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JOHN D. O'CONNELL*

Constructive Conquest in the Courts: A Legal History of the Western Shoshone Lands Struggle—1861 to 1991

ABSTRACT

Late in the twentieth century federal law courts found that the Western Shoshone still had title to millions of acres of putative public lands in Nevada. However, a claim alleging that the United States had long ago taken all Western Shoshone lands had been filed in the Indian Claims Commission by a tribal government representing only a portion of the tribe. Other Western Shoshone and the tribal government that had filed the claim were not allowed to correct the claim or to refuse the award to protect existing title. Ultimately the courts decided that the fictional nineteenth-century confiscation, assumed by the Claims Commission, would have to be made reality, even as to lands continuously in Indian possession. Congress must now act to correct this manifest injustice and to allow the Western Shoshone to retain an adequate land base.

INTRODUCTION

Many places in the West claim to have been America's last frontier, but the Great Basin, with its echelons of valleys and ranges, is surely the largest expanse of land in the lower 48 states that can legitimately make that claim. For the first hundred years after its inclusion within the United States, the only white occupants were prospectors, herdsman with roaming flocks of sheep, isolated ranchers, and the residents of the few and widely scattered towns.

Because of the Basin's remoteness and lack of population, it became the home of nuclear testing in the United States and, in the late 1970s, was to be the locus for the land-mobile MX Missile System, whose multitude of valley-filling "race track" bases, had it been built, would have constituted the largest military project in history. The Great Basin now contains one of the richest gold-mining districts in the world and an expanding population.

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It is also the eons-old homeland of the Newe, the indigenous hunter-gatherers who came to be known to the late-arriving non-Indians as the Western Bands of the Shoshone Nation, or the Western Shoshone.

In the fall of 1973, the author received a call for legal assistance from Mary and Carrie Dann, Western Shoshone herders of cattle and horses who were being threatened with impoundment of their stock for failing to obtain grazing permits from the Bureau of Land Management (BLM). At a meeting with the Danns and a group of traditional Shoshone elders, the elders explained through younger interpreters that the Western Shoshone had a treaty right to the use of the unoccupied lands of their ancestral territory until reservations were established for them. They said those treaty rights were now being ignored by the federal and state governments. The BLM was not only challenging their right to graze, it was chaining down stands of the pine-nut trees, which provided the Indians' traditional subsistence food. Nevada state game wardens were denying their treaty rights to hunt, fish, and trap.

The Shoshone elders also described what they felt to be an even more serious threat, an effort by attorneys to prosecute on their behalf a claim against the United States in the Indian Claims Commission (ICC) for a supposed nineteenth-century "taking" of all Western Shoshone lands. They feared that for them to pursue that claim and accept money for their land would be to abandon their treaty rights and to sell their Mother Earth. They described a twenty-year-long battle to stop the ICC claim. It seemed unlikely that these uneducated desert dwellers had a better grasp of the law than the attorneys who were representing them in the ICC and who were well known for their expertise in Indian law. Nonetheless, these elders exuded a quiet confidence that inspired the author's belief that their theory deserved to be investigated and tested.

An investigation was made and a defense to the trespass notice was launched to test the theory that Western Shoshone title had never been extinguished and that the Indians had a treaty right to use unoccupied lands within their territory. The BLM was induced to abandon its administrative enforcement efforts and to file a civil trespass action against the Danns in U.S. District Court in Reno. Thus, the United States of America, for the first time in the long and sordid history of its relations with the indigenous population, sought the aid of a court in evicting Indians from their homeland. And in so doing, it put down its sword of conquest and its shield of sovereign immunity and took up the burden of an ordinary plaintiff in the ancient action of trespass to property—the burden of proving superior title to the defendants who happened, in this instance, to be in possession under one of the oldest titles on Earth.

This article will demonstrate that the United States was unable to prove its superior title to the Western Shoshone lands and that District Judge Bruce Thompson eventually refused the government's request for

trespass damages and equitable relief against the Danns. However, the Shoshone elders' suspicion of the ICC proved well founded. The government was able to preclude assertion of the Western Shoshone title after 1979 by assisting the claims attorneys in pushing the Western Shoshone claim through the ICC and by accepting, as guardian of the Indians, payment of the ICC award on their behalf despite their continuing protests. By this method, the government of the United States underhandedly appropriated the lands of its wards in the last part of the twentieth century, while creating the illusion that the confiscation had occurred a century earlier. Although at times the lower courts made efforts to confront the reality of the history and the legal status of Western Shoshone title and to devise or force a solution, and at one time a negotiated settlement seemed close at hand, ultimately the judicial branch became the instrumentality for the last great seizure of Native American lands, leaving it to Congress to rectify the injustice.

This history begins with the Treaty of Ruby Valley of 1863, which granted the United States and its citizens limited use of Western Shoshone lands until reservations were established for the Indians and will show how that treaty relationship continued into modern times. Next, this history will describe the complicated course of the claims proceedings and the efforts of the Indians to have the ICC and the Court of Claims correct the erroneous assumption that Western Shoshone lands had all been taken long ago. The story will then backtrack to pick up and follow the course of the trespass case against the Dann sisters and the repeated appeals through the federal court system that paralleled the claims proceedings for five years and extended into the 1990s. This history will also describe the futile attempt of the Indians to refuse the ICC award and the occasional and ineffectual efforts of some high government officials and the trial judge to devise a solution that would allow the Indians to keep some of their lands.

In a separate article that follows in this volume, Thomas E. Luebben and Cathy Nelson will bring the story up-to-date by describing the aftermath of the Dann litigation, including the largely successful efforts to have international tribunals acknowledge the government's violations of international human rights and anti-discrimination agreements, the congressional establishment of a small reservation within Death Valley Park for the California portion of the Western Shoshone, and the current situation. Now, as the government cracks down on Indian ranchers and herdsmen who continue to use their lands, the Western Shoshone and Congress struggle to decide whether Congress should simply distribute the ICC claims money to individual Indians or whether it should also affirm Western Shoshone ownership of some of their lands in Nevada.

I. THE TREATY OF RUBY VALLEY

In 1863, the Western Bands of the Shoshone Nation entered into a Treaty of Peace with the United States at Ruby Valley in what is now central Nevada.¹ Among its provisions, the treaty described the boundaries of Western Shoshone Country, extending from the Snake River in Idaho through Nevada into southern California.² The treaty did not cede title to any Western Shoshone lands; Congress had specifically instructed the treaty commissioners not to extinguish Indian title.³ The treaty granted the United States certain privileges, including rights-of-way to construct telegraph lines, wagon roads, and a railroad to California and permission to engage in mining activity and to establish forts, towns, and ranches in support thereof.⁴ Additionally, the treaty granted the President the authority to establish permanent reservations for the Western Shoshone within their territory. The Indians agreed, in that event, to "abandon the roaming life, which they now lead" and to remove their camps to such reservations.⁵ However, the United States never exercised that option.⁶ Acknowledging

1. Treaty Between the United States of America and the Western Bands of Shoshonee Indians, Oct. 1, 1863, 18 Stat. 689 [hereinafter Treaty of Ruby Valley]; see also 2 INDIAN TREATIES: 1778-1883, at 851-53 (Charles J. Kappler ed., Interland Publishing Inc. 1972) (1904).

2. See Treaty of Ruby Valley, *supra* note 1, at 690, Art. V. The treaty expresses the boundaries in transliteration of the Western Shoshone place names. During the 1970s, members of the Western Shoshone Sacred Lands Association, see *infra* notes 40-41 and accompanying text, conferred with elders throughout Western Shoshone territory to establish the location of these places on a modern map. See also 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*, 42 NAT. RESOURCES J. 801, 817 n.70 (2002).

3. See Cong. Globe, 37th Cong., 2d Sess. 2092 (1862), available at <http://lcweb2.loc.gov/ammem/amlaw/lwgc.html>. The country was in the midst of the Civil War; Congress apparently wanted to secure peaceable passage to the gold fields of California and Western Nevada and to obtain permission for non-Indians to prospect for further minerals in Western Shoshone Country without the expense of a military campaign or supervising and supporting the Indians on a reservation.

4. Treaty of Ruby Valley, *supra* note 1, at 689-90, Art. III & IV.

5. *Id.* at 690, Art. VI.

6. Finding of Fact 5, *United States v. Dann*, 13 ILR 3158, 3158 (D. Nev. 1986), *aff'd in part and rev'd. on other grounds*, *United States v. Dann* (Dann III), 865 F.2d 1528 (9th Cir. 1989). A number of small executive-order reservations were established for local groups of Western Shoshone out of the "colonies" where some Western Shoshone had gathered on the edges of towns and out of ranches in the South Fork, Yomba, and Duckwater areas. But these were merely local arrangements, and the government never argued in *Dann* that they were the reservations anticipated by the treaty to trigger an extinguishment of the Shoshone title to their aboriginal territory. The ICC in *W. Shoshone Identifiable Group v. United States*, 40 Ind. Cl. Comm. 318, 325-28 (1977), had found previously that these reservations were not provided to the Western Shoshone tribe under the treaty and, further, that these reservations were inadequate to support the stock of even those individuals residing there without use of the

that use of the rights-of-way would disrupt Western Shoshone hunting and gathering, the treaty provided for compensation in the form of cattle,⁷ anticipating and encouraging the conversion of the Western Shoshone from a hunter-gatherer to a pastoral lifestyle.⁸

The Treaty of Ruby Valley was never abrogated and remained in full force and effect, at least until payment of the ICC claim,⁹ and the Western Shoshone title to their territory was never extinguished by an act of Congress.¹⁰ Apparently, the government simply forgot about what may have been intended to be its temporary arrangement with the Western Shoshone and came to believe it had stolen Western Shoshone lands, as it had the lands of other tribes. However, during the late 1800s, when the United States was waging wars of conquest against the indigenous peoples of the West, the Great Basin was simply of little interest to non-Indians other than prospectors, ranchers, and roaming sheepherders, all of whom regarded it mostly as a vast commons. Consequently, the Western Shoshone were never subject to conquest, nor were their lands ever purchased wholesale by treaty. Instead, relatively small portions of Western Shoshone lands were settled by non-Indians for ranching, mining, and developing towns in support of those activities, that is, for purposes consistent with the limited concessions of the treaty.¹¹

II. PROCEEDINGS IN THE CLAIMS TRIBUNALS

The Western Shoshone Traditional Council retained an attorney as early as 1932 to enforce their Treaty land rights, but nothing was done.¹² Instead, that attorney eventually allied himself with a prominent Washington, D.C., lawyer, Ernest K. Wilkinson,¹³ who was one of the

surrounding range. The government, in *Dann*, did argue that the establishment of the Duck Valley Reservation on the Idaho border was a fulfillment of the treaty; but the court of appeals held that, since that reservation was not within Western Shoshone Country, as the treaty required, and the great majority of Western Shoshone refused to move there, it did not fulfill the treaty. *United States v. Dann (Dann II)*, 706 F.2d 919, 930 (9th Cir. 1983), *rev'd on other grounds*, 470 U.S. 39 (1985). See further discussion *infra* notes 93-94 and accompanying text.

