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May 3, 2011

Special Rapporteur on the rights of Indigenous Peoples
Office of the High Commissioner for Human Rights
Palais Wilson,
Geneva, Switzerland
Via email: indigenous@ohchr.org

RE: IITC Response to the Rapporteur's Questionnaire on natural resource extraction and development projects on or near indigenous territories

Dear Special Rapporteur Anaya,

The International Indian Treaty Council (IITC) is pleased to respond to the Special Rapporteur on the rights of Indigenous Peoples' questionnaire on extractive development and Indigenous Peoples. This response is based upon the IITC's direct contact and experience with Indigenous Peoples in Turtle Island (North America), the United States and Canada.

The situations of Fish Lake, British Columbia and tar sands development in Alberta, Canada, are matters brought to the attention of the United Nations Human Rights Council's Special Procedures, as well as other international fora including the Universal Periodic Review of Canada and the United States as well as the CERD Periodic Review of both States. The Laguna Acoma Coalition For A Safe Environment (LACSE) report and the report of the Pit River Nation are taken from presentations to the Independent Expert, now Special Rapporteur on the right to water and sanitation in her recent mission to the United States.

As such, our response is intended not solely to inform the Rapporteur on these particular situations of which he may have ample knowledge, but to reflect on the state of Indigenous rights in North America, particularly the right to lands, territories and resources, the right to culture and religion (and access to Sacred Areas), and the right of free, prior and informed consent (FPIC). These rights and their negation lie at the root of conflict between Indigenous Peoples and States and their extractive industries.

We firmly believe that these rights and particularly FPIC is absolutely critical to the end of colonialism. From a profoundly tragic past to an almost equally tragic present, States, including the United States and Canada, are accustomed even now to taking lands, territories and natural resources without regard to the true owners and users of Indigenous ancestral lands.

Now, they have to ask. And we firmly believe that "no" is a legitimate and acceptable answer. If not, then colonialism in all of its forms will certainly continue.

It should also be pointed out that these rights, including the right to aboriginal lands and of FPIC are found not only in the United Nations Declaration on the rights of indigenous peoples adopted in 2007 by the General Assembly, but in the jurisprudence of Treaty Monitoring Bodies of the United Nations, first developed in the late 1990s as well as the human rights system of the Organization of American States.¹ We believe these rights are firmly established in international human rights conventional law and standards. But the question is not purely one of implementation by States of these rights, but implementation of the Declaration by Indigenous Peoples themselves. They have made it their own.

Respectfully submitted,

Alberto Saldamando, General Counsel,
International Indian Treaty Council

cc: Pit River Nation
The Laguna Acoma Coalition For A Safe Environment (LACSE)
Chief Marilyn Baptiste, Xeni Gwet'in First Nation
Ronald Lameman, Treaty 6 First Nation
Tom Goldtooth, Executive Director, Indigenous Environmental Network
Andrea Carmen, IITC Executive Director

¹ See UN jurisprudence and standards cited in the body of this response; See, also, CASE OF THE SARAMAKA PEOPLE V. SURINAME, INTER-AMERICAN COURT OF HUMAN RIGHTS, JUDGMENT OF AUGUST 12, 2008 (*INTERPRETATION OF THE JUDGMENT ON PRELIMINARY OBJECTIONS, MERITS, REPARATIONS, AND COSTS*)

What are the major concerns regarding the extraction or development of natural resources within or in close proximity to the territories of indigenous peoples? Please provide examples of any specific negative experiences and information about the lessons learned from those experiences.

A. Canada

The Human Rights Committee (HRC) has established that the Indigenous Peoples of Canada have the right of Self Determination under Article 1 of the International Covenant on Civil and Political Rights (ICCPR). In its 1999 recommendations to Canada the Committee emphasized the importance of the 1996 Canadian Royal Commission on Aboriginal Peoples (RCAP) findings in this regard: “With reference to the conclusion by RCAP that without a greater share of lands and resources institutions of aboriginal self-government will fail, the Committee emphasizes that the right to self-determination requires, *inter alia*, that all peoples must be able to freely dispose of their natural wealth and resources and that they may not be deprived of their own means of subsistence (Article 1, para. 2).

