

**REPORT ON EFFECTS OF CANADIAN TRANSNATIONAL
CORPORATE ACTIVITIES ON THE WESTERN SHOSHONE
INDIGENOUS PEOPLES**

**SUBMITTED TO THE COMMITTEE ON THE ELIMINATION OF RACIAL
DISCRIMINATION, 80TH SESSION**

BY THE WESTERN SHOSHONE DEFENSE PROJECT

**IN RELATION TO CANADA'S 19TH AND 20TH
PERIODIC REPORTS**

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EXECUTIVE SUMMARY

Canadian transnational corporations continue to be involved in ongoing human rights violations against the Western Shoshone peoples located within the United States. In 2007, the Committee on the Elimination of Racial Discrimination (“the Committee” or “CERD”) issued Concluding Observation number 17, which expressed concern over transnational corporations registered in Canada that conducted extractive activities with adverse effects on indigenous communities abroad.

Concluding Observation number 17 recommended that Canada take appropriate steps to prevent transnational corporations from violating indigenous peoples’ human rights abroad, explore ways to hold such corporations accountable, and report back to CERD on the matter. Canada, however, failed to even address the issue of transnational corporations’ activities in its 18th and 19th periodic reports. Further, Canada has failed to take effective administrative or legislative action to provide oversight and accountability for Canadian companies.

Toronto-based Barrick Gold Company and other Canadian transnational companies and their subsidiaries are conducting extremely destructive gold mining operations on Western Shoshone traditional lands in the United States. The Inter-American Commission on Human Rights has recognized that the United States is violating Western Shoshone rights to equality before the law, due process, and property. Likewise, CERD issued Early Warning and Urgent Action Decision 1(68), calling upon the United States to “freeze” and “desist” permitting of extractive activities on Western Shoshone ancestral lands. Nonetheless, Canadian mining and exploration companies have continued and even increased their activities, causing irreparable harm to Western Shoshone lands and exposing the Western Shoshone people to dangerous toxic chemicals. These activities pose a grave threat to both the health of Western Shoshone people and the survival of their culture.

I. INTRODUCTION

1. This report is submitted in response to Canada’s periodic report of January 2011¹ and requests that the Committee on the Elimination of Racial Discrimination (“CERD” or “the Committee”) take note of the involvement of Canadian transnational corporations in ongoing human rights violations against the Western Shoshone indigenous peoples located within the United States. In its most recent concluding observations on Canada, CERD addressed the widespread problem of transnational corporations that are registered in Canada and commit human rights violations against indigenous peoples located outside of Canada.² Canada, however, has failed to take meaningful steps to provide greater oversight and accountability for Canadian companies. Further, its 19th and 20th periodic reports fail to even address this issue, as specifically requested by CERD.

¹ Canada submitted its 19th and 20th periodic reports, due in 2007 and 2009 respectively, as a single document in January 2011. Nineteenth and Twentieth Periodic Reports of Canada, CERD/C/CAN/19-20, Jan. 28, 2011.

² Concluding Observations of the Committee on the Elimination of Racial Discrimination, CERD/C/CAN/CO/18, May 25, 2007, para. 17 (“2007 Concluding Observations”).

2. The situation of the Western Shoshone peoples has been an ongoing matter of concern to CERD and resulted in the issuance of Decision 1 (68) under the Early Warning and Urgent Action procedure at its 68th Session.³ Toronto-based Barrick Gold Corporation and other Canada-based mining and exploration companies are conducting gold mining activities on Western Shoshone ancestral lands. Such activities are causing irreparable damage to Western Shoshone sacred sites and releasing dangerous toxics into the air and water on Western Shoshone lands. Mining operations continue to occur with the permission of Canada and the United States despite CERD's repeated instructions that the United States "freeze," "stop," and "desist" these activities.⁴

3. Based on Canada's obligation to respect, protect and promote the rights of all peoples, we request that this Committee enforce Canada's obligations under the International Convention on the Elimination of Racial Discrimination by urging Canada to take appropriate measures to ensure that transnational corporations registered in Canada do not contribute to ongoing human rights violations against the Western Shoshone or other indigenous peoples.

II. HUMAN RIGHTS VIOLATIONS AGAINST THE WESTERN SHOSHONE

A. Background on the Situation of the Western Shoshone⁵

4. The ancestral territory of the Western Shoshone peoples encompasses 60 million acres stretching across parts of Idaho, Utah, Nevada, and California. In the 1863 treaty of peace and friendship (*Treaty of Ruby Valley*) between the Western Shoshone and the United States, the Western Shoshone agreed to allow the United States access across their lands as well as permission to perform certain activities there.⁶ In exchange, the United States recognized

³ CERD, Early Action and Early Warning Procedure, Decision 1(68) (United States) (2006) ("Decision 1(68)").

