

# **Shadow Report**

**to the**

## **United Nations Committee on The Elimination Of Racial Discrimination**

**In Response to The Combined Tenth to Twelfth Periodic Reports  
Submitted by The United States of America Under Article 9 Of The  
Convention**

**And**

**Early Warning And Urgent Action Procedure Decision  
1(68) (Western Shoshone)**

Submitted by the Western Shoshone Defense Project (WSDP)<sup>1</sup>

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<sup>1</sup> The Western Shoshone Defense Project (WSDP) is an affiliate of the Seventh Generation Fund for Indigenous Peoples. Founded in 1991 by Western Shoshone grandmothers, Mary and Carrie Dann, its mission is to affirm Newe (Western Shoshone) jurisdiction over Newe Sogobia (Western Shoshone homelands) by protecting, preserving, and restoring Newe rights and lands for present and future generations based on cultural and spiritual traditions.

## A. EXECUTIVE SUMMARY

1. This submission responds to the Committee on the Elimination of Racial Discrimination's ("CERD" or "the Committee") 107<sup>th</sup> session, list of themes in relation to the combined tenth to twelfth reports of the United States of America ("United States"), paragraph 23, with respect to updated information on the measures to address the situation of Western Shoshone peoples considered under the Committee's early warning and urgent action procedure (Decision 1(68) (A/61/18, p. 7) (the "decision").
2. In its decision, issued in March 2006, the Committee expressed concern over the United States' treatment of the Western Shoshone and their ancestral lands. Specifically, the Committee found the United States' "obligation to guarantee the right of everyone to equality before the law" was "not respected" and urged the United States to "pay particular attention to the right to health and cultural rights of the Western Shoshone peoples". The Committee called on the United States to "take immediate action to initiate a dialogue" with the Western Shoshone and to freeze, desist and stop further harmful activities on Western Shoshone ancestral land until a final decision or settlement was reached.
3. This submission will briefly review the inadequate responses by the United States which raise more concerns than they resolve given the State's complete reliance on an illegitimate process and questionable distribution of monetary compensation rather than addressing the concerns of the Committee. The United States continues to avoid a true dialogue and review of the underlying discriminatory bases for its treatment of the Western Shoshone and other indigenous peoples by continued reliance upon antiquated colonial concepts as the foundation of their laws, policies and regulations with respect to same.
4. The threats against Western Shoshone lands, culture and spiritual teachings continue unabated and as the late (deceased 1 January 2021) Carrie Dann stated:

*The struggle of the Western Shoshone Nation is the struggle of all Indigenous Peoples. It is not just about the abuse of power and economics – it is about the stripping away of our spirit. It is about being forced to live in two worlds – the real world and a world of made up laws and legal constructs which attempt to render us invisible. Laws which claim to transfer power from the sacred things to the almighty dollar. When we have been beaten down, time and time again, when we have to stand by and watch our world and our people collapsing in front of us, the one thing that keeps us going is our spiritual beliefs – our knowledge of the traditional teachings.*

5. To the Western Shoshone and for other indigenous peoples, the four sacred elements, land, air, water and sun are the laws which form the basis for all life. Peoples (Newe) do not have a dominating relationship to the land, but rather sacred responsibilities to protect and care for these areas.
6. Recommendations for the Committee to make to the United States are as follows:
  - a. That the United States review all laws and policies with respect to indigenous peoples to ensure compliance with recognized standards of human rights, in particular, a process to “decolonize” the underlying principles of federal Indian law and to honor and respect Treaties made with Indigenous Nations;
  - b. To address ongoing actions in Western Shoshone territory and to initiate a high level dialogue with traditional and tribal leadership; and/or
  - c. To develop a process to formally review, under contemporary, non-discriminatory standards, the questions and concerns raised previously by this Committee and the Inter-American Commission on Human Rights (IACHR) in Case No. 11.140, *Dann v. U.S.*, Report 75/02, Inter-Am. C.H.R., Doc. 5 rev. 1 at 860 (2002).
7. Suggested questions for the United States:
  - a. What steps has the State taken to address the underlying racially discriminatory foundations of federal Indian law?
  - b. What justification is there for continuing the reliance upon the ongoing application of the doctrine of discovery as applied to Indigenous Peoples?
  - c. What specific actions has the State taken to address the recommendation with respect to the Western Shoshone peoples by both the CERD and the IACHR?

