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.,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the 5-year statute of limitations of Section 12 of the Indian Claims Commission Act of 1946 ("ICCA"), 60 Stat. 1049, 1052 (formerly codified at 25 U.S.C. § 70k (repealed)), which applies only to claims accruing no later than August 13, 1946, bar federal court jurisdiction over an Indian tribe's claim that the Government breached its trust responsibility to consult with the tribe before taking significant actions adversely affecting the preservation and protection of the numerous items and sites of the tribe's cultural and historic heritage located on federal lands within the tribe's aboriginal territory, specifically before making the transfers of federal lands authorized by the Water Resources Development Act of August 17, 1999, Pub. L. 106-53, Title VI, §§ 601-609, 113 Stat. 269 ("WRDA"), where the tribe's breach-of-duty-to-consult claim does not involve either an historical land claim for money damages or the revision of treaties, contracts or agreements between the tribe and the United States, and where the breach occurred no earlier than 2002 when the WRDA transfers began?

2. Does an Indian tribe have standing to pursue its claim that the Government breached its trust responsibility to consult with the tribe before taking significant actions adversely affecting the preservation and protection of the numerous items and sites of the tribe's cultural and historic heritage located on lands within the tribe's aboriginal territory, where the

QUESTIONS PRESENTED – Continued

merit of the tribe's non-frivolous contention, that it has a legally protected interest in the tribe's aboriginal territory based on the Government's trust relationship with the Indian tribes, must be assumed in assessing the tribe's standing to sue?

3. Does the ICCA's 5-year statute of limitations bar federal court jurisdiction of a Sioux Indian tribe's claims that the 1889 Act of Congress purportedly changing the boundaries of the Great Sioux Reservation never went into effect for failure to satisfy the conditions specified by Congress in Section 28 of that Act, where those claims do not involve either an historical land claim or the revision of treaties, contracts or agreements between the Tribe and the United States?

4. Does a Sioux Indian tribe have standing to pursue its claims that an 1889 Act of Congress purportedly changing the Great Sioux Reservation boundaries never went into effect for failure to satisfy the conditions specified by Congress, where the challenged WRDA transfers of federal lands to the State of South Dakota adversely affect the tribe's legally protected interests in Native American cultural and historic items and sites located on federally-owned fee lands situated within the pre-1889 Act boundaries of the Great Sioux Reservation, thereby triggering the obligation under Article 12 of the Fort Laramie Treaty of 1868 to obtain the consent of the Sioux Tribes to this "cession" of reservation territory?

LIST OF PARTIES

Pursuant to Rule 14.1(b), the following list identifies all of the parties appearing in the court whose judgment is sought to be reviewed.

The Petitioner (Appellant) below is the Oglala Sioux Tribe of the Pine Ridge Indian Reservation.

The Respondents (Appellees) below are The United States Army Corps of Engineers; Les Brownlee, Acting Secretary of the Army; Domonic Izzo, Principal Deputy Assistant Secretary of the Army for Civil Works; Robert B. Flowers, Chief of Engineers; Kurt F. Ubbelohde, Omaha District Commander and District Engineer, Department of the Army, Corps of Engineers; and The United States of America.

CORPORATE DISCLOSURE STATEMENT

The Oglala Sioux Tribe is a sovereign, unincorporated Indian Tribe.

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OPINIONS BELOW

The District Court for the District of Columbia issued its Memorandum Opinion dismissing the case on March 17, 2008 (App. 21). *Oglala Sioux Tribe v. United States Army Corps of Engineers*, 537 F. Supp. 2d 161 (D.D.C. 2008), *aff'd*, 570 F.3d 327 (D.C. Cir. 2009). This decision was subsequently affirmed by the United States Court of Appeals for the District of Columbia Circuit on June 26, 2009 in a majority opinion authored by Senior Circuit Judge Randolph (App. 1-14). *Oglala Sioux Tribe of the Pine Ridge Indian Reservation v. United States Army Corps of Engineers*, 570 F.3d 327 (D.C. Cir. 2009). Circuit Judge Tatel filed a separate opinion, concurring in part, concurring in the judgment, and dissenting in part (App. 14-20). *Id.*, 570 F.3d at 334.

JURISDICTION

The judgment of the District of Columbia Circuit was entered on June 26, 2009 (App. 48-49). The District of Columbia Circuit denied the Petitioner's timely petition for rehearing *en banc* on November 30, 2009 (App. 50-51). Jurisdiction of this Court to review of the judgment of the District of Columbia Circuit is invoked pursuant to 28 U.S.C. § 1254(1).

TREATIES AND STATUTES INVOLVED IN THE CASE

Treaty with the Oglala Sioux, July 5, 1825, Arts. 2 & 3, 7 Stat. 253.

Fort Laramie Treaty of September 17, 1851, Art. 5, 11 Stat. 749.

Fort Laramie Treaty of April 29, 1868, Arts. 2 & 12, 15 Stat. 635.

Act of March 2, 1889, ch. 405, § 28, 25 Stat. 888, 899.

Indian Claims Commission Act of August 13, 1946, § 2, 60 Stat. 1049, 1050, formerly codified at 25 U.S.C. § 70a (repealed).

Indian Claims Commission Act of August 13, 1946, § 12, 60 Stat. 1049, 1052, formerly codified at 25 U.S.C. § 70k (repealed).

Native American Graves Protection and Repatriation Act of November 16, 1990, P.L. 101-602, 104 Stat. 3048, 25 U.S.C. §§ 3001(15)(A) & 3002.

Water Resources Development Act of August 17, 1999, Pub. L. 106-53, § 607(a)(4), 113 Stat. 269, 395

STATEMENT OF THE CASE

This petition presents four questions of great public importance in that the correct resolution of each of these questions is absolutely vital to the ability of the Tribe and other Indian tribes to adequately protect and preserve the tribes' and the

Nation's Native American cultural and historic heritage.

