

*Mary and Carrie Dann v. United States* at the  
Inter-American Commission on Human Rights:  
Victory for Indian Land Rights  
and the Environment

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I. INTRODUCTION

To many non-Indian people, central Nevada may seem like an arid wasteland. But to the Western Shoshone Indians who have thrived there for thousands of years by respecting and nurturing its delicate ecology, the land is beautiful, fragile, and precious. To them, the land is an essential component of who they are as a people. It remains the beleaguered matrix of their still-robust culture.

Beleaguered, indeed. The United States claims title to millions of acres of Western Shoshone lands that are protected by treaty and which have never been ceded by the Western Shoshone to the federal

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government.<sup>1</sup> The United States attempts to deny the Western Shoshone use of and access to these so-called public lands for economic and cultural activities by allowing large-scale cyanide heap leach gold mining, storage of nuclear waste, military testing of nuclear and conventional weaponry, and general mismanagement by federal agencies.<sup>2</sup> For the Western Shoshone people and their natural environment, United States “trusteeship” has meant discrimination and an enduring struggle to stave off final destruction of their ancestral lands along with traditional Western Shoshone culture.<sup>3</sup>

Traditional Western Shoshone ranchers Mary and Carrie Dann and other Western Shoshone have been fighting for over three decades to protect their livelihood, their culture, and their environment.<sup>4</sup> Recently, the Inter-American Commission on Human Rights (Commission) issued a precedent-setting decision upholding their rights as indigenous peoples to their ancestral lands and calling into question one of the most discriminatory principles of U.S. Indian law—the federal government can extinguish Indian land title without due process of law and without compensation.<sup>5</sup> The Commission recommended that the United States: (1) provide the Danns with a remedy to protect their ancestral lands and (2) review its law, procedures, and practices in regard to the property

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1. Treaty with the Western Bands of Shoshone Indians, Oct. 1, 1963, U.S.-W. Bands of Shoshone Indians, 18 Stat. 689, *reprinted in* 2 INDIAN AFFAIRS: LAWS AND TREATIES 851-53 (Charles J. Kappler ed., 2d ed. 1904) [hereinafter Treaty of Ruby Valley]; *United States v. Dann*, 13 ILR 3158 (D. Nev. 1986), *aff'd and rev. other grounds*, 873 F.2d 1189 (9th Cir. 1989); *see* discussion *infra* Part IV.

2. *See* CHRISTOPHER SEWALL, DIGGING HOLES IN THE SPIRIT: GOLD MINING & THE SURVIVAL OF THE WESTERN SHOSHONE 22, 24-31 (1999) (referring to a report of the Western Shoshone Defense Project, *available at* [http://www.mdes.org/ProjectUnderground/downloads/Shoshone\\_rpt.pdf](http://www.mdes.org/ProjectUnderground/downloads/Shoshone_rpt.pdf)).

3. The Western Shoshone are not alone among indigenous peoples in the failed trustee relationship with the United States. On September 16, 2002, U.S. District Judge Lamberth held Interior Secretary Gale Norton and Assistant Secretary of Indian Affairs Neal McCaleb in contempt of court for being unfit trustee-delegates for the United States for their failure to account for millions of dollars of funds the Department of Interior is supposed to be holding in trust for approximately 300,000 Indian people. *Cobell v. Norton*, No. CIV-A.96-1285, 2002 WL 31060187, at \*1 (D.D.C. Sept. 17, 2002). They are in good company. In February 1999, Lamberth also found then-Secretary of Interior Bruce Babbitt, then-head of the Bureau of Indian Affairs Kevin Gover, and then-Treasury Secretary Robert Rubin, in contempt of court. *Cobell v. Babbitt*, 37 F. Supp. 2d 6, 9 (D.D.C. 1999).

