

APPENDIX C

**RULES OF THE UNITED STATES COURT
OF FEDERAL CLAIMS**

Revised May 1, 2002

[LOGO]

Minor typographical errors were corrected 4/10/02,
5/17/02, 6/18/02, 9/1/02, and 1/13/03

* * * *

Rule 60. Relief from Judgment or Order

(a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On motion and upon such terms as are just, the court may relieve a party or the party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under RCFC 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct or an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon

which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

Rules Committee Note

Minor changes in wording were made to more closely conform to FRCP 60. Necessary differences were retained.

* * * *

APPENDIX D**TREATY WITH THE WESTERN SHOSHONI, 1863.**

Treaty of Peace and Friendship made at Ruby Valley, in the Territory of Nevada, this first day of October, A. D. one thousand eight hundred and sixty-three, between the United States of America, represented by the undersigned commissioners, and the Western Bands of the Shoshonee Nation of Indians, represented by their Chiefs and Principal Men and Warriors, as follows:

ARTICLE 1.

Peace and friendship shall be hereafter established and maintained between the Western Bands of the Shoshonee nation and the people and Government of the United States; and the said bands stipulate and agree that hostilities and all depredations upon the emigrant trains, the mail and telegraph lines, and upon the citizens of the United States within their country, shall cease.

ARTICLE 2.

The several routes of travel through the Shoshonee country, now or hereafter used by white men, shall be forever free, and unobstructed by the said bands, for the use of the government of the United States, and of all emigrants and travellers under its authority and protection, without molestation or injury from them. And if depredations are at any time committed by bad men of their nation, the offenders shall be immediately taken and delivered up to the proper officers of the United States, to be punished as their offences shall deserve; and the safety of all travellers passing peaceably over either of said routes is hereby guarantied by said bands.

Military posts may be established by the President of the United States along said routes or elsewhere in their country; and station houses may be erected and occupied at such points as may be necessary for the comfort and convenience of travellers or for mail or telegraph companies.

ARTICLE 3.

The telegraph and overland stage lines having been established and operated by companies under the authority of the United States through a part of the Shoshonee country, it is expressly agreed that the same may be continued without hindrance, molestation, or injury from the people of said bands, and that their property and the lives and property of passengers in the stages and of the employees of the respective companies, shall be protected by them. And further, it being understood that provision has been made by the government of the United States for the construction of a railway from the plains west to the Pacific ocean, it is stipulated by the said bands that the said railway or its branches may be located, constructed, and operated, and without molestation from them, through any portion of country claimed or occupied by them.

ARTICLE 4.

It is further agreed by the parties hereto, that the Shoshonee country may be explored and prospected for gold and silver, or other minerals; and when mines are discovered, they may be worked, and mining and agricultural settlements formed, and ranches established whenever they may be required. Mills may be erected and timber taken for their use, as also for building and other purposes in any part of the country claimed by said bands.

ARTICLE 5.

It is understood that the boundaries of the country claimed and occupied by said bands are defined and described by them as follows:

On the north by Wong-goga-da Mountains and Shoshonee River Valley; on the west by Su-nonto-yah Mountains or Smith Creek Mountains; on the south by Wi-co-bah and the Colorado Desert; on the east by Po-ho-no-be Valley or Steptoe Valley and Great Salt Lake Valley.

ARTICLE 6.

The said bands agree that whenever the President of the United States shall deem it expedient for them to abandon the roaming life, which, they now lead, and become herdsmen or agriculturalists, he is hereby authorized to make such reservations for their use as he may deem necessary within the country above described; and they do also hereby agree to remove their camps to such reservations as he may indicate and to reside and remain therein.

ARTICLE 7.

The United States, being aware of the inconvenience resulting to the Indians in consequence of the driving away and destruction of game along the routes travelled by white men, and by the formation of agricultural and mining settlements, are willing to fairly compensate them for the same; therefore, and in consideration of the preceding stipulations, and of their faithful observance by the said bands, the United States promise and agree to pay to the said bands of the Shoshonee nation parties hereto, annually for the term of twenty years, the sum of five thousand dollars in such articles, including cattle for

herding or other purposes, as the President of the United States shall deem suitable for their wants and condition, either as hunters or herdsman. And the said bands hereby acknowledge the reception of the said stipulated annuities as a full compensation and equivalent for the loss of game and the rights and privileges hereby conceded.

ARTICLE 8.

The said bands hereby acknowledge that they have received from said commissioners provisions and clothing amounting to five thousand dollars as presents at the conclusion of this treaty.

Done at Ruby Valley the day and year above written.

James W. Nye.
James Duane Doty.

Te-moak, his x mark.

Po-on-go-sah, his x
mark.

Mo-ho-a.

Par-a-woat-ze, his x
mark.

Kirk-weedgwa, his x mark.

Ga-ha-dier, his x mark.

To-nag, his x mark.

Ko-ro-kout-ze, his x
mark.

To-so-wee-so-op, his x mark.

Pon-ge-mah, his x mark.

Sow-er-e-gah, his x mark.

Buck, his x mark.

Witnesses:

J.B. Moore, lieutenant-colonel Third Infantry
California Volunteers.

Jacob T. Lockhart, Indian agent Nevada Territory.

Henry Butterfield, interpreter.

Oct. 1, 1863. 1 18 Stats., 689. 1 Ratified June 26,
1866. 1 Proclaimed Oct. 21, 1869.

EXHIBIT B



APPENDIX E

[CHAPTER 959]

AN ACT

To create an Indian Claims Commission to provide for the powers, duties and functions thereof, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That there is hereby created and established an Indian Claims Commission, hereafter referred to as the Commission.

