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Legal Comment

Newe Sogobie: Treaty breach, Trust status and extinguished land title

Zia Ahktar

Introduction

The Native Americans' core issue with the United States (US) government is that there was no derogation of title in the aftermath of signing their treaties. This created reservations and imposed terms which they could not refuse for fear of dispossession in the face of unchecked migration in the mid nineteenth century. It was in the period when the US was settling its frontier with migrants under the banner of Manifest Destiny.¹²⁸ By the mechanism of the Treaty of Ruby Valley ("RV") 1863, the Western Shoeshone were corralled onto a portion of Nevada that

¹²⁸ 19th century expression of the belief that 'White Americans had a God given right to colonise the whole of the north American continent'. http://www.historyonthenet.com/American_West/manifest_destiny.htm.

became their reservation. There was then a sale of additional estate that is claimed to have not met the legal standards of a transaction with a fiduciary. This is the subject of ongoing litigation on the basis that the US is in breach of Treaty, trustee rights and its due process clause in the Bill of Rights.

In terms of their original incorporation, the territories where the Indians resided when the colonial project was launched were defined as *terra nullius*. The discovery of the continent presupposed that the land was inhabited by barbarians who had no legal right to the land. At the inception of the US this idea was conventional wisdom as the 13 colonies became the first government of the Federal United States in 1783. In his essay, "An Overview of Indian Populations,"¹²⁹ C Mathew Snipp sets out to translate the term, "empty land," as an assertion of a right to entitlement of real estate inhabited by indigenous peoples:

As Europeans came to understand that the land being taken was inhabited by indigenous people, the doctrine evolved. This notion of *terra nullius* and the idea of uncultivated land became very important ... for opening the lands in the West for

¹²⁹ "An Overview of Indian Populations," chapter in "American Indian Nations" (2007, Alta Mira Press),

settlement, because if land is not cultivated by the Indians, it must be there for the taking. This became a primary justification for westward expansion, and continues to be such to this day.

He observes further that:

indigenous peoples continue to experience modern interpretations of this doctrine in relation to waters and territories that, because of their rich resources, are deemed more valuable to the United States than to Indians . It is the invented legacy of Columbus that America cherishes.¹³⁰

The US government's guardianship over its indigenous peoples is based upon a notion of a fiduciary obligation not found in ordinary trust principles. Its scope has been raised before a UN Advisory body by the native nations in their challenge that the US had no residual powers over them.

¹³⁰ *Ibid.*

In *Hopi Nation v US*¹³¹ a submission to the United Nations Secretariat by the Hopi Nation in 1987 stated that there was no grant of "trustee" powers that allowed the US to exercise control over that tribe. The US argued that there was:

... a unique political relationship between the Hopi tribe and the United States... Confirmation and acceptance of that special relationship by Indian tribes automatically subject them to the authority of Congress and the United States.

The Federal government pleaded that it acknowledged the international principles of "self-government and free consent".¹³² It is a position that simply means that it permits the sovereignty of the Indian nations, but in practice it falls short of real sovereignty and its premises is the *terra nullius* principle, which provides it with the legal authority to treat the land as it pleases including designating reservations for the native peoples.

¹³¹ Response of the Government of the United States to United Nations Secretariat Notes no. G/SO 215/1 USA (107), (112), (114), (117), and (119). United Nations Economic and Social Council, E/CN.4/GR.1987/7/Add.12 (30 September 1987), 23.

¹³² However the US submission to the UN also specifies that it does not have a "trust" relationship with the original Hopi government because that government has never confirmed and accepted such a relationship. http://www.nativeweb.org/pages/legal/shoeshone/dismiss_opp.html

This article will elaborate that the Federal government has mistreated the Native Americans by breaching their Treaty rights, the 5th Amendment of the US Constitution's Bill of Rights by taking land without justification, and by the licencing of the corporations who trespass on indigenous reservations by their mining. This paper will show that the issue of the title to land is unsettled despite the Indian Land Tribunal rulings. It is possible to raise it by reference to judicial review proceedings that will take account of the infringement of trustee principles and international legal standards that have not been respected by the US.

Original theory of territorial conquest

The Federal government arrived at its role as the primary guarantor of the native people by the process of the US Constitution. Its *modus operandi* with the Indians was achieved by the incorporation of the Commerce clause in Article I, Section 8, Clause 3, which states: "The Congress shall have power . . . To regulate commerce with foreign nations, and among the several states, and with the Indian tribes . . .".

The use of this provision by Congress with regard to Native Americans has been the subject of long, intense political and legal

controversy, because it has defined the distribution of powers between the Federal government and the states. The grant of a legislative or plenary power of Congress to decide the affairs of Indian tribes was supplemented by the courts over the Indians to form a judicial doctrine of authority over indigenous people. This was achieved by the conflict over the issue of the superior title to land that has been decided by the Supreme Court.

In *Johnson v McIntosh*¹³³ there was a dispute of title between a government purchase of land and the defendant who was asserting the perpetuity of tribal title in real estate. Chief Justice Marshall ruled that “the discovery process gave title to the (US) Government by whose subject, or by whose authority, it was made, against all other European governments”. The Chief Justice cited various charters to document Britain’s acceptance of the discovery doctrine, and how America had inherited its mantle, as far as ownership was concerned granting the Indians a mere title of occupation.

He stated of England’s colonial enterprise as follows:

¹³³ 1 Wheatley 542 (1823) .

So early as 1496, her monarch granted a commission to the Cabots, to discover countries then unknown to Christian people, and to take possession of them in the name of the King of England.

Justice Marshall held that the Christian European nations making such discoveries only had an obligation to recognise the “prior title of any Christian people who may have made a previous discovery” making the assumption that the native title, as that may exist, was null and void . The judgment established the Marshall doctrine that was consolidated in two other cases decided by the Court under the same Chief Justice.

In *Cherokee Nation v The State of Georgia*,¹³⁴ the Cherokees were seeking an injunction against being absorbed by the State of Georgia and they invoked the Court’s jurisdiction over suits between states and foreign governments on the grounds that the Cherokee Nation was a foreign government. The Supreme Court held that the Indian tribes were “denominated domestic dependent nations” and that Congress had jurisdictional authority over them. They existed only as a “distinct

¹³⁴ 30 US 1 (1831)

society, but not as a political entity”. Their relation to the US was as “that of a ward to his guardian” and not that of full-fledged states.

The Court ruled:

Though the Indians are acknowledged to have an unquestionable, and, heretofore, unquestioned right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government; yet it may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile, they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.

C J Marshall’s characterisation of the tribes as "dependent nations" is the basis for what has been called the trust relationship between the US and

the Indian tribes, through which the Federal government protects the tribes from interference and intrusion by state governments and state citizens. The collective effect of these cases on the development of federal Indian law has been described as the three bedrock principles by Philip J. Prygoski, a professor of law of Constitutional and federal Indian law at the Thomas M. Cooley Law School in Lansing, Michigan. He states that these have cemented a theory as follows: ¹³⁵

(1) by virtue of aboriginal political and territorial status, Indian tribes possessed certain incidents of preexisting sovereignty;

(2) such sovereignty was subject to diminution or elimination by the United States, but not by the individual states; and

(3) the tribes' limited inherent sovereignty and their corresponding dependency on the United States for protection imposed on the latter a trust responsibility.

