

REQUEST FOR EARLY WARNING MEASURES
AND URGENT PROCEDURES

TO

The United Nations
Committee on the Elimination of Racial
Discrimination

BY

The Western Shoshone National Council

IN RELATION TO

The United States of America

Submitted:

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Western Shoshone National Council
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Executive Summary

The Western Shoshone National Council (Council) is the contemporary manifestation of the traditional and original government of the Western Shoshone People. The Council hereby requests the United Nations Committee on the Elimination of Racial Discrimination (Committee or CERD):

- 1. to investigate** United States violations of Western Shoshone human rights, territorial integrity, and self-determination;
- 2. to prevent confiscation** of Western Shoshone livestock and destruction of and interference with Western Shoshone land use activities by the United States;
- 3. to require compensation** by the United States for confiscation of Western Shoshone livestock and destruction of and interference with Western Shoshone land use activities;
- 4. to assist the Western Shoshone Nation** to protect Western Shoshone human rights, territorial integrity, and self-determination against depredations and wrongful assertions of jurisdiction by the United States; and
- 5. to promote negotiations** between the Western Shoshone National Council and the United States Department of State and the Office of the President of the United States to address and resolve their differences.

The Western Shoshone Nation includes families and Bands [extended families], who possess, reside on, occupy, and use various specific and discrete lands and places within the ancestral territories of the Western Shoshone People. These lands and places have been actually and openly used and occupied by Western Shoshone People and their ancestors from time immemorial.

Western Shoshone uses and occupancy include, but are not limited to: residence; multiple forms of subsistence agriculture and silviculture;

cultivation, conservation, and improvement of natural resources, including waters and lands; breeding and raising of livestock; hunting and fishing; ceremonial and sacred use of specific springs and mountain areas for nurturing and harvesting of herbs, medicines and other plant life, and for burials.

The inherent right of the Western Shoshone to protect themselves by excluding all other nations from invading, usurping, or otherwise violating their land rights and territorial integrity is a fundamental aspect of international law.

The 1863 *Treaty of Ruby Valley* between the Western Shoshone Nation and the United States is the foundation of peaceful nation-to-nation relations between the Western Shoshone and the United States. [The text of the *Treaty* is available on the Internet as shown in the Appendix to this Request.]

The United States has ignored and attempted to bypass the government of the Western Shoshone Nation recognized in the *Treaty of Ruby Valley* and embodied in the Western Shoshone National Council.

The United States Bureau of Land Management attempts to enforce its grazing regulations on Western Shoshone livestock ranchers who are operating under Article 6 of the *Treaty of Ruby Valley*, which specifically acknowledges the right of any Western Shoshone person to be an agriculturist or herdsman.

Mining projects in Western Shoshone territory, operating under color of permits from the Bureau of Land Management, involve extremely damaging industrial processes, including cavernous, large-scale excavations, massive

extraction of ground water, and cyanide heap leaching, causing serious and increasing damage to Western Shoshone lands and way of life.

The Western Shoshone Nation's fundamental rights of substantive and procedural due process and to equal protection of the laws were violated in an Indian Claims Commission (ICC) proceeding that purported to award compensation to Western Shoshone individuals for a "taking" of Western Shoshone land title. Those violations included the United States choosing (1) the individuals who would be deemed to represent the Western Shoshone Nation, (2) the attorneys who would represent those individuals, and (3) the claims that would be allowed.

In addition, the ICC decision violated applicable principles of property law, in that it rested on (1) stipulations of a "taking" unsubstantiated by any facts, and (2) a theory of "taking by encroachment" that violates authoritative rules of Indigenous land title. Furthermore, although the United States Congress had mandated the filing of a final report by the ICC in every case in order to assure fairness, due process and equal protection, no final report was filed in the Western Shoshone case, thus depriving the Western Shoshone of requisite Congressional review of the fairness of the ICC proceeding.

The United States Supreme Court has ruled that the Western Shoshone are precluded from asserting their rights to continuing use and occupancy of their homelands. The Court has asserted a United States "trusteeship" over the Western Shoshone, through which the United States claims to have extinguished Western Shoshone self-determination.

The United States' assertion of "trusteeship" over the Western Shoshone is not compatible with the *Treaty of Ruby Valley* or with the spirit or the letter of general international obligations the United States has accepted.

The notion of “trusteeship” which the United States is using to preclude Western Shoshone self-determination is a judicial fiction rooted in a religious doctrine of “Christian supremacy.”

The Western Shoshone National Council unequivocally rejects the racist and discriminatory “trusteeship” derived from “Christian supremacy” as contrary to the *International Convention on the Elimination of All Forms of Racial Discrimination* and other human rights principles of contemporary international law.

International law prohibits the United States from interfering with Western Shoshone self-determination. The International Court of Justice has held that a nation encapsulated in an established state has the right to “determine [its] future political status by [its] own freely expressed will. “ *Western Sahara Case*, 1975 ICJ REP. 12, 36, par. 70.

The unilateral assertion by the United States of “trustee” power over the Western Shoshone is also contrary to the International Trusteeship System established by Chapter XII of the Charter of the United Nations.

The status of the Western Shoshone as a self-determining people is protected by the *International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976):

All peoples have the right of self-determination. By virtue of that right they freely determine their political status....
... In no case may a people be deprived of its own means of subsistence. *Id.*, Article 1.

The protection of Indigenous Peoples under international human rights law was expressly confirmed in the 1992 Helsinki Summit of the Conference for Security and Cooperation in Europe:

The participating States, Noting that persons belonging to indigenous populations may have special problems in exercising their rights, agree that their OSCE commitments regarding human rights and fundamental freedoms apply fully and without discrimination to such persons. *Helsinki 1992 Decisions*, chapter VI, par. 29.

As a result of United States violations of fundamental Western Shoshone human rights, the Western Shoshone People have suffered and continue to suffer irreparable harm to their persons, property, and way of life.

The Western Shoshone National Council calls upon the United Nations Committee on the Elimination of Racial Discrimination to take immediate action to address these issues and bring about redress of these harms.

Request

I. Introduction

A. The Western Shoshone Nation and the Western Shoshone National Council

The Western Shoshone National Council is the contemporary manifestation of the traditional and original government of the Western Shoshone People, which has been in existence for countless generations, continuously and unbroken from time immemorial to the present and throughout the period of Anglo-European presence on the North American continent.

In 1984, the Western Shoshone People transformed their oral governmental traditions and practices into a written mode, with the formalization of the National Council. The Western Shoshone National Council acts in an executive capacity, including the filing of this Request, through its Chief, Raymond D. Yowell, who is authorized to appear in its behalf in all matters affecting the Council's representation of the Western Shoshone People.

The Western Shoshone National Council includes traditional families and “federally recognized Western Shoshone Tribal Councils,” who possess, reside on, occupy, and use various specific and discrete lands and places within the ancestral territories of the Western Shoshone People. These lands and places have been actually and openly used and occupied by Western Shoshone People and their ancestors from time immemorial.

Western Shoshone uses and occupancy include, but are not limited to: residence; multiple forms of subsistence agriculture and silviculture; cultivation, conservation, and improvement of natural resources, including waters and lands; breeding and raising of livestock; hunting and fishing;

ceremonial and sacred use of specific springs and mountain areas for nurturing and harvesting of herbs, medicines and other plant life, and for burials.

