No. 01185

In The

Supreme Court of the United States

SPIRIT LAKE TRIBE,

Petitioner,

v.

STATE OF NORTH DAKOTA, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

15 Stat. 505 ratifies a treaty with an Indian Tribe and delimits the land which Congress asserted federal ownership of in trust for the Tribe. In 1971, a federal employee accepted a quitclaim deed to a portion of the land which 15 Stat. 505 claimed in trust for the Tribe (under the interpretation of 15 Stat. 505 which the parties concede applies based upon the posture of this case).

1. Where Congress claims federal ownership in trust and a federal employee asserts federal ownership in fee, is the federal employee's assertion a federal "claim to land" for purposes of the statute of limitations contained in the Quiet Title Act, 28 U.S.C. § 2409a(g)?

2. If the federal employee's act does constitute a claim for purposes of the Quiet Title Act, can a federal associate solicitor abandon the federal employee's unlawful claim and reclaim the land in trust?

3. Where a District Court grants a defendant's motion for summary judgment on a jurisdictional issue and does not resolve disputed issues of fact, does the Court of Appeals have authority to resolve disputed issues of fact against plaintiff?

PARTIES TO THE PROCEEDING

Petitioner is the Spirit Lake Tribe. At the time this litigation was initiated, the Tribe was known as the Devils Lake Tribe.

Respondents are the State of North Dakota, the Garrison Diversion Conservancy District, the United States of America, 101 Ranch, Ruth Ward, Ralph Ward, Steve A. Ward, Imogene Christensen, Claire Engelhardt, Reginald Herman, Eileen Herman, Arnold Yri, Vernyll Yri, Clifford M. Johnson, Melvin Diehl, Dustin King, the Estate of Mabel Solheim, the Estate of Minnie Johnston, Francis Schneider, and Gloria Schneider.

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PETITION FOR A WRIT OF CERTIORARI

The Spirit Lake Tribe respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

There are three reported and one unreported decisions in this matter. The District Court opinion is in an unreported decision entered on January 24, 2000 App. B. The judgment of the Court of Appeals from which the Tribe petitions for a writ of certiorari is based upon an opinion reported at 262 F.3d 732 (Aug. 17, 2001), App. A (*hereinafter Spirit Lake Tribe*), *reh'g denied,* (November 12, 2001), App. D.

The above opinions were from proceedings after remand of *Devils Lake Sioux Tribe v. State of North Dakota,* 917 F.2d 1049 (8th Cir. 1990). App. C. That opinion reversed *Devils Lake Sioux Tribe v. State of North Dakota,* 714 F.Supp. 1019 (D.N.D. 1989).

JURISDICTION

The judgment of the Court of Appeals was entered on August 17, 2001. A timely filed petition for rehearing was denied on November 12, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. § 2154(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution states:

> All legislative Powers herein granted shall be vested in a Congress of the United States which shall consist of a Senate and House of Representatives.

U.S. Const. Art. I, § 1.

> The Congress shall have Power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

U.S. Const. Art. I, § 8, Cl. 3.

> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.

U.S. Const. Art. IV, § 3, Cl. 2.

The Quiet Title Act's Statute of Limitations states:

> Any civil action under this section shall be barred unless it is commenced within twelve years of the date upon which it accrued. Such action shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States.

28 U.S.C. § 2409a(g).

The Treaty between the United States and the Tribe defines the boundaries of the land which the United States owns in trust for the Spirit Lake Tribe as:

> Beginning at the most easterly point of Devil's Lake; thence along the waters of said lake to the most westerly point of the same; thence on a direct line to the nearest point on the Cheyenne River; thence down said river to a point opposite the lower end of Aspen Island, and thence on a direct line to the place of beginning.

15 Stat. 505.

STATEMENT OF THE CASE

The Spirit Lake Tribe, formerly known as the Devils Lake Sioux Tribe, is one of two divisions of the Sisseton and Wahpeton Bands of the Sioux Nation. Long before North Dakota was admitted to the Union, the United States recognized that the Sisseton and Wahpeton Bands owned and occupied an area of several million acres in what is now eastern North Dakota.

In a Treaty dated February 19, 1867, the United States acquired all of the land of the Sisseton and Wahpeton Tribes. Most of that land was placed in the public domain, but the United States took possession of two tracts of land in trust for the Bands. Congress approved the Treaty, and the President signed the Treaty into law.[1]

[1] The Court of Appeals misunderstood the effect of the 1867 Treaty. The Court of Appeals stated that under the treaty, the "Tribe received vast lands in the Dakotas and Minnesota." *Spirit Lake Tribe* at 736. The Tribe did not receive that land in the Treaty, because the Tribe already had aboriginal title to that land. *See, e.g., Idaho v. United States*, 533 U.S. 262,___ n.5. The Treaty transferred title of that land to the United States, upon

15 Stat. 505. The Reservation described in the 1867 Treaty has been preserved as "the permanent homeland of the [Spirit Lake] Tribe." Act of Jan. 12, 1983, P.L. 97-459, 96 Stat. 2515.

