

**Inter-American Commission on Human Rights
of the
Organization of American States**

Case No. 11.140

**Mary Dann and Carrie Dann against
The United States**

**Petitioners' Supplemental Submission:
Brief on the Merits**

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I. Introduction

1. Mary and Carrie Dann, members of the Western Shoshone indigenous people, filed a petition with the Inter-American Commission on Human Rights (hereinafter the "Commission" or the "Inter-American Commission") in April, 1993. The petition alleges violations of rights guaranteed by the American Declaration on the Rights and Duties of Man and other provisions of international human rights law, in relation to the Danns' use and occupancy of Western Shoshone ancestral lands. On September 27, 1999, the Commission issued its Report No. 99/99, in which it found the Danns' petition admissible. The present submission is to assist the Commission as it proceeds to consider the merits of the case.

2. In this brief the petitioners summarize the facts of this case and specify the human rights violations that the United States has committed against the Danns in relation to their status as members of the Western Shoshone people. As discussed below, the facts that have been established in this case constitute violations of human rights protected by the American Declaration of the Rights and Duties of Man - in particular article XXIII (right to property); article II (right to equality under the law); articles III, VI, XIV (rights related to the maintenance of culture and family); and article XVIII (right to judicial protection and due process of law). The established facts also constitute violations of other provisions of international human rights law which are binding upon the United States.

II. Summary of the Facts

In their various submissions to the Commission, the Danns have established the following facts which form the basis of their complaint:

3. Mary and Carrie Dann are Western Shoshone Indians who - together with other members of their extended family, referred to as the Dann Band - occupy, hunt, graze, and otherwise use

lands that are within the larger ancestral territory of the Western Shoshone people. This use and occupancy of lands is part of the historically rooted matrix of traditional Western Shoshone land tenure. For several years, the United States, and its political subdivision, the State of Nevada, have taken action or threatened to impede the Western Shoshone people from using and occupying lands that are within their ancestral territory. This threat is ongoing, particularly with regard to the Danns.¹

4. The Danns, like others among the Western Shoshone, are in current possession and actual use of ancestral lands. Their livelihood is entirely dependent on hunting, gathering, and grazing livestock on the lands of their forebearers, in accordance with traditional land tenure patterns.² But United States officials have taken action to physically remove the Danns' livestock from rangelands within Western Shoshone ancestral territory, and further such action is threatened.³ In early 1998, the Bureau of Land Management again reinitiated trespass actions against the Danns, demanding that they remove their livestock from disputed lands and pay large fines.⁴ In May of 1999, the Bureau proceeded to issue a "Notice of Intent to Impound" any "unauthorized livestock grazing upon public land." This notice allows for impoundment to occur at any time after five days from delivery of the notice, within a twelve month period. Similar notices have been issued against other Western Shoshone communities.⁵

5. Government officials also have permitted or acquiesced in gold prospecting within Western Shoshone lands, including the lands upon which the Danns depend for their survival. With the permission of the United States, mining companies are digging the earth and pumping scarce water within an ever larger area, and are poised to take ownership or control of the area by operation of U.S. mining legislation or land exchanges with the U.S. government. Mining activity has already affected the Danns' use of their ancestral lands and has contaminated the groundwater in and around Crescent Valley. That activity threatens ever greater damage to the Danns' subsistence as it extends closer to the Danns' household.⁶ Additionally, U.S. permitting

¹ See Petition to the Inter-American Commission on Human Rights by Mary and Carrie Dann, on behalf of themselves and the Dann Band of the Western Shoshone Nation, against the United States (April 2, 1993) (hereinafter "Petition"); Observations of the Petitioners regarding the United States submission of July, 24, 1997 (September 11, 1997) (hereinafter "Petitioners' Observations of September 11, 1997"); Petitioners' Request for Precautionary Measures (Feb. 27, 1998) (hereinafter "Request for Precautionary Measures of Feb. 27, 1998").

² See Petition, *supra*, at 1-2; Petitioners' Observations of Sept. 11, 1997, *supra*, at 1-4.

³ See Petition, *supra*, at 3-4; Observations of the Petitioners with respect to the Response of the United States of America, at 5-6 (Dec. 22, 1993) (hereinafter "Petitioners' Observations of Dec. 22, 1993"); Request for Precautionary Measures of Feb. 27, 1998, *supra*, at 3-6.

⁴ See *id.*; Petitioners' Note regarding Request for Precautionary Measures and Request for Hearing (July 16, 1998) (hereinafter "Note on Precautionary Measures of July 16, 1998").

⁵ See Petitioners' Note regarding Additional Information (June 3, 1999), p. 2 and Exhibit 2.

⁶ See Request for Precautionary Measures of Feb. 27, 1998, *supra*, at 8-11.

of military activities and other land transfers within their traditional territory is damaging the health and welfare of the Western Shoshone.⁷

6. Further still, the Danns and other Western Shoshone people are being impeded from traditional subsistence hunting by officials of the state of Nevada. These officials, relying on the United States' denial of Western Shoshone title to ancestral lands, refuse to accommodate traditional Western Shoshone hunting practices and instead seek out and arrest Western Shoshone people, including members of the Dann band, who do not comply with restrictive state hunting laws and regulations.⁸

7. The United States does not contest that the Danns are Western Shoshone Indians, that the lands in question are Western Shoshone ancestral lands, or that the United States and others are engaged in the challenged actions on those lands. However, the United States denies altogether the continuing existence of Western Shoshone legal rights to ancestral lands, and it bases that denial on statutorily-based claims proceedings initiated in the Indian Claims Commission ("ICC") and concluded in the U.S. Court of Claims, proceedings that resulted in a monetary award for the presumed extinguishment of Western Shoshone title to land. The United States characterizes those proceedings as having conclusively established that Western Shoshone title and appurtenant rights were extinguished at some point in the past.⁹ But as discussed in previous submissions, the issue of whether those rights were truly extinguished was not actually litigated by the ICC or Court of Claims, Western Shoshone individuals and groups were not permitted to intervene in those proceedings to contest the presumed extinguishment of title, and the Western Shoshone people have refused to accept the money award.¹⁰

8. The United States judiciary has ultimately refused to consider the question of whether or not events have occurred that as a matter of law and fact have actually resulted in the extinguishment of Western Shoshone rights. The Danns themselves attempted to defend their interests in Western Shoshone aboriginal land rights against attacks by the United States in U.S. federal court, but with no success. After a lengthy litigious saga in the lower federal courts, the U.S. Supreme Court held that the Danns are barred from asserting Western Shoshone aboriginal title as the basis of rights to use and occupy lands. According to the Supreme Court, this bar is the statutory consequence of the earlier judgment and award in the collateral claims proceedings.¹¹ That judgment and award was premised on an uncontested stipulation, adopted by the ICC, that Western Shoshone title had been extinguished some time ago by acts of "gradual encroachment" by non-Indians, even though the lands in question remained, and continue to remain, among the most sparsely populated parts of the United States territory. The Danns and other Western Shoshone groups never acquiesced to the stipulation of extinguishment

⁷ See *id.* at 11-12.

