No. 08-231

In the Supreme Court of the United States

SOUTH FORK BAND, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

GREGORY G. GARRE
Solicitor General
Counsel of Record
RONALD J. TENPAS
Assistant Attorney General
MARK R. HAAG
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether petitioners' action to set aside a 1977 judgment of the Indian Claims Commission (ICC) was properly dismissed on the ground that it was not filed "within a reasonable time" under Rule 60(b) of the Rules of the Court of Federal Claims.

2. Whether the Treaty of Ruby Valley, Oct. 1, 1863, United States-Western Shoshone, 18 Stat. 689, in which the Western Shoshone agreed to provide access to certain lands in exchange for payment, recognized fee title in the Western Shoshone.

3. Whether petitioners' claims arising from the same land claims resolved by the ICC's final judgment are barred by the finality provision of Indian Claims Commission Act, ch. 959, § 22, 60 Stat. 1055 (25 U.S.C. 70u (1976)).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases–Continued: Page

Treaties, statutes and rules:

Statutes and rules—Continued: Page

Miscellaneous:

In the Supreme Court of the United States

No. 08-231

SOUTH FORK BAND, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is not published in the *Federal Reporter* but is reprinted in 279 Fed. Appx. 980. The opinion of the Court of Federal Claims (Pet. App. 18a-41a) is reported at 73 Fed. Cl. 59.

JURISDICTION

The judgment of the court of appeals was entered on May 22, 2008. The petition for a writ of certiorari was filed on August 20, 2008. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners, tribes and bands of the Western Shoshone, filed suit in the United States Court of Federal

Claims to invalidate a 1977 Indian Claims Commission (ICC) judgment awarding compensation for the taking of the Western Shoshone's aboriginal lands. In the alternative, petitioners alleged that they are entitled to prejudgment interest and additional relief under an 1863 treaty between the United States and the Western Shoshone, which they claimed recognized their fee title, as opposed to aboriginal title, in the lands. The Court of Federal Claims dismissed the suit for lack of subject matter jurisdiction and for failure to state a claim. The court of appeals affirmed. Pet. App. 1a-17a.

1. In the Indian Claims Commission Act (ICCA), ch. 959, 60 Stat. 1049 (25 U.S.C. 70 *et seq.* (1976)), Congress created the Indian Claims Commission (ICC or Commission) to hear a broad range of historical Indian claims against the United States, including claims relating to the taking of land, and to dispose of such claims "with finality." *United States* v. *Dann*, 470 U.S. 39, 45 (1985) (internal quotation marks and citation omitted).

Under Section 12 of the ICCA, any claim existing as of the date of the ICCA's enactment on August 13, 1946, had to be presented to the ICCA within five years of that date. 60 Stat. 1052 (25 U.S.C. 70k (1976)). A claim "existing before such date but not presented within such period" could not "thereafter be submitted to any court or administrative agency for consideration, nor * * * thereafter be entertained by Congress." *Ibid.*[1] Under Section 22 of the Act, payment of a claim under the ICCA discharged the United States' liability and barred any further claims "arising out of the matter involved in the controversy." 60 Stat. 1055 (25 U.S.C. 70u (1976)).

[1] The Court of Federal Claims has jurisdiction over claims brought by an Indian group against the United States accruing after August 13, 1946. 28 U.S.C. 1505.

As originally enacted, Section 23 of the ICCA provided for the ICC to complete its work and dissolve by 1956. 60 Stat. 1055. Section 23 was subsequently amended several times to extend that date, with the final amendment providing for dissolution of the Commission by September 30, 1978. Act of Oct. 8, 1976, Pub. L. No. 94-465, § 2, 90 Stat. 1990. Upon dissolution of the ICC, jurisdiction over all pending cases was transferred to the Court of Claims. *Ibid*.

