

Update to 13 November 2019 Early Warning and Urgent Action Procedure Request
Submitted by the Gwich'in Steering Committee et al.

*Respectfully Submitted to the Committee on the Elimination of Racial Discrimination
on the 4th of September, 2020*

I. Background.

On 13 November 2019, the Gwich'in Steering Committee, Land is Life, Cultural Survival, First Peoples Worldwide, and the University of Colorado's American Indian Law Clinic submitted a request to the *Committee on the Elimination of Racial Discrimination* ("Committee") under its early warning and urgent action procedures.¹ The submitting organizations commend this Committee for considering the provided information during its 101st session and issuing a letter to the United States requesting that the State party provide information on the status of the proposal and a number of measures related to the situation faced by the Gwich'in.² The submitting organizations now write to provide an update on recent actions taken by the United States that have further escalated the urgency and seriousness of the situation and to request additional measures be taken by this Committee under its early warning and urgent action procedures.

II. Recent actions by the United States indicate the lease sale is imminent, escalating the situation and providing evidence of ongoing discrimination against the Gwich'in.

On 17 August 2020, the United States government released the *Coastal Plain Oil and Gas Leasing Program Record of Decision* ("Record of Decision" or "ROD").³ This document, prepared by the United States Bureau of Land Management, is the final administrative step required for the United States to move forward with a lease sale of the Coastal Plain to oil and gas companies. In addition, a letter dated 15 July 2020 from the United States Department of the Interior ("DOI") included the oil and gas development in the Coastal Plain as a project that could be granted a waiver under *Executive Order 13927 "On Accelerating the Nation's Economic Recovery from the COVID-19 Emergency by Expediting Infrastructure Investments and Other*

¹ Request for Early Warning Measures and Urgent Action Procedures to the United Nations Committee on the Elimination of Racial Discrimination IN RELATION TO The United States of America (Nov. 13, 2019). Retrieved from: <https://www.colorado.edu/program/fpw/sites/default/files/attached-files/gwichin_steering_committee_request_to_cerd.pdf> (last visited Aug. 24, 2020).

² Letter to Permanent Representative Andrew Bremberg, 7 August 2020. Retrieved from: <https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/USA/INT_CERD_ALE_USA_9242_E.pdf> (last visited Sept. 1, 2020).

³ U.S. Bureau of Land Mgmt., *Coastal Plain Oil and Gas Leasing Program Record of Decision* (Aug. 2020) [hereinafter "ROD"]. Retrieved from: <https://eplanning.blm.gov/public_projects/102555/200241580/20024135/250030339/Coastal%20Plain%20Record%20of%20Decision.pdf> (last visited Aug. 21, 2020).

Activities” (“EO 13927”).⁴ If granted a waiver under EO 13927, the lease sale would be further fast tracked and could be announced as soon as today, the 4th of September 2020.⁵ Once finalized, the purchaser of a lease is often granted the right to develop the oil and gas in perpetuity. As a result, once the lease sale is initiated, it becomes nearly impossible to cancel the sale and prevent oil and gas development of the area.

The ROD released in August also confirms that the United States is seeking the most expansive drilling option that will have the greatest and most destructive impact on the Coastal Plain, the Herd, and the Gwich’in. The option selected was one of four presented in the Final Environmental Impact Statement, which included a range of possibilities including no development, limited development, and extensive development. Under the selected option, the United States can open the entire 1.56 million acres of the Coastal Plain to oil and gas leasing. Furthermore, the mitigation protocols stipulated by the United States, such as limiting development in certain parts of the Coastal Plain during certain times of the year, do not adequately protect the Coastal Plain or the Herd. The Herd uses the entirety of the Coastal Plain during calving and would be disturbed by construction and extraction activities. It is also well documented that oil and gas development has had negative effects on other caribou herds. Though the United States attempts to downplay the severity and extent of development, it also acknowledges that habitat destruction and the destruction of natural resources is necessary for development to occur. Similar to the Final Environmental Impact Statement, the ROD is an attempt to paper over the potentially disastrous impacts of development in order to speed up sale of the area to oil and gas interests.

