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American Indian Land Rights in the Inter-American System: *Dann v. United States* by Inbal Sansani*

On July 29, 2002, the Inter-American Commission on Human Rights (Commission), an organ of the Organization of American States (OAS) headquartered in Washington, D.C., released its long-awaited preliminary merits report to the public, stating that the U.S. government is violating international human rights in its treatment of Western Shoshone elders Carrie and Mary Dann. This is the first decision of the Commission, or of any international body, finding that the United States has violated the rights of American Indians.

The Commission's preliminary merits report had already been released to the parties on October 15, 2001, in response to a petition filed on April 2, 1993 by the Indian Law Resource Center (ILRC), a non-profit legal advocacy organization based in Helena, Montana. The ILRC brought the petition on behalf of the Dann sisters—American Indians, U.S. citizens, and members of the Dann Band of the Western Shoshone Nation. The petition charged the United States with illegally depriving the Dann sisters and other members of the Western Shoshone Nation of their ancestral lands.

The Commission's preliminary merits report supported the Danns' argument that the U.S. government used illegitimate means to gain control of Western Shoshone ancestral lands through the Indian Claims Commission (ICC), a now defunct administrative tribunal established by Congress in 1946 to determine outstanding American Indian land title disputes and to award compensation for land titles that had been extinguished. The preliminary merits report questioned the ICC's jurisdiction and ruling concerning millions of acres of Western Shoshone land. According to Robert T. Coulter, executive director of the ILRC, the Commission's thorough legal decision concluding that the ICC procedures were erroneous and even fraudulent will have important implications for American Indian nations across the United States. The Commission's preliminary merits report marks the latest phase in the Western Shoshones' protracted struggle, spanning more than 140 years and including 5 decades of court battles, to prove they still legally own and occupy their ancestral lands. According to Chief Raymond Yowell of the Western Shoshone National Council, a formal version of the traditional Western Shoshone government structure, the Dann action has become a test case for the Western Shoshones' right to land as a people.

The preliminary merits report was first issued in confidence to the U.S. Department of the Interior; the U.S. government responded to the Commission on December 17, 2001, rejecting the Commission's report "in its entirety." The Commission will adopt a final merits report in due course, which will contain the Commission's conclusions and recommendations in light of the U.S. government's response to the preliminary merits report.

Background

The 1863 Treaty of Peace and Friendship (Treaty) signed at Ruby Valley, Nevada, between the United States and the Western Bands of the Shoshone Nation of Indians, commonly referred to as the Western Shoshone, demarcated the boundaries of the Western Shoshones' ancestral territory. By signing the Treaty, the parties agreed to mutual use of the Western Shoshones' millions of acres of ancestral lands, but did not transfer title thereof to the United States. Both parties concur that the Treaty was an agreement designed to end hostilities between the Western Shoshone and the U.S. government by granting westward-bound settlers certain rights-of-way through Western Shoshone territory. The Western Shoshone argue that despite this understanding, the federal government gradually assumed control of the land through a series of re-drawings of reservation boundaries in the early 20th century. The Western Shoshone claim that the Bureau of Land Management (BLM), an agency of the U.S. Department of the Interior responsible for administering about one-eighth of the land in the United States and managing a wide variety of resources, gradually assumed control of the grazing areas surrounding the reduced reservations.

Western Shoshone members presently number approximately 6,500 and live mainly in central Nevada and parts of California, Colorado, Idaho, Utah, and Wyoming. The land occupied by the Western Shoshone is known as *Newe Segobia* or "The Land of the People of Mother Earth." The Danns live on a ranch constituting the Dann Band land in the small rural community of Crescent Valley, Nevada. They claim that this land has long been recognized by the Western

Shoshone people as the Danns' ancestral property, and is not part of any of the small Western Shoshone reservations that the government acknowledges to be Western Shoshone land in Nevada.

Domestic Legal Action

The 1934 Indian Reorganization Act (IRA) forced American Indians living on reservations to establish a governmental structure modeled after the federal government. Because not all American Indians lived on reservations, however, only some of the Western Shoshone were governed by the IRA governments. The Western Shoshone National Council (National Council) claimed to represent all Western Shoshone American Indians, although the National Council consisted mainly of traditional tribes and bands not recognized under the IRA system, such as the Dann Band. The U.S. government, however, does not recognize the National Council as the Western Shoshone national government.

