

Shadow Report

Submitted by the Winnemem Wintu Tribe

**In Response to the United States' June 12, 2013 Periodic Report to
the United Nations Committee on the Elimination of Racial
Discrimination Concerning the International Convention on the
Elimination of All Forms of Racial Discrimination**

I. Introduction

The Winnemem Wintu Tribe respectfully submits this Shadow Report as a supplement to the United States' June 2013 Periodic Report.¹ This Shadow Report addresses the United States' failure to respect, protect, and fulfill the rights guaranteed to the Winnemem Wintu under the Convention on the Elimination of All Forms of Racial Discrimination (hereinafter "Convention").²

The Winnemem Wintu Tribe is indigenous to northern California in the United States. This Shadow Report addresses past actions by the United States' government that have substantially interfered with the Tribe's observation of spiritual and cultural practices and have denied the Tribe access to traditional lands containing sites sacred to the Tribe's cosmology. This Shadow Report then describes a proposed governmental action that, if implemented, would further erode the Tribe's ties to its ancestral lands and undermine the Tribe's ability to practice its cultural traditions and customs. The Tribe has limited recourse to vindicate its rights under U.S. law because the U.S. government has revoked its formal recognition of the Winnemem Wintu, leaving them unable to invoke the protections of some U.S. laws concerning the rights of Native Americans.

The Winnemem Wintu respectfully ask that the Committee on the Elimination of Racial Discrimination (hereinafter "Committee") consider this Shadow Report as part of its review of the United States' Periodic Report and that the Committee issue appropriate recommendations calling upon the United States to honor its obligations under the Convention and other instruments of international law with respect to the Winnemem Wintu's ability to continue practicing their cultural and spiritual traditions in the lands they have inhabited for millennia. In particular, the Winnemem Wintu ask the Committee to recommend that the United States become a signatory to the United Nations Declaration on the Rights of Indigenous Peoples; conclude that the implementation of a proposed dam expansion that would flood Winnemem Wintu cultural sites would violate multiple obligations of the United States under the Convention; urge the United States to consult with and obtain free and informed consent from indigenous communities before implementing activities that would affect these communities' territories and resources; and recommend that the United States satisfy long unfulfilled statutory and contractual obligations owed to the Winnemem Wintu, including re-extending formal recognition to the Tribe.

¹ Periodic Report of the United States to the United Nations Committee on the Elimination of Racial Discrimination Concerning the International Convention on the Elimination of All Forms of Racial Discrimination, June 12, 2013, *available at* <http://www.state.gov/documents/organization/210817.pdf>.

² International Convention on the Elimination of All Forms of Racial Discrimination, G.A. res. 2106 (XX), Annex, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1966), 660 U.N.T.S. 195, *entered into force* Jan. 4, 1969.

II. History of the Winnemem Wintu Tribe

The Winnemem Wintu are a non-gaming, Native American tribe indigenous to what is now northern California. The name Winnemem Wintu means “Middle Water People,” a reference to the tribe’s historic home along the McCloud River. The tribe remains intimately connected to the McCloud River, nearby Mount Shasta, and the surrounding meadows. Chief Caleen Sisk has explained that for the Winnemem Wintu, “our beginning of life comes from Mt. Shasta, [and] all those stories up and down the river have meaning – from Yellow Jacket Mountain, to Fox Mountain, to the Sucker Pools, all these have stories that belong to the Winnemem people and songs that go with them.”³

In 1851, the federal government entered into a treaty with the Winnemem Wintu and other tribes, known as the Treaty at Cottonwood Creek,⁴ in which the tribes ceded tribal lands in exchange for a land allotment comprising a twenty-five mile span along the Sacramento River, running north from the mouth of Ash Creek. The U.S. Senate refused to ratify the treaty, but the federal government nonetheless began granting land ceded by the tribes to private parties. In the 1870s, the government took additional land historically occupied by the Winnemem Wintu in order to establish a government fish hatchery along the McCloud River.⁵

Following the Cottonwood Creek treaty, some Winnemem Wintu received land allotments that allowed them to remain along the McCloud River and other traditional sites. But as white settlers migrated to California in increasing numbers throughout the late nineteenth and early twentieth centuries,⁶ the state and federal governments began developing plans to construct a dam in the Sacramento River, in order to provide water allotments to farmers and urban areas in other parts of California.

In 1941, Congress enacted the Central Valley Project Indian Lands Acquisition Act,⁷ which authorized the construction of Shasta Dam. The construction of Shasta Dam formed a massive reservoir that permanently floods part of the McCloud River and other rivers, streams, and lakes. The 1941 Act specifically provided for the federal government’s “acquisition of tribal lands, sacred sites, ancestral villages, and burial grounds along the McCloud River” but required

³ Video of Chief Caleen Sisk-Franco speaking to supporters and the media, Apr. 20, 2009, available at <http://www.winnememwintu.us/journey-to-justice/>.

⁴ Treaty Made and Concluded at Reading’s Ranch, on Cotton Wood Creek, State of California, August 16, 1851, between O.M. Wozencraft, United States Indian Agent, and the Chiefs, Captains, and Head Men of the Noe-Ma, & C., Tribes of Indians (unratified), available at http://digital.library.okstate.edu/kappler/vol4/html_files/v4p1107.html.

⁵ See Anne Kathryn McTavish, The Role of Critical Cartography in Environmental Justice: Land-Use Conflict at Shasta Dam, California 65-68 (January 2010) (unpublished M.A. thesis, San Francisco State University), available at <http://geog.sfsu.edu/geog/sites/sites7.sfsu.edu/geog/files/thesis/McTavishThesis.pdf>.

