IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 2010-5150

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.

THE UNITED STATES,
Defendant-Appellee.

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

---

CORRECTED BRIEF OF THE UNITED STATES AND SUPPLEMENTAL APPENDIX FILED PURSUANT TO FED. CIR. R. 30(f)

IGNACIA S. MORENO
Assistant Attorney General

JOAN M. PEPIN
Environment & Natural Resources Division
United States Dept. of Justice
P.O. Box 23795, L'Enfant Station
Washington DC 20026
(202) 305-4626

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES:

RULES:

OTHER:

STATEMENT OF RELATED CASES

The United States concurs in the Statement of Related Cases in the brief for appellants the Shoshone Indian Tribe of the Wind River Reservation, Wyoming, and the Arapaho Indian Tribe of the Wind River Reservation, Wyoming (Tribes).

JURISDICTIONAL STATEMENT

The jurisdiction of the Court of Federal Claims (CFC) over the Tribes' claim is in dispute. The Tribes filed suit in 1979 in the U.S. Court of Claims, asserting jurisdiction under the Indian Tucker Act, 28 U.S.C. § 1505. The Tribes asserted, in relevant part, that certain actions that took place in the late 1940s, with the actual knowledge and participation of the Tribes, constituted a breach of legal duty by the United States. Because the Tribes' claim accrued more than six years before the suit was filed, the CFC dismissed the claim as barred by 28 U.S.C. § 2501, which provides that "[e]very claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues."

The United States concurs in the Tribes' statement of appellate jurisdiction.

INTRODUCTION

The Wind River Reservation, jointly owned by the Tribes, contains oil and gas fields that have been leased for oil and gas exploration and production since the early years of the 20th century. In 1948 and 1949, the Joint Business Council of the Shoshone and Arapaho Tribes voted unanimously to approve the requests of two lessees to replace their existing leases, which had been issued under a 1916 statute, with leases issued under the 1938 Indian Mineral Leasing Act (IMLA). The Tribes' Joint Business Council passed resolutions requesting the lease conversions, A98, A110, and the Tribes signed the new leases.

The Tribes' vote to convert these 1916 Act leases to IMLA leases reflected their view that 1916 Act leases were "not good contracts for the Tribes" because of their long (twenty year) initial term and the lack of any requirement on the lessee to drill. A141. In the late 1930s, the Tribes opposed the renewal of the leases on the very parcels that are at issue in this case because of the lack of drilling obligations in leases issued under the 1916 Act. In the late 1950s, the Tribes' attorneys recommended that *all* leasing under the 1916 Act be done away with

and instead conformed to the IMLA. Contrary to their current position that the 1916 Act is clearly better for Indians than the IMLA and that the United States hid that "fact" from the Tribes, the Tribes and their counsel insisted, for many years before and after the conversions, that the IMLA was better for Indians than the 1916 Act, and they acted accordingly.

The Tribes, however, like everyone else, were unable to foresee in 1949 that oil prices, which had long been fairly stable, would suddenly start to climb precipitously in the 1970s.[1] Supplemental Addendum (S. Add.) at 5-7. By 1983, the Tribes determined that, as things turned out, they would have made more money under the 1916 Act leases after all. The Tribes then claimed, for the first time, that the lease conversions

---

[1] *See* U.S. Energy Information Administration, Department of Energy, Annual Energy Review 2009, pp. 168-69, (Figure 5.18 and Table 5.18), http://www.eia.doe.gov/emeu/aer/pdf/aer.pdf. The relevant pages of this very large report are reproduced for the Court's convenience in the Supplemental Appendix at 34-36. Courts may take judicial notice at any time, including on appeal, of publicly-available documents produced by a government agency. *Funk v. Stryker Corp.*, __ F.3d __, 2011 WL 207961, *5 (5th Cir. 2011); *Denius v. Dunlap*, 330 F.3d 919, 926-27 (7th Cir. 2003) (taking judicial notice of information from official government website).

that they had requested were illegal, and they wrongly assert that the United States agrees.[2] The Tribes further allege that this claim, filed over 30 years after the conversions took place, did not accrue until 1983 because the Tribes were unaware, and could not possibly have known, about the lease conversions that they approved, requested, and signed.

---

[2] The Tribes repeatedly allege that the United States "admits" that the conversions were illegal, Tribes' Br. at 2, but that is a gross distortion of the record. The United States admits only a demonstrably harmless procedural error in the issuance of the new leases. The United States firmly *denies* that it violated any legal duty in terminating the 1916 Act leases, and firmly *denies* that it violated any legal duty in approving the issuance of IMLA leases between the Tribes and the lessees, other than the harmless procedural irregularity acknowledged above. At any rate, the putative illegality of the lease conversions is a merits issue, and therefore is not before this Court on this appeal from the CFC's dismissal of the Tribes' claims for lack of jurisdiction.

STATEMENT OF THE ISSUES

Whether 28 U.S.C. § 2501 bars Claim II, in which the Tribes allege that, in 1949 and 1950, the United States wrongfully terminated seven leases under the 1916 Act, where the Tribes had actual contemporaneous knowledge of the terminations, but did not file suit until 1979.

Whether the Tribes' claim that the 1916 Act leases should not have been terminated, and that the Tribes are owed the royalties they believe they would have received had those leases remained in effect, is a claim for mismanagement of a trust asset, rather than a claim for mismanagement of or loss to trust funds, within the meaning of the Interior Appropriations Act.

Whether the Tribes stated a claim that the lessees under the successor leases are trespassers, and the United States violated a fiduciary duty in failing to remove them.

STATEMENT OF THE CASE

The United States concurs in the Tribes' statement of the case.

STATEMENT OF FACTS

A. The 1916 Act governed oil and gas leasing on the ceded lands of the Wind River Reservation

In 1905, Congress ratified an agreement between the United States and the Tribes whereby the Tribes ceded to the United States all right, title, and interest in approximately 1,480,000 acres of the Wind River Reservation. The ceded lands were to be sold by the United States, with the proceeds to be paid to the Tribes. Act of March 3, 1905, Pub. L. No. 58-185, 33 Stat. 1016-18.

Around 1910, however, it became apparent that much of the ceded territory was potentially valuable for oil and gas. In order to allow the Tribes to benefit from those resources, Congress passed the Act of August 21, 1916, Pub. L. No. 64-218, 39 Stat. 519-20, a two-paragraph statute which authorized the Secretary of the Interior "to lease, for the production of oil and gas therefrom, lands within the ceded portion of the Shoshone or Wind River Indian Reservation," with the proceeds to benefit the Tribes. The 1916 Act specified that "[l]eases shall be for a period of twenty years with the preferential right in the lessee 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 . . . ." 39 Stat. 520. (Reproduced at S. Add. 1.)

The 1916 Act did not contain any terms requiring the lessee to develop the leases, drill wells, or produce oil or gas in paying quantities, causing the Shoshone to complain that under the 1916 Act, their property in some cases "for all practical purposes is thus being donated to the lessee." A142. 1916 Act leases were entered into between the Secretary of the Interior and the lessee, and did not require the consent of the Tribes.

B. The Indian Mineral Leasing Act of 1938 governed Indian mineral leasing generally, but excluded the ceded lands of the Wind River Reservation

In 1938, Congress passed the Indian Mineral Leasing Act (IMLA), 52 Stat. 348-48 (reproduced at S. Add. 3), another remarkably concise statute which changed certain aspects of pre-existing mineral leasing law that had proven disadvantageous to the Indians.[3] As the Shoshone

---

[3] Pre-existing law included not only the 1916 Act, which was expressly limited to the ceded lands of the Wind River Reservation, but also the Act of June 30, 1919, which governed mineral leasing on Indian reservations more generally. Like the 1916 Act, the 1919 Act required 20 year initial terms with a preferential right in the lessee to renew for successive ten-year periods, did not require that minerals be produced

accurately explained in 1959, "[t]he 1916 Act was among the first statutes authorizing oil and gas leasing of Indian lands. Subsequent experience has indicated the wisdom of shorter primary terms with extensions contingent upon the production of oil and gas in paying quantities." A142. To correct that problem, Congress provided in the IMLA that mineral leases on tribal lands would be "for terms not to exceed ten years and as long thereafter as minerals are produced in paying quantities." 25 U.S.C. § 396a.

The IMLA also "aimed to foster tribal self-determination by giving Indians a greater say in the use and disposition of the resources found on Indian lands." *United States v. Navajo Nation*, 537 U.S. 488, 494 (2003) (internal quotation omitted). Under pre-existing law such as the 1916 Act, leases on Indian land were entered into between the Secretary of the Interior and the lessee, without the consent or participation of the affected tribes. Under the IMLA, however, leases are entered into between the Indian tribe and the lessee, and merely approved by the Secretary of the Interior. Tribes can, and do, decide whether to enter into leases, and negotiate their terms.

---

in paying quantities, and did not require tribal consent. Act of June 30, 1919, 41 Stat. 31.

These benefits were initially unavailable to the Tribes for the leases at issue in this case, however, because the IMLA specifically stated that it "shall not apply to . . . the ceded lands of the Shoshone Reservation in Wyoming . . . ." 25 U.S.C. § 396f, 52 Stat. 348, S. Add. 4. With respect to ceded lands, the old 1916 Act regime remained in place.

C. The ceded lands were restored to the Wind River Reservation under the Act of July 27, 1939

In 1939, Congress passed an Act directing the Secretary of the Interior to restore to tribal ownership all undisposed-of ceded lands of the Wind River Reservation. Act of July 27, 1939, Pub. L. No. 76-238, 53 Stat. 1128. The land on which two of the leases at issue in this case are located was restored to tribal ownership on May 17, 1940. 40 Fed. Reg. 1805-06. The land on which the remaining five disputed leases are located was restored to tribal ownership on August 10, 1944. 44 Fed. Reg. 9749-54.

Once the ceded lands were restored to tribal ownership, they were no longer ceded lands, and therefore were no longer within the scope of the 1916 Act, which applies only to the ceded lands of the Wind River Reservation. The restored lands were then within the scope of the IMLA because they were no longer within the exclusion of "ceded" lands

of the Wind River Reservation. That point is undisputed. *See* Tribes' Br. at 10.

D. The Tribes were knowledgeable and active participants in managing the leases at issue in this case

Five of the seven parcels at issue in this case were located in the Maverick Springs field, and were first leased in 1918. The other two parcels were located in the Steamboat Butte field, and were first leased in 1938. All of the lands were ceded lands at the time the leases were issued, and thus all of the leases were issued under the 1916 Act.

The Tribes were dissatisfied with the terms of the 1916 Act leases on the Maverick Springs sites, and for many years they vigorously lobbied the Department of the Interior and Congress to cancel the leases and remove the lands out from the limitations of the 1916 Act. Supplemental Appendix (SA) 1-8. The reason for the Tribes' dissatisfaction was straightforward: nothing in the 1916 Act or the leases entered into pursuant to that Act required the lessees to produce, and as a result, in the Tribes' view, the lessees were holding the fields as reserves instead of for production. Without production, the Tribes were receiving only the rental payments of $1 or $1.25 per acre

annually, and were receiving nothing in the potentially enormously more profitable royalties. SA 7; *accord* A142.

The Tribes' disputes with the Department of the Interior reveal that the Tribes were knowledgeable about these particular leases and were actively concerned with the management of their oil resources. In a 1937 letter to the Secretary of the Interior, for example, the Tribes knowledgeably discussed the number of wells drilled in Maverick Springs, the daily production capacity, the quality of the oil, the depth of the wells, the geological structures underlying the field, the cost of pumping, the cost of transporting the oil, and the market for such oil, as well as comparable figures for other sites. *Id.* Moreover, when they failed to obtain the desired results from the Department of the Interior, the Tribes lobbied their representatives in the House and Senate. SA SA 1-4. Eventually the disputes were resolved and the leases renewed, with the Tribes obtaining some of the benefits they had sought. This record shows that the Tribes were active, sophisticated and effective advocates for their own interests, and belies their current portrayal of themselves as passive, uninformed beneficiaries, unquestioningly accepting whatever the Department of the Interior said or did.

E. The Tribes voted to convert the leases from the 1916 Act to the IMLA.

In 1948, the holder of the two Steamboat Butte leases requested that the leases be converted to "the form of lease now currently in use" – that is, a lease issued under the IMLA. The request was presented to the Joint Business Council of the Shoshone and Arapaho Tribes (Council) at their May 7, 1948 meeting. The Council voted unanimously to approve the request, A97, and prepared a resolution requesting the Department of the Interior's Commissioner of Indian Affairs to take the necessary steps "to convert the two said leases so as to continue such leases in effect so long as oil and gas are produced in paying quantities." A98. The leases were prepared, and were signed by the two Council chairmen on February 11, 1949.

In January 1949, the Council was again presented with a request, this time from the holder of the five Maverick Springs leases, to convert five 1916 Act leases to IMLA leases. Once again, all Council members present voted to approve the request. A109. Council member Robert Harris, the Chairman of the Shoshone Business Council, spoke about the importance of the Tribes being the lessors. He had been personally involved in advocating the Tribes' interests in the disputes in the 1930s

concerning the Maverick Spring leases, and felt that the Tribes at that time had "no voice" because they were not the lessors. *Id.* He urged that the "Tribes could get these out from under the old leases and become the lessors themselves." *Id.*

The Council accordingly passed a resolution resolving "that new leases be prepared in favor of the Husky Refining Company, covering the restored tribal lands described in the said contracts on the current tribal lease form, as provided for in the Act of May 11, 1938." Four of the five leases were executed by the Tribes on August 10, 1949. A116, 121, 126, 131. The fifth was executed by the Tribes on July 21, 1950. A136.

The United States and the Tribes vigorously disagree on what took place at those two Council meetings. The Tribes allege that the government agent, Mr. Waller, "concealed and misrepresented material facts" about the terms of the leases, the 1916 Act, and the IMLA.[4] The United States categorically denies that allegation. Fortunately, the Council meetings were transcribed, and the transcripts speak for themselves, as do the statutes and leases that were discussed at the

[4] *See generally* Tribes' Br. at 10-13, 21-26.

meetings. A94-97, 107-109. A comparison of the transcripts with the statutes and leases proves that the Tribes' allegations of concealment and misrepresentation are baseless.

F. In 1959, the Tribes' counsel protested the renewal of 1916 Act leases and recommended that all future leasing be conformed to the IMLA

Although the seven leases at issue in this case were protected by the provisions of the IMLA requiring production as a condition of continuation, many other leases, to the Tribes' consternation, were not. In 1959, the Tribes' attorney, Marvin Sonosky, wrote to the Secretary of the Interior to protest the renewal of other leases issued under the 1916 Act and to demand that in the future, the Secretary, to the extent possible, conform 1916 Act leases to the terms of the IMLA. Mr. Sonosky argued that "[l]eases issued under the 1916 Act are not good contracts for the Tribes," A141. He explained that "[t]he 1916 Act was among the first statutes authorizing oil and gas leasing of Indian lands. Subsequent experience has indicated the wisdom of shorter primary terms with extensions contingent upon the production of oil and gas in paying quantities. Thus, the policy of Congress and of the Department is expressed in the [IMLA], which requires that oil and gas leases be

executed by the Tribes and provides for terms 'not to exceed ten years' without extension except by production." A142. On behalf of the Tribes, Mr. Sonosky argued that the Department of the Interior "should bring the 1916 Act leases within the policy governing all other Indian oil and gas leases" – that is, the IMLA. A143.

Reflecting the same view, a 1959 Joint Memorandum from the Tribes' attorneys to the Shoshone and Arapaho Business Councils recommended that the Tribes seek legislation to amend then-existing law "to do away with future leasing under the 1916 Act and to conform all future leasing to the Indian Leasing Act of 1938." SA 11. The memorandum from the tribal attorneys noted that "[t]he Joint Business Council has authorized the attorneys to take steps to accomplish these two objectives, and we have moved on the matter." *Id.*

G. The Tribes brought suit in 1979

In 1979, the Eastern Shoshone Tribe and the Northern Arapaho Tribe filed separate lawsuits in the United States Claims Court, alleging that the United States mismanaged the Tribes' trust assets and trust funds. The two suits were consolidated, and divided into distinct phases. Claims pertaining to sand and gravel comprised one

phase, and were resolved by settlement in 2002. Oil and Gas Phase One addressed the underpayment of oil and gas royalties in the six years prior to the filing of suit, and was settled in 2004. Oil and Gas Phase Two includes claims for the underpayment of royalties prior to 1973, as well as several associated issues. The parties settled most of the issues in Oil and Gas Phase Two in 2009, but they were unable to reach agreement concerning Claim II – the one giving rise to the jurisdictional question presently before this Court.

H. In Claim II, the Tribes allege that the 1916 Act leases should not have been terminated, and that they are owed the additional royalties they could have received if the 1916 Act leases had remained in effect.

Claim II was not stated in the Tribes' original complaints. However, in 2006, in response to a court order requiring them to identify their Oil and Gas Phase Two claims with greater specificity, the Tribes for the first time clearly articulated Claim II. They asserted that seven 1916 Act leases had been wrongfully terminated and replaced with IMLA leases, and that "[t]hese conversions were illegal, costing the Tribes the difference in royalty that they could have obtained if these leases had remained 1916 Act leases." Dk. 20 p. 11.

It is important to note what Claim II does not allege. It does *not* allege that the Tribes failed to receive the royalties owed under the IMLA leases, nor does it allege that the IMLA leases should have contained terms more favorable to the Tribes. It also does *not* allege that the IMLA leases are void or that the lessees were in trespass. The Tribes' claim is simply and solely that the 1916 Act leases should have been renewed instead of terminated; and that the Tribes are owed the difference between the royalties they *actually* received under the IMLA leases, and the royalties they imagine they *would have* received had the 1916 Act leases remained in effect.

I. The CFC dismissed Claim II for lack of jurisdiction

In September 2009, the United States moved for judgment on the pleadings, arguing that Claim II is barred by 25 U.S.C. § 2501. The United States pointed out that the lease conversions occurred, with the Tribes' actual knowledge and participation, in 1948 and 1949, well more than six years prior to the filing of the Tribes' suit.

The Tribes responded that accrual of their claim was deferred, because (they alleged) the United States misled them and concealed its actions with the result that they were unaware of their claims. The

Tribes further contended that their claim falls within a provision of the Interior Appropriations Act that defers the accrual of any claim for losses to or mismanagement of Indian trust funds until an accounting, from which the beneficiary can determine whether there has been a loss, has been provided. Finally, the Tribes argued for the first time that the IMLA leases were void and that the lessees were trespassers, continuing into the six-year limitations period, who the United States had failed to evict, in violation of fiduciary duty.

The CFC found that Claim II was time-barred. The court rejected the Tribes' allegation that their alleged injury was "inherently unknowable" because, in addition to their actual knowledge of the conversions, the Tribes demonstrated actual knowledge of the differences between 1916 Act and IMLA leases in the 1959 Sonosky letter. The court declined to find whether or not there had been concealment or misrepresentation by the government, holding that, even if there had been, the Tribes were on inquiry notice and had, "at the very least . . . constructive knowledge of what they now characterize as the illegal conversion of the leases." Add. 11.

