Memorandum on International and Comparative Law Support for the Amah Mutsun Tribal Band's Request for a Ban on Sand and Gravel Mining at Juristac

Prepared By Dana Zartner, JD, Ph.D.
Associate Professor, International Studies Department
Adjunct Professor, School of Law
University of San Francisco
(415) 734-7603
dzartner@usfca.edu

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Executive Summary

This memorandum supports the Amah Mutsun Tribal Band's efforts to prevent sand and gravel mining, as well as any other environmentally damaging activity, from taking place on lands of great historical, cultural, and spiritual importance to their people. Drawing on international and comparative law, this memorandum illuminates some of the primary arguments against the granting of the mining permit. The land in question, known as *Juristac*, is of great importance to the Amah Mutsun. *Juristac* has historically been a significant place for cultural and spiritual ceremonies and serves as the home for several of the most important figures in the Amah Mutsun culture and religion. Mining on this sacred territory would irretrievably damage the landscape and infringe on the Amah Mutsun Tribal Band's connection to this place of cultural and spiritual practice, in addition to harming the surrounding natural environment in a manner that would be detrimental, not only to the Amah Mutsun, but to all peoples.

This memorandum discusses the binding and/or persuasive nature of international and comparative law on the issues at hand in this case. While, in the United States, international and comparative law is often not a part of legal argument, there are international legal principles relevant to this situation that are binding on the United States. These include the International Covenant on Civil and Political Rights and the Convention on the Elimination of All Forms of Racial Discrimination. The remaining international and comparative laws and cases discussed in this memorandum are supportive of the arguments being made by the Amah Mutsun and should be taken into consideration as customary international law for any decision made on the issues at hand. These include the United Nations Declarations on the Rights of Indigenous Peoples, the International Labor Organization Convention 169 – the Indigenous and Tribal Peoples Convention, the American Declaration on the Rights and Duties of Man, the American Convention on Human Rights, and the American Declaration on the Rights of Indigenous Peoples.

Based on these international legal principles, and drawing on jurisprudence from states around the world that have, increasingly, been deciding cases similar to the one at hand, the following arguments are put forward in favor of the Amah Mutsun Tribal Band's request to prevent sand and gravel mining at *Juristac*.

- International law requires states to respect indigenous legal traditions, including belief systems and decision-making processes. International law recognizes the right of self-determination and freedom from discrimination and supports the communal nature of indigenous legal traditions and the important relationship these legal traditions have to the land.

- International law, supported by judicial decisions from regional and domestic courts around the world, recognizes the important role of land and the natural world in the

spiritual and cultural life of indigenous peoples like the Amah Mutsun. Land is not thought of only through an individual right to own property, but is recognized under international law as an entity that has cultural and spiritual importance to indigenous peoples. This understanding of land and its role in a community is protected under rights to culture and freedom of religion found in both international and domestic law.

- International law requires states to engage in the process of free, prior and informed consent with indigenous peoples when there is any potential that their rights may be infringed on by state action. This requires a thorough, communicative process in which indigenous peoples' concerns are taken into account and addressed.

- International law supports the necessity of considering the impacts on the Amah Mutsun Tribal Band of granting these mining concessions, even though the Tribal Band does not own or reside on the land in question, and is not asking to own or reside on the land. International legal principles recognizing rights to culture, rights to spiritual practice, rights to self-determination, and rights to free, prior and informed consent all apply to situations such as these whether or not the land is owned or occupied by the indigenous peoples.

- International and domestic laws support the non-granting of mining permits in the face of uncertainty as to the impacts such activities will have on the land and the surrounding environment. In the absence of full certainty as to impacts, the Precautionary Principle, codified in international law and present even in domestic laws in California, including in Santa Clara County, requires us to err on the side of caution and protect the land from potential environmental degradation.

These arguments are outlined in more detail in the pages that follow.

I. THE AMAH MUTSUN AND JURISTAC

The proposed development of the Sargent Quarry Project in the area now known as Sargent Ranch lies the heart of the ancestral lands of the Amah Mutsun Tribal Band called *Juristac*[1] The area of *Juristic* is one of immense cultural and spiritual importance to the Amah Mutsun.[2] As with indigenous peoples around the world, the natural environment is an integral part of the whole; landscape, trees, rivers, and other natural features are imbued with spirits and have cultural significance. Even though, as in the case of the Amah Mutsun, an indigenous group may have been forcibly removed from direct contact with the land, the cultural and spiritual importance of such land and landscape remains a fundamental part of the religion, culture, and history of the tribal band. In the case of *Juristac*, the area is considered a 'power place' for the Amah Mutsun - a place that is the home of a powerful spiritual being known as *Kuksui*, where their ancestors held healing ceremonies and where important (often cross-tribal) dances took place.[3]

The Amah Mutsun Tribal Band is deeply concerned about preserving the spirituality of *Juristac*, particularly from the desecration of the land that mining would bring. Removing sediment, which is an integral part of the *Juristac* and its spirituality, will irreparably alter the landscape. Once removed or altered, the cultural and sacred significance of the land cannot be restored.[4]

California law, including CEQA and AB 52 do not provide for guidance on intangible tribal resources, such as land with a spiritual and cultural importance. National Park Service Bulletin 15, however, states that "a site can possess associative significance or information potential or both…."[5] National Park Bulletin 36 further states: "the significance of some properties may be apparent primarily to specialists, including individuals whose expertise is in the traditional cultural knowledge of a tribe. A property does not readily have to convey its significance

[1] Favro, Marianne, "Battle Brewing Over Native American Land in Gilroy", *NBC Bay Area* (July 10, 2019), available at https://www.nbcbayarea.com/news/local/Battle-Brewing-Over-Native-American-Land-in-Gilroy-512558401.html (last accessed September 25, 2019).
[2] Id.
[3] Gladu, Sydney, "Sacred Site Slated for Development", *City on a Hill Press* (October 5, 2017), available at https://www.cityonahillpress.com/2017/10/05/sacred-site-slated-for-development/ (last accessed September 25, 2019).
[4] Letter from Faculty of the Environmental Studies Program at the University of San Francisco in Support of Protecting Juristac, November 2018, available at http://www.protectjuristac.org/statements-of-support/. ["[M]ining processes associated with the excavation, extraction, and refinement of gravel and sand materials are notorious for triggering significant environmental and social change. Despite the 'sustainable' practices used, quarrying requires the removal of virtually all natural vegetation, topsoil, and subsoil which results in catastrophic effects for plant life and animal habitats. Extraction processes are accompanied by loud noise, vibrations, dust, and pollution which can permanently harm adjacent ecosystems. Proposed social benefits provided by mining projects such as viable long-term employment remain questionable.]
[5] U.S. Department of the Interior, National Park Service, *National Register Bulletin No 15*, available at https://www.nps.gov/nr/publications/bulletins/nrb15/nrb15_4.htm (last accessed September 25, 2019).

visually to the general public…."[6] This idea of recognizing the special cultural and spiritual connection to the land, coupled with the international law, described below, provides strong support for the Amah Mutsun Tribal Band's request to deny the mining permit.

Given its significance, the maintenance of the pristine nature of this landscape is of fundamental importance to Amah Mutsun culture and spirituality. Moreover, the preservation of this pristine natural environment is important for the overall ecological health of the area. Mines like that proposed by Sargent Ranch are literally 'wounds on the earth' that destroy the sacred nature of such sites. From countries all over the world, stories have emerged of the devastating effects extractivist projects, such as mining, have had on indigenous peoples' ways of life and traditional knowledge and practices, as well as on the natural environment as a whole. Increasingly, courts and policy-makers around the world have been finding in favor of indigenous peoples in the face of such adverse effects. In doing so, a growing understanding and acceptance of international and comparative law on these issues, as well as chthonic[7] legal traditions and beliefs, has developed and been codified in law, policy, and practice.

It is the obligation of the United States, and correspondingly the State of California and the County of Santa Clara, to its people (particularly its indigenous peoples), natural environment, and the world to address issues such as mining with full and fair assessment and inclusion of all relevant law and policy. As such, it is important to bring to light in discussing the granting of a permit for the quarry project all information pertinent to the issues at hand, including international and comparative law, to illuminate why it is so essential that this permit not be granted.