In response to the ROD, on 24 August 2020, the Gwich’in Steering Committee and allied partners filed a lawsuit in U.S. federal courts.⁶ While the litigation could delay or even temporarily prevent development of the Coastal Plain, the domestic legal framework only allows for relatively narrow procedural and environmental review and does not provide an adequate forum to address the ongoing human rights violations and the racial discrimination that the Gwich’in continue to experience. As stated in the complaint filed with the U.S. courts, “Protecting the Coastal Plain and the Porcupine Caribou Herd is a human rights issue for the Gwich’in People.”⁷ Yet, the Gwich’in do not have a clear legal basis to fully assert those rights under the United States legal system. In addition, regardless of the merits of the case, the elongated timeline of litigation relative to the accelerated timeline for development will likely result in the project moving forward, creating irreparable harm. An example of domestic

⁴ U.S. Dep’t of the Interior, Letter to the Honorable Larry Kudlow, 15 July 2020. Retrieved from: <https://biologicaldiversity.org/programs/public_lands/pdfs/Department-of-the-Interior-Response-to-EO-13927.pdf> (last visited Sept. 3, 2020).

⁵ Exec. Order No. 13927, 85 F.R. 35165 (2020). Retrieved from <https://www.federalregister.gov/documents/2020/06/09/2020-12584/accelerating-the-nations-economic-recovery-from-the-covid-19-emergency-by-expediting-infrastructure> [last visited Sept. 3, 2020].

⁶ Comp’l for Declaratory and Injunctive Relief, *Gwich’in Steering Committee et al v. Bernhardt et al*, 3:20-cv-00204, available at <https://www.trustees.org/wp-content/uploads/2020/08/2020-08-24-Coastal-Plain-Leasing-EIS-Complaint-FINAL-SIGNED.pdf>.

⁷ *Id.* at 7.

litigation failing to provide an adequate remedy for Indigenous Peoples is exhibited by the events surrounding the Standing Rock Sioux Tribe's opposition to the Dakota Access Pipeline.

The United States' recent actions are evidence of a very real and substantial threat of harm to the Gwich'in and align with a pattern of ongoing discrimination against Indigenous Peoples in the context of infrastructure and energy development projects. The submitting organizations continue to emphasize the urgency of this moment, which requires the immediate attention and intervention of this Committee to prevent serious violations of the International Convention on the Elimination of all Racial Discrimination by the United States government.

III. The concerns raised in the 13 November 2019 request remain unaddressed by the Government of the United States.

Over the past ten months, the United States has taken no actions to address the concerns of the Gwich'in and instead, barreled ahead with the lease sale. Since November, the Gwich'in Steering Committee has continued to express their concerns in various forums including at the United Nations and with private entities.

In October 2019, the Gwich'in Steering Committee, Cultural Survival, Land is Life, First Peoples Worldwide, and the American Indian Law Clinic at the University of Colorado submitted *Observations on the State of Indigenous Human Rights in the United States of America* to the Universal Periodic Review Working Group of the United Nations Human Rights Council.⁸ The report details how the United States government has repeatedly failed to protect the human rights of the Gwich'in in violation of ICERD, the International Covenant on Civil and Political Rights ("ICCPR"), and various human rights norms including those expressed in the United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP") and the Universal Declaration of Human Rights ("UDHR"). The Gwich'in continue to engage with the UPR Working Group and plan to participate in the November review of the United States.

The Gwich'in Steering Committee has also engaged with a number of financial institutions. In light of human rights concerns, twenty-five financial institutions have taken steps to fully or partially exclude financing for oil and gas development in the Arctic, including five major U.S. banks: Citigroup, Goldman Sachs, JPMorgan Chase, Morgan Stanley, and Wells Fargo.⁹ However, the United States continues to minimize or completely ignore the concerns raised by the Gwich'in.

