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Background Document on Dann v. United States

"Our Mother Earth Is Not For Sale"

"This land ... is our church", says Carrie Dann, trying to condense into a single word the complex, untranslatable importance of their ancestral homeland to her people. She is speaking for the Western Shoshone, who for millennia have inhabited a large swath of central Nevada.

To the minds of most nonnatives, this part of Nevada is an arid, forsaken wasteland, fit only for strip-mines, bombing ranges and nuclear waste dumps, and perhaps a bit of ranching before the land becomes too toxic or desiccated to support grazing. To the Western Shoshone, an ancient people who have thrived for upwards of 4,500 years in this austere land by respecting and nurturing its delicate ecology, it is beautiful, fragile, and indescribably precious. It is the beleaguered matrix of their still-robust culture. So fundamentally bound up is this land with their way of life that they are certain that they will cease to exist as a people if bereft of it, becoming no longer Western Shoshone, but simply "Indians" - another dispossessed, impoverished minority.

Their right to inhabit and subsist off this land is recognized in the 1863 Treaty of Ruby Valley. The Western Shoshone maintain that the Treaty of Ruby Valley is as valid today as it was in 1863, and in 1978 and 1983 the Ninth Circuit Court of Appeals agreed with them. The U.S. government, however, wants title to the Western Shoshone land, which it treats as "public domain land". To that end, it has maintained, on the basis of a line of clumsy doublespeak and circular logic endorsed by the United States Supreme Court, that the Treaty was pre-empted ("extinguished", in fed-speak) through the "gradual encroachment" of white settlers and others, scant years after it was signed. In reality, the Ninth Circuit Court of Appeals established that the issue of the "extinction" of the Treaty of Ruby Valley was never properly litigated. For decades, the Western Shoshone have been fighting an intransigent United States government for recognition of their treaty rights. The courts have brushed them aside.

The government likewise claims that the Western Shoshone were “paid” for the “taking” of their land, and so are no longer allowed to assert their treaty rights, extinguished or not, or their aboriginal rights to use the land for subsistence. However, the money the Western Shoshone were supposedly “paid” languishes in government vaults, because the Western Shoshone refuse to touch a penny of it, knowing that accepting it would strip them of their land rights. In 1979, to determine the Western Shoshone's compensation award for the “taking” of their land, that land was valued at 1872 dry-gulch prices, with no interest accruing during the intervening 107 years. 18 million acres, or 82 percent of Western Shoshone land, including land on which multinational corporations now mine for gold, was valued at an astonishingly miserly fifteen cents per acre. However, for the Western Shoshone, that is beside the point. Never mind that such a transparent ripoff adds insult to injury; the majority of the Western Shoshone simply do not want to give up their land, and the ancestral land use rights that go with it. Although some of the Western Shoshone are in favor of accepting a money settlement, it is generally believed that most of them are not making an informed choice, but have been manipulated into thinking that a paltry amount of money is the best they can get from a government too powerful to face down. The rest refuse to accept “payment” for land that their religion forbids them to part with, in spite of ongoing efforts to either bamboozle or bully them into doing so. For them, to accept such money would be to sell the foundation of their culture, their ancient birthright, their spiritual Mother, to people who have come close to destroying in one century what has sustained and defined them since prehistoric times.

They are running out of time. The government is fed up with the Western Shoshone and their stubborn refusal to give in, and Congress is considering two bills which would offer a quick, two-step solution to the government’s Western Shoshone troubles - in Carrie Dann's words, “the final nail in the coffin they have built for us as a people.” The first bill would force distribution of the compensation money upon the entire Western Shoshone Nation, effectively pre-empting their claim upon the land. The second bill would allow the government to sell the land out from under the Western Shoshone to the highest bidder - most likely to a few dozen more land-devouring, toxin-spewing gold mines.