2. The Western Shoshone are the aboriginal inhabitants of lands in parts of present-day Idaho, Utah, Nevada, and California. Pet. App. 2a. In 1863, the Western Shoshone entered into a treaty with the United States in which they agreed to allow travel across, and access to the natural resources within, the country they "claimed and occupied," in return for payment. That treaty, known as the Treaty of Ruby Valley, Oct. 1, 1863, United States-Western Shoshone, 18 Stat. 689, is one of five similar treaties that the United States entered in 1863 with various groups of Shoshone Indians. See Pet. App. 2a-3a; *Northwestern Bands of Shoshone Indians* v. *United States*, 324 U.S. 335, 340-343 (1945). After the treaties were adopted, the United States treated the Shoshone territory covered by the Treaty of Ruby Valley and the other 1863 treaties "as a part of the public domain." *Id.* at 346; see also *ibid.* ("School lands were granted. National forests were freely created. The lands were opened to public settlement under the homestead laws.") (citations omitted).

3. In 1951, a number of tribes and bands of the Shoshone Nation, including petitioner Te-Moak Tribe of Western Shoshone Indians, filed a joint petition in the ICC seeking compensation for the alleged taking of more than 80 million acres of land located in California,

Colorado, Idaho, Nevada, Utah, and Wyoming. *Shoshone Tribe of Indians of the Wind River Reservation* v. *United States* (*Shoshone Tribe*), 11 Indian Cl. Comm'n 387, 419 (1962);[2] see *Dann*, 470 U.S. at 41-42. The lands for which the petitioners sought compensation included the lands described in the Treaty of Ruby Valley. *Shoshone Tribe*, 11 Indian Cl. Comm'n at 397. The Shoshone based their claims on aboriginal title as well as on title allegedly recognized under the Treaty of Ruby Valley and the other 1863 treaties. *Id.* at 419; see *Dann*, 470 U.S. at 41; see also *Western Shoshone Nat'l Council* v. *Molini*, 951 F.2d 200, 203 (9th Cir. 1991), cert. denied, 506 U.S. 822 (1992).[3]

In 1962, the ICC found that aboriginal title to the Shoshone lands had been taken by gradual encroachment by settlers and others, as well as by the United States' taking of land for its own use and for use by citizens. *Shoshone Tribe*, 11 Indian Cl. Comm'n at 387-416;

---

[2] The decisions of the ICC are available at *Indian Claims Decisions* (visited Nov. 20, 2007) <http://digital.library.okstate.edu/icc>.

[3] An Indian tribe establishes aboriginal title by showing that it has inhabited the land "from time immemorial." *County of Oneida* v. *Oneida Indian Nation*, 470 U.S. 226, 234 (1985). Aboriginal title is "a right of occupancy which the sovereign grants and protects against intrusion by third parties." *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272, 279 (1955). That "right of occupancy may be terminated and such lands fully disposed of by the sovereign itself without any legally enforceable obligation to compensate the Indians." *Ibid.*

By contrast, "[w]here the Congress by treaty or other agreement" has recognized a tribe's title to land, aboriginal title is converted to "treaty" or "fee" title, and "compensation must be paid for subsequent taking." *Tee-Hit-Ton Indians*, 348 U.S. at 277-278. While "[t]here is no particular form for congressional recognition of Indian right of permanent occupancy," this Court has held that fee title requires a finding of a "definite intention by congressional action or authority to accord legal rights, not merely permissive occupation." *Id.* at 278-279.

see *Dann*, 470 U.S. at 41-42. With respect to the Western Shoshone specifically, the ICC found that title to approximately 22 million acres in Nevada and 2 million acres in California had been extinguished in the latter part of the 19th century. *Shoshone Tribe*, 11 Indian Claims Comm'n at 413-414. The ICC also found that the Western Shoshone formed an identifiable group distinct from other groups of the Shoshone Nation and that the Te-Moak Bands had the right to maintain the action on behalf of the Western Shoshone. *Id.* at 434-436, 466. The ICC severed the Western Shoshone's claims from the other claims filed by the Shoshone Nation, requiring the Te-Moak Bands to file a separate amended petition. See Pet. App. 4a.

For purposes of calculating compensation, the government and the Western Shoshone stipulated that all Western Shoshone lands had been taken by July 1, 1872. See *Western Shoshone Identifiable Group* v. *United States*, 29 Indian Cl. Comm'n 5, 7 (1972). Following a trial on valuation, the ICC determined the value of the property taken from the Western Shoshone as of 1872 to be approximately $26 million, including $4.6 million for minerals extracted from the Nevada land before the date of the taking. *Id.* at 57-58.