Western Shoshone land use and occupancy are and have been conducted in accordance with traditional Western Shoshone beliefs and teachings given to the Western Shoshone by *Ah-Peh* (Father, God) as to proper relationships among humans and between humans and the rest of Creation.

The Western Shoshone Nation asserts a continuing inherent right to decide how Western Shoshone people live on their lands in keeping with the Law of their own language, culture, and traditions, without interference or encroachment by any other government.

The Western Shoshone National Council is separate from and independent of entities designated by the United States as “federally recognized Western Shoshone tribal councils.” The territory of the Western Shoshone Nation includes, but is not limited to, those areas designated by the United States as “Western Shoshone reservations” or “colonies.” No part of Western Shoshone territory is “public land” of the United States.

B. The Committee on the Elimination of Racial Discrimination

The Committee on the Elimination of Racial Discrimination (CERD) The Committee on the Elimination of Racial Discrimination (CERD) is the body of independent experts that monitors implementation of the Convention on the Elimination of All Forms of Racial Discrimination by its State parties. In addition to the reporting procedure, through which all State parties are obliged to submit regular reports to the Committee on how human rights are being implemented, the Convention establishes mechanisms through which

the Committee performs its monitoring functions: the early-warning measures urgent procedures.

Early warning measures are to be directed at preventing existing problems from escalating into conflicts and can also include confidence-building measures. Urgent procedures are to respond to serious, massive or persistent patterns of racial discrimination.

In 1999 – 2001, the Yomba Shoshone tribe, joined subsequently by the Ely Shoshone Tribe and Duckwater Shoshone tribe, submitted Requests for Urgent Action, with regard to persistent violations of Western Shoshone human rights by the United States.¹ In response to that Request, CERD expressed concern with United States' actions affecting the Western Shoshone; in particular, mining and nuclear waste storage operations and the auctioning of Western Shoshone lands for private sale. CERD recommended that the United States provide for effective participation by the Western Shoshone in decisions affecting them and their land rights, as required under article 5(c) of the Convention, and emphasized the importance of securing the “informed consent” of Indigenous Peoples as stressed in CERD General Recommendation XXIII, adopted August 18, 1997, CERD/C51/Misc.13/Rev.4 (1997). The Committee also called for recognition and compensation by the United States for Western Shoshone losses occasioned by the United States. CERD encouraged the United States to use ILO Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries as a guide.

¹ See the July 2005 submission, *Second Request for Urgent Action under Early Warning Procedure*, filed by the Western Shoshone People, updating the situation from the time of the prior CERD Request and the CERD August 2001 Concluding Observations.

The United States refuses to act on CERD recommendations to protect the rights of the Western Shoshone under the Convention – particularly articles 1, 2 and 5. The United States not only stands in violation of these articles of the Convention but is also openly defiant of the recommendations of the Inter-American Commission of Human Rights to respect the rights of Western Shoshone members articulated in the American Declaration of the Rights and Duties of Man. On December 27, 2002, the Inter-American Commission found the United States in violation of the human rights of Western Shoshone sisters Mary and Carrie Dann, because of its failure to recognize and protect Western Shoshone rights over traditional lands and natural resources. The Commission recommended that the United States provide the Dann sisters with an effective remedy for the infringements of Western Shoshone property rights over ancestral lands through legislative or other measures consistent with the American Declaration and to ensure that United States laws, procedures and practices pertaining to Indigenous Peoples within its borders are in conformity with international human rights principles.

C. Purpose of Request

The Western Shoshone National Council files this Request to bring to the attention of the United Nations Committee on the Elimination of Racial Discrimination an ongoing and systematic series of actions by the United States that violate fundamental human rights of the Western Shoshone Nation, in flagrant disregard of the Recommendations of the CERD upholding the Convention on the Elimination of All Forms of Racial Discrimination and the Recommendations of the Inter-American

Commission of Human Rights upholding American Declaration of the Rights and Duties of Man.

The Western Shoshone National Council calls upon the United Nations Committee on the Elimination of Racial Discrimination to take immediate action to address these issues and bring about redress of these harms. In particular, the Western Shoshone National Council insists that the actions of the United States in this situation constitute a "serious, massive [and] persistent pattern of racial discrimination," warranting the application of urgent procedures to respond to problems requiring immediate attention.²

II. Overview of United States' Violations of Western Shoshone Human Rights, including the Right to Self-Determination

A. Territorial Integrity and the Treaty of Ruby Valley

The inherent right of the Western Shoshone to protect themselves by excluding all other nations from invading, usurping, or otherwise violating their land rights and territorial integrity is a fundamental aspect of international law:

...[A]s the right of a nation ought to be respected by all others, none can form any pretensions to the country which belongs to that nation, nor ought to dispose of it without her consent....

Vattel, *The Law of Nations* 164 (1758).

The United States has acknowledged this principle of territorial integrity and human right in its own organic law, specifically applicable to the Native Nations of the North American continent:

² See *Committee on the Elimination of Racial Discrimination - Early-Warning Measures and Urgent Procedures*: <http://www.ohchr.org/english/bodies/cerd/early-warning.htm> (visited 25 July 2005).

The utmost good faith shall always be observed towards the Indians, their lands and their liberty shall never be taken from them without their consent; and in their property, rights and liberty, they shall never be invaded or disturbed, unless in just and lawful wars authorized by Congress.... *The Northwest Ordinance*, 1 Stat. 51 (July 13, 1787).

In 1861, an Act of the United States Congress was passed to organize the Territory of Nevada, 12 Stat. 210. This Act reiterated the principles of territorial integrity and free consent stated in the Northwest Ordinance and explicitly applied these basic principles of international law to the Western Shoshone and other nations pre-existing in the territory:

Nothing in this act ... shall be construed to impair the rights of persons or property pertaining to the Indians in said territory, so long as such rights shall remain unextinguished by treaty with the United States and such Indians, ... but all such territory (belonging to the Indians) shall be excepted out of the boundaries, and constitute no part of the territory of Nevada, until said tribe shall signify their assent to the president of the United States, to be included in said territory.... *Act to Organize the Territory of Nevada*, 12 Stat. 210 (1861).

The *Treaty of Ruby Valley*, 1863, 18 Stat. 689, between the Western Shoshone Nation and the United States is the foundation of peaceful nation-to-nation relations between the Western Shoshone and the United States. [The text of the *Treaty* and a map of Western Shoshone lands are attached as Appendices to this Request.] The *Treaty* was signed and ratified by both parties and was duly promulgated. It remains in full force and effect, incorporated into the “supreme Law of the Land” by Article VI of the United States Constitution, as was admitted by the United States and found by a

United States District Court in 1984.³ The Western Shoshone Nation has never been conquered by nor agreed to any cession of its territory to the United States.

The *Treaty of Ruby Valley* provides entry to and passage across Western Shoshone lands by United States citizens for specified purposes under specified conditions. The *Treaty* does not extinguish Western Shoshone land rights, but is rather a formal expression of the fundamental principles of territorial integrity and free consent as the basis of international relations. It is the sole agreement between the two nations and the only basis for nation-to-nation government relations.

