WESTERN SHOSHONE DEFENSE PROJECT

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Via: ohchr-expertmechanism@un.org and postal mail
United Nations Human Rights Office of the High Commissioner
Attn: Expert Mechanism on the Rights of Indigenous Peoples

January 28, 2022

RE: Submission by the Western Shoshone Defense Project

This submission is sent in response to the Expert Mechanism on the Rights of Indigenous Peoples' ("Expert Mechanism") Call for Submissions regarding the Study on, "Treaties, agreements and other constructive arrangements, between Indigenous peoples and States, including peace accords and reconciliation initiatives, and their constitutional recognition". First and foremost, it is notable that the earlier Study on Treaties, Agreements and other Constructive Arrangements between States and Indigenous Populations (the "Study") conducted by Professor Miguel Alfonso Martinez is not mentioned in the Call for Submissions or related Concept Paper. (See E/CN.4/Sub.2/1999/20 (22 June 1999). We respectfully request that this Study be included in any and all discussions or analysis by the Expert Mechanism.

History and Summary Background of the United States Treaty with the Western Shoshone.

With the signing of the 1863 Ruby Valley Treaty of Peace and Friendship (the "Treaty"), the United States ("U.S.") government entered into a Nation-to-Nation agreement with the Western Shoshone Nation. (See Exhibit A, attached hereto for a copy of the Treaty). As an agreement between Nations, it was recognized within the US Constitution as the "supreme law of the land" (U.S. Constitution, Article VI). The Treaty recognized Western Shoshone territory and allowed the US safe passage and certain allowances for U.S. citizens in Western Shoshone territory. The Treaty of Ruby Valley did not cede any land. And similar to other treaties, it was not about 'granting" rights to Indigenous Peoples; it granted certain privileges and rights to the U.S., reserving all the sovereign rights and responsibilities possessed by the Western Shoshone Nation unless specifically waived. It is also important to note that the U.S. Supreme Court's "canons of treaty interpretation" require that treaties be interpreted as the Indigenous Peoples understood them at the time of signing and that any ambiguities be interpreted in favor of the Indigenous Peoples' understanding. This is especially important today, as the mining industry and the Federal government has referred to the Treaty in justifying mining development in Western Shoshone territory. Traditional Western Shoshone are quick to point out that in 1863 mining of "Western Shoshone Territory" was of an entirely different nature; it represented shafts, "glory holes" and individual prospectors with picks and shovels, a far cry from the open pit cyanide heap leach mining of today.

The Western Shoshone story exemplifies the enduring problems with domestic legal doctrines in the United States pertaining to indigenous peoples, especially in relation to rights over traditional lands. The violations suffered by the Western Shoshone have persisted and in fact intensified, contrary to the recommendations by the Inter-American Commission on Human Rights[1], and the

[1] *See* Dann Case 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), available

Committee on the Elimination of Racial Discrimination[2].

Barriers within the U.S. to Constructive Dialogue and/or Implementation

Following are examples of key barriers to constructive dialogue and/or implementation of the Treaty in the current U.S. legal and political system:

Doctrine of Discovery: The antiquated and racist "Doctrine of Discovery" continues to form the underlying foundation of Federal Indian Law in the United States. The legal fiction was cemented in the U.S. law by the Supreme Court's decision in *Johnson v. McIntosh* wherein the Court declared that the "discovery" of the Americas by christian European nations divested Indigenous Peoples of their rights because lands occupied by "heathens" were considered vacant.

Arising out of this concept came the doctrine of "plenary power" under which Congress claims a virtually unlimited ability to legislate with regard to Indigenous Peoples, including the power to eliminate existing rights.

Treaty Abrogation: Accordingly, despite Article VI of the U.S. Constitution recognizing treaties as the supreme law of the land, the U.S., based upon these antiquated, racist legal doctrines claims that it is able to unilaterally abrogate treaties made with Indigenous Nations any time. See, for example, *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903); *South Dakota v. Bourland*, 508 U.S. 679 (1993), *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977). This has resulted in Indigenous Nations being denied their lands, resources, hunting and fishing rights and protection of areas of cultural and spiritual significance.