⁴ *Id.*

⁵ For a comprehensive background of the history of the United States discriminatory treatment of the Western Shoshone see *Mary and Carrie Dann*, Case. 11.140 (United States), Inter-Am C.H.R. Report No. 75/02, Dec. 27, 2002 ("Dann")

<http://www.law.arizona.edu/depts/iplp/international/shoshone/documents/DannIACHRPubRpt7502.pdf>;

Second Request for Urgent Action under Early Warning Procedure to the Committee on the Elimination of Racial Discrimination of the United Nations, by the Timbisha Shoshone Tribe, Winnemucca Indian Colony and Yomba Shoshone Tribe of the Western Shoshone People in Relation to the United States of America (July 2005),

<http://www.law.arizona.edu/depts/iplp/international/shoshone/documents/CERDSecondRequestforUrgentAction.pdf>;

Update to Second Request For Urgent Action under Early Warning Procedure to the Committee on the Elimination of Racial Discrimination of the United Nations, by Western Shoshone groups and the Western Shoshone National Council (February 26, 2006),

<http://www.law.arizona.edu/depts/iplp/international/shoshone/documents/UpdatetoUrgentAction.pdf>.

⁶ See *Treaty of Ruby Valley* 1863, http://www.nativeweb.org/pages/legal/shoshone/ruby_valley.html. The treaty was between the United States of America and Western Bands of Shoshone Indians, ratified by the U.S. in 1866, and proclaimed on October 21, 1869. Mining was one of the permitted activities at that

Western Shoshone land boundaries and agreed to compensate the Western Shoshone for use of their lands.⁷ There have been no amendments or formal abrogation of the Treaty and the Western Shoshone people carry the full expectation that this Treaty should be respected by its parties and all foreign nations.

5. The United States now claims Western Shoshone traditional lands as federal or “public” lands. The United States relies on an agency finding that Western Shoshone title had been extinguished by “gradual encroachment” of non-indigenous settlers. The Inter-American Commission on Human Rights has found this to be an illegitimate means of claiming title.⁸

6. United States officials, transnational corporations and their home States have impeded Western Shoshone access to and use of their lands to the detriment of the Western Shoshone peoples and their survival. Under an antiquated federal law, the 1872 Mining Act, the United States permits mining on “public” lands, and administrative officials claim that there is no way to stop a mine from going forward.⁹ The United States government allows non-indigenous individuals and foreign mining companies to use and occupy Western Shoshone lands, namely for purposes of extraction and exploration of natural resources.

7. When one couples the Mining Act with the United States’ refusal to recognize Western Shoshone rights to their homelands, it is clear that transnational mining companies have been and continue to be reaping huge benefits from violations of Western Shoshone human rights. As discussed in more detail below,¹⁰ the Western Shoshone have been subjected to ongoing environmental damage by open pit cyanide heap leach gold mining and other industrial and military activities on their land. The Western Shoshone continue to face destruction of their traditional lands and resources, threatening their physical, cultural, and spiritual survival.

B. Ongoing Human Rights Violations Against the Western Shoshone

8. On December 27, 2002, the Inter-American Commission issued a final report finding the United States in violation of the rights of Western Shoshone petitioners to equality before the law, due process and property under the American Declaration of the Rights and Duties of Man.¹¹ The Commission recommended that the United States provide the petitioners with an effective remedy for the infringements of Western Shoshone property rights over ancestral lands and that the United States review its laws, procedures and practices regarding indigenous peoples, in particular the right to property.¹²

9. In 2006 CERD issued Early Warning and Urgent Action Decision 1(68), which noted its concern regarding the State’s “obligation to guarantee the right of everyone to equality before the

time; however, the type of mining understood then was with a pick and shovel, not open pit cyanide heap leach gold mining taking place today.

⁷ *See id.*

⁸ Dann, *supra* note 5.

⁹ *See* General Mining Law of 1872, 17 Stat.91 (1872), <http://goldplacer.com/1872MiningLaw.htm>.

¹⁰ *See infra* Part II.C.

¹¹ *See* Dann, *supra* note 3 at para. 5.

