

**Second Request for Urgent Action under Early Warning Procedure
to the
Committee on the Elimination of Racial Discrimination
of the United Nations**

**By the Western Shoshone People of the Timbisha Shoshone Tribe, Winnemucca
Indian Colony and Yomba Shoshone Tribe**

In Relation to the United States of America

July 29, 2005

Prepared with the Assistance of

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I. INTRODUCTION AND SUMMARY

The Western Shoshone people of the Timbisha Shoshone Tribe, Winnemucca Indian Colony and Yomba Shoshone Tribe hereby reiterate and expand upon a previous Amended Request for Urgent Action under Early Warning Procedure, submitted on July, 2000 to the Committee on the Elimination of Racial Discrimination (hereinafter CERD or the Committee).¹ This request informs CERD of the continued violations of the human rights of the Western Shoshone, an indigenous people, in an effort to protect against immediate and potentially widespread and irreparable harm. Since the last time the Western Shoshone reported to CERD, these violations have persisted and in fact intensified despite the reports, findings and recommendations from international human rights bodies and organizations including CERD,² the Inter-American Commission of Human Rights,³ The International Foundation for the Protection of Human Rights Defenders⁴ and Amnesty International,⁵ all urging the United States to respect the human rights of the Western Shoshone as recognized under international law.

This request provides an updated account of the situation from the time of the 2000 CERD Request and CERD's Concluding Observations on the United States of August 2001.⁶ As stated in the Amended Request of 2000, the United States has denied the

¹ See Amended Request for Urgent Action under Early Warning Procedure to the Committee on the Elimination of Racial Discrimination of the United Nations, July 1, 2000 (Attached as Appendix 1). The Yomba Shoshone tribe first submitted an Initial Request for Urgent Action in August 23, 1999, subsequently the Ely Shoshone Tribe and Duckwater Shoshone tribe joined in this request. See also Supplement to Request for Urgent Action under Early Warning Procedure by the Yomba Shoshone Tribe, Ely Shoshone Tribe and Duckwater Shoshone Tribe of the Western Shoshone Nation, July 26, 2001.

² See Committee on the Elimination of Racial Discrimination, *Concluding Observations: United States of America*, A/56/18, ¶¶ 380-407 (Aug. 2001) [hereinafter "CERD Concluding Observations"] (Attached as Appendix 2).

³ See Report No. 75/02, Case 11.140. *Mary and Carrie Dann v. United States*, December 27, 2002, Publicly Released in January 2003. Available at <http://www.indianlaw.org> [hereinafter "Dann Case"] (Attached as Appendix 3).

⁴ See The International Foundation for the Protection of Human Rights Defenders, *Front Line USA Threats, Attacks, Arrests and Harassment of Human Rights Defenders*, May 2004, at 31-43 (Attached as Appendix 4).

⁵ See Amnesty International, *Indigenous Rights are Human Rights: Four Cases of Rights Violations in the Americas*, May 2003, at 30-34. Available at www.amnestyusa.org/justearth/ (Attached as Appendix 5).

⁶ CERD has expressed concern with the situation faced by the Western Shoshone in particular the plans for expansion of mining and nuclear waste storage operations and for the auctioning of their lands for private sale. In its report, CERD recommended that the United States provide effective participation to indigenous peoples in decisions affecting them and their land rights as required under article 5(c) of the Convention;

Western Shoshone people their rights to traditional lands through a discriminatory determination that their rights in those lands were extinguished, by enforcing trespass actions against Western Shoshone people, by issuing permits to non-indigenous individuals and mining operations to occupy and extract resources for their traditional territories, and by failing to protect Western Shoshone lands from damage by nuclear waste storage.

The United States refuses to act on CERD's recommendations provided to protect the rights of the Western Shoshone under the Convention – particularly articles 1, 2 and 5. The United States not only stands in violation of these articles of the Convention but is also openly defiant of the recommendations of the Inter-American Commission of Human Rights to respect the rights of Western Shoshone people in relation to the American Declaration of the Rights and Duties of Man. On December 27, 2002, the Inter-American Commission issued a final report finding the United States in violation of the human rights of Western Shoshone sisters, Mary and Carrie Dann, because of its failure to recognize and protect Western Shoshone rights over traditional lands and natural resources. The Commission recommended that the United States provide the Western Shoshone petitioners with an effective remedy for the infringements of Western Shoshone property rights over ancestral lands through legislative or other measures consistent with the American Declaration and to ensure that its laws, procedures and practices pertaining to indigenous peoples within its borders are in conformity with international human rights principles.⁷

In the time since CERD issued its recommendations and the Inter-American Commission issued its final report, the U.S. has done nothing to attempt to remedy the situation. Instead, the U.S. has engaged in military style seizures of hundreds of Western Shoshone livestock and pushed forward in expansion of mining activities and proposals to store the nation's nuclear waste on Western Shoshone land.

The petitioners urge the Committee to take note of the serious situation that the Western Shoshone have continued to endure; of the United States' inaction regarding the Committee's own recommendations; and of its overall disregard of international law and institutions. The Western Shoshone again urge the Committee to call upon the United States to:

- a) rescind immediately all impoundment and trespass notices against Western Shoshone people;
- b) refrain from prosecuting Western Shoshone hunters;
- c) ensure that mining and other activities on Western Shoshone ancestral land do not impair their physical and cultural survival;
- d) suspend its plans on the proposed Yucca Mountain nuclear waste storage facility;

and emphasized the importance of securing the "informed consent" of indigenous communities as stressed in the Committee's Recommendation XXIII. *See* CERD General Recommendation XXIII, on indigenous peoples, adopted August 18, 1997, CERD/C51/Misc.13/Rev.4 (1997) [hereinafter "CERD General Recommendation XXIII"]. The Committee also called for the recognition and compensation for loss. CERD encouraged the United States to use ILO Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries as a guide. *See* International Labor Organization Convention (No. 169 of 1989) concerning Indigenous and Tribal Peoples in Independent Countries (entered into force 1991) [hereinafter "ILO Convention (No. 169)"].

