2007-5020

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

WESTERN SHOSHONE NATIONAL COUNCIL
and TIMBISHA SHOSHONE TRIBE,

Plaintiffs-Appellants,

SOUTH FORK BAND, WINNEMUCCA INDIAN COLONY, DANN BAND, BATTLE MOUNTAIN BAND, ELKO BAND and TE-MOAK TRIBE OF WESTERN SHOSHONE INDIANS

Plaintiffs-Appellants,

v.

UNITED STATES,

Defendant-Appellee.

APPEAL FROM THE COURT OF FEDERAL CLAIMS

BRIEF OF SOUTH FORK BAND APPELLANTS AND APPENDIX

Jeffrey M. Herman, Esq.
Stuart S. Mermelstein, Esq.
HERMAN & MERMELSTEIN, P.A.
Attorneys for Plaintiffs-Appellants
South Fork Band, Winnemucca Indian Colony,
Dann Band, Te-Moak Tribe of Western Shoshone
Indians, Battle Mountain Band and Elko Band
18205 Biscayne Blvd., Suite 2218
Miami, Florida 33160
Tel: (305) 931-2200
Fax: (305) 931-0877

FORM 9. Certificate of Interest

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Western Shoshone National Council, et al. v. The United States

No. 2007-5020

CERTIFICATE OF INTEREST

Counsel for the (petitioner) (appellant) (respondent) (appellee) (amicus) (name of party)

Appellant certifies the following (use "None" if applicable; use extra sheets if necessary):

1. The full name of every party or amicus represented by me is:

South Fork Band, Winnemucca Indian Colony, Dann Band, Te-Moak Tribe of Western Shoshone Indians, Battle Mountain Band and Elko Band

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are:

4. ☑ There is no such corporation as listed in paragraph 3.

5. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court are:

Jeffrey M. Herman, Esq. and Stuart Mermelstein, Esq. of Herman & Mermelstein, P.A.

3-2-07
Date

Signature of counsel

STUART MERMELSTEIN
Printed name of counsel

Reset Fields

TABLE OF CONTENTS

I. **BRIEF**

II. APPENDIX

TABLE OF AUTHORITIES

Cases

Statutes

Rules

STATEMENT OF RELATED CASES

Pursuant to Federal Circuit Rule 47.5, the following related case is pending before another appellate court:

Court:	United States Court Of Appeals For The Ninth Circuit
Case File No.:	06-16252 (consolidated with No. 06-16214)
D.C. Case No.:	CV-04-00702-LRH
Title of Case:	*Western Shoshone National Council, Raymond Yowell, Allen Moss, Joe Kennedy, John Wells, Carrie Dann, Johnny Bobb, Benny Riley, Timbisha Shoshone Tribe South Fork Band, Winnemucca Indian Colony, Dann Band, Te-Moak Tribe Of Western Shoshone Indians, Battle Mountain Band, Elko Band, And Timbisha Shoshone Tribe v. United States*

STATEMENT OF JURISDICTION

The U.S. Court of Federal Claims had jurisdiction over this matter because the claims at issue arose under the Tucker Act, 28 U.S.C. § 1491(a)(1). This is a civil action for money damages and ancillary relief brought by Indian tribes, bands and individuals, and arises under the Constitution, treaty with the United States, and federal law. In particular, the causes stated in the Court of Federal Claims touch upon the Treaty of Ruby Valley of 1863 between the United States and the Western Shoshone Nation.

This appeal is made to this Court from a final decision of the U.S. Court of Federal Claims dated September 20, 2006, in accordance with 28 U.S.C. §1295(a)(3). The Notice of Appeal of the South Fork Band, Winnemucca Indian Colony, Dann Band, Te-Moak Tribe of Western Shoshone Indians, Battle Mountain Band and Elko Band,[1] was filed on November 17, 2006, within 60 days after entry of the final order in accordance with Fed.R.App.P. 4(a)(1)(B). The judgment appealed from is a final judgment on a motion to dismiss brought under RCFC 12(b)(1) and 12(b)(6), which disposed of all of the claims in the case.

---

[1] This group of Appellants will be collectively referred to in this Brief as the "South Fork Band". The various tribes and bands which form the Western Shoshone tribe shall be collectively referred to herein as the "Western Shoshone Nation".

ISSUES PRESENTED FOR REVIEW

1. Whether a motion or claim under RCFC 60(b)(4) to have a judgment declared void must be brought within a reasonable time of the judgment, even though such a requirement would effectively convert a void judgment into a valid one.

2. The nature and extent of the interests in land established in the Western Shoshone Nation by the Treaty of Ruby Valley, in particular, whether it can be determined as a matter of law that (i) Article V of the Treaty conveys no recognized or "treaty" title to the Western Shoshone Nation and (ii) the Western Shoshone people held only 24 million acres of land by aboriginal title, which was extinguished by proceedings in the Indian Claims Commission, even though Article V of the Treaty acknowledges boundaries of land that the Western Shoshone people claimed and occupied in excess of 60 million acres.

3. Whether it can be determined as a matter of law that the Western Shoshone Nation is not entitled to continuing royalties under the Treaty of Ruby Valley for mining activities and other exploitation of the Western Shoshone land.

4. Whether the Court of Federal Claims has subject matter jurisdiction over a claim to an accounting ancillary to the monetary relief that the South Fork Band seeks in the Second Amended Complaint; and

5. Whether the Court of Federal Claims has subject matter jurisdiction over the South Fork Band's claim for breach of fiduciary duties arising from the Western Shoshone Nation's rights under the Treaty of Ruby Valley.

STATEMENT OF THE CASE

The homeland of the Western Shoshone Nation since time immemorial has stretched across a large area of the western United States, including portions of Nevada, California, Idaho and Utah. On October 1, 1863, the United States and the Western Shoshone Nation entered into a treaty identified as the Treaty with the Western Shoshone of 1863, 18 Stat. 689, Ratified June 26, 1866, Proclaimed October 21, 1869 (hereafter, the "Treaty of Ruby Valley" or "Treaty"). The claims at issue in this appeal seek principally to vindicate and enforce various rights of the Western Shoshone Nation provided under the Treaty of Ruby Valley.

This action was originally filed in the U.S. District Court for the District of Columbia on September 29, 2003. The Complaint included among other claims, quiet title claims under 28 U.S.C. §2409a. The United States filed a Motion to Transfer or in the Alternative Dismiss, seeking to change venue for the quiet title claims to the District of Nevada, and to transfer the remaining claims to the U.S. Court of Federal Claims. The D.C. District Court issued a Memorandum Opinion and Order granting the Government's Motion in its entirety. Western Shoshone National Council v. United States, 357 F.Supp. 2d 172 (D.D.C. 2004). As a result, various

claims were transferred to the Court of Federal Claims, while the quiet title claims were transferred to the U.S. District Court for the District of Nevada.

After the Court of Federal Claims received the transfer, a Second Amended Complaint was filed. (A 19). The Second Amended Complaint alleges the following claims:

Count I seeks declaratory relief that the judgment of the Indian Claims Commission is void under RCFC 60(b)(4) for lack of due process, or is otherwise unenforceable against the Plaintiffs in this action. (A 27-28, ¶¶ 49-55).

Count II is stated in the alternative to Count I. It seeks a declaration that, if the Indian Claims Commission judgment is valid and extinguished the Western Shoshone people's treaty title then the Western Shoshone people are entitled to pre-judgment interest on the Commission's takings award. (A 27-29, ¶¶ 57-63).

Count III seeks reasonable royalties on minerals mined and extracted from the Western Shoshone land pursuant to the Treaty of Ruby Valley. (A 29-30, ¶¶ 65-68).

Count IV seeks an accounting of the proceeds from the United States' use of the Western Shoshone land, ancillary to the claims for royalties and breach of fiduciary duties. (A 30-31, ¶¶ 70-77).

Finally, Count V seeks damages against the Government for breach of fiduciary duties arising from its mismanagement of the Western Shoshone land and failure to act in accordance with the rights and duties created under the Treaty of Ruby Valley. (A 31, ¶¶ 79-81).

The United States filed a Motion to Dismiss the Second Amended Complaint on September 29, 2005. After the Motion had been briefed, the Senior Judge Smith of the Court of Federal Claims heard two days of oral argument, and thereafter issued an Opinion dated September 20, 2006, granting the United States' Motion to Dismiss in its entirety. (A 2 *et seq.*). This Opinion was reported as Western Shoshone National Council v. United States, 73 Fed. Cl. 59 (2006).

Specifically, the Court of Federal Claims first held that the discharge provision of the Indian Claims Commission Act, Section 22(a), 25 U.S.C. §70u (1976), did not bar a claim under RCFC 60(b)(4) to void a judgment. (A 5). However, the Court nonetheless dismissed Count I of the Second Amended Complaint on the grounds that a claim under RCFC 60(b)(4) must be brought within a reasonable time, and as a matter of law the claim in Count I was untimely. (A 5-6). The Court further held as to Count I that even if the claim were timely, there would be no "grave miscarriage of

justice" if relief were not granted, and as a result, the Plaintiff had failed to state a claim under RCFC 12(b)(6). (A 7-8).

The Court of Federal Claims in its Opinion then rejected the claim in Count II of the Second Amended Complaint, which seeks interest for the taking of fee title land, holding that all of the Western Shoshone Nation's claims to aboriginal title had been extinguished in Indian Claims Commission proceedings, and as a matter of law, the Treaty of Ruby Valley did not confer recognized or fee title to the land described therein. (A 8-10). The Court further dismissed the claims in Count III for royalties under the Treaty of Ruby Valley on the basis of its findings that (i) the claim accrued before 1946 and was thus within the exclusive jurisdiction of the Indian Claims Commission; and (ii) the claim was discharged by Section 22(a) of the Indian Claims Commission Act, rejecting the South Fork Band's contention that this statutory provision was withdrawn by Congress and had no force or effect at the time it was purportedly triggered in this case. (A 10-12).

The Court of Federal Claims in its Opinion then dismissed Count IV for an accounting ancillary to the claims for monetary relief, on the grounds that (i) as an independent claim, the Court did not have subject matter jurisdiction; and (ii) as an ancillary claim, the Court's dismissal of the claims

in Counts III and V for monetary relief rendered this claim without basis. (A 12-13). Finally, the Court dismissed the claim in Count V for breach of fiduciary duties on the basis of lack of subject matter jurisdiction, finding that the claim was untimely under the limitations period of 28 U.S.C. §2501.

A final judgment in favor of the United States was entered. (A. 1). Notices of Appeal were separately filed by the Western Shoshone National Council[2] and the South Fork Band in a timely manner, on November 15, 2006 and November 17, 2006, respectively.

[2] The Western Shoshone National Council is joined by the Timbisha Shoshone Tribe and various individual Appellants in appeal of the judgment.

STATEMENT OF FACTS

Because this is an appeal from the granting of a motion to dismiss, the pertinent facts are contained in the Second Amended Complaint. This pleading initially sets forth the background of the Western Shoshone people and their claim to a land tract of over 60 million acres encompassing parts of Nevada, California, Idaho and Utah. (A 20-21, ¶¶ 10-16).

On October 1, 1863 the United States and the Western Shoshone Nation entered into the Treaty of Ruby Valley. Article 5 of the Treaty states as follows:

> It is understood that the boundaries of the country claimed and occupied by said bands are defined and described by them as follows:
>
> On the north by Wong-goga-da Mountains and Shoshone River Valley; on the west by Su-non-to-yah Mountains or Smith creek Mountains; on the south by Wi-co-bah and the Colorado Desert; on the east by Po-ho-no-be Valley or Steptoe Valley and Great Salt Lake Valley.

(A 21, 32 *et seq.*, Treaty of Ruby Valley).[3]

In exchange for this recognition of land boundaries under the Treaty of Ruby Valley, the Western Shoshone Nation granted the United States certain privileges for use of and access to the land. Article 2 of the Treaty of

[3] See A 35 for a map of the boundaries of land set forth in Article 5.

Ruby Valley provides that "[t]he several routes of travel through the Shoshone country, now or hereafter used by white men, shall be forever free, and unobstructed by the said bands, for the use of the government of the United States, and of all the emigrants and travellers under its authority and protection. . ." (A 32). Article 2 further authorizes the United States to establish military posts and station houses on the tribe's land. (Id.). Article 3 of the Treaty allows the continuation of "telegraph and overland stage lines", and also allows for the construction of a railway and its branches through the land. (A 32-33). Article 4 of the Treaty provides that the Western Shoshone land may be "prospected for gold and silver, or other minerals; and when mines are discovered, they may be worked, and mining and agricultural settlements formed, and ranches established whenever they may be required." (A 33).

Article 7 of the Treaty of Ruby Valley provides that the United States shall provide fair compensation to the Western Shoshone Nation for use of the land. (A 33-34). For the first twenty years, the amount of compensation is established at $5,000 per year. Since the Treaty of Ruby Valley was signed, many gold mines have been discovered and exploited. In the late 19th century and throughout the 20th century, mining and agricultural settlements were formed and ranches were established on the Western

Shoshone Fee Title Land. (A 22-23, Second Amended Complaint ¶¶ 23-25, 27-28).

In 1951, a Petition was filed against the United States of America by the Te-Moak Bands of Western Shoshone Indians before the Indian Claims Commission (the "ICC"). (A 23). The Te-Moak Bands alleged in the Petition that they represented the Western Bands of the Shoshone Nation. The ICC petition was assigned docket No. 326 (hereinafter the "ICC Claim"). The ICC Claim was filed by the law firm of Wilkinson, Cragun & Barker (the "Barker Law Firm"). (A 23-24).

During the course of the litigation before the ICC, the Te-Moak Tribe realized that the Barker Law Firm was not following instructions nor was the firm acting in the Western Shoshone's interests. Specifically, counsel refused to assert the position that the Western Shoshone land base was not taken by the United States. (A 24). Ultimately, the Te-Moak Band fired the Barker Law Firm and filed a notice of discharge of counsel with the ICC. (Id.) The Bureau of Indian Affairs ("BIA") on behalf of the United States refused to accept this discharge of counsel and renewed the legal contract of the Barker Law Firm on behalf of the Te-Moak Bands. (Id.). Despite the discharge of counsel, the ICC, the Barker Law Firm and the United States moved forward, with the Barker Law Firm purportedly representing the

interests of the Petitioners before the ICC. (Id.). They created a fiction known as the "Western Shoshone Identifiable Group" which became the de facto petitioner in the ICC proceeding replacing the Te-Moak Bands after they attempted to terminate the Barker Law Firm. (Id.). The Second Amended Compliant alleges that the Barker Law Firm had no representative, decision-making client among the Western Shoshone Nation and acted adversely to the interests of the Western Shoshone Nation. (A 24, ¶¶ 33-35).

On October 16, 1962 the ICC issued Findings of Fact, determining that the Western Shoshone Identifiable Group held certain land under aboriginal title and that the United States had extinguished the Western Shoshone's aboriginal title without compensation as follows:

> The Commission further finds... the Western Shoshone identifiable group exclusively used and occupied their respective territories as described in Finding ... 23 (except the Western Shoshone lands in the present State of California) until by gradual encroachment by whites, settlers and others, and the acquisition, disposition or taking of their lands by the United States for its own use and benefit, or the use and benefit of its citizens, the way of life of these Indians was disrupted and they were deprived of their lands. 11 Ind.Cl.Comm. 387, 416.

Shoshone Tribe v. United States, 11 Ind. Cl. Comm. 387, 416 (1962) (quoted at A 25). Paragraph 23 of the Findings of Fact contained a

description of territory which encompassed approximately 24 million acres of land.

The ICC issued an Opinion holding as follows:

> The Commission also concludes that the... Western Shoshone identifiable group w[as] [a] land-using entit[y] which respectively held Indian title to the lands described in Findings of Fact Nos. 21, 22 and 23, and that said Indian title was acquired by the United States from th[is]... aforementioned land-using entit[y] without the payment of compensation therefor and said land-using entit[y is] entitled to recovery under Section 2, Clause (4) of the Indian Claims Commission Act... The Indian title of the Western Shoshone group in their lands located in California was extinguished by the United States on March 3, 1853, Mohave Tribe v. United States, 7 Ind. Cl. Comm. 219. The case will now proceed to a determination of the dates of ... extinguishment of the Indian title of the lands of the Western Shoshone group which were not within the boundaries of the present State of California.

Id. at 445 (quoted at A 25). The Commission did not make any findings relating to recognized or "treaty" title in its Findings of Fact or Opinion. Nor did it make any findings regarding the land not described and encompassed within the approximate 24 million acres delineated in Paragraph 23 of its Findings of Fact. (A 25-26).

On February 11, 1966, the ICC approved a joint stipulation setting the date for valuation of the land described in its 1962 Opinion as July 1, 1872.

(A 26, ¶ 41). On October 11, 1972, the ICC issued an Opinion holding that the fair market value of the land held by aboriginal title (described in paragraph 23 of the Findings of Fact) on the date of taking was $21,550,000 and the value of minerals removed from the land prior to the taking was $4,604,600 for a total of $26,154,600. (A 26, ¶ 42).

SUMMARY OF ARGUMENT

The Court of Federal Claims in error dismissed all of the South Fork Band's claims before it as a matter of law. In so doing, the Court either misconstrued the applicable law or failed to recognize the presence of issues of fact which preclude a disposition at the pleadings stage.

The Court below first dismissed the South Fork Band's claim in count I for a declaration under RCFC 60(b)(4) that the ICC Judgment is void on the basis that it was not brought within a "reasonable time". Courts in other Circuits have held under the identical provision in Fed.R.Civ.P. 60(b)(4) that there is no such timeliness requirement. There are cogent reasons for not imposing any form of time bar under Rule 60(b)(4), especially since a judgment lacking in due process that is void should not become otherwise simply as a result of the passage of time. The Court of Federal Claims also held as a matter of law that the claim under RCFC 60(b)(4) should be dismissed on its merits under RCFC 12(b)(6) because there is no evidence of a "grave miscarriage of justice." This holding is in error and premature.

The Court of Federal Claims also determined as a matter of law that the Western Shoshone Nation had no right or interest in the land described in the Treaty of Ruby Valley either by recognized title or aboriginal title. The issue of whether the Western Shoshone Nation has recognized or "treaty"

title under the Treaty of Ruby Valley presents an issue of fact not amenable to disposition as a matter of law on a motion to dismiss. The Court's further holding that the Western Shoshone people hold no aboriginal title because such title was extinguished in its entirety in the ICC proceedings fails to recognize that (i) the ICC concerned itself with only a 24 million acre tract, not the 60 million acre portion described in the Treaty of Ruby Valley, and (ii) the Treaty must be read, at the very least, to admit and acknowledge aboriginal title through exclusive use and occupancy in the entirety of the described lands.

The Court of Federal Claims also dismissed the South Fork Band's Count III claim to royalties under the Treaty of Ruby Valley, misconstruing this claim as seeking amounts which accrued prior to 1946. The rights of the Western Shoshone Nation to continuing royalties raises issues of fact under the Treaty of Ruby Valley not subject to resolution as a matter of law. Additionally, the discharge bar of ICCA §22(a), 25 U.S.C. §70u (1976), does not apply to this claim because Congress withdrew and deleted this provision from the law as of the date of termination of the ICC; the subsequent proceedings involving the Western Shoshone and the "payment" under the ICC Judgment were made through U.S. Court of Claim procedures and legal principles, which do not include a discharge bar.

The Court of Federal Claims dismissed the South Fork Band's claim to an accounting ancillary to the monetary relief sought in the Second Amended Complaint on the grounds that it lacked subject matter jurisdiction. This claim - which was transferred to the Court of Federal Claims by the D.C. District Court on the basis that subject matter jurisdiction properly lies in the Court of Federal Claims - was properly before the Court below as part and parcel of its jurisdiction to award money damages.

Finally, the Court of Federal Claims dismissed the South Fork Band's claim in Count V for breach of fiduciary duties on the basis of lack of subject matter jurisdiction under the limitations provision of 28 U.S.C. § 2501. In so holding, the Court determined in error as a matter of law that the United States repudiated its fiduciary duties outside the limitations period. This prematurely determined issues of fact which are not properly resolved at the pleadings stage.

Accordingly, for the reasons set forth herein, the South Fork Band respectfully requests that the Court of Federal Claims' judgment dismissing all of the claims before it be reversed and the case remanded for rulings on these claims on their merits.

ARGUMENT

I. The Standard of Review is *De Novo*

The Court of Federal Claims issued its judgment dismissing all claims on the basis of either lack of subject matter jurisdiction, RCFC 12(b)(1), or failure to state a claim, RCFC 12(b)(6). "This court reviews *de novo* whether the Court of Federal Claims possessed jurisdiction and whether the Court of Federal Claims properly dismissed for failure to state a claim upon which relief can be granted, as both are questions of law." Wheeler v. United States, 11 F.3d 156, 158 (Fed.Cir. 1993); See also Adams v. United States, 391 F.3d 1212, 1218 (Fed. Cir. 2004) ("[w]hether the Court of Federal Claims properly dismissed Appellant's Complaint for failure to state a claim upon which relief can be granted is a question of law which we review *de novo*). The standard of review in this appeal is accordingly *de novo*.

II. Plaintiffs' Count I States a Claim Pursuant to Rule 60(b)(4)

Pursuant to RCFC 60(b)(4), a party is entitled to relief from a judgment where the judgment is void. A judgment is void where the issuing court acted in a manner inconsistent with due process of law. Bridgham by Libby v. Secretary of Dep't of Health and Human Services, 33 Fed. Cl. 101, 107 (1995). Count I of the Second Amended Complaint seeks a declaration

that the ICC Judgment is void under RCFC 60(b)(4). In this regard, Plaintiffs allege that they were "denied adequate procedural protections in the manner in which the ICC judgment was rendered." (A 27-28, ¶ 50). The pleading specifically alleges that counsel for the Western Shoshone Nation, the Barker Law Firm, was not acting pursuant to the Te-Moak Band's instructions[4] in the course of the ICC proceedings by continuing to pursue a claim that the Western Shoshone's land was taken by the United States and aboriginal title to the land at issue extinguished. (A 24, ¶ 33). The Te-Moak Band actually terminated the Barker Law Firm and filed a notice of discharge of counsel with the ICC, yet the BIA refused to accept this discharge and renewed the contract of the Barker Law Firm to "represent" the Western Shoshone Nation. (Id.) The United States, therefore, under a classic conflict of interest, forced on the Western Shoshone Nation counsel who continued to advocate against their express wishes and interests. (Id., ¶¶ 33-35).

