

**REPORT ON EFFECTS OF CANADIAN CORPORATE BEHAVIOR ON THE  
WESTERN SHOSHONE PEOPLES LOCATED IN THE UNITED STATES**

**SUBMITTED TO THE COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS (CESCR)**

**BY THE WESTERN SHOSHONE DEFENSE PROJECT**

**IN RELATION TO CANADA**

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## **I. INTRODUCTION AND SUMMARY**

1. This communication calls upon the Committee on Economic, Social and Cultural Rights (hereinafter CESCR or the Committee) to take note of the involvement of Canadian corporations in the ongoing, serious and persistent pattern of human rights violations against the Western Shoshone peoples of the Western Shoshone Nation, an indigenous people located within the United States of America. Toronto-based Barrick Gold, now the world's largest gold mining company, along with one of its predecessors, Placer Dome, and other junior Canadian mining companies have acted with the permission of Canada and the United States, to conduct gold mining activities that are destroying Western Shoshone ancestral land, air and water and targeting spiritually significant area.<sup>1</sup> These activities, which benefit the mining industry, are being performed in the face of recent international findings evidencing United States' non-compliance with recognized standard of human rights and calling upon the United States to "freeze", "desist" and "stop" further actions against the Western Shoshone.<sup>2</sup>

2. The author of this communication is the Western Shoshone Defense Project. The Defense Project was created in 1991 under the direction of the Western Shoshone National Council, the traditional government of the Western Shoshone Nation. Its mission is to protect and preserve Western Shoshone rights and homelands for present and future generations based upon cultural and spiritual traditions. The Defense Project operates with the guidance of the Western Shoshone National Council, whose members represent various Western Shoshone communities and organizations; and a Community Advisory Board with members from six Western Shoshone communities.

3. Based on violations of the International Covenant on Economic, Social and Cultural Rights, the Western Shoshone Defense Project requests that this Committee enforce Canada's obligations under the Covenant and recommends that it take appropriate measures to ensure that Canadian corporate behavior on indigenous lands does not contribute to ongoing violations against the Western Shoshone or other indigenous peoples.

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<sup>1</sup> For additional background on the history of multinational mining activities and impacts on the Western Shoshone Nation see "Digging Holes in the Spirit: Gold Mining and the Survival of the Western Shoshone Nation", by Christopher Sewall (Project Underground 1999, reprinted 2002) [hereinafter "Digging Holes"].

<sup>2</sup> CERD, Early Action and Early Warning Procedure, Decision 1(68) (United States) (2006) [hereinafter "CERD Early Warning Decision"] (attached as appendix 1).

## II. ONGOING HUMAN RIGHTS VIOLATIONS AGAINST THE WESTERN SHOSHONE AND CANADA'S RESPONSIBILITY TO ENSURE CORPORATE SOCIAL RESPONSIBILITY

### A. Background on the Situation of the Western Shoshone and Ongoing Violations by the United States<sup>3</sup>

4. The ancestral territory of the Western Shoshone people encompasses a 60 million acre area stretching from southern Idaho, western Utah, across Nevada, and down to the Mojave Desert of California. In the 1863 treaty of peace and friendship (*Treaty of Ruby Valley*) between the Western Shoshone and the United States, the Western Shoshone agreed to allow the United States access across their lands as well as permission to perform certain activities there.<sup>4</sup> In exchange, the United States recognized Western Shoshone land boundaries and agreed to compensate the Western Shoshone for use of their lands.<sup>5</sup> Since that time, there have been no amendments or formal abrogation of the treaty and the Western Shoshone people carry the full expectation that this treaty should be respected by its parties and all foreign nations.

5. The United States has persistently denied the Western Shoshone people their rights to traditional lands and now claims the land base as federal or "public" lands. The United States claims the lands became federal lands by relying on stipulated agency finding of "gradual encroachment" – a proceeding which has been found to be an "illegitimate" means of claiming title by the Inter-American Commission on Human Rights.<sup>6</sup>

6. United States officials, multi-national corporations and their home States have impeded Western Shoshone access to and use of their lands to the detriment of the Western Shoshone people and their survival.<sup>7</sup> Under an antiquated federal law, the 1872 Mining Act, the United States permits mining on "public" lands and administrative officials claim that under the Act, there is no way to stop a mine from going forward.<sup>8</sup> When one couples the Mining Act with the

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<sup>3</sup> For a comprehensive background of the history of the United States treatment of the Western Shoshone and their land and the legal response by the Western Shoshone people see Mary and Carrie Dann, Case. 11.140 (United States), Inter-Am C.H.R. Report No. 75/02 (merits decision of Dec. 27, 2002) [hereinafter "Dann Case"] (available on the internet at: [http://www.law.arizona.edu/depts/iplp/advocacy\\_clinical/western\\_shoshone/iac.htm](http://www.law.arizona.edu/depts/iplp/advocacy_clinical/western_shoshone/iac.htm)); Second Request for Urgent Action under Early Warning Procedure to the Committee on the Elimination of Racial Discrimination of the United Nations, by the Timbisha Shoshone Tribe, Winnemucca Indian Colony and Yomba Shoshone Tribe of the Western Shoshone People in Relation to the United States of America (July 2005) (available on the internet at: [http://www.law.arizona.edu/depts/iplp/advocacy\\_clinical/western\\_shoshone/cerd.htm](http://www.law.arizona.edu/depts/iplp/advocacy_clinical/western_shoshone/cerd.htm)); Update to Second Request For Urgent Action under Early Warning Procedure to the Committee on the Elimination of Racial Discrimination of the United Nations, by Western Shoshone groups and the Western Shoshone National Council (February 26, 2006) (available on the internet at: [http://www.law.arizona.edu/depts/iplp/advocacy\\_clinical/western\\_shoshone/cerd.htm](http://www.law.arizona.edu/depts/iplp/advocacy_clinical/western_shoshone/cerd.htm)).