JURISDICTION

SEC. 2 The Commission shall hear and determine the following claims against the United States on behalf of any Indian tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska: (1) claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President; (2) all other claims in law or equity, including those sounding in tort, with respect to which the claimant would have been entitled to sue in court of the United States if the United States was subject to suit; (3) claims which would result if the treaties, contracts and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by the court of equity; (4) claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands

of compensation agreed to by the claimant; and (5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity. No claim accruing after the date of the approval of the Act shall be considered by the Commission.

All claims hereunder may be heard and determined by the Commission notwithstanding any statute of limitations or laches, but all other defenses shall be available to the United States.

In determining the quantum of relief the commission shall make appropriate deductions for all payments made by the United States on the claim, and for all other offsets, counterclaims, and demands that would be allowable in a suit, brought in the Court of Claims under section 145 of the Judicial Code (36 Stat. 1136; 28 U.S.C. sec 250), as amended; the Commission may also inquire into and consider all money or property given to or funds expended gratuitously for the benefit of the claimant and if it finds that the mature of the claim and the entire course of dealings and accounts between the United States and the claimant in good conscience warrants such action, may set off all or part of such expenditures against any award made to the claimant, except that it is hereby declared to be the policy of Congress that monies spent for the removal of the claimant from one place to another at the request of the United States, or for agency or other administrative, educational, health or highway purposes, or for expenditures made prior to the date of the law, treaty, or Executive Order under which the claim arose or for expenditures made pursuant to the Act of June 18, 1934 (48 Stat 984), save expenditures made under section 5 of that Act or for expenditures under

any emergency appropriation or allotment made subsequent to March 4, 1933 and generally applicable throughout the United States for relief in stricken agricultural areas, relief of unemployment and conditions resulting therefrom, the prosecutions of public work and public projects for the relief of unemployment or to increase employment and for work relief including Civil Works Program shall not be a proper offset against any award.

MEMBERSHIP APPOINTMENT: OATH: SALARY

SEC. 3. (a) The Commission shall consist of a Chief Commissioner and two Associate Commissioners, who shall be appointed by the President, by and with the advice and consent of the Senate, and each of whom shall receive a salary of \$10,000 per year. At all times at least two members of the Commission shall be members of the bar of the Supreme Court of the United States in good standing: *Provided further.* That not more than two of the members shall be of the same political party. Each of them shall take an oath to support the Constitution of the United States and to discharge faithfully the duties of his office.

TERM OF OFFICE [ILLEGIBLE] REMOVAL

* * * until the dissolution of the Commission as hereinafter provided. Vacancies shall be filled in the same manner as the original appointments. Members of the Commission may be removed by the President for cause after notice and opportunity to be heard.

NOT TO ENGAGE IN OTHER VOCATIONS
OR REPRESENT TRIBES

(c) No Commissioner shall engage in any other business, vocation or employment during his term of

office not shall be, during his term of office or for a period of two years thereafter, represent any Indian tribe, band or group in any matter whatsoever, or have any financial interest in the outcome of any tribal claim. Any person violating the provisions of this subdivision shall be fined not more than \$10,000 or imprisoned more than two years, or both.

QUORUM

(d) Two members shall constitute a quorum, and the agreement of two members shall be necessary to any and all determinations for the transaction of the business of the Commission, and, if there be a quorum, no vacancy shall impair or affect the business of the Commission or its determinations.

STAFF OF COMMISSION

SEC. 4. The Commission shall appoint a clerk and such other employees as shall be requisite to conduct the business of the Commission. All such employees shall take oath for the faithful discharge of their duties and shall be under the direction of the Commission in the performance thereof.

OFFICES

SEC. 5. The principal office of the Commission shall be in the District of Columbia.

EXPENSES OF COMMISSION

SEC. 6. All necessary expenses of the Commission shall be paid on the presentation of itemized vouchers therefore approved by the Chief Commissioner or other member or officer designated by the Commission.

TIME OF MEETINGS

SEC. 7. The time of the meetings of the Commission shall be prescribed by the Commission.

RECORD

SEC. 8. A full written record shall be kept of all hearings and proceedings of the Commission and shall be open to public inspection.

CONTROL OF PROCEDURE

SEC. 9. The Commission shall have power to establish its own rules of procedure.

PRESENTATION OF CLAIM

SEC. 10. Any claim within the provisions of this Act may be presented to the Commission by any member of an Indian tribe, band, or other identifiable group of Indians as the representative of all its members; but wherever any tribal organization exists, recognized by the Secretary of the Interior as having authority to represent such tribe, band, or group, such organization shall be accorded the exclusive privilege of representing such Indians, unless fraud, collusion or laches on the part of such organization be shown to the satisfaction of the Commission.

* * * *

SEC. 17. The Commission shall give reasonable notice to the interested parties and an opportunity for them to be heard and to present evidence before making any final determination upon any claim. Hearings may be held in any part of the United States or in the territory of Alaska.

* * * *

Sec. 22. (a) When the report of the Commission determining any claimant to be entitled to recover has been filed with Congress, such report shall have the effect of a final judgment of the Court of Claims, and there is hereby authorized to be appropriated such sums as are necessary to pay the final determination of the Commission.

The payment of any claim, after its determination in accordance with this Act, shall be a full discharge of the United States of all claims and demands touching any of the matters involved in the controversy.

(b) A final determination against a claimant made and reported in accordance with the Act shall forever bar any further claim or demand against the United States arising out of the matter involved in the controversy.

* * * *

APPENDIX F

UNITED STATES PUBLIC LAWS

94th Congress - Second Session

Convening January 19, 1976

**DATA SUPPLIED BY THE U.S. DEPARTMENT
OF JUSTICE. (SEE SCOPE)**

Additions and Deletions are not identified
in this document.

PL 94-465 (S 2981)

OCTOBER 8, 1976

An Act to authorize appropriations for the Indian Claims Commission for fiscal year 1977, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there is authorized to be appropriated to carry out the provisions of the Indian Claims Commission Act (25 U.S.C. 70), during fiscal year 1977, not to exceed \$1,650,000.

