No. 2007-~~2050~~ 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.

On appeal from the United States Court of Federal Claims,
No. 05-CV-558 (Loren A. Smith, Senior Judge)

BRIEF OF THE UNITED STATES

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STATEMENT OF RELATED CASES

1 *Western Shoshone National Council et al. v United States*, No. 04-0702 (D. Nev. 2006), *appeals docketed,* Nos. 06-16252 and 06-16214 (9th Cir. July, 2006).

2. *Yowell v. United States,* No. 05-0634 (D. Nev. 2006), *appeal docketed,* No. 07-15086 (9th Cir. Jan. 22, 2007).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

FEDERAL STATUTES

FEDERAL RULES

JURISDICTION

Jurisdiction of the Court of Federal Claims – The jurisdiction of the Court of Federal Claims is in dispute. The complaint alleges jurisdiction under 28 U.S.C. § 1331 (federal question jurisdiction); 28 U.S.C. § 1362 (Indian claims arising under Constitution, laws, or treaties of the United States); 28 U.S.C. § 1491 (Tucker Act); and 28 U.S.C. § 1505 (Indian claims against the United States). A19.[1] As set forth below, the United States contends that jurisdiction in the Court of Federal Claims was barred by the Indian Claims Commission Act, 25 U.S.C. § 70u(a) (1976), the statute of limitations in 28 U.S.C. § 2501, and the absence of an applicable waiver of sovereign immunity.

Jurisdiction of the Federal Circuit – The Court of Federal Claims entered final judgment for the United States dismissing the claims on September 20, 2006. A1. Two of the plaintiff-appellants – Western Shoshone National Council and the Timbisha Shoshone Tribe (collectively the "National Council") – filed a notice of appeal on November 15, 2006. Dkt. 32. The other plaintiff-appellants – South Fork Band, Winnemucca Indian Colony, Dann Band, Battle Mountain Band, Elko Band, and Te-Moak Tribe of Western Shoshone Indians (collectively the "South

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[1] In this brief, "A---" refers to the Appellants' Appendix, which is attached to both the brief of the South Fork Band *et al.* and the brief of the Western Shoshone National Council and Timbisha Shoshone Tribe (which is styled "Appellants Initial Brief and Appendix').

Fork Band") – filed a notice of appeal on November 17, 2006.[2] Dkt. 33. Both notices of appeal were timely under Fed. R. App. P. 4(a)(1)(B). This Court's jurisdiction rests on 28 U.S.C. § 1295(a)(3).

ISSUES PRESENTED

The Western Shoshone seek to invalidate a 1977 Indian Claims Commission ("ICC") judgment awarding compensation for the taking of the Western Shoshone's aboriginal lands, and seek additional compensation and other relief under the Treaty of Ruby Valley in connection with those lands. The issues on appeal are:

I. Whether the Western Shoshone's challenge to the ICC final judgment (Count I) is subject to dismissal where (a) it was brought 24 years after the Court of Claims affirmed the ICC judgment, and (b) courts have previously rejected the factual and legal allegations that form the basis for the Western Shoshone's challenge.

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[2] The plaintiff-appellants, most of whom are federally-recognized bands or tribes, filed a single complaint in which they purport to assert the rights of the Western Shoshone tribes under the Treaty of Ruby Valley. A 19-22. The National Council and the South Fork Band have filed separate briefs in this Court. We refer to all the plaintiff-appellants collectively as the "Western Shoshone" except when it is necessary to distinguish between the arguments of the National Council and the South Fork Band.

II. Whether the Western Shoshone have waived their claim for prejudgment interest (Count II) by failing to raise it in their opening briefs, and, if not waived, whether the claim is subject to dismissal for lack of a waiver of sovereign immunity.

III. Whether the Western Shoshone's claims for royalties (Count III), an accounting (Count IV), and breach of fiduciary duty (Count V) are subject to dismissal for lack of jurisdiction and failure to state a claim because they are barred by the jurisdictional and finality provisions of the Indian Claims Commission Act and are premised on a misreading of the Treaty of Ruby Valley.

STATEMENT OF THE CASE

This case is an attempt by the Western Shoshone to relitigate issues that were conclusively decided long ago in the course of decades of litigation in the ICC, the Court of Claims, the United States District Court for the District of Nevada, the Ninth Circuit, and the Supreme Court. The Court of Federal Claims correctly dismissed the Western Shoshone's claims for lack of jurisdiction and failure to state a claim.

A. Statutory Framework

Congress enacted the Indian Claims Commission Act ("ICCA") (codified as amended at 25 U.S.C. § 70 *et seq* (1976 ed.) to "dispose of the Indian claims problem with finality" and to "transfer from Congress to the Indian Claims Commission the responsibility for determining the merits of native American claims." *United States v. Dann*, 470 U.S. 39, 45 (1985) (internal quotation marks and citations omitted). The ICCA vested the ICC with wide-ranging and exclusive jurisdiction to hear all possible historic Indian claims, subject to a strict statute of limitations under which any pre-August 13, 1946 causes of action not brought before August 13, 1951 would be forever relinquished. Specifically, Section 12 of the ICCA provided that:

> The Commission shall receive claims for a period of five years after the date of the approval of this Act [August 13, 1946] 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.

25 U.S.C. § 70k (1976) (emphasis added). *See also Navajo Tribe of Indians v. United States*, 601 F.2d 536, 538 (Ct. Cl. 1979) ("The applicable statute of limitations in the [ICCA] is a jurisdictional limitation upon the authority of the Commission to consider claims.").[3/]

[3/] The Court of Federal Claims has jurisdiction over claims brought by an Indian (continued...)

The ICCA's jurisdiction over such claims is exclusive. *McGhee v. United States*, 437 F.2d 995, 999 (Ct. Cl. 1971); *Navajo Tribe v State of New Mexico*, 809 F.2d 1455, 1464-1470 (10th Cir. 1987) (rejecting "Tribe's assertion that the ICC was only empowered to hear controversies involving a 'taking' of land" and finding the ICCA unambiguously gave the tribe "a five-year period to assert its title to these lands 'or forever hold [its] peace.'") (citation omitted); *Oglala Sioux Tribe of Pine Ridge Indian Reservation v. United States*, 650 F.2d 140, 142-43 (8th Cir. 1981) (upholding dismissal of tribe's action to quiet title to the Black Hills of South Dakota, because "Congress * * * deprived the district court of subject matter jurisdiction by expressly providing an exclusive remedy for the alleged wrongful taking through the enactment of the [ICCA].").

Payment of a claim under the ICCA discharges the United States' liability and bars any further claims. Specifically, Section 22 of the ICCA provides that:

> (1) payment of any claim, after a determination under the Act, *shall be a full discharge of the United States* of all claims and demands touching any of the matters involved in the controversy, and (2) 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(a) (1976) (emphasis added).

[3/](...continued)
group against the United States accruing after August 13, 1946. 28 U.S.C. § 1505.

B. The Treaty of Ruby Valley

In 1863, the United States negotiated the Treaty with the Western Bands of Shoshone Indians, also known as the Treaty of Ruby Valley. Oct. 1, 1863, U.S.-W. Shoshone, 18 Stat. 689; A32-34. The Treaty is one of five similar treaties that the United States negotiated between July and October of 1863 with various groups of Shoshone Indians. *Northwestern Bands of Shoshone Indians v United States*, 324 U.S. 335, 340-42 (1945). These treaties "acknowledged the territories claimed by the Shoshones without 'recognizing' title so as to establish a property interest compensable under the Fifth Amendment." *United States v. Dann*, 873 F.2d 1189, 1200 n. 8 (9th Cir. 1989); *Northwestern Bands*, 324 U.S. at 348 ("Nowhere in any of the series of treaties is there a specific acknowledgment of Indian title or right of occupancy.").

