

Amended Request for Urgent Action under Early Warning Procedure

to the

**Committee on the Elimination of Racial Discrimination
of the
United Nations**

**By the Yomba Shoshone Tribe and Ely Shoshone Tribe
of the Western Shoshone People**

In Relation to the United States of America

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I. Introduction

1. The Yomba Shoshone tribe and the Ely Shoshone tribe hereby reiterate and elaborate upon their request to the Committee on the Elimination of Racial Discrimination (hereinafter "CERD" or the "Committee") for urgent action under its early warning procedure. The Yomba Shoshone tribe submitted its initial request for urgent action to the Committee on August 23, 1999. On August 25, 1999, the Ely Shoshone tribe joined in the request. The people of the Yomba Shoshone and Ely Shoshone tribes, along with other Western Shoshone groups and individuals, are faced with a grave situation in which their rights under the International Convention on the Elimination of All Forms of Racial Discrimination (the "Convention") are being violated in a manner that threatens them with immediate and potentially widespread, irreparable harm.

2. In this amended request for urgent action under CERD's early warning procedure, the petitioners summarize and provide an updated account of the facts of this case and specify the human rights violations that the United States has committed against the people of the Yomba Shoshone and Ely Shoshone tribes in relation to their status as groups that form part of the Western Shoshone indigenous people. As discussed below, the facts in this case constitute violations of human rights protected by the International Convention on the Elimination of All Forms of Racial Discrimination - in particular article 1 (freedom from discrimination based on race, color, descent, or national or ethnic origin); article 2 (obliging states to refrain from practicing racial discrimination); and article 5 (requiring state parties to guarantee equality before the law). The facts also constitute violations of other provisions of international human rights law which are binding upon the United States.

3. As discussed in the initial request for urgent action, the United States is denying the Western Shoshone people rights to traditional lands, having determined in a discriminatory manner that those rights have been extinguished. Based on this discriminatory determination, the United States is denying Western Shoshone people access to traditional lands by enforcing trespass and other actions against the Western Shoshone while allowing non-indigenous people

to come onto and use those lands. The situation of the Western Shoshone people since the submission of the original request for urgent action has worsened. The United States government has continued in its denial of Western Shoshone rights to ancestral lands, thereby threatening irreparable harm to Western Shoshone subsistence, culture and way of life.

4. Further still, officials of the United States government have now 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 request for urgent action under CERD's early warning procedure and upon which the Yomba Shoshone and Ely Shoshone tribes and other Western Shoshone people rely – by selling it in open bidding to mining, ranching and other private interests.¹ The second legislative measure is a bill that effectively would finalize the very administrative determination of extinguishment that the Yomba Shoshone and Ely Shoshone are challenging as a violation of human rights.²

5. The Yomba Shoshone and Ely Shoshone tribes of the Western Shoshone people assert that the United States' conduct to deny them use and enjoyment of ancestral lands is in violation of relevant parts 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 Yomba Shoshone and Ely Shoshone tribes further assert that the legislative measures proposed by the United States, due to the complete lack of input granted the Western Shoshone people in regards to these bills and the resulting permanent impairment of the Western Shoshone people's rights if they are enacted, present an even greater threat to the Western Shoshone indigenous people's survival.

6. The Yomba Shoshone and Ely Shoshone tribes urge the Committee to take note of the serious nature of this situation, and to call upon the United States of America to rescind immediately all impoundment and trespass notices against Western Shoshone people, to refrain from prosecuting Western Shoshone hunters, to take measures to ensure that mining and other activities on Western Shoshone ancestral land does not impede their physical and cultural survival, to withdraw the current proposed legislation described below, and to proceed forthwith to resolve Western Shoshone land issues through negotiations with Western Shoshone leaders.

II. The Western Shoshone Indigenous People and Their Lands

7. The Yomba Shoshone and Ely Shoshone tribes, like others among the Western Shoshone people, are in current possession and actual use of ancestral lands in central Nevada and parts of California and Utah. Their livelihoods are entirely dependent on hunting, gathering, and grazing livestock on the lands of their forebearers, in accordance with traditional land tenure patterns. On these lands, they hunt rabbit, sagehen, ground squirrels, groundhogs, prairie dogs, and deer,

¹ See proposed Nevada Public Land Management Bill ("Nevada Public Land Bill"), S.719 (U.S. Senate bill) and H.R. 1506 (U.S. House bill) (Attached as Appendix 1).

² See proposed Western Shoshone Claims Distribution Bill ("Distribution Bill"), S.2795 (U.S. Senate bill) (Attached as Appendix 2).

and they fish from the rivers. In the past, elk, antelope, big horn sheep and buffalo were also hunted; but these animals have disappeared from the area, and cattle-raising has replaced them in the Western Shoshone diet and culture. The Yomba Shoshone and Ely Shoshone tribes also collect other food, most importantly pinenuts, for subsistence purposes.³

8. The Western Shoshone people, including the members of the Yomba Shoshone and Ely Shoshone tribes, also gather plants from the land for medicinal and religious purposes. They perform rituals and spiritual exercises at sacred sites such as hot springs and other locations, and provide proper care for places of cultural importance, including burial grounds, throughout their territory. Traditional hunting, fishing, gathering and other spiritual activities have been, and continue to be, an essential form of cultural expression for the Western Shoshone.⁴

9. Western Shoshone political and social structures have traditionally been decentralized under a system suited to their harsh natural environment. The Western Shoshone are organized primarily into bands of extended family groups, each of which has traditionally lived according to a customary land tenure system.⁵ The Yomba Shoshone tribe and the Ely Shoshone tribe are two such entities, and are two of the nine tribal entities of Western Shoshone people that are officially recognized by the United States government.⁶

10. In 1863, the Western Shoshone people signed a treaty of “peace and friendship” with the United States of America, in Ruby Valley, Nevada (the “Treaty of Ruby Valley”).⁷ The Treaty of Ruby Valley affirmed the boundaries of the traditional territory occupied by the Western Shoshone, and did not cede title to any Western Shoshone lands. It did grant the United States rights-of-way through Western Shoshone territory for roads, telegraph lines and railroads to California and limited land-use rights for mining, logging and mining support activities. The Treaty of Ruby Valley foresaw negative effects on Western Shoshone subsistence hunting, and contemplated the adoption of cattle herding by the Western Shoshone.⁸ Under the United States Constitution, this treaty continues to be part of the “supreme law” of the United States.⁹

³ See Steven J. Crum, *Po'i Pentun Tammen Kimmappah: The Road On Which We Came: A History of the Western Shoshone* (Salt Lake City; University of Utah Press: 1994), pp. 1-15 (for description of historical Western Shoshone practices) (Attached as Appendix 3).