“The Committee recommends that decisive and urgent action be taken towards the full implementation of the RCAP recommendations on land and resource allocation. The Committee also recommends that the practice of extinguishing inherent aboriginal rights be abandoned as incompatible with article 1 of the Covenant.”²

In 2005 the HRC’s Conclusions and Recommendations on Canada again linked Article 1 in Common with Indigenous Peoples’ rights to their lands and territories. The HRC stated its concern particularly to the State’s practice of extinguishing aboriginal title through government concessions for logging and the extraction of oil and gas on Indigenous territories as violations of Article 1 and 27 of the ICCPR, specifically referring to the rights of the Lubicon Lake Band.³

Identical concerns over Canada’s practice resulting in the extinguishment of Aboriginal Title were raised by the CERD Committee in 2007 in its Concluding Observations regarding Canada noting that the Canadian Supreme Court had also recognized the inherent Aboriginal Title of Indigenous Peoples to their lands and territories and ordered good faith negotiations between Indigenous Peoples and the Canadian government in order to resolve disputes. It also repeated its recommendation that Canada fully implement the 1996 RCAP recommendations “without delay.”⁴

1. Teztan Biny (Fish Lake), British Columbia

Teztan Biny, or Fish Lake, is situated in the Tsilhqot’in territory of Vancouver, British Columbia. Many elders continue to live near the lake in a traditional style, relying on the food

² Concluding Observations of the Human Rights Committee: Canada, CCPR/C/79/Add.105, para. 8 (1999).

³ Concluding Observations of the Human Rights Committee: Canada, 02/11/2005: paragraphs 8 and 9. “**The State party should ...consult with the Band before granting licenses for economic exploitation of the disputed land, and ensure that in no case such exploitation jeopardizes the rights recognized under the Covenant**”.

⁴ Concluding Observations, Canada, CERD UN Doc. CERD/C/CAN/CO/18, 25 May 2007, paragraph 27, 21, 22)

and water that the lake provides, and with no electricity. Teztan Biny is revered as an integral aspect to the survival of Tsilhqot'in people and culture. "Teztan Biny," one elder recently stated in a mini-documentary on Fish Lake, "is...well, I guess a lot of people...would call it heaven."

Teztan Biny is one of 16 lakes that the Canadian government marked for 'reclassification' by using a controversial provision under the Fisheries Act known as 'Schedule Two' which allows them to redefine any lake as a "Tailings Impoundment Area." Once a lake is redefined, it is no longer considered a natural body of water. This was the first step in condemning Fish Lake to mining.

Taseko Mines proposed a multi-billion dollar "Prosperity Lake" project that would require the drainage of Teztan Biny (Fish Lake) to dump its mining waste as well as to access copper and minor gold deposits. Little Fish Lake, down the river from Teztan Biny, would be flooded by the tailing ponds and the entire watershed would be impacted by tailings which would contain arsenic, mercury, lead, cadmium and other toxic metals used in the mining process. It is likely that dumping tailings would drain into the Taseko River and from there into the Chilko River, the biggest remaining salmon run in North America. Acknowledging that the salmon would not survive the company proposed the creation of an artificial lake as remediation.

Chief Marilyn Baptiste, and former chief Roger William of the Xeni Gwet'in have been active in the defense of their ancestral Sacred lands and aboriginal title. With a great deal of effort that spanned years, in November 2007, the Xeni Gwet'in tribe won a historic 339-day court battle that protected the Aboriginal right to fish, thereby protecting Teztan Biny. In the summer 2010, the Canadian Environmental Assessment Agency (CEAA) made official recommendations to the Canadian federal government to not continue with the proposed Taseko "Prosperity Lake" mining company⁵ concluding, *inter alia*, that the Project would result in significant adverse environmental effects on fish and fish habitat, on navigation, on the current use of lands and resources for traditional purposes by First Nations and on cultural heritage, and on certain potential or established Aboriginal rights or title. The Panel also concludes that the Project, in combination with past, present and reasonably foreseeable future projects would result in a significant adverse cumulative effect on grizzly bears in the South Chilcotin region and on fish and fish habitat.

IN the face of strenuous opposition by a concerned and involved community, the mining company, the Provincial government of British Columbia and Canada have all, for now, backed off, but there is always the threat that they may return.

2. The Tar Sands and Alberta First Nations⁶

The Indigenous Environmental Network Reports:⁷

⁵ Report of the Federal Prosperity Review Panel, <http://www.ceaa.gc.ca/050/documents/43937/43937E.pdf>, last visited 04/28/2011 (a summary of the CEAA's official report to the Canadian government)

⁶ With grateful acknowledgement of the Indigenous Environmental Network's "Canadian Indigenous Tar Sands Campaign" <http://www.ienearth.org/cits.html>, last visited 04.28/2011 from whom this response has borrowed shamelessly (with their knowledge and consent).

