No. 15-475

# In the Supreme Court of the United States

RAMONA TWO SHIELDS, *et al.*,
*Petitioners*,
v.
SPENCER WILKINSON, JR., *et al.*
*Respondents*.

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

## *AMICUS CURIAE* BRIEF OF THE INDIAN LAND TENURE FOUNDATION IN SUPPORT OF PETITIONERS

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## STATEMENT OF INTEREST[1]

The Indian Land Tenure Foundation ("ILTF") is a national, community-based organization serving American Indian nations and people in the recovery and control of their rightful homelands. ILTF is a tax-exempt organization under Section 501(c)(3) of the Internal Revenue Code. It works to promote education, increase cultural awareness, create economic opportunity, and reform the legal and administrative systems that prevent Indian people and Native Nations from owning and controlling reservation lands.

## SUMMARY OF THE ARGUMENT

The U.S. Court of Appeals for the Eighth Circuit ("Eighth Circuit") effectively granted the Respondents immunity for an alleged scheme to obtain nearly $1 billion from Petitioners, other Indian allottees, and tribal interests when it held that the Petitioners' suit for aiding and abetting a breach of fiduciary duty and tortious inducement of breach of fiduciary duty against Respondents could not proceed without joining the United States, a joint tortfeasor, as a Defendant. *Two Shields v. Wilkinson*, 790 F.3d 791 (8th Cir. 2015). ILTF submits that the Eighth's Circuit decision did not follow this Court's holding in *Temple v. Synthes Corp.*, 498 U.S. 5, 7 (1990) (per curiam) that "it is not

[1] This brief is filed with the consent of the parties. Copies of the consents have been filed with the Clerk. Pursuant to Supreme Court Rule 37.2, counsel of record for all parties have received timely notice of *amicus curiae's* intent to file this brief. No party or counsel for a party authored this brief in whole or in part. No party, counsel for a party, or person other than *amicus curiae*, its members, or counsel made any monetary contribution intended to fund the preparation or submission of this brief.

necessary for all joint tortfeasors to be named as defendants in a single law suit" and instead joined a minority of the Circuits that have failed to follow the clear rule announced in *Temple*. The minority rule is also inconsistent with the purpose of Rule 19 of the Federal Rules of Civil Procedure ("FRCP 19," or "Rule 19").

The United States is routinely involved with transactions involving lands held by Indians and Indian tribes because of its status as trustee over allotted Indian lands. *See generally United States v. Mitchell*, 445 U.S. 535, 540-41 (1980) ("*Mitchell I*") (discussing how the United States came to "hold[] title to [allotted] lands indefinitely"). In almost all cases, the United States must approve the terms of a lease permitting the extraction of natural resources from allotted Indian lands. The Eighth Circuit's incorrect application of FRCP 19 has the devastating effect on American Indians of essentially immunizing *all* private parties from suit who might aid and abet, induce, or otherwise conspire to have the United States breach its fiduciary duties towards American Indians. Because these private parties cannot be joined as parties in the U.S. Court of Federal Claims (the only court where the United States can be sued for breaching its fiduciary responsibilities), private parties will never have to face justice for their wrongful conduct, at least in those Circuits following the minority view, unless the Eighth Circuit's holding is overturned.

Petitioners' suit against Respondents should be permitted to proceed without the United States as a party. The United States claims no interest that will be impaired by this lawsuit proceeding in its absence.

## REASONS FOR GRANTING THE WRIT

### I. JOINT TORTFEASORS ARE NOT REQUIRED PARTIES

#### A. A Minority of Circuits Have Failed to Follow *Temple*'s Rule, Creating a Clear Circuit Split.

ILTF calls on the Court to resolve a split among the Circuits concerning the interpretation of FRCP 19(a), and affirm that a joint tortfeasor is not a "required party" in a lawsuit in federal court. In *Temple*, 498 U.S. at 7, this Court held that "it is not necessary for all joint tortfeasors to be named as defendants in a single law suit" because "a tortfeasor with the usual 'joint-and-several' liability is merely a permissive party to an action against another with like liability." *Id.* (quoting FRCP 19(a), advisory committee's notes to 1966 amendment); *see also Lawlor v. Nat'l Screen Serv. Corp.*, 349 U.S. 322, 330 (1955) (co-conspirators, as joint tortfeasors, were not indispensable parties). When "the threshold requirements of Rule 19(a) have not been satisfied" and a party is not a required party, no inquiry under Rule 19(b)'s balancing test is necessary. *Temple*, 498 U.S. at 8.

