2010-5150

United States Court of Appeals for the Federal Circuit

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

Plaintiff-Appellant

and

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

Plaintiff-Appellant,

v.

THE UNITED STATES,

Defendant-Appellee.

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

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

Harry R. Sachse
William F. Stephens
Arthur Lazarus, Jr.
Sonosky, Chambers, Sachse, Endreson & Perry, LLP
1425 K Street, N.W., Suite 600
Washington, D.C. 20005
(202) 682-0240 (Telephone)

Counsel for Eastern Shoshone Tribe

Richard M. Berley
Brian W. Chestnut
Ziontz, Chestnut, Varnell, Berley & Slonim
2101 4th Avenue, Suite 1230
Seattle, WA 98121
(206) 448-1230 (Telephone)

Counsel for Northern Arapaho Tribe

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

Form 9

FORM 9. Certificate of Interest

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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

No. 2010-5150

CERTIFICATE OF INTEREST

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

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

The Shoshone Indian Tribe of the Wind River Reservation

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

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

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

None.

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

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

9/7/2010
Date

Signature of counsel

Harry R. Sachse
Printed name of counsel

Please Note: All questions must be answered

cc: _____

FORM 9. Certificate of Interest

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Shoshone Indian Tribe v. U.S.

No. 2010-5150

CERTIFICATE OF INTEREST

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

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

The Arapaho Indian Tribe of the Wind River Reservation, Wyoming

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

N/A

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

None

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

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

September 7, 2010
Date

Signature of counsel

Richard M. Berley
Printed name of counsel

Please Note: All questions must be answered

cc: Harry Sachse; Terry Petrie

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES v

INTRODUCTION 1

I. What Happened 1

II. The Government's Admissions 2

III. The Government Misstates the Gravamen of the Tribes' "Conversion" Claim 4

ARGUMENT 6

I. The Tribes Should Not Be Penalized for Failing to Discover That These "Conversions" Were Illegal and Harmful to the Tribes until after Suit Was Filed 6

A. The Tribes were misled by the Government 6

B. The Tribes' loss was not reasonably discoverable prior to suit ... 10

C. The Sonosky letters relied upon by the Court and by the Government do not justify holding the Tribes responsible to discover the "conversions" and the losses before suit was filed ... 15

II. Claim II is Protected by the Interior Appropriations Acts 17

III. The Tribes' Trespass-Based Claim Is Valid and Timely 18

A. The Tribes' trespass-based claims are properly before the Court under notice pleading rules 18

B. With void 1938 Act leases, British-American and Husky became trespassers, not tenants-at-sufferance or tenants-at-will 20

C. Failure to prevent the oil companies' resulting trespass is a money-mandating duty that the Tribes on remand can demonstrate caused significant damages..... 26

CONCLUSION..... 27

PROOF OF SERVICE..... 29

CERTIFICATE OF COMPLIANCE..... 30

TABLE OF AUTHORITIES

Page(s)

Cases

Alder Terrace, Inc. v. United States, 161 F.3d 1372 (Fed. Cir. 1998).....12

Ariadne Fin. Serv. Pty. Ltd. v. United States, 133 F.3d 874 (Fed. Cir. 1998).....12

Bleak v. United States, 214 Ct. Cl. 812 (1977).....7

Boling v. United States, 220 F.3d 1365 (Fed. Cir. 2000) 13, 14

Bunch v. Cole, 263 U.S. 250 (1923) 22-23

Confederated Tribe of Warm Springs v. United States,
248 F.3d 1365 (Fed. Cir. 2001) 11, 12

Fallini v. United States, 56 F.3d 1378 (Fed. Cir. 1995) 13-14

Guffey v. Smith, 237 U.S. 101 (1915) 24-25

Hopland Band of Pomo Indians v. United States,
855 F.2d 1573 (Fed. Cir. 1988) 12

In re Skelly Oil Co., 16 IBLA 264 (July 29, 1974)..... 22

In re Robert B. Ferguson, 9 IBLA 275 (Feb. 6, 1973).....22

In re Superior Oil Co., GFS (O&G) SO-60 (Sept. 12, 1962)..... 22

Jones v. Harris Assocs. L.P., 130 S.Ct. 1418 (2010).....6

L.S.S. Leasing Corp. v. United States, 695 F.2d 1359 (Fed. Cir. 1982).....7

Navajo Nation v. United States, 631 F.3d 1268 (Fed. Cir. 2011).....13

Nw. La. Fish & Game Preserve Comm'n v. United States,
446 F.3d 1285 (Fed. Cir. 2006) 12

Oenga v. United States, 83 Fed. Cl. 594 (2008) 24-25, 26

Oenga v. United States, 96 Fed. Cl. 479 (2010) 26

Otay Mesa Property L.P. v. United States, 86 Fed. Cl. 774 (2009) 14-15

Pepper v. Litton, 308 U.S. 295 (1939) 6

Robinson v. Diamond Housing Corp., 463 F.2d 853 (D.C. Cir. 1972) 22

Sangre de Cristo Dev. Co., Inc. v. United States,
932 F.2d 891 (10th Cir. 1991), *cert. denied*, 503 U.S. 1004 (1992)..... 21

Shoshone Indian Tribe v. United States,
364 F.3d 1339 (Fed. Cir. 2004)..... ..... 6, 8, 15, 17-18

Shoshone Indian Tribe v. United States, 52 Fed. Cl. 614 (2002) 19

Shoshone Indian Tribe v. United States, 93 Fed. Cl. 449 (2010)..... *passim*

Swierkiewicz v. Sorema N.A., 534 U.S. 506 (2002) 19

United States v. Southern Pacific Transp. Co.,
543 F.2d 676 (9th Cir. 1976)..... 21-25