¹² *See id.* at para. 173.

law in the enjoyment of civil, political, economic, social and cultural rights, without discrimination based on race, colour, or national or ethnic origin.”¹³ CERD expressed particular concern over “efforts to privatize Western Shoshone ancestral lands for transfer to multinational extractive industries,” “open pit gold mining activities on Mount Tenabo and Horse Canyon,” and the conducting and planning “of all such activities without consultation with and despite protests of the Western Shoshone peoples.”¹⁴ CERD further ordered the State to “freeze” and “desist” from all such activities planned or conducted on the ancestral lands of Western Shoshone, particularly in relation to their natural resources.¹⁵

10. In its February 2008 Concluding Observations, CERD reiterated Decision 1(68) in its entirety.¹⁶ The Committee has since expressed its concern over the slow pace of implementation and the need for high-level U.S. officials to consult with the Western Shoshone concerning resource extraction on traditional lands.¹⁷ Despite these reports and recommendations by international human rights bodies, State parties have allowed the continuation and expansion of destructive activities on Western Shoshone lands.

C. Canadian Corporate Activities on Western Shoshone Lands

11. Approximately three-quarters of major mining and exploration companies are Canadian.¹⁸ Western Shoshone traditional lands are the third-largest gold-producing region in the world,¹⁹ and many of the numerous multinational companies and subsidiaries operating on these lands are Canadian. Canadian-owned or Canadian-based companies operating on Western Shoshone lands include Barrick Gold Company, Glamis Gold Limited, GoldCorp Inc., Great Basin Gold Limited, US Goldcorp, Bravo Venture Group, and Nevada Pacific Gold Limited.²⁰

12. One example of the destructive effects of Canadian corporations on Western Shoshone traditional lands is the situation of Mt. Tenabo and the adjacent Horse Canyon. The area has long been used by the Western Shoshone for spiritual and cultural purposes and is home to Western Shoshone creation stories, burial sites, medicinal and food plants, hunting and gathering grounds, and ceremony sites. Disregarding the specific mention of mining sacred Mt. Tenabo among CERD’s concerns in Decision 1(68), on November 12, 2008 the United States approved Barrick

¹³ CERD Decision 1(68), *supra* note 3, at para. 7.

¹⁴ *Id.*

¹⁵ *Id.* at para. 10.

¹⁶ Concluding Observations of the Committee on the Elimination of Racial Discrimination – United States of America, CERD/C/USA/CO/6, May 8, 2008 at paras. 19.

¹⁷ Letter from Committee for the Elimination of Racial Discrimination to the United States, September 28, 2009, TS/JF.

¹⁸ Chris Albin-Lackey, *Canada: Monitoring of Mining Companies Long Overdue*, THE TORONTO STAR (Oct. 27, 2010), <http://www.hrw.org/news/2010/10/27/monitoring-mining-companies-long-overdue>.

¹⁹ See, e.g., Mark Cherrington, *UN Body Holds Canada Responsible for Corporations’ Actions Abroad*, CULTURAL SURVIVAL (Apr. 9, 2007), <http://www.culturalsurvival.org/news/mark-cherrington/un-body-holds-canada-responsible-corporations8217-actions-abroad>.

²⁰ More information about these companies and their involvement on Western Shoshone lands can be found on the companies’ websites: www.nevadapacificgold.com; www.bravoventuregroup.com; <http://www.barrick.com>; www.glamis.com; www.goldcorp.com; www.hdgold.com/gbg/Home.asp; www.usgold.com.

Gold Corporations' Cortez Hills Expansion Project.²¹ The Project involves the construction of a massive, open-pit cyanide heap-leach gold mine on Mt. Tenabo.²²

13. Attempting to halt the mine, a coalition of non-profit organizations and Western Shoshone representatives filed suit in federal court.²³ Although U.S. courts eventually issued a limited injunction pending further environmental assessment,²⁴ Barrick Gold was allowed to continue most operations and the mine began production in 2010.²⁵ The injunction was lifted in 2011, and further challenges to the mine have failed in U.S. court.²⁶ Further mine exploration is occurring in Horse Canyon, and challenges to this exploration have likewise been unsuccessful.²⁷

14. The continued operation of Canadian mining corporations is devastating to Western Shoshone lands and culture due in part to the particularly toxic and destructive nature of present activities. Barrick is in the process of creating a 2200-foot hole in Mount Tenabo, through which it will extract tons of rock, pumping out 16.5 billion gallons of groundwater in the process.²⁸ Barrick then treats the ore with a cyanide solution to extract microscopic gold.²⁹ This cyanide heap leaching method releases toxic mercury, cyanide, and other chemicals into the environment, contaminating Western Shoshone air and water.³⁰ Due to its toxicity, cyanide heap leaching has

²¹ Bureau of Land Management, Department of the Interior, Cortez Hills Expansion Project: Record of Decision and Plan of Operations Amendment Approval (Nov. 2008), http://www.blm.gov/pgdata/etc/medialib/blm/nv/field_offices/battle_mountain_field/blm_information/ne_pa/cortez_hills_expansion.Par.31482.File.dat/Cortez ROD Final signed.pdf.

