UNITED STATES COURT OF APPEAL S
FOR THE FEDERAL CIRCUIT

2007-5020

WESTERN SHOSHONE NATIONAL COUNCIL, and TIMBISHA SHOSHONE TRIBE,
Plaintiffs-Appellants,

and

SOUTH FORK BANK, 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 U.S. COURT OF FEDERAL CLAIMS
in 05-CV-558, Senior Judge Loren A. Smith.

SECOND CORRECTED

APPELLANTS INITIAL BRIEF AND APPENDIX

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UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

WESTERN SHOSHONE NATIONAL COUNCIL,
Appellant,

vs.

UNITED STATES,
Appellee.

Case No.: **2007-5020**

CERTIFICATE OF INTEREST

(1) Full Name of Every Party Represented by HAGER & HEARNE.

(a) Western Shoshone National Council: and

(b) Timbisha Shoshone Tribe

(2) The real party in interest Shoshone Nation which of members of the Western approximately 10,000.

(3) Corporate disclosure: Not applicable.

(4) The names of the partners who have appeared for the party in the lower tribunal and are expected to appear for the party in the Federal Court of Appeals.

(a) Robert R. Hager, Esq.

(b) Treva J. Hearne, Esq.

DATED this 26th day of March, 2007.

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I.

CERTIFICATE OF STATUS OF RELATED CASES

(1) *Raymond Yowell v. United States of America*
United States Court of Appeals for the 9th Circuit
Case No.: 07-15086
District Court Case No.: CV-05-00634 LRH-VPC

(2) *Western Shoshone National Council, Raymond Yowell, Allen Moss, Joe Kennedy, John Wells, Carrie Dann, Johnny Bob and Benny Riley, and the Timibisha Shoshone Tribe, et al. v. United States of America*
United States Court of Appeals for the 9th Circuit
Case No. 06-16214
District Court Case No.: 04-00702-LRH

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II.

STATE OF SUBJECT MATTER AND APPELLATE JURISDICTION

The Federal Court of Claims was the proper jurisdiction over the matter because the cause of action arises under, including, but not limited to, 28 USC § 1331, 1362, 2201 and 2409a. This is a civil action brought by Indian Tribes, bands and individuals and arises under the Constitution, treaties and agreements between the United States and the Tribe, federal common law and federal statutes. The cause stated herein touch upon a Treaty between the United States of America and the Western Shoshone people.

JURISDICTION OF THE COURT OF APPEALS

The jurisdiction of this Appeal is properly with the Federal Circuit Court of

Appeals pursuant to Title 28 USC 41. The Court of Appeals has jurisdiction from final decisions of the Court of Claims pursuant to 28 USC 1291. This appeal is taken from an Order dismissing the claims of the Plaintiffs.

III.

STATEMENTS OF ISSUES ON APPEALS

(1) Is the Motion to Re-open the Western Shoshone claims under RCFC 60(b)(4) timely because it was filed within reasonable time?

(2) Was there a "grave miscarriage of justice" done to the Western Shoshone in the proceeding before the Indian Claims Commission?

(3) Is the Ruby Valley Treaty still in full force and effect and did it recognize the lands of the Western Shoshone.

IV.

STATEMENT OF THE CASE

The Appellants consist of Native American tribes, bands, groups and individuals all of whom are part of the Western Shoshone Nation. Since

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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 brought in this action seek 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 and transferred on May 18, 2005 (Appendix, page15). The Complaint consisted of six counts, two of which were to quiet title. It was amended as of right pursuant to Fed.R.Civ.P. 15(a), on December 8, 2003. 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 Court of Federal Claims The D.C. District Court issued a Memorandum Opinion and Order dated July 30, 2004, granting the Government's Motion. As a result, the quiet title claims were transferred to the District of Nevada, the remainder of the claims were transferred to the Federal Court of Claims (Appendix, page 15). On July 15, the Complaint was stamp filed (entitled Second Amended Complaint) against USA (Appendix, pages 16 and 19). USA filed a Motion to Dismiss on August 27, 2005. (Appendix, page 16).

