



United Nations Special Rapporteur on the Rights of Indigenous Peoples,

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End of Mission Statement

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In my capacity as United Nations Special Rapporteur on the rights of indigenous peoples, I carried out a visit to the United States of America from 22 February to 3 March 2017 to study the human rights situation of indigenous peoples, in particular with regard to energy development projects, and to follow up on key recommendations made by my predecessor, James Anaya, in both his 2012 report on the situation of indigenous peoples in the United States¹ and his 2013 report on indigenous peoples and extractive industries.²

Over the last ten days I have travelled to: Washington, D.C.; Albuquerque, New Mexico; Window Rock, Arizona; Boulder, Colorado; Fort Yates, Fort Berthold and Bismarck, North Dakota. I met with representatives of the federal government in Washington, D.C., including federal and regional representatives from the Army Corps of Engineers, the Department of State, the Department of the Interior, the Environmental Protection Agency, the Department of Health and Human Services, the Department of Energy, the Advisory Council on Historic Preservation and the Department of Justice. In North Dakota, I met with the Governor, and representatives from the State Historic Preservation Office and the Commission on Indian Affairs. I also met with members of the legislative branch including the office of Senator John Hoeven, chair of the Senate Committee on Indian Affairs, and the office of ranking member Norma Torres of the House Subcommittee on Indian, Insular, and Alaska Native Affairs. Finally, I met with the Inter-American Commission on Human Rights.

I visited several tribal communities: the Navajo Nation in Window Rock, Arizona, and other tribes from the Southwest, including the Hopi Tribe, the Tohono O'odham Nation, and several of the Pueblos, as well as tribes from the Great Plains, including the Standing Rock Sioux Tribe, the Cheyenne River Sioux Tribe, the Yankton Sioux Tribe, and the Mandan, Hidatsa, and Arikara Nation. I also met with leaders from the Ute Mountain Ute Tribe, the Southern Ute Tribe, the Northern Ute Tribe of the Uintah and Ouray Reservation, and the Crow Creek Sioux Tribe. I received numerous requests for visits from indigenous communities throughout the country who described their difficult situations, but due to time constraints I was unable to visit them all. I did however hold the first-ever virtual consultation where I spoke with representatives from indigenous communities around the country including from Alaska and Hawaii. I also met with representatives of indigenous peoples and a wide range of civil society and human rights organizations working on indigenous peoples' rights.

¹ A/HRC/21/47/Add.1.

² A/HRC/24/41.

I am grateful to the Government of the United States for its invitation and the full cooperation it has provided, and for allowing me to carry out my visit freely and in an independent manner. I would also like to express my deep gratitude to the representatives of indigenous peoples who invited me to visit their communities, to indigenous organizations, and to individuals who assisted me in organizing parts of my agenda, as well as to those who travelled from their communities in order to meet with me in various localities. This visit was made possible by a number of tribal nations, Native American individuals, and academic institutions that coordinated the regional consultations in various parts of the country and organized my agenda locally. These include the Councils of the Mandan, Hidatsa and Arikara Nation and the Standing Rock Sioux Tribe, the University of New Mexico, the University of Colorado, the Navajo Nation Human Rights Commission, Sitting Bull College, United Tribes Technical College, and the National Congress of American Indians. I am also grateful for the continued support of the Office of the High Commissioner for Human Rights.

During the course of my visit, I received a large volume of information from indigenous peoples, civil society organizations, and government representatives. Over the coming weeks, I will be reviewing this information in order to develop the report I will present to the United Nations Human Rights Council in September 2017. The purpose of the report is to identify best practices and to assist tribal nations and the federal government to find solutions to the ongoing challenges that indigenous peoples face in the United States. In advance of this report, I will provide some preliminary observations and recommendations on the basis of the findings of my visit. These do not reflect the full range of issues that were brought to my attention, nor do they reflect all of the initiatives on the part of the United States government.