For all material purposes, RCFC 60(b)(4) is identical to Fed.R.Civ.P. 60(b)(4). See Patton v. Secretary of the DHHS, 25 F.3d 1021, 1024 n. 4 (Fed. Cir. 1994). Therefore, the jurisprudence of the federal rules should be

[4] The Petitioner in the ICC Proceedings, docket no. 326, is identified as the "Te-moak Band of Western Shoshone Indians, Nevada, suing on behalf of the Western Bands of the Shoshone Nation of Indians." Shoshone Tribe of Indians v. United States, 11 Ind. Cl. Comm. 387, 418 (1962).

relied upon as persuasive authority in applying RCFC 60(b)(4). Widdoss v. Secretary of Dep't of Health and Human Services, 989 F.2d 1170, 1177-78 & n. 7 (Fed. Cir.) cert. denied, 510 U.S. 944, 114 S.Ct. 381 (1993) (in appeal from U.S. Claims Court, applying "settled law in our sister circuits" under Fed.R.Civ.P. 60(b)).

It is well-settled under federal law that claims brought pursuant to Rule 60(b)(4) constitute such exceptional circumstances as to relieve litigants from the normal standards of timeliness associated with other Rule 60(b) motions. See e.g., Carter v. Fenner, 136 F.3d 1000, 1006 (5th Cir. 1998); New York Life Insurance Company v. Brown, 84 F.3d 137, 142-43 (5th Cir. 1996); Orner v. Shalala, 30 F.3d 1307, 1310 (10th Cir. 1994); Katter v. Arkansas Louisiana Gas Co., 765 F.2d 730, 734 (8th Cir. 1985); Austin v. Smith, 312 F.2d 337, 343 (D.C. Cir. 1962); Von Dardel v. Union of Soviet Socialist Republics, 736 F.Supp. 1, 4 n. 8 (D.D.C. 1990). As the Court explains in Ruddies v. Auburn Spark Plug Co., 261 F.Supp. 648 (S.D.N.Y. 1996), "a void judgment can acquire no validity because of laches on the part of one who applies for relief from it." Indeed, a demand that RCFC 60(b)(4) claims must be made "within a reasonable time" is illogical; the mere passage of time cannot convert an absolutely void judgment into a valid one.

The Court of Federal Claims in this case nonetheless held that a claim under RCFC 60(b)(4) must be brought "within a reasonable time", and that the South Fork Band's pleading failed to show that the 24 year delay after the ICC Judgment was reasonable. (A 5-6). In imposing this reasonableness requirement, the Court of Federal Claims cited to Pueblo of Santo Domingo v. United States, 647 F.2d 1087 (Ct. Cl. 1981). In that case, a tribe sought to avoid a stipulation made in an ICC proceeding because the tribe's attorney acted contrary to the tribe's instructions and its interests. Although the Court of Claims denied the relief sought by the tribe, the South Fork Band respectfully requests that the Court consider the impassioned and persuasive dissent of Judge Nichols in Pueblo of Santo Domingo. Id. at 1089. Judge Nichols took issue with the Court making its ruling as a matter of law, without a hearing on the merits. Id. He noted that the tribe's charges of attorney misconduct, conflict of interest, and failure to follow instructions should be taken seriously, particularly because they are made by Native American litigants:

> The Indians charge serious misconduct and conflict of interests on the part of their former counsel. Misconduct on the part of its trial bar is always a proper concern of a court and this is doubly true in the case of Indian litigants who are supposed to lack the capability to protect or perhaps even perceive their own interests vis-à-vis

> their counsel, and to monitor him where a conflict exists.

Id. at 1090. He further explained the serious nature and extent of the problem of conflict of interest where an attorney supposedly representing a tribe acts without regard to the extinguishment of title to the tribe's lands:

> Unfortunately the machinery of the Indian Claims Commission Act is such as to generate conflicts of interest. One of many such situations is the one asserted here, i.e., the attorney's interest, but not the tribe's is to effect a judicial sale, as it were, of tribal land at values of some historic past date, not of the present, to be set by the Commission, whether or not the Indians may in reality ever have had their title extinguished except by the ICC proceeding itself.
>
> * * *
>
> One conflict long tacitly ignored in ICC cases is that the counsel's interest on the usual contingent fee basis turns only on the amount of award to be extracted from defendant; yet the tribe's interest is not only in the amount of the award, but also in minimizing what land title or claim thereto it has to give up, which may be substantial.

Id. at 1090-1091.

Consistent with Judge Nichol's dissenting opinion in Pueblo of Santo Domingo, the South Fork Band should be afforded an opportunity to have its claim under RCFC 60(b)(4) heard and decided on the merits. The South Fork Band is in a unique position vis-à-vis other tribes which had judgments in the ICC extinguishing title because the ICC Judgment, which reflects the

misconduct of the Barker Law Firm and the concomitant conflict of interest, was rendered without regard for the Western Shoshone's rights to land set forth in the Treaty of Ruby Valley. RCFC 60(b)(4) provides a mechanism for vindicating those rights under the unique circumstances of this case.

The Court of Federal Claims also held that the South Fork Band failed to state a claim for relief under RCFC 60(b)(4) because it did not present evidence to the Court's satisfaction:

> Plaintiffs *have failed to present any evidence* that would show a grave miscarriage of justice that has not already been considered by various federal courts. Therefore, even if Count I could be considered timely, *Plaintiffs have failed to state a claim* for which relief may be granted and the Court is compelled to dismiss it under RCFC 12(b)(6).

(A 7-8). Of course, these statements are inconsistent and irreconcilable with the standard on a motion to dismiss for failure to state a claim under RCFC 12(b)(6).[5] It simply cannot be held as a matter of law, particularly given the facts alleged that there was no "grave miscarriage of justice." To the contrary, the Western Shoshone Nation's substantial rights in an enormous

[5] Under RCFC 12(b)(6), the Court must accept all material facts alleged as true; draw all reasonable inferences in favor of the non-moving party; and dismiss only if the facts alleged do not entitle the plaintiff to a legal remedy. Roth v. United States, 73 Fed.Cl. 144, 147 (2006). At the very least, if the allegations are deemed insufficient the plaintiff should be granted leave to amend.

land base were extinguished for well below fair value (based on 1872 dollars), where in fact there had been no prior expulsion of the Western Shoshone people from the land either de jure or de facto. (A 20-21, ¶¶ 12, 16); See also Pueblo of Santo Domingo, 647 F.2d at 1091 (noting readiness of ICC to find extinguishment of Indian title despite the "general lip service" that such extinguishment in the absence of Congressional act "cannot be lightly implied").

It is also significant that no tribunal, including the ICC, has ever expressly determined that all title to the Western Shoshone land has been extinguished. In this regard, there has never been any finding of fact that the Western Shoshone people were expelled form the land or that the "white man" otherwise encroached on the land. There is no evidence that any other entity or group has ever used or occupied this land to the exclusion of the Western Shoshone people. This was true in 1946 and is the case today. The substantial portion of the land continues to be under the use and control of the Western Shoshone people. (A 20-21).

For the foregoing reasons, the Court of Federal Claims' dismissal of the South Fork Band's cause of action under RCFC 60(b)(4) is in error and should be reversed.

III. The Treaty of Ruby Valley Established Rights in the Western Shoshone Nation to the Described Land

Article 5 of the Treaty of Ruby Valley specifically describes over 60 million acres of land "claimed and occupied" by the Western Shoshone Nation. In exchange for the recognition of this land base by the United States, the Western Shoshone Nation gave the United States the right to mine and otherwise exploit the Western Shoshone's land. (A 33, Art. 4). The issues raised under Article 4 and 5 of the Treaty are the nature and extent of the rights of the Western Shoshone Nation in the described land.[6] The interests of Indian tribes and bands in land has historically taken two forms: "aboriginal" title and "treaty" title. The Court of Federal Claims held that the Western Shoshone Nation had neither of these forms of title as to the described land. In so holding, the Court rendered Articles 4 and 5 of the Treaty of Ruby Valley meaningless, in violation of the most basic tenets of contract and treaty interpretation.

It is initially important to distinguish "aboriginal" title from "treaty" title (also denominated as "recognized" title). Although they both reference claims to land and are both identified as "title", only "treaty" title connotes a

[6] The Court made this ruling in addressing Count II of the Second Amended Complaint, which seeks interest on the award contained in the ICC Judgment on the basis that the ICC Judgment if valid effects a taking of the Western Shoshone Nation's recognized title to the land described in the Treaty of Ruby Valley. (A 8-10).

traditional and common understanding of ownership. See Miami Tribe of Oklahoma v. United States, 146 Ct. Cl. 421, 175 F. Supp. 926 (1959). Aboriginal title, in contrast, is *not* a property right, but instead a possessory interest:

> [Indian title or aboriginal title] means mere possession not specifically recognized as ownership by Congress. After conquest they were permitted to occupy portions of territory over which they had previously exercised 'sovereignty,' as we use that term. This is not a property right but amounts to a right of occupancy which the sovereign grants and protects against intrusion by third parties but which right of occupancy may be terminated and such lands fully disposed of by the sovereign itself without any legally enforceable obligation to compensate the Indians.

Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 279, 75 S. Ct. 313, 317 (1955).

The issue of treaty title is a matter of treaty interpretation. There are certain well established tenets of treaty construction. "Courts have uniformly held that treaties must be liberally construed in favor of establishing Indian rights." United States v. State of Washington, 135 F.3d 618, 630 (9th Cir. 1998). "Any ambiguities in construction must be resolved in favor of the Indians. These rules of construction are rooted in the unique trust relationship between the United States and the Indians." Id. (internal quotations and citations omitted). Indeed, the first rule of treaty

interpretation requires the Court to construe the treaty as the Indians understood it:

> The first rule is that Indian treaties must be construed as the Indians understood them. This rule of construction was developed because the Indians did not know English, they had to depend on the government interpreters for their understanding of the negotiations and treaties, and they were not familiar with legal terms and phrases. It also reflects the assumption that the United States was bargaining from a stronger position than the Indians: A "treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indian."

Mille Lacs Band of Chippewa Indians v. State of Minnesota, 861 F. Supp. 784, 822 (D. Minn. 1994) (citations omitted). Most importantly for present purposes, "treaties are construed more liberally than private agreements, and to ascertain their meaning we may look beyond written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties." Id. (internal quotations and citations omitted). Accordingly, a claim premised upon treaty interpretation is particularly insusceptible to disposition on a motion to dismiss.

In Miami Tribe of Oklahoma v. United States, 175 F. Supp. 926 (Ct. Cl. 1959), the Court found that there were no "magic" words necessary to demonstrate the existence of "treaty" title:

> Where Congress has by treaty or statute conferred upon the Indian or acknowledged in the Indian the right to permanently occupy and use land, then the Indians have a right or title to that land which has been variously referred to in court decisions as 'treaty title', 'reservation title', 'recognized title', and 'acknowledged title.' As noted by the Commission, *there exists no one particular form for such Congressional recognition or acknowledgement of a tribe's right to occupy permanently land and that right may be established in a variety of ways.*

Id. at 936 (emphasis supplied). The language of Article 5 of the Treaty of Ruby Valley itself refers to an understanding between the parties on the boundaries of the Western Shoshone land, from which recognized title may be reasonably inferred:

> It is understood that the boundaries of the country claimed and occupied by said bands are defined and described by them as follows:
>
> On the north by Wong-goga-da Mountains and Shoshonee River Valley; on the west by Su-non-to-yah. Mountains or Smith Creek Mountains; on the south by Wi-co-bah and the Colorado Desert; on the east by Po-ho-no-be Valey or Steptoe Valley and Great Salt Lake Valley.

(A 32, Art. 5). Moreover, the Treaty obligates the United States to pay a royalty to the Western Shoshone, which is a strong indicia of ownership rights. (Id., Art. 7). The Treaty of Ruby Valley and the boundaries for the Western Shoshone land were specifically recognized by the United States when it ratified the Treaty and made it part of the U.S. Code. (18 Stat. 689, ratified June 26, 1866).

In Crow Tribe of Indians v. United States, 151 Ct. Cl. 281, 284 F.2d 361 (1960), the Court held that the Treaty of Fort Laramie of 1851, 11 Stat. 749, conferred recognized title on the plaintiff tribe where the language setting forth boundaries was comparable, if not weaker, than the language in the Treaty of Ruby Valley. Id. at 363-364. The Court's determination was based, in substantial part, on the tribe's agreement to cease attacks on settlers traversing its territory and to take responsibility for such acts:

> It is true that the language of the Treaty is not the technical language of recognition of title. Nevertheless, we think that the participation of the United States in a treaty wherein the various Indian tribes describe and recognize each others' territories is, under the circumstances surrounding this treaty, and in light of one of the overriding purposes to be served by the treaty, i.e., securing free passage for emigrants across the Indians' lands by making particular tribes responsible for the maintenance of order in their particular areas, a recognition by the United States of the Indians' title to the areas for which they are to be held

> responsible, and which are described as 'their respective territories.'

Id. at 363 (internal quotations and citations omitted). The United States entered into the Treaty of Ruby Valley for the same rationale of securing free passage to the western frontier. The Western Shoshone agreed in the Treaty to cease hostilities "within their country", and assured the protection of the traveling settlers "without molestation or injury from them." (A 32, Arts. 1 and 2). The legislative debate preceding the Treaty of Ruby Valley reflects the serious state of hostilities and the United States' motivation to recognize title in exchange for peace. Senator Dolittle noted that the Shoshones were a "very powerful tribe", and that "in the present situation of affairs there is an absolute necessity that some treaty arrangement should be made with the Shoshones, or otherwise we shall be involved in a war with them.".[7]

The Court of Federal Claims nonetheless held that the Treaty of Ruby Valley did not confer recognized title on the Western Shoshone Nation, in reliance upon Northwestern Bands of Shoshone Indians v. United States, 324 U.S. 335 (1945). The Supreme Court in Northwestern Bands did not rule upon an interpretation of the Treaty of Ruby Valley. Rather, the Court in a 5-4 decision, reviewed a different treaty, the Box Elder Treaty, 13 Stat.

[7] A 37, Congressional Globe, Senate, 37th Cong., 2d Sess., May 13, 1862.

663, and found that the parties to that Treaty did not intend to confer recognized title. Among other distinctions between the Box Elder Treaty and the Treaty of Ruby Valley, the Box Elder Treaty contained an amendment which would seem to foreclose the recognition of title:

> Nothing herein contained shall be construed or taken to admit any other or greater title or interest in the lands embraced within the territories described in said treaty in said tribes or bands of Indians than existed in them upon the acquisition of said territories from Mexico by the laws thereof.

Northwestern Bands of Shoshone Indians v. United States, 95 Ct. Cl. 642 ¶ 17 (1942), aff'd on other grounds, 65 S. Ct. 690 (1945) (quoting amendment added to Box Elder and other treaties, but not to Treaty of Ruby Valley). *The Treaty of Ruby Valley did not contain the determinative language found in the Box Elder Treaty or anything comparable to it.*[8] The Box Elder Treaty stated expressly that recognized title was *not* conveyed in the land boundaries language of the treaty. It may be, and indeed should be, inferred with regard to the Treaty of Ruby Valley that absent this clause the intent was to convey recognized title to the described land. Id. The

[8] The Court of Federal Claims relied upon dicta in the Supreme Court's Northwestern Bands opinion referencing the Government's treaties with other Shoshone Tribes, including the Treaty of Ruby Valley. 342 U.S. at 343. This dicta should not serve as the basis for a dismissal as a matter of law on the issue of recognized title.

presence of issues concerning recognized title which are not amenable to disposition on a motion to dismiss is further demonstrated by the fact that a government official at one time acknowledged that the Treaty of Ruby Valley conferred recognized title.[9]

The foregoing discussion of treaty language and historical facts pertinent to the issue of treaty title is illustrative and not by any means exhaustive. The critical point is that the issue of recognized title under the Treaty of Ruby Valley should not have been disposed of at the pleadings stage on a motion to dismiss.

The Court of Federal Claims also held that the Western Shoshone Nation had no claim to aboriginal title because this claim was extinguished by the ICC Judgment. (A 8-9). Yet the ICC in its Findings of Fact, Opinion, and later rulings concerned itself only with a 24 million acre tract of land. There is no mention of the remaining 36 million acres within the tract described in the Treaty. The Court of Federal Claims found that the ICC had rejected the claim of aboriginal title to the other 36 million acres, relying upon language in Shoshone Tribe v. United States, 11 Ind. Cl. Comm. 387, 414 (1962). The error in the Court of Federal Claims' reasoning and reliance upon the Opinion in Shoshone Tribe becomes

[9] A 36, November, 1975 Memo of William L. Benjamin, Director's Office of Trust Responsibilities for the BIA.

apparent when viewed in historical context. The Treaty of Ruby Valley was made in 1863 and ratified in 1866. The date of the ICC's valuation for the Western Shoshone Nation's extinguished title was 1872, merely seven years later. It is entirely incongruous that the United States could recognize in the Treaty a 60 million acre tract that the Western Shoshone Nation "claimed and occupied", and it then be determined that just a few years later the Western Shoshone people exclusively used and occupied only 24 million of those acres. Rather, the only way to read the Treaty consistently with the ICC proceedings is to find that the omitted 36 million acres was not addressed or adjudicated in the ICC proceeding. Otherwise, the grant of an overbroad scope to both Northwestern Bands and the ICC Judgment would read all meaning out of Articles 4 and 5 of the Treaty of the Ruby Valley. The South Fork Band submits that such a patently unfair result is not compelled, and under basic principles of treaty construction should be avoided.

Moreover, there is no evidence that the Western Shoshone Nation ever claimed that their aboriginal title to the other 36 million acres had ever been extinguished. The filings in the ICC proceedings do not show that this particular land was ever placed at issue. (A 25-26, Second Amended Complaint, ¶¶ 38, 41, 43). To the contrary, the Western Shoshone people

have continued to assert their own use and occupancy of this land. (A 20-21, id. ¶¶ 10, 12, 16).

Accordingly, for all of these reasons, the Court of Federal Claims' rejection of claims to both treaty title and aboriginal title is in error and should be reversed.

IV. The South Fork Band's Claim for Royalties Under the Treaty of Ruby Valley Should Not Have Been Dismissed

The Court of Federal Claims held as a matter of law that the South Fork Band failed to state a claim for royalties under Articles 4 and 7 of the Treaty of Ruby Valley (Count III of the Second Amended Complaint) because (i) the ICC had exclusive jurisdiction of the claim, which accrued prior to 1946; and (ii) the finality provision of the Indian Claims Commission Act ("ICCA") Section 22(a), bars the claim. These holdings improperly assume facts and misconstrue the law, and are thus in error, for the following reasons:

a.

Acrruing After 1946. In holding that the ICC had exclusive jurisdiction of the claim to royalties under the Treaty of Ruby Valley, the Court construes the Treaty as follows: "The Treaty, entered in 1863, expressly obligated the United States to pay the Western Shoshone Nation $5,000 per year for twenty years." (A 11). By negative implication, the Court interpreted the

Treaty not to provide for the payment of any other royalties. This interpretation is not by any means compelled by the language of the Treaty. The Treaty broadly provides in Article 4 for the mining and exploitation of the land:

> It is further agreed by the parties hereto, that the Shoshonee country may be explored and prospected for gold and silver, or other minerals; and when mines are discovered, they may be worked, and mining and agricultural settlements formed, and ranched established whenever they may be required. Mills may be erected and timber taken for their use, and also for building and other purposes in any pat of the county claimed by said bands.

(A 33). The language of Article 7 encompasses use of the land for a 20 year period but does not expressly address reasonable royalties for use of the land after that period. (A 33, 34). At best, the Treaty is ambiguous as to the payment of royalties on proceeds of the land after the expiration of twenty years.

As set forth above in the discussion of treaty title (Argument § III, supra), ambiguities in treaty construction are to be resolved in favor of the Native Americans, and the issue of Treaty construction generally requires a factual inquiry that makes this issue insusceptible to disposition on a motion to dismiss.

Accordingly, the Court of Federal Claims improperly construed the Treaty adversely to the Western Shoshone Nation as a matter of law,[10] and should not have dismissed the claim to royalties in Count III of the Second Amended Complaint.

b. ***Band's***

The Court of Federal Claims held that the discharge provision of Section 22(a) of the ICCA, 25 U.S.C. §70u (1976), bars the South Fork Band's claim to royalties. See Addendum, p. 55 infra. Under the broad language of this provision, the "payment of any claim" serves to discharge "all claims and demands touching on any of the matters involved in the controversy." Id. In applying this provision to claims before it, the Court of

[10] The nature and extent of the mining and exploitation of the land in accordance with Article 4 of the Treaty is unknown, and the amount of royalties are unliquidated. Accordingly, the statute of limitations, which under 28 U.S.C. §2501 is jurisdictional for a claim brought in the Court Federal Claims, would not bar this claim. For purposes of this statute of limitations, "a claim accrues when all events have occurred that fix the alleged liability of the Government and entitle the plaintiff to institute the action." Arakaki v. United States, 62 Fed. Cl. 244, 254 (2004). Accrual does not occur until the plaintiff knew or should have known of the facts which fix the United State's alleged liability. Id. at 256. "As an equitable matter, [the] Court has discretion to toll the statute of limitations where the facts giving rise to a claim were either inherently unknowable or intentionally concealed at the accrual date." Central Pines Land Co. v. United States, 61 Fed. Cl. 527, 533 (2004). Where the statute of limitations presents issues of fact for which the record is insufficient to resolve, the Court may defer or reserve decision on the issue. Arakaki, 62 Fed. Cl. at 254.

Federal Claims rejected the South Fork Band's position that Section 22(a) had no force or effect with respect to a "payment" made after September 30, 1978. The ICC was terminated as of that date, and various provision of the ICCA were withdrawn and deleted by Act of Congress, including Section 22(a). The Court of Federal Claims erred in failing to recognize the meaning and effect of Congress's withdrawal of Section 22(a).

Congress in 1976 legislated the termination of the ICC to be effective on September 30, 1978. Toward this end, Congress expressly provided for the transition of pending claims from the ICC to the U.S. Court of Claims, and in doing so showed no intent to retain the discharge provision of Section 22(a). See Addendum p. 56, infra, PL 94-465, S 2981, Oct. 8, 1976; PL 95-69, HR 4585, July 20, 1977. At that time, Congress amended § 23 of the ICCA as follows:

> Sec. 23. The existence of the Commission shall terminate at the end of fiscal year 1978 on September 30, 1978, or at such earlier time as the Commission shall have made its final report to the Congress on all claims filed with it. . . . *Jurisdiction is hereby conferred upon the Court of Claims to adjudicate all such cases under the provisions of section 2 of the Indian Claims Commission Act:* Provided, that section 2 of said Act shall not apply to any cases filed originally in the Court of Claims under section 1505 of title 28, Untied States Code. Upon dissolution of the commission, all pending cases including those on appeal shall be transferred to the Court of Claims

> for Adjudication on the same basis as those authorized to be transferred by this section.

