditional Council, Laguna Acoma Coalition for a Safe Environment, Western Shoshone Defense Project, Pit River Nation, Advocates for the Protection of Sacred Sites, Lakota Treaty Council, Kónitsąąíí Ndé (Big Water People Clan) and Cúelcahén Ndé (Tall Grass People Clan) of the Lipan Apache Band of Texas, Lipan Apache Women Defense, United Confederation of Taíno People, Hickory Ground Tribal Town, Muscogee (Creek) Nation, Gila River Alliance for a Clean Environment, Guahan Coalition of Guam, Na Koa Ikaika KaLahui Hawaii, Koani Foundation, Aha Moku Council, AmendAIRFA (American Indian Religious Freedom Act), Haskell Wetlands Walkers Student Organization and The Morning Star Institute.

The co-submitters of this Alternative Report thank the following for their significant contributions to the content of this Report: Pueblo of Laguna, the Gila River Indian Community Council, the Navajo Nation Human Rights Commission, the Yurok Tribe, Indigenous Youth Foundation and the Havasupai Community Tribal Members.

Contact: Danika Littlechild, Legal Counsel
International Indian Treaty Council
2940 16th Street, Suite 305
San Francisco CA 94103
Office phone: (415) 641-4482
Cell phone: +1(780)312-0246
Office fax: (415) 641-1298
danika@treatycouncil.org
www.treatycouncil.org

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Executive Summary

The International Treaty Council (IITC) *et. al*.[1] address the issues to be raised in the review of the United States of America's ("US") compliance as a State Party to the **International Covenant on Civil and Political Rights** (ICCPR). The co-submitters of the Indigenous Peoples Consolidated Alternative Report respectfully call the attention of the UN Human Rights Committee to critical human rights concerns that are not addressed, adequately or at all, in the US Government's Fourth Periodic Report. In many cases the co-submitters present very different points of view, interpretations and analysis from that offered by the US Report.

The co-submitters affirm the urgent need to address the crises facing Indigenous Peoples in the US and its territories regarding the lack of full legal protection for their sacred areas, religious practices, cultures and spirituality and the continuing desecration, contamination and destruction of Sacred Areas. US federal and state laws often restrict access in private, or at all, to the sacred areas essential for maintaining the religious, cultural and spiritual practices of Indigenous Peoples. In many cases, the US has failed to implement its own laws as well as its international obligations pertaining to freedom of religion and belief when it comes to Indigenous Peoples.

This report and the twenty eight (28) Submissions addressing specific critical cases document a pervasive pattern of obstacles and denials regarding the realization of rights to freedom of religious practice, access to Sacred Areas, and closely related rights to land and resources, Treaties, Self-determination and FPIC. These include:

1) Failure by the US to recognize and respect Indigenous Peoples' religious and spiritual beliefs and practice on an equal footing with the religions brought by the non-Indigenous settlers;

2) Failure by the US to respect the unbreakable connection between Indigenous Peoples' lands, waters and Sacred Areas and their religious and spiritual practices and beliefs;

3) Consistent priority given to economic development activities rather than freedom of religious practice for Indigenous Peoples as reflected in laws, policies and court decisions including those by the US Supreme Court;

4) Failure by the US to fully implement Free Prior and Informed Consent regarding legislative actions, military activities and development projects impacting or threating Sacred Areas;

5) Failure to honor, respect and implement Treaties, concluded between Indigenous Nations and the US, which affirm Indigenous jurisdiction over sacred lands, waters and areas, and affirm hunting, fishing and gathering essential for cultural and ceremonial practices

6) Failure by the US to recognize the rights of Indigenous Peoples to their traditionally owned or otherwise occupied or used lands and territories, including those legally recognized by ratified Treaties. These often include sacred and culturally important areas which now lie outside of the reservation lands currently recognized by the US, negatively impacting

[1] See cover page of the Report for a complete list of the co-submitters and other contributors.

Indigenous Peoples' rights and ability to protect and have access to Sacred Areas including those used for culturally-important gathering, hunting and fishing;

7) The especially problematic situation faced by Indigenous Peoples who are not "federally recognized" and therefore have no federally-recognized lands, nor ability to access even the limited protections provided by US federal Laws regarding their Sacred Areas or religious practices.

We respectfully present the Committee with the following core questions for the United States.

1) **Please provide 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.** (This question was already presented to the US by the Committee)

2) **How does the United States substantiate its claim to legal title to Indigenous Peoples' ancestral and lands, waters and Sacred Areas, including those recognized by ratified Treaties or which are or have been subject to international decolonization processes? Why are many of these lands, waters and sacred areas not considered by the US to be under Indigenous Peoples current jurisdiction and control? How and when was title or jurisdiction legally transferred to the US? What was the legal process used for transfer of Indigenous traditional lands to "third parties?"**

Finally, we submit the following recommendations to the Committee for consideration in their review and Concluding Observations regarding the United States report:

1. **That the US implement the UN Declaration on the Rights of Indigenous Peoples fully and without qualification, and use it as a guideline for interpretation and implementation of the ICCPR regarding Indigenous Peoples including those who are not "federally recognized";**

2. **That the US bring its national policies and laws into conformity with the provisions of the ICCPR, ICERD and UNDRIP regarding Self-determination, Right to Lands and Resources, Subsistence and Free Prior and Informed Consent;**

3. **That the US implement laws and policies that fully respect freedom of religious practice, culture and spiritual belief for Indigenous Peoples in accordance with their international human rights obligations;**

4. **That the US implement laws that enforce an absolute legal prohibition of the desecration of sacred areas, provide provisions for their protection, and uphold the rights of the Indigenous Peoples concerned to protect, manage and control them in accordance with their religious beliefs, teachings and protocols;**

5. **That the US implement a just, bi-lateral, fully participatory processes for redress and restitution of rights affirmed in Treaties with respect for their original spirit and intent as understood and interpreted by the Indigenous Peoples and in**

accordance with the framework contained in the UN Declaration on the Rights of Indigenous Peoples;

6. **That the US establish a national-level body for oversight and implementation of the US human rights obligations, including the provisions of International Human Rights Treaties and Declarations, Treaty Body recommendations and Nation-to Nation Treaties with Indigenous Peoples, with the full and effective participation of affected communities, Indigenous Peoples and Nations.**

"Medicine Lake and Mt Shasta were gifts to our Peoples from the Creator, the One Above. These places are part of our creation and our teachings about how we leave this world."
--- Mickey Gimmell Sr., 1944 - 2006
Pit River (Iss-Awhi) and Wintu Spiritual Leader, Member of the International Indian Treaty Council Board of Directors

Section I – Indigenous Peoples' Sacred Areas, Free Prior and Informed Consent and the United Nations Human Rights Council Review of the United States' Compliance with the International Covenant on Civil and Political Rights

1. Introduction

The International Indian Treaty Council (IITC) *et. al*.[2] welcome the opportunity to address the issues to be raised in the review of the United States of America's ("US") compliance as a State Party to the **International Covenant on Civil and Political Rights** (ICCPR). The co-submitters of this Indigenous Peoples Consolidated Alternative Report respectfully want to call the attention of UN Human Rights Committee ("the Committee") to critical human rights concerns that are not addressed, adequately or at all, in the US Government's Fourth Periodic Report to the Committee. In many cases the co-submitters will present very different points of view, interpretations and analysis from those offered by the US Report.

This is the first ICCPR review of the US to be carried out since the adoption of the UN Declaration on the Rights of Indigenous Peoples ("UNDRIP") by the United Nations (UN) General Assembly on September 13th, 2007. The United States, after its initial "no" vote along with only three other States became the last country to reverse this position and express its support (although with some very problematic qualifications discussed below) on December 16, 2010.

The UNDRIP, as the internationally accepted universal framework of minimum standards for the survival, dignity, well-being and rights of the world's Indigenous Peoples, provides a framework for the Committee's review of the United States' compliance with the Covenant in relation to the specific questions raised by the Committee regarding Indigenous Peoples.

There is an urgent need to address the crises facing Indigenous Peoples in many regions of the US and its territories regarding the lack of full legal protection for their sacred areas, religious practices, cultures and spirituality. For Indigenous Peoples their cultural, spiritual and religious practice, and the sacred responsibilities that provide them with life and identity, are inextricably linked to places of ceremonial practice, emergence and renewal. For the purpose of this submission, reflecting the understanding of the Indigenous Peoples who are jointly submitting

[2] Ibid.

this report, "Sacred Areas" is understood to include but not be limited to landscapes, ceremonial grounds and structures, burial grounds, waterways, sacred items and areas essential for the collection of ceremonial and culturally important animal and plant foods and medicines.

Desecration, contamination and destruction of these Sacred Areas continue as a result of urbanization, tourism, extractive industries, industrial development, and toxic contamination. US federal and state laws continue to restrict access in private, or at all, to the sacred areas essential for maintaining the religious, cultural and spiritual practices of Indigenous Peoples. In addition, in many cases the US has failed to implement its own national laws as well as its international obligations pertaining to freedom of religion and belief when it comes to Indigenous Peoples.

As the Committee has noted in its Question No. 27 to the US, regarding compliance with Article 27 of the Convention, the US government's obligation to obtain Indigenous Peoples' Free Prior and Informed Consent (FPIC) is a central concern for Indigenous Peoples with regards to their ability to protect their Sacred Areas. The failure of the US to fully respect and implement this minimum standard in its dealing with Indigenous Peoples is a consistent pattern presented by Indigenous Peoples who have contributed to this Consolidated Alternative Report.

For many Indigenous Peoples in the US, lack of access to sacred places is closely linked to a history of dispossession of their lands. This history is recounted in all the case submissions contained in this report. This dispossession and extinguishment of aboriginal title was noted and raised as a concern by the Committee in its 2006 Review of the US.[3] In its Fourth Periodic Report concerning the implementation of its obligations under the International Covenant on Civil and Political Rights, dated December 30, 2011, the US responded by recounting a very selective history of native land occupancy and property rights but failed to heed the recommendations of the HRC.[4]

Despite numerous efforts by Indigenous Peoples in both domestic and international fora, the United States continues to deny them the substantive enjoyment of the rights contained in the ICCPR, and affirmed in other international instruments. This Report sets out unedited chapters of US history and the myriad ways in which obstacles are placed for observance of these rights, including cultural rights, freedom of religious practice, access to Sacred Areas, and closely related rights to land and resources, Treaties, Self-determination and FPIC. Obstacles identified by the contributors to this Report include the following:

1) Failure by the US to recognize and respect Indigenous Peoples' religious and spiritual beliefs and practice on an equal footing with the religions brought by the non-Indigenous settlers;

2) Failure by the US to respect the unbreakable connection between Indigenous Peoples' lands, waters and Sacred Areas and their religious and spiritual practices and beliefs;

3) Consistent priority given to economic development activities rather than freedom of religious practice for Indigenous Peoples as reflected in laws, policies and court decisions including those by the US Supreme Court;

[3] See Human Rights Committee, Concluding Observations, para. 37, United States of America, Eighty-seventh session, 10-28 July 2006, UN Doc. CCPR/C/USA/CO/3, 15 September 2006 Para. 37.
[4] See Fourth Periodic Report, United States of America, 22 May 2012 (CCPR/C/USA/4) Paras. 684-689.

4) Failure by the US to fully implement Free Prior and Informed Consent regarding legislative actions, military activities and development projects impacting or threating Sacred Areas;

5) Failure to honor, respect and implement Treaties, concluded between Indigenous Nations and the US, which affirm Indigenous jurisdiction over sacred lands, waters and areas, and affirm hunting, fishing and gathering essential for cultural and ceremonial practices

6) Failure by the US to recognize the rights of Indigenous Peoples to their traditionally owned or otherwise occupied or used lands and territories, including those legally recognized by ratified Treaties. These often include sacred and culturally important areas which now lie outside of the reservation lands currently recognized by the US, negatively impacting Indigenous Peoples' rights and ability to protect and have access to Sacred Areas including those used for culturally-important gathering, hunting and fishing;

7) The especially problematic situation faced by Indigenous Peoples who are not "federally recognized" and therefore have no federally-recognized lands, nor ability to access even the limited protections provided by US federal Laws regarding their Sacred Areas or religious practices.

2. Relevant Provisions of the International Covenant on Civil and Political Rights

A) Article 1: Right to Self Determination and Right to Subsistence

ICCPR Article 1, clause 1, provides the fundamental right of self-determination: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." The adoption of the UN Declaration on the Rights of Indigenous Peoples affirmed that Indigenous Peoples are entitled to this right. As this report will demonstrate, actions taken by the US government which impede the ability of Indigenous Peoples to access and protect their sacred areas, effectively prevent the full and meaningful recognition of Indigenous Peoples' right to freely pursue their cultural development.

Article 1, paragraph 2, affirms that "In no case may a People be deprived of its own means of Subsistence." Cultural development, religious practice and subsistence are inextricably linked for Indigenous Peoples. Indigenous Peoples' relationships with traditionally used animals and plants in many cases go beyond use for food. They are a fundamental basis of ceremonies, spiritual relationships with the natural world, lands and waters and are the basis of Indigenous identity as evidenced by their role in creation stories, clan membership and ceremonies for passage into manhood/womanhood, and into and out of life in this world. In the US, centuries of government actions, including Treaty violations, imposed development and laws restricting access and reducing habitats, have served to deprive Indigenous Peoples of this essential part of their existence.

In 2002, at the First Global Consultation on the Right to Food, Indigenous Peoples affirmed this sacred relationship:

> ***[T]he Right to Food of Indigenous Peoples is a collective right based on our special spiritual relationship with Mother Earth, our lands and territories, environment, and natural resources that provide our traditional nutrition; underscoring that the means of***

> ***subsistence of Indigenous Peoples nourishes our cultures, languages, social life, worldview, and especially our relationship with Mother Earth; emphasizing that the denial of the Right to Food for Indigenous Peoples not only denies us our physical survival, but also denies us our social organization, our cultures, traditions, languages, spirituality, sovereignty, and total identity; it is a denial of our collective Indigenous existence, … .*** [5]

By the mid 1800's, settlers under the sponsorship of the US government had decimated the Buffalo, which was the Plains Indians' primary food source and a primary source of spiritual. This not only resulted in the destruction of their independent political life, but also devastation to their primary source of spiritual power, connection and identity. In the words of the White Clay Bison Restoration Project on the Ft. Belknap Reservation in Montana USA,

> ***Without the Buffalo, the independent life of the Indian people could no longer be maintained. The Indian spirit, along with that of the buffalo, suffered an enormous loss.***

In other areas of the US, Indigenous Peoples have been severely impacted by developments such as imposed damming and mining that have affected the life cycles of the Salmon:

> "***The cycles of our lives and the countless generations of our Peoples are merged with the life cycles of the Salmon. Salmon is our traditional food but it also defines who we are. Our spiritual and cultural existence and the survival of our future generations are based on the survival of the salmon and the exercise of our sacred responsibilities to protect the rivers, oceans, watersheds and eco-systems where they live. The health of the Salmon is one with the spiritual, cultural, and physical health of our Peoples. We declare that birthing places of all life are sacred places, including the great rivers and small streams where the Salmon spawn and the oceans where they live".*** [6]

Submissions in this Report from the Venetie and Chickaloon Tribal Governments in Alaska further document this profound and essential cultural and ceremonial relationship for many if not most Indigenous Peoples.

B) Article 18, the Rights to Freedom Of Thought, Conscience And Religion; and Article 27, the Right To Enjoy Culture And Practice Religion

Although the HRC's inquiry to the United States was specific to compliance with Article 27 of the ICCPR, the IITC and its co-submitters submit that Articles 18 and 27 are best understood when considered together. Article 18, clause 1 provides that "Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching." Article 27 provides a corresponding right for Indigenous Peoples in the US, "in

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[5] **DECLARATION OF ATITLÁN, GUATEMALA,** *Indigenous Peoples' Consultation on the Right to Food: A Global Consultation, Atitlán, Sololá, Guatemala, April 17 - 19, 2002.*

[6] Consensus Outcome Document: Pel' son' mehl Ney-puy *("Big Doings with the Salmon")*, Indigenous Peoples' International Gathering to Honor, Protect and Defend the Salmon, June 21st- 23rd, 2013, Hehlkeek 'We-Roy (*Klamath River*), Yurok Nation Territory, Northern California.

community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language."

Article 27 has been expressly linked to States' duty to guarantee Indigenous Peoples' right to enjoy their cultures and to the protection of their ways of life, closely linked to territory and resource use. The Committee, in its General Comment No. 23 on Article 27 in 1994, made the following observation:

> **7. With regard to the exercise of the cultural rights protected under article 27, the Committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of Indigenous Peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.** [7]

The Inter American Commission on Human Rights and the Inter-American Court have also applied General Comment 23 to interpret the American Convention in a case involving sacred area protection.[8]

Article 18 of the ICCPR has been interpreted to provide protection for Native Americans' access to sacred places. In 1998 Mr. Abdelfattah Amor, then Special Rapporteur on Religious Intolerance, and the first Special Procedure to address Native American spiritual concerns in the context of international law, visited the US. In his report, he generally supported the idea of the "development of a coherent and comprehensive framework for interpreting and applying the two constitutional religion clauses [i.e., freedom of religion and non-establishment clauses].[9] In doing so he "wholly endorse[d] the approach of taking into account the traditions of other peoples as reflected in the main United Nations human rights instruments, namely, the International Covenant on Civil and Political Rights (article 18)… ." [10]

In his Conclusions and Recommendations, he highlighted his concern regarding freedom of belief of Native Americans, as "a fundamental matter and [which] requires still greater protection."[11] Even with the limitations provided in clause 2 of Article 18, he observed:

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[7] General Comment No. 23 (1994): Article 27 (rights of minorities), 7, CPR/C/21/rev.1/Add.5 (1994) (footnote omitted).

[8] *Case of the Saramaka People v. Suriname, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172, 95 (Nov. 28, 2007):*

> 95. The above analysis [contained in General Comment No. 23, 7] supports an interpretation of Article 21 of the American Convention to the effect of calling for the right of members of Indigenous and tribal communities to freely determine and enjoy their own social, cultural and economic development, which includes the right to enjoy their particular spiritual relationship with the territory they have traditionally used and occupied.

[9] Report submitted by Mr. Abdelfattah Amor, Special Rapporteur, in accordance with Commission on Human Rights resolution 1998/18,Addendum, Visit to the United States of America, E/CN.4/1999/58/Add.1, 9 December 1998, para.71

[10] Ibid para 71

[11] Ibid para. 82

> *The expression of the belief has to be reconciled with other rights and legitimate concerns, including those of an economic nature, but after the rights and claims of the parties have been duly taken into account, on an equal footing (in accordance with each party's system of values).* ***As far as Native Americans' access to sacred sites is concerned, this is a fundamental right in the sphere of religion, the exercise of which must be guaranteed in accordance with the above- mentioned provisions of international law on the matter.***[12] *(Emphasis added.)*

Notably, Mr. Amor also concluded that the legislative framework that exists in the United States for the protection of Native America Freedom of Religion and belief (applied then as now only to "federally recognized tribes") was lacking:

> *80. As far as legislation is concerned, while noting advances in recent years in the instruments emerging from the legislature and the executive which are designed to protect Native Americans' religion in general (American Indian Religious Freedom Act) and in particular (Native American Graves Protection and Repatriation Act, Executive Order on Indian Sacred Sites, Executive Memorandum on Native American Access to Eagle Feathers), the Special Rapporteur identified weaknesses and gaps which diminish the effectiveness and hinder the application of these legal safeguards. Concerning the American Indian Religious Freedom Act, the Supreme Court has declared that this law was only a policy statement. As for the Executive Order on Indian Sacred Sites, unfortunately, it does not contain an 'action clause', leaving the tribes without the needed legal 'teeth.' Higher standards or the protection of sacred sites are needed and effective tribal consultation should be ensured.*[13]

Amor further recommended to the US that "in the legal sphere Native Americans' system of values and traditions should be fully recognized, particularly as regards the concept of collective property rights, inalienability of sacred sites and secrecy with regard to their location."[14]

The enclosed submissions from Indigenous Peoples, including Tribal and Traditional governments and communities, demonstrate that Mr. Amor's recommendations have not yet been implemented by the US.