The Western Shoshone have no intention of becoming simply another hapless group of victims, either of blind corporate greed, or of the United States's unenlightened, ethnocentric laws and policies. They intend to keep inhabiting this land, and maintaining their traditional, ecologically sustaining ways of using it. Frustrated by decades of dead-end litigation in the U.S. courts, and facing both the destruction of their lands and the imminent extinction of their ancient land use rights through legislative fiat, the Western Shoshone have taken their fight into the international arena, petitioning both the United Nations and the Organization of American States for help. The Yomba and Ely Shoshone, joined by the Danns, have petitioned the U.N.'s Committee on the Elimination of All Forms of Racial Discrimination for help, and addressed the U.N.'s Subcommission for the Promotion and Protection of Human Rights and the Working Group on Indigenous Populations.

The Danns, joined by the Yomba and Ely Shoshone as "friends of the court", have petitioned the 0.A.S.'s Inter-American Commission on Human Rights for assistance.

The Western Shoshones

The Western Shoshone are traditionally hunter-gatherers, roaming their lands in search of game and native foods, carefully rotating their harvesting areas so as not to deplete resources. Ranching has gradually supplanted some hunting activities with the disappearance of the buffalo herds and the diminishment of other game. But hunting is still an integral part of the Western Shoshone way of life, and deer, sage grouse, rabbit and other game still supply a significant part of their diet. Western Shoshone hunting and gathering practices are passed down from generation to generation, and incorporate important elements of their culture and religion.

The Treaty of Ruby Valley

Other than the occasional invasion by Spanish troops which the Western Shoshone repelled, the Western Shoshone had no contact with non-indigenous peoples until the early 1800's. Whites made only sporadic forays through Western Shoshone territory until 1840's However, during some of these early forays, they engaged in abusive practices that antagonized the Western Shoshone. Then traffic through Western Shoshone territory increased markedly because of the California Gold Rush. Predictably, friction between the Western Shoshone and the whites increased as well.

In 1863, the Western Shoshone, reputedly under duress, signed the Treaty of Ruby Valley with the United States government. As documented by a contemporary scribe, the commissioners sent to negotiate the treaty were specifically ordered not to negotiate for the extinction of the Western Shoshone's aboriginal title to the land. The commissioners “carefully followed their instructions”. Accordingly, the terms of this “treaty of peace and friendship” primarily guaranteed safe passage for civilian travellers and government personnel passing through Western Shoshone lands.

Other terms were blatantly advantageous to United States commercial and military interests, allowing unchecked right of way for railroads, mining, timber-cutting, ranching and military activities. However, the treaty clearly delineated as Western Shoshone territory a large portion of the Great Basin area from southern Idaho, through a small area of western Utah, through much of central Nevada, and into southern California. The treaty fully recognized the Western Shoshone's right to occupy and use this territory without interference, and prescribed advance compensation for anticipated game diminishment. Per President Lincoln's instructions, no title to any land was given up or ceded to the U.S., although the treaty did require the Western Shoshone to cooperate if the President decided to designate a reservation for them within the treaty area. A small reservation (the Duckwater Reservation) was eventually set up for the Western Shoshone, but it was outside the treaty area, and few Western Shoshone moved onto it. Most Western Shoshone continued to occupy their ancestral lands.

Aboriginal Hunting Rights Denied

The Western Shoshone are in no sense “recreational” hunters, like the nonnatives who purchase tags and make a festive event out of shooting the yearly stag, grilling up the meat as an exotic change from McDonald's or Hamburger Helper. The Western Shoshone hunt for subsistence and self-sufficiency, to sustain their families from day to day. They do not consider exercising their treaty rights to keep their children from going hungry without having to go on welfare “recreation”. State restrictions on such traditional subsistence activities, say the Western Shoshone, are illegitimate, and a violation of their treaty rights. Unfortunately, neither the Nevada state government nor the federal government agrees. Since the sixties, Western Shoshone hunters have routinely been thrown in jail and fined, and have had the food they

provide for their families confiscated, because they have continued to assert their ancestral hunting rights, refusing to purchase tags and following their traditional yearly hunting cycles.

The Western Shoshone have doggedly litigated this hunting issue from the local magistrates' courts all the way to the United States Supreme Court, to no avail. Domestic courts, with the exception of the Ninth Circuit Court of Appeals, have shown themselves unwilling to even begin to comprehend issues of the Western Shoshone's treaty rights, much less uphold those rights. The following dialogue from the 1985 trial of Timothy Dann for “poaching” a mule deer is illustrative:

Timothy Dann's attorney:	Are you familiar with the Treaty of Ruby Valley?
Sheriff:	No, I'm not.
Dann's attorney:	If that treaty were to say that Indians were to have the right to kill the deer, would you respect that?
Sheriff:	Under state law, I'd say no.

