



## **Protecting and Preserving Indigenous Communities in the Americas**

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"You must first change the way people think." That was the wisdom passed to a representative of the Washoe Tribe by an indigenous Buryat monk from the Russian state Buryatia, discussing how to protect Lake Baikal and the lands and natural resources of cultural importance to the indigenous people that region in southern Siberia. Notwithstanding international norms and national laws to protect indigenous peoples' customary use and tenure of their lands, persuading nonindigenous authorities and businesses to respect these rights demands innovative strategies that blend a variety of approaches and tools. As economic globalization introduces commerce to new regions and private actors seek to exploit new resources, indigenous peoples' cultural identity and very survival may hinge upon their ability to design new tools and breathe fresh life into existing mechanisms to change the thinking of governments, businesses, and the public at large.

Many places sacred to indigenous peoples are sources of both material and spiritual sustenance. Harvesting certain crops, catching a particular fish, or hunting certain animals reflects both economic needs and sacred customs. By guiding the public to a new understanding of the environment and the continuing relationship of the indigenous people to the land, indigenous communities have shown that it is possible to change the way people think. The Washoe Tribe, for instance, has successfully expanded its authority and responsibility with respect to its place of origin, Lake Tahoe. Through public relations, economic development, and environmental restoration activities, the tribe has emerged as an equal partner with the states of California and Nevada in the planning and management of the Lake Tahoe region.

Throughout North and South Americas in recent years, indigenous peoples have been confronted by initiatives that pose devastating consequences. With accelerating frequency, state and private actors enter indigenous territories to extract resources, develop energy, promote recreational and tourism activities, and expand industries. These activities often take place without consulting or benefiting indigenous communities. While beneficial opportunities for indigenous people may have emerged in some cases, a recent World Bank study shows indigenous poverty rates in Latin America as unchanged in the last decade. Indigenous children get less schooling, go hungry more often, and have less access to health care. Rather than improve these conditions, commercial activities often expose indigenous communities to hazards, risks, and wastes that contaminate their lands and interfere with their access to the cultural- and life-sustaining resources found in their traditional territories.

### **Charting New Legal Terrain**

For more than a decade, International Labor Organization (ILO) Convention 169 has specified terms under which states must recognize and protect ownership of indigenous peoples' lands and cultural practices. In Latin America, however, that convention has not been observed until

recently. In the past five years, the Inter-American Court of Human Rights and other international institutions have interpreted that convention to have relevance to Latin American indigenous communities faced with the loss and destruction of their lands and resources.

The landmark ruling of the Inter-American Court in *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment of Aug. 31, 2001, Inter-Am. Ct. H.R. (Ser. C) No. 79 (2001), affirmed that the right to property, as articulated in article 21 of the American Convention on Human Rights, includes the communal property of indigenous people as defined by their customary use and tenure, notwithstanding its treatment under national law. The Awas Tingni community brought the case to challenge concessions granted by the Nicaraguan government that permitted several companies to log on lands in traditional Awas Tingni territory. The government claimed the lands were state property because Awas Tingni members held no formal title. The court determined that applicable human rights law, including ILO Convention 169, protects indigenous peoples' land tenure such that "possession of the land should suffice for indigenous communities lacking real title to obtain official recognition of that property." *Id.* at ¶ 151. The court ordered demarcation and titling of the Awas Tingni lands, the boundaries of which to be determined "in accordance with [the communities'] customary laws, values, customs and mores." *Id.* at ¶ 173(3).

The court has followed and extended this approach in *Moiwana Village v. Suriname*, Judgment of June 15, 2005, and *Yakye Axa indigenous community v. Paraguay*, Judgment of June 17, 2005. In clarifying its order requiring demarcation, title, and the return of sacred territory in the latter case, the court stressed that the valuing of indigenous lands calls for criteria other than those usually applicable to private property. Other considerations must be weighed because "indigenous community culture . . . derives from the relationship with traditional territories and the resources located therein, not only because these provide a means of subsistence, but because they are integral elements of their cosmovision, religion and their cultural identity." *Id.* at ¶ 135.

