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respect

A NEWSLETTER ABOUT LAW AND DIVERSITY

Whose Land is it Anyway?

by Phyllis Raybin Emert

Imagine being in your “golden years” and having the U.S. government bring a lawsuit against you for trespassing on land that you believe is yours, land that has been in your family for as long as you can remember.

That is what the Dann sisters, American Indians who live in Nevada, contend happened to them. Carrie, 70, and Mary, 80, live on their ranch near Crescent Valley, Nevada, much as their Western Shoshone ancestors did more than 100 years ago. They have no electricity or hot water. Their cattle and horses graze freely on the surrounding land and they raise their own food, making money from the sale of their livestock.

The Dann sisters have been waging a battle with the federal government since 1972 over property rights. In 1974, the U.S. brought an action against them in federal court for trespassing. The Danns claim the land in question is part of their ancestral home. The government declared that it is public land and said the sisters must pay a fee and obtain a permit to allow their cattle to graze. The Danns' argument of ownership was rejected in district court; however, the Court of Appeals reversed the district court's decision and ruled in favor of the Danns. The government brought the case to the U.S. Supreme Court, which reversed the Court of Appeals decision. The Danns, however, have still refused to pay for a permit, stating that their ancestors never signed papers giving the land to the government.

Over the years, the sisters have been fined a total of \$3 million for trespassing and \$50,000 in other fees. The Bureau of Land Management (BLM) has seized hundreds of the Danns' cattle and horses and sold them at auction to help pay off their debt. Yet the Danns have stood firm.

“Trespass?” Mary Dann asked *The New York Times*. “Who... gave them the land anyway?”

The Treaty of Ruby Valley

The Western Shoshone Indians once occupied almost two-thirds of the land that is now the state of Nevada. There are numerous decentralized tribes within the Western Shoshone [>continued on page 2](#)

U.S. Supreme Court Rules on Cross-Burnings

by Jodi L. Miller

The First Amendment to the U.S. Constitution gives every citizen the right to free speech, but not the right to intimidate, according to a recent ruling by the U.S. Supreme Court regarding cross-burnings. In a 6-3 vote, the Court decided that it is acceptable for states to outlaw cross-burnings when they are used as a form of intimidation. A stipulation to the ruling is that the burden of proof is placed on prosecutors to prove that the burning of a cross was meant to threaten.

In the last issue of *Respect*, we reported on the national debate sparked by *Virginia v. Black*, the case that prompted the Court's recent ruling. Essentially the case surrounded two 1998 cross-burning incidents in Virginia. In one case, two Virginia Beach men attempted to burn a cross [>continued on page 5](#)

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nations, the biggest of which are the Temoak Shoshone Band, the Ely Shoshone Band and the Yomba Shoshone Band.

The U.S. government and the Western Shoshone signed the Treaty of Ruby Valley in 1863. This treaty of peace and friendship ended hostilities with the Western Bands of the Shoshone Nation of Indians. It also guaranteed safe passage by rail, stage and on horseback for white settlers through Shoshone country and provided for the establishment of military posts, mining camps, ranches, farms, mills and other outposts. The government also set aside reservations where the Indians would live when they, according to the treaty, "agreed to abandon the roaming life... and become herdsmen or agriculturists."

Today, much of the controversy centers on the question of when the Shoshone ancestral land became the property of the U.S. government. The Dann sisters argue that they have hunted, grazed and occupied this land "since time immemorial" and that the Treaty of Ruby Valley, which never specifically gave ownership of Shoshone land to the U.S. government, is still in effect. They claim that the U.S. has steadily taken over parts of the ancestral lands to the

benefit of the government and non-Indians. The Dannels also contend that the use of this land was "undisturbed and unchallenged until the early 1970s," when the Department of the Interior began to issue fines for grazing and trespassing on public lands.

The U.S. government states there was never an effort to remove the Dannels from the ranch land that legally belongs to them. The government wants the Dann sisters to pay for a permit to graze their livestock on public lands. Dewey Dann, father of Mary and Carrie, had a permit to graze his cattle on federally owned land, the government contends. However, the government has stated that following their father's death, the Dann sisters began to graze a greater number of cattle than permitted under their permit. Their excessive grazing damaged the range and interfered with other ranchers use of the public lands, according to the government.