⁸ See *id.* at 6-8; Petitioners' Observations of Sept. 11, 1997, *supra*, at 5.

⁹ See Response of the United States of America (Sept. 9, 1993) (hereinafter "U.S. Response to Petition").

¹⁰ See Petition, *supra*, at 5-10.

¹¹ See *United States v. Dann*, 470 U.S. 39 (1985).

in the claims proceedings, nor were they allowed to intervene in those proceedings to assert continuing aboriginal rights to land. Nonetheless, the U.S. Supreme Court held that the Danns are now precluded from asserting Western Shoshone aboriginal title, even while failing to justify or adopt the novel theory that "gradual encroachment" serves to extinguish aboriginal land title as a matter of U.S. law.

9. Thus, United States officials now contend that Western Shoshone aboriginal rights to land, upon which the Danns rely, have been extinguished. The United States maintains this position on the basis of the same domestic proceedings that denied the Danns and other Western Shoshone people the opportunity to contest the dubious theory by which Western Shoshone aboriginal rights were purportedly extinguished. As far as the United States is concerned, Western Shoshone rights have been extinguished by none other than the blunt forces of conquest, notwithstanding the fact that the Danns and other Western Shoshone people have continued through the present to use and occupy the lands in question in accordance with traditional land tenure patterns.

III. Proceedings before the Inter-American Commission

10. The Danns filed their petition before the Inter-American Commission on Human Rights to obtain relief from the United States' actions that impede, and threaten to further impede, their use and enjoyment of Western Shoshone ancestral lands. The Danns assert that the United States' conduct to deny them use and enjoyment of ancestral lands is in violation of relevant provisions of international human rights law, and that the mechanism by which the United States purports to have extinguished Western Shoshone rights is invalid for its discriminatory character and failure to accord due process. The United States responded to the petition by stating that the petitioners had not exhausted their domestic remedies.¹² In subsequent submissions, the United States added that, alternatively, the petition was not timely and that it failed to establish violations of the American Declaration.¹³

11. The Danns responded that violations of their rights are continuing and that domestic remedies do not provide due process of law and are ineffective to protect their rights. The Danns also elaborated on the nature of the rights violated.¹⁴

12. On February 27, 1998, the Danns submitted a request for Precautionary Measures to the Inter-American Commission on Human Rights.¹⁵ In this request the Danns sought to prevent the

¹² See U.S. Response to Petition, *supra*, at 9-11.

¹³ See Response of the United States of America to Petitioners' Rebuttal (April 18, 1994) (hereinafter "U.S. Response of April 18, 1994"); Note of the United States Replying to Questions on Issues Raised at Hearing on Admissibility, at 6-11 (March 10, 1997) (hereinafter "U.S. Note on Admissibility of March 10, 1997").

¹⁴ See Petitioners' Observations of Dec. 22, 1993, *supra*; Observations of Petitioners' with Respect to Reply of the United States of America (April 23, 1997) (hereinafter "Petitioners' Observations of April 23, 1997"); Petitioners' Observations of Sept. 11, 1997, *supra*.

¹⁵ See Petitioners' Request for Precautionary Measures of Feb. 27, 1998, *supra*.

United States from causing further damage by its authorization of mineral exploration and by its trespass and other legal actions against the Danns and other Western Shoshone people. Despite a request by the Commission that the United States government stay its actions pending an investigation by the Commission of the alleged facts surrounding the request for Precautionary Measures, the United States' Bureau of Land Management continued to issue trespass orders and decisions against the Danns and other Western Shoshone people. The United States' disregard of the Inter-American Commission's request led the Danns to file a further "Request for Precautionary Measures and Request for Hearing," in which the Danns reiterated their request, stressed its urgency, and asked to be granted a hearing before the Commission.¹⁶

13. Less than a year ago, on June 28, 1999, the Commission issued precautionary measures against the United States, requesting that the government stay enforcement or further issuance of certain legal actions against the Danns, pending a full investigation of the case by the Commission. Shortly thereafter, the Ely Shoshone Tribe and the Yomba Shoshone Tribe intervened as amicus curiae parties in the case, stating that the human rights violations being committed by the United States against the Danns are common to all Western Shoshone people.

14. On 27 September 1999, the Inter-American Commission on Human Rights issued Report No. 99/99, stating that "the Danns had invoked and exhausted the domestic remedies of the United States pursuant to Article 37 of [the Commission's] Regulations throughout the years including 1991, 1992, and more recently on December 18, 1998."¹⁷ The Commission also concluded that, based on facts established by the petition and subsequent submissions, the petition was timely and that the Danns' complaints are "continuing" and "on going."¹⁸ The Commission concluded, furthermore, that the Danns have raised a *prima facie* violation of their human rights.¹⁹ On these bases, the Commission has declared the Danns' case admissible.

15. After approval of the Inter-American Commission on Human Rights Report No. 99/99, the Danns, at the suggestion of the Commission, and through their legal counsel, reiterated their offer to the United States to enter into discussions for friendly settlement. The United States never responded to this communication. Instead, only months after the Danns submitted their latest request for friendly settlement discussions, officials of the United States government have announced that they will begin deliberations and eventual passage of two legislative measures which would critically impair the land, resource and cultural rights of the Western Shoshone people. The first legislative measure is a bill that would authorize the U.S. Secretary of Interior to dispose of supposedly "public" lands in the state of Nevada – including lands that are the subject of this case and upon which the Danns and other Western Shoshone people rely – by

¹⁶ See Note on Precautionary Measures of July 16, 1998, *supra*.

¹⁷ Case No. 11.140 (United States), Inter-Am.C.H.R., Report No. 99/99, OEA/Ser.L/V/II.104, doc. 23 (1999) at 18, para. 83.

¹⁸ *Id.* at 19, para. 88.

