CORRECTED

2010-5150

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

THE SHOSHONE INDIAN TRIBE OF THE
WIND RIVER RESERVATION, WYOMING,

Plaintiff-Appellant,

and

THE ARAPAHO INDIAN TRIBE OF THE
WIND RIVER RESERVATION, WYOMING,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

Appeal from United States Court of Federal Claims in consolidated case nos. 79-CV-4582 and 79-CV-4592, Chief Judge Emily C. Hewitt.

BRIEF OF PLAINTIFFS-APPELLANTS

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Counsel for Northern Arapaho Tribe

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Form 9

FORM 9. Certificate of Interest

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

The Shoshone Indian Tribe of the Wind River Reservation, WY v. United States

No. 2010-5150

CERTIFICATE OF INTEREST

Counsel for the (petitioner) (appellant) (respondent) (appellee) (amicus) (name of party) The Shoshone Indian Tribe of the Wind River Reservation, WY certifies the following (use "None" if applicable; use extra sheets if necessary):

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

The Shoshone Indian Tribe of the Wind River Reservation

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

The Shoshone Indian Tribe of the Wind River Reservation is the real party in interest.

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

None.

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

Harry R. Sachse, Lead Counsel; William F. Stephens, Associate Counsel
Sonosky, Chambers, Sachse, Endreson & Perry, LLP

9/7/2010
Date

Signature of counsel

Harry R. Sachse
Printed name of counsel

Please Note: All questions must be answered

cc: _____

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Form 9

FORM 9. Certificate of Interest

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Shoshone Indian Tribe v. U.S.

No. 2010-5150

CERTIFICATE OF INTEREST

Counsel for the (petitioner) (appellant) (respondent) (appellee) (amicus) (name of party) Arapaho Indian Tribe certifies the following (use "None" if applicable; use extra sheets if necessary):

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

The Arapaho Indian Tribe of the Wind River Reservation, Wyoming

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

N/A

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

None

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

Law firm: Ziontz, Chestnut, Varnell, Berley & Slonim;
Attorneys: Richard M. Berley and Brian W. Chestnut

September 7, 2010
Date

Signature of counsel

Richard M. Berley
Printed name of counsel

Please Note: All questions must be answered

cc: Harry Sachse; Terry Petrie

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STATEMENT OF RELATED CASES

Appellants – the Eastern Shoshone Tribe and the Northern Arapaho Tribe (together, the "Tribes") – filed this action in the United States Claims Court in 1979. This Court has heard one prior appeal in this overall action, although not in this consolidated subdocket. In *Shoshone Indian Tribe v. United States*, Nos. 03–5036, 03–5037 (April 7, 2004), the panel consisted of Circuit Judges Rader and Gajarsa and Senior Circuit Judge Archer. The Court's decision is reported at 364 F.3d 1339 (Fed. Cir. 2004) ("*Shoshone II*"). Counsel for Appellants know of no other case pending in this Court or any other court that will be directly affected by the Court's decision in the current appeal.

JURISDICTIONAL STATEMENT

The Court of Federal Claims has subject matter jurisdiction over the Tribes' claim under 28 U.S.C. § 1505, as a claim brought by Indian Tribes under the laws of the United States – including the Act of Aug. 21, 1916, Pub. L. No. 64-218, 39 Stat. 519 ("1916 Act"), concerning oil and gas production on the Wind River Reservation in Wyoming; and the Indian Mineral Leasing Act of 1938, Pub. L. No. 75-506, 52 Stat. 347, 25 U.S.C. §§ 396a-396g ("1938 Act"), applicable to Indian reservations nationwide.

The Court of Federal Claims entered its initial Judgment below on May 28, 2010, following an Opinion and Order dated May 27, 2010. On June 23, 2010, the

Tribes filed a timely Motion to Alter or Amend Judgment and for Rule 54(b) Certification. The court below granted the Motion on August 5, 2010, and entered an Amended Judgment on August 6, 2010. The lower court's decision is reported as *Shoshone Indian Tribe v. United States*, 93 Fed. Cl. 449 (May 27, 2010) ("*Shoshone III*"), which includes its Order Amending Opinion and Judgment. The Amended Judgment was a final decision by the Court of Federal Claims under Rule 54(b) with respect to all unresolved claims in the consolidated subdocket below, nos. 79-CV-4582 and 79-CV-4592.[1] The Tribes filed a timely Notice of Appeal on August 24, 2010. This Court has appellate jurisdiction under 28 U.S.C. § 1295(3).

INTRODUCTION

The Secretary of the Interior – at the request of the British-American Oil Company and the Husky Refining Company, and without considering the detriment to the Tribes or the illegality of the transaction – approved the "conversion" of seven productive 1916 Act leases on the Wind River Reservation into 1938 Act leases. In so doing, the Secretary violated both Acts, the regulations under both Acts, and the 1916 Act leases. The Government now admits that it had "no legal authority" to make the "conversions." *See* note 19, *infra.*

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[1] Claims remain in other subdockets of the originally filed case (79-CV-458 and 79-CV-459), but the Court of Federal Claims directed entry of judgment in this consolidated subdocket as a final decision pursuant to Rule 54(b).

The 1916 Act (as well as the 1916 Act regulations and lease provisions) require the Secretary to condition lease renewal, at the expiration of the initial 20-year term and every ten years thereafter, on the lessee accepting "*reasonable terms and conditions*" set by the Secretary. 1916 Act, § 2. Through this expiration and renewal provision, the Secretary over the years significantly raised royalties to the Tribes and released unproductive acreage as 1916 Act leases across the Wind River Reservation progressed. Under the seven "converted" leases, on the other hand, royalties to the Tribes were frozen at their initial rate of 12½ percent, because 1938 Act leases are held indefinitely so long as minerals are produced in paying quantities, with no opportunity to adjust the royalty rate. Moreover, 1938 Act leases by statute and regulation require competitive bidding, which the Secretary admittedly did not carry out in the seven "conversions" to 1938 Act leases.

The Secretary approved the seven "conversions" in 1948 and 1949. The Tribes had no reason at that time to question the legality or know the harm of these "conversions." The Interior Department's representative provided the Tribes with misleading explanations and statements about the "conversions" – at meetings when the Tribes were unrepresented by counsel, had no independent minerals consultant, and relied wholly on the United States to represent them as trustee. In "converting" the leases, the Secretary also changed the lease identification

numbers and forms, and nothing thereafter indicated that these seven parcels ever had 1916 Act leases. Later, when the Department determined that such "conversions" were illegal, it never so advised the Tribes or corrected the "conversions." The United States admittedly has never provided an accounting of the Tribes' overall mineral income or production, much less the income or production from individual leases or parcels. Therefore, no accounting ever showed the "conversions" or demonstrated the losses thereby incurred.

The Tribes filed this case in 1979. The Tribes' attorneys identified the first "conversion" in 1983. The rest of the "conversions" – and the extent of the injury to the Tribes – only became clear after that, when experts hired by the United States and the Tribes for this litigation (with the help of compulsory discovery rules) began putting together a minerals inventory of all the leases on the Reservation by property description or parcel. The experts identified the seven "conversions" and compared the income from the "converted" leases with unconverted 1916 Act leases in the same fields. While the United States denies liability and the experts provide differing calculations, the principal losses appear to exceed $20 million. We refer to the Tribes' losses as a result of these illegal "conversions" as Claim II.

The Court of Federal Claims ruled that Claim II is time-barred, granting the Government's motion for judgment on the pleadings and dismissing the Tribes'

summary judgment motion to establish liability as moot. *Shoshone III*, 93 Fed. Cl. at 464. This ruling is erroneous. The United States has never produced an accounting and instead affirmatively misled the Tribes. Moreover, the ruling does not even mention that the United States now admits the "conversions" were illegal. The "conversions" were direct violations of statutory, regulatory, and lease terms – not merely a failure to get the highest possible price on a trust asset – and therefore are within the scope of a series of Interior Appropriations Acts that delay accrual of claims until an accounting is provided. For these reasons, Claim II did not accrue until after this suit was filed. At minimum, Claim II extends to all losses from 1973 (six years before the suit was filed) to the final date at issue in this subdocket, because the Secretary allowed the oil companies to extract minerals under void leases, an ongoing trespass against the Tribes and therefore a continuing claim.

