1798.001

No. ___

IN THE

Supreme Court of the United States

SOUTH FORK BAND, WINNEMUCCA INDIAN COLONY, DANN BAND, TE-MOAK TRIBE OF WESTERN SHOSHONE INDIANS, BATTLE MOUNTAIN BAND AND ELKO BAND,
Petitioners,

v.

UNITED STATES, WESTERN SHOSHONE NATIONAL COUNCIL AND TIMBISHA SHOSHONE TRIBE,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does Rule 60(b)(4) of the Rules of the United States Court of Federal Claims ("RCFC"), providing for relief from a void judgment, require that it be raised within a "reasonable time", contrary to other Courts of Appeals' decisions construing the identical Fed.R.Civ.P. 60(b)(4) and holding that there is no timeliness requirement?

2. Can the Treaty of Ruby Valley be construed under RCFC 12(b)(6) as a matter of law to not confer treaty-recognized title, without regard to the established tenets for interpretation of Indian treaties?

3. Was the statutory "finality" bar of the Indian Claims Commission Act, §22, 25 U.S.C. §70u (1976), in effect after the termination of the Indian Claims Commission ("ICC") on September 30, 1978, such that it could then attach to an ICC judgment even though the conditions of the Statute had not been met at the time of the ICC's termination?

PARTIES TO THE PROCEEDING

The Petitioners in this case consist of Native American tribes, bands and groups, all of whom are part of the Western Shoshone nation, and include South Fork Band, Winnemucca Indian Colony, Dann Band, Te-Moak Tribe of Western Shoshone Indians, Battle Mountain Band and Elko Band. The Respondent is the United States, which is adverse to Petitioner. Also, named as Respondents in accordance with Rule 12.6 of the Supreme Court Rules is another group of Western Shoshone entities that were Appellants in the Court of Appeals, represented by separate counsel, which includes Western Shoshone National Council and Timbisha Shoshone Tribe. These additional Western Shoshone parties are not adverse to Petitioners.

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PETITION FOR A WRIT OF CERTIORARI

The South Fork Band, *et al.* respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The Opinion of the Court of Appeals (App. 1a-17a) is an unpublished disposition. The Opinion of the Court of Federal Claims granting the United States' motion to dismiss (App. 18a-41a) is reported at 73 Fed. Cl. 59.

JURISDICTION

The judgment of the Court of Appeals (App. 1a) was filed on May 22, 2008. This Court's jurisdiction rests on 28 U.S.C. §1254(1).

RULE AND TREATY INVOLVED

The Treaty with the Western Shoshone, 1863, 18 Stat. §689 (the "Treaty of Ruby Valley"), is set forth in the Appendix at 44a-48a.

This Petition concerns RCFC 60(b), which provides in its entirety as follows:

> **(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc.** On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from 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. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

STATEMENT OF THE CASE

This case involves a challenge to a judgment of the Indian Claims Commission as void for lack of due process, and the assertion of rights arising under an Indian treaty that have not before been litigated nor adjudicated. In affirming the Court of Federal Claims' dismissal of all claims brought by the South Fork Band *et al.* pursuant to RCFC 12(b), the Federal Circuit Court of Appeals has (i) construed RCFC 60(b)(4) concerning a void judgment in a manner that raises a direct conflict with the interpretation of other Courts of Appeals of the identical Fed.R.Civ.P. 60(b)(4); and (ii) effectively stripped the Treaty of Ruby Valley of all existing rights, duties and obligations, at the pleading stage of this case as a matter of law.

The Treaty of Ruby Valley established the boundaries of the Western Shoshone land, and as alleged by South Fork Band *et al.*, conferred the equivalent of fee title ownership of this land to the Western Shoshone. (App. 67a-68a, ¶¶ 19-23). It did so in ex-

change for certain privileges of use and access to the land set forth in the Treaty, including the protection of routes of travel, railway, telegraph and stage lines, and the right to establish ranching, mining and agricultural settlements. (App. 67a-69a, ¶¶ 19-27).

A petition was brought in 1951 by the Te-Moak Band of Western Shoshone Indians in the Indian Claims Commission ("ICC"). While this proceeding was still pending the Te-Moak Band terminated its counsel, the Barker Law Firm, which was not acting in accordance with its instructions and not seeking to further Western Shoshone interests. (App. 69a-70a, ¶¶ 29-33). The Bureau of Indian Affairs and the ICC rejected this discharge of counsel, and the law firm remained in the case against the will of the Te-Moak Band and other Western Shoshone entities, representing a de facto petitioner, the "Western Shoshone Identifiable Group".[1] (App. 70a-71a, ¶¶ 34, 35).

The ICC issued an Opinion finding that Western Shoshone aboriginal title had been extinguished to approximately 24 million acres of land. It ultimately awarded $26.1 million in compensation without prejudgment interest for the land and the value of minerals removed from the land, based on a taking

[1] The South Fork Band *et al.*'s Second Amended Complaint alleges that, upon information and belief, after the Te-Moak Band terminated the Barker Law Firm, this counsel nonetheless remained in the case purportedly representing the interests of the "Western Shoshone Identifiable Group" when, upon information and belief, these lawyers in fact had no representative, decision making client other than the Bureau of Indian Affairs. (App. 71a ¶ 35). In this manner, the case proceeded to judgment against the will of the Western Shoshone petitioners and contrary to the interests of the Western Shoshone people, resulting in a judgment that caused great damage to valuable treaty rights.

date of July 1, 1872. (App. 72a-73a,¶¶ 39-42). A judgment was subsequently issued in that amount, which was certified by the Court of Claims for payment on December 6, 1979 (the "ICC judgment"). At that time, the Indian Claims Commission had been dissolved, and the "finality" provision of the Indian Claims Commission Act ("ICCA"), §22, had been omitted and withdrawn from the United States Code. (App. 73a, ¶ 44). No report to Congress was made of the judgment pursuant to ICCA §22(a). (App. 74a, ¶ 45).

