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United States Senate
Committee on Indian Affairs
Washington, D.C. 20520.
Via Email: comments@indian.senate.gov; jade_danner@indian.senate.gov

**RE: Written Testimony to the United States Senate Committee on Indian Affairs;
Oversight Hearings on Setting the Standard:
Domestic Policy Implications of the UN Declaration on the rights of Indigenous
Peoples,
Dirksen Senate Office Building 628,
Thursday, 6/09/2011; 2:15 PM**

Dear Senate Indian Affairs Committee members

Please receive our respectful Greetings,

The International Indian Treaty Council (IITC), the first Indigenous Non-Governmental Organization (NGO) accorded Consultative Status by the United Nations Economic and Social Council (1977), is pleased that the Senate Committee on Indian Affairs (the Committee) is holding oversight hearings on the domestic policy implications of the United Nations Declaration on the rights of Indigenous Peoples (hereinafter “the Declaration”), now a universal aspiration of the international community.

We ask that the Committee receive and consider the IITC’s following comments and recommendations for action by the United States Senate, on this matter of great importance to the Indigenous Peoples in the United States.

The Declaration should be viewed as an urgent expression of the thousands of Indigenous Peoples, Nations, and Organizations from all over the world that participated in its drafting, beginning in 1982 at the UN Working Group on Indigenous Populations and ending with its adoption by the General Assembly in 2007.

In many respects the Declaration is a response to the tragic history of colonization of Indigenous Peoples and around the world, including in the US. The preamble affirms that the United Nations and its member states are “*Concerned* that indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands,

territories and resources.” In this context, the full implementation of the Declaration by the US at the National level, and integration of its rights and principles into national laws, policies and practices would do a great deal to further the recognition of the dignity and rights of Indigenous Peoples, the first Nations of this land, their cultures, identities and world views. It would greatly assist in the promotion of a just and positive future and provide a framework for positive relations between Indigenous Peoples and the United States.

US policy toward Indians continues to change. The Trail of Tears and resultant policy of “Relocation,” oppression and genocide (1828-1887) followed by the Dawes Act and the policy of “Allotment and Assimilation that lasted until 1934, have all contributed to our tragic history. Policies of assimilation such as the forced and many time violent removal of generations of Indian and Native children to Boarding Schools, begun in the late 1800s, continue to have a range of traumatic impacts on its victims and their descendants today, as well as social, cultural and physical disruption and the loss of language for whole Nations and communities. The relatively brief respite of the Indian Reorganization Act of 1934 was followed by another destructive and inhumane policy, that of Termination and Relocation of 1953 to 1968.

It was not until the 1970s, within living memory, and as a direct result of American Indian activism, that a measure of justice began to be done. Policies implemented since include the Self Determination of Indian Tribes and the affirmation of a “government to government” or “Nation to Nation” relationship. This included the recognition in the US courts of the continued validity of the legally-binding Treaty rights of Indian Nations, including fishing and land rights, although full recognition and implementation remain unrealized.

But the development of this more equitable relationship has not produced true justice. It is no accident or statistical anomaly that Indians in the United States continue to be the least educated, the least employed, the most impoverished, the most imprisoned, the greater victims of violence and disease, the most discriminated and hidden underclass in the United States today.

The United States should continue pressing for a more just relationship with America’s first Peoples. As Ambassador Rice said at the 9th Session of the UN Permanent Forum on Indigenous Issues (2010), “America cannot be fully whole until its first inhabitants enjoy all the blessings of liberty, prosperity, and dignity.” We believe that the UN Declaration, recognized as a minimal standard for the survival of Indigenous Peoples, is a large step toward this laudable aspiration. It would be sadly ironic if the United States delayed full and unqualified support for the Declaration until its policies were fully and unequivocally consistent with all of its provisions. As a universal aspiration, the Declaration should serve the United States, as it does the rest of humanity, as a blueprint, a roadmap and a framework for developing policies that lead toward a just and equitable future instead of relying on the inadequacies of the present or a blatantly inequitable and oppressive past.

The Declaration’s preamble states the conviction of the international community, “that the recognition of the rights of indigenous peoples in this Declaration will enhance harmonious and cooperative relations between the State and indigenous peoples, based on principles of justice, democracy, respect for human rights, non-discrimination and good faith,” It is in this spirit that we submit these comments for the Committee’s consideration.

Self Determination and Treaties Concluded with Indigenous Peoples

The UN Declaration on the Rights of Indigenous Peoples: A Framework for Recognition and Redress

It has been noted that many of the Declaration's most important provisions are already a part of US policy. Since the Nixon Administration the declared policy of the United States has been one of the Self Determination of Indian Tribes, and a "government to government" relationship with Tribes. In their explanation of vote at the General Assembly in 2007, the US Delegation recognized as much:

"The U.S. government recognizes Indian tribes as political entities with inherent powers of self-government as first peoples. In our legal system, the federal government has a government-to-government relationship with Indian tribes. In this domestic context, this means promoting tribal self-government over a broad range of internal and local affairs, including determination of membership, culture, language, religion, education, information, social welfare, maintenance of community safety, family relations, Economic activities, land and resources management, environment and entry by non-members, as well as ways and means for financing these autonomous functions."