The Inter-American Court has not limited its recognition of the collective rights of indigenous communities to its interpretation of the right to property. It has taken into account the impacts on cultural practices and beliefs in its consideration of the damage award for the Achi Mayan survivors represented in *Plan de Sanchez Massacre v. Guatemala*, Decision on reparations, Nov. 19, 2004, Inter-Am. Ct. H.R. (Ser. C) No. 116 (2004). The court found that the Guatemalan military's 1982 massacre of 284 Plan de Sanchez community members caused harm above and beyond each survivor's displacement and resettlement in townships administered by the Guatemalan military. The court ordered the government to pay damages for communal cultural harms, including:

- impeding proper burial of the dead,
- divorcing the community from customary funeral rites and other traditions,
- dislocating transmission of cultural practices to new generations by the murder of elders and women responsible for disseminating these practices, and
- forcing survivors to live in military-controlled towns rather than under their traditional communal structure.

The core elements of these determinations have been adopted by other regional and United Nations (UN) bodies. In March 2006, for example, the UN Committee for the Elimination of Racial Discrimination (CERD) relied in part upon the Inter-American Court's approach to indigenous property rights in its early warning and urgent action decision on the situation of the Western Shoshone peoples in the United States. The decision found that the "Western Shoshone people's legal rights to ancestral lands have been extinguished through gradual encroachment, notwith-

standing the fact that the Western Shoshone peoples have reportedly continued to use and occupy the lands and their natural resources in accordance with their traditional land tenure patterns.” CERD, Early Warning and Urgent Action Procedure Decision 1 (68), Mar. 10, 2006, ¶ 6.

Among the issues prompting this urgent action were destructive activities planned on areas of spiritual and cultural significance to the Western Shoshone people, particularly the “reinvigorated federal effort” to open a nuclear waste repository at Yucca Mountain. The CERD rejected the U.S. argument that the Western Shoshone lands were duly extinguished pursuant to proceedings of the Indian Claims Commission (ICC). Citing the Inter-American Commission on Human Rights case of *Mary and Carrie Dann v. United States*, Case 11.140, Inter-Am. C.H.R., Report No. 75/02, doc. 5 rev. 1, at 860 (2002), the committee concluded that the ICC proceedings, as carried out in the case of the Western Shoshone, “did not comply with contemporary human rights norms, principles and standards that govern determination of indigenous property interests.” CERD, *supra*, at ¶ 6 (quoting *Dann v. United States*, at ¶ 139). The committee calls for the United States to initiate dialogue to find a solution acceptable to the Western Shoshone, in accordance with CERD General Recommendation 23 on the rights of indigenous people to own, develop, control, and use their communal lands, territories, and resources.

### **Mobilizing to Enact National Indigenous Lands Laws**

National legal systems may recognize communal lands through the ratification of international agreements such as ILO Convention 169 and through provisions in national constitutions and legal codes. Yet those provisions are often unenforced. Ad hoc and formal working groups in Panama, Nicaragua, Guatemala, and Honduras have emerged to craft terms and create processes to protect the rights of specific indigenous communities. For example, in Guatemala, Achi Mayan indigenous communities and nongovernmental organizations in the areas most devastatingly affected by the Chixoy Dam, funded by the World Bank and the Inter-American Development Bank, prepared symposia and scheduled drafting sessions for June and July 2006 to develop legislation to protect their communal lands.

Despite Guatemala’s ratification of ILO Convention 169, the Guatemalan government passed legislation that fast-tracked grants to private entities for mineral leases on indigenous lands without consulting affected indigenous communities or seeking to mitigate impacts on indigenous lands or resources. Under Guatemala’s 1997 General Mining Law, the state retains ownership of subsurface rights and provides for private licenses in exchange for a 1-percent royalty shared between the federal government and the municipality in which the mine is operating. This law permits forced expropriation of lands and involuntary resettlement of indigenous communities, both facial violations of ILO Convention 169.