The Tribe is a body politic of approximately 41,000 citizens with territory of over 4,700 square miles in south-western South Dakota. The Tribe is the freely and democratically-elected government of the Oglala Sioux people, with a governing body recognized by the Secretary of the Interior (App. 60). It is the successor-in-interest to the Oglala Band of the Teton Division of the Sioux Nation.[1] In 1936, the Oglala Band reorganized as the "Oglala Sioux Tribe of the Pine Ridge Indian Reservation" under § 16 of the Indian Reorganization Act of June 18, 1934, ch. 576, 48 Stat. 987, 25 U.S.C. § 476, and enjoys all of the rights and privileges guaranteed under its existing treaties with the United States in accordance with 25 U.S.C. § 478b (App. 60).

Since time immemorial, up to and through the time of some of the actions forming the basis of the Tribe's Complaint, the seven Teton bands (including what is now the Oglala Sioux Tribe), jointly and severally, have exclusively used and occupied the following territory in the Missouri River basin: (a)

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[1] The Sioux Nation is comprised of seven divisions: (1) Medawakanton; (2) Sisseton; (3) Wahpakoota; (4) Wahpeton; (5) Yankton; (6) Yanatonai; and (7) Teton. *Sioux Nation v. United States*, 24 Ind. Cl. Comm. 147, 162 (1970). The Teton Division is comprised of seven distinct, sovereign bands: (1) Blackfeet; (2) Brule; (3) Hunkpapa; (4) Minnecounjou; (5) No Bows; (6) Oglala; and (7) Two Kettle (App. 63).

West of the Missouri River, approximately sixty million acres of land in what are now the States of North Dakota, South Dakota, Nebraska, Montana and Wyoming; (b) East of the Missouri River, approximately 14 million acres of land in what are now the States of North Dakota and South Dakota (App. 64).

On July 5, 1825, the United States and the Oglala Band entered into a treaty of friendship and protection, 7 Stat. 252, that was ratified by the United States and proclaimed on February 6, 1826 (App. 65). By Article 2 of the 1825 Treaty, 7 Stat. 253, the United States brought the Oglala Band and its members under its protection and the Oglala Band became a protectorate nation of the United States. (*Id.*) (App. 52). By Article 3 of the 1825 Treaty, 7 Stat. 253, Congress extended the Trade and Intercourse Acts to the Oglala Band and its aboriginal territory, including permanent successor provisions of § 12 of the Act of June 30, 1834, ch. 161, 4 Stat. 730, *currently codified at* 25 U.S.C. § 177 (App. 52, 65-66).

On September 17, 1851, the United States, the seven bands of the Teton Division of the Sioux Nation, and other signatory tribes, entered into a treaty known as the 1851 Fort Laramie Treaty, 11 Stat. 749, which was duly ratified by the United States (App. 53). Article 5 of the 1851 Fort Laramie Treaty defined the territory of the bands of the Teton Division ("1851 Treaty territory") as follows:

> commencing at the mouth of the White Earth River, on the Missouri River; thence in a

> southwesterly direction to the forks of the Platte River; thence up the north fork of the Platte River to a point known as the Red Butte, or where the road leaves the river; thence along the range of mountains known as the Black Hills, to the headwaters of the Heart River; thence down Heart River to its mouth; and thence down the Missouri River to the place of beginning (App. 53-55, 66).

In *Sioux Tribe v. United States*, 15 Ind. Cl. Comm. 577 (1965), the Indian Claims Commission ruled that the 1851 Ft. Laramie Treaty was a multilateral treaty by which the United States recognized the aboriginal territory of both the seven Teton bands and the other signatory tribes. (App. 66-67). The Commission further ruled that Article 5 of the 1851 Ft. Laramie Treaty recognized the Teton bands' joint and several aboriginal Indian title to (1) the entire sixty million acre area west of the Missouri River and (2) the entire fourteen million acre east of the Missouri River, *Sioux Nation v. United States*, 23 Ind. Cl. Comm. 419, 424 (1970) (App. 66-67).

Unconsented encroachments on the 1851 Ft. Laramie Treaty territory by the United States and its citizens resulted in the Powder River War of 1866-1868 between the United States and the Teton bands. Peace was concluded by a treaty entered into on April 29, 1868, 15 Stat. 635, known as the 1868 Fort Laramie Treaty ("1868 Treaty"), duly ratified by the United States on February 16, 1869 and proclaimed on February 24, 1869 (App. 67). The 1868 Treaty provided for a mutual demobilization without terms

of surrender on either side (App. 67). Article 2 of the 1868 Treaty established a designated territory within the 1851 Ft. Laramie Treaty territory boundaries for the seven Teton bands and other Sioux bands, a territory commonly referred to as the "Great Sioux Reservation" (App. 56-57, 67-68). Article 2 of the 1868 Treaty again recognized the seven Teton bands' aboriginal Indian title to all the lands within the Great Sioux Reservation, including all lands west of the low water mark of the east bank of the Missouri River, and again vested that title under the Constitution and laws of the United States (App. 56-57, 68). Article 12 of the 1868 Treaty further provided that no future cessions of territory within the Great Sioux Reservation would be "of any validity or force as against the said Indians, unless executed or signed by at least three-fourths of all the adult male Indians, occupying or interested in the same . . . " (App. 57, 68-69).

By the Act of February 28, 1877, ch. 72, 19 Stat. 254 ("1877 Act"), Congress purported to ratify and confirm an agreement between commissioners acting on behalf of the United States and the Teton and other bands of the Sioux Nation and the Northern Cheyenne and Arapaho tribes (App. 69). The purported agreement, which did not exist in fact or law, provided for the cession of over 7 million acres of land in the western part of the Great Sioux Reservation, including the Black Hills (App. 69). It was later determined that "the treaty was presented just to the Sioux chiefs and their leading men. It was signed by only 10% of the adult male Sioux population[,]" not

by the three-fourths required by Article 12 of the 1868 Fort Laramie Treaty. *United States v. Sioux Nation of Indians*, 448 U.S. 371, 381-382 (1980).[2]

By the Act of March 2, 1889, ch. 405, 25 Stat. 888 ("1889 Act"), Congress *conditionally* provided for the creation of six smaller reservations within the balance of the Great Sioux Reservation, the release of title by Indian persons associated with each smaller reservation to each of the other five smaller reservations, and for the restoration to the public domain and the opening to settlement of the balance of the territory within the Great Sioux Reservation outside the boundaries of the six smaller reservations (App. 58, 69-70).[3] The effectiveness of the 1889 Act was expressly conditioned by § 28 of that Act upon the acceptance and consent to its provisions by the Sioux Indians in the manner required by Article 12 of the 1868 Fort Laramie Treaty, i.e., its execution and signature by three-fourths of the adult male members of bands and tribes signatory to the 1868 Treaty (App. 57, 58, 69-72).