⁷ http://www.facebook.com/1/000e9/www.ienearth.org/docs/IENFactsheet_2.pdf

Decades ago, the Alberta government enticed impoverished First Nations band councils to lease treaty reserve lands to the tar sands industry as a means for economic development and jobs. This allowed the first experiments with tar sands operations in the 1960's and 1970's on lands inhabited mostly by Dene, Cree and Métis people. Companies such as Exxon, Shell, Syncrude Canada, BP/ Husky, CNRL and Suncor Energy moved into the area with well funded public relations campaigns targeting First Nation communities, schools, and senior citizens on how tar sand expansion would be good for its Indigenous neighbors. Initially there was an element of consent by First Nations Peoples. But none of the promises of economic prosperity, employment or environmental protections have come to fruition.

Instead, tar sands mining have devastated the cultural heritage, environment and the health of its First Nations Peoples, including the Mikisew Cree First Nation, Athabasca Chipewyan First Nation, Fort McMurray First Nation, Fort McKay Cree Nation, Beaver Lake Cree First Nation, Chipewyan Prairie First Nation, and local Metis peoples.

Surface mining operations occur when tar sands are located within 100m of the ground surface. First, the 'overburden' (boreal forest) is removed by clear cutting, the bitumen is stripped and transported using 'heavy hauler' trucks (over 3 stories high) to industrial "cookers" where steam and chemicals separate the heavy crude from bitumen. To date, surface mining has been the primary method to extract tar sands. Currently, 4,800 km² of land are leased for surface mine operations. Extracting the oil from sand and clay is a highly industrialized process which requires strip mining large areas, resulting in destruction of entire ecosystems. It requires large amounts of fresh water and produces large amounts of toxic wastes. By 2010, the industry is projected to generate 8 billion tons of waste sand and 1 billion cubic meters of waste water. Tar sands mining are a major source of greenhouse gas emissions and a major contributor to climate change and global warming.

Some of the toxic-tailing ponds are located next to the Athabasca River, a major tributary in northern Alberta. In 2007, Alberta approved withdrawal of 119.5 billion gallons of water for tar sands extraction. An estimated 82% of this water comes from the Athabasca River, the source of life and subsistence for the Mikisew Cree First Nation, the Athabasca Chipewyan First Nation at Fort Chipewyan, the Fort McMurray First Nation, the Fort McKay First Nation, and to the south, the Chipewyan Prairie First Nation, and many downstream First Nations.

The results are devastating for Indigenous Peoples, their health and their environment. A recent health study commissioned by the Nunee Health Board Society of Fort Chipewyan has empirical evidence that the governments of Alberta and Canada are ignoring the toxic contamination of downstream Indigenous communities and their resultant deteriorating health. Peoples most at risk are those whose means of subsistence is based on their lands and water. Dene, Cree and Métis communities maintain a subsistence diet of fish and wild game.

The Fort Chipewyan community has an 80% subsistence diet. Its residents identify tar sands mining and water polluted by its toxins as the cause of the alarming increases in rates of death and chronic illnesses including previously unknown cancers. Fort Chipewyan has experienced massive wildlife losses related to toxic contamination,

environmental degradation. Already the Athabasca delta has been completely altered from a pristine boreal forest, clean rivers and lakes to a devastated ecosystem of deforestation, open pit mines and watershed where fish regularly exhibit tumors and birds landing on contaminated tailings ponds die instantly.

As stated by Ronald Lameman, Beaver Lake Cree Nation, past Interim Director of the Confederacy of Treaty 6 First Nations, representing 18 First Nations in Alberta Canada, in a letter submitted to the CERD Committee by IITC, stated:

“The Nations and Peoples of Treaty No. 6 continue to have respect for and hold Sacred the true spirit and intent of Treaty No. 6. However, the government of Canada along with the provincial governments of this country continue to steamroll ahead with their modern version of Manifest Destiny by instituting discriminatory legislation, policies and regulations that violate the Treaty and collective rights of the Indigenous Nations of Treaty No. 6 territory.

“Transnational and Multinational Corporations, many of them based in Canada, continue to be unchecked in their raping and pillaging of Mother Earth and our homeland. Today, to give just one example, First Nations elders and leaders from the Northwest Territories who live downstream from the open pit “tar sands” mining sites have spoken out, calling for a moratorium of the extraction of “tar sands”. Tar sands extraction has had and continues to have a massive destructive environmental impact which I have recently seen with my own eyes. Vast areas of traditional subsistence hunting and fishing territories have been desecrated, contaminated and destroyed, and more are being threatened. Treaty Six supports the call made earlier this year by Grand Chief Herb Norwegian of the Dehcho First Nation, for a moratorium on tar sands extraction. This call needs to be upheld and enforced by the Canadian government until the long term impacts can be fully understood and rights of the Indigenous Peoples, including their free prior informed consent and right to subsistence can be guaranteed.”

