IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

SAC AND FOX NATION
OF MISSOURI, et al.,

Plaintiffs,

v. Case No. 96-4129-RDR-DJW

DIRK KEMPTHORNE,[1]
Secretary of the Interior,

Defendant.

DEFENDANT'S MEMORANDUM IN SUPPORT OF DEFENDANT'S
MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

Defendant, the Secretary of the Department of Interior ("the Secretary"), moves this Court for an order of dismissal for lack of subjection matter jurisdiction over Plaintiffs' claim for relief. This Court lacks jurisdiction over this lawsuit because the sovereign immunity of the United States, as provided in the Quiet Title Act, 28 U.S.C. § 2409a, expressly precludes suits that challenge the United States' title to Indian trust lands.

ISSUE PRESENTED

This case concerns the Secretary's decision to take .52 acres of land known as "the Shriner Tract" into trust on behalf of the Wyandotte Indian Tribe of Oklahoma ("the Tribe") under the mandate of Public Law 98-602 ("PL 602"). The specific issue presented at this time is:

[1] Dirk Kempthorne became the Secretary of the Interior on May 26, 2006. Pursuant to Rule 25(d)(1) of the Federal Rules of Civil Procedure, Dirk Kempthorne should be substituted for Bruce Babbitt as the Defendant in this suit.

1. Whether the sovereign immunity of the United States, as preserved in the Quiet Title Act, 28 U.S.C. § 2409a, precludes this lawsuit because it challenges the United States' title to Indian trust lands.

STATEMENT OF FACTS

A. Introduction

1. On October 30, 1984, Congress enacted legislation providing for the appropriation and distribution of money in satisfaction of judgments awarded to the Tribe by the Indian Claims Commission and the Court of Federal Claims as compensation for lands ceded to the United States in the 1800s. Pub. L. No. 98-602, 98 Stat. 3151 (1984)); AR3-0075-0080. Congress directed in Section 105(b)(1) of PL 602 that the "sum of $100,000 of such funds shall be used for the purchase of real property which shall be held in trust by the Secretary for the benefit of such Tribe." *Id.* § 105(b)(1); AR3-0077.

2. In May 1986, the Tribe deposited the $100,000 referenced in Section 105(b)(1) into an A.G. Edwards & Sons account, and, in June of that year, invested $95,000.00 of the $100,000 in Ryan Mortgage Acceptance Corporation 8.375% Series 23 bonds. AR1-0013; 0024-0032.

3. Three years later the Tribe transferred the PL 602 funds from the A.G. Edwards account to an account with Mercantile Investment Services. AR1-0092-0148.

4. On November 21, 1991, the Tribe withdrew $25,199.67 of PL 260 funds from the Mercantile account in anticipation of the purchase of property in Park City, Kansas. AR1-0202, 0224.

5. After this transaction, the Tribe transferred the remaining PL 602 holdings into its main "special account" with Mercantile, where they were commingled with other assets. AR1-0203, 0224-0226.

6. In July 1996, the Tribe took a $180,000 margin account loan against the "special account" to purchase a .52 acre tract of land in downtown Kansas City, Kansas, upon which stands the former Shrine Temple ("the Shriner Tract"). AR1-0266; 0273.

B. The Purchase of the Shriner Tract

Tribal Resolution No. 950418A

7. On April 18, 1995, the Tribe passed Resolution No. 950418A, which authorized and directed its chief, Leaford Bearskin, to apply to the federal government to take title to land in downtown Kansas City, Kansas, in trust for the use and benefit of the Tribe. AR3-0082-0083.

8. The Tribe's resolution stated that the Tribe would purchase the property with funds distributed to it under PL 602 at a price less than the appraised fair market value. The resolution further stated that the property would be used for tribal gaming purposes and would be improved with the construction of a Class III gaming facility.[2] AR3-0082.