In the United States, engagement with indigenous communities in the context of resource extraction and infrastructure projects is governed by several domestic statutes, orders, regulations, policies, and protocols that specify procedures as to how federal departments and agencies are to conduct "government-to-government" consultations. During my visit, I studied energy development projects and impacts in part due to the issues surrounding the Dakota Access Pipeline, a \$3.2 billion energy infrastructure project that crosses the Missouri River five hundred meters from the tribe's northern boundary.

From my conversations with people throughout Indian Country, I have learned that many of the complex issues that Native Americans face in the energy development context today are rooted in a long history of land and resource dispossession. In particular, the policy of allotment implemented by the Dawes Act in 1887 continues to have significant impacts on the development of energy resources throughout Indian Country. The different types of land ownership that exist within reservation boundaries make consistent resource management and regulatory control difficult and complex. Additionally, the checkerboard ownership of private land within reservations resulting from centuries-old policies allows for a double-edged sword whereby state governments may assert tax and regulatory authority over energy development within tribal lands. Meanwhile, the Bureau of Land Management and other federal agencies approve energy projects on lands within reservation boundaries without the consent or input of

the tribal government.

More recent events affecting tribes in North and South Dakota continue to have ongoing impacts on the indigenous peoples in that region. The 1868 Treaty of Fort Laramie established the territory of the Great Sioux Reservation, an area whose boundaries have continually diminished in the last century and a half. For the Standing Rock Sioux Tribe and other tribes in North and South Dakota, the Pick-Sloan project, undertaken without tribal consultation, resulted in the construction of two dams by the United States Army Corps of Engineers. The purpose of the project was to control flooding of the Missouri River, to improve irrigation, and to provide hydroelectric power to the region. The project which created Lake Oahe and Lake Sakakawe submerged hundreds of miles of tribal lands and displaced thousands of indigenous people. The lands, adjacent to the Missouri River that were flooded in the construction of the project were the most fertile and abundant in wildlife. In displacing indigenous peoples from this watershed, the Corps failed to relocate Native American graves. The project has been described by the late scholar Vine Deloria, Jr. as "the single most destructive act ever perpetrated on any tribe by the United States." Most affected were the Mandan, Hidatsa, and Arikara Nation; the Standing Rock Sioux Tribe; the Cheyenne River Sioux Tribe; the Crow Creek Sioux Tribe; the Lower Brule Sioux Tribe; the Yankton Sioux Tribe; and the Nebraska Tribe. Though Congress provided monetary compensation to the tribes, the devastating effects of Pick-Sloan persist today in the form of poverty and continued conflicts over tribal lands. Particularly, the painful history of Lake Oahe has resurfaced in the ongoing Dakota Access Pipeline issue.

The United States' commitment to a process of consultation with tribal governments presents opportunities for a more positive future and meaningful engagement. But challenges remain. The contemporary executive action that provides the most direct guidance on consultation with tribes, Executive Order 13175, while well intentioned has developed into a confusing and disjointed framework that suffers from loopholes, ambiguity, and a general lack of accountability. The regulatory regime has failed to ensure effective and informed consultations with tribal governments. The breakdown of communication and lack of good faith involvement in the review of federal projects has left tribal governments functionally unable to participate in consequential dialogue with the United States on projects affecting their lands, territories, and resources. As the United States indicated at the time it supported the Declaration, meaningful consultation with tribes, without the need for the tribes' agreement, is the preferred process of the United States in lieu of obtaining "free, prior, and informed consent" as set forth in the Declaration. Therefore, at a minimum, meaningful engagement and effective participation of tribal governments in assessing and reviewing extractive industry projects is a key element to the United States' meeting its human rights obligations as a signatory to the Declaration. Further, implementation of best practices about tribal consultation will ensure a more positive and profitable outcome for all stakeholders concerned.

Throughout the course of my mission, I heard universally that there is a pressing need for the federal government to precisely identify requirements for meaningful consultation with Indian tribes and to implement a consistent system across all federal agencies to ensure that consultation is undertaken with the goal of reaching agreement on projects and actions that affect indigenous

peoples.