When the treaties were negotiated the Shoshone were "a nomadic Indian nation of less than ten thousand people which roamed over eighty million acres of prairie, forest and mountain in the present states of Wyoming, Colorado, Utah, Idaho and Nevada." *Northwestern Bands,* 324 U.S. at 340. "As the distances made it impracticable to gather the Shoshone Nation into one council for treaty purposes, the [federal] commissioners made five treaties in an endeavor to clear up

the difficulties" – conflicts between the Indians and non-Indian settlers and travelers – "in the Shoshone country." *Id.* at 341-42.[4]

Of particular relevance here, Article 4 of the Treaty of Ruby Valley provided that "the Shoshone[] 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[.]" A33. Article 5 set out the boundaries of "the country claimed and occupied by" the Western Shoshone. A33; *see* A20. Article 6 provided that the Western Shoshone would move to reservations within the country described in Article 5 "whenever the President of the United States shall deem it expedient for them to abandon the roaming life[.]" And Article 7 provided that the United States would compensate the Western Shoshone for their agreement to the terms of the Treaty by paying them $5,000 per year for 20 years. A33-34.

In the years following adoption of the treaties, the United States treated the Shoshone territory covered by the Treaty of Ruby Valley and the other 1863 treaties as part of the public domain. "School lands were granted. National forests were freely created. The lands were opened to public settlement under the

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[4] *See Northwestern Bands of Shoshone Indians v. United States*, 95 Ct. Cl. 642, 1942 WL 4357 (Ct. Cl. 1942), for a detailed discussion of the history and circumstances surrounding the treaties.

homestead laws," and the United States administered the territory "as though no Indian land titles were involved." *Northwestern Bands,* 324 U.S. at 346 (citations omitted); *see also Te-Moak Bands of Western Shoshone Indians v. United States*, 18 Cl. Ct. 82, 83 (1989) ("settlers and other nonnative Americans gradually encroached upon the aboriginal title held by the Shoshones.").

C. Prior litigation

1. The Northwestern Bands litigation.

In 1931, a group of Shoshone bands brought suit in the Court of Claims to recover compensation for the alleged taking of lands they claimed had been secured to them under one the 1863 treaties, the Northwestern Shoshone Treaty of July 30, 1863 (also known as the Treaty of Box Elder). *Northwestern Bands of Shoshone Indians v. United States*, 95 Ct. Cl. 642, 1942 WL4357 (Ct. Cl. 1942), *aff'd,* 324 U.S. 335 (1945). The case, which pre-dated the enactment of the ICCA and creation of the ICC, was brought pursuant to the Act of February 28, 1929, ch. 377, 45 Stat. 1407, which conferred jurisdiction on the Court of Claims to determine claims against the United States "arising under or growing out of" the Treaty of Box Elder and related treaties.

The Court of Claims reviewed all five of the 1863 Shoshone treaties and determined that none conferred any recognition of tribal title or rights of occupancy. *Northwestern Bands,* 95 Ct. Cl. 642, 1942 WL 4357 at *19. The

bands appealed, and the Supreme Court affirmed, holding that:

> [n]owhere in any of the series of treaties is there a specific acknowledgment of Indian title or right of occupancy. It seems to us a reasonable inference that had either the Indians or the United States understood that the treaties recognized Indian title to these domains, such purpose would have been clearly and definitely expressed by instruction, by treaty text or by reports of the treaty commissioners, to their superiors or in the transmission of the treaties to the Senate for ratification.

324 U.S. at 348.

2. Proceedings before the Indian Claims Commission

In 1951, various tribes and bands of the Shoshone Nation, including plaintiff-appellant Te-Moak Band of Western Shoshone, filed a joint petition in the ICC[5/] seeking compensation for the alleged taking of their rights to over 80,000,000 acres of land located in California, Colorado, Idaho, Nevada, Utah and Wyoming. *Shoshone Nation v. United States*, 11 Ind. Cl. Comm'n 387, 419 (1962); *see United States v. Dann*, 470 U.S. 39, 41-42 (1985). The lands for which the petitioners sought compensation included the lands described in the Treaty of Ruby Valley. *Shoshone Nation,* 11 Ind. Cl. Comm'n at 397. The petitioners based their claims on ownership and occupation of the land since time immemorial – aboriginal title – as well as on title and ownership allegedly recognized under the Treaty of Ruby Valley and the other 1863 treaties. *Shoshone*

[5/] The decisions of the ICC are available at http://digital.library.okstate.edu/icc.

Nation, 11 Ind. Cl. Comm'n. at 419; *see Dann*, 470 U.S. at 41-42; *Western Shoshone National Council v Molini,* 951 F.2d 200, 203 (9th Cir. 1991).[6] The petitioners also sought an accounting. *See Te-Moak Bands of W Shoshone Indians ex rel. W. Shoshone Nation,* 18 Cl. Ct. 82, 83 (1989).

In 1957, the ICC found that the Western Shoshone were separate from the other Shoshone and that the Te-Moak Bands were representative of the Western Shoshone. The ICC therefore required the Te-Moak Band to file a separate amended petition on behalf of the Western Shoshone. *See Te-Moak Bands*, 18 Cl. Ct. at 83-84.

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[6] An Indian tribe establishes aboriginal title by showing that it has inhabited the land "from time immemorial." *Mashpee Tribe v. Secretary of the Interior*, 820 F.2d 480, 481-82 (1st Cir. 1987) (quoting *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 234 (1985)). This right does not have to be traced to a written document or land grant, but the tribe must show "historical evidence of the tribe's long-standing physical possession" of the land. *Zuni Indian Tribe v. United States*, 16 Cl. Ct. 670, 671 (1989). Aboriginal title is not fee title, but merely a "right of occupancy which the sovereign [Federal Government] grants and protects against intrusion by third parties." *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 279 (1955). This "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." *Id.*

Specific congressional action is necessary to "'recognize" aboriginal title and convert it to fee title. *Zuni Indian Tribe*, 16 Cl. Ct. at 672. Such recognition is generally accomplished by federal treaty or statute. *Id.* "[T]here is no particular form for congressional recognition of Indian right of permanent occupancy," but there must be a "definite intention by congressional action or authority to accord legal rights, not merely permissive occupation." *Tee-Hit-Ton Indians*, 348 U.S. at 278-79. *See generally Greene v. Rhode Island,* 398 F.3d 49, 50 (1st Cir. 2005).

In 1962, the ICC issued findings of fact holding that the title of the Western Shoshone had been extinguished in the latter part of the 19th century. *Shoshone Nation*, 11 Ind. Cl. Comm'n. at 416; *see Dann*, 470 U.S. at 41-42; *Te-Moak Band of Western Shoshone Indians v. United States* 593 F.2d 994, 999 (Ct. Cl. 1979) (ICC found that "full title extinguishment" occurred in 1872). The ICC determined the number of acres of land taken to be "22,211,753 acres in Nevada, and 2,184,650 acres in California." *Id.* at 996; *see Te-Moak Band*, 593 F.2d at 996. Following a trial on valuation of the land, in 1972 the ICC determined the value of the property taken to be $26,145,189.89, including $4,604,000.00 for minerals extracted from the Nevada land before the date of the taking. *Id.; Te-Moak Bands*, 18 Cl. Ct. at 84. In 1977, the ICC entered a final judgment awarding the Western Shoshone that amount, and in 1979 the Court of Claims affirmed the award. *See Te-Moak Band*, 593 F.2d 994. Thereafter, the Clerk of the Court of Claims certified the ICC's final award to the General Accounting Office, which on December 6, 1979, deposited the amount of the award into an interest-bearing trust account for the Western Shoshone in the Treasury of the United States. *Dann*, 470 U.S. at 42.