As applied, the mining law has eroded indigenous community rights, particularly consultation rights as provided by ILO Convention 169, article 7. Article 7 requires *actual* consultation, in which affected indigenous peoples have a right to express their points of view and a right to influence the decision. Defensoria Q’eqchi, a Guatemalan indigenous rights organization, has tracked mining concessions granted in Guatemala since the 1997 mining law was enacted. Of the 147 exploration licenses and 264 exploitation licenses granted, none involved actual consultation as required by article 7. Defensoria Q’eqchi reported: “The granting of hundreds of concessions . . . constitutes a serious violation of the rights of thousands of Guatemalans, indigenous or not, who were never consulted nor informed that the subsurface rights to their lands had been granted to a mining company.” Defensoria Q’eqchi, *Analysis of Mining Concessions: Indigenous Land and Cultures Endangered*, at 5 (Feb. 2004) (distributed in translation by Rights Action, Apr. 4, 2004).

Indigenous communities in the Sipicapa Maya region of San Marcos, Guatemala, have responded to mining operations with both nonviolent resistance and the application of traditional community law. A month-long roadblock by indigenous communities seeking to prevent delivery

of equipment to a mine operated by the Canadian subsidiary of the American company, Glamis Gold, ended in bloodshed. In January 2005, the Guatemalan government deployed 700 police using tear gas and live ammunition to open the roadway, killing one person and injuring seventeen others. The Sipicapa communities responded in June 2005 with a community consultation and referendum implemented in accordance with Sipicapa Maya traditional justice principles, the Guatemala Law of Urban and Rural Development Councils, the Guatemalan Constitution, and ILO Convention 169. The consultation resulted in eleven Sipicapa communities opposing the mining, one voting in favor, and one abstaining.

Glamis Gold brought suit, urging Guatemala's Constitutional Court to rule the consultations invalid. In April 2006, however, that court affirmed the validity of the community consultations, relying heavily on the consultation's legal basis in traditional indigenous law and the protections afforded by ILO Convention 169. Glamis Gold will likely challenge the ruling and seek protection of its property rights in the mining license granted under the General Mining Law.

This is not Glamis Gold's first legal challenge to indigenous land rights. A Glamis open pit mine application to the U.S. Department of the Interior's Bureau of Land Management (BLM) in 2000 was denied by Secretary Bruce Babbitt in January 2001 due to "substantial irreparable harm" to environmentally and culturally significant land. The proposed operation would remove natural ridge lines in the Indian Pass region of California, where members of the Quechan Tribe hold "dreaming" ceremonies. After the Bush administration suspended the BLM regulations on which the ruling had been based, Interior Secretary Gale Norton authorized the operation in October 2001. The California legislature then passed a law in 2003 that required backfilling and grading to restore the original contours of surface mined lands. Glamis reacted by filing a \$50 million compensation claim against the federal government and the state of California under Chapter 11 of the North American Free Trade Agreement. Glamis identified the state law requirements as "tantamount to expropriation." At this point, no work has ever commenced on the mine.

### **From Recovery and Resistance to Governance**

Indigenous communities have also used local governmental authority to protect and defend their resources and their rights. Surrounded by volcanoes, Lake San Pablo (or Imbakucha) in Otavalo, Ecuador, is one of the country's main tourist destinations. The Otavalo and other Quichua indigenous communities that reside in the region depend on the lake for bathing, washing clothes, and watering cattle, as well as for *titora* reeds used to make sleeping mats and build boats. San Pablo is one of several sacred lakes in the region, along with the three Mojanda lakes and Lake Cuicocha. And Lake San Pablo is seriously contaminated.

Indigenous organizations working to defend lands and resources, such as Lake San Pablo, have prompted Ecuador to adopt new, participatory approaches to local government. Through this process, indigenous communities have effectuated change by electing indigenous representatives and creating administrative mechanisms that more adequately reflect their traditions. Auki Tituaña, the indigenous mayor of Cotacachi (which borders Otavalo), notes positive results: "After 504 years of mestizo administration governing on behalf of a small handful of families, we've overcome these hurdles, and indigenous and nonindigenous can be proud of the accomplishments." Interview by Orlando Perez with Mayor Auki Tituaña, *El Trabajo Colectivo es la Clave*, [www.Hoy.com.ec/ANIVERSARIO19/Inioco6.htm](http://www.Hoy.com.ec/ANIVERSARIO19/Inioco6.htm) (2001).