Article IV of the 1867 Treaty described the boundaries of the Spirit Lake Tribe's current Reservation, as follows:

> Beginning at the most easterly point of Devil's Lake; thence *along the waters of said lake* to the most westerly point of the same; thence on a direct line to the nearest point on the Cheyenne River; thence down said river to a point opposite the lower end of Aspen Island, and thence on a direct line to the place of beginning.

The emphasized phrase of Article IV of the Treaty is patently ambiguous: it could mean that the northern boundary of the Reservation runs along the northern edge of the lake, on a line across the lake, or along the southern edge of the lake. *Spirit Lake Tribe* at 736; *Devils Lake Sioux Tribe* at 1051.

For many years, the State of North Dakota and the Tribe have disagreed regarding whether Congress claimed ownership in trust of the lakebed when it

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the United States Congress' solemn promise to hold the lakebed and other lands in trust for the Tribe.

This misunderstanding permeates the Court of Appeals incorrect legal analysis. By failing to realize that, as all parties agreed, the United States owned the lakebed, the Court of Appeals failed to even discuss the issue which it actually needed to decide: before 1974, did the Tribe have notice that the United States was claiming that its ownership was in *fee* rather than in *trust* for the Tribe.

enacted 15 Stat. 505, or whether the State took ownership of the lakebed under the equal footing doctrine.[2] In 1971, the State of North Dakota sold its disputed claim to 62,000 acres of the lakebed to the United States, and the State provided the United States with a quitclaim deed to that land, App. F.

In 1976, the Associate Solicitor for Indian Affairs in the Department of the Interior, in a thoroughly considered memorandum, stated that "the United States holds title to the lakebed in trust for the Devils Lake Sioux Tribe." App. E. In 1981 the United States "withdrew support from its 1976 opinion that had recognized the Tribe's beneficial ownership of the lakebed," *Devils Lake Sioux Tribe* at 1054. On June 9, 1986, the Tribe filed this lawsuit to confirm its title to the lakebed.

In the District Court below, the Tribe alleged jurisdiction based on 28 U.S.C. § 1331 (general federal question), 28 U.S.C. § 1362 (federal question asserted by an Indian Tribe), and 28 U.S.C. § 2409a (Quiet Title Act), and the United States asserted that it was immune from suit because the suit was not filed within twelve years of the United States acceptance of the State's quitclaim.

In *Devils Lake Sioux Tribe*, the District Court dismissed the Tribe's complaint, but the Court of Appeals overturned the dismissal and remanded the case. On remand, the District Court bifurcated the trial on the remaining

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[2] Unlike this Court's recent decision in *Idaho v. United States*, 533 U.S. 262, the present case does not involve complex issues regarding whether the congressional expression of its intent preceded statehood. The congressional act at issue was in 1867, over twenty years before North Dakota became a state.

threshold issues from the trial on the merits of the case. The case was stayed for several years while the parties unsuccessfully attempted to negotiate a resolution.

On January 24, 2000, the District Court granted the United States motion for summary judgment on the jurisdictional defense that the United States was immune because suit was not filed within twelve years of accrual. In its grant of summary judgment on that jurisdictional issue, the District Court explicitly stated that it was applying the standard summary judgment burden of proof. *Spirit Lake Tribe v. North Dakota*, Memorandum and Order, (D.N.D. January 24, 2000), Slip op. at 3-4.

The record before the District Court did not contain any evidence that the Tribe learned of the 1971 quitclaim deed before June 9, 1974 and the Tribe denied that it had such knowledge. Further, the quitclaim deed, App. F, does not state that the United States was claiming the land in fee rather than in trust for the Tribe, and the Tribe's position was that, even if it had known of the quitclaim, the deed could not have provided notice that the United States was claiming the land in fee in violation of 15 Stat. 505. Because it was deciding the case under the summary judgment standards, the District Court did not attempt to resolve disputed issues of fact, and it did not even mention the 1971 quitclaim deed, and it therefore did not issue findings of fact regarding that deed.

