

INTERNATIONAL HUMAN RIGHTS STANDARD-SETTING WRITTEN SUBMISSION ON PROTECTED AREAS AND CONSERVATION, IN REPLY TO THE CALL FOR INPUTS FROM THE MANDATE OF THE SPECIAL RAPPORTEUR ON THE RIGHTS OF INDIGENOUS PEOPLES FOR HIS REPORT TO BE PRESENTED AT THE 77TH SESSION OF THE UN GENERAL ASSEMBLY

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I. Introduction

The idea of untouched wilderness is a fallacy.¹ Almost every inch of the Earth has been shaped by human intervention, and these lands and waters include areas depopulated by colonialism.² The former Special Rapporteur on the rights of Indigenous peoples, Victoria Tauli-Corpuz, noted that public land conservation often involves the displacement of Indigenous peoples.³ The United States created the first State-designated conservation area, Yellowstone, from Indigenous land in 1872.⁴ Since the creation of Yellowstone, States conserving land have violated the rights of the lands' residents through displacement, extrajudicial killings, and restriction of access.⁵

Indigenous and tribal peoples' traditional worldviews are based on a relationship to the land.⁶ Indigenous lands are critical to the vitality of Indigenous peoples and cultures.⁷ Indigenous uses of traditional lands vary from tribe to tribe, but these uses define traditional lifeways.⁸ The Inter-American Court of Human Rights has established that:

for [I]ndigenous communities, relations to land are not merely a matter of possession and production but a material and spiritual

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¹ Mark Dowie, *The Myth of a Wilderness Without Humans*, MIT PRESS READER (Oct. 11, 2019), <https://thereader.mitpress.mit.edu/the-myth-of-a-wilderness-without-humans/>.

² *Id.*

³ Victoria Tauli-Corpuz, U.N. Doc. A/71/229, at ¶¶ 53-55 (2016).

⁴ PERMANENT FORUM ON INDIGENOUS ISSUES, STUDY TO EXAMINE CONSERVATION AND INDIGENOUS PEOPLES' HUMAN RIGHTS, E/C.19/2018/9, at ¶ 3 (2018).

⁵ *Id.*

⁶ Maya Indigenous Communities of the Toledo District (Belize), IACHR Case 12.053, Report No. 40/04, at ¶ 155 (2004).

⁷ *Id.*

⁸ Sawhoyamaya Indigenous Community v. Paraguay, IACHR Series Case No. 146, at ¶ 131 (2006) (Merits, Reparations and Costs, Judgement of Mar. 29, 2006).

element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.⁹

Therefore, States must protect Indigenous land rights to protect Indigenous culture.

States took action to protect Indigenous land rights with the passage of the United Nations Declaration on the Rights of Indigenous Peoples. Article 25 reserves to Indigenous peoples “the right to maintain and strengthen their distinctive spiritual relationship” with traditional lands and waters.¹⁰ Article 26 extends this right to “own, use, develop and control the lands, territories and resources.”¹¹ Indigenous land rights are now clearly protected by international law.¹²

II. Conservation and Indigenous lands in the United States

The United States has largely ignored its obligations to Indigenous peoples under contemporary international law and the treaties signed by the United States with tribes.¹³ State actors have cleared hunting grounds, interfered with waterways, and destroyed Indigenous permaculture.¹⁴ The United States Supreme Court permitted the destruction of Yurok, Karuk, and Tolowa sacred sites to build a logging road.¹⁵ The Court set a precedent for the nation that Indigenous rights to land are inferior to State development goals. The United States generally avoids fulfilling its obligations to Indigenous peoples unless it finds a treaty to still be binding.¹⁶

Contemporary United States policy shows limited willingness to support Indigenous rights to traditional land. Title IV of the Indian Self-Determination and Education Assistance Act of 1975

⁹ *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, IACHR Series Case No. 146, at ¶ 131 (2001) (Merits, Reparations, and Costs, Judgement of Mar. 29, 2006); *Yakye Axa Indigenous Community v. Paraguay*, IACHR Series Case No. 125, ¶¶ 124, 131 (Merits, Reparations, and Costs, Judgement of June 17, 2005); *Plan de Sánchez Massacre v. Guatemala*, IACHR Series Case No. 116, at ¶ 85 (2004) (Reparations and Costs, Judgement of Nov. 19, 2004).

¹⁰ UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES, A/RES/61/295, at art. 25 (2007).

¹¹ *Id.* at art. 26.

¹² *Id.*

¹³ Alex Brown, *Once-Ignored Promises to Tribes Could Change the Environmental Landscape*, PEW TRUSTS (Dec. 1, 2020), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2020/12/01/once-ignored-promises-to-tribes-could-change-the-environmental-landscape>.