In 1974, as the ICC proceedings were nearing completion, the Western Shoshone Legal Defense and Education Association, an unincorporated group of Western Shoshone Indians, petitioned to stay the proceedings and file an amended claim. *Western Shoshone Identifiable Group* v. *United States*, 35 Indian Cl. Comm'n 457 (1975). The Association contended that the Western Shoshone's lands were never taken, attempted to repudiate all sums that the ICC found owing to the Western Shoshone, and argued that the Western Shoshone still held

legal title to the property. See *id*. at 460. The ICC dismissed the Association's petition, concluding that the Te-Moak Bands adequately represented the Western Shoshone and that the Association's petition was untimely. *Id*. at 477. The Court of Claims affirmed. *Western Shoshone Legal Def. & Educ. Ass'n* v. *United States*, 531 F.2d 495, 498 (Ct. Cl.), cert. denied, 429 U.S. 885 (1976).

Shortly thereafter, the Te-Moak Band itself attempted to change its position in the ICC proceedings in order to assert claims of continued ownership of the claimed acreage on behalf of the Western Shoshone. As part of that effort, the Te-Moak Band discharged its prior counsel and retained new counsel, who moved for a stay of proceedings in the ICC. The ICC denied the stay, concluding that "it is too late in the litigation for the Commission to be asked to stay proceedings in order to permit the adjudication of the case on a new theory," and the ICC entered final judgment. *Western Shoshone Identifiable Group* v. *United States*, 40 Indian Cl. Comm'n 305, 307-310 (1977); *id.* at 452. The Court of Claims affirmed the award. *Temoak Band of W. Shoshone Indians*, 593 F.2d 994 (Ct. Cl.), cert. denied, 444 U.S. 973 (1979). The Clerk of the Court of Claims certified the ICC's final award to the General Accounting Office on December 6, 1979, which resulted in the automatic appropriation of the amount of the award into an interest-bearing trust account for the Western Shoshone in the Treasury of the United States. *Dann*, 470 U.S. at 42.[4]

---

[4] In 2004, Congress enacted legislation providing for the distribution of the ICC award from the trust account. Western Shoshone Claims Distribution Act (Distribution Act), Pub. L. No. 108-270, 118 Stat. 805. In 2007, the Secretary issued final regulations establishing an enroll-

4. In 2003, petitioners, along with other Western Shoshone groups, filed a complaint in the United States District Court for the District of Columbia. In their complaint, plaintiffs sought to quiet title in the Western Shoshone to land identified in the Treaty of Ruby Valley; a declaration that the ICC's judgment on the Western Shoshone's claims is void; interest and royalties for the use of the land; and an accounting. The district court transferred the quiet-title claims to the District of Nevada and the remaining claims to the Court of Federal Claims. *Western Shoshone Nat'l Council* v. *United States*, 357 F. Supp. 2d 172, 177 (D.D.C. 2004).[5]

Petitioners and the other plaintiffs then filed a five-count Second Amended Complaint in the Court of Federal Claims. Pet. App. 65a-81a. In Count 1, plaintiffs sought a declaration that the 1977 ICC judgment on the Western Shoshone's claims is void because it was rendered in violation of the Western Shoshone's due process rights. *Id*. at 75a-77a. Specifically, Count 1 alleged that the Western Shoshone were "denied adequate procedural protections," in that they were denied "their counsel of choice" and the opportunity "to change or withdraw their claim," and "their interests were not represented for purposes of Constitutional due process."

---

ment process to allow individuals to file applications to obtain a share of the Western Shoshone judgment fund. *Preparation of Rolls of Indians*, 72 Fed. Reg. 9836. After the submission of applications and establishment of the judgment roll, the Secretary will make a per capita distribution of the fund to the individuals listed on the judgment roll. Distribution Act § 3(c)(1), 118 Stat. 806.

[5] The district court in Nevada dismissed the quiet-title claims as barred by the Quiet Title Act's 12-year statute of limitations. *Western Shoshone Nat'l Council* v. *United States*, No. 04-702, 2006 WL 1663569 (D. Nev. June 7, 2006), aff'd, 274 Fed. Appx. 573 (9th Cir.), cert. denied, 129 S. Ct. 258 (2008).