The CFC also found the accrual-tolling provision of the Interior Appropriations Act inapplicable. Following this Court's holding in an

earlier appeal in this case, the CFC noted that the Interior Appropriations Act provision applies only to claims for losses to or mismanagement of trust *funds*, not to claims for mismanagement of trust *assets*. The court observed that the Tribes were not alleging that the United States failed to collect the royalties owing under the existing leases, but rather that the leases ought to have different terms than they actually do. That claim, the court found, alleged mismanagement of trust assets rather than of trust funds, and therefore was outside the accrual-tolling statute's ambit. Add. 12-14.

Finally, the Court rejected the Tribes' allegation that the IMLA leases were void and that the lessees were trespassers, finding that the cases the Tribes cited "differ substantially from this case" and noting that "the 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." Add. 14.

Accordingly, the CFC found that Claim II was barred by 28 U.S.C. § 2501, and dismissed it. The Tribes filed an unopposed motion to amend the judgment to clarify certain procedural details, and for Rule 54(b) certification. The Court granted the motion, and this appeal followed.

SUMMARY OF ARGUMENT

Claim II alleges that the United States illegally terminated seven 1916 Act leases, and that the Tribes are owed the difference between the royalties the Tribes believe those leases would have generated if still in effect, and the royalties the Tribes actually received from the IMLA leases that replaced the 1916 Act leases. That claim accrued in 1949 and 1950, when the 1916 Act leases were terminated. The Tribes had actual knowledge of those terminations at the time they occurred, so their charges of concealment and misinformation are irrelevant as well as baseless. Their argument that they were unaware of the differences between the two leasing statutes and the leases issued under them is likewise irrelevant; it is well settled that ignorance of the law is insufficient to defer accrual of a tribe's claim.

The Tribes seek to invoke a provision of the Interior Appropriations Act that defers accrual of certain claims, but that provision is inapplicable here. In an earlier appeal in this case, this Court made clear that the Interior Appropriations Act accrual-tolling provision applies only to claims for mismanagement of or losses to trust *funds*, and does not apply to claims for mismanagement of trust *assets*.

This Court specifically held that the accrual-tolling provision did defer accrual of claims that the United States failed to collect royalties under existing contracts because those were claims for losses of trust funds, but that it did not defer accrual of claims that the contracts should have had terms more favorable to the Tribes because those were claims for mismanagement of a trust asset. Claim II falls squarely in the latter category. It is a claim for mismanagement of a trust asset, and is therefore outside the ambit of the Interior Appropriations Act accrual-tolling provision.

Finally, the Tribes' eleventh-hour attempt to assert new theories for relief in this case should be rejected. Claim II does not allege that the IMLA leases are void, or that the lessees were trespassers, or that the United States had a duty to remove those supposed trespassers. The Tribes' continuing trespass argument, accordingly, has no place in this appeal. It is, moreover, meritless.

STANDARD OF REVIEW

This Court exercises *de novo* review over the question of whether the Court of Federal Claims possesses jurisdiction over a claim. *Navajo Nation v. United States*, __ F.3d __, 2011 WL 62825, *4 (Fed. Cir. Jan. 10, 2011).

ARGUMENT

I. Claim II is Barred by 28 U.S.C. § 2501

Under 28 U.S.C. § 2501, every claim over which the CFC has jurisdiction is "barred unless the petition thereon is filed within six years after such claim first accrues." That time-bar serves the public interest in that it "protects the government from having to defend suits long after the events sued upon have occurred" and "puts an end to the possibility of litigation after a reasonable time." *Hart v. United States*, 910 F.2d 815, 818 (Fed. Cir. 1990). That policy is especially important in cases like this one, where thirty years of hindsight has changed the Tribes' perception of which leasing statute provided the more advantageous terms.

The limitations period in 28 U.S.C. § 2501 is jurisdictional and cannot be waived. *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 136-39 (2008). Indian claimants, despite their beneficiary status, are not entitled to a more lenient interpretation of the statute of limitations; it is well settled that "statutes of limitations are to be applied against the claims of Indian tribes in the same manner as against any other litigant seeking legal redress or relief from the

government." *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1576 (Fed. Cir. 1988).

As explained above, Claim II alleges that the United States violated legal duties in terminating the 1916 Act leases. The 1916 Act leases were terminated, and Claim II thus accrued, no later than when the replacement IMLA leases were executed by the Tribes in 1949 and 1950. Claim II therefore accrued more than six years before the filing of the Tribes' 1979 complaint, and accordingly is barred.

A. The Tribes had actual and contemporaneous knowledge of the termination of the 1916 Act leases.

The Tribes allege that Claim II did not accrue at the time of the lease conversions because the Tribes lacked actual or constructive notice of Claim II until 1983. Tribes' Br. at 20-21. That allegation is demonstrably false. The record incontrovertibly shows that the Tribes had actual knowledge of the facts material to Claim II at the time that the lease conversions occurred.

A claim generally accrues "when all the events have occurred which fix the alleged liability of the defendant and entitle the plaintiff to institute an action." *Hopland Band*, 855 F.2d at 1577. However, accrual of a claim can be deferred "where the government fraudulently

or deliberately conceals material facts relevant to a plaintiff's claim so that the plaintiff was unaware of their existence and could not have discovered the basis of his claim." *Id.* The Tribes allege that, due to "misrepresentations and concealment" by the United States, they neither knew nor could have known of their claims. Tribes' Br. at 20.

We will show, *infra*, that the Tribes' charge of misrepresentation and concealment is completely baseless. More immediately relevant, however, is the fact that with or without any purported concealment or misinformation by the United States, the Tribes had *actual, contemporaneous* knowledge of the material facts giving rise to Claim II. Fraud or concealment defer accrual of a claim only when they cause a plaintiff to be unaware of the material facts of his claim. *Id.* Where, as here, the plaintiff had actual and contemporaneous knowledge of the material facts, allegations of concealment are irrelevant.

In this case, it cannot reasonably be disputed that the Tribes actually knew, at the time it happened, that the 1916 Act leases on the seven disputed parcels were terminated and that IMLA leases were issued in their stead. As explained above, the Council voted unanimously to approve the lease conversions. A97, A109. The Council

passed resolutions specifically requesting the conversions. A98, A110. The resolutions identified, by lease number, the specific 1916 Act leases to be terminated and replaced by IMLA leases. *Id.* The Tribes then signed the IMLA leases. A102, 106, 116, 121, 126, 131, 136.

The gravamen of Claim II is that the United States unlawfully terminated the 1916 Act leases. The event fixing the United States' alleged liability for Claim II, therefore, is the termination of the 1916 Act leases. Because the Tribes actually knew, by 1950 at the latest, that the 1916 Act leases had been terminated, the question of what they could have or should have known is irrelevant. They *did* know the material facts of Claim II at the time they occurred, and Claim II is therefore time-barred.

B. The Tribes' alleged lack of knowledge of their legal rights does not toll the statute of limitations

The Tribes admit that "[t]he Tribal Councils in 1948 and 1949 were aware of the seven 'conversions," Tribes' Br. at 20, but argue they lacked knowledge of the basis of Claim II because they were "unaware of the illegality of the 'conversions.'" Tribes' Br. at 17. The Tribes' argument reflects a fundamental misunderstanding about the requirements for deferring accrual of a claim. Deferral occurs only

when a plaintiff is justifiably ignorant of the material *facts* comprising his claim. Ignorance of the *law* does not defer accrual of a claim, even for Indian plaintiffs. "It is settled," this Court has held, "that 28 U.S.C. § 2501 is not tolled by the Indians' ignorance of their *legal* rights." *Menominee Tribe v. United States*, 726 F.2d 718 (Fed. Cir. 1984) (emphasis in original). *Accord Catawba Indian Tribe v. United States*, 982 F.2d 1564, 1572 (Fed. Cir. 1993) (rejecting accrual-tolling where "all the relevant *facts* were known. It was the meaning of the law that was misunderstood.") (emphasis in original); *Affiliated Ute Citizens of State of Utah,* 199 Ct.Cl. 1004 (1972) ("The facts were all available and an Indian group's ignorance of its legal rights does not toll the running of limitations.")

The "facts" of which the Tribes claim to have been unaware are the relevant provisions of the 1916 Act and the IMLA. The provisions of a statute are obviously more appropriately classified as law than as facts. Even if one did construe those statutory provisions as material facts, however, they were certainly neither unknown nor unknowable to the Tribes. The 1916 Act, which is only two paragraphs long, had been in existence for over thirty years at the time of the lease conversions in

this case, and it applied solely to the Wind River Reservation. The Tribes had every reason to be familiar with its terms, and the record demonstrates that they were. Similarly, IMLA is only two pages long, had existed for a decade by the time of the lease conversions, and governed all non-ceded and restored lands of the Wind River Reservation. If the Tribes were not familiar with its terms by 1948, they could have and should have been. "Without doubt the Indians were capable enough to seek advice, launch an inquiry, and discover through their agents the facts underlying their current claim. In short, the facts were all available, and the running of limitations would not be tolled as if they were unknowable." *Menominee Tribe v. United States*, 726 F.2d at 721 (internal quotation marks omitted).

The material *fact* in Claim II is that the 1916 Act leases were terminated, and it is clear and indisputable that the Tribes were aware of that fact. The provisions of the relevant statutes, and the purported illegality of that termination are legal questions, and the Tribes' alleged lack of knowledge of the law has no effect on the accrual of Claim II.

C. The United States did not mislead, misinform, or conceal information from the Tribes

The Tribes allege that they were misled and misinformed in three basic ways. First, they allege that the United States failed to inform them that they would make more money under the 1916 Act leases. Second, they allege that the United States failed to inform them that conversion would be (allegedly) illegal. Third, they allege that the United States failed to inform them that the replacement IMLA leases were not competitively bid. Tribes' Br. at 22-24. As will be shown below, the United States never concealed knowable information from the Tribes, nor did it mislead or misinform the Tribes about anything. Moreover, none of these allegations even pertain to the only material fact that needed to be known in order for Claim II to accrue: that the 1916 Act leases were terminated. The Tribes' allegations of malfeasance are therefore not only meritless, but are irrelevant to the timeliness of Claim II.

1. Mr. Waller's explanation of the differences between 1916 Act leases and IMLA leases was true, correct, and appropriate

There can be no reasonable dispute that, when the Council asked the government agent, Mr. Waller, to describe the differences between 1916 Act leases and IMLA leases, the answers he gave were true and

correct. His answers also appropriately identified the relevant differences between the two types of leases, given what was known at the time. At the May 7, 1948 meeting concerning the Steamboat Butte leases, for example, Mr. Waller explained that

> Now, what this request involves is that back in 1937 and 1938, the lands up in the Steamboat Butte Field were open ceded lands. Since then they have been restored to full tribal ownership. Regulations governing the leasing of the old ceded land provided that the leases therefor be issued for a term of 20 years and gave the lessee the preferential right to renew such leases for additional terms of 10 years, upon certain terms and conditions. Since the issuance of these two ceded leases, British-American [the lessee] obtained other leases in Steamboat Butte Field. These subsequent leases are under existing regulations and issued for a definite term of 10 years and continue in effect so long as oil and/or gas are produced in paying quantities.

A96. A comparison between Mr. Waller's statement and the two statutes he is summarizing, S.Add. 1-4, proves that Mr. Waller's statement was entirely accurate. Mr. Waller went on to explain that

> One difference between the old ceded lease and the present lease is that the ceded leasing was done directly with the companies by the Secretary of the Interior, and the Tribes had very little voice in it. The present leases are approved and signed by the Tribes. British-American is asking for your consideration to convert these two ceded leases into new leases under the existing regulations. It will be a lease between the oil company and the two Tribes.

Id. Once again, the transcript disproves the allegation of misinformation. What Mr. Waller stated is indisputably true.

The Tribes argue that this true statement was "misleading" because they now take the position that having the Tribes as necessary parties to the lease is "a distinction without a difference." Tribes' Br. at 12. They had a very different view at the time, however, *see* A109 (statement of Shoshone Business Council Chairman Robert Harris), and the Supreme Court has likewise recognized that, by making Tribes parties to mineral leases on their land, the IMLA "aimed to foster tribal self-determination by giving Indians a greater say in the use and disposition of the resources found on Indian lands." *United States v. Navajo Nation*, 537 U.S. at 494 (internal quotation omitted). It was certainly not misleading of Mr. Waller to state that the Tribes had "little voice" in the 1916 Act leases or that new leases under the IMLA would be "between the oil company and the two Tribes." A96.

In the January 1949 meeting where the Maverick Springs leases were discussed, Mr. Waller again explained the basic provisions of 1916 Act and IMLA leases. This time, he was asked whether there was "any advantage in this transfer" for the lessee. He responded

> That is debatable. . . . The only two real differences in the two leases is that the ceded form of 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 present 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 same rate of royalty.

A109. The United States stands by this statement as an accurate and reasonable summary of the differences between the two types of leases. The Tribes, on the other hand, contend that this very statement contains a "wealth of misinformation, misrepresenting and omitting critical information, all of which served to conceal the claim from the Tribes." Tribes' Br. at 23. They highlight the statement that the leases have the same rent and the same rate of royalty, charging that it "[m]ost egregiously . . . affirmatively misinformed the Tribes . . . ." *Id.* at 22.

The leases are in the record, and it is simple to verify whether or not Mr. Waller's misinformed the Tribes about their terms. The 1916 Act leases provided for a rental payment of $1.25 per acre annually, and a royalty of 12½% of the value of all oil, gas, and other hydrocarbons produced. A36, A47, A58, A69, A80. The IMLA leases that replaced those leases provided for a rental payment of $1.25 per acre annually,

and a royalty of 12½% of the value of all oil, gas, and other hydrocarbons produced. A113, A119, A123, A129, A134. Mr. Waller's statement was true.

The Tribes' real complaint is that Mr. Waller did not inform them that "[i]n fact, economic returns from 'converted' and 'unconverted' leases would be very different in renewal periods." Tribes' Br. at 23. Mr. Waller could not have known that at the time, however, and it is not "concealment" to fail to predict future economic returns.

2. It is only with the benefit of hindsight that the "terms and conditions" provision of the 1916 Act appears significant.

The Tribes' fundamental complaint about Mr. Waller's summary of the leases' terms is that he did not highlight the provision of the 1916 Act providing that oil and gas leases were to be renewed "upon such reasonable terms and conditions as may be prescribed by the Secretary of the Interior." S.Add. 2. With the benefit of hindsight, we now know that, starting in the late 1960s and 1970s, that provision was the means by which royalty rates were increased on some 1916 Act leases that came up for renewal at that time. (It was also, in subsequent decades, the means by which royalty rates were *decreased* on some 1916 Act leases on renewal). *See, e.g.*, SA 30, 33. Mr. Waller, they charge, failed

to inform them that they would be giving up that possibility if the 1916 Act leases were terminated.

This was not, as the Tribes contend, egregious concealment; it was the ordinary human inability to predict what may turn out to be important in the future. At the time, the "terms and conditions" provision appeared to be standard boilerplate, and neither Mr. Waller, the Tribes, nor anyone else foresaw the advantages it would have decades in the future, under changed conditions.

3. The Tribes' own highly expert attorneys also failed to predict the future advantages of the "terms and conditions" language in the 1916 Act.

The strongest proof that Mr. Waller acted reasonably in failing to perceive and explain the potential advantages of the "terms and conditions" language is that the Tribes' own attorneys did the same thing, even a decade later. The Shoshone Tribe's attorney, Marvin Sonosky, wrote on the Tribes' behalf to the Department of the Interior, protesting the renewal of 1916 Act leases and demanding that the leases, to the extent possible, be conformed to the IMLA. A143. Like Mr. Waller, Mr. Sonosky focused on the IMLA's requirement that leases be productive in order to be renewed, A141-142, and the ability under

the IMLA of the Tribes to grant or withhold consent to the issuance and renewal of leases. A143-144. Those were the provisions that seemed relevant and significant at that time. Like Mr. Waller, Mr. Sonosky never mentioned the possibility of raising royalty rates under the "terms and conditions" language of the 1916 Act, simply because that was not, at the time, a relevant or foreseeable possibility.

Even more compelling is the Joint Memorandum, from Mr. Sonosky and the Arapaho Tribe's attorney, Glen Wilkinson, to the Council, recommending that the Tribes seek legislation "to do away with future leasing under the 1916 Act and to conform all future leasing to the Indian Leasing Act of 1938.". SA 11. In their recommendation, the Tribal attorneys discussed the problem of non-productive leases being renewed under the 1916 Act, SA 10, and their desire to prevent renewal of leases without the Tribes' consent, SA 11. In other words, the Tribal attorneys highlighted the same differences between the laws that Mr. Waller did, because those were the differences that were significant at that time. The Tribal attorneys never mentioned that, in seeking legislation to abolish future leasing under the 1916 Act leases and to conform all future leasing to the IMLA, the Tribes would be

giving up the possibility of raising royalty rates upon renewal under the "terms and conditions" language of the 1916 Act – probably because the possibility never occurred to them, nor to anyone else at that time. SA 11.

We think the Tribes will agree that Mr. Sonosky was a preeminent expert in Indian law and that he faithfully represented the interests of the Tribes. But even he did not foresee that the Secretary's ability to impose "terms and conditions" upon renewal of 1916 Act leases might be used one day to benefit the Tribes by imposing royalty rate increases. If even Mr. Sonosky, in 1959, could not foresee that possibility, then certainly Mr. Waller cannot be faulted for failing to foresee the same thing a decade earlier.

4. Conversion was not illegal, and even if it were, that would not toll the statute of limitations

The Tribes allege that they were misled and misinformed by the United States that the conversions were legal, thus preventing them from discovering their claims. There are several reasons why this argument fails to support deferring accrual of their claim. First, the allegation that they were misled about the legality of the conversions is merely another way of saying they did not know the law, and it is well

settled that "that 28 U.S.C. § 2501 is not tolled by the Indians' ignorance of their *legal* rights." *Menominee Tribe*, 726 F.2d at 720-21 (emphasis in original). For that reason alone, this Court should reject the Tribes' argument that the government's supposed concealment of the purported illegality of the conversion defers accrual of their claim.

To accept the Tribes' position that accrual of a claim is deferred by their alleged lack of knowledge of the alleged illegality of the government's acts, this Court would have to choose one of two untenable courses. Either this Court would have to decide that a mere allegation of illegality is sufficient to defer accrual of a claim – in which case 28 U.S.C. § 2501 would effectively be nullified – or this Court would have to evaluate the allegation of illegality, and thus decide the merits of the case, in order to determine whether jurisdiction exists. This Court should reject the Tribes' argument.

In the event this Court does decide to proceed to this merits issue, the Tribes' allegation of illegality should be rejected. The conversion, so far as it is relevant to this case, was not illegal.

