July 27, 2001

Clinton R. Oke, Asst. Dist. Field Manager
Bureau of Land Management
Elko Field Office
3900 E. Idaho Street
Elko, Nevada 89801

APPEAL OF UNAUTHORIZED USE NOTICE AND ORDER TO REMOVE

Re: 4130/9230 (NV-012) T-NV-010-98-11-005

Dear Mr. Oke:

In accordance with the unauthorized use notice and order to remove referenced above which we received on July 20th, 2001, this letter constitutes evidence and information which tends to show that the Danns are not unauthorized users of the public lands. The decision was directed to Ms. Mary Dann. We have included a Statement of Reasons for the appeal below. We are also requesting a stay of implementation of the order to remove.

STATEMENT OF REASONS FOR APPEAL OF UNAUTHORIZED USE NOTICE AND ORDER TO REMOVE

Mary Dann, along with her sister, Carrie Dann, hereby appeal from the unauthorized use notice and order to remove signed by Clinton Oke, Assistant District Field Manager, postmarked July 18th, 2001 and designated above.

The Danns respectfully submit that your unauthorized use notice and order to remove referenced above, is in error for the following reasons:

A. THE DECISION IS IN ERROR BECAUSE THE BUREAU OF LAND MANAGEMENT LACKS AUTHORITY OVER THE LANDS IN QUESTION

1. Neither the Taylor Grazing Act of 1934 as amended (generally codified at 43 U.S.C.A. • 315-315n, 315o-1) nor the Federal Land Policy and Management Act of 1976 as amended (generally codified at 43 U.S.C.A. •• 1701-1784) provide the Bureau of Land Management (BLM) with authority over the lands in question. These two acts only apply to lands that were not reserved, homesteaded, or otherwise claimed before they were withdrawn into grazing districts pursuant to the Taylor Grazing Act. The lands in

question were otherwise claimed, and continue to be claimed, under the 1863 Treaty of Ruby Valley.

2. The 1863 Treaty of Ruby Valley (18 Stat. 689) has been in full force and effect, part of the supreme law of the United States, from its proclamation in 1869 through the present. This was a treaty of "peace and friendship" intended to accommodate the western migration of U.S. citizens in exchange for U.S. acknowledgment and respect for Western Shoshone traditional land use patterns. While the Treaty contemplated the establishment of mining and agricultural settlements and ranches, it ceded no lands.

3. Under the Treaty, the Western Shoshone agreed to become "herdsmen or agriculturalists" and to "abandon the roaming life". (Id. at Article IV). The Danns have simply been attempting to fulfill their duties under the Treaty. The BLM claims that, as a result of Indian Claims Commission and related proceedings in which the Danns neither participated nor were represented,[1] BLM regulations somehow supercede the Treaty and that the Danns must now submit to BLM authority on lands clearly identified under the Treaty as belonging to the Western Shoshone Nation.

4. The 1863 Treaty of Ruby Valley is of the same dignity as treaties with foreign nations. A cardinal rule in the interpretation of Indian treaties is that ambiguities are resolved in favor of the Indians.[2] Additionally, general acts of Congress do not apply to Indians, if their application would affect the Indians adversely,[3] unless congressional intent to include them is clear.[4] Similarly, treaties cannot be impliedly abrogated by a later statute, but must be expressly repudiated.[5]

5. Neither the Taylor Grazing Act, nor the Federal Land Management and Policy Act expressly repudiated the 1863 Treaty of Ruby Valley. Nonetheless, the application of these acts is adversely affecting Indians by treating lands protected under the Treaty of Ruby Valley as federal lands. Because congressional intent to include the Western Shoshone under these acts is not clear, and because neither act expressly repudiated the

---

[1] Shoshone Tribe v. United States, 11 Ind. Cl. Comm. 387, 416 (1962), Western Shoshone Identifiable Group v. United States, 40 Ind. Cl. Comm. 318 (1977), TeMoak Band of Western Shoshone Indians v. United States, 219 Ct. Cl. 346, 593 F.2d 994.

[2] Winters v. United States, 207 U.S. 564 (1908) ; 34 Op. A. G. 439 (1925) ; 6 Op. A. G. 658 (1854) ; Worcester v. Georgia, 6 Pet. 515, 582 (1832).

[3] Ex parte Crow Dog, 109 U.S. 556 (1883) ; 12 Op. A. G. 208 (1867). See Lewellyn v. Colonial Trust Co., 275 U.S. 232 (1927).