Special Rapporteur on the Rights of Indigenous Peoples James Anaya, in his official country visit to the US in 2012, heard from a number of Indigenous Peoples involved in current struggles to protect their Sacred Areas and Cultural practices.

Professor Anaya in his final report to the UN Human Rights Council in September 2012 noted Amor's report and affirmed that the basic situation of desecration and lack of access for

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[12] Ibid para. 82. Mr. Amor was the second Special Procedure to visit the United States. Agreeing with earlier observations made by Mr. Bacre Waly Ndiaye, Special Rapporteur on extrajudicial, summary or arbitrary executions (see, E/CN.4/1998/68/Add.3) in his 1997 visit to the United States, Mr. Amor observed the following: : "In general, it appears that international human rights law, including treaties ratified by the United States, is seen as belonging solely to foreign affairs and not to domestic affairs and that domestic law de facto takes precedence over international law." (Ibid. paras. 28 and 73)

[13] Ibid, para. 80

[14] Ibid, para. 81

Indigenous Peoples to sacred areas, mainly as a result of extractive activities or other types of imposed development, had not been alleviated in the 13 years that separated their country visits:

> *With their loss of land, Indigenous peoples have lost control over places of cultural and religious significance. Particular sites and geographic spaces that are sacred to Indigenous peoples can be found throughout the vast expanse of lands that have passed into government hands. The ability of Indigenous peoples to use and access their sacred places is often curtailed by mining, logging, hydroelectric and other development projects, which are carried out under permits issued by federal or state authorities. In many cases, the very presence of these activities represents a desecration.*[15]

C) Prior Human Rights Committee Recommendations to the United States

In its 2006 review of the United States' compliance with the ICCPR, the Committee noted its concern over the "extinguishment" of aboriginal title and violations of the right to decision-making by Indigenous Peoples over activities affecting their traditional territories. The HRC recommended that the United States

> *... should review its policy towards Indigenous peoples as regards the extinguishment of aboriginal rights on the basis of the plenary power of Congress regarding Indian affairs and grant them the same degree of judicial protection that is available to the non-Indigenous population. It should take further steps in order to secure the rights of all Indigenous peoples under articles 1 and 27 of the Covenant to give them greater influence in decision-making affecting their natural environment and their means of subsistence as well as their own culture.*[16]

The US, in ratifying the ICCPR, the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and other international Human Rights Treaties, committed to treat those within its jurisdiction in a manner consistent with the provisions of internationally recognized human rights. 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."

The failure of the US to fully implement this and other relevant recommendations from Treaty Bodies and Special Rapporteurs, and other mandate holders undermines this commitment and leaves impacted Indigenous Peoples without recourse or redress for gross and pervasive human rights violations.

3. The International Human Rights Framework

Fundamental rights contained in ICCPR and other International norms and standards together provide a framework by which the relevant rights for Indigenous Peoples can be understood and interpreted by the Committee. These include the following:

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[15] Anaya, James, Report of the Special Rapporteur on the Rights of Indigenous Peoples, The situation of Indigenous Peoples in the Unites States of America 30 August 2012, A/HRC/21/47/Add.1 at page 12.

[16] Human Rights Committee, Concluding Observations, United States of America, Eighty-seventh session, 10-28 July 2006, UN Doc. CCPR/C/USA/CO/3, 15 September 2006 Para. 37.

A) Free, Prior and Informed Consent

For Indigenous Peoples, the Right of 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. It is also an essential right for the protection and defense of Indigenous Peoples' sacred areas in particular those threatened by imposed development.

With the Adoption of the UNDRIP, as well as other international standards such as General Recommendation XXIII of the UN Committee on the Elimination of Racial Discrimination (CERD) and the 2005 UN General Assembly's Plan of Action for the 2nd International Decade of the Worlds' Indigenous Peoples,[17] FPIC is an undeniable operative international human rights framework to which the US is accountable.[18]

FPIC has also been affirmed in the jurisprudence of the Inter-American Human Rights Commission, the Inter-American Court and by a number of landmark Studies by UN Special Rapporteurs.[19]

Consent is also a fundamental Treaty Principle, to which the US is obligated and which predates its obligations under UN Conventions and Covenants. It is a foundation of the original relationship between the US and Indian Treaty Nations which the US Constitution recognizes as the "Supreme Law of the Land." 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*;"(Emphasis added.)

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[17] One of the UN General Assembly's five objectives for the *Programme of Action for the Second International Decade of the World's Indigenous People* is "promoting full and effective participation of Indigenous peoples in decisions which directly or indirectly affect their lifestyles, traditional lands and territories, their cultural integrity as Indigenous peoples with collective rights or any other aspect of their lives, considering the principle of free, prior and informed consent", GA Res 60/142, UN GAOR, 60th Sess., Supp. No. 49, UN Doc. A/60/49 (2006)

[18] International Labor Organization Convention No. 169 on Indigenous and Tribal Peoples, which also affirms consent, is not mentioned here because the US has not yet ratified it

[19] Special Rapporteur Erica-Irene A. Daes, in her landmark studies on *Indigenous land rights* (E/CN.4/Sub.2/2001/21), *Indigenous peoples' intellectual and cultural heritage* (E/CN.4/Sub.2/1993/28), and *Indigenous peoples' permanent sovereignty over natural resources* (E/CN.4/Sub.2/2004/30 and Add.1) recognized the historic and current violations of Indigenous Peoples' rights as result of the appropriations of their lands and resources without their Free Prior and Informed consent, and the failure of states to insure that these rights are protected. Madame Daes also emphasized the need to respect free prior and informed consent in any effective redress and resolution as well as in legislative measures to redress violations or correct current policies. For example, in her final recommendations in the *Indigenous land rights* study Madame Daes called upon states to implement "measures to recognize demarcate and protect the lands, territories and resources of Indigenous peoples" E/CN.4/Sub.2/2001/21 paragraph 145 …. but she also stressed that such legislation "must recognize Indigenous peoples' traditional practices and law of land tenure, and *it must be developed only with the participation and free consent of the Indigenous peoples concerned*." (ibid, paragraph146, emphasis added).

[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.

The UNDRIP affirms the Right to FPIC in a number of Articles which are directly relevant to the protection and practice of Indigenous Peoples' culture and religion. These include specifically Articles 10, 11, 19, 26, 28, 29 and 32. The closely linked right to participate in decision-making in matters which may affect them is also affirmed in Article 18. In addition the Right to Self-Determination (Article 3) and the rights affirmed in Treaties (Article 37) also imply and affirm Consent.

B) The United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP")

The adoption of the UNDRIP by the UN General Assembly on September 13th, 2007, was an historic step forward for Indigenous Peoples. A range of rights recognized by the ICCPR and ICERD are affirmed and further defined by the provisions of the UNDRIP. These include, *inter alia*, the closely related rights of Self Determination (Article 3); the recognition, observance and enforcement of Treaties concluded with States (Article 37); rights to traditional subsistence (Article 20); rights to cultural and traditional knowledge (Article 31); rights and relationship to land, territories and resources (Articles 25 and 26) and the right of Free Prior and Informed Consent in various articles as mentioned above.

The CERD recommended in 2008 that the US use the UNDRIP "as a guide to interpret the State party's obligations under the [ICERD] Convention relating to Indigenous peoples."[21]

1) The UNDRIP and Rights to Culture, Religious Traditions and Protection of Sacred Areas

Of particular importance for this submission regarding the rights to and protection of Sacred Areas, cultural and religious practices are the following articles in the UNDRIP:

Article 11

1. Indigenous Peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.

2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with Indigenous Peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

Article 12

Indigenous Peoples have the right to manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.

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[21] See Concluding Observations of the Committee on the Elimination of Racial Discrimination on the United States of America, Consideration of Reports Submitted by States Parties under Article 9 of the Convention, 8 May 2008 CERD/C/USA/CO/6, at para. 29

Article 25

Indigenous Peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.

These rights apply equally and without distinction to places found within existing reservations or territorial boundaries which the US "recognizes" legally, and those that are located on lands "traditionally owned or otherwise occupied or used" by the Indigenous Peoples in question.[22] They are very closely tied to, and reinforced by, Article 26 which affirms the rights of Indigenous Peoples to the lands, territories and resources "which they have traditionally owned, occupied or otherwise used or acquired".

2) The UNDRIP and the International Right to Self-Determination for Indigenous Peoples

The significance of the UNDRIP's full and unqualified recognition of Indigenous Peoples as Peoples for the first time in an international human rights standard has far-reaching implications. The range of other instruments which are legally binding upon the US and contain rights which accrue to all Peoples clearly also apply to Indigenous Peoples. Primary among those is the Right to Self-determination, including the right to freely pursue cultural development, as stated in the three paragraphs which constitute Article 1 in Common of the International Human Rights Covenants.

C) The UN Committee on the Elimination of Racial Discrimination and the Protection of Indigenous Peoples Sacred Areas

In its 2008 review of the US, the CERD's Concluding Observations addressed the US failure to uphold the rights of Indigenous Peoples concerning the protection of their Sacred Sites and areas of cultural importance, and made strong recommendations in that regard:

> 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.**

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[22] See, Report of the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya: Extractive industries and Indigenous Peoples, July 1, 2013, para 35 (citing Inter-American Court of Human Rights, *Sawhoyamaxa Indigenous Community* v. *Paraguay*, judgment of 29 March 2006, para. 128):

> It should be recalled that under various sources of international law, Indigenous Peoples have property, cultural and other rights in relation to their traditional territories, even if those rights are not held under a title deed or other form of official recognition.

The Committee further recommends that the State party recognize 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. [23]

The far-reaching implications of these recommendations addressing the United States' obligations under the Convention cannot be minimized. It bears repeating that the CERD recommended that the UNDRIP be used as a "guide to interpret [US] obligations under the Convention" notwithstanding the [US] position vis-a-vis the Declaration."

In 2006, in an Urgent Action/Early Warning Decision, the CERD made recommendations to the United States regarding the Western Shoshone's rights to their lands and resources, specifically calling upon the United States to "Freeze any plan to privatize Western Shoshone ancestral lands for transfer to multinational extractive industries and energy developers and desist from all activities planned and/or conducted on the ancestral lands of Western Shoshone or in relation to their natural resources, which are being carried out without consultation with and despite protests of the Western Shoshone peoples." [24] The CERD highlighted the US failure to comply with this earlier decision in its 2008 Concluding Observations and urged the US to implement its recommendations. To date, the US has not complied with the CERD's recommendations.[25]

D) The Rights Affirmed in Nation-to-Nation Treaties, Agreements and Other Constructive Arrangements including Free, Prior and Informed Consent

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. These include, among others, mutual recognition of sovereignty, peace and friendship, land and resource rights, rights to health, housing, education and subsistence rights (hunting, fishing and gathering); in some cases treaties were limited to transit though Treaty lands for settlers. The full recognition and observance of Treaties is directly relevant to the protection of and jurisdiction over a number of Sacred Areas in the US.

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 as well as being sacred pacts between sovereign Nations. Special Rapporteur James Anaya recognized, in his report on his 2012 country visit to the US, the sacred nature and

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[23] Committee on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America*, 77th Sess., UN Doc. CERD/C/USA/CO/6 (2008) at para. 29.

[24] Committee for the Elimination of Racial Discrimination, Sixty- eighth session Geneva, 20 February – 10 March 2006 Early Warning and Urgent Action Procedure, Decision 1 (68). United States of America, UN Doc. CERD/C/USA/DEC/1.

[25] See the enclosed submission from the Western Shoshone Defense Project, Case N in this Report, for specific violations of sacred areas and cultural rights which continue to be carried out on their lands as a result.

standing of the Treaties concluded with the US as understood by the Indigenous Nation Treaty Parties.[26]

Even though the US Congress unilaterally ended Treaty-making with Indian Nations in 1871, the preexisting Treaties are still in effect and contain obligations which are legally binding upon the US today. Article Six of the US Constitution references Treaties as part of "the Supreme Law of the Land;"[27] this includes and encompasses US obligations undertaken in accordance with Treaties entered into in good faith with the original Indigenous Nations of the land now known as the United States. Nevertheless, the US has continued to assert sole jurisdiction to determine, decide and control the process for redress of Treaty violations or to unilaterally abrogate legally binding Treaties based on the "plenary power of Congress."

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.*[28]

This consensual basis of Treaties and Agreements is an essential component upon which their original validity and ongoing viability is based. Consent and mutual agreement applies to processes for concluding, implementing, and interpreting Treaties, making any changes or amendments to their original provisions and determining effective, just and participatory mechanisms for redress, dispute resolution and restitution in the case of violations. The need for International redress mechanisms when disputes cannot be settled between the parties has been repeatedly called for including by the UN Study on Treaties, Agreements and Other Constructive Arrangements[29] , the Organization of America States[30] , the First and Second UN Treaty

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[26] Report of the Special Rapporteur on the Rights of Indigenous Peoples, , "The situation of Indigenous Peoples in the United States of America" 30 August, 2012 A/HRC/21/47/Add.1, para. 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."

[27] 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.

[28] 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.

[29] Study on treaties, agreements and other constructive arrangements between States and Indigenous populations, Final report by Miguel Alfonso Martínez, Special Rapporteur, E/CN.4/Sub.2/1999/20, 22 June 1999.

Seminars,[31] and the Indigenous Peoples Preparatory Meeting for the 2014 High Level Plenary meeting of the UN General Assembly to be called the World Conference on Indigenous Peoples in June 2013.[32]

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, as evidenced in the submissions on specific issues by Indigenous Treaty Nations with devastating impacts on the Sacred Areas where were legally recognized as under the jurisdiction of the Indigenous Treaty Parties under the terms of these Treaties.

A current example of the ongoing violation of Treaty Rights is the proposed Keystone XL Pipeline. On September 19, 2008, TransCanada Keystone Pipeline, LP1 ("TransCanada")[33] 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 so called "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. No process for consent in accordance with provisions of the UNDRIP, 1868 Ft. Laramie Treaty or Treaties with other Indigenous Treaty 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."***

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."*** This resolution (#MKE-11-030), which also addresses the violations of Treaty rights and potential impacts on cultural sites, is included as an attachment to this Report.

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[30] "Treaty Rights Recognized By The Organization Of American States," April 22, 2012, IITC Press Release

[31] Ibid. at fn. 28, Report of the United Nations seminar on treaties, agreements and other constructive arrangements between States and Indigenous Peoples, Hobbema, Canada, 14–17 November 2006,Chairperson: Sharon Venne, Co-Rapporteurs: Chief Wilton Littlechild and Andrea Carmen (A/HRC/EMRIP/2010/5], 17 May 2010

[32] Alta Outcome Document: http://wcip2014.org/wp-content/uploads/2013/06/Adopted-Alta-outcome-document-with-logo-ENG.pdf

[33] TransCanada Keystone Pipeline, LP is a subsidiary of the Canadian company TransCanada Corporation.

Submissions in this report by the IITC and Lakota Treaty Council, Western Shoshone Defense Project also provide examples of ongoing Treaty violations specifically impacting Sacred Areas and cultural rights.

E) The Impacts of US Qualified Support for the UNDRIP

US President Barack Obama announced on December 16, 2010, that the US would become the last of the four countries which originally voted "no" at the UN General Assembly to change its position and "lend its support" to the UNDRIP. The initial positive response by many Indigenous Peoples to this announcement was hampered by significant qualifications contained in the US State Department's written text, entitled "Announcement of US Support for the United Nations Declaration on the Rights of Indigenous Peoples."[34] The US qualifications and limitations placed on the application of internationally-recognized "minimum standard" rights directly impact Indigenous Peoples' enjoyment of the rights in the UNDRIP as well as those addressed by the Committee in this review of US' compliance with the ICCPR. These include, in particular:

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

A major concern expressed in the written statement issued by the US State Department dated December 10th, 2010, was its redefinition of the right to Free Prior and Informed Consent, affirmed in many articles of the UNDRIP as a much-diminished "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."[35]

The Submission (regarding the review of the US Fourth Periodic Report) by the Navajo Nation Human Rights Commission to the Committee also addresses the shortfalls of "consultation" as defined in the US Announcement of Support for the UNDRIP, 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 "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.*[36]

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[34] US Dep't of State Announcement of US Support for the United Nations Declaration on the Rights of Indigenous Peoples (December 10, 2010), available at http://www.state.gov/documents/organization/153223.pdf. This was not distributed until after the President's announcement.

[35] Ibid, page 5

[36] 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.

2) A "Different" Right of Self-Determination

The US also stipulated that it does not recognize the full right of Self-determination, as recognized in ICCPR for **all** Peoples for Indigenous Peoples, but instead will recognize "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."[37] This position contradicts the US Treaty relationship with Indigenous Nations and the principles of international law which affirm non-discrimination as well as a definition of Self-Determination for Indigenous Peoples in UNDRIP Article 3 consistent with Article 1 of ICCPR.

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 of the United States Mission to the United Nations, in a statement regarding the US position on the UNDRIP, referred to the UNDRIP as "a non-binding, aspirational document." This US statement also "reiterate[d] the U.S. government's view that self-determination, as expressed in the Declaration, is different from self-determination in international law."[38]

In response to the US statement at the Permanent Forum**,** IITC and a number of other Indigenous delegations took the floor[39] to object to this discriminatory statement seeking to limit the internationally recognized right of Self Determination in the Covenants for ALL Peoples to exclude Indigenous Peoples.

3) Limiting Implementation to "Federally Recognized Tribes"

Another notable and highly problematic qualification in the "Announcement of US Support" was the intent to implement the UNDRIP's provisions only for "federally recognized tribes." Professor Margo Tamez 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."[40]

The IITC supports the statements contained in the attached submissions regarding the situation of "unrecognized" Indigenous Peoples in its current Periodic Report to this Committee. This failure of recognition, based in many cases on its own polices of Tribal termination, constitutes extinguishment. 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.

