THE STATUS OF COMPLIANCE BY THE UNITED STATES GOVERNMENT WITH THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION

Compiled by*
Western Shoshone Defense Project
Julie Ann Fishel
PO Box 211171
Crescent Valley, NV 89821
(775) 468-0230
&
University of Arizona, Indigenous Peoples Law and Policy Program
Seánna Howard
Rogers College of Law
P.O. Box 210176
1201 E. Speedway Blvd.
Tucson, Arizona, 85721
(520) 626-8223

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I. INTRODUCTION

This report is being submitted in response to the U.S. State Department's request for information from civil society groups on the Periodic Report ("Report") being prepared regarding the status of U.S. compliance with the International Convention on the Elimination of All Forms of Racial Discrimination ("ICERD" or "Convention"). In accordance with the Convention, the Report will be submitted to the Committee on the Elimination of Racial Discrimination ("Committee" or "CERD"), and will address those issues raised by CERD during review of the U.S.' first Periodic Report and CERD's Concluding Observations and Recommendations issued in 2001. An issue that must be included in the U.S. Report is the issue of U.S. non-compliance with the Convention in regard to the situation of Indigenous Peoples, in particular the Western Shoshone Peoples of the Western Shoshone Nation. In fact, the United States has received specific recommendations and concerns previously from the Committee based on its lack of compliance in this regard:

1. Specific questions raised by CERD members during CERD's 59th session in 2001 when the U.S. appeared before the Committee;
2. Paragraph 400 of CERD's Concluding Observations and Recommendations to the United States in 2001;[1]
3. Detailed questions in a formal communication from CERD to the U.S. in August 2005[2];
4. A full decision[3] under CERD's Urgent Action/Early Warning Procedure in March of 2006 directing the U.S. to initiate an immediate dialogue with the Western Shoshone peoples and to immediately cease, desist and freeze from any further actions which threaten harm to Western Shoshone peoples and their lands and resources; and,
5. A letter from CERD to the U.S. following up on the March 2006 decision and requesting information on implementation.[4]

The United States has failed to respond to these concerns. It has instead continued to allow destructive activities on Western Shoshone lands, including expansion of open pit cyanide heap leach mining, plans to store nuclear waste at Yucca Mountain and military testing, in particular a recent plan to detonate 700 tones of ammonium nitrate and fuel oil mixture in a test named "Divine Strake".

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[1] *See* CERD, "Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America", 14/08/2001, A/56/18 paras. 380-407 (Aug. 14, 2001).

[2] Ltr from Mario Yutzis, Chairman of the Committee for the Elimination of Racial Discrimination to Kevin E. Moley, Permanent Representative of the United States of America to the United Nations (Aug. 19, 2005).

[3] Committee for the Elimination of Racial Discrimination, Early Warning and Urgent Action Procedure, Decision 68(1), United Sates of America, 68th Session, Geneva, 20 February – 10 March 2006.

[4] Ltr from Régis de Gouttes, Chairman of the Committee on the Elimination of Racial Discrimination to Kevin E. Moley, Permanent Representative of the United States of American to the United Nations (Aug. 16, 2006).

The U.S. State Department should be very familiar with Indigenous rights in the United States. This issue has been reported on repeatedly in the past, not only to CERD, but also in a report[5] submitted to the United Nations Human Rights Committee in January 2006, as well as a ten year legal proceeding before the Inter-American Commission on Human Rights ("IACHR" or "Commission"), of the Organization of American States. In the IACHR proceedings, the United States was found to be in violation of rights to property, due process and equality before the law.[6] The U.S. was given two specific recommendations in the IACHR Final Report; first to remedy the situation of the Western Shoshone petitioners, and secondly, to review all U.S. laws and policies to ensure compliance with recognized standards of human rights for Indigenous Peoples, in particular the right to property.[7] To date, the U.S. has failed to comply with either recommendation.

In addition to the specific recommendations and concerns raised by CERD and the IACHR, we also direct your attention to the Committee's General Recommendation XXIII Concerning Indigenous Peoples ("General Recommendation XXIII"). General Recommendation XXIII urges state parties with Indigenous Peoples in their territories to: "include in their periodic reports full information on the situation of such peoples, taking into account all relevant provisions of the Convention."[8] The State Department has failed in previous reports to include necessary information. For example, in its most recent report (HRI/CORE/USA/2005, 16 January 2006) to the Human Rights Committee, the United States did not include full information on the situation of the indigenous peoples in its territories. For example:

- Only the statistics involving 'population by race' included all races
- Language data regarding "spoke a language other than English at home" included Spanish, Asian or Pacific Island languages, French and German, but did not include indigenous languages.
- 'Life expectancy' data was limited to Whites and African Americans.
- 'Fertility rates' were limited to White women and Black women.
- 'Infant mortality, maternal mortality and life expectancy' data was confined to Black and White populations.
- 'Children living with one parent' included White, African American, Asian, and Hispanic children, but not indigenous children.
- Department of Labor statistics demonstrated men/women, Whites, African-American, and Hispanic statistics regarding employment, unemployment, and part-time employment, but did not address indigenous employment.
- 'Poverty level' statistics were only provided for White, Black, and Hispanic families.

[5] Indian Law Resource Centre, Western Shoshone Defense Project & University of Arizona Indigenous Peoples Law and Policy Program, "The Status of Compliance by the United States Government with the International Covenant on Civil and Political Rights" (Jan. 2006).
[6] *See* Report No. 75/02, Case 11.140. *Mary and Carrie Dann v. United States*, (Dec. 27, 2002).
[7] *See id.*
[8] U.N. Doc. A/52/18, annex V at 122 (1997) at para. 6.

- ‘Level of education’ statistics were only provided for Whites, Blacks, and Hispanics.
- ‘Functional literacy’ statistics were only provided by age groups, not by racial or ethnic groups.
- ‘Freedom to worship and to follow a chosen religion’ data only included Protestants, Roman Catholics, Jews, and Buddhist, Hindu, and Muslim/Islam groups. There was no mention of indigenous cultural practices.

Hence the issue of the lack of full information on the situation of Indigenous Peoples in the United States, and the lack of compliance and implementation of the Convention with regard to its treatment of Indigenous Peoples, and in particular in its dealings with the Western Shoshone must be included in any report submitted by the United States. Any inclusion of these issues, however, does not negate the U.S.’ responsibility to also respond fully and separately to the Decision issued last March by CERD given that the Urgent Action/Early Warning Procedure is a separate and distinct procedure within the Committee.

