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Western Shoshone Treaty Activism, US Indian Claims Law & Human Rights Violations

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Western Shoshone Treaty Activism, US Indian Claims Law & Human Rights Violations

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In the spring of 2002, a force of approximately one hundred Bureau of Land Management (BLM) personnel, federal agents, and hired rustlers descended on the Dann sisters' grazing livestock, in central Nevada. Geared with helicopters, four-wheelers, and military-grade firearms, the raiding party made off with 230 head of Dann cattle. The BLM later sold these at auction to the tune of over \$59,000 with no compensation to the Danns.¹ The same year, the Inter-American Commission on Human Rights (Inter-American Commission or IACHR) released a preliminary report stating that, in its judicial treatment of the Dann sisters and the Western Shoshone tribe, the United States was in violation of several articles of the American Declaration on the Rights and Duties of Man. The report confirmed what the Dann sisters and other Western Shoshone legal advocates had asserted for almost thirty years—that the federal government's extinguishment of the tribe's title to treaty-protected lands was both legally and morally corrupt. The story of the Danns' bitter struggle against federal judiciaries and regulatory agencies to retain their ranchlands does not begin with their 2002 confrontation with the BLM, however. It stretches back to 1951, when legal representation for the Western Shoshone first submitted a claim for wrongful taking to the newly formed Indian Claims Commission.

The Indian Claims Commission (ICC), formed in 1946, provided an expedited legal avenue for tribes to bring suit for damages against the federal government. The Western Shoshone claim remained in the ICC for some twenty-five years. During its lifetime, it became the object of vigorous debate among Shoshone people and federal officials. Among the nine federally recognized tribes and bands of Western Shoshone Indians, a rift between

¹ Thomas E. Luebben and Cathy Nelson, "Indian Wars: Efforts to Resolve Western Shoshone Land and Treaty Issues and to Distribute the Indian Claims Commission Judgment Fund," *Natural Resources Journal* 42 (2002): 807-808.

“traditionals”—so-called for “their adherence to traditional Western Shoshone religion, culture, and leadership”—and Shoshone desirous of a per capita monetary settlement grew. The Danns are among those traditionals who spearheaded a legal defense against the claims proceeding and asserted the persistence of a Western Shoshone treaty-enshrined title to some 30 million acres of land in the Nevada’s Great Basin region. Claims attorneys and the ICC tribunal, along with pro-settlement Shoshone, rejected the petitioners’ claims and entered a judgment fund of \$26 million into a federal trust account on behalf of the Shoshone claimants.

For the Danns and other advocates of treaty rights, the fight to retain the Shoshone tribal land base and assert sovereignty was just beginning. From 1974 until 1991, the Danns engaged Nevada’s BLM in federal courts, arguing their exception from public grazing regulations as Western Shoshone nationals and inheritors of the 1863 Treaty of Ruby Valley. The Shoshone traditional project of resistance against the US government’s claim procedure and Western Shoshone policies would culminate in the Danns’ representations before the international human rights judiciary.

The present project seeks to characterize the strategies and significance of Shoshone traditional activism, both in terms of a collective Western Shoshone land right and in the broader context of federal Indian law and policy. What interests and authorities conspired to undercut the aims of Shoshone traditional activism across judicial, legislative, and less formal regulatory venues? How was a dominant narrative of Shoshone dispossession constructed and implemented by Shoshone and US governments? What tools did traditional activists employ in pressing their collective claim to national sovereignty and territorial integrity? What implications did an international judicial venue have for Shoshone activism, in comparison with the US domestic justice system?

In order to understand the various meanings of Shoshone traditional resistance, as it took form in tribunals, federal law courts, and before international human rights committees, I will draw primarily upon the works of two scholars. Richard Clemmer, Professor of Anthropology at the University of Denver, has analyzed the Western Shoshone case before the ICC and suggested a framework—which he terms an “ideology of loss”—for understanding how the settler government’s administration of Indian affairs and procedures for processing Indian claims were configured to cement and even fabricate narratives of Native dispossession. Clemmer also offers examples of Western Shoshone resistance against this modern colonial project. In federal courtrooms, Clemmer argues that Shoshone litigants were able to force “consideration of alternatives to the dominant discourse.”²

In “The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man’s Jurisprudence,” legal scholar Robert Williams, Jr. takes a deeper historical approach to understanding the overwhelming favor shown by US courts to litigants who identify with the dominant culture. Williams traces the genealogy of a key principle of modern Indian law, the doctrine of discovery, from its pre-colonial roots in a papal vision of a universal and hierarchical Christian order. Treating more broadly than Clemmer the political economy of US Indian law, Williams conceives of a discursive “game-space”, wherein Native litigants achieve nominal success only by forfeiting their cultural identities. Looking to recent cases in Indian law, Williams examines the adjudications of the Supreme Court under Chief

² Richard O. Clemmer, “Land Rights, Claims, and Western Shoshones: The Ideolog of Loss and the Bureaucracy of Enforcement,” *PoLAR: Political and Legal Anthropology Review* 32, no. 2 (November, 2009): 281.

Justice Warren Burger; the 1985 case *US v. Dann* was among the final heard during Burger's presidency.

Both scholars conceptualize the discursive space comprised by US legal systems and procedures. They offer different explanations on the origins and administration of dominant cultural hegemony within this space and make different claims about how dominant ideologies obtaining in the US legal system proscribe outcomes for Native litigants.

Clemmer derives an "ideology of loss", one which narrowly construed Indian "claims" in the ICC as those for damages rather than rights, from the early to mid-nineteenth century American West and the intellectual context of "Manifest Destiny".³ He imputes to the so-called Marshall Trilogy, a series of Supreme Court cases decided between 1823 and 1832, the earliest legal prefiguring of this dispossessionary ideology. Justice Marshall articulated the concepts of "aboriginal title", an inferior land title accruing to Indian occupants susceptible to exclusive alienation by the colonizer; by the "doctrine of discovery", the colonizer secured finders-keepers rights over its sixteenth-century European competitors in the New World.⁴

Clemmer relies primarily upon Marxian and Gramscian sociological theories to explain this ideology's holdover in modern US Indian law and courtrooms. The transmission of an ideology of loss across institutions, administrations, and generations can be attributed to what Marx theorizes as an artificial separation of "ruling ideas" from "ruling people". When ideas become isolated from their finite, human origins, "the power and rule of actual, empirically documentable persons... is masked by the 'sway' of 'ideas'."⁵ Ideas favorable to dominant

³ Clemmer, "Land Rights, Claims, and Western Shoshones" 296.

⁴ *Ibid.*, 289-290.

⁵ *Ibid.*, 288.

interests, for Gramsci those of the State, depend for their implementation on bureaucratic functionaries adhering to what Clemmer terms “calculable rules”. The ICC bureaucracy and that of the larger federal court system were able, in Clemmer’s estimation, to submerge the colonial procedures inherent within an ideology of loss beneath multiple layers obfuscated authorship and authority. This analysis helps to explain Shoshone claims attorneys’ unflinching resolve to liquidate a persistent claim to tribal title under the pretense of consensus and over the protest of the alleged claimants.

Williams reaches further into the annals and defers to historical arguments in decoding what he terms the “algebra” of modern federal Indian law. Where Clemmer asserts that Marshall’s “Doctrine of Discovery” was unprecedented in European legal discourse, Williams traces its origins through a centuries long series of permutations to the Roman Pope Innocent’s thirteenth-century vision of a universal and hierarchal body of Christ, a global society subsumed under papal authority.⁶ “Spun from this Old World medieval corpus... were threads of ideas which came to inform all later European-derived legal thought on the rights and status of the indigenous inhabitants of the New World.”⁷ In particular, Williams argues that the principles of “unity and hierarchy” were preserved, in desacralized form, in the mid-sixteenth century European “Law of Nations”. He offers the jurisprudential writings of sixteenth-century English barrister, Sir Edward Coke, as an example of how legal procedures for combating normative divergence were transposed to advantage European states in a global, mercantile economy.⁸ In

⁶ Robert A. Williams, Jr., “The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man’s Indian Jurisprudence,” *Wisconsin Law Review* (1986): 233.

⁷ *Ibid.*, 239.

⁸ *Ibid.*, 242-243.

particular, Williams argues that Coke’s conceptualization of the “infidel” (non-Christian) as “perpetual enemy” emanates from medieval discourses on a universal system of law and contributes directly to Discovery-era rationales underpinning conquest and settlement in the New World.⁹ The Doctrine of Discovery, as articulated by Marshall, was merely an extension of the Law of Nations “by which the Old World’s monarchs sought to regulate their competitive dynastic activities in the New World.”¹⁰ Williams proceeds to discuss the ramifications for Native litigants of Marshall’s doctrine and its legal concomitants in the US justice system.