Nevertheless, and, over a vigorous dissent, the Court of Appeals resolved factual disputes against the Tribe (as discussed in detail in section III of the discussion of law, infra). The Court found that, the evidence "convinces us" that, before June 9, 1974, the Tribe knew or should have

known that, through acceptance of the quitclaim deed to the lakebed, a federal officer was claiming federal ownership of the lakebed. *Spirit Lake Tribe* at 739. Because it misunderstood the effect of the Treaty, *see* n. 1, *supra*, the Court of Appeals did not resolve the separate issue of whether notice of the quitclaim would constitute notice that the federal employee was claiming ownership in fee in violation of the Treaty. The Court then held as a matter of law that, for purposes of the Quiet Title Act's statute of limitations, the federal officer's claim trumped Congress' notice that the United States claimed the land in trust for the Tribe.

DISCUSSION OF LAW

I. This Court should review the Court of Appeals' decision that, even though Congress, via a federal statute, claimed land on behalf of the United States, a federal employee's acceptance of a quitclaim deed to that land constitutes a contrary claim to that same land for purposes of triggering the QTA statute of limitations.

There are two well-established lines of cases from this Court which are brought into tension by the facts of this case. The line of cases which the Tribe relied upon below establishes that, because Congress has the sole constitutional authority to legislate on behalf of the United States, where Congress claims land on behalf of the United States via a duly enacted federal statute, a federal executive branch officer cannot disclaim Congress' claim to the land. Congress' claim is the only federal claim to such land.

The Court below relied upon a different line of cases which holds that, where there is *not* a congressional claim regarding that same land, a federal executive branch officer's acts can constitute a claim to land for purposes of the QTA statute of limitations

While it appears plainly obvious to petitioner that the former line of cases applies in the present case, the Court of Appeals did not agree, and it barred the Tribe's suit, which asserted that Congress claimed ownership of Devils Lake in trust for the Spirit Lake Tribe.

There is no ruling from this Court which directly resolves which line of cases should apply, and this Court should accept review of this case and resolve the uncertainty in this important area of federal constitutional and statutory law.

A. The Constitution prohibits federal executive branch officials from disclaiming the United States ownership of Devils Lake in trust for the Devils Lake Sioux Tribe.

The United States Constitution states:

> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.

U.S. Const. Art. IV, § 3, Cl. 2.

This Court has described Congress' power under Art. IV, § 3, Cl. 2 in the broadest terms possible:

> We have said that the constitutional power of Congress in this respect is without limitation.

> *United States v. City and County of San Francisco*, 310 U.S. 16, 29, 30 [1940]. Thus neither the courts, nor the executive agencies, could proceed contrary to an Act of Congress in this congressional area of national power.

United States v. California, 332 U.S. 19, 27 (1947). *See also, Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985) (Congress must specifically authorize the taking of Indian trust land); *Kleppe v. New Mexico*, 426 U.S. 529 (1976) (reaffirming and applying *U.S. v. San Francisco's* holding regarding the Property Clause); *United States v. Sante Fe Pac. R. Co.*, 314 U.S. 339 (1941); *United States v. Oregon*, 295 U.S. 1, 27 (1935) ("The laws of the United States alone control the disposition of title to its lands."); *State v. Fitzgerald*, 40 U.S. (15 Peters) 407, 421 (1841) ("No appropriation of public land can be made for any purpose, but by authority of congress.")

Under this broad constitutional authority, where Congress passes a statute claiming land for the United States, only Congress can abandon the federal claim. *United States v. California*, 332 U.S. at 40; *Royal Indem. Co. v. United States*, 313 U.S. 289, 294 (1941); *Warren v. United States*, 234 F.3d 1331 (D.C.Cir. 2000). This rule of law is a specific application of the rule that Congress is the supreme legislative authority in this country, U.S. Const. Art. I, § 1, and that a federal statute is valid until superceded by a contrary federal statute.

The United States Constitution prohibits federal executive branch officers from disclaiming the federal interest which Congress asserts through a validly enacted federal law.

> Power to release or otherwise dispose of the rights and property of the United States is lodged in the Congress by the Constitution. Art. IV, § 3, cl. 2. Subordinate officers of the United States are without power, save only as it has been conferred upon them by Act of Congress or is to be implied from other powers so granted. [Citation to eight Supreme Court cases omitted.]

Royal Indem. Co. v. United States, 313 U.S. at 294.

Applying these holdings to the facts of the present case, it is beyond dispute that Congress claimed the land at issue in trust for the Tribe. For purposes of the motion for summary judgment which is the basis of the appeal, it was *conceded* that, via 15 Stat. 505 Congress claimed ownership of the whole of Devils Lake in trust for the Tribe. United States Reply Memorandum in Support of Motion for Summary Judgment at 4 (Dist. Ct. Docket No. 150); U.S. Response Brief to Court of Appeals at 14 n.7.