II. EXECUTIVE SUMMARY

As outlined in this report, the era of racial and colonial subjugation has not ended for the Indigenous Peoples living within the borders of the United States. Most Indigenous Peoples still live under the threat of having their lands taken, leased, or despoiled without their free, prior, and informed consent; of having their means of livelihood, including their own means of subsistence, subverted; of forcible relocation; of toxic contamination of their resources, including their waters; and of deprivation of their languages and cultural and spiritual traditions. The international community is becoming increasingly aware of these problems and ongoing abuses, and significant advances are being made in the development of international human rights law regarding Indigenous Peoples.

Unfortunately, the United States government is falling far behind in compliance, let alone implementation. It continues to ignore both the specific recommendations of UN monitoring bodies and its international human rights obligations regarding the development and implementation of domestic laws and policies relating to Indigenous Peoples within its borders.

This report will provide an overview of the discriminatory laws and policies of the United States concerning Indigenous Peoples. As will be discussed later in this report, in the United States today, Indigenous Peoples can be unilaterally deprived of their lands and resources without due process of law and without compensation; indigenous governments can be terminated or stripped of their rightful authority at the whim of the federal government; Indian treaties may be arbitrarily abrogated; and the religious freedoms, sacred sites, and the cultural integrity of Indigenous Peoples go virtually unprotected.

This report will also highlight the Western Shoshone peoples’ attempt to end the discrimination faced by them through the use of the Committee’s Urgent Action/Early

Warning Procedure and the United States' failure to comply with the important and historic decision. The continuing violations of the human rights of the Western Shoshone highlight the United States government's unwillingness to recognize and fulfill its obligations under the Convention, the recommendations of the Committee and other relevant international human rights laws.

Finally, this report will request that the United States include information in its report to the Committee on its failure to comply with international laws pertaining to Indigenous Peoples, and to explain its treatment of Indigenous Peoples in light of its obligations to protect and secure the land, resource, cultural and spiritual rights and other rights of such peoples.

III. OVERVIEW OF UNITED STATES DOMESTIC LAW AND POLICY CONCERNING INDIGENOUS PEOPLES

The Convention provides a number of protections for Indigenous Peoples, in particular: article 1, freedom from discrimination based on race, color, descent or national or ethnic origin; article 2 which requires states to refrain from practicing racial discrimination; and article 5 which guarantees equality before the law. Article 5(c) of the Convention, through its guarantee of political rights, has been interpreted by CERD to require the state to consult Indigenous communities and allow for effective participation in decisions that affect them[9]. Finally, article 5(v) guarantees the right to own property alone and in association with others. In addition to the Convention, the situation faced by Indigenous Peoples in the United States also constitutes violations of other provisions of international human rights law which are binding upon the United States.

Indigenous Peoples within the United States continue to be subjected to widespread discrimination and denial of fundamental human rights by the United States. Most suffer grave economic, social and political deprivation. Laws in the United States continue to deny basic rights to Indian communities that others in the country freely enjoy, especially rights to their lands and rights to be free from discriminatory and arbitrary government action. These ongoing threats to Indigenous Peoples can be traced directly back to the fundamental principles upon which U.S. Indian law and policy are based.

The current body of federal Indian law and policy has its foundations in a racist, antiquated principle – the doctrine of discovery. This legal fiction was cemented in U.S. law by the US Supreme Court in the case of *Johnson v. McIntosh*[10]. In *Johnson v. McIntosh*, Justice Marshall declared that the "discovery" of the Americas by Christian European nations divested Indigenous Peoples of their rights, the justification being that lands occupied by "heathens" were considered to be vacant. Through continuing applications of this doctrine in case law, federal policies and legislation; the judiciary, Congress, federal agencies and non-state actors perpetuate this false and discriminatory idea of European superiority over Indigenous Peoples.

[9] CERD Concluding Observations *supra*, note 1 at para. 400.
[10] 21 U.S. (8 Wheat) 543 (1823).

Arising out of this concept came the doctrine of congressional plenary power which claims to give Congress virtually unlimited ability to legislate with regard to Indians Peoples, including the power to eliminate existing rights. The plenary power doctrine has resulted in a multitude of discriminatory laws and policies relating to Indigenous Peoples in the United States, as outlined below, which violate articles 1, 2 and 5 of the Convention, as well as other human rights instruments. It is important to note that the issues and policies identified herein are not exhaustive. The following overview is merely meant to provide the U.S. Report preparers with a broad understanding of the United States' ongoing discriminatory policies towards Native Americans.

A. Treaty Abrogation

Article VI of the United States Constitution declares that the Constitution, and the laws and treaties of the United States made in accordance with it, are the "supreme law of the land." However, the United States claims to be able to abrogate treaties made with Indian Nations at any time. See, for example, *Lone Wolf v. Hitchcock,*[11] *South Dakota v. Bourland*[12], *Rosebud Sioux Tribe v. Kneip*[13]. This has resulted in numerous Indian Nations being denied their ability to access, use and protect their lands, resources, hunting and fishing rights and other interests.

This self-proclaimed right – to unilaterally abrogate treaties lawfully entered into with Indian Nations – is a clear violation of the Convention's equal protection clause found in article 5. The Committee, in its 2001 Concluding Observations, noted its concern "that treaties signed by the Government and Indian Tribes, described as "domestic dependent nations" under national law, can be abrogated unilaterally by Congress and that the land they possess or use can be taken without compensation by a decision of the Government."[14]

As stated in the *Congressional Record* by former U.S. Senator Daniel Inouye when Chair of the Indian Affairs Committee:[15]

> … 800 treaties … [were] entered into by sovereign Indian nations and the sovereign Government of the United States. But, shamefully, 430 of these treaties were not even considered by this body. And every one of the 370 that we did consider and ratify, we violated provisions in every one of them.

B. Termination of Tribes

The United States employs a lengthy and demanding federal approval process to determine which Indian Nations or peoples it will "recognize" on a government-to-government basis. Without this 'federal recognition' Indigenous Peoples, including those peoples already recognized by state governments, are denied their legal and indigenous identities as well as government-to-government relations with the federal government.

[11] 187 U.S. 553 (1903).
[12] 508 U.S. 679 (1993).
[13] 430 U.S. 584 (1977).
[14] CERD Concluding Observations, *supra* note 1 at para. 400.
[15] *Senate*, vol. 139, no. 147, S14880, 103rd Congress, First Session, October 27, 1993.