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[2] The Indian Gaming Regulatory Act of 1988 ("IGRA"), 25 U.S.C. §§ 2701-2719, divides Indian gaming into three different categories – Classes I, II, and III. *See Seneca-Cayuga Tribe of Oklahoma v. Nat'l Indian Gaming Com'n*, 327 F.3d 1019, 1023 (10th Cir. 2003) (citing 25 U.S.C. § 2703). Class I gaming includes traditional Indian games played in connection with celebrations and ceremonies. *Id.* Class II includes bingo and games similar to bingo. *Id.* Class III gaming includes all types of gaming that is neither Class I or Class II gaming. *Id.* at 1023-24. Kansas law currently would allow Class II, but not Class III gaming on the Shriner Tract. A tribe may engage in class III gaming only if (1) it has a governing ordinance approved by the Chairman of the National Indian Gaming Commission; (2) the State "permits such gaming for any purpose by any person, organization, or entity;" and (3) the tribe and the State enter into a compact approved by the Secretary of the Interior to govern the conduct of such gaming. 25 U.S.C. §§ 2710(d) & (d)(7)(B)(vii).

June 1995 Commercial and Industrial Real Estate Sale Contract

9. On or about June 20, 1995, McCurry Enterprises (seller) and Nations Realty Corporation (buyer) entered into a Commercial and Industrial Real Estate Sale Contract in the amount of $325,000 for the purchase of the Shriner Tract. AR2-0269-0274. Nations Realty is a subsidiary of NORAM and was an entity with whom the Tribe had contracted for financing and development of gaming facilities on the Shriner Tract.

1996 Fee to Trust Land Acquisition Application

10. On January 29, 1996, the Tribe filed with the Secretary a Fee to Trust Land Acquisition Application for four tracts of land in downtown Kansas City, including the Shriner Tract, which began the processes necessary for the United States to take the tracts into trust for benefit of the Tribe.[3] The application stated that Nations Realty had entered into an agreement with McCurry Enterprises to purchase the Shriner Tract for $325,000. AR3-0093; 0100.

June 1996 Commercial and Industrial Real Estate Sale Contract

11. On or about June 17, 1996, Nations Realty and McCurry Enterprises entered into a second Commercial and Industrial Real Estate Sale Contract, which reflected a purchase price of $180,000 for the Shriner Tract. AR2-0275-0277.

12. On June 21, 1996, Nations Realty assigned its interest in the June 1996 contract to purchase the Shriner Tract to the Tribe. AR3-0348.

[3] "In mid-April 1996, the [Tribe] narrowed the scope of their acquisition request to the Shriner Tract." *Sac and Fox Nation*, 240 F.3d at 1256; AR2-0232-0233.

13. On July 11, 1996, the Tulsa Field Solicitor prepared a second title opinion regarding the Shriner Tract in which the Field Solicitor determined, through documents provided by the Tribe, that Nations Realty was assigning all of its rights in the sales contract to the Tribe. AR3-0347-0348.

14. On July 16, 1996, the purchase of the Shriner Tract closed and title passed into trust. AR3-0352 & AR4-00071; 00078.

C. Trust Status of the Shriner Tract and the Prior Tenth Circuit Proceeding

On June 12, 1996, the Secretary published notice, pursuant to 25 C.F.R. § 151.12(b), of his final determination to take the Shriner Tract into trust for the benefit of the Tribe.[4] *See* 61 Fed. Reg. 29,757 (June 12, 1996). Thirty days later, on July 12, 1996, the State of Kansas, the Sac and Fox Nation of Missouri, the Iowa Tribe of Kansas and Nebraska, and the Prairie Band of Potawatomi Indians brought this suit. *See Sac and Fox Nation of Missouri v. Norton*, 240 F.3d 1250 (10th Cir. 2001). Plaintiffs originally challenged, pursuant to the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706, the Secretary's determinations that: (1) the acquisition of the Shriner Tract was mandated by PL 602; (2) NEPA and NHPA analyses were unnecessary prior to acquisition of the Shriner Tract; (3) only PL 602 funds were used to purchase the Shriner Tract; and (4) the Huron Cemetery, a property adjacent to the Shriner Tract, was a "reservation" for purposes of IGRA. *Id.* at 1260.

