



6-3-2020

Justice for Juristac: Using International and Comparative Law to Protect Indigenous Lands

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Zartner, Dana, *Justice for Juristac: Using International and Comparative Law to Protect Indigenous Lands*, 18 SANTA CLARA J. INT'L L. 175 (2020).

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**Justice for *Juristac*:
Using International and
Comparative Law to Protect
Indigenous Lands**

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Abstract

Battles between extractivist industries and indigenous peoples and environmentalists are raging around the world, as well as in our own backyard. At the southern end of the Santa Cruz Mountains in an area called Sargent Ranch, the Amah Mutsun Tribal Band is currently fighting to prevent the creation of a sand and gravel mine on their sacred lands. This article describes this battle and argues that extractivist industries like that proposed at Sargent Ranch are a violation of the cultural and spiritual rights of the indigenous peoples to their traditional land. In particular, this article focuses on the international and comparative law support for the Amah Mutsun's efforts, illustrating 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. 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. There are a number of international legal principles that are binding on the United States, the State of California, and the Country of Santa Clara that support this position and require the denial of the mining permit.

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I. Introduction

Sand mining has become one of the biggest mining sectors in the world.¹ Some estimate that 85% of today's extraction activity is for sand.² Sand mining is also one of the least talked about environmental catastrophes occurring around the globe, and is illegal in many places.³ We may often think of these kinds of issues as being problems plaguing developing countries. Indeed, on a recent trip to Cambodia riding up a river with a non-governmental organization (NGO), we came across an illegal sand dredging operation – one of many which operate with impunity in the country. But it is not only the lands of Cambodia, India, and others that are being affected by this particular extractivist industry.

Right now, not far from Santa Clara University, a fight over sand mining is occurring in our own back yard. At the southern end of the Santa Cruz Mountains is a large tract of land called Sargent Ranch. While it has been in private hands for over a century, the land in question is actually part of the heritage of the Amah Mutsun Tribal Band, one of the many California indigenous communities that were ousted from their lands under the California Mission system and federal and state laws beginning in the late 1700s.⁴

The owners of the property now want to develop a part of the land, known to the Amah Mutsun as *Juristac*, in order to create a sand and gravel mine.⁵ In the midst of this beautiful, natural landscape, they want to dig giant pits out of the earth – scars – to dredge up a few tons of sand and gravel. The Amah Mutsun Tribal Band has been working diligently to stop this from happening and protect this land of historical, cultural, and spiritual importance. Experts from across the Bay Area and California, as well as members of indigenous communities from around the world, have offered support for their efforts.⁶ Analysis has been done on the cultural, spiritual, historical, biological, and environmental damage to the Amah Mutsun, and recognition

¹ Fred Pearce, *The Hidden Environmental Toll of the World's Sand Mining*, YALE ENV'T 360 (Feb. 5, 2019), <https://e360.yale.edu/features/the-hidden-environmental-toll-of-mining-the-worlds-sand>.

² *Id.*

³ *Id.*

⁴ *History*, AMAH MUTSUN TRIBAL BAND, <http://amahmutsun.org/history>, (last visited Jan. 11, 2020).

⁵ Nathan Donato-Weinstein, *After Foreclosure, New Plan for 6.400 Acre Sargent Ranch South of Gilroy*, SILICON VALLEY BUS. J. (Jan. 27, 2016), <https://www.bizjournals.com/sanjose/news/2016/01/27/after-foreclosure-new-plan-for-6-400-acre-sargent.html>.

⁶ *Statements of Support*, PROTECT JURISTAC, <http://www.protectjuristac.org/statements-of-support/> (last visited Jan. 11, 2020).

of the cultural, spiritual, and environmental importance of this land known as *Juristac* is becoming more widely accepted.⁷

In late summer 2020, the Environmental Impact Report conducted on this project is set to be released for public comment.⁸ Most efforts opposing the mining contract have thus far focused on local and state laws and their impact on the situation. There are, however, other areas of law that must be considered as they strongly support the denial of permission for the mine and the protection of *Juristac* as an important historical, spiritual and culture landscape for the Amah Mutsun Tribal Band: international and comparative law. There is a significant role for international and comparative law in supporting the Amah Mutsun's efforts to protect their sacred lands from the scars of extractivist mining. The Amah Mutsun are not alone in the fight against sand mining (as well as other extractivist industries) and there is much that can be done to support their efforts under international law to which the United States is a party, and in the comparative cases that provide legal analysis recognizing the spiritual and cultural importance of indigenous lands. This article, therefore, lays out the key international and comparative laws supporting the Amah Mutsun claim.

This is not the first time indigenous communities have utilized international and comparative law in the U.S. to protect their rights and lands. One of the most famous recent cases involves the Standing Rock Sioux fighting to prevent the passage of the Dakota Access pipeline through sacred lands.⁹ Given the continuously developing international law concerning the rights of indigenous peoples and protections of nature, considering the applicable international and comparative law in domestic situations like that of the Amah Mutsun is an important tool in the advocacy toolbox.

This article will proceed as follows. First, a brief history of the Amah Mutsun Tribal Band and the importance of the land in question to the history, cultural, identity, and spiritual

⁷ Alice Kaufman, *Protect Juristac from Sand Mine*, GREEN FOOTHILLS (Nov. 22, 2019), <https://www.greenfoothills.org/protect-juristac-from-sand-mine/>; see also Katie Brown, *This is Definitely a Local Standing Rock: Sargent Ranch*, SAN JOSE MERCURY NEWS (July 9, 2019), <https://www.mercurynews.com/2019/07/09/this-is-definitely-a-local-standing-rock-sargent-ranch/>.

⁸ *Sargent Quarry Project*, COUNTY OF SANTA CLARA, DEPARTMENT OF PLANNING AND DEVELOPMENT, <https://www.sccgov.org/sites/dpd/Programs/SMARA/Pages/SargentRanch.aspx> (last visited Jan. 11, 2020).

⁹ Indian Law Resource Center, *Standing with Standing Rock*, INDIAN LAW RESOURCE CENTER (Feb. 21, 2017), <https://indianlaw.org/issues/human-rights/standing-rock>; see also Stephen Young, *The Sioux's Suits: Global Law and the Dakota Access Pipeline*, 6 AM. INDIAN L. R. 1 (2017).

practice of the indigenous peoples is provided. Second, an outline of the growing sand and gravel mining movement around the world, highlighting the myriad of problems associated with these extractivist activities is presented. Third, the relationship between the United States and international law relevant to the issue at hand will be discussed, including an explanation of how some key international legal principles are binding on the United States. Fourth, an analysis is provided of some of the legal principles that support the notion that the County of Santa Clara has a responsibility to deny the permit for this new mine. Principles such as the communal right to traditional, cultural and spiritual lands, the right to free, prior, and informed consent, the right to religious expression, and the precautionary principle found in international treaty law, customary international law, and regional and domestic court cases all support the Amah Mutsun's claim that mining on the land of *Juristac* will fundamentally harm the indigenous peoples. Finally, this article concludes with a summary of the argument as to why the Santa Clara County Board of Supervisors, and similarly situated political entities in the U.S. and around the world, should deny extractivist efforts on indigenous lands.

II. The History of the Amah Mutsun and *Juristac*.

In the late 1700s, Spanish missionaries began arriving in California, and almost immediately began displacing many of the coastal indigenous peoples, including the Amah Mutsun. This was followed by the entrenchment of the mission system and the conversion of Native Americans to Christianity. The Mexicans and Americans followed the missionaries over the next century and continued to exclude indigenous peoples from their traditional lands. While some land was occasionally returned to indigenous peoples, very little land was released from private ownership, including the lands that now encompass Sargent Ranch and *Juristac*. Those who fought back were either eliminated or pushed to less desirable lands further east.¹⁰

Today, while recognized by the State of California, the Amah Mutsun Tribal Band is not a federally-recognized tribe.¹¹ It has an enrolled membership of nearly 600 Bureau of Indian Affairs ("BIA") documented individuals, and the number is steadily increasing.¹² Moreover, there are renewed efforts by members of the tribe to revive the language and customs of the tribe,

¹⁰ *History, supra* note 4.