A majority of the Circuits (the First, Third, Fifth, Sixth, Seventh, Tenth, and D.C. Circuits) have each correctly recognized the principle that all joint tortfeasors need not be named as defendants in a single lawsuit. *See Goldman, Antonetti, Ferraiuoli, Axtmayer & Hertell v. Medfit Int'l, Inc.*, 982 F.2d 686, 691 (1st Cir. 1993) (finding it to be "patently correct," based upon the holding in *Temple*, that joinder is not mandatory for jointly and severally liable defendants);

*Gorfinkle v. U.S. Airways, Inc.*, 431 F.3d 19, 22 (1st Cir. 2005) (finding it permissible to dismiss a non-diverse party, in part, "because he is a potential joint tortfeasor, and thus a dispensable party"); *Huber v. Taylor*, 532 F.3d 237, 249-50 (3d Cir. 2008) (explaining that "[c]ourts, moreover, have long recognized that 'it is not necessary for all joint tortfeasors to be named as defendants in a single lawsuit'" (quoting *Temple*, 498 U.S. at 7)); *Chiasson v. Karl Storz Endoscopy-America, Inc.*, No. 94-30591, 1995 WL 582010 (5th Cir. Sept. 29, 1995) (per curiam) (Judgment noted at 68 F.3d 472 (table)); *August v. Boyd Gaming Corp.*, 135 F. App'x 731, 734 (5th Cir. 2005); *PaineWebber, Inc. v. Cohen*, 276 F.3d 197, 204 (6th Cir. 2001); *Sterling v. United States*, 85 F.3d 1225, 1228 (7th Cir. 1996) (holding that "[v]ictims are free to litigate separately against joint tortfeasors"); *Jett v. Phillips & Assocs.*, 439 F.2d 987, 990 (10th Cir. 1971); *Park v. Didden*, 695 F.2d 626, 631 (D.C. Cir. 1982) (noting "[a]n almost unbroken line of federal decisions holds that persons whose liability is joint and several may be sued separately in federal court").

The Eighth Circuit joined the Ninth and Eleventh Circuits in taking a contrary position, holding that "*Temple* did not establish that Rule 19 lacks application to all who are alleged to share liability for a wrong." Pet. App. 11a. Instead, that Court found that FRCP 19 "instructs courts to examine the interests of an absent party in an effort to determine whether 'as a practical matter' its ability to protect those interests will be hindered." *Id.* (citing FRCP 19(a)(1)(B)(i)). This holding followed the Eleventh Circuit, which held that a joint tortfeasor *could* constitute a required party under FRCP 19(a). *Id.*

(citing and quoting *Laker Airways, Inc. v. British Airways, PLC*, 182 F.3d 843 (11th Cir. 1999)). *Laker* held that "a joint tortfeasor will be considered a necessary party when the absent party 'emerges as an active participant' in the allegations made in the complaint that are 'critical to the dispositions of the important issues in the litigation.'" 182 F.3d at 848 (quoting *Haas v. Jefferson Nat'l Bank*, 442 F.2d 394, 398 (5th Cir. 1971)). The Ninth Circuit has issued a similar holding. *Ward v. Apple Inc.*, 791 F.3d 1041, 1049 (9th Cir. 2015) (explaining that, even if an antitrust co-conspirator is not a required party under FRCP 19(a)(1)(A), it does not preclude one from being a required party under FRCP 19(a)(1)(B)(i), "the purpose of which is to protect the interests of absent parties . . . [and] an absent party's role as a joint tortfeasor does not preclude it from having an interest in the action that warrants protection").

The Eighth Circuit below acknowledged the United States' status as a joint tortfeasor. Pet. App. 12a. Yet, it rejected *Temple*'s holding that a joint tortfeasor merely is a permissive party in a lawsuit. *Id.* This was on grounds that the United States' interests went beyond "'the usual' joint and several liability" or "'like liability' with that of the appellees." *Id.* at 11a. It relied on the Eleventh Circuit's *Laker* decision to suggest that some parties, such as the United States, may be required by FRCP 19 because their interests are "more significant than those of a routine joint tortfeasor." *Id.* (quoting 182 F.3d at 847-48).

