

## Annex II

### Background on Matter raised by Certain Western Shoshone Descendants

#### Executive Summary.

1. (a) The United States recognizes, as a historical matter, that indigenous people throughout the world have been unfairly deprived of the lands they once habitually occupied or roamed. Such ancestral lands once constituted most of the Western Hemisphere. In 1946, recognizing that many Indian tribes in the United States had been unfairly deprived of such lands, the U.S. Congress established a special body, the Indian Claims Commission (ICC), to hear claims by Indian tribes, bands, or other identifiable groups for compensation for lands that had been taken by private individuals or the government. The ICC provided Indian claimants greater access and more flexible rules under which to pursue their claims than would otherwise have been available to the general public.

(b) In 1951, the Western Shoshone, represented by the Te-Moak Bands, brought such a claim. That claim was successful, resulting in a decision (over objections of the U.S. Government) that Western Shoshone aboriginal title had been extinguished. The parties to the litigation stipulated that the lands were taken in 1872. A valuation trial was held and the ICC declared the value of the lands and sub-surface rights to be over \$26 million at the valuation date – compensation that is worth approximately \$157 million as of March 2007.

(c) The petitions submitted by certain Western Shoshone descendants to the Committee on the Elimination of Racial Discrimination (CERD) concern an internal dispute among Western Shoshone descendants about the litigation strategy pursued in that claim. Certain Western Shoshone descendants, who were themselves part of the litigating group, objected to seeking compensation for all Western Shoshone lands; instead they preferred not to claim compensation for a portion of the lands in favor of restoration of those lands. However, they failed to raise their objections in a timely manner so that the matter could be dealt with in the litigation under applicable law. Specifically, the ICC and appellate court found that their attempt to intervene in the proceedings was untimely because: (1) they had waited 23 years from the start of the case before seeking to participate, despite admitting in their filings to the court that they had been aware of the ICC proceedings for a very long time; (2) they had not presented an excuse to the court for the delay; and (3) they had not demonstrated fraud or collusion by the Te-Moak Bands, which were prosecuting the case on behalf of the Western Shoshone, and the U.S. Government. Because they were unsuccessful in pursuing their objections, the Western Shoshone descendants who disagreed with the decision of the Te-Moak Bands now seek to bring this issue before the CERD, despite ample recourse before U.S. courts, including the U.S. Supreme Court, and despite the fact that their position does not represent the views of all Western Shoshone descendants, most of whom wish to receive the compensation as awarded by the ICC.

## Introduction and Background.

2. The matter raised by certain descendants of the Western Shoshone involves litigation of title and use questions regarding lands – questions that have been considered at various levels of the United States administrative and judicial systems, including the U.S. Supreme Court, under applicable laws and regulations for more than 50 years. This Annex sets forth background information on this matter, and indicates the reasoning behind the U.S. Government’s view that the issues here do not involve discrimination based on race under the Convention on the Elimination of All Forms of Racial Discrimination.

3. Under United States law, the U.S. Government recognizes Indian tribes as political entities with inherent powers of self-government. The federal government therefore has a government-to-government relationship with Indian tribes. In this domestic context, this means promoting tribal self-government over a broad range of internal and local affairs, including determination of membership, culture, language, religion, education, information, social welfare, maintenance of community safety, family relations, economic activities, lands and resources management, environment and entry by non-members, as well as ways and means of financing these autonomous functions. This approach also recognizes the collective nature of indigenous rights, particularly land rights. Rather than representing an aggregation of individual land rights, American Indian tribal lands are collectively held.

4. To conduct vital aspects of tribal self-government, tribal authorities must be able to speak and act on behalf of their group and, recognizing the tribes’ inherent powers of tribal self-government, national governments must be able to deal with tribal representatives. Just as particular decisions of the U.S. Government do not reflect the consent or participation of each and every citizen, so the decision of a tribal government may not reflect the participation or consent of each and every member of the tribe. In the United States, there are 561 federally recognized tribes. In order for the United States to conduct business with tribes, it must be able to deal with and rely upon tribal representatives acting on behalf of their tribes, thereby respecting the collective nature of indigenous rights.

5. Based on the separate status of Indian tribes as recognized in the U.S. Constitution, tribes have a special political relationship with the federal government and are afforded special rights, benefits, and treatment that are not afforded to other sub-national groups or members of society. This special and more favorable treatment is permissible without violating the equal protection standards of the Constitution because it is based on the political relationship between tribes and the U.S. Government rather than the racial heritage of tribal members. Morton v. Mancari, 417 U.S. 535 (1974). When indigenous individuals deal with the federal government in their individual capacities, they are of course entitled to the same constitutional rights as all other citizens. On tribal matters,

the tribal representatives deal with the U.S. Government in respect of the government-to-government relationship between the federal government and tribes.

### Western Shoshone Land Claims.

6. *Historical Wrongs.* As the United States grew and expanded into the American west, especially during the nineteenth century, there were inevitable conflicts over rights to use the land in various regions between American Indians on the one hand, and the government and the new arrivals on the other. In the early decades of the twentieth century, the U.S. Congress recognized that many Indians had been unfairly deprived of the lands they had habitually occupied or roamed, and Congress thus passed a number of pieces of special legislation authorizing the adjudication of particular Indian claims by certain tribal groups, including the Western Shoshone. Such ad hoc laws, however, resolved only a very small number of Indian claims and grievances. Many serious Indian claims and grievances remained unresolved.

