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INDIGENOUS PEOPLES' FREE PRIOR AND INFORMED CONSENT IN THE INTER-AMERICAN HUMAN RIGHTS SYSTEM

by Alex Page*

INTRODUCTION

In a series of recent opinions, the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights have emphatically affirmed the internationally-protected rights of indigenous peoples to their traditional lands and resources and have called upon the states of the hemisphere to uphold their obligations to protect those rights in domestic law and practice. In so doing, the Court and Commission have acknowledged the interrelationship between indigenous land tenure, culture, and self-determination. As an incident of their rights protected by the American Convention on Human Rights and the American Declaration on the Rights and Duties of Man, the Court and Commission have found that indigenous peoples have the right to give or withhold their free, prior informed consent to activities affecting their lands and territories. This right attaches whether or not domestic law protects property or self-determination rights of indigenous peoples.¹

In the jurisprudence of the Inter-American Human Rights system, the conceptual underpinnings for indigenous peoples' right to free prior informed consent ("FPIC") lie in the right to property, on one hand, and rights to self-determination and culture, on the other. This understanding of the two distinct bases for FPIC is shared by international experts and adjudicatory bodies outside of the hemisphere² but perhaps most clearly explicated in Inter-American jurisprudence. The three leading cases discussed below articulate this right of indigenous peoples and illustrate its roots in rights to property, to self-determination, and culture.

COMMUNITY OF AWAS TINGNI V. NICARAGUA

In the early 1990s, the Nicaraguan government granted licenses (or "concessions") to a multinational corporation to log on the traditional lands of the Mayagna Community of Awas Tingni.³ Community members first learned of these concessions when they awoke one day to find loggers encroaching on their territories. The logging resulted not only in severe damage to the natural environment, but also in a wide range of social problems related to the uninvited presence of outsiders and harm to communal resources. Ultimately, the concessions raised the threat of serious violence and damage to the community's cultural integrity.⁴

At the time of granting logging concessions, Nicaraguan law provided that indigenous communities located on the Atlantic Coast were to have some regional autonomy and protection for their land rights.⁵ This law was not enforced, however, and provided no practical protection to the Awas Tingni

community against the incursion of multinational resource extraction interests. With the help of a group of environmental experts and indigenous rights lawyers, the Awas Tingni community filed a challenge to these incursions on its lands in the domestic courts of Nicaragua.

When the Nicaraguan courts failed to provide any relief, the Community filed a petition in the Inter-American Commission seeking a ruling that Nicaragua's actions violated the American Convention on Human Rights, to which Nicaragua is a party.⁶ The Commission agreed with the Community and took the case to the Inter-American Court on Human Rights, which issued a preliminary finding based on Article XXI of the American Convention on Human Rights, which provides a general protection for the human right to property and protects the rights of indigenous communities to their traditionally occupied lands and territories. By issuing concessions without the consent of the Community, the Court found Nicaragua had violated this right to property.⁷

In its final ruling, the Court reaffirmed the principle that indigenous peoples have rights to their traditionally used and occupied territory, and that these rights arise autonomously under international law.⁸ Without using the word consent, the Court held that the Community's right to its own property prevent the Nicaraguan Government from unilaterally exploiting community natural resources. To fulfill its obligations under the American Convention, the Commission found that Nicaragua was required to "officially delimit, demarcate, and title the lands belonging to the Awas Tingni Community within a maximum period of 15 months, with the full participation of, and considering the customary law, values, usage, and customs of, the Community."⁹

The role of culture was particularly important to the court, which noted that "[f]or indigenous communities, the relationship with the land is not merely one of possession and production, but also a material and spiritual element that they should fully enjoy, as well as a means through which to preserve their cultural heritage and pass it on to further generations."¹⁰ The Court's conclusion that demarcation could proceed only with the participation of the Awas Tingni community and in accordance with the Community's customary law, values, and practices also indicates the central role played in its decision by the principle of self-determination. Under the Court's interpretation,

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the American Convention on Human Rights protects indigenous communities' rights to property such that the right of each community to govern itself and to collectively organize its land-holding is also protected.

The dual concepts of collective rights and self-determination for indigenous peoples are essential in understanding how FPIC may be properly implemented. Because the community as a whole must decide how it is governed, consent must also come from the community as a whole. The *Awes Tingni* court found that whether a community granted its consent can only be determined by considering and respecting the customary law and practices of the community.