That concession for purposes of summary judgment was required by the facts of this case. As noted above, the language adopted by Congress in 15 Stat. 505 is ambiguous. *Spirit Lake Tribe* at 736, *Devils Lake Sioux Tribe* at 1051. Resolution of this type of ambiguity in a Treaty with a Tribe would require a lengthy, fact-intensive inquiry into the negotiation of the treaty, the understanding of the Tribe at the time it entered into the Treaty, the uses which the Tribe made of the lake prior to the treaty, etc. *See, e.g., United States v. Idaho*, No. 94-328, slip op., *aff'd*, 210 F.3d 1067 (9th Cir. 2000), *aff'd*, 533 U.S. 262 (2001) (District Court conducted nine day trial to determine congressional intent regarding ownership of a lakebed).

The facts related to all or most of the relevant factual inquires are in dispute.[3]

If the Court of Appeals had applied the line of cases interpreting Art. IV, § 3, Cl. 2 of the United States Constitution, it would have started its analysis with the congressional claim of trust ownership of the land. The Court of Appeals would then have determined if there was any subsequent *congressionally approved* grant of the lakebed to the State or *congressionally approved* claim of federal ownership in fee.

There was no congressionally approved claim of federal fee ownership in fee. To the contrary, in 1983, Congress specifically reaffirmed that the Reservation which it claimed in trust for the Tribe via the Treaty remains "the permanent homeland of the [Spirit Lake] Tribe." Act of Jan. 12, 1983, P.L. 97-459, 96 Stat. 2515. The only federal claim regarding the lakebed (for purposes of the QTA statute of limitations or for any other purpose) was Congress' claim that the United States owned the lakebed in trust for the Tribe.

While this Court has not answered the issue presented in the present case, in a case last term, this Court applied an analysis similar to that discussed above when it determined that the United States owned Lake Coeur d'Alene in trust for an Indian Tribe. *Idaho v. United States*, 533 U.S. 262 (2001) (both the majority and the dissent

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[3] Because, as conceded, the scope of Congress' ownership claim cannot be determined on summary judgment, the Tribe's position is that the merits of this case (i.e. the meaning of the facially ambiguous treaty) is inextricably intertwined with whether the twelve year statute of limitations has expired.

agree that, if Congress claimed a lakebed in trust for the Tribe, only Congress could disclaim that interest).[4] *See also, U.S. v. California* (Court first determined that United States owned land. The Court then held that, because U.S. claim was valid, non-congressional actors could not disclaim federal interest). Under *Idaho v. U.S., U.S. v. California,* and *Royal Indem. Co.*, the only way that the State of North Dakota could have obtained the lakebed (and then subsequently transferred the lakebed to the United States) would have been through federal statute. There has been no such statute.

In its briefs to the Court of Appeals, the Tribe challenged the United States or the State of North Dakota to find even one case in which Congress enacted a property boundary, but activities by federal officers were deemed superior to the notice, by Congress, of the extent of the federal claim. The United States and the State were unable to find any such case, and the Court of Appeals did not cite any such case, because there is no such case.

[4] This Court's decision in *Idaho v. United States* was entered after oral argument before the Court of Appeals in the captioned matter, but before the Court of Appeals issued its decision. Although the Tribe brought *Idaho v. United States* to the Court of Appeals' attention pursuant to Fed. R. App. Proc. 28(j), the Court of Appeals did not cite or apply this Court's decision in *Idaho v. United States* to the facts of the present case.

B. In cases where there is not a contrary claim to land made by Congress, this Court has held that, for purposes of the QTA statute of limitations, a federal executive branch officer can claim land on behalf of the United States.

Rather than apply the constitutional limitation on executive branch authority discussed above, the Court of Appeals majority held that, through *non-congressional* action, employees of the United States claimed that the United States acquired the lakebed in fee. The non-congressional action which the Court of Appeals majority relied upon was the United States acceptance of a quit-claim deed, by which the State transferred to the United States the State's disputed claim to ownership of 62,000 acres of the lakebed.[5] The Court held that this non-congressional action triggered the start of the twelve year statute of limitations contained in 28 U.S.C. § 2409a. That statute states:

> Any civil action under this section shall be barred unless it is commenced within twelve years of the date upon which it accrued. Such action shall be deemed to have accrued on the date the plaintiff or his predecessor in interest

[5] As Judge Bright's dissenting opinion below states, the *Spirit Lake Tribe* majority opinion did not even address the Tribe's argument that Congress' notice of the federal claim was superior to any claim by federal employees. Without even addressing the Tribe's primary argument that Congress' notice is supreme, the majority devoted most of its opinion to the more complex, secondary issue of whether the United States abandoned that alleged non-congressional claim to all or part of the lakebed.