⁶ *Id.* at 64-77.

⁷ Pub. L. No. 198, 55 Stat. 612-613 (1941).

that “just and equitable compensation therefor” be paid to affected Native American tribes.⁸ The 1941 Act further required:

As to any Indian cemetery lands required for the project, the Secretary of the Interior is authorized, in his discretion, in lieu of requiring payment therefor, to establish cemeteries on other lands that he may select and acquire for the purpose, and to remove bodies, markers, and other appurtenances to the new sites. All right, title, and interest of the Indians in the lands within any cemetery so relocated shall terminate Sites of the relocated cemeteries shall be held in trust by the United States for the appropriate tribe, or family⁹

The federal government never honored its statutory commitments to provide just and equitable compensation for the appropriated land. Although the government acquired at least seventy-two allotments, totaling approximately 9,500 acres, of Winnemem Wintu lands, it only paid compensation for twenty-eight of these allotments.¹⁰

Over ninety percent of the Winnemem Wintu’s ancestral lands were inundated as a result of the dam and ensuing flooding of the McCloud River, including many sacred burial sites.¹¹ While the government did create a new “Shasta Reservoir Indian Cemetery” to which it relocated 183 Winnemem Wintu burials, it has not held that cemetery in trust for the Winnemem Wintu.¹²

In dealings dating back to at least the signing of the Cottonwood Creek treaty in 1851, the federal government had recognized the Winnemem Wintu. It provided education grants to Winnemem Wintu youth throughout much of the twentieth century as part of its obligations under settlement terms arising out of the Shasta Dam construction in the 1940s. In 1985, however, the federal Bureau of Indian Affairs without warning excluded the Winnemem Wintu from its official list of federally recognized tribes. Without formal federal recognition, members of the Tribe became ineligible for the services and assistance that the Bureau of Indian Affairs provides to federally recognized tribes. They moreover cannot invoke statutory protections relating to the preservation of cultural practices that U.S. law restricts to federally recognized tribes, such as the protection of “privacy of tribal activities for traditional and cultural purposes” that U.S. law affords federally recognized tribes.¹³ The lack of federal recognition also makes the Winnemem Wintu ineligible for protection under the Native American Graves Protection and Repatriation Act,¹⁴ and the Indian Child Welfare Act, among others. They are furthermore ineligible for federal funding that would enable them to begin efforts to restore the historic

⁸ Shepherd, *Implementing the Human Right to Water in the Colorado River Basin*, 47 Willamette L. Rev. 425, 434-35 (2011).

⁹ Central Valley Project Indian Lands Acquisition Act, *supra* note 7, 55 Stat. 613.

¹⁰ McTavish, *supra* note 5, at 106, 110, 114.

¹¹ Minton, *The Old and the New: Evaluating Existing and Proposed Dams in California*, 2 Golden Gate Univ. Envtl. L. J. 96, 116 (2012).

¹² Shepherd, *supra* note 8, at 435; 55 Stat. 612 § 2.

¹³ 25 U.S.C. §§ 3052, 3054.

¹⁴ 25 U.S.C. § 3001 *et seq.*

salmon runs that, as discussed below in Part III.B, have been severely threatened by the Shasta Dam and other factors.

Approximately half of all California Indians, including the Winnemem Wintu and some seventy-five other tribes, are not formally recognized by the federal government.¹⁵ At the state level, the California Native American Heritage Commission officially recognizes the Winnemem Wintu, and the California state legislature recently adopted a Joint Resolution that calls on the U.S. Congress to restore federal recognition to the Winnemem Wintu. Congress, however, has failed to act on this recommendation by the State of California.

Indigenous groups have little ability under U.S. law to challenge a determination that they are ineligible for federal recognition. U.S. courts have refused to entertain such challenges, holding that under U.S. law, whether an indigenous group should receive federal recognition is a non-justiciable political question to be resolved by the executive branch, and not a question that courts may decide.¹⁶ The Winnemem Wintu, and other unrecognized tribes, are therefore caught in a conundrum, unable to invoke many of the protections U.S. law does extend to formally recognized tribes and unable to challenge the lack of federal recognition in the courts.

The Winnemem Wintu's land is now limited to a forty-two-acre village located outside Redding, California, which is home to approximately thirty tribal members. The total tribal membership hovers around 150, compared to its estimated peak of 14,000. As noted above, most of the Winnemem Wintu's traditional lands are now submerged under the McCloud Reservoir and the Shasta Reservoir, and salmon no longer breed upstream of Shasta Dam. In the face of these hardships, the Winnemem Wintu continue to strive to preserve their native language, practice their religion and traditional healing methods, and protect the few remaining sacred sites and burial grounds from further encroachment by the federal government. As discussed below, the Winnemem Wintu's struggle is under a new threat: proposed legislation to expand Shasta Reservoir, which would submerge additional Winnemem Wintu lands.

III. Acts and Omissions of the U.S. Government that Have Substantially Impeded the Winnemem Wintu's Religious and Cultural Practices

As discussed above, the construction of the Shasta Dam in the 1940s created Shasta Reservoir and submerged most of the Winnemem Wintu's remaining lands, including many sacred sites and burials along the McCloud River. That governmental action has significantly impeded the Tribe's ability to observe its annual BaLas Chonas, or Coming of Age, ceremony, as well as its relationship with the Sacramento River Chinook salmon.