⁷ *See* Dann Case, *supra* note 3 at ¶173.

- and
- e) suspend all activities that contribute to the contamination or appropriation of water by nuclear waste storage, or other U.S. permitted activities, on Western Shoshone ancestral land.

In addition, the Western Shoshone urge the Committee to call upon the United States to comply with the recommendations of the Inter-American Commission of Human Rights.⁸

II. BACKGROUND

The Western Shoshone are an indigenous people in current possession and actual use of ancestral lands in central Nevada and parts of California, Idaho, and Utah.⁹ For their livelihood, the Western Shoshone traditionally engage in a subsistence lifestyle of hunting, fishing and raising cattle on their ancestral lands. They also gather plants from their land for medicinal and religious purposes and perform rituals and spiritual exercises at sacred sites. As part of their traditional political and social structure, the Western Shoshone are organized primarily into bands of extended family groups.

In 1863, the Western Shoshone Nation signed a treaty of peace and friendship with the United States, the Treaty of Ruby Valley.¹⁰ In that treaty, the Western Shoshone agreed to allow the U.S. access across their lands as well as permission to perform certain activities there. In exchange, the U.S. recognized the boundaries to Western Shoshone land and agreed to fairly compensate the Western Shoshone for activities on their lands. Since that time, there have been no amendments or formal abrogation of the treaty. Nevertheless, the U.S. at present disregards its obligations under the treaty and instead treats Western Shoshone lands as public and open for use and distribution without any consultation with the traditional landholders or regard for the longstanding promise made in 1863.

In the July 2000 Amended Request for Urgent Action under the Early Warning Procedure, the Western Shoshone communities informed members of the Committee about discriminatory actions by the government of the United States that constituted violations of Articles, 1, 2 and 5 on the Convention on the Elimination of All Forms of Racial Discrimination. The Western Shoshone requested the Committee to take note of the serious and urgent nature of the situation and recommend to the United States to refrain from engaging in actions that infringe on their human rights, subsistence and culture.

At its 59th Session in August 2001, CERD reviewed the United States' periodic report. Committee members asked the United States delegation specific questions regarding: 1) the legal status of treaties with Indian tribes; 2) Congress' power to unilaterally amend or

⁸ *See id.*

⁹ *See* Sacred Lands Association, *Map of Western Shoshone Lands* (boundaries on this map reflect those as agreed upon in the Treaty of Ruby Valley, *infra* note 10) (Attached as Appendix 6).

¹⁰ *See* Treaty of Ruby Valley 1863 (Treaty between the United States of American and Western Bands of Shoshone Indians, ratified by the U.S. in 1866, and proclaimed on October 21, 1869, 18 Stat. 689) (Attached as Appendix 7).

rescind treaties with Indian tribes; and 3) its position on the 1863 treaty with the Western Shoshone and whether the U.S. was discriminating in the protection of property rights with respect to the Western Shoshone, including seizing Western Shoshone lands and allowing the land to be used for dumping radioactive material.¹¹ The responses provided by the United States delegation specifically dealing with the status of Indian treaties and the Western Shoshone situation were a source of concern to members of CERD.¹² Of particular concern were the U.S. claims of power to unilaterally abrogate Indian treaties by Congressional action and the continued reliance on the doctrine of discovery first cited in the 1823 Supreme Court decision of *Johnson v. Macintosh*.¹³ The U.S. was advised to recognize the evolution of law that has rejected the colonialist era doctrine of discovery and the view of indigenous peoples as “childlike”.¹⁴

Based on its analysis of the information provided by the United States and Western Shoshone Delegations, the Committee directly addressed problems faced by the Western Shoshone.¹⁵ The Committee’s Conclusions noted the “persistence of the discriminatory effects ... and destructive policies with regard to Native Americans.”¹⁶ CERD recommended the United States “ensure effective participation by indigenous communities in decisions affecting them, including those on their land rights, as required under article 5(c) of the Convention, and draws the attention of the State party to General Recommendation XXIII on Indigenous Peoples which stresses the importance of securing the ‘informed consent’ of indigenous communities and calls, *inter alia*, for recognition and compensation for loss”.¹⁷

From the time of the Committee’s review of the last U.S. periodic report and the publication of its Concluding Observations, the U.S. has failed to alter its practices to conform to the standards in the Convention or other recommended international legal instruments. The continual actions of the U.S. persistently threaten the livelihood and survival of the Western Shoshone. These actions include raids upon Western Shoshone land to confiscate livestock, the creation of proposed legislation that seeks to either payoff interest in Western Shoshone land or privatize the land unfairly and without consultation, and the issuance of collection notices that seek to intimate Western Shoshone and dislocate them from their traditional homeland. The United States perpetually bases its actions against the Western Shoshone on discriminatory proceedings that determined without any legal foundation that Western Shoshone property rights were extinguished. The recommendations made to the United States have been ignored and disregarded by the United States, and the threats that concerned the Committee stemming

¹¹ See *Reply of the United States to Questions from the U.N. Committee on the Elimination of Racial Discrimination by U.S. Assistant Attorney General Ralph F. Boyd, Jr. and U.S. Assistant Secretary of State Lorne Craner*, August 6, 2001, Geneva, Switzerland, at 2,11,15 (Attached as Appendix 8).