United States v. West, 232 F.2d 694 (9th Cir. 1956),
cert. denied, 352 U.S. 834 (1956) 24-25

Statutes

Act of Aug. 21, 1916, Pub. L. No. 64-218, 39 Stat. 51..... *passim*

Indian Mineral Leasing Act of 1938, 25 U.S.C. § 396..... *passim*

Indian Non-Intercourse Act, 25 U.S.C. § 177 ..... 21, 23

Rules

Fed. R. Civ. P. 8
8(a) 18-19
8(a)(2) 18
8(e)(1) 19
8(f) 19

Other Authorities

5 Charles A. Wright, Arthur R. Miller, & Edward H. Cooper, *Federal Practice & Procedure* §1215 (3d ed. 2002) 20

53 Cong. Rec. 839 (Jan. 10, 1916) 9

58 Cong. Rec. 4173-74 (Aug. 22, 1919) 9

Cong. Rec., 64th Cong., 2d Sess., vol. LIII, at 12,258 (Aug. 7, 1916) 9

C.J.S., *Landlord and Tenant* § 261 22

George T. Bogert, *Trusts* § 941 (6th ed. 1987) 6-7

Restatement (Second) of Trusts § 216(2)(b) (1959) 6-7, 8

Restatement (Third) of Trusts §§ 77, 82(1)(c) (2007) 8

S. Rep. No. 97-472 (1982) 21-22

INTRODUCTION

We begin with a brief description of what really happened, the Government's own admissions in this case, and the mischaracterization by the Government of the Tribes' claim. We then turn to the legal arguments made by the Government in its Response Brief ("Gov't Br.").

I. What Happened

Two oil companies, British-American and Husky, had productive leases authorized under a 1916 Act that provided the oil companies a 20-year primary term, after which they had only a "preferential right . . . to renew [the lease] for successive periods of ten years each upon such reasonable terms and conditions as may be prescribed by the Secretary of the Interior." 1916 Act, § 2.[1] The 20-year primary term benefited the oil companies, while the 10-year renewal period benefited the Tribes. Leases authorized under the Indian Minerals Leasing Act of 1938, 25 U.S.C. § 396 ("1938 Act"), are different. Once leases under the 1938 Act are issued, the terms remain unchanged "so long as oil or gas is produced in paying quantities," with no 10-year renewals. For productive leases, eliminating the 10-year renewals was much to the advantage of the oil company. But the 1938 Act also provided that such a lease can be granted only after competitive bidding, which substantially benefited the Tribes.

[1] Act of Aug. 21, 1916, Pub. L. No. 64-218, 39 Stat. 519.

British-American and Husky wanted the best of both worlds: they wanted (1) their leases permanently at a $1/8^{th}$ royalty, without the Secretary having a right to require changes in favor of the Tribes every 10 years; and (2) to make this change to 1938 Act leases without the opportunity for other companies to bid against them.

The lease "conversions" were not sought by the Tribes, but by the oil companies for their own benefit. The "conversions" were illegal, as the Government now admits. A252. Moreover, the Tribes were unrepresented by counsel and had no mineral consultant of their own. The Interior Department should have simply said "no," as it later did when oil companies requested such "conversions." A202; A249-250. Instead, Interior presented, supported, and approved the change. In doing so, the Secretary denied the Tribes the benefit of both statutes, leaving the Tribes with the worst of both worlds. Thereafter, the Government hid what happened by listing the "converted" leases as 1938 Act leases and not informing the Tribes when the Government later determined that such "conversions" were illegal.

II. The Government's Admissions

The Government has made important admissions in this case that are ignored or distorted in the Government's brief, and in the court's decision below:

> . . . Defendant admits to date that it has not uncovered information which confirms that the Tribes were advised by the United States that

> Conversion would have the effect of depriving the Tribes of the opportunity to receive higher royalty rates, depending on the market, or to have negotiations for the renewals of leases conducted under the terms of the Renewal Provision.

A241-42 (Admission No. 1) (emphasis added).

> . . . Defendant admits to date that it has not uncovered information that indicates that the United States required the lessees to engage in Competitive Bidding in connection with the Conversion of each Converted Lease.

A243-44 (Admission No. 3) (emphasis added).

> . . . Defendant admits that it has located to date no legal authority to Convert the Converted Leases to 1938 Act Leases without Competitive Bidding.

A252 (Admission No. 15) (emphasis added).

Importantly, the Government has admitted that for the oil companies to receive a 1938 Act lease, they would have to agree to cancellation of the 1916 Act leases, and then the Government would have to put the property up for public bidding under the 1938 Act:

> . . . Defendant admits that the Renewal Provision of the 1916 Act Lease suggests that the United States would have to extend the 1916 Act Lease or obtain surrender and termination . . . or cancellation and forfeiture . . . and then have the property advertised for Competitive Bidding under the 1938 Act before it could end production under the 1916 Act Leases that became Converted Leases.

A253 (Admission No. 16) (emphasis added).

Finally, the Government was asked to admit that, after internal Interior Department correspondence in May 1957 advising against a new "conversion"

request, "the Government no longer recommended or permitted Conversion of any 1916 Act Lease into a 1938 Act Lease." The Government replied:

> Defendant further states at this time that it is unaware of any instance after [May 9, 1957] in which it recommended or permitted the conversion of any 1916 Act lease . . . .