Even where the U.S. has "recognized" Indian Tribes, Congress maintains it has the power to terminate the federal recognition and legal status of entire Indian Tribes. This is yet another example of the plenary power doctrine. By proclaiming that it has the authority to terminate the legal status of "federally recognized" Indian Tribes, and failing to recognize the legal status of other Indigenous governing structures, the United States is violating the Convention by failing to ensure Indigenous Peoples have equal rights in respect of effective participation in public life and by failing to take effective measures to amend, rescind or nullify any policies which have the effect of creating or perpetuating racial discrimination, under articles 5(c) and 2(c) respectively.

C. Loss of Lands and Resources

At the end of the 19th century, the United States government adopted a policy of "allotment" of Indian lands, carving up the lands of Indian reservations and distributing small parcels, or allotments, to individual Indians as well as to non-Indian homesteaders. Most Indian lands passed out of Indian ownership through this policy, enacted into law in the Allotment Act of 1887:

> Of the approximately 156 million acres of Indian lands in 1881, less than 105 million remained by 1890, and 78 million by 1900. Indian land holdings were reduced from 138 million in 1887 to 48 million in 1934, a loss of 90 million acres. Of this, about 27 million acres, or two thirds of the land allotted, passed from Indian allottees by sale between 1887 and 1934. An additional 60 million acres were either ceded outright or sold to non-Indian homesteaders and corporations as "surplus" lands.[16]

In addition, many Nations, such as the Great Sioux Nation, are said to have lost collective lands due to unauthorized settlement near the turn of the century. This policy violates article 5(d)(v) of the Convention, the right to own property alone as well in association with others, and article 5 which guarantees the right to equal before the law.

D. Taking of Indian Property

In their 2001 Concluding Observations, the Committee also expressed concern that the US government claims to be able to take land from Indigenous Peoples without compensation. The self-proclaimed power of Congress to take Indian property, including land, money, and other property, without legal restriction and without compensation is perhaps the most extraordinary example of the plenary power of Congress. Rather than recognizing the preexisting right of Indigenous communities to their traditional lands and resources, the Supreme Court in 1955 declared that the United States may freely confiscate the land and resources of Indian Tribes that are held by aboriginal right, that is, by reason of long historical possession and use, and this can be done without any compensation.[17]

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[16] US Senate Committee on Indian Affairs "Amending the Indian Land Consolidation Act to Improve Provisions Relating to Probate of Trust and Restricted Land, and for Other Purposes,", Senate Report 108-264, (2004) at p.3.

[17] See, *Tee-Hit-Ton v. United States,* 348 U.S. 272 (1955).

The Court established the rule in *Tee-Hit-Ton* notwithstanding the strong protection for property rights set forth in the Fifth Amendment of the U.S. Constitution, which provides that property may not be taken without due process of law or just compensation. More importantly, the Court decided *Tee-Hit-Ton* despite the United States' obligations to meet international standards with respect to the property rights of Indigenous Peoples. Rather, the United States has refused to meet its international obligations, let alone provide *de minimus* property rights protections as guaranteed to all people by the Fifth Amendment. It has failed to protect the integrity of Indigenous lands, resulting in the original occupants of this country having the least protection for their rights to their land. No other community in the United States faces such insecurity or discriminatory treatment with respect to their property rights.

E. Trusteeship

One of the longstanding principles of federal Indian law is the United States' claim that there exists "a general trust relationship between the United States and the Indian people."[18] As a result of this claimed trust relationship, most Indian property of Indian Tribes, and some property of Indian individuals, is said to be held in legal "trust" status for them by the United States.[19] The U.S. claims to be responsible for administering the trust as the official trustee. Such a "trust relationship" could benefit Indian Peoples in some situations. However, there are too many obstacles in the law frustrating the ability of Indian beneficiaries, Tribal and individual, to hold the United States accountable through either administrative procedures or litigation. In fact, in some cases, such as the case of the Western Shoshone, the U.S. has actually used this "trust" relationship directly against the Indian people it is supposed to be "protecting."

In 1996, a group of thousands of individual Indians, with rights to mining, grazing and other royalties from land held in trust by the United States, filed a class action lawsuit against the United States. The suit, entitled *Cobell v. Norton*, still in litigation to this day, claims the United States has mismanaged royalty funds, by not only failing to pay these funds to the rightful Indian owners, but also of failing to even keep track of what money is owed to whom. In a recent memorandum decision, presiding Federal District Court Judge Royce Lamberth wrote:

> [W]hen one strips away the convoluted statutes, the technical legal complexities, the elaborate collateral proceedings, and the layers upon layers of interrelated orders and opinions from this Court and the Court of Appeals, what remains is the raw, shocking, humiliating truth at the bottom: After all these years, our government still treats Native American Indians as if they were somehow less than deserving of the respect that should be afforded

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[18] *U.S. v. Mitchell*, 463 U.S. 206, 225 (1983). See also, *Cobell v. Norton*, 240 F.3d 1081, 1098 (D.C.Cir.2001) ("the government has longstanding and substantial trust obligations to Indians.")

[19] See, *Cherokee Nation v. Georgia*, 30 U.S. 1, 16-17 (1832) (describing the federal-tribal relationship as similar to that of a guardian and ward).

> to everyone in a society where all people are supposed to be equal.[20]

The United States claims that the legal trust status of Indian property is permanent and involuntary. As no other people are subject to such trusteeship and control, it undermines Indigenous Peoples' right to be free from racial discrimination and right to equal protection under the law, as guaranteed by articles 1, 2 and 5 of the Convention.

F. Indian Self-Determination and Structure of Tribal Governments

The United States publicly takes the position that it encourages Indian self-determination. Indian self-determination, as defined by the federal government, is intended to support and strengthen the inherent sovereignty of Indian Nations by 'allowing' self-rule on internal affairs. This policy dates from 1970, but follows many decades of official efforts by the United States to destroy, co-opt, and fundamentally remake tribal governments.

