No. 09-1051

In the Supreme Court of the United States

OGLALA SIOUX TRIBE OF THE
PINE RIDGE INDIAN RESERVATION, PETITIONER

v.

UNITED STATES ARMY CORPS OF ENGINEERS, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

NEAL KUMAR KATYAL
Acting Solicitor General
Counsel of Record
IGNACIA S. MORENO
Assistant Attorney General
ROBERT J. LUNDMAN
Attorney
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether petitioner's claims are barred by the five-year limitations period specified in Section 12 of the Indian Claims Commission Act, ch. 959, 60 Stat. 1052, because they are based on the alleged nullity of an 1889 statute that modified a treaty with the Sioux and diminished the Great Sioux Reservation.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-20) is reported at 570 F.3d 327. The opinion of the district court (Pet. App. 21-47) is reported at 537 F. Supp. 2d 161.

JURISDICTION

The judgment of the court of appeals (Pet. App. 48-49) was entered on June 26, 2009. A petition for rehearing was denied on November 30, 2009 (Pet. App. 50-51). The petition for a writ of certiorari was filed on March 1, 2010 (Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In the Indian Claims Commission Act (ICCA), ch. 959, 60 Stat. 1049 (1946), Congress created the Indian Claims Commission (Commission) to hear a broad range of historical claims by Indians against the United States. The claims to be heard by the Commission included claims that "would result" if treaties or agreements were "revised" on grounds such as fraud or duress; claims "arising under the Constitution, laws, [or] treaties of the United States"; and "claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity." ICCA § 2(1), (3) and (5), 60 Stat. 1050 (Pet. App. 96). "Congress's intention was to 'draw[] in all claims of ancient wrongs, respecting Indians, and to have them adjudicated once and for all." Pet. App. 7 (brackets in original) (quoting *Temoak Band of W. Shoshone Indians* v. *United States*, 593 F.2d 994, 998 (Ct. Cl.), cert. denied, 444 U.S. 973 (1979)). The ICCA provided for the Commission to dispose of such claims "with finality." *United States* v. *Dann*, 470 U.S. 39, 45 (1985) (quoting H.R. Rep. No. 1466, 79th Cong., 1st Sess. 10 (1945) (House ICCA Report)).

Under Section 12 of the ICCA, any claim against the United States existing as of the date of the ICCA's enactment on August 13, 1946, had to be presented to the Commission within five years of that date. 60 Stat. 1052 (Pet. App. 98). A claim "existing before [the enactment] date but not presented within [the five-year] period" could not "thereafter be submitted to any court or administrative agency for consideration, nor * * * thereafter be entertained by the Congress." *Ibid*.

2. The Great Sioux Reservation, comprising much of what is now western South Dakota and part of North Dakota, was established in 1868 by the second Fort

Laramie Treaty (1868 Treaty), 15 Stat. 635. See *South Dakota* v. *Bourland*, 508 U.S. 679, 682 (1993). Article XII of the 1868 Treaty provided that any subsequent cession of any portion of the Great Sioux Reservation could be effective only if "executed and signed by at least three fourths of all the adult male Indians, occupying or interested in the same." 15 Stat. 639 (Pet. App. 57).

Congress subsequently enacted a statute diminishing the Great Sioux Reservation and dividing the remaining territory into six smaller Sioux reservations, one of which was petitioner's Pine Ridge Indian Reservation. Act of Mar. 2, 1889 (1889 Act), ch. 405, § 1, 25 Stat. 888; see *Bourland*, 508 U.S. at 682. Land outside the six smaller reservations was placed into the public domain, for sale to and settlement by the public. § 21, 25 Stat. 896; see also § 22, 25 Stat. 898 (providing for the disposition of proceeds from the sale of the land).

Section 28 of the 1889 Act provided that the statute would not become effective unless it was accepted and agreed to "by the different bands of the Sioux Nation of Indians, in manner and form prescribed by the twelfth article of the [1868 Treaty]," *i.e.*, by three-fourths of the adult male Indians on the Great Sioux Reservation. 25 Stat. 899 (Pet. App. 58). If the President received "satisfactory proof" of the requisite acceptance, he was to proclaim the effectiveness of the 1889 Act; if, however, he did not receive and proclaim such proof "within one year from the passage of" the 1889 Act, the statute would "become[] of no effect and null and void." *Ibid.*

President Benjamin Harrison issued the requisite proclamation within the specified time. The President proclaimed that "satisfactory proof ha[d] been presented * * * that the acceptance of and consent to the provi-

sions of the [1889 Act] by the different bands of the Sioux Nation of Indians ha[d] been obtained in manner and form as therein required," and that he "declared [the 1889 Act] to be in full force and effect." Proclamation of President Harrison, No. 9, 26 Stat. 1554 (1890).