The U.S. courts concluded that the Western Shoshone title to the land has been extinguished and that the Treaty of Ruby Valley "was not intended to acknowledge Shoshone title to lands covered by it." The process of westward expansion by white settlers, who took up permanent residence on what was

once Western Shoshone land, is referred to as a gradual encroachment by non-Native Americans and the U.S. government. The U.S. claims the Dannels and other Western Shoshone "lost any interest in the lands in question as a result of this encroachment by non-native Americans."

A bargain at 15 cents an acre

Also at issue in the Dann case is money and the discord within the Shoshone tribe over whether to accept a cash settlement for the land in question. In 1946, Congress formed the Indian Claims Commission (ICC) to hear and determine land claims against the government by any tribe, band or group of Indians. All claims were to be submitted for a period of five years from 1946 to 1951. In all, 852 claims were filed with the ICC, whose decision was final and had the same effect as a judgment in the U.S. courts. In the case of the Western Shoshone, the Indian Claims Commission found that the settlement of the West "constituted a deprivation of use of lands used by the Western Shoshone that required just compensation."

The amount of money awarded to the Western Shoshone in an ICC final ruling on December 12, 1979 was more than \$26 million, based upon the 1872 value of the

land—15 cents per acre. With no specific event marking the extinguishment of the Western Shoshone's **aboriginal title** to the land, the ICC decided that 1872 would be used as a "valuation date" to represent when the Shoshone were deprived of their ancestral land. Aboriginal title provides original natives of the United States exclusive rights to occupy the land used by them before the U.S. asserted power over them. The \$26 million figure, one of the largest Indian claims in history, also included nearly \$5 million in compensation for mineral rights.

The money was put in an interest-bearing trust account in the U.S. Treasury and is now worth more than \$136 million. The Western Shoshones, who number less than 6,000, are divided as to whether to accept payment or continue their fight for ancestral lands (see sidebar for more information on the settlement).

The Dann sisters claim that the ICC award was not fair compensation but was discriminatory, and that certain Western Shoshone groups, including the Danns themselves, were not allowed to participate in the proceedings. Thus, they were denied "the right to judicial procedures that accord with fundamental principles of fairness and **due process** of law."

Appealing for human rights

With all of their claims rejected by the U.S. court system and believing that they have been discriminated against, the Danns decided to present their case before the Inter-American Commission on Human Rights (IACHR), which is part of the Organization of American States (OAS). The commission acts as an advisory



body and makes recommendations regarding human rights violations in the Americas. Unlike the U.S. courts, the IACHR supported the Danns' position that the U.S. used an illegitimate claims process to gain control of Western Shoshone land. It recommended that steps be taken to provide a fair and legal process to determine land rights.

In a January 2003 report, the IACHR concluded that the U.S. had violated the property rights of the Dann sisters according to three articles of

the American Declaration of the Rights and Duties of Man that deal with equality, including the right to equality before the law, the right to a fair trial and the right to own property.

In its final decision, the IACHR found that the process used by the ICC in making its final ruling was flawed and did not keep "all members of the [Western Shoshone] community... fully and accurately informed," nor did

it give them "an effective opportunity to participate individually or as collectives." The IACHR recommended that the U.S. adopt certain measures to correct this process in order to "provide Mary and Carrie Dann with an effective remedy... to ensure respect for the Danns right to property."

In response, the U.S. completely dismissed the conclusions of the IACHR, which has no jurisdiction in the U.S. Responding to the IACHR report, the government asserted "Mary and Carrie Dann have been accorded the

right to equality before the law, the right to a fair trial, and the right to own property."

The U.S. also contended that the Danns' complaints were "fully and fairly litigated in the U.S. courts" and are not civil rights violations, but rather legal questions of land title and land use. The government reiterated that the land titles in question were extinguished and that compensation was paid.

"The ICC found that the Indians no longer exercised sufficient occupancy and control over the lands in question to retain aboriginal title and that the U.S. government had asserted enough authority over the lands to constitute a direct extinguishment of any pre-existing rights," the government stated.

The Danns were given every opportunity to attend open council meetings held in Western Shoshone territory regarding the ICC ruling and to vote to elect a committee to represent them before the ICC, according to the government.