STATEMENT OF THE ISSUES

The issues presented in this appeal are:

1. Should the Tribes' claims based on illegal lease "conversions" be barred by the six-year statute of limitations in 28 U.S.C. § 2501 – where the Government as trustee wrongly advised the Tribes that the "conversions" were both legal and advantageous; where the Government as trustee did not inform the Tribes when the Government later determined "conversions" were improper;

where the Government as trustee never provided an accounting to the Tribes to demonstrate the resulting losses; and where the Tribes first discovered the illegality of the "conversions" and resulting losses well after filing this suit?

2. Do the Interior Appropriations Acts defer accrual of Claim II as a loss to trust funds, where the Government failed to enforce lease terms, regulations, and statutes in administering leases and admittedly has never provided an accounting to the Tribes?

3. Do the Tribes have a continuing claim beginning in October of 1973 against the Government for failing to remove oil and gas trespassers, since the "converted" leases are unlawful and void?

STATEMENT OF THE CASE

The Tribes initially filed separate actions in the United States Claims Court on October 10, 1979, asserting claims that the Government mismanaged the Tribes' mineral estate and trust funds. The actions were consolidated and then divided into phases. One phase addressed sand and gravel. Another, "Oil and Gas Phase One," primarily addressed failure to collect royalties as required by the leases and regulations for the period from October 10, 1973, forward. Both of these prior phases have been fully resolved by settlements, at times with the assistance of court decisions. In one such decision, *Shoshone Indian Tribe v. United States*, 51 Fed. Cl. 60 (2001) ("*Shoshone I*"), the Court of Federal Claims

addressed the limitations provisions of the Interior Appropriations Acts which are also addressed in this appeal. As addressed in greater detail below, this Court affirmed in part and reversed in part in *Shoshone II*, 364 F.3d 1339 (Fed. Cir. 2004).[2]

"Oil and Gas Phase Two" addressed pre-1973 oil and gas royalty collection, and also a series of discrete oil-and-gas issues – including Claim II, the lease "conversion" issue which is the subject of this appeal. All other claims in Oil and Gas Phase Two have been settled.

The Government moved for judgment on the pleadings as to Claim II, asserting Claim II is barred by 28 U.S.C. § 2501, the six-year statute of limitations. The Tribes filed a motion for summary judgment on liability for illegal "conversion" of the leases. The Court of Federal Claims dismissed the Tribes' lease conversion claims as barred by the statute of limitations, and held that the Tribes' motion for summary judgment was moot. *Shoshone III*, 93 Fed. Cl. at 464.

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[2] Other decisions by the court below, not directly addressed in this appeal, are reported as follows: 52 Fed.Cl. 614 (2002) (preserving sand and gravel claims); 56 Fed.Cl. 639 (2003) (addressing Government's alleged duty to maximize revenues and whether take-or-pay settlement is royalty-bearing); 58 Fed.Cl. 77 (2003) (addressing cooperative agreement between Tribes and Minerals Management Service, "major-portion" analysis and other issues); 58 Fed.Cl. 542 (2003) (holding certain claims not estopped); 71 Fed.Cl. 172 (2006) (following appellate ruling on limitations, permitting amendment of pleadings to cover earlier time periods).

STATEMENT OF FACTS

The Tribes share an undivided interest in the Wind River Reservation, including oil and gas deposits. *Shoshone II*, 364 F.3d at 1342. This appeal relates to seven parcels on which the Secretary approved unlawful "conversions" of 1916 Act leases to 1938 Act leases, resulting in the Tribes' losing millions of dollars of royalty revenue.

1. 1916 Act. To enable the Tribes to benefit from oil and gas development on "ceded" lands, Congress passed the 1916 Act, which authorized the Secretary to lease these lands with proceeds to go to the Tribes.[3] The 1916 Act established a periodic expiration and renewal process. Any lease under the Act would have a 20-year primary term, and thereafter the lease-holder would have a "preferential right . . . to renew the same for successive periods of ten years each upon such reasonable terms and conditions as may be prescribed by the Secretary of the Interior." 1916 Act, § 2.

The renewal provision gives the Secretary periodic opportunities to protect the Tribes' interests – including by increasing the Tribes' royalty rate. On productive parcels this helps ensure that on renewal the Tribes receive a fair

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[3] A 1905 statute opened certain lands (the "ceded" lands) for potential settlement by non-Indians under the homestead, town-site, coal, and mineral land laws or by sale for cash, with proceeds to be paid to the Tribes. Act of March 3, 1905, Pub. L. No. 58-185, 33 Stat. 1016. Undisposed of "ceded" lands have since been restored to the Tribes. *See infra* at 10.

increase after an oil company lessee recovers development costs. Substantial royalty rate increases on periodic renewals were anticipated by Congress.[4] The Secretary has repeatedly and successfully utilized the 10-year preferential renewal provision to enhance the Tribes' returns from 1916 Act leases. *See infra* at 14 & note 22.

The Secretary issued the first 1916 Act leases in 1917, at a 12½ percent royalty rate.[5] Over the years, the Secretary entered into dozens of 1916 Act leases on behalf of the Tribes, including 29 historically productive 1916 Act leases on over one hundred parcels and six different oil and gas fields across the Reservation, all initially at a 12½ percent royalty rate.[6] The seven 1916 Act leases at issue here were originally signed in 1917, 1937, and 1938.

2. 1938 Act. The 1938 Act applies to Indian reservations nationwide, but does not replace leases already in effect under other Acts. The 1938 Act did not apply to the "ceded" portion of the Wind River Reservation. 1938 Act, §§ 1, 6.

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[4] *See* Cong. Rec., 64th Cong., 2d Sess., vol. LIII, at 12,258 (Aug. 7, 1916). In discussions of contemporaneous legislation on which the 1916 Act was modeled, Congress recognized renewals would be "upon such terms and conditions as the Secretary of the Interior may impose, *and he may double the royalty*." 58 Cong. Rec. 4173-74 (Aug. 22, 1919) (emphasis added). *See also* 53 Cong. Rec. 839 (Jan. 10, 1916) (Secretary's authority to increase royalties).

[5] *See, e.g.,* Lease No. I-96-IND-0444 (Nov. 15, 1917) [A12 – "A" refers to the Appendix filed with this appeal].

[6] Affidavit of Daniel T. Reineke (Oct. 27, 2009) ("Reineke Aff.), ¶ 9 [A191-92].

The 1938 Act requires competitive bidding for new leases following notice and advertisement, but an awarded lease has no renewal clause. § 2. Instead, after an initial 10-year term, 1938 Act leases are held indefinitely for as long as minerals are produced in paying quantities. § 1. Thus, if a productive lease under the 1938 Act provides for a royalty of 12½ percent, the rate is not subject to change.

3. Restoration of "Ceded" Lands. In 1939, Congress ordered the Secretary to "restore" to the Tribes all "undisposed of . . . ceded lands" at Wind River.[7] Beginning in 1940, the Secretary restored extensive lands, including all seven Claim II parcels.[8] Both before and after restoration, the Tribes remained beneficial owners of the minerals with the Government as trustee.[9] Once the lands were restored, *new* leases were issued under the 1938 Act for tracts not already under lease, because the restored lands were no longer "ceded" – but *existing* 1916 Act leases remained in force, including the seven Claim II leases.

4. The Lease "Conversions." In 1948, the British-American Oil Producing Company asked the superintendent of the Wind River Agency to "convert" two existing 1916 Act leases to 1938 Act leases.[10] These were

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[7] Act of July 27, 1939, Pub. L. 76-238, 53 Stat. 1128, §§ 1, 5.

[8] 5 Fed. Reg. 1805-06 (1940); 9 Fed. Reg. 9749-50 (1944).

[9] Gov't Resp. to Req. for Admis., Nos. 17-18 (Sept. 17, 2009) [A175-76].