IEN Reports⁸ on an increased resistance from impacted First Nations and communities throughout Canada to tar sands mining.

In Alberta, affected First Nations have launched a number of lawsuits to challenge tar sands developments and have built a substantial network of allies who together use education, civil disobedience, direct actions, and social networking to end tar sands exploitation. In 2008, the Beaver Lake Cree First Nation filed a lawsuit against the Government of Alberta based on 17,000 infringements of their treaty rights related to extraction in general and tar sands specifically.

Similarly, in 2008 the Prairie Chipewyan First Nation filed suit against the Government of Alberta for not properly consulting the community about a tar sands project located on their traditional territory. In 2006, Athabasca Chipewyan First Nation (ACFN) filed suit for a similar lack of consultation, This case was dismissed but had it succeeded, it would have radically altered the ability of the Alberta Government to grant leases. ACFN has

⁸ Op. Cit. Fn 7.

continued to be a leading voice in tar sands resistance at both the national and international level.

In British Columbia 61 First Nations signed a resolution in December, 2010 to oppose the Enbridge Northern Gateway pipeline, scheduled to deliver tar sand oil to the United States, the major customer. The 1,170 kilometer long Enbridge Northern Gateway pipeline from Alberta to the British Columbian coast is proposed to pass through 80 First Nations territories.

Building on this resolution, in February 2011 the Yinka Dene Alliance rejected an offer from Enbridge for 'revenue sharing' benefits representing more than \$1.5-billion in cash, jobs, business opportunities during the next 30 years, as well as a 10% stake in the project. They have stated that water, land and cultural heritage were more important than short-term financial gain. Similarly, in August of 2010, the indigenous hereditary chiefs of the *Wet'suwet'en* First Nation issued a final notice of trespassing to Enbridge, stating the company was no longer welcome on their territory. Since then community members have constructed a traditional long house directly in the path of the proposed pipeline and are resolute that pipelines will not cross their territory.

The Indigenous Environmental Network's Canadian Indigenous Tar Sands Campaign, an organizing project against tar sands development, has led an effective Indigenous-based network lifting up the collective voices of Indigenous grassroots and concerned elected First Nation leadership affected by the tar sands. Recently, for example, it organized an action in Europe at the Royal Bank of Scotland, a major financier of tar sands pipeline development, amply covered by European press.⁹ Similar actions have taken place at tar sands oil producing company meetings of shareholders.

B. The United States

In a recent Urgent Action to the Special Rapporteur¹⁰ the IITC pointed out United States legally binding international obligations under ratified human rights treaties with regard to Indigenous Peoples that are especially relevant in the context of mining and extractive industries. These obligations include:

International Covenant on Civil and Political Rights (ICCPR):¹¹

- Article 1 (the right to Self Determination),
- Article 18 (the right to Freedom of thought, conscience and religion)

⁹ See, e.g., Forbes, "RBS Sinking into Sticky Issues in Tar Sands", April 28 2011, <http://blogs.forbes.com/greatspeculations/2011/04/28/rbs-sinking-into-sticky-issues-in-tar-sands/>, last visited April 28, 2011.

¹⁰ Urgent Action regarding Glen Cove (Sogorea Te) Shellmound, dated April 26, 2011.

¹¹ 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.

- Article 27 (the right to language, culture and religion)

The Convention on the Elimination of all Forms of Racial Discrimination (ICERD)¹²

- Articles 5 (d) (v),, the right to own property
- Article 5 (e) (iv), (the right to health
- Article 5 (e) (vi), (the right to culture.

In an Urgent Action/Early Warning decision the CERD Committee recommended 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.”¹³ (Emphasis supplied)

Both the CERD and the Human Rights Committee disfavor the extinguishment of Aboriginal Title, recognizing that Indigenous rights extend to lands, resources of traditional use by Indigenous Peoples outside of reserve or reservation boundaries. Both voice concern regarding access to, and the deleterious effects of extractive industries on Sacred Areas.¹⁴

Indeed, the CERD Committee recommended that UN Declaration be used as a guide to interpret the State party's obligations under the Convention relating to indigenous peoples.¹⁵

There was great hope when the United States began a review of their negative vote at the General Assembly, that the United States change its position and endorse the UN Declaration. But the United States did not change its position as stated in their explanation of a negative vote during the General Assembly consideration of the Declaration.