¹⁴ *Id.* (permaculture here refers to the continued and historic management of wild rice beds by Indigenous peoples, including the harvesting and replanting of this crop).

¹⁵ *See Lyng v. Northwest Indian Cemetery Protective Assoc.*, 485 U.S. 439 (1988).

¹⁶ *See United States v. Washington*, No. 13-35474 (9th Cir. 2017).

allows tribes to contract with the State to administrate programs significant to the tribe.¹⁷

According to Justice Rebecca Tsosie of the Fort McDowell Yavapai-Apache Supreme Court, this approach is favorable to tribes, but this approach is not embraced by federal land managers.¹⁸

Instead, federal land managers usually balance input from “stakeholders” in a “multiple use” paradigm that privileges private interests like ranchers and loggers.¹⁹

Tribes have largely been excluded from public land management in the United States, despite performative public policy which suggests otherwise. President Biden released a memorandum ordering federal agencies to follow President Clinton’s Executive Order mandating consultation and coordination with Indian governments.²⁰ Secretaries Haaland and Vilsack issued a joint order recognizing historic Indigenous contributions to lands and waters and the continued need to cooperate with tribes.²¹ Despite these actions, there are only four National Parks that accommodate limited tribal co-management,²² out of a total of 423 national parks.²³ In these four parks, tribal rights are primarily limited to customary use rights with limited input (and no control) over park management.²⁴ Tribes do not have sufficient rights to manage traditional lands in the United States.

¹⁷ INDIAN SELF-DETERMINATION AND EDUCATION ASSISTANCE ACT OF 1975, PUB. L. NO. 93-638, 88 STAT. 2203, at Title IV (1975) (codified as amended at 25 U.S.C.A § 450a and elsewhere in titles 25, 42, and 50, U.S.C. app.); NPS Director Charles F. Sams III, TRIBAL CO-MANAGEMENT OF FEDERAL LANDS: ACKNOWLEDGING THE HISTORY AND CONSIDERING THE PATH FORWARD, U.S. DEPARTMENT OF THE INTERIOR (Mar. 8, 2022).

¹⁸ J. Rebecca Tsosie, *The Conflict Between the “Public Trust” and the “Indian Trust” Doctrines: Federal Public Land Policy and Native Nations*, 39 TULSA L. REV. 271, 310 (2003-04).

¹⁹ *Id.*

²⁰ PRESIDENT BIDEN MEMORANDUM ON TRIBAL CONSULTATION AND STRENGTHENING NATION-TO-NATION RELATIONSHIPS (Jan. 26, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/26/memorandum-on-tribal-consultation-and-strengthening-nation-to-nation-relationships/>.

²¹ U.S. Interior Sec. Haaland & Agriculture Sec. Vilsack, JOINT SECRETARIAL ORDER (3403) ON FULFILLING THE TRUST RESPONSIBILITY TO INDIAN TRIBES IN THE STEWARDSHIP OF FEDERAL LANDS AND WATERS (2021).

²² NPS Director Charles F. Sams III, *supra* fn. 17 (referring to Canyon de Chelly National Monument, Glacier Bay National Park and Preserve, Grand Portage National Monument, and Big Cypress National Preserve).

²³ Rocío Lower & Rebecca Watson, *How Many National Parks are There?*, U.S. NATIONAL PARK SERVICE (last updated Jan. 22, 2021), <https://www.nationalparks.org/connect/blog/how-many-national-parks-are-there#:~:text=The%20National%20Park%20System%20encompasses,%2C%20American%20Samoa%2C%20and%20Guam.>

²⁴ NPS Director Charles F. Sams III, *supra* fn. 17.

Other traditional lands sacred to tribes have been designated for complete destruction. Oak Flat is one of the most sacred sites to the Apache people, and it is a site still regularly in use for ceremony.²⁵ The State protected the land in a national forest until Congress swapped Oak Flat for unprotected land so that it could be strip mined for copper.²⁶ Several hundred miles north, Thacker Pass is a sacred site of the Fort McDermitt Paiute and Shoshone and the Burns Paiute Tribes and the site of a historic massacre.²⁷ The State has permitted the largest lithium mine in the United States at Thacker Pass.²⁸ The State does not involve tribes in management of traditional lands when their destruction serves State and private interests.

III. Payment for Ecosystem Services (PES)

The Special Rapporteur has requested input on payment for ecosystem services and their effect on tribes. PES has a negligible impact on tribes in the United States. The Conservation Security Program provided financial and technical assistance for tribes seeking to protect lands, but Congress did not reauthorize the law.²⁹ The Wildlife Habitat Incentives Program (WHIP) provides assistance for the protection of wetland and aquatic habitats.³⁰ These programs do not compensate tribes for historic contributions to ecosystem services, and so they do not compensate tribes for State-conserved traditional Indigenous lands.³¹

IV. Impact of Post-2020 Global Biodiversity Framework, Including 30x30

²⁵ Lily Meyer, 'Oak Flat' Tells the Story of an Apache Tribe Fighting to Save Its Land From Mining, NPR (Nov. 20, 2020), <https://www.npr.org/2020/11/20/936989723/oak-flat-tells-the-story-of-an-apache-tribe-fighting-to-save-their-land-from-min>.