¹⁹ *Id.* at 20, para. 91.

selling it in open bidding to mining, ranching and other private interests.²⁰ The second legislative measure is a bill that effectively would finalize the very 1979 ICC determination of extinguishment that the Danns are challenging as a violation of human rights.²¹ Due to the complete lack of input granted the Western Shoshone people in regards to these bills and the resulting permanent impairment of the Danns' and other Western Shoshone people's rights if they are enacted, these legislative measures will be the subject of a separate request for additional precautionary measures.

IV. United States Violations of the American Declaration on the Rights and Duties of Man in Respect to the Danns and the Western Shoshone People.

16. The uncontroverted facts recounted in the petition, and subsequent filings, establish violations of human rights affirmed by the American Declaration on the Rights and Duties of Man. As a member of the Organization of American States and a party to the OAS Charter, the United States 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 are, at a minimum, the rights that OAS member states are bound to uphold.²² Thus, the United States 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 United States is a party.

A. Right to Property

17. The United States has violated the right to property, which is affirmed in a number of international human rights instruments, including the American Declaration on the Rights and Duties of Man. Article XXIII of the American Declaration affirms the "right to own such property as meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home." This right includes the right to be free from unreasonable state interference with the enjoyment of property and from uncompensated takings thereof.²³ The right to property affirmed in article XXIII, especially, when considered in light of the fundamental principle of non-discrimination, embraces those forms of landholding and resource use that derive from the traditional land use and occupancy patterns of an indigenous people such as the Western Shoshone.

²⁰ See proposed Nevada Public Land Management Act ("Nevada Public Land Act"), S.719 (U.S. Senate bill) and H.R. 1506 (U.S. House bill).

²¹ See proposed Western Shoshone Claims Distribution Act ("Distribution Act").

²² 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 14, 1989, Inter-Am.Ct.H.R. (Ser. A) No. 10 (1989) at paras. 42-45.

²³ This general principle of law is also found in Art. 21.1 of the American Convention on Human Rights, which states: "No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law." Additionally, the Universal Declaration of Human Rights states that "[e]veryone has the right to own property alone as well as in association with others," and that "[n]o one shall be arbitrarily deprived of his property." G.A. Res. 217 A(III), Dec.10, 1948, art. 17.

18. Traditional Western Shoshone patterns of use and occupancy of lands and natural resources are described in the Danna's submissions and their supporting documents. These patterns correspond with a system of customary rules that determine entitlements to land and natural resources among the Western Shoshone people. This customary land tenure system, along with the rights derived from it, is a form of property that is recognized as aboriginal or Indian title by U.S. law.²⁴ Additionally, under U.S. law and that of other common law jurisdictions, aboriginal property rights may exist in the form of free-standing rights to fish, hunt, gather, or otherwise use resources or have access to lands.²⁵

19. Independently of the common law of domestic legal systems, indigenous systems of land tenure give rise to property interests that, along with other forms of property, are embraced and affirmed by article XXIII of the American Declaration. The fundamental principle of non-discrimination, which is found in the Declaration and general international law, leads to this interpretation of the reach of the right to property articulated in article XXIII. A contrary interpretation of article XXIII would allow discrimination to persist against indigenous peoples with regard to their own forms of land tenure and natural resources use.

20. This interpretation of article XXIII is supported by International Labor Organization Convention (No. 169) concerning Indigenous and Tribal Peoples, which provides for recognition of rights of ownership and possession by indigenous peoples over the lands that they traditionally occupy and access for subsistence and traditional activities. The Convention obligates governments to safeguard those rights and provide adequate procedures to resolve land claims.²⁶ Additionally, both the Proposed American Declaration on the Rights of Indigenous Peoples and the Draft United Nations Declaration on the Rights of Indigenous Peoples affirm the right of indigenous people to own, develop, control, and use the lands and resources they have traditionally owned or otherwise occupied and used.²⁷

²⁴ See F. Cohen, *Handbook of Federal Indian Law* 442-443, 491 (1982 ed.) at 442-443 and 491. United States law recognizes that aboriginal title includes an entitlement to full use and enjoyment of the surface and mineral estate as well as the natural resources appurtenant to lands. U.S. courts have also recognized that aboriginal title includes the right to hunt and fish on lands under the title and to manage resources within the aboriginal territory. See, e.g., *U.S. v. Washington* 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976); *Washington Fishing Vessel Ass'n*, 443 U.S. 658 (1979). *Id.*, at 490. See also *United States ex. rel. Hualapai Indians v. Santa Fe Pacific Railroad*, 314 U.S. 339 (1941) (series of executive and congressional actions that mistakenly treated Indian lands as public lands did not divest the Indians of their title.)

²⁵ Relevant precedents in other common law jurisdictions include: *R. v. Adams* (1996), 110 C.C.C. (3d) 97, 32 W.B.C. (2d) 91 (S.C.C.) (Can.) (Mohawks of St. Regis Reserve found to have right to fish in waters not within the reserve); *Amodu Tijani v. Secretary, Southern Nigeria*, 2 A.C. 399 (P.C. 1921) (holding native rights of a tribe include usufructuary occupation or right).

²⁶ International Labor Organization Convention (No. 169 of 1989) concerning Indigenous and Tribal Peoples in Independent Countries, art. 14 (entered into force Sept. 1991).

²⁷ See Proposed American Declaration on the Rights of Indigenous People, art. XVIII, approved by the Inter-Am.C.H.R. at its 1333rd sess. on Feb. 26, 1997, in OEA/Ser.L/V/II.95, doc.7 rev., 1997, at 654-676; Draft United Nations Declaration on the Rights of Indigenous Peoples, art. 26, adopted by the U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, 26 August 1994, E/CN.4/Sub.2/1994/45, at 105. Both draft instruments affirm that indigenous peoples have the right to full

21. The Danns have established facts that show the existence of Western Shoshone property rights on the basis of traditional use and occupancy of land and that they are beneficiaries of those rights as Western Shoshone people. Further, the Danns have established facts that constitute violations of those property rights, including action by the federal and state government agencies to prevent the Danns and other Western Shoshone people from using and occupying Western Shoshone ancestral lands according to traditional patterns.

