

United Nations Human Rights Council's 2nd Universal Periodic Review of the United States at its 22nd Session, April-May 2015

Non-implementation by the United States of the United Nations Declaration on the Rights of Indigenous Peoples as well as previous Recommendations from the Universal Periodic Review Process, United Nations Treaty Bodies and UN Special Procedures impacting the Rights of Indigenous Peoples

Coalition Submission by the International Indian Treaty Council, Indigenous Peoples Non-Governmental Organization with ECOSOC General Consultative Status and 39 Affiliated Tribal Nation Governments, Organizations and communities from lands and territories currently part of or under the political jurisdiction of the United States of America (full list of Co-submitters provided in the online submission form)

September 15th, 2014

*... "treaties, agreements and other constructive arrangements, and the relationship they represent, are the basis for a strengthened partnership between indigenous peoples and States
--- Preamble, United Nations Declaration on the Rights of Indigenous Peoples*

*"... I encourage States to take concrete steps to honour and strengthen the treaties they have concluded with indigenous peoples and to cooperate with them in implementing new agreements or other constructive arrangements through transparent, inclusive and participatory negotiations."
-- H.E. Navi Pillay, United Nations High Commissioner on Human Rights, August 7, 2013*



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1. The International Indian Treaty Council (IITC) and its US-based affiliates call the attention of the Universal Periodic Review Procedure of the UN Human Rights Council at its 22nd session to the lack of implementation by the United States of America (US) of previous UPR recommendations addressing the rights of Indigenous Peoples. We also address its failure to implement the *Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America*, issued by the 72th session in February 2008 and 85th session in August 2014 of the Committee on the Elimination of Racial Discrimination (CERD) as well as several related decisions by its urgent action procedure. The Co-submitters of this Report also address US failure to comply with relevant recommendations by the Human Rights Committee and the UN Special Rapporteur on the Rights of Indigenous Peoples.

2. The US stated position of selective implementation of UN Treaty body recommendations, and of denying their legally binding standing, undermines the effectiveness and viability of this process to hold any States party accountable for implementing its human rights obligations. This has broad implications for the shared obligations of all UN members contained in the UN Charter “to promote universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion”.¹

3. On July 8th, 2014, the IITC and its affiliates, with the Oglala Lakota Nation, Western Shoshone Defence Project and the Indigenous World Association (IWA), submitted an Alternative Report to the CERD documenting the US’ failure to implement or even to accept the very important and overarching recommendation in the final sentence of paragraph 29 in the February 2008 Concluding Observations of the CERD 72nd Session to the US:

While noting the position of the State party with regard to the United Nations Declaration on the Rights of Indigenous Peoples (A/RES/61/295), the Committee finally recommends that the declaration be used as a guide to interpret the State party’s obligations under the Convention relating to indigenous peoples.²

In its 7th, 8th and 9th Periodic Reports Submitted to the CERD in June 2013, the US recognized the Committee’s recommendation in paragraph 29, but openly challenged its validity and stated that it did not intend to implement it.³

4. The Co-submitters of this report to the UPR Process’s review of the US express profound concern that the US has stated at least twice at public meetings in the presence of representatives of the International Indian Treaty Council and many others that it “does not consider the CERD recommendations to be legally binding”⁴.

¹ United Nations Charter, Articles 55 (c).

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

³ http://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/USA/INT_CERD_NGO_USA_17778_E.pdf

⁴ This position was stated by representatives of the US State Department on April 20th, 2010 at the US Permanent Mission to the UN in New York City during a meeting with Indigenous representatives regarding the US announcement that day at the 9th Session of the UNPFII of its intent to consider a change of position on the UN Declaration on the Rights of Indigenous Peoples; and on April 24, 2014 at the State Department consultation at the University of Oklahoma School of Law with Indigenous Tribes, Nations and organizations in preparation for the United States second review by the UN Universal Periodic Review Process (2015).