⁴ See *id.*

⁵ See *id.*

⁶ See Kevin Gover, Assistant Secretary - Indian Affairs, “Indian Entities Recognized And Eligible To Receive Services From The United States Bureau of Indian Affairs” at “E” and “Y” (last modified March 17, 2000) <<http://www.doi.gov/bia/tribes/telist00.html>> (Attached as Appendix 4).

⁷ Treaty of Ruby Valley, 18 Stat. 689 (signed 1863; ratified 1866), in *Indian Affairs: Laws and Treaties. Vol. II (Treaties)* (Charles J. Kappler compiler and ed., Washington D.C.; Government Printing Office: 1904), pp. 851-853 (Attached as Appendix 5).

⁸ “The United States, being aware of the inconvenience resulting to the Indians in consequence of the driving away and destruction of game along the routes travelled by white men, and by the formation of agricultural and mining settlements, are willing to fairly compensate them for the same; therefore, and in consideration of the preceding stipulations, and of their faithful observance by the said bands, the United States promise...to pay...in such articles, including cattle for herding or other purposes, as the President

III. The United States' Attempts to Dispossess the Western Shoshone of Their Lands and Traditional Livelihood

A. Interference with Use and Enjoyment of Ancestral Land

11. Despite the Treaty of Ruby Valley, 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. In recent years, various members and groups of the Western Shoshone have been issued trespass and impoundment notices for grazing cattle and have been prosecuted for other customary uses of their traditional lands.¹⁰ United States officials have taken action to physically remove Western Shoshone livestock from rangelands within Western Shoshone ancestral territory and have imprisoned a member of the Dann Band of Western Shoshone for nine months for resisting. In December of 1998, the United States Department of the Interior affirmed trespass decisions against one group of Western Shoshone, the Danns, and ruled that the Bureau of Land Management (the "Bureau") could proceed to impound the Dann's livestock and confiscate their property.¹¹ The Danns' attempt to reach a land use and management agreement with the Bureau of Land Management in light of this decision resulted in the Bureau reiterating its position that the Western Shoshone people no longer have rights to their ancestral lands.¹² On May 28, 1999 - only two days after the Danns received the Bureau's response to their land use and management proposal - the Bureau issued a "Notice of Intent to Impound" any "unauthorized livestock grazing upon public land."¹³

of the United States shall deem suitable for their wants and condition, either as hunters or herdsmen." *Id.* at 852.

⁹ See *Worcester v. Georgia*, 31 U.S. 515 (1832); *Talton v. Mayes*, 163 U.S. 376, 384-385 (1896) (for proposition that treaties with Indians are part of the "supreme law" of the United States).

¹⁰ See, e.g., Warrant of Arrest for Timothy Dann, issued by Beowawe Township, County of Eureka, State of Nevada (Oct. 1, 1985) (Attached as Appendix 6).

¹¹ See United States Department of the Interior, Office of Hearings and Appeals, Interior Board of Land Appeals, Decision of Dec. 18, 1998, IBLA 98-372. (affirming trespass decisions against the Danns) (Attached as Appendix 7).

¹² On March 28, 1999 the Dann sisters presented a document to the Bureau of Land Management that contained comprehensive provisions for joint, cooperative management of the contested lands and detailed proposals to resolve the specific activities complained of by the United States. The proposed interim measures agreement stipulates that the rights of the Danns and other Western Shoshone to the lands in questions (and other rights) will ultimately be determined through later discussions with competent agencies of the United States government. See Proposed Interim Measures Agreement between Mary and Carrie Dann and the United States Bureau of Land Management (Attached as Appendix 8). In its response, the Bureau rejected the basic terms of the proposal and countered with terms essentially restating its position that the Western Shoshone people no longer have rights to their ancestral lands. See letter from Helen Hankins, Elko Field Office Manager, United States Department of the Interior, Bureau of Land Management to Deborah J. Schaaf, Esq., Indian Law Resource Center (May 26, 1999) (Attached as Appendix 9).

¹³ Notice of Intent to Impound from Helen Hankins, Elko Field Office Manager, United States Department of the Interior, Bureau of Land Management (May 1999) (Attached as Appendix 10).

12. The United States is treating most of the land concerned as government, or so-called "public," land, and it is imposing fees on Western Shoshone ranchers for grazing cattle on that land. Although some Western Shoshone groups refused to pay the grazing fees, the Yomba Shoshone tribe and other Western Shoshone groups initially paid the fees under protest. In late 1983 the Yomba Shoshone ceased paying the grazing fees based on a United States court decision in the Dann case, which found that Western Shoshone aboriginal title had not been extinguished.¹⁴ In 1991, in light of a subsequent court decision in *Western Shoshone National Council v. Molini*,¹⁵ it became apparent that the United States would not honor Western Shoshone aboriginal title even though the United States courts had not found that title to be extinguished.¹⁶ The Yomba Shoshone therefore resumed paying grazing fees. The United States, however, refused to issue the Yomba Shoshone ten-year permits for their usual number of cattle and instead offered only much-reduced, temporary permits. Still more recently, in early 2000, the United States issued a trespass notice against the Yomba Shoshone even after refusing to issue the Yomba Shoshone the short-term permits which would have prevented the supposed trespass. The Bureau of Land Management has now presented a proposed decision which would remove livestock, demand payment, deny grazing applications and cancel grazing preferences on traditional Western Shoshone land. The devastating threat to the Yomba Shoshone tribe's welfare and livelihood presented by this proposed decision is unquestionable.¹⁷

13. The United States is further impeding Western Shoshone traditional subsistence activities through enforcement of state hunting and fishing regulations which differ from the Western Shoshone traditional hunting and fishing seasons. These regulations require the possession of tags, permits and licenses to hunt and fish on lands within Western Shoshone territory. Officials of the state of Nevada, relying on the United States' denial of Western Shoshone title to ancestral lands, refuse to accommodate traditional Western Shoshone hunting and fishing practices and

¹⁴ *United States v. Dann*, 706 F. 2d 919, 927-933 (9th Cir. 1983), *rev'd on other grounds*, 470 U.S. 39 (1985).

¹⁵ 951 F.2d 200 (1991). The Yomba Shoshone felt that the decision in *Molini*, which held that off-reservation aboriginal hunting and fishing rights had been extinguished by payment of the Indian Claims Commission judgment, made it clear that under United States law the tribe had no aboriginal rights to run livestock in their traditional grazing areas.

¹⁶ For a more detailed explanation regarding the United States courts and the purported extinguishment of Western Shoshone rights, see paragraph 20 of this Amended Request.