¹¹ *Amah Mutsun Info Sheet*, AMAH MUTSUN TRIBAL BAND (Apr. 7, 2012), <http://amahmutsun.org/archives/591>.

¹² *History, supra* note 4.

as well as the practices of Traditional Ecological Knowledge, much of which pertains to the natural world and the local landscape on which the tribe historically lived – areas like *Juristac*.¹³

The proposed development of the Sargent Quarry Project in the area now known as Sargent Ranch lies at the heart of the ancestral lands of the Amah Mutsun Tribal Band, *Juristac*.¹⁴ The area of *Juristac* is one of immense cultural and spiritual importance to the Amah Mutsun.¹⁵ As with indigenous peoples around the world, the natural environment is an integral part of the whole, everything from the landscape, trees, rivers, to other natural features are imbued with spirits and have cultural significance.¹⁶ 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 people. 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.¹⁷

The Amah Mutsun Tribal Band is deeply concerned about protecting the spirituality of *Juristac*, particularly from the desecration of the land that mining would bring. Removing sediment, which is an integral part of *Juristac* and its spirituality, will irreparably alter the landscape. Once removed or altered, the cultural and sacred significance of the land cannot be restored.¹⁸

As the Amah Mutsun community continues to strengthen and engage in revitalization initiatives, they also continue to practice their “spiritual beliefs through dance, song, and ceremony, offering ... prayers to ... sacred mountains and high places.”¹⁹ They are also involved

¹³ Mary Ellen Hannibal, *Rekindling the Old Ways: The Amah Mutsun and the Recovery of Traditional Ecological Knowledge*, BAY NATURE MAG. (Apr. 6, 2016), <https://baynature.org/article/rekindling-old-ways/>.

¹⁴ Marianne Favro, *Battle Brewing Over Native American Land in Gilroy*, NBC BAY AREA (July 10, 2019), <https://www.nbcbayarea.com/news/local/Battle-Brewing-Over-Native-American-Land-in-Gilroy-512558401.html>.

¹⁵ *Id.*

¹⁶ See generally H. PATRICK GLENN, LEGAL TRADITIONS OF THE WORLD: SUSTAINABLE DIVERSITY IN LAW (4th ed. 2011).

¹⁷ Sydney Gladu, *Sacred Site Slated for Development*, CITY ON A HILL PRESS (Oct. 5, 2017), <https://www.cityonahillpress.com/2017/10/05/sacred-site-slated-for-development/>.

¹⁸ Adrienne Johnson et al., *Letter from Faculty of the Environmental Studies Program at the University of San Francisco in Support of Protecting Juristac* (Nov. 2018), http://www.protectjuristac.org/wp-content/uploads/2018/11/USF_faculty_letter_11-5-18.pdf.

¹⁹ *Amah Mutsun Info Sheet*, *supra* note 11.

in a number of land-based initiatives, which are supported by their belief that “we were put on this earth to care for the lands, waters and denizens of *Popeloutchom*.”²⁰

III. Sargent Ranch and Sand Mining.

Sargent Ranch, a 6,200-acre property within which *Juristac* and the sacred lands of the Amah Mutsun Tribal Band are located, once belonged to the indigenous coastal peoples of California. Through invasions by the Spanish, the Mexicans, and the Americans, the land was taken over and privatized. A few years ago, the owner of Sargent Ranch, LLC declared bankruptcy after plans for developing the land failed to take shape.²¹ The land was then acquired by San Diego-based Debt Acquisition Company of America (DACA).²² In December 2015, DACA filed paperwork with the County of Santa Clara to develop a sand and gravel mine, dubbed “Sargent Quarry,” on over 300 acres of the land. This segment of the property includes the sacred Amah Mutsun site of *Juristac*.

Sand is the most mined resource in the world; estimates indicate between 32 and 50 billion tons of sand and gravel are extracted each year.²³ In the United States alone “production and use of construction sand and gravel was valued at US\$8.9 billion in 2016, and production has increased by 24 percent in the past five years.”²⁴ Demand for sand has risen alongside growth in the building and development industry, particularly urban and luxury development. This increasing urbanization and the corresponding demand for building materials, requires greater amounts of sand.²⁵ Sand is a “key ingredient for concrete, roads, glass, and electronics.”²⁶ While it may seem as though there is plenty of sand available in the world given the planet’s vast desert areas, desert sand, which is rounded by the wind, is not generally usable for concrete.²⁷

While there are major environmental threats from sand mining worldwide, particularly along river deltas like the Yangtze and Mekong, environmental impacts are also being felt in

²⁰ *Id.* (*Popeloutchom* is the term for the native lands of the Amah Mutsun Tribal Band).

²¹ Donato-Weinstein, *supra* note 5.

²² *Id.*

²³ *Id.*

²⁴ Auror Torres, Jianguo Lu, Jodt Brandt & Kristen Lear, *The World is Facing a Global Sand Crisis*, THE CONVERSATION (Sept. 7, 2017), <https://theconversation.com/the-world-is-facing-a-global-sand-crisis-83557>.

²⁵ Kate Whiting, *This is the Environmental Catastrophe You’ve Probably Never Heard of*, WORLD ECON. F. (Apr. 24, 2019), <https://www.weforum.org/agenda/2019/04/global-demand-for-sand-is-wreaking-havoc-on-rivers/>.

²⁶ Torres, et al., *supra* note 24.

²⁷ *Id.*

California.²⁸ There are many environmental hazards from sand mining, including physically altering ecosystems, harming the natural habitats of animal and plant species, and causing erosion that can make communities more vulnerable to flooding, drought, or other extreme or changed weather patterns.²⁹ Additionally, sand and gravel mining of the kind proposed for *Juristac* is what is known as open pit mining. Open pit mines create giant wounds on the earth, ripping up any biodiversity in the way to create open scars on the land. Once this kind of destruction occurs, it is not possible to recreate the landscape and ecosystem that lived there before.³⁰

Analysis by local experts highlights the damage that will be done to the landscape of *Juristac* if the sand and gravel mine is approved. Letters of support from geologists, botanists, anthropologists, and environmentalists highlight devastating impacts such as: destruction of over 300 acres of landscape, depletion of groundwater resources in drought-prone California, adverse impacts on the wildlife and biodiversity of the region, as well as noise and air pollution.³¹ One letter from faculty experts at the University of San Francisco states:

[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. ... [R]esearch shows that extraction sector employment is often characterized by low-skill tasks, contract precarity, and uneven access to opportunities among men and women. Over time, these patterns stiffen, creating a socio-environmental landscape that is unjust.³²

These environmental impacts would be compounded by the cultural and spiritual impacts the destruction of *Juristac* would have on the Amah Mutsun. As discussed in detail below, there

²⁸ *Id.*; see also Dan Weikel, *Coastal Commission Approves Agreement to Close Last Beach Sand Mining Operation in Mainland US*, L.A. TIMES (July 13, 2017), <https://www.latimes.com/local/lanow/la-me-ln-sand-mining-agreement-20170713-story.html>.

²⁹ *Id.*

³⁰ See generally, Masoud Monjezi, et al., *Environmental Impact Assessment of open pit mining in Iran*, 58 ENV'T'L GEOLOGY 205 (2009).

³¹ Kaufman, *supra* note 7.

³² Johnson et al., *supra* note 18.

are multiple connections between indigenous peoples and the site. Once destroyed by something like open pit mining, this connection is irreparably harmed as it is impossible to recreate specific trees, rock outcroppings, or other natural features, which are imbued by indigenous peoples with spirituality. Taken together, these environmental, cultural, and spiritual harms that would come with the approval of the sand mine demonstrate why, in the interests of justice, the mine must not be allowed. Looking to international and comparative law provides tangible legal bases to further support this position.