Sec. 2. Section 23 of the Act entitled "An Act to create an Indian Claims Commission, to provide for the powers, duties and functions thereof, and for other purposes", approved August 13, 1946 (60 Stat. 1049, 1055), as amended (86 Stat. 115: 25 U.S.C. 70v), is hereby amended by striking said section and inserting in lieu thereof the following:

**"DISSOLUTION OF THE COMMISSION AND
DISPOSITION OF PENDING CLAIMS**

"Sec. 23. The existence of the Commission shall terminate at the end of fiscal year 1978 on Septem-

ber 30, 1978, or at such earlier time as the Commission shall have made its final report to the Congress on all claims filed with it. Upon its dissolution, the records and files of the Commission in all cases in which a final determination has been entered shall be delivered to the Archivist of the United States. No later than December 31, 1976, the Indian Claims Commission may certify and transfer to the Court of Claims all cases which the Commission determines it cannot completely adjudicate by September 30, 1978. In addition, the Commission may, at any time prior to September 30, 1978, certify and transfer to the Court of Claims any case which it determines cannot be completely adjudicated prior to the dissolution of the Commission. Jurisdiction is hereby conferred upon the Court of Claims to adjudicate all such cases under the provisions of section 2 of the Indian Claims Commission Act: Provided, That section 2 of said Act shall not apply to any cases filed originally in the Court of Claims under section 1505 of title 28, United States Code. Upon dissolution of the Commission, all pending cases including those on appeal shall be transferred to the Court of Claims for adjudication on the same basis as those authorized to be transferred by this section."

Sec. 3. Section 28 of such Act of August 13, 1946, as amended (25 U.S.C. 70v-2), is amended by striking said section and inserting in lieu thereof the following:

"STATUS REPORT TO CONGRESS

"Sec. 28. The Commission shall, on the first day of the 95th Congress, submit a report to the Committees on Interior and Insular Affairs of the Senate and House of Representatives on those cases which it

has transferred pursuant to section 23 of this Act. // 25 USC 70v. // as amended. In addition, the Commission shall submit a report to said Committees at six month intervals thereafter showing the progress made and the work remaining to be completed by the Commission, as well as the status of each remaining case, along with the projected date for its completion."

LEGISLATIVE HISTORY:

HOUSE REPORT No. 94--1150 accompanying H.R. 11909 (Comm. on Interior and Insular Affairs).

SENATE REPORT No. 94-737 (Comm. on INTERIOR and Insular Affairs).

CONGRESSIONAL RECORD, Vol. 122 (1976):

Apr. 9, considered and passed Senate.

Aug. 3, considered and passed House, amended, in lieu of H.R. 11909. Sept. 28, Senate agreed to conference report.

Sept. 29, House agreed to conference report.

Approved October 8, 1976.

UNITED STATES CODE
TITLE 25.—INDIANS
CHAPTER 2A—INDIAN CLAIMS COMMISSION

General Materials (GM)—
References, Annotations, or Tables

HISTORICAL AND STATUTORY NOTES

§§ 70 to 70n-2. Omitted

Codifications

Section 70, Act Aug. 13, 1946, c. 959. § 1, 60 Stat. 1049, which established the Indian Claims Commission, was omitted from the Code in that the Commission terminated on Sept. 30, 1978.

Section 70a, Act Aug. 13, 1946, c. 959. § 2, 60 Stat. 1050; Oct. 27, 1974, Pub.L. 93-494, § 2, 88 Stat. 1499, which related to the jurisdiction of the Commission, claims considered by the Commission, and offsets and counterclaims, was omitted from the Code in that the Commission terminated on Sept. 30, 1978.

Section 70b, Act Aug. 13, 1946, c. 959. § 3, 60 Stat. 1050; Act Apr. 10, 1967, Pub.L. 90-9. §§ 2, 3, 81 Stat. 11, Oct. 12, 1978, Pub.L. 95-453. 92 Stat. 1110, which related to the members of the Commission, was omitted from the Code in that the Commission terminated on Sept. 30, 1978.

Section 70c, Act Aug. 13, 1946, c. 959. § 4, 60 Stat. 1051, which related to the staff and oath of the Commission, was omitted from the Code in that the Commission terminated on Sept. 30, 1978.

Section 70d, Act Aug. 13, 1946, c. 959, § 5, 60 Stat. 1051, which related to the principal office of the

Commission, was omitted from the Code in that the Commission terminated on Sept. 30, 1978.

Section 70e, Act Aug. 13, 1946, c. 959. § 6, 60 Stat. 1051, Apr. 10, 1967, Pub.L. 90-9, § 4. 81 Stat. 11: Mar. 30, 1972, Pub.L. 92-265, § 5, 86 Stat. 115, which related to itemized vouchers and authorized appropriations, was omitted from the Code in that the Commission terminated on Sept. 30, 1978.

Section 70f, Act Aug. 13, 1946, c. 959. § 7. 60 Stat. 1051. which related to the time of Commission meetings, was omitted from the Code in that the Commission terminated on Sept. 30, 1978.

Section 70g, Act Aug. 13, 1946, c. 959. § 8. 60 Stat. 1051, which related to the record of proceedings and public inspection of such records, was omitted from the Code in that the Commission terminated on Sept. 30, 1978.

Section 70h, Act Aug. 13, 1946. c. 959. § 9. 60 Stat. 1051, which related to control of Commission procedure, was omitted from the Code in that the Commission terminated on Sept. 30, 1978.

Section 70i, Act Aug. 13, 1946. c. 959. § 10. 60 Stat. 1052, which related to presentation of claims, was omitted from the Code in that the Commission terminated on Sept. 30, 1978.

Section 70j, Act Aug. 13, 1946, c. 959. § 11, 60 Stat. 1052, which related to the forbidden transfer of suits in Court of Claims under prior Acts and offsets and counterclaims, was omitted from the Code in that the Commission terminated on Sept. 30, 1978.

