Fall 2002

The Indian Wars: Efforts to Resolve Western Shoshone Land and Treaty Issues and to Distribute the Indian Claims Commission Judgement Fund

Thomas E. Luebben

Cathy Nelson

Recommended Citation
Available at: https://digitalrepository.unm.edu/nrj/vol42/iss4/5
THOMAS E. LUEBBEN* & CATHY NELSON**

The Indian Wars: Efforts to Resolve Western Shoshone Land and Treaty Issues and to Distribute the Indian Claims Commission Judgment Fund

ABSTRACT

International human rights agencies have found the United States in violation of international treaties and human rights standards by denying the Western Shoshone Nation the use of their ancestral lands. The 1863 Treaty of Ruby Valley did not cede any Western Shoshone land to the United States, nor did it purport to "take" or "extinguish" Western Shoshone aboriginal Indian title. Nonetheless, all Western Shoshone tribes and communities combined now hold less than 28,000 acres of Indian trust lands, about five one-hundredths of their ancestral territory in Idaho, Nevada, and California. The Western Shoshone require a much larger land base to survive culturally and economically in the twenty-first century. Three decades of continuous litigation and political conflict with the federal government have been punctuated by dramatic seizures of Shoshone livestock by the Bureau of Land Management. Efforts to legislate distribution of a $26 million 1979 Indian Claims Commission award for a fictional federal "taking" of Western Shoshone land have failed because of strong opposition from Western Shoshone tribal governments and political organizations demanding a land base and recognition of aboriginal rights. Efforts to negotiate a resolution of these issues have been

* Thomas E. Luebben is a geophysical engineer (Colorado School of Mines 1966) and an attorney (J.D., New York University School of Law 1969) primarily representing Native Americans. Mr. Luebben's practice focuses on protection and recovery of tribal land, tribal water rights, and other natural resources. Mr. Luebben also serves as Director of Litigation for the Native Lands Institute of Albuquerque, NM. He has represented Indian tribes and Native American organizations and individuals throughout the United States, including Alaska and Hawaii, since 1971, and presently serves as tribal attorney and special counsel for tribes and Native American groups in Arizona, California, Montana, Nevada, and New Mexico. He teaches as an adjunct professor of law at the University of New Mexico and has written texts and taught seminars on Alaska Native Lands, Tribal Jurisdiction, Federal Indian Law, Indian Land Status, Indian Land Claims, Indian Water Rights, and Mineral Development on Indian Lands.

** Cathy Nelson is a 2001 graduate of The University of Arizona's James E. Rogers College of Law. She currently works for the Native Lands Institute housed in the law offices of Luebben, Johnson, and Young in Albuquerque, NM. During her third year of law school she interned with the Inter-American Commission on Human Rights. Subsequent to graduation from law school she completed a one-year fellowship with the University of Arizona's Indigenous Peoples Law and Policy Program.
unsuccessful because the federal government has never made an equitable offer. It is incumbent upon the U.S. Congress to secure a culturally and economically adequate land base for the Western Shoshone Nation.

I. INTRODUCTION

John D. O'Connell's preceding article, *Constructive Conquest in the Courts: A Legal History of the Western Shoshone Lands Struggle—1861 to 1991* (O'Connell article) documents nearly 40 years of continuous Western Shoshone land and Indian Claims Commission Act litigation, whereby the Executive and Judicial branches of the federal government have deprived the Western Shoshone of their ancestral lands. In *United States v. Dann,*¹ the Supreme Court held that the Western Shoshone have been "paid" a $26 million Indian Claims Commission (ICC) award,² even though the Western Shoshone have not received any money. The Ninth Circuit Court of Appeals relied on this legal fiction to hold that Western Shoshone aboriginal Indian title can no longer be asserted against the United States.³

There have been several efforts since 1980 to negotiate a resolution of the Western Shoshone land rights issue. Beginning in 1990, there have also been several efforts to legislate a distribution of the Western Shoshone judgment fund without confirming a land base. There is an ongoing, intense political struggle between Western Shoshone who are primarily interested in a prompt 100 percent per capita distribution of the judgment fund and Western Shoshone who insist there should be no distribution without a confirmation of Western Shoshone land rights.

Mary and Carrie Dann continue to the date of publication to graze livestock on Western Shoshone ancestral lands without a federal grazing permit and under imminent threat of livestock seizure by the Bureau of Land Management (BLM). Other Western Shoshone stockmen, livestock associations, and tribal communities have done the same over the years since the signing of the 1863 Treaty of Ruby Valley. Although Western

---

3. United States v. Dann, 873 F.2d 1189 (9th Cir. 1989) (Dann III).
Shoshone resistance has always been peaceful and unarmed, there is inevitably serious risk of unintended consequences for both sides.

Since the conclusion of the Dann litigation in 1991, the position of Western Shoshone land advocates has been that if the American courts will not restore their lands, the Western Shoshone have, at the very least, a powerful moral and equitable right to land restoration. Congress should act to confirm a culturally and economically adequate land base for the Western Shoshone Nation. Simple distribution of the ICC judgment fund without providing for a land base will change the Supreme Court’s legal fiction of payment into fact and perhaps fatally undermine the Western Shoshone moral and equitable claim.

This article discusses the political side of the Western Shoshone land rights struggle, including past and present efforts to negotiate a legislative resolution of Western Shoshone land issues and distribute the judgment fund. Efforts to legislate distribution of the judgment fund without providing land have consistently failed because of strong opposition from Western Shoshone tribal governments and political organizations. Efforts to negotiate a resolution of land rights issues have failed because the federal government has never negotiated with the Western Shoshone in good faith and has never made a credible proposal. The government’s primary objective has always been simply to distribute the Western Shoshone judgment fund while avoiding or minimizing any return of Western Shoshone lands. Even during periods of active negotiations, the government has refused to stay the litigation and continued to seek victory in the courts or on the ground by impoundment of Western Shoshone livestock. The government has always treated the issue as a win/lose conflict, rather than a unique situation requiring bilateral negotiations for a historically-informed resolution reflecting justice and equity.

4. The Court of Claims told the Western Shoshone twice that they would have to go to Congress to preserve their land rights. John D. O’Connell, Constructive Conquest in the Courts: A Legal History of the The Western Shoshone Lands Struggle—1861 to 1991, 42 NAT. RESOURCES J. 765, 777, 779.

5. At the present time, the Western Shoshone political organizations opposed to distribution of the judgment fund without a land settlement include the Western Shoshone National Council and the Western Shoshone Defense Project. Interview with Julie Fishel, Project Director, Western Shoshone Defense Project (Aug. 1, 2002). Ms. Fishel was formerly counsel to the Dann Band and the Yomba and Duckwater Shoshone Tribes on a pro bono basis through the Indian Law Resource Center.
II. THE CURRENT SITUATION IN NEVADA

A. Conflict and Confrontation with the BLM

Following the ratification of the 1863 Treaty of Ruby Valley, the federal government proceeded to ignore it and assume federal ownership of all Western Shoshone ancestral lands. Since the enactment and implementation of the Taylor Grazing Act of 1934, the federal government has demanded that Western Shoshone livestock operators pay grazing fees and otherwise fully comply with BLM grazing regulations.

Despite the outcome of the Dann litigation, the Danns have continued to assert that Western Shoshone aboriginal Indian title remains unextinguished and have continued to graze livestock in their traditional area without federal permits. Since 1991, the BLM and the Dann Band have maintained an uneasy stalemate punctuated by occasional dramatic and widely-publicized confrontations on the range. Ironically, the final result in Dann left the BLM in precisely the same position vis-à-vis the Danns as when it issued the first unauthorized trespass notice to the Danns in 1973, except the Danns can no longer assert Western Shoshone aboriginal Indian title as a defense. The federal district court denied the government injunctive relief and the BLM can undertake enforcement against the Danns and their livestock only under applicable BLM grazing regulations.

The BLM serves trespass and impoundment notices upon the Danns at least annually. Although it has in most years failed to act or has retreated before the resistance of the Western Shoshone and the outrage...
expressed by their supporters throughout the world, the BLM has raided the Dann Ranch on three occasions. In February 1992 the BLM seized and sold 161 horses belonging to the Danns.\textsuperscript{11} The BLM made another attempt to impound Dann livestock in April 1992 but stopped "because of management constraints placed on law enforcement personnel on the scene, as well as safety concerns after Carrie Dann got into the pen with cattle being impounded and refused to leave until the cattle were let out."\textsuperscript{12}

In November 1992, reinforced with personnel from the Eureka County Sheriff's Office, the BLM seized and sold 269 more horses.\textsuperscript{13} As reported by the BLM, Clifford Dann, a member of the Dann Band, "attempt[ed] to stop gather operations by blocking a road in the gather area, pouring gasoline on himself and others and threatened to light a match. Law enforcement personnel arrest[ed] him on charges of assaulting federal and local officers." Mr. Dann was convicted, fined $5000, and served two months of a nine-month federal sentence.\textsuperscript{14}

From 1993 to the present, the Dann Band and the BLM have continued administrative sparring and litigation over grazing enforcement issues, sporadic negotiations, and federal court litigation.\textsuperscript{15} In 1998, the Danns obtained stays of impoundment actions from both the federal district court\textsuperscript{16} and the Interior Board of Land Appeals.\textsuperscript{17} The stays were later lifted.