[10] Letter from H.A. Thompson, British-American Oil Producing Co., to J.M. Cooper, Sup't (Apr. 27, 1948) [A93].

productive leases, and the primary term under the 1916 Act had not expired.[11] The oil company would benefit from such a change because it would eliminate the periodic opportunity for the Secretary to improve lease terms for the Tribes on renewal.

In May of 1948, the Government and British-American presented the proposal to the Tribes' Joint Business Council.[12] The Tribes at that time were unrepresented by counsel, had no minerals consultant, and relied fully on the United States as the Tribes' trustee. The Government's representative, Blynn Waller, discussed some differences between 1916 Act and 1938 Act leases, but failed to explain the value of the 10-year renewal provision, or that on renewal the Secretary could require upward revision of 1916 Act lease royalty rates, while 1938 Act lease royalty rates would be fixed in perpetuity. The Government also failed to inform the Tribes that the "converted" leases would not be put up for public auction as required by the 1938 Act. The Tribes were instead left with the

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[11] *See* Lease No. I-96-IND-5627 (May 26, 1938) [A90]; Lease No. 14-20-0258-4927 (Mar. 24, 1937) [A30].

[12] The Joint Business Council consists of the Shoshone Business Council and the Arapaho Business Council but not the United States. The Court incorrectly assumed that the Joint Business Council included representatives of the United States. *Shoshone III*, 93 Fed. Cl. at 456 n.5.

impression that public auction *would* occur, as one Council member said, "We could put the new lease up for bids."[13]

Both the Government and British-American Oil Company persuaded the Tribes that they would have more "voice" under the new leases because the leases would be in the name of the Tribes, rather than the Secretary.[14] This is a distinction without a difference, and misleading. The Government failed to disclose to the Tribes that the Secretary would remain responsible for approving leases under the 1938 Act, as well as for collecting and managing the Tribes' income from such leases.

A year later, the Husky Refining Company requested that five of their 1916 Act leases be converted to 1938 Act leases. Unlike the leases held by British-American, these leases had expired and were up for renewal.[15] The same Government agent told the Tribes that "[t]he *only real differences* in the two leases is that the [1916 Act] lease is a lease between the oil company and the Secretary of the Interior, and the lease was made for a limited term, with the right of renewal."[16]

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[13] Min. of Jt. Bus. Coun. Mtg. (May 7, 1948) [A97].

[14] *Id.* at A96.

[15] Letter from J.M. Cooper, Sup't, to Comm'r of Indian Affairs (Aug. 11, 1949) [A137]; Letter from J.M. Cooper, Sup't, to J.R. Schwabrown, Sup'r (Feb. 23, 1949) [A111].

[16] Min. of Jt. Bus. Council Mtg. (Jan. 10, 1949) (emphasis added) [A109].

Instead of explaining the meaning of renewal "upon reasonable terms and conditions" set by the Secretary, the Government's representative told the Tribes that leases under either Act would have "the same rent and the same rate of royalty." One council-member asked, "Is there any advantage in this transfer for [Husky]?" Mr. Waller only replied, "That is debatable" without disclosing how Husky would benefit – or the Tribes suffer – from the change.[17]

After each of these meetings, the Tribes passed resolutions approving the "conversions" of leases on the seven parcels.[18] The Government has admitted that: (a) the Tribes were never advised by the Government that "conversion" would have the effect of depriving the Tribes of periodic opportunities to receive higher royalty rates; (b) none of the "converted" 1938 Act leases were ever publicly advertised or put up for competitive bidding; and (c) there is no legal authority to "convert" 1916 Act leases to 1938 Act leases without competitive bidding.[19] Based on the Government's complicity and advice, the Tribes were denied the advantages of *both* the 1916 and 1938 Acts – they lost the periodic opportunity for an increased royalty rate under the 1916 Act *and* competitive bidding under the 1938 Act.

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[17] *Id.*

[18] Resolution No. 152 (May 7, 1948) [A98]; Resolution No. 153 (Jan. 10, 1949) [A110].

[19] Gov't Resp. to Req. for Admis., Nos. 1-4, 15 (Sept. 17, 2009) [A163-66, 174].

5. **The End of "Conversion."** By 1957, the Government stopped advising lessees that "conversion" was an option.[20] When British-American asked in 1957 for another "conversion," the Government responded, "It is deemed inadvisable to issue a renewal lease under the [1938 Act] as it requires that the leases be advertised for competitive bids."[21] *None* of this was made known to the Tribes, whose only information had been that the "conversions" were lawful and beneficial, based on the Government's representations. The result of the "conversions," as demonstrated by the expert reports made after suit was filed, was that royalty rates for the seven parcels were frozen at 12½ percent, while unconverted leases under the 1916 Act in the *same fields* were renewed for increasing royalty rates as high as 33⅓ percent.[22]

6. **Discovery of the Claims.** Once the leases were "converted," they were re-written on 1938 Act forms, given new lease identification numbers, and thereafter handled in Interior records as 1938 Act leases, with no indication they had ever been 1916 Act leases.[23] This, combined with the lack of a lease-by-lease

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[20] *Id.*, Nos. 11-12 [A171-72].

[21] Letter from Comm'r of Indian Affairs to Area Dir. (May 9, 1957) [A139].

[22] *See, e.g.*, Lease No. 14-20-0258-2159 (Dec. 9, 1977) (renewal of lease on SBF 003 with 33 1/3 percent royalty) [A145, 147].

[23] *See* A99, 103, 112, 117, 122, 127, 132 (the 1938 Act leases on the seven Claim II parcels). There is nothing on these forms which distinguishes them from any other 1938 Act leases.

accounting, hid the existence of the "conversions" and thus the existence of Claim II.

The Government admittedly has never provided an accounting of the Tribes' trust monies or property.[24] Lease revenues were never segregated or reported by lease and thus were hidden within the Reservation's complicated network of leases. The Reservation has at least 16 separate oil and gas fields, with over 100 lease parcels, most of which have been producing for decades, and which have been subject over time to multiple leases under different leasing Acts. Over 1,600 wells have been drilled.[25] The Tribes received no statements which tied revenues to particular leases, which would indicate differential royalty rates for leases within a field, or which reported revenues in any other way in which the Tribes might become aware of their losses from the "conversions."

Claim II was first discovered by the Tribes' attorneys by happenstance in 1983, four years after this lawsuit was filed. While in negotiations with Gulf Oil, the Tribes discovered that a 1938 Act Gulf lease was a "converted" 1916 Act lease

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[24] *Shoshone I*, 51 Fed. Cl. at 63 (2001).

[25] Reineke Aff., ¶¶ 6-9 [A190-92]. Notwithstanding their oil and gas reserves, the Tribes and their members have long suffered from severely depressed socio-economic conditions. *See, e.g., Large v. Fremont County*, 709 F. Supp. 2d 1176, 1218-19 (D.Wyo. 2010).

and complained that the "conversion" was illegal.[26] Only then were the Tribes on notice that there were illegal "conversions" and that the Tribes may have suffered damages from the "conversions." Instead of waiting for an accounting from the Government, the parties' litigation experts collaborated to assemble several hundred thousand documents and create a unified historical database of oil and gas leases, other agreements, and documents evidencing production, pricing, royalty collection, and other information.[27] In 2007, the parties shared expert reports that, among other things, established an agreed list of "converted" leases and the differences in collections between "converted" and unconverted leases in the same fields.[28] While the exact amount is in dispute, the principal losses based on calculations by the parties' experts exceed $20 million.

SUMMARY OF ARGUMENT

Claim II is timely because claims against the Government do not accrue until the claimant knew or should have known of all facts that fix the Government's liability. In this case, the Tribes were unaware of the illegality of the

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[26] Letter from Kenneth J. Guido and Barbara Lavender to C. Burton Branstetter (Jan. 3, 1983) ("Guido/Lavender letter") [A154].

[27] Reineke Aff., ¶¶ 2-5 [A188-90].

[28] *Id.*, ¶ 8 [A191]. The parties' experts ultimately gave up on the Government's lease numbers and made a list of leases by land descriptions. The 19 leases associated with these seven parcels over time are provided at A12-92, 99-106, 112-136.

"conversions," or the damages associated with them, until after 1979 when this suit was filed.

