No. 08-3277

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SAC & FOX NATION OF MISSOURI, IOWA TRIBE OF KANSAS & NEBRASKA, and KATHLEEN SEBELIUS, Governor of the State of Kansas,

Plaintiffs-Appellants,

-v.-

KENNETH LEE SALAZAR,[*/] Secretary of the Interior, et al.,

Defendants-Appellees,

ORAL ARGUMENT REQUESTED

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS
(HON. RICHARD D. ROGERS)

BRIEF OF THE FEDERAL DEFENDANTS-APPELLEES

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[*/] Pursuant to Fed. R. App. P. 43(c)(2), we have substituted the name of the current officeholder for his predecessor, Dirk Kempthorne, in the caption of this case.

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ISSUE PRESENTED

The federal Quiet Title Act ("QTA"), 28 U.S.C. § 2409a, provides a limited waiver of the United States' sovereign immunity, but expressly precludes lawsuits challenging the United States' title to "trust or restricted Indian lands." Plaintiffs-Appellants Sac & Fox Nation of Missouri, Iowa Tribe of Kansas and Nebraska, and the Governor of Kansas filed this lawsuit to challenge the Secretary of the Interior's ("the Secretary") acquisition of title to .52 acres of land known as "the Shriner Tract" in trust on behalf of the Wyandotte Indian Tribe of Oklahoma ("the Tribe"). *See* Appellants' Appendix ("AA") at 39. The specific issue presented is:

Whether the sovereign immunity of the United States, as preserved in the QTA, precludes Plaintiffs' challenge to the Secretary's acquisition of title to the Shriner Tract in trust for the benefit of the Wyandotte Tribe because it challenges the United States' title to "trust or restricted Indians lands."

STATEMENT OF THE CASE

This appeal involves another chapter in the dispute over the Secretary's 1996 acquisition of the Shriner Tract in downtown Kansas City, Kansas in trust on behalf of the Wyandotte Tribe under the mandate of Public Law No. 98-602, 98 Stat. 3149 (Oct. 30, 1984) ("PL 602"), who intend to operate a tribal casino on the property. Over the past twelve years, Plaintiffs have employed various means to prevent the Tribe from operating a gaming facility on the Shriner Tract, including the filing of

lawsuits designed to prevent or set aside the Secretary's trust acquisition of the property – none of which have proven successful.

Plaintiffs filed the instant lawsuit on July 12, 1996. *See Governor of Kansas v. Kempthorne*, 516 F.3d 833, 837 (10th Cir. 2008). Shortly after the case was filed, the district court issued a temporary restraining order preventing the Secretary from consummating the Shriner Tract trust acquisition. *Id.* at 838. "The Wyandotte, however, immediately filed an interlocutory appeal with the court, arguing that the real estate contract for purchase of the Shriner Tract was due to expire and, if the TRO was not dissolved, the opportunity for the Tract to be placed in trust would be lost." *Id.* "In order to preserve the status quo," this Court dissolved the temporary restraining order upon certain conditions intended to preserve the court's ability to resolve "the ultimate question of whether gaming shall be permitted on the subject land." *Id.* With the restraining order dissolved, the Secretary acquired the Shriner Tract, which he currently holds in trust for the Tribe's benefit. *See Sac & Fox Nation v. Norton*, 240 F.3d 1250, 1257 (10th Cir. 2001).

The matter returned to the district court where the United States argued that its sovereign immunity precluded that court's continued jurisdiction. AA 90-93. The district court rejected the jurisdictional challenge on "law of the case" grounds,[1/] but

[1/]The district court was incorrect. The law of the case doctrine is inapplicable to questions of subject matter jurisdiction. *See Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 819 (1988); *Kennedy v. Lubar*, 273 F.3d 1293, 1299 (10th

nevertheless dismissed the case pursuant to Fed. R. Civ. P. 19, concluding that the Wyandotte Tribe was an indispensable party that had not been and could not be joined as a defendant because of the Tribe's sovereign immunity. AA 190-91.

On appeal, this Court disagreed with the district court's indispensable party analysis, but further concluded, among other things, "that the Secretary's determination that only Pub.L. 98-602 funds were used for the acquisition was not supported by substantial evidence in the record."[2/] *Sac & Fox Nation*, 240 F.3d at 1263. The Court therefore directed the district court to remand the matter "to the Secretary for further consideration of the question of whether Pub.L 98-602 funds were used for the acquisition of the Shriner Tract." *Id.* at 1264, 1268. Although the United States briefly touched upon the sovereign immunity issue in its Rule 19

Cir. 2001); *Am. Canoe Ass'n v. Murphy Farms, Inc.*, 326 F.3d 505, 515 (4th Cir. 2003); *Green v. Dep't of Commerce*, 618 F.2d 836, 839 n.9 (D.C. Cir. 1980); *Marcella v. Capital Dist. Physicians' Health Plan, Inc.*, 293 F.3d 42, 47 (2d Cir. 2002); *Amen v. Dearborn*, 718 F.2d 789, 794 (6th Cir. 1983).

[2/]Contrary to Plaintiffs' position (at 16, 50-51), it is not necessarily true that only PL 602 must have been used to purchase the Shriner Tract for its mandatory provisions to apply. During oral argument in a previous proceeding, the Secretary's counsel asserted that the mandatory duty to acquire the property arose if the majority of the funds used to purchase the property were PL 602 funds. *See Sac and Fox Nation*, 240 F.3d at 1263 n.11. However, because the then-existing record and briefs did not reference this argument, the Court disregarded it. *Id.* On remand, the Secretary did not endeavor to issue a formal interpretation of PL 602 given the limited directive in this Court's mandate. Because PL 602 remains ambiguous with respect to this question, however, the Secretary remains free to issue an interpretation.

indispensable party analysis – stating the position that this Court had preserved its jurisdiction (Pl. Appendix at 9-11) – this Court did not discuss the government's sovereign immunity and its jurisdictional impact in the *Sac & Fox Nation* opinion.

The district court remanded the case to the Secretary for further administrative proceedings, but also closed the case. AA 191. Plaintiffs did not ask for reconsideration, nor did they appeal the court's decision to close the case. *Id.* At one point during the administrative proceedings, Plaintiffs asked the district court to supplement the record in this case with regard to those proceedings. *Id.* The district court rebuffed that request, however, indicating that it had closed the case and that Plaintiffs needed to file a new action. *Id.*; *Wyandotte Nation v. Sebelius*, 443 F.3d 1247, 1253 n.10 (10th Cir. 2006) ("The *Sac & Fox* case, in which the orders were issued, is over; the district court issued a final judgment terminating the case.").

The outcome of the administrative proceedings resulted in the Secretary determining that the "funds used to purchase the Shriner's Property in Kansas City, Kansas were from the [PL] 602 settlement of specific land claims" and "affirm[ing] the trust status of the subject lands." 67 Fed. Reg. 10,926 (March 11, 2002). Plaintiffs thereafter initiated a new challenge to the Secretary's decisions, captioned *Governor of Kansas v. Kempthorne*. Plaintiffs requested for the first time in their *Governor of Kansas* complaint, among other relief, that the district court "revoke the non-discretionary trust status of the tract and rescind all other trust actions and

applications and activities concerning the same" and "declare void the trust determinations of the Shriner Tract." *See Governor of Kansas v. Kempthorne*, 516 F.3d 833, 843 (10th Cir. 2008).

The district court granted summary judgment to the Secretary on all claims, finding his statutory interpretations reasonable and his factual conclusions supported by substantial evidence. *See generally Governor of Kansas v. Norton*, 430 F. Supp. 2d 1204 (D. Kan. 2006), *vacated* 516 F.3d 833 (10th Cir. 2008). On appeal, this Court did not reach the merits of the Secretary's decision. Instead, the Court treated the case as a quiet title action against the United States that it did not have jurisdiction to consider because it sought to rescind the Shriner Tract's status as Indian trust lands – relief that fell outside the QTA's limited waiver of sovereign immunity. *See Governor of Kansas*, 516 F.3d at 846.

Plaintiffs moved to reopen the instant case pursuant to Fed. R. Civ. P. 60(b)(6), following the suggestion of the concurring judges in *Governor of Kansas*. *Id*. at 847. The district court granted that motion without addressing jurisdiction. AA 120. The court later determined, however, that it lacked subject matter jurisdiction over the case because Plaintiffs' lawsuit sought to encumber the United States' title to the lands it held in trust for the benefit of an Indian tribe. AA 211. In other words, because the QTA explicitly preserves the United States' sovereign immunity for lawsuits involving title to "trust or restricted Indian lands," the district court held that it lacked

jurisdiction to grant the relief that Plaintiffs desired. AA 197-99. This appeal follows. AA 212-14.