A249 (Admission No. 11).

These admissions undermine the Government's current arguments – especially the Government's assertions that the Tribes were properly informed of the effect of the "conversions" and that the competitive bidding requirement of the 1938 Act is an inconsequential formality.

III. The Government Misstates the Gravamen of the Tribes' "Conversion" Claim.

The Government's brief is based in large part upon a false premise: the argument that the Tribes' claim involves two independent transactions for each "conversion" – the cancellation of a 1916 Act lease and the subsequent issuance of a 1938 Act lease – and that this in some way limits the Tribes' claims. Gov't Br. at 36. This characterization is patently inaccurate. The two are intertwined as a single transaction, and the Tribes challenge the entire "conversion" scheme.

The Government asserts that the Tribes never state what "conversion" means. Gov't Br. at 35-36. However, the "conversion" claim has been described at length many times by the Tribes, beginning with the court-ordered Tribes' Statement Identifying Oil and Gas Phase Two Issues before the Court of Federal

Claims (Jan. 13, 2006) (A49-52), and it is accurately described in the Tribes' Brief at 10-13. Indeed, the concept of "conversion" was well-understood by the Government from the beginning. The terminology of "conversion" was used by the Government's own representative when it was first proposed. A159 (Government's representative states "British-American is asking for your consideration to convert these two ceded leases into new leases under the existing regulations"); A171 (Government's representative characterizes Husky Refining Company's request for the Council's approval to "have converted five of the old ceded oil and gas leases into this new form of tribal lease") (emphasis added).

The Government also maintains that Claim II relates only to the first step of the "conversions" – the Government's termination of the 1916 Act leases. Gov't Br. at 24, 38-39. This characterization is false. The Tribes have consistently alleged that Claim II is for unlawful "conversion" of 1916 Act leases into 1938 Act leases. The "material fact" in Claim II is not simply the termination of each 1916 Act lease (*cf.* Gov't Br. at 26), but instead the Government's misrepresentation of the lawfulness and economic consequences of the "conversions," and the Government's failure to follow the law in creating 1938 Act leases.

The law does not permit subdividing the Tribes' claim in the way the Government urges. When a fiduciary relationship is involved, the courts will assess the propriety of the fiduciary's behavior – including the trustee's disclosures

to the beneficiary, "the good faith of the transaction" and "its inherent fairness" – in light of "all the circumstances." *Jones v. Harris Assocs. L.P.*, 130 S.Ct. 1418, 1427 (2010) (quoting *Pepper v. Litton*, 308 U.S. 295, 306-307 (1939)) (emphasis added).

ARGUMENT

I. The Tribes Should Not Be Penalized for Failing to Discover That These "Conversions" Were Illegal and Harmful to the Tribes until after Suit Was Filed.

The Government states that the statute of limitations applies to the Tribes like any other litigant, Gov't Br. at 21-22, but fails to note that, given the nature of the fiduciary relationship, this Court has already held that the Tribes are "under a lesser duty to discover malfeasance" in light of "fundamental trust law principles." *Shoshone Indian Tribe v. United States*, 364 F.3d 1339, 1347-48 (Fed. Cir. 2004) ("*Shoshone II*"). The Government also contends that Claim II is based on the Tribes' "thirty years of hindsight." Gov't Br. at 21. To the contrary, the Tribes were affirmatively misled at the outset about the economic consequences of "conversion" and thereafter were never furnished with an accounting or other information that would inform them of their claim.

A. The Tribes were misled by the Government.

For the Tribes as beneficiaries to consent lawfully to a transaction, there must be full disclosure of all material facts and the legal rights involved. George

T. Bogert, *Trusts* § 941 (6th ed. 1987); Restatement (Second) of Trusts § 216(2)(b) (1959). Even the court below acknowledged that "[i]n this case, it is certainly possible that the government did not provide adequate information to the Tribes at the time that the conversions occurred." *Shoshone Indian Tribe v. United States,* 93 Fed. Cl. 449, 459 (2010) ("*Shoshone III*") (A11). Because the Government concealed the true nature and ramifications of the lease "conversions," accrual of Claim II was suspended until after this lawsuit was filed. *See, e.g., L.S.S. Leasing Corp. v. United States*, 695 F.2d 1359, 1365-66 (Fed. Cir. 1982); *Bleak v. United States*, 214 Ct. Cl. 812, 813 (1977).

The Joint Business Council of 1950 knew there had been a "conversion," but those Council Members were assured that the "conversion" was proper, not harmful, and without economic consequence. Following the advice of their trustee, the Tribes reasonably and understandably did not give it further thought. At the Joint Business Council meetings where the "conversions" sought by the oil companies were promoted by the Government, key information was either omitted or misstated. Most importantly, the Government admits that it failed to explain to its beneficiaries the adverse financial ramifications of "conversion" and value of the 10-year renewal provision the Tribes lost upon "conversion." A241-43; Tribes' Br. at 11-13, 22-23. The Government also admits it failed to explain that the replacement 1938 Act leases would not be competitively bid. A246-47; Tribes'

Br. at 11-12. Because the Government failed to provide this vital information to its beneficiary, the Tribes did not know the lease "conversions" effectively denied them the advantages of both the 1916 and 1938 Acts.

The Government argues that its agent was literally accurate when he reported that the 1938 Act leases would have the "same rent and the same rate of royalty" as the 1916 Act leases – because the 1916 Act leases and the 1938 Act leases at the time of "conversion" had the same rent and royalty. Gov't Br. at 27-31. But this statement was totally misleading. Instead of explaining that the Tribes were relinquishing the opportunity for the Secretary to set new royalty rates and impose other terms and conditions every 10 years, and that there would be no competitive bidding, the Government agent stated the opposite to its beneficiary – that there would be no financial difference. This omission and the resulting "conversions" cost the Tribes tens of millions of dollars.

