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Institution:	Inter-American Commission on Human Rights
File Number(s):	Report No. 75/02; Case 11.140
Title/Style of Cause:	Mary and Carrie Dann v. United States
Doc. Type:	Report
Decided by:	President: Juan Mendez; First Vice-President: Marta Altolaguirre; Second Vice-President: Jose Zalaquett; Commissioners: Julio Prado Vallejo, Clare K. Roberts, Susana Villaran. Commission Member Professor Robert Goldman did not take part in the discussion and voting on this case, pursuant to Article 17(2) of the Commission's Rules of Procedure.
Dated:	27 December 2002
Citation:	Dann v. United States, Case 11.140, Inter-Am. C.H.R., Report No. 75/02, OEA/Ser.L/V/II.117, doc. 1 rev. 1 (2002)
Represented by:	APPLICANTS: Steven M. Tullberg and Robert T. Coulter of the Indian Law Resource Center
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I. SUMMARY

1. The petition in the present case was lodged with the Inter-American Commission on Human Rights (the "Commission") against the United States of America (the "State" or the "United States") on April 2, 1993 by Messrs. Steven M. Tullberg and Robert T. Coulter of the Indian Law Resource Center (the "Petitioners"). The petition was presented on behalf of Mary and Carrie Dann, sisters and citizens of the United States (the "Dann sisters" or the "Danns").

2. The petition and subsequent observations allege that Marie and Carrie Dann are members of the Western Shoshone indigenous people who live on a ranch in the rural community of Crescent Valley, Nevada. According to the petition, their land and the land of the indigenous band of which they are members, the Dann band, is part of the ancestral territory of the Western Shoshone people and the Danns and other members of the Western Shoshone are in current possession and actual use of these lands. The Petitioners also contend that the State has interfered with the Danns' use and occupation of their ancestral lands by purporting to have appropriated the lands as federal property through an unfair procedure before the Indian Claims Commission ("ICC"), by physically removing and threatening to remove the Danns' livestock from the lands, and by permitting or acquiescing in gold prospecting activities within Western Shoshone traditional territory. Based upon these circumstances, the Petitioners allege that the State is responsible for violations of Articles II, III, VI, XIV, XVIII and XXIII of the American Declaration of the Rights and Duties of Man (the "American Declaration").

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3. The State denies that it has violated the Danns' rights under the American Declaration. The State argues that the matters raised by the Petitioners do not involve human rights violations but rather involve lengthy litigation of land title and land use questions that have been and are still subject to careful consideration by all three branches of the United States government. In this regard, the State contends that the Danns have title, ownership and possession of the lands constituting their ranch in Nevada which had been patented to their father, that there has never been an effort by the State to remove the Danns from their ranch, and that as long as the Danns comply with the requirements of the Bureau of Land Management they are eligible for a permit to graze their livestock on public lands. As to the traditional Western Shoshone territory more generally, the State submits that the Danns and other Western Shoshone lost any interest in the lands in question in 1872 as a result of encroachment by non-Native Americans, and that this determination was properly made through fair proceedings before the ICC, a quasi-judicial body established by the United States for the very purpose of determining Indian land claims issues. Finally, the State argues that the ICC awarded the Western Shoshone $26,145,189.89 in compensation for the loss of their lands based upon 1872 land values, which has been held in trust by the Secretary of the Interior until a distribution plan has been agreed upon with the Western Shoshone.

4. In Report N° 99/99 adopted by the Commission on September 27, 1999 during its 104th regular period of sessions, the Commission decided to admit the claims in the Petitioners' petition and to proceed with consideration of the merits of the complaint.

5. In the present report, having examined the evidence and arguments presented on behalf of the parties to the proceedings, the Commission concluded that the State has failed to ensure the Danns' right to property under conditions of equality contrary to Articles II, XVIII and XXIII of the American Declaration in connection with their claims to property rights in the Western Shoshone ancestral lands.

II. PROCEEDINGS BEFORE THE COMMISSION

A. Observations of the Parties

6. Upon receipt of the Petitioners' petition, on April 7, 1993 the Commission decided to open a case pursuant to Article 34 of its prior Regulations, [FN1] forwarded the pertinent parts of the petition to the United States by letter of the same date and requested that the State provided the Commission with information that it deemed pertinent within 90 days of receipt.

[FN1] During its 109th special session in December 2000, the Commission approved the Rules of Procedure of the Inter-American Commission on Human Rights, which replaced the Commission's prior Regulations of April 8, 1980. Pursuant to Article 78 of the Commission's Rules of Procedure, the Rules entered into force on May 1, 2001.

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7. By communication to the Commission dated August 27, 1993 the State requested an extension of time until September 10, 1993 within which to submit its reply to the petition. The Commission, in a note dated September 7, 1993 granted the State's request.

8. On September 9, 1993 the United States transmitted to the Commission its observations on the petition. On September 22, 1993 the Commission forwarded the pertinent parts of the State's observations to the Petitioners with a request for a response within 45 days. By note to the Commission dated November 2, 1993 the Petitioners requested an extension of time until December 14, 1993 within which to respond to the State's observations. The Commission granted the Petitioners' request on November 3, 1993.

9. By notes dated December 2, 1993 and January 3, 1994 the Petitioners forwarded to the Commission their response to the State's September 9, 1993 observations. The Commission transmitted the pertinent parts of the Petitioners' response to the State on January 6, 1994 with a request for information within 30 days. In a communication dated February 4, 1994 the State requested an extension of time to March 3, 1994 to reply to the Petitioners' response and on March 3, 1994 the State delivered to the Commission additional observations on the petition and requested a further extension of time to April 4, 1994 to complete its review of the matter and provide an appropriate response. By communication dated April 5, 1994, the State requested a further extension of time to April 18, 1994 within which to respond to the Petitioners' response of December 22, 1993 and on April 18, 1994 the State forwarded to the Commission additional observations on the Petitioners' response. The Commission forwarded the pertinent parts of the State's communications to the Petitioners. On May 4, 1994 the Petitioners requested an extension of time within which to respond to the State's observations, based upon ongoing efforts by the Danns and the United States to resolve the case.

10. On October 10, 1996 the Commission convened a hearing on the claims raised in the petition. Representatives of the Petitioners and the State attended the hearing and made submissions as to the admissibility and merits of the Danns' claims. In addition, by communication dated February 28, 1997 the United States provided written responses to various issues raised during the course of the hearing before the Commission. These written responses were subsequently transmitted to the Petitioners by letter dated March 10, 1997.

11. In Report N° 99/99 approved by the Commission on September 27, 1999 during its 104th regular period of sessions, the Commission decided to admit the claims in the Petitioners' petition and to proceed with consideration of the merits of the complaint.

12. In a communication dated March 23, 2000 and received by the Commission on the same date, the Petitioners delivered to the Commission a document entitled "Petitioners' Brief on the Merits of the Case." The Commission transmitted the pertinent parts of this communication to the State by note dated March 27, 2000 with a response requested within 30 days.

13. By note dated May 9, 2000, the State requested an extension of time of 45 days within which to file a response to the Petitioners' supplemental Brief, and in a subsequent communication dated May 18, 2000 the Commission granted the State's request. As of the date

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of this report, the Commission has not received any further observations from the State on the Petitioners' petition.

B. Precautionary Measures

14. In a letter dated August 16, 1993, the Petitioners informed the Commission that the State had published a notice on August 3, 1993 which stated that the United States Bureau of Land Management ("BLM") intended to impound all livestock on a portion of the Western Shoshone ancestral lands, described as "the South Buckhorn, Geyser, Scott's Gulch, Thomas Creek, and Safford County Allotments in the Elko District and portions of the Argenta and Carico Lake allotments in the Battle Mountain District." In their letter, the Petitioners contended that the Danns had grazed their livestock on the land for generations and that the United States probably intended to sell the impounded livestock belonging to the Danns and the Western Shoshone National Council. In these circumstances, the Petitioners argued that this would be devastating to the Danns and would further compound the wrongs that had already been committed against them by the State. On this basis, the Petitioners requested that the Commission issue precautionary measures pursuant to Article 29(2) of the Commission's prior Regulations.

15. By communication dated September 7, 1993 the Commission informed the United States of the communication by the Petitioners on August 16, 1993. In its communication, the Commission requested that the State stay its intention to impound all livestock belonging to the Danns until the case had been resolved.

16. Subsequently, by note dated February 27, 1998 the Petitioners again requested that the Commission issue precautionary measures pursuant to Article 29(2) of the Commission's previous Regulations to avoid immediate, grave and irreparable harm to the Danns. The Petitioners stated that the BLM had again issued a series of notices and orders on February 19, 1998 which declared that the Danns and other Western Shoshone people were trespassing on lands, ordered them to remove all livestock and property from the lands, and threatened them with fines, imprisonment, impoundment or cattle and confiscation of property if they failed to comply with the orders. On this basis, and because this aggressive government action was alleged to enhance the threat to the economic and cultural survival of the Danns and other Western Shoshone, the Petitioners contended that there was an urgent need for the Commission to issue precautionary measures.

17. In a communication to the State dated March 6, 1998 the Commission reiterated its previous request that the State stay any action to impound or confiscate the Danns' property pending the Commission's investigation of the alleged facts.

18. The Petitioners subsequently informed the Commission by letter dated July 16, 1998 that despite the Commission's reiteration of its request to the State, the BLM had continued with its "trespass" action against the Danns and other members of the Western Shoshone nation. The Petitioners indicated in particular that on April 2, 1998 the BLM issued additional orders and decisions against the Danns that directed the Danns to remove their livestock from part of the land in issue and to pay a fine of $288,191.78 for alleged unauthorized grazing. The Petitioners

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therefore reiterated their request that the Commission issue precautionary measures against the State's actions.

19. In a note dated August 5, 1998, the State responded to the Commission's March 6, 1998 communication by stating, inter alia, that "out of respect for the Commission, the State Department has initiated an interagency dialogue with the relevant Federal agencies to consider further the Commission's request. In the meantime, however, the United States will not hold in abeyance the normal operation of its law."

20. By communication dated June 3, 1999 the Petitioners informed the Commission that despite the Commission's previous requests for the State to stay its actions against the Danns, Federal officials continued to pursue enforcement measures against the Danns and other Western Shoshone. The Petitioners also stated that in an effort to defend themselves against these measures, the Danns appealed the BLM's decisions against them under the relevant domestic administrative procedure, and that on December 18, 1998 the BLM ruled against them. In addition, the Petitioners indicated that the Danns met with BLM officials on January 28, 1999 where the Danns were invited to submit a proposed interim measures agreement. When the Danns subsequently submitted a proposal on March 28, 1999 the proposal is said to have been rejected through the counter-offer by officials of terms that essentially restated the BLM's previous position, namely that the Western Shoshone no longer have rights to their ancestral lands.

21. In their June 3, 1999 communication, the Petitioners further indicated that only two days after the Danns received the BLM's response to their proposal, the BLM issued a "Notice of Intent to Impound" in respect of "any unauthorized livestock grazing upon public land" and that the Notice provided that any impoundment may occur without further notice after five days of delivery of the Notice within a twelve month period. Based upon these events, the Petitioners requested that the Commission issue precautionary measures to prevent the implementation of the State's intention to impound the Danns' property.

22. The Commission, in a note dated June 28, 1999 forwarded the pertinent parts of the Petitioners' June 3, 1999 submission to the State and requested pursuant to Article 29(2) of the Commission's prior Regulations that the State take precautionary measures to stay its intention to impound the Danns' livestock until the Commission had an opportunity to fully investigate the claims raised in the petition.

23. By communication dated August 9, 2000 and received by the Commission on August 10, 2000 the Petitioners submitted to the Commission a "Request for Additional Precautionary Measures". According to the petitioners, two bills had recently been introduced into the U.S. Congress, the Nevada Public Land Management Act of 1999 (the "Nevada Public Land Bill") and the Western Shoshone Claims Distribution Act (the "Distribution Bill"). According to the Petitioners, the Nevada Public Land Bill would authorize the U.S. Secretary of the Interior to dispose of "public" land in the State of Nevada by selling it in open bidding to mining, ranching and other private interests. The Distribution Bill would authorize the U.S. Secretary of the Interior to make a per capita distribution of the funds awarded by the ICC for the extinguishment of their rights in the Western Shoshone ancestral lands. The Petitioners claimed that this

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legislation, if enacted, would authorize the disposal to private interests of land that included the land used and occupied by the Danns, and would authorize the distribution of the funds awarded by the ICC but never accepted by the Western Shoshone people. The Petitioners also suggested that there was a possibility that both of these bills could be passed during the legislative session of Congress then in progress. Further, the Petitioners claimed that the proposed legislation would cause irreparable harm to the Danns' ability to survive culturally, physically, and economically and to their ability to pursue the very claim set forth in their submissions to the Commission.

24. In a note dated August 18, 2000 the Commission transmitted the pertinent parts of the Petitioners' August 9, 2000 communication to the State and, without prejudice to the possible adoption of precautionary measures, requested that the State take whatever measures it deemed necessary so that the Commission could receive within 20 days information that the State considered pertinent to the Petitioners' request. By communication dated October 19, 2000 to the State, the Commission reiterated its August 18, 2000 request for information in respect of the Petitioners' request for additional precautionary measures, and sought a response within 20 days.

25. The State, in a note dated December 4, 2000 provided the Commission with a response to its communication of October 19, 2000 in which the State indicated that the legislation referred to by the Petitioners had been introduced in Congress but that no significant action had been taken and none was expected during the session of Congress then in progress. The State also contended that, even if enacted, neither of the bills would cause irreparable harm to the Dann sisters and therefore that their request for precautionary measures had no basis in law or fact. By communication dated December 11, 2000, the Commission transmitted the pertinent parts of the State's response to the Petitioners with a response requested within 30 days. Subsequently, in a letter dated January 11, 2001, the Petitioners provided the Commission with observations respecting the State's December 4, 2000 response in which they asserted that the State had failed to offer any meaningful response to their request for precautionary measures and reiterated their request for the Commission to call upon the State to suspend any action on the Nevada Public Land Bill and the Distribution Bill.

C. Friendly Settlement

26. In its admissibility Report N° 99/99 of September 27, 1999 in this matter, the Commission placed itself at the disposal of the parties pursuant to Article 45(1) of the Commission's prior Regulations for the purpose of reaching a friendly settlement of the matter.

27. By letter dated October 25, 1999 to the Commission, the Petitioners reiterated their willingness to enter into a process of friendly settlement with the United States under the Commission's auspices. The Petitioners also indicated, however, that in the absence of agreement by the State they would request that the Commission proceed to evaluate and issue a decision on the merits of the petition. In a note dated November 1, 1999 the Commission transmitted the Petitioners' October 25, 1999 communication to the State with a response requested within 30 days.

28. In a letter dated June 15, 2000 and received by the Commission on June 16, 2000 the Petitioners requested a hearing at the next session of the Commission, or alternatively an

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informal conference with the United States and a representative of the Commission to explore any possibility of settlement. By notes dated September 19, 2000 the Commission informed the parties that the Commission had decided to grant the Petitioners' request for an informal conference to explore the possibility of a settlement in the matter and that the conference would be held on October 6, 2000 at the Commission's headquarters in Washington.

29. By communication dated October 3, 2000 the Petitioners confirmed their attendance at the October 6, 2000 settlement meeting in Washington and delivered a "Summary of Information Relevant to Petitioners' Position and Proposal" for the meeting. Also by letter dated October 3, 2000 the State informed the Commission that its preparations for the meeting, which included extensive consultations with other agencies in the US government, was not yet complete and requested a postponement of the meeting. The Commission decided to proceed with the October 6, 2000 meeting, which was presided over Commissioner Peter Laurie and which was attended by Ms. Carrie Dann and her representatives Messrs. James Anaya, James Stroud and Steven Tullberg. As of the date of this report, the Commission had not received any further solicitations from the parties to facilitate a friendly settlement of the matter.

D. Amici Curiae

30. On December 9, 1997 attorney Thomas E. Luebben Esq. requested permission to intervene in support of the Danns' proceeding before the Commission on behalf of the Yomba Shoshone Tribe, another tribe of the Western Shoshone nation. Further, by letter dated March 17, 1998 the Petitioners requested that the Commission permit the Tomba Shoshone Tribe to intervene in support of the Danns' case as a co-petitioner. On September 22, 1998 the Yomba Shoshone Tribe forwarded a brief to the Commission which they claim supports the Danns' position, and by communication dated September 27, 1999 the representatives of the Yomba tribe clarified that they wished their involvement in the proceedings to be considered in the nature of an amicus curiae.

31. By letters dated September 24 and 27, 1999 the Ely Shoshone Tribe similarly requested permission to intervene in the present proceedings as amicus curiae, and by communication dated September 24, 1999 the Petitioners informed the Commission on behalf of the Danns that they consented to the intervention of the Yomba and Ely Tribes as amici curiae.

32. In addition, by communication dated May 12, 2000 and received by the Commission on May 22, 2000 the Western Shoshone National Council delivered to the Commission an "Amicus Brief" supporting the Danns' position in the case, and subsequently confirmed by letter dated July 31, 2000 that they sought to intervene in the proceeding only as amicus curiae but claimed to preserve the right to submit in the future an appropriate petition regarding alleged human rights violations specific to it and its citizens.