Id. at 76a. In Count 2, plaintiffs alleged, in the alternative, that if the ICC's judgment was valid, they were entitled to an additional $14 billion in prejudgment interest for the extinguishment of fee title, in addition to the extinguishment of their aboriginal title. *Id.* at 77a-78a; see note 3, *supra* (discussing difference between aboriginal title and fee title). Count 3 sought mining royalties and other compensation under the Treaty of Ruby Valley. *Id.* at 78a-79a. Count 4 sought an accounting "of the proceeds from disposition or use of the land" under the Treaty. *Id.* at 79a-80a. Count 5 sought damages for the United States' alleged breach of fiduciary duties under the Treaty. *Id.* at 80a-81a.

The Court of Federal Claims granted the government's motion to dismiss the complaint. Pet. App. 18a-41a. The court dismissed Count 1, which sought to set aside the ICC judgment as void, on the ground that Rule 60(b) of the Rules of the Court of Federal Claims (RCFC) requires that motions to set aside judgments be brought "within a reasonable time," and plaintiffs had failed to show that their 24-year delay in challenging the ICC award after the Court of Claims certified payment in 1979 was "reasonable." *Id.* at 23a-24a. In the alternative, the court held that Count 1 failed to state a claim under Rule 60(b)(4) because the Western Shoshone had failed to raise any ground for setting aside the judgment that had not already been considered and rejected by federal courts in prior litigation. *Id.* at 28a-29a.

As to Count 2, the court rejected plaintiffs' argument that, under the Treaty of Ruby Valley, they held fee title that would entitle them to prejudgment interest on the ICC's award. Pet. App. 29a-33a. The court concluded that the Treaty of Ruby Valley contained no "specific acknowledgment of Indian title or right of occupancy."

Id. at 32a (quoting *Northwestern Bands*, 324 U.S. at 348).

The court dismissed Count 3, seeking royalties under the Treaty of Ruby Valley, on the ground that the claim was within the exclusive jurisdiction of the ICC and barred by the finality provision of the ICCA. Pet. App. 33a-37a. The court dismissed Count 4, seeking an accounting under the Treaty of Ruby Valley, on the ground that an accounting is available only where the defendant's liability has been established. *Id.* at 37a-38a. Finally, the court dismissed Count 5, alleging a breach of fiduciary duty under the Treaty of Ruby Valley, as barred by the six-year statute of limitations applicable to claims brought in the Court of Federal Claims. *Id.* at 38a-40a; see 28 U.S.C. 2501. The court reasoned that, even if the United States had owed the Western Shoshone a fiduciary duty, the Western Shoshone were put on notice of the United States' repudiation of any such duty in the 1950s when, in the ICC proceedings, the United States denied that the Western Shoshone had any interest in any of the disputed lands. *Id.* at 39a-40a.

5. The court of appeals affirmed in an unpublished opinion. Pet. App. 1a-17a.

First, the court of appeals agreed with the Court of Federal Claims that the Western Shoshone's request in Count 1 to set aside the ICC judgment, some 24 years after the Court of Claims certified the award for payment, was not brought "within a reasonable time" as required under RCFC 60(b). Pet. App. 9a-12a.

Turning to Count 2, the court of appeals noted that this Court had rejected a similar argument for recovery for the taking of fee title based on the Treaty of Box Elder, July 30, 1863, United States-Northwestern Shosho-

nee, 13 Stat. 663, a treaty between the United States and the Shoshone that was "similar in form" to the Treaty of Ruby Valley. Pet. App. 13a-14a (quoting *Northwestern Bands*, 324 U.S. at 343). The court further concluded that, while the Treaty of Ruby Valley acknowledged the Western Shoshone's right to continue occupying identified lands, nothing in the treaty "suggests that the [United States] intended to convey title to the Western Shoshone," and that "the United States' actions after adopting the Treaty are inconsistent with an interpretation that the Treaty of Ruby Valley conveyed title." *Id.* at 14a.

Finally, the court of appeals held that Count 3 (for royalties under the Treaty), Count 4 (for an accounting under the Treaty), and Count 5 (for breach of fiduciary duty under the Treaty) were barred by Section 22 of the ICCA, 60 Stat. 1055 (25 U.S.C. 70u (1976)), which provides that a final determination of the ICC bars any further claims arising from the same matter, and thus were properly dismissed for lack of subject matter jurisdiction. Pet. App. 15a-17a.

