

NGO Shadow Report

**ICCPR Article 1, Self-Determination and Native Americans**

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The United States has not expressed any reservations concerning Article 1 of the International Covenant on Civil and Political Rights and it is not addressed in any of the understandings and declarations put forth upon U.S. ratification in 1992. Nonetheless, the United States continues to violate Article 1 in its treatment of Native Americans based on discriminatory federal Indian policies. In fact, the U.S. claims to have “plenary” power over Native Americans and has developed a federal tribal recognition process, whereby the United States is the final arbiter as to whether a Native American peoples will be “recognized” as a self-governing tribe. U.S. assertions of plenary power of Native American peoples stems from cases based upon the antiquated and racist “doctrine of discovery.”

The central premise of the “doctrine of discovery” is that indigenous peoples are divested of certain natural rights by the mere arrival of Europeans because of an assumed European superiority, linked intrinsically to the Christian church. This legal fiction that discovery of the new world by Europeans resulted in inherent limitations on indigenous sovereignty in favor of the European “discovering” nation inherently discriminates against the rights of indigenous peoples to effectively rule themselves and their territories. In *Johnson v. McIntosh*, 21 U.S. (8 Wheat) 543 (1823), the Supreme Court ruled that by virtue of the discovery of North America by the Europeans and the “conquest” of its inhabitants, the federal government, as the Europeans’ successor, was entitled to enforce its laws over all persons and property within the United States. Legal scholars recognize that while the United States maintains a separation of church and state,

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<sup>1</sup> Contributions by Julie Fishel, Western Shoshone Defense Project, and Lucy Simpson, Indian Law Resource Center, to the introduction and Western Shoshone section.

the “doctrine of discovery” is a longstanding policy based on discriminatory treatment of people who were not Christians at the time of European arrival.<sup>2</sup> The *Johnson v. McIntosh* ruling, and the policies that sprung forth from it, stands to this day as a perpetuation of colonization and a violation of the fundamental human rights of indigenous peoples.<sup>3</sup>

The foundational principle of the “doctrine of discovery” gave rise to the doctrine of plenary power. The plenary power doctrine is the purported legal justification holding that Congress has virtually unlimited power over Indian tribes, their property, and their affairs. As stated by the Supreme Court, “Congress possesses plenary power over Indian affairs, including the power to modify or eliminate tribal rights.” *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998). This doctrine, another example of U.S. policy which this Committee has recommended against, has come to mean that, with a few small exceptions, Congress can legislate with regard to Indians without being subject to recognized standards of human rights, not to mention the U.S.’ own constitutionally-guaranteed rights. No other group of people is subject to such plenary power -- only Indians. The plenary power doctrine has resulted in a multitude of discriminatory laws and policies relating to indigenous peoples in the United States, as outlined below, which violate Article 1 of the ICCPR, as well as other human rights instruments.

### **Executive Summary**

Due to continuing interference with the self-governance and property rights of Native Americans, the U.S. government is in violation of Article 1 of the ICCPR. The government has engaged in long-term mismanagement of Individual Indian Money (IIM) accounts resulting in

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<sup>2</sup> Robert A. Williams, Jr., “Columbus’s Legacy: The Rehnquist Court’s Perpetuation of European Cultural Racism Against American Indian Tribes,” 39 Fed.B. News & J. 358-69 (1992). *See also* Newcomb, Steve, “Five Hundred Years of Injustice,” *Shaman’s Drum* (1992) at 19; S. James Anaya, *Indigenous Peoples in International Law*, 2d ed. 23-26 (Oxford and New York: Oxford Univ. Press, 2004).

<sup>3</sup> *See id.*

major losses from the Indian Trust. The Government continues to attack access and ownership of traditional lands using methods ranging from “gradual encroachment” to harassment via fines and property confiscation. These actions constitute breaches of Indian treaties, violations of violations of indigenous rights to property and culture and violations of Article 1(2) of the Covenant. The United States must recognize Native American property, including rights over traditional lands and resources, according to recognized human rights principles .

