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TODAY'S INDIAN WARS: BETWEEN CYBERSPACE AND THE UNITED NATIONS†

S. James Anaya*

After Peter Byrnes asked me to speak, he kept asking for a title. I wanted to give him something pithy, something that would capture your attention. I came up with “Today’s Indian Wars” to emphasize to you that there are still conflicts between our governments and Native American peoples; and these conflicts are being fought with new tools, including the Internet (hence “cyberspace”) and in new forums, including the United Nations. Hence: “Today’s Indian Wars: Between Cyberspace and the United Nations.”

THE DANN SISTERS

Before I talk about cyberspace or the United Nations, however, I’d like to tell you about Mary and Carrie Dann. These two Western Shoshone sisters have been involved in a life-long struggle to protect their traditional lands.

The traditional lands of the Western Shoshone encompass vast areas of the state of Nevada—actually a majority of the state of Nevada—and extend down into California and up into parts of southern Idaho. That is the territory that the Western Shoshone people have used and occupied for over a millennium. When white settlers began moving westward with the gold rush in California, they encountered the Western Shoshone people, and those encounters set off a series of events not concluded even today, events that involve a struggle for the very survival of the Western Shoshone people. The United States government no longer recognizes the Western Shoshone as the owners of this vast territory.

Nonetheless, individuals like Mary and Carrie Dann continue to try to eke out a living on this land. They are ranchers. (Or rather, they *were* both ranchers. Mary passed away just over a year ago. She died at the age of seventy-eight while taking an all-terrain vehicle out to check the cattle and horses on the range.) For all their lives, Mary and Carrie used the lands of their ancestors, hunting and fishing as well as grazing livestock. But they and others like them have been regarded as trespassers on their own lands. Mary and Carrie finally decided to fight for their rights; in 2003 they sued the federal government.

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On Thursday of last week [early March] a United Nations committee, the U.N. Committee on the Elimination of All Forms of Racial Discrimination, issued what it calls an “Urgent Action Decision” regarding the United States, in which it found that the “state party”—the United States—is denying the Western Shoshone indigenous peoples their traditional rights to land, and that measures taken by the state party in relation to the status, use, and occupation of these lands may cumulatively lead to irreparable harm to these communities. Based upon that finding, the Committee determined that the past and new actions taken by the state party on Western Shoshone ancestral land have led to a situation where the United States government is not respecting its obligations under the Convention on the Elimination of All Forms of Racial Discrimination—in particular, the obligation to guarantee the rights of everyone to equality before the law.

The United Nations Committee on the Elimination of Racial Discrimination is one of many United Nations bodies that promote the observance of human rights. Its specific task is to promote the observance of the Convention on the Elimination of All Forms of Racial Discrimination, a multilateral treaty to which the United States is a party. (It’s often said that the United States does not sign on to human rights treaties. That is not quite true. There are a couple of important human rights treaties to which the U.S. *is* a party, and one of those is the Convention on the Elimination of All Forms of Racial Discrimination.) So here we have the United Nations body that is in charge of promoting compliance with this treaty condemning the United States for its failure to recognize the use and occupancy rights of the Western Shoshone people on their traditional land, and therefore finding the United States in violation of its obligations under the treaty.

How did we get to this situation, where the United States today is being condemned by the United Nations for violating international law in its actions concerning indigenous peoples? Weren’t all of those issues taken care of years ago? Isn’t the United States the guarantor of human rights, worldwide? Isn’t the United States the beacon on the hill, for human rights? We’d like to think that’s the case, but there are pockets of darkness that this beacon of light does not reach, and one of those pockets involves Native Americans. In order to appreciate how we got to this situation today, with the United States being condemned for its mistreatment of Native Americans, and specifically the Western Shoshone, we need to go back in time.

REVIEW OF GOVERNMENT-WESTERN SHOSHONE RELATIONS

Let us begin with the Treaty of Peace and Friendship that the United States entered into with the Western Shoshone people in 1863. This is a treaty that

the United States entered into in order to secure a kind of peace with the Western Shoshone so that settlers could pass through Nevada to reach California, so that rail and telegraph lines could be established, and so that certain development activities, particularly mining and other extractive activities, could be conducted in the Western Shoshone lands. In exchange for that, the treaty described the extent of the Western Shoshone territory, and article six specifically recognized their "roaming life," which could continue unless they were provided a reservation.

