



# Chickaloon Village

*Traditional Council*

*(Nay'dini'aa Na')*

April 19, 2012

Gary Harrison,  
*Traditional Chief*

Doug Wade,  
*Chairman/Elder*

Rick Harrison,  
*Vice-Chairman*

Penny Westing,  
*Secretary*

Albert Harrison,  
*Treasurer/Elder*

Jess Lanman,  
*Elder Member*

Burt Shaginoff,  
*Elder Member*

Larry Wade,  
*Elder Member*

Shawna Larson,  
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Jennifer Harrison,  
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Professor James Anaya

United Nations Special Rapporteur on the Rights of Indigenous Peoples

Palais Wilson, Geneva, Switzerland

Via email: [indigenous@ohchr.org](mailto:indigenous@ohchr.org)

## **RE: Communication and Invitation to Visit Chickaloon Village, Alaska, on your visit to the United States**

Dear Special Rapporteur,

Please receive our respectful greetings. The Chickaloon Village Traditional Council, its Chief and Tribal Citizens all appreciate your work on behalf of Indigenous Peoples throughout the world, and look forward to your upcoming visit to the United States, and specifically, Alaska.

We are eager for your visit to our traditional lands and for the opportunity to give you, first hand, our concerns about proposed coal strip mining that threatens to once again decimate our lands, culture and ways of life.

In the following pages we document the history of our Peoples, the destruction and near decimation of our Peoples, lands, territories, ecosystem biodiversity and ways of life that began in the early 1900's by coal mining and continues to this day. We document "renewed" coal exploration and mining permits allowed illegally by the State of Alaska to Usibelli Coal Mine, Inc. a domestic privately held corporation. We also document new coal developments by Riversdale Alaska, a foreign, privately held corporation with close ties to Rio Tinto.

We also document our struggle against multiple proposed open pit coal mines on our ancestral lands, the failure of the State of Alaska as well as the Federal government to protect our rights and interests, and the failure of the much touted right of consultation supposedly guaranteed by the Federal government, based upon the so-called government-to-government relationship, the self-determination of recognized Indian tribes, and the Trust Relationship.

In the following pages we outline the rights violated by State and Federal agencies, including the racial discrimination practiced by both State and Federal officials against our Peoples, blatantly and with impunity; the role of the Alaska statehood as well as the Federal Alaska Native Claims Settlement Act, and the Alaska Mental Health Trust, both creatures of federal statute that underlie the denial of our most basic and critical rights such as the right to Self Determination; and our right to land, territories and resources.

We also document United States and Alaska racial discrimination as a matter of policy.

We do so with the hope that we may inform your visit to the United States. In this regard we would suggest the following questions to the government and its agencies addressing as a matter of broad policy, the denials of our rights.

Again, we welcome your visit to the United States and will very much appreciate and welcome your visit to Chickaloon Village. We also hope that although this communication was prepared in anticipation of your visit to the United States, that it will be treated as a communication and a response requested of the United States.

May the Creator Guide Our Footsteps,



Doug Wade,  
Chairman

### Questions for the United States

1. Are there any circumstances under federal law, regulation or practice where a recognized Tribe is entitled to the right of free, prior and informed consent?
2. Are federally recognized Alaska Native Tribes entitled to consultation with the federal government as described in Presidential Executive Orders and Federal Agency policies to the same extent as recognized tribes in the lower 48?
  - a. If so, what steps has the US taken to ensure that consultation is meaningful and respectful?
  - b. If so, when consultation requests go unheeded, denied or made meaningless, what remedy, grievance procedure or judicial process does the United States provide to Tribes?
3. Does the delegation of Federal regulatory powers to States carry with it the duty to consult recognized tribes? If not, is there a continuing federal responsibility to consult? If so, how does the United States reconcile that duty with the Indian Non-Intercourse Act and US Indian law and policy creating the relationship between the United States and Indian Tribes?
  - a. Has meaningful consultation ever taken place *before* delegation of federal responsibility to a State? What processes are in place to meaningfully consult with Tribes *after* a delegation of power to a State?
  - b. Can Tribes opt out of programs delegated to a State and deal directly with the Federal government on a government-to-government basis?
  - c. What steps and efforts does the federal government make to ensure States with delegated authority respect and consult with Tribes?
4. Has the Bureau of Land Management, the Office of Surface Mining, the Environmental Protection Agency or any other Federal regulatory agency ever denied a mining permit as a result of consultations with federally recognized tribes? With Alaska Native Tribes?
5. What should be the outcome if as a result of consultations it was determined that individual State mining permits were issued in contravention of federal law?
  - a. Does the United States support the Tribal civil and criminal jurisdiction over mining companies operating on Tribal and traditional lands?
6. What is the attitude of the United States concerning the Conclusions and Recommendations by Treaty Monitoring Bodies? Is there any legal or moral

- obligation to comply with their recommendations?
7. How does Alaska Native Claims Settlement Act (ANCSA) affect the federal responsibility to consult? If a Tribe objects to federal consultation with an ANCSA corporation, or if their consultation contradicts the corporations, which consultation would prevail under federal policy?
  8. What method or process does the United States support for returning Tribal control and jurisdiction over ANCSA lands? For Tribes that opted out of having an ANCSA corporation, or attempted to transfer lands back to the Tribe, what is the jurisdictional status of those lands? What efforts has the United States taken to reverse the damage done to Alaska Native Tribal authority and jurisdiction from the *Venetie* case?
  9. What efforts does the United States make to protect Tribal resources located on State and privately held lands and waters?
  10. Does the United States recognize federally-reserved Tribal water rights on Alaska Mental Health Trust Authority (AMHTA) lands and on Tribal traditional territories ceded to Alaska at statehood?
    - a. What efforts has the United States made to protect "prior existing" Tribal water use and occupancy rights on AMHTA lands?
  11. Does the United States recognize federally reserved Tribal water rights in ANCSA corporation lands? If not, does the United States believe that the treatment of Alaska Native Tribes' water rights has been equitable under the law and moral?
  12. Does the United States support Tribal water and air permitting programs? What efforts has the United States undertaken to ensure Tribes have the capacity and funding to run effective environmental programs?

## *CVTC Communication to the UN Special Rapporteur on the Rights of Indigenous Peoples*

### *A Tragic Legacy Revisited*

Coal mining in the Matanuska River watershed and the Wishbone Hill area has cast a long and tragic shadow over the Ahtna Athabascan Peoples of Alaska and Chickaloon Native Village (CNV).<sup>1</sup>

In the early 1900's, coal discoveries in the Matanuska River Watershed drew hundreds coal miners including the U.S. Navy to CNV ancestral lands. The Navy sought Matanuska coal in order to support the United States' Pacific Fleet during World War I. Coal miners introduced influenza and disease that devastated the Ahtna Athabascan peoples of the Tribal villages in the Matanuska Valley, including around Wishbone Hill. After the establishment of the coal mines and the government attention to the region, many Alaska Native children were taken by force from their homes and raised in orphanages and boarding schools. To make matter worse, when these children returned to their homelands, they found coal miners and government-supported homesteaders occupying the region and thereby excluding the Tribal citizens from their homeland; additionally the miners and homesteaders had left the Tribe's homeland and food sources, including salmon, caribou and moose, decimated.