Unrecognized Indigenous Peoples of U.S. territories, such as the Taíno of Puerto Rico, are further marginalized within the international system as their "home countries" are not full members of the United Nations or the Organization of American States. Submissions in this Report from the United Confederacy of Taíno People (Boriken/Puerto Rico) and the Lipan Apache (US/Texas border) provide informative explanations of the inability of many "unrecognized" Indigenous

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[37] 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.
[38] Link to the State Department's statement: http://usun.state.gov/briefing/statements/209946.htm
[39] Link to IITC's Intervention: http://www.iitc.org/iitc-speaks-out-at-the-unpfii-6th-session-in-response-to-us-statement-attempting-to-limit-the-right-of-self-determination-for-Indigenous-peoples-2/
[40] Margo Tamez, spokesperson and co-founder, Lipan Apache Women Defense, and professor of Indigenous Studies, University of British Columbia

Peoples to protect their cultural heritage and Sacred Areas, or access even the minimal safeguards provided by laws such as the Native American Graves Protection and Repatriation Act (NAGPRA). [41]

4. The US Domestic Framework: A History of Legal and Judicial Dispossession and Disenfranchisement

A) The Doctrine of Discovery and Resulting Laws and Policies: Impediments to Enjoyment of Rights under the ICCPR

Many, if not most, cases of desecration and lack of access to Sacred Places are linked to the history of US dispossession of Indigenous Peoples' lands. In many cases, sacred areas originally within traditional aboriginal lands of Indigenous Peoples are now outside their federally-recognized reservation or territorial boundaries, and therefore considered outside of their legal jurisdiction and control under US law. Many sacred areas are located what is now considered "public" or government-controlled lands, such as national forest areas, national and state parks, wilderness or protected areas, and military reservations. This history of this dispossession is recounted in many of the case submissions in the next section this Report.

Fundamental questions regarding US law and policy were addressed in detail in the last review of the US by the Committee, so this report will not repeat but instead supplement the reports submitted by Indigenous Peoples in that process. Suffice it to say that little progress has been made in US compliance with its human rights obligations. During the combined Second and Third Periodic Reviews of the United States in 2006, the Committee directed this question regarding Articles 1 and 27 of the ICCPR to the US:

> **Does the State party rely on the doctrine of discovery in its relationship with Indigenous peoples, and if so what are the legal consequences of such approach? What is the status and force of law of treaties with Indian tribes? Please indicate how the principle set forth in U.S. law and practice, by which recognized tribal property rights are subject to diminishment or elimination under the plenary authority reserved to the U.S. Congress for conducting Indian affairs, complies with articles 1 and 27 of the Covenant?**[42]

Reports submitted during that review process documented the US interpretation of the Doctrine of Discovery and how it has manifested itself in the in US law and policy including the "plenary power of Congress." These reports also demonstrated that such discriminatory principles are not in compliance with Articles 1 and 27 of the Covenant. The HRC Concluding Observations on the Second and Third U.S. Reports to the Committee, in 2006, further established the need for the US to respond to these deficiencies in implementing the ICCPR in its Fourth Periodic review:

> 37. The Committee notes with concern that no action has been taken by the State party to address its previous recommendation relating to the extinguishment of aboriginal and

[41] 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.

[42] Human Rights Committee, List of Issues To Be Taken Up in Connection with the Consideration of the Second and Third Periodic Reports of the United States of America, U.N. Doc. CCPR/C/USA/Q/3 (2006)

> Indigenous rights. The Committee, while noting that the guarantees provided by the Fifth amendment apply to the taking of land in situations where treaties concluded between the federal government and Indian tribes apply, is concerned that in other situations, in particular where land was assigned by creating a reservation or is held by reason of long possession and use, tribal property rights can be extinguished on the basis of the plenary authority of Congress for conducting Indian affairs without due process and fair compensation. … Finally, the Committee regrets that it has not received sufficient information on the consequences on the situation of Indigenous Native Hawaiians of Public Law 103-150 apologizing to the Native Hawaiians Peoples for the illegal overthrow of the Kingdom of Hawaii, which resulted in the suppression of the inherent sovereignty of the Hawaiian people. (articles 1, 26 and 27 in conjunction with Article 2, paragraph 3 of the Covenant).
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> **The State party should review its policy towards Indigenous peoples as regards the extinguishment of aboriginal rights on the basis of the plenary power of Congress regarding Indian affairs and grant them the same degree of judicial protection that is available to the non-Indigenous population. It should take further steps in order to secure the rights of all Indigenous peoples under articles 1 and 27 of the Covenant to give them greater influence in decision-making affecting their natural environment and their means of subsistence as well as their own culture.**[43]

Regrettably, the US, in its Fourth Periodic Report, dated December 30, 2011, responded by recounting a selected history of native land occupancy and property rights but failed to heed the recommendations of the Committee in this regard.[44]

In fact, discriminatory doctrines such as the Doctrine of Discovery and its resultant plenary policy are still in full force and effect in the US. Due in large part to its continuing legacy in the US and other countries, the Doctrine of Discovery was the theme of the 11th Session of the UN Permanent Forum on Indigenous Issues.[45] The UNPFII called upon States to "repudiate doctrines that serve as legal and political justification for the dispossession of Indigenous peoples from their lands, their disenfranchisement and the abrogation of their rights." [46]

Although it has shed its original religious justifications for appropriating Indigenous Peoples' lands on the surface, the Doctrine of Discovery continues as a foundational US legal principle which has been employed many times since the initial articulation in the "Marshall Trilogy" of cases (1823-1832). This includes *Tee-Hi-Ton Indians v. United States,* 348 U.S.272 (1955), wherein the US government argued against compensation for a federal taking of Indian timber lands on the basis of the Doctrine of Discovery found in US law. In 2005, in the case *City of Sherrill v. Oneida Indian Nation of New York,*[47] the US Supreme Court cited the doctrine of discovery as law still prevailing in the US: "[u]nder the 'Doctrine of Discovery, fee title to the

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[43] Concluding Observations of the Human Rights Committee on the Second and Third U.S. Reports to the Committee (2006), para 37.
[44] See Fourth Periodic Report, United States of America, December 30, 2011, paras. 684-689
[45] "Doctrine of Discovery: Its continuing impacts on Indigenous Peoples and Redress for Past Conquests (articles 28 and 37 of the UN Declaration on the Rights of Indigenous Peoples)."
[46] UNPFII Report on the eleventh session (7-18 May 2012) E/2012/43-E/C.19/2012/13, Recommendation 4.
[47] 544 U.S. 197

lands occupied by Indians when the colonists arrived became vested in the sovereign — first the discovering European nation and later the original states and the United States."[48]

B) Continuing Legacy Land Dispossession and Treaty Violations: The Allotment Act and the Indian Claims Commission

Land loss for Indigenous Peoples in the US has occurred not only under outright dispossession, as under the Doctrine of Discovery, but through laws enacted under policies of assimilation and genocide.

For example, between 1887 and 1934, under the Dawes Act,[49] land owned by Native Peoples in the US decreased from 138 million acres (560,000 km^2) in 1887 to 48 million acres (190,000 km^2) in 1934. Before 1946, a Tribe had to first seek special legislation waiving the US sovereignty to file a land claim in the US courts. Between 1881 and 1945, of 135 cases filed by 67 tribes under special legislation, 103 were dismissed.[50] Dissatisfaction with the special legislation approach resulted in the passage of the Indian Claims Commission Act of 1946,[51] so that the US could completely and finally dispose of all claims against it. It soon became apparent that the ultimate purpose was to prepare Tribes for complete assimilation and terminate their special status under US law. The Act created the Indian Claims Commission, which had authority to hear and finally determine all Indian claims against the federal government that accrued before August 13, 1946.[52] Most claims brought before the Commission were based on aboriginal or Indian title as well as Treaty rights.

Despite the implicit recognition of equitable claims, the Commission and the Court of Claims interpreted the Act to limit relief to monetary compensation. Lawyers involved in the process, including those purportedly representing the Tribes and Treaty Nation claimants, proceeded on the assumption that the seizures of Tribal and Treaty lands were constitutional exercises of eminent domain, implying that the Indigenous Peoples tribes had, at most, a right to monetary compensation, not return of their lands even if they had been illegally taken. Some tribes, realizing they could compromise their title, withdrew their claims from the process. As stated by Professor Nell Jessup Newton: "The determination that money damages can be the only remedy

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[48] Id. at fn.1, citing *Oneida Indian Nation of N. Y.* v. *County of Oneida,* 414 U. S. 661, 667 (1974) *(Oneida I)*.

[49] Act of February 8, 1887 (24 Stat. 388, Ch. 119, 25 USCA 331), Acts of Forty Ninth Congress, Second Session, 1887, also known as General Allotment Act.

[50] Of the 32 cases in which compensation was awarded, offsets exceeded the award and recovery was zero. Moreover, the US government resisted paying interest on those judgments. In fact, litigation of claims based upon violation of Indian treaties were specifically excluded from the jurisdiction of the Court of Claims, which was created in 1855 to allow citizens to file claims against the United States, and amended in 1963. Act of March 3, 1863, ch. 92, § 9, 12 Stat. 765,767.

[51] 25 U.S.C. §§ 70-70v

[52] The Act (25 U.S.C.§ 70a) created five classes of claims, three of which encompassed land claims:

> (3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any fact cognizable by a court of equity;
>
> (4) claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant; and
>
> (5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity.

for ancient wrongs inevitably shapes the kinds of wrongs that can be remedied. Ironically then, the worst crimes against tribes were the least remediable."[53]

Between 1946 and the termination of the Indian Claims Commission in 1978, 370 claims were filed with the Commission; the US Congress dismissed the Commission with referral of 102 cases to the Court of Claims. Some of these cases remain in litigation.

A just, fair process in the US to address, adjudicate and correct Treaty violations and other land rights abrogations with the full participation and agreement of impacted Indigenous Peoples has never, to date, been established in the US. Cases submitted by the Western Shoshone, and the IITC and Lakota Treaty Council provide examples of specific human rights violations resulting from the Land Claims Commission process.

C) Lack of Protection for the Human Rights to Freedom of Religion and Culture for Indigenous Peoples in US Jurisprudence

The First Amendment to the Constitution of the United States includes the clauses, "Congress shall make no law respecting an establishment of religion" "or prohibiting the free exercise thereof." In practice, the right to freedom of religion has been denied to Indigenous Peoples, and in the few instances where the US government has tried to accommodate Indigenous Peoples' religious practices, these actions have been challenged by corporate and private interests.[54] The US government, as owner/manager of public lands, routinely has acted or has permitted private actions that rendered Indian sacred sites inaccessible and unusable for religious ceremonies. By flooding a valley or a canyon, for example, or by building a road through a high alpine area, the US government has made it impossible in practice for Indigenous Peoples to exercise their religions. In each case, however, a federal court held that such destructive government activity was not an improper burden on the Indigenous Peoples' freedom to exercise their religious beliefs within the guarantees of the First Amendment.[55]

Special Rapporteur Amor took special note of US jurisprudence in this area in his 1999 report, at. Paragraph 56. He noted in particular the case of *Lyng v. Northwest Indian Cemetery Assoc'n*, 485 U.S. 439 (1988), 451-452, involving a road through a sacred area in California. *Lyng* gave a strong message to Indigenous Peoples in the US that they would not receive the same protections of religious freedom as other citizens, insofar as the "compelling interest" requirement would not be accorded to Indigenous Peoples' exercise of their religion in public lands. In that case, a proposed US Forest Service road through lands held sacred by many Northern California tribes was allowed, in spite of the Forest Service and admission that the road would "substantially burden" the spiritual practice, destroying the sanctity of the place.

> **The [US] government does not dispute, and we have no reason to doubt that the logging road building project at issue in this case could have a devastating effect on traditional Indian religious practice. Even if we assume that we should accept the**

[53] Nell Jessup Newton, "Indian Claims in the Courts of the Conqueror" (1992) 41 Am. U.L. Rev. 753 at 784.
[54] See, e.g. *Bear Lodge Multiple Use Ass'n v. Babbitt,* 2 F. Supp. 2d 1448, 1449 n.1 (D. Wyo. 1998), aff'd, 175 F.3d 814 (10th Cir. 1999) and Rayellen Resources, Inc. et al. v. NMCPRC, et. al., No.33,497, NM Sup. Ct. (as discussed in the Mt. Taylor submission, enclosed).
[55] See, e.g. discussion of these cases in George Lynge, "Ensuring the Full Freedom of Religion on Public Lands: Devils Tower and the Protection of Indian Sacred Sites," available online at https://www.bc.edu/dam/files/schools/law/lawreviews/journals/bcealr/27_2/04_TXT.htm

> **Ninth Circuit's prediction, according to which the G-O Road will 'virtually destroy the …Indians' ability to practice their religion,' the Free Exercise Clause only constrains the government from 'prohibiting religion,' not taking actions which may make it more difficult to practice religion, but which have no tendency to coerce individuals into acting contrary to their beliefs. [56]**

The Supreme Court went on to say, "Whatever rights the Indians may have to use the area, however, those rights do not divest the Government of its right to use what is, after all ***its*** land."[57] **(**Emphasis added).

One commentator described the implicit discrimination and violation of human rights in *Lyng*:

> By focusing on the form of impact the challenged government action creates, rather than the impairment of religious exercise, the Court has drawn a line that discriminates against American Indian religious practitioners. As a result of the free exercise analysis developed by the Supreme Court, persons practicing Western religious traditions are protected from even relatively minor burdens on their religious practices, while American Indians are not protected from government actions that essentially destroy entire religious traditions.[58]

In the San Francisco Peaks case discussed in the Navajo Nation Human Rights Commission submission, this line of reasoning was repeated by the Ninth Circuit Court of Appeals.[59] In the US, sacred areas, which are ostensibly protected by a variety of laws and the US Constitution, can be abrogated by lesser interests such as mere programs, policies or overarching goals like economic development. Please see the enclosed submission on San Francisco Peaks, Case L in this Report provides additional information regarding this case.

D) Shortfalls in Current US Laws for the Protection of Indigenous Peoples' Sacred Areas, Religious Practices and Cultural Property

Indigenous Peoples confront a complex set of laws when attempting to assert their basic and inherent human rights to religious freedom, spirituality and culture. Trying to relate multifaceted Indigenous claims respecting sacred areas as well as the various practices, activities, uses and deep spiritual relationships with these areas has proven difficult within the set of rigid institutions and categories of the US legal and political system. The bright line boundaries placed around legal definitions of "religion" and "culture" have proven nearly impossible to cross for Indigenous Peoples. Existing laws are inadequate in addressing and accommodating Indigenous belief, knowledge, spiritual and value systems based on very different world views, understandings and relationships to sacred and spiritual landscapes from that of the dominant society which defines the institutions and writes the laws. This section includes a review of laws specifically enacted to protect Indigenous Peoples' as well as other US laws that Indigenous Peoples have attempted to use, often without success.

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[56] Id. at 452.
[57] Id.
[58] Scott Hardt, Comment, "The Sacred Public Lands: Improper Line Drawing in the Supreme Court's Free Exercise Analysis," 60 U.Colo.L.Rev. 601, 657 (1989)
[59] *Navajo Nation v. U.S. Forest Serv.*, 479 F.3d 1024, 1025-26 (9th Cir. 2007).

The 1978 American Indian Religious Freedom Act (AIRFA), (Pub.L.95-341, 92 Stat. 469, 42 U.S.C. § 1996), reviewed in detail by Special Rapporteur Amor, has proven to be ineffectual as a means of substantive protection for Indigenous Peoples. Suzan Harjo, President of The Morning Star Institute described the manner in which AIRFA was curtailed at its inception in her testimony before the Special Rapporteur on the Rights of Indigenous Peoples in 2012:

> [W]hen the U.S. Congress was enacting the American Indian Religious Freedom Act (P.L.95-341, August 11, 1978), the U.S. Agriculture Department and its Forest Service were allowing a logging road to cross a Native ceremonial area in Northern California and did not want AIRFA to create a cause of action for the Native religious practitioners to defend the sacred place. USDA and FS officials approached the Chairman of the House of Representatives Agriculture Committee and asked him to carry their water, which he did by threatening to kill the bill, unless the Interior Committee Chairman stated that AIRFA had no teeth to protect Native sacred sites; and the Interior Chairman made that statement and AIRFA passed and was signed into law.
>
> Ten years later when the resultant litigation reached the U.S. Supreme Court, [the Lyng case] it cited that House floor colloquy as evidence that AIRFA was not a cause of action to protect Native American sacred places and declared that the U.S. Constitution's 1st Amendment freedom of religion clauses do not provide a right of action for sacred places; the high court further stated that, 'if Congress wants one, it would have to enact a special statute for that purpose. Congress has not enacted such a statute and no Administration has asked it to do so.'[60]

In response to another well-known case denying religious freedom protection, *Employment Division, Department of Human Resources v. Smith*,[61] Congress enacted the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. §§ 2000bb to 2000bb-4. The Act was supposed to reverse the *Smith* decision, restoring a standard whereby the government cannot burden a person's exercise of religion even if the burden results from a rule of general applicability unless: (1) that burden is "in furtherance of a compelling government interest" and (2) is the "least restrictive" means of furthering that compelling interest. The effectiveness of this Act was also curtailed in a case that made it inapplicable to state actions, so that it applies only to US government actions. In the San Francisco Peaks case it proved ineffectual as well.[62]

In 1990, in response to years of lobbying and pressure from Indigenous Peoples and their representatives, the US Congress passed the Native American Graves Protection and Repatriation Act, 25 U.S.C. 3001 et seq. (Nov. 16, 1990). It prohibits trade, transport or sale of Native American human remains and directs federal agencies and museums to take inventory of any Native American or Native Hawaiian remains and, if identifiable, the agency or museum is to return them to the tribal descendants. Enforcement of the Act has been problematic, to say the least. Indigenous Peoples have responded strongly and demanded legal protection against

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[60] Statement of Suzan Shown Harjo, President, The Morning Star Institute, on the significance of the United Nations Declaration on the Rights of Indigenous Peoples in the Areas of Language, Culture and Sacred Sites, for the Conference and Consultation with the United Nations Special Rapporteur on the Rights of Indigenous Peoples, university of Arizona Rogers College of Law, Tucson, Arizona, April 27, 2012, p. 1

[61] Smith, *supra*.

[62] See discussion on origins of RFRA in Joshua A. Edwards, *Yellow Snow on Sacred Sites: A Failed Application of the Religious Freedom Restoration Act*, 34 Amer. Ind. L. Rev. 1, pp. 151-169 (2010).

desecration of sacred grounds and human remains. Suzan Harjo's testimony before Special Rapporteur Anaya also addressed the US failings in implementation of NAGPRA:

> This sorry record is documented by the U.S. Government Accountability Office in its July 2010 Report, the title of which reveals the GAO's conclusion, "Native American Graves Protection and Repatriation Act: After Almost 20 Years, Key Federal Agencies Still Have Not Fully Complied with the Act." The GAO Report details federal agencies' high rates of failures to provide inventory notices, consult with tribes or actually repatriate human remains or funerary items. For more than a decade, the national NAGPRA office would not provide inventories and other material to Native Nations, particularly with respect to the "culturally unidentifiable human remains," most of which were identifiable by tribal researchers with access to the relevant documents that were being withheld.
>
> The NAGPRA rule on culturally unidentified human remains and associated funerary objects …mandates return of human remains, but purports to allow museums and other holding repositories to keep funerary objects associated with those remains, thus separating the deceased person from the items he or she was buried with, which are the property of the deceased in cultures and laws throughout the world. What the NAGPRA office has done is to tell Native Peoples that we can rebury grandma, but her moccasins, clothes, jewelry and other precious items that should be reburied with her now belong to the repositories that received the contraband directly or indirectly from the very thieves who robbed her grave.[63]

In May 1996, President Clinton signed Executive Order 13007: Indian Sacred Sites. This Executive Order directs federal agencies to protect American Indian sacred sites, including to "accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners" on federal land. The order also directs agencies to "avoid adversely affecting the physical integrity of such sacred sites" by providing notice of proposed activities that may impact sacred sites identified by a tribe or authorized individual representing an Indigenous religion. However, similar to AIRFA, the US government has limited its applicability and impact. Section 4 of the Order states:

> This order is intended only to improve the internal management of the executive branch and is not intended to, nor does it, create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity by any party against the United States, its agencies officers, or any person.[64]

E) "Consultation" Under the US Legal Framework does not include Free, Prior and Informed Consent

It is consistently clear that the range of supposed protections for sacred areas in US law and policy do not afford Indigenous Peoples the right of free prior and informed consent when it comes to activities that threaten their sacred areas and therefore do not ensure their rights under Articles 18 and 27 of the ICCPR.