For example, in 1934 the United States Congress passed the Indian Reorganization Act ("IRA"). The Act encouraged Indian Tribes and Nations to restructure their governments in the image of the tri-partite federal governmental system. This system is fundamentally incompatible with most Indigenous forms of governance, and the change has caused internal tension and strife that still persists today. As Professor Stephen Cornell of the Harvard Project on American Indian Economic Development writes:

> The legitimacy of governing institutions depends on a match with the values and culture of the people they govern. That doesn't necessarily mean reviving all traditional governments. We live in a very different world today, and government has to be redesigned to work within that world. But the government has to have the support of the people if it is going to work.[21]

In fact, many members of extended Indigenous communities that pre-existed the IRA, such as the Western Shoshone Nation and the Great Sioux Nation, question the authority of IRA sanctioned Tribal governments and rely instead on the treaties signed prior to the IRA and their very pre-existence for recognition of their status as Nations. By failing to recognize traditional Indigenous governments and attempting to force a tri-partite "U.S. style" government on Indian Peoples, the United States is violating Indigenous Peoples' right to control their land and practice their culture as per the Committee's General Recommendations.[22]

G. Intrusions on Sovereignty

Although the United States purports to promote Indian self-determination, the U.S. Supreme Court does not support this policy. Under the current legal regime, federally

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[20] Memorandum Opinion of July 12, 2005, Civil Action No. 96-1285 (RCL) available at: http://www.indianz.com/News/2005/009560.asp.

[21] Stephen Cornel, "Sovereignty, Prosperity and Policy in Indian Country Today," l, 5 Community Reinvestment 5, 9-13 (Fed. Res. Bank of Kansas City 1997).

[22] General Recommendation XXIII, *supra* note 8.

recognized Tribes exercise civil regulatory jurisdiction over reservation lands owned by Indian individuals and Tribes, but have only limited criminal jurisdiction over Tribal members and members of other Tribes within their reservation boundaries. Many Tribes have their own courts, and issue laws governing areas such as zoning, environmental and water quality regulation, taxation, and family matters such as adoption and marriage. Disputes about many of these matters are heard in Tribal courts. Increasingly, however, these rules and the authority of Tribal courts to interpret them are being threatened.

United States courts downgrade Tribal authority when tribes are asserting jurisdiction over non-Indians who may commit transgressions on their territories. . Furthermore, in the last twenty five years, Supreme Court decisions have weakened the Tribal civil regulatory powers over reservation lands in the areas of zoning, taxation, and civil Tribal court jurisdiction. [23] All these decisions undermine the ability of Tribes to exercise self-determination, to make their own laws and be ruled by them.

Allowing non-Indians to assert jurisdiction over Indians, but disallowing Indians from exercising jurisdiction over non-Indians, is inherently discriminatory. In "Sovereignty and Property," Professor Joseph Singer writes:

> The Supreme Court has assumed in recent years that although non-Indians have the right to be free from political control by Indian nations, American Indians can and should be subject to the political sovereignty of non-Indians.
>
> This disparate treatment of both property and political rights is not the result of neutral rules being applied in a manner that has a disparate impact. Rather, it is the result of *formally inequal* rules.... both property rights and political power in the United States are associated with a system of racial caste.[24]

Such a jurisdictional scheme undermines Indigenous Peoples' right to be free from discrimination and therefore violates the Convention.

H. Religious Freedom and Integrity of Spiritual Areas

Another area of vital importance to Indian Peoples is the protection and preservation of religious practices and spiritual sites. The administrative processes and the courts of the United States provide little practical protection to spiritual sites and, therefore, to the protection of traditional religious practices. For example, in *Lyng vs. Northwest Cemetery*

[23] See, for example, *Brendale v. Confederated Tribes & Bands of Yakima*, 492 U.S. 408 (1989) (within reservation boundaries, where land is owned by non-Indians and Indians, tribe may only exercise zoning authority over Indian-owned land, although this is the most basic of governmental rights that cities and counties exercise over private lands); *Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645 (2001) (tribe cannot impose occupancy tax on guests staying at a hotel on a parcel of non-Indian owned land located within the reservation boundaries); *Strate v. A-1 Contractors*, 520 U.S. 438 (1997) (tribal court lacked jurisdiction over a civil suit between non-Indians based on an incident that occurred on a state highway going through the reservation.).

[24] 86 N.W. U. L. Rev. 1, pp. 4-5 (emphasis in original).

Association[25] the Supreme Court held that a federal agency could permit road-building and timber-harvesting throughout a pristine wilderness area that was also a traditional religious area for three distinct tribes.

There currently exists a long list of severely threatened spiritual areas, including but not limited to Mt. Tenabo, Bear Butte, San Francisco Peaks, and Medicine Lake. Federal laws and omissions are proving time and time again to benefit economic, non-indigenous interests over the rights of Indigenous Peoples in each area. By providing little practical protection to spiritual sites and traditional religions practices, the United States is discriminating against Indigenous Peoples.

I. United States Obligations to Conform Domestic Law with International Law

The federal court system of the United States has affirmed that the federal government is under an obligation to conform its laws as much as possible to international law. The earliest case is *Murray v The Schooner Charming Betsy*,[26] in which the Supreme Court ruled that Acts of Congress must be interpreted as closely as possible to give them a meaning that conforms with U.S. international legal obligations. Despite this requirement, the United States continues to ignore its international legal obligations, including the International Convention on the Elimination of Racial Discrimination as outlined herein, when developing and implementing domestic policy relating to Indigenous Peoples.

IV. DISCRIMINATION FACED BY THE WESTERN SHOSHONE

We are presenting this information for use in preparation of the U.S. report to CERD, however, this does not absolve the United States of its obligation to respond to the Urgent Action/Early Warning Decision issued in the case of the Western Shoshone. Urgent procedures and early warning measures have become regular CERD agenda items which are separate and distinct from the Committee's consideration of state reports and complaints under article 14 of the Convention. The Committee may take early warning measures directed at preventing existing problems from escalating into conflicts or it may decide to initiate urgent action procedures to respond to problems requiring immediate attention to prevent or limit the scale or number of serious violations of the Convention.

The Committee released its full decision 68(1) under the Urgent Action/Early Warning Procedure in March 2006. This precedent setting decision with respect to the rights of Indigenous Peoples in the United States urged the U.S. to "freeze", "desist from" and "stop" any further actions on Western Shoshone Territory until the land dispute is resolved in good faith. The decision affirmed the findings of the IACHR by expressing concern over the United States' claim that Western Shoshone peoples' legal rights to ancestral lands had been extinguished through "gradual encroachment" and processes before the Indian Claims Commission. Despite the findings of the IACHR and CERD, the United States continues to engage in activities that threaten irreparable harm to the Western Shoshone peoples, their

[25] 485 U.S. 439 (1988).
[26] 6 U.S. 64 (1804).

ancestral homelands and spiritually significant sites. These activities include cyanide heap-leach gold mining and military weapons testing, with concomitant hazards to health and well-being; privatizing of land; continued issuances of geothermal and gas leases; and proceeding with plans to store nuclear waste and to appropriate ground water within Western Shoshone lands.