<sup>4</sup> See *Treaty of Ruby Valley* 1863 (Treaty between the United States of America and Western Bands of Shoshone Indians, ratified by the U.S. in 1866, and proclaimed on October 21, 1869). Mining was one of the permitted activities at that time; however, the type of mining understood then was with a pick and shovel, not open pit cyanide heap leach gold mining taking place today (available on the internet at: <http://www.wsdp.org/treaty.pdf>).

<sup>5</sup> See *id.*

<sup>6</sup> See *infra* para. 8 regarding the 2002 Final Report of the Inter American Commission on Human Rights.

<sup>7</sup> See Digging Holes, *supra* note 1 at pages 12 -31.

<sup>8</sup> See General Mining Law of 1872, 17 Stat.91 (1872).

United States' refusal to recognize Western Shoshone rights to their homelands it is clear that the mining companies have been and continue to be reaping huge benefits directly from the existing violations of U.S. Indian law and policy.

7. Applying federal laws governing “public” lands, the United States government has permitted non-indigenous individuals and foreign mining companies to use and occupy Western Shoshone lands, namely for purposes of extraction and exploration of natural resources. The Western Shoshone have been subjected to ongoing environmental damage by open pit cyanide heap leach gold mining and other industrial and military activities on their land. All the while, members of the U.S. Congress are promoting legislation that would further open Western Shoshone lands to non-indigenous individuals and foreign corporations. With these ongoing harms and the failure of the United States to adhere to the recommendations of international human rights bodies, the Western Shoshone face imminent threats to their traditional land and resources, and the survival of their culture and spirituality.

### **B. Ongoing Human Rights Violations Against the Western Shoshone**

8. The problems faced by the Western Shoshone are all the more egregious because state parties and multi-national corporations refuse to act on the specific recommendations by international human rights bodies, including the Inter-American Commission on Human Rights and the CERD. On December 27, 2002, the Inter-American Commission issued a final report finding the United States in violation of the rights of Western Shoshone petitioners to equality before the law, to a fair trial, and to property under the American Declaration of the Rights and Duties of Man.<sup>9</sup> The Commission recommended that the United States provide the petitioners with an effective remedy for the infringements of Western Shoshone property rights over ancestral lands and that the United States review its laws, procedures and practices regarding indigenous peoples, in particular the right to property.<sup>10</sup>

9. The United States has been in defiance of not only the findings and recommendations of the Inter-American Commission, but also the recommendations of the United Nations Committee on the Elimination of Racial Discrimination concerning the Western Shoshone<sup>11</sup> and the recent Early Warning and Urgent Warning Decision issued in March of 2006.<sup>12</sup> In 2001, CERD warned the United States that it must protect the rights of ethnic minorities, including the Western Shoshone, as guaranteed by the Convention in its articles 1, 2 and 5.<sup>13</sup> The Committee noted in particular the “persistence of the discriminatory effects ... and destructive policies with regard to Native Americans” as factors impeding the implementation of the Convention.<sup>14</sup> CERD recommended the United States “ensure effective participation by indigenous communities in decisions affecting them, including those on their land rights”<sup>15</sup> It also asked

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<sup>9</sup> See Dann Case, *supra* note 3 at para. 5.

<sup>10</sup> See *id.* at para.173.

<sup>11</sup> See Committee on the Elimination of Racial Discrimination, *Concluding Observations: United States of America*, UN Doc: A/56/18, paras. 380-407 (Aug. 2001) [hereinafter “CERD Concluding Observations”] (available on the internet at: [http://www.law.arizona.edu/depts/iplp/advocacy\\_clinical/western\\_shoshone/cerd.htm](http://www.law.arizona.edu/depts/iplp/advocacy_clinical/western_shoshone/cerd.htm)).

<sup>12</sup> See CERD Early Warning Decision, *supra* note 2.

<sup>13</sup> See CERD Concluding Observations, *supra* note 11 at paras. 393, 398, and 400.

<sup>14</sup> *Id.* at para. 384.

<sup>15</sup> *Id.* at para. 400.

the United States to adhere to its General Recommendation XXIII on Indigenous Peoples, which stresses the importance of securing the “informed consent” of indigenous communities and calls, *inter alia*, for recognition and compensation for loss.<sup>16</sup> In the CERD Early Warning and Urgent Action Decision, the Committee noted its concern regarding the State’s “obligation to guarantee the right of everyone to equality before the law in the enjoyment of civil, political, economic, social and cultural rights, without discrimination based on race, colour, or national or ethnic origin.”<sup>17</sup> CERD noted particular concern regarding:

- a) Reported legislative efforts to privatize Western Shoshone ancestral lands for transfer to multinational extractive industries and energy developers.
- b) Information according to which destructive activities are conducted and/or planned on areas of spiritual and cultural significance to the Western Shoshone peoples, who are denied access to, and use of, such areas. It notes in particular ... the alleged use of explosives and open pit gold mining activities on Mount Tenabo and Horse Canyon; and the alleged issuance of geothermal energy leases at, or near, hot springs, and the processing of further applications to that end....
- d) The conduct and / or planning of all such activities without consultation with and despite protests of the Western Shoshone peoples...<sup>18</sup>

CERD further ordered the state to “freeze” and “desist” from all activities planned or conducted on the ancestral lands of Western Shoshone, particularly in relation to their natural resources.<sup>19</sup>

10. In light of these international reports and recommendations state parties and corporate entities have done nothing to attempt to remedy the human rights violations identified by these bodies. Instead, extraction of gold and the expansion of mining exploration have perpetuated on Western Shoshone land leading to the ongoing destruction of Western Shoshone livelihood, culture and natural environment.

