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## **UPDATED REPORT TO THE UNITED NATIONS HUMAN RIGHTS COMMITTEE REGARDING THE UNITED STATES' COMPLIANCE WITH THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS**

By

THE INDIAN LAW RESOURCE CENTER

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UNITED NATIONS HUMAN RIGHTS COMMITTEE REGARDING THE  
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**I. INTRODUCTION**

This report is in response to the United Nations Human Rights Committee's request for updated information from non-governmental organizations relative to the United States' compliance with the International Covenant of Civil and Political Rights. We are submitting this report to provide important information to the Committee in anticipation of the United States' response to the Committee's List of Issues to be Taken Up in Connection with the Consideration of the Second and Third Periodic Reports of the United States of America ("List of Issues"). In particular, we would like to take this opportunity to provide the Committee with the Indian Law Resource Center's perspective on Issue No. 1 relating to the right to self-determination and rights of persons belonging to minorities.

**II. EXECUTIVE SUMMARY**

Article 1 of the International Covenant on Civil and Political Rights (ICCPR) recognizes the right to self-determination. For indigenous peoples, *inter alia*, the right of self-determination has been associated with the right freely to control lands and natural resources. See, *Concluding Observations and Recommendations of the Human Rights Committee: Canada*, 07/04/99, U.N. Doc. CCPR./C/79/Add.105 (1999). Article 27 of the ICCPR affirms the right of minorities to practice their own culture, religion, and language. This right has been held to apply specifically to indigenous groups and has been interpreted in connection with the right to property. See, Human Rights Committee, *General Comment No. 23 (50)(art.27)* at para. 7, adopted April 6, 1994, U.N. Doc. HRI/GEN/1/Rev. 1 at 38 (1994). Although the United States has ratified the ICCPR, and has received recommendation on its implementation from this Committee, it has failed to implement the above principles in its treatment of indigenous peoples.

With regard to the United States' Second and Third Periodic Reports, the Human Rights Committee developed its List of Issues to be taken up with the United States at the Committee's upcoming July session. Issue No. 1 relates to articles 1 and 27 and the right of self-determination and rights of persons belonging to minorities, respectively. Issue No. 1 reads as follows:

Does the State party rely on the doctrine of discovery in its relationship with indigenous peoples, and if so what are the legal consequences of such approach? What is the status and force of law of treaties with Indian tribes? Please indicate how the principle set forth in U.S. law and practice, by which recognized tribal property rights are subject to diminishment or elimination under the plenary authority reserved to the U.S. Congress for conducting Indian affairs, complies with articles 1 and 27 of the Covenant? (Previous concluding observations, § 290 and 302; Periodic report,

In anticipation of the United States' responses, this Report will provide the Committee with a full and true response, based on recognized international human rights principles, to the questions raised above. The first section of this report will address the Committee's question regarding the application of the doctrine of discovery and its legal consequences. The second section of this report will address the Committee's question regarding the legal status of treaties between the United States and Indian tribes. The final section of this report will address the plenary power doctrine and the United States' extinguishment of tribal property rights.

### **III. UPDATED REPORT REGARDING ISSUE NO. 1**

United States Indian law and policy are based on discriminatory doctrines that deny American Indian tribes and nations basic security in their continued existence and effective control over the use and development of their lands and resources. This body of law grew out of the period of "discovery" and colonization.

#### A. The Doctrine of Discovery

The American formulation of the discovery doctrine is that indigenous peoples were divested of certain natural rights, especially their land and resource rights, by the arrival of the colonizing power because of its assumed superiority over the indigenous peoples of the land. This doctrine has repeatedly been used to justify discriminatory treatment and erosions of indigenous sovereignty in modern times.

In recent years, various states have rejected the discovery doctrine and similar discriminatory legal doctrines that limit the land rights of indigenous peoples in favor of non-indigenous ownership. In *Mabo v. Queensland*, for example, decided in 1992, the High Court of Australia rejected the doctrine of "terra nullius." "Terra nullius" means "land of no one." Under this doctrine, land that was unclaimed by a recognized sovereign government was considered to be owned by no one, regardless of whether indigenous peoples lived on the land. As with the United States' doctrine of discovery, "terra nullius" places indigenous forms of government as sub-servient to Western European governments. Despite the fact that indigenous peoples had their own preexisting forms of sovereign governments, the colonizers ignored this and treated indigenous peoples as less than white peoples. In *Mabo*, the High Court rejected this doctrine as racist, recognizing the land rights of the indigenous peoples of Australia. In the United States, the doctrine of "terra nullius" is still considered good law and is called "the doctrine of discovery."

