No. 06-3213

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

GOVERNOR OF THE STATE OF KANSAS, et al.,

Plaintiffs-Appellants,

-v.-

DIRK KEMPTHORNE, Secretary of the Interior, et al.,

Defendants-Appellees,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS
(HON. JULIE A. ROBERTSON)

PETITION OF FEDERAL DEFENDANTS-APPELLEES FOR PANEL REHEARING
(Attachment in Scanned Pdf form)

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INTRODUCTION

In this case, the Governor of Kansas and three Indian tribes ("the Kansas parties"), attempt to divest the United States of its title to the Shriner Tract, a parcel of property in downtown Kansas City, Kansas, that the United States holds in trust for the benefit of the Wyandotte Tribe of Oklahoma. AA 34. On October 24, 2007, this Court held that the United States's sovereign immunity, as expressly preserved in the Quiet Title Act, 28 U.S.C. § 2409a, barred the Kansas parties' lawsuit and ordered the district court to dismiss the case for lack of jurisdiction. *See Governor of Kansas v. Kempthorne*, No. 06-3213, Slip Op. at 28 (Oct. 24, 2007).

As part of its rationale, the panel stated that "the presence of a waiver of sovereign immunity should be determined as of the date the complaint was filed." Slip Op. at 20-21. Two judges further advised that the circumstances of this case "are sufficiently extraordinary in nature that they appear to warrant vacatur, pursuant to Federal Rule of Civil Procedure 60(b)(6), of the final judgment entered by the district court in the *Sac & Fox Nation* case." Slip Op. at 3 (Briscoe, J., concurring).

Pursuant to Fed. R. App. P. 40, the Federal Defendants-Appellees ("the Secretary") respectfully request that the panel amend its opinion to delete these statements, both of which are incorrect. The parties never briefed the accrual of the sovereign immunity defense or the propriety of the a Rule 60(b)(6) motion; the panel need not resolve these questions to reach its holding; and the panel's statement on the sovereign immunity accrual question conflicts with various well-settled legal principles

and canons of construction, and could detrimentally affect the rights of Indians throughout the Tenth Circuit.

DISCUSSION

I. COURTS LACK JURISDICTION TO DIVEST THE GOVERNMENT OF TITLE TO INDIAN TRUST LANDS REGARDLESS OF WHEN THE GOVERNMENT TOOK TITLE TO SUCH LANDS.

A. An Actual Controversy No Longer Exists Once The Secretary Takes Land Into Trust For the Benefit Of Indians.

In stark contrast to the panel's statement that "the presence of a waiver of sovereign immunity should be determined as of the date the complaint was filed," this Court has held previously that for purposes of Article III jurisdiction "an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." *Lippoldt v. Cole*, 468 F.3d 1204, 1216 (10th Cir. 2006) (quoting *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997)). An actual controversy no longer exists where, as here, the land at issue has been taken into trust for the benefit of an Indian tribe because the sovereign immunity of the United States, as preserved in the Quiet Title Act, forbids the judiciary from divesting the United States of its title to Indian trust lands. *See State of Fla., Dept. of Business Regulation v. U.S. Dep't of the Interior*, 768 F.2d 1248, 1254 (11th Cir. 1985). Congress reserved that power for the Government. *See United States v. Mottaz*, 476 U.S. 834, 847 (1986) ("That the plaintiff in this case claims the right to elect a remedy that would not require the Government to relinquish its possession of the disputed lands is irrelevant: the Quiet Title Act expressly gives that choice to the Government, not the claimant"). Once

Congress or the Secretary[1/] has set lands, including trust lands, apart as Indian country,[2/] they remain so until Congress or the Secretary divests them of that character. *See Indian Country, U.S.A., Inc. v. State of Okl. ex rel. Oklahoma Tax Com'n*, 829 F.2d 967, 974 (10th Cir. 1987). An actual controversy thus no longer exists once the Secretary acquires land in trust because courts lack the ability to divest the United States of its title to Indian trust lands no matter when a complaint is filed.