Noise, solid waste, water pollution, deforestation, railroad kills, and overhunting by miners and homesteaders killed and drove off the moose and caribou, which were vital to Tribal sustenance and culture. Extreme water pollution, from the washing of coal directly into the creeks and rivers, as well as the dumping of raw sewage and other pollutants devastated the local salmon populations. On Moose Creek, damage done by the construction of the coal-carrying railroad—which straightened and diked the creek for 'adequate' railroad space, instead of constructing multiple bridges—led to impassible waterfalls on the lower end of the creek.<sup>2</sup> Coal mining wastes not only negatively impacted salmon egg and smolt (juvenile fish) survival, but coal mine related activities had directly cut off salmon from their extensive upstream spawning areas.

In 1968, Congress required the US Navy to convert its fleet to diesel engines and the Anchorage military bases began using oil for heat and electricity instead of coal. As a result, the Wishbone Hill area mines closed. The moose and vegetation slowly returned, but the caribou, once numerous never returned in sustainable numbers. Worse, salmon could not return to their spawning habitats on Moose Creek. In addition to the damage done to Moose Creek, coal mining in the Matanuska coal fields polluted and decimated salmon runs throughout the Matanuska Watershed including Eska Creek, the Chickaloon River, and many small and unnamed creeks and streams.

With Statehood, Alaska received title to large tracks of CNV traditional lands in the heart of their community. The Alaska Mental Health Trust Authority (AMHTA) received surface and subsurface title to much of these lands, including lands near the Native villages of Chickaloon

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<sup>1</sup> The Chickaloon Village Traditional Council (CVTC) is the governing body of the federally recognized CNV.

<sup>2</sup> See [http://alaska.fws.gov/external/reflections/moose\\_creek\\_renaissance.htm](http://alaska.fws.gov/external/reflections/moose_creek_renaissance.htm)

and Tyonek, as well as surrounding Wishbone Hill. Although the enabling statute promised not to interfere with pre-existing rights and title, Alaska Native rights, including subsistence, water, and occupancy rights have not been given any consideration by the AMHTA or DNR. With the passing of the Alaska Native Claims Settlement Act (ANCSA), CNV was left completely stripped of aboriginal title<sup>3</sup> from all of its traditional lands and left to the mercy of the State of Alaska and the AMHTA<sup>4</sup>, neither of which even recognized CNV's existence or right of self-governance.

After a protracted legal battle in the 1980's, the AMHTA began aggressively pursuing coal development on its holdings of CNV traditional lands. Together, AMHTA coal projects represent many of the coal mining prospects and proposed developments outside of Usibelli Coal Mine Inc's Healy mine—a massive coal mine which is the only currently operating coal mine in Alaska.

In 2002, the United States Fish and Wildlife Service ("USFWS") and CNV entered into cooperative agreements to restore the once prolific salmon runs in Moose Creek. Ten similar efforts by the Tribe for fish passage have been conducted and one is underway in Eska Creek, other tributaries of the Matanuska Watershed, and neighboring watersheds. With funding from the USFWS and other partners, CNV spent more than \$1,000,000 and thousands of man-hours rehabilitating Moose Creek and restoring fish access around the worst habitat damage inflicted by coal mining. These benefits of these strenuous efforts accrue for not only Tribal citizens, but all Alaskans and visitors.

#### ***A "Renewal" of Coal Mining***

In the late 1990's Usibelli Coal Mine Inc. (UCM) acquired AMHTA coal leases surrounding and on Wishbone Hill, which had sat dormant since they were first leased in 1984. UCM also did nothing to develop the leases until 2010, when it suddenly applied for an exploration permit and began aggressively pursuing development. UCM has continually relied almost exclusively on the original 1984 mining application and its underlying data, gathered without any input or consultation with CNV.

In the fall of 2010, the State of Alaska Department of Natural Resources granted UCM an exploration permit based upon on incomplete, stale and false information, drawn up *without any consultation or consideration for CNV*, from a 1991 coal mining permit application. The data presented in the 2010 application did not account for dramatic demographic changes surrounding the mining area, the restoration of salmon runs, the failures of data about mammal (particularly moose), salmon and bird species and habitats and without substantive response to the clean water, air, health and sanitation concerns raised by the Tribe.<sup>5</sup>

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<sup>3</sup> See *infra*. Fee title to CNV lands through ANCSA lands settlement put title in the hands of a for-profit corporation under the jurisdiction and authority of the State of Alaska.

<sup>4</sup> AMHTA lands are administered by the Trust Land Office, a sub-department of the Alaska State Department of Natural Resources (DNR). See <http://www.mhtrust.org/index.cfm/About-Us/Trust-History>.

<sup>5</sup> Appeal of Final Decision and Findings of Compliance, Exploration Permit for Usibelli's Wishbone Hill Development Permit, July 7, 2010 (Aug. 6, 2010), re-filed Sept. 10, 2010 and Appeal closed Oct. 14, 2010; see also CVTC Comments on Jonesville Mine Permit No. U-201 Renewal Jan. 24, 2011 Informal Conference.

Although the Alaska Surface Mining Control and Reclamation Act (ASMCRA) requires that coal mining activity begin within 3 years of the issuance of a permit<sup>6</sup> the State of Alaska Department of Natural Resources (DNR) approved the issuance of the “renewed” exploration and mining permits based upon this more than 20 year old application and stale data in a *pro forma* process.<sup>7</sup> DNR did not consult with the Tribe and only allowed written comments by CNV. The opportunity for a written appeal was denied. None of the above information and background, the bases of CNV’s concerns, were given fair and adequate consideration. UCM’s general mining permit has been challenged by CVTC and community groups and is currently under review by DNR and the Federal Office of Surface Mining (OSM).

Pursuant to this “renewed” permit, UCM conducted destructive exploration activities in sensitive, Sacred Tribal areas *without any Tribal consultation*, in anticipation of opening the Wishbone Hill coal strip mine in 2012. Since it bought the coal leases UCM has failed to provide the community with accurate information on the effects of its activities (or proposed activities) on the culturally important salmon species survival, human health and other areas of great concern.

Worse, UCM has a checkered history of mining violations. On January 20, 2011, the US Environmental Protection Agency (EPA) announced a Consent Decree and Final Order concerning UCM’s Healy coal mine, “that resolves water permit violations and numerous unpermitted discharges. As part of the Agreement, Usibelli will pay a \$60,000 penalty to EPA.”<sup>8</sup>

“According to Edward Kowalski, Director of EPA’s Regional Office of Compliance and Enforcement, mining responsibly means paying attention and looking ahead to prevent future problems. “Many of these discharges could have been minimized or avoided,” said EPA’s Kowalski. “By simply using and maintaining best management practices, we believe this penalty could have been avoided. Mining responsibly means making water quality protection a top priority.”<sup>9</sup>

This record of violations only compound CNV’s concerns. CNV is informed and believes that UCM has received other State issued citations including Notices of Violations (NOV) fines and abatement records at UCM controlled sites, information which has not been made available to the Tribe by UCM.