STATEMENT OF THE FACTS

I. Legal Background

A. The QTA And The Indian Lands Exception

Prior to 1972, the doctrine of sovereign immunity entirely barred quiet title actions against the United States.[3/] *See Block v. North Dakota*, 461 U.S. 273, 280 (1983). In the federal QTA of 1972, 28 U.S.C. § 2409a, Congress for the first time enacted a limited waiver of sovereign immunity allowing parties claiming title to real property adverse to that of the United States to bring certain quiet title actions against the United States. *Id.* at 280, 284-85. In enacting the QTA, Congress intended it to serve as the "exclusive means" for challenging the United States' title to real property. *See Governor of Kansas*, 516 F.3d at 841.

Several types of challenges were excluded from the QTA's waiver of sovereign immunity, including legal challenges that seek to divest, or have the effect of divesting, the United States of its title to "trust or restricted Indian lands." *See United*

[3/] Prior to the QTA, parties seeking to quiet title or other relief affecting the United States' title to real property were required to induce the United States to file a quiet title action against them, or to obtain discretionary relief from Congress or the Executive Branch. *See Block*, 461 U.S. at 280. Although sovereign immunity still prevents Plaintiffs from obtaining the relief they desire through the judicial branch, the congressional and executive options remain open and viable.

States v. Mottaz, 476 U.S. 834, 842 (1986); *Shivwits Band of Paiute Indians v. Utah*, 428 F.3d 966, 974-78 (10th Cir. 2005); *Neighbors for Rational Dev., Inc. v. Norton*, 379 F.3d 956, 961-66 (10th Cir. 2004). The QTA 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) (emphasis added). Based upon this language, courts have recognized that "when the United States claims an interest in real property based on that property's status as trust or restricted Indian lands, the QTA does not waive the Government's immunity." *Mottaz*, 476 U.S. at 843. Thus, once Congress or the Secretary[4] has set lands, including trust lands, apart as Indian country,[5] they remain so until Congress or the Secretary divests them of that character. *See Indian Country, U.S.A. v. State of Okl. ex rel. Okl. Tax Comm'n*, 829 F.2d 967, 974 (10th Cir. 1987).

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[4]Congress has delegated its power to acquire trust lands and other Indian property rights to the Secretary of the Interior. *See, e.g.*, 25 U.S.C. § 465.

[5]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)).

The QTA's legislative history 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 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. Accordingly, the United States' sovereign immunity precludes any party from seeking relief that divests or has the effect of divesting the United States' of its title to Indian trust lands.

B. Administrative Procedure Act (APA)

The APA waives the United States' sovereign immunity for certain lawsuits seeking non-monetary relief that challenge administrative agency action. *See* 5 U.S.C. § 702 ("An action . . . seeking relief other than money damages . . . shall not be dismissed . . . on the ground that it is against the United States."). That limited waiver contains several exceptions. As relevant here, the waiver excludes those claims seeking relief expressly or impliedly forbidden by another statute, *id.* § 702, such as where the QTA forbids title challenges to "trust or restricted Indian lands." *See*

Shivwits Band, 428 F.3d at 976; *Neighbors*, 379 F.3d at 961-62, 965. Only "final agency action for which there is no other adequate remedy in a court are subject to judicial review," and the waiver of sovereign immunity also is limited to such final agency action. *See* 5 U.S.C. § 704.

C. The Promulgation of 25 C.F.R. § 151.12(b)

Prior to 1996, the limits placed upon the waivers of sovereign immunity in the QTA and APA posed significant, if not insurmountable, obstacles to those seeking judicial review of the Secretary's acquisition of land in trust for the benefit of an Indian tribe. The Secretary's acquisition of land in trust did not become "final agency action" for APA purposes until the Secretary actually had taken the land into trust. 61 Fed. Reg. at 18,082. However, once the Secretary had acquired title to the land in trust, the QTA's exception for title challenges to Indian trust lands precluded judicial review at that time. *Id.* These two limits thus combined to preclude judicial review of the Secretary's land-into-trust decision.

This was the situation facing the Eighth Circuit when a challenge to the Secretary's acquisition of commercial land in trust for Lower Brule Tribe of Sioux Indians came before it in *South Dakota v. Interior*, 69 F.3d 878 (8th Cir. 1995), *vacated* 519 U.S. 919 (1996). The court held that the statute authorizing the Secretary to take the land into trust, 25 U.S.C. § 465, constituted an unconstitutional delegation of legislative power to the Secretary because, among other reasons, Congress failed

to provide an opportunity for judicial review prior to the trust land acquisition.[6/] *Id.* at 883-85.

The Secretary subsequently addressed the situation confronting the Eighth Circuit by issuing a regulation pursuant to which the Secretary's announcement of his intent to take land into trust is "final agency action" subject to judicial review under the APA. *See* 25 C.F.R. § 151.12(b). Under this regulation, the Secretary announces through the Federal Register or appropriate newspaper notice to affected members of the public "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." *Id.* The 30-day period provides time for filing an APA challenge to the Secretary's "final agency determination" that the QTA does not bar because the United States does not yet claim title. *Id.* If a lawsuit is filed and the 30-day period has expired, the Secretary may take the land into trust unless preliminary enjoined by a court on a showing by the plaintiffs of a substantial likelihood of success on the merits of their claims, a likelihood of irreparable harm

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[6/]The Supreme Court vacated the Eighth Circuit's decision in view of the new regulation, *South Dakota*, 519 U.S. 919, and every court has disagreed with the Eighth Circuit's 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; *South Dakota v. Interior*, 423 F.3d 790, 797-98 (8th Cir. 2005); *Carcieri v. Kempthorne*, 497 F.3d 15, 41-43 (1st Cir. 2007) (*en banc*), *rev'd on other grounds*, 2009 WL 436679 (Feb. 24, 2009); *Michigan Gambling Opposition v. Kempthorne*, 525 F.3d 23, 30-33 (D.C. Cir. 2008).

without an injunction, and an overall equitable balance that favors preliminary injunctive relief. *See Winter v. Natural Res. Def. Council*, 129 S. Ct. 365, 374 (2008) (requirements for preliminary injunctive relief). Absent preliminary injunctive relief, however, after 30 days, the regulation authorizes the Secretary to take the land into trust, thereafter precluding any further judicial review of the Secretary's land into trust decision. *See* 61 Fed. Reg. at 18,082 ("[t]he [QTA]. . . precludes judicial review after the United States acquires title."). "This rule [thus] ensures that review is available before formal conveyance of title to land to the United States, when the QTA's bar to judicial review becomes operative." *Id.*

II. Factual & Procedural History

The Wyandotte Tribe ceded much of its traditional territory to the United States in the 1800s. *See Governor of Kansas*, 516 F.3d at 836. In PL 602, Congress provided for the appropriation and distribution of money in satisfaction of judgments awarded to the Wyandotte Tribe by the Indian Claims Commission and the Court of Federal Claims as compensation for these ceded lands. *Id.* As relevant here, in Section 105(b)(1) of PL 602, Congress directed that the "sum of $100,000.00 of such funds shall be used for the purchase of real property which shall be held in trust by the Secretary for benefit of such Tribe." *Id.* (quoting Pub. L. 98-602 § 105(b)(1)).

Although it received the $100,000 appropriation in 1986, the Tribe made no immediate effort to acquire trust property pursuant to Section 105(b)(1). *Id.* at 837.

"[I]nstead, the funds were invested and eventually commingled with other tribal monies in investment accounts." *Id.* At the time of the Shriner Tract's purchase, the PL 602 funds had a value of approximately $212,170. *Id.* at 839.

In April 1995, the Tribe passed a resolution authorizing the use of "a portion of the PL 602 set aside funds" for the purchase of property, including the Shriner Tract. *Id.* at 837. The resolution stated that this property would be held in trust by the United States and would be used for tribal gaming purposes. *Id.*

Pursuant to this resolution, in June 1995, the Tribe through Nation's Realty contracted to purchase the Shriner Tract for $325,000, which was subsequently reduced by written agreement to $180,000. *Id.* In anticipation of the Shriner Tract purchase, the Tribe filed a "Fee-to-Trust Land Acquisition Application," initiating the process necessary for the Secretary to acquire the land in trust. *Id.* After evaluation, on June 12, 1996, the Secretary published notice pursuant to his newly enacted regulation, *see supra* at 9-11, of the final determination to take the Shriner Tract into trust for the Tribe's benefit. *Id.* (citing 61 Fed. Reg. 29,757 (June 12, 1996)).