Unable to deny this, the Government instead argues that the damages were unforeseeable. Gov't Br. at 31-32. However, as a fiduciary, the Government is obligated to abide by "the most exacting fiduciary standards," which includes acting with prudence and skill, keeping beneficiaries "reasonably informed," and disclosing "material information needed by beneficiaries for the protection of their interests." *Shoshone II*, 364 F.3d at 1348 (quotations omitted); Restatement (Third) of Trusts §§ 77, 82(1)(c) (2007). Any responsible trustee would have not

only recognized the illegality of the transactions, but also would have recognized and explained to its beneficiaries that under the 1916 Act leases there would be future opportunities to increase the royalty rate, as Congress had already recognized as early as 1916. *See* Cong. Rec., 64th Cong., 2d Sess., vol. LIII, at 12,258 (Aug. 7, 1916); 58 Cong. Rec. 4173-74 (Aug. 22, 1919); 53 Cong. Rec. 839 (Jan. 10, 1916) (describing the Secretary's authority to increase royalties upon lease renewals). Any responsible trustee would also have informed the Tribes that the producing leases were valuable and, therefore, locking in a royalty rate in perpetuity without competitive bidding was against their interests.

Importantly, in 1957 the Secretary denied a request for "conversion" by an oil company operating on the Wind River Reservation, on the very ground that the only legal way to "convert" would be to cancel the 1916 Act lease and put the property up for bids under the 1938 Act. A249 (Admission No. 11); A202; Tribes' Br. at 14, 24. If the Secretary had informed the Tribes of this 1957 determination, the Tribes then arguably might have been on "inquiry notice" to look for prior illegal "conversions" and take appropriate corrective action. However, inexplicably and in violation of its role as trustee, the Government never informed the Tribes of its corrected administrative position.

By concealing the financial downsides, the lack of competitive bidding, and the illegality of the transaction, the Government led the Tribes to believe that the

"conversions" were authorized and in their financial interest. Consequently, the Tribes were not in a position to discover their claim or the resulting harm, suspending the accrual of the claim.

B. The Tribes' loss was not reasonably discoverable prior to suit.

The Tribes in their opening brief showed they were not in a position to discover they were damaged, because their oil and gas network was opaque and complicated, and they did not receive an accounting from their trustee who managed their mineral estate, or have access to other information to reveal the loss. The only lease payment information available to the Tribes before 2007 were lump sum payments – unsegregated by parcel, lease, or even field. Tribes' Br. at 28-32. The court below described how the facts in this case were developed:

> The facts for this phase of the case, Oil and Gas Phase Two (Claim II), were developed jointly "in lieu of an accounting, by the [Government]" . . . . In 2007, the parties shared documents including "leases, letters, and similar materials [that] have been supplemented by additional discovery." . . . Also in 2007, the parties shared expert reports that discussed, *inter alia,* Claim II and damage calculations.

Shoshone III, 93 Fed. Cl. at 452 (citations omitted) (A4). This was, of course, well after suit was filed. It is undisputed that the Government never supplied the Tribes with an accounting of its oil and gas income, nor any records that would show that a lease now appearing to be a 1938 Act lease had been "converted" from a 1916 Act lease. If the Government had given the Tribes this information, the Tribes might have discovered the "conversions" (as they did during the discovery process)

and the discrepancies in royalty income between the "converted" leases and other leases that were not "converted." In fact, however, only with help from the parties' litigation experts and the benefit of the discovery rules was an accurate account of income lease-by-lease created, which included identification of the seven "conversions" and the loss incurred. This is when it was first reasonable for the Tribes to know of Claim II.

As this Court held in *Confederated Tribe of Warm Springs v. United States,* 248 F.3d 1365, 1375 (Fed. Cir. 2001), "to the extent that the difficulty in determining the amount of loss suffered by the Tribes is attributable to improper accounting procedures followed by the BIA, the consequences of those difficulties should not be visited upon the Tribes." Here, the lease conversions and their damages were so difficult to uncover that, even after discovery, the parties' expert witnesses had difficulties determining which leases had been converted. A268-69. Despite this, the Government does not explain how the Tribes could have determined they had been damaged.[2]

The facts here are very similar to the facts of the royalty collection cases cited in the Tribes' opening brief. Tribes' Br. at 30-31. In those on-point cases, the courts held that the claims of royalty owners did not accrue because it was not

[2] The Government is being inconsistent here. If the damages were as unforeseeable to everyone – including the Tribes – as the Government states, Gov't Br. at 2, 32, then surely the Tribes were reasonably unaware of Claim II.

possible to discover their losses. *Id.* However, the Government does not address these cases at all.