Id.

While the ICCA's jurisdictional provision, section 2, was retained for the Court of Claims, other provisions of the ICCA were expressly deleted and withdrawn from the law. In this regard, Congress made an express determination that various provisions of the ICCA were moot and had no application once the ICC was terminated and remaining claims were transferred to the U.S. Court of Claims. For example, those provisions relating to Commission proceedings and rules were withdrawn and omitted. E.g., 28 U.S.C. §70c (staff and oath of commission); §70f (time of commission meetings); §70g (record of proceedings); §70h (rules of procedure); §70p (hearings). See Addendum pp. 58-61, infra, Historical and Statutory Notes to Omitted 25 U.S.C. §§ 70-70v-3. Among these terminated provisions was the discharge provision, ICCA §22(a), 25 U.S.C. §70u (1976). It must therefore be inferred that by transferring jurisdiction of the remaining ICC proceedings to the Court of Claims and deleting Section 22(a), among other mooted provisions, Congress intended to subject these proceedings to the same legal rules and doctrines - including those of res judicata and collateral estoppel - applicable in litigation generally in the

Court of Claims.[11] In other words, Congress determined that discharge by payment under Section 22(a) was part and parcel of the ICCA, and was no longer necessary or appropriate once the ICC had been terminated and proceedings were conducted by the U.S. Court of Claims in accordance with its own rules and established principles of law. In this case, the U.S. Court of Claims certified the award for payment on December 6, 1979, well after the September 30, 1978 termination date of the ICC. See United States v.

---

[11] The doctrines of res judicata and collateral estoppel are very much distinct from the discharge bar under ICCA Section 22(a), 25 U.S. §70u (1976). Under these preclusion doctrines, "[t]he burden of establishing preclusion is placed on the party claiming it, and reasonable doubts will be resolved against an asserted preclusion." Does I through III v. District of Columbia, 238 F. Supp. 2d 212, 222 (D.D.C. 2002). None of the causes of action brought by the South Fork Band in the Court of Federal Claims have been fully adjudicated in a prior proceeding. See McSheffrey v. United States, 58 Fed.Cl. 21 (2003). As to collateral estoppel, the United States would have the burden to establish all of the following elements:

> (1) the issues to be concluded are identical to those involved in the prior action; (2) in that action the issues were "raised and actually litigated"; (3) the determination of those issues in the prior action was necessary and essential to the resulting judgment; and (4) the party precluded . . . was fully represented in the prior action.

Kentucky Bridge & Dam, Inc. v. United States, 42 Fed. Cl. 501 (1998) (quoting Mothers Restaurant, Inc. v. Mama's Pizza, Inc., 723 F.2d 1566, 1569-70 (Fed. Cir. 1983)). For present purposes, the essential point is that these preclusion doctrines are insusceptible to disposition on a RCFC 12(b)(6) motion to dismiss. The Court of Federal Claims in its Opinion did not reach the issues of preclusion that were raised by the United States.

Dann, 470 U.S. 39, 105 S. Ct. 1058, 1061 (1985). As a result, the discharge bar of Section 22(a), 25 U.S.C. §70u (1976), has no application in this case.

The Court of Federal Claims also relied on United States v. Dann for the continued application of the discharge of Section 22(a) after the termination of the ICC. (A 12). The Court in Dann addressed the narrow issue of when "payment" occurs under Section 22(a). 470 U.S. at 40-41, 105 S. Ct. 1060. It held that the appropriation of funds into a Treasury account constituted "payment" under Section 22(a). Id. The Court, however, did *not* consider or address the issue of whether Section 22(a) was applicable to a "payment" made after September 30, 1978, the effective date of the termination of the ICC and withdrawal and omission of Section 22(a), among other provisions. The Court of Federal Claims makes a quantum leap in asserting that the mere fact that the Supreme Court decided Dann establishes that ICCA Section 22(a) survived in tact after September 30, 1978. There is simply no analysis or holding in Dann to support this proposition.[12]

[12] The Court of Federal Claims also held that Section 22(a) does not bar a claim under RCFC 60(b)(4) (Count I of the Second Amended Complaint). (A 5).

V. The Court of Federal Claims Erred in Dismissing the Claim for an Accounting Ancillary to Monetary Relief

The Court of Federal Claims held that it did not have subject matter jurisdiction over an independent claim to an accounting. (A 12-13). The South Fork Band, however, did not include a claim for an accounting in its pleading with the intent that it be an "independent" claim; rather, this claim is included pursuant to the Court's holding in Klamath and Modoc Tribes and Yahooskin Band of Snake Indians v. United States, 174 Ct. Cl. 483, (1966). In Klamath, the Court denied a motion to dismiss an accounting claim and determined that it had jurisdiction over this claim:

> Although the allegations of [the accounting claim] are very general in nature and are obscured by placement under a paragraph headed "General Accounting", they are sufficient to withstand defendant's motion to dismiss. *We agree with plaintiffs that the court has the power to require an accounting in aid of its jurisdiction to render a money judgment on that claim.*

Id. at *5 (emphasis supplied). In particular, the Court held that it had jurisdiction to order the defendant to render an accounting once the issue of liability was determined:

> If, after a trial on the issue of liability, it is held that defendant has violated its statutory fiduciary obligations, it will be within the jurisdiction of the court to order the defendant in its capacity as a trustee to render an accounting for the purpose of

> enabling the court to determine the amount which plaintiffs are entitled to recover.

Id. See also Cherokee Nation of Oklahoma v. United States, 21 Cl. Ct. 565, 577 n. 7 (1990) ("the Claims Court does have jurisdiction to grant judgment when a fiduciary relationship exits under the standards of *Mitchell II* and plaintiff has proved a proper claim for breach of trust. Indian tribes have the same rights to sue in the Claims Court as granted to others under the Tucker Act.")

The Court of Federal Claims also held that the transfer of the accounting claim to it from the District Court for the District of Columbia had no bearing on its determination of subject matter jurisdiction. (A 13). The District Court, in response to the United States' motion to transfer the accounting claim, held that the Court of Federal Claims had subject matter jurisdiction and "it is in the interest of justice to transfer the Western Shoshone's accounting claim to the Court of Federal Claims, which will already be evaluating the challenge to the validity of the ICC's earlier ruling and the status of the disputed lands." Western Shoshone National Council v. United States, 357 F.Supp. 2d 172, 176 (D.D.C. 2004). The Court of Federal Claims, in rejecting the District Court's determination of subject

matter jurisdiction, effectively whipsaws the Western Shoshone Nation into a void where no court will accept subject matter jurisdiction.[13]

The Court of Federal Claims therefore in error dismissed the claim for an accounting based on lack of subject matter jurisdiction. This claim is ancillary to the South Fork Band's claims for monetary relief, and is viable in the Court of Federal Claims under the authority of Klamath.

VI. The Court of Federal Claims Erred in Holding as a Matter of Law that the Claim for Breach of Fiduciary Duties Accrued Outside the Limitations Period

The South Fork Band sets forth in Count V of its Second Amended Complaint a claim for breach of fiduciary duties. (A 31). The Court of Federal Claims held that it lacked subject matter jurisdiction over Count V.

[13] The Court of Federal Claims also rejected application of the doctrine of judicial estoppel. Under this doctrine, the Court has discretion to take action against a party playing "fast and loose with the courts." Cuyahoga Metropolitan Housing Authority v. United States, 65 Fed. Cl. 534 (2005); New Hampshire v. Maine, 532 U.S. 742, 750, 121 S. Ct. 1808 (2001). This doctrine applies where a party successfully urges a particular position in a legal proceeding, and then takes a contrary position in a subsequent proceeding where its interests have changed. Cuyahoga, 65 Fed. Cl. at 554 (citations omitted). The factors which "typically inform" this equitable doctrine are as follows: (1) the party's later position is "clearly inconsistent" with its earlier position; (2) the party has succeeded in persuading a court to accept its earlier position; and (3) the party seeking to advance the inconsistent position would derive an unfair advantage or impose an unfair detriment if not estopped. Id. It was error for the Court of Federal Claims to reject this doctrine out of hand as a matter of law, leaving the Western Shoshone Nation without a court to bring its accounting claim.

The timeliness of a claim for a breach of fiduciary duties must be considered in the context of the fiduciary relationship between the United States and the Western Shoshone Nation. The right of Native American tribes and bands to bring claims for damages against the United States arising from the breach of fidcuicary relationship was established in United States v. Mitchell, 463 U.S. 206, 103 S. Ct. 1961 (1983) (Mitchell II). See also United States v. White Mountain Apache Tribe, 537 U.S. 465, 123 S.Ct. 1126 (2003) (holding that a waiver of sovereign immunity may be established where there is a "fair inference" that the existence of a fiduciary relationship mandates a right of recovery in a money damages). "Federal courts have repeatedly recognized the right of Native Americans to seek relief for breaches of fiduciary obligations, including rights for monetary damages under the Tucker Act where prospective remedies would be inadequate. Indeed, this is the clear import of Mitchell II." Cobell v. Norton, 240 F.3d 1081, 1104 (D.C. Cir. 2001).

The Treaty of Ruby Valley broadly authorizes mining and use of resources from the Western Shoshone land, and the United States undertakes to compensate the Western Shoshone for the exploitation of its natural resources. (A 33, Treaty of Ruby Valley, Articles 4, 7). It may be fairly

inferred from these rights and duties a fiduciary relationship giving rise to a claim for money damages.

Under established fiduciary duty principles, the statute of limitations on a claim for damages arising from a breach does not begin to run until the fiduciary relationship is repudiated, or there is some unequivocal act in violation of the duties of the fiduciary (such as embezzlement of trust funds), or when the fiduciary refuses to provide an accounting. Cobell v. Norton, 260 F.Supp. 2d 98, 104-105 (D.D.C. 2003); See also Osage Tribe of Indians of Oklahoma v. United States, 2005 WL 2807671 (Ct. Cl. 2005) (holding that under Appropriations Acts, which apply to any Indian claim "concerning losses to or mismanagement of trust funds", the statute of limitations shall not begin to run until the beneficiary is provided with a "meaningful accounting"). Whether there is a repudiation of fiduciary duties of this nature is a question of fact, not susceptible to disposition on a motion to dismiss. Cobell, 260 F.Supp. 2d at 105 (citing Bogert & Bogert, The Law of Trusts and Trustees § 951, at 638-39 (rev. 2d ed. 1995)). There is nothing alleged in the Second Amended Complaint to indicate that the Government repudiated its fiduciary responsibilities to the Western Shoshone or otherwise committed some unequivocal act disclaiming its fiduciary duties. Accordingly, it should not be presumed that the claim for breach of fiduciary

duties accrued out time. To the contrary, the allegations of the Second Amended Complaint are consistent with an accrual of Plaintiff's claim for breach of fiduciary duties well within the six-year jurisdictional window for accrual of the claim under 28 U.S.C. §2501

CONCLUSION AND STATEMENT OF RELIEF SOUGHT

For the foregoing reasons, the South Fork Band Appellants respectfully request that the judgment of dismissal of the Court of Federal Claims be reversed in its entirety, and this case remanded to the Court of Federal Claims for a determination of the claims on their merits.

Respectfully submitted,

HERMAN & MERMELSTEIN, P.A.
Attorneys for Appellants South Fork Band, Winnemucca Indian Colony, Dann Band, Te-Moak Tribe of Western Shoshone Indians, Battle Mountain Band and Elko Band
18205 Biscayne Blvd., Suite 2218
Miami, Florida 33160
Telephone: (305) 931-2200
Facsimile: (305) 931-0877

By: _____
Jeffrey M. Herman, Esq.
Stuart S. Mermelstein, Esq.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this corrected Brief and Appendix of Appellant South Fork Band et al. (in accordance with Order dated March 12, 2007) has been filed and served this 23 day of March, 2007 as follows:

Two (2) Copies via U.S. Mail:

Mark R. Haag, Esq.
U.S. Department of Justice
P. O. Box 663
Washington, D.C., 20004

Treva Hearne, Esq.
HAGER & HEARNE
910 Parr Boulevard, Suite 8,
Reno, Nevada 89512

The original and twelve (12) copies via Federal Express:

Clerk of Court
United States Court of Appeals for the Federal Circuit
717 Madison Place, NW
Washington, DC 20439

CERTIFICATE OF COMPLIANCE
WITH FRAP 32(a)(7)

The undersigned represents that the Brief of Appellants complies with the type-volume limitation set forth FRAP 32(a)(7). The Brief of Appellant has 9379 words.

ADDENDUM OF STATUTES, RULES AND REGULATIONS

SEC. 2. The Secretary of the Interior is hereby authorized to determine, in such manner as he may deem appropriate, the reasonable value of such use, including therein all damages to adjacent lands not now subject to flowage rights, together with the improvements and crops thereon, and also the damages caused by the flood of May 1943, and, when so determined, the amount of such compensation and damages shall be deposited in the United States Treasury to the credit of the Seneca Indian School at Wyandotte, Oklahoma, pursuant to the provisions of the Act of May 17, 1926 (44 Stat. 560). The unobligated balance of funds under any allotment heretofore made for the acquisition of additional storage space in the Pensacola Reservoir shall be available to the Secretary of the Interior for payment of such compensation and damages, notwithstanding any time limitations heretofore established by the Congress with respect to the availability of such funds.

Determination of value.

25 U. S. C. § 155.

Approved, August 9, 1946.

[CHAPTER 947]

AN ACT

August 10, 1946
[H. R. 341]
[Public Law 715]
60 Stat. 978

Relating to the status of Keetoowah Indians of the Cherokee Nation in Oklahoma, and for other purposes, and authorizing conveyance of the Seger Indian School to the Cheyenne and Arapaho Indians of Oklahoma.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Keetoowah Indians of the Cherokee Nation of Oklahoma shall be recognized as a band of Indians residing in Oklahoma within the meaning of section 3 of the Act of June 26, 1936 (49 Stat. 1967).

Status of Keetoowah Indians.

25 U. S. C. § 503.

SEC. 2. That there is hereby set aside for the use and benefit of the Indians of the Cheyenne and Arapaho Reservation in Oklahoma the remainder of the lands comprising the diminished Seger School Reserve containing approximately five hundred and thirty-seven acres, and the improvements thereon, in section 15, township 10 north, range 14 west, of the Indian meridian, Oklahoma.

Seger School Reserve.
Use, etc., of lands.

Subject to the consent of the business committee of the Cheyenne and Arapaho Tribes thereto, the Secretary of the Interior is authorized to enter into an agreement with the Colony Union Graded School District Numbered 1, Colony, Oklahoma, for the use by the district of all or any portion of the land, and improvements thereon, described in this Act: *Provided*, That any such agreement shall contain the express condition that the land therein described and the improvements thereon shall revert to the use of the Indians of the Cheyenne and Arapaho Tribes when no longer used by the said school district for school purposes.

Agreement.

Condition.

Approved, August 10, 1946.

[CHAPTER 959]

AN ACT

August 13, 1946
[H. R. 4497]
[Public Law 726]
60 Stat. 1049

To create an Indian Claims Commission, to provide for the powers, duties, and functions thereof, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there is hereby created and established an Indian Claims Commission, hereafter referred to as the Commission.

Indian Claims Commission.

JURISDICTION

60 Stat. 1050

SEC. 2. The Commission shall hear and determine the following claims against the United States on behalf of any Indian tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska: (1) claims in law or

Classes of claims.

equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President; (2) all other claims in law or equity, including those sounding in tort, with respect to which the claimant would have been entitled to sue in a court of the United States if the United States was subject to suit; (3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity; (4) claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant; and (5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity. No claim accruing after the date of the approval of this Act shall be considered by the Commission.

All claims hereunder may be heard and determined by the Commission notwithstanding any statute of limitations or laches, but all other defenses shall be available to the United States.

Deductions for payments, etc.

In determining the quantum of relief the Commission shall make appropriate deductions for all payments made by the United States on the claim, and for all other offsets, counterclaims, and demands that would be allowable in a suit brought in the Court of Claims under section 145 of the Judicial Code (36 Stat. 1136; 28 U. S. C. sec. 250), as amended; the Commission may also inquire into and consider all money or property given to or funds expended gratuitously for the benefit of the claimant and if it finds that the nature of the claim and the entire course of dealings and accounts between the United States and the claimant in good conscience warrants such action, may set off all or part of such expenditures against any award made to the claimant, except that it is hereby declared to be the policy of Congress that monies spent for the removal of the claimant from one place to another at the request of the United States, or for agency or other administrative, educational, health or highway purposes, or for expenditures made prior to the date of the law, treaty or Executive Order under which the claim arose, or for expenditures made pursuant to the Act of June 18, 1934 (48 Stat. 984), save expenditures made under section 5 of that Act, or for expenditures under any emergency appropriation or allotment made subsequent to March 4, 1933, and generally applicable throughout the United States for relief in stricken agricultural areas, relief from distress caused by unemployment and conditions resulting therefrom, the prosecution of public work and public projects for the relief of unemployment or to increase employment, and for work relief including the Civil Works Program, shall not be a proper offset against any award.

25 U. S. C. § 461 et seq.
25 U. S. C. § 465.

MEMBERSHIP APPOINTMENT; OATH; SALARY

SEC. 3. a) The Commission shall consist of a Chief Commissioner and two Associate Commissioners, who shall be appointed by the President, by and with the advice and consent of the Senate, and each of whom shall receive a salary of $10,000 per year. At all times at least two members of the Commission shall be members of the bar of the Supreme Court of the United States in good standing: *Provided further*, That not more than two of the members shall be of the same political party. Each of them shall take an oath to support the Constitution of the United States and to discharge faithfully the duties of his office.

11051

until the dissolution of the Commission as hereinafter provided. Vacancies shall be filled in the same manner as the original appointments. Members of the Commission may be removed by the President for cause after notice and opportunity to be heard.

NOT TO ENGAGE IN OTHER VOCATIONS OR REPRESENT TRIBES

(c) No Commissioner shall engage in any other business, vocation, or employment during his term of office nor shall he, during his term of office or for a period of two years thereafter, represent any Indian tribe, band, or group in any matter whatsoever, or have any financial interest in the outcome of any tribal claim. Any person violating the provisions of this subdivision shall be fined not more than $10,000 or imprisoned not more than two years, or both.

QUORUM

(d) Two members shall constitute a quorum, and the agreement of two members shall be necessary to any and all determinations for the transaction of the business of the Commission, and, if there be a quorum, no vacancy shall impair or affect the business of the Commission, or its determinations.

STAFF OF COMMISSION

SEC. 4. The Commission shall appoint a clerk and such other employees as shall be requisite to conduct the business of the Commission. All such employees shall take oath for the faithful discharge of their duties and shall be under the direction of the Comission in the performance thereof.

OFFICES

SEC. 5. The principal office of the Commission shall be in the District of Columbia.

EXPENSES OF COMMISSION

SEC. 6. All necessary expenses of the Commission shall be paid on the presentation of itemized vouchers therefor approved by the Chief Commissioner or other member or officer designated by the Commission.

TIME OF MEETINGS

SEC. 7. The time of the meetings of the Commission shall be prescribed by the Commission.

RECORD

SEC. 8. A full written record shall be kept of all hearings and proceedings of the Commission and shall be open to public inspection.

CONTROL OF PROCEDURE

SEC. 9. The Commission shall have power to establish its own rules of procedure.

PRESENTATION OF CLAIM

SEC. 10. Any claim within the provisions of this Act may be presented to the Commission by any member of an Indian tribe, band, or other identifiable group of Indians as the representative of all its members; but wherever any tribal organization exists, recognized by the Secretary of the Interior as having authority to represent such tribe, band, or group, such organization shall be accorded the exclusive privilege of representing such Indians, unless fraud, collusion, or laches on the part of such organization be shown to the satisfaction of the Commission.

TRANSFER OF SUITS FROM COURT OF CLAIMS

SEC. 11. Any suit pending in the Court of Claims or the Supreme Court of the United States or which shall be filed in the Court of Claims under existing legislation, shall not be transferred to the Commission: *Provided*, That the provisions of section 2 of this Act, with respect to the deduction of payments, offsets, counterclaims and demands, shall supersede the provisions of the particular jurisdictional Act under which any pending or authorized suit in the Court of Claims has been or will be authorized: *Provided further*, That the Court of Claims in any suit pending before it at the time of the approval of this Act shall have exclusive jurisdiction to hear and determine any claim based upon fair and honorable dealings arising out of the subject matter of any such suit.

LIMITATIONS

Presentation of claims.

SEC. 12. The Commission shall receive claims for a period of five years after the date of the approval of this Act and no claim existing before such date but not presented within such period may thereafter be submitted to any court or administrative agency for consideration, nor will such claim thereafter be entertained by the Congress.

NOTICE AND INVESTIGATION

SEC. 13. (a) As soon as practicable the Commission shall send a written explanation of the provisions of this Act to the recognized head of each Indian tribe and band, and to any other identifiable groups of American Indians existing as distinct entities, residing within the territorial limits of the United States and Alaska, and to the superintendents of all Indian agencies, who shall promulgate the same, and shall request that a detailed statement of all claims be sent to the Commission, together with the names of aged or invalid Indians from whom depositions should be taken immediately and a summary of their proposed testimonies.

Investigation Division.

(b) The Commission shall establish an Investigation Division to investigate all claims referred to it by the Commission for the purpose of discovering the facts relating thereto. The Division shall make a complete and thorough search for all evidence affecting each claim, utilizing all documents and records in the possession of the Court of Claims and the several Government departments, and shall submit such evidence to the Commission. The Division shall make available to the Indians concerned and to any interested Federal agency any data in its possession relating to the rights and claims of any Indian.

CALLS UPON DEPARTMENTS FOR INFORMATION

SEC. 14. The Commission shall have the power to call upon any of the departments of the Government for any information it may deem necessary, and shall have the use of all records, hearings, and ⌊1053 ⌋reports made by the committees of each House of Congress, when deemed necessary in the prosecution of its business.

Use of documents, etc., in evidence.

At any hearing held hereunder, any official letter, paper, document, map, or record in the possession of any officer or department, or court of the United States or committee of Congress (or a certified copy thereof), may be used in evidence insofar as relevant and material, including any deposition or other testimony of record in any suit or proceeding in any court of the United States to which an Indian or Indian tribe or group was a party, and the appropriate department of the Government of the United States shall give to the attorneys for all tribes or groups full and free access to such letters, papers, documents, maps, or records as may be useful to said attorneys in the preparation of any claim instituted hereunder, and shall afford facilities for the

examination of the same and, upon written request by said attorneys, shall furnish certified copies thereof.