Section 70k, Act Aug. 13, 1946, c. 959. § 12, 60 Stat. 1052, which related to the limitation of time for presenting claims, was omitted from the Code in that the Commission terminated on Sept. 30, 1978.

Section 70l, Act Aug. 13, 1946, c. 959, § 13, 60 Stat. 1052, which related to notice to tribes, investigation of claims, and availability of data, was omitted from the Code in that the Commission terminated on Sept. 30, 1978.

Section 70m, Act Aug. 13, 1946, c. 959, § 14, 60 Stat. 1052, which related to information from governmental departments and official records as evidence, was omitted from the Code in that the Commission terminated on Sept. 30, 1978.

Section 70n, Act Aug. 13, 1946, c. 959, § 15, 60 Stat. 1053, which related to attorneys of claimants and the representation of the United States by the Attorney General, was omitted from the Code in that the Commission terminated on Sept. 30, 1978.

Section 70n-1, Pub.L. 88-168, § 1, Nov. 4, 1963, 77 Stat. 301; Pub.L. 89-592, Sept. 19, 1966, 80 Stat. 814; Pub.L. 93-37, § 2, May 24, 1973, 87 Stat. 73, which related to expert assistance for preparation and trial of claims and a revolving fund established for loans, was omitted from the Code in that the Commission terminated on Sept. 30, 1978.

Section 70n-2, Pub.L. 88-168, § 2, Nov. 4, 1963, 77 Stat. 301, which related to the inability of applicants to pay for assistance required and the denial of loans in cases of unreasonable fees, was omitted from the Code in that the Commission terminated on Sept. 30, 1978.

Indian Self-Determination Conflict of Interest Requirement Inapplicable to Commissioner Not in Office

Section 1 of Pub.L. 95-453 provided in part that § 45040 of this title shall not apply to those members

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of the Indian Claims Commission affected by the
Indian Self-Determination Act.

25 U.S.C.A. §70, 25 USCA § 70

UNITED STATES CODE ANNOTATED
TITLE 25.—INDIANS
CHAPTER 2A—INDIAN CLAMS COMMISSION

General Materials (GM)—
References, Annotations, or Tables

HISTORICAL AND STATUTORY NOTES

§§ 70n-4 to 70v-3. Omitted

Section 70n-4, Pub.L. 88-168, § 4, Nov. 4, 1963, 77 Stat. 301, which related to interest, was omitted from the Code in that the Commission terminated on Sept. 30, 1978.

Section 70n-5, Pub.L. 88-168, § 5, Nov. 4, 1963, 77 Stat. 301, which related to crediting to revolving fund of repayments and interest, was omitted from the Code in that the Commission terminated on Sept. 30, 1978.

Section 70n-6, Pub.L. 88-168, § 6, Nov. 4, 1963, 77 Stat. 301, which related to the liability of the United States, was omitted from the Code in that the Commission terminated on Sept. 30, 1978.

Section 70n-7, Pub.L. 88-168, § 7, Nov. 4, 1963, 77 Stat. 301, which prohibited approval of contingent fee contracts, was omitted from the Code in that the Commission terminated on Sept. 30, 1978.

Section 70o, Act Aug. 13, 1946, c. 959, § 16, 60 Stat. 1053, which forbade a member of Congress from practicing before the Commission, was omitted from the Code in that the Commission terminated on Sept. 30, 1978.

Section 70p, Act Aug. 13, 1946, c. 959, § 17, 60 Stat. 1053, which related to hearings, was omitted from the Code in that the Commission terminated on Sept. 30, 1978.

Section 70q, Act Aug. 13, 1946, c. 959, § 18, 60 Stat. 1054; Apr. 10, 1967, Pub.L. 90-9, § 4, 81 Stat. 11, which related to the testimony of witnesses, was omitted from the Code in that the Commission terminated on Sept. 30, 1978.

Section 70r, Act Aug. 13, 1946, c. 959, § 19, 60 Stat. 1054, which related to final determinations of Commission, was omitted from the Code in that the Commission terminated on Sept. 30, 1978.

Section 70s, Act Aug. 13, 1946, c. 959, § 20, 60 Stat. 1054, Sept. 8, 1960, Pub.L. 86-722, 74 Stat. 829, Mar. 13, 1978, Pub.L. 95-243, 92 Stat. 153, which related to judicial review, was omitted from the Code in that the Commission terminated on Sept. 30, 1978.

Section 70t, Act Aug. 13, 1946, c. 959, § 21, 60 Stat. 1055, which related to a report of determination of claim to Congress, was omitted from the Code in that the Commission terminated on Sept. 30, 1978.

Section 70u, Act Aug. 13, 1946, c. 959, § 22, 60 Stat. 1055, which related to the payment of claim after final determination and an adverse determination as a bar to further claims, was omitted from the Code in that the Commission terminated on Sept. 30, 1978.

Section 70v, Act Aug. 13, 1946, c. 959, § 23, 60 Stat. 1055; Act July 24, 1956, c. 679, 70 Stat. 624; June 16, 1961, Pub.L. 87-48, 75 Stat. 92; Apr. 10, 1967, Pub.L. 90-9, § 1, 81 Stat. 11, Mar. 30, 1972, Pub.L. 92-265, § 1, 86 Stat. 114; Oct. 8, 1976, Pub.L. 94-465, § 2, 90

Stat. 1990, which related to the dissolution of the Commission, was omitted from the Code in that the Commission terminated on Sept. 30, 1978.

Section 70v-1, Act Aug. 13, 1946, c. 959, § 27, as added Apr. 10, 1967, Pub.L. 90-9, § 5, 81 Stat. 11, and amended Mar. 30, 1972, Pub.L. 92-265, §§ 2, 3, 86 Stat. 115, which related to the trial calendar, was omitted from the Code in that the Commission terminated on Sept. 30, 1978.