A. Plaintiffs' Original Challenge In *Sac & Fox Nation*

Thirty days later, on July 12, 1996, Plaintiffs brought suit under the APA. AA 39. Their Complaint challenged the Secretary's determinations that: (1) the acquisition of the Shriner Tract was mandated by PL 602; (2) National Environmental Policy Act ("NEPA") and National Historic Preservation Act ("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 the Indian Gaming Regulatory Act ("IGRA"). *See Sac and Fox Nation of Missouri v. Norton*, 240 F.3d 1250, 1260 (10th Cir. 2001). Because the United States had not yet taken the Shriner Tract into trust, Plaintiffs did not seek any relief that would divest the United States of, or encumber its, title to that property. AA 51-52.

At Plaintiffs' request, the district court granted a temporary restraining order, preventing the Secretary from taking the Shriner Tract into trust on the Tribe's behalf. *Sac & Fox Nation*, 240 F.3d at 1257. The Wyandotte Tribe immediately moved to intervene in the lawsuit, 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, this Court held an emergency telephonic hearing, where a disagreement arose over what legal effect the Secretary's acquisition of the Shriner Tract would have on the case. AA 66. The Court noted, however, that both the government and the Tribe agreed that "acquisition by the Secretary of this land in trust [would] not affect or bar the ultimate question of whether this land can be used for Class III gaming pursuant to [IGRA]." *Id.* In view of this agreement, in order to

preserve the status quo "as best we can," on July 15, 1996, the court 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.

AA 66-67. Following the Court's 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]." *Sac & Fox Nation*, 240 F.3d at 1257.

The case proceeded to a merits review. On appeal, this Court concluded that PL 602 conferred upon the Secretary a nondiscretionary duty to take the Shriner Tract in trust for the benefit of Tribe, and, therefore, that the Secretary had no duty to conduct NEPA or NHPA analyses prior to the acquisition. *Id.* at 1262, 1268. It further held that the Tribe was not a necessary and indispensable party to the action, and that the Huron Cemetery was not a "reservation" for IGRA purposes. *Id.* at 1268. Most relevant here, however, the Court concluded 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 insufficient to sustain his determination. *Id.* at 1263. The Court therefore reversed the Secretary's original finding and directed the district court to remand to the Secretary for further consideration. *Id.* at 1264, 1268.

B. The Approval Of Gaming On The Shriner Tract

Meanwhile, in proceedings before the National Indian Gaming Commission ("NIGC"), the Wyandotte Tribe sought the NIGC's approval of gaming ordinances that would allow the Tribe to operate gaming facilities on the Shriner Tract. *See Wyandotte Nation v. NIGC*, 437 F. Supp. 2d 1193, 1200-01 (D. Kan. 2006). On September 10, 2004, however, the NIGC issued a final agency decision concluding that the Tribe could not operate such gaming facilities. *Id.* at 1201. The Wyandotte Tribe contested that decision in another lawsuit resulting in the district court reversing and remanding the NIGC's decision, *id.* at 1219, thereby prompting the NIGC to approve the Tribe's gaming ordinance and allow gaming to occur on the Shriner Tract. Plaintiffs never attempted to intervene in these proceedings.

C. The Secretary's Decision On Remand

On remand following this Court's decision in *Sac & Fox Nation*, the Tribe retained KPMG Peat Marwick ("KPMG"), an independent accounting firm, to analyze the Tribe's accounting of the PL 602 funds. After reviewing the Tribe's financial records and undertaking numerous procedures to review the appropriateness of the Tribe's computations, KPMG concluded that the Tribe's "computations were appropriate and that the ending value that resulted from the initial $100,000 investment was $212,170 at the time of the land purchase." AA 336. The Tribe supplied KPMG's findings and analysis to the Secretary, who partially relied on those

findings to affirm the trust status of the Shriner Tract. *See* 67 Fed. Reg. 10,926 (March 11, 2002) (AA 455). The Secretary subsequently amended his decision to correct a typographical error and to clarify that the decision did not authorize the Wyandotte Tribe to conduct gaming activities on the Shriner Tract – the legality of gaming activities instead was to be decided in proceedings (*supra* at 15) before the NIGC. *See* 67 Fed. Reg. 30,953 (May 8, 2002) (AA 456).

In response to Plaintiffs' request, the Secretary granted reconsideration of his decision to affirm the Shriner Tract's trust status. AA 512. The Secretary invited both Plaintiffs and the Tribe to submit briefs addressing the issues raised in Plaintiffs' request for reconsideration. *Id.* As part of their submission, Plaintiffs submitted an analysis conducted by Purinton, Chance and Mills, an accounting firm Plaintiffs had hired to refute the Wyandotte Tribe's accounting analysis. Purinton, Chance and Mills concluded that the Tribe had not purchased the Shriner Tract with PL 602 funds, and opined that $112,595 was the actual value of the PL 602 funds at the time of the Shriner Tract acquisition. AA 467-70.

Faced with these conflicting accounting analyses, the Secretary asked Thomas Hartman, Financial Analyst for the Indian Gaming Management Staff, to analyze and respond to the contradictory accounting analyses and factual allegations submitted in connection with purchase of the Shriner Tract. *See Governor of Kansas*, 430 F. Supp. 2d at 1215. Following his analysis, Mr. Hartman responded that the evidence

demonstrated that the Tribe purchased the Shriner Tract for $180,000; there was no evidence the PL 602 funds lost money and that KPMG used appropriate and accepted methodology to calculate the value of the PL 602 funds at $212,170; and that, while the Tribe invested and commingled the PL 602 funds, based on KMPG's analysis, the Tribe had ample PL 602 funds to purchase the Shriner Tract. *Id.* at 1216. He thus dismissed Plaintiffs' valuation as invalid and based on faulty assumptions. *Id.*

Thereafter, based upon the opinion of Mr. Hartman, among other evidence, the Secretary issued an Opinion on Reconsideration. AA 477-83. In his opinion, the Secretary first interpreted PL 602 as requiring him to acquire land in trust for the Tribe's benefit if the Tribe purchased the land with the original $100,000 appropriated to it by Congress, including any interest or investment income derived from that original amount. AA 480-82. In so doing, he rejected Plaintiffs' argument that $100,000 and $100,000 alone could be spent on the land acquired pursuant to the statute. *Id.* Upon interpreting the sum appropriated in PL 602 as including interest and investment income generated by the $100,000, the Secretary made several factual determinations before finding that the Tribe purchased the Shriner Tract with PL 602 funds and affirming the trust status of the land. AA 479-80, 483. Plaintiffs thereafter filed a lawsuit challenging the Secretary's interpretation of PL 602 and his factual determinations, captioned *Governor of Kansas v. Norton* (later *Kempthorne*).

D. The Proceedings in *Governor of Kansas v. Kempthorne*

The district court granted summary judgment to the Secretary on all claims, concluding that the Secretary reasonably interpreted PL 602 and that substantial evidence supported the Secretary's factual determinations. *See generally Governor of Kansas*, 430 F. Supp. 2d at 1204-26.

On appeal, in addition to defending the favorable decision on the merits, the Secretary asserted that the United States' sovereign immunity as preserved by Congress in the QTA barred Plaintiffs' challenge to the Shriner Tract's title. This Court agreed. *See Governor of Kansas v. Kempthorne*, 505 F.3d 1089, 1103 (10th Cir. 2007), *vacated* 516 F.3d 833 (10th Cir. 2008). It ordered the district court to vacate the judgment in favor of the Secretary and to dismiss the case.

As part of its now vacated initial decision, the panel *sua sponte* stated that "the presence of a waiver of sovereign immunity . . . [should] be determined as of the date the complaint is filed." *Id*. at 1099. Judge Briscoe, joined by Judge Hartz, also filed a concurring opinion expressing a belief that the final judgment entered in *Sac & Fox Nation* should be vacated to allow Plaintiffs to proceed with their claims. *Id*. at 1103-04. Although the prevailing party on appeal, the Secretary petitioned this Court for panel rehearing, requesting removal the panel's *sua sponte* legal statement – made without the benefit of briefing on the subject – that the waiver of sovereign immunity

is determined as of the date the complaint is filed, and questioning the concurring opinion's advisement to vacate the final judgment entered in *Sac & Fox Nation*.