REPRESENTATION BY ATTORNEYS

SEC. 15. Each such tribe, band, or other identifiable group of Indians may retain to represent its interests in the presentation of claims before the Commission an attorney or attorneys at law, of its own selection, whose practice before the Commission shall be regulated by its adopted procedure. The fees of such attorney or attorneys for all services rendered in prosecuting the claim in question, whether before the Commission or otherwise, shall, unless the amount of such fees is stipulated in the approved contract between the attorney or attorneys and the claimant, be fixed by the Commission at such amount as the Commission, in accordance with standards obtaining for prosecuting similar contingent claims in courts of law, finds to be adequate compensation for services rendered and results obtained, considering the contingent nature of the case, plus all reasonable expenses incurred in the prosecution of the claim; but the amount so fixed by the Commission, exclusive of reimbursements for actual expenses, shall not exceed 10 per centum of the amount recovered in any case. The attorney or attorneys for any such tribe, band, or group as shall have been organized pursuant to section 16 of the Act of June 18, 1934 (48 Stat. 987; 25 U. S. C., sec. 476), shall be selected pursuant to the constitution and bylaws of such tribe, band, or group. The employment of attorneys for all other claimants shall be subject to the provisions of sections 2103 to 2106, inclusive, of the Revised Statutes (25 U. S. C., secs. 81, 82–84). Fees.

The Attorney General or his assistants shall represent the United States in all claims presented to the Commission, and shall have authority, with the approval of the Commission, to compromise any claim presented to the Commission. Any such compromise shall be submitted by the Commission to the Congress as a part of its report as provided in section 21 hereof in the same manner as final determinations of the Commission, and shall be subject to the provisions of section 22 hereof. Authority of Attorney General.

NO MEMBER OF CONGRESS TO PRACTICE BEFORE COMMISSION

SEC. 16. No Senator or Member of or Delegate to Congress shall, during his continuance in office, practice before the Commission.

HEARING

SEC. 17. The Commission shall give reasonable notice to the interested parties and an opportunity for them to be heard and to present evidence before making any final determination upon any claim. Hearings may be held in any part of the United States or in the Territory of Alaska.

TESTIMONY

SEC. 18. Any member of the Commission or any employee of the Commission, designated in writing for the purpose by the Chief Commissioner, may administer oaths and examine witnesses. Any member of the Commission may require by subpena (1) the attendance and testimony of witnesses, and the production of all necessary books, papers, documents, correspondence, and other evidence, from any place in the United States or Alaska at any designated place of hearing; or (2) the taking of depositions before any designated individual competent to administer oaths under the laws of the United States or of any State or Territory. In the case of a deposition, the testimony shall be reduced to writing by the individual taking the deposition or under his direction and shall be subscribed by the deponent. In taking

Fees and mileage.

testimony, opportunity shall be given for cross-examination, under such regulations as the Commission may prescribe. Witnesses subpenaed to testify or whose depositions are taken pursuant to this Act, and the officers or persons taking the same, shall severally be entitled to the same fees and mileage as are paid for like services in the courts of the United States.

FINAL DETERMINATION

SEC. 19. The final determination of the Commission shall be in writing, shall be filed with its clerk, and shall include (1) its findings of the facts upon which its conclusions are based; (2) a statement (a) whether there are any just grounds for relief of the claimant and, if so, the amount thereof; (b) whether there are any allowable offsets, counterclaims, or other deductions, and, if so, the amount thereof; and (3) a statement of its reasons for its findings and conclusions.

REVIEW BY COURT OF CLAIMS

Certification of questions of law.

SEC. 20. (a) In considering any claim the Commission at any time may certify to the Court of Claims any definite and distinct questions of law concerning which instructions are desired for the proper disposition of the claim; and thereupon the Court of Claims may give appropriate instructions on the questions certified and transmit the same to the Commission for its guidance in the further consideration of the claim.

Notice of filing of final determination.

(b) When the final determination of the Commission has been filed with the clerk of said Commission the clerk shall give notice of the filing of such determination to the parties to the proceeding in manner and form as directed by the Commission. At any time within three months from the date of the filing of the determination of the Commission with the clerk either party may appeal from the determination of the Commission to the Court of Claims, which Court shall have exclusive jurisdiction to affirm, modify, or set aside such final determination. On said appeal the Court shall determine whether the findings of fact of the Commission are supported by substantial evidence, in which event they shall be conclusive, and also whether the conclusions of law, including any conclusions respecting "fair and honorable dealings", where applicable, stated by the Commission as a basis for its final determination, are valid and supported by the Commission's findings of fact. In making the foregoing determinations, the Court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error. The Court may at any time remand the cause to the Commission for such further proceedings as it may direct, not inconsistent with the foregoing provisions of this section. The Court shall promulgate such rules of practice as it may find necessary to carry out the foregoing provisions of this section.

Appeal.

Remand of cause to Commission.

Review by Supreme Court of U. S.

(c) Determinations of questions of law by the Court of Claims under this section shall be subject to review by the Supreme Court of the United States in the manner prescribed by section 3 of the Act of February 13, 1925 (43 Stat. 939; 28 U. S. C., sec. 288), as amended.

REPORT OF COMMISSION TO CONGRESS

SEC. 21. In each claim, after the proceedings have been finally concluded, the Commission shall promptly submit its report to Congress.

The report to Congress shall contain (1) the final determination of the Commission; (2) a transcript of the proceedings or judgment upon review, if any, with the instructions of the Court of Claims; and (3) a

EFFECT OF FINAL DETERMINATION OF COMMISSION

SEC. 22. (a) When the report of the Commission determining any claimant to be entitled to recover has been filed with Congress, such report shall have the effect of a final judgment of the Court of Claims, and there is hereby authorized to be appropriated such sums as are necessary to pay the final determination of the Commission. Report. Appropriation authorized.

The payment of any claim, after its determination in accordance with this Act, shall be a full discharge of the United States of all claims and demands touching any of the matters involved in the controversy.

(b) A final determination against a claimant made and reported in accordance with this Act shall forever bar any further claim or demand against the United States arising out of the matter involved in the controversy. Further claim barred.

DISSOLUTION OF THE COMMISSION

SEC. 23. The existence of the Commission shall terminate at the end of ten years after the first meeting of the Commission or at such earlier time after the expiration of the five-year period of limitation set forth in section 12 hereof as the Commission shall have made its final report to Congress on all claims filed with it. Upon its dissolution the records of the Commission shall be delivered to the Archivist of the United States. Records.

FUTURE INDIAN CLAIMS

SEC. 24. The jurisdiction of the Court of Claims is hereby extended to any claim against the United States accruing after the date of the approval of this Act in favor of any Indian tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska whenever such claim is one arising under the Constitution, laws, treaties of the United States, or Executive orders of the President, or is one which otherwise would be cognizable in the Court of Claims if the claimant were not an Indian tribe, band, or group. In any suit brought under the jurisdiction conferred by this section the claimant shall be entitled to recover in the same manner, to the same extent, and subject to the same conditions and limitations, and the United States shall be entitled to the same defenses, both at law and in equity, and to the same offsets, counterclaims, and demands, as in cases brought in the Court of Claims under section 145 of the Judicial Code (36 Stat. 1136; 28 U. S. C., sec. 250), as amended: *Provided, however*, That nothing contained in this section shall be construed as altering the fiduciary or other relations between the United States and the several Indian tribes, bands, or groups. Extension of jurisdiction of Court of Claims.

1056

EFFECT ON EXISTING LAWS

SEC. 25. All provisions of law inconsistent with this Act are hereby repealed to the extent of such inconsistency, except that existing provisions of law authorizing suits in the Court of Claims by particular tribes, bands, or groups of Indians and governing the conduct or determination of such suits shall continue to apply to any case heretofore or hereafter instituted thereunder save as provided by section 11 hereof as to the reduction of payments, offsets, counterclaims, and demands.

SEC. 26. If any provision of this Act, or the application thereof, is held invalid, the remainder of the Act, or other applications of such provisions, shall not be affected. Separability of provisions.

PL 94-465, 1976 S 2981
PL 94-465, OCTOBER 8, 1976, 90 Stat 1990
(Publication page references are not available for this document.)

UNITED STATES PUBLIC LAWS
94th Congress - Second Session
Convening January 19, 1976

DATA SUPPLIED BY THE U.S. DEPARTMENT OF JUSTICE. (SEE SCOPE)
Additions and Deletions are not identified in this document.

PL 94-465 (S 2981)
OCTOBER 8, 1976

An Act to authorize appropriations for the Indian Claims Commission for fiscal year 1977, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there is authorized to be appropriated to carry out the provisions of the Indian Claims Commission Act (25 U.S.C. 70), during fiscal year 1977, not to exceed $1,650,000.

Sec. 2. Section 23 of the Act entitled "An Act to create an Indian Claims Commission, to provide for the powers, duties and functions thereof, and for other purposes", approved August 13, 1946 (60 Stat. 1049, 1055), as amended (86 Stat. 115; 25 U.S.C. 70v), is hereby amended by striking said section and inserting in lieu thereof the following:

"DISSOLUTION OF THE COMMISSION AND DISPOSITION OF PENDING CLAIMS

" Sec. 23. The existence of the Commission shall terminate at the end of fiscal year 1978 on September 30, 1978, or at such earlier time as the Commission shall have made its final report to the Congress on all claims filed with it. Upon its dissolution, the records and files of the Commission in all cases in which a final determination has been entered shall be delivered to the Archivist of the United States. No later than December 31, 1976, the Indian Claims Commission may certify and transfer to the Court of Claims all cases which the Commission determines it cannot completely adjudicate by September 30, 1978. In addition, the Commission may, at any time prior to September 30, 1978, certify and transfer to the Court of Claims any case which it determines cannot be completely adjudicated prior to the dissolution of the Commission. Jurisdiction is hereby conferred upon the Court of Claims to adjudicate all such cases under the provisions of section 2 of the Indian Claims Commission Act: Provided, That section 2 of said Act shall not apply to any cases filed originally in the Court of Claims under section 1505 of title 28, United States Code. Upon dissolution of the Commission, all pending cases including those on appeal shall be transferred to the Court of Claims for adjudication on the same basis as those authorized to be transferred by this section.".

Sec. 3. Section 28 of such Act of August 13, 1946, as amended (25 U.S.C. 70v- 2), is amended by striking said section and inserting in lieu thereof the following:

"STATUS REPORT TO CONGRESS

" Sec. 28. The Commission shall, on the first day of the 95th Congress, submit a report to the Committees on Interior and Insular Affairs of the Senate and House of Representatives on those cases which it has transferred pursuant to section 23 of this Act, // 25 USC 70v. // as amended. In addition, the Commission shall submit a report to said Committees at six month intervals thereafter showing the progress made and the work remaining to be completed by the Commission, as well as the status of each remaining case along with the projected date for

PL 94-465, 1976 S 2981
(Publication page references are not available for this document.)

its completion.".

LEGISLATIVE HISTORY:

HOUSE REPORT No. 94--1150 accompanying H.R. 11909 (Comm. on Interior and Insular Affairs).

SENATE REPORT No. 94--737 (Comm. on INTERIOR and Insular Affairs).

CONGRESSIONAL RECORD, Vol. 122 (1976):

Apr. 9, considered and passed Senate.

Aug. 3, considered and passed House, amended, in lieu of H.R. 11909. Sept. 28, Senate agreed to conference report.

Sept. 29, House agreed to conference report.

Approved October 8, 1976.

PL 94-465, 1976 S 2981

END OF DOCUMENT

25 USCA S 70
25 U.S.C.A. § 70

UNITED STATES CODE ANNOTATED
TITLE 25. INDIANS
CHAPTER 2A--INDIAN CLAIMS COMMISSION
§§ 70 to 70n-2. Omitted

<General Materials (GM) - References, Annotations, or Tables>

HISTORICAL AND STATUTORY NOTES

Codifications

Section 70, Act Aug. 13, 1946, c. 959, § 1, 60 Stat. 1049, which established the Indian Claims Commission, was omitted from the Code in that the Commission terminated on Sept. 30, 1978.

Section 70a, Act Aug. 13, 1946, c. 959. § 2, 60 Stat. 1050; Oct. 27, 1974, Pub.L. 93-494, § 2, 88 Stat. 1499, which related to the jurisdiction of the Commission, claims considered by the Commission, and offsets and counterclaims, was omitted from the Code in that the Commission terminated on Sept. 30, 1978.

Section 70b, Act Aug. 13, 1946, c. 959, § 3, 60 Stat. 1050; Act Apr. 10, 1967, Pub.L. 90-9. §§ 2. 3, 81 Stat. 11, Oct. 12, 1978, Pub.L. 95-453, 92 Stat. 1110, which related to the members of the Commission, was omitted from the Code in that the Commission terminated on Sept. 30, 1978.

Section 70c, Act Aug. 13, 1946, c. 959, § 4, 60 Stat. 1051, which related to the staff and oath of the Commission, was omitted from the Code in that the Commission terminated on Sept. 30, 1978.

Section 70d, Act Aug. 13, 1946, c. 959, § 5, 60 Stat. 1051, which related to the principal office of the Commission, was omitted from the Code in that the Commission terminated on Sept. 30, 1978.

Section 70e, Act Aug. 13, 1946, c. 959. § 6, 60 Stat. 1051, Apr. 10, 1967, Pub.L. 90-9, § 4, 81 Stat. 11; Mar. 30, 1972, Pub.L. 92-265, § 5, 86 Stat. 115, which related to itemized vouchers and authorized appropriations, was omitted from the Code in that the Commission terminated on Sept. 30, 1978.

Section 70f, Act Aug. 13, 1946, c. 959. § 7. 60 Stat. 1051, which related to the time of Commission meetings, was omitted from the Code in that the Commission terminated on Sept. 30, 1978.

Section 70g, Act Aug. 13, 1946, c. 959. § 8. 60 Stat. 1051, which related to the record of proceedings and public inspection of such records, was omitted from the Code in that the Commission terminated on Sept. 30, 1978.

Section 70h, Act. Aug. 13, 1946, c. 959. § 9. 60 Stat. 1051, which related to control of Commission procedure, was omitted from the Code in that the Commission terminated on Sept. 30, 1978.

Section 70i, Act Aug. 13, 1946, c. 959. § 10. 60 Stat. 1052, which related to presentation of claims, was omitted from the Code in that the Commission terminated on Sept. 30, 1978.

Section 70j, Act Aug. 13, 1946, c. 959. § 11, 60 Stat. 1052, which related to the forbidden transfer of suits in Court of Claims under prior Acts and offsets and counterclaims, was omitted from the Code in that the Commission terminated on Sept. 30, 1978.

Section 70k, Act Aug. 13, 1946, c. 959. § 12. 60 Stat. 1052, which related to the limitation of time for presenting claims, was omitted from the Code in that the Commission terminated on Sept. 30, 1978.

Section 70l, Act Aug. 13, 1946, c. 959, § 13, 60 Stat. 1052, which related to notice to tribes, investigation of claims, and availability of data, was omitted from the Code in that the Commission terminated on Sept. 30, 1978.

Section 70m, Act Aug. 13, 1946, c. 959, § 14, 60 Stat. 1052, which related to information from governmental departments and official records as evidence, was omitted from the Code in that the Commission terminated on Sept. 30, 1978.

Section 70n, Act Aug. 13, 1946, c. 959, § 15, 60 Stat. 1053, which related to attorneys of claimants and the representation of the United States by the Attorney General, was omitted from the Code in that the Commission terminated on Sept. 30, 1978.

Section 70n-1, Pub.L. 88-168, § 1, Nov. 4, 1963, 77 Stat. 301; Pub.L. 89-592, Sept. 19, 1966, 80 Stat. 814; Pub.L. 93-37, § 2, May 24, 1973, 87 Stat. 73, which related to expert assistance for preparation and trial of claims and a revolving fund established for loans, was omitted from the Code in that the Commission terminated on Sept. 30, 1978.

Section 70n-2, Pub.L. 88-168, § 2, Nov. 4, 1963, 77 Stat. 301, which related to the inability of applicants to pay for assistance required and the denial of loans in cases of unreasonable fees, was omitted from the Code in that the Commission terminated on Sept. 30, 1978.

Indian Self-Determination Conflict of Interest Requirement Inapplicable to Commissioner Not in Office

Section 1 of Pub.L. 95-453 provided in part that § 450i(f) of this title shall not apply to those members of the Indian Claims Commission affected by the Indian Self-Determination Act.

25 U.S.C.A. § 70, 25 USCA § 70

Current through P.L. 108-80, approved 09-17-03

END OF DOCUMENT

25 USCA S 70v-3
25 U.S.C.A. § 70v-3

UNITED STATES CODE ANNOTATED
TITLE 25. INDIANS
CHAPTER 2A—INDIAN CLAIMS COMMISSION

Current through P.L. 108-59, (excluding P.L. 108-36)
approved 07-14-03

§§ 70n-4 to 70v-3. Omitted

<General Materials (GM) - References, Annotations, or Tables>

HISTORICAL AND STATUTORY NOTES

Section 70n-4, Pub.L. 88-168, § 4, Nov. 4, 1963, 77 Stat. 301, which related to interest, was omitted from the Code in that the Commission terminated on Sept. 30, 1978.

Section 70n-5, Pub.L. 88-168, § 5, Nov. 4, 1963, 77 Stat. 301, which related to crediting to revolving fund of repayments and interest, was omitted from the Code in that the Commission terminated on Sept. 30, 1978.

Section 70n-6, Pub.L. 88-168, § 6, Nov. 4, 1963, 77 Stat. 301, which related to the liability of the United States, was omitted from the Code in that the Commission terminated on Sept. 30, 1978.

Section 70n-7, Pub.L. 88-168, § 7, Nov. 4, 1963, 77 Stat. 301, which prohibited approval of contingent fee contracts, was omitted from the Code in that the Commission terminated on Sept. 30, 1978.

Section 70o, Act Aug. 13, 1946, c. 959, § 16, 60 Stat. 1053, which forbade a member of Congress from practicing before the Commission, was omitted from the Code in that the Commission terminated on Sept. 30, 1978.

Section 70p, Act Aug. 13, 1946, c. 959, § 17, 60 Stat. 1053, which related to hearings, was omitted from the Code in that the Commission terminated on Sept. 30, 1978.

Section 70q, Act Aug. 13, 1946, c. 959, § 18, 60 Stat. 1054; Apr. 10, 1967, Pub.L. 90-9, § 4, 81 Stat. 11, which related to the testimony of witnesses, was omitted from the Code in that the Commission terminated on Sept. 30, 1978.

Section 70r, Act Aug. 13, 1946, c. 959, § 19, 60 Stat. 1054, which related to final determinations of Commission, was omitted from the Code in that the Commission terminated on Sept. 30, 1978.

Section 70s, Act Aug. 13, 1946, c. 959, § 20, 60 Stat. 1054, Sept. 8, 1960, Pub.L. 86-722, 74 Stat. 829, Mar. 13, 1978, Pub.L. 95-243, 92 Stat. 153, which related to judicial review, was omitted from the Code in that the Commission terminated on Sept. 30, 1978.

Section 70t, Act Aug. 13, 1946, c. 959, § 21, 60 Stat. 1055, which related to a report of determination of claim to Congress, was omitted from the Code in that the Commission terminated on Sept. 30, 1978.

Section 70u, Act Aug. 13, 1946, c. 959, § 22, 60 Stat. 1055, which related to the payment of claim after final determination and an adverse determination as a bar to further claims, was omitted from the Code in that the

Commission terminated on Sept. 30, 1978.

Section 70v, Act Aug. 13, 1946, c. 959, § 23, 60 Stat. 1055; Act July 24, 1956, c. 679, 70 Stat. 624; June 16, 1961, Pub.L. 87-48, 75 Stat. 92; Apr. 10, 1967, Pub.L. 90-9, § 1, 81 Stat. 11, Mar. 30, 1972, Pub.L. 92-265, § 1, 86 Stat. 114; Oct. 8, 1976, Pub.L. 94-465, § 2, 90 Stat. 1990, which related to the dissolution of the Commission, was omitted from the Code in that the Commission terminated on Sept. 30, 1978.

Section 70v-1, Act Aug. 13, 1946, c. 959, § 27, as added Apr. 10, 1967, Pub.L. 90-9, § 5, 81 Stat. 11, and amended Mar. 30, 1972, Pub.L. 92-265, §§ 2, 3, 86 Stat. 115, which related to the trial calendar, was omitted from the Code in that the Commission terminated on Sept. 30, 1978.

Section 70v-2, Act Aug. 13, 1946, c. 959, § 28, as added Mar. 30, 1972, Pub.L. 92-265, § 4, 86 Stat. 115, and amended Oct. 8, 1976, Pub.L. 94-465, § 3, 90 Stat. 1990, which related to status reports to Congress, was omitted from the Code in that the Commission terminated on Sept. 30, 1978.

Section 70v-3, Act Aug. 13, 1946, c. 959, § 29, as added July 20, 1977, Pub.L. 95-69, § 2, 91 Stat. 273, and amended Apr. 2, 1982, Pub.L. 97-164, Title I, § 149, 96 Stat. 46, which related to cases transferred to United States Claims Court, was omitted from the Code in that the Commission terminated on Sept. 30, 1978.

25 U.S.C.A. § 70v-3

25 USCA § 70v-3

END OF DOCUMENT

APPENDIX

In the United States Court of Federal Claims

No. 05-558 L

10/20/06
DOCKET

WESTERN SHOSHONE NATIONAL COUNCIL, ET AL.,

JUDGMENT

v.

FILED SEP 20 2006

THE UNITED STATES

Pursuant to the court's Published Opinion, filed September 20, 2006, granting defendant's Motion to Dismiss Plaintiffs' Second Amended Complaint,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that judgment is in favor of defendant and the complaint is dismissed.

Brian Bishop
Clerk of Court

September 20, 2006

By: Lisa L. Reyes

Deputy Clerk

NOTE: As to appeal, 60 days from this date, see RCFC 58.1, re number of copies and listing of all plaintiffs. Filing fee is $455.00.

In the United States Court of Federal Claims

Case No. 05-558L
Filed: September 20, 2006
FOR PUBLICATION

* *

WESTERN SHOSHONE NATIONAL COUNCIL, et al.	*	
Plaintiffs,	*	Motion to Dismiss, RCFC 12(b)(1); RCFC 12(b)(6); RCFC 60(b), 60(b)(4); Indian Claims Commission Act (ICCA); Finality Provisions; 25 U.S.C. § 70u (1976) 25 U.S.C. § 70k (1976); ICCA § 22; Aboriginal Title; Treaty of Ruby Valley; 28 U.S. C. § 2501 (2000)
v.	*	
THE UNITED STATES,	*	
Defendant.	*	

* *

Jeffrey M. Herman, Herman & Mermelstein, P.A., Miami, FL, for Plaintiffs South Fork Band, Winnemuca Indian Colony, Dann Band, Te-Moak Tribe of Western Shoshone Indians, Battle Mountain and Elko Band.