### 7. *Creation of the ICC.*

(a) In 1946, the Congress adopted the Indian Claims Commission Act, which provided for a quasi-judicial body, the Indian Claims Commission (ICC), to consider unresolved Indian claims that had accrued against the United States, a large portion of which involved claims for compensation for taken lands. Before the ICC was created, federal courts did not have jurisdiction to hear Indian claims. The act authorized claims to be brought on behalf of “any Indian tribe, band, or other identifiable group of American Indians” with respect to “claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant. . . .”

(b) As noted above, in the U.S. legal system, ownership of indigenous lands is appropriately recognized as held by the collective tribal entity rather than individual members of the tribe. Recognizing the collective nature of indigenous rights, including property rights, is essential to honoring indigenous culture and world views. The ICC therefore sought to deal with the overall tribal government or other appropriate tribal authority who could speak for the entire group rather than for individual members or parts of the group.

8. *ICC Rules.* The ICC represented the exclusive remedy for tribes in suits against the United States, which ordinarily would have been barred by statutes of limitations and sovereign immunity laws. The ICC also recognized lower burdens of proof on claimants and more favorable rules of evidence in order to help Indians establish their historic claims. Such favorable, pro-claimant procedures would not ordinarily have been available under regular court rules. Indian tribes had five years to file their claims, and they could seek compensation for general wrongs that might not otherwise have been actionable under law. The wording of the act and its legislative history make clear that only

financial compensation was contemplated by Congress; the ICC had no authority to restore land rights that had been extinguished. The fact that the ICC could only decide financial compensation was confirmed by the Commission's decision in Osage Nation of Indians v. United States, 1 Indian Claims Commission 54 (December 30, 1948), reversed on other grounds, 119 Ct. Cl. 592, cert. denied, 342 U.S. 896 (1951). To encourage lawyers to assist Indian claimants, the Indian Claims Commission Act provided that lawyers could receive as attorneys' fees of up to ten percent of the awards that they won for their Indian clients. For many Indian claimants, the ICC provided the possibility of compensation and a measure of justice that would have been denied to them under the historically restrictive laws and policies that had limited their ability to seek such compensation.

9. *Representation of the Western Shoshone.* Where a tribe of Indians had a readily identifiable overall government or recognized authorities who could speak for the entire tribe, the ICC sought to deal with such authorities. In the case of the Western Shoshone, which had (and still have) no single governing body, the ICC entertained claims from members of the group acting in the interests of the entire group. The Western Shoshone have traditionally had a very loose organization, consisting of small "bands" of Western Shoshone tied geographically or by blood in frequently shifting alliances. Despite this loose organization, the ICC recognized the Western Shoshone as an "identifiable group" competent to make claims for damages or compensation for the taking of their traditional lands.

10. *Filing of Claim on behalf of the Western Shoshone.* In 1951, the Te-Moak Bands of Western Shoshone filed a claim on behalf of the Western Shoshone as a whole, seeking compensation for the value of Western Shoshone lands that had been taken by the United States. Under the Indian Claims Commission Act, the exclusive privilege of pursuing a claim rested with a recognized tribal organization "unless fraud, collusion or laches on the part of such organization be shown to the satisfaction of the Commission." Finding that the Te-Moak Bands of Western Shoshone were organized under the Indian Reorganization Act of 1934 and were recognized by the Secretary of Interior as having authority to maintain a suit, the ICC ruled expressly that the Te-Moak Bands of Western Shoshone Indians, Nevada, had the right to maintain this action for and on behalf of the Western Shoshone, the land-using entity. 11 Ind. Cl. Comm 387, 388. In so doing, the ICC recognized the Te-Moaks as tribal representatives of all of the Western Shoshone, acting in the interest of all in pursuing the claim.

11. *Over U.S. Objection, ICC finds for Western Shoshone.*

(a) In 1962, the ICC found that Western Shoshone lands had indeed been taken both by gradual encroachment of settlers and miners on the land, and by the U.S. Government's treatment of portions of the land as federal or public lands. Despite the Government's contention that the Indians had never owned the land and that therefore the question of title extinction did not arise, the ICC held that, after a 1957 trial contested on these grounds, and based on evidence in materials submitted at the trial, the Western Shoshone

had possessed aboriginal title to the territory involved and that this title had been extinguished by a process of gradual encroachment, see 531 F.2d at 500.

(b) The ICC found that, all together, the Western Shoshone aboriginal title to 22 million acres in Nevada had been extinguished in this way, i.e., the Western Shoshone had *de facto* lost the exclusive possession and control of these lands to other parties and could no longer assert exclusive possession and control of them. The ICC held that the Western Shoshone should be compensated for the extinguishment of their title to these lands and began the process of setting compensation.

12. *Consultation within the Western Shoshone.* During September and October of 1965, the Counsel for the Te-Moak Bands held open Council meetings at four locations in the Western Shoshone territory, and all Western Shoshone were given the opportunity to attend and vote to elect an eight-member claims committee, which (using a loan from the U.S. Government) hired an expert appraiser to provide testimony to the ICC regarding the valuation of the taken lands. The vote to establish the Committee and hire the expert appraiser was 219 in favor and 17 opposed. The expert was subsequently hired and the testimony provided to the ICC for purposes of the valuation process.