IV. Why Do We Need International and Comparative Law to Address this Issue?

The United States is known for its reluctance to internalize international law.³³ This does not mean, however, that internalization does not happen. There are international treaties and provisions of customary international law that are binding on the United States, and correspondingly other sub-state actors, such as the State of California and the County of Santa Clara. A number of these provisions support the claims of the Amah Mutsun Tribal Band that the land of *Juristac*, as culturally and spiritually important to them, should not be opened up for sand and gravel mining. In cases like this one, there is a great deal of supporting international law and comparative law from other jurisdictions that can fill in gaps that currently exist under the laws of the U.S. and California on these issues.

A. The Gaps in Domestic Law.

While the United States Constitution recognizes a right to freely practice one's religion and a right to equal protection under the law, there is little else expressed in U.S. Constitutional or federal law that directly speaks to the issue facing the Amah Mutsun.³⁴ There are some informal principles from the National Park Service that are relevant for the issue at hand. National Park Service Bulletin 15, for example, states that "a site can possess associative significance or information potential or both...."³⁵ 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

³³ DANA ZARTNER, COURTS, CODES, AND CUSTOMS: LEGAL TRADITION AND STATE POLICY TOWARDS INTERNATIONAL HUMAN RIGHTS AND ENVIRONMENTAL LAW 51-53, 64 (Oxford Univ. Press 2014).

³⁴ See generally, U.S. CONST.

³⁵ U.S. Department of the Interior, National Park Service, NATIONAL REGISTER BULLETIN NO. 15, https://www.nps.gov/subjects/nationalregister/upload/NRB-15_web508.pdf.

have to convey its significance visually to the general public....”³⁶ This idea of recognizing the special cultural and spiritual connection to the land, when coupled with international law, provides strong support for the Amah Mutsun Tribal Band’s request to deny the mining permit.

Additionally, there is some relevant law in the State of California, including the California Environmental Quality Act (CEQA) and Assembly Bill (AB) 52 applying CEQA to Native Americans. But neither of these pieces of legislation provide specific guidance on intangible tribal resources, such as land with spiritual and cultural importance.³⁷ This leaves legal gaps that are necessary to fill when balancing extractivist plans, like those for the Sargent Quarry, and claims such as those made the Amah Mutsun Tribal band to protect their sacred lands. The use of international and comparative law can help fill these gaps and support the protection of *Juristac*.

B. International and Comparative Law in the United States.

While international law has not always been readily internalized in the U.S., that does not mean that international law does not, and should not, apply in the U.S., or that legal and policy bodies in the United States shouldn’t draw lessons from similar situations that have occurred in other countries. The multilayered and intersectional nature of issues like those facing the Amah Mutsun, moreover, makes it clear that approaching the problem from just a domestic legal perspective is not enough. What issues like indigenous rights, environmental justice, and preventing the destruction of habitat by extractivist industries like sand mining require is multilevel and innovative activism. To achieve this, it is essential to use every tool available, including international and comparative law.

According to the Constitution of the United States, treaties are the “supreme law of the land.”³⁸ The U.S. Supreme Court reiterated this in 1900 when they stated that “[i]nternational law is part of our law.”³⁹ The United States became a party to the United Nations (the “U.N.”) in 1945, and in accordance with its Charter, in 1946 the U.N. created the Statute of the International

³⁶ *U.S. Department of the Interior, National Park Service, NATIONAL REGISTER BULLETIN NO. 36: GUIDELINES FOR EVALUATING AND REGISTERING ARCHAEOLOGICAL PROPERTIES*, <https://www.nps.gov/subjects/nationalregister/upload/NRB36-Complete.pdf>.

³⁷ Native Americans: California Environmental Quality Act, A. B. 52, 2013-2014 Leg. Assemb. (Ca. 2004).

³⁸ U.S. CONST. art. VI.

³⁹ *The Paquete Habana*, 175 U.S. 677, 700 (1900).

Court of Justice, which is binding on all UN member states.⁴⁰ Article 38 of the Statute provides the recognized sources of international law, including treaties and customary international law.⁴¹ The United States later solidified its recognition of customary international law as a form of law in the Restatement (3rd) of Foreign Relations Law of the United States.⁴² 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.”⁴³ Therefore, international law is relevant as a framework for interpretation of rights domestically.⁴⁴

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 U.S. 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 should be considered persuasive, if not binding, in the United States.

The United States is party to two significant human rights treaties that contain provisions relevant to the issue of sand mining on land of cultural importance to the Amah Mutsun Tribal Band: the International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Elimination All Forms of Racial Discrimination (CERD). The United States ratified the International Covenant on Civil and Political Rights in 1992.⁴⁵ The obligations of the United States under the treaty apply to all federal, state, and local government entities and agents.⁴⁶ This

⁴⁰ U.N. Charter art. 92-94.

⁴¹ Statute of the International Court of Justice art. 38, June 26, 1945, 59 Stat. 1055, 1060, 33 U.N.T.S. 993 [hereinafter I.C.J. Statute].

⁴² RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (A. LAW. INST. 1987).

⁴³ Gary Born, *Customary International Law in United States Courts*, 92 WASH. L. REV. 1641, 1645 (2017).

⁴⁴ CENTRE FOR INTERNATIONAL GOVERNANCE INNOVATION, UNDRIP IMPLEMENTATION BRAIDING INTERNATIONAL, DOMESTIC AND INDIGENOUS LAWS: SPECIAL REPORT 23 (2017).

⁴⁵ International Covenant on Civil and Political Rights, Mar. 23, 1976, 999 U.N.T.S. 171 [hereinafter ICCPR]; *see also* ACLU, *FAQ: The Covenant on Civil and Political Rights (ICCPR)*, ACLU.ORG (Apr. 2019), <http://www.aclu.org/other/faq-covenant-civil-political-rights-iccpr>. 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.

⁴⁶ *Id.*

means the relevant provisions of the ICCPR apply to government actions in all states and counties in matters in which they have jurisdiction.⁴⁷ 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.

The ICCPR includes a number of provisions relevant to the Amah Mutsun's efforts to protect their sacred land. These include Article 1, which protects the right of self-determination of peoples and the right to freely pursue social and cultural development, as well as engage with the use of natural wealth and resources; Article 18, which protects freedom of religion; and Article 27, which protects the rights of minority groups.⁴⁸ Article 27 specifically says that states have a special responsibility towards ethnic, religious or linguistic minorities and that members of these groups have the right to "enjoy their own culture, to profess and practice their own religion, or to use their own language."⁴⁹

In 1994, the United States also ratified the Convention on the Elimination of All Forms of Racial Discrimination. CERD is important here because the treaty provides international recognition for the special importance states must attach to ensure that indigenous 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.⁵⁰

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

⁴⁷ *Id.*

⁴⁸ ICCPR, *supra* note 45, at art. 1, art. 18, art. 27.

⁴⁹ *Id.* at art. 27.

⁵⁰ G.A. Res. 2106 (XX), International Convention on the Elimination of All Forms of Racial Discrimination, at art. 1(1) (Dec. 21, 1965) [hereinafter CERD].

shall not be continued after the objectives for which they were taken have been achieved.⁵¹

According to the former UN Special Rapporteur on the Rights of Indigenous Peoples, Professor James Anaya, international legal provisions like these found in CERD confer upon states a special duty to consult with indigenous peoples when a state decision has the potential to affect them in ways not felt by other members of society.⁵² This includes both recognizing historical (and current) discrimination faced by indigenous peoples, and also addressing 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 to remedy historical wrongs and provides 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 has obligations under customary international law, which require protections relevant to the issue at hand. Customary international law reflects the body of widespread and consistent practices of states done out of a sense of legal obligation.⁵³ Customary international law is a binding form of law, both within the international system at large and in the United States.⁵⁴ Customary international law can be 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.⁵⁵

There are numerous documents and decisions relevant to the case of the Amah Mutsun 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).⁵⁶ UNDRIP was

⁵¹ *Id.* at art. 1(4).

⁵² James Anaya, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, U.N. Doc. A/HRC/12/34 (2009), at 15.