Treva J. Hearne, Hager & Hearne, Reno, NV, for Plaintiffs Western Shoshone National Council and Timbisha Shoshone Tribe, with whom was *Robert R. Hager*, of counsel.

Sara E. Culley, United States Department of Justice, for Defendant, with whom was *Thomas Bartman*, United States Department of the Interior, of counsel.

OPINION

SMITH, Senior Judge:

This is the latest litigation involving a claim to approximately 60 million acres that goes back more than fifty years. This action challenges proceedings before the Indian Claims Commission (ICC) and the Court of Claims. The Court has before it Defendant's Motion to Dismiss Plaintiffs' Second Amended Complaint under Rules of the Court of Federal Claims (RCFC) 12(b)(1) and 12(b)(6). The Court held oral argument in Reno, Nevada on May 25, 2006 and in Washington, DC on June 14, 2006. For the reasons set forth in this opinion, the Court hereby **GRANTS** Defendant's Motion to Dismiss

Plaintiffs' Second Amended Complaint.

FACTS[1]

Since time immemorial, the Shoshone have occupied certain lands in what is now part of the United States. The Shoshone lived in extended family groups, or bands, and gathered together for ceremonial celebrations or food gathering activities. Today, they live in various communities in the same lands. Some of the bands of Shoshone are recognized by Congress under the Indian Reorganization Act, others are not.

During the United States' westward expansion, tensions arose between the United States and the western Indian tribes, including some of the Shoshone. When the Civil War began, the Union required additional resources, many of which were found in the West. The United States, seeking to avoid conflict with the Indians, entered into a series of treaties to ensure undisturbed passage to the resources of the West. These five treaties became known as the Doty Treaties after the Government's negotiator, Mr. James Doty. On October 1, 1863, the United States entered into a treaty with the "Western Shoshoni," which became known as the Treaty of Ruby Valley. 18 Stat. 689, Ratified June 26, 1866, Proclaimed Oct. 21, 1869.

In 1946, Congress sought to provide a means for Indian Tribes to bring historical claims against the United States for the taking of land and other related actions. To achieve that goal, Congress passed the Indian Claims Commission Act (ICCA). The ICCA created the Indian Claims Commission (ICC) and provided that Indian tribes could bring claims before the ICC for taken lands and had jurisdiction to hear cases filed within five years of the passage of the ICCA. The limitation provision made clear that "no claim existing before such date but not presented within such period may thereafter be submitted to any court or administrative agency for consideration." 25 U.S.C. § 70k (1976). Effectively, all claims existing on August 13, 1946 had to be filed by August 13, 1951 or be barred forever. *E.g. Lower Sioux*, 519 F.2d at 1383. This case is brought by Plaintiffs concerning their rights under the Treaty of Ruby Valley of 1863 and issues of validity and enforceability against the Plaintiffs of a judgment rendered in the Indian Claims Commission (ICC).

PROCEDURAL BACKGROUND

This case was originally filed in the United States District Court for the District of Columbia and was transferred to this Court on a Motion by Defendant.[2] After being transferred to this Court, the case was initially assigned to another Judge. Pursuant to this Court's rules, Defendant then filed a

---

[1] The facts are compiled from the Parties' briefs and prior litigation in this and related cases.

[2] One portion of the Complaint, seeking to quiet title, was transferred to the District Court in Nevada. That Court has since denied Plaintiffs' claim.

In the United States Court of Federal Claims

Case No. 05-558L
Filed: September 20, 2006
FOR PUBLICATION

* *

WESTERN SHOSHONE NATIONAL COUNCIL, et al.	*	
Plaintiffs,	*	Motion to Dismiss, RCFC 12(b)(1); RCFC 12(b)(6); RCFC 60(b), 60(b)(4); Indian Claims Commission Act (ICCA); Finality Provisions; 25 U.S.C. § 70u (1976) 25 U.S.C. § 70k (1976); ICCA § 22; Aboriginal Title; Treaty of Ruby Valley; 28 U.S. C. § 2501 (2000)
v.	*	
THE UNITED STATES,	*	
Defendant.	*	

* *

Jeffrey M. Herman, Herman & Mermelstein, P.A., Miami, FL, for Plaintiffs South Fork Band, Winnemuca Indian Colony, Dann Band, Te-Moak Tribe of Western Shoshone Indians, Battle Mountain and Elko Band.

Treva J. Hearne, Hager & Hearne, Reno, NV, for Plaintiffs Western Shoshone National Council and Timbisha Shoshone Tribe, with whom was *Robert R. Hager*, of counsel.

Sara E. Culley, United States Department of Justice, for Defendant, with whom was *Thomas Bartman*, United States Department of the Interior, of counsel.

OPINION

SMITH, Senior Judge:

This is the latest litigation involving a claim to approximately 60 million acres that goes back more than fifty years. This action challenges proceedings before the Indian Claims Commission (ICC) and the Court of Claims. The Court has before it Defendant's Motion to Dismiss Plaintiffs' Second Amended Complaint under Rules of the Court of Federal Claims (RCFC) 12(b)(1) and 12(b)(6). The Court held oral argument in Reno, Nevada on May 25, 2006 and in Washington, DC on June 14, 2006. For the reasons set forth in this opinion, the Court hereby **GRANTS** Defendant's Motion to Dismiss

Plaintiffs' Second Amended Complaint.

FACTS[1]

Since time immemorial, the Shoshone have occupied certain lands in what is now part of the United States. The Shoshone lived in extended family groups, or bands, and gathered together for ceremonial celebrations or food gathering activities. Today, they live in various communities in the same lands. Some of the bands of Shoshone are recognized by Congress under the Indian Reorganization Act, others are not.

During the United States' westward expansion, tensions arose between the United States and the western Indian tribes, including some of the Shoshone. When the Civil War began, the Union required additional resources, many of which were found in the West. The United States, seeking to avoid conflict with the Indians, entered into a series of treaties to ensure undisturbed passage to the resources of the West. These five treaties became known as the Doty Treaties after the Government's negotiator, Mr. James Doty. On October 1, 1863, the United States entered into a treaty with the "Western Shoshoni," which became known as the Treaty of Ruby Valley. 18 Stat. 689, Ratified June 26, 1866, Proclaimed Oct. 21, 1869.

In 1946, Congress sought to provide a means for Indian Tribes to bring historical claims against the United States for the taking of land and other related actions. To achieve that goal, Congress passed the Indian Claims Commission Act (ICCA). The ICCA created the Indian Claims Commission (ICC) and provided that Indian tribes could bring claims before the ICC for taken lands and had jurisdiction to hear cases filed within five years of the passage of the ICCA. The limitation provision made clear that "no claim existing before such date but not presented within such period may thereafter be submitted to any court or administrative agency for consideration." 25 U.S.C. § 70k (1976). Effectively, all claims existing on August 13, 1946 had to be filed by August 13, 1951 or be barred forever. *E.g. Lower Sioux*, 519 F.2d at 1383. This case is brought by Plaintiffs concerning their rights under the Treaty of Ruby Valley of 1863 and issues of validity and enforceability against the Plaintiffs of a judgment rendered in the Indian Claims Commission (ICC).

PROCEDURAL BACKGROUND

This case was originally filed in the United States District Court for the District of Columbia and was transferred to this Court on a Motion by Defendant.[2] After being transferred to this Court, the case was initially assigned to another Judge. Pursuant to this Court's rules, Defendant then filed a

---

[1] The facts are compiled from the Parties' briefs and prior litigation in this and related cases.

[2] One portion of the Complaint, seeking to quiet title, was transferred to the District Court in Nevada. That Court has since denied Plaintiffs' claim.

Notice of Directly Related Cases and the case was reassigned. Thereafter, Defendant filed its Motion to Dismiss Plaintiffs' Second Amended Complaint.[3] Both the South Fork Band and National Council filed opposition to Defendant's Motion, and Defendant replied. The Court then held oral argument over two days and now issues its opinion.

STANDARD OF REVIEW

RCFC 12(b)(1) provides for the dismissal of claims if the Court lacks jurisdiction over the subject matter of the claims. It is well settled that "a party seeking the exercise of jurisdiction in its favor has the burden of establishing that such jurisdiction exists," *Rocovich v. United States*, 933 F.2d 991, 993 (Fed. Cir. 1991) (citing *KVOS, Inc. v. Associated Press*, U.S. 269, 278 (1936)), and that "subject matter jurisdiction is strictly construed." *Leonardo v. United States*, 55 Fed. Cl. 344, 346 (2003).

RCFC 12(b)(6) authorizes a court to dismiss a claim for failure to state a claim upon which relief can be granted. Claims must be dismissed if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his legal claim which would entitle him to relief." *Conley v. Gibson*, 355U.S. 41, 102 (1957).

THE SECOND AMENDED COMPLAINT

I. Count I

In Count I, Plaintiffs seek either a declaratory judgment that the ICC Judgment is not enforceable against them, or that the ICC Judgment is void under RCFC 60(b) because of alleged due process violations. Defendant argues that the Court should dismiss Count I under RCFC 12(b)(1) and 12(b)(6) because they are out of time and they fail to state a claim. The South Fork Band responds that they are entitled to relief under RCFC 60(b)(4) because they were denied due process before the ICC and there is no time limit for RCFC 60(b)(4). The National Council takes a somewhat different approach, although they incorporate all of South Fork Band's arguments. The National Council argues that the "sham" proceeding before the ICC denied them of due process and that they are, therefore, entitled to relief from it and all cases that rely on it, including those handed down by the Supreme Court of the United States. The National Council alleges that they have new evidence that no court has ever examined in the long history of this case. Further, they argue that they are not bringing a motion under

---

[3] After Defendant filed its Motion to Dismiss, Plaintiffs filed a substitution of counsel with regard to two of the named Plaintiffs. Plaintiffs South Fork Band, Winnemuca Indian Colony, Dann Band, Te-Moak Tribe of Western Shoshone Indians, Battle Mountain and Elko Band (collectively "South Fork Band") retained prior counsel. Plaintiffs Western Shoshone National Council and Timbisha Shoshone Tribe (collectively "National Council") retained new counsel. When referring to all of the Plaintiffs together, the Court will refer to "Plaintiffs." If, however, the Court is referring to one of the groups of Plaintiffs, it will refer to either "South Fork Band" or "National Council." When referring to Western Shoshone generally, the Court will refer to "Shoshone" or "Western Shoshone."

RCFC 60(b), but rather an independent action allowed under the rule.

A. Finality Provision of the ICCA

The Supreme Court and the Court of Claims have both made clear that the paramount purpose of the ICCA was to determine meritorious Indian claims with finality. *E.g. United States v. Dann*, 470 U.S. 39, 44-45 (1985) (quoting H.R. Rep. No 1466, 79th Cong., 1st Sess., 10 (1945)).[4] Defendant argues that the finality provision of the ICCA bars the current action. Section 22(a) of the ICCA states that "[t]he payment of any claim, after its determination in accordance with this Act, shall be a full discharge of the United States of all claims and demands touching any of the matters involved in the controversy." 25 U.S.C. § 70u(a) (1976) (omitted after the dissolution of the ICC). The Government argues that, given Congress's intent to draw all historic Indian claims to a close, the Court should apply § 22(a) to this count because it attempts to re-litigate long-settled issues. The Court certainly agrees that Congress has long desired to bring these claims to an end. However, it does not appear that Congress intended the finality provision to bar Rule 60 challenges to the ICC process. The Court of Claims allowed an independent action to proceed eight years after the payment of an ICC judgment. *Andrade v. United States*, 485 F.2d 660, 661 (Ct. Cl. 1973). Therefore, the Court cannot dismiss Count I under § 22(a). That does not, however, end the inquiry.

B. Timeliness of a Motion Under RCFC 60(b)

RCFC 60(b) sets forth the circumstances under which the Court may grant a party relief from a judgment or order that is not the result of clerical error. The text of RCFC 60(b) sets forth two distinct time limitations. As relevant here, a motion for relief based on "newly discovered evidence" must be filed "not more than one year after the judgment, order, or proceeding was entered or taken." RCFC 60(b). Further, with regard to a motion seeking relief from a void judgment under RCFC 60(b)(4), the rule states that it must be filed "within a reasonable time." *Id.* South Fork Band argues that there is no time limit on motions under RCFC 60(b)(4). They base their argument on cases from other circuits that have held that the passage of time cannot make a void judgment valid. The Defendant argues that none of those cases deal with a delay this long and that the reasonable time requirement bars Count I.

While other circuits may reject time limits for Fed. R. Civ. P. 60(b), the Court of Claims made plain that motions challenging ICC procedures filed under Ct. Cl. Rule 152(b) (now RCFC 60(b)) must be filed within a reasonable time. *E.g. Pueblo of Santo Domingo v. United States*, 647 F.2d 1087, 1089 (Ct. Cl. 1981). This determination is binding upon this Court. As the Federal Circuit made clear, "[t]here can be no question that the Court of Federal Claims is required to follow the precedent of the Supreme Court, our court, and our predecessor court, the Court of Claims." *Coltec Indus., Inc. v.*

---

[4] National Council requests this Court set aside the *Dann* decision. National Council Br. at 7. It is clear, as stated above, "[t]here can be no question that the Court of Federal Claims is required to follow the precedent of the Supreme Court, our court, and our predecessor court, the Court of Claims." *Coltec Indus., Inc.*, 454 F.3d at1353; *see also Strickland*, 423 F.3d at 1338 & n.3.

United States, 454 F.3d 1340, 1353 (Fed. Cir. 2006) (citation omitted); *see also Strickland v. United States*, 423 F.3d 1335, 1338 & n.3 (Fed. Cir. 2005). Therefore, to be timely, this motion must be filed within a reasonable time. In this case, the Court of Claims affirmed the ICC judgment in 1979. *Temoak Band of Western Shoshone Indians, Nev. v. United States*, 593 F.2d 994 (Ct. Cl. 1979). Further, it appears that all of the procedural defects alleged by the South Fork Band took place before that date. Assuming that this Court could base its reasonableness determination on the district court complaint filed in September 2003, Plaintiffs would have to show that the 24 year delay was reasonable. They have failed to do so.

C. Timeliness of an Independent Action Under RCFC 60(b)

Conceding the one year limitation imposed on motions introducing newly discovered evidence under RCFC 60(b)(1), the National Council frames its claim as an independent action. The Court of Claims made clear that the timeliness of an independent action contemplated under the rule is governed by the statute of limitations and laches. *Andrade v. United States*, 485 F.2d 660, 664 (Ct. Cl. 1973) (per curiam). As in all cases before this Court, 28 U.S.C. § 2501 imposes a six year statute of limitations. The *Andrade* Court held that the unexplained delay of eight years made the independent action untimely and dismissed that case. In this case Defendant argues that the facts the National Council claim are newly discovered were, in fact, clearly available and known to the Ninth Circuit and Supreme Court in *Dann*.

The National Council's attorneys have been particularly unhelpful in deciding this issue.[5] In the National Council's brief, they assert as "newly discovered" the fact that the ICC's Final Report listed twenty cases as "not report [sic] to Congress as completed." National Council Br. at 16. In support of this contention the National Council did not cite the ICC Final Report itself, but instead cited a book, published in 1990, which merely reproduced a chart from the ICC Final Report. *Id.* at 16 n.32 (citing H.D. Rosenthal, Their Day in Court: A History of the Indian Claims Commission 266-67 (1990)). The National Council never explains how this fact, which is clearly stated in the ICC Final Report published in 1978, and Mr. Rosenthal's book published in 1990, could be newly discovered after 2000. All one had to do was open the report, an official publication of the United States Government, to see the footnote that the National Council raises in its brief. ICC Final Report, p. 125; National Council Br. at 16.

Oral argument only made Plaintiffs' position appear more unreasonable. As noted above, the National Council Brief raised the issue of the footnote to the ICC Final Report. The following exchange took place during oral argument:

> MR. HAGER: It's been less than six years since they found out there was no final report. That's what I'm saying.
>
> THE COURT: But that's not what your materials say. Your

[5] The Court wants to make clear that it in no way directs this criticism toward the counsel for the South Fork Band.

materials say 1990 is your source for finding that there was no report. And that's, by my count, 15 years from the time the case was filed.

MR. HAGER: I didn't say 1990.

THE COURT: No?

MR. HAGER: No. I said within the last two or three years is when Steve Newcombe from the Indigenous Rights Institute learned that there was no final report.

THE COURT: But the source of that is a cite from a 1990 book, which may not have been in his library, but still was public record. And he's citing, from looking at the 1990 book, he's citing the 1979 report. So in 1979 it was public information.

Wash. Tr. at 39.[6] The National Council then made things worse by arguing that *United States v. Beggerly*, 524 U.S. 38 (1997), supported its position that this Court could reopen this case. Wash. Tr. at 35-36. While presenting an accurate account of what the circuit court did in *Beggerly*, nowhere did the National Council's attorney mention that the Supreme Court reversed the circuit court's decision. *Beggerly*, 524 U.S. at 49. This type of oral argument does a disservice to both the Court and the client.

In the end, the issue of whether this alleged defect in the ICC Final Report is newly discovered is not difficult. Newly discovered evidence is judged on an objective rather than subjective standard. Plaintiffs must show that they could not have discovered such evidence through due diligence prior to when they found it. The publication in an official publication of the United States, in 1978, is enough to put Plaintiffs on objective notice of this fact. Further, the republication of the same fact in a book documenting the history of the ICC in 1990 can only amplify the point that there was no newly discovered evidence. Thus, there is no basis to sustain an independent action 25 years after the fact. While the Court for the moment assumes this "newly discovered" evidence is actual evidence, reading it makes that highly unlikely. However, whether it has any objective credibility is not critical to the Government's motion.

Therefore, the Court finds that Plaintiffs' Count I is untimely as either a motion under RCFC 60(b)(4) or an independent action. Because the statute of limitations in this Court constitutes a waiver of sovereign immunity, the Court must dismiss Count I for lack of subject-matter jurisdiction. As the Court will demonstrate below, even if Count I were timely, Plaintiffs have failed to state a claim.

D. Merits of Plaintiffs' Claims and This Court's Authority Under RCFC 60(b)(4)

Even if the motion and independent action are timely, the Court finds that Plaintiffs have failed to state a claim under RCFC 60(b). In order to grant relief, the Court must find that a "grave miscarriage of justice" would result if relief is denied. *Beggerly*, 524 U.S. at 47. In this case, Plaintiffs claim that their due process rights were violated by the proceeding before the ICC. The National

---

[6] The Court will refer to the "Reno Tr." and "Wash. Tr." to differentiate between the two court sessions.

Council argues that Defendant violated its rights by designating who would represent the Shoshone, choosing their attorney, limiting the claims allowed, and entering unsupportable stipulations. National Council Br. at 7. The South Fork Band states more generally that the ICC failed to provide procedural safeguards. South Fork Band Br. at 30-31. However, these same allegations have been presented to courts in the past and rejected. For example, the designation of the representative was challenged, and upheld, by the Court of Claims. *Western Shoshone Legal Defense & Educ. Ass'n*, 531 F.2d at 503. Further, Plaintiffs claim that the Plaintiffs before the ICC were denied the right to fire their counsel. However, when they did so, the proposed new counsel appeared and argued before the Court of Claims. *Temoak Band*, 593 F.2d at 995. Additionally, the Supreme Court denied petitions for certiorari with respect to the cases that had been heard in the Court of Claims. *Western Shoshone Identifiable Group v. United States*, 444 U.S. 973 (1979); *Western Shoshone Legal Defense & Educ. Ass'n*, 429 U.S. 885 (1975). The extraordinary relief allowed under RCFC 60(b) does not provide a second chance to appeal. Plaintiffs have failed to present any evidence that would show a grave miscarriage of justice that has not already been considered by a various federal courts. Therefore, even if Count I could be considered timely, Plaintiffs have failed to state a claim for which relief may be granted and the Court is compelled to dismiss it under RCFC 12(b)(6).

II. Count II

In Count II, Plaintiffs seek to recover interest for taking of the Plaintiffs' "fee title land." South Fork Band Br. at 15-16. The Government moves to dismiss Count II because there is no waiver of sovereign immunity for prejudgment interest for the taking of the disputed land. *See Library of Congress v. Shaw*, 478 U.S. 310, 315 (1986) (holding that the United States is immune from an award of interest absent an express waiver of immunity). Plaintiffs counter that Count II is argued in the alternative to Count I and is predicated upon the following two circumstances: "(1) the Court determines that the ICC Judgment is valid; and (2) the Court finds . . . that the ICC Judgment extinguished the [Plaintiffs'] 'independent treaty-based rights.'" *Id.* If Plaintiffs held Treaty Title to the disputed land, as opposed to aboriginal title,[7] then Plaintiffs claim they are entitled to interest because this would constitute a Fifth Amendment taking. The Court holds that it must dismiss this claim.

A. Aboriginal Title

Plaintiffs argue that the ICC did not deal with a significant portion of the Plaintiffs' land that they occupy under aboriginal title. The Plaintiffs claim that, at the least, the Treaty of Ruby Valley defined the area that the Plaintiffs occupy under aboriginal title. That area, described in Article V of

---

[7] Aboriginal title is the right to exclusive possession that tribes hold as the result of occupying land from time immemorial. There is no waiver of sovereign immunity for the extinguishment of aboriginal title. Treaty title is the equivalent of fee title that is acquired through a treaty with the United States. Because it is the equivalent of fee title, the taking of property held under treaty title requires compensation under the Fifth Amendment, which includes interest. For an in depth examination of this distinction, *see Seneca Nation of Indians v. New York*, 206 F. Supp. 2d 448 (W.D.N.Y. 2002).

the Treaty, amounts to approximately 60,000,000 acres of land. The ICC proceedings, according to Plaintiffs, only dealt with 24,000,000 acres. Reno Tr. 26-29; *See also Western Shoshone Identifiable Group v. United States*, 29 Ind. Cl. Comm. 5, 63 (1972) (finding aboriginal title to 22,211,753 acres in Nevada and 2,184,650 acres in California). Therefore, Plaintiffs claim that they still maintain aboriginal title to approximately 36,000,000 acres even if the ICC judgment was valid. South Fork Band Br. at 15 n.5. Defendant responds that Plaintiffs' reading of the ICC judgment is flawed. According to the Government, the ICC dealt with the entire area and found that the Shoshones only established aboriginal title to the 24,000,000 acres. In the alternative, Defendant argues that even if Plaintiffs are correct, that the time and place to bring their claim to the 36,000,000 acres was before the ICC.