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[4] In April 1996, the Department of the Interior promulgated a regulation that provides an opportunity for parties to seek judicial review of the Secretary's decision to take land into trust for Indians without running afoul of the Quiet Title Act. *See* 25 C.F.R. § 151.12(b) (2006). Pursuant to this regulation, the Secretary announces through Federal Register notice or other notice to affected members of the public any final administrative determination to take land in trust. *Id.* The Secretary then waits at least thirty days after the announcement before acquiring title to the land in trust. During this period, the Secretary's decision is final agency action but, because the United States does not yet claim title, the Quiet Title Act does not bar judicial review of the Secretary's decision. In promulgating the regulation, the Department of the Interior noted that the 30-day period was being provided because "[t]he Quiet Title Act . . . precludes judicial review after the United States acquires title." 61 Fed. Reg. 18,082 (1996).

On the same day that this suit was filed, at the Plaintiffs' request, this Court granted a temporary restraining order, preventing the Secretary from taking the Shriner Tract into trust on behalf of the Tribe. *Id.* at 1257. The Tribe immediately moved to intervene and to dissolve the temporary restraining order. *Id.* According to the Tribe, if the Shriner Tract transaction was not closed by July 15, 1996, the Secretary's right to acquire the Shriner Tract in trust would expire. *Id.* As a result of the Tribe's representation, on July 15, 1996, the Tenth Circuit Court of Appeals granted an emergency hearing and dissolved the temporary restraining order:

> subject to the conditions which constitute the law of this case, that the respective rights of the parties to obtain judicial review of all issues which have been raised in the complaint below shall be preserved, including standing of all parties, jurisdiction, compliance by the Secretary with all requirements of law, and the ultimate question of whether gaming shall be permitted on the subject land.

Id. (internal quotations omitted). Following the Order dissolving the temporary restraining order, "the Secretary consummated the proposed transaction by purchasing the Shriner Tract and taking it into trust on behalf of the [Tribe]." *Id.*

This case then proceeded on the merits, followed by an appeal by the Plaintiffs. On appeal, the Tenth Circuit concluded that PL 602 conferred upon the Secretary a nondiscretionary duty to take the Shriner Tract into trust for the benefit of Tribe, and, therefore, that the Secretary had no duty to conduct NEPA or NHPA analyses prior to the acquisition.[5] *Id.* at 1262, 1268. The Tenth Circuit, concluded, however, that the three documents the Secretary cited as providing substantial evidence for his determination that the Tribe purchased the Shriner Tract with PL 602 funds were

[5] The Tenth Circuit Court of Appeals also held that the Tribe was not a necessary and indispensable party to the action, and that the Huron Cemetery was not a "reservation" for purposes of IGRA. *Sac and Fox Nation*, 240 F.3d at 1268.

insufficient to sustain his determination.[6] *Id.* at 1263. The court therefore reversed the Secretary's original finding and directed this Court to remand to the Secretary for further consideration. *Id.* at 1264, 1268.

On August 22, 2001, this Court remanded the matter to the Secretary "to reconsider whether Pub. L. 98-602 funds alone were used to purchase the Shriner Tract in connection with the decision to approve taking the Shriner Tract into trust for the benefit of the Wyandotte Tribe of Oklahoma." Doc. 233 herein. The next day a final judgment was entered in this case. Doc. 234 herein. On remand, the Secretary concluded that the Wyandotte Tribe had used only Pub. L. 98-602 funds to purchase the Shriner Tract and published her conclusion in the Federal Register. AR2-0165-0168. The Plaintiffs then requested reconsideration by the Secretary, who, in June of 2003, again concluded that the Shriner Tract had been purchased with Pub. L. 98-602 funds or accruals therefrom, which the Secretary concluded was appropriate. AR2-0320-0326.

On July 11, 2003, the Plaintiffs in this case and the Kickapoo Tribe of Indians of the Kickapoo Reservation in Kansas filed a complaint challenging the Secretary's decision as arbitrary and capricious and requesting an order requiring the Secretary to revoke the trust acquisition of the Shriner Tract. *Governor of Kansas v. Norton,* District of Kansas Case Number 03-4140-JAR, Doc. 1, Complaint. On May 9, 2006, a Memorandum and Order was entered in that case affirming the Secretary's decision. AR4-00079-000113. The Plaintiffs in that case filed an appeal, and, on appeal, the Secretary asserted, for the first time, that the Plaintiffs' claims were barred by the Quiet Title Act, 28 U.S.C. § 2409a. The Tenth Circuit agreed and dismissed the appeal with directions

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[6] Those documents were Resolution No. 950418A, an April 19, 2006, letter from the Tribe to the Bureau of Indian Affairs ("BIA"), and an internal e-mail message between BIA employees. *See Sac and Fox Nation*, 240 F.3d at 1263.

to this Court to vacate its judgment and dismiss that case. *Governor of Kansas v. Kempthorne*, 505 F.3d 1089, 1103 (10th Cir. 2007).

