

**SHADOW REPORT
UPDATE TO THE
COMMITTEE FOR THE ELIMINATION
OF RACIAL DISCRIMINATION
ON THE
EARLY WARNING AND URGENT ACTION PROCEDURE
DECISION 1(68)
IN RELATION TO THE UNITED STATES OF AMERICA
SUBMITTED BY
THE WESTERN SHOSHONE NATIONAL COUNCIL**

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Introduction and Summary

This update is respectfully submitted to the Committee for the Elimination of Racial Discrimination ("CERD") in order to inform the Committee of the actions of the State Party since the issuance of the CERD Decision 1(68) on 10 March, 2006. The following are examples of the deteriorating situation of the Western Shoshone:

- 1. The State Party is attempting to circumvent the Committee's Decision 1(68) by the State Party's scheme to distribute money to individual Western Shoshone in order to assert that the State Party has purchased all the rights of all the Western Shoshone to their ancestral lands.**
- 2. The State Party has delegated to the State of Nevada the responsibility to regulate mercury emissions from multinational mining corporations in Western Shoshone territory, with the result that Western Shoshone ancestral lands have now for the first time ever been declared to have mercury levels which threaten the survival of the Western Shoshone.**
- 3. The State Party continues to actively cooperate and plan with private corporations to extract and export water from Western Shoshone ancestral lands to the City of Las Vegas, which threatens irreparable harm to the Western Shoshone, and their cultural rights and traditional spiritual practices.**
- 4. The State Party has delegated to the State of Nevada the rights to control and regulate the use of water within Western Shoshone territory, and the State of Nevada has abused that power by allowing multinational gold mining companies to conduct huge scale open pit mining which threatens irreparable harm the underground water resources essential to all life in Western Shoshone territory.**
- 5. The State Party has since the CERD decision 1 (68) started to store above ground nearly all of its high level nuclear waste and weapons grade nuclear material solely at the Nevada Test Site located on Western Shoshone ancestral lands, and is presently involved in efforts to approve the transportation corridor and process permit applications to open the only high-level nuclear waste repository in the United States at Yucca Mountain.**
- 6. The State party continues to deny access of the Western Shoshone in national courts by preventing the adjudication of claims brought by the Western Shoshone on their merits, with three separate decisions on September 20, 2006, December 11, 2006, and May 31,2007, dismissing the claims on domestic technicalities.**
- 7. The State Party's accelerated granting of leases for "fracking" on July 17 and 18, 2014, in the context of the status, occupation and other uses of these lands threatens the water and land resources in these Western Shoshone communities.**

8. **The State party has made a final decision and announced its intention to detonate a huge bomb on Western Shoshone ancestral lands, in violation of the Nuclear Non-Proliferation Treaty and the domestic ban on the development of new nuclear weapons.**
9. **The State party is presently involved in legislative efforts to suspend domestic legal procedures and environmental standards as part of ongoing federal efforts to open a high-level nuclear waste repository at Yucca Mountain.**
10. **The State Party is presently involved in legislative and regulatory efforts to prevent the Western Shoshone from their traditional ways of harvesting foods and medicinal herbs, which State denial of traditional practices threatens the health and spiritual and cultural traditions of the Western Shoshone.**

Discussion

The nature and urgency of the emergency situation created by the State party's ongoing actions set forth above will now be described in more detail. The issues below are addressed in the same order as set forth above.

1. **The State Party's accelerated actions to distribute so-called "settlement" or "judgment fund" monies to individual Western Shoshone is a blatant attempt to circumvent this Committee's Decision 1(68), and is a violation of the fundamental due process and equal protection rights of the Western Shoshone under domestic and international law.**

The State Party submitted to the Committee in April, 2007, its response to March, 2006, Decision 1(68). In Annex II of its "Periodic Report of the United States of America," the State Party acknowledges in the first sentence of the Executive Summary that "(T)he United States recognizes, as a historical matter, that indigenous people throughout the world have been unfairly deprived of the lands they once habitually occupied or roamed."¹ The State Party then proceeds to describe the procedure it used to establish laws that discriminated against the American Indians and deprive the Indians, including the Western Shoshone, of the fundamental due process and equal protection rights afforded all other persons. The detailed explanation by the State party in Annex II to its "periodic Report" of April, 2007, is merely a step-by-step explanation of how the State party enacted laws specifically targeted at American Indians which were designed

¹Attachment 1, Periodic Report of the United States of America to the Committee on the Elimination of Racial Discrimination Concerning the International Convention on the Elimination of All Forms of Racial Discrimination, April 2007", index and Executive Summary.

to deprive the Western Shoshone of the right to trial, and the rights to due process and equal protection guaranteed to all persons under the United States Constitution and “contemporary international human rights norms, principles and standards that govern determination of indigenous property interests”, as stressed by the Inter-American Commission on Human Rights in the case of *Mary and Carrie Dann versus United States* (Case 11.140, 27 December 2002), and Paragraph 6 of Decision 1(68) of this Committee

The State Party alleges in Paragraph 1 of the Executive Summary of Annex II to its Periodic Report of April, 2007 that ‘the ICC (Indian Claims Commission established in 1946) provided Indian claimants greater access and more flexible rules under which to pursue their claims than would otherwise have been available to the general public.’ The truth is that the ICC was created to create a unique and unprecedented procedure based specifically upon race for the adjudication Indian land claims in a manner which was intended to and did deny the Western Shoshone the fundamental due process and equal protection rights secured them under the United States Constitution. The State Party’s allegation that the ICC provided “flexible rules” for the State Party to employ in the “final extinguishment” of Indian claims is a true and accurate description of the unique procedure employed by the State party to violate the rights of the Western Shoshone. The State Party’s assertion that these “flexible rules” were otherwise unavailable to the general public is in fact a disingenuous way of saying that no other Americans were ever subjected to the violations of their Constitutional rights in the manner in which those unique “rules” were applied to the Western Shoshone.

These “flexible rules” which the State Party admits were specifically targeted at American Indians, were used by the State party to violate the rights of the Western Shoshone in the adjudication of the Western Shoshone in proceedings before the United States ICC, the United States Court of Claims, the United States District Court, the United States Ninth Circuit Court of Appeals, and the United States Supreme Court as follows:

1. The State Party, as the defending party against whom the land claim was brought, selected the “identifiable group” of Western Shoshone who the State Party would recognize as the only Western Shoshone persons who would be allowed to pursue claims against the State Party.
2. The State Party chose the attorney who would represent the “identifiable group”, thereafter specifically depriving the Western Shoshone of their fundamental right under American law to be represented by the attorney of their choice when the Western Shoshone later sought to be represented by other counsel. The delegation to the defending party, the United States, of the power to choose the attorney representing the claimants, the Western Shoshone, is an outrageous and fundamental violation of the rights of litigants in domestic courts to choose the attorney they want to represent them.
3. The State party chose the claims that it would allow the Western Shoshone to bring against the State party, thereby specifically denying the Western Shoshone of their

fundamental right of substantive due process and their right to a fair trial on those claims which they as the claimants had the right to prosecute against the United States.

4. The State Party, the ICC and each of its domestic courts mentioned above, failed to provide notice to individual Western Shoshone that their rights to their ancestral lands were being adjudicated, and failed to provide individual Western Shoshone with their fundamental rights under the United States Constitution and well-established federal law that each individual Western Shoshone could “opt-out” and not be bound by the sham ICC proceeding used by the State Party to “finally extinguish” the Western Shoshone land claims.

By way of comparison with the procedure used by the State Party to “extinguish” the rights of the Western Shoshone, if each individual Western Shoshone had instead been a member of a class of persons in the United States who had been injured as a result of the use of a defective medication, each such Western Shoshone individual would have the right to choose his or her own attorney, to participate or not participate in a class action against the pharmaceutical manufacturer of that medication, to pursue those claims which the claimant chose to pursue, to notice of exact terms of any proposed settlement prior to the finalization of such a settlement, and the right to opt out of any class settlement to pursue those claims individually rather than be bound by a settlement with which that individual Western Shoshone did not agree. Each and every one of these fundamental rights was denied the Western Shoshone by the “flexible rules” the State Party adopted to extinguish the rights of the Western Shoshone. And, as admitted by the State Party, these “flexible rules” were targeted directly at the racial minority of American Indians.

Since the State Party’s Periodic Report of April, 2007, the State Party has been acting to accelerate its efforts to distribute the so-called “judgment fund distribution” to individual Western Shoshone in order to circumvent this Committee’s Decision 1(68).²The State Party’s Bureau of Indian Affairs (BIA) has been holding meetings and informing Western Shoshone leaders that the only relief the Western Shoshone will ever obtain for their land claims is the money the BIA will distribute to finalize the “extinguishment” of those land claims, and that unless individual Western Shoshone apply before the deadline established by the State Party for entitlement to a share of that money, the individual Western Shoshone will never receive anything for the extinguishment of their rights to their ancestral lands.

These actions by the State Party and its BIA are in direct defiance of Paragraph 9 of Decision 1(68), wherein the Committee specifically urged “the State Party to take immediate action to initiate a dialogue with the representatives of the Western Shoshone peoples in order to find a solution acceptable to them, and which complies with their rights under, in particular, articles 5 and 6 of the Convention.”

²Attachment 2, “Meeting: Western Shoshone Claims Update - BIA Enrollment Application Process/Deadline”, giving notice of the State Party’s Bureau of Indian Affairs meeting scheduled for February 11, 2008, at the United States District Courthouse in Reno, Nevada.

2. **In March, 2007, for the first time in history and after thousands of years of use and occupancy by the Western Shoshone, the fish and waters of their ancestral lands were declared by the State of Nevada to be polluted and contaminated by mercury from gold mining to the extent that the health, cultural rights and mere survival of the Western Shoshone people is now threatened.**

Since March, 2007, the State of Nevada issued a "Health Advisory" for (1) Chimney Dam Reservoir, (2) Comins Lake, (3) Rye Patch Reservoir, and (4) Wildhorse Reservoir, notifying the public that mercury levels had been detected in fish in those waters at levels which are dangerous or deadly if consumed by humans.³ It came as no surprise that the ancestral lands of the Western Shoshone were becoming dangerously contaminated with mercury by gold mining on those lands, and scientists and environmental groups had been predicting for more than ten years that mercury emitting from gold mining in Nevada would eventually result in health warnings and dangerously high levels in fish and waters of that State. The State Party has delegated to the State of Nevada the authority to enforce environmental laws applicable to mercury emissions. It is in the financial interest of the State of Nevada, however, to disregard mercury emissions to allow gold mining companies to maximize production, due to the fact that the State of Nevada receives five percent (5%) of every dollar of gold produced in Nevada. The actual net proceeds of minerals received by the State of Nevada during the year 2005 to 2006 was Eight Hundred Fifty Three Million Thirty Eight Thousand Seven Hundred Sixty Seven Dollars (\$853,038,767).⁴ As a result of its desire to allow multi-national gold producers to maximize production at the cost of damage to the environment and to the health of the Western Shoshone and all other persons who presently live on Western Shoshone ancestral lands, the State of Nevada has knowingly allowed the mercury emissions over the past thirty years of gold mining to now pose a threat to the very lives of persons living on those lands.

The State Party has knowingly allowed the State of Nevada to fail to enforce the State Party's national environmental laws and standards as to Western Shoshone Territory. Worse yet, the response of the State of Nevada to the presence of deadly levels of mercury on Western Shoshone ancestral lands has been to declare that **there will be no clean-up plan to remove mercury from the contaminated areas, but instead a plan to merely reduce the additional amount of mercury the mines will be allowed to disperse into those areas.** This is a blatant declaration by the State of Nevada, with the ratification and approval of the State Party, that the health and cultural rights of the Western Shoshone, and the health of all other persons affected by the deadly levels of mercury, are less important than the profits and maximization of gold production of multi-national mining companies, and the taxes derived therefrom by the State of Nevada.

³Attachment 3, Nevada Department of Wildlife public health notices and advisories warning of high mercury levels detected in fish in Chimney Dam Reservoir, Comins Lake, Rye patch Reservoir, and Wildhorse Reservoir.

⁴Attachment 4, "Actual Net Proceeds of Minerals Assessed Valuations" - fiscal year 2005-2006.

The decision by the State of Nevada to not require any cleanup of existing mercury contamination, and the ratification and approval of that decision by the State Party, has been despite numerous media reports about mercury emitted by mining on Western Shoshone ancestral lands.⁵ There have also been published scientific articles, one of which concluded that in at least one case near a gold mine on Western Shoshone ancestral lands, “ambient mercury concentrations (in the air) were observed to be **over 100 times background concentrations**”, and that “these concentrations were much higher than expected” and raise serious health concerns.⁶ Another published scientific article concluded in March, 2005, that “Nevada gold mines are a previously unrecognized source of large atmospheric mercury releases, and constitute the largest source of new byproduct mercury in the U.S.”⁷

This latter article also notes that despite the fact that mercury is required to be regulated by all the major federal environmental laws in the U.S., “**prior to March of 2006, neither the U.S. EPA nor the Nevada Division of Environmental Protection regulated mercury emissions from Nevada mines, other than as water pollutants or as hazardous air pollutants when a single source exceeds 10 tons.**” These media reports, the health warnings, and the scientific publications show that despite knowledge and admission by state and federal environmental regulators, the multinational mining companies operating on Western Shoshone ancestral lands are continuing to be allowed with governmental approval to add more and more deadly mercury to the environment. These actions by the State Party are in violation of the spirit of the “Global Mercury Assessment”⁸ published by the United Nations Environmental Programme in December, 2002, and of the Recommendations of this Committee in Paragraph 8 of Decision 1(68) wherein the Committee stated that “the State party is urged to pay particular attention to the right to health and cultural rights of the Western Shoshone people, which may be infringed upon by activities threatening their environment and/or disregarding the spiritual and cultural significance they give to their ancestral lands.”

Given the urgency of the danger and harm posed by the recent admission by the State Party and its environmental regulators in Nevada that mercury levels are now at dangerous and deadly amounts on Western Shoshone ancestral lands, the Western Shoshone National Council and the Winnemucca Indian Colony respectfully request that this matter be placed on the agenda of the upcoming Session on an emergency basis.

⁵Attachment 5, Reno Gazette-Journal articles “Tests show high levels of mercury in air near mines” (8/26/05), “Study finds three kinds of mercury exiting state mines” (5/11/07), “Mercury compromise unveiled” (3/27/07)

⁶Attachment 6, “Mercury Air Concentrations in Northern Nevada”, Patrick Joyce, Dr. Glenn C. Miller, University of Nevada, Reno, January 2007.

⁷Attachment 7, “Mercury and Modern Gold Mining in Nevada, Greg Jones and Glenn Miller, University of Nevada, Reno, March, 2005.

⁸Attachment 8, “Global Mercury Assessment”, United Nations Environmental Programme, December, 2002

The State Party has demonstrated a callous disregard for the health effects of the Western Shoshone, and the Western Shoshone continue to be deprived of access to domestic courts to protect their rights and prevent further irreparable harm to their health, their lands, and their culture.

3. **The State party, through its Bureau of Land Management continues to process applications for the approval of a large-scale pipeline project to pump and transfer groundwater from Western Shoshone ancestral lands to the city of Las Vegas, which poses disastrous environmental consequences to the already arid lands from which those waters will be removed.**

The city of Las Vegas, Nevada, has been the fastest growing metropolitan area in the U.S. over the past thirty years. The population of the Las Vegas metropolitan area has grown from approximately 300,000 people in 1972 to more than 2,000,000 people today. Las Vegas is located in the Mojave Desert, and has less precipitation annually on average than any other metropolitan area in the U.S. Nearby Lake Mead, which was created as the result of the construction of the Hoover Dam, has gone down by more than forty meters from the height of the water level prior to the huge increase of population of Las Vegas. Las Vegas is running out of water, and the solution in the minds of city and state officials has been to acquire water from Western Shoshone ancestral lands in Eastern Nevada and to transport that water by means of a huge pipeline to be constructed across those lands. The pipeline can only be constructed with the approval of officials employed by the State Party's Bureau of Land Management, which has been acting quickly and without adequate environmental study to approve the necessary permits.

In the arid Western U.S., it has long been said that "water does not flow downhill, it flows towards money." In the case of the waters proposed to be exported from Western Shoshone lands to Las Vegas, it can veritably be said that these waters are destined, with State approval and encouragement, to flow from the areas in which they are needed by the indigenous people, the environment, the vegetation and the wildlife, to the city of Las Vegas where the water is wanted by people with money, the casinos, and the developers. This water exportation scheme has been the subject of much controversy in the low population areas from which the water is proposed to be exported, but the political power and the money behind those who stand to gain financially from the project has resulted in the State Party acting in concert with the proponents of the plan to approve the pipeline as quickly as possible.⁹

⁹ Attachment 9, "Pipeline will leave negative legacy - Pumping groundwater to Valley would damage rural Nevada." Reno Gazette-Journal, 10/28/07

4. The State Party has authorized the State of Nevada to permit multinational mining companies to permanently destroy huge areas of Western Shoshone ancestral lands and the water resources on those lands.

In the U.S., it is left to each individual State to determine how and by whom its water resources will be used, and what, if any, reclamation will be required in addition to some minor, inexpensive requirements of federal reclamation law. For example, in the State of Montana, cyanide, a lethal poison, is not allowed to be used due to prohibition by Montana State law. In Nevada, cyanide is allowed under Nevada State law, and virtually all of the gold produced by mines in Nevada is the result of cyanide heap leaching operations. Cyanide is allowed under federal law.

Under Colorado State law, before mining is completed at any mine in that State, the original contours of the land must be restored so that there remains no evidence that an area has been mined. In Nevada, however, mining companies are not required to restore the contours of the land that has been mined, and after mining is concluded the mining company is only required to put a shallow layer of topsoil in the bottom of what is sometimes a six hundred (600) meter or deeper pit and on top of the cyanide heap ore pad, and put some grass seed in that shallow top soil, in order to fully satisfy State reclamation law. The end result is that, in Nevada, there are huge deep pits and huge flat mountains of spent gold ore that will remain there forever.

Worse yet, and of immediate concern regarding urgency in this Committee's consideration, is the fact that the gold mine pits are so deep that they are below the water table. In order to mine under such conditions, the multinational mining companies must constantly pump huge quantities of water from some of those pits merely to keep the pits from becoming toxic lakes. When the mining ends, and the pumping stops, those pits will in fact become what the State party calls "Mine Pit Lakes." Despite the fact that the State party's own U.S. Fish and Wildlife Service has determined these Mine Pit Lakes in Nevada to "exceed aquatic life effect concentrations", the State party continues to allow these mine pits to be dug deeper and with full knowledge that these pit lakes "can turn out to be the site of perpetually contaminated water."¹⁰

The permanent harm to the environment of Western Shoshone ancestral lands and Nevada from the huge scale gold mining operations presently allowed by the State party has also been the subject of national debate and media attention. The New York Times succinctly noted in 2005 that the "Environment pays price for gold in Nevada."

¹⁰Attachment 10, Statement of Dan Randolph before the House Subcommittee on Energy and Mineral Resources, 8/21/07

¹¹Attachment 11, "Environment pays price for gold in Nevada", New York Times, 12/30/05

The scale of the devastation to the environment is beyond the comprehension of anyone who has not seen the effect with his or her own eyes. Accordingly, the Western Shoshone National Council and the Winnemucca Indian Colony respectfully request a site visit by the Committee, or the working group, in order to observe the State party's lack of responsibility in allowing mining operations to be conducted in the current fashion.

5. The State Party has during the past year started to store above ground nearly all of its high level nuclear waste and weapons grade nuclear material solely at the Nevada Test Site located on Western Shoshone ancestral lands, and continues to proceed with plans to open a nuclear waste repository at Yucca Mountain.

Since March, 2006, the State party has begun to store all of its weapons grade nuclear material solely at the Nevada Test Site (NTS) on Western Shoshone ancestral lands, and to store nuclear waste above ground at the NTS.¹² The proposed Yucca Mountain project continues to move forward by the expenditure to date of more than Ten Billion Dollars (\$10,000,000,000), however the short term solution to the nuclear waste storage problem has been to temporarily store some nuclear waste above ground pending final approval by the State Party of its plans to store all of the nuclear waste from nuclear power plants in the U.S. and 42 other countries at the planned Yucca Mountain site on Western Shoshone ancestral lands.

This storage of nuclear waste on Western Shoshone ancestral lands and the continued federal efforts to open the Yucca Mountain nuclear waste repository are contrary to the concerns expressed by the Committee in Paragraph 7 (b) of Decision 1 (68).

6. The State party continues to deny access of the Western Shoshone in national courts by preventing the adjudication of claims brought by the Western Shoshone on their merits, with five separate decisions on September 20, 2006, December 11, 2006, May 31, 2007, January 18, 2008, and June 4, 2009, dismissing the claims on domestic technicalities.

The Western Shoshone have continued to challenge in domestic courts the taking of their lands and resources by the State Party. In three separate rulings since September 20, 2006, the federal courts of the State party have refused to consider the claims asserted by the Western Shoshone challenging the legality of the ICC process and the federal court rulings, which followed that process. In each of those three separate decisions, the courts relied upon technicalities of U.S. law to dismiss the cases without addressing the merits of any claim brought by the Western Shoshone. These decisions have all been made by the domestic courts of the State Party since the time of this Committee's Decision 1(68) in March, 2006.¹³

¹²Attachment 12, two photographs of nuclear waste storage at the Nevada Test Site.

¹³Attachment 13(a), 13(b), and 13(c)

In effect, the State Party has passed laws to create technical obstacles that prevent the Western Shoshone from raising the issue of the illegality of the taking of their lands. By enacting legislation specifically designed to discriminate against American Indian, including the ICC law as described above, the legislative and executive branches of the State Party have prevented the domestic courts in the United States from addressing the issues of the legality of the proceedings and the taking of the lands by the State Party.

7. The State Party's accelerated granting of leases for "fracking" on July 17 and 18, 2014, in the context of the status, occupation and other uses of these lands threatens the water and land resources in these Western Shoshone communities.

The State Party has been permitting corporations to drill for oil and gas within the Western Shoshone territory using hydraulic fracturing, commonly known as fracking, which will devastate and pollute the groundwater, poison the wildlife and wild plants, already suffering through drought conditions, enter the food chain, and result in serious, even deadly, health consequences for the Western Shoshone people.

Last year the Bureau of Land Management began accepting applications for oil and gas exploration using the system of hydraulic fracturing or fracking, within Western Shoshone territory. Fracking has been banned from many countries because of the devastating effects on water quality and water quantity, and its resulting deadly effects on the health of humans, animals, and vegetation. The Bureau of Land Management did not do a complete Environmental Impact Statement to analyze potential adverse effects to the environment effects, but rather completed a shorter, more limited, and less expensive, Environmental Assessment. The Western Shoshone National Council was not contacted about this activity, but found out about it by accident. They sent a letter of opposition to the Bureau of Land Management, which included Decision 1(68). There was no response.

Over 5,000 comments, mostly critical of the action, were submitted to the Bureau of Land Management prior to the lease sale of 112 parcels. Including the Western Shoshone National Council, groups of farmers and ranchers, environmental groups, and one county were among those who submitted opposition and attended and spoke at hearings and meetings. Several of these parties have now initiated legal action against the Bureau of Land Management.

Despite the obvious concerns, the Bureau of Land Management issued a Finding of No Significant Impact and authorized the lease sale which was held on July 17, 2014. The leases are for a period of 10 years with annual rental fees of \$1.50 - \$2.00 per acre. In its finding of no significant impact, the Bureau noted that the leases might affect air quality, cultural resources, Native American religious concerns, riparian areas, threatened and endangered species, migratory birds, grazing, recreation, soil, vegetation, wildlife and visual resources, but concluded that none of these impacts were considered significant. All of these are significant to the people of the Western Shoshone Nation.

Because of a loophole in the environmental laws, oil and gas industries are exempt from most federal environmental laws including the Clean Water Act, Clean Air

Act, Safe Drinking Water Act, and the National Environmental Policy Act. Those who suffer from the toxic chemicals released into the water and onto the land have no recourse. Disposal by injection of frack waste into ponds has been related to the dramatic increase in earthquake activity, even in areas that never experienced earthquakes before. Several of the drill sites are very close to Yucca Mountain.