> knew or should have known of the claim of the United States.

28 U.S.C. § 2409a(g).

In applying that statute of limitations, this Court and the Courts of Appeals have held that, where the claim is not contrary to a federal statute, a federal employee's actions can constitute a claim to land for purposes of the Quiet Title Act. *See, e.g., U.S. v. Mottaz*, 476 U.S. 834 (1986) (Plaintiff's claim was barred because, more than twelve years before suit was filed, Plaintiff knew or should have known that United States Forest Service had purchased her interest in land.)

Although this Court and the Courts of Appeals have barred suits based upon federal employees' claims, on behalf of the United States, that the United States owns a parcel of land, this Court has *never* permitted a federal employee to claim land on behalf of the United States when that claim is contrary to a boundary which Congress itself has established.

C. This Court should resolve the tension between its cases under the quiet title act statute of limitations and its cases holding that only Congress can disclaim a federal interest in land.

By relying on *Mottaz*, (and applying that holding to the facts it improperly found on review of a motion for summary judgment on a jurisdictional issue[6]) the Court of Appeals placed the power of federal employees over

[6] Section III of this petition discusses the Appellate Court's holding that it can resolve disputed issues of material fact against the non-moving party.

the power granted to Congress in Art. IV, § 3, Cl. 2 of the United States Constitution. This Court has never permitted this extremely dubious grant of power to federal employees, and the decision appears to directly contradict this Court's holding that subordinate officers of the United States cannot disclaim land which Congress has claimed. This Court should issue a writ of certiorari and determine whether a federal officer can claim land in fee when Congress has already explicitly claimed that land in trust on behalf of the United States.

II. The Court of Appeals majority opinion directly conflicts with the decisions of the Ninth Circuit in *Michel v. U. S.*, 65 F.3d 130 (9th Cir. 1995) and *Shultz v. Department of Army*, 886 F.2d 1157 (9th Cir. 1989) and with the decision of the District of Columbia Circuit in *Warren v. United States*, 234 F.3d 1331 (D.C. Cir. 2000).

The Court of Appeals for the Ninth Circuit, in two separate cases, held that, where a federal officer makes a claim to land for purposes of the QTA statute of limitations, the United States, through a federal officer, can abandon that claim. *Michel v. United States*, 65 F.3d 130 (9th Cir. 1995); *Shultz v. Department of Army*, 886 F.2d 1157 (9th Cir. 1989). In *Shultz*, the Ninth Circuit held:

> The statute of limitations provision in the Quiet Title Act cannot reasonably be read to imply that if the government has once asserted a claim to property, twelve years later any quiet title action is forever barred. If the government has apparently abandoned any claim it once asserted, and then it reasserts a claim, the later

> assertion is a *new claim* and the statute of limitations for an action on that claim accrues when it is asserted.
>
> . . .
>
> If Shultz's predecessors-in-interest had reasonable notice of the government's claim prior to 1974, the district court should determine if at some subsequent time Shultz or his predecessors *had reason to believe the government did not continue to claim an interest.* In that event, the present claim would have accrued when the government reasserted a claim.

Id. at 1161. (Emphasis added.)

The alleged federal abandonment of a claim at issue in *Shultz* was not based upon congressional action.

In *Michel v. U.S.*, the Ninth Circuit reaffirmed *Shultz*, reversing the District Court's dismissal of the complaint under FRCP 12(b). Similar to *Shultz*, the alleged disclaimer of the federal interest in *Michel* was not by congressional action. In fact, the disclaimer was made orally at a meeting between plaintiffs and a "government official." *Id.* at 133, 134.

Shultz and *Michel* are indistinguishable from the present case, and no other Circuit has directly addressed the issue of whether the Quiet Title Act's statute of limitations will begin to run anew after the United States appears to abandon a claim and then later reasserts the claim.

The Eighth Circuit Court of Appeals directly contradicts *Shultz* and *Michel*. In both *Shultz* and *Michel*, the Court held that, for purposes of the QTA, a federal officer

could abandon another federal officer's claim to the land.[7]

In contrast, in *Spirit Lake Tribe*, the Court cited the law discussed in section IA of this brief, and held that a federal attorney cannot abandon another federal officer's "claim to land". The Court of Appeals for the Eighth Circuit held that only Congress could abandon a federal officer's acts which put a landowner on notice of a federal claim to property. *Spirit Lake Tribe* at 740.

It is puzzling that the Court of Appeals did not apply the principle of law discussed in section IA of this petition to prohibit a federal employee from claiming land contrary to an act of Congress, but the Court then adopted a much more expansive interpretation of that same principle of law (and an interpretation more expansive than any this Court has issued) to prohibit a federal attorney from abandoning a federal employee's unlawful claim to land. *Cf. Warren v. United States*, 234 F.3d 1331 (D.C. Cir. 2000) (Congress claimed land on behalf of the United States. Therefore, for purposes of the QTA statute of limitations, only Congress could disclaim that statutory claim to land).