Dann's attorney went on to explain that this was an issue of federal, not state taw. No matter; the judge ruled that “under state law”, Timothy Dann “had to have tags” to hunt deer.

Traditional Pine-nut Harvesting Areas Destroyed or Co-opted

Likewise threatened are the Western Shoshone rights to fish (also restricted by Nevada's game laws), and to harvest the pinyon groves that provide pine-nuts, both a staple food and a cornerstone of Western Shoshone tradition. True to form, the federal government doesn't give a toss what the Western Shoshone use these pinyon groves for. Insisting that these groves are on “public” lands, the federal government has authorized the wholesale cutting of hundreds of acres of pinyon for Christmas trees and has “chained” them by the tens of thousands of acres to provide forage areas for nonnative ranchers’ cattle and for the deer and sheep hunted by nonnative recreational hunters. “Chaining” involves wrapping whole stands of pinyon with chains, hooking the chains up to tractors, and hauling away until the trees are yanked up by the roots and the ground is cleared. Most invasive of all is the federal government's authorization in 1994 of sixteen commercial pine-nut harvesting areas in areas traditionally harvested by the Western Shoshone.

Gold Mines: Raping Mother Earth

Mines have been proliferating throughout Western Shoshone territory since the end of the Civil War. Nevada is rich in mineral deposits, especially gold, and over the past fifteen years Western Shoshone land has become the epicenter of a new Gold Rush. Unfortunately, the gold deposits contain low-grade ore, from which the gold can only be extracted using a lethal cyanide potion. Cyanide spills have already occurred on Western Shoshone land, and mining activities have left the land scarred and pocked with contaminant-saturated sump holes and tailing ponds.

"You cannot talk to these people," Carrie Dann said in a 1989 interview, her voice ringing with outrage and exasperation. "They look out over the land, and they see it in dollars and cents. They look at how much more you can rape the land. They don't look at human values. One of these days some of that stuff is going to come down and hit someone's water supply." Prophetic words. Fifteen years later, a toxic plume from an abandoned mine is seeping its way toward the neighboring Paiutes' water supply in western Nevada, threatening to contaminate it. The Paiutes are frantically trying to qualify for Superfund aid before their water turns to poison.

Mining is appallingly water-consumptive. Mines are dug below the water table and must be "dewatered"; little of this water eventually returns to the aquifer, and much of the rest becomes grossly polluted. Tolerating such a destructively parasitic use of water in the driest state in the U.S. seems irresponsible beyond belief, but in fact over a trillion gallons of precious, virtually nonrenewable groundwater have been sucked out of Nevada's arid Humboldt Basin in support of mining activities. Ages-old springs are disappearing, taking with them the fragile ecosystems, and eventually the human communities, they once nourished.

Mining has also resulted in the demolition of Western Shoshone cultural sites and the destruction of wildlife habitat.

Desecrating Sacred Land: Military Abuses. Nuclear Testing and Nuclear Waste

Military activities menace the Western Shoshone and the neighboring Paiute alike. Military overflights terrify game and livestock and drop "chaff", a material that is potentially hazardous both to livestock and to the ecology. The Paiute have reported problems with drunken

pilots, bombed wells and corrals, and unexploded bombs accidentally dropped on their land. Military land within Western Shoshone territory has tong been used for nuclear testing, over the dismayed protests of the Western Shoshone, who call themselves “the most bombed notion on earth”. The federal government has hollowed out Yucca Mountain, a sacred Western Shoshone landmark, to be used as a future nuclear waste dump, over the vigorous opposition both of the Western Shoshone and of alarmed nonnative groups such as Citizen Alert, which opposes nuclear testing as well.