The Federal Government has also failed to recognize specific Native American tribes as self-governing peoples. The established process for federal recognition was established by the United States in 1934 under what is referred to as the “Indian Reorganization Act”. This process, imposed upon Native communities, oftentimes resulting in direct conflict with long-standing traditional forms of self-government. This has resulted in the creation of significant obstacles to federal recognition that are not easily overcome. Certain federally required criteria cannot be met because of actions taken by the Government and majority factions of the population throughout this country’s history.<sup>4</sup> Refusal to recognize Native American peoples or Nations which do not fit certain criteria because of historical actions represents a violation of Article 1(3) of the Covenant.<sup>5</sup> The United States must recognize and respect rights to self-determination and allow for tailoring of any “recognition process” to the needs of the individual tribe and allow for certain deviations from the established process. If the United States continues to insist on formal federal recognition of individual “tribes”, the Federal Government must take

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<sup>4</sup> During the late 1800s and continuing through the early 1900s, the U.S. Government actively supported the use of boarding schools in order to assimilate Native American children into Christian American society. Students were required to conform to European dress and to become “civilized”. There was a strict English-only language policy employed in the schools. See <http://www.twofrog.com/rezsch.html#Justification> for more information. Also during this time, the eugenics movement enjoyed increasing popularity. Many chose assimilation rather than to be targeted as a lesser person by this movement. See <http://www.indiancountry.com/content.cfm?id=1096410443>.

<sup>5</sup> The example of the Abenaki follows.

factors, such as the historical pressure to assimilate into the greater American community into account in decisions for federal recognition.

Three current examples of the failure of the United States to abide by the Covenant follow. The first is the case of the Western Shoshone. This case provides one example of government efforts to extinguish Native American property rights through a discriminatory and unjust agency process. The case also highlights government failure to resolve the matter in good faith after being requested to do so by regional and United Nations human rights bodies, relying instead on the use of retaliatory measures when indigenous peoples assert their rights under the law. The second case, still in U.S. Courts after ten years, is *Cobell v. Norton*. This case involves efforts of Native Americans to receive a full and accurate accounting of the Individual Indian Money trust after years of malfeasance and mismanagement. It also highlights government retaliation when Native Americans assert their rights. The last case demonstrates many of the obstacles indigenous communities face when they seek federal recognition.

#### **Interference and Denial of Rights to Property – The Western Shoshone**

The self-proclaimed power of Congress to take Indian property, including aboriginal land, money, and other property, without legal restriction and without compensation is perhaps the most extraordinary example of the claimed plenary power of Congress. In this regard, the United States has refused to meet its international obligations, as well as the constitutional protections provided to others for their property, and has failed to protect the integrity of indigenous lands, resulting in the original occupants of this country having the least protection for their rights to their land.<sup>6</sup> No other community in the United States faces such insecurity or

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<sup>6</sup> The UNHRC has advised the U.S. Government to take steps to ensure that indigenous rights are not extinguished by Congress. The 1995 report urged equal treatment and application of laws as well as judicial review in order to protect these rights. UNHRC Concluding Observations of the Human Rights Committee: United States of America, Mar. 10, 1995, Doc. CCPR/C/79/Add.50; A/50/40 at paras. 290, 291, 302.

discriminatory treatment with respect to their property rights. This policy violates indigenous peoples' enjoyment of their rights to self-determination under Article 1, their right to equal protection of the law under Article 26, and, because of their cultural and spiritual connections to the land base, their right to culture under Article 27.