Once the case had been transferred to the Court of Claims, two groups of Western Shoshone parties each filed an Opposition to Motion to Dismiss on different issues. One of these groups included the South Fork Bank, Winnemucca Indian Colony, Dann Band, Te-Moak Tribe of Western

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Shoshone Indians, Battle Mountain Band and Elko Band. (Appendix, page 17). Hereafter, for ease of reference, this group shall be referred to collectively as the "South Fork Band"). The other group consisted of the Western Shoshone National Council, Raymond Yowell, Allen Moss, Joe Kennedy, John Wells, Carrie Dann, Johnny Bobb, Benny Riley and the Timbisha Shoshone Tribe., Second Amended Complaint. (Appendix, page 19); (for ease of reference this group shall hereafter be referred to collectively as the "Western Shoshone National Council"). The pleadings of the South Fork Band and Western Shoshone National Council each raise separate and distinct claims against the United States relating to the Treaty of Ruby Valley, and the rights provided and recognized thereunder.

After the parties had filed briefs on this Motion, the District Court issued an Order dated September 20, 2006 granting the United States' Motion to Dismiss in its entirety. (Appendix, page 18). A final judgment in favor of the United States was entered. (Appendix, page 1). Notices of Appeal were timely filed by the Western Shoshone National Council and the South Fork Band.

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STATEMENT OF THE FACTS

The Plaintiffs herein adopt the statement of facts in the opening brief of the Plaintiffs referred to as the "South Fork Band."

SUMMARY OF THE ARGUMENT

The Western Shoshone have asked the Federal Court of Claims to hear their claims to the rents and profits made by the United States and its emigrants on the lands that were recognized as Western Shoshone lands in the Ruby Valley Treaty of 1863. The Western Shoshone further asked the Court to set aside all decisions based upon the erroneous Claims Commission hearings that were not lawfully submitted to Congress and upon which the Western Shoshone have been unfairly denied their rights to

their lands and profits.

ARGUMENT INCLUDING STANDARD OF REVIEW

I.

The Western Shoshone have asked the Court to set aside the cases that were supported by the Indian Claims Commission findings because the Indian Claims Commission's process was fundamentally unfair.

Based upon this strict construction of the rules regarding dismissal of an action based upon lack of jurisdiction, the Western Shoshone people respectfully request that this Court reverse the dismissal granted by the United States Court of Federal Claims. Never have the claims of the Western Shoshone been litigated with all the facts and issues properly before a court of appropriate jurisdiction; and, without the erroneous and expansive mis-statements of the United States clouding the real issues. For reasons set out below, the Courts have heard matters regarding the Ruby Valley Treaty piecemeal and without a complete history of the facts. The United States of America has failed to provide the facts known to it about the flaws in the Indian Claims Commission, hereinafter "ICC," process and these facts are now known to the Plaintiffs. These flaws taint the use of all cases that depend upon that ICC ruling as support for a dismissal of the Western Shoshone claims.

The lower Court complained that the National Council's attorney did not present sufficient evidence that the National Council discovered information that was substantial to the determination of the courts recently and filed timely based upon that discovery. The Court chastised counsel for making these statements without further evidence. This was argument on a motion to dismiss. If the Court needed more evidence or if there was any

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question of the sufficiency of the evidence, then the Court should not have ruled on the Motion to Dismiss. That is not the stage of litigation where sufficiency of evidence can be determined.

The core of the 60 b motion is that a "grave miscarriage of justice" has occurred. That is what the ***Beggerly***[1] case holds and that is the standard that the Court required. Without evidence, the Court cannot determine if a grave miscarriage of justice has occurred. The National Council's allegations that a grave miscarriage of justice had occurred must be accepted as true at the stage of the litigation where a Motion to Dismiss is before the Court.

Moreover, the Court cannot determine an objective standard of the availability of the documentation. The two references referred to by the Court, as mentioned; whether the ICC Final Report was readily available or the information as listed actually gave notice to the Shoshone National Council are questions of fact not appropriate for determination in an Motion to Dismiss.

The National Council would also provide evidence of failure of representation by any counsel, counsel appointed by the United States to represent a small and non-representative segment of the Western Shoshone Nation. In further support of the fairness of setting aside the ICC order, the Dann decision and its progeny for the reason that evidence will shoe that the United States knew of the failure of the ICC to file a final report on the Western Shoshone, but did not disclose that information to any court.