B. United States Judicial Violations of Western Shoshone Human Rights

The Ninth Circuit Court of Appeals is the highest United States court to have ruled on substantive Western Shoshone land rights issues. The Court found in favor of Western Shoshone land rights against various arguments advanced for their extinguishment by the United States. The Ninth Circuit held that Western Shoshone land rights have

...not been extinguished as a matter of law by application of the public land laws, by creation of the Duck Valley Reservation, or by inclusion of the disputed lands in a grazing district and issuance of a grazing permit pursuant to the Taylor Grazing Act. *United States v. Dann*, 706 F.2d 919, 927-933 (9th Cir. 1983), rev'd on other grounds, 470 U.S. 39 (1985).

On appeal by the United States, the Supreme Court overturned the Court of Appeals, despite the fact that the Supreme Court itself reiterated the lower

³ *United States of America v. Mary Dann and Carrie Dann*, Civil R-74-60 BRT, U.S.D.C. (Nev.), 1986.

court's finding that Western Shoshone land rights had never been litigated, let alone decided:

Whatever may have been the implicit assumptions of both the United States and the Shoshone Tribes (sic) during the litigation... the extinguishment question was not necessarily in issue, it was not actually litigated, and it has not been decided. *United States v. Dann*, 470 U.S., at 43-44, quoting 572 F.2d 222, 226-227.

The Supreme Court based its reversal of the Ninth Circuit decision on an assertion that the United States had “paid” the Western Shoshone for their lands by making an “award” pursuant to a United States statute, the *Indian Claims Commission Act*, 25 U.S.C. §70u(a) (1976 ed.). Since the Court could not find an actual payment and transfer of land rights between the Western Shoshone and the United States, the Court’s decision rested on a further assertion that the United States is a “trustee” for the Western Shoshone:

The final award of the Indian Claims Commission placed the Government in a dual role with respect to the Tribe: the Government was at once a judgment debtor ... and a trustee for the Tribe.... In short, the Indian Claims Commission ordered the Government *qua* judgment debtor to pay ... the Government *qua* trustee for the Tribe as the beneficiary. *United States v. Dann*, 470 U.S. 39, 49-50 (1985).

The Supreme Court's use of “trust” doctrine in conjunction with the provisions of the *Indian Claims Commission Act* thus had the effect of *precluding* actual litigation and enforcement of the *Treaty of Ruby Valley*.

As more fully set forth in Section II below, the Western Shoshone Nation explicitly rejects any attempt by the United States to impose upon it a “trust” relationship, especially when such “trusteeship” amounts to a unilateral declaration by the United States that it “owns” Western Shoshone lands in

contravention of Western Shoshone aboriginal rights and the *Treaty of Ruby Valley*.

The Western Shoshone Nation has never entered into any “trust” agreement with the United States. The Supreme Court did not cite any trust instrument or document indicating otherwise. The Court cited various scholarly works on trust law,⁴ all of which presume the existence of a trust document and none of which support the existence of a “trust” in the circumstances of the Western Shoshone Nation and the United States.

The United States’ assertion of “trusteeship” over the Western Shoshone is not compatible with the spirit or the letter of international obligations the United States has accepted. This policy increases tensions with the Western Shoshone Nation, which could lead to instability in the region as a whole.

Furthermore, the Supreme Court decision in this case rested on a mistake of fact regarding the “finality” of the ICC proceeding. The Court simply presumed that the ICC had filed a final report to Congress in the Western Shoshone case, as required by statute, when in fact no final report was ever filed. The absence of the final ICC report to Congress was a material failure in the obligation of the United States to preserve due process rights of the Western Shoshone and a fundamental flaw in the theory of acceptance of money by the United States as an alleged “trustee” on behalf of the Western Shoshone people.

⁴ The Court cited G. Bogert, *Law of Trusts and Trustees* (2d rev. ed. 1982); A. Scott, *Law of Trusts* (3d ed. 1967); Stone, “Some Legal Problems Involved in the Transmission of Funds,” 21 *Columbia Law Review* 507 (1921); *Uniform Fiduciaries Act* (1978). 470 U.S., at 48, n.11.

C. United States Executive Agency Violations of Western Shoshone Rights

1. Department of the Interior

The United States Department of the Interior, after initial negotiations with the Western Shoshone National Council, has several times attempted and purported to engage in factional negotiations with groups of Western Shoshone individuals in an attempt to “settle” Western Shoshone land rights within the terms of an Indian Claims Commission “final award.”⁵

By trying to factionalize negotiations with the Western Shoshone, the United States has ignored and attempted to bypass the government of the Western Shoshone Nation recognized in the *Treaty of Ruby Valley* and embodied in the Western Shoshone National Council. The Western Shoshone National Council is the only body that can lawfully negotiate Western Shoshone territorial issues.

2. Bureau of Land Management

The United States Bureau of Land Management (BLM) claims authority over Western Shoshone territory as “public lands” of the United States, despite repeated protest and expression of concern by the Western Shoshone National Council. The Bureau has produced no evidence of any transfer of Western Shoshone lands into “public lands” of the United States, other than the self-proclaimed “trusteeship” theory.

⁵ These purported “negotiations” placed the Department of the Interior in an obvious conflict of interest under the legal theory of the U.S. Supreme Court, it being simultaneously a legal opponent of and a self-proclaimed “trustee” for the Western Shoshone.

i. Grazing regulations

The BLM attempts to enforce its grazing regulations on Western Shoshone livestock ranchers who are operating under Article 6 of the *Treaty of Ruby Valley*, which specifically acknowledges the vested treaty right for any Western Shoshone person to be an agriculturist or herdsman.

The BLM has confiscated Western Shoshone livestock and prosecuted Western Shoshone ranchers and repeatedly threatens to carry out further confiscation and prosecution. These actions exacerbate the United States' failure to carry out its obligations under *Treaty* Article 6.

On 24 May 2002, BLM, acting in concert with other unknown United States agents, members of the Nevada state, county and local uniformed and non uniformed personnel, staged a paramilitary raid on the grazing land of the Western Shoshone People, using modern military weapons of war and the tactics of a military campaign, including small arms and motorized vehicles. With the aid of the aforementioned federal and state personnel and employing civilian cowhands and a cattle-trucking firm, a round-up of Western Shoshone cattle was conducted. Western Shoshone cattlemen and other observers were kept at a distance during the raid by threats of arrest and/or violence to their persons.

The real effect of the treacherous, roughshod, paramilitary behavior of BLM is to deprive the Western Shoshone not only of cattle, but to deny them their way of life as Western Shoshone People.

The cattle business has become a way of life and is the main livelihood for those Western Shoshone who are involved in it. This livelihood and way of life — protected under the *Treaty of Ruby Valley* — are threatened by BLM impoundment and confiscation actions.

ii. Mining activities

Article Four of the *Treaty of Ruby Valley* grants limited rights to United States citizens to prospect for and mine ore deposits on Western Shoshone Territory. At the time of the treaty signing, the nature of mining was understood by the signatories to involve the development of visible ore deposits on a human scale. This understanding has never been renegotiated and remains the Western Shoshone position on the issue.⁶

Under a “cardinal rule” of United States law regarding interpretation of Indian treaties, the *Treaty of Ruby Valley* must be read as the Western Shoshone understand it:

A cardinal rule in the interpretation of Indian treaties ...[is] that ambiguities are resolved in favor of the Indians. ...A somewhat different, although related, rule of treaty interpretation is to the effect that, since the wording in treaties was designed to be understood by the Indians, who often could not read and were not learned in the technical language, doubtful clauses are resolved in a nontechnical way as the Indians would have understood the language. Cohen, *Handbook of Federal Indian Law* 37 (1942) (citations omitted).