Instead of addressing the important facts and law cited by the Tribes, the Government mischaracterizes the Tribes' position by asserting that the Tribes contend Claim II does not accrue until the Tribes knew or should have known the "full extent" of their damages, or until the damages are "most painful," which the Government contends has been "soundly rejected" by this Court. Gov't Br. at 43-46. Despite the Government's assertions, the Tribes' position rests on the black letter law that accrual of a claim is suspended until all the events that fix the defendant's alleged liability have occurred and plaintiff knew or should have known of their existence, including the resulting damages. *Ariadne Fin. Serv. Pty. Ltd. v. United States*, 133 F.3d 874, 878 (Fed. Cir. 1998) ("breach of contract claim accrued when *Ariadne* should have known that it had been damaged by the government's breach"); *Hopland Band of Pomo Indians v. United States,* 855 F.2d 1573, 1577 (Fed. Cir. 1988). The requirement that damages must occur and be known in order to trigger accrual has not been rejected by this or any other court but rather consistently reaffirmed. *E.g, Nw. La. Fish & Game Preserve Comm'n v. United States,* 446 F.3d 1285, 1290 (Fed. Cir. 2006); *Alder Terrace, Inc. v. United States*, 161 F.3d 1372, 1377 (Fed. Cir. 1998); Tribes' Br. at 30-32 (citing cases

demonstrating that royalty owners often lack the information necessary to discover their claims).

The Government asserts that *Navajo Nation v. United States*, 631 F.3d 1268 (Fed. Cir. 2011), *Boling v. United States*, 220 F.3d 1365 (Fed. Cir. 2000), and *Fallini v. United States*, 56 F.3d 1378 (Fed. Cir. 1995), show the Tribes should have discovered Claim II before suit was filed. These are "takings" cases that are legally and factually unlike this case. In each of these cases (and in a similar case cited by the court below), the facts showed that the alleged taking and resulting harm were obvious and well-known to the plaintiffs.

In *Navajo Nation*, the Navajo claimed that the Government owed damages for an alleged taking arising out of a 1980 Act of Congress which required the consent of the Hopi Tribe before development of certain Navajo land. This Court held that the alleged taking occurred when the Act was passed and dismissed the claim as barred by the statute of limitations, because the claim was filed eight years after the Act became law. 631 F.3d at 1273-74. The alleged taking and harm in *Navajo* was known over six years before suit was filed because it was based on the Act of Congress. *Id.* at 1276-77. The Navajo did not claim that the damages were unknowable, as the Tribes do here.

In *Fallini*, this Court held that a takings claim accrued when Congress enacted legislation 21 years before suit was filed which precluded landowners from

excluding wild horses from drinking out of water sources the landowners had constructed. Unlike the Tribes here, this Court noted that the plaintiffs knew of the damages at least nine years before filing suit, because they had sent a bill to the Government for water allegedly taken. 56 F.3d at 1380-81.

In *Boling*, this Court remanded a case to the Court of Federal Claims to determine when erosion had "stabilized" such that a takings claim had accrued. 220 F.3d at 1370-73. This "stabilization" doctrine is inapplicable outside of the takings arena.

Citing a similar case, the court below stated that "a party need not have actual knowledge of the events fixing liability in order for the claim to accrue." *Shoshone III*, 93 Fed. Cl. at 455 (A7) (citing *Otay Mesa Property L.P. v. United States*, 86 Fed. Cl. 774, 786 (2009)). But the *Otay* takings case also involved a far different situation than the facts here. In *Otay,* the landowner claimed the Government went far beyond a 20-foot right-of-way granted by the landowner for occasional patrolling and thereby effectively took his land. The court found that the "Border Patrol's presence on the subject property grew from sporadic to pervasive by the mid-to-late 1990's," with helicopters flying night and day and new buildings and a second fence erected. 86 Fed. Cl. at 787-88. The Court held that the federal taking was open and notorious starting at that time, and thus barred

the landowner's claim because it was more than six years before suit. *Id.* at 790-91. There is simply no correlation between *Otay* and the hidden facts here.

As this Court has recognized, "[i]t is often the case . . . that the trustee can breach his fiduciary responsibilities of managing trust property without placing the beneficiary on notice that a breach has occurred." *Shoshone II*, 364 F.3d at 1348. The Government never put the Tribes on notice of Claim II or its losses.

C. The Sonosky letters relied upon by the Court and by the Government do not justify holding the Tribes responsible to discover the "conversions" and the losses before suit was filed.

As a way of holding the Tribes responsible for knowing that they had a claim for the "conversions" more than six years before suit was filed, the lower court quotes from letters, written approximately ten years after the "conversions," from the Shoshone Tribe's then-attorney, Marvin Sonosky. *Shoshone III*, 93 Fed. Cl. at 457-59 (A9-11). These letters criticize the 1916 Act's 20-year primary term as too long, ask the Government to allow the Tribes to participate in setting the conditions under which 1916 Act leases would be renewed, and state Mr. Sonosky's preference in new leases for the 1938 Act's shorter primary term and automatic termination at the end of that term (or any time thereafter) if oil and gas is not produced in paying quantities. A204-07. Based on these letters, the court stated: "The court finds that the 1959 letter clearly indicates that the Tribes' counsel was aware of the differences between the 1916 Act and the 1938 Act as

they applied to the Tribes." 93 Fed. Cl. at 457 (A9). The court also stated: "That heightened level of concern should have led to a broader inquiry as to the status of the leases and, if appropriate, to legal action." *Id.* at 459 (A11).

As lawyer for the Shoshone Tribe, Mr. Sonosky understood the 1938 and 1916 Acts. He did not, however, have any independent knowledge of the 1948-1949 "conversions," which occurred long before he became counsel. Rather, the focus of his attention in 1959 was to make sure that the 1916 Act leases were being developed and, if one was up for renewal, that the Secretary would involve the Tribes in setting the terms for renewal. That a distinguished attorney in the fields of Indian law and oil and gas law like Mr. Sonosky did not discover the "conversions" strongly confirms that, with the BIA's poor recordkeeping and failure to report, these "conversions" were not reasonably discoverable. For the court to jump from Mr. Sonosky's understanding of the 1916 Act and 1938 Act, to an alleged duty to inquire about unknown "conversions" is unrealistic.[3] Knowledge of the 1916 Act and 1938 Act would lead to the (ordinarily valid) assumption that the Interior Department also knew the law and would not have permitted such a "conversion." *See* A252 (Admission No. 15), *supra* at 3-4.