Plaintiffs' arguments cannot withstand scrutiny. The ICC dealt with all of the Shoshone aboriginal title claims, not just the 24,000,000 acres for which it awarded damages. The ICC defined with specificity the area that was exclusively used and occupied by the Western Shoshone Identifiable Group (*i.e.* the 24,000,000 acres). *Western Shoshone*, 29 Ind. Cl. Comm. at 413-14. The Commission stated that:

> Lands within the claimed area which have been found not to have been exclusively used and occupied by the four Shoshone land-using entities described herein include lands for which there is no substantial evidence of their respective exclusive use and occupancy and also lands used by various other tribes or groups of Indians.

Id. at 414. Further, Plaintiffs' claim to aboriginal title to the additional 36,000,000 acres cannot withstand the fact that the ICC determined that other tribes held such title to parts of that same land. As discussed above, aboriginal title requires that the claiming Indians must establish exclusive occupancy and use of the land, therefore, it is impossible for more than one tribe to hold aboriginal title to the same land. The ICC held that the Shoshone Tribe, which was distinct from the Western Shoshone, held aboriginal title to land extending from Twin Falls, Idaho "southwest to the Western Shoshone identifiable group's northeastern boundary line . . . ; thence southeast along said Western Shoshone boundary line . . . ; thence in a direct northeasterly line . . . ." *Id.* at 412. The Goshute Tribe held aboriginal title to lands from Wendover, Utah "due west to the Western Shoshone group's boundary line . . . ; thence south along the Western Shoshone boundary to Kimberly, Nevada; thence east . . . ." *Id.* at 413. Further, in other cases, the ICC determined that the Northern Paiute and the Indians of California held aboriginal title to other tracts within the 60,000,000 acres, including all of the land in California not established as Western Shoshone land in the ICC decision. *Indians of California v. United States*, 8 Ind. Cl. Comm. 1 (1959).

Therefore, the ICC dealt with aboriginal title to all 60,000,000 acres and determined that the Western Shoshone only established aboriginal title to approximately 24,000,000 acres. The parties then stipulated that the aboriginal title had been extinguished as of July 1, 1872. Under the ICC judgment, Plaintiffs no longer hold aboriginal title to any of the 60,000,000 acres and the claim must be dismissed for lack of subject-matter jurisdiction.

C. Treaty of Ruby Valley

Underlying much of the litigation presently before the Court is the Treaty of Ruby Valley and the proper interpretation of it. Plaintiffs argue that the Treaty grants them treaty title. The Government argues that the Treaty was merely one of friendship and that it conveyed no treaty rights to any of the lands described in it. Much of the briefing submitted on this topic involved the meaning of the Supreme Court's decision in *Northwestern Bands of Shoshone Indians v. United States*, 324 U.S. 355 (1945). Defendant argues that *Northwestern Bands* precludes the determination that Plaintiffs ever held treaty title to the land. Plaintiffs argue that *Northwestern Bands* did not rule upon an interpretation of the Treaty of Ruby Valley. Rather, Plaintiffs argue the Court reviewed a different treaty, the Box Elder Treaty. The Court finds this argument to be without merit. In *Northwestern Bands*, the Supreme Court discusses all of the treaties entered into with the Shoshones in 1863, which were "similar in form." 324 U.S. at 343. Further, the Court's conclusion that no recognized title had been conferred is stated in terms clearly applicable to the Treaty of Ruby Valley. *Id.* at 348. Following a discussion in which the Court specifically referenced the Western Shoshone treaty, the Court stated "nowhere in any of the series of treaties is there a specific acknowledgment of Indian title or right of occupancy." *Id.*

South Fork Band also argue that recognized title may be reasonably inferred from the language used in the Treaty of Ruby Valley. South Fork Band Resp. Br. at 9. The Court disagrees. Even though there is no particular form necessary for congressional recognition of Indian right of permanent occupancy, "there must be the definite intention by congressional action or authority to accord legal rights, not merely permissive occupation." *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 278-79 (1955)(citation omitted). And specifically, in *Northwestern Bands*, the Supreme Court stated that such definite intention was lacking in the language employed in the Treaty of Ruby Valley. 324 U.S. 348. It is clear to the Court that Plaintiffs cannot rely on the allegation that the Treaty of Ruby Valley recognized the Western Shoshones' ownership of land. Accordingly, the Court finds that the claim must be dismissed for Plaintiffs can not prove any set of facts in support of their claim that would entitle them to relief.

III. Count III

In Count III, Plaintiffs seek royalties for minerals mined from the disputed land under the Treaty of Ruby Valley. Defendant argues that this Count is barred by the statute of limitations and the finality provision of the ICCA. Defendant argues that because the ICC Judgment includes a $4,604,600 award for minerals removed from the land, § 22 bars this Count. *Temoak Band*, 593 F.2d at 996; 40 Ind. Cl. Comm. 318, 452 (1977). Plaintiffs[8] argue that the finality provision cannot bar this case

[8] These arguments are the South Fork Band's. The National Council does not argue this issue specifically, but it does expressly incorporate all of the South Fork Band's arguments. National

because it was repealed before the payment of the ICC judgment. Alternatively, they argue that it is not jurisdictional. They finally argue that the ICC procedure was not followed, therefore, the finality provision was never triggered in this case.

A. The Exclusive Jurisdiction of the ICC

Defendant argues that the ICC had exclusive jurisdiction over any claim seeking to recover royalties under the Treaty of Ruby Valley. The Court has already noted that when Congress passed the ICCA, it sought to bring all meritorious claims to conclusion. To that end, the ICC had jurisdiction to hear cases filed within five years of the passage of the ICCA. The limitation provision made clear that "no claim existing before such date but not presented within such period may thereafter be submitted to any court or administrative agency for consideration." 25 U.S.C. § 70k (1976). Effectively, all claims existing on August 13, 1946 had to be filed by August 13, 1951 or be barred forever. *E.g. Lower Sioux*, 519 F.2d at 1383. Further, the Indian Tucker Act grants the Court of Federal Claims jurisdiction over claims "accruing after August 13, 1946." 28 U.S.C. § 1505 (2000). Plaintiffs argue that this Count accrued after 1946, however, they do not explain that proposition. The Treaty, entered in 1863, expressly obligated the United States to pay the Western Shoshone $5,000 per year for twenty years. It is impossible to conclude that the failure to pay treaty mandated compensation, based on a treaty entered in 1863, did not accrue before 1946. There is no indication of any payment after the twenty years required by the text of the Treaty. Therefore, the Court must dismiss this Count because it was within the exclusive jurisdiction of the ICC.

B. The Finality Provision of the ICCA

Even if jurisdiction over Count III was not placed exclusively in the ICC, the Court would be required to dismiss this Count because of the finality of the ICC Judgment. Plaintiffs' argument that the finality provision of the ICCA is not jurisdictional is untenable. The finality provision, ICCA § 22, states that:

> [P]ayment of any claim, after a determination under the Act, shall be a full discharge of the United States of all claims and demands touching on any of the matters involved in the controversy.
> (b) A final determination against a claimant made and reported in accordance with the Act shall forever bar any further claim or demand against the United States arising out of the matter involved in the controversy.

25 U.S.C. § 70u (1976) (omitted 1978). This provision constitutes a limitation on the Government's waiver of sovereign immunity. *See Dann*, 470 U.S. at 45. Therefore, if it applies to Count III, the finality provision would remove jurisdiction from this Court.

Council, Br. at 1. With this caveat, the Court will refer to "Plaintiffs" in this section.

The Court must determine if the finality provision may still apply now that the ICCA has been omitted from the U.S. Code. Plaintiffs argue that the ICCA was repealed effective September 30, 1978 when the ICC was terminated. Pub.L. 94-465, 90 Stat. 1990 (Oct. 8, 1976). Therefore, Plaintiffs argue that §22 cannot apply to this case because the payment of the ICC judgment was not until December 6, 1979. Plaintiffs assert that the ICCA had been repealed by that time. Plaintiffs further seek to limit the *Dann* decision to simply deciding when payment occurred, arguing that *Dann* does not decide whether the ICCA applied to payments made after September 30, 1978. This argument, however, miscomprehends the history of the ICCA and the *Dann* decision. There is nothing in the history of the ICCA to indicate that it has ever been repealed. In terminating the ICC, Congress modified two provisions; it did not repeal any. Pub.L. 94-465, 90 Stat. 1990. Instead, the ICCA has been omitted from the U.S. Code after the termination of the ICC. *See* South Fork Band Br. at Ex.'s 5 & 6.

Plaintiffs also fail to explain why the Supreme Court would decide *Dann* if the payment of the ICC judgment would have no effect. Indeed, the *Dann* Court was clearly aware that ICCA § 22 would preclude certain of the Danns' claims if the Court found payment had occurred. The *Dann* Court reversed the Ninth Circuit because the circuit's decision "would frustrate the purpose of finality by *postponing the preclusive effects of § 22(a)* while subjecting the United States to continued liability for claims and demands that 'touch' on the matter previously litigated and resolved by the Indian Claims Commission." *Dann*, 470 U.S. at 45 (emphasis added). Because payment of the ICC judgment occurred after the omission of the ICCA from the U.S. Code, *Dann* clearly establishes that the ICCA's finality provision may still act to bar claims against the Government.

Plaintiffs' argument that § 22 cannot bar this Count because the final report was never filed also fails to survive review. As discussed above, this cannot be the basis of relief under RCFC 60(b). Further, the Supreme Court clearly stated that the preclusive effect of § 22 bars further claims upon payment of the ICC award and thus this Court is bound by that determination.

IV. Count IV

In Count IV, Plaintiffs[9] ask the Court to order Defendant to provide "an accounting of the proceeds from disposition or use of the land, including without limitation, mining activities in accordance with Section 4 of the Treaty of Ruby Valley." Compl. ¶ 76. Defendant argues that this Court lacks the necessary equitable jurisdiction to order such an accounting until Defendant's liability is established. Plaintiffs respond that the Court must look at Count IV in conjunction with Counts III and V, and may therefore retain jurisdiction. Further, Plaintiffs allege, and Defendant denies, that Defendant took an inconsistent position in the district court and should not now be allowed to change its position.

---

[9] These arguments are the South Fork Band's. The National Council does not argue this issue specifically, but it does expressly incorporate all of the South Fork Band's arguments. National Council, Br. at 1. With this caveat, the Court will also refer to "Plaintiffs" in this section.

Preliminarily, it is clear that no argument made to the district court may alter the subject-matter jurisdiction of this Court. Jurisdiction in this Court may only be conferred by Congress. *E.g. Transcountry Packing Co. v. United States*, 568 F.2d 1333, 1336 (Ct. Cl. 1978). Thus, even if Defendant argued to the district court that this Court was the only court with jurisdiction over this claim, and convinced the district court to transfer the case here, that does nothing to help this Court determine its jurisdiction over this claim. The subject-matter jurisdiction of this Court cannot be established by estoppel.

The Court finds that it does not have jurisdiction over Count IV. If taken as an independent claim, South Fork Band concedes that this Court lacks jurisdiction. Even if the Court could retain jurisdiction over this Count as South Fork Band argues, the Court cannot do so here because it is dismissing Counts III and V in this opinion. Therefore, the Court dismisses Count IV for lack of subject-matter jurisdiction.

V. Count V

In Count V, Plaintiffs seek damages for alleged breaches of fiduciary duties that Plaintiffs argue were owed by the Government to Plaintiffs. Defendant argues that Count V should be dismissed for lack of subject-matter jurisdiction in this Court. First, Defendant argues, the relief sought in Count V is barred by the exclusivity and finality provisions of the ICCA. Second, Defendant argues that even if Count V survives its ICCA challenge, it is untimely under the six-year statute of limitations found in 28 U.S.C. § 2501 (2000). Plaintiffs[10] respond that the ICCA does not bar this Count and that the statute of limitations has not begun to run in this case because the Government has not repudiated the relationship or provided an accounting of Plaintiffs' funds.

Without reaching the ICCA argument, this claim is clearly out of time under this Court's generally applicable statute of limitations. 28 U.S.C. § 2501. Because § 2501 constitutes a waiver of sovereign immunity, its bar deprives this Court of subject-matter jurisdiction over untimely claims. *E.g. Hopeland Bands of Pomo Indians v. United States*, 855 F.2d 1573, 1576-77 (Fed. Cir. 1988). The statute of limitations begins to run at the time of "first accrual," which is the time when all of the facts necessary to establish liability have taken place. *Nager Electric Co. v. United States*, 368 F.2d 847, 851 (Ct. Cl. 1966). These facts, of course, must not be inherently unknowable at the time they occur. *Menonominee Tribe v. United States*, 726 F.2d 718, 720-22 (Fed. Cir. 1988). In the case of a trust relationship, the statute does not begin to run on a breach unless the fiduciary expressly repudiates the relationship or provides an accounting of trust funds. *E.g. Osage Tribe of Indians of Oklahoma v. United States*, 68 Fed. Cl. 322 (2005). A trustee, however, may repudiate the relationship through "actions inconsistent with [its] obligations under the trust." *Jones v. United States*, 801 F.2d 1334, 1336 (Fed. Cir. 1986) (citation omitted).

---

[10] These arguments are the South Fork Band's. The National Council does not argue this issue specifically, but it does expressly incorporate all of the South Fork Band's arguments. National Council, Br. at 1. With this caveat, the Court will also refer to "Plaintiffs" in this section.

Assuming *arguendo*, that the Government owed a fiduciary duty to the Plaintiffs under the Treaty of Ruby Valley,[11] it is impossible to accept the Plaintiffs' view that the Government has not long ago repudiated such a relationship. Ever since the initial case before the ICC, filed in 1951, the Government has denied that the Plaintiffs retained *any* interest in the disputed land. *E.g. Western Shoshone Legal Defense & Educ. Ass'n v. United States*, 531 F.2d 495, 500 (Ct. Cl. 1976) (noting that "the Government consistently maintained that the Indians never owned the lands they claimed"). That position, repeated in numerous cases over 55 years, is irreconcilable with the Government acknowledging its role as a fiduciary. It is also impossible to conclude that Plaintiffs only became aware of the Government's position within the last six years. For the purposes of § 2501, Count V first accrued in the 1950's when the Government denied that the Plaintiffs had any interest in any of the disputed 60 million acres.

The Plaintiffs also point to *Osage Tribe* to support their claim that appropriations acts have set aside the statute of limitations until an accounting has been provided. *Osage Tribe*, however, does not apply to this case because *Osage Tribe* dealt with a trust fund expressly created by statute. *Osage Tribe*, 68 Fed. Cl. at 325-26. In this case, Plaintiffs can only claim that the Treaty of Ruby Valley created a trust relationship with regard to the lands and assets of the land described in the Treaty. However, the Federal Circuit has made it clear that the setting aside of the statute of limitations until an accounting is provided applies only to cases of trust fund mismanagement, not asset mismanagement. *Shoshone Indian Tribe of the Wind River Reservation v. United States*, 364 F.3d 1339, 1350 (Fed. Cir. 2004). Therefore, the Court must dismiss Count V for lack of subject-matter jurisdiction.

CONCLUSION

For the reasons set forth in this opinion, the Court hereby GRANTS Defendant's Motion to Dismiss Plaintiffs' Second Amended Complaint. The Clerk is directed to enter judgment in favor of Defendant.

IT IS SO ORDERED.

LOREN A. SMITH
Senior Judge

---

[11] The Supreme Court has held that pervasive control over Indian lands can be found to create a fiduciary relationship with the Government. *United States v. Mitchell*, 463 U.S. 206, 224 (1983). In this case, the language in the Treaty of Ruby Valley does not appear to grant such pervasive control to the United States. Therefore, for the sake of this argument, the Court will assume, without deciding, that such a relationship did exist.

(See above for address)
TERMINATED: 12/06/2005
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Treva Jean Raymann Hearne
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

V.

Defendant

USA

represented by **Sara Elizabeth Culley**
U. S. Department of Justice
Environment and Land Division
P.O. Box 663
Washington, DC 20044-0663
(202) 305-0466
Fax: (202) 305-0267
Email: sara.culley@usdoj.gov
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
05/18/2005	1	Case transferred in from the United States Distict Court for the District of Columbia (Washington, D.C.); Case Number 03-CV-2009. Original file certifi copy of transfer order and docket sheet received and filed by WESTERN SHOSHONE NATIONAL COUNCIL, SOUTH FORK BAND, WINNEMUCCA INDIAN COLONY and DANA BAND.(dw1) (Entered: 05/18/2005)
05/18/2005	2	NOTICE of Assignment to Judge Emily C. Hewitt. (dw1) (Entered: 05/18/200
06/08/2005	3	Consented MOTION to Substitute Attorney Jeffrey M. Herman in place of Alb A. Foster, filed by WESTERN SHOSHONE NATIONAL COUNCIL.Service: 6/7/2005. (mb2,) (Entered: 06/13/2005)
06/08/2005		***Attorney Jeffrey M. Herman for WINNEMUCCA INDIAN COLONY; DANA BAND; WESTERN SHOSHONE NATIONAL COUNCIL and SOUTH FORK BAND added. Attorney Albert A. Foster, Jr terminated. (mb2,) (Entered: 06/13/2005)
06/08/2005	4	MOTION for Extension of Time until 7/15/2005 to File an Amended Complair filed by WESTERN SHOSHONE NATIONAL COUNCIL.Service: 6/3/2005. Response due by 6/20/2005. (mb2,) (Entered: 06/13/2005)
06/13/2005	5	ORDER granting [4] Motion for Extension of Time. Amended Complaint due b 7/15/2005. Signed by Judge Emily C. Hewitt. (mb2,) (Entered: 06/16/2005)
07/14/2005	6	NOTICE of Appearance by Sara Elizabeth Culley for USA. Service: 7/14/200 (mb2,) (Entered: 07/18/2005)
07/14/2005	7	NOTICE of Directly Related Case(s) [76-32613], filed by USA. Service:

		7/14/2005.(mb2,) (Entered: 07/18/2005)
07/14/2005	7	MOTION to Reassign Case, filed by USA. Service: 7/14/2005. Response due b 8/1/2005. (Document contained with [7] Notice)(mb2,) (Entered: 07/18/2005)
07/15/2005	8	[TRANSFER] COMPLAINT (Captioned Second Amended Complaint) against USA filed by BATTLE MOUNTAIN BAND, ELKO BAND, TE-MOAK TRIBE OF WESTERN SHOSHONE INDIANS, TIMBISHA SHOSHONE TRIBE, WESTERN SHOSHONE NATIONAL COUNCIL, SOUTH FORK BAND, WINNEMUCCA INDIAN COLONY, DANN BAND. Answer Due by 9/13/2005. Copies (5) to defendant.(dls) (Entered: 07/18/2005)
07/27/2005	9	ORDER REASSIGNING CASE. Case reassigned to Senior Judge Loren A. Smith for all further proceedings. Judge Emily C. Hewitt no longer assigned to case. Signed by Judge Emily C. Hewitt. (dls) (Entered: 07/28/2005)
07/27/2005	10	NOTICE of Reassignment to Senior Judge Loren A. Smith. (dls) (Entered: 07/28/2005)
09/13/2005	11	MOTION for Extension of Time to File Answer re [8] Transfer Complaint, until 9/27/2005, filed by USA.Service: 9/13/05. (dls) (Entered: 09/22/2005)
09/15/2005	12	ORDER granting [11] Motion for Extension of Time to Answer. Answer Due by 9/27/2005. (signed by the Clerk) (dls) (Entered: 09/22/2005)
09/27/2005	13	MOTION to Dismiss pursuant to Rule 12(b)(1), MOTION to Dismiss pursuant to Rule 12(b)(6), filed by USA. Service: 9/27/2005. Dispositive Motion Response due by 10/28/2005.(mb2,) (Entered: 09/29/2005)
10/27/2005	14	MOTION to Establish Briefing Schedule , filed by USA. Service: 10/26/2005. Response due by 11/14/2005. (mb2,) (Entered: 11/01/2005)
11/02/2005	15	ORDER granting [14] Motion to Establish Briefing Schedule. Signed by Judge Loren A. Smith. (mb2,) (Entered: 11/04/2005)
11/02/2005		Set Deadlines: Response due by 11/28/2005. Reply due by 12/19/2005. (mb2,) (Entered: 11/04/2005)
11/28/2005	16	MOTION for Extension of Time until 12/16/2005 to File Response or Reply as to [13] MOTION to Dismiss pursuant to Rule 12(b)(1) , filed by WESTERN SHOSHONE NATIONAL COUNCIL. Service: 11/23/2005. Response due by 12/12/2005. (mb2,) (Entered: 12/01/2005).
12/06/2005	17	Consented MOTION to Substitute Attorney Treva J. Hearne in place of Jeffrey M. Herman , filed by WESTERN SHOSHONE NATIONAL COUNCIL, BATTLE MOUNTAIN BAND, ELKO BAND, TE-MOAK TRIBE OF WESTERN SHOSHONE INDIANS, SOUTH FORK BAND, TIMBISHA SHOSHONE TRIBE, WINNEMUCCA INDIAN COLONY, DANN BAND. [FILED BY LEAVE OF THE JUDGE] Service: 11/21/2005. (mb2,) (Entered: 12/07/2005)
12/06/2005		NOTICE granting re: [17] Motion to Substitute Attorney (Consented) pursuant to Rule 83.1(d)(4). Added attorney Treva Jean Raymann Hearne for ELKO BAND; TE-MOAK TRIBE OF WESTERN SHOSHONE INDIANS; SOUTH FORK BAND; TIMBISHA SHOSHONE TRIBE; WINNEMUCCA INDIAN COLONY; DANN BAND; WESTERN SHOSHONE NATIONAL COUNCIL and BATTLE MOUNTAIN BAND. Attorney Jeffrey M. Herman terminated. Entered by the Clerk. (mb2,) (Entered: 12/07/2005)