II. INTERNATIONAL AND COMPARATIVE LAW IN THE UNITED STATES

According to the Constitution of the United States, treaties are the "supreme law of the land."[8] The U.S. Supreme Court reiterated this in 1900 when they stated that "[i]nternational law is part of our law."[9] In 1946, the United Nations, to which the U.S. became a party in 1945, in accordance with its Charter created the Statute of the International Court of Justice, which is binding on all UN member states.[10] Article 38 of the Statute provides the recognized sources of international law, including treaties and customary international law.[11] The U.S. later solidified

[6] U.S. Department of the Interior, National Park Service, *National Register Bulletin: Guidelines for Evaluating and Registering Historic Properties*, pg. 36, available at https://www.nps.gov/Nr/publications/bulletins/pdfs/nrb36.pdf (last accessed September 25, 2019).
[7] 'Chthonic' is the term given to the legal traditions of many indigenous groups by comparative lawyer H. Patrick Glenn. Chthonic legal traditions are those traditions that center law around a balance between all living things and peoples who are in close harmony with the earth. *See generally* H. Patrick Glenn, *Legal Traditions of the World: Sustainable Diversity in Law*, (4th ed. 2011).
[8] United States Constitution, art. vi.
[9] The Paquete Habana, 175 U.S. 677, 700 (1900).
[10] United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI.
[11] United Nations, Statute of the International Court of Justice, 18 April 1946.

its recognition of customary international law as a form of law in the Restatement (3rd) of Foreign Relations Law of the United States.[12] This reflected the idea that "customary international law is federal law" and is "directly applicable in U.S. courts and prevailing over inconsistent state law."[13] Therefore, international law is relevant as a framework for interpretation of rights domestically.[14]

Being "the supreme law of the land" makes treaty obligations as binding as federal statutes. While the United States Senate has determined that most treaties are non-self-executing – meaning they require additional legislation to be fully enacted into US law – the act of ratification requires that the federal government, as well as the states and local governments, not enact policies or take actions that are contrary to the provisions of the treaty. Similar analysis can be applied to customary international law. Therefore, international treaties and customary international law may be considered as binding and/or persuasiveness in the United States.

The United States is party to two significant human rights treaties that contain provisions relevant to the present situation: the International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Elimination of Racial Discrimination (CERD). The United States ratified the International Covenant on Civil and Political Rights (ICCPR) in 1992.[15] The obligations of the United States under the treaty apply to all federal, state, and local government entities and agents.[16] This means the relevant provisions of the ICCPR apply to government actions in all states and counties in matters in which they have jurisdiction.[17] Therefore, any decisions taken by Santa Clara County must not conflict with the provisions of the ICCPR, or any other treaty that the United States has ratified.

In 1994, the United States also ratified the Convention on the Elimination of Racial Discrimination (CERD). CERD is important in this instance because the treaty provides international recognition for the special importance states must attach to ensuring that indigenous

[12] Restatement (Third) of the Foreign Relations Law of the United States (AM. Law. Inst. 1987) [*hereinafter* Restatement (Third)].
[13] Gary Born, *Customary International Law in United States Courts*, 92 Wash. L. Rev. 1641, 1645 (2017).
[14] Centre for International Governance Innovation, *UNDRIP Implementation Braiding International, Domestic and Indigenous Laws: Special Report* (2017), available at https://www.cigionline.org/publications/undrip-implementation-braiding-international-domestic-and-indigenous-laws (last accessed October 18, 2018), at 23.
[15] International Covenant on Civil and Political Rights, United Nations, Treaty Series, vol. 999, p. 171, entry into force 23 March 1976. Upon ratification, the ICCPR became the "supreme law of the land" under the Supremacy Clause of the U.S. Constitution, which gives acceded treaties the status of federal law. The U.S. must comply with and implement the provisions of the treaty just as it would any other domestic law, subject to any reservations or understandings. Though the government has the obligation to comply with the ICCPR, one of the reservations attached by the U.S. Senate is a "not self-executing" Declaration, which is intended to limit the ability of litigants to sue in court for direct enforcement of the treaty. *ACLU: The Covenant on Civil and Political Rights*, available at http://www.aclu.org/other/faq-covenant-civil-political-rights-iccpr (last accessed October 19, 2018).
[16] Id.
[17] Id.

peoples are not more adversely affected by policy decisions than the broader population. Article 1 of the treaty defines racial discrimination as:

> [A]ny distinction, exclusion, restriction or preference based on race, color, descent, or national or ethnic origin which has 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.[18]

The treaty then goes on to state that:

> Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.[19]

According to the former UN Special Rapporteur on the Rights of Indigenous Peoples, Professor James Anaya, States have a special duty to consult with indigenous peoples when a state decision has the potential to affect indigenous peoples in ways not felt by other members of society.[20] This is both to recognize the historical (and current) discrimination faced by indigenous peoples around the world, but also to address the historical wrongs that have been committed against indigenous peoples, including tribal bands such as the Amah Mutsun. As will be discussed further below, protecting the Amah Mutsun's cultural and spiritual connection to the *Juristac* territory is necessary protection to remedy historical wrongs, as well as provide the most balanced result among the parties vis-à-vis the land, the environment, and fundamental rights.

In addition to specific treaty obligations under the ICCPR and CERD, the United States also has obligations under customary international law, which require protections relevant to the issue at hand. Customary international law is the widespread and consistent practice of states done out of a sense of legal obligation.[21] Customary international law is a binding form of law, both within the international system at large and in the United States.[22] Customary international law can be

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[18] International Convention on the Elimination of Racial Discrimination, United Nations Treaty Series, 660 UNTS 195, art. 1(1) (1965).
[19] Id., art. 1(4).
[20] James Anaya, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, HRC Red 6/12 UNHRC, 12th Sess., UN Doc A/HRC/12/34 (2009), available at http://repository.un.org/bitstream/handle/11176/278672/A_HRC_12_34-EN.pdf?sequence=3&isAllowed=y (last accessed October 18, 2018), at 15.
[21] Restatement (Third), *supra* note 12, section 102(2), "Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation."
[22] ICJ statute, *supra* note 11; The Paquete Habana, *supra* note 9.

demonstrated in a number of ways, including through the development and recognition of non-binding declarations, governmental statements on the binding nature of a particular legal provision, and repeated practice over a period of time. A legal principle may also be officially recognized as customary international law by a court or tribunal at the state, regional, or international level.[23]

There are numerous documents and decisions relevant to the situation at hand whose binding nature is based in customary international law. The foremost of these is the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).[24] UNDRIP was adopted by the United Nations General Assembly in September 2007. President Barack Obama then specifically endorsed the principles of the Declaration in December 2010.[25] The United States further solidified its commitment to UNDRIP and the binding nature of its provisions in its footnote to the American Declaration on the Rights of Indigenous Peoples, in which the US reaffirmed its commitment to the UNDRIP, stating:

> *The United States reiterates its longstanding belief that implementation of the United Nations Declaration on the Rights of Indigenous Peoples ("UN Declaration") should remain the focus of the OAS and its member states. OAS member states joined other UN Member States in renewing their political commitments with respect to the UN Declaration at the World Conference on Indigenous Peoples in September 2014. … [t]he United States intends to continue its diligent and proactive efforts, which it has undertaken in close collaboration with indigenous peoples in the United States and many of its fellow OAS member states, to promote achievement of the ends of the UN Declaration.*[26]

While a declaration, not a treaty, UNDRIP is widely held around the world as customary international law, embodying principles of "great and lasting importance" that should be interpreted generously and consistently with human rights law more broadly, whether international or provided through domestic constitutions.[27] The United Nations has recognized that a declaration such as UNDRIP is "a solemn instrument resorted to only in very rare cases relating to matters of major and lasting importance where maximum cooperation is expected."[28] Moreover, UNDRIP has been repeatedly cited by domestic courts around the world, as well as

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[23] The Paquete Habana, *supra* note 9.
[24] UN General Assembly, United Nations Declaration on the Rights of Indigenous Peoples, 2 October 2007, A/RES/61/295, 46 ILM 1013 (2007) [*hereinafter* UNDRIP].
[25] Barack Obama, *Remarks by the President at the White House Tribal Nations Conference*, December 16, 2010, available at https://obamawhitehouse.archives.gov/the-press-office/2010/12/16/remarks-president-white-house-tribal-nations-conference (last accessed October 18, 2018).
[26] Organization of American States, American Declaration on the Rights of Indigenous Peoples, A/RES/61/295 (2007).
[27] Centre for International Governance Innovation, *supra* note 14, at 8; *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14 (2013).
[28] UN Economic and Social Council, *Commission on Human Rights: Report to the Economic and Social Council on the eighteenth session of the Commission*, UNESCOR, 34th Sess., UN Doc E/CN.4/832 (26 April 1962), para. 105.

international courts such as the Inter-American Court of Human Rights and the African Court on Human and Peoples Rights, as authoritative evidence of the rights of indigenous peoples. Relevant provisions of UNDRIP are discussed throughout this brief in support of the arguments of the Amah Mutsun Tribal Band.