It is necessary first to be clear about what "conversion" means. Throughout their brief, the Tribes place the word in quotation marks

every time they use it, never explaining what they mean. The United States submits that conversion, in this case, refers to two distinct actions: the termination of seven 1916 Act leases between the Secretary of the Interior and the lessees; and the creation and approval of seven IMLA leases between the Tribes and the lessees for the same parcels.

The first action, termination of the 1916 Act leases, clearly was legally permissible. Those leases were between the Secretary of the Interior and the lessees, and nothing in the 1916 Act, or any other authority of which we are aware, prevents the parties from terminating those contracts by mutual consent. The Tribes have never produced any authority indicating that it is illegal for the Secretary and lessee to terminate a 1916 Act lease.

The Tribes have already admitted, as they must, that once ceded lands were restored to the Wind River Reservation, they were eligible for leasing under the IMLA. Tribes' Br. at 10. It is undisputed that the seven parcels at issue in this case were all restored to the reservation before the IMLA leases were issued. It was not, therefore, illegal to lease those parcels under the IMLA. The United States does

acknowledge a procedural error – a harmless, legally irrelevant error of which the Tribes were aware at the time – in the issuance of the leases, and we explain below why that does not matter. But putting that issue to one side for the moment, there is no basis for the Tribes to argue that it was illegal to issue IMLA leases on the seven parcels at issue in this case.

At any rate, the first step of conversion – termination of the 1916 Act leases – is the only part that is relevant to Claim II. The Tribes' stated claim is that the 1916 Act leases should have been renewed instead of terminated, and that they are owed the royalties they would have received had those leases remained in effect. SA 20-21. Under that theory, the legality or validity of the IMLA leases is a moot point; legal or not, they should never have existed, because the 1916 Act leases on the same parcels should never have ceased to exist.[5] Because no illegal action happened that is germane to the Tribes' claim, the

[5] The existence of the IMLA leases is relevant to the Tribes' claimed damages because the Tribes acknowledge that the amounts that they actually received under the IMLA leases would have to be deducted from the amounts they believe they would have received if the 1916 Act leases had remained in effect. But the legal validity of the IMLA leases is irrelevant to both the existence of Claim II and the amount of alleged damages; all that matters is what amounts were paid.

Tribes' novel argument that the alleged illegality of an action will defer accrual of a claim, even if accepted, has no application here.

5. The lack of competitive bidding is irrelevant to Claim II, and at any rate was harmless and the Tribes were aware of it.

The Tribes claim that they lacked notice of Claim II because the government did not inform them that the IMLA leases were not competitively bid. Although it appears to be true that the replacement leases were not competitively bid, that procedural defect in issuing the IMLA leases has no bearing on Claim II, which asserts that the 1916 Act leases should have remained in effect. Moreover, the error was harmless, and the Tribes were aware of it at the time.

a) Claim II is about the termination of the 1916 Act leases, not the propriety of the IMLA leases

The Tribes' argument that they were unaware of Claim II because the United States did not inform them of the lack of competitive bidding on the IMLA leases is a non sequitur. Claim II is based solely on the Tribes' claim that the 1916 Act leases were wrongfully terminated. SA 20-21. Under the Tribes' theory, the issuance of IMLA leases on those seven parcels, *with or without competitive bidding*, was improper because the 1916 Act leases should never have been terminated.

Procedural irregularities in the issuance of the IMLA leases are simply irrelevant to Claim II.

The Tribes could have filed a claim alleging that the United States violated a legal duty in failing to submit the replacement leases for competitive bidding, but they have never done so. Claim II is the only claim before this Court, and the competitive bidding issue is irrelevant to it.

b) The lack of competitive bidding was harmless

As noted above, the Tribes have never filed a claim based on the lack of competitive bidding on the IMLA leases. A likely reason for that choice is that such a claim would have no associated damages. There is no evidence, and the Tribes have never claimed, that the leases would have fetched a higher return if they had been competitively bid. In fact, the Tribes' own evidence shows that the opposite is true. As even the Tribes' expert witness acknowledged, at the time that these leases were entered into, and indeed for twenty years thereafter, there was *no difference at all* between the royalties or rents on the actual IMLA leases and the royalties or rents that theoretically could have been imposed by the Secretary on the 1916 Act leases. SA 24. Clearly, then,

the IMLA leases were issued at appropriate market royalty and rental rates, meaning the procedural error of issuing the leases to the prior lessees without competitive bidding was harmless.

c) The Tribes were aware that the IMLA leases were issued to the pre-existing lessees without competitive bidding

Significantly, the Tribes never claim to have been unaware that the leases were not competitively bid; they are careful only to state that the United States did not specifically inform them of it. Tribes' Br. at 11-12, 14, 17, 24. In fact, an examination of the record reveals that the Tribes were, or should have been, aware that the leases were simply issued to the holders of the terminated 1916 Act leases. That is, in fact, what the Tribes voted to do, and what the resolutions they passed requested.

At the January 1949 meeting of the Council, at which the conversion of the five Maverick Springs leases was approved, the government agent, Mr. Waller, clearly and accurately represented that the existing lessee, Husky Refining Company, was requesting the Council's approval to "have converted five of the old ceded oil and gas leases into this new form of tribal lease." A108. Mr. Waller clearly stated that "if you approve this proposal, you will be the lessors. It will

be a lease between the Tribes and the Husky Refining Company." A109. A Council member moved to "approve the request of the Husky Oil Company," which the Council unanimously did. Id. Tribal Resolution No. 153 accordingly "resolved . . . that new leases be prepared in favor of the Husky Refining Company, covering the restored tribal lands described in the said contracts on the current tribal lease form, as provided for in the [IMLA]." It seems clear that the Tribes knew that the leases were going to be issued to the Husky Refining Company, rather than put out for competitive bids.

Likewise, at the May 7, 1948 meeting of the Council, Mr. Waller clearly and accurately represented that the lessee "is asking for your consideration to convert these two ceded leases into new leases under the existing regulations. It will be a lease between the oil company and the two Tribes." A96. After the Council voted to approve the request, Mr. Waller stated "This will mean that I will have to write new leases for British-American and present them to the Council Chairmen for signature." A97.

The Tribes note that one Council member, Mr. Harris, mused that the new leases could be put up for bids, and they argue that this shows

that the Council was "left with the impression that public auction would occur." Tribes' Br. at 12. The Tribes' reading of the transcript, however, is selective. Not only does the Tribes' argument ignore Mr. Waller's clear statement that the leases would be issued to British-American; more importantly, they ignore what the Council *actually voted to do*. The Resolution adopted by the Council specifically states that "the British-American Oil Producing Company, lessees of ceded and tribal oil and gas leases . . . presented its written request to the Joint Business Council to convert its ceded lease[s] . . . to the leasing terms as provided in [the IMLA]," and the Council "RESOLVE[S] . . . to convert the two said leases so as to continue such leases in effect so long as oil and gas are produced in paying quantities." The Tribes clearly understood and intended that they were changing only the form of lease, not the lessee.

Finally, the Tribes actually executed all these leases, which should have put them on notice that they all went to the same lessees. Accrual of the Tribes' claim is not deferred by the government's purported failure to inform the Tribes of a fact of which they were

already aware – particularly a fact with no legal relevance to the Tribes' claim.

D. Accrual of Claim II was not deferred by market conditions

The Tribes' final argument in support of deferred accrual is that they could not have been aware of their claim within six years after the conversions because they did not suffer actual monetary damages until decades later, and the full extent of those damages was not known for even longer. According to the Tribes' expert witness, the hypothetical returns that would have been received from the 1916 Act leases, had they remained in effect, did not begin to diverge from the actual returns from the actual IMLA leases until 1968.[6] SA 24-26. In the Tribes' apparent view, their claim could not accrue until the different leases actually produced different returns.

The Tribes' position has been "soundly rejected" by this Court. *Navajo Nation v. United States*, __ F.3d __, 2011 WL 62825, *8 (Jan. 10, 2011). It is well-established that the "proper focus, for statute of limitations purposes, is upon the time of the defendant's *acts*, not upon

---

[6] Even if accrual were deferred by market conditions, which it is not, 1968 is still more than six years before the filing of the complaint in 1979.

the time at which the *consequences* of the acts became most painful." *Fallini v. United States,* 56 F.3d 1378, 1383 (Fed. Cir. 1995), *quoting Delaware State College v. Ricks*, 449 U.S. 250, 258 (1980) (internal quotation marks omitted, emphasis in original). The relevant acts by the United States were the termination of the seven 1916 Act leases, which occurred, with the Tribes' actual knowledge, in 1949 and 1950 at the latest. As of that date, the Tribes lost the opportunity to benefit from increased royalties upon renewal of the leases. That lost opportunity was the "damage" they incurred, and they could have, had they chosen, brought suit over the government's termination of the 1916 Act leases at any time within six years after the terminations occurred. But the Tribes were not entitled to wait decades, until market conditions caused the lost opportunity to become painful, to file suit.

The Tribes argue that "a claim does not accrue until the claimant has suffered damages," Tribes' Br. at 20, 28, citing three cases, one of which is the decision under review. All three of those cases rely solely on one source for that proposition: the Court of Claims' 1964 decision in *Terteling v. United States*, 334 F.2d 250, which in turn relies entirely on

an interpretation of *United States v. Dickinson*, 331 U.S. 745 (1947), that has been repeatedly and unambiguously disavowed by this Court.

In *Terteling,* the Court of Claims found that a cause of action did not accrue until the plaintiff "could determine the total amount" of damages. 334 F.2d at 254. The *Terteling* court reasoned that the Supreme Court's decision in *Dickinson* "teaches us that these contractors had the right to wait until their full obligations were ascertainable before bringing suit therefor. This they did, and in our opinion the instant suit was timely filed." *Id.* at 255.

This Court has squarely rejected that broad reading of *Dickinson.* In *Boling v. United States*, 220 F.3d 1365, 1371 (Fed. Cir. 2000), for example, this Court stated that "[t]he contention that *Dickinson* stands for the proposition that the filing of a lawsuit can be postponed until the full extent of the damage is known has been soundly rejected." *See also Fallini*, 56 F.3d at 1382 ("it is not necessary that the damages from the alleged taking be complete and fully calculable before the cause of action accrues"); *Navajo Nation*, 2011 WL 62825 *8. Clearly, this Court has rejected the reasoning on which *Terteling* relied, and therefore

Terteling and its progeny[7] are no longer good law on the relationship between damages and the accrual of a cause of action. The law of this Circuit is clear: a claim accrues "when all the events have occurred which fix the alleged liability of the government and entitle the plaintiff to institute an action," *Navajo Nation,* 2011 WL 62825 at *5 (brackets omitted), not decades later when a plaintiff begins to find the consequences of those actions painful. *Id.* at *8.

---

[7] The Tribes cite the decision below, Add.7, as well as *Rosebud Sioux Tribe v. United States*, 75 Fed. Cl. 15 (2007), in support of the proposition that a claim does not accrue until the claimant suffers damages. The decision below simply cites *Rosebud Sioux*, and *Rosebud Sioux* simply cites *Terteling* for that assertion. Neither decision provides further reasoning or authority, and thus carry no more persuasive value than *Terteling* itself. The Tribes also cite this Court's decision in *Alder Terrace, Inc. v. United States*, 161 F.3d 1372, 1377, (Fed. Cir. 1998), which quotes that *Terteling* dicta in passing, but also notes, in the same sentence, that "it is not necessary for purposes of claim accrual that the claimant be able to calculate the precise, final quantum of damages." The *Alder Terrace* Court held that the plaintiff's claim accrued when the law first restricted the plaintiff's rights, not when that restriction became apparent to him, noting that "[a]ll litigants are, of course, charged with knowledge of the United States Statutes at Large." *Alder Terrace* thus offers no support for the Tribes' position.

II. Accrual of Claim II is not deferred by the Interior Appropriations Act

A. The Interior Appropriations Act defers accrual of claims for losses to or mismanagement of trust *funds*, not claims for mismanagement of trust *assets*

In a series of Appropriations Acts for the Department of the Interior ("Appropriations Act"), Congress has provided that "the statute of limitations shall not commence to run on any claim . . . concerning losses to or mismanagement of trust funds, until the affected tribe or individual Indian has been furnished with an accounting of such funds from which the beneficiary can determine whether there has been a loss." *See, e.g.*, Pub. L. No. 111-88, 123 Stat. 2904, 2922 (2009).

In an earlier appeal in this case, this Court had occasion to define the scope of that provision.[8] *Shoshone Indian Tribe v. United States*, 364 F.3d 1339 (Fed. Cir. 2004) (*Shoshone II*). The CFC had held that the Appropriations Act deferred the accrual of the Tribes' claim that the United States had failed to obtain appropriate lease terms on the Tribes' sand and gravel assets. The United States appealed, arguing

[8] This Court construed the provision in an earlier Appropriations Act, but the language is identical.

that the Appropriations Act provision applied only to claims for mismanagement of or losses to trust funds already collected.

This Court rejected both positions, finding the government's position too narrow and the CFC's reading "overly expansive." Noting that waivers of sovereign immunity are to be construed strictly in favor of the sovereign, 364 F.3d at 1346, this Court reasoned that the "Act covers claims concerning 'losses to . . . trust *funds*' rather than losses to mineral trust *assets*. While it is true that a failure to obtain a maximum benefit from a mineral asset is an example of an action that will result in a loss to the trust, the Act's language does not on its face apply to claims involving trust *assets*." *Id.* at 1350 (emphasis in original).

Following those principles, this Court held that "We limit . . . the claims that may be brought to those relating to (1) the Government's mismanagement of tribal trust funds after their collection and (2) losses to the trust resulting from the Government's failure to timely collect amounts due and owing to the Tribes under its sand and gravel contracts." *Id.* at 1342. The Tribes' claims that its sand and gravel contracts should have had more favorable terms than they did,

however, were claims for mismanagement of a trust asset, and were thus outside the ambit of the Act's deferral of claim accrual. *Id.* at 1350.

B. Claim II alleges mismanagement of a trust asset

Claim II falls squarely within the category of claims that this Court held were outside the scope of the Appropriations Act. In Claim II, the Tribes claim that they are owed the royalty rates that theoretically could have been imposed if the 1916 Act leases had remained in effect. They are *not* claiming that the United States did not collect the royalties actually due and owing under the IMLA leases that were actually in effect. In short, they argue these parcels should have had different, better leases. That is not a claim for mismanagement of trust funds, or losses to trust funds, as this Court defined those terms in *Shoshone II.* It is instead a claim that the United States has mismanaged a trust asset by not placing it under the most profitable form of lease.

The Tribes attempt to expand this Court's decision in *Shoshone II* by misreading it, contending that this Court held that the Interior Appropriations Act defers accrual of claims "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 1350." Tribes' Br. at 34 (emphasis added). The highlighted language, however, appears only in the Tribes' brief, not in this Court's decision, and is inconsistent with this Court's holding. Under the Tribes' edited version of *Shoshone II,* so long as a plaintiff cites some statutory or regulatory source for its claim that the lease should have had better terms, the plaintiff's claim is one for mismanagement of trust funds rather than mismanagement of a trust asset. The Tribes' interpretation of *Shoshone II,* however, cannot be reconciled with either the opinion or the holding of that case. Indeed, in the very claim that this Court found time-barred in that case, the Tribes had alleged that the United States breached a statutory duty under the IMLA in failing to obtain better lease terms. Invocation of a statute does not convert a time-barred claim for mismanagement of a trust asset into a timely claim for losses to trust funds.

C. Where, as here, an accounting would make no difference, the Appropriations Act claim deferral provision does not apply

The Interior Appropriations Act claim deferral provision is, by its express terms, limited to claims in which the beneficiary can determine,

from an accounting of trust funds, whether there has been a loss. In this case, as the CFC found, an accounting would have been "particularly unhelpful" because "the basis for plaintiffs' argument [is] that defendant failed to collect royalties under 1916 Act leases that were not actually in place . . . It is difficult to envision an accounting under a contract that was not in effect." Add. 14.

The Tribes argue that an accounting *would* have revealed their claim, if the accounting also set forth "the 1916 Act origin of the 1938 Act leases." Tribes' Br. at 35. An accounting, however, does not provide information about past, expired leases; rather, it shows "what [the trustee] has received, what he has expended, what gains have accrued, and what losses have resulted." *Shoshone II,* 364 F.3d at 1351. The Tribes' argument amounts to saying that an accounting would have revealed the claim, if it were more than just an accounting. The Tribes have alleged the mismanagement of a tribal asset, and as this Court has noted, "[a]n accounting alone will not reveal the mismanagement of tribal assets." *Id.*

Statutes that defer accrual of a claim against the United States are waivers of sovereign immunity, and as such must be strictly

construed in favor of the sovereign. *Shoshone II,* 364 F.3d at 1346. To apply the Appropriations Act accrual-tolling provision to a claim that would not have been revealed by an accounting would be to broadly expand, rather than to narrowly construe, the scope of a waiver of sovereign immunity.

III. The Tribes have not pled a claim for continuing trespass, and even if they had, such a claim would lack merit.

A. Claim II does not allege a trespass claim.

The Tribes allege that they have a claim against the United States for breaching a fiduciary duty to remove trespassers from the Wind River Reservation. Specifically, the Tribes argue that the IMLA leases were void; that the lessees were trespassers; and that the United States had a trust duty to remove those putative trespassers. Tribes' Br. at 36, 40, 41. None of the Tribes' contentions is correct, but more importantly, none of them falls within the scope of Claim II, and they are therefore beyond the scope of the issues before this Court.

In 2005, twenty-six years after the Tribes filed their complaints, the CFC ordered the Tribes to file a statement identifying the issues to be resolved in Phase Two. The CFC directed the Tribes to include in their statement "the types of damages claimed, the legal theories

supporting recovery, and the time frames for which recovery is sought. . . This statement shall also identify any discrete claims from the pre-1973 time period falling outside conventional Oil and Gas Phase Two claims for improper collection of royalties or improper accounting . . . ." SA 13-14.

In compliance with that order, the Tribes filed their Statement Identifying Oil and Gas Phase Two Issues, SA 16-21, identifying eleven claims, all but one of which have since been resolved. The remaining claim is Claim II, "Failure to Collect Amounts Due Under 1916 Act Leases by Illegal Conversion to 1938 Act Leases." SA 18. Claim II, as set forth by the Tribes, states as follows: "The Secretary, however, at the request of several oil companies, converted [seven] 1916 Act leases to 1938 Act leases, unlawfully freezing the royalty rate at 12.5% . . . These conversions were illegal, costing the Tribes the difference in royalty that they could have obtained if these leases had remained 1916 Act leases." SA 20-21.

Claim II does not allege that the IMLA leases were void; it does not allege that the lessees were in trespass; and most importantly it does not allege any duty in the United States to remove those supposed

trespassers. The Tribes' new argument is wholly outside the scope of Claim II, and is therefore not within the scope of the issues that were before the CFC, and is not within the scope of the issues before this Court.