4. Preliminary Report No. 113/01 in case 11.140, Inter-Am. C.H.R. (forthcoming 2003), ¶ 138-40, *available at* [http://www.indianlaw.org/IACHR\\_Report.pdf](http://www.indianlaw.org/IACHR_Report.pdf) [hereinafter Commission's Report]. The Inter-American Commission on Human Rights (Commission) is a part of the Organization of American States (OAS), of which the United States is a member.

5. *Id.*

rights of all indigenous persons to ensure that they are consistent with international standards of human rights.<sup>6</sup>

This decision is the first time the Commission found that the United States violated the rights of American Indians.<sup>7</sup> The Commission's report opens a new avenue of legal discourse by which to measure and reform United States Indian law and policy, including discriminatory federal laws that permit Congress to treat lands owned by Indian tribes differently from property owned by non-Indians.

## II. INDIGENOUS RIGHTS AND ENVIRONMENTAL PROTECTION

The vulnerability of indigenous lands and resources to unsustainable and destructive exploitation is one of the gravest environmental dangers in the hemisphere. As global trade and competition for resources have increased, many countries throughout the Americas have continuously increased the number of concessions granted for logging, mining, and drilling of oil and gas in areas that belong to, or are occupied by, indigenous peoples.<sup>8</sup> These areas are often the most ecologically intact and most healthy ecosystems that remain in the Americas. They are also some of the most vulnerable because of the widespread lack of legal protection for indigenous lands.<sup>9</sup> In many countries, governments and commercial interests are practically free to carry on destructive and environmentally disastrous development without regard for indigenous ownership or other legal restraints. In most situations, national laws provide little or no legal recourse for indigenous peoples trying to protect their environment and their resources. The consequences for the environment and for the indigenous peoples are typically devastating.

Mary and Carrie Dann and other indigenous leaders from all over the world are working at the international level to develop legal protections for indigenous rights to lands and resources and to stop the destruction of their environments.<sup>10</sup> One of the central ideas in this work is that environmental protection and human rights advocacy must be integrated and pursued together. The United Nations and the

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6. *Id.* ¶ 148.

7. *See id.* ¶ 147.

8. *See, e.g.,* Vernellia R. Randall, *NGO Forum: World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance*, ¶ 146 (2001), at <http://academic.udayton.edu/race/06hrights/WCAR2001/NGOFORUM/indigenous.htm> (discussing environmental racism and its effects on indigenous populations).

9. *See, e.g., Human Rights of Indigenous Peoples*, U.N. ESCOR, 49th Sess., ¶ 29, U.N. Doc. E/CN.4/Sub.2/1997/17 (1997), available at <http://www.unhchr.ch>.

10. *See* SEWALL, *supra* note 2, at 34.

Organization of American States (OAS) are developing human rights standards that protect indigenous peoples, their lands, and their environments. Furthermore, the United Nations and the OAS will establish environmental protection as a human right.<sup>11</sup> The Commission in the *Dann* case and the Inter-American Court of Human Rights in the *Awas Tingni* case established powerful precedents in this regard. They require countries to respect indigenous land and resource rights<sup>12</sup> and made it possible for indigenous peoples to protect their environments and their cultures more effectively.<sup>13</sup>

### III. THE ONGOING THEFT OF WESTERN SHOSHONE LANDS BY THE UNITED STATES

The history of the United States' efforts to gain control of Western Shoshone ancestral lands in Nevada is one of the most notorious and shameful Indian law cases in U.S. history. Ironically, it began with a Treaty of Peace and Friendship signed in 1863 between the Western Bands of the Shoshone Nation and the United States.<sup>14</sup> The treaty did not cede title to any Western Shoshone lands; rather, it recognized the indigenous land base, and granted to the United States limited access to and use of the lands for specified purposes.<sup>15</sup> This treaty was ratified by Congress and remains in full force and effect today.<sup>16</sup>

The problem for the Dannels and other Western Shoshone began in 1951 when a few Western Shoshone were persuaded by the Bureau of Indian Affairs to file a claim before the Indian Claims Commission (ICC).<sup>17</sup> The ICC was an administrative body created in 1946 by the United States Congress to compensate Indian tribes for lands and

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11. See discussion *infra* Part IV.