One of the clearest examples of this violation of the right to property is the Western Shoshone case. This is a violation of Article 1(2) of the Covenant because it does not allow the Western Shoshone to "freely dispose of their natural wealth and resources."<sup>7</sup> The United States has asserted ownership over Western Shoshone traditional land, in violation of Western Shoshone ancestral rights and the Treaty of Ruby Valley. The Treaty was confirmation that the United States in 1863 recognized the boundaries of Western Shoshone lands. It did not cede title to the lands, but merely gave to the U.S. limited access and use for specified purposes and allowed for "fair compensation" to the Western Shoshone for those uses. Despite the Treaty of Ruby Valley, the United States unilaterally assumed federal ownership and control over these same lands, and has been actively impeding and at some points, denying Western Shoshone peoples access, use and decision making authority regarding these lands.<sup>8</sup>

To make matters worse, the United States has refused to provide the Western Shoshone with a full and fair opportunity for a hearing on the matter – a clear violation of due process. As a result, the United States has taken and used Western Shoshone lands and property without fair and adequate compensation or effective indigenous participation.<sup>9</sup> Additionally, the Indian Claims Commission (ICC) has not only chosen which of the Western Shoshone claims are

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<sup>7</sup> International Covenant on Civil and Political Rights, Mar. 23, 1976, art. 1(2), 999 UNTS 171, this right was further defined in the UNHRC General Comment No. 12: The right to self-determination of peoples (Art. 1), 21<sup>st</sup> Session CCPR, Mar. 3, 1984, Paragraph 5.

<sup>8</sup> Western Shoshone National Council, Request for Early Warning Measures and Urgent Procedures, Jul. 25, 2005 at iii, iv; See also, Western Sahara, 1975 ICJ 12 at 36.

<sup>9</sup> Western Shoshone National Council, Second Request for Early Action, Jul. 29, 2005 at 5, 6.

allowed a hearing, but has also identified who would represent the Western Shoshone and which individuals may make the claims.

The United States is proceeding to utilize Native American land as its own, for activities such as mining and nuclear waste storage, to the benefit of non-native individuals and corporations. Those individuals within the Western Shoshone Nation that seek to assert their rights are often met with retaliation, ranging from confiscation of property to intimidation, fines or collection notices.<sup>10</sup>

The United States' actions against the Western Shoshone have been found to violate established human rights principles by two different international tribunals. The Inter-American Commission on Human Rights has held that due to its actions concerning Western Shoshone property, the United States is in violation of rights to property, due process and equality under the law.<sup>11</sup> The United States' response was to claim that the Commission does not have jurisdiction over it.<sup>12</sup>

More recently, in March, 2006, the United Nations' Committee for the Elimination of Racial Discrimination (CERD) published a full decision under its Urgent Action and Early Warning procedures, concerning the Western Shoshone. The Committee stated that U.S. treatment of the Western Shoshone should be reviewed and addressed immediately and stressed that action should not be postponed until after the United States submits its Periodic Report. The Committee urged the United States to respect and protect Western Shoshone human rights, initiate an immediate dialog with the Western Shoshone to work out a solution that is acceptable

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<sup>10</sup> Western Shoshone National Council, Second Request for Early Action, Jul. 29, 2005 at 2, 10-12.

<sup>11</sup> Final Report, Inter-American Commission on Human Rights, Organization of American States, 75/02, Case 11.140.

<sup>12</sup> Press Release, Western Shoshone Travel to United Nations to Combat Ongoing U.S. Human Rights Violations Against Indigenous Peoples (Aug. 15, 2005) (on file with author).

to both governments, cease activities on and privatization of Western Shoshone lands, and remove restrictions and penalties for traditional land use by the Western Shoshone people.<sup>13</sup>

The United States has responded to these decisions with disregard and the Western Shoshone continue to suffer ongoing human rights violations regarding their land rights. For a further discussion of the Western Shoshone situation, please refer to the separate Compliance Report dated January, 2006 submitted by the Indian Law Resource Center, in coordination with the Western Shoshone Defense Project and the University of Arizona Indigenous Peoples Law and Policy Program, entitled “The Status of Compliance by the United States Government with the International Covenant on Civil and Political Rights.” For a further discussion of the discovery and plenary power doctrines as they relate to the extinguishment of Indian lands, please see the separate Report to be submitted to the Human Rights Committee by the Indian Law Resource Center in June, 2006.