²² *Id.*

²³ See *South Fork Band Council v. United States Department of the Interior*, 588 F.3d 718 (9 Cir. 2009), [http://scholar.google.com/scholar_case?case=14887262341648190921&q=outh+Fork+Band+Council+of+Western+Shoshone+of+Nevada+v.+U.S.+Dept.+of+Interior,+588+F.3d+718+\(9th+Cir.+2009&hl=en&as_sdt=2,3&as_vis=1;Thanksgiving+the+Cortez+Way+U.S.+Ignores+Western+Shoshone+Objections+Barrick+Gold+Readies+Itself+to+Carve+up+Mt.+Tenabo+Spiritual+Area](http://scholar.google.com/scholar_case?case=14887262341648190921&q=outh+Fork+Band+Council+of+Western+Shoshone+of+Nevada+v.+U.S.+Dept.+of+Interior,+588+F.3d+718+(9th+Cir.+2009&hl=en&as_sdt=2,3&as_vis=1;Thanksgiving+the+Cortez+Way+U.S.+Ignores+Western+Shoshone+Objections+Barrick+Gold+Readies+Itself+to+Carve+up+Mt.+Tenabo+Spiritual+Area), Press Release, Nov. 21, 2008, <http://www.iearth.org/news/ThanksgivingtheCortezWay.html>. The plaintiffs included the South Fork Band Council of Western Shoshone, the Te-Moak Tribe of Western Shoshone, Timbisha Shoshone Tribe, the Western Shoshone Defense Project and the Great Basin Mine Watch.

²⁴ US Court Allows Continued Mining at Cortez Hills, Barrick Gold Corporation Press Release, April 14, 2010, <http://www.barrick.com/News/PressReleases/PressReleaseDetails/2010/US-Court-Allows-Continued-Mining-at-Cortez-Hills/default.aspx>.

²⁵ See Adella Harding, *Barrick hosts thank-you tour*, ELKO DAILY FREE PRESS, May 19, 2010, http://elkodaily.com/news/local/article_b06d7647-cccc-5fb2-ae61-a98fde279fbd.html.

²⁶ See Adella Harding, *BLM, Barrick win in Cortez Hills case*, ELKO DAILY FREE PRESS, Jan. 5, 2012, http://elkodaily.com/mining/blm-barrick-win-in-cortez-hills-case/article_7d0529ca-37e2-11e1-8d15-0019bb2963f4.html.

²⁷ See *Te-Moak Tribe of W. Shoshone of Nev. v. U.S. Dep't of the Interior*, 608 F.3d 592 (9th Cir. 2010), <http://www.leagle.com/unsecure/page.htm?shortname=infco20100618155>.

²⁸ Bureau of Land Management, U.S. Department of the Interior, Cortez Hills Expansion Project: Final Environmental Impact Statement 3.1-17, 3.1-29 (Sept. 2008), http://www.blm.gov/nv/st/en/fo/battle_mountain_field/blm_information/national_environmental/cortez_hills_expansion.html.

²⁹ *Id.*

³⁰ See generally Mineral Policy Center, *Cyanide Leach Mining Packet* (Aug. 2000), http://www.earthworksaction.org/files/publications/Cyanide_Leach_Packet.pdf?pubs/Cyanide_Leach_Packet.pdf.

been banned in several countries.³¹ The continuation of such practices, with the permission of the United States and Canada, is causing irreparable damage to Western Shoshone lands, threatening both the health of Western Shoshone people and the survival of their culture.

III. CANADA'S FAILURE TO ENSURE TRANSNATIONAL RESPONSIBILITY AND ACCOUNTABILITY

15. Canada has been alerted numerous times to its responsibilities under international law for the behavior of transnational corporations registered in Canada. Following her 2002 mission to Canada, the Special Rapporteur on Toxic Wastes recommended "that particular attention [be] paid to allegations relating to threats to the traditional lifestyles and rights of indigenous groups."³² The Special Rapporteur acknowledged the "jurisdictional and procedural issues arising from trying to establish accountability," but nonetheless called on Canada "to explore ways of establishing extraterritorial jurisdiction over human rights violations" abroad, noting that "[t]he concept of extraterritorial jurisdiction for human rights violations is not unknown in both international and many national laws."³³

16. In 2005, Canada's own Standing Committee on Foreign Affairs and International Trade acknowledged the problem of human rights abuses committed abroad by Canadian mining corporations.³⁴ The Committee expressed particular concern "that Canada does not yet have laws to ensure that the activities of Canadian mining companies in developing countries conform to human rights standards, including the rights of ... indigenous peoples."³⁵ The Committee made a series of recommendations, including that Canada "[s]trengthen or develop new mechanisms for monitoring" and "dealing with" complaints and to "[e]stablish clear legal norms in Canada" to ensure Canadian corporations are "held accountable."³⁶ The comments made by both Canada and the Committee centered on the accountability of Canadian corporations in "developing" countries. This focus should be extended to include "developed" countries such as the United States where indigenous communities like the Western Shoshone are seriously impacted by harmful corporate practices.