The Tribes lacked constructive notice of Claim II for at least three reasons. First, at the time of the "conversions," the Tribes reasonably relied upon assurances from the Government, their trustee, that the "conversions" were proper and without economic consequences. Second, when the Government later determined that "conversions" were improper without competitive bidding as required by the 1938 Act, the Government failed to inform the Tribes. Third, the Government managed the leases, collected royalties, and deposited payments into the Tribes' respective accounts in lump sums, providing no accounting or lease-specific information. The Government's acts and omissions as trustee, affirmatively misleading its beneficiaries and concealing material facts, deferred accrual of Claim II for limitations purposes.

The court below misconstrued a letter from the Tribes' attorneys in 1959 complaining that the Government was wrongfully renewing 1916 Act leases on which oil companies *had not produced oil and gas*. Such complaints had nothing to do with the Claim II lease "conversions." At the time of the 1959 letter, those "converted" leases were all shown as 1938 Act leases and were on *producing* tracts. Contrary to the analysis of the lower court, the attorney's letter manifests no awareness of the "conversions," nor any reason to be aware.

In addition, in a series of Interior Appropriations Acts,[29] Congress has suspended the six-year statute of limitations on Indian claims against the Government relating to "losses to . . . trust funds" until the Government has provided a meaningful accounting. *Shoshone II*, 364 F.3d at 1348-51. In *Shoshone II*, this Court distinguished claims relating to the initial negotiation of lease terms – describing them as claims relating to "trust assets" – from claims relating to failure to enforce lease terms, and their governing statutes and regulations, which result in "losses to . . . trust funds." Claim II does not allege failure by the Government in initial negotiation of new lease terms, but non-compliance with existing statutory, regulatory and lease terms which caused "losses to . . . trust funds." Claim II is thus covered by the Interior Appropriations Acts.

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[29] *See* Department of the Interior Appropriation Act of 2009, Pub. L. No.111-88, 123 Stat. 2904 (2009). Earlier versions, with minimal variations, include: Act of November 5, 1990, Pub. L. No. 101-512, 104 Stat. 1915; Act of November 13, 1991, Pub. L. No. 102-154, 105 Stat. 990; Act of October 5, 1992, Pub. L. No. 102-381, 106 Stat. 1374; Act of November 11, 1993, Pub. L. No. 103-138, 107 Stat. 1379; Act of September 30, 1994, Pub. L. No. 103-332, 108 Stat. 2499; Act of April 26, 1996, Pub. L. No. 104-134, 110 Stat. 1321; Act of September 30, 1996, Pub. L. No. 104-208, 110 Stat. 3009; Act of November 14, 1997, Pub. L. No. 105-83, 111 Stat. 1543; Act of November 29, 1999, Pub. L. No. 106-113, 113 Stat. 1501; Act of October 11, 2000, Pub. L. No. 106-291, 114 Stat. 922; Act of November 5, 2001, Pub. L. No. 107-63, 115 Stat. 414; Act of February 20, 2003, Pub. L. No. 108-7, 117 Stat. 11; Act of November 10, 2003, Pub. L. No. 108-108, 117 Stat. 1263; Act of December 8, 2004, Pub. L. No. 108-447, 118 Stat. 2809; Act of March 11, 2009, Pub. L. 111-8, 123 Stat. 524.

Finally, the Tribes have a continuing claim against the Government for allowing oil companies to extract petroleum under invalid leases. The "converted" 1938 Act leases are void, as the Government admits they were entered into without legal basis. Extraction under such leases is therefore trespass. The Government has a continuing duty to prevent such trespass. Under established law, each extraction of oil from the Reservation under an invalid lease constitutes a new trespass. The Tribes have enforceable claims against the Government for failing to prevent trespasses that occurred anytime forward from six years prior to the filing of this suit in 1979.

ARGUMENT

A. STANDARD OF REVIEW

Whether a claim is barred by the statute of limitations is an issue of subject matter jurisdiction, which is a question of law subject to *de novo* review. *Nw. La. Fish & Game Preserve Comm'n v. United States*, 446 F.3d 1285, 1289 (Fed. Cir. 2006). Whether Claim II is within the scope of the Interior Appropriations Acts' provision postponing the commencement of the statute of limitations is also a matter of statutory construction, which this Court also reviews *de novo*. *Shoshone II*, 364 F.3d at 1345.

B. CLAIM II IS TIMELY BECAUSE THE TRIBES NEITHER KNEW NOR SHOULD HAVE KNOWN OF CLAIM II UNTIL AFTER THEY FILED THIS SUIT.

A claim against the Government first accrues: (1) when all events which fix the Government's liability have occurred; and (2) plaintiff was or should have been aware of their existence. *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1577 (Fed. Cir. 1988). Furthermore, a claim does not accrue until the claimant has suffered damages. *Alder Terrace, Inc. v. United States*, 161 F.3d 1372, 1377 (Fed. Cir. 1998); *Rosebud Sioux Tribe v. United States*, 75 Fed. Cl. 15, 24 (2007) ("It is too well established to require citation of authority that a claim does not accrue until the claimant has suffered damages.") (internal quotation marks omitted).

The Tribes had no actual knowledge of Claim II when filing suit in 1979. The Tribal Councils in 1948 and 1949 were aware of the seven "conversions," but were misinformed by their trustee that all was legal and beneficial, and the Tribes did not have means of determining the resulting harm in the ensuing years. The 1938 Act lease forms on the seven Claim II parcels provided no indication to later Tribal leaders or attorneys that the "conversions" had ever happened.

The Tribes' actual ignorance of Claim II is evidenced by the original filings in this case. The Tribes' 1979 petitions include various claims that the Government mismanaged the Tribes' mineral assets, income, and trust funds, but

the petitions make no specific mention of the "conversions" at issue in Claim II. *See, e.g.*, Petition of Shoshone Tribe, §§ 11, 21-25 (Oct. 10, 1979). Certain oil and gas-related claims were specified in detail—including, for example, charges that the Government wrongfully allowed drainage of the Tribes' oil and gas. *Id.*, § 25(g). If the Tribes had been aware of Claim II in 1979, the petitions would have prominently included a claim based on illegal "conversion" of leases, in addition to the other specified claims.

It was not until the early 1980s that the Tribes – by accident and as part of a negotiation with an oil company – learned that two of the lease "conversions" occurred, were illegal, and were detrimental to the Tribes.[30] The Tribes' reasonable ignorance that they had a claim against the Government for the illegal "conversions" was caused directly by the Government's misrepresentations and concealment, and by the lack of an accounting or other information that could have put the Tribes on notice.

1. The Government, the Tribes' Trustee, Concealed and Misrepresented Material Facts, As Well As the Illegality of the "Conversions."

Accrual of a claim is suspended if the plaintiff shows that the defendant has concealed its acts with the result that plaintiff was unaware of their existence. *Young v. United States*, 529 F.3d 1380, 1384 (Fed. Cir. 2008). At the Tribes' Joint

[30] *See* Guido/Lavender letter [A154].

Business Council meetings where the "conversions" were presented, the Government omitted or misstated critical information when it requested on behalf of the oil companies that the Tribes approve the proposed lease conversions.

The Government stated that "conversions" would be legal, and even preferable.[31] Rather than citing the adverse economic consequences of the proposed "conversions," the Government told the Tribes that the main difference was that the new leases would be "approved and signed by the Tribes" rather than the Secretary – but this change had no effect on the Government's role as trustee in managing collections of amounts due under the leases for the Tribes as beneficiaries. In addition, the Government mischaracterized the Secretary's renewal authority under the 1916 Act by depicting the 1916 Act renewals as subject to the Government's "rules and regulations," rather than upon "reasonable terms and conditions" that may be prescribed by the Secretary, which accords significantly greater authority to control lease terms. Most egregiously, the Government's agent affirmatively misinformed the Tribes that a "conversion" would have no economic consequences, with leases having the "same rent and royalty" –

[31] The Government now acknowledges that such "conversion" was illegal. *See* Gov't Resp. to Req. for Admis., No. 15 (Sept. 17, 2009) [A174]; *see also* Letter from Comm'r of Indian Affairs to Area Dir. (May 9, 1957) [A139].