Professor Prygoski states that:

¹³⁵ From Marshall to Marshall <http://www.abanet.org/genpractice/magazine/1995/fall/marshall.html>

there are two competing theories of tribal sovereignty: first, the tribes have inherent powers of sovereignty that predate the "discovery" of America by Columbus; and second, the tribes have only those attributes of sovereignty that Congress gives them. The Supreme Court has relied on one or the other of these theories in deciding the sovereignty cases, but which ever theory the Court has favored in a given case it has determined to a large extent what powers the tribes have and what protections they receive against federal and state government encroachment.¹³⁶

Treaty of Ruby Valley

The issues of contention between the indigenous people and the Federal government are the terms of treaties that have consigned them as nominally independent nations within the US. In asserting their sovereignty the Western Shoeshone have been in the forefront of litigation against the US government in recent times both in the US courts and internationally. They claim the territory called *Newe Sogobie*, the 'land of

¹³⁶ Ibid.

the People of the Earth'.¹³⁷ This is a territory defined by the Treaty of Friendship and Peace or the Treaty of Ruby Valley between the US and the Western Shoeshone in 1863. The extent of the land the Treaty covered included most of the State of Nevada, and parts of California, Idaho, and Utah where the various bands of the tribe had traditionally roamed as nomadic and sedentary people.

The Treaty subtext provided the US government rights to land that are set out in the following two provisions:¹³⁸

ARTICLE 4

It is further agreed by the parties hereto, that the Shoeshonee country may be explored and prospected for gold and silver, or other minerals; and when mines are discovered, they may be worked, and mining and agricultural settlements formed, and ranches established whenever they may be required. Mills may

¹³⁷ The Shoeshone are aborigines and their name means the snake people. They were split into the Idaho groups of Western Shoeshone were called *Tukuaduka* (sheep eaters), while the Nevada/Utah ones were called the *Gosiute* or *Toi Ticutta* (cattle eaters). The estimated population of Northern and Western Shoeshone was 4,500 in 1845. In a census, after nearly a century there were 3,650 Northern Shoeshone and 1,201 Western Shoeshone, in a 1937 count by the United States Office of Indian Affairs.

¹³⁸ http://www.nativeweb.org/pages/legal/shoeshone/ruby_valley.html

be erected and timber taken for their use, as also for building and other purposes in any part of the country claimed by said bands.

ARTICLE 6

The said bands agree that whenever the President of the United States shall deem it expedient for them to abandon the roaming life, which, they now lead, and become herdsmen or agriculturalists, he is hereby authorized to make such reservations for their use as he may deem necessary within the country above described; and they do also hereby agree to remove their camps to such reservations as he may indicate, and to reside and remain therein.

These stipulations were deemed to prevail even over those chiefs or headmen of the Western Shoeshone who were not parties to the Treaty. However, the seeds of the dispute between the US and the tribe flared up when the desire to expand its infrastructure caused the Federal government to buy additional land. This transaction was forced upon the tribes under the terms of the Treaty at the price of 2.50 cents an acre, which was a

gross undervalue at the time when it was negotiated. It was conducted at the period of the gold rush and the provisions of the Mining Act 1872 made it mandatory on the tribe to sell the land.¹³⁹

The US government in the purchase of land at an undervalue has been breaching the 5th Amendment of the US constitution. This states quite clearly that “No person shall be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation”. In this transaction that the Federal government completed with the Western Shoeshone, there is clear suspicion that it was without the due process being followed. It has led to the charge from the Native Americans that it was breached in undervalued purchase.

The issue came to light when the Indian Reorganisation Act 1934 was enacted which caused the institution of a structure modelled on the Federal government, unlike the tiers of traditional Chiefs that had governed the Western Shoeshone tribe.¹⁴⁰ The federal authorities sponsored a Ta Moak Council (“TMC”) to be the new government, but

¹³⁹ The General Mining Act of 1872, 30 U.S.C. SS 21-54 states: “the citizens can enter and use public lands for mining exploration. If valuable mineral deposits are found, a mining claim may be filed for a lode or placer claim, as well as a nearby mill-site”.

¹⁴⁰ The Indian Reorganization Act of 1934 assigned the U.S. as trustee of the reservation lands. As not all Indians lived on reservations, only a part of the Western Shoeshone came under the IRA governments. The rest formally joined the National Council. www.hartford-hwp.com/archives/41/018.html.

those who opposed this interference formed a National Council (“NC”) which aimed to represent those Western Shoeshones who wanted to claim their lands under the Ruby Valley Treaty.

The NC reflected the concerns of the Dann band, a group of kinsmen who are part of this tribe and who live on the Duck Water Valley part of the reservation, earmarked by the RVT as the tribe’s. This new entity of the NC was not, however, recognised by the US government which encouraged the TMC to submit a claim to the Indian Claims Commission established in 1946, to adjudicate on Native American claims of dispossession.

The NC objected to this application by the TMC by stating that such action was invalid because the US had never been able to extinguish Western Shoeshone title. It raised the point by arguing that the Treaty of RV was still effective and they were seeking not just compensation in monetary terms, but also full restitution in terms of land seized since the 1863 reservation was established.

In *Western Shoeshone v US*¹⁴¹ the Indian Claims Commission (“ICC”) upheld the claim that the Western Shoeshone had been deprived of their land by 'gradual encroachment' of whites and others but without a

¹⁴¹ ICC 387 (1962).

specific 'taking' date. They applied the July 1872 transaction as the approximate date of valuation for the compensation claim. The Commission determined the fair market value of the lands acquired from the Western Shoeshone to be \$21,550,000, and limited itself to awarding damages on that computation alone.

After an appeal there was a further ruling in 1977 when the ICC entered final judgment, and awarded the Western Shoeshone (“WS”) more than \$26 million in damages for “full extinguishment of aboriginal title”. The US Court of Claims in 1979 also gave its ruling that went against the wishes of the major portion of the Shoeshone, and awarded them less than \$27 million of the 1872 value without interest, for the appropriation under Article 5 of the Bill of Rights. The Shoeshone refused to accept the money because it would have constituted for them surrendering all their rights to their ancestral homeland that they deemed was worth more on its appropriation.

The WS rank and file rejected the damages. The monetary amount was received by the Secretary of the Interior. This has now been held in a trust account for more than 40 years and it has grown with interest to over \$100 million. However, experts have opined that the ICC was flawed as an adjudicative body and had been established by the government to absolve

itself of the blame for land seizures in violation of treaties pledged from the late nineteenth century.

At its original hearings there were 176 federally recognised Indian nations who filed at least one claim prior to 1951. This led to 370 petitions in which enrolled tribes claimed the Federal government had provided them either with inadequate or no compensation for land taken from them. Almost a third of the petitions focused on the government's mismanagement of natural resources or trust funds.

In his very damning analysis of the tribunal, Harvey D. Rosenthal states that the:

... federal government itself tacitly admitted as much during the 1970s in the findings of the so-called Indian Claims Commission, to make "quiet" title to all illegally taken Indian land within the lower 48 states. What the Commission did over the ensuing thirty-five years was in significant part to research the ostensible documentary basis for U.S. title to literally every square foot of its claimed territory. It found, among other things, that the United States had no legal basis whatsoever—no treaty, no agreement,

not even an arbitrary act of Congress—to fully one-third of the area within its boundaries.¹⁴²

The ICC had been originally mandated to decide claims for ten years, but such was the demand that its board operated until September 1978, when the US Court of Claims superseded jurisdiction over outstanding cases. While the ICC Commission outcome was deemed a final verdict to the outstanding claims of Indian tribes as regards the ownership of land, those tribes who considered it as part of the manipulative process have refused to accept its findings.¹⁴³

Trespass actions against the Western Shoeshone

The monetary settlement was not acceptable to the NC, including the Dann band, who wanted to resurrect their title which, they claimed, was illegally stolen from the Western Shoeshone. The courts have ruled in a series of cases that they are not to be deemed the legal owners of property

¹⁴² Indian Claims and the American Conscience: A Brief History of the Indian Claims Commission, in Imre Sutton, ed., *Irredeemable America: The Indians' Estate and Land* (Albuquerque: University of New Mexico Press, 1985, pp. 35-86).

¹⁴³ This includes the Sioux whose claim, the Black hills, is the longest running case in the US history. They have refused to accept a monetary settlement in lieu of the return of Paha *Sapi*, their name for the range.

taken from the tribe and that their original land must be considered as public lands.