12. See generally Commission's Report, *supra* note 4; Judgment of Aug. 31, 2001, Inter-Am. C.H.R., available at [http://www.indianlaw.org/judgment\\_official\\_English.doc](http://www.indianlaw.org/judgment_official_English.doc) [hereinafter *Awas Tingni*]. The Inter-American Court of Human Rights affirmed that indigenous peoples have collective rights to the lands and natural resources that they have traditionally used and occupied. *Awas Tingni*, *supra*, ¶ 153. The court further stated that governments violate the human rights of indigenous peoples when they fail to take affirmative legislative or administrative measures to protect and enforce these property rights and when they authorize access to indigenous lands and resources without consulting with indigenous peoples or obtaining their consent. *Id.* ¶ 173.

13. Commission's Report, *supra* note 4, ¶ 148; *Awas Tingni*, *supra* note 12, ¶¶ 138, 156, 167.

14. Treaty of Ruby Valley, *supra* note 1.

15. *Id.* arts. II-VII.

16. *Id.*

17. See SEWALL, *supra* note 2, at 14-15.

resources taken from them.<sup>18</sup> The proceedings were conducted without the consent and participation of Western Shoshone tribal and traditional leaders, including Mary and Carrie Dann.<sup>19</sup> Those leaders tried unsuccessfully to intervene in the case, to be represented by counsel, and to obtain an evidentiary hearing on the issue of whether Western Shoshone rights were truly extinguished.<sup>20</sup> Despite these protests, in 1962 the ICC found that Western Shoshone title to approximately twenty-four million acres of ancestral lands had been extinguished at some time in the past by the “gradual encroachment” of non-Indians.<sup>21</sup> In 1972, the attorneys bringing the claim and the ICC stipulated to an 1872 extinguishment date in order to determine the valuation price for Western Shoshone lands, approximately 15 cents per acre. The funds, without interest, were deposited in the U.S. Treasury.<sup>22</sup> The attorneys received ten percent of the award for their fee, approximately \$2.6 million.<sup>23</sup> There has been no other use or distribution of the funds.<sup>24</sup>

In 1974, prior to the final decision of the ICC, the U.S. Bureau of Land Management filed suit against the Danns claiming that by grazing livestock on federal lands without a permit, they were trespassing.<sup>25</sup> The United States Court of Appeals for the Ninth Circuit disagreed and ruled that Western Shoshone land rights had not been extinguished as a matter

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18. *Id.* The U.S. Congress created the Indian Claims Commission Act to provide a mechanism through which Congress could transfer its authority to determine the merits of Indian land claims in the face of the doctrine of sovereign immunity, and to dispose of those claims with finality. Indian Claims Commission Act, 60 Stat. 1050, §§ 2-22, 25 U.S.C. § 70a-u (1976) (repealed 1978). The ICC had jurisdiction to hear and determine “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.” 25 U.S.C. § 70a (repealed 1978). The ICC did not have the authority, however, to adjudicate title or to provide equitable relief; that is, the ICC could compensate tribes for lands taken, but could not return lands. *Osage Nation of Indians v. United States*, 1 Ind. Cl. Comm. 54, 82 (1948), *rev’d on other grounds*, 97 F. Supp. 381 (Ct. Cl. 1951); *see also* SEWALL, *supra* note 2, at 14.

19. Commission’s Report, *supra* note 4, ¶¶ 43, 117.

20. *See* John D. O’Connell, *Constructive Conquest in the Courts: A Legal History of the Western Shoshone Land Struggle*, 42 NAT. RESOURCES J. (forthcoming 2003) (manuscript on file with authors); *see also* Commission’s Report, *supra* note 4, ¶¶ 114-123.

21. *Shoshone Tribe of Indians v. United States*, 11 Ind. Cl. Comm. 387, 416 (1962); Commission’s Report, *supra* note 4, ¶ 116.