The Court granted the Secretary's petition and issued a revised opinion. *See Governor of Kansas v. Kempthorne*, 516 F.3d 833, 843-44 (10th Cir. 2008). It agreed that for purposes of *Governor of Kansas* it did not need to decide whether a time-of-filing rule applies to questions of sovereign immunity under the QTA. *Id.* at 843-44. The Court held that both it and the district court lacked jurisdiction over the case despite the Court's 1996 order purporting to preserve its jurisdiction and the Secretary's participation in the litigation because "the previous orders of this court and the conduct of the Secretary during litigation are simply irrelevant [to questions of sovereign immunity]; without a valid congressional waiver neither the district court nor this court possess jurisdiction to hear this case." *Id.* at 846.

Judge Briscoe declined to revise her concurring opinion continuing to maintain that the final judgment in *Sac & Fox Nation* should be vacated pursuant to Fed. R. Civ. P. 60(b)(6). *Id.* at 846-47. Judge Hartz, however, while agreeing with Judge Briscoe that it may be appropriate to reopen *Sac & Fox Nation*, 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.

E. The Proceedings Below In Reopened *Sac & Fox Nation*

Although the district court believed the Rule 60(b)(6) question to be a "close issue," it ultimately vacated the original judgment in *Sac & Fox Nation*. AA 105-120. The United States then moved the district court to dismiss the case for lack of subject matter jurisdiction (AA 122-39), which the district court granted because the land already had been taken into trust and the United States' sovereign immunity precluded the court from granting the relief that Plaintiffs now desired (AA 189-211).

The district court initially noted that the relief Plaintiffs desired had materially changed since they filed their complaint in 1996. AA 194-96. "*At the present time*," they seek "to remove the Shriner Tract from being held in trust or to somehow encumber how the land will be used while it remains in trust." AA 196. If Plaintiffs were to request leave to amend their complaint to request this new relief, the district court concluded that it could not grant it because such relief would cloud the government's title to lands held in trust for an Indian tribe for which no waiver of sovereign immunity existed. *Id.* It therefore found that an Article III case or controversy no longer existed after the Secretary took the Shriner Tract into trust for the benefit of the Wyandotte Tribe because the doctrine of sovereign immunity prevented the court from redressing Plaintiffs' claims. AA 197-99.

Finding the cases cited by Plaintiffs "unpersuasive" (AA 199-210), the district court granted the United States' 12(b)(1) motion to dismiss for lack of subject matter jurisdiction. AA 211. Plaintiffs appealed. AA 212-13.

SUMMARY OF ARGUMENT

The district court correctly held that courts lack jurisdiction to entertain Plaintiffs' challenge. The United States' sovereign immunity, as preserved in the QTA, bars challenges to the United States' title to land held in trust for Indians. Plaintiffs seek 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 United States' sovereign immunity thus precludes Plaintiffs' lawsuit, including any challenge made to the Secretary's decisions as an officer of the United States.

As this Court previously recognized in *Governor of Kansas*, this Court's July 15, 1996 order purporting to preserve jurisdiction and prior statements made by government officials regarding the trust status of the Shriner Tract do not alter this result. Only Congress can waive the United States' sovereign immunity. Where, as here, Congress has preserved the government's immunity and precluded the type of relief that Plaintiffs seek, neither the actions of courts nor executive officials can override Congress and waive sovereign immunity.

A time-of-filing rule which in certain instances assesses jurisdiction based upon facts in existence at the time of the filing of the complaint would not assist Plaintiffs.

Time-of-filing rules generally are only applicable in federal diversity of citizenship cases, and this Court's jurisdiction does not depend upon diversity of citizenship. In any case, the United States' sovereign immunity trumps any application of a time-of-filing rule.

Finally, the district court did not abuse its discretion by not estopping the United States from asserting its sovereign immunity. Plaintiffs never asked the district court to estop the United States from asserting the sovereign immunity defense; thus, they have waived the argument. Moreover, no party, particularly the United States in the context of its sovereign immunity, can be estopped from asserting that a federal court lacks subject matter jurisdiction over a lawsuit. Estoppel also is inapplicable where, as here, the United States' past and present positions are not clearly inconsistent and where Plaintiffs actually have benefitted from what they allege to be an inconsistent past position.

This Court should affirm the judgment of the district court.

STANDARD OF REVIEW

This Court reviews *de novo* the district court's decision to dismiss for lack of jurisdiction under Fed. R. Civ. P. 12(b)(1), and its determinations on sovereign immunity. *See Ordinance 59 Ass'n v. Interior*, 163 F.3d 1150, 1152 (10th Cir. 1998). The burden of establishing a waiver of sovereign immunity is on the plaintiffs. *See Sydnes v. United States*, 523 F.3d 1179, 1183 (10th Cir. 2008).

ARGUMENT

I. The United States' Sovereign Immunity, As Explicitly Preserved In The QTA, Bars Plaintiffs' Challenge To The Secretary's Acquisition Of The Shriner Tract In Trust.

The history of this case is both lengthy and complicated, suffering from some unfortunate misunderstandings by both this Court and the parties. But Plaintiffs' case nonetheless suffers from a basic and fatal jurisdictional flaw. Because the Secretary has taken the Shriner Tract into trust for the Tribe's benefit, there is no waiver of sovereign immunity for the relief Plaintiffs seek, *i.e.*, to remove the Shriner Tract's status as Indian trust lands. In fact, the QTA explicitly excludes from its limited waiver of sovereign immunity this very type of challenge involving title to "trust or restricted Indian lands." This Court must affirm the dismissal of this case.

"The concept of sovereign immunity means that the United States cannot be sued without its consent." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Jacks*, 960 F.2d 911, 913 (10th Cir. 1992). Such consent may be found "only when Congress unequivocally expresses its intention to waive the government's sovereign immunity in the statutory text." *United States v. Murdock Mach. & Eng'g Co.*, 81 F.3d 922, 930 (10th Cir. 1996) (quotation omitted). Plaintiffs fail to demonstrate that the United States by a clear and unequivocal Act of Congress waived its sovereign immunity to allow them to maintain a lawsuit where its ultimate success would require the United

States to relinquish title to land it unquestionably holds in trust for the benefit of an Indian tribe.

In fact, not only is there no express waiver for this type of relief, Congress' statements in the QTA require the exact opposite conclusion. The Act declares that its limited waiver of sovereign immunity "does not apply to trust or restricted Indian lands." 28 U.S.C. § 2409a(a). Thus, because the QTA provides the "exclusive means" for challenging the United States' title to real property, *see Governor of Kansas*, 516 F.3d at 841, Congress' preservation of sovereign immunity in the QTA forecloses 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." *See Mottaz*, 476 U.S. at 842; *Shivwits Band*, 428 F.3d at 974-78; *Neighbors*, 379 F.3d at 961-66. "Thus, when the United States claims an interest in real property based on that property's status as trust or restricted Indian lands, the QTA does not waive the Government's immunity." *Mottaz*, 476 U.S. at 843.

With the aforementioned law in mind, this Court in *Governor of Kansas* dismissed Plaintiffs' lawsuit because it sought to revoke the Shriner Tract's trust status. 516 F.3d at 843. In the instant case too, Plaintiffs seek to reverse the Secretary's acquisition of the Shriner Tract as trust Indian lands. AA 196. But because the United States unconditionally holds that land in trust for the benefit of the Wyandotte Tribe and has a colorable claim to title over that land, the QTA expressly

preserves the United States' immunity to such a challenge. This Court therefore lacks jurisdiction over this action for the same reasons it lacked jurisdiction in *Governor of Kansas*, in *Shivwits Band*, 428 F.3d at 974-78, and in *Neighbors*, 379 F.3d at 961-66. A similar holding from this Court should result.

While Plaintiffs (at 39-49) purport only to request review under the APA of the Secretary's decision to take the land into trust, the district court correctly recognized the flaw in this argument. To obtain any meaningful relief in this case, Plaintiffs need the courts to set aside the Secretary's land-into-trust decision, requiring the United States to relinquish the Shriner Tract's title. It does not matter that Plaintiffs brought their challenge to the trust acquisition of the Shriner Tract under the APA rather than under the QTA. It is well-established that a plaintiff cannot avoid the Indian trust lands exception under the QTA by seeking judicial review under the APA. *See Governor of Kansas*, 516 F.3d at 842-43; *Neighbors*, 379 F.3d at 964-65 (citing *Mottaz*, 476 U.S. at 841-42; *Block*, 461 U.S. at 284-85); *Shivwits Band*, 428 F.3d at 975. Indeed, the APA states that its provisions do not "confer[] authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." 5 U.S.C. § 702. Where the QTA explicitly forbids the relief that Plaintiffs seek – *i.e.*, revoking the Shriner Tract's trust status – the APA's limited waiver of sovereign immunity does not apply. *See Native Am. Distributing v.*

Seneca-Cayuga Tobacco Co., 546 F.3d 1288, 1297 (10th Cir. 2008) (questions of sovereign immunity "turn[] on the relief sought by the plaintiffs").

