No. 2007-5020

UNITED STATES COURT OF APPEAL S
FOR THE FEDERAL CIRCUIT

WESTERN SHOSHONE NATIONAL COUNCIL,
and TIMBISHA SHOSHONE TRIBE,

Plaintiffs-Appellants,

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

Plaintiffs-Appellants,

v.

UNITED STATES,

Defendant-Appellee.

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

CORRECTED
REPLY BRIEF OF APPELLANTS
WESTERN SHOSHONE NATIONAL COUNCIL
and TIMBISHA SHOSHONE TRIBE

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I.

The Western Shoshone have correctly requested to set aside the *Dann* decision pursuant to Rule 60(b)(4)

The government argued in the 9th Circuit that the only Court with jurisdiction to overturn the ICC decision is the Federal Court of Claims. The Federal Court of Claims is not the only Court that could overturn the decision in ***Dann,*** but according to both parties, this Court can overturn a decision pursuant to Rule 60(b)(4) in this matter. The government has continually misunderstood which decision the Plaintiffs have asked to be set aside. Since the Plaintiffs maintain that no final decision was ever reached by the ICC (notwithstanding the government's argument that if the Senate allocated the money, then that was the end of the discussion), it is not the ICC decision that is attacked, but the 9th Circuit and Supreme Court decision. The ***Dann*** decision began by the United States suing the Dann sisters in the United States Federal District Court, District of Nevada. The Supreme Court has long ago adopted the policy that the District Court does not need appellate leave before reopening a case

under Rule 60(b).[1]

Rule 60(b) relief is specifically appropriate when there has been a mistake, for example when the Supreme Court, the 9th Circuit and other courts believed that the ICC had entered a final judgment, when it did not. [2] Rule 60(b) relief is specifically appropriate when there has been mistake, inadvertence or fraud, for example where the ICC did not file the required final report with Congress, and the parties did not advise the 9th Circuit nor the Supreme Court of that fact prior to their rulings in the ***Dann*** case.

The argument that these parties cannot seek Rule 60(b) relief because they were not parties to the ***Dann*** nor the ICC action is also incorrect. A non party may seek relief from a judgment if the non party's

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[1] ***Standard Oil Co. Of California v. U.S.,*** 429 U.S. 17, 97 S.Ct. 31 (1976).

[2] ***SEC v. ESM Group,*** 835 F.2d 270 (11th Cir. 1988). This court has held that the elements of an independent action are (1) a judgment which ought not, in equity and good conscience, to be enforced; (2) a good defense to the alleged cause of action on which the judgment is founded; (3) fraud, accident or mistake which prevented the defendant in the judgment from obtaining the benefit of his defense; (4) the absence of fault or negligence on the part of defendant; and (5) the absence of any adequate remedy at law.

interests are directly affected.[3] The Western Shoshone National Council represents the Western Shoshone people and are directly affected by any claims or judgments that affect their right to their lands.

The government also argues that there is no waiver of sovereign immunity that would give this Court jurisdiction over the parties to set aside the ***Dann*** decision. The United States sued the Dann sisters. The United States waived any sovereign immunity challenges by initiating the litigation against the Dann sisters. A Rule 60(b) motion is appropriate without any further waiver of sovereign immunity. The United States is subject to the jurisdiction of this Court on this matter.

The government argues that under no circumstances could the Motion have been filed in what would be considered a "reasonable time" as required by the Rule. The government filed a generic report in a sea of bureaucracy when it filed any information regarding the ICC. At least one court has stated that if the government wants to forfeit land, it must bear the burden of demonstrating that procedures were used to give

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[3] ***Yak Native Village v. Exxon***, 25 F.3d 773 (9th Cir. 1994). Also see, ***Supermarket of Homes v. San Fernando Valley Board,*** 786 F.2d 1400 (9th Cir. 1986)

notice to the parties that were reasonably likely to effect actual notice.[4] The lax rules of representation of Tribes and Indian people before the ICC were surely adopted to include as many claims as possible, not to exclude rightful persons from actual claims in a fair and open process as was done to the Western Shoshone.

II.

Manifest injustice will result if the Court's prior ruling is allowed to stand.

The Honorable Bruce Thompson, presiding in a case involving the Western Shoshone specifically found that the United States had admitted that the Ruby Valley Treaty was still in full force and effect **after the *Dann* decision was returned from 9th Circuit and the United States Supreme Court.**.

The contractual obligations and declarations of the Ruby Valley Treaty are relevant and do support the request by the Western Shoshone for a declaratory judgment on their rights under the Treaty.

The Western Shoshone National Council prays that this Court consider that the Organization of American States has asked the

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[4] ***U.S. v. One Toshiba Color Television***, 213 F.3d 147 (3rd Cir. 2000)

questions that this Court should ask of the United States, although not binding on the Court, and demand to know why the rights of the Western Shoshone have been violated by the United States.[5] This should be

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[5] Excerpts from the CERD committee letter of the United Nations to the United States of America, August 19, 2005:

1. Has the 1863 Treaty of Ruby Valley been abrogated in whole or in part, and, if so, following which process? According to information received, the State party considers that this Treaty was not intended to acknowledge Shoshone title to lands covered by it, a reading of the legal situation contested by the Western Shoshone people. Please comment on the divergence of views, and explain how the State party reconciles its position with the principle that Indian treaties shall be construed in favor of the Indians.