In the decision from the Tenth Circuit, the court stated that "the presence of a waiver of sovereign immunity . . . [should] be determined as of the date the complaint is filed." *Id.* at 1099. The concurring opinion in that case also advised that the final judgment entered in this case should be vacated to allow the Plaintiffs to proceed with their claim in this case. *Id.* at 1103-1104.[7] The Secretary moved the Tenth Circuit for rehearing, challenging the statement that the waiver of sovereign immunity is determined as of the date the complaint is filed and the advisement to vacate the final judgment entered in this case. On rehearing, the Tenth Circuit agreed that for purposes of that case, it did not need to decide whether the United States could divest the court of jurisdiction by taking the Shriner Tract into trust after the complaint in this case was filed. *Governor of Kansas v. Kempthorne*, 516 F.3d 833, 843-44 (10th Cir. 2008). The court did not revise the concurring opinion on remand to the extent it advised that the final judgment in this case should be vacated. However, an additional concurring opinion recognized "that relief under Fed. R. Civ. P. 60(b)(6) will be unavailable if the government is correct that it can divest a court of jurisdiction by taking land into trust for a tribe after a complaint has been filed and served ..." *Id.* at 847.

Upon Plaintiffs' motion, and over the objection of the Defendant, this Court did vacate the final judgment entered in August of 2001 in this case. Consequently, Plaintiffs now again challenge the Secretary's decision that only Pub. L. 98-602 funds were used to purchase the Shriner Tract as arbitrary and capricious.

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[7] Plaintiffs did, in fact, file a motion to vacate in this case, which was granted on April 3, 2008. *See* Doc.265 herein.

SUMMARY OF ARGUMENT

This Court lacks jurisdiction to entertain the Plaintiffs' challenge. The sovereign immunity of the United States, as expressly preserved in the Quiet Title Act, bars challenges to the United States' title to land held in trust for Indians. The Plaintiffs' lawsuit seeks to set aside the Secretary's trust acquisition of the Shriner Tract, and, therefore, they challenge the United States' title to property held in trust for Indians. The sovereign immunity of the United States thus precludes the Plaintiffs' lawsuit.

ARGUMENT

I. The Quiet Title Act Bars the Plaintiffs' Challenge to the Secretary's Decision to Take the Property Into Trust.

The Quiet Title Act provides the exclusive basis for jurisdiction over suits that challenge the United States' title to real property. *United States v. Mottaz*, 476 U.S. 834, 841 (1986); *Block v. North Dakota*, 461 U.S. 273, 286 (1983). The Quiet Title Act provides in relevant part:

> 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 . . . .

28 U.S.C. § 2409a(a). The exception for "trust or restricted Indian lands" "retain[s] the United States' immunity from suit by third parties challenging the United States' title to land held in trust for Indians." *Mottaz*, 476 U.S. at 842. "Thus, 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." *Id.* at 843.

In this case, the Plaintiffs are challenging the Secretary's acquisition of the Shriner Tract as trust Indian lands. Because the United States has taken that land into trust for the Tribe and has a

colorable claim to title over that land, the Quiet Title Act expressly preserves the United States' immunity to such a challenge. This Court therefore lacks jurisdiction over this action. *Governor of Kansas*, 516 F.3d 833. *See also Shivwits Band of Paiute Indians v. Utah*, 428 F.3d 966, 974-78 (10th Cir. 2005) (holding that Quiet Title Act bars suit challenging the Secretary's decision to take land into trust for the benefit of an Indian tribe where the United States has already taken the property into trust); *Neighbors for Rational Development, Inc. v. Norton*, 379 F.3d 956, 961-66 (10th Cir. 2004) (same).