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[2] In *United States v. Sioux Nation of Indians*, the Court held that the 1877 Act amounted to confiscation by the United States of the western end of the Great Sioux Reservation, in violation of both Article 12 of the 1868 Treaty and the Fifth Amendment to the Constitution, and that the United States was required to pay interest for this unconstitutional taking of land.

[3] The six smaller reservations are called the Pine Ridge Indian Reservation, the Rosebud Indian Reservation, the Standing Rock Indian Reservation, the Cheyenne River Indian Reservation, the Lower Brule Indian Reservation, and Crow Creek Indian Reservation (App. 70).

A three-member commission[4] appointed by the Secretary of the Interior (the "Crook Commission") was charged with obtaining the consent of three-fourths of the adult male members of the Sioux bands signatory to the 1868 Treaty, as required by § 28 of the 1889 Act in order for that Act to take effect (App. 72). The Crook Commission decided to seek to have the adult male members associated with each of the six agencies of the Interior Department within the Great Sioux Reservation ("Sioux agencies") sign a quitclaim deed to evidence their consent under Article 12 of the 1868 Treaty in accordance with § 28 of the 1889 Act (App. 72). The Commission scheduled meetings during the summer of 1889 at the six Sioux agencies to obtain the requisite number of signatures on quitclaim deeds (App. 72).

The Crook Commission failed to obtain the consent of three-fourths of the adult male members of the bands and tribes signatory to the 1868 Treaty (App. 72). Five thousand six hundred and seventy-eight (5,678) adult male members were eligible to give consent under Article 12 of the 1868 Treaty and § 28 of the 1889 Act, and three-fourths of that number equals 4,259. The Crook Commission obtained no more than 3,942 valid signatures on quitclaim deeds

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[4] The three members of the commission were Charles Foster of Ohio, William Warner of Missouri, and General George Crook of the United States Army. (*Message from the President of the United States*, Sen. Doc. No. 51, 51st Cong., 1st Sess., p. 1 (1890).)

(App. 73). Furthermore, the majority of the signatures obtained by the Crook Commission were obtained through coercion, fraud and bribery (App. 73-74).

On or about January 30, 1890, the Crook Commission submitted a report concerning its activities to President Benjamin Harrison entitled *Report and Proceedings of the Sioux Commission*, Sen. Exec. Doc. 51, 51st Cong. 1st Sess. (1890) ("1890 Commission Report"). Among other things, the 1890 Commission Report contained the names of each of the persons from whom the Commission had obtained signatures on quitclaim deeds. 1890 Commission Report, pp. 242-307. The census records contained in the 1890 Commission Report show *prima facie* that the Commission failed to obtain signatures from three-fourths of the adult male members eligible to give consent under Article 12 of the 1868 Treaty and § 28 of the 1889 Act (App. 74).

On February 10, 1890, President Harrison nevertheless issued a Proclamation, 26 Stat. 1554 ("1889 Proclamation"), declaring the 1889 Act "to be in full force and effect." (App. 75). Thereafter, "approximately one-half [of the Great Sioux Reservation that remained after the 1877 Act] was restored to the public domain . . . while six separate reservations [including the Pine Ridge Reservation of the Oglala Sioux Tribe] were carved out of the remainder." *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 589 (1977).

Since 1890 and up to and including the present, the Oglala Band and its successor, the Oglala Sioux Tribe, has protested the facts set forth above continuously, publicly, and notoriously and has continuously, publicly and notoriously maintained that the boundaries of the Great Sioux Reservation were never diminished nor otherwise altered by the 1889 Act (App. 76). The Tribe likewise has continuously, publicly and notoriously maintained that it retains recognized aboriginal Indian title to all lands located in the Great Sioux Reservation and has never acquiesced in any claim or assertion that said boundaries have been diminished or otherwise altered or that such title has been relinquished or extinguished (App. 76). Since 1890 and up to and including the present, the United States has disregarded these protests. For example, the United States has denied the Band, the Tribe and its members, by force and threat of criminal prosecution, their right to use and occupy any lands – except lands within the Pine Ridge Reservation – within the balance of the Great Sioux Reservation, including all lands within the other five of the six smaller reservations conditionally created in §§ 2 through 6 of the 1889 Act and the nine million acres of land conditionally restored to the public domain and opened to settlement in § 21 of the Act (App. 76).

By the Water Resources Development Act of August 17, 1999, P.L. 106-53, Title VI, §§ 601-609, 113 Stat. 269, 385, *as amended by* the Water Resources Development Act of December 11, 2000,

P.L. 106-541, Title V, § 540, 114 Stat. 2572, 2664 ("WRDA"), Congress directed the Secretary of the Army to transfer title or grant perpetual leases to recreational areas and other lands around Lake Oahe, Lake Sharpe, Lake Francis Case, and Lewis and Clark Lake to the State of South Dakota, the Cheyenne River Sioux Tribe, and the Lower Brule Sioux Tribe on or before January 1, 2002 (App. 78). WRDA was enacted by Congress without public hearings and over the objections of the Oglala Sioux Tribe (App. 78). Fifty-one recreational areas and other lands around Lake Oahe, Lake Sharpe and Lake Francis Case are located within Oglala aboriginal territory. Eighteen of these areas and other lands are located west of the Missouri River within the Great Sioux Reservation and 33 of such areas and other lands are located outside the Great Sioux Reservation but within the fourteen million acre area east of the Missouri River that is part of Oglala aboriginal territory (App. 78-79).

In December 2001, the Tribe notified the Corps under the Native American Graves Protection and Repatriation Act of November 16, 1990, P.L. 101-601, 104 Stat. 3048, 25 U.S.C. § 3002(a) ("NAGPRA") that it claims ownership and control of all Native American cultural items excavated or discovered at all recreational areas and other lands that are the subject of this action (App. 81). Those lands also contain Native American cultural items and historic properties that are included or are eligible to be included in the National Register of Historic Places

established by the National Historic Preservation Act of October 15, 1966, P.L. 89-665, 80 Stat. 915, 16 U.S.C. § 470-470x-6 ("NHPA"), including human remains, funerary objects, grave goods, sacred places and other items of cultural patrimony, prehistoric and historic village sites, ceremonial sites, structures, objects, artifacts, and records, each of which is of traditional religious, cultural and historical importance to the Tribe and its members (App. 82).