7. Treaty of Ruby Valley, *supra* note 1, at 690, Art. VII.

8. Finding of Fact 6, *United States v. Dann*, 13 ILR 3158.

9. Finding of Fact 4, Conclusion of Law 2, *id.* at 3158-59.

10. See *Dann II*, 706 F.2d 919, discussed in detail *infra* notes 81-97 and accompanying text.

11. *Id.*

12. Elmer R. Rusco, *The MX Missile and Western Shoshone Land Claims*, 2 NEV. PUB. AFF. REV. 45, 47-48 (1982).

13. *W. Shoshone Identifiable Group v. United States*, 652 F.2d 41, 43 (Ct. Cl. 1981). Mr. Wilkinson's partnership, Wilkinson, Cragun and Barker, continued to represent the Western Shoshone, despite the Western Shoshone's attempt to discharge those lawyers, see *infra* notes 51-52 and accompanying text, throughout the ICC proceedings. In the later years Mr. Robert

creators of the ICC and, subsequently, a Utah politician and president of Brigham Young University. Mr. Wilkinson and his partners (claims attorneys) obtained a Bureau of Indian Affairs (BIA) supervised attorney contract with the Temoak Bands Council, one of the federally recognized tribal governments that represent portions of the Western Shoshone people and territory, and filed a claim on behalf of the Western Shoshone before the ICC in 1951 seeking compensation for a taking of "a large part" of Western Shoshone lands.¹⁴ This case became *Western Shoshone Identifiable Group v. United States*, ICC Docket Number 326K.¹⁵

A. Inherent Problems for Indian Land Rights in the ICC

Congress had passed the Indian Claims Commission Act in 1946 in an attempt to settle all the outstanding claims of Indians against the United States for wrongs committed against them.¹⁶ Important features of the claim system that developed were (1) the Commission could award only money damages for past wrongs, it could not return lands to Indians;¹⁷ (2) no care was taken to determine who owned or controlled the claims (if anyone did besides the claims attorneys);¹⁸ and (3) attorneys were paid a contingency fee based upon the amount of the recovery. In land cases, the amount of recovery was directly related to the amount of the Indians' land that the ICC found the Indians no longer owned, generating a clear conflict of interest between attorneys and clients in those instances where the Indians

Barker took a leading role. Eventually, the claims lawyers received a fee of 2.6 million dollars out of the claims award for their efforts in pushing the Western Shoshone claim through the ICC. See *infra* note 65. As explained in Luebben & Nelson, *supra* note 2, the Western Shoshone have received no actual benefit to date from the ICC award.

14. See *United States v. Dann* (Dann I), 572 F.2d 222, 224-25 (9th Cir. 1978); *W. Shoshone Identifiable Group v. United States*, 35 Ind. Cl. Comm. 457, 461-62 1975.

15. The case when filed bore the caption *Shoshone Tribe of Indians of the Wind River Reservation v. United States*, ICC Docket No. 326. Later, the case was subdivided among the sub-tribes of the Shoshone Nation. As will be seen, the decisions in the case were reported under many different captions.

16. E.g., Russel Lawrence Barsh, *Indian Land Claims Policy in the United States*, 58 N.D. L. REV. 7, 12 (1982).

17. *Id.* at 21; see also Caroline L. Orlando, *Aboriginal Title Claims in the Indian Claims Commission: United States v. Dann and Its Due Process Implications*, 13 B.C. ENVTL. AFF. L. REV. 241, 253-54 (1986).

18. See *Pueblo of Santo Domingo v. United States*, 647 F.2d 1087, 1089-91 (Ct. Cl. 1981) (Nichols, J., dissenting). The ICC did not establish an investigation division as mandated by Congress and instead relied upon an adversary system to obtain its information. ROBERT N. CLINTON, NELL JESSUP NEWTON & MONROE E. PRICE, *AMERICAN INDIAN LAW, CASES AND MATERIALS* 723 (3d ed.1991). As a result, the ICC could not know if all the affected parties were adequately represented by those appearing before the ICC unless the attorneys chose to reveal that.

were still in possession or still had an arguable claim to possession.¹⁹ Once it had been established that Indians had owned lands, the government had no incentive to dispute that it had long ago stolen those lands. If payment of the award for taking lands effectuates an extinguishment of the Indians' title²⁰ and the United States could thereby obtain those lands at nineteenth-century prices,²¹ it was in the government's interest to agree that it had committed that ancient wrong whether or not it had actually done so. Thus, there was a unity of interest in the ICC between the claims attorneys and the government to agree that the Indians' lands had been taken, and that consensus saved the ICC the work of determining if, when, and how each tract was taken.²²

19. Pueblo of Santo Domingo, 647 F.2d at 1090 (Nichols, J., dissenting). The government in its dual role as trustee of the Indians' assets and as the defendant in the ICC also had a glaring conflict of interest, but this ethical dilemma did not seem to restrain the lawyers representing the government in the ICC, MICHAEL LIEDER & JAKE PAGE, *WILD JUSTICE, THE PEOPLE OF GERONIMO VS. THE UNITED STATES* 92 (1997), or give pause to either the BIA agents in the field, see BIA Agent Steve Ferraca addressing a 1972 "claims meeting" in Elko, Nevada, in the documentary film *BROKEN TREATY AT BATTLE MOUNTAIN* (Cinnamon Productions 1974), or the Secretary of the Interior in accepting the ICC award for his Western Shoshone wards despite their protestations. Discussed *infra* notes 113-114, 120, and accompanying text.

20. The commentators seem to agree that it does, apparently in large part, because of the Western Shoshone litigation. See, e.g., Charles F. Wilkinson, *Home Dance, the Hopi, and Black Mesa Coal: Conquest and Endurance in the American Southwest*, 1996 BYU L. REV. 449, 460; John S. Harbison, *Hohfeld and Herefords: the Concept of Property and the Law of the Range*, 22 N.M. L. REV. 459, 491, n.217 (1992). Up until the ICC award became final in the Western Shoshone claims proceeding, government agents insisted that the ICC claim would have no such effect, while the traditional Indians argued that it did; after the award, the parties switched sides on the issue, and the government argued that the Western Shoshone could no longer assert title, while the Danns argued that payment of the claim award had no effect on the title, at least as to those lands still in Western Shoshone possession. The government prevailed, whichever side of the issue it argued in the Western Shoshone litigation. In another case, the government succeeded in convincing a three-judge panel that a pending claim in the ICC for a taking of all Seminole lands would have no effect on the possessory rights of the petitioner Seminoles who were still in possession in the Everglades. *Osceola v. Kuykendall*, 4 ILR F-80, F-82 (D.D.C. 1977). The Seminole cases are discussed in Barsh, *supra* note 16, at 20; Orlando, *supra* note 17, at 261-63.

21. In most claims, the ICC did not award interest from the date of taking. Barsh, *supra* note 16, at 18.

22. The entry of such stipulations to save the "burdensome individual computation of value as of the date of disposal of each separate tract" was encouraged by the claims tribunals. *W. Shoshone Legal Def. & Educ. Ass'n v. United States*, 531 F.2d 495, 500 (Ct. Cl. 1976), *cert. denied*, 429 U.S. 885 (1976). Of course it also avoided the embarrassment of exposing the fact that there were still Indians in occupation of the lands that the lawyers in Washington were assuming had been taken long ago. As it turned out, the use of such stipulations, in a case like that of the Western Shoshone, where the tribal title had not been extinguished and not all of the Indians' lands had actually been taken, had the effect of confiscating lands in the first instance.

B. The ICC Finding that Western Shoshone Lands Had Been Taken and the 1872 Date of Valuation

In 1962, the ICC held that "by gradual encroachment by whites, settlers, and others and the acquisition, disposition, or taking of their lands by the United States for its own use and benefit, or the use and benefit of its citizens, the way of life of [the Western Shoshone] was disrupted and they were deprived of their lands."²³ However, the only issue actually litigated was whether the Western Shoshone had title to begin with; no evidence was submitted or argument held concerning the "taking" of Western Shoshone land,²⁴ let alone extinguishment of their title.²⁵

23. *Shoshone Tribe of Indians of the Wind River Reservation v. United States*, 11 Ind. Cl. Comm. 387, 416 (1962).

24. *United States v. Dann* (Dann I), 572 F.2d 222, 226 (9th Cir. 1978). The Danns had introduced the entire transcript of the proceedings in the ICC claim to date in the district court and represented to that court, *see* Defendants' Memorandum of Points and Authorities in Support of Defendant's Cross-Motion for Summary Judgment at 45, n.78, *United States v. Dann*, CV-R-74-60 BRT (D. Nev. filed Mar. 17, 1975), and to the court of appeals, Brief of Appellants at 5, *United States v. Dann*, 572 F.2d 222 (9th Cir. 1978) (No. 77-1696), that there was no evidence in the ICC record concerning the taking of Western Shoshone lands. The government was unable to designate any such evidence in response to the Danns' discovery request, *see* Defendants' Memorandum of Points and Authorities in Support of Defendant's Cross-Motion for Summary Judgment at 45, n.78, *United States v. Dann*, CV-R-74-60 BRT (D. Nev. filed Mar. 17, 1975), and did not challenge these assertions. Thus the court of appeals had ample grounds to conclude that the "finding" of the ICC that Western Shoshone lands were taken was merely an expression of a common assumption, rather than any considered result of litigation on the question.

25. There is an important distinction between "taking" lands and extinguishing title, although the ICC and the Court of Claims use those terms loosely and interchangeably. *See, e.g., W. Shoshone Legal Def. & Educ. Ass'n v. United States*, 531 F.2d at 501. This can induce confusion, and some commentators have on occasion followed suit, even while criticizing those tribunals' handling of the Western Shoshone cases. *See, e.g., Orlando, supra* note 17, at 266-67. While it might constitute a "taking" within the broadly defined basis for compensation in the ICC, *see Barsh, supra* note 16, at 12-13, merely treating lands as if they were public lands or even granting title to third parties does not extinguish aboriginal title. *United States v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 353-54 (1941). There the Court held that only an act of Congress expressing a clear intent to extinguish aboriginal title could extinguish such title. *Id.* at 354.

It would seem that the decision whether the Indians should seek compensation in the ICC for a taking of lands in the past or assert their unextinguished title would be for the Indians rather than their claims attorneys and the government to make. However, the Western Shoshone were never allowed to make such an election of strategy. *See* Resolution of the Business Council of the Temoak Bands of Western Shoshone, Nevada (Nov. 10, 1976), reproduced in Respondent's Appendix F at F1-F2, *United States v. Dann*, 470 U.S. 39 (1985) (No. 83-1476). Apparently this was because the ICC "community" seemed not to understand, or care about, the distinction between a mere taking and extinguishment of title. *See* Pueblo

Because the ICC was unable to determine, on the record before it, when the actual taking of any particular tract had occurred and was therefore unable to determine damages, it set those matters for further trial.²⁶ However, the claims attorneys and the government attorneys obviated the reason to delve into those issues by stipulating that the ICC could use July 1, 1872, as the "date of valuation"; that is, that the claim should be valued for purposes of computing compensation as if the lands had all been taken on that date.²⁷ Actually, very few non-Indians lived within Western Shoshone territory in 1872, and not many more in 1962.²⁸

The petition, that was filed on behalf of the Western Shoshone in the ICC and that had set out the claim, did not allege that *all* the Indians' lands had been taken. It stated, "[The United States] has disposed of a large part of the said land to settlers and others, or has seized and converted a large part of the said lands to its own use and benefit...."²⁹ Furthermore, there *was* evidence in the ICC record of continuing occupation of Western Shoshone aboriginal lands by traditional bands such as the Darns. The report of the expert anthropologist witness, submitted by the claims attorneys in the offset phase of that litigation determining the value of the Western Shoshone claim, stated:

For most citizens of the United States, it is difficult to comprehend why Western Shoshone Indian families will remain in some of their poorer ancestral locations, barely surviving...on arid plots of land difficult to reach because they are many miles away from improved roads.

The best efforts of federal, state and county authorities have failed to tempt the Western Shoshone to abandon their ancestral areas. Western Shoshone are in 1973 as they were in 1863 dispersed in nearly all sections of...the Western Shoshone territory described in the [Treaty of Ruby

of Santo Domingo v. United States, 647 F.2d 1087, 1090 (Ct. Cl. 1981) (Nichols, J., dissenting) and *infra* note 33 and accompanying text.

26. Shoshone Tribe of Indians of the Wind River Reservation v. United States, 11 Ind. Cl. Comm. at 416.

27. *Id.* It is sometimes said that the parties stipulated that the Western Shoshone lands were taken, or stipulated that the tribal title was extinguished, on that date. See Orlando, *supra* note 17, at 266; Nell Jessup Newton, *Indian Claims in the Courts of the Conqueror*, 41 AM. U. L. REV. 753, 762, 827 (1992). As will be shown, that may have been the ultimate effect of the stipulation, but the stipulation itself merely stated "that the Nevada portion of the Western Shoshone lands in dockets 326 and 367 shall be valued as of July 1, 1872." W. Shoshone Identifiable Group v. United States, 29 Ind. Cl. Comm. 5, 7 (1972).