The treaty of Ruby Valley of 1863 described the lands of the Western

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[1] ***United States v. Beggerly,*** 524 U.S. 38, 118 S.Ct. 1862; 141 L.Ed.2d 32 (1998) at page 1868.

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Shoshone, give the emigrants the right to cross the lands, and conduct certain activities on the land.

The United States District Court of Nevada declared in 1986 that the Treaty of Ruby Valley was in full force and effect, (Appendix, p. 17), filed by the Shoshone National Council on January 11, 2006, Exhibit 1 thereto, [as to Motion to Dismiss, page 3, line 1], (Appendix, p. 17, #22).

Plaintiffs are entitled relief from the ICC decision and all subsequent court decisions premised thereof, as the proceeding before the ICC was fraught with error. In particular, the United States Supreme Court in the *Dann* case, ***United States v. Dann***, 470 US 39; 105 S.Ct. 1058; 84 L.Ed. 2d 28 (1985) made its decision under the presumption that the ICC had filed its final report, and that final report had been adopted by Congress as required for finality of adjudication under the ICC Act. The *Dann* Court could not as a matter of law have found finality in the absence of the final ICC Report. Congress had mandated the filing of a final report by th ICC in order to assure fairness, due process and equal protection for the Indian claimants in every ICC proceeding. The failure to file a final ICC report deprived the Western Shoshone Nation of the requisite congressional review of the fairness of the ICC proceeding prior to finality and; therefore, renders the entire procedure of Congress and the ICC null and void.

Furthermore, the Western Shoshone National's fundamental rights of substantive and procedural due process and equal protection were blatantly violated in the ICC proceeding. These violations included the government (1) designating the individuals who would be deemed to represent the Western Shoshone Nation, (2) choosing the attorneys who would represent those individuals, (3) restricting the claims which would be allowed, and (4) entering into stipulations which were unsubstantiated by any plausible facts.

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Because the ICC decision did not follow the process required by law, the alleged decision was invalid. With these new facts and the new evidence that have finally been discovered and revealed by these Plaintiffs, this Court to set aside the *Dann* decision because the ICC decision was not final and all reliance upon it has been a fiction. The United States as a party knew or should have known, by virtue, of the information available to it, that the ICC decision was not a decision at all, was not final and the parties herein were not adequately represented, but the United States failed to reveal this to any Court wherein this issue has arisen.

The reason that the litigation over the lands of the Western Shoshone continues is because no Court has ever had the entire flawed progression of events before it. This is the first case involving issues related to the recently discovered lack of a final ICC report and the effect of that fatal defect on the ICC decision and the *Dann* decision, which raises an issue contemplated in F.R.C.P. Rule 60(b), where relief from a judgment founded on "mistake, inadvertance...or newly discovered evidence" may be obtained by "an independent action." The United States failed to take the elemental steps to extinguish Indian title by the proper treaty procedure. The United States attempted to overcome this failure by a sham Indian Claims Commission proceeding total constructed by the government and not approved by the Western Shoshone. It is entirely upon this flawed and unfair process that the defendant, United States, supports its argument that the Western Shoshone lands have been ceded or extinguished as well as all rights under the Treaty, and that a "grave miscarriage of justice" has occurred.

The defendant further refused to allow the Temoak Band to amend their claims the United States opposed the amendment of that sought to establish Western Shoshone ownership of lands, and additional flagrant

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violation of a litigant's rights to decide upon which claims to pursue in any given proceeding. For purposes of this case, the *Dann* case is not *res judicata* to the lands issues, but merely a determination that the ICC award was final as to unspecified parties.

The substance of Western Shoshone land rights have never actually been litigated. The United States Supreme Court did not overturn the 9th Circuit holding to this effect when it reversed the Circuit Court decision on other grounds, expressly noting that:

> ...[w]hatever may have been the implicit assumptions of both the United States and the Shoshone Tribes (sic) during the litigation ...the extinguishment question was not necessarily in issue, it was not actually litigated, and it has not been decided. ***United States v. Dann,*** 470US at 43-44, quoting 572 F.2d 222, 226-227.

