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,
Secretary of the Interior,

Defendant.

DEFENDANT'S REPLY TO PLAINTIFFS'
RESPONSE BRIEF IN OPPOSITION TO MOTION TO DISMISS
FOR LACK OF SUBJECT MATTER JURISDICTION

The Defendant by and through Eric F. Melgren, United States Attorney for the District of Kansas, and Jackie A. Rapstine, Assistant United States Attorney, herein replies to Plaintiffs' brief in opposition to Defendant's motion to dismiss for lack of subject matter jurisdiction.

STANDARD OF REVIEW

Once Defendant files a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) for lack of jurisdiction, Plaintiffs bear the burden of proving that jurisdiction does exist. Federal district courts are courts of limited jurisdiction. The burden of establishing jurisdiction is on the Plaintiffs. *See, Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375 (1994). There can be no presumption of jurisdiction. *See, e.g., McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178 (1936). Courts may only exercise jurisdiction when specifically authorized to do so and must dismiss a cause when it becomes obvious that jurisdiction is lacking. *Lloyd v. Loy*, 2001 WL 950261, *1 (D. Kan. July 23, 2001). 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, and Plaintiffs' response to Defendant's motion to dismiss fails to meet Plaintiffs' burden of establishing that jurisdiction exists in this case.

STATEMENT OF FACTS

In the Defendant's memorandum in support of the motion to dismiss, Defendant sets forth a statement of facts, to which Plaintiffs did not directly respond. Rather, Plaintiffs set forth their own statement of facts in the "Background" section of their response brief. Many of the facts set forth by the Plaintiffs are not pertinent to Defendant's Motion to Dismiss, and some are subject to dispute, but for purposes of Defendant's Motion to Dismiss, the parties substantially agree on the most basic facts upon which the jurisdictional issue centers: the Shriner Tract **was** taken into trust by the Secretary of Interior in 1996 after Plaintiffs' complaint was filed, and the tract currently remains in trust.

RESPONSE TO PLAINTIFFS' DISCUSSION

I. *Department of Interior v. South Dakota* Does Not Establish that Jurisdiction Under The Quiet Title Act Is Determined At The Time Of Filing.

Plaintiffs urge the Court to interpret *Dept. of Interior v. South Dakota*, 519 U.S. 919 (1996) to stand for the proposition that "the Indian lands exception to the waiver of sovereign immunity in the Quiet Title Act does not apply if the complaint is filed before the United States takes the land at issue into trust." (Doc. 277, p.13) (emphasis in original). No such proposition can be gleaned from *Dept. of Interior*, a case in which the United States Supreme Court granted certiorari, vacated the judgment below, and remanded the case back to the **Secretary of Interior** without explanation or elaboration. *Id.* at 919-920. In *Dept. of Interior*, the judgment below, which was entered by the Eighth Circuit, declined to address the sovereign immunity and Quiet Title Act issues because it found the statute under which title was taken to be unconstitutional. *South Dakota v. Dept. of*

Interior, 69 F.3d 878, 881 n.1 (8th Cir. 1995). In the resulting appeal to the Supreme Court, there is nothing in the decision from which one can conclude that the decision to grant certiorari, vacate and remand was based on any interpretation of the Quiet Title Act. In fact, the decision to grant certiorari, vacate and remand is one paragraph long and it is devoid of any elaboration.

By the same token, the Supreme Court's decision in *Dept. of Interior* cannot be interpreted to directly support Defendant's position on this Motion to Dismiss. The underlying history of that case, however, does support Defendant's position because it was that case that led to the enactment of 25 C.F.R. §151.12(b), which is the regulation that allowed the Plaintiffs in this case to seek review of the Secretary's decision to take the Shriner tract into trust before it was actually transferred into trust. *Dept. of Interior* began when the Secretary of Interior took 91 acres in trust for a Sioux Tribe in South Dakota pursuant to 25 U.S.C. § 465. The Plaintiffs in that case were a city and the state who brought suit under the Administrative Procedures Act ("APA"). The Eighth Circuit found the underlying statute that authorized the acquisition of the 91 acres to be unconstitutional because it delegated legislative powers to the Department of Interior in violation of the nondelegation doctrine. *South Dakota*, 69 F.3d at 884-885.