In 2004, Congress passed and the President signed into law provisions for the distribution of the ICC award from the trust account. Western Shoshone

Claims Distribution Act, Pub. L. No. 108-270, 118 Stat. 805 (2004). The Act provides "for the use and distribution of the funds awarded to the Western Shoshone identifiable group under Indian Claims Commission Docket Numbers 326-A-1, 326-A-3, and 326-K, and for other purposes," and authorizes the Secretary of the Interior to promulgate implementing regulations. *Id.* at Section 5. On February 16, 2007, the Secretary issued final regulations establishing an enrollment process to allow individuals to file applications to obtain a share of the Western Shoshone judgment fund. 72 Fed. Reg. 9,836 (Mar. 5, 2007). After the submission of applications and establishment of the judgment roll, the Secretary will make a per capita distribution of the fund to the individuals listed on the judgment roll. 118 Stat. 805, Section 3(c)(1).

3. The first attempt to intervene in the ICC proceedings

In 1974, as the ICC proceedings were nearing completion, the Western Shoshone Legal Defense and Education Association[7] attempted to intervene in the ICC proceedings. *Western Shoshone Identifiable Group v United States,* 35 Ind. Cl. Comm'n. 457 (1975). The Association contended that the Western Shoshone's lands were never taken, attempted to repudiate all sums that the ICC found owing

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[7] The Association, a group of Western Shoshone Indians, is not a federally-recognized Indian tribe or band. *See Te-Moak Bands of Western Shoshone Indians of Nevada v. United States,* 18 Ct. Cl. 82, 84 (1989).

to the Western Shoshones, and argued that its constituents still held legal title to the property. *See, e.g., id* at 460. The ICC dismissed the Association's petition after concluding that the Te-Moak Bands properly controlled the litigation on behalf of all Western Shoshone and that the Association's petition was untimely. *Id.* at 477.

The Association appealed the ICC's denial of the intervention petition, and the Court of Claims affirmed, reasoning that intervention should not be permitted because the attempt was made:

> [i]n 1974, some 23 years after this Western Shoshone claim was first made to the Commission [ICC] in 1951, some 12 years after the Commission had decided (in 1962) that the United States had extinguished the claimant's title to the large areas involved, eight years after the Commission had approved (in 1966) the parties' stipulation as to the valuation date of these lands, about one and one-half years after the Commission had determined (in October 1972) the actual value of the property, and about a month after the problem of offsets had been tried and submitted for disposition.

Western Shoshone Legal Defense and Educ. Ass'n, 531 F.2d 495, 498 (Ct. Cl. 1976). The Court of Claims also determined "that there is no doubt whatever that appellants were for a very long time quite aware of the position with respect to the Nevada land taken before the Commission by appellee Te-Moak Bands and its counsel." *Id.* at 497.

4. The Te-Moak Band hires new counsel and seeks a stay in order to change its position in the ICC.

In 1977, following the Court of Claims' affirmance of the ICC's denial of this intervention attempt, the Te-Moak Band itself attempted to change its position in the ICC proceedings in order to assert claims of continued ownership of the claimed acreage on behalf of the Western Shoshone. *See Te-Moak Band*, 593 F.2d at 996. As part of this effort, the Te-Moak Band "terminated the contract with [its prior counsel] Wilkinson, Cragun & Barker" and retained new counsel, who moved for a stay of proceedings in the ICC. *Te-Moak Band*, 593 F.2d at 997. The ICC denied the stay and entered final judgment. *Id.* The Te-Moak Band, represented by its new counsel, then appealed to the Court of Claims, which affirmed the ICC's decision. *Id.* at 997, 1002. The Supreme Court denied certiorari. *Western Shoshone Identifiable Group v. United States,* 444 U.S. 973 (1979).

5. The United States' trespass proceedings against the Danns

In 1974, at the same time that the Western Shoshone Legal Defense and Education Association was seeking to intervene in the ICC proceedings, the United States instituted trespass proceedings against two sisters, Mary and Carrie

Dann, members of an autonomous band of the Western Shoshone,[8] for grazing cattle on federal lands without obtaining grazing permits. *Dann*, 470 U.S. at 43. In response, the Danns claimed that the land had been in the possession of their family from time immemorial and that their aboriginal title to the land precluded the government from requiring grazing permits. *Id.* The case eventually reached the Supreme Court, which held that the United States had paid the award stemming from the ICC's judgment regarding Western Shoshone aboriginal title, and that this payment was "a full discharge" for purposes of Section 22 of the Indian Claims Commission Act. *Dann,* 470 U.S. at 45, 49-50.[9] Accordingly, the Ninth Circuit held on remand that the Danns could not continue to assert aboriginal title as a defense in the United States' trespass action against them:

> Now that the Supreme Court has made it clear that the Western Shoshone claim has been paid, we cannot avoid the rule of [*United States v. Gemmill*, 535 F.2d 1145, 1149 (9th Cir. 1976)] that payment for the taking of a aboriginal title establishes that that title has been extinguished.

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[8] The Dann Band is a plaintiff-appellant in this case. A20.

[9] When the United States initiated the *Dann* litigation in 1974, the ICC had held that the Western Shoshone's aboriginal title had been extinguished in the latter part of the 19th century, and that the land taken totaled approximately 24,000,000 acres, but had not yet issued a final judgment regarding the amount of compensation the Western Shoshone were owed. By the time the *Dann* litigation reached the Supreme Court, the ICC had determined the final award, the award had been certified to the General Accounting Office, and the funds had been deposited into a trust account. *See Dann*, 470 U.S. at 41-42.

* * *

> We reject, therefore, the Danns' attempt to continue to rely on the defense of tribal aboriginal title.

Dann, 873 F.2d at 1194-95 (footnote omitted).

6. The Western Shoshone assert hunting and fishing rights based on alleged aboriginal and treaty title

Despite the foregoing decisions of the ICC, the Court of Claims, the Ninth Circuit, and the Supreme Court, some Western Shoshones continued to claim ownership based on the Treaty of Ruby Valley. In 1986, plaintiff-appellant Western Shoshone National Council claimed hunting and fishing rights based on aboriginal title and treaty title under the Treaty of Ruby Valley and filed suit against the State of Nevada for interference with those rights. *Western Shoshone National Council v. Molini*, 951 F.2d 200, 201 (9th Cir. 1991). The Ninth Circuit rejected those claims. *Id.* at 203. The Court explained that the ICC litigation analyzed claims "based on both aboriginal and treaty-based rights, and ordered compensation for the extinguishment of those rights." *Id.* (citing *Shoshone Nation*, 11 Ind. Cl. Comm'n at 419). The ICC's "general finding that title had been extinguished therefore also operates to bar the Shoshone from asserting hunting and fishing rights based on the Treaty of Ruby Valley." *Molini*, 951 F.2d at 203. The Court emphasized that "the [ICC] award establishes conclusively that

Shoshone title has been extinguished," and any hunting and fishing rights not expressly reserved were subsumed within the title transfer. *Id.*

7. The second attempt to intervene in the ICC proceedings

In 1987, plaintiff-appellant Timbisha Shoshone Tribe and two other Western Shoshone tribes (the Duckwater Shoshone and the Yomba Shoshone) which are not parties in this case attempted to intervene in the ICC proceedings with regard to the accounting claims included in the original petition. *Te-Moak Bands of Western Shoshone v. United States*, 18 Cl. Ct. 82, 83 (1989). By this time, the ICC had been terminated, and the case had been transferred to the Court of Claims and then to the United States Claims Court (now the Court of Federal Claims). *See id.* at 85. Like the Western Shoshone Legal Defense and Education Association in 1974, and the Te-Moak Band in 1977, the proposed intervenors claimed that they owned the land until at least 1979, and that all revenue generated by the land until that date (at least) was owed to the Western Shoshone. *Id.* at 84-85. Accordingly, they sought a general accounting for the United States' alleged misuse of revenues from the land, which had been held in trust by the United States. *Id.* The United States Claims Court denied the motion to intervene as untimely. *Id.* at 89. The court also rejected an attempt by the Te-Moak Bands to add to the ICC proceedings new claims for the alleged loss of water rights. *Te-*

Moak Bands of Western Shoshone Indians of Nevada v. United States, 18 Cl. Ct. 74 (1989).