28. See LIEDER & PAGE, *supra* note 19, at 189.

29. W. Shoshone Identifiable Group v. United States, 35 Ind. Cl. Comm. 457, 461-62 (1975).

Valley]....As the better land was acquired by whites for mining and ranching, the Shoshone remained and adjusted as best they could.³⁰

Despite this notice to the government that many Western Shoshone were still in possession of their aboriginal lands under claim of treaty right, the government failed to exercise the opportunity, which it had in the ICC, to seek an offset for such lands.³¹ By agreeing to value the claim for convenience purposes as if all Shoshone lands were taken in 1872, the government elected to pay for the wrongful taking of lands that it had not in fact taken, some of which were still in the possession of Indians.

C. The Inability of the Western Shoshone to Control the ICC Claim

Throughout the ICC proceedings (1951–1979), a large number of Western Shoshone, known as “traditionals” for their adherence to traditional Western Shoshone religion, culture, and leadership, protested that their treaty was still in effect, that they still owned and occupied a large portion of their territory, and that accepting compensation for a taking of Western Shoshone lands would amount to selling those lands.³² The claims attorneys consistently answered these protests by insisting that the Indians were wrong and that the claim in the ICC did not threaten existing land rights.³³ The BIA actively supported the claims attorneys in this dispute and

30. Omer C. Stewart, *The Western Shoshone of Nevada and the U.S. Government, 1863–1950*, in *SELECTED PAPERS FROM THE 14TH GREAT BASIN ANTHROPOLOGICAL CONFERENCE* at 77, 81 (Donald R. Tuohy ed., 1978). The quoted statement was in the context of Dr. Stewart explaining the Western Shoshone view of Art. VI of the Treaty of Ruby Valley, *supra* note 1 at 852, wherein the Western Shoshone agreed to move onto reservations, provided those reservations were established within their territory. The implication was that the Western Shoshone remained in their native valleys because they believed that they had a treaty right to do so. The Shoshone were correct in this belief. *Conclusion of Law 3, United States v. Dann*, 13 ILR 3158, 3159 (D. Nev. 1986), *rev'd on other grounds*, 865 F.2d 1528 (9th Cir. 1989).

31. *United States v. Dann*, 13 ILR at 3159.

32. Rusco, *supra* note 12, at 48–49.

33. Representation made to the ICC by Western Shoshone claims attorney Robert W. Barker during oral argument. Transcript (Nov. 14, 1974) at 21, *W. Shoshone Identifiable Group v. United States*, 35 Ind. Cl. Comm. 457 (1975) (ICC Docket No. 326K) (on file with author). Mr. Barker also told the commission that in his opinion the claims case could have no effect on the *Dann* trespass case pending in the federal district court, discussed at length *infra*, which he misconstrued as involving individual rights. *Id.* at 25–26. The United States, represented by counsel at that hearing, did not dispute the representations of Mr. Barker concerning either what had been represented to the Western Shoshone over the course of the proceedings or the legal effect of the ICC proceedings on existing Western Shoshone land rights. The most charitable interpretation of the position of the claims attorneys and the government at this point is that they erroneously believed that the Western Shoshone did not have any extant tribal land rights. *See id.* at 22. A gross misunderstanding of Indian property

emphatically assured the Western Shoshones that they were "not selling your land."³⁴ Those who wished to preserve their existing land rights were unpersuaded but unable to control the claims lawyers.

In 1965, the claims attorneys requested that the Temoak Bands Business Council authorize a loan against the claims proceeds to finance expert witnesses. However, that council refused because it represented only a portion of the Western Shoshone people.³⁵ The claims attorneys then called for "general meetings" of the Western Shoshone, at which the majority of those present expressed their disapproval and walked out, an unfortunately ineffectual action not unusual in Indian country.³⁶ The remaining minority informally elected members of a "claims committee" who ratified the loan but thereafter took no other effective action to control the prosecution of the claim.³⁷

The government was aware of the difficulties that the Western Shoshone had in controlling the prosecution of the ICC claim. The Interior Department's Associate Solicitor for Indian Affairs reported in 1977,

Among the Western Shoshone there are groups who have persisted in their efforts to recover a substantial land base ever since their [ICC] claim was first conceived....The Shoshone are impecunious and, consistent with their aboriginal social structure, without a strong central leadership. As a result, although the Shoshone who assert that

law, specifically concerning aboriginal title and *United States v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339 (1941), discussed *supra* note 25, was apparently common in the ICC community of lawyers and judges. See Transcript (Nov. 14, 1974) at 21, *W. Shoshone Identifiable Group v. United States*, 35 Ind. Cl. Comm. 457 (1975) (ICC Docket No. 326K) (on file with author), and LIEDER & PAGE, *supra* note 19, at 186-88. In addition to holding the erroneous view that loss of possession results in extinguishment of Indian title, Mr. Barker seemed to be unaware that many Western Shoshone had been and still were in continuous occupation of tribal lands, Transcript (Nov. 14, 1974) at 18-20, *W. Shoshone Identifiable Group v. United States*, 35 Ind. Cl. Comm. 457 (1975) (ICC Docket No. 326K) (on file with author), although his own evidence submitted the year previously had shown that it was so. See Stewart, *supra* note 30 and accompanying text.

34. See, e.g., *BROKEN TREATY AT BATTLE MOUNTAIN*, *supra* note 19. However, the Court of Claims later characterized the decision to file the claim as a decision by the Indians "to exchange lands for money." *Temoak Band of W. Shoshone Indians v. United States*, 219 Ct. Cl. 346, 363 (1979).

35. Affidavit of Raymond Yowell, reproduced in Respondents' Appendix I at I2-I3, *United States v. Dann*, 470 U.S. 39 (1985) (No. 83-1476). Mr. Yowell has been active in Western Shoshone political affairs since the 1960s. He was a former chairman of the Temoak Bands Council and the Inter-Tribal Council of Nevada. He was a member of the Western Shoshone claims committee, and later became a leader of the Sacred Lands Association and Chief of the Western Shoshone National Council.

36. See, e.g., Orlando, *supra* note 17, at 261 n.180.

37. Yowell Affidavit, *supra* note 35, at I3-I5.

their title to land is intact may be in the majority, it is those seeking damages who are accommodated by the structure of the Indian Claims Commission Act.³⁸

This lack of a "strong central leadership," that is, a recognized political structure for the Western Shoshone as a nation to make decisions and settle controversies, would prove to have devastating results. The claims attorneys who had no interest in asserting land rights were in control of the claim; the nation as a whole, the tribal owner of the Western Shoshone lands, was voiceless to protect its property interest in the ICC. Further, the lack of any dispute-resolution process no doubt contributed to the seemingly endless and acrimonious contention between the "money people" and the "land people"³⁹ that continues to fester to this day, adversely affecting attempts to achieve a resolution of either the land or the money claims issues.⁴⁰ The fact that the Western Shoshone were also impecunious, as reported by the Associate Solicitor, meant that they were unable to obtain legal representation free of conflict of interest until the era of the public interest lawyers began in the 1970s.

D. Efforts to Wrest Exclusive Control from the Claims Attorneys in the ICC

In 1974 a group of traditional Western Shoshone organized the Western Shoshone Legal Defense and Education Association, later known as the "Sacred Lands Association." Along with their traditional chief, Frank Temoke, the association sought to broaden Western Shoshone representation in the ICC proceedings and exclude from the "taking" claim those lands not actually occupied by towns and white ranchers.⁴¹ The ICC denied that request.⁴² The Court of Claims affirmed, holding that the

38. Memorandum to Acting Assistant Secretary of Interior, Indian Affairs, from Associate Solicitor, Indian Affairs (Oct. 12, 1977), reproduced in Respondents' Appendix H at H6-H7, *United States v. Dann*, 470 U.S. 39 (1985) (No. 83-1476).

39. See, e.g., the "claims meeting" scene in *BROKEN TREATY AT BATTLE MOUNTAIN*, *supra* note 19.

40. E.g., Michelle Nijhuis, *Land or Money? A decades-old struggle over ancestral land leaves the Western Shoshone divided once again*, *HIGH COUNTRY NEWS*, August 5, 2002, cover story. See discussion in Luebben & Nelson, *supra* note 2, at 809.

41. The author, along with Gerald H. Kinghorn and Kathryn Collard of Salt Lake City, represented the association.

42. *W. Shoshone Identifiable Group v. United States*, 35 Ind. Cl. Comm. 457, 477 (1975). The ICC took the view that the Temoak Bands Council was the "exclusive representative plaintiff" of the "descendants of the Western Shoshone identifiable group" unless the association could show "collusion"; the association's allegations that the Temoak Bands Council (or more accurately the claims lawyers) and the government were jointly representing that all Western Shoshone lands had been taken in 1872, when in fact a large portion of those

Temoak Bands of Western Shoshone, a BIA-recognized tribal government, had the exclusive right to maintain the action on behalf of the "original Western Shoshone Identifiable Group,"⁴³ despite the fact that it politically represented only a portion of the Western Shoshone people and territory.⁴⁴ The court faulted the traditionals for failing to make their long-standing opposition to the claim known to the ICC earlier; notice to the claims attorneys and to "representatives of the United States" was apparently not deemed sufficient.⁴⁵ The court observed in a footnote that a majority of the Western Shoshones could "postpone payment, in order to try out the issue of current title,...[by] ask[ing] Congress to delay making the appropriation...to pay the award."⁴⁶

The Business Council of the Temoak Bands, which had been declared by the decisions of the ICC and the Court of Claims to have exclusive control of the prosecution of the claim, responded to those decisions by passing a resolution directing its chairman to file in the ICC a pro se pleading, with the resolution attached, seeking a delay so that a proper representative entity could be designated and a determination of the validity of Western Shoshone title could be obtained.⁴⁷ The resolution gave notice to the ICC and the Secretary of Interior that the Temoak Bands Council politically represented only a portion of the Western Shoshone, that it had informed the claims attorneys more than ten years previously that it could not take any action affecting lands belonging to the Western Shoshone as a whole, and that it never made an election of remedies to seek

lands had not been taken, was not sufficient to amount to "collusion" under the Indian Claims Commission Act. See *W. Shoshone Legal Def. & Edu. Ass'n v. United States*, 531 F.2d 495, 499 (Ct. Cl. 1976), cert. denied, 419 U.S. 855 (1976).

43. *W. Shoshone Legal Def. & Edu. Ass'n*, 531 F.2d at 499. The "original Western Shoshone Identifiable Group" apparently is the claims tribunals' name for the ancestral Western Shoshone entity that, at one time, long ago, owned the land. The tribunals' view that they were dealing only with "the descendants" of an entity that no longer existed, let alone owned any lands, no doubt colored their perceptions of both the substantive and adequacy of representation issues. If the only group interests before the ICC are those of descendants of an extinct former owner, with a monetary claim, and each member has an identical interest in seeing that claim maximized, issues of representation are simple. However, if a group is made up of a mixture of persons who are no longer associated with the land and those who not only claim a continuing property interest in the land but have been in continuous occupancy, serious due-process issues are involved. For a thorough review of those issues see Orlando, *supra* note 17.

44. Elmer R. Rusco, *The Organization of the Te-Moak Bands of Western Shoshone*, 25 NEV. HIST. SOC. Q. 174, 176 (1982).

45. *W. Shoshone Legal Def. and Ed. Ass'n*, 531 F.2d at 499.

46. *Id.* at 503 n.16.