The fact Plaintiffs do not explicitly seek to quiet title to the Shriner Tract also does not allow them to avoid the QTA's limitations. "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." *Shivwits Band*, 428 F.3d at 975 (quotations omitted). Nor does it matter for QTA purposes, as Plaintiffs appear to suggest (at 41), that this case does not involve a discretionary trust acquisition under 25 U.S.C. § 465. "[I]n determining whether a particular claim falls within the scope of the [QTA's] prohibition, a reviewing court 'must focus on the relief . . . request[ed],' rather than on the party's characterization of the claim." *Id.* Here, there can be no doubt that Plaintiffs seek to divest the United States of its title to the Shriner Tract, as they dispute that the United States holds rightful title to the property, and ask the Court to adjudicate that dispute. This lawsuit is therefore just the type of action that falls within the QTA and, because the property undisputedly is held in trust for Indians, the type of action that the Act precludes. The district court therefore properly dismissed it.

II. Neither Courts Nor Government Officials Can Waive The United States' Sovereign Immunity.

This Court's July 15, 1996 order purporting to preserve jurisdiction and prior statements made by government officials regarding the trust status of the Shriner Tract do not complicate the resolution of this case. This Court long has recognized that "only Congress . . . can waive the sovereign immunity of the United States." *Merrill Lynch*, 960 F.2d at 913. Congress has never consented to any lawsuit challenging the United States' title to "trust or restricted Indian lands." In the QTA, Congress has expressly preserved the United States' immunity from lawsuits seeking to divest the government of title to Indian trust lands. *See Neighbors*, 379 F.3d at 961. Thus, as this Court recognized in *Governor of Kansas*, because Congress never has waived the United States' sovereign immunity to this lawsuit and, in fact, explicitly preserved it, neither the Secretary's regulation, his attorneys, nor a judicial decree can waive sovereign immunity. *See* 516 F.3d at 846.

By its terms, the Secretary's regulation, 25 C.F.R. § 151.12(b), upon which Plaintiffs relied to bring this lawsuit in 1996, permits judicial review of the Secretary's decision to take land into trust only *before* formal conveyance of title to the United States. *See Neighbors*, 379 F.3d at 964; *see also* 61 Fed. Reg. 18,082 (Apr. 24, 1996) (citing *Mottaz*, 476 U.S. 834; *North Dakota*, 461 U.S. 273; *Florida*, 768 F.2d 1248). The Court must interpret the Secretary's regulation in light of the QTA because that

regulation cannot override Congress' preservation of sovereign immunity in the QTA. *Id.* "[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). Yet that is exactly what Plaintiffs contend has happened here and, for this reason, their contention should be rejected. *See Merrill Lynch*, 960 F.2d at 913.

Prior statements by the Secretary or his attorneys made in a 2001 filing also fail to waive the government's sovereign immunity or confer jurisdiction upon this Court. *See Native Am. Distributing*, 546 F.3d at 1295. "[O]fficers of the United States possess no power through their actions to waive an immunity of the United States or to confer jurisdiction on a court" in the absence of an express waiver of immunity. *Id.* (citing *United States v. Murdock Mach. & Eng'g Co. of Utah*, 81 F.3d 922, 931 (10th Cir. 1996) (quotations and alteration omitted). This is true even where a sovereign "entity has affirmatively led or passively permitted another party to believe it is amenable to suit." *Id.* This may seem inequitable but is well-established that "there can be no 'waiver of . . . immunity based on policy concerns, perceived inequities arising from the assertion of immunity, or the unique context of a case.'" *Id.* (quoting *Ute Distrib. Corp. v. Ute Indian Tribe*, 149 F.3d 1260, 1267 (10th Cir.

1998)). Where the Shriner Tract is held in trust for the benefit of the Wyandotte Tribe, the Secretary's regulations and attorneys cannot provide that waiver.

For similar reasons, this Court's 1996 Order dissolving the temporary restraining order also fails to assist 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. "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." *Henry v. Office of Thrift Supervision*, 43 F.3d 507, 511 (10th Cir. 1994). Thus, it is well-established that "only Congress, not the courts, can waive the sovereign immunity of the United States." *Merrill Lynch*, 960 F.2d at 913; *see also Governor of Kansas*, 516 F.3d at 846.

Moreover, the stated purpose of the 1996 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. *See Wyandotte Nation*, 443 F.3d at 1254. This is a question entirely separate from whether the United States may validly hold the land in trust. *See id.* ("Our July 15th Order thus allowed the purchase of the Shriner Tract, but ensured that the purchase would not affect the resolution of the ultimate question of whether gaming should be permitted."). This purpose has been accomplished. The NIGC issued a final agency decision that the Tribe could not

conduct gaming on the Shriner Tract. *See Wyandotte Nation*, 437 F. Supp. 2d at 1201. The Wyandotte Tribe contested that decision in another lawsuit – in which Plaintiffs never attempted to intervene – resulting in the district court reversing and remanding the NIGC's decision, *id.* at 1219, thereby prompting the NIGC to permit gaming to occur. Thus, as far as the purpose of this Court's 1996 Order is concerned, that purpose has been fulfilled by judicial and administrative review of whether gaming legally could occur on the Shriner Tract irrespective of whether the United States properly holds the Shriner Tract in trust.

At bottom, Plaintiffs' argument boils down to the novel theory that the Secretary's regulation and/or this Court's order have combined to waive the United States' sovereign immunity to this lawsuit. But only Congress, not the Executive branch, the Judicial branch, or the Executive and Judicial branches acting together, can waive the United States' sovereign immunity. As this Court previously has stated, questions of sovereign immunity "must focus on the relief . . . request[ed]." *Neighbors*, 379 F.3d at 961. Here, Plaintiffs desire relief that Congress prohibited courts from granting. The Shriner Tract is held by the United States in trust, and executive regulations and court orders cannot provide the waiver of sovereign immunity necessary for the courts to effectuate the type of relief Plaintiffs would need to succeed in this lawsuit. *Id.* at 962.

III. A Time-Of-Filing Rule Would Not Assist Plaintiffs.

If this Court holds that some combination of the Secretary's regulation and this Court's 1996 order provides jurisdiction to effectuate the relief Plaintiffs desire, it need not reach the remaining issues. If, however, this Court concludes that judicial orders and executive regulations cannot confer jurisdiction, then Plaintiffs urge this Court to adopt a time-of-filing rule which they assert would determine jurisdiction by facts established at the outset of the litigation. Time-of-filing rules, however, generally only are applicable in federal diversity of citizenship cases. This Court's jurisdiction at the time of the complaint did not then – and does not now – depend upon diversity of citizenship. And unlike ordinary defendants, the United States is absolutely immune from any lawsuit unless Congress explicitly authorizes the courts to grant the relief that plaintiffs seek in that lawsuit. The United States' sovereign immunity thus would trump any application of a time-of-filing rule.

In sum, as explained more fully below, Plaintiffs' time-of-filing argument is highly flawed. If a court order purporting to preserve jurisdiction in this very case cannot confer jurisdiction, then a judicially-created rule of general application such as a time-of-filing rule certainly cannot do so.

A. Time-Of-Filing Rules Do Not Apply To Federal Question Cases

One reason a time-of-filing rule would not assist Plaintiffs is that time-of-filing rules do not apply to cases where the court's jurisdiction is based upon a federal

question. Rather, time-of-filing rules find their origin in federal diversity of citizenship cases. *See Connectu LLC v. Zuckerberg*, 522 F.3d 82, 92 (1st Cir. 2008) (citing *Mollan v. Torrance*, 22 U.S. (9 Wheat) 537, 539 (1824)). Courts have extended these rules to other situations where concerns of forum shopping and strategic behavior offer special justifications for it. *Id.* But while outliers exist, courts have been careful not to extend the rules to federal question cases like this.[7] *Id.* at 92 & n.8.