Western Shoshone have a different relationship with the earth than most other people. They are caretakers of the land, and in their belief, they were put where they are to do so. Water is spiritual to them, water is life to them; its purity of utmost importance, used in ceremony. Western Shoshone don't usually move from their land. If their sacred water turns deadly, many will stay on their land regardless. The chemicals will eventually sicken and kill them, and the culture will be gone. The plants, the wildlife, the water, the burial sites, the ceremonial sites cannot be replaced. They will die off and so will their language and customs.

8. The State party has made a final decision and announced its intention to detonate a huge bomb on Western Shoshone ancestral lands, in violation of the Nuclear Non-Proliferation Treaty and the domestic ban on the development of new nuclear weapons.

On April 4, 2006, the State party announced its decision to detonate 700 tons of high explosives at the Nevada Test Site, which is located on Western Shoshone ancestral lands. The Western Shoshone were forcibly removed from those lands which became the Nevada Test Site in 1951, and the State party admits to having detonated 928 above-ground and below-ground nuclear bombs on those lands between 1951 and 1992. The “test” announced on April 4, 2006, was named “Divine Strake.”

On April 20, 2006, a proceeding to stop “Divine Strake” was commenced in the United States District Court in Las Vegas, in the case entitled Winnemucca Indian Colony, et al. v. United States of America, Donald Rumsfeld, et al. Those documents filed with the court also included the Affidavits of scientific and legal experts who have challenged the legality of the State party’s decision to conduct the “Divine Strake” test. Of particular import to this CERD matter is the Affidavit of John Burroughs, the Executive Director of the Lawyer’s Committee on Nuclear Policy in New York City. Attorney Burroughs explains why the planned “Divine Strake” test is in violation of the State party’s obligations under the Nuclear Non-Proliferation Treaty and the 1996 advisory opinion of the International Court of Justice.

It is noteworthy to point out to CERD that the State party is simultaneously asking the UN to impose sanctions against North Korea and Iran under the Nuclear Non-Proliferation Treaty, while the State party is itself actively planning to violate its obligations under that same Treaty. Enclosed are documents which reflect that the State party admits that “Divine Strake” is intended to provide information to be used to develop a new nuclear bomb to be used to attack all potential adversarial “hardened and deeply buried targets.” The Winnemucca Indian colony, on behalf of itself and all other Western Shoshone, respectfully requests that CERD express particular concern about the use of Western Shoshone ancestral lands for the purpose of developing and testing nuclear weapons, and that CERD further urge the State party to respect and obey its international Treaty and domestic legal obligations of disarmament and Nuclear Non-Proliferation.

9. The State party is presently involved in legislative efforts to suspend domestic legal procedures and environmental standards as part of ongoing federal efforts to open a high-level nuclear waste repository at Yucca Mountain.

Since the time of the 68th session of CERD, legislation has been introduced in the United States Congress that would exempt the planned high-level nuclear waste repository at Yucca Mountain from substantive and procedural environmental laws and regulations, including the establishment of radiation exposure standards unique to that project. The package of legislative reforms includes plans to more than triple the amount of nuclear waste to be stored at Yucca Mountain.

Yucca Mountain is located on Western Shoshone ancestral lands, and the area has great spiritual significance to the Western Shoshone. As to Yucca Mountain, the response of the State party since the time Decision 1 (68) was issued has been to expedite federal efforts to develop and open the nuclear waste dump there. The Winnemucca Indian colony, on behalf of itself and all other Western Shoshone, respectfully requests that CERD express particular concern about federal actions to open the planned Yucca Mountain nuclear waste repository, and to exempt that project from otherwise applicable

legal and environmental standards, and that CERD further urge the State party to desist from any further efforts to open a nuclear waste repository at Yucca Mountain.

10. The State Party is presently involved in legislative and regulatory efforts to prevent the Western Shoshone from their traditional ways of harvesting foods and medicinal herbs, which State denial of traditional practices threatens the health and spiritual and cultural traditions of the Western Shoshone.

On December 20, 2007, the State Party proposed to adopt federal regulations to restrict and prevent the Western Shoshone from engaging in their traditional harvest of all Shoshone medicine plants, including those used in ceremonies, many Native food sources, e.g. pine nuts, the traditional staple food, and Native basketry or tool and implement crafting materials. Although the U.S. Forest Service uses non-Indian commercial pine nut harvesters to locate the best auction sites, they did not seek the same harvesters, nor did they seek out Native People for advice about the costs of harvest or sustainable harvest limits when setting the new rule. Shoshone would be required to obtain permits to gather culturally important plants and native foods, interfering with the freedom to practice their religion.

The new rule sets sustainable harvest by looking at levels over the past three years rather than individual plant production cycles, e.g. pine nuts are on a 4-7 years cycle depending on weather and other factors. No protection would be provided for culturally important plants. Some gathering rights are preserved where treaties specifically spell out gathering rights. The Ruby Valley Treaty of peace and friendship only allowed safe passage and gave up no rights to food, medicine, or spiritual plants. Only federally recognized tribes would have an exemption. Some ceremonies, including coming of age ceremonies, requiring pine nuts have virtually disappeared. The language surrounding this use is almost faded from memory.

Further, the concept of "personal use" relates mostly to non-subsistence use. Many Shoshone groups do not believe in selling food, but rather harvest and share with elders and extended families. Some federal agencies describe commercial use as more than 20 lbs. Per year of pine nuts. Pine nuts are used traditionally for flour, oil, and gravies, as well as medicine. Could the average American subsist on 20 lbs of meat per year? Some Shoshone always traded excess pine nuts for other foods.

While pinyon trees bearing pine nuts are being burned in "hazardous fuel reduction plans" like the one in the BLM management plan that would use prescribed and natural burns to torch 3.6 million acres of over 11 million acres in the next several years, no evaluation of economic impact has been undertaken. Pine nuts average \$14-16 per lb. While over 8 million metric tons of pine nuts are imported from other countries, the BLM and USFS burn the pine nuts, further impoverishing Shoshone and making them have to purchase rather than conduct traditional harvest.

No cumulative impact studies have been undertaken to measure the effects of drought, recent devastating insect infestation, plans to deplete water by pipeline, dewatering, and water table-lowering by mining operations.

ATTACHMENT 1

**PERIODIC REPORT
OF THE
UNITED STATES OF AMERICA
TO THE U. N. COMMITTEE ON THE ELIMINATION
OF RACIAL DISCRIMINATION
CONCERNING THE INTERNATIONAL CONVENTION ON THE
ELIMINATION
OF ALL FORMS OF RACIAL DISCRIMINATION
APRIL 2007**

**PERIODIC REPORT OF THE UNITED STATES
TO THE U.N. COMMITTEE ON THE ELIMINATION OF RACIAL
DISCRIMINATION**

CONTENTS

	<u>Page</u>
Introduction	1
I. GENERAL	2
A. Background	2
B. Land and People	2
C. General Political Structure	11
D. General Legal Framework	12
E. Information and Publicity	14
F. Factors Affecting Implementation	15
II. INFORMATION RELATING TO ARTICLES 2 TO 7 OF THE CONVENTION	15
Article 2	16
A. Information on the legislative, judicial, administrative or other measures that give effect to the provisions of article 2, paragraph 1	16
B. Information on the special and concrete measures taken in the social, economic, cultural and other fields, in accordance with Article 2, paragraph 2	45
Article 3	48
Article 4	49
A. Information on the legislative, judicial, administrative or other measures that give effect to the provisions of article 4	49
B. Information on appropriate measures taken to give effect to General Recommendations 1 of 1972, VII of 1985, and XV of 1993	51
C. Information in response to Decision 3 (VII) adopted by the Committee on 4 May 1973	52

Article 5	
Information on the legislative, judicial administrative or other measures that give effect to article 5, taking into consideration General Recommendations XX and XXII	54
A. The right to equal treatment before the tribunals and all other organs administering justice	54
B. The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by an individual group or institution	64
C. Political rights – Information on the means for guaranteeing these rights, and on their enjoyment in practice	69
D. Other civil rights	74
E. Economic, social, and cultural rights	74
Article 6	95
A. Information on the legislative, judicial, administrative or other measures that give effect to the provisions of article 6, in particular measures taken to assure effective protection and remedies through competent national tribunals and other State institutions	95
B. Measures taken to assure everyone the right to seek from such tribunals just and adequate reparation or satisfaction for any damage	97
C. Information on the practice and decisions of courts and other judicial and administrative organs	97
D. Information in connection with General Recommendation XXVI	97
Article 7	98
Conclusion	103
Committee Comments and Recommendations	103
ANNEX I – Examples of State Civil Rights Programs	
ANNEX II – Background on Matter Raised by Certain Western Shoshone Descendants	
ANNEX III – Domestic Laws	

Annex II

Background on Matter raised by Certain Western Shoshone Descendants

Executive Summary.

1. (a) The United States recognizes, as a historical matter, that indigenous people throughout the world have been unfairly deprived of the lands they once habitually occupied or roamed. Such ancestral lands once constituted most of the Western Hemisphere. In 1946, recognizing that many Indian tribes in the United States had been unfairly deprived of such lands, the U.S. Congress established a special body, the Indian Claims Commission (ICC), to hear claims by Indian tribes, bands, or other identifiable groups for compensation for lands that had been taken by private individuals or the government. The ICC provided Indian claimants greater access and more flexible rules under which to pursue their claims than would otherwise have been available to the general public.

(b) In 1951, the Western Shoshone, represented by the Te-Moak Bands, brought such a claim. That claim was successful, resulting in a decision (over objections of the U.S. Government) that Western Shoshone aboriginal title had been extinguished. The parties to the litigation stipulated that the lands were taken in 1872. A valuation trial was held and the ICC declared the value of the lands and sub-surface rights to be over \$26 million at the valuation date – compensation that is worth approximately \$157 million as of March 2007.

(c) The petitions submitted by certain Western Shoshone descendants to the Committee on the Elimination of Racial Discrimination (CERD) concern an internal dispute among Western Shoshone descendants about the litigation strategy pursued in that claim. Certain Western Shoshone descendants, who were themselves part of the litigating group, objected to seeking compensation for all Western Shoshone lands; instead they preferred not to claim compensation for a portion of the lands in favor of restoration of those lands. However, they failed to raise their objections in a timely manner so that the matter could be dealt with in the litigation under applicable law. Specifically, the ICC and appellate court found that their attempt to intervene in the proceedings was untimely because: (1) they had waited 23 years from the start of the case before seeking to participate, despite admitting in their filings to the court that they had been aware of the ICC proceedings for a very long time; (2) they had not presented an excuse to the court for the delay; and (3) they had not demonstrated fraud or collusion by the Te-Moak Bands, which were prosecuting the case on behalf of the Western Shoshone, and the U.S. Government. Because they were unsuccessful in pursuing their objections, the Western Shoshone descendants who disagreed with the decision of the Te-Moak Bands now seek to bring this issue before the CERD, despite ample recourse before U.S. courts, including the U.S. Supreme Court, and despite the fact that their position does not represent the views of all Western Shoshone descendants, most of whom wish to receive the compensation as awarded by the ICC.

ATTACHMENT 2

MEETING: WESTERN SHOSHONE CLAIMS UPDATE
BIA ENROLLMENT APPLICATION PROCESS / DEADLINE
 AND
"PRIVACY ACT" IMPACT & POTENTIAL PROCEDURE FOR EDUCATIONAL TRUST FUND
 and / or *EDUCATIONAL ADMINISTRATIVE COMMITTEE*

AGENDA

February 11, 2008, at 10:00 a.m. (Monday) to noon
 Bruce Thompson Court House, Federal Building
 400 S. Virginia St., Suite 902, Reno, NV 89501

CALL TO ORDER: Mr. Felix Ike of Western Shoshone Claims Steering Committee

OPENING PRAYER: Mrs. Daisy Smith, Elder Western Shoshone

WELCOME & INTRODUCTIONS:

1. Tracy Hartzler-Toon, Counsel to the Majority
Committee on Indian Affairs
Senator Harry Reid of Nevada
2. Karen H. Whitenton, Fiduciary Trust Officer
Office of the Special Trustee for American Indians
Field Operations – Western Nevada, Carson City
3. Guests: BIA, Eastern and Western Nevada Agencies
4. Western Shoshone Tribal Chairpersons / Representatives

UPDATE:

1. Mrs. Hartzler-Toon comment on Senator Reid interim budget request for BIA, Phoenix Area, for processing claims (Omnibus Bill); Explanation on FY 09 budget preparation; **Other questions / answers.**
2. Mrs. Whitenton comment on Steering Committee Request on one page "insert or flyer" with checks reviewing Public Law protection of per Capita payment(s) **and** on one page "insert" for release of information related to the Educational Trust Fund; Annual review of Trust Account; **Other questions / answers.**
3. Mrs. Daisy West (BIA Central) Cancelled her attendance due to medical problem. Was to comment on progress of the BIA's enrollment applications process.
4. Tribal Chairpersons / Representatives to **discuss:** Contract for research technicians; Application deadline; "Privacy Act" implications for Educational Trust Fund. **See next 2 attached sheets**

- BRIEF COMMENT:**
1. Mr. Felix Ike brief presentation of "Checklist-Time Frame / Tracking for P.L. 108-270"
 - 2 (time permitting). Mrs. Nancy Stewart (WSCSC) on question of development / draft of "Educational Trust Fund Rules, Regulations, & Procedures" for approval by Tribes; Comment on Educational web site.

CLOSING PRAYER: Mrs. Daisy Smith, Elder Western Shoshone

ADJOURNMENT: Mr. Felix Ike (Lead Co-chair, WSCSC)

Note: *Federal Register* (3/5/2007)—Direct quotes from "Final Rule" p. 9837 (Privacy Act) and p. 9838 (Deadline)

Comment: BIA should provide a copy of the completed roll to the Administrative Committee responsible for the Western Shoshone Educational Trust Fund.

Response: The Western Shoshone per capita payment roll is subject to the provisions of the Privacy Act. The information contained on that roll will not be released to anyone without the explicit permission of the individuals listed. Each individual who participates in the distribution has the option to decide if they want to release information to a third party concerning their participation in the distribution.

The Administrative Committee will need to develop a procedure for collecting such information from individuals who want to voluntarily reveal their participation in the Western Shoshone judgment fund distribution.

Application Deadline

We will not establish a firm application deadline in this rule. In order to allow adequate time for submitting and processing applications we will establish a deadline using the following three steps:

Step 1. One hundred and eighty days (180) after opening the enrollment application process, we will count all applications that we have received.

Step 2. We will note the date on which we complete the eligibility determinations of 90 percent of the applications that we receive by the date established under Step 1.

Step 3. The application deadline will be 90 days after the date noted in Step 2.

For example, if we receive 10 applications during the first 180 days after opening the application process, the final application deadline date will be 90 days after we process 9 applications. Similarly, if we receive 10,000 applications during the first 180 days after opening the application process, the final application deadline date will be 90 days after we process 9,000 applications.

We will take several steps to ensure that all potential applicants are informed of the application deadline date for filing applications to share in the Western Shoshone judgment fund distribution.

1. We will notify all BIA Regional Directors and Agency Superintendents and require them to post notices in regional offices, agency offices, community centers on and near reservations, and in Indian Health Clinics.

2. We will notify tribal newspapers and newspapers of general circulation

/Rules and Regulations

in major communities in Nevada, California, Idaho, Arizona, Oregon and Utah.

3. We will hold community meetings in Reno and Las Vegas, Nevada, and on or near the Indian reservations or the established service areas for the following tribes: Duckwater, Duck Valley, Ely, Fallon, Ft. McDermitt, Te-Moak, Timbisha and Yomba.

At each of the community meetings we will:

(1) Inform potential beneficiaries of the application deadline date for filing applications to share in the distribution of the Western Shoshone judgment fund;

(2) Inform potential beneficiaries of eligibility criteria; and

(3) Help applicants to prepare and file applications.

ATTACHMENT 3



HEALTH ADVISORY

The Nevada State Health Division has determined that a potential public health problem may exist from eating **Walleye** caught in Chimney Dam Reservoir. Studies performed by the State Dept. of Wildlife, in conjunction with the State Division of Environmental Protection, have found elevated levels of methylmercury in **Walleye** in this body of water.

The Nevada State Health Division recommends that until further notice:




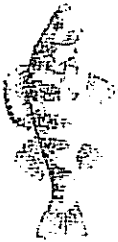
- No one should eat **Walleye** from Chimney Dam Reservoir

The methylmercury levels in the fish will continue to be evaluated. Future advisories will be modified as conditions warrant. For more information on the levels in specific species, please visit the Nevada Department of Wildlife's website: www.ndow.org or call: 775.688-1500.

Health advisory issued March 2007

HEALTH ADVISORY

The Nevada State Health Division recommends no consumption of walleye from Chimney Dam Reservoir

Species	Mercury Average (ppm)	Recommended Fish Meals/Month**
Walleye 	1.98	None
Carp 	0.72	1
White Crappie 	0.71	1
Yellow Perch 	0.46	2




* The mercury numbers are based on edible fish tissue samples taken by the Nevada Department of Wildlife from 2004-2007 and analyzed by the Environmental Protection Agency in Richmond, CA. Samples will continue to be evaluated.

** This recommendation is in line with USDA-EPA guidance issued in March 2004. The assumed meal size is 8 oz.

* Fish absorb methylmercury as they feed in affected waters and it builds up over time. Depending on what the fish eat, it builds up more in some types of fish and shellfish than others. For more information visit www.ndow.org.

HEALTH ADVISORY

The Nevada State Health Division recommends
no consumption of largemouth bass or
northern pike from Comins Lake

Species	Mercury Average (ppm)*	Recommended Fish Meals/Month**
 Northern Pike	1.20	None
 Largemouth Bass	1.25	None
 Rainbow Trout	0.85	1







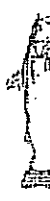
* The mercury numbers are based on edible fish tissue samples taken by the Nevada Department of Wildlife from 2004-2007 and analyzed by the Environmental Protection Agency in Richmond, CA. Samples will continue to be evaluated.

** This recommendation is in line with USDA-EPA guidance issued in March 2004. The assumed meal size is 8 oz.

- Fish absorb methylmercury as they feed in affected waters and it builds up in them over time. Depending on what the fish eat, it builds up more in some types of fish and shellfish than others. For more information, visit www.ndow.org.

HEALTH ADVISORY

The Nevada State Health Division recommends no consumption of wipers and walleye and no more than one eight-ounce meal per week of any other fish from Rye Patch Reservoir

Species	Mercury Average (ppm)*	Recommended Fish Meals/Month**
Walleye 	2.89	None
Wiper 	3.26	None
White Crappie 	0.67	4
Carp 	0.46	4
Yellow Perch 	0.51	4
Green Sunfish 	0.98	4
Brown Bullhead 	0.56	4






* The mercury numbers are based on edible fish tissue samples taken by the Nevada Department of Wildlife from 2004-2007 and analyzed by the Environmental Protection Agency in Richmond, CA. Samples will continue to be evaluated.

** This recommendation is in line with USDA-EPA guidance issued in March 2004. The assumed meal size is 8 oz.

- Fish absorb methylmercury as they feed in affected waters and it builds up over time. Depending on what the fish eat, it builds up more in some types of fish and shellfish than others. For more information visit www.ndow.org

Nevada Department of Wildlife

The Nevada Department of Wildlife is providing this data to the angler community for informational purposes only. There is no health advisory in effect for Wildhorse Reservoir

Species	Mercury Average (ppm)*	Recommended Fish Meals/Month**
Channel Catfish 	0.52	1
Smallmouth Bass 	0.51	1
Yellow Perch 	0.33	2
Rainbow Trout 	0.14	8
Brown Trout 	0.09	8

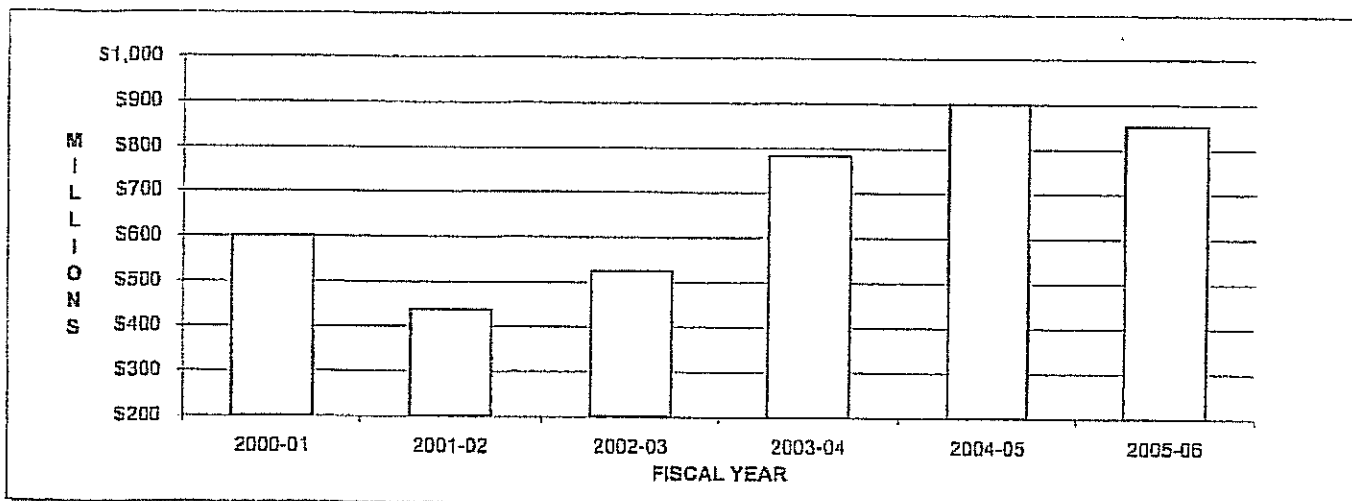
* The mercury numbers are based on edible fish tissue samples taken by the Nevada Department of Wildlife from 2004-2007 and analyzed by the Environmental Protection Agency in Richmond, CA. Samples will continue to be evaluated.

** This recommendation is in line with USDA-EPA guidance issued in March 2004. The assumed meal size is 8 oz.

Fish absorb methylmercury as they feed in affected waters and it builds up over time. Depending on what the fish eat, it builds up more in some types of fish and shellfish than others. For more information visit www.ndow.org.

ATTACHMENT 4

ACTUAL NET PROCEEDS OF MINERALS ASSESSED VALUATIONS



FISCAL YEAR	ACTUAL ASSESSED VALUATION*	% CHANGE FROM PRIOR YEAR	FISCAL YEAR	ACTUAL ASSESSED VALUATION*	% CHANGE FROM PRIOR YEAR
2000-01	\$ 601,362,809	2.40%	2003-04	\$ 783,208,831	49.31%
2001-02	438,013,468	-27.16%	2004-05	899,953,526	14.91%
2002-03	524,535,480	19.75%	2005-06	853,038,767	-5.21%

* Based on actual calendar year reports to the Department.

ACTUAL NET PROCEEDS OF MINERALS ASSESSED VALUATIONS BY COUNTY

COUNTY	2003-04	2004-05	2005-06
Carson City	\$ -	\$ -	\$ -
Churchill	11,741,724	31,139,107 (1)	22,707,635
Clark	4,460,800	3,485,211	3,665,792
Douglas	36,578	29,374	18,350
Elko	87,242,534	104,523,070	73,710,852
Esmeralda	493,178	594,393	126,885
Eureka	207,305,771	248,186,052	270,408,434
Humboldt	85,028,363	70,036,472	52,450,411
Lander	233,414,110	265,538,030	206,044,239
Lincoln	44,877	20,813	35,799
Lyon	140,751	192,788	96,422
Mineral	5,884,381	8,221,458	7,424,840
Nye	137,687,050	147,725,274 (1)	154,270,419
Pershing	1,439,464	15,876,466	19,206,532
Storey	402,530	1,025,199	2,015,975
Washoe	989,482	2,637,610	2,322,364
White Pine	6,897,238	715,600	38,533,818
TOTAL	\$ 783,208,831	\$ 899,946,917	\$ 853,038,767

Note (1): Per 2005-06 Net Proceeds of Minerals Bulletin, page 4, column "2004".

ATTACHMENT 5

5-11-07

Nevada
Legislature

25

Days left in session

TODAY'S HOT TOPIC:
OFFICIAL PAY INCREASES

The Assembly Government Affairs Committee debates Senate Bill 516, which allows for pay increases for various local government officials, including \$22,000 for the Clark County Sheriff and \$18,000 for Washoe County Sheriff Mike Haley.

