UNITED NATIONS CERD COMMITTEE

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CONSIDERATION OF THE 7th, 8th and 9th PERIODIC REPORTS OF THE UNITED STATES OF AMERICA UNDER ARTICLE 9 OF THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION

JOINT ALTERNATIVE REPORT of INDIGENOUS WORLD ASSOCIATION AND LAGUNA-ACOMA COALITION FOR A SAFE ENVIRONMENT: The Case of Mt. Taylor, A Sacred Cultural Landscape

July 21, 2014

This Report is submitted by the Indigenous World Association (IWA), an ECOSOC accredited NGO, together with the Laguna-Acoma Coalition for a Safe Environment (LACSE). LACSE, an organization of Laguna Pueblo and Acoma Pueblo residents, in New Mexico, USA, is committed to addressing uranium mining legacy issues, including protection of sacred areas, affecting both indigenous nations, and is a member of the Multicultural Alliance for a Safe Environment (MASE), which is submitting a separate report on related issues of environmental justice through the US Human Rights Network.

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I. Summary

Mt. Taylor ("Kaaweesthiimaa" in the Acoma language, "Tsibiinaa" in the Laguna language), a sacred landscape and area to Acoma, Laguna, and other Indigenous Nations in the region, is under threat of irreparable harm should proposed uranium mining by Roca Honda Resources, LLC, and others proceed in the area. Despite the recognition of this area as a traditional cultural property under federal and state law, the United States Forest Service, an agency of the United States government, has taken actions which substantively disregard United States obligations under the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), especially rights with regard to property, health, and participation in cultural activities provided in Article 5 of the ICERD. Despite the Recommendation of the Committee on the Elimination of Racial Discrimination (hereinafter "CERD") in 2008, 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 United States has failed to observe its human rights obligations in this situation.

Current federal law purporting to provide protection for cultural rights, and policy on consultation in cases affecting protection of cultural rights, including Executive Orders, have provided no substantive protection for cultural rights. Both the federal and state governments are responsible permitting agencies for mining activities. However, the United States has not taken sufficient steps to establish appropriate mechanisms to ensure a coordinated approach towards the implementation of the Convention at the federal, state and local levels, which are all implicated in the case of Mt. Taylor.

Roca Honda extractive activities will irreparably and forever damage Mt. Taylor, which has been acknowledged by the Forest Service as an invaluable Sacred Area and Traditional Cultural Property (TCP) held in reverence by all of the Indigenous Nations in the region.[1] Their access to and use of Mt. Taylor-- its lands, resources and waters—is vital to the continuation of cultural and religious activities for these indigenous peoples, as it has been for centuries. This relationship with the mountain, and Mt. Taylor itself, will be damaged beyond repair – with unconscionable and devastating impacts to the Indigenous Peoples and Nations throughout the region. As the Special Rapporteur on the Rights of Indigenous Peoples has found, in many cases, "the very presence of these activities represents a desecration."[2]

The Indigenous World Association (IWA) and Laguna-Acoma Coalition for a Safe Environment (LACSE) urge the CERD to address the United States' refusal to implement its current treaty obligations and policies on consultation in a manner that observes free, prior and

[1] The U.S. Forest Service has acknowledged the potential for "irreparable harm to surrounding tribes and their traditional cultural practices," "direct physical impacts to four historic properties," and cumulative effects that would be "adverse and significant, exacerbating loss of integrity of Mt. Taylor TCP." The DEIS can be found at http://www.fs.fed.us/nepa/nepa_project_exp.php?project=18431

[2] A/HRC/21/47/Add. 1, para. 43.

informed consent, as well as to provide substantive protection for the rights contained in Article 5 of the Convention, as mentioned above.