¹⁷ See Proposed Decision: Demand for Payment, Order to Remove, Denial of Grazing Application, Cancellation of Cooperative Range Improvement Agreements and Cancellation of Grazing Preference on Ione, Stewart Springs and Clear Creek Allotments, United States Department of the Interior, Bureau of Land Management, June 8, 2000 (Attached as Appendix 11). The Bureau is demanding \$880,163.45 in past payments and interest for the 1982-1992 period, before it will even consider reissuing Yomba Shoshone grazing permits. Attached to this proposed decision, and presented despite ongoing negotiations, is a Notice of Intent to Impound dated March 1, 2000. In addition to its effect on the Yomba Shoshone tribe's livelihood, this proposed decision is significant because it is the first attempt by the Bureau of Land Management to remove Western Shoshone grazing preferences, thereby clearing the way to instead issue those preferences to non-Indians.

instead actively seek out and arrest Western Shoshone people who do not comply with restrictive state hunting and fishing laws and regulations.¹⁸

14. The United States has also sought to restrict traditional Western Shoshone gathering of pinenuts, an important food source for the Western Shoshone people. At the same time, the United States has permitted non-indigenous people to commercially harvest the pinenuts upon which the Western Shoshone have traditionally relied.¹⁹

15. Additionally, government officials have permitted or acquiesced in gold prospecting within Western Shoshone lands, including the lands upon which the people of the Yomba Shoshone, Ely Shoshone and other groups of Western Shoshone 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 United States mining legislation or land exchanges with the United States government. Mining activity has already affected the Western Shoshone use of their ancestral lands, and it has reduced and contaminated the ground water in the Humboldt River basin—the main water source for the Western Shoshone, destroyed traditional food sources, and severely damaged Western Shoshone cultural and sacred sites.²⁰

¹⁸ See Affidavit of Terry Crawford, Nevada Department of Wildlife (Feb. 29, 1988) (statement of Nevada Department of Wildlife chief of law enforcement regarding departmental policy of applying Nevada hunting and fishing laws and regulations to the Western Shoshone) (Attached as Appendix 12); Declaration of Saggie Williams (Oct. 3, 1987) (Attached as Appendix 13); Declaration of Glenn V. Holley Sr. (Mar. 18, 1987) (Attached as Appendix 14); Declaration of Roland Brady (Mar. 12, 1987) (Attached as Appendix 15); Declaration of Ian D. Zabarte (Mar. 9, 1987) (Attached as Appendix 16); Affidavit of Felix Ike (Mar. 19, 1987) (Attached as Appendix 17) (statements of traditional Western Shoshone hunters regarding encounters with Nevada Department of Wildlife officials). See also *Whiterock v. State*, 112 Nev. 775 (1996), *rehearing denied* (Dec 17, 1996), *cert. denied*, *Whiterock v. Nevada*, 520 U.S. 1244, (1997) (Supreme Court of Nevada found aboriginal rights to hunt and fish extinguished in case where Western Shoshone hunter was found guilty of hunting without a valid tag) (Attached as Appendix 18).

¹⁹ See Letter from Larry Kibby, Consultant/Director, Western Shoshone Historic Preservation Society to Rodney Harris, District Manager, Elko District Office (July 14, 1994) (formal notice that the intended pinenut commercialization areas are traditional use areas) (Attached as Appendix 19); Letter from Larry Kibby, Consultant/Director, Western Shoshone Historic Preservation Society to Mr. Bruce Babbitt, Secretary of the Interior (March 2, 1994) (protesting intended commercialization of Christmas trees and pinenut harvesting areas) (Attached as Appendix 20); Letter from Larry Kibby, Consultant/Director and Paula Brady, Executive Board of Trustees, Western Shoshone Historic Preservation Society to Jim Currivan, Battle Mountain District Manager (August 9, 1993) (requesting creation of an advisory committee to provide an input avenue for communities with an interest in the planned woodcutting areas) (Attached as Appendix 21); Letter from Paula J. Brady, Board of Trustee and Larry Kibby, Consultant/Director, Western Shoshone Historic Preservation Society to Gary Foulkes, Archaeologist or Mike Sondergaard, Forester (July 30, 1993) (pointing out other traditional uses of land that would be impacted by woodcutting) (Attached as Appendix 22).

²⁰ See Tom Myers, Cumulative Hydrologic Effects of Open Pit Gold Mining In The Humboldt River Drainage (March 10, 1994) (A report to the Sierra Club) (Attached as Appendix 23); Letter from Christopher Sewall, Staff Person, Western Shoshone Defense Project to Doug Zimmerman, Bureau Chief, Bureau of Mining Regulation and Reclamation, Nevada Division of Environmental Protection (Aug. 1, 1997) (regarding water contamination and other problems at exploratory drill site in Crescent Valley, Nevada) (Attached as Appendix 24); Letter from Del Wisner, Mine Manager, Inland Gold & Silver Corp. to Doug Zimmerman, Nevada Department of Environmental Protection (Dec. 18, 1991) (regarding

16. United States permitting of military activities and other land transfers within Western Shoshone traditional territory is further damaging the health and welfare of the Western Shoshone.²¹ Moreover, the United States is now planning to store 77,000 tons of nuclear waste from across the United States inside of Yucca Mountain, a site sacred to the Western Shoshone. If the United States continues with this plan, in addition to desecrating this sacred site they will endanger the health of the Western Shoshone people both through the inherently dangerous transportation of the waste as well as the potential for leakage from its eventual storage.²²

B. United States' Effort to Hold Western Shoshone Title to Land Extinguished

17. In the United States' communications with the Western Shoshone people and in its judicial and administrative decisions, the United States does not contest 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 which, according to the United States, establish that at some point in the past Western Shoshone title and rights to land were extinguished.

18. The proceedings upon which the United States relies for this assertion are those of the Indian Claims Commission (ICC), an administrative body that was created by the United States Congress in 1946 to partially compensate indigenous peoples for lands and resources of which they had been deprived. In 1951, a claim was brought before this commission and concluded in the United States Court of Claims, purportedly on behalf of the entire Western Shoshone people.²³ These proceedings resulted in a meager monetary award for the presumed extinguishment of Western Shoshone title to land.²⁴

accidental discharge of 17 pounds of cyanide) (Attached as Appendix 25); Oro Nevada Resources Inc., Annual Report of 1996 (example of mining activity in Nevada) (Attached as Appendix 26); Letter and enclosures from Stewart R. Wilson, Wilson and Barrows, Ltd. to Helen M. Hankins, District Manager, United States Department of the Interior, Bureau of Land Management (Dec. 9, 1996) (example of a proposed land exchange) (Attached as Appendix 27); Danielle Knight, "Indigenous Groups Worldwide Blast U.S. Mining Giant," *Inter Press Service*, May 5, 2000 (regarding the Newmont Mining Corporation, which is active on Western Shoshone traditional lands) (Attached as Appendix 28); Pratap Chatterjee, "Gold, greed and cyanide," *Dollars & Sense*, Jan. 1, 1999 (further information on Newton and other mining companies) (Attached as Appendix 29).