WHAT DO YOU THINK? Log on to RGJ.com to join in the debate.

IN THEIR OWN WORDS

"This isn't about fair competition, this is about greed. This is about a cycle of debt that they never get off. If we don't expand the law to check, it's pretty easy to see what everyone will do — no one will re there will be nothing to stop those abuses."

Assembly Speaker Barbara Buckley, D-Las Vegas is talking about high have evaded the 2005 payday loan law and need to be stopped.

Study finds three kinds of mercury exiting state mines

BY AMANDA FERRI
ASSOCIATED PRESS

Regulators announced Thursday that new monitoring at five of Nevada's largest mines has shown three kinds of mercury are coming out of smokestacks, including a gaseous form that can find its way into fish.

The findings tell the Nevada Division of Environmental Protection what kinds of pollution control technology to require at the mines, agency spokesman Danie Pistone said. The monitoring program is the

first for its kind in the country and requires mines to work with a third party to test the emissions coming out of their equipment.

Tests found the presence of an oxidized, vaporous form of mercury, but further tests are needed to determine how much.

"The oxidized form is the most reactive form, the form that is deposited more locally. That's the one that could potentially make it into Nevada waterways," Pistone said.

The Assembly this week unanimously approved Assembly Bill 115, which would require higher

fees of mining companies to pay for two new positions at NDEP to regulate mercury emissions. The proposal has support from Gov. Jim Gibbons, Pistone said.

Nevada is the nation's top gold producer, producing 78 percent of the total amount mined in the country. The state produces 12 percent of the world's gold. The calculated value of gold produced in Nevada was \$3.8 billion last year, up about \$750 million from 2005.

In February, the NDEP announced its first enforcement action against a mine accused

of violating new pollution standards. Department Administrator Leo Drexeloff said that announcement was made in part to emphasize the state means business about controlling mercury pollution.

The new rules require mines that release significant amounts of mercury to install scrubbers and similar technology to control smokestack emissions.

Mercury is released into the atmosphere during roasting and other refining procedures used to extract gold from ore.

Assembly members to raise welfare pa

ASSOCIATED PRESS

Assembly members of a joint budget subcommittee voted along party lines Thursday to raise welfare payments, which haven't gone up since 1993, by 15 percent.

Under the plan advanced by Assemblywoman Sheila Leslie, D-Reno, the maximum payment of \$348 a month for a family of three would go up by \$52.

The plan would cost \$3.2 million over the coming two fiscal years, and the money would come from an existing reserve fund that now holds about \$27 million, Leslie said. The vote was 4-2, with As-

sembly member committee and Repub Senators to get panel proposal, a budget two hours before adjoi "I think a since 1993 afford it," I meeting. "V sitting in re due. It's tim est families: Leslie also loads are d welfare law who qualify receive it in

This Mother's Day Delight Mom with a Special Gift

<http://www.rgj.com/news/stories/html/2005/08/26/107404.php?sps=rqj.com&sch=Umbrella&sp1=rqj&sp2=umbrella&sp3=umbrella&sp5=RGJ.com&sp6=news&sp7=umbrella&ismultitag=umbrella.rgj.com>

Tests show high levels of mercury in air near mines

Jeff DeLong
RENO GAZETTE-JOURNAL
8/26/2005 01:07 am

An Idaho conservation group says tests it conducted near eastern Nevada gold mines revealed high levels of mercury in the air, offering new evidence the mines could be polluting downwind states.

Industry representatives counter the samples collected by the Idaho Conservation League represent no real health danger and insist they are working with Nevada regulators to minimize mercury releases.

The aerial tests are the latest development in mounting debate over mercury emissions from mines and their potential effects on Nevada's neighbors.

Measurements taken July 25 near mines in the Carlin-Elko area found mercury concentrations of more than 100 times what would normally be expected in the environment, said Justin Hayes, program director for the conservation league. Mercury measured in the town of Carlin itself were up to 10 times above normal levels.

"We think our data shows (mines) have a very measurable impact, especially if you're downwind," Hayes said. "This proves beyond any shadow of a doubt these mines are having impacts on air quality and that means impacts on human health."

The league, which has threatened to sue the U.S. Environmental Protection Agency over mercury releases from Nevada mines, is concerned about high levels of the toxic substance being found in Idaho's fish. Others in Utah are worried after federal researchers found some of the highest levels of mercury ever measured anywhere in the waters of the Great Salt Lake.

Nevada mines were identified as a possible source of mercury after the EPA revised rules in 1998 to add mercury to the list of toxic discharges required to be reported. Nevada's four biggest mining companies reported the release of more than 10 tons of mercury, making Nevada the nation's No. 1 source of mercury emissions at the time. Mercury is released into the air during roasting and other refining processes used to extract gold from ore.

A voluntary emissions program started in 2001 already has resulted in a near 75 percent reduction in emissions from the releases cited by EPA in 1998, Drozdoff said.

The league's findings, Drozdoff said, don't "change anything about where we're headed."

Initial recommendations from NDEP about a strengthened mercury-control program are expected in October, with a final plan expected by the end of the year.

"In my mind, we've got a job at hand to do and we're going to continue to do what we've committed to," Drozdoff said.

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WSJ_mercury.pdf

<http://www.rgj.com/news/stories/html/2005/08/26/107404.php?sps=rgj.com&sch=Umbrella&sp1=rgj&sp2=umbrella&sp3=umbrella&sp5=RGJ.com&sp6=news&sp7=umbrella&jsmultitaq=umbrella.rgj.com>

Tests show high levels of mercury in air near mines

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8/26/2005 01:07 am

<http://news.rgj.com/apps/pbcs.dll/article?AID=/20070327/NEWS11/703270342/1004/NEWS>



Mercury compromise unveiled

Jeff DeLong (JDELONG@RGJ.COM)

RENO GAZETTE-JOURNAL
March 27, 2007

A compromise designed to strengthen Nevada's new regulations to control mercury emissions from precious metal mines was unveiled to state lawmakers Monday, winning the support of regulators, the mining industry and environmentalists.

Changes proposed by state Assemblywoman Sheila Leslie, D-Reno, would require the state to update worker safety regulations for mercury in mines and to hire two additional inspectors to perform spot checks on mines to ensure mercury regulations are being obeyed.

Leslie dropped a provision in her bill that would impose a limit on mercury emissions and to reduce, if possible, those emissions by at least 25 percent by 2012. Mining industry representatives said they would have fought that requirement "on several levels" but will support the compromise bill.

No action was taken Monday by the Assembly Committee on Commerce and Labor and amended legislation will be prepared for a future vote, Leslie said.

"I think it's a good negotiation when nobody got everything they wanted but everyone can support the final product," Leslie said. "In the end, it moves the state forward."

Russ Fields, executive director of the Nevada Mining Association, said the industry supports the proposed changes as an improvement to first-of-their-kind regulations on mercury emissions from precious metal mines adopted last year by the Nevada Environmental Commission.

"It goes back and relies on the mercury control program that has begun to work, and work well," Fields said.

Environmentalists also lauded the compromise.

"We think this is a win," said Dan Randolph, director of Great Basin Mine Watch. The two additional inspectors for the Nevada Division of Environmental Protection will substantially improve the state's ability to enforce its regulations while an update to antiquated mine safety regulations for mercury is long overdue, Randolph said.

"It's a good step forward that can protect the people ... and also protect the environment," Kyle Davis, policy director for the Nevada Conservation League, told lawmakers.

Leo Drozdoff, NDEP administrator, said the two new inspectors would substantially boost his department's on-the-ground ability to enforce its regulations, with inspections to be conducted at large and smaller mines. Some visits will be made by surprise.

"It basically allows us to spend a very good amount of time out at these sites and with a new program, that's a good idea," Drozdoff said.

Also testifying Monday was John Mauldin, a Battle Mountain resident who, along with three family members, is suffering from mercury poisoning that he said came from eating contaminated Nevada fish.

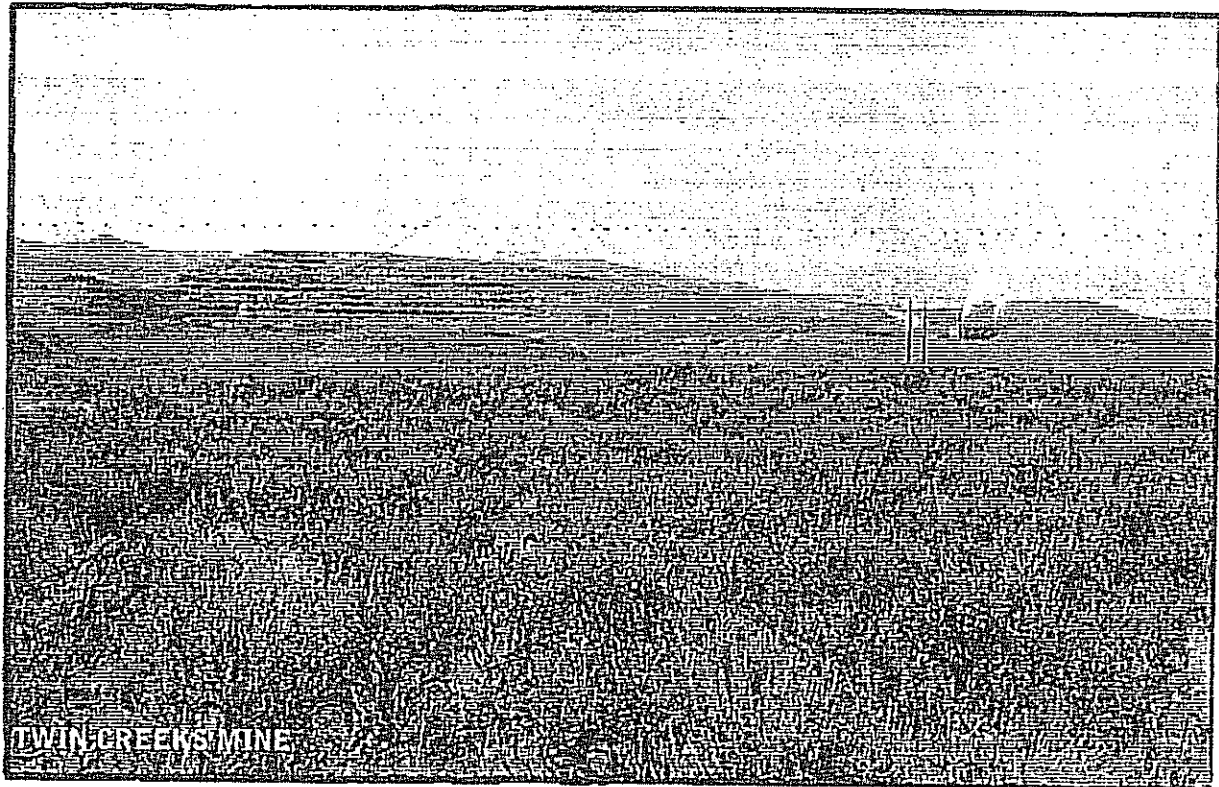
Mauldin urged lawmakers to do all they can to improve monitoring and testing for the toxic substance so others don't become ill.

"I really do not want to see anybody go through what I have had to endure the last 10 years," Mauldin said.

Mercury, naturally found in Nevada's rocks and soil, is released into the atmosphere during roasting and other refining processes used to extract gold from ore. A neurotoxin, it is particularly dangerous to children and developing fetuses.

ATTACHMENT 6

Mercury Air Concentrations in Northern Nevada: MONITORING ACTIVE METALS MINES AS SOURCES OF MERCURY POLLUTION



January, 2007
Patrick Joyce
Dr. Glenn C. Miller
University of Nevada, Reno
Department of Natural Resource & Environmental Science

Introduction

Gold mines in northern Nevada are a significant source of mercury air emissions, particularly from a variety of thermal sources at each mine, including roasters, carbon kilns, retorts, autoclaves and furnaces. The US EPA's Toxics Release Inventory (since 1998) and the 2006 Nevada state regulations require mining companies to report their mercury air emissions on an annual basis. In recent years, individual metals mines around the state have reported anywhere from 0 to 9,400 pounds of mercury emissions per year.¹

However, inconsistencies in data collection lead to questions of the validity of some of these reported numbers. Rigorous source measurements are not required for compliance with TRI reporting (only a best estimate), and, neither the federal or state program currently requires ambient air monitoring to determine mercury concentrations in and around mining facilities. Without an ambient air monitoring program, a reconciliation of total mercury emission reporting with the actual mercury concentrations in air is effectively not possible. Ambient air concentrations are also required to assess impacts of mercury on human health and the environment.

One previous study² (Idaho Conservation League, 2005) measured mercury concentrations in air around selected mines. This study found elevated concentrations of mercury downwind from certain mines, compared to ambient air upwind or distant from the mines. In at least one case, ambient mercury concentrations were observed to be over 100 times background concentrations.

The purpose of the present study is to determine if a readily available and field transportable instrument would be useful for determining mercury concentrations in ambient air, particularly around gold mines. We also sought to determine if the concentrations of mercury in ambient air around gold mines are sufficiently elevated to obtain useful data, compared to background sites?

In order to answer the above questions an instrument was selected, and a series of trips were taken in northern Nevada to assess the utility of the instrument and to measure ambient mercury concentrations in air at several sites in northern Nevada.

Instrument

The instrument used to collect instantaneous levels of mercury in ambient air was an RA-915+ Zeeman Spectrometer, rented from Ohio Lumex of Twinsburg, OH. A one-day training course was taken and proper maintenance according to the manual was performed. This instrument has an internal calibration source, and

does not require external standards. The EPA reported the following in a May 2004 evaluation of the instrument:

"The RA-915+ Mercury Analyzer is a portable AA spectrometer with a 10-meter (m) multipath optical cell and Zeeman background correction. Mercury is detected without preliminary accumulation on a gold trap. Mercury samples are heated to 750-800°C, causing organic materials to be decomposed and mercury to be vaporized in a carrier gas of ambient air. The airflow carries the vaporized mercury to be carried to the analytical cell. The RA-915+ includes a built in test cell for field performance verification. The operation of the RA-915+ is based on the principle of differential, Zeeman AA spectrometry combined with high frequency modulation of polarized light. This combination eliminates interferences and provides the highest sensitivity. A mercury lamp is placed in a permanent magnetic field in which the 254-nm resonance line is split into three polarized components, two of which are circularly polarized in the opposite direction. These two components (σ^- and σ^+) pass through a polarization modulator, while the third component (π) is removed. One σ component passes through the absorption cell; the other σ component passes outside of the absorption cell and through the test cell. In the absence of mercury vapors, the intensity of the two σ components are equal. When mercury vapor is present in the absorption cell, mercury atoms cause a proportional, concentration-related difference in the intensity of the components. This difference in intensity is what is measured by the instrument.³

The elimination of background interference, portability, and low detection limit made the RA-915+ a useful instrument for this project. This instrument continuously monitors elemental mercury concentrations in air and reports concentrations of mercury each second.

Limitations

Measurements were limited to areas where public access was available. Thus, we were not always able to access locations directly downwind from some facilities, or take measurements at similar distances from each operating facility. Similarly, information was not available concerning operating hours of processing facilities, so we were not able to coordinate measurements with times when processing facilities were in operation or at peak operation. While atmospheric mercury can exist in particulate, divalent, or elemental forms, the elemental form is almost always the predominant form. It is also the only form measured with this instrumental configuration. Finally, the measurements

Conclusions

Ambient mercury concentrations were measured downwind from ten gold mines in northern Nevada. Spot sampling revealed mercury concentrations significantly higher than detection limits and background levels at seven of these facilities. The performance of the mercury determination instrument for this brief study was very good and indicates that the instrument can yield useful results and be operated with minimal training. Thus, it has applications for use by mining companies for a routine monitoring of mercury concentrations in air for purposes of protection of worker health, as well determining ambient air concentrations at the open-air mine sites.

The highest 60 second averaged ambient air mercury concentrations were measured at the Twin Creeks (259 ng/m³; maximum of 694 ng/m³), Coeur Rochester (1619 ng/m³; maximum of 2326 ng/m³) and Marigold mines (1463 ng/m³; maximum of 3120 ng/m³). These elevated concentrations (compared to background concentrations of <5 ng/m³) tended to occur directly downwind from processing facilities. The lowest ambient air mercury concentrations were measured at the Florida Canyon and Lone Tree mines, with mercury concentrations not substantially different from background concentrations. While these measurements were not designed to comprehensively determine mercury concentrations in air within a mine site, it was clear that the concentration of mercury was highly dependent on the wind direction as well as the proximity to operating facilities. Highest concentrations were determined downwind from processing facilities, while much lower concentrations (near background) were determined upwind from each mine.

These concentrations were much higher than expected and approach concentrations where impacts to worker health and safety, particularly to women of child bearing age, should be assessed.

Actively leached cyanide heaps were found to be potentially large sources of release of mercury into the atmosphere. Particularly at the Coeur Rochester heap, elevated concentrations were observed near wet (active) portions of the heap, while dry sections had much lower concentrations. These heaps are presently an unrecognized source of mercury release to the atmosphere, and this source, as well as tailings facilities and waste rock dumps may be significant sources of fugitive emissions.

Recommendations

We make the following recommendations:

1. This specific instrument, the Lumex RA-915+ Mercury Analyzer, was found to be very useful for measuring elemental mercury concentrations in air. Further study is recommended to compare this instrument with others that are suitable for field measurements. The goal should be to have a robust but cost-effective set of methods for determining mercury in ambient air. These measurements can be used for ambient monitoring to identify whether worker health and the environment are protected from mercury releases from mining sites.
2. In part, due to suggestions that frequent measurement of ambient mercury concentrations and emission sources is too expensive, routine mercury measurements have not been required. However, this set of measurements, albeit only a snap shot, demonstrated a relatively simple elemental mercury measurement technique that required less than one day of training, and was easily used in the field. This instrument would allow each mine the capability for routine (weekly or more often) measurements of elemental atmospheric mercury. State and federal regulatory agencies can also use these instruments for compliance purposes.
3. Further research is necessary to determine the total amount of mercury released from a mine site, particularly from active heaps, but also from waste rock dumps, tailings facilities and pit wall surfaces. Unlike thermal sources which generally emit as a point source, a large heap can be several hundred acres, and emit mercury continuously, although it will certainly vary with environmental conditions. These non-thermal sources are not characterized at present and not included in total mercury emissions from mines, but should be.
4. Because of the simplicity of these measurements, they show promise for validating modeling efforts for mercury release from a mine site. While it is effectively impossible to determine concentrations of mercury in all of the air mass downwind from a mine, simple measurements can validate models by collecting the necessary meteorological data as well as mercury concentrations at selected points. This procedure would greatly assist in allowing a determination of whether all sources of mercury from a mine site were being considered. It could also help to allow regulators to make more reliable estimates of total mercury released at a mine site.

References

1. EPA Toxics Release Inventory, August, 2006, <http://www.epa.gov/tri/>.
2. Justin Hayes (2005), "Mercury Pollution in Northeast Nevada Air: A Screening Level Survey of the Potential Impacts of Gold Processing Facilities in Air Quality" Idaho Conservation League, Boise.
3. EPA/600/R-03/147, May 2004.
4. Google Earth, Version 4.0.2091; September 14, 2006.
5. InfoMine, <http://www.infominc.com>; September 2006.

Acknowledgements: All overhead photography excluding Coeur-Rochester was obtained using Google Earth. The Coeur photography was a courtesy of SkyTruth.

ATTACHMENT 7

Mercury and Modern Gold Mining in Nevada

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A. Introduction

Mercury has long been associated with gold mining, and releases of mercury into the environment remain a concern due to its health effects on humans and other organisms. Much of the historic release of mercury has been associated with either primary mercury mining, or use of mercury for recovery of gold and silver via amalgamation from milled ore. For example, amalgamation processes were the primary source of mercury releases to the Carson River Superfund Site during the late 1800's, and occurred via tailings disposal, thermal processes, and other discharges to surface water, land and the atmosphere. In the United States, mercury amalgamation for gold recovery has effectively ceased, and introduction of new mercury from hard rock mining activities is primarily associated with inadvertent release of mercury during gold mining and processing. In recent years, all of the primary mercury mines in the U.S. have been closed, and the only significant source of new anthropogenic mercury into commerce is byproduct production, again, primarily from the gold mining industry.

In 2003, approximately 82% of gold produced in the U.S. came from Nevada mines (Nevada Bureau of Mines and Geology, 2003). Based on a review of the available information, the large majority of new byproduct mercury is also produced in Nevada. This report assesses how mercury is managed in gold mines in Nevada.

B. Objectives and Purpose of Report

Because of concerns about production and release of mercury into the environment, information is required to determine the sources of mercury from gold mining and how these are managed. We sought to answer the following questions:

- (1) What is the total amount of by-product mercury produced annually in Nevada gold mining facilities? How is this mercury managed? Who purchases this mercury?
- (2) How much mercury is released into the atmosphere from gold mines in Nevada? Are reductions in emissions observed, due to the current voluntary mercury emissions reduction program?
- (3) What are other sources of mercury from gold mining? What is the significance of those sources?

C. Mercury Background

Mercury is a naturally occurring metal, and the only metallic element that is a liquid at ambient temperatures, having the appearance of a silver *shiny metal*. Mercury is 13.5 times heavier

than water, although it is relatively volatile in the metallic state, with a vapor pressure of 1.2×10^{-3} torr at 20°C (CRC, 1969). Mercury is geologically concentrated in regions associated with volcanic activity, high heat flow, and plate tectonic boundaries, and is commonly found associated with gold deposits although the amount of mercury in gold ore can vary widely, from less than 0.1 mg/kg to over 100 mg/kg. The mercury released to the living environment has increased since the industrial age, and the increased loading presumably has come from human activity (USEPA, Mercury White Paper, 2003). The new non-anthropogenic mercury released into the living environment from natural sources (e.g. soils, and geothermal springs) is generally assumed to be relatively constant.

Mercury is known to cycle extensively in the atmosphere, and plant, soil and water systems involving complex processes that are not completely understood. Mercury undergoes extensive biological cycling in *sediments to toxic and biologically available methylated forms and back to stable and less available sulfide complexes*. Mercury can be photochemically released from soils as elemental mercury into the atmosphere, and, subsequently is transported in the atmosphere, where it is reoxidized in the atmosphere to an ionic form and is deposited on soils, plants or water (Gustin, et al., 2004). Certain natural sources of recycled mercury can be *substantial (e.g. forest fires)*. Due to the difficulties in accurately measuring the loading of natural cyclical mercury, disagreement remains on the total mercury burden in the environment. Various discussions on mercury are available, and a recent extensive and widely considered overview is available from United Nations Environmental Program website (UNEP, 2003)

New anthropogenic mercury is defined as that mercury that is released into the living ecosystem from previously geologically isolated sources, and is most often derived from coal and metal mining activity, and, to a lesser extent from geothermal heat recovery. Air emissions and land releases of new mercury from anthropogenic sources include electric utility facilities, lime kilns, chemical manufacturers, mining operations and other thermal processes that utilize fossil fuels. The U.S. EPA suggests that 1/3 of the total U.S. emissions of new mercury are deposited through wet and dry deposition in the continental 48 states. The remaining 2/3 is transported into the global reservoir outside the borders of the United States. One estimate has noted a total of 5,500 tons of atmospheric cyclical mercury is released into the global reservoir annually from natural, oceanic, and newly produced anthropogenic emission sources (USEPA White Paper, 2003).

Until 1998, the amount of mercury released into the atmosphere from gold mining activities had not been systematically measured and reported, and reliable estimates from this sector were not available. Since that time the amount of mercury released from mining to the atmosphere has been estimated, based on a series of emission factors as a result of EPA's Toxics Release Inventory (TRI)

requirements. These estimates showed that a sizeable amount of mercury was being released from a small number of large mines, and subsequent efforts have been made to reduce those emissions.

Because gold mining is concentrated in Nevada, and mercury releases from these mines is considered a significant environmental issue, we focused on Nevada gold mines. Some efforts were made to examine gold producing facilities out of state, although very little data are available.

Governmental Regulations on Mercury

The U.S. EPA has developed an extensive array of regulatory requirements for atmospheric release of mercury. Summarized below is a short list of dates for regulation of mercury in the U.S. Shortly after the passage of the 1970 Clean Air Act, as well as the increasing awareness of the toxicity of mercury, domestic use began to decline, although a demand still exists and will likely continue.