On March 5, 2002, the BLM sent the Dewey Dann Estate\textsuperscript{18} a Notice of Intent to Impound livestock.\textsuperscript{19} On August 9, 2002, the BLM sent the

\begin{itemize}
  \item id.
  \item Id.
  \item id. at 4.
  \item Order Granting Preliminary Injunction, id. (enjoining defendants from impounding, confiscating, or forcibly removing plaintiff’s livestock). According to pages seven and eight of the Dann Trespass Chronology, the preliminary injunction granted by the district court was in effect for approximately one year.
  \item Dann Trespass Chronology, supra note 11, at 7.
  \item The Dewey Dann Estate is a cattle herd inherited by Mary and Carrie Dann, brothers Clifford and Richard Dann, and two nieces from their father, Dewey Dann. Dewey Dann applied for and obtained a federal grazing permit for this herd in 1936 when the Taylor Grazing Act of 1934 was first implemented in his area, albeit under formal protest that the requirement violated his Western Shoshone land and treaty rights. Out of respect for the views and interests of other Estate heirs, the Dann sisters have tried to maintain this permit. Interview with Carrie Dann (Mar. 15, 2001).
  \item Letter from Helen Hankins, Elko Field Manager, BLM, U.S. Department of the Interior, to the Dewey Dann Estate and Mary Dann (Mar. 5, 2002) (providing notice of intent to impound). Unauthorized grazing on lands under the jurisdiction of the BLM is regulated
\end{itemize}
Danns a Notice of Final Decision canceling the grazing preference for the grazing permit that had been held by the Dewey Dann Estate. The grazing permit itself had been cancelled in 1995 "for failure to apply appropriately for a grazing permit transfer." The Notice further alleges that "[a]t that time you chose to quit paying any grazing fees and turned out unauthorized livestock onto public lands. From 1995 to present you have been issued three repeated willful trespass actions with no acceptable offer of settlement...." The Notice goes on to assert that "{t}he total due the United States...for the Danns, Dewey Dann Estate, and affiliates since 1991 is $2,987,162.86." The effect of the cancellation of the grazing preference is that a new grazing permit can be issued in the area of the Dann Ranch to some other livestock operator. The Danns have appealed the grazing preference cancellation.

The Western Shoshone Defense Project office is located in the small community of Crescent Valley, Nevada, a few miles from the Dann Ranch. On the night of September 19, 2002, and again two days later, the Defense Project received anonymous telephone tips that the BLM was planning a four-day operation to impound Dann livestock beginning the following weekend. The Project immediately sent out an alert and request for assistance to other Western Shoshone communities and tribes and to Dann supporters throughout the country. The BLM’s impoundment action was pursuant to 43 CFR Subpart 4150 (2002). Section 4150.2 provides for the issuance of a "Notice and order to remove." 43 C.F.R. § 4150.2. If the trespassing livestock are not removed, or the livestock owner does not enter into a settlement as authorized by Section 4150.3, the BLM may issue a "Notice of intent to impound" under Section 4150.4-1.

20. Letter from Clinton R. Oke, Assistant Field Manager Renewable Resources, BLM, Elko Field Office, to the Dewey Dann Estate and Mary Dann (Aug. 9, 2002) (providing Notice of Final Decision). A "grazing preference" is the priority right to receive a BLM grazing permit to a certain area ahead of other potential livestock operators if the applicable requirements specified in the grazing regulations are met, such as ownership or control of a "base property" (private land) in the vicinity. 43 CFR § 4110.0-5 It is also a priority right to have a grazing permit renewed when it periodically expires. Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1752(c) (2000). The loss of the "grazing preference" in a given area may mean that the ranching operation cannot continue. See generally COGGINS, WILKINSON, & LESHY, FEDERAL PUBLIC LAND AND RESOURCES LAW 706-08 (3d ed. 1993).

21. Oke letter, supra note 20. The BLM had insisted that the Danns apply for a formal transfer of the permit from the Estate to the heirs. Interview with Julie Fishel, Project Director, Western Shoshone Defense Project (Dec. 16, 2002).

23. Id. at 2 (citing violation of 43 CFR § 4140.1(b)(1)(i)).
24. Id. at 3.
25. Interview with Julie Fishel, Project Director, Western Shoshone Defense Project (Sept. 10, 2002).

apparently timed to seize Dann livestock just before they would ordinarily be removed from the range for the winter and yearlings and weaned calves would be marketed. Western Shoshone cowboys arrived to assist the Danns in rounding up all the livestock they could and moving them back to winter enclosures at the ranch.27

Federal forces began moving into position well before dawn on Sunday, September 22. Approximately 20 passenger vehicles, semi-trailer cattle trucks, horse trailers, and a helicopter were involved in the operation, together with several all-terrain vehicles. The Nevada Livestock Association provided the following eyewitness account:

The Bureau of Land Management attacked the Dann Sisters from Crescent Valley, Nevada early Sunday morning September 22, 2002 in the Pine Valley area of Eureka County. They impounded an unknown amount of cattle (BLM estimates of 200 head), with the help of Greg Cook of Vernal, Utah, and his hired rustlers as well as from 50 to 100 BLM and federal personnel.

Helicopters and surveillance airplanes roamed the skies. The BLM deployed and established a lock down of a great portion of Eureka County with armed quasi-militarized BLM enforcement officers as well as other federal agents. All access by roads, including the road from Carlin, Nev. and county access roads were blocked by BLM with assistance, on state highways, from the Nevada Highway Patrol.

BLM set up the evening before the attack in Pine Valley. A large base camp with helipad, command post trailers, up to 100 personnel, the majority of which were armed. Various types of weaponry, camouflage, military paraphernalia, night vision scopes, flack vests, as well as some special operations type personnel. Manned four-wheel drive pickups and special camo-green ATVs were deployed throughout the area.28

That day the BLM rounded up cattle in the Pine Valley and Cottonwood Canyon areas. The BLM attempted to close the county road through Cottonwood Canyon, the only access to the area, but the county sheriff ordered that the road be left open. Despite this order, the BLM continued engaging in tactics designed to block traffic on the road,

---

27. Sewall interview, supra note 26.
including requiring that travelers have an escort through the Canyon from the sheriff’s office. The BLM succeeded in seizing approximately 230 head of cattle; a major blow to the Danns’ precarious livelihood. However, the bulk of the herd was rounded up by Western Shoshone cowboys and taken back to the Dann Ranch before the BLM could capture them. The BLM promised, however, to return at a later date for any additional unpermitted Dann livestock they may find on the open range. The BLM sold 232 head of cattle for $59,292 at auction in Reno, Nevada, on October 4, 2002. One of the buyers immediately returned the livestock he had just purchased to the Dann sisters. Despite periodic trespass and impoundment notices and actual livestock seizures, the Danns continue to use and occupy their ancestral lands in defiance of the government.

The BLM has taken aggressive action against other Western Shoshone stockmen as well. In a pre-dawn raid near the South Fork Reservation south of Elko, Nevada, on the morning of May 24, 2002, the BLM seized 162 head of cattle belonging to Western Shoshone National Council Chief Raymond Yowell and South Fork Shoshone Band member Myron Tybo. The BLM maintains that the cows were trespassing on public lands and that the Western Shoshone ranchers had not paid their grazing fees. The BLM had previously cancelled grazing permits that had been held by the Te-Moak Shoshone Livestock Association ever since the South Fork Reservation was created in 1937 by the BIA’s purchase of non-Indian ranches with appurtenant grazing rights. Since 1980, other Western Shoshone entities, including the Duckwater and Yomba Shoshone tribes, have from time to time refused to pay federal grazing fees on the grounds that Western Shoshone aboriginal

29. Interview with Julie Fishel, Project Director, Western Shoshone Defense Project, and Christopher Sewall, Program Director, Western Shoshone Defense Project (Sept. 23, 2002).
32. Mullins, supra note 31.
36. Interview with Raymond Yowell, Chief, Western Shoshone National Council (Oct. 5, 2002). The BLM subsequently issued a new grazing permit to the “South Fork Livestock Partnership,” an entity controlled by three other members of the South Fork Shoshone Band but unaffiliated with the Band or the TeMoak Livestock Association. This action by the BLM has caused serious political stress and dissension within the South Fork tribal community. Id.
Indian title remained unextinguished. 37 Despite the federal government's success in the courts, the Western Shoshone continued through the 1990s to graze as many as 3500 head of livestock on more than one-million acres of public lands without federal grazing permits 38 and to pursue their traditional hunting and gathering activities throughout their ancestral homeland in defiance of Nevada law.