In 1973, the Bureau of Land Management (“BLM”), part of the Department of the Interior, cited the Dann band for trespassing on BLM land. It alleged that by grazing livestock without an official permit on land considered to be “public” the Danns were violating the 1934 Grazing Act, intended for the management of public rangelands. This trespass issue was based on the presumption that the band members were using public property that lay at the core of their land rights dispute with the Federal government. In response to the grazing permit breach they argued that their Aboriginal title to the land prevented the US government from requiring them to hold the herbivore licences.

This led to a trespass action by the US government in *US v Dann*.¹⁴⁴ Although successful at the District Court level the Federal government had the decision overturned at the Ninth Circuit Court. It reversed the first instance decision by stating that the Shoeshone title was not extinguished because the money had not been paid. The Appeal Court ruling in Nevada left open the possibility that, firstly, the land title may not have been extinguished and, secondly individual proprietors on their ranches could

¹⁴⁴ 470 US 39 (1985).

assert their rights that they were not on public land. The government then petitioned the Supreme Court for a review, but in their submission did not ask the Court to determine ownership, and only if payment had been made as per the Federal Claims Court ruling.

At the Supreme Court it was ruled that the transfer of funds to the Secretary of the Interior constituted payment whether the Shoeshones accepted the funds or not. The Court ruled that the US government had priority based on the judgment of the ICC ruling that right to lands in Nevada had previously been “fully extinguished” for the tribe including hunting and fishing rights. It added further that the Federal authorities had paid \$ 26 million for this taking of Western Shoeshone property when it first purchased it in 1872.

The Court upheld the original ICC ruling made under Section 22 (2) of its statute that their determination of title was final. It applied to Nevada as well as to the rest of the country; and the creation of a reserve in 1863 could not prevent these outcomes as the land acquisition was deemed valid by its provisions.

Justice Brennan, giving the majority ruling of the Court stated:

The Court has applied these principles to relations between Native American communities and the United States. In *Seminole Nation v. United States*, 316, US, 286 (1942), the United States was obligated by treaty to pay annual annuities to members of the Seminole Nation. Instead, the Government transferred the money to the Seminole General Council. Members of the Tribe argued that because the Seminole General Council had misappropriated the money, the Government had not satisfied its obligation to pay the individual members of the Tribe. In disposing of the case, the Court relied upon the rule that "a third party who pays money to a fiduciary for the benefit of the beneficiary, with knowledge that the fiduciary intends to misappropriate the money or otherwise be false to his trust, is a participant in the breach of trust and liable therefore to the beneficiary."

The Court's holding was based on its recognition of the traditional rule that a debtor's payment to a fiduciary of the creditor satisfies the debt. Absent actual knowledge of the fraudulent intent of the trustee - or some other recognized

exception to the general rule - the Government's payment to the Council would have discharged its treaty obligations. *Ibid.* The order remanding the case for purposes of determining whether the Government had fraudulent intent, *id.*, at 300, would have made sense only if the Court believed that, absent such knowledge, the Government's treaty obligations were discharged.

The Court's reliance on the general rule in *Seminole Nation* is authority for our holding that the United States has made "payment" under 22(a). The final award of the Indian Claims Commission placed the Government in a dual role with respect to the Tribe: the Government was at once a judgment debtor, owing \$26 million to the Tribe, and a trustee for the Tribe responsible for ensuring that the money was put to productive use and ultimately distributed in a manner consistent with the best interests of the Tribe. In short, the Indian Claims Commission ordered the Government qua judgment debtor to pay \$26 million to the Government qua trustee for the Tribe as the beneficiary. Once the money was deposited into the trust account, payment was effected.

The Danns also claim to possess individual as well as tribal aboriginal rights and that because only the latter were before the Indian Claims Commission, the "final discharge" of 22 (a) does not bar the Danns from raising individual aboriginal title as a defense in this action. Though we have recognized that individual aboriginal rights may exist in certain contexts, this contention has not been addressed by the lower courts and, if open, should first be addressed below. We express no opinion as to its merits.¹⁴⁵

The Court ruled that the ICC certification of a monetary award occurred when the government placed the funds in the Western Shoshone Treasury account on "a statutory interpretation" of the ICC Act, rather than on an actual finding of the "extinguishment of title". However, Justice Brennan reasoned that, while the pleadings based on the Nevada Ninth Circuit Court of Appeals decision did not preclude a subsequent course of action,

¹⁴⁵ J Brennan delivered the opinion of the Court based on the question presented whether the appropriation of funds into a Treasury account pursuant to 31 U.S.C. § 724a (1976 ed., Supp. V)] constitutes "payment" under 22(a) of the Indian Claims Commission Act, 60 Stat. 1055, 25 U.S.C. 70u(a) (1976 ed.) <http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=us&vol=470&invol=39>.

because the relevant title issue was neither actually pleaded nor actually decided in the ICC proceedings, this did not end the possibility of further litigation.

As a consequence of this anomaly the Dann band pressed their claim as a class action law suit to declare their land title in perpetuity and to allege discrimination on account of a breach of a 5th Amendment right. This Article states that there has to be due process in the taking of land; it has to be for a valid public purpose; and adequate compensation paid for any taking of land. The 14th Amendment underlies its procedure to be contingent on a guarantee of equal rights and protection to an individual or a group of people under the US Constitution.

Inter-American Court declares a wrongful taking

After exhausting their remedy at the Supreme Court level in the US the Western Shoeshone decided to present a petition at the Organisation of American States (“OAS”) Inter-American Commission on Human Rights (“IA-CHR”) in 1994. The band was represented by Carrie and the late Mary Dann, who alleged that they have had use and occupation of their lands since ‘time immemorial’, and that the US purported to have

appropriated the land as Federal property through an ICC judgment procedure, which was not an appropriate tribunal for this to be heard because its terms and reference were set by the US government.

The IA-CHR is a permanent body with headquarters in Washington, and it meets in regular and special sessions several times a year to examine allegations of human rights violations in the hemisphere. Its duties stem from the reference to three documents; the OAS Charter, the American Declaration of the Rights and Duties of Man 1948 and the American Convention on Human Rights 1969. The Commission (i) acts on individual petitions alleging human rights violations, (ii) prepares studies and reports, and (iii) makes recommendations to OAS member states for the adoption of progressive measures in favour of human rights.

Its two main functions are adjudicatory and advisory. Under the former, it hears and rules on the specific cases of human rights violations referred and rules on cases brought before it in which a state party to the Convention has accepted its contentious jurisdiction accused of a human rights violation. The Commission issues resolutions, reports and recommendations to States to ensure respect for the rights set out in the

Inter-American human rights instruments and those set out in its “Protection Mechanisms”.¹⁴⁶

The Commission has the power under its mandate to declare precautionary measures to prevent serious human rights violations in urgent cases, which, in some instances, mean references to the Inter-American Court of Human Rights (“IAC”). The IAC was established in 1979 and has adjudicatory powers that include advisory opinions on matters relating to the interpretation of the American Convention. The US however is one of the 13 countries out of 35 that do not recognise the jurisdiction of the Inter-American Court, because of its non-ratification of the American Convention of Human Rights.¹⁴⁷

The petition to the OAS HR Commission set out the alleged impropriety of the US government and its breach of the OAS Charter for Human Rights. The issue of trespass was framed with the Western Shoeshone assertion that the US had physically removed livestock and other property from their land. The Danns claimed that this was to

¹⁴⁶ The Inter-American Commission of Human Rights (IACHR) is established under Article 33 of the American Convention on Human Rights, 9 *I.L.M.* 673 (1970).

¹⁴⁷ The Court's jurisdiction is limited. It may only hear cases where the state involved has a) ratified the American Convention on Human Rights, b) has accepted the Court's optional jurisdiction, c) the Inter-American Commission on Human Rights has completed its investigation, and d) the case was referred to the Court either by the Commission or the state involved in the case within three months of the release of the Commission's report. An individual or a petitioner may not independently bring forth a case to be considered by the Court.

facilitate the government's gold prospecting activities within the Western Shoeshone traditional territory.