12/06/2005	18	ORDER granting [16] Motion for Extension of Time to File Response/Reply re [13] MOTION to Dismiss pursuant to Rule 12(b)(1). Response due by 12/16/2005. Reply due by 1/27/2006. Signed by Judge Loren A. Smith. (mb2,) (Entered: 12/12/2005)
12/16/2005	19	RESPONSE to [13] MOTION to Dismiss pursuant to Rule 12(b)(1) , filed by SOUTH FORK BAND. Reply due by 1/27/2006. Service: 12/16/2005.(mb2,) (Entered: 12/21/2005)
12/19/2005	20	MOTION for Leave to File Opposition to Motion to Dismiss Out of Time , filed by WESTERN SHOSHONE NATIONAL COUNCIL, TIMBISHA SHOSHONE TRIBE. Service: 12/16/2005. Response due by 1/5/2006. (lld,) (Entered: 12/23/2005)
01/11/2006	21	ORDER granting [20] Motion for Leave to File Out of Time. Signed by Judge Loren A. Smith. (mb2,) (Entered: 01/17/2006)
01/11/2006	22	RESPONSE to [13] MOTION to Dismiss pursuant to Rule 12(b)(1) , filed by WESTERN SHOSHONE NATIONAL COUNCIL. [FILED BY LEAVE OF THE JUDGE] Reply due by 1/3/2006. Service: 12/16/2005.(mb2,) (Entered: 01/17/2006)
02/01/2006	23	MOTION for Extension of Time until 2/10/2006 to File Reply as to [13] MOTION to Dismiss pursuant to Rule 12(b)(1) , filed by USA. [FILED BY LEAVE OF THE JUDGE] Service: 1/27/2006. (mb2,) (Entered: 02/03/2006)
02/01/2006	24	ORDER granting [23] Motion for Extension of Time to File Reply re [13] MOTION to Dismiss pursuant to Rule 12(b)(1). Reply due by 2/10/2006. Signed by Judge Loren A. Smith. (mb2,) (Entered: 02/03/2006)
02/10/2006	25	REPLY to Response to Motion re [13] MOTION to Dismiss pursuant to Rule 12 (b)(1) , filed by USA. Service: 2/10/2006.(mb2,) (Entered: 02/14/2006)
03/20/2006	26	ORDER Setting Hearing on Motion [13] MOTION to Dismiss pursuant to Rule 12(b)(1): Oral Argument set for 5/25/2006 - 5/26/2006 Out of Town Location before Sr. Judge Loren A. Smith. Signed by Senior Judge Loren A. Smith. (dw1 (Entered: 03/21/2006)
06/01/2006	27	ORDER Setting Hearing on Motion [13] MOTION to Dismiss pursuant to Rule 12(b)(1): **Oral Argument set for 6/14/2006 at 2:00 PM in National Courts Building before Sr. Judge Loren A. Smith.** Signed by Judge Loren A. Smith. (mb2) (Entered: 06/08/2006)
06/02/2006		Set/Reset Transcript Deadlines: Transcript due by 6/12/2006. (vp1,) (Entered: 06/02/2006)
06/09/2006	28	TRANSCRIPT of Proceedings held on May 25, 2006 before Judge Loren A. Smith. (dw1) (Entered: 06/13/2006)
06/15/2006		Set/Reset Transcript Deadlines: Transcript due by 6/19/2006. (vp1,) (Entered: 06/15/2006)
06/19/2006	29	TRANSCRIPT of Proceedings held on June 14, 2006 before Senior Judge Loren A. Smith. (dw1) (Entered: 06/20/2006)
09/20/2006	30	PUBLISHED OPINION and ORDER granting [13] MOTION to Dismiss pursuant to Rule 12(b)(1) filed by USA,. The Clerk is directed to enter judgment for defendant. Signed by Judge Loren A. Smith. (lld,) (Entered: 09/20/2006)

09/20/2006	31	JUDGMENT entered, pursuant to Rule 58, in favor of defendant and the complaint is dismissed. (lld,) (Entered: 09/20/2006)
11/15/2006	32	NOTICE OF APPEAL, filed by WESTERN SHOSHONE NATIONAL COUNCIL, BATTLE MOUNTAIN BAND, ELKO BAND, TE-MOAK TRIBE OF WESTERN SHOSHONE INDIANS, SOUTH FORK BAND, WINNEMUCCA INDIAN COLONY, DANN BAND. Filing fee $ 455.00, receipt number 065695. Copies to judge, opposing party and CAFC. (hw1,) (Entered: 11/15/2006)
11/17/2006	33	NOTICE OF APPEAL, filed by BATTLE MOUNTAIN BAND, ELKO BAND, TE-MOAK TRIBE OF WESTERN SHOSHONE INDIANS, SOUTH FORK BAND, WINNEMUCCA INDIAN COLONY, DANN BAND. Filing fee $ 455, receipt number 065707. Copies to judge, opposing party and CAFC. (hw1,) (Entered: 11/22/2006)
11/21/2006	34	CAFC Case Number 07-5020 for [33] Notice of Appeal, filed by SOUTH FORK BAND, WINNEMUCCA INDIAN COLONY, DANN BAND, TE-MOAK TRIBE OF WESTERN SHOSHONE INDIANS, BATTLE MOUNTAIN BAND, ELKO BAND. (hw1,) (Entered: 11/28/2006)

PACER Service Center			
Transaction Receipt			
03/01/2007 10:57:56			
PACER Login:	hg0094	**Client Code:**	1798.001
Description:	Docket Report	**Search Criteria:**	1:05-cv-00558-LAS
Billable Pages:	4	**Cost:**	0.32

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

WESTERN SHOSHONE NATIONAL COUNCIL, et al.,

Plaintiffs,

v.

No. 05-558L
Judge Emily C. Hewitt

UNITED STATES OF AMERICA,
Defendant.

/

SECOND AMENDED COMPLAINT

Plaintiffs, Western Shoshone National Council, South Fork Band, Winnemucca Indian Colony, Dann Band, Te-Moak Tribe of Western Shoshone Indians, Battle Mountain Band, Elko Band, and Timbisha Shoshone Tribe, by and through undersigned counsel, bring this Complaint against the United States, and state as follows:

PARTIES AND JURISDICTION

1. This Court has jurisdiction over the subject matter of this action under 28 U.S.C. §§ 1331, 1362, 1491 and 1505. This is a civil action brought by Indian Tribes or bands and arises under the Constitution, treaties and agreements between the United States and the Tribe, federal common law and the federal statutes.

2. Plaintiff Western Shoshone National Council is a governing body of the Western Shoshone Nation, and represents the interests of certain Western Shoshone tribes and bands which are parties and successors in interest to the Treaty of Ruby Valley.

3. Plaintiff Te-Moak Tribe of Western Shoshone Indians ("Te-Moak Tribe") is a federally recognized tribe which acts as representative body of Battle Mountain Band, Elko Band South Fork Band and Wells Band.

4. Plaintiff South Fork Band is a federally recognized band of the Te-Moak Tribe.

5. Plaintiff Battle Mountain Band is a federally recognized band of the Te-Moak Tribe.

6. Plaintiff Elko Band is a federally recognized band of the Te-Moak Tribe.

7. Plaintiff Winnemucca Indian Colony is a band of Western Shoshone Indians.

8. Plaintiff Dann Band is a traditional Western Shoshone family and this action is brought through its representatives Mary Dann and Carrie Dann.

9. Plaintiff Timbisha Shoshone Tribe is a federally recognized tribe.

GENERAL ALLEGATIONS

The Western Shoshone Nation

10. The Western Shoshone people identify themselves as *Newe*, a word that means "the people." Their homelands stretch in the north from the Snake River Valley in Idaho, in the east from Salt Lake Valley in Utah, in the west across most of eastern and central Nevada, and southward into Death Valley and the Mojave Desert of California. Most of these lands are within what is known as the Great Basin, a high altitude desert with no external drainage to the ocean. (The Western Shoshone homelands shall be referred to as the "Western Shoshone Land Base".)

11. Prior to the appearance of white people, the Western Shoshone lived in extended family groups, congregating together in times of ceremony or collective food gathering activities, such as antelope drives and pinenut picking.

12. The Western Shoshone people have continuously owned and occupied the Western Shoshone Land Base since time immemorial.

13. Today the Western Shoshone people generally live in various communities, some of which include: Battle Mountain Indian Colony, Elko Indian Colony, Wells Indian Colony, South Fork Reservation, Ruby Valley Allotments, Odgers Ranch, Dann Ranch, Yomba Reservation, Duckwater Reservation, Ely Indian Colony, Winnemucca Indian Colony and the Timbisha Community.

14. The Western Shoshone Nation is comprised of bands or tribes of Native American Indians. Some of the Bands are formally recognized by the Congress of the United States under the Indian Reorganization Act.

15. The people of the Western Shoshone, and their bands, tribes and communities shall be collectively referred to as the "Western Shoshone Nation". Plaintiffs bring this action on behalf of themselves and the Western Shoshone Nation.

16. The Western Shoshone Nation owns and occupies a large tract of land in Nevada, California, Idaho and Utah which exceeds over 60 million acres.

The Treaty of Ruby Valley

17. On October 1, 1863 the United States government and the Western Shoshone Nation entered into a treaty known as the Treaty With The Western Shoshone, 1863. 18 Stat. 689, Ratified June 26, 1866, Proclaimed October 21, 1869. (The "Treaty of Ruby Valley") A copy of the Treaty of Ruby Valley is attached hereto as Exhibit A.

18. The Treaty of Ruby Valley is a valid and binding contract between the United States and the Western Shoshone Nation. The Treaty of Ruby Valley is enforceable by law.

19. Article 5 of the Treaty of Ruby Valley states as follows:

> It is understood that the boundaries of the country claimed and occupied by said bands are defined and described by them as follows:
>
> On the north by Wong-goga-da Mountains and Shoshone River Valley; on the west by Su-non-to-yah Mountains or Smith creek Mountains; on the south by Wi-co-bah and the Colorado Desert; on the east by Po-ho-no-be Valley or Steptoe Valley and Great Salt Lake Valley.

The boundaries described in Article 5 are generally shown in the map attached hereto as Exhibit B. (The land described in Article 5 of the Treaty of Ruby Valley shall be referred to as the "Western Shoshone Fee Title Land".)

20. The Congress of the United States expressly recognized permanent ownership of Western Shoshone Fee Title Land in the Western Shoshone Nation when it ratified the Treaty of Ruby Valley on June 26, 1866.

21. The Western Shoshone Nation continues to own the Western Shoshone Fee Title Land. The Western Shoshone ownership includes all rights typically associated with such title, including without limitation, the right to hunt and fish, and to live and work the land (for example, all rights to farming, ranching and grazing). Also encompassed within this title are all mineral rights from the land including gold, silver, copper, timber and water.

22. The Western Shoshone Nation continues to occupy and use a substantial portion of the Western Shoshone Land Base.

23. Under the Treaty of Ruby Valley, the Western Shoshone Nation granted the United States certain privileges for use of and access to the land described in the Treaty and, in exchange, the United States recognized Western Shoshone ownership of the land which under U.S. law equates to statutory or fee title.

24. Article 2 of the Treaty of Ruby Valley provides that "[t]he several routes of travel through the Shoshone country, nor or hereafter used by white men, shall be forever free, and unobstructed by the said bands, for the use of the government of the United States, and of all the emigrants and travellers under its authority and protection. . ." Article 2 further authorizes the Government to establish military posts and station houses in the Shoshone country.

25. Article 3 of the Treaty allows the continuation of "telegraph and overland stage lines", and also allows for the construction of a railway and its branches through Shoshone country. Article 4 of the Treaty provides that the Western Shoshone Fee Title Land may be "prospected for gold and silver, or other minerals; and when mines are discovered, they may be worked, and mining and agricultural settlements formed, and ranches established whenever they may be required."

26. The Treaty of Ruby Valley thus provides the U.S. Government and private citizens acting under the authority of the U.S. Government with certain rights and privileges to use and occupy the Western Shoshone Fee Title Land, which are not inconsistent with the Western Shoshone Nation's Fee Title and concomitant rights in the Western Shoshone Fee Title Land.

27. Article 7 of the Treaty of Ruby Valley provides that the United States shall provide fair compensation to the Western Shoshone Nation for use of the Western Shoshone Fee Title Land. (The Treaty provides that for the first twenty years, the amount of compensation shall be $5,000 per year.) Since the Treaty of Ruby Valley was signed, many gold mines have been discovered and exploited. Upon information and belief, most of the gold produced in the United States comes from the Western Shoshone Fee Title Land. The Western Shoshone Nation has never received an accounting from the United States on the minerals taken from the Western Shoshone Fee Title Land.

28. In the late 19th century and throughout the 20th century, mining and agricultural settlements were formed and ranches were established on the Western Shoshone Fee Title Land.

29. In 1951, a Petition was filed against the United States of America by the Te-Moak Bands of Western Shoshone Indians before the Indian Claims Commission (the "ICC"). The Te-Moak Bands alleged in the Petition that they represented the Western Bands of the Shoshone Nation. The ICC petition was assigned docket No. 326 (hereinafter the "ICC Claim").

30. The ICC Claim was filed by the law firm of Wilkinson, Cragun & Barker (the "Barker Law Firm").

31. Count 1 of the ICC Claim plead a "Taking of Lands" and alleged that (a) the Western Shoshone Nation owned and occupied certain land since time immemorial

("Aboriginal Title"), and (b) the Western Shoshone Nation held recognized title and ownership to land under the Treaty of Ruby Valley (Western Shoshone Fee Title Land).

32. Count 2 of the ICC Claim plead a "General Accounting" for funds collected and managed by the United States on behalf of the Western Shoshone Nation.

33. During the course of the litigation before the ICC, the Te-Moak Bands (the original plaintiff) realized that the Barker Law Firm was not acting pursuant to their instructions. Specifically, counsel refused to assert the position that the Western Shoshone Land Base was not taken by the government. Ultimately, the Te-Moak Bands fired the Barker Law Firm. The BIA refused to accept this discharge of counsel and renewed the legal contract of the Barker Law Firm on behalf of the Te-Moak Bands. The Te-Moak Bands filed a notice of discharge of counsel with the ICC. Despite the discharge of counsel, the ICC, the Barker Law Firm and the United States moved forward, with the Barker Law Firm purportedly representing the interests of the petitioners.

34. The ICC, the Barker Law Firm and the United States created a fiction known as the Western Shoshone identifiable group during the early stages of the litigation. This fictional entity was alleged to be the de facto plaintiff after the Te-Moak Bands terminated their counsel.

35. The Western Shoshone identifiable group was not and is not a recognized legal entity by the Western Shoshone people and had no authority to represent the interests of the Western Shoshone Nation or its people. Upon information and belief, after the Te-Moak Bands terminated the Barker Law Firm, the Barker Law Firm had no representative, decision-making client other than the BIA.

36. On October 16, 1962 the ICC issued Findings of Fact, determining that the Western Shoshone identifiable group held certain land under Aboriginal Title and that the United States had extinguished the Western Shoshone's Aboriginal Title without compensation as follows:

> The Commission further finds... the Western Shoshone identifiable group exclusively used and occupied their respective territories as described in Finding ... 23 (except the Western Shoshone lands in the present State of California) until by gradual encroachment by whites, settlers and others, and the acquisition, disposition or taking of their lands by the United States for its own use and benefit, or the use and benefit of its citizens, the way of life of these Indians was disrupted and they were deprived of their lands. 11 Ind.Cl.Comm. 387, 416.

37. Paragraph 23 of the Findings of Fact contained a description of territory which encompassed approximately 24 million acres of land.

38. The Commission did not make any finding relating to the Western Shoshone Fee Title Land in its Findings of Fact. Nor did it make any findings regarding the land not described and encompassed within the approximate 24 million acres set forth in Paragraph 23 of its Findings of Fact.

39. On October 16, 1962 the ICC issued an Opinion of the Commission (the "1962 Opinion") and held:

> "The Commission also concludes that the... Western Shoshone identifiable group w[as] [a] land-using entit[y] which respectively held Indian title to the lands described in Findings of Fact Nos. 21, 22 and 23, and that said Indian title was acquired by the United States from th[is]... aforementioned land-using entit[y] without the payment of compensation therefor and said land-using entit[y is] entitled to recovery under Section 2, Clause (4) of the Indian Claims Commission Act... The Indian title of the Western Shoshone group in their lands located in California was extinguished by the United States on March 3, 1853, Mohave Tribe v. United States, 7 Ind. Cl. Comm. 219. The case will now proceed to a determination of the dates of ... extinguishment of the Indian title of the lands of the Western Shoshone group which were not within the boundaries of the present State of California; 11 Ind.Cl.Comm. 387, 445."

40. The Commission did not make any ruling relating to the Western Shoshone Fee Title Land in the 1962 Opinion.

41. On February 11, 1966, the ICC approved a joint stipulation setting the date for valuation of the land described in its 1962 opinion as of July 1, 1872.

42. On October 11, 1972, the ICC issued an Opinion of the Commission (the "1972 Opinion") and held that the fair market value of the land held by Aboriginal Title (described in paragraph 23 of the Findings of Fact) on the date of taking was $21,550,000 and the value of minerals removed from the land prior to the taking was $4,604,600 for a total of $26,154,600 (the "ICC Judgment").

43. The Commission did not make any ruling relating to the Western Shoshone Fee Title Land in the 1972 Opinion.

44. In 1946, Congress enacted the Indian Claims Commission Act, 60 Stat. 1049, 25 U.S.C. §70 *et. seq.* (1976 ed). ("ICCA"). The ICCA was substantially repealed as of September 30, 1978, including 25 U.S.C. §70u, Act Aug. 13, 1946, c. 959, §22, 60 Stat. 1055. (See PL 94-465, Oct. 8, 1976, 90 Stat. 1990). This repealed provision stated that "the payment of any claim, after its determination in accordance with this Act, shall be a full discharge of the United States of all claims and demands, touching on any of the matters involved in the controversy." Id., §22(a). The ICC Judgment was certified by the U.S. Court of Claims for payment on December 6, 1979. The Government then placed the $26.1 million award of the ICC Judgment in trust. In United States v. Dann, 470 U.S. 39, 105 S.Ct. 1058 (1985), the Supreme Court held that "payment" of the award of the ICC Judgment had been effected upon the deposit of these funds into a trust account. Nonetheless, on December 6, 1979 when the award of the ICC Judgment was certified, and thereafter when "payment" was made in accordance with the Supreme Court's determination, Section 22(a) of the ICCA had been terminated and omitted from the U.S. Code and was inapplicable. There was, as a result, no discharge pursuant to §22(a) of claims of the Western Shoshone Nation, including the claims set forth herein.

45. Not only did the ICC Judgment not effect a discharge of the United States, but the ICC Judgment never became final. Under the ICCA, a judgment of the ICC becomes final upon the submission of a "final report" to Congress. It has recently been discovered that no final report was ever submitted to Congress on the ICC Judgment.

The Relationship Between the Western Shoshone Nation and the United States

46. Principles of honesty and fair dealing have controlled the government's dealing with Indian nations. Treaties between Indian Tribes and the United States are to be interpreted as the Indians understood them, with any ambiguities construed liberally in favor of the Tribes.

47. The United States has taken on or has exercised some control or supervision over the Western Shoshone land and the management of the resources from the land.

COUNT I
(Declaratory Judgment - ICC Judgment Void
Pursuant to Fed.R.Civ.P. 60(b)(4))

48. Plaintiff repeats and realleges the allegations in paragraphs 1 through 47 above.

49. The ICC Judgment was rendered in an absence of due process. The Barker Law Firm continued to represent the "petitioners" after being terminated by the Te-Moak Bands. In an apparent conflict of interest, the BIA renewed the contract of the Barker Law Firm to continue to represent the Te-Moak Bands in the ICC proceeding against the government. The true representatives of the Western Shoshone people attempted to change, withdraw or dismiss the ICC claim prior to final determination, but were not allowed to do so by the government or the courts. The ICC Judgment was thereafter obtained by dismissed counsel representing a fictitious entity.

50. Such a judgment, which purports to bind all Western Shoshone tribes and bands, lacks the fundamental requisites of due process of law under the Fifth Amendment to the Constitution. In this regard, the Western Shoshone people have a protectible property interest in their rights in the Western Shoshone Land Base; the government

deprived the Western Shoshone people of that interest by means of the ICC Judgment; the Western Shoshone people were denied adequate procedural protections in the manner in which the ICC Judgment was rendered, without their counsel of choice and without being allowed to change or withdraw their claim; and the Plaintiffs herein and the Western Shoshone Nation were not parties in the ICC proceeding and their interests were not represented for purposes of Constitutional due process by the Western Shoshone identifiable group.

51. There is an actual controversy regarding the legal effect of the ICC Judgment.

52. Plaintiffs seek a judgment pursuant to 28 U.S.C. §2201 declaring the ICC Judgment to be unenforceable against the Plaintiffs, or void under Fed.R.Civ.P. 60(b)(4) on grounds of failure of due process.

53. The ICC, by proceeding forward to judgment under the circumstances set forth herein, engaged in a clear and egregious usurpation of judicial power.

54. Because the ICC Judgment is unenforceable against the Plaintiffs or void, Plaintiffs herein assert treaty title and aboriginal title to the entire Western Shoshone Land Base, all 60 million acres.

55. WHEREFORE, Plaintiffs demand a declaration that the ICC Judgment is unenforceable or void, and such other and further relief as this Court deems just and proper.

COUNT II
(Declaratory Judgment - Interest on Takings Award)

56. Plaintiffs repeat and reallege paragraphs 1 through 47 above.

57. This claim is in the alternative and assumes that the ICC Judgment is valid.

58. The award of $26.1 million by the ICC was alleged to be based upon the fair market value of the subject land as of July 1, 1872. Pre-judgment interest, from 1872 to the date of the ICC's Judgment, was not awarded.

59. If the award on the ICC claim encompassed the taking of Western Shoshone Fee Title Land, then it was and remains a well established principle of law that the Western Shoshone Nation would have been entitled to an award of pre-judgment interest. If, however, the award of the ICC Judgment encompassed only Aboriginal Title, then the Western Shoshone Nation would not have been entitled to pre-judgment interest.

60. The ICC Findings of Fact and the ICC Judgment did not address the Western Shoshone Fee Title Land. Whether the ICC Judgment encompasses the Plaintiffs' claims to the Western Shoshone Fee Title Land is a matter in controversy.

61. If this Court were to determine that the treaty and statutory rights of the Western Shoshone Nation in the Western Shoshone Fee Title Land were extinguished by the ICC Judgment, then Plaintiffs seek a declaration pursuant to 28 U.S.C. §2201 that the Western Shoshone Nation is entitled to compounded pre-judgment interest on the award from July 1, 1872 to the date of the ICC Judgment.

62. The amount of interest due under this count exceeds $14 billion.

63. WHEREFORE, Plaintiffs demand declaratory relief, in the alternative to Count I, of entitlement to pre-judgment interest from July 1, 1872 to the date of the ICC Judgment, and such other and further relief as this Court deems just and proper.

COUNT III

(Declaratory Judgment - Right to Royalties for Use of Land)

64. Plaintiffs repeat and reallege allegations 1 through 47 above.

65. The Western Shoshone Nation is entitled to fair compensation for use of the Western Shoshone Fee Title Land and the Western Shoshone Land Base pursuant to Articles 4 and 7 of the Treaty of Ruby Valley. Fair compensation requires, among other things, payment of reasonable royalties on all minerals mined and extracted from the Western Shoshone Fee Title Land and the Western Shoshone Land Base.

66. Upon information and belief, there is an actual controversy regarding Plaintiffs' entitlement to fair and reasonable royalties under the Treaty of Ruby Valley.

67. Pursuant to 28 U.S.C. §2201, Plaintiffs seek a declaration that the Western Shoshone Nation is entitled to fair and reasonable compensation for past, present and future use of the Western Shoshone Fee Title Land and Western Shoshone Land Base.