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#### **Mismanagement of Individual Indian Money Accounts – *Cobell v. Norton***

*Cobell v. Norton*, a case currently within the U.S. Court system, highlights the history and problems of Indian Trusts, the retaliatory reaction of the U.S. Executive, and demonstrates another violation of Article 1 of the Covenant.<sup>14</sup> On December 19, 2005, the D.C. Circuit decided the Equal Access to Justice Act lawsuit, *Cobell v. Norton*, in favor of the plaintiffs.<sup>15</sup> This is the latest in a series of cases concerning United States Government’s malfeasance in managing Individual Indian Money (IIM) accounts. The court granted the plaintiffs fees and expenses in the sum of approximately \$7.1 million.<sup>16</sup> The U.S. Executive, through the

<sup>13</sup> Early Warning and Urgent Action Procedure, U.N. Committee for the Elimination of Racial Discrimination, 68<sup>th</sup> Session, Decision 1 (68): United States of America at 3, U.N. Doc. CERD/C/USA/DEC/1 (2006).

<sup>14</sup> International Covenant on Civil and Political Rights, Mar. 23, 1976, art. 1(2), 999 UNTS 171.

<sup>15</sup> *Cobell v. Norton*, ---F.Supp.2d--- (Pg. 1) (D.C. Circ. 2005).

<sup>16</sup> *Id.*, at 1.

Department of Interior's Bureau of Indian Affairs, has since stated that the judgment will be paid using Native American program funds.

The IIM accounts are trusts set up to hold money from natural resource leases on Native American land. The trusts result from Congressional use of the plenary power doctrine in order to enact the General Allotment Act of 1887.<sup>17</sup> The Act allowed the Government to hold land in trust for individuals. No other group in the United States is subject to a system such as this. In 1934, the Government stopped granting land trusts, but extended the trust period for the lands already given.<sup>18</sup> A 1938 act allowed the Government to transfer funds from these trusts with the Treasury Department and invest them in Government securities.<sup>19</sup> In 1994, the Government passed the American Indian Trust Fund Management Reform Act in response to an embarrassing record of mismanagement.<sup>20</sup>

The lawsuit, started in 1996, resulted from frustration over Government delays in fulfillment of its duties under the 1994 Act.<sup>21</sup> In 1999, *Cobell v. Babbitt*, 91 F.Supp.2d 1 (D.D.C. 1999) was decided. The District Court held that the United States had breached its statutory trust duty and ordered an accurate accounting of the IIM accounts. The government was to retain all necessary information for the accounting and establish policies and procedures to ensure future accurate accounting. The Court retained jurisdiction and ordered quarterly reports from the government.<sup>22</sup> In 2001, *Cobell v. Norton*, 240 F. 3d 1081 (D.C. Cir. 2001) affirmed the D.C. Circuit Court.<sup>23</sup> The Court stated that there was mismanagement and that the Treasury Department had failed in their fiduciary duties. The Court also affirmed the mandatory oversight

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<sup>17</sup> *Cobell v. Norton*, 428 F.3d 1070, 1072 (U.S. App. D.C. 2005).

<sup>18</sup> *Id.*, at 1072.

<sup>19</sup> *Id.*, at 1072.

<sup>20</sup> *Id.*, at 1072-1073.

<sup>21</sup> *Id.*, at 1072.

<sup>22</sup> *Cobell*, --- F.Supp.2d--- (Pg 6).

<sup>23</sup> *Id.*, at 7.



of accounting in this case because of the high level of government malfeasance.<sup>24</sup> It also expressed disapproval of the unreasonable delays and unwillingness of the U.S. Government to cooperate with court orders.<sup>25</sup>

*Cobell v. Norton*, 428 F.3d 1070 (U.S. App. D.C. 2005), overturned the ordered accounting methods but affirmed that the U.S. Government had breached their fiduciary duties. The court held that an historical accounting with respect to IIM accounts could not stand and the district court's decision was vacated. The accounting would have been extremely costly, if not impossible to do. Even the Plaintiffs in this case did not believe that the accounting would be possible to perform. Although the Court stated that the 1994 Act to Authorize the Deposit and Investment of Indian Funds did not order the best imaginable accounting and deferred to the Interior Department's plan, it admonished the government for its fiduciary breach.<sup>26</sup>