They contended that the BLM had wrongly claimed that the Danns' use of the Western Shoeshone homeland had not been 'undisturbed and unchallenged' until the trespass suit brought by the US. The Danns had specifically challenged this point at the Supreme Court in the 1985 litigation, but had been prevented from enacting a defence of Western Shoeshone "Aboriginal" title against Federal trespass actions, and other impediments to their use and enjoyment of ancestral lands, thereby depriving them of adequate judicial protection.

Their pleadings specifically stated that the US had violated the following:

Article 1:

To achieve an order of peace and justice, to promote their solidarity, to strengthen their collaboration, and to defend their sovereignty, their territorial integrity, and their independence.

Article 3 (b):

International order consists essentially of respect for the personality, sovereignty, and independence of States, and the faithful fulfillment of obligations derived from treaties and other sources of international law.

Article 14:

Recognition implies that the State granting it accepts the personality of the new State, with all the rights and duties that international law prescribes for the two States.

Article 18:

Respect for and the faithful observance of treaties constitutes standards for the development of peaceful relations among States. International treaties and agreements should be public.

Article 26:

In the event that a dispute arises between two or more American States which, in the opinion of one of them, cannot be settled through the usual diplomatic channels, the parties shall agree on some other peaceful procedure that will enable them to reach a solution.

In *Western Shoeshone v US*¹⁴⁸ the OAS HR Commission determined that the ICC claims process violated the rights under the principles established by the US Constitution under the Article 5, Due Process and Just Compensation Clause; and by breaching the Article 14 Equal Protection Clause. It rejected the US argument that the extinguishment of Western Shoeshone title was justified by the need to encourage settlement in the western US, because it held that the Treaty was breached in a manner that facilitated the taking over of the tribe's territory, including that of the Danns, without recourse to natural justice.

Moreover, the Commission criticised the premise of the extinguishment of title as one not “based on judicial determination of pertinent evidence” but on “arbitrary stipulations” between the government and the TMC, regarding the time and loss of indigenous title

¹⁴⁸ Case 11 140, Inter American CHR para. 139, Report no 75/02 (27 December 2002).

in the entirety of the Western Shoeshone ancestral lands. It declared the transfer of the tribe's title in 1962 to be against internationally recognised human rights procedures in the infringements of the requirement to pay just compensation, which it held to be:

... a substantive right and the right to due process that was a procedural requirement that was not complied with by the US government in the case of the dealings with the Western Shoeshone nation.¹⁴⁹

The Commission held that the Treaty signed by the US with the Western Sheoshone was an "attribute of sovereignty" and, if not exercised properly, then it also violated the owners' entitlement to notice, just compensation and recourse to judicial review, and by ignoring these safeguards in this case, the US government had breached the Dann band's inalienable rights. The OAS HR Commission ruling established a principle that a State's inability to respect the human rights enumerated in its Constitution strengthened the case against it in not honouring a similar

¹⁴⁹ Para 143 Summary and Conclusions of the OAS HR Commission .Indian Law Resource Centre http://www.dlncoalition.org/related_issues/dannvsus.htm.

right guaranteed under another different Treaty, by which it has promised to abide.

In responding to these preliminary findings the US government argued that, rather than invoking breaches of their rights under the US Constitution, the Danns should exhaust all their remedies in the US courts. The government also alleged that the band had not exhausted domestic remedies and could still pursue their claims to tribal land on an individual basis rather than as a collective Aboriginal title.

In confirming its findings in the final report in 2003, however, the OAS Commission also referred to the decision of the Ninth Circuit Court of Appeals in a case brought by the Dann band alleging violation by the US of their land. In *Western Shooshone National Council v Molini*¹⁵⁰ the Court had summarily decided for the defendant, the State of Nevada Wildlife Department and the BLM. The Danns' group claim on behalf of the tribe failed in this case because the judgment stated that there had been no interference with the Aboriginal title and the Treaty reserved land to hunt and fish. This ruling, which relied upon the 1985 Supreme Court dicta of Justice Brennan, regarded it as applicable to all the bands of the

¹⁵⁰ 493 US 890 (1989).

Western Shoeshone, and the subsequent denial of their appeal by this Court precluded domestic legal redress for the Dann band.

The OAS findings rebutted the US argument that the Danns' claims were fully and fairly litigated in the US courts and it held that the ICC lacked jurisdiction to evaluate processes, such as due process and just compensation in settling the claim by the payment of \$ 26 million on an 1872 evaluation. The US claimed that the Supreme Court had ruled that the tribe could not litigate the award once its trustee, the Interior Department, had accepted receipt of the award in 1974, and that the 1946 statute establishing the ICC charter predated its 1951 ratification of the OAS charter. However, this contention was not accepted and the Commission referred to the principles of Article XVII of the proposed OAS Declaration of the Rights of Indigenous Peoples.¹⁵¹ This affirms that:

... the Indigenous Peoples are entitled to full recognition of their laws, traditions, customs, land tenure systems, and institutions for the development and management of resources and the right

¹⁵¹ Approved by the Inter-American Commission on Human Rights on February 26, 1997, at its 1333rd session, 95th regular session.

to effective measures by states to prevent any intervention with alienation of, or encroachment upon those rights.

In rejecting the US argument the Commission held in its Final Merits Report that the main issue in the Danns' case was the 1962 ICC ruling that occurred after the US ratification of the OAS charter in 1951 and provided the Commission with jurisdiction over the matter, and the capacity to adjudicate complaints by the OAS Commission of Human Rights with respect to State parties. As such, the OAS Commission considered the American Declaration to articulate its member states' general human rights obligations under the OAS charter, and considered it to have the effect of a multilateral treaty with the force of law. Thus, it argued that it was a binding obligation on the part of the US to uphold the organisation's human rights principles and obligations and to comply with the Commission's recommendations.

Injunctive remedy for breach of environmental laws

The US government acted defiantly to the Commission's ruling and the Bush administration enacted the Land Distribution Act in July 2004,

which formally annexed 24 million acres of land in Nevada, Utah, California and Idaho that was earmarked as a reserve in the Ruby Valley Treaty of 1863. This was officially absorbed with the payment by the US government of \$145 million awarded to the tribe and most of the 8,000 or so eligible tribal members were designated to receive a proportion of the payment from this amount.¹⁵²

In addition, the Act demarked the Yucca Mountain, a site within the Ruby Valley lands, as the nation's nuclear waste repository by a provision in the Act.¹⁵³ The land is rich in resources, including gold, water and geothermal energy. There was a pending mineral exploration right awarded to a mining company to operate within the Ruby Valley lands through "privatisation" bills brought forward by Senator James Gibbons - Republican, and fellow Nevadan Senator Harry Reid - Democrat, both of whom are among Congress' leading recipients of mining company monetary contributions.

The designation of the Yucca Mountain as a national site for uranium waste was challenged by the West Shoeshone in an action that

¹⁵² Western Shoeshone Claims Distribution Act 2004 S 958 (l) transferred 26,000,000 acres from the tribe to the US in cash distributions approximately \$5 an acre, or \$30,000 per tribal member.

¹⁵³ The Yucca Mountain is part of 60 million acres of Western Shoeshone territory in Nevada, Idaho, Utah and California, which was never ceded to the U.S. government. According to the 1863 Ruby Valley Treaty most of the area now used by the U.S. military for nuclear weapons testing and the proposed waste storage site was explicitly recognized as Shoeshone land. www.sacredland.org/yucca-mountain/

also brought them into conflict with the Barrack Corporation. This Canadian company, which is the world's largest extractor of gold from the mines that lie under the Western Shoeshone land, had been served notice by the tribe to eject them from the range. The Mount Tenabo area, where the mining corporation was acting, is holy land to the tribe.

