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# THE WESTERN SHOSHONE STRUGGLE: OPENING DOORS FOR INDIGENOUS RIGHTS

JULIE ANN FISHEL \*

The struggle of the Western Shoshone Nation is the struggle of all Indigenous Peoples. It is not just about abuse of power and economics – it is about the stripping away of our spirit. It is about being forced to live in two worlds – the real world and a world of made up laws and legal constructs which attempt to render us invisible. Laws which claim to transfer power from the sacred things to the almighty dollar. When we have been beaten down, time and time again, when we have to stand by and watch our world and our people collapsing in front of us, the one thing that keeps us going is our spiritual beliefs – our knowledge of the traditional teachings.

Carrie Dann, Western Shoshone \*\*

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\*\* Carrie Dann is a Western Shoshone grandmother and long-time activist for Western Shoshone land rights and human rights. Ms. Dann and her late sister

Western Shoshone lands span sixty million acres, from the Snake River in Idaho, across two-thirds the State of Nevada, a portion of Western Utah, flowing into Southern California across Death Valley and beyond. The territory ranges from snow-topped mountains, green canyons with fresh spring water and massive stretches of semi-arid desert on the valley floor with oceans of sage and hot springs throughout the territory. Breathtaking colors of sunrises and sunsets span the horizons.

Western Shoshone creation stories stem from this land and flow like a river from South to North and down again, telling the people how to behave and what their responsibilities are as human beings. They call the land *Newe Sogobia*, which, in the Shoshone language, means, "Peoples' Earth Mother." They themselves are *Newe*, the "People." The creation stories say that the *Newe* were placed on this land base with the responsibility to care for it through their songs and prayers. Their responsibilities extend not only for the current generation of people, but also for the future generations of all peoples and life.

For tens of thousands of years before the trappers, cavalry, miners and settlers began arriving from Europe; the Shoshone took care of the land base according to their own laws, their own land management systems and their own governing methods. Their relationship with the land, the air, the water, the sun and the life that depends on those things, is much different from the system brought from across the ocean. The *Newe* see the earth as a female living being.

The Western European system sees the earth as a resource for human consumption and dominion.<sup>1</sup> According to Shoshone traditional teachings, the issue of "ownership" or "title" is much different. For the *Newe*, the Creator, or "*Apa*," holds title to the land.

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Mary Dann have been recognized time and time again for their perseverance and commitment to the struggle of the Western Shoshone and other indigenous peoples.

<sup>1</sup> Steven Newcomb, *The Evidence of Christian Nationalisms in Federal Indian Law: The Doctrine of Discovery, Johnson v. McIntosh, and Plenary Power*, 20, N.Y.U. REV. L. & SOC. CHANGE 303 (1993).

People do not have a dominating relationship with the land, but rather have sacred responsibilities to protect the land areas from which they originate. Therefore, for the Shoshone, indigenous rights means having the right to access, use, and pray for the land in their own way. Further, it is the right to decision-making over activities that may affect the land and its resources.

To someone passing through the area, the wealth of the land is hidden, unlike in California, where in the 1800's gold nuggets could be found in abundance. Some have even referred to the area as a "wasteland." In 1863, the United States, while embroiled in its Civil War, entered into a Treaty of Peace and Friendship ("Ruby Valley Treaty") with the "Western bands of the Shoshonee [sic] Nation" ("Western Shoshone").<sup>2</sup> The U.S. entered into this treaty because it wanted safe passage across the territory to the gold fields of California.<sup>3</sup>

According to the terms of the Ruby Valley Treaty, there was no cession of land by the Shoshone. Hence, the U.S. government recognized the Shoshone land boundaries and agreed to compensate Shoshone peoples for damages that had been caused by the movement of the settlers for a railroad, telegraph poles, and for minerals taken through the small operations scattered sparsely across the area.<sup>4</sup> In exchange, the Shoshone agreed to live in peace and share their land with small towns of settler populations and ranches to support those towns.<sup>5</sup> In the treaty, the Shoshone never waived any rights to decision making over the land base or activities affecting their environment and well-being.

The *Newe* have lived up to their end of the bargain, while the U.S. government, on the other hand, has not. The U.S. now claims nearly ninety percent of Western Shoshone lands as "public" or "federal" lands.<sup>6</sup> In fact, the land base is the largest contiguous

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<sup>2</sup> Treaty with the Western Shoshoni [sic], U.S.-W. Shoshone, October 1, 1863, 18 Stat. 689 [hereinafter *Treaty of Ruby Valley*].

<sup>3</sup> *Id.* art.2.

<sup>4</sup> *Id.* art. 5, 7.

<sup>5</sup> *Id.* art. 2-4.

<sup>6</sup> See e.g. U.S. Dept. of Interior, <http://www.blm.gov/nv/st/en.html>;

“public” land area in the continental United States.<sup>7</sup> After the discovery in the early 1960’s of a process to extract microscopic gold from the earth, a U.S. quasi-judicial agency stipulated that Shoshone “aboriginal title” and rights to the land had been extinguished through “gradual encroachment.”<sup>8</sup> Under the statute that set up that same agency, the Shoshone were barred from asserting their title in U.S. courts.<sup>9</sup>

Today, under U.S. management, the Western Shoshone land base is being used for military testing, open pit cyanide heap leach gold mining, oil and gas exploration, geothermal energy exploitation, nuclear waste disposal planning and water privatization.<sup>10</sup> It took the newcomers less than 150 years to severely alter the health of the land, air and water.

Today, seismic booms from military jets frequently jar entire communities to attention. Radiation effects from nuclear testing continue to seep silently and lethally through Western Shoshone families, while springs are drying up. Mercury contamination is on

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Environmental Protection Office, <http://www.epa.gov/region09/indian/mapnv.pdf>; The National Atlas, <http://nationalatlas.gov/printable/images/pdf/fedlands/nv.pdf>

<sup>7</sup> See Bureau of Land Management, 2006 Public Land Statistics, 16-18, [http://www.blm.gov/style/medialib/blm/wo/Business\\_and\\_Fiscal\\_Resources/2006\\_pls.Par.66250.File.dat/Complete\\_PLS2006.pdf](http://www.blm.gov/style/medialib/blm/wo/Business_and_Fiscal_Resources/2006_pls.Par.66250.File.dat/Complete_PLS2006.pdf).

<sup>8</sup> *Shoshone Tribe of Indians of the Wind River Reservation v. U.S.*, 11 Ind. Cl. Comm. 387, 416 (1962).

<sup>9</sup> Indian Claims Commission Act of 1946, Act of Aug. 13, 1946, Ch. 959 § 22, 60 Stat. 1049 (codified in part at 25 U.S.C. §§ 70n (2000)) (“ICC Act”). See generally, Russel Lawrence Barsh, *Indian Claims Policy in the United States*, 58 N.D.L. Rev. 7 (1982). For a thorough discussion on recent findings that the U.S. Supreme Court erred in applying this statutory bar in assuming that the second prong requiring a final report was never fulfilled, see Steven Newcomb, *Failure of the United States Indian Claims Commission to File a Report with Congress in the Western Shoshone Case (Docket 326-K), Pursuant to Sections 21 and 22(a) of the Indian Claims Commission Act*, Jan. 2003, available at [www.nativeweb.org/pages/legal/shoshone/ili-report.html](http://www.nativeweb.org/pages/legal/shoshone/ili-report.html).

<sup>10</sup> See Update to the Committee on the Elimination of Racial Discrimination on the Early Warning and Urgent Action Procedure Decision 1(68), Feb. 7, 2007 (Prepared with the assistance of the University of Arizona Indigenous Peoples Law and Policy Program) and attached documentation, available at [http://www.wsdp.org/70th\\_Session\\_Update\\_Feb\\_07.doc](http://www.wsdp.org/70th_Session_Update_Feb_07.doc).

the rise in the air and water and huge gaping holes from the industrial mining process dot the land like cancer sores. Tens of thousands of gallons of water per minute are being extracted in the mining process, twenty-four hours a day, every day of the year.

The Western Shoshone have not been erased. They are still here, holding their spiritual ceremonies, gathering plants and medicines and consistently maintaining their original ties to the land. Throughout the years, the *Newe* have resisted this destruction and maintained themselves through their spirituality, with the support of thousands of individuals and organizations from the U.S. and beyond, during a decades-long legal battle which is clearing new paths on the international interpretation of indigenous rights. In response to Shoshone resistance, the U.S. has engaged in military style seizures of Shoshone livestock, the issuance of trespass fines in the millions of dollars, and has conducted ongoing armed surveillance of those Western Shoshone who continue to assert their original and treaty rights.

Despite the resistance of U.S. government officials, even in the face of global warming and climate change, recognition and respect for Indigenous Peoples' rights and their traditional ways has been gathering strength over the past several decades - empowering peoples and educating non-Indigenous Peoples, governments and industries on a global basis.<sup>11</sup> This activity has generated the development of well-articulated standards which are used to measure compliance with and implementation of those Indigenous Peoples' rights.<sup>12</sup>

As the international jurisprudence continues to grow,

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<sup>11</sup> The international focus on Indigenous Peoples is reflected by such actions including, but not limited to, the United Nations designation of an International Decade of the World's Indigenous Peoples, the International Labour Organization's 1989 Convention on Indigenous and Tribal Peoples and the ongoing efforts of the United Nations and the Organization of American States to finalize completion and implementation of declarations on the rights of Indigenous Peoples.

<sup>12</sup> For a thorough review of the development and applicability of international law to Indigenous Peoples, see S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* (2nd ed. 2004).

governments around the world are increasingly being subjected to scrutiny of their internal policies regarding Indigenous Peoples. International and national corporations are also feeling the heat as their operations are measured in terms of human rights standards, rather than mere application of domestic laws. More and more, because of perseverance of peoples like the Western Shoshone, the international community is paying particular attention to the situation of Indigenous Peoples within the boundaries of the developed countries, including the U.S.<sup>13</sup> In fact, almost incrementally, as U.S. pressure increases against the *Newe*, the strength of their struggle and other Indigenous struggles is on the rise. In December 2002, the Inter-American Commission on Human Rights (“IACHR”) rendered a Final Report finding the United States in violation of rights to property, due process and equality under the law.<sup>14</sup>

The United Nations Committee on the Elimination of Racial Discrimination (“CERD”) separately reviewed the case of the Western Shoshone. In a historic move, CERD publicly issued a full decision against the U.S. on March 10, 2006,<sup>15</sup> In the decision, the U.S. was urged to “freeze”, “desist” and “stop” actions being taken, or threatened to be taken against the Western Shoshone Peoples of the Western Shoshone Nation.<sup>16</sup> The “nature and urgency” of the Shoshone situation was stressed by CERD and the U.S. was informed that the situation warranted immediate attention under the CERD’s Early Warning and Urgent Action Procedure.<sup>17</sup> The CERD decision is historic in that it is the first time a United Nations Committee has issued a full decision against the U.S. in respect to its highly controversial Federal Indian Law and Policy. In fact, when

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<sup>13</sup> Many of the “developed” countries, in particular, the United States, Canada, Australia and New Zealand, are located on lands to which they are not indigenous and thus face an interesting paradigm as the world community moves closer and closer toward full respect of Indigenous Peoples rights over lands and resources.

<sup>14</sup> *Dann v. United States*, Case 11.140, Inter-Am. C.H.R., Report No. 75/02, OEA/Ser.L/V/II.117, doc. 1 rev. 1 (2002).

<sup>15</sup> U.N. Comm. on the Elimination of Racial Discrimination [CERD], *Decision 1 (68): Early Warning and Urgent Action Procedure*, U.N. Doc. CERD/C/USA/DEC/1 (Apr. 11, 2006).

<sup>16</sup> *Id.* ¶ 10.

<sup>17</sup> *Id.* ¶ 4.

U.S. representatives first appeared before CERD in 2001, CERD members expressed alarm and concern that U.S. laws regarding Indigenous Peoples continue to be based on the outdated, colonial era “doctrine of discovery.”<sup>18</sup>

What the CERD decision means for Indigenous Peoples in the U.S. and globally is monumental in terms of a new opening to more effectively deal with Indigenous human rights violations that have long been covered up in the guise of “manifest destiny”, “national security”, and “economic development.” Whether and how long before the effects of the decision will be felt by communities on the ground is still to be determined and will depend much upon how political, academic and judicial fora examine and begin to apply the CERD decision’s meaning.