The fact that the Plaintiffs brought their challenge to the trust acquisition of the Shriner Tract under the APA rather than under the Quiet Title Act does not rescue their claims. *See Shivwits Band*, 428 F.3d at 975 (judicial review available under APA only if the United States has not acquired title to property) (citing *Neighbors*, 379 F.3d at 964)). It is well-established that a plaintiff cannot avoid the Indian lands exception under the Quiet Title Act by seeking judicial review of an agency action under the APA. *See Neighbors*, 379 F.3d at 965 (plaintiffs cannot circumvent Quiet Title Act's limitations with artful pleading) (citing *Mottaz*, 476 U.S. at 841-42; *North Dakota*, 461 U.S. at 284-85).

The fact the Plaintiffs do not explicitly seek to quiet title to the Shriner Tract also does not allow them to avoid the Quiet Title Act's limitations. *See Shivwits Band*, 428 F.3d at 975 ("'If Congress was unwilling to allow a plaintiff claiming title to land to challenge the United States' title to trust land' it was 'highly unlikely Congress intended to allow a plaintiff with no claimed property rights to challenge the United States' title to trust land.'") (quoting *Neighbors*, 379 F.3d at 962)). "[I]n determining whether a particular claim falls within the scope of the [Quiet Title Act's] prohibition, a reviewing court 'must focus on the relief . . . request[ed],' rather than on the party's

characterization of the claim." *Id.* (quoting *Neighbors*, 379 F.3d at 961)). The Plaintiffs seek to divest the United States of its title to the Shriner Tract, dispute that the United States holds rightful title to the property, and ask the Court to adjudicate that dispute. This is just the type of action that falls within the scope of the Quiet Title Act and, because the property indisputably is held in trust for Indians, the type of action that the Quiet Title Act precludes.

The Tenth Circuit's July 15, 1996, order dissolving this Court's temporary restraining order also fails to assist the Plaintiffs because such an order cannot give this Court jurisdiction where none exists. A federal court cannot confer subject matter jurisdiction upon itself or waive the United States' sovereign immunity by judicial decree. *See Henry v. Office of Thrift Supervision*, 43 F.3d 507, 511 (10th Cir. 1994) ("Federal courts are courts of limited jurisdiction; they are empowered to hear only those cases authorized and defined in the Constitution which have been entrusted to them under a jurisdictional grant by Congress."); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Jacks*, 960 F.2d 911, 913 (10th Cir. 1992) ("only Congress, not the courts, can waive the sovereign immunity of the United States").

Furthermore, the stated purpose of the July 15th Order was to ensure that the purchase of the Shriner Tract would not affect the resolution of the ultimate question of whether gaming should be permitted on the tract, which is a question separate from whether the United States may hold the land in trust. *Wyandotte Nation v. Sebelius*, 443 F.3d 1247, 1254 (10th Cir. 2006). This purpose has been accomplished. On September 10, 2004, the National Indian Gaming Commission ("NIGC") issued a final agency decision that the Tribe could not conduct gaming on the Shriner Tract. The Tribe contested that decision in another lawsuit, and, on July 6, 2006, this Court reversed the NIGC's decision. *Wyandotte Nation v. NIGC*, 437 F. Supp.2d 1193 (D.Kan. 2006).

Moreover, the fact that Plaintiffs have obtained an Order vacating the dismissal of this case does not rescue Plaintiffs because the land has been taken into trust. 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. Dept. of Interior*, 768 F.2d 1248, 1254 (11th Cir. 1985). Congress reserved that power for the Government. *See Mottaz*, 476 U.S. at 847 ("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[8] has set lands, including trust lands, apart as Indian country,[9] 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 Comm'n*, 829 F.2d 967, 974 (10th Cir. 1987). An actual controversy, therefore, 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.

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

[9] Lands owned by the United States in trust for Indian tribes are "Indian country." *See Oklahoma Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114, 123 (1993); *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)).

II. 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; *North Dakota*, 461 U.S. at 286. 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).

