No.

In the

Supreme Court of the United States

GORDON B. SAUCERMAN; JOE BENJAMIN; SHARRON BENJAMIN; CLEO FREEMAN,

Petitioners,

v.

GALE NORTON, Secretary of the Interior; KEVIN GOVER, Assistant Secretary for Indian Affairs; ELUID MARTINEZ, Commissioner of Reclamation; WAYNE NORDWALL, Phoenix Area Director for Bureau of Indian Affairs; JANET WONG, Staff Solicitor; WAYNE SUMATZKUKU, Bureau of Indian Affairs Realty Specialist; WILLIAM TITCHYWY, ALLEN ANSPACH; CHEMEHUEVI TRIBAL COUNCIL; ROBERT MOELLER; EDWARD SMITH; DAVID CHAVEZ;; CHEMEHUEVI TRIBAL COUNCIL; DAVID CHAVEZ; EDWARD SMITH; ROBERT MOELLER,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Does the "Indian exception" to the Quiet Title Act divest the federal court of subject matter jurisdiction to determine the land status element of *Montana v. United States*, 450 U.S. 544 (1981), as the Ninth Circuit has ruled or is the exception not applicable to a determination of land status as held by the Tenth Circuit in *State of Kansas v. United States, et al.*, 249 F. 3d 1212 (10th Cir. 2001)?

Does a Solicitor's Opinion that the Secretary of the Interior has the discretionary authority to restore "equitable title" to the shoreline of Lake Havasu to the Chemehuevi Indian Tribe create a "colorable claim" in the United States that defeats judicial review of the laws and administrative actions which are the basis of its claim?

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the Ninth Circuit Court of Appeals in this case.

OPINIONS BELOW

On November 19, 2002, the Ninth Circuit Court of Appeals entered its unpublished opinion affirming the District Court; it appears at Appendix 1a to the petition. The decision of the United States Federal District Court for Arizona is not reported; it appears at Appendix 6a to the petition.

JURISDICTION

The Order sought to be reviewed was entered by the Ninth Circuit Court of Appeals on November 19, 2002. Appendix (App.) at 1a. The time allowed by law for filing a petition for writ of certiorari was extended by Justice O'Connor on February 13, 2003, from February 17, 2003 to and including March 19, 2003. No. 02-A663 petition is timely filed. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment, Fourteenth Amendment, 42 U.S.C. § 1983 and 42 U.S.C. § 1985.

STATEMENT OF THE CASE

A. Judicial Proceedings

This case began when the Chemehuevi Tribal Court had served on the non-Indian petitioners Complaints to evict them from their cabins on the California shoreline of Lake Havasu. The shoreline area is the designated flood and seep zone right of way retained by the Metropolitan Water District of Southern California and owned by the United States Bureau of Reclamation.

In order to protect their Fifth and Fourteenth Amendment individual rights to due process and equal protection of law and to protect their Fifth Amendment possessory interest rights to their cabins, the Petitioners filed suit in the United States District Court for Arizona to challenge whether the Chemehuevi Tribal Court has civil jurisdiction over their persons and property under *Montana v. United States*, 450 U.S. 544 (1981).

On May 18, 2001, BIA law enforcement officers from the Parker Arizona Agency, enforced the Chemehuevi tribal court eviction orders against the Petitioners Saucerman and Benjamin by removing them from their cabins on the shoreline of Lake Havasu. Petitioner Freeman of Needles Lodge was evicted through the self-help ordinance of the Chemehuevi tribe.

On July 9, 2001, the District Court dismissed the Complaint for lack of subject matter jurisdiction as required by the Ninth Circuit's interpretation of the Indian exception to the Quiet Title Act, 28 U.S.C. § 2409a, under *Metropolitan Water District of Southern California v. United States*, 830 F.2d 139(9th Cir. 1987) *aff'd sub.nom. California v. United States*, 490 U.S. 520 (1989). App. 6a. Because the Order dismissing the case failed to address the new Supreme Court cases of *Atkinson v. Shirley*, 532 U.S. 645 (2001) and *Nevada v. Hicks*, 533 U.S. 353 (2001), petitioners filed a Motion for Reconsideration which was denied on February 7, 2002, during the briefing to the Ninth Circuit Court of Appeals. All of the issues raised in the Motion for Reconsideration were briefed in the Appeal.