3. The lands at issue in this case were originally acquired by the United States between 1944 and 1962 as part of the Pick-Sloan Missouri River Basin Program. After floods devastated the lower Missouri River basin in 1943 and 1944, Congress enacted the Flood Control Act of 1944, ch. 665, 58 Stat. 887, which directed the United States Army Corps of Engineers (Corps) to establish the Pick-Sloan Program as a comprehensive flood control plan along the Missouri River. Pet. App. 26-27, 77; see *Bourland*, 508 U.S. at 683, 689-690. To construct the project, the Corps acquired land along the Missouri River from certain Sioux Tribes, from land allotted to tribal members, and from non-Indians. Between 1949 and 1962, seven subsequent Acts of Congress authorized additional limited takings of Indian lands, within the six reservations created by the 1889 Act, for dams on the Missouri River in both North and South Dakota. See *id.* at 683-684; *Lower Brule Sioux Tribe* v. *South Dakota*, 711 F.2d 809, 813 & n.1 (8th Cir. 1983), cert. denied, 464 U.S. 1042 (1984). On the land it acquired, the Corps constructed the Pick-Sloan works, including hydroelectric and flood control dams, reservoirs, and other features.

In legislation enacted in 1999 and amended in 2000, Congress directed the Corps to transfer certain federal lands within the Pick-Sloan Program area to South Dakota and to two Indian Tribes. See Water Resources Development Act of 1999 (1999 WRDA), Pub. L. No. 106-53, §§ 605-606, 113 Stat. 390-395; Water Resources

Development Act of 2000 (2000 WRDA), Pub. L. No. 106-541, § 540, 114 Stat. 2664; see also *Crow Creek Sioux Tribe* v. *Brownlee*, 331 F.3d 912, 914 (D.C. Cir. 2003). Section 605(a)(1) of the 1999 WRDA[1] required the Corps to transfer fee title in certain described federal lands to the South Dakota Department of Game, Fish and Parks "for fish and wildlife purposes, or public recreation uses, in perpetuity," and required that the Corps transfer specified "recreation areas not later than January 1, 2002." § 605(a)(1)(A) and (B), 113 Stat. 390-391, amended by 2000 WRDA § 540(d)(1)(B) and (C), 114 Stat. 2665.[2] Additionally, Congress directed the Corps to lease other specific, named recreation areas to the State in perpetuity and to provide the State with easements and other access rights upon request. § 605(d)(2)(B) and (g)(3)(A), 113 Stat. 392-393, amended by 2000 WRDA §540(d)(3) and (5), 114 Stat. 2665-2666.

Congress specified, however, that the land transfers would not relieve the Corps of its duties under several resource-protection statutes with respect to the transferred property. 1999 WRDA § 605(h), 113 Stat. 393, amended by 2000 WRDA § 540(d)(6), 114 Stat. 2666. Specifically, the National Historic Preservation Act, 16 U.S.C. 470 *et seq.*; the Archaeological Resources Protection Act of 1979, 16 U.S.C. 470aa *et seq.*; and the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3001 *et seq.*, all "shall apply to land transferred under" Section 605. 1999 WRDA

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[1] Unless otherwise indicated, section numbers used in text correspond to sections of the 1999 WRDA, as amended by Section 540 of the 2000 WRDA.

[2] See also 1999 WRDA § 605(b) and (c), 113 Stat. 391-392 (describing land and recreation areas to be transferred), amended by 2000 WRDA § 540(d)(2), 114 Stat. 2665.

§ 605(h), 113 Stat. 393, amended by 2000 WRDA § 540(d)(6), 114 Stat. 2666. The Secretary of the Army was also required, within ten years after enactment, to "inventory and stabilize each cultural site and historic site located on the land and recreation areas" transferred pursuant to the statute. 1999 WRDA § 605(*l*), added by 2000 WRDA § 540(d)(7), 114 Stat. 2667.

Finally, the statute contains provisos expressly preserving reservation boundaries, tribal rights, and federal regulatory authority. Section 607(a)(1)-(5) provides that "[n]othing in this title diminishes or affects * * * any external boundary of an Indian reservation of any Indian Tribe," any tribal water right or treaty right, or any other rights of Indian Tribes (except as specifically provided). 113 Stat. 395, amended by 2000 WRDA § 540(h)(6), 114 Stat. 2671. The 1999 WRDA also makes clear that nothing therein diminishes or affects "any authority of the Secretary [of the Army], the Secretary of the Interior, or the head of any other Federal agency under a law in effect on the date of enactment of this Act," which expressly includes authority under the three federal resource-protection statutes noted above. § 607(a)(6)(A), (B) and (G), 113 Stat. 395-396; see p. 5, *supra*.