Supporting the provisions of UNDRIP are additional customary international laws found in the Universal Declaration on Human Rights (UDHR)[29], the International Labor Organization Convention 169 (ILO 169)[30], and provisions of numerous environmental treaties including the Convention on Biological Diversity (CBD)[31], the Rio Declaration on the Environment and Development[32], and the Paris Agreement[33]. ILO 169, in particular, is relevant for the situation at hand as it is a convention specifically focused on the rights of, and protections for, indigenous and tribal peoples.[34] Each of these international documents has risen to the level of customary international law, given widespread acceptance among states of their respective provisions, the consistent agreement of states about these principles, and the statements and actions by states that lend support to the notion that the principles contained in these legal documents are considered binding.[35] Additionally, courts around the world have declared certain of the provisions within these documents to be customary international law, and sub-national government entities, including Santa Clara, San Francisco, and Marin counties, have also recognized the importance of some of these norms, such as the Precautionary Principle.

The United States is also a member of the Organization of American States, and therefore a member of the Inter-American Commission of Human Rights (IACHR), which is one of the principal organs of the OAS created in the Charter of the Organization of American States.[36] The IACHR reviews cases of alleged human rights violations by member states and issues

[29] UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III). [*hereinafter* UNHR]
[30] International Labor Organization (ILO), Indigenous and Tribal Peoples Convention, C169 (27 June 1989). [*hereinafter* ILO 169].
[31] Convention on Biological Diversity, 1760 UNTS 79; 31 ILM 818 (1992).
[32] Rio Declaration on Environment and Development, UN Doc. A/CONF.151/26 (vol. I); 31 ILM 874 (1992).
[33] Paris Agreement, United Nations Treaty Collection, 8 July 2016.
[34] ILO 169, *supra* note 30. ILO 169 states that in considering issues concerning indigenous peoples, "the social, cultural, religious and spiritual values and practices of these peoples shall be recognized and protected, and due account shall be taken of the nature of the problems which face them both as groups and individuals." (Article 5). Specifically, in thinking about land, ILO 169 calls on governments to "respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories … which they occupy or otherwise use." (Article 13). Article 14 goes on to say that "the rights of peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for …. Traditional activities," In this case, while the Amah Mutsun do not occupy the land in question, nor are they claiming a right of occupancy, the use the land in that it is of cultural and spiritual importance to their history and beliefs.
[35] For example, the Inter-American Court of Human Rights has held the Universal Declaration of Human Rights "can be regarded as expressive of customary international law." *See* James S. Anaya and Claudio Grossman, *The Case of the Awas Tingni v. Nicaragua: A New Step in the International Law of Indigenous Peoples*, Ariz. J. Int'l & Comp. L. 19(1) (2002), at 15.
[36] Charter of the Organization of American States, 119 U.N.T.S. 3, entered into force December 13, 1951, Chapter XV.

recommendations based on violations of the Charter of the Organization of American States, the American Declaration on the Rights and Duties of Man, and the American Convention on Human Rights. The U.S. has ratified the Charter and adopted the American Declaration, which, while not a binding treaty, has been "interpreted by both the Inter-American Commission on Human Rights and the courts as a source of international legal obligations for member states of the Organization of American States."[37]

In this case, the Amah Mutsun Tribal Band is requesting the denial of a permit for mining that would take place on land of great cultural and spiritual importance to them. There is a great deal of international law, found within both treaties and customary international law, which supports the position of the Amah Mutsun. While there is not a significant amount of case law within the U.S. that uses international law in situations involving indigenous peoples, it is not without precedent. The 9th Circuit Court of Appeals, citing the U.S. Supreme Court decision in *Barker v. Harvey*, recognized in *Chunie v. Ringrose* that the rules of international law "undoubtedly" apply to cases concerning indigenous peoples and use of land in the United States.[38]

In addition to the international law relevant for the Amah Mutsun's claim, this memorandum draws on comparative law to support its arguments. Questions of land use, environmental protections, and the importance of land to indigenous peoples are not unique to this case, the State of California, or the United States. Similar scenarios have come up around the world before different policy makers and courts. The memorandum will highlight some of these comparative legal decisions in its analysis to further illustrate the direction in which other states have gone on these issues and the broader support there is globally for the protection of sacred lands. While comparative law, unlike international law, is not binding in the United States, it can be persuasive as a sign of general global trends on a particular issue. This has been recognized by the United States Supreme Court, as well as in efforts by states to make use of available knowledge from around the world on particular issues.[39]

The remainder of this memorandum will discuss in more detail how the various provisions of international and comparative law discussed in this section support the Amah Mutsun Tribal

[37] Centre for International Governance Innovation, *supra* note 14, at 70-71.
[38] *United States ex Rel. Chunie v. Ringrose*, 788 F.2d 638 (9th Cir. 1986) This case, raising the question of indigenous land claims, ultimately held international law was not relevant to the issues at hand because they occurred prior to 1945 when the international law cited – Charter of the United Nations, Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, International Covenant of Economic, Social, and Cultural Rights, American Declaration on the Rights and Duties of Man – had not yet entered into force. In the present case, however, that is not an issue as this is not a case of land ownership and is a contemporary situation.
[39] *Roper v. Simmons*, 125 S.Ct. 1183 (2005); 543 U. S. 551 (2005). Additionally, states like California, for example, have sent teams to Australia to learn from the Australians how they are addressing, for example, drought and other environmental effects of climate change. Craig Miller, *Californians Take Drought Lessons From Down Under*, KQED Public Radio & Television, available at https://www.kqed.org/science/329656/californians-take-drought-lessons-from-down-under (last accessed October 19, 2018).

Band's request for a denial of authorization for a new sand and gravel on mine on the sacred territory of *Juristac*.

III. INTERNATIONAL AND COMPARATIVE LAW RECOGNIZES COMMUNAL VIEWS OF LAW AND THE SPIRITUAL AND CULTURAL IMPORTANCE OF LAND AMONG INDIGENOUS PEOPLES

Underlying the issues of this case are the different views that exist between indigenous and Enlightenment-era derived conceptions of nature, community, and the human-nature relationship. Enlightenment-era philosophies, such as those espoused by John Locke that were of influence on the U.S. founding law, were grounded in the idea of a right to property, which in turn was based on the right of individuals to own land and have control over that which they owned. Save for certain public necessities, where the government could take control through eminent domain, ownership of land was considered an individual right. This philosophy has underscored property law in the United States ever since. It is an individualist view of land, supported by the individualist legal culture of the United States, grounded in the country's history and legal foundations.[40]

Much international and comparative law, however, supports a different view of land and nature; one less focused on individual rights and more focused on communal good. This view requires ownership to be limited by the best interests of the community as a whole, particularly in terms of impacts on protecting cultural traditions, natural resources, and environmental health. International law clearly requires consideration of the cultural and spiritual importance of land to indigenous peoples when making decisions about land use.[41]

Communal View of the Law and the Land

A common thread among indigenous peoples around the world is a communal view of law, a more holistic view of the natural world, and belief in a greater symbiosis between human beings and nature.[42] A communal view of law is distinguishable from an individualist one based on whether a society's self-image is defined in terms of "I" or "We" and the "degree of interdependence a society maintains among its members."[43] The greater the interdependence and focus on responsibilities to the community (which for some peoples includes the natural and spiritual worlds), the more communal the legal tradition.[44] Many communal societies center communal rights over individual rights and are more likely to have a collective form of dispute