Trusteeship: Another longstanding principle of federal Indian law is the United States' claim that there exists "a general trust relationship between the United States and the Indian people." *U.S. v. Mitchell,* 463 U.S. 206, 225 (1983). As a result of this claimed "trust relationship", territories of Indigenous communities, and property of Indigenous individuals, is said to be held in legal "trust" status for them by the United States. See, *Cherokee Nation v. Georgia,* 30 U.S. 1, 16-17 (1832) (describing the federal-tribal relationship as similar to that of a guardian and ward). The U.S. claims to be responsible for administering the trust as the official trustee. Such a "trust relationship" could benefit Indian Peoples in some situations. However, there are too many obstacles in the law frustrating the ability of Indian beneficiaries, tribal and individual, to hold the United States accountable through either administrative procedures or litigation. In fact, in some cases, such as the case of the Western Shoshone, the U.S. has actually used this "trust" relationship directly against the Indian people it is supposed to be "protecting" (the United States used the notion of trustee to accept money on behalf of the Western Shoshone against the wishes of most of the Western Shoshone people).

Religious Freedom and Integrity of Sacred Sites: Another area of vital importance to Indigenous Peoples is the protection and preservation of spiritual practices and sites. The administrative processes and the judicial courts of the United States provide little practical protection to spiritual sites and, therefore, to the protection of traditional spiritual practices. For example, in *Lyng vs.*

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at http://www.cidh.org/annualrep/2002eng/USA.111140.htm ("Dann Case").

[2]*See* Decision 1 (68) (United States of America), U.N. ESCOR, CERD, 68th Sess., U.N. Doc. CERD/C/USA/DEC/1 (Apr. 11, 2006).

Northwest Cemetery Association, the Supreme Court held that a federal agency could permit road-building and timber-harvesting throughout a pristine wilderness area that was also a traditional spiritual area for three distinct tribes. 485 U.S. 439 (1988). By providing little practical protection to spiritual sites and traditional spiritual practices, the United States is denying protection of the Treaty territory and undermining Indigenous Peoples' rights to culture and self-determination.

The Lack of National Human Rights Structures: No national human rights commission or institution exists in the United States. There are some federal and state agencies which are set up to address human rights concerns, however, they either do not include specific redress for Indigenous Peoples and/or they are limited to "federally-recognized" tribes, and only address self-selected concerns through the lens of existing federal Indian law, refusing to address larger concerns under applicable human rights standards.

Further Background and Legal History of the Western Shoshone

As mentioned above, in the 1863 Treaty of Peace and Friendship the Western Shoshone agreed to allow the United States access across their lands as well as permission to perform certain activities therein[3]. In exchange, the U.S. recognized certain boundaries of the Western Shoshone territory and agreed to compensate the Western Shoshone for certain uses of their lands[4]. Since that time, there have been no amendments or any formal abrogation of the treaty. Despite the existence of this Treaty, the U.S. now defines Western Shoshone ancestral land as government or "public" land, and denies the Western Shoshone full access, use and decision making over those areas.

Instead, the United States has persistently denied the Western Shoshone people their rights to traditional lands, having wrongfully determined those rights were "extinguished" through a discriminatory and unjust administrative proceeding. In that proceeding, the Indian Claims Commission (ICC), a commission established by the U.S. Congress to adjudicate Indian claims, adopted a "stipulation" that Western Shoshone land title had been extinguished through acts of "gradual encroachment" through attorneys and a committee, not representative of the people. Based thereon, the Indian Claims Commission set aside monies for the presumed taking of lands in an amount far below the land's market value.

Since the time the monetary award was ordered, U.S. officials have impeded Western Shoshone access to and use of their lands in violation of the Treaty and to the detriment of the Western Shoshone people and their survival. Several Western Shoshone individuals and groups have been prosecuted for trespass on their own land. At the same time, the United States has permitted non-indigenous individuals and mining companies to use and occupy Western Shoshone lands. United States' law enforcement officials have conducted military-style raids against Western Shoshone ranchers, seizing livestock that is crucial to basic subsistence. The United States has also failed to protect Western Shoshone people from environmental damage by nuclear and other military testing and nuclear waste storage, open pit cyanide heap leach gold mining, and other industrial and military activities on their land. All the while, members of the U.S. Congress have

[3] *See Treaty of Ruby Valley* 1863 (Treaty between the United States of America and Western bands of Shoshone Indians, ratified by the U.S. in 1866, and proclaimed on October 21, 1869) (Attached as Exhibit A).

[4] *See id.*

promoted legislation that would further open Western Shoshone lands to non-indigenous individuals and corporations. With these ongoing harms and the failure of the United States to adhere to the recommendations of international human rights bodies, the Western Shoshone continue to face imminent threats to their traditional land and resources, and the survival of their culture.