¹⁵ Dadigan, Winnemem Wintu Tribe Struggles to Protect Sacred Sites, *The Huffington Post*, July 20, 2012, http://www.huffingtonpost.com/2012/07/17/winnemem-wintu_n_1681397.html.

¹⁶ *Miami Nation of Indians of Ind., Inc. v. U.S. Dep't of Interior*, 255 F.3d 342, 347 (7th Cir. 2001); *Winnemem Wintu Tribe v. U.S. Dep't of Interior*, 725 F. Supp. 2d 1119, 1133 (E.D. Cal. 2010).

A. BaLas Chonas Ceremony

The BaLas Chonas ceremony is a vital component of the Tribe's religion and belief system. Throughout much of the twentieth and twenty-first centuries, acts and omissions of the U.S. government have prevented the Winnemem Wintu from fully and consistently practicing this sacred ceremony.

The BaLas Chonas ceremony honors the coming of age of young Winnemem Wintu women, marking a girl's transition to womanhood. The four-day ceremony constitutes an essential rite of passage. Planned in correspondence with lunar and seasonal cycles, it was traditionally observed such that the final day would coincide with the full moon during the lunar month corresponding to the summer solstice.

According to tradition, the first day of the BaLas Chonas ceremony began with the young female participants swimming from the village located on one side of the McCloud River to a campsite located on the other side of the river. They would camp on the embankment for four days and three nights, during which they would be visited by older women from the tribe. The women would teach the girls traditional practices, including the grinding of herbs and medicines, at a site known as the Kokospom, or the sacred Puberty Rock. On the fourth day, the celebrants would swim back across the river under a full moon to join tribal dancers and take their place as women.

The successful, uninterrupted completion of the Coming of Age ceremony is an important facet of the Winnemem Wintu's efforts to protect their right to carry on their lives, their culture, their traditions, and their religion. Since the 1920s, however, the Tribe's ability to practice the full ceremony has been substantially, and at times completely, impaired because of acts and omissions by the U.S. government. The McCloud River is primarily managed by the federal government, which also manages federally owned land on either side of the McCloud River where Puberty Rock and the historic village site are located. The McCloud River receives heavy traffic from recreational fishermen and boaters, particularly during the summer season. Boat traffic on the river interferes with the sacred nature of the ceremony and threatens the safety of the participants. Throughout most of the twentieth century and the beginning of the twenty-first century, this interference prevented the Tribe from observing the complete BaLas Chonas ceremony at its original location. Instead, for decades the Tribe was forced to observe the ceremony at another campsite, removed from the sacred sites and landmarks that are integral to the ceremony.

The need to return the ceremony to its original location took on urgency in recent years, when the only living tribal member who had observed the full ceremony in its original site entered her mid-eighties. In 2006, the Winnemem Wintu sought the assistance of the U.S. Forest Service, the federal agency with jurisdiction over this area, asking that the agency close a short stretch of the McCloud River for the duration of the four-day ceremony in order to prevent boat traffic from disrupting the ceremony. The Forest Service offered an ineffective "voluntary" closure, which recreational boaters did not respect. The first BaLas Chonas ceremony held in decades was marred by interference and disrespect from recreational boaters and campers, some of whom were visibly intoxicated. Throughout the four-day ceremony, onlookers yelled

obscurities and flashed the young celebrant, and the presence of boats travelling at high speeds down the river created a serious safety risk for the young woman. As a representative for the Tribe explained afterwards, “Our ceremonies establish the fabric of this tribe. Experiencing racism of this magnitude indelibly marks this fabric.”¹⁷

Following this deeply insulting and upsetting experience, the Winnemem Wintu chose not to hold the BaLas Chonas ceremony during consecutive years while they pursued negotiations with the Forest Service, seeking a partial mandatory closure of the McCloud River in order to ensure the safety of the celebrant. The tribe emphasized the necessity for an involuntary closure, pointing to the presence of alcohol, firearms, indecent exposure, physical endangerment and racially motivated harassment, which were documented on film during the 2006 BaLas Chonas ceremony. Despite entreaties from advocacy groups and a U.S. Senator, the Forest Service refused to provide a mandatory river closure.

In 2010, unable to delay the ceremony any longer for two young Winnemem Wintu women, the Tribe decided to hold the BaLas Chonas ceremony. Without a mandatory river closure, the sacrosanctity of the ceremony was again severely undermined by the presence of boisterous and disrespectful recreational boaters, fishers, and campers. The Forest Service also refused to provide a mandatory river closure in 2011, when the Tribe planned to observe the ceremony for its next spiritual leader. Tribal leaders determined that the risk to the young woman and the future of the tribe was too great to hold her ceremony without a mandatory closure of the McCloud River and postponed her ceremony until the summer of 2012.

In 2012, thanks to the continuing diligent advocacy and protests by the Winnemem Wintu, the federal government finally agreed to enforce a mandatory river closure. As a condition, however, the government banned certain traditional activities that are inextricable to the ceremony, including gathering wood for the sacred fire. The Tribe was finally able to hold the ceremony for its next spiritual leader that summer, but the ceremony was tense at times and was marred by the presence of federal agents. At the end of the ceremony, law enforcement officers entered the ceremony and issued citations, including \$10,000 in penalties, to Chief Caleen Sisk for having used a boat to transport elders across the river, despite the fact that the Tribe had previously informed the Forest Service of its intent to do so. The government dropped the charges the day before Chief Sisk’s scheduled court date, after she had retained a lawyer and spent time preparing for the court appearance.