> The *only* two real differences in the two leases is that [1916 Act] lease is a lease between the oil company and the Secretary of the Interior, and the lease was made for a limited term, with the right of renewal. The [1938 Act] lease form on tribal land is between the Tribes and the oil company, and runs for ten years and as long thereafter as oil and gas are produced. It has the *same rent and the same rate of royalty.*[32]

In fact, economic returns from "converted" and "unconverted" leases would be very different in renewal periods.

The Government also failed to disclose that the oil and gas companies stood to benefit from the "conversions," concealing what the Tribes would lose if the 10-year expiration and preferential renewal requirements were lost. When the Government's agent was asked whether the oil companies would benefit, he replied only that this was "debatable," without explaining anything about the potential benefits to the oil companies.

The Tribes had no reason to believe their trustee would provide such a wealth of misinformation, misrepresenting and omitting critical information, all of which served to conceal the claim from the Tribes. The Government now admits that it failed to advise the Tribes that the lease "conversions" would have adverse economic consequences for the Tribes, or to otherwise explain the value of the 10-year renewal provision.[33] Even the court below acknowledged that the Government may have been less than forthright: "In this case, it is certainly

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[32] Min. of Jt. Bus. Coun. Mtg. (Jan. 10, 1949) (emphasis added) [A109].

[33] Gov't Resp. to Req. for Admis., Nos. 1-2 (Sept. 17, 2009) [A163-65].

possible that the government did not provide adequate information to the Tribes at the time that the conversions occurred." *Shoshone III,* 93 Fed. Cl. at 459.

The Government subsequently determined for itself in 1957 that "conversions" were not in accordance with the law, because the Secretary could not issue 1938 Act leases without competitive bidding.[34] This is a determination that the Government continues to acknowledge today.[35] Nevertheless, the Government neither alerted the Tribes nor did anything else to undo the wrong. The court below did not even address this egregious concealment by the Tribes' trustee.

Because of these concealments, misrepresentations, and omissions by the Government as the Tribe's trustee (and the lack of any accounting that would show the "conversions" or the resulting losses, *see* § C, *infra*), this Court should hold that Claim II did not accrue until after this suit was filed. The court below, instead, attributed overwhelming and inappropriate significance to a 1959 letter written by Marvin Sonosky, a Tribal attorney.[36] In that letter, Mr. Sonosky requested that the Secretary obtain the Tribes' consent before renewing 1916 Act leases. *Shoshone*

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[34] Letter from Comm'r of Indian Affairs to Area Dir. (May 9, 1957) ("It is deemed inadvisable to issue a [1916 Act] renewal lease under the [1938 Act] as it requires that the leases be advertised for competitive bids.") [A139].

[35] Gov't Resp. to Req. for Admis., Nos. 3-8, 15 (Sept. 17, 2009) [A165-69, 174].

[36] Letter from Marvin Sonosky to Fred Seaton, Secretary of the Interior (Feb. 17, 1959) ("Sonosky letter") [A141].

III, 93 Fed. Cl. at 457-59. Importantly, the letter never mentions the "conversions," nor does it address any of the seven parcels at issue in Claim II. The letter demonstrates that Mr. Sonosky had no knowledge of the seven lease "conversions."

According to the court below, the Sonosky letter demonstrated a "heightened level of concern [that] should have led to a broader inquiry as to the status of the leases and, if appropriate, to legal action." *Id.* at 459 (citing *Mitchell v. United States*, 10 Cl. Ct. 63 (1986) ("[W]hatever is notice enough to excite attention and put the party on his guard and call for inquiry, is [also] notice of everything to which such inquiry might have led"). The court asserted that "[t]his letter undermines plaintiff's contentions that they neither knew of the conversions nor had reason to question the government's actions regarding the leases," and that the "attorneys' decision not to follow up on the concerns expressed in the letter do not automatically extend the statute of limitations." *Id.* at 458.

As a mere reading of its text makes clear, the Sonosky letter provides no support for the court's conclusion. The letter shows concern that the Secretary was granting 1916 Act renewals to oil companies who had failed to develop diligently. A "broader inquiry" by the Tribes on this issue might have led to other instances of non-diligent operators improperly receiving renewals of their 1916 Act leases. Such an inquiry would *not* have turned up the seven 1916 lease "conversions" for

at least two reasons. First, the "converted" leases had been renumbered, thus concealing their origins, and nothing in the seven "converted" 1938 Act leases indicated they had ever been 1916 Act leases in the past, so the leases themselves would have provided no help in discovering the illegal "conversions." Second, the seven "converted" 1916 Act leases, as 1938 Act leases, had *no renewal provision* and were *producing*. The "converted" leases thus would have been wholly outside the scope of leases that concerned Mr. Sonosky and the Tribes in the 1959 letter, which were *renewable* and *non-producing*.

Not only did the Sonosky letter cover a completely different subject, but it was also written ten years after the meetings at which the Tribes, without legal representation, faced the proposed "conversions." Moreover, as of 1959, the "converted" leases had not yet caused damages to the Tribes in the form of differential royalties.

The court below also says that "it is unclear from the content of the letter whether plaintiffs' attorneys understood exactly *when* and *how* the 1916 Act leases were converted to the 1938 Act leases." *Id.* (emphasis added). In fact, the letter shows affirmatively that the Tribes' attorneys *did not know and had no reason to suspect* that the Government had engaged in any illegal "conversions" at all. Had the attorneys even suspected such violations of law, there is no question that this

would have been the topic of additional letters demanding explanations and curative actions from the Government.

In sum, while the Tribes through their attorneys had knowledge of one category of breach (*i.e.*, improper renewal of *non-producing* 1916 Act leases that were on their face 1916 Act leases), that breach did not put the Tribes on inquiry notice of an unrelated breach from ten years earlier (the illegal "conversion" of *producing* 1916 Act leases to 1938 Act leases). It is the Government that bears the responsibility as trustee to oversee the Tribes' mineral estate, to provide the Tribes with accountings, and to correct its own errors, not the Tribes' attorneys.

The court below also mentions the Government's contention that the Tribes were aware, or should have been aware, of the applicable 1916 Act and 1938 Act provisions. *Shoshone III*, 93 Fed. Cl. at 455-56. However, not everyone is presumed to know the law, especially someone in the position of a beneficiary. *See, e.g., Liparota v. United States*, 471 U.S. 419 (1985) (Government must prove that defendant actually knew that acquisition or possession of food stamps was in a manner unauthorized by statute or regulation); *Peeler v. Heckler*, 781 F.2d 649, 653-54 (8th Cir. 1986) (social security beneficiaries are not presumed to know the law); *Gormas v. Bowen*, 713 F. Supp. 234, 236 (W.D. Mich. 1989) (same); George T. Bogert, *Trusts* § 941 (6th ed. 1987). This is especially applicable when the

Government as trustee affirmatively misleads its beneficiary into believing that an action is entirely legal.

2. There Is No Reason the Tribes Should Have Known About This Claim Before Suit Was Filed.

The accrual of a claim against the Government is suspended "until the claimant knew or should have known that the claim existed." *Young v. United States*, 529 F.3d 1380, 1384 (Fed. Cir. 2008).[37] After acknowledging that a party must suffer damages prior to commencement of the statute of limitations, *Shoshone III,* 93 Fed. Cl. at 455, the lower court nonetheless failed to recognize that there was no reasonable way for the Tribes to determine *any* of the damages caused by the illegal "conversions" until well after this suit was filed.[38] The *full* extent of the conversions and damages was discovered even later, with the help of extensive information-gathering under the discovery rules and the parties' expert witnesses.[39]

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[37] The court below also noted that the "knew or should have known" test is equivalent to the standard described in *Otay Mesa Property L.P. v. United States*, 86 Fed. Cl. 774 (2009): "Where the Government's actions are open and notorious, the plaintiff is on inquiry notice and the statute of limitations begins to run." *Id.* at 786 (citing *Ingrum v. United States*, 560 F.3d 1311, 1317 (Fed. Cir. 2009)). The court, however, did not rule that the Government's action here was open and notorious. Indeed, the court could not have, since the Government instead misrepresented and concealed its breach of trust here. § B.1, *supra*.