²¹ See Letter from Carrie Dann, Acting Director, Western Shoshone Defense Project to James M. Phillips, Lahontan Area Manager, U.S. Bureau of Land Management (Mar. 15, 1995) (regarding concerns of health impacts from military activity on/over Western Shoshone land) (Attached as Appendix 30); Letter from Carrie Dann, Director, Western Shoshone Defense Project to Sylvia Baca, Acting-Director, Bureau of Land Management (June 13, 1997) (regarding military expansion in Nevada and lack of proper consultation with Western Shoshone) (Attached as Appendix 31); Letter and enclosures from Christopher Sewall, Staff Person, W.S.D.P. to Dave Loomis, Project Manager, Central Nevada Communication Sites Plan Amendment and EA (June 8, 1997) (regarding Tracking Systems site on Bald Mountain) (Attached as Appendix 32); Frank Mullen Jr., "Military chaff use under fire," *Reno/Sparks*, Aug. 2, 1997 (Attached as Appendix 33).

²² See Evelyn Nieves, "Tribe fights plan for nation's poison," *The Seattle Times*, Apr. 23, 2000 (regarding nuclear storage plans for Yucca Mountain) (Attached as Appendix 34).

²³ See S. James Anaya, "Native Land Claims in the United States: The Unatoned for Spirit of Place," *The*

19. For the Western Shoshone people, who continue to use and occupy those same lands, this decision was a travesty. The judgment funds have never been distributed to any Western Shoshone individual or group because the Western Shoshone have refused to accept the relatively small amount of money for land that they have never in fact sold, ceded, lost or abandoned. Furthermore, the issue of whether Western Shoshone land rights were truly extinguished was never actually litigated by the Indian Claims Commission or the Court of Claims, and Western Shoshone individuals and groups were not permitted to intervene in the proceedings to contest the presumed extinguishment of title.²⁵

20. 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. One group of Western Shoshone people, the Dann Band, 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. The highest United States court to have actually examined and ruled on substantive Western Shoshone land rights 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.”²⁶ However, 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 held that the Danns are barred from asserting Western Shoshone aboriginal title as the basis of rights to use and occupy lands as a statutory consequence of the earlier judgment and award in the collateral claims proceedings.²⁷ That judgment and award was premised on an uncontested stipulation, adopted by the Indian Claims Commission, 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 Dann Band, the Yomba Shoshone and Ely Shoshone tribes, and other Western Shoshone groups never acquiesced to the stipulation of extinguishment in the claims proceedings. Nor were the Yomba Shoshone or other individuals or groups of Western Shoshone people allowed to intervene in those proceedings to assert

Cambridge Lectures 1991 (F. McArdle, ed.) (Cowansville, Quebec: Les Editions Yvon Blains Inc. 1992), 28-32 (brief summary of the Indian Claims Commission as it effected the Western Shoshone) (Attached as Appendix 35).

²⁴ In 1979, the Claims Committee determined payment for the allegedly extinguished Western Shoshone lands on the basis of a meager US \$0.15 to 3.50 per acre. See 29 Ind. Cl. Comm.5, 19-30.

²⁵ See, e.g., *Western Shoshone Legal Defense and Educ. Ass’n v. United States*, 531 F.2d 495 (Ct.Cl.), *cert. denied*, 429 U.S. 885 (1976) (unsuccessful motion by a group of Western Shoshone to intervene in ICC proceedings).

²⁶ The public land laws, creation of the Duck Valley Reservation, and actions under the Taylor Grazing Act were all events that the United States argued contributed to extinguishment of Western Shoshone rights. The court disagreed. *United States v. Dann*, 706 F. 2d 919, 927-933 (9th Cir. 1983), *rev’d on other grounds*, 470 U.S. 39 (1985).

²⁷ See *United States v. Dann*, 470 U.S. 39 (1985) (Attached as Appendix 36).

continuing aboriginal rights to land. Nonetheless, the U.S. Supreme Court held that the Western Shoshone 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.

21. Based on this ruling, United States officials now contend that Western Shoshone aboriginal rights to land have been extinguished. As far as the United States is concerned, Western Shoshone rights have simply been extinguished without the need for a full and fair determination of the matter, notwithstanding the fact that the Western Shoshone people have continued through the present to use and occupy the lands in question in accordance with traditional land tenure patterns. Such an attempt at effectively extinguishing the rights of an indigenous people in land should not be allowed to stand.

C. Recent Legislative Proposals that Would Further Efforts to Extinguish Western Shoshone Rights in Land

22. In addition to the on-going discrimination practiced by the United States against the Western Shoshone people, as described above, the United States has escalated the discriminatory threat to Western Shoshone property interests by proposing two new pieces of legislation which, if enacted into law, would critically impair the land, resource and cultural rights of the Western Shoshone people.

23. The first legislative measure is a bill entitled the Nevada Public Land Management Act of 1999 (the “Nevada Public Land Bill”).²⁸ This bill would authorize the United States Secretary of the Interior to dispose of “public” land in the state of Nevada by selling it in open bidding to mining, ranching and other private interests. This land includes most of the Western Shoshone ancestral territory currently used and occupied by the Western Shoshone people, including land used and occupied by the Yomba Shoshone and Ely Shoshone tribes. There are no provisions acknowledging, much less safeguarding, the interests of the Western Shoshone people, and the United States never involved the Yomba Shoshone and Ely Shoshone tribes, or any other Western Shoshone leaders, in any manner when the bill was drafted and introduced in Congress. The threatened impact of the bill is usurpation of Western Shoshone lands and, as a result, the destruction of the Western Shoshone people and their way of being.

24. The second legislative measure is a bill entitled the Western Shoshone Claims Distribution Act (the “Distribution Bill”).²⁹ The Distribution Bill is intended to finalize the questionable determination of the 1979 Indian Claims Commission that Western Shoshone land rights were extinguished, a determination that is challenged by the Yomba Shoshone and Ely Shoshone tribes as a violation of human rights. The Distribution Bill authorizes the United States Secretary of the Interior to make a per capita distribution of the funds awarded by the Indian Claims Commission, but never accepted by the Western Shoshone people. The Distribution Bill recognizes the extensive controversy over the distribution of the funds, and even states in its background information that “(g)iven a choice, some of the Western Shoshone

²⁸ Nevada Public Land Bill (Attached as Appendix 1).

²⁹ Distribution Bill (Attached as Appendix 2).

would prefer to acquire additional trust lands within their aboriginal land areas rather than accepting compensation for the loss of those lands.”³⁰ Regardless, the legislation was introduced to the United States Senate on June 27, 2000 for potential enactment against the wishes of the majority of Western Shoshone people and their governing bodies. Once the bill is enacted, there are no provisions for input or involvement by any Western Shoshone leaders for the distribution of these same funds.