This Court has held that the United States is "like other tortfeasors" under FRCP 19. *United States v. Aetna Cas. & Sur. Co.*, 338 U.S. 366, 382 (1949)

(evaluating claims brought against the United States under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-2680). The Court's intervention in this matter is necessary to correct the Eighth Circuit's incorrect application of FRCP 19 that contradicts the principle of *Temple* that a plaintiff need not name all joint tortfeasors in a single action. If the Eighth Circuit's interpretation of FRCP 19(a) were permitted to stand, the impact on American Indian plaintiffs would be disproportionate and devastating. American Indians would *never* be able to sue a private party who devised a tortious scheme that involved the acquiescence, or at least inattention, of the United States. This result would be neither just nor equitable, but would simply add another unfortunate chapter to the historic mistreatment of the members and allottees of the Three Affiliated Tribes of the Fort Berthold Reservation.

### B. The Minority Rule Is Inconsistent with the Purpose of Rule 19.

This Court has long recognized that one of the keys to applying FRCP 19 is "the interest of the courts and the public in complete, consistent, and efficient settlement of controversies" and in "settling disputes by wholes, whenever possible." *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 111 (1968). The Advisory Committee's notes to the 1966 amendment to the Rule noted that Rule 19(a) is "not at variance with the settled authorities holding that a tortfeasor with the usual 'joint-and-several' liability is merely a permissive party to an action against another with like liability." When discussing the common-law joinder rule that preceded Rule 19, Chief Justice

Marshall stated "if the case may be completely decided as between the litigant parties, the circumstance that an interest exists in some other person, whom the process of the Court cannot reach . . . ought not to prevent a decree on its merits." *Elmendorf v. Taylor*, 23 U.S. (10 Wheat.) 152, 166-68 (1825). Hence, the Eighth Circuit's holding also is inconsistent with the purpose of FRCP 19, which was "designed primarily as a tool for consolidating litigation, not for squelching its progress entirely." Katherine Florey, *Making the Sovereigns Indispensable:* Pimentel *and the Evolution of Rule 19*, 58 UCLA Law Rev. 667, 716 (2011).

The minority rule places Petitioners in a "Catch-22" from which they cannot escape. Petitioners can only sue the United States in the Court of Federal Claims.[2] The Respondents cannot be sued in the Court of Federal Claims. *Nicholson v. United States*, 29 Fed. Cl. 180, 185 (1993) (Court of Federal Claims "*lacks jurisdiction* over suits against private third-party defendants," and its jurisdiction "extends only to claims against the United States."). It is impossible, then, in cases like this, to consolidate all the parties into a single action and "settle the dispute by whole" because no Court has jurisdiction over all of the parties. FRCP 19's purpose is to promote consolidation of related litigation when possible, not to slam shut the courthouse doors.

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[2] *Two Shields v. United States*, 119 Fed. Cl. 762 (2015). The Petition states that the case is currently on appeal to the Federal Circuit and has been fully briefed. Pet. at 10.

## II. THE EIGHTH CIRCUIT'S HOLDING GRANTS PRIVATE PARTIES A "GET-OUT-OF-JAIL-FREE" CARD FOR TORTS INVOLVING INDIAN LANDS

The trust relationship is intended to shield Indian allottees and Indian tribes from harm. *Anicker v. Gunsburg*, 246 U.S. 110, 119 (1918) (government authority to approve or deny leases on Indian land was "unquestionably" designed to protect Indians from "the designs of those who would obtain their property for inadequate compensation"). Under the Eighth Circuit's holding the trust relationship is inverted and fashioned into a shield for those who act to harm American Indians. The Eighth Circuit's holding offers unscrupulous individuals a "get-out-of-jail-free" card for schemes to induce the United States to breach its trust duty to individual Indian allottees and Indian tribes.