2. The State party reportedly maintains that the Western Shoshone people lost their rights to ancestral lands, as identified in the 1863 Treaty, as a result of "gradual encroachment" by non-Native Americans. Has such "gradual encroachment" been demonstrated in relation to Western Shoshone land? How does the State party reconcile this position with its obligations under article 5(d)(v) of the Convention to guarantee the right of everyone, without discrimination, to own property alone as well as in association with others?

3. Please provide information on the decisions of the Indian Claims Commission (ICC) regarding Western Shoshone ancestral land, and, bearing in mind article 5(a) and (c) of the Convention, indicate to what extent Western Shoshone people were informed about the proceedings before the ICC and whether they were parties and/or participated in them.

4. Please report on the content of the 2004 Western Shoshone Claims Distribution Act, and on how the State party has reacted to the protests formulated by Western Shoshone people against this legislation. Is the proposed compensation included in the Bill fair and adequate?

See U.S. Department of State, Reply of the United States of America to Questions from the UN Committee on the Elimination of Racial Discrimination, 6 August 2001, p. 1-2.5.

5. Please outline the scope of Western Shoshone access to judicial process to assert their title to land and other rights related to its use and occupation.

6. The imposition of grazing fees, trespass and collection notices, horse and livestock impoundments, restrictions on hunting and fishing as well as arrests are reported to be inflicted on the Western Shoshone people while using what they claim as their ancestral lands. Please comment on this information, and explain the reasons why, if confirmed, these actions have been carried out.

7. Please inform the Committee on action taken by the State party to respond to the Committee's concern with regard to plans for expanding mining and nuclear waste storage on Western Shoshone ancestral land, and with placing their land up for auction for privatization.

8. How does the State party deal with land and resources having cultural and spiritual significance for indigenous peoples? In this regard, please provide information on the draft Bill H.R. 2869 "Northern Nevada Rural Economic Development and Land Consolidation Act 2003", and the reasons for its presentation, as well as on legislative discussions, if any, regarding the reform of the General Mining Law of 1872, 17 Stat. 91 (1872).

9. Please also provide information on the reported decision of the State party to expand mining activities in the Mount Tenabo area and to store nuclear waste in Yucca Mountain.

10. Which measures has the State party adopted in order to follow up on the Committee's recommendation that the State party ensure effective participation by indigenous communities in decisions affecting them, including those on their land rights? In this regard,

persuasive to this Court in the Western Shoshone's present prayer for relief to this Court to reconsider its decision. The Court can dismiss and apply the liberal amendment rules embodied in Fed. Rule Civ. Proc., Rule 15, that would allow the Plaintiffs herein to amend and present these claims to the Court as stand alone claims that will finally root out the decidedly unfair process that the United States has foisted upon the Western Shoshone through the ICC, no final decision, suing the Dann sisters and not bringing this to the Court's attention, and, finally, as the Honorable Bruce Thompson found, that the United States admits that the terms of the Ruby Valley Treaty are in full force and effect. The United States needs to stand to answer why the terms of the Ruby Valley Treaty have been ignored and now denied with such a cavalier attitude from that same United States that admitted that the Treaty stood intact in the very recent past.

The basic tenet of our democracy is the fairness with which we treat the people least able to defend themselves. Until very recent history, the Indian tribes of America were treated with disdain and kangaroo courts

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please explain whether discussions have been undertaken with the Western Shoshone people with a view to finding solutions acceptable to them.

that made a mockery of the justice that this country extends to its other citizens. This Court has the opportunity to reverse and remand for findings in the Court of Claims regarding whether the circumstances of not finding out that the ICC process was defective until recently was a reasonable time within which to file this Rule 60(b)(4) request to set aside the prior cases. This Court has the opportunity to reverse and remand for findings in the Court of Claims whether the lands of the Western Shoshone were taken from them without due process or whether, in fact, the Western Shoshone still retain the reversionary rights to their lands recognized by the Treaty of Ruby Valley.

WHEREFORE THE ABOVE-STATED REASONS, the Western Shoshone National Council, et al, respectfully request that the Court reverse and remand this matter to the Court of Claims with direction to hear the claims of the Western Shoshone people.

DATED this 15th day of August 2007.

RESPECTFULLY SUBMITTED

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CERTIFICATE OF COMPLIANCE

Pursuant to FRAP 32(a)(7)(B), I certify that the foregoing brief was produced using Georgia 14-point typeface and contains 1,854 words.

TREVA J. HEARNE

CERTIFICATE OF SERVICE

I hereby certify that on August 14th, 2007, two (2) copies of the foregoing Reply Brief of Appellants Western Shoshone National Council and Timbisha Shoshone Tribe were served by first class U.S. mail, postage prepaid, upon counsel at the addresses listed below:

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