MARY AND CARRIE DANN V. UNITED STATES

In 1993, two leaders of a Western Shoshone band filed a petition in the Inter-American Commission against the United States. Their recourse to the inter-American human rights system followed decades of struggle on the ground and in the Federal courts of the United States.

Western Shoshone, or "Newe" people, used and occupied a vast area of the American West for many years prior to European colonization. During this time, Western Shoshone society developed a decentralized structure. Small family groups occupied large areas of rugged, arid land, and came together periodically to make decisions for the greater Western Shoshone community. In 1863, the federal government signed a treaty with the Western Shoshone confirming their rights to the land they had traditionally used and occupied.¹¹ Despite the treaty, non-Indians subsequently moved on to portions of Western Shoshone lands, and the government took no action to stop them. Indeed, many of these incursions were by the government itself.

While the Dann band fought successfully to prevent encroachment on the lands it traditionally used and occupied, the greater Western Shoshone resistance could not stop all incursions onto Western Shoshone lands. Efforts to challenge non-Indian intrusions under law were unsuccessful, in large part because the federal courts of the United States did not generally recognize Indian tribes' right to bring lawsuits. In 1946, under pressure to address the rapidly declining health and welfare of Indian communities within its borders, the United States established a quasi-judicial administrative body, the Indian Claims Commission ("ICC"), to provide financial relief to Indian tribes and nations whose lands and territories had been taken.¹² Although many tribes and nations were led to believe that ICC would provide a forum in which to vindicate their continuing land rights, the ICC was authorized only to issue money judg-

ments. While the ICC had no authority to confirm or return land to tribes, it did have the power to discharge the legal obligations of the United States to Indian nations and thereby to extinguish title as a practical matter, stripping land from Indian nations and preventing further recourse against the federal government. Indian nations seeking redress in the ICC were not allowed to argue that their land rights should be maintained and protected, but instead could get relief only if they conceded that their land rights had been extinguished.¹³

In 1951 a small group of leaders from the Te-moak Band of the Western Shoshone filed a case in the Claims Commission.¹⁴ Early in the proceedings, other Western Shoshone, including the Danns, attempted to intervene in order to remove their traditional treaty-protected lands from the claim.¹⁵ The ICC rejected the intervention.¹⁶

In order to be eligible for a money judgment, lawyers for the Te-moak Band stipulated that Western Shoshone land rights had been extinguished as of 1872.¹⁷ The Te-moak Band subsequently informed the ICC that they had fired their lawyers and sought to revise their pleadings to clarify that title to their lands had never been extinguished.

At the same time, the Dann Band of Western Shoshone faced an increasing challenge by the federal government to their long-

standing traditional use of lands protected by the 1863 Treaty. In 1974, the United States sued the Danns for trespass, claiming that despite the fact that the 1863 Treaty confirmed Western Shoshone rights to the land at issue, subsequent encroachment by non-Indian settlers made those rights meaningless.¹⁸

The Danns insisted that the United States had no rights to their traditional lands and that its efforts to establish those rights were unlawful.¹⁹ As this legal battle proceeded, the ICC issued a ruling in the case before

it. The ICC rejected the Te-moak Band's efforts to suspend the litigation and ignored its decision to terminate representation by its lawyers.²⁰ The ICC held, based on the stipulation made by Te-moak's lawyers, that Western Shoshone land rights had been extinguished and that compensation would be paid.²¹

Thus, as the Dann Band fought the federal trespass action against them in federal district court, they faced an adverse judgment on the case litigated in the ICC without their permission or participation and without the approval of any Western Shoshone community. Based on the ICC judgment, the United States Supreme Court later ruled in the Dann's trespass action – without deciding whether the Treaty of Ruby Valley continued to protect the Western Shoshone lands at issue – that the Danns were prohibited from asserting their land rights against the United States.²² Despite the Western Shoshones' refusal to

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accept the ICC money award²³ and despite the fact that the question of extinguishment was never actually litigated in the ICC, the Supreme Court's decision thus left the Western Shoshone with no judicially confirmed land rights and no apparent means of further recourse to secure those rights.