Like Clemmer, Williams models a discursive space where Native litigants engage judges and lawyers, functionaries of the dominant ideological heritage discussed above. He offers several modern Supreme Court cases involving Native litigants to demonstrate how federal Indian law and policy perpetuate the tradition of subjugating and erasing non-normativity. One such case study, the 1985 *Kerr-McGee v. Navajo Tribe*, treated the legitimacy of the Navajo council’s imposing a mineral severance tax on a non-Indian energy company.¹¹ Williams draws from the case’s decision in favor of the Navajo defendants an “algebra” that pre-ordains outcomes in the discursive “game-space” of US courtrooms in favor of the “player who successfully appropriates the position of the absolute limit, signified by the United States as superior sovereign.”¹² For Williams, the nominal Navajo victory in *Kerr-McGee* was guaranteed by a “sophisticated, anglicized taxing scheme, and a sophisticated, anglicized bureaucratic governing structure” , or the erasure of “those aspects of difference which might deny an identity

⁹ Ibid., 251.

¹⁰ Williams, “The Algebra of Federal Indian Law,” 253.

¹¹ Ibid., 281.

¹² Ibid., 285.

with the interests of the absolute sovereign”.¹³ In light of these roughly sketched rules, Clemmer’s “ideology of loss” takes on a new hue where loss entails not just the dominant assumption of Native peoples’ material dispossession but the loss of traditional identities through litigants’ obeisance to the “totalizing structure, whose order of reason posits as its absolute limit the superior sovereignty of the United States’ non-Indian governments.”¹⁴ Accordingly, Williams’ view of the meaningful recourse available to Native litigants within the current US justice system is dim.

In his intellectual treatise, Williams does not countenance the significance of Native legal resistance or the possibility of appropriating colonial instruments to subvert the State’s sovereign narrative and dispossessory policies towards Native peoples. His final recommendation for remediating unjust indigenous legal frameworks is systemic, including the explicit renunciation of such principles as the Doctrine of Discovery and the adaptation of juridical institutions to accommodate normatively divergent visions of justice in a plural society. Williams’ arguments raise a question that will reverberate through the present discussion: Can the potential benefits for Native people of participating in the colonizer’s justice system outweigh the assimilative and defeating consequences which Williams outlines? Williams’ fixation on the importance of plurality of “vision” in a healthy justice system that encapsulates Indian and non-Indian cultures and ways of knowing suggests an answer to this vexing question. Clemmer’s rather truncated discussion of Shoshone traditional resistance in US courtrooms treats the impact of Native legal activism in similar terms of vision and narrative.

¹³ Ibid., 287; 286.

¹⁴ Ibid., 285.

For Clemmer, the value of Shoshone traditionalists' collective resistance against unwelcome US policies, both inside and outside of the courtroom, consisted in "an assertion of disparate values within the national legal system."¹⁵ In one practical example before the ICC, this looked like representing Shoshone traditional definitions of "claim" that underscored a persistent right to treaty lands, rather than an entitlement to payment for lands presumed taken. Through such representations, Shoshone litigants "inserted wedges into the established relations of power and forced consideration of alternatives to the dominant discourse" rooted in an ideology of loss.¹⁶ While Clemmer seeks to present an account of Shoshone agency within and around the infamous ICC claim, the majority of his analysis is focused on explaining the mechanization of power relationships in the ICC proceedings; this discussion is primarily an extension of his underdeveloped analysis of Shoshone legal activism.

The present project accords with Clemmer's basic notion of resistance as the forceful presentation of alternatives to the dominant narrative accommodated by the United States' courts. We will explore the double-edged nature of Western Shoshone legal proceedings that, as Clemmer notes, "produced and transformed Native and non-Native histories."¹⁷ Where Clemmer refers here to what attorney John O'Connell has characterized as a "constructive conquest"—the ratification of pseudo-histories by the federal judiciary—we will extend the notion of legal proceedings as history-producing to include the narrative voice of Shoshone litigants. Shoshone legal activists, along with lawyers and judges, grappled to assert disparate historical accounts. As

¹⁵ Clemmer, "Land Rights, Claims, and Western Shoshones," 297.

¹⁶ *Ibid.*, 281.

¹⁷ Clemmer, "Land Rights, Claims, and Western Shoshones," 298.

noted in the Danns' 1993 petition to the Inter-American Commission, the sisters' legal efforts in the US justice system "made a clear record of the injustice and human rights abuses that they [the Western Shoshone people] are suffering."¹⁸ Shoshone legal activism also constituted a powerful record of a traditional narrative rooted in the 1863 Treaty of Ruby Valley.

The political contexts in which the Danns and others championed the Shoshone traditional narrative were shaped by the bureaucratic relationships outlined by Clemmer and the dispossessory and Euro-normative ideologies of which he and Williams treat. In our examination of the litigious and extra-judicial activist efforts surrounding the Western Shoshone claim, we will gain a fuller appreciation for the role of bureaucracy in shaping US Western Shoshone policy. More often than not, an ostensible discoordination between federal agencies allowed case histories to be manipulated against Shoshone activists and helped perpetuate misguided beliefs about the Western Shoshone in the US official mind. Perhaps the most remarkable feat of Shoshone resistance discussed here lies in the Danns' direct protest against what Williams calls the "principle of exclusive [federal] domestic jurisdiction" in Indian legal affairs.¹⁹ The Danna sisters' efforts in the international human rights system served to disrupt this exclusive jurisdiction and focus international scrutiny on an otherwise insular US system of indigenous law and policy.

The petition submitted on behalf of the Danns to the IACHR, in 1993, will serve to organize our discussion of Shoshone activism. The document ties together the broad analytic

¹⁸ Petition to IACHR: Mary Dann and Carrie Dann, on behalf of themselves and the Dann Band of the Western Shoshone Nation, Petitioners, against The United States of America, Respondent, 5, April 1, 1993, Box 50, Folder 12, Western Shoshone Defense Project Records.

¹⁹ Williams, "The Algebra of Federal Indian Law," 295.

themes of Shoshone resistance and US hegemony, implementing the former rhetorically and providing a critical overview of the latter in a legal history of the Western Shoshone claim. Its conceptualization of the ICC claim as an assault on persisting Western Shoshone treaty rights epitomizes the treaty-based activist strategies which preceded it in the ICC and federal courts. In order to understand the treaty's instrumentality in asserting the Shoshone traditional narrative we will consider the historical context of the 1863 Treaty of Ruby Valley, the conventions of treaty-making and "canons of construction" regulating their interpretation in US law, and the Shoshone tradition of treaty-based activism of which the Danns were heirs.

The IACHR petition dedicates much of its substance to a critical explanation of the Western Shoshone ICC case and the integrally related litigation in *Dann*, between the Nevada BLM and the Dann sisters, which followed. These proceedings are framed as "modern-day expropriations... carried out by government bureaucrats, lawyers and judges rather than by the United States cavalry."²⁰ This critical lens, along with the analytic tools offered by Clemmer and Williams, will inform our survey of the Danns' litigious efforts in US domestic courts. While a "totalizing logic" is evident in the actions of US judges and legal representation, we will assess the impact of the Danns' legal activism in challenging the dominant narrative that cemented over course of the same proceedings. Our analysis will establish the instrumentality of the Treaty of Ruby Valley in Shoshone traditionals' representation of their tribal narrative and claim to Shoshone national lands.

Finally, we will inquire into the petition's fate before the Inter-American Commission. While jurors in the international human rights system would ratify the treaty-based vision of

²⁰ Petition to IACHR, 2, April 1, 1993, Box 50, Folder 12, Western Shoshone Defense Project Records.

sovereignty and a persistent title to tribal lands promulgated by the Dann sisters and other Shoshone traditionals, several factors conspired against the same objectives at home. Our discussion of US and Shoshone efforts to legislate a distribution of the ICC claim and the extreme measures undertaken by the BLM to silence the Dann sisters, during the 90s and early 2000s, will afford a glimpse into the nationalist insecurities of the State. In this section, we will consider the divisive power of the Shoshone traditional interpretation of Ruby Valley, both for “pro-distribution” Shoshone and for federal and state government officials. The eventual distribution of the award, over the admonitions of the Inter-American Commission and the UN Committee on the Elimination of Racial Discrimination, does not bespeak a US Shoshone policy invulnerable to outside criticism. On the contrary, evidence of the Interior Department’s active involvement in currying Shoshone support for a distribution bill indicates a somewhat desperate attempt by the State to definitively silence the Shoshone land rights movement and avoid further embarrassment in the international human rights community.

Although Clemmer has identified some of the hegemonic features of the Western Shoshone ICC claim proceedings and nodded to the success of Shoshone litigants in contesting the US dominant narrative of dispossession, an in-depth analysis of the treaty-based strategies of Shoshone activism is lacking in his conversation of “indigenous people’s resistance.”²¹ We will explore how these strategies matured over time and the broad impact of their implementation in courtrooms, before Congress, and on Shoshone rangelands. Our story will show that the Danns and other Shoshone traditionals were able to occupy the “official record” and defend a tribal narrative besieged by State attorneys and courts. Their collective success in influencing federal

²¹ Clemmer, “Land Rights, Claims, and Western Shoshones,” 298.

policy, if ultimately towards retaliation, demonstrates the particular efficacy of treaty-based activism as a means of challenging US authority in tribal affairs.