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[7] In addition to its rejection of *Shultz* and *Michel*, the Court of Appeals lists five other purported reasons for rejecting the Tribe's reliance on the Associate Solicitor's opinion. The Court's remaining reasons for rejecting the Associate Solicitor's opinion are based upon the Court's holding that it was not bound by the common burden of proof and standard of appellate review for a motion for summary judgment. That issue is discussed in section III of this petition.

The Court of Appeals decision contradicts itself, and, more importantly for current purposes, it is contrary to the only other circuits to have addressed the issues of law presented. The Tribe respectfully requests that this Court issue a writ of certiorari to resolve the conflict in the decisions between the Courts for the Eighth and Ninth Circuits, and to render a decision which applies an internally consistent interpretation of Art. IV, § 3, Cl. 2 of the United States Constitution.

III. There is a lack of clarity in the law and a divergence of opinion among the circuits regarding the scope of appellate review of a district court grant of a motion for summary judgment on a jurisdictional issue.

The present case raises the issue of whether the Court of Appeals' scope of review of an order granting summary judgment on a FRCP 12(b)(1) motion is identical to the appellate court's scope of review of the more common order of summary judgment on the merits. The Court below explicitly distinguished motions for summary judgment on the merits from motions for summary judgment on a jurisdictional issue. The Court then held that, when the District Court grants summary judgment on a jurisdictional issue (without receipt of the parties' evidence on disputed issues of material fact and without deciding those disputed issues), the Appellate Court has the authority to resolve disputed issues of facts on appeal. *Spirit Lake Tribe* at 744. This case therefore squarely presents the issue of whether the District Court and the parties have the authority to permit a motion for

summary judgment on a request for dismissal under Rule 12(b)(1).

A. With the agreement of the parties, the District Court held that it would determine if the United States jurisdictional defense could be resolved upon undisputed facts.

When a defendant files a motion to dismiss under FRCP 12(b)(1), the Court can set that motion for hearing or can order that consideration of the motion be deferred until trial. FRCP 12(d). The District Court's ability to defer the 12(b)(1) motion until trial is limited in cases, like the present case, where the 12(b)(1) motion raises a sovereign immunity defense. Where immunity is raised, the Court must resolve that FRCP 12(b)(1) issue at the earliest possible opportunity. *Harlow v. Fitzgerald*, 457 U.S. 800, 817-18 (1982). *Cf. Johnson v. Jones*, 515 U.S. 304 (1995) (holding that, where the merits of a qualified immunity defense were inextricably intertwined with the merits of the case, the court would not be able to resolve the immunity issue until it resolved the merits of the case in chief). The reason for this rule is that "the essence of . . . immunity is its possessor's entitlement not to have to answer for his conduct in a civil damages action." *Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985). *See also, Siegert v. Gilley*, 500 U.S. 226, 232 (1991).

Applying that law to the facts of the present case, the District Court had a duty to resolve the United States' sovereign immunity defense in an expeditious manner. The United States position was that its sovereign immunity would be least impinged upon if the Court would

attempt to resolve the jurisdictional defense without subjecting the United States to an evidentiary hearing. The United States claimed that an evidentiary hearing was not necessary because the *undisputed* facts established a lack of jurisdiction.

While FRCP 12(d) does not specifically permit summary judgment on a jurisdictional issue, the procedure adopted by the parties and the Court was well-suited to the facts of this case. It is also analogous to the procedures which Courts apply to resolve claims on the merits. For a claim on the merits, the Court can rule on the claim on the pleadings (Fed. R. Civ. Proc 12(b)(6)), on the undisputed facts (Fed. R. Civ. Proc. 56), or after trial.

B. The Appellate Court reviewed the District Court's decision as if the District Court had determined the jurisdictional issue on the merits.

Although the parties adopted a procedure which is not prohibited by the federal rules, the Court of Appeals, post hoc, converted the United States' motion for summary judgment on the jurisdictional issue to a motion on the merits of the jurisdictional issue. The Court held that "the Tribe is not entitled to the benefit of every favorable inference because, strictly speaking, we are not reviewing the propriety of summary judgment." *Spirit Lake Tribe* at 744.