13. *Valuation of Taken Land and Sub-Surface Rights.* Since the process of encroachment was a gradual one that lacked any specific historical, legal, or administrative event to mark the extinguishment of Western Shoshone title to the lands, in 1966 the Counsel for the representatives of the Western Shoshone and the United States Government stipulated that July 1, 1872 would be taken as the valuation date for the Western Shoshone taken lands in Nevada. This stipulation was not collusion, nor an arbitrary process, but a proper application of the admonition that parties to such litigation should attempt to agree, if possible, on one or a few valuation dates rather than undertaking burdensome individual computations of value as of the date of disposals of each separate tract, see 531. F2d at 500. The ICC then began the process of determining the valuation of the 22 million acres at that time. A valuation trial was held, and in 1972 the ICC declared the value of the taken lands and sub-surface rights to be \$26,154,600.

14. *Request to Intervene in ICC Proceedings.*

(a) In 1974, another Western Shoshone group, the Western Shoshone Legal Defense and Education Association, sought to intervene in the ICC proceedings. This group, of which the Dann family were members, was not a recognized tribal group and did not represent the Te-Moak Bands. Its goal was to remove certain lands from the settlement in the ICC, claiming that title to these lands had not been extinguished and that the lands were therefore held by the Western Shoshone in aboriginal title. The ICC rejected the intervention request, Western Shoshone Legal Defense & Education Ass'n v. United States, 35 Ind. Cl. Comm. 457 (1975). That decision, in turn, was appealed to the Court of Claims, which also denied the request, Western Shoshone Legal Defense and Education Association and Frank Temoke v. the United States and the Western Shoshone Identifiable Group, represented by the Temoak Bands of Western Shoshone Indians,

Nevada, 531 F.2d 495 (Ct. Cl., 1976) (This decision can be found at Tab A). In so doing, the Court noted that:

- (1) the Legal Defense and Education Association had waited 23 years from the start of the case before seeking to participate in the claims proceedings, despite the fact that it had been aware of and opposed to what was occurring in those proceedings during that time;
- (2) the Legal Defense and Education Association had not presented any excuse for such delay; and
- (3) it had not demonstrated fraud or collusion on the part of the Te-Moak Bands of Western Shoshone, the tribal organization that was participating in the proceedings as the Indians' exclusive representative, as required by statute.

In view of these facts, the Court could find no legal justification for intervention at so late a stage. The Supreme Court denied a petition for a writ of certiorari in the case, 444 U.S. 973 (1979).

(b) In these cases, the ICC and the Court of Claims carefully considered the requests of the challenging entities. On the issue of representation, both the ICC and the Court of Claims found, based on consideration of the evidence, that the Te-Moak Band had been the appropriate representative of the entire Western Shoshone, and that the petitioner's allegations of fraud and collusion were unfounded. The Court of Claims noted:

“The fact is that at bottom all that appellants have demonstrated is that there is a dispute between an undetermined number of supporters of appellants and the organized entity, the Te-Moak Bands, over the proper strategy to follow in this litigation.” 531 F.2d at 503.

(c) In considering the request for intervention, the Court of Claims also directly addressed the question of whether the Danns and the other complainants had been fully apprised of the litigation strategy that had been employed by the organized entity of the Western Shoshone group. After examining the record, and based on the petitioners own admissions in their filings to the court, the court found that “there is no doubt whatever that appellants [including the Danns] were for a very long time quite aware of the position with respect to this Nevada land taken before the [Indian Claims] Commission by appellee, Te-Moak Bands and its counsel.”

(d) The court's order was not based on any unwillingness to consider a representational dispute timely presented, or to allow an Indian group to contend that it still retained title to ancestral lands. The Court of Claims explained the process as follows:

“If there are circumstances in which the organized entity fails properly to represent the group, the normal method of redress is through the internal

mechanism of the organized entity. And if there be cases in which the internal mechanism is clogged or unavailable then, at least, the members claiming to represent the majority interest are required to make their position formally known to the [Indian Claims] Commission and the other parties as soon as possible – and not after much work has been done, and years have passed, on the unchallenged assumption that the organized entity represents the group.” 531 F.2d at 504; see also 593 F.2d 994, 997-999. (Emphasis added.)

(e) The delay in this case was substantial – the request to intervene was made 23 years after the litigation had been initiated. As the U.S. Court of Claims observed in denying the request for intervention:

“The [petition to intervene] was first thrust upon the [Indian Claims] Commission and the parties in 1974, some 23 years after this Western Shoshone claim was first made to the [Indian Claims] Commission in 1951, some 12 years after the Commission had decided (in 1962) that the United States had extinguished the claimant’s title to the large area involved, eight years after the Commission had approved (in 1966) the parties’ stipulation as to the valuation date of these lands, about one and one-half years after the Commission had determined (in October 1972) the actual value of the property, and about a month after the problem of offsets had been tried and submitted for disposition.” 531 F.2d at 498.

(f) In light of the determination of the Court of Claims’ that “no adequate excuse was offered for the long delay” (531 F.2d at 498-499, 501-502 N. 13, see also 593 F.2d at 997), neither the United States court procedural rulings nor the preclusive effect that Congress has assigned to the judgment of the ICC offends due process. Nor was the holding in any way discriminatory; legal standards concerning the timeliness of intervention are applied equally to all litigants, whether in Indian claims cases or others, see 531 F.2d at 502-503.