The Supreme Court decision in *Dann*, supra, thus left intact the Ninth Circuit holding on the substantive issues of Western Shoshone land rights. That holding was the issues had never been litigated. The Supreme Court rested its reversal of the Ninth Circuit decision on an interpretation of the ICC Act, 25 USC § 70u(a)(1976 ed), and on an assertion that the United States may act as a "trustee" for the Danns. The Plaintiffs look forward to a trial on the merits of whether the United States has been in a "trustee" relationship with the Western Shoshone Nation for any of its members. This is an issue of fact not appropriate for a Motion to Dismiss.

II.

The Western Shoshone have suffered "a grave miscarriage of justice."

The Supreme Court of the United States, in ***United States v. Dann,*** 470 US 39 (1985), "deemed" Western Shoshone land rights extinguished when the Secretary of the United States Department of the

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Interior accepted a monetary award of the ICC as "trustee" for the claimants in the ICC Docket 326-K. The Plaintiffs alleges as follows:

(1) the ICC violated the Treaty of Ruby Valley, due process and equal protection rights of the Western Shoshone;

(2) Plaintiffs in this action are not in privity with the claimants in the ICC proceeding;

(3) The Supreme Court decision in *Dann* is premised on fundamental factual error, in that there was never a "final report" of the Western Shoshone proceeding filed, as required by Congress; and

(4) The reasoning of the Supreme Court in *Dann* is premised on a doctrine of religious discrimination, in violation of the United States Constitution and international human rights and covenants.

The Supreme Court made its ruling in *Dann* without the critical evidence that the ICC process had never been completed. The absence of the final report was a material flaw in the preservation of the due process rights of the Western Shoshone and a fundamental flaw in the acceptance of any money by the United States as an alleged "trustee" on behalf o the Western Shoshone people.

The deprivation of rights to members of the Western Shoshone Nation was undertaken solely on the basis of their categorization as members of an "Indian tribe," which Plaintiffs allege as a racial and ethnic distinction in violation of the United States Constitution. The theory, then advocated by the government, that payment may be "deemed" to have been made to the Temoak Band, a small band of Western Shoshone, does not suffice to transfer Western Shoshone land rights to the United States. Even

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if factual payment occurred—which it has not—payment alone does not guarantee that a land right gets conveyed to one party and extinguished as to another. The flaw in this reasoning can be demonstrated by example; payment could be made to one who purports to be the holder of the entire land right when in fact that right (or part of it) may lie elsewhere, and therefore, the elsewhere land right is not extinguished. Often, inadequately described lands are purportedly conveyed, but that fails to extinguish land rights:

> A purported conveyance is not one in fact unless it contains a description from which a competent person can locate the land intended to be conveyed and can distinguish it from all other land. 4 Casner, *American Law of Property*, sec. 18.34 (1952).

Such is the case with the Western Shoshone lands. The "facts" of the so-called "taking" of Western Shoshone lands, which would include the boundaries of the lands so taken, were never determined:

> Because an average "taking date" was stipulated, the Commission did not determine the facts of taking for any individual parcel of the vast aboriginal holdings of the Western Shoshone. ***United States v. Dann***, 706 F.2d 919, 924 (9th Cir. 1983).

Defendants allege that "Plaintiffs' claims are barred by the exclusive jurisdiction and finalty of the ICC award." citing Section 22 of the ICC Act (Appendix, 16, #13). However, Defendants fail to note the key element in achieving "finality" under the ICC Act, which is the filing of a Final Report with Congress.

> When the final 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. 60 Stat. 1055, 25 USC 70u(1976),

Plaintiffs allege that no ICC Final Report was ever filed with Congress in the Western Shoshone case, Docket 326-K. On September 30, 1978,

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Congress dissolved the ICC. In 1979, the ICC's overall "Final Report" to Congress was published. In a footnote to the charge, the Commission notes that twenty of the 324 dockets were "not report to Congress as completed." Western Shoshone Docket 326-K is not one of the "not reported" cases. See, H.D. Rosenthal, **Their Day in Court: A History of the Indian Claims Commission**, 266-267 (1990).

Probably due to the Supreme Court's limited inquiry into the *Dann* facts, the technical question of "payment" (i.e. the effect of transfer of funds into a judgment account), the absence of a Final Report was apparently never briefed or argued and never discovered. Plaintiffs allege that they are not bound by the decisions of the ICC regarding "claims" and "awards" made by and for the Temoak Band. The United States made no effort to provide representation for the Western Shoshone Nation.