The first time the Tribes even mentioned the theory that the lessees were continuous trespassers was on October 29, 2009 – shortly after the thirty year anniversary of the filing of their complaints – in response to the United States' motion for judgment on the pleadings. The Tribes had over twenty-six years to formulate their Phase Two claims, and an alleged failure to remove continuing trespassers was not among them. They should not be permitted to advance new theories for recovery at this late stage in the proceedings, and this Court should decline the invitation to entertain their untimely new theories.

B. The leases were not void, and even if they were, that would not make the lessees trespassers

If this Court does decide to address the continuous trespass argument, it should find that the leases are not void, or that, even if they were void, the lessees were not trespassers. The United States has admitted to a procedural error in issuing these leases to the lessees in accordance with the Tribal Resolutions rather than putting the leases

out for competitive bids. However, as shown above, pp. 38-43, that error, which was known to the Tribes at the time, was harmless – even the Tribes' expert admits that the IMLA leases had the fair market rent and royalty at the time they were issued. SA 24-26. The Tribes have failed to show that a demonstrably harmless procedural error in preparing the leases renders the leases wholly void.

The Tribes rely heavily on a 1966 case from the Western District of New York holding that certain leases entered into between the Seneca Nation of New York and certain lessees, without compliance with *any* of the terms of the IMLA, were invalid. *United States v. 9,345.53 Acres of Land*, 256 F. Supp. 603 (W.D.N.Y. 1966). The legal irregularities in those leases, however, were far more significant and substantive than the single procedural defect in the issuance of the leases in this case. The leases in the Seneca case were never approved by the Secretary of the Interior, *id.* at 604, and were entered into in violation of 25 U.S.C. § 396a (setting lease terms), 396b (requiring, with exceptions, competitive bidding); 396c (requiring lessee to post bonds), and 396d (subjecting leases to the rules and regulations promulgated by the Secretary of the Interior). *Id.* at 607-08. There is a

difference between a lease entered into pursuant to statute, but with one harmless procedural mistake; and a lease entered into in complete disregard of every provision of the statute. The invalidity of the latter does not prove the invalidity of the former.

Even if the IMLA leases were invalid, however, the Tribes' assumption that the lessees would thereby automatically become trespassers is without support. Assuming *arguendo* that the leases were void, the lessees would be tenants at sufferance or tenants at will, not trespassers. *See, e.g., Robinson v. Diamond Housing Corp.*, 463 F.2d 853, 858 (D.C. Cir. 1972) (lessee, "having entered possession under a void and unenforceable lease, was not a trespasser but became a tenant at sufferance"). The presumption that the lessee of an invalid lease is a tenant at will is "especially" appropriate in this situation, where the Tribes approved and signed the lease, and where the lessees paid rent and royalty. Corpus Juris Secundum, Landlord and Tenant § 261 ("A tenancy at will can arise where a person goes into possession of land pursuant to an invalid contract or lease, especially where the possession is by permission of the owner, or where rent is paid by the person in possession and is accepted by the landlord.")

The allegedly contrary cases cited by the Tribes "differ substantially from this case," as the CFC noted. Add. 14. In *Oenga v. United States* and *Guffey v. Smith,* the trespassing oil companies had no lease at all – valid or invalid – covering the parcels on which they drilled. *Oenga v. United States,* 83 Fed. Cl. 594, 617-18 (2008); *Guffey v. Smith,* 237 U.S. 101 (1915). In *United States v. West,* the leases had been terminated. *United States v. West,* 232 F.2d 694, 699 (9th Cir. 1956). In this case, by contrast, the lessees held facially valid leases, executed by the Tribes themselves and approved by the Secretary of the Interior, covering the appropriate parcels, and they paid rents and royalties under those leases, without protest from the Tribes, for at least thirty years. Even if those leases were invalid – which they were not – the lessees would have a tenancy at will or a tenancy at sufferance, and would not be in trespass.

C. The United States did not violate a fiduciary duty to remove these "trespassers"

As shown above, the lessees were not trespassers, so the United States cannot possibly have had a fiduciary duty to remove them. But even if the lessees were trespassers, the Tribes have failed to show that

the United States breached a fiduciary duty in failing to remove these royalty-paying apparent leaseholders.

The Tribes base their allegation of a duty to remove trespassers on the Claims Court's decision in *Cherokee Nation of Oklahoma v. United States,* 21 Cl. Ct. 565, 576 (1990) (*Cherokee I*). The court in that case, however, did not find that such a duty exists; rather, the court simply held, on a motion to dismiss, that the Cherokee had stated a claim.[9] The court warned the tribe, however, that at trial, they would have to "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." *Id.* at 577. Neither that opinion nor its sequel, *Cherokee Nation of Oklahoma v. United States*, 26 Cl. Ct. 798 (1992) (*Cherokee II*), indicate whether that requirement was ever met. Neither *Cherokee* decision, therefore, establishes that a fiduciary duty to remove trespassers exists.

---

[9] The Claims Court's decision in *Cherokee I* predated the Supreme Court's decision in *United States v. Navajo Nation*, 537 U.S. at 490 (2003), which made clear that, in order to state a claim for breach of fiduciary duty, an Indian claimant must identify a source of substantive law establishing that duty. The Claims Court appears to have found that the Cherokee stated a claim before satisfying that requirement. To the extent it is inconsistent with *Navajo Nation*, *Cherokee I* is no longer good law.

As the Claims Court held in *Cherokee I*, "[t]he existence of a general fiduciary duty does not mean that every Government action disliked by the Indians is automatically a violation of that trust." 21 Cl. Ct. at 577 (internal quotation and ellipsis omitted). The Supreme Court has made it clear that "[t]o state a claim cognizable under the Indian Tucker Act, . . . a tribe must identify a substantive source of law that establishes specific fiduciary or other duties." If that threshold is satisfied, then the court must determine "whether the relevant source of substantive law can fairly be interpreted as mandating compensation for damages sustained as a result of a breach of the duties the governing law imposes." *United States v. Navajo Nation*, 537 U.S. at 490 (internal quotation omitted). The Tribes have failed to identify any statute, regulation, or other source of substantive law that imposes on the Secretary of the Interior a substantive duty to evict alleged trespassers, thus failing to satisfy the first prong the *Navajo Nation* test. They have also utterly failed to show that the putative duty to remove trespassers is money-mandating. The Tribes have failed to state a claim that the United States breached a fiduciary duty in failing

to remove the "trespassers," and the CFC was right to grant the United States' motion for judgment on the pleadings.

CONCLUSION

For the foregoing reasons, the judgment of the CFC should be affirmed.

Respectfully submitted,

IGNACIA S. MORENO
Assistant Attorney General

JOAN M. PEPIN
Environment & Natural Resources Division
United States Dept. of Justice
P.O. Box 23795, L'Enfant Station
Washington DC 20026
(202) 305-4626
joan.pepin@usdoj.gov

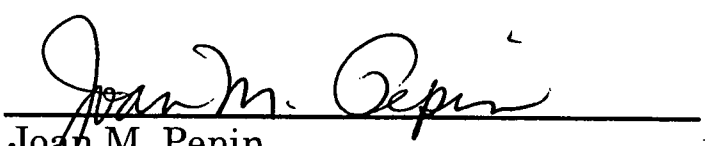
90-2-20-978/1

CERTIFICATE OF SERVICE

I certify that on March 17, 2011, the foregoing Corrected Brief and Supplemental Appendix Filed Pursuant to Fed. Cir. R. 30(f) was served on counsel for the appellants by U.S. Mail and email at the following addresses:

Richard M. Berley
Brian W. Chestnut
Ziontz, Chestnut, Varnell,
Berley & Slonim
2101 Fourth Ave., Suite 1230
Seattle, WA 98121
rberley@zcvbs.com

Harry R. Sachse
William F. Stephens
Peng Wu
Sonosky, Chambers, Sachse,
Endreson & Perry LLP
1425 K Street, NW, Suite 600
Washington, DC 20005
hsachse@sonosky.com



Joan M. Pepin
Attorney, Appellate Section
U.S. Department of Justice
Environment & Natural Resources Div.
P.O. Box 23795
Washington, DC 20026
(202) 305-4626
joan.pepin@usdoj.gov

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(b). The brief contains 12,928 words, excluding parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6). The brief has been prepared in Century Schoolbook 14 point font, using Microsoft Word 2007.

Joan M. Pepin
Attorney, Appellate Section
U.S. Department of Justice
Environment & Natural Resources Div.
P.O. Box 23795
Washington, DC 20026
(202) 305-4626
joan.pepin@usdoj.gov

Supplemental Addendum

SUPPLEMENTAL ADDENDUM

TABLE OF CONTENTS

CHAP. 363.—An Act To authorize the Secretary of the Interior to lease, for production of oil and gas, ceded lands of the Shoshone or Wind River Indian Reservation in the State of Wyoming.

August 21, 1916.
[S. 6308.]
[Public, No. 218.]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior is hereby authorized and empowered to lease, for the production of oil and gas therefrom, lands within the ceded portion of the Shoshone or Wind River Indian Reservation in the State of Wyoming, under such terms and conditions as shall be by him prescribed; and the proceeds or royalties arising from any such leases shall be first applied to the extinguishment of any indebtedness of the Shoshone Indian Tribe to the United States and thereafter shall be applied to the use and benefit of said tribe in the same manner as though secured from the sale of said lands as provided by the Act of Congress approved March third, nineteen hundred and five, entitled "An Act to ratify and amend an agreement with the Indians residing on the Shoshone or Wind River Indian Reservation in the State of Wyoming, and to make appropriations for carrying the same into effect": *Provided, however*, That nothing contained in this Act shall be construed to abridge or enlarge any asserted or initiated rights or claims under any law of the United States.

Shoshone Indian Reservation, Wyo.
Oil and gas leases on ceded lands of, authorized.

Proceeds to Indians.

Vol. 33, p. 1020.

Proviso.
Prior rights not affected.

SEC. 2. That the leases granted under this Act shall be conditioned upon the payment by the lessee of such royalty as may be fixed in the lease, which shall not be less than one-tenth in amount or value of the production and the payment in advance of a rental of not less than

Royalties.

Terms, etc.

$1 per acre per annum during the continuance of the lease. The rental paid for any one year to be credited against the royalties as they accrue for that year. Leases shall be for a period of twenty years with the preferential right in the lessee 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, unless otherwise provided by law at the time of expiration of any such period; said leases shall be irrevocable except for the breach of the terms and conditions of the same and may be forfeited and canceled by an appropriate proceeding in the United States District Court for the District of Wyoming whenever the lessee fails to comply with their terms and conditions.

Approved August 21, 1916.

[CHAPTER 198]

AN ACT

To regulate the leasing of certain Indian lands for mining purposes.

May 11, 1938
[S. 2689]
[Public, No. 506]

Indian lands.
Leasing of unallotted lands for mining purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That hereafter unallotted lands within any Indian reservation or lands owned by any tribe, group, or band of Indians under Federal jurisdiction, except those hereinafter specifically excepted from the provisions of this Act, may, with the approval of the Secretary of the Interior, be leased for mining purposes, by authority of the tribal council or other authorized spokesmen for such Indians, for terms not to exceed ten years and as long thereafter as minerals are produced in paying quantities.

Exception.

Terms of lease.

SEC. 2. That leases for oil- and/or gas-mining purposes covering such unallotted lands shall be offered for sale to the highest responsible qualified bidder, at public auction or on sealed bids, after notice and advertisement, upon such terms and subject to such conditions as the Secretary of the Interior may prescribe. Such advertisement shall reserve to the Secretary of the Interior the right to reject all bids whenever in his judgment the interest of the Indians will be served by so doing, and if no satisfactory bid is received, or the accepted bidder fails to complete the lease, or the Secretary of the Interior shall determine that it is unwise in the interest of the Indians to accept the highest bid, said Secretary may readvertise such lease for sale, or with the consent of the tribal council or other governing tribal authorities, a lease may be made by private negotiations: *Provided*, That the foregoing provisions shall in no manner restrict the right of tribes organized and incorporated under sections 16 and

Public sales of leases; terms and conditions.

Rights reserved.

Readvertisement for sale.

Private negotiations.

Proviso.
Designated rights of Indians not restricted.

48 Stat. 987, 988. 25 U. S. C. §§ 476, 477.

17 of the Act of June 18, 1934 (48 Stat. 984), to lease lands for mining purposes as therein provided and in accordance with the provisions of any constitution and charter adopted by any Indian tribe pursuant to the Act of June 18, 1934.

Corporate surety bonds to be furnished by lessees.

SEC. 3. That hereafter lessees of restricted Indian lands, tribal or allotted, for mining purposes, including oil and gas, shall furnish corporate surety bonds, in amounts satisfactory to the Secretary of the Interior, guaranteeing compliance with the terms of their leases: *Provided*, That personal surety bonds may be accepted where the sureties deposit as collateral with the said Secretary of the Interior any public-debt obligations of the United States guaranteed as to principal and interest by the United States equal to the full amount of such bonds, or other collateral satisfactory to the Secretary of the Interior, or show ownership to unencumbered real estate of a value equal to twice the amount of the bonds.

Proviso. Acceptance of personal surety bonds.

Operations; rules and regulations.

SEC. 4. That all operations under any oil, gas, or other mineral lease issued pursuant to the terms of this or any other Act affecting restricted Indian lands shall be subject to the rules and regulations promulgated by the Secretary of the Interior. In the discretion of the said Secretary, any lease for oil or gas issued under the provisions of this Act shall be made subject to the terms of any reasonable cooperative unit or other plan approved or prescribed by said Secretary prior or subsequent to the issuance of any such lease which involves the development or production of oil or gas from land covered by such lease.

Cooperative unit, etc., plans.

Delegation of authority to approve leases.

SEC. 5. That the Secretary of the Interior may, in his discretion, authorize superintendents or other officials in the Indian Service to approve leases for oil, gas, or other mining purposes covering any restricted Indian lands, tribal or allotted.

Specified sections not to apply to lands designated.

SEC. 6. Sections 1, 2, 3, and 4 of this Act shall not apply to the Papago Indian Reservation in Arizona, the Crow Reservation in Montana, the ceded lands of the Shoshone Reservation in Wyoming, the Osage Reservation in Oklahoma, nor to the coal and asphalt lands of the Choctaw and Chickasaw Tribes in Oklahoma.

Inconsistent provisions repealed.

SEC. 7. All Act[1] or parts of Acts inconsistent herewith are hereby repealed.

Approved, May 11, 1938.

Supplemental Appendix

SUPPLEMENTAL APPENDIX

TABLE OF CONTENTS

STANDARD FORM NO. 14A
APPROVED BY THE PRESIDENT
MARCH 10, 1926

TELEGRAM

OFFICIAL BUSINESS—GOVERNMENT RATES

Post Office Department
WASHINGTON

5—9449 GOVERNMENT PRINTING OFFICE

SHU M 78 NL 14 extra

RIVERTON, WYOMING (June 11 1933

JOSEPH C O'MAHONEY, PO DEPT WASHINGTON

We are informed Oil Cpmpanies claim to have secured indefinite delay in operation of MaverickSprings production Shoshone Reservation we vigorously protest against delay in commencement of operations and request your assistance for further hearing unless our rights are upheld as expressed by Secretary at end of May seventeenth hearing when he stated order of February twenty eighth would be enforced with only slight modification.

G A Driskell, Chairman Shoshone Tribal Council,
Henry Lee Tyler, Chairman Arapahone Tribal Council
Ernest Posey, Special Representative Arapahone Tribe

1018am June 12

THE SECRETARY OF THE INTERIOR

WASHINGTON

L-O&G
22133-34
9105-33
RCC

MAY 16 1934

Hon. Vincent Carter,

House of Representatives.

My dear Mr. Carter:

I have your letter of May 3, enclosing a copy of a resolution passed by the Shoshone-Arapaho Tribal Council at a meeting held April 20, wherein attention is called to conditions in the Maverick Springs oil field on the ceded portion of the Shoshone Indian Reservation, Wyoming.

It is noted from the resolution that the Council desires to have the leases cancelled on account of failure of the lessees to produce and sell oil therefrom and the failure to protect existing wells from the intrusion of water in said field; that in the event cancellation of the leases is not warranted at this time, immediate steps be taken to change the wording of the royalty clause in said leases so as to provide that the Indians shall have the right to take the royalty either in kind or in money, thus enabling them to create an immediate market for the oil.

The existing conditions in the Maverick Springs oil field in so far as they relate to producing and marketing oil have prevailed for a number of years. Due to the low grade of the oil produced, there has been, until recently, practically no demand therefor. The demand for this grade of oil at the present time is for road building purposes, and it appears that the present supply thereof is in excess of the demand. There is no pipe line to the field, and the lessees contend that the cost of production and the low price received for the oil do not justify the construction of a pipe line at this time. The cost of transportation by truck as suggested in the resolution referred to is excessive, and the net price received for the oil would be so low that the Indians would receive very little

To Secretary

MAY 11 1934

For signature

Mailed by
L.B.M.

DEPT. OF THE INTERIOR
RECEIVED
MAY 11 1934
SECRETARY'S OFFICE

CARBON FOR SECRETARY'S OFFICE

NARA RECORDS
DOI 1360

revenue, even though the potential capacity of the field, approximately 5,000 barrels per day, could be produced and marketed. There is very little prospect of finding a market for all of the oil that could be produced at this time. While the price of oil has increased somewhat, the Indians would be fortunate to get a market for any considerable quantity at around thirty cents per barrel.

A little more than a year ago an order was issued requiring all lessees to begin producing and marketing oil from existing wells on or before September, 1933, and owners of non-producing leases were notified that no further extension of time within which to drill would be granted. Several of the lessees protested against this order and after a hearing before the Department, the order was modified on June 19, 1933 so as to permit lessees, on the execution of an agreement to pay an additional $1.00 per acre per year, to continue to hold their leases without drilling or producing oil, until required by the Secretary of the Interior to do so. Sections 3 and 4 of the agreements entered into by the various lessees reads as follows:

> "(3) That during the period of payment of said additional rentals the second party shall be relieved from any obligation to drill wells on said leased premises, if any such obligation exists, until required so to do by the Secretary of the Interior;
>
> "(4) That said lease shall remain in full force and effect as now existing, except as modified by the terms of this agreement, the execution of which shall neither prejudice the rights of the parties hereto in any way nor constitute any binding acknowledgment of the validity of the said order of February 28, 1933."

In view of the additional payment of $1.00 per acre per year made by the lessees, it is believed that the income received by the Indians from the leases at present would be approximately as much as if the leases were being actually produced and oil marketed therefrom.

In view of the foregoing it is not believed advisable to consider cancellation of the leases at this time nor is it thought

1366

necessary to change the wording of the royalty provision of the leases as suggested by the Tribal Council for it is believed that the oil operators are in a better position to secure a market for the oil than are the Indians. The Geological Survey will, however, be requested to make an investigation of the matter of water incursions into the wells, and such action will be taken relative thereto as the facts may warrant. It may be said, however, that just as soon as conditions justify, the lessees will be required to produce and market oil from their leases.