Many indigenous peoples in the United States perceive a general lack of consideration of the future impacts on their lands in approving extractive industry projects in particular, and a lack of recognition that they face significant impacts from development of not just their own, but neighbouring resources as well. In the context of the Dakota Access Pipeline, the potentially affected tribes were denied access to information and excluded from consultations at the planning stage of the project. Furthermore, in a show of disregard for treaties and the federal trust responsibility, the Army Corps approved a draft environmental assessment regarding the pipeline that ignored the interests of the tribe. Maps in the draft environmental assessment omitted the reservation, and the draft made no mention of proximity to the reservation or the fact that the pipeline would cross historic treaty lands of a number of tribal nations. In doing so, the draft environmental assessment treated the tribe's interests as non-existent, demonstrating the flawed current process. Although the final environmental assessment recognized the presence of the Standing Rock Sioux Tribe five hundred meters away, it dismissed the risks to the reservation and failed to mention any of the other tribes that traditionally used the territory. Without an adequate social, cultural or environmental assessment, and the absence of meaningful consultation with or participation by the tribes, the Corps gave multiple domestic authorizations permitting the construction of DAPL. One such authorization permitted construction beneath the Missouri River at Lake Oahe, while another authorized the discharge of materials and waste into waters throughout the tribes' ancestral lands.

Sadly, I found the situation faced by the Standing Rock Sioux Tribe is shared by many other indigenous communities in the United States, as tribal communities nationwide wrestle with the realities of living in ground zero of energy impact. The goal of tribal consultation is not simply to check a box, or to merely give tribes a chance to be heard. Rather, the core objective is to provide federal decision makers with context, information, and perspectives needed to support informed decisions that actually protect tribal interests. Treaty rights, the federal trust responsibility to tribes, environmental justice, and the principles enshrined in the Declaration all must be given life and meaning in federal decisions that impact tribes. Meaningful consultation has the potential to provide the solid foundation for such decisions, but federal agencies must be willing to recognize these principles and to work actively to put them into practice uniformly at the local, regional, and national level.

I also received reports during this mission regarding the criminalization of indigenous peoples asserting their right to protest in the now-world famous struggle of several tribes in opposition to the Dakota Access Pipeline. As is well-documented, the controversy surrounding the Dakota Access Pipeline has drawn thousands of people to the boundaries of the Standing Rock Sioux Reservation as they sought to protect the land and the water and uphold tribal sovereignty. While the actions taking place have been almost completely non-violent and peaceful, there has been a militarized, at times violent, escalation of force by local law enforcement and private security forces. As noted in my predecessor James Anaya's previous reports, indigenous peoples have the right to oppose extractive activities that impact their land and resources free from reprisals, acts of violence, or undue pressures to accept or enter into consultations about extractive projects.

Finally, given the impacts on indigenous peoples of the Dakota Access Pipeline, I am deeply concerned by the January 24, 2017 presidential memorandum, granting the last easement necessary to begin construction of the Dakota Access Pipeline under Lake Oahe, and the Notice of Termination of the Intent to Prepare an Environmental Impact Statement. I am also concerned about similar impacts on indigenous peoples of the Keystone XL Pipeline and the January 24, 2017 executive order inviting TransCanada to resubmit its permit application to the State Department, while ordering the Secretary of State to expedite the review process.

Indian lands represent twenty percent of fossil fuel energy in the United States, and possess an even greater percentage of renewable energy potential. In addition to rich oil and gas deposits across Montana, North Dakota, Texas, Oklahoma, Utah, Colorado, Alaska, and New Mexico, Indian lands have incredible wind and solar potential, as well as hydroelectric and geothermal resources. A number of tribes have made entrepreneurial efforts to create tribal utilities for the benefit of their own and neighbouring communities, and are involved in a wide array of energy generation and transmission as large parts of tribal lands serve as thruways for the national electrical grid system. Indian tribes are owners and operators of new and emerging technologies, breaking the pattern of reliance on outside entities. These examples and many more suggest that by exercising political sovereignty, indigenous peoples can approach energy resource development in a diverse way to support economic sovereignty.