⁸ *Observations on the State of Indigenous Human Rights in the United States*, Prepared for the Universal Periodic Review Working Group (October 2019), available at <https://www.colorado.edu/program/fpw/sites/default/files/attached-files/gwichinsteeringcommitteeuprsubmission.pdf>.

⁹ BankTrack, *Banks and Arctic oil and gas*, Retrieved from: https://www.banktrack.org/campaign/banks_and_arctic_oil_and_gas (last visited Sept. 4, 2020).

The submitting organizations reiterate that the statements in the previous filing to this Committee are accurate and true, and that if the United States is permitted to lease the area for oil and gas development, the Gwich'in will be harmed in the following ways:

- Development of the Coastal Plain harms the Porcupine Caribou Herd, and therefore the Gwich'in. Because the Herd provides the majority of the Gwich'in's subsistence, the health of the Gwich'in is directly tied to the health of the Herd. Destruction of the caribou population violates the Gwich'in's right to health under ICERD Article 5(e)(iv). It also limits employment opportunities for the Gwich'in, in violation of ICERD Article 5(e)(i). Furthermore, food scarcity inhibits the ability of children to learn, and the loss of the Herd limits the Gwich'in's cultural education, in violation of ICERD Articles 5(e)(v) & 7. Finally, the destruction of the Gwich'in subsistence culture is a violation of ICERD Articles 2(2), 5(e)(vi), & 7.
- Development in the Coastal Plain would destroy land sacred to the Gwich'in. The ROD allows the installation of, at minimum, 2,000 acres of drilling pads, hundreds of miles of roads and pipelines, and other support structures.¹⁰ This massive development is offensive to the Gwich'in, who consider the area to be so sacred that they refuse to step foot onto the Coastal Plain, even in times of extreme famine. The development would therefore infringe on the religious freedom rights of the Gwich'in under ICERD Article 5(d)(vii).
- Development will also impact the health of the Gwich'in by exacerbating the rate of climate change and air pollution. Alaska is being affected by climate change at twice the rate of the rest of the United States, causing major changes to the weather patterns and plant and animal life cycles. By worsening the local effects of climate change, development and habitat destruction violates the rights of the Gwich'in by injuring their right to health under ICERD Article 5(e)(iv).
- Development will create security risks for the Gwich'in by increasing the risk of violence against Indigenous women. Sudden influxes of oil and gas workers, who are generally well-paid men from outside the community, typically leads to violence, trafficking, and sexual violence against Indigenous women in the area.¹¹ The development of the Coastal Plain, and the work camps that will accompany them, therefore violate the Gwich'in's right to security under ICERD Article 5(b).
- The United States has violated the rights of the Gwich'in by continually failing to consult with the Gwich'in or seek their free, prior and informed consent. Under UNDRIP, nations have the duty to consult with Indigenous Peoples prior to approving projects that may affect their ancestral lands, territories, or resources. To date, the United States has only provided cursory meetings with select members of the Gwich'in, focusing primarily on how best to drill, not whether development should even occur in the first place.

¹⁰ ROD, at 10.

¹¹ HONOR THE EARTH, *Man Camps Fact Sheet: Chasing out the Specter of Man Camps...* Retrieved from: <http://www.honorearth.org/man_camps_fact_sheet> (last visited Aug. 20, 2020); see also NCAI Policy Research Center, *Statistics on Violence Against Native Women* (2013).

IV. Recent actions of the United States are reflective of the nation's historic and ongoing discrimination towards Indigenous Peoples.

The pandemic, and the response of the United States, further exposes the entrenched discrimination and structural inequalities that the Gwich'in face. As this Committee has recently noted, the pandemic disproportionately affects already marginalized and vulnerable minority groups.¹² Gwich'in and other Alaskan Natives, particularly those that are far from population centers, are in the midst of a public health crisis. Gwich'in leaders are focused on protecting the health and wellness of their communities and limiting the spread of the disease into their villages, some of which are only accessible by plane, and even then, only under favorable weather conditions. Under these circumstances, the leaders are understandably limited in their ability to comment and participate in any leasing or development process. However, rather than address the effects of the pandemic on these marginalized communities, the United States government issued EO 13927 and is using this moment to remove existing regulations and forge ahead with development of the Coastal Plain and other energy projects that directly and disproportionately impact Indigenous Peoples. The decision to move ahead with this controversial and nonessential project during a global health crisis illustrates the disregard that the United States has for Indigenous Peoples and their way of life.