"Merely because the Danns disagreed with the final decision of the ICC and believe it to be wrong does not mean that the decision was incorrect," the government stated.

In the report, the U.S. also pointed out that the Danns could have pursued a claim in court for individual tribal aboriginal title. Even the U.S. Supreme Court indicated that the Danns might have been able to claim rights to some

of the lands by using the individual aboriginal rights argument, but they chose not to pursue that avenue. Finally, the government declared that the American Declaration deals with the rights of individuals and not the Western Shoshone people as a whole, and repeated that the IACHR's recommendations were not binding on the U.S.

Deborah Schaaf, of the Indian Law Resource Center in Helena, Montana, was one of

several attorneys who represented the Dann sisters before the IACHR. She believes that neither the Danns, nor the Western Shoshones were afforded due process by the Indian Claims Commission.

"Those very laws and processes which the U.S. claims are legitimate," declared Schaaf, "are violations of international law. The U.S. is obligated to follow the IACHR recommendations

as a member of the Organization of American States," she added.

Schaaf explained that the Danns are not interested in pursuing individual aboriginal rights claims. Their position is that the lands in question are ancestral lands that belong to the Western Shoshone Indians. The Dann sisters want "binding negotiations between the U.S. and the Western Shoshone," stated Schaaf. "It's a question of collective

property rights."

In the meantime, attorneys on behalf of the Danns have filed a request for urgent action with the United Nations Committee on the Elimination of Racial Discrimination. The UN Committee, which meets every two years in Geneva, Switzerland, has submitted questions to the U.S. regarding the issue of Western Shoshone lands, and the U.S. has until August 2004 to respond. ■

Cash Settlement Divides Western Shoshone Tribe

The Indian Claims Commission ruled in 1979 that the Western Shoshone Indians deserved fair compensation for the loss of their ancestral lands. At that time, \$26 million was placed in a United States Treasury account earmarked for distribution to individual tribe members. Never distributed, the money has been earning interest and is now worth more than \$136 million.

A battle is raging between the Western Shoshones, who number around 6,000, about whether to accept the money—each tribe member would receive approximately \$20,000 in cash—or to continue to fight to get back their ancestral land. If they choose the cash, the Western Shoshones give up any further claims on the land.

The U.S. government already believes the decision of the ICC is final, and the Shoshones have no legal claims on what is public land. The U.S. Supreme Court backed up the federal government in *United States v. Dann* (1985) when the Court declared, in its opinion, that payment had already occurred "when the funds in question were placed by the United States into an account in the Treasury for the Tribe." This decision reversed the Ninth Circuit Court of Appeals, which concluded that payment had not occurred because a delivery system was not put into place.

The late U.S. Supreme Court Justice William Brennan delivered the Court's unanimous opinion. He declared that "funds transferred from a debtor to an agent or trustee of the

creditor constitutes payment, and it is of no consequence that the creditor refuses to accept the funds from the agent..." Furthermore, Brennan wrote, "Once the money was deposited into the trust account, payment was effected."

Mary and Carrie Dann, along with a number of tribal council leaders, are Indian traditionalists who live off the land and believe that the government stole ancestral lands from the Western Shoshone and, therefore, refuse to accept any money. Some Western Shoshones do want the cash payment.

One example is retired teacher Nancy Stewart, a Western Shoshone who told *The New York Times* that the Dann sisters were "hardliners who want two-thirds of the state back. That's never going to happen," Stewart declared.

Democratic Senator Harry Reid of Nevada, who believes that most Shoshones would prefer the cash settlement, introduced legislation in November 2001 to disburse the money. The Senate passed Senator Reid's bill on November 13, 2002. The bill was then sent to the House and referred to the House Committee on Resources where it died when Congress adjourned. The senator plans to introduce the bill again this year.

In the meantime, the debate over money versus land and the Dann sisters' fight for property rights continues. ■

— Phyllis Raybin Emert

Cross-Burning *continued from page 1*

in the yard of a Black neighbor. In the other case, a man burned a cross during a Ku Klux Klan rally on the property of a fellow Klansman, frightening a neighbor of the property owner. Both cases resulted in convictions under a Virginia statute prohibiting cross-burnings, which were ultimately appealed to the U.S. Supreme Court.