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<sup>6</sup> The federal Surface Mining Control and Reclamation Act allow individual states to develop their own coal regulatory programs consistent with federal legislation and to assume primacy over the federal program. AS 27.21.070(b) requires that “... a permit terminates if a permittee does not begin surface coal mining operations under the permit within three years after the permit is issued.” UCM was required to have both an exploration permit and a general mining operations permit. The validity of UCM’s mining permit is under review by the Federal Office of Surface Mining (OSM) and the Alaska Department of Natural Resources.

<sup>7</sup> DNR and Usibelli’s own documents on the record, attest to the fact that no mining activity occurred under the stale 1991 permit, by Usibelli’s own admission, until 2007, an admitted lapse of 16 years. In truth, mining operations did not begin until 2010.

<sup>8</sup> EPA Press release, *Usibelli Coal Mine, near Healy, Alaska, agrees to pay \$60,000 EPA penalty for Clean Water Act violations*, Contact Info: Eva DeMaria, EPA NPDES Compliance Unit, (206) 553-1970, demaria.eva@epa.gov Tony Brown, EPA Public Affairs, (206) 553-1203, brown.anthony@epa.gov (Seattle – January 20, 2011)

<sup>9</sup> Id.

In mid-June 2011, Chickaloon Tribal citizens saw “shoulder work” signs on either side of UCM’s exploration road to the Wishbone Hill mine site, less than 100 yards and across the road from the CNV Tribal Ya Ne Dah Ah School.<sup>10</sup> Soon thereafter, the felling of trees and bulldozing began to clear and level a large area at the mouth of the exploration road regardless of nearby known cultural and archeological sites. Since then, development has accelerated, while at no time has UCM consulted with CNV about impacts to cultural resources.

Neither the Chickaloon Village Traditional Council (CVTC), nor Tribal school personnel, nor Tribal citizens were informed in advance that this work would take place, or on whose behalf it was being done. Subsequent conversations with the contractor revealed that the work was being done on behalf of UCM, pursuant to an expired Alaska Department of Transportation (DOT) driveway permit.

According to information gathered by Heather McCausland of the Mat Valley Coalition, a community-based coal mine opposition organization, the only actions required by this permit were for installation of storm drains required for each acre of cleared land. According to the chain of emails by residents of the area relaying this information approximately 2 acres were cleared for a Usibelli parking lot. No additional permits were required as this was an extension granted by DOT and no public notice was apparently required or given.

Given that the children, some as young as 4 years old, are daily dropped off and picked up by their caregivers, CNV Tribal citizens, parents and caregivers are concerned that the increased traffic contemplated by a two acre parking lot, has and will continue to pose safety and health issues, particularly if large coal trucks are to be stationed there. At this point UCM has not announced how the lot will be utilized, but tarping of coal loads, washing toxic coal dust covered haul trucks, and a site for adding and removing tire chains all are all possibilities. Washing coal-hauling trucks that close to the school would directly send toxic heavy metals into the underlying groundwater which provides for the Tribal school’s well.

Health and mental health impacts to CNV from the Wishbone Hill proposal remain among the most critical issues for the Tribe. In the fall of 2011, at the behest of CVTC, DNR ordered a Health Impact Assessment (HIA) of the Wishbone Hill coal mine project. CVTC requested a comprehensive HIA to fully inform decision makers and permitting decisions including UCM’s general mining permit renewal application. Although DNR agreed to the HIA, instead of a comprehensive HIA, it ordered a shortened, rushed “rapid assessment,” and refused to hold off on permit renewal until the HIA was complete. In fact, DNR issued preliminary approval of UCM’s application, and has continued to work on final approval of the permit without waiting for the HIA’s completion.<sup>11</sup>

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<sup>10</sup> The Ya Ne Dah Ah School was established in 1992 to teach children at the pre-school, elementary to 12th grade school level using traditional methods. The cultural teacher, Athabascan Elders, parents, and community members teach our language, traditional values, ethics, and cultural traditions to our future generations. These methods combined with a high quality academic curriculum meet the needs of our youth by helping them gain an understanding of western educational principles. See, Chickaloon Native Village and the Ya Ne Dah Ah School website, [http://www.chickaloon.org/index.php?option=com\\_content&view=article&id=148&Itemid=163](http://www.chickaloon.org/index.php?option=com_content&view=article&id=148&Itemid=163), last visited 9/27/11.

<sup>11</sup> See Wishbone Hill Renewal Preliminary Decision, Findings of Fact and Decision, [http://dnr.alaska.gov/mlw/mining/coal/wishbone/wbh\\_prelimFF082411.pdf](http://dnr.alaska.gov/mlw/mining/coal/wishbone/wbh_prelimFF082411.pdf) (August 24, 2011).

In March of 2012, the Alaska Department of Health and Social Services, Division of Epidemiology issued its preliminary Wishbone Hill HIA.<sup>12</sup> The HIA found that in seven out of eight categories health indicators were at medium to high risk. CVTC continues to work to improve the HIA cooperatively with the State, but it remains unknown whether the State will incorporate the public comments of the HIA, or incorporate the HIA's findings in current and future permit applications for the Wishbone Hill coal mine, or consult with CVTC regarding health and mental health impacts of its decisions.

### ***Our Cultural and Spiritual Rights***

CVN's aboriginal territory encompasses vast and extremely diverse lands and waters that include the tallest mountains in North America, unique wet and dry tundra, grasslands, glaciers, beautiful fresh water lakes and rivers, sandy and mud-covered tidelands and icy ocean waters. CNV's ancestral homelands are rich in biodiversity and are home to caribou, moose, bears, wolves, beavers, migratory birds, blueberries, cranberries, and all five species of pacific salmon. CNV's way of life, their identity and their very cultural survival depend on these lands and waters, held Sacred by Ahtna Athabascan communities. The abundant fresh water makes their way of life, their self-sufficiency, their existence as Peoples and self-determination possible.

CNV's traditional homelands include the small streams and tributaries of the Matanuska River Valley, which are critical habitats for moose and salmon. Salmon require the healthy and nutrient rich waters of the Matanuska River and its tributaries for spawning and rearing. Moose require the dense willows and plant life for food and protection from predators. It is in three of these rivers, including what is now known as Wishbone Hill, that coal mining in the early 20<sup>th</sup> Century by the United States Department of Defense and other mines nearly wiped out of existence the moose, the salmon and people of CNV. Prior to the United States Navy's invasion of their territory, the ancestors of CNV relied on all five salmon species native to Moose Creek, Eska Creek, and Chickaloon River for their means of subsistence and spiritual practice.

Both the United States government and the State of Alaska refer to this lifestyle as a "subsistence" culture or practice. However, the term "subsistence" wrongly implies "mere survival." More accurately, in the north, Indigenous Peoples' very essence and identity is bound to, and inseparable from their relationship with the land and water, and the animals, plants, air, soil and sun.

Hunting, fishing, and picking berries are not just techniques for surviving the harsh climates of the north, but a spiritual, shared relationship that defines and dedicates the Indigenous way of life entirely. This way of life requires large volumes of free-flowing clean water for both spiritual and physical health and well-being. It is this way of life that is only possible with abundant clean water for the moose and salmon to thrive and these species are absolutely central to Ahtna Athabascan culture and religious practices.