The Circuit Court majority was wrong: it was reviewing an order based upon a motion for summary judgment. *Spirit Lake Tribe v. North Dakota*, Memorandum and Order, (D.N.D. January 24, 2000) at 17 ("It is ordered that the United States Motion for Summary Judgment (Dkt. 116) is granted and that a judgment of dismissal be entered as to all named defendants in the plaintiff's complaint."); Docket Entry 116 ("Defendant United States of America, by its attorneys, hereby moves for summary judgment and dismissal of this action" on jurisdictional grounds.). *See also, Spirit Lake Tribe v. North Dakota, Memorandum and Order, passim* (District Court repeatedly stated and demonstrated that it was not resolving disputed issues of material fact.)

The State's and the United States' briefs to the Court of Appeals explicitly acknowledged that the standard summary judgment burden of proof and summary judgment standard of review applied to this appeal. Brief of State of North Dakota and Garrison Diversion Conservancy District at 28, 29, 33-34; Answering Brief for the United States at 14, 27 n.13, 42-44; Supplemental Brief for the United States at 17 n.5.

C. This Court has not ruled upon the issue of law presented herein, and the Courts of Appeals have reached divergent positions on this important issue of law.

The Court of Appeals' holding that the District Court and the parties cannot agree to attempt to resolve a jurisdiction dispute on undisputed facts is not contrary to any direct holding of this Court. But it is contrary to the explicit rationale for this Court's decisions in *Harlow*, *Siegert*, and *Mitchell*. Those cases are premised on the rule that a claim of sovereign immunity should be resolved in a manner which, while insuring plaintiff's right to due process of law, also resolves the immunity claim with the

least possible impingement on the claimed immunity. By hearing the United States' motion claiming that the case could be resolved on the undisputed facts, without subjecting the United States to a lengthy evidentiary hearing, the District Court did exactly what *Harlow* suggested should be done.[8]

The Eighth Circuit's decision is squarely in conflict with the repeated and explicit holding of the Fifth Circuit that:

> A motion to dismiss for lack of jurisdiction may be decided by the district court on one of three bases: the complaint alone, the complaint supplemented by undisputed facts evidenced in the record, or the complaint supplemented by undisputed facts plus the court's resolution of disputed facts. . . . [Where the Court dismisses based upon the complaint and the undisputed facts,] our review is limited to determining whether the district court's application of the law is correct and whether the facts are indeed undisputed.

Ynclan v. Department of Air Force, 943 F.2d 1388, 1390 (5th Cir. 1991). This holding has been consistently repeated by the Fifth Circuit for at least twenty years. *See, e.g., Bank One Texas v. U.S.*, 157 F.3d 397, 403 (5th Cir. 1998); *Barrera-Montenegro v. United States*, 74 F.3d 657, 659 (5th Cir. 1996); *Poindexter v. U.S.*, 777 F.2d 231, 235-236 (5th Cir. 1985); *Williamson v. Tucker*, 645 F.2d 404 (5th Cir. 1981), *cert. denied*, 454 U.S. 897 (1981).

[8] As discussed above, the evidentiary hearing on the jurisdiction issue which the United States was seeking to avoid via its summary judgment request would have involved complex and substantial factual issues. Further, if this case could not be resolved on undisputed facts, resolution of the disputed jurisdictional facts would appear to be intertwined with the merits of the case and so would have required a full trial of the case. *Johnson v. Jones, supra.*

The Court of Appeals for the District of Columbia has adopted the same standard. *Herbert v. National Academy of Sciences*, 974 F.2d 192, 197 (D.C. Cir. 1992); *Hohri v. U.S.*, 782 F.2d 227 (D.C. Cir. 1986), *vacated on other grounds*, 482 U.S. 64 (1987).

Just like disputes on the merits, disputes regarding jurisdiction could be resolved on the pleadings alone, on the pleadings supplemented by undisputed facts, or on the pleadings supplemented by the Court's resolution of disputed facts. Unlike the Eighth Circuit, discussed *supra*, or the Tenth Circuit, discussed *infra*, the Fifth and District of Columbia Circuits permit the District Courts to have discretion to resolve jurisdictional disputes on any of these three bases. Permitting the District Court that discretion is implicitly in FRCP 12(d). The District of Columbia and Fifth Circuits then apply the scope of review which matches the scope of inquiry which the District Court chose.

Although their holdings are less explicit, the Second and Sixth Circuits, apply a rule similar to that in the Fifth and District of Columbia Circuits. *Zappia Middle East Const. Co. Ltd. v. Emirate of Abu Dhabi*, 215 F.3d 247, 249 (2nd Cir. 2000); *RMI Titanium Co. v. Westinghouse Elec. Corp.*, 78 F.3d 1125 (6th Cir. 1996).