22. The United States does not dispute the history of traditional land tenure that gives rise to Western Shoshone aboriginal title, nor does the United States dispute that its agents and those of the state of Nevada are engaged in actions that have impeded the ability of the Western Shoshone to continue to use and occupy the lands in question. Rather, the United States asserts that Western Shoshone property rights were extinguished as a result of statutorily-based claims proceedings. In fact, however, Western Shoshone title has not been validly extinguished, even as a matter of United States law. The highest United States court to have examined and ruled on substantive Western Shoshone land rights, in a case involving the Danns, supported those rights and found against extinguishment, stating that Western Shoshone land rights had “not been extinguished as a matter of law by application of the public land laws, by creation of the Duck Valley Reservation, or by inclusion of the disputed land in a grazing district and issuance of a grazing permit pursuant to the Taylor Grazing Act.”²⁸ The United States Supreme Court reversed that lower court's holding in favor of the Danns, but *not* on the basis of a finding of actual extinguishment of Western Shoshone title. Rather, the Supreme Court relied on a statutory interpretation of the Indian Claims Commission Act and accepted the contention that the assertion of Western Shoshone title is barred by the Act because of the monetary award for the presumed extinguishment of Western Shoshone title in the collateral claims proceeding.²⁹ It is on the basis of this statutory interpretation, rather than on a substantive decision of extinguishment, that the Danns are barred from asserting Western Shoshone title in domestic judicial proceedings, and that the United States officials now assert that Western Shoshone title to the land is extinguished.

23. Further, the validity of this asserted extinguishment is itself challenged by the Danns as a violation of human rights, as explained below in the discussions of the right to equality, cultural integrity, self-determination, judicial protection, and due process.

B. Right to Equality under the Law

24. The facts in this case constitute a violation of the right to equality under the law. Article II of the American Declaration states that “[a]ll persons are equal before the law and have the rights and duties established in this Declaration without distinction as to race, sex, language, creed or any other factor.” As discussed above, indigenous peoples have property rights to land

recognition of their laws, traditions, and customs, land-tenure systems and institutions for the development and management of resources, and the right to effective measures by states to prevent any interference with, alienation of, or encroachment upon these rights.

²⁸ See *United States v. Dann*, 706 F. 2d 919, 927-933 (9th Cir. 1983), rev'd on other grounds, 470 U.S. 39 (1985).

²⁹ See *United States v. Dann*, 470 U.S. 39 (1985) at 44.

and natural resources that arise from traditional land use and occupancy patterns. The United States is obligated to protect such indigenous property rights and to accord those rights the same degree of protection it provides the property rights of non-Indians.

25. The Danns have established that they and the Western Shoshone people as a whole have been the subject of discriminatory treatment by the United States in relation to their property rights. Such discriminatory treatment is indicated, first, by the theory adopted by the U.S. Indian Claims Commission to hold Western Shoshone title extinguished, a holding that forms the basis of the United States' denial of continuing Western Shoshone property rights. The ICC determined Western Shoshone title to have been extinguished simply on the basis of "gradual encroachment" by non-indigenous settlers, miners and others. Such purported non-consensual transfer of property rights in land away from indigenous people who continue in possession of their land, in favor of non-indigenous interests, is discriminatory. A seminar of experts convened by the United Nations identified this kind of treatment of indigenous peoples as part of a larger pattern of racial discrimination suffered by them. The seminar's report concludes:

Racial discrimination against indigenous peoples is the outcome of a long historical process of conquest, penetration and marginalization, accompanied by attitudes of superiority and by a projection of what is indigenous as "primitive" and "inferior." The discrimination is of a dual nature: on the one hand, gradual destruction of the material and spiritual conditions [needed] for the maintenance of their [way of life], on the other hand, attitudes and behavior signifying exclusion or negative discrimination when indigenous peoples seek to participate in the dominant society.³⁰

26. Discrimination exists, furthermore, in the absence of substantive protections for indigenous property rights, including those rights derived from Western Shoshone aboriginal title, that are equal to the protections accorded non-indigenous forms of property. Under United States law, the taking of property by the government ordinarily requires a valid public purpose and just compensation.³¹ The Danns have detailed facts that indicate that no public purpose has been established for the purported extinguishment of Western Shoshone land title and that the Western Shoshone never received just compensation for the land. Although the Western Shoshone were proffered some compensation for the purported taking of the land, by way of the award resulting from the claims proceedings, the amount proffered falls far below the standard of just compensation required under U.S. law for the taking of non-indigenous property.³² The

³⁰ *Report of the United Nations Seminar on the Effects of Racism and Racial Discrimination on the Relations Between Indigenous Peoples and States*, E/CN.4/1989/22, HR/PUB/89/5, at 5 (1989).

³¹ See United States Constitution, Fifth Amendment, applicable to state and local governments via the Fourteenth Amendment. See also *Board of Com'rs of Tippecanoe County v. Lucas*, 93 U.S. 108 (1876) (Private property cannot be taken from individuals by the state, except for public purposes, and then only upon compensation, or by way of taxation.); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S.Ct. 3164 (1982) (when authorized by government, even the minor but permanent physical occupation of an owner's property resulting from installation of cable television facilities constitutes a "taking" of property for which just compensation is due under the Fifth and Fourteenth Amendments of the Constitution).

³² See Petition, *supra*, at 17-21; Petitioners' Observations of April 23, 1997, *supra*, at 12-15.

1979 monetary award that resulted from the claims proceeding was calculated on the basis of a valuation of the land as of July 1, 1872, the presumed extinguishment date, and no interest was calculated into the award.³³

27. The failure of the United States to proffer the Western Shoshone just compensation for the purported taking of their land is a result of the United States' discriminatory standard in regards to indigenous peoples' property in general, a standard that is notoriously reflected in judicial opinions such as *Tee-Hit-Ton Indians v. United States*.³⁴ In that case the United States Supreme Court expressly stated that no Supreme Court case "has ever held that taking of Indian title or use by Congress required compensation."³⁵ This is true, according to the Supreme Court, because "Indian occupation of land without [prior explicit] government recognition of ownership creates no rights against taking or extinction by the United States protected by the Fifth Amendment or any other principle of law."³⁶ The Court further claimed that the government's right to extinguish aboriginal title without just compensation was clear because "[e]very American schoolboy knows that the savage tribes of this continent were deprived of their ancestral ranges by force and that, even when the Indians ceded millions of acres by treaty in return for blankets, food and trinkets, it was not a sale but the conquerors' will that deprived them of their land."³⁷ Additionally, the Court found that it would inhibit the growth of the United States if the government were obligated to pay for taken land.³⁸ Such blatant discriminatory treatment of indigenous land title cannot be allowed to stand today.