[63] Ibid at pp.4-5. This rule, adopted on May 12, 2010, is codified at 43 CFR 10.11(c)(4)
[64] 61 Fed. Reg. 26,771 (1996).

US limitation relegation of the right to Free Prior and Informed Consent to "a process of consultation" is discussed in section E of this Report. Despite US claims to the contrary, including in its current report to the Committee and response to the Committee's question re: FPIC in paragraph 27, implementation of Executive Order 13175 on Consultation and Coordination with Tribal Governments has not effectuated the provision of substantive protections to Indigenous Peoples required to ensure effective protection of Sacred Areas. While it mandates agencies to put in place plans and processes for input from federally recognized tribes where they are impacted by policy development, it also contains limitations: the parties are limited to federally recognized tribes and federal agencies (who may or may not have appropriate plans in place); the role of tribes in a consultation process is limited to "timely input;" and consultation is limited to policy development.

F) Other Relevant US Laws Continue the Pattern

Beyond US legislation directly related to Indigenous Peoples, other laws are designed to preserve and protect historic sites in general. While some Indigenous sacred areas and sites have been designated as traditional cultural properties under these laws at the US federal and state level, they have consistently been challenged by private interests. Consultation required under these laws has also fallen far short of the standard provided by Free Prior and Informed Consent.

These include the National Historic Preservation Act, the National Environmental Protection Act, the Archaeological Resources Protection Act, the Endangered Species Act, the Clean Water Act, and the Clean Air Act. [65]

The National Historic Preservation Act (NHPA)[66] provides some measure of protection for areas of historical significance on public lands, and the National Environmental Protection Act (NEPA)[67] provides a process for evaluation of potential adverse effects on public lands when a federal undertaking is proposed. NHPA Section 106 requires agencies to consult with potentially affected parties prior to commencing a federal "undertaking" that may affect National Register-eligible property and to consider the undertaking's effect on such property. With regard to sacred sites and areas on public lands, Section 106 require that federal agencies, including the Bureau of Land Management, consult with Indian tribes and Native Hawaiian organizations prior to granting permits for activities that may affect properties of traditional religious or cultural significance to Indigenous Peoples.[68]

Like NHPA's Section 106, NEPA requires federal agencies to consult with parties that may be affected by proposed federal projects, except that NEPA applies to the environment rather than historic sites. NEPA requires agencies to evaluate environmental and social impacts, and this assessment includes analysis of "ecological . . . aesthetic, historic, cultural, economic, social, or health [impacts] whether direct, indirect, or cumulative."[69]

As noted earlier in this Report, a major shortcoming in all of these Acts is that they apply only to federally recognized Tribes, thereby leaving out protection for many Indigenous Peoples in the

[65] The US includes some of these laws in its response to Issue No. 27 presented by the Committee. For the purposes of this Report, only the first two of these laws are discussed in detail. The submissions refer to all of these laws.
[66] 16 U.S.C. §§ 470 to 470x-6, 1966.
[67] 42 U.S.C. §§ 4321–4370 (2006).
[68] 42 U.S.C.§ 470a(d)(6)(B)(2006) and 36 C.F.R. § 800.2(c)(2) (2011).
[69] 40 C.F.R. § 1508.8 (1977).

US. Moreover, Indigenous Peoples and expert commentators have expressed dismay at the lack of protections these two acts in particular offer for Indigenous sacred sites:

> Critics have therefore denounced NHPA as "mere window dressing for Native Americans trying to save their sacred sites" because it includes "no provisions which Native Americans can use to stop the imminent destruction of their land and sacred sites, or to force the abandonment of a project which threatens significant historic property."
>
> Likewise, critics point out that NEPA does not require agencies to adopt the least environmentally or culturally harmful alternative. … Therefore, although challenges to the sufficiency of an agency's environmental impact assessment may lead a court to invalidate agency actions all that is required is a thorough reevaluation of environmental impacts before the challenged actions are able to resume.[70]

In a very current example, the US government is in effect forcing consent of Tribal governments for the Keystone XL Pipeline project (discussed in Section II D of this Report). Under NHPA, section 106, the consulting agency is responsible to determine what sorts of parties must sign a Programmatic Agreement (PA), and a permit for the project will be subject to any conditions in the PA. If Tribes do not sign on as concurring parties, they will not have standing to object during the time when the PA is carried out. The right to object under this provision is reserved for signatory parties and concurring parties, so Tribes are being forced to sign on as concurring parties or risk losing all rights to address compliance with the PA including the protection of sacred areas and dispute resolution. Yet, by signing on to the PA, they would indicate their consent to its terms, which were developed without their consultation.[71]

G) Conclusion: A Way Forward

It may be helpful for the Committee, and the US, to recall that the US has been provided with the elements for a very different framework in order to move past the historic pattern of injustice, disenfranchisement and discrimination which runs through the history of US law and jurisprudence regarding Indigenous Peoples. The UN Rapporteur on the Rights of Indigenous Peoples recommended the following way forward for the United States:

> 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.[72]

[70] Kinnison, A. J. (2011). Indigenous Consent: Rethinking U.S. Consultation Policies in Light of the U.N. Declaration on the Rights of Indigenous Peoples. *Arizona Law Review*, 1301-1332.
[71] This information was provided by Jennifer Baker, Contributing Attorney
[72] Conclusions and recommendations, Report of the Special Rapporteur on the Rights of Indigenous Peoples, The situation of Indigenous Peoples in the Unites States of America, 30 August 2012, A/HRC/21/47/Add.1, para 90.

5. Proposed Questions for the United States

We reiterate and the support the very relevant question already presented to the US by the Committee in its paragraph 27 [73]and urge the Committee to revisit this question in light of the information presented in this Indigenous Peoples Consolidated Alternative Report:

1) **Please provide 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.**

In addition we present the following question as central to the issues under discussion in this report and direct relevance to the Committee in its review of the United States:

2) **How does the United States substantiate its claim to legal title to Indigenous Peoples' ancestral and lands, waters and Sacred Areas, including those recognized by ratified Treaties or which are or have been subject to international decolonization processes? Why are many of these lands, waters and sacred areas not considered by the US to be under Indigenous Peoples current jurisdiction and control? How and when was title or jurisdiction legally transferred to the US? What was the legal process used for transfer of Indigenous traditional lands to "third parties?"**

1. Proposed Recommendations for the Committee regarding the United States

1. **That the US implement the UN Declaration on the Rights of Indigenous Peoples fully and without qualification, and use it as a guideline for interpretation and implementation of the ICCPR regarding Indigenous Peoples including those who are not "federally recognized";**

2. **That the US bring its national policies and laws into conformity with the provisions of the ICCPR, ICERD and UNDRIP regarding Self-determination, Right to Lands and Resources, Subsistence and Free Prior and Informed Consent;**

3. **That the US implement laws and policies that fully respect freedom of religious practice, culture and spiritual belief for Indigenous Peoples in accordance with their international human rights obligations;**

4. **That the US implement laws that enforce an absolute legal prohibition of the desecration of sacred areas, provide provisions for their protection, and uphold the rights of the Indigenous Peoples concerned to protect, manage and control them in accordance with their religious beliefs, teachings and protocols;**

5. **That the US implement a just, bi-lateral, fully participatory processes for redress and restitution of rights affirmed in Treaties with respect for their original spirit and intent as understood and interpreted by the Indigenous Peoples and in**

[73] List of issues in relation to the fourth periodic report of the United States of America (CCPR/C/USA/4 and Corr. 1), adopted by the Committee at its 107th session (11–28 March 2013), April 29, 2013, para 27.

accordance with the framework contained in the UN Declaration on the Rights of Indigenous Peoples;

6. **That the US establish a national-level body for oversight and implementation of the US human rights obligations, including the provisions of International Human Rights Treaties and Declarations, Treaty Body recommendations and Nation-to Nation Treaties with Indigenous Peoples, with the full and effective participation of affected communities, Indigenous Peoples and Nations.**

Section II: Case Submissions (in alphabetical order)

Case A: Amend the American Indian Religious Freedom Act and the Haskell Wetlands Walkers Student Organization

AmendAIRFA.org/Contact: Millicent Pepion, Founding member and Petition Oversight Coordinator/ Admin@AmendAIRFA.org

Issue: To Protect a Sacred Place from future highway construction projects

The sacred Wakarusa Wetlands are located just south of Haskell Indian Nations University's campus in Lawrence, Kansas. Since Haskell's inception, as an off reservation Indian boarding school, the school has accommodated students from over a 100 different Nations each year. In its earliest years Haskell students were forced to forgo their religious practices and languages and to learn the "Christian way". The Wakarusa Wetlands has always served as a spiritual sanctuary for Haskell students to pray, perform ceremonies, practice their languages, harvest traditional medicinal plants, and meditate.

The area was the original homeland of the Kaw Indigenous Nation. The Kaw were forcibly removed to "Indian Country" (modern day Oklahoma) by the US government under the Indian removal Act in the early 1800's. The Haskell students of today also hold this place to be sacred in their honor, as well as in honor of the Indian students who were forced to attend Haskell in the previous two centuries, many whom are still missing from that time period and are believed to be buried in the wetlands.

These wetlands are not just sacred to humans either. There are over 435 different plants and shrubs that have been documented and studied by Haskell students over the years. In addition, over 235 different migratory birds counted that have passed through the wetlands annually since the late 1980's. Finally, because these wetlands are clay based they are able to absorb and store large quantities of water produced by floods when the Kansas River or Wakarusa River spill over. This area is sacred to people, plants, animals, and water systems.

Sadly, in October of 2013 these sacred wetlands will be destroyed in order to make way for a bypass freeway local lawmakers feel is needed to accommodate the growing population. This comes after a twenty year court battle with the City of Lawrence, Douglas County, and the Kansas Department of Transportation put forth by Haskell students in an effort stop the freeway from being built.

This is a spiritual issue. AmendAIRFA.org members believe that Congress needs to address specific legislation to protect sacred places in an inclusive manner for all people whom those places affect. We declare that mutual respect and dignity be given to Native peoples in concerns that affect our home communities. We respectfully request that the U.S. government adhere to our cultural, social, medical, environmental, and spiritual interests of which AmendAIRFA.org members seeks to protect.

Haskell wetlands walkers evolve in to AmendAIRFA.org pioneers

Last year, a group of Haskell students, and students from other universities, walked from the Wakarusa Wetlands to Washington DC to raise awareness about the need to protect the Wakarusa

Wetlands, and all sacred places across Indian Country. Sadly, it was during an election year and no one from Congress would come near this issue. With construction of the freeway underway those same students feel now is a good time to bring this issue back up with Congress to protect future scared places form being desecrated.

The students have in possession a draft piece of legislation that can amend the American Indian Religious Freedom Act to "provide a right of action for the protection of Native American sacred places." The spirit of the United Nations Declaration of the Rights of Indigenous Peoples encourages Native communities to stand up for what they believe in. We believe that a balance between Native science and Western science can be achieved for the betterment of all life.

We believe now is the time to amend the American Indian Religious Freedom Act to include the protection of Native American sacred places. Our past may be lost but our future is continuing on and will continue on forever. Holy sites such as the Wakarusa Wetlands should be saved for future generations of all peoples, plants, animals, and water systems to thrive.

Case B: The Sacred Black Hills (Paha Sapa) And The 1868 Ft. Laramie Treaty,

Submission by the Birgil Kills Straight (bkillsstraight@yahoo.com), Lakota Treaty Council, and the International Indian Treaty Council: Bill Means (bill.means73@live.com) and Danika Littlechild (danika@treatycouncil.org)

The sacred meaning and significance of the Black Hills (the Paha Sapa) to the Lakota can best be expressed in the traditional understandings and teachings of the elders. Following is the explanation of their sacredness presented to IITC for this submission by Lakota elder Birgil Kills Straight on August 27th, 2013, on behalf of the Lakota Treaty Council:

> "What I have to say about the Black Hills will be easy but I will make it short. This is a part of Lakota Creation Story:
>
> *In the beginning, inyan (stone) gave life to wi (sun); we have winyan (woman) and everything that we see on earth today, came from that woman. We call her the "sacred life giver." In the First World it is the Spirit World. The Second World is "Wahutekan Oyate makoce" (Root Nation world) where our spirits were in the vegetation when no other form of life existed. In the Third World, we lived as "Wahu Topa oyate" (Four-legged Nations), we were the buffalo people. Today, we live in the Fourth World which is the "Wahu Nupa makoce" (Two Legged Nations/world). After this world, we will return to the Fifth World (the Spirit World) where we came from.*
>
> *When the Black Hills first appeared, it is within the Sun Dance Sea or some say Pierre Sea when water extended from the Arctic to the Gulf of Mexico. We came out of the Black Hills, from a hole in the ground, as Buffalo people in the Third World. We as Lakota originated in the Black Hills. Even among pre-Christian white people, the Black Hills is the entry way into heaven. For these and other reasons, Lakota call the Black Hills Sacred.*"

The Black Hills (He' Sapa) are the sacred place of Creation for the Lakota. The protection of the Black Hills is an ancient, inherent and sacred responsibility for the Lakota, and was the central component of the Treaty the Lakota Nation made with the US settler government in 1868 known as the Ft. Laramie Treaty. Bills Means, Oglala Lakota, IITC Board member and co-founder

explains that "the Black Hills means as much to the Lakota as the Vatican means to Roman Catholics or Jerusalem means to Christians, Muslims and Jews."

The sacred Black were confiscated by in response to the discovery of gold only 6 years after they were recognized by the United States ratification of the Fort Laramie Treaty with the Lakota Nation as belonging to the Lakota (Sioux) in perpetuity.

In his Final Report, the Special Rapporteur on Treaties, Agreements and other constructive arrangements between States and Indigenous Peoples Miguel Alfonso Martinez found the following with regard to "obvious and serious violations of the legal obligations undertaken by State parties":[74]

> "Probably the most blatant case in point is the United States federal Government's taking of the Black Hills (in the present day state of South Dakota) from the Sioux Nation during the final quarter of the nineteenth century.
>
> The lands which included the Black Hills had been reserved for the Indigenous nation under provisions of the 1868 Fort Laramie Treaty. It is worth noting that in the course of the litigation prompted by this action, the Indian Claims Commission declared that "A more ripe and rank case of dishonorable dealing will never, in all probability, be found in our history" and that both the Court of Claims, in 1979, and the Supreme Court of that country decided that the United States Government had unconstitutionally taken the Black Hills in violation of the United States Constitution.
>
> However, United States legislation empowers Congress, as the trustee over Indian lands, to dispose of the said property including its transfer to the United States 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. The Indigenous party, interested not in money but in the recovery of lands possessing a very special spiritual value for the Sioux, has refused to accept the monies, which remain undistributed in the United States Treasury, according to the information available to the Special Rapporteur."[75]

In 1980, the United States Supreme Court found 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…" [76] also noting the finding of the Court of Claims that "a more ripe and rank case of dishonorable dealing will never, in all probability, be found in the history of our nation."[77]

Despite clear acknowledgement of illegal wrongdoing by the US Supreme Court over 30 years ago, these illegally-confiscated Treaty lands have not been returned, and gold mining continues in

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[74] Study on treaties, agreements and other constructive arrangements between States and Indigenous populations, Final report by Miguel Alfonso Martínez, Special Rapporteur, UN Doc. E/CN.4/Sub.2/1999/20, 22 June 1999, paragraph 275.
[75] Id, at para. 276
[76] 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).
[77] Ibid.

the Sacred Black Hills in violation of the Lakota Nations religious practice, cultural rights and Treaty recognized right to Consent.

Case C: Chickaloon Native Village

Contact: Lisa Wade, Council Member and Health & Social Services Director P.O. Box 1105 Chickaloon Village Traditional Council

There are three primary sacred sites presently impacted by coal mining activities of three distinct corporations within our sacred, traditional and customary use areas.[78]

The first is at *Tsidek'etna'* 'Grandmother's Place Creek' or Moose Creek and *Chidaq'ashla Bena* 'Lake of Grandmother's Little Place' or Wishbone Hill. The second area is Ts'es *Taci'ilaexde* 'Where Fish Run Among Rocks' or Eska Creek in Sutton. The third area is *Hnu Ch'k'el'iht* 'where we do work' or Castle Mountain in Chickaloon. All of these sacred sites are within the Matanuska River watershed in southcentral Alaska.

Our Tribal identity is intrinsically bound to, and inseparable from, our relationship with the areas impacted by these coal leases including the water, the animals, plants, air, soil and sun. Hunting, fishing, picking berries, and other cultural and traditional activities are not just techniques for surviving the harsh climates of the north, they are part of a spiritual, symbiotic relationship that is our Indigenous way of life. They are ceremony for us and only possible with abundant clean water and healthy habitat for the moose and salmon to thrive. These are sensitive areas where traditional and customary activities have taken place for thousands of years. These include potlatch hunting and gathering, rights of passage, and burial places of our ancestors.

Presently, two of the sacred areas are gated off restricting access to Tribal citizens. Exploration activities, vast roadways are being constructed through berry picking areas and cultural resource areas without consultation or consent of Chickaloon Native Village. Drilling activities are taking place during the prime hunting season even after Riversdale Alaska indicated that they would not be drilling at this crucial time for our hunters. Rites of passage for our young hunters are being delayed or they are being rerouted to less familiar areas putting our young men at risk.

Three coal leases cover more than 20,000 acres of land along the base of the Talkeetna Mountains paralleling the Matanuska River watershed in south central Alaska approximately one hour northeast of Anchorage, Alaska's largest city. These leases are immediately adjacent to numerous residential communities including our low income Tribal housing. Also impacted is our Tribal school, traditional and cultural use hunting and gathering areas, and salmon streams for which the Tribe has invested more than $1,000,000 and thousands of hours to restore after past coal mining activities. Those past activities extend to the early 1900s, when the discovery of coal brought hundreds of miners with one of the main beneficiaries being the US Navy.[79]

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[78] In April of 2012, Professor James Anaya, the United Nations Special Rapporteur on the Rights of Indigenous Peoples visited Alaska and Chickaloon Native Village to hear testimony from Tribal citizens and Council Members describing these issues. A special Communication to the UN Special Rapporteur on the Rights of Indigenous Peoples was introduced. This Communication provides more detail and should be read along with this submission. See: **Chickaloon Village Tribal Council Communication to the UN Special Rapporteur on the Rights of Indigenous Peoples, Mr. James Anaya, dated April 19, 2012, Found online at: http://cdn6.iitc.org/wp-content/uploads/12.4.19-CVTC-Coverletter-and-communication-to-SR-Anaya-web2.pdf**

[79] *Ibid*., at pages 1-5

Threats to our way of life are cumulative in nature as approximately 20,000 acres of land in our customary and traditional use areas have been leased for coal exploration and extraction. Damages to this vast land base could be reduced to barren rubble as some previous coal mine sites in the area already demonstrate. These are sensitive areas where traditional and customary activities have taken place for thousands of years. These include potlatch hunting and gathering, rites of passage, and burial places of our ancestors.