B. The Quiet Title Act Does Not Waive The Government's Sovereign Immunity To Allow Challenges To Its Title To Indian Trust Lands If A Complaint Is Filed Before The Land Is Acquired.

The Quiet Title Act provides the exclusive basis for jurisdiction over suits that explicitly or implicitly challenge the United States' title to real property. *Id.* at 841; *Block v. North Dakota*, 461 U.S. 273, 286 (1983). The Quiet Title Act provides that:

> The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights. *This section does not apply to trust or restricted Indian lands*, nor does it apply to or affect actions which may be or could have been brought under sections 1346, 1347, 1491, or 2410 of this title, sections 7424, 7425, or 7426 of the Internal Revenue Code of 1986, as amended (26 U.S.C. 7424, 7425, and 7426), or section 208 of the Act of July 10, 1952 (43 U.S.C. 666).

[1/]Congress has delegated its power to acquire trust lands and other Indian property rights to the Secretary. *See* 25 U.S.C. § 465.

[2/]Lands owned by United States in trust for Indian tribes are "Indian country." See *Oklahoma Tax Comm'n v. Sac & Fox Nation*, 509 U.S. 114, 123 (1985); *HRI, Inc. v. EPA*, 198 F.3d 1224, 1249 (10th Cir. 2000); *United States v. Roberts*, 185 F.3d 1125, 1133 (10th Cir. 1999); *see also* 18 U.S.C. § 1151 (defining Indian country for both civil and criminal purposes, *Mustang Production Co. v. Harrison*, 94 F.3d 1382, 1385-86 (10th Cir. 1996)).

28 U.S.C. § 2409a(a) (emphasis added). The italicized portion represents Congress's preservation of sovereign immunity, foreclosing all legal challenges that seek to divest, or have the effect of divesting, the United States of its title to "trust or restricted Indian lands." *Shivwits Band of Paiute Indians v. Utah*, 428 F.3d 966, 974-78 (10th Cir. 2005); *Neighbors for Rational Development, Inc. v. Norton*, 379 F.3d 956, 961-66 (10th Cir. 2004)). The Quiet Title Act thus precludes any party from seeking relief that would divest the United States of its title to Indian trust lands.

Nothing in the Quiet Title Act provides consent to lawsuits seeking to divest the United States of its title to "trust or restricted Indian lands" as long as a complaint is filed before the land is taken into trust. Nor can such consent be implied. A waiver of sovereign immunity "'must be construed strictly in favor of the sovereign and not enlarged beyond what its language requires.'" *Haceesa v. United States*, 309 F.3d 722, 728 (10th Cir. 2002) (citing *United Tribe of Shawnee Indians v. United States*, 253 F.3d 543, 547 (10th Cir. 2001) (quoting *United States v. Nordic Village, Inc.*, 503 U.S. 30, 34 (1991)). Absent explicit language in a statute waiving the United States's sovereign immunity, a court errs by implying a waiver. *See FTC v. Kuykendall*, 466 F.3d 1149, 1154 (10th Cir. 2006). The panel's statement, however, creates an implied waiver of the government's immunity where a third party files a complaint before the land is taken into trust. But the Quiet Title Act states the opposite, "[t]his section does not apply to trust or restricted Indian lands." 28 U.S.C. § 2409a(a). The panel's statement thus exceeds the statutory language, departs from established precedent, and should be deleted.

C. Ambiguity Must Be Resolved In Favor Of The United States And In A Way That Does Not Interfere With Indian Rights.

Even if there were ambiguity in the Quiet Title Act as to whether the United States consents to lawsuits seeking to divest it of title to "trust or restricted Indian lands" where a complaint is filed before the land is taken into trust, the panel's statement fails to comply with the long-established rule that courts must resolve ambiguity in statutes waiving immunity in favor of the Government and Indians.[3/] *See, e.g.*, *Villescas v. Abraham*, 311 F.3d 1253 (10th Cir. 2002); *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455, 1461 (10th Cir. 1997) (citing *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985); *United States v. Thompson*, 941 F.2d 1074, 1077 (10th Cir. 1991); *Oneida County v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985). Allowing waivers of sovereign immunity to be determined at the time of the complaint eviscerates the Indian trust lands exception to the Quiet Title Act to the detriment of Indians. The legislative history of the Quiet Title Act explains Congress's rationale for preserving the United States's immunity to suit over trust or restricted Indian lands.

