THE INTER-AMERICAN SYSTEM

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IACHR REPORT NO. 75/02 MARY AND CARRIE DANN (UNITED STATES) 27 DECEMBER 2002

Report 75/02 on the Dann Case presented the Inter-American Commission on Human Rights (IACHR or "the Commission") with its first opportunity to address the matter of indigenous rights in the United States from the perspective of the American Declaration on the Rights and Duties of Man in what, the State insisted, was a mere case of a land dispute wholly unconnected with the protection of human rights. The case was first declared admissible in September 1999 and, after failed attempts to discuss the possibility of a friendly settlement, a decision on the merits was issued after non compliance with interim requests that the State refrain from its intention to impound the indigenous community property until the Commission had an opportunity to consider the claim.

The victims, the Dann sisters, lived on a ranch close to Crescent Valley, Nevada, which was their sole means of support, and were considered a part of the Western Shoshone people that occupied a particular region of the Western Shoshone ancestral territory. The Dann family had traditionally occupied and used a tract of land that extended beyond their individual ranch and which constituted part of the Dann Band land. There was no dispute regarding the status of the Western Shoshone "people" or "nation" as a collective of individuals of native descent who had for generations occupied the vast and arid territory of approximately 24,000,000 acres that is now primarily the state of Nevada in the United States, and subsisted on its resources. The relation of the Western Shoshone to their ancestral lands was based upon a system of aboriginal land title that had historically been communal in nature and upon land and resource use patterns including hunting, fishing, raising cattle and horses, and engaging in commerce with their neighbours.

The Commission explained in its report that in 1951 the Temoak Band, on behalf of the "Western Shoshone Identifiable Group", filed a claim with the Indian Claim...
Commission (ICC) against the United States alleging that a vast expanse of Western Shoshone ancestral territory had been taken in Nevada and California and that the Federal Government had extinguished the Western Shoshone’s title by confiscation. In 1962, the ICC found that the Western Shoshone Tribe had held aboriginal title to a total of 24,396,403 acres in Nevada, and that their title to most of this land had become extinguished over an unspecified period of time by gradual encroachment of both the federal government and third parties. In 1966, the Temoak claimants and the Government agreed to stipulate an average extinguishment date of July 1, 1872 in order to determine the amount of compensation due, and the ICC agreed upon the date.

In 1977, the ICC completed the compensation phase of the proceeding and awarded the Western Shoshone $26 million in compensation, based on the value of the property at the time of the alleged extinguishment, $.10 to $.15 per acre, without interest. In 1979, the Court of Claims affirmed this award on appeal. In 1974, however, a group of Western Shoshone, including crucially the Danns, attempted to intervene in the ICC process in order to remove a portion of the 24,000,000 acres of Western Shoshone property from the pending process. This included the lands that were the subject of a separate trespass action by the United States against the Danns in the federal courts. The interveners, including the Danns, argued that any lands to which they claimed aboriginal title, including lands which they continued to occupy and use, should be excluded from the determination of the final award. The ICC rejected the intervention and that ruling was affirmed by the Court of Claims, which viewed the attempted intervention as an intra-tribal disagreement over the proper litigation strategy.

In 1975 and 1976, the Temoak Band adopted a position similar to that of the Danns, namely that aboriginal title to the lands in question had never been extinguished and that the Band’s previous attorney had not presented them with the choice of whether to include all of the ancestral lands in the claim or to assert that

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4 In 1946, the U.S. Government created a specific administrative mechanism for determining and compensating Indian land claims, in the form of the Indian Claims Commission established under the Indian Claims Commission Act (ICC Act) 60 Stat. 1055, 25 U.S.C. § 70a-v. According to paragraph 70(a) of the ICC Act, the jurisdiction of the ICC extended only to claims accruing before August 13, 1946 and included the following authority: ‘The Commission shall hear and determine the following claims against the United States on behalf of any Indian tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska: […] (4) claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant’. Decisions of the ICC were open to judicial review by the U.S. Court of Claims. Finally, determinations of questions of law by the Court of Claims under the ICC Act were subject to review by the U.S. Supreme Court. Upon final conclusion of each claim, the ICC was to submit its report to Congress. The filing of this report had the effect of a final judgment of the Court of Claims and the ICC Act itself provided the authorization for the payment of those sums. Finally, according to paragraph 70(u) of the ICC Act, the determination of a claim by the ICC forever discharged the United States and barred any other claims arising out of the matter involved in the controversy.