28 U.S.C. § 2409a(a) (emphasis added). The italicized portion represents Congress' 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*, 428 F.3d at 974-78; *Neighbors*, 379 F.3d at 961-66. 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 (1992)). Any ambiguities in a waiver must be construed "in favor of immunity." *United States v. Williams*, 514 U.S. 527, 531 (1995) (citation omitted). Absent explicit

language in a statute waiving the United States' sovereign immunity, a court errs by implying a waiver. *See FTC v. Kuykendall*, 466 F.3d 1149, 1154 (10th Cir. 2006). Therefore, the existence of Plaintiffs' complaint in this case when the Shriner Tract was taken into trust does not confer jurisdiction on this Court because there is no waiver of sovereign immunity.

III. Any 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 Court must resolve the ambiguity in a statute waiving immunity in favor of the Government and Indians.[10] *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 would eviscerate 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' rationale for preserving the United States' 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

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[10] 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).

> administration against abridging the historic relationship between the Federal Government and the Indians without the consent of the Indians.

H.R. Rep. No. 1559, 92d Cong., 2d Sess. 91972). 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." *Florida*, 768 F.2d at 1254-55. The waiver of sovereign immunity provided by the Quiet Title Act does not 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. Even if there is some ambiguity in the language of the Quiet Title Act, that ambiguity must be resolved in favor of the United States and in a manner that does not interfere with Indian rights.

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

The Tenth Circuit Court of Appeals has long recognized that "only Congress . . . can waive the sovereign immunity of the United States." *Merrill Lynch, Pierce, Fenner & Smith*, 960 F.2d at 913 (10th Cir. 1992). Congress has never consented to any lawsuit challenging the United States' title to "trust or restricted Indian lands." Congress has expressly preserved the United States' 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).

In April of 1996, the Secretary 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. Before the regulation, arguably, courts lacked jurisdiction to review the Secretary's decision to acquire land into trust because the lack of final agency action that is 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 *Mottaz*, 476 U.S. 834; *North Dakota*, 461 U.S. 273; *Florida*, 768 F.2d 1248.

The Secretary promulgated 25 C.F.R. § 151.12(b) to fix this alleged problem,[11] 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, as the preamble to 25 C.F.R. § 151.12 states, "[t]his 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 (emphasis added).

By its terms, the Secretary's regulation permits judicial review only **before** formal conveyance of title to the United States. *Id.* The Court must interpret this regulatory opportunity

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[11] The Supreme Court vacated the Eighth Circuit's decision in view of the new regulation, *South Dakota*, 519 U.S. 919, and every other court has disagreed with the Eighth Circuit's holding, including the Tenth Circuit 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. 2005); *City of Roseville v. Norton*, 219 F. Supp.2d 130, 155-56 (D. D.C. 2002).

in view of the Quiet Title Act because the Secretary's regulation cannot override Congress' 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' sovereign immunity by issuing a regulation, *United States v. Richman*, 124 F.3d 1201, 1205 (10th Cir. 1997). The regulation's preamble specifies that no judicial review is available once the land has been transferred into trust.[12] 61 Fed. Reg. at 18,082.

CONCLUSION

While Plaintiff's may perceive immunity to be a harsh result in this case, the law that has developed since the Shriner Tract was taken into trust, clarifies that the only way this Court could have retained jurisdiction over Plaintiffs' claims would have been accomplished if the Tenth Circuit had not dissolved the temporary restraining order entered by this Court in July of 1996. The regulation upon which Plaintiffs relied in bringing their challenge to the proposed trust acquisition prior to completion of taking the land into trust was implemented in April of 1996. The proposed trust acquisition in this case arose within three months of the implementation of that then-new regulation, leaving the Plaintiffs, the Defendant, and the courts to proceed without the benefit of any precedence. Now, with the benefit of hindsight and development of the law, the only thing that could have saved Plaintiffs from their current predicament would have been for the Plaintiffs to

[12] 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.

successfully convince the Tenth Circuit, **in July of 1996, not to dissolve the temporary restraining order** entered by this Court because to do so would deprive the court of jurisdiction. The mere absence of foresight simply does not and cannot waive sovereign immunity or confer jurisdiction in light of the Quiet Title Act. The Shriner Tract is now held in trust, and this Court lacks jurisdiction to grant Plaintiffs the relief they seek. Therefore, Defendant moves the Court for an order dismissing this action with prejudice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on May 14, 2008, the foregoing document was electronically filed with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to the following:

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