The Committee gave the United States until July 15, 2006 to respond to the Decision and report on what compliance measures it had taken. To date, neither CERD nor the Western Shoshone people have received a response from the U.S. We ask that the United States communicate to the Committee what actions have been taken to comply with Decision 68(1) and/or their reasons for the lack of compliance.

A. Background and History

The Western Shoshone are an Indigenous People engaged in a long term battle to protect against ongoing human rights violations resulting from a series of actions and omissions by the United States. Their story exemplifies the enduring problems with domestic legal doctrines in the United States pertaining to Indigenous Peoples, especially in relation to rights over traditional lands. The violations suffered by the Western Shoshone have persisted and in fact intensified, contrary to the recommendations by the IACHR[27] and CERD[28]. These findings confirm that the behavior of the United States in regard to the Western Shoshone is inconsistent with its obligations under the Convention and other relevant international human rights law.

In the 1863 treaty of peace and friendship (*Treaty of Ruby Valley*) between the Western Shoshone Nation and the United States, the Western Shoshone agreed to allow the United States access across their lands as well as permission to perform certain activities there.[29] In exchange, the United States recognized the boundaries to Western Shoshone land and agreed to compensate the Western Shoshone for use of their lands.[30] Since that time, there have been no amendments or formal abrogation of the treaty. Despite the existence of this treaty, the United States treats Western Shoshone ancestral land as federal government or "public" land, and denies the Western Shoshone their agreed upon rights to that land.

The United States justifies its actions on quasi-judicial federal proceedings before the Indian Claims Commission (ICC). The ICC, a commission established by the U.S. Congress to finalize Indian land claims and later replaced by the Court of Claims, adopted a stipulation that Western Shoshone land title had been extinguished through "gradual encroachment" of whites, settlers and others. During the proceedings, the Western Shoshone were not allowed to fire the attorneys who claimed to represent them, nor were they allowed to intervene with their own attorneys. [31] The ICC set aside a

[27] Dann case, *supra* note 6.
[28] *See* CERD Concluding Observations, *supra* note 1.
[29] *See Treaty of Ruby Valley* 1863 (Treaty between the United States of America and Western Bands of Shoshone Indians, ratified by the U.S. in 1866, and proclaimed on October 21, 1869).
[30] *Id.*
[31] *See* e.g. Caroline L. Orlando, Aboriginal Title Claims in the Indian Claims Commission: United States v. Dann and its Due Process Implications, 13 Envir. Aff. 215, 241 (1986). See also Steven Newcomb,

payment of approximately 15 cents an acre. The Western Shoshone refused to accept this money because they refused to accept an invalid determination that their title had somehow been extinguished without documentation or fair legal process.[32] The U.S. Department of Interior accepted the payment "on behalf" of the Western Shoshone as their "trustee". The U.S. Supreme Court then determined that the Western Shoshone could no longer assert title to their lands because of the ICC proceedings.[33] The Court ruled that "payment" had been made. "Payment" being the acceptance of the monies by the Department of the Interior as "trustee", despite Western Shoshone protest.

Since the time the monetary award was ordered, United States officials have impeded Western Shoshone access to and use of their lands to the detriment of the Western Shoshone people and their survival. Several Western Shoshone individuals and communities have been prosecuted for trespass on their own land. At the same time, the United States has permitted non-Indigenous individuals and mining companies to use and occupy Western Shoshone lands.

United States' law enforcement officials have conducted military-style raids against Western Shoshone ranchers, seizing livestock that is crucial to basic subsistence. The United States has also failed to protect Western Shoshone people from environmental damage by nuclear waste storage, open pit cyanide heap leach gold mining, and other industrial and military activities on their land. All the while, members of the U.S. Congress are promoting legislation that would further open Western Shoshone lands to non-Indigenous individuals and corporations. With these ongoing harms and the failure of the United States to adhere to the recommendations of international human rights bodies, the Western Shoshone face imminent threats to their traditional land and resources, and the survival of their culture.

B. The United States' Actions and Inaction Violate the Western Shoshone's Right to be Free From Discrimination under Articles 1, 2 and 5 of the International Convention on the Elimination of all Forms of Racial Discrimination.

The United States is in violation of its obligations under ICERD to ensure that the Western Shoshone peoples are free from racial discrimination and that they receive equal protection of the law. The discriminatory process by which the United States made its determination that Western Shoshone lands were extinguished demonstrates a violation of equal protection guaranteed under article 5. In addition, the following acts and omissions of the United States demonstrate the failure of the United States to adhere to its obligations under the Convention, including articles 1, 2, and 5; and its disregard of other international laws protecting Indigenous Peoples.

"Western Shoshone Crisis: Is the U.S. a Nation of Arbitrary Laws?" Indian Country Today, March 10, 2003.

[32] The Inter American Commission on Human Rights agreed with the Western Shoshone and found that the ICC process was an illegitimate means by which the U.S. was claiming extinguishment and flawed on several recognized human rights grounds. *See* Dann Case, *supra* note 6, at paras. 140-143.

[33] *U.S. v. Dann*, 706 F.2d 919 (9th Cir. 1983) and 470 U.S. 39 (1985).