Using the participatory framework, indigenous, mestizo (of indigenous and nonindigenous heritage), and Afro- Ecuadorians united to press Cotacachi County to enact an ecological ordinance to keep a copper mine out of a culturally and resource significant cloud forest region. The ordinance, which established Cotacachi as an "ecological county," serves as a tool to restrain environmental degradation and introduces incentives for clean industry technologies and sustainable resource use. Policies developed under the ordinance include community-based ecotourism and the creation of community-based protected areas. The municipal Web site

describes the ordinance as a “seismic shift in the fundamental understanding of what is meant by ‘development and the management of natural resources.’” See [www.cotacachi.gov.ec/htmls/esp/Municipio/ordenanzas.htm#eco](http://www.cotacachi.gov.ec/htmls/esp/Municipio/ordenanzas.htm#eco).

Indigenous communities on the Bolivian and Peruvian shores of Lake Titicaca have confronted erosion, loss of vegetation, and massive contamination of the lake from solid and industrial waste, chemical waste, and fertilizer runoff. Recent studies estimate that the lake will be extinct within ten years. To regulate and manage the lake and its resources, the fourteen indigenous municipalities bordering the Bolivian side of the lake united in March 2003 as a governmental consortium under the Bolivian law of *mancomunidades* (municipal consortia). Later that year, Bolivian President Carlos Mesa joined Peruvian President Alejandro Toledo in inaugurating the Bi-National Mancomunidad of Lake Titicaca, which unites the fourteen Bolivian shoreline municipalities with the thirty-four indigenous communities on the Peruvian shore. The initiative seeks not only to reverse contamination levels but also provide terms for economic revitalization and sustainable development for the indigenous communities bordering the lake.

### **The Washoe Tribe Approach**

Indigenous efforts to protect cultural sites and resources also exist in the United States. The federally recognized Washoe Tribe of Nevada and California has used several of the tools mentioned above to protect and reacquire their homelands and preserve their culture. The ancestral lands of the tribe consist of at least one-and-a-half-million acres spanning what is now eastern California and western Nevada. Lake Tahoe’s *Da ow a ga* (edge of the lake) has been the heart of the Washoe Tribe’s civilization and culture for thousands of years. Since the Gold Rush of the 1850s, the tribe has been denied access to a crucial part of their homeland and the ability to conduct important cultural practices. In seeking redress, the tribe has relied upon a number of federal laws and policies, including the National Historic Preservation Act, the National Environmental Policy Act, and the Comprehensive Environmental Response and Liability Act (CERCLA, or Superfund Act).

In the late 1990s, the tribe successfully competed for a long-term Forest Service concession permit for a lakeshore resort and marina. In the operation of this resort, the tribe has returned Washoe people to the lakeshore, reawakened the traditions and history of the place, created a forum for public education, and entered the Tahoe economic community as a full partner.

As part of a Support Agency Cooperative Agreement with the U.S. Environmental Protection Agency under CERCLA, the Washoe Tribe is working to remediate contamination to tribal lands and traditional use areas on public lands from an abandoned open pit sulfur mine that was listed as a federal Superfund site in 2000. With the support of federal and state agencies, the tribe is seeking to establish remediation standards based upon a human health risk assessment that will protect tribal members engaged in traditional and customary activities on affected lands. As part of the restoration process, under the federal Natural Resources Damage and Restoration Program, the tribe will seek the acquisition of replacement lands with similar resources.

### **New Tools for Change**

Analogous to the Gold Rush that tore lands away from American Indian communities 150 years ago, the lands of indigenous peoples are sought for commercial potential by today’s global enterprises. Faced with the threatened loss and destruction of lands and resources vital to their cultural practices and essential for their survival, indigenous communities throughout the Americas are forging new tools to address these challenges. It remains to be seen whether they will be able to consistently change the way people think.

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