< **Table C-1. Federal and State Regulations/Programs Affecting Mercury** >

Year	Federal Regulation	Comments
1970	Clean Air Act	Established EPA to set regulatory standards for hazardous air pollutants.
1971		In March of this year, mercury was designated a hazardous pollutant.
1972	Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)	Stopped the production of many pesticides which contained mercury.
1972	Federal Water Pollution Control Act	Gave EPA authority to enforce and regulate the discharge of mercury into waterways.
1973		In September of this year, mercury was designated a toxic pollutant.
1973		In October of this year, the dumping of mercury or mercury compounds in the ocean became prohibited.
1974	Safe Drinking Water Act	EPA was given the authority to establish and regulate safe standards for drinking water.
1978	Resource Conservation and Recovery Act	Regulations were established for the disposal of mercury-bearing waste.
1980	Comprehensive, Environmental Response, Compensation, and Liability Act	Established a \$1.6 billion fund for clean up of toxic waste sites.

1986	Emergency Planning and Community Right-to-Know Act with Sec. 313 - TRI	Required specific industries to report releases of over 650 chemical and chemical categories. Establishing Sec. 313 as the Toxic Release Inventory
1997		U.S. EPA changed TRI toxic release requirements and required the metal mining industry to report, beginning in 1998.
2001	Voluntary Mercury Reduction Program	Four mining facilities in Nevada voluntarily agreed to VMRP goals on December 18 of this year.
2005	Clean Air Mercury Rule (Coal Fired Power Plants)	New regulations designed to reduce mercury emissions from coal power plants.
2006	Nevada Mercury Emissions Control Program	New regulations designed to require control of atmospheric mercury emissions from mines

Sources: * Jasinski, 1994
State of Nevada, 2000
U.S. EPA, 28 October 2003

The laws and regulations above were originally a response to excessive mercury releases from four specific emission industries, accounting for roughly 83% of all 1995 anthropogenic emissions of mercury. These industries consist of medical waste incineration facilities (27% of total), municipal waste combustion facilities (23% of total), utility boilers (21% of total) and commercial/industrial boilers (12% of total) (U.S. EPA, 1996). The mining industry emissions were not included in these totals.

Prior to March of 2006, neither the U.S. EPA nor the Nevada Division of Environmental Protection (NDEP) regulated mercury emissions from Nevada mines, other than as water pollutants (Johnson, 2003), or as hazardous air pollutants when a single source exceeds 10 tons (20,000 lbs). Nevada recently passed a regulatory program for atmospheric emissions of mercury from mines that seeks to apply control technology on the various mercury emitting units. Except for primary mining of mercury, which no longer exists in the U.S., mercury emissions from mining operations are not regulated under the National Ambient Air Quality Standards Act (NAAQS), the National Emission Standards for Hazardous Air Pollutants (NESHAP), or under Nevada's Hazardous Air Pollutants (NHAP) program. In spite of the fact that the larger gold mines emit more mercury per facility than the average coal fired power plants, the imposition of regulations was previously seen as costly to both the regulating agency and to the mining industry (USEPA, Nevada Mining Partnership Program 2003).

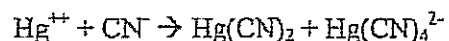
One regulatory option available to the EPA falls under the Clean Air Act, allowing the EPA to establish Maximum Achievable Control Technology (MACT) air emission limits for the mining industry in a voluntary program. In late 2001 the EPA (Region IX), the NDEP and four gold mining companies in Nevada implemented the Voluntary Mercury Reduction Program (VMRP). As part of this agreement, the four companies agreed to take steps to reduce mercury stack emissions by 50% in three years time. The Toxic Release Inventory for Nevada indicates that these four Nevada mining companies emitted roughly 90% of all reported mercury from Nevada in 2001 to the atmosphere. (U.S. EPA, October 2003). The participating Nevada facilities underwent investigations at each site to better understand *mercury sources*, to explore emission prevention solutions, and then to begin implementation of these source reductions. Under this program atmospheric mercury emissions from Nevada gold mines have demonstrated decreases for atmospheric mercury release. This VMRP program was the basis for the mercury regulatory program for mines that was implemented in March of 2006.

D. Mercury from gold mining

Mercury is commonly observed in gold bearing areas of Nevada, and a major mercury belt exists in western Nevada, although concentrations vary substantially depending on each site. Reports of concentrations of mercury in gold ore can range from undetectable to over 0.01% by weight. (USGS, 2003; van Zyl and Eurick, 2001). Management of mercury in Nevada generally falls in three categories: 1) Byproduct production captured for sale, 2) Atmospheric emissions, and 3) Wastes deposited on site, primarily as a minor component of waste rock. (van Zyl and Eurick, 2001)

By-Product Production Recoverable for Sale

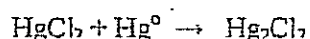
Extraction of gold from ore most commonly utilizes basic solutions of cyanide as the lixiviant. Cyanide, in the presence of oxygen, converts elemental gold to a water soluble gold cyanide complex. These process fluids are then passed over activated charcoal, which captures the gold cyanide complex, and is thus removed from the aqueous solution. Mercury closely follows the chemistry and mechanism of capture of gold cyanide. In the presence of cyanide, mercury is converted to a highly water soluble di- or tetra-cyano mercury complex.



Mercury cyanide complexes are then captured with gold cyanide on activated charcoal and can ultimately be collected via retorts as liquid metallic mercury (van Zyl and Eurick, 2001). Recovered

liquid byproduct mercury is placed into either 76 pound or one-ton flasks and stored on site until it can be delivered to commercial facilities that are able to further refine the mercury for use in a variety of products.

Additional mercury can be collected from roasters or autoclaves using air pollution control processes, and this source now constitutes the largest amount of mercury recovered for sale. In Nevada the majority of mercury recovered for sale is from a mercury recovery process at the Barrick mines in northeastern Nevada. In this case, mercury is recovered from roasters in a process which sprays mercuric chloride droplets in a scrubber cell for the roaster. Mercuric chloride reacts with elemental mercury and forms mercurous chloride (calomel), which is not volatile.



The calomel is captured as a precipitate and transferred to a mercury recycler who presumably converts it to elemental mercury and sells it into commerce.

This report has examined only the Nevada byproduct mercury production. The byproduct production data were mostly obtained through voluntary reports from the various companies, because mercury by-product production is not reported in a publicly available manner. We were unable to obtain information on byproduct production in other states and also found that international by-product mercury production is not reported in a manner that is accessible. However, based on discussions with the recycling companies that receive mercury from mines, byproduct mercury is produced primarily from gold production, and these data will provide the majority of byproduct mercury production in Nevada.

Previous information on mercury by-product production was found to generally be unreliable. There does not appear to be a systematic approach for recording mercury byproduct production in Nevada or the U.S., and when available, the data are incomplete. Because by-product mercury is not released into the atmosphere, land or water, it is not reported in the Toxic Release Inventory (TRI). During the development of this study, it was our understanding that mercury production was reported to the Nevada Tax Board as part of their annual reporting on Net Proceeds of Minerals. Due to the relatively diminutive totals, the Tax Board does not publish them in their annual bulletins (Ewell, 2003), and they are apparently not available to the public. Requests for that information were initially unsuccessful due to concerns about proprietary information. However, following a subsequent request in early 2005, these data for the past 3 years were received and indicated that only one company, Newmont, submitted this information on mercury production to the Tax Board for that period. However the information was submitted as either pounds or flasks of mercury produced at individual mines or as dollars received for the mercury transferred to a recycler, and we could not determine the

amount of mercury produced. Thus, at present there is apparently no systematic requirement for reporting mercury production in Nevada.

The Nevada Division of Minerals has kept records of mercury by-product production when the information was submitted. In Table D.1, the available Nevada data are provided. For example, in 1990, the total Nevada reported mercury byproduct production was approximately 112 metric tons (plus 504 metric tons of primary mercury). For this same year, all U.S. mines reported producing 114 metric tons of by-product (Sznopak, et al, 1999). Nevada produced approximately 60% of the nations gold in 1990. The mercury estimate for Nevada did not include the Hycroft/Crofoot/Lewis mine, which produced about the same amount of gold in 1990 that it did in 1995 when it reported 24.5 metric tons of byproduct mercury (Nevada Division of Minerals, 2003). Sznopak and coworkers (1999) also reported that 65 tons of U.S. byproduct mercury was produced in 1996, a year when both Paradise Peak and Hycroft were still producing gold but did not report by-product mercury. In 1992, the EPA estimated that 70 tons of by-product mercury was produced in the U.S. (EPA, July 2002), although at that time both Paradise Peak and Hycroft mines were in full production, and while the mercury production at Paradise Peak was not reported, they produced 74 metric tons mercury in 1991, and up to 120 tons in previous years. Thus, the amount of mercury produced as byproduct mercury in the U.S. in previous years remains uncertain.

At the present time, however, we are unaware of any remaining large producers of byproduct mercury in the gold mining industry. Both the Paradise Peak mine (now closed) and the Hycroft Mine (residual leaching) are no longer significant sources of mercury. Another large producer of gold in California, the McLaughlin Mine, was historically a mercury mine and produced byproduct mercury, although specific production data are not available. This mine is now closed.

Newmont's international operations, it is the largest gold producer in the world. Unlike the other companies in the VMRP, Newmont has several sites in Nevada that potentially can produce mercury, although these are generally grouped into the western operations (primarily Twin Creeks) and the complex near Gold Quarry in the Carlin Trend. At Newmont's numerous operations in Nevada, two general technologies of wet scrubbers and sulfur-impregnated carbon filters are utilized for mercury capture and management. Technologies utilized at Newmont have been in place for many years and many were in place prior to the requirement that mines report under the Toxic Release Inventory reporting program and prior to the establishment of the Voluntary Mercury Reduction program. At one process area at the Twin Creeks mine, a new technology (to Newmont) is being tested that uses a wet scrubber with a hypochlorite solution.

Mercury recovered in the processes is ultimately captured in two refineries at Newmont's operations in Nevada. Newmont's byproduct mercury from Nevada is shipped to DF Goldsmith.

E. Conclusion

Nevada gold mines are a previously unrecognized source of large atmospheric mercury releases, and constitute the largest source of new byproduct mercury in the U.S. Data for estimating mercury released to the atmosphere have been available only since the TRI reporting requirements were applied to mines in 1998 and only sporadically for the amount of byproduct mercury produced. Mercury content in ore is highly variable, and any determination of releases of mercury to the air or byproduct production require direct measurements at each mine. It is apparent, however, that atmospheric mercury releases have decreased in recent years (and also an increase in mercury byproduct production) due, in part, to the efforts applied via the VMRP program.

Byproduct mercury production and mercury emissions are closely related, since most of the byproduct mercury is recovered through atmospheric emission control systems. At present there is no requirement for reporting byproduct mercury produced from each mine, nor is there specific requirements for actually measuring mercury emissions. There is also no requirement for measurement of mercury in the ore that is processed. More complete reporting in all of these categories would allow a better assessment using a mass-balance approach of mercury management from gold mines.

The demand for commodity mercury in the U.S. is decreasing due to a substitution of mercury-containing products to similar functioning non-mercury product. World demand is also decreasing, as manufacturing companies are turning away from its use in common household and industrial products. Ceramic composites are replacing dental amalgams, digitized instruments are replacing mercury thermometers, membrane cells are replacing mercury cells in electrolytic

production of chlorine and caustic soda, and indium compounds are being substituted for mercury in alkaline batteries. Governments from many parts of the world are regulating its use and manufactured applications, due to increasing public concerns regarding mercury contamination and health warnings. Given public concerns however, mercury use remains in many products, and a demand will continue to exist for the foreseeable future. Byproduct mercury from gold mines is best processed through recycling facilities that help to meet demand.

A brief comment was made in this report comparing mercury regulations in the coal fired power plants to mercury in gold mining. While mercury releases from gold mines are not included in the new mercury rule for power plants, it is useful to examine how these plants are meeting the new and stringent requirements. The analytical requirements for mercury measurements in power plants are potentially applicable to gold mines, as are its mercury control technologies.

Acknowledgements

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F. References

- Bender, M.T., "Retirement of Mercury" A presentation to the Great Lakes Binational Toxics Strategy Stakeholders Forum, (2000) <http://www.mercurypolicy.org/new/documents/3mbretjg.pdf>
- Bethlehem Apparatus. Personal interview. 8 Sept. 2003.
- Brooks, William E. "Mercury." Mineral Commodity Summaries, 2003. USGS
(<http://minerals.er.usgs.gov/minerals/pubs/commodity/mercury/430303.pdf>)
- Brooks, William E. "Mercury." Minerals Yearbook, 2002. USGS
(<http://minerals.er.usgs.gov/minerals/pubs/commodity/mercury/mercmvb02r.pdf>)
- Brooks, William E. Mercury" Minerals Yearbook, 2003. USGS
(<http://minerals.usgs.gov/minerals/pubs/commodity/mercury/mercuryb03.pdf>)
- Bundesanstalt Fur Geowissenschaften und Rohstoffe, 2004
(http://www.bgr.de/b126/pdf/commodity_prices.pdf)
- CRC, "Handbook of Chemistry and Physics", Chemical Rubber Company, Cleveland, OH (1969)
- Ewell, Richard. Personal interview. Nevada Department of Taxation, June 2003
- Fialka, John J. "EPA and FDA, Long in Dispute, Plan Mercury Standards for Fish." Wall Street Journal 21 Oct. 2003

- Gray, John E., "Geologic Studies of Mercury by the U.S. Geological Survey", U.S. Geological Survey Circular 1248, U.S. Dept. of Interior (2003)
- Gustin, Mae S. "Are Mercury Emissions from Geologic Sources Significant? A Status Report" *The Science of the Total Environment* 302:153-167 (2003)
- Gustin, Mae. S., J. A. Erickson, D. E. Schorran, D.W. Johnson, S.E. Lindberg and J.S. Coleman, "Application of Controlled Mesocosms for Understanding Mercury Air-Soil-Plant Exchange" *Environ. Sci. Technol.*, 38:6044-6050, (2004)
- Jasinski, Stephen M. "The Materials Flow of Mercury in the United States." Bureau of Mines Information Circular 9412, 1994. (<http://pubs.usgs.gov/usbmic/ic-9412/mercury.pdf>)
- Johnson, Jolaine E. Personal Interview. May 2003.
- Mercury. Health Care Without Harm. (<http://www.noharm.org/mercury/issue>)
- Mercury Market Subgroup. Mercury Commodity Market Review: Economic Facts & Reasoning About the Global Mercury Commodity Market, Including U.S. Contributions. Review Draft. February 2003.
- NBMG. "Nevada's Mineral Production in 1998." *Nevada Geology*. No. 36 December 1999. (<http://www.nbmge.unr.edu/dox/nl/n36.pdf>)
- NBMG. "Nevada's Mineral Production in 2000." *Nevada Geology*. November 2001. (<http://www.nbmge.unr.edu/dox/nl/n38.htm>)
- NBMG. "Nevada's Mineral Production in 2003." *Nevada Geology*. No. 41 December 2004 : <ftp://comstock.nbmge.unr.edu/pub/dox/mi/03.pdf>.
- Nevada Bureau of Mines and Geology. The Nevada Mineral Industry 2001. Special Publication MI-2001. University of Nevada, Reno. Mackay School of Mines
- "Nevada Mercury Production", Nevada Division of Minerals, 2003
- Plachy, Jozef. "Mercury." *Mineral Commodity Summary, 1997.* USGS (<http://minerals.usgs.gov/minerals/pubs/commodity/mercury/430397.pdf>)
- Porter, Kenneth E. and Brooks, William E. "Mercury Statistics, 2002," (<http://minerals.usgs.gov/minerals/pubs/of01-006/mercury.pdf>)
- Reese, Robert G. Jr. "Mercury." *Mineral Commodity Summary, 2001.* USGS (<http://minerals.usgs.gov/minerals/pubs/commodity/mercury/430301.pdf>)
- Reese, Robert G. Jr. "Mercury." *Mineral Commodity Summary, 2002.* USGS (<http://minerals.usgs.gov/minerals/pubs/commodity/mercury/430302.pdf>)
- Reese, Robert G. Jr. "Mercury." *Minerals Yearbook, 2001.* USGS (<http://minerals.usgs.gov/minerals/pubs/commodity/mercury/hgmyb2001.pdf>)

State of Nevada. Department of Conservation and Natural Resources, Division of Environmental Protection. A Guide to the Toxic Release Inventory for Nevada. Nevada, 2000.

State of Nevada. Division of Environmental Protection. State of Nevada Mining Operations: Voluntary Mercury Air Emissions Reduction Program. Program Summary. 2002.

Sznopek, John L. and Goonan, Thomas G. "The Materials Flow of Mercury in the Economies of the United States and the World." U.S. Geological Survey Circular 1197, 1999.
(<http://pubs.usgs.gov/circ/2000/c1197/c1197.pdf>)

UNEP. "Global Mercury Assessment report" (2003) <http://www.chem.unep.ch/mercury/Report/Final>

United States. Environmental Protection Agency. Mercury Study Report to Congress: Whitepaper. 22 May 2003. (<http://www.epa.gov/air/merwhite.html>).

United States. Environmental Protection Agency. Mercury White Paper. 19 August 2003.
(<http://www.epa.gov/air/whtpaper.pdf>).

United States. Environmental Protection Agency. "Nevada Mining Partnership Program". Region 9: Cross-Program Activities. David Jones, Adam Browning. 28 Oct. 2003.
(http://www.epa.gov/region9/cross_pr/innovations/mining.html)

United States. Environmental Protection Agency, Office of Air Quality Planning and Standards, and Office of Research and Development. Mercury Study Report to Congress. Volume I: Executive Summary. SAB Review Draft. June 1996.

United States. Environmental Protection Agency. Office of Research and Development. "Assessing and Managing Mercury from Historic and Current Mining Activities." Draft. 5 July 2002.

United States. Environmental Protection Agency. Toxic Chemical Release Inventory Reporting Forms and Instructions. Revised 2002 Version.

"Toxics Release Inventory (TRI) Program." 18 March 2003. (www.epa.gov/tri/report/trime)

United States. Environmental Protection Agency. March (2005) "Clean Air Mercury Rule: Basic Information: <http://www.epa.gov/air/mercuryrule/basic.htm>

Upton, Bill. Letter to the Nevada Division of Environmental Protection. 16 Jan. 2003.

van Zyl, D.J.A. and G. M. Earick, "The Management of Mercury in the Modern Gold Mining Industry" EPA Conference Proceedings on Mercury in the Environment, 2001.

ATTACHMENT 8



UNITED NATIONS
ENVIRONMENT PROGRAMME
CHEMICALS



GLOBAL
MERCURY
ASSESSMENT

Issued by UNEP Chemicals

Geneva, Switzerland

December 2002

Key findings of the report

WHY SHOULD WE BE CONCERNED AND CAN INTERVENTION RESULT IN CHANGE?

Mercury is Present throughout the Environment

1. Environmental mercury levels have increased considerably since the on-set of the industrial age. Mercury is now present in various environmental media and food (especially fish) all over the globe at levels that adversely affect humans and wildlife. Widespread exposures are occurring due to human-generated sources, and past practices have left a legacy of mercury in landfills, mine tailings, contaminated industrial sites, soils and sediments. Even regions with no significant mercury releases, such as the Arctic, are adversely affected due to the transcontinental and global transport of mercury.

Mercury is Persistent and Cycles Globally

2. The most significant releases of mercury pollution are emissions to air, but mercury is also released from various sources directly to water and land. Once released, mercury persists in the environment where it circulates between air, water, sediments, soil and biota in various forms. Current emissions add to the global pool—mercury that is continuously mobilised, deposited on land and water, and re-mobilised.

3. The form of mercury released varies depending on source type and other factors. The majority of air emissions are in the form of gaseous elemental mercury, which is transported globally to regions far from the emissions source. The remaining emissions are in the form of gaseous inorganic ionic mercury forms (such as mercuric chloride) or bound to emitted particles. These forms have a shorter atmospheric lifetime and will deposit to land or waterbodies within roughly 100 to 1000 kilometres of their source. Elemental mercury in the atmosphere can undergo transformation into ionic mercury, providing a significant pathway for deposition of emitted elemental mercury.

4. Once deposited, the mercury form can change (primarily by microbial metabolism) to methylmercury, which has the capacity to collect in organisms (bioaccumulate) and to concentrate up food chains (biomagnify), especially in the aquatic food chain (fish and marine mammals). Methylmercury is therefore the form of greatest concern. Nearly all of the mercury in fish is methylmercury.

Mercury Exposure Has Serious Effects

5. Mercury has caused a variety of documented, significant adverse impacts on human health and the environment throughout the world. Mercury and its compounds are highly toxic, especially to the developing nervous system. The toxicity to humans and other organisms depends on the chemical form, the amount, the pathway of exposure and the vulnerability of the person exposed. Human exposure to mercury can result from a variety of pathways, including, but not limited to, consumption of fish, occupational and household uses, dental *amalgams* and *mercury-containing vaccines*.

6. Methylmercury is adversely affecting both humans and wildlife. This compound readily passes the placental barrier and the blood-brain barrier, and is a neurotoxicant, which may in particular cause adverse effects on the developing brain. Studies have shown that methylmercury in pregnant women's diets can have subtle, persistent adverse effects on children's development as observed at about the start of school age. Moreover, some studies suggest small increases in methylmercury exposure may cause adverse effects on the cardiovascular system. Many people (*and wildlife*) are currently exposed at levels that pose risks of these, and possibly other adverse effects.

7. Some populations are especially susceptible to mercury exposure, most notably the fetus, the newborn, and young children because of the sensitivity of the developing nervous system. Thus, parents,

pregnant women, and women who might become pregnant, should be particularly aware of the potential harm of methylmercury. Moderate consumption of fish (with low mercury levels) is not likely to result in exposures of concern. However, indigenous populations and others who consume higher amounts of contaminated fish or marine mammals, as well as workers who are exposed to mercury, such as in small-scale gold and silver mining, may be highly exposed to mercury and are therefore at risk.

8. Besides their importance to many native cultures, fish are an extremely valuable component of the human diet in many parts of the world, providing nutrients that are often not available in alternative food sources. Mercury is a major threat to this food supply. Likewise, contaminated fish can bring serious economic problems to communities and regions dependent on fisheries for their economic survival.

9. There are also particularly vulnerable ecosystems and wildlife populations. These include top predators in aquatic food webs (such as fish-eating birds and mammals), Arctic ecosystems, wetlands, tropical ecosystems and soil microbial communities.

Intervention Can be Successful

10. Mercury pollution has significant impacts at local, national, regional and global levels. These impacts can be addressed through a range of actions at each of these levels, targeting reductions in uses, releases and exposures. Numerous actions implemented in Europe, North America and elsewhere have successfully reduced uses and releases of mercury. However, inventories are still incomplete in these regions, and some releases are still significant. The extent of decreases in environmental levels and ecosystem improvements in response to decreased releases of mercury will vary considerably depending on local ecosystem characteristics and other factors, and in some cases may take several decades. However, an evaluation of mercury levels in Swedish lakes indicates that, by reducing releases, environmental levels of mercury, such as in freshwater fish, may be reduced significantly in specific locations within one to two decades.

WHY IS LOCAL/REGIONAL ACTION, BY ITSELF, NOT SUFFICIENT?

Global Cycling of Mercury Increases the Problem

11. As described above, the origins of atmospheric mercury deposition are local and regional as well as hemispherical or global. Besides local sources of mercury releases (such as waste incineration and coal combustion facilities), the general global background concentrations (global pool) contribute significantly to the mercury burden at most locations. Similarly, virtually any local source contributes to the global pool. Also, rivers and ocean currents are media for long-range mercury transport.

12. In some nations, local and regional mercury depositions have gradually increased contamination levels to the point that countermeasures have been enacted in recent decades to reduce emissions. However, due to long-range transport, even nations with minimal mercury releases, and other areas remote from industrial activity, may be adversely affected. For example, high mercury levels are observed in the Arctic, far from the sources of any significant releases.

Mercury Has an Impact on Global Fishing

13. Many fish species in international waters migrate to remote and diverse locations. Moreover, after harvest, commercial fish are commonly exported to various nations throughout the world, to locations far removed from place of origin. Therefore, mercury contamination of lakes, rivers, and especially oceans is truly a global issue, affecting fishing industries and fish consumers around the world.