B. Efforts to Legislate Distribution of the Judgment Fund

Ever since the entry of final judgment in the Western Shoshone ICC litigation on December 6, 1979, there has been a continuing political struggle between those Western Shoshone who want only an immediate 100 percent per capita distribution of the judgment fund and those who insist on contemporaneous federal recognition of their aboriginal Indian title land rights or a negotiated resolution of Western Shoshone land rights issues. 39 In February 1980, just after the final award, the BIA created the “Western Shoshone Planning Committee.” 40 The Committee consisted of individuals from various Western Shoshone communities, apparently contacted or appointed by the BIA. Working with the BIA, the Committee was to prepare

37. In 1980, the Duckwater Shoshone Tribe and the Duckwater Stockmen’s Association concluded that Western Shoshone aboriginal Indian title remained unextinguished and stopped paying grazing fees. In January 1982, the Duckwater Shoshone Tribe and the BLM signed an interim grazing agreement whereby the Duckwater Tribe would not pay grazing fees “based on its belief that it holds unextinguished Indian title to those lands” and “pending final judicial resolution of the disputed title issue.” Duckwater Stockmen’s Assoc. v. Bureau of Land Management, Cancellation of Billing Notice G126860, U.S. Department of the Interior Office of Hearings and Appeals, Stipulation and Compromise 4 (Jan. 6, 1982) (on file with authors). When the Supreme Court held in 1985 that the Western Shoshone had been “paid” the Indian Claims Commission award in Western Shoshone Identifiable Group v. United States, ICC Docket 326-K (1979), the BLM contended the grazing agreement was no longer in effect because the Supreme Court had adjudicated the title. The Duckwater Shoshone Tribe disagreed and continued grazing livestock without paying fees. In 1997, at the insistence of some members who feared BLM seizure of their livestock and faced with mounting BLM claims for fees, interest, and penalties, the Duckwater Tribe settled with the BLM for a fraction of the amount claimed by the BLM and reactivated its grazing permits. Interview with Jerry Millett, Tribal Administrator, Duckwater Shoshone Tribe (Oct. 5, 2002).

38. Interview with Carrie Dann (Dann Band) (Mar. 21, 2002); Yowell interview, supra note 35; interview with James Birchim, Chairman, Yomba Shoshone Tribe (June 19, 2002); interview with Jerry Millett, Tribal Administrator, Duckwater Shoshone Tribe (Dec. 12, 1997). The actual numbers of livestock and acreage involved are difficult or impossible to determine.


40. Memorandum from the Assistant Secretary of Indian Affairs to Acting Deputy Commissioner of Indian Affairs (May 19, 1980) (regarding handling of Western Shoshone judgment funds) (on file with authors).
an administrative iudement distribution plan as required by the Indian Tribal Judgment Funds Use or Distribution Act of 1973.41 The Act required that the plan be submitted to Congress within six months after the appropriation of funds to pay the judgment. That deadline could not be met as a result of the confusion created by the federal district court decision in Dann II.42 The Committee and the BIA became inactive after Senator John Melcher, Chairman of the Senate Select Committee on Indian Affairs, refused to grant an extension of time.43 Under the Act, if a distribution plan is not timely filed with Congress, new legislation is required to effect a distribution.

Since 1989, Western Shoshone individuals have initiated several efforts to obtain legislation mandating a per capita distribution of the judgment fund. Four unsuccessful bills have been introduced in Congress.44 Two bills are pending in the 107th Congress.45 The passage of time and the increasing size of the judgment fund (augmented by more than 20 years of accumulated interest) have intensified the bitter struggle between the “land people” and the “money people.” Many Western Shoshone either never

42. Author Thomas E. Luebben was present on May 3, 1980, when a BIA representative conducting a mass meeting of Western Shoshones as part of the judgment distribution planning process was confronted with the April 25, 1980, decision of the federal district court in Dann II. The Dann II decision held that Western Shoshone aboriginal Indian title was good until December 6, 1979, the date of the Court of Claims award of $26 million in Western Shoshone Identifiable Group v. United States. See United States v. Dann, 706 F.2d 919 (9th Cir. 1983) (Dann II), rev’d, 470 U.S. 39 (1985). A commotion ensued, with many speakers saying that the Dann sisters had been correct all along that only the Indian Claims Commission case itself could have extinguished title, and that $26 million was not enough compensation for a taking of Western Shoshone lands that only occurred in 1979. The BIA representative announced that the meeting would be terminated because he had to seek legal advice from government attorneys as to the meaning of the decision. Memorandum from Assistant Secretary of Indian Affairs to Acting Deputy Commissioner of Indian Affairs re Handling of Western Shoshone Judgment Funds (May 19, 1980) (on file with authors).
43. Letter from Senator John Melcher, Chairman, Senate Select Committee on Indian Affairs, to Ralph R. Reeser, Acting Deputy Assistant Secretary for Indian Affairs (Aug. 4, 1980). Senator Melcher denied the request for the extension because “it appears that a significant number of Western Shoshone people oppose acceptance of the award at this time. There is pending litigation in the case of U.S. v. Dann...in which title to certain land and the date of compensable taking are still in issue. The outcome of that case could clearly have a strong bearing on the course of action the Congress, the Department and the Western Shoshone people might wish to pursue.” Id.
held any hope of land recovery or gave up that hope as the years passed. Ideologically and spiritually motivated individuals who insist that the 1863 Treaty of Ruby Valley still governs their relationship with the United States show no signs of giving up. They believe the United States is continuing to commit an egregious violation of Western Shoshone human rights that must be brought to the world's attention.46

The House Interior and Insular Affairs Committee held a hearing in April 1990 on Nevada Congressman Barbara Vucanovich's H.R. 3384, titled the "Western Shoshone Claims Distribution Act." That Committee held a second hearing in April 1992 on Vucanovich's H.R. 3897, essentially the same bill as the earlier H.R. 3384. Both bills were unanimously opposed by federally-recognized Western Shoshone tribal governments, the Western Shoshone National Council, and the Dann Band because these bills did not recognize Western Shoshone land and treaty rights or provide a land base.47

In March of 1998, the Temoak Bands Council48 authorized the creation of an ad hoc committee to study the Western Shoshone claims situation and report back to the Council.49 That Committee subsequently characterized itself as the "Western Shoshone Claims Committee" and proceeded to contact the Nevada Congressional delegation to urge introduction of a bill providing for a 100 percent per capita distribution of the judgment fund, although this action far exceeded the Committee's mandate from the Council.50 At the Committee's request, Senator Reid introduced S.2795 on June 27, 2000. No hearings were held and the bill died at the end of the 106th Congress.

On May 23, 1998, the Western Shoshone Claims Committee held a mass meeting in Elko, Nevada, and distributed ballots for a straw poll as to

46. Interview with James Birchim, Chairman, Yomba Shoshone Tribe (Oct. 10, 2002); Yowell interview, supra note 35; interview with Carrie Dann (Sept. 10, 2002).
47. Interview with Jerry Millett, Tribal Administrator, Duckwater Shoshone Tribe, and former Chief, Western Shoshone National Council (Apr. 2, 1998).
48. The Temoak Bands Council is the over-all governing body of the Temoak Tribe of Western Shoshone Indians of Nevada. The Temoak Tribe became a federally-recognized tribal government under the Indian Reorganization Act of 1934, 25 U.S.C. § 476 (2000), on August 24, 1938, when the Assistant Secretary of the Interior approved the Constitution and By-laws of the Temoak Band of Western Shoshone Indians, Nevada. The tribe changed its name to the Temoak Tribe of Western Shoshone Indians of Nevada in 1982 when it adopted a new constitution. The Temoak Tribe is a federation that includes the Battle Mountain Band Council, the Elko Band Council, the South Fork Band Council, and the Wells Band Council. Each Band Council is an Indian Reorganization Act federally-recognized tribal government in its own right. Interview with Elwood Mose, former Chairman, Temoak Bands Council (Apr. 23, 1998).
49. Memorandum from Elwood Mose, Chairman, Temoak Tribe of Western Shoshone, to Leta Jim, Vice-Chairman, and Larry Piffero, Councilman, Temoak Tribe of Western Shoshone (Mar. 8, 1998) (citing Tribal Council approval on Mar. 4, 1998) (on file with authors).
50. Mose interview, supra note 48.
whether the judgment fund should be distributed 100 percent per capita. The "confidential" ballot presented the following two options:

Yes ___ I am in favor of 100 percent per capita claims payment to persons who have at least one-quarter (1/4) degree of Western Shoshone Blood.

No ___ I am not in favor of receiving any claims payment.

Notably, the ballot did not present the option of seeking return of Western Shoshone lands.

The ballot included the following language: "Be advised by accepting award or not accepting the claims monies does not prevent future claims against the U.S. Government." The purpose of this statement was apparently to induce Western Shoshone concerned that distribution of the judgment fund would have an adverse effect on their land and treaty rights to support S.958 nonetheless.

Not surprisingly, the overwhelming majority of those who voted in the poll chose the first option, 100 percent per capita distribution.

Senator Reid reintroduced the Western Shoshone Claims Distribution Act, essentially unchanged, in May 2001 (S.958). Nevada Congressman Gibbons introduced a similar bill, H.R.2851, in September 2001. The Claims Committee geared up to support the bill and those demanding a land settlement geared up to oppose it. At Senator Reid's request, the Senate Indian Committee scheduled a hearing on the bill for March 21, 2002. All of the federally-recognized Western Shoshone tribal governments in Nevada, as well as the Claims Committee and the Western Shoshone National Council, were invited by the Senate Committee to send representatives to Washington to testify on S.958. Less than 24 hours prior to the hearing, Senator Reid cancelled it, ostensibly because he had just learned that the straw poll ballot included confusing language as to the

51. Announcement of Straw Poll and Confidential Ballot of 1998 (on file with authors).
52. Mark Waite, Western Shoshones vote to receive $105 million, ELKO DAILY FREE PRESS, May 25, 1998, at A1. The reported results indicated that 1021 of a total of 1074 voters voted in favor of the distribution. James Birchim, Chairman of the Yomba Shoshone Tribe, has suggested that many Western Shoshone who would otherwise oppose a distribution without a land settlement either voted for the distribution or did not vote because they assumed that checking the second option would exclude them from the distribution if and when it occurred. Interview with James Birchim (Oct. 10, 2002).
53. Carrie Dann was notably excluded from the witness list, despite protests from well-known Indian advocates, including Vine Deloria, Jr. Letter from Vine Deloria, Jr., President, Native Lands Institute, to Senator Daniel Inouye, Chairman, Senate Indian Affairs Committee (July 30, 2002) (on file with authors).
effect of a judgment fund distribution on Western Shoshone land and treaty rights, and because of concern about the meaning of a provision in the bill arguably intended to preserve such rights despite the distribution. At a meeting the following day with Senator Reid's staff, would-be witnesses in support of the bill spoke passionately in favor of the distribution.