Seizure of Livestock and Trespass Actions

United States officials are interfering with the Western Shoshone enjoyment of their ancestral lands and are actively depriving them of their means of subsistence by removing or attempting to remove their livestock from their traditional lands. These actions have continued despite CERD's Decision and recommendations and specific requests by the Inter-American Commission to halt these actions and return to the Western Shoshone their livestock.[34] In May of 2002, the United States federal Bureau of Land Management (BLM) confiscated and sold one hundred and sixty Western Shoshone cattle, costing the Western Shoshone over $100,000 in losses.[35] On September 22, 2002, just one year after CERD issued its concluding observations, the BLM raided the ranch of the Danns, a Western Shoshone family, confiscating two hundred and thirty two head of cattle and auctioning them within days.[36] Since that time, Western Shoshone individuals and groups have continued to receive orders to remove their livestock from Western Shoshone traditional lands that the government now considers "public lands"[37] and have been subjected to persistent surveillance by armed federal rangers. Furthermore, a number of Western Shoshone have received collection requests from the U.S. Internal Revenue Service and private collection agencies to recover accumulated fines levied as a result of their livestock grazing on their traditional lands.[38]

Legislative attempts to unilaterally extinguish rights to traditional lands

In direct opposition to the recommendations of the IACHR and CERD, the United States continued to move forward with legislative attempts to distribute Western Shoshone land to resource development corporations and other non-Indigenous actors. In one proposed bill, H.R. 2869, the Northern Nevada Rural Economic Development and Land Consolidation Act of 2003,[39] traditional Western Shoshone lands would have been privatized by the federal government and handed over to major mining interests, in particular, multinational gold giant, Placer Dome.[40] United States legislators from Nevada sponsored another bill, H.R. 2722, which provided for increased geothermal energy production in Western Shoshone lands.[41] Among the areas proposed for privatization were Mount Tenabo and Horse Canyon, culturally and spiritually significant

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[34] *See* Dann Case *supra* note 6 at para. 179.

[35] *See* Valerie Taliman, "Shoshone Request Senate Investigate BLM actions." *Indian Country Today*, July 19, 2002.

[36] See id.

[37] *See e.g.* United States Department of the Interior, Bureau of Land Management, "Unauthorized Use Notice and Order to Remove" April 20, 2004, to Mary Dann.

[38] *See* Letter to Mary Dann from the Department of the Treasury, Feb. 16, 2005 (seeking $397,476.10 in alleged debt, fees and interest); Letter to Mary Dann from Pioneer Credit Recovery, March 21, 2005 (seeking a total of $433,596.47); Letter to Mary Dann from the Department of the Treasury, Apr. 26, 2005 (seeking $5,044,253.28 in alleged debt, fees and interest); Letter to Sandy Smales from the Department for the Treasury, Apr. 28, 2005 (seeking $5,351.60 in alleged debt, fees and interest); Letter to Sandy Smales from Diversified Collection Services, Inc., June 27, 2005 (seeking a total of $5839.54).

[39] *See* proposed Northern Nevada Rural Economic Development and Land Consolidation Act of 2003 ("Placer Dome Bill"), H.R. 2869 (U.S. House Bill).

[40] *See id. See also* Western Shoshone Defense Project, "Western Shoshone to Question Placer Dome Mining at Annual Shareholder Meeting" (Press Release) April 25, 2005.

[41] *See* proposed John Rishel Geothermal Steam Act Amendments of 2003 ("Geothermal Bill"), H.R. 2722 (U.S. House Bill).

areas also used for gathering of food and medicinal plants, and places in the traditional grazing area where recent massive federal seizures of Western Shoshone livestock have occurred.[42] Although these legislative efforts ultimately failed, continued efforts are currently underway to privatize Western Shoshone lands within the boundaries of the Treaty of Ruby Valley to be sold to major mining corporations.[43]

In addition to seeking transfer of Western Shoshone land to non-Indigenous buyers, the United States has also moved to unilaterally distribute the Indian Claims Commission award for the deemed loss of lands the Western Shoshone continue to claim, use and occupy. According to the United States, its "payment" of monetary award dictated by the ICC proceedings into a trust account represents the final step in its unilateral appropriation of Western Shoshone lands. Concerted efforts to force distribution of the "compensation" through legislation have continued.

Despite ongoing protests by Western Shoshone and numerous unanswered concerns by members of Congress and the public, Congress passed into law the Western Shoshone Claims Distribution Act on July 7, 2004.[44] These unilateral legislative attempts and the process by which the United States has chosen to distribute the Western Shoshone award highlight the paternalistic and discriminatory policies of the United States and the willingness of the United States to act against the constitutional and human rights of its Indigenous Peoples.

Lack of consultation

The issue of forced monetary distribution serves as an additional example of the United States' failure to adequately protect the rights of the Western Shoshone to their land and resources, in spite of IACHR and CERD directives.[45] When the legislation to distribute the ICC award was being developed, the Western Shoshone National Council and seven Western Shoshone tribal governments adopted resolutions opposing the monetary distribution and favoring a negotiated settlement with the federal government.[46]

Despite such concerted opposition to the distribution bill by the Western Shoshone and their elected representatives, the United States did not afford Western Shoshone authorities an adequate opportunity to participate in the legislative process. In order to create the impression that the Western Shoshone people favored the distribution of approximately $20,000 to each tribal member, a small committee of individuals

[42] *See id.* Both these bills were drafted without consultation with or consideration of the effects of the proposed for mining and geothermal energy production on Western Shoshone use of and cultural beliefs regarding the area, nor do they provide for compensation for the use of Western Shoshone resources.
[43] *See* Text of the "Pomba Proposal" (Post-mark up), *Recommendations for budget reconciliation*, as approved by the Committee on Resources on October 26, 2005.
[44] *See* Western Shoshone Claims Distribution Act (Pub. L. 180-270, July 7, 2004, 118 Stat. 805).
[45] *See* Dann Case, *supra* note 6; CERD Concluding Observations, *supra* note 1 at para. 400.
[46] *See* Battle Mountain Indian Colony, Resolution No. 02-BM-11 (May 14, 2002); Elko Band Council, Resolution 2004-EBC-22 (June 1, 2004); Elko Band Council, Resolution 2004-EBC-23 (June 1, 2004);South Fork Band Council, Resolution No. 03-SF-20 (June 11, 2003); Te-Moak Tribe of Western Shoshone, Resolution No. 04-TM- 34 (May 20, 2004); Wells Band Council, Resolution 24-WBC-02 (June 13, 2003); Winnemucca Indian Colony, Resolution 6-2003-04 (July 12, 2003); Yomba Shoshone Tribe, Resolution YT-05-03 (March 7, 2003).

conducted two "straw polls".[47] The polls were not widely publicized and lasted only a few hours, effectively preventing many eligible Western Shoshone from participating in the vote. There were no independent monitors in the polls and the results were counted by individuals who supported the payment and who had been expressly repudiated as representatives of the Western Shoshone on this issue.[48] On the basis of this single exercise, U.S. Senator Reid, who was behind the distribution legislation, falsely asserted to the Senate in 2002 that the majority of Western Shoshone people desired passage of the legislation.[49]