The plaintiffs included the South Fork Band Council of Western Shoeshone, the Te-Moak Tribe of Western Shoeshone Indians, the Timbisha Shoeshone Tribe, the Western Shoeshone Defense Project, and Great Basin Resource Watch. They challenged the US Interior Department's Bureau of Land Management decision to approve the Cortez Hills Mine in November of 2008.

In *Western Shoeshone v USA*,¹⁵⁴ the Federal Ninth Circuit Court of Appeals ruled on the construction and operation of the Cortez Hills gold mine that was under-developed by the Barrack Gold Corporation. The Court reversed the decision of the US District Court for Nevada, and imposed a preliminary injunction on the extraction; and held that the Interior Department's Approval of the mineral range was a violation of the National Environmental Policy Act 1982. The Court ruled that the Yucca

¹⁵⁴ 06-16214; April 15, 2008.

Mountain mining range was against the public interests due to the “irreparable environmental harm threatened by this massive project”.

The Mount Tenabo area is of cultural importance to the Western Shoeshone just as the Black Hills are for the Sioux. It has values of spirit life, and medicinal, food and ceremonial plants that underlie their practices. The open-pit mining would include an extensive groundwater pumping system to dewater the under soil that would have transported the pumped water away from Mount Tenabo. It was contended that the mine would permanently destroy approximately 6,800 acres of land on and around the landscape, over 90% of which is classified as Federal “public” land.

This ruling has been heralded as a significant development by the Western Shoeshone who have been vindicated in their argument that it impacts negatively on their land base. The judgment does not address the transfer of title, but instead deals with the lack of responsibility of the BLM to cater for the needs of the tribe, to which it has a trust duty. It is a ruling that has been confirmed in the following case against the Department of the Interior. This was a lawsuit whose origins lay in the Western Shoeshone claim that plans to industrialise the mountain range would cause contamination of their reservation base.

The case involved the Barrack Gold Corporation, and the issue of corporate responsibility and the encroachment of indigenous land resulted in the injunctive ruling.

In *South Fork Band and others v US DOI*¹⁵⁵ (2009) the issue arose out of the enforcement of the 9th Circuit Court decision that would result in the injunction against the Barrack Corporation because it had held that the US Interior Department's BLM had violated Federal law under the Federal Land Policy Management Act ("FLPMA") and the National Environmental Policy Act ("NEPA") in approving the mining project, and by its failure to adequately account for both the Tribes' access to religious sites and the mine's environmental impact on the area.

The respondent, Barrack Cortez Inc, submitted a motion in early 2010 to the lower court requesting it to only issue a limited injunction, which would not halt the entire project but only certain mining activities. The South Fork Band, who were parties to the previous action, petitioned the lower court to issue a full injunction which would halt all further construction activity on the mine until the BLM prepares an updated EIS. On April 14 the court refused to require the mine to cease all operations

¹⁵⁵ April 15, 2008 588 F.3d 718.

and instead issued limited restrictions on the company's activity until the full trial takes place.

The progress of this case, however, has vindicated the campaign of the Western Shoeshone bands to pursue the matter in the courts. The claims have led to the exposure of mal-administration of the US Department of the Interior and, also revealed the lack of respect for the indigenous land rights which have been affected by the open-pit mining on adjacent land that is still claimed by the tribe as incorrectly annexed by the Federal government.

Judicial review of the claim

There is scope, on the basis of the rulings in the international tribunals and the recent injunctive rulings, for the Western Shoeshone to seek to overturn the judgment of Justice Brennan in *Dann* at the Supreme Court that their title was extinguished by the ICC ruling in 1962. This can be done by dismantling the trust doctrine and its foundation which is the root cause of this unequal relationship that has permitted the Federal government to annex land and extinguish Western Shoeshone title.

It has been criticised as being based on premises that allow legislative power against the tribes. In an article by Janice Aitkin the issue is discussed in these terms:

The relationship between the United States and the American Indians is marked by extreme shifts in the policy of the federal government toward the Indian Nations, from the forcible removal of "hundreds of tribes . . . from their ancestral lands" to "a commitment . . . to revive tribal governments." The history of that relationship developed out of a tension between the two doctrines that form the basis for the federal-tribal relationship: the "plenary" power over Indian affairs vested in the federal government by the United States Constitution and "special trust obligations" which impose strict fiduciary standards on the federal government's dealings with Indians. The "trust doctrine" is rooted in Chief Justice Marshall's opinions in the "Cherokee Cases," *Cherokee Nation v. Georgia* and *Worcester v. Georgia*, where he described the relation of the Indian tribes to the United States as resembling "that of a ward to his guardian.

This doctrine has proved to be a two-edged sword. For more than five decades following the Cherokee Cases, issues regarding the scope and meaning of the trust doctrine remained dormant. Then, for a period of about forty years, beginning with *United States v. Kagama* and ending with *United States v. Candelaria*, the trust doctrine was treated as an additional, independent source of federal power over Indian affairs. During this period, the trust relationship was used to expand the ability of the Federal Government to intrude into internal...¹⁵⁶.

In the Dann case at the Supreme Court the plaintiff had argued that the Treaty of RV did not dispense with the lands of the tribe and that the tribe was a sovereign nation. At the 9th Circuit Court of Appeals the loss of title had not been expressly ruled on, and the Supreme Court recognised this, making it possible premises for future consideration. The judicial review will seek to overturn the notion of *terra nullius*, the basis upon which the US has exercised authority that denies title to Aboriginal people who have not agreed to dispose of their land.

¹⁵⁶ The Trust Doctrine in Federal Indian Law: A Look at its Development and at How Its Analysis Under Social Contract Theory Might Expand Its Scope. Winder 1997. 18 N. Illinois University Law Rev. 115

There is plausible evidence upon which the notion that the US is the guardian and the Indians are its wards is dispensed with absolutely. The grounds on which to argue are the documents which form a chronology and came at the formative time of the US. It was manifested in a late nineteenth century NW Ordinance, promulgated by the Congress in 14 July 1787, which stated the following:

The utmost good faith that shall always be observed towards the Indians, their lands and their liberty that it shall never be taken from them without their consent; and in their property, rights and liberty, they shall never be invaded or disturbed, unless in just and lawful wars authorized by Congress...¹⁵⁷

The subsequent Act of Congress in 1861 to organise the Territory of Nevada invoked the principles of territorial integrity and free consent stated in the Ordinance. These explicitly applied them to the Western Shoeshone and other Indian nations pre-existing on the territory. Its preamble was set out in these terms:

¹⁵⁷ The Northwest Ordinance, 1 Stat. 51.

Nothing in this act ... shall be construed to impair the rights of persons or property pertaining to the Indians in said territory, so long as such rights shall remain unextinguished by treaty with the United States and such Indians, ... but all such territory (belonging to the Indians) shall be excepted out of the boundaries, and constitute no part of the territory of Nevada, until said tribe shall signify their assent to the president of the United States, to be included in said territory...¹⁵⁸

By taking the Treaty of Ruby Valley 1863 into consideration against the background of these two documents, the US has not extinguished Western Shoeshone land rights that gave a formal expression to the fundamental principles of territorial integrity and free consent on the basis of international relations. The Supreme Court had accepted in its 1985 judgment that the substance of the rights had never been litigated; that left intact the Ninth Circuit ruling holding on to the substantive issues of Western Shoeshone land rights.

The 1985 Supreme Court's reversal of the Ninth Circuit decision on an interpretation of the Indian Claims Commission ruling was on the

¹⁵⁸ Act to Organize the Territory of Nevada, Id. (1861).

assertion that the US may act as a "trustee" for the Western Shoeshone Nation. However, the tribe's argument is that there is no trustee relationship between the tribe and the US government, and while the Court in its judgment did presume the existence of a bona-fide, documented trust relationship, none of these prove the existence of a "trust" in the circumstances of the Indian tribes and the US.

The trust relationship is itself a highly contentious matter between the tribes and the US government. As the *Hopi* case revealed, it is a special relationship granting a right of guardianship while admitting to a free consent of the Indians. However, in fixing the award, the ICC placed the US in a dual and contradictory role by making the Federal Government at once a judgment debtor and a trustee for the Tribe. This had the effect of ordering the Government qua judgment debtor to pay and the Government qua trustee for the Tribe as the beneficiary.