The intent of the ICC law is allowing a few or fragment members of a Tribe to represent the whole of the Nation was so that all claims could be heard. The intent of Congress was not to allow the United States to appoint a few who agreed with the United States position to substantive for the whole of a Nation that disagreed with the United States position.

The United States, rather than deal with the Western Shoshone forthrightly on the lands issue, has taken various cowardly and back door approaches to these issues. First, the United States tried to railroad the ICC decision by appointing and paying attorneys that represented the Temoak Band of the Western Shoshone issue even after the Band tried to fire them. The United States simply stated that it didn't recognize the firing opposing counsel. This is a violation of a litigant's fundamental right to be represented by counsel of his or her own choice.

The Western Shoshone have exclusively been ignored, deprived of a

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reservation, deprived of their land and profit from their lands. This sad profile of the United States resentment of the Western Shoshone can only be described as a "grave miscarriage of justice."

III.

The Treaty of Ruby Valley is Still in Full Force and Effect

The United States engaged a process to extinguish Indian title to lands settled by emigrants to the lands historically inhabited by the indigenous peoples of North America. The United States historically entered into a treaty wherein the Indian tribe would cede any rights to their lands in exchange for a reservation or other consideration. This language of cession is not present in the Treaty of Ruby Valley.

The Court relies upon the Court's declarations in *Northern Bands of Shoshone Indians v. United States,* 324 US 335 (1945). The Court simply glosses over the Supreme Court's reference to the group of treaties, where it appeared to exclude the Treaty of Ruby Valley. The Supreme Court said, referring to the Northwestern Shoshone Treaty: "Before [The Northwestern Shoshone Treaty] or the other treaties were ratified by the Senate an additional article was added to each and, except for one treaty not further involved here, accepted by the Indians. 324 US at page 344. The Senate in addition in the other Treaties which read as follows."

> "Nothing contained herein 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. [324 US 335, 344].

Treaties found in the Statues at Large contain the Senate Amendments. The Eastern, Northwestern and Shoshoni-Gaship treaties all carry the Senate amendment referred to hereinabove by the Court. The

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Western Shoshoni Treaty does not carry this amendment. The only amendment to the Western Shoshone Treaty is that the Senate filled in the blank in Article 8 with the word 'five' to set the dollar amount of provisions and clothing. Clearly, the Court caught the fact that the Western Shoshone Treaty was different. To ignore that exclusion of the Ruby Valley Treaty by the Supreme Court is a wrong interpretation of this case.

Moreover, the decision in *Northwestern Bands* is quite narrow, focused on the technical question whether the rights of the petitioners in that case "arise under or grow out of the Box Elder treaty," pursuant to a special jurisdictional act of Congress of February 28, 1929, 45 Stat. 1407." 324 US at 354. The Treaty of Ruby Valley, other than being referenced as one of several treaties with different parts of the Shoshone Nation, is, in the words of the opinion itself, "not further involved," in the ***Northwestern Bands*** decision. The decision in *Northwestern Bands,* whatever its merits in regard to the Box Elder Treaty and jurisdictional issues is not sufficient ground for the lower Court to have dismissed the Complaint.

Finally, the technical ruling in *Northwestern Bands* interpreting the jurisdiction act rested on an anomalous theory of treaty interpretation: The Court looked in the Treaty for "a special acknowledgment of the Indian title or right of occupancy...clearly and definitely expressed." 324 US at 348. This interpretive viewpoint is at odds with the controlling theory of treaty interpretation that was announced in the earliest Indian law cases and continues to this day.

In ***Chactoaw Nation v. US***, 119 US 1(1886) the Supreme Court reaffirmed the doctrine stated by Justice McLean in ***Worchester v. Georgia***, 6 Pet. 515, 582 (1832): "The language used in treaties with the Indians should never be construed to their prejudice." At page 27. The

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Court reaffirmed this rule of treaty interpretation in ***Minnesota v. Mille Lacs Band of Chippewa Indians***, 526 US 172 (1999), the Supreme Court stated simply, "we interpret Indian treaties to give effect to the terms as the Indians themselves would have understood them." This doctrine is repeated in cases to numerous to recount.