In late 2004, the U.S. Bureau of Land Management approved a multi-phase hard rock mining exploration project known as the Horse Canyon/Cortez Unified Exploration Project in Western Shoshone territory, to include building roads and drilling pad construction, allowing for 200 acres of disturbance within the larger 30,548 acre project area. The BLM acknowledges the important cultural interests, if not the property rights, of the Western Shoshone in the area of the project, and yet took no steps to protect the Western Shoshone's interests or adequately consult with the Western Shoshone prior to extending the approval.[50] In approving this mining activity on Western Shoshone lands, the BLM has ignored a number of generally applicable consultation requirements in U.S. domestic law.[51] The only notice provided was a single letter to the Dann band of Western Shoshone advising them of the project, which was followed by a denial of their request for further information; and two letters to the Te-moak tribe of the Western Shoshone *after* the decision had been made.[52] In the absence of any adequate consultation, Western Shoshone groups have initiated a lawsuit in U.S. courts contesting the BLM's approval of the mining project.[53]

This lack of consultation is in direct violation of CERD's interpretation of Article 5(c) of the Convention which requires states to "ensure effective participation by Indigenous communities in decisions affecting them, including those on their land rights." It also violates General Recommendation XXIII on Indigenous Peoples which stresses the

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[47] Valerie Taliman, "Shoshones want negotiated land settlement", *Indian Country Today*, October 15, 2002.
[48] *See id.* Yomba Shoshone tribal administrator Geoffrey Bryan notified the Senate Indian Affairs Committee if the serious flaws in this process. Reid's supporters within the tribe, including former Te-Moak Shoshone Chairman Felix Ike and few of his relatives and friends were the only ones allowed to count the ballots and are probably the only ones who know where the ballots are present at. Ike and his supporters were voted out of office last fall, further indicating that the vast majority if Western Shoshone people, in fact, do not support his action. *See* Steven Newcomb, "The Western Shoshone Claims Distribution Act: An open letter to Congressman Tom Delay." *Indian Country Today*, January 24, 2004.
[49] Leaders from the Sioux Nation and other Indian Nations have denounced the precedent set by Reid in attempting to forcibly distribute money using a small group of supporters and an unofficial referendum. *See* Valerie Taliman, "Shoshones want negotiated land settlement", *supra* note 43 (referring to comments by Oglala Sioux Nation President John Steele expressing concern over similar actions being carried out against his people who have refused monetary compensation for their claims to the Black Hills of South Dakota which is a sacred site to them).
[50] *See* Te-Moak Tribe Of Western Shoshone Of Nevada, Great Basin Mine Watch, Western Shoshone Defense Project, v. U.S. Department of Interior et al., Case No. 05-CV00279 (U.S. District Court, Reno, Nevada) filed Spring 2005 [hereinafter "Te Moak Tribe Of Western Shoshone v. U.S."].
[51] *See id.*
[52] *See* Te Moak Tribe of Western Shoshone v. U.S. *supra* note 46 at p. 23-24.
[53] *See id.*

importance of securing the 'informed consent' of Indigenous communities in decisions directly relating to their rights and interests.[54]

Nuclear Waste

Discriminatory treatment of the Western Shoshone peoples and the lack of consultation and participation afforded them is evident in the United States' plan to store 77,000 tons of nuclear waste from across the United States in Yucca Mountain, a site of spiritual significance to the Western Shoshone. A government-created independent body determined that the metal containers planned to store spent nuclear fuel will leak and corrode sooner than anticipated,[55] and strongly urged the U.S. Department of Energy (DOE) to redesign its proposed storage system for Yucca Mountain. Despite the many unresolved technical and scientific questions posed to the DOE by the U.S. Nuclear Regulatory Commission about the project's safety, President Bush proposed a massive budget increase for the project.[56] Apart from the technical safety issues surrounding the proposed project in Yucca Mountain, the issue of title to the land involved has not been resolved. The DOE is required by law to demonstrate ownership of the land it proposes to use. Such ownership cannot be attributed to the DOE or the United States without legal basis for the purported extinguishment of Western Shoshone ancestral title for the land encompassing Yucca Mountain.

Military Testing

The non-compliance of the United States is compounded by a number of recent weapons tests on Western Shoshone territory, activities which are inconsistent with the findings of the IACHR and CERD. Last year alone, the National Nuclear Security Administration conducted two sub-critical experiments[57] at the Nevada Test Site, on Western Shoshone traditional lands, without consultation or notice to the Western Shoshone people. Unicorn, the 23rd sub-critical test to date, was conducted August 30, 2006.[58] Earlier in the year, another sub-critical experiment, Krakatau, was conducted February 23, 2006.[59] In addition to restricting Western Shoshone access to their traditional land, violating consultation obligations under international law and outright destruction of the land base, it is feared that these tests will contaminate underground water sources and have lasting effects on Western Shoshone traditional land and resources.

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[54] General Recommendation XXIII, *supra* note 8 at 4(d).

[55] *See* Ryan Slattery, "Independent Nuclear Dump Report: Waste Canisters will Leak", *Indian Country Today*, November 12, 2003. The Board stated that due to the conditions underneath Yucca Mountain, corrosion would occur within the first 1,000 years. The Department of Energy must prove that radioactive materials will not escape for at least 10,000 years in order for Yucca Mountain to be licensed as a repository. *See id.*

[56] *See id.*

[57] Sub-critical experiments have been highly controversial and are claimed by some experts to violate the Comprehensive Test Ban Treaty in their use of chemical high explosives in order to examine the behavior of plutonium. *See* "Unicorn Subcritical Experiment Conducted at NTS" Press Release, National Nuclear Security Administration ("NNSA"), (Aug. 30, 2006) available at: http://www.nnsa.doe.gov/docs/newsreleases/2006/PR_2006-08-30_NSO-06-27.htm. For further information on sub-critical testing, *see also* Shundahai Network at http://www.shundahai.org/sub_crit.htm.