In 1951, the Western Shoshone Te-Moak Tribal Council, a governmental body created by the IRA, filed a claim with the ICC on behalf of a "Western Shoshone Identifiable Group" against the U.S. government to seek compensation for loss of aboriginal title to lands in several western states. The National Council, however, objected to the filing of the Te-Moak Tribal Council's claim, arguing that so doing was unnecessary because the United States had never extinguished Western Shoshone territorial title. It argued that the claim was only for money damages, but not for the return of the Western Shoshones' land gradually taken in contravention of the Treaty.

Although it has never been clear what the majority of Western Shoshone members expected from the suit, in 1962, the ICC entered an interlocutory order holding that the nation's aboriginal title had been extinguished in the latter part of the 19th century "by gradual encroachment by whites, settlers and others, and the acquisition, disposition or taking of their lands by the United States," and awarded the Western Shoshone in excess of \$26 million in compensation for the land and "full title extinguishment." The ICC "award" has been accruing interest in a trust in the U.S. Treasury for the past 40 years. According to the ICC process, once the "award" money was distributed to the Western Shoshone as payment for their homeland, the tribes could not make further claims against the United States. The ICC did not establish an actual date of taking, however, nor was it able to identify the number of acres or specific areas where U.S. citizens encroached. To members of the Western Shoshone, this "taking" translated as theft, and they refused to accept an "award" for a taking they claim never occurred.

After Western Shoshone title to the land had been adjudicated "extinguished," the United States brought an action in trespass against the Dann sisters in 1974. The complaint alleged that by grazing livestock without a BLM permit on land considered to be "public," the Danns were violating the 1934 Taylor Grazing Act, intended to manage public range lands. This trespass issue, based on the question of whether the Danns were using ancestral land for grazing or were so using public land, was at the core of the Danns' land rights dispute. In response to the grazing permit requirement the Dann sisters argued that their aboriginal title to the land prevented the U.S. government from requiring grazing permits.

In 1985, the Supreme Court ruled in *United States v. Dann* that Western Shoshone territorial title had been extinguished by the ICC certification of a monetary "award" in 1979 and that "payment" had occurred when the government placed the funds in the Western Shoshone U.S. Treasury account. The Supreme Court's ruling was based on a statutory interpretation of the 1946 ICC Act rather than on an actual finding of extinguishment of title. The Court ruled that litigation of the title was precluded by the fact that the ICC had already certified an "award" in the proceedings. However, the lower court, the Ninth Circuit Court of Appeals, had concluded that the ICC award certification had no preclusive effect because the pertinent title issue was neither actually litigated nor actually decided in the ICC proceedings and therefore payment had not occurred. Because the Supreme Court did not discuss or reverse this part of the lower court's decision, the Court of Appeals' ruling—that Western Shoshone title had not actually been litigated—remains intact, as does Western Shoshone title.

Case 11.140: The Dann Case before the Inter-American Commission on Human Rights

The Danns' 1993 petition and subsequent communications to the Commission alleged that they were in "current possession and actual use of" their ancestral lands. The Danns further claimed that they have continually used and occupied Western Shoshone ancestral lands since "time immemorial" and that the family ranch was their sole means of support. The sisters contended that the United States interfered with the Danns' use and occupation of these lands by (1) purporting to have appropriated the land as federal property through the ICC procedure; (2) physically removing and threatening to remove the Danns' livestock and property from their land (most recently on September 22, 2002) without due process of law and without just compensation; and (3) permitting or acquiescing in gold prospecting activities within Western Shoshone traditional territory. The ILRC claimed that the Danns' use of the Western Shoshone homeland had been "undisturbed and unchallenged" until the 1974 trespass suit brought by the

United States.