28. Discriminatory treatment of indigenous property is further indicated by the facts relating to the procedure by which the United States determined extinguishment of and compensation for Western Shoshone lands. Under U.S. law, property rights ordinarily can only be extinguished or condemned through careful, rigorous proceedings in which all interested parties are entitled to be heard through counsel of their own choosing. By contrast, the facts of this case establish a marked absence of such procedural safeguards in the claims proceedings upon which the United States bases its denial of Western Shoshone property rights in relation to the Danns. Although the U.S. is asserting that the land rights of all the Western Shoshone people were affected, only one small group was actually represented before the ICC and Court of Claims. Other Western Shoshone people, including the Danns, were not permitted to intervene. Furthermore, even those Western Shoshone claimants who were represented were prevented from dismissing their lawyer when they decided he was not acting in their best interests. In an example of discrimination which cannot be justified under either domestic or international law, the U.S. government is now

³³ See Petition, *supra*, at 16-17.

³⁴ *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955).

³⁵ *Id.* at 281.

³⁶ *Id.* at 285.

³⁷ *Id.* at 289.

³⁸ See *Id.* at 290.

attempting to hold the Danns and other Western Shoshone people to the terms negotiated by this lawyer in a proceeding in which they were denied the right to participate.³⁹

29. Thus, the United States' assertion that it has extinguished, on the basis of the claim proceedings, Western Shoshone property rights - and along with them the derivative use and occupancy rights of the Danns - constitutes a violation of the international standard of equality under the law. In its reliance on the claims process, the United States is not protecting or supporting indigenous land rights to the same extent as other property rights. Continued attacks upon the Danns' use of their aboriginal land and resources on the grounds that Western Shoshone title to the land was extinguished, where the basis and terms of extinguishment make for a lower standard of treatment for indigenous people, are impermissibly discriminatory.⁴⁰

30. The American Declaration and international law more generally establish a norm of non-discrimination that requires governments to take steps to eliminate policies and practices that discriminate against indigenous peoples in relation to their enjoyment of lands and resources.⁴¹ The U.N. Committee on the Elimination of Racial Discrimination (CERD), in interpreting the requirements of the fundamental norm of non-discrimination embraced by the Convention on the Elimination of All Forms of Racial Discrimination, to which the United States is a party, has admonished state parties to "recognize and protect the rights of indigenous peoples to own, develop, control, and use their communal lands, territories, and resources."⁴² The facts established by the Danns' show that the United States has failed this obligation in regard to the Danns.

31. On one recent noteworthy occasion, CERD demonstrated the application of the fundamental norm of non-discrimination in the context of indigenous peoples. In March of 1999, CERD issued a decision under its early warning and urgent actions 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

³⁹ See Petition, *supra*, at 10-20; Petitioners' Observations of Dec. 22, 1993, *supra*, at 13.

⁴⁰ The racially discriminatory nature of such treatment of indigenous land rights was confirmed by the Australian High Court in *Mabo v. Queensland [No.1]* (1988), 166 C.L.R. 186. In that case, justices Brennan, Toohey, and Gaudron, in a joint judgment, expressed the Court's majority view that a legislative measure targeting native title for legal extinguishment to the exclusion of non-indigenous property rights was racially discriminatory and hence invalid. In regard to the indigenous Miriam people of the Murray Islands, the justices viewed the negative differential treatment of their claims to native title as "impair[ing] their human rights while leaving unimpaired the human rights of those whose rights in and over the Murray Islands did not take their origins in the laws and customs of the Miriam people." *Id.* at 218.

⁴¹ The international standard of non-discrimination is reflected, *inter alia*, in: U.N. Charter art. 1(3); International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, G.A. Res. 2106 A(XX), 660 U.N.T.S. 195 (entered into force Jan. 4, 1969); American Convention on Human Rights, Nov. 22, 1969, OAS Treaty Ser. No. 36, 1144 U.N.T.S. 123 (entered into force July 18, 1978); Universal Declaration of Human Rights, G.A. Res. 217 A(III), Dec. 10, 1948, art. 10; ILO Convention 169, *supra*, art. 2(2).

⁴² CERD General Recommendation XXIII, on indigenous peoples, adopted 18 Aug. 1997, CERD/C51/Misc.13/Rev.4 (1997).

expense of indigenous title.”⁴³ The committee also pointed out the lack of effective participation by indigenous communities in the formulation of the amendments to the Native Title Act. CERD found that these aspects of the amended Act and related circumstances raise concerns about Australia's compliance with its obligations under the Convention to take appropriate steps to eliminate racial discrimination particularly in regard to vulnerable groups. Thus, CERD called upon the Australian government to address these concerns, “as a matter of utmost urgency,” and in particular urged the government to suspend the amendments to the Native Title Act and to re-open discussions with aboriginal representatives regarding the subject.⁴⁴ The lack of procedural and substantive protections for the Danns in the present case makes for an equally compelling case of invidious discrimination that requires immediate attention.

C. Right to Cultural Integrity

32. The American Declaration affirms the right to protection of cultural integrity through the right to property (article XXIII), the right to religious freedom (article III), the right to family and protection thereof (article VI), and the right to take part in the cultural life of the community (article XIV). These rights form a group of entitlements establishing a right to preservation of cultural identity. The Commission has observed that, “[f]or indigenous peoples, the free exercise of such rights is essential to the enjoyment and perpetuation of their culture.”⁴⁵

33. The principles of the American Declaration that relate to the protection of indigenous culture should be read in light of other international instruments, particularly the International Covenant on Civil and Political Rights, to which the United States is a party. Article 27 of the Covenant states, “[i]n those States in which ethnic, religious, or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.”

34. Relying particularly on article 27, the Inter-American Commission has affirmed that international law protects minority groups, including indigenous peoples, in the enjoyment of all aspects of their diverse cultures and group identities.⁴⁶ The Commission has held that, for indigenous peoples in particular, the right to cultural integrity covers “the aspects linked to productive organization, which includes, among other things, the issue of ancestral and

⁴³ CERD Decision (2)54 on Australia: Australia, CERD/C/54/Misc.40/Rev.2, para. 6 (March 18, 1999). See also Additional Information pursuant to Committee Decision: Australia CERD/C/347 (Jan.22, 1999) (additional information from State Party).

⁴⁴ See CERD Decision (2)54 on Australia, *supra*, paras.9-11.

⁴⁵ Inter-Am.C.H.R., *Report on the Situation of Human Rights in Ecuador*, OEA/Ser.L/V/II.96, doc. 10 rev., April 24, 1997, at 103 (hereinafter “*Ecuador Report*”).