Another example of a modern state recognizing indigenous land rights is Canada. In 1982, the Canadian people amended their Constitution to recognize both the aboriginal and treaty rights of Canada's First Nations. Aboriginal rights are important because they are the rights that pre-existed contact with non-indigenous people. The constitutional provision was followed up in 1997 with *Delgamuukw v. British Columbia*, in which the Supreme Court of Canada recognized the special relationship indigenous peoples have with the land and determined that indigenous oral tradition was legally admissible evidence of indigenous land rights -- meaning indigenous oral history may be used in court as proof of indigenous title to land.

The United States is one of a dwindling number of countries that still fails to adequately recognize the pre-existing land rights of indigenous peoples, based on its continued reliance on the discriminatory discovery doctrine. In her final working paper prepared in 2001 for the Sub-Commission on the Promotion and Protection of Human Rights by the Special Rapporteur, Mrs. Erica-Irene A. Daes, Mrs. Daes states that the discovery doctrine has had well-known adverse effects on indigenous peoples. See, ¶ 31. In the United States, one of the worst effects of the discovery doctrine is the emergence of the plenary power doctrine, which supposedly gives the U.S. Congress almost absolute power over the affairs of indigenous peoples in the United States. In the United States today, under the plenary power doctrine, indigenous peoples can be deprived of their traditional lands and resources without due process and without compensation; indigenous governments can be terminated at will by the federal government; treaties may be arbitrarily abrogated, and the religious freedom and cultural integrity of indigenous peoples go virtually unprotected. For a further discussion of the discovery and plenary power doctrines and the above mentioned adverse effects, please see the previous joint report to the Human Rights Committee submitted in January 2006 by the Indian Law Resource Center, the Western Shoshone Defense Project, and the University of Arizona Indigenous Peoples Law and Policy Program, entitled *The Status of Compliance by the United States Government with the International Covenant on Civil and Political Rights* (“Previous Joint Report”).

In response to this Committee’s request to discuss restrictions on the enjoyment of the right to self-determination, in its Second and Third Periodic Report, the United States failed to address any of the adverse impacts deriving from the discovery or plenary power doctrines. Rather, the United States merely attempted to justify these restrictions by stating that United States law makes tribal sovereignty subject to the plenary power of Congress. Clearly, the United States continues to use the plenary power doctrine and the discovery doctrine to justify the continued denial of the enjoyment of the right of self-determination by indigenous peoples.

#### B. The Legal Status of Treaties Between the U.S. and Indian Tribes

There are nearly four hundred treaties signed between the United States and Indian tribes. See, Stephen L. Prevar, *The Rights of Indians and Tribes: The Authoritative ACLU Guide to Indian and Tribal Rights*, 46 (3d ed. 2002). Until 1871, when the United States ceased entering into treaties with Indian tribes, most treaties were designed to take land from a tribe in exchange for a set of promises, which included in most cases, to reserve specific territories for the tribe to be protected from non-Indian encroachment, to respect the tribe’s sovereignty, and to provide for the well-being of tribal members. *Id.* at 27. In 1854, one U.S. Senator described the nature of these treaty land deals to Indians in this manner: “As long as water flows, or grass grows upon the earth, or the sun rises to show your pathway, or you kindle your camp fires, so long shall you be protected by this Government and never again be removed from your present habitations.” *Id.* Based on these types of promises, the tribes that entered into these treaties did so in good faith.

Indian treaties are generally considered “not [as] a grant of rights to the Indians, but a grant of rights from them.” *U.S. v. Winans*, 198 U.S. 371 (1905). This means that tribal rights should not be limited to those specifically mentioned in a treaty. Rather, any right that a sovereign nation would normally possess that is not expressly extinguished by a treaty, must be regarded as “reserved” to the tribe. See, *Menominee Tribe v. U.S.*, 391 U.S. 404 (1968); *U.S. v. Dion*, 476 U.S. 734, 739

(1986). Thus, a tribe entering into a treaty should be able to reasonably expect that the rights reserved to itself would be honored by the United States. Under current Indian law and policy, however, this is not the case. The United States may subsequently extinguish these rights by congressional action based on the plenary power doctrine.

The United States Supreme Court has extended the doctrine of federal plenary power over indigenous peoples to include the power to unilaterally abrogate treaties between indigenous nations and the federal government. See, *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903). This is despite the fact that under the U.S. Constitution, treaties are expressly stated to be the supreme law of the land. In essence, the United States' claimed power to abrogate legally binding treaties dishonors the word of the United States. This means that even though Indian tribes already fulfilled their treaty obligations by giving up vast land holdings to the United States, Congress may unilaterally decide to break the government's promises to Indian tribes. See, Prevar at 49, citing Vine Deloria Jr., *Custer Died for Your Sins* (New York: Avon Books, 1969) at 35-59; S. Steiner, *The New Indians* (New York: Dell Publishing Co., 1968) at 160-74.; and C. Wilkinson and J. Bolkman, "Judicial Review of Indian Treaty Abrogation: 'As Long as Water Flows, or Grass Grows upon the Earth'-How Long a Time is That?" 63 *Cal. L. Rev.* 601, 608-610 (1975).