ARGUMENT

The court of appeals correctly affirmed the dismissal of petitioners' complaint, which seeks to relitigate issues that were conclusively decided decades ago. The court's unpublished decision does not warrant further review.

1. Petitioners' primary contention (Pet. 12-19) is that the court of appeals erred in affirming the dismissal of Count 1 of their Second Amended Complaint, which seeks to set aside the 1977 judgment of the ICC as void under RCFC 60(b)(4) on the ground that the ICC proceedings did not comport with due process. Petitioners' contention lacks merit.

RCFC 60(b)(4) provides that, "[o]n motion and upon such terms as are just," the Court of Federal Claims may relieve a party from a final judgment that is "void." Any motion to set aside a final judgment under Rule 60(b) must, however, "be made within a reasonable time."[6] In this case, the Western Shoshone sought Rule 60(b)(4) relief some 24 years after the Court of Claims certified the ICC's award for payment. Pet. App. 10a, 24a. As the court of appeals correctly concluded, "[t]wenty-four years is not a reasonable time to have waited to challenge the Court of Claims' affirmance." *Id.* at 10a.

Petitioners argue (Pet. 14-15) that the court of appeals' application of the "reasonable time" requirement under RCFC 60(b)(4) conflicts with decisions of other courts of appeals that have held that motions for relief from a void judgment under the parallel provision of the

---

[6] At the time the suit was filed, Rule 60(b) provided, in relevant part:

> On motion and upon such terms as are just, the court may relieve a party or the party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under RCFC 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken.

RCFC 60(b) (2002). The Rules of the Court of Federal Claims were amended on November 3, 2008. Those amendments do not, however, affect any issue in this case.

Federal Rules of Civil Procedure are not subject to a "reasonable time" requirement. Petitioner is correct that other courts have stated that, notwithstanding the language of the rule, no time limits apply to a Rule 60(b)(4) motion to set aside a void judgment. See, *e.g.*, *New York Life Ins. Co.* v. *Brown*, 84 F.3d 137, 142-143 (5th Cir. 1996); *Orner* v. *Shalala*, 30 F.3d 1307, 1310 (10th Cir. 1994). But see *Days Inns Worldwide, Inc.* v. *Patel*, 445 F.3d 899, 905-906 & n.7 (6th Cir. 2006) (affirming denial of Rule 60(b)(4) motion on the ground that it was not filed within a reasonable time, but noting that a different result might obtain had the movant challenged the court's subject-matter jurisdiction, since "objections to subject-matter jurisdiction may not be waived or forfeited"); *Beller & Keller* v. *Tyler*, 120 F.3d 21, 24 (2d Cir. 1997) (noting that, although "[c]ourts have been exceedingly lenient in defining the term 'reasonable time,' with regard to voidness challenges," where a party has previously filed a Rule 60(b) motion to set aside a default judgment without raising voidness arguments, a later Rule 60(b)(4) motion would be untimely); *State Street Bank & Trust Co.* v. *Inversiones Errazuriz Limitada*, 374 F.3d 158, 178 (2d Cir. 2004) (affirming denial of Rule 60(b)(4) motion as untimely under similar circumstances), cert. denied, 543 U.S. 1177 (2005).

This case does not, however, present a suitable opportunity for this Court to resolve any tension among the courts of appeals as to whether a motion under Rule 60(b)(4) of the Federal Rules of Civil Procedure must be filed within "a reasonable time." As a preliminary matter, the court of appeals' decision is unpublished, and, by its terms, it interprets the Rules of the Court of Federal

Claims, rather than the Federal Rules of Civil Procedure.