In their petition, the Danns specifically challenged the Supreme Court's 1985 ruling, arguing that it prevented them from asserting a defense of Western Shoshone aboriginal title against federal trespass actions and other impediments to their use and enjoyment of ancestral lands, thereby depriving them of adequate judicial protection. Based on these circumstances, the Danns alleged that the United States is responsible for violations of Article II (right to equality before the law), Article III (right to religious freedom and worship), Article VI (right to a family and to protection thereof), Article XIV (right to work and to fair remuneration), Article XVIII (right to a fair trial), and Article XXIII (right to property) of the American Declaration of the Rights and Duties of Man (American Declaration).

Admissibility of the Dann Petition

In a September 27, 1999 report on the admissibility of the Danns' petition, the Commission determined that the sisters had invoked and exhausted all domestic administrative and judicial remedies. In support of this determination, the Commission pointed to a 1991 Ninth Circuit Court of Appeals case, *Western Shoshone National Council v. Molini*, in which the Court of Appeals affirmed summary judgment for defendant, the State of Nevada Department of Wildlife, in an action by plaintiffs, Western Shoshone National Council and individual Western Shoshone. Plaintiffs claimed that Nevada's wildlife regulations interfered with the Western Shoshones' aboriginal and treaty-reserved rights to hunt and fish. The Court of Appeals cited the Supreme Court's ruling in *United States v. Dann*, holding that (1) tribal rights to lands in Nevada had been previously fully extinguished, including hunting and fishing rights; (2) the United States had paid \$26 million for this taking of Western Shoshone land; (3) those rights included hunting and fishing; (4) this determination of title applied to Nevada as well as to the rest of the United States; and (5) the 1863 Treaty did not change these results. The summary judgment entered against all the plaintiffs, and the subsequent denial of their appeal effectively precluded domestic legal redress for all Western Shoshone, including the Danns. Moreover, the Commission concluded that based on the facts alleged in the petition and subsequent submissions, the violations were "continuing," "ongoing," and constituted a *prima facie* violation of rights protected in the inter-American system.

Preliminary Report on the Merits

In its October 2001 preliminary merits report, the Commission concluded that the United States failed to ensure the Danns' right to property in the Western Shoshone ancestral lands "under conditions of equality" contrary to Article II (right to equality before the law), Article XVIII (right to a fair trial), and Article XXIII (right to property) of the American Declaration. The Commission explained that in interpreting and applying the American Declaration it considered these provisions in the context of human rights systems at-large, in light of international law developments since the American Declaration was first composed, and with regard to other relevant rules of international law applicable to member states. The Commission specified that it would draw from the American Convention on Human Rights, which serves as an authoritative expression of the American Declaration's fundamental principles.

The Commission explained that detailed international legal norms and principles apply to Indigenous Peoples' rights to land in addition to the American Declaration, including the U.S. Constitution, International Labor Organization Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries, the draft United Nations Declaration on the Rights of Indigenous Peoples, and the draft OAS American Declaration on the Rights of Indigenous Peoples. These norms and principles encompass distinct human rights considerations relating to indigenous communities' ownership, use, and occupation of their traditional lands.

The Commission framed the contentious issues in the Dann case as whether any or all of the Western Shoshones' property rights remain vested in the Western Shoshone people, and what is the proper method of respecting any such rights. Because the Commission believed that the Western Shoshones' possible subsistence lies at the heart of the Dann dispute, it began its analysis by reviewing the manner in which the United States purportedly determined the Danns' ancestral land rights.

The Commission found that the ICC claims process was flawed and failed to comply with international human rights norms. Therefore, the process denied the Danns and other Western Shoshone their human rights under Article II (right of equality before the law), Article XVIII (right to a fair trial), and Article XXIII (right to property). Although the United States suggested that extinguishment of Western Shoshone title was justified by the need to encourage settlement in the western United States, the Commission concluded that this reason could not justify the sweeping manner by which the United States purported to extinguish indigenous claims, including those of the Danns, in the entirety of the Western Shoshone territory.