By a review of the recent Western Shoshone success at the United Nations, this paper focuses on the present-day circumstances of the Western Shoshone and the ongoing impairment of Indigenous rights caused by U.S. laws and policies. This article will walk the reader through the international process used by the Western Shoshone petitioners and provide thoughts on how to build on that success and move towards full recognition, respect for and implementation of Indigenous Peoples’ human rights.

### *I. Background*

The basis for the Western Shoshone struggle and their work in the international arena stems from a commitment by the Western Shoshone Nation and its peoples to maintain their spirituality and culture. The Western Shoshone case directly challenges the United States and the Western European economic and political systems to respect traditional indigenous ways of viewing the world, as

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<sup>18</sup> See Notes of Author from Aug. 6, 2001 U.N. CERD Review of United States. See also Reply of the United States to Questions from the U.N. Committee on the Elimination of Racial Discrimination by U.S. Assistant Attorney General Ralph F. Boyd, Jr. and U.S. Assistant Secretary of State Lorne Craner, Aug. 6, 2001, Geneva, Switzerland. (Attached in Human Rights Advocacy packet – on file with author).



decision-makers over their own lands and resources. This entails a new – or rather old - way of doing things, caring for the environment and maintaining a natural balance based on traditional teachings. As Carrie Dann, Western Shoshone grandmother and land rights activist has stated repeatedly:

We were taught that we were placed here as caretakers of the lands, the animals, all the living things – those things that cannot speak for themselves in this human language. We, the two-legged ones, were placed here with that responsibility. We see the four most sacred things as the land, the air, the water and the sun [l.a.w.s.]. Without any one of these things there would be no life. This is our religion – our spirituality – and defines who we are as a people.

In order to come into compliance with respect for the *Newe* way of life, U.S. laws must be reformed. This reformation is necessary not only to ensure protection of Indigenous Peoples' rights, but also to demonstrate that the U.S. and its political subdivisions affirmatively respect the "l.a.w.s." of the first peoples – the land, the air, the water and the sun.

Publicly, the U.S. has stated that adherence to human rights standards is a fundamental tenet of its foreign policy and that the judgments of international bodies, in particular the IACHR, should be applied to itself just as they should be applied to others.<sup>19</sup> The U.S., under the current Bush Administration, reaffirmed this policy when it signed the Inter-American Democratic Charter ("Charter") and adopted it on September 11, 2001.<sup>20</sup> In that Charter, member states of the Organization of American States ("OAS") "reaffirm[ed] their intention to strengthen the Inter-American system for protection of human rights" and commit[ted] themselves to the "promotion and

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<sup>19</sup> Luigi R. Einaudi, U.S. Ambassador, Remarks at the Organization of American States General Assembly in Support for Human Rights, Nassau, Bahamas (May 20, 1992)(on file with author).

<sup>20</sup> Inter-American Democratic Charter arts. 8-10, Sept. 11, 2001, 40 I.L.M. 1289, *available at* [http://www.OAS.org/oaspage/eng/documents/democratic\\_charter.htm](http://www.OAS.org/oaspage/eng/documents/democratic_charter.htm).

protection of human rights of Indigenous Peoples.”<sup>21</sup>

Despite this stated adherence to human rights, the actions taken by the U.S. are anything but respectful, let alone in compliance with the concerns and recommendations set forth both by CERD and the IACHR.<sup>22</sup> The U.S. has in fact chosen to reject these determinations with regard to the situation of the Western Shoshone.<sup>23</sup> So much so, that Western Shoshone use of ancestral land continues to be denied and impeded through actions of the U.S. and its political subdivision, the State of Nevada. In recent years, U.S. officials have issued trespass notices, conducted armed seizures of hundreds of Western Shoshone cattle and horses, unduly restricted traditional hunting and fishing in ancestral lands, and arrested Western Shoshone people who do not comply with these “regulations.”<sup>24</sup> At the same time, U.S. government officials have permitted and acquiesced to gold mining activities that severely threaten Western Shoshone culture, spirituality, physical subsistence and environment.<sup>25</sup>

U.S. military activities and other land transfers in Western Shoshone traditional territory continue to cause damage to their health and welfare. The proposed plans to store 77,000 tons of nuclear waste inside the Western Shoshone spiritual area of Yucca Mountain threaten irreparable harm.<sup>26</sup> Additionally, recent efforts to privatize and sell water from vast underground aquifers to the Las Vegas area have intensified despite Western Shoshone opposition.<sup>27</sup>

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<sup>21</sup> *Id.* art. 9.

<sup>22</sup> *See infra.*

<sup>23</sup> The United States has not yet responded formally to the CERD Decision. Neal McCaleb, U.S. Assistant Secretary of Indian Affairs, S.958 Comm. Hearing: Bill to Provide for the Use and Distribution of the Funds Awarded to the Western Shoshone Identifiable Group under Indian Claims Commission, Remarks Before the 107<sup>th</sup> Cong. of the United States (Aug. 2, 2002) (testifying informally that the United States rejected the Inter-American Commission’s Preliminary Report in its entirety).

<sup>24</sup> *Id.* ¶10-13.

<sup>25</sup> *Id.* ¶15.

<sup>26</sup> *Id.* ¶16.

<sup>27</sup> Southern Nevada Water Authority, Clark, Lincoln and White Pine Counties

As mentioned earlier, the U.S. is holding fast to its false presumption of extinguishment of Western Shoshone land title under the now disbanded Indian Claims Commission (“ICC”). The ICC was created in 1946 to partially compensate Indigenous Peoples for “lost” lands and resources.<sup>28</sup> A claim purportedly on behalf of the entire Western Shoshone peoples was brought before the ICC in 1951 and concluded in the United States Court of Claims where it resulted in a stipulation that Western Shoshone title to land was “extinguished.”<sup>29</sup> A monetary payment amounting to about fifteen cents per acre was paid by the U.S. government to the Secretary of the Interior in 1979.<sup>30</sup>

Despite heavy governmental pressure to distribute these monies to the Western Shoshone people, not one Western Shoshone person has received any portion of the payment as of today. When the payment was first issued in 1979, the Western Shoshone refused to accept it because they maintained that the U.S. had not shown proof of any transfer of Western Shoshone title by the Western Shoshone nation to the U.S.<sup>31</sup> The sole theory, first stated by the ICC, on which the U.S. claimed the extinguishment of Western Shoshone land title, is that the “gradual encroachment” by “whites”, settlers and others has effectively caused this extinguishment.<sup>32</sup> The theory of “gradual encroachment” is not founded in the law and has never been used before or since the Western Shoshone case. In fact,

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Groundwater Development Project, [http://www.nvgroundwaterproject.com/html/overview\\_snwa\\_planning.html](http://www.nvgroundwaterproject.com/html/overview_snwa_planning.html) (last visited Feb. 26, 2007).

<sup>28</sup> Press Release, President Truman comments on the purpose of the Indian Claim Commission (Aug. 13, 1946).

<sup>29</sup> *Western Shoshone Legal Def. & Educ. Ass’n v. U.S.*, 531 F.2d 495, 500 (Ct. Cl. 1976).

<sup>30</sup> See John D. O’Connell, *The Constructive Conquest in the Courts: A Legal History of the Western Shoshone Lands Struggle - 1861 to 1991*, 42 NAT. RESOURCES J., 765, 780, n. 60 (2002), citing Finding of Fact 20, *U.S. v. Dann*, 13 ILR 3158, 3159 (D. Nev. 1986), *aff’d in part and rev’d on other grounds*, 856 F.2d 1528 (9<sup>th</sup> Cir. 1989); *see also* *U.S. v. Dann*, 470 U.S. 39, 42 (1985). For the breakdown on the monetary award per acre, *see* *W. Shoshone Identifiable Group v. U.S.*, 29 Ind. Cl. Comm. 5 (1972).

<sup>31</sup> *See* *Temoak Band of W. Shoshone Indians, Nev. v. U.S.*, 593 F.2d 994, 996-7 (Ct. Cl. 1979).

<sup>32</sup> *Temoak Band of Western Shoshone*, 593 F.2d at 996

the theory makes no sense in light of the fact that Shoshone continue to live on the land, and the non-indigenous small towns and ranches were permitted under the Treaty of Ruby Valley.<sup>33</sup> The U.S. does not deny that the Western Shoshone land delineated in the treaty is open, in fact wide open, with up to ninety percent classified as “public” or “federal” lands.

The Shoshone have never been given a hearing that would afford them the opportunity to dispel the myth of “gradual encroachment.” The issue of title extinguishment was never actually litigated in the ICC proceedings. Western Shoshone individuals and groups were not permitted to intervene in the proceedings, nor to fire the attorneys who agreed to the stipulations of the ICC. They were also not permitted to intervene with their own attorney.<sup>34</sup> In fact, at the same time that the ICC proceedings were moving forward, the Department of Interior was suing Western Shoshone for “trespass” on the very same land base in federal courts.<sup>35</sup>

The trespass case was brought by the U.S. in 1974 against Mary and Carrie Dann, Western Shoshone sisters.<sup>36</sup> In those proceedings, the Ninth Circuit Court of Appeals agreed with the Western Shoshone and rejected each of the “extinguishment” arguments presented by the U.S.<sup>37</sup> The U.S. was told that it had failed to prove extinguishment of Western Shoshone title as a matter of law and that if it believed there was extinguishment and subsequent transfer of title to federal control, it would need to prove that “extinguishment” in a full hearing before the lower court.<sup>38</sup>

Rather than prepare its evidence and afford the Western

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<sup>33</sup> See Treaty of Ruby Valley 1863, 18 Stat. 689 (Treaty between the United States of American and Western Bands of Shoshone Indians, signed 1893, ratified by the U.S. in 1866, and proclaimed on October 21, 1869), in 2 INDIAN AFFAIRS: LAWS AND TREATIES, 851-853 (Charles J. Kappler ed., 1904). See also Cong. Globe, 37<sup>th</sup> Cong., 2d Sess. 2092 (1862), available at <http://lcweb2.loc.gov/ammem/amlaw/lwcg.html>.

<sup>34</sup> *W. Shoshone Legal Def.*, 531 F.2d 495.

<sup>35</sup> *U.S. v. Dann*, 572 F.2d 222 (9th Cir. 1978).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 226.

<sup>38</sup> *Id.*

Shoshone their day in court, the U.S. waited until the ICC devised a stipulated “compensation” amount and the Department of Interior accepted the “payment” on behalf of the Western Shoshone as its claimed “trustee” under U.S. law.<sup>39</sup> At that point, the U.S., through the Department of Interior, pursued an appeal to the U.S. Supreme Court, not on the title and extinguishment issues, but rather on the question of whether or not the Department of Interior’s acceptance of “payment” on behalf of the Western Shoshone constituted “payment” under the ICC thereby barring the Western Shoshone from continuing to assert title to their lands in U.S. courts.<sup>40</sup> In 1985, the United States Supreme Court agreed with the U.S. that the Department of Interior stands as a “trustee” for the Western Shoshone.<sup>41</sup> The Supreme Court further held that if the Department of Interior accepted money on the Western Shoshone’s behalf, the fact that the Western Shoshone were protesting, attempted to fire their attorneys, and had been denied intervention did not matter.<sup>42</sup> Therefore, because the Supreme Court held that “payment” had been made, the Western Shoshone could no longer argue collective title in U.S. courts.<sup>43</sup>

### *U.S. Law and Policy*

How could this happen? It should be a clear conflict of interest when the same party claiming you are “trespassing” on land could also accept, as your “trustee,” money for the same land base. The conflict seems clear, and yet, this behavior against Indigenous Peoples in the U.S. has not only been tolerated, but also reinforced when lands or resources are deemed desirable by economic or military interests. This behavior has in fact been “legalized” in the U.S. through the fundamental tenets of the Federal Indian Law and Policy, which are based upon antiquated, religiously grounded racist

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<sup>39</sup> *U.S. v. Dann*, 470 U.S. 39, 50 (1985).

<sup>40</sup> *Id.* at 47.

<sup>41</sup> *Id.* at 39.

<sup>42</sup> *Id.* at 49.