The latest lawsuit came out of the 10-year fight for justice for Native Americans.<sup>27</sup> In this suit, the plaintiffs sought expenses and court costs under the Equal Access to Justice Act (EAJA). The Court opinion stated that the government had acted in bad faith and the award served as a sanction for government misconduct, citing government delay and defiance.<sup>28</sup> A February 2, 2006 press release from the Indian Trust website cites statements from a letter from Associate Deputy Interior Secretary James Carson. He stated that the \$7.1 million award from the EAJA judgment would be paid via cuts in various Native American programs.<sup>29</sup> To this date,

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<sup>24</sup> *Id.*, at 12.

<sup>25</sup> *Id.*, at 12.

<sup>26</sup> *Cobell*, 428 F.3d at 1078-1079.

<sup>27</sup> Press Release, Interior Seeks to Punish Indians for Trust Lawsuit (Feb. 2, 2006), available at Indian Trust Website, <http://www.indiantrust.com/>.

<sup>28</sup> Press Release, Dec. 19, 2006, available at Indian Trust Website, <http://www.indiantrust.com/>.

<sup>29</sup> Press Release, Interior Seeks to Punish Indians for Trust Lawsuit (Feb. 2, 2006), available at Indian Trust Website, <http://www.indiantrust.com/>.

many of the “land-based” accounts have still not been reconciled. These accounts include mineral leases, etc.<sup>30</sup>

On February 23, 2006, plaintiff, Cobell, appealed to Congress to stop the cuts in Native American programs in order to pay for the EAJA judgment proposed by the U.S. Interior Department. In her letter, Cobell argued that the proposed Interior Department actions are not just unfair, they are downright punitive. She further stated, “This is not ‘equal access to justice’, but precise and targeted injustice.”<sup>31</sup> In response to Cobell’s appeal, Congress has started to discuss a possible settlement.<sup>32</sup> Although both the Court and Congress have expressed disapproval of the Interior Department’s actions, the Executive continues to support it.

### **Tribal Recognition and Self-Determination Rights – The Abenaki Tribe in the Northeastern United States**

The United States’ Executive branch, through the Department of the Interior, is charged with determining the status of Native American tribes. If a tribe is determined to be a sovereign tribe by the Department of the Interior, Congress may then confer federal recognition on the tribe. Federal recognition entitles a tribe to sovereign status, ideally allowing the tribe to engage in relations with other governments and govern citizens within the tribal borders as a sovereign would.<sup>33</sup> Article 1(3) of the Covenant states that, “parties shall promote the realization of self-determination.”<sup>34</sup> Refusal of federal recognition impinges on this right. Some state governments

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<sup>30</sup> See generally, “The Facts v. The Brochure: The Interior Department attempts to cover up incompetence and fraud in its handling of the Individual Indian Money Accounts in a glossy new “progress report” by Indian Trust, available at Indian Trust Website, <http://www.indiantrust.com/>.

<sup>31</sup> Press Release, Cobell Appeals to Congress To Block Interior’s “Cruel Action” (Feb. 23, 2005), available at Indian Trust Website <http://www.indiantrust.com/>.

<sup>32</sup> Press Release, Congress to Settle Indian Case? (Mar. 2, 2006) Albuquerque Tribune, available at Indian Trust Website, <http://www.indiantrust.com/>.

<sup>33</sup> Testimony of Tracy Toulou, Director, Office of Tribal Justice, before the House Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs, Oversight Hearing on the Tribal Acknowledgment Process (Feb. 7, 2002).

<sup>34</sup> International Covenant on Civil and Political Rights, Mar. 23, 1976, art. 1(3), 999 UNTS 171.

have voted to recognize certain tribes but this does not bring the tribe closer to federal recognition and the rights that accompany recognition. The following example highlights this issue.