15. *Change in Litigation Strategy.* Subsequently, in 1976, the Te-Moak Bands, now represented by different counsel, themselves moved for a stay of the ICC proceedings in order to obtain an administrative decision from the Secretary of the Interior that the Western Shoshone still held title to 12 million acres, representing a portion of the land that the Te-Moak Bands originally claimed had been taken. The ICC denied the request for a stay and issued its final decision in August 1977, Western Shoshone Identifiable Group v. United States, 40 Ind. Cl. Comm. 305, 311 453 (1977). The Court of Claims affirmed the ICC action in 1979, primarily on the grounds that the request for the stay in order to change litigation strategy was untimely, 593 F.2d 994 (1979).

16. *Certification of Compensation Award.* In December 1979, the Court of Claims certified the award of slightly more than \$26,000,000 to the U.S. General Accounting Office, and that amount was placed in an interest-bearing trust account in the United States Treasury. The Supreme Court in 1985 subsequently found that, although the award money had not yet actually been distributed, for reasons noted below, the payment of the award into the trust account represented a full discharge of the United States,

pursuant to the ICC Act, from all claims and demands touching any of the matters involved in the controversy. United States v. Dann, 470 U.S. 39 (1985).

17. *Distribution of Compensation.*

(a) *Developing a Distribution Plan.* By statute (25 U.S.C. 1402), once Congress appropriates funds for the ICC award and the money is deposited in an interest-bearing account, the Secretary of Interior is required, after consulting with the tribe, to submit to Congress a plan for distribution of the fund. Because of the refusal of some groups representing minorities of the Western Shoshone to consult with the Secretary, the Secretary was not in a position to develop the plan for presentation to Congress.

(b) *1998 & 2002 Referenda.* Nonetheless, during this time many Western Shoshone worked to find a way to distribute the funds, and more than 1,400 Western Shoshone formed an association in the attempt to receive payments from the trust fund. Western Shoshone referenda were held in 1998 in which 1,230 Western Shoshone voted in favor of distribution of the funds and 53 voted against. In 2002, Western Shoshone referenda again were held in which 1,647 Western Shoshone voted in favor of distribution of the funds and 156 voted against distribution. In response to the referenda, the “Western Shoshone Claims Distribution Act” (PL 108-270) became law in 2004. The law specifically provided that a receipt of a share of the judgment funds under the bill would not constitute a waiver of any existing treaty rights pursuant to the 1863 Treaty of Ruby Valley, nor would it prevent any Western Shoshone Tribe or Band or individual Shoshone Indian from pursuing other rights guaranteed by law.

(c) *Developments in March 2007.* At the current time, the Department of the Interior is developing a process to distribute the judgment, which in March 2007 was valued at more than \$157 million. During March 2007, the Shoshone governments at Duck Valley, Duckwater, Ely, Yomba, and Fallon each passed resolutions that reaffirmed support for distribution, while the Chairman of the Te-Moak tribe of Western Shoshone issued a proclamation of affirmation in favor of distribution. (See Tab B for text of resolutions.)

18. *Legal Considerations.*

(a) *Issues Relating to Retroactive Application of the Convention.* In 1951, the Western Shoshone land claims were brought in the ICC – a forum set up specifically for Indians to provide greater access to pursue claims than would otherwise have been available, and to ensure fair compensation for lands taken by the United States. This petition before the CERD essentially seeks to review the work of the ICC, which was developed in the 1940s to deal with historical and unfair takings of indigenous lands. In this case, it was stipulated by the parties that such takings occurred in the 1800s. In its Early Warning and Urgent Action Procedure, the CERD may be viewed as analyzing events that occurred well before the CERD existed and before the U.S. became a party to the CERD. The United States respectfully requests the CERD to consider the sweeping implications of any attempt to reach back in this fashion. In particular, the United States notes the CERD’s statement that the processes before the ICC did not comply with “contemporary

international human rights norms.” (Para. 6 of CERD Decision 1(68), quoting the Inter-American Commission on Human Rights)<sup>1</sup> Observers of the Committee’s work are left asking themselves: Is it fair to hold institutions created 60 years ago to contemporary norms? How far back will the Committee reach in applying contemporary norms? When will the Committee choose to retroactively apply those norms?

(b) *Collective Nature of Indigenous Rights.* The case involved a collective tribal claim to land, not an aggregation of related individual claims. Hence, neither the Danna nor other individuals were entitled to be individually represented in the ICC proceedings. All members of the group were represented by the Te-Moak Bands, an entity that was found by the Court, after scrutiny, to legitimately represent the collective interests at issue. The Danna and the other members of the Western Shoshone Legal Defense and Education Association were part of the litigating group with regard to the claims proceeding, the litigation strategy was subject to group decision, and any dissenters had ample time during the case itself to try to resolve their issues within the tribal context or to bring them to the attention of the ICC and courts. Because the Western Shoshone Legal Defense and Education Fund waited 23 years to try to intervene in the ICC proceedings despite admitting they had known for a long time about the proceedings, and because they presented no excuse of this delay, their attempt to intervene in the proceedings was barred as untimely. Simply put, implementing basic rules in a consistent and even-handed manner regarding the timeliness of filing claims in adjudicative proceedings does not constitute racial discrimination. Ms. Danna and her supporters now attempt to bring before the CERD and other international bodies what was, in reality, an internal dispute among differing factions of the Western Shoshone about the litigation strategy with regard to a portion of the lands at issue. The processes employed and the decisions of the