This treaty is unlike other treaties between the United States and Indian tribes around this period. It is a treaty of "peace and friendship," intended to establish a peace between the United States and the indigenous peoples on the basis of mutual friendship. Other treaties of the time followed the military defeat by the United States of indigenous peoples and involved the cession of land from indigenous peoples to the United States. Those tribes were reduced to reservations, which you see today throughout Arizona and New Mexico and other parts of the western United States.

The United States government might have viewed the Peace and Friendship Treaty as an interim arrangement; the treaty did allow the President to establish reservations and require the Western Shoshone to move to them. However, no reservation was ever established for the Western Shoshone people, and they continued to occupy their vast territory.

At least, many of them did. In the early part of the 1900s, the United States did establish what it called "colonies" for several groups of Western Shoshone people. These colonies are areas of a few acres, set aside as places where many of the Western Shoshone could at least have homes; but these areas were too small to allow them to continue their traditional ways of life, which required vast territory. And the establishment of these small colonies for the Western Shoshone people was not the fulfillment of the treaty provision allowing the establishment of a reservation. Thus, the Treaty of Peace and Friendship continued.

Yet today, as I mentioned earlier, the United States regards the Western Shoshone as not having rights to this vast territory, notwithstanding the fact that there has never been any specific act of the President or Congress or a treaty establishing a reservation, as authorized by the original treaty. This is one of those situations that one can regard as never having been totally "fixed" by the United States. It's one of those tribes that sort of got away. It's one that the U.S. didn't defeat militarily and forgot to reduce to a reservation.

So what is the government's legal position with regard to the claims of the Western Shoshone people to their traditional land? The United States points to a monetary award by the Indian Claims Commission, a monetary payment made available to the Western Shoshone to extinguish their land

rights. The Indian Claims Commission is a federal agency that was set up by a 1946 federal statute, in order to address outstanding Indian claims—not just those of the Western Shoshone but also a number of other claims by native peoples around the country.

There are two broad types of claims that went to the Indian Claims Commission. In the eastern part of the United States, there were claims that state governments or private parties acquired land from tribes (on unfair terms), in violation of a 1790 federal statute, the Nonintercourse Act. This Act reserved the right to acquire Indian lands to the federal government, to the exclusion of states and private parties. The claims in the East, then, are that the transfers to state governments and private actors were invalid. The claims we see in the western part of the United States are different. These claims stemmed from situations where the United States left unfinished business with regard to the tribes—perhaps did not complete the taking of their lands or the reduction of the tribes to reservations—or engaged in such blatantly unfair dealings that the government felt it desirable to open itself up to claims by tribes.

The Indian Claims Commission process was intended to settle once and forever the claims by Indian tribes. However, the jurisdiction of the Commission was such that it was allowed to provide only monetary awards, not to confirm ongoing interests in land. Also, the way claims typically got started was initiation by the federal government itself. The federal government, through the Bureau of Indian Affairs, would identify lawyers, take the lawyers to a tribe, and say, “O.K., let’s set up a claims committee and go through this process of preparing a claim.” In other words, the whole process in many instances was directed by the federal government. There was a kind of collusion between the lawyers who were retained for the tribes and the federal government itself.

That’s what happened here with the Western Shoshone. The federal government arranged for lawyers to develop a claim—concoct a claim—on behalf of the Western Shoshone for this unfinished business concerning their land. They constituted what was denominated a claims committee, made up of a few Western Shoshone individuals; they identified what they called a “Western Shoshone identifiable group.” That very term suggests this notion of the concoction of a claim, rather than the Western Shoshone nation coming forward willingly and knowingly to make a claim; and the claim was not one that the Western Shoshone would have made. The claim stipulated that the Western Shoshone land rights had been extinguished. Western Shoshone people who were in any way knowledgeable or involved with this claims process had assumed at first that they were making a claim to secure their land, to gain recognition of their rights in their land, yet the claim stipulated quite the opposite. It conceded that those lands had somehow been taken or

lost, and it simply claimed money in exchange for those lands. The loss of their lands was never actually litigated.