The Court of Appeals decided three issues in affirming the dismissal of all claims, and has thus denied the Western Shoshone any and all rights under the Treaty of Ruby Valley as a matter of law at the pleading stage. In dismissing the South Fork Band *et al.*'s claims under RCFC 60(b)(4), the Court of Appeals interpreted this Rule in conflict with the well-reasoned decisions of other Courts of Appeals. The Court of Appeals in this case dismissed the South Fork Band *et al.*'s claim to treaty title contrary to established tenets of treaty construction that render these claims particularly insusceptible to disposition as a matter of law on a motion to dismiss. Finally, in dismissing the South Fork Bank *et al.*'s other treaty based claims, the Court of Appeals applied the finality provision of § 22 of the ICCA without regard to whether this provision had survived the dissolution of the ICC.

1. Claims Alleged In This Action

The operative pleading of the South Fork Band *et al.* filed in the Court of Federal Claims is the Second Amended Complaint, which sets forth five claims for

relief.[2] Count I seeks a declaration that the ICC judgment is void pursuant to RCFC 60(b)(4). (App. 74a-76a). It is alleged that the ICC judgment was issued in an absence of due process, under circumstances which tainted the proceeding with a conflict of interest and left the interests of the Western Shoshone people unrepresented in the proceeding. (App. 69a-71a, 74a-75a, ¶¶ 29-35, 49-50).

Count II of the Second Amended Complaint is in the alternative to Count I, and seeks a declaration that the Western Shoshone are entitled to prejudgment interest on the award set forth in the ICC judgment. This claim is based upon the Western Shoshone's assertion of treaty title to the subject land under the Treaty of Ruby Valley, the taking of which would entitle the Western Shoshone to prejudgment interest under the Fifth Amendment. (App. 66a-69a, 76a, ¶¶ 12-28, 58-59). The pleading alleges treaty title, as follows:

> Under the Treaty of Ruby Valley, the Western Shoshone Nation granted the United States

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[2] The South Fork Band *et al.* originally filed their claims in the District Court for the District of Columbia. The District Court granted the United States' motion to transfer venue, splitting the claims and transferring those alleged under Quiet Title Act, 28 U.S.C. § 2409a, to the District of Nevada, and transferring all other claims, including those seeking relief from the ICC judgment and declaratory relief concerning rights under the Treaty of Ruby Valley, to the Court of Federal Claims. *See Western Shoshone National Council v. United States*, 357 F.Supp. 2d 172 (D.D.C. 2004). The claims under the Quiet Title Act transferred to the District of Nevada were subsequently dismissed by that Court and the dismissal was affirmed on appeal. The claims under the Quiet Title Act are now the subject of a separate Petition for Writ of Certiorari pending at case no. 08-100.

> certain privileges for use of and access to the land described in the Treaty and, in exchange, the United States recognized Western Shoshone ownership of the land which under U.S. law equates to statutory or fee title.

(App. 68a, ¶ 23).

It is further alleged that the issue of treaty title was never actually litigated in the ICC, and no judgment or order was ever issued deciding whether the Treaty of Ruby Valley conferred treaty title. (App. 70a-73a, ¶¶ 31-38, 43). Rather, the ICC litigated the extinguishment of aboriginal title to approximately 24 million acres of land, as of the stipulated date of July 1, 1872. (App. 70a-71a, ¶¶ 31, 33, 34, 36, 37). The Treaty of Ruby Valley, which was proclaimed just a few years prior to that stipulated date, delineated 60 million acres of land within the Western Shoshone's boundaries. (App. 66a-67a, ¶¶ 16, 19). The ICC did not consider nor adjudicate treaty title to this land, nor aboriginal title outside the 24 million acre tract addressed in the ICC case. (App. 71a-72a, ¶ 38).

Counts III-V of the Second Amended Complaint assert other rights under the Treaty of Ruby Valley, including a right to royalties and for breach of fiduciary duties. (App. 77a-80a, ¶ 65-81).

2. Court of Federal Claims Proceeding

The Court of Federal Claims dismissed all Counts of the South Fork Band *et al.*'s pleading. It first dismissed the Count I claim for relief from a void judgment under RCFC 60(b)(4), holding that such a claim must be brought within a "reasonable time":

> While other circuits may reject time limits for Fed.R.Civ.P. 60(b), the Court of Claims made

> plain that motions challenging ICC procedures filed under Ct.Cl. Rule 152(b) (now RCFC 60(b)) must be filed within a reasonable time. *E.g. Pueblo of Santo Domingo v. United States*, 647 F.2d 1087, 1089 (Ct.Cl.1981). This determination is binding upon this Court. As the Federal Circuit made clear, "[t]here can be no question that the Court of Federal Claims is required to follow the precedent of the Supreme Court, our court, and our predecessor court, the Court of Claims." *Coltec Indus., Inc. v. United States*, 454 F.3d 1340, 1353 (Fed.Cir. 2006) (citations omitted); *see also Strickland v. United States*, 423 F.3d 1335, 1338 & n.3 (Fed. Cir. 2005). Therefore, to be timely, this motion must be filed within a reasonable time. In this case, the Court of Claims affirmed the ICC judgment in 1979. *Temoak Band of Western Shoshone Indian, Nev. v. United States*, 593 F.2d 994 (Ct. Cl. 1979). Further, it appears that all of the procedural defects alleged by the South Fork Band took place before that date. Assuming that this Court could base its reasonableness determination on the district court complaint filed in September 2003, Plaintiffs would have to show that the 24 year delay was reasonable. They have failed to do so.