⁵³ RESTATEMENT (THIRD), *supra* note 42, § 102(2) ("Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.")

⁵⁴ I.C.J. Statute, *supra* note 41; *see also* The Paquete Habana, 175 U.S. 677 (1900).

⁵⁵ *The Paquete Habana*, 175 U.S. 677.

⁵⁶ G.A. Res. 61/295, Declaration on the Rights of Indigenous Peoples (Oct. 2, 2007) [hereinafter UNDRIP].

adopted by the United Nations General Assembly in September 2007. President Barack Obama specifically endorsed the principles of UNDRIP in December 2010.⁵⁷ The United States further reaffirmed its commitment to UNDRIP and the binding nature of its provisions in its footnote to the American Declaration on the Rights of Indigenous Peoples, 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 [*Organization of American States*] 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.⁵⁸

While a declaration and not a treaty, UNDRIP is widely held 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.⁵⁹ 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.”⁶⁰ Moreover, UNDRIP has been repeatedly cited by domestic courts around the world, as well as 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 article in support of the arguments of the Amah Mutsun Tribal Band. Specifically the more holistic understanding of the cultural and spiritual importance of land to indigenous peoples, the right to Free, Prior, and Informed Consent (FPIC) for any

⁵⁷ The White House: Office of the Press Secretary, *Remarks by the President at the White House Tribal Nations Conference* (Dec. 16, 2010), <https://obamawhitehouse.archives.gov/the-press-office/2010/12/16/remarks-president-white-house-tribal-nations-conference>.

⁵⁸ Organization of American States [OAS], General Assembly Res. 2888, *American Declaration on the Rights of Indigenous Peoples*, at 47 n.1, OAS Doc. AG/RES. 2888 (XLVI-O/16) (June 15, 2016).

⁵⁹ CENTRE FOR INTERNATIONAL GOVERNANCE INNOVATION, *supra* note 44, at 8; *see also* Manitoba Metis Federation Inc. v. Canada (Attorney General), [2013] 1 S.C.R. 623 (Can.).

⁶⁰ COMMISSION ON HUMAN RIGHTS: REPORT TO THE ECONOMIC AND SOCIAL COUNCIL ON THE EIGHTEENTH SESSION OF THE COMMISSION, UNESCO, 34th Sess., U.N. Doc. E/CN.4/832 (26 April 1962), para. 105.

projects that might impact indigenous lands, and the special need to redress past wrongs in considering contemporary issues involving indigenous peoples.⁶¹

Supporting the provisions of UNDRIP are additional customary international laws found in the Universal Declaration on Human Rights (UDHR),⁶² the International Labor Organization Convention 169 (ILO 169),⁶³ and the provisions of numerous environmental treaties, including the Convention on Biological Diversity (CBD),⁶⁴ the Rio Declaration on the Environment and Development,⁶⁵ and the Paris Agreement.⁶⁶ 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.⁶⁷ Each of these international documents has risen to the level of customary international law. Indeed, the widespread acceptance among states of their respective provisions, the consistent agreement of states about these principles, and the statements and actions by states, lend support to the notion that the principles contained in these legal documents are considered binding customary international law.⁶⁸ Additionally, courts around the world have declared certain specific provisions within these documents to be customary international law. Further, even sub-national government entities, including the counties of Santa Clara, San Francisco, and Marin, have recognized the importance of some of these norms, such as the Precautionary Principle (discussed *infra*, Section V.C.).

⁶¹ UNDRIP, *supra* note 56.

⁶² G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) [hereinafter UDHR].

⁶³ Int'l Labor Organization (ILO), C169, Indigenous and Tribal Peoples Convention, June 27, 1989, 1650 U.N.T.S. 28383 [hereinafter ILO 169].

⁶⁴ Convention on Biological Diversity, June 5, 1992, 1760 U.N.T.S. 30619; 31 I.L.M. 818.

⁶⁵ U.N. Conf. on Env't and Dev., Rio Declaration on Environment and Development, U.N. Doc. A/CONF.151/26 (Vol. I), 31 I.L.M. 874 (Jun. 14, 1992).

⁶⁶ Conference of the Parties, Adoption of the Paris Agreement, Dec. 12, 2015, U.N. Doc. FCCC/CP/2015/L.9/Rev/1 (Dec. 12, 2015) [hereinafter Paris Agreement].

⁶⁷ ILO 169, *supra* note 63. 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 of the land in that it is of cultural and spiritual importance to their history and beliefs.

⁶⁸ 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 & Claudio Grossman, *The Case of the Awas Tingni v. Nicaragua: A New Step in the International Law of Indigenous Peoples*, 19 ARIZ. J. INT'L & COMP. L. 1, 15 (2002).

The United States is also a member of the Organization of American States, and therefore is a member of the Inter-American Commission of Human Rights (IACHR), which is one of the principal charter organs of the OAS.⁶⁹ The IACHR reviews cases of alleged human rights violations by member states and issues 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.”⁷⁰ The U.S. has not ratified the Inter-American Convention, nor are they party to the Inter-American Court of Human Rights.

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. As described here, 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. For example, in *Chunie v. Ringrose*, the 9th Circuit Court of Appeals, citing to the U.S. Supreme Court decision in *Barker v. Harvey*, recognized that the rules of international law “undoubtedly” apply to cases concerning indigenous peoples and use of land in the United States.⁷¹

In addition to these international laws, there is comparative law that supports the Amah Mutsun’s claims. 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. This

⁶⁹ Charter of the Organization of American States, Apr. 30, 1948, Chapter XV, 2 U.S.T. 2394, 119 U.N.T.S. 3.

⁷⁰ CENTRE FOR INTERNATIONAL GOVERNANCE INNOVATION, *supra* note 44, at 70-71.

⁷¹ See *United States ex Rel. Chunie v. Ringrose*, 788 F.2d 638 (9th Cir. 1986). While raising the question of indigenous land claims, this case 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.

article will highlight some of these comparative legal decisions 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 a persuasive sign of global trends on a particular issue. This has been recognized by the United States Supreme Court, as well as states such as California, to make use of available knowledge from around the world on particular issues.⁷²

Given its significance, the maintenance of the pristine nature of the *Juristac* landscape is of fundamental importance to the Amah Mutsun's culture and spirituality. Moreover, the preservation of this pristine natural environment is important for the overall ecological health of the area. The mines proposed by Sargent Ranch are literally 'wounds on the earth' that destroy the sacred nature of a given site. Stories have emerged of the devastating effects extractivist projects, including mining, have had on indigenous peoples' ways of life and traditional knowledge and practices from countries the world over, as well as the effects on the natural environment as a whole.⁷³ Increasingly, courts and policymakers around the world are 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 chthonic⁷⁴ 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 people (particularly indigenous peoples), the 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, in discussing the granting of a permit for the quarry project, it is important to bring to light all information pertinent to the issues at hand, including international and comparative law, to illuminate why it is so essential that this permit be denied.

⁷² See *Roper v. Simmons*, 543 U. S. 551 (2005); see also Craig Miller, *Californians Take Drought Lessons From Down Under*, KQED (Nov. 2, 2015), <https://www.kqed.org/science/329656/californians-take-drought-lessons-from-down-under> (discussing how states like California, have sent teams to Australia to learn how Australians are addressing drought and other environmental effects of climate change).

⁷³ *Indigenous peoples suffer abuses in race for natural resources*, UN NEWS (Sept. 20, 2011), <https://news.un.org/en/story/2011/09/387482-indigenous-peoples-suffer-abuses-race-natural-resources-un-rights-expert>.

⁷⁴ '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 GLENN, *supra* note 16.

V. International and Comparative Laws Require the Protection of *Juristac*.

As discussed in the previous section, there are international laws that are binding on the United States, as well as on sub-state entities like the State of California and the County of Santa Clara. Many of these binding international legal principles support the protection of *Juristac* and recognition of its unique cultural and spiritual importance to the Amah Mutsun Tribal Band. This section will discuss in more detail the primary international and comparative laws relevant to this case. These principles, coupled with domestic law and trends in public support for preserving lands and recognizing indigenous rights, demonstrate a clear position that must be taken on this issue: preserve *Juristac*.