The Indian Claims Commission, or “We’re From the Government And We Are Here To Help You”

In 1946, the Congress established the Indian Claims Commission (ICC). The ominous “chief purpose” of the ICC was “to dispose of Indian claims problems with finality”. The idea was to get money settlements for Indian tribes who could prove that they had once held title to a measurable amount of land, and who had lost that land because their treaties had not been honored. According to the cynical view, the idea was also for the federal government to get undisputed title to as much Indian land as possible.

The ICC required lawyers contracting with Indian tribes to handle ICC claims to have the contracts approved by the ICC, and to be supervised by the Department of the Interior (the very entity that stood to gain undisputed title to the “taken” land). Claims lawyers were to receive a contingency fee of seven to ten percent of the amount awarded to a tribe. Arguing that a tribe had not, in fact, lost the land and wanted recognition of its aboriginal title instead of compensation was obviously not in the claims lawyers' best interests, as they stood to gain nothing from such a claim.

In 1947, a firm of lawyers, one of whom had helped the federal government set up the ICC, contracted with the “Te-Moak Band”, one small, autonomous group of Shoshone that was wrongly characterized by the lawyers as representing the entire Western Shoshone people, to file an ICC claim on behalf of the Western Shoshone for “lands taken”. The claim was filed in 1951, the same year the government began testing nuclear weapons on its military bases in Western Shoshone country.

"Gradual Encroachment"

In 1962, the ICC ruled that the Treaty of Ruby Valley had been "extinguished" through the "gradual encroachment" of white settlers, mining operations, railroads, and so on, and that the Western Shoshone had thereby lost title to 22 million acres of land. Now, such a "gradual encroachment" theory might be believable in, say, an Illinois or a New Jersey context, but the idea that the Western Shoshone in central Nevada had been effectively elbowed off their land by hordes of white settlers erecting housing tracts is transparent nonsense. The Western Shoshone, in the forties, fifties and sixties, were undeniably inhabiting and using most of their treaty lands. Although there had been some white settlement, central Nevada remained very sparsely populated, and remains so to this day. The Western Shoshone hunted, fished, harvested and herded as they had always done. But "gradual encroachment" was, as the wags say, "close enough for government work". In 1966, the claims lawyers agreed with the government that the Western Shoshone had officially been "gradually encroached" off their nearly empty land on July 1, 1872.

The 1872 Mining Act

In 1872, Congress had passed an important piece of legislation: the General Mining Act of 1872. This act is currently heavily criticized for the destructive license it has afforded to multinational mining outfits, some of the largest of which operate on Western Shoshone land. The government argued that the simple passage of this act, as well as the mining that took place as a result, was part of the "gradual encroachment" by which Western Shoshone lands were "taken". The government's "camel's-nose-under-the-tent-flap" rationale went something tike this:

1. The Treaty of Ruby Valley allowed right-of-way for mining on Western Shoshone land.
2. The 1872 Mining Act allowed the government to authorize mining on public lands.
3. So the Treaty of Ruby Valley, taken together with the 1872 Mining Act, allowed the government to treat Western Shoshone lands as "public" lands.
4. So the government effectively took possession of Western Shoshone lands in 1872.

5. Plus there was all this mining going on, which also took land from the Western Shoshone.

In fact, truly large-scale mining on Western Shoshone land did not begin for over one hundred years after the act was passed - after the Western Shoshone had begun to contest the taking of their land. Also, a central tenet of federal Indian law, which would have made short work of the government's rationale had the issue ever been litigated, is that courts are supposed to interpret Indian treaties the way the Indians signing them would have interpreted them. It's not likely that the Western Shoshone, in 1863 or at any other time, would have understood "you have right of way through our land to get to your mines" to mean "if you can tell people they can come and mine, that means you own all our land".

The "Claims Committee"

In accordance with ICC regulations, it was agreed that the Western Shoshone would be compensated at whatever amount their land was determined to have been worth on July 1, 1872, plus the value of minerals extracted before that date (although the government later contested the value-of-minerals extracted provision).

In order to complete the valuation, experts had to be hired. Experts cost money the Te-Moak Band didn't have, but the ICC allowed claimants to borrow money from the government against a claim, to pay for valuation experts. The Te-Moak Band's Tribal Council was asked to authorize the loan application. However, for the first time, they balked at acting on behalf of the entire tribe.