In a case recognizing the importance of moose to Athabascan culture, the Supreme Court of Alaska, in *Frank v. State of Alaska*, held that one of the most important rights guaranteed by the

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<sup>12</sup> Draft Health Impact Assessment available at: <http://www.epi.alaska.gov/hia/WishboneHillDraftHIA.pdf> (last visited, April 4, 2012).



Alaska Constitution to Alaska Native peoples, the Free Exercise Clause, was violated by State interference with the taking of moose for Athabascan religious practices.<sup>13</sup> *Frank* remains the law of the land and has been cited repeatedly by the Alaska Supreme Court.

In *Frank* the Alaska Supreme Court applied Alaskan Constitutional doctrine, that the Free Exercise Clause requires government to accommodate religious practices by creating exemptions from general laws.<sup>14</sup> The exemption in that case allowed Carlos Frank to follow Athabascan cultural practices for taking moose for funerary services rather than the State's fish and game laws. The Court applied the well-established rule that government must grant exceptions, "to facially neutral laws in order to protect religiously based conduct."<sup>15</sup>

The Court found that, "the evidence is inescapable that the utilization of moose meat at a funeral potlatch is a practice deeply rooted in the Athabascan religion," and that "[m]oose is the centerpiece of the most important ritual in Athabascan life and is the equivalent of sacred symbols in other religions." It went on to find that taking moose for funerary ceremonies was a right that exists outside of the State's regulatory structure for either sport or subsistence hunting and is not governed by State hunting seasons.<sup>16</sup> This case applies directly to CNV's spiritual and ceremonial interests not only in moose, but to the lands and resources that sustain them. Under state law, the State may not impermissibly burden CNV's religious practice of taking potlatch moose for funerary services from areas customarily and traditionally used by the Tribe, such as the Moose Creek and Eska Creek drainages.

CNV's religious, spiritual, cultural and ceremonial rights and interests in Wishbone Hill and the surrounding area are thus well established under Alaska State law. These vested rights and interests extend not only to the land and water, but also to habitat restoration efforts, and the salmon runs themselves in Moose Creek, Eska Creek, and other small streams that drain in to the Matanuska River. Although no thorough baseline understanding of these salmon populations has ever been established, these small streams have already been affected adversely by the public road system in the area and their poor condition would only be compounded by the additional heavy use envisioned in UCM's proposed coal mining operation.

With financial support from federal agencies and other partners, CVTC invested over \$1,000,000 and years of effort on fish passage and streambed restoration as well as salmon population enhancement efforts seeking to remediate the grievous damage done by earlier coal mines. Moose Creek was originally a highly productive and dependable salmon stream ruined by previous coal mining. CVTC's fish passage restoration project has received substantial funding and won national awards and recognition from the United States Federal Government. But without any direct consultation and input from the Tribe, UCM has and will undoubtedly frustrate, if not annul these efforts.

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<sup>13</sup> *Frank v. State*, 604 P.2d 1068, 1070 (Alaska 1979) (holding that religious practice protected where proponent is "sincere" and the practice is "deeply rooted" in religious belief rather than "essential," and that no value has a higher place in our constitutional system of government than that of religious freedom").

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 1071 (citations omitted).

<sup>16</sup> *Id.* at 1073.

### *The Failure of Consultation*

The United States, in its so-called Statement of Support for the United Nations Declaration on the rights of indigenous peoples declared that:

“The U.S. Government efforts to strengthen the government-to-government relationship with tribes cannot be limited to enhancing tribal self-determination. It is also crucial that U.S. agencies have the necessary input from tribal leaders before those agencies themselves take actions that have a significant impact on the tribes. It is for this reason that President Obama signed the Presidential Memorandum on the implementation of Executive Order 13175, “Consultation and Coordination with Indian Tribal Governments,” and directed all federal agencies to develop detailed plans of action to implement the Executive Order. 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.”<sup>17</sup>

Even this limited recognition of the right of consultation has not been, as required, implemented in good faith with regard to CNV (and we suspect, to the recognized Tribes of the lower 48). Objections raised by CNV on the lack of consultation and consideration of the stale and factually false mining permit application data, the proposed mines’ impacts to water, cultural, archeological and historic resources, sacred sites, religious practices, the health and safety of the community have not been addressed by the Alaska Department of Natural Resources nor any federal agency, even though the delegation of federal regulation of surface coal mining requires Alaska to apply federal standards.<sup>18</sup> Concerns anticipating greatly increased dust and air pollution, water pollution and reduction, noise, physical danger from the blasting and transporting of the coal, toxic drilling compounds introduced into the environment, and interference with access rights of Tribal members, as well as inaccurate and stale baseline data, continue to be ignored.

The duty to consult with recognized Indian Tribes remains the same policy adopted during the Clinton administration, Executive Order 13175 (2000), “*Consultation and Coordination with Tribal Governments*” (EO 13175 lists as one of its purposes “to strengthen the United States’ government-to-government relationships with Indian tribes...” EO 13175 itself only requires consultation where a federal agency is contemplating policies that are, “significantly or uniquely affecting Indian tribal governments.” It itself does not apply to mining and other proposed activity undertaken or permitted by federal government agencies. Thus the need for President Obama’s direction to all federal agencies to develop detailed plans of action to implement the Executive Order, although project specific consultation is and has been ignored in this case.

Section 106 of the National Historic Preservation Act (NHPA), 16 U.S.C. Section 470f, requires federal agencies to consult with any Indian Tribe that attaches religious and cultural significance

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<sup>17</sup> 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 Lives of Indigenous Peoples, pp. 4 and 5, (undated), <http://www.state.gov/documents/organization/153223.pdf>, last visited 3/14/2012.

<sup>18</sup> See, fn. 3, *supra*.

to historic properties that may be affected by the agency's undertakings.<sup>19</sup> NHPA Section 106 is the only legally required right of consultation for recognized Indian Tribes and is based upon the government to government relationship as well as the so-called "trust relationship." It applies not only to reservation lands but lands outside reservations that have historical or cultural significance to Tribes.

But the intended end result of these consultations only is to require federal agencies to "consider the effects of their undertakings on historic properties" and to provide the Advisory Council on Historic Preservation (ACHP) an "opportunity to comment." "*Consultation*" is defined as a process of seeking, discussing, and considering the views of other participants, and, where feasible, *seeking agreement* with them regarding matters arising in the Section 106 process (36 CFR Section 800.16 (f)).

The failures of the federal construct of consultations, limited as it is, and its requirements of "good faith consultations," the "government to government relationship" and the "trust relationship" are glaringly apparent with regard to CNV. These minimal requirements are apparently not required of Alaska and other states of the union in spite of the fact that Alaska's authority to regulate coal mining is delegated from the federal government. In addition to federal surface mining legislation, other important federal legislations such as the Clean Air Act and its requirements have been delegated to the state of Alaska, under no real obligation to consult with CNV. And because Alaska does not even recognize CNV's existence, it refuses to consult, or exercise even a minimal duty of care. By delegating power to the State, the United States has virtually washed its hands of its trust responsibility to Tribes.