33. Similarly, in a letter dated July 19, 2001 Michael H. Blackeye, Chairman of the Duckworth Shoshone Tribe, requested leave of the Commission to intervene as amicus curaie in the Danns' proceeding and adopted the points set forth and the arguments made in the brief of the Yomba Shoshone Tribe submitted to the Commission in September 1999.

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34. After having reviewed the requests for intervention set forth above and the related amici briefs, the Commission considered that they essentially reiterated arguments already presented by the Petitioners and accordingly did not require further processing in these proceedings.

III. POSITIONS OF THE PARTIES

A. Position of the Petitioners

35. In their initial petition and subsequent observations, the Petitioners have contended that the State is responsible for violations of the rights of Mary and Carrie Dann under Articles II (right to equality before the law), III (right to religious freedom and worship), VI (right to a family and to protection thereof), XIV (right to work and to fair remuneration), XVIII (right to a fair trial) and XXIII (right to property) of the American Declaration in respect of their use and occupancy of the Western Shoshone ancestral lands.

36. With respect to the factual circumstances of their claims, the Petitioners state that the Danns are members of the Western Shoshone aboriginal people who reside on a ranch in the rural community of Crescent Valley, Nevada. According to the petition, the Danns together with other members of their extended family in the Dann band occupy, hunt, graze and otherwise use lands (the "Dann lands") that are within the larger ancestral territory of the Western Shoshone people. This ancestral territory is alleged to encompass not only the ranch upon which the Danns live but rangelands and other property principally in the state of Nevada (the "Western Shoshone ancestral lands").

37. In this connection, the Petitioners indicate that relations between the Western Shoshone and the United States government continue to be regulated by the 1863 Treaty of Ruby Valley which was ratified by the United States in 1866 and proclaimed on October 21, 1869, [FN2] and which constituted a peace treaty between the United States and the Western Shoshone people.

[FN2] 18 U.S. Stat. 689.

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38. The Petitioners contend that the Danns have used and occupied the Western Shoshone ancestral lands since time immemorial and that the family ranch is the Danns' sole means of support, where all of their needs are met by the sale of their livestock, goods and produce to neighboring Western Shoshone and to non-Indians.

39. The Petitioners also claim that from 1863 to the present the United States has steadily expropriated parts of the Western Shoshone ancestral lands to the benefit of government and non-Indians, and that without sufficient money, education and legal assistance the Western Shoshone have traditionally been unable to mount effective opposition to the government's encroachment and erosion of their land base. With respect to the Dann lands in particular, the Petitioners claim that the use by the Danns and other Western Shoshone of these lands was undisturbed and unchallenged until the early 1970's when the United States government through the Department of the Interior began taking or threatening actions to impede the Danns and other

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Western Shoshone from using and occupying lands that are within their ancestral territory. In this manner, the Petitioners say that the Danns are being wrongfully dispossessed of their ancestral homelands including portions upon which they depend for their living.

40. These State actions have included the initiation of trespass actions against the Danns demanding that the Danns remove their livestock from disputed lands and pay significant fines, and the issuance of "Notices of Intent to Impound" in respect of "unauthorized livestock grazing upon public land." They have also included gold prospecting within the traditional Western Shoshone ancestral lands which is said to have been permitted or acquiesced in by State officials. As part of this prospecting, mining companies are said to have been digging the earth, pumping scarce water, and are poised to take ownership or control of the area by operation of U.S. mining legislation or land exchanges with the U.S. government. The Petitioners claim that this mining activity has already affected the Danns' use of their ancestral lands and has contaminated the ground water in and around Crescent Valley, and that the activity threatens even greater damage as it extends closer to the Danns' household.

41. Further the Petitioners state that the Danns and other members of the Western Shoshone have been impeded from their traditional subsistence hunting by officials of the state of Nevada, who are said to have relied upon the United States' denial of Western Shoshone title to ancestral land to refuse to accommodate traditional Western Shoshone hunting practices. Rather, State officials have sought out and arrested members of the Western Shoshone people including members of the Dann band who do not comply with the state hunting laws and regulations.

42. As examples of these activities, during the October 10, 1996 hearing before the Commission the Petitioners claimed that the United States had impounded and sold the Danns' livestock on two occasions, 161 horses in March 1992 and 269 horses in November 1992. The Petitioners also claimed that a mining company, Oro Nevada Mining Company, was claiming some of the Western Shoshone ancestral lands under a law that permits mining companies to acquire land belonging to the U.S. government. The company is also said to have issued a formal notice that it would drill test holes in several areas on the Danns' grazing lands and that all of the range land used by the Danns was subject to actual gold mining claims.

43. According to the Petitioners, in taking these actions the State has relied upon a 1966 ruling by the ICC, a statutorily-based administrative tribunal established by the State under the Indian Claims Commission Act to determine aboriginal land claims. In this ruling, which was subsequently upheld by the U.S. Court of Claims, the ICC is said to have adopted an uncontested stipulation that Western Shoshone title had been extinguished some time previously through by acts of "gradual encroachment" by non-Indians. It is on this basis that the Petitioners claim that the State denies the continuing existence of Western Shoshone legal rights to ancestral land. As outlined below, however, the Petitioners contest the propriety and validity of these proceedings, on the basis that the issue of whether the Western Shoshone rights were truly extinguished was not actually litigated by the ICC or by the US judiciary. They also claim that Western Shoshone individuals and groups were not permitted to intervene in the proceedings to contest the presumed extinguishment of title and that the Western Shoshone people have refused to accept the money awarded by the ICC.

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1. Right to Property

44. The Petitioners contend that the State is responsible for violations of the Danns' right to property under Article XXIII of the Declaration, by reason of the limitation that the State has placed on the Danns' occupation and use and of the Western Shoshone ancestral lands. Article XXIII of the Declaration provides as follows:

Every person has a right to own such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home.

45. In particular, the Petitioners claim that the Danns and other Western Shoshone people have properly laid claim to the Western Shoshone ancestral lands through traditional patterns of use and occupancy of those lands and its natural resources. The Petitioners refer to this as a "customary land tenure system" and assert that this is a form of property that is recognized as original or Indian title by the law of the United States and other common law jurisdictions, as are "free standing" rights to fish, hunt, gather, or otherwise use resources or have access to lands. [FN3]

[FN3] Petitioners' Supplemental Brief on the Merits, dated March 2000, p. 8, n. 24, citing, inter alia, F. Cohen, Handbook of Federal Indian Law 442-443, 491 (1982 ed.); United States ex rel. Hualapai Indians v. Santa Fe Pacific Railroad, 314 U.S. 339 (1941); R. v. Adams (1996) 110 C.C.C. (3d) 97 (S.C.C.) (Can.); Amodu Tijani v. Secretary, Southern Nigeria, 2 A.C. 399 (P.C. 1921).

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46. In this context, and independent of the common law of domestic jurisdictions, the Petitioners contend that the right to property under Article XXIII of the Declaration, when considered in light of the fundamental principle of non-discrimination, should be interpreted to encompass those forms of landholding and resource use that derive from the traditional land use and occupancy patterns of an indigenous people such as the Danns. In support of this contention the Petitioners cite the International Labor Organization Convention (Nº 169) concerning Indigenous and Tribal Peoples, [FN4] Article 14 of which provides as follows:

[FN4] International Labor Organization Convention (Nº 169 of 1989) concerning Indigenous and Tribal Peoples in Independent Countries, entered into force Sept. 1991.

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1. The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect.

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2. Governments shall take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession.
3. Adequate procedures shall be established within the national legal system to resolve land claims by the peoples concerned.

47. The Petitioners similarly rely upon Article XVIII of the proposed American Declaration on the Rights of Indigenous People [FN5] and Article 26 of the Draft United Nations Declaration on the Rights of Indigenous Peoples, [FN6] both of which affirm that aboriginal peoples have the right to full recognition of their laws, traditions and customs, land tenure systems and institutions for the development and management of resources, and the right to effective measures by states to prevent any interference with, alienation of, or encroachment upon these rights.

[FN5] Proposed American Declaration on the Rights of Indigenous People, approved by the IACHR at its 1333rd sess. On Feb. 26, 1997, OEA.Ser.L/V/II.95, doc. 7 rev., 1997, at 654-676.
[FN6] Draft United Nations Declaration on the Rights of Indigenous Peoples, adopted by the U.N. Sun-commission on Prevention of Discrimination and Protection of Minorities, 26 August 1994, E/CN.4/Sub.2/1994/45, at 105.

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48. In the circumstances of Mary and Carrie Dann, the Petitioners claim that they have established facts demonstrating the existence of the Western Shoshone property rights on the basis of traditional use and occupancy of land and that the Danns are the beneficiaries of these rights as members of the Western Shoshone people. The Petitioners also contend that they have established facts indicating that the State has interfered with those rights, including through actions of federal and state government agencies that have prevented the Danns and other Western Shoshone people from using and occupying Western Shoshone ancestral lands according to traditional patterns. On this basis, the Petitioners submit that the State has violated the Danns' right to property under Article XXIII of the American Declaration as that right is properly interpreted and applied in relation to aboriginal and other customary land tenure systems.

49. The Petitioners also point out in this respect that the State has not disputed the history of traditional land tenure that is alleged to give rise to Western Shoshone aboriginal title or that its agents and those of the state of Nevada are engaged in acts that impede the ability of the Danns to continue to occupy and use the lands in question, but rather assert that Western Shoshone property rights were extinguished as a result of statutorily-based claims proceedings. The Petitioners dispute the propriety of this assertion, however, on the ground that the Western Shoshone property rights have not been extinguished even as a matter U.S. law and, moreover, challenge the validity of this purported extinguishment itself as a violation of the Danns' fundamental human rights.

50. The Petitioners claim in particular that U.S. courts have never ruled conclusively on the extinguishment of Western Shoshone property rights but rather have disposed of the Danns domestic claims based upon those courts' interpretations of the Indian Claims Commission Act

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in a manner which barred the Danns from asserting Western Shoshone title in domestic judicial proceedings. According to the Petitioners this conclusion may be drawn from the judicial history of the Danns' domestic judicial proceedings.

51. In this respect, the Petitioners point out that the U.S. Court of Appeals for the Ninth Circuit, which was the highest U.S. court to examine and rule on substantive Western Shoshone land rights, actually concluded that Western Shoshone land rights "had not been extinguished as a matter of law by application of the public lands act, by creation of the Duck Valley Reservation, or by inclusion of the disputed land in a grazing district and issuance of a grazing permit pursuant to the Taylor Grazing Act." While the U.S. Supreme Court subsequently reversed that court's finding, it did so not on the basis of a finding of actual extinguishment of Western Shoshone title, but rather on a statutory interpretation of the Indian Claims Commission Act that barred the assertion of Western Shoshone title because of the Indian Claims Commission monetary award for the presumed extinguishment of Western Shoshone title in the collateral claims proceedings. [FN7]

[FN7] Petitioners' Supplemental Brief on the Merits, supra, p. 9, citing United States v. Dann, 706 F. 2d 919, 927-933 (9th Cir. 1983), reversed on other grounds, 470 U.S. 39 (1985).

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52. In respect of the State's contention that the Danns failed to pursue "individual aboriginal title" to the lands in question before domestic courts, the Petitioners explain that they have not pursued such proceedings because doing so would have separated them from the treaty-based Western Shoshone nation claim, the position that would preserve the land and culture of the Western Shoshone people as a whole. At base, they argue that to pursue such a claim would undermine the aboriginal rights and treaty-recognized basis of title that forms the essential historical, cultural and political foundation for the Western Shoshone and other indigenous nations and tribes. [FN8]

[FN8] Petitioner's observations of January 25, 1995, pp. 6-7.

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2. Right to Equality under the Law

53. The Petitioners also challenge the State's interference with the Danns' occupation and use of the Western Shoshone ancestral lands as discriminatory contrary to Article II of the Declaration, which protects the right to equality before the law. [FN9] In particular, the Petitioners assert that the State is obliged to protect the Danns' aboriginal property rights and to accord those rights the same degree of protection that it provides for the protection of the property rights of non-Indians but has failed to do so.

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[FN9] Article II of the American Declaration reads: "All persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor."

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54. The Petitioners assert several grounds for their claim of discrimination. They first contend that the theory upon which the ICC determined the extinguishment of Western Shoshone, namely "gradual encroachment" by non-indigenous settlers, miners and others, constitutes a nonconsensual and discriminatory transfer of property rights in land away from indigenous people who continue in possession of their land and in favor of non-indigenous interests. They claim that this is a "lawless concept that simply rewards trespassers and relieves the United States of its own legal obligation to uphold Indian land rights." [FN10] The Petitioners support their arguments in part with the findings of a seminar of experts convened by the United Nations that identified property transfers of this nature as part of a larger pattern of racial discrimination suffered by indigenous peoples. [FN11]

[FN10] Petitioners' petition of April 2, 1993, p. 21.

[FN11] Petitioners' Supplemental Brief on the Merits, supra, p. 10, citing Report of the United Nations Seminar on the Effects of Racism and Racial discrimination on the Relations Between Indigenous Peoples and States, E/CN.4/1989/22, HR/PUB/89/5, at 5 (1989).

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55. The Petitioners identify as a further source of discrimination the absence of substantive protections for indigenous property rights, including those rights derived from Western Shoshone aboriginal title, that are equal to the protections accorded to non-indigenous forms of property. In particular, they indicate that under U.S. law, including the Fifth Amendment to the U.S. Constitution and other federal and state laws, the taking of property by the government ordinarily requires a valid public purpose and the entitlement of the owners to notice, a judicial hearing and fair compensation based upon the fair market value of the property taken. [FN12] The Petitioners argue in contrast that the Western Shoshone ancestral lands were taken in the absence of any of these prerequisites, a circumstance that the Petitioners claim is consistent with the discriminatory standards applied by the U.S. to indigenous peoples' property in general as reflected in judicial decisions such as Tee-Hit-Ton Indians v. United States. [FN13] In the Danns' circumstances, the Petitioners claim to have stated facts that indicate that no public purpose has been established for the purported extinguishment of the Western Shoshone land title and that the 1979 monetary award that resulted from the ICC claims proceedings was calculated on the basis of a valuation of the land as of July 1, 1872, the presumed extinguishment date, and that no interest was calculated into the award. [FN14] On this basis, the Petitioners contend that the Western Shoshone were not provided with just compensation that is otherwise required for the taking of non-indigenous property.

[FN12] Petitioners' petition of April 2, 1993, p. 21.

[FN13] Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 281, 285 (1955) (stating, inter alia, that no Supreme Court case "has ever held that taking of Indian title or use by Congress required

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compensation," because "Indian occupation of land without [prior explicit] government recognition of ownership crates no rights against or extinction by the United States protected by the Fifth Amendment or any other principle of law."
[FN14] Petitioners' petition dated April 2, 1993, pp. 16-17.
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56. Also according to the Petitioners, discriminatory treatment of indigenous property is further indicated by the facts relating to the procedure by which the United States determined extinguishment of and compensation for Western Shoshone ancestral lands, which the Petitioners claim has failed to protect or support indigenous land rights to the same extent as other property rights. In the circumstances of the Danns and other members of the Western Shoshone, the Petitioners contend that during the ICC proceedings by which the State claims the Western Shoshone peoples' rights were extinguished, only one small group was actually represented before the ICC and subsequently before the U.S. Court of Claims. They also claim that other Western Shoshone, including the Danns, were not permitted to intervene in the ICC proceedings. Moreover, those Western Shoshone claimants who were represented before the ICC were prevented from dismissing their lawyer when they decided that he was not acting in their best interest.

57. The Petitioners contrast this situation to the requirements of general U.S. property law, according to which property rights ordinarily can only be extinguished or condemned through "careful, rigorous proceedings in which all interested parties are entitled to be heard through counsel of their own choosing." [FN15] The Petitioners therefore complain that the U.S. government is now attempting to hold the Danns and other Western Shoshone people to the terms negotiated by a lawyer in a proceeding in which they were denied the right to participate, in violation of the international standard of equality under the law.

[FN15] Petitioners' Supplemental Brief of the Merits, supra, p. 12.
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58. In support of their contention that this treatment constitutes discrimination for the purposes of Article II of the Declaration, the Petitioners cite decisions and proclamations of domestic and international bodies. These include a decision of the Australian High Court in which a majority of that Court concluded that a legislative measure targeting native title for legal extinguishment to the exclusion of non-indigenous property rights was racially discriminatory and therefore invalid. [FN16] The Petitioners also cite statements by the UN Committee on the Elimination of Racial Discrimination urging state parties to the Convention on the Elimination of All Forms of Racial Discrimination to "recognize and protect the rights of indigenous peoples to own, develop, control, and use their communal lands, territories and resources." [FN17] They point to one decision in particular under the Committee's early warning and urgent actions procedures, expressing concern over amendments to Australia's Native Title Act, which the Committee regarded as having created legal certainty for governments and third parties at the expense of indigenous title and as having failed to provide for effective participation by indigenous communities in the formulation of the legislative amendments. [FN18] In respect of the latter decision, the Petitioners argue that the lack of procedural and substantive protections

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for the Danns makes for an "equally compelling case of invidious discrimination that requires immediate attention."