Mercury May Be More Problematic to Less-Developed Regions

14. As awareness of mercury's adverse impacts has increased, the uses of mercury have been reduced significantly in many industrialised countries. Alternatives are commercially and competitively available for most uses. However, these reductions in use have had the effect of lowering demand relative to the supply of mercury, which has kept mercury prices low and encouraged ongoing (and in some cases, increased) use of mercury and outdated mercury technologies in less-developed regions or nations. As mer-

cury regulations and restrictions are less comprehensive or less well enforced in many less-developed regions, these trends have contributed to the concentration, in these areas, of a disproportionate burden of some of the health and environmental risks that accompany mercury.

Mercury is Subject to Significant International Use and Commerce

15. Despite improved awareness of risks, mercury continues to be used in a variety of products and processes all over the world. Elemental mercury metal is used in small-scale mining of gold and silver; chlor-alkali production; manometers for measurement and control; thermometers; electrical switches; fluorescent lamps; and dental amalgam fillings. Mercury compounds are used in batteries; biocides in the paper industry, pharmaceuticals; paints and on seed grain; and as laboratory reagents and industrial catalysts.

16. There is significant ongoing trade in mercury and mercury-containing products, some of which is illegal, uncontrolled and/or unregulated. The most significant *global movement* of mercury that remains poorly understood is the flow of mercury through international commerce. While overall quantities of mercury traded (and mined) have diminished in recent years, significant amounts are still transported. The unabated demand in many developing nations is a particular concern. Mercury available on the world market is supplied from a number of sources, including, among others:

- Mining of mercury (extracted from ores within the earth's crust) either as the main product or as a by-product of mining and refining other metals (gold, zinc) or minerals;
- Private and government stocks (mercury in chlor-alkali plants, government reserves);
- Recycled mercury recovered from spent products and industrial wastes.

17. Even under current regulations and restrictions, many of the uses and movements of mercury and mercury containing products are likely to eventually result in the release of mercury to the global environment. Meanwhile, large amounts of mercury that remain in mine tailings, landfills and sediments, as well as stockpiles, continue to present a threat of future release. Hence, actions to reduce, manage and address uses, stocks and trade may be useful at local, regional, national and international levels to prevent or minimize future releases.

HOW DOES MERCURY GET INTO HUMANS AND WILDLIFE?

18. Although local conditions may affect mercury exposure in certain populations, most people are primarily exposed to methylmercury through the diet (especially fish) and to elemental mercury vapours due to dental amalgams and occupational activities. The toxicity of methylmercury is described above. Elemental mercury vapour is also toxic to the nervous system and other organs. While methylmercury is of greatest concern for general populations, elevated exposures to elemental mercury are also of concern.

19. Elevated methylmercury levels have been measured in numerous freshwater and marine fish species throughout the world. The highest levels are found in large predatory fish and fish-consuming mammals. Exposure studies from diverse geographic areas indicate that a significant portion of humans and wildlife throughout the world are exposed to methylmercury at levels of concern, primarily due to consumption of contaminated fish.

20. Depending on local mercury pollution load, substantial additional contributions to the intake of total mercury can occur through air and water. Also, personal use of skin lightening creams and soaps, mercury use for religious, cultural and ritualistic purposes, use in some traditional medicines and mercury in the home and working environment can result in substantial elevations of human exposure. Exposures also occur through the use of vaccines and some other pharmaceuticals containing mercury preservatives (such as Thimerosal/Thiomersal).

21. Elevated elemental mercury levels in the working environment have been reported in chlor-alkali plants, mercury mines, thermometer factories, refineries, dental clinics, and in mining and manufacturing of gold and silver extracted with mercury. The relative impacts from local pollution (such as former mining sites), occupational exposure and local traditions may vary considerably between nations and are known to be significant in some areas.

ATTACHMENT 9

NEVADA VIEWS: Pipeline will leave negative legacy

Pumping groundwater to valley would damage rural Nevada

By DEAN BAKER
SPECIAL TO THE REVIEW-JOURNAL

There is a great demand for increased water supplies for Las Vegas to sustain its rampant growth. Is a pipeline into another dry part of Nevada the answer -- or just a pipe dream? Is it a visionary solution -- or a legacy of disaster, leaving debt, dried-up desert and dust from lack of water?

The Southern Nevada Water Authority proposes to build a pipeline to the driest part of the driest state in the United States.

The water laws of the West, particularly in Utah and Nevada, were written and debated in a very different time and environment than today. There are many differences now, population and growth perhaps being the most significant. While there was no prohibition on interbasin transfers, there was probably no thought or consideration given to the possibility of using modern methods to construct several hundred miles of pipeline to move water, as the water authority intends. If it had been considered, I believe there would have been restrictions written into the underground water laws.

We are just now in the process of learning the consequences of pumping underground water. The fact is, large-scale underground water pumping should be viewed as a mining operation. This means that the resource is depleted and is not able to be replenished over time. The underground water laws were mostly written to serve agriculture, which used gas engines and flood irrigation on a small local farm or ranch. It was not unusual for these pumps to be used only in dry years to supplement stream flow water. Sprinkler irrigation was something in the future, as were humans living in areas where water to drink has to be imported long distances.

Agriculture today efficiently uses underground water on larger acreages with automated sprinkler systems. The agricultural production from these underground water sources is significant and important to the U.S. economy and as a source of our food.

The back side of this underground water use: In most areas, the falling water table is already leaving negative impacts that were unforeseen. Springs are ceasing to flow, with wildlife and livestock losing their water sources. Plants that depend on their roots going into groundwater are dying, and dust storms are appearing in the changing landscape. Additional consequences will appear in the future.

Most aquifers that are being significantly pumped have problems of water table decline and changes in water quality.

Sadly, the water authority pipeline project would affect areas that are already showing these impacts from underground water pumping. Snake Valley has had several springs dry up caused by pumping underground water. At one of these springs, Needle Point, a dozen wild horses died of thirst before anyone knew the

spring was dry. There was no history of Needle Point Spring not flowing until underground water started being pumped about one mile away.

There is a large difference between this long-term water authority mining project and past agricultural uses. The investment will be huge -- billions of dollars. People and businesses will become dependent on the water to live, making it impossible to shut the water off. This will cause the water to be used as long as possible, regardless of impacts, thus creating the "Legacy of the Southern Nevada Water Authority Pipeline."

It appears to me that most knowledgeable people who do not have a financial or political interest in the water authority proposal don't believe it is right or will be the answer for Southern Nevada. The late Gov. Mike O'Callaghan opposed the project. The Utah Division of Natural Resources questions the wisdom of more underground water pumping in western Utah -- whether it is for agriculture, the city of St. George or the Southern Nevada Water Authority

Others such as Las Vegas Mayor Oscar Goodman say that Las Vegas will run out of water only if Las Vegas runs out of money. The mayor may find Mother Nature will be very hard to buy water from.

The pipeline project would have negative aspects for Las Vegas citizens. Health care and education deteriorate with rapid growth. And if Las Vegas continues to grow and becomes one of the largest cities in the West, it will be detrimental to the gaming and entertainment industry. There are already traffic, crime, air pollution and other problems. If Las Vegas continues to grow in its present manner, all of these problems will only accelerate -- and new problems will surface such as water shortages and more environmental challenges.

There is enough water for Las Vegas now. Why would there be a desire in Southern Nevada to endanger its position as the entertainment capital of the world to simply bring in more population?

Just since beginning the environmental impact process, the water authority has already doubled the amount of water it wants from Snake Valley (from 25,000 to 50,000 acre-feet), revealing a glimpse of the future.

In 30 years, the operators will still be building power lines and pipelines, drilling wells and going into new territories to keep water running in this multibillion-dollar pipeline. Project promoters do not have sufficient information to know if there will be water to keep the pipeline operational as it is planned.

The cost of finding water and building the project will be huge, much more than publicly projected. It will be difficult to pay back the billions of dollars in debt because of the unforeseen and unplanned costs due to the lack of water and environmental problems.

The end legacy will be dust, vegetation losses and irreversible changes. Wildlife habitat will be lost due to nonexistent feed and water and growing environmental problems. It is a legacy that will not be good for Las Vegas or the state of Nevada. But the legacy will be catastrophic for the people of eastern Nevada.

Dean Baker has been a rancher and farmer in Nevada's Snake Valley for more than 50 years. A former member of the Nevada Tax Commission, Mr. Baker represented White Pine County on the Southern Nevada Water Authority's Integrated Water Planning Commission.

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ATTACHMENT 10

Statement of Dan Randolph

Executive Director, Great Basin Mine Watch
85 Keystone Ave, Suite K
Reno, Nevada 89509

I thank the Chair and Subcommittee Members for inviting me to testify on this important matter. Also, I thank you for coming out to Nevada, to the heart of mining country, to hear how we in Nevada see this issue.

Great Basin Mine Watch is a non-profit organization, founded in 1994. Our mission is to protect the land, air, water and wildlife of the Great Basin and the people and communities that depend on them from the adverse impacts of mining. We have been involved with the federal land management agencies, the various state agencies with oversight of mining issues, and the mining industry extensively. I am here representing Great Basin Mine Watch. My statement will focus on Nevada issues.

The question of if and how to reform the Mining Law of 1872 is of great importance throughout the western states, but especially here in northern Nevada. While on a west-wide level, the mining industry may be relatively minor economically, in our area it is clearly the largest industry. We believe that the Hardrock Mining and Reclamation Act of 2007 would bring necessary reforms that will help protect the people and lands of Nevada, while helping this important industry thrive.

The Need for Reform

The need for mining reform is evident in Nevada. While mining practices have generally improved since the days of historic mining, modern mines (1976 or later) still pose significant environmental and health consequences. Great Basin Mine Watch will outline the most prominent of these that occur here in Nevada, which include mercury emissions, dewatering activities, long-term open pit management, and water resource degradation.

Mercury

Mercury is emitted into the air from processing equipment and sites at many precious metal mines. Mercury often occurs naturally in the rocks that are being mined for gold or silver.¹ In the latest EPA Toxics Release Inventory (TRI) released to the public in March 2007, Nevada precious mines reported releasing 4,682 pounds of mercury into the air.² Based on recent tests, and recent corporate revisions to TRI reports, the actual total may be much larger. This airborne mercury can be deposited near the mine site or be carried hundreds or even thousands of miles before settling.

¹ Jones, Greg, and Glenn Miller; October 24, 2005, Mercury and Modern Gold Mining in Nevada, .

² <http://www.epa.gov/triexplorer/>

Mercury not released to the air is either captured as by-product, and sold, or becomes part of the waste rock or tailings.³ According to the 2005 TRI 3,567,801 pounds of mercury were stored on site at mines in Nevada. The 2005 TRI confirms that mercury that is emitted from gold mines in northern Nevada constitutes the largest source of mercury pollution in the region.⁴

Mercury is a highly toxic and highly mobile element. It is a neurotoxin associated with a variety of health ailments including loss of vision, loss of memory, temporary or permanent brain damage, tremors and deafness. Mercury is easily converted to organic methylmercury when it comes into contact with microorganisms. Methylmercury persists in biological systems causing accumulation up the food chain. Most mercury exposure in human comes from eating fish contaminated with methylmercury. Larger, older and predatory fish are more likely to contain larger amounts of mercury. As a result the EPA has made recommendations to limit the amount of fish that people consume especially pregnant women and young children. The effect of mercury poisoning can be particularly devastating while development of the nervous system is still occurring.

The Nevada State Health Division issued fish consumption advisories for six water bodies in the state in March 2007 in response to data gathered from samples of fish tissue with high levels of mercury. Some fish from other waters showed levels of mercury that according to EPA guidelines would support the release of additional fish consumption advisories.

Last year the state of Idaho issued fish consumption advisories for several water bodies. Idaho officials were concerned that the source of the mercury was mining activity of Northern Nevada.⁵ This illustrates that the effects of mining are not isolated, that environmental contamination and ecosystem disruption have the potential to span states.

Mining in Nevada and other states releases a large amount of mercury into the environment. Companies allowed to mine on public lands need to be aware of how much mercury they are releasing, and plan for abatement of the circulation of mercury in the environment while the mining continues and after it ends. The provisions of the Hardrock Mining and Reclamation Act of 2007 would facilitate this practice.

Mercury can be isolated and used industrially, but at a minimum it must be contained and disposed of properly. Also mines must use the best emissions reduction technology that is available. Recently the Nevada Division of Environmental Protection began a mercury air emissions testing campaign to determine the types (species) of airborne mercury released from ore processing equipment. The species of mercury released is a large determining factor in how far the particles will travel before being deposited.

The tests revealed that in a few cases more mercury was being released than was reported by the mines in a voluntary program. But more to the point for the purpose of HR2262 it revealed that emission control technology being used are not as effective as they are engineered to be and that emissions are highly variable.

³ Jones and Miller, 2005.

⁴ <http://www.epa.gov/triexplorer/>

⁵ Barker, Rocky, November 5, 2005, *The Idaho Statesman*; [High mercury levels found in Idaho reservoir.](#)

Mercury pollution is one of the most persistent problems that mining produces during operations and into the future. The problem needs to be addressed from the outset of any new mining operation. New legislation like HR2262 can help keep mercury pollution to a minimum through careful planning, engineering and consistent monitoring.

Water

Nevada is the driest state in the union. Water quality and quantity are both critical to the future of the state.

As many of the mines are in rural areas, away from the primary population centers, there used to be an "out of sight, out of mind" attitude towards the impacts of mining on the state's waters. However, that is clearly no longer the case. Currently, there are at least seven proposals before the State Engineer to allow trans-basin water transfers, from rural areas to the metropolitan areas. Some of these involve pumping groundwater in remote basins and piping it hundreds of miles.⁶ Clearly, all water in the state is a resource that should be protected.

Water Quality

Great Basin Mine Watch will address three major water quality issues of modern mines with specific examples, which are: 1) pit lake consequences, 2) waste rock pile drainage, 3) heap leach seepage. All of these mines are modern mines that have been in operation since 1980.

Brief background on specific mines cited here

Mule Canyon Mine: is an open pit gold mine located in the central portion of the Argenta Mining district, approximately 15 miles southeast of Battle Mountain Nevada and 10 miles west of Beowawe. The modern mining began in 1989 with the eventual creation of six pits with associated waste rock dumps, a heap leach facility, and a mill. Mining was completed in 2005, with activity in the South Pit ending in December 1999.

Big Springs Mine: is an open pit gold mine located along the North Fork Humboldt River at the north end of the Independence Range, Elko County Nevada. Mining of the disseminated gold deposits began in the late 1980s and stopped in 1993. Reclamation commenced in 1993 and has been declared complete. The mine also had a mill and tailings impoundment.

Sleeper Mine: is an open pit gold mine located in Desert Valley on the western flank of the Slumbering Hills in Humboldt County, Nevada, approximately 30 miles northwest of Winnemucca. Active mining was conducted between March 1986 and October 1997 with three open pits with associated waste rock piles, five heap leach pads with associated solution ponds, and a tailings facility.

Pit Lake Consequences

Modern mining often involves the displacement of large volumes of rock and ore. Particularly, with the use of heap leach cyanide gold extraction large open pit mining has proven cost

⁶ Nevada Division of Water Resources, <http://water.nv.gov/>

effective. As a result lower grade gold ore is being pursued creating enormous open pits often well below the regional water table. In order to mine the deep pits groundwater must be pumped to create a "cone of depression" in the water table to keep the pit dry (dewatering will be discussed later.)

Often when mining activities cease in the pit, and hence dewatering ceases, water begins filling in the pit forming a "pit lake." It is also common that rock exposed during mining in the pit has a "reactive" component, meaning that with exposure to air, water, and microbes it will undergo oxidation; typically elevating the levels of sulfate and Total Dissolved Solids in the pit lake. In historic mines this oxidation has caused severe acidification of water draining from the mine and into the ground and surface water, often called "acid mine drainage."⁷ Therefore, reactive rock in a pit can cause the pit lake water to become acidic (low pH), which in turn tends to leach metals out of the rock in the pit further degrading the water making it unsuitable for humans and wildlife.

Once the pit lake water becomes degraded there exists the potential for this water to infiltrate and contaminate the groundwater. Measures to improve pit water such as adding lime to neutralize the acid can be effective in the short-term, but the pit water often degrades again over a period of years.⁸ In order to maintain acceptable water quality treatment may be required for hundreds of years as the exposed reactive rock is consumed. In effect, pit lakes can turn out to be site of perpetually contaminated water.

The Mule Canyon mine provides a striking example of a modern mine pit lake problem. The 1995 Environmental Impact Statement (EIS) for Mule Canyon predicted that only pit lakes would form in the South and West Pits. The South Pit lake was expected to be approximately 110 feet deep, and the West Pit with two "ponds" less than 20 feet deep. Seasonal temporary ponds were predicted in the other pits as well.⁹ Pit lake water quality was predicted to be poor initially but in the very long-term (~40 years after filling) improve substantially.¹⁰ These water level predictions were considerably off the mark,¹¹ where all the pits currently have substantial pit lakes with the South Pit expected to overflow the rim.¹² As a result a potentially serious water contamination situation has arisen since the South Pit lake water is of poor quality with low pH, and elevated levels of Total Dissolved Solids, sulfate, magnesium, and manganese (over 10 times acceptable levels).¹³ Newmont Mining Inc. has initiated interim procedures, and has

⁷ One such example of severe acid mine drainage is the Rio Tinto mine in Northeastern Nevada, which contaminates a portion of the Owhyee River. For further information see; Duckwater Reservation, Shoshone-Paiute Tribes, *Rio Tinto Mine/Mill Reclamation Audit*, February 2000.

⁸ Nevada Department of Environmental Protection, "Hollister Mine Fact Sheet," permit number NEV0088022, January 16, 2007; Nevada Department of Environmental Protection, "Tonopah Mine Fact Sheet," permit number NEV0088029, January 16, 2007 and Equitorial Tonopah Inc., "Fourth Quarter 2006 Water Pollution Control Permit," NEV88029, January 8, 2007.

⁹ US BLM, Final Mule Canyon Environmental Impact Statement, (NV-060 1793/3809 N64-92-001P, September 1996, pg 4-9.

¹⁰ *ibid*, pg. 4-14.

¹¹ According to the EIS the water level in the South Pit would have only risen to about 5690 feet AMSL. Currently, the level is at the rim or about 5940 AMSL, so about 250 feet higher than predicted.

¹² US Bureau of Land Management, Environmental Assessment Mule Canyon Mine Interim Water Management Plan, NV063-EA07-084, June 2007.

¹³ *ibid*, appendix B.

proposed further interim procedures to evaporate the “excess” water to prevent contamination of surface drainages. It is not clear whether this degraded water may have already infiltrated into the groundwater. In general, this is a long-term problem with no current solution, since the source of acidification has not been identified and water levels continue to rise.

The Department of the Interior U.S. Fish and Wildlife Service in Nevada, concerned about contaminated pit lake water, has been examining the potential for pit lakes to impact wildlife. A preliminary study resulted in the following statement:

“In 2000, the US Fish and Wildlife Service identified 18 existing pit lakes in Nevada. Water quality data was obtained for 12 of the existing lakes. Of the pit lakes for which data was available, four were slightly acidic. All pit lakes for which water quality data was obtained contained at least one trace element at concentrations that are potentially toxic to aquatic life or wildlife. Aquatic life effect concentrations were exceeded for arsenic, cadmium, and chromium in 2 of the 12 pit lakes for which water quality data were available. Copper concentrations exceeded an aquatic life effect level in at least six pit lakes. Mercury was detected in four pit lakes. All concentrations exceeded aquatic life and wildlife effect concentrations. However, detection levels used for mercury in the remaining pit lakes were greater than wildlife effect concentrations. Selenium exceeded a wildlife effect concentration in six pit lakes. Zinc exceeded an aquatic life effect concentration in six pit lakes.”¹⁴

The Big Springs mine also underscores concerns related to pit lakes. The 2005 SWX pit lake data shows elevated levels of Total Dissolved Solids, sulfate, manganese, and magnesium,¹⁵ and seepage from this pit lake has been implicated in contributing to contamination of Sammy Creek, which feeds the North Fork Humboldt River.¹⁶ Recently, July 10, 2007, the US forest Service released a scoping notice regarding continue exploration in the Big Springs area. It notes that the pit lakes at Big Springs have drained, “In late October 2006, two lakes that had formed in existing mine pits (pit lakes) and the surrounding aquifer began draining. The pit lakes are now dry and the aquifer level has dropped about 150 feet below previous levels measured prior to October 2006. It is unknown where the aquifer is draining to or what the impacts, if any, would be to water quality and surface and groundwater resources.”¹⁷ To the extent that the lake water quality was poorer than that in the groundwater, draining the lakes into the groundwater would have degraded the groundwater. In general, contaminated pit lake water is a legacy of modern surface pit mining with varying potential to degrade the waters of Nevada.

Waste Rock Drainage

¹⁴ US Fish and Wildlife Service, “Assessment of Wildlife Hazards Associated with Mine Pit Lakes,” www.fws.gov/pacific/ecoservices/envicon/pim/reports/Reno/PitMines.htm.

¹⁵ Nevada Department of Environmental Protection, Water Monitoring Report for 10/4/2005, Water Pollution control Permit #NEV87001.

¹⁶ Myers, Tom, *Expert Report, Nevada State Environmental Commission, Appeal hearing, Water Pollution control Permit Renewal, NEV0087001, Big Springs Mine, Technical Report 2005-07-GBMW*, September 14, 2005, pg. 28.

¹⁷ Notice of Intent for the Big Springs Environmental Impact Statement, Federal Register, vol. 72, No. 130, page 37182.

ATTACHMENT 11

ff.org/centers/csspp/library/co2weekly/20060105_news/20060105_04.html

Environment pays price for Nevada gold

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Toxic mines: Facing little regulation, they are blamed for spreading deadly mercury and depleting the region's water supply

By Kirk Johnson
The New York Times
Salt Lake Tribune

ELKO, Nev. - Just outside the chasm of North America's biggest open-pit gold mine, there is an immense, ever-flowing oasis in the middle of the Nevada desert. It is an idyllic and isolated spot where migratory birds often alight for a stopover. But hardly anything about it is natural.

This is water pumped from the ground by Barrick Gold of Toronto to keep its vast Goldstrike mine from flooding, as the world's third-largest gold company carves a canyon 1,600 feet below the level of northern Nevada's aquifer.

Nearly 10 million gallons a day draining away in the driest state in the nation - and the fastest growing one - is just one of the many strange byproducts of Nevada's tangled love affair with gold.

An extensive review of government documents and court records, and scores of interviews with scientists and present and former mine industry workers and regulators, show that an absence of federal guidelines, of the sort that are commonplace for coal or oil, allowed gold miners wide latitude to operate here in the desert, perhaps more than any other American industry.

The resulting costs - to Nevada, its neighbors and even the rest of the country - are only now coming into focus as diminishing ores foreshadow gold mining's eventual demise and a more urbanized West begins to express concerns over water shortages and mining's other legacies.

Gold mines in northeastern Nevada are one of the possible sources of mercury in Utah's Great Salt Lake, where tests have found some of the worst mercury pollution ever reported in the United States. Prevailing winds may carry mercury from the gold operations into the lake. Two days before the opening of the last duck hunting season, state officials warned Utah hunters not to eat two species of waterfowl that feed on Great Salt Lake marshes because tests of their flesh show toxic levels of mercury. The health advisory was believed to be the first of its kind in the nation, said state health officials.

Barrick says the effects of its pumping will last at most a few decades. But government scientists estimate it could take 200 years or more to replenish the groundwater that it and neighboring mine companies have removed, with little public attention or debate, as they meet soaring consumer demand for gold, whose price tops \$500 an ounce.

Goldstrike, meantime, may have only 10 years left, Barrick says, and most of the state's 20 or so other major mines are not expected to last much longer.

When they are gone, the vast pits they leave behind will create a deficit in the aquifer equivalent to 20 to 25 years of the total flow of Nevada's longest river, the Humboldt, according to state figures tallied by independent scientists. That is three times as much water as New York City stores in its entire upstate reservoir system.

"When they stop pumping, what you're going to hear is a huge sucking sound," said Robert Glennon, a law professor at the University of Arizona who has written on water issues in the West. "The impact on the Humboldt River will be catastrophic."

Toxic mercury: That is not all. Nevada's gold mines will bequeath more toxic mercury waste in their mountainous rock piles than any other industry, about 85 percent of the nation's total in 2003, according to the most recent figures from the Environmental Protection Agency. They already generate more than 3 percent of the airborne mercury pollution, the agency says, equivalent to 25 or more average coal-fired power plants.