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

6. From the point of view of Indigenous Peoples and others suffering from racial discrimination and other forms of human rights violations due to US policies and practices, the position expressed by the US is neither legally accurate nor morally acceptable. Its failure to implement, or even to accept in some cases, the Committee's recommendations in paragraphs 19, 29 and 30 is neither legally accurate or morally acceptable and results in ongoing discrimination and human rights violations for Indigenous Peoples. Various examples are cited or referenced in this Report.

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

8. We draw the attention of the CERD to the fifth preambular paragraph of the 1969 Vienna Convention on the Law of Treaties⁵: "Recalling the determination of the peoples of the United Nations to establish conditions under which justice and respect for the obligations arising from treaties can be maintained." Article 26 of the Vienna Convention sets out the basis of international law respecting treaties - *pacta sunt servanda*: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith."

9. Further, the Vienna Convention states in Article 27 that a party to a treaty "may not invoke the provisions of its internal law as justification for its failure to perform a treaty." In fact, the United States itself has acknowledged to the CERD that their federalist system cannot be an excuse for its failure to apply the ICERD domestically. In the Addendum to its third periodic report, the US stated that federalism "does not condition or limit the international obligations of the United States. Nor can it serve as an excuse for any failure to comply with those obligations as a matter of domestic or international law."⁶

10. The IITC and a number of other Indigenous Peoples' governments and organizations also made submissions addressing the US failure to implement other recommendations from the CERD's 2008 Concluding Observations for the Periodic Review of the United States by the CERD's 85th session in August 2014. These included:

- a. Paragraph 19 addressing the case of land appropriation from the Western Shoshone;⁷
- b. Paragraph 30 regarding implementation of measures to prevent corporations registered in the US from impacting the human rights of Indigenous Peoples in other countries, specifically

⁵ The CERD interprets the ICERD treaty largely in lieu of states – the states would be bound by the Vienna Convention rules, so the treaty bodies have to adhere to them as well.

⁶ Government of the United States, Third Periodic Reports of States Parties (1999), CERD/C/351/Add.1, Addendum, Para.167

⁷ http://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/USA/INT_CERD_NGO_USA_17778_E.pdf

addressing the manufacture and export of pesticides by the US which it prohibits for use in the US due to their known detrimental impacts on human health including reproductive health⁸; and

- c. Paragraph 29 regarding the protection of areas of spiritual and cultural significance and the right to participate in relevant decision-making in that regard⁹.

11. The CERD, in its Concluding Observations regarding the US¹⁰ also cited shortfalls in US compliance with these key elements of recommendations after 6 years, addressing specific examples of lack of compliance and reiterating specific recommendations regarding the protection of sacred areas, free prior and informed consent, lack of redress and access to justice. The CERD also reiterated its 2008 recommendations regarding US responsibility to take action to prevent the corporations its licenses from violating the rights of Indigenous Peoples outside the US.¹¹

⁸ http://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/USA/INT_CERD_NGO_USA_17655_E.pdf

⁹ http://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/USA/INT_CERD_NGO_USA_17778_E.pdf; and http://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/USA/INT_CERD_NGO_USA_17600_E.pdf

¹⁰ Concluding observations on the combined seventh to ninth periodic reports of United States of America, [CERD/C/USA/CO/7-9], August 29th 2014, **Rights of indigenous peoples**

24. While acknowledging the steps taken by the State party to recognize the culture and traditions of indigenous peoples, including the support for the United Nations Declaration on the Rights of Indigenous Peoples announced by President Obama on 16 December 2010, the issuance of Executive Orders 13007 and 13175 and the high-level conferences organized by President Obama with tribal leaders, the Committee remains concerned at:

- (a) Lack of concrete progress achieved to guarantee, in law and in practice, the free, prior and informed consent of indigenous peoples in policy-making and decisions that affect them;
- (b) The ongoing obstacles to the recognition of tribes, including high costs and lengthy and burdensome procedural requirements;
- (c) Insufficient measures taken to protect the sacred sites of indigenous peoples that are essential for the preservation of their religious, cultural and spiritual practices against polluting and disruptive activities, resulting inter alia from resource extraction, industrial development, construction of border fences and walls, tourism, and urbanization;
- (d) The continued and previous removal of indigenous children from their families and communities through the United States child welfare system; and
- (e) The lack of sufficient and adequate information provided by the State party on the measures taken to implement the recommendations of the Committee in its Decision 1(68) regarding the Western Shoshone peoples (CERD/C/USA/DEC/1) adopted under the Early Warning and Urgent Action Procedure in 2006, as well as the ongoing infringement of the rights of the Western Shoshone peoples (arts.5 and 6).

Recalling its general recommendation No. 23 (1997) on indigenous peoples, the Committee calls upon the State party to:

- (a) Guarantee, in law and in practice, the right of indigenous peoples to effective participation in public life and in decisions that affect them based on their free, prior and informed consent;
- (b) Take effective measures to eliminate undue obstacles to the recognition of tribes;
- (c) Adopt concrete measures to effectively protect the sacred sites of indigenous peoples as a result of the State party's development or national security projects and exploitation of natural resources, and ensure that those responsible for any damages caused are held accountable;
- (d) Effectively implement and enforce the Indian Child Welfare Act of 1978 to halt the removal of indigenous children from their families and communities; and
- (e) Take immediate action to implement the recommendations contained in Decision 1(68) and provide comprehensive information to the Committee on concrete measures taken in this regard

¹¹ Ibid, **Disparate impact of environmental pollution**, paragraph 10.

The Committee calls upon the State party to: (d) Take appropriate measures to prevent the activities of transnational corporations registered in the State party which could have adverse effects on the enjoyment of human rights by local populations in other countries, especially by indigenous peoples and minorities.

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

13. On December 16, 2010, President Barack Obama announced that the US would change the position it took at the UN General Assembly on September 13th 2007, and would now “lend its support” to the Declaration. The initial positive response by many Indigenous Peoples in and outside the US was immediately tempered by the significant qualifications contained in the US State Department’s written statement entitled “Announcement of US Support for the United Nations Declaration on the Rights of Indigenous Peoples”¹² distributed immediately following the President’s statement. The US qualifications and limitations placed on the application of the now internationally-recognized “minimum standard for the dignity, survival and well-being”¹³ of Indigenous Peoples has serious and discriminatory impacts on Indigenous Peoples’ full enjoyment of the rights in the UN Declaration as well as those affirmed in legally binding International Standards to which the US is a State party including the ICERD.

14. Most of the recommendations regarding the rights of Indigenous Peoples in the Human Rights Council’s 2010 UPR report to the US¹⁴ called upon the US support and implementation of the UN Declaration on the Rights of Indigenous Peoples, taking into account its “no” vote on September 13th, 2007 when the UN General Assembly adopted the UN Declaration on the Rights of Indigenous Peoples. By the time the US submitted its final response to the UPR recommendations on March 10th, 2011, it had made a statement of qualified support for the Declaration. UPR recommendations 83, 85, 200, 201, 202, 205 and 206, were therefore accepted in whole or part by the US. Recommendation 204, in keeping with the CERD 2008 recommendation to the US “*That the United Nations Declaration on the Rights of Indigenous People be used as a guide to interpret the State obligations under the Convention relating to indigenous peoples*”, was not accepted by the US.