With no recourse available to them in the federal courts, in 1993 the Danns took their case to the Inter-American Commission on Human Rights. There, they invoked the same international legal rights later established in the *Awas Tingi* case, including the right to equality, the right to property, and the right to judicial protection. Because the United States is not a party to the American Convention on Human Rights, the Danns based their arguments on the American Declaration on the Rights and Duties of Man, which applies to all states in the hemisphere and articulates state obligations vis-a-vis these rights. The Danns argued that the US had violated their rights and had failed to uphold the obligations expressed in the American Declaration by failing to provide a forum for the proper adjudication of their land rights.

The Commission agreed, finding that the processes employed by the United States to adjudicate Western Shoshone land rights "were not sufficient to comply with contemporary international human rights norms, principles and standards that govern the determination of indigenous property interests."²⁴

The Commission examined these norms, principles, and standards in the context of "evolving rules and principles of human rights law in the Americas and in the international community more broadly, as reflected in treaties, custom and other sources of international law" related to indigenous peoples.²⁵ These norms, the Commission found, required "consideration of [indigenous peoples'] particular historical, cultural, social, and economic situation and experience" and special attention to the "connection between communities of indigenous peoples and the lands and resources that they have traditionally occupied and used, the preservation of which is fundamental to the effective realization of the human rights of indigenous peoples more generally and therefore warrants special measures of protection."²⁶

Looking to the International Covenant on Civil and Political Rights, the Convention on the Elimination of All Forms of Racial Discrimination, the International Labour Organisation's Convention No. 169, and the Draft American Declaration on the Rights of Indigenous Peoples, the Commission found these general international legal principles applicable in the context of indigenous human rights to include state "recognition...of the permanent and inalienable title of indigenous peoples" and the right "to have such title changed only by mutual consent between the state and respective indigenous peoples when they have full knowledge and appreciation of the nature or attributes of such property."²⁷

The Commission also found that the American Declaration provisions on fair trial and property require that any determination of indigenous land rights be based on the fully informed consent of the whole community, meaning that all members must be fully and accurately informed and have the chance to participate.²⁸ In the *Dann* band's case, the Commission found, there was no consultation with the community, and no mandate

from the Western Shoshone for the actions taken in the ICC that resulted in what the Commission called "the ICC's finding that the entirety of the Western Shoshone interest in their ancestral lands...was extinguished at some point in the past."²⁹

The *Dann* ruling demonstrates the challenges attendant to the implementation of indigenous peoples' right to FPIC in even those national systems with complex and relatively sophisticated legal structures. Despite the legitimate reputation of the United States judicial system as a leading example of strong rule of law, the Commission found the flaws in the United States system for resolving indigenous land rights to be so egregious that they constituted human rights violations.

Efforts to implement FPIC for indigenous peoples must therefore take account of not only developing countries, where rule of law is often weak, but also countries in which legal frameworks protecting basic rights to equality and access to the courts are usually strong. Even in such countries, the *Dann* case makes clear, indigenous people may by law be treated in ways that violate their human rights.

The Commission's *Dann* ruling also suggests that a central inquiry in assessing the efficacy of protections for FPIC will relate to the issue of who has the authority to give consent for actions impacting the property rights of indigenous communities. The *Temoak Band's* initial decision to take the case to the ICC might reasonably lead one to question whether consent can ever be characterized as free when an indigenous people faces extremely limited options. The subsequent development of the ICC case without the Danns' involvement and contrary to the instructions of the *Temoak Band* suggests that another critical inquiry will relate to the issue of what procedures are adopted for determining when a group of individuals has authority to speak for a community or nation. And special measures will almost certainly be required to ensure that there is full information and conditions necessary for indigenous peoples to exercise free choice.

MAYA COMMUNITIES OF SOUTHERN BELIZE V. BELIZE

At the time of this writing, the case of *The Maya Indigenous Communities of the Toledo District v. Belize* was still pending in the Inter-American Commission. In January 2004, however, the Government of Belize took the unusual step of making public the Commission's preliminary report on the merits in the case, which had been released to Belize confidentially under the Commission's rules several months earlier.³⁰

The Maya case arose when the Belizean government granted logging and oil extraction concessions on Maya lands without obtaining the consent of the Maya communities.³¹ Despite the longstanding use and occupancy of these lands by traditional Maya communities, Belizean law considers them to be national lands under the discretionary authority of the government.³² The actions taken by the Belizean government threatened severe harm to more than three dozen Maya villages in Southern Belize, and the Maya communities filed a suit in Belizean courts in 1996 challenging these actions. When the domestic courts failed to act on their complaint, they filed a peti-

tion with the Inter-American Commission on Human Rights.