CVTC has vigilantly participated in every notice and comment opportunity and even successfully challenged several permits, temporarily turning back UCM's Clean Air Act permit (a permit that allows them to pollute Tribal air), and the mining permit for Jonesville Mine, a second proposed mine on Wishbone Hill at the headwaters of Eska Creek, an important salmon spawning stream.

These efforts by CNV to protect their rights have proven up to now ultimately futile in the face of indifference if not purposeful blindness. The State maintains that the Tribe is not entitled to consideration, consultation, or process beyond the general notice and comment allowed to the general public—even though these proposals explicitly implicate Tribal resources, rights, and traditional lands and waters. Requests for reconsideration and even small extensions of time for technical comments are often rejected out of hand. (See, Letter from DNR refusing to extend 15 day notice and comment period for water rights application, March 21, 2012).

At the heart of these failures is the delegation to the State of Alaska by Federal agencies of their responsibilities to regulate. Because the United States has delegated permitting responsibility under the Clean Air Act and Clean Water Act, to the State of Alaska, Tribes are left with no right of consent, and no possibility of government-to-government consultation. Furthermore, the Federal government, by delegating to the State, fails to exercise its Trust responsibilities to protect Tribal air, water and natural resources. CNV and other Tribes are now left at the mercy

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<sup>19</sup> See, *Consultation with Indian Tribes in the Section 106 Review Process: a Handbook*, Advisory Council on Historic Preservation (ACHP), November, 2008, <http://www.achp.gov/regs-tribes2008.pdf>, last visited 3/15/2012.

of a State that does not even recognize their existence, and worse yet seeks to undermine and destroy their legitimacy at every turn.

CVTC continues to seek government-to-government consultation with the EPA, and the Office of Surface Mining, but, these efforts offer little hope. These federal agencies are reluctant to exercise oversight, regulate, or control over permitting programs delegated to the State of Alaska. Worse yet, OSM and the EPA keep up cozy relationships with their State counterparts, often to the detriment of Tribal interests. Despite the great wealth of natural resources in Alaska, because the Alaska Native Claims Settlement Act (ANCSA) severed Tribes from their lands and revenue sources, small Alaska Tribes do not have the capacity or ability to run effective Tribal water and air permitting programs.

The United States fails to show any respect for CNV's Right of Self determination even as described by the US Statement of Support. The duty to consult and seek agreement, the protection of culturally and historic significance, and consultation with federal agencies pursuant to President Obama's executive order all continue to be blatantly ignored and undermined by the State.

The State of Alaska's own failure to consult in order to respect and protect CNV and indigenous rights and religious practices is itself systemic. The SHPO, whose job is to implement and enforce the NHPA and Alaska Historic Preservation Act, (AHPA), ensuring that Tribes are consulted and cultural resources are protected, does not, as a matter of practice, consult with any Tribe.

In fact, the SHPO has publicly held out the belief that there are no Tribes in Alaska, and therefore no duty or responsibility to the 229 federally recognized Tribes is owed. These views reflect those of a small, but politically connected and powerful minority that believes, despite repudiation of the argument by the State and Federal courts, that Alaska Tribes were "created" by administrative fiat when they were added to the list of Federally Recognized Tribes, and therefore not legitimate. Led by the Alaska Outdoor Council and their attorney, these self described policy makers see it as their mission to undermine and attack Alaska Native sovereignty, jurisdiction, and subsistence hunting and fishing rights. The owner of UCM is a prominent sponsor and member of the Alaska Outdoor Council.

In 1989, the incumbent SHPO signed off on a cultural resource survey that would become one of the foundational permitting documents for the Wishbone Hill and Jonesville coal mine proposals. She did this without ever consulting or communicating with CNV. Her conclusions that Moose Creek was not an important cultural or resource area for indigenous people were flat out wrong. Nothing could be further from the truth. CNV continues to pay the high price of these factually false assertions and unilateral decisions.

The State of Alaska continues to violate CNV's right to consultation, if not the right to Free Prior and Informed Consent with regard to cultural resources and there is no reason to believe that position will ever change. In fact, through the AHPA, the State actually claims "title" to all historic resources located on State lands. AS 41.35.020(a). Although the statute declares that it does not interfere with the rights of indigenous peoples in cultural resources, in practice, because

the State does not recognize any rights or even the existence of Tribes, it continually interferes with and violates Tribal rights and interests.

### ***Alaska Mental Health Trust Authority Chickaloon Area Coal Leases Threaten Gravesites and Sacred Sites***

Just as the Wishbone Hill coal mine proposal has reached a critical juncture, CNV faces a new and potentially devastating coal mining threat—on CNV Traditional and sacred lands now controlled by the Alaska Mental Health Trust Authority (Trust; AMHTA). The Trust, a federal creation, operated by the State of Alaska, received title to almost one million acres of land in Alaska, which it uses to create revenue to support mental health programs in Alaska. The governing board of the Trust believes its only responsibility is to make as much money as possible from these lands, primarily through leasing for intensive non-renewable resource development, including coal and gold mining, and timber harvesting.

Unfortunately, much of these lands now controlled by the Trust are Traditional indigenous lands, including sacred sites, critical fish and game habitat and traditional hunting and fishing areas. In December of 2011, the Trust put out for lease nearly 11,000 acres in the heart of CNV's traditional territory. CVTC expressly objected, warning the Trust that the lands they intended to lease included some of the Tribes' most important sacred sites, including gravesites, subsistence areas and critical fish and game habitats.<sup>20</sup> Warning the Trust that coal mining and the threat of mining had already caused incredible psychological and physical harm, stress, and community strife to CNV, CVTC requested that the Trust take into account the mental health impacts of a coal mine in the very heart of the Chickaloon Tribe's spiritual existence and the destruction of cultural resources a mine would cause. Instead of simply taking these impacts into account and consulting with the Tribe, the Trust refused CVTC's request, forcefully responding that the CVTC had failed to allege any mental health harm that would come from mining through its sacred sites and gravesites.<sup>21</sup>

Over CVTC and community objection, the Trust went forward with a competitive bid, leasing the Chickaloon lands to an Australian mining company, Riversdale Alaska, with ties to Rio Tinto. CVTC subsequently filed a FOIA request, and discovered that Alaska's State Historic Preservation Officer, (SHPO), had actually warned the Trust that the lease offer was an undertaking subject to would be subject to Section 106 of the National Historic Preservation Act, (36 CFR 800.16(y)) and the Alaska Historic Preservation Act, AS 41.35. Amazingly and sadly, at no time did the SHPO communicate or consult with CNV. These statutes are supposed to protect Tribes and their cultural resources, but that is impossible if Tribes are left on the outside and decisions are made for them and without their consent.

### ***The Alaska Native Claims Settlement Act Undermines CNV's Right of Self Determination and their right of Free Prior and Informed Consent***

CVTC and other Tribes in Alaska face an even greater impediment to self-determination in the form of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1601 *et seq.* ANCSA was held out as a settlement of aboriginal land claims in exchange for money and the fee title to approximately 44 million acres of land. Rather than assign title to directly to Alaska Native

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<sup>20</sup> See CVTC request for reconsideration of Best Interest Finding, (Dec. 2012).