In any event, even if petitioners' claim were not subject to the "reasonable time" limitation of RCFC 60(b), the claim would nevertheless fail. As the Court of Federal Claims noted (Pet. App. 28a-29a), courts have previously considered and rejected the substance of petitioners' claim of error (see Pet. 16-19): that the ICC's judgment was "tainted" by the alleged refusal of the government to allow the Western Shoshone to change counsel—and more fundamentally, the ICC's refusal to allow the Western Shoshone to change their litigating position—in the final stages of a proceeding that had begun decades earlier. See *Temoak Band of W. Shoshone Indians* v. *United States*, 593 F.2d 994, 998 (Ct. Cl.) ("The abandonment of an entire claim at any point with prejudice may well be a claimant's right, but the partial and contingent abandonment of it, after 25 years, without prejudice, when the goal of final adjudication is in sight cannot be."), cert. denied, 444 U.S. 973 (1979); see also *Western Shoshone Legal Def. & Educ. Ass'n* v. *United States*, 531 F.2d 495, 498 (Ct. Cl.), cert. denied, 429 U.S. 885 (1976). There is no reason for a different result here. And to the extent that petitioners allege that the government's alleged refusal to allow the Te-Moak Band to change counsel independently states a due process violation, that allegation is belied by the fact that the Te-Moak Band's chosen counsel represented the Te-Moak Band before the Court of Claims. See *Temoak Band*, 593 F.2d at 997.

2. Petitioners next contend (Pet. 19-25) that the court of appeals erred in holding that the Treaty of Ruby Valley did not confer fee title on the Western Shoshone, and that the Western Shoshone are therefore not

entitled to prejudgment interest on the ICC's award. Petitioners' contention lacks merit, and it does not warrant this Court's review.

As the court of appeals correctly recognized (Pet. App. 13a-14a), this Court's decision in *Northwestern Bands of Shoshone Indians* v. *United States*, 324 U.S. 335 (1945), forecloses petitioner's argument. In *Northwestern Bands*, various Shoshone groups sought to recover damages for the taking of lands as to which they held aboriginal title, alleging that the United States had recognized their title in the 1863 Treaty of Box Elder. See *id.* at 336. Like the Treaty of Ruby Valley, the Treaty of Box Elder was one of the five treaties of peace and amity negotiated between the Shoshone and the United States after a period of conflict, "to clear up the difficulties in the Shoshone country." 324 U.S. at 341-342. After reviewing the Treaty of Box Elder "and the others which were entered into with the other Shoshone tribes," the Court rejected the Northwestern Bands' claim to fee title. *Id.* at 347. The Court explained:

> Nowhere in any of the series of treaties is there a specific acknowledgment of Indian title or right of occupancy. It seems to us a reasonable inference that had either the Indians or the United States understood that the treaties recognized the Indian title to these domains, such purpose would have been clearly and definitely expressed by instruction, by treaty text or by the reports of the treaty commissioners, to their superiors or in the transmission of the treaties to the Senate for ratification.

Id. at 348. As the court of appeals correctly held in this case, the Court's "reasoning and conclusions cover the Treaty of Ruby Valley," as well as the other 1863 trea-

ties between the Shoshone and the United States. Pet. App. 14a.

Petitioners (Pet. 22-25) attempt to distinguish the Treaty of Ruby Valley from the Treaty of Box Elder on the ground that the Senate had amended the latter treaty to include the following provision:

> Nothing herein contained shall be construed or taken to admit any other or greater title or interest in the lands embraced within the territories described in said treaty in said tribes or bands of Indians than existed in them upon the acquisition of said territories from Mexico by the laws thereof.

Northwestern Bands, 324 U.S. at 344. According to petitioners, that provision "would seem to foreclose the recognition of title." Pet. 22. And because the Treaty of Ruby Valley "did not contain th[at] determinative language," petitioners argue, "[i]t may be inferred" that "the intent was to convey recognized title." Pet. 23.

When the *Northwestern Bands* Court considered the Senate amendment to the Treaty of Box Elder, however, it neither understood the language of the amendment broadly to "foreclose the recognition of title," nor otherwise suggested that it was "determinative" of the question whether title had been recognized. By its terms, the amendment foreclosed only "*any other or greater* title or interest" than existed in the tribes or bands "upon the acquisition of said territories from Mexico," 324 U.S. at 344 (emphasis added); it did not, as petitioners would have it, "state[] expressly that title was *not* conveyed" at all, Pet. 23. Indeed, the petitioners in *Northwestern Bands* cited the amendment as evidence *in favor* of the proposition that the treaty recognized title to the described lands, arguing that, "'if the treaty recognized no rights,'" the provision limiting the recog-

nition of title to lands contained within the Mexican Cession would have been unnecessary. 324 U.S. at 351. The Court rejected the argument, reasoning that the Senate had particular reason to act cautiously with respect to questions concerning title to lands within the Mexican Cession. See *id.* at 351-353. But in concluding that the Senate amendment did not *undermine* its conclusion that the Treaty of Box Elder did not recognize title in the Northwestern Bands, the Court never suggested that the Senate amendment *demanded* that conclusion. *Ibid.*