¹² See *id.* The United States did not address questions regarding the alleged “compensation” offered to the Western Shoshone, nor questions regarding Western Shoshone land use, fishing and hunting and the radioactive waste storage in Western Shoshone lands.

¹³ 21 U.S. (8 Wheat.) 543.

¹⁴ *Id.* Mr. Thornberry referred to the Australian High Court’s rejection of the *terra nullius* concept in *Mabo v. Queensland*, (1992) 175 C.L.R. 1.

¹⁵ CERD Concluding Observations, *supra* note 2.

¹⁶ *Id.* at ¶ 384.

¹⁷ *Id.* at ¶ 400.

from mining, nuclear waste storage and privatization of Western Shoshone ancestral lands continue.¹⁸

III. THE UNITED STATES' CONTINUED VIOLATIONS OF THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION AND ITS DISREGARD OF THE COMMITTEE'S CONCLUDING OBSERVATIONS

A. CERD's Concerns and Recommendations have not been addressed or followed

1. The United States has proceeded with plans to take action affecting the rights of indigenous peoples, including the expansion of open pit cyanide heap leach gold mining, nuclear waste storage and selling ancestral lands.

The United States has moved forward with legislative attempts to distribute the land itself 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 2003,¹⁹ culturally significant Western Shoshone lands would be privatized by the federal government and handed over to major mining interests, in particular, multinational gold giant, Placer Dome.²⁰ Nevada legislators have also sponsored another bill, H.R. 2722, that would provide for increased geothermal energy production in Western Shoshone lands.²¹ One U.S. Senator has called the land area the “next Saudi Arabia of geothermal energy”.²² 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. Among the areas proposed for privatization under HR 2869, are Mount Tenabo and Horse Canyon, culturally and spiritually significant areas also used for gathering of food and medicinal plants, and placed in the traditional grazing area where recent massive federal seizures of Western Shoshone livestock have occurred.²³

In addition to seeking to distribute Western Shoshone land to non-indigenous corporate buyers, the United States has also moved to unilaterally distribute the Indian Claims Commission (ICC) award for the deemed loss of lands the Western Shoshone continue to claim, use and occupy. The United States justifies its actions on the grounds that Western Shoshone land rights were extinguished through the administrative claim proceedings of

¹⁸ See e.g. Non-Competitive Geothermal Lease Sale, Environmental Assessment, BLM/EK/PL-2003/005 (Formalizing the approval of a lease of land to Cortez Mining Company that encompasses hot springs which have been historically and are currently being used for spiritual and cleansing purposes. This particular company will use geothermal energy here to power expansion of mining operations.) (Attached as Appendix 9)

¹⁹ See proposed Northern Nevada Rural Economic Development and Land Consolidation Act of 2003 (“Placer Dome Bill”), H.R. 2869 (U.S. House Bill) (Attached as Appendix 10)

²⁰ See *id.* See also Western Shoshone Defense Project, “Western Shoshone to Question Placer Dome Mining at Annual Shareholder Meeting” (Press Release) April 25, 2005.

²¹ See proposed John Rishel Geothermal Steam Act Amendments of 2003 (“Geothermal Bill”), H.R. 2722 (U.S. House Bill) (Attached as Appendix 11).

²² Western Shoshone Defense Project, “Bush Signs Western Shoshone Legislation Tribal Leaders View Bill as Massive Land Fraud” (Press Release) January 9, 2004 .

²³ See *id.*

the ICC which stated that “gradual encroachment” by non-Indians caused this extinguishment.²⁴ Therefore, according to the United States, Western Shoshone lands are “public” lands which can be disposed of, and the payment of money compensation dictated by the ICC proceedings represents the final step in legitimizing its unilateral appropriation of Western Shoshone lands. Strong, concerted efforts to force distribution of the “compensation” through legislation have continued.

Congress passed and George Bush signed into law on July 7, 2004 the Western Shoshone Claims Distribution Act,²⁵ despite ongoing protests by Western Shoshone and numerous unanswered concerns by members of Congress and the public. The Bill mandates payment of \$142 million to the Western Shoshone on a per capita basis, as “compensation” for the loss of their ancestral lands.²⁶ However, the Western Shoshone fear that this distribution of the compensation would create the wrongful impression of Western Shoshone acceptance of the purported extinguishment of their property rights.²⁷

Prior to the passage of the distribution law, a report by the Indigenous Law Institute on behalf of the Western Shoshone National Council revealed flaws in the adjudication of Western Shoshone land claims by the ICC.²⁸ This was further supported in the Inter-American Commission report, which stated that the ICC process violated due process, the right to property and the right to equality under international law.²⁹ The fact that this legislation was developed with a lack of attention to the unethical and corrupt nature of the ICC process and a blatant disregard for the authority of national and international bodies underscores the unequal and discriminatory treatment accorded to Western Shoshone people by United States officials and congress.

2. The Western Shoshone have not been provided effective participation and consultation nor has their informed consent been secured

The Committee recommended that the United States provide meaningful participation and consultation to indigenous communities and secure their “informed consent” on matters directly affecting them.³⁰ The roundups, distribution law and proposed legislative measures to privatize Western Shoshone lands represent a complete defiance of those recommendations and of the United States’ obligations under international law.

The Western Shoshone National Council, the traditional governing body of the Western Shoshone Nation and five of the seven Western Shoshone tribal governments passed

²⁴ See Amended Request for Urgent Action, *supra* note 1, at ¶37.

²⁵ See Western Shoshone Claims Distribution Act (Pub. L. 180-270, July 7, 2004, 118 Stat. 805).