<sup>43</sup> *Id.* at 39.

doctrines stemming back to the Middle Ages.<sup>44</sup> These concepts continue to establish precedents in U.S. law.<sup>45</sup>

According to the supremacy clause of the U.S. Constitution, treaties made by the U.S. are the supreme law of the land.<sup>46</sup> Yet, contemporary legal standards in Federal Indian law claim that treaties with Indian Nations may be unilaterally abrogated by Congress;<sup>47</sup> Indigenous Peoples can be deprived of their lands and resources without due process of law and without compensation;<sup>48</sup> and the plenary power doctrine<sup>49</sup> permits the federal government to terminate or otherwise limit Indigenous authority and jurisdiction. With the Supreme Court's continuing legal trend and the absence of Congressional initiative, the threat to Indigenous Peoples, their self-governance and cultural and spiritual integrity looms ever larger.<sup>50</sup>

These ongoing threats to Indigenous Peoples, in particular the Western Shoshone, can be traced directly back to the fundamental principles upon which U.S. Indian law and policy is based. Current U.S. Indian law and policy is rooted in the Marshall Trilogy.<sup>51</sup> The central premise of Justice Marshall's formulation of Indian law, through the conceptual doctrine of discovery, is that Indigenous Peoples are divested of certain natural rights by the mere arrival of Christian Europeans because of an assumed superiority of religion

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<sup>44</sup> See generally ROBERT A. WILLIAMS, JR., *LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA* 33-37 (2005).

<sup>45</sup> *Id.* at 85-87.

<sup>46</sup> U.S. CONST. art. VI.

<sup>47</sup> See *Lone Wolf v. Hitchcock*, 187 U.S. 553, 556 (1903).

<sup>48</sup> See *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 290-91 (1955).

<sup>49</sup> See *Lone Wolf*, 187 U.S. at 565.

<sup>50</sup> See generally David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice and Mainstream Values*, 86 MINN. L.R. 267, 276 (Dec. 2001) (The Supreme Court has rendered numerous decisions profoundly eroding the former judicial recognition of tribal sovereignty and jurisdiction).

<sup>51</sup> The "Marshall Trilogy" is a set of three Supreme Court cases authored by Chief Justice Marshall which delineated the legal status of Indigenous Peoples in the United States. See *Johnson v. M'Intosh*, 21 U.S. 543 (1823); *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831); *Worcester v. Georgia*, 31 U.S. 515 (1832).

and race.<sup>52</sup> The Supreme Court recognized the questionable nature of this premise, but avoided an analysis of the issue by deferring to the political authority of the U.S. to determine federal-indigenous (“tribal”) relationships.<sup>53</sup> These fundamental principles have given rise to the doctrine of “plenary power.” This doctrine of plenary power states that Congress makes decisions on behalf of Indigenous Peoples with an underlying assumption of superiority. This absolute power is used by courts and policy makers alike to unilaterally rescind or otherwise limit the rights of the Indigenous Peoples living within the borders of the U.S.

From the plenary power doctrine arises the U.S.’s determination that it may unilaterally abrogate treaties entered into with Indigenous Nations.<sup>54</sup> Recently, the Supreme Court has extended this doctrine even further under the judicial theory of “implicit divestiture” of sovereign rights.<sup>55</sup> Under this judicial

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<sup>52</sup> Johnson, 21 U.S. at 576-77. According to the legal fiction expressed by Chief Justice Marshall in the *Johnson* ruling, the “discovery” by “Christian people” of lands inhabited by “natives, who were heathens,” resulted in certain limitations on American Indian sovereignty in favor of the “dominion” of the “Christian people” who “discovered” those lands. See Newcomb, *supra* note 1. The origins of this doctrine is traced to a set of legal rules and principles originating in the Middle Ages and the Crusades to the Holy Lands. See STEVE NEWCOMB, FIVE HUNDRED YEARS OF INJUSTICE: THE LEGACY OF FIFTEENTH CENTURY RELIGIOUS PREJUDICE, available at [http://ili.nativeweb.org/sdrm\\_art.html](http://ili.nativeweb.org/sdrm_art.html) (Feb. 27, 2007). At that time, Christian princes were authorized by the Pope to undertake Holy Wars of conquest against the “heathen” and “infidel” peoples. *Id.* It was under this same legal theory holding that non-Christian “savage” peoples were under the superior and absolute sovereignty and jurisdiction of the Pope that the *inter caetera divinae* (the papal bull) was performed in 1493 granting Spain the entire new world. *Id.*

<sup>53</sup> 21 U.S. at 587-88.

<sup>54</sup> See *Lone Wolf*, 187 U.S. 553.

<sup>55</sup> Extended versions of the discovery doctrine have never been delegated by Congress and have been expressly rejected in other developed countries. For example, in Australia, the original interpretation of the discovery doctrine has been found to depend on a “discriminatory denigration of indigenous inhabitants, their social organization and customs.” *Mabo v. Queensland* (1992) 107 A.L.R. 1 (Austl.). The Australian High Court found that the application of the doctrine of discovery was one that regarded the lands occupied by indigenous tribal peoples as *terrae nullius* or vacant lands because the peoples were “so low in the scale of

theory, the U.S. claims that Indian Nations or tribes may lose lands and powers of self-governance when the federal courts find that certain exercises of tribal powers are inconsistent with the “limited sovereignty” of a tribe or with the overriding interests of the federal government.<sup>56</sup>

*U.S. Efforts to Distribute the “Payment” and to Privatize Western Shoshone Land*

Since the Supreme Court’s decision in 1985, the U.S., through individual members of Congress and federal agencies, has spent considerable energy and taxpayer money to attempt to distribute the Western Shoshone “payment” and to open up Western Shoshone lands for privatization or use by the military. As mentioned previously, through the presumption of an extinguishment of Western Shoshone land title, the U.S. has declared their ancestral lands as “public land” and facilitated various legislative proposals to expedite resource extraction in favor of, for example, huge corporate mining interests.

In 1999, prompting the filing of the original CERD petition, Senator Harry Reid introduced the Nevada Public Lands Management Act of 1999 (“Public Lands Act”).<sup>57</sup> At about that same time, Senator Reid also introduced the Western Shoshone Claims Distribution Act (“Distribution Bill”).<sup>58</sup> The Public Lands

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social organization” that Europeans did not recognize their legal systems or governing authority over the lands they occupied. *Id.* Based on Australia’s Racial Discrimination Act of 1975, international human rights standards and modern principles of racial equality, the Australian High Court refused to accept such a doctrine as the “contemporary law” of a civilized democratic state and stated that it would not allow its domestic law to be “frozen in an age of racial discrimination.” *Id.*

<sup>56</sup> See *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978); *United States v. Dion*, 476 U.S. 743 (1986); Curtis Berkey, *International Law and Domestic Courts: Enhancing Self-Determination for Indigenous Peoples*, 5 HARV. HUM. RTS. J. 65 (Spring 1992).

<sup>57</sup> Nevada Public Lands Management Act of 1999, Pub. L. No. 105-263, 112 Stat. 2343 (1998).

<sup>58</sup> S. 618, 108<sup>th</sup> Cong. (2003).



Act would have authorized the Secretary of the Interior to dispose of so-called “public” land in Nevada, i.e. Shoshone territory, and to sell it to the highest bidder.<sup>59</sup> The Public Lands Act had no provisions acknowledging or safeguarding Western Shoshone interests and Western Shoshone leaders were never involved or consulted on the drafting of this bill.<sup>60</sup>

The Public Lands Act was taken off the legislative schedule after the first Western Shoshone delegation appeared before CERD in August 2000. Since that time, there have been numerous other attempts to open up the Western Shoshone lands for privatization, namely, the Placer Dome Give-Away Bill (“Placer Dome”),<sup>61</sup> the John Rishel Geothermal Steam Act Amendments of 2003,<sup>62</sup> amendments to the House Budget Reconciliation Package,<sup>63</sup> and most recently, scattered public land “auctions” ranging from forty acres apiece to five thousand acres.<sup>64</sup>

Efforts to legislate the forced distribution of “payment” have

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<sup>59</sup> Nevada Public Lands Management Act of 1999, *supra* note 57, ¶ 4(a).

<sup>60</sup> *Id.* ¶ 23.

<sup>61</sup> Northern Nevada Rural Economic Development and Land Consolidation Act of 2003, H.R. 2869, 108th Cong. (1st Sess. 2003) (Bill enacted to open 100,000 acres within Western Shoshone to purchase by Barrick, a mining company formerly named Placer Dome).

<sup>62</sup> The John Rishel Geothermal Steam Act Amendments of 2003, Hearing on H.R. 2772 Before H. Resources Subcomm. On Energy & Mineral Resources, 108th Cong. (2003) (Bill encouraging expansion of geothermal energy development which would occur within Western Shoshone). In 2005, that bill was amended and passed in the Energy Policy Act, containing a number of provisions that encourage development of geothermal resources on public lands. *See* John Rishel Geothermal Steam Act Amendments of 2005 (Energy Policy Act) Public Law No: 109-58. *See* 42 U.S.C. § 15801 [hereinafter *Energy Policy Act of 2005*].

<sup>63</sup> U.S. Rep. Nick J. Rahall, Extension of Remarks, An Assault on America’s Public Lands: The Hardrock Mining Provisions of the Resources Committee’s Budget Reconciliation Package, November 7, 2005. *See also* Text of the “Pombo Proposal” (Post-mark up), *Recommendations for budget reconciliation*, as approved by the Committee on Resources on October 26, 2005 (on file with author).

<sup>64</sup> *See* Federal Register Vol. 71, No. 54, March 21, 2006/Notices at 14248; various communications with Bureau of Land Management (All of which are attached to the August 8, 2006 Update to Early Warning and Urgent Action Procedure Decision 1 (68)).

also continued unabated and have been led by Senator Reid and then-Congressman Jim Gibbons.<sup>65</sup> With extremely heavy political pressure and one White House staffer calling the bill “red hot”, the Distribution Bill was pushed through Congress and eventually signed into law by President George Bush in July 2004.<sup>66</sup> The Distribution Bill authorizes the Secretary of the Interior to make a per capita distribution of the funds awarded by the Indian Claims Commission.<sup>67</sup> This bill bypasses both the traditional government and the federally recognized tribal councils. The bill has no provisions for input or involvement by Western Shoshone leaders for distribution of funds, despite heavy opposition and protest by Shoshone leadership.<sup>68</sup>

During legislative hearings, Senator Reid and Congressman Gibbons both made statements regarding good faith resolution of long-standing land issues. These statements were not given much credence by many Western Shoshone because at the same time these public commitments were made, other pieces of legislation, which are cited above, were geared to give the same land away to corporate interests. For example, legislative measure HR 2869, authored by Gibbons, would have allowed for privatization of tens of thousands of acres of culturally significant areas within Shoshone territory to multinational gold giant, Placer Dome.<sup>69</sup> One of the areas, Mt. Tenabo, is located in Crescent Valley, which is also the site of federal seizures of hundreds of Shoshone livestock, and home to local Western Shoshone creation stories, ancient burial sites and medicinal and food plant sources.

Another bill, HR 2772, also sponsored by Congressman Gibbons, would have encouraged large-scale expansion of geothermal energy production with no provision for Western

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<sup>65</sup> Mr. Gibbons was recently named as the Governor of the State of Nevada.

<sup>66</sup> Western Shoshone Claims Distribution Act, Pub. L. No. 108-27, 118 Stat. 805 (2004).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* ¶ 24. As of the date of this article, these funds are still held by the Department of Treasury – no Western Shoshone have received any amount of these monies.

<sup>69</sup> *Id.* at 48.

Shoshone cultural beliefs or compensation for use of the hot waters.<sup>70</sup> The magnitude of this expansion was reflected in a quote by Senator Reid wherein he termed the land as the next “Saudi Arabia” of geothermal energy.<sup>71</sup>

In order to get the Distribution Bill passed, a plethora of misrepresentations and false “spins” were given out by the authors of the bill. Senator Reid and Congressman Gibbons claimed to stand behind a “vote,” showing the “overwhelming majority” of Western Shoshone wanted the money distributed.<sup>72</sup> In fact, no vote was ever authorized or certified by any Western Shoshone council. Further, when Senator Reid and Congressman Gibbons were asked to provide documentation verifying the alleged “vote,” none was ever produced. By formal council resolutions, nine of the eleven elected councils, the traditional government and all of the traditional peoples opposed the distribution.<sup>73</sup>

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<sup>70</sup> *Western Shoshone Defense Projects Alerts: The Western Shoshone Distribution Bill- H.R. 884/S 618 Key Points*, Aug. 19, 2005, *available at* [http://www.wsdp.org/distribution\\_bill.htm](http://www.wsdp.org/distribution_bill.htm).