While the Court ruled that cross-burnings cannot be used as a form of terror, it also stated in a separate 7–2 ruling that the Virginia statute completely banning all cross-burnings is unconstitutional. U.S. Supreme Court Justice Sandra Day O'Connor called the statute "flawed" because it took what she termed a "shortcut" in instructing juries to view the very act of setting a cross on fire as an act of intimidation and to conclude that a cross-burner's intent is to terrorize someone.

"It does not distinguish between cross-burning at a public rally or a cross-burning on a neighbor's lawn," Justice O'Connor wrote in her majority opinion and added "a burning cross is not always intended to intimidate but is sometimes a statement of ideology," which is protected under the First Amendment of the U.S. Constitution.

For Justice David H. Souter, the real issue is that Virginia's statute is "content-based," meaning that the Virginia law really bans a philosophy or a certain viewpoint, which violates the First Amendment.

Disagreeing with the majority of his colleagues on the Court, Justice Clarence Thomas does not believe cross-burnings qualify as protected expression at all and argued in his **dissenting opinion**

that the Virginia statute should have been upheld.

"Just as one cannot burn down someone's house to make a political point and then seek refuge in the First

Amendment, those who hate cannot terrorize and intimidate to make their point,"

Justice Thomas said. He went on to say that the Virginia statute "prohibits only conduct, not expression, so there is no need to analyze it under any of our First Amendment tests."

According to Somerville attorney Brian Cige, what the Court said in its ruling is that while individual states can ban cross-burnings meant to intimidate, it is unconstitutional to presume that the intent of all cross-burnings is to intimidate. In other words,

prosecutors must prove that a person's intent in burning the cross was meant to intimidate. Cige also clarified that instances of burning crosses for political speech would be allowed under the Court's ruling.

Here in New Jersey

What is New Jersey's stance on cross-burnings? A 1981 New Jersey law created stricter punishments for criminal acts or vandalism that utilized swastikas or burning crosses. In 1994, however, the New Jersey Supreme Court struck down this statute because of a previous U.S. Supreme Court ruling making it unconstitutional to outlaw specific symbols, even those considered to be symbols of hate.

In light of the U.S. Supreme Court's recent ruling, New Jersey Senator Byron Baer, who championed the 1981 law, told *The Star-Ledger* that he would ask the Office of Legislative Services to draft legislation restricting the use of hate symbols that would pass muster with the U.S. Supreme Court.

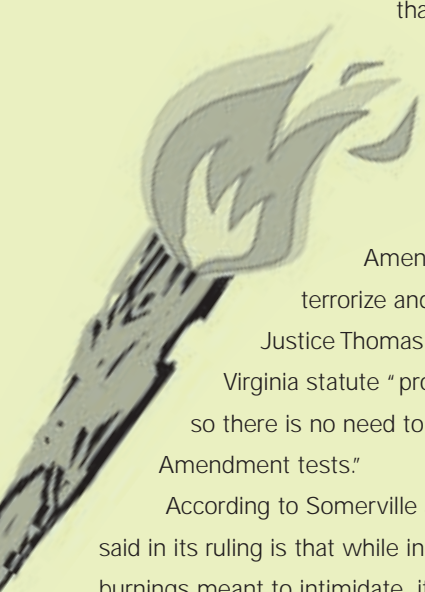
David M. Ragonese, with the Attorney General's Office in Trenton, is optimistic that the U.S. Supreme Court's ruling means there will be a greater chance of banning the practice of cross-burnings in New Jersey. Monmouth County lawyer Eugene McDonald, who speaks to high school and college students about constitutional issues, is not so sure.

"The trouble with the Court's ruling," McDonald said, "is that there is no triggering mechanism to prove intent."

He points out that a person guilty of cross-burning can simply say that it was not his intention to threaten anyone, and that he was merely exercising his right to free speech.

Paul DeGroot, an assistant prosecutor in Passaic County, believes there are factors that can prove intent in a cross-burning case, including the size of the cross, what was said at the cross-burning, where the cross was burned and whether it was in public view. He agrees with the Court's ruling and notes that it has always been, "as it should be," the prosecution's job to prove intent.