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<sup>1</sup> With respect to the “contemporary human rights norms” identified in the 2002 Report of the Inter-American Commission, the United States would like to share several observations. In analyzing the scope of contemporary human rights norms, the 2002 report relied heavily on the Draft American Declaration on the Rights of Indigenous Peoples. The application of the provisions in a draft document in a case before the Commission was inappropriate. To begin with, the draft declaration is, of course, a draft, and its content changes during each negotiating round of the OAS Indigenous Rights Working Group, which has been meeting since 1999 to finalize this document. If one reviews the current rolling chair’s text, one will find most of the provisions remain in brackets or otherwise not agreed to, even by the working level negotiators of the document, much less by OAS member states. States have not yet agreed to such international legal obligations for historic wrongs with respect to historically occupied lands. Moreover, as stated on numerous occasions by both states and the Indigenous Caucus in these negotiations at the OAS, the Working Group is negotiating an aspirational and future-looking declaration and not a legally binding document, much less a statement of what law applies today or to activities arising many decades ago. Simply put, a draft, aspirational declaration not yet agreed to by governments cannot establish international legal principles, norms, or obligations; there is no basis for such an assertion in international law.

ICC and the courts were taken in accordance with applicable law and provided all the due process and equal protection guarantees required by the U.S. Constitution. In this context, allegations that actions by the United States in this case implicate its obligations under the CERD are utterly without legal or factual basis.

### Treaty of Ruby Valley

19. The U.S. Government has long been involved with the Western Shoshone and concerned for their welfare. In the latter half of the 19<sup>th</sup> Century, the United States concluded numerous treaties of peace and friendship with the Shoshone bands. These treaties were designed to end conflicts between the Shoshone bands and the new settlers. The Treaty of Ruby Valley, one of five Shoshone treaties signed in 1863, was by its own terms such a treaty of peace and friendship covering the northern portion of the lands roamed by the Western Shoshone.

20. The Treaty of Ruby Valley was not designed to address permanent land rights between the parties. The boundaries specified in Article V of the Treaty were intended to delimit and recognize the area claimed and roamed by the nomadic bands within which the provisions of the treaty were to be applicable. Article V was neither written nor intended to cede that territory to the Western Shoshone bands, nor reserve it in any way for their permanent and exclusive use. The U.S. Supreme Court found in 1945 that the 1863 Shoshone treaties, including the Treaty of Ruby Valley, were not intended to confirm or acknowledge title in the Indians for any land, nor were they interpreted as such by the Government of the United States. Northwestern Band of Shoshone Indians v. United States, 324 U.S. 335 (1945).

21. The territory specified in the Treaty of Ruby Valley was an articulation of the area within which the Shoshone would be expected to roam and to adhere to the terms of the treaty of peace and friendship, including the provision that the Western Shoshone bands agreed to cease “hostilities and all depredations upon the emigrant trains, the mail and telegraph lines, and upon the citizens of the United States . . . .” The Western Shoshone bands did not, and could not have, exclusively and permanently used and occupied such a large area of land, as the entire Shoshone people, including the Western Shoshone, numbered only some 10,000 people at the time the treaty was signed (estimate of the U.S. Indian Claims Commission). By contrast, some 20,000 non-Indians already resided in the area at that time (estimate of the U.S. District Court). The Western Shoshone did not have treaty or “recognized” title to the land in question and, thus, their ICC case had to rest on any aboriginal title they may have acquired through exclusive possession and control of any lands, whether enumerated in the Treaty or not. It has been established by decisions of the U.S. Court of Claims that aboriginal title must rest on actual, exclusive, and continuous use and occupancy.

22. The parties to the Treaty of Ruby Valley fully expected that the United States would make extensive, and sometimes exclusive, use of the area in question. In fact, the Treaty itself provided, among other things, for United States construction of ranching, mining and agricultural settlements, travel, telegraph lines, railways, mineral prospecting,

timber mills, and military facilities. Article VI specified that the President of the United States was authorized to establish “such reservations for [the bands’] use as he may deem necessary within the country above described” when the bands abandoned the “roaming life,” and the bands agreed to move to such reservations and remain there. No reservations were ever established expressly pursuant to the Treaty, although reservations and land purchases have been made for the benefit of the Western Shoshone under other authority.

### The Dann Family.

23. The impoundment of Dann family livestock involves different, but overlapping, issues. Ms. Dann owns and operates a ranch in Crescent Valley, Nevada, on the estate of her late father, Dewey Dann. Mr. Dann obtained title to this land through both land purchase and the Homestead Act; thus the ranch is held in fee simple title – and continues to be held in this manner. Several other families also received title to land in Crescent Valley in the same manner.

24. Because cattle require large areas for grazing, petitioners’ father grazed his cattle on both his private land and on lands owned by the United States and managed by the Bureau of Land Management (BLM). Under United States law, the BLM allows individuals to graze their cattle on federal public lands by permit, in return for the payment of minimal fees. This system allows ranchers to raise more livestock than their own private lands would support, at a minimal cost, because the fees are far less than comparable market fees. The BLM designates the areas of public lands for grazing, the numbers of cattle permitted to graze based on the state of the range, and the total number of ranchers and cattle in the area. The goal is to preserve the range so that it may continue to be used for livestock grazing.