With regard to the right of free, prior and informed consent, the United States' "Statement of Support" interprets that right as not requiring consent:

“In this regard, the United States recognizes the significance of the Declaration's provisions on free, prior and informed consent, which the United States understands to call for a process of meaningful consultation with tribal leaders, but not necessarily the agreement of those leaders, before the actions addressed in those consultations are taken.”¹⁶

¹² CERD Concluding Observations, Examination of the United States, UN Doc. CERD/C/USA/DEC/1, 11 April 2006.

¹³ United States of America, DECISION 1 (68), CERD/C/USA/DEC/1, 11 April 2006 (Early Warning & Urgent Action Procedure) para. 10 (a).

¹⁴ 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 (ICCPR Article 18). See, also, Fn.11 and 12.

¹⁵ Id,

¹⁶ United States Department of State Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples; Initiatives to Promote the Government-to-Government Relationship & Improve the

1. Laguna and Acoma Pueblos, New Mexico

The Laguna Acoma Coalition For A Safe Environment (LACSE) reports:

The Grants Mineral Belt the most intensely mined area for uranium in the U.S. from 1950-1990. Laguna Pueblo, Acoma Pueblo and the Navajo Nation have all experienced impacts of depleted water sources from uranium development in the mineral belt. In the de-watering process necessary in uranium mining and milling many underground sources of water used by the three tribes went dry.

The Jackpile uranium mine on the Laguna Pueblo in northwest New Mexico was the largest open pit uranium mine in the world from 1952-1982. The mine site is 2,000 feet from the Laguna village of Paguete. Numerous Laguna miners who worked at Jackpile have filed claims under the federal Radiation Exposure Compensation Act (RECA), as over 80% of the workforce worked in the mine. Over time numerous cases of cancer have developed in the Pueblo among former miners and their family members.

Surface water sources like the Puerco River became contaminated due to the close proximity of mines and mills which spread contaminants through run-off and wind. These contamination issues have impacted domestic water consumption and use as well as agriculture and livestock watering and have drawn correlations to cancerous related illnesses among the impacted population.

Proposed Mining on Mount Taylor, [a Sacred Area]:

Mining permits have been filed to state agencies and to the USDA Forest Service. Two companies have applied to develop uranium mines near Mt. Taylor; Strathmore Minerals Corporation submitted a Roca Honda uranium mine permit application in 2009 that proposes to withdraw 4,000 gallons per minute or about 10 million gallons of water per day. The US Forest Service has requested an Environmental Impact Statement for it.

Another mining Company, Rio Grande Resources Corporation is now doing experimental uranium removing from groundwater project. It is an existing mine site held in abeyance and if ever it goes back into operation it also plans to withdraw and discharge similar amounts of water. They are both at the base of Mt. Taylor.

Removal of Mount Taylor from the New Mexico State Register of Cultural Properties

These same mining companies, Rio Grande Resources, Roca Honda Resources, LLC and others filed a petition in New Mexico state district court for review of the New Mexico Cultural Properties Review Commission (CPRC) decision to list Mt. Taylor as traditional cultural property on the New Mexico State Registry of Cultural Properties. The designation included over 800 squares miles of Mt. Taylor, from its peak to its surrounding guardian mesas.

On Friday, February 4, 2011, New Mexico State District Court Judge Shoobridge overturned the listing of the Mount Taylor TCP in the State Register of Cultural Properties. He did so primarily because he felt that the state's regulations do not allow cultural properties of such large size (819 sq. miles according to his order) to be listed in the State Register. He also ruled that the Cultural Properties Review Committee violated the due process rights of owners of mineral rights within the TCP by not providing them with personal notice of the nomination prior to making its decision. Finally, he found that the Committee erred by determining that the Cebolleta Land Grant was "state" and not "private" land and, thus, included in the TCP as a "contributing property."

The Judge did find, however, that the Committee's decision did not violate the state constitution's Establishment Clause or Criteria Consideration A of the National Park Service's regulations. These were the two issues addressed in our amicus brief, which the Judge cited favorably. This ruling confirms that, in addition to being significant to the tribes' religious beliefs and practices, Mount Taylor "is [also] a legitimate part of [the tribes'] respective histories and cultures" and "has thousands of areas important to [New Mexico's] history and national heritage. . . ." As well, his order in no way affects or casts doubt on the U.S. Forest Service's prior determination that the TCP is eligible for listing in the National Register of Historic Places. This means that the tribes will still be consulted over federal projects on the mountain, including most, if not all, of the large scale mining projects.