In their petition, filed in 1998, the Maya claimed that the Government's unilateral issuance of concessions without their consent violated Maya rights to property, equality, judicial protection, consultation, and self-determination, among other rights.³³ The Maya argued that the American Declaration on the Rights and Duties of Man protected these rights and imposed affirmative obligations on the Government of Belize to protect them.

In its preliminary report on the case, the Commission relied on its conclusion in the *Dann* case that determinations about the scope or existence of indigenous peoples' property rights cannot be made without the free and informed consent of the peoples concerned.³⁴ The Commission noted that its application of this principle in the *Dann* case related to a judicial determination, and clarified that the principle also applied in cases of direct natural resource exploitation on indigenous territories: "Articles XVIII [judicial protection] and XXIII [right to property] of the American Declaration," the Commission found, "specially oblige a member state to ensure that any determination of the extent to which indigenous claimants maintain interests in the lands to which they have traditionally held title and have occupied and used is based upon a process of fully informed consent on the part of the indigenous community as a whole."³⁵ Given the Commission's conclusion that the right to FPIC flows from the right to property, this conclusion can hardly be controversial. The ability to decide whether and how the resources on one's own property are exploited is an obvious and well-accepted incident of property ownership.

While confirming that consultation and consent are required for the protection of indigenous property rights, the Commission declined to find an independent basis for FPIC in international law protecting rights to consultation and self-determination, however. Instead, the Commission acknowledged the arguments put forward by the Maya and held that "the duty to consult is a fundamental component of the State's obligations in giving effect to the communal property right of the Maya people in the lands they have traditionally used and occupied."³⁶ The Commission reemphasized "the distinct nature of the right to property as it applies to indigenous people, whereby the land traditionally used and occupied by these communities plays a central role in their physical, cultural, and spiritual vitality."³⁷ For these reasons, the Commission found, violations of separate provisions of the American Declaration alleged by the Maya were "subsumed within the broad violations of Article XXIII" and therefore did not need to be determined.³⁸

In this way, the Commission acknowledged the interrelationship between indigenous self-determination and property ownership, and found that a proper conception of indigenous property rights comprehends rights to culture, self-determination, and consultation and consent. Neither indigenous property rights generally nor FPIC specifically can be properly understood without acknowledgment of this interrelationship, since communal ownership and self-governance have profound implications for the way indigenous people make decisions related to land or other property. It is this understanding of the role of self-

determination and cultural integrity that must provide the basis for the implementation of FPIC.

IMPLEMENTATION OF FREE PRIOR INFORMED CONSENT

Despite strong rulings from the Inter-American Commission and Court on indigenous peoples' right to FPIC, significant barriers to implementing that right on the ground remain. Foremost among these, perhaps, is the unequal bargaining power of the vast majority of indigenous communities vis-a-vis national governments and extractive industries. Typically, indigenous peoples are poor and lack training, experience, or access to information about international business. Many nonetheless hold lands and territories with a wealth of natural resources. Indigenous peoples often lack access to broader markets and economic alternatives to resource extraction. They typically lack political power within the national system and access to effective judicial protection, in part because national and local courts and lawyers are often hostile to or ignorant of the rightful place of indigenous peoples in the law. Implementing an effective regime under which indigenous peoples can give or withhold their FPIC to development activities affecting them thus requires attention to a wide range of broader social and economic issues. In the absence of true equality, it remains an open question whether the right of indigenous peoples to give or withhold consent will be adequately protected.