### **C. Canada’s Responsibility to Regulate Canadian Corporate Behavior**

11. Canada’s own Standing Committee on Foreign Affairs and International Trade has condemned Canada’s mining corporations acting abroad in its 14th Report adopted on June 26, 2005.<sup>20</sup> In that report, Canada’s corporate social responsibility in developing countries was scrutinized with the conclusion that foreign mining activities “have had adverse effects on local

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<sup>16</sup> *Id.* at para 393. *See also* CERD General Recommendation XXIII, on indigenous peoples, adopted August 18, 1997, U.N. Doc. CERD/C51/Misc.13/Rev.4 (1997) [hereinafter “CERD General Recommendation XXIII”]. The Committee also called for the recognition and compensation for loss. CERD encouraged the United States to use ILO Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries as a guide. *See* International Labor Organization Convention (No. 169 of 1989) concerning Indigenous and Tribal Peoples in Independent Countries (entered into force 1991).

<sup>17</sup> CERD Early Warning Decision, *supra* note 2 at para. 7.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at para. 10.

<sup>20</sup> *See* Report of the House of Commons Standing Committee on Foreign Affairs and International Trade: "Mining in Developing Countries - Corporate Social Responsibility"(June 26, 2005) (attached as appendix 2).

communities.”<sup>21</sup> The Committee expressed particular concern “that Canada does not yet have laws to ensure that the activities of Canadian mining companies in developing countries conform to human rights standards, including the rights of workers and of indigenous peoples.”<sup>22</sup> The Committee issued a number of recommendations to Canada to reign in its corporate behavior abroad, including:

2. Put in place stronger incentives to encourage Canadian mining companies to conduct their activities outside of Canada in a socially and environmentally responsible manner and in conformity with international human rights standards...

3. Strengthen or develop new mechanisms for monitoring the activities of Canadian mining companies in developing countries and for dealing with complaints alleging socially and environmentally irresponsible conduct and human rights violations...

4. Establish clear legal norms in Canada to ensure that Canadian companies and residents are held accountable when there is evidence of environmental and/or human rights violations associated with the activities of Canadian mining companies...”<sup>23</sup>

12. In 2003, the Special Rapporteur on Toxic Waste and Products issued a report on the adverse effects of the illicit movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights including comments about her mission to Canada in October of 2002.<sup>24</sup> As part of her recommendations particular to Canada the Special Rapporteur recommended, “that particular attention is paid to allegations relating to threats to the traditional lifestyles and rights of indigenous groups”<sup>25</sup> and called upon “the Canadian and other Governments to explore ways of establishing extraterritorial jurisdiction over human rights violations, committed by companies operating abroad. The concept of extraterritorial jurisdiction for human rights violations is not unknown in both international and many national laws, and the Special Rapporteur recommends that the establishment of accountability be explored”.<sup>26</sup>

### III. CANADIAN CORPORATE ACTIVITIES ON WESTERN SHOSHONE LANDS

13. Western Shoshone lands are currently the third largest gold producing area in the world. Numerous multinational corporations and their subsidiaries, as well as “junior” companies, are operating, or submitting plans to operate, on these lands. Many of these companies are Canadian-

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<sup>21</sup> *Id.* at page 1

<sup>22</sup> *Id.* at page 2.

<sup>23</sup> *Id.* at page 3.

<sup>24</sup> See UN Special Rapporteur on Toxic waste and Products, 2002 Annual Report, UN Doc: E/CN.4/2003/56. paras. 72-77 (2003) (available on the internet at: <http://www.hri.ca/fortherecordCanada/documentation/commission/e-cn4-2003-56.htm>).

<sup>25</sup> Addendum to UN Special Rapporteur on Toxic waste and Products, 2002 Annual Report, UN Doc: E/CN.4/2003/56/Add.2I at para. 124 (2003) (available on the internet at: <http://www.hri.ca/fortherecordCanada/documentation/commission/e-cn4-2003-56-add2.htm>)

<sup>26</sup> *Id.* at para. 126.

owned or Canadian-based, including Bravo Venture Group, Nevada Pacific Gold Limited, and Barrick Gold Company, Glamis Gold Limited, GoldCorp Inc., Great Basin Gold Limited, and US Goldcorp.<sup>27</sup> Some of the activities described below are directly connected to one particular Canadian corporation, Barrick Gold, which is directly threatening Western Shoshone cultural and spiritual areas.<sup>28</sup> Other activities and operations on Western Shoshone lands are stated more generally, highlighting the need for Canada to implement regulations in order to adequately monitor Canadian corporate activities on indigenous lands in accordance with international human rights law.

#### **A. Exploration and Mining Expansion Activities in the area of Mount Tenabo and Horse Canyon and Ongoing Gold Mining Impacts on the Environment**

14. The areas on and surrounding Mount Tenabo and Horse Canyon have long been used by the Western Shoshone for spiritual ceremonies and cultural purposes. The area is home to Western Shoshone creation stories and holds deep ongoing spiritual significance to Western Shoshone people. There are burial sites in the area, several of which have already been evidenced by the United States agencies themselves. This area has also been documented as an important historical and ongoing site for gathering medicinal and food plants, hunting and gathering and other cultural purposes. This area includes properties recently recognized by one U.S. agency as eligible for listing on the U.S. National Register of Historic Places as Properties of Cultural and Religious Importance. The area was also identified recently by the United Nations Committee on the Elimination of Racial Discrimination and particular concern was expressed by this United Nations Committee with regard to mining activities and their threat to Western Shoshone spiritual and cultural uses.