[40] Dana Zartner, *Courts, Codes, and Customs: Legal Tradition and State Policy towards International Human Rights and Environmental Law* (2014), 51-53, 64.
[41] UNDRIP, *supra* note 24; ILO 169, *supra* note 30; Awas Tingni, *infra* note 57.
[42] Glenn, *supra* note 7, at 63; Zartner, *supra* note 40, at 34-35
[43] Geert Hofstede, *Hofstede Insights: Country Comparisons*, available at https://www.hofstede-insights.com/country-comparison/the-usa/ (last accessed October 7, 2018).
[44] Dana Zartner, *The Culture of Law: The Culture of Law: Understanding the Influence of Legal Tradition on Transitional Justice in Post-Conflict Societies*, 22 Ind. Int'l & Comp. L. Rev. 297 (2012).

resolution. This process is valued among indigenous communities for its ability "to foster harmony and relations within and between communities."[45] Maintenance of social harmony and the balance of nature is more important in considering penalties than right or wrong, guilty or innocent.[46]

Additionally, some legal cultures believe that the behavior of the community transcends the present.[47] Whether tied to ancestors and heirs or grounded in spirituality, some legal cultures encompass not just one's behavior in the present, but what this might mean for past or future generations.[48] This is particularly relevant when discussing land and natural resources. Under this worldview, no one can 'own' land; rather, those here today serve as stewards of the land and its natural resources for the benefit of both present and future generations, as well as out of respect for those who came before.

All of these characteristics combine to form a communal view of land and nature that often significantly differs from an individualist society on questions of property and its use. While peoples around the world are, of course, different in their traditions and cultures, "all indigenous peoples of the world share one thing in common: they all share a deeply felt spiritual attachment to their ancestral territories, as well as the idea of collective stewardship over land and its resources. This special relationship is at the core of indigenous peoples' identity."[49] Even in situations, like the one in the present case, where the peoples concerned do not own or reside on the property in question, the land still retains its place of importance in the traditions, culture, and spiritual life of the peoples.

International law has recognized this and codified this recognition into the provisions of treaties and declarations.[50] Domestic and regional court cases from around the world have also incorporated communal views of law and land into their decisions, including on issues like the one presented here pertaining to the question of mining on traditional lands. The Inter-American Commission of Human Rights has adopted the view that "the international human right of property embraces the communal property regimes of indigenous peoples as defined by their own customs and traditions."[51] This interpretation has also been accepted by the Inter-American

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[45] Centre for International Governance Innovation, *supra* note 14, at 77.
[46] Zartner, *supra* note, at 44.
[47] Luc Huyse, *Introduction: Tradition-Based Approaches in Peacemaking, Transitional Justice and Reconciliation Policies*, in Traditional Justice and Reconciliation after Violent Conflict: Learning from African Experiences, at 11-12 (2008).
[48] Id.
[49] Katje Göcke, *Protection and Realization of Indigenous Peoples' Land Rights at the National and International Level*, Goettingen Journal of International Law 5(1) (2013), at 90.
[50] UNDRIP, *supra* note 24, arts. 18 and 19. UNDRIP specifically states that indigenous peoples have the right to participate in decision-making processes on issues that affect them according to their own legal traditions.
[51] Anaya and Grossman, *supra* note 35, at 12.

Court of Human Rights and the Court has held that this view of property is binding even on those states, like the U.S., not a party to the American Convention on Human Rights.[52]

Under this worldview, land and indeed all nature, has a spirit of its own and an importance in its own right to the harmony of the world, separate from its benefit to human beings. There is no personal or formal ownership of property and humans are not "elevated to a position of domination, or dominium, over the natural world."[53] The land is held in common for all peoples and those in current possession of the land have an obligation to serve as stewards of the land for both present and future generations. Indigenous understandings of land center on a "communal or collective environment, with no formal concept of property…."[54]

This consideration of the importance of land for the cultural and spiritual life of an indigenous community like the Amah Mutsun Tribal Band is true, even for those peoples who have neither owned, nor lived, on the land in question for many years.[55] The international legal obligations of the United States (and thus, the State of California and the County of Santa Clara), must respect the cultural and spiritual significance of the land at *Juristac* for the people of the Amah Mutsun Tribal Band and take this into account when making any decisions on the use of the land. In this case, the question at hand is not about returning the land to the possession of the Amah Mutsun Tribal Band, but rather it is about ensuring that this landscape, which is of cultural and spiritual importance to the Amah Mutsun, is protected regardless of ownership.

The history of dispossession and questions of protecting indigenous rights are, of course, not unique to California, or the United States. One of the primary purposes of UNDRIP has been to find ways to remedy past injustices. UNDRIP Article 8(2)(b) says that "[s]tates shall provide effective mechanisms for prevention of … any action which has the aim or effect of dispossessing" indigenous peoples of "their lands, territories, or resources." While the Amah Mutsun Tribal Band is not seeking ownership of the land in question, they are asking that the County of Santa Clara acknowledge their historical, cultural and spiritual ties to the land and landscape at *Juristac*. It should be recognized that this history resulted in the Amah Mutsun's dispossession of the land, and allow them, moving forward, to engage with this natural landscape that is so fundamental to their spiritual and cultural development.

Legal Recognition of the Cultural Importance of the Land

[52] Anaya and Grossman, *supra* note 35, at 12.
[53] Glenn, *supra* note 7, at 70
[54] Id.
[55] Anaya and Grossman, *supra* note 35, at 2. In the Awas Tingni case, state of Nicaragua gave a logging concession to a foreign company to cut trees on indigenous lands. The Inter-American Court of Human Rights held that the absence of official title to the land is not determinative of an absence of rights and the government should refrain from any actions that would undermine the community's interests. The court went even further and upheld "the collective land and resource rights of indigenous peoples."; Göcke, *supra* note, at 89. [Inherent land rights are those not derived from Colonial powers.]

In addition to recognizing the communal view of land held by indigenous peoples, as well as communally-centered chthonic legal traditions, international law promotes and protects the understanding of land and nature as important aspects of traditional culture and cultural development. International law protects the indigenous peoples' right to their social and cultural development, for both present and future generations.[56]

This understanding of land and the natural environment, as well as the communal view of land held by indigenous peoples, has been enshrined in international law. It has been recognized that this relationship between indigenous peoples and the natural environment, including land, flora, fauna, and resources, requires special consideration, particularly in situations, like this one, where there is a question of use of traditional culturally or spiritually significant lands for environmentally-damaging activities such as mining. Numerous provisions of international treaties and declarations call on states to ensure the protection of traditional cultures.[57] Under international law, states have an obligation to make decisions regarding law and policy that impacts indigenous peoples in a manner that takes into account the customary law, values, customs, and mores of the indigenous community.[58]

The ICCPR protects this relationship between culture and land through the self-determination clause of Article 1. The right to self-determination includes the right to freely pursue social and cultural development, as well as engage with the use of natural wealth and resources.[59] UNDRIP further developed these principles, providing in Article 31 that, "[i]ndigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions …." These provisions of self-determination protect the right of indigenous peoples to cultural development and, in this case, cultural development ties the natural landscape to the history, spirituality, and cultural traditions of the peoples.

The situation is somewhat less straightforward for landless tribes such as the Amah Mutsun than it is for those tribes, both around the world and here in the U.S., who have land. This difference

[56] UNDRIP, *supra* note 24, art. 11(1) "Indigenous peoples have the right to practice and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archeological and historical sites, artifacts, designs, ceremonies, technologies and visual and performing arts and literature."
[57] Inter-American Court of Human Rights, *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment of August 31, 2001 (Merits, Reparations and Costs), at 82. [*hereinafter* Awas Tingni] The IACtHR defines property as "those material things which can be possessed, as well as a right which may be part of a person's patrimony; that concept includes all movables and immovable corporeal and incorporeal elements and any other intangible object capable of having value." (at 74)
[58] Id., at 69; Inter-American Court of Human Rights, *Case of Kalina and Lokono Peoples v. Surinam*, Judgment of November 25, 2015 (Merits, Reparations, and Costs).
[59] ICCPR, supra note 15, art. 1.

in recognition is, however, through no fault of the Amah Mutsun Tribal Band and rather is the result of the history of development and the politics of geography that took place in California.[60]

Moreover, this different treatment of the Amah Mutsun people is also, in and of itself, a violation of international law. As highlighted above, CERD prohibits discrimination of any kind that has the effect of infringing on the enjoyment of human rights, including cultural rights.[61] The treaty goes on, in Article 5, to require state parties to the treaty to "guarantee the right of everyone" to enjoy their rights, including social and cultural rights, which encompasses "participation in cultural activities". These provisions are bolstered by Article 27 of the ICCPR, which says:

> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

Taken together, these legal principles outline a clear codification in international law that there is a right to culture and cultural development, and that this right must be protected. Failure to provide such protection is not only a violation of the right itself, but also subsidiary obligations such as the right to self-determination and the right to development. In the case of the Amah Mutsun Tribal Band, the request is much less far-reaching than anticipated by the treaties. In this instance, the request is simply to preserve an untouched parcel of land that is of fundamental historical importance to the Amah Mutsun culture, and remains a key component of the culture and religion of the peoples, as it is essential for the future development of their culture.