Section 70v-2, Act Aug. 13, 1946, c. 959, § 28, as added Mar. 30, 1972, Pub.L. 92-265, § 4, 86 Stat. 115, and amended Oct. 8, 1976, Pub.L. 94-465, § 3, 90 Stat. 1990, which related to status reports to Congress, was omitted from the Code in that the Commission terminated on Sept. 30, 1978.

Section 70v-3, Act Aug. 13, 1946, c. 959, § 29, as added July 20, 1977, Pub.L. 95-69, § 2, 91 Stat. 273, and amended Apr. 2, 1982, Pub.L. 97-164, Title I, § 149, 96 Stat. 4.6, which related to cases transferred to United States Claims Court, was omitted from the Code in that the Commission terminated on Sept. 30, 1978.

25 U.S.C.A. § 70v-3

25 USCA § 70v-3

APPENDIX G

IN THE UNITED STATES COURT
OF FEDERAL CLAIMS

[Filed July 15, 2005]

No. 05-558L
Judge Emily C. Hewitt

WESTERN SHOSHONE NATIONAL COUNCIL, *et al.*,
Plaintiffs,

v.

UNITED STATES OF AMERICA,
Defendant.

SECOND AMENDED COMPLAINT

Plaintiffs, Western Shoshone National Council, South Fork Band, Winnemucca Indian Colony, Dann Band, Te-Moak Tribe of Western Shoshone Indians, Battle Mountain Band, Elko Band, and Timbisha Shoshone Tribe, by and through undersigned counsel, bring this Complaint against the United States, and state as follows:

PARTIES AND JURISDICTION

1. This Court has jurisdiction over the subject matter of this action under 28 U.S.C. §§ 1331, 1362, 1491 and 1505. This is a civil action brought by Indian Tribes or bands and arises under the Constitution, treaties and agreements between the United States and the Tribe, federal common law and the federal statutes.

2. Plaintiff Western Shoshone National Council is a governing body of the Western Shoshone Nation, and represents the interests of certain Western Shoshone tribes and bands which are parties and successors in interest to the Treaty of Ruby Valley.

3. Plaintiff Te-Moak Tribe of Western Shoshone Indians ("Te-Moak Tribe") is a federally recognized tribe which acts as representative body of Battle Mountain Band, Elko Band South Fork Band and Wells Band.

4. Plaintiff South Fork Band is a federally recognized band of the Te-Moak Tribe.

5. Plaintiff Battle Mountain Band is a federally recognized band of the Te-Moak Tribe.

6. Plaintiff Elko Band is a federally recognized band of the Te-Moak Tribe.

7. Plaintiff Winnemucca Indian Colony is a band of Western Shoshone Indians.

8. Plaintiff Dann Band is a traditional Western Shoshone family and this action is brought through its representatives Mary Dann and Carrie Dann.

9. Plaintiff Timbisha Shoshone Tribe is a federally recognized tribe.

GENERAL ALLEGATIONS

The Western Shoshone Nation

10. The Western Shoshone people identify themselves as *Newe*, a word that means "the people." Their homelands stretch in the north from the Snake River Valley in Idaho, in the east from Salt Lake Valley in Utah, in the west across most of eastern and central Nevada, and southward into Death Valley and the Mojave Desert of California. Most of these lands are within what is known as the Great Basin, a high alti-

tude desert with no external drainage to the ocean. (The Western Shoshone homelands shall be referred to as the "Western Shoshone Land Base".)

11. Prior to the appearance of white people, the Western Shoshone lived in extended family groups, congregating together in times of ceremony or collective food gathering activities, such as antelope drives and pinenut picking.

12 The Western Shoshone people have continuously owned and occupied the Western Shoshone Land Base since time immemorial.

13. Today the Western Shoshone people generally live in various communities, some of which include: Battle Mountain Indian Colony, Elko Indian Colony, Wells Indian Colony, South Fork Reservation, Ruby Valley Allotments, Odgers Ranch, Dann Ranch, Yomba Reservation, Duckwater Reservation, Ely Indian Colony, Winnemucca Indian Colony and the Timbisha Community.

14. The Western Shoshone Nation is comprised of bands or tribes of Native American Indians. Some of the Bands are formally recognized by the Congress of the United States under the Indian Reorganization Act.

15. The people of the Western Shoshone, and their bands, tribes and communities shall be collectively referred to as the "Western Shoshone Nation". Plaintiffs bring this action on behalf of themselves and the Western Shoshone Nation.

16. The Western Shoshone Nation owns and occupies a large tract of land in Nevada, California, Idaho and Utah which exceeds over 60 million acres.

The Treaty of Ruby Valley

17. On October 1, 1863 the United States government and the Western Shoshone Nation entered into a treaty known as the Treaty With The Western Shoshone, 1863. 18 Stat. 689, Ratified June 26, 1866, Proclaimed October 21, 1869. (The "Treaty of Ruby Valley") A copy of the Treaty of Ruby Valley is attached hereto as Exhibit A.

18. The Treaty of Ruby Valley is a valid and binding contract between the United States and the Western Shoshone Nation. The Treaty of Ruby Valley is enforceable by law.

19. Article 5 of the Treaty of Ruby Valley states as follows:

It is understood that the boundaries of the country claimed and occupied by said bands are defined and described by them as follows:

On the north by Wong-goga-da Mountains and Shoshone River Valley; on the west by Su-non-toyah Mountains or Smith creek Mountains; on the south by Wi-co-bah and the Colorado Desert; on the east by Po-ho-no-be Valley or Steptoe Valley and Great Salt Lake Valley.

The boundaries described in Article 5 are generally shown in the map attached hereto as Exhibit B. (The land described in Article 5 of the Treaty of Ruby Valley shall be referred to as the "Western Shoshone Fee Title Land".)

20. The Congress of the United States expressly recognized permanent ownership of Western Shoshone Fee Title Land in the Western Shoshone Nation when it ratified the Treaty of Ruby Valley on June 26, 1866.