Threats to human health are numerous. Already Tribal citizens are experiencing increased rates of stress, depression, and anxiety over access to sacred sites being denied, over the community divide created by coal mine politics created by Usibelli Coal Mine Inc., Riversdale Alaska, and Ranger Alaska, and racial discrimination towards Tribal citizens voicing their concerns.

Another threat to our sacred sites is the failure of the State of Alaska as well as the U.S. Federal government to protect our sovereign rights and interests, and the failure of consultation guaranteed by the U.S. Federal government[80], based upon the government-to-government relationship, the self- determination of recognized Indian Tribes, and the Trust Relationship.

With Statehood, Alaska received title to large tracts of Chickaloon Native Village traditional lands in the heart of their community. The Alaska Mental Health Trust Authority (AMHTA) received surface and subsurface title to much of these lands, including lands near the Native Villages of Chickaloon and Tyonek, as well as surrounding Wishbone Hill. Although the enabling statute promised not to interfere with pre-existing rights and title, Alaska Native rights including subsistence, water and occupancy have not be given any consideration by the AMHTA or DNR. With the passing of the Alaska Native Claims Settlement Act (ANCSA), Chickaloon Native Village was left completely stripped of aboriginal title from all its traditional lands. Chickaloon Native Village was left to the mercy of the State of Alaska and AMHTA, neither of which even recognized Chickaloon Native Village's existence or right of self-determination.[81]

As such, the federal construct of consultation, limited as it is, and the requirements of "good faith consultations," the "government to government relationship" and the "trust relationship" are apparently not required of Alaska – in spite of the fact that Alaska's authority to regulate coal mining is delegated from the federal government. Since Alaska does not recognize the existence of Chickaloon Native Village, it refuses to consult, or exercise even a minimal duty of care. By delegating power to Alaska, the United States federal government has virtually washed its hands of its trust responsibility to Tribes.

[80] *Ibid.* at pages 7-9, in reference to the requirement for Free, Prior and Informed Consent under the UN Declaration on the Rights of Indigenous Peoples; Executive Order 13175 (2000) "Consultation and Coordination with Tribal Governments"; Section 106 of the National Historic Preservation Act (NHPA), 16 U.S.C. Section 470f requiring federal agencies to consult with any Indian Tribe attaching religious or cultural significance to historic properties.
[81] *Ibid.* at pages 1-2

Case D: Gwich'in Nation – Native Village of Venetie Tribal Government

Contact: Faith Gemmill, 456 N.Alaska St. Palmer, AK 99645 Tel: 907-750-0188 Email: redoil1@acsalaska.net

Located in the Northeast Corner of Alaska[82], is the 1002 area: Coastal Plain of the Arctic National Wildlife Refuge, "*Iizhik Gwats'an Gwandaii Goodlit,*" understood by the Gwich'in Nation as *The Sacred Place Where Life Begins*.

The Gwich'in Nation is composed of fifteen villages strategically located along the migratory route of the Porcupine Caribou Herd in Northeast Alaska and Northwest Canada. The relationship with the Caribou has existed since time began. For the Gwich'in, a long-term decline in the herd's population or a major change in its migration would be devastating. The Porcupine Caribou Herd provides the Gwich'in Nation with their food security and represents 80% of their traditional diet. For thousands of years, the Gwich'in have depended on the animal for Physical, Cultural, Spiritual, Social and Economic means. The Gwich'in creation story tells of a time when animals had human characteristics, then there was a split between the animal and human...humans came to be. In the story it is said that Gwich'in came from the Caribou. There was an agreement between the two, from that time on the Caribou would retain a part of the Gwich'in heart and the Gwich'in would retain a part of the Caribou heart. In a spiritual sense the Gwich'in and Caribou are one, if there is harm to one, the other will also be harmed. Reliance on traditional and customary use (now termed "subsistence") of the Porcupine Caribou Herd is a matter of survival. Beyond the importance of our basic needs, the caribou is central to our traditional spirituality. Our songs and dances tell of the relationship that we have to the caribou. The caribou is a part of us.

When the herd nears a village on its annual migration to the Coastal Plain, the entire Gwich'in community prepares to harvest food for the year. During the harvest, the Caribou are also central to the social fabric of the Gwich'in. The Gwich'in use their vast store of traditional knowledge and take the opportunity to pass on that knowledge along with Gwich'in cultural values to the younger generation.

This is the time when the life lessons are taught to the younger generation of the Gwich'in people. The women and grandmothers teach the younger women and girls very important traditional skills. The girls are taught the proper names of the animal parts and proper methods of taking care of the meat. They also learn the techniques for tanning the hides for clothing, what part of the animal is used for certain tools, such as needles, hooks, tanning tools and sinew. The elder women tell the younger ones of the family lineage and ties. It is an important time of learning the functions of the women of the tribe.

[82] See Special Attachments: Map

The men and grandfathers teach the hunting skills needed: the methods of stalking and taking the animal, the value of sharing what is taken, the names and memory of the hunting lands and lessons of timing. The young are taught to handle the kill with great care and respect, and to give proper thanks to the Creator for the gift. This teaches the young men of their responsibility to the tribe as a provider.

The connection between the Gwich'in and the caribou continues today, as the Porcupine Caribou Herd continues to provide the Gwich'in with basic necessities.

Today, Gwich'in community members continue to rely on the caribou to meet both their subsistence and spiritual needs. The hunting and distribution of caribou meat also enhances their social interaction and cultural expression. Caribou skins are used for winter boots, slippers, purses, bags, and other items of Native dress. Bones continue to be used as tools. Songs, stories, and dances, old and new, reverberate around the caribou further strengthening Gwich'in spiritual ties to the Caribou.

There is also a spiritual belief of the people, the elders stated that the Gwich'in must seek protection of the calving and post calving grounds of the Porcupine Caribou Herd, they must "Do It In A Good Way" and they will be successful. They were also told by the elders that as they go forward protecting The Sacred Place Where Life Begins: 1002 area, Coastal Plain of the Arctic National Wildlife Refuge, they must relay that this fight is for all humanity. If ever the area is opened up for development it will begin a cycle of destruction for all humanity. In essence the Gwich'in struggle is for all life to continue.

In the 1950s, post-war construction and accelerating resource development across Alaska raised concerns about the potential loss of this region's special natural values. In 1952-53, government scientists conducted a comprehensive survey of potential conservation areas in Alaska. Their report, "The Last Great Wilderness," identified the undisturbed northeast corner of Alaska as the best opportunity for protection. Two major consequences followed:

1. In 1957, Secretary of Interior Fred Seaton of the Eisenhower Administration revoked the previous military withdrawal on 20 million acres of the North Slope of Alaska to make it available for commercial oil and gas leasing. This was in addition to the previously established 23 million acre Naval Petroleum Reserve.

2. In 1960, Secretary Seaton designated 8.9 million acres of coastal plain and mountains of northeast Alaska as the Arctic National Wildlife Range to protect its "unique wildlife, wilderness and recreation values."

These two actions laid out a general land use pattern for northern Alaska by setting aside about 43 million acres for multiple land uses including oil and gas development, while the northeastern corner was protected for wildlife and wilderness conservation.

The U.S. House of Representatives passed legislation in 1978 and 1979 designating the entire original Range, including the now contested arctic coastal tundra, as Wilderness. The Senate's version, however, required studies of wildlife and petroleum resources, and the potential impacts of oil and gas development within the northern part of the Range. It postponed the decision to authorize oil and gas development or Wilderness designation. Differences between the House and Senate were not worked out by a conference committee in the usual manner. Instead, following

the 1980 election, the House accepted the Senate bill and President Carter signed Alaska National Interest Lands Conservation Act (ANILCA) into law. ANILCA doubled the size of the Range, renamed it the Arctic National Wildlife Refuge, and designated most of the original Range as Wilderness.

The part of the original Range that was not designated Wilderness was addressed in Section 1002 of ANILCA, and is now referred to as the "1002 Area." Section 1002 outlined additional information that would be needed before Congress could designate the area as Wilderness, or permit oil development. Studies of the 1002 Area included a comprehensive inventory and assessment of the fish and wildlife resources, an analysis of potential impacts of oil and gas exploration and development on those resources, and a delineation of the extent and amount of potential petroleum resources. **In Section 1003 of ANILCA, Congress specifically stated that the "production of oil and gas from the Arctic National Wildlife Refuge is prohibited and no leasing or other development leading to production of oil and gas from the [Refuge] shall be undertaken until authorized by an act of Congress."**

Since then, the 1002 area of the Arctic National Wildlife Refuge has been a hot button issue, highly controversial when a bill comes forward in the House of Representatives or the US Senate. The Gwich'in seek permanent protection of the 1002 are of the Arctic National Wildlife Refuge. This political position was affirmed at the Gwich'in Nintsyaa Gathering in 1988, and re-affirmed at the most recent Gwich'in Gathering in 2012 by resolution:

NOW THEREFORE BE IT RESOLVED: That the United States President and Congress recognize the rights of the Gwich'in People to continue to live our way of life by prohibiting development in the calving and post-calving grounds of the Porcupine Caribou Herd; and

BE IT FURTHER RESOLVED: That the 1002 area of the Arctic National Wildlife Refuge be made Wilderness to protect the sacred birthplace of the caribou.

Every year there is an effort in the State of Alaska or in the US Congress to access the Coastal Plain of the Arctic National Wildlife Refuges by pro-drilling forces. The most recent effort is by Alaska Governor Sean Parnell who on May of 2013 escalated his fight with the Obama administration over potential oil drilling in the Arctic National Wildlife Refuge by formally submitting a plan to conduct seismic research in the region.[83]

No Free Prior and Informed consent has been ensured in the case of the Gwich'in and The Arctic National Wildlife Refuge. As cited above, the laws that govern the land now rest in an act of the United States Congress to either open the area to oil and gas development or protect it permanently as wilderness. The Gwich'in have consistently called upon the US to affirm permanent protection, despite this, there is always new pressure to gain access to the 1002 area of the coastal plain of the Arctic National Wildlife Refuge.

[83] See: http://www.adn.com/2013/05/20/2909179/state-pushes-offer-to-help-pay.html See also: http://www.adn.com/2010/12/06/1591148/battle-over-anwr-begins-heating.html

Case E: Gila River – Arizona Freeway (South Mountain Loop 202)

Gila River Alliance for a Clean Environment (GRACE) Submission on the Issue of the Arizona Freeway (South Mountain Loop 202) Through Sacred Mountains that would cause Major and Disparate Cultural Impacts to the Gila River Indian Community (GRIC) Tribal Members of Arizona and Violate their Rights to Self-Determination, to Maintain their Distinct Cultural Identities and Connections with their Traditional Lands, and their Free Prior and Informed Consent.

> ***As an Akimel O'odham woman, I regard Muhadeg (South Mountain) as a place of spiritual significance to the O'odham tribes. The mountain is central to the O'odham creation story and continues to be a place to hold ceremonies by and for the O'odham people. The mountain is also sacred to us because of the plant life we use for medicinal and ceremonial purposes and also because of the wildlife we hunt to sustain ourselves. The construction of this freeway would greatly harm the wellbeing of the mountain and therefore will bring harm to the O'odham…. Also, as an advocate for my children, I wish to state my opposition to the Loop 202 expansion, aka, the South Mountain Freeway as I see it as a threat to their religious freedoms being that Muhadag is considered our most valued place of worship and must be protected for our future generations.***
>
> -Testimony by Renee Jackson of Akimel O'odham

The Gila River Alliance for a Clean Environment[84] (GRACE) is a grassroots organization of the Akimel O'odham[85] (River People) and Maricopa[86] (Pee Posh) Indigenous Peoples of the Gila River Indian Community (GRIC). Founded in 2002, it advocates for the protection of the environment and the sacred and cultural sites of the GRIC and its Peoples. Established in 1859 as the first reservation in part of what later became Arizona in 1912 and located 17 miles south of downtown Phoenix, the GRIC covers 372,000 acres and is the seventh largest federally recognized reservation in Arizona.[87]

Located in the immediate exterior of the north end of the GRIC on city park preservation land,[88] the Ma Ha Tauk, Gila, and Guadalupe mountain ranges, together popularly known as the South Mountain, "figures prominently in oral traditions of both the Akimel O'Odham (River People)

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[84] GRACE Contact: Lori Riddle; P.O. Box 11217; Bapchule, AZ 85121; 520-610-3405; contaminatedinaz@yahoo.com.

[85] The Akimel O'odham are native to central and southern Arizona and are descendants of the Hohokam, whose artifacts have been dated as far back as 10,000 years ago. (The Gila River Indian Community, History: the Gila River, http://www.gilariver.org/index.php/about-tribe/profile/history (last visited July 6, 2013)).

[86] The Maricopa are a Yuman tribal people and started migrating from their lower Colorado River area homes in the mid-1700s. (The Gila River Indian Community, History: the Gila River, http://www.gilariver.org/index.php/about-tribe/profile/history.

[87] ADOT, South Mountain Study Team, *Chapter 2 Gila River Indian Community Coordination* http://www.azdot.gov/south-mountain-loop-202-docs/eis/chapter2/chapter2.pdf (last visited July 6, 2013).

[88] The preservation land is called the South Mountain Park Preserve and it is one of the largest city parks in the U.S.

and the Pee Posh (Maricopa)."[89] The Akimel O'odham believe that South Mountain is where their creator emerged and as a traditional land, it is where burial sites, archeological sites, and shrines are housed. Tribal members use the South Mountain for many activities. South Mountain is where tribal members "pray…fast…prepare…gather…strength."[90] It is part of "a heritage that goes back hundreds and thousands of years."[91] Rituals and ceremonies are performed there and tribal traditionalists pick and harvest traditional cultural foods and medicines.

In 2007, the GRIC Tribal Council adopted a tribal resolution affirming that the South Mountain is "a sacred place/traditional cultural property…that…must be kept inviolate.[92] The resolution states the GRIC Community Council "strongly opposes any alteration of the South Mountain Range for any purpose…and any alteration…would be a violation of the cultural and religious beliefs of the Gila River Indian Community and would have a negative cumulative effect on the continuing lifeways of the people of the Gila River Indian Community."[93] "Because of its association with cultural practices and beliefs of a living community that (a) are rooted in that community's history and (b) are important in maintaining the continuing cultural identity of the community," the South Mountain is a traditional cultural property eligible to be included in the National Register of Historic Places (NRHP)[94] and with this status, use or alteration would require federal consultation.[95]

However, without ensuring adequate consultation, on April 26, 2013, the Arizona Department of Transportation (ADOT) released a Draft Environmental Impact Study (DEIS)[96] identifying its proposal and preferred alternative for building a major highway –the South Mountain Loop 202- that would cut and blast through the southwestern edge of South Mountain[97] and is taking action to complete the proposal and get the project implemented despite being fully aware of and acknowledging the sacredness and spiritual and cultural significance of the mountain.[98]

If this project is implemented, there would be profound negative impacts on the cultural and spiritual well-being of the Indigenous Peoples of the GRIC.

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[89] Gila River Indian Community Resolution NO. GR-41-07, designating the South Mountain Range (Muhadag, Avikwaxos) as a Sacred Place and Traditional Cultural Property of the Gila River Indian Community.
[90] YouTube, South Mountain Freeway Proposal - Public Comments /Part 2 Dec. 21, 2009, https://www.youtube.com/watch?v=zGW3LwbaI5Y
[91] *Id.*
[92] Gila River Indian Community Resolution NO. GR-41-07.
[93] *Id.*
[94] National Park Service, National Register Bulletin 38, Guidelines for Evaluating and Documenting Traditional Cultural Properties 1990, available at www.cr.nps.gov/nr/publications/bulletins/nrb38/htm. Tribal lands includes "all lands within the exterior boundaries of any Indian reservation." (16 U.S.C. § 470w (14)).
[95] 106 of the NHPA requires that federal agencies having direct or indirect jurisdiction over a proposed "undertaking" are required, before granting a license or permit, to "take into account the effect of the undertaking on any district, site, building, structure or object that is included in or eligible for inclusion in the National Registry" using a "reasonable and good faith effort." 16 U.S.C. § 470f.
[96] ADOT, Loop 202 (South Mountain Freeway) http://www.azdot.gov/southmountainfreeway/. The DEIS comment period begin on 4/26/2013 and ended 7/24/2013).
[97] ADOT, South Mountain Study Team, *South Mountain Freeway Draft EIS Summary*, 13 available at http://www.azdot.gov/Highways/Valley_Freeways/Loop_202/South_Mountain/PDF/FHWA-AZ-EIS/00-SMDEIS-Summary-Chapter.pdf.
[98] The DEIS states that "the mountains are considered sacred—playing a role in tribal cultures, identities, histories, and oral traditions…Many traditional religious and ceremonial activities continue on the mountains." (ADOT, South Mountain Study Team, *Summary* at 39.)

GRACE believes that all people should be able to access, participate and contribute to their cultural life in a continuously developing manner without discrimination. GRACE argues that by funding this project, the United States is discriminating against them as an Indigenous People by approving destruction of GRIC heritage and culture that is central and fundamental to their continued practice and development of GRIC culture. GRACE also argues that the GRIC tribal members' inherent rights to their cultural and spiritual traditions, and history and philosophy have been violated. It asserts that the United States is in the process of violating the GRIC tribal members right to self-determine (i.e. right to maintain and strengthen their distinct cultural institutions), right not to be subjected to destruction of their culture; right to protect and develop past and future manifestations of their culture; right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned lands; right to protect and develop their cultural heritage and oral traditions; and right to determine priorities for use of their lands.

GRACE argues that the United States has violated its obligation to consult and cooperate in good faith with the tribal members in order to obtain free and prior informed consent. Executive Order 13175, "Consultation and Coordination with Indian Tribal Governments", requires proper consultation. The federal government's consultation requirement is based on the trust relationship that it has with all Tribes. Here, this trust relationship is broken by the federal government not making a reasonable and good faith effort to include the Tribal public in consultation and to ultimately support an unnecessary project that will desecrate sacred land.

The GRIC's treatment is a telling example of the federal government's rampant disrespect of Indigenous Peoples' cultural and religious practices and economic development being prioritized over Indigenous Peoples' fundamental human rights.

Case F: Havasupai Tribe and Destruction of Sacred Areas by Uranium Mining

Issue: Uranium Mining in Grand Canyon, Submitted by Carletta Tilousi, Havasupai Tribal Member and former Havasupai Tribe Council Member

The Havasupai Tribe is comprised of 776 members and is located at the bottom of the Grand Canyon, in the State of Arizona. The Havasupai Indian Reservation is approximately 188,000 acres and its surrounding lands and waters, many of which are now located on federal lands in and around the Grand Canyon National Park, are of immense cultural, religious, spiritual and historic importance to the Havasupai Tribe. However, due to dispossession of many of their aboriginal lands, myriad places, plants, and animals that possess cultural, religious, spiritual and historic importance for the Havasupai Tribe are situated on US federal public lands. This includes sacred sites, burial grounds, and locations of religious practices. Given this situation, the Tribe relies upon the federal and state governments' responsible management and protection of these lands. At present, these lands and sacred areas are under threat of further destruction from extraction of uranium.

In 1986, the Arizona Department of Environmental Quality ("ADEQ") approved the issuance of several air quality and water quality draft permits for three uranium mines in Northern Arizona: Canyon Mine, the EZ Mine, Pinenut Mine, and also a Water Discharge Authorization Permit for EZ Mine. Energy Fuels, Inc., a Canadian corporation, owns these mines. The ADEQ failed to consult with Havasupai tribe and its tribal members before ADEQ made a decision to the issuance of the permits.

Formal ADEQ public hearings were held to receive public comments in Fredonia and Flagstaff, Arizona, which are both at leas two-days travel (one way) from the Havasupai Reservation, in December 2010 and January 2011. Havasupai Tribe leadership attended a hearing in Flagstaff in early January and provided testimony opposing the issuance of permits, explaining that the Tribe strongly opposed the issuance of the permits due to the adverse impact uranium mining would have on air and water quality, tribal health and sacred sites located within close proximity to the mining area. The Havasupai Tribe and tribal members continue to oppose the issuance of any of the above-referenced permits regarding air and water quality.

In particular, the Havasupai Tribe relies upon the water quality of Havasu Creek and its surrounding springs, which are connected to the Redwall-Muav aquifer, to sustain the physical, cultural and religious needs of its people. As such, any uranium contamination of the air and/or ground and surface waters would adversely and disproportionately affect the health, cultural integrity and religious practices of the Havasupai Tribe and other surrounding Native American Tribes who rely upon the air and water quality of the nearby springs for drinking water and for numerous ceremonial practices.

The Havasupai people have sacred sites, burial grounds, and religious practices in and around the proposed mining areas. In particular, Red Butte has recently been designated as eligible for listing as a Traditional Cultural Property by the federal government under the National Historic Preservation Act, and designated as a Traditional Cultural Property under Arizona State law. Canyon Mine is situated directly on this Traditional Cultural Property. Nevertheless, the ADEQ has failed to take this into account in its permitting process. The issuance of air and water quality permits that would allow mining in this area, and the areas surrounding EZ Mine and Pinenut Mine, would disproportionately, directly and adversely affect the Tribe in its religious, spiritual and cultural practices. Because the Tribe will not disclose the exact locations of its burial grounds, sacred sites or locations of religious practices, it has been deprived of its rights to freedom of religious practice and religious protection. Special Rapporteur Amor documented this lack of understanding and consequent discriminatory treatment in his report on the US:

60. In general, the charge is often made that legislation derived from a western legal system is incapable of comprehending Native American values and traditions. Native Americans are being asked to "prove their religion", and in particular the religious significance of sites, most of which are situated on land belonging to the federal, state or local Governments and some on private land; but the need to provide "proof" conflicts with certain values, because the sacred site has to remain secret; furthermore, to reveal its location would allow the authorities to interfere in matters of religion.[99]

Uranium extraction is an incredibly invasive activity that has a multitude of effects on the surrounding environment. In 1986 the Environmental Impact Statement (EIS) concluded that "uranium mining would have no significant cultural or religious impacts to sacred places in around Red Butte and Canyon mine." The Havasupai Tribe maintains that the EIS did not effectively and meaningfully evaluate the effects of uranium mining on air and water quality. Significant climatic and geological events such as the occurrence of earthquakes, increased winds, and several serious flooding events have impacted both the air and waters surrounding Canyon

[99] Report submitted by Mr. Abdelfattah Amor, Special Rapporteur, in accordance with Commission on Human Rights resolution 1998/18,Addendum, Visit to the United States of America, E/CN.4/1999/58/Add.1, 9 December 1998.

Mine and Red Butte. In particular, the Village at Supai has been impacted by increased quantities of silt and waste that have descended from the top of the Canyon to the bottom due to the increased flooding. These major events have not been taken into account in determining whether to issue any of the above-mentioned permits, in particular, the Canyon Mine permit.

In the case of Canyon Mine, the Havasupai's watershed is directly at issue. The Redwall-Muav aquifer is situated below the Canyon Mine. It is that aquifer that the Tribe relies upon to sustain the physical, cultural, spiritual and religious wellbeing of the Havasupai. The Havasupai rely on Havasu Creek for drinking water, agricultural uses and ceremonial purposes. If the Tribe's water supply is contaminated from the uranium mining, the Tribe has no other water supply upon which to rely.

Since the EIS was completed over 25 years ago, statutory and regulatory changes in the Clean Air Act and Water Act have been enacted; they relate specifically to radiation, radon, particulate matter and dust emissions—all of which were not taken into consideration in 1986. The Havasupai Tribe has requested that a new Environmental Impact Statement ("EIS") for Canyon Mine be prepared. This is allowed under federal law and regulations, especially where there is new information that would significantly alter the initial decision.

Additionally, the US Forest Service's 1986 approvals did not analyze the Canyon Mine's potential effects to Red Butte as a historic property under the NHPA. The Forest Service recently commenced consultation with the Havasupai Tribe concerning the Canyon Mine's impacts to Red Butte, and claims that it intends to continue consultation. The Forest Service is refusing to undertake and complete a NHPA Section 106 Process relating to adverse impacts to the Red Butte TCP, including consulting with the Tribe for the purposes of developing a Memorandum of Agreement, prior to allowing Canyon Mine to restart mining operations, as required under NHPA and its regulations.[100] In failing to do so, the Havasupai Tribe is being denied its right to free, prior and informed consent, among other violations.

Case G: Kónitsąąíí Ndé and Cúelcahén Ndé (Big Water People Clan; Tall Grass People Clan), Lipan Apache Women Defense & the Lipan Apache Band of Texas

Submission regarding El Calaboz Ranchería, Texas-México region, Kónitsąąíí gokíyaa Ndé ('Ndé Big Water Country'/Lipan Apache Traditional Territory)

For More Information Contact: *Margo Tamez, spokesperson and co-founder, Lipan Apache Women Defense, margo.tamez@gmail.com*

The Ndé (Lipan Apache) contend that the United State's economic interests and military policies in their traditional homelands, located in what is now the Texas-Mexico border region are in conflict with Ndé inherent collective rights to maintain, recover, recuperate, and revitalize their inherent religious relationships with the sacred landscape known to Ndé as Kónitsąąíí gokíyaa—Big Water country. The territorial claim of Ndé to Kónitsąąíí gokíyaa is based on the 650 million acres expropriated from Ndé ancestors and traditional authorities. The Ndé oral tradition, oral history, living and enduring testimony, and anthropological and historical records all support this

[100] 16 U.S.C. § 470f, 36 C.F.R § 800.13(b)(1).

claim. There are unseverable bonds between Ndé and ancestral sites of memory embedded in the sacred landscape—in current-day urban, suburban, and rural areas. Much of this is now behind 'private property' fences; however, a significant portion is under the operational control of the U.S. federal government.

The Ndé are organized by matrilineal clan systems, with rich oral tradition, religious beliefs, practices, and enduring relationships with a specific land-base. Ndé social, legal, physical, ecological, philosophical, and economic principles are rooted in religious and sacred knowledge and ritual life in their customary, ancestral homeland. This integral relationship is at risk of destruction. Since the 1872 'Remolino Massacre', the Ndé relationship to a land base and their peoplehood have been under attack.

"Non-Recognition" is Major Obstruction to Ndé Spiritual and Religious Freedom. The United States denies the juridical personality of Ndé, however, cannot deny the primary evidence of Ndé international diplomacy and treaty history with Spain, Mexico, Texas and the U.S. (as the latest in a long line of European origin polities which have dispossessed and displaced Ndé). The US negates the juridical personality of Ndé, despite its extensive record of treaty-making with Ndé leaders.[101]

Non-recognition or selective recognition of Ndé and hundreds of other Indigenous Peoples by the U.S. is fundamental to a serious examination of its implementation of Free Prior and Informed Consent (FPIC). However, recognition by the U.S. should not be criteria in assessing their legal obligations to comply with the right of self-determination of peoples as a fundamental principle in international law. It is embodied in the Charter of the United Nations and the Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, Common Article 1. Without the State's full compliance with ICCPR and the Article 1 rights that apply to "All Peoples", non-recognition will continue to violate the Ndé Peoples' inherent rights to self-determine their cultural development based on spiritual, religious, and philosophical principles of *being Ndé* within the Ndé traditional lands and territories—currently urban, suburban, and rural.

The U.S. Senate's ratification of ICCPR in 1992 declared that "the provisions of Article 1 through 27 of the Covenant are not self-executing."[102] In other words, although the ICCPR is binding upon the U.S. in international law, still, on the ground, it isn't part of domestic law and policy. Some have gone so far as to argue that non-self-execution declaration is untruthful and deceptive to the international community particularly when the state fails to shape domestic laws and policy-making to the minimum human rights standards as articulated in the Covenant.[103] In 2006, the Committee had articulated concerns with the U.S. and its non-compliance.[104]

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[101] See Margo Tamez, HR/GENEVA/ /SEM/NGOs/2012/BP.7, "Kónitsąąíí gokíyaa Ndé: Big Water People's Homeland—a Shadow of Self-Determination in a bifurcated Traditional Territory." 3rd Treaty Seminar, Strengthening Partnership between States and Indigenous peoples: treaties, agreements and other constructive arrangements," 16-17 July 2012, UNHCHR, pp. 13, note 3-4.
[102] S. Exec. Rep. No. 102-23 (1992).
[103] Louis Henkin, U.S. Ratification of Human Rights Treaties: the Ghost Senator Bricker, 89 *Am.J.Int'L*. 341, 346 (1995); Jordan J. Paust, International Law as Law of the United States 375 (2d ed. 2003).
[104] Human Rights Committee: United States of America, U.N. Doc. No. CCP/C/USA/Co/3/Rev.1, para. 10 (2006).

In 2006, the United States passed legislation to construct the border wall through Ndé lands along the Texas-Mexico Border without their FPIC. These were never surrendered, relinquished nor sold by the Ndé to any another jurisdiction, including the U.S. and the state of Texas. In 2009, the U.S. began construction of this mega-project. The border wall cuts through the middle of the Ndé customary territory, on the Texas side of the international border. More specifically, the 18 foot, steel and concrete, gulag-style wall, divides the Ndé traditional territory across 70 miles of the Texas-Mexico border.

At the micro level, the wall stands in the middle of the customary inherited lands of Eloisa Garcia Tamez, an Ndé elder. Ndé sites of religious and cultural relevance extend across the entire Texas-Mexico border region. When the State constructs walls, edifices or other architectures and impediments across Indigenous lands—causing inhibitors, containment, or constraining of Indigenous Peoples' movement, or outright denying the movement on or across collective or individual's lands— this has irreparable impacts on Indigenous Peoples' access to sacred sites of memory and significance. In the situation of the U.S. border wall, the rhetoric and nationalist discourses of 'the war on terror' and anti-Mexico/anti-Mexican rhetoric exacerbates these physical impediments.

As a result of generations of extensive privatization of the Ndé traditional and customary lands by settlers, municipalities, and industries, and the violent displacement policies which fragmented and urbanized the Ndé, there are severe threats to the dissemination of the sacred and ritual practices to current-day youth and future generations. The state's uses of militarization (drones, armed soldiers, aggressive technologies, and the criminalization of Indigenous border Peoples and landscapes as 'suspect') as a public 'security' policy without consideration to Indigenous Peoples' ongoing displacement and marginalization, has exacerbated this entrenched conflict in a vulnerable region.

The United States succeeded the Spanish monarchy, the French empire, the Texas Republic, the Mexican republic, and the Mexican State in claiming title to the Ndé traditional and customary lands. The US has neglected and negated the sovereignty of the Ndé and the inherent rights to self-determination, culture, and freedom of religion. The Ndé exist in limbo as a result of administrative erasure. Ndé Peoples have title to lands currently occupied by the U.S. and Mexico, and have never relinquished their rights, lands, nor identity. As a firm policy of denial, the State has never offered Ndé any remedy, reparation, restoration or resolution, nor has it established a process to obtain their consent.

Case H: Laguna-Acoma Coalition for a Safe Environment

Issue: Mt. Taylor Sacred Area Threatened by Uranium Mining

Contacts: PetuucheGilbert, Acoma Tribal Member and Vice President, LACSE, petuuche@aol.com; June L. Lorenzo, Pueblo of Laguna Tribal Member and LACSE Member, junellorenzo@aol.com

Mt. Taylor ("Kaaweesthiimaa" in Acoma, "Tsiibiinaa" in Laguna languages), a sacred landscape for the Pueblos of Acoma and Laguna, Zuni, the Navajo Nation, the Hopi, and many other New Mexico tribes, is under threat by the proposed Roca Honda Mine and other proposals for extraction of uranium. An application for mining and plan of operation has been submitted by

Roca Honda Resources, LLC., to the State of New Mexico and to the US Forest Service (Cibola National Forest).

Mt. Taylor has been a place for religious pilgrimage since time immemorial. Pueblo Indian Peoples visit the sacred shrine on the peak to pray for the continuation of life-giving resources including air and water. The highest mountain in northwestern New Mexico (elevation 11,301 feet), Mt. Taylor harbors Pinyon-Juniper, Ponderosa Pine and Douglas Fir trees, native plants, grasses and shrubs. Water is a critical resource and sacred source of life for this high desert area which sees only an average of 10 to 12 inches of rain per year. Mt. Taylor, as a naturally forested area, produces rain and snow that feeds the aquifers and springs for the areas, providing life for animals, plans and humans.

The Aboriginal Rights of Indigenous Peoples

The region around Mt. Taylor is homeland to the Acoma, Laguna, Zuni Pueblos, the Hopi and Navajo (Dineh) Nation. This region was invaded by the Spanish Crown during the 16th century and declared Spanish land under the doctrine of discovery. Thereafter it became Mexican territory with Mexican Independence, and after the 1848 Treaty of Guadalupe Hidalgo it became US territory. The Treaty acknowledged the rights of the Pueblo People to continue use of their lands and water, although they were not parties to the Treaty. As a result of this Treaty, the U.S. recognized the Spanish land grants to the Pueblos by the Congressional Act of 1858. Although much of this landscape is now considered public lands, Acoma, Laguna, Zuni, and other Indigenous Peoples consider it to be part of their aboriginal territory, and continue to maintain their relationship with the Sacred Mountain now called Mt. Taylor through pilgrimages, harvesting of food, and in other manners. Today, most of Mt. Taylor is managed by the U.S. Forest Service (USFS) within the U.S. Department of Agriculture.

Acoma and Laguna Pueblos submitted land claims of aboriginal use to the Indian Claims Commission (ICC), Dockets 266 and 227. Problematic for the tribes was the insistence under the Indian Claims Act to prove "exclusive use and occupancy," as no Pueblo ever claimed to exclusively use or occupy the mountain.

In 2008 the USFS made a determination that Mt. Taylor was eligible for listing on the National Register of Historic Places, pursuant to the National Historic Preservation Act. Beginning in 2008, the five tribes of Acoma Pueblo, Laguna Pueblo, Zuni Pueblo, the Navajo Nation and the Hopi Tribe, petitioned the New Mexico Cultural Properties Review Committee to designate Mt. Taylor as a Traditional Cultural Property (TCP) under New Mexico State law. The designation was granted after a protracted series of public hearings, but is currently under litigation in the New Mexico courts. Uranium companies and private parties are challenging the designation.

US Responsibilities

The US has a duty and obligation to protect recognized federally Indian trust resources under existing federal law. Specifically the US government has established laws and policies to protect Native American freedom of religion and the protection and use of sacred areas. These include the American Indian Religious Freedom Act of 1978, the passage of Executive Order 13007 on the protection of sacred sites, and Executive Order 13175 on Consultation and Coordination with Tribal Governments. This year President Obama has instructed federal agencies to consult and

work directly with Native American tribes in the implementation of federal Indian laws and policies.

Proposed Uranium Mining on Mt. Taylor, Cibola National Forest, by Roca Honda and Laramide

This part of New Mexico was devastated by the first wave of uranium mining from the 1940's to 1980's. Human and environmental health have not yet recovered in the homelands of the Indigenous Peoples of this region. Currently two new uranium mines are being proposed at Mt. Taylor, the Roca Honda mine, owned by Roca Honda Resources (RHR), LLC, which is financed by companies from Canada and Japan, and the La Jara Mesa Mine, owned by Laramide Mine. The permitting processes involve both state and federal agencies. Key to a decision as to whether mining can proceed is an Environmental Impact Statement (EIS) which is required by the National Environmental Policy Act (NEPA) of 1969. In March of 2013 a Draft Environmental Impact Statement was issued for public Review by the USFS. The comment period for the public has closed and a decision from the Forest Service is being awaited.

A critical issue in the Draft Environmental Impact Statement (DEIS) for Roca Honda Mine for the tribes is the review of Cultural and Historic Resources. The USFS admits in the DEIS that mining operations "would adversely affect the Mt. Taylor TCP and cause irreparable harm to surrounding tribes and their traditional cultural practices."[105]

In the course of preparing the DEIS, public meetings were held and consultation meetings were held with Tribes. However these consultation meetings have not been conducted in a manner that respects impacted Tribal Nations' right to free, prior and informed consent. In fact, at one of the Tribal "consultation" meetings the USFS stated that it could not deny the permit because of the General Mining Act of 1872 which confers a statutory right to mine on public lands:

> The Forest Service may reject an unreasonable or illegal plan of operation, **but cannot categorically prohibit mining activities or deny reasonable and legal mineral operations under the mining law.**" (*Emphasis added*).[106]

The Forest Service referenced other federal laws to justify granting a permit to mine. In short, Mt. Taylor is to be sacrificed in order to allow mining based on the U.S. Mining Act of 1872, the 1897 Organic Act and the 1955 Multiple Use Mining Act.

These statements by the USFS essentially render Executive Order 13007 meaningless, namely those provisions to " (1) accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and (2) avoid adversely affecting the physical integrity of such sacred sites." (61 Federal Register 26771, Section 1). The USFS response to assertions regarding EO 13007 is that "in consideration of the General Mining Act of 1872, for the current proposed project the order does not preclude selection of a project alternative that would result in impacts to the physical integrity of the Mt. Taylor TCP as a sacred site, or to access to this sacred

[105] The Roca Honda DEIS can be viewed at http://www.fs.fed.us/nepa/nepa_project_exp.php?project=18431
[106] DEIS, Alternative I, pg. v

site."[107] In other words, the 1872 Mining Act trumps any considerations of Sacred Area protection by Indigenous Peoples in their Aboriginal territories.

Indigenous Peoples Opposition to Uranium Mining

The Multicultural Alliance for a Safe Environment (MASE) and the New Mexico Environmental Law Center reviewed the Roca Honda DEIS and urged the U.S. Forest Service to take the "No Action Alternative."[108] MASE, in their comments, responded to the USFS:

"Most importantly, the Roca Honda Mine as proposed by Roca Honda Resources/Strathmore Minerals /Sumitomo Corp. (RHR), will irreparably and forever damage and in many ways destroy Mt. Taylor. Mt. Taylor is acknowledged by the Forest Service and all experts as an invaluable Sacred Site and Traditional Cultural Property (TCP) held in reverence by all of the Indian Tribes and Pueblos in the region. Members of these federally-recognized Tribes/Pueblos, many of whom are members of MASE, currently use (as their ancestors have done for centuries) Mt. Taylor and its lands and waters for federally-protected religious worship and other forms of cultural and religious activities. As the DEIS admits, these uses, and Mt. Taylor itself, will be damaged beyond repair – with unconscionable and devastating impacts to the Indigenous Peoples and Nations throughout the region. As such, the Forest Service is required under federal law to deny the proposed Plan of Operations (PoO), any Right-of-Way (ROW) application, and any other proposed permit or approval submitted by RHR for the Roca Honda Mine. (MASE letter, pg. 2).

Indigenous Nations Opposition to Uranium Mining on Mt. Taylor

The Pueblo of Acoma and the All Indian Pueblo Council[109] have adopted resolutions for the protection of Mt. Taylor. The Pueblo of Laguna has enacted a moratorium on uranium mining on tribal lands. These resolutions are attached.[110]

Conclusion

Mt. Taylor, a sacred place to Acoma, Laguna, and other Indigenous Nations in the region, will see cultural devastation from uranium if mining is permitted by the U.S. government. Even while complying with Executive Order 13175 the Cibola National Forest will adhere to the General Mining Act of 1872 in order to permit Roca Honda Mine. As a result the U.S. Forest Service will

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[107] DEIS, pg. 355

[108] See the attached MASE letter dated June 13, 2013, is available at https://cara.ecosystem-management.org/Public/Letter/183109?project=18431

[109] The All Indian Pueblo Council (AIPC) is comprised of 19 Pueblo Tribes in New Mexico: Acoma, Cochiti, Isleta, Jemez, Laguna, Nambe, Ohkay Owingeh, Picuris, Pojoaque, San Felipe, San Ildefonso, Sandia, Santa Ana, Santa Clara, Santo Domingo, Taos, Tesuque, Zia and Zuni; and 1 Sovereign Pueblo, Ysleta Del Sur, located in Texas

[110] Attached are the following resolutions:

1. Pueblo of Acoma Tribal Resolution, TC-MAY 23, 2013-VIa: The Pueblo of Acoma Approval for Continuing Protection of Cultural and Water Resources in the Mt. Taylor Traditional Cultural Property from Impacts of the Proposed Roca Honda Mine.
2. All Indian Council Resolution 2007 -12: Companion Resolution for the Protection of Mt. Taylor and All Sacred Sites and Cultural Properties Related to the Pueblos of Acoma and Laguna, and the Nineteen Pueblos of New Mexico.
3. Pueblo of Laguna Resolution No. 10-08 "Resolution of the Pueblo of Laguna Council Declaring a Moratorium on Any Uranium Mining Activity on Pueblo Lands," dated March 18, 2008.

discriminately violate Executive Order 13007 and other laws and policies respecting and protecting Native American rights to practice their religion and cultural practices within the sacred landscape of Mt. Taylor.

Case I: Muscogee (Creek) Nation and Hickory Ground Tribal Town

Issue: The United States Government's Failure to protect Hickory Ground Sacred Area

Contact: Brendan Lutwick, Attorney brendan@lutwick.com

On behalf of the Muscogee (Creek) Nation ("MCN"), a federally-recognized Indian tribe, please accept this request to call upon the United States to protect the religious and cultural rights of the MCN and sacred land known as "Hickory Ground," a property listed on the National Register of Historic Places. Hickory Ground includes a ceremonial ground, burial sites and individual Muscogee graves. Hickory Ground was obtained with federal funds under the pretense of historic preservation. However, to date, 57 known sets of human remains and sacred funerary objects have been allowed by the US to be intentionally exhumed in violation of US federal law and international human rights standards including Articles 18 and 27 of the ICCPR.

The MCN historically occupied millions of acres of territory throughout the Southeastern United States, including the present-day US state of Alabama. The Creek Nation was a confederacy consisting of semi-autonomous "tribal towns," each led by a traditional chief called a "Mekko." Each town possessed a ceremonial ground where a sacred fire was kept. The traditional Creek religion was practiced and the deceased were buried with sacred funerary objects. Hickory Ground Tribal Town ("*Oce Vpofa"* in the Muscogee language) is a tribal town that formerly was located at present-day Wetumpka, Alabama, which also served as the last capital of the National Council of the Creek Nation prior to their forced removal by the United States (the infamous "trail of tears) to "Indian Territory" (present-day Oklahoma) in the 1830s.

The Creek tribal towns, including *Oce Vpofa*, continue to exist as distinct tribal entities within the MCN, carrying on the traditions of their ancestors. Tribal town affiliation is matrilineal; thus the members of *Oce Vpofa* in Oklahoma are the lineal descendants of the ancestors buried at the historic Hickory Ground in Wetumpka, Alabama.

Hickory Ground was listed as an "historic property" on the National Register of Historic Places under the National Historic Preservation Act in 1980, based on its significance as the last capital of the Creek Nation prior to removal and undisturbed archeological remains located there. In 1980, the Alabama Historic Commission nomination included the following:

Hickory Ground or *Oce Vpofa* is primarily significant as the last capital (1802-1814) of the National Council of the Creek Nation in the Creek's original homeland…. It is one of the few Creek Indian sites known to have been inhabited as late as1832 … and one of the few remaining such sites which has not been extensively disturbed or destroyed…. The site is prime development property. The present owner has delayed plans to sell to developers while a historic preservation discretionary fund application for acquisition by the Creek Nation is being prepared."

However the Creek Nation's plans did not materialize and this sacred area was given to another group by the US government with a false promise to the MCN that this sacred ground would be preserved and protected. A neighboring tribe was federally recognized in 1984, and the US Secretary of the Interior accepted 8 parcels of land into trust for the new tribe. Seven of these

parcels were in an area where members of the newly-recognized tribe were located; the eighth parcel, Hickory Ground, was located over 100 miles away, and taken into trust by the US for the new tribe even though there was no significant population of that tribe in that immediate area.

The new tribe applied for a federal historic preservation grant to acquire the property, which was awarded by the U.S. Dept. of Interior to fund the acquisition. In its applications, the new tribe promised to preserve the land for the benefit of all Creek Indians, including "the existing Hickory Ground tribal town in Oklahoma," and to protect the remains "without excavation."

Members of the MCN who are lineal descendants of the exhumed ancestors requested the remains to be reinterred at the ceremonial ground in accordance with Muscogee spiritual beliefs. Disregarding the rights of MCN and lineal descendants, the US made a series of policy and legal decisions that failed to protect and preserve the sacred area. In April 2012, the burials were relocated in order to construct a $246 million casino resort on the sacred burial ground.

In 1999, the National Park Service entered into an agreement with the new tribe granting them authority over Hickory Ground without consulting with or obtaining the consent of the MCN; this made MCN's aboriginal lands and place of religious and cultural significance subject to another tribe's authority under its Tribal Historic Preservation Office. This was done in total disregard of Executive Order 13175, which ensures the US must obtain meaningful and timely input from the MNC, and Executive Order 13007, which required federal agencies to avoid adversely affecting the physical integrity of Hickory Ground as a Native American sacred place.[111]

Starting in 1991, human remains were removed from Hickory Ground, in direct violation of federal laws and without consent of the MCT or the linear descendants. The US government, through the Department of the Interior and the National Park Service, has consistently failed to consult with the MCN and have failed to respect international human rights obligations regarding protection of sacred sites. Remains were excavated without obtaining an ARPA permit. The Archaeological Resources Protection Act (ARPA) § 470cc (b)(2) governs excavation on federal lands. However US government officials limited their investigation to one location and concluded that ARPA had not been violated. [112] Despite a number of official objections by the MCN, including to the US Department of Interior and the United States Senate Committee on Indian Affairs, the US issued a permit for further excavation at Hickory Ground in 2003.

Excavations proceeded without any consultation with the MNC. In 2006, archaeologists reported that approximately 425 human features had been excavated, and warned that "proposed development of the property would be expected to encounter additional…human remains….[and] construction in these areas would be extremely harmful to these items."

The US refuses to require compliance with federal laws designed to foster accountability and prevent harm to sacred areas. Under the mandates of the National Historic Preservation Act (NHPA),§(2)(A), the National Park Service must review a tribe's historic preservation office at least every 4 years. This has never been done in the case of the tribe currently excavating human remains. In the case of Hickory Ground, not only does the US fail to comply with federal laws

[111] Executive Order 13007, issued in 1996 by President Clinton, provides at Sec. 1(a) that "In managing Federal lands, each executive branch agency with statutory or administrative responsibility for the management of Federal lands shall …. (2) avoid adversely affecting the physical integrity of such sacred sites."
[112] Note that the Alabama Historical Commission disagreed with the US investigator's conclusions.

designed to protect sacred sites, but it also fails to accord the Muscogee (Creek) Nation rights affirmed in the ICCPR and other human rights instruments.

Case J: NaKoa Ikaika KaLahui Hawaii - Papahānaumokuākea Sacred Area Northwest Hawaiian Islands (NWHI) – USA Nomination as a UNESCO World Heritage Site

Contact person: Mililani Trask, Convener NaKoa Ikaika KaLahui Hawaii, Inaugural member of the UN Permanent Forum on Indigenous Issues Tel: (808) 990-0529 mililani.trask@gmail.com

Papahānaumokuākea is of great spiritual and cultural importance to Indigenous Hawaiians with significant cultural sites found on the islands of Nihoa and Mokumanamana. Mokumanamana has the highest density of sacred sites in the Hawaiian Archipelago and has spiritual significance in Hawaiian cosmology.

The traditional "Code of Conduct" for the Aha Moku districts, "*No laila oiai oe e komo ana I keia wahi kapu nou keia Kuleana e ho'oko."* "Therefore, as you enter this sacred place, this responsibility is place upon you." The significance of this traditional saying by our kupuna or elders is that it applies to every one of us who are responsible for the well-being of our islands, including the NWHI.

The Papahānaumokuākea Marine National Monument is the single largest conservation area in the USA, and one of the largest marine conservation areas in the world. It encompasses 139,797 square miles of the Pacific Ocean (362,073 square kilometers) - an area larger than all the country's national parks combined. On July 30, 2010 Papahānaumokuākea was inscribed as a mixed (natural and cultural) World Heritage Site by the delegates to the United Nations Educational, Scientific and Cultural Organization's (UNESCO) 34th World Heritage Convention in Brasilia Brazil.

When the US nominated this area for inscription on the list of World Heritage Sites, the supporting documentation submitted to UNESCO acknowledged that the area was considered "sacred" not only to Hawaiians but to other Polynesians as well. The US report states:

> Native Hawaiians explored and settled the archipelago, inhabiting the main Hawaiian Islands and venturing into the region to the northwest, now known as Papahānaumokuākea. This chain of far-flung islands and atolls, and the waters surrounding them, continue to be respected a sacred zone, a place containing the boundary between Ao, the world of light and the living, and Pö, the world of the gods and spirits, of primordial darkness, from which all life comes and to which it returns after death. Papahānaumokuākea is as much a spiritual as a physical geography, rooted deep in Native Hawaiian creation and settlement stories. Many oral traditions say that Native Hawaiians are genealogically related not only to the living creatures that make up the land and ocean ecosystems, but to the islands and atolls themselves. In relatively recent times, the islands of Papahānaumokuākea have become known as the Küpuna (Revered Elders or Ancestors) Islands, in part because they are geologically older than the main Hawaiian Islands, and because, according to Hawaiian oral tradition, these islands themselves are ancestors to Native Hawaiians. Thus, Hawaiians not only look to their Küpuna Islands for 'ike (knowledge), but they also have a deeply embedded kuleana(privilege and responsibility) to care for their küpuna.

> Each island is a teacher…the most famous Hawaiian creation chant, the Kumulipo, tells of the birth of the world from the darkness of Pō, beginning with the simplest known form of life, the coral polyp, and progressing to the more complex forms …As time passes, life begins created in sibling pairs, a land creature or plant for every sea creature or plant. These twins almost always share similar names; they are often also linked in real-life cycles, with one blooming on land as the other becomes fertile or abundant in the sea.[113]

During the lengthy hearing & nomination process, over 200 public hearings were held, but no Indigenous consultations were conducted. Hawaiians joined with the Guahon Coalition of Guam, opposed the nomination based on cultural and subsistence reasons, and requested that the Obama Administration conduct consultations. Communications setting out such objections and calling for appropriate Indigenous consultations were sent to the U.S .Ambassador to UNESCO Mr. H.E. David Killion[114], White House Senior Policy Advisor for Native American Affairs Kimberly TeeHee, the International Union for Conservation of Nature, the International Council on Monuments and Sites, and Mr. Francesco Bandarin of UNESCO.

No response was received from the United Sates. Discussions held with the White House Indian Affairs staffers attending the United Nations Permanent Forum on Indigenous Issues (9th Session) in New York revealed that the Obama Administration did not support 'consultations' with Hawaiians and the Indigenous of Guam because we are not 'federally recognized Indians'. According to the White House, Obama staffers and Kimberly TeeHee, the United States has no obligation to consult with Hawaiians or Indigenous Peoples of the US Trust Territories because the Executive Order 13175 on Consultation and Coordination with Tribal Governments only requires consultation with federally recognized American Indian "Tribal" Governments. Hawaiians and Chamorro Peoples are not federally recognized and are therefore not "Indians" for the purposes of consultation under the Executive Order.

The result of this World Heritage inscription and the complete absence of consultation in the process leading up to it, is that Indigenous Hawaiians are not allowed free cultural access to the area for spiritual and cultural purposes unless approved by the US National Oceanic and Atmospheric Administration (NOAA) pursuant to the US criteria which states that only Hawaiians who are "PONO" (righteous) may access the area for cultural practice, and then only through the NOAA procedures. In 2013 the US sequestered all funding for the UNESCO site for research, culture and tourism. The area is now used exclusively use for US military exercises.

Case K: Pit River Nation & the Advocates for the Protection of Sacred Sites

The Medicine Lake Highlands, California USA – A Sacred Place – Radley Davis COntact

Submitted by the Pit River Nation & the Advocates for the Protection of Sacred Sites

> ***"To our People and many other tribal Nations, Medicine Lake is a very beautiful and special place. Medicine Lake and Mt Shasta were gifts to our Peoples from the Creator,***

[113] Native Hawaiian Culture and Papahanaumoku, page 20-21, US Nomination Documents to UNESCO, http://papahanaumokuakea.gov/management/ web site of the US NOAA

[114] See attachments: Letter from Rowena Akana, Office of Hawaiian Affairs to David Killion, Permanent Delegation of USA to UNESCO dated July 12, 2010; and, NaKoa Ikaika KaLahui Hawaii - ECO-SOC Affiliate to the Indigenous World Association, The Koani Foundation, The Guahan Coalition for Peace and Justice & numerous other Indigenous NGOs of Guam to David Killion, Permanent Delegation of USA to UNESCO dated July 19, 2010

the One Above. These places are part of our creation and our teachings about how we leave this world.

There is only one place like that for us, where if you bathe in the water in the Lake,

and follow the rules the Creator set down for that place, there can be healing for anyone. It is sacred to the tribes from all directions that traveled hundreds of miles to come there. It is a place of peace and healing, where you can both see and feel the spirits that are there. Our Spiritual People and healers received knowledge and power there, and it was a place of meditation and training where they went to receive these gifts to protect all life.

Captain Jack and the Modoc People fled to Medicine Lake as a stronghold when the armies came after them in 1872. There were 3000 soldiers against 50 Indian men, women and children. In that battle, the armies could not defeat the Modocs, and only one Indian lost their life. The place protected them that way. That is how strong this place is."

Statement made in June 2004 by the late Mickey Gemmill Sr. Pit River (Iss-Ahwi) and Wintu Spiritual Leader, Member of the IITC Board of Directors from 2000-2006

The Medicine Lake Highlands (Highlands) consist of roughly 73,000 acres of forests, lakes and unique volcanic geological formations in the Modoc, Klamath, and Shasta-Trinity National Forests in Northern California, USA. Since time immemorial, the Pit River Tribe and other Indigenous Peoples have used the Highlands for religious purposes and cultural ceremonies. As Pit River elder Willard Rhoades disclosed regarding Medicine Lake,

> *"In creating this world, when it was moist, the maker of life stopped here to rest and drink and wash and imparted himself into this water. Through this sacred water we are connected to healing and that's why we respect this place deep in our heart."*

In April 2013, through their Declaration to the world, the Advocates for the Protection of Sacred Sites (APOSS) and Pit River Tribe defined threats to sacred Indigenous territories, lands, waters, ceremonial places, rights and ways of life and in particular, the threats of hydraulic fracturing, geothermal development and related wide-ranging destructive impacts on the Highlands. In February 2013, the Pit River Tribal Council reaffirmed the importance of protecting the sacred Highlands by issuing a resolution strongly opposing geothermal development and any other industrial activities there.

In the 1980s, The United States Bureau of Land Management (BLM) issued over two dozen geothermal leases in the Highlands, set to expire in 10 years unless the leaseholder identified and diligently pursued commercial production. Although no geothermal power has ever been produced or identified in the subsequent 30 years, BLM has continued to extend the leases. The Pit River Tribe and its Allies have litigated the illegal lease extensions since 2004, and the 9th Circuit has twice affirmed that a previously-approved development plan violated federal law. Nevertheless, BLM and Calpine Corporation, which now holds all the leases, continue to advocate developing the Highlands.

In particular, the lessee proposes to develop up to five power plants and their associated cooling towers, wellfields, production and injection pipeline system, access roads, and electricity transmission lines across the Medicine Lake landscape. The development of such industrial-scale projects will, as the BLM and Forest Service have already concluded, have significant adverse impacts on the area's cultural uses and environment values. Moreover, it has become clear that any development will require hydraulic stimulation, known as "enhanced geothermal systems" or EGS, to extract heat from the rocks. Similar to fossil fuel fracking, EGS requires the continuous use and subsequent disposal of large amounts of acids and water, potentially threatening the area's pristine water quality and resources.

This case is another clear example of an energy corporation and federal government entities not respecting a tribe's culture and traditions to protect a sacred place and to disregard its own evidence that building these power plants will cause irreparable harm to all in its path.

To prevent the destruction of the sacred Highlands by industrial development, the Pit River Tribe, APOSS and their Allies respectfully requests consideration of the following recommendations:

1. Recommend the United States Secretary of Interior fulfill the trust responsibility to the Pit River Tribe by directing BLM to exercise its authority to cancel the leases for noncompliance with the *Geothermal Steam Act*'s due diligence requirements.

2. In the alternative, recommend the State introduce legislation to "buy-back" the geothermal leases from Calpine. Models for funding such a buy-back include the *Soldedad Canyon High Desert California Public Lands Conservation and Management Act* introduced in 2011, and the highly successful *Santini-Burton Act*, funding land purchases to protect Lake Tahoe from the sale of surplus federal land around Las Vegas.

3. Recommend the State introduce legislation to designate the Highlands as a National Monument or seek and support a presidential designation under the *Antiquities Act* of 1906. In addition to well-documented historic and cultural values, the Highlands support outstanding environmental resources and unique natural volcanic features.