IV. United States Violations of the International Convention on the Elimination of All Forms of Racial Discrimination in Respect to the Western Shoshone People.

25. The facts just summarized establish violations of human rights affirmed by the International Convention on the Elimination of All Forms of Racial Discrimination, to which the United States is a party. As such, the United States incurs international responsibility for violation of rights articulated in the Convention, as well as for the violation of rights affirmed in any other treaty to which the it is a party. The United States' violation of the Convention, through its discriminatory treatment of indigenous property rights, is the essential basis for this request for urgent preventative measures.

A. Discriminatory Treatment of Western Shoshone Property Interests

1. Western Shoshone People's Traditional Land Tenure as Property

26. Traditional Western Shoshone patterns of use and occupancy of lands and natural resources 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 is a form of property that is protected from discrimination by the Convention.

27. Among indigenous peoples generally, each group's particular system of land tenure embodies a property regime. Within the corresponding system of indigenous peoples' customary norms, traditional land tenure is generally understood as establishing collective property of the indigenous community and derivative rights among community members.

28. In the United States 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 United States law.³¹

³⁰ See Background Information - Docket 326-K at para. 5, attached to Draft Western Shoshone Claims Distribution Act Bill prior to its introduction to the United States Senate (Attached as Appendix 37). This background information admits that controversy surrounds any discussion concerning the distribution of these funds and specifically identifies the many administrative and judicial battles fought by the Danns and other Western Shoshone people. Notably, there is no mention of the fact that the Danns' case is still very much alive and currently pending before the Inter-American Commission on Human Rights with a recent, favorable ruling on admissibility and a finding of a *prima facie* human rights violation. Similarly, there is no mention of the present urgent action request originally submitted to this Committee on August 19, 1999.

³¹ 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.

Additionally, under United States 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.³²

29. Independently of the common law of domestic legal systems, indigenous systems of land tenure give rise to property interests, and these interests have been embraced and affirmed by CERD General Recommendation XXIII concerning Indigenous Peoples. CERD calls upon states, as part of their obligations as parties to the Convention, to “recognise and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return these lands and territories.”³³ The fundamental principle of non-discrimination, which is found in the Convention and general international law, leads to this interpretation of the reach of the right to property as articulated in Recommendation XXIII. A contrary interpretation of the right to property would allow discrimination to persist against indigenous peoples with regard to their traditional forms of land tenure and natural resource use.

30. This interpretation of the right to property as articulated in recommendation XXIII is supported by International Labor Organization Convention (No. 169) concerning Indigenous and Tribal Peoples (“ILO Convention No. 169”), which provides for recognition of rights of ownership and possession by indigenous peoples over the lands that they traditionally occupy and use, and access to those lands for subsistence and traditional activities. ILO Convention No. 169 obligates governments to safeguard those rights and provide adequate procedures to resolve land claims.³⁴ Additionally, Articles 25 through 28 of the Draft United Nations Declaration on the Rights of Indigenous Peoples and Article XVIII of the Proposed American 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.³⁵

1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976); *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979). *Cohen*, *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).

³² 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 to include usufructuary occupation or right).

³³ CERD General Recommendation XXIII concerning Indigenous Peoples, adopted at the Committee's 1235th meeting, on 18 August 1997, CERD/C/51/Misc.13/Rev.4.

³⁴ International Labor Organization Convention (No. 169 of 1989) concerning Indigenous and Tribal Peoples in Independent Countries, art. 14 (entered into force Sept. 1991).

³⁵ *See* 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; 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. Both draft instruments affirm that indigenous peoples have the right to full recognition of their laws, traditions, and customs, land-tenure systems and institutions for the

31. The United States is not among the several states that have ratified ILO Convention No. 169. However, the articles of ILO Convention No. 169 just mentioned, similar to the land rights provisions of the Proposed American Declaration and the Draft United Nations Declaration, are appropriately considered as articulating the implications of the principle of non-discrimination as applied to indigenous lands and as reinforcing CERD General Recommendation XXIII.

32. The international norms that recognize rights based on indigenous peoples' traditional landholdings and resource use are increasingly incorporated and reflected in the domestic legal practice of states throughout the American region and the world. Throughout the Western Hemisphere especially, state members have amended their constitutions or have adopted new laws to recognize and protect land and natural resource rights for indigenous peoples. Similarly, state legal systems in other parts of the world have incorporated property rights based on indigenous peoples' traditional land tenure.³⁶

2. The Requirement that Indigenous Property Rights Receive Non-discriminatory Protection

33. Articles 1, 2 and 5 of the Convention protect the property interests of indigenous peoples from discriminatory treatment. The first two articles address the general right to freedom from discrimination which forms the basis of more specific rights. Article 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. Article 2 obliges states to refrain from practicing racial discrimination and to ensure that all public authorities conform to this obligation. Article 2.2 obligates states not only to refrain from discrimination but to actively take special and concrete measures to guarantee the human rights and fundamental freedoms of certain racial groups.³⁷

34. Article 5 of the Convention 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, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights."³⁸ These rights include the right to own property and the right to equal treatment before the tribunals and all other organs administering justice.³⁹ As discussed above, indigenous peoples, such as the Western Shoshone, have property rights to land and natural resources that arise from traditional land use and occupancy patterns. The United States, as a state party to the Convention, is

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.

³⁶ Much of this regional and global state practice is described in the recent scholarly work by Professor Siegfried Wiessner. See Siegfried Wiessner, "Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis," 12 *Harv. Human Rights J.* 57 (1999) (Attached as Appendix 38).

³⁷ International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature and ratification* Dec. 21, 1965, *entered into force* Jan. 4, 1969, 5 I.L.M. 352, at art. 1-2.

³⁸ *Id.* at art. 5.

³⁹ See *id.* at 5(a).

obligated to affirmatively protect such indigenous property rights and, moreover, to accord those rights the same degree of protection it provides the property rights of non-indigenous people.

3. Discriminatory Efforts to Hold Western Shoshone Property Interests Extinguished

35. In the United States' communications with the Western Shoshone people, the United States government 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 the statutorily-based claims proceedings discussed above. However, these proceedings were themselves discriminatory. The theory of extinguishment employed was discriminatory and the purported taking of land occurred without a public purpose or compensation equal to what non-indigenous people would have received for the land if it had been taken legitimately. Furthermore, there was a lack of procedural safeguards, and due process for the Western Shoshone was not equal to what non-indigenous people ordinarily receive in United States courts. These discriminatory elements of the claims process constitute violations of Western Shoshone rights to equality under the law.