(App. 24a). The Court thus acknowledged the conflict with other Circuits in imposing a "reasonable time" requirement under RCFC 60(b)(4), and thereby giving life to an allegedly void judgment.[3]

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[3] The Court of Federal Claims continued in *dicta* to hold that even if the claim were filed timely, it should be dismissed for failure to state a claim under RCFC 12(b)(6). In this regard, the Court found as a matter of law that the South Fork Band *et al.*

The Court of Federal Claims dismissed Count II, holding that the Western Shoshone were not conferred treaty title under the Treaty of Ruby Valley. Count III for royalties under the Treaty of Ruby Valley was dismissed as barred under the finality provision of ICCA § 22. The Court of Federal Claims dismissed the Count IV claim for an accounting for lack of subject matter jurisdiction, despite the argument that this claim was ancillary to the claims in Count III and V for money damages. The Court further held that this claim fell along with its decision to dismiss Counts III and V. The Court dismissed Count V based on the generally applicable statue of limitations, 28 U.S.C. § 2501.[4]

3. The Federal Circuit Court of Appeals Decision

The Federal Circuit affirmed the dismissal of all Counts of the South Fork Band *et al.*'s Second Amended Complaint, on three grounds. First, it agreed with the Court of Federal Claims that a claim under RCFC 60(b)(4) attacking a judgment as void must be brought within a "reasonable time", and that this action did not satisfy that timeliness requirement. (App. 9a-11a). Second, it held that "[b]ecause

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had failed to present "any evidence that would show a grave miscarriage of justice. . . ." (App. 28a). The South Fork Band *et al.* challenged this ruling on appeal, noting that Rule 12(b)(6) is not the place for evidentiary determinations. The Federal Circuit Court of Appeals expressly did not reach this issue on the basis of its holding that Count I was untimely under RCFC 60(b)(4). (App. 12a).

[4] The Federal Circuit, in contrast, held that Counts III through V all failed under the ICCA finality provision, § 22, 25 U.S.C. § 70u (1976), and did not address any other grounds for dismissal.

the Treaty of Ruby Valley did not recognize that the Western Shoshone held fee title in the disputed territory, this Court agrees with the Court of Federal Claims that Count II fails to state a claim under RCFC 12(b)(6)." (App. 15a). The Federal Circuit Court of Appeals thus construed the Treaty as a matter of law against the Western Shoshone to reject treaty title. Third, the Court of Appeals held that Counts III-IV, asserting other rights under the Treaty of Ruby Valley, all fail under the finality provision of the ICCA. The Federal Circuit thus held that any rights the Western Shoshone may assert under the Treaty of Ruby Valley were extinguished as a result of the ICC judgment or nonexistent as a matter of law. (App. 15a-17a).

4. Basis for Federal Jurisdiction

The Court of Federal Claims had jurisdiction over this matter because the claims at issue arose under the Tucker Act, 28 U.S.C. § 1491(a)(1). This is a civil action for money damages and ancillary relief brought by Indian tribes, bands and individuals, and arises under the Constitution, treaty with the United States, and federal law. In particular, the claims alleged in the Court of Federal Claims touch upon the validity of a judgment issued in a federal proceeding and affect rights under the Treaty of Ruby Valley of 1863 between the United States and the Western Shoshone.

REASONS FOR GRANTING THE PETITION

This case raises issues of great importance that have not been addressed by this Court.

First, the Federal Circuit Court of Appeals held that a request for relief declaring a judgment void

under RCFC 60(b)(4) must be brought within a reasonable time. This creates a direct conflict with the decisions of other Courts of Appeals interpreting the identical Fed.R.Civ.P. 60(b)(4), which have held that there is no time limit to declaring a judgment void.

Second, the Court of Appeals has rendered an interpretation of the Treaty of Ruby Valley as a matter of law at the pleading stage that adversely affects substantial rights claimed under the Treaty. The Treaty rights asserted in the pleading in this case have not before been litigated or adjudicated, particularly the issue of "treaty" title under the Treaty of Ruby Valley. Treaty rights have the force of statute as well as of contract. *See Menominee Indian Tribe of Wisconsin v. Thompson*, 161 F.3d 449, 457 (7th Cir. 1998) ("treaties between the United States and Indian tribes are congressional acts akin to statutes"). This matter is thus one of great importance, critical to the quality of life and well being of the Western Shoshone people.

Third, the Court of Appeals has denied the Western Shoshone' rights under the Treaty of Ruby Valley, including royalties arising from the exercise of mineral rights, on the basis of a statutory "finality" provision, ICCA §22, which was no longer in effect at the time it was supposedly triggered by the U.S. Court of Claims' certification of the ICC judgment on December 6, 1979. This decision raises issues concerning the interpretation and effect of the congressional act directed at the dissolution of the Indian Claims Commission in 1976, which have not before been decided by this Court. For the same reasons, given the impact of those provisions on

substantial treaty rights, this is a matter of great importance.

Given that the three issues decided in this case by the Court of Appeals either give rise to a direct conflict with other Courts of Appeals on an important matter, or concern matters of substantial rights under the Treaty of Ruby Valley that have not previously been decided by this Court, the time is now ripe for this Court to address and settle these issues.

I. THE COURT OF APPEALS' DECISION LIMITING RULE 60(b)(4) IS IN CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEALS

RCFC 60(b) provides in relevant part as follows:

> 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: . . . (4) the judgment is void; . . . The motion shall be made within a reasonable time, . . .