How had they supposedly lost their lands? Those land rights had been extinguished by white settlers, through the gradual encroachment of white settlers onto their land. This theory of gradual encroachment was a novel one. There was nothing and there still is nothing in U.S. law that provides for the taking of Indian land by such gradual encroachment. And, as a matter of fact, it's hard to see how it can be said that the Western Shoshone lands were taken by gradual encroachment. Central Nevada is the most desolate part of the lower forty-eight of the United States. Even today, you look across valleys and cannot see *anything* for miles and miles. When you are driving through, you have to fill up at every gas station you see because you don't know where the next station might be. If you are driving at night (and this has happened to me), you can take a wrong turn and have no idea which way you're going. You might not hit anything for another hundred or two hundred miles. (One time I was with a lawyer friend and we got lost. We drove around for hours. Then he said, "Well, you're an Indian; go out and look at the stars, and see if you can figure out where we are." And guess what, I did! I went out, looked at the stars, and said, "Hey, we're heading to Las Vegas, not Reno.") Yet this almost completely unoccupied land is the place the U.S. said was taken from the Western Shoshone people by gradual encroachment. It's a constructive taking. It's a concoction. And it was stipulated.

For that so-called taking, the Western Shoshone were given a monetary award, in the Indian Claims proceedings. What was that award? This area is rich in minerals, one of the richest in the entire country. A motherlode of gold was recently found there; it is predicted that the next big gold rush worldwide will be in central Nevada. Gold prospecting and mining were occurring at the time of the Treaty of Ruby Valley (the Treaty of Peace and Friendship), and a lot of gold and other minerals certainly had been taken out of Western Shoshone land at the time of the Indian Claims Commission award. So how did the Indian Claims Commission value the lands that had been taken? It valued those lands on the basis of 1872 prices—*1872 prices*—with no interest. How did it come up with 1872? The Commission called that an average taking date, the average of the time period of the gradual encroachment. And the Commission found the 1872 price per acre was about one dollar and twenty-five cents. The Western Shoshone were awarded a dollar and a quarter per acre, with no interest.

How could this happen? How could the government construct the taking of Indian lands and award so little for them? Answering this requires us to understand at least a little bit about the basic doctrines of federal Indian law.

FEDERAL INDIAN LAW

One of the essential doctrines in federal Indian law is the so-called doctrine of discovery, a doctrine derived from colonial era relations between European powers and indigenous peoples. It basically means that when the European powers came to the Western Hemisphere, simply by *discovering* Indian lands, they acquired certain rights over those lands and certain prerogatives of sovereignty over those lands. The United States, as the successor to those European powers, has the benefit of these rights and prerogatives over Indian lands. Related to that is the doctrine of federal plenary power over Indian lands. This is based in part on this notion of discovery and in part on the Commerce Clause of the United States Constitution. The Commerce Clause, as you know, delegates to the federal government the power to regulate commerce among the states and with foreign nations. As you may or may not know, it also gives the federal government the power to regulate commerce with the Indian tribes; that is explicit in the Commerce Clause. So the Commerce Clause affirms the federal power over Indian tribes. It has also a negative component, just as the Commerce Clause does with regard to interstate commerce. It has the effect of displacing any power, or at least a good bit of power, that the states might otherwise have with regard to the tribes. In sum, the Commerce Clause, the historical doctrine of discovery, and a notion of inherent federal authority, similar to the notion of inherent federal authority in the area of foreign affairs or immigration, support this doctrine of plenary federal power over Indians.

The courts have said that with this power comes an obligation of trusteeship toward the Indians, so the federal government acts as trustee for the interests of the tribes. That can be a good or bad thing, depending upon how the government perceives the tribes' interests. At certain points in history, the United States has said that the best thing for them is simply to cease to exist as distinct indigenous peoples. Hence, at various points in time, the U.S. policy has been to assimilate indigenous peoples into the larger American society and to engage in active policies not to recognize any distinct power or rights in them. That is one version of federal trusteeship. In the case of the Western Shoshone, the trusteeship was exercised through the claims process, in which the government said that the best thing for these people is to give them money and forget their land.