[4] Cherokee Tobacco, 11 Wall. 616 (1870), aff'g sub nom. United States v. Tobacco Factory, 28 Fed. Cas. No. 16,528 (D.C. W. D. Ark. 1870) ; United States v. 43 Gallons of Whiskey, 93 U.S. 188 (1876).

[5] William Canby, Jr., American Indian Law in a Nutshell 91-96 (2d ed. 1988). See also Menominee Tribe v. United States, 391 U.S. 404 (1968) (holding that implied abrogation of treaties should not generally be assumed).

1863 Treaty of Ruby Valley, the BLM lacks the authority to validly render the decision currently under appeal.

B. THE DECISION IS IN ERROR BECAUSE IT VIOLATES THE FEDERAL GOVERNMENT'S TRUST RESPONSIBILITY

6. The Danns and their extended family are Western Shoshone Indians, and their land use patterns and cultural and spiritual practices are part of Western Shoshone traditional land tenure and culture which has been maintained and developed over centuries. The Danns do not accept that the Western Shoshone people have freely entered into a relationship of trusteeship with the United States by which the United States may validly dispose of Western Shoshone lands and resources or interfere with Western Shoshone traditional cultural practices without Western Shoshone consent. However, under the United States' own legal doctrine, the U.S. government has a general fiduciary obligation toward Native Americans, by which it must deal with them in the utmost good faith and actively seek to protect their well-being and interests. See United States v. Mitchell, 463 U.S. 206, 225 (1983); Seminole Nation v. United States, 316 U.S. 286, 296-97 (1942). The decision appealed is contrary to this fiduciary standard.

7. The general fiduciary obligation that exists as a matter of the United States' own law extends to all federal agencies; it imposes a judicially enforceable duty that federal agencies act in accordance with the most exacting fiduciary standards in any dealings with Native Americans, a duty that is in addition to obligations that arise from specific statutes or executive orders. See Pyramid Lake Paiute Tribe v. Morton, 354 F.Supp. 252, 256-57 (D.D.C. 1972); Northern Cheyenne Tribe v. Hodel, 12 Indian L. Rep. (Am. Ind. Law. Training program) 3065, 3070 (D. Mont. May 28, 1985). The Interior Board of Land Appeals has recognized that this obligation extends to the Bureau of Land Management. See Island Mountain Protectors, National Wildlife Federation, Assiniboine and Gros Ventre Tribes, and Fort Belknap Community Council, 144 IBLA 168 (May 29, 1998).

8. The federal fiduciary obligation is commensurate with relevant congressional policies, which today are to safeguard the interests of Native Americans in maintaining or building self -sufficiency, cultural integrity, and self-determination.[6]

[6] The general federal fiduciary obligation toward Native Americans has been a constant in legal doctrine since the founding of the United States, although the character of that obligation has changed along with the evolution in relevant congressional policies and prevailing normative assumptions in domestic judicial doctrine and international law. As understood by Chief Justice Marshall in the Cherokee cases, Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831), and Worcester v. Georgia, 31 U.S. (6 Pet. 5) 515 (1832), the United States' fiduciary obligation toward Native Americans derived from a course of dealing by which the Indian tribes themselves, through their treaties, looked to the United States for protection while maintaining self-governance. By the turn of the century judicial doctrine had evolved, along with congressional policies, such that federal trusteeship over Native Americans was rooted in conceptions of Indians as "uncivilized" and as not worthy of continuing their existence as sovereign entities with robust powers of self-governance. See Lone Wolf v. Hitchcock, 187 U.S. 553, 564 (1903); United States v. Kagama, 118 U.S. 375, 384 (1886). In the contemporary era, the federal trusteeship obligation has developed away from such racist conceptions of Indians. The federal fiduciary obligation is now a source of protection for

9. The United States' fiduciary obligation toward the Western Shoshone in particular should be assessed in light of the 1863 Treaty of Ruby Valley, 18 Stat. 689. This was a treaty of "peace and friendship" intended to accommodate the western migration of U.S. citizens in exchange for U.S. acknowledgment and respect for Western Shoshone traditional land use patterns. From the time of its proclamation in 1869 through the present, the Treaty of Ruby Valley has been in full force and effect, part of the supreme law of the United States under its constitution.