Subpart (4) of Rule 60(b) has been set apart and distinguished by the federal courts from the other grounds for relief under Rule 60(b).[5] *New York Life Ins. Co. v. Brown*, 84 F.3d 137, 142-143 (5th Cir. 1996). It is necessarily treated specially because of the meaning and effect of a void judgment, which must be considered a nullity:

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[5] RCFC 60(b)(4) is for present purposes identical to Fed.R. Civ.P. 60(b)(4). *See Patton v. Secretary of the DHHS*, 25 F.3d 1021, 1024 n. 4 (Fed. Cir. 1994) ("RCFC 60 is a virtual duplicate of the Fed.R.Civ.P. 60").

> Rule 60(b)(4) allows district courts to "relieve a party . . . from a final judgment" because the judgment is void. We typically review district court orders denying Rule 60(b) relief for abuse of discretion. *CJC Holdings, Inc. v. Wright & Lato, Inc.*, 979 F.2d 60, 63 (5th Cir. 1992). ***"When, however, the motion is based on a void judgment under rule 60(b)(4), the district court has no discretion—the judgment is either void or it is not."*** *Recreational Prop, Inc. v. Southwest Mortgage Serv. Corp.*, 804 F. 2d 311, 313 (5th Cir. 1986); 11 Charles Alan Wright, Arthur R. Miller and Mary Kay Kane, *Federal Practice and Procedure* § 2862 (2d ed. 1995). ***"[T]here is no time limit on an attack on a judgment as void.*** The one-year limit applicable to some Rule 60(b) motions is expressly inapplicable, and even the requirement that the motion be made within a 'reasonable time, 'which seems literally to apply to motions under Rule 60(b)(4), cannot be enforced with regard to this class of motion." *Briley v. Hidalgo*, 981 F. 2d 246, 249 (5th Cir. 1993) (quoting 11 Charles Alan Wright, Arthur R. Miller and May Kay Kane. *Federal Practice and Procedure* § 2862 (1973)).

New York Life, 84 F.3d at 142-43 (emphasis supplied). *Accord Carter v. Fenner*, 136 F.3d 1000, 1006 (5th Cir. 1998); *Orner v. Shalala*, 30 F.3d 1307, 1310 (10th Cir. 1994); *Austin v. Smith*, 312 F.2d 337, 343-44 (D.C. Cir. 1962) ("[u]nder subsection (4) above, the only question for the court is whether the judgment is void; if it is, relief from it should be granted"); *see also Ruddies v. Auburn Sports Plug Co.*, 261 F. Supp. 648 (S.D.N.Y 1966) ("a void judgment can acquire no validity because of laches on the part of one who applies for relief from it").

In other words, a valid, enforceable judg
cannot spring from a void judgment. The passa
time cannot affect such a judgment. The case
setting forth this interpretation of Rule 60(b)(
well grounded in logic and policy. It is a l
standing principle of the federal courts under l
(60)(b). *See e.g. Crosby v. The Broadstreet Co.*,
F.2d 483, 485 (2d Cir.), *cert. denied*, 83 S.Ct. 1
(1963) (granting relief from 30 year old judgmen
void under Rule 60(b)(4) on grounds that it is a p
restraint of speech in violation of the First Ame
ment); *Austin*, 312 F.2d at 343 (declaring judgm
void after four years); *see also* Wright & Miller,
Fed. Prac. & Proc. 2d §2862 (2008) (citing authorit
for principles that the Court has no discretion w
regard to relief under Rule 60(b)(4) and that there
no time limit in seeking such relief).

Despite this authority, the Federal Circuit Court
Appeals and Court of Federal Claims in this ca
held that a request for relief under Rule 60(b)(
must be made within a "reasonable time". Th
based this decision on *Pueblo of Santo Domingo*
United States, 647 F.2d 1087 (Ct. Cl. 1981).
Pueblo, the Court of Claims denied relief under Ru
60(b) to an Indian tribe from a stipulation entered
an ICC proceeding. It is not at all clear from th
Court's opinion in *Pueblo* that the application fo
relief before the Court was based on Rule 60(b)(4
and indeed, it may very well have been based on Rul
60(b)(1) ("mistake, inadvertence, surprise, excusabl
neglect") or 60(b)(3) ("fraud, misrepresentation, o
other misconduct of an adverse party"). Nonetheless
the relief sought in the present case is clearly unde
Rule 60(b)(4), and the Federal Circuit's decisio
holding that *Pueblo* is controlling and imposes a
"reasonable time" requirement under Rule 60(b)(4

relief is squarely at odds with the established decisions in other Courts of Appeals which reject a time limitation under Rule 60(b)(4).

The Court of Appeals in this case noted that, in the absence of decision on the issue by the Supreme Court, it was bound by the precedent of the Court of Claims. (App. 10a-11a). *See First Hartford Corp. Pension Plan & Trust v. United States*, 194 F.3d 1279, 1290 n.3 (Fed. Cir. 1999) ("[w]e recognize that both we and the Court of Federal Claims are bound by the decisions of the Court of Claims, this Court's predecessor Court"); *Coltec Indus., Inc. v. United States*, 454 F.3d 1340, 1353 (Fed.Cir. 2006) ("[t]here can be no question that the Court of Federal Claims is required to follow the precedent of the Supreme Court, our Court and our predecessor court, the Court of Claims"). The Court of Appeals in this case further rejected the interpretation of Rule 60(b)(4) rendered by other Courts of Appeals imposing no time limit, noting that "[t]his Court detects nothing in the record or arguments in this case that compel departure from the rule and guidance in *Pueblo of Santo Domingo*." (App. 11a). This issue of whether a "reasonable time" limit should be imposed on a request for relief under Rule 60(b)(4) has not before been addressed by the Supreme Court, and as a result of the Federal Circuit Court of Appeals' decision, there is now a direct conflict among the Courts of Appeals that is ripe for this Court's review.