15. It is clear that no provision contained in of the UN Declaration on the Rights of Indigenous Peoples can be interpreted as authorizing the US to unilaterally interpret or redefine its relevant human rights obligations in order to limit or qualify them based on existing federal laws and policies. Rather than lower its interpretation of its international human rights obligations to fit its own existing laws and policies, the US has an obligation to review and amend US laws and policies which perpetrate discrimination and other human rights violations against Indigenous Peoples in accordance with Article 2c of the ICERD.¹⁵

¹² US Dep’t of State Announcement of US Support for the United Nations Declaration on the Rights of Indigenous Peoples (December 16, 2010), available at <http://www.state.gov/documents/organization/153223.pdf>, distributed immediately after President Obama’s statement at the Tribal Leaders Meeting in Washington DC

¹³ United Nations Declaration on the Rights of Indigenous Peoples Article 43

¹⁴ Report of the United States of America Submitted to the U.N. High Commissioner for Human Rights in Conjunction with the Universal Periodic Review, Response to the U.N. Human Rights Council Working Group Report [<http://www.state.gov/j/drl/upr/archive/157986.htm>]

¹⁵ ICERD Article 2:

16. The US' stated qualifications regarding its interpretation and scope of implementation of the UN Declaration include an attempt to redefine, in its own federal policies and its positions at international bodies, the right to Free, Prior and Informed Consent as a much diminished and legally unsubstantiated "Right to Consultation". The "Announcement of US Support" issued by the US State Department specifically redefined the right to FPIC for Indigenous Peoples as a "process of consultation with tribal leaders which does not require, in the US view "the agreement of those leaders, before the actions addressed in those consultations are taken."¹⁶

17. For Indigenous Peoples, Free Prior and Informed Consent (FPIC) is a requirement, prerequisite and manifestation of the exercise of their fundamental right to self-determination as defined in international law. FPIC is now affirmed as the internationally accepted minimum standard for the survival, dignity and well-being of Indigenous Peoples. Many of the relevant provisions of the UN Declaration directly refer to FPIC as the context, framework and criteria for the implementation and realization of a number of rights and provisions. Article 10 on forced relocation; Article 11 addressing the restitution of cultural property; Article 19, addressing adoption of legislative and administrative measures; Article 29 addressing the disposal and storage of hazardous materials on Indigenous lands; and Article 32 on development activities affecting Indigenous Peoples lands, territories and natural resources all contain broad affirmations of the right to FPIC for Indigenous Peoples. The Co-submitters also emphasize the strong affirmation of FPIC as a core principle for redress and restitution of Indigenous Peoples' lands, territories and resources contained in CERD General Recommendation XXIII¹⁷.

18. On September 13th, 2013 a "Consolidated Indigenous Peoples Alternative Report" was submitted to the UN Human Rights Committee by IITC with 28 co-submitters and contributors consisting of Traditional and Tribal governments, organizations, Treaty Councils, Indigenous Peoples organizations and traditional societies for the US Periodic Review by that Treaty Body.¹⁸ It cited the Navajo Nation Human Rights Commission report to the same body. Representing the federally recognized Navajo Nation, the NNHC addressed the shortfalls of "consultation" as defined in the US Announcement of Support for the UN Declaration, as well as in Executive Order 13007 and Executive Order 13175 referenced in the questions to the US by the Committee.¹⁹

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

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

¹⁶ Ibid, page 5

¹⁷ CERD General Recommendation XXIII, para. 5: "*The Committee especially calls upon States parties to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories.*"

¹⁸ The Indigenous Peoples' Consolidated Alternative Report to the UN Human Rights Committee can be downloaded from the Human Rights Committee web site: <http://www2.ohchr.org/english/bodies/hrc/>. The Indigenous Peoples' Consolidated Alternative Report is also available on IITC's web site: www.treatycouncil.org.

¹⁹ "*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...*

19. The US further stipulated in its “Announcement of Support” that it did not intend to recognize for Indigenous Peoples the same right of Self-determination as recognized in Article 1 in Common of the International Covenants for all Peoples. Instead, the US has repeatedly asserted its recognition for “a new and distinct international concept of self-determination specific to Indigenous peoples... which is “different from the existing right of self-determination in international law.”²⁰

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

21. The US has continued to reassert this discriminatory position in international bodies. For example, on May 22, 2013, at the 12th session of the UN Permanent Forum on Indigenous Issues, US State Department representative Laurie Shestack Phipps, Advisor for economic and social affairs at the United States Mission to the United Nations presented a statement for the US’ that “reiterate[d] the U.S. government’s view that self-determination, as expressed in the Declaration, is different from self-determination in international law.”²¹

22. The International Indian Treaty Council (IITC) and two other Indigenous delegations took the floor in response. The IITC intervention, presented by Mr. Roberto Borrero of the IITC Board of Directors, strongly objected to the US position, calling it “blatantly discriminatory”.²²

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

24. Another discriminatory qualification made in the “Announcement of US Support” was the intent to implement the UN Declaration’s provisions only for “federally recognized tribes.” Professor

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”. 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.

²⁰ US Dep’t of State Announcement of US Support for the United Nations Declaration on the Rights of Indigenous Peoples (December 10, 2010), page 3, UN Permanent Forum on Indigenous Issues 12th session, agenda item 6, “Discussion on the World Conference on Indigenous Peoples”

²¹ Link to the State Department’s statement: <http://usun.state.gov/briefing/statements/209946.htm>

²² Link to IITC’s Intervention, May 27th, 2013, UNPFII 12th session, agenda item 6: <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/>

Margo Tamez, Lipan Apache, states that “Although numbers vary from one reporting unit to another, on the average, there are between 200-300 unrecognized historical Indigenous nations living in political juridical limbo in the U.S.”²³

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

26. “Unrecognized” Indigenous Peoples of U.S. territories, such as the Taíno of Puerto Rico, as well as Indigenous Peoples divided by international borders between the US and Canada or US and Mexico, suffer additional discrimination within the US legal system. Examples submitted by the United Confederacy of Taíno People (Boriken/Puerto Rico) and the Lipan Apache (US/Texas border) in other Alternative reports submitted to this session document the inability of many such Indigenous Peoples to protect their cultural heritage and sacred areas, or access the minimal safeguards provided by US laws such as the Native American Graves Protection and Repatriation Act (NAGPRA).²⁴

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

28. 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, FPIC, and traditionally owned, used and occupied lands and territories. Even though the US Congress unilaterally ended Treaty-making with Indian Nations in 1871, pre-existing Treaties are still in effect and contain obligations which are still legally binding upon the US. Article Six of the US Constitution references Treaties as part of “the Supreme Law of the Land;”²⁵

²³ Margo Tamez, spokesperson and co-founder, Lipan Apache Women Defense, and professor of Indigenous Studies, University of British Columbia

²⁴ 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.

²⁵ Article 6, clause two of the US Constitution reads: *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*

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

30. Consent is a fundamental Treaty Principle which predates any UN Standard. It is the foundation of the original Treaty relationship between the US and Indian Nations. For example, the Ft. Laramie Treaty concluded on April 29th, 1869 with the “Great Sioux Nation”²⁶ 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;”*

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

31. Today, the US continues to make unilateral decisions to extract resources (gold, uranium, coal, timber, water, etc.), and to carry out development projects on Treaty lands with devastating impacts on the Sacred Areas, including waters and other resources, which were legally recognized as under the jurisdiction of the Indigenous Treaty Parties under the terms of these Treaties. A number of Sacred Areas vital to cultural identity and the practice of religious freedom currently threatened by extractive industries, tourism, corporate recreation and other forms of development without the FPIC of the impacted Indigenous Peoples were included in the joint CERD submission addressing at the US review in August 2014 including those in California, South Dakota, New Mexico, Arizona, Nevada, Alaska, Kansas, Puerto Rico, Hawaii, Texas and Alabama.²⁷

32. On March 27th, 2014 the United Nations Human Rights Committee issued its Advance Concluding Observations on its review of the Forth report of United States regarding its compliance with its legally binding obligations as a State party to the International Covenant on Civil and Political Rights. It contained the recommendations which are also directly relevant to the US

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.

²⁶ 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

²⁷ http://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/USA/INT_CERD_NGO_USA_17778_E.pdf

implementation of the UPR recommendations under current discussion regarding FPIC and the full and unqualified implementation of the UN Declaration on the Rights of Indigenous Peoples.²⁸

33. One current example of the pervasive and ongoing violations of Treaty Rights affecting Indigenous Peoples lands, environments and sacred areas by the US is the proposed Keystone XL Pipeline. On September 19, 2008, TransCanada Keystone Pipeline, LP1 (“TransCanada”)²⁹ filed an application for a Presidential Permit with the U.S. Department of State (“DOS”) to build and operate the Keystone XL Pipeline to bring crude oil produced in Northern Alberta Canada (the “tar sands” project) to the Gulf of Mexico for processing and transport. At that time, the proposed Keystone XL pipeline included both the northern segment from Canada to Nebraska and the southern segment from Oklahoma to Texas. The proposed route would run through the middle of the US over the Oglala Aquifer and through the Treaty and traditional lands of a number of Indigenous Nations. To date, no process for consent in accordance with the provisions of the UN Declaration, the 1868 Ft. Laramie Treaty or US Treaties with other Indigenous Nations who would be impacted along the proposed route has been proposed or put in place by the US.

40. 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.”*

34. 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.”**

35. The resistance of the Treaty Nations to the Keystone XL Pipeline continues. On May 13th, 2014 at the 13th Session of the United Nations Permanent Forum in New York Dr. Richard L. Zepher addressed the session on behalf of President Bryan V. Brewer of the Oglala Lakota Nations and on this matter, affirming that “the territory of the Oglala Lakota Nation was acknowledged and

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

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

²⁹ TransCanada Keystone Pipeline, LP is a subsidiary of the Canadian company TransCanada Corporation.

guaranteed by the Treaties of 1851 and 1868 between the United States of America and the Great Sioux Nation of Indians”. He also stated on behalf of his Nation stated that “*We stand together in the defense of our homeland by predatory corporations and governments, and against destructive and illegal projects such as the Keystone XL Pipeline*”.

36. The US has a legally-binding obligation to establish “effective protection and remedies” in accordance with Article 6 of the ICERD for violation of Indigenous Peoples’ Treaties and land rights, beyond State-controlled courts and Land Claims processes established and controlled by only one Treaty party (the US). The UN Declaration’s on the Rights of Indigenous Peoples’ provisions of partnership and consent serve as the basis for the development of just, fair, bilateral mechanisms for redress and dispute resolution between the Indigenous and State Treaty Parties for the first time in the history of the US. Key elements of such bi-lateral mechanisms for Treaty- and land rights redress/restitution/conflict resolution/adjudication based on the provisions of the UN Declaration Articles 27, 28 and 40. These provisions must be read in conjunction with Article 37 of the Declaration affirming Indigenous Peoples rights and State obligations with regards to Treaties, Agreements and other Constructive Arrangements concluded between Indigenous Peoples and States or their successors.

37. The Indian Land Claims Commission, established by the US government in 1946 (and disbanded in 1978) was a failed process for Treaty abrogation “settlements” in violation of the FPIC of Indigenous Treaty Nations. It was established by the US government as a unilateral decision-making process. The same party (the United States) which had violated the Treaties was the sole arbitrator of the resulting claims by the violated parties (the Indigenous Treaty Nations). If and when the Commission determined that a violation had indeed occurred, only monetary compensation was offered, not the return of lands that were determined to have been illegally taken.³⁰ In some cases, such as the Lakota, they have never accepted the monetary “settlement” for their sacred land that was not for sale in the first place. To this day, there has never been a just, participatory bilateral mechanism established to enable redress of Treaty, land rights or other human rights violations or to return lands determined to have been taken without FPIC.

38. This denial of due process has been addressed by the CERD. In its 2006 recommendations to the US in response to a submission under the Early Warning and Urgent Action Procedure³¹ by the Western Shoshone National Council et. al. stated that the Indian Claims Commission processes had denied due process and did not comply with contemporary human rights norms, principles and standards. The CERD expressed concerns regarding the US assertion that the Western Shoshone lands had been rightfully and validly appropriated as a result of “gradual encroachment” and that the offer to provide monetary compensation to the Western Shoshone, although never accepted,

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

³¹ CERD/C/USA/DEC/1 11 April, 2006

constituted a final settlement of their claim to restitution.³² CERD reiterated its concerns regarding this case and lack of US information as requested in its August 2014 Concluding Recommendations, as noted above.

39. In response to submissions by Indigenous Peoples as well as US Government agencies and representatives during his country visit to the United States in April-May 2012, UN Special Rapporteur on the Rights of Indigenous Peoples James Anaya submitted a report to the 21st session of United Nations Human Rights Council titled “The situation of indigenous peoples in the United States of America” [A/HRC/21/47/Add.1, 30 August 2012]. It contained the following observations, conclusions and recommendations which are directly relevant to achieving the full and effective implementation of the US Human Rights obligations regarding the rights of Indigenous Peoples to redress, Treaty rights, and access to justice.³³

³² “The Committee is concerned by the State party’s position that Western Shoshone peoples’ legal rights to ancestral lands have been extinguished through gradual encroachment, notwithstanding the fact that the Western Shoshone peoples have reportedly continued to use and occupy the lands and their natural resources in accordance with their traditional land tenure patterns. The Committee further notes with concern that the State party’s position is made on the basis of processes before the Indian Claims Commission, “which did not comply with contemporary international human rights norms, principles and standards that govern determination of indigenous property interests”, as stressed by the Inter-American Commission on Human Rights in the case *Mary and Carrie Dann versus United States* (Case 11.140, 27 December 2002)”. Ibid para 6.

³³ Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya, The situation of indigenous peoples in the United States of America [A/HRC/21/47/Add.1, August 30, 2012], key paragraphs as follows:

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

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

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

VI. Conclusions and recommendations

The need to build on good practices and advance toward reconciliation

90. Measures of reconciliation and redress should include, inter alia, initiatives to address outstanding claims of treaty violations or non-consensual takings of traditional lands to which indigenous peoples retain cultural or economic attachment, and to restore or secure indigenous peoples’ capacities to maintain connections with places and sites of cultural or religious significance, in accordance with the United States international human rights commitments.

The federal judiciary

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

40. In addition to the Special Rapporteur's recommendations addressing lands, treaties and redress in the context of implementation of the UN Declaration on the Rights of Indigenous Peoples, we highlight his recognition of the continued incarceration of American Indian political prisoner Leonard Peltier as "one of the open wounds of historical events". He proceeded to call for the US to consider granting clemency for Peltier.³⁴ Although the US specifically rejected the recommendation #154 from the previous UPR regarding freedom for Leonard Peltier³⁵, this now is a matter of extreme urgency. It should again be included in the next recommendations to the US based on the recommendation of the UN Rapporteur on the Rights of Indigenous Peoples to the US, as well as widespread continued calls by Indigenous Peoples and a range of human rights NGO's.

41. The Co-submitters are pleased to note that the Draft Resolution submitted by the President of the General Assembly on September 15, 2014 titled "Outcome document of the high-level plenary meeting of the General Assembly known as the World Conference on Indigenous Peoples", to be presented for adoption by the UN General Assembly on September 22, 2015 invites the Treaty bodies to consider the UN Declaration on the Rights of Indigenous Peoples in carrying out their mandates and invites States to report on their implementation of the UN Declaration on the Rights of Indigenous Peoples during the Universal Periodic Review Process.³⁶ It also affirmed the commitment of the member States to uphold and not undermine the UN Declaration on the rights of Indigenous Peoples³⁷ and to uphold Free Prior and Informed Consent in regards to administrative and legislative matters³⁸ and prior to the approval of any projects that affect the lands and resources of Indigenous Peoples.³⁹