<sup>71</sup> *Id.* at 11.

<sup>72</sup> Library of Congress, Record of House of Representatives Congressman Gibbons request for suspension of the House Rules for placement of Western Shoshone Claims Distribution Act, on unanimous consent, June 21, 2004, *available at* <http://thomas.loc.gov/cgi-bin/query/R?r108:FLD001:H54611>; James Rainey, *While Shoshones Struggle, Millions of Dollars Await Them*, LAS VEGAS SUN, Feb. 16, 2000; Tony Batt, *Western Shoshone Tribe: \$120 million payment has Bush Backing*, LAS VEGAS REV. J. WASH. BUREAU, Aug. 3, 2002.

<sup>73</sup> Copies of Council Resolutions and documentation on file with the author. See Res. 04-TM-34, from Western Shoshone tribe of TeMoak. Then Chairman Hugh Stevens wrote to members of Congress in his letter of May 26, 2004: “We understand that at a hearing held on the Western Shoshone Claims Distribution Act, the U.S. Department of Interior told the Committee that the majority of the Western Shoshone favor a distribution of the so-called judgment funds . . . . *That statement by the U.S. Interior Department is categorically incorrect.* Congressman Tom Udall of New Mexico requested the Interior Department substantiate its claim that the majority of the Western Shoshone supports the distribution bill. *The Department still has not provided the documentation that was requested nearly a year ago.*” (emphasis added). Chairman Stevens concludes by writing: “As an elected leader . . . and speaking for the largest Tribe of the several that make up the Western Shoshone Nation, I make this direct appeal to you to please bring a halt to the unauthorized and illegal processing of legislation

Raul Grijalva, a congressman from Arizona, who, along with other human rights and indigenous rights supporters, kept the bill at bay for many years, wrote a letter to then Secretary of Interior Gale Norton in November 2003.<sup>74</sup> The letter raised detailed concerns about the real intent of the bill and the involvement of the federal government and mining, energy and nuclear industries in presenting a misleading picture of the issues to the public and to members of Congress.<sup>75</sup> In his letter, Congressman Grijalva wrote that:

Concerns have been raised regarding the treatment of Western Shoshone land and treaty rights, specifically with regard to actions taken by the Department of Interior in the management of these lands and in enforcement actions against Western Shoshone people on the lands. If these concerns are accurate, [the Western Shoshone Distribution Bill] may be . . . in conflict with the Department of Interior's position as a Trustee and its obligation to uphold the laws of the United States.<sup>76</sup>

The letter contained four pages of detailed, concise questions directed at the Department of Interior's involvement in the current situation of the Western Shoshone.

After being halted repeatedly, Senator Reid and Congressman Gibbons made use of several behind the scenes congressional maneuvers. They did this by way of scheduling the bill on suspension and consent calendars normally reserved for mundane, non-controversial issues such as postage stamp approval. When that did not prove successful, the voice vote scheduled for a Monday evening was moved without notice. It was placed several hours earlier when no opposition would be present.<sup>77</sup>

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to steal Indian lands . . . .”

<sup>74</sup> Letter from Raul Grijalva to Congressman of Arizona, to Gale Norton, Secretary of Interior (Nov. 17, 2003), *available at* <http://www.wsdp.org/>.

<sup>75</sup> *Id.*

<sup>76</sup> Letter *available at* [www.wsdp.org](http://www.wsdp.org).

<sup>77</sup> *House Passes Bill in Expedited Vote Despite NCAI Resolution and Western Shoshone Opposition*, *available at* [http://www.wsdp.org/distribution\\_bill.htm#062204](http://www.wsdp.org/distribution_bill.htm#062204).

Once the Distribution Bill was signed by President Bush, no time was wasted in working up the next attempt to privatize, for corporate interests, virtually all of the Shoshone lands. Confirming Western Shoshone predictions about massive federal land giveaways, the House Resources Budget Reconciliation Package was amended in late 2005 (“Amendment”) to include what one leading Congressman dubbed a “blazing fire sale of federal lands to domestic and international corporate interests.”<sup>78</sup> Subtitle B of the Amendment would have lifted the moratorium on privatization or patenting of lands by mining companies and opened up virtually all federal or “public” lands at a small fraction of its true value.<sup>79</sup>

Congressman Richard W. Pombo (R-WA), then Chairman of the House Committee on Resources, defended the Amendment by claiming that the sale of public lands would raise money to pay federal debts and would encourage “sustainable economic development.”<sup>80</sup> Later, after pressure from public land enthusiasts in the West, Congressman Gibbons admitted that the Amendment was his creation and it focused on the lands in Nevada.<sup>81</sup> He vowed that he would work on another measure specific to Nevada, approximately two-thirds of which is Shoshone homelands.<sup>82</sup>

Even with the passage of the Distribution Bill, the Western Shoshone have not backed off, but have, instead increased their pressure:

Western Shoshone title is still intact. We have been fighting this for years and will continue to fight. The U.S. thought when they made some notations in their bookkeeping that the Shoshone would be “paid” and any

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<sup>78</sup> U.S. Representative Nick Rahall, Extension of Remarks, (Nov. 7, 2005), available at [http://www.bettermines.org/pubs/rahall\\_remarks.pdf](http://www.bettermines.org/pubs/rahall_remarks.pdf).

<sup>79</sup> See Text of the “Pombo Proposal” (Post-mark up), *Recommendations for budget reconciliation*, as approved by the Committee on Resources on October 26, 2005 (on file with author). *Id.* at 52, Subtitle B.

<sup>80</sup> Janet Wilson & Bettina Boxall, *Revisions of Mining Law Put On Hold*, DEATH VALLEY US, Dec. 14, 2005, available at <http://www.death-valley.us/article1410.html>.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

cloud to land title would be lifted. Well, they were wrong and we're still here. We've never accepted their money and never will – our land, the earth mother is not for sale and we will protect her and continue our responsibilities as caretakers under the Creator's law.<sup>83</sup>

Despite the passage of the Distribution Bill in 2004, as of this writing in November 2006, no money has been distributed to or accepted by the Western Shoshone.

### *Role of the Corporations*

Why was so much effort put into paying a handful of Indians in the middle of the desert? Follow the money. . . in dollars and cents, Nevada – Western Shoshone homelands – are anything but a wasteland. One thing that has been highlighted throughout this struggle has been the connection between industry and government actions. As stated by one Western Shoshone leader, Larson R. Bill, in a public statement 2004:

GOLD: Western Shoshone lands are the 3<sup>rd</sup> largest gold producing area in the world, behind only South Africa and Australia. . . In mining contributions received in the 2004 [election] cycle, Congressman Gibbons comes in 2<sup>nd</sup> in the House with Reid as the 4<sup>th</sup> highest recipient in the Senate.  
...

WATER: Western Shoshone lands have been cited as sitting atop a subterranean sea with vast quantities of drinking quality fossil waters. Vidler Water, a subsidiary of PECO Holding Corp., is in the area and initiating discussions with County and State officials regarding water privatization efforts.

ENERGY: Western Shoshone hot springs are cited to be the next "Saudi Arabia" of geothermal energy production by Senator Harry Reid. Congressman Gibbons' bill, HR 2772, would open up our area to massive geothermal

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<sup>83</sup> Raymond Yowell, former Chief of the Western Shoshone National Council.

production with preliminary subsidies for the energy industry and the option to convert energy leases into mineral claims through the “back door.”

NUCLEAR WASTE: . . . The construction contract for the waste repository [at Yucca Mountain] was awarded to Bechtel Corporation at \$1.2 billion.

NUCLEAR WEAPONS/MILITARY: Western Shoshone lands are home [without our consent] to the Nevada Test Site and the Federal Counterterrorism facility, both managed through Bechtel, SAIC and Lockheed Martin. The management contracts amount to billions of dollars on a several year renewal basis.<sup>84</sup>

By using existing federal laws, U.S. officials and the multinational corporations have impeded Western Shoshone access to and use of their own lands to the detriment of the Western Shoshone peoples and their survival.<sup>85</sup> For example, under an antiquated federal law, the 1872 Mining Act (“Mining Act”), the U.S. permits mining on “public” lands and administrative officials claim that under the Act, there is no way to stop a mine from going forward.<sup>86</sup>

When one couples the Mining Act with the U.S.’s refusal to recognize Western Shoshone rights to their homelands, it is apparent that the corporate and military interests have been, and continue to be, reaping huge benefits directly from the existing violations of U.S. Indian law and policy. In fact, it was shortly after the discovery of huge deposits of microscopic gold, and a process to extract that gold, that Western Shoshone title was stipulated as “extinguished.”<sup>87</sup> The timing is an interesting coincidence, to say the least.

Thus, applying federal laws governing “public” lands, the

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<sup>84</sup> Statement by Larson R. Bill, Shoshone Community Leader, May 2004 (on file with author).

<sup>85</sup> See *Digging Holes in the Spirit: Gold Mining and the Survival of the Western Shoshone Nation*, available at [http://www.moles.org/ProjectUnderground/reports/shoshone\\_rpt.html](http://www.moles.org/ProjectUnderground/reports/shoshone_rpt.html).

<sup>86</sup> See General Mining Law of 1872, 17 Stat. 91.

<sup>87</sup> See note 29, *infra*. Stipulated by ICC.

U.S. government has permitted non-indigenous individuals and foreign mining companies to use and occupy Western Shoshone lands, namely for purposes of extraction and exploitation of Shoshone natural resources. The Western Shoshone have been subjected to ongoing environmental damage by open pit cyanide heap leach gold mining and other industrial and military activities on their land. The environmental pollutants directly threaten the physical health of the Western Shoshone and other people, animals and plant life in the area, and the destruction and restriction of access to their spiritual and cultural areas.

Damage to their natural environment plays a heavy toll on their cultural and collective health and well-being. Carrie Dann explains,

Our teachings tell us that we, as a people, and I, as an individual, are responsible for the health and well-being and preservation of our lands. If this area is further disturbed and mining allowed to move forward, I will be failing my duty to the land and to the future generations.<sup>88</sup>

All the while, as mentioned previously, members of the U.S. Congress are promoting legislation that would further open Western Shoshone lands to exploitation by non-indigenous individuals and foreign corporations. This relationship between the laws and policies that, on the one hand, deny Western Shoshone their rights, and, on the other hand, encourages corporate exploitation for monetary profit cannot be ignored.

With the assistance of organizations such as Indigenous Environmental Network, Oxfam America, the Western Mining Action Network, International Indian Treaty Council, Earthworks,

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<sup>88</sup> See Larson Bill and Julie Ann Fishel, REPORT ON EFFECTS OF CANADIAN TRANSNATIONAL CORPORATE ACTIVITIES ON THE WESTERN SHOSHONE PEOPLE OF THE WESTERN SHOSHONE NATION (Feb. 2007), *available at* [http://www.wsdp.org/Shoshone\\_Shadow\\_Report-1.pdf](http://www.wsdp.org/Shoshone_Shadow_Report-1.pdf) (citing to Te-Moak Tribe of Western Shoshone Indians of Nevada, Great Basin Mine Watch, Western Shoshone Defense Project v. U.S. Department of Interior et al., Case No. CV-N-05-0279-LRH-VPC (Declaration of Carrie Dann, Western Shoshone Elder) (D. Nevada 2006) (hereinafter “Carrie Dann Declaration”))



Mine Watch Canada, Corp Watch, the Data Center and many others, Western Shoshone have engaged in several actions targeted directly at the companies affecting the environmental integrity of their lands. Shareholder and consumer campaigns, agency and federal court proceedings, public protests, auditor reviews and media work have all been used to expose corporate connections to the ongoing violations against Western Shoshone. With the strengthening of standards for “social responsibility,” many companies are now conducting internal reviews for fear that they will receive negative marks from auditors listing companies who are not living up to public statements regarding corporate practices.