15. Canada and the United States have permitted ongoing multinational gold mining activities in this same area. This includes detonation of explosives to further mining exploration and the blockage of access ways used by Western Shoshone to conduct food and spiritual activities.<sup>29</sup> Barrick Gold of Toronto, now the world's largest gold company, is the primary actor in the Mount Tenabo and Horse Canyon areas as the majority owner of Cortez Gold Mines, the entity submitting exploration and mining expansion proposals in the area. Western Shoshone have explored every possible access in the domestic legal arena to challenge and halt this destruction – to no avail.

16. Mining activities by Cortez Joint Venture/Cortez Gold Mines (now Barrick Gold and Kennecott) have been approved by the state without the free, prior and informed consent of the Western Shoshone or adequate consideration of the resulting harm that the mining will cause the

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<sup>27</sup> More information about these companies and their involvement on Western Shoshone lands can be found on the companies' websites: [www.nevadapacificgold.com](http://www.nevadapacificgold.com); [www.bravoventuregroup.com](http://www.bravoventuregroup.com); <http://www.barrick.com>; [www.glamis.com](http://www.glamis.com); [www.goldcorp.com](http://www.goldcorp.com); [www.hdgold.com/gbg/Home.asp](http://www.hdgold.com/gbg/Home.asp); [www.usgold.com](http://www.usgold.com).

<sup>28</sup> Barrick Gold Company currently owns and operates several mines on Western Shoshone lands, including majority ownership in the controversial Cortez Gold Mine in Crescent Valley, Nevada.

<sup>29</sup> See Adella Harding, *Blast Opens New Era at Cortez* ELKO DAILY FREE PRESS, January 27, 2006 (attached as appendix 3). See also Photos depicting destruction of Western Shoshone territory and blockage of access road to Horse Canyon (Western Shoshone Defense Project) (attached as appendix 4).



Western Shoshone.<sup>30</sup> Because of the increased activity in this area, on May 9, 2005, the Western Shoshone Defense Project, the Te-Moak Tribe of Western Shoshone, and the Great Basin Mine Watch filed a lawsuit against the U.S. Bureau of Land Management challenging the approval of mining activities on Mount Tenabo and Horse Canyon.<sup>31</sup> Additional mining would result in irreversible and complete damage to Western Shoshone traditional, religious, cultural, and historical practices. The parties to this lawsuit are currently disputing procedural technicalities, which threaten to prevent the Western Shoshone from arguing the merits of their claim. Meanwhile, the mining plans move forward through corporate actions and acquiescence by the executive branches of the United States and Canada.

17. Since the filing of the lawsuit, the U.S. Department of Interior, Bureau of Land Management (hereinafter BLM), has announced plans by Cortez Gold Mines to further expand its open-pit gold mining and processing operation in the Cortez Hills Expansion Project.<sup>32</sup> In the state's public notice about this project, it reports that the "disturbance area" associated with this project would be 15,242 acres of land, an area covering Western Shoshone traditional land.<sup>33</sup> This action would entail the destruction of approximately 5,000 acres of Pinyon Forest, a staple Western Shoshone food source, a new open pit cyanide heap leach mine on the Southern flank of the mountain, new heap leach pads and increased dewatering and underground detonations. Cortez has also proposed expansion through its Underground Project which digs into the East flank of Tenabo wrapping around to the Southwest portion of the mountain.

18. Beyond even the specific area of Mt. Tenabo and Horse Canyon, mining activities on Western Shoshone land have attracted national and international attention recently with a devastating picture of massive dewatering and dangerously high levels of mercury and other toxins.<sup>34</sup> The environmental damage resulting from the cumulative effects of the mining activities will severely affect, if not outright destroy, Western Shoshone land, resources, and customary uses of their land and resources in the area. With no sign of the mining industry slowing, urgent action is necessary to protect the Western Shoshone land and resources from further harm.<sup>35</sup>

19. With the previous track record in the U.S. courts as demonstrated in the Western Shoshone's long procedural history relating to the purported extinguishment of title to traditional lands<sup>36</sup> and recent failed attempts to halt ongoing threats to land, resources and cultural practices,

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<sup>30</sup> See Second Request for Urgent Action under Early Warning Procedure to the Committee on the Elimination of Racial Discrimination of the United Nations, *supra* note 3.

<sup>31</sup> See Te-Moak Tribe of Western Shoshone Indians of Nevada, Great Basin Mine Watch, Western Shoshone Defense Project v. U.S. Department of Interior et al., Case No. 05-CV00279 (Complaint) (D. Nevada filed May 9, 2005) (on file with author).

<sup>32</sup> See Notice of Intent to Prepare an Environmental Impact Statement to Analyze the Proposed Amendment to the Pipeline/South Pipeline Plan of Operations (NVN-067575) for the Cortez Hills Expansion Project, Federal Register pp. 72308-72309, Vol. 70, No. 231, December 2, 2005 (on file with author).

<sup>33</sup> See *id.* at 72309.

<sup>34</sup> See Kirk Johnson, *Dried, Tainted Nevada May Be Legacy of Gold Rush*, THE NEW YORK TIMES, Dec. 30, 2005 (attached as appendix 5). See also "Dirty Metals: Mining, Communities, and the Environment," a Report by Earthworks and Oxfam America (2004) (available on the internet at: <http://www.nodirtygold.org/pubs/DirtyMetals.pdf>).