At the same time, as of May, according to state figures, about \$200 million in cleanup costs were simple promises to pay from the corporate miners of a notoriously boom-and-bust industry.

Along with the modern superscale mining methods that were largely devised here beginning in the 1980s, such trade-offs have helped make Nevada the third-largest gold producer in the world, behind South Africa and Australia.

But mining experts, legal scholars and historians say that prosperity was also built on the basis of a law drafted in the age of the horse and buggy - the General Mining Law of 1872 - that declares mining the best use of public land, gives miners access to that land for bargain-basement prices and makes no mention of cleanup.

Mining industry officials vigorously defend the statute and say that the absence of federal guidelines - far from making things less strict - gave rise to an even tighter regulatory framework because other laws filled the breach, from endangered species protection to air and water rules.

No better way? "We just can't see a way to write a mining law that would appropriately regulate all of these different things and work any better," said Carol Raulston, a spokeswoman for the National Mining Association, the industry's trade group.

But here in Nevada, where four-fifths of the nation's gold is produced, current and former regulators say the antiquated law allows for special treatment of a favorite-son industry on a landscape of bleak extremes that few big environmental groups have risen to defend.

"If you look at the gold industry today, most of it is Nevada, and Nevada is mostly not prized by environmentalists," said John Leshy, who was the top lawyer for the Department of the Interior in the Clinton administration. "Nevada is being written off as a sacrifice area for gold."

In an ever more urban West, the day of reckoning is fast approaching, people like Leshy say. The new West, embodied by postindustrial Las Vegas, will inherit the landscape that gold leaves behind.

The glittering, energy-guzzling city is already probing north to satisfy its water needs, with a \$2 billion pipeline that will be the biggest groundwater project in American history if approved and built over the next 15 years.

Water experts say the scientific studies for the plan are only now likely to reveal just how Nevada's aquifer system really works, and how it was affected by the mines.

But, they warn, the 383 billion gallons of water pumped so far from the Goldstrike mine alone - enough to fill one of the midsize Finger Lakes of upstate New York - may have already imposed its stamp on the region's future.

Michael DuBois, an analyst with the Idaho State Department of Environmental Quality, was assigned earlier this year to figure out why the Salmon Creek Reservoir, on the Nevada border, had mercury levels 10 times higher than any body of water ever tested in the state.

The more DuBois and other scientists looked, the more they became convinced that airborne mercury, which has been linked to impaired neurological development in fetuses, infants and children, was coming north from Nevada's gold mines. "There are things crossing state lines here that don't know anything about political boundaries," he said this summer on a visit to the reservoir, where prominent warning signs had been posted about consumption of fish.

Regulation in sight: In November, under pressure from Idaho, Nevada said it would begin regulating mercury from the mines, which had been operating under a voluntary system since 2001. "We were moving in this direction anyway, but we ramped it up," said Colleen Cripps, a deputy administrator at the Nevada Division of Environmental Protection.

But how the huge mercury output from the mines was missed or barely

regulated for so long is just as big an issue for neighboring states that may have to live with the consequences for many years to come.

Mercury persists in the environment, as it accumulates in the tissues of fish and birds that pick it up from water sources. Nobody knows just how much has come from the mines over time because the Environmental Protection Agency did not even require it to be reported until 1998.

Before then, simple reassurances were regulation enough. In a 1997 agency report on mercury, gold was left off the list as a source because, the report's authors said, an "industry representative" had told them mercury was not a problem.

State officials insist that the voluntary efforts worked, and that the four companies taking part in the plan, including Barrick, cut emissions by 82 percent. But gaps in Nevada's patchwork regulation persisted.

In 2001, Barrick built a \$330 million "roaster," which heats ore for gold extraction and in the process also frees other metals, like mercury. But because it built the machine on private land, no state or federal law required an analysis of the environmental impact.

The roaster was subsequently identified by the EPA as a main mercury source. The mine, the agency says, now accounts for about 1 percent of the nation's total airborne mercury output.

Barrick's vice president for the environment, Richie Haddock, said the location of the roaster was driven by proximity to the pit, and by the fact that the land beneath contained no valuable ore. The roaster, he added, was also built with the most modern technology. There was no effort to avoid scrutiny, he said.

Regulatory gaps: But no scrutiny was the effect, and such regulatory gaps have become part of doing business, numerous legal scholars and present and former regulators say.

"The fact that the 1872 mining law had no environmental provisions was significant, because it means that those rules had to emerge from other places," said James McElfish, a senior lawyer at the Environmental Law Institute, a nonpartisan research group in Washington that advocates sustainable development and environmental protection. "The upshot of this is that it's a process of experimentation and diffuse authority, and no one is really leading the way."

Industry officials, while acknowledging that gold mines have emitted significant levels of mercury, say that where the mercury actually came to earth is a much harder question. What has been found in places like Salmon Creek, they say, could just as easily have come from a coal-burning plant in China or a natural source.

But local regulators like DuBois and Michael L. Abbott, an advisory scientist at the Idaho National Laboratory, part of the Department of Energy, are not convinced. After studying the wind patterns and deposition rates this summer and fall near Salmon Creek, Abbott said he believed that mercury from Nevada's gold mines is still coming north.

"Where do they think it's going to go?" Abbott said, "Outer space?"

Large-scale open-pit mining takes a lot of water, millions of gallons, mostly to dilute the cyanide that miners use to soak their ore and separate its microscopic bits of gold. Even so, mines like Goldstrike pump out so much water that company officials say they can use only a relatively small amount - less than 10 percent of what is displaced.

About half the rest goes into settling ponds, where it is expected to sink back into the aquifer, company records show. About one-quarter is used for irrigation. About 6 percent is sent to "sand dune drainage/evaporation."

The rest has engorged the Humboldt River since the 1980s. Though

Barrick has not discharged any of its water to the river since 1999, other mines remain in full pump-and-drain mode.

That pumping could change both the quantity and quality of the groundwater, and even the shape of the aquifer, said Glenn Miller, a professor of environmental science at the University of Nevada, Reno. "I think it may never be quite the same hydrologic system," he said. "There is simply no data to suggest that these changes aren't going to be permanent."

Officials at Barrick strongly disagree. Haddock, the environmental vice president, said in a written response that geological faults would confine the effects of dewatering near the mine.

Barrick, he said, has tried to make Goldstrike a model for its mines around the world. "A great deal of Barrick's culture developed at Goldstrike," he wrote, "and we try to export that culture throughout the company," which is set to take over Placer Dome as the No. 1 gold miner.

Water law loophole: Permanent impacts are not supposed to happen under a strict interpretation of the state water law, said Glennon at the University of Arizona.

An exception was made for gold. In the 1980s as mine pumping surged, the state decided that modern mining, however different in its scale and scope, was still just a "temporary" use of water, as it had been in the days of the prospector and his mule.

"The policy, if there was a policy, is that Nevada has always been a mining state, and as long as we could keep the impact within reason, it should be allowed," said Peter Morros, who made many of those decisions as the state engineer - Nevada's top water resource officer - from 1981 to 1990.

But the real story of gold's impact on Nevada's waters will emerge only in coming decades when the pumps are turned off, scientists say. That is when the 40-odd pits - from monsters like Goldstrike's Betze-Post to smaller mines like Newmont's Lone Tree - will start to fill with water that the mine companies no longer displace.

The lakes will store an estimated 500 billion gallons or more, according to estimates by Miller at the University of Nevada and other scientists. The Betze-Post, the center of Barrick's operations, is expected to become the largest artificial lake located wholly in the state, holding about 114 billion gallons.

Poison water: The result will be, if not the biggest water-storage project in the West, then certainly the strangest. Some of the lakes are expected to be poisonous, laced with arsenic and selenium. Others may have metal and acid concentrations toxic to fish but safe for humans. Some will be relatively benign.

Mining companies say the water quality in the aquifer, not mining, will dictate the outcome.

One thing is certain: In the hot desert sun, the water will constantly evaporate. And for every gallon of evaporation, the lakes will draw another gallon from the aquifer beneath them. Most will take decades, if not centuries, to fill. They will be like huge desert sponges, sucking from the aquifer eternally.

The Betze-Post pit, which Barrick expects to lose 74,000 gallons of water every hour to evaporation, will have good water quality, said Haddock, the environmental vice president, because of the aquifer's purity and the high volume of limestone that will act as a buffering agent.

Other scientists say it is not that simple.

The mine pits will fill with water that filters through surrounding rock, much of it disturbed by mining and thus potentially prone to acid generation. Rock with sulfide in it, once it contacts air and water, produces sulfuric acid.

"After the pits fill, after complete recovery, there is a

possibility that water could be affected by acid drainage," said Russell Plume, a hydrologist at the U.S. Geological Survey, a federal government research agency.

In the meantime, Nevada law is already trying to come to grips with the post-mine landscape. One pit mine, called Sleeper, which was operated until 1996 by a company called Amax Gold and is now closed, is already filling with water and losing about 257 million gallons a year to evaporation.

That lost water has to be accounted for somewhere in the state's water ledgers, said Hugh Ricci, the state engineer. The same will hold true for every other pit lake.

In Sleeper's case, because Nevada rules require water allocations for beneficial uses only, Ricci's predecessor came up with a novel legal interpretation. He declared that the pit lake would be used for recreation, and that its evaporation would therefore be a "recreational use."

By 2020, Las Vegas, the go-go city of the sands, is expected to have 3 million people living in an area that gets perhaps 4 inches of rain a year.

Some ecologists and water experts have argued for years that big desert cities, whether Phoenix or Las Vegas, are contradictions of nature that will one day face their comeuppance as water becomes too costly or scarce.

High stakes: The stakes for Nevada, planners and legal scholars say, could be even higher because of what happened under gold's regime.

By the time the mines around Elko are likely to be played out, the Las Vegas pipeline, assuming it is built, will be drawing the first of up to 58 billion gallons of water a year - enough for 20 percent of the city's projected population.

Those two pincer trends - urbanization from one side, mine closure from the other - raise the greatest uncertainties for tiny Elko, a town of just 16,000, that may be the nation's last gold boomtown.

"If the basin is drained, then this becomes like the Owens Valley in California," said Warren Russell, an Elko County Commissioner. The Owens Valley, near Death Valley National Park, was drained in the 1930s - the incident made famous by the movie "Chinatown" - as Los Angeles locked in water resources.

For now, Las Vegas water officials say they have no designs on any water farther north than their pipeline, which will end 100 miles or so south of Elko. But everyone cautions that a return of the drought that gripped the region in recent years - or a victory in court by the Western Shoshone Indians, who claim vast tracts of Nevada that they say were stolen in the 1800s - could change every calculation.

The general manager of the Las Vegas-based Southern Nevada Water Authority, Patricia Mulroy, said in an interview that her motto was never to say never - to rule out tapping the waters of northern Nevada would be folly.

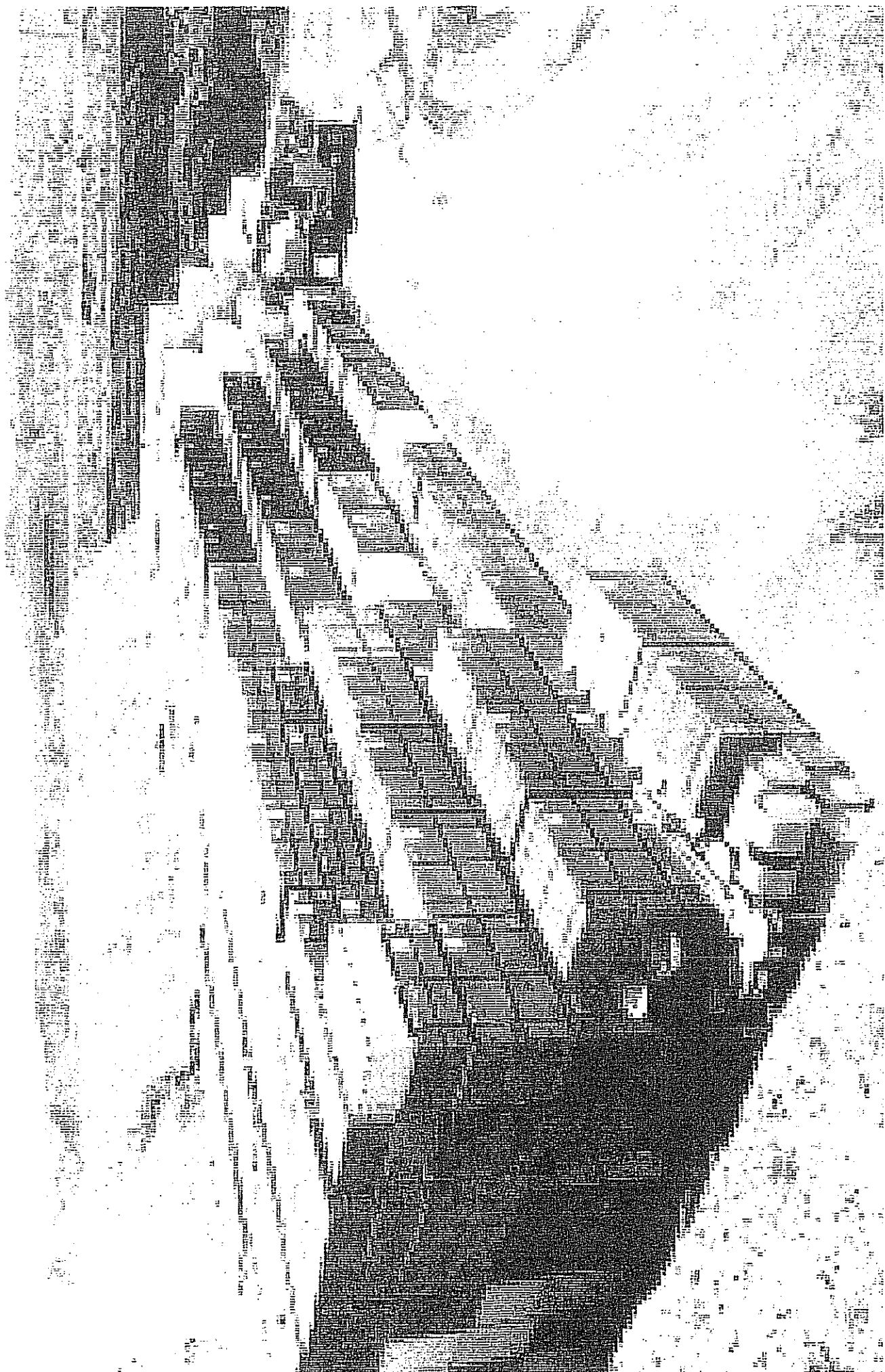
ATTACHMENT 12

Area 3 Disposal Process - Marsads Supersacks



Area 3 Disposal Process -
Marsads Supersacks

Area 3 Disposal Process -
Marsads Supersacks



ATTACHMENT 13(a)

In the United States Court of Federal Claims

Case No. 05-558L
Filed: September 20, 2006
FOR PUBLICATION

WESTERN SHOSHONE NATIONAL
COUNCIL, et al.

Plaintiffs,

v.

THE UNITED STATES,

Defendant.

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*
* *Motion to Dismiss, RCFC 12(b)(1);*
* *RCFC 12(b)(6); RCFC 60(b), 60(b)(4);*
* *Indian Claims Commission Act (ICCA);*
* *Finality Provisions; 25 U.S.C. § 70u (1976)*
* *25 U.S.C. § 70k (1976); ICCA § 22;*
* *Aboriginal Title; Treaty of Ruby Valley;*
* *28 U.S. C. § 2501 (2000)*
*
*
*

Jeffrey M. Herman, Herman & Mermelstein, P.A., Miami, FL, for Plaintiffs South Fork Band, Winnemucca Indian Colony, Dann Band, Te-Moak Tribe of Western Shoshone Indians, Battle Mountain and Elko Band.

Treva J. Hearne, Hager & Hearne, Reno, NV, for Plaintiffs Western Shoshone National Council and Timbisha Shoshone Tribe, with whom was Robert R. Hager, of counsel.

Sara E. Culley, United States Department of Justice, for Defendant, with whom was Thomas Bartman, United States Department of the Interior, of counsel.

OPINION

SMITH, Senior Judge:

This is the latest litigation involving a claim to approximately 60 million acres that goes back more than fifty years. This action challenges proceedings before the Indian Claims Commission (ICC) and the Court of Claims. The Court has before it Defendant's Motion to Dismiss Plaintiffs' Second Amended Complaint under Rules of the Court of Federal Claims (RCFC) 12(b)(1) and 12(b)(6). The Court held oral argument in Reno, Nevada on May 25, 2006 and in Washington, DC on June 14, 2006. For the reasons set forth in this opinion, the Court hereby GRANTS Defendant's Motion to Dismiss

FACTS¹

Since time immemorial, the Shoshone have occupied certain lands in what is now part of the United States. The Shoshone lived in extended family groups, or bands, and gathered together for ceremonial celebrations or food gathering activities. Today, they live in various communities in the same lands. Some of the bands of Shoshone are recognized by Congress under the Indian Reorganization Act, others are not.

During the United States' westward expansion, tensions arose between the United States and the western Indian tribes, including some of the Shoshone. When the Civil War began, the Union required additional resources, many of which were found in the West. The United States, seeking to avoid conflict with the Indians, entered into a series of treaties to ensure undisturbed passage to the resources of the West. These five treaties became known as the Doty Treaties after the Government's negotiator, Mr. James Doty. On October 1, 1863, the United States entered into a treaty with the "Western Shoshoni," which became known as the Treaty of Ruby Valley. 18 Stat. 689, Ratified June 26, 1866, Proclaimed Oct. 21, 1869.

In 1946, Congress sought to provide a means for Indian Tribes to bring historical claims against the United States for the taking of land and other related actions. To achieve that goal, Congress passed the Indian Claims Commission Act (ICCA). The ICCA created the Indian Claims Commission (ICC) and provided that Indian tribes could bring claims before the ICC for taken lands and had jurisdiction to hear cases filed within five years of the passage of the ICCA. The limitation provision made clear that "no claim existing before such date but not presented within such period may thereafter be submitted to any court or administrative agency for consideration." 25 U.S.C. § 70k (1976). Effectively, all claims existing on August 13, 1946 had to be filed by August 13, 1951 or be barred forever. *E.g. Lower Sioux*, 519 F.2d at 1383. This case is brought by Plaintiffs concerning their rights under the Treaty of Ruby Valley of 1863 and issues of validity and enforceability against the Plaintiffs of a judgment rendered in the Indian Claims Commission (ICC).

PROCEDURAL BACKGROUND

This case was originally filed in the United States District Court for the District of Columbia and was transferred to this Court on a Motion by Defendant.² After being transferred to this Court, the case was initially assigned to another Judge. Pursuant to this Court's rules, Defendant then filed a

¹ The facts are compiled from the Parties' briefs and prior litigation in this and related cases.

² One portion of the Complaint, seeking to quiet title, was transferred to the District Court in Nevada. That Court has since denied Plaintiffs' claim.

Notice of Directly Related Cases and the case was reassigned. Thereafter, Defendant filed its Motion to Dismiss Plaintiffs' Second Amended Complaint.³ Both the South Fork Band and National Council filed opposition to Defendant's Motion, and Defendant replied. The Court then held oral argument over two days and now issues its opinion.

STANDARD OF REVIEW

RCFC 12(b)(1) provides for the dismissal of claims if the Court lacks jurisdiction over the subject matter of the claims. It is well settled that "a party seeking the exercise of jurisdiction in its favor has the burden of establishing that such jurisdiction exists," *Rocovich v. United States*, 933 F.2d 991, 993 (Fed. Cir. 1991) (citing *KVOS, Inc. v. Associated Press*, U.S. 269, 278 (1936)), and that "subject matter jurisdiction is strictly construed." *Leonardo v. United States*, 55 Fed. Cl. 344, 346 (2003).

RCFC 12(b)(6) authorizes a court to dismiss a claim for failure to state a claim upon which relief can be granted. Claims must be dismissed if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his legal claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 102 (1957).

THE SECOND AMENDED COMPLAINT

I. Count I

In Count I, Plaintiffs seek either a declaratory judgment that the ICC Judgment is not enforceable against them, or that the ICC Judgment is void under RCFC 60(b) because of alleged due process violations. Defendant argues that the Court should dismiss Count I under RCFC 12(b)(1) and 12(b)(6) because they are out of time and they fail to state a claim. The South Fork Band responds that they are entitled to relief under RCFC 60(b)(4) because they were denied due process before the ICC and there is no time limit for RCFC 60(b)(4). The National Council takes a somewhat different approach, although they incorporate all of South Fork Band's arguments. The National Council argues that the "sham" proceeding before the ICC denied them of due process and that they are, therefore, entitled to relief from it and all cases that rely on it, including those handed down by the Supreme Court of the United States. The National Council alleges that they have new evidence that no court has ever examined in the long history of this case. Further, they argue that they are not bringing a motion under

³ After Defendant filed its Motion to Dismiss, Plaintiffs filed a substitution of counsel with regard to two of the named Plaintiffs. Plaintiffs South Fork Band, Winnemucca Indian Colony, Dann Band, Te-Moak Tribe of Western Shoshone Indians, Battle Mountain and Elko Band (collectively "South Fork Band") retained prior counsel. Plaintiffs Western Shoshone National Council and Timbisha Shoshone Tribe (collectively "National Council") retained new counsel. When referring to all of the Plaintiffs together, the Court will refer to "Plaintiffs." If, however, the Court is referring to one of the groups of Plaintiffs, it will refer to either "South Fork Band" or "National Council." When referring to Western Shoshone generally, the Court will refer to "Shoshone" or "Western Shoshone."

RCFC 60(b), but rather an independent action allowed under the rule.

A. Finality Provision of the ICCA

The Supreme Court and the Court of Claims have both made clear that the paramount purpose of the ICCA was to determine meritorious Indian claims with finality. *E.g. United States v. Dann*, 470 U.S. 39, 44-45 (1985) (quoting H.R. Rep. No 1466, 79th Cong., 1st Sess., 10 (1945)).⁴ Defendant argues that the finality provision of the ICCA bars the current action. Section 22(a) of the ICCA states that “[t]he 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.” 25 U.S.C. § 70u(a) (1976) (omitted after the dissolution of the ICC). The Government argues that, given Congress’s intent to draw all historic Indian claims to a close, the Court should apply § 22(a) to this count because it attempts to re-litigate long-settled issues. The Court certainly agrees that Congress has long desired to bring these claims to an end. However, it does not appear that Congress intended the finality provision to bar Rule 60 challenges to the ICC process. The Court of Claims allowed an independent action to proceed eight years after the payment of an ICC judgment. *Andrade v. United States*, 485 F.2d 660, 661 (Ct. Cl. 1973). Therefore, the Court cannot dismiss Count I under § 22(a). That does not, however, end the inquiry.

B. Timeliness of a Motion Under RCFC 60(b)

RCFC 60(b) sets forth the circumstances under which the Court may grant a party relief from a judgment or order that is not the result of clerical error. The text of RCFC 60(b) sets forth two distinct time limitations. As relevant here, a motion for relief based on “newly discovered evidence” must be filed “not more than one year after the judgment, order, or proceeding was entered or taken.” RCFC 60(b). Further, with regard to a motion seeking relief from a void judgment under RCFC 60(b)(4), the rule states that it must be filed “within a reasonable time.” *Id.* South Fork Band argues that there is no time limit on motions under RCFC 60(b)(4). They base their argument on cases from other circuits that have held that the passage of time cannot make a void judgment valid. The Defendant argues that none of those cases deal with a delay this long and that the reasonable time requirement bars Count I.

While other circuits may reject time limits for Fed. R. Civ. P. 60(b), the Court of Claims made plain that motions challenging ICC procedures filed under Ct. Cl. Rule 152(b) (now RCFC 60(b)) must be filed within a reasonable time. *E.g. Pueblo of Santo Domingo v. United States*, 647 F.2d 1087, 1089 (Ct. Cl. 1981). This determination is binding upon this Court. As the Federal Circuit made clear, “[f]here can be no question that the Court of Federal Claims is required to follow the precedent of the Supreme Court, our court, and our predecessor court, the Court of Claims.” *Coltec Indus., Inc. v.*

⁴ National Council requests this Court set aside the *Dann* decision. National Council Br. at 7. It is clear, as stated above, “[f]here can be no question that the Court of Federal Claims is required to follow the precedent of the Supreme Court, our court, and our predecessor court, the Court of Claims.” *Coltec Indus., Inc.*, 454 F.3d at 1353; see also *Strickland*, 423 F.3d at 1338 & n.3.