In response to the Eighth Circuit's decision, the Secretary of Interior promulgated 25 C.F.R. § 151.12(b), which authorized judicial review of the Secretary's decision to take land into trust as a final agency decision subject to challenge pursuant to the APA. The preamble to the regulation clarified that the regulation was necessary because "[t]he Quiet Title Act . . . precludes judicial review after the United States acquires title." 61 Fed. Reg. 18,082 (1996). Upon promulgation of this regulation, the Secretary, in the *South Dakota* case, petitioned the Supreme Court to grant a writ of certiorari, to vacate the Eighth Circuit's decision, and to remand the matter to the **Secretary of**

Interior so that he could voluntarily take the land out of trust and allow the case to proceed anew pursuant to the new regulation. The Supreme Court granted the petition, vacated the Eighth Circuit decision, and remanded not to the district court or the court of appeals, but directly to the Secretary as the government requested, who then voluntarily took the land out of trust. *Dept. of Interior*, 519 U.S. 919. Nothing in the Supreme Court's order implied that any court had jurisdiction to take the land out of trust. The Supreme Court's order remanding the matter to the Secretary of Interior does not and should not be equated with authority to grant the relief Plaintiffs now seek in this case.

After the matter was remanded to the Secretary of Interior, the Sioux Tribe then applied to have the South Dakota land taken into trust and, over the objections of the City and State, the Secretary decided to take the land into trust. However, because the regulation had been promulgated, notice of the decision was published and the City and State filed a lawsuit to prevent the Secretary from taking the land into trust. *South Dakota v. Dept. of Interior*, 423 F.3d 790 (8th Cir. 2006). Ultimately, the Eighth Circuit upheld the Secretary's decision to take the land into trust.

Contrary to Plaintiffs' arguments, the history and the ultimate outcome of *Dept. of Interior* supports the Defendant's position because it illustrates that, besides Congress, the Secretary of Interior, and only the Secretary, can remove land from trust. A court cannot order land to be taken out of trust, which is the precise relief that Plaintiffs now seek in this case. *Dept. of Interior* further illustrates that the land's trust status precludes judicial review regardless of when the land is taken into trust. In this case, the Shriner Tract is and remains in trust. Plaintiffs cannot obtain the relief they now seek even though the complaint in this case was filed before the land was taken into trust. Sovereign immunity precludes the judicial relief Plaintiffs now seek, and Defendant's motion to dismiss must be granted for lack of subject matter jurisdiction.

2. Any Waiver Of Sovereign Immunity At The Filing Of The Complaint Was Revoked When The Shriner Tract Was Taken Into Trust.

Plaintiffs contend that because the Shriner Tract had not been taken into trust at the time Plaintiffs filed their complaint, the subsequent trust acquisition did not divest the Court of jurisdiction. In other words, once the Court had jurisdiction, it could not be deprived of jurisdiction when the land was taken into trust even though the Quiet Title Act clearly establishes that there is no waiver of sovereign immunity for challenges to title to Indian lands held in trust. In advancing this position, Plaintiffs suggest that a finding to the contrary would allow the United States to purposely take land into trust after unsuccessfully litigating challenges to decisions to take land into trust, as if to suggest that the Secretary manipulated jurisdiction in this case. Such a suggestion is completely without merit in this case. The undisputed facts clearly establish that the Shriner Tract was taken into trust only after the Wyandotte Tribe appealed this Court's temporary restraining order and successfully convinced the Tenth Circuit to lift the restraining order to allow the Secretary of Interior to take the tract into trust. It was only then that the Secretary took the land into trust, and there is absolutely no evidence that but for the order from the Tenth Circuit the land would have been taken into trust.

Moreover, it is entirely likely that if the Plaintiffs in this case had argued that the lifting of the restraining order and the subsequent taking of the Shriner Tract into trust would trigger the Quiet Title Act and deprive the court of jurisdiction, the restraining order would not have been lifted because irreparable harm would have been caused to Plaintiffs. Certainly, that argument could be made in future cases as well to prevent the potential manipulation suggested by Plaintiffs.