²⁶ A non-discriminatory application of U.S. takings law would entitle the Western Shoshone to compounded pre-judgment interest from the date of extinguishment (1872) to the date of the ICC judgment – an amount exceeding \$14 billion. Because in U.S. law ‘unrecognized’ Indian title is not protected under the Fifth Amendment of the U.S. Constitution as are all other forms of property belonging to non-indigenous peoples, no pre-judgment interest was ordered by the ICC.

²⁷ See Steven Newcomb, “The Western Shoshone Claims Distribution Act: An open letter to Congressman Tom Delay.” *Indian Country Today*, January 24, 2004 [hereinafter “Open letter to Congressman Tom Delay”]. *Indian Country Today* articles cited hereinafter can be accessed at www.indiancountry.com.

²⁸ See Steven Newcomb, “Western Shoshone Crisis: Is the U.S. a Nation of Arbitrary Laws?”, *Indian Country Today*, March 10, 2003.

²⁹ See Dann Case, *supra* note 3 at ¶¶136-144

³⁰ CERD Concluding Observations, *supra* note 2, at ¶400.

official resolutions or statements explicitly opposing monetary distribution and favoring a negotiated settlement with the federal government.³¹ In the face of such concerted opposition to the distribution bill by the Western Shoshone and their leadership, the United States did not afford any opportunity for the Western Shoshone authorities to be consulted in the legislative process. Instead, in order to create the impression that the Western Shoshone people favored the distribution of \$20,000 to each tribal member, a small committee of individuals conducted a “straw poll” working with the support of Senator Harry Reid’s office and asking tribal members from nine Western Shoshone bands if they favored the distribution of the ICC award.³² The poll was not widely publicized and lasted only a few hours, effectively preventing all 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 representative of the Western Shoshone on this issue.³³ On the basis of this single exercise, in 2002 Senator Reid falsely asserted to the Senate that the majority of Western Shoshone people desired passage of the Distribution Bill.³⁴

In late 2004, the U.S. Bureau of Land Management (BLM) approved a multi-phase hard rock mining project known as the Horse Canyon/Cortez Unified Exploration Project over 200 acres of Western Shoshone territory, with road-building, drill pad construction, and drilling. 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 neither protect them nor consult with the Western Shoshone prior to extending the approval.³⁵

³¹ See Battle Mountain Indian Colony, Resolution No. 02-BM-11 (May 14, 2002) (Attached as Appendix 12); Elko Band Council, Resolution 2004-EBC-22 (June 1, 2004) and Elko Band Council, Resolution 2004-EBC-23 (June 1, 2004) (Attached as Appendix 13); South Fork Band Council, Resolution No. 03-SF-20 (June 11, 2003) (Attached as Appendix 14); Te-Moak Tribe of Western Shoshone, Resolution No. 04-TM-34 (May 20, 2004) (Attached as Appendix 15); Wells Band Council, Resolution 24-WBC-02 (June 13, 2003) (Attached as Appendix 16); Winnemucca Indian Colony, Resolution 6-2003-04 (July 12, 2003) (Attached as Appendix 17); Yomba Shoshone Tribe, Resolution YT-05-03 (March 7, 2003) (Attached as Appendix 18).

³² Valerie Taliman, “Shoshones Want Negotiated Land Settlement.” *Indian Country Today*, October 15, 2002.

³³ See *id.* Yomba Shoshone tribal administrator Geoffrey Bryan notified the Senate Indian Affairs Committee of 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 of Western Shoshone people, in fact, do not support his action. See Steven Newcomb, “Open letter to Congressman Tom Delay” *supra* note 27.

³⁴ 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 32 (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).

³⁵ See Great Basin Mine Watch, Western Shoshone Defense Project, Te-Moak Tribe Of Western Shoshone Of Nevada v. U.S. Bureau Of Land Management et al., *Petition For Review To The State Director And Request For Stay Of Finding Of No Significant Impact, Record Of Decision And Approval Of Plan Of Operations*, November 24, 2004, at p. 10, 12.

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.³⁶ The only notice provided was a single letter to the Dann band of Western Shoshone advising them of the project, followed by a denial of the Western Shoshone's request for further information; and several letters to the Te-moak tribe without any formal consultation.³⁷ In the absence of any adequate consultation mechanism, the Western Shoshone have been obliged to contest this approval through the courts.³⁸

These actions are indicative of the utter lack of respect for the principle of consultation and participation applicable to the Western Shoshone and other indigenous peoples in the United States under Article 5(c) of the Convention, in accordance with the Committee's interpretation of that article in the aforementioned Concluding Observations to the United States. It also indicates complete disregard of the Committee's appeal to the United States to follow its Recommendation XXIII which states that no decision directly relating to indigenous peoples' rights and interests are to be taken without the informed consent of the indigenous peoples affected.³⁹

3. The Continuing Threat of Nuclear Waste Storage

Discriminatory treatment of the Western Shoshone people 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 traditionally significant site. Western Shoshone people's lands, environment, health and safety are in grave danger due to the proposed nuclear waste project promoted by President Bush as part of his energy and national security policy without any consultation with the Western Shoshone people. This project has also received congressional support – further demonstrating the degree of disregard throughout the United States government for the rights of the Western Shoshone people.⁴⁰

The proposed storage of nuclear waste in Yucca Mountain by the United States is problematic not only because it desecrates a site of spiritual significance to the Western

³⁶ *See id.*

³⁷ *See id.* p. 23-24.