⁴⁶ See, e.g., The Miskito Case, Case 7964 (Nicaragua), Inter-Am.C.H.R., *Report on the Situation of a Segment of the Nicaraguan Population of Miskito Origin*, OEA/Ser.L/V/II.62, doc.10 rev. 3, at 76-78, 81 (1983); The Yanomami Case, Case 7615 (Brazil), Inter-Am.C.H.R., OEA/Ser.L/V/II.66, doc. 10 rev.1, at 24, 31 (1985); *Ecuador Report*, *supra*, at 103-4.

communal lands.”⁴⁷ Consistent with this understanding of the right to culture is article VII of the Commission's Proposed Declaration on the Rights of Indigenous Peoples, which links indigenous cultures to the use and enjoyment of lands.⁴⁸

35. The United Nations Human Rights Committee has confirmed the Commission's interpretation of the reach of the cultural integrity norm in relation to article 27 of the Covenant on Civil and Political Rights.⁴⁹ Accordingly, the U.N. Human Rights Committee found article 27 to be violated in circumstances similar to those confronting the Western Shoshone. In *Ominayak, Chief of the Lubicon Lake Band of Cree v. Canada*,⁵⁰ the Committee determined that Canada had violated article 27 by allowing the provincial government of Alberta to grant leases for oil and gas exploration and for timber development within the ancestral territory of the Lubicon Lake Band. The Committee found that the natural resource development activity compounded historical inequities to “threaten the way of life and culture of the Lubicon Lake Band, and constitute a violation of article 27 so long as they continue.”⁵¹

36. The facts set forth in the Danns' submissions and supporting documents establish that indigenous cultural integrity is similarly being denied here. The United States is actively attempting to deprive the Danns of their traditional lands. In doing so, the United States is directly threatening the Danns' enjoyment of Western Shoshone culture, as that culture is dependent on the land and the natural resources upon it. Acting through the Bureau of Land Management, the United States has issued civil and criminal penalty notices to the Danns for the use of their traditional lands.⁵² The United States has threatened to confiscate their livestock, impeded their gathering of subsistence foods, limited their access to sacred sites, and permitted private mining concessions and harmful military activities on traditional Western Shoshone

⁴⁷ The Miskito Case, *supra*, at 81.

⁴⁸ Article VII of the Proposed Declaration on the Rights of Indigenous Peoples articulates the obligation of states to respect the cultural integrity of indigenous peoples and expressly links indigenous cultural integrity to their “property...ways of life, customs, traditions, forms of social, economic and political organization, institutions practices, beliefs and values use of dress, and languages.”

⁴⁹ See Human Rights Committee, General Comment No. 23 (50) (Art. 27), adopted April 6, 1994, para. 7 (stating that “culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples”). The Committee has applied this understanding of the cultural integrity norm in complaint proceedings under the Optional Protocol to the Covenant. See, e.g., *B. Ominayak, Chief of the Lubicon Lake Band v. Canada*, Communication No. 167/1984, Hum. Rts. Comm., A/45/40, vol. II, annex IX.A., para. 32.2 (economic and social activities of Lubicon Cree linked with territory are part of culture protected by article 27); *Länsmann et al. v. Finland*, Communication No. 511/1992, Hum. Rts. Comm., CCPR/C52/D/511/1992/(1994) (reindeer herding part of Sami culture protected by article 27); *Kitok v. Sweden*, Communication No. 197/1985, Hum. Rts. Comm., A/43/40, annex VII.G (1988) (article 27 extends to economic activity “where that activity is an essential element in the culture of an ethnic community”).

⁵⁰ Communication No. 167/1984, *supra*.

⁵¹ *Id.* at para. 33.

⁵² Request for Precautionary Measures of Feb. 27, 1998, Exhibit 1.

lands-activities that threaten the environment and destroy available resources.⁵³ Moreover, the United States is denying the Western Shoshone people of the use and enjoyment of their ancestral territory by its insistence that Western Shoshone aboriginal title has been extinguished. In their totality, the United States' actions and those permitted by it threaten to destroy Western Shoshone culture, in violation of the human rights of the Danna and other Western Shoshone people.

D. Right to Self-Determination

37. As demonstrated above, under the American Declaration and other aspects of international law, indigenous peoples have rights to the protection of their traditionally occupied lands and natural resources. These rights to lands and resources are necessary in order for indigenous peoples to be able to pursue their traditional means of subsistence, and they therefore relate to the fundamental principle of self-determination. Self-determination is a principle of general international law that is affirmed in multiple international instruments. The International Covenant on Civil and Political Rights, to which the United States is a party, states that “[a]ll peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social, and cultural development.”⁵⁴ At its core, self-determination means that human beings, individually and collectively, have a right to be in control of their own destinies under conditions of equality. For indigenous peoples, the principle of self-determination establishes a right to control their lands and natural resources and to be genuinely involved in all decision-making processes that affect them.⁵⁵ Article 1 (2) of the International Covenant on Civil and Political Rights states, “In no case may a people be deprived of its own means of subsistence.”⁵⁶

38. In its concluding observations on Canada's compliance report of April, 1999, the U.N. Human Rights Committee reinforced the relationship between indigenous traditional lands and resources and the right to self-determination. Concerning the situation of indigenous peoples in Canada, “the Committee emphasizes that the right to self-determination requires, *inter alia*, that all peoples must be able to freely dispose of their natural wealth and resources and that they may not be deprived of their own means of subsistence.”⁵⁷ Thus, the Committee admonished against governmental acts that would unilaterally infringe on indigenous peoples' enjoyment of their rights to lands and natural resources, and recommended that “the practice of extinguishing inherent aboriginal rights be abandoned as incompatible with article 1 of the Covenant.”⁵⁸

⁵³ Request for Precautionary Measures of Feb. 27, 1998 and its Exhibits.

⁵⁴ International Covenant on Civil and Political Rights, *supra*, art.1(1).

⁵⁵ See S. James Anaya, *Indigenous Peoples in International Law* 85-88 (Oxford and New York: Oxford Univ. Press, 1996).

⁵⁶ International Covenant on Civil and Political Rights, *supra*, art.1(2).

⁵⁷ Concluding Observations of the Human Rights Committee: Canada, CCPR/C/79/Add.105, para. 8, (April 7, 1999).

⁵⁸ *Id.*

39. Under the facts of the present case, the United States is in violation of its obligation to ensure the enjoyment of the right of self-determination. United States officials are interfering with the Danns' enjoyment of their ancestral lands and are actively depriving the Danns and other Western Shoshone people of their means of subsistence by removing or attempting to remove their livestock from their traditional lands. The United States claims to have extinguished the aboriginal land rights of the Western Shoshone people. However, as made clear by the U.N. Human Rights Committee, such a claim of unilateral extinguishment is incompatible with the United States' obligations under the self-determination provisions of the International Covenant on Civil and Political Rights.