As early as 1979, the Corps was notified by its contract archaeologists that cultural resources were being damaged and removed by recreational users (App. 84). The Corps took inadequate or ineffective protective measures, causing many of the religious, cultural and historical resources described above to be damaged or removed during the time the properties were managed by the Corps, without the knowledge or consent of the Tribe (App. 84).[5] Because the WRDA transfers will leave these properties with even less protection against future damage and removal of cultural resources, the cultural heritage of the Tribe and of the other bands of the Sioux Nation ("the Sioux Tribes") will continue to suffer irreparable harm (App. 81-84).

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[5] For example, the Walth Bay Village was reported in 1986 to be subject to continuing vandalism and disturbance from recreational visitors, and the largely unexcavated village site within the Spring-Cow Creek Recreational Area was already deteriorating in 1979 from erosion and recreational use (App. 84).

On December 28, 2001, the Tribe instituted the instant action in the United States District Court for the District of Columbia to enjoin the Corps from carrying out the transfers set forth in the WRDA. Jurisdiction in the District Court was predicated on 28 U.S.C. §§ 1331(a) and 1362.

In its first claim, the Tribe seeks a declaratory judgment that (1) the 1889 Act never became effective in accordance with the conditions fixed by § 28 of that Act; (2) that the 1889 Act therefore did not operate to diminish or otherwise alter the boundaries of the Great Sioux Reservation as defined by Article 2 of the 1868 Fort Laramie Treaty; (3) that no treaty or act of Congress subsequent to March 2, 1889 has ever diminished or otherwise altered the boundaries of the Great Sioux Reservation; and (4) that each of the recreational areas and other lands that are the subject of this action and within the boundaries of the Great Sioux Reservation are subject to the provisions of Article 12 of the 1868 Fort Laramie Treaty (App. 85-86).

In its second claim, the Tribe seeks a declaratory judgment that the February 2002 transfers and leases by Defendants to the State of South Dakota of recreational areas and other lands within the boundaries of the Great Sioux Reservation, are without force or effect, and an injunction prohibiting Defendants from transferring any such recreational areas or other lands to the State of South Dakota pursuant to WRDA, without the voluntary consent of each of the bands of the Sioux Nation that were signatory to the 1868 Fort Laramie Treaty, or their successors,

including the Oglala Sioux Tribe, obtained in the manner and form specified in Article 12 of the 1868 Fort Laramie Treaty (App. 87-88).

In its third claim, the Tribe seeks a declaratory judgment that Defendants are required to consult with and reasonably accommodate the views of the Oglala Sioux Tribe prior to taking any significant actions regarding transfer, leasing or management of the recreational areas and other lands that are within the Oglala aboriginal territory and further seeks relief in the nature of mandamus to compel such consultation and reasonable accommodation (App. 88-89).[6]

On March 15, 2008, the District Court dismissed these three claims on the grounds that the Tribe lacked standing to assert them (App. 43-44). *OST v. USACE*, 537 F. Supp. 2d at 169-172. On June 26, 2009, the D.C. Circuit, by a 2-1 vote, affirmed the judgment of the District Court dismissing these claims, but on different grounds, namely that the claims were barred by the Indian Claims Commission Act (App. 6-12). *OST of PRIR v. USACE*, 570 F.3d at 331-333.

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[6] The Tribe also asserted a fourth claim, seeking relief in the nature of mandamus requiring the Corps to locate, inventory and nominate for inclusion in the National Register all Native American cultural items and other historic properties within the recreation areas and other lands that are the subject of this action and that appear to qualify for inclusion in the National Register (App. 90-91). The Tribe is not seeking review by this Court of any question concerning this fourth claim.

REASONS WHY THE PETITION SHOULD BE GRANTED

I. The Questions Presented Regarding The Tribe's Duty-to-Consult Claim Are of Great Public Importance, As They Vitally Affect All Indian Tribes' Ability To Preserve and Protect the Nation's Native American Heritage.

"Unfortunately, there are numerous statistics that bear testimony to the fact that a considerable amount of [Native American] cultural property has been destroyed through looting of sites." P. Gerstenblith, "Identity and Cultural Property: The Protection of Cultural Property in the United States," 75 B.U.L. Rev. 559, 564-565 (May 1995) (footnote omitted). In 1987, it was estimated that 32% of the known archaeological sites in the southwest had been damaged. *Id.* at 565 & n. 12. In 1994, the National Park Service reported more than 600 thefts of artifacts from Native American sites. *Id.* & n. 13. More recently, it has been estimated that a third of the approximately 2,000,000 Native American sites[7] located on federally owned lands have been looted. R. Iraola, "The Archaeological Resources Protection Act – Twenty-Five Years Later," 42 Duq. L. Rev. 221, 221 & n. 4 (Winter 2004).

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[7] "The two million figure may be conservative: some archaeologists estimate the number of sites on Indian and federal lands at six to seven million." Iraola, *infra*, 42 Duq. L. Rev. at 221 n. 4.

As of the mid-1980's, the sale of artifacts plundered from Native American burial sites throughout the United States was estimated to be "a billion dollar per year business." C. Amato, "Digging Sacred Ground: Burial Site Disturbances and the Loss of New York's Native American Heritage," 27 Colum. J. Envtl. L. 1, 2 & n. 2 (2002). With the advent of the Internet in the 1990's, "the trade in Native American artifacts has increased, leading to fears that the ease and anonymity of internet transactions could inspire a rise in illegal excavations." *Id.*; *see also* Antonia M. DeMeo, "More Effective Protection for Native American Cultural Property Through Regulation of Export," 19 Am. Ind. L. Rev. 1, 8-10 (1994) (chronicling the increasing values of Native American artifacts on the international art market and the extensive destruction and desecration of archaeological sites and cemeteries that have resulted from this increase).