In February of 2004, the Western Shoshone Defense Project, a non-profit organization established to protect Western Shoshone land and Western Shoshone decision making over those lands, joined an international gold campaign called “No Dirty Gold”, with Oxfam and Earthworks. The campaign is targeted at consumer purchases of gold and highlights the violations of rights against Indigenous Peoples in mining areas around the world.<sup>89</sup> Becoming a part of the campaign has linked the Western Shoshone directly with a global network of communities facing very similar issues in their areas.

These actions demonstrate one thing that has been highlighted in the international filings - that the ongoing and planned actions by various corporations take place on lands the Western Shoshone have traditionally used, and continue to use, for hunting, gathering, religious, cultural, and other traditional purposes.<sup>90</sup> These uses of the land serve as a vehicle to share knowledge about traditional Western Shoshone practices between elders and youth. The destruction of the lands and natural environment on and surrounding Western Shoshone spiritual sites is devastating to the perpetuation of Western Shoshone culture, and their right to maintain existence as a distinct people.

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<sup>89</sup> Consumer and Retailers Lend Support to Clean Up Dirty Gold, *available at* <http://www.nodirtygold.org>.

<sup>90</sup> Carrie Dann Declaration, *supra* note 88.

*II. International Filings - The Western Shoshone**Take Their Case to the World*

The process of filing the Urgent Action Request before CERD was not a unilateral effort, but one which has always been part of a multi-faceted approach. This approach involved extensive federal court and agency proceedings, a separate filing before the IACHR, on the ground monitoring of state and federal actions, corporate engagement strategies and grassroots organizing, education and alliance building.

It is important to note that at the time the CERD petition was first filed, and during part of its process, individual Western Shoshone petitioners Mary and Carrie Dann were pursuing a complaint before the IACHR, as described below. Thus, much of the original legal briefings and analysis, in which the U.S. fully participated, was done from 1992 to 2002 before the IACHR. After ten years of legal briefings and evidentiary hearings, the IACHR, in its Report Number 75/02 regarding the Western Shoshone, found the U.S. in violation of rights to due process, to equality under the law and to property.<sup>91</sup> The U.S. was ordered to remedy the situation of the Western Shoshone and to review all its laws and policies regarding Indigenous Peoples to ensure compliance with recognized human rights standards, in particular the right to property.<sup>92</sup>

The U.S., as a member of the international community, and more specifically as a member of the United Nations (“UN”) and the Organization of American States (“OAS”) as well as the ratifying party to international human rights treaties, has accepted specific obligations under international law. As a member of the UN, the U.S. is obligated to uphold the provisions contained within the Universal Declaration of Human Rights.<sup>93</sup> In particular, the U.S. has ratified the U.N. Convention on the Elimination of all Forms of

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<sup>91</sup> Dann v. United States, Case 11.140, Inter-Am. C.H.R., Doc. 5 rev. 1 at 860 (2002).

<sup>92</sup> *Id.* ¶ 173.

<sup>93</sup> Universal Declaration of Human Rights, G.A. Res. 217 A (III) (Dec. 10, 1948).

Racial Discrimination.<sup>94</sup>

Additionally, as a member of the OAS and a party to the OAS Charter, the U.S. is legally bound to promote the observance of human rights. The Inter-American Court on Human Rights has declared that the rights affirmed in the American Declaration on the Rights and Duties of Man (“American Declaration”) are, at a minimum, the rights that OAS member states are bound to uphold.<sup>95</sup> Thus, the U.S. incurs international responsibility for any violation of rights articulated in the American Declaration, as well as for the violation of rights affirmed in any treaty to which the U.S. is a party.

### *Inter-American Commission on Human Rights*

The IACHR was established as a permanent organ of the OAS by amendment in 1967 and has the authority to investigate country specific issues of human rights and to issue reports thereon.<sup>96</sup> In the early 1990’s, after the U.S. Supreme Court decision in *U.S. v. Dann*, a Petition was filed with the Inter-American Commission on behalf of Western Shoshone grandmothers, Mary and Carrie Dann (“Petitioners”). The Western Shoshone National Council and several Western Shoshone communities joined the proceedings as amicus parties.

The Western Shoshone Petitioners argued that the violations arose out of the discriminatory land claims proceedings before the ICC and federal actions impairing Western Shoshone use and occupation of traditional lands.<sup>97</sup> The Petition was based on the

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<sup>94</sup> Convention on the Elimination of Racial Discrimination, Dec. 21, 1965, 660 UNTS 195.

<sup>95</sup> See Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights, Advisory Opinion OC-10/89 of July 1989, Inter-Am.Ct.H.R. (Ser. A.) No. 10 ¶ 42-45 (1989).

<sup>96</sup> For a brief history of the IACHR, see <http://www.cidh.oas.org/what.htm>.

<sup>97</sup> See Petitioners’ Supplemental Submission: Brief on the Merits, Mary and Carrie Dann v. United States, Case 11.140, Inter-Am Ct. H.R., Report No. 99/99 (1999) (submission was filed in 2000 and is available at [http://www.law.arizona.edu/Depts/IPLP/advocacy\\_clinical/western\\_shoshone/doc](http://www.law.arizona.edu/Depts/IPLP/advocacy_clinical/western_shoshone/doc)

U.S.' failure to meet its obligations in respect of Western Shoshone rights, and challenged the U.S. to reform discriminatory legal doctrines that have denied basic constitutional and human rights to Indigenous Peoples for generations.<sup>98</sup>

Rejecting the U.S.' effort to have the case dismissed, the IACHR ruled in September of 1999 that the Petition was admissible and that the claims contained therein raised a *prima facie* human rights violation, namely a violation of Articles II, XVII, XVIII of the American Declaration.<sup>99</sup>

Prior to the ruling on admissibility, the IACHR issued precautionary measures against the U.S. on several separate occasions.<sup>100</sup> The precautionary measures requested that the government halt further action against the Western Shoshone pending the IACHR's investigation of their claims.<sup>101</sup> The U.S. declined to respond to invitations to enter into friendly settlement proceedings and in April of 2001, the IACHR once again issued precautionary measures requesting that the U.S. stay any intention to impound Western Shoshone cattle until the Petition had been reviewed on the merits.<sup>102</sup>

On December 27, 2002, in its Final Report, the IACHR concluded that the U.S. was in violation of several Western Shoshone human rights, including the right to property, due process and equality under the law.<sup>103</sup> The IACHR determined that the assertion of title by the U.S. to Western Shoshone lands violated recognized human rights law because the ICC proceedings lacked adequate due process protections and were discriminatory.<sup>104</sup>

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uments/Dansuppbrief.pdf

<sup>98</sup> *Id.*

<sup>99</sup> Dann v. United States, Case 11.140, Inter-Am. C.H.R., Report No. 99/99, OEA/Ser.L/V/II.106 Doc. 3 rev. ¶ 91 (1999).

<sup>100</sup> *Id.* ¶ 14-25.

<sup>101</sup> *Id.* ¶ 24.

<sup>102</sup> On file with author – reference in Report No. 75/02, *supra* note 104.

<sup>103</sup> Dann v. United States, Case 11.140, Inter-Am. C.H.R., Report No. 75/02, OEA/Ser.L/V/II.117 Doc. 1 rev. 1 (2002).

<sup>104</sup> *Id.* ¶ 172

The IACHR also determined that general international legal principles require protection of the particular and collective interest that Indigenous Peoples have in their traditional lands and resources, including:

- \* the right of indigenous peoples to legal recognition of their varied and specific forms and modalities of their control, ownership, use and enjoyment of territories and property;
- \* the recognition of their property and ownership rights with respect to lands, territories and resources they have historically occupied; and
- \* where property and user rights of indigenous peoples arise from rights existing prior to the creation of a state, recognition by that state of the permanent and inalienable title of indigenous peoples relative thereto and to have such title changed only by mutual consent between the state and respective indigenous peoples when they have full knowledge and appreciation of the nature or attributes of such property.<sup>105</sup>

The two recommendations by the IACHR called on the U.S. to take specific actions in order to comply with its human rights obligations:

1. Provide [Western Shoshone petitioners] with an effective remedy, which includes adopting legislative or other measures necessary to ensure respect for the [Western Shoshone] right to property . . . in [their] ancestral lands and
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 . . . .<sup>106</sup>

The IACHR decision was the first time the U.S. had been

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<sup>105</sup> *Id.* ¶ 140.

<sup>106</sup> *Id.* ¶ 173.

reviewed by an independent judicial body on its laws and policies regarding Indigenous Peoples. The U.S. response to this decision was to assert that the IACHR did not have jurisdiction (although it had lost on those same arguments in the admissibility phase of the proceedings) and to proceed, one month later, with an armed seizure of over four hundred Western Shoshone horses.

### *The CERD Process*

In 1994, the U.S. ratified the UN Convention on the Elimination of All Forms of Discrimination (“Convention”). Under the terms of the Convention, the U.S. is obligated to submit a report every four years detailing how domestic law and policy is in compliance with the Convention.<sup>107</sup> If the U.S. is not in compliance, it is required to set forth the measures being taken to bring its domestic structure into compliance. The Convention established CERD as the body responsible for the review of state reports and making recommendations to the state party.<sup>108</sup> The format used by CERD to make these recommendations is through written Concluding Observations and Recommendations (“Concluding Observations”). CERD meets at the UN in Geneva, Switzerland twice a year for three-week sessions in the late winter and late summer.

CERD consists of eighteen independent experts who are selected based on “high moral standing and acknowledged

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<sup>107</sup> United Nations International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106 (XX), art. 9 (Dec. 21, 1965) [hereinafter CERD].

<sup>108</sup> *Id.* art. 8 (1-5). For example, in March of 1999, CERD issued a precedent setting decision under its early warning and urgent action procedures against the government of Australia, on the basis of concerns over recent amendments to Australia’s Native Title Act. CERD noted that specific provisions of the newly amended Act discriminate against indigenous Australians by “creat[ing] legal certainty for governments and third parties at the expense of indigenous title.” CERD Decision (2)54 and Australia: Australia, CERD/C/54/Misc.40/Rev.2, ¶ 6 (Mar. 18, 1999). CERD urged the government to suspend the amendments to the Native Title Act and to re-open discussions with aboriginal representatives regarding the subject.

impartiality.”<sup>109</sup> The experts represent different geographical regions and come from differing legal backgrounds and perspectives.<sup>110</sup> CERD members are elected by the States parties to the Convention for a term of four years and serve independently of their governing regimes.<sup>111</sup> CERD members have extremely busy schedules during each three week session. Country reports are reviewed in both private and public sessions, decisions are reached, and recommendations are made to the individual countries, or “States parties.”

Outside of the periodic reports submitted by the parties to the Convention, CERD members must also consider individual complaints filed under Article 14 of the Convention.<sup>112</sup> Urgent Requests can be made through a special procedure called the Early Warning and Urgent Action Procedure (“Urgent Action Procedure”). CERD established this procedure in 1993 in response to a call by the Security Council and the General Assembly of the UN. At that time, the UN, through these bodies, saw a need for stronger methods of “preventative diplomacy” to reduce the threat of heightened tensions in situations of massive, ongoing human rights violations.<sup>113</sup> The U.S. never objected to these procedures and sat as a Permanent Member of the Security Council and as a member of the General Assembly during these discussions.

Specifically, the Urgent Action Procedure is designed “to prevent or limit the scale of serious violations” of the Convention, and to address long-standing, persistent patterns of racial discrimination that involve or may lead to “escalating conflicts.”<sup>114</sup> Since that time, CERD has taken action under the procedure in more

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<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* art. 8, ¶ 1.

<sup>112</sup> CERD, *supra* note 107, art.14.

<sup>113</sup> Committee for the Elimination of Racial Discrimination [CERD], 68<sup>th</sup> Sess., Decision I (68), Geneva, Switz., Feb. 20-Mar. 10, 2006, *Early Warning and Urgent Action Procedure*.