8. The Western Shoshone's challenge to disposal of nuclear waste based on the Treaty of Ruby Valley

On March 4, 2005, plaintiff-appellant Western Shoshone National Council and certain individuals filed a complaint against the United States, the Department of Energy, and the Department of the Interior in the district of Nevada alleging that a federal plan to dispose of nuclear waste at Yucca Mountain violated the Treaty of Ruby Valley because nuclear waste disposal is not one of the authorized uses for the land set forth in the Treaty. The district court concluded that the plaintiffs had identified no applicable waiver of the United States' sovereign immunity and dismissed for lack of jurisdiction. *Western Shoshone National Council v. United States of America*, 408 F. Supp. 2d 1040, 1052 (D. Nev. 2005).

D. Proceedings and Disposition Below

Litigation in the case now on appeal began in September, 2003, when the plaintiff-appellants filed a complaint in the United States District Court for the District of Columbia. *Western Shoshone National Council v. United States*, 357 F. Supp. 2d 172 (D.D.C. 2004). The complaint sought to quiet title in the Western Shoshone to land delineated in the Treaty of Ruby Valley; a declaration that the ICC's judgment on the Western Shoshone's claims is void; interest and royalties

for the use of the land; and an accounting. *Id* at 174. The D.C. district court granted the United States' motion to transfer the Quiet Title Act claims to the district of Nevada and the remaining claims to the Court of Federal Claims. *Id* at 177.[10/]

The Western Shoshone then filed a five-count complaint, styled "Second Amended Complaint," in the Court of Federal Claims. Dkt. 8, A19. Count I seeks a declaration that the judgment rendered by the ICC regarding the Western Shoshone's claims is void under RCFC 60(b)(4) or otherwise unenforceable. A27-28. Count II is an alternative claim, which seeks, in the event the ICC judgment is held not to be void, $14 billion in prejudgment interest on the ICC's taking award. A28-29. Count III seeks mining royalties and other compensation pursuant to the Treaty of Ruby Valley. A29-30. Count IV seek an seeks 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." A30-31. Finally, Count V seeks damages for the United States' alleged breach of fiduciary duties with respect to Western Shoshone land. A31.

10/ Following the transfer, the district of Nevada dismissed the Quiet Title Act claims, finding them barred by that Act's twelve-year statute of limitations. *Western Shoshone National Council et al. v. United States*, No. 04-0702 (D. Nev. 2006). The National Council and South Fork Band's appeals of that dismissal are pending. *Western Shoshone,* Nos. 06-16252 and 06-16214 (9th Cir.) (consolidated).

The United States moved to dismiss for lack of jurisdiction and failure to state a claim, and the Court of Federal Claims (Senior Judge Loren A. Smith) dismissed in an Order and Opinion dated September 20, 2006. A1, 2. The court held that Count I (seeking relief from the ICC judgment) was untimely both as a motion under RCFC 60(b)(4) and as an independent action. A7. In addition, if not untimely, Count I would fail to state a claim under Rule 60(b), because the Western Shoshone failed to present any evidence that would show a violation of due process or a graving miscarriage of justice that had not already been considered and rejected by federal courts in prior litigation. A8.

With respect to Count II (seeking prejudgment interest), the court rejected the Western Shoshone's underlying contentions that (1) the ICC judgment did not address all of the Shoshone aboriginal title claims, and (2) the Treaty of Ruby Valley conferred recognized title. The court found those contentions inconsistent with the ICC judgment and the Supreme Court's decision in *Northwestern Bands*. As a result, the court concluded that Court II failed to state a claim. A8-10.

The court dismissed Count III (seeking compensation under the Treaty of Ruby Valley) for lack of jurisdiction, finding the claim to be within the exclusive jurisdiction of the ICC and barred by the finality provision of the ICCA. A11. In so holding, the court rejected the Western Shoshone's contention that the ICCA

had been repealed. A12. The court dismissed Count IV (seeking an accounting) on the ground that the Court of Federal Claims lacks authority to order an accounting unless the defendant's liability has been established. And the court dismissed Count V (alleging a breach of fiduciary duty) as untimely under the applicable six-year statute of limitations. The court reasoned that even assuming, *arguendo,* that the United States had owed the Western Shoshone a fiduciary duty, the Western Shoshone were put on notice of the United States' repudiation of any such duty in the 1950s when, in the ICC proceedings, the United States denied that the Western Shoshone had any interest in any of the disputed land. A13-14.

This appeal followed.

SUMMARY OF ARGUMENT

The claims raised in the Western Shoshone's complaint involve issues that were conclusively decided long ago. In 1945, the Supreme Court held that the five treaties negotiated with various bands of Shoshone in 1863 – including the Treaty of Ruby Valley – did not recognize any title in the Indians. *Northwestern Bands,* 324 U.S. at 348. In 1951, after enactment of the ICCA, the tribes of the Shoshone Nation filed suit in the ICC seeking compensation for the taking of their aboriginal lands. In 1962, the ICC determined that the aboriginal title of the Western Shoshone had been extinguished in the latter part of the 19th century. 11 Ind. Cl.

Comm'n. 387; see *Dann*, 470 U.S. at 41-42. In 1972, the ICC determined that the value of the taken property, including the value of minerals extracted before the date of taking, was $26,145,189.89. 29 Ind. Cl. Comm'n. 5. In 1977, the ICC denied belated attempts by dissident Shoshone groups and the Te-Moak Band to raise new claims in the ICC proceedings based on continued ownership of the disputed land, and issued its final judgment. 40 Ind. Cl. Comm'n. 318 (1977). The Court of Claims affirmed in 1979, *Te-Moak Band*, 593 F.2d at 995-96, and the Supreme Court denied *certiorari* that same year. *Western Shoshone Identifiable Group,* 444 U.S. 973. Since then, the Supreme Court and the Ninth Circuit have held in separate litigation that the United States has paid the Western Shoshones' claim under the ICCA, *Dann*, 470 U.S. at 50 and 873 F.2d at 1194, and that the ICC award "establishes conclusively that Shoshone title has been extinguished." *Molini*, 951 F.2d at 203.

The Western Shoshone's current attempt to relitigate these issues is barred by the ICC judgment and suffers from other fundamental defects. In Count I of the complaint, the Western Shoshone seek relief from the ICC judgment under RCFC 60(b)(4). The rule requires, however, that such relief be sought "within a reasonable time." The Western Shoshone cannot satisfy this requirement, because they filed their complaint 24 years after the Court of Claims affirmed the ICC

judgment. Nor is Count I timely if it is characterized as an "independent action" under RCFC 60(b), because any such action is barred by laches. And even if Count I were timely, it would fail to state a claim upon which relief may be granted, because the Western Shoshone's assertions that the ICC judgment violated due process and is a grave miscarriage of justice have been considered and rejected in prior litigation.

The Western Shoshone have waived any challenge to the Count of Federal Claims' dismissal of Count II by failing to raise the issue in their opening briefs. In addition, Count II, which seeks prejudgment interest on the ICC award, is subject to dismissal for lack of subject-matter jurisdiction, because the Western Shoshone have failed to establish the requisite waiver of sovereign immunity for the recovery of prejudgment interest.

Counts III through V, which seek compensation and an accounting based on rights purportedly created by the Treaty of Ruby Valley, are barred because they involve claims that accrued prior to 1946, and therefore could only be brought in the ICC. Counts III through V are also barred by the ICCA's finality provision, which provides that payment of an ICC award constitutes "a full discharge of the United States of all claims and demands touching any of the matters involved in the controversy," and "forever bar[s] any further claim or demand against the

United States arising out of the matter involved in the controversy." And in any event, these counts fail to state a claim upon which relief may be granted, because they are premised on the view that the Treaty of Ruby Valley recognized the Western Shoshone's title, a view which cannot be reconciled with the Supreme Count's decision in *Northwestern Bands.*

Accordingly, the Court of Federal Claims' dismissal for lack of jurisdiction and failure to state a claim is correct and should be affirmed.