"Accidental disturbance of burial sites is also common," given that the vast majority of such sites are unmarked. C. Amato, 27 Colum. J. Envtl. L. at 2. *See also* Jack F. Trope & Walter R. Echo-Hawk, "The Native American Graves Protection and Repatriation Act: Background and Legislative History," 24 Ariz. St. L. J. 35, 38-43 (1992) (detailing history of Indian grave disturbances and looting, commencing with the arrival of the first European settlers). In short, the theft and desecration of Native American cultural objects and remains constitutes a "unique problem," *Bonnichsen v. United States, Dep't of the Army*, 969

F. Supp. 628, 649 (D. Ore. 1997), that, despite Congress' passage of NAGPRA, continues to plague the aboriginal territories of the various tribes to this day.

As shown by the facts of this case, looting and disturbance of Native American sites continues to occur on federal lands located within the Oglala aboriginal territory, both *within* and *outside* of the boundaries of the Great Sioux Reservation. The Tribe has undertaken to enhance the preservation and protection of these sites by (1) notifying the Corps under NAGPRA of it claims of ownership and control of all Native American cultural items excavated or discovered at the subject recreational areas and other lands, and by (2) bringing this action to enjoin the WRDA transfers unless and until the Defendants comply with their duty to consult and accommodate the Tribe's concerns regarding such preservation and protection.

The D.C. Circuit's ruling on the ICCA statute of limitations question threatens to seriously undermine both the Tribe's and other Indian tribes' ability to compel the Government to consult with the affected tribes before taking actions that have an adverse impact on the protection and preservation of the Nation's Native American cultural and historic heritage in the face of the ongoing looting and accidental disturbance documented above. The ICCA, enacted in 1946, provided a "five-year window of time" in which tribes could present to the Indian Claims Commission "all of their claims against the Government *that*

accrued before August 13, 1946." *Shoshone Indian Tribe v. U.S.*, 364 F.3d 1339, 1343 (Fed. Cir. 2004) (emphasis added), *cert. denied*, 544 U.S. 973 (2005); *see* ICCA, § 12, 60 Stat. 1049, 1052 (formerly codified at 25 U.S.C. § 70k). Claims accruing before August 13, 1946 and not filed with the Commission by August 13, 1951 "cannot be submitted to any court, administrative agency, or the Congress." *Id.*, citing *Navajo Tribe v. New Mexico*, 809 F.2d 1455, 1461 (10th Cir. 1987). On the other hand, because "[t]he ICCA confined the Commission's jurisdiction to tribal claims that accrued before its 1946 enactment," *Navajo Tribe*, 809 F.2d at 1460, claims accruing *on or after August 13, 1946* can be asserted in the federal courts.

In its third claim, the Tribe seeks declaratory relief that the Corps is required to consult with and reasonably accommodate the Tribe's interests before "taking any significant actions" regarding the transfer, lease or management of the lands in question, and seeks mandamus relief to compel consultation and accommodation (App. 88-90). As Judge Tatel recognized, the third claim rests on assertions that "the lands are 'within Oglala aboriginal territory'" (App. 17), that "the Tribe has 'aboriginal interests in the lands set aside by [the 1851 Ft. Laramie Treaty] for [its] occupancy and use,' only 'a portion of which . . . eventually became the Great Sioux Reservation'" (App. 17), and that these aboriginal interests "impose on the government a 'trust responsibility' to consult with the Tribe before 'taking any significant actions'

as to the lands" (App. 17). *See OST of PRIR v. USACE*, 570 F.3d at 335 (Tatel, J.).

Given the Corps' duty to consult with the Tribe before taking significant action affecting the lands in question, the Tribe's claim did not accrue until the Corps breached this duty. Judge Tatel correctly observed that the alleged breach of duty by the Corps did not begin to occur until "2002 when the WRDA transfers began" (App. 18), *OST of PRIR v. USACE*, 570 F.3d at 336 (Tatel, J.), specifically not until February 8, 2002, when the Corps began to transfer and lease the lands to the State of South Dakota (App. 85). As Judge Tatel opined, because the Tribe's breach-of-trust-responsibility claim "could not possibly have existed in 1946 – over half a century before the government began executing the WRDA transfers without consulting the Tribe – the [ICCA] imposes no bar on its adjudication today" (App. 18). *OST of PRIR v. USACE*, 570 F.3d at 336 (Tatel, J.).

The ICCA also poses no bar to the adjudication of the Tribe's breach-of-duty-to-consult claim because "the ICC only had jurisdiction of claims against the United States *seeking monetary relief*." *Ottawa Tribe of Oklahoma v. Speck*, 447 F. Supp. 2d 835, 842 (N.D. Ohio 2006) (emphasis added); *see United States v. Dann*, 873 F.2d 1189, 1198 (9th Cir.) (ICC "simply had jurisdiction to award damages for takings or other wrongs that occurred on or before August 13, 1946"), *cert. denied*, 493 U.S. 890 (1989); *Mille Lacs Band of Chippewa Indians v. Minnesota Dep't of Natural*

Resources, 853 F. Supp. 1118, 1137 (D. Minn. 1994) (same); *see also Navajo Tribe*, 809 F.2d at 1461 (reviewing pertinent legislative history). The Tribe's breach-of-duty-to-consult claim seeks declaratory and mandamus relief, not monetary damages. Accordingly, the five-year statute of limitations of the ICCA does not apply to this claim.

The contrary conclusion of the D.C. Circuit majority rests on a fundamental misunderstanding of the Tribe's breach-of-trust-responsibility claim. The majority described this claim as "based on the assertion" that the lands in question remain "part of the Great Sioux Reservation" because "the [March 2,] 1889 Act dissolving much of the Reservation never went into effect" (App. 5-6). *OST of PRIR v. USACE*, 570 F.3d at 330. According to the majority, because the breach-of-trust-responsibility claim would require the court to decide whether the 1889 Act was "null and void" and "to treat the area as if the 1868 [Ft. Laramie] Treaty had not been modified," the claim "arose before 1946" (App. 10). *Id.* at 332.