40. The United States is further violating the right of self-determination and related internationally recognized human rights by its failure to adequately consult with the Danns and other Western Shoshone people regarding any decisions affecting the enjoyment of their ancestral lands. The human rights norms that protect indigenous peoples' interests in land and natural resources obligate states to consult with the indigenous groups concerned about any decision that may affect their interests and to adequately weigh those interests in the decision-making process.⁵⁹ The right to property affirmed in article XXIII of the American Declaration would have little meaning for indigenous peoples if their property could be encumbered without due consultation, consideration, and in appropriate circumstances, just compensation, by the state. Without a full and fair opportunity to be heard and to genuinely influence the decisions before them, the Danns and other Western Shoshone groups are unable to exercise their right to self-determination as guaranteed by international law.

41. International Labour Organisation Convention No. 169 on Indigenous and Tribal Peoples clarifies that indigenous peoples' right to consultation extends even to decisions about resources that remain under state ownership.⁶⁰ Further, ILO Convention No. 169 establishes that indigenous peoples "have the right to decide their own priorities for the process of development as it affects their lives . . . [and hence] they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect

⁵⁹ Within the framework of article 27 of the International Covenant on Civil and Political Rights, the United Nations Human Rights Committee has recognized the imperative of ensuring indigenous peoples' effective participation in decisions that may affect their traditional land and resource use. See Human Rights Committee, General Comment No. 23 (50) (art. 27), adopted April 6, 1994, at para. 7. In keeping with the goals of article 9 of the International Convention on the Elimination of All Forms of Racial Discrimination, the Committee on the Elimination of Racial Discrimination has held that no decision directly relating to indigenous peoples' rights and interests are to be taken without the informed consent of the indigenous people affected. See CERD General Recommendation XXIII, on indigenous peoples, adopted August 18, 1997, CERD/C51/ Misc.13/Rev.4 (1997). See *generally* International Labour Organization Convention No. 169, art. 7 (1989) (for the proposition that indigenous peoples have the right to decide their own priorities for development, and that they therefore "shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly").

⁶⁰ "In cases in which the State retains the ownership of mineral or sub-surface resources or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands." Convention No. 169, *supra*, art. 15.2.

them directly.”⁶¹ Consequently, the Convention stipulates that consultations “shall be undertaken in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures.”⁶²

42. These international precedents show that states are obligated by international law to protect the land and resource rights of indigenous peoples as an aspect of indigenous peoples' right to self-determination. They further show that states are obligated by international law to fully inform and meaningfully consult indigenous people when making decisions disposing of or affecting their traditional lands. The United States does not deny that the Danns and other Western Shoshone groups are currently being deprived of their livelihoods due to efforts by U.S. officials to remove their live stock from their traditional lands. Nor does the United States deny that it has deemed the Danns' aboriginal rights extinguished via a process to which the Danns never consented and which is unprecedented even under U.S. law. Furthermore, the United States does not deny that the Danns and other Western Shoshone groups have been excluded from participating in decisions that affect their lands and natural resources. Therefore, the inescapable conclusion is that the United States has violated, in regard to the Danns and other Western Shoshone people, rights to consultation, the enjoyment of their social and economic development, their very subsistence, and, thus, their right to self-determination.

E. Rights to Judicial Protection and Due Process of Law

43. Finally, the facts established by the Danns portray a pattern of treatment that constitutes a denial of their rights to judicial protection and due process of law, rights affirmed by article XVIII of the American Declaration and numerous other international instruments.⁶³ Under article XVIII of the American Declaration on the Rights and Duties of Man, “[e]very person may resort to the courts to ensure respect for his legal rights.” Article XVIII includes the requirement that states must provide “a simple, brief procedure whereby the courts will protect [every person] from acts of authority that, to his prejudice, violate any fundamental constitutional rights.” Implicit in article XVIII, furthermore, is the right to judicial procedures that are in accordance with fundamental principles of fairness and due process of law.⁶⁴

⁶¹ *Id.*, art. 7.

⁶² Convention No. 169, *supra*, art. 6.2. This principle has recently been recognized in domestic judicial decisions. See, e.g., Const. Ct. Judgement No. SU-039 (1997) (Case of Comunidad U'wa); Delgamuukw v. British Columbia (1997), 3 S.C.R. 1010 para. 168 (S.C.C.) (Can.), per Lamer CJC.

⁶³ See e.g., American Convention on Human Rights, art. 25; Universal Declaration of Human Rights, art. 8: “Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.” G.A. Res. 217 (III 1948). See also International Convention on the Elimination of All Forms of Racial Discrimination, *supra*, article 6: “State Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.”

⁶⁴ See American Convention on Human Rights, art. 8: “Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously

44. The Danns' right to judicial protection in accordance with due process of law was infringed upon as a result of the claims proceedings initiated in Indian Claims Commission and subsequent judicial treatment of those proceedings. The Danns and other Western Shoshone people who sought to assert continuing Western Shoshone title to land were denied participation or adequate representation in the claims proceedings, and those proceedings resulted in a determination that Western Shoshone title was extinguished without there having been an opportunity to litigate or contest the theory of extinguishment advanced by the United States.⁶⁵

45. Violation of the right to judicial protection is further indicated by the trespass action initiated by the United States against the Danns in federal court, which resulted in the U.S. Supreme Court ruling that the Danns could no longer assert Western Shoshone aboriginal title because of the claims proceedings.⁶⁶ The Ninth Circuit Court of Appeals decided that Western Shoshone title had not actually been extinguished,⁶⁷ but the Supreme Court reversed the lower court on other grounds and ruled that the Danns were barred from asserting such title as a result of the judgment of the ICC and subsequent money award by the Court of Claims.⁶⁸ That Supreme Court ruling has prevented the Danns from asserting a defense of Western Shoshone aboriginal title against federal trespass actions and other impediments to their use and enjoyment of Western Shoshone ancestral lands. The lack of effective judicial recourse to vindicate rights establishes a violation of the substantive right to judicial protection.