⁶ The historical record of mining in this region demonstrates the basis for this interpretation. The Western Shoshone themselves were often the source of information about mine sites at the time of the *Treaty*: “[I]n southern Utah in the winter of 1863-64 ... an Indian is said to have shown [William Hamblin] silver-bearing samples of rock.” Hulse, *Lincoln County, Nevada: 1864-1909* (University of Nevada Press, 1971) 6. In 1866, the Nevada State Mineralogist reported: “On showing specimens of float rock to an old Indian, he told them that he knew where there was plenty more of the same kind, and led the party to the 'Ely & Sanderson' lode.” Hulse, at 13. The understanding of mining in terms of “visible deposits on a human scale,” was widely shared: “Connor's California Volunteers of 1864 ... spent their leisure time, when they were not killing Indians, in locating mines ... [at] the very places where they camped, made a fire, noticed lead or silver sweating out of the hearth, 'located' the ledge, and entered the record in a book....” Hulse, 7.

Current mining projects in Western Shoshone territory, operating under color of permits from the BLM, involve extremely damaging industrial processes, including cavernous, large-scale excavations, massive extraction of ground water, and cyanide heap leaching. These invasive production methods were not contemplated when the *Treaty* was negotiated in 1863, when “placer mining” with little equipment was the most common form of mining throughout the region.⁷ Open-pit industrial mining, causing serious and increasing damage to Western Shoshone territory and way of life, is neither envisioned nor permitted by the *Treaty of Ruby Valley*.

III. Critique of United States Legal Doctrine Denying Western Shoshone Human Rights and Self-Determination

A. The purported United States “trusteeship” over the Western Shoshone has no basis in fact and is based on religious supremacy doctrines.

The United States Supreme Court ruled in *United States v. Dann*, 470 U.S. 39 (1985), that the Western Shoshone are precluded from asserting their rights to continuing use and occupancy of their homelands. The Court based the decision on the following tortuous logic: that the United States, as

⁷ One could hardly have contemplated mining on a massive scale in 1863. Cyanide leaching was first patented in 1887 in England and not used in Nevada until 1896 and not on a large scale until 1901. “[L]arge scale open pit mining and heap leaching ... [are] the technology of the 1980's.” “Placer mining” with little equipment was the most common form of mining throughout the area and period. Dynamite was only invented in 1867 and the mechanical drill in 1869. See Hardesty, *The Archeology of Mining and Miners: A View from the Silver State* (The Society for Historical Archeology, 1988) and Hagwood, Jr., *The California Debris Commission* (U.S. Army Corps of Engineers, 1981). As late as 1900, the methods of mining at the ledges near Mt. Oddie--which were learned of from Western Shoshone Indians--were “primitive in the extreme.” Carpenter, Eliot, and Sawyer, *The History of Fifty Years of Mining at Tonopah, 1900-1950*, XLVII, No. 1 University of Nevada Bulletin 1-2 (1953).

“trustee” for the Western Shoshone, has accepted payment from itself, on behalf of the Western Shoshone, supposedly resulting in an extinguishment of Western Shoshone land rights.

The Western Shoshone reject this tortuous logic. They also reject any “payment” for a non-existent and unprovable “taking” of their land. Acceptance by the United States Secretary of the Interior of a monetary award from the Indian Claims Commission in exchange for Western Shoshone land rights is a sham — an accounting maneuver in the Treasury of the United States, dressed in a bizarre legal doctrine.

Constitutional scholars have criticized the *Dann* decision:

[T]he Court held a “payment” had been effected, although the Indians received no money and opposed the conversion of their land. The trust doctrine was the device the Court struck upon for executing this maneuver. The United States was not only the judgment debtor to Indians, the Court said, but was also trustee to the Indians. Therefore the United States as debtor can pay itself as trustee, say this change in bookkeeping constitutes payment to Indians, and the Court will certify the fiction as a reality. Ball, *Constitution, Court, Indian Tribes*, 1987 American Bar Foundation Research Journal 1, 65.

The United States has been unable to produce any trust instrument, document, or other empirical evidence that the Western Shoshone have ever agreed to a “trust” relationship with the United States. This is evidence that a “trust relationship” does not and cannot exist.

The *Treaty of Ruby Valley* establishes a formal governmental relationship between the Western Shoshone Nation and the United States. It contains nothing to substantiate the assertion of a “trust.” The actions of the United States in proclaiming itself “trustee” over the Western Shoshone constitutes

an act of aggression in violation of the peace and friendship terms of the *Treaty of Ruby Valley* and a denial of Western Shoshone human rights.

The notion of “trusteeship” which the United States Supreme Court used to preclude substantive presentation and defense of Western Shoshone land rights in the *Dann* litigation is a unilaterally-imposed judicial fiction rooted in an early U.S. Supreme Court case, *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831):

...[I]t may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupillage. Their relation to the United States resembles that of a ward to his guardian. 30 U.S., at 17.

This *dictum* of United States “guardianship” over American Indians was premised on a religious doctrine of Christian supremacy announced eight years previously in *Johnson v. McIntosh*, 21 U.S. 543 (1823), where the Court stated as follows:

On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves as much of it as they could respectively acquire. Its vast extent offered an ample field to the ambition and enterprise of all; and the character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendancy. The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity, in exchange for unlimited independence. 21 U.S. at 572-573.

In (the) first effort made by the English government to acquire territory on this continent, we perceive a complete recognition of the principle which has been mentioned. The right of discovery given by this commission (to the Cabots) is confined to countries “then unknown to all Christian people;” and of these countries Cabot was empowered to take possession in the name of the King of England, thus asserting a right to take possession, “notwithstanding the occupancy of the natives, who were heathens, and at the same time admitting the prior title of any Christian people who may have made a previous discovery. *Id.* at 576-7.

Henry Wheaton, the court reporter for *Johnson v. McIntosh*, later elaborated the concept of Christian nationalism on which the United States’ assertion of “trusteeship” is premised:

...[T]he heathen nations of the other quarters of the globe were the lawful spoil and prey of their civilized conquerors, and as between the Christian powers themselves, the Sovereign Pontiff was the supreme arbiter of conflicting claims. ... It thus became a maxim of policy and of law, that the right of the native Indians was subordinate to that of the first Christian discoverer.... Wheaton, *Elements of International Law* 219, 220 (1855).

Justice Joseph Story, a judge on the same court, also independently discussed how the laws of Christendom became the basis for United States denial of fundamental human rights, including the right of self-determination, of the Indigenous Peoples. In his famous *Commentaries on the Constitution*, Story pointed out that non-Christian peoples were regarded as less than Christians in their rights to territorial integrity:

...[I]nfidels, heathens, and savages ... were not allowed to possess the prerogatives belonging to absolute, sovereign and independent nations. 1 Story, *Commentaries on the Constitution of the United States* 134 (1833).

The United States assertion of “trusteeship” over the Western Shoshone thus arises from a prejudice of religious supremacy of Christians over the Indigenous Peoples of the continent:

Grant that *res nullius* is the property of the [Christian] finder; that an infidel is *nullus* [an unbaptised person or people, of no legal standing]; that the American savage is an infidel, and the argument is complete.... Such is the origin of the Right of Discovery, the criterion to which the nations that divided the New World appealed in territorial controversies, and the ultimate ground of title throughout the United States. Hinsdale, “The Right of Discovery,” 2 *Ohio Archeology and History Quarterly* 37 (1888).

