No. 03___

IN THE

Supreme Court of the United States

CALVERT TURLEY, DELORES TURLEY, JOSEPH WHANN, NANCY WHANN, GREGORY GATES, DEBORAH GATES, and ROBERT THWEATT,

Petitioners,

v.

DANIEL EDDY, JR., RUSSELL WELSH, SONIA STONE, HERMAN "TJ" LAFFOON, SONIA CHAVEZ, DOREEN WELSH, VALERIE WELSH-TAHBO, DENNIS PATCH, and CRAIG CHUTE,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether, when considering Indian tribal officials' sovereign immunity defense, courts must first determine the scope of tribal sovereignty.

Whether, when Indian tribal officials assert sovereign immunity as a defense to litigation challenging the lawfulness of their actions asserting reservation jurisdiction over lands which are (1) outside of the legislated boundaries of the tribe's reservation and (2) precluded by statute from having reservation status, courts must first determine the scope of tribal sovereignty.

Whether courts can apply the "Indian lands exception" to the Quiet Title Act, 28 U.S.C. § 2409a without first determining that the litigation involves "trust or restricted Indian lands."

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STATEMENT OF JURISDICTION

The court of appeals entered its judgment on July 16, 2003. Rehearing was denied on August 25, 2003. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const. Art. IV, § 3, cl. 2 [Property Clause]

> 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. I, § 8, cl.3 [Commerce Clause]

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

U.S. Const. Amend. V [Takings Clause]

> ...nor shall private property be taken for public use, without just compensation.

Quiet Title Act, 28 U.S.C. § 2409a (App. at 18a)

> (a) The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights. This section does not apply to trust or restricted Indian lands....

California Indian Reservation Act of April 8, 1864, 13 Stat. 39 (App. at 19a-22a)

> ... there shall be set apart by the President, and at his discretion, not exceeding four tracts of land, within the limits of said state, to be retained by the United States for the purposes of Indian reservations....

Colorado River Reservation Act of March 3, 1865, 13 Stat. 541, 559 (App. at 23a-24a)

> *Indian Service in the Territory of Arizona*.... All of that part of the public domain in the Territory of Arizona, lying west of a direct line from Half-Way Bend to Corner Rock on the Colorado River, containing about seventy-five thousand acres of land, shall be set apart for an Indian reservation for the Indians of said river and its tributaries.

Act of April 30, 1964, 78 Stat. 188 (Sections 2(b) and 5) (App. at 25a-27a)

I. STATEMENT OF THE CASE

A. Introduction.

At the outset it is important to recognize that petitioners do not question the established principle of Indian tribal sovereign immunity. Indeed, petitioners readily acknowledge that when tribal immunity applies, it is virtually absolute.

This case raises the related, but clearly distinct, issue of the courts' obligation to inquire as to the scope of tribal immunity when the applicability of the doctrine itself is at issue.

Petitioners challenge actions of officials and representatives of the Colorado River Indian Tribes ("Tribe"), a federally recognized Indian tribe occupying the Colorado River Reservation in Arizona. The ultimate issue is whether respondents are lawfully asserting reservation jurisdiction over lands on the western bank of the Colorado River within California (the "West Bank Lands") and outside the boundaries of the Tribe's reservation.

The courts below dismissed the case on sovereign immunity grounds without inquiry as to the scope of tribal sovereignty. In other words, they concluded that the doctrine of tribal immunity bars petitioners' suit because respondents are tribal officials representing the Tribe. In making that determination, the courts did not first examine the nature of the challenged actions to ascertain whether they are protected, ignoring the fundamental principle that actions beyond the scope of tribal sovereignty are not.

Each of the petitioners owns or occupies a residence on the West Bank Lands. In 2000 and 2001, respondents began aggressively asserting reservation status and tribal ownership of, and jurisdiction over, the West Bank Lands. These actions culminated in the issuance of tribal notices that petitioners should vacate their residences and tribal confiscation of personal property of some of the petitioners. The petitioners sought judicial review in

the district court to determine whether the respondents are acting beyond the legislated scope of the Tribe's sovereignty and to enjoin activities beyond that scope.