Proposed Questions and Recommendations for the United States by the 22nd session of the UPR Working Group

³⁴ Ibid, paragraph 91, VI. Conclusions and Recommendations, **The need to build on good practices and advances toward reconciliation:** "Other measures of reconciliation should include efforts to identify and heal particular sources of open wounds. And hence, for example, promised reparations should be provided to the descendants of the Sands Creek massacre, and new or renewed consideration should be given to clemency for Leonard Peltier." For more information refer to the Alternative Report submitted to the CERD 85th session for the US review "Racial Discrimination by the Criminal Justice System Against Indigenous Peoples in US and the Case of Leonard Peltier" http://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/USA/INT_CERD_NGO_USA_17603_E.pdf.

³⁵ Report of the United States of America Submitted to the U.N. High Commissioner for Human Rights in Conjunction with the Universal Periodic Review, Response to the U.N. Human Rights Council Working Group Report, March 10, 2011, paragraph 32.

³⁶ Draft Outcome Document of the high-level plenary meeting of the General Assembly known as the World Conference on Indigenous Peoples [A/69/L.1, September 15, 2014], paragraph 29. "We invite the human rights treaty bodies to consider the Declaration in accordance with their respective mandates. We encourage Member States to include, as appropriate, information on the situation of the rights of indigenous peoples, including measures taken to pursue the objectives of the Declaration, in reports to those bodies and during the universal periodic review process".

³⁷ Ibid, paragraph 4, "We reaffirm our solemn commitment to respect, promote and advance and in no way diminish the rights of indigenous peoples and to uphold the principles of the Declaration."

³⁸ Ibid, paragraph 3

³⁹ Ibid, paragraph 20

42. The Co-submitters respectfully request that States participating in the 22nd Session of the Universal Periodic Review Process question the United States to clarify its position and the legal and political implications of selective acceptance and implementation of Treaty body recommendations as a State Party to these UN Conventions. Of particular concern is the US stated position regarding the legal standing of CERD recommendations.

43. The Co-submitters respectfully request that the US also be questioned regarding its lack of implementation of UN Special Procedures and previous UPR recommendations to US.

44. The Co-submitters request that the UPR Working Group reiterate the previous UPR recommendation 204, based on the 2008 recommendation to the US by the CERD, that the US use the UN Declaration on the Rights of Indigenous Peoples as a guide to interpret its obligations under the Convention relating to Indigenous Peoples.

45. The Co-submitters request that the UPR Working Group recommend that the US fully implement the UN Declaration on the Rights of Indigenous Peoples without any attempted qualifications that seek to diminish the inherent rights of Indigenous Peoples to, *inter alia*, Self-Determination, Free, Prior and Informed Consent, Rights to Traditionally owned, occupied and used Lands, Territories and resources, cultural rights and Sacred Areas.

46. The Co-submitters request that the UPR Working Group recommend that the United States commit to fully implement its Treaty obligations with Indigenous Nations in keeping with its own Constitution and the UN Declaration on the Rights of Indigenous Peoples in all laws, policies, judicial proceedings and executive/administrative decisions on all levels. This includes the full and unqualified implementation of the Treaty rights, including, *inter alia*, the rejection of the Keystone XL Pipeline. This also includes the establishment, in conjunction and partnership with Indigenous Peoples, of a just, fair and participatory process for redress, remedy and restitution for violations of Treaty rights

47. The Co-submitters request that the UPR Working Group recommend That the United States reconsider its rejection of recommendation # 154 regarding ending the incarceration of Leonard Peltier in its first UPR review, based on the continued widespread calls by Indigenous Peoples and Human Rights organizations, and the recommendation of Special Rapporteur on the Rights of Indigenous Peoples James Anaya after his official visit to the United States in 2012.