36. The right to equal protection and due process of law in regard to administrative and judicial proceedings is affirmed in numerous international instruments. The Convention states that "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."⁴⁰ The Universal Declaration of Human Rights states that "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."⁴¹ The American Declaration on the Rights and Duties of Man states that "[e]very person may resort to the courts to ensure respect for his legal rights" and adds 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."⁴²

37. Discriminatory treatment of Western Shoshone property interests and rights to equal treatment are 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 Western Shoshone property rights. The Indian Claims Commission 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

⁴⁰ International Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 37, at art. 6.

⁴¹ Universal Declaration of Human Rights, G.A. Res. 217 A(III), Dec. 10, 1948, art. 8.

⁴² American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), OEA/Ser.L.V/II.82 doc.6 rev.1 at 17, art. XVIII (1992).

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 treatment of indigenous peoples in this manner 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.⁴³

38. 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.⁴⁴ No public purpose has been established for the purported extinguishment of Western Shoshone land title and 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. The 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.⁴⁵

39. 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*.⁴⁶ In that case the United States Supreme Court emphasized that the Court in no case "has ever held that taking of Indian title or

⁴³ *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).

⁴⁴ 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).

⁴⁵ See *supra* note 24.

⁴⁶ *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955).

use by Congress required compensation.”⁴⁷ 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.”⁴⁸ The Court further asserted that the government’s right to extinguish aboriginal title without just compensation was clear because, in words that blemish the United States judicial landscape, “[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.”⁴⁹ Additionally, the Court found that it would inhibit the growth of the United States if the government were obligated to pay for taken land.⁵⁰ Such blatant discriminatory treatment of indigenous land title should not be allowed to stand today.

40. 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 United States 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 Yomba Shoshone and Ely Shoshone tribes. Although the United States is asserting that the land rights of all the Western Shoshone people were affected, only one small group was actually represented before the Indian Claims Commission and Court of Claims. Other Western Shoshone groups were not permitted to intervene.⁵¹ 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.⁵² In an example of discrimination which cannot be justified under

⁴⁷ *Id.* at 281.

⁴⁸ *Id.* at 285.

⁴⁹ *Id.* at 289.

⁵⁰ *See Id.* at 290.

⁵¹ *See supra* note 25.

⁵² When the actual Western Shoshone clients eventually realized the threat of extinguishment and attempted to terminate the attorney’s representation in the final years of the ICC case, the claims attorney pressed forwards on his own and took the case to final judgement. He did not report to or accept direction from the Western Shoshone individuals who he purported to represent. The United States nonetheless continued to approve the attorney’s contract to handle the case. It is apparent that this attorney was representing his own interests in obtaining handsome attorneys’ fees (10% of the final judgement) and the interests of the United States rather than the interests of the Western Shoshone clients. See Plaintiff’s Discharge of Counsel and Additional Motion to Stay Proceedings (Jan. 20, 1977); Resolution of the Business Council of the Temoak Bands of Western Shoshone Indians of Nevada; Letter from Leslie Blossom, Chairman, Temoak Bands of Western Shoshone Indians to Secretary of the Interior, Department of the Interior (Jan. 19, 1977); Letter from Leslie Blossom, Chairman, Temoak Bands of Western Shoshone Indians to Secretary of the Interior, Department of the Interior (Feb. 4, 1977); Letter from William A. Gershuny, Acting Associate Solicitor, Division of Indian Affairs to Leslie Blossom,

either domestic or international law, the U.S. government is now attempting to hold all Western Shoshone people to the terms negotiated by this lawyer in a proceeding in which they were denied the right to participate.

41. 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 Yomba Shoshone and Ely Shoshone tribes - constitutes a violation of the international standards 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 Yomba Shoshone and Ely Shoshone tribes' 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.⁵³

42. The Convention and international law 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.⁵⁴ CERD, in interpreting the requirements of the fundamental norm of non-discrimination embraced by the Convention, 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."⁵⁵ The facts show that the United States has failed this obligation in regard to the Western Shoshone people.

4. Discriminatory Nature of Proposed United States Legislation

43. The two pieces of legislation recently proposed by the United States continue and escalate the trend of discrimination against indigenous property interests that has been inflicted upon the Western Shoshone people. These two bills, if permitted to become law, would critically impair the land, resource and culture rights of the Western Shoshone people.

Chairman, Te-Moak Bands of Western Shoshone Indians (Feb. 24, 1977) (all regarding Temoak's attempts to dismiss counsel) (these documents are appendices C through E, respectfully, of Western Shoshone Identifiable Group v. U.S., 100 S.Ct. 469 (1979), and are attached as Appendix 39).

⁵³ The racially discriminatory nature of such treatment of indigenous land rights was confirmed by CERD's Decision (2)54 on Australia, 18 March 1999, CERD/C/54/Misc.40/Rev.2, para. 6-8 and CERD Concluding Observations on Australia, 24 March 2000, CERD/C/56/Misc.42/rev.3, para. 8-10. In these observations, CERD criticized Australian amendments to the Native Title Act, which disadvantaged indigenous titleholders in comparison to non-indigenous titleholders.

⁵⁴ The international standard of non-discrimination is reflected, *inter alia*, in: United Nations 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, *supra* note 41, art. 10; ILO Convention 169, *supra* note 34, art. 2(2).

⁵⁵ CERD General Recommendation XXIII concerning Indigenous Peoples, *supra* note 33.

44. The Nevada Public Land Bill would permit the government to sell most of the Western Shoshone ancestral territory currently used and occupied by the Yomba Shoshone, Ely Shoshone and other Western Shoshone people to mining, ranching and other private interests. This bill makes no provisions for the Western Shoshone people, nor did the United States consult with the Western Shoshone in any manner regarding the bill's drafting and introduction in Congress.

45. The Distribution Bill is intended to finalize the Indian Claims Commission decision, which the United States claims extinguished Western Shoshone land rights, by authorizing distribution of the funds awarded but never accepted by the Western Shoshone people. This bill fails to make provisions for the input or involvement by any Western Shoshone leaders for the distribution of these funds. Without adequate and informed consultation with the Western Shoshone people, and against the express wishes of many, this bill was recently proffered to the United States Congress.

46. These two legislative measures constitute an effort on the part of the United States to forever impair the rights of the Western Shoshone people,⁵⁶ and they are in direct violation of the United States' responsibility under article 2(c) of the Convention to rescind or nullify any laws or regulations which create or perpetuate racial discrimination. The Nevada Public Land Bill, which will serve to privatize land claimed by Western Shoshone aboriginal title, has already been introduced in both the Senate and the House of Representatives. The Distribution Bill, which will silence the Western Shoshone defense that they have never accepted payment for the alleged extinguishment of these same lands, was introduced to the United States Senate on July 27, 2000. The effect of these two discriminatory bills would be to immediately and potentially irreversibly sever the Yomba Shoshone and Ely Shoshone tribes and other Western Shoshone people from most of the ancestral lands on which they base their subsistence and way of life. With the loss of the land base, to which Western Shoshone culture is inextricably intertwined, will inevitably come the destruction of the Western Shoshone as a people.