A. 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 conceptions of nature, community, and the human-nature relationship. Enlightenment-era philosophies, such as those espoused by Locke and Montesquieu, influenced the drafters of U.S. founding law and were grounded in the idea of a right to property. This, in turn, was based on the right of individuals to own land and have control over that which they owned.⁷⁵ 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. This is an individualist view of land, supported by the individualist legal culture of the United States and grounded in the country's history and legal foundations.⁷⁶

International and comparative law, however, supports a different view of land and nature, one less focused on individual rights and more focused on the communal good and respect of nature for nature's sake. This view requires ownership to be limited by the interests of the community as a whole or the needs of the natural space, particularly in terms of how ownership impacts protecting cultural traditions, natural resources, and environmental health. International

⁷⁵ ZARTNER, *supra* note 33.

⁷⁶ *Id.*

law clearly requires consideration of the cultural and spiritual importance of land to indigenous peoples when making decisions about land use.⁷⁷

1. Communal View of the Law and the Land.

A common thread among indigenous peoples around the world is a communal view of land, a more holistic view of the natural world, and a belief in a greater symbiosis between human beings and nature.⁷⁸ Many indigenous communities recognize nature has its own rights as an independent entity, equally important with human beings in the balance of life.⁷⁹ These factors all combine to form a more communal view of law, which is distinguishable from an individualist one. Whether a society leans communal or individualist is shaped by the society's self-image and understanding in terms of "I" or "we" and the "degree of interdependence a society maintains among its members."⁸⁰ The greater the interdependence and focus on responsibilities to the community (which for many indigenous peoples includes the natural and spiritual worlds), the more communal the legal tradition.⁸¹ Many communal societies emphasize the good of the group over individual rights and are more likely to have a collective form of dispute resolution. This process is valued among indigenous communities for its ability "to foster harmony and relations within and between communities."⁸² Maintenance of social harmony and the balance of nature is more important in considering solutions than the ideas of right or wrong, guilt or innocence.⁸³

Additionally, some cultures believe that the behavior of the community transcends the present.⁸⁴ 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.⁸⁵ This is particularly relevant when discussing land and natural resources. Under

⁷⁷ UNDRIP, *supra* note 56; ILO 169, *supra* note 63; Anaya & Grossman, *supra* note 68.

⁷⁸ GLENN, *supra* note 16, at 63; ZARTNER, *supra* note 33, at 34-35.

⁷⁹ *Id.*

⁸⁰ Country Comparison, HOFSTEDE INSIGHTS, <https://www.hofstede-insights.com/country-comparison/the-usa/> (last visited Oct. 7, 2018); *see also* ZARTNER, *supra* note 33.

⁸¹ Dana Zartner, *The Culture of Law: Understanding the Influence of Legal Tradition of Transitional Justice in Post-Conflict Societies*, 22 IND. INT'L & COMP. L. REV. 297 (2012).

⁸² CENTRE FOR INTERNATIONAL GOVERNANCE INNOVATION, *supra* note 44, at 77.

⁸³ ZARTNER, *supra* note 33, at 44.

⁸⁴ 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 11-12 (Luc Huyse & Mark Salter eds., 2008).

⁸⁵ *Id.*

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.⁸⁶ These ideas are the basis for much of today’s ‘sustainability’ discussion.

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 varied in their traditions and cultures, “all indigenous peoples of the world share one thing in common: 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.”⁸⁷ 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 codified this recognition into the provisions of treaties and declarations.⁸⁸ 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 position that “the international human right of property embraces the communal property regimes of indigenous peoples as defined by their own customs and traditions.”⁸⁹ This interpretation has also been accepted by the Inter-American Court of Human Rights, which held that this view of property is binding even on those states, like the U.S., that are not a party to the American Convention on Human Rights.⁹⁰

⁸⁶ ZARTNER, *supra* note 33.

⁸⁷ Katje Göcke, *Protection and Realization of Indigenous Peoples’ Land Rights at the National and International Level*, 5 GOETTINGEN J. OF INT’L L. 1 (2013), at 90.

⁸⁸ ICCPR, *supra* note 45; CERD, *supra* note 50; ILO 169, *supra* note 63; UNDRIP, *supra* note 56 (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.)

⁸⁹ Anaya & Grossman, *supra* note 68, at 12.

⁹⁰ *Id.* While not party to the American Convention on Human Rights or a member of the Inter-American Court of Human Rights, the U.S. is a member of the Organization of American States and thus the Inter-American Commission on Human Rights. The interpretation of the Commission serves as a guideline for OAS members, and thus applies to the United States.

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 any 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.”⁹¹ 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....”⁹²

This consideration of the importance of land for the cultural and spiritual life of an indigenous community is true even for those peoples who have neither owned, nor lived, on the land in question for many years, like the Amah Mutsun Tribal Band.⁹³ 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.

This question in this moment is not about returning the land to the possession of the Amah Mutsun Tribal Band, but rather 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 not unique to California or the United States. To illustrate, 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 at this moment, they are asking that the County of Santa Clara acknowledge their historical, cultural, and spiritual ties to the land and

⁹¹ GLENN, *supra* note 16.

⁹² *Id.*

⁹³ Anaya & Grossman, *supra* note 68, at 2. In the *Awas Tingni* case, the 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.”; *see also* Göcke, *supra* note 87 (inherent land rights are those not derived from Colonial powers.)

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.

2. Legal Recognition of the Cultural Importance of the Land.

In addition to recognizing the communal view of land held by indigenous peoples and other communally-centered 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.⁹⁴

This understanding of land and the natural environment, as well as the communal view of land held by indigenous peoples, is enshrined in international law. The relationship between indigenous peoples and the natural environment, including land, flora, fauna, and resources, is recognized as one requiring special consideration, particularly in situations where there is a question around the use of 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.⁹⁵ Under international law, states have an obligation to make decisions regarding law and policy in a manner that takes into account the customary law, values, customs, and mores of the indigenous community where those decisions impact indigenous peoples.⁹⁶

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, and engage with the use of natural wealth and resources.⁹⁷ UNDRIP further develops these principles and provides in Article 31: “[i]ndigenous

⁹⁴ UNDRIP, *supra* note 56, at 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.”)

⁹⁵ *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Inter-Am. Ct. H.R. (ser. C) No. 79, at 82 (Aug. 31, 2001) [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.” *Id.* at 74.

⁹⁶ *Id.* at 69; *Kalina and Lokono Peoples v. Suriname*, Inter-Am. Ct. H.R. (ser. C) No. 309 (Nov. 25, 2015).

⁹⁷ ICCPR, *supra* note 45, at art. 1.

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 indigenous peoples’ right to cultural development and cultural development ties the natural landscape to the history, spirituality, and cultural traditions of the peoples.

The situation is somewhat less straightforward for landless peoples such as the Amah Mutsun than it is for those indigenous communities, both around the world and here in the U.S., who are in possession of their traditional lands. This difference in recognition is through no fault of the Amah Mutsun Tribal Band, but rather is the result of the history of colonialism and the discrimination and displacement practices that took place in California.⁹⁸ Lacking current possession of the land in no way diminishes the importance of *Juristac* in the cultural and spiritual life of the Amah Mutsun Tribal Band or the right to have their culture protected.

Additionally, it is important to remember that the different treatment of the Amah Mutsun people is an independent and discrete 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.⁹⁹ The treaty, under Article 5, requires 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.”¹⁰⁰ These provisions are bolstered by Article 27 of the ICCPR, which states:

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.¹⁰¹

Taken together, these legal principles outline a clear codification in international law of a right to culture and cultural development, and emphasize this right must be protected. Failure to provide protection is not only a violation of this right, but also subsidiary obligations such as the right to self-determination and the right to development. The Amah Mutsun Tribal Band’s request is much less far-reaching than anticipated by the treaties. In this instance, the request is

⁹⁸ Debra Utacia Krol, *Can Native American Tribes Protect Their Land if They’re Not Recognized By The Government?*, THE REVELATOR (Mar. 12, 2019), <https://therevelator.org/native-american-tribes-protect-land/>.