The State of California also recognizes these ideas. Assembly Bill (AB) 52 recognizes "that California Native American prehistoric, historic, archeological, cultural, and sacred places are essential elements in tribal cultural traditions, heritages, and identities." [62] California recognizes that cultural and sacred places are "essential" in tribal culture, tradition, heritage, and identities, and international law recognizes that there is a right to protect and sustain culture and cultural development for present and future generations. Therefore, it follows from these laws that protection of cultural and sacred spaces such as *Juristac* is necessary for the protection of these rights and fulfillment of these obligations to culture and cultural development tied to historically important land like *Juristac*.

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[60] Krol, Debra Utacia, "Can Native American Tribes Protect Their Land if They're Not Recognized By The Government?", *The Revelator: An Initiative of the Center for Biological Diversity* (March 12, 2019), available at https://therevelator.org/native-american-tribes-protect-land/ (last accessed September 25, 2019).
[61] CERD, *supra* note 18, art. 1.
[62] Assembly Bill No. 52, Chapter 532, an act to amend Section 5097.94 of, and to add Sections 21073, 21074, 21080.3.1, 21080.3.2, 21082.3, 21083.09, 21084.2, and 21084.3 to, the Public Resources Code, relating to Native Americans. [Approved by Governor September 25, 2014. Filed with Secretary of State September 25, 2014], available at https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140AB52 (last accessed October 15, 2018).

Legal Recognition of the Spiritual Importance of the Land

In addition to the legal recognition of the cultural importance of land, international law recognizes the spiritual importance of the land to indigenous peoples like the Amah Mutsun Tribal Band. As with cultural ties to the land, indigenous religions and spiritualties are interwoven into every aspect of life.[63]

There are very strong protections under international law, as there are under U.S. Constitutional law, for the freedom of religious expression and practice.[64] This includes the right of indigenous peoples to "manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religions and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains."[65] Articles 1 and 18 of the ICCPR both protect the freedom of religion, with Article 18(1) specifically stating:

> Everyone shall have the right to freedom of … religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with other and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.[66]

ICCPR Article 18(3) continues, stating that the "[f]reedom to manifest one's religion or beliefs may be subject only to such limitation as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others."

Nothing in these provisions contradict the right to freedom of religion found in the U.S. Constitution, and therefore are binding in their entirety. There is also nothing in the present case that threatens public safety, order, health or morals in a way that would justify denial of these rights. Moreover, nothing in these international legal principles, nor in the U.S. Constitution's First Amendment protecting the freedom of religion, specify that this only applies to specific religions or kinds of religious practices. While it is certainly more common in the United States for religion to be a monotheistic, text-based religion such as Christianity (Bible), Islam (Quran), or Judaism (Torah), international and domestic law protects all other religions and religious practices equally.[67] Even in U.S. law, there is specific recognition of this. The American Indian

[63] UNDRIP, *supra* note 24; United Nations Permanent Forum on Indigenous Issues, "Indigenous Peoples – Land, Territories, and Natural Resources", available at https://www.un.org/en/events/indigenousday/pdf/Backgrounder_LTNR_FINAL.pdf (last accessed September 25, 2019).
[64] ICCPR, *supra* note 15, art. 18; Awas Tingni, *supra* note 57, at 70.
[65] UNDRIP, *supra* note 24, article 12(1).
[66] ICCPR, *supra* note 15, arts. 1 and 18.
[67] There are some limitations on religious freedom in the United States, but these are, indeed, very limited.

Religious Freedom Act was enacted to ensure that Native Americans could freely practice their faith, according to their own customs, as well as have access to their sacred sites.[68]

Native Americans, and most indigenous peoples around the world, have "land-based religions, which means they practice their religion within specific geographic locations."[69] Territory can be sacred due to remains of ancestors buried there, spirits found there, and the religious significance of natural features, such as hills, which are inhabited by these spirits.[70] For indigenous peoples, "[s]acred sites are like churches; they are places of great healing and magnetism."[71]

This relationship between religion, spirituality, and land has been discussed in numerous court cases in countries around the world. The Awas Tingni Community in their case against Nicaragua for allowing extractivist industries on traditional lands described the spiritual importance of the landscape in their traditional territories:

> "Cerro Urus Asang is a sacred hill since our ancestors because therein we have buried our grandparents and therefore we call it sacred. Thus, Kiamak is also a sacred hill because there we have (…) the arrows of our grandparents. Then comes Cano Kuru Was, it is a village. Every name we have mentioned in the framework is sacred…. We maintain our history, since our grandparents. That is why we have [it] as Sacred Hill (…) Asangpas Muigeni is spirit of the hill, is of equal form to a human (being), but is a spirit (who) always lives under the hills…."[72]

In ruling in favor of the Awas Tingni peoples, and against the Nicaraguan government, one of the judges of the Inter-American Court of Human Rights stated:

> The lands of the indigenous peoples constitute a space which is, at the same time, geographical and social, symbolic and religious, of crucial importance for their cultural self-identification, their mental health, their social self-perception.[73]

Similarly, in New Zealand the High Court held that a planning tribunal must take into account "Maori spiritual and cultural values" and the Maori's "spiritual, cultural and traditional relationships with natural water".[74] In this case, private landowners sought a permit from the local water authority and planning tribunal to build a pond to treat dairy water waste near a

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[68] Rosalyn R. LaPier, *Why Native Americans Struggle to Protect their Sacred Places*, The Conversation (August 28, 2018), available at https://truthout.org/articles/why-native-americans-struggle-to-protect-their-sacred-places/ (last accessed September 4, 2018).
[69] Id.
[70] Inter-American Court of Human Rights. Joint Separate Opinion of Judges A.A. Cancado Trindade, M. Pacheco Gomez, and A. Abreu Burelli, *Case of the Mayahna (Sumo) Awas Tingni Community v. Nicaragua*. Judgment of August 31, 2001 (Merits, Reparations and Costs), at 1. [*hereinafter* Joint Separate Opinion]
[71] LaPier, *supra* note 68 quoting Joseph Toledo, a Jemez Pueblo tribal leader.
[72] Joint Separate Opinion, *supra* note 70, at 1
[73] Id., at 2.
[74] *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (HC).

stream that is a tributary for the Waikato River. The permit application was opposed by a local trust, which argued that the applicants did not adequately consider the extent of the pollution that would be caused by the project and which would impact both the physical and spiritual sustenance provided by the Waikato River to the Maori people.[75]

This concept of the spirituality of the land for Native American peoples has even come out in opinions written by justices of the Supreme Court of the United States. *Lyng v. Northwest Indian Cemetery Protection Association* concerned the construction of a US forest service road through undeveloped federal lands sacred to northern California tribes. The lower courts ruled in favor of the Yurok, Karok, and Tolowa tribes, stating the road would impact their religious practices. The U.S. Supreme Court reversed, however, in his dissenting opinion, Justice Brennan clearly highlighted the connection between indigenous peoples, their spirituality, and the land, stating, "Native American faith is inextricably bound to the use of land. The site-specific nature of Indian religious practice derives from the Native American perception that land is itself a sacred, living being."[76] Justice Brennan went on to further recognize the importance of this connection and the need for its protection:

> [F]or Native Americans religion is not a discrete sphere of activity separate from all others.… [F]or most Native Americans … .worship cannot be delineated from social, political, cultural and other areas…. While traditional Western religions view creation as the work of a deity who institutes natural laws which then govern the operation of physical nature, tribal religions regard creation as an ongoing process in which they are morally and religiously obligated to participate. … Native Americans fulfill this duty through ceremonies and rituals designed to preserve and stabilize the earth and to protect humankind from disease and other catastrophes. Failure to conduct these ceremonies in the manner and place specified, adherents believe, will result in great harm to the earth and to the people whose welfare depends on it.[77]

The land of *Juristac* is spiritual for the Amah Mutsun Tribal Band. *Juristac* is home to *Kuksui*, who is the spiritual leader of the Amah Mutsun and an important figure among the Ohlone peoples more broadly.[78] *Juristac* is also home to several other deities.[79] The Amah Mutsun believe these deities restore life balance and harmony among all living things, which, as discussed above, is a crucial feature of the culture and spirituality of indigenous peoples around the world, including the Amah Mutsun Tribal Band.[80]

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[75] *Huakina Development Trust*, *supre* note 74.
[76] *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1987), Dissent by Justice Brennan.
[77] Id.
[78] Letter from Faculty, *supre* note 4; Gladu, *supra* note 3; Amah Mutsun Tribal Band, "Walk to renew the sacred" (September 24, 2019) available at http://www.protectjuristac.org/updates/walking-to-renew-the-sacred/ (last accessed September 25, 2019).
[79] Amah Mutsun, *supre* note 78.
[80] Id.

Juristac is spiritually important for the Amah Mutsun Tribal Band in other ways as well. According to the history of the Amah Mutsun, the interconnection of different parts of the landscape; and land … is a metaphor for life. [81]

Additionally, the religious practices of the Amah Mutsun are connected to the watershed, and … these watersheds are very important to the Amah Mutsun[82] The live oak trees are home to spirits. and the hills are important because of the plants that grow there including willows, tule, plants traditionally used for baskets. These plants were fundmetnal to the Amah Mutsun peoples and were used in daily life and cultural and spiritual ceremonies.[83] As the Amah Mutsun work to rebuild their culture and traditional practices, maintaining this sacred and spiritual landscape is of fundamental importance.

Land and landscapes, for indigenous peoples like the Amah Mutsun, are fundamental to their physical, cultural and spiritual vitality. The strong spiritual connection to land may be "expressed in different ways, depending on the particular indigenous peoples involved and … may include … maintenance of sacred or ceremonial sites … or other elements characterizing indigenous or tribal culture."[84] International law specifically protects indigenous religious and spiritual practices, and right of peoples to "maintain and strengthen their distinctive spiritual relationship with … lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard."[85] The landscape of *Juristac* holds this kind of religious and spiritual importance for the Amah Mutsun people, and therefore there is an obligation to protect and preserve it.

IV. INTERNATIONAL LAW REQUIRES FREE, PRIOR AND INFORMED CONSENT BEFORE ANY ACTION MAY BE TAKEN THAT IMPACTS LANDS OF CULTURAL AND SPIRITUAL IMPORTANCE TO INDIGENOUS PEOPLES

One of the fundamental principles underlying the international law concerning the rights of indigenous peoples is the requirement of free, prior, and informed consent (FPIC). This principle includes the absence of any coercion or pressure when making decisions (free); ample time to gather information and engage in a fully-informed discussion before a project starts (prior) based on all the relevant information reflecting all views and positions (informed); and, the

[81] Edward Ketchum. 2002 "Amah/Mutsun Band of Ohlone Costanoan Indians". In *Gathering of Voices: The Native Peoples of the Central California Coast,* edited by Linda Yamane, pp. 206-207. Santa Cruz County History Journal No. 5. Museum of Art and History, Santa Cruz, California.
[82] Id.
[83] Barbara R. Bocek. 1984. "Ethnobotany of Costanoan Indians, California, Based on Collections by John P. Harrington." Economic Botany 38 (2): 240–255.
[84] Inter-American Commission on Human Rights, *Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources and Jurisprudence of the Inter-American Human Rights System*, 35 Am. Indian L. Rev. 263 (2010) citing to the case of the *Sawhoyamaxa Indigenous Community v. Paraguay*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 146 ¶131 (Mar. 29, 2006).
[85] UNDRIP, *supra* note 24, art. 25.

demonstration of clear and compelling agreement, including traditional consensus procedures (consent).[86] This requires "meaningful consultation" with indigenous peoples prior to any project that may have an impact on them. In this context, meaningful consultation is "not just a process of exchanging information", but entails" testing and being prepared to amend policy proposals in light of information received, and providing feedback."[87]

FPIC is supported by numerous international treaties and customary international law.[88] ICCPR Article 1 supporting the right of self-determination, includes the right for a people to make decisions concerning their own interests. The CERD committee responsible for overseeing state compliance with the treaty has specifically called on the U.S. to implement of FPIC when adopting measures affecting the rights of indigenous peoples as a means of preventing the disappearance of their cultures and as necessary for their survival.[89] UNDRIP contains several articles that focus on the rights related to free, prior and informed consent, and ILO 169 also stipulates this requirement for states.[90]

In 2006, the Inter-American Commission reached the same conclusion. In this case, which involved logging and mining concessions in the territory of the Saramaka people in Suriname, the Inter-American Commission stated unambiguously that 'in light of the way international human rights legislation has evolved with respect to the rights of indigenous peoples that the indigenous people's consent to natural resource exploitation activities on their traditional territories is always required by law.'[91] Similar decisions have been taken by the African Commission on Human and Peoples Rights, which in the case of the Endorois of Kenya held: "In terms of consultation, the threshold is especially stringent in favor of indigenous peoples….

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[86] International Indian Treaty Council, *Indigenous Peoples and the Right to Free, Prior, and Informed Consent*, available at https://www.iitc.org/wp-content/uploads/2014/07/Indigenous-Peoples-and-the-Right-to-Free-Prior-and-Informed-Consent_121013-WEB.pdf (last accessed October 7, 2018).
[87] *Tsleil-Waututh Nation v. Canada*, 2018 FCA 153 (2018), at para. 6.
[88] ICCPR, *supra* note 15; CERD, *supra* note 18, General Comment 23 of 1997. Calls upon state parties to "ensure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent."; UNDRIP, *supra* note 24, arts. 10, 11(2), 19, 28(1), 30(1), 32(2). Article 32(2) is particularly relevant to situations with extractivist industries and states: "States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project … in connection with the development , utilization or exploitation of mineral, water or other resources."; ILO No. 169, *supra* note 30, arts. 6 and 15; European Parliament, Directorate-General for External Policies, "Indigenous Peoples, Extractive Industries and Human Rights", EXPO/B/DROI/2013.23 (2014), at 6; Inter-American Court of Human Rights, *Kichwa Indigenous People of Saroyaku v. Ecuador*, Judgment of June 27, 2012 (Merits and Reparations), Series C No. 245; *Tsleil-Waututh Nation v. Canada*, 2018 FCA 153, at para. 6.
[89] Committee on the Elimination of Racial Discrimination, *Consideration of Reports Submitted by States Parties Under Article 9 of the Convention*, CERD/C/USA/CO/6, available at http://undocs.org/CERD/C/USA/CO/6 (last accessed October 18, 2018); *CERD Report of the Committee on the Elimination of Racial Discrimination*, 80th Session, GA 67th Sess. Supp. NO. 18 (A/67/18), available at: https://www2.ohchr.org/english/bodies/cerd/docs/A.67.18%20English.pdf (last accessed October 18, 2018).
[90] UNDRIP, supra note 24, arts.10, 19, 29, 32; ILO 169, *supra*, note 30, art. 6.
[91] Inter-American Commission on Human Rights, *Report on Admissibility and Merits No. 09/06, Twelve Saramaka Clans*, Case 12.338 (Suriname), 2 March 2006, at para. 214.