[58] *See* NNSA *id.*

[59] *Id*

Also, in March 2006, the U.S. Defense Threat Reduction Agency (DTRA) announced plans to detonate a 700-ton ammonium nitrate and fuel oil explosive, called "Divine Strake", on June 2, 2006 on Western Shoshone homelands.[60] The federal agency planning the test announced that it would create a 3.2 magnitude earthquake and the first "mushroom cloud" seen over the area since atmospheric nuclear weapons testing was terminated in the 1970s.[61] This simulated nuclear explosion is likely to mobilize radioactive contamination into the air from surrounding soil contaminated by past nuclear tests.[62] The explosion would be nearly 50 times larger than any existing conventional weapon.[63]

The Divine Strake test has sparked local, national and international outrage [64] In response to the announced detonation, the Stop the Divine Strake Coalition was formed by Western Shoshone organizations and citizens' groups. People across the country and globally began protesting, and legal and administrative actions were pursued [65] A number of U.S. and foreign organizations planned an "International Day of Action" at the Nevada Test Site on May 28, 2006 to protest against the test. Three days before the protest and four days after an injunction was filed, the U.S. announced that the test was "indefinitely postponed."[66] The test is still being threatened and detonation may proceed as early as this year according to government officials.[67]

Ground Water Appropriation

The U.S. government is developing plans which could further deprive Western Shoshone people their use of traditional lands and resources, in this instance water, a precious

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[60] Western Shoshone Defense Project & Shundahai Network "U.S. Defies U.N. Decision-Plans Massive Military Detonation on Western Shoshone Land" April 4, 2006.

[61] Agence France-Presse "U.S. to Test 700-Ton Explosive" DefenseNews.com, March 30, 2006.

[62] Robert Gehrke, "Debate on Blast Safety Heats Up, Test May Shake up Some Nasty Stuff, Critics Argue" *The Salt Lake Tribune*.

[63] *Id.*

[64] The DTRA has said that the test will help in designing a weapon to blast underground bunkers, leading to public concerns that the test is a precursor to the development of new, low-yield tactical nuclear weapons. *See* Robert Gehrke, "Explosion test has Hatch Upset" *The Salt Lake Tribune* & *France-Presse supra*, note 33; Member of Congress, Jim Matheson, expressed his concerns to the DTRA that the Divine Strake test is "linked to nuclear arsenal objectives", "in the development of a low-yield nuclear weapon." *See* Ltr from Jim Matheson to James Tegnelia, April 7, 2006.

[65] The Coalition is made up of 38 national and international organizations who are calling for a cancellation of the Divine Strake detonation. *See* Brenda Norrell, "'Divine Strake' Detonation Halted" *Indian Country Today*, June 5, 2006; *see also* Scott Sonner, AP, "Tribal Leaders Lead Protest Nevada Test Site's 'Divine Strake'"*Las Vegas Sun* June 3, 2006; *see also* Carla Roccapriore, "Protestors Rally Against Bomb Test in Desert" *Reno Gazette-Journal*, June 4, 2006; see also Divine Strake Coalition "River of Peace March" Notice; On May 22, 2006, a lawsuit seeking an injunction was filed to stop the test, arguing that the explosion could disperse radioactive particles into the atmosphere. " Second Amended Motion for Temporary Restraining Order and for Preliminary Injunction" submitted by Winnemucca Indian Colony et al, Case No: 2:06cv-00497-LDG-PAL U.S. District Court, District of Nevada (May 22, 2006); The Nevada Division of Environment Protection (NDEP) has told the National Nuclear Security Administration that they are prohibited from proceeding with the test until the NDEP authorization has been received. *See* Keith Rogers, "Environmental Officials Halt Test Site Explosion" *Las Vegas Review Journal*, April 12, 2006; *See also* ltr from Michael Elges to Kathleen A. Carlson dated April 28, 2006.

[66] KLASTV.com "Opponents of Divine Strake Celebrate" May 29, 2006.

[67] Jennifer Talhelm, "Feds delay Divine Strake explosion to 2007" *Reno Gazette Journal* August 2, 2006.

resource in arid Nevada. The Southern Nevada Water Authority ("SNWA") is proposing a groundwater "development" project which would involve the construction of a pipeline and production facilities to divert 200,000 acre feet per year of groundwater from areas immediately adjacent to Western Shoshone lands.[68] Groundwater monitoring, testing and exploratory welling is scheduled to begin in 2007 and the anticipated date for pipeline and facility construction is as early as 2009[69] To the Western Shoshone people, water is not only an essential resource to their livelihoods (cattle ranching, agriculture etc) but it is a sacred part of their culture.

E. Western Shoshone Case Study Conclusion

These ongoing threats to the Western Shoshone are the result of the United States government's adherence to discriminatory principles that are central to United States' law and policy concerning Indigenous Peoples. The United States has failed to address and correct the injustices of its laws and policy with respect to Native Americans, and the Western Shoshone in particular, even in the face of decisions and recommendations of international human rights bodies. In fact, the United States is continuing to ignore its obligations under international law, in particular the rights to be free from discrimination and to equality before the law as affirmed in the International Convention on the Elimination of All Forms of Racial Discrimination. Without further attention by international human rights bodies and political pressure upon the United States, the Western Shoshone's rights to occupy and control their traditional lands and resources, and their rights to exercise and sustain their culture are at risk of being permanently harmed.

V. CONCLUSION AND RECOMMENDATIONS

The domestic laws and policies of the United States perpetuate a legal system that legitimizes discriminatory practices towards Indigenous Peoples, in terms of failing to protect their rights to property, religious freedom, protection of spiritually significant areas, control and management of resources, and self-determination. The Western Shoshone people serve as an example of the imminent threats that the Indigenous Peoples of the United States are facing as a result of the United States' policies and practices described in this report.

As we have made clear in this report, the Indigenous Peoples within the borders of the United States continue to suffer from the discriminatory treatment of the United States. We believe it is imperative that the United States immediately examine its level of compliance with the Convention, Urgent Action/Early Warning Decision 1(68), the Committee's Concluding Observations, and General Recommendation XXIII Concerning

[68] Southern Nevada Water Authority, "Clark, Lincoln and White Pine Counties Groundwater Development Project" available at http://www.nvgroundwaterproject.com/html/index.html

[69] Enclosure to ltr from Penny Woods to Interested Party (no date), United States Department of the Interior, Bureau of Land Management; The U.S. Department of Interior recently agreed to drop its protests against the project. *See* Henry Brean, "$2 billion project: Water authority gets deal, Federal agency ends protest of plan to tap rural county" Las Vegas Review-Journal (Sep. 12, 2006).

Indigenous Peoples; and address the continuing violations of its international human rights obligations to Indigenous people. We appreciate the opportunity to provide this important information to the United States and urge you to address these issues in your upcoming report to CERD.