The government again granted a mandatory river closure in 2013 but delayed making this decision, and granting the necessary permits, until the day of the ceremony, causing considerable stress and uncertainty for the organizers.

The Tribe is currently in the planning stages for the 2014 ceremony, which it plans to hold in mid-June, around the full moon. As of the submission of this Shadow Report, the government has not committed to a mandatory river closure and has proposed additional

¹⁷ See “Help Protect Winnemem Wintu BaLas Chonas Women’s Coming of Age Ceremony,” available at <http://www.winnememwintu.us/wp-content/uploads/2011/03/FINALHelp-Protect-Winnemem-Wintu-BaLas-Chonas-2011-325.pdf>.

burdensome terms as part of the permitting requirements. The Tribe has furthermore recently learned that a critical sacred site for the ceremony, a cave where the participants are brought, has been vandalized with graffiti. The Tribe has requested that the government exclude members of the public from visiting the cave and that it remove the graffiti. The government has repeatedly granted permission for college groups to visit the site, without first consulting the Winnemem Wintu. The government in fact recently permitted a college group to visit the cave unattended, despite having given the Winnemem Wintu assurances that it would not allow further visitations until it developed a management plan for the cave in consultation with the Tribe.

B. Sacramento River Chinook Salmon Migration

The Sacramento River Chinook salmon has “for centuries . . . sustained the Winnemem Wintu and . . . formed the foundation of the Tribe’s cultural and spiritual ceremonies and beliefs.”¹⁸ Salmon are a vital component of many Winnemem sacred ceremonies.¹⁹ The construction of Shasta Dam, however, permanently blocked the upstream migration of the salmon to their historic spawning grounds north of the dam, in Winnemem Wintu territory.²⁰ The salmon has been in a state of precipitous decline since the construction of Shasta Dam and is currently listed on the federal endangered species list.²¹

A federal court has recognized that following the construction of Shasta Dam, “the loss of native salmon runs has transformed the Winnemem Wintu’s way of life, which once involved community celebrations, salmon bakes, and festivals, all centered around the salmon. . . . The Winnemem Tribe’s connection to salmon is so strong that they believe that if the salmon go, the Winnemem Wintu will also disappear.”²² The decline of Sacramento River Chinook salmon has had detrimental “dietary and health effects . . . on Tribal members.”²³ As one tribal member explained, “We know who we are, we’ve never lost that. We know we’re the river people and we

¹⁸ *Consol. Salmonid Cases*, 713 F. Supp. 2d 1116, 1154 (E.D. Cal. 2010).

¹⁹ *Pac. Coast Fed’n of Fishermen’s Associations v. Gutierrez*, 606 F. Supp. 2d 1122, 1151-52 (E.D. Cal. 2008) (hereinafter “*Pac. Coast Fed’n*”).

²⁰ *Id.* at 1136 (explaining that winter-run Chinook salmon historically spawned and reared in “the upper Sacramento River and tributaries where spring-fed streams allowed for spawning, egg incubation, and rearing in cold water” and that “[m]ost components of the winter-run Chinook’s life history have been compromised by the habitat blockage in the upper Sacramento River” resulting from dam construction that has blocked almost 300 miles of tributary spawning habitat).

²¹ Historically, several hundred thousand Chinook salmon returned from the ocean to migrate up the Sacramento River. In 2007, only about 90,000 made it back, and fewer than 60,000 were expected in 2008, the lowest number on record. Abigail Tucker, *On California’s Coast, Farewell to the King Salmon*, *Smithsonian Magazine* (October 2008), available at <http://www.smithsonianmag.com/science-nature/on-californias-coast-farewell-to-the-king-salmon-11992359/?no-ist>; see also *Consol. Salmonid Cases*, *supra* note 18, 713 F. Supp. 2d at 1153-55 (summarizing concerning statistics on salmonid decline in the Sacramento River).

²² *Consol. Salmonid Cases*, *supra* note 18, 713 F. Supp. 2d at 1154-55 (internal quotation marks omitted).

²³ *Id.*

know we're the salmon people.”²⁴ According to tribal leader Caleen Sisk, the dam fundamentally and irrevocably altered the Winnemem Wintu's way of life, and her father's generation “was tormented with [this] change.”²⁵

C. The U.S. Government's Proposal to Raise Shasta Reservoir Elevation

The federal government is currently considering a proposed action to raise the elevation of Shasta Reservoir, the massive artificial lake formed by Shasta Dam. In a draft report prepared to study the environmental impact of the proposal, the federal government identifies the primary purposes of the proposal to enlarge the Reservoir as to: “[i]ncrease the survival of anadromous fish populations in the Sacramento River” and “[i]ncrease water supply and water supply reliability for agricultural, [municipal and industrial], and environmental purposes, to help meet current and future water demands.”²⁶ The legislative branch of the federal government has introduced proposed legislation that would authorize raising the Reservoir's elevation by 18.5 feet (approximately six meters).²⁷

The proposed legislation would flood additional cultural and ceremonial lands of the Winnemem Wintu, including up to twenty-six sacred sites such as BaLas Son (Puberty Rock), Ilawi Son (Children's Rock), Woman's Blessing Place, and Suckerfish Pool.²⁸ These sites' cultural and spiritual significance to the Winnemem Wintu is inextricably tied to their physical location.²⁹ Seven additional sites that are used in conjunction with sacred sites that would be inundated would also be indirectly affected. Nine other sites could be destroyed due to staging, construction, and campground relocation.³⁰

The Winnemem Wintu's continuing ability to access these traditional communal sites is vital to their ability to observe cultural and spiritual practices. In comments on the Draft Study that were submitted to the federal government, the Tribe explained:

Over many millennia, [Winnemem Wintu] community members have developed intimate relationships with particular stones, mountains, meadows, and pools along the McCloud River that hold benevolent healing spirits. . . . Ceremonial, medicinal and social activities linked to specific Winnemem Wintu sacred sites include the blessing and healing of sexually and physically abused women, training and initiation of traditional medicine people, the SudiSawal traditional hydrotherapy

²⁴ Dancing the Salmon Home (Moving Image Productions 2013).