Plaintiffs' argument also fails on the merits. There are two time-of-filing rules: weak and strong. To apply the time-of-filing rule appropriately, one must understand its mechanics. Courts

have applied the time-of-filing rule in two ways to create a weak and a strong application. In the weak application, a time-of-filing rule divests courts of jurisdiction when the court simply did not have jurisdiction at the time the plaintiff filed the case. *See, e.g.*, *Spielman v. Genzyme Corp.*, 251 F.3d 1, 6 (1st Cir. 2001) (divesting jurisdiction because "Spielman's attempt to meet the jurisdictional minimum was in vain from the beginning."); *Cohn v. Cities Serv. Co.*, 45 F.2d 687, 689 (2d Cir. 1930) (divesting jurisdiction because the allegations failed to meet the statutory amount in controversy minimum). Moreover, "later events may not create jurisdiction where none existed at the time of filing." *Spectronics Corp. v. H.B. Fuller Co.*, 940 F.2d 631, 635 (Fed. Cir. 1991). *See, e.g.*, *McNeil v. United States*, 508 U.S. 106 (1993) (lack of jurisdiction over action brought pursuant to Federal Tort Claims Act before resolution of administrative claim is not remedied upon subsequent denial of the administrative claim). In this weak application, the time-of-filing rule simply provides a convenient point of time at which to ensure the court has jurisdiction.

With the strong application, the time-of-filing rule substantively perpetuates jurisdiction that once existed even after the basis for that jurisdiction no longer exists. *See, e.g.*, *Mollan v. Torrance*, 22 U.S. (9 Wheat.) 537, 539 (1824) (perpetuating diversity jurisdiction although the parties were no longer diverse). Courts perpetuate jurisdiction according to the strong time-of-filing rules in four situations: (1) diversity jurisdiction, *Mollan*; (2) personal jurisdiction, *Minn. Mining & Mfg. Co. v. Eco Chem*, 757 F.2d 1256, 1264 (Fed. Cir. 1985) (relying on *Mollan* to perpetuate in personam jurisdiction over substituted parties); (3) cases removed from state courts to federal courts, *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 293 (1938) ("events occurring subsequent to removal which reduce the amount recoverable, whether beyond the plaintiff's control or the result of his volition, do not oust the district court's jurisdiction once it has attached."); *Dole Food Co. v.*

Patrickson, 538 U.S. 468, 478 (2003) (addressing cases removed from state courts, also); and (4) pendent jurisdiction, *Rosado v. Wyman*, 397 U.S. 397, 405 (1970) (permitting a court the discretion to exercise pendent jurisdiction after declaring the sole federal question moot). Notably, diversity jurisdiction, personal jurisdiction, and jurisdiction conferred through removal all offer circumstances in which the risk of forum shopping and manipulation of jurisdiction are temptations.

While Plaintiffs may attempt to convince this Court that the circumstances surrounding the Shriner Tract could lead to temptations of manipulation of jurisdiction in the future, there is no basis for that claim. As already discussed, the Shriner Tract was taken into trust only after the Wyandotte Tribe appealed the restraining order to the Tenth Circuit and the Tenth Circuit dissolved the restraining order, thereby allowing the land to be taken into trust. But for that appeal, which the Secretary did not initiate, and the dissolution of the restraining order, there is absolutely no evidence that the Secretary would have taken the Shriner Tract into trust, which is the event that triggered the Quiet Title Act.