Other International Tribunals Have Determined That the United States' Actions and Inactions Continue to Violate Western Shoshone Rights

The problems faced by the Western Shoshone are all the egregious because the United States refuses to act on the specific recommendations by the Inter-American Commission on Human Rights and the UN CERD Committee. On December 27, 2002, the Inter-American Commission issued a final report finding the United States in violation of the rights of Western Shoshone petitioners to equality before the law, to a fair trial, and to property under articles II, XVIII and XXIII of the American Declaration of the Rights and Duties of Man, one of the primary human rights instruments within the Organization of the American States[5]. The Commission found the Indian Claims Commission proceedings to be flawed on several human rights grounds[6]. The fundamental problem with the proceeding was that the issue of whether Western Shoshone rights to land were truly extinguished was not actually litigated by the ICC or the subsequent Court of Claims and that Western Shoshone individuals and groups were not permitted to intervene in those proceedings to contest the presumed "extinguishment" of title[7]. The Commission recommended that the United States provide the petitioners with an effective remedy for the infringements of Western Shoshone property rights over ancestral lands[8]. It affirmed that this should occur through legislative or other measures consistent with the above articles of the American Declaration[9]. Finally, the Commission recommended that the United States review its laws, procedures and practices regarding indigenous peoples, in particular the right to property[10].

The United States defied not only the findings and recommendations of the Inter-American Commission, but also the recommendations of the United Nations Committee on the Elimination of Racial Discrimination (CERD). In 2001, CERD issued Concluding Observations in respect to the United States' first periodic report to the Committee under the Convention on the Elimination of all Forms of Racial Discrimination[11]. The Committee noted in particular the "persistence of the discriminatory effects ... and destructive policies with regard to Native Americans" as factors impeding the implementation of the Convention[12]. CERD recommended the United States "ensure effective participation by indigenous communities in decisions affecting them, including those on their land rights, as required under article 5(c)of the Convention"[13]. These findings from CERD urged the United States to alter its policies regarding the treatment of indigenous land

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[5]*See* Dann Case, *supra* note 1 at para.5.

[6]*See Id,* at paras. 140-143

[7]*See e.g.* 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). *See* also Steven Newcomb, "Western Shoshone Crisis: Is the U.S. Nation of Arbitrary Laws?, *Indian Country Today*, March 10, 2003.

[8]*See* Dann Case, *supra* note 1 at para. 173.

[9]*See id.*

[10]*See id.*

[11]*See* Concluding Observations of the Committee on the Elimination of Racial Discrimination: (United States of America) U.N. Doc. No. CERD/C/59/Misc.17/Rev.3, para. 5 (August 2001).

[12]*See id,* at para. *384*

[13]*See id,* at para. 400.

rights, which are crucial to the physical, cultural and spiritual survival of the Western Shoshone and other Indigenous Peoples. In 2006, CERD took further action and issued a full urgent action decision against the United States.14

In the time since the Inter-American Commission issued its final report and CERD issued it concluding observations and decision regarding the Western Shoshone, the U.S. has done nothing to attempt to remedy the human rights violations identified by these bodies. Instead the United States has intensified its tactics to intimidate and threaten the Western Shoshone.

Western Shoshone Case Study Conclusion

These ongoing threats to the Western Shoshone are the result of the United States government's adherence to discriminatory principles that are central to United States' law and policy concerning indigenous peoples. The United States has failed to address and correct the injustices of its laws and policy with respect to Native Americans, and the Western Shoshone in particular, even in the face of decisions and recommendations of international human rights bodies. In fact, the United States is continuing to ignore its obligations under international law, in particular the right of self-determination, culture, and equal protection. Without further attention by international human rights and political pressure upon the United States, the Western Shoshone's rights under the Treaty of Ruby Valley to occupy and control their traditional lands and resources, and their rights to exercise and sustain their culture are at risk of being permanently damaged.

CONCLUSION

The domestic laws and policies of the United States perpetuate a legal system that legitimizes discriminatory and racist practices towards Indigenous Nations and Peoples, in terms of failing to protect their rights to property, religious freedom, protection of spiritual sites, control and management of resources, and self-determination. Despite the existence of a fully ratified treaty, the Western Shoshone people serve as an example of the imminent threats that the Indigenous Nations and Peoples of the United States are facing as a result of the United States' policies and practices described in this submission.

Respectfully submitted,

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14 Decision1(68), (United States of America), U.N. ESCOR, CERD, 68th Sess., U.N. Doc. CERD/C/USA/DEC/1 (Apr. 11, 2006).