22. *W. Shoshone Identifiable Group*, 29 Ind. Cl. Comm. 5, 7 (1980); Commission’s Report, *supra* note 4, ¶ 116 (finding that the estimated value of the property was between ten and fifteen cents an acre).

23. *W. Shoshone Identifiable Group v. United States*, 652 F.2d 41, 52 (Ct. Cl. 1981).

24. *See* SEWALL, *supra* note 2, at 14.

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

of law.<sup>26</sup> The United States waited until the ICC proceedings were completed and the judgment fund had been deposited in the Treasury before appealing the Ninth Circuit's decision to the Supreme Court. The United States Supreme Court ruled only on a very narrow issue: that the Western Shoshone were "paid" when the government, acting as their "trustee," deposited the money in a U.S. Treasury account for their benefit.<sup>27</sup>

In its ruling, the Supreme Court did not discuss how the ICC acquired legal authority to extinguish Western Shoshone land rights.<sup>28</sup> The Court did not consider the extent to which gradual encroachment had actually occurred on Western Shoshone lands or that such gradual encroachment does not ordinarily suffice under U.S. law to extinguish Indian land rights.<sup>29</sup> Nor did the Court take into account the numerous Western Shoshone allegations of fraud in the ICC proceedings and their attempts to withdraw the claim when they came to understand that they could only receive money and not confirmation of land rights.<sup>30</sup> The Supreme Court simply ignored such considerations in favor of an unmitigated application of the statutory bar of the Indian Claims Commission Act, and held that payment for the "taken" lands was made when the funds were deposited in the U.S. Treasury.<sup>31</sup> The Western Shoshone were therefore barred, under section 22(a) of the Indian Claims Commission Act, from asserting their aboriginal land rights.<sup>32</sup>

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26. *United States v. Dann*, 706 F.2d 919, 927-33 (9th Cir. 1983), *rev'd on other grounds*, 470 U.S. 39, 44 (1985).

27. *Dann*, 470 U.S. at 45-50. This "payment" has been sitting in the U.S. Treasury collecting interest ever since, as the Western Shoshone refused to accept money for lands they never relinquished and that they continue to occupy and use. Commission's Report, *supra* note 4, ¶ 119. But the Nevada congressional delegation is now pushing forward with legislation to distribute these monies to around 6500 individual eligible Western Shoshone people in a one-time payment in the amount of approximately \$20,000 each. Western Shoshone Claims Distribution Act, S.958, 107th Cong. (2002). These lands contain the Carlin Trend, which produces the bulk of the gold produced in the United States and approximately ten percent of world gold production annually. *See* SEWALL, *supra* note 2, at 2.

28. *See, e.g.*, *United States v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 347 (1941) (holding that only an act of Congress expressing a clear intent to extinguish aboriginal title could extinguish such title).

29. *See id.*

30. Commission's Report, *supra* note 4, ¶ 118.

31. *Dann*, 470 U.S. at 45.

32. *Id.* (citing section 22(a) of the ICC, which states that "payment of any claim . . . shall be a full discharge of the United States of all claims and demands touching any of the matters involved in the controversy"). In a later case, *Western Shoshone National Council v. Molini*, the Supreme Court extended the decision in *Dann* by holding that Western Shoshone hunting and fishing rights are part of the aboriginal title that was likewise barred from adjudication. 951 F.2d 200, 203 (9th Cir. 1991).

Since that time, the federal government has initiated many enforcement actions against the Danns, demanding that they remove their livestock from the disputed lands in addition to assessing \$300,000 in fines.<sup>33</sup> The United States also opened Western Shoshone lands for gold prospecting and large scale, intensive mining.<sup>34</sup> These actions had cumulative negative hydrologic effects on the Humboldt River Drainage and contaminated the ground water in and around the Danns' ranch in Crescent Valley. They threaten even greater damage as time goes on.<sup>35</sup>