II. 2008 CERD Concluding Observations and Recommendations on Protection of Sacred Areas, Protection of Cultural Rights, and Implementation by All Levels of Government

In its 2008 Concluding Observations and Recommendations, at paragraph 29, the CERD specifically addressed the protection of sacred places threatened by extractive activities, as well as the need for indigenous peoples to participate in decisions affecting them:

> The Committee is concerned about reports relating to activities – such as nuclear testing, toxic and dangerous waste storage, mining or logging – carried out or planned in areas of spiritual and cultural significance to Native Americans, and about the negative impact that such activities allegedly have on the enjoyment by the affected indigenous peoples of their rights under the Convention. (Articles 5 (d) (v), 5 (e) (iv) and 5 (e) (vi)).
>
> The Committee recommends that the State party take all appropriate measures – in consultation with indigenous peoples concerned and their representatives chosen in accordance with their own procedures – to ensure that activities carried out in areas of spiritual and cultural significance to Native Americans do not have a negative impact on the enjoyment of their rights under the Convention.
>
> The Committee further recommends that the State party recognise the right of Native Americans to participate in decisions affecting them, and consult and cooperate in good faith with the indigenous peoples concerned before adopting and implementing any activity in areas of spiritual and cultural significance to Native Americans. …

Protection of sacred areas is essential to the preservation and promotion of indigenous cultures. Thus, the CERD Observations and Recommendations at paragraph 38, regarding the United States' duty to observe the rights contained in Article 7, with regard to preserving and promoting culture and traditions of indigenous peoples, are also pertinent:

> The Committee also requests the State party to provide, in its next periodic report, detailed information on the measures adopted to preserve and promote the culture and traditions of American Indian and Alaska Native (AIAN) and Native Hawaiian and Other Pacific Islander (NHPI) peoples.

In the United States, and especially in the case of Mt. Taylor, coordination between federal, state and local government agencies is key to protection of sacred areas. Notably, the CERD expressed its concern about the "lack of appropriate and effective mechanisms to ensure a co-ordinated approach towards the implementation of the Convention at the federal, state and local levels. (Article 2)." Thus the CERD's recommendation that the United "establish appropriate mechanisms to ensure a co-ordinated approach towards the implementation of the Convention at the federal, state and local levels," at paragraph 13, is critical.

The United States did not respond to recommendations regarding sacred areas and cultural rights in its 2009 report.

At the time the CERD issued its Concluding Observations and Recommendations in 2008, the United States had not adopted the UN Declaration on the Rights of Indigenous Peoples[3] (hereinafter referred to as "UNDRIP"). Nonetheless, the CERD recommended that the UNDRIP "be used as a guide to interpret the State party's obligations under the Convention relating to indigenous peoples." Thus, since the United States' statement in support of the UNDRIP in December 2010, it has been incumbent on the United States to implement the obligations contained in the UNDRIP.

III. Obligations of the United States under ICERD

When the United States ratified the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) in 1994, it committed to be legally bound by ICERD obligations and committed to treat those within its jurisdiction in a manner consistent with the provisions of internationally recognized human rights. The United States is obligated to pprotect and promote equality and non-discrimination in the enjoyment of human rights for indigenous peoples in the United States, including rights to health, cultural rights, right to own property, and right to participate in decision-making in areas that relate to their rights and interests. Failure by the United States 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 CERD's General Recommendation No. 23, regarding indigenous peoples, is particularly important in this review. The CERD called upon states parties to:

> (a) Recognize and respect indigenous distinct culture, history, language and way of life as an enrichment of the State's cultural identity and to promote its preservation;
> (b) Ensure that members of indigenous peoples are free and equal in dignity and rights and free from any discrimination, in particular that based on indigenous origin or identity;
> (c) Provide indigenous peoples with conditions allowing for a sustainable economic and social development compatible with their cultural characteristics;
> (d) Ensure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent;
> (e) Ensure that indigenous communities can exercise their rights to practise and revitalize their cultural traditions and customs and to preserve and to practise their languages.[4]

[3] A/RES/61/295

[4] Committee on the Elimination of Racial Discrimination, General Recommendation 23, Rights of indigenous peoples (Fifty-first session, 1997), U.N. Doc. A/52/18, annex V at 122 (1997), reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI\GEN\1\Rev.6 at 212 (2003), para. 4.