17. In its 2007 Concluding Observation number 17, CERD expressed its concern over reports that the extractive activities of Canadian corporations operating in other countries were having adverse effects on "the right to land, health, living environment and way of life of indigenous

³¹ See Cyanide Bans Worldwide, RAINFOREST INFO. CTR. (Oct. 2004), <http://www.rainforestinfo.org.au/gold/Bans.html>.

³² Addendum to UN Special Rapporteur on Toxic waste and Products, 2002 Annual Report, UN Doc: E/CN.4/2003/56/Add.2I at para. 124 (2003), <http://www.hri.ca/fortherecordCanada/documentation/commission/e-cn4-2003-56-add2.htm>.

³³ *Id.* at para. 126.

³⁴ See Report of the House of Commons Standing Committee on Foreign Affairs and International Trade: "Mining in Developing Countries - Corporate Social Responsibility" (June 26, 2005), <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=1961949&Language=e&Mode=1&Parl=38&Ses=1 - EnsureConduct>.

³⁵ *Id.* at p. 2.

³⁶ *Id.* at p. 3.

peoples” located in those countries.³⁷ Making reference to ICERD articles 2.1(d) and 4(a)–(b), as well as General Recommendation No. XXIII, the Committee encouraged Canada to “take appropriate legislative or administrative measures to prevent acts of transnational corporations registered in Canada which negatively impact on the enjoyment of rights of indigenous peoples in territories outside Canada.”³⁸ The Committee recommended, in particular, that Canada “explore ways to hold transnational corporations registered in Canada accountable.” Finally, the Committee requested that, in its next periodic report, Canada include further information on the effects of transnational corporations on indigenous peoples abroad and measures taken to address the problem.³⁹

18. In its 18th and 19th periodic reports, Canada failed to even address the issue of transnational corporations’ impacts on indigenous peoples abroad, making no reference to the problem or to Concluding Observation number 17. Although Canada in 2009 appointed a corporate social responsibility counsellor to investigate complaints about Canadian companies’ human rights abuses abroad, there has not been any legislation requiring corporate engagement with this process.⁴⁰ The counsellor’s office has only launched two inquiries, and the first was promptly dropped when the company involved refused to participate.⁴¹ In October 2010, the Canadian Parliament voted against a bill called the “Responsible Mining Act,” which would have authorized greater scrutiny of corporate behavior and allowed the federal government to deny funds to companies committing human rights abuses.⁴² In the absence of effective administrative or legislative action, human rights victims are left having to litigate in Canadian courts.⁴³ It remains unclear whether these courts will, as the Senate Standing Committee recommended, articulate clear legal principles that can be used to hold Canadian corporations accountable for their human rights violations. At present, Canada continues to lack any effective mechanisms for holding companies accountable for human rights abuses abroad.

IV. CONCLUSION

19. Based upon the ongoing, serious and persistent pattern of human rights violations against the Western Shoshone peoples perpetuated in part by Canadian transnational mining corporations, we request that the Committee on the Elimination of Racial Discrimination recommend that Canada:

- a) Formally adopt and implement the Recommendations by Canada’s Standing Committee on Foreign Affairs and International Trade with specific reference to “indigenous lands” both in *developing* and *developed* countries;

³⁷ 2007 Concluding Observations, *supra* note 2, at para. 17.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Mining watchdog agency called “bogus PR job,”* CBC NEWS, Oct. 31, 2011, <http://www.cbc.ca/news/canada/story/2011/10/31/mining-watchdog-agency.html>.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*; see also Mining Watch Canada, *What next for Corporate Accountability in Mining?*, <http://www.miningwatch.ca/home>.

- b) Call upon Canadian transnational corporations operating on Western Shoshone lands to respect CERD Decision 1(68) and cease all activities that support or profit from the United States' continuing violation of Western Shoshone human rights; and
- c) Complete a report on the activities of Canadian companies on Western Shoshone traditional lands in light of the human rights violations and ongoing CERD review of the situation.