³⁸ *See id.*

³⁹ *See* CERD General Recommendation XXIII, *supra* note 6, para 4d. Lack of consultation with indigenous peoples regarding their property rights and interests is also contrary to other international instruments such as the ILO Convention No. 169 concerning Indigenous and Tribal Peoples, which the Committee also recommended the United States use to guide its behavior *See* CERD Concluding Observations, *supra* note 2. Art 17(2) of the ILO Convention No. 169 states: "The peoples concerned shall be consulted whenever consideration is being given to their capacity to alienate their lands or otherwise transmit their rights outside their own community." ILO Convention (No. 169) *supra* note 6. Under that convention, indigenous peoples "have the right to decide their own priorities for the process of development as it affects their lives...[and] participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly."³⁹ Indigenous peoples have rights to consultation under ILO Convention No. 169 even in matters relating to resources under state ownership. *Id.*, art. 15(2) states: "In cases in which the State retains 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.

⁴⁰ *See* Valerie Taliman, "House Approves Yucca Mountain." *Indian Country Today*, May 14, 2002.

Shoshone, but because it sits on an active earthquake zone and an aquifer that provides water to many Nevada residents.⁴¹ The Nuclear Waste Technical Review Board, an independent body created by Congress, determined that the metal containers that are planned to store spent nuclear fuel will leak and corrode sooner than anticipated,⁴² and strongly urged the Department of Energy (DOE) to redesign its proposed storage system for Yucca Mountain. However, DOE officials are still planning to proceed with the project.⁴³ The state of Nevada has also opposed the proposed site at Yucca Mountain and has filed lawsuits against federal agencies, including the Environmental Protection Agency, in order to halt the project on procedural grounds.⁴⁴ 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.⁴⁵

Apart from the technical safety issues surrounding the proposed project in Yucca Mountain, the issue of title to the land involved has not been fully resolved. The DOE is required by law to demonstrate ownership of the land it proposes to use. Such land "must be located in and on lands that are either acquired lands under the jurisdiction and control of DOE, or lands permanently withdrawn and reserved for its use."⁴⁶ Such ownership cannot be attributed to the DOE or the United States if, as stated earlier, there is no legal basis for the purported extinguishment of Western Shoshone ancestral title for the land encompassing Yucca Mountain. Thus, in addition to threatening the Western Shoshone people – their land, health, and culture, the proposed nuclear waste storage project in ancestral Western Shoshone land suffers from legal and procedural irregularities arising out of the discriminatory treatment against Western Shoshone people's property rights, in violation of article 5 of the Convention.⁴⁷

5. United States has not provided any recognition or compensation for loss

Among the other things called for by the Committee in its Concluding Observations concerning the United States was recognition and compensation for loss.⁴⁸ Since the last request to CERD, the Western Shoshone National Council, TeMoak Tribe of Western Shoshone, Timbisha Shoshone Tribe, Winnemucca Indian Colony, Dann Traditional Family, Wells Band, Battle Mountain Band, Southfork Band and Elko Band have filed another lawsuit against the federal government asserting their title to their 60 million acres of ancestral land recognized in the Treaty of Ruby Valley, and seeking non-discriminatory compensation for the loss of any part of that land and its resources that

⁴¹ *See id.*

⁴² *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.*

⁴³ *See id.*

⁴⁴ *See* Public Citizen, "Bush's Proposal to Inflate Yucca Mountain Budget is Irresponsible" (Press Release) February 4, 2004.

⁴⁵ *See id.*

⁴⁶ *See* 10 CFR § 63.121. *Requirements for ownership and control of interests in land.*

⁴⁷ *See* Amended Request for Urgent Action, *supra* note 1 at ¶34.

⁴⁸ *See* CERD Concluding Observations, *supra* note 2, at ¶400.

have in fact been irrevocably taken from the Western Shoshone people.⁴⁹ This current lawsuit alleges further legal and procedural irregularities about the judgment by the ICC regarding Western Shoshone ancestral lands and challenges the constitutionality of the ICC itself.⁵⁰ In addition for compensation for any rights that may have been truly extinguished, the claim seeks compensation for royalties for all the minerals mined and extracted from their lands, to which the Western Shoshone are entitled under Articles 4 and 7 of the Treaty of Ruby Valley, but have never received.⁵¹ The current lawsuit against the United States claims pre-judgment interest and mining royalties is indicative of the degree of discriminatory treatment engaged in by the United States in holding Western Shoshone lands as extinguished. The United States is vigorously opposing the action.

Compensation for loss of land and for use of natural resources on indigenous lands is required by the Convention, as interpreted by the Committee in its General Recommendation on Indigenous Peoples. This requirement now generally accepted as a matter of international law, as manifested by ILO Convention No. 169 on Indigenous and Tribal Peoples.⁵² In cases where the State claims mineral resources in indigenous lands, ILO Convention No. 169 requires consultation with the indigenous peoples concerned as well as “fair compensation for any damages which they may sustain as a result of such activities.”⁵³ The principles of Convention No. 169 also demonstrate that the Western Shoshone are entitled to compensation, either through land restitution or monetary payment, even if it Western Shoshone land title was ‘properly’ extinguished at some point. Therefore, the current demand by the Western Shoshone for the compounded interest due under the purported title extinguishment is also something that they are entitled to under international law – if not more.

C. Interference with Western Shoshone Property Rights continues through Military-Style Actions by the United States

As stated in the first Amended Request for Urgent Action, the United States has interfered with the Western Shoshone peoples’ use and enjoyment of their ancestral land through armed enforcement actions against tribal members and the livestock on which they depend for their livelihood. The imposition of grazing fees, trespass notices, horse and livestock impoundments, restrictions on hunting and fishing and arrests continues to

⁴⁹ See *Western Shoshone v. United States*, Case No. CV-040702LRH-VPC (Complaint). (Case pending before the U.S. District Court for Nevada).