It is for this reason that Plaintiffs cannot rely on cases such as *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 289 (1938); *Newman-Green v. Alfonzo-Larrain*, 490 U.S. 826, 830 (1989), and *Freeport-McMoRan, Inc. v. K N Energy, Inc.*, 498 U.S. 426, 428 (1991). These are diversity of citizenship cases, which provide no assistance where, as here, jurisdiction is not based on diversity.

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[7]Numerous examples exist where courts have refused to apply time-of-filing rules: when a sovereign restricts its sovereign immunity, *Beers v. Arkansas*, 61 U.S. 527, 529 (1857); when a case becomes moot, *Cardinal Chem. Co. v. Morton Int'l., Inc.*, 508 U.S. 83, 97 (1993); when a case or controversy dissolves, *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975); when the parties lose standing, *Gollust v. Mendell*, 501 U.S. 115, 126 (1991); and when one party removes a case from a state court, 28 U.S.C. § 1446(d). In fact, for purposes of Article III jurisdiction, it is well-established that "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)); *McClendon v. City of Albuquerque*, 100 F.3d 863, 867 (10th Cir. 1996) ("it is . . . not enough that the dispute was alive when the suit was filed").

Plaintiffs also unjustifiably rely on the Third Circuit's doubtful decision in *Rosa v. Res. Trust Corp.*, 938 F.2d 383, 392 n.12 (3d Cir. 1991). The First Circuit recently made the following analysis of the problems with *Rosa* and its application of a time-of-filing rule to a federal question case:

> 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). The First Circuit noted 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 n.8. Thus, as the First Circuit observed, *Rosa* does not offer any meaningful analysis of why the court applied a time-of-filing rule outside the realm of diversity cases and, consequently, it is of no assistance in deciding whether or not a time-of-filing rule should be applied to a question involving a waiver of sovereign immunity.

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 a 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.

Plaintiffs mistakenly cite *New Rock* as if it supports the their position. *New Rock* actually found that the court had no 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." *Id.* at 1503. In rejecting the "black letter rule," *New Rock* 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 *supra* at 13-14, the Shriner Tract was only taken into trust when this Court lifted the restraining order with the knowledge that the land would be taken into trust as soon as the restraining order was lifted. While Plaintiffs attempt to convince this Court (at 20, 40, 44, 46) that the circumstances surrounding the Shriner Tract could encourage manipulation of jurisdiction in the future, there is no basis for that claim. The Shriner Tract was taken into trust only after the Wyandotte Tribe appealed the restraining order to this Court

and this Court dissolved the restraining order, thereby allowing the land to be taken into trust and triggering the United States' sovereign immunity. 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 violated the restraining order. And had the Secretary taken the land into trust in contravention of the temporary restraining order, contempt sanctions and other means existed to secure the Secretary's compliance that would not implicate the QTA or the United States' sovereign immunity. Thus, as the district court correctly held (AA 199), it would be inappropriate to apply a time-of-filing rule to a question of sovereign immunity.

B. Sovereign Immunity Trumps Time-Of-Filing Rules

Even if time-of-filing rules were extended to federal question cases, the United States' sovereign immunity would trump these "judge-made construct[s]." *Connectu*, 522 F.3d at 93. The Supreme Court long-ago resolved any would-be conflict between sovereign immunity and time-of-filing rules in *Beers v. Arkansas*. In *Beers*, the plaintiff brought a suit upon State bonds under an Arkansas law that allowed the State to be sued. 61 U.S. (20 How.) 527, 528 (1857). While the suit was ongoing, the Arkansas legislature amended the law "requiring the bonds to be filed in court, or the suit to be dismissed." *Id.* When the plaintiff subsequently refused to file the bonds, the state court dismissed the lawsuit and the Supreme Court affirmed that dismissal on sovereign immunity grounds. *Id.* at 528-29. The Supreme Court noted that a

"sovereign cannot be sued in its own courts, or in any other, without its consent and permission" and if the sovereign consents to be sued it "may withdraw its consent whenever it may suppose justice to requires it." *Id.* at 529. Thus, even though a waiver of sovereign immunity existed at the time of filing, the Supreme Court held that Arkansas' unilateral act of withdrawing its consent to be sued divested the court of jurisdiction over the lawsuit. *Id.* at 529-30.

Here, just as in *Beers*, even if a waiver of sovereign immunity existed at the time of filing, that waiver no longer applied once Plaintiffs' lawsuit sought revocation of the United States' title to Indian trust lands. By stating that the QTA's waiver of sovereign immunity "does not apply to trust or restricted Indian lands," Congress has made it abundantly clear that the United States does not consent to lawsuits where plaintiffs request such relief. 28 U.S.C. § 2409a(a),

1. Waivers of Sovereign Immunity Must Be Strictly Construed And Ambiguity Resolved In Favor Of The United States.

In addition to being directly contrary to the Supreme Court's holding in *Beers*, the time-of-filing rule that Plaintiffs urge is contrary to established principles for interpreting waivers of sovereign immunity. "The basic rule of federal sovereign immunity is that the United States cannot be sued at all without the consent of Congress." *Block v. North Dakota*, 461 U.S. 273, 287 (1983). When interpreting waivers of sovereign immunity, a waiver "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)). "A necessary corollary of this rule is that when Congress attaches conditions to the legislation waiving the sovereign immunity of the United States, those conditions must be strictly observed, and exceptions thereto are not to be lightly implied." *Block*, 461 U.S. at 287.

Ignoring these basic principles (at 39-50), Plaintiffs ask this Court to imply an exception to the express preservation of sovereign immunity for lawsuits involving title to "trust or restricted Indian lands" to allow challenges to the government's title if a complaint is filed before the land is acquired. Plaintiffs, however, identify nothing in the QTA's text (as they must) that provides consent to lawsuits seeking to encumber the United States' title to "trust or restricted Indian lands" as long as a complaint is filed before the land is taken into trust. *See Villescas v. Abraham*, 311 F.3d 1253, 1256 (10th Cir. 2002) ("waiver . . . must be unequivocally expressed in statutory text"). Nor can such consent be implied. *Id.* 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, because the QTA does not explicitly allow for challenges to the United States' title where a party files a complaint before land is taken into trust, this Court cannot infer such a waiver.

Even if there were ambiguity in the QTA 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.[8/] *Villescas*, 311 F.3d at 1256. Accordingly, the mere existence of a complaint that pre-dated the taking of the Shriner Tract into trust cannot confer post-acquisition jurisdiction on this Court because there is no unequivocal waiver of sovereign immunity.

2. Any Ambiguity In The Waiver Must Also Be Resolved In A Way That Does Not Interfere With Indian Rights.

In addition to resolving any ambiguity in the QTA against finding a waiver of sovereign immunity, "federal statutes are to be construed liberally in favor of Native Americans, with ambiguous provisions interpreted to their benefit." *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)). This canon of construction further counsels against applying a time-of-filing rule to challenges such as this involving the United States' title to Indian trust lands.

[8/]The rule resolving ambiguity in favor of the Government applies equally to the Plaintiff Indian tribes. *See 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).

Allowing waivers of sovereign immunity to be determined at the filing of the complaint where a party seeks to rescind the trust status of land held for an Indian tribe's benefit runs counter to significant Indian interests. As the QTA's legislative history explains, the purpose of the Indian lands exception is to fulfill the "solemn obligations" made to the Indian people who "have often surrendered claims to vast tracts of land" to the United States in exchange for promises that United States would secure title to that land in trust. *See* H.R. Rep. No. 1,559, 92d Cong., 2d Sess. (1972). "By 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. To imply an exception to the Indian trust lands exception by allowing challenges to those trust lands where a party files a complaint before the Secretary takes the land in trust could open a gaping hole in that exception (contrary to congressional intent) and should be rejected.[9/]

[9/]For example, as the law currently operates, either the Secretary must "self-stay" by agreeing not to take land into trust until some later date; or opponents of land-into-trust decisions must convince a court that they have meritorious claims, irreparable harm, and an overall balance of harm that favors preliminary injunctive relief. Adopting a time-of-filing rule would eliminate this process allowing opponents to suspend indefinitely the taking of land-into-trust simply by filing a complaint. There is no legal basis for such a rule that would abrogate congressional limits on a waiver of sovereign immunity. And adopting such a rule would severely limit the potential uses of trust land as both Indian tribes and their potential business partners would be reluctant to strike commercial deals with the uncertainty of litigation clouding title to the land for years, if not decades, even

Nor is this canon of construction rendered inapplicable in this lawsuit by the participation of the plaintiff Indians tribes who have gaming interests in opposition to the Wyandotte Tribe. The United States' interpretation benefits all Indians, not just the Wyandotte, by foreclosing all title challenges to Indian lands, as Congress intended, even those filed before Indian lands had been taken into trust.