Witnesses representing the tribal governments stated unanimously that, while they supported per capita distribution of the judgment fund, they did not want the funds distributed without a contemporaneous land settlement. Both the Yomba Shoshone Tribe and the Duckwater Shoshone Tribe proposed amendments to S.958 that would address land issues. The proposed amendments would transfer to those tribes in trust the same lands they currently use for livestock grazing pursuant to BLM and Forest Service grazing permits. The amendments would also require the General Accounting Office to conduct an investigation and study and recommend to Congress what lands should be returned to the Western Shoshone to provide each federally-recognized tribe and the Dann Band with a culturally and economically-viable land base.

Following cancellation of the March 21 hearing, the Claims Committee redrafted the ballot and conducted the straw poll by mail. This time the ballots presented the following three options with the request that the voter mark the "yes" or "no" box:

1. I want Congress to enact S.958 to authorize the distribution of the judgment funds awarded to the Western Shoshone in Docket 326-K plus interest to be paid 100 percent per capita.

54. Author Thomas E. Luebben's notes (complied in his capacity as counsel to the Yomba Shoshone Tribe (on file with authors).
55. Receipt of a share of the judgment funds under this section shall not be construed as a waiver of any existing treaty rights pursuant to the 1863 Treaty of Ruby Valley, inclusive of all Articles I through IX, and shall not prevent any Western Shoshone Tribe or Band or individual Shoshone Indian from pursuing other rights guaranteed by law.
S.958, 107th Cong. § 2(9) (2001). If the purpose of this provision was to preserve Western Shoshone land and treaty rights, it was defective because it lacked essential language that would set aside the bar of section 22(a) of the Indian Claims Commission Act.
56. Although present in the room, Carrie Dann was not allowed to speak. Interview with Carrie Dann (Mar. 21, 2002).
57. Interview with Steven Tullberg, counsel for Mary and Carrie Dann (Mar. 21, 2002).
59. Id.
2. I support one quarter (1/4) degree Western Shoshone blood requirement for eligibility to share in the 326-K judgment fund distribution as stated in S.958.

3. I support Section 3, the Western Shoshone Educational Trust Fund of S.958 to authorize the Distribution of the judgment funds awarded to the Western Shoshone in Docket 326-A-1 and 326-A-3.60

Once again, voters were given no option for a land settlement. The results again overwhelmingly favored 100 percent per capita distribution.61 At the suggestion of Senator Reid, the ballots were accompanied by a "fact sheet" that stated the following:

The United States Supreme Court has ruled that claims to tribal aboriginal land title were extinguished upon the payment into the U.S. Treasury of judgment funds awarded under Docket Numbers 326-K, 326-A-1, and 326-A-3 by the Indian Claims Commission. Accordingly, the distribution of these funds neither revives any extinguished claims nor extinguishes any existing future claims against the United States government.62

Again, the purpose of this statement was apparently to induce those Western Shoshone who might be concerned that distribution of the judgment fund would adversely affect their land and treaty rights to support the per capita judgment fund distribution despite the lack of provisions for a land base. The statement, however, is simply incorrect: the Supreme Court did not rule in Dann that the title was extinguished upon payment.63 It is correct that distribution will not affect Western Shoshone legal rights based upon aboriginal Indian title or the Treaty of Ruby Valley because the bar of Section 22 of the Indian Claims Commission Act64 has rendered those rights unenforceable. The statement, however, did not alert


61. Letter from Mr. Larry Piffero, Co-Chair, Western Shoshone Claims Steering Committee to Senators Harry Reid and Daniel Inouye, U.S. Senate Committee on Indian Affairs (June 5, 2002) (on file with authors). The letter transmitted the official election results to the Senate Indian Committee, indicating that 1647 voted in favor of the distribution and 156 voted against it.

62. Letter from Senator Harry Reid, U.S. Senate, to Felix Ike, Chairman, Temoak Tribe of Western Shoshone (May 1, 2002) (on file with authors).


Western Shoshone ballot recipients of the political reality that once the judgment fund has been distributed, the United States will undoubtedly assert in the press and in domestic and international forums that the Western Shoshone have been fully and fairly compensated and have no further basis for complaint. Until a distribution bill is enacted, it is clear that Congress must, and eventually will, consider the Western Shoshone situation in the process of enacting a distribution bill. Congress might be persuaded at that time to make good on the Court of Claims' admonishment that the Western Shoshone land advocates' recourse is to Congress.\textsuperscript{65} Western Shoshone tribal governments that oppose a "naked distribution" without provisions for a land base are concerned that they will forever lose the moral high ground and the attention of Congress if the Western Shoshone Claims Distribution Act is enacted. Once the judgment fund is distributed, Congress will have no incentive to revisit the issue.

In mid-July of 2002, the Senate Indian Committee rescheduled the hearing on S.958 for August 2, 2002. This time, however, it limited the witness list to two representatives of the Claims Committee in support of the bill, one representative of the Wells Band Council\textsuperscript{66} in opposition, and two BIA witnesses, including Assistant Interior Secretary for Indian Affairs, Neal McCaleb. Both BIA witnesses testified in support of the bill. A majority of the Western Shoshone tribal governments, the Western Shoshone National Council, and the Dann Band submitted testimony, letters, and resolutions opposing S.958, although they were not allowed to testify at the hearing.

The August 2, 2002, hearing on S.958 was scheduled hastily, giving the Western Shoshone little time to prepare. Notice of the hearing was given only to Temoak Bands Council Chairman Felix Ike by telephone from Senator Reid's office. Chairman Ike then sent a memorandum via facsimile

\textsuperscript{65} Western Shoshone Legal Defense & Educ. Ass'n v. United States, 531 F.2d 495, 503 n.16 (Ct. Cl.) \textit{cert denied}, 419 U.S. 855 (1976). ("If the majority of the Identifiable Group wishes to postpone payment in order to try out the issue of current title, it can, of course, ask Congress to delay making the appropriation and direction which will be necessary to pay the award. \textit{Cf.} Turtle Mountain Band of Chippewa Indians v. United States, 203 Ct. Cl. 426, 454-56, 490 F.2d 935, 951-53 (1974). That course is still open if the majority of the Identifiable Group can be persuaded to follow it.").

\textsuperscript{66} The following are the nine federally-recognized Western Shoshone tribal governments: The Temoak Tribe of Western Shoshone Indians of Nevada, the Battle Mountain Band Council, the Elko Band Council, the South Fork Band Council, the Wells Band Council, the Duckwater Shoshone Tribe, the Ely Shoshone Tribe, the Timbisha Shoshone Tribe, and the Yomba Shoshone Tribe. \textit{See} Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs; Notice, 67 Fed. Reg. 46,328 (2002).
to each of the federally-recognized Bands. The Senate Indian Affairs Committee itself gave the tribes no notice. This conduct demonstrated flagrant disregard for Western Shoshone tribal sovereignty by the U.S. government.

It is noteworthy that in their introductory remarks at the August 2 hearing on S.958, both Senator Reid and Committee Chairman Inouye mentioned the demands of the opponents of S.958 for a Western Shoshone land base. Concurrently, the local Nevada BLM and BIA offices have discussed the possibility of a transfer in trust of BLM lands already permitted for grazing to one of the federally-recognized Western Shoshone tribes.

Longstanding federal policy has been to support tribal governments and respect tribal sovereignty by conducting relations with Indian tribes on a government-to-government basis, as well as consulting with tribal governments on issues that affect them. The manner in which the straw polls were conducted with the apparent involvement and support of the BIA, but without the authorization of any tribal government, and the manner in which the Senate Indian Committee scheduled the August 2 hearing without inviting the tribal governments to testify, or even notifying them, was directly contrary to explicit federal policy.