Sincerely yours,

(Sgd) HAROLD L. ICKES

Secretary of the Interior.

5-cv-8

Fort Washakie, Wyoming,
February 24, 1937.

To
The Secretary of the Interior,
Department of the Interior Bldg.,
Washington, D.C.

Sir:-

The Maverick Springs oil field, located in the Shoshone or Wind River Indian Reservation in Fremont County, Wyoming, is controlled in its entirety by The Ohio Oil Company, The Texas Company, Stanolind Oil and Gas Company and Continental Oil Company under oil and gas leases granted by the Secretary of the Interior between January 21, 1918 and December 15, 1920, inclusive. These leases expire at different dates extending from November 15, 1937 to December 15, 1940. Oil was discovered in the Maverick Springs field in commercial quantities in the year 1918. Thirty-two (32) wells were drilled in this field between 1918 and 1927, inclusive, and the admitted proven daily production is 9,456 barrels. Development in the field ceased with the completion of the last well on September 3, 1927. No oil has been produced or marketed from the Maverick Springs field, other than that utilized for drilling purposes.

The Union Oil Company of California is one of the major oil companies of the United States and its success was based upon the development and refining of asphalt-base oil produced in California. From 1921 to 1929, inclusive, Union Oil Company of California owned the lease on Maverick Springs acreage now controlled by Continental Oil Company. The Union drilled the 15 wells on such leased acreage.

The investigations, tests and manufacturing of asphalt-base crude oils by Union Oil Company of California conclusively demonstrate the fact that Maverick Springs oil is comparable in quality to the best California asphalt-base oils (see data contained in attached resolution) and that California asphalt-base crude oil can be advantageously utilized for the commercial manufacture of the standard products of crude petroleum.

The investigations made by the Research Department of Union Oil Company of California demonstrated conclusively that Maverick Springs crude oil contained 63.6 per cent cracking stock (gasoline, gas oil and lubricating distillates) and 36.3 per cent asphalt.

The drilling depths to the amber formations in the Maverick Spri field range from 945 feet to 1525 feet. Part of the wells in the field flow naturally. The cost of pumping production of a like quality of oil in the Hom Dome field (30 miles distant) with far greater drilling depths, is less than 1 cents per barrel. There is a drop in elevation from the Maverick Springs fiel the town of Riverton and railroad connection (distance of 41 miles) of more th 1900 feet. Cost of pipe line transportation of crude oil from the Maverick Sp field to railroad connection would not exceed 25 cents per barrel.

SA 5

By letter dated January 21, 1937 and addressed by the Director of the United States Geological Survey to the Commissioner of Indian Affairs, Director Mendenhall stated that the matter of the establishment of a fair price for oil from the Maverick Springs field, Wyoming, had been investigated by the office of the local oil and gas supervisor and it was recommended by the United States Geological Survey that the established price for a period of five years be 20 cents under the highest posted price for black oil from either the Grass Creek, Hamilton Dome or Oregon Basin fields, Wyoming, whichever might be the highest, with a minimum price of 50 cents a barrel in any event.

The United States Geological Survey has neither the trained personnel nor the equipment required for the investigation and testing of asphalt-base oils, experimentation as to the best practical commercial use thereof, determination as to market facts and adequate consideration of transportation rates for crude oil and its manufactured products. Lacking such trained personnel it must necessarily rely in its investigations of such matters upon data furnished it by oil field operators, pipe line and railroad carriers, refiners, manufacturers and marketers. Those from whom the geological Survey obtains its information necessarily protect their own interests and divulge only those facts which would not adversely affect their business.

The findings of the Geological Survey as to a fair price for Maverick Springs crude for the next five years is in absolute conflict with the findings of Union Oil Company of California, which was conducting its investigations and tests for its own business.

Under the circumstances the reliability of the findings and recommendations of the Geological Survey as to the value of Maverick Springs crude must be questioned not only by the tribes of the Shoshone and Arapahoes, who are beneficially interested but by the Secretary of the Interior.

Upon the representations made by the Maverick Springs operators as to the poor quality of the crude oil production obtained, the excessive costs of production and transportation, and the lack of any market, the Secretary of the Interior waived in part the enforcement of the development, production and marketing obligations of the leases by order dated June 19, 1933.

The known facts negative the conclusions reached by the Geological Survey, as well as the representations of the operators.

1. Between 25 and 30 black oil fields have been discovered in Wyoming since 1918.

2. The production of Wyoming asphalt-base oil since 1913 exceeds 20 million barrels.

3. The production of asphalt-base oil in Wyoming during the past four years is approximately as follows:

1933 production 1,364,210.45 barrels
1934 production 2,439,404.35 barrels
1935 production 3,415,984.00 barrels
1936 production 3,596,571.00 barrels.

4. The asphalt-base oils produced in California are utilized by all Pacific Coast refiners for the manufacture of standard petroleum products.

5. The quality of Maverick Springs oil is comparable to the best Wyoming and California asphalt-base oil (see data contained in attached resolution as to findings of Union Oil Company of California).

6. The potential production from the Embar formations of the Maverick Springs field has been variously estimated from 11,250,000 barrels to 21,000,000 barrels, without use of the acidization process. In addition, there are probabilities of large production from the underlying Tensleep, Amsden and Madison lime formations.

7. The cost of production of Maverick Springs crude oil from the Embar formation should not equal 10 cents per barrel and the transportation charges from the field to railroad pipe line terminus will not exceed 25 cents per barrel.

8. An existing market for Maverick Springs crude oil is shown not only by the Pacific Coast utilization of asphalt-base oils and the sales of Wyoming black oils from 1918 down to the present time, but by the 1936 drilling of wild-cat structures for asphalt-base production in fields, to depths and by operators as follows:-

(a) Wertz Dome in Carbon County, Wyoming. Test for Tensleep production only. Production obtained at 5883 feet. Operator, Sinclair Wyoming Oil Company.

(b) Muskrat field in Fremont County, Wyoming. Test for Embar productio Production obtained between 7268 and 7293 feet. Operator, Sinclai Wyoming Oil Company.

(c) Gooseberry anticline in Park County, Wyoming. Test for Embar production only. Production obtained at 5660 feet. Operator, Genera Petroleum Corporation of California.

The United States, as legal owner of the Maverick Springs field acts as trustee for the Shoshone and Arapahoe Indians.

The Maverick Springs oil and gas leases were granted by the Sec retary of the Interior for the primary purpose of obtaining the payment of royalties on production which would be utilized for the benefit of the Shoshon and Arapahoe Indians. Although 32 wells have been drilled and there is prover daily production of 9,455 barrels of a high grade asphalt-base oil, the opera continue to utilize the Maverick Springs field as their reserve.

The existing leases will terminate within the near future, and to be assumed that the operators will exercise their preferential rights for renewal of the leases. The first lease will expire on November 15th of this

Transmitted herewith is a resolution this day adopted at a Co meeting held at Fort Washakie, Wyoming, which more clearly evidences the fac

to the value of the oil, the existence of a market and the necessity for remedial action on behalf of the Shoshone and Arapahoe Indians.

Those whom we represent are entitled to the benefits which would arise from Maverick Springs development, production and marketing. Their necessities are such as to justify prompt recognition of their beneficial interests and rights. Only through you can the existing wrongs be rectified.

We request full consideration of the facts herein summarized and more fully detailed in the attached resolution, with early action which will result in -

(a) Cancellation of the agreements authorizing the suspension of lease obligations for drilling and development, for the production of oil and the marketing of the same,

(b) Notice to the operators of the necessity for diligent development, production and marketing,

(c) Direction for modification of renewal lease forms so as to provide for the right to take royalty in kind and for the correction of past inequalities by stringent provision for adequate development, production and marketing with diligence, and

(d) Authorization and direction to the Commissioner of Indian Affairs for the employment of a qualified petroleum engineer from civil life to fully investigate all phases of the Maverick Springs situation from the standpoint of production and transportation, value for use, ability of existing Wyoming refineries to properly utilize asphalt-base oil with their present equipment, markets for the products which could be obtained through recognized manufacturing processes and reports of findings, conclusions and recommendations to you, --

all as is more formally sought through the petition of the resolution herewith transmitted.

Respectfully submitted,

THE SHOSHONE TRIBE

By_____

_____

_____

_____

_____

_____

_____

Members of the Council.

THE ARAPAHOE TRIBE

By_____

_____

_____

_____

_____

_____

_____

Members of the Council.

LAW OFFICES
MARVIN J. SONOSKY
[redacted] CONNECTICUT AVENUE
WASHINGTON 6, D. C.
METROPOLITAN [redacted]

JOHN S. WHITE

July 27, 1959

JOINT MEMORANDUM

To: Shoshone Business Council
Arapahoe Business Council

From: Tribal Attorneys

Subject: Joint recommendation of tribal attorneys based on title under the Special Attorney's contract

We have studied the report made under the Special Attorney's contract. Based upon our investigation, examination and study of the records and procedures of the Department of the Interior in the management of the Tribes' mineral lands as reflected by the Special Attorney's report, we recommend as follows:

1. That a general audit and accounting of the mineral proceeds received since August 15, 1953, from the subject land be furnished by the Bureau of Land Management, Geological Survey, and the Bureau of Indian Affairs.

The audit and accounting problem has been presented to the Department of the Interior. On May 28, 1959, a conference was held with officials of the Bureau of Indian Affairs and the Bureau of Land Management. The Tribes were requested to furnish a sample list of cases in which we believed that the mineral receipts were not properly credited to the Tribes. By letter of June 4, 1959, to the Assistant Director, Bureau of Land Management, the list was furnished. In that letter we again advised the Bureau of Land Management that the Tribes were entitled to an accounting so that they would know whether they have been credited with 100% of the gross proceeds received by the United States from minerals in the Riverton Project since August 15, 1953.

At the May 28, 1959, conference, we were advised that the Bureau of Land Management had uncovered $27,656.00 not previously credited to the Tribes. We were told this money would be credited to the Tribes. We believe that our examination of the title and case records in the Cheyenne Land Office prompted the action which disclosed these funds.

The Tribes are entitled to a complete audit and accounting of the mineral proceeds received by the United States from the Riverton lands. This means a case by case audit setting out the acreages, rents, amounts paid, and where credited.

2. That closer liason be worked out with the Tribes' mineral consultants as to future leasing and mineral management.

3. That the Tribes carefully consider all unit agreement proposals, suspensions of operations, and renewals of leases before giving their approval.

Recommendations 2 and 3 will be discussed together. From our conferences and study of the records and procedures of the Geological Survey, we are doubtful that the Tribes have received adequate protection and advice on their mineral lands, including oil and gas management and development. For example, in several instances, patents were issued to reclamation patentees without reserving any minerals. These patents covered about 1,000 acres. Had the minerals been reserved they would have belonged to the Tribes. The minerals were lost to the Tribes only because the Geological Survey reported the lands had no mineral value. Two of these patents were issued as late as December 1951, and the lands were in the same section as lands which later were included in the Tribes' oil and gas lease 14-20-258-49, which brought a bonus of $430,199.00, equal to $231.29 per acre at the March 1953 lease sale. In December 1951, the prospective value of these lands for minerals was known. Certainly, any doubts should have been resolved in the Tribes' favor and perhaps would have been, had the Tribes been afforded an opportunity to present their views.

Again, Geological Survey consistently has reported it had no objection to granting 10 year renewals of 1916-Act leases even though the lessee did no development work in the primary 20-year term. For example, see the Tribes' leases 1-96-Ind-5017 (BLM renewal W-058218), 1-96-Ind-5628 (recently on appeal as The Superior Oil Company, BIA Realty 12368-58), and 1-96-Ind-7943. According to Geological Survey, lease W-058218 has been held for 20 years without development even though the acreage is within the known geologic

structure of the Pilot Butte Field. Before granting the renewal, the Bureau of Land Management called upon the Geological Survey for its recommendations. By letter of November 25, 1957, the Survey advised that "no operations for oil or gas have been conducted on the leasehold***", but concluded that "therefore, this office offers no objection to a ten-year renewal of this lease insofar as operations are concerned." Failure to develop for 20 years was apparently ignored. Ordinarily, a lessee who did nothing for 20 years would not be entitled to a free ride for 10 more years. Geological Survey gave this no weight.

This problem was called to the attention of the Assistant Secretary of the Interior, by letter of May 15, 1959, from the Tribes' attorneys. By letter of June 17, 1959, the Assistant Secretary advised the Tribes' attorneys that the Bureau of Land Management had been requested to review the facts and that a response would be prepared. We are waiting for the Department's report.

4. That the law be amended to do away with future leasing under the 1916 Act and to conform all future leasing to the Indian Leasing Act of 1938.

5. That until legislation is obtained, the regulations should be amended to require tribal consent to any new 1916 Act leases and tribal consultation before renewals are granted.

The Joint Business Council has authorized the attorneys to take steps to accomplish these two objectives, and we have moved on the matter. (See BIA Files: Realty-Minerals 2253-59 - letters of February 17, 1959, tribal attorneys to Secretary of the Interior; Assistant Commissioner's reply of March 19, 1959; March 24, 1959, tribal attorneys to Commissioner of Indian Affairs; May 15, 1959, tribal attorneys to Assistant Secretary Roger C. Ernst; June 2, 1959, Commissioner of Indian Affairs to Marvin J. Sonosky; June 12, 1959, Marvin J. Sonosky to Commissioner of Indian Affairs.)

6. That the Tribes obtain (a) a complete set of all the plats and supplemental survey plats of the entire reservation, and in particular of the Riverton Reclamation Project, (b) copies of the microfilm containing the plats of the reservation, and (c) a print of the microfilm.

7. That on the latest approved BLM plats of survey, there should be shown in color the mineral lands owned by the Tribes. (This can be done in the Realty Section.)

These two recommendations are related. All of the township plats and supplemental survey plats covering the Wind River Reservation, and the Riverton Reclamation Project are in the process of being microfilmed by the Bureau of Land Management. Without the plats, tract locations and acreages cannot be computed for future leasing purposes. With these materials at Wind River, complete land survey data will be available. Prospective lessees will be able to know what is open. At the Tribes request, we can order these items.

The land descriptions in the Riverton Project for the colored plats referred to in recommendation 7 may be obtained from the tract inventory schedules accompanying the report under the Special Attorney's contract.

8. That the Special Attorney's report should not be given to outsiders free of charge.

The Special Attorney's report has been marked as the property of the Tribes. It should not be given away. It is for use at the Agency. If the Tribes desire, there is no objection to selling copies on the understanding that no part of the report will be reproduced without written permission of the Tribes. We recommend a selling price of $500.00 per copy.

Respectfully submitted,

Marvin J. Sonosky
Attorney for the Shoshone Tribe

Glen A. Wilkinson
Attorney for the Arapahoe Tribe

In the United States Court of Federal Claims

(E-Filed: June 6, 2005)

THE SHOSHONE INDIAN TRIBE OF THE WIND RIVER RESERVATION, WYOMING, Plaintiff, v. THE UNITED STATES, Defendant.	No. 4582-79 L
THE ARAPAHO INDIAN TRIBE OF THE WIND RIVER RESERVATION, WYOMING, Plaintiff, v. THE UNITED STATES, Defendant.	No. 4592-79 L

ORDER

Before the court is plaintiff Tribes' Proposed Scheduling Proposal and Defendant's Proposed Litigation Schedule, electronically filed May 18, 2005. Further to a telephonic status conference held Wednesday, June 1, 2005 to discuss these filings, the court hereby adopts the following schedule:

1. Identification of Issues. The plaintiffs shall file a statement identifying the issues to be resolved at trial by Friday, January 13, 2006. This statement shall include the types of damages claimed, the legal theories supporting recovery, and the time frames for which recovery is sought. Plaintiffs' claims in this subdocket regard royalty accounting

and related oil and gas valuation and collection issues for the period prior to October 10, 1973 (Oil and Gas Phase Two). The Oil and Gas Phase Two claims necessarily exclude issues relating to subdocket Nos. 79-4581/79-4591 (sand and gravel), 79-4583/79-4593 (trust fund mismanagement), and the lead docket No. 79-458/79-459 (Oil and Gas Phase One and environmental or special deposit account claims deferred until resolution of claims in the Oil and Gas Phase Two subdocket). This statement shall also identify any discrete claims from the pre-1973 time period falling outside conventional Oil and Gas Phase Two claims for improper collection of royalties or improper accounting, including but not limited to any so-called drainage claims as discussed by way of example in the June 1, 2005 teleconference (discrete claims). Until the close of non-expert discovery as set forth below, plaintiffs shall reasonably cooperate with defendant to provide access to discovery documents concerning discrete claims identified in plaintiffs' January 13, 2006 filing. Plaintiffs shall also file updates of their statement identifying issues with reasonable promptness with respect to discrete claims identified after their January 13, 2006 filing.

2. Non-Expert Discovery. On or before Tuesday, August 16, 2005, and at least every 60 days thereafter while any revisions to the database are ongoing, plaintiffs shall provide defendant access to the database they are currently compiling. All discovery, except for discovery pertaining to expert testimony as described below, shall conclude by Friday, September 22, 2006.

3. Plaintiffs' Initial Expert Disclosure. Plaintiffs shall furnish initial expert reports, including the data or other information considered by the experts in forming opinions, and the experts' qualifications, to defendant by Friday, May 19, 2006.

4. Depositions of Plaintiffs' Experts. Defendant shall complete its depositions of plaintiffs' experts, except regarding rebuttal reports as described below, by Friday, June 23, 2006.

5. Defendant's Responsive Expert Disclosure. Defendant shall furnish any expert reports responsive to plaintiffs' expert reports, including the data or other information considered by the experts in forming opinions, and the experts' qualifications, to plaintiffs by Friday, July 28, 2006.

6. Despositions of Defendant's Experts: Plaintiffs shall complete their depositions of defendant's experts by Friday, August 25, 2006.

7. Plaintiffs' Expert Rebuttal. Plaintiffs shall furnish rebuttal expert reports, if any, including the data or other information considered by the experts in forming opinions, and the expert's qualifications, to defendant by Friday, September 22, 2006.

8. Rebuttal Expert Depositions. Defendant shall complete depositions of plaintiffs' rebuttal experts by Friday, October 20, 2006.

9. Dispositive Motions. The parties shall file a notice of intent to file any dispositive motions concerning types of damages claimed, the legal theories supporting recovery, and the time frames for which recovery is sought on or before Friday, October 27, 2006. The parties shall file any dispositive motions by Friday, November 10, 2006.

10. Meeting of Counsel. If no dispositive motions are filed by either party, the parties shall meet to satisfy the requirements of RCFC Appendix A ¶ 13, including the exchange of exhibit and witness lists, by Friday, November 17, 2006.

The parties are urged to contact the court at any time when they believe the involvement of the court will help to secure the just, speedy, and inexpensive determination of this action. See RCFC 1.