In any event, like many of the tribes for which Congress was concerned, the Wyandotte Tribe also ceded much of its traditional territory to the United States. *See Sac & Fox Nation*, 516 F.3d at 836. In PL 602, Congress provided payment to the Tribe as compensation for certain of these land transfers and it mandated that the Secretary take any land purchased with PL 602, Section 105(b)(1) funds into trust. *Id.* Accordingly, this case is just the type of lawsuit Congress sought to prohibit in the Indian trust lands exception.

In sum, the QTA's Indian trust land exception prohibits courts from exercising jurisdiction over a challenge to the United States' title to Indian trust lands regardless of when a complaint may have been filed. Even if there is some ambiguity in the language of the QTA, that ambiguity must be resolved in favor of the United States and in a manner that does not interfere with Indian rights. This Court should reject the view that a time-of-filing rule applies here.

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where an opponent lacks meritorious claims, irreparable injury, and the public interest heavily favors the land-into-trust transaction.

3. Plaintiffs Misplace Reliance On The So-Called "Implicit" Holding of *Interior v. South Dakota* And The Other Out-Of-Circuit Cases That Do Not Address The Indian Trust Lands Exception.

Plaintiffs urge the Court (Br. 31-35) to interpret *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 QTA does not apply if the complaint is filed *before* the United States takes the land at issue into trust." No such proposition can be gleaned from *Interior*, a case in which the U.S. Supreme Court granted certiorari, vacated the judgment below, and remanded the case back to the Secretary without explanation or elaboration. *Id.* at 919-20. In *Interior*, the judgment below, which was entered by the Eighth Circuit, specifically declined to address the sovereign immunity and QTA issues because it found the statute under which title was taken to be unconstitutional. *South Dakota v. Interior*, 69 F.3d 878, 881 n.1 (8th Cir. 1995). In the subsequent proceedings before 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 QTA interpretation. AA 201. In fact, the decision to grant certiorari, vacate and remand is one paragraph and it is devoid of any elaboration.[10/]

[10/]To be sure, this procedure was questioned by Justice Scalia who did not believe the United States should be given a second-bite at the litigation apple. *See Interior*, 519 U.S. at 920-23 (Scalia, J., dissenting). He noted that the United States' position on the availability of judicial review remained the same, so that the new regulation should not change the constitutional calculus upon which the Eighth Circuit's decision rested. *Id.* at 920-22. His dissent was directed at the Court's treatment of the United States, allowing it to relitigate its case even after losing

It is for this reason that this Court in a footnote to its now vacated opinion in *Governor of Kansas* rejected Plaintiffs' argument. *See Governor of Kansas*, 505 F.3d at 1100 n.5 ("given the Supreme Court's lack of explanation, we cannot presume the Court's rejection of the Eighth Circuit's judgment was based on its interpretation of the [QTA]."). This Court deleted that footnote from its amended opinion because it had no need to address the effect of *Interior* in that opinion, but the deleted footnote nevertheless finds support in law and should be re-adopted. As the D.C. Circuit has stated, "[t]hat the court has taken jurisdiction in the past does not affect the [jurisdictional] analysis because jurisdictional issues that were assumed but never expressly decided in prior opinions do not thereby become precedents." *Am. Portland Cement Alliance v. EPA*, 101 F.3d 772, 776 (D.C. Cir. 1996) (citing *Brecht v. Abrahamson*, 507 U.S. 619, 631 (1993); *KVOS, Inc. v. Associated Press*, 299 U.S. 269, 279 (1936); *Webster v. Fall*, 266 U.S. 507, 511 (1925). In other words, "[q]uestions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Webster*, 266 U.S. at 511.

Moreover, if anything, the underlying history of *Interior* supports the government's position because it was that case that led to the issuance of 25 C.F.R.

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below. *Id.* at 921. Contrary to Plaintiffs' argument (at 33-34), nothing in the dissent suggests that the Court's opinion was based on some implicit interpretation of the QTA.

§ 151.12(b), the regulation that allowed Plaintiffs in this case to seek review of the Secretary's decision to take the Shriner Tract into trust before it was taken into trust. That case began when a city and a state brought suit under the APA challenging the Secretary's decision to take 91 acres in trust for a Sioux Tribe in South Dakota pursuant to 25 U.S.C. § 465. *See South Dakota*, 69 F.3d at 880. 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 Secretary in violation of the non-delegation doctrine. *Id.* at 884-85.

In response to the Eighth Circuit's decision, the Secretary 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 APA challenge. The Secretary, in the *South Dakota* case, petitioned the Supreme Court to grant a writ of certiorari, vacate the Eighth Circuit's decision, and 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. Pl. Addendum at 27-28. The Supreme Court granted the petition, vacated the Eighth Circuit's decision, and directed that the Eighth Circuit remand the matter to the Secretary, as the government had requested, so the Secretary could voluntarily take the land out of trust to allow the case to proceed anew. *Interior*, 519 U.S. at 919-20. Nothing in the Supreme Court's order implied that any court had jurisdiction to order the Secretary to take the land out of

trust, and the Court's action in remanding the matter to the Secretary so he could voluntarily take the land out of trust supports the government's position. Thus, contrary to Plaintiffs' arguments, the history and the ultimate outcome of *Interior* supports the United States' position because it illustrates that, besides Congress, only the Secretary of the Interior can remove land from trust.

Plaintiffs' additional reliance (at 45-49) 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 *supra* at 36-41. 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 United States' sovereign immunity in actions to quiet title to property on which the United States claims a mortgage or lien.

Moreover, as the Fifth Circuit recognized in *Kabakjian*, to the extent these cases purport to derive their jurisdiction from § 2409a, their holdings contradict the QTA's express language. *See Kabakjian*, 267 F.3d at 212. Unlike § 2409a, § 2410 contains no jurisdictional divestiture provision. "Congress chose, for whatever reason, to

include subsection (e) of the [QTA] and failed to include an analogous provision in § 2410, the more narrowly drawn statute." *Id.* Subsection (e) of the QTA 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 QTA lawsuit by disclaiming an interest in the real property. *See Kabakjian*, 267 F.3d at 212. In other words, the fact that the plain wording of the QTA allows the United States to divest a district court of jurisdiction *after* the filing of the complaint, supports the government's argument that applying a time-of-filing rule to cases involving questions of sovereign immunity under the QTA would be inappropriate.

Finally, 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 discuss subsection (e) of the QTA, 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 lands 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). Deriving a black letter rule from this case-specific holding would be unjustified. Plaintiffs' arguments should be rejected and the district court's judgment upheld.

IV. No Party Can Be Judicially Estopped From Asserting That A Federal Court Lacks Jurisdiction And, In Any Case, Estoppel Is Unwarranted.

Plaintiffs suggest (at 26-30) for the first time on appeal that the Secretary should be estopped from asserting the jurisdictional defense of sovereign immunity. A decision on judicial estoppel, however, is one within the district court's discretion. *See Bradford v. Wiggins*, 516 F.3d 1189, 1194 (10th Cir. 2008) (standard of review). Where Plaintiffs entirely failed to ask the district court to invoke that discretion, the argument should be deemed waived. *See Tele-Communications, Inc. v. Commissioner*, 104 F.3d 1229, 1232 (10th Cir. 1997).

Although this Court has the power to consider the estoppel issue *sua sponte* in appropriate circumstances, *see Kaiser v. Bowlen*, 455 F.3d 1197, 1204 (10th Cir. 2006), invoking estoppel in this circumstance would be inappropriate. Even assuming estoppel could be applied against the government under any set of circumstances, *see Double J Land & Cattle Co. v. Interior*, 91 F.3d 1378, 1381 (10th Cir. 1996), for a estoppel to apply, "the position to be estopped must generally be one of fact rather

than of law or legal theory," *Kasier*, 455 F.3d at 1204. Not only is the applicability of the sovereign immunity defense a question of law making estoppel immaterial, the "sovereign immunity defense 'is jurisdictional in nature.'" *Robbins v. U.S. Bureau of Land Management*, 438 F.3d 1074, 1080 (10th Cir. 2006). No party can be estopped from asserting that a federal court lacks subject-matter jurisdiction. *See Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982) ("[N]o action of the parties can confer subject-matter jurisdiction upon a federal court . . . Principles of estoppel do not apply"). "A party cannot estop itself into jurisdiction where none exists." *See Hajek v. Burlington N. R.R. Co.*, 186 F.3d 1105, 1108 (9th Cir. 1999)); *see also* Fed. R. Civ. P. 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action."). This is particularly true of the government in the context of sovereign immunity. *See Governor of Kansas*, 516 F.3d at 845; *Native Am. Distrib.*, 546 F.3d at 1295. Because this Court lacks subject-matter jurisdiction over this lawsuit, it also lacks the authority to invoke equitable principles such as estoppel.