In its preliminary merits report, the Commission criticized the ICC for permitting an individual or small group of American Indians to present a claim on behalf of a whole tribal nation without requiring proof of that nation's consent, as well as the absence of rules permitting the intervention of interested persons in the ICC proceedings. The Commission concluded that any determination of Indigenous Peoples' interests in land must be based on a process of informed

and mutual consent by the indigenous community as a whole. Specifically, the Commission explained that (1) “members must be fully and accurately informed;” and (2) “members must have an effective opportunity to participate as individuals and as collectives.” The Commission determined that because the 1951 ICC claim was pursued by one band of the Western Shoshone—the Te-Moak Tribal Council and the purported “identifiable group”—without the informed consent of the others, this process failed to comply with the aforementioned principles.

The Commission found that the lengthy judicial determination as to whether and to what extent Western Shoshone title may have been extinguished was “not based upon a judicial determination of pertinent evidence,” but rather “upon apparently arbitrary stipulations” between the U.S. government and the Te-Moak Tribal Council regarding the extent and timing of the loss of indigenous title to the entirety of the Western Shoshone ancestral lands. Therefore, because the Danns’ rights were not determined in an effective and fair process, the claimed “extinguishment” of the Western Shoshones’ land title in 1962 as a result of the ICC process was, in fact, a violation of internationally recognized human rights, specifically Article XVIII—the right to a fair trial—of the American Declaration.

The Commission determined that the United States’ claim that it holds title to the Dann land was based upon the faulty ICC proceeding and discriminated against the Danns by depriving them of equal protection under the law. The Commission explained that the notion of equality before the law relates to the application of substantive rights as well as to the protection to be given individuals by the state. The ILRC argued that the ICC’s “extinguishment” theory constituted “a nonconsensual and discriminatory transfer of property rights in land.” At a minimum, any permissible distinctions among the treatment of people regarding the enjoyment of protected rights and freedoms must be based on objective and reasonable justification.

Finally, the Commission found a violation of the Fifth Amendment to the U.S. Constitution, generally applicable to the government’s taking of property, and ordinarily requiring a valid public purpose as well as the owners’ entitlement to notice, just compensation, and judicial review. The Commission concluded that these prerequisites were not extended to the Danns and that there was no proper justification for this discriminatory treatment. The Commission referred to the Fifth Amendment right to property to support its conclusion that the United States was bound to protect the same right under the American Convention. In effect, the Commission’s decision suggested that a state’s commitment to respect the human rights enumerated in one treaty strengthens the case against that state to honor a similar right under another, separate treaty by which it has promised to abide.

Recommendations

The Commission recommended that the U.S. government provide a fair legal process to determine the Danns’ and other Western Shoshone land rights, and provide the Dann sisters with an effective remedy, which includes adopting legislative or other measures necessary to ensure respect for their right to property. Specifically, the Commission concluded that the Danns should be afforded resort to the courts for the protection of their property rights “in conditions of equality and in a manner that considers both the collective and individual nature of the property rights” they claim in the Western Shoshone ancestral lands. The Commission further recommended that the United States review its procedures and practices to ensure that Indigenous Peoples’ property rights are determined in accordance with the rights established in the American Declaration.

United States Government’s Response

The U.S. government’s violation of the Danns’ right to property was highlighted in September 2002, with the BLM’s most recent raid on the Danns’ ranch. In response to the BLM’s controversial auction of Western Shoshone cattle confiscated during that raid, the Commission urgently appealed to the U.S. government to return the 232 head of cattle to the Danns and to halt further action against them until review of the Danns’ case was concluded, including implementation of any final recommendations that the Commission may adopt in the matter. The BLM proceeded with the auction a few days later, however, claiming that the OAS had no jurisdiction over the case.

In its periodic responses to the Danns’ allegations between 1993–2000, the United States argued that rather than involving violations of the Danns’ rights under the American Declaration, the sisters raise matters that concern lengthy litigation of land title and land use questions that continue to be subject to consideration by all three branches of the U.S. government. Furthermore, the U.S. government claimed that the Dann sisters cannot bring their case to the Commission because they have not exhausted domestic remedies.