Section I: Newe & US Historical Perspectives

For several reasons, the Treaty of Ruby Valley featured prominently in the case for Shoshone land rights which the Danns made to the Inter-American Commission in 1993. The statute which bound the United States and Western Shoshone in mutual recognition of the other sovereign had, since its ratification, been a fulcrum in competing claims between its signatories. In this section, we will explore the historical circumstances of the original treaty convention and how the accord transposed violent conflicts between the settler and indigenous societies into a timeworn legal stalemate. In order to understand the historical development of divergent and entrenched perspectives surrounding Ruby Valley, we will consider the far-ranging attitudes of the State towards Indian treaties and inquire into the origins of Shoshone treaty-based legal activism. Because of its historical centrality in the political competition between US and Shoshone sovereigns and because of its earlier function as a litigious weapon for Shoshone activists, Ruby Valley presented itself to the Danns as an apt instrument for pressing Shoshone land rights in domestic and international legal venues.

Early Newe-US History: The 1863 Treaty of Ruby Valley

Carry and Mary Danns' Newe ancestors, probably did not encounter European-American emigrants until the early nineteenth century, despite the succession of foreign powers that laid claim to their lands in the Great Basin before then. In 1827, while under the remote dominion of recently independent Mexico, Newe people encountered the American fur trapper Jedediah

Smith. The meeting was short-lived, as Smith was unable to locate the beaver-rich Humboldt River, but others would soon follow in search of the same quarry. Within six years of Smith's failed expedition, European trappers employed by the British Hudson Bay Company would radically deplete the beaver population native to the Humboldt.²² The disruption to Newe communities, both ecological and social, caused by the trapping industry was a portent of the destructive advance of white civilization through the Intermountain West.

Following the US annexation of the Great Basin and the California Gold Rush in 1848, westbound Anglo emigrants surged across Newe lands. As contact between the invading and indigenous societies increased so did occasion for hostilities between them. An influx of gold-seekers traveling the Overland Route drained food resources along the Humboldt, causing a state of famine among Newe communities in the region.²³ Emigrants became known for their abuses against Newe people, whom they regarded as inferior. Crum notes that "they used the Indians for target practice and sexually abused the women."²⁴ In response to the ransacking of their fragile desert resources and other injuries suffered at the hands of the transient settler population, the Newe began to conduct raids on the emigrant parties.

Early contact with federal officials saw failed attempts to establish peaceful relations between Newe communities and permanent white settlements in the Great Basin. Agents from the Utah Territory Superintendency of the Office of Indian Affairs determined that "bad conduct" by white settlers, including untold numbers of murders, against the Newe was the cause

²² Steven Crum, *The Road on which We Came* (Salt Lake City: University of Utah Press, 1994), 13-14.

²³ *Ibid.*, 18.

²⁴ *Ibid.*

of ongoing warfare between the two societies.²⁵ Despite isolated attempts to accord peace and even establish a reservation for Basin Newe in Ruby Valley, Utah agents were unable to stem Newe-white conflict which, by the early 1860s, was repeating itself to the South in today's central Nevada.²⁶ Shortly after the Nevada Territory was founded in 1861, the US established a military fort in Ruby Valley to reign in unrest; however, volunteer personnel's indiscriminate attacks on Newe people only intensified violence in the region.²⁷

In the early 1860s, multiple reasons presented themselves to both Newe and federal representatives to make peace. The seemingly endless mass of white settlers and the superior force and organization of the US military suggested to some Newe leaders that violent resistance against the invading settlers was futile. For its part, the US government was eager to open up Newe lands for the construction of a transcontinental railroad. With a civil war escalating in the East, the government was loathe to spare troops in the territories.²⁸

In an 1863 treaty of "peace and friendship", the Newe (thereafter known and self-labeled as Western Shoshone) made several concessions to the settler government.²⁹ On October 1st, 1863, US treaty commissioners met with Northeast Nevada Shoshone community leaders in order to negotiate a peace between their nations. Representing the US were Nevada Territorial Governor, James Nye, and Utah Territory's superintendent of Indian affairs, James Doty. Among

²⁵ Crum, *The Road on Which We Came*, 19.

²⁶ *Ibid.*, 20-23.

²⁷ *Ibid.*, 23.

²⁸ *Ibid.*, 24

²⁹ Charles J. Kappler, compiler and ed. "Treaty with the Western Shoshoni, 1863," in *Indian Affairs: Laws and Treaties 2* (Washington: Government Printing Office, 1904), 851.

those Newe leaders present were Chiefs “Te-moak, Mo-ho-a, Kirk-weedgwa, [and] To-nag.”³⁰

The US commission’s most urgent concern was the cessation of Shoshone “hostilities and all depredations upon the emigrant trains, the mail and telegraph lines, and upon the citizens of the United States within their country.”³¹ In return for accommodation of these conditions and other provided modes of settlement and development, the US agreed to compensate the Western Shoshone for the loss of game due to white settlement and award the participating bands annuities for the following twenty years.³²

Although it provided for limited US settlement of Shoshone lands, the Treaty of Ruby Valley was not a treaty of cession. Nowhere did it expressly transfer Shoshone title to the federal government; in fact, the US treaty commissioners were forbidden from pursuing such a transaction.³³ Even as such, over a century later, claims attorneys would argue that the provisions in Ruby Valley indicated an overarching Congressional intent to extinguish Shoshone land title. Such arguments were subject to both the vehement opposition of Shoshone advocates of treaty land rights and a matrix of federal legal conventions regulating the ratification, interpretation, and abrogation of Indian treaties.

³⁰ Kappler, “Treaty with the Western Shoshoni, 1863,” 851.

³¹ Ibid.

³² Kappler, “Treaty with the Western Shoshoni, 1863,” 852.

³³ Elmer R. Rusco, “Historic Change in Western Shoshone Country: The Establishment of the Western Shoshone National Council and Traditionalist Land Claims,” *American Indian Quarterly* 16, no. 3 (1992): 340.

US Indian Treaties

Indian Treaty scholar Charles Cleland offers a categorical breakdown of US motivations in treating with Native peoples, from the late eighteenth century until the abandonment of the practice in 1871. The most widespread genre of Indian treaty, during and immediately following the wars of US independence and 1812, was the treaty of peace and friendship. These accords were contrived to end hostilities between indigenous and settler societies and to negotiate trade relations between them.³⁴ Three genres succeeded this first one as most prevalent among US Indian treaties of their time, each reflecting a different ascendant federal Indian policy. In order, these were treaties of cession, removal, and “reservation and civilization”.³⁵ These treaties posed solutions to two problems vis-à-vis Indian affairs that historically plagued the US official mind: the problem of white population growth and settler expansion and the problem of Indian cultural assimilation. Of the 364 treaties negotiated between the US government and Indian tribes, well over half bound Native parties to vacate their homelands.³⁶ Throughout these documents an assimilationist impulse on the part of the settler government is evident.

This impulse is visible in the Western Shoshone’s 1863 treaty, which was rendered in the last years of the Indian treaty period. The sixth article provides for the removal of Shoshone people to a reservation within the bounds of their current territory, upon which time the “President of the United States shall deem it expedient for them to abandon the roaming life, which they now lead, and become herdsmen or agriculturalists.”³⁷ Following the Jacksonian

³⁴ Charles E. Cleland, *Faith in Paper: The Ethnohistory and Litigation of Upper Great Lakes Indian Treaties* (University of Michigan Press, 2011), 14.

³⁵ Ibid.

³⁶ Ibid.

³⁷ Kappler, “Treaty with the Western Shoshoni, 1863,” 852.

policy of Indian “removal” into the trans-Mississippi West and surge of white expansion towards the Pacific, the trustee government became more and more concerned with the problem of harmonizing two broad “types” of societies which, it would seem, were fated to live side by side. English notions of Christian dominion and civilization and the Jeffersonian yeoman farmer reverberated through the American conscious, furnishing the content of such treaty clauses.

While it has historically leveraged its overwhelming force and imposed its legal idioms to dispossess America’s indigenous people with impunity, the United States has also sought to develop safeguards in its courts against these same unconscionable tendencies. More than a century-and-a-half of treaty interpretation in US law courts has produced what is known as the “canons of construction,” a conventional legal method of assessing treaties in light of the historical inequalities that undergird them. Articulated largely by Supreme Court Justices in historic opinions, these precepts include the necessity of construing treaties “liberally in favor of the Indians”.³⁸ Alongside these standards for adjudicating treaty rights, federal courts (in principal, at least) operate on the important presumption that all rights not expressly forfeited, in “a treaty or similar agreement,” by tribes to the United States remain undisturbed.³⁹ Notwithstanding these best-practice rules meant to favor tribal parties, federal Indian law has figured a treacherous landscape for Native litigants.

³⁸ Cleland, *Faith in Paper*, 42.

³⁹ See *Ibid.*, 41 and David E. Wilkins and K. Tsianina Lomawaima, *Uneven Ground: American Indian Sovereignty and Federal Law* (University of Oklahoma Press, 2001), 121.