47. 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 procedure 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."⁵⁷ CERD also pointed out the lack of effective participation by indigenous communities in the formulation of the amendments to the Native Title Act. These aspects of the amended Act and related circumstances were found to 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

⁵⁶ The Distribution Bill provision relating to non-waiver of "existing" rights in the Distribution Bill is a worthless protection for the Western Shoshone people. The United States has repeatedly stated that Western Shoshone land rights are extinguished, thus not falling within the definition of "existing" rights.

⁵⁷ CERD Decision (2)54 on Australia, 18 March 1999, CERD/C/54/Misc.40/Rev.2, para. 6. See *also* Additional Information pursuant to Committee Decision: Australia CERD/C/347 (January 22, 1999) (additional information from State Party).

particular urged the government to suspend the amendments to the Native Title Act and to re-open discussions with aboriginal representatives regarding the subject.⁵⁸ In March of 2000 CERD revisited the issue and found that the amended Act had resulted in the drafting of state and territory legislation which contained “provisions reducing the protection of the rights of native title claimants.”⁵⁹ The Committee further expressed its concern at Australia’s “unsatisfactory response” to its previous decision and at the “continuing risk of further impairment of the rights of Australia’s indigenous communities.”⁶⁰ The Committee reaffirmed its earlier decision and stressed the importance of States ensuring the effective participation of indigenous peoples in decisions affecting indigenous land rights.⁶¹

48. The lack of procedural and substantive protections for the Western Shoshone in the present case makes for an equally compelling case of invidious discrimination that requires immediate attention.

B. Discriminatory Treatment of Western Shoshone Culture

49. The right of Western Shoshone people to the integrity of their culture is also central to this case, and is at imminent risk. The enjoyment of one’s culture is necessary to the effective exercise of human rights. CERD General Recommendation XXIII recognizes that non-discrimination in the context of indigenous peoples requires states to “ensure that indigenous communities can exercise their rights to practice...their cultural traditions and customs.”

50. The Inter-American Commission on Human Rights has affirmed that international law protects minority groups, including indigenous peoples, in the enjoyment of all aspects of their diverse cultures and group identities.⁶² 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 communal lands.”⁶³ Consistent with this understanding of the right to culture is article VII of the Commission’s Proposed American Declaration on the Rights of Indigenous Peoples, which links indigenous cultures to the use and enjoyment of lands.⁶⁴

⁵⁸ See CERD Decision (2)54 on Australia, *id.* at paras. 9-11.

⁵⁹ CERD Concluding Observations on Australia, 24 March 2000, CERD/C/56/Misc.42/rev.3, para. 8.

⁶⁰ *Id.* at para. 9.

⁶¹ See *id.*

⁶² 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); 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 103-4.

⁶³ The Miskito Case, *id.* at 81.

⁶⁴ Article VII of the Proposed Declaration on the Rights of Indigenous Peoples, *supra* note 35, 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

51. Article 27 of the International Covenant on Civil and Political Rights, to which the United States is a party, 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.” The United Nations Human Rights Committee has determined culture in that provision to include “a particular way of life associated with the use of land resources, especially in the case of indigenous peoples.”⁶⁵

52. The United Nations Human Rights Committee (the “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*,⁶⁶ 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 activities 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.”⁶⁷

53. The facts set forth regarding the Western Shoshone people establish that indigenous cultural integrity is similarly being denied here. The United States is actively attempting to terminate the relationship of the Western Shoshone with their lands. This relationship is central to Western Shoshone spirituality, culture, family structure, social and political patterns of organization, subsistence livelihood, and personal life rhythm and culture. This assault is discriminatory both because the majority in United States society is not subjected to similar attacks on the foundations of its culture, and because the loss of culture impairs the ability of Western Shoshone people to equally exercise their human rights in any meaningful way.

C. Violation of the Right of Self-Determination

54. As demonstrated above, under the Convention and other aspects of international law, indigenous peoples have rights to the non-discriminatory treatment of their property interests in their traditionally occupied lands. 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.”⁶⁸ At its core,

and political organization, institutions practices, beliefs and values use of dress, and languages.”

⁶⁵ Human Rights Committee, General Comment No. 23 (50) (Art. 27) adopted April 6, 1994, para. 7.

⁶⁶ Communication No. 167/1984, Hum. Rts. Comm., A/45/40.

⁶⁷ *Id.* at para. 33.

⁶⁸ International Covenant on Civil and Political Rights, December 16, 1996. G/A/Res/ 2200(XXI), 999 U.N.T.S. 171 (entered into force March 23, 1976), art.1(1).

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.⁶⁹ 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."⁷⁰

55. CERD recognized the importance of self-determination for insular peoples in its General Recommendation XXI. The Committee emphasized that it is the duty of states to promote the right to self-determination of peoples, and that the implementation of the principle requires every state to promote universal respect for and observance of human rights and fundamental freedoms.⁷¹ Advocating governmental adherence to and implementation of the Convention and the related principle of self-determination, the Committee added, "Concern for the protection of individual rights without discrimination on racial, ethnic, tribal, religious or other grounds must guide the policies of Governments. In accordance with article 2 of [the Convention]...., Governments should be sensitive towards the rights of persons belonging to ethnic groups, particularly their right to lead lives of dignity, to preserve their culture, to share equitably in the fruits of national growth."⁷²

56. In its concluding observations on Canada's compliance report of April, 1999, the United Nations 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."⁷³ 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."⁷⁴

57. 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 Western Shoshone people's enjoyment of their ancestral lands and by doing so are actively depriving the Western Shoshone people of their means of subsistence. The United

⁶⁹ See S. James Anaya, *Indigenous Peoples in International Law* 85-88 (Oxford and New York: Oxford Univ. Press, 1996).

⁷⁰ International Covenant on Civil and Political Rights, *supra* note 68, art.1(2).

⁷¹ See CERD General Recommendation XXI on the Right to Self-Determination, 15 March 1996, contained in A/51/18, at paras. 2-3.

⁷² *Id.* at para. 5.

⁷³ Concluding Observations of the Human Rights Committee: Canada, CCPR/C/79/Add.105, para. 8, (April 7, 1999).

⁷⁴ *Id.*

States claims to have extinguished the aboriginal land rights of the Western Shoshone people. However, as made clear by the United Nations 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.

58. 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 Yomba Shoshone and Ely Shoshone tribes, and with other Western Shoshone people, regarding 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.⁷⁵ In keeping with the goals of article 9 of the Convention, CERD 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.⁷⁶ The right to non-discriminatory treatment in respect to property under article 5 of the Convention 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 Western Shoshone people are unable to exercise their right to self-determination as guaranteed by international law.