<sup>21</sup> See Communication Re: Request for Reconsideration, (December 28, 2011).

Tribes, ANCSA set up a scheme that gave land claims money and land to for-profit, *non-tribal* corporations *organized under Alaska state law*. ANCSA corporations included powerful multi-million/billion dollar regional corporations (often non-responsive to local issues), and village corporations, which are smaller and control tracks of land often directly surrounding villages. ANCSA corporations are wholly a creature of statute, created solely as a delivery mechanism for the settlement of land claims. ANCSA corporations received the monies, and eventually, fee title to Traditional Alaska Native territories and waters. These corporations are not Tribal governments, have no governmental powers, and have no traditional attributes of sovereignty. These corporations only represent their shareholders and they do not represent Tribal governments or *all* Tribal citizens.

As such, ANCSA has been described, often by opponents of Tribal jurisdiction, as termination legislation. Tribes have criticized the both the process that delivered the Act and the outcome. Many indigenous individuals and Tribes had no input or say in the legislation, and no consultation with Tribes was ever undertaken. Certainly very few Alaska Native peoples exercised Free Prior and Informed Consent with regard to ANCSA.

ANCSA was really a tremendous give-away to resource development corporations, primarily, oil, mining and timber companies. ANCSA corporations were set up to develop and exploit the land and its resources. Without Tribal oversight, large-scale developers were able to wrest day-to-day operations and control of the majority of regional corporations. A select group of individuals that negotiated the law “on behalf” of all Alaska Native peoples, have spent the last 30 years in high paying jobs, employed by industry. As the former Gwichin chief of Fort Yukon recognized, these corporations long ago ceased to be “Native” and are now little different than all the other for-profit corporations exploiting Alaska Native resources.<sup>22</sup>

ANCSA corporations, particularly regional corporations, now routinely partner with foreign and domestic resource extraction corporations to exploit oil, timber, and minerals. Tribal governments and villages closest to the development and downstream villages often oppose these projects that threaten their clean air, water, and subsistence hunting and fishing culture. Yet, ANCSA’s corporate voting structure prevents Tribal governments and villages from exercising their rights. Free Prior and Informed consent is not even contemplated. For example, despite its documented history of human rights abuses against other Indigenous Peoples and overwhelming regional and Tribal opposition to the mine, Calista Corporation, the regional corporation for the Yukon-Kuskokwim Delta has partnered with Barrick Gold to create a massive strip gold mine upstream from some of the poorest villages in the United States.<sup>23</sup> The project threatens Chinook salmon and multiple fish species relied on by Yukon-Kuskokwim villages, and requires a hydro-electric project that would threaten fish and villages in the Bristol Bay region.<sup>24</sup> This example is repeated in almost every region in Alaska.

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<sup>22</sup> *Rural Alaska Villages Resist Oil Development on Yukon Flats*,  
[http://juneauempire.com/stories/072208/sta\\_307860642.shtml](http://juneauempire.com/stories/072208/sta_307860642.shtml).

<sup>23</sup> See

[http://kuskokwimcouncil.org/index.php?option=com\\_content&view=article&id=74:mining&catid=37&Itemid=57](http://kuskokwimcouncil.org/index.php?option=com_content&view=article&id=74:mining&catid=37&Itemid=57)

<sup>24</sup> See <http://kyuk.org/public-to-meet-on-hydropowering-the-y-k-delta/>.

As a creation of the Federal government, ANCSA corporations are also susceptible to Congressional and judicial assertions of plenary power. Tribes rightfully reject such notions as a violation of fundamental human rights when applied to them. But unlike Tribes—the Indian Reorganization Act (IRA) notwithstanding, Congress did write ANCSA corporations, their structures, and even the jurisdictional status of their land holdings, into existence. Thus, when Congress exercises its “plenary” authority to authorize its political subdivision—the State of Alaska—to assert jurisdiction, to write regulations, and to exercise authority over (ostensibly Tribal) property, businesses and their operations, few objections can even be raised. Even though these actions fly in the face of bedrock principals of United States Indian law<sup>25</sup>, Alaska Native Tribes have no recourse.

Worse yet, because through ANCSA the United States claims to have unilaterally abrogated aboriginal hunting and fishing rights<sup>26</sup> and with the help of the United States Supreme Court<sup>27</sup> enshrined State jurisdiction over all corporation lands (approximately 44 million acres), Alaska Native Tribes are left in the tenuous position of being perceived and treated as governments without territorial reach. It is hard to imagine a more difficult position for a Tribal government, short of actual termination. While probably few Alaska Native Tribes would accept the proposition that they lost their aboriginal right to hunt and fish or that they lack de jure jurisdiction over their traditional territories (now in ANCSA corporation hands), when the weight of the United States, its courts, and the courts and offices of its political subdivisions including the State of Alaska are brought to bear on any resource conflict, Alaska Native Tribes consistently lose and will continue to do so.

Complicating the matter, the United States consistently conflates the rights and responsibilities it owes Alaska Native Tribes with oversight and responsibility for Alaska Native Corporations created by the ANCSA. This confusion is intentional. Former Alaska Senator Stevens in particular, a long-time opponent of Tribal sovereignty and Tribal self-governance, used his power and position to insert language into statutes to include ANCSA corporations whenever statutes mentioned Tribes, Indian Tribes or Alaska Native Tribes.<sup>28</sup> Sen. Stevens inserted language into budget riders using his power as Appropriations Committee Chair to extend consultation rights owed Alaska Native Tribes under President Clinton’s Executive Order to ANCSA corporations.<sup>29</sup> This conflation of Tribes and Corporations has eroded Tribal self-governance and any hope of a “government-to-government” relationship with the United States.

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<sup>25</sup> *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832) (“[t]he Cherokee nation...is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of Congress....”).

<sup>26</sup> 43 U.S.C. § [].

<sup>27</sup> *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520 (1998) (holding because of the lack of adequate superintendence and congressional intent to “set aside” as reservations, ANCSA corporation lands are not “Indian Country” within the meaning of 18 USC § 1151, subject to Tribal jurisdiction and authority).

<sup>28</sup> See, the Native American Graves Protection and Repatriation Act (NAGPRA) of 1990, 25 USC 3001(7) (defining Indian tribe as “any tribe, band, nation, or other organized group or community of Indians, including any Alaska Native village (as defined in, or established pursuant to, the Alaska Native Claims Settlement Act) [43 U.S.C. 1601 et seq.]”).

<sup>29</sup> Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, Div. H. § 161, 118 Stat. 3, 452 (2004) as amended by Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, Div. H., Title V. §518, 118 Stat. 2809, 3267 (2004).