[FN16] Id., p. 13, n. 40, citing Mabo v. Queensland [Nº 1] (1988) 166 C.L.R. 186.
[FN17] Id., citing CERD General Recommendation XXIII, on indigenous peoples, adopted 18 August 1997, CERD/C51/Misc.13/Rev.4 (1997).
[FN18] Id., pp. 13-14, citing CERD Decision (2)54 on Australia: Australia, CERD/C/54/Misc.40/Rev.2, para. 6 (18 March 1999); Additional Information pursuant to Committee Decision: Australia CERD/C/347 (22 January 1999).

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3. Right to Cultural Integrity

59. The Petitioners contend that the State's actions in relation to the Dann land and the Western Shoshone ancestral land more broadly violate the Danns' right to protection of cultural integrity, which they in turn claim is affirmed in the American Declaration through Article XXII (right to property), Article III (right to religious freedom), Article VI (right to family and protection thereof) and Article XIV (right to take part in the cultural life of the community). The Petitioners state in particular that the Commission has recognized the free exercise of these rights as "essential to the enjoyment and perpetuation of the culture of indigenous peoples." [FN19]

[FN19] Id., p. 14, citing IACHR, Report on the Situation of Human Rights in Ecuador, OEA/Ser.L/V/II.96, doc. 10 rev., April 24, 1997, at 103.

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60. In the circumstances of the Danns in particular, the Petitioners assert that the United States is actively attempting to deprive the Danns of their traditional lands. As the Western Shoshone culture is dependent upon the land and the natural resources upon it, the Petitioners argue that the State's actions are directly threatening the Danns' enjoyment of Western Shoshone culture. Among the acts that are said to threaten this deprivation are the issuance of civil and criminal penalty notices to the Danns for the use of their traditional lands, threats to confiscate the Danns' livestock, impediments to the gathering of subsistence foods, limits to their access to sacred sites, and the permission of private mining concessions and harmful military activities on traditional Western Shoshone lands, which activities have threatened the environment and destroyed available resources.

61. According to the Petitioners, these actions together with the State's insistence that Western Shoshone title has been extinguished, threatens to destroy Western Shoshone culture in violation of the American Declaration, as informed in particular by Article 27 of the International Covenant on Civil and Political Rights. Article 27 of the ICCPR states that "[i] in those States in which ethnic, religious, or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language." The Petitioners argue that the Commission itself has relied upon Article 27 of the ICCPR in

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affirming that international law protects minority groups, including indigenous peoples, in the enjoyment of all aspects of their diverse cultures and group identities, [FN20] and that for indigenous peoples in particular, the right to cultural integrity covers "the aspects linked to productive organization, which includes, among other things, the issue of ancestral and communal lands." [FN21] Also in this connection, the Petitioners cite general comments and decisions of the UN Human Rights Committee. These include the Committee's views in the case Ominayak, Chief of the Lubicon Lake Band of Cree v. Canada, in which it found Canada responsible for violating Article 27 of the ICCPR by allowing the provincial government of Alberta to grant leases for oil and gas exploration and for timber development within the ancestral territory of the Lubicon Lake Band. According to the Committee, this natural resource development activity compounded historical inequities to "threaten the way of life and culture of the Lubicon Lake Band."

[FN20] Id., pp. 14-15, citing The Miskito Case, Case 7964 (Nicaragua), IACHR, Report on the Situation of a Segment of the Nicaraguan Population of Miskito Origin, OEA/Ser.L/VII.62, doc. 10 rev. 3, at 76-78, 81 (1983); The Yanomami Case, Case 7615 (Brazil), IACHR, OEA/Ser.L/V/II.66, doc. 10 rev. 1, at 24, 31 (1985); Ecuador Report, supra, at 103-4. The Petitioners also rely upon Article VII of the Commission's Proposed Declaration on the Rights of Indigenous Peoples, which links indigenous cultures to the use and enjoyment of lands.
[FN21] The Miskito case, supra, at 81.

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62. Based upon these submissions, the Petitioners contend that the State is responsible for violations of the Danns' right to cultural integrity as protected through Articles III, VI, XIV and XXIII of the American Declaration.

4. Right to Self Determination

63. The Petitioners argue that the United States is also responsible for violations of the Danns' right to self determination as prescribed under international law. According to the Petitioners, the principle of self-determination means that "human beings, individually and collectively, have a right to be in control of their own destinies under conditions of equality." [FN22] The Petitioners contend that the State is responsible for violations of this principle in two respects, by depriving the Danns of their land and resources and therefore their means of livelihood, and by excluding the Danns from participating in decisions that affect their lands and natural resources.

[FN22] Petitioners' Supplemental Brief on the Merits, supra, p. 16, citing ICCPR, Article 1(1), which provides that "[a]ll peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social, and cultural development."

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64. In particular, the Petitioners argue that for indigenous peoples, the principle of self determination establishes a right to control their lands and natural resources and to be genuinely involved in all decision-making processes that affect them. In support of this contention the Petitioners refer to statements by the UN Human Rights Committee respecting the situation of indigenous peoples in Canada in which the Committee has emphasized "that the right to self-determination requires, inter alia, that all peoples must be able to freely dispose of their natural wealth and resources and that they may not be deprived of their own means of subsistence." [FN23]

[FN23] Id., p. 17, citing Concluding Observations of the Human Rights Committee: Canada, CCPR/C/79/Add.105, para. 8 (April 7, 1999).

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65. In the case of the Danns, however, the Petitioners submit that the United States has actively interfered with the Danns' enjoyment of their ancestral lands and is actively depriving the Danns and other Western Shoshone people of their means of subsistence by removing or attempting to remove their livestock from their traditional lands. The Petitioners also argue that the United States has failed to adequately consult with the Danns and other Western Shoshone people regarding any decision affecting the enjoyment of their ancestral lands. According to the Petitioners, the right to property affirmed in Article XXIII of the American Declaration would have little meaning for indigenous peoples if their property could be encumbered without due consultation, consideration, and in appropriate circumstances, just compensation by the state. Without a full and fair opportunity to be heard and to genuinely influence the decisions affecting them, the Petitioners argue that the Danns and other Western Shoshone groups are unable to exercise their right to self-determination as guaranteed by international law. [FN24]

[FN24] Id., p. 18, citing, inter alia, International Labour Organization Convention Nº 169 on Indigenous and Tribal Peoples, Article 15.2 of which provides: "In cases in which the State retains the ownership of minerals or sub-surface resources or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands."

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66. Based upon these submissions, the Petitioners argue that the State has violated, in regard to the Danns and other Western Shoshone, their rights to consultation, the enjoyment of their social and economic development, and their very subsistence, and therefore their right to self-determination.

5. Rights to Judicial Protection and Due Process of Law

67. The Petitioners contend that the State has denied the Danns their rights to judicial protection and to due process of law as affirmed by Article XVIII of the American Declaration

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and numerous other international instruments. The Petitioners argue that implicit in Article XVIII of the Declaration is the right to judicial procedures that accord with fundamental principles of fairness and due process of law. In support of their position, they cite several determinations by this Commission and by the Inter-American Court to the effect that the right to judicial protection extends beyond free access to and exercise of judicial recourse, such that, for example, it is necessary for the intervening judicial body to issue a conclusion based upon the merits of the claim that establishes the validity or invalidity of the legal position giving rise to the judicial resource before the judicial recourse can be said to be effective. [FN25]

[FN25] Id., at 21 citing, I/A Court H.R., Godinez Cruz Case, Judgment of January 20, 1989, (Ser. C), No, 5 (1989) at paras. 69-71; I/A Court H.R., Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 of the American Convention on Human Rights), Advisory Opinion OC-9/87 of Oct. 6, 1987, (Ser. A) Nº 9 (1987); I/A Court H.R., Fairen Garbi, Solis Corrales Case, Preliminary Objections, Judgment of June 26, 1987, (Ser. D) Nº 2 (1994), paras. 90-93.

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68. In the circumstances of the present case, the Petitioners submit that the Danns and other Western Shoshone people who sought to assert continuing Western Shoshone title to land were denied participation or adequate representation in the proceedings before the Indian Claims Commission, proceedings which resulted in a determination that Western Shoshone title was extinguished without there having been an opportunity to litigate or contest the theory of extinguishment advanced by the United States.

69. More particularly, the Petitioners indicate that during the 1950's, 60's and 70's proceedings took place before the Indian Claims Commission respecting the determination of any claims that the Western Shoshone may have to their ancestral lands. In these proceedings, the United States and the lawyer purporting to represent all of the Western Shoshone "conceded and formally stipulated" that the Western Shoshone land rights had been "extinguished" on July 1, 1872 under a theory of "gradual encroachment" by non-Native Americans. The Danns claim not to have authorized or participated in these proceedings and were not entitled to intervene to challenge the stipulation by the Western Shoshone attorney. The Petitioners also argue that nothing of significance occurred with respect to Western Shoshone land rights on July 1, 1872 and that the stipulation of this extinguishment date is pure fiction and, at base, only served to reach a compromise between the government's desire to minimize any payment for the land and the attorney's desire to maximize the payment and associated legal fees. [FN26]

[FN26] Petitioners' petition of April 2, 1993, p. 15.

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70. The ICC proceedings resulted in a final ruling on December 12, 1979 in which the ICC calculated an amount of compensation for the Western Shoshone people based upon a valuation of the property at the time previously stipulated, 1872. The Petitioners contend further that the attorney litigating the matter before the ICC was indeed an adversary of the Danns and the other

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Western Shoshone he purported to represent, entered into the stipulation in 1966 without the authorization of the Western Shoshone, and was in actuality representing the interests of the United States and his own interests in obtaining "handsome attorneys fees." [FN27] They also argue that the attorney, the U.S. government and the U.S. courts misled the Western Shoshone concerning the effect of their judgments on Western Shoshone land rights. [FN28]

[FN27] Petitioners' petition of April 2, 1993, p. 19.
[FN28] Petitioners' petition of April 2, 1993, pp. 19-20.

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71. In response to the State's contention that "open council meetings" were held by the attorney to consult the other members of the Western Shoshone, the Petitioners argue that these meetings were not democratically fostered and controlled by the Western Shoshone people and moreover were held eight years after the 1957 hearing on the land title question and three years after the ICC ruling on the issue of the title extinguishment. [FN29]

[FN29] Petitioners' response to the State's Observations, dated December 22, 1993, p. 13, n. 6.

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72. Other legal proceedings took place contemporaneously with and subsequent to the ICC ruling. This included an action brought by the United States in 1974 against the Danns in the Federal Court in the State of Nevada claiming that it owned the lands at issue and seeking damages from the Danns for trespass and an injunction preventing the Danns from grazing their livestock on what the State considered to be public lands. During the course of this litigation, the State argued that the Danns were bound by the stipulation reached between the United States and the lawyer in the ICC proceedings. The Trial Court subsequently issued a ruling in April 1980, four months after the ICC ruling on compensation, concluding that Western Shoshone title to their ancestral lands had been extinguished on December 12, 1979 by the ICC final judgment. On appeal, the Court of Appeals for the Ninth Circuit concluded that Western Shoshone title could not have been extinguished by the ICC proceedings, because even though the ICC had issued a final judgment, the Western Shoshone had not been paid the money awarded under the judgment. On further appeal, however, the U.S. Supreme Court concluded that the Western Shoshone had been "paid" the money award from the ICC proceedings, and that this payment took place when the U.S. Congress appropriated the funds and placed them in a U.S. Treasury account controlled by the Secretary of the Interior. The Petitioners note that the U.S. Supreme Court did not address their contentions regarding the propriety and fairness of the ICC proceedings or their outcome. The matter was remanded back to the Federal Court, which ultimately adopted the stipulated 1872 extinguishment date for the purposes of disposing of the proceedings.

73. In light of this judicial history, the Petitioners point out that the domestic courts ultimately disposed of proceedings regarding the Danns' interests in the Western Shoshone ancestral lands without determining the actual existence of historical acts of extinguishment or considering allegations of fraud in the collateral claims proceedings. Rather, while the Ninth

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Circuit Court of Appeal decided in the trespass action initiated by the United States against the Danns that Western Shoshone title had not actually been extinguished, [FN30] the Supreme Court reversed this decision on other grounds and ruled that the Danns were barred as a result of the judgment of the ICC and subsequent money award by the Court of Claims from asserting such title. [FN31] The Petitioners argue that the Supreme Court's ruling has prevented the Danns from asserting a defense of Western Shoshone aboriginal title against federal trespass actions and other impediments to their use and enjoyment of Western Shoshone ancestral lands, and have therefore deprived the Danns of adequate judicial protection.

[FN30] United States v. Dann, 706 F.2d 919 (9th Cir. 1983), rev'd on other grounds, 470 U.S. 39 (1985).
[FN31] Id.

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74. The Petitioners also contend in this regard that according to a decision of the Ninth Circuit Court of Appeals in the subsequent case of Western Shoshone National Council v. Molini, that Court extended the Supreme Court's decision in Dann to preclude the Danns from asserting hunting and fishing rights as part of aboriginal title, despite the fact that the ICC process clearly did not address the extinguishment of all Western Shoshone aboriginal and treaty rights. [FN32] Further, the Petitioners reject as insufficient any suggestion by the State that the "largely theoretical" remedy of possible judicial recognition of "individual aboriginal rights" as ineffective and inadequate. The Petitioners emphasize in this regard that the Danns are among the Western Shoshone Indians who as a whole exist as an indigenous nation or people in the sense that they comprise a discrete community bonded by ethnographic, cultural and political factors. Thus, it is the customary system of land tenure generated by the Western Shoshone people as a whole over centuries, rather than the Danns own individual land use patterns, that forms the foundation of the land rights asserted by the Danns. On this basis, the Petitioners argue that "individual aboriginal rights" do not provide a basis for the Danns to assert use and occupancy rights that derive from Western Shoshone title.

[FN32] Petitioners' Supplemental Brief on the Merits, supra, p. 21, citing WSNC v. Molini, 951 F.2d 200 (9th Cir. 1991), cert. denied, 506 U.S. 822 (1992).

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75. Accordingly, the Petitioners submit that the State has failed to provide the Danns with effective judicial remedies in violation of its international obligation to protect fundamental rights.

B. Position of the State

76. With respect to the merits of the Petitioners' claims, the State denies that it has violated the Danns' rights under the American Declaration. Indeed, the State argues that the matters raised by the Petitioners do not involve human rights violations, but rather involve lengthy litigation of land title and land use questions that have been and are still subject to careful

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consideration by all three branches of the United States government. In this connection, the State contends that the Danns' title to the lands at issue has been extinguished by lengthy litigation in the United States' courts, including the U.S. Supreme Court, and that compensation for the loss of title has been placed in a trust fund for the Danns and other members of the Western Shoshone people, pending development of a plan for the distribution of the funds.

77. The State first challenges the Petitioners' contention that they have been deprived of the ownership and use of lands in Nevada. The State argues that the Danns have title, ownership and possession of the lands constituting their ranch in Nevada which had been patented to their father, and that there has never been an effort by the State to remove the Danns from their ranch. [FN33] The State also indicates that as long as the Danns comply with the requirements of the Bureau of Land Management, they are eligible for a permit to graze their livestock on public lands.

[FN33] The State has argued in this regard that although the Petitioners contend that their land is not of adequate size to support their ranching operation, "this is clearly not a basis for alleging a human rights violation." State's observations of July 14, 1997, p. 17.

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78. The State claims in this regard that the Danns' late father, Dewey Dann, settled in an area of Nevada, established a ranch on the land, and acquired title to the land from the United States through a patent to use the land for farming and ranching. The State also maintains that it gave Mr. Dann a permit to graze his cattle on public lands until his death in the 1960's which authorized him to graze 170 cattle and 10 horses on federally owned land near their ranch that was shared by other ranchers in the area. The State claims that Mr. Dann complied with the permit and that it never interfered with the grazing of cattle by the Danns under the permit. [FN34] The State claims, however, that following their father's death, the Dann sisters began to graze a greater number of cattle than permitted under their permit, and that this excessive grazing damaged the range and interfered with other ranchers' uses of the public lands. The State claims that the BLM attempted to resolve the matter administratively with the Danns, but that these efforts failed and thus required the BLM to take impoundment and other formal actions to end the unauthorized grazing. [FN35]

[FN34] State's Observations dated September 9, 1993, p. 7.
[FN35] Id., p. 1.

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79. Also as part of the context of the Petitioners' claims, the State alleges that there is in actuality no entity known as the "Western Shoshone Nation", but rather that there are groups of Western Shoshone peoples that are recognized as tribes. Through an established process, the United States recognizes certain Native American groups, or "tribes," as sovereign nations, and as a consequence treats those tribes as having their own leadership or government and maintains government-to-government relations with them. Western Shoshone bands or tribes with this

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recognized status include the Ely Shoshone Tribe of Nevada and the Te-moak Tribe of the Yamba Reservation, but according to the State does not include the Dann band. [FN36]

[FN36] State's observations dated July 14, 1997, at 4.