[38] *See* Guido/Lavender letter [A154].

[39] Reineke Aff., ¶¶ 2-9 [A188-92].

The oil and gas system at Wind River is opaque. During the relevant time frame, the Government administered the Tribes' minerals as the Tribes' trustee. Since drilling began on Wind River Reservation in the early 1900s, parcels have been subject to different leases and leasing acts, with various numbering systems. One parcel of land cannot necessarily be identified by a unique lease number, but may correspond with multiple, overlapping leases and other agreements, with different numbers.[40] The Government deposited the oil and gas income into the Tribes' accounts, but *never* provided an accounting. The Tribes received lump sum payments, not segregated by lease or even by field. The Government should have kept adequate records and shared information about the Reservation's mineral estate with the Tribes, but did not. *See In re United States,* 590 F.3d 1305, 1312 (Fed. Cir. 2009) (the United States, as a "fiduciary[,] has a duty to disclose all information related to trust management to the beneficiary"); *Shoshone II*, 364 F.3d at 1351 ("a trustee must keep clear and accurate accounts, showing what he was received, what he was expended, and what gains have accrued and what losses have resulted") (quoting 2A *Scott on Trusts* § 172 (2001); *see also Restatement (Second) of Trusts* § 82 (trustee has duty to keep beneficiary informed).

[40] *Id.*, ¶¶ 6-9 [A190-92].

As mentioned previously, after the "conversions," nothing in the "converted" 1938 Act leases indicated they had ever been 1916 Act leases.[41] Thus, the beneficiary Tribes did not have means to determine from the 1938 Act leases that they were "converted" or that the "conversions" gave rise to damages. Indeed, even after this litigation began, with the benefit of discovery rules to compel production of the necessary information, and with the assistance of hired experts, simply determining *which parcels* had "converted" leases proved difficult for the experts on both sides.[42] The experts' determination of damages for Claim II also required extensive analysis.[43]

In mineral law, where the royalty owner is not in a position to determine damages, courts routinely allow claims filed after the limitations period would have otherwise expired. In *Frye v. Amoco Prod. Co.*, 943 F.2d 578 (5th Cir. 1991), royalty owners claimed they were owed additional royalties because Amoco failed to pay based on the proper volume of gas. The only relevant information available to the royalty owners was royalty payment check stubs, which under-reported production. Applying a similar standard to that of this Court (suspending the limitations period "while the cause of action is not knowable by the plaintiff

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[41] *See* A99, 103, 112, 117, 122, 127, 132 (the 1938 Act leases on the seven Claim II parcels).

[42] Reineke Aff., ¶¶ 8, 9 [A191-92] (describing how an eighth parcel was originally included in Claim II).

[43] *Id.*, ¶¶ 1, 8 [A187-88, 192].

through the exercise of reasonable diligence," *id.* at 586), the Fifth Circuit found that the plaintiffs had no reason to suspect the miscalculation until after the limitations period ran and, therefore, ruled the claim timely. *Id.* at 587.

Other courts have reached similar results. *In Hebble v. Shell Western E & P, Inc.*, 238 P.3d 939, 944 (Okla. 2009), a claim for failure to pay net profits was held to be timely despite the fact that suit was filed ten or more years after payments were allegedly due. The court held that Shell, the unit operator, had a fiduciary duty to plaintiffs and that the plaintiffs did not have actual or constructive knowledge of their claim, even though they knew the well was producing, because payment was due only after Shell's expenses were reimbursed, and Shell withheld that information. Similarly, the court in *Dorchester Gas Producing Co. v. Hagy,* 748 S.W.2d 474 (Tex.App. 1988), *dism'd by joint mot. on appeal*, 777 S.W.2d 709 (Tex. 1989), held that the statute of limitations did not bar a royalty owner claim based on testimony that, despite receiving royalty payment stubs, it was impossible for plaintiff to detect the loss without a "special formula" only the producer knew. Therefore, plaintiff had no reason to suspect he was paid the wrong amount. 748 S.W.2d at 481. *See also Goodall v. Trigg Drilling Co., Inc.*, 944 P.2d 292, 294-95 (Okla. 1997) (statute of limitations tolled for at least nine years where plaintiff was without basis to determine royalties were owed).

Thus, the courts recognize that royalty owners, such as the Tribes, often lack the information necessary to discover their claims. Finding that accrual was delayed in this case makes even more sense because the defendant is a fiduciary and the Tribes had less information at their disposal than the plaintiffs had in the above cases.

The lower court's decision does not reflect these considerations. Instead, it again relies almost exclusively on the 1959 Sonosky letter to state that the Tribes should have known of the breach involved in Claim II. *Shoshone III*, 93 Fed. Cl. at 457-58. However, as we have shown, that letter provides no support for the lower court's conclusion. *See* § B.1, *supra*.

The Government managed the Tribes' mineral estate and provided no accounting to the Tribes – and has yet to do so. The purpose of the accrual suspension rule is precisely to address situations like this, where plaintiffs have been misled by their trustee into justifiable ignorance of the breach of trust and their damages and all information necessary to formulate the claim was in the hands of the Government, who was managing the leases and collecting (but not reporting) royalties on the Tribes' behalf. The Tribes' claims are timely because the Tribes had no reason prior to the filing of this lawsuit to know of the Government's breach or the resulting damages.

C. CLAIM II IS TIMELY UNDER THE INTERIOR APPROPRIATIONS ACTS BECAUSE CLAIM II RELATES TO "LOSSES TO . . . TRUST FUNDS."

Congress has deferred the accrual of the six-year statute of limitations to Claim II through a series of Interior Appropriations Acts, which provide the following:

> [N]otwithstanding any other provision of law, the statute of limitations shall not commence to run on any claim ... concerning losses to or mismanagement of trust funds, until the affected tribe ... has been furnished with an accounting of such funds from which the beneficiary can determine whether there has been a loss.[44]

In *Shoshone II*, this Court rejected "the Government's narrow reading" of these Acts as limited to the handling of funds already collected. The Court pointed out that the Acts are in accord with general trust law, and that "[b]eneficiaries of a trust are permitted to rely on the good faith and expertise of their trustees; because of this reliance, beneficiaries are under a lesser duty to discover malfeasance relating to their trust assets. * * * It is therefore common for the statute of limitations to not commence to run against the beneficiaries until a final accounting has occurred that establishes the deficit of the trust." 36 F.3d at 1348. The Court then quoted the Supreme Court in *United States v. Mitchell*, 463 U.S. 206, 227 (1982), that "trusteeship would mean little if the beneficiaries were required to supervise the

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[44] Department of the Interior Appropriation Act of 2009, Pub. L. No. 111-88, 123 Stat. 2904 (2009). Prior versions are listed in note 29, *supra*.

day-to-day management of their estate by their trustee or else be precluded from recovery for mismanagement." *Id.*

This Court noted that statutes of limitations for breaches of trust do not generally commence until the trustee "'repudiates' the trust and the beneficiary has knowledge of the repudiation." *Shoshone II* at 1348. No such repudiation has occurred here. The Government remains the Tribes' trustee both under the 1916 and 1938 Acts, and continues to hold legal title to the Tribes' mineral estate.

This Court accordingly interpreted the Interior Appropriations Acts as deferring the running of the statute of limitations not only as to claims of mishandling of money *already collected* by the Government, as the Government argued, but also where the Government *failed to collect* money required under leases, as well as the regulations and statutes under which they are governed. *Shoshone II*, 364 F.3d at 1350. The Court categorized such failures to collect as "losses to . . . trust funds" and held that the statute of limitations does not run until the Government has supplied the Tribes with an accounting that would allow them to determine their losses. *Id.* This Court has already acknowledged that there has been no accounting here. *Id.* at 1344.

The Government must follow statutes governing oil and gas leasing, the regulations under those statutes, and lease-terms dictated by those statutes. The competitive bidding provisions of the 1938 Act are Congressionally-mandated, and

help assure a fair return to the Tribes. The Government must follow these provisions to create a valid lease. The periodic renewal provisions of the 1916 Act were also required by Congress to generate a fair return to the Tribes. The Government had the duty under the Acts and leases to abide by these terms, and its failure caused the "losses to . . . trust funds" at issue here.