<sup>114</sup> See Committee on the Elimination of Racial Discrimination [CERD], *Working Paper: Prevention of Racial Discrimination, Including Early Warning and Urgent Procedures*, ¶ 8, Annex III, U.N. Doc. A/48/18 (1993).

than twenty specific settings.<sup>115</sup>

The distinction between the individual complaint procedure of Article 14 and the Urgent Action Procedure is key to the Western Shoshone Decision by CERD. The U.S. has attempted to argue that because it did not sign onto Article 14, the Western Shoshone case cannot be considered outside of their regular periodic reporting.<sup>116</sup> If the United States' position was correct, it would enable the U.S. to control the timing of submission and the extent to which the Western Shoshone or any Indigenous rights issue is buried amidst other more main stream issues of racial discrimination. The CERD members maintained the distinction in the processes and informed the U.S. that it is in fact obligated to the Urgent Action Procedure outside of any Article 14 argument.<sup>117</sup>

In addition to the written filings, updates and supplements, Western Shoshone delegations traveled to Geneva, Switzerland in 2000, 2001, 2005 and 2006. These in-person delegations were crucial to getting the CERD members' attention. When the first Western Shoshone delegation went to Geneva in 2000, it was difficult to even get an audience with the CERD members. The U.S. was not up for review at that time and the Urgent Action Procedure had rarely been used. There was also intentional confusion caused by the U.S. over compensation issues and whether the issues were "immediate." Some CERD members were resistant. Other CERD members were very supportive – one member even told the Western Shoshone that the situation of Indigenous Peoples in the U.S. and other "developed" countries was one of the most long-standing, atrocious cases of human rights violations in world history.

After setting up informal briefing sessions, public film events, panel discussions and lobbying key CERD members, the

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<sup>115</sup> Committee on the Elimination of Racial Discrimination [hereinafter *CERD*], *Early Warning and Urgent Procedures*, available at <http://www.ohchr.org/english/bodies/cerd/early-warning.htm>. (last visited April 21, 2007).

<sup>116</sup> U.N. Press Office, Mar. 2, 2006 and open discussion by CERD at its 68<sup>th</sup> Session in March 2006.

<sup>117</sup> CERD Decision 1(68), *supra* note 113.



Rapporteur for the upcoming U.S. Report, Mr. Yuri Rechetov, was assigned specifically to the Western Shoshone petition. After that point, the Shoshone delegates had a direct audience with Mr. Rechetov and were able to follow his guidance in the most effective means by which to move the Urgent Action Request through the appropriate CERD members. By the time the Western Shoshone renewed their Request in 2005, a five-member working group had been established by the CERD to work specifically on Early Warning and Urgent Action Requests.

Travel and resources have also been a major challenge for Western Shoshone, as well as for other Indigenous Peoples participating in the international processes. Prioritization in terms of the potential effectiveness of international action, in the face of so much domestic action, has always been a top consideration. Funding sources for Western Shoshone travel and expenses came from direct appeals to individual and foundation sponsors and from private foundation grants. Legal representation and assistance has been provided on a *pro bono* basis, first through the Indian Law Resource Center and more recently through the University of Arizona Indigenous Peoples Law and Policy Program.

The Petitioners in the CERD proceedings have included a cross-section of Western Shoshone tribal communities and the Western Shoshone National Council, the traditional government of the Western Shoshone Nation.<sup>118</sup> The tribal communities did not file as separate federally-recognized tribes, but as part of the Western Shoshone Nation. This was a key element in not only educating Western Shoshone about the larger, traditional issues, but it also afforded the opportunity to delve deeply into issues of self-determination and U.S. ongoing manipulation with native governments.

As was explained in several legal briefings and oral testimony, the U.S., through the 1934 Indian Reorganization Act

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<sup>118</sup> Some of the petitioners changed over the years, when new tribal councils emerged with different views, some dropping off the petition, with others joining on. Further discussion on this issue is included in the section on “obstacles.”

(“IRA”),<sup>119</sup> imposed a system of “indirect” colonial rule much like that used by Great Britain in parts of West Africa.<sup>120</sup> It was through this system that the U.S. gave Indian communities the option of signing onto this new IRA “tribal” system whereby they could apply to be recognized by the U.S. They would have to agree to adopt model government forms created by the U.S., agree to be loyal to the U.S. and to seek approval for their actions through the U.S. Department of Interior.<sup>121</sup>

In the case of the Western Shoshone, this discussion in the 1930’s caused a split between traditional people who saw the creation of the IRA tribal governments as compromising true decision-making authority (basically becoming mini-U.S.) and those who felt that the IRA tribal option was a good one that would allow them to seek their redresses through established federal processes. Some people firmly believed that the best approach was to work from “within” the system.<sup>122</sup>

This split continues to the present day and can be heard voiced at many meetings and in informal discussions throughout Shoshone territory. With the CERD filing, and much on the ground education and information, we are now witnessing better dialogue and understanding between traditional and IRA tribal peoples, many of whom had not spoken to one another for several decades. As mentioned earlier, the focus of the CERD petition was the entire land base, not individual communities, but the Western Shoshone Nation and the fundamental denial of basic human rights caused by the underlying discriminatory basis of U.S. Federal Indian law and policy.

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<sup>119</sup> Indian Reorganization Act, Ch. 576 § 1-19 (1934).

<sup>120</sup> Max Planck Institute for Comparative Public Law and International Law, *World Court Digest*, Part II, ch. 17 Dependant Territories, (2002), available at <http://www.mpil.de/ww/en/pub/research/details/publications/institute/wcd.cfm?217000000400.cfm>.

<sup>121</sup> Indian Reorganization Act, Ch. 576 § 3 (1934).

<sup>122</sup> STEVEN J. CRUM, *ROAD ON WHICH WE CAME: A HISTORY OF THE WESTERN SHOSHONE* (1994).

*1999 – 2001 - The Original Request and CERD's Concluding Observations*

The original Request was filed in the summer of 1999, after the introduction of two pieces of legislation, discussed above (the Distribution Bill and the Public Lands Act), and a precedential March 1999 CERD Urgent Action decision involving aboriginal organizations in Australia.<sup>123</sup> The Western Shoshone petition was filed and modeled in large part after the Australian petition.

The Request centered on violations of rights to property, equality under the law, judicial and administrative processes, cultural integrity and self-determination.<sup>124</sup> The filing emphasized that the Convention protects such rights when its provisions are interpreted in light of other international legal instruments, in particular the International Labor Organization Convention (No. 169) concerning Indigenous and Tribal Peoples (“ILO Convention 169”),<sup>125</sup> the draft United Nations Declaration on the Rights of Indigenous Peoples,<sup>126</sup> the findings specific to the Western Shoshone by the IACHR, and CERD General Recommendation XXIII concerning Indigenous

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<sup>123</sup> Committee on the Elimination of Racial Discrimination, 54th Sess., U.N. Doc. CERD/C/54/Misc40/Rev 2 (Mar. 18, 1999).

<sup>124</sup> Convention on the Elimination of all Forms of Racial Discrimination art. 1, 2, and 5, Jan. 4, 1969, 660 U.N.T.S. 195. Art. 1 guarantees that fundamental freedoms in political, economic, social and cultural fields be free from discrimination based on race, color, descent or national or ethnic origin. Art. 2 obliges states to refrain from practicing racial discrimination and to ensure that all public authorities conform to this obligation. Art. 2.2 obligates states not only to refrain from discrimination but to affirmatively take special and concrete measures to guarantee the human rights and fundamental freedoms of certain racial groups. Art. 5 specifically addresses property rights, and states that “State parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, color, or national or ethnic origin to equality before the law, notably in the enjoyment of the following rights.”

<sup>125</sup> International Labor Organization Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, 28 I.L.M. 1382.

<sup>126</sup> Draft United Nations Declaration on the Rights of Indigenous Peoples, E.S.C. Res. 1994/45, U.N. ESCOR, 46th Sess., U.N. Doc. E/CN.4/Sub.2/1994/56 (1994), *reprinted in* 34 I.L.M. 541.

Peoples<sup>127</sup> as well as other instruments and precedents which amply show the new international legal standards regarding Indigenous Peoples rights.

The Request detailed that the violations against the Western Shoshone are based on a pattern of acts and omissions by which the U.S., in a racially discriminatory manner is:

Failing to recognize and protect the traditional land rights of the Western Shoshone people;

Disregarding its commitments made to the Western Shoshone people under the Treaty of Ruby Valley;

Purporting to extinguish Western Shoshone land rights through proceedings that denied the Western Shoshone people the same due process, equal protection and property rights guaranteed to others;

Seeking to force on the Western Shoshone “payment” for the extinguishment of their land rights;

Treating Western Shoshone individuals and groups as trespassers on their homelands and seeking, actively, to oust them from those lands;

Conducting ongoing military testing;

Developing a nuclear waste dumping project on Western Shoshone lands; and

Allowing environmentally catastrophic mining and other extractive activities on Western Shoshone lands, without the consent of, nor appropriate consultation with, the Western Shoshone.<sup>128</sup>

It was also emphasized that the violations against the Western

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<sup>127</sup> CERD General Recommendation XXIII concerning Indigenous and Tribal Peoples, 1235<sup>th</sup> mtg., CERD/C/51/Misc.13/Rev.4. (Aug. 18, 1997).

<sup>128</sup> See Amended Request for Urgent Action under Early Warning Procedure to the Committee on the Elimination of Racial Discrimination of the United Nations July 1, 2000. The Yomba Shoshone Tribe submitted an initial Request for Urgent Action on August 23, 1999. (On file with author.)

Shoshone, while involving a pattern of government acts and omissions that began decades ago, are anything but stale. Instead, the Request demonstrated how the pattern was continuing and rapidly escalating with ongoing irreparable effects on the Western Shoshone peoples.

After the written submission, a Western Shoshone delegation traveled to Geneva the following summer of 2000. It took two weeks of intensive informational panels, video presentations, live testimony, the creation of briefing sheets and persistent follow through by the delegation until the CERD members agreed to consider the Request and issued a written communication to the U.S. regarding the situation. At about that same time, the Public Lands Bill, mentioned earlier, was taken off the Congressional schedule. However, the Distribution Bill remained.

Unrelated to the Western Shoshone Request, the U.S., under the Clinton Administration, submitted its first-ever periodic report to CERD in the Fall of 2000. The Report did not mention the situation of the Western Shoshone. CERD scheduled the U.S. Report for a full committee review in August 2001. In January of 2001, George Bush was sworn in as the new President of the United States of America. The Western Shoshone continued to pursue a full, separate Urgent Action decision.

In July of 2001, an Amended Request for Urgent Action was submitted ("Amended Request").<sup>129</sup> CERD's review of the U.S.'s periodic report set the stage for large human rights and civil liberties based organizations across the U.S. to inundate Geneva in August of that same year. Knowing that their issue could easily get buried under the long-established, mainstream human rights issues, the Shoshone delegation stepped up their efforts to educate and inform the CERD members of the situation of Western Shoshone, and specifically, the historic and ongoing use of discriminatory laws and policies impacting all Indigenous Peoples in the U.S.

The impact of the Western Shoshone filings was strongly felt

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<sup>129</sup> See Supplement to Request for Urgent Action under Early Warning Procedure, July 26, 2001 (on file with author).

during the CERD's review of the U.S. Report. Nearly every member asked questions of the U.S. delegation with regard to U.S. Indian law and policy. Specific questions centered on the status of treaties with Indian Nations and the "takings" of Indigenous lands and resources. The U.S. replied by confirming everything that the Western Shoshone had set forth in their filings and briefing sheets. The U.S. informed the CERD members point blank that yes, it did claim to have the right to abrogate treaties, take lands and resources and exercise plenary power over Indigenous Peoples.<sup>130</sup>

CERD members roundly criticized the U.S.'s reply, stating that the U.S. had failed to answer the fundamental question of the implementation and actual exercise of indigenous rights. The need for attention to indigenous issues and for the inclusion of the Convention in domestic legislation was emphasized.<sup>131</sup> CERD member Patrick Thornberry of Great Britain expressed shock that the U.S. would cite to *Johnson v. M'Intosh*<sup>132</sup> and the doctrine of discovery. Thornberry stated emphatically that with regard to Indigenous Peoples, the current state of U.S. law demonstrated basic incompatibility with the CERD Convention.<sup>133</sup>

He further informed the U.S. delegation that the power of treaty abrogation by one side is not fair or right and is inconsistent with the doctrine of Indigenous self-determination.<sup>134</sup> He told the U.S. delegation that the doctrine of discovery is outdated and the rest of the "enlightened world" had recognized this and was making

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<sup>130</sup> See Lorne W. Craner, Assistant Secretary of State for the Bureau of Democracy, Human Rights, and Labor; Ralph F. Boyd, Jr., Assistant Attorney General, Reply of the United States to Questions from the UN Committee on the Elimination of Racial Discrimination, Geneva, Switzerland (Aug. 6, 2001), available at <http://www.state.gov/g/drl/rls/rm/2001/4486.htm> (last visited April 21, 2007).