> The Federal Government's trust responsibility for Indian lands is the result of solemn obligations entered into by the United States Government. The Federal Government has over the years made specific commitments to the Indian people through written treaties and through informal and formal agreements. The Indians, for their part, have often surrendered claims to vast tracts of land. President Nixon has pledged the administration against abridging the historic relationship between the Federal Government and the Indians without the consent of the Indians.

[3/] This rule applies despite the plaintiff Indian tribes. *Mottaz*, 476 U.S. at 851 ("But even for Indian plaintiffs, [a] waiver of sovereign immunity 'cannot be lightly implied but must be unequivocally expressed.") (quotations omitted).

H.R. Rep. No. 1559, 92d Cong., 2d Sess. (1972). Thus, "[b]y forbidding actions to quiet title when the land in question is reserved or trust Indian land, Congress sought to prohibit third parties from interfering with the responsibility of the United States to hold lands in trust for Indian tribes." *State of Fla., Dept. of Business Regulation v. U.S. Dept. of the Interior*, 768 F.2d 1248, 1254-55 (11th Cir. 1985). The panel, however, wrongly construes the Quiet Title Act's waiver of sovereign immunity to permit lawsuits divesting Indians of their land as long as a third party files a complaint before the United States takes their land into trust. The Quiet Title Act's language does not so declare – and even if ambiguity exists in its language – the panel's construction wrongly resolves the ambiguity against the United States and substantially interferes with Indian rights. The erroneous statement should be deleted.

D. Congress Never Waived The United States's Sovereign Immunity And The Secretary's Regulation Cannot Do So.

This Court has long recognized that "only Congress . . . can waive the sovereign immunity of the United States." *Merrill Lynch, Pierce, Fenner & Smith v. Jacks*, 960 F.2d 911, 913 (10th Cir. 1992). Congress has never consented to any lawsuit challenging the United States's title to "trust or restricted Indian lands." Congress has expressly preserved the United States's immunity from lawsuits seeking to divest it of title to Indian trust lands. *See Neighbors*, 379 F.3d at 961 ("when the United States claims an interest in real property based on that property's status as trust or restricted Indian lands, the Quiet Title Act does not waive the Government's immunity") (quotation omitted).

The Secretary has promulgated a regulation, 25 C.F.R. § 151.12(b), that "*permits judicial review before transfer of title to the United States*." 61 Fed. Reg. 18,082 (Apr. 24, 1996) (emphasis added). The Secretary promulgated this regulation in response to the Eighth Circuit's decision in *South Dakota v. Interior*, 69 F.3d 878 (8th Cir. 1995), *vacated by Interior v. South Dakota*, 519 U.S. 919 (1996). *Id.* at 18,082. In that case, the Eighth Circuit held unconstitutional the statute authorizing the acquisition of Indian trust land, 25 U.S.C. § 465, because of, among other reasons, the lack of opportunity for judicial review. *South Dakota*, 69 F.3d at 883-85. Courts lacked jurisdiction to review the Secretary's decision to acquire land into trust because the lack of final agency action required for Administrative Procedure Act ("APA") review rendered the pre-title-acquisition decision unreviewable, and "[t]he Quiet Title Act (QTA), 28 U.S.C. 2409a, preclude[d] judicial review after the United States acquire[d] title." 61 Fed. Reg. at 18,082 (citing *United States v. Mottaz*, 476 U.S. 834 (1986); *North Dakota v. Block*, 461 U.S. 273 (1983); *Florida v. Department of Interior*, 768 F.2d 1248 (11th Cir. 1985)). The Secretary promulgated 25 C.F.R. § 151.12(b) to fix this alleged problem,[4/] making the Secretary's announcement of his intent to take land into trust a final agency action subject to APA review. 61 Fed. Reg. at 18,082. But,