The legal foundation for this challenge is in two federal statutes: the California Indian Reservation Act of April 8, 1864, 13 Stat. 39 ("1864 Act"), and the Colorado River Reservation Act of March 3, 1865, 13 Stat. 541, 559 ("1865 Act"). The first limited the number of Indian reservations which could be established within California to no more than four. The second established the Tribe's reservation within what today is the State of Arizona without legislating an exception to the 1864 Act so as to legalize the Tribe's claim to reservation land in California.

The West Bank Lands are not held by the Secretary of the Interior in trust for the Tribe. Rather, they are public domain.

The implications of this case are enormous and far-reaching, since the Tribe is asserting – and the Bureau of Indian Affairs is not contesting – that it can stake a claim to public domain land and unilaterally incorporate that land into an expanded reservation despite statutory prohibitions to such an acquisition. If the respondents can ignore statutes specifically prohibiting their actions here, then officials of other tribes are free to undertake similar actions without pursuing the statutory and regulatory requirements for acquiring lands in trust and then having them taken into reservation status. Congress has imposed limits on tribal land acquisition and reservation proclamation, and the courts must be willing to enforce them. The courts below have not done so.

In defense to petitioners' action against the tribal officials and representatives who are implementing the Tribe's reservation expansion, the respondents have asserted below that the courts must dismiss litigation against tribal officials without even considering the scope of tribal sovereignty – arguing that the Tribe is an indispensable party under Fed. R. Civ. P. 19, necessitating

dismissal since tribal sovereign immunity protects it from suit. The respondents have further asserted that the courts cannot consider the scope of tribal sovereignty in assessing the nature of land in dispute since the United States also is an indispensable party which cannot be sued because of the "Indian lands" exception to the Quiet Title Act, 28 U.S.C. § 2409a, even though the West Bank Lands are neither in trust status nor reservation lands as a matter of law.

Thus, the defense of tribal immunity has been invoked to bar judicial review of whether that defense even applies to the dispute as a matter of federal statute. Congress has plenary power over such matters and has enacted two laws dealing with this specific situation. By summarily dismissing petitioners' claims, the courts below have ignored those laws as well as decisions of this Court. Unless this Court considers and decides the matter, petitioners are left with no redress and officials of other tribes have a theoretical license to unilaterally expand their reservations without accountability.

B. Procedural History.

The district court granted the respondents' motion to dismiss, citing the indispensability of the Tribe and its immunity from suit because of tribal sovereignty (App. 11a-15a) and the indispensability of the United States and its immunity from suit under the Indian lands exception to the Quiet Title Act (App14a-15a).

The court did not assess the scope of tribal sovereignty in applying the doctrine of tribal sovereign immunity. Without even examining whether the West Bank Lands are in trust, the district court erroneously concluded, "The same analysis requires the Court to hold that the United States, which holds the West Bank Lands in trust for the Tribe, is also a necessary and indispensable party." (App. 14a.) Nor did the court assess whether the West Bank Lands are Indian lands under the Quiet Title Act. Rather, it assumed that the lands were in trust despite statements of this Court

and materials in the record to the contrary, and ruled that the United States is both indispensable and immune from suit (App. 14a-15a).

The Ninth Circuit summarily affirmed the district court without oral argument, repeating the findings of the Tribe's and United States' indispensability and without initially determining the scope of tribal sovereignty or the status of the West Bank Lands as "Indian lands." In fact, the court simply stated, "Indian trust lands are at stake" (App. 2a.) and applied the exception to the Quiet Title Act. Further, relying on two decisions of this Court in the Colorado River water rights adjudication in which the specific limitations of tribal sovereignty in the 1864 and 1865 Acts apparently were never raised and the reservation issue not decided,[1] the court found the Tribe to be indispensable. (App. 2a-3a.)

The Ninth Circuit subsequently denied the petition for rehearing and suggestion for rehearing en banc (App. 16a-17a).

II. REASONS FOR GRANTING THE WRIT

Scope of Tribal Sovereignty.