### C. Elimination of Tribal Property Rights and the Plenary Power Doctrine

As discussed above, the Supreme Court maintains that Congress can unilaterally abrogate treaties. This includes the power to diminish reservation lands that were promised to Indian tribes by treaty. See, *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977). With regard to the Rosebud Sioux Tribe, the United States entered into a treaty with the Tribe in which the U.S. promised never to reduce the size of the Tribe's reservation without the Tribe's consent. After signing the treaty, however, Congress unilaterally passed a law reducing the size of the reservation. The Supreme Court held that Congress had the power to abrogate the treaty and could take the land, even though it was promised to the Tribe by treaty. The precedent set by this case results in all Indian tribes being denied any security in their ability to effectively control their lands and resources in the future, because at any time Congress can diminish or eliminate their reservation lands.

Although Congress can take land guaranteed by treaty, under the Fifth Amendment to the U.S. Constitution, Congress may not take property without due process and just compensation. Indian rights recognized by treaty, including property rights, are considered a form of property protected by the Fifth Amendment. See, *Shoshone Tribe v. U.S.*, 299 U.S. 476, 497 (1937). Under current federal Indian law, however, not all Indian land rights are given "property right" status by the federal government.

The United States only gives "property right" status to those lands that the tribe has reserved to itself by treaty, after ceding its other lands to the federal government. The land title to these lands is considered "recognized" title. In contrast to these formally recognized lands, current federal law does not give the same property status to unrecognized lands held by aboriginal right -- that is, by reason of long historical possession and use. This means that if a tribe never ceded any of its lands to the United States, current federal law will not provide the tribe with recognized "property rights" to these traditional lands, and Congress can take these lands at will without compensation.

By reason of the discovery doctrine, Indian tribes supposedly lost the title to their lands upon the arrival of European colonizers. Under federal Indian law policies, Indian tribes, as the original inhabitants of the United States, have only a right to continue to occupy and use their traditional lands. This interest is generally referred to as aboriginal title. Using the discovery doctrine as the basis for its reasoning, the Supreme Court has identified the following principles as definitive of aboriginal title: (1) the federal government gained ownership of all lands within the U.S. by discovery; (2) Indians retain a perpetual right to remain on their ancestral lands until Congress decides to take the lands; (3) aboriginal title is a possessory interest, not a property interest, meaning Indians have a right to possess their traditional lands, but not to own them. See, Prevar at 25. An important part of this is Congress' claimed right, under the plenary power doctrine, to extinguish aboriginal title at any time for any reason. This means that the lands and resources owned by tribes "since time immemorial" can be taken by the government for any reason.

This distinction between recognized title, with property right status, and unrecognized title, generally referred to as aboriginal title, is not only false, but discriminatory as well. It emerges directly from the discovery doctrine, and fails to adequately recognize the pre-existing land rights of indigenous peoples. Although both types of title can be unilaterally taken by Congress under the plenary power doctrine, only recognized title carries with it the right to compensation under the Fifth Amendment. This means that the government can take traditionally held lands, that were never ceded by the tribe to the United States, without compensation and without due process of law.

In the case of *Tee-Hit-Ton v. United States*, decided in 1955, the U.S. Supreme Court announced that the United States government is free to take or confiscate indigenous lands and resources held by aboriginal right (that is, by reason of long historical possession and use) without due process of law and without paying any compensation. The *Tee-Hit-Ton* decision continues to be upheld and applied by United States courts. In the case of *Karuk Tribe of California, et al. v. United States*, decided in 2000, the federal circuit court held that the Karuk Tribe of Indians was not entitled to compensation for lands taken from them by an act of Congress, even though those lands had been reserved for the Karuk Tribe pursuant to a federal statute and executive orders. The holding in *Karuk* is thus an expansion of the holding in *Tee-Hit-Ton*, applying the principle that Indian land can be taken without compensation even when the land is part of a congressionally established Indian reservation. In a strong dissent, Judge Pauline Newman made the following observations:

It is not tenable, at this late date in the life of the Republic, to rule that Native Americans living on a Reservation are not entitled to the constitutional protections of the Fifth Amendment. . . . This case is not concerned with Indian title deriving from aboriginal occupancy . . . it is concerned solely with Reservation lands duly established by governmental action . . . . The argument, pressed by the panel majority, that reservations established by Act of Congress and implemented by executive order are somehow inferior in their property attributes, is without force or support.