47. Resolution of the Business Council of the Temoak Bands of Western Shoshone Indians of Nevada (Nov. 10, 1976), reproduced in Respondents' Appendix F at 2-5, *United States v. Dann*, 470 U.S. 39 (1985) (No. 83-1476).

compensation rather than to assert title to those lands.⁴⁸ The resolution also authorized a petition to the Secretary of Interior to take administrative action to transfer Western Shoshone lands being mistakenly administered by the BLM and the Department of Agriculture to the BIA.⁴⁹ That petition incorporated a thorough exposition of the legal basis for the claim of aboriginal and treaty title to those lands.⁵⁰

The Temoak Bands Council passed a further resolution directing its chairman to petition the Secretary of Interior for assistance in obtaining new legal counsel and to inform the ICC that it was firing the claims attorney for the Western Shoshone because he could not be controlled.⁵¹ The ICC denied the motion for a stay, for the reason that it was late in the proceedings, and ignored the effort to fire the claims attorney, who continued to be recognized as the "attorney of record for the plaintiff."⁵²

E. The Temoak Bands and the Government Seek a Stay from the Court of Appeals to Negotiate a Land Settlement

The Temoak Bands Council, through a new attorney, Reid Peyton Chambers, hired with a special grant from the BIA, appealed the denial of the stay request.⁵³ While the appeal was pending, Mr. Chambers also pressed the petition for administrative action, obtaining substantial support in the Department of the Interior from the Associate Solicitor and the

48. *Id.*

49. *Id.*; Petition to Secretary of Interior from The Temoak Bands of Western Shoshone Indians, Nevada and the United Western Shoshone Legal Defense and Education Association at 1, 3-5 (Feb. 18, 1977) (on file with Univ. of N.M. School of Law Library). An identical petition was filed with the President. See Memorandum from Thomas W. Fredericks, Associate Solicitor, to Solicitor, Department of the Interior from Associate Solicitor, Indian Affairs (Mar. 22, 1978) (on file with Univ. of N.M. School of Law Library).

50. See Petition to Secretary of Interior, *supra* note 49 at 5-45.

51. Resolution of the Business Council of the Temoak Bands of Western Shoshone Indians of Nevada (Nov. 14, 1976), reproduced in Respondents' Appendix G at G2-G5, *United States v. Dann*, 470 U.S. 39 (1985) (No. 83-1476).

52. *W. Shoshone Identifiable Group v. United States*, 40 Ind. Cl. Comm. 305, 309 (1977).

53. The full caption of the Court of Claims' decision expresses the confusion of the claims tribunals as to the Indian parties: "*The Temoak Band (sic.) of Western Shoshone Indians, Nevada v. The United States and the Western Shoshone Identifiable Group Represented by the Temoak Bands of Western Indians (sic.), Nevada.*" *Temoak Band of W. Shoshone Indians v. United States*, 593 F.2d 994 (1979). Reid Peyton Chambers appears as counsel for the Temoak Bands and Robert Barker (the claims attorney) as counsel for the Western Shoshone Identifiable Group (represented by the Temoak Bands). "The Western Shoshone Identifiable Group" is an entity that only existed for ICC purposes and had no governing body and no voice other than the claims attorney.

Assistant Secretary for Indian Affairs,⁵⁴ who found that "the claim set forth in this petition is a substantial and persuasive one" and that there were compelling equity and policy reasons for the government to negotiate an overall settlement with the Western Shoshone involving confirmation of title to land as well as money compensation, thereby fulfilling the promise made in the treaty.⁵⁵ The Interior Department's Solicitor appointed a task force to negotiate with tribal leaders and the Department of Justice joined with the Temoak Bands in asking the Court of Claims for a stay of proceedings to allow settlement negotiations.⁵⁶

Nonetheless, the Court of Claims issued its decision on the appeal, rejecting what it perceived to be a "belated change of heart" by the Temoak Bands and again directed the Western Shoshone to Congress: "If the Indians desire to avert the extinguishment of their land claims by final payment, they should go to Congress as recommended [in the earlier decision].... The essential point of the matter is that the Temoak's true appeal is to legislative grace, not as of right to this court."⁵⁷ The government and the Temoak

54. See Transcript, Reid Chambers Report, Western Shoshone Claims Meeting at 16-17 (June 23, 1979) (on file with Univ. of N.M. School of Law Library). The claims meeting was called by the Temoak Bands Council, which invited other tribal governments and entities and the Western Shoshone people generally to hear Mr. Chambers explain the legal situation and the options available. Mr. Chambers did so orally, answering questions from the leaders and the people generally. The author was present.

55. Memorandum from Forest Gerrard, Assistant Secretary to Solicitor, Department of the Interior (Apr. 11, 1978) (on file with Univ. of N.M. School of Law Library). That memorandum was supported by reference to the Memorandum from Thomas W. Fredericks, Associate Solicitor, to Solicitor, Department of the Interior (Mar. 28, 1978) (on file with Univ. of N.M. School of Law Library). Mr. Fredericks stated, "The basis of the land claim is simple and convincing," *id.* at 5, and went on to describe and analyze the arguments set out in the petition. Mr. Fredericks concluded that the Secretary had the authority to confirm title to a reservation for the Western Shoshone under Article VI of the Treaty of Ruby Valley and federal statutes. *Id.* at 17.

56. Transcript, Reid Chambers Report, *supra* note 54, at 17-18.

57. *Temoak Band*, 593 F.2d at 999. The Court of Claims seemed to view the Western Shoshone as either minority, dissident troublemakers or passive louts who slept on their rights and then ungratefully turned on the judges and claims lawyers who had worked tirelessly to obtain money for them. However, the author of the *Temoak Band* opinion dissented in a similar matter two years later, taking a much more sympathetic attitude toward Indians who alleged that their attorney had ignored their desires in entering a stipulation regarding a taking of lands, noting the built-in conflict of interest. See *Pueblo of Santo Domingo v. United States*, 647 F.2d 1087, 1090 (Ct. Cl. 1981) (Nichols, J., dissenting). Judge Nichols observed, concerning unnamed ICC cases involving unextinguished aboriginal title, "instances have occurred where awards were made and title extinguished by judgment where there was no expulsion even de facto." *Id.* at 1091. During the later dispute in the Western Shoshone claim regarding payment of the claims attorneys, discussed *infra* note 65, the Court of Claims observed that the claims attorneys were subject to the supervision of the Commissioner of Indian Affairs and the Secretary of the Interior. W. Shoshone Identifiable Group

Bands jointly moved the Court of Claims to reconsider their earlier joint stay request, and the court reluctantly granted a forty-two-day stay.⁵⁸ The Interior Department's Solicitor decided that there was insufficient time and called off negotiations, allowing the stay to lapse.⁵⁹

F. Final Judgment Entered in the Claims Case

In December 1979, the Court of Claims reported the final award of the ICC of \$26 million—the 1872 value without interest—for the “taking” of Western Shoshone lands.⁶⁰ With interest since 1979, the fund has now grown to more than \$137 million.⁶¹ The lands within Nevada had been earlier categorized and valued by the ICC as follows: farming lands (430,000 acres for which \$1,500,000 was awarded); townsites (4800 acres for which \$900,000 was awarded); good grazing lands (3,000,000 acres for which \$3,750,000 was awarded); and fair-to-poor grazing lands (18,000,000 acres for which \$2,700,000 was awarded).⁶² The remainder of the award was for

v. United States, 652 F.2d 41, 52 (Ct. Cl. 1981). However, the Court of Claims never blamed those agencies for the confusion in the Western Shoshone litigation.

58. *Temoak Band of W. Shoshone Indians v. United States*, 219 Ct. Cl. 346, 361-63 (Ct. Cl. 1979). The court stated, “We must strongly reject the alleged right of parties to withdraw cases from submission for settlement negotiations, except in extraordinary circumstances.... Any interruption of this process [submission for appellate decision] makes a mockery of the orderly and expeditious conduct of court business.” *Id.* at 362. The court’s stay was conditioned on there being no further stay and that any modification of the judgment by stipulation would not require further fact finding or affect the rights of third parties. *Id.* The court suggested that “[p]ossibly a simple stipulation to reduce the amount of land affected by the judgment and the dollar amount of the award, would be feasible,” but stated its preference for congressional action to address the Indians’ “new expectations.” *Id.* at 363. The author suggested to Reid Chambers that the \$2,700,000 for 18,000,000 acres of fair to poor grazing lands, *see infra* notes 62-64 and accompanying text, be dropped from the award with a stipulation that these were the lands claimed by the BLM within the territory and leave to the law courts the decision as to who owned them. Mr. Chambers stated that would be too risky and the government would never agree to let the law courts decide the issue.

59. Transcript, Reid Chambers Report, *supra* note 54, at 19.

60. Finding of Fact 20, *United States v. Dann*, 13 ILR 3158, 3159 (D. Nev. 1986), *aff’d in part and rev’d on other grounds*, 856 F.2d 1528 (9th Cir. 1989); *see also* *United States v. Dann*, 470 U.S. 39, 42 (1985). The Court of Claims had taken over all the ICC cases when the existence of the ICC terminated in 1978 pursuant to Pub. L. No. 94-465, § 2, 90 Stat. 1990 (1976) (codified at 25 U.S.C. § 70v (2000)), *see* Barsh, *supra* note 16, at 17, so the case was not remanded to the ICC at the conclusion of the appeal in *Temoak Bands*.

61. *A Bill to Provide for the Use and Distribution of the Funds Awarded to the Western Shoshone Identifiable Group under Indian Claims Commission Docket Numbers 326-A-1, 326-A-3, 326-K, and for Other Purposes*, 2002: Hearing on S. 958 before Senate Select Committee on Indian Affairs, 107th Cong., August 2, 2002 (statement of Neal A. McCaleb, Assistant Secretary for Indian Affairs, Department of the Interior).

62. *W. Shoshone Identifiable Group v. United States*, 29 Ind. Cl. Comm. 5 (1972).

lands in California and for minerals.⁶³ Since it is reasonable to assume that the lands selected for entry and settlement by non-Indians would be the better lands, the approximately 16,000,000 acres of putative BLM lands to which the traditional Western Shoshone still claimed title⁶⁴ were likely to have been valued as "fair to poor grazing lands" at the 1872 value of 15 cents per acre. The claims attorneys were paid attorneys' fees of 2.6 million dollars out of that fund in 1981,⁶⁵ but no Western Shoshone person or entity has received any benefit to date.⁶⁶

Although the ICC had no jurisdiction to adjudicate title to Indian land (its jurisdiction was limited to awarding money damages for "ancient wrongs"), its decision ratified the assumption that a "taking" had occurred. The 1872 date, which the ICC adopted as an acknowledged fiction convenient for evaluating an ancient wrong, eventually came to be treated as if it were the date of an historical event by the law courts and the predicate to force reality to conform to that constructed history. The Western Shoshone people had to become the homeless victims, dependent upon government welfare, that the ICC community presumed them to be.⁶⁷

63. See *id.* The great bulk of the \$26 million award was for minerals.

64. The amount of lands within Western Shoshone territory that were being administered by the BLM was estimated by the Department of the Interior to be 15.5 million acres. Petition for Writ of Certiorari at 24, *United States v. Dann*, 470 U.S. 39 (1985) (No. 83-1476). While there are other lands claimed by the United States within the territory to which Western Shoshone title may not have been extinguished, *id.*, only BLM lands were involved in the *Dann* case, and, consequently, only those lands had been the subject of litigation and a judicial determination that they still were the property of the Western Shoshone.

65. *W. Shoshone Identifiable Group v. United States*, 652 F.2d 41, 52 (Ct. Cl. 1981). Several Western Shoshone entities objected to the awarding of the fees on the grounds that the claims attorneys had failed to serve the Indians' wishes, were guilty of malpractice and conflict of interest, and had caused their clients to effectively lose title to their lands, including lands they were still using and occupying. The Court of Claims held that the Indians were precluded from making this argument because "it has now been held that there was a taking, and the large judgment here is to pay it. That is what they authorized the suit for. The decision in their favor is the law of the case and will not be disturbed." *Id.* at 51. The Court of Claims was unperturbed by the fact that "the law of the case" was based upon a stipulation that was signed by the claims attorneys, that was not authorized by the clients, and that was contrary to the factual findings and legal conclusions of the federal district court where the issue of continuing title actually had been litigated. *Id.* at 47. The Court of Claims even considered the efforts that the claims attorneys exerted in fighting off efforts by those Western Shoshone, including the official "representative plaintiff," who wished to keep their lands, as a reason to increase the amount of attorneys' fees. *Id.* at 50. The Court of Claims found that the claims attorneys had "accomplished remarkable results for their clients." *Id.* at 49.