United States, 454 F.3d 1340, 1353 (Fed. Cir. 2006) (citation omitted); *see also Strickland v. United States*, 423 F.3d 1335, 1338 & n.3 (Fed. Cir. 2005). Therefore, to be timely, this motion must be filed within a reasonable time. In this case, the Court of Claims affirmed the ICC judgment in 1979. *Temoak Band of Western Shoshone Indians, Nev. v. United States*, 593 F.2d 994 (Ct. Cl. 1979). Further, it appears that all of the procedural defects alleged by the South Fork Band took place before that date. Assuming that this Court could base its reasonableness determination on the district court complaint filed in September 2003, Plaintiffs would have to show that the 24 year delay was reasonable. They have failed to do so.

C. Timeliness of an Independent Action Under RCFC 60(b)

Conceding the one year limitation imposed on motions introducing newly discovered evidence under RCFC 60(b)(1), the National Council frames its claim as an independent action. The Court of Claims made clear that the timeliness of an independent action contemplated under the rule is governed by the statute of limitations and laches. *Andrade v. United States*, 485 F.2d 660, 664 (Ct. Cl. 1973) (per curiam). As in all cases before this Court, 28 U.S.C. § 2501 imposes a six year statute of limitations. The *Andrade* Court held that the unexplained delay of eight years made the independent action untimely and dismissed that case. In this case Defendant argues that the facts the National Council claim are newly discovered were, in fact, clearly available and known to the Ninth Circuit and Supreme Court in *Dann*.

The National Council's attorneys have been particularly unhelpful in deciding this issue.⁵ In the National Council's brief, they assert as "newly discovered" the fact that the ICC's Final Report listed twenty cases as "not report [sic] to Congress as completed." National Council Br. at 16. In support of this contention the National Council did not cite the ICC Final Report itself, but instead cited a book, published in 1990, which merely reproduced a chart from the ICC Final Report. *Id.* at 16 n.32 (citing H.D. Rosenthal, *Their Day in Court: A History of the Indian Claims Commission* 266-67 (1990)). The National Council never explains how this fact, which is clearly stated in the ICC Final Report published in 1978, and Mr. Rosenthal's book published in 1990, could be newly discovered after 2000. All one had to do was *open* the report, an *official* publication of the United States Government, to see the footnote that the National Council raises in its brief. ICC Final Report, p. 125; National Council Br. at 16.

Oral argument only made Plaintiffs' position appear more unreasonable. As noted above, the National Council Brief raised the issue of the footnote to the ICC Final Report. The following exchange took place during oral argument:

MR. HAGER: It's been less than six years since they found out there was no final report. That's what I'm saying.

THE COURT: But that's not what your materials say. Your

⁵ The Court wants to make clear that it in no way directs this criticism toward the counsel for the South Fork Band.

materials say 1990 is your source for finding that there was no report. And that's, by my count, 15 years from the time the case was filed.

MR. HAGER: I didn't say 1990.

THE COURT: No?

MR. HAGER: No. I said within the last two or three years is when Steve Newcombe from the Indigenous Rights Institute learned that there was no final report.

THE COURT: But the source of that is a cite from a 1990 book, which may not have been in his library, but still was public record. And he's citing, from looking at the 1990 book, he's citing the 1979 report. So in 1979 it was public information.

Wash. Tr. at 39.⁶ The National Council then made things worse by arguing that *United States v. Beggerly*, 524 U.S. 38 (1997), supported its position that this Court could reopen this case. Wash. Tr. at 35-36. While presenting an accurate account of what the circuit court did in *Beggerly*, nowhere did the National Council's attorney mention that the Supreme Court reversed the circuit court's decision. *Beggerly*, 524 U.S. at 49. This type of oral argument does a disservice to both the Court and the client.

In the end, the issue of whether this alleged defect in the ICC Final Report is newly discovered is not difficult. Newly discovered evidence is judged on an objective rather than subjective standard. Plaintiffs must show that they could not have discovered such evidence through due diligence prior to when they found it. The publication in an official publication of the United States, in 1978, is enough to put Plaintiffs on objective notice of this fact. Further, the republication of the same fact in a book documenting the history of the ICC in 1990 can only amplify the point that there was no newly discovered evidence. Thus, there is no basis to sustain an independent action 25 years after the fact. While the Court for the moment assumes this "newly discovered" evidence is actual evidence, reading it makes that highly unlikely. However, whether it has any objective credibility is not critical to the Government's motion.

Therefore, the Court finds that Plaintiffs' Count I is untimely as either a motion under RCFC 60(b)(4) or an independent action. Because the statute of limitations in this Court constitutes a waiver of sovereign immunity, the Court must dismiss Count I for lack of subject-matter jurisdiction. As the Court will demonstrate below, even if Count I were timely, Plaintiffs have failed to state a claim.

D. Merits of Plaintiffs' Claims and This Court's Authority Under RCFC 60(b)(4)

Even if the motion and independent action are timely, the Court finds that Plaintiffs have failed to state a claim under RCFC 60(b). In order to grant relief, the Court must find that a "grave miscarriage of justice" would result if relief is denied. *Beggerly*, 524 U.S. at 47. In this case, Plaintiffs claim that their due process rights were violated by the proceeding before the ICC. The National

⁶ The Court will refer to the "Reno Tr." and "Wash. Tr." to differentiate between the two court sessions.

Council argues that Defendant violated its rights by designating who would represent the Shoshone, choosing their attorney, limiting the claims allowed, and entering unsupportable stipulations. National Council Br. at 7. The South Fork Band states more generally that the ICC failed to provide procedural safeguards. South Fork Band Br. at 30-31. However, these same allegations have been presented to courts in the past and rejected. For example, the designation of the representative was challenged, and upheld, by the Court of Claims. *Western Shoshone Legal Defense & Educ. Ass'n*, 531 F.2d at 503. Further, Plaintiffs claim that the Plaintiffs before the ICC were denied the right to fire their counsel. However, when they did so, the proposed new counsel appeared and argued before the Court of Claims. *Temoak Band*, 593 F.2d at 995. Additionally, the Supreme Court denied petitions for certiorari with respect to the cases that had been heard in the Court of Claims. *Western Shoshone Identifiable Group v. United States*, 444 U.S. 973 (1979); *Western Shoshone Legal Defense & Educ. Ass'n*, 429 U.S. 885 (1975). The extraordinary relief allowed under RCFC 60(b) does not provide a second chance to appeal. Plaintiffs have failed to present any evidence that would show a grave miscarriage of justice that has not already been considered by a various federal courts. Therefore, even if Count I could be considered timely, Plaintiffs have failed to state a claim for which relief may be granted and the Court is compelled to dismiss it under RCFC 12(b)(6).

II. Count II

In Count II, Plaintiffs seek to recover interest for taking of the Plaintiffs' "fee title land." South Fork Band Br. at 15-16. The Government moves to dismiss Count II because there is no waiver of sovereign immunity for prejudgment interest for the taking of the disputed land. See *Library of Congress v. Shaw*, 478 U.S. 310, 315 (1986) (holding that the United States is immune from an award of interest absent an express waiver of immunity). Plaintiffs counter that Count II is argued in the alternative to Count I and is predicated upon the following two circumstances: "(1) the Court determines that the ICC Judgment is valid; and (2) the Court finds . . . that the ICC Judgment extinguished the [Plaintiffs'] 'independent treaty-based rights.'" *Id.* If Plaintiffs held Treaty Title to the disputed land, as opposed to aboriginal title,⁷ then Plaintiffs claim they are entitled to interest because this would constitute a Fifth Amendment taking. The Court holds that it must dismiss this claim.

A. Aboriginal Title

Plaintiffs argue that the ICC did not deal with a significant portion of the Plaintiffs' land that they occupy under aboriginal title. The Plaintiffs claim that, at the least, the Treaty of Ruby Valley defined the area that the Plaintiffs occupy under aboriginal title. That area, described in Article V of

⁷ Aboriginal title is the right to exclusive possession that tribes hold as the result of occupying land from time immemorial. There is no waiver of sovereign immunity for the extinguishment of aboriginal title. Treaty title is the equivalent of fee title that is acquired through a treaty with the United States. Because it is the equivalent of fee title, the taking of property held under treaty title requires compensation under the Fifth Amendment, which includes interest. For an in depth examination of this distinction, see *Seneca Nation of Indians v. New York*, 206 F. Supp. 2d 448 (W.D.N.Y. 2002).

the Treaty, amounts to approximately 60,000,000 acres of land. The ICC proceedings, according to Plaintiffs, only dealt with 24,000,000 acres. Reno Tr. 26-29; *See also Western Shoshone Identifiable Group v. United States*, 29 Ind. Cl. Comm. 5, 63 (1972) (finding aboriginal title to 22,211,753 acres in Nevada and 2,184,650 acres in California). Therefore, Plaintiffs claim that they still maintain aboriginal title to approximately 36,000,000 acres even if the ICC judgment was valid. South Fork Band Br. at 15 n.5. Defendant responds that Plaintiffs' reading of the ICC judgment is flawed. According to the Government, the ICC dealt with the entire area and found that the Shoshones only established aboriginal title to the 24,000,000 acres. In the alternative, Defendant argues that even if Plaintiffs are correct, that the time and place to bring their claim to the 36,000,000 acres was before the ICC.

Plaintiffs' arguments cannot withstand scrutiny. The ICC dealt with all of the Shoshone aboriginal title claims, not just the 24,000,000 acres for which it awarded damages. The ICC defined with specificity the area that was exclusively used and occupied by the Western Shoshone Identifiable Group (*i.e.* the 24,000,000 acres). *Western Shoshone*, 29 Ind. Cl. Comm. at 413-14. The Commission stated that:

Lands within the claimed area which have been found not to have been exclusively used and occupied by the four Shoshone land-using entities described herein include lands for which there is no substantial evidence of their respective exclusive use and occupancy and also lands used by various other tribes or groups of Indians.

Id. at 414. Further, Plaintiffs' claim to aboriginal title to the additional 36,000,000 acres cannot withstand the fact that the ICC determined that other tribes held such title to parts of that same land. As discussed above, aboriginal title requires that the claiming Indians must establish exclusive occupancy and use of the land, therefore, it is impossible for more than one tribe to hold aboriginal title to the same land. The ICC held that the Shoshone Tribe, which was distinct from the Western Shoshone, held aboriginal title to land extending from Twin Falls, Idaho "southwest to the Western Shoshone identifiable group's northeastern boundary line . . . ; thence southeast along said Western Shoshone boundary line . . . ; thence in a direct northeasterly line . . ." *Id.* at 412. The Goshute Tribe held aboriginal title to lands from Wendover, Utah "due west to the Western Shoshone group's boundary line . . . ; thence south along the Western Shoshone boundary to Kimberly, Nevada; thence east . . ." *Id.* at 413. Further, in other cases, the ICC determined that the Northern Paiute and the Indians of California held aboriginal title to other tracts within the 60,000,000 acres, including all of the land in California not established as Western Shoshone land in the ICC decision. *Indians of California v. United States*, 8 Ind. Cl. Comm. 1 (1959).

Therefore, the ICC dealt with aboriginal title to all 60,000,000 acres and determined that the Western Shoshone only established aboriginal title to approximately 24,000,000 acres. The parties then stipulated that the aboriginal title had been extinguished as of July 1, 1872. Under the ICC judgment, Plaintiffs no longer hold aboriginal title to any of the 60,000,000 acres and the claim must be dismissed for lack of subject-matter jurisdiction.

C. Treaty of Ruby Valley

Underlying much of the litigation presently before the Court is the Treaty of Ruby Valley and the proper interpretation of it. Plaintiffs argue that the Treaty grants them treaty title. The Government argues that the Treaty was merely one of friendship and that it conveyed no treaty rights to any of the lands described in it. Much of the briefing submitted on this topic involved the meaning of the Supreme Court's decision in *Northwestern Bands of Shoshone Indians v. United States*, 324 U.S. 355 (1945). Defendant argues that *Northwestern Bands* precludes the determination that Plaintiffs ever held treaty title to the land. Plaintiffs argue that *Northwestern Bands* did not rule upon an interpretation of the Treaty of Ruby Valley. Rather, Plaintiffs argue the Court reviewed a different treaty, the Box Elder Treaty. The Court finds this argument to be without merit. In *Northwestern Bands*, the Supreme Court discusses all of the treaties entered into with the Shoshones in 1863, which were "similar in form." 324 U.S. at 343. Further, the Court's conclusion that no recognized title had been conferred is stated in terms clearly applicable to the Treaty of Ruby Valley. *Id.* at 348. Following a discussion in which the Court specifically referenced the Western Shoshone treaty, the Court stated "nowhere in any of the series of treaties is there a specific acknowledgment of Indian title or right of occupancy." *Id.*

South Fork Band also argue that recognized title may be reasonably inferred from the language used in the Treaty of Ruby Valley. South Fork Band Resp. Br. at 9. The Court disagrees. Even though there is no particular form necessary for congressional recognition of Indian right of permanent occupancy, "there must be the definite intention by congressional action or authority to accord legal rights, not merely permissive occupation." *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 278-79 (1955)(citation omitted). And specifically, in *Northwestern Bands*, the Supreme Court stated that such definite intention was lacking in the language employed in the Treaty of Ruby Valley. 324 U.S. 348. It is clear to the Court that Plaintiffs cannot rely on the allegation that the Treaty of Ruby Valley recognized the Western Shoshones' ownership of land. Accordingly, the Court finds that the claim must be dismissed for Plaintiffs can not prove any set of facts in support of their claim that would entitle them to relief.

III. Count III

In Count III, Plaintiffs seek royalties for minerals mined from the disputed land under the Treaty of Ruby Valley. Defendant argues that this Count is barred by the statute of limitations and the finality provision of the ICCA. Defendant argues that because the ICC Judgment includes a \$4,604,600 award for minerals removed from the land, § 22 bars this Count. *Temoak Band*, 593 F.2d at 996; 40 Ind. Cl. Comm. 318, 452 (1977). Plaintiffs⁸ argue that the finality provision cannot bar this case

⁸ These arguments are the South Fork Band's. The National Council does not argue this issue specifically, but it does expressly incorporate all of the South Fork Band's arguments. National

because it was repealed before the payment of the ICC judgment. Alternatively, they argue that it is not jurisdictional. They finally argue that the ICC procedure was not followed, therefore, the finality provision was never triggered in this case.

A. The Exclusive Jurisdiction of the ICC

Defendant argues that the ICC had exclusive jurisdiction over any claim seeking to recover royalties under the Treaty of Ruby Valley. The Court has already noted that when Congress passed the ICCA, it sought to bring all meritorious claims to conclusion. To that end, the ICC had jurisdiction to hear cases filed within five years of the passage of the ICCA. The limitation provision made clear that "no claim existing before such date but not presented within such period may thereafter be submitted to any court or administrative agency for consideration." 25 U.S.C. § 70k (1976). Effectively, all claims existing on August 13, 1946 had to be filed by August 13, 1951 or be barred forever. *E.g. Lower Sioux*, 519 F.2d at 1383. Further, the Indian Tucker Act grants the Court of Federal Claims jurisdiction over claims "accruing after August 13, 1946." 28 U.S.C. § 1505 (2000). Plaintiffs argue that this Court accrued after 1946, however, they do not explain that proposition. The Treaty, entered in 1863, expressly obligated the United States to pay the Western Shoshone \$5,000 per year for twenty years. It is impossible to conclude that the failure to pay treaty mandated compensation, based on a treaty entered in 1863, did not accrue before 1946. There is no indication of any payment after the twenty years required by the text of the Treaty. Therefore, the Court must dismiss this Court because it was within the exclusive jurisdiction of the ICC.

B. The Finality Provision of the ICCA

Even if jurisdiction over Count III was not placed exclusively in the ICC, the Court would be required to dismiss this Court because of the finality of the ICC Judgment. Plaintiffs' argument that the finality provision of the ICCA is not jurisdictional is untenable. The finality provision, ICCA § 22, states that:

[P]ayment of any claim, after a determination under the 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.

(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.

25 U.S.C. § 70u (1976) (omitted 1978). This provision constitutes a limitation on the Government's waiver of sovereign immunity. *See Dann*, 470 U.S. at 45. Therefore, if it applies to Count III, the finality provision would remove jurisdiction from this Court.

Council, Br. at 1. With this caveat, the Court will refer to "Plaintiffs" in this section.

The Court must determine if the finality provision may still apply now that the ICCA has been omitted from the U.S. Code. Plaintiffs argue that the ICCA was repealed effective September 30, 1978 when the ICC was terminated. Pub.L. 94-465, 90 Stat. 1990 (Oct. 8, 1976). Therefore, Plaintiffs argue that §22 cannot apply to this case because the payment of the ICC judgment was not until December 6, 1979. Plaintiffs assert that the ICCA had been repealed by that time. Plaintiffs further seek to limit the *Dann* decision to simply deciding when payment occurred, arguing that *Dann* does not decide whether the ICCA applied to payments made after September 30, 1978. This argument, however, misconprehends the history of the ICCA and the *Dann* decision. There is nothing in the history of the ICCA to indicate that it has ever been repealed. In terminating the ICC, Congress modified two provisions; it did not repeal any. Pub.L. 94-465, 90 Stat. 1990. Instead, the ICCA has been omitted from the U.S. Code after the termination of the ICC. See South Fork Band Br. at Ex.'s 5 & 6.

Plaintiffs also fail to explain why the Supreme Court would decide *Dann* if the payment of the ICC judgment would have no effect. Indeed, the *Dann* Court was clearly aware that ICCA § 22 would preclude certain of the Danns' claims if the Court found payment had occurred. The *Dann* Court reversed the Ninth Circuit because the circuit's decision "would frustrate the purpose of finality by postponing the preclusive effects of § 22(a) while subjecting the United States to continued liability for claims and demands that 'touch' on the matter previously litigated and resolved by the Indian Claims Commission." *Dann*, 470 U.S. at 45 (emphasis added). Because payment of the ICC judgment occurred after the omission of the ICCA from the U.S. Code, *Dann* clearly establishes that the ICCA's finality provision may still act to bar claims against the Government.

Plaintiffs' argument that § 22 cannot bar this Court because the final report was never filed also fails to survive review. As discussed above, this cannot be the basis of relief under RCFC 60(b). Further, the Supreme Court clearly stated that the preclusive effect of § 22 bars further claims upon payment of the ICC award and thus this Court is bound by that determination.

IV. Count IV

In Count IV, Plaintiffs⁹ ask the Court to order Defendant to provide "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." Compl. ¶ 76. Defendant argues that this Court lacks the necessary equitable jurisdiction to order such an accounting until Defendant's liability is established. Plaintiffs respond that the Court must look at Count IV in conjunction with Counts III and V, and may therefore retain jurisdiction. Further, Plaintiffs allege, and Defendant denies, that Defendant took an inconsistent position in the district court and should not now be allowed to change its position.

⁹ These arguments are the South Fork Band's. The National Council does not argue this issue specifically, but it does expressly incorporate all of the South Fork Band's arguments. National Council, Br. at 1. With this caveat, the Court will also refer to "Plaintiffs" in this section.

Preliminarily, it is clear that no argument made to the district court may alter the subject-matter jurisdiction of this Court. Jurisdiction in this Court may only be conferred by Congress. *E.g. Transcountry Packing Co. v. United States*, 568 F.2d 1333, 1336 (Ct. Cl. 1978). Thus, even if Defendant argued to the district court that this Court was the only court with jurisdiction over this claim, and convinced the district court to transfer the case here, that does nothing to help this Court determine its jurisdiction over this claim. The subject-matter jurisdiction of this Court cannot be established by estoppel.

The Court finds that it does not have jurisdiction over Count IV. If taken as an independent claim, South Fork Band concedes that this Court lacks jurisdiction. Even if the Court could retain jurisdiction over this Count as South Fork Band argues, the Court cannot do so here because it is dismissing Counts III and V in this opinion. Therefore, the Court dismisses Count IV for lack of subject-matter jurisdiction.

V. Count V

In Count V, Plaintiffs seek damages for alleged breaches of fiduciary duties that Plaintiffs argue were owed by the Government to Plaintiffs. Defendant argues that Count V should be dismissed for lack of subject-matter jurisdiction in this Court. First, Defendant argues, the relief sought in Count V is barred by the exclusivity and finality provisions of the ICCA. Second, Defendant argues that even if Count V survives its ICCA challenge, it is untimely under the six-year statute of limitations found in 28 U.S.C. § 2501 (2000). Plaintiffs¹⁰ respond that the ICCA does not bar this Count and that the statute of limitations has not begun to run in this case because the Government has not repudiated the relationship or provided an accounting of Plaintiffs' funds.

Without reaching the ICCA argument, this claim is clearly out of time under this Court's generally applicable statute of limitations. 28 U.S.C. § 2501. Because § 2501 constitutes a waiver of sovereign immunity, its bar deprives this Court of subject-matter jurisdiction over untimely claims. *E.g. Hopeland Bands of Pomo Indians v. United States*, 855 F.2d 1573, 1576-77 (Fed. Cir. 1988). The statute of limitations begins to run at the time of "first accrual," which is the time when all of the facts necessary to establish liability have taken place. *Nager Electric Co. v. United States*, 368 F.2d 847, 851 (Ct. Cl. 1966). These facts, of course, must not be inherently unknowable at the time they occur. *Menominee Tribe v. United States*, 726 F.2d 718, 720-22 (Fed. Cir. 1988). In the case of a trust relationship, the statute does not begin to run on a breach unless the fiduciary expressly repudiates the relationship or provides an accounting of trust funds. *E.g. Osage Tribe of Indians of Oklahoma v. United States*, 68 Fed. Cl. 322 (2005). A trustee, however, may repudiate the relationship through "actions inconsistent with [its] obligations under the trust." *Jones v. United States*, 801 F.2d 1334, 1336 (Fed. Cir. 1986) (citation omitted).

¹⁰ These arguments are the South Fork Band's. The National Council does not argue this issue specifically, but it does expressly incorporate all of the South Fork Band's arguments. National Council, Br. at 1. With this caveat, the Court will also refer to "Plaintiffs" in this section.


Assuming *arguendo*, that the Government owed a fiduciary duty to the Plaintiffs under the Treaty of Ruby Valley,¹¹ it is impossible to accept the Plaintiffs' view that the Government has not long ago repudiated such a relationship. Ever since the initial case before the ICC, filed in 1951, the Government has denied that the Plaintiffs retained *any* interest in the disputed land. *E.g. Western Shoshone Legal Defense & Educ. Ass'n v. United States*, 531 F.2d 495, 500 (Ct. Cl. 1976) (noting that "the Government consistently maintained that the Indians never owned the lands they claimed"). That position, repeated in numerous cases over 55 years, is irreconcilable with the Government acknowledging its role as a fiduciary. It is also impossible to conclude that Plaintiffs only became aware of the Government's position within the last six years. For the purposes of § 2501, Count V first accrued in the 1950's when the Government denied that the Plaintiffs had any interest in any of the disputed 60 million acres.

The Plaintiffs also point to *Osage Tribe* to support their claim that appropriations acts have set aside the statute of limitations until an accounting has been provided. *Osage Tribe*, however, does not apply to this case because *Osage Tribe* dealt with a trust fund expressly created by statute. *Osage Tribe*, 68 Fed. Cl. at 325-26. In this case, Plaintiffs can only claim that the Treaty of Ruby Valley created a trust relationship with regard to the lands and assets of the land described in the Treaty. However, the Federal Circuit has made it clear that the setting aside of the statute of limitations until an accounting is provided applies only to cases of trust fund mismanagement, not asset mismanagement. *Shoshone Indian Tribe of the Wind River Reservation v. United States*, 364 F.3d 1339, 1350 (Fed. Cir. 2004). Therefore, the Court must *dismiss* Count V for lack of subject-matter jurisdiction.

CONCLUSION

For the reasons set forth in this opinion, the Court hereby GRANTS Defendant's Motion to Dismiss Plaintiffs' Second Amended Complaint. The Clerk is directed to enter judgment in favor of Defendant.

IT IS SO ORDERED.


LOREN A. SMITH
Senior Judge

¹¹ The Supreme Court has held that pervasive control over Indian lands can be found to create a fiduciary relationship with the Government. *United States v. Mitchell*, 463 U.S. 206, 224 (1983). In this case, the language in the Treaty of Ruby Valley does not appear to grant such pervasive control to the United States. Therefore, for the sake of this argument, the Court will assume, without deciding, that such a relationship did exist.