## **B. OVERVIEW OF UNITED STATES RESPONSE**

8. The United States formally responded to decision 1(68) as part of its 2007 periodic report, attempting to refute the legal determinations of both the Committee as well as the determinations of the IACHR, decisions relied upon by the Committee. These arguments by the United States were subsequently reviewed and rejected by the Committee in its periodic review of the United States.
9. In its current report, the United States simply references paragraphs 178 and 179 of its 2013 report(para.133,CERD/C/USA/10-12) which paragraphs refer to the earlier statements in the 2007 Report and the distribution of certain monies to “qualifying” individuals. The monies referenced are the same monies that came about from the discriminatory process rejected by CERD and the IACHR. There is no mention, let alone response by the United States, with respect to the underlying discriminatory legal foundations giving rise to the ongoing violations and concerns.

10. Not only has the United States failed to address the underlying discriminatory processes used to claim Western Shoshone lands, but in its 2007 response, and currently, the United States also fails to consider any of the Committee's recommendations to "freeze", "desist" and "stop" further harmful activities. As acknowledged by the Committee, the activities of the United States threaten the environmental, cultural and spiritual health of the Western Shoshone. The United States has continued with these same harmful activities, such as continued approval of the expansion of gold mining, lithium mining and other extractive industries on ancestral lands.
11. What is similarly remarkable about the State's response is its absolute reliance on the assertion that the United States is under no obligation to provide recognition of lands to the Western Shoshone, rather than money, as compensation. The Committee's General Recommendation states that monetary restitution may suffice in certain circumstances,<sup>2</sup> however a State Party is required to "take steps to return those lands" and "compensation should as far as possible take the form of lands and territories".<sup>3</sup>
12. Even in its "distribution" of monies, the United States further violated Western Shoshone rights by adding insult to injury with an intentional run around both the traditional and tribal governments and those individuals who specifically rejected any form of monetary compensation on what they say is systemic racism and abuse by the United States. To consider individualized taking of monies that many saw as "damages" rather than land payments as acceptance by an entire peoples is illegal according to Shoshone custom, religion and traditional laws that do not permit individuals to "sell" the Nation's lands and territories which belong to the past, present and future generations of Shoshone. To many, this amounts to nothing less than an attempt by the United States to commit cultural genocide through discriminatory laws created to dispose Western Shoshone of their religion, beliefs, lands and resources. As stated by one elder:

*We were taught that we were placed here as caretakers of the lands, the animals, all the living things - those things that cannot speak for themselves in this human language. We, the two-legged ones, were placed here with that responsibility. We see the four most sacred things as the land, the air, the water and the sun [l.a.w.s.]. Without any one of these things there would be no life. This is our religion - our spirituality - and defines who we are as a people. ...To take our land is to take our life.*

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<sup>2</sup> See CERD Gen. Recomm. 23, para. 5

<sup>3</sup> *Id.*; see also U.N. Declaration, art. 28.