The Ninth Circuit Court of Appeals affirmed the District Court's dismissal, relying solely on the Lindgren Solicitor's Opinion of August 15, 1974, as giving the Chemehuevi Indian tribe a "colorable claim" to title to the Lake Havasu shoreline. All other claims, including the civil rights claims to enforce the right of the petitioners to challenge tribal civil court jurisdiction over them were dismissed because of lack of subject matter jurisdiction under the Indian exception to the Quiet Title Act, 28 U.S.C. § 2409a(a). App. 1a.

B. Factual Background

The facts relating to this case began in 1907 when the Indian Service acted to create an Indian reservation for the Chemehuevi Indian Tribe in an area already reserved for the Reclamation Service. The dispute between the Reclamation Service and Indian Service was still unresolved in 1936 when the Parker Dam was being completed and the reservoir that is now Lake Havasu was filling with the waters of the Colorado River.

In 1936, Solicitor Margold wrote an Opinion clarifying the remaining Chemehuevi Tribal claims. Congress used the Margold Opinion to create a final resolution of the Chemehuevi claims in the Parker Dam Act of 1940, 54 Stat. 744. The Act extinguishes "all right, title and interest" of the Chemehuevi Indian Tribe to the lands needed for the reclamation project. All remaining tribal claims were extinguished in Indian Claims Commission Cases No. 351 and 351-A. Petitioners' cabins were built on the designated flood and seep right

of way of the reclamation project in the late 1940's under land use permits.

The Chemehuevi Indian Tribe is one of the five tribes for which the United States intervened in *Arizona v. California*, Orig. No. 8. In 1974, a new Solicitor's Opinion asserted that the Secretary of Interior has continuing discretionary authority from the Parker Dam Act to review the lands needed for reclamation purposes. The Lindgren Solicitor's Opinion was published in the Federal Register for August 15, 1974. 11 Op. Solic. 2071.

Within months of the publication of the Lindgren Opinion, a lawsuit entitled *Havasu Landing, Inc., et al. v. Rogers C.B. Morton*, No. CV 74-3565-EC, was filed by the non-Indian residents of the California shoreline. Attorneys for the Secretary of Interior claimed that a Secretarial Order was executed on August 15, 1974, which had restored "equitable title" of the California shoreline of Lake Havasu to the Chemehuevi Indian Tribe while also protecting the valid existing property rights of the non-Indians. The case was settled by agreement.

The cabin owners attempted to enforce the settlement agreement in *Havasu Landing Homeowners Assoc. et al. v. Babbitt*, 74 F.3d 1245 (9th Cir. 1996). The case was dismissed under the Indian Exception to the Quiet Title Act for lack of subject matter jurisdiction.

Then in 1992, the Department of Interior filed suit on behalf of the Chemehuevi Indian Tribe for trespass and ejectment against Havasu Landing mobile home residents who leased lots in *United States v. Jorgensen*, et al., 116 F.3d 1487 (9th Cir. 1997). Three different Secretarial Orders were alleged during the course of the litigation. The Department of Justice attorneys never produced any Secretarial Order. The Ninth Circuit decided that the California shoreline where the non-Indians reside is federal land.

Following the *Jorgensen* ruling, the Chemehuevi Tribe filed an application with the Bureau of Land Management (BLM) for a trust patent for the lands taken by the Parker Dam Act. This application is indefinitely pending. The BLM accepted permit renewal applications in February 2000 for the non-Indians on the shoreline that are also still pending. All of these facts are stated in the Complaint.