66. See Luebben & Nelson, *supra* note 2.

67. Ironically, one of the purposes of the Indian Claims Commission Act was to end the dependency of the American Indian, who was perceived as lying around idly waiting to receive some payment for the ancient wrongs done to his tribe. This dependency was seen to hamper the efforts to assimilate Indians into the mainstream of self-supporting Americans

Mary and Carrie Dann did not match this stereotype.⁶⁸

III. UNITED STATES *v.* MARY and CARRIE DANN

Mary and Carrie Dann are members of a traditional Western Shoshone extended-family band who have remained on their native lands in Crescent Valley and supported themselves by raising livestock as contemplated by the Treaty of Ruby Valley.⁶⁹ In 1974, five years before entry of the final judgment in the ICC case, the BLM sued the Danns for an injunction and trespass damages for grazing livestock on "public domain" lands without a permit. The Danns asserted unextinguished Western Shoshone title and the Treaty of Ruby Valley, and since they were in possession, they challenged the plaintiff, the United States, to prove superior title in accordance with American real property law. The United States was never able to do so. Over the course of seventeen years, the case was before the U.S. District Court in Reno four times, the Court of Appeals for the Ninth Circuit three times, and the U.S. Supreme Court once.

A. The Initial Round in the District Court and on Appeal in *Dann I*

In 1977, the district court held that the 1962 ICC finding of a taking by "gradual encroachment" was conclusive and binding on the Danns. The Danns appealed, and the court of appeals, in *United States v. Dann (Dann I)*,⁷⁰ granted an expedited review, reversed the judgment of the district court, and remanded the case for a trial on the issue of title to the land. The court of appeals held that the ICC determination was not binding because the ICC case had not at that time gone to final judgment and, more importantly, because the question of whether the Western Shoshone title had been extinguished had not actually been litigated or decided in the

and paying off the old claims was proposed as a solution. *Pawnee Tribe v. United States*, 109 F. Supp. 860, 869 (Ct. Cl. 1953); Barsh, *supra* note 16, at 12.

68. *The Today Show: The American Dream* (NBC television broadcast, Nov. 4, 1984); See generally, Allison M. Dussias, *Squaw Drudges, Farm Wives, and the Dann Sisters' Last Stand: American Indian Women's Resistance to Domestication and the Denial of Their Property Rights*, 77 N.C. L. REV. 637 (1999) (discussing the Dann sisters' struggle against the federal government for legal recognition of their right to graze livestock on Western Shoshone ancestral land).

69. Findings of Fact 1, 2, and 6, *United States v. Dann*, 13 ILR 3158 (D. Nev. 1986), *aff'd in part and rev'd on other grounds*, 856 F.2d 1528 (9th Cir. 1989). By the mid-1980s, the extended family had approximately thirty members, of whom half were living on or near the base camp at any given time. The base camp was located on lands that the Dann sisters' father had homesteaded adjacent to his mother-in-law's camp when Indians became citizens in 1925, thereby securing the band's water supply and hay meadow. Finding of Fact 7, *id.*

70. 572 F.2d 222 (9th Cir. 1978).

claims proceeding.⁷¹ The court of appeals remanded the case to the district court "for the purpose of deciding title."⁷²

B. Round II in the District Court

On remand, District Court Judge Bruce Thompson, at the request of the government and over the objection of the Danns,⁷³ waited almost two years for the ICC proceedings to become final. In April 1980, the district court held that Western Shoshone aboriginal title had not been extinguished prior to December 6, 1979, but, as of that date, the tribal title was extinguished by the legal effect of the entry of the final judgment and award in the ICC proceedings. Because the Western Shoshone title had been good at the time that the government had sued the Danns for trespass, the district court dismissed the government's claim for damages, but it issued an injunction against the Danns' further unpermitted grazing use of the government's (newly acquired) public domain.⁷⁴ Both sides appealed, and the district court stayed its judgment pending the outcome.

C. The Western Shoshone Refuse the ICC Award

Meanwhile, immediately following the ICC's monetary award, the BIA began to develop a judgment fund distribution plan as required by the Indian Tribal Judgment Funds Use or Distribution Act of 1973.⁷⁵ However, Judge Thompson's decision had reverberated through Western Shoshone country because it confirmed the legal arguments made by the traditionals over the years: the only threat to their treaty and land rights was the claim proceeding in the ICC, and those Western Shoshones who had followed the BIA line supporting the claim had been duped.⁷⁶ Whatever support the ICC claim had enjoyed in Western Shoshone country crumbled. A hearing of record held in Elko, Nevada, on July 26, 1980 by the BIA on the distribution plan for the ICC award turned to a shambles, as witness after witness, many

71. *Id.* at 225-27. This holding and the support for it are discussed *supra* note 24.

72. *Dann I*, 572 F.2d at 223.

73. Reporter's Transcript of Proceedings, at 28-31, *United States v. Dann*, CV-R-74-60 BRT (D. Nev. Sept. 8, 1978) (on file with author).

74. Judgment Granting Injunction (Apr. 25, 1980), reproduced in Petition for Writ of Certiorari at 31a, *United States v. Dann*, 470 U.S. 39 (1985) (No. 83-1476).

75. 25 U.S.C. §§ 1402-1404 (2000).

76. An attorney in the office of the Associate Solicitor for Indian Affairs told the author at the time that the bureaucrats in the field were amazed that the traditional Indians were treating the Thompson decision as a victory. However, the source and his counterparts in the Justice Department understood the significance of Judge Thompson's exposure of the claims process and the confirmation of the traditionals' treaty theories.

speaking in Shoshone, denounced the claim and called upon the Western Shoshone Nation to refuse the award.⁷⁷

When it became clear that the BIA could not complete the distribution plan within the six months required by the Distribution Act, largely because of massive Western Shoshone opposition to accepting the judgment, the BIA asked the Senate Select Committee on Indian Affairs for an extension of time. The committee chairman rejected the BIA's request because of the Indian opposition, the uncertainty about the status of the Western Shoshone title, and the pendency of the appeal in the *Dann* case.⁷⁸ This put the judgment outside the purview of the 1973 Distribution Act, and the award could not be distributed or used for the benefit of the Western Shoshone without authorizing legislation.⁷⁹ The Western Shoshone thought they had succeeded in following the Court of Claims' advice on how to avoid losing their land, as a result of the ICC proceedings, by having Congress delay the payment until they could establish the continuing validity of the tribal title in the law courts.⁸⁰

D. The Court of Appeals Upholds Shoshone Title in *Dann II*

In its 1983 decision on appeal of the district court's April 1980 ruling in *United States v. Dann* (*Dann II*), the Court of Appeals for the Ninth Circuit agreed with the Western Shoshone.⁸¹ It reversed the district court's order granting the injunction but left intact the dismissal of the trespass damage claim,⁸² holding that the assertion of Western Shoshone title was not yet barred by the ICC judgment because the "payment" of the award required by the statutory discharge language had not occurred.⁸³ The court of appeals also went on to the merits of the title issue and addressed every

77. Over 80 percent of the witnesses opposed the distribution, at least until the title issue was resolved. See Transcript of Proceedings, Public Hearing of Record before the Bureau of Indian Affairs, Western Shoshone Proposed Plan of Distribution (July 26, 1980) (on file with Univ. of N.M. School of Law Library).

78. Letter from Senator John Melcher to Department of the Interior (Aug. 4, 1980), reproduced in Respondents' Appendix M, *United States v. Dann*, 470 U.S. 39 (1985) (No. 83-1476).

79. 25 U.S.C. §§ 118, 1402(a), (b), 1405(b). This was the view of the Solicitor for the Department of the Interior, expressed in a letter to the author dated September 2, 1980 (on file with author). The Solicitor also stated in the letter that this finding meant there was ample time to resolve any question raised in *Dann II*. *Id.*

80. See *supra* notes 46 & 57.

81. 706 F.2d 919 (9th Cir. 1983), *rev'd*, *United States v. Dann*, 470 U.S. 39 (1985).

82. *Id.* at 923. The government's claim for trespass damages against the Danns was never reinstated. See discussion *infra* note 146 and accompanying text.

83. *Dann II*, 706 F.2d at 927.

argument that the government made concerning how the United States had extinguished Western Shoshone aboriginal title.⁸⁴

The government did not dispute, in *Dann II*,⁸⁵ that the Western Shoshone had possessed title at one time but it claimed that, separate from any effect of the ICC proceedings, Western Shoshone aboriginal title had been extinguished by

(1) application of the public land laws, including the homestead laws, to the lands aboriginally held by the Western Shoshone; (2) creation of the Duck Valley Reservation for the Western Shoshone; and (3) administration of the lands pursuant to the Taylor Grazing Act for over 45 years.⁸⁶

Addressing the effect of the public land laws, the court of appeals found that the Preemption Act, as amended,⁸⁷ by its own terms did not apply to Indian lands, the title to which was unextinguished.⁸⁸ When the Preemption

84. The Ninth Circuit in *Dann II* dealt only with aboriginal title as distinguished from treaty-recognized title, stating that the Danns had abandoned a claim to treaty title. *Id.* at 922 n.1. Actually, the Danns at all times asserted treaty-recognized title as well. However, they reasoned that since the difference between the two types of title simply bears on whether compensation for a taking is compelled by the Fifth Amendment, *see id.*, the distinction made no difference here because the Danns argued that there was no taking or extinguishment, rather than what compensation might be due. *See* Appellants' Response to Cross Appeal and Appellants' Reply Brief at 17-19, *Dann II*, 706 F.2d 919 (9th Cir. 1983) (Nos. 80-4298, 80-4345), *rev'd*, 470 U.S. 39 (1985). Although it is often remarked that aboriginal title *only* gives an Indian nation the exclusive right to use and occupy the land and not the right to alienate, *see, e.g.,* *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823), for all practical purposes that title "is as sacred as the fee simple of the whites." *Mitchel v. United States*, 34 U.S. (9 Pet.) 711, 745 (1835). This is particularly true for the traditional Western Shoshone, who have no interest in "selling Mother Earth." The other disadvantage to holding aboriginal title rather than recognized title is that the Supreme Court has held that, if Congress expressly extinguishes aboriginal title, it need not provide compensation under the Fifth Amendment to the United States Constitution. *See* *Tee-Hit Ton Indians v. United States*, 348 U.S. 272, 288-89 (1955). Complete confiscation of Indian title by Congress was probably politically impractical by the mid-1970s; otherwise, the convoluted machinations used to obscure the appropriation of Western Shoshone title described here or the congressional confirmation of ownership by Alaska native villages and "regional corporations" of substantial tracts of their aboriginal lands in the Alaska Native Claims Settlement Act, 43 U.S.C. § 1601 *et seq.* (2000) at the time that aboriginal title to Alaska was extinguished would not have been necessary.

85. 706 F.2d at 923.

86. *Id.* at 928.

87. Act of June 22, 1838, ch. 119, 5 Stat. 251 (repealed 1891). The preemption act laws were the predecessors to the Homestead Act and began the process of distributing the federal public domain to settlers. *See generally* GEORGE CAMERON COGGINS, CHARLES F. WILKINSON & JOHN D. LESHY, *FEDERAL LAND AND RESOURCES LAW*, 80, 86 (3d ed. 1993).

88. *United States v. Dann (Dann II)*, 706 F.2d 919, 929 (9th Cir. 1983), *rev'd on other grounds*, *United States v. Dann*, 470 U.S. 39 (1985).