ATTACHMENT 13(b)

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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * * * *

RAYMOND YOWELL,)	
)	
Plaintiff,)	03:05-CV-0634-LRH (VPC)
)	
vs.)	
)	<u>ORDER</u>
UNITED STATES OF AMERICA, and P.)	
Lynn Scarlett, Acting Secretary of the United)	
States Department of the Interior,)	
)	
Defendants.)	

Presently before this court is the United States' motion to dismiss for lack of subject matter jurisdiction (#10¹). Plaintiff, Raymond Yowell, has filed an opposition (#13) to which the United States has replied (#14). The United States argues that the current suit cannot proceed because the United States has not waived its right to sovereign immunity.

When subject matter jurisdiction is attacked via Rule 12(b)(1), the court is granted more leeway than in a normal motion to dismiss. This is so because federal courts are courts of limited jurisdiction, *Owen Equip. & Erection Co. v. Kroger*, 473 U.S. 365, 374 (1978), and are "presumed to lack jurisdiction in a particular case unless the contrary affirmatively appears." *Stock West, Inc. v. Confederated Tribes of the Colville Reservation*, 873 F.2d 1221, 1225 (9th Cir. 1989).

"In ruling on a challenge to subject matter jurisdiction, the district court is ordinarily free to hear evidence regarding jurisdiction and to rule on that issue prior to trial, resolving factual

¹ References to (#XX) refer to the court's docket.

1 disputes where necessary.” *Augustine v. U.S.*, 704 F.2d 1074, 1077 (9th Cir. 1983) (citing
2 *Thornhill Publ’g Co. v. General Tel. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979). When the court
3 is faced with a factual attack on subject matter jurisdiction, “[n]o presumptive truthfulness
4 attaches to plaintiff’s allegations, and the existence of disputed material facts will not preclude
5 the trial court from evaluating for itself the merits of jurisdictional claims.” *Thornhill Publ’g*
6 *Co., Inc.*, 594 F.2d at 733 (quoting *Mortensen v. First Fed. Sav. & Loan Ass’n*, 549 F.2d 884,
7 891 (3rd Cir. 1977)). “However, where the jurisdictional issue and substantive issues are so
8 intertwined that the question of jurisdiction is dependent on the resolution of factual issues going
9 to the merits, the jurisdictional determination should await a determination of the relevant facts
10 on either a motion going to the merits or at trial.” *Augustine*, 704 F.2d at 1077. “[A]n action
11 should not be dismissed for lack of jurisdiction without giving the plaintiff an opportunity to be
12 heard unless it is clear the deficiency cannot be overcome by amendment.” *May Dept. Store v.*
13 *Graphic Process Co.*, 637 F.2d 1211, 1216 (9th Cir. 1980).

14 If the United States is a party to an action and it has not waived its sovereign immunity,
15 the action must be dismissed for lack of subject matter jurisdiction. *U.S. v. Nye County, Nev.*,
16 178 F.3d 1080, 1089 n.12 (9th Cir. 1999); *Elias v. Connett*, 908 F.2d 521, 527 (9th Cir. 1990);
17 *Pesci v. I.R.S.*, 67 F.Supp.2d 1189, 1194 (D. Nev. 1999). The plaintiff bears the burden of
18 proving that sovereign immunity has been unequivocally waived. *Cato v. U.S.*, 70 F.3d 1103,
19 1107 (9th Cir. 1995).

20 The United States’ motion points out that Plaintiff can point to no statute or law which
21 would demonstrate that the United States has waived its right to sovereign immunity in this
22 instance. The United States demonstrates that Plaintiff has provided only jurisdictional statutes
23 to support his claims². Further, the United States points to ample case law supporting their
24 argument that these statutes of general jurisdiction do not waive sovereign immunity. *See, e.g.*,
25 *Hughes v. United States*, 953 F.2d 531, 539 n.5 (9th Cir. 1992) (“A mere assertion that general
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27 ² These statutes include 28 U.S.C. §§ 1331 (federal question jurisdiction); 1343(a)(3)
28 (jurisdiction in Civil Rights Act cases); 1367 (supplemental jurisdiction); and 2201 (declaratory
judgment jurisdiction).

1 jurisdictional statutes apply does not suffice to confer jurisdiction when, as in this case, the
2 government did not waive its immunity.”).

3 Plaintiff's response wholly fails to rebut the United States' position. Rather, Plaintiff
4 delves into the merits of his lawsuit, challenging the enforceability of cases such as *United States*
5 *v. Dann*, 470 U.S. 39 (1985) and arguing that the Treaty of Ruby Valley, an often contested
6 Treaty affecting the Native Americans of Nevada, should be held to be in full force and effect.
7 Plaintiff then proceeds to argue why the doctrine of *res judicata* should not be invoked to provide
8 the contested cases with their normal preclusive effects. However, the issue of *res judicata* is
9 irrelevant to whether the United States has waived its sovereign immunity so that it could be sued
10 over the validity of those cases. Accordingly, Plaintiff has provided no real opposition to the
11 United States' position.

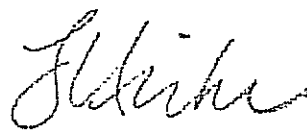
12 The court has reviewed the authority cited by the United States as well as the arguments
13 made by Plaintiff and concludes that there has been no waiver of sovereign immunity which
14 would allow the current claims to proceed. Further, the court sees no set of facts that could be
15 pled at this time to cure this defect. The United States has analyzed potential claims for
16 jurisdiction, as well as the possibility of construing this matter as one arising under the
17 Administrative Procedures Act, and has pointed to binding case law in all areas that would
18 preclude a finding that sovereign immunity has been waived. Plaintiff has provided no opposing
19 argument that would suggest that the United States has waived its right of sovereign immunity.

20 Accordingly, Plaintiff's claims must be dismissed for lack of subject matter jurisdiction.

21 It is hereby ORDERED that the United States' motion to dismiss (#10) is GRANTED.

22 The Clerk shall enter judgment accordingly.

23 DATED this 8th day of December, 2006.

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LARRY R. HICKS
UNITED STATES DISTRICT JUDGE

AO 450 (Rev. 5/85) Judgment in a Civil Case

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

RAYMOND YOWELL,

Plaintiff,

v.

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 3:05-cv-0634-LRH (VPC)

UNITED STATES OF AMERICA,
et al.,

Defendants.

 Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

 Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

 X **Decision by Court.** This action came to be considered before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the judgment is in favor of the Defendant and against the Plaintiff.

January 12, 2007

LANCE S. WILSON
Clerk

Wayne Julian
Deputy Clerk

ATTACHMENT 13(c)

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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

WESTERN SHOSHONE NATIONAL)
COUNCIL, RAYMOND YOWELL, ALLEN)
MOSS, JOE KENNEDY, JOHN WELLS,)
CARRIE DANN, JOHNNIE BOBB and)
BENNIE REILLEY, individually and class)
representatives,)

03:06-CV-00015-LRH-RAM

Plaintiffs,

ORDER

v.

BNSF RAILROAD COMPANY,)
NEWMONT GOLD COMPANY, BARRICK)
GOLDSTRIKE MINES INC., GLAMIS)
GOLD, INC., NEVADA LAND RESOURCE)
COMPANY, LLC., SIERRA PACIFIC)
POWER COMPANY, IDAHO POWER)
COMPANY and UNION PACIFIC)
RAILROAD COMPANY,)

Defendants.

Presently before the court are three motions to dismiss (## 80, 83, 93). Plaintiffs have filed an opposition (# 98), and replies have been filed (## 100, 102).

I. Factual Background

This is a civil action brought by Plaintiffs, the governing body of the Western Shoshone Nation and members of the Western Shoshone National Council, seeking the return of land, in addition to compensation for its past use, that Plaintiffs claim was fraudulently conveyed to

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1 Defendants by the United States. The present dispute is only the latest action in a series of actions
2 seeking the return of, and compensation for, Western Shoshone tribal lands.

3 The First Amended Complaint alleges that the Western Shoshone have occupied the lands
4 at issue in this case from time immemorial. (First Am. Compl. ¶ 14.) On July 1, 1862, the United
5 States enacted the Pacific Railroad Act in order to finance and construct a transcontinental railroad
6 that would cross lands held by Plaintiffs' predecessors in interest. *Id.* ¶ 16. On October 1, 1863,
7 the Treaty of Ruby Valley was entered into by the United States and the Western Shoshone Nation.
8 *Id.* ¶ 18. Plaintiffs allege that the land at issue in this case was conveyed in its entirety by the time
9 the transcontinental railroad was completed in 1869. *Id.* at 24. Plaintiffs position in this case is
10 that the conveyance of the lands was subject to Western Shoshone title. *Id.* Plaintiffs argue that
11 the Treaty of Ruby Valley expressly recognized ownership rights and Indian title in favor of the
12 Western Shoshone Nation. *Id.* at 26. Plaintiffs filed their amended complaint on April 10, 2006,
13 asserting causes of action for declaratory judgment, disgorgement of profits, constructive trust,
14 accounting, waste, trespass, injunction, and seek class certification.

15 II. Legal Standard

16 In considering "a motion to dismiss, all well-pleaded allegations of material fact are taken
17 as true and construed in a light most favorable to the non-moving party." *Wylar Summit P'Ship v.*
18 *Turner Broad. Sys., Inc.*, 135 F.3d 658, 661 (9th Cir. 1998) (citation omitted). However, a court
19 does not necessarily assume the truth of legal conclusions merely because they are cast in the form
20 of factual allegations in a plaintiff's complaint. *See Clegg v. Cult Awareness Network*, 18 F.3d
21 752, 754-55 (9th Cir. 1994).

22 There is a strong presumption against dismissing an action for failure to state a claim. *See*
23 *Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246, 249 (9th Cir. 1997) (citation omitted). "The issue is
24 not whether a plaintiff will ultimately prevail but whether [he] is entitled to offer evidence in
25 support of the claims." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), *overruled on other grounds*

1 by *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982). Consequently, the court should not grant a
2 motion to dismiss “for failure to state a claim unless it appears beyond doubt that the plaintiff can
3 prove no set of facts in support of his claim which would entitle him to relief.” *Conley v. Gibson*,
4 355 U.S. 41, 45-46 (1957); *see also Hicks v. Small*, 69 F.3d 967, 969 (9th Cir. 1995).

5 **III. Discussion**

6 On June 19, 2006, defendants BNSF Railroad Company, Newmont USA Limited, Glamis
7 Gold, Inc., Nevada Land and Resource Company, L.L.C., Sierra Pacific Power Company, Idaho
8 Power Company, and Union Pacific Railroad Company (collectively, “Defendants”) filed a motion
9 to dismiss asserting three arguments: 1) This court lacks jurisdiction because Plaintiffs’ claims are
10 barred by the finality provision and exclusive jurisdiction of the Indian Claims Commission Act
11 (“ICCA”) and is foreclosed by the Western Shoshone Claims Distribution act; 2) The action must
12 be dismissed for failure to join the United States, which is a necessary and indispensable party; and
13 3) The Treaty of Ruby Valley did not recognize any rights in favor of the Western Shoshone.

14 Defendant Idaho Power Company filed a separate motion to dismiss arguing that “its status as a
15 publicly regulated entity which acquired its interest in the lands which are the subject of Plaintiffs’
16 lawsuit well beyond the date conclusively adjudicated by the United States government as the date
17 that the Plaintiffs’ aboriginal and tribal interest in the land was terminated provides an additional”
18 reason to dismiss the case. (Mem. in Support of Def. Idaho Power Co.’s Supp. Mot. to Dismiss (#
19 84) at 2.) Finally, Barrick Goldstrike Mines Inc. (“Barrick”) filed a motion to dismiss arguing that
20 it was not served with a summons and complaint within the 120-day period required by Rule 4(m)
21 of the Federal Rules of Civil Procedure.

22 With respect to the ICCA, Defendants argue that this action is barred by the act. In
23 opposition to Defendants’ motion to dismiss, Plaintiffs do not specifically address Defendants
24 arguments concerning the ICCA. Rather, Plaintiffs assert that the Indian Claims Commission
25 (“ICC”) process was flawed.

1 Upon carefully considering the parties' points and authorities, relevant law, and the record
2 as a whole, the court finds that Plaintiffs' claims are barred by the finality provision of the ICCA.
3 Because Plaintiffs claims are barred by the ICCA, the court will not address the separate arguments
4 made by either Idaho Power Company or Barrick.

5 "The Indian Claims Commission Act . . . was designed to provide a forum for Indian claims
6 arising from the United States's taking of Indian lands." *Western Shoshone Nat'l Council v.*
7 *Molini*, 951 F.2d 200, 201 (9th Cir. 1991) (citing 25 U.S.C. § 70 (1976 ed.)). "The Act created the
8 Commission, which was empowered to hear and decide land claims brought against the United
9 States." *Id.* (citing 25 U.S.C. § 70a (1976 ed.)). "The Act also provided that 'payment of any claim
10 . . . shall be a full discharge of the United States of all claims and demands touching any of the
11 matters involved in the controversy.'" *Id.* (quoting 25 U.S.C. § 70u (1976 ed.)).

12 In 1951, The Shoshone Tribes filed a claim with the ICC for compensation for the loss of
13 their aboriginal title to lands in the western United States. *United States v. Dann*, 470 U.S. 39, 41
14 (1985). "Eleven years later, the Indian Claims Commission entered an interlocutory order holding
15 that the aboriginal title of the Western Shoshone had been extinguished in the latter part of the 19th
16 century . . ." *Id.* (citing *Shoshone Tribe v. United States*, 11 Ind. Cl. Comm'n 387, 416 (1962)).
17 The ICC awarded the Western Shoshone approximately \$26 million. *Id.* In light of this award, the
18 Supreme Court, in *United States v. Dann*, 470 U.S. 39, 50 (1985), has held that the United States
19 has effectuated payment under the ICCA. As mentioned previously, the "'payment of any claim . .
20 . shall be a full discharge of the United States of all claims and demands touching any of the
21 matters involved in the controversy.'" *Molini*, 951 F.2d 200, 201 (9th Cir. 1991) (quoting 25
22 U.S.C. § 70u (1976 ed.)).

23 The court agrees with Defendants that this title extinguishment bars claims of tribal title
24 against parties other than the United States. In *Molini*, the Western Shoshone argued that the ICC
25 award had no preclusive effect in their lawsuit against the state of Nevada. 951 F.2d at 202. The
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1 *Molini* court noted that “[t]he chief purpose of the Act [establishing the Commission] was to
2 dispose of the Indian claims problem with finality’ and that consistent with this purpose,
3 compensation for a taking established that Indian title had been extinguished.” *Id.* (citing *United*
4 *States v. Pend Oreille Public Utility District No. 1*, 926 F.2d 1502, 1507 (9th Cir. 1991)). Because
5 Indian title had been extinguished, the Ninth Circuit held that the monetary award “constituted a
6 general determination of title which bars the Shoshone from asserting title against the State of
7 Nevada.” *Id.* The court finds the *Molini* court’s reasoning equally applicable in the case at bar.
8 The ICC’s monetary award bars the Western Shoshone from asserting title against Defendants. To
9 the extent Plaintiffs are attempting to challenge the ICC proceeding itself, Plaintiffs should have
10 raised such arguments on direct appeal from that decision.

11 IT IS THEREFORE ORDERED that Defendants’ Motion to Dismiss (# 80) is hereby
12 GRANTED.

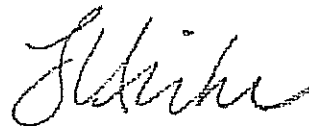
13 IT IS FURTHER ORDERED that Idaho Power Company’s Supplemental Motion to
14 Dismiss (# 83) is hereby DENIED as moot.

15 IT IS FURTHER ORDERED that Barrick’s Motion to Dismiss (# 93) is hereby DENIED as
16 moot.

17 The Clerk of the court shall enter judgment accordingly.

18 IT IS SO ORDERED.

19 DATED this 31st day of May, 2007.



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22 LARRY R. HICKS
23 UNITED STATES DISTRICT JUDGE
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United States District Court, D.
Nevada.

**WESTERN SHOSHONE
NATIONAL COUNCIL v.
BNSF RAILROAD CO.**

03:06-CV-00015-LRH-RAM. (D.
Nev. Jan. 18, 2008)

WESTERN SHOSHONE NATIONAL COUNCIL,
RAYMOND YOWELL, ALLEN MOSS, JOE
KENNEDY, JOHN WELLS, CARRIE DANN,
JOHNNIE BOBB and BENNIE REILLEY,
individually and class representatives, Plaintiffs, v.
BNSF RAILROAD COMPANY, NEWMONT
GOLD COMPANY, BARRICK GOLDSTRIKE
MINES INC., GLAMIS GOLD, INC., NEVADA
LAND RESOURCE COMPANY, LLC., SIERRA
PACIFIC POWER COMPANY, IDAHO POWER
COMPANY and UNION PACIFIC RAILROAD
COMPANY, Defendants.

03:06-CV-00015-LRH-RAM.

United States District Court, D. Nevada.

January 18, 2008

ORDER

LARRY HICKS, District Judge

Presently before the court is a motion to reconsider (# 108¹) filed by Plaintiffs, the governing body of the Western Shoshone Nation and members of the Western Shoshone National Council. Defendants have filed an opposition (# 109), and Plaintiffs replied (# 110)

1.

Refers to the court's docket number.

On May 31, 2007, this court issued an Order (# 106) dismissing this action upon a finding that a monetary award entered by the Indian Claims Commission ("ICC") bars the Western Shoshone from asserting title against Defendants. Judgment (# 107) was entered the same day. On June 8, 2007, Plaintiffs filed the present motion stating, in a conclusory manner, that the court should reconsider its May 31, 2007, Order (# 106) because the court failed to apply the correct standard of law, failed to consider all the legal arguments that have been provided and that the court improperly placed the burden of proof.

A motion for reconsideration can be brought pursuant to either Rule 59(e) or 60(b) of the Federal Rules of Civil Procedure. *Circuit City Stores, Inc. v. Mantor*, 417 F.3d 1060, 1063-64 (9th Cir. 2005). Plaintiffs' motion does not identify whether it is filed pursuant to Rule 59(e) or 60(b). A motion for reconsideration filed within ten days of entry of judgment is treated as a Rule 59(e) motion. *Am. Ironworks Erectors, Inc. v. N. Am. Const. Corp.*, 248 F.3d 892, 898-99 (9th Cir. 2001). If the motion is not filed within ten days of entry of judgment, it is treated as a Rule 60(b) motion. *Id.* at 899. As the present motion was filed within ten days of the entry of judgment, the court will treat the motion as one filed pursuant to Rule 59(e).

"While Rule 59(e) [of the Federal Rules of Civil Procedure] permits a district court to reconsider and amend a previous order, the rule offers an 'extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources.'" *Carrol v. Nakatani*, 342 F.3d 934, 945 (9th Cir. 2003) (quoting 12 James Wm. Moore et al., Moore's Federal Practice § 59.30(4) (3d ed. 2000)). Reconsideration of the district court's initial decision is *inappropriate* in the absence of (1) newly discovered evidence; (2) an intervening change in controlling law; or (3) clear error or manifest injustice. *Carrol*, 342 F.3d at 945; *Sch. Dist. No. 1J, Multnomah County, Or. v. AC and S, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993) (citations omitted). Moreover, the motion must "set forth facts or law of a strongly convincing nature to induce the Court to reverse its prior decision." *Mutual*

*Life Ins. Co. of New York v. Pointe Tabatio Rese-
Properties No. 1*, 206 F.R.D. 495, 497 (D. Ariz. 2002)
(citations omitted)

As previously mentioned, the court's Order (# 106) dismissing this action relied on the legal conclusion that an award by the ICC bars the Western Shoshone from asserting title against Defendants. Plaintiffs have provided no authority or argument that would suggest this court's legal conclusion is erroneous. In fact, Plaintiffs' motion does not address this court's legal conclusion in any manner. Rather, Plaintiffs state that the underlying issues in this case are too fact intensive to be subject to a motion to dismiss. Nevertheless, Plaintiffs have not identified a single fact in this case that would preclude a motion to dismiss.

In a footnote, Plaintiffs cite to the unpublished decision of *Schugg v. Gila River Indian Cmty.*, 2007 U.S. Dist. Lexis 38142, 2007 WL 1526741 (D. Ariz. 2007) as a factually analogous case that required a factual determination. In *Schugg*, the Gila River Indian Community contended that it held aboriginal title to certain land. 2007 U.S. Dist. Lexis 38142 at *5, 2007 WL 1526741 at *1. On a motion for summary judgment, the *Schugg* court found that aboriginal title was extinguished in 1877 when Congress conveyed the land at issue to the Territory of Arizona as school land. 2007 U.S. Dist. Lexis 38142 at *21-22, 2007 WL 1526741 at *6. Alternatively, the court found that the Gila River Indian Community was barred from claiming aboriginal title because the ICC had previously adjudicated the fact that aboriginal title had been extinguished. *Id.*

In short, the court finds nothing in *Schugg* that would suggest the court's Order (# 106) is erroneous. Furthermore, Plaintiffs have failed to present any newly discovered evidence, show an intervening change in controlling law, or show clear error or manifest injustice. *4

IT IS THEREFORE ORDERED that Plaintiffs' motion to reconsider (# 108) is hereby DENIED.

IT IS SO ORDERED.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JUN 04 2009

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

WESTERN SHOSHONE NATIONAL
COUNCIL; RAYMOND YOWELL;
ALLEN MOSS; JOE KENNEDY; JOHN
WELLS; CARRIE DANN; JOHNNIE
BOBB; BENNIE REILLY,

Plaintiffs - Appellants,

v.

BNSF RAILROAD CO.; NEWMONT
GOLD COMPANY; GLAMIS GOLD,
INC.; NEVADA LAND AND
RESOURCE COMPANY LLC; SIERRA
PACIFIC POWER COMPANY; UNION
PACIFIC RAILROAD COMPANY;
BARRICK GOLDSTRIKE MINES, INC.;
IDAHO POWER COMPANY,

Defendants - Appellees.

No. 08-15179

D.C. No. CV-06-00015-LRH

MEMORANDUM*

Appeal from the United States District Court
for the District of Nevada
Larry R. Hicks, District Judge, Presiding

* This disposition is not appropriate for publication and is not precedent
except as provided by 9th Cir. R. 36-3.

Submitted June 2, 2009**
Las Vegas, Nevada

Before: RAWLINSON and BYBEE, Circuit Judges, and BURNS***, District Judge.

The parties are familiar with the facts of this case and we do not repeat them here. Appellants Western Shoshone National Council, Raymond Yowell, Allen Moss, Joe Kennedy, John Wells, Carrie Dann, Johnnie Bobb, and Bennie Reilly (collectively “the Council”) appeal the district court’s Federal Rule of Civil Procedure 12(b)(6) dismissal of their various claims asserting Western Shoshone Indian title to land conveyed by the United States to the defendants. We affirm.

The district court correctly concluded that the Council’s title claims are barred by the finality provision of the Indian Claims Commission Act as well as the Western Shoshone Claims Distribution Act. *See W. Shoshone Nat’l Council v. Molini*, 951 F.2d 200, 203 (9th Cir. 1991) (“We conclude that the Commission award establishes conclusively that Shoshone title has been extinguished.”); *United States v. Dann*, 873 F.2d 1189, 1198-99 (9th Cir. 1989) (“[T]he payment of the claims award establishes conclusively that a taking occurred.”). The Council also argues that the Shoshone Tribe acquired title through the Treaty of Ruby Valley

** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

*** The Honorable Larry Burns, United States District Judge for the Southern District of California, sitting by designation.

and that its rights under that Treaty were not extinguished by proceedings before the Commission. The Supreme Court, however, has held that no treaty recognizes Western Shoshone "Indian title or right of occupancy." *Nw. Band of Shoshone Indians v. United States*, 324 U.S. 335, 348 (1945). Even if the Treaty of Ruby Valley conveyed title rights to Western Shoshone in the first instance, we have specifically held that "[t]he Commission's general finding that title had been extinguished . . . also operates to bar the Shoshone from asserting . . . rights based on the Treaty of Ruby Valley." *Molini*, 951 F.2d at 203.

The Council's remaining contentions are unpersuasive.

AFFIRMED.