59. 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.⁷⁷ 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 them directly."⁷⁸ Consequently, the ILO 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."⁷⁹

⁷⁵ 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.

⁷⁶ See CERD General Recommendation XXIII, on indigenous peoples, adopted August 18, 1997, CERD/C51/Misc.13/Rev.4 (1997).

⁷⁷ "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." ILO Convention No. 169, *supra* note 34, art. 15.2.

⁷⁸ *Id.*, art. 7.

⁷⁹ ILO Convention No. 169, *supra* note 34, 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

60. States are thus obligated by international law to protect the land and resource rights of indigenous peoples as an aspect of indigenous peoples' right to self-determination. Further, states are obligated by international law to fully inform and meaningfully consult indigenous people when making decisions disposing of or affecting their traditional lands. As this request for action under CERD's early warning procedure and the attached documents show, the Yomba Shoshone, Ely Shoshone and other Western Shoshone groups are currently being deprived of their livelihoods due to efforts by United States officials to remove their livestock from their traditional lands and to otherwise sever Western Shoshone links with those lands. The United States has deemed Western Shoshone aboriginal rights extinguished via a process to which entire groups of Western Shoshone never consented and which is unprecedented even under U.S. law. Furthermore, this request shows that Yomba Shoshone, Ely Shoshone, and other Western Shoshone groups have been excluded from participating in decisions that affect their lands and natural resources, including decisions about proposed legislation that would fundamentally impair Western Shoshone rights. Therefore, the inescapable conclusion is that the United States has violated, in regard to the Yomba Shoshone, Ely Shoshone, and other Western Shoshone people, rights to consultation, the enjoyment of their social and economic development, their very subsistence, and, hence, their rights to equality and self-determination.

V. The Discrimination Being Undertaken by the United States is Intentional and Knowing

61. The United States has been put on notice that its actions to impede or deny Western Shoshone peoples' use of and access to their ancestral lands is a *prima facie* human rights violation. As discussed in the request for urgent action originally submitted to the Committee, proceedings relating to Western Shoshone rights are under current consideration by the Inter-American Commission on Human Rights. As the original request details, in 1993, Mary and Carrie Dann, Western Shoshone sisters, petitioned the Inter-American Commission, alleging violations of their rights to equality under the law, property, due process and cultural integrity.

62. The Commission determined less than a year ago that the Dannels' petition was admissible and established *prima facie* human rights violations.⁸⁰ Previously, on June 28, 1999, the Commission had issued precautionary measures against the United States, requesting the United States government stay the enforcement of the trespass and impoundment notices against the Dann sisters pending a full investigation by the Commission.⁸¹ On October 25, 1999, the Dannels, through their counsel, sent a letter requesting that the government enter discussions to resolve the Western Shoshone land and resource issues.⁸² To date, the United States has not responded to

U'wa) (Colombia); *Delgamuukw v. British Columbia* (1997), 3 S.C.R. 1010 para. 168 (S.C.C.) (Can.), per Lamer C.JC.

⁸⁰ See 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.

⁸¹ See letter from Jorge E. Taiana, Executive Secretary, Organization of American States to Messrs. Anaya and Tullberg (June 28, 1999) (Attached as Appendix 40).

⁸² See letter from S. James Anaya, Attorney for the Petitioners to Dr. Jorge Taiana, Executive Secretary, Inter-American Commission on Human Rights (Oct. 25, 1999) (Attached as Appendix 41).

the precautionary measures request, nor has it responded to the request to enter into settlement discussions. Instead, officials of the United States government are now pursuing the above-described actions to prevent the Western Shoshone from enjoying ancestral lands and to hold Western Shoshone rights extinguished.

VI. Conclusion and Petition

63. As a consequence of actions for which the United States is responsible, the members of the Yomba Shoshone and Ely Shoshone tribes, and other Western Shoshone people, are suffering and in danger of suffering immediate and irreparable harm. The most immediate threats consist of the two pieces of legislation being considered by the United States government, the notices of trespass and impoundment actions regarding Western Shoshone cattle grazing, together with the refusal to recognize the right to graze and hunt on Western Shoshone land unmolested by undue state interference. In the past, similar notices have led to the impoundment and destruction of Western Shoshone livestock, and the imprisonment of at least one Western Shoshone individual.

64. The Inter-American Commission on Human Rights has found that the threat of irreparable harm faced by the Dann Western Shoshone sisters in particular merits precautionary measures at this time, and specifically, has requested that the United States suspend enforcement of the trespass and impoundment notices against the Danns. Regrettably, the United States has not responded to the request by the Inter-American Commission, and historically the United States has demonstrated a reluctance to comply with the recommendations of that body when to do so is not convenient for the United States. Moreover, the precautionary measures requested by the Inter-American Commission extend only to the Dann sisters.

65. Western Shoshone resistance to the dispossession of their lands by the United States has been through peaceful political means and legal action. The Western Shoshone people are bound by and honor the Treaty of Ruby Valley, which affirmed peace and friendship between them and the people of the United States. The Yomba Shoshone and Ely Shoshone tribes request the intervention of this Committee to aid in preventing the escalation of this problem into greater conflict.

66. The United States has never presented a report to the Committee for the Elimination of Racial Discrimination. Its initial report is almost five years overdue. The Western Shoshone have no recourse to an individual complaint under article 14 of the Convention, as the United States has not made the necessary declaration. Nonetheless, a review of the United States' performance regarding the Western Shoshone is required immediately.

67. This amended request for urgent action is therefore brought pursuant to the early warning procedure of CERD in the hope that the Committee may impress upon the United States the urgency of the situation and the serious, wrongful nature of its behavior toward the Western Shoshone people. The objective is that the United States will be convinced to correct its current course of action and to work with the Western Shoshone people toward the effective realization and respect for their rights.

68. The Yomba Shoshone tribe and the Ely Shoshone tribe therefore reiterate and add to their request that the Committee review the United States under the early warning procedure, and urgently:

- a. call upon the United States to immediately rescind all notices of trespass and impoundment of livestock against members, tribes, or associations of the Western Shoshone people, and to refrain from any further issuance of such notices or action until a negotiated settlement ensuring Western Shoshone land rights has been achieved;
- b. call upon the United States to refrain from prosecuting Western Shoshone people for hunting and gathering when they do so according to Western Shoshone tradition;
- c. call upon the United States to ensure that mining and other development activities in Western Shoshone traditional land does not further threaten Western Shoshone health, culture and livelihood;
- d. call upon the United States to suspend further action on the 1999 Nevada Public Land Management Bill and the Western Shoshone Distribution Fund Bill; and
- e. call upon the United States to open discussions with the leaders of the Western Shoshone people with a view to finding solutions acceptable to them and which would comply with the United States' obligations under the Convention on the Elimination of All Forms of Racial Discrimination.

Dated: July 1, 2000

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