68. Videotape of Hearing before the Senate Committee on Indian Affairs (Aug. 2, 2002) (on file with authors).

69. Advisory, U.S. Department of the Interior, The Interior Department Announces Consultation Meetings Schedule for Indian Trust Management Proposed Plan (Dec. 6, 2001) (meetings scheduled on proposed plan to consolidate trust asset management under separate unit), available at http://www.doi.gov/news/consultation.htm; Exec. Order No. 13,175, 65 Fed. Reg. 67,249 (Nov. 9, 2000) (Sec. 1: "The United States continues to work with Indian tribes on a government-to-government basis"; Sec. 5: "Each agency shall have an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications."); Bureau of Indian Affairs Government-to-Government Consultation Policy, pursuant to Exec. Order No. 13175 (Sec. VI(A)(5): providing guidelines on giving notice to tribal governments through their tribal Chairpersons unless otherwise specified, and Sec. VI(B)(3)(a): engaging in various forms of consultation such as negotiated rule-making in developing policies related to "tribal self-government, trust resources, treaty and other rights, unless such a process would be inappropriate"); President's Memorandum for the Heads of Executive Departments and Agencies, 59 Fed. Reg. 85 (May 4, 1994) ("Federal Government operates within a government-to-government relationship with federally recognized Native American tribes."); Exec. Order No. 12,866, 29 WEEKLY COMP. FRES. DOC. 1883, 1925–1933 (Oct. 4, 1993) ("regulatory approaches that respect the role of State, local and tribal governments..."; Sec. 4: "to maximize consultation and the resolution of potential conflicts at an early state, to involve the public and its State, local and tribal officials in regulatory planning...").
At this writing, S.958 has been reported out favorably by the Senate Indian Committee, despite the opposition of at least five of the nine federally-recognized Western Shoshone tribal governments, but has not been passed by the Senate. Congressman James Gibbons' companion bill, H.R. 2851, has been referred to the House Natural Resources Committee with no hearings scheduled.

C. Efforts to Negotiate a Resolution of the Land Issue

Western Shoshone tribal communities in Nevada desperately need additional land. The Western Shoshone currently hold approximately 25,300 acres of reservation trust lands and 2400 acres of individual "public domain" trust allotments, less than five one hundredths of one percent of their ancestral territory of more than 60 million acres. These lands include the Battle Mountain Reservation (683 acres), the Duckwater Reservation (3815 acres), the Elko Reservation (193 acres), the Ely Reservation (123 acres), Odgers Ranch (1987 acres), the South Fork Reservation (13,694 acres), the Wells Reservation (80 acres), and the Yomba Reservation (4718 acres).

The need for a negotiated, legislated resolution of the Western Shoshone land and Treaty rights issue was evident to some Western Shoshone leaders as early as 1980. This was not evident to the Interior Department, however. In a written response to a telephonic inquiry from author Thomas E. Luebben, Moody Tidwell, Interior Department Deputy Solicitor, rejected the idea that the continuing existence of Western Shoshone land rights compelled a land claims negotiation as not "appropriate or necessary." Nonetheless, Mr. Tidwell did suggest that land...

---

70. In the 1970s, the Western Shoshone Sacred Lands Association prepared a map of Western Shoshone Country based upon the boundary calls in the 1863 Treaty of Ruby Valley. Interview with Raymond Yowell, supra note 36. Northwest Economic Associates, Vancouver, WA, transferred the Association map to an electronic file and computed the area at 62 million acres in Idaho, Nevada, and California. Interview with Dr. Robert B. McKusick, President, Northwest Economic Associates (Oct. 17, 2001) (hard copies of map on file with authors).

The Indian Claims Commission determined the total area of Western Shoshone Country to be 24 million acres based upon a map prepared by the plaintiffs' expert witness anthropologist, Dr. Omer C. Stewart. Among the differences between Dr. Stewart's map and the Association map are that Dr. Stewart apparently believed the "Shoshonee River" (the northern boundary call in the Treaty) was located in northern Nevada. The elders assert unequivocally that it is the modern Snake River in Idaho. Yowell interview, supra note 35. The Association map also includes much more land in California than Dr. Stewart's map. Dr. Stewart described his work in preparing trial exhibits and maps of Shoshone ancestral lands in The Shoshone Claims Cases, in IRREDEEMABLE AMERICA: THE INDIANS' ESTATE AND LAND CLAIMS 187, 196-200 (Imre Sutton ed., 1985). A striking aspect of Dr. Stewart's work is that he does not mention any effort to interview Western Shoshone people about the location of their ancestral boundaries.

71. 2000 BIA W. REG'L OFFICE ANN. REALTY REP.
transfers could be discussed with the BIA in the context of "developing legislation to authorize distribution of the judgment fund." Following the Ninth Circuit's decision in *Dann II*, the Reagan Administration was more open to Western Shoshone land negotiations. The Western Shoshone National Council had by then been carefully organized to include all of the Western Shoshone tribal governments, the Dann Band, and all other active Western Shoshone political entities. In a letter to Thomas E. Luebben, John Fritz, Deputy Assistant Secretary, Indian Affairs, recognized the Council as the appropriate Western Shoshone political entity to deal with for the purpose of land negotiations.

Four well-attended, formal negotiating sessions were held from May 1985 through January 1986. Although there was initial apparent progress, in the end critical threshold issues were never resolved. In January 1986, the government stated its negotiation goals as first, "[t]o provide a mutually acceptable distribution plan of the money award in Docket 326-K....," and second, "to provide an acceptable and reasonable reservation trust land base in settlement of Article 6, Treaty with The Western Shoshone, 1863...." The Western Shoshone National Council's priority was an immediate moratorium on the disposal of Western Shoshone ancestral lands pending negotiations and confirmation of Western Shoshone land rights.

The National Council was very reluctant to negotiate with the BIA. The Council characterized the Interior Department's negotiating team as a "technical-level team" and demanded that the federal team be led by someone with direct authority from the President, arguing that not only were several different agencies within the Interior Department affected by Western Shoshone land rights, but several federal departments as well.

The National Council also demanded that the government acknowledge the

---

74. O'Connell, *supra* note 4, notes 93-104 and accompanying text.
76. Author Thomas E. Luebben's Notes (compiled in his capacity as Counsel to the Western Shoshone National Council) (on file with authors).
77. Letter from Thornton W. Field, Assistant Solicitor, Branch of Lands and Minerals, Division of Indian Affairs, to Jerry Millett, Chief, Western Shoshone National Council (Jan. 30, 1986).
78. Luebben's Notes, *supra* note 76.
continuing existence of a Western Shoshone claim to use and occupancy, and, as an essential prerequisite to good faith negotiations, stay the Dann litigation. In response to a letter from National Council Chief Jerry Millett strongly stating the Council's position, by letter of June 30, 1986, the head of the federal team declared that "further negotiations at this time would be futile" and "the Department does not recognize any valid legal claim to Western Shoshone tribal ancestral lands..." Although neither side ever formally declared the negotiations at an end, no further meetings were held.

A second negotiation effort was begun in the last months of the first Bush Administration in 1992. In May, Senators Bryan and Reid of Nevada wrote the Chairman of the Senate Select Committee on Indian Affairs, Daniel Inouye, "to request that the Committee meet with the leaders of the 'core tribes' and other interested parties to determine whether or not there is the basis for an acceptable settlement." In June, Senator Inouye wrote to Tim Glidden, Counselor to the Secretary, "requesting the establishment of an inter-agency negotiations team which will ...assist in the development

---

80. On November 12, 1975, William L. Benjamin, Acting Director, Office of Trust Responsibilities, BIA, had written a remarkable memorandum to the Interior Department's Solicitor for Indian Affairs, stating,

Enclosed is a copy of a letter from Mr. Tom Delahanty, Jr., Lynbrook, New York forwarded to us for consideration by Senator James Buckley. Mr. Delahanty refers to the Treaty of 1863 with the Western Shoshone and alleges that the land was never taken legally by the United States, so therefore the land is still theirs. Also they have the right to hunt on the lands referred to. Our review of the treaty and Executive Orders indicates that Mr. Delahanty is correct. It is requested that a review of the matter be conducted by your office to determine land ownership and the hunting and fishing rights of the Western Shoshone Indians.

Memorandum from William L. Benjamin, Acting Director, Office of Trust Responsibilities, to the Interior Department Solicitor, Indian Affairs (Nov. 12, 1975) (on file with authors).

By 1980, the government had clarified its position, stating, "The United States takes the position that the title of the Western Shoshone to the aboriginal lands in Nevada has been extinguished as of 1872." Letter from Thomas W. Fredericks, Assistant Secretary of the Interior, Indian Affairs, to Jerry Millett, Chairman, Duckwater Shoshone Tribe, and Raymond Yowell, Western Shoshone Sacred Lands Association (Nov. 17, 1980).

In 1986, the Shoshone believed that the status of aboriginal Indian title was still very much at issue in the Dann litigation. Letter from Jerry Millett, Chief, Western Shoshone National Council, to Thornton W. Field, Assistant Solicitor, Branch of Lands and Minerals, Division of Indian Affairs (May 28, 1986) (on file with authors).

81. Letter from Jerry Millett, supra note 80.

82. Letter from Thornton W. Field, Assistant Solicitor, Branch of Lands and Minerals, Division of Indian Affairs, to Jerry Millett, Chief, Western Shoshone National Council (June 30, 1986) (on file with authors).

83. Letter from Senators Richard Bryan and Harry Reid to Daniel Inouye, Chairman, Select Committee on Indian Affairs, U.S. Senate (May 12, 1992) (on file with authors).
of a legislative proposal..." Mr. Glidden discussed the Western Shoshone situation with Cy Jamison, Director of the BLM. Mr. Jamison indicated his willingness to initiate negotiations with the Western Shoshone for the return to Western Shoshone control of BLM lands. Mr. Glidden wrote Senate Indian Committee Chairman Inouye on July 27, 1992, stating the Interior Department's readiness to name a negotiation team. Unfortunately, the first Bush Administration ended before any negotiations could take place.