This Court recognizes "the undisputed existence of a general trust relationship between the United States and the Indian people." *United States v. Mitchell*, 463 U.S. 206, 225 (1983) ("*Mitchell II*"). *See also United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313, 2324 (2011) ("We do not question 'the undisputed existence of a general trust relationship between the United States and the Indian people.'") (quoting *Mitchell II*, 463 U.S. at 225). This Court has held that "[a] fiduciary relationship necessarily arises when the Government assumes such elaborate control over forests and property belonging to Indians." *Mitchell II*, 463 U.S. at 225.

The Petitioners, like many other American Indian allottees throughout the United States, are not free to

sell or lease the land allotted to them without the approval of the United States government. *Cobell v. Norton*, 240 F.3d 1081, 1088 (D.C. Cir. 2001) ("As a result of allotment, individual Indians became beneficiaries of the trust lands, but lost the right to sell, lease, or burden the property without the federal government's approval."). Under the statute at issue here, the Secretary of the Interior has authority to "reject all bids whenever . . . the interests of the Indians will be served by so doing[.]" 25 U.S.C. § 396. Federal regulations make clear that the purpose of such review is to "ensure that Indian mineral owners desiring to have their resources developed are assured that they will be developed in a manner that maximizes their best economic interests" while minimizing other adverse impacts. 25 C.F.R. § 212.1(a) (2015). Similar provisions govern leases involving timber, grazing rights, fishing activities, certain water rights and irrigation matters, and other uses of allotted lands. *Cohen's Handbook of Federal Indian Law* § 5.03[3][b], at 399 (2012 ed.).

While others might *choose* to do business with the United States, an Indian allottee has no choice. Under this trust relationship, Indians will almost never enter into a contract with a private party to develop a resource on allotted land without the approval of the United States.[3] What then, is the Indian allottee's

[3] Under the 2012 Helping Expedite and Advance Responsible Tribal Home Ownership (HEARTH) Act, Pub. L. No. 112-151, 126 Stat. 1150 (codified at 25 U.S.C. § 415), the federal responsibility can be delegated to tribes that adopt approved programs for reviewing proposed leases. The HEARTH Act was not passed until several years after the leases at issue here were finalized. Moreover, only 21 of the 566 recognized tribal entities have approved programs in place.

remedy if he or she is defrauded through a private party's scheme? To seek redress, the Indian allottee must already bear the burden of bringing two separate lawsuits, one against the private party and one against the United States in the Court of Federal Claims. Under the Eighth Circuit's holding, the suit against a private party may *never* proceed because a required party, the United States, will always be absent. The chief architects of schemes to defraud American Indians thereby become untouchable.

History has shown that concern over third parties scheming to induce the United States to breach its fiduciary duties to Indians is well-placed. Documented complaints about private parties exploiting the natural resources in the area of Fort Berthold itself date back to 1869, when the Tribe complained that non-Indians "came on their land at Berthold and cut wood for sale to steam boats." I *Indian Affairs: Laws and Treaties* 881, 882 (Charles J. Kappler, ed. 1904). In 1878, when the Northern Pacific Railroad Company was building a railroad through reservation lands, it wrote to the Secretary of the Interior requesting that "the Indian title [be] extinguished as soon as possible so as to free the grant to the railroad company from any claim of title." *Indians of Fort Berthold Indian Reservation v. United States*, 71 Ct. Cl. 308, 319 (1930). The United States obliged the railroad. *Id.* In 1953, the United States flooded more than 150,000 acres of the Fort Berthold Reservation after building the Garrison Dam, displacing more than 300 families representing more than 80 percent of tribal membership. S. Rep. No. 102-250 at 2 (1991). Although the waters flowing through the dam are capable of generating more than 580 megawatts of electricity, none of that electricity was

reserved for the use of the Tribe and the Tribe has no water rights in the reservoir. Michael L. Lawson, *Dammed Indians Revisited: The Continuing History of the Pick-Sloan Plan and the Missouri River Sioux* 55 (2009). In coal extraction leases, the federal government routinely did not explore Indian lands before approving leases (despite doing so for other federal lands), resulting in lower bids. Marjane Ambler, *Breaking the Iron Bonds: Indian Control of Energy Development* 72-73 (1990).