#### IV. INTER-AMERICAN COMMISSION ON HUMAN RIGHTS: *MARY AND CARRIE DANN V. UNITED STATES*

After numerous efforts to obtain a hearing in federal court, Mary and Carrie Dann filed a formal complaint to the Inter-American Commission in 1993.<sup>36</sup> The complaint challenged the United States legal doctrine that the federal government can extinguish Indian land title without due process of law and without compensation.<sup>37</sup> It further charged the United States with violating the human rights of the Danns and other Western Shoshone as set forth in the American Declaration on the Rights and Duties of Man (American Declaration) and other provisions of international human rights law.<sup>38</sup>

On July 28, 2002, the Commission concluded that the United States violated several of the Dann's human rights, including the right to equality before the law, the right to judicial protection and due process, and the right to property.<sup>39</sup>

The Commission decided that the assertion of title by the United States to lands claimed by the Western Shoshone violated international human rights law because the ICC proceedings lacked adequate due process protections and were discriminatory.

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33. Most recently, on September 22, 2002, the United States took forceful measures to remove the Danns' livestock. Armed federal agents with ground and air support managed to round up 228 head of cattle just a few miles away from the Danns' ranch. See Charlie LeDuff, *Range War in Nevada Pits U.S. Against 2 Shoshone Sisters*, N.Y. TIMES, Oct. 31, 2002, at A18.

34. SEWALL, *supra* note 2, at 16-19.

35. NEV. DIV. OF WATER RES., HUMBOLDT RIVER CHRONOLOGY I.94-I.96 (2000), available at <http://water.nv.gov/Water%20planning/humboldt/HCR-pt1.pdf>.

36. Commission's Report, *supra* note 4, ¶ 1.

37. See *id.* ¶ 35.

38. *Id.* The petition alleged violations of article II (right to equality before 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).

39. *Id.* ¶ 147. These rights are articles II, XVIII, and XXIII of the American Declaration on the Rights and Duties of Man. *Id.*

[T]he Commission concludes that to the extent the State has asserted as against [Mary and Carrie Dann] title in the property in issue based upon the ICC proceedings, the Danns have not been afforded their right to equal protection of the law under Article II of the American Declaration . . . . The record before the Commission indicates that under prevailing common law in the United States, including the Fifth Amendment to the U.S. Constitution, the taking of property by the government ordinarily requires a valid public purpose and the entitlement of owners to notice, just compensation, and judicial review. In the present case, however, the Commission cannot find that the same prerequisites have been extended to the Danns in regard to the determination of their property claims to the Western Shoshone ancestral lands, and no proper justification for the distinction in their treatment has been established by the State.<sup>40</sup>

This has important implications for Indian communities, as it opens the way for reform of laws that now allow the United States to take Indian lands without the constitutional protections guaranteed to the property of all other Americans.<sup>41</sup>

The Commission also determined in its report that general international legal principles require protection of the particular and collective interest that indigenous peoples have in their traditional lands and resources.<sup>42</sup>

Of particular relevance to the present case, the Commission considers that general international legal principles applicable in the context of indigenous human rights to include:

—the right of indigenous peoples to legal recognition of their varied and specific forms and modalities of their control, ownership, use and enjoyment of territories and property;<sup>43</sup>

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40. *Id.* §§ 143-144.

41. For example, the Commission's conclusions call into question the Supreme Court's ruling(s) that Indian peoples do not always have a property right to lands over which they exercised sovereignty prior to the "coming of the white man." *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 279 (1955). The Court also held that Congress can often take Indian lands without compensation. *Id.* at 288-89.

