

# United States of America

## Submission to the United Nations Universal Periodic Review

Ninth Session of the Working Group on the UPR  
Human Rights Council  
1-12 November 2010

### Indigenous Peoples Rights

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#### Endorsed by:

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1. In its 2006 examination of the United States under the International Covenant on Civil and Political Rights (ICCPR) the Human Rights Committee (HRC) 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.”<sup>1</sup>

2. ICCPR Article 1 refers to the right of all peoples, including Indigenous Peoples, to Self Determination; Article 27 recognizes the right to practice language, culture and religion. The HRC determined that for Indigenous Peoples, their right to practice their cultures includes the right to control the lands and natural resources necessary for the maintenance of these cultures. Positive measures to ensure the effective participation of communities in decisions which affect them must also be ensured.<sup>2</sup>

3. The United States continues to allow the destruction, depletion and desecration of ancestral lands of Indigenous Peoples subject to Aboriginal Title. These include areas of profound religious, spiritual and cultural significance as well as lands and waters essential for their subsistence ways of life. Corporations are 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 survival and health.

4. For example, in Alaska, essential subsistence use areas are threatened by proposed oil and gas development including within the Arctic National Wildlife Refuge, Yukon Flats Wildlife Refuge, and Teshekpuk Lake of the National Petroleum Reserve. On March 31st, 2010 the President of the United States announced government approval of exploration on oil leases in the Beaufort and Chukchi Seas, and in Cook Inlet within the Outer Continental Shelf (OCS) of Alaska. Mining projects, including the proposed Donlin Creek and Pebble Mines, as well as the Elim and Bokan Uranium Mines, threaten essential subsistence areas. Coal mining is also proposed within regions in Alaska that are critical to subsistence. By allowing fossil fuel development and mineral extraction in these lands and waters, the United States is violating the right of Alaska Indigenous Peoples to their means of subsistence in violation of Article 1.2 of the ICCPR, to which the United States is obligated. Fossil fuel development also directly contributes to critical violations of human rights caused by Climate Change for Indigenous Peoples in Alaska and elsewhere. These include the right to food and subsistence, adequate housing, culture and health among others.

5. The Pueblo, Navajo, Hopi, Havasupai, and Western Shoshone Peoples were exposed to the ruinous effects of uranium mining milling, waste storage and weapons testing, since the late 1940's. Uranium production has killed hundreds of Indigenous Peoples, including hundreds of miners still dying from radiation poisoning and cancers of all sorts. Radioactive residue blown by

the wind and seeping into surface and ground water in a continual poisoning of Indigenous communities has never been remedied. Governmental “remediation measures” consist only of leveling out the abandoned uranium mines and bulldozing dirt over the poisoned Earth. The groundwater upon which the Peoples and wildlife depend can never be restored. President Obama’s call for increased nuclear energy development is posing a renewed threat to Indigenous Peoples, as well as sacred sites such as the Grand Canyon, Arizona, and Mt. Taylor in New Mexico. As reported by the Denver Post<sup>3</sup>, in the five Western states where uranium is mined in the US, 4,333 new claims were filed in 2004, according to the Interior Department; in 2009 the number swelled to 43,153. Most if not all such claims are on lands where Indigenous Peoples live and conduct religious ceremonies. These lands are subject to aboriginal title and traditional use as noted by the HRC. The views of the Indigenous Peoples and communities who will be directly affected is yet again, not considered.

6. The Lakota Nation and the Pine Ridge Reservation located in South Dakota, have been subjected to the same deleterious effects including illness, deaths and environmental ruination by uranium mining in the Sacred Black Hills, which are recognized and protected by the 1868 Ft. Laramie Treaty with the US and are also subject to Aboriginal Title. The Lakota are now in a struggle against the expansion of a uranium mine licensed by the Nuclear Regulatory Commission (NRC) of the United States. The mining company, CAMECO, the world’s largest producer of uranium proposes an “in situ leaching” process (ISL) that would pump millions of gallons of toxic and radioactive substances such as Arsenic, Radium 226 & 228, Thorium 230 into the Earth and groundwater. The licensing of the CAMECO expansion is in litigation. The proposed ISL would undoubtedly affect the regional watershed but CAMECO’s scientists claim that the watersheds are unrelated and that “no one uses” the affected watershed in the homeland of the Lakota Nation.

7. In these examples, representing cases which are too numerous to mention in this brief submission, the rights to life, health, self determination and means of subsistence of Indigenous Peoples, as well as the right to practice their culture and religion continues to be affected by the United States failure to implement the 2006 recommendations of the Human Rights Committee and their obligations under the International Covenant on Civil and Political Rights.

8. The UN Committee on the Elimination of Racial Discrimination (CERD) made similar recommendations to the United States regarding their failure to uphold and consider the rights of Indigenous Peoples concerning the protection of sacred sites and areas of cultural importance which continue to be threatened, desecrated and destroyed by imposed development and resource extraction carried out without their consent. In their 2008 examination of the United States’ compliance with the International Convention on the Elimination of all forms of Racial Discrimination (ICERD) the CERD voiced concern “... 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 (arts. 5 (d) (v), 5 (e) (iv) and 5 (e) (vi)).”

9. “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 procedure, – to ensure that activities carried out in areas of spiritual and cultural significance to

Native Americans do not have a negative impact on the enjoyment of their rights under the Convention. The Committee further recommends that the State party 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.”<sup>4</sup>

10. The United States as a matter of practice, does not consult in good faith with Indigenous Tribes, Peoples and Nations affected by these and other devastating projects on lands outside of reservation boundaries, even though many of these are Sacred Areas are of great cultural and spiritual significance to Native Peoples and are subject to Aboriginal Title as well as legally-binding Treaties between Indigenous Peoples and the State. The United States regularly and consistently allows the destruction or desecration of Sacred Areas, as well as traditional subsistence use areas by private corporate interests. The balancing required by article 18 of the ICCPR on the right to religious practice, as found by the Special Rapporteur on Religious Intolerance in his 1999 visit to the United States, is not carried out in either policy or practice.<sup>5</sup>

11. In an Urgent Action/Early Warning decision<sup>6</sup> 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.” In its 2008 examination of the United States the CERD regretted the lack of compliance with its decision: “**The Committee reiterates its Decision 1 (68) in its entirety, and urges the State party to implement all the recommendations contained therein.**”<sup>7</sup> According to the Western Shoshone, the United States has not complied.

12. In spite of the CERD Decision and an earlier decision of the Inter American Commission on Human Rights (IACHR) ruling favorably for Western Shoshone property rights, their livestock has been impounded and mining interests have continued to expand their operations in their traditional homelands. A private gold mining company is currently crushing Sacred Mount Tenabo to dust, soaking it with cyanide, a devastating attack on Western Shoshone Spiritual practice, as well as on their ground and surface waters, their means of subsistence and environment. This violation of their human rights is being carried out with impunity in utter disregard of recommendations of the CERD to the US addressing this critical matter.

13. In another example of private economic interests taking precedence over Indigenous Peoples’ cultural and religious freedom rights, the United States allowed a ski resort to pollute San Francisco Peaks in Arizona with artificial snow made of sewage, desecrating the sanctity of the area. This has been carried out not only without consent, but in the face of vehement and united protest by Indigenous Peoples who consider it to be sacred, including the Navajo, Yavapai-Apache White Mountain Apache, Hopi, Havasupai and Hualapai Nations. Their legal challenge to the government’s decision to permit this activity has been denied. The United States has once again failed to uphold its international obligations to respect, protect and uphold the rights of Indigenous Peoples to maintain their religious practices and cultures.

14. The United States entered into and ratified more than 400 Treaties with Indigenous 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 rights, health, housing, education and subsistence rights (hunting, fishing and gathering) among others. Even though Congress ended US Treaty-making with Indian Nations in 1871, the preexisting Treaties are still in effect and contain obligations which are legally binding today.

15. It is of utmost importance for this UPR process to note that the Western Shoshone, Navajo Nation and the Lakota Nation, along with hundreds of other Indigenous Nations, entered into legally binding, Nation to Nation Treaties with the United States that should ensure that such activities as mentioned above would not be allowed without the free prior and informed consent of the Indian Nations Treaty parties. The Western Shoshone entered into the peace and friendship Treaty of Ruby Valley with the United States in 1863, recognizing Western Shoshone Territory. The Lakota (Sioux) Nation's territory was recognized by the United States (in perpetuity) by the 1868 Fort Laramie Treaty. The Kingdom of Hawaii entered into friendship, commerce and navigation Treaties with the United States in 1826, 1849, 1875 and 1884. The United States violated these Treaties and committed an Act of War against the Kingdom of Hawaii by invading and overthrowing it in 1893, annexing it through the Newlands Resolution in 1898, and finally making it a State through the Statehood Act of 1959.

16. Treaties with Indigenous Nations, and the range of rights they affirm, continue to be consistently violated by the United States. Currently all the Supreme Court of the United States requires to legitimate the abrogation of Treaties is the expression of a clear legislative intent on the part of Congress; there is nothing illegal, immoral or unjust, according to the Supreme Court, in the abrogation of Treaties concluded in good faith between indigenous peoples and the United States.<sup>8</sup> This is the "Plenary Powers" Doctrine challenged by the Human Rights Committee. The review of this policy recommended by the Committee has never taken place.

17. Yet, the US Supreme Court has affirmed the lack of good faith by the US in addressing its Treaty obligations with Indian Nation Treaty Parties. In 1980, regarding violations of the 1868 Ft. Laramie Treaty with the "Great Sioux Nation" (Lakota, Dakota and Nakota), the Supreme Court affirmed a statement by 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".<sup>9</sup> However, despite this clear acknowledgement of wrongdoing by the US Supreme Court, the Treaty lands which were illegally-confiscated, including the sacred Black Hills, have never been returned. A just, fair process in the US to address, adjudicate and correct these and other Treaty violations with the full participation and agreement of *all* Treaty Parties has never been established.