10. Also relevant in this regard are the United States' obligations under international human rights law. The International Covenant on Civil and Political Rights, a multilateral treaty to which the United States is a party, obligates the United States to safeguard all aspects of indigenous peoples' cultures, including those aspects related to land use and productive economic activities.[7] In addition, multiple developments internationally over the last several years establish a norm of customary international law that requires the United States to protect indigenous peoples' connections with ancestral lands, particularly in regard to subsistence activities.[8]

---

indigenous collective landholding and self-governance. See, e.g., Navajo Tribe v. United States, 364 F.2d 320 (1966) (federal fiduciary obligation breached when Bureau of Mines assumed oil and gas lease in a manner contrary to Tribe's own economic development interests). The character of the contemporary fiduciary obligation owed the United States toward indigenous Americans is defined by current congressional policies that favor Indian self-governance and self-sufficiency, as well as by relevant international law, see text para. 8, infra.

[7] The United Nations Human Rights Committee, the body charged with overseeing compliance with the Covenant, has confirmed that, where indigenous groups are concerned, traditional land tenure and resource use is an aspect of the enjoyment of culture protected by article 27 of the Covenant, which article broadly upholds the cultural rights of minority communities. See Human Rts. Com, General Comment No. 23 (50) (art. 27) (1994) ("Culture manifests itself in many forms, including a particular way of life associated with the use of land and resources, especially in the case of indigenous peoples."). In Ominayak, Chief of the Lubicon Lake Band v. Canada, Human Rts. Com., Communication No. 167/1984, U.N. GAOR, 45th Sess., Supp. No. 40, Annex IX, U.N. Doc. A/45/40 (1990), the Committee construed the cultural rights guarantees of article 27 of the Covenant to extend to "economic and social activities" involving land and resource use, upon which the Lubicon Lake Band of Cree Indians relied. The Committee found that Canada had violated article 27 by allowing the provincial government of Alberta to grant leases for oil and gas exploration and for timber development within the aboriginal territory of the Band. Id. at 27. See also Kitok v. Sweden, Hum. Rts. Com., Communication No. 197/1985, U.N. GAOR, 43rd Sess., Supp. No. 40, Annex VII.G., para. 9.2, U.N. Doc. A/43/40 (1988) (article 27 extends to economic activity "where that activity is an essential element in the culture of an ethnic community"); Lansmann et al. v. Finland, Hum. Rts. Com. Communication No. 511/1992, U.N. Doc. CCPR/C/52/D/511/1992 (1994) (reindeer herding part of Saami indigenous culture protected by article 27).

[8] These multiple activities include the standard-setting on indigenous rights within the United Nations, the Organization of American States, and the International Labour Organization; the inclusion of provisions concerning indigenous lands and resources in various resolutions adopted by states at international conferences, including the 1992 UN Conference on Environment and Development; and decisions concerning specific indigenous land rights controversies by international institutions. See generally S. James Anaya, Indigenous Peoples in International Law 39-71 (New York and Oxford: Oxford Univ. Press, 1996).

11. The decision hereby appealed is contrary to the fiduciary duties that the U.S. Bureau of Land Management, as an agency of the United States government, must be presumed to have toward the Western Shoshone. This decision is part of a concerted effort by BLM officials to prevent Western Shoshone people from using Western Shoshone ancestral lands in accordance with traditional land tenure patterns. Like their Western Shoshone ancestors before them, the Danns rely on multiple uses of Western Shoshone ancestral lands for their economic and cultural survival.

12. The BLM takes the position that the lands in question are no longer lands over which the Western Shoshone hold aboriginal rights of use and occupancy; instead, according to the BLM, the lands are part of the federal public domain. However, the issue of land ownership must be considered in light of the anomalous circumstances under which the federal courts have come to hold that the Western Shoshone can no longer assert title to the lands in question.

13. The courts have held the Western Shoshone to be precluded from asserting title to ancestral lands, solely as a result of the "payment" in 1979 of a claim under the Indian Claims Commission Act. The claim – which was resisted by the Danns and eventually by the Western Shoshone as a whole once they came to understand its nature – had proceeded under the theory that Western Shoshone title over the lands in question had been extinguished at some point in the past. However, as confirmed by the Ninth Circuit Court of Appeals, not only had such an extinguishment not occurred, Western Shoshone people, including the Danns, in fact continued to be in possession of Western Shoshone ancestral lands. United States v. Dann, 706 F.2d 919 (9th Cir. 1983), rev'd. on other grounds 470 U.S. 39 (1985). However, while not overturning these findings, the Supreme Court held that the 1979 "payment" of the claim at 1872 prices precluded assertion of Western Shoshone title, even though the Western Shoshone refused to accept the money award. United States v. Dann, 470 U.S. 39 (1985). To this day the award remains undistributed amid various efforts at negotiating legislation to address Western Shoshone land rights and the fate of the award.[9]