A Western Shoshone Tradition of Treaty Activism

The Shoshone traditional position vis-à-vis Ruby Valley far predated the petitioning group's challenge to stay the ICC settlement proceedings in 1974. Raymond Yowell referred in the WSNC's 1995 resolution, entitled "Western Shoshone National Council Reaffirms Sovereignty," to Shoshone treaty-based petitions to the United States: "Since the inception of the "Treaty of Ruby Valley of 1863," the Western Shoshone government and its representatives have filed with the United States Federal government, [sic] grievances and protests with regard to gross violations of the treaty."⁴⁰ Western Shoshone leaders contracted with attorney Milton Bradt, in 1932, to represent claims against the United States for its violations of Ruby Valley. Before the official formation of the ICC in 1948, Shoshone litigants repeatedly failed to gain redress from the US party to Ruby Valley. Between 1934 and 1944, Nevada congressman introduced nine consecutive bills to grant the ICC-predecessor Court of Claims special jurisdiction to hear a Shoshone suit against the federal government to no avail.⁴¹ These legal shows of opposition belong to a tradition of treaty-based dissent against the federal trustee among Shoshone inheritors of Ruby Valley.

The Treaty of Ruby Valley presented itself to the Danna and other Shoshone traditionals as an apt tool for pursuing legal claims to tribal lands in US courts. Shoshone legal activists fought to affirm the existence of their traditional narrative, an integral part of which was the 1863 treaty and its function as a charter of Shoshone territorial sovereignty within the US legal

⁴⁰ Proclamation #I-95: Western Shoshone National Council Reaffirms Sovereignty, February 6, 1995, Box 12, Folder 17, Western Shoshone Defense Project Records, 2013-10, Special Collection, University Libraries University of Nevada, Reno (Hereafter WSDP Records).

⁴¹ Crum, *The Road on Which We Came*, 114.

framework. The treaty's inherence within the Shoshone narrative, and its centrality in Shoshone-US litigious debate, together recommended Ruby Valley as a perfect instrument for Shoshone activists to press narrative—not just land—claims against their colonizers. Of course, subjecting to litigation before US courts a statute so essential to the history of tribal sovereignty in Shoshone-US relations posed extreme risks for Native stakeholders.

Section II: Litigating Histories

The 1993 petition prefaces its critical overview of the Western Shoshone claim with a section on Ruby Valley, setting up the Shoshone traditional adherence to treaty-enshrined tribal land rights in contradistinction with the ICC judges' and lawyers' dismissal of the 1863 treaty as powerless to protect tribal property. In this section, we will examine the first substantive treaty arguments which the Danns, alongside other Shoshone petitioners, engaged in the ICC tribunal. Our analysis of these and later iterations in US law courts will develop a picture of Shoshone strategies of treaty-based resistance in action and a sense for the opaque and contingent attitudes of the State towards tribal claims to land. The exhaustion of domestic legal remedies meant that the Danns could press their international claim to sovereign land rights beyond the United States' exclusive jurisdiction. Their 1993 petition to the Inter-American Commission presented a treaty-centric "legal fight against the attempted government takeover of their home... [as] an integral part of the larger effort by the Western Shoshone Nation to secure its Western Shoshone homeland under the 1863 Treaty of Ruby Valley."⁴²

⁴² Petition to IACHR, p. 5, April 1, 1993, Box 50, Folder 12, Western Shoshone Defense Project Records.

Indian Claims Commission

In order to understand the basis for the Danns' claim that the case before the ICC constituted the first in a recent series of legal conquests against the Western Shoshone Nation, we will consider some of the structural limitations and procedural conventions of the ICC that frustrated the Shoshone assertion of treaty rights. The Danns' 1974 petition to the ICC, as members of the Western Shoshone Legal Defense and Education Association (WSDLEA or Association), will introduce us to the divergent visions of Ruby Valley and of Shoshone title articulated over the course of the claims process and entrenched in later legal proceedings.

The 1946 Indian Claims Commission Act was an overture to the federal Indian policy of termination—the 1950s US campaign to annul its trust relationship with tribes. President Truman hailed the “final settlement of all outstanding claims which this measure [ICC Act] insures” as the vehicle by which “Indians can take their place without special handicaps or special advantages in our nation and share fully in its progress.”⁴³ The statute provided for the suspension of the US government's sovereign immunity against individual suit and for the formation of a commission to process tribal claims against the state for breach of trust. Most claims to come before the Commission before its 1979 dissolution alleged the wrongful taking of tribal lands. As settlement for successful claims, and commensurate with the government's overarching terminationist policies, tribes were awarded monetary reparations and the sins of the State were formally absolved.

A few attributes of the ICC and its claims procedure were especially problematic for Shoshone who upheld the persistence of tribal land ownership under Ruby Valley. First, the

⁴³ John R. Wunder, *Retained by the People: A History of American Indians and the Bill of Rights* (Oxford University Press, 1994), 91.

ICC's designation of a group as representative of its claimant community—a community which, in the Shoshone case, included multiple tribal jurisdictions and autonomous bands like the Danna—was wont to conflict with tribal interests unexpressed in the claims structure. One Interior Department employee noted that “while the Shoshone who assert that their title to land is intact may be in the majority, it is those seeking damages who are accommodated by the structure of the Indian Claims Act.”⁴⁴ This statement also gets at another of the ICC's fundamental limitations. As legal scholar Nell Jessup Newton notes, the limitation of the ICC to monetary restitution when the vast majority claims stemmed from the dispossession of tribal land meant that “the worst crimes against tribes were the least remediable.”⁴⁵

Upon the ICC's formation, the law firm Wilkinson, Cragun, and Barker received permission from the Bureau of Indian Affairs (BIA) to contract with the Te-moak Band Council and submit a claim to the Commission on behalf of the Western Shoshone.⁴⁶ The ICC processed the claim and designated the Te-moak Band as delegates for the “Western Shoshone Identifiable Group”. The Te-Moak representation alleged that all of the land set forth in Ruby Valley had been wrongfully taken from the tribe. In an unprecedented turn of legal phrase, the Commission ruled in 1962 that the tribe's lands had been taken through the “gradual encroachment of whites, settlers, and others”.⁴⁷ Without a treaty of cession and without any evidence of a time of actual

⁴⁴ John D. O'Connell, “Constructive Conquest in the Courts: A Legal History of the Western Shoshone Lands Struggle, 1861-1991,” *Natural Resources Journal* 42 (2002): 774.

⁴⁵ Nell Jessup Newton, “Indian Claims in the Courts of the Conqueror,” *American University Law Review* 41 (1992): 784.

⁴⁶ *Ibid.*, 770.

⁴⁷ *Ibid.*, 772.

taking, the Commission valued the land at its estimated 1872 worth and entered judgment on the award.

The Dann sisters, along with other members of the WSLDEA, petitioned the ICC to stay its actions in the Western Shoshone claim, in April of 1974. The petition was the result of growing concerns amongst Shoshone citizens that an ICC settlement might prevent future Shoshone claims to treaty lands. The Association accused the plaintiff counsel of colluding with the United States government in the claims process and effectively selling the Western Shoshone's land to the Secretary of the Interior at its measly 1872 value. It further argued that Western Shoshone people still inhabited much of the lands that the ICC had deemed lost to the government. Aside from casting a dubious light on the legitimacy of the Western Shoshone claim's representation, the 1974 petition draws out divergent opinions surrounding Ruby Valley which would reverberate in US law courts and in the Dannels' international efforts to advocate Shoshone land rights.

Polarized views on Shoshone treaty rights emerged during the ICC proceedings. In what the ICC identified as the "crux of [its] legal position," the Association argued that Ruby Valley provided for the sole means by which the defendant government could extinguish Shoshone title; "gradual encroachment" did not figure among these.⁴⁸ Article IV lists the establishment of mining claims, agricultural settlements, ranches, and timber mills as the only acceptable sustained use by non-Indians of Western Shoshone territory.⁴⁹ The Association argued, therefore,

⁴⁸ WSLDEA v. US, 35 Ind. Cl. Comm. 457 (1976), 472.

⁴⁹ Kappler, "Treaty with the Western Shoshoni, 1863," 852.

that US administration of treaty lands as national forest or grazing districts did not legally constitute an extinguishment of Shoshone title to all of the land set forth in Ruby Valley.⁵⁰

In response to petitioners' invocation of Ruby Valley, the ICC sided with Barker's understanding that if the defendant had exceeded its agreed-upon jurisdiction in appropriating Shoshone land, "Congress had full power to authorize such uses by subsequent legislation which superseded the treaty in this respect."⁵¹ Pointing to a series of events that included the 1862 Pacific Railroad Act, the Ruby Valley Treaty, increased non-Indian mining activity, and the creation of Duck Valley Reservation, Barker had argued that the overarching "Congressional intent in the mid-1860's was to deal differently with the Nevada lands of the Western Shoshone"—that is, to "exercise a full power of dominion and control over the lands".⁵²

Even without taking into account congressional plenary power and its retroactive utility, the ICC contended that Ruby Valley was impotent to enforce land rights. This impasse over Ruby Valley's *recognition* of land rights represented a fundamental divergence in thought between State officials and Shoshone traditionals. In its 1976 decision against the petitioners, the ICC asserted that, while Ruby Valley did make note of Shoshone self-defined territorial boundaries, nowhere did it grant its indigenous signatories "any permanent right to lands."⁵³ The Danns and other Shoshone traditionals would refuse to cede their vision of Ruby Valley to this

⁵⁰ WSLDEA v. US, 35 Ind. Cl. Comm. 457 (1976), 471-472.

⁵¹ Ibid.

⁵² Robert W. Barker, Memorandum in response to Petition to Stay Proceedings and for Leave to File Amended Claim by the United Western Shoshone Legal Defense and Education Association and Frank Temoke, 14, July 1, 1974, ICC-B_326-K_00010.