In acknowledging that individual Western Shoeshone land rights may exist, but on the basis that a "payment" had been effected, the Supreme Court ruling in effect stated that, although the tribe received no money and opposed the conversion of their land, they were still bound to obey the ruling of the Claims Court.

This interpretation of the trust instrument has been criticised by Milner S. Ball who states:¹⁵⁹

The trust doctrine was the device the Court applied for executing this maneuver, that made the US not only the judgment debtor to Indians, but was also trustee to the Indians. Therefore the United States as debtor can pay itself as trustee, say this change in bookkeeping constitutes payment to Indians, and the Court will certify the fiction as a reality.

The trust is a construct of the ward/guardianship theory that invokes the Marshall doctrine which is based upon the outmoded concepts of Christian supremacy. Its genesis is the "discovery," and "trusteeship" over "heathens" that, at its annunciation, relied upon the charters of monarchs and popes in centuries past to fashion a reasoning that the land the Europeans settled upon was *terra nullius*. This has been relied upon in Supreme Court opinions up to the present day.

The Western Shoeshone in the class action of the Dann band have expressly rejected these concepts of religious supremacy inherent in the

¹⁵⁹ Constitution, Court, Indian Tribes," 1987 American Bar Foundation Research Journal 1, 65 (1987).

doctrine as an unacceptable legal basis for international relations, or as justification for assertion of authority of the Federal government over the tribes. The doctrine of Christian supremacy and the concomitant assertion of federal "trusteeship" over "Indian wards" is inherent in the notion of a "Christian discovery" that may not operate by *collateral estoppel* or *res judicata* or otherwise - to bar a full and fair adjudication of the facts of the plaintiffs' rights to, and in, their homelands.

On January 17, 2006, however, the US Federal Court of Claims dismissed a petition in *Western Shoeshone v US*,¹⁶⁰ which sought to invalidate the judgment of ICC in 1977 that awarded compensation in lieu of return of the lands and to seek additional compensation for the breach of the 1863 Treaty. The Court granted the US motion to dismiss the plaintiff's action for lack of subject-matter and for failure to state a claim. The claim had to be made within five years under the limitation period set out in Section 12 of the ICCA. This was submitted 24 years later.

¹⁶⁰ 73 Fed. Cl. 59 (2006).

Possible remedies in the international forums

The treatment of Western Shoeshone by the US as their trustee has not met the international standard as a fiduciary as was decided by the OAS HR Commission rulings. There has further support for this theory by the finding on March 10, 2006 of the UN Committee on the Elimination of Racial Discrimination. Their resolution stated that there was "credible information alleging that the Western Shoeshone indigenous people are being denied their traditional rights to land".¹⁶¹ Its monitoring of the US behaviour has been continuous and provides an international spotlight on the conduct of the Federal government.

The standards that the US needs to apply have been enhanced in the backdrop of the Declaration of Rights of the Indigenous Peoples at the UN. The General Assembly resolution of September 2008 does not carry a

¹⁶¹ The UN Committee on the Elimination of Racial Discrimination (CERD) urged the US to "freeze", "desist" and "stop" actions being taken or threatened to be taken against the Western Shoeshone. In its decision, CERD stressed the "nature and urgency" of the Shoeshone situation informing the U.S. that it goes "well beyond" the normal reporting process and warrants immediate attention under the Committee's Early Warning and Urgent Action Procedure. www.indigenousinstituteamericas.org/UN_blastsUSTreatmentofSheoshones.html.

Convention status and is, therefore, not legally binding but does have moral authority.¹⁶² The preamble expresses concern

... that indigenous peoples have suffered from historic injustices as a result of their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests.

Article 27 states:

States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise

¹⁶² The General Assembly overwhelmingly backed protections for the human rights of indigenous peoples, adopting a landmark declaration that brought to an end nearly 25 years of contentious negotiations over the rights of native people to protect their lands and resources, and to maintain their unique cultures and traditions. www.un.org/news/press/docs/2007/ga10612.doc.html.

occupied or used. Indigenous peoples shall have the right to participate in this process.

Article 38 lays a duty upon the host countries to take effective measures

to achieve the ends of the Declaration.

This Declaration calls for the implementation of a different ideological impulse than the one pursued by the US under the Marshall doctrine. However, it has not been accepted by the Federal government which, along with Canada, is at present the only country that has opposed the declaration at the General assembly.¹⁶³

The Western Shoeshone claim that the religious aspect of the concept of discovery is a bar to the recognition of their rights has been upheld recently by a recent acknowledgement of the Episcopalian Church which issued a condemnation in a resolution entitled “Repudiate the Doctrine of Discovery”.¹⁶⁴ It renounced the doctrine “as fundamentally opposed to the Gospel of Jesus Christ and our understanding of the

¹⁶³ The resolution was passed by 147-4 with the opposition by US, Canada, Australian and New Zealand.

¹⁶⁴ It was passed unanimously by the Episcopal House of Bishops during the church’s 76th General Convention July 8 – 17 2009 in Anaheim.

inherent rights that individuals and peoples have received from God,” and promises to share the document with its churches, governments within its boundaries, and the UN.

The resolution expressly asks Queen Elizabeth II to publicly repudiate the Doctrine of Discovery, by revoking the Charters to John Cabot and encourages all Episcopal churches to support indigenous peoples in their ongoing efforts for their inherent sovereignty and fundamental human rights as peoples to be respected.¹⁶⁵ The Native American jurist, Steven Newcomb, has claimed it to be a success in the following terms:¹⁶⁶

... (t)he significance of the resolution in relation to the efforts by indigenous nations to protect their sacred places. The Black Hills, Mt. Graham, the Go-Road in Northern California, Yucca Mountain and San Francisco Peaks are the most well known, but there are certainly many others throughout the continent.

Since they first arrived, Christian Europeans worked hard to cut

¹⁶⁵ John Cabot was a citizen of Venice but he obtained letters-patent from Henry VII of England in 1496 to conduct a voyage of ‘discovery’ on behalf of the British Crown.

¹⁶⁶ “The Right of Christian Invasion”, *Indian Country Today*, 31/7/09.

the ties of indigenous nations to their traditional lands. Attacking their languages and ceremonial traditions in the name of Christianity was a key means of attempting to sever the ongoing spiritual relationship that indigenous nations maintained for many thousands of years with their most sacred places and territories.

The Episcopal Church has been complimented by the Quakers' proclamation at their "Indian Committee of Philadelphia Yearly Meeting" in 2009 in its Minutes – analogous to a resolution of its meeting.¹⁶⁷ The Minutes read as follows:

The Doctrine of Discovery was a principle of international law developed in a series of 15th century papal bulls and 16th century charters by European monarchs. It was a racist philosophy that gave white Christian Europeans the green light to go forth and claim the lands and resources of non-Christian peoples and kill or enslave them, if other Christian Europeans had not already done so.

¹⁶⁷ Indian Country Today 13/12/09. 'Quakers renounce discovery doctrine'.

If there is no remedy in the US courts to resolve this issue of land title, then on the basis of the findings of the OAS, CERD and the provisions of the Declaration of Indigenous Rights at the UN, the Western Shoeshone may seek to assert their right to self-determination. The precedence in which indigenous rights and territorial integrity have merged to establish a principle of free consent in international law is the judgment in *Western Sahara Case*.¹⁶⁸ The dispute centred on Spain's remaining territory in Africa which Algeria and the Polisario, an indigenous group, were claiming as sovereign territory that had a right to independence, and Morocco was claiming as part of its nation state.