Western Shoshone efforts to initiate a new round of land negotiations continued. On January 19, 1994, Interior Secretary Bruce Babbitt met with a large Western Shoshone delegation in Denver, Colorado, to begin negotiations. Secretary Babbitt delegated the day-to-day work to Counselor to the Secretary, John Duffy. Several bi-lateral negotiations meetings were held between a "federal settlement team" headed by Mr. Duffy and a Western Shoshone negotiating team representing all of the federally-recognized Western Shoshone tribal governments, the Dann Band, and the Western Shoshone National Council. These meetings culminated in a 1995 offer of settlement from the federal team. The federal offer was to allow Western Shoshone tribes to purchase at fair market value parcels of land listed on the BLM's land management disposal list within 20 miles of their respective, existing reservations. The federal team proposed that Western Shoshone ICC judgment funds be used for these purchases.

The Western Shoshone negotiators rejected the proposal because it involved only small, isolated parcels, in contrast to the large block acreages required by the Shoshone communities. In addition, it was politically impossible for the Shoshone leadership to advocate the use of ICC judgment funds for this purpose because of the expectation of a large per capita distribution that the claims attorneys and the BIA had fostered over the years. Most important was the manifest unfairness of reselling to the Shoshone at current fair market value what the government had just acquired, sometime between 1979 and 1989, for the 1872 value. The focus of the federal settlement team continued to be distribution of the judgment fund, however, with Western Shoshone land recovery treated as a secondary matter. Sporadic land negotiation meetings continued between

84. Letter from Daniel K. Inouye, Chairman, Select Committee on Indian Affairs, U.S. Senate, to Mr. Tim Glidden, Counselor to the Secretary, U.S. Department of the Interior (June 22, 1992) (on file with authors).
85. Interview with Timothy Glidden, Counselor to the Secretary, U.S. Department of the Interior (Mar. 20, 2002).
86. Id.
87. Letter from Timothy W. Glidden, Counselor to the Secretary, Department of the Interior, to Daniel K. Inouye. Chairman, Select Committee on Indian Affairs, U.S. Senate (July 27, 1992) (on file with authors).
federal officials and various Western Shoshone tribal leaders through 1997, but this effort eventually petered out.

There are no ongoing land recovery negotiations between the Western Shoshone tribal governments, the Western Shoshone National Council, the Dann Band, and the United States. The Executive Branch has forgotten the representations it made about land return during the Reagan Administration. The "payment" of the ICC judgment to the Western Shoshones remains a legal fiction. As discussed, supra, Part II.A, a new Western Shoshone Claims Committee, working with the BIA and Nevada Senator Harry Reid, is seeking legislation to distribute the judgment fund. Most Western Shoshone tribal governments and political entities are resisting that effort because it does not provide for a land base.

Tragically for the Western Shoshone, the Carlin Gold Belt has been discovered in Western Shoshone Country, and it is now one of the richest mining districts in the world. Western Shoshone ancestral lands are regularly being appropriated by mining companies, many of them foreign, under the General Mining Law of 1872. As a result, the non-Indian population in northern Nevada has increased enormously. Of even greater significance is the realization that the last of Nevada's untapped water supplies lies beneath the many great north-south trending valleys of Shoshone Country. Since the 1970s, the political practicality of a generous and painless settlement has steadily diminished.

III. PROCEEDINGS IN INTERNATIONAL FORUMS

Despite the failure of domestic legal proceedings and administrative agencies to redress the harms they have suffered, the Western Shoshone continue to seek review and recognition of the wrongs done to them by the U.S. government. They have initiated proceedings asserting violations of their human rights under international law in two distinct international forums. The first claim, Dann v. United States, was filed in the Inter-American Commission on Human Rights of the Organization of the American States (IACHR or the Commission), within the regional, inter-American system for the protection of human rights. The second claim was initiated before the Commission for the Elimination of Racial

---

88. O'Connell, supra note 4, at 789.
89. See CHRISTOPHER SEWALL, DIGGING HOLES IN THE SPIRIT (1999). For example, in 1997 alone, $2,397,005,064.00 worth of gold was produced from Western Shoshone ancestral lands. Id. at 20.
90. General Mining Law of July 1, 1872, 30 U.S.C. §§ 22 et seq. The law allows miners to "stake" an unlimited number of 20-acre claims and to purchase the land from the federal government for five dollars per acre (43 U.S.C. §§ 3862.4-6) when an economic discovery of minerals is made.
Discrimination (CEDR) of the United Nations, within the global, or universal, system for the protection of human rights.\textsuperscript{91}

A. IACHR Proceeding

In 1993, the Danns filed a petition with the Organization of American States' Inter-American Commission on Human Rights.\textsuperscript{92} The IACHR is an independent body of the Organization of American States (the OAS) created to promote the observance and defense of human rights by its member states. As a member of the OAS—a regional agency affiliated with the United Nations that governs the relationships among the nations of North, Central, and South America—the United States is bound by the human rights principles set forth in the American Declaration on the Rights and Duties of Man (the American Declaration). In their petition, the Danns alleged that by denying them the use of their aboriginal and Treaty lands and continuing to apply discriminatory legal doctrines, the United States deprived the Dann sisters of their human rights under Articles II (right to equality before the law), XVII (right to recognition of juridical personality and civil rights), and XVIII (right to a fair trial) under the American Declaration. The IACHR requested three times that the U.S. government stay any action pending the Commission's investigation of the Danns' petition. The United States never responded substantively to those requests.\textsuperscript{93}

In response to the Danns' petition, the U.S. government asserted that the Danns had not exhausted all domestic legal remedies, characterizing its own conduct as demonstrating a good faith effort at resolving the matter.\textsuperscript{94} The United States maintained that, although the Danns' claims had been fully litigated in the courts of the United States and "title had been extinguished by the lengthy litigation in the case in the

\textsuperscript{91} Both claims have been brought under the auspices of the Indian Law Resource Center, with S. James Anaya serving as Special Counsel and with the participation of staff attorneys from its offices in Helena, Montana, and Washington, D.C. For a further description of the inter-American human rights system with respect to indigenous peoples, see also S. James Anaya & Robert A. Williams, Jr., \textit{The Protection of Indigenous Peoples' Rights over Lands and Natural Resources Under the Inter-American Human Rights System}, 14 \textit{Harv. Hum. RTS. J.} 33 (2001).


\textsuperscript{94} Dann Preliminary Report, supra note 92, ¶¶ 76-94.
United States Courts including the Supreme Court's decision in 1985," the Danns had not exhausted all domestic remedies. The United States asserted that it had tried to resolve the matter administratively through BLM procedures, but the Danns had refused to discuss the matter or remove their excess livestock from the "public domain" lands. The government pointed to the Supreme Court's ruling determining that the establishment of a trust account for the Court of Claims award in *Western Shoshone Identifiable Group v. United States* was sufficient action to constitute payment and discharged the United States from further obligation.95 The United States further asserted that, should the Danns wish to pursue litigation, they still had a claim available under "individual tribal aboriginal title."96 The Danns have rejected this legal theory because it does not allow for the vindication of the land and treaty rights of the Western Shoshone Nation as a whole: it would force the Dann sisters to assert individual land rights to the exclusion of other Western Shoshone. The Dann sisters have consistently asserted that Western Shoshone ancestral lands are held by the Western Shoshone Nation, not individuals, and are protected by the Treaty of Ruby Valley.97

On September 27, 1999, the IACHR determined that, despite the arguments of the United States, the Danns' petition was admissible because

95. *Id.* ¶ 76.
96. *Id.* ¶ 92; Dann Admissibility Report, *supra* note 93, ¶¶ 25, 61-71.
97. See O'Connell article discussion *supra* notes 136-137 and accompanying text. Particularly relevant to the Western Shoshone case is the recent holding of the Inter-American Court of Human Rights in The Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua (the *Awas Tingni* case), Case 79, Inter-Am. Ct.H.R. ser. C (2001). Although the Inter-American Court interprets only the American Convention on Human Rights, the IACHR interprets the same right to property in the American Declaration in light of the court's decisions to provide consistency within the inter-American system for the protection of human rights. In the *Awas Tingni* case, the court adopted a broadened definition of the right to property, recognizing indigenous peoples' close relationship with their lands. The court held that indigenous peoples' traditional use and occupancy of their lands was sufficient for the government to formally recognize their right to property. *Id.* ¶ 151. The court further stated that

[a]mong indigenous peoples there is a communitarian tradition regarding a communal form of collective property of the land, in the sense that *ownership of the land is not centered on an individual but rather on the group and its community. Indigenous groups, by the fact of their very existence, have the right to live freely in their own territory; the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival. For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.

*Id.* ¶ 149.
it raised "a prima facie violation of a human right" of Articles II, XVII, and XVIII of the American Declaration. In reaching its decision, the Commission cited the lengthy litigation and history of the case, the Danns' efforts to resolve the disputes administratively, and the United States' failure to prove the existence, effectiveness, and non-exhaustion of domestic legal remedies. The Commission further placed itself at the disposal of the parties in view of reaching a friendly settlement.

In October of 2001, the Commission transmitted to the United States a non-public, preliminary report, finding the United States in violation of Articles (right to equality before the law), XVIII (right to a fair trial), and XXIII (right to property) of the American Declaration. The United States made public its observations on that report and requested that they be published in the Commission's next annual report.