⁵⁰ The complaint alleges that the ICC judgment did not address fee title rights of the Western Shoshone established in the Treaty of Ruby Valley and that United States officials misrepresented the status of these fee title rights in order to induce the Western Shoshone not to pursue their rights under the Treaty. *Id.* at ¶¶40-52. The ICC is alleged to be unconstitutional because its judges were not afforded protections required under Article III of the U.S. Constitution, and therefore it had no subject matter jurisdiction. *Id.* at ¶¶65-66. Lack of procedural due process protections was also evident in the ICC process.

⁵¹ See *id.* at ¶85. The U.S. through the Treaty of Ruby Valley also undertook a fiduciary trust duty to control and manage the Western Shoshone’s land. Therefore, the U.S. was also obligated to provide the Western Shoshone people with a complete accounting “of the proceeds from disposition or use of the land, including without limitation, mining activities in accordance with Section 4 of the Treaty of Ruby Valley.” *Id.* at ¶95.

⁵² ILO Convention No. 169, *supra* note 6, at art. 16(4).

⁵³ *Id.* at art.15(2).

be inflicted on the Western Shoshone people for merely engaging in traditional and customary use of their ancestral lands.⁵⁴

Since the last request to the Commission, the United States has greatly intensified these armed tactics in order to intimidate and threaten Western Shoshone people. Impoundment of horses and livestock continues to impose substantial economic losses as well as grief and shock to Western Shoshone members. In May of 2002, 160 Western Shoshone cattle were confiscated and sold by the Bureau of Land Management (BLM), costing over \$100,000 in losses.⁵⁵ These actions were reported by Western Shoshone Chief Yowell to the Senate Indian Affairs Committee, which attributed them to Chief Yowell's rejection of the Distribution Bill. One concerned member of Congress has requested an inquiry on that matter and an investigation of the illegal seizure, impoundment and sale of cattle by the BLM, to no avail.⁵⁶

Actions against Carrie and Mary Dann, of the Dann of Western Shoshone, have continued despite CERD's observations and specific requests by the Inter-American Commission to halt these actions and return their livestock.⁵⁷ Rather than halting incursions onto Western Shoshone land, just one year after the CERD issued its Concluding Observations, on September 22, 2002, the BLM raided the Dann's cattle, confiscating 232 head of cattle, which were auctioned off the next day.⁵⁸ The utter disregard by the United States for the economic and cultural value of native property is evidenced by the February 6, 2003 round-up by the BLM of over 400 of the Dann sisters' horses making them run 20 to 30 miles during harsh winter weather, which resulted in the unnecessary deaths of at least 47 mares and foals.⁵⁹

Additionally, intimidation tactics against Western Shoshone people continue. One Western Shoshone elder, Robert Healy Sr. of Odger's Ranch, was ordered to remove his cattle from their grazing lands, or suffer the confiscation and sale of his animals. Like Carrie and Mary Dann, Mr. Healy is also under constant ongoing helicopter surveillance by the BLM.⁶⁰ The Dann sisters and other Western Shoshone have continued to receive orders to remove their livestock from 'public lands'⁶¹ and have been subjected to regular surveillance by armed federal rangers.

Furthermore, the Western Shoshone have begun receiving collection notices from the IRS and a private collection agency to recover accumulated fines levied as a result of their livestock grazing on their traditional lands.⁶² The assistant director of the regional office

⁵⁴ See *Id.* at ¶¶11-14.

⁵⁵ See Valerie Taliman, "Shoshone Request Senate Investigate BLM Actions." *Indian Country Today*, July 19, 2002.

⁵⁶ See Letter to Gale Norton from Senator Raul M. Grijalva, Nov. 17, 2003 (Attached as Appendix 19).

⁵⁷ See Valerie Taliman, "Human Rights Panel: Return Dann Cattle." *Indian Country Today*, October 15, 2002.

⁵⁸ See *id.*

⁵⁹ See Ryan Slattery, "Finger pointing in death of confiscated Western Shoshone horses." *Indian Country Today*, August 22, 2003.

⁶⁰ See *id.*

⁶¹ 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 (Attached as Appendix 20).

⁶² See Letter to Mary Dann from the Department of the Treasury, Feb. 16, 2005 (seeking \$397,476.10 in alleged debt, fees and interest) (Attached as Appendix 21); Letter to Mary Dann from Pioneer Credit Recovery, March 21, 2005 (seeking a total of \$433,596.47) (Attached as Appendix 22); Letter to Mary

of the Bureau of Lands Management has personally indicated to the Danns that they face seizure of their private ranch property in satisfaction of those fines. Ironically, in the proceedings before the Inter-American Commission on Human Rights, the United States emphatically denied that the Dann sisters' interest in their homestead was in any way threatened by the U.S. position regarding extinguishment of Western Shoshone title.⁶³

Western Shoshone members have been continually treated as trespassers and illegal homesteaders on their own land. When one Western Shoshone member, Della Patterson, challenged this classification asserting her rights under the Treaty of Ruby Valley, the government offered a direct sale to Ms. Patterson's land, a process that would require a great deal of personal expense and is erroneous considered the land in question is already Western Shoshone owned and occupied.⁶⁴ In spite of continued protest, the Department of the Interior subsequently issued an order of trespass threatening to impose penalties and imprison this individual without further proof of ownership over the land.⁶⁵

These actions against Western Shoshone members are clearly undertaken in order to harass and intimidate them, have been labeled "domestic terrorism"⁶⁶ and are violations of indigenous peoples' basic human rights protected under the Convention. Under article 2 of the Convention, states are to refrain from practicing racial discrimination and ensure its public authorities also conform to this obligation. The Convention also calls for equality before the law in the enjoyment of the right to property and equal treatment before judicial and administrative organs.⁶⁷ The United States has ordered and condoned the mistreatment of Western Shoshone people, their lands, significant cultural sites as well as livestock and horses by federal officials. Therefore, the Western Shoshone are subject to racial discrimination by the United States and its officials, in violation of Article 1 of the Convention.⁶⁸

Dann from the Department of the Treasury, Apr. 26, 2005 (seeking \$5,044,253.28 in alleged debt, fees and interest) (Attached as Appendix 23); Letter to Sandy Smales from the Department for the Treasury, Apr. 28, 2005 (seeking \$5,351.60 in alleged debt, fees and interest) (Attached as Appendix 24); Letter to Sandy Smales from Diversified Collection Services, Inc., June 27, 2005 (seeking a total of \$5839.54) (Attached as Appendix 25).