<sup>131</sup> "[The Convention] is not just a legal document, but it is essential that it be effectuated, by a law or otherwise." Yuri Reshetov, Committee member and Country Rapporteur to the U.S. Report (Aug. 6, 2001).

<sup>132</sup> 21 U.S. (8 Wheat.) 543 (1823).

<sup>133</sup> Interview with Patrick Thornberry, CERD Committee Member. (Aug. 6, 2001).

<sup>134</sup> *Id.*

efforts to reform their laws.<sup>135</sup> Thornberry also raised serious doubts about the plenary power doctrine and stated that “Indigenous Peoples are not weak. They are not children.”<sup>136</sup> Thornberry concluded his remarks by stating that the U.S. is “well advised” to recognize the evolution of law in this area, and like comparable common law jurisdictions who have made changes, the U.S. should do the same: “This would be an emancipating and reconciling development, especially for the living victims.”<sup>137</sup>

At that time, due to reported “heavy” pressure from U.S. affiliates, CERD did not issue a separate decision, but instead wrapped review of the Western Shoshone situation into its overall Concluding Observations.<sup>138</sup> In its written Concluding Observations, the CERD noted, as factors and difficulties impeding the implementation of the Convention, the “persistence of discriminatory effects of destructive policies with regard to Native Americans.”<sup>139</sup> The CERD also noted with concern:

[t]hat 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 [the situation of the Western Shoshone] and other actions affecting the rights of indigenous peoples.<sup>140</sup>

The CERD recommended that:

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<sup>135</sup> *Id.* See generally Siegfried Wiessner, *Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis*, 12 HARV. HUM. RTS. J. 57 (1999).

<sup>136</sup> Statement by committee member Patrick Thornberry, CERD Review of U.S. Report, Aug. 6, 2001.

<sup>137</sup> *Id.*

<sup>138</sup> See *Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America*, U.N. Doc. CERD/C/59/Misc.17/Rev.3 (Aug. 14, 2001).

<sup>139</sup> *Id.* ¶ 5.

<sup>140</sup> *Id.* ¶ 21.

the [U.S.] 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 [U.S.] to General Recommendation XXIII 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.<sup>141</sup>

More generally, the CERD recommended that the U.S. undertake the necessary measures to ensure consistent application of the provisions of the Convention at all levels of the government<sup>142</sup> and to “take all appropriate measures to review existing legislation and federal, state and local policies to ensure the effective protection against any form of racial discrimination and any unjustifiable disparate impact.”<sup>143</sup> With regard to Indigenous Peoples, the CERD encouraged the U.S. to use ILO Convention 169 on Indigenous and Tribal Peoples as guidance.<sup>144</sup>

The U.S. was scheduled to submit a follow-up report addressing the issues raised by CERD and its continuing efforts to implement the Convention domestically on November 20, 2003. The U.S. is now three years overdue in submission of that report.

### *The 2005 Renewed Filing*

In August of 2005, after passage of the Distribution Bill, and increased U.S. actions being taken against Western Shoshone, the Western Shoshone renewed their Urgent Action Request (“Renewed Request”) and provided additional information to CERD requesting immediate and specific follow up.<sup>145</sup> The decision to renew the

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<sup>141</sup> *Id.*

<sup>142</sup> *Id.* ¶ 11.

<sup>143</sup> *Id.* ¶ 14.

<sup>144</sup> *Id.* ¶ 21.

<sup>145</sup> See Second Request for Urgent Action under Early Warning Procedure to the Committee on the Elimination of Racial Discrimination of the United Nations,



Urgent Action Request was based on Western Shoshone leaders' concerns that the threat of the "payment" distribution and increased harassment by federal agencies was paving the way for the U.S. to finally dispense of the entire title issue. Intimidation tactics by the U.S. post-August 2001 did not have the apparent intended effect of fracturing the Shoshone peoples' resolve; they had the opposite effect. More people began speaking out and questioning the actions of federal, state and corporate entities on their land base. As one chairman stated in a press release announcing the 2005 filing:

Our traditional laws tell us we were placed here as caretakers of the land. As part of the Western Shoshone Nation, we will not stand idly by and allow the U.S. federal government to cement its hold on our ancestral land base.<sup>146</sup>

Thus, the 2005 renewed filing was prompted by this sense of immediacy, urgency and gathering strength. The Renewed Request emphasized that since CERD's Concluding Observations expressing its concerns in 2001, the situation of the Western Shoshone had become even graver.<sup>147</sup> The Petitioners, with the legal assistance of the University of Arizona's Indigenous Peoples Law and Policy Program and the Indigenous Law Institute, documented the increased pattern of violations post 2001, highlighting especially the military style seizures of Western Shoshone livestock in 2002 and 2003. U.S. Internal Revenue Service and private collection agency actions, reinvigorated federal efforts to store nuclear waste at Yucca Mountain, and the passage of the Distribution Bill.

After the payment legislation was passed, efforts to privatize Western Shoshone lands for transfer to multinational extractive industries and energy developers intensified. The Western Shoshone asserted that these actions, justified by the racially discriminatory legal doctrines enshrined in the domestic law of the U.S., demonstrated a serious, massive and persistent pattern of racial discrimination against the Western Shoshone Nation and its people

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July 29, 2005 (on file with author).

<sup>146</sup> Joe Kennedy, Timbisha Shoshone Chairman.

<sup>147</sup> See *supra* note 145.

in accordance with CERD's Urgent Action and Early Warning Procedures.

The case was built through the written filings, summary sheets and oral and video testimony. The August 2005 delegation was met by an interested and concerned CERD. The IACHR Report and CERD's 2001 Concluding Observations were used as the foundation for demonstrating the strength in the legal arguments and the failure of the U.S. to respond, let alone comply with its human rights obligations. The increased actions against Western Shoshone, cited above, underscored the need for immediate action.

In response to the written filings and direct testimony by the Western Shoshone delegation, CERD responded promptly and on the final day of its 67th Session, August 19, 2005, CERD's Chairman issued a formal letter and series of questions to the U.S. regarding the situation of the Western Shoshone.<sup>148</sup> The letter was issued after a private meeting with representatives from the United States on August 15, 2005.

CERD's questions ranged from the U.S.' position on the Treaty of Ruby Valley, seizures of Western Shoshone livestock, efforts to privatize Western Shoshone land to benefit mining and energy industries and ongoing harassment of Western Shoshone people. The CERD asked specifically about U.S. approval of expanded mining activities in the Mount Tenabo area in Crescent Valley and the approval to store nuclear waste at Yucca Mountain.

The CERD asked the U.S. to respond to the questions by December 31, 2005, for further examination at its next session beginning February 20, 2006. The U.S. responded shortly before the February session with a brief letter informing CERD that they would be filing their regular report later and that the Western Shoshone issue was not "novel" and therefore did not warrant immediate attention.<sup>149</sup> The U.S. also asserted that since they had not invoked

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<sup>148</sup> Correspondence from Chairman of the Committee for the Elimination of Racial Discrimination Mario Yutzis to Honorable Kevin G. Moley, Permanent Representative of the United States of America to the United Nations (August 19, 2005), *available at* <http://www.wsdp.org>.

<sup>149</sup> Non-public letter to CERD from the U.S. Mission, discussed during

Article 14 of the Convention, the Western Shoshone Request could not be considered outside of the U.S. periodic report. Thus, the challenge for the Western Shoshone at the 2006 winter session was to demonstrate to the CERD that the situation did in fact fall within the Urgent Action Procedure and should be considered outside of the U.S.' follow up to the periodic report.

*2006 – CERD Issues an Urgent Action Decision*

A written legal Supplement to the Renewed Request was filed in February, and another Western Shoshone delegation traveled to Geneva. The delegation went armed with evidence of dramatic escalations of human rights violations against their peoples within the six months following CERD's letter written in August 2005. In addition to evidence of the U.S.'s conduct, the Western Shoshone delegation also delivered over 13,000 signatures from citizens across the U.S. supporting the Western Shoshone action to CERD.<sup>150</sup> In both the written filing and in oral testimony by the delegation, full emphasis was placed on the immediacy of the situation. Specific examples of the heightened actions against Shoshone people between August and February were as follows:

- *Gold Mining.* Intimidation, harassment and denial of Western Shoshone access to traditional gathering and spiritual areas, in particular with regard to the culturally and spiritually significant area of Mt. Tenabo where the use of explosives and open pit gold mining activities had

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CERD's open discussion in its 68<sup>th</sup> Session, Feb/March 2006. (taken from notes of author).

<sup>150</sup> See Update, *supra* note 10, at 10 and app. 12-13 (documenting the recent actions intimidating and/or denying Western Shoshone access to pine nutting, medicinal plant gathering and spiritual areas and the February 3, 2006 threat of collection of \$5,695,610 in "trespass" fines. Also, *in person* testimony of Shoshone representatives Steven Brady and Bernice Lalo). See also *id.* at 6-7 and app. 6, 7, 13 (documenting recent mining activities at Mt. Tenabo area and recent federal approvals of additional mining despite increased public acknowledgement of destructive impacts of massive dewatering and mercury emissions by the open pit gold mining processes). See *id.* at n. 32 (Press communications demonstrate an immediate increase in gold prospecting).

substantially increased since October 2005;<sup>151</sup>

- *Nuclear Testing.* Reinitiated underground nuclear testing;<sup>152</sup>

- *Nuclear Waste.* Escalating federal efforts to open a high-level nuclear waste repository at Western Shoshone spiritual area Yucca Mountain, and prevention of traditional spiritual use by Western Shoshone of the area;<sup>153</sup>

- *Geothermal.* Processing of nine new geothermal energy lease applications at or near hot springs, threatening denial of spiritual and cleansing uses;<sup>154</sup> and

- *Privatization Efforts.* Federal efforts to privatize Western Shoshone lands for transfer to multinational extractive industries and energy developers.<sup>155</sup>

The Western Shoshone delegation asserted that these actions, combined with the actions detailed in earlier briefings to the CERD, demonstrated a drastic escalation of destructive activities being undertaken or allowed by the U.S. and demonstrated a serious,

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<sup>151</sup> See Update, *supra* note 10, at 10, apps. 12-13 - documenting the recent actions intimidating and/or denying Western Shoshone access to pine nutting, medicinal plant gathering and spiritual areas and the February 3, 2006 threat of collection of \$5,695,610 in “trespass” fines. Also, *in person* testimony of Shoshone representatives Steven Brady and Bernice Lalo. See also *id.* at 6-7, app. 6, 7, 13 – documenting recent mining activities at Mt. Tenabo area and recent federal approvals of additional mining despite increased public acknowledgement of destructive impacts of massive dewatering and mercury emissions by the open pit gold mining processes. Press communications demonstrate an immediate increase in gold prospecting, *see id.* n. 32.

<sup>152</sup> See Update, *supra* note 10, at 6 and app. 5 (documenting February 23, 2006 “subcritical” nuclear test by joint action of U.S. and U.K.).

<sup>153</sup> See *id.* at 4-6 (documenting recent federal efforts to open the nuclear waste repository and rejection of Western Shoshone efforts to find protective relief in U.S. courts).

<sup>154</sup> See *id.* at 8 (documenting increased geothermal lease activity despite acknowledgment of spiritual significance to Western Shoshone).

<sup>155</sup> See *id.* at 9 (documenting recent federal efforts to privatize “public” lands to multinational corporate interests at \$1,000 an acre).

massive and persistent pattern of racial discrimination against the Western Shoshone Nation. The oral testimony relayed personal testimonies of being denied access to food and medicine areas, and their renewed efforts in the federal district courts.<sup>156</sup>

In sum, the Western Shoshone petitioners demonstrated that the stage had been set for the U.S. to take its final measures of enforcing the collection notices through eviction or imprisonment and forcibly distributing the alleged payment for “extinguishment,” thereby opening the lands for one of the largest indigenous land thefts in modern history.