### ***The State of Alaska's Bad Faith Toward Alaska Native Tribes***

This erosion of rights might not occur if the State of Alaska actually negotiated, communicated with or had any inclination to treat Tribal governments with good faith and fair dealings. But the State of Alaska has persistently and historically objected to the recognition of the very existence of Alaska Native Tribes, and has fought even the smallest assertion of Tribal jurisdiction with the full weight of its multi-billion dollar government and plethora of lawyers and friends. For example, because of his close relationship with his mentor and then Chief Justice Rehnquist, Chief Justice Roberts of the United States Supreme Court, then in private practice, was hired by the State and successfully argued on behalf of Alaska and against Tribal jurisdiction in the aforementioned *Venetie* case. Recently, the State of Alaska used its nearly unlimited budget to engage in a legal fight—appealing all the way to the United States Supreme Court—in order to prevent a birth certificate from being issued to child who had been adopted under Tribal authority.<sup>30</sup>

The State of Alaska's history of racism and Alaska Native vote suppression also earned it a spot on the list of States covered by the Voting Rights Act's (VRA) Section 5, which requires, almost exclusively (other than Alaska), southern states to “pre-clear” changes to voting practices and regulations with the United States Department of Justice. (DOJ). All of the States and counties covered by Section 5 had in place when the VRA was passed, a literacy test which was used to deny minorities the right to vote. In Alaska, the literacy test required Alaska Natives to verify that they were “civilized” rather than savage.

Despite DOJ scrutiny of the State's voting practices, Alaska managed to violate the VRA and successfully suppressed Alaska Native voting, particularly in Southwest Alaska by refusing to provide any printed materials written in Central Yup'ik or any other Native language, even for the purpose of reading translations to elders that cannot read in either language.<sup>31</sup> Southwest Alaska is one of the poorest areas in the United States, with disproportionately high levels of unemployment and low levels of English proficiency.

### ***The Decolonization of Alaska***

CNV wishes to draw the Special Rapporteur's attention to the issue of Alaskan Statehood and the illegitimate process by which it became a State of the Union of the United States of America. In 1959, the status of Alaska was changed from Non-Self Governing Territory, as it was listed under article 73 of the United Nations Charter, and became a State within the United States of America.<sup>32</sup> Under article 73 of the United Nations Charter:

“Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of

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<sup>30</sup> See *Kaltag Tribal Council v. Jackson*, No. 3:06-cv-00211-TMB, (D. Alaska filed Feb. 22, 2008), *aff'd*, 344 Fed. App'x 324 (9th Cir. 2009), *cert. denied*, 131 S. Ct. 66 (2010).

<sup>31</sup> See *Nick v. Bethel*, No.3:07-cv-0098-TMB (D. Alaska filed July 30, 2008) (granting Preliminary Injunction).

<sup>32</sup> The background is common knowledge, found in the Wikipedia website for example, [http://en.wikipedia.org/wiki/United\\_Nations\\_list\\_of\\_Non-Self-Governing\\_Territories](http://en.wikipedia.org/wiki/United_Nations_list_of_Non-Self-Governing_Territories), visited 4/3/1012.



international peace and security established by the present Charter, the well-being of the inhabitants of these territories, and, to this end:

- a. “to ensure, with due respect for the culture of the peoples concerned, their political, economic, social, and educational advancement, their just treatment, and their protection against abuses;
- b. “to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement; “

Neither the interests of the “peoples concerned” nor their culture was respected in 1959. The “sacred trust,” was not observed.

The referendum in 1959, as part of the de-colonization process, failed to provide the options to the Alaska Native population required by international law, including independence or free association. The only option on the ballot was whether Alaska would remain a territory or become a state.

Worse, at the time of the referendum, elections laws in Alaska territory required that “voters in territorial elections be able to read and write the English language” purposefully meant to limit or exclude Alaska Native peoples from voting: “This literacy test and its intended restriction of Native suffrage likely reflected the opinion of many Whites at the time. The *Fairbanks Daily News-Miner*, a daily paper, published an editorial in 1926 entitled, “Alaska—A White Man’s Country,” in which the editors insisted, “... notwithstanding the fact that the Indians outnumber us, this is a white man’s country, and it must remain such.”<sup>33</sup> 86 years later, both the restraints on Alaska Native voting and the racist attitude persist.

Referendum Ballots were printed only in English and not Alaska Native languages (which continues to be a basis for the application of the Voting Rights Act to Alaska). And at the time, because of the territory’s boarding school policy, schools were not located in Alaska Native villages; Alaska Native children had to travel hundreds of miles to attend school in order to learn the English language.<sup>34</sup> Many, if not most, did not. And if this were not bad enough, there were no polling places set up in many Native Villages.

“In 1940, about 1,000 of Alaska’s 75,000 residents were military. By 1943, 152,000 out of 233,000 belonged to the armed forces stationed in Alaska. And even though there was a post-war drop in population to about 99,000 in 1946, Cold War military expenditures pushed it back up to around 138,000 by 1950.”<sup>35</sup> These military personnel and their families were allowed to vote. As armed forces of the occupying power they should not have been allowed to vote in the 1959 Referendum,

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<sup>33</sup> Natalie Landreth and Moira Smith, *Voting Rights in Alaska: 1982–2006*, 17 *Review of Law and Social Justice* 1, 91-92 (2007).

<sup>34</sup> *Id.* at 92.

<sup>35</sup> <http://xroads.virginia.edu/~cap/bartlett/49state.html>

The Native Peoples of Alaska were denied their right to exercise their choice of status in the de-colonization process. This is a continuing injury, and not merely “a historical truth.”

### **Human Rights Violated**

#### ***Rights Recognized by International Covenants and Conventions:***

In view of the threat posed by the proposed UCM Wishbone Hill coal mine, and the unresponsiveness of the State of Alaska to the critical issues raised by CVTC, in May of 2011, the CNV Traditional Council filed a Complaint with the Organization for Economic Cooperation and Development (OECD) based upon the OECD Guidelines for Multinational Enterprises (2008), challenging UCM’s corporate behavior and that of the Electric Power Development Co., Ltd (JPower) a Japanese publicly held corporation expected to be the intended buyer of UCM Wishbone Hill mine coal.<sup>36</sup>

A press release issued upon the filing of CNV’s OECD Complaint cited above was carried by some Alaska press, as it examined the issue of coal mining in Alaska and responsible corporate behavior and did not focus on the failures of governmental action and inaction. The result raised a furor of public debate including racist public reactions: the following is a comment that ran on the Mat-Su Valley Frontiersman website:

“Chickaloon and Sutton now owe their existence to federal tax money that is given to the “Chickaloon Indians” who, for the most part are less Indian than my dog, and who want nothing more than to leech off of the rest of us. The coal mine permits will address the air quality issues. Alaska has the most restrictive environmental law and regulations in the country. This is about a few deciding on the basis of emotionalism and feelings about something that they perceive as a problem without bothering to find out what steps are required to mitigate the problem. We do need the jobs. The needs of the many outweigh the idiocy of the few.”<sup>37</sup>

Tribal Elders reported highly emotional verbal attacks against them and the Tribe in public places and some even were hesitant to go out. The issue of coal mining, particularly on AMHTA Lands in Alaska now continues to raise these same reactions and concerns.

Under the Convention on the Elimination of all Forms of Racial Discrimination (ICERD), the United States has a legally binding obligation “by all appropriate means and without delay, to pursue a policy of eliminating racial discrimination in all its forms” and “to take special and concrete measures” to protect racial groups “guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms.