The lawyers agreed to hold meetings with tribal elders throughout Western Shoshone country. Most of the elders got up and walked out of the meetings, furious that anyone would suggest that they sell the earth they thought of as their Mother. The lawyers reassured those who remained that they were not "selling their mother", that they were only trying to get money from the government for land well and truly taken. Those they convinced to support the claim elected some of their number to be members of a "Claims Committee", who would assist the lawyers, and who would receive compensation for doing so. However, there was no system put in place to

allow the tribe to control the committee or to remove any of its members. They were accountable only to the claims lawyers, who, instead of their clients, were effectively running the litigation.

In 1972, the ICC issued its decision valuing the Western Shoshone's land at $26 million. Then, in 1973, the government goofed.

Enter the Danns

Mary and Carrie Dann live in Crescent Valley, on a ranch built by their father, Dewey, on land their family has inhabited for generations. They raise horses and cattle, and they and members of their extended family practice traditional Western Shoshone hunting and gathering. Early one morning in 1973, Mary rode out to check on the Dann cattle. When she got home, an official from the Federal Bureau of Land Management was waiting for her. The official informed her that she was trespassing, because she was grazing her cattle on “public” land without a permit. He patronizingly told her that she was welcome to speak to the BLM's Advisory Board about getting a grazing permit. Mary calmly informed the official that they were on Western Shoshone land that had been occupied by generations of her ancestors, and that she and her sister had no intention of paying to graze their cows on their own land.

In 1974 the BLM filed suit against the Danns for trespass.

Carrie and Mary Dann have been leading the charge to stop the government from commandeering the Western Shoshone traditional land base ever since.

The Dann sisters discovered that the ICC claim was the reason the government thought it owned Western Shoshone land. They also discovered that most Western Shoshone opposed the ICC claim, but felt powerless to do anything to stop it. The Danns organized, enlisting supporters to help them form the Western Shoshone Legal Defense and Educational Association. The Danns answered the trespass charge by explaining that they had been grazing their animals on land that; according to the Treaty of Ruby Valley, belonged to the Western Shoshone Nation. Simultaneously, the Association tried to intervene in the ICC proceeding and get it stopped.

Dewey, Cheatham & Howe

Robert Barker was the lead attorney working on the ICC claim. In the legal profession, the following ethical tenets are well-known:

1. It's your client's case, not yours. You try to get whatever your client wants you to get, even if it means that you make less money, and even if you think you know better than your client what's good for him.
2. Thou shalt be completely honest with thy client.
3. Thou shalt not have a conflict of interest. You work for your client, not for the client's adversary.

Robert Barker and the other claims attorneys had already violated the first two tenets by manipulating the reluctant Western Shoshone into keeping the controversial litigation going and by misrepresenting the effect the claim would have on their land rights. Barker then violated the third by opposing at every turn the Western Shoshone's efforts to stop the claim, even after the Te-Moak Band that had originally brought the claim reorganized and joined the fight to stop it. In effect, Barker ended up siding with the government and not the Western Shoshone. The Western Shoshone's efforts to intervene were dismissed by the courts.

The Te-Moak Band tried to fire Barker. They were told that the Court of Claims would have to approve his termination. The Court of Claims brushed off the Te-Moak Band's request, blithely characterized the Western Shoshone's vehement opposition to the lawyer’s actions as a “dispute over strategy”, and extended Barker's contract for two years. In 1979, when the claim award was made final, the attorneys were awarded a 9.1% contingency fee. Not satisfied, they appealed, asking for the ten percent maximum, $2.6 million. In the meantime, three different Western Shoshone groups opposed any award of attorney's fees, accusing the attorneys of malpractice and unethical conduct on seventeen separate grounds, and pointing out evidence of the strong opposition to the ICC claim. The Court of Claims not only awarded the attorneys the larger fee they asked for, but praised them for “the high quality of legal services rendered”, citing “substantial benefit to Indians because of persistent, able, and protracted efforts of their legal counsel”.