⁹⁹ CERD, *supra* note 50, at art. 1.

¹⁰⁰ *Id.* at art. 5.

¹⁰¹ *Id.* at art. 27.

simply to preserve an untouched parcel of land which is of fundamental historical, cultural, and spiritual importance to the Amah Mutsun, and which remains a key component of the culture and religion of the peoples and is essential for the future development of their culture.

The State of California follows international law in recognizing these principles. Assembly Bill (AB) 52, an update to the California Environmental Quality Act (CEQA) that focuses on impacts to tribal cultural resources in the state, recognizes “that California Native American prehistoric, historic, archeological, cultural, and sacred places are essential elements in tribal cultural traditions, heritages, and identities.”¹⁰² In other words, California law accepts these cultural and sacred places are “essential” in tribal culture, tradition, heritage, and identities, and support international law’s recognition of a duty to protect and sustain culture and a right to cultural development for present and future generations. Therefore, it follows from these laws that protection of cultural and sacred spaces is necessary to protect these rights and fulfill these obligations to culture and cultural development tied to historically important lands, like *Juristac*.

3. Legal Recognition of the Spiritual Importance of the Land.

In addition to legal recognition of the cultural importance of land, international law acknowledges 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 spirituality are interwoven into every aspect of life.¹⁰³

There are very strong protections under international law for the freedom of religious expression and practice, just as there are under U.S. Constitutional law.¹⁰⁴ 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.”¹⁰⁵

¹⁰² Native Americans: California Environmental Quality Act, *supra* note 37.

¹⁰³ UNDRIP, *supra* note 56; *United Nations Permanent Forum on Indigenous Issues*, INDIGENOUS PEOPLES – LAND, TERRITORIES, AND NATURAL RESOURCES, https://www.un.org/en/events/indigenousday/pdf/Backgrounder_LTNR_FINAL.pdf (last visited Sept. 25, 2019).

¹⁰⁴ ICCPR, *supra* note 45, at art. 18; *Awat Tingni*, *supra* note 95, at 70.

¹⁰⁵ UNDRIP, *supra* note 56, at art. 12(1).

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 others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.¹⁰⁶

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.”¹⁰⁷

None of these international legal 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 situation regarding the question of sand mining on *Juristac* that threatens public safety, order, health or morals in a way that would justify denial of the rights of the Amah Mutsun. Moreover, nothing in these international legal principles, nor in the U.S. Constitution’s First Amendment protecting the freedom of religion, indicate 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.¹⁰⁸ Even U.S. law specifically recognizes this. The American Indian Religious Freedom Act was enacted to ensure that Native Americans could freely practice their faith, according to their own customs, and have access to their sacred sites.¹⁰⁹

Native Americans, and most indigenous peoples around the world, have “land-based religions, which means they practice their religion within specific geographic locations.”¹¹⁰ Territory can be deemed sacred due to remains of ancestors buried there, spirits found there, or the religious significance of natural features, such as hills, which are inhabited by these spirits.¹¹¹

¹⁰⁶ ICCPR, *supra* note 45, at art. 1, art. 18.

¹⁰⁷ *Id.* at art. 18.

¹⁰⁸ There are some limitations on religious freedom in the United States, but these are, indeed, very limited.

¹⁰⁹ Rosalyn R. LaPier, *Why Native Americans Struggle to Protect their Sacred Places*, THE CONVERSATION (Aug. 28, 2018), <https://truthout.org/articles/why-native-americans-struggle-to-protect-their-sacred-places/>.

¹¹⁰ *Id.*

¹¹¹ *Awah Tingni*, *supra* note 95, at 1.

For indigenous peoples, “[s]acred sites are like churches; they are places of great healing and magnetism.”¹¹²

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....¹¹³

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.¹¹⁴

Similarly, in New Zealand the High Court held a planning tribunal must take into account “Maori spiritual and cultural values” and the Maori’s “spiritual, cultural and traditional relationships with natural water.”¹¹⁵ In that 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 tributary stream 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, which would impact both the physical and spiritual sustenance provided by the Waikato River to the Maori people.¹¹⁶

This recognition of indigenous peoples’ spirituality and connection with the land is even discussed in opinions written by justices of the Supreme Court of the United States. *Lyng v.*

¹¹² LaPier, *supra* note 109 (quoting Joseph Toledo, a Jemez Pueblo tribal leader).

¹¹³ *Awas Tingni*, *supra* note 95, at 1.

¹¹⁴ *Id.* at 2.

¹¹⁵ *Huakina Development Trust v. Waikato Valley Authority* [1987] 2 NZLR 188 (N.Z.).

¹¹⁶ *Id.*

Northwest Indian Cemetery Protection Association concerned the construction of a U.S. 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. While the U.S. Supreme Court ultimately allowed the road, Justice William Brennan's dissenting opinion clearly highlights 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."¹¹⁷ Justice Brennan went on to further recognize the importance of this connection and the need to protect it:

[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.¹¹⁸

The land of *Juristac* is spiritual for the Amah Mutsun Tribal Band. *Juristac* is home to *Kuksui*, "the spiritual leader of the Amah Mutsun," and a "prominent mythical character" among the Ohlone peoples more broadly.¹¹⁹ *Juristac* is also home to several other deities.¹²⁰ The Amah Mutsun believe these deities restore "life balance" and harmony among all living things, which, as discussed above is not limited to the Amah Mutsun, but is a crucial feature of the culture and spirituality of indigenous peoples around the world.¹²¹

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

¹¹⁷ *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439, 461 (1987) (Brennan, J., dissenting).

¹¹⁸ *Id.* at 460.

¹¹⁹ Johnson et al., *supra* note 18; Gladu, *supra* note 17.

¹²⁰ *Walking to Renew the Sacred*, PROTECT JURISTAC (Sept. 24, 2019), <http://www.protectjuristac.org/updates/walking-to-renew-the-sacred/>.

¹²¹ *Id.*

landscape is a metaphor for life.¹²² Additionally, the religious practices of the Amah Mutsun are connected to the watershed making these natural features also very important to the Amah Mutsun.¹²³ The live oak trees are home to spirits, and the hills are important because of the plants growing there including willows, tule, and oaks. These plants were fundamental to the Amah Mutsun peoples and used in daily life, for example to make baskets, in addition to their cultural and spiritual importance.¹²⁴ Maintaining this sacred and spiritual landscape is of fundamental importance for the Amah Mutsun as they work to rebuild their culture and traditional practices.

Land and the landscape are fundamental to physical, cultural and spiritual life for indigenous peoples like the Amah Mutsun. 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.”¹²⁵ International and comparative 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.”¹²⁶ 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.

B. 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

¹²² Edward Ketchum, *Amah Mutsun Band of Ohlone Costanoan Indian*, in *GATHERING OF VOICES: THE NATIVE PEOPLES OF THE CENTRAL CALIFORNIA COAST* 206-207 (Linda Yamane ed., 2002).

¹²³ *Id.*

¹²⁴ Barbara R. Bocek, *Ethnobotany of Costanoan Indians, California, Based on Collections by John P. Harrington*, 38 *ECON. BOTANY* 240, 240-255 (1984).

¹²⁵ 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 Sawhoyamaya Indigenous Community v. Paraguay, Inter-Am. Ct. H.R. (ser. C) No. 146 ¶131 (Mar. 29, 2006)).

¹²⁶ UNDRIP, *supra* note 56, at art. 25.