REASONS FOR GRANTING THE PETITION

This Court should resolve the conflict that exists between the Tenth and Ninth Circuit Courts of Appeal as to whether a "land status" element implicates the title of the land. This Court is the only court that can reverse the Ninth Circuit's *Metropolitan Water District* rationale substituting "colorable claim" for the plain language of the Indian exception to the Quiet Title Act, 28 U.S.C. § 2409a(a). *Metropolitan Water District of Southern California v. United States*, 830 F.2d 139 (9th Cir. 1987), *aff'd sub.nom. California v. United States*, 490 U.S. 520 (1989).

I. THE CONFLICT OVER LAND STATUS

The Tenth Circuit has ruled in *State of Kansas v. United States of America, et al.*, 249 F.3d 1213 (10th Cir. 2001) that an inquiry and findings as to "land status" for the Indian Gaming Regulatory Act (IGRA) does not divest a federal district court of subject matter jurisdiction under the Indian exception of the Quiet Title Act (QTA), 28 U.S.C. § 2409a(a). The Ninth Circuit misapplied the Indian exception to the Quiet Title Act in this case to divest subject matter jurisdiction to decide the land status element required by *Montana v. United States*, 450 U.S. 544 (1981).

The QTA reads:

> '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.... This section does not apply to trust or restricted Indian lands....' 28 U.S.C. § 2409a(a).

The Tenth Circuit Court of Appeals is correct in *State of Kansas v. United States of America, et al.*, 249 F.3d 1213 (10th Cir. 2001) that the land status element of the Indian Gaming Regulatory Act (IGRA) does not conflict with the Indian Exception to the Quiet Title Act. Both IGRA and the *Montana* test require only that a Court decide whether the Indian tribe is asserting jurisdiction over Indian or non-Indian land. The simple determination of whether the status of the land is Indian or non-Indian violates the Indian exception of the QTA according to the Ninth Circuit. *Metropolitan Water District of Southern California v. United States*, 830 F.2d 139 (9th Cir. 1987), *aff'd sub.nom. California v. United States*, 490 U.S. 520 (1989).

Regardless of the land status determination, this lawsuit will not affect title to the tract. *State of Kansas* at 1225. The Tenth Circuit concluded that since the title was unaffected, the QTA, 28 U.S.C. § 2409a, did not limit judicial review of the agency decision under 5 U.S.C. § 702. *State of Kansas* at 1225. The Ninth Circuit dismissed this case pursuant to the Indian exception to the QTA without ever examining the land status. App. 3a-4a.

In *State of Kansas v. United States*, defendants claimed that because (1) the State's action is in effect one "to adjudicate a disputed title to real property in which the United States claims an interest," and (2) the tract constitutes "restricted Indian lands," the Government has not waived its sovereign immunity

from suit. *State of Kansas* at 1224. The Tenth Circuit confronted this circular reasoning by not allowing the United States to characterize the *Kansas* suit as arising under the QTA by *presupposing* that the land is *de jure* "Indian lands." *State of Kansas* at 1224.

The Tenth Circuit proceeded to determine whether the land in question was "trust or restricted Indian land" by examining the land status before determining whether the QTA applied. The Tenth Circuit concluded that the land was not Indian land and therefore, the QTA was not applicable.

The Ninth Circuit decision assumes defendant's position (1) that petitioners suit is really an attempt to litigate the title to the shoreline. App. 3a-4a. No claim is made in the Complaint challenging the title of the United States to the shoreline nor could it be without challenging the valid existing rights that are the basis of petitioners standing to sue. Additionally, petitioners brought suit in the Federal District Court for Arizona which has no subject matter jurisdiction to quiet title to any land in the state of California. *Wildman v. United States*, 827 F.2d 1306, 1307 (9th Cir.1987), citing *Sherrill v. McShan*, 356 F.2d 607 (9th Cir.1966).

The Ninth Circuit's application of *Metropolitan Water District* in this case presupposes (2) that the Lindgren Solicitor's Opinion makes the shoreline lands *de jure* "Indian lands" to divest all subject matter jurisdiction of the federal courts. App. 3a-4a. The decision intentionally ignores the specific factual allegations that the shoreline is owned in fee title by the Bureau of Reclamation (BOR) and that the Ninth Circuit itself in *United States v. Jorgensen*, et al., 116 F.3d 1487 (9th Cir. 1997), held that this shoreline is federal land.