In this regard, we affirm the core importance of the Declaration's Treaty provisions and relevant parts of its preamble and their importance to all Native Americans, and in particular for the United States. The hundreds of ratified Nation to Nation Treaties with Indigenous Nations are considered a Sacred, binding oath by the Indigenous Parties to the Treaties that were concluded between Indigenous Peoples and the United States. The UN Declaration in Article 37 calls upon States to honor and uphold Treaties, Treaty Rights and the Treaty relationship. As recognized in the preamble: "... treaties, agreements and other constructive arrangements and the relationship they represent are the basis for a strengthened partnership between indigenous peoples and States".

The United States in international fora, such as its Periodic Report to the CERD Committee has recognized its Treaties with Indian tribes as binding and enforceable:

"Although treaty making between the federal government and the Indian tribes ended in 1871, the treaties retain their full force and effect even today because they are the legal equivalent of treaties with foreign governments and have the force of federal law.¹"

The Treaty provisions of the Declaration are thus also admittedly part and parcel of US policy toward Indigenous Peoples in the United States. The international character of the over 400 Nation to Nation Treaties it concluded with American Indian Nations and the Hawaiian Nation between 1778 and 1871 must be recognized and respected, in both policy and in fact.

But the truth is they are not. As an example, it is well settled case law that Treaties concluded with Indian Nations can be abrogated at will, with complete impunity by Congressional action

¹ UN Doc. CERD/C/USA/6, 1 May 2007, at Paragraph 335.

without due process. If Indian Nations cannot rely on the Treaties concluded with the United States and ratified by this august body, the US Senate, their decisions and self determination are ultimately illusory, overtaken by the unilateral decisions of others. The Nation to Nation relationship based on respect, recognition, equality and mutual consent which, the basis of the original and enduring Treaty relationship will continue to be undermined and made a nullity.

The Treaties entered into and ratified by the United States government with Indian Nations recognize and affirm a broad range of rights and relationships including mutual recognition of sovereignty, peace and friendship, land rights, right of transit, health, housing, education and subsistence rights (hunting, fishing and gathering) among others. Even though Congress may have ended US Treaty-making with Indian Nations in 1871, the preexisting Treaties are still in effect and contain obligations which are legally-binding upon the United States today. Treaties as “the Supreme Law of the Land” must certainly encompass the US’ obligations described in those Treaties entered into in good faith with the original Indigenous Nations of this land.

The US Supreme Court has confirmed the lack of good faith by the US in addressing its Treaty obligations with Indian Nation Treaty Parties. As an example, 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”.² However, despite this clear acknowledgement of wrongdoing and bad faith, the Treaty was unilaterally abrogated, and the land, including Pahá Sápa, the sacred Black Hills, central to Lakota culture even now, were taken. They are now in the hands of the United States, and, pursuant to a valid Treaty honorably concluded with the United States, could be returned to their rightful owners without substantially affecting the general scheme of things.

A just and 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, as presented in the UN Declaration, has never been established. Relevant provisions, in addition to Article 37, provide guidance to States and Indigenous Peoples for the establishment of such processes. They include:

“Article 40: “Indigenous peoples have the right to access to and prompt decision through a just and fair procedures for the resolution of conflicts and disputes with States ... [and] give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.

“Article 28 I, Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.

² 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).

“Article 28 2: Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.

The failures of the unilateral processes established in the US in the past, including the now defunct Indian Claims Commission, is well recognized. The denial of due process with regard to the unilateral abrogation of Treaties concluded with Indian Nations in the US has been addressed by the CERD Committee, the Treaty Monitoring Body of the International Convention on the Elimination of all forms of Racial Discrimination. 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 Procedure³, the CERD identified the 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.⁴

Establishing a fair, transparent and fully participatory process to ensure that the mutual obligations established under these Treaties are fully honored, upheld and respected is an essential aspect of the US’ compliance with its obligations under international Treaties as well as the requirements of the Declaration. This can be a priority for consideration by this body of new legislative provisions and processes to be undertaken in light of the US support for the UN Declaration. It is our fervent hope, recommendation and request that the process currently being undertaken by the US Senate Committee on Indian Affairs will accept this historic opportunity to include due consideration of the ongoing need to establish such a process with the full and equal participation of both the Indian Nation and US Treaty Parties in accordance with international human rights norms and standards, taking into consideration the provisions of the UN Declaration as well as the recommendations of the UN Treaty Monitoring Bodies.⁵

³ CERD/C/USA/DEC/1 11 April 2006

⁴ “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.

⁵ 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

The Right of Free, Prior and Informed Consent

The Right to Free Prior and Informed Consent (FPIC) is a central underpinning of the UN Declaration and the right of Self Determination, affirmed in a number of the Declaration's Articles as well as in a number of other international standards, including General Recommendation XXIII of the CERD.⁶ No doubt there are challenges in reconciling current US policies with the full implementation of FPIC, as contained in the UN Declaration and other international standards addressing this internationally-recognized right. But there is also a historic potential and opportunity for a greater, more just and equitable recognition of the rights of Indigenous Peoples in the United States consistent with the Declaration.