Case L: San Francisco Peaks

For more information please contact: Leonard Gorman (Navajo Nation Human Rights Commission, PO Box 129 Saint Michaels, Navajo Nation (AZ) 86511 Tel: 928-871-7436), Danika Littlechild, IITC Legal Counsel (danika@treatycouncil.org)

On August 17, 2011, the International Indian Treaty Council and the Havasupai Tribe filed an urgent action to the Committee on the Elimination of Racial Discrimination addressing the United States' ongoing agreement to allow activities carried by a private company, the Arizona Snow Bowl Ski resort. The With the permission of the US Government, the Snow Bowl project will use snow manufactured from human waste water on this area of ancient spiritual and religious significance to many Indigenous Nations of the area, despite their ongoing opposition. The Intertribal Council of Arizona, with a membership of 20 Tribal Nations, joined as a co-submitter to the CERD on August 18th.

The Snow Bowl plans to spray up to 1.5 million gallons of treated sewage effluent on Holy San Francisco Peaks every day, or more than 100 million gallons over the course of the winter ski

season. And the city of Flagstaff, Arizona, would profit by selling 180,000,000 gallons of its treated sewage to Arizona Snowbowl for this purpose. The company has already begun to clear-cut pristine forests to build pipelines to bring in the waste water.

On March 9th, 2012, the CERD wrote to express its concern to the US about the Ski Resort's impacts on Indigenous Peoples' cultural and spiritual beliefs and requested the US to provide information as to the process by which is has obtained the Free Prior and Informed Consent of the Indigenous Peoples in this regard. To date the US has not provided a satisfactory response to the CERD, nor has it put any such process in place.

Domestic remedies have been utilized to no avail. In 2006, the Navajo Nation, Hopi Tribe, Havasupai Tribe, Hualapai Tribe, Yavapai- Apache Nation, the White Mountain Apache Nation, Bill Bucky Preston (of the Hopi Tribe), Norris Nez (of the Navajo Nation), Rex Tilousi (of the Havasupai Tribe), Dianna Uqualla (of the Havasupai Tribe), the Sierra Club, the Center for Biological Diversity, and the Flagstaff Activist Network, filed suit challenging the United States Forest Service approval of a permit allowing Arizona Snowbowl Resort Limited Partnership to expand their ski resort, located on "federally owned public land" allowing inter alia, the use of recycled sewage to make artificial snow.

The Federal District Court denied their claims under the then recently amended Religious Freedom Restoration Act (RFRA).[115] The trial court judgment was reversed by a three judge panel of the Federal District Court[116]. Subsequently, the full Ninth Circuit Court, en banc, reversed the three judge panel.[117] As described by the 9th Circuit 3 Judge Panel:

"Humphrey's Peak, Agassiz Peak, Doyle Peak, and Fremont Peak form a single large mountain commonly known as the San Francisco Peaks, or simply the Peaks. The Peaks tower over the desert landscape of the Colorado Plateau in northern Arizona. At 12,633 feet, Humphrey's Peak is the highest point in the state. The Peaks are located within the 1.8 million acres of the Coconino National Forest." And …,

"The [United States] Forest Service has described the Peaks as "a landmark upon the horizon, as viewed from the traditional or ancestral lands of the Hopi, Zuni, Acoma, Navajo, Apache, Yavapai, Hualapai, Havasupai, and Paiute. The Service has acknowledged that the Peaks are sacred to at least thirteen formally recognized Indian tribes, and that this religious significance is of centuries' duration. Though there are differences among these tribes' religious beliefs and practices associated with the Peaks, there are important commonalities. As the Service has noted, many of these tribes share beliefs that water, soil, plants, and animals from the Peaks have spiritual and medicinal properties; that the Peaks and everything on them form an indivisible living entity; that the Peaks are home to deities and other spirit beings; that tribal members can

[115] Navajo Nation v. U.S. Forest Serv., 408 F. Supp. 2d 866, 907 (D. Ariz. 2006).
[116] Navajo Nation v. U.S. Forest Serv., 479 F.3d 1024, 1029 (9th Cir. 2007).
[117] Navajo Nation v. U.S. Forest Serv. No. 06-15455, (9th Cir. en banc, 2008, W. Fletcher dissenting), found at: http://www.narf.org/sct/navajonationvusfs/9th_circuit_en_banc_opinion.pdf, last visited 08/15/2011. Justice Fletcher, joined in dissent by two other judges, called the en banc majority interest test to the "severe adverse effects on the practice of [plaintiffs'] religion" in *Lyng*, the Court reasoned that the protections of the First Amendment "cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development." 485 U.S. at 447, 451. The Court directly incorporated this reasoning into *Smith*. *See* 494 U.S. at 885. Congress then rejected this very reasoning when it restored the application of strict scrutiny "in all cases where free exercise of religion is substantially burdened." 42 U.S.C. § 2000bb (b)." Slip opinion at 10093.

communicate with higher powers through prayers and songs focused on the Peaks; and that the tribes have a duty to protect the Peaks."[118]

> ***"It became evident early on in the process that the federal authorities were ignoring the deeply felt concerns of the Hopi Tribe and all native nations," Hopi Chairman Wayne Taylor said in a statement. "It is our duty and obligation to protect and preserve the spiritual integrity of Nuvatukyaovi, and we will never give up in our efforts to do so."***

Under US law, the Forest Service is the "owner" of San Francisco Peaks. As an agency of the United States it is the "custodian" of Sacred Areas in the so-called "US trust relationship with Indian Tribes." In a pattern demonstrated by this and other examples in this Report, the US government and its agencies continue to allow the destruction, depletion and desecration of ancestral lands of Indigenous Peoples without regard to Aboriginal Title and the traditional spiritual and cultural use of the millennia. These include areas of profound religious, spiritual and cultural significance as well as lands and waters essential for subsistence and spiritual ways of life. Corporations and private interests are regularly issued permits to extract uranium, coal, oil, timber, gas and other resources and to release and use all types of persistent and deadly pollutants on or near Indigenous lands and communities causing detrimental impacts, and in some cases, irreversible damage to their spiritual, cultural, social and physical health and survival. In this case, a privately owned ski resort, Snowbowl, was issued a permit in the normal course of business. The US government defended throughout the course of litigation in its courts the destruction of forest and desecration of Sacred San Francisco Peaks without regard to the religious and cultural beliefs and practices of 13 Indian Tribal Nations and thousands of Indigenous individuals. Their collective and individual human rights to manifest religion or belief, all have been effectively nullified.

The IITC and the other co-submitters of this Consolidated Alternative Report call attention to and express strong support for the Shadow Report submitted to this session of the Human Rights Committee by the Navajo Nation Human Rights Commission. Representing the Navajo Nation, one of the Indigenous Nations who hold San Francisco Peaks to be sacred, the NNHRC provides more detail on this ongoing violation of freedom of religion and denial for Free Prior and Informed Consent. We affirm the NNHRC Shadow Report which expresses the profound, devastating and irreparable impacts of this desecration on the ways of life of the Navajo Nation, affirming that:

> ***"The Navajo Life Way is in jeopardy because the United States has not exercised its legal, political, and moral responsibility towards its Native Americans to protect Indigenous sacred places and cultural property".***

[118] Fn. 2, Navajo Nation v Forest Service, No. 06-15455 slip opinion at p. 2838 (9th Cir. 2007), found at: http://www.narf.org/sct/navajonationvusfs/9th_cir_opinion.pdf.

Case M: United Confederation of Taíno People (UCTP)

Contact: R. Múkaro Borrero, President, mukaro@uctp.org, Office of International Relations and Regional Coordination, P.O Box 4515, New York City, NY 10163

Sacred Area*:* Caguana Ceremonial Center, Utuado, Puerto Rico; Jácanas (PO29), Ponce, Puerto Rico

Issue: Lack of recognition denies and consequently violates the human rights and fundamental freedoms of Indigenous Peoples' in "Insular Areas" where the United States is currently exercising jurisdiction.

The Fourth periodic report of the United States of America to the ICCPR, on pg. 4, notes that the "United States continues to exercise sovereignty over a number of Insular Areas, each of which is unique and constitutes an integral part of the U.S. political family." Within this framework of U.S. Insular Areas, the Fourth periodic report identifies, for instance, the island of Puerto Rico as "a Commonwealth that is self-governing under its own constitution..." While the report stress the effort of the U.S. to "ensure that Puerto Ricans are able to express their will about status options and have that will acted upon," as well as concern for "job creation, education, healthcare, clean energy, and economic development," the lack of recognition of the Taíno People in Puerto Rico ensures that their voices and will are silenced about all issues related to their rights as Indigenous Peoples, including the right to self-determination and free prior and informed consent.

Affirming Indigenous Peoples as distinct within the pluri-cultural Commonwealth of Puerto Rico, the 2010 U.S. Census reveals over 35,000 people residing in Puerto Rico recognized themselves as American Indian, "alone or in combination with some other race."[119] Only 350 of these individuals identified themselves as connected to recognized U.S. mainland American Indian Tribes while others recognized themselves specifically as Taino. The Taíno People are verifiably pre-Columbian inhabitants of Puerto Rico and other Caribbean Islands, and were the first Indigenous Peoples in the Americas to be called "Indians" (American Indians, Amerindians). Despite this well-known history, the Taíno are not formally recognized by the United States.

Indeed, the core and the heart of the issue is the United States' failure to formally recognize the Taino People and other Indigenous Peoples within Insular areas. This denies their human rights and fundamental freedoms in all respects including access to Sacred Areas, Burial Sites, Ceremonial Centers, Ancestral Remains and Funerary Objects. In contrast to the inequity of the specific situation of the Taíno People and Indigenous Peoples within insular areas, other American Indians, Native Alaskans, and Native Hawaiians, for example, can exercise their rights under the Native American Grave Protection and Repatriation Act (NAGPRA) and the National Historic Preservation Act. This legislation includes, inter alia, provisions for American Indigenous Peoples to take part in the discussions and decisions regarding their sacred sites.[120] At

119 US Census Bureau. U.S. Department of Commerce, U.S. Census Bureau. (2010). *Profile of general population and housing characteristics: 2010* (DP-1). Retrieved from American Fact Finder website: http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=DEC_10_DP_DPDP1

120 Native American Grave Protection and Repatriation Act, 25 U.S.C. §§ 3001-3013 (1994) // National Historic Preservation Act, Pub. L. No. 89-665, § 1, 80 Stat. 915 (1966) (codified as amended at 16 U.S.C. §§ 470a to 470w-6 (1988)). While the NHPA mentions some Indigenous Peoples of Pacific Insular areas, it ignores Insular areas in the Caribbean.

minimum, the Taíno People have a right to the same protective provisions created for other American Indians, Native Hawaiians, and Alaskan Natives.

The discriminatory treatment of the Taíno People was presented to the CERD in 2008, the UN Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance (2008), and the 2009 Universal Periodic Review in official submissions, yet these international mechanisms have not only ignored the specific issue as it relates specifically to the Taíno People, but also the broader issue of the denial of Human Rights and fundamental freedoms and related situations of Indigenous Peoples in all "Insular areas" under the jurisdiction of the United States.[121]

The United States claims "plenary power" over Puerto Rico and its "native inhabitants" based on Article IX of the 1898 "Treaty of Peace between the United States of America and the Kingdom of Spain (The Treaty of Paris): "The civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress." The Taíno People of Puerto Rico justly claim their right to be secured in the free exercise of their religion as affirmed under Article X of the same Treaty of Paris, which explicitly provides that "The inhabitants of the territories over which Spain relinquishes or cedes her sovereignty shall be secured in the free exercise of their religion."

With respect to the right of the Taíno People to freely exercise their religion, Taíno Peoples call for (1) the removal of ancestral remains from museum and institutional displays, throughout Puerto Rico and Vieques, used to promote or generate tourism; (2) Taíno access, administration and management of Sacred Sites, Burial Sites, Ceremonial Centers and places, Funerary and Ceremonial Objects, and Ancestral Remains throughout the Island, must be respected through the implementation of proper spiritual protocols; and (3) that all governmental projects, laws, regulations that impact upon Taíno Rights including tourism projects be carried out with the free prior and informed consent of the Taíno People, in order to protect and safeguard the integrity of local Taíno culture, traditions, customs and spirituality.

In particular, the United Confederation of Taíno People (UCTP) draws attention to human rights violations and fundamental freedoms with respect to the *Caguana Ceremonial Center* and *Jácanas* (P029 archeological site) Caguana Ceremonial Center is a National Historic Landmark under the management of the United States National Park Service (NPS) located in Utuado, Puerto Rico. Additionally, Puerto Rico's Department of Natural Resources deferred decision-making at *Jácanas* in Ponce, Puerto Rico to U.S. federal agencies, and denied the right of the Taíno People to free prior and informed consent, and self-determination.[122] Consequently, the Taíno People continue to be denied entry into *Jácanas* for religious purposes.

The right to consultation with regard to access to this Sacred Site, including Burial Site, Funerary Objects and Ancestral Remains located at and removed from *Jácanas* to an unverified location in the U.S. mainland by the U.S. Army Core of Engineers, was consciously violated by said agency. The specific exclusion of Taíno Peoples' by the Army Corp of Engineers in the consultation

121 The 2008 UCTP Joint Taíno CERD Report and the 2009 International Indian Treaty Council UPR Submission on the Examination of the United States are available at www.uctp.org. See also "UN Special Rapporteur Investigating Racism in the U.S." at http://uctp.blogspot.com/2008/05/un-special-rapporteur-investigating.html.
122 See "Government Oppression of the Taíno People in Puerto Rico" at http://www.uctp.org/index.php?option=com_content&task=view&id=54&Itemid=2

process with regard to *Jácanas* violates the National Historic Preservation Act with respect to notice and consultation with the Taíno People, "interested parties" as defined by the Act.[123] Additionally, Taíno have been denied entry into the *Caguana Ceremonial Center* and community members forced to pay admission to enter and pray, then denied the right to sing their ceremonial songs and dance, and play their drums. Among other violations, the UCTP has duly noted the mismanagement and endangerment of the Sacred Stones that line the Ceremonial Batey (plazas) at *Caguana*, the failure to make provisions for Indigenous community access, and the violation of Taíno spiritual protocols.

Access to sacred and ceremonial places in *Borikén* (Puerto Rico) are vital to Taíno identity, religious beliefs and practices.[124] ICCPR Article 27, for instance, places an obligation on the United States not to impair that access. Indeed, the ICCPR and the Treaty of Paris make it clear that the United States must be compelled to recognize its duty to comply with its human rights obligations to the Taíno People and all Indigenous Peoples within Territories and "Insular areas" over which the U.S. continues to exert sovereignty, according to the US 4th Periodic Report submitted to the Human Rights Committee. These "Insular Areas" include the Commonwealth of Puerto Rico; Guam, an unincorporated, organized territory of the United States; American Samoa, an unincorporated, unorganized territory of the United States; the U.S. Virgin Islands, an unincorporated, organized territory of the United States; and the Northern Mariana Islands, a self-governing commonwealth in political union with the United States.

Case N: Western Shoshone Nation

Contact: Western Shoshone Defense Project, 242 2nd Street, Crescent Valley NV 89821 Tel: (775) 468-0230

In 1863, the Western Shoshone Nation signed the Treaty of Ruby Valley with the United States, relinquishing no land whatsoever but permitting peaceful transit of settlers across their lands on the way to settle and mine gold in neighboring California. By the turn of the century, the US had claimed jurisdiction over nearly all Western Shoshone lands, now known as Nevada, in blatant violation of the Treaty of Ruby Valley. The Indian Claims Commission (ICC), established by the US in 1946 to adjudicate Treaty violations and other land claims by Indigenous Peoples, heard the Western Shoshone case in 1974, with the US government representing the Shoshone in a case against their own government. No Shoshone were allowed to testify. The US claimed that they had acquired Western Shoshone lands through "gradual encroachment" beginning in the 1870's. A monetary settlement was awarded to the Western Shoshone by the ICC at the price of 15 cents an acre, the estimated land value in 1872, for mineral-rich land that was never for sale in the first place.

Because the ICC authorized this payment, which was then accepted unilaterally by the US government as "trustee" for the Western Shoshone, the United States has continued to claim that the case was "settled". The US makes this claim, despite the fact that Western Shoshone people continue to dispute it and have pending actions both at the United Nations and the Organization of American States human rights systems.

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123 NHP Act, Section 101 (c), (C), Section 110 (a), (iii), and Section 113 (b) specify inclusion of "interested parties" in the consultation process.

124 Borikén is the Taíno name for the island known today as Puerto Rico. The Taíno language is verifiably a part of the Arawakan language group that extends throughout the Caribbean into South America.

In 1992, the Western Shoshone submitted their case to the Inter-American Commission which examined the relevant land title claims as well as the "settlement" process used by the ICC and the US courts. The Inter-American Commission concluded that "these processes were not sufficient to comply with contemporary international human rights norms, principles and standards that govern the determination of Indigenous property interests".

After the US refused to abide with this outcome or to change their policies whatsoever as a result, the Western Shoshone moved forward on their urgent action submission to the UN Committee on the Elimination of Racial Discrimination ("CERD"). The CERD also expressed concern that the United States' position was "made on the basis of processes before the Indian Claims Commission, 'which did not comply with contemporary international human rights norms' as stressed by the Inter-American Commission":

"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)".

Despite the CERD's concerns expressed on this and other occasions to the US regarding the ongoing violations of Western Shoshone human rights, activities being carried out on Western Shoshone lands in violation of their Free Prior and Informed Consent and Treaty rights have continued and in fact have increased in intensity and scope.

For example, the Western Shoshone have continued to suffer the impacts of mining carried out by Barrick Gold Corporation, based in Toronto Canada, and permitted by the United States. Of particular concern to the Western Shoshone has been the destruction and desecration of the sacred mountain Mt. Tenabo where a massive open pit gold mine is continuing to move forward despite their clear and consistent opposition.

As Western Shoshone grandmother Joyce McDade stated at a protest by the Western Shoshone on January 18th 2009, *"Denabo has special significance for Western Shoshone, it means the writing on the rocks walls of the mountain put there by our Creator. We go to pray to our Creator to give us strength to keep us going. How can we pray to our creator when the place is being blown up?"*

Barrick has been engaged in gold mining operations in Western Shoshone Treaty Territory known as Nevada USA since 1965, producing massive environmental and cultural destruction. In November 2008, nearly two years after the CERD issued the recommendation to Canada regarding preventing human rights violations by Canadian Corporations, Barrick carried out a massive clear cut of pine trees to make way for a huge open pit gold mine known as the Cortez Hills Expansion Project. This took place on one side of Mt. Tenabo, a mountain in the centre of a sacred area called Newe Sogobia by the Western Shoshone used for sweat lodges and other ceremonies, as well as traditional food and medicinal plant gathering.

Western Shoshone Elder Carrie Dann who visited the site after these pine trees (an important source of the traditional food called pinon nuts) were clear cut and viewed the destruction including piles of uprooted trees and unfenced polluted ponds. She called it a "war zone against the trees by the Barrick Gold Company".

In a written statement submitted to the International Indian Treaty Council on January 9th 2012, Larson Bill of the Western Shoshone Defense Project affirmed that this struggle is continuing and that no improvement has yet been seen in the behavior of Barrick Gold corporation or the US government that permits these operations in spite of their Treaty and human rights obligations to the Western Shoshone Nation. Mr. Bill further stated that: *"Under the shadow of the U.S. policies and laws, the Canadian mines will continue to overlook the sacred connection of the Shoshone People to their lands and all living things upon it".*