14. The matter of Western Shoshone rights over ancestral lands is also now before an international body. In 1993, the Danns filed a petition with the Inter-American Commission on Human Rights in which they challenge the United States' denial of Western Shoshone land rights. Upon receiving the petition, the Inter-American Commission requested that the United States stay all action to remove the Danns or their property from the disputed lands. In the face of the additional notices and orders by the BLM, the Commission in March of 1998 reiterated its request for a stay.[10] In light of further action by the BLM, the Commission issued precautionary measures on June 28,

---

[9] A legislative measure which would attempt to finalize the decision of the Indian Claims Commission, which is disputed in this case and in the case before the Inter-American Commission, by authorizing a per capita distribution of the money awarded in that process, is one of two legislative measures that are the subject of a request for additional precautionary measures currently being considered by the Commission.

[10] See Letter from David J. Padilla, Assistant Executive Secretary, Inter-American Commission on Human Rights, to S. James Anaya, March 10, 1998 (attached).

1999 and respectfully requested that the United States' government take the appropriate measures to stay its intention to impound the Dann sisters' livestock pending the Commission's investigation of the claims raised in the Danns' petition to the Commission.[11] On September 27, 1999, the Commission concluded that the Danns' petition is admissible and that it raises a prima facie violation of human rights, namely Articles II, XVII, XVIII of the American Declaration of the Rights and Duties of Man.[12]

15. Under such circumstances, the federal fiduciary obligation bars the BLM from moving against the Danns and other Western Shoshone as if they were mere trespassers on federal lands. Rather, the trust responsibility requires the BLM to mitigate against further harm to the interests of the Danns and other Western Shoshone in their ancestral lands and to take into account the relevant equities. Adding to the general federal trust responsibility, 43 C.F.R. § 4120.5-1 requires the BLM to "cooperate with ...Indian tribal and local governmental entities, institutions ...and individuals to achieve" relevant land management objectives. A far better approach than that represented by the decision being appealed would be for the BLM to exercise its lawful authority and enter into cooperative arrangements with the Western Shoshone, at least until the underlying land rights issue is resolved through legislation or otherwise. On various occasions, the Danns and Western Shoshone leaders have approached BLM officials about entering into such cooperative arrangements by which legitimate Western Shoshone interests could be secured while meeting BLM range management objectives. However, in meeting such efforts the BLM has not abandoned its heavy handed stand.

C. THE DECISION IS IN ERROR BECAUSE IT CONFLICTS WITH ESTABLISHED NORMS OF INTERNATIONAL LAW

16. The unauthorized use notice and order to remove issued against the Danns relies on the authority of the Bureau of Land Management under the Taylor Grazing Act, the Federal Land Policy and Management Act, and relevant federal regulations. While these statutes and regulations provide the BLM with substantial authority to promote compliance with the public land laws, they should not be construed to provide the basis of decisions such as this one that conflict with relevant international law.

17. The Supreme Court and lower federal courts have long adhered to the principle that federal statutory schemes, if at all possible, should be read to conform with international law. See, e.g. Murray v. The Charming Betsy, 6 U.S. (2 Cranch) 118 (1804); Trans World Airlines, Inc. V. Franklin Mint Corp., 466 U.S. 243, 252 (1984); United States v. PLO, 695 F.Supp. 1456, 1464-66 (S.D.N.Y. 1988). To do otherwise is to risk placing the United States in the posture of an international outlaw, a condition that could be damaging to the United States in its international relations. Thus, federal courts have gone to substantial lengths to construe federal statutes so that their reach does not

[11] See Letter from Jorge E. Taiana, Executive Secretary, Inter-American Commission on Human Rights, to S. James Anaya and Steven M. Tullberg, June 28, 1999 (attached).

[12] See Letter from Jorge E. Taiana, Executive Secretary to James Anaya and Steven M. Tullberg, October 12, 1999 (attached).

run afoul of relevant international legal obligations (independently of whether or not the international law is itself self-executing and hence capable of direct judicial application as a matter of federal law). See, e.g., id., at 1466-71 (construing operation of Anti-Terrorism Act to be limited by mandates of the U.N. Headquarters Agreement, despite language in the Act that was contrary to the Agreement).