B. Religious discrimination is an unacceptable justification for assertion of power by the United States over the Western Shoshone.

The incorporation of religious supremacy doctrine into United States law constitutes a violation of the principle of separation of church and state and therefore violates a fundamental tenet of the United States Constitution.

However believable the concepts of Christian supremacy, “discovery,” and “trusteeship” over “heathens” may have been to monarchs and popes in centuries past, and however oft quoted and relied upon in United States law, these doctrines fail to meet current standards of international law.

...[T]he [“trustee”] theory is inconsistent with widely accepted tenets of contemporary morality. It is grounded on both cultural intolerance for nonwhite institutions and the conviction that Indians are inherently inferior to Americans of European descent. Such attitudes contradict the principle, broadly reflected in American law, that all individuals should be accorded equal respect regardless of race. Note, “Rethinking The Trust Doctrine In Federal Indian Law,” 98 *Harvard Law Review* 420, 427 (1984).

The United States assertion of “trusteeship” over the Western Shoshone Nation is purely and simply an extension of the Christian European colonial notion that Christian “discovery” established a “divine right” of dominion over the persons and lands of non-Christian Peoples. United States reliance on these archaic doctrines violates Western Shoshone self-determination, territorial integrity, and human rights.

To argue that the Indian people may not challenge the theoretical framework set forth by Marshall in the *Johnson* ruling is to say that they must simply acquiesce in a one hundred-and-seventy-year-old precedent predicated on the belief that the first Christian discoverer (or its legal successor) has a divine right to subjugate the heathens who were discovered. It is to contend that Indian nations ought to learn to accept a judicial pretention based on religious and cultural prejudice that asserts that their rights to complete sovereignty and to territorial integrity may be impaired, diminished, denied, or displaced simply because they were not Christian people at the time of European arrival to the Americas. It is to accept the preposterous idea that federal Indian law will forever rest on the foundation of a subjugating Christian ideology.” Newcomb, “The Evidence of Christian Nationalism in Federal Indian Law: The Doctrine of Discovery, *Johnson v. McIntosh*, and Plenary Power,” XX *New York University Review of Law & Social Change* 303, 336 (1993).

The Western Shoshone National Council unequivocally rejects the racist and discriminatory “trusteeship” derived from “Christian supremacy” and calls upon the United Nations Committee on the Elimination of Racial Discrimination to protect Western Shoshone human rights under principles of contemporary international law.

C. The United States Indian Claims Commission process violated Western Shoshone rights under international law.

1. Violation of Western Shoshone right to self-determination

The United States Indian Claims Commission Act, the *Indian Claims Commission Act*, 25 U.S.C. §70u(a) (1976 ed.), allowed the Commission to recognize “any member” of the Western Shoshone Nation as the “official representative” of the Nation, with power to stipulate a “taking” of Western Shoshone land rights and to accept compensation for such a “taking.”⁸

Pursuant to this provision, the Commission “recognized” the federally chartered “Temoak Band” to “represent” the Western Shoshone Nation. Such authorization violated the framework of inter-governmental relations established between the United States and the Western Shoshone in the *Treaty of Ruby Valley*.

Despite repeated Western Shoshone protests over a period of thirty-nine years, the United States Court of Claims rejected a challenge to this purported “representation.”⁹ The Court presumed the validity of the Commission's power to designate a “representative” of the Western

⁸ “Any claim within the provisions of this chapter may be presented to the Commission by any member of an Indian tribe, band, or other identifiable group of Indians as the representative of all its members....” 60 Stat. 1049, §10.

⁹ “[I]ndividual members of the Petitioner Association (appellant Western Shoshone Legal Defense and Education Association), and their predecessors on numerous occasions over the past thirty-nine years have resisted any legal action jeopardizing the rights and interests of the Western Shoshone Indians in their tribal lands and have made repeated protests, against the inclusion of such lands in the Claim filed in the above captioned proceeding to the officers of the Temoak Bands of Western Shoshone Indians, the Claims attorneys retained by said organization ... and to representatives of The United States of America.” *Western Shoshone Legal Defense And Education Association v. United States*, 531 F.2d 495, 499 (Ct. Cl. 1976).

Shoshone Nation, thereby enabling a stipulated “taking” of and “compensation” for Western Shoshone lands still actually occupied by the Western Shoshone.¹⁰

The *Treaty of Ruby Valley* is an international agreement between the Western Shoshone and the United States. The designation of an entity other than the Western Shoshone National Council to “represent” the Western Shoshone Nation, whether done by the Indian Claims Commission or the Department of the Interior, constituted and continues to constitute a violation of the *Treaty* and of Western Shoshone human rights.

International law prohibits the United States from interfering with Western Shoshone self-determination. The International Court of Justice has held that a nation encapsulated in an established state has the right to “determine [its] future political status by [its] own freely expressed will.” *Western Sahara Case*, 1975 ICJ REP. 12, 36, par. 70.

2. Violation of Western Shoshone right to equal protection of the laws

The United States judiciary has acknowledged that the Indian Claims Commission Act violated ordinary due process and equal protection standards:

An Indian claim under the Act is unlike a class suit in that there is no necessity that the position of each individual member of

¹⁰ When the Temoak Band, the designated representative, itself attempted to stop the ICC proceedings, the Court of Claims refused, on the ground that “far too much water had gone under the bridge.” *The Temoak Band of Western Shoshone Indians v. The United States and the Western Shoshone Identifiable Group Represented by the Temoak Bands of Western Indians*, 593 F.2d 994, 996 (1979). Note that the U.S. Court of Claims put the Temoak on both sides of the lawsuit, as plaintiff and defendant, a sign of the bizarreness of the Court's approach.

the group be represented. *Western Shoshone Legal Defense and Education Association v. United States*, 531 F.2d, at 504.

This is a clear deprivation of rights on the basis of a racial and national distinction, contrary to the *International Convention on the Elimination of All Forms of Racial Discrimination*, 660 U.N.T.S. 195, entered into force Jan. 4, 1969. In view of Articles 1, paragraph 3, and 5, paragraph (d), of the *Convention*, any discrimination on the ground of nationality or ethnicity must be avoided when enacting or implementing legal provisions. The *Convention* guarantees

... the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

(a) The right to equal treatment before the tribunals and all other organs administering justice.... *Id.*

The Western Shoshone National Council was not a party before the Indian Claims Commission, nor were a majority of Western Shoshone persons ever actually represented by the Indian Claims Commission “designated representative.”¹¹ Despite these facts, the United States asserts that the

¹¹ “The Te-Moak Bands has never at any time included within its membership even a majority of all Western Shoshones. ...[T]he Te-Moak Bands is only one of several governments organized under the Indian Reorganization Act. ...[The attorneys for the Te-Moak Bands] may have realized the unrepresentative character of the Te-Moak Bands Tribal Council, because at various times they called several meetings open to all Western Shoshones at a number of locations within Western Shoshone country to approve actions they were taking and to elect a claims committee.... At these meetings, traditionalist Western Shoshones appeared and protested the claims process, usually walking out in protest before a vote could be taken. In consequence the total number of votes taken at all these meetings was only a small fraction of the total Western Shoshone population.” Rusco, “Historic Change in Western Shoshone Country: The Establishment of the Western Shoshone National Council and Traditionalist Land Claims,” 16 *American Indian Quarterly* 337, 346-347 (1992).