21. The Western Shoshone Nation continues to own the Western Shoshone Fee Title Land. The Western Shoshone ownership includes all rights typically associated with such title, including without limitation, the right to hunt and fish, and to live and work the land (for example, all rights to farming, ranching and grazing). Also encompassed within this title are all mineral rights from the land including gold, silver, copper, timber and water.

22. The Western Shoshone Nation continues to occupy and use a substantial portion of the Western Shoshone Land Base.

23. Under the Treaty of Ruby Valley, the Western Shoshone Nation granted the United States certain privileges for use of and access to the land described in the Treaty and, in exchange, the United States recognized Western Shoshone ownership of the land which under U.S. law equates to statutory or fee title.

24. Article 2 of the Treaty of Ruby Valley provides that "[t]he several routes of travel through the Shoshone country, nor or hereafter used by white men, shall be forever free, and unobstructed by the said bands, for the use of the government of the United States, and of all the emigrants and travellers under its authority and protection. . ." Article 2 further authorizes the Government to establish military posts and station houses in the Shoshone country.

25. Article 3 of the Treaty allows the continuation of "telegraph and overland stage lines", and also allows for the construction of a railway and its branches through Shoshone country. Article 4 of the Treaty provides that the Western Shoshone Fee Title Land may be "prospected for gold and silver, or other minerals; and when mines are discovered, they may be worked,

and mining and agricultural settlements formed, and ranches established whenever they may be required.”

26. The Treaty of Ruby Valley thus provides the U.S. Government and private citizens acting under the authority of the U.S. Government with certain rights and privileges to use and occupy the Western Shoshone Fee Title Land, which are not inconsistent with the Western Shoshone Nation's Fee Title and concomitant rights in the Western Shoshone Fee Title Land.

27. Article 7 of the Treaty of Ruby Valley provides that the United States shall provide fair compensation to the Western Shoshone Nation for use of the Western Shoshone Fee Title Land. (The Treaty provides that for the first twenty years, the amount of compensation shall be \$5,000 per year.) Since the Treaty of Ruby Valley was signed, many gold mines have been discovered and exploited. Upon information and belief, most of the gold produced in the United States comes from the Western Shoshone Fee Title Land. The Western Shoshone Nation has never received an accounting from the United States on the minerals taken from the Western Shoshone Fee Title Land.

28. In the late 19th century and throughout the 20th century, mining and agricultural settlements were formed and ranches were established on the Western Shoshone Fee Title Land.

The Indian Claims Commission

29. In 1951, a Petition was filed against the United States of America by the Te-Moak Bands of Western Shoshone Indians before the Indian Claims Commission (the "ICC"). The Te-Moak Bands alleged in the Petition that they represented the Western Bands of

the Shoshone Nation. The ICC petition was assigned docket No. 326 (hereinafter the "ICC Claim").

30. The ICC Claim was filed by the law firm of Wilkinson, Cragun & Barker (the "Barker Law Firm").

31. Count 1 of the ICC Claim plead a "Taking of Lands" and alleged that (a) the Western Shoshone Nation owned and occupied certain land since time immemorial ("Aboriginal Title"), and (b) the Western Shoshone Nation held recognized title and ownership to land under the Treaty of Ruby Valley (Western Shoshone Fee Title Land).

32. Count 2 of the ICC Claim plead a "General Accounting" for funds collected and managed by the United States on behalf of the Western Shoshone Nation.

33. During the course of the litigation before the ICC, the Te-Moak Bands (the original plaintiff) realized that the Barker Law Firm was not acting pursuant to their instructions. Specifically, counsel refused to assert the position that the Western Shoshone Land Base was not taken by the government. Ultimately, the Te-Moak Bands fired the Barker Law Firm. The BIA refused to accept this discharge of counsel and renewed the legal contract of the Barker Law Firm on behalf of the Te-Moak Bands. The Te-Moak Bands filed a notice of discharge of counsel with the ICC. Despite the discharge of counsel, the ICC, the Barker Law Firm and the United States moved forward, with the Barker Law Firm purportedly representing the interests of the petitioners.

34. The ICC, the Barker Law Firm and the United States created a fiction known as the Western Shoshone identifiable group during the early stages of the litigation. This fictional entity was alleged to be

the de facto plaintiff after the Te-Moak Bands terminated their counsel.

35. The Western Shoshone identifiable group was not and is not a recognized legal entity by the Western Shoshone people and had no authority to represent the interests of the Western Shoshone Nation or its people. Upon information and belief, after the Te-Moak Bands terminated the Barker Law Firm, the Barker Law Firm had no representative, decision-making client other than the BIA.

36. On October 16, 1962 the ICC issued Findings of Fact, determining that the Western Shoshone identifiable group held certain land under Aboriginal Title and that the United States had extinguished the Western Shoshone's Aboriginal Title without compensation as follows:

The Commission further finds. . . the Western Shoshone identifiable group exclusively used and occupied their respective territories as described in Finding . . . 23 (except the Western Shoshone lands in the present State of California) until by gradual encroachment by whites, settlers and others, and the acquisition, disposition or taking of their lands by the United States for its own use and benefit, or the use and benefit of its citizens, the way of life of these Indians was disrupted and they were deprived of their lands. 11 Ind.Cl.Comm. 387, 416.

37. Paragraph 23 of the Findings of Fact contained a description of territory which encompassed approximately 24 million acres of land.

38. The Commission did *not* make any finding relating to the Western Shoshone Fee Title Land in its Findings of Fact. Nor did it make any findings re-

garding the land not described and encompassed within the approximate 24 million acres set forth in Paragraph 23' of its Findings of Fact.