STANDARD OF REVIEW

This Court reviews de novo the Court of Federal Claims' dismissal of a complaint for lack of jurisdiction or for failure to state a claim. *Samish Indian Nation v. United States*, 419 F.3d 1355, 1363 (Fed. Cir. 2005); *Boise Cascade Corp. v. United States*, 296 F.3d 1339, 1343 (Fed. Cir. 2002).

RCFC 12(b)(1) provides for dismissal of claims if the court lacks jurisdiction over the subject matter. When considering a motion to dismiss, the trial court must presume that well-pleaded factual allegations in the complaint are true. *Reynolds v. Army & Air Force Exch. Serv.*, 846 F.2d 746, 747 (Fed. Cir. 1988). Nevertheless, "[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)). "[S]ubject matter jurisdiction is strictly construed." *Leonardo v United States*, 55 Fed. Cl. 344, 346 (2003) (citations omitted).

RCFC 12(b)(6) authorizes a court to dismiss a claim on the basis of a dispositive issue of law. *Neitzke v. Williams*, 490 U.S. 319, 326 (1989) (citing *Hishon v King & Spalding*, 467 U.S. 69, 73 (1984)). "[I]f as a matter of law 'it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations,' a claim must be dismissed, without regard to whether it is based on an outlandish legal theory or on a close but ultimately unavailing one." *Neitzke*, 490 U.S. at 327 (quoting *Hishon*, 467 U.S. at 73). Moreover, "a plaintiff's obligation to provide the 'grounds of his entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic v. Twombly,* 127 S. Ct. 1955, 1959 (2007). "Factual allegations must be enough to raise a right to relief above the speculative level," and a plaintiff must make "a 'showing,' rather than a blanket assertion, of entitlement to relief." *Id.* at 1965 and n.3.

ARGUMENT

I. The Western Shoshone's challenge to the ICC judgment (Count I) is subject to dismissal for lack of jurisdiction and failure to state a claim.

A. Count I was not brought within a reasonable time, as required by RCFC 60(b)(4).

Under the ICCA's finality provision, the payment of the Western Shoshone's claim in the ICC litigation constitutes "a full discharge of the United States of all claims and demands touching any of the matters involved in the controversy," and "forever bar[s] any further claim or demand against the United States arising out of the matter involved in the controversy." 25 U.S.C. § 70u(a) (1976 ed.); *see Western Shoshone Legal Defense and Educ. Ass'n*, 531 F.2d at 497, n. 2; *Dann*, 873 F.2d at 1200 (payment of the ICC claim barred plaintiffs "from asserting the tribal title to grazing rights just as clearly as it bars their asserting title to the lands"); *Molini*, 951 F.2d at 203 (ICC finding that the Western Shoshones' title had been extinguished barred the plaintiffs from asserting independent treaty-based rights).

In Count I of their complaint (A27), the Western Shoshone seek to avoid the ICCA's finality provision and set aside the ICC's judgment under RCFC 60(b),[11/]

[11/] RCFC 60(b), which is essentially identical to Fed. R. Civ. P. 60(b), provides in relevant part:

(continued...)

which provides that the Court of Federal Claims may, under certain circumstances, relieve a party from a final judgment. Specifically, the South Fork Band[12/] invokes RCFC 60(b)(4), which provides for relief from a judgment that is "void." Br. at 19. The rule provides, however, that a motion for relief on the ground that a judgment is void "shall be made within a reasonable time." As the Court of Federal Claims correctly found, the Western Shoshone cannot satisfy this requirement, because they filed their complaint in 2003, 24 years after the Court of Claims affirmed the ICC judgment. See *Te-Moak Band*, 593 F.2d at 995-96.

The South Fork Band not does not attempt to justify this 24-year delay, but instead argues that the "reasonable time" requirement does not apply to motions under RCFC 60(b)(4), notwithstanding the express language of the rule. South Fork Band Br. at 21. That argument is incorrect. In *Pueblo of Santo Domingo v. United States,* 647 F.2d 1087 (Ct. Cl. 1981), the Court of Claims addressed

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[11/](...continued)

> (b) On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: * * * (4) the judgment is void[.] * * * *The motion shall be made within a reasonable time*[.] * * * This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment[.]

RCFC60(b) (emphasis added).

[12/] As discussed below, the National Council does not rely on RCFC 60(b)(4), but instead argues that Count I is timely as an independent action under RCFC 60(b).

precisely this issue in the context of an attempt by an Indian tribe to withdraw from a stipulation that certain lands had been taken, which had been entered 12 years earlier in an ICC proceeding. The tribe alleged that its attorney had entered into the stipulation without authorization. The Court of Claims held that the tribe's motion was governed by Ct. Cl. Rule 152(b) (now RCFC 60(b)), which "commands that the motion shall be made within a 'reasonable time'" and "requires 'diligence' upon the part of the moving party." *Pueblo of Santo Domingo,* 647 F.2d at 1089 (citing *Andrade v. United States,* 485 F.2d 660, 664 (Cl. Ct. 1973). The 12-year delay, the Court concluded, was "far too long." *Id* Thus, *Pueblo of Santo Domingo* is directly on point and its holding is controlling here. *See Coltec Indus., Inc., v. United States,* 454 F.3d 1340, 1353 (Fed. Cir. 2006) (Federal Circuit is bound by precedent of the Court of Claims).

South Fork Band argues (Br. at 22) that this Court should nonetheless adopt the position of Judge Nichols in his *Pueblo of Santo Domingo* dissent, where he urged a remand for fact-finding on the tribe's motion to set aside the stipulation. But Judge Nichols' view was premised on critical facts not present in this case, including that the stipulation was contrary to the tribe's original ICC petition, and that the tribe's attempt to withdraw the stipulation was arguably consistent with its

long-standing position in the case. *Pueblo of Santo Domingo,* 647 F.2d at 1090 (Nichols, J., dissenting). Moreover, Judge Nichols explained that he

> would permit the tribe to withdraw the stipulation and vacate the [ICC] decision only on clear and convincing evidence that their original position was as alleged, that they communicated it to counsel in his instructions, that he violated the instructions without notice to them, and that they took timely action when they learned what he had done.

Id.

In this case, in contrast, the position the South Fork Band now seeks to pursue is at odds with the Western Shoshone's long-standing position in the ICC litigation, and the South Fork Band was on notice of this position for over 24 years before filing this action. Accordingly, they would not be entitled to relief under RCFC 60(b)(4) even if the standard articulated in Judge Nichol's dissent were applicable. Indeed, Judge Nichols is the author of the Court of Claims' unanimous decision in *Te-Moak Band of Western Shoshone,* 593 F.2d at 998, which held that the ICC did not abuse its discretion when it denied the Te-Moak Band's 1977 request to stay the ICC litigation to allow the tribe to proceed on its new theory that it still owned much of the land. As that decision explained, the Te-Moak Band's attempt to change its position after 25 years of litigation would have "sidetracked" the case and "would have been contrary to the statutory procedure under which the suit was brought, the intent and purpose of the [ICCA], and the

duty of the federal judicial system to employ its resources economically as well as to achieve the ends of justice speedily." *Id.* at 998-99.