In all other situations, that are not within the strong application, subsequent events divest courts of jurisdiction that had existed at the time of filing. Subsequent events divest courts of jurisdiction in the following circumstances: (1) when a sovereign restricts its sovereign immunity, *Beers v. Arkansas*, 61 U.S. 527, 529 (1858); (2) when a case becomes moot, *Cardinal Chem. Co. v. Morton Int'l., Inc.*, 508 U.S. 83, 97 (1993); (3) when a case or controversy dissolves, *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975) ("The rule in federal cases is that an actual controversy must be extant at all states of review, not merely at the time the complaint is filed." (citations omitted) (quotations omitted)); (4) when the parties lose standing, *see, Gollust v. Mendell*, 501 U.S. 115, 126 (1991) ("the plaintiff must maintain a personal stake in the outcome of the litigation throughout its

course." (quotations omitted)); (5) when one party appeals, *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982) ("The filing of a notice of appeal is an event of jurisdictional significance -- it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal.") *superceded by statute on other grounds* as recognized in *In re Markowitz*, 190 F.3d 455, 460, n. 2 (6th Cir. 1999); and (6) when one party removes a case from a state court, 28 U.S.C. § 1446(d) (divesting state court of jurisdiction upon removal to federal district court).

Plaintiffs rely on several cases in an attempt to advance their position that jurisdiction continued even after the Shriner Tract was taken into trust because the complaint was already on file. In this effort, Plaintiffs cite *Newman-Green v. Alfonzo-Larrain*, 490 U.S. 826, 830 (1989), but it is a diversity jurisdiction case. As discussed above, diversity jurisdiction is the premier example of the strong time-of-filing application, and jurisdiction in this case is not based on diversity.

Next, Plaintiff's rely on *Rosa v. Res. Trust Corp.*, 938 F.2d 383, 392 n.12 (3d Cir. 1991), which is an action that was brought pursuant to the Employee Retirement Income Security Act of 1974 against Resolution Trust Corporation (RTC). RTC challenged jurisdiction for plaintiffs' failure to comply with statutory claims procedures. Recently, the First Circuit addressed the time-of-filing rule in the context of a case in which the original complaint was based on diversity jurisdiction and the amended complaint, that was filed prior to any responsive pleading, was based on a federal question in *Connectu LLC v. Zuckerberg*, 522 F.3d 82 (1st Cir. 2008). In so doing, the First Circuit made the following instructive analysis:

> Notwithstanding the impressive pedigree of the time-of-filing rule, it is inapposite here. The letter and spirit of the rule apply most obviously in **diversity cases, where the rule originated**, *see Mollan*, 22 U.S. at 537-39, and where heightened concerns about forum-

> shopping and strategic behavior offer special justifications for it. These concerns are not present in the mine-run of federal question cases, and courts have been careful not to import the time-of-filing rule indiscriminately into the federal question realm.

Connectu, 522 F.3d at 92 (citations omitted) (emphasis added). In addition to its instructive analysis, the First Circuit footnoted that "[w]hile there are outliers, *see, e.g., Rosa v. Res. Trust Corp.*, 938 F.2d 383, 392 n. 12 (3d Cir. 1991), those few decisions allude to the time-of-filing rule reflexively and without any meaningful analysis." *Id.* at 92 fn.8. Thus, as correctly noted by the First Circuit, *Rosa* does not offer any analysis of why the court applied the time-of-filing rule and, consequently, it is of no assistance in resolving the jurisdictional issue in this case.

Plaintiffs also rely on *Freeport-McMoRan, Inc. v. K N Energy, Inc.*, 498 U.S. 426, 428 (1991), another diversity jurisdiction case, which is inapplicable here. Moreover, in *Freeport-McMoRan*, the Supreme Court made the additional statement that the addition of a nondiverse party would not defeat jurisdiction. In *Bishop v. Moore*, 2000 WL 246583 (D. Kan. 2000), this Court rejected the notion that "[d]iversity jurisdiction, once established, is not defeated by the addition of a nondiverse party to the action," *id.*, as dictum. The rejection of this statement reflects the willingness of this Court to recognize that even diversity jurisdiction may cease to exist in certain circumstances so that even though jurisdiction existed when the complaint was filed, the court may later be deprived of jurisdiction by a change in circumstances.

Plaintiffs also cite *St. Paul Mercury Indem. Co.*, 303 U.S. at 289, which is another diversity case in which the amount of damages sought was reduced below the jurisdictional limit after the case was removed to federal court raising concerns about manipulation of jurisdiction. The Supreme Court found that even though the damages sought had been reduced, that did not deprive the court

of jurisdiction. However, because that case involves a diversity issue it has no application to this case.