### C. THE RACIST UNDERPINNINGS OF FEDERAL INDIAN LAW

13. Unfortunately, in the United States today, treaties with Indian nations may still be unilaterally abrogated;<sup>4</sup> Indigenous Peoples can be deprived of their lands and resources without due process of law and without compensation;<sup>5</sup> and the plenary power doctrine permits the federal government to unilaterally terminate or otherwise limit tribal governmental authority and jurisdiction.
14. These ongoing threats to Indigenous Peoples can be traced directly back to the fundamental principles upon which U.S. Indian law and policy are based. Current U.S. Indian law and policy is rooted in the Marshall Trilogy.<sup>6</sup> The central premise of Justice Marshall's formulation of the doctrine of discovery is that Indigenous Peoples are divested of certain natural rights by the mere arrival of Europeans because of an assumed European superiority.<sup>7</sup>
15. The United States has failed to address and correct the injustices of its laws and policy with respect to indigenous peoples. This lack of action is in direct opposition to the international community's growing support for Indigenous Peoples' rights. The lack of secure indigenous rights in the United States means that American Indians, Native Hawaiians and Alaska Natives continue to live under an uncertain and unstable scheme of law and policy which at times empowers them and at times deprives them of fundamental rights simply due to their status as Indigenous Peoples.<sup>8</sup>

### D. PRIOR REQUESTS BY THE COMMITTEE

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<sup>4</sup> See *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903).

<sup>5</sup> See *Tee-Hit-Ton Indians v. U.S.*, 348 U.S. 272 (1955).

<sup>6</sup> The "Marshall Trilogy" is a set of three Supreme Court cases authored by Chief Justice Marshall which delineated the legal status of indigenous peoples in the United States. See *Johnson v. M'Intosh*, 21 U.S. (8 Wheat) 543 (1823); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

<sup>7</sup> See *Johnson*, 21 U.S. at 591. This legal fiction that discovery of the new world by Europeans resulted in inherent limitations on tribal sovereignty in favor of the European "discovering" nation traces its origins to a set of legal rules and principles originating in the Middle Ages and the Crusades to the Holy Lands. See Anaya, *supra* note 3, at 9-38. At that time, Christian princes were authorized by the Pope to undertake Holy Wars of conquest against the "heathen" and "infidel" peoples. *Id.* It was under this same legal theory holding that non-Christian "savage" peoples were under the superior and absolute sovereignty and jurisdiction of the Pope that the *inter caetera divinai* (the papal bull) was performed in 1493 granting Spain the entire new world. *Id.*

<sup>8</sup> The International Convention on the Elimination of All Forms of Racial Discrimination defines racial discrimination as "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life." International Convention on the Elimination of All Forms of Racial Discrimination, entered into force Jan. 4, 1969, art. 1, para. 1, 60 U.N.T.S. 195, available at <<http://www.unhchr.ch>>.

16. Prior to the submission of the United States Report, a Request for Urgent Action was filed on behalf of certain Western Shoshone tribes. The Request alleged that United States actions and policy with regard to Indigenous Peoples and the Western Shoshone, in particular, violated rights of property, equality under the law, judicial process, cultural integrity and self-determination. The Committee, in its review of the United States Report in August of 2001, questioned the United States delegation with regard to U.S. Indian policy, specifically, the status of treaties with Indian tribes and the taking of Indigenous lands and resources. The United States replied by informing the Committee members on U.S. Indian policy, its basis in the doctrine of discovery, the plenary power doctrine and the trusteeship relationship.<sup>9</sup>
17. Committee members roundly criticized the United States' reply, stating that the United States had failed to answer the fundamental question of the implementation and actual exercise of Indigenous rights. The need for attention to Indigenous issues and for the inclusion of the Convention in domestic legislation was emphasized by the Committee.<sup>10</sup> Committee member Patrick Thornberry of Great Britain stated surprise that the United States would cite to *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823) and the doctrine of discovery. Mr. Thornberry stated emphatically that the current state of United States law demonstrated basic incompatibility with the Convention. He further stated that the power of treaty abrogation by one side is not fair or right and is inconsistent with the doctrine of indigenous self-determination. He informed the United States delegation that the doctrine of discovery is outdated and the rest of the "enlightened world" had recognized this and was making efforts to reform their laws. Mr. Thornberry also raised serious doubts about the plenary power doctrine and stated that "Indigenous peoples are not weak. They are not children." Mr. Thornberry concluded his remarks by stating that the United States is "well advised" to recognize the evolution of law in this area, and like comparable common law jurisdictions who have made changes, the United States should do the same: "This would be an emancipating and reconciling development, especially for the living victims."<sup>11</sup>
18. In its written Concluding Observations, the Committee noted, as factors and difficulties impeding the implementation of the Convention, the "persistence of discriminatory effects of destructive policies with regard to Native Americans."<sup>12</sup> The Committee also noted with concern:

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<sup>9</sup> See Reply of the United States to Questions from the U.N. Committee on the Elimination of Racial Discrimination by U.S. Assistant Attorney General Ralph F. Boyd, Jr. and U.S. Assistant Secretary of State Lorne Craner, August 6, 2001, Geneva, Switzerland.