Another factor in all of this is the diminished constitutional status of Native Americans. For example, indigenous peoples do not have full Fifth Amendment protection for their ancestral lands, so the United States can take those lands without just compensation, as it did or purported to do in the Western Shoshone case. That's why the United States was able to value the

lands at 1872 prices and say, "That's all you're going to get. No interest." Just compensation would require fairer pricing and interest. The notion of trusteeship and federal plenary power based in part on the doctrine of discovery lead to diminished constitutional rights enjoyed by Native Americans.

This is the architecture of federal Indian law. This is the architecture that determines the legality of actions taken by the federal government vis-à-vis the Indians, the architecture that places extraordinary power in the federal government to do almost anything it wants with regard to the tribes, with very little check by the courts. This is the architecture, then, that allowed the presumed taking of Western Shoshone lands for an amount of money that was *far* below the current market value of those lands. The federal courts upheld the Indian Claims Commission's decision and award to the Western Shoshone.

INTERNATIONAL FORUMS AND COMPUTER AID

Left without any recourse in the United States, the Western Shoshone people took their case to the Inter-American Commission on Human Rights, a human rights institution that exists within the Organization of American States. Its job is to promote human rights within the Western Hemisphere, and to promote the observance of human rights by governments throughout their jurisdiction. The Inter-American Commission examined the Western Shoshone's claims and proceedings on the basis of human rights standards, and it found that the Indian Claims Commission proceedings and presumed extinguishment of Western Shoshone rights violated due process. The Inter-American Commission applied the same due process standards that would apply to non-Indians and found that the Indian Claims Commission proceedings did not afford the procedural guarantees that others would enjoy. For example, the lawyers for the Western Shoshone had not been chosen and were not controlled by the Indians; the federal government had controlled the case. At one point, the Western Shoshone had even tried to fire the lawyers, and the Indian Claims Commission said they couldn't do that because the U.S., as their trustee, did not want the lawyers fired. The Inter-American Commission also found that the government had violated the right to equal protection under the law by not providing the Western Shoshone the same guarantees that would be enjoyed by others. And, finally, the Inter-American Commission found that the Western Shoshone's property rights had been violated by the Indian Claims Commission proceedings and by the continued failure of the U.S. government to recognize Western Shoshone interests in their lands.

The United States government has continued to regard the matter as settled because the federal courts said that it is settled. With regard to the decision

of the Inter-American Commission on Human Rights, the United States position is that the government doesn't have to follow what the Inter-American Commission or any other international body says. The denial of Western Shoshone land rights by the United States continues.

For decades, the Western Shoshone people have refused to accept the money awarded by the Indian Claims Commission. They have said, "This is not money that we want. We want our land." About three years ago—recently in the grand scheme of this long story—Congress passed legislation to distribute the money, saying, "We're going to distribute the money, whether you want us to or not." It enacted a law providing for the preparation of a roll of surviving Western Shoshone individuals, and it's going to divide up the monetary award on a per capita basis. The distribution is going to come out to about twenty thousand dollars per Western Shoshone individual. That might sound like a significant amount of money, but in a year or two, that money will be gone, and the rights over the lands are gone. If the U.S. has its way, the Western Shoshone people will be gone.

On the assumption that the land is no longer Western Shoshone land, federal agents have engaged in prosecuting Western Shoshone people for "trespassing" on what the government considers federal land. The Dann sisters, with whom we began, have been subjected to trespass actions by the United States. That has put them at the forefront of the struggle. The U.S. has cited them for trespass, and the fines that have been levied against the sisters amount to almost six million dollars. Almost *six million dollars*. The Dann sisters and others have been trying to be self-sufficient on that land, but not only is the U.S. trying to deprive them of that self-sufficiency, it is charging enormous fines. It's as if the United States wants to ensure that Indians like the Dann sisters are relegated to a life of destitution.

Another consequence of the government's denial of Western Shoshone land rights has been expanded natural resources extraction on Western Shoshone territory, which has caused environmental damage because of the extractive methods used. The damage includes depletion of the water table and the pollution of ground water, particularly by gold mining companies. There is now geothermal development, the development of geothermal resources, within Western Shoshone territory. And much of the extractive and geothermal development activity is affecting sacred sites that are still used by Western Shoshone people, as well as the lands and resources that have provided subsistence for the Western Shoshone. I'm sure you have heard about the plans to expand the nuclear waste storage at Yucca Mountain, which will directly affect the Western Shoshone. All of this is happening on the assumption that the Western Shoshone no longer have rights to their lands.