In *Pueblo of Santo Domingo*, the Court of Claims supported its decision to impose a timeliness requirement by noting that "[t]ime is now of the essence since Congress has expressed its desire that the special Indian claims litigation be wound up by having terminated the operations of the ICC in

1978." 647 F.2d at 1089. The Federal Circuit Cour of Appeals in this case quotes this language i imposing a timeliness requirement on the Weste Shoshone under Rule 60(b)(4). (App. 10a). Yet i should not be a matter of debate that Rule 60(b)(4) i a rule of neutral application. It applies to all partie litigating in the federal courts equally. It should n be interpreted more narrowly, nor more harshl against Indian parties.[6] Accordingly, the Feder Circuit Court of Appeal's decision to deviate fro the logic and policy established in other Courts Appeals in interpreting Rule 60(b)(4), by seeming crafting the rule to deny a constitutional right sp cifically to Indian parties, warrants this Court attention and review.

Rule 60(b)(4) is properly invoked in this case challenge a judgment on grounds of due process law. A judgment is void where the issuing cou acted in a manner inconsistent with due proce *Bridgham by Libby v. Secretary of Dep't of Heal and Human Services*, 33 Fed. Cl. 101, 107 (199 The South Fork Band *et al.* claims in this case th the ICC's judgment lacked due process of law becau the Bureau of Indian Affairs and the ICC prevent the petitioners in that proceeding from terminati their counsel during the case. That counsel p ceeded to judgment, against the wishes and intere of the petitioners and the Western Shoshone peo representing a fictional entity, the "Western S shone Identifiable Group". As a result, the p ceeding was therefore tainted, raising serious qu

[6] Additionally, the interest of expediency is not a legitir basis to validate a judgment that should otherwise be decl void for lack of due process.

tions of conflict of interest and due process. (App. 70a-71a, ¶¶ 33-35).

Specifically, the Barker Law Firm, counsel of record in the ICC proceeding for the petitioning Te-Moak Band,[7] was not acting in accordance with its clients instructions by continuing to pursue a claim that the Western Shoshone land was taken by the United States and aboriginal title to the land at issue extinguished.[8] (App. 70a, ¶ 33). The Te-Moak Band terminated the Barker Law Firm and filed a notice of discharge of counsel with the ICC that was not recognized by the ICC. The Bureau of Indian Affairs refused to accept this discharge and renewed the contract of the Barker Law Firm to represent the Western Shoshone. (App. 70a-71a, ¶¶ 33, 34). The United States and the ICC, adversely to the Western Shoshone, thus forced attorneys upon the Western Shoshone who continued at that point to proceed in the case contrary to the express wishes and interests of the Western Shoshone, and upon information and belief, had no representative, decision-making client other than the Bureau of Indian Affairs. (App. 70a-71a, ¶¶ 33-35). In this manner, the proceeding plowed forward in the ICC to judgment, which was superficially in the Petitioners' favor but caused great

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[7] The Petitioner in the ICC Proceedings, docket no. 326, is identified as the "Te-Moak Band of Western Shoshone Indians, Nevada, suing on behalf of the Western Bands of the Shoshone Nation of Indians." *Shoshone Tribe of Indians v. United States*, 11 Ind. Cl. Comm. 387, 418 (1962).

[8] As alleged in the South Fork Band et al.'s Second Amended Complaint, the claim of extinguishment was inconsistent with the Western Shoshone people's use and occupancy of the land. (App. 68a, ¶ 22).

damage to their rights and interests in land under the Treaty of Ruby Valley.

The problem of counsel for an Indian tribe seeking a judgment in the ICC against the will and interests of its petitioning client was endemic to the representation of Indian tribes in the ICC, and was particularly egregious in this instance. In essence, it was in the interests of the tribe's attorneys and the United States to have a judgment extinguishing title as of a historic date, yet such a judgment was typically contrary to the interests of the tribe. Judge Nichols of the Court of Claims explained the serious nature of this problem of conflict of interest when attorneys purportedly representing a tribe act, as the Barker Law Firm did here, without regard to the extinguishment of title to the tribe's lands to the ultimate detriment of their client:

> Unfortunately the machinery of the Indian Claims Commission Act is such as to generate conflicts of interest. One of many such situations is the one asserted here, i.e., the attorney's interest, but not the tribe's is to effect a judicial sale, as it were, of tribal land at values of some historic past date, not of the present, to be set by the Commission, whether or not the Indians may in reality ever have had their title extinguished except by the ICC proceeding itself.
>
> * * *
>
> One conflict long tacitly ignored in ICC cases is that the counsel's interest on the usual contingent fee basis turns only on the amount of award to be extracted from defendant; yet the tribe's interest is not only in the amount of the award, but also in minimizing what land title or

> claim thereto it has to give up, which may be substantial.

Pueblo of Santo Domingo, 647 F.2d 1090-91 (Nichols, J. dissenting).