46. A lack of due process and fairness follows from the Supreme Court's ruling in *U.S. v. Dann*, as the Court did not determine the actual existence of historical acts of extinguishment or consider allegations of fraud in the collateral claims proceedings. The Supreme Court put aside such considerations in favor of a fatal application of the statutory bar of the Indian Claims Commission Act, even though acts of gradual encroachment onto Indian lands, upon which the ICC finding of extinguishment was based, do not ordinarily suffice under U.S. law to extinguish Indian land title. In a later case, *Western Shoshone National Council v. Molini*,⁶⁹ the Ninth Circuit Court of Appeals extended the Supreme Court's decision in *Dann* and held that hunting and fishing rights are part of the aboriginal title that may no longer be asserted as a result of the statutory bar. The Supreme Court declined a petition for review of the Ninth Circuit decision in *Molini*, although the ICC process clearly did not address the extinguishment of all Western Shoshone aboriginal and treaty rights.⁷⁰ These decisions effectively locked the Danns out of the

established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature."

⁶⁵ See Petition, *supra*, at 13-18.

⁶⁶ See Petition, *supra*, at 4-9.

⁶⁷ See *United States v. Dann*, 706 F. 2d 919 (9th Cir. 1983), *rev'd on other grds.*, 470 U.S. 39 (1985).

⁶⁸ See *United States v. Dann*, 470 U.S. 39 (1985).

⁶⁹ 951 F.2d 200 (9th Cir. 1991), *cert. denied*, 506 U.S. 822 (1992).

⁷⁰ See *WSNC v. Molini*, 506 U.S. 822 (1992). *Molini* rejected the same assertion of Western Shoshone land and resource rights involved in this case and conclusively established the futility of any further effort to defend those rights in United States courts. Concluding diligent efforts by the Danns and other

domestic judicial process without having considered the merits of their claim to continuing rights over lands and natural resources. The Inter-American Commission has clarified that the right to judicial protections extends beyond free access to and exercise of judicial recourse. The Inter-American Court on Human Rights, in agreeing with the Commission, has held that it is necessary for the intervening judicial body to issue a conclusion based on the merits of the claim that establishes the validity or invalidity of the legal position giving rise to the judicial recourse, otherwise the judicial recourse is ineffective.⁷¹ The absence of an effective domestic remedy not only disposes of the need to exhaust such remedies, it also establishes a violation of the substantive right to judicial protection.⁷²

47. Contrary to what the United States might argue, the largely theoretical remedy of possible judicial recognition of "individual aboriginal rights" is both ineffective and inadequate.⁷³ As the Danns have explained in their various submissions to the Commission, they are among the Western Shoshone Indians who as a whole exist as an indigenous nation or people in the sense that they comprise a discrete community bonded by ethnographic, cultural and political factors. The various Western Shoshone bands of tribes with which the United States maintains "government-to-government" relations, as well as the Dann band, are part of the larger Western Shoshone Nation. The land rights asserted by the Danns do not derive from their own individual land use patterns in isolation from the larger Western Shoshone group - such individual land use being the theory behind "individual aboriginal rights" - hence the Danns' reason for not claiming individual rights apart from collective title. Rather, the rights asserted in this case arise from a customary system of land tenure that has been generated over centuries by the Western Shoshone people as a whole. Western Shoshone customary practices define and regulate land use among and within the various Western Shoshone bands, including with the Danns. As the Commission noted in a recent decision on admissibility, although the state may claim a remedy is available, without further explanation, there is no proof that the remedy may be adequate or effective.⁷⁴

48. "Individual aboriginal rights" do not provide a basis for the Danns to assert use and occupancy rights that derive from Western Shoshone collective aboriginal title. This supposed

Western Shoshones in some twenty years of legal battles in U.S. courts, the *Molini* decision was the final determinant of the exhaustion and futility of domestic remedies.

⁷¹ See *Godínez Cruz Case*, Judgment of January 20, 1989, Inter-Am.Ct.H.R. (Ser. C) No. 5 (1989) at paras. 69-71. In the context of responding to a government's contention that a party failed to exhaust domestic remedies, the Inter-American Court noted that a party's legal remedy can be made ineffective "when it is shown that remedies are denied for trivial reasons or without an examination of the merits, or if there is proof of the existence of a practice or policy ordered or tolerated by the government, the effect of which is to impede certain persons from invoking internal remedies that would normally be available to others. In such cases, resort to those remedies becomes a senseless formality."

⁷² See *Judicial Guarantees in States of Emergency* (Arts. 27(2), 25, and 8 of the American Convention on Human Rights), Advisory Opinion OC-9/87 of Oct. 6, 1987, Inter-Am.Ct.H.R. (Ser.A) No. 9 (1987), paras. 24-25; *Fairen Garbi, Solis Corrales Case*, Preliminary Objection, Judgment of June 26, 1987, Inter-Am.Ct.H.R. (Ser.D) No. 2 (1994), paras. 90-93.

⁷³ See *Petitioners' Observations of April 23, 1997*, *supra*, at 3-5; *Petitioners' Observations Sept. 11, 1997*, *supra*, at 10-16.

⁷⁴ Case 11.166 (Peru), Inter-Am. C.H.R., Report 46/97, OEA/Ser.L/V/II.98, doc. 7 rev., at 160, para. 37.

remedy is entirely apart from and undermines Western Shoshone collective rights as it implies that collective aboriginal rights no longer exist. All submissions to the Commission in this case show the futility of asserting collective Western Shoshone aboriginal rights. As the facts in this case illustrate, the Danns are precluded from asserting rights derived from Western Shoshone aboriginal title in the domestic judicial process and therefore no effective judicial procedures exist for protecting those rights. The failure of the United States to provide effective judicial remedies is a violation of its international obligation to protect fundamental rights.

IV. Conclusion

49. The Danns have set forth facts that establish violations of rights affirmed in the American Declaration on the Rights and Duties of Man. The United States has not disproved the essential facts, but rather has tended to confirm them. By the acts and omissions of government officials described herein, which infringe on the Danns' rights over lands and resources and which deny their right to cultural integrity, self-determination and equality under the law, the United States has incurred international responsibility. The Danns have established that no effective domestic judicial procedures exist in relation to the object of the Danns' petition, which is to obtain relief from ongoing violations of their rights over lands and natural resources. Because of its international obligations to provide effective judicial procedures and due process of law, the United States is also internationally responsible for this shortcoming of its judicial system.

50. By reason of the foregoing, the Danns reiterate their request that the Inter-American Commission on Human Rights prepare a report setting forth all of the facts and applicable law, declaring that the United States is in violation of its human rights obligations, and instructing the United States to guarantee the Danns' stewardship, use and possession of aboriginal Western Shoshone lands.