2. Medicine Lake Highlands, California

Recently extractive industries have promised "green energy" in various forms. The promises of "clean coal" and nuclear energy only promise more devastation for Indigenous Peoples. Another forms of "green energy" the production of electricity from naturally occurring from so-called "hot springs," or geothermal energy is only another form of extraction of the resources of the earth, many times at the expense of Indigenous Peoples.

The Pit River Tribe reports:

Medicine Lake Highlands is a critically important tribal region located northeast of Mount Shasta in the mountains of northern California. The Pit River, Modoc, Shasta, Karuk, Wintu and other Tribes revere the area for its natural healing powers and for its connections to their Tribes' longstanding histories. For example, the Pit River Tribe believes that the Creator and his son bathed in Medicine Lake after they created the earth, and the Creator imparted his spirit to the waters. Because of the Lake's sacredness, Tribes from the coast of California to the Rocky Mountains use the surrounding area as a place of reverence, healing and training ground for medicine people.

The Highlands is also sought after by geothermal energy companies that have applied for development permits from the U.S. Bureau of Land Management (BLM) and the U.S. Forest Service (USFS), which manage the area.

Since the 1990s, the Pit River Tribe, Stanford Environmental Law Clinic and other supporters of the protection of the sacred Medicine Lake Highlands in northeastern California have been challenging the BLM and USFS failure to undertake adequate environmental review and tribal consultation for industrial-scale energy development in the Highlands. On November 6, 2006, the U.S. Ninth Circuit Court of Appeals ruled that the BLM and USFS original extension of Calpine Corporation's geothermal leases in the Highlands violated both the National Environmental Policy Act (NEPA) and the National Historic Preservation Act (NHPA). The agencies should have prepared an Environmental Impact Statement (EIS) before renewing the leases and should have included a "no action" alternative. Because the agencies violated NEPA and NHPA, both the five-year lease extensions and the subsequent 40-year extensions were undone. The Court also said that BLM and USFS violated their fiduciary duty to the Pit River Tribe by failing to complete an EIS before extending the Calpine leases.

The Pit River Tribe, the other plaintiffs, and allies, believed that this ruling should have invalidated all of Calpine's lease rights at Fourmile Hill. Unfortunately, on remand, the district court found that Calpine's original 1988 leases are still valid, well beyond their expressed expiration. The Pit River Tribe appealed the order, and on March 10, 2010, oral argument was presented. At the new hearing the SELC attorneys maintained that the leases, originally issued in 1988 for a duration of five years, and renewed once, expired by their own terms when the 1998 renewals for 40 years were declared null and void by the Ninth Circuit judges.

On August 2, 2010, the Ninth Circuit Court upheld the district court ruling that BLM is allowed to focus its remand on a new lease extension decision rather than requiring the agency to undertake a new initial lease decision. Further, the Ninth Circuit articulated and ensured that BLM has "full discretion" to deny the extension if it believes that is appropriate under applicable law and policy. Also, as the Ninth Circuit reaffirmed, before making any new extension decision, BLM must prepare an Environmental Impact Statement (EIS) that explicitly considers the environmental impacts of, and alternatives to, extending the leases. The agency also must undertake additional sovereign-to-sovereign consultation with the Pit River Tribe. Until a new lease decision is made, no development at Medicine Lake Highland-Fourmile Hill may go forward.

The case involves a 49-megawatt geothermal project proposed by San Jose-based Calpine Corporation on leases covering about eight square miles near Fourmile Hill, just over the edge of the Medicine Lake Caldera. But the Ninth Circuit decision has implications for a much greater area. After the leases were renewed, the Medicine Lake Highlands--an area covering about 113 square miles--were designated as eligible for the National Register of Historic Places as a Traditional Cultural Area. Calpine's total lease holdings cover about half the area, or 66 square miles, and were approved through a similar process as the Fourmile Hill leases. Calpine has stated plans to generate 500 to 1000 megawatts in the Highlands by exploiting hot magma and fluids believed to exist 9,000 to 11,000 feet underground.