68. WHEREFORE, Plaintiffs demand a final judgment declaring their rights to fair and reasonable compensation for use of land under the Treaty of Ruby Valley, and for such other and further relief as this Court deems just and proper.

COUNT IV
(Accounting)

69. Plaintiffs repeat and reallege paragraphs 1 through 47 above.

70. Under the Treaty of Ruby Valley and Federal law, the U.S. Government undertook a duty to control and manage the Western Shoshone land.

71. The books of account and records pertaining to moneys and financial transactions of and for the Western Shoshone Nation have been maintained in the exclusive possession and control of the United States.

72. At all relevant times, Defendant has been under a duty to pay interest to the Western Shoshone Nation on funds received by the United States arising from use or disposition of the Western Shoshone land.

73. At all relevant times, Defendant has been under a duty as fiduciary to invest funds coming into the United States' possession for the benefit of the Western Shoshone Nation.

74. Defendant owes the Western Shoshone Nation a fiduciary duty and obligations of the highest responsibility to administer the Western Shoshone land and funds with the greatest skill and care possessed by a fiduciary.

75. Defendant's fiduciary duties include, among others, the duty to provide the Western Shoshone Nation with a full and complete accounting of their funds.

76. Defendant has failed to provide the Western Shoshone Nation with an accounting of the proceeds from disposition or use of the land, including without

limitation, mining activities in accordance with Section 4 of the Treaty of Ruby Valley. Plaintiffs are entitled to such an accounting for proceeds from disposition or use of the land.

77. WHEREFORE, Plaintiffs demand judgment for an accounting, and such other and further relief as this Court deems just and proper.

COUNT V
(Breaches of Fiduciary Duties)

78. Plaintiffs repeat and reallege paragraphs 1 through 47 above.

79. Defendant owes fiduciary duties to Plaintiffs with respect to both (i) monies derived or obtained from the Western Shoshone land; and (ii) monies that should have been received or earned by Defendant but were not because of mismanagement of the mineral resources and other resources from the Western Shoshone land.

80. Defendant has breached its fiduciary duties owed to the Western Shoshone Nation with respect to the Western Shoshone Fee Title Land, by mismanaging the land and failing to account for the proceeds and profits of the land.

81. Plaintiffs and the Western Shoshone Nation have suffered damages as a result of the Defendant's breaches of fiduciary duties.

WHEREFORE, Plaintiffs demand compensatory damages of breaches of fiduciary duties, and such other and further relief as this Court deems just and proper.

DATED THIS 14 day of July, 2005.

Respectfully submitted,

HERMAN & MERMELSTEIN, P.A.
18205 Biscayne Blvd., Suite 2218
Miami, Florida 33160
Telephone: (305) 931-2200
Facsimile : (305) 931-0877

By: _____
Jeffrey M. Herman, Esquire
Stuart S. Mermelstein, Esquire
Adam D. Horowitz, Esquire

EXHIBIT A

TREATY WITH THE WESTERN SHOSHONI, 1863.

Treaty of Peace and Friendship made at Ruby Valley, in the Territory of Nevada, this first day of October, A. D. one thousand eight hundred and sixty-three, between the United States of America, represented by the undersigned commissioners, and the Western Bands of the Shoshonee Nation of Indians, represented by their Chiefs and Principal Men and Warriors, as follows:

ARTICLE 1.

Peace and friendship shall be hereafter established and maintained between the Western Bands of the Shoshonee nation and the people and Government of the United States; and the said bands stipulate and agree that hostilities and all depredations upon the emigrant trains, the mail and telegraph lines, and upon the citizens of the United States within their country, shall cease.

ARTICLE 2.

The several routes of travel through the Shoshonee country, now or hereafter used by white men, shall be forever free, and unobstructed by the said bands, for the use of the government of the United States, and of all emigrants and travellers under its authority and protection, without molestation or injury from them. And if depredations are at any time committed by bad men of their nation, the offenders shall be immediately taken and delivered up to the proper officers of the United States, to be punished as their offences shall deserve; and the safety of all travellers passing peaceably over either of said routes is hereby guarantied by said bands.

Military posts may be established by the President of the United States along said routes or elsewhere in their country; and station houses may be erected and occupied at such points as may be necessary for the comfort and convenience of travellers or for mail or telegraph companies.

ARTICLE 3.

The telegraph and overland stage lines having been established and operated by companies under the authority of the United States through a part of the Shoshonee country, it is expressly agreed that the same may be continued without hindrance, molestation, or injury from the people of

said bands, and that their property and the lives and property of passengers in the stages and of the employes of the respective companies, shall be protected by them. And further, it being understood that provision has been made by the government of the United States for the construction of a railway from the plains west to the Pacific ocean, it is stipulated by the said bands that the said railway or its branches may be located, constructed, and operated, and without molestation from them, through any portion of country claimed or occupied by them.

ARTICLE 4.

It is further agreed by the parties hereto, that the Shoshonee country may be explored and prospected for gold and silver, or other minerals; and when mines are discovered, they may be worked, and mining and agricultural settlements formed, and ranches established whenever they may be required. Mills may be erected and timber taken for their use, as also for building and other purposes in any part of the country claimed by said bands.

ARTICLE 5.

It is understood that the boundaries of the country claimed and occupied by said bands are defined and described by them as follows:

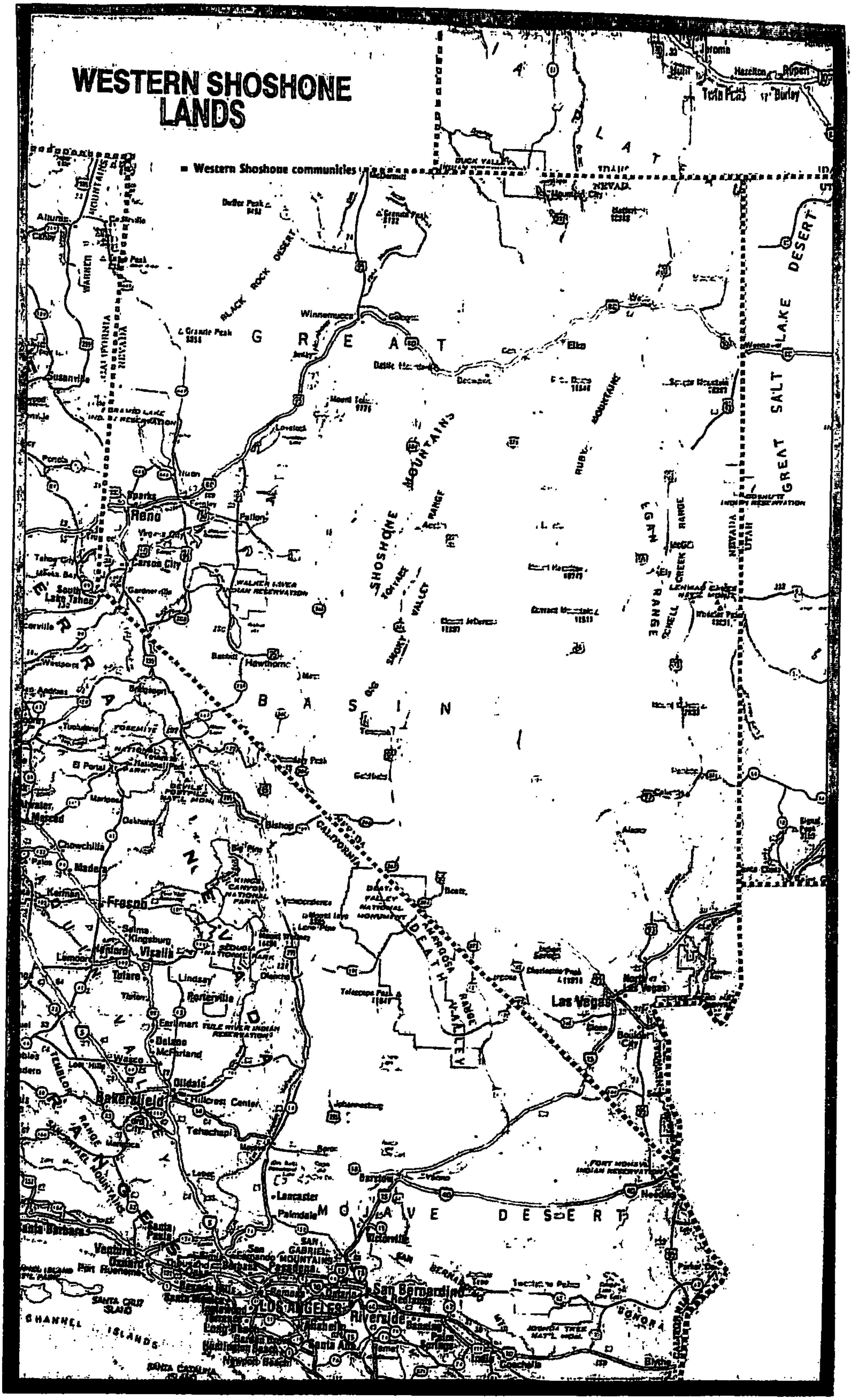
> On the north by Wong-goga-da Mountains and Shoshonee River Valley; on the west by Su-non-to-yah Mountains or Smith Creek Mountains; on the south by Wi-co-bah and the Colorado Desert; on the east by Po-ho-no-be Valley or Steptoe Valley and Great Salt Lake Valley.

ARTICLE 6.

The said bands agree that whenever the President of the United States shall deem it expedient for them to abandon the roaming life, which, they now lead, and become herdsmen or agriculturalists, he is hereby authorized to make such reservations for their use as he may deem necessary within the country above described; and they do also hereby agree to remove their camps to such reservations as he may indicate, and to reside and remain therein.

ARTICLE 7.

The United States, being aware of the inconvenience resulting to the Indians in consequence of the driving away and destruction of game along the routes travelled by white men, and by the formation of agricultural and mining settlements, are willing to fairly compensate them for the same;


WESTERN SHOSHONE LANDS
■ Western Shoshone communities
GREAT BASIN
MOJAVE DESERT
GREAT SALT LAKE DESERT
SHOSHONE MOUNTAINS
RUBY MOUNTAINS
BLACK ROCK DESERT
DEATH VALLEY
NEVADA
CALIFORNIA
UTAH
Winnemucca
Elko
Reno
Sparks
Carson City
Fallon
Hawthorne
Bishop
Las Vegas
Boulder City
Needles
Barstow
Fresno
Visalia
Bakersfield
Lancaster
Palmdale
Victorville
San Bernardino
Riverside
LOS ANGELES
Santa Barbara
Ventura
Susanville
Tulare
Porterville
Tehachapi
Madera
Merced
Chowchilla
Blythe
CHANNEL ISLANDS

therefore, and in consideration of the preceding stipulations, and of their faithful observance by the said bands, the United States promise and agree to pay to the said bands of the Shoshonee nation parties hereto, annually for the term of twenty years, the sum of five thousand dollars in such articles, including cattle for herding or other purposes, as the President of the United States shall deem suitable for their wants and condition, either as hunters or herdsmen. And the said bands hereby acknowledge the reception of the said stipulated annuities as a full compensation and equivalent for the loss of game and the rights and privileges hereby conceded.

ARTICLE 8.

The said bands hereby acknowledge that they have received from said commissioners provisions and clothing amounting to five thousand dollars as presents at the conclusion of this treaty.

Done at Ruby Valley the day and year above written.

James W. Nye.
James Duane Doty.

Te-moak, his x mark.
Mo-ho-a.
Kirk-weedgwa, his x mark.
To-nag, his x mark.
To-so-wee-so-op, his x mark.
Sow-er-e-gah, his x mark.
Po-on-go-sah, his x mark.
Par-a-woat-ze, his x mark.
Ga-ha-dier, his x mark.
Ko-ro-kout-ze, his x mark.
Pon-ge-mah, his x mark.
Buck, his x mark.

Witnesses:

J.B.Moore, lieutenant-colonel Third Infantry California Volunteers.
Jacob T.Lockhart, Indian agent Nevada Territory.
Henry Butterfield, interpreter.

Oct. 1, 1863. | 18 Stats., 689. | Ratified June 26, 1866. | Proclaimed Oct. 21, 1869.

Solicitor - Indian Affairs

Acting Director, Office of Trust Responsibilities - BIA NOV 1 x 1973

Land Status, Western Shoshone Indians

Enclosed is a copy of a letter from Mr. Tom Delehanty, Jr., Lynbrook, New York forwarded to us for consideration by Senator James Buckley.

Mr. Delehanty refers to the Treaty of 1863 with the Western Shoshone and alleges that the land was never taken legally by the United States, so therefore the land is still theirs. Also they have the right to hunt on the lands referred to.

Our review of the treaty and Executive Orders indicates that Mr. Delehanty is correct. It is requested that a review of the matter be conducted by your office to determine land ownership and the hunting and fishing rights of the Western Shoshone Indians.

Your prompt attention to this matter will be appreciated.

WILLIAM L. [illegible]

Enclosure

any of the Indian tribes who formerly occupied what is now the State of Iowa. They were always obliged to have a large quantity of cattle, because, as was said by the Senator from Minnesota, it takes the Indians a good while, especially if the cattle are plenty and fat, to come to a conclusion, and especially if the Indian traders throw any obstacle in the way of the consummation of the treaty. I suppose the men who will have the disposal of this money, if we appropriate it, if the Department is properly conducted, will be the commissioners who will be sent out there. Probably the Governor of the State will be one of them.

Mr. WILKINSON. I do not know it officially, but I can state to the Senator from Iowa that it is the intention of the Secretary of the Interior to go there himself. That is his present intention, if he can get time to go away from his duties here. At all events, I am very well assured that either he or the Commissioner of Indian Affairs will be present when the treaty is made; and it is the determination of the Department that this money, as well as all others appropriated for this purpose, shall be faithfully expended.

Mr. FESSENDEN. I should like to inquire why, if $10,000 was considered sufficient last year, it has got up to $15,000?

Mr. WILKINSON. The Senator from Ohio is mistaken about that matter.

Mr. SHERMAN. What was the amount?

Mr. WILKINSON. I think it was $20,000.

The PRESIDENT *pro tempore*. That amendment has been disposed of, and the next amendment will be read.

The next amendment of the committee was to add:

For defraying the expenses of negotiating a treaty with the Shoshones or Snake Indians, or so much thereof as may be needed, to be expended under the direction of the Secretary of the Interior, $20,000.

Mr. FESSENDEN. I should like to have some explanation of that.

Mr. DOOLITTLE. This tribe of Shoshones is a very powerful tribe lying in the north and northeast part of Utah Territory, reaching over into Oregon. Part of them are in the State of Oregon, and part of them in Utah. They are upon the emigrant route to Oregon, and are committing depredations more or less continually upon persons going and returning. It has been urged upon us by the Department, and by those who represent that section of the country, especially my friend from Oregon, [Mr. NESMITH,] that in the present situation of affairs there is an absolute necessity that some treaty arrangement should be made with the Shoshones, or otherwise we shall be involved in a war with them. That is really the explanation of it.

Mr. NESMITH. This amendment is of a good deal of practical importance to all the people residing upon the Pacific coast. The Indians, to whom it refers, cover the ground through which emigrant parties to Oregon, Washington, and California must pass to reach there. They are a sort of predatory people. They have no fixed habitation. They run about, fish and hunt, plunder the emigrants, and murder them when an opportunity occurs. There never has been a treaty made with them. They have perpetrated some terrible outrages on emigrants, almost every year for the last fifteen or twenty years, until last year, the Government furnished an escort to emigrants in passing through that country. It has been difficult to bring them to any sort of terms of peace. Troops have been sent against them; but they occupy an immense area of country in the eastern portion of Oregon, and a very large part of the southern portion and all the eastern portion of Washington Territory and a portion of Utah, and extend down in the northern and northwestern portions of California. It is impossible to punish them by military force. Efforts of that kind have been repeatedly made. They say now that if the Government will make them some presents, they are willing to come to terms and permit our people to pass and repass through their country without interruption: and that is the object for which this amendment is incorporated in the bill. With the permission of the Senate, I will read an extract from the report of Superintendent Geary, superintendent of Indian affairs for Oregon and Washington Territories, which will throw some light on this subject:

"The late painful disaster in the Snake country"—

The Snakes and Shoshones are all the same people in fact—

"in which twenty-nine persons, men, women, and children, have fallen by the hands of the savages, or perished by famine and other privations in their efforts to escape from their cruel enemies, accumulates the evidence of the atrocious character of the Snake Indians to whom the communications of this office have so frequently called your attention; and recent information from reliable and authentic sources evince that our relations with the interior tribes are in a precarious state, and that another war will only be prevented by the most assiduous vigilance and care. In this aspect of affairs, the sum of $20,000 for adjusting difficulties, preventing outbreaks, and maintaining peace in this vast region dotted over with a sparse and defenseless population of emigrants, must be regarded as moderate."

The object of this amendment, as I understand, is not for the purpose of making a treaty that contemplates the purchase of any land. In the western portion of the country occupied by this tribe very rich and valuable gold fields have been discovered, and our people are there now working them. There is great danger of their being thus brought in collision with the Indians; and I think the small sum of $20,000 placed in the hands of the superintendent of Oregon, within whose jurisdiction these Indians are, could be used to advantage to prevent hostilities, and permit emigrants to pass through that country.

In answer to the question of the Senator from Maine in relation to the expence of holding treaties generally, I will state that in that country it is an extremely expensive business. In order to reach the country where you must go to treat with them, you must travel some three or four hundred miles by steamboat navigation. The steamboat navigation is difficult. Flour, beef, pork, and sugar are worth from a dollar to a dollar and a half in that region, or were, at the last advices I had from that country. These Indians have to be assembled together. They must be collected and brought in from a vast distance, and the expense of collecting them is considerable. When they get together they have to be fed. In one particular they are very much like members of Congress. When they get together they are not disposed to do business at once, but want to talk for a few days; and two or three days are spent in talking over and considering the different subjects brought before the tribes for their consideration before anything is done. When they get through these preliminaries of talking, they generally proceed with the work of making a treaty. During all this time they must be fed. Their wives and children cannot be abandoned and left without provisions and without supplies. This appropriation contemplates the payment of these expenses.

The Senator from Maine proposed an interrogatory to me why these expenses were so great. I referred him to the Senator from Minnesota, who has just taken his seat, supposing that perhaps he would give him the information he desired. I apprehend the Senator from Maine does not desire that information in detail, as it is a pure question of arithmetic. In the first place we must ascertain the number of Indians, and then the cost of the supplies. Generally the matter of holding treaties with Indians, particularly in remote distances in the interior, is very expensive.

Mr. FESSENDEN. Will my friend allow me to ask him a question?

Mr. NESMITH. Certainly, with pleasure.

Mr. FESSENDEN. He is very familiar with this matter of negotiating treaties with the Indians?

Mr. NESMITH. I have had some experience in that, sir.

Mr. FESSENDEN. Did the Senator ever know or hear of a case where there was any of the appropriation left?

Mr. NESMITH. Yes, sir; there have been a great many instances where there was a balance left of the fund appropriated. I could refer to instances under General Palmer, who was superintendent of Indian affairs in Oregon for several years; I could refer to instances under the superintendency of Governor Stevens, where balances of appropriations were unexpended and paid back to the Treasury. I know a great many instances of the kind. I think this clause is very important, not for the purpose of making any purchase from the Indians, but for the purpose of quieting them and maintaining peace between them and a large population of miners who are now occupying a portion of their country, as well as the emigrants who are crossing the plains.

Mr. DOOLITTLE. In connection with this, I desire to state for the information of the Senate that the Committee on Indian Affairs have instructed me to offer, as an additional section to the bill, a provision that in any treaty engagements hereafter entered into in pursuance of our appropriations there shall be no engagement on behalf of the Government by which the Government is to be bound to pay money to the Indians. It has been a great source of corruption. They are pursued and followed by traders who want to get hold of the money. The section which I shall offer provides that instead of money being paid over to the Indians, whatever is given shall be given in clothing and in such agricultural implements as shall be for their benefit. I thought I would state this because this amendment contemplates the negotiation of a treaty. I do not desire that the Government should enter into treaty negotiations with the Indian tribes by which we are bound to pay them money.

The amendment was agreed to.

The next amendment of the Committee on Indian Affairs was to insert:

For payment to Ta-oah, or White Coat, an Omaha chief, for horses killed by white settlers, $228.

Mr. POMEROY. I wish to inquire of the chairman of the committee whether that comes within the rule. Is it not a private claim strictly? I asked the committee to consider a private claim and have it reported, and they said they could not, because a private claim could not be put on an appropriation bill; but this seems to me to be one, and I inquire whether it is within the rule for us to pay an Indian for what a white person destroys.

Mr. DOOLITTLE. There is some force in the objection taken by the Senator from Kansas that it may be considered a private claim. It is a very small sum, and I prefer not to have that question raised upon it. If it were put in the bill, it might bring in some other large claims that I prefer should be considered by themselves. I withdraw the amendment.

The PRESIDENT *pro tempore*. By general consent it may be withdrawn. The next amendment will be read.

The Secretary read, as follows:

For pay of assistant engineer for Omahas for the fiscal year ending June 30, 1863, $800.

Mr. FESSENDEN. There is a treaty with the Omahas by which we are bound to provide an engineer, miller, &c., and appropriations have been made for that. This does not come under any law or treaty. It is a new idea entirely. I hope it will not be adopted.

Mr. SHERMAN. It is for the purpose of finding some one to attend to the business of the engineer.

Mr. FESSENDEN. While he is attending to other business.

The amendment was rejected.

The next amendment was to insert:

For pay of assistant miller for Omahas, for the same period, $300.

Mr. FESSENDEN. The same objection applies to that.

The amendment was rejected.

The next amendment was to insert:

For this amount to the hands of late agent W. W. Denham, unexpended for, belonging to the Otoes and Missourias, $13,956 07.

Mr. FESSENDEN. What is that?

Mr. WILKINSON. If I understand it correctly, it is——

Mr. DOOLITTLE. Allow me. I was conversing for a moment with the Commissioner of Indian Affairs, whom I have invited to a seat by my side, and he is confident that, in relation to this miller and engineer for the Omahas, the appropriation has not been provided for, and that was the reason why the Department sent in the estimate. I wish to look into it.

Mr. FESSENDEN. I have it before me in the bill.

For eighth of ten installments for support of miller, &c.

Mr. DOOLITTLE. For the Omahas?

Mr. FESSENDEN. Yes, sir.

Mr. DOOLITTLE. Is not an assistant?

Mr. FESSENDEN. There is no treaty provision for any assistant. This is a new suggestion, to have an assistant.

The PRESIDENT *pro tempore*. That amendment has been disposed of.