98. Dann Admissibility Report, supra note 93, ¶ 91.
99. Id. ¶¶ 78-83.
100. Observations of the Government of the United States to the Inter-American Commission on Human Rights Report No. 113/01 of October 15, 2001, concerning Case No. 11.140 (Mary and Carrie Dann) (Dec. 17, 2001), at 1, 3. Although the Commission's report was not initially made public, the government made its own observations public via facsimile transmission to a Nevada public radio station (copy on file with authors). Because communications between a government and the Commission are considered of a quasi-diplomatic nature, a government would not usually make its observations public during the ongoing resolution of a case before the Commission. However, a government is not obligated to keep its own communications confidential, only those of the Commission. Pursuant to Article 43(2) of the Inter-American Commission's rules of procedure, available at www.oas.org, a government is not authorized to publish a report until the Commission has formally adopted a decision regarding publication of the report. This decision is usually in the form of inclusion of the report in the Commission's Annual Report to the OAS General Assembly. In its observations, the U.S. contentions that the Commission's report was in error can be summarized as follows:

1. the "fourth instance" principle precluded the IACHR from reviewing U.S. judicial proceedings that "fully and fairly" litigated the matter;
2. the IACHR lacked jurisdiction to consider events related to the Indian Claims Commission Act of 1946;
3. the American Declaration was not binding on the United States; and
4. emerging and contemporary international human rights norms were not applicable to this case.

These arguments were essentially objections to the admissibility of the case, and no real defenses were asserted. The government maintained that "the Danns' contentions regarding the alleged lack of due process in the Indian Claims Commission proceedings were fully and fairly litigated" in the U.S. courts and need not be reconsidered in proceedings before the Commission. The United States also asserted that the Commission lacked jurisdiction to make determinations on the procedures developed under the Indian Claims Commission Act as the Act predated U.S. ratification of the OAS Charter. See Indian Claims Commission Act of 1946, ch. 359, 60 Stat. 1049 (formerly codified as amended at 25 U.S.C. §§ 70-70v-2 (1976)) (setting forth jurisdiction of the Act as only over claims occurring prior to Act's approval); Charter of the Organization of American States, adopted in Bogotá on April 30, 1948, during
On July 29, 2002, in response to a request from the plaintiffs Mary and Carrie Dann, and contrary to its established practice, the Commission released the preliminary report, citing the government's publication of portions of it. Further, the Commission indicated it was aware of the August 2, 2002, hearing on S.958 before the Senate Committee on Indian Affairs and noted that the legislation was moving ahead despite the "deficiencies identified by the Commission" in its preliminary report. The report concluded that in its treatment of the Danns and its disregard of Western Shoshone land rights, the United States had violated Articles II, XVIII, and XXIII of the American Declaration. The Commission also concluded that the newly-evolved indigenous rights principles were applicable in this instance because their widespread acceptance was evident in other human rights instruments.

In its report, the Commission provides a lengthy and detailed analysis of the ICC proceedings and the domestic litigation in United States v. Dann. The IACHR concluded that the issue of extinguishment of Western Shoshone title to their ancestral lands was left "without definitive

the Ninth International Conference of American States, ratified by the United States on June 15, 1951 (as amended in Basic Documents Pertaining to Human Rights in the Inter-American System (2001), OEA/Ser.L/V/1.4 rev.8, at 1, available at www.oas.org). Thus, in the years prior to 1946, the United States had not yet incurred the international legal obligation to respect human rights as set forth in the OAS Charter.

Finally, the United States asserted that the Commission's interpretation of the human rights principles of the American Declaration in light of the applicable principles of the OAS Proposed American Declaration on the Rights of Indigenous People (approved by the Inter-American C.H.R.at its 1333rd session Feb. 26, 1997, OEA/Ser.L/V/II.95. doc. 7, rev. 1997, at 654-76), particularly the right to property, was inappropriate because the draft declaration had not yet been ratified. According to the reasoning of the United States, the principles governing and the content of the right to property in the unratified draft declaration were not widely enough accepted to be applicable in these circumstances.

In earlier pleadings, the Danns had responded to those assertions by stating that their claims had not been "fully and fairly litigated" in the U.S. courts. In fact, the basic issue of who owns the land has still never been litigated in the U.S. legal system. They also asserted that the harm caused by the government's conduct is ongoing, and continuing to the present, thus contemporary human rights norms are indeed applicable. This is so particularly in light of the pervasiveness of these contemporary norms in other international human rights instruments such as the Draft United Nations Declaration on the Rights of Indigenous Peoples (adopted by the U.N. Subcommission on Prevention of Discrimination and Protection of Minorities, Aug. 26, 1994, E/CN.4/Sub.2/1994/45) and the International Labor Organization's Convention (169) Concerning Indigenous and Tribal Peoples in Independent Countries (International Labor Organization Convention (No. 169 of 1989) Concerning Indigenous and Tribal Peoples in Independent Countries (entered into force Sept. 1991)).

102. Id. ¶¶ 130-131.
substantive adjudication by the United States courts." Further, the Commission concluded that the processes established by the ICC were not sufficient to comply with contemporary international human rights norms, principles, and standards that govern the determination of indigenous property interests and that the collective interests of the Western Shoshone people were not effectively served by the process because the government neither engaged in meaningful consultation with the Western Shoshone on key issues nor attempted to redress the evident lack of effective collective representation of the Western Shoshone people in the ICC proceedings. These conclusions parallel those expressed in the analysis of the ICC proceedings provided in the O'Connell article.

The IACHR recommended, first, that the United States provide the Danns with an effective remedy to determine the status of title to their ancestral lands, including legislative or other measures necessary to ensure respect for the human rights found to have been violated by the United States. Secondly, the IACHR recommended that the government should review its existing legislation, procedures, and practices to ensure that they respect the property rights of indigenous persons as enshrined in the American Declaration.

Pursuant to article 45(1) of its rules of procedure, the IACHR may publish a final report if “within three months from the transmittal of the preliminary report to the State in question the matter has not been solved.” The IACHR released the preliminary report well after the three-month period had passed and no efforts to resolve the matter had been undertaken; however, the parties still anticipate publication of a final report with the Commission’s conclusions and recommendations.

B. CERD Proceeding

On August 23, 1999, the Yomba Shoshone Tribe, a band of the Western Shoshone Nation and a federally-recognized tribal government, submitted a request for urgent action to the U.N. Committee for the Elimination of Racial Discrimination under its urgent action/early warning

103. Id. ¶ 137.
104. Id. ¶¶ 139-141.
procedure. The CERD was established by the International Convention on the Elimination of All Forms of Racial Discrimination, a treaty to which the United States is a party, to monitor and review actions by states to fulfill their obligations under the convention. The request for urgent action claims that the rights of the Western Shoshone people have been and are being violated by the United States in a discriminatory fashion and asks that CERD direct the United States to halt actions that threaten irreparable harm to the Western Shoshone people and to enter into negotiations with Western Shoshone leaders to resolve Western Shoshone land claims.

CERD asked the U.S. government to respond to those claims and, at its March 2001 working session, the Committee requested additional briefing papers on indigenous issues, including the Western Shoshone situation. In August 2001, the United States appeared before CERD and was asked to answer specific questions regarding Western Shoshone land rights but stated its inability to do so. In its concluding observations on the session, CERD expressed its concern with the “persistence of the discriminatory effects of the legacy of...destructive policies with regard to Native Americans” generally and with the U.S. government’s actions affecting the Western Shoshone in particular and recommended that the U.S. government “should ensure effective participation by indigenous communities in decisions affecting them, including those on their land rights, as required under article 5(c) of the Convention.” The United States must now respond to that report by November of 2003.

---


110. Fishel interview, supra note 108.

111. Id. The U.S. representative stated that, because of the details and legal complexities of the Western Shoshone litigation, the United States would need to do further research and consult with the Department of the Interior for a more detailed answer. Id.


113. Id. ¶ 21.
C. Objectives of the International Proceedings

While neither of these tribunals can issue enforceable orders, the release of their respective reports has been given substantial media coverage, increasing public awareness of the issues the Western Shoshone face as well as drawing attention to the government’s failure to effectively uphold their rights in their ancestral lands. Further, the findings, conclusions, and recommendations of the tribunals have significantly contributed to the evolution of human rights standards that include the collective interests of indigenous peoples. The Western Shoshone hope that by publicizing these failures of the U.S. government they will favorably influence the outcome of their continuing land rights struggle.

IV. CONGRESS ESTABLISHES A RESERVATION FOR THE TIMBISHA SHOSHONE TRIBE OF DEATH VALLEY

Congress recently addressed a portion of the Western Shoshone land issue by providing a reservation for the Timbisha Shoshone Tribe (the Timbisha), a Western Shoshone band located in Death Valley, California.\(^\text{114}\) While the legal history of Western Shoshone aboriginal title in California is different than in Nevada,\(^\text{115}\) overall the story of the Timbisha is remarkably similar to that of the Danni, and over the years they have been close allies in the land rights struggle.\(^\text{116}\) The Timbisha experience in negotiating what became the Timbisha Shoshone Homeland Act may serve to inform the current debate surrounding Western Shoshone land rights in Nevada, where the majority of Western Shoshone live.