<sup>35</sup> See Sandy Shore, *Gold Prospective Picks Up*, Associated Press, February 11, 2006 (on file with author).

<sup>36</sup> See Dann Case, *supra* note 3, paras. 114-123.

the pending lawsuit on this matter is not expected to succeed. However, these ongoing resistance efforts aim to increase state awareness of Western Shoshone interests and to promote effective consultation about matters concerning Western Shoshone traditional lands and resources, as required under human rights instruments.

## **B. Attempts to Privatize Western Shoshone Ancestral Lands**

20. With the encouragement of the mining industry, the United States has moved forward with legislative attempts to privatize and distribute the land itself to resource development corporations and other non-indigenous actors. In one proposed bill, H.R. 2869, the Northern Nevada Rural Economic Development and Land Consolidation Act of 2003,<sup>37</sup> culturally significant Western Shoshone lands, including 60,000 acres on and around the Mt. Tenabo area, would be privatized by the federal government and handed over to the Canadian multinational, Placer Dome.<sup>38</sup> This bill was drafted without consultation with or consideration of the effects of the proposed for mining on Western Shoshone use of and cultural beliefs regarding the area, nor was there any provision for compensation for the use of Western Shoshone resources.

21. In another attempt to privatize Western Shoshone land in the last six months, U.S. House of Representatives voted on and approved the amendment of a budget reconciliation bill to allow Western Shoshone lands within the boundaries of the *Treaty of Ruby Valley* to be privatized and sold to major mining and energy corporations.<sup>39</sup> This bill, had it passed the Senate, would have allowed gold and other mining and energy corporations to purchase “public lands” outright for \$1,000 per acre. Although the new legislation did not pass—due to a massive outcry by public citizens across the United States, U.S. Senator Gibbons has vowed to reintroduce the issue.<sup>40</sup> U.S. Congressman Rahall, the Senate Resources Committee ranking democrat said, “If enacted, this proposal would result in a blazing fire sale of federal lands to domestic and international corporate mining interests. This is the worst kind of sham reform of the Mining Law ever to be promoted in my tenure of Congress.”<sup>41</sup> These unilateral legislative attempts highlight the United States’ paternalistic policies towards indigenous peoples and the willingness of the state to blatantly and publicly act against indigenous peoples’ interests.

## **C. Violations of the Covenant Resulting from Canadian Corporate Activities on Western Shoshone Land**

22. In light of the principle of international cooperation and the special duty of States to protect the indigenous peoples of the world, the Western Shoshone Defense Project brings this

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<sup>37</sup> See proposed Northern Nevada Rural Economic Development and Land Consolidation Act of 2003 (“Placer Dome Bill”), H.R. 2869 (U.S. House Bill) (on file with author).

<sup>38</sup> See *id.* See also Western Shoshone Defense Project, “Western Shoshone to Question Placer Dome Mining at Annual Shareholder Meeting” (Press Release) April 25, 2005. Placer Dome was bought out by Barrick in January of 2006 (on file with author).

<sup>39</sup> See Text of the “Pombo Proposal” (Post-mark up), *Recommendations for budget reconciliation*, as approved by the Committee on Resources on October 26, 2005 (on file with author).

<sup>40</sup> Janet Wilson and Bettina Boxall, *Revisions of Mining Law Put On Hold* DEATH VALLEY.US, December 14, 2005, (available on the internet at: <http://www.death-valley.us/article1410.html>).

<sup>41</sup> U.S. Rep. Nick J. Rahall, Extension of Remarks, An Assault on America’s Public Lands: The Hardrock Mining Provisions of the Resources Committee’s Budget Reconciliation Package, November 7, 2005 (on file with author).

Committee's attention to Canada's lack of compliance with the Covenant vis-à-vis the behavior of its corporate entities, namely violations of the rights to self-determination and culture (articles 1 and 15), the right to enjoy the highest obtainable standard of health (article 12) and the right to an adequate standard of living, including the rights to food and water (article 11).

### **1. Right to self-determination under Article 1 and right to culture under Article 15**

23. In the recent Early Warning and Urgent Action Decision issued by CERD, the United States was urged to "pay particular attention to the right to health and cultural rights of the Western Shoshone people, which may be infringed upon by activities threatening their environment and/or disregarding the spiritual and cultural significance they give to their ancestral lands."<sup>42</sup> Canada has an opportunity to respond to CERD's warning by reigning in its country's corporate behavior which directly threatens the self-determination and cultural rights of the Western Shoshone people.

24. Article 1 of the Covenant protects the right of self-determination of all peoples, including indigenous peoples. The Covenant states that "All peoples have the right of self-determination. By virtue of that right they ... freely pursue their economic, social and cultural development. This free pursuit of cultural development, linked to and strengthened by the political right of self-determination, in turn allows people to preserve their cultural identity. The right to culture is further protected by Article 15 which provides "everyone" with the right "to take part in cultural life".