The minority rule's effect would reach far beyond the Fort Berthold Reservation. Indian trust lands include natural resources on 55 million surface acres and 57 million acres of subsurface mineral estates. U.S. Dept. of Interior, Indian Affairs, Budget Justifications ES-7 (FY 2016). The economic value of natural resources on Indian lands is immense. The U.S. Department of the Interior estimates the sales value of natural resource-related activity on Indian lands in 2014 (including oil, gas, coal, irrigation, grazing, timber, and other minerals) was $9.56 billion and that this activity supports more than 130,000 domestic jobs. U.S. Dept. of Interior, Economic Report Table 2-2 (FY 2014). Under the minority rule, private parties who induce the United States to disregard its trust responsibilities to claim a larger share of this this nearly $10 billion market are immune from suit.

## III. PETITIONERS' SUIT SHOULD PROCEED WITHOUT THE UNITED STATES

The absence of the United States ought not to prevent the U.S. District Court for the District of North Dakota ("District Court") from reaching the merits of Petitioners' claims against Respondents. The Eighth Circuit, when it reviewed the District Court's dismissal, incorrectly concluded that *Republic of Philippines v. Pimentel* mandates dismissal because "there is a potential for injury to the interests of the absent sovereign." 553 U.S. 851, 867 (2008) (quoted at Pet. App. 13a). *Pimentel* is procedurally and factually inapposite. Procedurally, *Pimentel* is based entirely on an interpretation of FRCP 19(b) and whether an action could move forward if undisputedly "required" parties under Rule 19(a) also were subject to the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1604. Here, *Temple* permits the Court to resolve this case under FRCP 19(a), eliminating the need to apply FRCP 19(b). 498 U.S. at 8.

Even if FRCP 19(b) were relevant, the facts supporting dismissal in *Pimentel* are not present here. *Pimentel* concerned approximately $35 million in a brokerage account and whether the money could be used to enforce a judgment in a class action litigated in the United States, or whether the money belonged to the foreign sovereigns under a 1955 Philippine law. *Pimentel* characterized the sovereigns' interest as "a unique interest in resolving the ownership of or claims to the [brokerage account] assets and in determining if, and how, the assets should be used[.]" 553 U.S. at 866. This was both a monetary and a comity interest. *Id.* The United States' interests, as recited by the Eighth

Circuit, are neither. The three governmental interests cited by the Eighth Circuit were (1) the "defense of the leasing decisions by the BIA and the Secretary of the Interior," (2) "the correct interpretation and application of oil and gas leasing statutes and regulations," and (3) "ensuring that Indian lessees are not subject to competing obligations." Pet. App. 6a. None of these are similar to the interests implicated in *Pimentel*.

First, the United States had the opportunity to mount a "defense of its leasing decisions" in the Court of Federal Claims and chose not to do so. There, Petitioners claimed that the Bureau of Indian Affairs ("BIA") "breached its fiduciary duty to prudently manage their mineral rights, which are held in trust by the United States." *Two Shields*, 119 Fed. Cl. at 766. Petitioners included "a detailed narration of the depredations experienced by their tribes, and characterized the BIA's alleged breach as 'the latest chapter of United States mismanagement or outright abuse regarding the members of the Three Affiliated Tribes.'" *Id.* As the Court of Federal Claims noted, the United States "does not dispute plaintiffs' characterization of the BIA's actions; in fact, defendant barely mentions them at all." *Id.* Instead, the United States took the position that "the BIA's alleged misdeeds are immaterial because plaintiffs' claims have already been litigated and settled" in the $3.4 billion *Cobell* settlement. *Id.*; *Cobell v. Salazar*, 679 F.3d 909 (D.C. Cir. 2012) (upholding approval of the settlement). Far from needing defense, it has been the position of the United States that its leasing decisions affecting Petitioners were part of a pattern of historic mismanagement of Indian trust assets that resulted in a multi-billion dollar settlement.