18. As pointed out above, the United States is obligated under international law to safeguard the cultural integrity and traditional land use patterns of the indigenous peoples within its borders, including the Western Shoshone. The relevant statutes and regulations upon which the BLM's authority relies must be read in light of these obligations. This analysis leads to the conclusion that the authority of the BLM does not extend to uphold the decision appealed, a decision which is contrary to the United States' international legal obligation to uphold the cultural integrity and traditional landholding of the Western Shoshone.

PETITION FOR STAY OF ORDER TO REMOVE

19. For the reasons set forth above, appellant requests that you reverse your decision of July 18th, 2001. Appellant further requests that you stay the order to remove pending review of our appeal.

20. If a stay is not granted, the Danns and the members of their family who rely upon the ranching operation as their primary means of subsistence will undoubtedly suffer immediate and irreparable harm. If they are forced to remove their cattle from the open range and pay the fines imposed by the BLM, their ranching operation will irreversibly fail and they will become financially insolvent. The threatened impoundment of their livestock, confiscation of property, and imprisonment would be utterly devastating to the Danns in ways that would be impossible to remedy.

21. On the other hand, the Bureau of Land Management will suffer no harm if the stay is granted. No evidence has been presented that the Danns' livestock are causing environmental harm to the range.

22. In order to grant a stay, it need not be determined that there is a clear likelihood that the Danns ultimately will prevail on the merits of their appeal. It is sufficient that they have "raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberative investigation." Sierra Club, 108 IBLA 381, 385 (1989). See Powderhorn Coal Co. V. OSM (On Reconsideration), 132 IBLA 36, 38 (1995); Powderhorn Coal Co. v. OSM, 129 IBLA 22, 28 (1994); Jan Wroncy, 124 IBLA 150, 152-53 (1992); Marathon Oil Co., 90 IBLA 236, 245-46, 93 Interior Dec. 6, 11-12 (1986); Sun Oil Co., 42 IBLA 254, 257-58 (1979).

23. Serious and substantial questions are being raised by this appeal. These include the issues of whether the Bureau of Land Management is in violation of the federal trust

PO Box 211308 Crescent Valley, Nevada 89821 ph: 775-468-0230 fax: 775-468-0237 email: wsdp@igc.org

responsibility of whether it is acting in excess of its lawful authority, issues that require careful investigation and deliberation.

24. Finally, the public interest weighs in favor of granting the stay. The public interest would be served in that a stay would abate the pattern of at best questionable dealing by which Western Shoshone land rights have been undermined. The BLM's position that the Western Shoshone people have no rights in the lands at issue, which is the premise of its action against Danns, rests on a litigious saga that by any objective standard falls short of fundamental fairness. Whatever the technical correctness of the BLM's legal position, it is of dubious moral legitimacy under the totality of circumstances. The public interest weighs in favor of not perpetuating the specter of dishonor on the part of the federal government in regard to its dealings with Native Americans. If the BLM were to go ahead and carry out its unauthorized use notice and order to remove and notice of intent to impound against the Danns, under present circumstances, it would unnecessarily contribute to the reality of government misdealing and undermine its own ability to peaceably fulfill its range management objectives.

25. A stay would also be in the public interest insofar as it would support U.S. foreign policy objectives in cooperating with international institutions and securing the observance of human rights. As already noted, the Inter-American Commission on Human Rights has repeatedly requested that the BLM stay its action against the Danns and has recently found that the Danns' petition before the Commission is admissible and that it raises a prima facie violation of human rights. The Inter-American Commission is an organ of the Organization of American States which, under the OAS Charter, is charged with promoting the observance of human rights among OAS member countries. As a member of the OAS, the United States has publicly committed itself to cooperating with the Commission and following its decisions. In 1992 the U.S. ambassador to the OAS said, "we affirm our support for the Commission, we express our readiness to have its judgments applied to ourselves." U.S. Ambassador Lungi R. Einaudi, Statement to the First Committee, OAS General Assembly, the Bahamas, May 20, 1992. If the BLM proceeds in defiance of the Inter-American Commission in the present case, the international standing of the United States as a defender of human rights will be harmed.

For the foregoing reasons, Mary Dann and Carrie Dann request that your reverse your unauthorized use notice and order to remove dated July 18th, 2001 and that, pending this appeal, any enforcement action in relation to that notice and order be stayed.

Sincerely,

By: _____

James S. Stroud, Acting Director
Western Shoshone Defense Project