South Fork Band asserts that several courts of appeals have held, notwithstanding the express language of the Rule 60(b), that there is no timeliness requirement for seeking relief from a purportedly void judgment under subsection (b)(4). Br. at 21. None of the cases cited by South Fork Band involved challenges to an ICC judgment, however, and none involved delay as lengthy as the one here at issue. *See Carter v Fenner,* 136 F.3d 1000, 1006 (5th Cir. 1998) (motion filed less that four months after entry of judgment); *New York Life Ins. Co. v. Brown,* 84 F.3d 137, 141 (5th Cir. 1996) (motion filed less than two years after entry of judgment); *Orner v Shalala,* 30 F.3d 1307, 1309 (10th Cir. 1994) (motion filed six months after entry of judgment); *Katter v. Arkansas Louisana Gas Co ,* 765 F.2d 730 (8th Cir. 1985) (in a case not involving Rule 60(b), rejecting a collateral attack brought four years after entry of judgment); *Austin v. Smith,* 312 F.2d 337, 343 (D.C. Cir. 1962) (motion filed less than five years after entry of judgment); *Von Dardel v. Union of Soviet Socialist Republics,* 736 F. Supp. 1, 3 (D.D.C. 1990) (motion filed less that four years after entry of judgment); *Ruddies v. Auburn Spark Plug Co.,* 261 F. Supp. 648, 650 (S.D.N.Y. 1966) (motion filed less than

two and a half years after entry of judgment). And in any event, these decisions, unlike *Pueblo of Santo Domingo,* are not binding on this Court.

B. Count I is untimely as an independent action.

The National Council takes a different tack on the timeliness issue, arguing that Count I is not subject to RCFC 60(b)'s timeliness requirement because it is an "independent action" seeking relief from the ICC judgment. Br. at 12 (quoting RCFC 60(b)). The complaint does not identify Count I as an independent action, however, but instead seeks relief under Rule 60(b)(4). A27-28. Moreover, even if Count I is nevertheless construed as an independent action, the National Council's argument is off the mark. While the RCFC 60(b) requirement that a motion be filed within a reasonable time does not apply to independent actions, the doctrine of laches does apply. *United States v. Beggerly,* 524 U.S. 38, 46 (1998) ("If relief may be obtained through an independent action in a case like this, where the most that may be charged against the Government is a failure to furnish relevant information that would at best for the basis for a Rule 60(b)(3) motion [for relief based on fraud, misrepresentation, or other misconduct of an adverse party], the strict 1-year time limit on such motions would be set at naught."); *see also Andrade v. United States,*485 F.2d 660, 664 (Ct. Cl. 1973) (holding that a 1972

independent action seeking to overturn a 1964 ICC judgment was barred by laches and the six-year statute of limitations in 28 U.S.C. § 2501).

As discussed above, the Court of Claims affirmed the ICC judgment in 1979. *Te-Moak Bands*, 593 F.2d 994. The complaint's challenge to the judgment is based on alleged procedural defects that occurred prior to 1979 during the ICC proceedings. See A27 (Compl. at ¶¶ 49-50, claiming the ICC judgment violated due process because the Western Shoshone (allegedly) were denied the right to change counsel and change and withdraw their claims). The ICC proceedings were, of course, public, and the National Council does not allege that it was unaware of the alleged procedural defects at the time they occurred. Thus, any claims based on these alleged defects accrued prior to 1979, and the National Council's purported independent action based on those alleged defects, filed in 2003, is barred by laches and the statute of limitations.

The National Council also alleges that (1) the ICC judgment never became final because the ICC never submitted a final report of the Western Shoshone judgment to Congress; and (2) the National Council's recent discovery of this "new" fact makes its independent action challenging the judgment timely. Br. at 12, 19; *see* A27 (Compl. ¶ 45). But as the Court of Federal Claims explained, this fact is not new, but is stated in the ICC's 1978 Final Report and in a 1990 book

cited by the National Council, which in turn cites the 1978 ICC Final Report. A6-7. Furthermore, the National Council is mistaken (Br. at 9-10) when it suggests, without citation to authority, that its claim did not accrue until it had actual notice of this fact. To the contrary, "whether the pertinent events have occurred is determined under an objective standard; a plaintiff does not have to possess actual knowledge of all the relevant facts in order for the cause of action to accrue." *Fallini v. United States,* 56 F.3d 1378, 1380 (Fed. Cir. 1995) (citing *Menominee Tribe v. United States,* 726 F.2d 718, 721 (Fed. Cir. 1984)).

Moreover, the absence of a final report does not support the National Council's contention that the ICC judgment never became final, but merely reflects the fact that in 1977 Congress amended the standing appropriations act, 31 U.S.C. § 724a, to include Indian claims awards, thereby eliminating the need for the ICC to provide final reports of its awards to Congress in order to trigger separate Congressional appropriations. *Dann,* 706 F.2d 919, 926 (9th Cir. 1983) (*citing* H.R. Rep. No. 644, 95th Cong., 1st Sess. 53 (1977)), *overruled on other grounds,* 470 U.S. 39. And any suggestion that the ICC judgment was not properly submitted to Congress is untenable given Congress's enactment of the Western Shoshone Claims Distribution Act, Pub. L. No. 108-270, 118 Stat. 805 (2004), which provides for the distribution of the ICC judgment.

Similarly without merit is National Council's unsupported argument (Br. at 9-10) that the Court of Federal Claims was required to accept its characterization of this "new" fact for purposes of the motion to dismiss. As the Supreme Court recently explained, "[f]actual allegations must be enough to raise a right to relief above the speculative level," and a plaintiff must make "a 'showing,' rather than a blanket assertion, of entitlement to relief." *Bell Atlantic,* 127 S. Ct. at 1965 and n.3.

In sum, the Court of Federal Claims held correctly that, if Count I is an independent action, it was untimely.

C. Count I fails to state a claim.

Even if Count I were timely, it would be subject to dismissal for failure to state a claim, because the Western Shoshone failed to allege facts that would entitle them to relief pursuant to Rule 60(b)(4) or in an independent action. As this Court has explained:

> In the sound interest of finality, the concept of void judgment must be narrowly restricted. * * * [A] judgment is void for purposes of 60(b)(4) only when the court that rendered the judgment lacked jurisdiction or failed to act in accordance with due process of law.

Broyhill Furniture Industries, Inc. v. Craftmaster Furniture Corp., 12 F.3d 1080, 1084 (Fed. Cir. 1993) (quoting James W. Moore & Jo Desha Lucas, *Moore's Federal Practice* at ¶ 60.25[2] at 60-255 (2d ed. 1993) (additional citations

omitted)).[13/] Similarly, an "independent action" under Rule 60(b) is available "only to prevent a grave miscarriage of justice." *Beggerly,* 524 U.S. at 47.

The Western Shoshone's complaint falls well short of the required showings, because, as the Court of Federal Claims correctly found (A8), the allegations that form the basis for the challenge to the ICC judgment have already been presented to – and rejected by – the Court of Claims. Accordingly, the Western Shoshone's attempt to relitigate these issues is barred by the doctrines of res judicata and collateral estoppel. Res judicata or claim preclusion provides that a "final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Federated Department Stores, Inc v. Moitie*, 452 U.S. 394, 398 (1981). A final judgment is final "not only as to every matter which was offered and received to sustain or defeat the claim, but as to any other admissible matter which might have been offered for that purpose." *Nevada v. United States*, 463 U.S. 110, 129-30 (1983). The principles advanced by the doctrine of res judicata "are at their zenith in cases concerning real property, land, and water." *Id.* at 129 n.10. Collateral estoppel, or issue preclusion, provides that once a court of competent jurisdiction has decided an issue of fact or law necessary to its judgment, that determination is

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[13/] The Western Shoshone do not allege that the ICC lacked jurisdiction over their claims, so there is no basis for holding the ICC judgment void on that ground.

conclusive in subsequent litigation on a different cause involving a party or a privy to the prior case. *Montana v. United States,* 440 U.S. 147, 153 (1979).