4. Petitioner filed this action against the United States, the Corps, and various Army and Corps officials in the United States District Court for the District of Columbia. Pet. App. 61. Both the initial complaint and the first amended complaint alleged that the transfers prescribed by the 1999 and 2000 WRDAs would undermine the protections of NAGPRA and other resource-protection statutes. At the time, a similar lawsuit brought by the Crow Creek Sioux Tribe was pending before the same district judge. *Id.* at 29. In that case,

the district court denied a preliminary injunction, and on appeal from that decision, the court of appeals held that the Crow Creek Tribe lacked Article III standing. *Crow Creek*, 331 F.3d at 915-918. The Crow Creek Tribe had claimed that the transfer of lands to the State would reduce the protections that tribal graves and historical artifacts received under federal law. *Id.* at 916. The court rejected that contention and held that pursuant to the 1999 WRDA, even after the land was transferred, the same federal laws would continue to apply and the responsible federal officials would continue to have the same authority to enforce those laws, as if the Corps still held the land. *Id.* at 916-918 (citing 1999 WRDA §§ 605(h), 607(a)(6)). Thus, the court held, the transfer of lands to the State did not cause the Crow Creek Tribe any injury. *Ibid.*

After the court of appeals issued its ruling in *Crow Creek*, petitioner conceded that the first four claims for relief in its first amended complaint were foreclosed. Pet. App. 32. The case was then transferred to another district judge, and petitioner obtained leave of court to file a second amended complaint. *Ibid.*; see *id.* at 59-95. The first three claims in that new pleading rested on the allegation that petitioner has legally protected interests in the lands transferred to South Dakota pursuant to the 1999 WRDA. First, petitioner alleged that its interest in the transferred lands was injured by respondents' "den[ial] that the boundaries of the Great Sioux Reservation have never been diminished or otherwise altered by the 1889 Act or [any] other subsequent treaty or act of Congress" and respondents' "fail[ure] * * * to acknowledge and abide by * * * the 1868 Fort Laramie Treaty." *Id.* at 86. Second, petitioner alleged that its interest in the transferred lands was injured by respon-

dents' past and future "transfer or lease" of those lands without the "voluntary consent in accordance with article 12 of the 1868 Fort Laramie Treaty" of the relevant bands of the Sioux Nation. *Id.* at 87. Third, petitioner alleged that respondents had "a trust responsibility" under several treaties "and federal statutory and common law" to consult with petitioner and to reasonably accommodate its views before transferring or leasing land to South Dakota, and that respondents' failure to undertake such consultations had injured petitioner. *Id.* at 88-90; see *id.* at 29-32.[3] Petitioner sought declaratory and injunctive relief. *Id.* at 91-93.

5. The district court dismissed the case for lack of subject matter jurisdiction. Pet. App. 21-47.

The court held that petitioner "lacks standing to bring [the three claims relevant here] because it does not have a legally protected interest in the recreational areas and other lands at issue." Pet. App. 36 (capitalization and boldface omitted). Any such interest, the district court concluded, had been abrograted when the Great Sioux Reservation was diminished by the 1889 Act. *Id.* at 38-42. The lands at issue "were removed from what remained of the Great Sioux Reservation, and were thus taken out of the control and interest of the tribes, once the 1889 Act went into effect." *Id.* at 39.

6. The court of appeals affirmed on a different ground. Pet. App. 1-20.

a. The court of appeals concluded that petitioner's claims fell within Section 2 of the ICCA, which set forth the types of claims a Tribe could bring against the United States. Accordingly, the court held, petitioner's

[3] The fourth claim in the second amended complaint was based on the National Historic Preservation Act and is no longer at issue. Pet. 14 n.6.

failure to assert those claims within the ICCA's five-year limitations period barred those claims. Pet. App. 6-12.