U.S. v. Dann

In the meantime, the Danns continued to litigate the trespass charge against them. The U.S. District Court in Nevada found the Danns guilty of trespass in 1977, rejecting their argument that they had aboriginal rights to the land. The court said that the ICCs "extinguishment" ruling meant the Danns could no longer claim aboriginal title.

The Danns appealed to the Ninth Circuit Court of Appeals, which disagreed and sent the case back to the lower court in 1978, finding that the Danns could still claim aboriginal title because that issue had not been litigated. The District Court, at the government's request, then tried a different tactic, waiting until the Court of Claims upheld the ICCs compensation award and the award was certified for payment in 1979. The district court then held that upon certification, the award had been automatically "paid," and that this "payment" extinguished aboriginal title to the Western Shoshone lands.

Again the Danns appealed to the Ninth Circuit, and in 1983 the Ninth Circuit again disagreed with the lower court, finding that "payment" didn't change the fact that aboriginal title had never been litigated, and that, in any case payment wasn't complete until the award was in the Western Shoshone's hands.

The Supreme Court

The government appealed to the Supreme Court. On the day of the trial, a government attorney interviewed on the steps of the Supreme Court uttered, straight-faced, the following bit of officious jabberwocky:

"Our position is that the ICC ruled that the treaty was extinguished," before purposefully striding off to do battle with the Indians.

The Supreme Court avoided the question of the validity of the Treaty of Ruby Valley, focussing instead on the "payment" issue. The Supreme Court found that the Western Shoshone had in fact been "paid, intoning the circular mantra that the Western Shoshone's treaty rights had

been pre-empted when the Western Shoshone were “paid” for the supposed “extinguishment” of the treaty, and that therefore the legitimacy of the “extinguishment” need never be addressed.

“Payment” had consisted of the Treasury Department taking the Western Shoshone award and paying it to the Secretary of the Interior, “in trust” for the Western Shoshone. In the words of tribal member Jerry Millett, the government had “appropriated money, pulled it out of one pocket, stuck it in the other pocket, and said that we've been paid”. The Supreme Court’s rationale was that quibbling over what constituted “payment” would be too confusing for the courts.

After their brush-off by the Supreme Court, the Western Shoshone made one last foray into the courts. They attempted to assert aboriginal hunting rights, trying to get the federal government to at least stop Nevada from enforcing its poaching laws against traditional Western Shoshone hunters and gatherers. Again, they got nowhere.

In the meantime the BLM began a campaign of harassment, slapping the Danns with fines and impoundment notices. In 1992, the BLM impounded and sold several hundred of the Danns' horses and cattle, over the desperate protests of the entire Dann family. Carrie Dann was injured by a BLM agent. Clifford Dann, Mary and Carrie's older brother, doused his arms with gasoline and threatened to set himself on fire if the livestock were not released. When a BLM agent crept up behind him and tackled him, and was splashed with a bit of gasoline from the can Clifford holding, the elderly, partially deaf man was arrested and jailed for nine months for “assaulting a federal officer”.

The BLM continues to harass the Danns. The fines have now surpassed one million dollars, which the Danns wouldn't have the slightest hope of paying even if they considered the fines legitimate, and even if they accepted their share of the “compensation” money - roughly $20,000 for every Western Shoshone of at least one-quarter blood. Since 1992 there have been no actual impoundments, but the threats of impoundment continue, and the Danns’ offers to negotiate a solution to the stalemate between them and the government are met with broken-record-style demands for payment of fines. The BLM has also taken the ominous step of refusing

to renew the Danns' grazing preferences, which the Danns see as a first step to the government forcing them off their land.

Hauling Out The Big Guns: The International Forum

By 1991, the Western Shoshone had exhausted every avenue in the U.S. court system trying to get their land rights upheld. Forming the Western Shoshone Defense Fund, they turned to the international community for help, under the representation of the Indian Law Resource Center, an international clearinghouse for indigenous rights law which is frequently called upon to advise the United Nations. By turning to the international community for help, the Western Shoshone sent a signal to the U.S. government: We are not going away. If your courts and your government won't give us the time of day, We'll find someone bigger than you who will: the rest of the world. They also sent a signal to the world, to the effect that the U.S.'s legal system had utterly failed them, and that their human rights were being blatantly ignored.