Western Shoshone Nation and all included families and Bands are bound by the Commission's rulings.¹²

The United States judiciary has never decided the technical questions of privity and representation in the Claims Commission cases affecting the Western Shoshone. The U.S. Ninth Circuit Court of Appeals expressly refused in the *Dann* litigation “... to resolve the question ... [of] 'parties' to the ICC litigation by virtue of any representation of the Shoshone Tribes in the litigation.” *United States v. Dann*, 572 F.2d 222, 226 (1978).

The Circuit Court noted that

Some difficult issues are presented in deciding the identity of parties ... in the context of tribal litigation before the Commission. [citations omitted]. 572 F.2d, at 226, n.1.

The Court declined a second time to decide the privity issue in a subsequent phase of the litigation:

In *Dann I* we found it unnecessary to decide whether the Danns were in privity with the claimants in the claim proceedings.... We again decline to decide the question of identity or privity of parties.... *United States v. Dann*, 706 F.2d 919, 924, n. 3 (1983).

The Circuit Court reasoned that it did not need to resolve these issues because it gave the Claims Commission award “no collateral estoppel or res judicata effect.” *Id.* When the United States Supreme Court subsequently “deemed” the award to have such preclusive effect, the question of

¹² In ordinary domestic law of the United States, a stipulation is not binding upon persons not parties to the stipulation, nor upon those whose status as parties was expressly withheld and who did not participate in or agree to the stipulation. See *Kneeland v. Luce*, 141 U.S. 437 (1891). It is elemental due process that a party is not bound by a judgment rendered in its absence. See *Restatement (Second) of Judgments*, Ch. 4 (1982).

representation and privity of parties became of crucial importance, but has never been decided.

The ICC Western Shoshone cases have been described as “bizarre and complex ... litigation, in which elaborate efforts by elements of the tribe to discharge the claims attorneys and stay the proceedings ... were repeatedly rebuffed...” Hughes, “Indian Law,” 18 *New Mexico Law Review* 403, 417 n. 96 (1988).

One crucial Claims Commission case demonstrates by its title alone the impossibility of sustaining the assertion that the Commission decisions are binding on all Western Shoshone: *Temoak Bands of Western Shoshone Indians v. United States and Western Shoshone Identifiable Group Represented by the Temoak Bands*, 593 F.2d 994 (Ct. Cl.), cert. den. 444 U.S. 973 (1979). One scholar described this as “a phase of the case in which the Temoak Bands apparently ended up being aligned against themselves.” Hughes, *Id.*

There is no factual or legal basis to support a conclusion that the Western Shoshone Nation is bound by any decisions of the United States Indian Claims Commission regarding “claims” and “awards” purportedly made by and for the Temoak Band, particularly after the Temoak Band itself sued to stop the federal “representatives” purportedly acting in its name from carrying out any “claim.”

Even if the Supreme Court theory that payment may be “deemed” to have been made to the Temoak Band were acceptable as a legal principle, it would not suffice to transfer the entirety of Western Shoshone land rights to the United States. Moreover, even if actual payment had occurred—which has not happened—payment alone does not guarantee that a land right gets

conveyed to one party and extinguished as to another. Thus, for example, payment could be made to one who purports to be the holder of the entire land right when in fact that right (or part of it) may lie elsewhere, and that right is not extinguished. Sometimes inadequately described lands are purportedly conveyed, and that fails to extinguish land rights:

A purported conveyance is not one in fact unless it contains a description from which a competent person can locate the land intended to be conveyed and can distinguish it from all other land. 4 Casner, *American Law Of Property*, sec. 18.34 (1952).

Such is the case with Western Shoshone lands. The “facts” of the so-called “taking” of Western Shoshone lands, which would include the boundaries of the lands so taken, were never determined:

Because an average “taking date” was stipulated, the Commission did not determine the facts of taking for any individual parcel of the vast aboriginal holdings of the Western Shoshone. *United States v. Dann*, 706 F.2d 919, 924 (9th Cir. 1983).

Further, as an Indian law scholar has pointed out:

In *Shoshone Tribe v. United States* [11 Ind. Cl. Comm. 387, 416 (1962)], ... the parties stipulated [a “taking” date] ... although no act even arguably constituting a legal taking occurred on that date. Hughes, “Indian Law,” 18 *New Mexico Law Review* at 419-420.

The United States relies on this contested stipulation as the basis for a finding that Western Shoshone title was taken by “encroachment,” *Shoshone Tribe v. United States*, 11 Ind. Cl. Comm, at 416 (1972). As evidence that the stipulation of an 1872 “taking” was utterly without factual foundation, consider the decision of the Nevada Supreme Court in *State v. McKenney*, 18 Nev. 182 (1883), a case involving the question of criminal jurisdiction over acts committed by a Shoshone man within Shoshone territory: The

Court held that the courts of Nevada had no jurisdiction to try a member of the Shoshone Nation, which was recognized and treated with as a Nation by the United States, having its Chief and laws, for killing another Shoshone person within Shoshone territory. If, in fact, there had been a "taking" of Western Shoshone lands in 1872, one would expect that the highest court in Nevada would have heard about it eleven years later; instead, the Court found to the contrary.

Furthermore, the theory of "taking by encroachment" itself directly violates international law recognized by the United States:

...the principle that Indian land can be taken ... only by an express and deliberate act of the sovereign [is a principle] rooted in international law.... One of the earliest pieces of legislation enacted under the American Constitution, the first Indian Trade and Intercourse Act, Act of July 22, 1790, ch. 33, 1 Stat. 138, included a codification of this elemental doctrine at § 4, and it has been part of the positive law of the nation ever since. Hughes, 18 *New Mexico Law Review* at 412 n. 58.

On the other hand, if "title by encroachment" is a valid legal concept, it must work in both directions and would thereby sustain reestablishment of Western Shoshone territory purportedly "taken" by the United States. For decades, Western Shoshone ranchers have been grazing livestock on lands to which the United States claims title by encroachment, a period much longer than that which was stipulated by parties in the Indian Claims Commission to support its finding of a "taking."¹³

¹³ "A stipulation was entered ... that July 1, 1872, [eight years, nine months after the October 1, 1863, signing of the *Treaty of Ruby Valley*] would be deemed the date of taking...." *U.S. v. Dann*, 572 F.2d 222, 225 (1978).

IV. Contemporary International Law Requires Free Consent as the Basis for Relations Among Nations and Peoples.

Courts outside the United States have acknowledged that contemporary international principles of territorial integrity and free consent, by which one nation respects the rights and government of another and through which nations negotiate just resolutions of their acknowledged differences, supersede discriminatory doctrines derived from English common law:

... [I]t is imperative in today's world that the common law should neither be nor be seen to be frozen in an age of racial discrimination.

A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration. It is contrary both to international standards and to the fundamental values of our common law to entrench a discriminatory rule which, because of the supposed position on the scale of social organization of the indigenous inhabitants of a settled colony, denies them a right to occupy their traditional lands. *Mabo And Others v. Queensland* (No. 2), 175 CLR 1 F.C. 92/014, par's. 29, 41, 42 (1992) [High Court of Australia].