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80. With respect to the status of the lands at issue in this case more generally, the State confirmed that U.S. courts recognize the doctrine of aboriginal title that permits Native Americans as tribes, or in some cases as individuals, to use and occupy their traditional homelands. [FN37] In the present case, however, the State emphasized that the U.S. courts ultimately concluded that Western Shoshone title has been extinguished and barred by the ICC proceedings. In addition, the United States recognizes that the Western Shoshone historically occupied an area that covers a large part of what is now the state of Nevada. This land was ceded to the United States by Mexico in 1848 by the Treaty of Guadeloupe Hidalgo, subject to the occupancy by Native Americans, and in 1863, the United States signed the "Treaty of Ruby Valley" with the Western Shoshone. Under the terms of that treaty, the United States and the Western Shoshone agreed to end hostilities and live amicably, and according to the State the treaty was not intended to acknowledge Shoshone title to lands covered by it. [FN38] Subsequent to this treaty, the United States claims that it began treating certain lands within the areas in question as public lands of the United States.

[FN37] State's observations dated September 9, 1993, p. 2.
[FN38] Id., p. 3.

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81. The State also claims that in the 1800's, more people in the United States began to move westward and settle new lands in the West, including the areas in the state of Nevada traditionally occupied by the Western Shoshone. This was accomplished in part through the granting to settlers by the United States of patents if the settlers took up permanent residence, established a farm or ranch, and met certain other requirements.

82. In light of this history, the State maintains that the Danns and other Western Shoshone lost any interest in the lands in question as a result of this encroachment by non-Native Americans, and that this determination was properly made through proceedings before the Indian Claims Commission, a quasi-judicial body established for the very purpose of determining Indian land claims issues. According to the State, Congressional legislation establishing the ICC was necessary in part because the doctrine of sovereign immunity historically barred Indians from suing the federal government for the loss of ancestral lands. The State clarified in this regard that according to the legislation that created the ICC, the Commission had jurisdiction to hear, among other claims, "claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant." [FN39] According to the State, the term "otherwise" in this provision included takings of lands by gradual encroachment of settlers and mining.

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[FN39] State's observations dated July 14, 1997, at 10-11, citing 25 U.S.C. § 70a(4) (repealed).
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83. In this connection, the State, in response to question put to it by the Commission during the October 10, 1996 hearing in this matter, [FN40] clarified that under U.S. law, two methods exist by which the government obtains title to property through the exercise of sovereign powers: "direct condemnation" and "inverse condemnation." In the former process, the State files a lawsuit to condemn the property of an individual to serve a public purpose, such as building a road. In the latter process, some official action by the United States for a public purpose other than the filing of a lawsuit, for example the flooding of property in connection with the building and filling of a dam, results in depriving an individual of the use or his or her property. In both of these instances, the United States awards just compensation. [FN41] According to the State, the ICC was specifically established to litigate and decide Indian claims on grounds that included inverse condemnations. The State further indicated that the Commission would generally do so in three stages: determining whether the tribe possessed aboriginal or other title to the area and whether such interest had been extinguished; determining the value of the area at the date of taking; and offsetting any funds that had been expended by the United States for the tribe. [FN42]

[FN40] Three questions in particular were put to the State during the October 10, 1996 hearing before the Commission to which it subsequently replied: 1) what is the current status of the award to the Western Shoshones? 2) What procedure is there in United States law for a taking of property? What is the justification for the taking? 3) What is the status of the petitioners' land now? What is the present situation?
[FN41] State's observations dated February 28, 1997.
[FN42] State's observations dated September 9, 1993, p. 4.
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84. In the case of the Western Shoshone, the ICC effectively found an inverse condemnation based upon the settlement of the West. This condemnation was effected for the public purpose of encouraging settlement and agricultural developments and constituted a deprivation of use of lands used by the Western Shoshone that required just compensation, which was ultimately awarded.

85. On the issue of compensation, the State clarified that the amount awarded to the Western Shoshone was $26,145,189.89, based upon 1872 values of approximately 15 cents per acre plus loss of gold and other resources. [FN43] At the time of the ICC's final judgment in August 1977, the ICC statute provided that the award would be deposited in the registry where it would earn interest until a distribution plan was agreed upon and approved by either the Department of the Interior, if reached within six months, or by Congress, if reached in more than six months. At the time of the State's September 1993 observations, no distribution plan had been developed. According to the State, this was due to the lack of agreement to the plan among the various participants. In the interim, the State indicates that the funds are being held in an interest bearing

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account and that once a distribution plan is approved, it will be presented to the United States Congress for approval, following which the award and interest will be distributed. [FN44]

[FN43] State's observations dated September 9, 1993, p. 6.
[FN44] State's observations dated September 9, 1993, p. 6.

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86. By the same submissions, the State disputes the Petitioners' contention that the proceedings before the ICC were a "sham" and that the Danns have been the subject of human rights violations because they personally have not had a full "trial" on the issue of whether the Western Shoshones still own the land which is now the present-day state of Nevada. According to the State, the ICC process transpired as follows. In 1951 the Temoak band of Western Shoshone filed a petition before the ICC seeking compensation for the taking of large areas of Western Shoshone land in California and Nevada. In 1962 the ICC ruled that the Indians' aboriginal title to the California property had been extinguished in March 1853 and that the amount of compensation could be established based upon that date. It also ruled in 1962 that the Indians had continuously used and occupied 22 million acres of Nevada land until their way of life was disrupted and they were deprived of their lands by "gradual encroachment" by white settlers and others and the acquisition, disposition or taking of their lands by the United States for its use and benefit and that of its citizens. During September and October 1965, counsel for the Temoak Bands held open council meetings at four locations in the Western Shoshone territory. All of the Western Shoshone were given the opportunity to attend and vote to elect an 8-member claims committee, which used a loan from the U.S. government to hire an expert appraiser to provide testimony to the ICC regarding the valuation of the lands taken. The vote to establish the committee and hire the expert appraiser was 219 in favor and 17 opposed. The expert was subsequently hired and the testimony provided to the ICC.

87. The State also contends that because the encroachment had been gradual, there was no specific historical, legal or administrative event to mark the extinguishment of Western Shoshone tribal aboriginal title to the lands in question. Thus, in 1966 counsel for the Western Shoshone and the U.S. government agreed to stipulate that July 1, 1872 would be taken as the valuation date for the Shoshone lands in Nevada. The ICC then began to determine the value of the land at the time it had been taken and after a valuation trial held that the Indians were entitled to approximately $26 million in compensation, including approximately $4.6 million in compensation for minerals that had been removed from the land prior to 1872. In March 1974 the offset issues were tried and submitted to the ICC. In April 1974 another Western Shoshone group, the Western Shoshone Legal Defense and Education Association, which included the Danns, attempted to intervene in the proceedings and argued that the tribe still had title to approximately 12 million acres of Nevada land, thereby contesting the ICC's finding that this title had been extinguished. [FN45]

[FN45] State's observations dated September 9, 1993, at 4-5.

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88. The State further contends that regardless of whether there was a trial on the status of title to Western Shoshone ancestral lands, a final decision was reached by the ICC that the Western Shoshone had been deprived of their lands as of 1872. The State also argues that the U.S. Supreme Court recognized this decision and on this basis prevented the Danns from relying upon the non-extinguishment of Western Shoshone land rights as a defense in the proceedings brought against them by the United States. [FN46] The State argues that merely because the Danns disagree with the final decision of the ICC and believe it to be wrong does not mean that the decision is incorrect.

[FN46] State's observations dated July 14, 1997, at 10.

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89. With regard to the Petitioners' complaints as to the Danns' lack of representation before the ICC, the State claims that this issue was raised before and addressed by the ICC, and that the ICC legislation itself addressed who among the many Shoshone Indians was qualified to represent the interests of all of the Shoshone Indians. In particular, the ICC Act provided for representation by a tribal organization recognized by the Secretary of the Interior where one existed unless fraud or collusion could be demonstrated, and that the Western Shoshones were represented by such an organization, namely the Temoak Band. [FN47] As suggested above, the State claims that the Danns were kept fully apprised through regular meetings held with members of the tribe, including the Danns, and notes in this regard that the Court of Claims rejected any allegations of wrongdoing by the attorneys who represented the Temoak band based upon the absence of any concrete evidence supporting such allegations. The State also argues that according to the U.S. Court of Claims, the ICC proceeding was not in the nature of a class action in which every individual interest need be addressed, but rather that the proceeding involved a group claim and that if there were allegations that the group had been improperly represented, "then at least, the members claiming to represent the majority interest are required to make their position formally known to the Commission and the other parties as soon as possible–and not after much work has been done, and years have passed." [FN48] The State further contends that while the ICC was not free to provide any compensation other than damages, it was free to find that the Shoshone title to the land had not been extinguished. According to the State, however, the ICC found that the Indians no longer exercised sufficient occupancy and control over the lands in question to retain aboriginal title and that the U.S. government had asserted enough authority over the lands to constitute a direct extinguishment of any pre-existing rights. [FN49]

[FN47] State's observations dated September 9, 1993, p. 5.
[FN48] State's observations dated September 9, 1993, p. 5-6, citing Western Shoshone Legal Defense and Education Association v. United States, 531 F.2d 495 at 504 (Ct. Cl.).
[FN49] Id.

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90. Further, while the State recognizes that the Temoak Band itself subsequently dismissed their attorney, challenged the ICC's extinguishment finding based upon an argument of

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collusion, and attempted to stay the proceedings on this basis, the ICC rejected this claim, and the Court of Claims affirmed, on the basis that the attorney had not misled the Indians as to the nature and scope of the ICC proceedings and that the claims of collusion were not adequately supported. [FN50] The State also argued in this regard that although the Danns and other Western Shoshones were not able to contend before the ICC proceeding that the land "should be quieted" in the tribe's name and that the tribe still owned the land, such a bar was not unique to claims by Native Americans at the time and that non-Native Americans bringing actions claiming an interference with their property faced the same dilemma. While today the United States does permit actions to be brought against it to quiet title to lands, these claims are still subject to limitations and even then, lands of Native Americans are specifically exempted. [FN51]

[FN50] State's observations dated September 9, 1993, at 5; State's observations dated July 14, 1997, at 13, citing Western Shoshone Legal Defense and Educational Association v. United States, 35 Ind. Cl. Comm. 457 (1975), aff'd 531 F.2d 495 (Ct. Cl. 1976), cert. denied, 429 U.S. 885 (1976).
[FN51] State's observations dated February 28, 1997.

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91. The State therefore argues that in effect, the Petitioners are seeking to have the Commission second-guess decisions made many years ago by their fellow Western Shoshone and their attorney in deciding to seek compensation rather than litigate land title rights, by the ICC in its handling of the matters, and by U.S. courts that endorsed the ICC decision. [FN52]

[FN52] State's observations dated April 18, 1994, p. 7.

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92. A further argument proposed by the State asserts that the Danns could pursue a claim before domestic courts based upon "individual tribal aboriginal title." The State notes in this regard that the U.S. Supreme Court in dispositively rejecting the Danns' claims in 1985 indicated that the Danns might have been able to claim rights to some lands by asserting a theory of individual aboriginal rights, and that while the Danns initially pursued this course of action, in 1991 they voluntarily withdrew this claim. [FN53]

[FN53] State's observations dated September 9, 1993, p. 2.

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93. Specifically with respect to the Petitioners' allegation that the United States is responsible for a violation of the right to property under Article XXIII of the American Declaration, the State contends that this provision of the Declaration is concerned with the rights of an individual and not of a separate governmental entity such as an Indian tribe. [FN54] The State also argues more generally that the Declaration is based upon individual rights as opposed to those of groups such

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as the Western Shoshone and therefore does not provide a proper basis for the Petitioners' complaints.

[FN54] State's observations dated July 14, 1997, at 4.

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94. To the extent that the Petitioners purport to rely upon the American Convention, the State emphasizes that the United States is not a party to the Convention and is therefore not bound by it, and that in any event the Convention, like the Declaration, is concerned with the rights of individuals and not entities such as Western Shoshone tribes. Similarly, to the extent that the Petitioners rely upon the Proposed American Declaration on the Rights of Indigenous People, the State argues that the Declaration has not been adopted, is and will continue to be the subject of government comments, is not binding, and therefore does not form a proper basis for the Petitioners' complaints. The State takes a like approach to the Petitioners' reliance upon the ILO Convention (Nº 169) concerning Indigenous and Tribal Peoples in Independent Countries, which the United States also has not ratified.

IV. ANALYSIS

A. Application and Interpretation of the American Declaration of the Rights and Duties of Man

95. The Petitioners claim that the State has violated the rights of the Danns under Articles I, XVIII, and XXVI of the American Declaration of the Rights and Duties of Man. As the Commission concluded in its admissibility report in this matter, the Commission is competent to determine these allegations as against the United States. The State is a Member of the Organization of American States that is not a party to the American Convention on Human Rights, as provided for in Article 20 of the Commission's Statute and Article 23 of the Commission's Rules of Procedure, and deposited its instrument of ratification of the OAS Charter on June 19, 1951. [FN55] The events raised in the Petitioners' claim occurred subsequent to the State's ratification of the OAS Charter. The Danns are natural persons, and the Petitioners are authorized under Article 23 of the Commission's Rules of Procedure to lodge the petition on behalf of the Danns.

[FN55] Article 20 of the Statute of the IACHR provides that, in respect of those OAS member states that are not parties to the American Convention on Human Rights, the Commission may examine communications submitted to it and any other available information, to address the government of such states for information deemed pertinent by the Commission, and to make recommendations to such states, when it finds this appropriate, in order to bring about more effective observance of fundamental human rights. See also OAS Charter, Articles 3, 16, 51, 112, and 150 of the OAS Charter; I/A Court H.R., Advisory Opinion OC-10/89 Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights, July 14, 1989, Ser. A Nº 10 (1989), paras. 35-45;

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I/A Comm. H.R., James Terry Roach and Jay Pinkerton v. United States, Case 9647, Res. 3/87, 22 September 1987, Annual Report 1986-87, paras. 46-49.

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96. In addressing the allegations raised by the Petitioners in this case, the Commission also wishes to clarify that in interpreting and applying the Declaration, it is necessary to consider its provisions in the context of the international and inter-American human rights systems more broadly, in the light of developments in the field of international human rights law since the Declaration was first composed and with due regard to other relevant rules of international law applicable to member states against which complaints of violations of the Declaration are properly lodged. [FN56] The Inter-American Court of Human Rights has likewise endorsed an interpretation of international human rights instruments that takes into account developments in the corpus juris gentium of international human rights law over time and in present-day conditions. [FN57]

[FN56] See I/A Court H.R., Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights, Advisory Opinion OC-10/89 of July 14, 1989, Inter-Am.Ct.H.R. (Ser. A) Nº 10 (1989), para. 37 (pointing out that in determining the legal status of the American Declaration, it is appropriate to look to the inter-American system of today in the light of the evolution it has undergone since the adoption of the Declaration, rather than to examine the normative value and significance which that instrument was believed to have had in 1948). See also ICJ, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, p. 16 ad 31 stating that "an international instrument must be interpreted and applied within the overall framework of the juridical system in force at the time of the interpretation").

[FN57] Advisory Opinion OC-16/99, supra, para. 114, citing, inter alia, the decisions of the European Court of Human Rights in Tryer v. United Kingdom (1978), Marckx v. Belgium (1979), and Louizidou v. Turkey (1995).

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97. Developments in the corpus of international human rights law relevant to interpreting and applying the American Declaration may in turn be drawn from the provisions of other prevailing international and regional human rights instruments. This includes in particular the American Convention on Human Rights which, in many instances, may be considered to represent an authoritative expression of the fundamental principles set forth in the American Declaration. [FN58]

[FN58] See IACHR, Report of the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System, Doc. OEA/Ser.L/V/II.106, Doc. 40 rev. (February 28, 2000), para. 38; IACHR, Garza v. United States, Case 12.275, Annual Report of the IACHR 2000, paras. 88, 89 (confirming that while the Commission clearly does not apply the American Convention in relation to member states that have yet to ratify that treaty, its provisions may well be relevant in informing an interpretation of the principles of the Declaration).

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98. It is in light of these principles that the Commission will consider and apply the relevant provisions of the American Declaration in the present case.

B. Pertinent Facts

99. Before undertaking an analysis of applicable human rights norms and principles in the context of the Danns' complaints, the Commission considers it instructive to set forth its findings as to the pertinent background facts in this matter.

1. The Western Shoshone People and Mary and Carrie Dann

100. According to the observations of both the Petitioners and the State in this matter, the Western Shoshone "people" or "nation" constitutes a collective of individuals of native descent who have traditionally occupied the vast and arid territory of approximately 24,000,000 acres that is now primarily the state of Nevada in the United States. There appears to be no dispute between the parties as to the indigenous status of the Western Shoshone or of their historical occupation and use of this territory and its resources. Moreover, the parties agree that at some point the Western Shoshone had title to this territory as their ancestral lands. [FN59] Rather, in the Commission's estimation, the point of contention in this case involves the question of whether any or all of those property rights subsist and the proper method of determining and respecting any such rights.

[FN59] See similarly U.S. v. Dann, 706 F.2d 919 at 923 (9th Cir. 1983) (confirming that in the proceedings before the U.S. federal courts, the U.S. did not dispute the fact that the Western Shoshone at one time held aboriginal title to the lands in question).

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101. Also according to the record in this matter, the Western Shoshone nation is comprised of numerous relatively decentralized bands or tribes, including the Temoak Shoshone Band, the Ely Shoshone Band, and the Yomba Shoshone Band. Each band is comprised primarily of groups and individuals who have an extended family relationship and who have traditionally occupied the same area within the Western Shoshone ancestral territory.

102. The Western Shoshone and the U.S. government are parties to an existing treaty, the Treaty of Ruby Valley of 1863. [FN60] The Petitioners claim that under this treaty, the United States recognized certain Western territories as "Western Shoshone country" but granted the United States certain privileges such as building a railway to California, engaging in mining, and establishing mining towns and settlements. Moreover, the Petitioners contend that an encroachment by the U.S. on Western Shoshone territory transpired in the late 19th and early 20th centuries and that this occurred in violation of the terms of the Treaty of Ruby Valley.

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[FN60] Treaty of Ruby Valley 1863 (Treaty Between the United States of America and Western Bands of Shoshone Indians, ratified by the US in 1866, and proclaimed on October 21, 1869, 18 Stat. 689).

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103. In terms of the relation of the Western Shoshone to their ancestral lands, the Petitioners have contended the existence of a system of aboriginal land title that has historically been communal in nature and based upon land and resource use patterns. These patterns have been influenced by the fact that the Western Shoshone bands live in sparsely populated communities located far from each other in the vast territory and that in order to sustain themselves, bands have hunted, fished, and raised cattle and horses, and engaged in commerce with their neighbors. The State has not specifically contested this characterization of the Western Shoshone's traditional occupation and use of their ancestral lands.

104. With respect to the Dann family in particular, the parties have indicated that the Danns live on a ranch on Dann band land close to the small rural community of Crescent Valley, Nevada, where they raise livestock. Their ranch is the Danns' sole means of support, as they raise their own food and all of their needs are met by the sale of livestock, goods and produce to neighboring Western Shoshone and to non-Indians. The parties have also indicated that the Dann band is not among the federally-chartered Western Shoshone tribes with which the United States government maintains official relations. There appears to be no dispute, however, that the Dann band, and the Dann sisters themselves, are considered a part of the Western Shoshone people who have traditionally occupied a particular region of the Western Shoshone ancestral territory, and as such share in the history and status of the Western Shoshone as an aboriginal people. [FN61] Similarly, the Petitioners have claimed, and the State has not contested, that the Dann family has traditionally occupied and used a region broader than their individual ranch and that this constitutes part of the Dann Band land.

[FN61] The State has not, for example, suggested that the Danns would not be entitled to share in the distribution of funds awarded by the ICC to the Western Shoshone people in 1979.

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2. U.S. Domestic Process for Determining Indigenous Land Claims – the Indian Claims Commission

105. As the possible subsistence of Western Shoshone rights in their ancestral lands lies at the heart of the dispute before it, the Commission considers it necessary to review the manner in which the State has purported to determine and accommodate those rights.

106. The information before the Commission indicates that in 1946, the U.S. government created a specific administrative mechanism for determining and compensating Indian land claims, in the form of the Indian Claims Commission established under the Indian Claims Commission Act. [FN62] Authorities suggest that the ICC was created with two principal purposes, to provide a mechanism through which Congress could transfer its authority to determine the merits of Native American land claims in the face of the doctrine of sovereign

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immunity under U.S. law, and to dispose of those claims with finality. [FN63] The Commission was dissolved on September 30, 1978 pursuant to paragraph 70(v) of its statute.

[FN62] Indian Claims Commission Act, 60 Stat. 1055, 25 U.S.C. § 70a-v.
[FN63] US v. Dann, 470 U.S. 36 at 45. The doctrine of sovereign immunity under US law historically barred Indians from suing the federal government for the loss of ancestral lands unless Congress passed a law specifically permitting such claims. State's observations dated July 14, 1997, pp. 10-11.

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107. According to paragraph 70(a) of the ICC Act, the jurisdiction of the ICC extended only to claims accruing before August 13, 1946 and included the following authority:

The Commission shall hear and determine the following claims against the United States on behalf of any Indian tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska: […] (4) claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant.

108. Section 70(i) of the Act limited the presentation of claims to those filed by members of Indian tribes or tribal organizations registered by the Secretary of the Interior and paragraph 70(k) prescribed a limitation period for the presentation of claims, for a period of five years after August 13, 1946. The legislation also provided that lawyers representing claimants before the ICC could receive as payment up to 10% of the award they received for their Indian clients. According to the State, this provision was included in order to encourage lawyers to assist Indian clients. [FN64]

[FN64] ICC Act, supra, § 70(n). See also State's observations dated September 9, 1993, p. 4.

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109. Decisions of the ICC were open to judicial review by the U.S. Court of Claims by two means. First, the ICC itself had the authority to refer to the Court of Claims for guidance on any "definite and distinct questions of law concerning which instructions are desired for the proper disposition of the claim." [FN65] In addition, either party was entitled to appeal any determination by the Commission, whether final or interlocutory, to the Court of Claims within three months from the date of determination. In these cases, the Court of Claims was empowered to determine whether the ICC's findings of fact were supported by substantial evidence and whether the conclusions of law were valid and supported by the Commission's findings of fact. [FN66] Finally, determinations of questions of law by the Court of Claims under the ICC Act were subject to review by the U.S. Supreme Court. [FN67]

[FN65] ICC Act, supra, § 70(s)(a).

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[FN66] Id., § 70(s)(b).
[FN67] Id., § 70(s)(c).
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110. Upon final conclusion of each claim, the ICC was to submit its report to Congress. The filing of this report had the effect of a final judgment of the Court of Claims and the ICC Act itself provided the authorization for the payment of those sums. [FN68]

[FN68] Id., § 70(t), (u).
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111. Finally, according to paragraph 70(u) of the ICC Act, the determination of a claim by the ICC forever discharges the United States and bars any other claims arising out of the matter involved in the controversy.

112. The nature and breadth of the ICC's jurisdiction was further developed through judicial interpretations of the ICC legislation. In particular, it was established in the case of Osage Nation of Indians v. United States [FN69] that the ICC Act limited the relief that could be ordered by the ICC to that which was compensable in money and did not include recovery of land where that would be plausible. [FN70]

[FN69] Osage Nation of Indians v. United States, 1 Ind. Cl. Comm. 54 (1948), rev'd on other grds, 119 Ct. Cl. 592 (1951), cert. Denied, 342 U.S. 89 (1951).
[FN70] Id.
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113. The Commission notes that according to information on the record, publicists have over the years since its establishment and dissolution criticized the ICC on various grounds. Among the subjects of these criticisms have been the fact that the ICC Act permitted an individual or small group of Indians to present a claim on behalf of a whole tribal group without requiring proof of the consent of that tribe, the absence of rules permitting the intervention of interested persons in the proceedings before the ICC, and the narrowing of the ICC jurisdiction to award only monetary compensation and accordingly to preclude claimants from recovering lands. [FN71]

[FN71] See e.g. Petra T. Shattuck and Jill Norgren, Partial Justice: Federal Indian Law in a Liberal Constitutional System, pp. 151-153; Caroline L. Orlando, Aboriginal Title Claims in the Indian Claims Commission: United States v. Dann and its Due Process Implications, 13 Envir. Aff. 215, 241 (1986).
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3. Procedural History of the Western Shoshone and Dann Land Claims

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114. As reviewed in the Commission's admissibility Report 99/99 in this matter, [FN72] the domestic procedural history concerning the Western Shoshone ancestral lands and the Danns' claims relating thereto included a proceeding before the ICC commenced by Temoak Band of the Western Shoshone and related appeals to the Court of Claims, as well as separate proceedings brought by the U.S. government against the Danns in the federal courts.

[FN72] Mary and Carrie Dann v. United States, Case 11.140, Report Nº 99/99, Annual Report of the IACHR 1999, p. 286.

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115. According to the information before the Commission, in 1951 the Temoak Band on behalf of the "Western Shoshone Identifiable Group" filed a claim with the ICC against the United States based upon the United States having taken a vast expanse of Western Shoshone ancestral territory in Nevada and California. [FN73] The claim alleged that from time to time the federal government had extinguished the Western Shoshone's title by confiscation. [FN74]

[FN73] Shoshone Tribe v. US, 11 I.C.C. 387 (1962). See also US v. Dann, 706 F.2d 919 (1983).
[FN74] Shoshone Tribe v. US, 11 I.C.C. 387 (1962).

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116. In 1962, the ICC found that the Western Shoshone Tribe had held aboriginal title to a total of 24,396,403 acres in Nevada, and that their title to most of this land was extinguished over an unspecified period of time by gradual encroachment of both the federal government and third parties. In 1966, the Temoak claimants and the government agreed to stipulate an average extinguishment date of July 1, 1872 in order to determine the amount of compensation due, and the ICC agreed upon the date. [FN75] Subsequently in 1977 the ICC completed the compensation phase of the proceeding and awarded the Western Shoshone with $26 million in compensation. This finding was based on the value of the property at the time of the alleged extinguishment, $.10 to $.15 per acre, without interest. In 1979 the Court of Claims affirmed this award on appeal.

[FN75] Shoshone Tribe v. US, 11 I.C.C. at 413-14, 416; Temoak Band v. US, 593 F.2d at 996.

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117. In 1974, however, a group of Western Shoshone including the Danns attempted to intervene in the ICC process in order to remove a portion of the 24,000,000 acres of Western Shoshone property from the pending process. This included the lands that were the subject of the separate trespass action by the United States against the Danns in the federal courts. The interveners argued that any lands to which they claimed aboriginal title, including lands which they continued to occupy and use, should be excluded from the determination of the final award. The ICC rejected the intervention and that ruling was affirmed by the Court of Claims, which viewed the attempted intervention as an intra-tribal disagreement over the proper litigation strategy. [FN76]

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[FN76] Western Shoshone Legal Defense & Education Ass'n v. United States, 531 F.2d 495 (Ct. Cl. 1976), cert. denied, 429 U.S. 885 (1976). See also US v. Dann, 706 F.2d 919 (1983) at 922-923.

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118. In 1975 and 1976, the Temoak Band dismissed their attorney and adopted a position similar to that of the Danns, namely that aboriginal title to the lands in question had never been extinguished and that the Band's previous attorney had not presented them with the choice of whether to include all of the ancestral lands in the claim or to assert that title to a portion of the lands was not extinguished. Accordingly, they attempted to stay the proceedings in the ICC and before the Court of Claims to further address this issue. However, the ICC denied the stay and entered a final judgment, and on appeal the Court of Claims affirmed the ICC's ruling on the basis that it was too late for the Temoak Band to change their litigation strategy. [FN77]

[FN77] Temoak Band v. US, 593 F.2d at 996-999 (Ct. Cl.).

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119. In December 1979 the Clerk of the Court of Claims certified the Commission's award to the U.S. General Accounting Office, which automatically appropriated the amount of the award and deposited it for the tribe in an interest-bearing trust account in the Treasury of the United States. According to the most recent information before the Commission this award has not yet been paid out, although a bill was introduced before Congress in mid-2000 to authorize the Secretary of the Interior to make a per capita distribution of the funds.

120. Outside of the process before the ICC, in 1974 the United States brought an action in trespass in the federal courts against the Danns, in relation to grazing that the Danns had undertaken without a permit in the Northeast corner of Nevada. In response to the action, the Danns argued that the land had been in their possession and the possession of their ancestors since time immemorial and that their aboriginal title in the property precluded the State from requiring grazing permits.

121. The U.S. District Court rejected the Danns' argument, on the basis that the Danns' aboriginal title in the property had been extinguished by the collateral claims process before the ICC and that the United States had acquired all twenty-two million acres of Western Shoshone land through the estoppel effect of the ICC's 1962 judgment. [FN78] On appeal, the Ninth Circuit Court of Appeals reversed the District Court decision and remanded the matter back, on the basis that the extinguishment issue had not been litigated or decided in the ICC proceedings. [FN79] On remand, the District Court held in 1980 that aboriginal title in the land in issue was extinguished when the final ICC award was certified for payment, [FN80] and on further appeal the Ninth Circuit in a 1983 judgment once again reversed the District Court, reiterating its previous holding that the Dann band was not estopped from raising aboriginal title as a defense because the issue of extinguishment of title had not actually been litigated before the ICC. [FN81] Moreover, the Court held that the title of the Western Shoshone had never been

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extinguished by prior application of public land laws or by the creation of a Western Shoshone reservation because in the Court's view these actions did not evince a clear indication of congressional intent to extinguish aboriginal title. [FN82]

[FN78] U.S. v. Dann (Dann I), 572 F.2d at 23.
[FN79] U.S. v. Dann, 572 F.2d 222 at 226 (9th Cir. 1978).
[FN80] US v. Dann (Dann II), 706 F.2d at 923.
[FN81] US v. Dann, 706 F.2d 919 (9th Cir. 1983).
[FN82] Id. at 929-31.

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122. On further review by the U.S. Supreme Court, the Ninth Circuit decision was reversed, on the basis that "payment" of the award could be taken to have occurred when the monies were appropriated to the U.S. Treasury and thus to have discharged all claims and demands involving the Western Shoshone land claim. On this basis, the U.S. Supreme Court determined that the Danns were estopped from raising aboriginal title as a defense to the U.S. trespass action. [FN83]

[FN83] U.S. v. Dann, 470 U.S. 36.

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123. The matter was once again remanded to the District Court and on further appeal to the Ninth Circuit, it was finally decided by that Court that the U.S. Supreme Court's finding of preclusion was decisive on precluding the issue of aboriginal title collectively and accordingly accepted the ICC's determination of July 1, 1872 as the appropriate date for the extinguishment of Western Shoshone land rights. In reaching this conclusion, the Court stated:

It is true that the taking was not actually litigated…but the payment of the claim award establishes conclusively that a taking occurred. From the claims litigation, we can only conclude that the taking occurred in the later part of the nineteenth century. [FN84] [emphasis added]

[FN84] U.S. v. Dann, 873 F.2d 1189, 1199 (9th Cir. 1989).

C. Indigenous Peoples' Human Rights Principles and the American Declaration on the Rights and Duties of Man

124. As indicated above, in addressing complaints of violations of the American Declaration it is necessary for the Commission to consider those complaints in the context of the evolving rules and principles of human rights law in the Americas and in the international community more broadly, as reflected in treaties, custom and other sources of international law. Consistent with this approach, in determining the claims currently before it, the Commission considers that this broader corpus of international law includes the developing norms and principles governing the human rights of indigenous peoples. As the following analysis indicates, these norms and

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principles encompass distinct human rights considerations relating to the ownership, use and occupation by indigenous communities of their traditional lands. Considerations of this nature in turn controvert the State's contention that the Danns' complaint concerns only land title and land use disputes and does not implicate issues of human rights.

125. In particular, a review of pertinent treaties, legislation and jurisprudence reveals the development over more than 80 years of particular human rights norms and principles applicable to the circumstances and treatment of indigenous peoples. [FN85] Central to these norms and principles is a recognition that ensuring the full and effective enjoyment of human rights by indigenous peoples requires consideration of their particular historical, cultural, social and economic situation and experience. In most instances, this has included identification of the need for special measures by states to compensate for the exploitation and discrimination to which these societies have been subjected at the hands of the non-indigenous.

[FN85] See IACHR, The Human Rights Situation of the Indigenous People in the Americas, OEA/Ser.L/V/II.108, Doc. 62 (October 20, 2000), pp. 21-25.

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126. For its part, the Commission has since its establishment in 1959 recognized and promoted respect for the rights of indigenous peoples of this Hemisphere. In the Commission's 1972 resolution on the problem of "Special Protection for Indigenous Populations. Action to combat racism and racial discrimination," the Commission proclaimed that "for historical reasons and because of moral and humanitarian principles, special protection for indigenous populations constitutes a sacred commitment of the states." [FN86] This notion of special protection has since been considered in numerous country and individual reports adopted by the Commission and, as will be discussed further below, has been recognized and applied in the context of numerous rights and freedoms under both the American Declaration of the Rights and Duties of Man and the American Convention on Human Rights, including the right to life, the right to humane treatment, the right to judicial protection and to a fair trial, and the right to property. [FN87]

[FN86] See IACHR, Yanomami Case, Report 12/85, Annual Report of the IACHR 1984-85, para. 8.

[FN87] See e.g. Yanomami Case, supra; IACHR, Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin, OEA/Ser.L/V/II.62, Doc. 10 rev. 3 (29 November 1983); IACHR, Second and Third Reports on the Human Rights Situation in Colombia 1993, 1999; Proposed American Declaration on the Rights of Indigenous Peoples, approved by the IACHR, 95th regular session, February 26, 1997, Annual Report of the IACHR 1997, Chapter II.

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127. In acknowledging and giving effect to particular protections in the context of human rights of indigenous populations, the Commission has proceeded in tandem with developments in international human rights law more broadly. Special measures for securing indigenous human

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rights have been recognized and applied in other international and domestic spheres, including most predominantly the Inter-American Court of Human Rights, [FN88] the International Labor Organization, [FN89] the United Nations through its Human Rights Committee [FN90] and Committee to Eradicate All Forms of Discrimination, [FN91] and the domestic legal systems of many states. [FN92]

[FN88] I/A Court H.R., Case of Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Judgment of August 31, 2001 (Merits).
[FN89] See e.g. ILO Convention (Nº 169) concerning Indigenous and Tribal Peoples in Independent Countries.
[FN90] See e.g. UNHRC, General Comment 23, ICCPR Article 27, U.N. Doc. HRI/GEN/1/Rev.1 at 38 (1994), para. 7.
[FN91] See e.g. CERD General Recommendation XXIII(51) concerning Indigenous Peoples (August 18, 1997).
[FN92] For a compilation of domestic legislation governing the rights of indigenous peoples in numerous OAS member states, see IACHR, Authorities and Precedents in International and Domestic Law for the Proposed American Declaration on the Rights of Indigenous Peoples, OEA/Ser.L/V/II.110 Doc. 22 (1 March 2001).
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128. Perhaps most fundamentally, the Commission and other international authorities have recognized the collective aspect of indigenous rights, in the sense of rights that are realized in part or in whole through their guarantee to groups or organizations of people. [FN93] And this recognition has extended to acknowledgement of a particular connection between communities of indigenous peoples and the lands and resources that they have traditionally occupied and used, the preservation of which is fundamental to the effective realization of the human rights of indigenous peoples more generally and therefore warrants special measures of protection. The Commission has observed, for example, that continued utilization of traditional collective systems for the control and use of territory are in many instances essential to the individual and collective well-being, and indeed the survival of, indigenous peoples and that control over the land refers both its capacity for providing the resources which sustain life, and to the geographic space necessary for the cultural and social reproduction of the group. [FN94] The Inter-American Court of Human Rights has similarly recognized that for indigenous communities the relation with the land is not merely a question of possession and production but has a material and spiritual element that must be fully enjoyed to preserve their cultural legacy and pass it on to future generations. [FN95]

[FN93] See IACHR, The Human Rights Situation of Indigenous Peoples in the Americas 2000, OEA/Ser.L/V/II/108, Doc. 62 (October 20, 2000), p. 125; Yanomami Case, supra. (recognizing the collective rights of the Yanomami people in Brazil to the delimitation and demarcation of Yanomami territory and recommending that the Brazilian government take steps to demarcate those lands together with measures of a collective nature relating to the education, health and social integration of the Yanomami people). See also ILO Convention (Nº 169), supra, Art. 13 (providing that "[i]n applying the provisions of this Part of the Convention governments shall

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respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship.”).
[FN94] IACHR, Report on the Situation of Human Rights in Ecuador, OAS.Ser.L/V/II.96.Doc.10 rev 1, April 24, 1997, p. 115.
[FN95] Awas Tingni Case, supra, para. 149.
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129. The development of these principles in the inter-American system has culminated in the drafting of Article XVIII of the Draft American Declaration on the Rights of Indigenous Peoples, [FN96] which provides for the protection of traditional forms of ownership and cultural survival and rights to land, territories and resources. While this provision, like the remainder of the Draft Declaration, has not yet been approved by the OAS General Assembly and therefore does not in itself have the effect of a final Declaration, the Commission considers that the basic principles reflected in many of the provisions of the Declaration, including aspects of Article XVIII, reflect general international legal principles developing out of and applicable inside and outside of the inter-American system and to this extent are properly considered in interpreting and applying the provisions of the American Declaration in the context of indigenous peoples.

[FN96] Draft American Declaration of the Rights of Indigenous Peoples, supra, prepared pursuant to GA Resolution 1022/89, November 18, 1989, para. 13. For a historical overview of the development of the Draft Declaration, see IACHR, The Human Rights Situation of the Indigenous People in the Americas 2000, supra, pp. 4-6.
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130. Of particular relevance to the present case, the Commission considers that general international legal principles applicable in the context of indigenous human rights to include:

the right of indigenous peoples to legal recognition of their varied and specific forms and modalities of their control, ownership, use and enjoyment of territories and property; [FN97]

[FN97] See e.g. Draft Inter-American Indigenous Declaration, supra, Art. XVIII(1); IACHR, Report on the Situation of Human Rights in Ecuador (1977) (observing that for indigenous peoples the “continued utilization of traditional systems for the control and use of territory are essential to their survival, as well as to their individual and collective well-being.” In this connection, Article 27 of the ICCPR, an instrument to which the United States is a party, protects the right of persons belonging to “ethnic, linguistic or religious minorities…in conformity with other members of their group, to enjoy their own culture, to profess and practice their own religion [and] to use their own language.” In its General Comment 23 on Article 27 of the ICCPR the UN Human Rights Committee observed that “culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous people.” According to the Committee, securing the cultural rights of an indigenous people may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. ICCPR, General Comments 23, supra, para. 7. See similarly UNHRC,

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Ominayak v. Canada, March 26, 1990 (finding Canada responsible for violations of Article 27 of the ICCPR, based upon historical inequities suffered by the Lubicon Lake Band in northern Alberta and the expropriation by the provisional government of the territory of the Lubicon Lake Band for the benefit of private corporate interests).
The UN Committee on the Elimination of All Forms of Racism has similarly recognized that the "land rights of indigenous peoples are unique and encompass a tradition and cultural identification of the indigenous peoples with their lands that has been generally recognized," CERD decision 2(54) on Australia, para. 4. In this decision, the Committee criticized amendments to Australia's Native Title Act as incompatible with Australia's obligations under the Race Convention, particularly Articles 2 and 5, due in part to the inclusion of provisions that extinguish or impair the exercise of indigenous title rights and interests in order to create legal certainty for governments and third parties at the expense of indigenous title. Article 5(c) of the Race Convention in particular calls upon State Parties to "recognize and protect the rights of indigenous peoples to own, develop, control and use their common lands, territories and resources."
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the recognition of their property and ownership rights with respect to lands, territories and resources they have historically occupied; [FN98] and

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[FN98] See Draft Inter-American Indigenous Declaration, supra, Art. XVIII(2). See similarly CERD General Recommendation XXIII (51) concerning Indigenous Peoples (August 18, 1997) (calling upon states parties to the Race Convention to "recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources."); ILO Convention (Nº 169), supra, Art. 14(1) (providing that "[t]he rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognized. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect. "); Art. 15(1) (stating that "[t]he rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources.").
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where property and user rights of indigenous peoples arise from rights existing prior to the creation of a state, recognition by that state of the permanent and inalienable title of indigenous peoples relative thereto and to have such title changed only by mutual consent between the state and respective indigenous peoples when they have full knowledge and appreciation of the nature or attributes of such property. [FN99] This also implies the right to fair compensation in the event that such property and user rights are irrevocably lost. [FN100]

[FN99] See Draft Inter-American Indigenous Declaration, supra, Art. XVIII(3)(i), (ii). See similarly ICCPR, General Comments 23, supra, para. 7 (recognizing that the enjoyment of

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cultural rights, including those associated with the use of land resources, "may require positive legal measures to ensure the effective participation of members of minority communities in decisions which affect them emphasizing the importance."; CERD General Recommendation XXIII (51), supra (calling upon states to return indigenous lands and territories traditionally owned or otherwise inhabited or used by them where they have been deprived of those lands and territories without their free and informed consent); ILO Convention (Nº 169), supra, Art. 15(2) (providing that

[i]n cases in which the State retains the ownership of mineral or subsurface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced before undertaking or permitting any programs for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities.

In this connection, the Inter-American Court of Human Rights has recently pronounced upon the obligation of states under Article 21 (the right to property) of the American Convention to provide effective procedures for delimiting, demarcating and recognizing title to indigenous communal lands. See Awas Tingni Case, supra, paras. 134-139.

[FN100] See similarly American Convention on Human Rights, Art. 23(2) (providing that "[n]o one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.").

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131. Based upon the foregoing analysis, the Commission is of the view that the provisions of the American Declaration should be interpreted and applied in the context of indigenous petitioners with due regard to the particular principles of international human rights law governing the individual and collective interests of indigenous peoples. [FN101] Particularly pertinent provisions of the Declaration in this respect include Article II (the right to equality under the law), Article XVIII (the right to a fair trial), and Article XXIII (the right to property). As outlined above, this approach includes the taking of special measures to ensure recognition of the particular and collective interest that indigenous people have in the occupation and use of their traditional lands and resources and their right not to be deprived of this interest except with fully informed consent, under conditions of equality, and with fair compensation. The Commission wishes to emphasize that by interpreting the American Declaration so as to safeguard the integrity, livelihood and culture of indigenous peoples through the effective protection of their individual and collective human rights, the Commission is respecting the very purposes underlying the Declaration which, as expressed in its Preamble, include recognition that "[s]ince culture is the highest social and historical expression of that spiritual development, it is the duty of man to preserve, practice and foster culture by every means within his power."

[FN101] The Inter-American Court of Human Rights has similarly employed an evolutive approach to the interpretation of international human rights instruments in interpreting the right to property under Article 21 of the American Convention on Human Rights to encompass the rights of members of indigenous communities in the framework of communal property. Awas Tingni Case, supra, paras. 148, 149.

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132. The Commission will therefore interpret and apply the provisions of the American Declaration to the Petitioners' claims of violations of the American Declaration in light of above principles.

D. Application of International Human Rights Norms and Principles in the Circumstances of Mary and Carrie Dann

133. Among the provisions of the American Declaration which are alleged to have been violated by the State in the present case are Articles II, XVIII and XXIII, which read as follows:

Article II. Right to equality before the law

All persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor.

Article XVIII – Right to a fair trial

Every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights.

Article XXIII – Right to property

Every person has a right to own such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home.

134. As noted above, the Commission has accepted based upon the observations of the parties that the Western Shoshone are an indigenous people who are acknowledged as historically having had ownership, use and occupation of the Western Shoshone ancestral lands. In addition, the Dann sisters are accepted as members of the Western Shoshone people. Accordingly, their claims in the present case, relating as they do to their potential interests in the Western Shoshone ancestral lands, should be determined in the context of the foregoing principles of indigenous human rights law.

135. In the context of the procedural history in the Dann case outlined above, two factual issues of particular significance to the issues raised in this case appear to be the subject of conflicting submissions by the parties and require determination by the Commission based upon the record before it.

136. First, the Petitioners contend that the Danns did not authorize or participate in the ICC claim submitted by the Temoak Band before the ICC, and that when they and several other bands subsequently sought to intervene in the proceedings, they were unsuccessful. The State submits conversely that throughout the proceedings before the ICC the Western Shoshone were kept fully apprised through regular meetings held with members of the tribe. The only such meetings

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specifically referred to by the State, however, were meetings convened by the attorney for the Temoak Band in 1965, 14 years after the ICC proceedings commenced and 3 years after the ICC issued its extinguishment finding. In the absence of evidence to the contrary the Commission accepts that the Danns did not play a full or effective role in retaining, authorizing or instructing the Western Shoshone claimants in the ICC process.

137. In addition, there appears to be some conflict between the parties' positions as to whether the subsistence of Western Shoshone title to all or part of its ancestral territory was the subject of litigation and determination by the ICC. Based upon the record before it, the Commission finds that the determination as to whether and to what extent Western Shoshone title may have been extinguished was not based upon a judicial evaluation of pertinent evidence, but rather was based upon apparently arbitrary stipulations as between the U.S. government and the Temoak Band regarding the extent and timing of the loss of indigenous title to the entirety of the Western Shoshone ancestral lands. In reaching this conclusion, the Commission has considered in particular the 1983 judgment of the U.S. Court of Appeals for the Ninth Circuit in which that Court concluded on the evidence available that Western Shoshone title had not been extinguished. [FN102] In this respect, the Ninth Circuit was the only judicial body to review the substance of the ICC's finding of "extinguishment" of Western Shoshone title, but its findings were reversed by the U.S. Supreme Court without consideration of the merits of the Ninth Circuit's findings on this point. This effectively left the issue of title to Western Shoshone lands without definitive substantive adjudication by the U.S. courts.

[FN102] United States v. Dann, 706 F. 2d 919 (9th Cir., 1983), rev'd on other grounds 470 U.S. 39 (1985)) (concluding in respect of the ICC extinguishment finding that "the extinguishment was not denied by the government, and the fact of the taking was never actually litigated. Because an average 'taking date' was stipulated, the Commission did not determine the facts of taking for any individual parcel of the vast aboriginal holdings of the Western Shoshone," and upholding the District Court's decision in respect of the lands claimed by the Danns that "aboriginal title had not been extinguished as a matter of law by application of the public land laws, by creation of the Duck Valley Reservation, or by inclusion of the disputed lands in a grazing district and issuance of a grazing permit pursuant to the Taylor Grazing Act.").

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138. In evaluating the Petitioners' claims in light of these evidentiary findings, the Commission first wishes to expressly recognize and acknowledge that the State, through the development and implementation of the Indian Claims Commission process, has taken significant measures to recognize and account for the historic deprivations suffered by indigenous communities living within the United States and commends the State for this initiative. As both the Petitioners and the State have recognized, this process provided a more efficient solution to the sovereign immunity bar to Indian land claims under U.S. law and extended to indigenous communities certain benefits relating to claims to their ancestral lands that were not available to other citizens, such as extended limitation periods for claims.

139. Upon evaluating these processes in the facts as disclosed by the record in this case, however, the Commission concludes that these processes were not sufficient to comply with

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contemporary international human rights norms, principles and standards that govern the determination of indigenous property interests.

140. The Commission first considers that Articles XVIII and XXIII of the American Declaration specially oblige a member state to ensure that any determination of the extent to which indigenous claimants maintain interests in the lands to which they have traditionally held title and have occupied and used is based upon a process of fully informed and mutual consent on the part of the indigenous community as a whole. This requires at a minimum that all of the members of the community are fully and accurately informed of the nature and consequences of the process and provided with an effective opportunity to participate individually or as collectives. In the case of the Danns, however, the record indicates that the land claim issue was pursued by one band of the Western Shoshone people which no apparent mandate from the other Western Shoshone bands or members. There is also no evidence on the record that appropriate consultations were held within the Western Shoshone at the time that certain significant determinations were made. This includes in particular the ICC's finding that the entirety of the Western Shoshone interest in their ancestral lands, which interests affect the Danns, was extinguished at some point in the past.

141. To the contrary, despite the fact that it became clear at the time of the Danns' request to intervene that the collective interest in the Western Shoshone territory may not have been properly served through the proceedings pursued by the Temoak Band, the courts ultimately did not take measures to address the substance of these objections but rather dismissed them based upon the expediency of the ICC processes. In the Commission's opinion and in the context of the present case, this was not sufficient in order for the State to fulfill its particular obligation to ensure that the status of the Western Shoshone traditional lands was determined through a process of informed and mutual consent on the part of the Western Shoshone people as a whole.

142. The insufficiency of this process was augmented by the fact that, on the evidence, the issue of extinguishment was not litigated before or determined by the ICC, in that the ICC did not conduct an independent review of historical and other evidence to determine as a matter of fact whether the Western Shoshone properly claimed title to all or some of their traditional lands. Rather, the ICC determination was based upon an agreement between the State and the purported Western Shoshone representatives as to the extent and timing of the extinguishment. In light of the contentions by the Danns that they have continued to occupy and use at least portions of the Western Shoshone ancestral lands, and in light of the findings by the Ninth Circuit Court of Appeals as to the merits of the ICC's extinguishment finding, it cannot be said that the Danns' claims to property rights in the Western Shoshone ancestral lands were determined through an effective and fair process in compliance with the norms and principles under Articles XVIII and XXIII of the American Declaration.

143. Further, the Commission concludes that to the extent the State has asserted as against the Danns title in the property in issue based upon the ICC proceedings, the Danns have not been afforded their right to equal protection of the law under Article II of the American Declaration. The notion of equality before the law set forth in the Declaration relates to the application of substantive rights and to the protection to be given to them in the case of acts by the State or others. [FN103] Further, Article II, while not prohibiting all distinctions in treatment in the

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enjoyment of protected rights and freedoms, requires at base that any permissible distinctions be based upon objective and reasonable justification, that they further a legitimate objective, regard being had to the principles which normally prevail in democratic societies, and that the means are reasonable and proportionate to the end sought. [FN104]

[FN103] Canada Report, supra, para. 96, citing "Draft Declaration and Accompanying Report"; IACHR, Report Nº 51/96, Annual Report of the IACHR 1996, p. 550, paras. 177-178.
[FN104] See Ferrer-Mazorra et al. v. United States, Case 9903, Annual Report of the IACHR 2000, para. 238.

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144. The record before the Commission indicates that under prevailing common law in the United States, including the Fifth Amendment to the U.S. Constitution, the taking of property by the government ordinarily requires a valid public purpose and the entitlement of owners to notice, just compensation, and judicial review. [FN105] In the present case, however, the Commission cannot find that the same prerequisites have been extended to the Danns in regard to the determination of their property claims to the Western Shoshone ancestral lands, and no proper justification for the distinction in their treatment has been established by the State. In particular, as concluded above, any property rights that the Danns may have asserted to the Western Shoshone ancestral lands were held by the ICC to have been "extinguished" through proceedings in which the Danns were not effectively represented and where the circumstances of this alleged extinguishment were never actually litigated nor the merits of the finding finally reviewed by the courts. And while compensation for this extinguishment was awarded by the ICC, the value of compensation was calculated based upon an average extinguishment date that does not on the record appear to bear any relevant connection to the issue of whether and to what extent all or part of Western Shoshone title in their traditional lands, including that of the Danns, may no longer subsist. Further, the Commission understands that the amount of compensation awarded for the alleged encroachment upon Western Shoshone ancestral lands did not include an award of interest from the date of the alleged extinguishment to the date of the ICC decision, thus leaving the Western Shoshone uncompensated for the cost of the alleged taking of their property during this period.

[FN105] See e.g. U.S. Const., Fifth Amendment (providing in part that "'nor shall private property be taken for public use, without just compensation."); City of Cincinnati v. Vester, 281 U.S. 439 (1930).

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145. All of these circumstances suggest that the Danns have not been afforded equal treatment under the law respecting the determination of their property interests in the Western Shoshone ancestral lands, contrary to Article II of the Declaration. While the State has suggested that the extinguishment of Western Shoshone title was justified by the need to encourage settlement and agricultural developments in the western United States, the Commission does not consider that this can justify the broad manner in which the State has purported to extinguish indigenous claims, including those of the Danns, in the entirety of the Western Shoshone territory. In the

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Commission's view, this is particularly apparent in light of evidence that the Danns and other Western Shoshone have at least until recently continued to occupy and use regions of the territory that the State now claims as its own.

V. PROCEEDINGS SUBSEQUENT TO REPORT 113/01

146. On October 15, 2001 the Commission adopted Report 113/01 pursuant to Article 43 of its Rules of Procedure, setting forth its analysis of the record, findings and recommendations in this matter.

147. Report 113/01 was transmitted to the State on October 19, 2001 with a request that the State provide information as to the measures it had taken to comply with the recommendations set forth in the report within a period of two months, in accordance with Article 43(2) of the Commission's Rules.

148. By communication dated December 17, 2001 and received by the Commission on December 19, 2001 the State delivered a response to the Commission's request for information, in which it rejected the Commission's report in its entirety and asserted that Mary and Carrie Dann had been accorded the right to equality before the law, the right to a fair trial, and the right to own property.

149. Prior to discussing the State's objections in further detail, the Commission emphasizes that the purpose of transmitting a preliminary merits report to the state concerned in accordance with Article 43(2) of the Commission's Rules of Procedure is to receive information as to what measures have been adopted to comply with the Commission's recommendations. [FN106] At this stage of the process, the parties have had a full opportunity to argue their positions, the admissibility and merits phases of the process are completed, and the Commission has rendered its decision. Therefore, while a state may provide its views on the factual and legal conclusions reached by the Commission in its preliminary report, it is not for a State at this point, as the United States has done in the present case, to reiterate its previous arguments, or to raise new arguments, concerning the admissibility or merits of the complaint before the Commission, nor is the Commission obliged to consider any such submissions prior to adopting its final report on the matter.

[FN106] Article 43(2) of the Commission's Rules of Procedure provides: "If [the Commission] establishes one or more violations, it shall prepare a preliminary report with the proposals and recommendations it deems pertinent and shall transmit it to the State in question. In so doing, it shall set a deadline by which the State in question must report on the measures adopted to comply with the recommendations. The State shall not be authorized to publish the report until the Commission adopts a decision in this respect." [emphasis added]

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150. In light of the significance of the legal issues raised in this case, however, and without detracting from the fundamental procedural considerations noted above, the Commission has decided to summarize and provide observations on certain aspects of the State's response. The

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United States made four principal arguments in rejecting the conclusions and recommendations in the Commission's report. It first contended that the Danns' complaints regarding the alleged lack of due process in the Indian Claims Commission proceedings were fully and fairly litigated in the United States courts and should not be reconsidered by the Commission. Second, the State argued that the Commission lacked jurisdiction to evaluate processes established under the 1946 Indian Claims Act since the Act predated the U.S. ratification of the OAS Charter. Third, the State claimed that the Commission erred in interpreting the principles of the American Declaration in light of Article XVIII of the OAS draft Declaration on the Rights of Indigenous Peoples, which had not yet been adopted by the political organs of the OAS. Finally, the State rejected the Commission's findings on the basis that the American Declaration is not a legally binding instrument and therefore cannot be the object of violations by the United States.

151. In elaborating upon the arguments in its response, the United State provided an overview of the history of litigation in US domestic courts pertaining to the Western Shoshone lands. According to the State, this included in particular the action filed in 1951 on behalf of the Western Shoshone with the Indian Claims Commission to recover damages for the loss of aboriginal title to lands in the Western United States, including Nevada and California. The State notes that this litigation was completed in 1977, after the Indian Claims Commission had determined the fair market value of the lands acquired from the Western Shoshone to be $21,550,000.00 based upon a July 1, 1872 valuation date stipulated by the parties. The State also acknowledged that the Western Shoshone Legal Defense and Education Association, representing Mary and Carrie Dann, subsequently moved to stay the Indian Claims Commission proceedings and presented an amended claim in which it sought to delete from the claims lands to which it contended the Western Shoshone still retained aboriginal title. The State asserts that the Indian Claims Commission, viewing this dispute as an "internal one among the Western Shoshone over litigation strategy," denied the motion, a decision that was subsequently maintained on appeal to the US Court of Claims and ultimately to the US Supreme Court through denial of a petition for a writ of certiorari.

152. The State also refers to the trespass action commenced by the United States government against the Danns in 1974 alleging that they were grazing livestock on certain public lands in Nevada without a permit as required by regulations promulgated by the Secretary of the Interior under the Taylor Grazing Act. The United States notes in particular that according to the US Supreme Court, the finality under section 22(a) of the 1946 Indian Claims Commission Act of the ICC's judgment and award in the Western Shoshone litigation precluded the Danns from continuing to assert aboriginal title, since the award had been placed in a trust fund account for the benefit of members of the Western Shoshone. The Supreme Court also observed that only tribal, but not individual, aboriginal rights were precluded by the Indian Claims Commission proceedings, although the Court declined to address the issue of individual aboriginal title further since it had not been addressed by the lower courts. On remand, the US Court of Appeals for the Ninth Circuit ruled that the Danns would be able to assert individual aboriginal title as a defense in the trespass action to the extent that such rights were acquired prior to the withdrawal of the lands from the public grazing legislation in 1934 and continuously exercised since that time. However, the Danns subsequently withdrew their claims of individual aboriginal title as a defense in the trespass action, and as a result the US federal courts have ordered the Danns to comply with the United States' grazing regulations.

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153. In disputing the findings in the Commission's report, the State first contends that the Commission has violated the "fourth instance" procedural rule by advancing the same arguments that have been adjudicated, reviewed and rejected by federal courts in the above litigation in accordance with US federal law and, in the State's view, the provisions of international law, contemporary or otherwise.

154. In this connection, the State identifies as a "fundamental error" throughout the Commission's decision its factual assumption that the land at issue in the Indian Claims Commission litigation represented an aggregation of individual claims and not a collective tribal claim of the Western Shoshone. The State asserts that the claim before the Indian Claims Commission was in fact a collective tribal claim regarding all of the communal tribal lands and not an aggregation of related individual claims, a characteristic recognized by the US Court of Claims and by the "firmly established principle" under US law that tribes, not individuals, have authority over communal tribunal land. As a consequence, the Danns were not entitled to be individually represented in the Indian Land Claims proceeding.

155. The State also contends that the Commission committed a fundamental factual error by concluding that at the time of the Danns' request to intervene, the collective interest in the Western Shoshone territory may not have been properly served through the proceedings pursued by the Temoak Band. Rather, the State argues that US Court of Claims properly concluded that the Temoak Band was the appropriate representative of the entire Western Shoshone and that the allegations of fraud and collusion levied by the Danns and other petitioners against the Temoak Band were unfounded. The State notes in particular that the US Court of Claims viewed the dispute by the Danns and other petitioners raised in their application to intervene as a dispute "over the proper strategy to follow in this litigation." The State observes in this regard that the US Court of Claims also held that during the title phase of the proceeding before the Indian Claims Commission there had been a judicial evaluation of the pertinent evidence pertaining to the issue of extinguishment of Western Shoshone title, whereby the Indian Claims Commission made its own determination that the Western Shoshone lands were held by separate Shoshone entities and that Indian title to the area was extinguished by encroachment. The US Court of Claims considered in particular that it was proper for the parties to agree to stipulate that the Nevada lands be valued as of July 1, 1872 rather than having a further "burdensome" trial of the dates of disposals of each separate tract.

156. Based upon these findings by the US Court of Claims, the State argues that the Commission erred in finding that the Temoak band did not properly serve the interests of the Western Shoshone, but rather that the US courts fully examined this question and properly concluded that the Temoak Band was the proper representative of the Western Shoshone and that they had fully litigated their claim.

157. Another factual error that the United States alleges on the part of the Commission is the finding that the Danns were not fully apprised of the litigation strategy that had been employed by the organized entity of the Western Shoshone group. The State points in this regard to a finding by the US Court of Claims that the Danns were for a very long time quite aware of the position with respect to the Nevada land taken before the Indian Claims Commission by the

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Temoak Band and its counsel. The State also points to findings in the same US Court of Claims decision that the attorney for the Temoak Band reported that Western Shoshone General Council meetings occurred in 1947, three years before the ICC action was filed, in 1959, three years before the ICC issued its extinguishment finding, and in 1965, five years before the ICC issued its decision awarding $26,154,600 to the Western Shoshone, and therefore that the Commission erred in finding that there was no evidence on the record that appropriate consultations were held within the Western Shoshone at the time that certain significant determinations were made.

158. Further, the State disputes the Commission's finding that the US courts did not take the measures necessary to address the substance of the Danns' request for intervention but dismissed them based upon the expediency of the ICC proceedings. The State relies in this regard upon the US Court of Claims' denial of the intervention based upon the "unjustified tardiness of the request for intervention", which occurred 23 years after the litigation was initiated. The State therefore contends that in light of the Court of Claims' determination that no adequate excuse was offered for the long delay, and the fact that any other litigant in US federal courts would be subject to equivalent procedural requirements concerning timeliness, neither the United States Courts procedural ruling nor the preclusive effect of that Congress has assigned to the judgment of the Indian Claims Commission offends due process. The State therefore maintains that the processes employed in the Western Shoshone Indian Claims Commission litigation did provide due process guarantees required by the US Constitution and reflected in the American Declaration, and indeed afforded them an even greater opportunity to press their claims than would be available to a non-Indian seeking compensation for the taking of their land, as the Commission in part recognized.

159. In its response to the Commissions' report, the United States also contended that the processes established under the Indian Claims Act of 1946 did not violate contemporary norms of international law. The State first argues that the Commission lacked jurisdiction over events that resulted solely from the passage of the Indian Claims Commission Act, since that statute only extended jurisdiction to the Indian Claims Commission for claims arising from the taking of aboriginal lands prior to August 13, 1946, while the United States did not ratify the OAS Charter until after the Indian Claims Commission Act was signed into law on August 13, 1946.

160. The State further complains that the evaluation of the processes established under the 1946 Indian Claims Commission Act in light of contemporary international norms is an impermissible inter-temporal application of law, according to which the State claims 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 and were not accepted at the time, and only resulted from the subsequent development or evolution of international law." [FN107] In the State's view, the Commission has violated the principle of inter-temporal law because the Indian Claims Proceedings concerning the Western Shoshone were completed in 1977 and the Indian Claims Commission itself was dissolved on September 30, 1978.

[FN107] State's Response dated December 17, 2001, p. 13, citing Sir Gerald Fitzmaurice, The Law and Procedure of the International Court of Justice, XXX Brit, Y. B. Int'l L. 5 (1953); H.

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Thirlway, The Law and Procedure of the International Court of Justice, 1960-1989, LX Brit. Y.B. Int'l L. 1, 128-9 (1989); The South West Africa Cases, I.C.J. Rep. 4, 23 (1966).
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161. The State's second objection to the Commission's legal approach challenges the Commission's conclusion that aspects of Article XVIII of the OAS draft Declaration on the Rights of Indigenous Peoples reflect general international legal principles developing out of and applicable inside and outside of the inter-American system and could therefore be relied upon in interpreting and applying the provisions of the American Declaration in the context of indigenous peoples. In support of its position that Article XVIII of the draft declaration does not reflect general international legal principles, the State cites the 1999 advice of the Inter-American Juridical Committee that "[i]nternational law does not recognize the indigenous person's right of ownership and use of lands as defined in this article," [FN108] and objects that the Commission makes no effort to reconcile its position with that of the Inter-American Juridical Committee.

[FN108] State's response dated December 17, 2001, p. 14, citing Observations and Recommendations of the Inter-American Juridical Committee on the "proposed American Declaration on the Rights of Indigenous Populations," OAS Doc. RECIDIN/INF.1/99 (January 29, 1999).
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162. The State also relies upon its own previously-expressed view, and that of other OAS member states, that draft Article XVIII does not reflect general international legal principles. [FN109] The State therefore rejects what it characterizes as the application of substantive norms that may or may not emerge in a non-binding document that has not yet been agreed to by member states of the OAS to processes established by the United States in 1946. The State adds that it is not relevant to analyze whether the United States violated general norms of international law since the Commission is not an international tribunal, and further objects that treaties cited by the Commission, including the International Covenant on Civil and Political Rights and the Convention on the Elimination of Racial Discrimination, are not binding upon the United States to the disputed situation since they were ratified long after the litigation in question was completed.

[FN109] State's response dated December 17, 2001, p. 14, citing Observations and Recommendations of the United States, Dec. 16, 1997, OAS Doc. RECIDIN/INF.7/99; Observations and Recommendations by Guatemala on the Proposed American Declaration on the Rights of Indigenous Populations, OAS Doc. RECIDIN/INF.8/99; Observations and Recommendations by Canada on the Proposed American Declaration on the Rights of Indigenous Populations, OAS Doc. RECIDIN/INF.5/99; Observations and Recommendations by Mexico on the Proposed American Declaration on the Rights of Indigenous Populations, OAS Doc. RECIDIN/INF.9/99.
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163. The Commission has the following brief observations in respect of the State's objections to the conclusions and recommendations in the Commission's preliminary merits report in this matter. Beginning with the State's final objection relating to the legal status of the American Declaration, the State claims that the Commission erred in finding that the United States has violated provisions of the American Declaration because the Commission's competence, as defined through the 1967 amendment of the OAS Charter and the 1979 Statute of the Inter-American Commission approved by OAS Resolution No. 447, October 1979, "does not turn a non-binding document such as the American Declaration into a treaty that can be considered to be legally binding upon the United States." [FN110] The State's observations fail to consider, however, the well-established and long-standing jurisprudence and practice of the inter-American system according to which the American Declaration is recognized as constituting a source of legal obligation for OAS members states, including in particular those states that are not parties to the American Convention on Human Rights. [FN111] These obligations are considered to flow from the human rights obligations of member states under the OAS Charter, [FN112] which member states have agreed are contained in and defined by the American Declaration, [FN113] as well as from the customary legal status of the rights protected under many of the Declaration's core provisions. [FN114] As a source of legal obligation, therefore, it is appropriate for the Commission to consider and, where substantiated, find violations of that instrument attributable to a member state of the OAS, including the United States.

[FN110] State's response dated December 17, 2001. p. 15.

[FN111] See I/A Court H.R., Advisory Opinion OC-10/89 "Interpretation of the Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights", July 14, 1989, Ser. A Nº 10 (1989), paras. 35-45; James Terry Roach and Jay Pinkerton v. United States, Case 9647, Res. 3/87, 22 September 1987, Annual Report of the IACHR 1986-87, paras. 46-49. For examples of decisions in which the Commission has found violations of the American Declaration in respect of OAS member states that are not parties to the American Convention on Human Rights, see Case 1742 (Cuba), May 1975, Annual Report of the IACHR 1975; Maclean v. Suriname, Case 10.116, Resolution Nº 18/89, Annual Report of the IACHR 1988-1989; Michael Edwards et al. v. The Bahamas, Case 12.067, Report Nº 48/01, Annual Report of the IACHR 2000; Garza v. United States, Case 12.243, Report Nº 52/01, Annual Report of the IACHR 2000.

[FN112] Charter of the Organization of American States, Arts. 3, 16, 51, 112, 150.

[FN113] See e.g. OAS General Assembly Resolution 314, AG/RES. 314 (VII-O/77), June 22, 1977 (charging the Inter-American Commission with the preparation of a study to "set forth their obligations to carry out the commitments assumed in the American Declaration of the Rights and Duties of Man"); OAS General Assembly Resolution 371, AG/RES (VIII-O/78), July 1, 1978 (reaffirming its commitment to "promoting the observance of the American Declaration of the Rights and Duties of Man."); OAS General Assembly Resolution 370, AG/RES. 370 (VIII-O/78), July 1, 1978 (referring to the "international commitments" of OAS member states to respect the rights recognized in the American Declaration of the Rights and Duties of Man).

[FN114] Case 12.379, Report Nº 19/02, Lares-Reyes et al. (United States), February 27, 2002, para. 46.

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164. The Commission also observes that many of the State's objections relate to the extent to which and manner in which the Commission evaluated issues, facts and evidence that, according to the State, had already been the subject of consideration and determination by the domestic courts. What the State must recognize in this connection, however, is that the Commission has an independent obligation to evaluate the facts and circumstances of a complaint as elucidated by the parties in light of the principles and standards under the American Declaration. This includes such matters as the adequacy of the procedures through which the petitioners' property interests in the Western Shoshone ancestral land were purported to be determined. While proceedings or determinations at the domestic level on similar issues can be considered by the Commission as part of the circumstances of a complaint, they are not determinative of the Commission's own evaluation of the facts and issues in a petition before it. This is particularly significant in cases such as the present, where neither the courts not the state itself regarded the matters raised in the case as human rights issues, but rather as questions regarding land title and land use. The Commission hastens to add in this connection that, contrary to what the State appears to contend in its response, the domestic courts did not reach consistent or clear decisions on certain central aspects of the petitioners' complaints relating to the Western Shoshone ancestral land, including particularly the question of whether the alleged extinguishment of indigenous title in the land had ever been litigated before domestic authorities as well as whether the Danns' due process rights were properly respected in the domestic process. [FN115] It was therefore not only appropriate, but crucial, for the Commission to reach conclusions on these matters, in light of the significant implications of this aspect of the circumstances of the complaint upon the State's obligations under Articles II, XVIII and XXIII of the American Declaration in connection with indigenous property interests.

[FN115] The US Court of Appeals for the Ninth Circuit, for example, indicated in three judgments that the question of extinguishment of title had never been litigated before the Indian Claims Commission, and the US Supreme Court never ultimately decided the question, having relied instead upon the payment of the ICC's award into a trust fund as having discharged all claims and demands involving the Western Shoshone land claim. US v. Dann, 572 F.2d 222, 226 (9th Cir. 1978); US v. Dann, 706 F.2d 919, 922 (9th Cir. 1983); US v. Dann, 470 U.S. 39 (1985); US v. Dann, 873 F2d 1189, 1199 (9th Cir. 1989). By disposing of the Danns' objections to the US trespass action based upon the payment of monies in trust, the US Supreme Court likewise did not address the issue as to whether the Danns' due process protections were properly respected throughout the Indian claims process.

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165. Specifically with regard to the adequacy of the Danns' participation in the process by which title to the Western Shoshone ancestral lands was purported to be determined, the Commission considers it important to emphasize, as it noted in its decision on the merits, that the collective interests of indigenous peoples in their ancestral lands is not to be asserted to the exclusion of the participation of individual members in the process. To the contrary, the Commission has found that any determination of the extent to which indigenous peoples may maintain interests in the lands to which they have traditionally held title and have occupied and used must be based upon a process of fully informed and mutual consent on the part of the indigenous community as a whole. And as the Commission concluded on the circumstances of

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this case, the process by which the property interests of the Western Shoshone were determined proved defective in this respect. That only proof of fraud or collusion could impugn the Temoak Band's presumed representation of the entire Western Shoshone people, and that Western Shoshone General Council meetings occurred on only three occasions during the 18 year period between 1947 and 1965, fails to discharge the State's obligation to demonstrate that the outcome of the ICC process resulted from the fully informed and mutual consent of the Western Shoshone people as a whole.

166. The State's objections to the Commission's competence, relating both to the fourth instance formula and its jurisdiction ratione temporis concerning the 1946 Indian Claims Commission Act, were not raised by the State before or in response to the Commission's admissibility report, in which the Commission concluded that it had competence to consider the Petitioners' complaints, [FN116] and the Petitioners have had no notice of or opportunity to respond to these new allegations. Consequently, it is not open to the State to raise these objections at this stage of the process. In any event, the Commission considers that the fourth instance formula has no application in this case. According to the fourth instance formula, the Commission in principle will not review the judgments issued by the domestic courts acting within their competence and with due judicial guarantees. The fourth instance formula does not, however, preclude the Commission from considering a case where the Petitioner's allegations entail a possible violation of any of the rights set forth in instruments of the inter-American human rights system. [FN117] In the present case, the Petitioners have alleged, and the Commission in fact found, discrete violations of the principles and standards under the American Declaration of the Rights and Duties of Man based upon its evaluation of the facts and evidence as presented by the parties in the proceeding before it, and therefore the fourth instance formula does not apply. Moreover, the notion that the Commission is precluded from addressing an issue merely because the domestic courts of a member state may have addressed the same matter is plainly inconsistent with the exhaustion of domestic remedies requirement and must be rejected on this ground as well. Concerning the fact that the Indian Claims Commission Act was promulgated in 1946, it is well established that a state remains responsible for any violations of a human rights instrument that pre-dated its ratification or accession to the instrument, to the extent that those violations continue to have effects or are not manifested until after the date of ratification. [FN118] In the present case, the facts as determined by the Commission clearly indicate that the Indian Claims Commission Act applied to and had effects upon the Petitioners well after the United States' ratification of the OAS Charter in 1951, and indeed continue to do so, and consequently the State properly remains responsible for the effects of the application of that legislation upon the petitioners to the extent they are inconsistent with the petitioners' rights under the American Declaration.

[FN116] Case 11.140, Report Nº 99/99, Mary and Carrie Dann (United States), Annual Report of the IACHR 1999.

[FN117] See I/A Comm. H.R., Santiago Marzioni, Report Nº 39/96, Case 11.673 (Argentina), October 15, 1996, Annual Report 1996, p. 76, paras. 48-52. See also I/A Comm. H.R., Clifton Wright, Case 9260 (Jamaica), September 16, 1988, Annual Report 1987-88, p. 154.

[FN118] According to the jurisprudence of the Inter-American Court and Commission and that of other international human rights tribunals, human rights instruments may properly be applied

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in respect of acts that arose prior to the ratification of those instruments but which are continuing in nature and whose effects persist after the instruments' entry into force. See e.g. I/A Court H.R., Blake Case, Preliminary Objections, Judgment of July 2, 1996, Series C Nº 27, paras. 33-34 and 46; IACHR, João Canuto de Oliveira v. Brazil, Report Nº 24/98, Annual Report of the IACHR 1997, paras. 13-18. See similarly Eur. Court H.R., Papamichalopoulos et al. v. Greece, June 24, 1993, Series A Nº 260-B, pp. 69-70, 46.

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167. As for the alleged impermissible inter-temporal application of law, the State's submissions in this regard rely upon the mistaken premise that the Commission is addressing a "previously existing situation" in evaluating the Danns' complaint. While it may be the case that the ICC process itself took place more than 30 years ago, the Petitioners' complaints concerning indigenous title to the property, including alleged improprieties in the ICC process, remained the subject of controversy and continued to effect the Petitioners' interests at the time their petition was lodged and continue to do so. Moreover, the American Declaration, as an embodiment of existing and evolving human rights obligations of member states under the OAS Charter, is not to be interpreted and applied as the law that existed at the time of the Declaration's adoption but rather in light of ongoing developments in the rights protected under those instruments. [FN119] Consequently, it is appropriate to evaluate the Petitioners' complaints in light of developments in the corpus of international human rights law more broadly since the American Declaration was first composed. [FN120] To the extent that the Danns remain the victims of an on-going violation of their rights under Articles II and XXIII of the Declaration, then, the State is obliged to resolve the situation in light of its contemporary obligations under international human rights law and not those applicable at the time when the ICC process took place, to the extent that the law may have evolved.

[FN119] Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights, Advisory Opinion OC-10/89, July 14, 1989, Inter-Am. Ct. H.R. (Ser. A) Nº 10 (1989), para. 37, citing Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, p. 16 ad 31

[FN120] I/A Court H.R., Advisory Opinion OC-16/99, The Right to Information on Consular Assistance in the Framework of the Guarantees of Due Process of Law, October 1, 1999, Ser. A Nº 16, para. 114, citing, inter alia, the decisions of the European Court of Human Rights in Tyrer v. United Kingdom, Judgment of April 25, 1978, Ser. A Nº 26, pp. 15-16, para. 31; Marckx v. Belgium, Judgment of June 13, 1979, Ser. A Nº 31, p. 19, para. 41, and Loizidou, Preliminary Objections, supra, para. 71.

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168. The State's criticisms of the Commission's reference to the draft Inter-American Declaration on the Rights of Indigenous Peoples and of contemporary international human rights standards to the Danns' situation, like its objections to the Commission's jurisdiction, are untimely and not properly the subject of argument at this stage of the process, particularly since the basis of these objections were clearly in issue during the processing of the complaint before

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the Commission. As the Commission observed in its preliminary merits report, however, the provisions of the draft Indigenous Declaration are properly considered in interpreting and applying the provisions of the American Declaration in the context of indigenous peoples to the extent that the basic principles reflected in provisions of the draft Declaration, including aspects of Article XVIII, reflect general international legal principles developing out of and applicable inside and outside of the inter-American system. [FN121]

[FN121] See supra, para. 129. See similarly Awas Tingni Case, supra, separate concurring opinion of Judge Sergio García Ramírez, para. 9.

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169. Based upon the State's response, the Commission must conclude that no measures have been taken to comply with the Commission's recommendations. On this basis, and having considered the State's observations, the Commission has decided to ratify its conclusions and reiterate its recommendations, as set forth below.

VI. CONCLUSIONS

170. The Commission, based upon the foregoing considerations of fact and law, and in light of the response of the State to Report 113/01, hereby ratifies the following conclusions.

171. The Commission wishes to emphasize that it is not for this body in the circumstances of the present case to determine whether and to what extent the Danns may properly claim a subsisting right to property in the Western Shoshone ancestral lands. This issue involves complex issues of law and fact that are more appropriately left to the State for determination through those legal processes it may consider suitable for that purpose. These processes must, however, conform with the norms and principles under the American Declaration applicable to the determination of indigenous property rights as elucidated in this report. This requires in particular that the Danns be afforded resort to the courts for the protection of their property rights, in conditions of equality and in a manner that considers both the collective and individual nature of the property rights that the Danns may claim in the Western Shoshone ancestral lands. The process must also allow for the Danns' full and informed participation in the determination of their claims to property rights in the Western Shoshone ancestral lands.

172. Based upon the foregoing analysis, the Commission hereby concludes that the State has failed to ensure the Danns' right to property under conditions of equality contrary to Articles II, XVIII and XXIII of the American Declaration in connection with their claims to property rights in the Western Shoshone ancestral lands.

VII. RECOMMENDATIONS

173. In accordance with the analysis and conclusions in the present report,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS REITERATES THE FOLLOWING RECOMMENDATIONS TO THE UNITED STATES:

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1. Provide Mary and Carrie Dann with an effective remedy, which includes adopting the legislative or other measures necessary to ensure respect for the Danns' right to property in accordance with Articles II, XVIII and XXIII of the American Declaration in connection with their claims to property rights in the Western Shoshone ancestral lands.
2. Review its laws, procedures and practices to ensure that the property rights of indigenous persons are determined in accordance with the rights established in the American Declaration, including Articles II, XVIII and XXIII of the Declaration.

VIII. PUBLICATION

174. By communication dated October 30, 2002, the Commission transmitted this report, adopted as Report Nº 53/02 pursuant to Article 45(1) of the Commission's Rules of Procedure, to the State and to the Petitioners in accordance with Rule 45(2) of the Commission's Rules and requested information within 30 days as to measures adopted by the State to implement the Commission's recommendations. [FN122]

[FN122] By communication dated July 26, 2002, the Commission provided the Petitioners with a copy of its preliminary merits Report Nº 113/01 and the State's response to that report. This action was taken because the Commission had received information that officials with the US Bureau of Land Management in Nevada had published the United States' December 17, 2001 response to the Commission's confidential merits report containing direct quotations from the Commission's report, and because the Indian Affairs Committee of the US Senate had scheduled an August 2, 2002 hearing on the Western Shoshone Claims Distribution Act notwithstanding deficiencies identified by the Commission in its report concerning the Indian Claims Commission process.

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175. In a note dated November 27, 2002 and received by the Commission on the same date, the State responded to the Commission's October 30, 2002 request for information. In its communication, the State reiterated the arguments contained in its response to the Commission's preliminary merits report in this matter, namely that the United States rejected the Commission's findings in their entirety because: (i) the Danns' contentions regarding alleged lack of due process in the Indian Claims Commission proceedings were fully and fairly litigated in the United States courts and should not be relitigated before the Commission; (ii) the Commission lacks jurisdiction to evaluate processes established under the 1946 Indian Claims Commission Act since the Act predates U.S. ratification of the OAS Charter; and (iii) the Commission erred in interpreting the principles of the American Declaration in light of Article XVIII of the OAS draft declaration on indigenous rights.

176. In its response, the United States also reiterated its position that the Danns' claim "is, fundamentally, not a human rights claim, but an attempt by two individual Indians to reopen the question of collective Western Shoshone tribal property rights to land - a question that has been litigated to finality in the U.S. courts." Based upon these submissions, the United States stated

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that it "respectfully declines to take any further actions to comply with the Commission's recommendations."

177. Also by communication dated November 27, 2002 and received by the Commission on that date, the Petitioners provided a response to the Commission's October 30, 2002 request for information. In their response, the Petitioners asserted that the United States had failed to comply with the Commission's recommendations. They referred in this regard to United States' communications to the Commission and to the public in which the State has explicitly rejected the Commission's findings. These communications include the testimony of Neal McCaleb, US Assistant Secretary for Indian Affairs, at an August 2, 2002 hearing of the US Senate Indian Affairs Committee in which Mr. McCaleb is alleged to have stated that the Commission's preliminary report was "in error" and should not be considered relevant to that Committee's consideration of the Western Shoshone Claims Distribution Act.

178. The Petitioners also claim that representatives of the United States have responded to repeated overtures by counsel for the Petitioners to engage in discussions to resolve the issues in the case by reiterating that the United States does not agree with the Commission's conclusions and that it is not bound to uphold the human rights principles outlined in the American Declaration of the Rights and Duties of Man.

179. Further, the Petitioners contend that the United States has, since the Commission's preliminary report was issued, taken actions that further infringe on the human rights of the Danns that are the subject of the Commission's conclusions and recommendations. These actions are said to include the seizure and confiscation on September 22, 2002 by the US Bureau of Land Management and 40 armed federal agents of approximately 225 head of cattle from the Danns' ancestral land, which were subsequently auctioned off to the highest bidder several days later. These events took place despite an October 2, 2002 request by the Commission for the United States to comply with the Commission's June 28, 1999 precautionary measures by returning the said livestock to the Danns and refraining from impounding any additional livestock belonging to the Danns until the procedure before the Commission was complete, including implementation of any final recommendations that the Commission might adopt in the matter. The Petitioners also refer to further actions taken by the US Congress to enact the Western Shoshone Claims Distribution Act, which would authorize a per capita distribution of the funds awarded by the Indian Claims Commission as payment for Western Shoshone ancestral lands, notwithstanding the findings in the Commission's report.

180. Finally, the Petitioners assert that it is not too late for the United States to take remedial congressional action or other measures to implement both of the recommendations contained in the Commission's report. In particular, they state that although the Western Shoshone Claims Distribution Act passed the Senate on November 7, 2002, the bill did not become law because the House of Representatives adjourned without taking any action on the legislation. Although Senators supporting the bill have publicly pledged to reintroduce it after the new congress convenes in January, the Petitioners and other Western Shoshone have proposed that Congress enact legislation mandating negotiations between the Western Shoshone and the United States to identify and protect Western Shoshone lands sufficient to ensure their economic and cultural prosperity, and have suggested that Congress convene hearings to review the Indian Claims

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Commission proceedings and other US laws, procedures and practices that may not comply with international human rights protections.

181. In light of the information received from the parties, including the Petitioners' indication that domestic legislative and other mechanisms remain available for the State to give effect to the Commission's recommendations, the Commission in conformity with Article 45(3) of its Rules of Procedure decides to ratify the conclusions and reiterate the recommendations in this Report, to make this Report public, and to include it in its Annual Report to the General Assembly of the Organization of American States. The Commission, according to the norms contained in the instruments which govern its mandate, will continue evaluating the measures adopted by the United States with respect to the above recommendations until they have been complied with by the United States.

Done on the 27th day of the month of December, 2002. (Signed): Juan E. Méndez, President; Marta Altolaguirre, First Vicepresident; José Zalaquett, Second Vicepresident; Julio Prado Vallejo, Clare K. Roberts and Susana Villarán, Commissioners.