⁵³ WSLDEA v. US, 35 Ind. Cl. Comm. 457 (1976), 474.

neutered form. Their resolute adherence to an interpretation of the treaty radically opposed to the State's would persist beyond the ICC and into federal law courts.

US Law Courts

While the WSLDEA was bringing their petition to the ICC, the Nevada BLM sued the Danns sisters for grazing their livestock on public land without a permit. The Danns argued that the lands in question, outside Crescent Valley in Northeast Nevada, were owned collectively by the Western Shoshone tribe and, therefore, not subject to federal regulation. The three rounds in federal district and appellate courts which followed would center around the Danns' claim of tribal title and the effect of the Western Shoshone claim on this contested ownership. In the end, courts would fixate on the significance of the ICC's 1979 payment to Secretary of the Interior on behalf of Shoshone claimants. Under the 1946 ICC Act, did settlement preclude any further litigation of the land title presumed lost? Did the automatic appropriation which followed the ICC's judgment constitute payment, or was a legislated distribution plan necessary? The series of legal arguments in which the Danns and attorney John O'Connell engaged demonstrate the contingent nature of the State's policy towards the Western Shoshone. An incoherence across government bodies, including the DOI, the ICC, and federal courts, meant that legal victory was sometimes up for grabs. Unfortunately for the Danns sisters and their Shoshone supporters, the Supreme Court's 1985 review of the *Dann* case rendered moot their most valuable bargaining chip—a popular Shoshone refusal to accept the ICC's 1979 settlement. The Supreme Court's ruling that payment was effected upon the ICC's judgment undermined the collective act of resistance that had gained traction in the Ninth Circuit.

A review of the *Dann* case and the Supreme Court's 1985 decision will elucidate the traction and pitfalls that Shoshone treaty activism met in US law courts. While the Danns were ultimately unsuccessful in their immediate objective of validating a Shoshone collective land right, their efforts generated a record of the State's injustices that would attract important criticism from the international human rights community. We will focus on the litigation following the first round of appeals to the Ninth Circuit, where the issue of ICC payment and the instrumentality of Ruby Valley become most apparent.

In 1983, the Ninth Circuit ruled in favor of the appellant Dann sisters. Contrary to the government's arguments, the court questioned the effect of the ICC proceedings on Shoshone land title. Not only was the issue never actually litigated before the ICC, the court maintained, but the automatic appropriations made by Congress following the ICC's 1979 award did not constitute a payment capable of barring the Danns' claim of Shoshone title.⁵⁴ The court's definition of payment indirectly validated the Shoshone opposition to claim distribution. Under this opinion, a popular Shoshone refusal to accept the ICC award would leave undecided the question of Shoshone title.

The Ninth Circuit furthermore ratified the legal force of Ruby Valley, citing its protection against events which the US government claimed served to extinguish Shoshone title to treaty lands. In its appeal, the government had argued that several events had worked to extinguish Shoshone title well before the ICC payment. In this regard, the government aligned itself with the erstwhile Shoshone claims attorney, Robert Barker, who had submitted to the ICC that several events, including the 1862 extension of public land laws to the Nevada Territory and the

⁵⁴ *United States v. Dann*, 706 F.2d 919, §2, §24 (9th Cir., 1983).

1877 creation of the Duck Valley Reservation, “establish[ed] that the United States extinguished the Indian title ‘by the exercise of complete dominion, adverse to the right of occupancy.’”⁵⁵ What was upheld by the ICC in its 1976 decision against the WSLDEA was problematized by the Ninth Circuit. The plaintiff government, too, cited homestead laws and the formation of Duck Valley as agents of title extinguishment. The court noted that an 1891 amendment of the Preemption Act stipulated that homestead laws were not meant to repeal or modify existing treaties with Native communities.⁵⁶ It further pointed to Article IV of Ruby Valley, which enumerated the means by which non-Indians could make use of and appropriate Shoshone territory. No wholesale opening of Shoshone lands to widespread agricultural and homesteading is countenanced in this article.⁵⁷ The court gave short shrift to the presentation of Duck Valley as a title-extinguishing event, as the reservation did not conform to Article VI’s provision for removal of Western Shoshone people to a location *within* the boundaries set forth in Article V; Duck Valley was located outside of these boundaries.⁵⁸

The Supreme Court’s 1985 review of *Dann* was incredibly narrow in its scope, ruling only on whether the ICC’s 1979 award and the automatic Congressional appropriation that followed constituted payment to the Shoshone claimants. Reversing the Ninth Circuit’s decision that an ICC final award without an agreed-upon distribution plan fell short of an effective

⁵⁵ Robert W. Barker, Memorandum in response to Petition to Stay Proceedings and for Leave to File Amended Claim by the United Western Shoshone Legal Defense and Education Association and Frank Temoke, 24, July 1, 1974, ICC-B_326-K_00010.

⁵⁶ *United States v. Dann*, 706 F.2d 919, §38 (9th Cir., 1983).

⁵⁷ *Ibid.*, §43.

⁵⁸ *Ibid.*, §47.

payment to Shoshone stakeholders, the Court held that such a definition of payment “would frustrate the Indian Claims Commission Act’s purpose to dispose of Indian claims with finality.”⁵⁹ The court’s reversal meant a final answer to the protracted question of the ICC proceedings’ significance for Shoshone title, for it directly contradicted the Court of Claims assurance that legislative recourse for title recognition remained with Congress. “This justification of delay [of the award’s distribution],” the Supreme Court insisted, “obviously conflicts with the purpose of relieving Congress of the burden of having to resolve these claims.”⁶⁰

While its ruling effectively barred their claim to collective Shoshone ownership, the Supreme Court left open to the Danns a claim to their customary ranchlands based on individual aboriginal title.⁶¹ Importantly, the sisters withdrew their individual-title defense before their case went to its final 1991 trial in district court.⁶² Their unpermitted cattle were deemed to be trespassing on federal land and made subject to removal by the BLM. The Danns’ steadfast identification with a Western Shoshone national cause and refusal to yield collective rights to legal atomization exemplifies the nationalist impulse that ran through their activism.

Section III: International Censures against the State

A number of adverse factors competed with the Inter-American Commission’s decision to influence the outcome of the Shoshone traditional fight for treaty lands. Following the final

⁵⁹ *United States v. Dann*, 470 U.S. 39 (1985).

⁶⁰ *Ibid.*, §14.

⁶¹ *Ibid.*, §19.

⁶² WSDP Bios: Carrie and Mary Dann, Box 4, Folder 21, WSDP Records.

district court ruling against the Danns, in 1991, the Shoshone resistance to the distribution of the ICC award was staged along three fronts: in Shoshone Country; Washington; and the international human rights community. Early attempts to negotiate with the BLM and secure a restoration of treaty lands to the Shoshone saw the formation of a powerful institutional ally in the Danns' struggle, the Western Shoshone National Council. Shoshone efforts to negotiate a distribution plan with the US government, during the mid to late 1990s, were marked by increased disagreement between Shoshone traditionalists and pro-distribution tribal leaders. The Danns' efforts abroad achieved their greatest force in the early 2000s, when both CERD and IACHR juries published systemic critiques of US policy on the protection of indigenous property; the Inter-American Commission's 2002 report, in particular, urged the respondent State to "provide an effective remedy" pursuant to the American Declaration's conventions on human rights. In response to these censures, US redoubled its efforts to dispose of Shoshone treaty lands with finality.

In Shoshone Country

In the 1990s, despite attempts by Shoshone leaders and federal representatives to negotiate a legislative settlement, the BLM sought to discipline Nevada's Shoshone ranchers into observing federal public grazing regulations. The agency's tactics in engaging Shoshone resistance included the issuance of enormous fines, all-out, militarized roundups of Shoshone livestock, and some early attempts to negotiate with tribal leaders. Two primary targets were the Dann sisters and Raymond Yowell, Chief of the Western Shoshone National Council. The Western Shoshone Defense Project, established in 1991 to protect the Danns and their livestock against the BLM raids, and the National Council would work in tandem to resist BLM incursions

into Shoshone territory and educate the Shoshone populace and councils about the Nation's legal right to self-government.

In the optimistic glow surrounding the Ninth Circuit's 1983 decision upholding a persistent Western Shoshone claim to treaty lands, leaders across Shoshone communities gathered to establish the National Council.⁶³ The WSNC was the first Western Shoshone Nation-wide political entity and accrued broad-based support from pre-existing Shoshone councils at its inception. At its outset, the National Council was primarily concerned with representing a unified Shoshone effort to re-secure the tribal territory enshrined by Ruby Valley. Assuming leadership of the National Council early on, Raymond Yowell provided crucial support to the Dann sisters that reinforced the nationalist dimension of their project.

In an early 1992 WSNC press release following the first in a series of attempted BLM roundups of Dann livestock, the National Council lionized the Dann sisters and framed their resistance as important to the Shoshone nationalist cause:

The Danns have successfully resisted being thrown off our lands by the BLM for 18 years. Can you imagine defending yourself against the most powerful government in the world, taking your case to the 9th circuit court four times, and the Supreme Court twice, just because you were born, raised and hoped to live your life in the same place? The Danns defended themselves under the 1863 Treaty of

⁶³ Rusco, "Historic Change in Western Shoshone Country," 350.