42. Commission's Report, *supra* note 4, ¶ 130.

43. *See, e.g., Draft Declaration on the Rights of Indigenous People* art. 18(i), OAS Comm. on Juridical and Political Affairs, OAS Doc. OEA/Ser.K/XVIGT/DADIN/doc.5/02 (1999) [hereinafter Draft Declaration]; *Report on the Situation of Human Rights in Ecuador*, OAS, OAS Doc. DEA Doc.OEA/Ser.L/v/II96, doc.lrev.1 (1977), available at <http://www.oas.org> (observing that for indigenous peoples the "continued utilization of traditional collective systems for the control and use of territory are essential to their survival, as well as to their individual and collective well-being"); International Covenant on Civil & Political Rights (ICCPR) art. 27, 999 U.N.T.S. 171, art. 27, reprinted in RICHARD B. LILICH, INTERNATIONAL HUMAN RIGHTS INSTRUMENTS § 170.1 (2d ed. 1990) (protecting the right of persons belonging to "ethnic, religious, or linguistic minorities . . . in conformity with the other members of their group, to enjoy their own culture, to profess and practice their own religion [and] to use their own language"). In its General Comment 23 on article 27 of the ICCPR the UN Human Rights



- the recognition of their property and ownership rights with respect to lands, territories and resources they have historically occupied;<sup>44</sup>
- and
- where property and user rights of indigenous peoples arise from rights existing prior to the creation of a state, recognition by that state of the permanent and inalienable title of indigenous peoples relative thereto and to have such title changed only by mutual consent between the state and respective indigenous peoples when they have full knowledge and appreciation of the nature or attributes of such property.<sup>45</sup>

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Committee observed that “culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous people.” *General Comment 23* art. 27, ¶ 7, U.N. GAOR, Hum. Rts. Comm., 50th Sess., U.N. Doc. HRI/GEN/1/Rev.1 (1994). According to the Committee, securing the cultural rights of an indigenous people “may include such traditional activities as fishing or hunting and the right to live in reserves protected by law.” *Id.*; see also *Communication No. 167/1984: Canada*, ¶¶ 32.2, 33, U.N. ICCPR, 38th Sess., Mar. 26, 1990, U.N. Doc. CCPR/C/38/D/167/1984 (finding Canada responsible for violations of article 27 of the ICCPR, based upon historical inequities suffered by the Lubicon Lake Band in northern Alberta and the expropriation by the provisional government of the territory of the Lubicon Lake Band for the benefit of private corporate interests).

The U.N. Committee on the Elimination of All Forms of Racism (CERD) has similarly recognized that the “land rights of indigenous peoples are unique and encompass a tradition and cultural identification of the indigenous peoples with their lands that has been generally recognized.” *Decision 2(54) on Australia: Australia*, ¶ 4, U.N. ESCOR, CERD, 54th Sess., U.N. Doc A/54/18, para. 21(2) (1999). In this decision, the CERD criticized amendments to Australia’s Native Title Act as incompatible with Australia’s obligations under the Racial Discrimination Convention, particularly articles 2 and 5, due in part to the inclusion of provisions that extinguish or impair the exercise of indigenous title rights and interests in order to create legal certainty for governments and third parties at the expense of indigenous title. *Id.* ¶¶ 6-9.

44. See *Draft Declaration*, *supra* note 43, art. XVIII(2); see also *CERD General Recommendation 23: Indigenous Peoples* ¶ 5, U.N. CERD, 51st Sess., CERD/C/5R.1236 (1997) (calling upon states parties to the Racial Discrimination Convention to “recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources”).

The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect.

*Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries* art. 14(1), Int’l Labor Org., 67th Sess., June 27, 1989, reprinted in *HUMAN RIGHTS: SIXTY MAJOR GLOBAL INSTRUMENTS* 327 (Winston E. Langley ed., 1992) [hereinafter ILO Convention]. “The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources.” *Id.* art. 15(1).

45. See *Draft Declaration*, *supra* note 43, art. XVIII(3)(i)-(ii); see also *General Comment 23*, *supra* note 43, ¶ 7 (recognizing that the enjoyment of cultural rights, including those associated with the use of land resources, “may require positive legal measures to ensure the effective participation of members of minority communities in decisions which affect them”).