The Western Shoshone continue to dispute this assumption; they continue to assert rights over their land and to engage in battles of a modern type within an on-going war against the United States. This war really is a continuation of the Indian wars we saw in the nineteenth century; but the tools of the modern war are different—peaceful protest and also modern technology, such as the Internet. The Western Shoshone and other people have used the Internet to establish networks—networks with other indigenous peoples and networks with nongovernmental organizations—and to communicate more effectively with United Nations bodies that can take some action. For example, the Western Shoshone have communicated with groups such as Oxfam America, a nongovernmental organization that itself recently used the Internet to develop a letter campaign against the United States, to establish an outcry to various agencies including agencies at the United Nations.

The use of such technologies as the Internet and other means of mass communication has been critical to forging a transnational series of alliances among indigenous peoples, and between indigenous peoples and various interest groups that have been able to apply increasing pressure not only on governments but on international agencies that prod governments to remedy situations affecting indigenous peoples. The arenas of the struggle have gone beyond domestic arenas. Domestic courts and legislative bodies are still involved, but so are bodies such as the Inter-American Commission on Human Rights and the United Nations Committee on the Elimination of Racial Discrimination. And governments are being called to task at the international level, and not just before domestic courts where the deck is essentially stacked in favor of the government. (Domestic courts have proved not to be adequate avenues of recourse for tribes in the United States or for indigenous peoples elsewhere.)

The extension of the plane of battle to the international level has had some success, as with the decision of the U.N. Committee on the Elimination of Racial Discrimination that I referred to at the beginning of my presentation. On the basis of its finding that the United States is in violation of its obligations under the Convention on the Elimination of All Forms of Racial Discrimination, the Committee is urging the United States to initiate a dialogue with the Western Shoshone to reach a settlement of their grievances. It is specifically calling upon the United States to freeze, desist, and stop all actions against the Western Shoshone and their land rights. And it is asking the U.S. to report back to the Committee on the implementation of its decision.

Who is going to win this battle, and who will win all the other Indian wars? In the past, it was simply a matter of power. The federal government, being the more powerful party, won the Indian wars of the nineteenth cen-

tury. Is that going to happen today? Will the United States win simply because it is more powerful and able to say to the Inter-American Commission and the U.N. Committee, “We don’t have to listen to you, and we have the power to carry out our will and disregard Western Shoshone claims to their traditional territories”? Many predict that that will happen, and many say that that already *is* happening; but I’d like to think that in the twenty-first century, we’re in a different era in which might alone does not make right, that it is not simply a matter of sheer U.S. power. In an era in which the U.S. purports to be a beacon of light for the promotion of human rights in the world, I would like to think that what is *right* matters.

QUESTIONS AND ANSWERS

Q: How many Western Shoshone are there?

A: Estimates vary, and the United States has not yet developed its roll for the distribution of funds. Estimates range from 7,000 to 10,000.

Q: Is there a governing body for the Western Shoshone?

A: There are various governing bodies. I mentioned the different “colonies” that were set up throughout Western Shoshone territories. Each “colony” has its own governing body; these governing bodies for the most part were organized under the Indian Reorganization Act, another statute of the early part of the twentieth century. The Indian Reorganization Act of 1934 was designed to “teach” the art of democracy to the native peoples, so they could be prepared for *real* assimilation as full citizens down the road. The governing bodies organized under this Act were modeled after municipal governments, not after the kinds of governing structures that the Western Shoshone traditionally have had. Most of these governing bodies have joined with Western Shoshone groups that describe themselves as organized under a traditional structure, to oppose the actions of the federal government and to appeal to international institutions.

Q: Who holds title to these lands today?

A: That depends on whom you ask. Under Western Shoshone traditional law, the Western Shoshone people hold legal title. Under international human rights law, the U.S. has violated the customary land rights of the Western Shoshone people by simply purporting to take those lands. Under federal law, the U.S. courts have said that the land, at least the land involved in cases before the courts, is federal public land—in some cases managed by the Bureau of Land Management, in other cases managed by the Defense Department, and in other cases managed by the Forest Service.