At the administrative level, the U.S. claimed that the Danns refused to discuss with the BLM the issue of grazing without a permit. However, the Commission concluded that the Dann sisters invoked and pursued administrative remedies, such as entering into negotiations with the BLM, most recently on January 26, 1999. At the judicial level, the United States claimed that the Danns could still pursue their claims to the Western Shoshone land based on individual—rather than collective—aboriginal title. The Commission cited the Supreme Court decisions in Dann

and Molini, however, to conclude that the Danns' judicial remedies had been "effectively foreclosed" for their own claims and those of other Western Shoshone.

The United States conceded that the Danns have title, ownership, and possession of the lands constituting their Nevada ranch, and that the government has never attempted to remove the Danns from their ranch. The United States contended that as long as the Danns comply with the BLM's requirements, they are eligible for a permit to graze their livestock on public lands.

In its December 2001 reply to the Commission's preliminary merits report, the United States rejected the Commission's report in its entirety. According to the Nevada BLM, the U.S. Department of State disagreed with the Commission's determinations for the following reasons: (1) the Danns' contentions regarding the alleged lack of due process in the ICC proceedings were fully and fairly litigated in U.S. courts; (2) the Commission lacked jurisdiction to evaluate processes established under the 1946 ICC Act because the Act predates the 1951 United States ratification of the OAS Charter; and (3) the Commission erred in interpreting principles of the American Declaration in light of Article XVIII of the proposed OAS American Declaration on the Rights of Indigenous Peoples, which affirms that Indigenous Peoples are entitled to full recognition of their laws, traditions and customs, land tenure systems, and institutions for the development and management of resources, and the right to effective measures by states to prevent any interference with, alienation of, or encroachment upon these rights. In addition to its support of the Danns' position regarding the ICC "award" and the lack of due process afforded by U.S. domestic courts, the Commission challenged the U.S. government's claim against its jurisdiction by noting that the main issue the Danns' case raises—the 1962 ICC "award"—occurred subsequent to the United States' ratification of the OAS Charter in 1951, which therefore provides the Commission with jurisdiction over the matter.

Enforcing the Rights of American Indians in the Inter-American System

The American Convention establishes both the procedures and substantive rights that govern the adjudication of complaints by the Inter-American Commission and the Inter-American Court of Human Rights (Court) with respect to state parties. However, the principal instrument that sets forth the applicable substantive rights of countries not party to the American Convention is the American Declaration. As such, the Inter-American Commission considers the American Declaration to articulate OAS member states' general human rights obligations under the OAS Charter, a multilateral treaty with the force of law.

As an OAS member state, the United States is legally bound to uphold the organization's human rights principles and obligated to comply with the Commission's recommendations. The primary obstacle to enforcing the rights of American Indians in the inter-American system, however, is that the United States has not accepted the jurisdiction of the Court. Although the Commission has reviewed the United States' treatment of American Indians, the U.S. government does not consider itself obligated to respond to the Commission's findings. The ultimate challenge facing the Danns and other American Indians is utilizing the Commission's preliminary merits report to persuade the United States to change its actions.

Regardless of the U.S. government's response to the Commission's findings, or its failure to accept the Court's jurisdiction, it may be argued that the organs of the inter-American system are porous. The Commission's actions thus far in the Dann case, and any future action by the Commission or the Court on such issues, will in fact affect the United States indirectly. Although the decisions may not be binding on the United States, the Commission's decision in the instant case will contribute to the inter-American system's perspective and approach to informing the rights of Indigenous Peoples in the Americas. The Commission draws from the decisions of the Court in preparing its reports and recommendations, and the United States may gradually be forced to respond to the Commission's findings. To whatever degree the Commission is influenced by the Court, the Court's decisions touch even those countries that have yet to accept its jurisdiction.

The Commission's recognition of violations of the Dann sisters' rights may prove substantial to the developing jurisprudence on Indigenous Peoples' rights in the Americas. Further, the Danns' act of bringing their claims before the Commission, and thereby bringing the United States within the ambit of its jurisdiction, is significant. Being a player in the international community entails accepting certain obligations to respond to developments within the systems to which a state is party, and also to honor the responsibilities a member state accepts by committing itself to respecting a set of rights enumerated in particular international instruments. It is important that the United States begin to acknowledge the development of the inter-American system's jurisprudence concerning the rights of indigenous populations and its domestic application.

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