The pleading in this case challenges on due process grounds the proceedings that resulted in the ICC judgment. The facts alleged present serious and flagrant due process violations. Whether the Western Shoshone petitioners had been accorded due process in the ICC has not before been litigated, and the issue is one of great importance which should be reached on its merits.[9]

II. IN INTERPRETING THE TREATY OF RUBY VALLEY AS A MATTER OF LAW AGAINST THE WESTERN SHOSHONE, THE COURT OF APPEALS DECIDED AN IMPORTANT QUESTION THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

The operative pleading in this case alleges facts demonstrating that the Treaty of Ruby Valley conferred recognized title, also known as treaty title, on the Western Shoshone. (App. 65a-69a). "Treaty"

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[9] Attempts were made in the 1970's to avoid issuance of the ICC judgment through a motion to intervene by a Western Shoshone entity not recognized by the United States, and by motion to stay brought by the Te-Moak Band. (App. 5a). *See Western Shoshone Legal Def. & Educ. Ass'n v. United States*, 35 Ind. Cl. Comm. 457 (1975), *aff'd* 531 F.2d 495 (Ct. Cl.), *cert. denied*, 429 U.S. 885 (1976); *Te-Moak Band of Western Shoshone Indians v. United States*, 593 F.2d 994 (Ct. Cl. 1979). The instant case, however, is the first attempt to challenge the ICC proceeding and judgment on due process grounds pursuant to Rule 60(b)(4).

title connotes a traditional and common understanding of title, *i.e.* fee title.[10] *Miami Tribe of Oklahoma v. United States*, 146 Ct. Cl. 421, 175 F. Supp. 926 (Ct. Cl. 1959). "'Treaty-recognized title' is a term that refers to Congressional recognition of a tribe's right permanently to occupy land. It constitutes a legal interest in the land and, therefore, could be extinguished only upon the payment of compensation." *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voight*, 700 F.2d 341 (7th Cir. 1983) (citing *United States v. Sioux Nation of Indians*, 448 U.S. 371, 415 n. 29 (1980)).

Whether the Treaty of Ruby Valley confers treaty title is generally a question of fact, not subject to dismissal at the pleading stage pursuant to Rule 12(b)(6). This is due to the unique nature of Indian treaties, which give rise to special rules of interpretation. "A treaty, including one between the United States and an Indian tribe, is essentially a contract between two sovereign nations." *State of Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 675 (1979). Treaties are accorded special rules of contract interpretation: "[T]reaties are to be interpreted liberally in favor of the Indians, . . . and treaty ambiguities to be resolved in their favor." *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 194 (1999). In *State of Washington*, this Court elaborated on this rule of liberal interpretation:

> Accordingly, it is the intention of the parties, and not solely that of the superior side, that must

[10] Treaty title should be distinguished from aboriginal title, which is not a property interest, but instead a possessory interest not recognized as ownership by Congress. *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 279 (1955).

> control any attempt to interpret the treaties. When Indians are involved, this Court has long given special meaning to this rule. It has held that the United States, as the party with the presumptively superior negotiating skills and superior knowledge of the language in which the treaty is recorded, has a responsibility to avoid taking advantage of the other side. "[T]he treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indian." *Jones v. Meehan*, 175 U.S. 1, 11, 20 S.Ct. 1, 5, 44 L.Ed. 49.

Id. 443 U.S. at 675-76. Consistent with this reasoning, "[c]ourts have uniformly held that treaties must be liberally construed in favor of establishing Indian rights." *United States v. State of Washington*, 135 F.3d 618, 630 (9th Cir. 1998). How the Indians may have understood the treaty can be discovered from "the history of the treaty, the negotiations that preceded it, and the practical construction given the treaty by the parties. In sum, the treaty is to be interpreted to attain the reasonable expectations of the Indians." *United States v. Top Sky*, 547 F.2d 486, 487 (9th Cir. 1976) (citations omitted). With regard to the issue of whether a treaty confers recognized title, there are no "magic" words or special language that would typically allow this issue to be decided on the basis of the treaty language alone. *Miami Tribe of Oklahoma v. United States*, 175 F. Supp. 926 (Ct. Cl. 1959) ("there exists no one particular form for such Congressional recognition or acknowledgment of a tribe's right to occupy permanently land and that right may be established in a variety of ways").

Contrary to these tenets of construction, the Federal Circuit Court of Appeals decided as a matter of law that the Treaty of Ruby Valley did not confer treaty title on two grounds: (1) a 1945 Supreme Court decision, *Northwestern Bands of Western Shoshone Indians v. United States*, 324 U.S. 335 (1945), which rejected a claim of aboriginal title under a different treaty, the Treaty of Box Elder, that is distinguishable from the Treaty of Ruby Valley; and (2) a finding that there is no language in the Treaty of Ruby Valley "that suggests that the Union intended to convey title to the Western Shoshone." (App. 14a).

In its analysis of these two grounds, the Court of Appeals in this case turns the construction of Indian treaties on its head, examining the Treaty from the viewpoint of the expectations of the United States, and effectively imposing a presumption against the Western Shoshone. In *Northwestern Bands*, a 5-4 decision, the Court determined that the Box Elder Treaty, 13 Stat. 663, did not confer aboriginal title. Among other distinctions between the Box Elder Treaty and the Treaty of Ruby Valley, the Box Elder Treaty contained an amendment which would seem to foreclose the recognition of title:

> 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 of Shoshone Indians v. United States, 95 Ct. Cl. 642 ¶ 17 (1942), *aff'd on other grounds*, 65 S. Ct. 690 (1945) (quoting amendment added to Box Elder and other treaties, but not to

Treaty of Ruby Valley). The Treaty of Ruby Valley did not contain the determinative language found in the Box Elder Treaty or anything comparable to it.[11] The Box Elder Treaty stated expressly that title was *not* conveyed in the land boundaries language of the treaty. It may be inferred with regard to the Treaty of Ruby Valley that based on the absence of this clause the intent was to convey recognized title to the described land.

The Court of Appeals in this case reads a reference to the Treaty of Ruby Valley in the *Northwestern Bands* opinion overbroadly as foreclosing a claim to treaty title. Yet in that case, the tribal parties were different, the treaty was different, and the issue before the Court, concerning aboriginal title rights, was different. The opinion in *Northwestern Bands* thus should not serve as a basis to short circuit the treaty interpretation analysis compelled under the precedent of this Court.[12]

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[11] The Court of Federal Claims relied upon *dicta* in the Supreme Court's *Northwestern Bands* opinion referencing the Government's treaties with other Shoshone Tribes, including the Treaty of Ruby Valley. 342 U.S. at 343. This dicta should not serve as the basis for a dismissal as a matter of law on the issue of recognized title.