The issue is still very relevant here in New Jersey. The last reported occurrence of cross-burning in the state took place in August 2002. The Loves, an African-American couple, woke to find a cross burning on the front lawn of their Monroe Township home. The culprits were never caught. ■



Hey Teachers! **NJSBF Offers Tapes that Promote Tolerance**

The New Jersey State Bar Foundation stocks more than 250 titles on a variety of law-related topics in its free Video Loan Library. The following videos target tolerance and diversity issues.

Beyond Hate In these two programs, Bill Moyers attempts to take us beyond hate by exploring its origins and dimensions through the eyes of world leaders, human rights activists, Arabs and Israelis, high school students, youth gangs, and an American white supremacist group.

The Heart of Hatred (grades 7–12) This program features conversations with a variety of people who have explored the heart of hatred. (52 minutes)

Learning to Hate (grades 7–12) In this program, Moyers focuses on how children learn to hate, and how attitudes toward hatred differ from culture to culture. (39 minutes)

Crimes of Hate (grades 6–12) In an era when bias crimes are increasing in frequency and intensity, this documentary reveals the twisted thinking of perpetrators, the anguish of their victims, and how law enforcement deals with these crimes. The video consists of an overview of hate crimes in three segments—the crime of racism, the crime of anti-Semitism and the crime of gay bashing. (27 minutes)

Eye of the Storm (grades 6–12) Iowa teacher, Jane Elliott, conducts an eye-opening test of prejudice in her classroom. In a two-day experiment, third-graders are separated into “superior” blue-eyed children and “inferior” brown-eyed children. On the second day, the roles are reversed. This documentary explores the behavioral effects, attitudes and classroom performance of the children as they suffer from the segregation, discrimination and prejudice of the experiment. (25 minutes)

Videos are loaned for a period of two weeks. There is no charge to borrow the videos, but a \$50 refundable security check for each video, made payable to the New Jersey State Bar Foundation is required. Requests must be made in writing. Videos must be returned via insured U.S. mail or UPS so that shipments are insured and can be tracked.

For a complete list of available videos visit our Web site at www.njsbf.org or call 1-800 FREE LAW. Requests with checks may be sent to the New Jersey State Bar Foundation, Video Loan Library, One Constitution Square, New Brunswick, NJ 08901-1520.

A Class Divided (grades 6–12) A follow-up to Iowa teacher Jane Elliott’s original experiment where she taught her third-graders about the effects of prejudice by dividing the class on the basis of eye color. In this PBS Frontline documentary, filmed 15 years later, she meets with some of her former students to analyze the experiment and its impact on their lives. (60 minutes)

Heil Hitler: Confessions of a Hitler Youth (grades 7–12) Alfons Heck, one of the millions of impressionable German children, recalls in this video how he became a high-ranking member of the Hitler Youth Movement. While all societies try to influence their youth to follow their values, what makes things go out of control? Students will be encouraged by this video to think more critically about the dangers to society from pressures to conform. Archival footage depicting Nazi violence may be upsetting to some viewers. (30 minutes)

The Truth About Hate (grades 6–12) Hosted by Leeza Gibbons, this program explores the origins of hate through the eyes of today’s teenagers as they come face-to-face with their own racism, ethnic bigotry, religious hatred and sexual discrimination. (32 minutes)

What’s Hate All About (grades 7–12) This video helps young people understand the dynamics underpinning this most dangerous of human emotions. Using an MTV-style format, the program examines through the personal stories of real teens the many reasons people hate and the stereotypes that hate fosters. The program helps students recognize their own negative feelings toward others, and shows them that they can make a difference by speaking out against hate in all its varied forms. (24 minutes)

aboriginal title: this title provides original natives of the United States exclusive rights to occupy the land and water used by them before the U.S. asserted power over them. **burden of proof:** the obligation to prove by evidence in a case that your argument is truthful. **dissenting opinion:** a statement written by a judge that disagrees with the opinion reached by the majority of his or her colleagues. **due process:** legal safeguards that a citizen may claim if a state or court makes a decision that could affect any right of that citizen. **encroachment:** an illegal intrusion to gain possessions or land. **extinguished:** destruction or cancellation of a right, power or contract. **immemorial:** going back beyond human memory or records. **just compensation:** compensation that is fair to both an owner and the public when property is taken for public use.