Even if this Court had subject-matter jurisdiction, for estoppel to apply "a party's later position must be clearly inconsistent with its earlier position." *Kaiser*, 455 F.3d at 1203. But the United States' current position on the availability of judicial review – the position which Plaintiffs deem inconsistent – remains the same today as stated in 2001. As stated in the 2001 brief, "federal courts may generally

review lawsuits challenging a decision to take property into trust as long as (1) the suit is filed within the 30-day period provided under 25 C.F.R. § 151.12(b) and (2) the jurisdiction of the federal court is protected by order or by voluntary delay on the actual taking of the property into trust by the United States."[11/] Pl. Addendum at 9-10. The mistake made by the Secretary's attorneys in the 2001 brief was that they mistook the phrase "protected by order" to apply to orders purporting to retain jurisdiction even after the land had been taken into trust. That position is irreconcilable with QTA and thus is incorrect for the reasons stated throughout this brief. The only view consistent with the QTA is the view that the phrase "protected by order" refers to temporary restraining orders, preliminary injunctions, or other orders preventing "the actual taking of the property into trust by the United States." This view is particularly compelling when read in conjunction with the subsequent phrase "on the actual taking of the property into trust by the United States" which clarifies any ambiguity in the

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[11/]This statement was not the Secretary's interpretation of his regulation. Plaintiffs (at 35-39) urge this Court to defer to what they deem to be an interpretation that the Secretary supposedly issued in 2001 announcing, they assert, that the Shriner Tract was not held in trust. First, Plaintiffs raised this issue for the first time on appeal and for that reason this Court should not consider it. *Tele-Commc'ns*, 104 F.3d at 1232. Second, the Secretary has issued no such interpretation. At most, the 2001 statements were ad hoc arguments made by lawyers during litigation which are not entitled to deference. *See S. Utah Wilderness Alliance v. Dabney*, 222 F.3d 819, 828 (10th Cir. 2000). Finally, even if the Secretary had issued an interpretation in 2001, he is free to change his mind and courts must defer to the current interpretation, not to some former interpretation of Plaintiffs' choosing. *See Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 127 S. Ct. 2518, 2530 (2007) (agencies are "fully entitled" to change their minds).

scope of the phrase "protected by order." Thus, where the United States' position remains essentially the same and is consistent with the QTA, estoppel is inapplicable.

Finally, estoppel is inapplicable because Plaintiffs cannot demonstrate that they will be unfairly advantaged by the allegedly inconsistent past position. *See Kaiser*, 455 F.3d at 1204. The Secretary made the allegedly inconsistent past statements in the context of the Rule 19 indispensable party argument. *See* Pl. Addendum 9-10. The statements were entirely unrelated to the Court's July 15, 1996, decision to dissolve the temporary restraining order, the action that led to the Secretary taking the land into trust and thereby triggering the United States' sovereign immunity. Plaintiffs thus cannot explain how they or the court detrimentally relied on those statements as relevant to the issues currently before the Court. In fact, those 2001 statements actually *benefitted* Plaintiffs because those statements supported their position that the case need not be dismissed for the failure to join the Wyandotte Tribe, an alleged indispensable party, in the action. Where Plaintiffs actually benefitted from the allegedly inconsistent past statements, they cannot now argue that the United States be judicially estopped from asserting its position.

VI. Plaintiffs May Not Maintain An Officer's Suit Against The Secretary As An End Run Around Sovereign Immunity.

For the first time on appeal and with no basis in the complaint, *see* AA 41 (stating that the Secretary has been sued only in his *official* capacity), Plaintiffs assert (at 50-52) that they may avoid the preservation of sovereign immunity in the Indian

lands exception by maintaining an officer's-suit against the Secretary in his individual capacity for alleged *ultra vires* acts. The Supreme Court, however, firmly rejected that officer's-suit approach in *Block v. North Dakota*. *See* 461 U.S. at 281-85. "If [courts] were to allow claimants to try the Federal Government's title to land under an officer's-suit theory," said the Supreme Court, "the Indian lands exception to the QTA would be rendered nugatory." *Id.* at 285. The Court thus rejected North Dakota's officer's-suit theory, holding that "Congress intended the QTA to provide the exclusive means by which adverse claimants could challenge the United States' title to real property." *Id.* at 286.

Moreover, there can be no doubt that the United States is the real party interest. The relief sought by Plaintiffs would not impact the Secretary individually, but it would impact the United States' title to the Shriner Tract – title the Secretary acquired on the United States' behalf pursuant to PL 602's mandate. "Clearly, this relief would operate against the sovereign," *Florida*, 768 F.2d at 1251, and therefore the action is barred by sovereign immunity.

In support of its officer's-suit approach, Plaintiffs cite (at 52) a statement from the Ninth Circuit's decision in *Alaska v. Babbitt* ("*Alaska I*"), which incorrectly states that "sovereign immunity does not bar an action for judicial review of an agency decision where . . . the government officer's powers are limited by statute and his actions are *ultra vires*." 38 F.3d 1068, 1076 (9th Cir. 1994). A closer look at *Alaska I*

reveals that the court derived that incorrect statement from its dated opinion in *Washington v. Udall*, 417 F.2d 1310, 1314-15 (9th Cir. 1969), which in turn relied on the Supreme Court's *Larson-Malone* test. But the Supreme Court rejected the *Larson-Malone* test in QTA cases, *see Block*, 461 U.S. at 282-85; *Mottaz*, 476 U.S. at 846-47, casting significant doubt on *Alaska I*'s value. And the Ninth Circuit's more recent decisions rejecting the officer's-suit approach in QTA cases place *Alaska I* in further doubt. *See, e.g., Alaska v. Babbitt*, 182 F.3d 672, 674-75 (9th Cir. 1999) ("*Alaska II*"). Accordingly, because controlling case law confirms that the QTA provides the "exclusive means" for challenging the United States' title to real property, this Court should reject Plaintiffs' officer's-suit theory raised for the first time on appeal.

* * *

While Plaintiffs may believe the application of sovereign 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 if this Court had not dissolved the temporary restraining order entered by the district court in July 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 1996. The proposed trust acquisition in this case arose within three months of the implementation of that new regulation, leaving Plaintiffs, the United States, and the courts to proceed without

the benefit of any precedent. Now, with the benefit of hindsight and development of the law, the only thing that could have prevented the dismissal of their complaint would have been for Plaintiffs to successfully convince this Court, in July 1996, not to dissolve the temporary restraining order in order to preserve jurisdiction. The mere the fact that Plaintiffs did not do so cannot waive sovereign immunity or confer jurisdiction in light of Congress' express preservation of immunity. The Shriner Tract is now held in trust, and this Court lacks jurisdiction to grant Plaintiffs the relief they seek.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's judgment dismissing this matter for a lack of subject matter jurisdiction.

Respectfully Submitted,

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ORAL ARGUMENT STATEMENT

The defendants-appellees believe that oral argument would benefit the Court, as this appeal has a complex procedural and factual history, and involves important issues of sovereign immunity.

CERTIFICATE OF COMPLIANCE

I certify that the pursuant to Fed. R. App. P. 32(a)(7)(C) that this brief is proportionately spaced, has a typeface of 14 points or more and contains 13,701 words. I used WordPerfect 12.0 to prepare this brief.

_____

/s/ Allen M. Brabender

CERTIFICATE OF DIGITAL SUBMISSION

Pursuant to 10th Circuit Emergency General Order, October 20, 2004, as amended 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 March 6, 2009, and, according to the program, are free of viruses.

_____

/s/ Allen M. Brabender

CERTIFICATE OF SERVICE

I hereby certify that I have caused two copies of the BRIEF OF FEDERAL DEFENDANTS-APPELLEES to be served by regular first class mail, postage prepaid, and electronic mail this 6th day of March 2009, upon the following counsel:

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