The anomalous ruling in *Northwestern Bands*, being contrary to controlling doctrine of treaty interpretation for Indian treaties (and being in any event inapplicable to the one treaty excepted from the Court's analysis), was not sufficient ground for the Court to dismiss the Complaint and conclude that the Western Shoshone have no rights under the Treaty of Ruby Valley.

The Treaty of Ruby Valley is in full force and effect.

CONCLUSION AND STATEMENT OF RELIEF SOUGHT

The reason that the litigation over the claims of the Western Shoshone continues is because no Court has ever had before it the entire flawed progression of events in the ICC proceedings and the Dann case. This is the first case involving issues related to the recently-discovered lack of a final ICC report and the effect of that fatal defect on the ICC decision and the DANN decision, which raises an issue contemplated in FRCP 60(b), where relief from a judgment founded on "mistake, inadvertance...or newly discovered evidence, "may be obtained by an independent action." The United States failed to take the elemental steps in extinguishing Indian title by the proper treaty procedure. The United States attempted to over come this failure by a sham ICC proceeding totally constructed by the government and not approved by the Western Shoshone.

Dated this 26th day of March, 2007.

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P 32(a)(7)(C) and the Ninth Circuit Rules 32-1, the attached opening brief is:

1. Proportionately spaced with a typeface of 14 points or more, in Georgia font, generated in the WordPerfect 12 word processing software, and contains approximately 4989 words and 724 lines.

DATED this 26th day of March, 2007.

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PROOF OF SERVICE

Pursuant to FRCP 5, NRCP 5(b) and CA Code of Civil Procedure 1013a(a)I certify that I am an employee of the law offices of HAGER & HEARNE, 910 Parr Boulevard, Suite 8, Reno, Nevada 89512, and that on this date, I served the foregoing document(s) described as follows:

CORRECTED APPELLANTS INITIAL BRIEF AND APPENDIX

On the party(s) set forth below by:

_x___ Placing an original or true copy thereof in a sealed envelope placed for collection and mailing in the United States Mail, at Reno, Nevada, postage prepaid, following ordinary business practices.

____ Facsimile (FAX) to: _____

____ Federal Express or other overnight delivery.

____ E-filing pursuant to _____ District Electronic Filing Procedures.

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PROOF OF SERVICE

Pursuant to FRCP 5, NRCP 5(b) and CA Code of Civil Procedure 1013a(a)I certify that I am an employee of the law offices of HAGER & HEARNE, 910 Parr Boulevard, Suite 8, Reno, Nevada 89512, and that on this date, I served the foregoing document(s) described as follows:

SECOND CORRECTED APPELLANTS INITIAL BRIEF AND APPENDIX

On the party(s) set forth below by:

_x___ Placing an original or true copy thereof in a sealed envelope placed for collection and mailing in the United States Mail, at Reno, Nevada, postage prepaid, following ordinary business practices.