It came before the ICJ in 1974 when Morocco announced its intention to bring the issue to the ICJ. As a consequence Spain agreed to delay the referendum on the future of the territory pending the ICJ submission on the grounds that it be a non-binding, advisory opinion, rather than a "contentious issue", where the ruling would oblige the interested states to act in a particular manner. The UN General Assembly

¹⁶⁸ ICJ REP. 12, 36, par. 70. (1975).

issued Resolution 3292, which affirmed the wording of the reference to be submitted.

It was based on the following questions:

I. Was Western Sahara (Río de Oro and Sakiel El Hamra) at the time of colonisation by Spain a territory belonging to no one, i.e., was *terra nullius*?

If the majority opinion was "no", could the following be addressed:

II. What were the legal ties between this territory and the Kingdom of Morocco and the Mauritanian entity?

The evidence was submitted by Spain, Algeria, Mauritania and Morocco that, according to rules as internationally-recognised, States have a right of representation ruling out the Polisario from making submissions. In its pleadings Spain cited the relationship which explorers and colonisers had with the Sultan, none of which ever recognised his authority over the region. In their submission, Algeria defended its claim that the Saharans

were a distinct people, and not bound to be part of either Morocco or Mauritania.

The ICJ decided by a vote of 13 to 3 that at the time of colonisation the territory was not *terra nullius*. It acknowledged that there were legal ties of allegiance between this territory and Morocco, based on tribal links that had made the border porous. However, the Court defined the nature of these legal ties in the penultimate paragraph of its opinion, and declared that neither legal tie implied sovereignty or rightful ownership by the Kingdom over the territory. These legal ties also did not apply because of the right to "self-determination through the free and genuine expression of the will of the peoples of the Territory." ¹⁶⁹

The WS-NC have the basis to argue that international law prohibits organs of the US government from interfering with Western Shoeshone self-determination; and the attempt by the US to enforce a "taking" of Western Shoeshone land was described by purported "representative members" of the Ta-Moak Council as a flagrant and unacceptable invasion of Western Shoeshone territory and sovereignty.

¹⁶⁹ ICJ Reports (1975) p.68, para. 162).

Further, they may argue the Indian Claims Court process for "representation" of the Western Shoeshones Nation by "any member" of the tribe constitutes a denial of due process and equal protection to all members of the Western Shoeshones not actually represented by the officially-designated "representative". Indigenous claims in the ICC are unlike a class action suit in that there is a necessity that the position of each individual member of the group be represented, and therefore any decision it reaches is null and void concerning individual bands of the tribe.

The theory that payment may be "deemed" to have been made to the TMC, thus, does not effect a transfer of the Western Shoeshone land rights to the US. The NC was not a party before the ICC, and nor was a majority of Western Shoeshone persons ever actually represented by any party to the ICC proceedings. These are plausible grounds to support the contention that the trustee qua trustee relationship was never reached, and so forth.

The issues that the indigenous people face in other countries, where there is a large population of indigenous people, resonates with those of the Indians in the US, with whom they bear a historical comparison. There have, however, already been initiatives in the direction of granting them

rights in land that overrides the concept of them being tenants of will of the estates they reside upon. The legal systems of Canada and Australia have reached further than the US to facilitate the native peoples' rights in land and there needs to be an evaluation of their developing jurisprudence.

Canada

The Canadian Constitution Act 1982 sets out the relationship between the Indians, Metis and Inuit in a legal framework. The origins of this relationship have been defined as going back to the Royal Proclamation Act of 1763, which came after the French and Indian war. It set out a territory and the terms of the relationship were to maintain the Indians as wards of the Crown until the dominion of Canada came into being.¹⁷⁰

There has been an extension of legal responsibility granted to the first nations for leasing reserve lands to other parties and retaining rights in land. In *R v Guerin*¹⁷¹ the Musquem Indian band held roughly 416 acres

¹⁷⁰ The RP Act came into effect after the French and Indian War when the Treaty of Paris ended the close relationship of the Indians of the Great Lakes Region with France. It created a boundary line between the British colonies on the Atlantic coast and Indian Reserve west of the Appalachian Mountains. The proclamation also gave the Crown a monopoly on all future land purchases from American Indians until dominion of Canada was created in 1867.

¹⁷¹ 2 SCR 335 (1984).

(1.7 km²) of prime land in the Vancouver area, and in 1958, the Federal government, on behalf of the band, made a deal with the Shaughnessy Heights Golf Club to lease 162 acres (0.7 km²) of the land in order to build a golf club. However, the actual terms of the agreement between the government and the club were not revealed to the band.

In 1970, the band discovered the true terms and protested on the basis that the government had a duty to properly explain the full extent of the deal. The terms were less favourable than if there had been a formal surrender of the lease. At first instance the court held that the Crown had breached their trust with the band and awarded the Musqueam ten million dollars. This ruling was overturned by the Federal Court of Appeal. The matter was then considered by the Supreme Court of Canada, which reasoned that the nature of Aboriginal title imposes an enforceable fiduciary duty upon the Crown. The Court ruled that the government had breached its fiduciary duty by making the lease on different terms from what had been promised to the tribe.

The Court stated that the fiduciary duties of the Crown derived from the nature of title and from the Indian Acts, and held Canada liable for its breach of duty in that case. It established the Aboriginal title to be a *sui*

generis right and rejected the government's limitation period defence to claim by ruling that the government had been guilty of "fraudulent concealment" and "equitable fraud" by not providing a copy of the lease to the band. Therefore, the limitation period did not begin to run until they had obtained knowledge of the government's breach in 1970.

Justice Dickson described the nature of Aboriginal title as an inherent right that existed prior to the Royal Proclamation of 1793 and one which was founded on historical occupation. Justices Beetz, Chouinard and Lamer JJ concurred with his opinion which stated:

[w]here by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary. Equity will then supervise the relationship by holding him to the fiduciary's strict standard of conduct.¹⁷²

The second major point that came out of the case is the Court's ruling is that the government owes a unique, legally enforceable fiduciary

¹⁷² 166 CLR 186 (1988).

duty to first nations when dealing with reserve lands. This duty places the government under a legal duty to take the same care with the management of tribal lands as would be exercised by a prudent person when dealing with his own property.

Subsequently, many first nations have been able to make successful claims against the government for breaches of fiduciary duty. This part of the decision was especially encouraging to those tribes who under Section 35 of the Constitution Act (“CA”) have been able to rely upon the recognised and affirmed Aboriginal and Treaty rights.

In *R v Sparrow*¹⁷³ the Supreme Court interpreted the Section to hold that Aboriginal rights, such as fishing, that were in existence in 1982 are protected and could not be infringed without justification on account of the government's fiduciary duty to the Aboriginal peoples of Canada. The fiduciary relationship would extend to existing fishing rights even if there was no inherent right to fish based on the Musqueam tribe's fishing rights that had not been continuously exercised over centuries.

The Court, however, interpreted the provisions in the Constitution Act 1982 to mean that communal native title ensures for the benefit of the

¹⁷³ 1 S.C.R. 1075 (1990).

community as a whole, and this includes the sub-groups and individuals within it who have particular rights, and the tribe consists as a sum of the whole. The Court held that the word "existing" in Section 35(1) must be "interpreted flexibly so as to permit their evolution over time". As such, "existing" was interpreted as referring to rights that were not "extinguished" prior to the introduction of the 1982 Constitution. This termination could only occur through an act that showed "clear and plain intention" on the part of the government to deny those rights and this was not provable prior to 1982.¹⁷⁴

Australia

The arrival date of the Europeans in Australia was 1788 when the Aboriginal people and the Torres Islanders were displaced. The mid-nineteenth century saw the expansion of the population with the discovery of gold in east Australia, which caused the white population to more than double between 1850 and 1860. It then took more than a century for the

¹⁷⁴ The Court used Professor Slattery's definition in "Understanding Aboriginal Rights," *supra*, at p. 782, (1987, Canada Bar Association) that interprets "existing" as those rights are "affirmed in a contemporary form rather than in their primeval simplicity and vigour". This interprets the constitutional guarantee embodied in s. 35(1) and the notion of "frozen rights" was to be rejected.