39. On October 16, 1962 the ICC issued an Opinion of the Commission (the "1962 Opinion") and held:

"The Commission also concludes that the . . . Western Shoshone identifiable group w[as] [a] land-using entit[y] which respectively held Indian title to the lands described in Findings of Fact Nos. 21, 22 and 23, and that said Indian title was acquired by the United States from th[is] . . . aforementioned land-using entit[y] without the payment of compensation therefor and said land-using entit[y] is] entitled to recovery under Section 2, Clause (4) of the Indian Claims Commission Act . . . The Indian title of the Western Shoshone group in their lands located in California was extinguished by the United States on March 3, 1853, *Mohave Tribe v. United States*, 7 Ind. Cl. Comm. 219. The case will now proceed to a determination of the dates of . . . extinguishment of the Indian title of the lands of the Western Shoshone group which were not within the boundaries of the present State of California; 11 Ind.Cl.Comm. 387, 445."

40. The Commission did not make any ruling relating to the Western Shoshone Fee Title Land in the 1962 Opinion.

41. On February 11, 1966, the ICC approved a joint stipulation setting the date for valuation of the land described in its 1962 opinion as of July 1, 1872.

42. On October 11, 1972, the ICC issued an Opinion of the Commission (the "1972 Opinion") and held that the fair market value of the land held by Abo-

original Title (described in paragraph 23 of the Findings of Fact) on the date of taking was \$21,550,000 and the value of minerals removed from the land prior to the taking was \$4,604,600 for a total of \$26,154,600 (the "ICC Judgment").

43. The Commission did not make any ruling relating to the Western Shoshone Fee Title Land in the 1972 Opinion.

44. In 1946, Congress enacted the Indian Claims Commission Act, 60 Stat. 1049, 25 U.S.C. §70 *et. seq.* (1976 ed). ("ICCA"). The ICCA was substantially repealed as of September 30, 1978, including 25 U.S.C. §70u, Act Aug. 13, 1946, c. 959, §22, 60 Stat. 1055. (See PL 94-465, Oct. 8, 1976, 90 Stat. 1990). This repealed provision stated that "the payment of any claim, after its determination in accordance with this Act, shall be a full discharge of the United States of all claims and demands, touching on any of the matters involved in the controversy." *Id.*, §22(a). The ICC Judgment was certified by the U.S. Court of Claims for payment on December 6, 1979. The Government then placed the \$26.1 million award of the ICC Judgment in trust. In *United States v. Dann*, 470 U.S. 39, 105 S.Ct. 1058 (1985), the Supreme Court held that "payment" of the award of the ICC Judgment had been effected upon the deposit of these funds into a trust account. Nonetheless, on December 6, 1979 when the award of the ICC Judgment was certified, and thereafter when "payment" was made in accordance with the Supreme Court's determination, Section 22(a) of the ICCA had been terminated and omitted from the U.S. Code and was inapplicable. There was, as a result, no discharge pursuant to §22(a) of claims of the Western Shoshone Nation, including the claims set forth herein.

45. Not only did the ICC Judgment not effect a discharge of the United States, but the ICC Judgment never became final. Under the ICCA, a judgment of the ICC becomes final upon the submission of a "final report" to Congress. It has recently been discovered that no final report was ever submitted to Congress on the ICC Judgment.

*The Relationship Between the
Western Shoshone Nation and the United States*

46. Principles of honesty and fair dealing have controlled the government's dealing with Indian nations. Treaties between Indian Tribes and the United States are to be interpreted as the Indians understood them, with any ambiguities construed liberally in favor of the Tribes.

47. The United States has taken on or has exercised some control or supervision over the Western Shoshone land and the management of the resources from the land.

COUNT I

(Declaratory Judgment - ICC Judgment Void
Pursuant to Fed.R.Civ.P. 60(b)(4))

48. Plaintiff repeats and realleges the allegations in paragraphs 1 through 47 above.

49. The ICC Judgment was rendered in an absence of due process. The Barker Law Firm continued to represent the "petitioners" after being terminated by the Te-Moak Bands. In an apparent conflict of interest, the BIA renewed the contract of the Barker Law Firm to continue to represent the Te-Moak Bands in the ICC proceeding against the government. The true representatives of the Western Shoshone people attempted to change, withdraw or dismiss the ICC claim

prior to final determination, but were not allowed to do so by the government or the courts. The ICC Judgment was thereafter obtained by dismissed counsel representing a fictitious entity.

50. Such a judgment, which purports to bind all Western Shoshone tribes and bands, lacks the fundamental requisites of due process of law under the Fifth Amendment to the Constitution. In this regard, the Western Shoshone people have a protectible property interest in their rights in the Western Shoshone Land Base; the government deprived the Western Shoshone people of that interest by means of the ICC Judgment; the Western Shoshone people were denied adequate procedural protections in the manner in which the ICC Judgment was rendered, without their counsel of choice and without being allowed to change or withdraw their claim; and the Plaintiffs herein and the Western Shoshone Nation were not parties in the ICC proceeding and their interests were not represented for purposes of Constitutional due process by the Western Shoshone identifiable group.

51. There is an actual controversy regarding the legal effect of the ICC Judgment.

52. Plaintiffs seek a judgment pursuant to 28 U.S.C. §2201 declaring the ICC Judgment to be unenforceable against the Plaintiffs, or void under Fed.R.Civ.P. 60(b)(4) on grounds of failure of due process.

53. The ICC, by proceeding forward to judgment under the circumstances set forth herein, engaged in a clear and egregious usurpation of judicial power.

54. Because the ICC Judgment is unenforceable against the Plaintiffs or void, Plaintiffs herein assert treaty title and aboriginal title to the entire Western Shoshone Land Base, all 60 million acres.

55. WHEREFORE, Plaintiffs demand a declaration that the ICC Judgment is unenforceable or void, and such other and further relief as this Court deems just and proper.