[3] As we have noted, the leases themselves gave no indication that they had ever been 1916 Act leases. Tribes' Br. at 14-15.

II. Claim II is Protected by the Interior Appropriation Acts.

The seven "conversions" constituted a failure by the Government to follow Congress' requirements of both (1) the competitive bidding required under the 1938 Act and its regulations, and (2) the periodic renewal required under the 1916 Act, its regulations, and the 1916 Act leases themselves. The Government's failure to abide by both leasing regimes generates "losses to . . . trust funds" that the Interior Appropriations Acts defer until an accounting is provided. Tribes' Br. at 34-35.

Based on the Tribes' assertion that there are no valid leases on these parcels after "conversion," the court below says, "[I]t is difficult to envision an accounting under a contract that was not in effect," and that "[t]here is simply no 'contract' under which defendant has failed or delayed 'in . . . collecting payments.'" *Shoshone III*, 93 Fed. Cl. at 462 (A14). This conclusion makes no sense at all. If drilling is taking place and funds are being received without any valid lease, a particularly egregious violation of trust, it is all the more important that the Government account for these funds to the Tribes. Moreover, the Government's insistence that the gravamen of the Tribes' claim is the wrongful termination of the 1916 Act leases only, Gov't Br. at 37-39, does not help the Government with respect to limitations. If the 1916 Act leases should have remained in effect, then the Government should have collected royalties under them, and claims for

collection of royalties under issued leases are preserved by the Interior Appropriations Acts as a loss to "trust funds." *Shoshone II*, 364 F.3d at 1350.

III. The Tribes' Trespass-Based Claim Is Valid and Timely.

A. The Tribes' trespass-based claims are properly before the Court under notice pleading rules.

The Tribes have detailed their "conversion" claim and have given the Government fair notice of the claim. The Government cites no authority whatsoever for its argument that the Tribes should be barred from asserting a continuing claim for the failure to remove mineral companies with unlawful leases, or for failure to collect proper damages from such companies. These continuing claims flow directly from the Tribes' longstanding claim that the 1938 Act replacement leases were based on an unlawful "conversion" scheme and were issued without the required competitive bidding. The most natural and obvious result of an unlawful Indian leasing scheme would be that the resulting leases are invalid. The Government can assert no prejudice.

The federal rules require only a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). The original Petitions expressly asserted that the Government "failed to oversee, monitor, and administer . . . oil and gas leases" in violation of its trust duties. A31 (Shoshone Tribe's 1979 Petition). *See also* A30 (Claim I of Shoshone Petition, failure to collect funds arising from oil and gas leasing). The Tribes' subsequent 2006

Statement Identifying Oil and Gas Phase Two Issues – which was requested by the court below and came after much discovery had taken place – described Claim II in detail, A49-52, concluding that "[t]hese conversions were illegal." A52.

The Government's inability to cite authority for its position is unsurprising, because federal pleading is designed to be liberal and relaxed:

> This simplified notice pleading standard relies on liberal discovery rules . . . . Other provisions of the Federal Rules of Civil Procedure are inextricably linked to Rule 8(a)'s simplified notice pleading standard. Rule 8(e)(1) states that "[n]o technical forms of pleading or motions are required," and Rule 8(f) provides that "[a]ll pleadings shall be so construed as to do substantial justice." Given the Federal Rules' simplified standard for pleading, "[a] court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." [citation omitted] . . . . The liberal notice pleading of Rule 8(a) is the starting point of a simplified pleading system, which was adopted to focus litigation on the merits of a claim.

Swierkiewicz v. Sorema N.A., 534 U.S. 506, 512-14 (2002).

Consistent with these policies, the court below has recognized that, "[s]ince the action was first filed in 1979, the parties' and the court's understanding of the facts and legal bases of the Tribes' claims has evolved as discovery has progressed and hearings have been held." *Shoshone Indian Tribe v. United States*, 52 Fed. Cl. 614, 627 (2002). The court's conclusion was consistent with well-understood and accepted federal practice that claims become more concisely framed through the course of discovery, motion practice, and other pre-trial work:

> It was the design of the rulemakers that the discovery procedures should give the parties an opportunity for securing an elaboration of the allegations[,] and that process[,] and not the pleadings[,] bears the burden of filling in the details of the dispute for the parties and the court.

5 Charles A. Wright, Arthur R. Miller, & Edward H. Cooper, *Federal Practice & Procedure* § 1215 (3d ed. 2002). It is more than sufficient that the Tribes described Claim II as a breach of trust related to the illegal "conversion" of seven specific 1916 Act leases to 1938 Act leases, whether or not the words "trespass" or "void" were used. The Tribes' 2006 Statement certainly put the Government on notice that the Tribes alleged "[t]hese conversions were illegal." A52.

Moreover, as the court below noted, the facts in this case were being developed through discovery and expert reports well after the complaints were filed. *Supra* at 10. For example, the Government shared tens of thousands of pages of discovery with the Tribes as late as 2009, after the Government filed its motion for judgment on the pleadings that is the subject of this appeal. In addition, the Government's 2009 responses to the Tribes' discovery requests admitted for the first time that the Government did not advertise the 1938 Act leases on the seven Claim II parcels in accordance with the 1938 Act requirements. A243-44.