Aboriginal Land Rights Act 1976 to come into force as a result of the findings of the Woodward Aboriginal Land Rights Commission, and a framework was established to consider land claims, based upon the four Land Councils set up under the Act. It enabled Aboriginal people in the North Territory to claim rights to land based on traditional occupation.

The issue that came before the courts was whether a fiduciary relationship allowed the making of land grants on trust for Aboriginal peoples. In *Mabo v Queensland*¹⁷⁵ there was determination of the legal rights of the Meriam people to land on the Murray Island, which was annexed to the State of Queensland in 1879. This was because prior to their contact with Europeans the Meriam people had lived on the islands in a subsistence economy based on farming. The Island was not subject to public or community ownership, but was regarded as belonging to individuals or groups.

The Queensland Government, however, attempted to terminate the proceedings by enacting the Coast Islands Declaratory Act 1985, which stipulated that, upon the annexation of the Islands in 1879, their vesting in the State of Queensland was "freed from all other rights, interests and claims whatsoever". In the High Court it was held that this legislation was

¹⁷⁵ 166 CLR 186 (1988).

contrary to the Racial Discrimination Act 1975, and the plaintiffs further sought declarations that the Meriam people were entitled to the Murray Islands "as owners, as possessors, as occupiers or as persons entitled to use and enjoy the said islands". Their arguments were that they held a possessory title by reason of long possession, which was accepted by the Court.

The Queensland Government argued that, when the territory of a settled colony became part of the Crown's dominions, and the law of England became the law of the colony, it meant that the Crown acquired the "absolute beneficial ownership", but this reasoning was rejected. In *Mabo v Queensland (2)*¹⁷⁶ the implications of the constitutional treatment of the Aboriginal peoples was considered in the light of the trust that was declared to arise in their favour in the first judgment. The Torres Strait Islands were confirmed as belonging to the indigenous people based upon the findings of fact made by Justice Moynihan in this case. He held that the Murray Islanders had a strong sense of relationship to the islands and regarded the land as theirs to own in perpetuity.

He ruled as follows:

¹⁷⁶ 175, CLR 1 (1992).

A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration. It is contrary both to international standards and to the fundamental values of our common law to entrench a discriminatory rule which, because of the supposed position on the scale of social organization of the indigenous inhabitants of a settled colony, denies them a right to occupy their traditional lands.

The decision implied that the indigenous population had a pre-existing claim in law, which remains in force except where specifically modified or extinguished by legislative or executive action. The Court also repudiated the concept that, on the acquisition of sovereignty, absolute beneficial ownership of all the lands inhabited by native Australians vested in the Crown. The majority thought that, upon acquisition of sovereignty, the Crown acquired not an absolute but a qualified title that would be subject to native title rights where those rights had not been validly extinguished. The Court accepted that the common law land rights could co-exist with the law of native tribes which was a product of customary laws and

traditions though, where there had been a valid grant of fee simple by the Crown, the Aboriginal title would be extinguished.

In response to the *Mabo (2)* judgment, the Australian Federal Parliament enacted the Native Title Act 1993. This established a statutory definition of native title based on the comment made by Justice Brennan in the Canadian case of *Sparrow* that "native title has its origin and is given its content by the traditional laws acknowledged by and the customs observed by the indigenous inhabitants of a territory".¹⁷⁷ The Commission established they could ascertain and define the legal position of landholders, and the processes that must be followed for native title to be claimed, protected and recognised through the courts.

However, the notion of claiming land rights is independent of asserting native title and, as the Aboriginal Land Rights Act 1976 points in its preamble, it was designed for the establishment of "new legal rights created and granted under Australian law" to indigenous Australians.¹⁷⁸ In a land rights claim, indigenous people can seek a grant of title to land from the Commonwealth, State or Territory governments. That grant may

¹⁷⁷ Judge Brennan in *Mabo* at pages 64 and 69.

¹⁷⁸ Section 23.

protect those interests by giving indigenous people legal ownership of that land.

This is the basis of a new land law theory that takes a critical view of all that has happened as a consequence of the Marshall doctrine. It will lead to the establishment of new legal rights created and granted by statutory law in the US. This can be of the same range and category as the Australian law, but with greater implications because of the large territorial base of Indian reservations. The scope of those rights is *sui generis* for the purpose of extending to the customs and the land of the native people.

Conclusion

In the US the Native Americans exist in a legal limbo because of the anachronistic laws that govern them. They are part of a framework that needs radical appraisal and reform. In that conundrum of nineteenth century treaties that have been signed under bribery or coercion, they are seeking to overturn the mechanisms that have ruled them.¹⁷⁹The Treaty of R V is incorporated into the "*Supreme Law of the Land*" by Article VI of

¹⁷⁹ The US signed treaties with the Native Americans from 1787 up until 1868.

the US Constitution which gives precedence to treaties signed with foreign nations. These have become the basis for "rights safeguarded by the Constitution".¹⁸⁰

Under its plenary power, however, Congress decides the conduct of the relations with the Indian tribes. In the manner of its execution of the Treaty with the Western Shoeshone the premise is that of recognising the sovereign rights of the tribe in their dealings with the US. This has not been implemented from the time of the taking of the land, i.e., since the Treaty was signed. There is breach of the 5th Amendment that allows the taking of land under strict guidelines of public benefit, justice and its true monetary value. The US government has not acted in accordance with these concepts and, while it has paid compensation in the 1962 rulings of the ILT, that is not a genuine decision because the majority of the tribe has refused to accept it as a reflection of the real economic worth. In any event they want the land seized after the Treaty to be returned and for the Treaty to be negotiated in its proper spirit.

The issue that has been of concern to the Indians is the title to land as that has the greatest impact legally. This refers to the land that has been surrendered after the Treaty was signed. It is not in the West Shoeshone

¹⁸⁰ Article VI, Clause 2 of the US Constitution states that all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.

Reservation and there can be no Supreme Court ruling of 1985 *res judicata*. The matter has been raised in the landmark ruling in the OAS HR Commission that upheld a breach by the US of its Bill of Rights and the infringement of the American Declaration of Rights.

This ruling provides the Western Shoeshone strong grounds to plead their case in a judicial review of their title claim as that was abolished by means that did not meet natural justice standards. The recent 9th court ruling has confirmed that the US Government has, in licencing the Barrack Corporation to mine land in the Mount Tenabo area, infringed an elemental right of the tribe in practicing their religion in a traditional manner. The Declaration of the Rights of the Indigenous Peoples 2007 is also strongly in their favour in order to petition for the connection that they have with their lands.

In its 1985 judgment the Supreme Court did not expressly overrule the question of title deeds that would be a key to any subsequent legal action that could invoke the restoration of ancestral lands. The plenary power of Congress prevents the Western Shoeshone from being a sovereign nation in real terms and the Marshall doctrine has emaciated their status as a domestic dependent nation. This precludes the challenge in the ICJ which could only be initiated by a UN resolution in the General

Assembly by another country that could compel the World Court at The Hague to act on the precedence of the *Western Sahara case*. The lack of a mechanism under the Declaration of Rights of the Indigenous People means that the matter cannot be raised as an infringement in the UN as it would if there was a breach of the Convention of Civil and Political Rights.¹⁸¹

The Western Shoeshone need to solve the issue of *locus standi*, and invalidate the ruling of the defunct ICC, that may lead to the ending of the trustee status of the US, that allow the terms of their beneficial status to be subjectively viewed in the context of guardianship. The notion of *terra nullius* lies buried in the sand where the courts in countries outside the US with large Aboriginal populations have declared that the native people did have a pre-existing right before the Europeans invaded their lands. It is time to bring to an end the tribes' dependence on the US, which has deprived the indigenous peoples of their true inheritance and sold out their rights for the enrichment of the gold diggers.

¹⁸¹ Articles 1 and 3 are pertinent in this case. Art 1 states: (i) All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development. Art 3: States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realisation of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

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