Ruby Valley stating that BLM regulations did not apply to them, but that it was the US government that is trespassing upon Western Shoshone lands.⁶⁴

For their part, Nevada BLM administrators were tasked with the nebulous and unseemly chore of implementing the high court's 1985 ruling. While legislators in Washington could play at aloofness, it fell to the BLM to manage Nevada's rangelands in accordance with US law. Where Shoshone ranchers grazed in excess of an area's allotted limit or refused to secure a grazing permit, BLM personnel were obligated to address the situation. Soon after the 1991 conclusion of *Dann*, the BLM sought cooperative resolutions to conflicts over grazing regulation in Northeastern Nevada. The agency's success was precluded, however, by its unwillingness to acknowledge the ultimate importance of land rights to Shoshone stakeholders and freeze any punitive measures in order to accommodate the ongoing disputation of land rights.

Yowell and Nevada BLM State Director Billy Templeton met in late 1991 and decided on a compromise wherein the Danns would reduce the grazing burden on their South Buckhorn Allotment and the BLM would hold off any impoundment of Dann livestock. Templeton further promised Yowell that, in return for his help swaying the Danns, he would "make sure the right people know that you care about the land and that you have an issue that cries for resolution."⁶⁵ Yowell followed through with his end of the bargain, helping the Danns to reduce the number of their grazing cattle by over 10% and horses by over 75%.⁶⁶ A BLM roundup in February of the

⁶⁴ WSNC Public Notice, 1992, Box 41, Folder 38, WSDP Records

⁶⁵ Billy Templeton to Raymond Yowell, August 8, 1991, Box 12, Folder 10, WSDP Records.

⁶⁶ WSNC Press Release, "Western Shoshone Surprised by BLM's Mistake," 1992, Box 41, Folder 38, WSDP Records.

following year answered for Templeton. The roundup targeting Dann livestock was responsible for the impoundment of over one hundred horses; however, the Dann sisters maintained that the captured animals did not belong to them.⁶⁷ The BLM 's misfire resounded as a warning.

Templeton had expressed his attitude towards WSNC abetment of the Dannels' non-compliance in a letter, before: "...I do not consider the Dann trespass to be related to the issue of Shoshone tribal aboriginal rights. It is still beyond my comprehension that the Western Shoshone National Council would spend so much energy to shield the Dannels in their abuse of the land that the Shoshone should appreciate more than anyone."⁶⁸ The inverse of Templeton's implication was true. Because of the National Council's commitment to upholding the Treaty of Ruby Valley and its deep appreciation for the Shoshone land rights inscribed therein, it lent its full support to the Dann resistance.

In reply to Senator Bob Dole's inquiry into the Dann situation, probably petitioned by a constituent, Templeton demonstrates the expansive and self-serving legal interpretations that had served the United States in dispossessing the Shoshone. In his letter, Templeton remembers that the ICC "awarded and placed in trust for the Western Shoshone \$26 million in return for extinguishing tribal claims."⁶⁹ The senator may well have read "title" in place of "claims", as the Interior Department evidently had. Of course, the Ninth Circuit had made plain that no such extinguishment had been litigated before the ICC. Even the 1985 Supreme Court ruling, damaging as it was to the Dannels and other Western Shoshone advocates of treaty land rights, had refrained from adjudicating the question of title extinguishment.

⁶⁷ Ibid.

⁶⁸ Templeton to Yowell, August 8, 1991, Box 12, Folder 10, WSDP Records.

⁶⁹ Templeton to Senator Bob Dole, February 3, 1993, Box 12, Folder 10, WSDP Records.

In a March 1992 meeting with Templeton, Yowell encountered the frustrating departmental run-around that had begun to typify his communications with federal representatives. Yowell is quoted in a WSNC press release as identifying a US “unwillingness to pursue negotiations as an avenue for resolving this ongoing dispute over Western Shoshone land rights.”⁷⁰ The press release further indicates that BLM officials both denied having the authority to enter into negotiations with the National Council and declined to pass Yowell’s demands through the proper channels.⁷¹ Facing the futility of these quibbling measures with low-level US functionaries, Chief Yowell and the National Council would increasingly reserve their diplomatic appeals for only the highest federal authorities.

Within weeks of Yowell’s meeting with Templeton, the National Council issued a proclamation nationalizing the Danns’ livestock. The proclamation furthermore advised that “any attempt by the United States to interfere with the livelihood of the Western Shoshone and the peaceful conduct of their lives will be considered an illegal act under international law.”⁷² By consolidating Shoshone cattle under incorporated ownership, a project which Yowell would push further in founding the Western Shoshone Traditional Cattlemen Association, the National Council accomplished two ends. In its fight against the BLM, the coordinated effort of Shoshone traditional ranchers presented the agency with an unbroken front that protected its own and confused regulatory procedures. The mobilization of Shoshone citizens and the attraction of

⁷⁰ WSNC Press Release, “Western Shoshone Efforts at Negotiation Spurned by BLM,” March 13, 1992, Box 41, Folder 38, WSDP Records.

⁷¹ Ibid.

⁷² Raymond Yowell, “Nationalization of Western Shoshone Livestock,” March 26, 1992, Box 41, Folder 38, WSDP Records.

sympathetic popular attention also figured as aims in the WSNC platform, as these could translate to momentum in Washington.

Before the US Legislature

In its correspondence with the IACHR, the Indian Law Resource Center (ILRC) adduced the US legislative attempts to distribute the Western Shoshone ICC award among factors that threatened the Danns' cause before the international human rights community. The Danns and others, including Yowell, were concerned that the award's distribution—damages for which the Shoshone people were undoubtedly qualified—would reduce the Nation's collective ability to pursue land claims. Shoshone citizens' success in forestalling legislation to distribute the funds, since the 1979 entrance of the award into a tribal trust account, had figured as one of the most impressive shows of unified resistance against the US claims procedure and commitment to retaining tribal lands.

The increasing polarization during the 1990s of the debate between pro- and anti-distribution Shoshone centered on the historical land-versus-money issue, with Shoshone traditionals like the Danns championing the authority of Ruby Valley and the persistence of Shoshone title. The factionalism that characterized legislative negotiations during the period of the IACHR review demonstrates the plurality of opinion within Shoshone Country concerning the veracity and value of the Shoshone traditional narrative espoused by the Danns and Yowell. Where the WSNC would attempt, early on, to present the United States with a univocal Shoshone national front in securing the Nation's interests, the competing visions of separate Shoshone councils relegated this effort to fantasy. Yowell's government, along with smaller communities like the Dann band not federally recognized as official tribal governments, would

be edged from the negotiating table as the Congress moved towards a 100% per capita distribution of the ICC award.

From the National Council's inception, one of its foundational principles had been to represent for the first time the entire Western Shoshone populace in its international dealings. These included negotiations with the United States to secure the trustee's acknowledgement of persistent Shoshone treaty rights, such as tribal territorial integrity. A 1985 memo entitled "Internal Rules for Western Shoshone National Council Negotiating Team" stipulates that "each member of the WSNC negotiating team must keep the best interests of the Western Shoshone Nation as a whole in mind at all times, and must not show any lack of unity among the WSNC to the US negotiating team or in public."⁷³ The document indicates the body's early orientation towards US diplomacy and its awareness of perhaps the single greatest asset when representing multiple tribal interests in negotiation with the federal government—cohesion.

In a dispatch to the Western Shoshone councils, Yowell denounced a 1990 bill that would have provided for a partial distribution of the ICC award as non-representative of Shoshone interests and called upon council chairs to demonstrate their opposition to US lawmakers. In reference to legislators' failure to adequately consult Shoshone citizens on the matter, Yowell asserts that "Western Shoshone should make the decision concerning national Western Shoshone issues" and articulates the WSNC goal of developing a "comprehensive bill that will contain and represent all Western Shoshone interests concerning the Land Rights issues."⁷⁴

⁷³ WSNC, "Internal Rules for Western Shoshone National Council Negotiating Team," November 8, 1985, Box 43, Folder 15, WSDP Records.

⁷⁴ Yowell, "Hearing on HR 3384," March 22, 1990, Box 43, Folder 7, WSDP Records.

Shoshone supporters and opponents of distribution, alike, recognized the exigency of entering into talks with federal representatives in order to disentangle wide-ranging Shoshone public concerns from local clashes with the BLM. In 1992, tribal leaders met with the Chair of the Senate Select Committee on Indian Affairs to present the issues of concern to the Shoshone public and begin laying plans for further negotiations with the US. The Shoshone appeal to Senator Daniel Inouye's sympathy for indigenous issues and departmental distance from conflicts on Nevadan rangelands reflect the sourness of Shoshone-Interior relations of the time.

Carrie Dann set her bitter wit to the task of lambasting Interior Secretary Manuel Lujan, in the same year. Dann begins her letter with a series of at-times elementary questions evidently meant to highlight the Secretary's misapprehension of the same. The interrogative format figures a sub-textual critique of federal paternalism in Shoshone affairs. Dan asks:

When did the Secretary of Interior assume trusteeship over the Western Shoshone Indians? Over the Western Shoshone Nation?