[T]he African Commission is of the view that in any development or investment projects that would have a major impact within the Endorois territory, the State has a duty not only to consult with the community, but also to obtain their free, prior, and informed consent, according to their customs and traditions."[92]

Additional cases have arisen in multiple jurisdictions around the world concerning whether there was adequate free, prior, and informed consent. These cases frequently arise in the contest of extractivist industries seeking to engage in mining, logging, or some other kind of activity on lands of cultural and spiritual importance to indigenous peoples. Courts around the world have heard cases brought on behalf of indigenous groups, and consistently and increasingly are finding in favor of indigenous peoples' claims that extractivist industries have interfered with their cultural and spiritual connections to land with free, prior, and informed consent. In addition to those mentioned above, such cases have arisen in Ecuador, Nicaragua, Peru, Bolivia, New Zealand, India, and Canada, to name a few.[93]

The County of Santa Clara, in conformance with both California and U.S. law, has begun the process of FPIC for the land in question by calling for an independent study on its importance to the history of the Amah Mutsun peoples.[94] The Amah Mutsun Tribal Band has requested additional assessment and analysis on the importance of the *Juristac* landscape, which would be in conformance with the international legal obligations regarding FPIC. Under international law, the County is also encouraged to thoroughly assess the potential harms that could come to the land as a result of this proposed mining project, and seriously weigh the concerns expressed by the Amah Mutsun against the extractivist industry. Case law from around the world is increasingly finding in favor of indigenous peoples when they are faced with a similar situation, taking into account the unknown impacts of the proposed activity as much as the known results, and relying heavily on the arguments made by indigenous groups seeking to protect natural areas from destruction.

V. UNDER INTERNATIONAL, COMPARATIVE, AND CALIFORNIA LAW, THE PRECAUTIONARY PRINCIPLE MUST BE ADOPTED WHEN MAKING DECISIONS THAT COULD NEGATIVELY IMPACT THE ENVIRONMENT

The Precautionary Principle is a concept that has developed in international and domestic law that centers on the idea that "inaction is preferable to action in circumstances where taking action

[92] African Commission on Human and Peoples Rights, *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v. Kenya*, Judgement of 4 February 2010, 276/03, paras. 226 and 290.
[93] European Parliament, *supra* note 90, at 12-13; *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 SCR 511, para. 27; *The Kichwa Peoples v. Ecuador*, Petition 167/03, Inter-Am.H.R., Report No. 62/04, OEA/Ser.L/V/II.122, doc. 5 rev. 1 (2004); Cirone, M., The Vedanta Case in India, CEDAT (2012), available at http://www.ejolt.org/2015/08/vedanta-case-india/ (last accessed October 19, 2018).
[94] AB 52, *supra* note 62.

could result in serious or irreversible harm."[95] In essence, the Precautionary Principle supports the idea that it is 'better to be safe than sorry'. If there is uncertainty surrounding the impacts of an action on the environment, then the Precautionary Principle would dictate that we need to take the course of action that is least likely to have a negative impact. The Precautionary Principle has been adopted in numerous international treaties.[96] It has also been adopted into the laws of countries such as Germany, Australia, Canada, India, and Brazil. In Australia, for example, the New South Wales Land and Environmental Court held in 2006 that the precautionary principle must be considered when issuing new permits that could have an adverse environmental impact.[97] The Court outlined specific factors to consider when conducting this analysis, including whether there is a threat of serious, irreversible environmental damage and the threat and scope of potential environmental damage.[98]

In a case before the Brazilian Supreme Court, the Court, in finding for plaintiffs who brought a claim against the federal government, municipalities, and corporations for failure to reduce deforestation and address climate change, the court stated:

> "[T]he precautionary principle still counsels us to act now to avert calamitous climate change before every last detail is fully known (or fully appreciated)."[99]

Following this, a very recent case in Holland also relied on the Precautionary Principle as the Dutch Supreme Court held that the government was responsible for not doing enough to prevent climate change.[100] The Netherlands argued that climate change impacts are too uncertain a basis for claims like the one by the plaintiff. The Dutch Court in its decisions, however, invoked the precautionary principle, which it considers a binding principle of law. The Court went on to discuss how it is precisely this uncertainty, with relation to causes and effects of activities with potential to harm the environment, which requires states to take proactive action to protect it.[101]

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[95] Scott LaFranchi, *Surveying the Precautionary Principle's Ongoing Global Development: The Evolution of an Emergent Environmental Management Tool*, 32 B.C. Envtl. Aff. L. Rev. 679 (2005).
[96] Including the United Nations Framework Convention on Climate Change, Convention on Biological Diversity, Convention on International Trade in Endangered Species to name a few.
[97] *Telstra Corporation Limited v Hornsby Shire Council*, 2006] NSWLEC 133 (24 March 2006).
[98] Id.
[99] Dejusticia, translated excerpts from: Corte Suprema de Justicia, Vallabona, Luis Armando Tolosa, Reporting Judge, *Demanda Generaciones Futuras v. Minabiente*, STC4360-2018, Number: 11001-22-03-000-2018-003119-01 (Approved in the session on April 4th, 2018), Bogotá, D.C.
[100] *Netherlands v. Urgenda*, The Hague Court of Appeal, Civil-law Division, Case number: 200.178.245/01, Case/cause list number: C/09/456689/ HA ZA 13-1396 [Ruling of 9 October 2018].
[101] The Court cited the United Nations Framework Convention on Climate Change – a treaty to which the U.S. is also a party – as well as the case of *Tătar v. Romania* [European Court of Human Rights, 67021/01 (2009)] as supportive of their decision.

While the United States as a whole has not adopted the Precautionary Principle, the principle is binding as customary international law on the United States.[102] Moreover, many sub-national entities have adopted the Precautionary Principle, including the City of San Francisco; Marin County; Mendocino County; Berkeley, California; Eugene, Oregon; Portland, Oregon; and Seattle, Washington.

Santa Clara County, as well, has adopted the Precautionary Principle in some of its policies. In the county's Integrated Pest Management Program, the Precautionary Principle is used as a basis for the promotion of organic farming, sustainable landscaping, and practice grazing.[103] Santa Clara County's own website, in fact, emphasizes support for the Precautionary Principle, stating:

> *Precaution is a guiding principle we can use to stop environmental degradation. The precautionary principle in simpler terms can be described as "A stitch in time saves nine"… When an activity raises threats of harm to human health or the environment, precautionary measures should be taken even if some cause-and-effect relationships are not fully established scientifically.*[104]

The activities proposed for the *Juristac* land, in addition to destroying the pristine condition of this sacred site, have the potential to cause significant environmental harm. Building the sand and gravel pit and all attendant buildings, roads, and processing components, including sewage treatment, will significantly alter and potentially pollute the land.

In addition to the possibility for environmental destruction, degradation, and pollution, there is no doubt that mining of the nature anticipated here uses significant amounts of water. Given the drought that has existed in California over the last decade, and the likelihood of increased drought conditions in the future (especially in light of the recent report by the IPCC on the more dire and immediate impacts we are likely to feel from climate change), the precautionary principle would warrant less use and more preserving of California's water resources. In this situation, the connection between environmental harm and the proposed mining is not even that uncertain. Numerous environmental groups have raised the alarm over the harms to water

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[102] Support for the customary international law nature of the Precautionary Principle in the widespread and consistent recognition of this concept in both binding international treaties such as the Convention on Biological Diversity and the United Nations Framework Convention on Climate Change, as well as non-binding declarations such as the Rio Declaration on the Environment & Development

[103] County of Santa Clara, *Integrated Pest Management Program Progress Report* (2014, available at https://www.sccgov.org/sites/ipm/Documents/IPM%20Progress%20Report%202002-14%20Final.pdf (last accessed October 19, 2018); 2008 County of Santa Clara Legislative Policies and Priorities, *Integrated Waste Management* (2008), available at https://www.sccgov.org/sites/rwr/rwrc/Documents/Draft-2008-SCCo-Legislative-Priorities.pdf (last accessed October 19, 2008).

[104] County of Santa Clara, *Best Practices and Alternative Approaches for Pest Management* (2016), available at https://www.sccgov.org/sites/ipm/Resources/Best%20Practices/Pages/Best-Practices-and-Alternatives-Approaches-to-Pest-Management.aspx (last accessed October 19, 2018).

sources from sand and gravel mining.[105] Given this, the potential for environmental harm and the corresponding negative impact this would have on land of great cultural and spiritual importance to the Amah Mutsun Tribal Band, the Precautionary Principle dictates that the requested mining permit be denied.