(prior) based on all the relevant information reflecting all views and positions (informed); and the demonstration of clear and compelling agreement, including traditional consensus procedures (consent).¹²⁷ FPIC also 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.”¹²⁸

FPIC is supported by numerous international treaties and customary international law.¹²⁹ ICCPR Article 1, which supports 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 FPIC when adopting measures affecting the rights of indigenous peoples. FPIC is seen as a means of preventing the disappearance of their cultures and as necessary to ensure their survival.¹³⁰ 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.¹³¹

In 2006, the Inter-American Commission reached the same conclusion. The case before the commission 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

¹²⁷ INT’L INDIAN TREATY COUNCIL, INDIGENOUS PEOPLES AND THE RIGHT TO FREE, PRIOR, AND INFORMED CONSENT 1-2 (2013), https://www.iitc.org/wp-content/uploads/2014/07/Indigenous-Peoples-and-the-Right-to-Free-Prior-and-Informed-Consent_121013-WEB.pdf.

¹²⁸ *Tsleil-Waututh Nation v. Canada*, [2018] F.C. 153, para. 501 (Can.) (quoting *Haida Nation v. British Columbia*, [2004] S.C.R. 73, para. 46 (Can.)).

¹²⁹ ICCPR, *supra* note 45; CERD, *supra* note 50. CERD 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 56, at 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 63, at arts. 6, 15; European Parliament, Directorate-General for External Policies, *Indigenous Peoples, Extractive Industries and Human Rights*, EXPO/B/DROI/2013.23 (2014), at 6; *Kichwa Indigenous People of Saroyaku v. Ecuador*, Inter-Am. Ct. H.R. (ser. C) No. 245, (June 27, 2012); *Tsleil-Waututh Nation v. Canada*, F.C. 153 at para. 6.

¹³⁰ Comm. on the Elimination of Racial Discrimination, *Consideration of Reports Submitted by States Parties Under Article 9 of the Convention*, CERD/C/USA/CO/6, <http://undocs.org/CERD/C/USA/CO/6> (last visited Oct. 18, 2018); CERD Report of the Committee on the Elimination of Racial Discrimination, 80th Session, GA 67th Sess. Supp. NO. 18 (A/67/18), <https://www2.ohchr.org/english/bodies/cerd/docs/A.67.18%20English.pdf>.

¹³¹ UNDRIP, *supra* note 56, at arts. 10, 19, 29, 32; ILO 169, *supra* note 63, at art. 6.

peoples that the indigenous people's consent to natural resource exploitation activities on their traditional territories is always required by law."¹³² Similar decisions were made by the African Commission on Human and Peoples Rights, and in the case of the Endorois of Kenya held:

“[i]n terms of consultation, the threshold is especially stringent in favor of indigenous peoples.... [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.”¹³³

Additional cases have arisen in jurisdictions around the world concerning whether native peoples were given adequate opportunity for free, prior, and informed consent. These cases frequently occur in the context 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 worldwide have heard cases brought on behalf of indigenous groups and consistently, and increasingly, find in favor of indigenous peoples' claims that extractivist industries interfere with their cultural and spiritual connections to land and with their right to free, prior, and informed consent. In addition to those mentioned above, similar cases have arisen in Ecuador, Nicaragua, Peru, Bolivia, New Zealand, India, and Canada, among others.¹³⁴

The County of Santa Clara, in conformance with both California and U.S. law, initiated the FPIC process for the land in question by calling for an independent study on its importance to the history of the Amah Mutsun peoples.¹³⁵ The Amah Mutsun Tribal Band 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 is increasingly favoring indigenous

¹³² Inter-American Commission on Human Rights, Application to the Inter-American Court of Human Rights in the Case of 12 Saramaka Clans against the Republic of Suriname, Case 12.338, Inter-Am. Comm'n H.R., ¶ 154 (2006).

¹³³ Center for Minority Rights Development (Kenya) and Minority Rights Group International on Behalf of Endorois Welfare Council v. Kenya, 276/2003, Afr. Comm'n H.P.R., ¶ 226 and 291 (Feb. 4, 2010).

¹³⁴ European Parliament, *supra* note 129, at 12-13; Haida Nation v. British Columbia (Minister of Forests), [2004] 3 S.C.R. 511, at para. 27 (Can.); 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); *see also* M. Cirone, *The Vedanta Case in India*, CEDAT (2012), <http://www.ejolt.org/2015/08/vedanta-case-india/> (last visited Oct. 19, 2018).

¹³⁵ Native Americans: California Environmental Quality Act, *supra* note 37.

peoples when 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. Any analysis of the harms that may result as a result of extractivist activity must utilize the broader conceptions of land, and its spiritual and cultural importance to indigenous peoples, that is outlined in this article, as well as considering historical discrimination against the Amah Mutsun.

C. 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 could result in serious or irreversible harm.”¹³⁶ 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 many international treaties.¹³⁷ It has also been adopted by the domestic 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.¹³⁸ 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.¹³⁹ The same analysis describes the potential threat to *Juristac*, which would be irreversible in regards to the environmental, spiritual, and cultural elements of the land.

In a case before the Brazilian Supreme Court, the court entered judgment in favor of plaintiffs and against the federal government, municipalities, and corporations for failure to

¹³⁶ 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).

¹³⁷ Including the United Nations Framework Convention on Climate Change, Convention on Biological Diversity, Convention on International Trade in Endangered Species, for example.

¹³⁸ *Telstra Corporation Limited v Hornsby Shire Council*, [2006] NSWLEC 133 (Austl.).

¹³⁹ *Id.*

reduce deforestation and address climate change. The court stated: “the precautionary principle still counsels us to act now to avert calamitous climate change before every last detail is fully known (or fully appreciated).”¹⁴⁰

Recently a case in Holland also relied on the Precautionary Principle, with the plaintiff claiming the Dutch government was responsible for not doing enough to prevent climate change.¹⁴¹ In its defense, the Netherlands argued that climate change impacts are too uncertain a basis for claims like the one by the plaintiff. The Dutch Supreme Court in its decision, however, invoked the Precautionary Principle as a binding principle of law. The Court went on to discuss how it is precisely this uncertainty, with respect to causes and effects of activities with potential to harm the environment, that requires states to take proactive action to protect it.¹⁴²

While the United States has not adopted the Precautionary Principle as national policy, the principle is binding as customary international law on the United States.¹⁴³ 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.

Similarly, Santa Clara County has adopted the Precautionary Principle in some of its policies. In the county’s Integrated Pest Management Progress Report (2002-2016), for example, the Precautionary Principle is used as a basis for the promotion of organic farming, as well as environmental preferable purchasing (EPP).¹⁴⁴ Santa Clara County’s own website, in fact, emphasizes support for the Precautionary Principle, stating:

¹⁴⁰ *Demanda Generaciones Futuras v. Minambiente*, STC4360-2018, Number: 11001-22-03-000-2018-003119-01 (Dejusticia trans., Apr. 5, 2018) (Colom.).

¹⁴¹ *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].

¹⁴² 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 Ct. H.R., 67021/01 (2009)) as supportive of their decision.

¹⁴³ 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.

¹⁴⁴ County of Santa Clara, *Integrated Pest Management Program Progress Report (2002-2016)*, <https://www.sccgov.org/sites/ipm/about/Documents/IPM%20Progress%20Report%202002-2016%20Final.pdf> (last visited Jun. 4, 2020); County of Santa Clara, *2008 County of Santa Clara Legislative Policies and Priorities: Integrated Waste Management (2008)*, <https://www.sccgov.org/sites/rwr/rwrc/Documents/Draft-2008-SCCo-Legislative-Priorities.pdf> (last visited Oct. 19, 2008).

We are at an exciting juncture in the history of the world. On the one hand, we are faced with unprecedented threats to human health and the life-sustaining environment. On the other hand, we have opportunities to fundamentally change the way things are done. We do not have to accept "business as usual." Precaution is a guiding principle we can use to stop environmental degradation. The precautionary principles in simpler terms can be related to the phrase "a stitch in time saves nine".¹⁴⁵

The activities proposed for *Juristac* have the potential to cause significant environmental harm, in addition to destroying the spiritual and cultural aspects of the sacred site. Building out the site, including the sand and gravel pit and all attendant buildings, roads, and processing components (e.g. sewage treatment) will significantly alter and potentially pollute the land. Further, despite claims by the proposed developer that after the ten-year lease is up they will restore the lands, it is simply not possible to restore sacred and cultural sites to their original state. The cultural and spiritual importance of the land is tied to the natural features and landscape that have always been there. Digging huge pits across this landscape destroys that very essence and there is no way to restore it. Moreover, once animals and plants are displaced from an ecosystem, there is no guarantee they will return.