25. Mr. Dann had a permit issued in 1936 from the United States to graze his cattle. He complied with the permit and its accompanying rules, and grazed cattle continuously on the public lands. The United States did not interfere with the Dannes’ grazing of cows under the permit issued to petitioners’ father. Following their father’s death, the Dann sisters continued to be permitted to graze cattle in the same manner as their father, and were subject to the applicable rules and regulations flowing from that permit. Nonetheless, they began to graze a greater number of cattle than allowed under their father’s permit. Although they had permits allowing them to put 170 cattle and 10 horses on the public lands during specific times of the year, they consistently put more livestock on the public allotment than their permit allowed – at times as many as 2,000 animals. This excess of livestock resulted in the severe degradation of forage on the public lands. In some instances, the poor range conditions have caused the other permit holders to have to remove animals that they would otherwise have been authorized to graze there. The habitat for native wildlife has also been severely affected. In addition to overgrazing the lands for which they had permits, the Dann sisters grazed other federal lands without a permit, and profited from these activities.

26. The BLM, which has the responsibility to protect those lands, tried repeatedly to resolve the matter administratively with the Dann sisters, but they refused to remove the excess cattle and the attempts at resolution were unsuccessful. As a result, in 1974, the United States filed a judicial action for grazing trespass against the Dann sisters, under the Taylor Grazing Act, 43 U.S.C. 315 et. seq. The purpose of this action was to have the Dann sisters remove the excess cattle from the public lands. In defense, they claimed that they owned these lands on two grounds: (i) the lands were the aboriginal lands of the Western Shoshone and should be recognized as still being owned by Western Shoshone; and (ii) as individuals, they held aboriginal rights to these lands.

27. This defense raised the very same issues that had been the subject of the ICC action discussed above. The United States responded by demonstrating that the matter of title to land by the Western Shoshone had been addressed and decided in the ICC proceeding, which was complete. Petitioners claimed that there was no extinguishment of title because the money awarded had not yet been distributed. This issue went all the way to the U.S. Supreme Court, which held in a 1985 decision that the Western Shoshone land title had been extinguished at the time the United States paid the award for the land into the registry. Thus, the Supreme Court found that the Dann sisters' claim that the Western Shoshone still held title to the lands was without merit. United States v. Dann, 470 U.S. 39 (1985).

28. (a) Although the Supreme Court held that the tribal claim to aboriginal title no longer existed, the Court held that the Danns might be able to assert individual claims under certain circumstances: "The Danns also claim to possess individual as well as tribal aboriginal rights and that because only the latter were before the Indian Claims Commission, the 'final discharge' of section 22(a) does not bar the Danns from raising individual title as a defense in this action. Though we have recognized that individual aboriginal rights may exist in certain circumstances in certain contexts, this contention has not been addressed by the lower courts, and, if open, should first be addressed below." 470 U.S. at 50. On remand, the United States Court of Appeals for the Ninth Circuit ruled that the Danns would be able to assert individual aboriginal title as a defense in the trespass action, to the extent "such aboriginal right . . . [was] acquired prior to the withdrawal of the lands from open grazing and their subjection to the regime of the Taylor Grazing Act" in 1934, and was "continuously exercised since that time." Dann v. United States, 873 F.2d 1189, 1199, 1200 (1989).

(b) Nonetheless, on June 6, 1991, just as the U.S. District Court for the District of Nevada was about to hear the issue of individual title, the Dann sisters withdrew all claims to individual aboriginal rights and titles to graze cattle and to range improvements on public lands of the United States. The Dann sisters were represented before the Court by counsel of their own choosing. In withdrawing their claims to individual aboriginal rights and titles, they explained that pursuing such claims would have separated them from the treaty-based Western Shoshone nation claim. As a result, U.S. federal courts ordered that the Danns comply with regulations issued by the Secretary of Interior pursuant to the Taylor Grazing Act.

29. At the time they withdrew their claims of individual aboriginal title as a defense, the Dann sisters also said that, although they were not going to pursue claims of individual aboriginal rights further in court, they intended to continue to graze their animals as they saw fit on the lands that they had claimed. Subsequently they did so. In enforcement of the applicable laws and regulations, and with prior notice, the BLM four times impounded hundreds of livestock that were far in excess of the permitted number, including horses twice in 1992, cattle in 2002, and horses once again in 2003. The first impoundment of 161 horses occurred in March 1992, and the second impoundment of 269 horses occurred in November 1992.

30. It should be noted that federal ranching regulations applicable to grazing on federal lands are created and enforced for the public benefit, and that all persons must comply with them, regardless of race, ethnicity, or tribal affiliation. The BLM has an obligation to all area ranchers, as well as to the general public, to take appropriate and necessary action to ensure that public lands are sustainable into the future. Thus, the actions taken with regard to the Dann sisters for their blatant violations of these regulations are no different from those that would have been taken against any rancher who continued to overgraze on public lands after being ordered to stop. The regulations in question have not been applied discriminatorily in any way to the Dann sisters. Indeed, there is no argument possible that U.S Government actions in this matter constitute “racial discrimination” as that term is defined in the CERD.