The court noted that each of petitioner's claims "rests on the contention that the United States did not validly implement the 1889 Act, rendering [the 1889 Act] a nullity." Pet. App. 6-7. The court concluded that those claims therefore fell within Section 2 of the ICCA, "most directly under provision (3), which encompasses 'claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity.'" *Id.* at 9 (quoting ICCA § 2(3), 60 Stat. 1050). Petitioner's claims "would require the court to decide whether to rescind the Sioux Tribe's agreements with the United States approving the 1889 Act's diminishment of the Great Sioux Reservation, to declare that Act null and void, and to treat the area as if the 1868 Treaty had not been modified." *Id.* at 10. Even if not within provision (3), the court of appeals noted (*id.* at 10 n.3), petitioner's claims would fall within provisions (1) and (5), which respectively encompass claims "arising under the * * * laws [and] treaties of the United States" and claims "based upon [a lack of] fair and honorable dealings." ICCA § 2(1) and (5), 60 Stat. 1050.

Finally, the court of appeals rejected petitioner's argument that its claims merely involve the determination of a reservation's boundaries and are therefore not time-barred under the ICCA. Pet. App. 11-12. The court noted that it "is generally true" that the ICCA does not bar a claim seeking to determine a reservation boundary, but held that petitioner's claims do not fall

within that exception. Such permissible reservation-boundary suits call upon courts "to interpret federal legislation and executive orders, not to set these sources aside or to treat them as void on the basis of centuries-old flaws in the ratification process." *Id.* at 11.

The court of appeals also rejected the notion, accepted by the partial dissent (see pp. 11-12, *infra*), that petitioner had advanced the sort of fiduciary-breach claim that would fall outside the ICCA. Whereas "Judge Tatel construe[d] the third claim as asserting that the government owes [petitioner] a permanent fiduciary duty of consultation before taking any significant action on any land [petitioner] has *ever* occupied," the panel majority concluded that "[petitioner] itself never mention[ed] [that theory] in its briefs in [the court of appeals]." Pet. App. 10 n.4. Rather, the panel majority explained, petitioner's "argument was instead that it retained an unbroken 'aboriginal interest' in its ancestral lands due to the alleged nullity of the 1889 Act." *Ibid.* (citing *id.* at 169). Furthermore, the panel majority noted, the claim that Judge Tatel ascribed to petitioner was "a novel theory, having no support in federal Indian law." *Ibid.*

b. Judge Tatel concurred in part, concurred in the judgment in part, and dissented in part. He would have reversed only as to petitioner's claim regarding an alleged trust obligation to consult. Pet. App. 14-20.

Judge Tatel described petitioner's first claim as "alleg[ing] that the boundaries of the Great Sioux Reservation remain intact despite the 1890 presidential proclamation to the contrary, and it seeks a declaration to this effect." Pet. App. 14. He concluded that petitioner had "effectively abandon[ed]" that claim on appeal and

that the court therefore "needn't address the claim at all." *Id.* at 15.

Petitioner's second claim, as Judge Tatel understood it, "allege[d] that certain transfers of land under [the 1999 WRDA] * * * violate [petitioner's] 1868 Fort Laramie Treaty right to consent to any 'cession' of land within the Great Sioux Reservation." Pet. App. 14. Judge Tatel would have affirmed dismissal of that claim for lack of standing because it was "so transparently frivolous" that it failed to create a justiciable controversy. *Id.* at 16 (citation omitted). Judge Tatel found it "abundantly clear" from the 1999 WRDA that "these transfers have no effect on existing reservation boundaries." *Ibid.* (citing 1999 WRDA § 607(a)(4), 113 Stat. 395). Thus, no WRDA transfer "even implicates—let alone harms—the treaty right to approve 'cessions' of reservation land." *Ibid.*

Judge Tatel would have allowed petitioner's third claim to proceed to a motion to dismiss. Judge Tatel understood petitioner to be claiming that "the WRDA transfers violate the government's separate 'trust responsibility' to consult with [petitioner] before taking any 'significant actions' related to its aboriginal land." Pet. App. 15. In Judge Tatel's view, the alleged breach of that duty—"if such a duty exists"—"began in 2002 when the WRDA transfers began," and the ICCA therefore should not apply. *Id.* at 18. Judge Tatel then "assum[ed]," "for now," that petitioner could establish that such a duty exists, and he concluded that breach of such a duty would be sufficient injury to give petitioner standing to sue. *Id.* at 19. He noted, however, that petitioner might well be unable to get past the pleading stage: "[t]o be sure, in light of the decades of private and government ownership of [petitioner's] aboriginal

territory, as well as the legacy of [petitioner's] treaties with the United States, a Rule 12(b)(6) motion may get the better of this claim too." *Ibid*.