Second, the United States' interest in the correct interpretation and application of its laws *in a federal court accustomed to interpreting and applying federal statutes and regulations* is neither impaired, nor impeded here. *See* FRCP 19(a)(1)(A); *see also Idaho ex rel. Evans v. Oregon & Washington*, 444 U.S. 380, 387 (1980) (rejecting a Special Master's holding "that federal interests were so intertwined . . . that [the court] could not possibly render an adequate judgment in the absence of the United States as a party" when the relief sought was a matter of accounting); *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365, 373 (1968) ("While the United States has exercised its supervisory authority over oil and gas leases in considerable detail, we find nothing in this regulatory scheme which would preclude [Indian] petitioners from seeking judicial relief for an alleged violation of the lease."). Nor is the United States exposed to "double, multiple, or otherwise inconsistent obligations" because of any interest it has in the BIA's reputation. *See* FRCP 19(a)(1)(B)(ii). The District Court's decision would be not be "*res judicata* as to, or legally enforceable against," the United States as a nonparty. *Provident Tradesmens Bank & Trust*, 390 U.S. at 110. A merits decision on Petitioners' claims also would not call into question "the validity of many of the land grants approved by the government." Pet. App. 9a (citing *Nichols v. Rysavy*, 809 F.2d 1317, 1333 (8th Cir. 1987)). The Petitioners' claims focus specifically on the alleged scheme conceived and executed by Respondents involving 42,500 acres within the Fort Berthold Reservation. The suit is not a generic challenge to BIA's statutes and regulations.

Third, Respondents and the United States[4] have asserted below that the suit cannot proceed because the United States would remain free to collect lease payments (on behalf of Petitioners) in addition to any damages Petitioners might obtain directly from Respondents. This fails to recognize that Respondents' continuing lease payments could be considered in determining the appropriate amount of monetary damages. While Respondents' obligations under the leases to the United States may be relevant to the size of the damages, they do not make it inherently unfair to assess any damages at all. This is a matter of mere accounting, not indispensability. *Idaho ex rel. Evans*, 444 U.S. at 387.

The Eighth Circuit painted with too broad a brush when it compared Petitioners' claims against Respondents with the sovereignty interests implicated in *Pimentel*. The relief sought in this proceeding does not include revocation of the leases or an injunction barring Respondents from complying with their leases, nor are the Petitioners disputing title to the leases, proposing changes to how the government collects under the leases, or asking a court to set them aside. The United States admits as much in an *Amicus* Brief it filed with the District Court. U.S. *Amicus* Br. at 7 (agreeing that "plaintiffs do not seek as relief in this action revocation of their leases").

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[4] The United States filed an *amicus* brief before the District Court, but declined to participate before the Eighth Circuit. *Amicus* Brief of the United States in Partial Support of Defendants' Motions to Dismiss, Two Shields v. Wilkinson, No. 4:12-cv-DLH-CSM (D.N.D., Aug. 13, 2013) ("U.S. *Amicus* Br.").

There is no merit to the Eighth Circuit's holding that failure to join the United States in the case before it would be tantamount to trying the government "behind its back." Pet. App. 8a (quoting *Nichols*, 809 F.2d at 1334). This Court has permitted Indian tribes to sue a railroad for the improper use of Indian lands "even though the tribes could not sue the United States for its failure to collect the sums allegedly due." *Poafpybitty*, 390 U.S. at 370 (citing *Creek Nation v. United States*, 318 U.S. 629, 640 (1943) (comparing the right to sue the railroads with the right to sue under oil and gas leases on tribal lands)). Petitioners have similar rights to sue Respondents for their wrongs here without needing to sue the United States in the same forum. *Lincoln Property Co. v. Roche*, 546 U.S. 81, 91 (2005) ("In general, the plaintiff is the master of the complaint and has the option of naming only those parties the plaintiff chooses to sue, subject only to the rules of joinder of necessary parties.") (quoting 16 J. Moore *et al.*, *Moore's Federal Practice* § 107.142[2][c], at 107-67 (3d ed. 2005).

The relief sought below is limited solely to monetary damages *from the Respondents*, not from the United States. *Cf. Pimentel*, 553 U.S. at 866 (finding that a foreign sovereign had "a unique interest in resolving the ownership of or claims to [foreign corporation] assets" and the taking of its property by a U.S. court). Private parties should not be able to avoid monetary damages stemming from their tortious acts against American Indians simply because they commit those acts on land held in trust by the United States.

## CONCLUSION

The Court should grant the petition for writ of *certiorari* and reverse the decision of the Eighth Circuit.

Respectfully submitted,

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