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PG 21A

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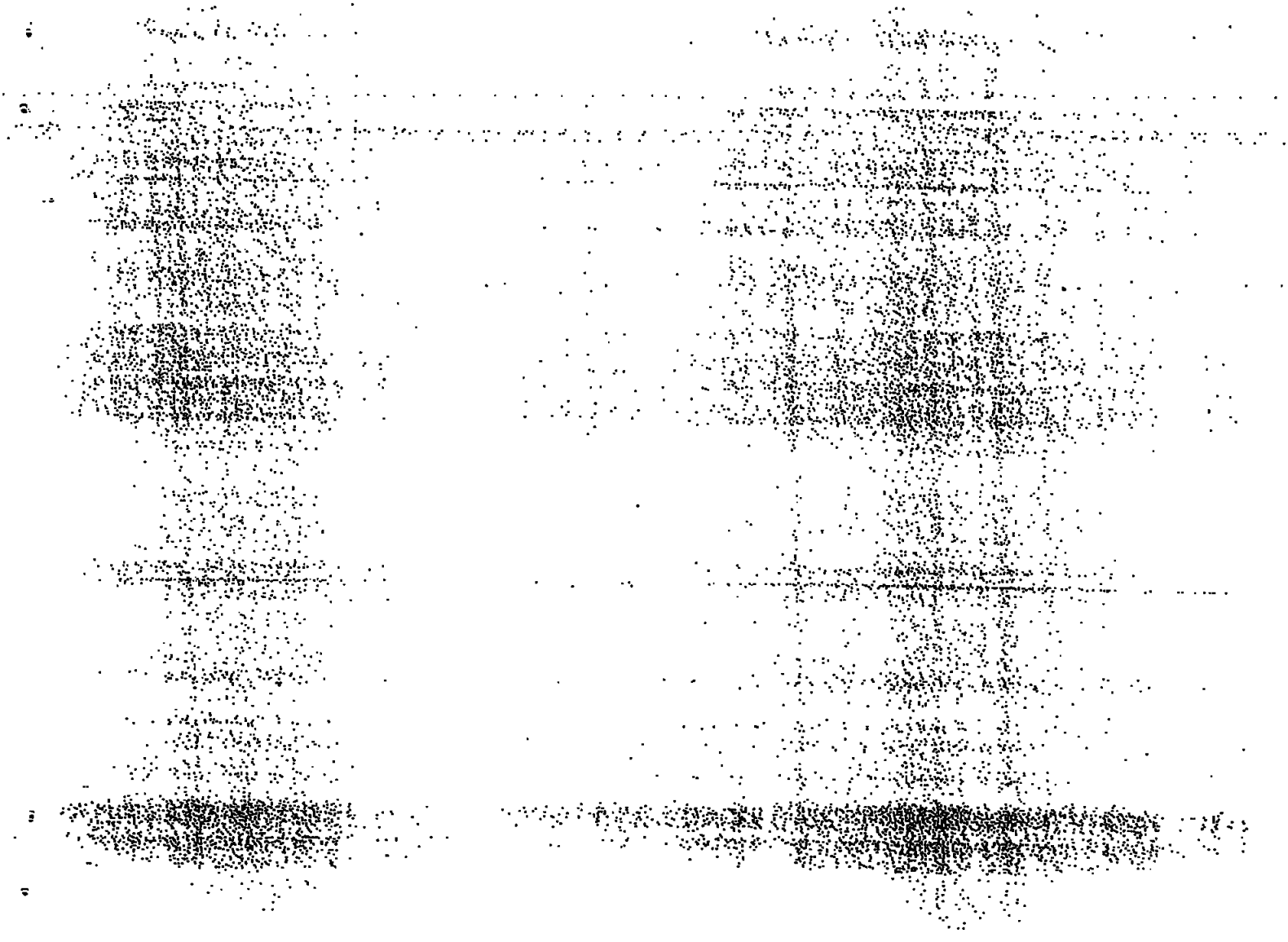
APPENDIX



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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: Tina Lee Price 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, Winnemucca Indian Colony, Duck Band, Te-Moak Tribe of Western Shoshone Indians, Battle Mountain and Elko Band.

Mona 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 Gorman*, 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

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[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 upon, 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

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[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, Yomba Shoshone Tribe, Duck Valley 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 judgment or order that is not the result of clerical error. The text of RCFC 60 distinct time limitations. As relevant here, a motion for relief based on "newly dis... must be filed 'not more than one year after the judgment, order, or proceeding was ... RCFC 60(b). Further, with regard to a motion seeking relief from a void judg... 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 these 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." *Cohen Indus., Inc. v.*

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[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." *Cohen Indus., Inc.*, 484 F.3d at 1333; *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 but 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 counte
alternative to Count I, and is predicated upon the following two
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

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[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 abori[illegible] acres cannot withstand the fact that the ICC determined that [illegible] same land. As discussed above, aboriginal title requires [illegible] exclusive occupancy and use of the land, therefore, it is im[illegible] original title to the same land. The ICC held that the Sh[illegible] the Western Shoshone, held aboriginal title to land extendi[illegible] the Western Shoshone identifiable group's northeastern bo[illegible] and Western Shoshone boundary line . . . ; thence in a direct[illegible] about 7 this held aboriginal title to lands from Wendover, [illegible] one group's boundary line . . . ; thence south along the Wes[illegible] ada; thence east . . . . *Id.* at 413. Further, in other cases, [illegible] ute and the Indians of California held aboriginal title to other tracts within the 60, [illegible] luding all of the land in California not established as Western Shoshone land in *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 right, 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
Treaty of Ruby Valley. Defendant argues that this Count is barred
finality provision of the ICCA. Defendant argues that because this
award for minerals removed from the land, § 22 bars this Count.
Ind. Cl. Comm. 318, 452 (1977). Plaintiffs[8] argue that the fin

[8] These arguments are the South Fork Band's. The Natior
specifically, but it does expressly incorporate all of the South

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.