6 Shoshone Tribe v US, ibid., at 413-4, 416; Temoak Band v US, 593 F.2d at 996.
title to a portion of the lands had not been extinguished. Accordingly, they attempted to stay the proceedings in the ICC and before the Court of Claims to further address this issue. However, the ICC denied the stay and entered a final judgment. On appeal, the Court of Claims affirmed the ICC’s ruling on the basis that it was too late for the Temoak Band to change their litigation strategy. In December 1979, the Clerk of the Court of Claims certified the ICC’s award to the U.S. General Accounting Office, which automatically appropriated the amount of the award and deposited it for the tribe in an interest-bearing trust account in the Treasury of the United States. However, at the time of the Report’s approval this award had not yet been paid out.

In the meantime, in 1974 the United States brought an action in trespass in the federal courts against the Danns, alleging that the Danns had undertaken unauthorised grazing in the Northeast corner of Nevada. In their defence, the Danns argued that the land had been in their possession, and the possession of their ancestors, since time immemorial and that their aboriginal title in the property precluded the State from requiring grazing permits. The U.S. District Court rejected the Danns’ argument, on the basis that the Danns’ aboriginal title in the property had been extinguished by the collateral claims process before the ICC and that the United States had acquired all 22 million acres of Western Shoshone land through the estoppel effect of the ICC’s 1962 judgment. On appeal, the Ninth Circuit Court of Appeals reversed the District Court decision and remanded, on the basis that the extinguishment issue had not been litigated or decided in the ICC proceedings. On remand, the District Court held in 1980 that aboriginal title in the land in issue had been extinguished when the final ICC award was certified for payment, and on further appeal the Ninth Circuit in a 1983 judgment once again reversed the District Court on the same grounds: that there was no estoppel to setting up the aboriginal title as a defense, because the issue of extinguishment of title had not actually been litigated before the ICC.

In turn, however, the U.S. Supreme Court reversed, stating that the Danns were estopped from raising aboriginal title as a defence to the U.S. trespass action. On further remand to the Ninth Circuit it was finally decided that the U.S. Supreme Court’s finding was decisive on precluding the issue of aboriginal title collectively and the Court accordingly accepted the ICC’s determination of July 1, 1872 as the appropriate date for the extinguishment of Western Shoshone land rights. In reaching this conclusion, the Court stated ‘...[i]t is true that the taking was not actually litigated...but the payment of the claim award establishes conclusively that a taking occurred. From the claims litigation, we can only conclude that the taking occurred in the later part of the nineteenth century’.

Consequently the petitioners alleged before the Commission that the Danns had not authorized or participated in the ICC claim submitted by the Temoak Band, and

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7 US v Dann, 572 F.2d 222 at 226 (9th Cir. 1978).
8 US v Dann (Dann II), 706 F.2d at 923.
9 US v Dann, 706 F.2d 919 (9th Cir. 1983).
10 US v Dann, 470 U.S. 36.
11 US v Dann, 873 F.2d 1189, 1199 (9th Cir. 1989).
that when they and several other bands had subsequently sought to intervene in the proceedings, they were unsuccessful. They thus alleged that the State had violated their right to equality before the law, fair trial and property protected in Articles II, XVII and XXIII of the American Declaration.\footnote{Article II of the American Declaration provides that ‘All persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor’. Article XVIII (Right to a fair trial) provides that ‘Every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights’. Article XXIII (Right to property) provides that ‘Every person has a right to own such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home’.} In response, the State submitted that throughout the proceedings before the ICC the Western Shoshone had been kept fully apprised through regular meetings with members of the tribe. The Commission found that only one of the meetings specifically referred to by the State was convened by the attorney for the Temoak Band in 1965, 14 years after the ICC proceedings commenced and 3 years after the ICC issued its ruling. In the absence of evidence to the contrary, the Commission therefore established that the Danns did not play a full or effective role in retaining, authorizing or instructing the Western Shoshone claimants in the ICC process.\footnote{Mary and Carrie Dann, supra note 2, at para. 136.}