On March 8, 2006, CERD rejected the U.S.’s argument and issued a full formal decision.<sup>157</sup> In its decision, made public after giving the U.S. twenty-four hours to respond privately, the CERD informed the U.S. that “[a]lthough these are indeed long-standing issues . . . they warrant immediate and effective action . . . [and] should be dealt with as a matter of priority.”<sup>158</sup> The U.S. was “urged to pay particular attention to the right to health and cultural rights of the Western Shoshone . . . which may be infringed upon by activities threatening their environment and/or disregarding the spiritual and cultural significance they give to their ancestral lands.”<sup>159</sup>

The decision gives the Western Shoshone the backing they sought, by detailing the U.S.’s actions against them, especially those threatening their health, environment, and spiritual beliefs and calling upon the U.S. to immediately:

Respect and protect the human rights of the Western Shoshone peoples;

Initiate a dialogue with the representatives of the Western Shoshone peoples in order to find a solution acceptable to them, and which complies with their rights;

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<sup>156</sup> *See generally id.*

<sup>157</sup> Committee for the Elimination of Racial Discrimination, 68<sup>th</sup> Sess., *Early Warning and Urgent Action Procedure Decision 1(68)*, United States of America, U.N. Doc. CERD/C/USA/DEC/1 (Apr. 11, 2006).

<sup>158</sup> *Id.* ¶ 5.

<sup>159</sup> *Id.* ¶ 8.

Adopt the following measures until a final decision or settlement is reached on the status, use and occupation of Western Shoshone ancestral lands in accordance with due process of law and the U.S.'s obligations under the Convention;

Freeze all efforts to privatize Western Shoshone ancestral lands for transfer to multinational extractive industries and energy developers;

Desist from all activities planned and/or conducted on Western Shoshone ancestral lands;

Stop imposing grazing fees, livestock impoundments, hunting, fishing and gathering restrictions and rescind all notices already made.<sup>160</sup>

In its decision, the CERD drew particular attention to its General Recommendation 23 (1997) on the rights of Indigenous Peoples, in particular their right to own, develop, control and use their communal lands, territories and resources.<sup>161</sup> The CERD gave the U.S. a July 15, 2006, deadline to provide it with information on the action it had taken to come into compliance with its obligations under the Convention. After returning from Geneva, the traditional governing body, the Western Shoshone National Council ("WSNC") sent a direct communication to the U.S. Permanent Representative to the U.N., requesting an initial meeting with the U.S. Mission to discuss the dialogue as recommended by CERD.<sup>162</sup> As of the time of this writing, the U.S. has responded only by informing the WSNC that the issue was "forwarded to the appropriate agencies in Washington."<sup>163</sup>

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<sup>160</sup> *Id.* ¶ 10.

<sup>161</sup> *Id.* ¶ 9.

<sup>162</sup> Letter from Raymond D. Yowell to Kevin E. Moley, April 3, 2006 (on file with author).

<sup>163</sup> Mr. Moley responded to the WSNC advising them that their letter was "forwarded to the appropriate agencies in Washington." See Letter, from Kevin E. Moley to R. Yowell, Apr. 25, 2006. See also Letter from R. Yowell to Natalie Prouvez et al. (on file with author).

*III. Conclusion – Where Do We Go From Here?*

International law, particularly recent statements by international bodies reviewing U.S. Indian law and policy, provides insight into the continued failings of the U.S. to address the historic discrimination against Indigenous Peoples, and the additional failure of the U.S. to adequately implement standards to recognize and protect Indigenous Peoples' rights. With the IACHR Final Report and the CERD Decision, these are no longer allegations, but rather facts. U.S. law has been, and continues to be, in violation of fundamental human rights and therefore must be reformed, if not completely overhauled.

The U.S. is a member of the international community, and as the signatory of certain international human rights treaties, the U.S. has specific obligations to reform its domestic laws and policies, and to bring itself into compliance with recognized standards of human rights with regard to Indigenous Peoples.

These international human rights decisions also open a new avenue of legal discourse by which to measure and reform U.S. Indian Law and Policy. The U.S., as a proclaimed leader in the international community, should step up to the plate and take the necessary steps to implement recognition and protections of indigenous rights at the domestic level.

The CERD Decision and the IACHR Report in and of themselves are not going to bring about the needed change. Responsibility now lies in the U.S. leadership, judicial bodies and the general public. We must come up with strong, creative campaigns, and educational strategies. Thus far, the U.S. is choosing to ignore these rulings. It will take consistent pressure and resolve from the broader society to achieve what CERD has requested.

One problem of course, is that most people in the U.S., general public, academia and government included, are not aware of Indigenous Peoples' situations or human rights law as it applies domestically. It is not uncommon to be confronted with either a blank stare or an instant reaction of fear and defensiveness when discussing indigenous issues. Widespread education needs to occur, from the ground up. Indigenous human rights issues have begun to

make their way into the agenda of some of the human rights curricula and legal education programs. But more must be done to raise awareness. The voice of people demanding justice for the first peoples of this land must be heard.<sup>164</sup>

Even from likely supporters, such as human rights and environmental organizations, there is resistance to understanding and fully respecting indigenous rights in the U.S. We cannot be sure of the reason for this. It may stem from inherent racism that has existed in this country since before the Revolutionary War. It also may stem from the fact that most people do not see, let alone converse with, Indigenous Peoples. U.S. policies have, for the most part, made Indigenous Peoples an invisible population on their own lands.

Importantly, the U.S. has now been told to review all of its laws and policies to ensure they are in compliance with recognized human rights standards, in particular the right to property. The timing is perfect to push for mandatory training for U.S. officials and members of Congress in the area of international Indigenous human rights and the U.S.'s duties and obligations under the Convention.

There are also ongoing discussions about calling for the establishment of a Truth Commission, or Regional Truth Commissions, which would serve as a vehicle to begin a dialogue based on the true history and ongoing plight of the Western Shoshone and other Indigenous Peoples. A lack of official accountability has always been a major blocking point in addressing this systemic human rights issue. Hopefully by starting with the truth, some of that can begin to be lifted. Some communities and organizations have been looking at national "get out the vote" and electoral campaigns targeted at educating the public about reforming antiquated, racist laws which subjugate not only Indigenous Peoples, but all U.S. citizens.

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<sup>164</sup> More law schools and Native American programs are picking up the ball and including instruction on indigenous rights. Colorado School of Mines now has courses on mining and ethics with some focus on indigenous communities. Bar associations and others need to implement the same into continuing legal education programs. Organizations such as the First Peoples Human Rights Coalition have begun developing these types of materials. See <http://www.firstpeoplesrights.org/>.



As Mary McCloud, a Western Shoshone great-grandmother and activist stated in a public speech:

This government needs to be accountable for the actions it takes. Both here and abroad – for the love of money they go out and do what they want. This country has gone around the world trying to manipulate and persuade governments and attack Indigenous Peoples and their lands and resources in its own money driven craze. We need to deeply analyze the motives of this country, or the wealthy people or the corporations, whoever is running the show.<sup>165</sup>

As McCloud states, this issue also opens up fundamental questions about ongoing collusion between industry and the government. The CERD decision gives us a very powerful tool for use in corporate engagement strategies. By confirming the IACHR and rejecting the U.S.’s claim that Western Shoshone lands somehow transferred to “federal” or U.S. ownership, the CERD decision calls into question the underlying legality of corporate entities operating on these lands without Western Shoshone effective participation, let alone consent.

For example, part of the Western Shoshone strategy for dealing with corporations has been to research who the companies are and what they are saying publicly. Many of these companies claim to follow international human rights standards. Now that there is proof of ongoing, massive human rights violations, the companies must answer to their own shareholders and determine whether they are encouraging and perpetuating those violations in the name of profit.

The companies’ social responsibility policies and commitments to Indigenous Peoples have been reviewed and used as tools by Western Shoshone advocates to demonstrate how each company is not fulfilling its own statements with regard to Western Shoshone lands. Western Shoshone efforts have also gained a lot of

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<sup>165</sup> Press Statement given at Peace Rally in Reno, Nevada, Mary McCloud, Western Shoshone great-grandmother (Mar. 20, 2004).

attention through the use of the “No Dirty Gold” campaign and related media.

Another U.N. treaty body, the Committee on Economic, Social and Cultural Rights (“CESCR”) has authority to review States parties to the International Covenant on Economic, Social and Cultural Rights (“ICESCR”).<sup>166</sup> Using the CERD Decision as a foundation, the Western Shoshone Defense Project (“WSDP”) filed a report with CESCR against Canada for the involvement of their corporations on Western Shoshone lands. Based on violations of the ICESCR, the WSDP requested that the Canada’s obligations to monitor their corporations be enforced. The report also recommended that Canada take appropriate measures to ensure that Canadian corporate behavior on Indigenous lands in the U.S. does not contribute to ongoing violations against the Western Shoshone or any other Indigenous Peoples. Whereas there are numerous Canadian companies operating on Western Shoshone lands, Barrick was selectively singled out in the report because of its refusal to adhere to Western Shoshone requests to cease further mining activities in the Mt. Tenabo area.<sup>167</sup>

Other opportunities exist at the level of the shareholders of publicly-held companies. An example of this was at this year’s Newmont Gold Company’s Annual General Meeting. Newmont currently operates gold mines across Western Shoshone territory in Nevada – equating to nearly forty percent of its equity base. It is seeking a host of new exploration in the area. In April 2006, a coalition of Newmont Mining shareholder groups called upon Chairman and CEO Wayne Murdy, to respect the U.N. CERD decision and to “develop a policy toward Native American peoples in the United States and address the specific concerns of the Western Shoshone.”<sup>168</sup> In addition to the shareholder letter, a delegation of Western Shoshone addressed the CEO and Board of Newmont at its

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<sup>166</sup> ESCOR, General Comment 2: International Technical Assistance Measures, 4th Sess., ¶ 1, U.N. Doc. E/1990/23 (Feb. 2, 1990).

<sup>167</sup> Report on Canadian Corporate Behavior on the Western Shoshone Peoples Located in the United States, submitted May 1, 2006 (on file with author).

<sup>168</sup> Letter from Newmont Mining Shareholders to Chairman and CEO Wayne Murdy (Apr. 2006) (on file with author).

Annual General Meeting in Denver, Colorado directly about the CERD Decision and Newmont's ongoing activities and efforts to privatize Shoshone lands.

Boston Common Asset Management and six other faith-based health and investment services groups led the signatures of the shareholder letters. In the communication, the shareholders called upon Newmont to:

recognize and comply with the Treaty of Ruby Valley (recognizing Western Shoshone land ownership);

maintain the cultural and spiritual integrity of the lands, protect the environment (namely on issues of dewatering, cyanide use and mercury emissions);

establish a Western Shoshone advisory committee, with inclusion of Western Shoshone in decision-making, transparency of company information and financial and technical assistance;

comply with Treaty of Ruby Valley obligations for "fair compensation", including revenue sharing and royalty commitments, training and employment, joint venture work and scholarship and youth funding; and

establish a dispute resolution mechanism between the company and the Western Shoshone.<sup>169</sup>

The U.S. may hold out for a while longer trying to keep this issue hidden and ignoring the international rulings, but with the continued persistence of Indigenous Peoples, like the Western Shoshone, this issue cannot be ignored forever. Furthermore, one key area that must be focused on is grassroots organizing. Educational materials, human rights "guides" and toolkits for Indigenous communities need to be created and distributed to Indigenous Peoples themselves to help them understand how to use such tools to succeed in their campaign to publicize their human rights.

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<sup>169</sup> *Id.*

The U.S. is clinging strongly to the concepts underlying its original Federal Indian Law decisions dating back to the *Johnson v. McIntosh* decision and from there to the papal bulls and royal charter of the fifteenth century. However, as noted above, these concepts are based upon racially and religiously discriminatory concepts of “Christian discovery,” “heathen savagery,” and “childlike inferiority.” Just as international law has continued to develop and delineate unacceptable discriminatory practices, so too should the U.S. adopt such an approach in shaping its own policy, beginning with the Western Shoshone.

“This Earth is one Earth, one Mother of us all and we must stand together in her defense.”<sup>170</sup>

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<sup>170</sup> Raymond Yowell, Chief of Western Shoshone National Council, Remarks to delegates at Pre-meeting of *No Dirty Gold Campaign*, Lima, Peru (Jan. 16, 2004).