18. This denial of due process relating to appropriating Indigenous Peoples' lands was addressed by the CERD in its recommendations to the US in 2006 in response to a submission by the Western Shoshone National Council et al under the CERD's Early Warning and Urgent Action Procedure<sup>10</sup>. CERD identified the unilateral process established by the US for addressing violations of Treaties with Indigenous Nations, the "Indian Claims Commission" established in 1946 and dissolved in 1978, as a denial of due process which did not comply with contemporary human rights norms, principles and standards. The CERD expressed concerns regarding the US assertion that the Western Shoshone lands had been rightfully and validly appropriated as a result

**of “gradual encroachment” and that the offer to provide monetary compensation to the Western Shoshone, although never accepted, constituted a final settlement of their claims.<sup>11</sup>**

19. In light of these persistent and ongoing violations, it is of particular importance that CERD, in its 2008 Concluding Observations, while noting the position of the United States on the United Nations Declaration on the Rights of Indigenous Peoples<sup>12</sup> recommended that the UNDRIP be used as a guide to interpret the State party’s obligations under the Convention relating to Indigenous Peoples.<sup>13</sup> The UNDRIP is a standard that the United States is therefore required to comply with in its obligations under the ICERD. A range of rights recognized by the HRC and CERD are affirmed in the UNDRIP including the right of Self Determination (article 3); the recognition, observance and enforcement of Treaties concluded with States (article 37); and the right of Free Prior and Informed Consent, recognized in a number of articles.

20. The CERD in its General Recommendation XXIII requires States to ensure that no decisions directly relating to their rights and interests are taken without their free, prior and informed consent. The UNDRIP also recognizes this right in a number of articles, including, *inter alia* Articles 19 and 32. At all international fora where the United States is compelled to respond, it claims that it “consults” with “recognized” tribal governments. The United States has terminated hundreds of so-called “recognized tribal governments” and refuses to reinstate or to formally recognize many Indigenous Peoples. Nevertheless, the right of free, prior and informed consent called for by the CERD Committee<sup>14</sup> and HRC Committee Conclusions and Recommendations, as well as the UNDRIP, must be applied and respected. It should be noted that a State’s formal recognition of Indigenous Peoples is not required in order to apply these international standards.

21. It is time that the United States is called upon to commit itself to respect and observe not only its multilateral human rights treaties, but its Treaties with Indigenous Nations. An essential first step will be to establish, with the full and equal participation of the Indigenous Treaty parties, a just and effective process for redressing Treaty violations based on the firmly established international human rights principles of self-determination, due process and free prior informed consent. The deficiencies in compliance with the ICCPR and ICERD should be brought to the attention of the United States in this UPR process, including its failure to implement to UNDRIP as recommended by the CERD. In addition, we recommend that the US be questioned regarding:

1. The failure to comply with the CERD Decision (and the appurtenant OAS- IACHR decision) regarding the Western Shoshone and their right to property and due process;
2. The destruction, desecration of, and denial of access to Indigenous Sacred Areas, a denial of Indigenous Peoples’ right to practice their religion and maintain their culture;
3. The failure to consult in good faith with Indigenous Peoples (whether or not the Peoples affected are “recognized” by the United States) and the failure to acquire their free, prior and informed consent with regard to matters that directly affect their interests; and,
4. The unilateral termination or abrogation of Treaties with Indigenous Peoples and failure to implement a fair, just and bilateral process to address violations of these Treaties.

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<sup>1</sup> 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.

<sup>2</sup> Human Rights Committee General Comment (Article 27) 23.7.

<sup>3</sup> [http://www.denverpost.com/ci\\_9227230?source=rss](http://www.denverpost.com/ci_9227230?source=rss), visited April 13, 2009.

<sup>4</sup> Committee on the Elimination of Racial Discrimination Seventy-second session Geneva, 18 February - 7 March 2008, Concluding observations, United States of America, UN Doc. CERD/C/USA/CO/6, 8 May 2008, para. 29.

<sup>5</sup> See, 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. 82.

<sup>6</sup> 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.

<sup>7</sup> Fn. 4 Supra, Para. 19.

<sup>8</sup> See, e.g. *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998).

<sup>9</sup> *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).

<sup>10</sup> Fn. 6, Supra.

<sup>11</sup> Id., at Paragraph 6: “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).”

<sup>12</sup> United Nations Declaration on the Rights of Indigenous Peoples (2007). UN Doc. A/RES/61/295 (Hereinafter “UNDRIP”).

<sup>13</sup> Fn. 4, Supra.

<sup>14</sup> See also, CERD General Recommendation XXIII (5) on Indigenous Peoples.