The court below therefore erred in finding that Claim II did not relate to "losses to . . . trust funds," but was correct in rejecting the Court of Federal Claims' analysis of this issue in *Oenga v. United States*, 83 Fed. Cl. 594, 611 (2008). The *Oenga* court held that the Interior Appropriations Acts only protect claims where funds were lost through failure to follow lease terms, as opposed to federal statutes or regulations. The court below correctly held that applicable statutes and regulations should be considered part of the lease, *Shoshone III,* 93 Fed. Cl. at 461 n. 10, but then ignored the violations of statutes and regulations – as well as lease terms – here.

The lower court also erred in its holding that an accounting required under the Interior Appropriations Acts would have been unhelpful to the Tribes. *Id.* at 462. If the 1916 Act origin of the 1938 Act leases were revealed, and if "meaningful accountings"[45] were provided which contemporaneously segregated

[45] Accountings under the Interior Appropriations Acts must be "meaningful," *Shoshone II,* 364 F.3d at 1347, and of sufficient quality and detail that "the beneficiary can determine whether there has been a loss." *See* 32-33, *supra.*

lease revenues by parcel, the Tribes would have been in position to know of differential royalty rates for actively-producing leases on neighboring parcels within a field, and thus the opportunity to question their trustee about reasons for the difference. The Tribes never received such accountings.

The Interior Appropriations Acts should be regarded as a "special case" of the general rules of accrual of claims against a trustee for limitations purposes, one that is even more protective of tribal plaintiffs. In the Interior Appropriations Acts, Congress directed that there should be no debate regarding when a tribe should be deemed to be on actual or constructive notice of a claim – not until an accounting is provided. In this case, the result should be the same under the two approaches – the general claim accrual rules and the special Interior Appropriations Acts. Without an adequate accounting, there is no basis for finding that the Tribes knew or should have known of Claim II prior to commencement of this case.

D. ALTERNATIVELY, THE TRIBES HAVE A CONTINUING CLAIM AGAINST THE GOVERNMENT FOR ALLOWING PRODUCTION OF TRIBAL OIL AND GAS WITHOUT VALID LEASES.

1. A 1938 Act Lease Issued Without Competitive Bidding Is Invalid.

Section 2 of the 1938 Act provides: "Leases for oil-and/or gas-mining purposes...*shall* be offered for sale to the highest responsible qualified bidder, at public auction or on sealed bids..." 25 U.S.C. §396b (emphasis added). When a statute uses the word "shall" rather than "may," this requirement is mandatory and

not discretionary. *See Merck & Co. v. Hi-Tech Pharmacal Co., Inc.*, 482 F.3d 1317, 1322 (Fed. Cir. 2007).

The lower court seemed to consider the lack of competitive bidding as mere harmless error, not worth analyzing in its opinion – even despite the United States' admission that competitive bidding is required. *Shoshone III,* 93 Fed. Cl. at 462-63. Such dismissive treatment of a safeguard that is expressly mandated by statute and regulations is erroneous, and contributes to the erroneous decision below.

Leasing of tribal lands for oil and gas takes place under the backdrop of the Non-Intercourse Act, 25 U.S.C. § 177, which prohibits the "purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians" without consent of the United States. *See Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 587-99 (1823) (holding transfer of Indian land title void unless granted under authority of the United States). As a result, it has long been understood that any disposition of Indian lands – including leases – must be carried out in accordance with a treaty or statute:

> [T]he power of the Department to authorize such leases to be made, or that of the President or Secretary to approve or to make the same, if it exists at all, must rest upon some *law*, and therefore be derived from either a treaty or a statutory provision.

18 U.S. Op. Att. Gen. 235 (1885) (emphasis in original); *see also Neb. Pub. Power Dist. v. 100.95 Acres of Land*, 719 F.2d 956, 961 (8th Cir. 1983) ("Conveyances of

Indian lands must conform to the requirements of federal law") (citing *Smith v. McCullough*, 270 U.S. 456 (1926)); 2 Rocky Mountain Mineral Law Foundation, *Law of Oil and Gas Leases* § 26.05 (2009) ("Development of Indian mineral resources can only occur where some legal authority sanctions the development"). Consequently, courts have consistently held that such statutes are to be strictly followed, or else the conveyances are void. *Sangre de Cristo Dev. Co., Inc. v. United States*, 932 F.2d 891 (10th Cir. 1991), *cert. denied*, 503 U.S. 1004 (1992) (Government's approval of lease is invalid where statutory prerequisite of environmental study was not carried out); *Smith v. Stevens,* 77 U.S. (10 Wall.) 321, 326-27 (1870) (voiding sale of Indian land that was not in accordance with relevant statutory procedures).

Notably, the Government itself has successfully made the *exact same* argument that the Tribes advance here – that tribal mineral leases which are not issued in compliance with the 1938 Act are wholly void. *See United States v. 9,345.53 Acres of Land*, 256 F. Supp. 603, 605 (W.D.N.Y. 1966) (agreeing with "Government claims that in the absence of compliance with the provisions of Federal Act of May 11, 1938 [including 25 U.S.C. 396b requiring competitive bidding], the leases are void."). The Government has admitted that it can locate no legal authority to "convert" leases without competitive bidding.[46] That is

[46] Gov't Resp. to Req. for Admis. No. 15 [A174].

because no such authority exists. The Government has also admitted "it has not uncovered documents or evidence which show that the Conversion of any Converted Lease was carried out with Competitive Bidding."[47] The "converted" 1938 Act leases on the seven Claim II parcels are therefore void.

Competitive bidding requirements are also strictly adhered to in non-Indian federal oil and gas leasing. It "cannot be emphasized too strongly that if lands are determined to be subject to the competitive bidding regulations at any time prior to lease issuance, the lands may be leased only through the competitive bidding process." Rocky Mountain Mineral Law Foundation, *Law of Federal Oil & Gas Leases*, § 5.02 n.2 (2009) (citing 43 C.F.R. § 3120 (1987)) (emphasis in original). As with tribal leases, if the required competitive bidding is not carried out, the federal lease is also invalid. For example, in the cases *In re Skelly Oil Co.*, 16 IBLA 264, 267 (July 29, 1974); *In re Robert B. Ferguson*, 9 IBLA 275, 276-77 (Feb. 6, 1973); and *In re Superior Oil Co.*, GFS (O&G) SO-60 (Sept. 12, 1962), noncompetitive leases that had been issued in good faith were nullified because it became evident that the purportedly leased lands were within "known geologic structures" prior to issuance of the leases, and by statute leasing on such structures required competitive bidding. *See* 30 U.S.C. § 226(b) (Mineral Leasing Act of 1920).

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[47] *Id.*, No. 6 [A167].

2. Drilling by Oil Companies on the Reservation Without a Valid Lease Constitutes Trespass.

An oil company extracting minerals without the authority of a valid lease is a trespasser. *See Guffey v. Smith*, 237 U.S. 101 (1915) (awarding damages to lessor where another producer drilled wells on the same parcel, even in good faith); *United States v. West,* 232 F.2d 694, 699 (9th Cir. 1956), *cert. denied*, 352 U.S. 834 (1956) (occupying land after termination of grazing license constitutes trespass); *Oenga v. United States*, 83 Fed. Cl. 594, 617-18 (Fed. Cl. 2008) (oil and gas development outside the scope of the lease constitutes trespass).