On April 6, 2006, the Vermont House of Representatives passed a bill bringing the state's Abenaki one step closer to full state recognition.<sup>35</sup> On April 13, 2006, the County Courier reported that the Senate would consider the revised bill the House passed in early April. The bill, S.117, has a great deal of support in the state and is expected to pass. Vermont Governor, Jim Douglas also says he supports the effort and will sign the bill when it reaches his office.<sup>36</sup>

Although state recognition represents a large victory for the Abenaki tribe, it is quite small on the national level. State recognition does not confer federal recognition in any way. The Federal Bureau of Indian Affairs has even stated that the Abenaki are unlikely to receive a grant of federal recognition.<sup>37</sup>

Federal recognition of Indian tribes falls under 25 C.F.R. Part 83. Federal recognition of the Abenaki would entitle the tribe to the protection, services, and benefits of the Federal Government and would entitle the Tribe to the immunities and privileges other federally recognized tribes receive due to their inter-governmental relationship with the United States.<sup>38</sup> In order to receive recognition, a tribe must meet the seven criteria described in 25 C.F.R. Part 83.7.<sup>39</sup> Difficulties for the Abenaki arise because in the early 20<sup>th</sup> century, they hid their identity

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<sup>35</sup> Available at [http://www.boston.com/news/local/vermont/articles/2006/04/06/house\\_passes\\_abenaki\\_recognition\\_bill/](http://www.boston.com/news/local/vermont/articles/2006/04/06/house_passes_abenaki_recognition_bill/)

<sup>36</sup> Available at <http://www.thecountycourier.com/index.php?option=content&task=view&id=2858>

<sup>37</sup> Available at [http://www.boston.com/news/local/vermont/articles/2006/04/06/house\\_passes\\_abenaki\\_recognition\\_bill/](http://www.boston.com/news/local/vermont/articles/2006/04/06/house_passes_abenaki_recognition_bill/)

<sup>38</sup> 25 C.F.R. Part 83.2 (1994).

<sup>39</sup> 25 C.F.R. Part 83.7 (1994). Pertinent requirements for recognition are as follows:

(a) A petitioner group must have been identified as an American Indian entity on a substantially continuous basis since 1900.

(b) A predominant portion of the petitioning group comprises a distinct community and has existed as a community from historical times until the present

to avoid becoming targets of the eugenics movement, a movement that helped perpetuate a cultural genocide against those viewed as undesirable.<sup>40</sup> Even if the Abenaki succeeded in meeting all seven criteria, the Executive branch of the United States Government retains final veto power over this grant of federal recognition.<sup>41</sup>

### **Conclusion and Recommendations**

The United States must continue to facilitate the realization of Native American rights. These rights must be recognized and protected as guaranteed by the U.S. Constitution, as well as by internationally recognized human rights principles. Article 1 of the ICCPR states that all peoples have the right to self-determination; a right that extends to traditional lands and resources, property and social rights. An essential first step is to recognize the rights of Native Americans as equal to those held by other American citizens. The Government must abide by the laws of the state in all cases where human and property rights are at issue, especially in cases when the state seeks to extinguish a right. The laws governing federal recognition of Native American tribes must be flexible enough to be met by all legitimate tribes and allow for deviations from the established process as circumstances warrant. Historical factors must be considered and given meaningful weight if this process is to be fair. Finally, all governmental branches of the United States must work together and refrain from any retaliatory or punitive actions when Native Americans assert their rights.

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(c) The petitioner has maintained political influence or authority over its members as an autonomous entity from historical times until the present.

(d) A copy of the group's present governing document including its membership criteria. In the absence of a written document, the petitioner must provide a statement describing in full its membership criteria and current governing procedures.

(e) The petitioner's membership consists of individuals who descend from a historical Indian tribe or from historical Indian tribes which combined and functioned as a single autonomous political entity.

(f) The membership of the petitioning group is composed principally of persons who are not members of any acknowledged North American Indian tribe.

(g) Neither the petitioner nor its members are the subject of congressional legislation that has expressly terminated or forbidden the Federal relationship.

<sup>40</sup> Available at <http://www.indiancountry.com/content.cfm?id=1096410443>.

<sup>41</sup> 25 C.F.R. Part 83.7(g) (1994).