During my mission, it became clear to me that the indigenous peoples in the United States have a vibrant and enduring relationship to their culture and sacred places. Tribal colleges are promoting indigenous languages and culture through their curricula and efforts are being undertaken to preserve stories and traditions. However, the ability for indigenous people to protect their sacred places is severely restricted by the United States legal system. Two important examples are Mount Taylor and Chaco Canyon. Mount Taylor represents one of the six Navajo sacred mountains and has been designated as traditional cultural property under United States law, while Chaco Canyon has been designated a UNESCO World Heritage Site for its vast cultural resources with deep significance to the Pueblo and Navajo people. Despite these designations, proposed mining and oil and gas projects threaten to desecrate these landscapes and indigenous lifeways as the federal government, rather than the indigenous peoples concerned, has final approval authority over the exploration and development of these areas. In such cases, it is imperative that the government consult or otherwise secure the free, prior, and informed consent of indigenous peoples, in order to protect the sacred and cultural resources of indigenous peoples, not only when projects impact their current lands, but also when projects impact homelands that are customarily and aboriginally owned, occupied, or otherwise used regardless of whether they are located on federal, state, or private lands. Domestic laws cannot define sacredness or confine the idea to specific dots on a map. Instead efforts must be made to amend existing laws governing the protection of sacred and cultural places to encompass an indigenous definition of sacredness as an interconnected landscape with unique relationships to the practice of religions, strengthening of community, livelihoods, subsistence, and gathering of traditional medicines and resources.

I learned from my visit that working closely with Tribal Historic Preservation Officers (THPOs) is a best practice to protect tribal cultural material. THPOs hold unique expertise and knowledge about the tribal lands, territories, and resources. Not only are they intimately familiar with the state and federal permitting and regulatory processes but, as one tribal THPO said, “our oral stories, star knowledge, and cultural history are what help me to evaluate what’s on the ground to know what not to disturb.” Tribal member employees have a connection to the lands that cannot be undervalued and must be leveraged to best protect and respect tribal lands. Tribal THPOs should thus have the ability to provide input on projects taking place on tribal territories outside of reservation boundaries given their deep knowledge of history and culture.

One recent example of proactive and laudable government action to protect indigenous sacred and cultural resources is the recent designation of the Bears Ears National Monument. Through its unprecedented model of co-management with local and regional tribes, the land use model adopted for the Bears Ears Monument allows for the continued use of the area for cultural practices for future generations while using indigenous communities’ traditional knowledge to protect a unique cultural and ecological landscape for the use and enjoyment of the indigenous peoples concerned, as well as the public.

In fact, development on and near indigenous lands has disparate impacts on tribal communities as distinct from other communities. For example, in the Bakken Shale region, the tribes have significant concerns about the safety of those living on the reservations, especially women and children. Already Native women are 2.5 times more likely to be sexually assaulted in their lifetimes as compared to other women in the United States. And, when the oil boom began in the Bakken, the influx of oil and gas workers to the area coincided with a dramatic increase in violent crime and an incredible increase of human trafficking of Native women and children. Risk factors contributing to the sex trafficking of Native women include higher incidences of poverty, lower educational attainment levels, and historical trauma. As a direct result of outside development, the entrance of transient workers with no ties to the community, who can for the most part not be prosecuted for their criminal acts that occur on the reservation creates an unsafe and unstable environment for families on the reservation. Additionally, there is no mechanism in place to increase needed resources for the tribe to adequately protect their citizens through law enforcement or other services.

In reference to the increase of violence against women in the Bakken and near the Navajo Nation, tribes informed me that the oil and gas leasing approvals undertaken by the Bureau of Indian Affairs should but do not adequately consider the safety and welfare impacts of extractive energy projects on native women and children. Applicable United States regulations require that, at a minimum, the federal government consider safety, health and welfare impacts of these projects. Further, the United States acknowledges that it is committed to a trust responsibility for native peoples. This responsibility requires the United States to carefully review energy projects on, adjacent to, or outside of indigenous lands where there are potential impacts. In fact, Articles 21 and 22 of the Declaration explicitly task states with taking effective measures to ensure the continuing improvement of social and economic conditions of indigenous women and children, and to ensure that they have full protection and guarantees against all forms of violence and

discrimination.