The plaintiffs-appellants in this cases are in privity with – or, in some instances, identical to – the parties in the prior cases. The claims litigated before the ICC and Court of Claims were collective tribal claims brought on behalf of all Western Shoshone. *Te-Moak Bands*, 18 Cl. Ct. at 84; *Western Shoshone Legal Defense and Educ. Ass'n*, 531 F.2d at 499. Likewise, in this case the Western Shoshone seek to litigate tribal claims on "behalf of themselves and the Western Shoshone Nation." *See, e g ,* A21 (Compl. at ¶ 15).

Specifically, in *Western Shoshone Legal Defense & Educ. Ass'n.,* the Court of Claims considered and rejected the argument now raised by the National Council (Br. at 16) challenging the selection of the Te-Moak Band as the representative of Western Shoshone in the ICC proceedings. 531 F.2d at 497 (not a constitutional violation for the ICCA to grant the privilege of representation to recognized tribe), *cert. denied,* 429 U.S. 885 (1976). Likewise, in *Te-Moak Band,* the Court of Claims rejected the argument now raised by the South Fork Band that it was a violation of due process for the ICC to refuse to allow the Te-Moak Band, after many years of litigation, partially to abandon its claim and relitigate under a new theory. *Te-Moak Band,* 593 F.2d at 998 ("The abandonment of an entire

claim at any point with prejudice may well be a claimant's right, but the partial and contingent abandonment of it, after 25 years, without prejudice, when the goal of final adjudication is in sight cannot be."). The *Te-Moak Band* decision also establishes that there is no basis for the Western Shoshone's current assertion (A28, Compl. at ¶ 50) that the Western Shoshone were deprived of the right to be represented by "their counsel of choice." Rather, the new counsel selected by the Te-Moak Band participated in its appeal of the ICC's judgment. *Te-Moak Band,* 593 F.2d at 997.

The Western Shoshone argue (South Fork Band Br. at 24; National Council Br. at 10) that their allegations of a denial of due process and a grave miscarriage of justice raise issues of fact that required the Court of Federal Claims to deny the government's motion to dismiss for failure to state a claim. But mere conclusory assertions are insufficient to defeat a motion to dismiss – particularly where, as here, they are contradicted by prior decisions of the Court of Claims. As the Supreme Court recently held, "a plaintiff's obligation to provide the 'grounds of his entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic,* 127 S. Ct. at 1964-65. "Factual allegations must be enough to raise a right to relief above the speculative level," and a plaintiff must make "a 'showing,'

rather than a blanket assertion, of entitlement to relief." *Id* at 1965 and n.3. In so holding, the Court rejected a literal reading of its earlier statement in *Conley v Gibson,* 355 U.S. 41, 45-46 (1957), that "a complaint should not be dismissed * * * unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." The Court explained that this "phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard." 127 S. Ct. at 1969. In addition, the Court stressed that "[i]t is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through 'careful case management.'" *Id.* at 1967. Instead, the court admonished, courts should "tak[e] care to require allegations" that meet the Federal Rules' threshold pleading requirements. *Id.*

II. The Western Shoshone have waived their claim for prejudgment interest (Count II), which in any event is subject to dismissal for lack of the required waiver of sovereign immunity and is barred by the statute of limitations.

Count II is an alternative claim to Count I. It seeks a declaration that, if the ICC judgment is valid, the Western Shoshone are entitled to $14 billion as pre-judgment interest on the ICC award for the period from 1872 (the date the Western Shoshone's land was taken) until the date of the ICC award. A28-29; *see* South Fork Band Br. at 6. Neither the South Fork Band nor the National Council

specifically address Count II in its brief. Accordingly, any challenge to the district court's dismissal of Count II has been waived. *Becton Dickinson & Co. v. C.R. Bard, Inc* , 922 F.2d 792, 800 (Fed. Cir.1990) ("[A]n issue not raised by an appellant in its opening brief ... is waived.").

In any event, Count II is subject to dismissal for lack of subject-matter jurisdiction, because the Western Shoshone have failed to establish the requisite waiver of sovereign immunity for the recovery of prejudgment interest. *Library of Congress v. Shaw*, 478 U.S. 310, 314 (1986) ("In the absence of express congressional consent to the award of interest separate from a general waiver of immunity to suit, the United States is immune from an interest award."); *Smith v. Principi*, 281 F.3d 1384, 1387 (Fed. Cir. 2002), *cert. denied*, 537 U.S. 821 (2002); *Alaska Airlines, Inc. v. Johnson*, 8 F.3d 791, 798 (Fed. Cir. 1993) ("[I]nterest may not be recovered against the government in the absence of an explicit waiver of sovereign immunity for that purpose."). The ICCA did not include a specific provision waiving sovereign immunity for prejudgment interest, and the ICC was not authorized to award prejudgment interest. *Fort Berthold Reservation v United States*, 390 F.2d 686, 690 (Ct. Cl. 1968) (claimants who recover for a taking of their land pursuant to the ICCA are not entitled to collect interest); *Loyal Band of Group of Creek Indians v. United States*, 97 F. Supp. 426, 431 (Ct. Cl. 1951);

Osage Nation v. United States, 97 F. Supp. 381, 424 (Ct. Cl. 1951). In the absence of such a waiver, the Court of Federal Claims lacked jurisdiction over Count II. *Hercules Inc v United States*, 516 U.S. 417, 422-23 (1996) ("The United States, as sovereign, is immune from suit save as it consents to be sued, and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.") (citations and internal quotation marks omitted).

In addition, Count II is barred by the statute of limitations set out in 28 U.S.C. § 2501, which provides that civil actions against the United States in the Court of Federal Claims must be filed within six years of the accrual of the cause of action. *Andrade v. United States,*485 F.2d 660, 664 (Ct. Cl. 1973) A claim against the United States accrues when all the events have occurred that fix the alleged liability of the defendant. *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1576-77 (Fed. Cir. 1988)). Here, any claim for prejudgment interest would have accrued no later than 1979, when the Court of Claims affirmed the ICC's final judgment.

III. The Western Shoshone's claims for royalties (Count III), an accounting (Count IV), and breach of fiduciary duty (Count V) are subject to dismissal for lack of jurisdiction and failure to state a claim.

Count III alleges that the Western Shoshone are entitled, under Articles 4 and 7 of the Treaty of Ruby Valley, to "royalties on all minerals mined and

extracted from the Western Shoshone Fee Title Land and Western Shoshone Land Base." A29-30. Count IV asserts that "under the Treaty of Ruby Valley and Federal law, the U.S. Government undertook a duty to control and manage the Western Shoshone land," and seeks an accounting of the management of funds received by the United States for the use of that land. A 30. Count V alleges that the United States has breached a (purported) fiduciary duty to the Western Shoshone. A31. These claims are all subject to dismissal for lack of jurisdiction.

A. Counts III, IV, and V are within the exclusive jurisdiction of the ICC and are barred by the finality provision of the ICCA and the statute of limitations.

As described above (pp. 4-5), the ICCA gave the ICC exclusive jurisdiction to hear Indian claims that arose before August 13, 1946, and required that all such claims be presented before August 13, 1951, or forever relinquished. 25 U.S.C. § 70(k) (1976 ed.); *United States v. Lower Sioux Indian Community*, 519 F.2d 1378, 1383 (Ct. Cl. 1975). The Western Shoshone and the United States entered into the Treaty of Ruby Valley in 1863, and the annual payments to the Western Shoshone provided for in the Treaty ended in 1882. 18 Stat. 689; A 34; *see Western Shoshone Legal Defense Educ. Ass'n*, 531 F.2d at 496-97. Accordingly, any claims that the Western Shoshone could have had for royalties, an accounting, or

breach of a fiduciary duty under the Treaty accrued long before August 13, 1946, were within the exclusive jurisdiction of the ICC, and are now barred.