#### Consultation with the Western Shoshone.

31. Pursuant to Executive Order 13175, the United States works with Indian tribes to resolve land and related issues. Today the Western Shoshone consist of six different tribes, bands, and groups, five of which are federally-recognized tribes. Utilizing tribal participation and input, the Elko and Battle Mountain Field Offices of the BLM have been tasked with identifying Western Shoshone concerns and working with the tribes, bands, and groups with regard to the area at issue as well as other areas. Such consultation covers a variety of subject areas, including traditional cultural properties and activities; Native American grave protection and repatriation of remains; protection of archaeological resources; land acquisition; educational programs, and other matters, such as oil and gas leasing, geothermal leases and drilling applications. Some examples of the ways in which such collaboration occurs are set forth in the main report. Others are set forth below:

- BLM regularly invites the various Western Shoshone tribal governments to consult on many land management projects and proposals.
- After project information is mailed to the tribes, BLM calls tribes to see if they would like to be involved or participate further. Most Shoshone tribes defer to the most local band or tribe (in relation to a project location). For example, an Elko BLM project description and location will be mailed to all those Shoshone tribes with interests within the specific BLM administrative boundary. If the project is

located farther south, the Battle Mountain Band will be the lead tribal group. If the project is located farther north, the Wells Band will be most involved. The overall Te-Moak Tribal Council usually requests to be updated and if need be, will work with BLM, if there is no resolution between BLM and the more local band councils.

- At times, a more distant Shoshone tribe will request to be a participant in the decision-making processes. This could occur if the distant tribe has tribal members who are originally from an area where a proposed land management action is to take place. In such a case, the more distant tribal government will request to consult with BLM on behalf of their affected individual tribal members.
- The BLM Native American Coordinator meets in person with tribal staff, elders, and tribal councils at least weekly. All Environmental Impact Statement (EIS) information is sent to the tribes with invitations to meet and attend field tours if they have concerns. Depending on the resources possibly affected and the proposed action location, most Environmental Assessment information is also sent to the tribes. In recent years, the BLM Elko Office has issued invitations for tribal consultation with regard to fires; mining activities; oil, gas and geothermal leasing; and land sales. The BLM Battle Mountain Office has invited tribal involvement concerning land sales; oil, gas, and geothermal leasing; fuels reduction projects; the Cortez Hills Plan of Operations; and the Mount Hope Molybdenum Mine Plan of Operations.
- In 2000-2002, the BLM committed to water monitoring and maintaining adequate water flow into Rock Creek (Rock Creek Canyon TCP), which is used for sacred ceremonial and healing purposes. This action was a result of mitigation measure identification efforts for various mining projects in the area (BETZE Project and SOAPA/Leeville Dewatering and Water Management).
- In 2003 and 2004, mining proposals (Hollister Development Block Project) may have affected the Tosawihi Quarries TCP because of proposed surface-disturbing activities. Based on several years of consultation prior to 2003, ethnographic studies, and other coordination, the BLM worked with the mining company to minimize surface impacts.
- The Wells Band of Western Shoshone recently requested consultation on proposed geothermal leases in the vicinity of Wells, Nevada. The BLM reduced the surface occupancy on one of the parcels to protect the view shed of an area sacred to the local Shoshone.
- The BLM Elko Field Office and Western Shoshone Tribal representatives established mitigation measures and operating procedures for a Geothermal Leasing area, which contained a sacred hot spring in Ruby Valley.

- The BLM has invited the Battle Mountain Band and the Duck Valley Western Shoshone Committee to assist in the development of spring protection plans for sacred springs within the Tosawihí Quarries TCP boundary. Recent fires and past grazing appear to have impacted many springs in the area.
- The BLM Battle Mountain Field Office is currently working with the Yomba and Duckwater Tribes to identify specific areas of Native American concern regarding certain oil, gas, and geothermal leases and applications to drill.
- In consultation with the Wells Band of the Te-Moak Tribe of Western Shoshone, BLM and Spirit Minerals Mining Company are in the process of developing tribal monitor/observer and cultural resources education opportunities. This action comes out of a recent proposal for an exploration drilling plan for Barite north of the town of Wells, Nevada.
- The BLM Battle Mountain Field Office has reached agreement with the Duckwater Shoshone Tribe on the 7-Mile Fuels Reduction Project. Duckwater Shoshone will be assisting BLM with the fuels reduction effort by helping to create a wood harvesting area to be specifically used by the tribe. The wood fuels will be used by the Duckwater Shoshone Tribe's Elders Heating Assistance Program.
- During the summer of 2006, the Elko BLM Office, the City of Elko, the Te-Moak Tribe of Western Shoshone, and the Elko Band of Western Shoshone came to a mutually beneficial agreement to manage firework-caused wild fires within the Elko Community. The BLM agreed to construct fire breaks around the Te-Moak and Elko Band lands near and within the City of Elko and bordering BLM-administered lands.
- As noted in the report, the Battle Mountain BLM and the Te-Moak Tribe have established a new "Cortez Hills Tribal Working Group." This working group, made up of BLM and tribal staff and leadership, will identify specific affected resources and alternatives or mitigation measures that might produce the least impacts with regard to mining in the Crescent Valley/Cortez area. The first meeting of the group was scheduled for the week of October 2, 2006. The newly elected Te-Moak Tribal Council of 2007 has voted to continue to support the BLM in its development of a Cumulative Effects Study Area for Western Shoshone activities, sites, and resources. The new Te-Moak Council has also voted to continue to support the BLM/Tribal Working Group and its goals and also designated five new members, with all five being current Te-Moak Council members.
- As noted in the report, the BLM Elko Field Office has been working with the Te-Moak Tribe of Western Shoshone (Elko, South Fork, Battle Mountain, Wells Bands) on their land acquisition efforts. The BLM has been assisting in identifying available federal lands, interpreting Master Title Plats and legal

descriptions, producing maps, and serving as mediator between the tribes and city and county governments. These land acquisition efforts have been going on for at least nine years. BLM continues to assist the Te-Moak Tribe of Western Shoshone and the four constituent Bands in the development of land acquisition packages to be sent to the Nevada Congressional Delegation.