[12] The Court of Appeals found, solely on the basis of the *Northwestern Bands* opinion, that the "United States actions after adopting the Treaty are inconsistent with an interpretation that the Treaty of Ruby Valley conveyed title." (App. 14a). Approaching the interpretation of the Treaty from the viewpoint of the United States, as the Court of Appeals did here, is contrary to the basic tenets of treaty construction. Additionally, there is nothing to indicate that the United States was not simply acting in accordance with the various privileges provided by the Western Shoshone in the land under the express terms of the Treaty.

In *Crow Tribe of Indians v. United States*, 151 Ct. Cl. 281, 284 F.2d 361 (1960), the Court held that the Treaty of Fort Laramie of 1851, 11 Stat. 749, conferred recognized title on the plaintiff tribe where the language setting forth boundaries was comparable, if not weaker, than the language in the Treaty of Ruby Valley. *Id.* at 363-364. The Court's determination was based, in substantial part, on the tribe's agreement to cease attacks on settlers traversing its territory and to take responsibility for such acts:

> It is true that the language of the Treaty is not the technical language of recognition of title. Nevertheless, we think that the participation of the United States in a treaty wherein the various Indian tribes describe and recognize each others' territories is, under the circumstances surrounding this treaty, and in light of one of the overriding purposes to be served by the treaty, i.e., securing free passage for emigrants across the Indians' lands by making particular tribes responsible for the maintenance of order in their particular areas, a recognition by the United States of the Indians' title to the areas for which they are to be held responsible, and which are described as 'their respective territories.'

Id. at 363 (internal quotations and citations omitted).

The United States entered into the Treaty of Ruby Valley for the same rationale of securing free passage to the western frontier. The Western Shoshone agreed in the Treaty to cease hostilities "within their country", and assured the protection of the traveling settlers "without molestation or injury from them." (App. 44a). Article 5 of the Treaty of Ruby Valley specifically describes over 60 million acres of land

"claimed and occupied" by the Western Shoshone. As alleged in the South Fork Band *et al.*'s pleadings, in exchange for the recognition of this land base by the United States, the Western Shoshone nation gave the United States the right to mine and otherwise exploit the Western Shoshone land. (App. 45a, Arts. 3 and 4). This includes the Western Shoshone's agreement to protect routes of travel, railway, telegraph and stage lines through the described Western Shoshone land, and the right to establish ranching, mining and agricultural settlements on this land. (App. 44a-45a, Arts. 2-4; App. 67a-69a, ¶¶ 19-27). The language of the Treaty is, at worst, ambiguous on whether the Treaty confers recognized title. As a result, resort is necessary to the tenets of treaty interpretation, and the issue is not amenable to disposition on a Rule 12(b)(6) motion to dismiss.[13] The Court of Appeals in this case disregarded the basic tenets of treaty construction in dismissing the claim to treaty title. This issue of whether the Treaty of Ruby Valley confers treaty title has not been raised before, nor addressed by this Court in *Northwestern Bands* or any other decision. Yet it is an important question of federal law, having an enormous impact on the rights of the Western Shoshone people. The issue should accordingly be settled by this Court.

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[13] This is also demonstrated by the fact that a government official at one time acknowledged that the Treaty of Ruby Valley conferred recognized title. (App. 81a, November 1975 Memo of William L. Benjamin, Director's Office of Trust Responsibilities for the BIA, included in record in both Court of Federal Claims and Federal Circuit).

III. WHETHER THE "FINALITY" PROVISION OF THE ICCA, § 22, REMAINED IN EFFECT TO FIRST ATTACH TO A JUDGMENT AFTER THE ICC WAS DISSOLVED EFFECTIVE SEPTEMBER 30, 1978, IS AN ISSUE OF GREAT IMPORTANCE WHICH SHOULD BE SETTLED BY THIS COURT

The Court of Appeals in this case decided as a matter of law that the "finality" provision of the ICCA, §22, 25 U.S.C. §70u (1976), barred a claim for royalties, as well as any other assertion of rights under the Treaty of Ruby Valley, by virtue of the ICC judgment.[14] This "finality" provision states as follows:

> (a) . . . The payment of any claim, after its determination in accordance with this Act, shall be a full discharge of the United States of all claims and demands touching any of the matters involved in the controversy.
>
> (b) A final determination against a claimant made and reported in accordance with this Act shall forever bar any further claim or demand against the United States arising out of the matter involved in the controversy.

25 U.S.C. § 70u (1976) (App. 54a). The statutory bar provided by § 22 is substantially broader than that provided by the common law doctrines of res judicata and collateral estoppel, which typically govern the

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[14] The Court of Appeals' decision is premised on the validity of the ICC judgment and assumes that all Western Shoshone rights in land were extinguished as of 1872, pursuant to its decision affirming dismissal of Counts I and II. (App. 15a-16a).

effect of a prior judgment.[15] As a result, the issue of whether the bar of § 22 is operative in this case substantially affects the analysis of rights available to the Western Shoshone under the Treaty of Ruby Valley.