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[4/]The Supreme Court vacated the Eighth Circuit's decision in view of the new regulation, 519 U.S. 919, and every other court has disagreed with the Eighth Circuit's 1995 holding, including this Court and the Eighth Circuit on remand. *See United States v. Roberts*, 185 F.3d 1125, 1136 (10th Cir. 1999); *Shivwits Band*, 428 F.3d at 973; *Carcieri v. Kempthorne*, 497 F.3d 15, 41-43 (1st Cir. 2007) (*en banc*); *South Dakota v. Interior*, 423 F.3d 790, 797-98 (8th Cir. 2006); *City of Roseville v. Norton*, 219 F. Supp. 2d 130, 155-56 (D. D.C. 2002).

as the preamble to 25 C.F.R. § 151.12 states: "This rule ensure[d] that [judicial] review [was] available before formal conveyance of title to land to the United States, when the QTA's bar to judicial review becomes operative." 61 Fed. Reg. at 18,082.

By its terms, the Secretary's regulation permits judicial review only before formal conveyance of title to the United States. *Id.* The panel must interpret this regulatory opportunity in view of the Quiet Title Act because the Secretary's regulation cannot override Congress's express preservation of sovereign immunity in that statute. "[R]egulations cannot trump the plain language of statutes," *Robbins v. Bentsen*, 41 F.3d 1195, 1198 (7th Cir. 1994), and executive branch officials cannot waive the United States's sovereign immunity by issuing a regulation, *United States v. Richman*, 124 F.3d 1201, 1205 (10th Cir. 1997). The panel, however, has interpreted the Secretary's regulation to do just that, even though the regulation's preamble specifies that no judicial review is available once the land has transferred into trust.[5/] 61 Fed. Reg. at 18,082. The panel's statement thus should be deleted.

[5/]The Secretary's regulation gives a party 30 days to oppose the taking of land into trust by requesting injunctive relief from the courts. *See* 25 C.F.R. § 151.12(b) ("The notice will state that a final agency determination to take land in trust has been made and that the Secretary shall acquire title in the name of the United States no sooner than 30 days after the notice is published."). If the opposing parties show a substantial likelihood of success on the merits of their claims, that they will suffer irreparable harm without an injunction, and that the equitable balance favors injunctive relief, the court may enjoin the Secretary from taking land into trust. *See Summum v. Pleasant Grove City*, 483 F.3d 1044, 1048 (10th Cir. 2007) (listing requirements for injunctive relief). Without an injunction, however, after 30 days, the regulation allows the Secretary to take the land into trust, thereafter precluding any further judicial review of the Secretary's land into trust decision. 61 Fed. Reg. at 18,082.

E. The Cases The Panel Cites Do Not Support Its Statement.

The panel's statement finds no support in the out-of-circuit cases it cites. In those cases the holdings were based on jurisdiction under 28 U.S.C. § 2410(a), which waives the United States's sovereign immunity for actions seeking to quiet title to real or personal property on which the United States has or claims a mortgage or lien. *See Kabakjian v. United States*, 267 F.3d 208, 212 (5th Cir. 2001); *United States v. Kulawy*, 917 F.2d 729, 733 (2d Cir. 1990); *Delta Savings & Loan Assoc. v. I.R.S.*, 847 F.2d 248, 249-50 (5th Cir. 1988); *Bank of Hemet v. United States*, 643 F.2d 661, 664 (9th Cir. 1981).[6] Those cases do not involve § 2409a or the Indian trust lands exception, under which waivers must be strictly construed in favor of the United States and Indian tribes. *See, supra*, 3-5. Because these out-of-circuit cases do not involve § 2409a or the Indian trust lands exception, they have no bearing here.