25. This Committee can look to the decisions, communications and recommendations issued by the Human Rights Committee on analogous provisions protecting self-determination and culture in the International Covenant on Civil and Political Rights in order to see these provisions have special importance to indigenous peoples. The Human Rights Committee has stated that the right of self-determination affirmed in article 1 of the ICCPR protects indigenous peoples', *inter alia*, in their enjoyment of rights over traditional lands and resources, and that the unilateral extinguishment of an indigenous group's ancestral rights in land is a violation of article 1.<sup>43</sup> With respect to culture, the Human Rights Committee has interpreted the notion of culture broadly, observing that "culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples".<sup>44</sup> Significant to both the practice of self-determination and the security of culture, both inextricably linked to traditional land and resources, that Committee has recognized the imperative of ensuring indigenous peoples' effective participation in decisions that may affect their traditional land and resource use.<sup>45</sup> In cases that reflect the situation of the Western Shoshone, where indigenous peoples' traditional uses of land and resources are threatened, the Human Rights Committee has held its provision on culture found in article 27 of the ICCPR to protect the

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<sup>42</sup> CERD Early Warning Decision, *supra* note 3 at para. 8.

<sup>43</sup> See *Concluding Observations and Recommendations of the Human Rights Committee: Canada*, 07/04/99, U.N. Doc. CCPR./C/79/Add.105 (1999) (available on the internet at: <http://www.hri.ca/fortherecord1999/documentation/tbodies/ccpr-c-79-add105.htm>).

<sup>44</sup> Human Rights Committee, General Comment No. 23 (50) (art. 27) at para. 7, adopted April 6, 1994, U.N. Doc. HRI/GEN/1/Rev.1 at 38 (1994).

<sup>45</sup> See *id.* See also S. James Anaya, *Indigenous Peoples in International Law*, 2d ed. 141-42 (Oxford and New York: Oxford Univ. Press, 2004).

survival and continued development of the cultural, religious and social identity of the groups concerned.<sup>46</sup>

26. The ongoing and planned actions by the Canadian corporations take place on lands where Western Shoshone have traditionally and continue currently to use for hunting, gathering, religious, cultural, and other traditional uses.<sup>47</sup> The use of the land for these purposes serves as a vehicle to share knowledge about traditional Shoshone practices between elders and with Western Shoshone youth. The destruction of the lands and natural environment on and surrounding Western Shoshone spiritual sites proves devastating to the perpetuation of Western Shoshone culture.

27. Specific to religious and cultural customs, the physical destruction of this area is irreconcilable. The sites upon which the Canadian mining company is operating have been explained as akin to a “church” or a “mosque”.<sup>48</sup> Fasting and vision questing occurs in these places; in caves, cliffs and other areas.<sup>49</sup> According to the religion of the Western Shoshone people, these areas must not be disturbed.<sup>50</sup>

According to our teachings, areas like this one must be maintained in peace and solitude with little to no disruption by unnatural noises or other human activities.

Without this quietness and peace, our spiritual helpers cannot live in their own ways and continue to give us the understanding of how we should live our life.<sup>51</sup>

The mining activities have already disturbed the solitude of the area and threaten to ultimately destroy the Western Shoshone peoples’ ability to use this area as a spiritual place.

28. The survival of indigenous peoples’ culture is intricately linked to customs involving health, food and water, described below, thereby also linking a violation of any of those rights to the violations of culture and self-determination.

## 2. Right to health under Article 12

29. Ongoing and planned Canadian corporate activities are placing a direct threat to the health and well-being of the Western Shoshone people through the destruction of the Western Shoshone natural environment, including pollution of air, water, and food and by denying them access to areas of spiritual and cultural significance. In a general comment on the right to

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<sup>46</sup> See e.g. *Ominayak, Chief of the Lubicon Lake Band of Cree v. Canada*, Communication No. 167/1984, Hum. Rts. Comm. U.N. Doc. A/45/40, Vol. II, annex IV.A, para. 32.2. (March 26, 1990) (protecting the rights of persons to engage in economic and social activities that are part of the culture of the community to which they belong when Canada allowed the provincial government of Alberta to grant leases for oil and gas exploration and for timber development within the ancestral territory of the Lubicon Lake Band). See also *Länsman v. Finland*, Communication No. 671/1995, Hum. Rts. Comm. U.N. Doc. A/52/40, Vol. II, para. 10.7 (October 30, 1996) (noting that different activities restricting the right to enjoy culture in themselves may not constitute a violation of article 27, but such activities, taken together, may erode the rights of an indigenous group)

<sup>47</sup> See *Te-Moak Tribe of Western Shoshone Indians of Nevada, Great Basin Mine Watch, Western Shoshone Defense Project v. U.S. Department of Interior et al.*, Case No. CV-N-05-0279-LRH-VPC (Declaration of Carrie Dann, Western Shoshone Elder) (D. Nevada 2006) (hereinafter “Carrie Dann Declaration”) (attached as appendix 6).

<sup>48</sup> *Id.* at para. 9.

<sup>49</sup> See *id.* at para. 10.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at para. 11.

health, this Committee recognized the international responsibility involved in protecting the health status of the world's population. To achieve this end, the Committee stated:

To comply with their international obligations in relation to article 12, States parties have to respect the enjoyment of the right to health in other countries, and to prevent third parties from violating the right in other countries, if they are able to influence these third parties by way of legal or political means, in accordance with the Charter of the United Nations and applicable international law.<sup>52</sup>

Also, this committee has already determined that violations of the right to health "can occur through the direct action of States or other entities insufficiently regulated by States."<sup>53</sup>

30. The indigenous peoples of the world, including the Western Shoshone, are guaranteed the right to health under article 12 of the Covenant. Stemming from this right is the duty of the United States and foreign states, including Canada, to provide its peoples the right to obtain the highest attainable standard of health. This committee has commented on the duty of a State to take all necessary measures in order to safeguard indigenous peoples from infringements of the right to health by third parties.