²⁵ *Id.*

²⁶ Draft Shasta Lake Water Resources Investigation Environmental Impact Statement, June 2013, at ES-6, available at http://www.usbr.gov/mp/nepa/documentShow.cfm?Doc_ID=14081 (hereinafter “Draft Study”).

²⁷ Shasta Dam Expansion Act of 2014, H.R. 4125, 113th Cong. (2014).

²⁸ Minton, *supra* note 11, at 116.

²⁹ Draft Study, *supra* note 26, at 14-20 through 14-31.

³⁰ Letter from Stephan Volker to Katrina Chow, Project Manager for the Bureau of Reclamation (Sept. 26, 2013) (on file with author).

purification ceremony, the Blessing of the Hands ceremony, introduction of children to the spiritual worlds at Children’s Rock, traditional place-specific baptism of Winnemem babies, traditional marriage ceremonies, fasting rituals, the Coming of Age ceremony for young women, the initiation rites for young men, the blessing of the acorn caps for young women, the traditional Spring Dekas ceremony, the ceremonial burial of babies’ placentas and of hair during times of mourning, the traditional practice of gathering medicinal teas, foods and cooking materials at places of great sentiment and long-standing tradition, pilgrimages to sacred prayer rocks, the transmission of Coyote Stories from generation to generation and the visitation of ancestral dwelling places, burial grounds and massacre sites. These cultural practices form the foundation of the Winnemem Wintu’s identity as a distinct people, and are anchored to the earth in specific places that will be affected by the proposed dam enlargement.³¹

The federal government has recognized the adverse impacts that the proposal to increase the elevation of Shasta Reservoir would have on the Winnemem Wintu. The government’s Draft Study acknowledges that the Winnemem Wintu “continue to actively practice many aspects of their traditional culture” and “have strong traditional and contemporary connections with the land [near Shasta Reservoir], and their ongoing use of many archaeological and religious sites is fundamental to the well-being of their culture, particularly the education of their youth.”³² According to the Draft Study, the proposed elevation increase would “increase the frequency of inundation of Puberty Rock, restricting the Winnemem Wintu from holding the puberty ceremony at this important location during certain periods.”³³ This proposal would inundate additional burials at Kaiba Village and Wita Waqap Village, located above Puberty Rock, and would adversely impact 120 ancestral villages.³⁴

The Draft Study acknowledges that the proposal to raise Shasta Dam would cause significant adverse impacts to the Winnemem Wintu’s cultural resources. The Draft Study further recognizes that the California Native American Heritage Foundation has identified sacred lands within the study area. The government is aware from initial consultation that the Winnemem Wintu and other Native American groups “are deeply concerned regarding the environmental and cultural effects of the project.”³⁵

Despite this awareness of the disastrous effects the proposed actions would have on the ability of the Winnemem Wintu and other indigenous groups to access traditional lands, the

³¹ Letter from Environmental Water Caucus to Katrina Chow, Project Manager for the Bureau of Reclamation (Sept. 30, 2013), *available at* <http://www.ewccalifornia.org/reports/shastadeiscomments.pdf>.

³² Draft Study, *supra* note 26, at 14-9 to 14-11; *id.* at 14-9 (recognizing the Winnemem Wintu’s “complex cultural landscape of village sites, ceremonial areas, burial sites, and resource areas intersect[ing] the study area”).

³³ *Id.* at 14-23.

³⁴ *Id.* at 14-10 to 14-11, 14-23. Villages, burial groups, and Traditional Cultural Properties of the Pit River Madesi Band would also be flooded. *Id.* at 14-23.

³⁵ *Id.* at 14-10.

Draft Study fails to offer any alternative action that would protect this vital access. The Draft Study merely acknowledges that any of the proposed actions would prevent the Winnemem Wintu's access to sacred and traditional sites and that "no feasible mitigation is available to reduce the impact to a less-than-significant level" because the link between the sites' physical location and their cultural and spiritual significance to the Tribe precludes relocation of the sites.³⁶

IV. Analysis of the United States' Legal Obligations to the Winnemem Wintu

A. The United States' Obligations Under International Law Require Action that Protects, Not Endangers, the Winnemem Wintu's Access to Sacred Spiritual and Cultural Sites

The U.S. government's refusal to take steps to ensure that the Winnemem Wintu's ability to access the limited remaining historical lands containing sacred sites and to hold the full BaLas Chonas ceremony each year without harassment or disruption by recreational boaters, fishers, and campers violates the United States' obligations under several international instruments.

As a signatory to the Convention, the United States is prohibited from engaging in acts or omissions that have "the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life."³⁷ All persons within a state's territory are granted "economic, social and cultural rights" including "[t]he right to equal participation in cultural activities."³⁸ In order to fulfill its obligations under the Convention, the United States must affirmatively take "[s]pecial measures . . . as may be necessary in order to ensure such groups or individuals [requiring protection] equal enjoyment or exercise of human rights and fundamental freedoms" are protected and must take "in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms."³⁹

The Committee has "consistently affirmed that discrimination against indigenous peoples falls under the scope of the Convention and that all appropriate means must be taken to combat and eliminate such discrimination."⁴⁰ The United States is required as a party to the Convention to "[r]ecognize and respect indigenous distinct culture, history, language and way of life as an enrichment of the State's cultural identity and to promote its preservation" and to "[e]nsure that

³⁶ *Id.* at 14-20 through 14-31.