The unilateral assertion by the United States of “trustee” power over the Western Shoshone is also contrary to the International Trusteeship System established by Chapter XII of the Charter of the United Nations, which provides for the possibility of “trusteeship” relations among nations on the basis of specific “trusteeship agreement(s).”

The United Nations shall establish under its authority an international trusteeship system for the administration and supervision of such territories as may be placed thereunder by subsequent individual agreements. *Charter of the United Nations*, June 26, 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153, entered into force Oct. 24, 1945, Art. 75.

As was pointed out in Section II above, there is no evidence of a trust agreement between the Western Shoshone Nation and the United States. The purported United States “trusteeship” over the Western Shoshone is a figment of United States law, rooted in ancient religious prejudices.

The 1863 *Treaty of Ruby Valley* is the only formal instrument governing relations between these two nations. The United Nations Charter protects the *Treaty* from being infringed or unilaterally converted into a “trust”:

Except as may be agreed upon in individual trusteeship agreements... nothing in this Chapter shall be construed in or of itself to alter in any manner the rights whatsoever of any states or any peoples or the terms of existing international instruments.... *Charter, Id.*, Art. 80.

The United States recognized these international principles in a 1987 submission to the United Nations Secretariat regarding American Indian Nations. The Hopi Nation had challenged the assertion of “trustee” powers by the United States. The United States replied by asserting the existence of

...a unique political relationship between the Hopi tribe and the United States. ... Confirmation and acceptance of that special relationship by Indian tribes automatically subject them to the authority of Congress and the United States. *Response of the Government of the United States to United Nations Secretariat Notes no. G/SO 215/1 USA (107), (112), (114), (117), and (119)*. United Nations Economic and Social Council, E/CN.4/GR.1987/7/Add.12 (30 September 1987), 23.

The United States has not referred to any act or document indicating Western Shoshone “confirmation and acceptance” of a “trust relationship” with the United States. The United States submission to the United Nations in the Hopi case specified that the United States does *not* have a “trust” relationship with the original Hopi government because that government has

never confirmed and accepted such a relation. The same is true of the original government of the Western Shoshone.

The United States' invocation of purported "trustee" powers to deny Western Shoshone human rights is a direct violation of the purposes for which the United Nations recognized "trust" agreements:

The basic objectives of the trusteeship system ... shall be: ... to promote ... self-government.... *Charter, Id.*, Art. 76.

In this context, the rhetoric of "government-to-government relations" which the United States sometimes uses to explain its "unique relation" to Indigenous Peoples is a subterfuge. The United States has used racist and discriminatory doctrines of "Christian discovery" and "dominion" to attempt to define the Western Shoshone Nation out of existence and to evade the *Treaty of Ruby Valley*. The United States is engaged in an ongoing effort to deprive Western Shoshone people of their human rights: their property, their self-determination, and their way of life.

Human rights of Indigenous Peoples are defined in contemporary international principles and practices of the United Nations, the United Nations Committee on the Elimination of Racial Discrimination, and other bodies. These rights include cultural and territorial integrity, collective security within their homelands, and preservation, use, and development of their lands according to their own cultures.¹⁴

¹⁴ See especially *The Yanomami Case*, No. 7615, Inter-Am. C.H.R., OEA/Ser.L/V/II.66, doc. 10, rev.1 (1973); *The Miskito Case*, Case No. 7694, Inter-Am. C.H.R., OEA/Ser.L/V/II.62, doc. 10, rev. (1983), OEA/Ser.L/V/II.62, doc. 26 (1984); *Ominayak v. Canada*, Hum. Rts. Com., Communication No. 167/1984, U.N. GAOR, 45th Sess., Supp. No. 40, Annex IX, U.N. Doc. A/45/40 (1990); *Kitok v. Sweden*, Hum. Rts. Com., Communication No. 197/1985, U.N. GAOR, 43rd Sess., Supp. No. 40, Annex VII.G.,

The status of the Western Shoshone as a self-determining people is protected by the *International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976):

All peoples have the right of self-determination. By virtue of that right they freely determine their political status....
... In no case may a people be deprived of its own means of subsistence. *Id.*, Article 1.

The United Nations Committee on the Elimination of Racial Discrimination enunciated strong commitments relating to the right of self-determination of peoples in the 1975 Helsinki Declaration:

The participating States will respect the equal rights of peoples and their right to self-determination, acting at all times in conformity with the purposes and principles of the Charter of the United Nations and with the relevant norms of international law, including those relating to territorial integrity of States.

By virtue of the principle of equal rights and self-determination of peoples, all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external interference, and to pursue as they wish their political, economic, social and cultural development.

The participating States reaffirm the universal significance of respect for and effective exercise of equal rights and self-determination of peoples for the development of friendly relations among themselves as among all States; they also recall the importance of the elimination of any form of violation of this principle. *Declaration on Principles Guiding Relations between Participating States*, principle VIII, Helsinki, 1975.

These commitments were reaffirmed in *Questions relating to Security in Europe*, par. 4, Vienna, 1989; *Friendly Relations among Participating States*, par.7, Paris, 1990; and Moscow, 1991 (Preamble, par. 7).

The protection of Indigenous Peoples under international human rights law was expressly confirmed in the 1992 Helsinki Summit of the Conference for Security and Cooperation in Europe:

The participating States, Noting that persons belonging to indigenous populations may have special problems in exercising their rights, agree that their OSCE commitments regarding human rights and fundamental freedoms apply fully and without discrimination to such persons. *Helsinki 1992 Decisions*, chapter VI, par. 29.

On September 17, 2001, the Inter-American Court of Human Rights released its decision in the *Mayagna (Sumo) Awas Tingni Community Case*. The Court affirmed the existence of Indigenous Peoples' collective rights to their land, resources, and environment. The Court ruled that the Nicaraguan government denied the Community equal protection under the laws and violated obligations to bring state domestic laws in line with international law articulated in the American Convention on Human Rights. The Court further declared that indigenous communities' relationships with the land are not merely a question of possession and production; the land is also a material and spiritual element which they should fully enjoy, as well as a means of preserving their cultural heritage and passing it on to future generations.

In August 2001, the United Nations Committee on the Elimination of Racial Discrimination considered the specific circumstances of United States actions toward the Western Shoshone. Among its concluding observations were the following:

The Committee notes with concern that treaties signed by the Government and Indian tribes, described as "domestic dependent nations" under national law, can be abrogated unilaterally by Congress and that the land they possess or use can be taken without compensation by a decision of the Government. It further expresses concern with regard to information on plans for the expansion of mining and nuclear waste storage on Western Shoshone ancestral land, for placing their land to auction for private sale and other actions affecting the rights of Indigenous Peoples. The Committee recommends that the State party should ensure effective participation by indigenous communities in decisions affecting them, including those on their land rights, as required under article 5(c) of the Convention, and draws the attention of the State party to General Recommendation XXIII(51) on Indigenous Peoples which stresses the importance of securing the "informed consent" of indigenous communities and calls, inter alia, for recognition and compensation for loss. The State party is also encouraged to use as guidance the ILO Convention 169 on Indigenous and Tribal Peoples. *CERD/C/59/Misc.17/Rev.3*, 14 August 2001.