These issues are critical to the overall assessment and legitimate application of tribal immunity and claims to land status when non-Indian property rights are at stake. It is clear that tribal sovereign immunity precludes suits against tribes and that the United States cannot be sued when Indian lands are at issue. However, it also is clear that tribal officials cannot go beyond the scope of tribal sovereignty in acting on behalf of their tribes, and the courts must first determine that sovereignty extends to their actions before ruling that litigation can or cannot proceed. This was not done here, and the petitioners are being forced out of their homes and seeing their property confiscated as a result.

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[1] *Arizona v. California*, 460 U.S. 605, 629-31 (1983); *Arizona v. California*, 530 U.S. 392, 418-19 (2000).

At stake is nothing less than the integrity of Congress' power to regulate commerce with "Indian tribes." Faced in 1886 with a congressional enactment which prescribed a system of criminal laws for Indians living on their reservations, this Court rejected the government's argument that the law was grounded on the Commerce Clause. However, it sustained the act on the following grounds: "From their very weakness and helplessness, so largely due from the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this Court, whenever the question has arisen." *United States v. Kagama*, 118 U.S. 375, 384 (1886).

It would appear that the *Kagama* reasoning would render the Commerce Clause irrelevant as a source of power over Indian tribes, but this Court, in sustaining acts of Congress, appears to treat the Commerce Clause and "the recognized relations of tribal Indians" as joint sources of Congress' power. *See Perrin v. United States*, 232 U.S. 478 (1914); *Johnson v. Gearlds*, 234 U.S. 422 (1914); *Dick v. United States*, 208 U.S. 340 (1908).

Congress has carefully legislated limits to the Tribe's reservation jurisdiction as the following illustrates.

By the1864 Act, Congress limited the number of Indian reservations which could be established within California to four. (App. 19a.). The four reservations established pursuant to that law are Round Valley, Mission, Hoopa Valley and Tule River. *Mattz v. Arnett,* 412 U.S. 481, 493-94 (1973).

By the 1865 Act, Congress created the Colorado River Reservation within the Territory of Arizona extending west to the Colorado River. (App. 23a.) It did not authorize the extension of the reservation into California.

There is no subsequent statute authorizing a reservation for the Tribe within California.[2]

Congress defined the Colorado River Reservation for certain purposes in the Act of April 30, 1964, 78 Stat. 188 (the "1964 Act"), as follows: "'Colorado River Reservation' means the reservation for Indian use established by the Act of March 3, 1865 (13 Stat 559)... ." (App. 26a.)

The 1964 Act confirmed that the Reservation boundaries had never been legislated to include land within California, stating "any of the described lands in California shall be subject to the provisions of this Act when and if determined to be within the reservation." (App. 27a.)

This Court has recognized the limits placed on the extension of the reservation into California.

In 1963, this Court reviewed the report of a Special Master who examined the reservation boundary and determined that the western line of the Reservation was a riparian boundary at the Colorado River and not extending into California, as was discussed in *Arizona v. California,* 460 U.S. at 630-36. That review apparently led to the Secretary of Interior's issuance in 1969 of an administrative memorandum stating that the West Bank Lands were in trust by virtue of accretion and no longer part of the public domain. In 1983, this Court rejected that attempt by the Secretary to finesse the reservation in favor of the Tribe: "[W]e in no way intended that *ex-parte* secretarial determinations of the boundary

[2] Since 1864, Congress has authorized California reservations for other tribes as the need and appropriateness dictated. *See, e.g.,* Mission Indians Relief Act of January 12, 1891, 26 Stat. 712, which authorized the establishment of reservations for Mission Indians residing in Southern California, which reservations were to be set aside from lands then in the public domain.

issues would constitute 'final determinations'...." *Arizona v. California,* 460 U.S. at 636.

Despite the clear power of Congress to determine these issues, the respondents continue to ignore the law and avoid any judicial review by claiming tribal rights which do not exist as a matter of statute.

Citing *Dawavendewa v. Salt River Project Agricultural Improvement and Power Dist.*, 276 F.3d 1150 (9th Cir. 2002), the district court held that the Tribe's sovereign immunity precluded it being joined as a party. However, sovereign immunity has no application where, as here, the actions challenged are beyond the scope of the Tribe's sovereignty. And sovereignty does not extend beyond the bounds of the Tribe's reservation. Taken to the extreme, the district court's ruling would seem to permit tribal officials to claim virtually any land, yet avoid litigation testing its claim by hiding behind the veil of tribal immunity.[3] Surely, there is no basis to sanction such an absurd result especially when respondents' actions ignore statutory limitations on the Tribe's reservation boundary and, correspondingly, its jurisdiction.