²⁶ CARL LEVIN AND HOWARD P. "BUCK" McKEON NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2015 (proposed as H.R. 4435, passed as H.R. 3979, Pub.L. 113–291).

²⁷ Carly Nairn, *At a Native massacre site, tribes brace for a new, lithium-driven rush*, MONGABAY (Feb 23, 2022), <https://news.mongabay.com/2022/02/at-a-native-massacre-site-tribes-brace-for-a-new-lithium-driven-rush/>.

²⁸ *Id.*; Amit Katwala, *The spiraling environmental cost of our lithium battery addiction*, MONGABAY (May 8, 2018), <https://www.wired.co.uk/article/lithium-batteries-environment-impact>.

²⁹ Tonya Smith, et al., *Indigenous peoples, local communities, and Payments for Ecosystem Services*, CANADIAN GEOGRAPHER 1, 7 (2019),

https://www.researchgate.net/publication/334606834_Indigenous_peoples_local_communities_and_Payments_for_Ecosystem_Services/link/60c105e7299bf1949f446175/download.

³⁰ *Id.*

³¹ Tonya Smith, *supra* fn. 29, at 11 (2019)..

The Post-2020 Global Biodiversity Framework aims to, among other goals, protect 30% of lands and waters by 2030.³² If the State-led conservation paradigm continues without Indigenous leadership, this conservation is likely to result in a land grab from Indigenous peoples. As an example, recent conservation efforts by the WWF in Africa have resulted in the alleged rape and murder of Indigenous peoples.³³ At least 14% of the world's land is currently protected by State and privately governed protected and conserved areas, while 17% is protected by Indigenous communities, including 80% of global biodiversity.³⁴ Indigenous-led conservation efforts must be recognized and fostered, as these efforts have already closed the 30% conservation gap.

V. Concluding Recommendations

The United States has not fulfilled its obligations to protect Indigenous land and water rights. States should embrace the historic contributions of Indigenous peoples and accord Indigenous peoples leadership in international land and water conservation efforts. The United States and other United Nations member-states should follow the best practices outlined by former Special Rapporteur Victoria Tauli-Corpuz: to legally and financially empower Indigenous peoples to expand Indigenous-led conservation of their traditional lands.³⁵

³² A NEW GLOBAL FRAMEWORK FOR MANAGING NATURE THROUGH 2030: 1ST DETAILED DRAFT AGREEMENT DEBUTS, CONVENTION ON BIOLOGICAL DIVERSITY PRESS RELEASE, at ¶ 12 (12 Jul 2021), <https://www.un.org/sustainabledevelopment/blog/2021/07/a-new-global-framework-for-managing-nature-through-2030-1st-detailed-draft-agreement-debuts/>.

³³ EMBEDDING HUMAN RIGHTS IN NATURE CONSERVATION: FROM INTENT TO ACTION, REPORT OF THE INDEPENDENT PANEL OF EXPERTS OF THE INDEPENDENT REVIEW OF ALLEGATIONS RAISED IN THE MEDIA REGARDING HUMAN RIGHTS VIOLATIONS IN THE CONTEXT OF WWF'S CONSERVATION WORK 1, 113-117 (Nov. 17, 2020), [s/independent_review__independent_panel_of_experts_final_report_24_nov_2020.pdf](https://www.un.org/development/desa/indigenouseoples/wp-content/uploads/sites/19/2020/11/Independent_Panel_of_Experts_Final_Report_24_Nov_2020.pdf).

³⁴ ICCA CONSORTIUM, TERRITORIES OF LIFE 2021 REPORT 1, 15 (2021); *see also* Kayinke Sena, Recognizing Indigenous Peoples' Land Interests is Critical For People and Nature, WWF (Oct. 22, 2020) (Indigenous peoples protect 80% of world biodiversity), <https://www.worldwildlife.org/stories/recognizing-indigenous-peoples-land-interests-is-critical-for-people-and-nature#:~:text=By%20fighting%20for%20their%20lands,they%20have%20lived%20for%20centuries.>

³⁵ Victoria Tauli-Corpuz, Report of the Special Rapporteur of the Human Rights Council on the rights of indigenous peoples, U.N. Doc. A/71/229, ¶ 71, 72, 74, 80, 81 (2016), <https://www.un.org/development/desa/indigenouseoples/wp-content/uploads/sites/19/2019/01/N1624109.pdf>.