Counsel, 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 Court 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[2] ask the Court to
proceeds from disposition or use of the land,
in accordance with Section 4 of the Treaty of Ruby
Court lacks the necessary equitable jurisdiction to
is established. Plaintiffs respond that the Court n
and V, and may therefore retain jurisdiction. F
Defendant took an inconsistent position in the di
its position.

[2] 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[18] 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. *Menominee 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 his obligations under the trust." *Jones v. United States*, 801 F.2d 1334, 1336 (Fed. Cir. 1986) (citation omitted).

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[18] 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

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[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**
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Date Filed	#	Docket Text
05/18/2005	1	Case transferred in from the United States District Court for the District of Columbia (Washington, D.C.); Case Number 03-CV-2009. Original file certified 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: 05/18/2005)
06/08/2005	3	Consented MOTION to Substitute Attorney Jeffrey M. Herman in place of Albert 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 Complaint, 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 by 7/15/2005. Signed by Judge Emily C. Hewitt. (mb2,) (Entered: 06/13/2005)
07/14/2005	6	NOTICE of Appearance by Sara Elizabeth Culley for USA. Service: 7/14/2005. (mb2,) (Entered: 07/18/2005)
07/14/2005	7	NOTICE of Directly Related Case(s) [76-325L], 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 by 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)
12/08/2005		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, BATTLE MOUNTAIN BAND. Attorney Jeffrey M. Herman terminated. (signed 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)

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IN THE UNITED STATES COURT OF FEDERAL CLAIMS

WESTERN SHOSHONE NATIONAL COUNCIL, et al.,

Plaintiffs,

v.

UNITED STATES OF AMERICA,
Defendant.

No. 05-558L
Judge Emily C. Hewitt

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

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, 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." 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 wherever 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.

The Indian Claims Commission

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.

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 rel[illegible] a duty as fiduciary to invest funds coming into the [illegible] trust 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 guaranteed 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 understood that the same may be continued without hindrance, molestation [illegible]

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-no-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, going to and from the settlements, and mining settlements, are willing to [illegible]

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-hora,
Kirk-pendgwa, his x mark.
To-nag, his x mark.
To-se-wee-se-op, his x mark.
Sow-gre-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. R. 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.

WESTERN SHOSHONE LANDS
= Western Shoshone Communities
G R E E
LAKE

Solicitor - Indian Affairs

Acting Director, Office of Trust Responsibilities - BIA NOV 1 2 [illegible]

Land Status, Western Shoshone Indians

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

Mr. Delahanty 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. Delahanty 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.

[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:

[illegible]

Mr. FESSENDEN. [illegible]

Mr. DOOLITTLE. [illegible]

[illegible]

The Snakes and Shoshonees 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 official 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 $24,000 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 expense 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 [illegible] him to the Senator from Minnesota, who has just taken his seat, supposing that perhaps he would give him the information he desired. [illegible] the Senator from Maine does not desire [illegible] 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 districts 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. Has he ever been 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 would 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 of a great many instances of the kind. I think this [illegible] is very important [illegible] 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-sah, or White Cow, an Omaha chief, for horses killed by white settlers, $60.

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; but it is a very small sum, and I prefer not to have the question raised upon it. If it were put in the bill it might [illegible]

[illegible]

The PRESIDENT *pro tempore*. [illegible]

[illegible]

Mr. FESSENDEN. [illegible]

[illegible]

Mr. SHERMAN. [illegible]

[illegible]

Mr. FESSENDEN. [illegible]

[illegible]

Mr. FESSENDEN. The same objection applies to that.

The amendment was rejected.

The next amendment was to insert:

[illegible]

Mr. FESSENDEN. [illegible]

Mr. DOOLITTLE. [illegible]

[illegible]

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