The Ninth Circuit's circular reasoning can be broken by requiring the court to decide the land status of the shoreline before deciding whether the QTA applies as the Tenth Circuit did in *State of Kansas v.*

United States of America, et al., 249 F.3d 1213 (10th Cir. 2001). This includes adjudicating reservation boundaries which is conceptually distinct from adjudicating title to the same land. *State of Kansas* at 1225, citing *Navajo tribe of Indians v. New Mexico*, 809 F.2d 1455, 1475 (10th Cir. 1987). The Ninth Circuit and the trial court "fail to appreciate the discrete concepts of land status and land title." *State of Kansas* at 1225.

II. THE NINTH CIRCUIT ERRS BY SUBSTITUTING "COLORABLE CLAIM" FOR "TRUST OR RESTRICTED INDIAN LANDS"

The Ninth Circuit cites *Metropolitan Water District of Southern California v. United States*, 830 F.2d 139 (9th Cir. 1987), *aff'd sub.nom. California v. United States*, 490 U.S. 520 (1989), to divest the federal court of subject matter jurisdiction by holding that the Lindgren Solicitor's Opinion "met the burden" to hold that a colorable claim of Indian land exists under the Indian exception of the QTA. App. 3a-4a. The Ninth Circuit follows its own rationale rather than applying the interpretation of the Indian exception of the QTA made by this Court that the immunity is not waived where the land either is held in "trust or [is] restricted Indian lands." *Block v. North Dakota*, 461 U.S. 273, 275-6 (1983).

Metropolitan Water District follows and extends the rationale of *Wildman v. United States*, 827 F.2d 1306 (1987) interpreting the Indian exception to the QTA. *Wildman* was a preemptive action brought to quiet title to lands moved by avulsion from the California shoreline of the Colorado River to the Arizona shoreline adjoining the Fort Mojave Indian Reservation. The Ninth Circuit found that

> "Nothing in the statute or its history suggests that the United States was to be put to the burden of establishing its title when it has a colorable claim and has chosen to assert its immunity on behalf of land of which the government declares that it is the trustee for Indians....The immunity of the government applies whether the government is right or wrong." *Wildman* at 1309.

Using the colorable claim interpretation, the *Metropolitan Water District* opinion extended this QTA rationale even farther by preventing Section 702 of the Administrative Procedures Act from waiving the sovereign immunity of the United States. *Metropolitan Water District* at 143. The Ninth Circuit then prohibited tribal boundary determinations under the QTA by concluding that "The effect of a successful challenge would be to quiet title in others than the tribe." *Metropolitan Water District* at 143.

The resulting QTA rationale of the Ninth Circuit prevents non-Indians from being able to protect their property in a court under the Ninth Circuit. E. John Athens, Jr., *The Ninth Circuit Errs Again: The Quiet Title Act as a Bar to Judicial Review*, 19:2 Alaska Law Review 433 (2002). As the law review article states, "In other jurisdictions discussed below, courts have held that the Indian lands exception to the QTA does not bar judicial review of agency decisions that initially give rise to the claim that the property is Indian land. *The Ninth Circuit Errs Again* at 446. "There will be no judicial review based on constitutional claims, statutory claims, or factual claims, as long as the government can identify some rationale, even an incorrect one, for the agency decision. Without a bright line definition of 'colorable claim,' the federal government will be compelled by its trust duty to protect Native allotments to seek dismissal on the basis of the Indian lands exception to the QTA of

virtually any claim filed by Alaska, no matter how meritorious." *The Ninth Circuit Errs Again* at 458-9.