This category includes such omissions as the failure to regulate the activities of individuals, groups or corporations so as to prevent them from violating the right to health of others; the failure to protect consumers and workers from practices detrimental to health...the failure to discourage the continued observance of harmful traditional medical or cultural practices; and the failure to enact or enforce laws to prevent the pollution of water, air and soil by extractive and manufacturing industries.<sup>54</sup>

31. Mercury, known to be released into the environment as a result of gold mining activities is one of the top threats and health concerns on the Western Shoshone communities. Mercury is known to be one of the deadliest contaminants resulting from gold-mining activities and has specifically been linked to gold-mining activities in Nevada where the Barrick mines operate.<sup>55</sup> Nevada mines reportedly have released more than 10 tons of mercury.<sup>56</sup> Mercury is released into the air during roasting and other refining processes used to extract gold from ore. Researchers who have studied the mercury issue in the area have noted "these mines are having impacts on air quality and that means impacts on human health."<sup>57</sup> Airborne mercury has been linked to impaired neurological development in fetuses, infants and children.<sup>58</sup> As Mercury persists in the environment, it accumulates in the tissues of fish and birds that use contaminated water sources.<sup>59</sup> Because many of the Western Shoshone people are dependant on local water sources and local fish for food and willow gathering for baskets, their exposure to Mercury cannot be avoided.

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<sup>52</sup> CESCR General Comment No. 14, UN Doc: E/C.12/2000/4, para 39 (2000).

<sup>53</sup> *Id.* at para. 48

<sup>54</sup> *Id.* at para. 51

<sup>55</sup> Kirk Johnson, *Dried, Tainted Nevada May Be Legacy of Gold Rush*, *supra* note 34.

<sup>56</sup> See Jeff, DeLong, *Tests Show High Levels of Mercury*. RENO GAZETTE- JOURNAL, Aug. 26, 2005 (available on the internet at: <http://www.rgj.com/news/printstory.php?id=107404>).

<sup>57</sup> *Id.*

<sup>58</sup> See U.S. Department of the Interior, U.S. Geological Survey, *Fact Sheet FS-216-95* (available on the internet at: [http://water.usgs.gov/wid/FS\\_216-95/FS\\_216-95.html](http://water.usgs.gov/wid/FS_216-95/FS_216-95.html)).

<sup>59</sup> Kirk Johnson, *Dried, Tainted Nevada May Be Legacy of Gold Rush*, *supra* note 34.

32. This Committee has commented on the special measures that state parties must make in protection of the right to health of indigenous peoples:

The vital medicinal plants, animals and minerals necessary to the full enjoyment of health of indigenous peoples should also be protected. The Committee notes that, in indigenous communities, the health of the individual is often linked to the health of the society as a whole and has a collective dimension. In this respect, the Committee considers that development-related activities that lead to the displacement of indigenous peoples against their will from their traditional territories and environment, denying them their sources of nutrition and breaking their symbiotic relationship with their lands, has a deleterious effect on their health.<sup>60</sup>

33. Aside from environmental pollutants that directly threaten the physical health of the Western Shoshone people, the destruction and restriction of access to their spiritual and cultural areas and damage to their natural environment also play a heavy toll on their cultural and collective health and well-being. Carrie Dann, a Western Shoshone elder and leader explains,

Western Shoshone believe we were placed here on this land as caretakers. Our teachings tell us that we, as a people, and I, as an individual, are responsible for the health and well-being and preservation of our lands. If this area is further disturbed and mining allowed to move forward, I will be failing my duty to the land and to the future generations.<sup>61</sup>

The relationship that the Western Shoshone have with their environment is unique in that damage to their natural environment also is felt on a personal and spiritual level and in a collective manner.

### 3. Rights to food and water under Article 11

34. Closely linked to the Western Shoshone's rights to self-determination, culture and health, is the right to access food and water. The behavior of gold mining has led to environmental damage to the land and water that the Western Shoshone people depend upon for their subsistence and that they consider to be sacred. Due to gold-mining activities, the Western Shoshone have been denied access to areas where they gather traditional foods, such as pine nuts. Several cold water springs in the area which have traditionally provided the Western Shoshone people with clean drinking water are no longer usable. Western Shoshone also depend upon the general water sources in the area to irrigate their land and to provide water to their animals. Canada is failing to protect the people who suffer the effects of its corporation's behavior through the depletion and contamination of water and food sources.

35. The U.N. Special Rapporteur on the Right to Food has placed special attention on the significance of the rights to food and water in relation to indigenous peoples.

In international law, the right to adequate food and the fundamental right to be free from hunger applies to everyone without discrimination, yet the right to food of indigenous peoples is frequently denied or violated, often as a result of

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<sup>60</sup> CESCR General Comment No. 14, UN Doc: E/C.12/2000/4, para 27 (2000).

<sup>61</sup> Carrie Dann Declaration, *supra* note 47 at para. 17.

systematic discrimination or the widespread lack of recognition of indigenous rights...[u]nderstanding what the right to food means to indigenous peoples however is far more complex than merely examining statistics on hunger, malnutrition or poverty. Many indigenous peoples have their own particular conceptions of food, hunger, and subsistence...[and] understand the right to food as a collective right. They often see subsistence activities, such as hunting, fishing, and gathering as essential not only to their right to food, but to nurturing their cultures, languages, social life and identity. Their right to food often depends closely on their access to and control over their lands and other natural resources.<sup>62</sup>

36. This Committee's General Comments 12 and 15 succinctly spell out that state parties should recognize the essential role of international assistance and cooperation and comply with their commitment to take joint and separate action to achieve the full realization of the rights to food and water.<sup>63</sup> In this way, States are obliged to respect these rights of persons living in other states and guarantee that their policies do not contribute to violations of the right to adequate food in other countries or to safe drinking water. They have the duty to promote and help other states (through international assistance and cooperation) to implement the right to food and water in a manner that is culturally appropriate.