COUNT II

(Declaratory Judgment –
Interest on Takings Award)

56. Plaintiffs repeat and reallege paragraphs 1 through 47 above.

57. This claim is in the alternative and assumes that the ICC Judgment is valid.

58. The award of \$26.1 million by the ICC was alleged to be based upon the fair market value of the subject land as of July 1, 1872. Pre-judgment interest, from 1872 to the date of the ICC's Judgment, was not awarded.

59. If the award on the ICC claim encompassed the taking of Western Shoshone Fee Title Land, then it was and remains a well established principle of law that the Western Shoshone Nation would have been entitled to an award of pre judgment interest. If, however, the award of the ICC Judgment encompassed only Aboriginal Title, then the Western Shoshone Nation would not have been entitled to pre judgment interest.

60. The ICC Findings of Fact and the ICC Judgment did not address the Western Shoshone Fee Title Land. Whether the ICC Judgment encompasses the Plaintiffs' claims to the Western Shoshone Fee Title Land is a matter in controversy.

61. If this Court were to determine that the treaty and statutory rights of the Western Shoshone Nation in the Western Shoshone Fee Title Land were extin-

guished by the ICC Judgment, then Plaintiffs seek a declaration pursuant to 28 U.S.C. §2201 that the Western Shoshone Nation is entitled to compounded pre-judgment interest on the award from July 1, 1872 to the date of the ICC Judgment.

62. The amount of interest due under this count exceeds \$14 billion.

63. WHEREFORE, Plaintiffs demand declaratory relief, in the alternative to Count I, of entitlement to pre judgment interest from July 1, 1872 to the date of the ICC Judgment, and such other and further relief as this Court deems just and proper.

COUNT III

(Declaratory Judgment - Right to Royalties for Use of Land)

64. Plaintiffs repeat and reallege allegations 1 through 47 above.

65. The Western Shoshone Nation is entitled to fair compensation for use of the Western Shoshone Fee Title Land and the Western Shoshone Land Base pursuant to Articles 4 and 7 of the Treaty of Ruby Valley. Fair compensation requires, among other things, payment of reasonable royalties on all minerals mined and extracted from the Western Shoshone Fee Title Land and the Western Shoshone Land Base.

66. Upon information and belief, there is an actual controversy regarding Plaintiffs' entitlement to fair and reasonable royalties under the Treaty of Ruby Valley.

67. Pursuant to 28 U.S.C. §2201, Plaintiffs seek a declaration that the Western Shoshone Nation is entitled to fair and reasonable compensation for past,

present and future use of the Western Shoshone Fee Title Land and Western Shoshone Land Base.

68. WHEREFORE, Plaintiffs demand a final judgment declaring their rights to fair and reasonable compensation for use of land under the Treaty of Ruby Valley, and for such other and further relief as this Court deems just and proper.

COUNT IV

(Accounting)

69. Plaintiffs repeat and reallege paragraphs 1 through 47 above.

70. Under the Treaty of Ruby Valley and Federal law, the U.S. Government undertook a duty to control and manage the Western Shoshone land.

71. The books of account and records pertaining to moneys and financial transactions of and for the Western Shoshone Nation have been maintained in the exclusive possession and control of the United States.

72. At all relevant times, Defendant has been under a duty to pay interest to the Western Shoshone Nation on funds received by the United States arising from use or disposition of the Western Shoshone land.

73. At all relevant times, Defendant has been under a duty as fiduciary to invest funds coming into the United States' possession for the benefit of the Western Shoshone Nation.

74. Defendant owes the Western Shoshone Nation a fiduciary duty and obligations of the highest responsibility to administer the Western Shoshone land

and funds with the greatest skill and care possessed by a fiduciary.

75. Defendant's fiduciary duties include, among others, the duty to provide the Western Shoshone Nation with a full and complete accounting of their funds.

76. Defendant has failed to provide the Western Shoshone Nation with an accounting of the proceeds from disposition or use of the land, including without limitation, mining activities in accordance with Section 4 of the Treaty of Ruby Valley. Plaintiffs are entitled to such an accounting for proceeds from disposition or use of the land.

77. WHEREFORE, Plaintiffs demand judgment for an accounting, and such other and further relief as this Court deems just and proper.

COUNT V

(Breaches of Fiduciary Duties)

78. Plaintiffs repeat and reallege paragraphs 1 through 47 above.

79. Defendant owes fiduciary duties to Plaintiffs with respect to both (i) monies derived or obtained from the Western Shoshone land; and (ii) monies that should have been received or earned by Defendant but were not because of mismanagement of the mineral resources and other resources from the Western Shoshone land.

80. Defendant has breached its fiduciary duties owed to the Western Shoshone Nation with respect to the Western Shoshone Fee Title Land, by mismanaging the land and failing to account for the proceeds and profits of the land.

81. Plaintiffs and the Western Shoshone Nation have suffered damages as a result of the Defendant's breaches of fiduciary duties.

WHEREFORE, Plaintiffs demand compensatory damages of breaches of fiduciary duties, and such other and further relief as this Court deems just and proper.

DATED THIS 14 day of July, 2005.

Respectfully submitted,

HERMAN & MERMELSTEIN, P.A.
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By: /s/ Jeffrey M. Herman
Jeffrey M. Herman, Esquire
Stuart S. Mermelstein, Esquire
Adam D. Horowitz, Esquire

APPENDIX H

Solicitor - Indian Affairs

Acting Director, Office of Trust Responsibilities - BIA
November 1975

Land Status, Western Shoshone Indians

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

Mr. Delahanty refers to the Treaty of 1863 with the Western Shoshone and alleges that the land was never taken legally by the United States, so therefore the land is still theirs. Also they have the right to hunt on the lands referred to.

Our review of the treaty and Executive Orders indicates that Mr. Delahanty is correct. It is requested that a review of the matter be conducted by your office to determine land ownership and the hunting and fishing rights of the Western Shoshone Indians.

Your prompt attention to this matter will be appreciated.

William L. Benjamin

Enclosure

[EXHIBIT 2]