In the face of such concerns, some commentators advocate for flat prohibitions on alienation of indigenous lands and resources without the express permission of the national government. Indeed, several countries in the hemisphere have adopted laws to this effect, though enforcement is inconsistent.³⁹ This approach, however, may perpetuate the paternalism toward indigenous peoples still rife in many countries, and may accomplish little toward redressing the fundamental conditions of inequality that hamper just application of the principle of FPIC. Furthermore, national governments are frequently principal wrongdoers in efforts to wrest lands and resources from indigenous control.⁴⁰

The international arena holds some promise for properly implementing indigenous peoples' right to give or withhold consent to development activities affecting their lands and territories, though questions remain whether international institutions are properly situated to fulfill this promise. Regardless of the mechanism, proper implementation of FPIC will require a solid understanding of indigenous peoples' right to self-determination and cultural integrity, as well as to property and equality. There must be a firm basis in the customary laws and practices of the indigenous people concerned. Indigenous peoples must determine the standards by which to gauge whether consent is sought from a legitimate authority within their communities and whether conditions are such that their consent is in fact free and informed. The Inter-American Commission's rulings in the *Awás Tingni*, *Dann*, and *Belize* cases suggest that inquiries regarding proper implementation of FPIC must therefore be directed at indigenous peoples themselves.



ENDNOTES: Inter-American Human Rights System

¹ See Case of the Mayagna (Sumo) Community of Awas Tingni v. the Republic of Nicaragua, Inter-Am. C.H.R., Series C, No. 79 (31 August 2001); Case 11.140, Inter-Am. C.H.R., Report No. 75/02 (27 December 2002); Case 12.053, Inter-Am. C.H.R., Preliminary Report No. 96/03 (24 October 2003).

² See, e.g., *General Recommendation XXIII(51) concerning Indigenous Peoples*, U.N. Comm. on the Elimination of Racial Discrimination, U.N. Doc. CERD/C/51/Misc. 13/Rev.4, para. 5 (18 August 1997); *Concluding observations of the Human Rights Committee: Canada*, U.N. Doc. CCPR/C/79/Add.105. (7 April 1999); Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries, adopted on 27 June 1989 by the General Conference of the International Labour Organisation at its seventy sixth session, entry into force 5 September 1991; *Case of the Ogoni People v. Nigeria*, African Commission on Human and Peoples Rights, Communication 155/96, the Social and Economic Rights Action Center and the Center for Economic and Social Rights / Nigeria, paras. 5558 (2001).

³ S. James Anaya and Claudio Grossman, *The Case of Awas Tingni v. Nicaragua: A New Step in the International Law of Indigenous Peoples*, 19 ARIZ. J. INT'L & COMP. LAW 3 (2002); S. James Anaya, *The Awas Tingni Petition to the Inter-American Commission on Human Rights: Indigenous Lands, Loggers, and Government Neglect in Nicaragua*, 9 ST. THOMAS L. REV. 157 (1996).

⁴ *Petition by the Mayagna Indian Community of Awas Tingni against Nicaragua*, filed October 2, 1995.

⁵ Statute of Autonomy for the Atlantic Coast Regions of Nicaragua, Law No. 28 (1987).

⁶ *Petition by the Mayagna Indian Community of Awas Tingni against Nicaragua*, filed October 2, 1995.

⁷ *Order of the InterAmerican Court of Human Rights Regarding Provisional Measures Requested by the Representatives of the Victims with Respect to the Republic of Nicaragua* (6 September 2000).

⁸ *Case of the Mayagna (Sumo) Community of Awas Tingni v. the Republic of Nicaragua*, Inter-Am. C.H.R., Series C, No. 79 (31 August 2001).

⁹ *Id.* at para. 164.

¹⁰ *Id.* at para. 149.

¹¹ Treaty between the United States and the Western Bands of Shoshonee Indians, Oct. 1, 1863, 18 STAT. 689.

¹² See Indian Claims Commission Act of 1946, Pub. L. No. 726, Ch. 959 § 2, 60 STAT. 1049, *codified at* 25 U.S.C. §§ 70 - 70v-3 (1976).

¹³ The Claims Commission's provisions for legal representation exacerbated this problem by creating an incentive for unscrupulous lawyers to push for the adjudication of certain claims. The Commission provided contingency payments to be made to lawyers from any money judgment issued by the commission. Even some tribes whose best interests would have been served by avoiding the Claims Commission and retaining rights to thousands of acres of lands were encouraged by their attorneys to seek money judgments under this system. See, e.g., *Pueblo of Santo Domingo v. United States*, 647 F.2d 1087, 1090 (Ct. Cl. 1981) (Nicols, J., dissenting) ("[I]t is the attorney's interest, but not the tribe's...to effect a judicial sale, as it were, of tribal land at values of some historic past date,... whether or not the Indians may in reality ever have had their title extinguished except by the ICC proceeding itself.") Compounding the unfairness of this system was the fact that compensation was calculated as of the historical date of the taking (often more than a hundred years earlier) and no interest was provided.