A second geothermal project located at Telephone Flat within the pristine Medicine Lake Caldera was at first denied by local decision makers, and then approved (Clinton Administration) in 2002 at the Washington DC level. It was the Bush Administration who overturned the previous Administration decision. The plaintiffs have a pending lawsuit challenging the Telephone Flat project on similar grounds as the current Fourmile Hill case. The Telephone Flat lawsuit was automatically stayed when Calpine filed Chapter 11 bankruptcy proceedings in 2005 and became the eighth largest public company to file for bankruptcy in history with assets reported at \$26.6 billion, but the tribe and environmentalists have plans to reactivate that claim.

Tragically, BLM, USFS, California Energy Commission, and Calpine Energy Company do not care about preserving the natural and sacred Medicine Lake Highlands, as they have been trying to build geothermal power plants there since the 1980's. The geothermal projects have been hotly debated ever since they came to public attention in 1997.

These partners want to build geothermal power plants that would:

- permanently damage this geologically unique and pristine area;
- transform the Medicine Lake Highlands into an industrial wasteland with multiple power plants;
- involve noisy 24-hour drilling;
- require drilling to 9000 feet beneath the surface;
- allow miles of 36" above ground high-pressured pipelines to transport hot geothermal fluid to the power plants;
- allow landscape-fragmenting pipelines;
- require injection and extraction of large amounts of toxins and toxic plumes exuding dangerous levels of arsenic, mercury and hydrogen sulfide known to cause cancer or birth defects;
- create a situation for accidental releases of acids and chemicals into the shallow water table or maintenance-related pipeline ruptures and explosions;
- replace the natural surface environment with toxic slump ponds, roads, pipelines, and cooling towers;
- have the potential to cause earthquakes, volcanic eruptions or avalanches;
- desecrate this well known, continuously culturally used and documented sacred and traditionally important area;
- likely cause irreversible contamination of the air, water, plants, and wildlife in the region;
- harness toxic energy and peddle it as "green energy" in order to fast track or gain support for this environmentally damaging and irresponsible project
- Create transmission lines that pass north, then northeast of the project between two spiritually important mountains used for religious and spiritual activity; \
- Ultimately threaten the underlying aquifer – which is California's largest pure spring system and flows into the Fall River joining the Pit River and winds into the Sacramento River before reaching the San Francisco Bay.

Along with our allies, we have called on the U.S. Congress to build a door to the courts for Native nations to protect our traditional churches. Many sacred places are being damaged because Native nations do not have equal access under the First Amendment to defend them. All other peoples in the United States can use the First Amendment to protect their churches, but the Supreme Court closed that door to Native Americans in 1988. The Court, from 1988 to 2009, has declined to allow federal religious freedom statutes to be used to protect Native American religious freedom at sacred places. Native Americans are the only peoples in the United States who do not have a constitutional or statutory right of action to protect sacred places or our exercise of religious freedom..

The Obama Administration is strengthening consultation and sacred sites Executive Orders, but executive orders do not create legal protections. During his presidential campaign in 2008, Sen. Barack Obama addressed this issue as part of his Native American policy platform for religious freedom, cultural rights and sacred places protection: “Native American sacred places and site-specific ceremonies are under threat from development, pollution, and vandalism. Barack Obama supports legal protections for sacred places and cultural traditions, including Native ancestors’ burial grounds and churches.”

Pit River Tribe, along with many other Native peoples also are encouraged that the U.S. has issued a “Statement of Support for the United Nations Declaration on the Rights of Indigenous Peoples.” Unfortunately, that Statement of Support does not require the Free, Prior and Informed Consent of Indigenous Peoples, only that they be “consulted.”

Make no mistake about it, we oppose this geothermal project. We will defend our Medicine Lake from any attempts to build power plants in our sacred water and natural area. The federal government must ban such development out of respect for Native American religious and traditional use rights and to fulfill its fiduciary responsibility to the tribal governments of the area and act in their best interests.

Lessons learned:

It is clear, not only by the examples listed above, but generally and world-wide¹⁷, that mining and extraction are too destructive, and the promises by industry for benefit too ephemeral and in most cases misleading if not outright false, to provide any benefit for Indigenous Peoples. With regard to the destructive results of mining on Indigenous Peoples, their rights to life, to health, to culture, to religious and spiritual practice and very identity, examples abound.

¹⁷ See.e.g., “LOCAL STRUGGLES AND IMPACTS OF MINING IN ASIA”, Asia indigenous Peoples Pact Foundation (AIPP), 16th June 2008;” Indigenous Peoples’ Rights, Extractive Industries and Transnational and Other Business Enterprises. A Submission to the Special Representative of the Secretary- General on human rights and transnational corporations and other business enterprises,” a joint submission by the Forest Peoples Programme and Tebtebba Foundation, 29 December 2006.