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[6] Only *Bank of Hemet v. United States*, 643 F.2d 661, 664 (9th Cir. 1981), purports to involve § 2409a. The facts of that case, however, reveal that the United States claimed an interest in the property only by tax lien. *Id.* at 663. Section 2410(a) thus provided jurisdiction. Moreover, as discussed in the main text, the Ninth Circuit failed entirely to discuss subsection (e) of the Quiet Title Act, a provision which undoubtably applied to that case because the United States had sold the residence and no longer claimed an interest in the property. *Id.* at 664. The failure to discuss this key provision, the lack of discussion of the Indian trust exception, and the Ninth Circuit's erroneous statement that sovereign immunity is mere "hyper-technicality," should render this 26 year-old, out-of-circuit case unpersuasive. At bottom, the Ninth Circuit limited its holding to the case's specific facts. *Id.* at 655 ("*We hold that under the circumstances of this case* the presence of a waiver of sovereign immunity should be determined as of the date of the complaint"). To create a general rule out of this fact-specific holding, unjustifiably extends *Bank of Hemet.*

Moreover, as the Fifth Circuit recognized in *Kabakjian*, to the extent these cases purport to derive their jurisdiction from § 2409a, their holdings contradict the Act's express language.[7] *See Kabakjian*, 267 F.3d at 212. The Quiet Title Act states:

> If the United States disclaims all interest in the real property or interest therein adverse to the plaintiff at any time prior to the actual commencement of the trial, which disclaimer is confirmed by order of the court, *the jurisdiction of the district court shall cease* unless it has jurisdiction of the civil action or suit on ground other than and independent of the authority conferred by section 1346(f) of this title.

28 U.S.C. § 2409a(e) (emphasis added). This italicized provision allows the United States to divest a court of jurisdiction over a Quiet Title Act lawsuit by disclaiming an interest in the real property. *See Kabakjian*, 267 F.3d at 212 ("[s]ubsection (e) of the Quiet Title Act can be read to provide that the government can, after the suit is filed, sell the property in issue and thereby divest the district court of jurisdiction."). Thus, contrary to the panel's statement, the Quiet Title Act expressly allows the United States to divest the district court of jurisdiction after the filing of the complaint.

F. Summary

The panel's statement regarding the timing of the waiver of sovereign immunity conflicts with various well-settled legal principals and canons of constructions, case law, the Quiet Title Act's plain language, and finds no support in the out-of-circuit cases its cites. It should be reconsidered, and the statement deleted. At minimum,

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[7] Unlike § 2409a, § 2410 contains no jurisdictional divestiture provision. *See Kabakjian*, 267 F.3d at 212 ("Congress chose, for whatever reason, to include subsection (e) in the Quiet Title Act and failed to include an analogous provision in § 2410, the more narrowly drawn statute.").

because the panel need not resolve this issue to resolve this case, it should defer resolution to a case where the parties have fully briefed this very important issue.

II. THIS COURT DOES NOT HAVE THE *SAC & FOX NATION* CASE BEFORE IT. THE KANSAS PARTIES DO NOT QUALIFY FOR RELIEF UNDER FEDERAL RULE OF CIVIL PROCEDURE 60(B)(6).

Judge Briscoe, joined by Judge Hartz, declare that the circumstances of this case "are sufficiently extraordinary in nature that they appear to warrant vacatur, pursuant to Federal Rule of Civil Procedure 60(b)(6), of the final judgment entered by the district court in the *Sac & Fox Nation* case." Slip Op. at 3 (Briscoe, J., concurring). The *Sac & Fox Nation* case, however, "is over; the district court issued a final judgment terminating this case on August 23, 2001." *Wyandotte Nation v. Sebelius*, 443 F.3d 1247, 1253 n.10 (10th Cir. 2006). The Kansas parties filed no notice of appeal from this six-year-old judgment; thus, the *Sac & Fox Nation* case and the propriety of a Rule 60(b)(6) motion are not before this Court. *See Alva v. Teen Help*, 469 F.3d 946, 948 (10th Cir. 2006) (holding timely notice of appeal is jurisdictional prerequisite to appellate review). Accordingly, the two-judge concurrence constitutes an improper advisory opinion and should be stricken. *See Preiser v. Newkirk*, 422 U.S. 395, 401 (1975) ("[A] federal court has neither the power to render advisory opinions nor to decide questions that cannot affect the rights of litigants in the case before [it].").