Disagreeing with the majority, Judge Tatel correctly pointed out that "[i]n reality the [breach-of-trust-responsibility] claim rests not on the contention that the lands are within the Great Sioux Reservation . . . but rather on the assertion that the lands are 'within Oglala aboriginal territory,'" a far larger expanse of land (App. 17). *OST of PRIR v. USACE*, 570 F.3d at 335 (Tatel, J). Indeed, the majority of the lands in question (33 out of the 51 lands at issue) lie "*outside* the Great Sioux Reservation" (emphasis in

original) (App. 17). *Id.* Because "the majority of the lands at issue in the [breach-of-trust-responsibility] claim were never part of the Great Sioux Reservation and thus were entirely unaffected by the 1889 Act," this claim "clearly asserts a legal interest stemming from the Tribe's aboriginal interests in the lands, rather than the 'alleged nullity of the 1889 Act'" (App. 18). *Id.* at 336.

The majority also erred in finding that the breach-of-trust-responsibility claim was "never mention[ed]" in the Tribe's briefs to the court of appeals (App. 10). *OST of PRIR v. USACE*, 570 F.3d at 332 n. 4. The Tribe in fact argued that "Defendants owe the Tribe a trust responsibility based upon [the Tribe's] aboriginal interest in the lands at issue" (App. 167-171), quoting *OST v. USACE*, 537 F. Supp. 2d at 171. This fiduciary duty, the Tribe further argued, is similar to that recognized by a Canadian court (the British Columbia Court of Appeal) in *Haida Nation v. British Columbia*, 2002 BCCA 147,[8]

[8] This decision was affirmed in relevant part by the Canadian Supreme Court in *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511. In *Haida Nation* and the companion case of *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550, the Canadian Supreme Court "unanimously established for the first time that both federal and provincial governments have a duty to consult and accommodate Aboriginal peoples when making decisions that may adversely affect unproven Aboriginal title and rights claims." Kirsten M. Carlson, "Does Constitutional Change Matter? Canada's Recognition of Aboriginal Title," 22 Ariz. J. Int'l & Comp. Law 449, 474 (Fall 2005); *see also* P.

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obligating British Columbia "to consult with and accommodate a tribe" prior to undertaking a significant action affecting lands in which the tribe has aboriginal interests (App. 38).

Having erroneously concluded that the ICCA barred the district court from hearing the Tribe's breach-of-duty-to-consult claim, the D.C. Circuit majority did not reach the issue of standing (App. 6-7). *OST of PRIR v. USACE*, 570 F.3d at 331 n. 2. In holding the Tribe lacked standing to sue, the District Court rejected the Tribe's reliance on *Haida Nation*, 2002 BCCA 147, and ruled that, because the Tribe possessed no "legally protected interest" in the Oglala aboriginal lands, it failed to allege any injury-in-fact. *OST v. USACE*, 537 F. Supp. 2d at 169-172.

Judge Tatel reached the issue of the Tribe's standing to bring its breach-of-duty-to-consult claim. He concluded that the district court's "reasoning improperly 'decid[ed] the merits under the guise of determining the plaintiff's standing'" (App. 18). *OST of PRIR v. USACE*, 570 F.3d at 336 (quoting *Inf. Handling Servs. v. Defense Aut. Printing Servs.*, 338

Manus, "Indigenous Peoples' Environmental Rights: Evolving Common Law Perspectives in Canada, Australia, and the United States," 33 B.C. Envtl. Aff. L. Rev. 1, 32 (2006) ("The Court concluded that the consultation requirement encompasses situations where government-approved activity might detrimentally impact land or natural resources to which a tribe has established only *potential* aboriginal rights and title.") (footnote omitted; emphasis in original).

F.3d 1024, 1030 (D.C. Cir. 2003)). Standing in no way depends on the merits of the plaintiff's claim. *See Warth v. Seldin*, 422 U.S. 490, 500 (1975); *see also Meese v. Keene*, 481 U.S. 465, 473 (1987) ("whether the statute in fact constitutes an abridgment of the plaintiff's speech is, of course, irrelevant to the standing analysis"). "Whether a plaintiff has a legally protected interest (and thus standing) does not depend on whether he can demonstrate that he will succeed on the merits." *Claybrook v. Slater*, 111 F.3d 904, 907 (D.C. Cir. 1997). "[A]t the motion to dismiss stage, a plaintiff's non-frivolous contention regarding" the merits of the controversy "must be taken as correct for purposes of standing." *Inf. Handling Servs.*, 338 F.3d at 1030 (citations omitted).

Judge Tatel further properly determined that, "given the hornbook principle that the 'federal government has a trust or special relationship with Indian tribes,' 1-5 Cohen's Handbook of Federal Indian Law, § 5.04[4][a]," the Tribe's duty-to-consult claim "is hardly so frivolous as to justify dispensing with the normal practice of assuming its merit" for purposes of standing (App. 18-19). *OST of PRIR v. USACE*, 570 F.3d at 336. Judge Tatel referred to the federal courts' recognition of the existence of a guardian-ward relationship between the Government and the Indian tribes (App. 19). *Id.*; *see United States v. Sioux Nation of Indians*, 448 U.S. at 415; *United States v. Creek Nation*, 295 U.S. 103, 109-110 (1935); *Littlewolf v. Lujan*, 877 F.2d 1058, 1063 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1043 (1990). As part of

this relationship, "[t]raditionally, the courts have enforced trusteeship duties . . . against executive branch officers, usually under a common law fiduciary theory." *Littlewolf*, 877 F.2d at 1064, citing *Seminole Nation v. U.S.*, 316 U.S. 286 (1942). "[T]his Court has recognized the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people."[9] *Seminole Nation*, 316 U.S. at 297.

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[9] This fiduciary relationship "has been described as 'one of the primary cornerstones of Indian law,' F. Cohen, Handbook of Federal Indian Law 221 (1982), and has been compared to one existing under a common law trust, with the United States as trustee, the Indian tribes or individuals as beneficiaries, and the property and natural resources managed by the United States as the trust corpus." *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 11 (2001). The trust corpus in this case is comprised of the Native American cultural items excavated or discovered at the recreational areas and other lands that are the subject of this action to which the Tribe claims ownership and control under NAGPRA.