IT IS SO ORDERED.

s/Emily C. Hewitt
EMILY C. HEWITT
Judge

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

THE SHOSHONE INDIAN TRIBE OF THE WIND RIVER RESERVATION, WYOMING, *Plaintiff,* v. THE UNITED STATES, *Defendant.*	No. 4582-79 L Judge Hewitt
THE ARAPAHO INDIAN TRIBE OF THE WIND RIVER RESERVATION, WYOMING, *Plaintiff,* v. THE UNITED STATES, *Defendant.*	No. 4592-79 L Judge Hewitt

TRIBES' STATEMENT IDENTIFYING OIL AND GAS PHASE TWO ISSUES

Harry R. Sachse
Counsel of Record
Anne D. Noto
SONOSKY, CHAMBERS, SACHSE ENDERSON & PERRY, LLP
1425 K Street, NW, Suite 600
Washington, DC 20005
(202) 682-0240 (Telephone)
(202) 682-0249 (Facsimile)
hsachse@sonosky.com
Attorneys for Eastern Shoshone Tribe

Richard M. Berley
Counsel of Record
Brian W. Chestnut
ZIONTZ, CHESTNUT, VARNELL, BERLEY & SLONIM
2101 4th Avenue, Suite 1230
Seattle, WA 98121
(206) 448-1230 (Telephone)
(206) 448-0962 (Facsimile)
rberley@zcvbs.com
Attorneys for Northern Arapaho Tribe

TABLE OF CONTENTS

Shoshone, supra, that certain Appropriations Acts[3] specifically preserve these claims. In addition, this Court's ruling in *Osage Nation v. United States*, 57 Fed. Cl. 392 (2003), which relied on its earlier ruling herein (*Shoshone Indian Tribe v. United States,* 51 Fed. Cl. 60 (2001)), held that the ICC Act did not bar pre-1946 claims within the scope of the Appropriations Acts.

The date of the earliest oil and gas transactions concerning which the Tribes currently have usable data, and thus the earliest date to which Tribes' claims for failure to collect amounts due under leases might currently extend, is believed to be July 6, 1917. The earliest dates for which the Tribes currently have data indicating differentials between prices paid on the Reservation and in an off- Reservation "fair and open market," indicating that the Tribes failed to receive royalties based on "reasonable value" under the regulations, are from the mid-1930's. These dates are subject to amendment if and when more information becomes available. The Tribes are permitted under the Court's scheduling Order to update this identification of issues. Order of June 6, 2005, at 2, ¶ 1. At this stage, however, the Tribes believe that significant changes from these dates are unlikely.

II. FAILURE TO COLLECT AMOUNTS DUE UNDER 1916 ACT LEASES BY ILLEGAL CONVERSION TO 1938 ACT LEASES.

In 1904, at the insistence of the United States, the Shoshone and Arapahoe Tribes did "cede, grant, and relinquish to the United States, all right, title, and interest" in 1,480,000 acres, representing about two-thirds of their reservation. The ceded lands were that part of the reservation north and east of the Big Wind River and the Little Wind River or Popo-Agie River.

[3] Act of Nov. 5, 1990, Pub. L. No. 101-512, 104 Stat. 1915; Act of Nov. 13, 1991, Pub. L. No. 102-154, 105 Stat. 990; Act of Oct. 5, 1992, Pub. L. No. 102-381, 106 Stat. 1374; Act of Nov. 11, 1993, Pub. L. No. 103-138, 107 Stat. 1379; Act of Sept. 30, 1994, Pub. L. No. 103-332, 108 Stat. 2499; Act of Apr. 26, 1996, Pub. L. No. 104-134, 110 Stat. 1321; Act of Sept. 30, 1996, Pub. L. No. 104-208, 110 Stat. 3009; Act of Nov. 14, 1997, Pub. L. No. 105-83, 111 Stat. 1543; Act of Nov. 29, 1999, Pub. L. No. 106-113, 113 Stat. 1501; Act of Oct. 11, 2000, Pub. L. No. 106-291, 114 Stat. 922; Act of Nov. 5, 2001, Pub. L. No. 107-63, 115 Stat. 414; Act of Feb. 20, 2003, Pub. L. No. 108-7, 117 Stat. 11; Act of Nov. 10, 2003, Pub. L. No. 108-108, 117 Stat. 1241.

The United States undertook to dispose of the ceded lands under the "homestead, town-site, coal, and mineral land laws, or by sale for cash," and agreed to pay the Indians the amounts received by the Government. Agreement of Apr. 21, 1904, *approved by* the Act of March 3, 1905, ch. 1452, 33 Stat. 1016, art. I, II. The Tribes remained the equitable owners of the land and minerals, with the United States as trustee for purposes of disposing of the land. *United States v. Shoshone Tribe,* 304 U.S. 111, 114 (1938); *Florence E. Gallivan,* 60 I.D. 417, 418 (1950); *see also Ash Sheep Co. v. United States,* 252 U.S. 159 (1920). Through the years, beginning about 1906, portions of the 1904 "ceded" lands were entered, homesteaded, or purchased for cash, and after 1920 taken up under the reclamation-homestead laws.

Around 1910, it became apparent that much of the 1904 ceded land was potentially valuable for oil and gas. The Secretary of the Interior had approved oil and gas leases on some allotted Indian lands, but under then-existing law he had no authority to lease "undisposed of" ceded lands for oil and gas development. To protect the Tribes' interest pending legislation, the lands then considered potentially valuable for oil and gas were withdrawn as a petroleum reserve by Presidential Order of August 2, 1912 (*see* S. Rep. No. 64-712 (1916); H.R. Rep. No. 64-975 (1916)).

In order for the Tribes to benefit from oil and gas deposits within the ceded portion of the reservation, Congress in the 1916 Act empowered the Secretary of the Interior to lease the "ceded" lands for oil and gas development "under such terms and conditions as shall be by him prescribed" with the proceeds, bonuses, and royalties from the leases to be "applied to the use and benefit of said tribe." Pursuant to the 1916 Act, the Secretary promulgated regulations governing leasing and production of oil and gas within the ceded portion of the Reservation on Apr. 16, 1917, which were codified, as amended, in 25 C.F.R., Part 184 (1958).

The 1916 Act itself, however, and consequently the leases made under it, have a provision of great benefit to the Tribes. Congress provided in the 1916 Act that any lease under the Act "shall be for a period of twenty years with the preferential right of the lessee 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, unless otherwise provided by law at the time of expiration of any such period . . . ." This provides an opportunity to increase the royalty to the Tribe after the oil company has recovered its costs and made a fair profit. In contrast, leases under the 1938 Act are all for the same term – an initial period not to exceed 10 years and "as long thereafter as minerals are produced in paying quantities." 25 U.S.C. § 396a; 25 C.F.R. § 211.27(a). If a lease under the 1938 Act provided for a royalty of 1/8th (12.5%) to the Tribes, the royalty remains at that rate until all recoverable oil and gas is removed from the leased lands, even if the oil company has earned back its costs many times over and is making huge profits from the lease with decades to go. The Government's violation of the 1916 Act lease renewal provisions resulted in significant lost trust funds to the Tribes.

The Secretary entered into numerous 1916 Act leases for the Tribes through 1939, when Congress ceased the disposal of ceded lands and restored to the Reservation all ceded lands not disposed of, except certain lands within the Riverton Reclamation District. Act of July 27, 1939 ch. 387, 53 Stat. 1128, 1129, § 5 (*codified at* 25 U.S.C. § 575). No law has ever been passed that relieved the lessees from their obligations under these 1916 Act leases, and the Tribes have benefited significantly from the provision allowing a renewal of terms every ten years after the first 20-year term. Over time, 1916 Act leases were renewed with increased royalties up to 25%.

The Secretary, however, at the request of several oil companies, converted at least the following 1916 Act leases to 1938 Act leases, unlawfully freezing the royalty rate at 12.5%:

Steamboat Butte:

(1) I-96 Ind-7736
(2) I-96-Ind-7737

Maverick Springs:

(1) I-96-Ind-7745
(2) I-96-Ind-7746
(3) I-96-Ind-7747
(4) I-96-Ind-7748
(5) I-96-Ind-7749

As discovery is ongoing, additional conversions may be discovered and claimed.

These conversions were illegal, costing the Tribes the difference in royalty that they could have obtained if these leases had remained 1916 Act leases. This Court has already held that the duty of the Secretary to collect the royalty due under a lease is a money-mandating obligation. The same is true of the duty of the Secretary to enforce the terms of existing leases, and not to modify those terms to the detriment of the Tribes, contrary to law.

Time Periods. To the best of the Tribes' present knowledge and belief, unlawful conversion of 1916 Act leases into 1938 Act leases occurred between the early 1940's and the mid 1950's. The time period for which damages are sought begins on the date of each such conversion and extends to December 31, 2000.

III. FAILURE TO RESERVE MINERALS IN PATENTS UNDER THE 1905 ACT, AND FAILURE TO CORRECT PATENTS OR OTHERWISE PROTECT THE TRIBES' MINERAL INTERESTS IN PATENTED LANDS.

The United States in a number of instances issued patents on tribal land ceded in trust pursuant to the Act of March 3, 1905 (ch. 1452, 33 Stat. 1016) ("1905 Act") without expressly reserving the minerals in violation of that Act and subsequent acts, cited below, requiring reservation of mineral deposits. As a result of that failure, and the failure each year of the United States to correct the patents or otherwise protect the Tribes' mineral estate in such lands, the

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

The Shoshone Indian Tribe of the Wind River Reservation, Wyoming and The Arapaho Indian Tribe of the Wind River Reservation, Wyoming v. The United States	}	Case Nos. 458-79L and 459-79L

Expert Report

of

Daniel T. Reineke, P.E.

April 27, 2007

Expert Report of Daniel T. Reineke, P.E.
Exhibit List

Exhibit No.	Description
1A & B	Lease Mapping on CD
2	Sample Company Self-Reporting Forms
3	Database Explanation
4	Historical Database on CD
5	Wind River Basin Fields
6	Platt's Prices - Spreadsheet on CD
7	U.S.G.S. Price - Spreadsheet on CD
8	Normalized Gross Proceeds Prices at 40 Degrees
9	Major Portion Prices at 40 Degrees
10	Recalculated Unit Price on CD
11	Claim 1 Calculations on CD
12	Claim II Calculations
13	Claim III and IV Calculations
14	Claim V Calculations
15A & B	Claim VI Calculations
16	Curriculum Vitae for Daniel T. Reineke, P.E.

Underpayment Due to 1916 Act Lease Conversions
PARCEL MSF002

Lease #	Royalty Rate	Form #	Start Date	End Date		HBP Date
I-96-IND-0444	0.125000	1916 Act	1/21/1918	1/21/1938		
I-96-IND-6535	0.125000	1916 Act	1/21/1938	1/21/1948		
I-96-IND-7746	0.125000	5-157 (November 1947)	2/21/1948	10HBP		2/21/1958
MSF002	**Maverick Springs**					
Renewal Date	**Date**	**Volume**	**Royalty Differential**	**Recalculated Value**		**Damage**
1/21/1938	NO CLAIM					
1/21/1948	NO CLAIM					
Converted 6/21/1950						
1/21/1958 12.5%						
	Jan-59	823	0.0000	$2.66		$0.00
	Feb-59	1,188	0.0000	$2.47		$0.00
	Mar-59	1,162	0.0000	$2.47		$0.00
	Apr-59	806	0.0000	$2.47		$0.00
	May-59	770	0.0000	$2.62		$0.00
	Jun-59	762	0.0000	$2.47		$0.00
	Jul-59	789	0.0000	$2.47		$0.00
	Aug-59	785	0.0000	$2.47		$0.00
	Sep-59	402	0.0000	$2.46		$0.00
	Oct-59	406	0.0000	$2.47		$0.00
	Nov-59	403	0.0000	$2.46		$0.00
	Dec-59	397	0.0000	$2.49		$0.00
	Jan-60	404	0.0000	$2.46		$0.00
	Feb-60	401	0.0000	$2.49		$0.00
	Mar-60	816	0.0000	$2.47		$0.00
	Apr-60	339	0.0000	$2.57		$0.00
	May-60	396	0.0000	$2.47		$0.00
	Jun-60	264	0.0000	$2.51		$0.00
	Jul-60	823	0.0000	$2.47		$0.00
	Aug-60	818	0.0000	$2.47		$0.00
	Sep-60	431	0.0000	$2.49		$0.00
	Oct-60	405	0.0000	$2.49		$0.00
	Nov-60	813	0.0000	$2.49		$0.00
	Dec-60	410	0.0000	$2.47		$0.00
	Jan-61	824	0.0000	$2.49		$0.00
	Feb-61	422	0.0000	$2.46		$0.00
	Mar-61	837	0.0000	$2.62		$0.00
	Apr-61	403	0.0000	$2.48		$0.00
	May-61	813	0.0000	$2.49		$0.00
	Jun-61	390	0.0000	$2.55		$0.00
	Jul-61	806	0.0000	$2.57		$0.00
	Aug-61	391	0.0000	$2.55		$0.00
	Sep-61	407	0.0000	$2.55		$0.00
	Oct-61	791	0.0000	$2.55		$0.00
	Nov-61	411	0.0000	$2.55		$0.00
	Dec-61	283	0.0000	$2.53		$0.00
	Jan-62	773	0.0000	$2.49		$0.00
	Feb-62	352	0.0000	$2.49		$0.00
	Mar-62	736	0.0000	$2.49		$0.00
	Apr-62	776	0.0000	$2.46		$0.00
	May-62	404	0.0000	$2.47		$0.00
	Jun-62	801	0.0000	$2.66		$0.00

Underpayment Due to 1916 Act Lease Conversions
PARCEL MSF002

Renewal Date	Date	Volume	Royalty Differential	Recalculated Value		Damage
	Jul-62	787	0.0000	$2.47		$0.00
	Aug-62	622	0.0000	$2.49		$0.00
	Sep-62	407	0.0000	$2.47		$0.00
	Oct-62	703	0.0000	$2.47		$0.00
	Nov-62	386	0.0000	$2.49		$0.00
	Dec-62	804	0.0000	$2.46		$0.00
	Jan-63	737	0.0000	$2.51		$0.00
	Feb-63	425	0.0000	$2.51		$0.00
	Mar-63	778	0.0000	$2.51		$0.00
	Apr-63	814	0.0000	$2.51		$0.00
	May-63	380	0.0000	$2.51		$0.00
	Jun-63	818	0.0000	$2.51		$0.00
	Jul-63	811	0.0000	$2.51		$0.00
	Aug-63	815	0.0000	$2.51		$0.00
	Sep-63	430	0.0000	$2.51		$0.00
	Oct-63	832	0.0000	$2.51		$0.00
	Nov-63	381	0.0000	$2.51		$0.00
	Dec-63	793	0.0000	$2.51		$0.00
	Jan-64	401	0.0000	$2.51		$0.00
	Feb-64	743	0.0000	$2.51		$0.00
	Mar-64	809	0.0000	$2.53		$0.00
	Apr-64	826	0.0000	$2.61		$0.00
	May-64	393	0.0000	$2.51		$0.00
	Jun-64	822	0.0000	$2.51		$0.00
	Jul-64	417	0.0000	$2.51		$0.00
	Aug-64	803	0.0000	$2.53		$0.00
	Sep-64	1,157	0.0000	$2.51		$0.00
	Oct-64	2,756	0.0000	$2.51		$0.00
	Nov-64	1,585	0.0000	$2.51		$0.00
	Dec-64	2,032	0.0000	$2.51		$0.00
	Jan-65	2,056	0.0000	$2.51		$0.00
	Feb-65	1,206	0.0000	$2.51		$0.00
	Mar-65	2,032	0.0000	$2.53		$0.00
	Apr-65	1,631	0.0000	$2.51		$0.00
	May-65	2,012	0.0000	$2.53		$0.00
	Jun-65	1,622	0.0000	$2.53		$0.00
	Jul-65	4,046	0.0000	$2.53		$0.00
	Aug-65	2,063	0.0000	$2.51		$0.00
	Sep-65	2,741	0.0000	$2.51		$0.00
	Oct-65	2,313	0.0000	$2.51		$0.00
	Nov-65	2,021	0.0000	$2.53		$0.00
	Dec-65	2,018	0.0000	$2.53		$0.00
	Jan-66	2,390	0.0000	$2.53		$0.00
	Feb-66	1,528	0.0000	$2.56		$0.00
	Mar-66	1,954	0.0000	$2.62		$0.00
	Apr-66	1,526	0.0000	$2.56		$0.00
	May-66	1,571	0.0000	$2.56		$0.00
	Jun-66	1,175	0.0000	$2.62		$0.00
	Jul-66	387	0.0000	$2.56		$0.00
	Aug-66	1,167	0.0000	$2.56		$0.00
	Sep-66	1,951	0.0000	$2.56		$0.00
	Oct-66	1,555	0.0000	$2.56		$0.00
	Nov-66	1,582	0.0000	$2.56		$0.00

Underpayment Due to 1916 Act Lease Conversions
PARCEL MSF002

Renewal Date	Date	Volume	Royalty Differential	Recalculated Value		Damage
	Dec-66	1,581	0.0000	$2.72		$0.00
	Jan-67	1,218	0.0000	$2.89		$0.00
	Feb-67	1,220	0.0000	$2.56		$0.00
	Mar-67	2,326	0.0000	$2.72		$0.00
	Apr-67	1,200	0.0000	$2.56		$0.00
	May-67	1,182	0.0000	$2.56		$0.00
	Jun-67	1,510	0.0000	$2.56		$0.00
	Jul-67	1,593	0.0000	$2.56		$0.00
	Aug-67	1,188	0.0000	$2.67		$0.00
	Sep-67	1,437	0.0000	$2.56		$0.00
	Oct-67	1,609	0.0000	$2.56		$0.00
	Nov-67	1,522	0.0000	$2.56		$0.00
	Dec-67	1,609	0.0000	$2.64		$0.00
1/21/1968 16 2/3%	Jan-68	1,210	0.0417	$2.64		$133.18
	Feb-68	1,252	0.0417	$3.28		$171.20
	Mar-68	1,263	0.0417	$2.64		$139.07
	Apr-68	1,213	0.0417	$2.64		$133.53
	May-68	1,599	0.0417	$2.64		$176.00
	Jun-68	780	0.0417	$2.64		$85.88
	Jul-68	824	0.0417	$2.69		$92.45
	Aug-68	1,501	0.0417	$2.69		$168.33
	Sep-68	1,921	0.0417	$2.69		$215.49
	Oct-68	2,024	0.0417	$2.69		$227.05
	Nov-68	1,562	0.0417	$2.69		$175.24
	Dec-68	1,604	0.0417	$2.69		$179.88
	Jan-69	1,230	0.0417	$2.69		$137.96
	Feb-69	1,069	0.0417	$2.69		$119.88
	Mar-69	1,484	0.0417	$2.80		$173.25
	Apr-69	1,914	0.0417	$2.80		$223.42
	May-69	1,528	0.0417	$2.80		$178.40
	Jun-69	1,556	0.0417	$2.80		$181.64
	Jul-69	1,612	0.0417	$2.80		$188.25
	Aug-69	1,532	0.0417	$2.80		$178.93
	Sep-69	1,597	0.0417	$2.85		$189.83
	Oct-69	1,253	0.0417	$2.85		$148.97
	Nov-69	1,618	0.0417	$2.85		$192.29
	Dec-69	1,222	0.0417	$2.85		$145.27
	Jan-70	1,110	0.0417	$2.85		$131.93
	Feb-70	1,683	0.0417	$2.85		$199.98
	Mar-70	1,111	0.0417	$2.85		$132.03
	Apr-70	1,101	0.0417	$2.84		$130.39
	May-70	1,120	0.0417	$2.84		$132.64
	Jun-70	1,139	0.0417	$2.85		$135.40
	Jul-70	1,184	0.0417	$2.84		$140.25
	Aug-70	763	0.0417	$2.85		$90.72
	Sep-70	707	0.0417	$2.84		$83.77
	Oct-70	1,597	0.0417	$2.85		$189.85
	Nov-70	1,515	0.0417	$3.10		$195.88
	Dec-70	1,234	0.0417	$3.09		$159.03
	Jan-71	1,143	0.0417	$3.10		$147.70
	Feb-71	1,167	0.0417	$3.10		$150.81
	Mar-71	1,215	0.0417	$3.10		$157.09
	Apr-71	1,140	0.0417	$3.10		$147.41