Act was replaced by the Homestead Act of March 3, 1891,⁸⁹ the latter act specifically provided that it was not to affect any Indian lands that were subject to treaties, and "disposition of such lands shall continue in accordance with the provisions of such treaties...."⁹⁰ Article IV of the Treaty of Ruby Valley⁹¹ provided for the establishment of agricultural settlements and ranches, but only to the extent needed. The court of appeals therefore held that "the granting of homesteads by the government could work, at most, an extinguishment of aboriginal title to the actual land granted and no more."⁹²

The government contended that the creation of the Duck Valley Reservation fulfilled Article VI of the treaty wherein the Western Shoshone agreed to move to reservations when such reservations were established within their territories. However, the court of appeals found the treaty to be of no help to the government in that regard because the Duck Valley Reservation was not within "their territories" as the treaty required, and, accordingly, the great majority of Western Shoshone, including the Danns, refused to move there. For the same reason, the court found no abandonment of title by the movement of some Western Shoshone onto that reservation.⁹³ The court was unimpressed with the government's argument that it should be given the benefit of the bargain for fulfilling the treaty because it erroneously and unilaterally thought that the reservation was within Western Shoshone territory.⁹⁴

The court also rejected the government's claim that Western Shoshone title was extinguished by application of the Taylor Grazing Act:

We do not find in the Taylor Grazing Act any clear expression of congressional intent to extinguish aboriginal title to all Indian lands that might be brought within its scope.... Indeed, we question whether aboriginally held lands can be properly characterized as "unappropriated and unreserved lands" forming a "part of the public domain" to which the Taylor Grazing Act applies.⁹⁵

89. Act of Mar. 3, 1891, Ch. 561, § 4, 26 Stat. 1095, 1097.

90. *Dann II*, 706 F.2d at 929 (quoting Act of Mar. 3, 1891, Ch. 561, § 10, 26 Stat. 1095, 1098).

91. *Supra* note 1.

92. *Dann II*, 706 F.2d at 930.

93. *Id.* at 931. The government did not make a claim in *Dann* that the other, small, executive-order reservations sprinkled around Western Shoshone territory were in fulfillment of the treaty. See *supra* note 6.

94. *United States v. Dann (Dann II)*, 706 F.2d 919, 930 (9th Cir. 1983), *rev'd on other grounds*, *United States v. Dann*, 470 U.S. 39 (1985).

95. *Id.* at 932, citing *Lane v. Pueblo of Santa Rosa*, 249 U.S. 110 (1919).

E. Settlement Negotiations Prompted by *Dann II*

While the decision of the court of appeals in *Dann II* confirmed that Western Shoshone title was extant as of December 1979, by remanding the case for trial to determine whether that title had been preserved to the date of trial,⁹⁶ it sent a signal that the situation was still fluid and pointedly observed that Congress could preclude the assertion of Western Shoshone title by authorizing the payment of the ICC award.⁹⁷ The Ninth Circuit appeared to be doing what courts should do when confronted with a problem created by a century of neglect by the political branches and involving vast expanses of land. It defined the existing legal rights of the parties and left the ultimate resolution to the affected parties to work out through the political processes.

Although the court implied that Congress could simply authorize the payment and bar the assertion of Western Shoshone title, it seemed unlikely that Congress in the mid-1980s would openly confiscate all of Western Shoshone lands in the face of domestic and international sympathy for Indians in general and the Western Shoshone in particular.⁹⁸ The prospect of obtaining a legislative solution, as the Court of Claims suggested earlier, became much more feasible for the Western Shoshone because the status quo now favored them. Furthermore, it was intolerable both for the government and for some non-Indian interests concerned with the vast area of land to which the decision could apply. However, it was apparent that the Western Shoshone would not be able to obtain a satisfactory legislative solution on their own; it would take negotiation to get the support of the administration and the Nevada congressional delegation, and that meant obtaining the support of the other interests in Nevada.

At that time, in the early 1980s, a negotiated settlement seemed doable with minimal disruptions to existing uses. The Treaty of Ruby

96. *Dann II*, 706 F.2d at 933.

97. The court, in finding that the ICCA bar had not yet fallen, had stated that Congress could "invoke the bar of [the ICCA] by allowing a plan of use or distribution [of the ICC award] to take effect or by legislating one." *Id.* at 927.

98. A powerful documentary film by Joel Freedman, narrated by Robert Redford, *BROKEN TREATY AT BATTLE MOUNTAIN*, *supra* note 19, had won major awards and had played on National Public Television, and sympathetic feature articles had appeared in newspapers and magazines across the country. See, e.g., Sandra Widener, *The Sixteen Million Acre Question*, *THE DENVER POST*, May 13, 1984, *Empire Magazine*, at 10 (cover story).

Only a few years earlier, Congress had extinguished the extant aboriginal title to Alaska; but in so doing, it settled aboriginal land claims by confirming title for substantial land bases for the various indigenous populations, as well as transferring some of the wealth from the lands back to them. Alaska Native Claims Settlement Act of 1971, 43 U.S.C. § 1601 *et seq.*

Valley⁹⁹ provided a blueprint. Although it could be argued that modern intrusions by non-Indian interests far exceeded anything contemplated by the Indians in making the treaty concessions to non-Indian mining, ranching, and transportation needs, Western Shoshone leaders took the expansive position that all existing private titles to lands and mining interests were valid under the treaty.¹⁰⁰ Western Shoshone hunting and gathering uses had gone on for centuries without disrupting any economic interest of non-Indians, and only in isolated areas were there grazing conflicts, since the major Western Shoshone stock operations held exclusive grazing permits to large areas (although they had ceased to pay for them when it became clear that the government had no right to control Western Shoshone grazing in their territory).

The fact that many Shoshone leaders, including the principal leaders, were themselves ranchers, having more in common with their non-Indian counterparts than either did with the BLM land managers, made it relatively easy for the Western Shoshone to reach out to the stockmen. The "sagebrush rebellion" was in full swing, and the Western Shoshone may have appeared to be a more reasonable landlord than the BLM. The non-Indian ranchers signaled their openness to a negotiated settlement of the Western Shoshone land dispute.¹⁰¹ The Western Shoshone also called upon other allies and friendly contacts¹⁰² made during the 1970s when most interests in the Great Basin united in opposition to the MX Missile System,

99. See *supra* note 1.

100. Applying this view to the swath of checkerboarded railroad lands through Western Shoshone country, every other section for twenty miles on either side of the railroads, was the most generous concession, since that could not reasonably be considered a necessary right-of-way for a railroad and *United States v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339 (1941), was directly on point that railroads, and their successors, took such land subject to aboriginal title. At that time, the huge open-pit mining operations had not yet begun in Shoshone country. If they had, it would have been difficult for many traditionals, including the Danns, to concede that such operations were contemplated by the treaty. The traditionals probably would have at least insisted that the Western Shoshone had a right to regulate mining practices within their territory to protect the environment.

101. See, e.g., Nevada State Multiple Use Advisory Committee on Federal Lands, Recommendation #84-1, Western Shoshone Land Claims (June 30, 1984), reproduced in Respondents' Appendix U, *United States v. Dann*, 470 U.S. 39 (1985) (No. 83-1476).

102. For example, Raymond Yowell, the Western Shoshone leader of the Sacred Lands Association, Sub-Chief of the National Council, and former member of the claims committee, met with the Social Policy Committee of the Church of Jesus Christ of Latter-Day Saints to ask for the assistance of the Mormon Church in countering the church influence, inappropriately used by the claims lawyers, that had contributed to the creation of the problem. He reported a sympathetic hearing to the author, who had arranged the meeting.

which the Carter Administration had proposed basing throughout the remote valleys.¹⁰³

The Western Shoshone National Council, a revival of the Traditional Council as a strongly united federation of the federally-recognized tribal governments, the traditional Sacred Lands Association, and even an organization of individual Western Shoshone originally formed to support the ICC claim, was recognized in April 1984 by the BIA as the entity that "represents by far the majority interests of the Western Shoshone people. It is primarily the Council that we will look forward to working with in developing a proposed legislative settlement...."¹⁰⁴ A negotiated political settlement was in the air, and the Western Shoshone National Council met with Deputy Assistant Secretary John Fritz¹⁰⁵ and, later, with other representatives of the Department of the Interior¹⁰⁶ to discuss the land needs of the Western Shoshone. The Reagan administration seemed open to a negotiated settlement.

F. The Supreme Court Reviews and Reverses *Dann II* on Narrow Grounds

While the Department of the Interior was negotiating, the Department of Justice requested that the Solicitor General seek Supreme Court review of the court of appeals decision in *Dann II*. The Solicitor General granted the Danns a telephone hearing on whether he should do so. The author sought to persuade him that the matter was positioned for a fair settlement in the legislative process, which was required in any event, and that process should not be disrupted by Supreme Court review. In response to the author's further argument that it was not honorable for the United States to seek to confiscate lands that the Western Shoshone were still using without providing the reservations promised by treaty, the Solicitor General stated that "everyone knows that the Western Shoshone will end up owning their grazing lands."¹⁰⁷ The Solicitor General indicated

103. See K.M. Chrysler, *Revolt in the West Could Kill Supermissile*, U.S. NEWS & WORLD REP., Mar. 31, 1980, at 47; Rusco, *supra* note 12.

104. Letter from John W. Fritz, Deputy Assistant Secretary for Indian Affairs, to Thomas E. Luebben, Counsel for the Western Shoshone National Council (April 23, 1984), reproduced in Respondents' Appendix P at P2, *United States v. Dann*, 470 U.S. 39 (1985) (No. 83-1476).

105. The author was present. Portions of that meeting appear in the documentary film *TO PROTECT MOTHER EARTH* (Cinnamon Productions 1989).

106. The author attended one of these meetings in Austin, Nevada, and was informed of others in telephone conversations with Thomas E. Luebben of Albuquerque, Legal Counsel for the National Council, during the remainder of 1994 and through 1985.

107. The Solicitor General also stated that he did not think much of the author's "ethical argument" concerning the conduct of the ICC claim because it should be directed against "those folks on K Street," meaning, presumably, the claims lawyers, Wilkinson, Cragun & Barker. This was somewhat surprising because the Solicitor General, Rex Lee, had served as

that he had been led to believe that the Department of the Interior would support measures to secure a land base of three million acres for the Western Shoshone regardless of what happened in the *Dann* case if it went to the Supreme Court.¹⁰⁸

The Solicitor General did petition for and obtain a writ of certiorari from the United States Supreme Court to review the decision of the court of appeals in *Dann II*. Significantly, the government did not ask the Supreme Court to determine who owned the land. Instead, the government asked the Court only to determine whether, after deposit of the ICC judgment fund into the treasury, the Western Shoshone remained free to assert that aboriginal title had never been extinguished.¹⁰⁹ The Supreme Court granted the petition for review but narrowed the question even further, to whether the deposit of the funds constituted "payment" within the meaning of the discharge provision of the ICCA.¹¹⁰ In an opinion that one commentator described as "most notable for what it did not say and for treating the case as simply one of statutory construction,"¹¹¹ the Court held that the transfer of funds on December 19, 1979, constituted "payment," whether or not the funds were ever accepted by or distributed to the Shoshone, because it was the intent of Congress in passing the ICCA to achieve finality,¹¹² and the government, "*qua* judgment debtor," paid the

Dean of the Law School under BYU President Ernest K. Wilkinson, who had been the partner in that law firm who had supervised the Western Shoshone claim for many years. See *W. Shoshone Identifiable Group v. United States*, 652 F.2d 41 (Ct. Cl. 1981). It also ignored the statutory responsibility that the Department of the Interior had to supervise the claims lawyers. See Act of Aug. 13, 1946, Ch. 959, § 15, 60 Stat. 1049, 1053 (codified in part at 25 U.S.C. §§ 70n (2000)). This shifting of responsibility to the claims lawyers also seems inconsistent with the government's eventual argument in the Supreme Court that the Western Shoshone's acceptance of the ICC award was effectuated by the Secretary of the Interior in his capacity as guardian of Indians.

108. The figure of three million acres had evolved during discussions between Western Shoshone leaders and officials of the Department of the Interior and congressional staff as an approximation of the lands needed to sustain the Western Shoshone stock operations. See *supra* note 107. Its use by the Solicitor General seemed to indicate that there was communication, at that time, between the Department of the Interior and the Department of Justice.