The Commission also considered there was a conflict between the parties’ positions as to whether Western Shoshone title was the subject of litigation and determination by the ICC. Based upon the record before it, the Commission found that the determination of the domestic courts as to whether their title may have been extinguished was not based upon a judicial evaluation of pertinent evidence, but upon apparently arbitrary stipulations as between the U.S. government and the Temoak Band. In the Commission’s view, the 1983 judgment of the U.S. Court of Appeals for the Ninth Circuit was the only decision to review the substance of the ICC’s finding of ‘extinguishment’ of Western Shoshone title. However, these findings had been reversed by the U.S. Supreme Court without consideration of the merits on this point, leaving the issue of title to Western Shoshone lands without definitive substantive adjudication.

The Commission did expressly acknowledge that the United States had taken significant measures to recognize and account for the historic deprivations suffered by indigenous communities living within the State. It remarked on the implementation of an efficient solution to the sovereign immunity bar to Indian land claims under U.S. law, and on its extension to indigenous communities of certain benefits relating to claims to their ancestral lands that were not available to other citizens. However, it concluded that these processes were not sufficient to comply with contemporary international human rights norms, principles and standards that govern the determination of indigenous property interests.
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The Commission found it necessary to consider the Dann sisters’ complaints on the subsistence of their property rights in the context of the evolving rules and principles of human rights law in the Americas as reflected in treaties, custom and other sources of international law. The Commission relied upon developing norms and principles governing the human rights of indigenous peoples which encompass distinct human rights considerations relating to the ownership, use and occupation by indigenous communities of their traditional lands. Central to these norms and principles was ‘a recognition that ensuring the full and effective enjoyment of human rights by indigenous peoples requires consideration of their particular historical, cultural, social and economic situation and experience’.

This recognition extended to acknowledgement of a particular connection between communities of indigenous peoples and the lands and resources that they have traditionally occupied and used, the preservation of which is fundamental to the effective realization of their human rights. The Inter-American Court of Human Rights has similarly recognized that for indigenous communities the relation with the land is not merely a question of possession and production but has a material and spiritual element that must be fully enjoyed to preserve their cultural legacy and pass it on to future generations.

The development of these principles in the Inter-American system has been reflected in the drafting of Article XVIII of the Draft America Declaration on the Rights of Indigenous Peoples, which provides for the protection of traditional forms of ownership and cultural survival and rights to land, territories and resources. The Commission indicated in its Report in the Dann Case that while the Draft Declaration has not yet been approved by the OAS General Assembly, the provision in Article XVIII does reflect general international legal principles that can be properly considered in interpreting and applying the provisions of the American Declaration in the context of cases relating to indigenous peoples.

The Commission considered that the Dann case merited consideration of indigenous human rights principles, including: the right of indigenous peoples to legal recognition of the varied and specific forms and modalities of their control, ownership, use and enjoyment of territories and property; the recognition of their property and ownership rights with respect to lands, territories and resources they have historically occupied; and, where property and user rights of indigenous peoples arise from rights existing prior to the creation of a state, recognition by that state of the permanent and inalienable title of indigenous peoples relative thereto and to have such title changed only by mutual consent between the state and the indigenous

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14 Ibid., at para. 124.
15 See IACtHR, Case of Mayagna (Sumo) Awas Tingni Case, Judgment of 31 August, 2001, para. 149; 10 IHRR 000 (2003).
peoples concerned when they have full knowledge and appreciation of the nature or attributes of such property.\textsuperscript{17}

The Commission considered the obligations of the State under Articles XVIII and XXIII of the American Declaration in the light of these principles. It concluded that the Declaration specially obliged member states to ensure that 'any determination of the extent to which indigenous claimants maintain interests in the lands to which they have traditionally held title and have occupied and used, is based upon a process of fully informed and mutual consent on the part of the indigenous community as a whole'.\textsuperscript{18} It established that this required at a minimum that all of the members of the community be fully and accurately informed of the nature and consequences of the process and provided with an effective opportunity to participate individually or as collectives.