Underpayment Due to 1916 Act Lease Conversions
PARCEL MSF002

Renewal Date	Date	Volume	Royalty Differential	Recalculated Value		Damage
	May-71	725	0.0417	$3.10		$93.74
	Jun-71	1,110	0.0417	$2.92		$135.22
	Jul-71	826	0.0417	$3.10		$106.79
	Aug-71	1,057	0.0417	$3.10		$136.70
	Sep-71	1,532	0.0417	$3.10		$198.00
	Oct-71	1,064	0.0417	$3.10		$137.49
	Nov-71	1,068	0.0417	$3.10		$138.06
	Dec-71	465	0.0417	$3.10		$60.11
	Jan-72	1,453	0.0417	$3.10		$187.88
	Feb-72	597	0.0417	$2.92		$72.66
	Mar-72	1,568	0.0417	$2.92		$190.95
	Apr-72	1,385	0.0417	$3.11		$179.67
	May-72	961	0.0417	$3.11		$124.63
	Jun-72	1,059	0.0417	$3.10		$136.87
	Jul-72	705	0.0417	$3.10		$91.19
	Aug-72	679	0.0417	$3.10		$87.81
	Sep-72	1,465	0.0417	$3.10		$189.40
	Oct-72	678	0.0417	$3.10		$87.70
	Nov-72	1,753	0.0417	$3.10		$226.62
	Dec-72	706	0.0417	$3.10		$91.22
	Jan-73	1,178	0.0417	$3.10		$152.33
	Feb-73	1,173	0.0417	$4.50		$220.11
	Mar-73	399	0.0417	$3.10		$51.63
	Apr-73	1,432	0.0417	$3.38		$201.81
	May-73	1,196	0.0417	$3.38		$168.60
	Jun-73	788	0.0417	$3.46		$113.76
	Jul-73	825	0.0417	$3.46		$118.96
	Aug-73	806	0.0417	$4.18		$140.53
	Sep-73	1,207	0.0417	$4.82		$242.55
	Oct-73	2,091	0.0417	$4.82		$420.22
	Nov-73	808	0.0417	$4.82		$162.42
	Dec-73	2,446	0.0417	$4.82		$491.55
	Jan-74	1,020	0.0417	$9.46		$402.37
	Feb-74	908	0.0417	$9.46		$358.19
	Mar-74	1,049	0.0417	$9.46		$413.81
	Apr-74	1,095	0.0417	$9.46		$431.96
	May-74	999	0.0417	$9.46		$394.09
	Jun-74	845	0.0417	$9.46		$333.34
	Jul-74	1,043	0.0417	$9.46		$411.44
	Aug-74	498	0.0417	$9.46		$196.45
	Sep-74	1,225	0.0417	$9.46		$483.24
	Oct-74	1,297	0.0417	$10.51		$568.43
	Nov-74	1,136	0.0417	$10.51		$497.87
	Dec-74	1,078	0.0417	$10.51		$472.45
	Jan-75	967	0.0417	$9.88		$398.40
	Feb-75	952	0.0417	$9.88		$392.22
	Mar-75	1,080	0.0417	$9.88		$444.96
	Apr-75	453	0.0417	$9.88		$186.63
	May-75	887	0.0417	$9.88		$365.44
	Jun-75	1,062	0.0417	$9.88		$437.54
	Jul-75	441	0.0417	$9.88		$181.69
	Aug-75	1,062	0.0417	$9.88		$437.54
	Sep-75	1,112	0.0417	$9.88		$458.14

Underpayment Due to 1916 Act Lease Conversions
PARCEL MSF002

Renewal Date	Date	Volume	Royalty Differential	Recalculated Value		Damage
	Oct-75	690	0.0417	$9.88		$284.28
	Nov-75	534	0.0417	$9.88		$220.01
	Dec-75	672	0.0417	$9.88		$276.86
	Jan-76	1,237	0.0417	$9.21		$475.08
	Feb-76	1,034	0.0417	$10.08		$434.63
	Mar-76	1,158	0.0417	$10.15		$490.13
	Apr-76	1,139	0.0417	$10.22		$485.41
	May-76	880	0.0417	$10.22		$375.03
	Jun-76	990	0.0417	$10.22		$421.91
	Jul-76	968	0.0417	$10.22		$412.54
	Aug-76	1,547	0.0417	$10.22		$659.29
	Sep-76	219	0.0417	$11.95		$109.13
	Oct-76	711	0.0417	$11.95		$354.30
	Nov-76	673	0.0417	$11.95		$335.37
	Dec-76	667	0.0417	$11.95		$332.38
	Jan-77	815	0.0417	$11.54		$392.19
	Feb-77	920	0.0417	$11.54		$442.72
	Mar-77	898	0.0417	$11.54		$432.13
	Apr-77	968	0.0417	$11.54		$465.82
	May-77	939	0.0417	$11.54		$451.86
	Jun-77	502	0.0417	$11.54		$241.57
	Jul-77	777	0.0417	$11.54		$373.91
	Aug-77	1,016	0.0417	$12.49		$529.17
	Sep-77	956	0.0417	$12.49		$497.92
	Oct-77	1,019	0.0417	$12.49		$530.73
	Nov-77	1,017	0.0417	$12.49		$529.69
	Dec-77	1,020	0.0417	$12.49		$531.25
1/21/1978 25.0%	Jan-78	905	0.1250	$12.71		$1,437.82
	Feb-78	628	0.1250	$12.71		$997.74
	Mar-78	658	0.1250	$12.71		$1,045.40
	Apr-78	679	0.1250	$12.71		$1,078.76
	May-78	677	0.1250	$12.71		$1,075.58
	Jun-78	544	0.1250	$12.71		$864.28
	Jul-78	612	0.1250	$12.71		$972.32
	Aug-78	628	0.1250	$12.71		$997.74
	Sep-78	622	0.1250	$12.71		$988.20
	Oct-78	644	0.1250	$12.71		$1,023.16
	Nov-78	602	0.1250	$12.71		$956.43
	Dec-78	664	0.1250	$12.71		$1,054.93
	Jan-79	659	0.1250	$11.48		$945.67
	Feb-79	577	0.1250	$12.25		$883.53
	Mar-79	612	0.1250	$12.25		$937.13
	Apr-79	533	0.1250	$12.25		$816.16
	May-79	565	0.1250	$15.75		$1,112.34
	Jun-79	596	0.1250	$19.10		$1,422.95
	Jul-79	618	0.1250	$22.30		$1,722.68
	Aug-79	614	0.1250	$25.05		$1,922.59
	Sep-79	541	0.1250	$26.50		$1,792.06
	Oct-79	555	0.1250	$29.50		$2,046.56
	Nov-79	590	0.1250	$31.00		$2,286.25
	Dec-79	559	0.1250	$32.50		$2,270.94
	Jan-80	568	0.1250	$32.50		$2,307.50
	Feb-80	562	0.1250	$37.00		$2,599.25

Underpayment Due to 1916 Act Lease Conversions
PARCEL MSF002

Renewal Date	Date	Volume	Royalty Differential	Recalculated Value		Damage
	Mar-80	621	0.1250	$38.00		$2,949.75
	Apr-80	556	0.1250	$40.00		$2,780.00
	May-80	576	0.1250	$40.00		$2,880.00
	Jun-80	475	0.1250	$40.00		$2,375.00
	Jul-80	373	0.1250	$40.00		$1,865.00
	Aug-80	1,021	0.1250	$38.00		$4,849.75
	Sep-80	125	0.1250	$36.00		$562.50
	Oct-80	594	0.1250	$36.00		$2,673.00
	Nov-80	580	0.1250	$36.00		$2,610.00
	Dec-80	645	0.1250	$36.00		$2,902.50
	Jan-81	422	0.1250	$38.00		$2,004.50
	Feb-81	528	0.1250	$38.00		$2,508.00
	Mar-81	508	0.1250	$38.00		$2,413.00
	Apr-81	630	0.1250	$38.00		$2,992.50
	May-81	414	0.1250	$38.00		$1,966.50
	Jun-81	355	0.1250	$36.00		$1,597.50
	Jul-81	451	0.1250	$36.00		$2,029.50
	Aug-81	473	0.1250	$36.00		$2,128.50
	Sep-81	431	0.1250	$36.00		$1,939.50
	Oct-81	458	0.1250	$35.00		$2,003.75
	Nov-81	537	0.1250	$36.00		$2,416.50
	Dec-81	649	0.1250	$35.00		$2,839.38
	Jan-82	508	0.1250	$33.85		$2,149.48
	Feb-82	472	0.1250	$31.56		$1,862.04
	Mar-82	438	0.1250	$28.48		$1,559.28
	Apr-82	435	0.1250	$33.45		$1,818.84
	May-82	898	0.1250	$36.93		$4,145.39
	Jun-82	2,461	0.1250	$35.07		$10,788.41
	Jul-82	2,327	0.1250	$34.16		$9,936.29
	Aug-82	2,778	0.1250	$33.95		$11,789.14
	Sep-82	3,003	0.1250	$35.63		$13,374.61
	Oct-82	2,787	0.1250	$35.68		$12,430.02
	Nov-82	4,138	0.1250	$33.15		$17,146.84
	Dec-82	3,707	0.1250	$31.72		$14,698.26
	Jan-83	3,693	0.1250	$30.19		$13,936.46
	Feb-83	4,178	0.1250	$27.95		$14,596.89
	Mar-83	4,668	0.1250	$28.82		$16,816.47
	Apr-83	4,397	0.1250	$30.11		$16,549.21
	May-83	4,233	0.1250	$29.50		$15,609.19
	Jun-83	3,855	0.1250	$30.50		$14,697.19
	Jul-83	4,767	0.1250	$31.16		$18,567.47
	Aug-83	3,961	0.1250	$30.91		$15,304.31
	Sep-83	3,836	0.1250	$30.11		$14,437.75
	Oct-83	3,963	0.1250	$29.41		$14,568.98
	Nov-83	3,697	0.1250	$28.84		$13,327.69
	Dec-83	3,524	0.1250	$28.24		$12,439.72
	Jan-84	3,187	0.1250	$28.69		$11,429.38
	Feb-84	3,066	0.1250	$29.14		$11,167.91
	Mar-84	3,383	0.1250	$29.76		$12,584.76
	Apr-84	3,223	0.1250	$29.62		$11,933.16
	May-84	3,107	0.1250	$29.52		$11,464.83
	Jun-84	2,803	0.1250	$28.97		$10,150.36
	Jul-84	3,370	0.1250	$27.75		$11,689.69

Underpayment Due to 1916 Act Lease Conversions
PARCEL MSF002

Renewal Date	Date	Volume	Royalty Differential	Recalculated Value		Damage
	Aug-84	3,036	0.1250	$28.25		$10,720.88
	Sep-84	2,866	0.1250	$28.31		$10,142.06
	Oct-84	3,078	0.1250	$27.76		$10,680.66
	Nov-84	2,920	0.1250	$28.35		$10,347.75
	Dec-84	2,929	0.1250	$23.93		$8,761.37
	Jan-85	2,772	0.1250	$24.14		$8,364.51
	Feb-85	2,466	0.1250	$26.77		$8,251.85
	Mar-85	2,865	0.1250	$27.74		$9,934.39
	Apr-85	2,715	0.1250	$28.30		$9,604.31
	May-85	3,021	0.1250	$27.12		$10,241.19
	Jun-85	2,682	0.1250	$26.64		$8,931.06
	Jul-85	2,496	0.1250	$26.83		$8,370.96
	Aug-85	2,978	0.1250	$27.26		$10,147.54
	Sep-85	2,734	0.1250	$27.79		$9,497.23
	Oct-85	2,906	0.1250	$29.04		$10,548.78
	Nov-85	2,296	0.1250	$30.31		$8,698.97
	Dec-85	2,747	0.1250	$26.73		$9,178.41
	Jan-86	3,076	0.1250	$22.74		$8,743.53
	Feb-86	2,259	0.1250	$14.94		$4,218.68
	Mar-86	2,095	0.1250	$12.62		$3,304.86
	Apr-86	967	0.1250	$12.85		$1,553.24
	May-86	1,067	0.1250	$14.69		$1,959.28
	Jun-86	1,029	0.1250	$12.72		$1,636.11
	Jul-86	1,037	0.1250	$10.82		$1,402.54
	Aug-86	1,235	0.1250	$14.84		$2,290.93
	Sep-86	1,011	0.1250	$13.91		$1,757.88
	Oct-86	1,052	0.1250	$13.85		$1,821.28
	Nov-86	1,007	0.1250	$14.21		$1,788.68
	Dec-86	1,834	0.1250	$15.33		$3,514.40
	Jan-87	2,023	0.1250	$17.91		$4,528.99
	Feb-87	999	0.1250	$16.98		$2,120.38
	Mar-87	1,097	0.1250	$17.56		$2,407.92
	Apr-87	984	0.1250	$18.39		$2,261.97
	May-87	2,643	0.1250	$19.16		$6,329.99
	Jun-87	2,380	0.1250	$19.78		$5,884.55
	Jul-87	2,717	0.1250	$21.10		$7,166.09
	Aug-87	2,642	0.1250	$20.02		$6,611.61
	Sep-87	2,565	0.1250	$19.28		$6,181.65
	Oct-87	2,299	0.1250	$19.60		$5,632.55
	Nov-87	2,531	0.1250	$18.67		$5,906.72
	Dec-87	2,181	0.1250	$16.99		$4,631.90
1/21/1988 25.0%	Jan-88	1,384	0.1250	$16.91		$2,925.43
	Feb-88	1,147	0.1250	$16.52		$2,368.56
	Mar-88	1,178	0.1250	$15.97		$2,351.58
	Apr-88	1,078	0.1250	$17.63		$2,375.64
	May-88	1,078	0.1250	$17.19		$2,316.35
	Jun-88	970	0.1250	$16.28		$1,973.95
	Jul-88	919	0.1250	$15.55		$1,786.31
	Aug-88	917	0.1250	$15.95		$1,828.27
	Sep-88	923	0.1250	$14.26		$1,645.25
	Oct-88	878	0.1250	$13.52		$1,483.82
	Nov-88	883	0.1250	$13.89		$1,533.11
	Dec-88	930	0.1250	$16.13		$1,875.11

Underpayment Due to 1916 Act Lease Conversions
PARCEL MSF002

Renewal Date	Date	Volume	Royalty Differential	Recalculated Value		Damage
	Jan-89	926	0.1250	$17.77		$2,056.88
	Feb-89	870	0.1250	$17.69		$1,923.79
	Mar-89	859	0.1250	$19.38		$2,080.93
	Apr-89	891	0.1250	$20.82		$2,318.83
	May-89	914	0.1250	$19.87		$2,270.15
	Jun-89	907	0.1250	$19.80		$2,244.83
	Jul-89	820	0.1250	$19.48		$1,996.70
	Aug-89	692	0.1250	$18.22		$1,576.03
	Sep-89	889	0.1250	$19.34		$2,149.16
	Oct-89	465	0.1250	$19.85		$1,153.78
	Nov-89	862	0.1250	$19.61		$2,112.98
	Dec-89	919	0.1250	$20.85		$2,395.14
	Jan-90	862	0.1250	$22.61		$2,436.23
	Feb-90	833	0.1250	$21.86		$2,276.17
	Mar-90	836	0.1250	$20.14		$2,104.63
	Apr-90	878	0.1250	$18.18		$1,995.26
	May-90	957	0.1250	$17.95		$2,147.27
	Jun-90	1,049	0.1250	$16.45		$2,157.01
	Jul-90	864	0.1250	$18.20		$1,965.60
	Aug-90	866	0.1250	$27.06		$2,929.25
	Sep-90	794	0.1250	$33.51		$3,325.87
	Oct-90	854	0.1250	$35.84		$3,825.92
	Nov-90	857	0.1250	$32.08		$3,436.57
	Dec-90	807	0.1250	$27.13		$2,736.74
	Jan-91	860	0.1250	$24.98		$2,685.35
	Feb-91	783	0.1250	$20.23		$1,980.01
	Mar-91	892	0.1250	$19.65		$2,190.98
	Apr-91	941	0.1250	$20.58		$2,420.72
	May-91	1,075	0.1250	$20.98		$2,819.19
	Jun-91	1,013	0.1250	$19.94		$2,524.90
	Jul-91	1,049	0.1250	$21.15		$2,773.29
	Aug-91	798	0.1250	$21.44		$2,138.64
	Sep-91	1,001	0.1250	$21.64		$2,707.71
	Oct-91	0	0.1250	$22.98		$0.00
	Nov-91	949	0.1250	$22.21		$2,634.66
	Dec-91	994	0.1250	$19.25		$2,391.81
	Jan-92	1,003	0.1250	$18.54		$2,324.45
	Feb-92	887	0.1250	$18.76		$2,080.02
	Mar-92	859	0.1250	$18.52		$1,988.59
	Apr-92	762	0.1250	$19.73		$1,879.28
	May-92	824	0.1250	$20.48		$2,109.44
	Jun-92	811	0.1250	$21.88		$2,218.09
	Jul-92	839	0.1250	$21.28		$2,231.74
	Aug-92	806	0.1250	$20.84		$2,099.63
	Sep-92	779	0.1250	$21.38		$2,081.88
	Oct-92	784	0.1250	$21.19		$2,076.62
	Nov-92	735	0.1250	$19.84		$1,822.80
	Dec-92	762	0.1250	$18.91		$1,801.18
	Jan-93	760	0.1250	$18.37		$1,745.15
	Feb-93	690	0.1250	$19.34		$1,668.08
	Mar-93	755	0.1250	$19.57		$1,846.92
	Apr-93	666	0.1250	$19.50		$1,623.38
	May-93	790	0.1250	$19.17		$1,893.04