37. Gold mining is known to cause a variety of problems related to water depletion and contamination. In order to maintain mine operations, Barrick Gold uses approximately 10 million gallons of water each day in Nevada gold mines.<sup>64</sup> Government scientists have estimated it could take more than 200 years to replenish the groundwater that it has used.<sup>65</sup> Evaporation and seepage from the gold mining pits can permanently alter groundwater movement and the seepage is frequently contaminated with sulfuric acid and other pollutants.<sup>66</sup>

38. The environmental damage that Barrick and other gold companies in the area have done to the water system that the Western Shoshone depend upon is feared to be permanently damaged.<sup>67</sup> Glenn Miller, a professor of environmental science at the University of Nevada, Reno justified this fear, "I think it may never be quite the same hydrologic system," he said. "There is simply no data to suggest that these changes aren't going to be permanent."<sup>68</sup>

39. The water contamination also directly affects the food upon which the Western Shoshone depend for their survival. Mercury contamination in the air eventually ends up in nearby rivers and lakes where it is taken up into the food chain and become concentrated in fish. As explained above, exposure to mercury can cause significant neurological and developmental problems,

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<sup>62</sup> U.N. Special Rapporteur on the Right to Food, Annual Report to the General Assembly, UN Doc.A/60/350 at paras. 19 and 21 (2005) (available on the internet at: <http://www.ohchr.org/english/issues/food/annual.htm>).

<sup>63</sup> See CESCR, General Comment No. 11, UN Doc: E/C.12/1999/5, para. 36 (1999); CESCR, General Comment No. 14, UN Doc: E/C.12/2000/4, para 39 (2000).

<sup>64</sup> See Kirk Johnson, *Dried, Tainted Nevada May Be Legacy of Gold Rush*, *supra* note 34

<sup>65</sup> See *id.*

<sup>66</sup> See *Dirty Metals: Mining, Communities, and the Environment*, *supra* note 34 at page 5.

<sup>67</sup> See Kirk Johnson, *Dried, Tainted Nevada May Be Legacy of Gold Rush*, *supra* note 34.

<sup>68</sup> *Id.*

often expressing itself as attention and language deficits, impaired memory and impaired vision and motor function.<sup>69</sup>

40. In addition to the physical destruction of the sites that hold spiritual significance to the Western Shoshone people, elders have felt the impacts of the mining activities on their ability to conduct traditional activities without fear of harassment or intimidation, including their attempt to gather traditional food and medicines. For example, in October of 2005, a group of Western Shoshone elders were barred access to an area to gather medical plants and food despite giving the Canadian mining company notice of the excursion.<sup>70</sup> The public road, torn up by mining company equipment, was impossible to cross without demanding the company clear heavy equipment and create a new path to access the gathering site.<sup>71</sup>

#### IV. CONCLUSION

41. Based upon the ongoing, serious and persistent pattern of human rights violations against the Western Shoshone peoples of the Western Shoshone Nation perpetuated in part from Canadian mining corporations, we request that the Committee on Economic, Social and Cultural Rights recommend to Canada to:

1. Formally adopt and act upon the Recommendations by Canada's Standing Committee on Foreign Affairs and International Trade specific reference to "indigenous lands";
2. Call upon Canadian companies operating on Western Shoshone lands to respect the UN CERD's decision and to cease all support of privatization efforts and/or to desist from exploration, new mines or expansion of existing mines in Western Shoshone territory until a good faith resolution is reached between the United States and the Western Shoshone peoples of the Western Shoshone Nation; and
3. Complete a report on the activities of Canadian companies on Western Shoshone lands in light of the human rights violations and ongoing CERD review of the situation.

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<sup>69</sup> For a general overview on the damaging effects that Mercury has on the aquatic system see *U.S. Department of the Interior, U.S. Geological Survey, Fact Sheet FS-216-95* (available on the internet at: [http://water.usgs.gov/wid/FS\\_216-95/FS\\_216-95.html](http://water.usgs.gov/wid/FS_216-95/FS_216-95.html)).

<sup>70</sup> Carrie Dann Declaration, *supra* note 47 at para. 7. See also Photos depicting destruction of Western Shoshone territory and blockage of access road to Horse Canyon (Western Shoshone Defense Project) (attached as appendix 4).

<sup>71</sup> See *id.*



## V. LIST OF APPENDICES

1. CERD, Early Action and Early Warning Procedure, Decision 1(68) (United States) (2006).
2. Report of the House of Commons Standing Committee on Foreign Affairs and International Trade: "Mining in Developing Countries - Corporate Social Responsibility" (June 26, 2005).
3. Adella Harding, *Blast Opens New Era at Cortez* ELKO DAILY FREE PRESS, January 27, 2006.
4. Photos depicting destruction of Western Shoshone territory and blockage of access road to Horse Canyon (Western Shoshone Defense Project).
5. Kirk Johnson, *Dried, Tainted Nevada May Be Legacy of Gold Rush*, THE NEW YORK TIMES, Dec. 30, 2005.
6. Te-Moak Tribe of Western Shoshone Indians of Nevada, Great Basin Mine Watch, Western Shoshone Defense Project v. U.S. Department of Interior et al., Case No. CV-N-05-0279-LRH-VPC (Declaration of Carrie Dann, Western Shoshone Elder) (D. Nevada 2006).