The Timbisha, one of the original constituent entities of the Western Shoshone National Council, have lived in their native valley and surrounding areas for thousands of years, adapting as well as they could to the relatively recent non-Indian incursions.\(^\text{117}\) Despite early settler harassment, they managed to cling to a small village area they could continuously occupy. Later, the National Park Service destroyed their


\(^{115}\) In Barker v. Harvey, 181 U.S. 481, 491 (1901), the Supreme Court found that the California Private Land Claims Act of Mar. 3, 1851, 9 Stat. 631, required California Indians to present aboriginal Indian title claims to a board of commissioners established by the Act within two years after enactment. No Indians did so; few if any were even aware of such a requirement. Consequently, the ICC found that Western Shoshone aboriginal Indian title in California was extinguished as of March 3, 1853. Shoshone Tribe of Indians v. United States, 11 Ind. Cl. Comm. 387, 415 (1962).

\(^{116}\) Interview with Carrie Dann and Pauline Esteves, former Chairperson, Timbisha Shoshone Tribe (Oct. 14, 1996).

\(^{117}\) Interview with Pauline Esteves, Timbisha elder and former Tribal Chairperson (Oct. 14, 1996).
homes and tried to drive them from Death Valley National Park. Tribal
member Barbara Durham has described the Timbisha's experience:

Our people maintained an existence. Even through the days of the National Park Service trying to do everything in their power to force the people to leave their Homelands. There was a Park policy to eliminate the local Indians. The adobe homes were washed down by high-power water hoses, or they were set on fire when the people left the Valley for the highlands during the summer.118

The California Desert Protection Act of 1994 included a provision directing the Secretary of the Interior, “in consultation with the Timbisha Shoshone Tribe and relevant Federal agencies,” to conduct a study “to identify lands suitable for a reservation for the Timbisha Shoshone Tribe that are located within the Tribe’s aboriginal homeland area within and outside the boundaries of Death Valley National Monument [and Park].”119 That study produced a Draft Secretarial Report120 and eventually led to the passage of the Timbisha Shoshone Homeland Act,121 which established a 7600-acre reservation in several parcels surrounding Death Valley National Park and one 314-acre parcel within the park itself at Furnace Creek, the cultural, political, and geographical heart of the Timbisha homeland.122 In addition, the Act grants the Timbisha Shoshone traditional-use rights and establishes a special-use area in the National Park wherein the Timbisha have non-exclusive rights.123 There are no references in the secretarial report to the legal history of the Timbisha or the Western Shoshone, and on the surface at least, the report and Act seem to be based upon the long and close relationship between the Timbisha people and their lands rather than upon any legal claim.

Although it is encouraging to other Western Shoshone that the Timbisha were able to obtain congressional confirmation to ownership of a portion of their traditional homeland within a National Park, it is worth noting that the negotiations were arduous and the first round of talks broke

120. See TIMBISHA TRIBAL HOMELAND DRAFT REPORT, supra note 118, at ii.
down. From the outset of the first phase, the negotiating federal agencies and the tribe had differing ideas of what the nature and outcome of the talks were to be. The Timbisha, on the one hand, viewed the discussions as bi-lateral negotiations between two sovereign entities regarding its land base, the results of which would then be presented in a unified manner to Congress. On the other hand, the federal agencies perceived their objective as completion of the study mandated by the provision in the Desert Protection Act, "in consultation with" the tribe. In fact, the National Park Service controlled the content of that study, much to the consternation of the tribe.

Following the breakdown of the first round of negotiations, the tribe took actions that resulted in an atmosphere of greater respect for the tribe by the federal government. The Timbisha began a political organizing campaign, writing letters to Congress and publicizing its cause nationally and internationally. Through these actions, the tribe was able to leverage support of other native groups and the National Congress of American Indians (NCAI) and generate negative publicity about the government’s anti-Indian policies. The tribe also sued the BLM for allowing gold mining on tribal lands without prior consultation. Finally, in preparation for a lawsuit against the Department of the Interior, the tribe submitted extensive requests for information to the National Park Service and the BLM under the Freedom of Information Act.

The second round of negotiations began in January 1998, proceeding under a specific framework of negotiation rules defining the process by which the negotiations would take place. The parties determined beforehand who would represent each side at the first meeting. Prior to sitting down at the first meeting, the tribe had explicitly requested by letter that the federal government agree to undertake government-to-government negotiations that would result in a written agreement to recommend to Congress the lands to be set aside as the Timbisha homeland. The government did not agree to include this point in the official framework of

---

124. Steven Haberfeld, Government-to-Government Negotiations: How the Timbisha Shoshone Got Its Land Back, 24 AM. INDIAN CULTURE & RES. J. 127, 138 (2000). Dr. Haberfeld is founder and executive director of Indian Dispute Resolution Services (IDRS), a national Indian non-profit organization that provides cross-cultural communication and conflict resolution training to tribal leaders and government officials. He was the principal designer of the negotiation process federal and tribal teams used to reach an agreement that led to the Timbisha Shoshone Homeland Act. Id. at 127.
125. Id. at 138.
126. Id. at 136-37.
127. Id.
128. Id. at 139-41.
the meeting until the meeting was actually in session. Under these conditions, the negotiations went much more smoothly and resulted in the agreement that led to the Timbisha Shoshone Homeland Act. Section 6 of the Act, Implementation Process, subpart (a) provides

[government-to-government agreements. In order to fulfill the purposes of this Act and to establish cooperative partnerships for purposes of this Act, the National Park Service, the Bureau of Land Management, and the Tribe shall enter into government-to-government consultations and shall develop protocols to review planned development in the Park. The National Park Service and the Bureau of Land Management are authorized to enter into cooperative agreements with the Tribe for the purpose of providing training on the interpretation, management, protection, and preservation of the natural and cultural resources of the areas designated for special uses by the Tribe..."

As part of the Congressional Record for the August 2, 2002, hearing on S.958, the Western Shoshone Claims Distribution Act, Professor Charles Wilkinson submitted a letter to Senator Inouye recommending that Congress approve legislation mandating the negotiation of Western Shoshone land claims, using the Timbisha Shoshone Homeland Act as a model. In Professor Wilkinson’s opinion, the objective of such negotiations would be to secure an adequate land base for the Western Shoshone. He further states that Congress should take no action to distribute the ICC judgment fund unless the distribution is an outcome of the negotiations. He emphasizes that the nature of the negotiations must be government-to-government with the members of the federal negotiating team such as to give an indication of the high priority of the government to serve the interests of the tribe as well as the federal government. As in the second round of the Timbisha negotiations, both teams should undertake a study to determine which lands are most appropriate for the Western Shoshone land base. He goes on to state that in his opinion, the above-cited provision in the Desert Protection Act “did not create a process designed to accomplish the stated goals of the Congressional mandate” because the resolution of the Timbisha need for a homeland was not a priority for the federal agencies involved. He cautions against the pitfalls of this style of

129. Id. at 144-45.
131. Letter from Professor Charles Wilkinson, University of Colorado at Boulder School of Law, to Senator Daniel Inouye, Chairman, Senate Committee on Indian Affairs 1-2 (Sept. 6, 2002) (on file with authors). Professor Wilkinson participated as neutral facilitator in the second round of the negotiations of the Timbisha Shoshone Homeland Act.
132. Id. at 2.
negotiation—one in which the interests of the parties are fundamentally at odds. He attributes the success of the second round of Timbisha negotiations to the recognition by both parties that the interests of the tribe and the National Park Service were “served by ‘recognizing their coexistence on the same land and by establishing partnerships for compatible land uses.’”

The negotiation process establishing the Timbisha Shoshone Homeland Act could provide valuable lessons to the Western Shoshone who continue to assert their land rights. Perhaps most importantly, the Timbisha experience demonstrates how a tribe can insist that the government comply with its obligation to begin negotiations in good faith and approach the tribe as an equal. Additionally, the Timbisha Shoshone’s other actions to mobilize political organization show how a tribe can use forces external to the negotiation process to gain leverage in its bargaining position vis-à-vis the federal government.

V. CONCLUSION

The Western Shoshone land rights issue has spawned one of the strangest courses of litigation in American legal history. The final outcome of the ICC proceedings and the Dann case is inconsistent with fundamental principles of Anglo-American property law, American constitutional due process requirements and protections for property, and international norms dictating state respect for indigenous peoples’ human rights. Although the federal government insists that the Western Shoshone have had their day in court and their land and treaty rights have been fully and fairly litigated, knowledgeable investigators and legal scholars who take a careful look at the legal and political history of the issue, as did the Inter-American Commission on Human Rights, are likely to agree that the failure of the courts, the relevant federal agencies, and the Congress to honor the 1863 Treaty of Ruby Valley and to protect or restore the ancestral Western Shoshone land base, or a significant portion thereof, cries out for an equitable resolution. No remedy is available in the American courts. The international forums with jurisdiction to review the violations of Western Shoshone human rights by the United States, CERD, and the IACHR have rendered opinions that are precedent-setting but unenforceable. In the absence of litigable rights and claims, the Western Shoshone continue to hold and assert a powerful moral claim. A naked distribution of the judgment fund without providing for a land base simply does not address

---

133. Id. at 3.
134. Id.
the fundamental issue. It is inappropriate under the circumstances and likely to end any chance for significant Western Shoshone land recovery.

There is optimism among some Western Shoshone land advocates that the current high level of domestic and international controversy over Western Shoshone judgment fund distribution and land issues will result in bi-lateral negotiations with Executive Administration officials to identify a culturally and economically adequate land base for the Western Shoshone. Many Western Shoshone continue to nurture the hope that members of the Executive Branch and Congress will recognize a moral and international law imperative and exercise the initiative and leadership necessary to confirm Western Shoshone rights in their ancestral lands.