ARGUMENT

Petitioner contends that the ICCA's limitations period does not bar its claims and that it has standing to pursue them. The court of appeals correctly held that the ICCA limitations period bars petitioner's claims as petitioner argued them. That decision does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. a. The limitations period of Section 12 of the ICCA bars petitioner's claims, because those claims are based on the allegation that the 1889 Act is a nullity. Section 12 of the ICCA provides that all claims that could be brought under the statute, and that existed as of the statute's enactment in 1946, are barred unless brought within five years of enactment. 60 Stat. 1052 (Pet. App. 98). The court of appeals correctly recognized that petitioner's claims are within the scope of the ICCA, and petitioner does not contend that that context-specific decision conflicts with any decision of another appellate court.

Section 2 of the ICCA defined the scope of claims that a Tribe could bring against the United States before the Commission.[4] The intent of the ICCA was to

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[4] Section 2 set forth the following potential claims:

> The Commission shall hear and determine the following claims against the United States on behalf of any Indian tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska: (1) claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President; (2) all other

create a mechanism for resolving a broad range of potential claims against the United States and, through the limitations provision, to provide closure for these claims. Before the ICCA was enacted, "tribes had no forum for pursuing claims against the federal government absent congressional action authorizing litigation on behalf of individual tribes." *Cohen's Handbook of Federal Indian Law* 443 (2005 ed.) (*Cohen*); see also *Navajo Tribe of Indians* v. *New Mexico*, 809 F.2d 1455, 1460 (10th Cir. 1987). As the court of appeals explained, Congress enacted the ICCA to create such a forum for tribal claims "and to have them adjudicated once and for all." Pet. App. 7 (quoting *Temoak Band of W. Shoshone Indians* v. *United States*, 593 F.2d 994, 998 (Ct. Cl.), cert. denied, 444 U.S. 973 (1979)); see p. 2, *supra*.[5]

> claims in law or equity, including those sounding in tort, with respect to which the claimant would have been entitled to sue in a court of the United States if the United States was subject to suit; (3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity; (4) claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant; and (5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity.

60 Stat. 1050.

[5] See also House ICCA Report 3 ("[The ICCA] would require all pending Indian claims of whatever nature, contractual and noncontractual, legal and nonlegal, to be submitted to this fact-finding body [the Commission] within 5 years, and would outlaw claims not so submitted."); *id.* at 10 ("[I]t is essential that the jurisdiction to hear claims which is vested in the Commission be broad enough to include all possible claims. If any class of claims is omitted, we may be sure that soon-

The court of appeals correctly determined (Pet. App. 9-10) that petitioner's claims fall squarely within provision (3) of Section 2—"claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity." 60 Stat. 1050. As the court of appeals explained, to adjudicate petitioner's claims premised on the continuing existence of the Great Sioux Reservation established by the 1868 Treaty, the court would have to "decide whether to rescind the Sioux Tribe's agreements with the United States approving the 1889 Act's diminishment of the Great Sioux Reservation, to declare that Act null and void, and to treat the area as if the 1868 Treaty had not been modified." Pet. App. 10. And the "ground" for the rescission, according to petitioner, would be that the United States secured the written consent of individual Indians (in the form of quitclaim deeds) through fraud, coercion, and bribery. Pet. 9; Pet. App. 73-74. The President proclaimed those consents to have been proved valid and the 1889 Act to be effective as a result. See pp. 3-4, *supra*. By seeking to reverse that proclamation and declare the consents to have been invalid *ab initio*, petitioner thus seeks a revision of those quitclaim deeds and the changes that the 1889 Act made to the 1868 Treaty "on the ground of fraud [or] duress," 60

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er or later that omission will lead to appeals for new special jurisdictional acts."); *Cohen* 445 ("The Act was designed to settle the historic claims of all tribes. The claims permitted were deliberately broad.").

Stat. 1050, the basis for a claim encompassed by provision (3) of Section 2 of the ICCA.[6]

b. Indeed, as the court of appeals noted (Pet. App. 10 n.3), it could have reached an identical conclusion under other provisions of Section 2 of the ICCA. Petitioner's claims also fall squarely within provision (1), which authorizes "claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President." 60 Stat. 1050. Petitioner's claims are founded on the allegation that the United States breached the 1868 Treaty establishing the Great Sioux Reservation when the United States implemented the 1889 Act and opened portions of the Great Sioux Reservation for settlement. See, *e.g.*, Pet. App. 6-7, 85-90. Specifically, petitioner alleges and argues that the United States failed to follow the procedures for obtaining approval of cessions by three-fourths of the adult male Indians. See p. 3, *supra*; Pet. 26-27; Pet. App. 86-90. The claim that the United States violated Article XII of the 1868 Treaty in implementing the 1889 Act is a claim "arising under" the 1868 Treaty, and thus falls within provision (1) of ICCA Section 2.