Underpayment Due to 1916 Act Lease Conversions
PARCEL MSF002

Renewal Date	Date	Volume	Royalty Differential	Recalculated Value		Damage
	Jun-93	822	0.1250	$18.09		$1,858.75
	Jul-93	891	0.1250	$16.89		$1,881.12
	Aug-93	871	0.1250	$17.01		$1,851.96
	Sep-93	1,050	0.1250	$16.50		$2,165.63
	Oct-93	746	0.1250	$17.15		$1,599.24
	Nov-93	851	0.1250	$15.61		$1,660.51
	Dec-93	837	0.1250	$13.51		$1,413.48
	Jan-94	771	0.1250	$14.03		$1,352.14
	Feb-94	697	0.1250	$13.78		$1,200.58
	Mar-94	825	0.1250	$13.68		$1,410.75
	Apr-94	790	0.1250	$15.42		$1,522.73
	May-94	825	0.1250	$16.89		$1,741.78
	Jun-94	862	0.1250	$18.06		$1,945.97
	Jul-94	844	0.1250	$18.65		$1,967.58
	Aug-94	792	0.1250	$17.38		$1,720.62
	Sep-94	783	0.1250	$16.45		$1,610.04
	Oct-94	812	0.1250	$16.72		$1,697.08
	Nov-94	852	0.1250	$17.07		$1,817.96
	Dec-94	832	0.1250	$16.16		$1,680.64
	Jan-95	830	0.1250	$17.04		$1,767.90
	Feb-95	775	0.1250	$17.57		$1,702.09
	Mar-95	899	0.1250	$17.54		$1,971.06
	Apr-95	896	0.1250	$18.90		$2,116.80
	May-95	872	0.1250	$18.74		$2,042.66
	Jun-95	804	0.1250	$17.45		$1,753.73
	Jul-95	885	0.1250	$16.33		$1,806.51
	Aug-95	361	0.1250	$17.02		$768.03
	Sep-95	410	0.1250	$17.23		$883.04
	Oct-95	421	0.1250	$16.43		$864.63
	Nov-95	374	0.1250	$16.99		$794.28
	Dec-95	406	0.1250	$18.03		$915.02
	Jan-96	354	0.1250	$17.85		$789.86
	Feb-96	376	0.1250	$18.09		$850.23
	Mar-96	405	0.1250	$20.33		$1,029.21
	Apr-96	398	0.1250	$22.50		$1,119.38
	May-96	487	0.1250	$20.17		$1,227.85
	Jun-96	414	0.1250	$19.57		$1,012.75
	Jul-96	479	0.1250	$20.58		$1,232.23
	Aug-96	407	0.1250	$21.07		$1,071.94
	Sep-96	383	0.1250	$22.99		$1,100.65
	Oct-96	450	0.1250	$24.00		$1,350.00
	Nov-96	479	0.1250	$22.96		$1,374.73
	Dec-96	474	0.1250	$24.34		$1,442.15
	Jan-97	424	0.1250	$24.14		$1,279.42
	Feb-97	367	0.1250	$21.09		$967.50
	Mar-97	405	0.1250	$19.59		$991.74
	Apr-97	396	0.1250	$18.60		$920.70
	May-97	400	0.1250	$19.49		$974.50
	Jun-97	386	0.1250	$17.89		$863.19
	Jul-97	412	0.1250	$18.16		$935.24
	Aug-97	352	0.1250	$18.41		$810.04
	Sep-97	409	0.1250	$18.26		$933.54
	Oct-97	410	0.1250	$19.79		$1,014.24

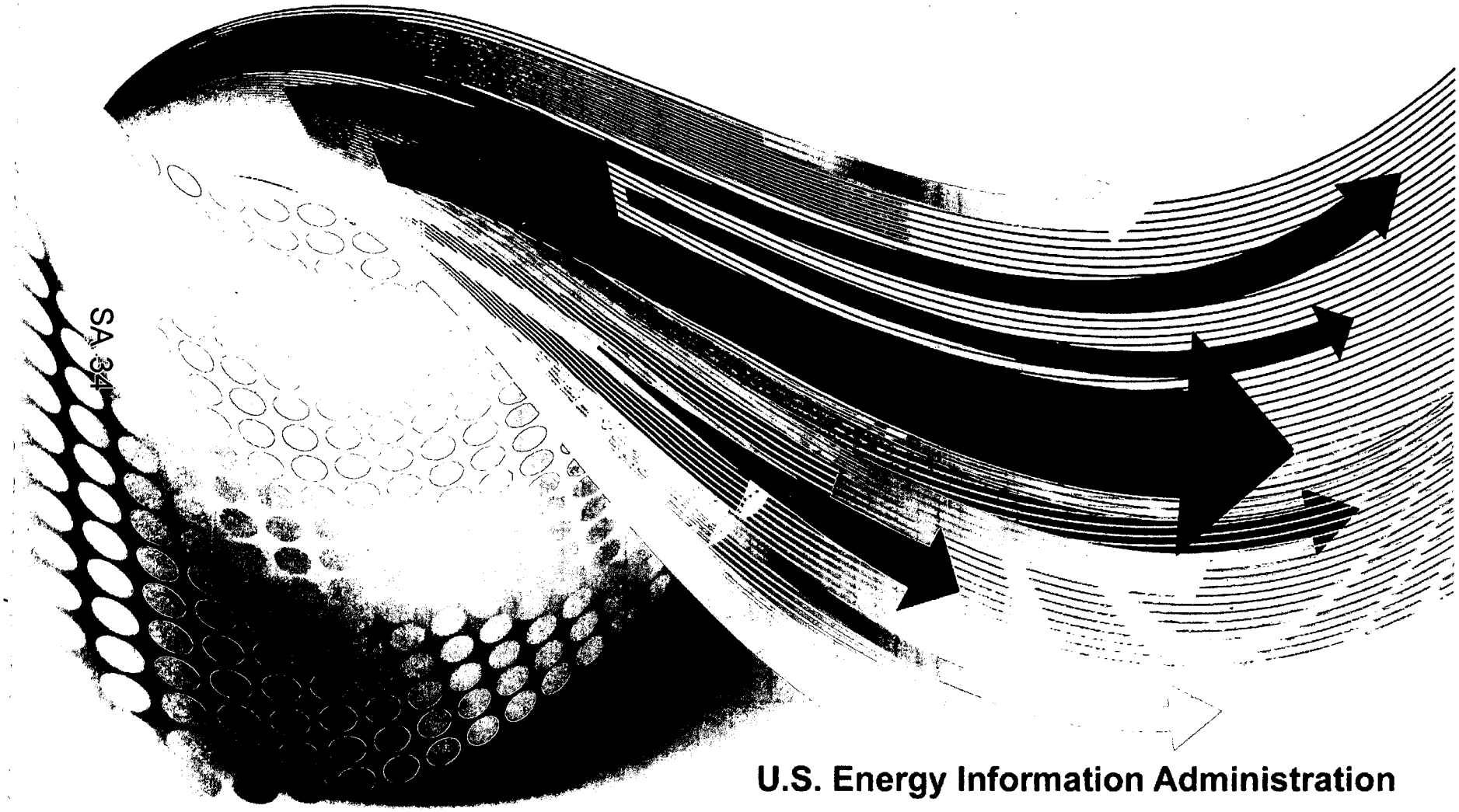
Underpayment Due to 1916 Act Lease Conversions
PARCEL MSF002

Renewal Date	Date	Volume	Royalty Differential	Recalculated Value		Damage
	Nov-97	395	0.1250	$18.44		$910.48
	Dec-97	535	0.1250	$16.75		$1,120.16
1/21/1998 19%	Jan-98	485	0.0650	$14.97		$471.93
	Feb-98	478	0.0650	$16.21		$503.64
	Mar-98	530	0.0650	$13.16		$453.36
	Apr-98	562	0.0650	$13.05		$476.72
	May-98	250	0.0650	$12.59		$204.59
	Jun-98		0.0650			$0.00
	Jul-98		0.0650			$0.00
	Aug-98		0.0650			$0.00
	Sep-98		0.0650			$0.00
	Oct-98		0.0650			$0.00
	Nov-98		0.0650			$0.00
	Dec-98		0.0650			$0.00
	Jan-99		0.0650			$0.00
	Feb-99		0.0650			$0.00
	Mar-99		0.0650			$0.00
	Apr-99		0.0650			$0.00
	May-99		0.0650			$0.00
	Jun-99		0.0650			$0.00
	Jul-99		0.0650			$0.00
	Aug-99		0.0650			$0.00
	Sep-99		0.0650			$0.00
	Oct-99		0.0650			$0.00
	Nov-99		0.0650			$0.00
	Dec-99		0.0650			$0.00
	Jan-00		0.0650			$0.00
	Feb-00		0.0650			$0.00
	Mar-00		0.0650			$0.00
	Apr-00		0.0650			$0.00
	May-00		0.0650			$0.00
	Jun-00		0.0650			$0.00
	Jul-00		0.0650			$0.00
	Aug-00		0.0650			$0.00
	Sep-00		0.0650			$0.00
	Oct-00		0.0650			$0.00
	Nov-00					
	Dec-00					
				TOTAL		$956,433.90

DOE/EIA-0384(2009) | August 2010

Annual Energy Review 2009

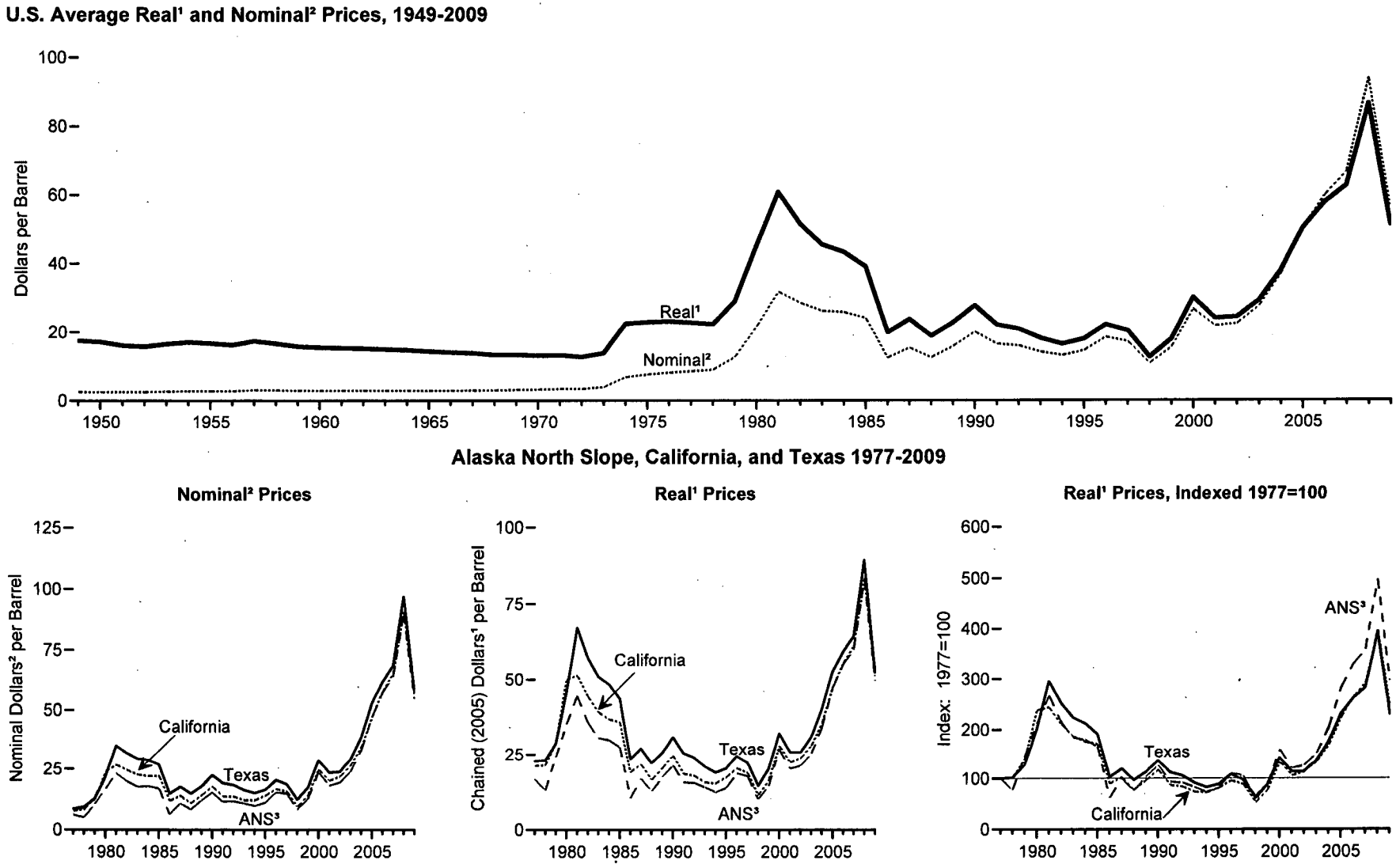
www.eia.gov/aer



SA 34

U.S. Energy Information Administration

Figure 5.18 Crude Oil Domestic First Purchase Prices



[1] In chained (2005) dollars, calculated by using gross domestic product implicit price deflators. See Table D1.
[2] See "Nominal Dollars" in Glossary.
[3] Alaska North Slope.
Source: Table 5.18.

SA 35

Table 5.18 Crude Oil Domestic First Purchase Prices, Selected Years, 1949-2009

(Dollars per Barrel)

Year	Alaska North Slope		California		Texas		U.S. Average	
	Nominal [1]	Real [2]	Nominal [1]	Real [2]	Nominal [1]	Real [2]	Nominal [1]	Real [2]
1949	--	--	NA	NA	NA	NA	2.54	R17.53
1950	--	--	NA	NA	NA	NA	2.51	R17.14
1955	--	--	NA	NA	NA	NA	2.77	R16.70
1960	NA	NA	NA	NA	NA	NA	2.88	R15.49
1965	NA	NA	NA	NA	NA	NA	2.86	R14.36
1970	NA	NA	NA	NA	NA	NA	3.18	R13.08
1971	NA	NA	NA	NA	NA	NA	3.39	R13.28
1972	NA	NA	NA	NA	NA	NA	3.39	R12.73
1973	NA	NA	NA	NA	NA	NA	3.89	R13.84
1974	NA	NA	NA	NA	NA	NA	6.87	R22.40
1975	NA	NA	NA	NA	NA	NA	7.67	R22.85
1976	NA	NA	NA	NA	NA	NA	8.19	R23.08
1977	[3]6.29	[3,R]16.66	7.92	R20.98	8.58	R22.73	8.57	R22.70
1978	5.21	R12.90	8.58	R21.24	9.29	R23.00	9.00	R22.28
1979	10.57	R24.15	12.78	R29.20	12.65	R28.91	12.64	R28.88
1980	16.87	R35.33	23.87	R49.99	21.84	R45.74	21.59	R45.21
1981	23.23	R44.48	26.80	R51.32	35.06	R67.13	31.77	R60.83
1982	19.92	R35.95	24.58	R44.36	31.77	R57.33	28.52	R51.47
1983	17.69	R30.71	22.61	R39.25	29.35	R50.95	26.19	R45.47
1984	17.91	R29.97	22.09	R36.96	28.87	R48.31	25.88	R43.30
1985	16.98	R27.58	22.14	R35.96	26.80	R43.52	24.09	R39.12
1986	6.45	R10.25	11.90	R18.91	14.73	R23.40	12.51	R19.88
1987	10.83	R16.72	13.92	R21.49	17.55	R27.10	15.40	R23.78
1988	8.43	R12.58	10.97	R16.38	14.71	R21.96	12.58	R18.78
1989	12.00	R17.26	14.06	R20.22	17.81	R25.62	15.86	R22.81
1990	15.23	R21.09	17.81	R24.67	22.37	R30.98	20.03	R27.74
1991	11.57	R15.48	13.72	R18.35	19.04	R25.47	16.54	R22.12
1992	11.73	R15.33	13.55	R17.70	18.32	R23.94	15.99	R20.89
1993	10.84	R13.86	12.11	R15.48	16.19	R20.70	14.25	R18.22
1994	9.77	R12.23	12.12	R15.17	14.98	R18.76	13.19	R16.51
1995	11.12	R13.64	14.00	R17.17	16.38	R20.09	14.62	R17.93
1996	15.32	R18.44	16.72	R20.12	20.31	R24.44	18.46	R22.22
1997	14.84	R17.55	15.78	R18.66	18.66	R22.07	17.23	R20.38
1998	8.47	R9.91	9.55	R11.17	12.28	R14.36	10.87	R12.71
1999	12.46	R14.36	14.08	R16.23	17.29	R19.93	15.56	R17.93
2000	23.62	R26.65	24.82	R28.00	28.60	R32.26	26.72	R30.14
2001	18.18	R20.06	20.11	R22.18	23.41	R25.82	21.84	R24.09
2002	19.37	R21.03	21.87	R23.74	23.77	R25.80	22.51	R24.44
2003	23.78	R25.27	26.43	R28.09	29.13	R30.96	27.56	R29.29
2004	33.03	R34.13	34.47	R35.62	38.79	R40.08	36.77	R38.00
2005	47.05	R47.05	47.08	R47.08	52.61	R52.61	50.28	R50.28
2006	56.86	R55.07	57.34	R55.53	61.31	R59.38	59.69	R57.81
2007	63.69	R59.96	65.07	R61.26	68.30	R64.30	66.52	R62.63
2008	90.10	R83.05	90.47	R83.40	R96.85	R89.28	94.04	R86.69
2009[P]	54.41	49.57	56.12	51.13	57.40	52.29	56.39	51.37

[1] See "Nominal Dollars" in Glossary.

[2] In chained (2005) dollars, calculated by using gross domestic product implicit price deflators in Table D1. See "Chained Dollars" in Glossary.

[3] Average for July through December only.

R=Revised. P=Preliminary. NA=Not available. -- = Not applicable.

Note: Prices are for the marketed first sales price of domestic crude oil. See Note 4, "Crude Oil Domestic First Purchase Prices," at end of section.

Web Pages: • For all data beginning in 1949, see http://www.eia.gov/emeu/aer/petro.html.

• For related information, see http://www.eia.gov/oil_gas/petroleum/info_glance/petroleum.html

Sources: • 1949-1973—Bureau of Mines, *Minerals Yearbook*, "Crude Petroleum and Petroleum Products" chapter. • 1974-January 1976—Federal Energy Administration (FEA), Form FEA-90, "Crude Petroleum Production Monthly Report." • February 1976-1977—FEA, Form FEA-P-124, "Domestic Crude Oil Purchaser's Monthly Report." • 1978-1982—U.S. Energy Information Administration (EIA), Form ERA-182, "Domestic Crude Oil First Purchaser's Report." • 1983 forward—EIA, *Petroleum Marketing Monthly* (April 2010), Table 18.

SA 36