Moreover, while "the parameters of the duty to consult have not been well-defined by the judiciary, where federal activities affect trust resources, tribes should be entitled to greater involvement than the due process rights afforded non-Indians." S. Zellmer, "Indian Lands as Critical Habitat for Indian Nations and Endangered Species: Tribal Survival and Sovereignty Come First," 43 S.D. L. Rev. 381, 389-90 (1998); *see Northwest Sea Farms v. United States Army Corps of Engineers*, 931 F. Supp. 1515, 1520 (W.D. Wash. 1996) (although agency's regulations do not specifically require consideration of treaty rights as part of "public interest" review mandated by statute, trust and treaty obligations provided agency with authority to do so; Corps must ensure that treaty rights are given full effect); *Northern Cheyenne Tribe v. Hodel*, 12 Ind. L. Rep. 3065, 3070 (D. Mont.

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Having found that the Tribe showed a legally protected interest, Judge Tatel proceeded to address the remaining two requirements for standing: "whether [1] the challenged conduct injures the Tribe's claimed (and non-frivolous) legal interest in a direct, concrete, and particularized way [2] that a court order would redress" (App. 19). *OST of PRIR v. USACE*, 570 F.3d at 336. First, he concluded that the injuries to the Tribe's legal interest were caused by actions of the Corps, because the Corps' "failure to consult with the Tribe before proceeding with the WRDA transfers deprived the Tribe of its alleged procedural right to be consulted" (App. 19). *Id.* He further properly determined that the Tribe's procedural right to be consulted was "redressable where, as here, 'there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant,'" quoting *Massachusetts v. EPA*, 549 U.S. 497, 518 (2007) (App. 19-20). *Id.*

1985) (Interior Department's procedural duty to consult with tribes regarding impact on trust and treaty rights is violated if tribes are treated like mere citizens), *remanded for modification of injunction*, 851 F.2d 1152 (9th Cir. 1988). "[I]n practical terms, a procedural duty has arisen from the trust relationship such that the federal government must consult with an Indian tribe in the decision-making process to avoid adverse effects on [trust or] treaty resources." *Klamath Tribes v. United States*, 1996 WL 924509, at *8 (D. Or. Oct. 2, 1996) (No. 96-381-HA) (holding that Forest Service must consult with Tribe and consider effects of timber harvest on mule deer and other tribal resources).

Thus, to enable the Tribe and other Indian bands to preserve the country's unique and irreplaceable Native American heritage, the Court should grant the Petition and, in accordance with Judge Tatel's dissent, hold that the ICCA does not bar the Tribe's duty-to-consult claim, and that the Tribe has standing to pursue that claim. These questions should be addressed by this Court now, since in the not too distant future the items of cultural property in question will be gone or irreparably damaged. *Cf.* Gerstenblith, 75 B. U.L. Rev. at 565 ("By the time society decides in twenty or thirty years that these [Native American cultural] resources are also important, they will be gone or irreparably injured.")

II. The ICCA Does Not Bar Jurisdiction Over The Tribe's Great Sioux Reservation Boundaries Claims.

The Tribe's first two claims are based on the allegation that "the 1889 Act dissolving much of the [Great Sioux] Reservation *never went into effect* because the Crook Commission failed to obtain valid signatures from three-fourths of the adult male Sioux population" (App. 5-7, 10, 72-74) (emphasis added). *OST of PRIR v. USACE*, 570 F.3d at 330. The appeals court majority ruled that these claims fall under § 2(3) of the ICCA, "encompass[ing] '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'" (App. 9-10). *Id.* at 332 (emphasis added), quoting ICCA, § 2(3), 60 Stat. 1050, formerly codified at 25 U.S.C. § 70a(3) (repealed). The majority reasoned that the first two 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" (App. 10). *Id.* (emphasis added).

The term "revised" as used in § 2(3) is undefined, but "revise" has generally been accorded the meaning "to review, re-examine *for correction*; to go over a thing *for the purpose of amending, correcting, rearranging, or otherwise improving it.*" Black's Law Dictionary 1484 (4th ed. 1968) (emphasis added); *see also* Webster's Third New Intern. Dictionary 1944 (1976) (revise means "to make a new, amended, improved, or up-to-date version of"). Given the grounds set forth in § 2(3) for revisions, "revised" is used in much the same sense as "reformed", i.e., the equitable remedy of reformation. *See* Black's Law Dictionary 1446 (reform means "[t]o correct, rectify, amend, remodel. Instruments *inter partes* may be *reformed*, when defective, by a court of equity") (emphasis in original).

The Tribe is not seeking to revise or reform any agreements between the Sioux Tribes and the United States. Rather, the Tribe contends that no valid agreements to approve or consent to the 1889 Act were ever entered into, because the Crook Commission obtained no more than 3,942 valid signatures on

the quitclaim deeds, or less than 4,259 signatures, the required three-fourths of the adult male members of the bands and tribes signatory to the 1868 Treaty (App. 69-75). Alternatively, the Tribe is seeking to rescind the quitclaim deeds – to declare the deeds void from their inception and to put an end to them "as though [they] never were," Black's Law Dictionary 1471 (4th ed. 1968) – on the grounds that facially valid signatures were obtained by duress, coercion, fraud and bribery (App. 129-130).

These claims do not fall within the fair meaning of "revised" as used in § 2(3) of the ICCA. Nor do they, as the appeals court majority suggested (App. 9), *OST of PRIR v. USACE*, 570 F.3d at 332 n. 3, fall within § 2(5) of the Act, referring to claims "based upon fair and honorable dealings *that are not recognized by any existing rule of law or equity*." 60 Stat. 1050, 25 U.S.C. § 70a(5) (repealed) (emphasis added). Finally, to the extent the Tribe's boundaries claims arise under the laws and treaties of the United States, *see* ICCA § 2(1), 60 Stat. 1050, specifically the challenged WRDA transfers' violation of Article 12 of the 1868 Fort Laramie Treaty, Judge Tatel correctly recognized that those claims did not accrue until the transfers were initiated in 2002 and are therefore not subject to the ICCA (App. 18). *OST of PRIR v. USACE*, 570 F.3d at 335 (Tatel, J.) (the Tribe's second claim "focuses on the unlawfulness of the current WRDA transfers, not on the government's failure to remedy a historical wrong").