Counts III through V are also barred by the ICCA's finality provision, which provides that payment of an ICC award constitutes "a full discharge of the United States of all claims and demands touching any of the matters involved in the controversy," and "forever bar[s] any further claim or demand against the United States arising out of the matter involved in the controversy." 25 U.S.C. § 70u(a) (1976 ed.); *see Western Shoshone Legal Defense and Educ. Ass'n*, 531 F.2d at 497, n. 2; *Dann*, 873 F.2d at 1200; *Molini*, 951 F.2d at 203. Indeed, the compensation awarded to the Western Shoshone by the ICC included $4,604,600 for removal of minerals from the Nevada portion of their aboriginal lands before July 1, 1872, the date on which the land was deemed taken. *See Te-Moak Band,* 593 F.2d at 999. The ICC proceedings also included a claim for an accounting. *Te-Moak Bands of W. Shoshone Indians,* 18 Cl. Ct. at 83.

The South Fork Band argues (Br. at 35-37) that Count III is not barred because the Treaty is purportedly "ambiguous" as to the payment of royalties after 1882, and Count III seeks royalties accruing after 1946. But even if the South Fork Band's characterization of the Treaty had merit – and it does not – any question as to whether the Western Shoshone have a continuing right to royalties

under the Treaty was conclusively resolved when the ICC (1) found that the Western Shoshone's rights in the land were extinguished n the latter part of the 19th century, and (2) provided compensation from the United States to the Western Shoshone for that "full title extinguishment." *See Te-Moak Band,* 593 F.2d at 999; *Molini,* 951 F.2d at 203 (the ICC award "establishes conclusively that Shoshone title has been extinguished"). Once the United States compensated the Western Shoshone for the taking of the land in 1979, the Western Shoshone lost any right they might otherwise have had to be compensated for the subsequent use of the land.

The South Fork Band's argument that its royalty claim survives the ICC judgment is indistinguishable from the arguments rejected by the Ninth Circuit in *Dann* and *Molini.* In *Dann,* the Ninth Circuit held, on remand from the Supreme Court, that the Dann sisters, who were members of an autonomous band of the Western Shoshone, were barred by the ICC judgment from "asserting the tribal title to grazing rights just as clearly as it bars their asserting title to the lands." *Dann,* 873 F.2d at 1200. In *Molini,* the court rejected the plaintiff-appellant Western Shoshone National Council's argument that the Shoshone had hunting and fishing rights under the Treaty of Ruby Valley that survived the ICC judgment. As the court explained, "[t]he Commission's general finding that title

had been extinguished * * * operates to bar the Shoshone from asserting hunting and fishing rights based on the Treaty[.]" *Molini,* 951 F.2d at 203.

Similarly without merit is South Fork Band's contention (Br. at 46) that its breach of fiduciary duty claim is not barred because "the statute of limitations does not begin to run until the fiduciary relationship is repudiated," and there is a question of fact as to whether that has occurred. If this claim did not accrue in 1882 when the United States ceased making payments to the Western Shoshone under the Treaty, it accrued, at the latest, in the 1950s when the United States took the position in the ICC proceedings that the Western Shoshone did not retain an interest in any of the disputed land. *E g , Western Shoshone Legal Defense and Educ. Ass'n,* 531 F.2d at 500.

Further, because Counts III and V are subject to dismissal for the reasons just discussed, Count IV (the accounting claim) is subject to dismissal for the additional reason that the Court of Federal Claims lacks equitable jurisdiction to order an accounting in the absence of a finding of government liability. *American Indians Residing on the Maricopa-Ak Chin Reservation v. United States*, 667 F.2d 980, 990 (1981); *Klamath and Modoc Tribes v. United States*, 174 Ct. Cl. 483, 1966 WL 8850 *5 (1966) ("To require the Government *ab initio* to render a general accounting on the basis of unproved allegations and before its liability is

determined would convert this proceeding from a suit for money damages to an independent equitable action for a general accounting.").

B. Counts III through V are subject to dismissal for failure to state a claim.

In addition to the jurisdictional defects described above, Counts III, IV, and V also fail to state a claim upon which relief can be granted, because they are premised on the mistaken view that the Treaty of Ruby Valley recognized ownership in favor of the Western Shoshone. *See, e.g.,* A20 (Compl. at ¶¶ 20, 23). The Supreme Court's decision in *Northwestern Bands of Shoshone Indians v. United States* established that recognized title was not conferred by any of the treaties the United States negotiated with various bands of the Shoshone in 1863 – including the Treaty of Ruby Valley. In *Northwestern Bands*, the Northwestern Bands of Shoshone Indians attempted to establish a claim of recognized title based on the Treaty of Box Elder, a treaty of peace and amity similar to the Treaty of Ruby Valley. 324 U.S. at 336-38. In particular, the Northwestern Bands argued that "the permission from the Indians for travel or mining and for the maintenance of communication and transportation facilities by the United States for its citizens" contained in the treaty – and in the Treaty of Ruby Valley – "imply a recognition by the United States of Indian title." *Id.* at 348. Because the five 1863 Shoshone treaties were substantially similar in form and were negotiated as part of a single

effort by the United States to make peace with the entire Shoshone Nation, the Supreme Court reviewed all five treaties to determine whether any of them evinced an intent to confer any recognition of tribal tital or rights of occupancy, and concluded (like the Court of Claims) that the treaties were not intended to recognize such title:

> Nowhere in any of the series of treaties is there a specific acknowledgment of Indian title or right of occupancy. It seems to us a reasonable inference that had either the Indians or the United States understood that the treaties recognized Indian title to these domains, such purpose would have been clearly and definitely expressed by instruction, by treaty text or by reports of the treaty commissioners, to their superiors or in the transmission of the treaties to the Senate for ratification.

Id.

The Western Shoshone's present argument that the Treaty of Ruby Valley recognized title in the Western Shoshone is untenable in light of the directly contrary holding of the Supreme Court in *Northwestern Bands*. *See also Molini*, 951 F.2d at 203 (the ICC considered Western Shoshone claims based on both aboriginal and treaty-based rights, and its "general finding that title had been extinguished therefore also operates to bar the Shoshone from asserting hunting and fishing rights based on the Treaty of Ruby Valley.").

Lastly, Count V is subject to dismissal for the additional reason that it fails to allege a viable claim for breach of fiduciary duties. The Western Shoshone

claim that the United States owes them fiduciary duties regarding monies derived or obtained from the Western Shoshone land or monies that should have been received or earned by the United States but was not because of mismanagement. A 31. The Western Shoshone cannot show that they presently own the roughly 60 million acres that they contend is Western Shoshone land, however, as the district of Nevada has dismissed their suit seeking to quiet title to that land. *Western Shoshone National Council et al. v. United States*, No. 04-0702 (D. Nev. 2006), *appeals docketed,* Nos. 06-16252 and 06-16214 (9th Cir. July 2006) (consolidated); *see* n.10, supra. In addition, the Western Shoshone have failed to cite to any statute, regulation or treaty that imposes a specific obligation on the United States to manage these lands as Indian trust land. Nor have they shown that the remedy of money-damages could be fairly inferred from the source of law creating the duty. To state a claim that falls within the waiver of sovereign immunity provided by the Tucker Act, the Western Shoshone "must invoke a rights-creating source of substantive law that 'can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained.'" *United States v. Navajo Nation*, 537 U.S. 488, 503 (2003) (quoting *United States v. Mitchell*, 463 U.S. 206, 218 (1983)); *United States v. White Mountain Apache Tribe,* 537 U.S. 465, 472 (2003). In the absence of such law, Count V must be

dismissed for failure to state a claim upon which relief could be granted. *Navajo Nation*, 537 U.S. at 506.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Federal Claims should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to FRAP 32(a)(7)(B), I certify that the foregoing brief was produced using Times New Roman 14 point typeface and contains 11,488 words.

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CERTIFICATE OF SERVICE

I hereby certify that on July 2, 2007, copies of the foregoing Brief of United States were served by first-class U.S. mail, postage prepaid, upon counsel at the address listed below:

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