³⁷ Convention, *supra* note 2, art. 1(1).

³⁸ *Id.* art. 5(e)(vi).

³⁹ *Id.* arts. 1(4), 2(2).

⁴⁰ Gen. Rec. XXIII, United Nations High Commissioner for Human Rights, U.N. GAOR, 51st Sess., Annex, U.N. Doc. A/52/18/Annex V ¶ 1 (Aug. 18, 1997).

indigenous communities can exercise their rights to practice and revitalize their cultural traditions and customs and to preserve and to practice their languages.”⁴¹

The United Nations Declaration on the Rights of Indigenous Peoples⁴² provides critical guidance on the scope of the United States’ obligations to the Winnemem Wintu and other indigenous peoples in the United States. The United States is one of only four countries that has refused to sign the Declaration; however, many if not all of the Declaration’s provisions constitute an expression of customary international law that should bind the United States.⁴³ Indeed, the Committee has expressed its conclusion that the Declaration should serve as a “guide to interpret [the United States’] obligations under the Convention to indigenous peoples.”⁴⁴

The Declaration codifies customary international law relating to the rights of indigenous peoples to maintain, protect and develop archaeological and historical sites; to manifest, practice, develop and teach their spiritual and religious traditions, customs, and ceremonies; to maintain, protect, and have access in privacy to their religious and cultural sites; to own, develop, use, control, maintain and strengthen spiritual relationships with lands, waters, seas and other resources.⁴⁵ The Declaration further affirms the obligation of states to “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,

⁴¹ *Id.* ¶ 4. As a signatory to the International Covenant on Civil and Political Rights, the United States owes a similar duty to honour the rights of ethnic, linguistic, and religious minorities, such as the Winnemem Wintu, “to enjoy their own culture, to profess and practise their own religion, [and] to use their own language.” G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966), arts. 18, 27.

⁴² G.A. Res. 61/295, U.N. GAOR, 61st Sess., 107th plen mtg., U.N. Doc. A/RES/61/295 (Sept. 13, 2007).

⁴³ See Karen Engle, *On Fragile Architecture: The UN Declaration on the Rights of Indigenous Peoples in the Context of Human Rights*, 22 Eur. J. Int’l L. 141, 163 (2011) (“[T]he Declaration . . . repeated and re-affirmed those already existing [principles of international law], which had already been recognised in international case law, in international instruments and in customary international law.”) (quoting Montes and Cisneros, “The United Nations Declaration on the Rights of Indigenous Peoples: the Foundation of a New Relationship between Indigenous Peoples, States and Societies,” in C. Charters and R. Stavenhagen (eds), *Making the Declaration Work* (2009), at 155); Anaya and Wiessner, “The UN Declaration on the Rights of Indigenous Peoples: Towards Re-empowerment,” *Jurist* (June 2007), available at <http://jurist.law.pitt.edu/forumy/2007/10/un-declaration-on-rights-of-indigenous.php> (arguing that “indigenous peoples have a right under customary international law to ‘demarcation, ownership, development, control and use of the lands they have traditionally owned or otherwise occupied and used’”).

⁴⁴ Comm. on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: United States of America*, ¶ 29, U.N. Doc. CERD/C/USA/CO/6 (Feb. 2008) (hereinafter “2008 Concluding Observations”).

⁴⁵ G.A. Res. 61/295, Annex, arts. 11(1), 12(1), 25, and 26(1)-(2), U.N. Doc.A/RES/61/295/Annex (Oct. 2, 2007).

utilization or exploitation of” water resources.⁴⁶ The Declaration is therefore highly relevant in assessing the United States’ obligations to the Winnemem Wintu and other indigenous groups, despite the United States’ refusal to become a signatory to the Declaration. Indeed, the Committee has previously urged the United States to use the Declaration “as a guide to interpret the State party’s obligations under the Convention relating to indigenous peoples.”⁴⁷

The United States has in fact expressed support for the Declaration, while defending its refusal to sign.⁴⁸ In its 2010 Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples, the United States declared a goal of “serving as a model in the international community in promoting and protecting the collective rights of indigenous peoples”⁴⁹ The United States should immediately begin making good on this commitment by protecting the rights guaranteed to the Winnemem Wintu under the Convention and other international laws concerning the rights of indigenous peoples.

B. The Committee’s 2008 Concluding Observations Expressed Concern Over the United States’ Failure to Protect Areas of Spiritual and Cultural Significance to Native Americans and the United States’ 2013 Periodic Report

After considering the United States’ previous 2007 submission of several overdue periodic reports as well as shadow reports submitted by numerous civil rights and civil liberties organizations, the Committee issued a set of Concluding Observations.⁵⁰ In the Concluding Observations, the Committee expressed concern over evidence of interference with indigenous Americans’ rights under Articles 5(d)(v), 5(e)(iv) and 5(e)(vi) of the Convention and urged the United States 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.”⁵¹

In addition, the Committee urged the United States to “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.”⁵² The Committee had made the same recommendation in 2001, when it urged the United States to “ensure effective participation

⁴⁶ *Id.* art. 32(2); *see also id.* art. 19 (affirming a similar obligation to “consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them”).