B. With void 1938 Act leases, British-American and Husky became trespassers, not tenants-at-sufferance or tenants-at-will.

As we showed in our original brief on appeal, failure to abide by the competitive bidding requirement meant that the "converted" 1938 Act leases were

void, and British-American and Husky thus became trespassers, creating a continuing claim against the Government. *See* Tribes' Br. at 36-41. Under the Indian Non-Intercourse Act, 25 U.S.C. § 177,[4] the Government's consent is required for valid Indian leasing, and that consent must be given in strict accordance with leasing statutes. *See, e.g., United States v. Southern Pacific Transp. Co.*, 543 F.2d 676, 692 (9th Cir. 1976) ("The 1899 Act [authorizing railway rights-of-way across Indian reservations] was meant to protect fully Indian interests, and we are thus obliged to construe the Act and the regulations strictly in the Indians' favor."). The fact that the Secretary signs a lease is meaningless if the lease was not issued in accordance with the law: "[N]ot just any Departmental approval would suffice – the approval must have been a valid approval" based on the statutory requirements. *Sangre de Cristo Dev. Co., Inc. v. United States*, 932 F.2d 891, 894 (10th Cir. 1991), *cert. denied*, 503 U.S. 1004 (1992) (holding a lease invalid where the Secretary approved it without the statutorily-required prerequisite of an environmental study); *see also Southern Pacific*, 543 F.2d at 685, 689-90 (even though the Secretary had admittedly "approved" the railway's maps, this was not sufficient to create a right under the statutory requirements); S.

[4] The Non-Intercourse Act provides: "No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution." 25 U.S.C. § 177.

Rep. No. 97-472, at 3 (1982) (acknowledging that 1938 Act leases are "restricted to a regulated advertisement / competitive bidding procedure").[5]

The Government instead cites common law principles of landlord-tenant law to argue that, even if the leases were void, British-American and Husky became tenants-at-will or tenants-at-sufferance, rather than trespassers. Gov't Br. at 56 (citing C.J.S., *Landlord and Tenant* § 261).[6] However, such common law principles are inapplicable here, where federal statutes – namely, the Non-Intercourse Act, the 1916 Act, and the 1938 Act – control the leasing of Indian mineral lands. Given these statutes, a tenancy may not be implied. *See, e.g., Bunch v. Cole*, 263 U.S. 250 (1923); *Southern Pacific*, 543 F.2d at 697-98.

In *Bunch*, the Supreme Court held that a series of challenged leases on restricted Cherokee land "fell outside the permission given" by Congress because

---

[5] Similarly, federal leases are also void where competitive bidding is required but not carried out. *See, e.g., In re Skelly Oil Co.*, 16 IBLA 264, 267 (July 29, 1974); *In re Robert B. Ferguson*, 9 IBLA 275, 276-77 (Feb. 6, 1973); *In re Superior Oil Co.*, GFS (O&G) SO-60 (Sept. 12, 1962) (all nullifying non-competitive federal leases where the applicable statute required "known geologic structures" to be leased by competitive bidding).

[6] The Government's only case citation for this tenancy-at-sufferance / tenancy-at-will argument has nothing to do with Indian tribes, oil and gas leasing, or the federal government. Rather, that case deals with a landlord in D.C. allegedly evicting a tenant from an apartment building as retribution for reporting housing code violations. *Robinson v. Diamond Housing Corp.*, 463 F.2d 853, 858 (D.C. Cir. 1972). Furthermore, the portion of the case that the Government quotes is merely the D.C. Circuit quoting part of the District court's opinion – an opinion the Circuit court reversed and remanded. *Id.* at 858, 871.

the leases were outside the time frame set forth in the authorizing statute absent Secretarial approval, and the leases were thus "absolutely null and void." *Id.* at 253. The state court below had ruled that, even if the leases were void, under Oklahoma landlord-tenant law principles a "tenancy at will" would be created because the Cherokee allottee ("an Indian ward") had signed the leasing instruments. *Id.* at 251-52. The Supreme Court reversed, holding that "we think the conclusion is unavoidable that [the Oklahoma law] gives force and effect to leases which a valid enactment of Congress declares shall be of no force or effect, and that in this respect it must be held invalid" under the supremacy clause of the Constitution. *Id.* at 254.

In *Southern Pacific*, the Walker River Paiute Tribe of Nevada and the United States brought suit against a railway for trespass – a claim held to be timely, even though the railway had operated along that route for 90 years before suit was filed. 543 F.2d at 680 n.1. The District Court had held that since the Tribe did not object to the railway for decades and the Tribe accepted money and other consideration, this implied a license to the railway. *Id.* at 697. The Ninth Circuit reversed, holding that an implied license "would run counter to the historic policies underlying" the Non-Intercourse Act, and that otherwise "[p]urchasers would be encouraged to induce improvident and unfair sales of Indian lands if they could

enter into possession and reap profits with immunity from trespass damages so long as no one objects." *Id.* at 697-98.

Without leases validly approved by the Secretary in compliance with the 1938 Act, British-American and Husky were left with no leaseholds at all.[7] By citing common landlord-tenant law, the Government ignores the 200-plus-year backdrop of Federal Indian law, well-settled Supreme Court case law, the Government's trust responsibility to adhere strictly to statutes that convey Indian lands and minerals, and the applicable statutes themselves. Indeed, we know of no case in which an extractor of Indian minerals outside the scope of a valid lease was deemed to be a tenant-at-will or tenant-at-sufferance – or anything other than a trespasser.