This also implies the right to fair compensation in the event that such property and user rights are irrevocably lost.<sup>46</sup>

The Commission's ruling extended beyond its affirmation that indigenous peoples have a right to property in their ancestral lands. The Commission also found that articles XVIII and XXIII of the American Declaration (rights to judicial protection and property) require that any determination of indigenous peoples' interests in land must be "based upon a process of fully informed and mutual consent on the part of the indigenous community as a whole."<sup>47</sup> Community members must (1) be fully and accurately informed and (2) have an effective opportunity to participate as individuals and as groups.<sup>48</sup>

The Commission called on the United States to take specific actions in order to comply with its human rights obligations:

1. Provide Mary and Carrie Dann with an effective remedy, which includes adopting legislative or other measures necessary to ensure respect for the Danns' right to property in accordance with Articles II, XVIII and XXIII of the American Declaration in connection with their claims to property rights in the Western Shoshone ancestral lands.
2. Review its laws, procedures and practices to ensure that the property rights of indigenous persons are determined in accordance with the rights established in the American Declaration, including Articles II, XVIII and XXIII of the Declaration.<sup>49</sup>

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In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities.

ILO Convention, *supra* note 44, art. 15(2). In this connection, the Inter-American Court of Human Rights has recently pronounced upon the obligation of the states under article 21 (the right to property) of the American Convention on Human Rights to provide effective procedures for delimiting, demarcating and recognizing title to indigenous communal lands. *See* *Awas Tingni*, *supra* note 12.

46. Commission's Report, *supra* note 4, ¶ 130; *see American Convention on Human Rights* art. 21(2), OAS, OAS doc. O.A.S.T.S. No. 36 1978, reprinted in RICHARD B. LILICH, INTERNATIONAL HUMAN RIGHTS INSTRUMENTS § 190.1 (2d ed. 1990) ("No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.").

47. Commission's Report, *supra* note 4, ¶ 140.

48. *Id.*

49. *Id.* ¶ 148.

The United States must now decide how it will respond to this adverse ruling.<sup>50</sup> As a member of the Organization of American States and party to the OAS Charter, the United States is legally bound to promote the observance of human rights.<sup>51</sup> The Inter-American Court of Human Rights has declared that the rights affirmed in the American Declaration are the fundamental rights that all OAS member states are bound to uphold.<sup>52</sup> It is well established that the Commission itself has jurisdiction to promote the observance and protection of human rights through the OAS Charter.<sup>53</sup>

On one hand, the United States has made it clear that adherence to human rights standards is a fundamental tenet of its foreign policy and that the judgments of the Commission should be applied to itself just as they should be applied to others.<sup>54</sup> Luigi R. Einaudi (now Assistant Secretary General of the OAS) clearly articulated this when he was the U.S. Permanent Representative to the OAS: “Human rights are a central concern of US foreign policy. This reflects . . . the realization . . . that no country anywhere can be indifferent to violations of basic human rights wherever they occur. . . . When we affirm support for the Commission,

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50. The Commission is not the only international body which has directly scrutinized current U.S. law and policy with regard to indigenous peoples. In August 2001, CERD reviewed the status of law and policy in the United States. *Concluding Observations of the CERD: United States of America*, U.N. ESCOR, CERD, 59th Sess., U.N. Doc. A/56/18, ¶¶ 380-401 (2001). During oral questioning of the U.S. representatives, CERD members raised questions with regard to U.S. Indian policy. More specifically, they questioned the status of treaties with Indian tribes and the taking of indigenous lands and resources. *Id.* They roundly criticized the United States’ reply, stating that the United States had failed to address the actual implementation and exercise of indigenous rights as recognized by the Convention. *Id.* The Convention “is not just a legal document, but it is essential that it be effectuated, by a law or otherwise.” *Id.* (citing Yuri Reshetov, Country Rapporteur to the U.S. Report, Remarks at CERD, 59th Sess. (Aug. 6, 2001) (on file with authors)). In its written Concluding Observations, CERD noted, as factors and difficulties impeding the implementation of the Convention, the “persistence of the discriminatory effects of . . . destructive policies with regard to Native Americans” and expressed concern about “plans for expanding mining and nuclear waste storage on Western Shoshone ancestral land, placing their land up for auction for private sale, and other actions affecting the rights of indigenous peoples.” *Concluding Observations of the CERD: United States of America, supra*, ¶¶ 384, 400.