Moreover, the concurring judges base their opinion upon the mistaken notion that "plaintiffs, through no fault of their own, will be prohibited from pursuing" their claims. Slip Op. at 3 (Briscoe, J., concurring). In fact, the Kansas parties made a calculated decision to allow final judgment to be entered in *Sac & Fox Nation* despite

the potential sovereign immunity implications of such a decision. As explained below, the Kansas parties must live with the consequences of that strategic decision. Rule 60(b)(6) does not provide them with relief in this circumstance.

Federal Rule of Civil Procedure 60(b)(6) allows a court, under extraordinary circumstances, to relieve a party from final judgment if requested within a reasonable time period. *Cashner v. Freedom Stores, Inc.*, 98 F.3d 572, 580 (10th Cir. 1996). It is well-settled, however, that "the broad power granted by clause (6) is not for the purpose of relieving a party from free, calculated, and deliberate choices he has made. A party remains under a duty to take legal steps to protect his own interests." *Id.* (quoting 11 Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d § 2864 at 359-60 (1995)). Here, the Kansas parties failed to take legal steps necessary to protect their interests, and therefore Rule 60(b)(6) does not apply.

Following this Court's decision in *Sac & Fox Nation* and the remand to the Secretary, the district court issued a show cause order to all parties, directing them to "show cause by July 15, 2001, why the court should not enter judgment." The district court received no opposition from the Kansas parties to the entry of judgment, and accordingly entered final judgment in August 2001. The Kansas parties chose not to appeal the entry of final judgment, despite case law suggesting that courts should retain jurisdiction after remanding matters to agencies. *See Caesar v. West*, 195 F.3d 1373, 1374 (Fed. Cir. 1999).

These circumstances fall within the type of free, calculated and deliberate choices for which Rule 60(b)(6) does not provide relief. The Kansas parties elected

to allow final judgment to be entered without contest. They cannot second-guess their decision and attack that judgment six years later. *See* 11 Wright, Miller & Kane, § 2864 at 359-60 ("[I]t ordinarily is not permissible to use this motion to remedy a failure to take an appeal."). Even if the district court erred in entering final judgment in *Sac & Fox Nation*, that error would not relieve the Kansas parties of the responsibility to timely challenge that decision. That is precisely why appeal rights exist – to give parties an opportunity to challenge allegedly erroneous decisions. Failure to recognize that a decision is erroneous or will otherwise deprive them of an opportunity to pursue their claims does not relieve the Kansas parties of their responsibilities. Miscalculating the legal impact of their own decision is not a ground for relief under Rule 60(b)(6), and does not entitle the Kansas parties to relief from a six-year-old final judgment the entry of which they affirmatively failed to challenge. The statement suggesting the filing of a Rule 60(b)(6) motion thus should be deleted.

CONCLUSION

For the foregoing reasons, the Secretary respectfully requests that the panel grant rehearing and amend its opinion.

Respectfully submitted,

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DJ # 90-6-21-00918
DECEMBER 2007

CERTIFICATE OF DIGITAL SUBMISSION

Pursuant to 10th Circuit General Order filed August 10, 2007, I certify that:

(a) all required privacy redactions have been made (none were necessary) and, with the exception of those redactions, every document submitted in Digital Form or scanned PDF format is an exact copy of the written document filed with the Clerk; and

(b) the digital submissions have been scanned for viruses with the most recent version of a Computer Associates eTrust Antivirus, version 7.1.192, updated through December 7, 2007, and, according to the program, are free of viruses.

_____

/s/ Allen M. Brabender

CERTIFICATE OF SERVICE

I hereby certify that I have a copy of the PETITION OF THE FEDERAL DEFENDANTS-APPELLEES FOR PANEL REHEARING to be served by regular first class mail, postage prepaid, and electronic mail this 7th day of December, 2007, upon the following counsel of record:

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PANEL DECISION
(Attachment in scanned Pdf form)

Governor of Kansas v. Kempthorne, No. 06-3213 (10th Cir. Oct. 24, 2007)