⁶³ See Dann Case, *supra* note 3 at ¶77.

⁶⁴ See Letter to U.S. Senator Reid from Della Patterson, Feb. 21, 2002 (Attached as Appendix 26); Letter to U.S. Senator Reid from Della Patterson, March, 14, 2002 (Attached as Appendix 27); Letter to U.S. Senator Reid from William S. Fisher, U.S. Department of the Interior, April 8, 2002. (Attached as Appendix 28).

⁶⁵ See *e.g.* United States Department of the Interior, Bureau of Land Management, "Notice of Trespass" November 29, 2002, to Della Patterson (Attached as Appendix 29).

⁶⁶ Western Shoshone Defense Project, "Domestic Terrorism? Federal Agents Move in on the Danns" (Press Release) September 20, 2002. (Attached as Appendix 30).

⁶⁷ See *id.* at art. 5; see also Amended Request for Urgent Action, *supra* note 1, at ¶34.

⁶⁸ See *id.* at ¶33.

IV. THE UNITED STATES' DISCRIMINATORY TREATMENT CONTINUES DESPITE INTERNATIONAL CONDEMNATION OF ACTIONS IN WESTERN SHOSHONE LANDS

A. The Report by the Inter-American Commission of Human Rights and United States' Recalcitrance

In 1993, Western Shoshone grandmothers Mary and Carrie Dann lodged a petition with the Inter-American Commission against the United States for violations of their human rights arising out of the discriminatory land claims proceedings and federal actions impairing their use and occupation of Western Shoshone traditional lands.⁶⁹

In its final report on the Dann petition, released in January, 2003, the IACHR found that the United States violated the rights of the Western Shoshone petitioners to equality before the law, to a fair trial, and to property under articles II, XVIII and XXIII of the American Declaration on the Rights and Duties of Man in relation to Western Shoshone lands.⁷⁰ The IACHR recommended that the U.S. provide the Western Shoshone petitioners with an effective remedy for the infringements of Western Shoshone property rights over ancestral lands through legislative or other measures consistent with the above articles of the American Declaration; and that it review its laws, procedures and practices regarding indigenous peoples, in particular the right to property.⁷¹

Throughout the proceedings before the Inter-American Commission and even after its final report, the United States has adamantly refused to acknowledge its obligations and duties under international law as applied by Commission. The United States ignored repeated precautionary measures orders issued by the IACHR in 1993, 1998 and 1999 requesting suspension of enforcement and livestock impoundment actions against the Dann sisters.⁷² Additional precautionary measures were issued by the IACHR in 2000 regarding the imminent passage of the Nevada Public Lands Bill and the Distribution Bill, which were before Congress.⁷³ In neither case did the United States provide meaningful responses to nor take action complying with the precautionary measures.

The United States has not been responsive to efforts by the Western Shoshone to have Congress mandate negotiations between the government and the Western Shoshone people to protect Western Shoshone lands and ensure their economic and cultural prosperity.⁷⁴ Such actions by the Congress would comport with the IACHR's final recommendations to revise laws, procedures and practices that do not comply with international human rights protections.⁷⁵

In light of the IACHR's report and recommendations, the international human rights organization, Amnesty International, has also expressed concern over the violations of the rights of the Western Shoshone to equality before the law, to be free of

⁶⁹ See Amended Request for Urgent Action under Early Warning Procedure to the Committee on the Elimination of Racial Discrimination of the United Nations, *supra* note 1.

⁷⁰ See Dann Case, *supra* note 3 at ¶5.

⁷¹ See *id.* at ¶173.

⁷² See *id.* at ¶¶14-22.

⁷³ See *id.* at ¶23-25.

⁷⁴ See *id.* at ¶180.

⁷⁵ See *id.*

discrimination, and to enjoy property.⁷⁶ The actions of the United States in impounding the Western Shoshone livestock and horses, its assertions of public title over Western Shoshone lands along with its permitting mining activities in those lands, and its open defiance of international law and institutions persuaded Amnesty International to include this case within its report on violations of indigenous human rights in the Americas.⁷⁷

V. CONCLUSION AND PETITION

The Western Shoshone people continue to suffer real physical, economic, and cultural harm from the actions complained of in the previous Request for Urgent Action and described in this communication, which threaten to be irreparable. The Distribution Act has passed, although it has yet to be implemented. Legislation enabling the private sale of vast portions of traditional Western Shoshone lands is pending in Congress. Coercive trespass actions, enforcement actions against and surveillance of Western Shoshone members are ongoing. Cattle and horse impoundments continue and have caused widespread economic and emotional harm to Western Shoshone members. In addition, Western Shoshone ancestral lands are being degraded daily by mining operations which only threaten to increase with proposed legislation.⁷⁸ Furthermore, the proposed nuclear waste storage plan in Yucca Mountain threatens to cause even more irreparable damage to the health and environment of the Western Shoshone people.