This problem exacerbates other important issues as well. Much of the testimony that I received referenced the historical trauma that deeply affects indigenous individuals every day. This trauma cumulated as a result of the largely discriminatory policies of the government towards Indian tribes and individuals since first contact and today still results in distrust of government initiatives and poor health outcomes for Indian individuals.

When resources are extracted from indigenous territories, the people living in those territories experience the attendant health impacts that result as evidenced in the 1940s when large uranium deposits were developed on the Navajo Nation's lands. Private companies developing uranium often employed Navajo workers and failed to communicate the known health risks of exposure to uranium. The workers, and the women and children living near the mines, continue to be burdened by high rates of lung disease and various cancers. Recently, the United States and the Navajo Nation entered into a historic settlement agreement to resolve latent claims remaining from the clean-up to restore healthy tribal communities on the Navajo Nation. To date, there are 15,000 abandoned uranium mines in the United States that need to go through the reclamation process, many of which impact indigenous lands.

Indigenous communities experience negative health impacts from extraction that occurs off the reservation as well. For instance, the Gold King mine disaster in Silverton, Colorado caused three million gallons of contaminated water to flow into the Animas River onto the Navajo Nation reservation, over one hundred miles away. Following the spill, levels of heavy metals in the water, including arsenic and cadmium, exceeded allowable state limits for domestic water. The contamination caused severe damage to crops and livestock, threatening the livelihood of Navajo farmers and ranchers. The long term health impacts of the spill remain unknown. Importantly, the Gold King Mine had not been operational since it was abandoned in 1923. The disaster which occurred almost a century after the project closed demonstrates the possible long-term future impacts of natural resource extraction and attendant infrastructure on indigenous peoples.

The Gold King Mine spill and the Dakota Access Pipeline issue highlight the many water concerns associated with energy development. In places like the arid west, the substantial volumes of water used in drilling operations cause stress on surface water and groundwater supplies. Contamination of underground and surface waters is also a concern, with many projects threatening vital resources in water-scarce regions. In fact, a recent EPA study found scientific evidence that activities in the hydraulic fracturing water cycle can impact drinking water resources through spills, faulty well construction, discharges into surface waters, or disposal into underground injection wells. For indigenous peoples, water provides lifeways, subsistence, and has undeniable spiritual significance. In Lakota, they express this belief as *Mni Wiconi*: water is life.

In addition, another implication of energy development being borne by indigenous peoples has been a dramatic increase in the flaring of natural gas in North Dakota's Bakken formation.

Because of the lack of sufficient natural gas pipeline infrastructure in the relatively new production area, many wells in the area have been forced to flare the natural gas product as a method of disposal. The health implications of natural gas flaring are related to the exposure of hazardous air pollutants emitted during the combustion of the gas flare. The various pollutants, including methane, have been associated with a variety of adverse health impacts, including cancer, lung damage, and various other neurological defects. These effects are being felt by the residents of the Mandan, Hidatsa, and Arikara Nation, and in surrounding communities.

Indigenous communities in the United States want more control over their energy resources as a part of their overall desire to be self-determined with respect to their lands, territories, and resources. They are committed to balancing many different sets of concerns in their own approaches to energy development. The tribes rely on the income generated from natural resources to not only support critical government programs, but also to balance the protection of their lands, waters, and sacred places with the benefit of revenue and jobs.

I have been very impressed by the remarkable and unshakeable resolve tribes have to find creative ways to self-determine their development. For example, the Mandan, Hidatsa, and Arikara Nation recently formed Missouri River Resources, a wholly-owned tribal company dedicated to using best practices in the oil and gas industry to generate economic benefits for the tribal community through responsible oil development. Similarly, the Red Willow Production Company, a \$2 billion company wholly owned and managed by the Southern Ute Tribe, has been generating revenue through oil and gas development on their reservation since 1992 and continues to maximize benefits for their tribal community while carefully managing their lands and resources.