Indian tribes ordinarily possess the common law immunity from suit traditionally enjoyed by sovereign powers, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978), but that doctrine is not called into play when tribal officials are acting outside the scope of tribal sovereignty: "[T]ribal immunity is not a bar to actions which allege conduct that is determined to be outside the scope of a tribe's sovereign powers." *Snow v. Quinault Indian Nation*, 709 F.2d 1319, 1321 (9th Cir. 1983), *cert. denied*, 467 U.S.

[3] The extent to which the district court refused to even consider the scope of tribal sovereignty is shown by its cavalier rejection of whether the respondents had reservation jurisdiction over the West Bank Lands as "a fundamentally flawed premise" (App. 6a). The court simply refused to even consider that reservation jurisdiction does not extend into California.

1214 (1984) (citing *Swift Transportation Inc. v. John*, 546 F. Supp. 1185, 1188 (D. Ariz. 1982)).

Furthermore, although respondents were sued in their capacity as members of the Tribe's Tribal Council, "tribal officials are not necessarily immune from suit." *Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269, 1270 (9th Cir. 1991) (citing *Santa Clara Pueblo*, 436 U.S. at 59). "When such officials act beyond their authority, they lose their entitlement to the immunity of the sovereign." *Id.*

That the courts must first examine the scope of tribal sovereignty is adjudicated: "[E]ven if the tribe and its instrumentalities are immune, the individual officers of the tribe will not be immune unless they were 'acting in their representative capacity and within the scope of their authority.'" *Alaska v. Native Village of Venetie*, 856 F.2d 1384, 1387 (9th Cir. 1988) (quoting *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 479 (9th Cir. 1985)). In other words, tribal officers are subject to suit under the doctrine of *Ex parte Young*[4] when they act beyond their authority. *Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians of Florida*, 177 F.3d 1212, 1225 (11th Cir. 1999), *cert. denied*, 529 U.S. 1018 (2000).

The extent to which the district court refused to even consider the scope of tribal sovereignty is shown by its abject dismissal that it should examine whether the respondents have reservation jurisdiction over the West Bank Lands as "a fundamentally flawed premise." (App. 6a.) Yet the court's Rule 19 dismissal included the conclusion that the Tribe has a "legally protected interest in whether the West Bank Lands are reservation

[4] 209 U.S. 123, 151 (1908) (citing *Ex parte Ayers*, 123 U.S. 443, 504 (1887)).

lands." (App. 7a-8a.)[5] However, if the reservation legally cannot extend into California, then the Tribe cannot have a legally protected interest and its sovereignty cannot extend to the West Bank Lands; in short, if the Tribe does not have a legally protected interest in the lands, then respondents' exercise of reservation jurisdiction was beyond the scope of sovereign immunity. The court did not conduct any assessment of the scope of tribal sovereignty, and in the absence of such an assessment it could not competently conclude that the Tribe has a legally protected interest in the West Bank Lands.

The point is important because Rule 19 does not concern an "interest" which is not legally protected. The fact that the Tribe has been asserting jurisdiction for a period of years does not establish a legal right otherwise barred by statute. And the appropriate test by which to judge the legality of respondents' activities is whether the reservation can extend to the West Bank Lands as a matter of law. If the Tribe's claims are illegal, then they are not protected, but the district court did not conduct the appropriate review. It should be required to do so before invoking tribal sovereign immunity to block the litigation.

Restated, the Tribe cannot be prejudiced if its claim to the West Bank Lands is illegal. And, the courts should first determine whether federal law bars the Tribe's claims, for it they are barred then there can be no tribal interest and no tribal sovereignty.

Indispensability of the United States.