⁴⁷ 2008 Concluding Observations, *supra* note 44, ¶ 29.

⁴⁸ *See* Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples: Initiatives to Promote Government-to-Government Relationship & Improve the Lives of Indigenous Peoples, *available at* <http://www.state.gov/documents/organization/143223.pdf>.

⁴⁹ *Id.* at 2.

⁵⁰ *See supra* note 44.

⁵¹ *Id.* ¶ 29.

⁵² *Id.*

by indigenous communities in decisions affecting them, including those on their land rights.”⁵³ The Committee’s 2008 Concluding Observations furthermore specifically requested that the United States include in its next periodic report “detailed information on the measures adopted to preserve and promote the culture and traditions of” indigenous peoples.⁵⁴

On June 12, 2013, the United States submitted its first periodic report since 2007 (hereinafter “2013 Periodic Report”).⁵⁵ Only fourteen paragraphs of the 217-paragraph 2013 report address issues relating to indigenous peoples in the United States.⁵⁶ The Periodic Report describes a set of federal laws and executive orders that ostensibly protect Native Americans, many of which are either aspirational yet unenforceable or applicable only to federally recognized tribes, and thus not to the Winnemem Wintu.⁵⁷ The Periodic Report then summarizes recent efforts to consult with Native American tribes affected by issues such as historic preservation, the designation of critical habitat for endangered species, the preservation of indigenous languages, the protection of sacred sites, security initiatives, housing, and cooperative resource protection.⁵⁸

The United States responded to the Committee’s 2008 recommendation 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” by invoking the “Voluntary Principles on Security and Human Rights Initiative.”⁵⁹ The Voluntary Principles are a non-binding, “multi-stakeholder initiative that promotes implementation of a set of principles that guides extractive companies on providing security for their operations in a manner that respects human rights.”⁶⁰ The primary purpose of the Voluntary Principles is “to strengthen the[] capacity [of extractive industries] to address complex security and human rights issues in their operations around the world.”⁶¹ The Voluntary Principles do not address the international law obligations of Convention signatories like the United States to promote respect for and protection of indigenous persons’ rights. The United States’ decision to join the Voluntary Principles fails to address the Committee’s previous recommendations and does not constitute an enforceable commitment to take affirmative measures to fulfill its obligations under the international law framework summarized below to protect Native Americans’ right to observe spiritual and cultural practices.

⁵³ Comm. on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: United States of America*, 21, U.N. Doc. CERD/C/59/Misc.17/Rev.3 (2001) (hereinafter “2001 Concluding Observations”).

⁵⁴ 2008 Concluding Observations, *supra* note 44, ¶ 38.

⁵⁵ *See supra* note 1.

⁵⁶ *Id.* ¶¶ 167-181.

⁵⁷ *Id.* ¶ 169.

⁵⁸ *Id.* ¶¶ 171-174,

⁵⁹ *Id.* ¶ 177.

⁶⁰ *Id.*

⁶¹ *United States Joins with Other Governments, Major Companies, and NGOs in Effort to Strengthen Voluntary Principles on Security and Human Rights*, 106 Am. J. Int’l L. 156, 158 (2012).

In short, the 2013 Periodic Report does not address the Committee’s 2007 recommendations to demonstrate meaningful consultation with indigenous groups or those groups’ “effective participation . . . in decisions affecting them,” to “undertake[] the necessary measures to ensure the consistent application of the provisions of the Convention at all levels of government,⁶² to accept the Declaration on the Rights of Indigenous Peoples as a guide to interpret the United States’ obligations under the Convention, or “to provide, in its next periodic report, detailed information on the measures adopted to preserve and promote the culture and traditions” of indigenous groups. It likewise fails to demonstrate any willingness by the United States to “review the definition of racial discrimination . . . so as to ensure . . . that it prohibits racial discrimination in all its forms, including practices and legislation that may not be discriminatory in purpose, but in effect.”⁶³

C. The Flooding of Lands Containing Winnemem Wintu Sacred Sites by Expanding Shasta Reservoir Would Violate the United States’ Obligations Under the Convention

The Winnemem Wintu respectfully urge the Committee to remind the United States of its duty to respect, protect, and fulfill the rights of the Winnemem Wintu by rejecting any water resource management proposal affecting the McCloud River that would inundate the Winnemem Wintu’s remaining sacred lands. By adopting and implementing any of the proposals to increase the elevation of Shasta Dam, the United States would prevent the Winnemem Wintu from accessing many sacred and cultural sites and substantially impede if not completely preclude the observation of the BaLas Chonas ceremony. The proposal moreover disregards an alternative action that would in fact facilitate the return of the Chinook salmon, with which Winnemem Wintu culture and traditions are interlinked, to their native territory above Shasta Dam.

The United States is bound by its status as a signatory to the Convention to ensure the Winnemem Wintu’s continued access to their traditional communal sites for cultural and spiritual practices because their culture is inextricably tied to the land.⁶⁴ While the Draft Study mentions potential impacts to cultural resources, it places little if any importance on protecting the Winnemem Wintu culture. This is clear from the primary and secondary “planning objectives,” which address such diverse issues as anadromous fish populations, water supply, ecosystem resources, flooding, hydropower, recreation, and water quality, but make no mention of cultural resources. The Winnemem Wintu have a human right to sustainable traditional food and medicinal sources and a right to practice their culture, including the BaLas Chonas ceremony that is threatened under the proposed action, in their traditional territory. The government, however, appears prepared to sacrifice the Winnemem Wintu’s culture for the benefits claimed for others.