Did the Western Shoshone leadership agree to let their people become a ward of the United States?

What are the duties of a trustee?⁷⁵

Dann's far-reaching criticism mirrors the substance of WSNC opposition to US Shoshone policies. These misgivings towards the fundamental nature of trusteeship served to marginalize Shoshone traditionals in the US legal system, among tribal counterparts more willing to stomach

⁷⁵ Carrie Dann to Secretary of the Interior Manuel Lujan, March 23, 1992, Box 4, Folder 24, WSDP Records.

the systemic inequalities had characterized US-Shoshone relations. In order to press their constituents' claims before a federal audience, Shoshone leaders undertook a diplomatic project that would founder on their inability to coordinate competing aims.

The Inouye meeting in December 1992 shows a growing distance between Western Shoshone councilmen and traditional leaders like Yowell and the Danns. Although Senator Inouye suggested the future involvement of these parties in Shoshone-federal negotiations, WSNC leadership was excluded from that first meeting where questions about the structure of a Shoshone negotiating team were raised. In D.C., Shoshone leaders represented some of the same issues most pressing for traditionalists, like securing an adequate land base and proscribing the onrush of mining activity in Northeastern Nevada; however, they also "hoped the situation with the Dann sisters didn't get in the way of resolving some of the larger issues".⁷⁶ Yowell communicated with Inouye as soon as he caught wind of the D.C. meeting, reproaching the senator for not including himself, as representative of the WSNC, and the Danns. "In any proposed negotiations concerning the land rights of the Western Shoshone Nation, the Western Shoshone National Council as the selected representational government of the Western Shoshones must be the leading entity," Yowell asserted.⁷⁷ As Shoshone leaders gathered to propose a distribution plan for the 1978 claim, the disparate visions of traditional and federally sponsored councils became irreconcilable.

In a 1992 statement to the Committee on Interior and Insular Affairs, one pro-distribution member of the Te-Moak Shoshone Tribe epitomized the critique of what some Shoshone people perceived to be the WSNC's and Danns' radical ideology. Erstwhile Te-Moak councilmember

⁷⁶ George Waters to Paul Snooke, December 4, 1992, Box 13, Folder 27, WSDP Records.

⁷⁷ Yowell to Senator Daniel Inouye, December 3, 2003, Box 41, Folder 38, WSDP Records.

Elwood Mose complained that the WSNC, among the loudest detractors from the cause of monetary settlement, had “lost its sense of purpose” and that it “operated in a sort of separate reality, blinding itself to anything adverse [sic] to its mythology.” Mose further besmirched the National Council’s “unyielding support of the Danns who appeared indifferent to general Shoshone interests and bitterly opposed judgment distribution solely to protect their private holdings.”⁷⁸ These unfavorable ideas of the Shoshone traditional platform, unfairly characterized here as exclusively self-serving, give expression to a Shoshone public torn between the Danns’ stubborn adherence to Ruby Valley and its protections against US despotism and the immediate material increase promised by distribution. The economic consideration should not be quickly dismissed as selfish or short-sighted. The \$26 million accruing interest was no pittance, even distributed among individual thousands, to the many Shoshone living beneath the poverty line.

Mose’s presentation of the National Council’s reality as “mythology” gets at the powerful effect that Shoshone traditional interpretations of Ruby Valley’s substance and ongoing importance to tribal sovereignty had on everyone, not just activists’ federal adversaries. Specifically, Yowell’s insistence upon approaching the United States government as a co-equal sovereign and his pretense of a united “Western Shoshone Nation” must have struck some Shoshone citizens less energized towards the traditionalists’ cause as unrealistic. Indeed, the nationalist vision that Yowell pursued and which the Danns championed in domestic and international courts was just that—a vision. It was a vision rooted, as we have shown, in a particular reading of Shoshone history that collided with the US government’s official narrative

⁷⁸ Elwood Mose, Statement to the Committee on Interior and Insular Affairs on HR 3897, April 30, 1992, Box 14, Folder 1, WSDP Records.

and, with a considerable cash settlement pending, seemed to gamble the interests of everyday Shoshone citizens as well.

Despite portrayals like that of Elwood Mose, a simple majority opinion concerning a distribution plan in Shoshone Country was not in evidence. Over the coming years, competing Shoshone negotiation teams and claims distribution committees would emerge, separate Shoshone councils would increasingly disagree over key provisions of a US-Shoshone legislative accord, and bills would falter in Congress. Not until 2004, accompanied by a conspicuous increase in federal involvement in Shoshone internal affairs, would the Western Shoshone Claims Distribution Act be signed into law. Next, we will consider those years when international pressures mounted against the United States' Western Shoshone policies, when the BLM intensified its raids against Shoshone ranchers and the Danns' cry for justice reached a fever pitch. The 2004 distribution law was one sign of the United States' contempt for the international human rights community and its urgent need to abolish the Western Shoshone traditional narrative that had survived the government's historical and modern depredations and the mire of Shoshone factionalism and threatened to powerfully resurge in the early 2000s.

The International Judicial Front

Through this petition the Danns seek to maintain their way of life on lands inherited from their Western Shoshone ancestors. *Equally important is their objective of preserving all Western Shoshone land for the use and benefit of future generations of the Western people.* They fear that the Western Shoshone will not be able to

survive *as a people and as a nation* if the United States is permitted to continue its expropriation of Western Shoshone land [emphasis added].⁷⁹

Between the Danns 1993 petition to the IACHR and the Commission's 2002 publication of its final report on the case *Mary and Carrie Dann v. United States*, the situation in Shoshone Country had grown direr for the petitioners. Attempts at negotiating with the Nevada BLM had failed, and higher appeals to federal authorities had repeatedly ended in stalemate with the Department of the Interior. Outside of Crescent Valley, on Shoshone ancestral lands, the Dann sisters and the Western Shoshone Defense Project were on constant alert to protect themselves and the Danns' livestock from BLM impoundment raids. Mining corporations like Oro Nevada were rapidly privatizing and plundering treaty lands, encroaching on and polluting Shoshone cultural sites.⁸⁰ On top of all this, the US Congress, previously invoked by federal courts as a viable recourse for asserting Shoshone title, was entertaining ever more forceful iterations of a distribution bill that could preclude the restoration of treaty lands. The same conditions that closed in upon and buffeted resolute Shoshone traditionals elevated their standing before the international human rights judiciary.

The Danns' legal activism before the IACHR and CERD is most significant in our analysis because of its international appeal. The claims that the Danns and other Shoshone traditionals like Raymond Yowell had historically represented to the US government, extensions

⁷⁹ Petition to IACHR, 2, April 1, 1993, Box 50, Folder 12, Western Shoshone Defense Project Records.

⁸⁰ Julie Fischel, "Draft Request for Provisional Measures," Nov 4, 1997, Box 49, Folder 19, WSDP Records.

of ancestral efforts tracing to the 1863 treaty convention in Ruby Valley, were inherently international. Under the banner of Ruby Valley, Shoshone demands for the United States' respect of their territorial integrity had presupposed a nation-to-nation relationship between the Shoshone people and their trustee government. While Shoshone legal activists were able to invert constructions of US Indian law in order to champion this national self-conception in US courts, ultimately the colonizer judiciary ratified its own government's narrative. The international human rights system was not simply the last recourse for the traditional vision of a more-than-tokenistic Shoshone sovereignty; it was the most appropriate forum in which to pursue this vision. The Danns' fight suffered, domestically, from a particularization that acted to alienate the sisters' personal from the larger Western Shoshone national cause. IACHR and CERD representatives, on the other hand, gravitated to arguments that problematized the very nature of US-Indian relations, foregrounding issues of universal Western Shoshone and Native American importance.

The Danns' engagement of the international human rights system saw the apotheosis of those activist themes which we have traced across judicial venues, including the ICC tribunal, federal district and appellate courts, and finally the United States Supreme Court. Themes centering on the 1863 Treaty of Ruby Valley and a systemic critique of US-Shoshone relations were incubated in these and in less formal contexts, such as Shoshone rangelands in the Great Basin and in traditionalists' correspondence with US government officials. The following consideration of the Danns' strategies and their outcomes before the IACHR and CERD will demonstrate the full power of Shoshone treaty-based activism to successfully assert nationalist claims against the State and give meaningful expression to a tribal self-narrative strangled in its own physical home.

With the IACHR report still pending, ILRC counsel Julie Fischel and a Western Shoshone delegation traveled to Geneva in the fall of 2000 to present the Shoshone plight to the Committee on the Elimination of Racial Discrimination, a UN body designed to implement the 1966 international accord of which the US was a signatory state. Different from its 1993 petition to the IACHR, the ILRC's CERD request was submitted on behalf of the entire Western Shoshone Nation. The delegation, comprised of Carrie Dann and council representatives of the Yomba and Ely Tribes of Shoshone and with written support from the Te-Moak Tribe, alleged in its "Request for Urgent Action" that the "United States is denying the Western Shoshone people rights to ancestral lands, having determined in a discriminatory manner that those rights are extinguished."⁸¹ The compact request, covering only one page, frames the Shoshone cause as a matter of international treaty enforcement: The United States "denies the continuing existence of Western Shoshone rights to ancestral lands... despite the Treaty of Ruby Valley."⁸²

Questions raised by the Committee, during the following year's meeting in Geneva, to the US member state indicate the effectiveness of the Western Shoshone's 2000 request in addressing systemic issues in federal Indian law. In 2001, the Committee noted "with concern that treaties signed by the Government [United States] 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."⁸³ The Committee's critique of the politics underpinning modern US Indian law marked a new

⁸¹ Julie Fischel to James Anaya, attachment, August 17, 2000, Box 49, Folder 20, WSDP Records.