The Government and the lower court erroneously distinguish the trespass cases of *Guffey v. Smith*, 237 U.S. 101 (1915), *Oenga v. United States*, 83 Fed. Cl. 594 (2008), and *United States v. West*, 232 F.2d 694 (9th Cir. 1956), *cert. denied*, 352 U.S. 834 (1956), which actually strongly support the Tribes. As here, in each case there is a purported lessee/licensee whose use of Tribal lands is argued to be lawful under the purported lease/license, but the courts held each of these purported lessees/licensees to be trespassers. In *Guffey*, the defendants extracted

---

[7] The good or bad faith of an oil company with invalid leases may be relevant to the amount of trespass damages, *Guffey v. Smith*, 237 U.S. 101, 118-19 (1915), but is irrelevant to whether there was a trespass.

oil and gas under an invalid lease which was for the same parcel as a valid, prior lease with another party, and the Supreme Court held that trespass damages were owed. 237 U.S. at 118-19. In *Oenga*, the oil company used part of plaintiff's land for oil and gas development outside the scope of its lease, a trespass, and the Court of Federal Claims thus allowed a claim against the Government as trustee for failure to prevent this trespass. 83 Fed. Cl. at 617-23. In *West*, the defendants continued to graze on Indian lands after any license they may have previously held had terminated, and the Circuit court held them to be "clearly trespassers" at that point, subject to an injunction brought by the Government. 232 F.2d at 699. These cases are all variations of the same hornbook premise of Indian law: use of Tribal lands outside the scope of a valid lease is simply a trespass. As the *Southern Pacific* Court stated:

> Although it may appear harsh to condemn an apparently good-faith use as a trespass after 90 years of acquiescence by the owners, we conclude that an even older policy of Indian law compels this result.

543 F.2d at 699.

The Government tries to minimize the illegality of what it did, and the harm to the Tribes, by calling the failure to require competitive bidding under the 1938 Act "a harmless, legally irrelevant error," a "procedural defect," and a mere "procedural error." Gov't Br. at 37, 38, 40. However, this "procedural error" is a clear-cut violation of statutory and regulatory mandates, denying the Tribes

continuation of the prior 1916 Act leases with the 10-year renewal requirement, and also denying the Tribes the opportunity for bonuses and other benefits of bidding on productive land parcels. The Government's argument demonstrates a lack of basic understanding of oil and gas leasing and a total disregard for applicable statutes.

C. Failure to prevent the oil companies' resulting trespass is a money-mandating duty that the Tribes on remand can demonstrate caused significant damages.

The Government lastly argues that even if the 1938 Act leases are void and the oil companies became trespassers, this would not be a money-mandating claim. As the Government admits, the *Cherokee* cases cited by the Tribes leave open the possibility that a valid claim can be made against the Government for failure to prevent trespass against Indians – if shown with particularity. Gov't Br. at 57-58. The recent *Oenga* case provides just such an example. In that case, the Court of Federal Claims ruled that the plaintiffs (allotted landholders) had a valid trespass claim against the United States for allowing an oil company to use the allotted lands totally outside the scope of any applicable lease, and the court awarded damages of several million dollars. *Oenga*, 83 Fed. Cl. at 617-23 (ruling on summary judgment that the trespass claim could move forward); *Oenga v. United States*, 96 Fed. Cl. 479, 546-47 (2010) (affirming the earlier decision and awarding damages for the unauthorized use of the allotted lands).

Furthermore, the ruling on appeal here is for lack of timeliness, and nothing else. The Tribes have shown this trespass-based continuing claim would be timely, at least going back to six years before suit was filed. On remand, the Tribes can show with greater particularity the Government's failure to prevent trespass and the resulting damages.

CONCLUSION

Because of the Government's concealment of the illegality and harm of the "conversions," the Government's failure to provide an accounting, and the Tribes' reasonable ignorance that the "conversions" were both illegal and harmful until well after suit was filed, Claim II is timely. At the very least, the Tribes have a continuing claim for the Government's failure to prevent the trespasses of the oil companies, going back to six years before suit was filed. The Court's decision below should be reversed and remanded for further proceedings.

Dated: April 8, 2011

Respectfully submitted,

Harry R. Sachse
William F. Stephens
Arthur Lazarus, Jr.
SONOSKY, CHAMBERS, SACHSE
ENDRESON & PERRY LLP
1425 K Street NW, Suite 600
Washington, DC 20005
(202) 682-0240 (Telephone)
(202) 682-0249 (Facsimile)
hsachse@sonosky.com

Counsel for Eastern Shoshone Tribe

Richard M. Berley
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

Counsel for Northern Arapaho Tribe

PROOF OF SERVICE

I certify that two true, correct, and complete copies of the foregoing document were served on the date below via first class mail, postage prepaid, as well as by electronic mail, addressed as follows:

Joan M. Pepin
U.S. Department of Justice
Environmental & Nat. Res. Division
Appellate Section
P.O. Box 23795
Washington, DC 20026
joan.pepin@usdoj.gov

Terry Petrie
U.S. Department of Justice
Environmental & Nat. Res. Division
999 18th Street
South Terrace, Suite 370
Denver, CO 80202
terry.petrie@usdoj.gov

Dated this 8th day of April, 2011.

Harry R. Sachse

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type and volume limitations set forth in Rule 32(a)7(C)(i) and contains 6,365 words in proportionally-space, 14-point Times New Roman font type:

Dated this 8th day of April, 2011.

Harry R. Sachse