109. *Petition for a Writ of Certiorari I, United States v. Dann*, 470 U.S. 39 (1985) (No. 83-1476).

110. *United States v. Dann*, 470 U.S. 39, 40 (1985).

111. Newton, *supra* note 27, at 829.

112. The Court reasoned that to delay the preclusive effect of the ICCA, 25 U.S.C. § 72 (2000), until Congress had approved the distribution plan would frustrate that intent by subjecting the United States to continuing claims and demands touching the controversy previously litigated in the ICC. *United States v. Dann*, 470 U.S. at 45. While focusing on a very narrow legal question, the Court was not limiting its view to the narrow facts and posture of the case before it. The Danns did not claim that the United States had any liability for taking the lands they used, and there had been neither a controversy concerning or litigation of the

government, "*qua* trustee for the Tribe as beneficiary."¹¹³ The Court relied upon the doctrine that, in the absence of fraud, a guardian may accept an offer on behalf of his wards.¹¹⁴

The Court remanded for further proceedings without addressing the Danns' arguments concerning the lack of due process in the ICC proceedings, what effect the statutory discharge the government received by the "payment" would have on existing Western Shoshone title, or whether that discharge justified the government's effort to eject the Danns from continuously occupied ancestral lands.¹¹⁵ The Court did, however, specifically mention that the Danns' alternative claim to "individual aboriginal title" was still open, implying that other issues were not.¹¹⁶

G. In the District Court for Round III—The *Thompson* Decision

While efforts were made to revive the negotiations,¹¹⁷ the government seemed to lose interest in negotiating, and institutional memory of the "legislative settlement" faded as time went on after the Supreme Court's decision. The low-level Justice Department lawyers assigned to the *Dann* case on remand appeared entirely unaware of the history of the case or of what representations had been made by the Solicitor General or appointed officers of the Department of the Interior during the Reagan Administration.¹¹⁸ They indicated to the author that their

taking question in the ICC. The Court seemed to be protecting the United States from the ghosts of its past genocide in general and the threat to real estate titles across the country if the entire bundle of ICC proceedings started to unravel.

113. *Id.* at 49-50.

114. *Id.* at 48-50. In addition to the irony of applying the guardianship doctrine in this circumstance there was the insult implicit in attributing wardship to Indians such as the Danns, who had never become dependent on the government but had remained proudly self-sufficient on their aboriginal lands. The social meaning of wardship includes not only inferiority but childlike dependence. "A guardian is someone who has charge of you the same way that a parent has charge of a minor child....If you are an adult and you are the ward of a guardian who is taking care of you, it is because you are physically or mentally unable to take care of yourself." Edward McDonough, *Point of Law: Conservatorship, Guardianship Are 2 Different Legal Entities*, SALT LAKE TRIB., Feb. 25, 2001, at AA-2.

115. For a summary of those arguments, see Newton, *supra* note 27, at 829-30; Orlando, *supra* note 17, at 270-72.

116. *United States v. Dann*, 470 U.S. 39, 50 (1985).

117. A ray of hope had been emitted by Peter Taylor, counsel to the Senate Select Committee on Indian Affairs, who was quoted in reaction to the Supreme Court's decision saying, "The result renders [the Western Shoshone] a landless tribe and that was not the intent of Congress when it set up the commission." Ronald B. Taylor, *Indian Sisters Spur Land Rights Battle*, L.A. TIMES, Mar. 24, 1985, at Part I, 3, 35.

118. See *supra* notes 104-108 and accompanying text.

instructions came from their "clients" in the Elko office of the BLM. The government moved for a preliminary injunction against the Darns.¹¹⁹

At the hearing on the motion in September 1986, the district court converted the matter into a trial over the Darns' objection and denied the Darns the opportunity to put on proffered evidence that the Secretary of the Interior, as the guardian of the Indians, was personally aware that he was selling his wards' lands to himself, as custodian of the lands of the United States, at 1872 prices by accepting the ICC award in 1979.¹²⁰ The district court went on to hold that the Darns were "precluded from asserting Western Shoshone Indian title" as a result of the 1979 payment.¹²¹

However, District Court Judge Bruce Thompson, in devising the equitable remedy requested by the government, attempted to honor the hallowed public-land-law protection of valid existing rights by "grandfathering in" the Darns' land-use rights. In accordance with the Supreme Court's remand leaving open the issue of "individual aboriginal rights," Judge Thompson found that the Darns had established such rights to the section of land (660 acres) that had been the location of their grandmother's camp.¹²² Judge Thompson further found, in an innovative extension of the concept of individual aboriginal title to include usufructory rights, that the Darns had such a right, and a treaty right, to continue to graze 598 head of cattle and 840 horses on the "public domain," without permits from the BLM, based upon their continuous lawful use up until December 1979, the date upon which the Taylor Grazing Act became applicable to the Western Shoshone lands.¹²³ The district court further found that "it would not be equitable and it would be contrary to good conscience to deprive the [Darns] of individual aboriginal and treaty rights which were established by continuous use and possession prior to December 19,

119. The government did not acknowledge that there might be anything odd in seeking a preliminary injunction after twelve years of litigation, including a lengthy delay sought by the government. See *supra* note 73 and accompanying text.

120. Transcript, July 31, 1986, at 4-10, *United States v. Dann* (D.C. Nev. Civil No. 74-60 BRT), reproduced in Excerpt of Record at ER149-56, *United States v. Dann* (Dann III), 873 F.2d 1189 (9th Cir. 1989) (Nos. 86-2835 & 86-2890). The proffer was based upon information from Reid Chambers, the new attorney for the Temoak Bands, discussed *supra* notes 53-59 and accompanying text, and from an attorney in the Associate Solicitor's office who had told the author at the time that the Solicitor, after being fully apprised of the results of the investigation by senior Department of the Interior officials, described *supra*, had personally met with and briefed the Secretary at length concerning the Western Shoshone situation and emerged from the meeting to announce to his staff that the Secretary had decided against taking any action to remedy the situation in the claims tribunals before the judgment became final and was paid.

121. Conclusion of Law 5, *United States v. Dann*, 13 ILR 3158, 3159 (D. Nev. 1986).

122. Conclusion of Law 9, *id.* That section of land is now the location of a camp maintained by supporters of the Darns.

123. Conclusions of Law 10, 12, *id.*

1979.¹²⁴ Judge Thompson also converted the grazing permits held by the estate of Mary and Carrie Danns' parents into additional individual aboriginal and treaty grazing rights.¹²⁵

While the Danns disagreed with Judge Thompson's solution because it individualized what the Danns asserted were tribal rights, it nonetheless appeared to be a rational and practical solution reflecting the judge's long experience and expertise at resolving conflicts over uses of public lands.¹²⁶ It also seemed to leave a way open for other Western Shoshone individuals and entities to protect their existing uses. And, like his April 1980 decision,¹²⁷ it forthrightly set out what had happened to the Western Shoshone tribal title and treaty rights—they had continued to exist up to December 1979 but now were precluded solely as a result of the payment of the ICC claim. The findings of fact¹²⁸ remain a valuable historical record. Once again, the legal system seemed to be working to recognize the actual facts and define the problem and, this time, to devise a judicial solution.

H. The Appeal of the *Thompson* Decision: *Dann III*

The government, however, rejected Judge Thompson's solution and appealed, seeking to eliminate *any* Western Shoshone treaty or aboriginal right to use their territory, and the Danns cross-appealed. The Danns conceded that the "full discharge" of "all claims and demands touching any of the matters involved in the controversy" received by the government pursuant to the ICCA¹²⁹ may have relieved the government of all liability for past wrongs and barred the Indians from all further remedies, including the return of land that had been actually taken prior to the discharge. They argued, however, that that discharge did not create a new cause of action

124. Finding of Fact 25, *id.*

125. Mary and Carrie Dann had continued to obtain permits for the cattle belonging to the estate out of respect for other heirs who did not feel comfortable challenging the government. These permits had been obtained by their father under protest. Findings of Fact 8-10, Conclusion of Law 11, *id.* The Dann sisters' own much larger, unpermitted herds were derived from their grandmother, who had begun herding horses in the nineteenth century under treaty right. Findings of Fact 6, 11, *id.*

126. Two of Judge Thompson's opinions in other cases appear as principal cases in GEORGE C. COGGINS, CHARLES WILKINSON & JOHN D. LESHY, *FEDERAL LAND AND RESOURCES LAW* 87-90, 454-57 (3d ed.1993). Those cases are *Stewart v. Penny*, 283 F. Supp. 821 (D. Nev. 1965) (homesteading), and *Amax Exploration, Inc. v. Mosher*, Civil R-86-162 BRT (D. Nev. 1987) (mining).

127. Discussed *supra* notes 74, 76 and accompanying text.

128. See *United States v. Dann*, 13 ILR 3158 (D. Nev. 1986).

129. Indian Claims Commission Act of 1946, Act of Aug. 13, 1946, Ch. 959, § 22, 60 Stat. 1049 (codified in part at 25 U.S.C. §§ 70n (2000)).

for the government that justified removal of Indians who had been in continuous possession of tribal lands. The Danns asserted that if the statute were interpreted so that the discharge not only eliminated all claims for remedies for past wrongs, causes of action that the statute created, but also provided the basis for altering the status quo and disrupting possession, then due process standards required that the ICC judgment be invalidated because the existing property interest of the Western Shoshone had not been represented in the ICC.¹³⁰ The Danns further argued that it was an abuse of discretion not to allow the Danns to present their evidence on the improper representation in the ICC and the fraud committed by the Secretary of Interior in accepting the ICC award.

The government, in its appeal, argued that the *Thompson* decision was wrong in recognizing individual possessory rights of the Danns because such rights could only be based upon government land policies that had changed before "entry" by the Danns, and they were not entitled to more land than the 160 acres their father had homesteaded. The government pointed out that the court in *Dann II*¹³¹ had stated that the ICC did not have jurisdiction over claims arising after 1946, and the ICC award could not result in the extinguishment of title on the date the award became final. The government argued that therefore the ICC judgment compels the conclusion that the title *must* have been extinguished before 1946, and because "the parties in the [ICC] proceedings stipulated to a valuation date of July 1872 for the government's taking of tribal aboriginal title," that date "should here be considered the date upon which tribal aboriginal title to the lands at issue was extinguished."¹³²

130. The Danns were not arguing that every member of a group should have a right to be heard in the ICC, but that *some* person or entity should have been heard on the issue of whether all the Western Shoshone lands had been taken and all Western Shoshone title had been extinguished, if those issues were to be preclusively determined there. To decide those questions without hearing from the titleholder, or any person having an interest in preserving the title, deprived the titleholder of due process. See discussion *supra* note 43.

131. *United States v. Dann (Dann II)*, 706 F.2d 919, 928 (9th Cir. 1983), *rev'd on other grounds*, 470 U.S. 39 (1985).

132. Brief for the United States at 26, *United States v. Dann (Dann III)*, 873 F.2d 1189 (9th Cir. 1989) (Nos. 86-2835 & 86-2890). The parties seemed to be in agreement that the ICC could not extinguish title. The dispute appeared to the author to be about what to do when the ICC awarded damages, computed as if all lands were taken, when title to particular tracts had not, in fact and law, been extinguished and the Indians were still in possession. Should the government suffer whatever losses might result because it paid damages for wrongs it had not yet committed? Should the government be allowed to recover its loss from the parties responsible for the mistake or deduct them from the ICC award? Or, should reality be altered to conform to a stipulation, and the Indians be forcibly removed from their lands because the stipulation was that the award could be valued as if the lands had all been taken in the last century?