⁸² Ibid.

⁸³ Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America, U.N. Doc. CERD/C/59/Misc.17/Rev.3 (2001), §21.

degree of success for Shoshone legal activists and demonstrates the utility of Indian treaties in challenging settler government policies.

Petitioners employed these international judicial critiques to leverage protection for Western Shoshone traditionals in the United States. Following the 2001 CERD meeting, Deborah Schaaf of the ILRC wrote to the Senate Committee on Indian Affairs to update legislators on both CERD's and IACHR's censures against US Western Shoshone policies. Specifically, Schaaf anticipated that the pending IACHR report on the Danns' case would "have a direct and even decisive bearing on Senate Bill 958"—the latest bill before Congress meant to distribute the frozen ICC claim.⁸⁴ Citing the United States' public refutation of the Danns' allegations before the IACHR, Schaaf urges the Senate Committee, "rather than move into a contentious and potentially embarrassing legislative hearing... [to] seriously review the report on the merits of the Danns' case approved by the Inter-American Commission and consider working toward the establishment of a process to achieve a fair resolution of the underlying dispute about Western Shoshone land rights."⁸⁵ CERD's scrutiny of the inherent inequalities of federal Indian law bolstered Schaaf's higher-ground standing, adding force to such appeals.

In December of 2002, the Inter-American Commission published its final report on the Danns' case. The United States' objections to the original petition, included in the 2002 report, clarify the state's entrenched position that Indian treaties, despite US canons of construction, were not to be imbued with new (anticolonial) significance in the light of modern developments in human rights law. The report quotes the United States' complaint over the Commission's

⁸⁴ Deborah Schaaf to Senator Kent Conrad, November 5, 2001, Box 49, Folder 21, WSDP Records.

⁸⁵ Ibid.

“inter-temporal application of law”. The state argued that “it is not permissible to import into the legal evaluation of a previously existing situation, *or of an old treaty*, doctrines of modern law that did not exist or were not accepted at the time [emphasis added].”⁸⁶ This argument demonstrates an intent opposite to a meaningful rectification of ancient wrongs, the pretext provided for purchasing Shoshone silence in the ICC. Indeed, the state demonstrates here an obstinate adherence to colonial legal constructs as though their ongoing injuries to indigenous people were an unavoidable inheritance of the past—a past, in this case, assiduously curated and guarded by the US government. The Commission countered that its charter American Declaration, ratified two years after the 1946 ICC act, was appropriately invoked to remedy Shoshone grievances originating before the ICC, as these figured an ongoing reality for the petitioners.⁸⁷

The Commission concluded its report by referring the United States respondent to articles II, XVIII, and XXIII of the American Declaration. These articles deal, respectively, with the human rights to equality before the law, a fair trial, and to property.⁸⁸ The Commission recommended that the state both “provide Mary and Carrie Dann with an effective remedy,” pursuant to these conventions, “in connection with their claims to property rights in the Western Shoshone ancestral lands” and “review its laws, procedures and practices to ensure that the

⁸⁶ Mary and Carrie Dann v. United States, Case 11.140, Report No. 75/02, Inter-Am. C.H.R., Doc. 5 rev. 1 at 860 (2002), §160.

⁸⁷ Ibid., §167.

⁸⁸ Inter-American Commission on Human Rights, *American Declaration of the Rights and Duties of Man*, May 2, 1948.

property rights of indigenous persons are determined in accordance” with these rights.⁸⁹

Emboldened by the IACHR’s admonitions, the ILRC immediately engaged US Secretary of State Colin Powell to begin talks on implementing the Commission’s findings; Powell declined, however, to help facilitate any such dialogue and forwarded the ILRC’s communication to Interior.

While significant in the scope of its criticism and its prestigious ratification of the Shoshone traditional narrative, the IACHR report proved toothless in remediating unjust federal actions toward the Western Shoshone. National Director of the BLM Kathleen Clarke replied to the ILRC letter of December 2002 in April of the following year. Embodying the totalizing logic of the state and its brazen disregard for its subordinate responsibility to comply with the findings of the Organization of American States, Clarke informed the ILRC that the “United States has rejected the Commission’s findings as erroneous” and, for this reason, “the BLM cannot agree that the Commission’s report is a basis for halting any actions to impound the Dann sisters’ livestock.”⁹⁰

US Impunity

The Inter-American Commission’s report met with US hostility. A BLM raid which resulted in the impoundment of over five hundred of the Danns’ horses answered the official censures, not two months after their publication. This was the second government roundup of Dann livestock in six months, each resulting in the auction of animals without the sisters’

⁸⁹ Mary and Carrie Dann v. United States, Case 11.140, Report No. 75/02, Inter-Am. C.H.R., Doc. 5 rev. 1 at 860 (2002), §173.

⁹⁰ Kathleen Clarke to Steven Tullberg, April 3, 2003, Box 12, Folder 19, WSDP Records.

compensation. The acceleration of these extreme measures to crush the Dann sisters' resistance reverberated in the capitol, where a Western Shoshone claims distribution bill gained the fervent support of Nevada Senator Harry Reid.

In her 2004 update to Executive Secretary Santiago Canton of the IACHR on the US response to the Commission's report, Schaaf regretfully informed Canton that the "United States has failed in every respect to comply with the Commission's recommendations."⁹¹ In her letter, Schaaf locates the latest BLM raids in a retaliatory set of US policies meant to drive home to "the Danns, to the larger Western Shoshone community, and to the general public that it is hopeless and even costly to look for justice against the United States through the international law of human rights."⁹² As Schaaf wrote to Canton, a Western Shoshone claim distribution bill had passed in the Senate and was nearing passage in the House. The Department of the Interior had become actively involved in promoting this legislation and, in its testimony to Congress, had entirely omitted mention of the IACHR report.⁹³

Schaaf's letter to Secretary Canton brings together many of the narrative and analytic themes woven into our inquiry of Western Shoshone traditional legal activism. It summarizes the resolution of formerly disorganized US government branch operations into a single bludgeon against the intolerable Shoshone resistance. It bespeaks the circuitous and totalizing logic of federal Indian law which, in the Western Shoshone case, furnished the US judiciary a series of pretexts with which to gradually and nakedly extinguish Shoshone title to treaty lands. It bears

⁹¹ Schaaf to Executive Secretary IACHR Santiago Canton, January 22, 2004, Box 49, Folder 23, WSDP Records.

⁹² Ibid.

⁹³ Ibid.

witness to the “modern-day expropriations... carried out by government bureaucrats, lawyers and judges rather than by the United States cavalry”, which the Danns illustrated and condemned in their 1993 petition.⁹⁴ It presents the shifting and resourceful chimera that Shoshone traditionals faced in their campaign to assert a Shoshone national future and the veracity of their tribal narrative.

Conclusion

The Danns’ work towards gaining the recognition of Western Shoshone treaty rights brought them into contact with various organs of State power. While no one agenda dictated the actions of individual personnel, departments, or courts, over the course of the Western Shoshone claim’s contestation, US official notions of an irremediable Shoshone dispossession began to predominate. Legal pronouncements made for one purpose were construed in new lights and converted to other, increasingly damaging uses. An 1872 date of taking may have appeared expedient to claims attorneys fixated on a winning strategy before the ICC tribunal; what expedited valuation in the ICC, however, reified a past conquest in the law courts.

The distribution of the ICC’s 1978 award to individual Shoshone citizens figured as the last of these versatile State actions presenting themselves as one thing and effecting another result. The 2004 Western Shoshone Claim Distribution Act put into action a plan to dole out per capital the ICC award that had appreciated to \$144 million. It passed Congress under the

⁹⁴ Petition to IACHR, 2, April 1, 1993, Box 50, Folder 12, Western Shoshone Defense Project Records.

presumed auspices of majority Western Shoshone support; however, Western Shoshone councilmembers from seven of the nine tribes had repudiated the bill shortly beforehand.⁹⁵

If the Danns' and concerted Western Shoshone treaty activism failed to stem the multi-sited push to liquidate Shoshone title, it served the interjection of a powerful counter-narrative into a dominant one fueled by an "ideology of loss." The Treaty of Ruby Valley provided a rallying point for Western Shoshone traditionalists and for their supporters around the globe. Its force was contested in US courts, alternately upheld and denied. That the Shoshone plea for intervention before the international human rights community was made under the banner of Ruby Valley speaks to activists' steadfast commitment to sovereign nationhood. That bodies like CERD and the Inter-American Commission affirmed this vision is a testament to the instrumentality of an 1863 treaty in elevating indigenous rights above the exclusive jurisdiction of the colonizer government.

⁹⁵ Hugh Stevens, Chairman Te-Moak Tribe of Western Shoshone to Congressmen Rahall, Udall & Grijalva, May 26, 2004, Box 14, Folder 14, WSDP Records.

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