¹⁴ Complaint, *Western Shoshone Identifiable Group v. United States*, ICC Docket No. 326K.

¹⁵ Once the Secretary of Interior determined that one tribal group was authorized to represent a tribe, that group was given, in nearly all cases, the exclusive right of representation. See 25 U.S.C. § 70h (1976).

¹⁶ *Western Shoshone Identifiable Group v. United States*, 35 Ind. Cl. Comm. 457, 477 (1975); see also *Western Shoshone Legal Defense &*

Education Ass'n v. United States, 531 F.2d 495 (Ct. Cl. 1976), *cert. denied*, 429 U.S. 885 (1976). Rules developed by the ICC allowed any identifiable group to represent an Indian nation and effectively barred other representatives from intervening.

¹⁷ John O'Connell's detailed history of the case notes that there was no evidence in the record regarding actual taking or extinguishment of Western Shoshone lands. John D. O'Connell, *Constructive Conquest in the Courts: A Legal History of the Western Shoshone Lands Struggle, 1861-1991*, 42 NAT. RES. J. 765, n.13, n. 65 (2002).

¹⁸ See *United States v. Dann*, 706 F.2d 919 (9th Cir. 1983).

¹⁹ *Id.*

²⁰ The Te-moak Band was one of many Indian nations whose litigation decisions were ignored by their lawyers and the Claims Commission. In a number of the cases, lawyers refused to accept litigation directives issued by their clients and continued to press Indian Claims Commission cases even after the Indian clients ordered them to stop. See, e.g., *Sioux Nation of Indians v. United States*, 601 F.2d 1157 (Ct. Cl. 1979), *aff'd*, 448 U.S. 371 (1981). Claims lawyers in the Western Shoshone case received \$2.6 million in fees, while the Western Shoshones themselves have received little to no actual benefit from the judgment. John D. O'Connell, *Constructive Conquest in the Courts: A Legal History of the Western Shoshone Lands Struggle, 1861-1991*, 42 NAT. RES. J. 765, n.24 (2002).

²¹ See *Western Shoshone Identifiable Group v. United States*, 40 Ind. Cl. Comm. 305, 309 (1977).

²² This ruling arose from the provision of the Indian Claims Commission Act clarifying that money judgments of the Commission would serve as final judgments against the United States, discharging it from further obligation. See *U.S. v. Dann*, 470 U.S. 39 (1985).

²³ The Western Shoshone still maintain they will not take money for land. In all, the U.S. Treasury Department holds judgment funds for eighteen tribes who refuse to accept the Claims Commission judgments.

²⁴ Case 11.140, Inter-Am. C.H.R. para. 139, Report No. 75/02 (27 December 2002).

²⁵ *Id.* at paras. 124, 125.

²⁶ *Id.* at paras. 125, 128.

²⁷ *Id.* at para. 130.

²⁸ *Id.* at para. 140.

²⁹ *Id.*

³⁰ See Press Release, Government Reviews Report of the Inter-American Commission of [sic] Human Rights, (January 19, 2004); Case 12.053, Inter-Am. C.H.R. Preliminary Report No. 96/03 (24 October 2003) [hereinafter Preliminary Belize Report].

³¹ Preliminary Belize Report.

³² National Lands Act, Statutes of Belize; Law of Property Act, Statutes of Belize, Ch. 190.

³³ *Petition of the Maya Indigenous Communities*, filed August 7, 1998.

³⁴ Preliminary Belize Report, at para. 141. While the Commission may modify the report prior to publishing it in final form, it is likely that the substance of the report will not be altered significantly.

³⁵ *Id.*

³⁶ Preliminary Belize Report, para. 154.

³⁷ *Id.*

³⁸ *Id.* at para. 155.

³⁹ For example, Bolivia, Colombia, Panama, and the United States, among other states of the Americas, have statutory or constitutional provisions limiting the alienability of indigenous lands.

⁴⁰ In all three of the cases discussed above, the national government facilitated the activities that were found to have violated indigenous rights. This occurred in the Western Shoshone case without such Congressional consent, despite federal law requiring the consent of Congress to any alienation of Indian land.