All of these rights are implicated in the protection of sacred places for indigenous peoples.

In its 2008 Recommendation at paragraph 29, the CERD made clear the nexus between the protection of sacred areas and rights contained in Article 5 of the Convention: the right to own property alone as well as in association with others (5 (a) (v)); the right to public health, medical care, social security and social services (5(e) (vi)); and the right to equal participation in cultural activities (5 (e) (vi)). IWA and LACSE respectfully assert that the right to freedom of thought, conscience and religion (5 (d) (vii)) is also implicated in the protection of sacred areas.

IV. The United States Has Not Adequately Implemented CERD Recommendations Obligations Regarding Protection of Sacred Places and Related Rights

A. United States Responses to CERD

United States responses to Recommendations Nos. 29, 38 and 13 are contained in paragraphs 169, 171, 173, and 176 of its periodic report. The United States response recites a litany of federal laws, policies and actions that allegedly provide protection of rights contained in the ICERD. However, many of these laws and policies, enacted before the United States adoption of the ICERD, fall short of the human rights standards that ICERD and other human rights treaties now require.

(1) Federal Laws and Executive Orders

Paragraph 169 of the United States periodic report, in response to ICERD concluding observations in paras 29 and 38, sets forth federal laws and Executive Orders "relevant to protection of tribal culture and traditions." Those most directly relevant to protection of sacred areas are: the American Indian Religious Freedom Act, 42 U.S.C. 1996; the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3001 *et seq*..; the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bbl; and the National Historic Preservation Act (NHPA), 16 U.S.C. 470 et seq. Executive Order 13007, which directs federal agencies to "accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners," is also listed.

To the great dismay of indigenous peoples in the United States, these statutes and government policies have fallen short of substantive protection for sacred areas and related human rights of indigenous peoples, including those of the ICERD. This is evidenced in cases litigated in the federal and state courts, and through failure or refusal to interpret government policies in a manner that implements the ICERD human rights standards.

The American Indian Religious Freedom Act (AIRFA) has been rendered ineffective in providing substantive protection for sacred areas since the United States Supreme Court found in 1988 that "[n]owhere in the law is there so much as a hint of any intent to create a cause of

action or any judicially enforceable individual rights."[5] The Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb *et. seq*., according to the United States periodic report, "invalidates government action that substantially burdens religious exercise unless the action is justified by a compelling governmental interest." However, the U.S. Supreme Court has held that RFRA applies only to federal, and not state actions.[6] Moreover, in a significant sacred area case in Arizona, a federal appellate court has heightened the burden for indigenous peoples who attempt to use RFRA to protect sacred areas by holding that a "substantial burden" is imposed only when individuals are "forced to choose between following the tenets of their religion and receiving a governmental benefit...or coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions."[7]

The National Historic Preservation Act (NHPA), 16 U.S.C. 470 *et seq*., requires federal agencies to "consider the effects of projects they carry out, financially assist, or license on historic properties and to consult Indian tribes and Native Hawaiian organizations that attach religious and cultural importance to such properties in that process." However, NHPA provides only procedural and substantive requirements, thereby limiting the impact of consultation for indigenous peoples.[8] NHPA 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."[9] This is particularly crucial in the case of Mt. Taylor, which has been designated as eligible for listing on the National Register of Historic Properties under NHPA but remains under threat of irreparable harm. This is discussed further, below.

(2) U.S. Policies on Consultation

Paragraphs 171, 172 and 173 of the U.S. periodic report address issues of consultation, as provided in federal laws and as determined by Executive Orders and federal government policy. The list includes Executive Order 13175[10] (Consultation and Coordination with Indian Tribal Governments); Executive Order 13007[11] (Indian Sacred Sites); federal laws that also require consultation with federally recognized tribes and in some cases with the Native

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[5] *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439, 456 (1988), wherein the Supreme Court reviewed the U. S. Congressional record on AIRFA and quoted a member of Congress; Representative Udall emphasized that the bill would not "confer special religious rights on Indians," would "not change any existing State or Federal law," and in fact "has no teeth in it." (Citing 124 Cong. Rec. 21444-21445 (1978)).

[6] See *City of Boerne v. Flores*, 521 U.S. 507 (1997).

[7] *Navajo Nation v. United States Forest Service, 535 F.3d 1058, 1070 (9th Cir. 2008) (en banc), cert. denied, 129 S. Ct. 2763 (2009).* The UN Special Rapporteur on the Rights of Indigenous Peoples has reviewed this situation in detail. See, e.g., A/HRC/18/35.Add 1, Annex X.

[8] See, Kinnison, A. J., "Indigenous Consent: Rethinking U.S. Consultation Policies in Light of the U.N. Declaration on the Rights of Indigenous Peoples," *53 Ariz. L. Rev.* 1301, 1310-1311 (2011).

[9] Ibid at 1311, citing Erik B. Bluemel, "*Accommodating Native American Cultural Activities on Federal Public Lands,* 41 Idaho L. Rev. 475, 537 (2005).

[10] 65 FR 6877(2009). Issued in 2009 by President Obama, E.O. 13175 directs all federal agencies to develop detailed plans of action to implement the Order.

[11] 61 FR 26771-26772 (1996).

Hawaiian community, on matters that affect them, e.g., the Archeological Resources Protection Act of 1979, NAGPRA, the National Historic Preservation Act, and the American Indian Religious Freedom Act. Paragraph 172 describes a series of tribal consultations between the White House and tribal governments from 2009-2012. Paragraph 173 highlights a series of consultations designed to specifically address the United States Forest Service protection of sacred sites on public lands, in 2010 and 2011, as well as agreements for coordination between federal agencies.

In most cases, however, including that of Mt. Taylor, consultation has fallen short of the standard set forth by the CERD and other human rights bodies. Both Executive Order 13007 and 13175 contain the caveat that they are "intended only to improve the internal management of the executive branch and [are] not intended to, nor do [they], 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.[12] In practice, consultation has proven insufficient to provide protection for areas of spiritual and cultural significance, especially where U.S. mining law is interpreted to require a preference for extraction over preservation by federal agencies.

(3) U.S. Response Regarding Use of UNDRIP as a Guide

Paragraph 176 of the U.S. periodic report specifically responds to the CERD recommendation to use the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) as a guide to interpret CERD treaty obligations (paragraph 29):

> [T]he United States does not consider that the Declaration – a non-legally binding, aspirational instrument that was not negotiated for the purpose of interpreting or applying the CERD – should be used to reinterpret parties' obligations under the treaty. Nevertheless, as stated in the United States announcement on the Declaration, the United States underlines its support for the Declaration's recognition in the preamble that indigenous individuals are entitled without discrimination to all human rights recognized in international law, and that indigenous peoples possess certain additional, collective rights.

It is precisely this response that concerns indigenous peoples in the United States regarding the United States' obligations under human rights treaties. The concerns of IWA and LACSE with specific regard to Mt. Taylor are addressed below.

While both Laguna Pueblo and Acoma Pueblo are federally recognized tribes in the United States, current laws and Executive Orders do not provide protection for the cultural rights of indigenous peoples who are not federally recognized. This constitutes discrimination and denies non-federally recognized peoples the right to equal enjoyment of human rights.

[12] See 61 FR 26771-26772 (1996), supra, at Sec. 4; 65 FR 6877 (2009), supra, at Sec.10.

B. The United States' Failure to Acknowledge Its Human Rights Obligations Under CERD and Other Human Rights Treaties: The Case of Mt. Taylor

It is a fundamental principle of international human rights law that human rights are interrelated, interdependent and indivisible. Universal human rights are often expressed and guaranteed by law, in the forms of treaties, customary international law, general principles and other sources of international law. International human rights law lays down obligations of state governments to act in certain ways or to refrain from certain acts, in order to promote and protect human rights and fundamental freedoms of individuals or groups.[13] Thus the United States failure to acknowledge the relationship between the ICERD and the UNDRIP in the observation of human rights standards for indigenous peoples, in effect constitutes discrimination in that it denies indigenous peoples equality and non-discrimination in the enjoyment of human rights.

Within the context of sacred area protection, the United States responses to the CERD fail to address issues of land tenure, cultural rights and the right to free, prior and informed consent of indigenous peoples. These are rights contained in Article 5 of the ICERD, which obligates state parties to guarantee the right of everyone to equality before the law, in the enjoyment of the rights set forth.

In the case of Mt. Taylor, most of the lands under threat of harm from proposed extraction of uranium are on national forest lands, with the remainder on state and private lands. All of this land base is in the aboriginal territory of indigenous peoples, including Acoma Pueblo, Laguna Pueblo, the Zuni Tribe, and Navajo Nation, as evidenced by archaeological evidence, ethno historical reports submitted, and a rich body of oral history and traditional knowledge by indigenous peoples in the area. Many other indigenous peoples had access to these lands for religious and cultural purposes for millennia before European contact. 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 U.S. territory. The treaty acknowledged the rights of the Pueblo Indian people to continue use of their lands and water. In 1858, the U.S. recognized the Spanish land grants to the Pueblos by congressional act.

Cibola National Forest was arbitrarily established in 1931, without notice to or consent by affected indigenous peoples.[14] To the extent that any of the affected indigenous peoples wish to have access to these lands for cultural purposes and regain possession of these aboriginal lands, the actions of the U.S. Forest Service impede these efforts in their actions with regard to proposed uranium mining on Mt. Taylor.

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[13] See, e.g., http://www.ohchr.org/en/issues/pages/whatarehumanrights.aspx

[14] Acoma Pueblo and Laguna Pueblo submitted land claims of aboriginal land use before the Indian Claims Commission (ICC); a congressionally created body which was not designed to return lands, only monetary compensation. The Special Rapporteur noted the shortcomings of the Indian Claims Commission in his country report on the United States, A/HRC/21/47/Add.1, para. 77. Problematic for the tribes was an insistence under the Indian Claims Act for "exclusive use and occupancy," as no pueblo ever claimed to exclusively "own" the mountain.

In 2008, the U.S. Forest Service (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 (NHPA). At the state level, in 2009, Mt. Taylor was declared to be a Traditional Cultural Property pursuant to the New Mexico Cultural Properties Act,[15] after concerted efforts by five tribes in New Mexico and Arizona: Acoma Pueblo, Laguna Pueblo, Zuni Pueblo, Navajo Nation and the Hopi Tribe. The designated area covers approximately 400,000 acres (161,874.3 hectares). However, this designation was challenged in New Mexico courts by uranium companies and private parties.[16] After over 4 years of litigation, the New Mexico Supreme Court issued a decision on February 6, 2014, upholding the designation. At most, the designation guarantees consultation on possible impacts to historical and cultural properties.[17] Regrettably, the USFS and New Mexico agencies have not conducted consultations using the standard of free, prior and informed consent.

Mt. Taylor is situated in northwestern New Mexico, formerly known as the Grants Mineral Belt. This part of New Mexico was devastated by uranium mining from the 1940's to 1980's. Currently both indigenous and non-indigenous communities are struggling to address the wide ranging legacy issues affecting human and environmental health. Part of the legacy of past uranium mining is that the air (breath), soil (plants), and water (springs, streams) are polluted and can never be returned to their original state before mining. The landscape has been scarred; and the cumulative impact of additional mining will do further harm, resulting in deep pain for humans, wildlife, and Mother Earth. The area now harbors 97 abandoned uranium mines and 5 former uranium mills. Currently two new uranium mines are being proposed: the Roca Honda mine, owned by Roca Honda Resources (RHR), LLC, and the La Jara Mesa Mine, owned by Laramide Mine. The areas proposed for mining will adversely impact the Mt. Taylor Traditional Cultural Property.

Permitting processes involve both federal and New Mexico state agencies. USFS is the main permitting authority for the United States. The New Mexico State Environment Department also has a role in permitting as well as addressing legacy issues of past mining and milling. 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 (DEIS) was issued for public review by the U.S. Forest Service (USFS). A number of indigenous peoples, including Acoma and Laguna, raised the issue of protection of cultural and historic resources. The Forest Service admits in the DEIS that mining operations "would adversely affect the Mt. Taylor TCP and cause irreparable

[15] N.M. Stat. Ann. §§ 18-6-1 through 18-6-17.

[16] *Rayellen et. al. v. NM Cultural Properties Review Committee*, Docket No. 33,497

[17] See N.M. Stat. Ann. §§ 18-6-8.1, which provides that where there is a state-sponsored land or structure modification which may affect a registered cultural property, the state historic preservation officer shall be given a "reasonable and timely opportunity to participate in planning such undertaking so as to preserve and protect, and to avoid or minimize adverse effects on, registered cultural properties."

harm to surrounding tribes and their traditional cultural practices."[18] The USFS has announced that it will issue a final EIS for the Roca Honda mine in 2015.

Of great concern for indigenous peoples is that the USFS expressed its opinion that is it essentially obliged to allow mining in the area, pursuant to the 1872 General Mining Act of 1872,[19] notwithstanding its finding that uranium mining would cause irreparable harm to the surrounding tribes and traditional cultural practices.[20] Consultations that took place in the course of preparing the DEIS were not conducted in a manner that respects impacted indigenous peoples' right to free, prior and informed consent. At a minimum, the USFS did not meet the CERD committee recommendation that the United States "take all appropriate measures – in consultation with indigenous peoples concerned and their representatives chosen in accordance with their own procedures – to ensure that activities carried out in areas of spiritual and cultural significance to Native Americans do not have a negative impact on the enjoyment of their rights under the Convention." The USFS 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 General Mining Act of 1872, the 1897 Organic Act and the 1955 Multiple Use Mining Act.[21]

In response to the DEIS, the Multicultural Alliance for a Safe Environment –of which LACSE is a member--has argued that USFS approval of the Roca Honda mine will violate the Religious Freedom Restoration Act (RFRA), insofar as the impacts and burdens on Tribal/Pueblo religious uses constitutes a "substantial burden" on the acknowledged "exercise of religion" on Mt Taylor. Because the USFS has not met its burden to "demonstrate that application of the burden to the person represents the least restrictive means of advancing a compelling interest," USFS approval of the Mine would violate RFRA.[22] The USFS in the DEIS stated that the restrictive interpretation[23] controls, so that significant impacts to religious uses of public land described by affected indigenous peoples, including Acoma and Laguna, do not constitute a "substantial burden" under RFRA and therefore RFRA offers no protection against proposed mining.[24]

These actions by a United States government agency render Executive Order (EO) 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

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[18] *Draft Environmental Impact Statement for Roca Honda Mine,* p. x (Feb. 2013). See note 1, *supra.*

[19] The General Mining Act is codified as 30 U.S.C. §§ 22-42.

[20] See DEIS, supra, n. 14, at p. v.: "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."

[21] 30 U.S.C. § 611.

[22] See Letter of Multicultural Alliance for a Safe Environment, dated June 13, 2013, at **https://cara.ecosystem-management.org/Public/Letter/183109?project=18431**, pp. 5-7.

[23] Discussed, *supra,* at pp. 4-5.

[24] See DEIS, n. 14, supra at p. 8.

physical integrity of such sacred sites."[25] 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 site."[26] It is this failure by the USFS to implement rights contained in the Convention that continues to threaten the continued existence of a sacred cultural landscape, and violate the rights of indigenous peoples in the region. The statements of the USFS essentially tell indigenous peoples that mining law will prevail over protection of sacred areas when they conflict. The laws and policies identified by the US only provide temporary procedural safeguards, but do not fundamentally change this prioritizing of mineral extraction over the cultural rights of indigenous peoples.

Finally, the demonstrated failure of both the USFS and New Mexico state agencies to recognize, much less implement, human rights standards in the case of Mt. Taylor serves to further exacerbate the U.S. shortcomings with regard to the ICERD and other human rights treaties. In 2008, the CERD recommended that the U.S. "establish appropriate mechanisms to ensure a co-ordinated approach towards the implementation of the Convention at the federal, state and local levels." (Para. 13). Sadly this has not been the case with regard to Mt. Taylor, notwithstanding written and oral submission from LACSE and indigenous peoples who have been engaged in efforts to protect the mountain and related rights recognized under international human rights treaties. Massive depletions to deep aquifers that can be used by present and future generations have not been adequately addressed by all federal, state and local decision-makers. One of the biggest obstacles to protection of present and future drinking water sources in the Grants Mineral Belt is the Environmental Protection Agency's and NMED's exemption to the mining industry from safe drinking water and water quality regulations.[27]

IWA and LACSE respectfully submit that meaningful recognition of and engagement in the implementation of the ICERD and related human rights instruments by the US Forest Service and New Mexico state agencies would provide meaningful and substantive protection of sacred areas that are at the center of indigenous culture and life ways.

V. Other UN Body Recommendations

A. Human Rights Committee

In April of this year, the Human Rights Committee issued the following Concluding Observations and Recommendation in response to the fourth periodic report of the United States (on its compliance with the International Covenant on Civil and Political Rights) regarding protection of sacred areas:

[25] 61 Federal Register 26771, Section 1.
[26] See Roca Honda DEIS, note 1, *supra*, at p. 355.
[27] The Roca Honda DEIS, at p. 411, states that treating water from mine operations and related activities to EPA drinking water standards is not currently part of Roca Honda's plan.

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.[28]

B. UN Special Rapporteur on the Rights of Indigenous Peoples

In 2012, the Special Rapporteur on the Rights of Indigenous Peoples, in his report on the United States, issued a number of observations regarding threats to sacred areas.[29] He highlighted the history of loss of millions of acres of land to indigenous peoples, a "history of inadequately controlled extractive activities and other activities within or near remaining indigenous lands," (para. 41), the resultant loss of control over places of cultural and spiritual significance, including areas "that have passed into government hands," (para. 43), and the curtailed ability to use and access sacred places by indigenous people due to mining and other projects, "which are carried out under permits issued by federal or state authorities." He rightly observed that "in many cases, the very presence of these activities represents a desecration." (para. 43).

In the same report, the Special Rapporteur noted concerns about the adequacy of implementation of law and government programmes concerning indigenous peoples, noting in particular "decisions about lands that are outside of indigenous-controlled areas but that nevertheless affect their access to natural or cultural resources or environmental well-being." (para. 69). He noted that "the severed or frayed connections with culturally significant landscapes and sacred sites," (para. 76) often resulting from illegal takings or environmental pollution, are among the issues the United States should address with firm determination.[30] In this regard he unequivocally made the following recommendation:

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[28] CCPR/C/USA/CO/4, para. 25, found at http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsijKy20sgGcLSyqccX0g1nnMFNOUOQBx7X%2bI55yhIwlkDk6CF0OAdiqu2L8SNxDB4%2bVRPkf5gZFbTQO3y9dLrUeUaTbS0RrNO7VHzbyxGDJ%2f

[29] A/HRC/21/47/Add. 1

[30] In the Special Rapporteur's thematic report on Indigenous Peoples and Extractive Industries, A/HRC/24/41, para. 35 (1 July 2013), he made a similar observation:

> 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.

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 significance, in accordance with the United States international human rights commitments.

The Special Rapporteur recognized that states of the United States also exercise authority that affects the rights of indigenous peoples, and recommended that state authorities "become aware of the rights of indigenous peoples affirmed in the [UNDRIP]." (para. 106).

In July 2013, the Special Rapporteur issued a thematic report on Extractive Industries and Indigenous Peoples.[31] Among the issues addressed are the right of indigenous peoples to oppose extractive activities (paras. 19-25), and the principle of free prior and informed consent (paras. 26-36). In particular, the Special Rapporteur notes the importance of free, prior and informed consent as a "safeguard for the internationally recognized rights of indigenous peoples that are typically affected by extractive activities that occur within their territories,"[32] including "the right to non-discrimination in relation to lands, territories, and natural resources, including sacred places."[33]

In his 2012 final report to the Human Rights Committee, Special Rapporteur Anaya credited observations and recommendations made in 1998 by Mr. Abdelfattah Amor, then Special Rapporteur on Religious Intolerance, on his visit to the U.S, regarding protection of sacred areas and freedom of belief.[34] Amor addressed Native American spiritual concerns in the context of international law and recommended in his report 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."[35]

C. Expert Mechanism on the Rights of Indigenous Peoples

In June 2012, the UN Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) issued its "Follow-Up Report on Indigenous Peoples and Right to Participate in Decision-making, With a Focus on Extractive Industries."[36] This report contains an analysis of the Guiding Principles on Business and Human Rights[37] as they relate to indigenous peoples. EMRIP also notes the need to protect sacred sites in the context of extractive industrial development in this report.[38] The Annex to this report is EMRIP's Advice No. 4 (2012). Key in Advice No. 4 is the recognition by EMRIP that the right to participate in decision-making is not confined to

[31] A/HRC/24/41.
[32] Ibid., para. 28.
[33] Ibid.
[34] A/HRC/21/47/Add.1 at p. 12.
[35] E/CN.4/1999/58/Add.1, para. 81.
[36] A/HRC/21/55
[37] A/HRC/17/31
[38] Note 12, supra, para. 20.

recognized legal entitlements to lands, territories and resources, but that it "extends to situations where indigenous peoples have traditionally owned or otherwise occupied and used land, territories and resources under their own indigenous laws."[39]

D. Permanent Forum on Indigenous Issues

In 2009, the Permanent Forum on Indigenous Issues authorized an international expert group workshop on indigenous peoples' rights, corporate accountability and the extractive industries. The resulting report, entitled "Report of the international expert group meeting on extractive industries, Indigenous Peoples' rights and corporate social responsibility"[40] included important observations regarding threats to sacred places from extractive activities. In particular, the report noted that "[m]ost national laws on mineral, oil and gas extraction were made without consultations with Indigenous Peoples and many of those contradict or undermine Indigenous Peoples' rights, in particular the failure to adequately protect spiritual areas commonly referred to as 'sacred sites.'"[41]

VI. Recommended Questions

1. What steps has the United States taken to ensure that extractive activities carried out in areas of spiritual and cultural significance to Indigenous Peoples, including traditional territories not currently titled to them, do not have a negative impact on the enjoyment of their rights under the Convention, including those rights in Article 5?

2. What positive meaningful measures has the United States taken to preserve and promote the connection between culture and traditions of indigenous peoples and their ancestral territories, including cultural landscapes and sacred areas? (Article 7)

3. What measures has the United States taken to implement the CERD's General Recommendation No. 23 in indigenous peoples, and its 2008 recommendation regarding the UNDRIP, especially with regard to ensuring that the standard of free, prior, and informed consent is implemented with regard to proposed extractive activities on or near cultural landscapes and sacred areas?

4. What mechanisms has the United States established to ensure the effective, coordinated implementation of the Convention at all levels of government- federal, state, and local, so that all levels of government respect and promote protection of cultural landscapes and sacred areas of indigenous peoples? (Article 2)

[39] Note 12, supra, Annex, p. 16, paras. 6 and 7.
[40] E/C.19/2009/CRP. 8.
[41] Ibid, para. 20.

VII. Proposed Recommendations

1. Recommend that the United States undertake a comprehensive review of domestic laws and policies, which some U.S. and state agencies interpret to privilege extractive activities over the rights of indigenous peoples, and bring them into compliance with the CERD standards.

2. Recommend that the United States adopt effective measures to protect cultural landscapes and 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.

3. Recommend that the United States take steps to implement the 2008 CERD recommendation that it "establish appropriate mechanisms to ensure a coordinated approach towards the implementation of the Convention at the federal, state and local levels."