No doubt there are many non-indigenous people of good faith and understanding in Alaska. Yet, as evidenced by the inclusion of Alaska as a “preclearance” State under the Voting Rights Act, (discussed above), given the overtly racist rhetoric, many times under the guise of “jobs”

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<sup>36</sup> The Complaint is pending a final Statement from the US NCP, that took the lead in this case.

<sup>37</sup> The comment was deleted after much protestation by the Tribe. Mat-Su Frontiersman Website:

<http://www.adn.com/2011/09/07/2054439/public-crowds-meeting-on-proposed.html#ixzz1XP4I586T>, visited 7 September 2011. This web page is no longer posted.

accompanying the public discourse on coal mining in Alaska, the United States persistently violates Articles 2.1 and 2.2 of the ICERD.

Worse, under the same article 2.1(a), the United States has a legally binding obligation to ensure that public officials “engage in no act or practice” of racial discrimination. The acts and practice of public officials such as the Alaska SHPO and other federal and State public officials entrusted with full and equal compliance with federal and state mining and related regulation and legislation are particularly jarring. Public assertions that Indigenous Peoples don’t really exist but are creatures of statute and can be disregarded, or assigning the right of consultation to ANCSA Corporations while denying it to Indigenous Peoples are patently *purposeful* distinctions based on race or ethnicity by public officials that deny fundamental political, economic and cultural rights. It is the very ICERD definition of racial discrimination (Part 1, article 1).

Both the CERD Committee and the Human Rights Committee, have repeatedly demonstrated concern over the United States practice of the extinguishment of aboriginal title and the loss of indigenous lands.<sup>38</sup> ANCSA, as the major device legislated and rigorously enforced to separate the Ahtna Peoples from their ancestral lands and territories, is a particularly egregious violation of rights: of Self Determination, the right to manifest religion or belief, and the right to practice language culture and religion (ICCPR articles 1, 18 and 27 and General Comment 23), as well as the right to own property, the right to health, and the right to culture (ICERD articles 5(d)(v), 5(e)(iv) and 5(e)(vi) as well as General Recommendation XXIII).

In a recent letter to the United States by the CERD Committee pursuant to its Urgent Action / Early Warning Procedure, the United States was reminded of its legally binding obligations:<sup>39</sup>

“The Committee recalls its recommendation to the State party (CERD/C/USA/CO/6 of March 2008, particularly paragraph 29 which urges the State party to 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 has further recommended that the State party recognize the right of Native Americans to participate in decisions affecting them, and consult and cooperate in good faith with the indigenous peoples concerned before adopting and implementing any activity in areas of spiritual and cultural significance to Native Americans.”

There is a total and persistent failure of the United States to recognize and live up to these legally binding international human rights standards and obligations with regard to Chickaloon Native Village and Alaska Native peoples.

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<sup>38</sup> Human Rights Committee, Concluding Observations, United States of America, Eighty-seventh session, 10-28 July 2006, UN Doc. CCPR/C/USA/CO/3, 15 September 2006 Para. 37. Committee on the Elimination of Racial Discrimination Seventy-second session Geneva, 18 February - 7 March 2008, Concluding observations, United States of America, UN Doc. CERD/C/USA/CO/6, 8 May 2008, para. 29. See also, CERD General Recommendation XXIII (1997), particularly paragraphs 3, 4, and 5, and ICERD article

<sup>39</sup> Committee on the Elimination of all forms of Racial Discrimination, Letter to the United States, ref: GH/SP, 9 March 2012,

### ***Rights under the United Nations Declaration on the Rights of Indigenous Peoples***

Given the Human Rights Committee and the CERD's Conclusions and Recommendations to the United States, there is a great deal to be said for the proposition that the United States is already obligated to respect, protect and implement the United Nations Declaration on the rights of indigenous peoples (the Declaration).

Chief among these rights is the right of Self Determination (article 3), including the right to autonomy (article 4) as well as the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures (articles 3 and 8). ANCSA in particular and the State of Alaska in general, obliterate these rights in words, actions and effect. US public policy, strictly observed, is to deny any effective governance by Chickaloon Native Village of their lands, territories and resources, and highly destructive open pit mining, legal or illegal, is permitted with impunity, over the strenuous objection of the owners and keepers of all that sustains life on their ancestral lands, all that is Sacred.

The right of Free, Prior and Informed Consent found in four articles of the Declaration, particularly article 32, paragraph 2, is implicit in the CERD Letter to the United States, quoted above, and other relevant Treaty Monitoring Body Conclusions and Recommendations: "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 their mineral, water or other resources." (emphasis supplied) There is no doubt that this right is denied Chickaloon Native Village.

Article 8 prohibits the destruction of Indigenous culture and the dispossession of their lands. ANCSA and the State of Alaska are effectively promoting this destruction and dispossession. Article 11 recognizes the right of Indigenous Peoples to practice and revitalize their cultural traditions and article 31 recognized that Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage. Given that article 14 also recognizes the right of Indigenous Children to have access to an education in their own culture, the threat to the CNV Tribal Ya Ne Dah Ah (*Ancient Teachings*) School as a result of UCM's road and parking lot construction across the highway road, even the children of the Chickaloon Tribal community are denied their right to a culturally appropriate education. The possibility that the CNV Tribal Ya Ne Dah Ah School may be forced to close as residents flee the dangers from the undeniable increase in pollution and community strife is real and looming.

There are many cultural and political rights recognized by the Declaration that are violated by the United States and the State of Alaska. See, as examples, article 5 (the right to maintain their own institutions); article 6.2, the collective right to live in peace, freedom and security); article 9 (the right to live in accordance with their own traditions and customs; article 11, (the right to practise and revitalize their cultural traditions and customs; article 12 (the right to manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies; article 15 (the right to the dignity and diversity of their cultures, traditions, histories and aspirations; article 20 (the right to be secure in the enjoyment of their own means of subsistence

and development: article 25 (the right to the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard; and most importantly, article 26 (the right to their lands, territories and resources).

Needless to say, the impermissible restrictions on voting by Alaska Native peoples violate article 5, the right “to participate fully, if they so choose, in the political, economic, social and cultural life of the State.”

CNV is expected only to watch and experience once again the destruction by coal mining of their traditional lands, territories, resources, cultures, traditions, and spiritual ways, while these rights and their rights to culture even as described by the Alaska Supreme Court in *Frank v. State of Alaska*, are again and again violated.

### ***Conclusion***

The Chickaloon Native Village Traditional Council welcomes the Special Rapporteur’s visit to the United States and to Alaska. Knowing of the Special Rapporteur’s interest in mining and extractive industries and their destructive effects on Indigenous Peoples, we are eager for the Special Rapporteur’s visit with Chickaloon Village Traditional Council to gather the Tribal perspective on the threat posed to CNV’s lifeways and survival by coal mining. We appreciate your urgent attention and concern.

Respectfully,



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Alberto Saldamando, Attorney, on behalf of CVTC



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Geoffery A. Stauffer, Attorney at Law in representation of CVTC  
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