We note that while President Obama's "Consultation and Coordination with Tribal Governments" policy mandates, as stated by Ambassador Rice at the Permanent Forum last year, "that all agencies have an accountable process for meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications," the new policy falls short of consent, particularly Free, Prior and Informed Consent.

We doubt that there are any justifiable or outstanding objections to the concept of consultation, or that these consultations be prior to any action by the State, or that they be informed. With regard to "free" consent itself, there is implicit in this new policy toward Indian and Alaskan Tribal governments a recognition that there is a right to participate effectively in a process over matters that affect them. At the very least this current policy requires a good faith effort to achieve agreement.

We believe that the principles of democracy and democratic participation as well as the Treaty relationship would be strengthened by fully recognizing the right of consent when American Indian, Alaska and Hawaiian Tribal Nations would or could be affected by government or governmental actions, or by activities of third parties that are condoned or permitted by the government. Ambassador Rice's stated objective of the United States at the Permanent Forum, was of not being "satisfied" and to, "seek to continue to work together with our partners in indigenous communities to provide security, prosperity, equality, and opportunity for all." "Working together," "as partners," connotes equity, mutuality equality – and consent.

Without the requirement of consent there is an inherent contradiction in policy of the recognition by the United States of "...Indian tribes as political entities with inherent powers of self-government as first peoples." Without consent there is no certainty of self government, nor equity or equality in the "government to government" relationship. In the end, without free, prior and informed consent, there is only the undesired and many times destructive action, in many cases over a Tribe's strenuous objection. Without recognition and implementation of the right of

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." 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.

⁶ CERD General Recommendation XXIII (5) on Indigenous Peoples, Fifty-first session, 1997, Contained in document A/52/18, annex V.

Consent, through a formal, good faith process which includes but is not limited to exchanges of views and intentions through consultations, the potential for unwanted unilateral action is as real today as it was the day Columbus landed. Without consent there is only the taking.

Of particular concern is unwanted “development” on Indigenous lands threatening subsistence habitats, sacred sites and cultural practices, environmental integrity, water and health among other rights. *Article 32* of the Declaration that recognizes, again, a fundamental principle of the right of self determination, the right to determine and develop their own lands and their priorities for development:

“2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.”

The reasons for stated reservations concerning the right of Free, Prior and Informed Consent by the US are based entirely on unfounded fears of a “veto” power over development. But this development is, after all, on or affecting their own Lands. So-called “development” can and does impact, many times profoundly a Tribe’s own lands and resources as well as the health and welfare of its members and other factors vital to the preservation of their culture and way of life.

US policy should be based on positive aspirations and not on imagined negativity. Aspirations need no reservations lest they become incomplete, imperfect goals, lest they become inadequate hopes. US Policy should be forward looking, implementing a vision of improved and respectful relations with all American Indian, Alaska and Hawaiian Native Peoples and Nations.

Conclusion

It is sometimes said that treaty violations and the loss of Indian lands are “historical wrongs” not now capable of redress. Yet this “history” continues to plague Indigenous Peoples, continues to eat away at their identities, cultures and ways of life. How recent do “historical wrongs” have to be in order that they be made right? For many Indigenous Nations, Peoples and individuals, these wrongs are as unjust and painful today as the day they were committed. And today, even now, many of these wrongs are factually capable of justice.

As the Declaration’s preamble affirms, “*Recognition of the rights of Indigenous Peoples in this Declaration will enhance cooperative and harmonious relations between the State and Indigenous Peoples.*” We look forward to this end and this recognition by the United States of America of the inherent dignity and rights of Indigenous Peoples with the full implementation of the United Nations Declaration on the rights of Indigenous Peoples.

Recommendations

It should be noted that although the Plenary Powers Doctrine exists and is part of United States Constitutional law today, it is not constitutionally required. The Congress as well as the Executive can and have taken a much more humane and equitable approach and are capable of achieving greater equity and justice in spite of it. We therefor recommend:

1. That the Congress, in conjunction with Indigenous Peoples, establish a process that includes the full participation and agreement of the Indigenous Peoples concerned, with just and fair procedures for the resolution of all conflicts and disputes with the United States that give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and their international human rights, in accordance with the provisions of the UN Declaration.
2. That the Congress take steps to implement an equitable and just process or mechanism, with the full and effective participation and agreement of the Indigenous Nation Treaty Parties, to review implementation of the obligations and commitments contained in Treaties concluded with Indigenous Nations and to redress and resolve violations and unmet obligations in this regard. We further recommend that this US Senate Committee hold regular hearings, in consultation and with full participation of Indigenous treaty Nations, to review the progress of establishing this process.
3. That the Congress, by appropriate legislation require the Free, Prior and Informed Consent of the Indigenous Peoples concerned, prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

For all our Relations...

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