⁶² 2001 Concluding Observations, *supra* note 53, ¶ 11; *and see* 2008 Concluding Observations, *supra* note 44, ¶ 13 (reiterating the Committee’s “concern [over] the lack of appropriate and effective mechanisms to ensure a coordinated approach towards the implementation of the Convention at the federal, state and local levels” as required in Article 2 of the Convention).

⁶³ 2008 Concluding Observations, *supra* note 44, ¶ 10; 2001 Concluding Observations, *supra* note 53, ¶ 14.

⁶⁴ *See supra* Part IV.A.

The Draft Study does not adequately analyze the cultural impacts of the proposal to increase the elevation of Shasta Dam. Consequently, it fails to fully and fairly address the proposed action's profound and irreparable impacts on the Winnemem Wintu, ignoring their longstanding but never resolved claims to ownership of the lands that would be flooded; their vital, historic cultural ties to the salmon runs that Shasta Dam destroyed; and their dependence on a healthy, balanced and sustainable ecosystem. The Draft Study fails to adequately discuss how raising the dam's height would destroy the Winnemem Wintu's natural and cultural heritage, and harm water quality, water quantity, fish and wildlife habitat, and public recreational use of Shasta Reservoir, and it ignores the alternative of restoring historic salmon runs above the reservoir through construction of a fishway around Shasta Dam. These flaws have been pointed out to the agency that prepared the Draft Study by numerous environmental and indigenous advocacy groups in formal written comments. The Draft Study should therefore be withdrawn and its profound errors and omissions should be rectified.

In order to meet its obligations under the Convention and customary international law, the government must address the potential destruction of most of the Winnemem Wintu's remaining cultural sites that is threatened by the proposed dam elevation. As a first step, it must address what would be lost and explore alternatives and mitigations that would prevent such losses. To do this, the government must engage in meaningful consultation with the Tribe. It has not done so. The government held three meetings with the Tribe in 2007 and 2008, and it has invited individual Winnemem Wintu members to participate in a consultation relating to the National Historic Preservation Act. This belated consultation with individual members, and not the Tribe's leadership, remains incomplete and has prevented the government from sufficiently analyzing the proposed action's impacts on the Tribe's cultural resources. This, despite the fact that the Winnemem Wintu have repeatedly requested to be part of the decision-making process and have taken agency representatives to see many sacred sites. The federal government cannot make an informed decision on whether to authorize a project that would involve raising the Shasta Dam elevation unless it first provides an analysis of its impact on cultural resources. Such an analysis is impossible without more, and meaningful, consultation with the Winnemem Wintu.

The government must furthermore satisfy its obligations under the 1941 Act to compensate the Winnemem Wintu for the land inundated by the dam construction and to hold relocated cemeteries in trust for the Tribe.⁶⁵

V. Recommendations and Conclusion

Since the original construction of Shasta Dam in the 1940s, the federal government has failed to cooperate in good faith with affected Indian communities, including the Winnemem Wintu, regarding the management of water resources in California. The construction and now the proposed expansion of Shasta Dam and Reservoir have jeopardized the Tribe's ability to access sacred and cultural sites. It is imperative to the Tribe's continuing survival that members have

⁶⁵ *See supra* Part II.

access to historic communal sites where they have traditionally observed cultural and spiritual practices.

The Winnemem Wintu vigorously opposed the original construction of Shasta Dam and have long advocated against federal action that would further threaten the Sacramento River Chinook salmon's survival.⁶⁶ Unable to invoke the protections of certain U.S. laws and executive branch policies that apply only to formally recognized tribes, and unable to challenge the lack of formal recognition in U.S. courts, the Winnemem Wintu now appeal to the Committee for assistance in their struggle to maintain access to their remaining traditional and cultural sites.

Specifically, the Winnemem Wintu ask that the Committee:

- (1) Recommend that the United States become a signatory to the United Nations Declaration on the Rights of Indigenous Peoples.
- (2) Conclude that the United States' implementation of the proposed dam expansion legislation would violate the State Party's obligations under the Convention, including Articles 1(1), 1(4), 2(1)(c), 2(2), and 5(e)(vi) in the absence of meaningful consultation with the Winnemem Wintu, and any other indigenous groups that would be adversely affected by the action.
- (3) Emphasize to the United States that its obligations under the Convention, standing alone and as construed in light of the United Nations Declaration on the Rights of Indigenous People, require that the United States obtain the free and informed consent of indigenous communities prior to approving any project that will affect that community's territory or resources.
- (4) Remind the United States of its obligations as a signatory to the Convention to facilitate and enable the Winnemem Wintu to observe cultural rituals including the BaLas Chonas ceremony.
- (5) Implore the United States to honor the Winnemem Wintu's sovereignty by satisfying the government's long unfulfilled statutory and contractual obligations to the Tribe and by once again formally recognizing the Tribe.

* * * * *

The Winnemem Wintu thank the Committee for its consideration of this shadow report. By reminding the United States of its obligations under the Convention, the Committee will contribute to the Winnemem Wintu people's centuries-long struggle for the survival of their culture and community.

⁶⁶ *Pac. Coast Fed'n*, *supra* note 19, 606 F. Supp. 2d at 1152.

May 6, 2014

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Jamie L. Crook", with a long horizontal flourish extending to the right.

Jamie L. Crook, Esq.
RELMAN, DANE & COLFAX, PLLC
1225 19th Street, NW, Suite 600
Washington, DC 20036
United States

Counsel for the Winnemem Wintu Tribe