V. Updated Conclusion & Renewed Request for Early Warning Measures and Urgent Action Procedures.

In light of the ongoing discrimination against the Gwich'in and the threat of imminent and irreversible destruction of the Coastal Plain, the submitting organizations humbly request that this Committee again consider the situation in Alaska under its early warning and urgent action procedures in order to avoid additional violations of the Convention. In particular, the submitting groups urge this Committee to adopt a decision:

1. Urging the Government of the United States of America to fully respect its international obligations, in particular those arising from the International Convention on the Elimination of All Forms of Racial Discrimination to which it is a party;
2. Stating concern regarding the discriminatory treatment of the Gwich'in and again requesting that the United States submit information to the Committee under the early warning and urgent action procedures related to the situation in *Iizhik Gwats'an Gwandaii Goodlit (The Sacred Place Where Life Begins)* and that they do so prior to holding a lease sale.

¹² CERD, *Statement on the coronavirus (COVID-19) pandemic and its implications under the International Convention on the Elimination of All Forms of Racial Discrimination*, 101st Session (Aug. 7, 2020).

3. Recommending that the United States, consistent with the commitments that it has made under ICERD and UNDRIP, recognize the denial of rights to the Gwich'in as a human rights issue and begin to take action to rectify the human rights violations.
4. Recommending the United States revoke the ROD and not proceed with the lease sale.
5. Recommending the United States halt any future activities that infringe on the rights of the Gwich'in as Indigenous Peoples through:
 - a. Adopting Option A in the Final Environmental Impact Statement, so that no part of the Coastal Plain will be offered for future oil and gas lease sales;
 - b. Passing legislation to provide permanent protection for the Coastal Plain;
 - c. Adopting a plan that permanently protects the wildlife in the Coastal Plain including the polar bears and the Porcupine Caribou Herd;
 - d. Honoring its commitments under the *Agreement Between the Government of Canada and the Government of the United States of America on the Conservation of the Porcupine Caribou Herd*;¹³
 - e. Honoring the government's trust responsibility to Indigenous Peoples within the United States; and
 - f. Engaging in meaningful consultation and obtaining the free, prior and informed consent of the Gwich'in under the principles enshrined in UNDRIP and related international norms before commencing any projects on or near the sacred lands of the Gwich'in.
4. Requesting that other States and international entities, including financial institutions, withdraw their support for development of the Coastal Plain, and informing all Member States that the support of oil and gas development is a violation of ICERD and the United Nations Guiding Principles on Business and Human Rights.
5. Recommending that a Committee member seek permission from the United States to visit Alaska and create a report on the situation based on their findings.
6. Recommending the United States reaffirm its commitment to incorporating UNDRIP into domestic law.
7. Recommending the United States, in the face of COVID-19 and the global health crisis, aid Indigenous Peoples through:
 - a. Ensuring equal access to healthcare services for all people;
 - b. Seeking ways to meaningfully partner and assist Indigenous Peoples in fighting COVID-19;
 - c. Avoiding unnecessary development projects that tax the physical and emotional resources of Indigenous Peoples during the health crisis;
 - d. Ensuring isolated Indigenous communities are protected from the effects of COVID-19; and

¹³ *Agreement Between the Government of Canada and the Government of the United States of America on the Conservation of the Porcupine Caribou Herd* (signed July 18, 1987) <<https://www.treaty-accord.gc.ca/text-texte.aspx?id=100687>> (last visited Aug. 20, 2020).

- e. Partnering with Indigenous Peoples to create individualized approaches to COVID-19 economic recovery.
8. Stating that the Committee will continue to monitor this issue and will address these alleged violations at the next CERD meeting session.