Petitioners (Pet. 22-23) also attempt to distinguish *Northwestern Bands* on the ground that the question in that case concerned aboriginal title, rather than recognized title. Petitioners are mistaken. See *Northwestern Bands*, 324 U.S. at 339 ("In this case * * * the success of the claim depends not upon proof of the Indian title, which may be admitted, but upon recognition of that title by the Box Elder treaty.") (citation omitted); *id.* at 340 ("The decisive question in this case is whether it was intended by the Northwestern Shoshone or Box Elder Treaty of July 30, 1863, to recognize or acknowledge by implication the Indian title to the lands mentioned in the treaty.").

Moreover, even if petitioners' claim for prejudgment interest were not otherwise foreclosed, it is in any event barred by Section 22 of the ICCA, because it "aris[es] out of the matter involved in the controversy" before the ICC. 60 Stat. 1055 (25 U.S.C. 70u(b) (1976)).

3. Finally, petitioners contend (Pet. 26-30) that the court of appeals erred in dismissing Counts 3, 4, and 5 of their complaint on the ground that they are barred by Section 22 of the ICCA. According to petitioners, Section 22 did not survive the dissolution of the ICC in 1978,

was therefore no longer in effect in 1979 when the Court of Claims certified the ICC's award for payment, and thus has no application in this case. That contention also lacks merit.

As the Court of Federal Claims correctly explained, when Congress provided for the ICC's termination in 1978, Congress did not repeal any provision of the ICCA, and "[t]here is nothing in the history of the ICCA to indicate that it has ever been repealed." Pet. App. 36a. Petitioners do not dispute that conclusion. They contend (Pet. 28, 29), however, that the ICCA's finality provision was nevertheless a dead letter by the time payment was made in this case because the ICCA, including its finality provision, had been omitted from the United States Code.

Petitioners' argument is both factually and legally incorrect. As a factual matter, the ICCA was not omitted from the Code until 1982; the ICCA, including its finality provision, continued to appear in the Code as of 1979, when the Court of Claims certified the ICC's award. But more fundamentally, that the ICCA has been omitted from subsequent editions of the United States Code does not mean that the ICCA is no longer in force. Unless a title of the Code has been enacted into positive law, the content of that title provides only "prima facie" evidence of the content of the laws of the United States, 1 U.S.C. 204(a), while the Statutes at Large provides the "legal evidence of laws," 1 U.S.C. 112. Thus, even though a statutory provision may have been omitted from the Code, it "remains on the books if the Statutes at Large so dictates." *United States Nat'l Bank* v. *Independent Ins. Agents of Am., Inc.*, 508 U.S. 439, 448 (1993). The ICCA appeared in Title 25 of the Code, a title that has not been enacted into positive law.

And petitioners point to nothing in the Statutes at Large indicating that Congress, as opposed to the codifier, intended to erase the ICCA from the books once the ICC dissolved. See Pet. 27-29.

In any event, even if petitioners' claims were not barred by the finality provision of the ICCA, they would nevertheless be barred by 28 U.S.C. 2519, which similarly forbids claims arising from matters adjudicated by the Court of Claims, see *United States* v. *Dann*, 470 U.S. 39, 45 n.10 (1985), as well as Section 12 of the ICCA, which gave the ICC exclusive jurisdiction to hear Indian claims that arose before August 13, 1946, and required that all such claims be presented before August 13, 1951, or forever relinquished, see 60 Stat. 1052 (25 U.S.C. 70k (1976)).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

GREGORY G. GARRE
Solicitor General
RONALD J. TENPAS
Assistant Attorney General
MARK R. HAAG
Attorney

NOVEMBER 2008