Plaintiffs' reliance on *F. Aderete Gen. Contractors, Inc. v. United States*, 715 F.2d 1476 (Fed. Cir. 1983) and *New Rock Asset Partners, L.P. v. Preferred Entity Advancements, Inc.*, 101 F.3d 1492 (3d Cir. 1996) is also unfounded. *F. Aderete* is another example of a case, like *Rosa*, in which the court referred to the time-of-filing rule without any meaningful or instructive analysis. This deficiency in analysis is actually addressed in *New Rock*, in which the court observed, in referring specifically to *Rosa* and *F. Aderete*, "[t]he rule that jurisdiction is assessed at the time of filing of the complaint has been applied only rarely to federal question cases. Moreover, in these rare cases, the rule has often been applied axiomatically without extensive discussion or analysis." *New Rock*, 101 F.3d at 1503. It is also significant that both the plaintiff and the government agreed that the court had jurisdiction in *F. Aderete*, which certainly is not true in this case.

Interestingly, Plaintiffs also cite *New Rock* as if it supports the Plaintiffs' position in this case. It does not. The court in *New Rock* actually found that it was divested of jurisdiction when the Resolution Trust Corporation left the case and rejected "New Rock's argument that the 'black letter rule' that jurisdiction is determined at the time of filing preserves jurisdiction."[1] *Id.* at 1503. In rejecting the "black letter rule," *New Rock* correctly recognized that the "letter and spirit of the rule apply most clearly to diversity cases." *Id.* In addition, the concept that potential manipulation of jurisdiction supports the rule has no place in this case because, as already discussed, the Shriner

[1] The Court did find that the discretion to exercise supplemental jurisdiction pursuant to 28 U.S.C. § 1367 did exist and should be exercised. *New Rock*, 101 F.3d at 1504.

Tract was only taken into trust when the Tenth Circuit lifted the restraining order with the knowledge that the land would be taken into trust as soon as the restraining order was lifted.

Plaintiff's additional reliance on several out-of-circuit cases including *Kabakjian v. United States*, 267 F.3d 208 (5th Cir. 2001); *United States v. Kulawy*, 917 F.2d 729 (2d Cir. 1990); *Delta Savings & Loan Assoc. v. I.R.S.*, 847 F.2d 248 (5th Cir. 1988) and *Bank of Hemet v. United States*, 643 F.2d 661, 664 (9th Cir. 1981), is also misplaced. With the exception of *Bank of Hemet*, the holdings in those cases did 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, as previously addressed by Defendant. Rather, with the exception of *Bank of Hemet*, these cases were based on jurisdiction pursuant to 28 U.S.C. § 2410(a), which waives the sovereign immunity of the United States in actions to quiet title to property on which the United States claims a mortgage or lien.

Furthermore, while *Bank of Hemet* purports to involve § 2409a, the facts reveal that the United States claimed an interest in the underlying property only by virtue of a federal tax lien so that § 2410(a) actually provided the basis for jurisdiction. *Bank of Hemet*, 643 F.2d at 663. Moreover, the Ninth Circuit failed to entirely discuss subsection (e) of the Quiet Title Act, a provision that applied in that case because the United States had sold the property and no longer claimed an interest in it. *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," renders this case unpersuasive. In addition, the Ninth Circuit limited its holding to the specific facts before it. *Id.* at 655 ("We hold **under the circumstances** of this case the presence of waiver of sovereign immunity should be determined as of the date the complaint was filed.") (emphasis added).

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.[2] *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 federal district 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."). In other words, the Quiet Title Act allows the United States to divest the district court of jurisdiction **after** the filing of the complaint, which supports the Defendant in this case, not the Plaintiffs.

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

CONCLUSION

For the reasons stated in Defendant's memorandum in support of Defendant's motion to dismiss and for the reasons stated herein, Defendant moves the Court for an Order dismissing Plaintiffs' Complaint for lack of subject matter jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on June 30, 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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I further certify that on June 30, 2008, I mailed the foregoing document and the notice of electronic filing by first-class mail, postage prepaid, to the following non-CM/ECF participants:

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