Nonetheless, the current law in the United States is that Congress can take traditional indigenous lands held by aboriginal title without compensation, merely because the federal government has not formally recognized the title by treaty. This is a brazen denial of basic property rights enjoyed by

the rest of the U.S. population and stems directly from the discovery and plenary power doctrines.

In response to this Committee's previous recommendation that the United States take steps to ensure that previously recognized aboriginal Indian rights cannot be extinguished, the United States merely attempts to justify this policy rather than provide an outline of steps to ensure it will no longer occur. As justification, in its Second and Third Periodic Report, the United States merely says that under U.S. law, recognized tribal property rights are subject to diminishment or elimination under the plenary power doctrine. The fact that taking recognized tribal property rights requires due process and compensation, in contrast to the taking of aboriginal title, does not make the taking any less egregious. What the United States fails to acknowledge is that Congress' claimed right to take Indian lands, recognized or unrecognized, under the plenary power doctrine, results in Indian and Alaska Native tribes being unfairly and discriminatorily denied any certainty in their ability to continue to use and occupy lands they have held since time immemorial.

In addition to the diminishment and extinguishment of recognized tribal property rights and unrecognized aboriginal title, under the plenary power doctrine, the United States continues to use the so-called "trust" relationship as justification for preventing indigenous peoples from freely disposing of their natural wealth and resources, contrary to article 1 of the ICCPR. As a result of an alleged trust relationship between indigenous peoples and the United States, the federal government claims extensive power to manage the lands and affairs of indigenous communities. An underlying assumption of the trust relationship is that indigenous peoples in the United States are incompetent or legally disabled from exercising full control over their own property and affairs.

In its Second and Third Periodic Report to this committee, the United States failed to provide an explanation of the factors that prevent indigenous peoples from freely disposing of their natural wealth and resources, as requested by this committee. Rather, the United States merely states that "there are processes available for the disposal or alienation of the land or natural resources if [indigenous peoples] so choose, *with the consent of the federal government.*" (Emphasis added). The United States fails to answer the underlying question of how a people can freely dispose of their resources if they must first receive the consent of the federal government.

In its Report, the United States also discusses the history of trust fund accounts and the numerous tribal trust accounting and asset mismanagement cases pending against the United States. However, rather than provide any information regarding how they intend to resolve this situation, the United States merely mentions the American Indian Trust Fund Management Reform Act that is supposed to ensure proper discharge of the government's trust responsibilities. Again, this response ignores the discriminatory nature of the trust relationship and the negative impacts this relationship has on many Indian communities and tribes within the United States.

Currently, the federal government is being sued by indigenous parties for the loss of billions of dollars in trust monies which were supposedly being managed by the federal Bureau of Indian Affairs for the benefit of indigenous communities and individual Indians. At one time these monies could have formed stable reservation economies. Instead, these monies are gone – lost and unaccounted for in a corrupt and incompetent federal bureaucracy. The gross mismanagement and misdeeds of the federal government in managing tribal affairs and resources have resulted in the indigenous peoples of the United States becoming the poorest and most disadvantaged segment of

the population.

The federal law places Indian and Alaska Native tribes, all their property, and all their affairs in a state of involuntary, permanent trusteeship, with the federal government as trustee. In most situations, tribes cannot hold the trustee accountable. While some aspects of trusteeship have benefits for tribes, this trusteeship is a source of widespread and very serious abuse, because the government claims almost unlimited powers as trustee but refuses to be actually held accountable. No other category of people is subject to such a system of involuntary, permanent trusteeship.

#### **IV. CONCLUSION AND RECOMMENDATIONS**

This Committee previously asked the United States to describe the processes which in practice allow the exercise of the right of self-determination within the United States. The U.S. merely responded by stating that it enables, assists and supports the exercise of tribal self-determination. However, by every measure, Indian tribes continue to rank at the bottom of every scale of economic and social well-being. The federal government, acting through Congress and the executive, continues to take tribal lands and resources, in many cases without payment and without any legal remedy for the tribes. Congress frequently deals with Indian property and Indian claims by enacting legislation that would be forbidden by the Constitution if it affected anyone else's property or claims. Using this legal framework, the government also manages or controls most Indian land, frequently mismanages the land and resources, and fails to properly account for the resources and for moneys owed to the tribes that own the land and resources. Because of the federal government's essentially limitless power and constant intrusion, under the plenary power doctrine, Indian governments cannot function properly to govern their lands or to carry out much-needed economic development. This denial of simple justice has long served to deprive Indian tribes of a fair opportunity to advance the interests of their communities. No other people in the country is in such an untenable and insecure position. We hope this Committee will use the information contained within this Report to require the United States to fully and effectively respond to Issue No. 1 and previous recommendations of this Committee.