The court below distinguished this case from *Oenga* because the trespass claim in *Oenga* "was based on the extraction of oil from areas other than those explicitly stated in the lease itself," whereas in this case "defendants were not making use of plaintiffs' land outside the scope of particular leases." *Shoshone III,* 93 Fed. Cl. at 462. The court further stated, "[T]he oil and gas operators who extracted minerals from the seven parcels in this case were doing so under the authority of lease agreements executed by the Tribes themselves." *Id.* This misses the point and is contrary to law. An invalid lease gives its holder *no right* to extract oil, whether within or without the bounds of the underlying parcel. It is a pure trespass. It does not matter whether a lease expired, or the land is outside the

scope of a valid lease, or, as here, the lease is invalid due to a violation of federal law.[48]

Neither Tribal nor Secretarial consent can validate leases that were issued in violation of federal law. The Tribes' signature on the leases does not change the explicit provisions of the 1938 Act requiring competitive bidding. Congress, rather than the Tribes or the Secretary, sets the requirements for valid oil and gas leases on Reservation lands. Additionally, the Tribes' consent is meaningless where the Government failed to disclose all material facts relevant to the transaction. *See* George T. Bogert, *Trusts* § 941 (6th ed. 1987) ("Not only must the beneficiary be informed as to the facts surround the transaction to be approved, but he must also be made cognizant of the legal effect of his consent.").

3. The Tribes Have a Continuing Claim Against the Government for Failure to Remove Trespassers.

The Government has a duty to prevent trespassers from illegally extracting minerals from the Reservation. This duty flows directly from the Government's responsibilities under both the 1916 and 1938 Acts regarding the approval and regulation of oil and gas leasing on the Wind River Reservation. *See Cherokee Nation of Okla. v. United States*, 21 Cl. Ct. 565, 576 (1990) ("*Cherokee I*") ("In

[48] This is also "hornbook law." See Williams & Meagan, *Oil and Gas Law Abridged* § 225 (3rd Ed. 2001). Good or bad faith affects the measure of damages but not the existence of a trespass or the right to damages.

order to administer plaintiff's mineral estate and collect royalties, the government must remove trespassers who take oil or gas illegally").

Under both statutes, the Government has the duty to ensure that oil companies drilling on the Wind River Reservation are doing so under valid leases. The crux of Claim II is that the Government not only failed to do as Congress required under the 1916 Act leases, but also failed to issue valid 1938 Act leases by failing to require competitive bidding. As a result, the oil companies, *even if* they were operating in good faith under leases signed by the Tribes, were still trespassers.[49] The Government had a continuing duty to cure this defect by either issuing valid 1938 Act leases following competitive bidding or removing the trespassers. The Government did neither.

For the seven Claim II parcels, the trespasses have continued into the limitations period – well beyond 1973 – constituting continuing claims which are not barred by 28 U.S.C. § 2501. The continuing claims doctrine applies when the Government owes "an ever-present duty," where "non-performance of the duty is properly viewed as giving rise to a series of actionable breaches." *Mitchell v. United States*, 10 Cl.Ct. 787, 789 (1986). The doctrine prevents the defendant from escaping all liability for its wrong and thus "acquiring a right" to continue its

[49] Their good faith is questionable.

wrongdoing, while retaining intact the 6-year statute of limitations set forth by Congress. *Hopland Band*, 855 F.2d at 1571.

At issue in *Mitchell* was the Government's alleged failure to replant after harvesting trees on Indian lands, a duty defined in broad terms. The court held that "the duty to regenerate is a continuing one" and "plaintiffs may sue with respect to stands harvested long ago (although their potential recovery is . . . limited to the six-year limitations period)." *Id.* at 789. "[T]he existence of a continuing duty to regenerate means that on each day the BIA failed in its duty to regenerate a given stand, there arose a new cause of action." *Id.* at 788.

Similarly, in *Cherokee I*, the court held that the Government had no duty to remove casual trespassers, but the tribe has a claim if it can "show with particularity the statutes and regulations applicable to its claim for failure to remove trespassers from the mineral estate and how defendant failed to comply with those requirements." 21 Cl. Ct. at 574-77. This is because the Government's "role in managing the [tribe's] mineral estate is greater than its role in managing [tribal] lands in general" and "the Secretary should aggressively carry out his trust responsibility in the administration of Indian oil and gas." *Id.* at 576. The court in *Cherokee* refused to grant the Government's motion to dismiss. Returning to the trespass issue two years later, the court held that the continuing claims doctrine may be applicable to the tribe's trespass claim, pending further

development of the facts, so that "claims that first accrued [more than six years before filing] but which continued extant during the six year statutory period potentially remain actionable." *Cherokee Nation of Okla v. United States*, 26 Cl. Ct. 798, 803 (1992) ("*Cherokee II*") ("This court has consistently treated each alleged trespass in the instant case as its own individual wrong").

The Government itself used this principle successfully in *United States v. Hess,* 194 F.3d 1164 (10th Cir. 1999). It argued that it had the right to collect for continuing mineral trespasses by Hess against the Southern Ute Tribe although the first trespass occurred more than six years and 90 days – the relevant statute of limitations[50] – before the Government filed its suit. The court ruled for the Government that "each distinct gravel sale was an individual trespass and thus, a new cause of action arose with each individual act." *Id.* at 1174-75. Thus, the Government's claim for sales beginning six years before the suit was filed were not barred by the statute of limitations. *Id.* Having won in *Hess*, the Government should not argue to the contrary here.

Instead of looking to *Mitchell, Cherokee*, and *Hess*, cases with analogous fact patterns, the court below compared Claim II to *Brown Park Estates-Fairfield Dev. Co. v. United States*, 127 F.3d 1449 (Fed. Cir. 1997). In *Brown Park*, plaintiffs argued that HUD's failure to make the required rental adjustments

[50] 28 U.S.C. § 2415(b).

occurring six years prior to filing suit caused lower payments in subsequent years compared to what would be due if rent had been adjusted properly. *Id.* at 1455. The court stated that "a claim based upon a single distinct event, which may have continued ill effects later on, is not a continuing claim," *id.* at 1456, and plaintiffs did not argue "that HUD failed to make rent adjustment during [the six years prior to filing suit]." *Id.* at 1457.

By contrast, the Government here has continuously failed to perform its statutory duty to prohibit oil companies from withdrawing oil and gas from the Wind River Reservation without valid leases. It is not the act of illegal "conversion", discussed earlier in this brief, that creates a continuing claim, but each year's extraction of oil and gas under the illegally-formed leases. Claims for trespass occurring within six years prior to the filing of this action are thus not barred by the statute of limitations.

CONCLUSION

The decision below should be reversed and the case remanded to the Court of Federal Claims for a decision on the merits of Claim II.

Dated: December 20, 2010.

Respectfully submitted,

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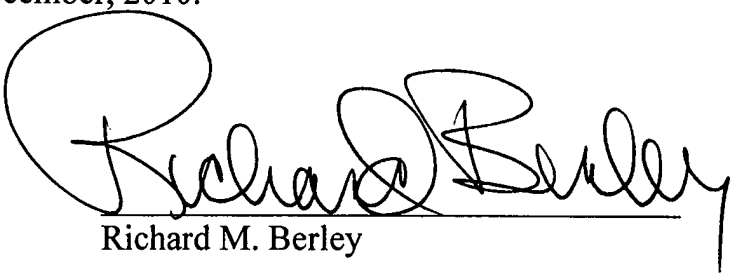
Two true, correct and complete copies of plaintiff-appellants' Appendix were served on Defendant-Appellants' counsel of record via first class mail and email on December 10, 2010.

Dated this 20th day of December, 2010.



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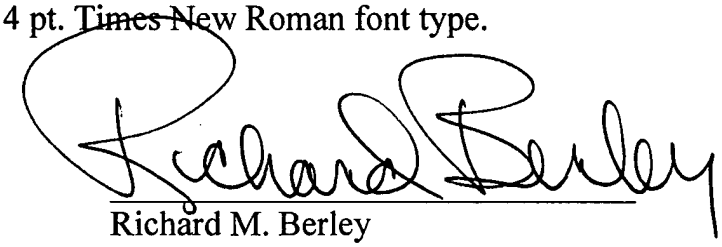
CERTIFICATE OF COMPLIANCE

I, Richard M. Berley, hereby certify that this brief complies with the type and volume limitations set forth in Rule 32(a)7(C)(i) and contains 10,887 words in proportionally-spaced, 14 pt. Times New Roman font type.



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ADDENDUM

Shoshone Indian Tribe v. United States, 93 Fed.Cl. 449 (May 27, 2010), including Order Amending Opinion and Judgment (Aug. 5, 2010)