On December 27, 2002, the Inter-American Commission on Human Rights of the Organization of American States (OAS) issued its final report in the case of *Mary and Carrie Dann v. United States*, Case No. 11.140.¹⁵ The complaint in the case, filed in 1993 by two Western Shoshone sisters, charged that the United States was illegally depriving the Western Shoshone of their lands.

The Commission's summary conclusions and recommendations, issued on July 29, 2002, are as follows:

¹⁵ The full text of the OAS Report is available on the Internet (visited 25 July 2005): <http://www.cidh.oas.org/annualrep/2002eng/USA.11140.htm>

1. The United States in its treatment of the Danns and their land rights has violated Articles II (right to equality before the law), XVIII (right to a fair trial), and XXIII (right to property) of the American Declaration on the Rights and Duties of Man.
2. There are detailed international legal principles and norms that apply to indigenous peoples' rights to land, based on the American Declaration, ILO Convention No. 169, the draft UN Declaration on the Rights of Indigenous Peoples, the OAS draft American Declaration on the Rights of Indigenous Peoples, and other sources.
3. The Indian Claims Commission process in the Western Shoshone claim did not comply with international human rights norms.
4. Any determination of indigenous peoples' interests in land must be based upon a process of fully informed and mutual consent on the part of the indigenous community as a whole. Specifically: 1) Members must be fully and accurately informed, and 2) Members must have an effective opportunity to participate as individuals and as collectives.
5. The Western Shoshone claim in the Indian Claims Commission was pursued by one band of Western Shoshone without a mandate (informed consent) from the others, and this was not adequate to comply with international human rights norms, that is, the principle that there be informed and mutual consent on the part of the Western Shoshone community as a whole.
6. Therefore, the Danns' rights (and the rights of other Western Shoshone) in their lands were not determined in an effective and fair process in compliance with the norms and principles of international law.
7. In regard to the United States' assertion of ownership of the land as against the Danns, the Danns have not been afforded their right to equal protection of the law under Article II of the American Declaration of the Rights and Duties of Man.
8. The requirements of the Fifth Amendment to the U.S. Constitution (property shall not be taken by the government except for a public purpose, with due process of law, and with

fair market compensation), which apply generally to takings of property by the United States, were not extended to the Danns, and there was no proper justification for this discriminatory treatment.

9. Furthermore, no interest was awarded on the compensation by the Indian Claims Commission, thus leaving the Western Shoshone uncompensated for the cost of the alleged taking during the period between the alleged taking and the award.

10. In regard to their claimed lands and the Western Shoshone claim in the Indian Claims Commission, the Danns have not been afforded equal treatment under the law.

11. The United States must make available a fair legal process to determine the Danns' (and other Western Shoshone) land rights.

12. The United States has failed to ensure the Danns' right to property under conditions of equality contrary to Articles II, XVIII, and XXIII of the American Declaration of the Rights and Duties of Man.

The OAS Report supports the position of the Western Shoshone National Council that the claimed "extinguishment" of Western Shoshone land title as a result of the Indian Claims Commission process was in fact a violation of international human rights law.

The OAS Report issued two specific recommendations:

The Commission recommends that the United States:

1. Provide the Western Shoshone with an effective remedy, which includes adopting legislative or other measures necessary to ensure respect for their right to property in accordance with Articles II, XVIII and XXIII of the American Declaration in connection with their claims to property rights in Western Shoshone ancestral lands.

2. Review its laws, procedures and practices to ensure that the property rights of indigenous persons are determined in accordance with the rights established in the American

Declaration, including Articles II, XVIII, and XXIII of the Declaration.

Rather than complying with the recommendations of CERD and the OAS, the United States moved instead to compound the prior wrongs by enacting a –so-called Western Shoshone Claims Distribution Act, Pub. L. 180-270, 118 Stat. 805 (July 7, 2004). This law does not fulfill either the CERD or OAS human rights recommendations. In fact, the law goes counter to those recommendations. The forced distribution of the contested Indian Claims Commission “award” actually extends and exacerbates ongoing U.S. violations of Western Shoshone rights by purporting to close the books on the purported "taking" of Western Shoshone lands by monetary payments to individual Western Shoshone citizens.

V. Conclusion

The actions of the United States discussed in this document constitute violations of Western Shoshone fundamental human rights, including their rights to self-determination and to natural wealth and resources and are contrary to international law.¹⁶

As a result of these violations of fundamental human rights, the Western Shoshone people have suffered and continue to suffer irreparable harm to their persons, property, and way of life.

¹⁶ In addition to materials cited in the text, see *Declaration on the Granting of Independence to Colonial Countries and Peoples*, G.A. res. 1514(XV), 15 U.N. GAOR Supp. (No. 16) at 66 U.N. Doc. A/4684 (1961); *Permanent Sovereignty over Natural Resources*. G.A. res. 1803 (XVII), 17 U.N. GAOR Supp. (No. 17) at 15, U.N. Doc. A/5217 (1962); and *Convention concerning Indigenous and Tribal Peoples in Independent Countries* (ILO No. 169), 72 ILO Official Bull, 59, entered into force Sept. 6, 1991.

The United States has shown blatant disregard for Western Shoshone human rights, and openly and notoriously ignored recommendations of the CERD and the OAS IACHR. This behavior constitutes a serious, massive and persistent pattern of racial discrimination, warranting urgent measures under CERD procedures.

The Western Shoshone National Council is and has been open for real, meaningful dialogue with the United States government on issues affecting Western Shoshone human rights and self-determination. The United States has sought to avoid such dialogue, relying instead on legal fictions and assertions of power that violate fundamental international law human rights principles.

In the absence of a domestic remedy for violations of the *Treaty of Ruby Valley* and vindication of Western Shoshone human rights under United States law, the Western Shoshone National Council requests the United Nations Committee on the Elimination of Racial Discrimination:

- 1. to investigate** United States violations of Western Shoshone human rights, territorial integrity, and self-determination;
- 2. to prevent confiscation** of Western Shoshone livestock and destruction of and interference with Western Shoshone land use activities;
- 3. to require compensation** by the United States for confiscation of Western Shoshone livestock and destruction of and interference with Western Shoshone land use activities;
- 4. to assist the Western Shoshone Nation** as a whole to protect Western Shoshone human rights, territorial integrity, and self-determination against depredations and wrongful assertions of jurisdiction by the United States; and
- 5. to promote negotiations** between the Western Shoshone National Council and the United States Department of State and

the Office of the President of the United States to address and resolve their differences.

**LIST OF SUPPORTING DOCUMENTS
AVAILABLE ON THE INTERNET***

1. *TREATY OF RUBY VALLEY BETWEEN THE WESTERN SHOSHONE NATION AND THE UNITED STATES*, October 1, 1863: 18 Statutes at Large 689: On the Internet at http://www.nativeweb.org/pages/legal/shoshone/ruby_valley.html and searchable at <http://memory.loc.gov/ammem/amlaw/lwsllink.html>
2. HISTORIC MAP SHOWING WESTERN SHOSHONE (SHOSHONI) TERRITORY: On the Internet at http://www.lib.utexas.edu/maps/united_states/early_indian_west.jpg
3. CONTEMPORARY MAP OF WESTERN SHOSHONE TERRITORY: On the Internet at <http://www.nativeweb.org/pages/legal/shoshone/images/newemap.gif>

* All Internet sites visited 25 July 2005.