Petitioner argues at one point (Pet. 28) that its claims do not fall within provision (1) because they are based on the transfers pursuant to the 1999 WRDA, which postdate the ICCA. But a few pages earlier (Pet. 26), petitioner concedes that the foundation for its first

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[6] Petitioner argues (Pet. 27-29) that it is seeking a declaration that the 1889 Act never went into effect, rather than seeking to "revise" or "reform" the agreements pursuant to which the 1889 Act was proclaimed effective. But the 1889 Act clearly diminished and replaced the Great Sioux Reservation as established by the 1868 Treaty with the six smaller reservations established by the 1889 Act. It is that modification to the 1868 Treaty that petitioner now seeks to revise or reform.

two claims is its position that the 1889 Act is a nullity that never went into effect. Accord, *e.g.*, Pet. 27-28 (arguing that the 1889 Act is a nullity because of the government's failure to comply with Article XII of the 1868 Treaty).

Petitioner's claims also fall within provision (5) of Section 2, which provides for "claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity." 60 Stat. 1050 (Pet. App. 96). Petitioner claims (Pet. 9-10, 27-28; accord Pet. App. 72-76) that the United States breached its obligations with respect to the cessions that followed 1889; used "coercion, fraud, and bribery" to obtain the quitclaim deed signatures from tribal members; and then illegally pushed petitioner off of its Great Sioux Reservation lands and confined it to the smaller Pine Ridge Reservation. Thus, petitioner's claims rest on allegations that the United States did not act "fair[ly]" and "honorabl[y]" in implementing the 1889 Act.

In sum, petitioner's basic claim is that the United States violated the law in diminishing the Great Sioux Reservation in the 1890s. There is no dispute that petitioner was aware of the United States' actions, as the court of appeals explained: "[Petitioner] surely knew that such an action arose before 1946. Not only did the 1889 Act purport to divest the Sioux tribes of title to millions of acres of land, but it explicitly returned the land to the public domain and divested it of its reservation status." Pet. App. 10-11 (citations omitted); see also *id.* at 76 (petitioner's allegation that it has "protested" those actions "[s]ince 1890).[7] Because petitioner's claims

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[7] There is no question that the United States took action adverse to the Tribe's alleged treaty right before 1946. As the decisions of this

fall within Section 2, they fall within the five-year limitations period provided for in Section 12 and cannot be brought against the United States now. See *Oglala Sioux Tribe* v. *United States*, 650 F.2d 140 (8th Cir. 1981) (holding that petitioner's sole remedy for claim to Black Hills was pursuant to ICCA), cert. denied, 455 U.S. 907 (1982); *Navajo Tribe of Indians* v. *New Mexico*, 809 F.2d 1455, 1463-1464 (10th Cir. 1987) (holding that plaintiff Tribe's claim against the United States seeking to affirm title to certain lands was barred by ICCA Section 12).[8]

c. The court of appeals also correctly recognized that petitioner's claims do not seek to determine the boundary of petitioner's existing reservation. The court of appeals acknowledged that such a claim generally would

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Court make clear, the diminishment of the Great Sioux Reservation is a "historical fact[]." Pet. App. 15 (Tatel, J., concurring in part, concurring in the judgment in part, and dissenting in part); see, *e.g.*, *South Dakota* v. *Bourland*, 508 U.S. 679, 682-683 (1993).

[8] This case does not present the question whether the ICCA limitations period can be applied to claims by a Tribe against a State or other non-federal party. The ICCA applies only to "claims" that could have been brought "against the United States." ICCA § 2, 60 Stat. 1050. And as the court of appeals noted, "[n]one of the Supreme Court's Indian reservation cases addresses *any* dispute between a tribe and the United States, whether over the validity of agreements or otherwise. Rather the cases involve jurisdictional disputes between a tribe and a state government, disputes the Court resolves by interpreting federal laws." Pet. App. 12 n.5 (citing cases). But cf. *Western Shoshone Nat'l Council* v. *Molini*, 951 F.2d 200, 202 (9th Cir. 1991) (holding that a Commission award of compensation to a Tribe for loss of title barred that Tribe from asserting title against a State), cert. denied, 506 U.S. 822 (1992); *Arizona* v. *California*, 530 U.S. 392, 416-417 (2000) (leaving open the question whether a consent judgment under the ICCA between a Tribe and the United States for a taking would bar the Tribe from asserting title against a State).

lie outside the scope of the ICCA. Pet. App. 11; see also *New Mexico* v. *United States Dep't of the Interior*, 820 F.2d 441, 447 (D.C. Cir. 1987). But as the court recognized, in a permissible reservation-boundary suit against the United States, the court is "called upon to interpret federal legislation and executive orders, not to set these sources aside or to treat them as void on the basis of centuries-old flaws in the ratification process." Pet. App. 11. Here, petitioner does not ask a court to interpret or clarify existing reservation boundary lines, but rather seeks the restoration of a completely different reservation from the one it currently holds.