More fundamentally, jurisdiction exists over the Tribe's Great Sioux Reservation boundaries claims because the ICCA does not bar suits to determine a reservation's boundaries. *See Navajo Tribe*, 809 F.2d at 1475. While conceding this is "generally true," the majority determined that a reservation boundary claim is still subject to the ICCA where the adjudication of such a claim requires a treaty, contract or agreement between a tribe and the United States to be "revised" (App. 11-12). *OST of PRIR v. USACE*, 570 F.3d at 333. As discussed above, however, the resolution of the Tribe's reservation boundary claims will not "revise" any treaty, contract or agreement between the Tribe and the Government, but rather will either (1) declare that no agreement between the Sioux Tribes and the United States to consent to the 1889 Act was ever entered into, given the lack of the requisite signatures of three-fourths of all adult male Sioux on the quitclaim deeds, or (2) rescind (not revise) any such agreement based on signatures being obtained through coercion, fraud or bribery.

Thus, the Court should grant the Petition to reach and decide the questions regarding the application of the ICCA to the Tribe's Great Sioux Reservation boundaries claims, as those questions, like those involving the Tribe's breach-of-duty-to-consult claim, are of great public importance and central to the ability of Indian tribes to preserve and protect the Nation's Native American cultural and historic heritage.

III. The Tribe Has Standing To Pursue Its Great Sioux Reservation Boundaries Claims.

The D.C. Circuit majority did not reach the issue of whether the Tribe has standing to pursue its Great Sioux Reservation boundaries claims, as it erroneously concluded that the ICCA bars jurisdiction of these claims (App. 6-7). *OST of PRIR v. USACE*, 570 F.3d at 331 n. 2. Judge Tatel did reach this issue, determining that the Tribe lacked standing to sue because the boundaries claims are "so transparently 'frivolous'" the court need not assume their merit for purposes of evaluating standing (App. 16). *Id.* at 335 (Tatel, J.). Judge Tatel reasoned that, because the WRDA provides that transfers authorized by that Act have no effect on existing reservation boundaries, the WRDA transfers do not trigger the right under the 1868 Treaty to approve "cessions" of reservation land. *Id.*

While the WRDA transfers do not affect the "external boundaries" of any Indian reservation, *see* Pub. L. No. 106-53, § 607(a)(4), 113 Stat. 269, 395, they do adversely affect the Tribe's legally protected interests (as well as those of the other Sioux Tribes) in the cultural resources of the reservation lands that are being transferred from the United States to the State of South Dakota. NAGPRA, which broadly applies to "tribal lands," i.e., "all lands within the exterior boundaries of an Indian reservation," 25 U.S.C. § 3001(15)(A), "confirms a tribe's interest in cultural property eligible for protection under the laws." *Quechan Indian Tribe v. U.S.*, 535 F. Supp. 2d

1072, 1097-1098 (S.D. Cal. 2008), citing 25 U.S.C. § 3002.

Moreover, while the lands in question are federal fee lands, not lands held in trust for the Sioux Tribes, the cultural resources on these lands are the trust property of the Tribe and the other Sioux tribes under NAGPRA. The United States' "functional obligations" over cultural resources management on tribal lands extend to "federally-owned fee lands within an Indian reservation" and give rise to a fiduciary relationship between the Tribe and the United States.[10] *See Quechan Ind. Tribe*, 535 F. Supp. 2d at 1109 ("[T]he various federal statutes aimed at protecting Indian cultural resources, located both on Indian *and public land*, demonstrate the government's comprehensive responsibility to protect those resources and, thereby establishes a fiduciary relationship.") (emphasis added), citing *Bear Medicine v. United States*, 241 F.3d 1208, 1218 (9th Cir. 2000). Creation of the Great

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[10] Federal statutes imposing these "functional obligations" are as follows: the Archeological Resources Protection Act, 16 U.S.C. §§ 470aa-470mm, which discusses archeological resources both on public and Indian lands; the American Antiquities Act, 16 U.S.C. § 433, protecting historic ruins and objects of antiquity on lands owned or controlled by the government; the Archaeological Historic and Preservation Act, 16 U.S.C. §§ 469-469c-2, preserving historical and archeological data from irreparable loss or destruction caused by alteration of the land resulting from Federal construction project or federally licensed activity; and the NHPA, 16 U.S.C. §§ 470-470x-6, which requires preservation of historic properties controlled or owned by the United States.

Sioux Reservation itself also created a trust relationship between the United States and the Sioux Tribes. *See Quechan Ind. Tribe*, 535 F. Supp. 2d at 1109-10, where in response to plaintiff's argument that "the creation of the [Fort Yuma] Reservation establish[ed] a trust relationship between the United States and the Quechan," the district court stated that this Court "has recognized the existence of a trust relationship between the United States and Indian tribes . . . requir[ing] the government's conduct in its dealings with Indian tribes to be judged 'by the most exacting fiduciary standards,'" quoting *Seminole Nation*, 316 U.S. at 297.

No such fiduciary relationship exists between the Indian tribes and the transferor of the WRDA transfers, namely the State of South Dakota. The transfers terminate the special fiduciary relationship between the United States and the Tribe regarding protection of the Tribe's cultural resources on the lands transferred, adversely affecting the Tribe's interests in those resources. The transfers are therefore a "cession" of territory within the Great Sioux Reservation that triggers the obligation under the 1868 Treaty to obtain the consent of the affected tribes, including the Oglala Sioux Tribe. The Government's failure to obtain the consent of the Sioux Tribes, including the Oglala Sioux Tribe, before proceeding with the WRDA transfers deprived the Tribe of its legally protected interests in cultural resources on the lands so transferred, including its rights as one of the beneficiaries of the special

fiduciary relationship that exists between the United States and the Sioux Tribes regarding the protection of cultural resources on federal fee lands within the Great Sioux Reservation. This injury is clearly redressable by enjoining Defendants from completing the transfers unless and until the consent of the Sioux Tribes is first obtained in the manner prescribed by Article 12 of the 1868 Treaty.

Thus, the Court should grant the Petition and hold that the Tribe has standing to pursue its Great Sioux Reservation boundaries claims, a question of great public importance vitally affecting the Sioux tribes' ability to protect and preserve this country's Native American cultural and historic heritage.

CONCLUSION

In view of the arguments and authorities set forth above, the Petitioner, the Oglala Sioux Tribe, respectfully requests that this Court grant this Petition and issue a writ of certiorari to the United States Court of Appeals for the District of Columbia.

Respectfully submitted,

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