*Working with Ms. Carrie Dann*

- Since the Dann family, specifically Carrie Dann, has much traditional/cultural knowledge of certain areas, BLM regularly asks for her participation in identifying traditional use areas, resources, and activities that might be impacted by a land management activity. BLM cannot guarantee that no impacts will occur, because BLM operates under a multiple use mandate. However, if given enough specific information, BLM can limit, reduce, or, at times, eliminate impacts to cultural/traditional sites and activities. Because Ms. Dann is very knowledgeable as a Shoshone Elder, and out of courtesy, BLM invites her to consult, even though Carrie Dann does not represent any federally recognized tribal government. An effort is made to reduce or limit impacts to areas and resources, just as would be the case for other citizens.
- Ms. Dann has had an impact in the way BLM manages local resources. For example, due to Ms. Dann and her late sister's work with BLM, BLM has designated the Mount Tenabo/White Cliffs/Horse Canyon Traditional Cultural Property as being eligible for listing on the National Register of Historic Places as a Property of Cultural and Religious Importance (PCRI). This designation gives certain protections and requires certain mitigation measures within the PCRI boundary. BLM has also worked with Ms. Dann and the Western Shoshone Defense Project on public driven oil, gas, and geothermal leasing projects, located within her home area (Crescent Valley/Grass Valley). When Ms. Dann and her group choose to participate and based on the information she and her group choose to share, BLM has, in the past, deferred and eliminated certain areas from lease sale consideration or has attached stipulations on such a lease for the leasee to strictly follow. Most of BLM's work with Ms. Dann and her organization falls under the BLM Cultural Resources/Native American Coordination program.
- BLM has also continuously encouraged Ms. Dann to contact the Te-Moak Tribal Council, if she would like BLM to address her issues through a government-to-government process.

32. These examples show only some of the many efforts being made by the BLM to address tribal concerns related to the lands of interest to the Western Shoshone. It is notable that the Te-Moak Tribal Council of 2007 is participating in many of these cooperative efforts, notwithstanding the views expressed by some of the complainants before the CERD Committee.

## Conclusion.

33. (a) The basic issue here concerns compensation for the loss of tribal aboriginal property rights that occurred in the 1800s – loss that occurred far before the existence of the CERD Convention. Recognizing that many Indians had been unfairly deprived of the lands they had habitually occupied or roamed, the U.S. Congress established a process in 1946 to provide Native Americans special access to courts and tribunals and a more flexible basis on which to pursue claims than would have been available to other Americans. A recognized entity that legitimately represented the interests of all members of the Western Shoshone under applicable law filed a claim in that process, contending that Western Shoshone title to the lands had been extinguished, and requesting compensation. Although the Government contested that claim, the ICC and higher courts found for the Western Shoshone, holding that they had been deprived of its lands, and ordering that the loss be redressed through monetary compensation.

(b) The Dann sisters and their supporters objected to the litigation strategy being pursued, taking the view that for a portion of the lands, they wanted title restored instead of compensation. In this, they differed from the collective decisions taken by the Western Shoshone (the entity in interest) during the litigation of the claim. Moreover, despite the fact that the Dann sisters were members of the litigating group and were aware of the positions being taken, they failed to bring their objections to the attention of the ICC or court in time for them to have been dealt with during the litigation or even to present an excuse for their 23 year delay in seeking to intervene in the proceedings. U.S. courts, applying applicable law, held that the Danns and their supporters had failed to raise their concerns in a timely fashion during the pendency of the claims litigation, and that title had, in fact, already been extinguished and the Western Shoshone should be compensated. Because their attempts to raise their concerns in U.S. courts were too late to be considered, Ms. Dann and other dissenters from the decision taken by those representing the Western Shoshone now attempt to bring before the CERD Committee the same internal dispute among Western Shoshone descendants. And, in doing so, they do not represent the views of all Western Shoshone descendants, most of whom favor receipt of the compensation provided by the ICC.

(c) Actions by U.S. courts and the U.S. government with regard to this matter have been in accordance with the law, and have fully addressed the issues raised by complainants, both procedural and substantive. Claimants had access to the courts at every level, including the U.S. Supreme Court, on numerous occasions. Claimants were in no way discriminated against in either their access to judicial forums, or in the manner in which the proceedings were conducted or decisions were made. If anything, claimants received the benefit of access to a greater array of legal forums, and to more flexible standards in proving tribal property rights than would have been applied to litigants asserting non-tribal rights.

(d) The notion that takings of land must be dealt with through restoration of land rather than monetary compensation is not a requirement of the Convention on the Elimination

of All Forms of Racial Discrimination or of any human rights or other international convention to which the United States is a party. The United States is under no domestic or international obligation to provide lands as compensation rather than money. Nor is the United States under any domestic or international obligation to set aside sound and generally applicable procedural rules with regard to legitimacy of representation or timely consideration of issues in cases. The application of such rules is not inconsistent with due process (in fact, it serves due process); nor does it in any way constitute discrimination. It is the position of the United States that its actions in this case do not violate the CERD Convention.