As this case demonstrates, using its QTA rationale the Ninth Circuit can make the QTA Indian exception apply even when there is a direct diminishment of the reservation by Congress, there are constitutional claims, the land is fee titled in the United States and only a Solicitor's Opinion of continuing discretionary authority exists to make a claim that the land is colorably Indian land. App. 3a-5a. The rationale of *Metropolitan Water District* and *Wildman* was approved by this Court in its *per curiam* order in *California v. United States*, 490 U.S. 520 (1989). Only this Court can correct the Ninth Circuit's misapplication of the Indian exception to the QTA.

III. JURISDICTION TO DETERMINE LAND STATUS DOES NOT REQUIRE A WAIVER OF THE SOVEREIGN IMMUNITY OF THE UNITED STATES

As previously stated, this case was brought to determine whether the Chemehuevi Tribal Court has civil jurisdiction to evict these non-Indians from their shoreline cabins on Lake Havasu under *Montana v. United States*. The petitioners alleged that the shoreline lands are not "trust or restricted Indian lands" because Congress specifically took "all right, title and interest" to the lands starting from the shoreline down into the river valley in the Parker Dam Act of 1940 for the Boulder Canyon Reclamation Project. 54 Stat. 744. Once taken for reclamation purposes, the Secretary of Interior is specifically prohibited by Congress from restoring lands within federal reclamation projects to Indian reservations or placing those lands into trust status for a tribe. 25 U.S.C. § 463 and § 575.

The jurisdiction of the federal courts to decide which sovereign has jurisdiction over a specific piece of

land once encompassed within Indian reservation boundaries has been upheld by this Court in numerous cases. See generally *Solem v. Bartlett*, 465 U.S. 463 (1984), *Atkinson v. Shirley*, 532 U.S. 645 (2001). None of these cases affected the title to the land.

Indian tribes and tribal members have often claimed tribal jurisdiction still exists over an area when they attempt to avoid state jurisdiction over criminal charges or to avoid state regulatory enforcement. *DeCoteau v. District County Court*, 420 U.S. 425 (1975), *Hagen v. Utah*, 510 U.S. 399 (1994), *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998).

Tribal members using tribal courts have also asserted jurisdiction over non-members and non-Indians for harm that occurred within reservation boundaries, requiring the federal courts to determine the extent of tribal court jurisdiction over particular tribal court claims. *Duro v. Reina*, 495 U.S. 676 (1990), *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), *El Paso Natural Gas v. Neztsosie*, 526 U.S. 473 (1999).

In all of the cases cited above, the federal courts had subject matter jurisdiction to make the land status determinations to provide a judicial resolution of the disputed claims without a waiver of the sovereign immunity of the United States.

In *South Dakota v. Bourland*, 508 U.S. 679 (1993), this Court expanded this jurisdiction to specifically include "the question of jurisdiction over non-Indians... the only question before us is whether the Tribe may regulate non-Indians who hunt and fish in the taken area." *Bourland* at 685, Fn 6.

The Parker Dam Act contains express diminishment language taking "all right, title and interest" of the Chemehuevi Indian Tribe to the project lands. *South Dakota v. Bourland* is on point for this case disputing tribal jurisdiction over non-Indians on the shoreline of Lake Havasu. This case has stronger facts

than *Bourland* because no tribal rights were reserved in the Parker Dam Act and no treaty ever existed between the Chemehuevi Tribe and the United States. Using the rationale of *Metropolitan Water District*, the Ninth Circuit divested itself of subject matter jurisdiction to decide this case. App. 3a-4a.

The Ninth Circuit's QTA rationale has the potential to nullify this Court's statement that "Hitherto, the absence of tribal ownership has been virtually conclusive of the absence of tribal civil jurisdiction; with one minor exception, we have never upheld under *Montana* the extension of tribal civil authority over nonmembers on non-Indian land." *Nevada v. Hicks*, 533 U.S. 353, 360 (2001). The Ninth Circuit's rationale may be applied to nullify any decision of this Court regarding tribal jurisdiction over non-Indians with which it does not agree including *Montana v. United States* and any opinions of this Court interpreting *Montana* if this decision is allowed to stand.

CONCLUSION

The petition for writ of certiorari should be granted.

DATED: March 19, 2003

Respectfully submitted,

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