VI. INTERNATIONAL LAW SUPPORTS AND PROTECTS THE AMAH MUTSUN TRIBAL BAND'S HISTORICAL, CULTURAL, AND SPIRITUAL CONNECTION TO *JURISTAC* AND PREVENTS ANY USE OF THE LAND THAT WOULD DESTROY THESE CONNECTIONS

Under international law, the term 'peoples' refers to "communities with an identity that connects them to their past ancestors", as well as their traditions, territories, and culture.[106] Breaks in continuity among a peoples, whether in terms of living together as a group or living on their traditional lands, does not remove the status of them as a peoples under international law; particularly in cases where the break was forced such as through colonialization.[107] Removal from traditional land, whether through physical force or through laws, does not remove the spiritual and cultural connection between a peoples and their traditional territories. In fact, a history of forced removal from land or loss of land during the period of colonization makes it even more important to protect land that has significant cultural and spiritual importance to indigenous peoples to ensure that their cultures, traditions, and practices are able to survive for present and future generations.

As described throughout this Memorandum, the land at issue in this case is important culturally and spiritually for the Amah Mutsun Tribal Band. The fact that the Amah Mutsun have not resided on the land in many years does not diminish its importance to their traditions and spiritual relationship with the world. As the Amah Mutsun Tribal Band continues to work to rebuild their heritage, traditions, and community, which were lost due to the colonizing of the land, it is of vital importance that what does remain intact stays that way. The Amah Mutsun Tribal Band is actively engaged in revitalization of their culture and heritage, including language and traditional ecological knowledge.[108] The *Juristac* landscape is a significant part of the revitalization of traditional practices and the lack of access or ownership of the land in more

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[105] The Guardian, *Sand Mining: The Global Crisis You Have Never Heard Of* (2017), available at: https://www.theguardian.com/cities/2017/feb/27/sand-mining-global-environmental-crisis-never-heard (last accessed October 19, 2018); California River Watch, *Fact Sheets*, available at: http://www.ncriverwatch.org/resources/facts.php, (last accessed October 19, 2018); Ako T. A., Onoduku U. S., Oke S. A., Essien B. I., Idris F. N., Umar A. N., and Ahmed A.A., *Environmental Effects of Sand and Gravel Mining on Land and Soil in Luku, Minna, Niger State, North Central Nigeria*, Journal of Geosciences and Geomatics, vol. 2, no. 2 (2014).

[106] James S. Anaya, Indigenous Peoples in International Law (2004), at 3.

[107] Id.

[108] Hannibal, Mary Ellen, "Rekindling the Old Ways: The Amah Mutsun and the Recovery of Traditional Ecological Knowledge", *Bay Nature Magazine* (April-June 2016), available at https://baynature.org/article/rekindling-old-ways/ (last accessed September 25, 2019).

recent history does not diminish its importance in the cultural, spiritual and traditional worldview of the tribal band.

Santa Clara County has an obligation under international law to authorize no activity, such as the proposed sand and gravel mine, that would interfere with this right. This is especially true in light of the historical interference that has already taken place as a result of colonial policies that stripped land from indigenous peoples in California.

The Amah Mutsun Tribal Band, like most of the Ohlone peoples, were subjected to devastating changes during the period of Spanish colonialism and missionization. During the Mission period, the Franciscan fathers actively discouraged or banned traditional Ohlone customs, rites, and rituals.[109] For indigenous peoples, like the Amah Mutsun, there is no separating the cultural and spiritual from the land and the natural features that exist. As has been widely reported, the area in question for the proposed mine is home to several places of cultural significance to the Amah Mutsun Tribal Band including the *Juristac* landscape, which includes four villages, tar pits, tree of Life (Live Oaks),and the spring of eternal life.

Given the cultural and spiritual importance of this land to the Amah Mutsun people, under principles of international law, supported by comparative decisions from regional and state courts, it is imperative that the permits requested for mining activities be denied. The proposed mining would irreversibly change the shape of this land and create a great wound across the landscape for many years to come. Components of the proposed project include spoils stockpiles, visual barriers, a processing plant, and a sewage disposal system, all of which have the potential to destroy the integrity of this vital landscape.[110] While the Applicant states that they will make remediation efforts, there is no way to return the land and landscape to its natural state once it has been destroyed by mining operations. Replanting trees and grass is not the same thing as having the natural landscape in place as it has been for centuries. Moreover, there is no guarantee that particular features of the land, which are fundamental to the Amah Mutsun, will not be harmed.

International law requires states to take indigenous peoples laws, traditions, customs, land tenure systems, and decision-making institutions and procedures into account when making decisions that might affect their lands.[111] As the issue before the Santa Clara County Board of Supervisors is one that will significantly affect lands that are of cultural and spiritual importance to the Amah Mutsun Tribal Band, this must be taken into account by the county in rendering its decision.

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[109] Sherbourne F. Cook. 1943 The Indian versus the Spanish Mission. Ibero-America 21 (Reprinted in 1976 in *The Conflict between the California Indian and White Civilization*. Berkeley and Los Angeles: University of California Press.).
[110] Letter from Faculty, *supra* note 4.
[111] UNDRIP, *supra* note 24; ILO 169, *supra* note 30.

Given the significant damage this mining activity would cause, granting the permit is contrary to international law and goes against the legal trend in other jurisdictions around the world.

The historic mistreatment of the indigenous peoples of the Americas, including in California, is a well-documented fact. Colonization and the creation of the Mission system in California drove indigenous peoples from their lands, broke apart community connections, and forced assimilation both culturally and religiously. Given this history, and in light of existing international law, it is fundamentally important to take all measures possible to protect the efforts of indigenous peoples to enjoy, and in many cases rebuild, their culture and practice their religion. The land in question here, the area of *Juristac* and the sacred sites included within this territory, are fundamental for the Amah Mutsun to freely enjoy their cultures and religion. Under international law, there is an obligation of the United States to address these past historical injustices and ensure future non-interference with human rights and fundamental freedoms, including spiritual and cultural rights.

VII. CONCLUSION

Issues surrounding the rights of indigenous peoples to protect their traditional lands for spiritual and cultural purposes and to have the right to prevent mining and other environmental harm to these lands are not unique to this case. Around the world, indigenous peoples have been fighting for rights to their traditional lands and better protections for the natural environment for the benefit for all. Courts and governments have increasingly been open and supportive of the position that indigenous peoples have a right to these lands, and that more sustainable and active stewardship of natural spaces and natural resources is in everyone's interest. Sustainable development and limits on corporate growth at the expense of the natural world are becoming more common as the basis for legal and policy decisions in a number of countries.

While the histories of the relationships between indigenous peoples and settlers varies from state to state, there can be found everywhere questions of determination of land ownership, use, and protection in the face of the often conflicting situations of desire for development and protection of the environment, as well as cultural and spiritual practices. Courts and legislators around the world have worked over the past several decade to develop equitable definitions of ownership, use, and practice. The United States, the State of California, and the County of Santa Clara should take into consideration the international law on these issues and work being done around the world. Particularly in the Inter-American system, of which the US is a part, and with our fellow Common Law states of New Zealand, Canada, and Australia, there is much that can be drawn upon to understand the responsibilities of protecting indigenous rights to their traditional lands.

The developments in international and comparative law over the past several decades have clearly moved towards the recognition of the rights of indigenous persons to protect their

traditional lands, and to freely engage in their traditional cultural and spiritual practices. Given the important role that the natural world and all its components play in the spiritual beliefs of indigenous peoples, including the Amah Mutsun, careful consideration must be made of any requests to encroach on traditional lands, particularly with something as damaging to the natural landscape as mining and extraction. Moreover, the benefits to all of us of a clean and healthy environment merit consideration of international law supporting a Precautionary Principle approach to these issues and recognition of the natural world as living entity worthy of protection in its own right.

Santa Clara County has an opportunity here to stand up and buck the trend coming out of Washington, DC with the efforts to roll back environmental and human rights protections in favor of corporations and unfettered development. While this is a relatively small piece of land in one corner of the world, our efforts matter. Sand and gravel pits gouge the earth and create scars across the ground, which no amount of remediation can completely heal. There is simply no way to restore the land and its features back to their original state. International law and court decisions coming from regional and domestic tribunals from around the world require action and are supportive of these efforts. Santa Clara County should adhere to this law and follow this global trend and deny the request for a permit for sand and gravel mining on *Juristac*.