Congress in 1976 legislated the termination of the ICC to be effective on September 30, 1978. Toward this end, Congress expressly provided for the transition of pending claims from the ICC to the Court of Claims, and in doing so showed no intent to retain the discharge provision of Section 22. (App. 55a-64a). At that time, Congress amended § 23 of the ICCA as follows:

> Sec. 23. The existence of the Commission shall terminate at the end of fiscal year 1978 on September 30, 1978, or at such earlier time as the Commission shall have made its final report to the Congress on all claims filed with it. . . . ***Jurisdiction is hereby conferred upon the Court of Claims to adjudicate all such cases under the provisions of section 2 of the Indian Claims Commission Act:*** Provided, that section 2 of said Act shall not apply to any cases filed originally in the Court of Claims under section 1505 of title 28, United States Code. Upon dissolution of the Commission, all

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[15] The Court of Appeals in this case held that ICCA §22 was jurisdictional, in that it limited the Government's waiver of sovereign immunity. (App. 16a). The doctrines of res judicata and collateral estoppel, in contrast, are not jurisdictional; it is the defendant's burden under these doctrines to establish preclusion, and reasonable doubts are to be resolved in favor of the plaintiff. *Braniff Airways, Inc. v. Memphis-Shelby County Airport Authority*, 783 F.2d 1283, 1289 (5th Cir. 1986); *Kauffman v. Moss*, 420 F.2d 1270, 1274 (3d Cir. 1970).

> pending cases including those on appeal shall be transferred to the Court of Claims for adjudication on the same basis as those authorized to be transferred by this section.

P.L. 94-465, 90 Stat. 1990. (App. 55a-56a). (emphasis supplied).

While the ICCA's jurisdictional provision, section 2, was retained for the Court of Claims, other provisions of the ICCA were not. In this regard, Congress made an apparent decision that various provisions of the ICCA were moot and had no application once the ICC had been dissolved and remaining claims were transferred to the Court of Claims. For example, those provisions relating to Commission proceedings and rules were withdrawn and omitted. *E.g.*, 28 U.S.C. § 70c (staff and oath of commission); § 70f (time of commission meetings); § 70g (record of proceedings); § 70h (rules of procedure); § 70p (hearings). (*See* App. 58a-64a, historical and statutory notes to omitted 25 U.S.C. §§ 70 *et seq.*). Among these terminated provisions was the discharge provision, ICCA § 22, 25 U.S.C. § 70u (1976).

It should therefore be inferred that by transferring jurisdiction of the remaining ICC proceedings to the Court of Claims and omitting Section 22, among other mooted provisions, Congress intended to subject these proceedings to the same legal rules and doctrines—including those of res judicata and collateral estoppel—applicable in litigation generally in the Court of Claims. In other words, Congress determined that discharge by report to Congress and payment under Section 22 was part and parcel of the ICCA, and was no longer necessary or appropriate once the ICC had been terminated and proceedings were conducted by the Court of Claims in accordance

with its own rules and established principles of law. As to the ICC judgment in the Western Shoshone proceeding, the Court of Claims certified the award for payment on December 6, 1979, well after the September 30, 1978 termination date of the ICC, and apparently no report was ever made to Congress as required under § 22(a). *See United States v. Dann*, 470 U.S. 39, 105 S. Ct. 1058, 1061 (1985) (date award certified for payment); App. 74a, ¶ 45 (alleging that no report to Congress was ever made on the ICC judgment as required by ICCA § 22). The proceedings in the Court of Claims after September, 1978 in the Western Shoshone case are consistent with the inapplicability and nonexistence of ICCA § 22. As a result, the discharge bar of ICC § 22, 25 U.S.C. § 70u (1976), should not be applied to the claims made under the Treaty of Ruby Valley in this case.

The Court of Appeals in this case did not address the question of whether ICCA § 22 was in effect after September 30, 1978, when the proceeding continued in the Court of Claims. The Court of Federal Claims, in deciding that ICCA § 22 was in effect at the relevant time, held that "[i]n terminating the ICC, Congress modified two provisions; it did not repeal any. Pub.L. 94-465, 90 Stat. 1990. Instead, the ICCA has been omitted from the U.S. Code after the termination of the ICC." (App. 36a). However, if Congress had intended that not just Section 2 of the ICCA, which is expressly mentioned, but other provisions applicable to proceedings in the ICC carried over to proceedings in the Court of Claims, it could have easily stated so. (*See* App. 55a-57a, P.L. 94-465, 90 Stat. 1990). It did not. *Cf. Custis v. United States*, 511 U.S. 485, 492 (1994) (omission of language in statute indicative of Congress's intent).

The Court of Federal Claims also relied on *United States v. Dann*, 470 U.S. 39 (1985), which decided the narrow question of when "payment" occurs under ICCA § 22(a). 470 U.S. at 40-41. It held that the appropriation of funds into a Treasury account constituted "payment" under § 22(a). *Id.* The Court in *Dann*, however, did *not* consider the issue of whether § 22 was applicable to a "payment" made after the effective date of the termination of the ICC on September 30, 1978.[16]

Accordingly, the question of whether the broad statutory bar of ICCA §22, 25 U.S.C. §70u (1976), was effective at the relevant time, after proceedings were transferred to the Court of Claims and the ICC dissolved, is one of great importance to the Western Shoshone that has not been, but should be, settled by this Court.

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[16] The issue of whether ICCA §22 was effective at the time of "payment" was apparently not argued in the Supreme Court, and not considered by the Court. The Court of Appeals in this case also cites to *United States v. Dann*, 873 F.2d 1189, 1200 (9th Cir. 1989), and *Western Shoshone National Council v. Molini*, 951 F.2d 200, 203 (9th Cir. 1991), as applying the bar of §22 to claims made under the Treaty of Ruby Valley. As in the case of the Supreme Court's Opinion in *Dann*, however, the issue of whether the ICC judgment triggered § 22—given that payment was not made until after the termination of the ICC and no report to Congress was made as required by § 22—was not addressed and not considered. It is a question of first impression raised in this case.

CONCLUSION

Petitioners, the South Fork Band *et al.* respectfully request that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

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