In addition to the possibility of environmental destruction, degradation, and pollution, there is no doubt the mining use anticipated here requires significant amounts of water. As California has been subject to a drought over the last decade, and there is a likelihood of increased drought conditions in the future, the precautionary principle would warrant less use of and more preservation of California's water resources. In this situation, the connection between environmental harm and the proposed mining is all but certain. Environmental groups have raised the alarm over potential harms to water sources from sand and gravel mining.¹⁴⁶ The Precautionary Principle dictates that the requested mining permit be denied because of both 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.

¹⁴⁵ County of Santa Clara, *Sustainable Solutions to Pest Problems: Best Practices* (2020), <https://www.sccgov.org/sites/ipm/resources/Pages/best-practices.aspx> (last visited Jun. 4, 2020).

¹⁴⁶ Vince Beiser, *Sand Mining: the Global Environmental Crisis You've Probably Never Heard of*, THE GUARDIAN (Feb. 27, 2017); see also California River Watch, FACT SHEETS, <http://www.ncriverwatch.org/resources/facts.php> (last visited Oct. 19, 2018); Ako T. A., Onoduku U. S., Oke S. A., Essien B. I., Idris F. N., Umar A. N. & Ahmed A.A., *Environmental Effects of Sand and Gravel Mining on Land and Soil in Luku, Minna, Niger State, North Central Nigeria*, 2 J. OF GEOSCIENCES AND GEOMATICS (2014).

D. International Law Requires Protection of Juristac by Santa Clara County.

As this article demonstrates, international and comparative law support and protect 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. The protections for the rights of indigenous peoples under international law are essential to not only right past wrongs, but ensure that cultures and the environments they are connected to endure. 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.¹⁴⁷ Breaks in continuity among a peoples, whether in terms of living together as a group or living on their traditional lands, does not change their status from a peoples under international law, particularly in cases where the break was forced, for example through colonialization.¹⁴⁸ Removing peoples from their traditional land, whether through physical force or laws, does not remove the spiritual and cultural connection between a peoples and their traditional territories. In fact, because of the history of forced removal from land or loss of land during the period of colonization, it is 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 article, the land at issue in this case is important culturally and spiritually for the Amah Mutsun Tribal Band. That the Amah Mutsun have not resided on the land in many years does not diminish the land's importance to their traditions and spiritual worldview. It is of vital importance that what does remain intact stays that way as the Amah Mutsun Tribal Band continues to rebuild their heritage, traditions, and community, all which were lost due to colonizing the land.¹⁴⁹ The Amah Mutsun Tribal Band is actively engaged in revitalization of their culture and heritage, including restoring their language and rebuilding traditional ecological knowledge, especially among the younger generations. The *Juristac* landscape is a significant part of the revitalization effort and the lack of access or ownership of

¹⁴⁷ JAMES S. ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 3 (Oxford Univ. Press 2004).

¹⁴⁸ *Id.*

¹⁴⁹ Hannibal, *supra* note 13.

the land in more 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, comparative, and domestic law to prevent any activity, such as the proposed sand and gravel mine, which would interfere with these rights. This is especially true in light of historical interference in the form of colonial policies that stripped land from indigenous peoples in California. The Amah Mutsun Tribal Band were subjected to devastating changes during the period of Spanish colonialism and missionization, like most of the peoples indigenous to the land that is now California. During the Mission period, the Franciscan fathers actively discouraged or banned indigenous customs, rites, and rituals.¹⁵⁰ 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 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 former village sites, tar pits, and natural features of particular cultural and spiritual importance.

It is imperative that the permits requested for mining activities be denied under principles of international law, given the cultural and spiritual importance of this land to the Amah Mutsun people. This is further supported by comparative decisions from regional and state courts as well as the laws of California and even existing policies of the County of Santa Clara. In November 2018, Santa Clara County declared itself a Human Rights County, with the Board of Supervisors passing a resolution grounded in the Universal Declaration of Human Rights and calling on the county to be a “leader among other counties in the promotion of human rights and human dignity”.¹⁵¹ While not specifically referencing indigenous peoples, the recognition in the document of the UDHR lends support to the international legal arguments presented here and their binding character on the County of Santa Clara. Supporting the Amah Mutsun Tribal Band in their efforts to save their traditional lands is an action in line with this resolution.

¹⁵⁰ SHERBOURNE F. COOK, THE INDIAN VERSUS THE SPANISH MISSION. IBERO-AMERICA (1943), *reprinted in* THE CONFLICT BETWEEN THE CALIFORNIA INDIAN AND WHITE CIVILIZATION (Univ. of Cal. Press, 1976).

¹⁵¹ Francisco Rivera Juaristi, *Santa Clara County in California Becomes Human Rights County*, HUMAN RIGHTS AT HOME BLOG (Dec. 12, 2018), https://lawprofessors.typepad.com/human_rights/2018/12/santa-clara-county-in-california-becomes-human-rights-county-.html.

The proposed mining would irreversibly change the shape of the land and create a great wound across the landscape for years to come. Components of the proposed project include spoils stockpiles, visual barriers, a processing plant, and a sewage disposal system.¹⁵² While the mining company claims they will remediate the land after the project, 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 are 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 historically recognized as important to the Amah Mutsun, will be preserved.

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.¹⁵³ 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, and these factors must be taken into account by the county in rendering its decision. As this mining activity would cause significant damage, granting the permit is contrary to international law and the trends seen around the world.

The historic mistreatment of the indigenous peoples of the Americas, including those in California, is well-documented. Colonization and the creation of the Mission system in California drove indigenous peoples from their lands, broke apart community connections, and forced both cultural and religious assimilation. Given this history and 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 religion. The area of *Juristac* and the sacred sites included within this territory are fundamental to the Amah Mutsun to free enjoyment of their cultures and religion. Under international law, these past historical injustices must be addressed and future non-interference with human rights and fundamental freedoms, including spiritual and cultural rights, ensured.

¹⁵² Johnson et al., *supra* note 18.

¹⁵³ UNDRIP, *supra* note 56; ILO 169, *supra* note 63.

VI. Conclusion

The issues surrounding the rights of indigenous peoples to protect their traditional lands for spiritual and cultural purposes, and to consequently prevent mining or other environmental harm to these lands, are not unique to this case. Around the world, indigenous peoples have fought for rights to their traditional lands and better protections for the natural environment for the benefit of all. Courts and governments have increasingly been open and supportive of the indigenous peoples' position that they have a right to these lands, and that more sustainable and active stewardship of natural spaces and natural resources are in everyone's interest. Sustainable development and placing limits on corporate growth that comes 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, everywhere they share common questions. The issues 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 must be dealt with, in addition to issues around cultural and spiritual practices. Courts and legislators around the world have worked over the past several decades 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 the trends toward protecting indigenous peoples and the environment. Particularly in the Inter-American system and with fellow Common Law states of New Zealand, Canada, and Australia, there is much for us to draw upon to understand the responsibilities of protecting indigenous rights to their traditional lands.

The developments in international and comparative law in recent 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, a clean and healthy environment benefits every citizen and

merits consideration of implementing the Precautionary Principle seen in international law as an approach to these issues, ultimately recognizing the natural world as living entity worthy of protection in its own right.

Santa Clara County has an opportunity to remain faithful to its international obligations and stop the rollback of environmental and human rights protections in favor of corporations and unfettered development coming out of Washington, D.C. While Sargent Ranch is a relatively small piece of land in one corner of the world, its preservation efforts matter because the damage is irreversible. 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 from regional and domestic tribunals worldwide require action and support preservation efforts. Santa Clara County should adhere to international law and lead American jurisprudence in a new direction, following the global trend, by denying a permit for sand and gravel mining on *Juristac*.