The Tenth Circuit has taken a position even more at odds with the Eighth Circuit. It limits the District Court's discretion by requiring that jurisdiction fact disputes can

only be resolved by an evidentiary hearing. *Wenz v. Memery Crystal*, 55 F.3d 1503, 1505 (10th Cir. 1995). The Ninth Circuit adopts a similar, but not identical approach. In that Circuit, the Court resolves any disputed jurisdictional facts against the party that moved to dismiss. *Dreier v. U.S.*, 106 F.3d 844 (9th Cir. 1996).

The conflicting positions of the Circuits is in need of resolution by this Court.

D. Had the Court of Appeals properly applied the summary judgment scope of review to the facts of this case, it would have reinstated the Tribe's claim that the United States owns the lakebed in trust for the Tribe.

The Court of Appeals' opinion is obviously dependant upon its contention that, on review of a motion for summary judgment on a jurisdictional issue, the Appellate Court does not need to abide by the summary judgment scope of review. *See, Spirit Lake Tribe* at 738-39 (without proof, majority assumes that the Tribe must have known of the 1971 quitclaim deed. The Court states "we have no doubt" and that the evidence "convinces us" that the Tribe knew or should have known of the deed); *Id.* at 738-39 (Contrary to reasonable inferences, the majority held that the quitclaim provided notice that the United States was violating its solemn treaty obligations to the Tribe by claiming the lakebed in fee. The quitclaim deed, App. F, transferred whatever interest the State had in a portion of the lakebed to the United States, but the deed did not specify whether the United States took the land in fee or in trust. More important, the quitclaim was

consistent with the United States' trust obligations because it benefitted the Tribe: it eliminated any potential state claim of ownership, and it furthered the Garrison project); *Spirit Lake Tribe* at 744 (1981 memo stated that the 1976 memo should "*no longer* be relied upon as stating the position of this Department on the ownership of the lakebed." The reasonable inference is that, prior to 1981, the 1976 memo had been relied upon and should have been relied upon. The majority explicitly held it did not have to apply that reasonable inference in favor of Tribe.); *Id.* at 744 (Even though the Court of Appeals previously *held* that a reasonable inference from the 1976 memo was that the United States acknowledged that it owned the lakebed in trust for the Tribe, *Devils Lake Sioux Tribe v. North Dakota*, 917 F.2d 1049, 1052-53 (8th Cir. 1990), the *Spirit Lake Tribe* Court refused to apply that reasonable inference.); *Id.* at 742-43 (Reasonable inference from fact that the Associate Solicitor issued his 1976 letter is that he had authority to issue the letter. Even though the Court admitted that no document showed whether or not the Associate Solicitor had authority or authorization to issue his opinion, the Court concluded that he did not have authorization to issue the letter.); *Id.* at 741 (The Court of Appeals further held, contrary to reasonable inferences, that, even though record does not show that Associate Solicitor informed Tribe that his 1976 letter was without effect, he must have informed Tribe of this "fact" in 1978.[9]); *Id.* at 742-43 (The Court states that one reason to

[9] Not only does this portion of the Court of Appeal's opinion fail to draw reasonable inferences in favor of the Tribe, it also contains an obvious logical error. The Court held that, when the Associate Solicitor began work for the Tribe in 1978,

reject the Associate Solitor's opinion is that "the evidence in the case *suggests* that the government never took an affirmative act consistent with" the Associate Solicitor's opinion. The evidence and reasonable inferences therefrom are directly to the contrary. The government asserted the Associate Solicitor's opinion in subsequent litigation against the State of North Dakota, *Devils Lake Sioux Tribe* at 1053 n.6, and the reasonable inference from facts is that the Tribe and the United States relied upon the 1976 opinion when they settled an Indian Claims Commission suit. *Id.* at 1056).

As these and other reasonable inferences from the facts show, if the Court of Appeals had limited its scope of review to that commonly applicable to summary judgment motions, the Court would have reversed the District Court's grant of summary judgment on the jurisdictional issue.

Although the federal rules do not specifically authorize a motion for summary judgment in an attempt to avoid a lengthy evidentiary hearing on a jurisdictional issue, this Court should accept review and adopt the Fifth Circuits's well-reasoned and well-established holdings that if the District Court resolves a jurisdictional dispute on purportedly undisputed facts, the Court of Appeals must apply the scope of review applicable to all other summary judgment decisions.

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he must have informed the Tribe that he lacked authority to issue the 1976 letter. Even assuming that the Associate Solicitor told the Tribe that his 1976 opinion was issued without effect, the Tribe's case was filed less than twelve years after that alleged notice would have been provided.

CONCLUSION

For all of the reasons stated above, the Spirit Lake Tribe respectfully requests that this Court issue a writ of certiorari to review the important issues of law presented in this petition.

Respectfully submitted,

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