51. See Advisory Opinion OC-10/89, ¶ 42, Inter-Am. C.H.R., OAS/Ser.L/V/III.21, doc.4 (1989).

52. *Id.* ¶ 43.

53. *Statute of the Inter-American Commission on Human Rights* art. 20(b), OAS, Oct. 1970, available at <http://www.oas.org> (establishing the Commission’s jurisdiction to receive petitions alleging violations of the American Declaration by states not parties to the American Convention on Human Rights); see also Case 10.951, ¶ 36, Inter-Am. C.H.R. Report No. 109/99 (1999), reprinted in 1 IHHR 68, 75 (2001).

54. Ambassador Luigi R. Einaudi, Statement Strengthening Support for Human Rights at the Organization of American States General Assembly (May 20, 1992).

we express our readiness to have its judgments applied to ourselves.”<sup>55</sup> The United States recently reaffirmed this policy, signing the Inter-American Democratic Charter (Charter) and adopting it on September 11, 2001.<sup>56</sup> In the Charter, OAS “member states reaffirm their intention to strengthen the inter-American system for protection of human rights” and commit themselves to the “promotion and protection of human rights of indigenous peoples.”<sup>57</sup> Indeed, Roger Noriega, U.S. Ambassador to the OAS and Chair of the OAS Permanent Council, used the occasion of the first anniversary of the adoption of the Charter to again define respect for human rights as an essential element of democracy and representative government.<sup>58</sup>

On the other hand, the first signals of the U.S. reaction to the conclusions of the Commission are unencouraging at best. Assistant Secretary of Indian Affairs Neal McCaleb testified at a Senate Committee hearing on August 2, 2002, that the United States rejected the Commission’s report in its entirety.<sup>59</sup> Furthermore, on September 22, 2002, the United States took forceful measures to remove the Danna’s livestock in direct defiance of both the Commission’s report and a series of letters from the Commission asking the United States to stay enforcement actions while the case is pending.<sup>60</sup> So far, there has been no official statement from the United States clarifying how it will respond when the Commission issues its final report on the merits of the case. This final report is expected early in 2003. The Danna and many others hope that the United States will show its respect for human rights by working to implement the Commission’s recommendations.

## V. CONCLUSION

The decision of the Inter-American Commission on Human Rights in the *Danna* case opens up new possibilities for indigenous peoples to

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55. *Id.*

56. *Inter-American Democratic Charter* arts. 8-9, OAS, Sept. 11, 2001, OAS Doc. AG/Res.1 (XXVIII-E/01), available at [http://www.oas.org/oaspage/eng/documents/democratic\\_charter](http://www.oas.org/oaspage/eng/documents/democratic_charter).

57. *Id.* art. 9.

58. Letter from Roger Noriega, Ambassador, U.S. Permanent Representative to the OAS, to Friends of the Americas (Oct. 8, 2002) (on file with the Indian Law Resource Center).

59. *A Bill to Provide for the Use and Distribution of the Funds Awarded to the Western Shoshone Identifiable Group Under Indian Claims Commission: Hearing on S.958 Before the Senate Comm. on Indian Affairs*, 107th Cong. (2002) (statement of Neal A. McCaleb, Asst. Sec. for Indian Affairs, Dep’t of the Int.).

60. Letter from Santiago A. Cantor, Executive Secretary, Inter-American Commission on Human Rights, Organization of American States, to the United States (Oct. 2, 2002) (on file with author).

defend their rights and protect the environment in the United States. It is a major step in laying the foundation to bring about positive Indian policy changes and to reform discriminatory aspects of U.S. law. The *Dann* case provides an opportunity for tribes, scholars, and advocates for Indian rights, human rights, and the environment to come together to discuss how to best implement the Inter-American Commission's decision and realize its hopeful promise.