<sup>10</sup> "[The Convention] is not just a legal document, but it is essential that it be effectuated, by a law or otherwise." Statement by Committee member Yuri Reshetov, country rapporteur to the U.S. Report, taken from notes of the author August 6, 2001.

<sup>11</sup> Committee member Patrick Thornberry, notes taken by the author during open session of CERD review of U.S. Report, August 6, 2001.

<sup>12</sup> See Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America. 14 Aug. 2001, CERD/C/59/Misc.17/Rev.3, para.

[t]hat treaties signed by the Government and Indian tribes, described as “domestic dependent nations” under national law, can be abrogated unilaterally by Congress and that the land they possess or use can be taken without compensation by a decision of the Government. It further expresses concern with regard to information on [the situation of the Western Shoshone] and other actions affecting the rights of indigenous peoples.<sup>13</sup>

19. The Committee recommended that:

the [U.S.] should ensure effective participation by Indigenous communities in decisions affecting them, including those on their land rights, as required under article 5(c) of the Convention, and draws the attention of the [U.S.] to General Recommendation XXIII(51) on Indigenous Peoples which stresses the importance of securing the “informed consent” of indigenous communities and calls, *inter alia*, for recognition and compensation for loss.<sup>14</sup>

20. More generally, the Committee recommended that the United States undertake the necessary measures to ensure consistent application of the provisions of the Convention at all levels of the government<sup>15</sup> and to “take all appropriate measures to review existing legislation and federal, state and local policies to ensure the effective protection against any form of racial discrimination and any unjustifiable disparate impact.”<sup>16</sup> With regard to indigenous peoples, the Committee encouraged the United States to use ILO Convention 169 on Indigenous and Tribal Peoples as guidance.<sup>17</sup>

21. Then again, in September of 2009, the Committee again called for the United States to fully implement the decision and for high-level dialogues with the Western Shoshone. This has not occurred.

## **E. RECOMMENDATIONS AND QUESTIONS**

22. It is hereby respectfully requested that the Committee make the following comments and recommendations in its concluding observations to the United States:

- a. That the United States review all laws and policies with respect to indigenous peoples to ensure compliance with recognized standards of human rights, in particular, a process to “decolonize” the underlying principles of federal Indian law and to honor and respect Treaties made with Indigenous Nations;

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<sup>13</sup> *Id.* at para. 21.

<sup>14</sup> *Id.* CERD General Recommendation XXIII

<sup>15</sup> *Id.* at para.11.

<sup>16</sup> *Id.* at para. 14.

<sup>17</sup> *Id.* at para. 21.

- b. To address ongoing actions in Western Shoshone territory and to initiate a high level dialogue with traditional and tribal leadership; and/or
- c. To develop a process to formally review, under contemporary, non-discriminatory standards, the questions and concerns raised previously by this Committee and the Inter-American Commission on Human Rights (IACHR) in Case No. 11.140, *Dann v. U.S.*, Report 75/02, Inter-Am. C.H.R., Doc. 5 rev. 1 at 860 (2002).

23. Suggested questions for the United States:

- d. What steps has the State taken to address the underlying racially discriminatory foundations of federal Indian law?
- e. What justification is there for continuing the reliance upon the ongoing application of the doctrine of discovery as applied to indigenous peoples?
- f. What specific actions has the State taken to address the recommendation with respect to the Western Shoshone peoples by both the CERD and the IACHR?