The Western Shoshone people continue to resist the dispossession of their lands through nonviolent political means and legal action. The intervention of the Committee to aid in further preventing the escalation of this problem is necessary, especially in light of the United States' inaction to the report by the Inter-American Commission of Human Rights. A full review of the United States under the early warning procedure of CERD will again impress upon the United States the gravity of its treatment of the Western Shoshone people. It is also of utmost urgency to impress upon the United States its obligation to comply with international human rights standards applicable to indigenous peoples. Therefore, the Western Shoshone petitioners reiterate the request to the Committee, first expressed in the Amended Request for Urgent Action under the Early Warning Procedure of 2000, to review the United States and to urgently call upon the United States:

- (a) to 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) to refrain from prosecuting Western Shoshone people for hunting, fishing and gathering when they do so according to custom and tradition;

⁷⁶ See Amnesty International, *supra* note 5.

⁷⁷ See *id.* at p. 33.

⁷⁸ See Keith Rogers, "Group says industries threaten public lands," *Las Vegas Review-Journal*, April 13, 2005.

(c) to ensure that mining and other “development” activities in Western Shoshone traditional land does not further threaten Western Shoshone health, culture and livelihood; and

(d) 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.

In addition:

(e) to comply with the recommendations of the Inter-American Commission of Human Rights to respect the rights of the Western Shoshone to equality before the law, to a fair trial and to property protected under articles II, XVIII and XXIII of the American Declaration of the Rights and Duties of Man, and to provide them with an effective remedy to their claims to property rights on their ancestral lands through adoption of legislative or other measures and to review its laws, procedures and practices so that indigenous property rights are determined according to the principles in the American Declaration; and

(f) to suspend all plans to build a nuclear waste storage facility in Yucca Mountain, due to its high degree of risk, the lack of clear uncontested title of the Department of Energy over the proposed site area, and the overall pattern of dangerous nuclear-energy related activities disproportionately located on or near indigenous lands – thus further accentuating the discriminatory treatment towards the Western Shoshone and other indigenous peoples in the United States.

List of Appendices

1. Amended Request for Urgent Action under Early Warning Procedure to the Committee on the Elimination of Racial Discrimination of the United Nations, July 1, 2000.
2. Committee on the Elimination of Racial Discrimination, *Concluding Observations: United States of America*, A/56/18, ¶¶ 380-407 (Aug. 2001).
3. Report No. 75/02, Case 11.140. *Mary and Carrie Dann v. United States*, December 27, 2002, Publicly Released in January 2003.
4. The International Foundation for the Protection of Human Rights Defenders, *Front Line USA Threats, Attacks, Arrests and Harassment of Human Rights Defenders*, May 2004.
5. Amnesty International, *Indigenous Rights are Human Rights: Four Cases of Rights Violations in the Americas*, May 2003.
6. Sacred Lands Association, *Map of Western Shoshone Lands*.

7. Treaty of Ruby Valley 1863 (Treaty between the United States of American and Western Bands of Shoshone Indians, ratified by the U.S. in 1866, and proclaimed on October 21, 1869, 18 Stat. 689).
8. *Reply of the United States to Questions from the U.N. Committee on the Elimination of Racial Discrimination by U.S. Assistant Attorney General Ralph F. Boyd, Jr. and U.S. Assistant Secretary of State Lorne Craner*, August 6, 2001.
9. Non-Competitive Geothermal Lease Sale, Environmental Assessment, BLM/EK/PL-2003/005.
10. Northern Nevada Rural Economic Development and Land Consolidation Act of 2003 (“Placer Dome Bill”), H.R. 2869 (U.S. House Bill).
11. John Rishel Geothermal Steam Act Amendments of 2003 (“Geothermal Bill”), H.R. 2722 (U.S. House Bill).
12. Battle Mountain Indian Colony, Resolution No. 02-BM-11 (May 14, 2002).
13. Elko Band Council, Resolution 2004-EBC-22 (June 1, 2004) and Elko Band Council, Resolution 2004-EBC-23 (June 1, 2004).
14. South Fork Band Council, Resolution No. 03-SF-20 (June 11, 2003).
15. Te-Moak Tribe of Western Shoshone, Resolution No. 04-TM-34 (May 20, 2004).
16. Wells Band Council, Resolution 24-WBC-02 (June 13, 2003).
17. Winnemucca Indian Colony, Resolution 6-2003-04 (July 12, 2003).
18. Yomba Shoshone Tribe, Resolution YT-05-03 (March 7, 2003).
19. Letter to Gale Norton from Senator Raul M. Grijalva, Nov. 17, 2003.
20. United States Department of the Interior, Bureau of Land Management, “Unauthorized Use Notice and Order to Remove” April 20, 2004, to Mary Dann.
21. Letter to Mary Dann from the Department of the Treasury, Feb. 16, 2005.
22. Letter to Mary Dann from Pioneer Credit Recovery, March 21, 2005.
23. Letter to Mary Dann from the Department of the Treasury, Apr. 26, 2005.
24. Letter to Sandy Smales from the Department for the Treasury, Apr. 28, 2005.
25. Letter to Sandy Smales from Diversified Collection Services, Inc., June 27, 2005.

26. Letter to U.S. Senator Reid from Della Patterson, Feb. 21, 2002.
27. Letter to U.S. Senator Reid from Della Patterson, March, 14, 2002.
28. Letter to U.S. Senator Reid from William S. Fisher, U.S. Department of the Interior, April 8, 2002.
29. United States Department of the Interior, Bureau of Land Management, "Notice of Trespass" November 29, 2002, to Della Patterson.
30. Western Shoshone Defense Project, "Domestic Terrorism? Federal Agents Move in on the Danns" (Press Release) September 20, 2002.