I. The Court of Appeals Rules for the Government in *Dann III*

The court of appeals in *United States v. Dann (Dann III)*¹³³ reversed the *Thompson* decision, ruling in favor of the government on all issues except one: it found that the Danns did have the right under then-applicable public land laws to enter and use public lands up to 1934, when the area was closed to entry pursuant to the Taylor Grazing Act. The court agreed that the fact of payment compelled a conclusion that Western Shoshone title to the lands used and occupied by the Danns was extinguished prior to 1946 and that July 1, 1872, was "the most appropriate date."¹³⁴ The court held that the necessary implication of the Supreme Court decision was that Western Shoshone tribal title was extinguished prior to 1946.¹³⁵

The court of appeals remanded to the district court for a determination of whether the Danns held "individual occupancy rights" established by actual use and occupancy prior to November 1934, when Nevada was closed to homesteading and landless Indians could no longer establish individual title by settling on public domain. In apparent answer to the Danns' claim that they should have been allowed to prove fraud by the Secretary of the Interior in accepting the ICC award, the court of appeals held that the Danns had been rightly prevented from putting on additional evidence in the district court, stating that "[t]he evidence the Danns sought to introduce was in support of tribal aboriginal title."¹³⁶ The court dismissed

133. 873 F.2d 1189 (9th Cir. 1989), *cert. denied*, 493 U.S. 890 (1989).

134. *Id.* Judge Thompson had not found that title was "extinguished" by the payment of the claim. He found that the effect of the statutory discharge in the Indian Claims Commission Act was to "preclude" assertion of the title, *see* Conclusion of Law 5, *United States v. Dann*, 13 ILR 3158 (D. Nev. 1986), *aff'd in part and rev'd. on other grounds*, 865 F.2d 1528 (9th Cir. 1989), because the court of appeals, in *Dann II*, 706 F.2d at 927, had stated that payment would preclude or "bar" assertion of title, and there was nothing in the Supreme Court's decision finding that payment had occurred, which was to the contrary concerning the effect of that payment. In *Dann III*, the court of appeals seems to apply the collateral estoppel and res judicata principles that it had rejected in *Dann II*. In *Dann II* that court determined that a bar was the exclusively applicable effect of the statutory discharge received by payment of an ICC award. 706 F.2d at 924.

135. *Dann III*, 873 F.2d at 1194-95. Despite the insistence of the court of appeals that an ICC judgment could not have the effect of extinguishing title, the Supreme Court decision in *Dann* continues to be cited by commentators for that proposition. *See* Wilkinson, *supra* note 20, at 469; Harbison, *supra* note 20, at 491 n.217.

136. *Dann III*, 873 F.2d at 1195 n.4. However, the court did not state what the proffer was and therefore gave no explanation why the Danns could not show fraud in view of the Supreme Court's holding that, "absent actual knowledge of the fraudulent intent of the trustee," the Indians were bound by the payment by the government as debtor to the government as trustee. *United States v. Dann*, 470 U.S. 39, 48-50 (1985). Apparently the Ninth Circuit was ruling that, since payment compelled the conclusion that the title was extinguished prior to 1946, the Danns could not put on evidence that in fact it was not and that the Secretary of the Interior had been personally informed, prior to his acceptance of the

the Danns' due process arguments on the grounds that the tribal title was not "a direct property interest of their own" and "[t]he Danns were simply part of a litigating group with regards to the claims proceeding, and litigation strategy was subject to group decision."¹³⁷

J. The Final Round in District Court

At the time scheduled for trial in June 1991, the Danns withdrew any claim to "individual occupancy rights," as interpreted by the court of appeals,¹³⁸ because such a claim was inconsistent with their political assertion of aboriginal and treaty rights as Western Shoshone in continuous occupancy of tribal lands.¹³⁹ Although assertion of individual occupancy

payment, that it was not, and that payment would have the effect of taking lands from under the feet of his wards. See *supra* note 120.

137. *Dann III*, 873 F.2d at 1195. The court seems to suppose that the Danns had some input into the "group decision," but it does not explain its basis for such supposition. However, as explained *supra* notes 34-44 and accompanying text, the "group" had no recognized government and was nominally represented by the Temoak Bands, which politically represented only a portion of the "group" and had territorial jurisdiction over only a portion of Western Shoshone lands. The Danns did not belong to the Temoak Bands, and even the Temoak Bands had no control over the decisions that were made by the claims lawyers. See discussion *supra* notes 47-52 and accompanying text. See also *supra* note 131.

138. See *United States v. Dann*, 873 F.2d 1189, 1197 (9th Cir. 1989) (*Dann III*). The potential economic value of the individual aboriginal occupancy rights that the Danns were abandoning was considerable. Prior to the trial date, the attorneys for the government had suggested to the author that the matter of the Danns' individual aboriginal grazing and occupancy rights be settled at the right to graze 250 head of cattle on the range without permits plus title to some land and requested a counteroffer. The government also suggested that the number could be considerably higher if it were limited to the Dann sisters' lifetimes. See author's notes of telephone conversations with Justice Department attorneys Patricia Weiss and Daria Zane, May 5, 1991 (on file with author). The author forwarded this offer to the Danns with his opinion that the government would probably agree to the Danns' perpetual right to graze 500 head of cattle, without permits, and confirm their individual title to two additional quarter sections of land adjacent to the Danns' homestead. The author reminded them that this offer was in addition to reinstatement of the grazing permits for the livestock operation belonging to the estate of their parents. The Danns walked away from this offer as well as the opportunity to present their evidence of their parents' and grandmother's pre-1934 use and to have a now-sympathetic Judge Thompson qualify those rights. They did so out of principle and because they wanted it clear that they had been fighting for Western Shoshone rights rather than personal benefit.

139. While it is true that the Danns had previously asserted individual rights, which survived any loss of tribal rights in the ICC, they had asserted those rights as Western Shoshone and those rights derived from the tribal aboriginal title and treaty. See, e.g., Brief for Respondents at 33-38, *United States v. Dann*, 470 U.S. 39 (1985) (No. 83-1476). The Danns argued in *Dann III* that they were in a stronger position than the Indians in *Cramer v. United States*, 261 U.S. 219 (1923), because they had been in possession of tribal lands for generations and their use of the lands for grazing was sanctioned by Article VII of the Treaty of Ruby Valley, see *supra* notes 7 and 8. "Thus the Danns did not enter upon 'unappropriated public

rights was the only legal defense remaining, the Danns argued that the government was nonetheless not entitled to the equitable relief of an injunction because it lacked clean hands and, therefore, the court should confine itself to issuing a legal ruling and leave the government to its own devices in securing its ill-gotten gains.¹⁴⁰ Meeting with counsel in camera and off the record,¹⁴¹ Judge Thompson, in response to that argument, stated that he had no intention of issuing an injunction against the Danns because the BLM had administrative remedies it could pursue.

In the courtroom, the judge allowed Mary and Carrie Dann and Western Shoshone National Council Chief Raymond Yowell to personally address the court,¹⁴² and they passionately and eloquently expressed their lack of faith in the fairness of the U.S. courts and their intention to continue to occupy their ancestral lands. The court ordered the BLM not to impose any penalties and fees against the Danns for alleged trespass prior to June 6, 1991, and mandated that any cattle owned by the estate of the Danns' parents and found by agents of the BLM on the federal range in excess of permitted use "shall not be disturbed unless and until the appropriate notice of trespass and opportunity to remove any such cattle or livestock shall be given after this date, and the opportunity shall be given to the owners to rectify the situation, all in accordance with the regulations of the Bureau of Land Management."¹⁴³

The court determined that Mary and Carrie Dann's unpermitted cattle were in trespass and those cattle and unauthorized improvements were subject to removal by the BLM from the range "in accordance with Federal Range Codes and Regulations."¹⁴⁴ The court later denied the government its costs in the litigation referring to the court's previously expressed "intention in this equitable action that the [Danns] should not be

lands' under the benevolent policy of the Interior Department toward homeless Indians." Danns' Reply and Response Brief at 37, *United States v. Dann*, 873 F.2d 1189 (9th Cir. 1989) (Nos. 86-2835 & 86-2890). They argued that the essence of *Cramer* was not charity but "pre-existing right," which in their case flowed from their continuous occupation of tribal lands under treaty right. *Id.* The Danns just could not bring themselves to make a claim that they entered unappropriated public lands and acquired some government benefits for homeless Indians, regardless of the economic benefit of such a claim.

140. Defendants' Memorandum on Appropriate Relief, *United States v. Dann*, CV-N-74-60 BRT (D. Nev. 1986).

141. See Minutes of the Court, June 6, 1991, *United States v. Dann*, CV-R-74-60 BRT (D. Nev. 1986).

142. *Id.*

143. *Id.* at 2.

144. *Id.*

penalized for their untiring efforts to obtain recognition and enforcement of rights as Shoshone Indians."¹⁴⁵

Thus, Judge Thompson limited the government's remedies to agency enforcement of applicable BLM grazing regulations, placing the government in exactly the same position that it had claimed to be in before it sued the Danns for an injunction and trespass damages seventeen years previously. The government had failed to obtain either an injunction or damages.¹⁴⁶ Nonetheless, the government, exploiting its legal position as guardian of the Indians, had succeeded in undermining the Western Shoshone title by delaying the proceedings in the *Dann* case until it could force the ICC judgment upon its protesting wards.

IV. CONCLUSION

The legal history of the United States is replete with instances where the Judicial Branch proved itself unable¹⁴⁷ or unwilling¹⁴⁸ to prevent the confiscation of Indian property by the political branches. However, it is one thing to say that when the President or Congress engages in such conquest, relief to the victims is not available in "the courts of the conqueror";¹⁴⁹ it is quite another to say that such conquest may occur by operation of those courts themselves in applying the constructive taking date adopted for one purpose in a claims tribunal as the historical date of extinguishment of title in the law courts. If the United States is to take property by conquest, it does not seem to be too much to ask that it actually draw its sword, get on its horse, and go out and conquer; or, if it does not have the stomach for such real conquest, it should at least muster the political will to conquer constructively by openly extinguishing the Indians'

145. *United States v. Dann*, CV-R-74-60 BRT, at 2 (D. Nev. Jul. 11, 1991) (order denying costs).

146. The damage claim dismissed by the district court in its order of April 25, 1980, discussed *supra* notes 74 and 82 and accompanying text, was never reinstated. Whether this was because of oversight or the result of careful, strategic planning on the part of the government is not known. Although it would be consistent with the government's later theory regarding when the lands became federal lands, it would seem preposterous to impose damages for trespass upon persons who were lawful possessors according to the courts at the time, because the court of appeals later decided, *see discussion supra* notes 132-135 and accompanying text, that their title had to be now deemed to have been extinguished a century earlier because of a stipulation entered in another proceeding where final judgment was not entered until years after the alleged trespass.

147. FELIX COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 83 (1982 ed.) (discussing President Jackson's refusal to enforce the Supreme Court's decision in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832)).

148. *See, e.g., Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903).

149. *Johnson v. M'Intosh*, 21 U.S. (8 Wheat) 543, 588 (1823).

title by legislation as it has in the past.¹⁵⁰ On the other hand, if the United States is to hold itself to the rule of law and submit disputes with indigenous people to the courts, those courts ought to provide due process of law by allowing meaningful access to the claims tribunals and applying accepted doctrines of discharge and issue and claim preclusion in the courts. The United States did none of these in confiscating the lands of the Western Shoshone.

This is not some ancient wrong, sounding of "old, unhappy, far off things and battles long ago,"¹⁵¹ for which no one now living is responsible. Over the last three decades, the Judicial and Executive Branches were repeatedly given opportunities to adopt an honest and equitable solution, either based upon existing law or imposed by political settlement, and they repeatedly squandered them. The opportunity remains to devise a legislative settlement, in the claim distribution process or otherwise, that would mitigate this rank injustice and denial of due process by confirming reservations for the Western Shoshone. If the United States must now seize Western Shoshone lands, it should at least provide a place to which they could remove themselves and their stock as it promised in the Treaty of Ruby Valley and as it provided to other tribes during the age of conquest.

150. See, e.g., *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955).

151. William Wordsworth, *The Solitary Reaper*, in *A TREASURY OF THE FAMILIAR* 412-13 (Ralph L. Woods, ed., 1945).