Moreover, as Judge Tatel noted (Pet. App. 16), even if petitioner's claims actually did ask a court to interpret or clarify a reservation boundary line, the 1999 WRDA expressly provides that it has no effect on reservation boundaries. 1999 WRDA § 607(a)(4), 113 Stat. 395, amended by 2000 WRDA § 540(h)(6), 114 Stat. 2671. Any claim that the 1999 WRDA, or the transfers it authorized, changed a reservation border would be, as Judge Tatel put it, "so transparently frivolous" that it would not even be adequate to invoke federal jurisdiction. Pet. App. 16 (citation omitted). Indeed, later in its petition, petitioner effectively acknowledges that "the WRDA transfers do not affect the 'external boundaries' of any Indian reservation." Pet. 30.

2. Petitioner attempts to argue (Pet. 19-20) that other courts have held that the ICCA limitations period is confined to claims seeking money damages. The court of appeals touched on that issue only in passing. See Pet. App. 8 (observing that "[i]t is well established that the [ICCA] bars * * * claims to equitable relief, claims for damages, and related constitutional and procedural claims"); cf. *id.* at 9 (stating that plaintiffs cannot cir-

cumvent the ICCA "through 'artful pleading'") (citation omitted). But even if the decision below can be said to raise this issue, it resolved it correctly and creates no circuit conflict.

Although monetary relief was the sole form of relief *available* under the ICCA, see ICCA §§ 2, 19, 22, 60 Stat. 1050, 1054, 1055, the statute clearly requires that all claims described in Section 2 be brought within the five-year period without conditioning that requirement on the form of relief requested. See ICCA § 12, 60 Stat. 1052. And Section 2 repeatedly refers to claims both at "law" (*i.e.*, claims for damages) and in "equity" (which would include claims for injunctive and declaratory relief). ICCA § 2(1), (2) and (3), 60 Stat. 1050. Section 2, therefore, encompasses more than just claims for money damages.

All of the courts of appeals that have considered the question have held that the ICCA applies to claims based on their content and whether they fit into Section 2, not based on the form of relief sought. *Navajo Tribe*, 809 F.2d at 1464-1471; *Oglala Sioux Tribe*, 650 F.2d at 143; see also *Cohen* 445 ("Although the Indian Claims Commission had jurisdiction only to award damages, the courts have dismissed later attempts to regain land by bringing possessory actions * * * on the grounds that the ICCA provided the exclusive remedy for claims accruing before 1946.").

The cases petitioner cites (Pet. 19) do not establish that the ICCA limitations period applies only to claims for monetary relief. Rather, two of them simply hold that the ICCA authorizes only a monetary *remedy*. See *United States* v. *Dann*, 873 F.2d 1189, 1198 (9th Cir.), cert. denied, 493 U.S. 890 (1989); *Mille Lacs Band of Chippewa Indians* v. *Minnesota*, 853 F. Supp. 1118,

1137 (D. Minn. 1994) (citing *Dann*, 873 F.2d at 1198), aff'd on other grounds, 124 F.3d 904, 923-926 (8th Cir. 1997), aff'd on other grounds, 526 U.S. 172 (1999). The remaining case holds that the ICCA does not apply to bar claims brought by a Tribe against a State or other non-federal parties, a question not presented here. See *Ottawa Tribe* v. *Speck*, 447 F. Supp. 2d 835, 842 (N.D. Ohio 2006) ("The plain language of the statute states that the ICCA only applies to claims against the United States. Accordingly, the five year statute of limitations in the ICCA does not apply to this claim."); note 8, *supra*.

3. a. Relying on Judge Tatel's opinion, petitioner contends (Pet. 18-26) that its third claim should properly be read to assert an aboriginal, non-Treaty interest in the transferred lands that imposes a freestanding duty on the Corps to consult with petitioner before making the transfers. Petitioner contends that such a claim would not be time-barred by the ICCA. But the panel majority did not decide the latter question, because it concluded that petitioner did not plead any such theory in the district court or brief it in the court of appeals. Pet. App. 10 n.4. Certiorari is not warranted to review the fact-bound question whether the court of appeals correctly assessed the contents of petitioner's pleadings and appellate briefs.