“Mining is an activity with a short-term life and long-term consequences. Large-scale mining is fundamentally extractive and unsustainable. Contemporary mining has developed that has ever greater environmental impacts due to its extensive nature.”¹⁸

This is demonstrated by the Tar Sands development in Alberta, Canada, and the experience of the Laguna and Acoma Pueblos with regard to uranium mining.

With regard to Canada and the United States, the almost total lack of recognition and respect for the property rights of Indigenous Peoples is the cornerstone of the ruination. In Canada where aboriginal rights and title are recognized constitutionally and in case law, this lack of recognition is *de facto*, and in the United States where it *de jure*, mining on ancestral lands is routinely permitted in spite of the objections of the Indigenous Peoples most concerned.

The right of consent is no panacea. In tar sands development, Indigenous Peoples gave their consent not knowing the full impact of this most destructive development. Free, prior and informed consent without the means, both juridical and financial, of contesting the false and misleading information given prior to consent, is no right at all. Indeed, it could be said that the full implications of the right of free, prior and informed consent establish an employment program for lawyers.

The only real right in Free, Prior and Informed Consent is not consent but the right to say “no.”

The best lesson learned is that an active, mobilized and concerned community can stop destructive extraction and itself implement human rights standards, particularly the rights contained in the United Nations Declaration on the rights of Indigenous Peoples. Throughout the world Indigenous Peoples are not relying on States or industry to recognize and implement their rights but are implementing them themselves. The Pit River Nation has for years fought for and maintained their Sacred Medicine Lake, beginning even before the adoption of the Declaration. The Tsilhqot'in Peoples have been successful in preserving their Sacred Teztan Biny (Fish Lake) through strenuous political and judicial efforts.

Indigenous Peoples in Alberta, Canada are mounting an international effort to put an end to the destruction of tar sands mining. And the Laguna and Acoma Pueblos, a coalition of concerned Pueblo citizens knowing full well the destructive effects of uranium mining have mobilized effective judicial opposition to it at Sacred Mt. Taylor, New Mexico.

Indigenous Peoples at the Commission on Sustainable Development, finding lack of enforcement of human rights standards applicable to Indigenous Peoples, devotes a full section of their report, cited herein, to “Indigenous Peoples actions” in defense of their rights and against extractive industries and development.¹⁹

¹⁸ Commission on Sustainable Development Eighteenth session, 3-14 May 2010, Item 3 of the provisional agenda, Discussion papers submitted by major groups, Contribution by indigenous peoples, UN Doc. E/CN.17/2010/11/Add.3, para. 13. 16 February 2010. This document too, has examples of the detrimental effects of mining and extraction on Indigenous Peoples world-wide.

¹⁹ Id, Part C, paras. 59 – 62.

What are the possible benefits for indigenous peoples of extractive or natural resource development within or in close proximity to their territories? Please identify any specific examples of positive cases or good practices

It is difficult to find any examples of positive cases or good practices with regard to mining and extractive development. As pointed out by Indigenous Peoples at the Commission on Sustainable Development, extractive development is unsustainable, and given today's technologies for extraction, extremely and permanently destructive.

This difficulty is exemplified by the declaration adopted by the participants at the Indigenous Peoples' Global Summit on Climate Change, held in Anchorage Alaska on 20-24 April, 2009. Their declaration, the Anchorage Declaration, adopted by Indigenous Peoples from all corners of Sacred Mother Earth, was divided on extraction:

“In addition, the Summit participants agreed to present two options for action which were each supported by one or more of the participating regional caucuses. These were as follows:

“A. We call on the phase out of fossil fuel development and a moratorium on new fossil fuel developments on or near Indigenous lands and territories.

“B. We call for a process that works towards the eventual phase out of fossil fuels, without infringing on the right to development of Indigenous nations.”

In either case, both options called for an end, sooner or later, to fossil fuel extraction and development.

What are the principal steps required for avoiding negative impacts for indigenous peoples from the extraction or development of natural resources and for establishing good practices in this regard?

1. Full respect and observance of the rights of Indigenous Peoples;
2. Respect for the property rights of Indigenous Peoples and the full implementation of the rights of Indigenous Peoples with regard to their aboriginal title;
3. A general awareness and policies and practices by developed as well as developing States on the need for more efficient conservation and recycling of materials, as well as the urgent need to protect the environment;
4. An end to natural resource extraction and development projects on or near indigenous territories; and,
5. An active, mobilized and concerned community defending their rights.