In the case of the Danns, however, the land claim had been pursued by one band of the Western Shoshone people with no apparent overall mandate from the other Western Shoshone bands or members. The Commission also found no evidence that appropriate consultations were held within the Western Shoshone at the time that certain significant determinations were made, including in particular the ICC’s finding that the entirety of the Western Shoshone interest in their ancestral lands, which interests affected the Danns, was extinguished at some point in the past. In the Commission’s opinion, in this situation there was insufficient evidence to show that the State had fulfilled its particular obligation to ensure that the status of the Western Shoshone traditional lands was determined through a process of informed and mutual consent. The insufficiency of this process was augmented by the fact that, on the evidence, the issue of extinguishment was not litigated before or determined by the ICC, in that the ICC did not conduct an independent review of historical and other evidence to determine as a matter of fact whether the Western Shoshone properly claimed title to all or some of their traditional lands. Therefore the Danns’ claims to property rights in the Western Shoshone ancestral lands had not been determined through an effective and fair process in compliance with the norms and principles under Articles XVIII and XXIII of the American Declaration.

In addition, the Commission concluded that to the extent that the State had asserted title in the property based upon the ICC proceedings, the Danns had not been afforded their right to equal protection of the law under Article II of the American Declaration. It indicated that, under prevailing law in the United States, including the Fifth Amendment to the U.S. Constitution, the taking of property by the government ordinarily requires a valid public purpose and the entitlement of owners to notice, just compensation, and judicial review. In the present case, however, the Commission could not find that the same prerequisites had been extended to the Danns in regard to the determination of their property claims to the Western Shoshone ancestral lands, and no proper justification for the distinction in their treatment had been established by the State. While compensation for this extinguishment was

\textsuperscript{17} Mary and Carrie Dann, supra note 2 at para 130.

\textsuperscript{18} Ibid., at para. 140.
awarded by the ICC, its value was calculated based upon an average extinguishment date that did not bear any relevant connection to the issue of whether and to what extent all or part of Western Shoshone title in their traditional lands, including that of the Danns, may no longer subsist. Further, this compensation failed to include an award of interest from the date of the alleged extinguishment to the date of the ICC decision, thus leaving the Western Shoshone uncompensated for the cost of the alleged taking of their property during this period.

In view of these findings the Commission recommended the State to provide Mary and Carrie Dann with an effective remedy, including the adoption of legislative or other measures necessary to ensure respect for the Danns’ right to property in accordance with Articles II, XVIII and XXIII of the American Declaration in connection with their claims to property rights in the Western Shoshone ancestral lands; and to review its laws, procedures and practices to ensure that the property rights of indigenous persons are determined in accordance with the rights established in the American Declaration, including Articles II, XVIII and XXIII of the Declaration.

The United States rejected the Commission’s Report and recommendations in their entirety. It alleged that the Danns’ contentions regarding a lack of ‘due process’ in the ICC proceedings were fully and fairly litigated in the United States courts and should not be relitigated before the Commission. It also contended that the Commission lacked jurisdiction to evaluate processes established under the 1946 Indian Claims Commission Act since the Act predated U.S. ratification of the OAS Charter and that it had erred in interpreting the principles of the American Declaration in the light of Article XVIII of the OAS Draft Declaration on Indigenous Rights. In its response, the United States also reiterated its position that the Danns’ claim was ‘fundamentally, not a human rights claim, but an attempt by two individual Indians to reopen the question of collective Western Shoshone tribal property rights to land – a question that has been litigated to finality in the U.S. courts’. In consequence, the United States stated that it ‘respectfully decline[d] to take any further actions to comply with the Commission’s recommendations’. 19

On September 22, 2002, the United States took action to further infringe the rights of the Danns by seizing and confiscating, by action of 40 armed federal agents, approximately 225 head of cattle from their ancestral land which were subsequently auctioned off to the highest bidder several days later. These events took place despite an October 2, 2002 request by the Commission to comply with precautionary measures stipulating the return of said livestock to the Danns and that the authorities should refrain from impounding any additional livestock until the procedure before the Commission was complete, including implementation of any final recommendations that the Commission might adopt on the matter.

19 Ibid., at para. 176.