Furthermore, the court of appeals did not err. The theory petitioner pleaded in its second amended complaint and briefed in the court of appeals was "that it retained an unbroken 'aboriginal interest' in its ancestral lands due to the alleged nullity of the 1889 Act." Pet. App. 10 n.4. Petitioner's brief on appeal focused on the alleged nullity of the 1889 Act and the diminishment of the Great Sioux Reservation, rather than on separate

aboriginal rights that survived even if the 1889 Act was triggered. See, *e.g.*, *id.* at 167 ("It has long been recognized that [petitioner], as well as the other tribes and bands who were parties to the Fort Laramie Treaty of 1851, ha[s] aboriginal interests in the lands set aside by that treaty for the occupancy and use of the various tribes and bands, a portion of which lands eventually became the Great Sioux Reservation."); *id.* at 169 ("[The 1889 Act and the actions following its enactment] did not, in clear and plain language, either terminate the Great Sioux Reservation or diminish its borders. Consequently, [petitioner] still retains and may assert a valid aboriginal interest in the recreational and other lands at issue in this case."). The relevant portions of the second amended complaint focused on petitioner's alleged treaty rights and did not even mention the "aboriginal" rights petitioner now argues are the basis of its claim. See *id.* at 88-90. As the court of appeals concluded, "the claim [petitioner] does make—as distinguished from the one Judge Tatel offers—depends upon our resolution of a dispute arising in 1890. As such, it is barred by the [ICCA]." *Id.* at 10 n.4.

b. Even if petitioner had pleaded and preserved the claim it now advances, the claim would lack merit in any event. As Judge Tatel suggested (Pet. App. 19), such a claim could not survive a motion to dismiss. The question whether the claim is also time-barred therefore lacks any significance.

The basis of petitioner's claim of aboriginal right is a single decision by a Canadian provincial appellate court. See Pet. 21-22 (discussing *Haida Nation* v. *British Columbia*, 2002 BCCA 147, modified in part, [2004] 3 S.C.R. 511 (Can.)). Petitioner does not identify any principle of this country's Indian law that supports its

contention. Moreover, NAGPRA and other federal resource-protection statutes (see p. 5, *supra*) impose duties on federal agencies to consult with interested Tribes, such as when tribal artifacts are discovered. See, *e.g.*, 25 U.S.C. 3002(c)(2). The transfers of title pursuant to the 1999 WRDA in no way lessen the force of that statutory obligation. See 1999 WRDA § 605(h), 113 Stat. 393, amended by 2000 WRDA § 540(d)(6), 114 Stat. 2666. Consultation under these statutes would presumably, in a host of cases, satisfy the same obligations that petitioner wishes to impose as a matter of common law.

4. As petitioner recognizes (Pet. 30-33), even if the court of appeals' decision were reversed in its entirety, petitioner still could not prevail unless it could also persuade the court to reverse the district court's ruling that petitioner lacks standing.[9] Petitioner now seeks to demonstrate the requisite Article III injury on the theory (Pet. 30-31) that the transfers pursuant to the 1999 WRDA affect petitioner's legally protected interests in the cultural resources of the transferred lands. Pet. 30. But petitioner abandoned that claim when it sought and received leave to amend its complaint a second time and dropped all counts referring to NAGPRA and other cultural-resources protections. See pp. 7-8, *supra*. And in any event, as Judge Tatel noted, the 1999 WRDA explicitly provides that NAGPRA and other resource-protection statutes continue to apply to the transferred lands in exactly the same way they applied before the lands were transferred. § 605(h), 113 Stat. 393, amended by 2000 WRDA § 540(d)(6), 114 Stat. 2666; see pp. 5-

[9] Petitioner also forfeited any appeal from the dismissal of its first claim, as Judge Tatel noted. Pet. App. 15. Nor did it preserve any claim of an aboriginal right to consultation, as discussed above, pp. 20-21, *supra*.

6, 7, 11, *supra.* The transfers thus have no impact on the level of protection that any cultural resources receive, and petitioner has failed to plead any claim of injury. See *Crow Creek Sioux Tribe* v. *Brownlee*, 331 F.3d 912 (D.C. Cir. 2003).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General
IGNACIA S. MORENO
Assistant Attorney General
ROBERT J. LUNDMAN
Attorney

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