Despite their successes, tribes continue to face significant challenges in harnessing their own development possibilities. In particular, the legal, regulatory, and tax structures currently in place serve to create additional hurdles while reducing the possibility of realizing important benefits. Of particular concern is the dual taxation regime that allows state governments to tax energy revenues derived from tribal lands without any requirement that those taxes are deployed to serve those tribal communities. Whether it is repaving destroyed roads, creating adequate environmental mitigation, providing emergency response plans, or bulking up the capacity of law enforcement, the energy-producing tribes find themselves alone in managing the impacts of development without adequate resources to do so.

The issues surrounding energy development underscore the need for reconciliation with indigenous peoples in the United States. Tribal leaders and representatives indicate that they are interested in engaging in a program of reconciliation to remedy the harms they have faced and improve the government-to-government relationship going forward. Such a program would acknowledge the historical wrongs inflicted upon indigenous peoples in the United States and confront systemic barriers that prevent the full realization of indigenous peoples' rights.

Nevertheless, there are encouraging steps being taken by federal agencies to implement the Declaration in consultation policies. Since 2012, the federal government has made commendable

efforts to develop policies toward more robust measures to effectively implement existing policies and to advance towards full recognition of the rights of indigenous peoples. For example, the Advisory Council on Historic Preservation has issued guidance to federal agencies in carrying out their Section 106 responsibilities under the National Historic Preservation Act, in line with the Declaration. These suggestions include developing a working knowledge of the Declaration and its articles, reviewing and updating agency policies to reflect the Declaration principles, and considering the Declaration to be a policy reference in the Section 106 process and beyond.

Further, in January 2017, the Department of the Interior, the Department of the Army, and the Department of Justice issued a report, “Improving Tribal Consultation and Tribal Involvement in Federal Infrastructure Decisions,” following a series of regional consultations with tribal leaders to solicit recommendations on engaging tribes in infrastructure-related activities. The report provides an encouraging path forward that strongly upholds the government-to-government relationship between tribes and the federal government. The report also provides constructive strategies to increase communication, to maximize opportunities for good faith negotiations, and to ensure tribal input at every decision point. I am encouraged by the process of meaningful consultation with the tribes that the United States undertook in creating this report, and applaud the efforts made by the government to consider ways in which to improve consultation processes consistently across agencies, incorporating input from indigenous peoples. In order to meet the obligations of the Declaration, the United States should continue to build efforts to incorporate principles of meaningful consultation with the goal of obtaining free, prior, and informed consent from indigenous peoples as set forth in Articles 10, 11, 19, 28, 29, and 32.

As when my predecessor issued his 2012 report, significant work still needs to be done to implement policies and initiatives to further the rights of indigenous peoples. Unfortunately, the many recommendations of my predecessor in his 2012 report have yet to be realized.

In order to fully realize the rights of indigenous peoples as enshrined in the Declaration, I recommend that the United States government continue to improve upon its policies to develop stronger government-to-government relations with tribes. To do so, the government must, at a minimum, adhere to its own consultation policy as set forth in Executive Order 13175. The federal, state, and local governments should adopt consistent practices in consulting with tribes on projects that could affect indigenous rights. The federal government should take steps to consider fully and implement the suggestions from its own 2017 report, “Improving Tribal Consultation and Tribal Involvement in Federal Infrastructure Decisions.”

Tribes must continue to be supported to develop capacity and resources to realize self-determination to take advantage of their expanded authority in all areas including in energy development and law enforcement. I urge the government to continue to honour its treaty and trust obligations to indigenous peoples.

To ensure that native communities are not further plagued by violence, for measures that have the potential to create positive impacts on tribal communities, such as the 2013 reauthorization of

the Violence Against Women Act, the United States must continue to take measures to ensure that tribal governments are able to implement them, including by providing adequate resources.

The United States should take appropriate measures to ensure the United Nations Guiding Principles on Business and Human Rights are properly considered by all accountable actors in any projects that have impacts on indigenous peoples in the United States.

Finally, I recommend that for any extractive industry project affecting indigenous peoples, regardless of the status of the land, the United States should require a full environmental impact assessment of the project in consideration of the impact on indigenous peoples' rights.