In finding that the United States is a necessary and

[5] The district court reinforced its supposition that the reservation extends to the West Bank Lands with a concluding statement that the Tribe is the "beneficial" owner of the land (App. 15a). The term "beneficial" is applied to a tribe for which land is in trust, land status assumed by the court but not supported by the record before it.

indispensable party, the district court assumed that the United States "holds the West Bank Lands in trust for the Tribe." To support its ruling, the district court relied on *Imperial Granite Co. v. Pala Band of Mission Indians, supra*, for the proposition that "the United States is an indispensable party to any suit brought to establish an interest in Indian trust land." (App.14a.) The Ninth Circuit repeated that determination. (App. 2a.) The error in this finding is that the West Bank Lands are not Indian trust lands – rather, they are public domain lands.[6] Indeed, other than the Secretary's 1969 *ex parte* determination of trust status, there is no foundation for a statement that the lands are held in trust. Again, it is noted that this Court rejected that secretarial determination in 1983. *Arizona v. California, supra,* 460 U.S. at 636.

The Secretary of the Interior's sole statutory authority for (a) taking land into trust for tribes is 25 U.S.C. § 465, and (b) proclaiming reservation lands is 25 U.S.C. § 467. The narrow provisions of these two laws do not extend to lands owned by the United States prior to tribal initiation of the fee-to-trust process, which means the lower courts found trust status which could not have been attained under federal law. Congress simply has not authorized the trust acquisition which the courts found.

To further bolster its conclusion that the United States is a necessary and indispensable party, the district court also noted that the Quiet Title Act expressly excludes Indian trust lands from the government's waiver of immunity. But the district court's reliance

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[6] No Indian tribe qualified its land claims within California pursuant to the California Land Review Commission Act of March 3, 1851, 9 Stat. 631, which required all claimants to land to establish their title to the satisfaction of a Commission created by that law; as a result, any Indian lands within the state "became a part of the public domain of the United States." *Indians of California v. United States*, 98 Ct.Cl. 583, 587 (Ct.Cl. 1942) (*citing Barker v. Harvey*, 181 U.S. 481 (1901); *United States v. Title Insurance & Trust Co.*, 265 U.S. 472 (1924)).

here is misplaced as well. Though the United States may be an indispensable party when "lawsuits involve 'the fixing of a boundary' to trust or restricted indian property," *Carlson v. Tulalip Tribes of Washington*, 510 F.2d 1337 (9th Cir. 1975), this is not such a case. The West Bank Lands are not held in trust for the Tribe; and the suit below seeks only to determine the extent to which tribal officials are operating beyond the scope of the Tribe's sovereignty. Under these facts, the United States is either not a necessary and indispensable party or can be joined under the waivers of sovereign immunity of the Quiet Title Act.

Finally, a general consideration further underscores both the fundamental error of the decisions of the lower courts and their larger import. Tribes do not have a fundamental right to ignore applicable federal laws, especially when their actions result in the loss of property belonging to their neighbors. To put it bluntly, the result in this case is unjust. We cannot ignore – nor should we – the fact that ancestors of the respondents and other similarly situated Indians were dispossessed of most of their lands, having been confronted by a superior military force from an economically more powerful society. However, that history is not a license for them to ignore laws and judicial decisions requiring that they operate within the scope of their tribal sovereignty.

The decisions below are at odds with the modern trend in property law, including this Court's jurisprudence, which uses as its touchstone equitable notions of "justice and fairness" in determining when property rights have been seized. *See, e.g., Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998); *Hodel v. Irving*, 481 U.S. 704 (1987); and *Andrus v. Allard*, 444 U.S. 51, 65 (1979). This case thus presents the question of whether and to what degree this Court's jurisprudence of "justice and fairness" applies equally to the separate but related question of the existence and nature of an individual's right to present legal claims. If the courts will not examine whether the defense of sovereign immunity is even appropriately being interposed when tribal officials and

representatives are alleged to be operating beyond the scope of tribal sovereignty, then no litigant can ever challenge illegal actions of the officials of any Indian tribe. That cannot be, and is not, the law.

The actions of respondents – with the obvious and documented sanction of the Department of the Interior – are depriving petitioners of their property – property to which the Tribe has no legal right. The modern approach brings a flexible and equitable concern for justice and fairness to the issue of whether property rights are being illegally taken. It cannot be reconciled with the notion that tribes can act with impunity.

III. CONCLUSION

For the reasons stated above, petitioners respectfully urge that this Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX