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No. 11-1448

OFFICIAL BUSINESS PENALTY \$300

IN THE
Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

SAMISH INDIAN NATION,
Respondent.

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

**BRIEF OF SAMISH INDIAN NATION
IN OPPOSITION TO PETITION
FOR A WRIT OF CERTIORARI**

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QUESTIONS PRESENTED

1. Whether the petition should be denied because this action has been voluntarily dismissed under Court of Federal Claims Rule 41(a)(1)(A)(i) and the case is now moot.

2. Whether the Court of Federal Claims has subject matter jurisdiction under the Tucker Act, 28 U.S.C. § 1491(a)(1) or the Indian Tucker Act, 28 U.S.C. § 1505 to adjudicate a claim for damages against the United States arising from its alleged failure to pay to an Indian tribe a share of funds under the Revenue Sharing Act, 31 U.S.C. §§ 1221 *et seq.* (repealed), which described such funds as “entitlements” and which mandated that payments be made to all states, local governments and Indian tribes based on a statutorily-defined formula.

3. Whether the Anti-Deficiency Act, 31 U.S.C. § 1341(a)(1)(A) is a limitation on the power of the Court of Federal Claims to enter a judgment in damages.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED.....	i
TABLE OF AUTHORITIES.....	v
JURISDICTION	1
STATUTORY PROVISIONS INVOLVED.....	1
INTRODUCTION.....	2
STATEMENT	3
REASONS FOR DENYING THE PETITION....	8
I. This Case Is Moot	8
II. The Court Of Appeals And The Petitioner Agree On The Standard For Determining Subject Matter Jurisdiction Over Damages Claims In The Court Of Federal Claims.....	11
III. The Court Of Appeals Applied This Court's Standard Here.....	12
IV. The Court Of Appeals Held That An Alleged Violation Of The Revenue Sharing Act – Not The Due Process Clause Or The APA – Provides The Basis For Jurisdiction Over A Damages Claim Against The United States	15
V. The Court Of Appeals' Decision Is Consistent With <i>United States v. Testan</i> , 424 U.S. 392 (1976).....	19

TABLE OF CONTENTS—Continued

	Page
VI. The Court Of Appeals' Ruling That The Tribe's Claim Under The Revenue Sharing Act Was Not Barred By The Anti-Deficiency Act Is Consistent With This Court's Decision In <i>Salazar v. Ramah Navajo Chapter</i> , 567 U.S. ___, 132 S. Ct. 2181 (2012).....	21
CONCLUSION	22
APPENDIX	
APPENDIX A	
Judgment and Mandate of the Court of Appeals (Feb 3, 2012).....	1a
APPENDIX B	
Samish Indian Nation's Notice of Dismissal Pursuant to Court of Federal Claims Rule 41(a)(1)(A)(i) (Aug 2, 2012)	2a
APPENDIX C	
Docket Entry by the Court of Federal Claims that complaint is dismissed pursuant to Rule 41(a)(1)(A)(i) (Aug 2, 2012)	4a
APPENDIX D	
State and Local Fiscal Assistance Act of 1972, Pub. L. No. 92-512, 86 Stat. 919 (1972).....	5a

TABLE OF AUTHORITIES

CASES	Page(s)
<i>Agwiak v. United States</i> , 347 F.3d 1375 (Fed. Cir. 2003)	14
<i>Alvarez v. Smith</i> , 130 S.Ct. 576 (2009).....	9, 10
<i>Britell v. United States</i> , 372 F.3d 1370 (Fed. Cir. 2004)	14-15
<i>Deakins v. Monaghan</i> , 484 U.S. 193 (1988) ..	10
<i>DeFunis v. Odegaard</i> , 416 U.S. 312 (1974).	2, 10
<i>Frank v. Minnesota Newspaper Ass'n, Inc.</i> , 490 U.S. 225 (1989).....	9
<i>Greene v. Babbitt</i> , 943 F. Supp. 1278 (W.D. Wash. 1996).....	3, 4, 17, 18
<i>Greene v. Lujan</i> , No. C89-645Z, 1992 WL 533059 (W.D. Wash. Feb. 25, 1992), <i>aff'd</i> <i>Greene v. Babbitt</i> , 64 F.3d 1266 (9th Cir. 1995).....	4, 18
<i>Greenlee County, Arizona v. United States</i> , 487 F.3d 871 (Fed. Cir. 2007).....	14
<i>James v. Caldera</i> , 159 F.3d 573 (Fed. Cir. 1998).....	16
<i>LeBlanc v. United States</i> , 50 F.3d 1025 (Fed. Cir. 1995)	16
<i>Lewis v. United States</i> , No. 2010-5005, 2012 WL 884860 (Fed. Cir. Feb. 17, 2012).....	16

TABLE OF AUTHORITIES—Continued

	Page(s)
<i>North Carolina v. Rice</i> , 404 U.S. 244 (1971).....	10
<i>Salazar v. Ramah Navajo Chapter</i> , 567 U.S. __, 132 S. Ct. 2181 (2012).....	21, 22
<i>Selig v. Pediatric Specialty Care, Inc.</i> , 551 U.S. 1142 (2007).....	10
<i>United States v. Jicarilla Apache Nation</i> , 564 U.S. __ (2011).....	13
<i>United States v. Navajo Nation</i> , 556 U.S. 287 (2009).....	12, 13
<i>United States v. Testan</i> , 424 U.S. 392 (1976).....	19, 20
<i>United States v. White Mountain Apache Tribe</i> , 537 U.S. 465 (2003).....	20
<i>Wopsock v. Natchees</i> , 454 F.3d 1327 (Fed. Cir. 2006).....	16
 CONSTITUTION, STATUTES AND REGULATIONS	
U.S. Const., Amend. V.....	11, 15-19
U.S. Const., Art. III, § 2	9
1937 Housing Act as amended by the Housing and Community Development Act of 1974, Pub. L. No. 93-383, §§ 102(a)(1), 103, 201, 88 Stat. 633	6
Act of Sept. 25, 1972, Pub. L. No. 92-433, § 9, 86 Stat. 724, 729	6

TABLE OF AUTHORITIES—Continued

	Page(s)
Administrative Procedure Act (APA), 5 U.S.C. §§ 551 <i>et seq.</i>	11, 15-19
Anti-Deficiency Act, 31 U.S.C. § 1341(a)(1)(A).....	7, 21, 22
Child Nutrition Act of 1966, Pub. L. No. 89-642, 80 Stat. 885	6
Child Nutrition Amendments of 1978, Pub. L. No. 95-627, § 3, 92 Stat. 3603.....	6
Classification Act, 5 U.S.C. § 5101	19, 20
Comprehensive Employment and Training Act of 1973, Pub. L. No. 93-203, §§ 204(a)(2), 207, 302, 87 Stat. 839	6
Department of the Interior and Related Agencies Appropriations Act for FY 1984, Pub. L. No. 98-146, 97 Stat. 919, 929 (1983).....	6
Department of the Interior and Related Agencies Appropriations Act for FY 1991, Pub. L. No. 101-512, 104 Stat. 1915, 1930 (1990).....	6
Food and Agriculture Act of 1977, Pub. L. No. 95-113 § 1301, 91 Stat. 913, 961, 980	6
Housing and Community Development Act of 1977, Pub. L. No. 95-128, §§ 102(a)(16), 103(a), 901, 91 Stat. 1111.....	6

TABLE OF AUTHORITIES—Continued

	Page(s)
Indian Housing Act of 1988, Pub. L. No. 100-358, §§ 201-02, 102 Stat. 676	6
Indian Self-Determination and Education Assistance Act, 25 U.S.C. §§ 450 <i>et seq.</i>	4, 12, 13, 15
Indian Tucker Act, 28 U.S.C. § 1505	3, 4, 11, 20
Job Training Partnership Act. Pub. L. No. 97-300, § 401, 96 Stat. 1322	6
National School Lunch and Child Nutrition Act Amendments of 1973, Pub. L. No. 93-150, § 6(a), 87 Stat. 560, 563	6
Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, §§ 671, 674(c), 901, 2601-2611, 95 Stat. 357	6
Revenue Sharing Act, 31 U.S.C. §§ 1221 <i>et seq.</i>	<i>passim</i>
State and Local Fiscal Assistance Act of 1972, Pub. L. No. 92-512, 86 Stat. 919 (1972)	1-2
State and Local Assistance Amendments of 1976, Pub. L. No. 94-488, 90 Stat. 2341.....	2
State and Local Fiscal Assistance Act Amendments of 1980, Pub. L. No. 96-604, 94 Stat. 3516.....	2
Act of Sept. 13, 1982, Pub. L. No. 97-258, 96 Stat. 877, 1010-31.....	2

TABLE OF AUTHORITIES—Continued

	Page(s)
Local Government Fiscal Assistance Amendments of 1983, Pub. L. No. 98- 185, § 2, 97 Stat. 1309	2
Consolidated Omnibus Reconciliation Act of 1985, Pub. L. No. 99-272, 100 Stat. 82, 327-28	2
Snyder Act, 25 U.S.C. §§ 2, 13	4, 12, 13, 15
Tucker Act, 28 U.S.C. § 1491	3, 4, 11, 14, 20
25 C.F.R. Part 83	17
25 C.F.R. § 300 (1975)	6
RCFC 12(b)(1)	5, 9
RCFC 41(a)(1)(A)(i)	2, 8, 9
 TREATISES	
Eugene Gressman, <i>et al.</i> , <i>Supreme Court Practice</i> (9th ed. 2007)	10

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JURISDICTION

Although the petition, at the time it was filed, properly invoked the jurisdiction of this Court under 28 U.S.C. §1254(1), this Court now lacks jurisdiction because, as discussed below, the sole remaining claim in the case became moot while the petition was pending in this Court.

STATUTORY PROVISIONS INVOLVED

In addition to the statutory provisions cited by Petitioner, this case involves the Revenue Sharing Act, which was originally enacted as the State and

Local Fiscal Assistance Act of 1972, Pub. L. No. 92-512, 86 Stat. 919 (1972). The Act was thereafter amended and extended by the: State and Local Assistance Amendments of 1976, Pub. L. No. 94-488, 90 Stat. 2341; State and Local Fiscal Assistance Act Amendments of 1980, Pub. L. No. 96-604, 94 Stat. 3516; Act of Sept. 13, 1982, Pub. L. No. 97-258, 96 Stat. 877, 1010-31; and the Local Government Fiscal Assistance Amendments of 1983, Pub. L. No. 98-185, § 2, 97 Stat. 1309. The Act was repealed by the Consolidated Omnibus Reconciliation Act of 1985, Pub. L. No. 99-272, 100 Stat. 82, 327-28. Prior to its repeal the Act had been codified at 31 U.S.C. §§ 1221 *et seq.* The relevant excerpts of the Revenue Sharing Act are set forth in Respondent's Appendix 5a-10a, *infra*.

INTRODUCTION

There is no live case or controversy between the parties to this case. With respect to claims arising under 38 federal statutes and treaties, the government prevailed below, securing dismissal of those claims for lack of jurisdiction. That left only a claim arising under the Revenue Sharing Act, which the Court of Appeals declined to dismiss. But that claim was subsequently dismissed voluntarily, as on August 2, 2012, Respondent filed a notice of dismissal in this case in the Court of Federal Claims, pursuant to that Court's Rule 41(a)(1)(A)(i). That notice terminated all that remained of the case, thereby rendering moot the issues presented in the petition. *See DeFunis v. Odegaard*, 416 U.S. 312, 316 (1974).

In this circumstance, with no remaining concrete adversity between the parties, denial of the petition as moot would be an appropriate disposition. Alternatively, the Court might grant the petition for the

limited purpose of vacating the judgment of the Court of Appeals with respect to matters relating to the claim pursuant to the Revenue Sharing Act, and remanding with instructions to dismiss the action with prejudice. The Respondent has no objection to either of these dispositions. In either event, there is no basis for the Court to address the merits of the questions presented in the petition.

While the absence of a case or controversy is all that is necessary to dispose of the petition, even prior to the case becoming moot, the petition should have been denied for the reasons discussed below.

STATEMENT

The Samish Indian Nation (“Tribe”), a federally recognized tribe, brought this suit for damages against the United States in the Court of Federal Claims in 2002. The Tribe invoked the jurisdiction provided by the Tucker Act, 28 U.S.C. § 1491, and the Indian Tucker Act, 28 U.S.C. § 1505. The Tribe asserted claims under 39 statutes (and treaties), *see* Pet. App. 101a, by which the United States provided federal funds for the benefit of federally recognized tribes, but which the Samish did not receive prior to 1996.

The Samish Indian Nation’s status as a federally recognized tribe, and the federal government’s misdeeds in connection with the government’s failure to treat the Samish Indian Nation as a federally recognized tribe from 1969 until 1996, were adjudicated in the Tribe’s *Greene v. Babbitt* litigation, where the Tribe was ultimately successful in having its fed-

erally recognized status reaffirmed.¹ Those proceedings were concluded by a final judgment entered on November 1, 1996.²

The Tribe's suit for damages under the 39 statutes was initially dismissed by the Court of Federal Claims on September 30, 2003. Pet. App. 115a-134a, *Samish Indian Nation v. United States*, 58 Fed. Cl. 114 (2003). On appeal, the Court of Appeals for the Federal Circuit affirmed in part and reversed in part. Pet. App. 78a-114a, *Samish Indian Nation v. United States*, 419 F.3d 1355 (Fed. Cir. 2005). Applying this Court's precedent regarding the standard for determining subject matter jurisdiction under the Tucker Act and Indian Tucker Act, the Court of Appeals affirmed dismissal of two of the Tribe's claims – those made under the Indian Self-Determination and Education Assistance Act, 25 U.S.C. §§ 450 *et seq.*, and the Snyder Act, 25 U.S.C. §§ 2, 13. Pet. App. 92a-101a, 114a. The Court of Appeals reversed the portion of the trial court's decision which had found the remaining claims to be barred by the statute of limitations. Pet. App. 102a-103a, 114a. Because the trial court had not yet examined the statutes under which the remainder of the claims were made, the Court of Appeals remanded the case "for further proceedings to determine whether the remaining statutes underlying the claim are money-mandating." Pet. App. 79a.

¹ *Greene v. Lujan*, No. C89-645Z, 1992 WL 533059 (W.D. Wash. Feb. 25, 1992) (Pet. App. 337a-354a), *aff'd Greene v. Babbitt*, 64 F.3d 1266 (9th Cir. 1995); *Greene v. Babbitt*, 943 F. Supp. 1278 (W.D. Wash. 1996) (Pet. App. 140a-163a).

² *Greene v. Babbitt*, No. C89-645Z (Final Judgment filed Nov. 1, 1996) (Pet. App. 137a-139a), *amended*, Order of Jan. 13, 1997 (Pet. App. 135a-136a).

Following remand, the Tribe filed an amended complaint. The government again moved to dismiss under Court of Federal Claims Rule 12(b)(1) on one ground – lack of subject matter jurisdiction. The Court of Federal Claims bifurcated briefing on the government’s motion to dismiss. Briefing proceeded first on two major programs that provided funds for federally recognized tribes – Bureau of Indian Affairs (“BIA”) funding known as “Tribal Priority Allocations” or “TPA” and Indian Health Service (“IHS”) funding. By opinion and order of May 27, 2008, the trial court granted the government’s motion to dismiss the TPA and IHS claims for lack of subject matter jurisdiction finding that they did not arise under statutes that could “fairly be interpreted as mandating compensation by the Federal Government for the damages sustained.” *Samish Indian Nation v. United States*, 82 Fed. Cl. 54, 58 (2008) (citations omitted).

Briefing then proceeded on the government’s motion, under RCFC 12(b)(1), to dismiss the remainder of the Tribe’s claims. In an opinion and order issued on November 30, 2009, Pet. App. 23a-77a, 90 Fed. Cl. 122 (2009), the trial court considered each of the remaining statutes under which the Tribe raised claims, and granted the government’s motion to dismiss all of them. The court concluded that as to all of these statutes, except one, the court lacked subject matter jurisdiction because, as with TPA and IHS funding, none of the statutes on which the claims were based could “fairly be interpreted as

mandating compensation by the Federal Government for the damages sustained.” Pet. App. 48a-77a.³

As to the claim made under the Revenue Sharing Act, the trial court concluded that because under the statute “Indian tribes are ‘entitled to’ funds and ‘shall be allocated’ those funds, and that the Treasury

³ The Court of Federal Claims dismissed, for lack of subject matter jurisdiction, the Tribe’s claims regarding funds provided to federally-recognized tribes for the following purposes and under the following statutes: (a) Community development and community services provided through federal block grants (*see* Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, §§ 671, 674(c), 901, 2601-2611, 95 Stat. 357); (b) Job training programs, (*see* Comprehensive Employment and Training Act of 1973 (“CETA”), Pub. L. No. 93-203, §§ 204(a)(2), 207, 302, 87 Stat. 839 and the Job Training Partnership Act (“JTPA”), Pub. L. No. 97-300, § 401, 96 Stat. 1322); (c) Food and nutrition programs for Women, Infants and Children (“WIC”), (*see* Act of Sept. 25, 1972, Pub. L. No. 92-433, § 9, 86 Stat. 724, 729 (amending Child Nutrition Act of 1966, Pub. L. No. 89-642, 80 Stat. 885), National School Lunch and Child Nutrition Act Amendments of 1973, Pub. L. No. 93-150, § 6(a), 87 Stat. 560, 563, Child Nutrition Amendments of 1978, Pub. L. No. 95-627, § 3, 92 Stat. 3603); (d) the Commodity Food Distribution program, (*see* Food and Agriculture Act of 1977, Pub. L. No. 95-113 § 1301, 91 Stat. 913, 961, 980); and (e) Housing assistance, (*see* 1937 Housing Act as amended by the Housing and Community Development Act of 1974, Pub. L. No. 93-383, §§ 102(a)(1), 103, 201, 88 Stat. 633, Housing and Community Development Act of 1977, Pub. L. No. 95-128, §§ 102(a)(16), 103(a), 901, 91 Stat. 1111, the Indian Housing Act of 1988, Pub. L. No. 100-358, §§ 201-02, 102 Stat. 676, and the Housing Assistance Program (HIP), 25 C.F.R. Part 300 (1975) as funded through annual appropriations to the Department of the Interior, *e.g.*, Department of the Interior and Related Agencies Appropriations Act for FY 1984, Pub. L. No. 98-146, 97 Stat. 919, 929 (1983), Department of the Interior and Related Agencies Appropriations Act for FY 1991, Pub. L. No. 101-512, 104 Stat. 1915, 1930 (1990)).

Secretary ‘shall . . . pay out’ the funds to the Indian tribes,” the statute provided a substantive source of law for purposes of the court’s subject matter jurisdiction. Pet. App. 40a-41a, 46a. The trial court, however, dismissed the Tribe’s Revenue Sharing Act claim as nonjusticiable. The court stated that because appropriations for Revenue Sharing had lapsed in 1983, the Tribe’s claims under that act were barred by the Anti-Deficiency Act and therefore moot. Pet. App. 47a-48a & 38a n.10.

The Tribe appealed two claims from the court’s May 2008 and November 2009 decisions – challenging the Court of Federal Claims’ decision that TPA was not money-mandating and its decision that the Tribe’s claims under the Revenue Sharing Act were mooted by the lapse in appropriations.

In a decision issued on September 20, 2011, the Court of Appeals for the Federal Circuit affirmed the trial court’s decision dismissing the Tribe’s TPA claim for lack of subject matter jurisdiction. Pet. App. 10a-14a, 657 F.3d 1330, 1335-1337 (Fed. Cir. 2011).

The Court of Appeals also affirmed the trial court’s conclusion that, based on the text of the statute, the Revenue Sharing Act provided a substantive source of law for purposes of the Court of Federal Claims’ subject matter jurisdiction. Pet. App. 15a-16a. The Court of Appeals reversed the trial court’s determination that the claim under the Revenue Sharing Act was mooted by the lapse in appropriations. Pet. App. 16a-21a. The Court of Appeals remanded the case for further proceedings. Pet. App. 22a. The United States petitioned for rehearing en banc. The petition was denied by order entered on January 26, 2012, Pet. App. 355a-356a, and the mandate was

issued on February 3, 2012. Resp. App. 1a. The United States did not seek a stay of the mandate or a stay of the case on remand.⁴

On August 2, 2012, Respondent filed a notice of dismissal in the Court of Federal Claims pursuant to RCFC 41(a)(1)(A)(i), *see* Resp. App. 2a-3a, and the court entered the dismissal of the complaint on the docket that day. Resp. App. 4a.

REASONS FOR DENYING THE PETITION

I. This Case Is Moot.

Two rulings of the Court of Appeals and two rulings of the Court of Federal Claims resulted in dismissal of all claims in this case, save one – the Tribe’s claim arising under the Revenue Sharing Act. On August 2, 2012, that remaining claim was voluntarily dismissed under the Rules of the Court of Federal Claims. The governing Rule provides:

Subject to RCFC 23(e) and 23.1(c) and any applicable federal statute, the plaintiff may dismiss an action without a court order by filing:

- (i) A notice of dismissal before the opposing party serves an answer, a motion for summary judgment, or a motion for judgment on the administrative record;

⁴ Following issuance of the Court of Appeals’ mandate, the trial court entered several status report orders, *see Samish Indian Nation v. United States*, Fed. Cl. No. 02-1383, Trial Court Status Report Orders dated February 9, 2012 (Dkt. 104), April 27, 2012 (Dkt. 106), May 31, 2012 (Dkt. 108), and June 5, 2012 (Dkt. 110), and the United States filed several status reports with the court, *see id.*, U.S. Status Reports dated April 27, 2012 (Dkt.105), May 30, 2012 (Dkt. 107), and June 5, 2012 (Dkt. 109).

RCFC 41(a)(1)(A)(i). In this case, the government did not file an answer, motion for summary judgment, or motion for judgment on the administrative record. The government only filed multiple motions to dismiss for lack of subject matter jurisdiction (under RCFC 12(b)(1)). See Pet. App. 30a. As the plain language of the Rule makes clear, a Rule 12(b)(1) motion does not affect a plaintiff's right to voluntarily dismiss under RCFC 41(a)(1)(A)(i). Since the government previously succeeded in having claims under 38 statutes and treaties dismissed with prejudice under Rule 12(b)(1), and the remaining claim has now been voluntarily dismissed under RCFC 41(a)(1)(A)(i), there is no longer any concrete adversity between the parties – and nothing remains for this Court to decide.

This Court has underscored the requirement of a live controversy between the parties:

The Constitution permits this Court to decide legal questions only in the context of actual “Cases” or “Controversies.” U.S. Const., Art. III, § 2. An “actual controversy must be extant at all stages of review, not merely at the time the complaint is filed.” *Preiser v. Newkirk*, 422 U.S. 395, 401, 95 S.Ct. 2330, 45 L.Ed.2d 272 (1975) (quoting *Steffel v. Thompson*, 415 U.S. 452, 459, n.10, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974)).

Alvarez v. Smith, 130 S.Ct. 576, 580 (2009). Where a party is no longer seeking any relief, a case or controversy is absent, and, as this Court has noted, “[t]here is no justification for our retaining jurisdiction of a civil case where no real controversy is before us.” *Frank v. Minnesota Newspaper Ass’n, Inc.*, 490 U.S. 225, 227 (1989).

An abstract concern about legal principles – outside the setting of an actual dispute between the parties – does not provide a basis for federal court jurisdiction. Any concern expressed in the petition regarding the Court of Appeals’ ruling “is no longer embedded in any actual controversy about the [Tribe’s] particular legal rights,” and accordingly “falls outside the scope of the constitutional words ‘cases’ and ‘controversies.’” *Alvarez*, 130 S.Ct. at 580-81. In sum, “federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them.” *DeFunis v. Odegaard*, 416 U.S. 312, 316 (1974) (quoting *North Carolina v. Rice*, 404 U.S. 244, 246 (1971)). Since this case has been dismissed it cannot affect the rights of the parties.

Accordingly, the questions presented in the petition are moot, and the denial of the petition on that basis would be an appropriate disposition. See Eugene Gressman, *et al.*, *Supreme Court Practice*, ch. 19.4, at 939 & n.33 (9th ed. 2007). Alternatively, since the issues in the petition were mooted by action taken by the Respondent (and the Respondent prevailed on these issues below), the Court may determine that a different disposition is more appropriate here. See, *e.g.*, *Deakins v. Monaghan*, 484 U.S. 193, 200-01 (1988). If so, the Court could vacate the September 20, 2011 judgment of the Court of Appeals with respect to matters relating to the Revenue Sharing claim, see *e.g.*, *Selig v. Pediatric Specialty Care, Inc.*, 551 U.S. 1142 (2007), and remand the matter for

dismissal with prejudice.⁵ Either disposition would be appropriate here.

The absence of a case or controversy should be controlling with regard to the disposition of the petition. But even if there were a live controversy between the parties, the petition should be denied, as we discuss next.

II. The Court Of Appeals And The Petitioner Agree On The Standard For Determining Subject Matter Jurisdiction Over Damages Claims In The Court Of Federal Claims.

The petition seeks review of an interlocutory decision from the Court of Appeals that the Court of Federal Claims has subject matter jurisdiction over a claim for damages against the United States arising under the Revenue Sharing Act. Even if a live case or controversy were present, no dispute exists about this Court's standard for determining whether a statute provides a basis on which the Court of Federal Claims has subject matter jurisdiction over a damages claim under the Tucker Act, 28 U.S.C. § 1491 and Indian Tucker Act, 28 U.S.C. § 1505. The Court of Appeals' opinion and the government's petition are in substantial harmony on this issue. *Compare*, Pet. App. 10a with Pet. at 17-18. Both the Court of

⁵ The petitioner argues that the claim under the Revenue Sharing Act also implicates the Due Process Clause, U.S. Const., Amend V, and the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.* Pet. at 14, 21-23. The Tribe disputes this characterization of the claim, as well the petitioner's construction of the Court of Appeals' decision in this regard. *See* pp. 15-19 below. In any event, the dismissal of the underlying action renders the questions presented in the petition moot.

Appeals and the petition articulate the same two-part standard and rely on this Court's decisions (including *United States v. Navajo Nation*, 556 U.S. 287 (2009)). There is simply no conflict between the Court of Appeals' decision and the decisions of this Court regarding the applicable standard that would warrant this Court's review.

III. The Court Of Appeals Applied This Court's Standard Here.

The Court of Appeals in this case applied this Court's standard in its rulings by separately examining each of the statutes under which claims were made to determine whether it provided a basis for subject matter jurisdiction. As a result of that analysis, the Court of Appeals affirmed the Court of Federal Claims' decisions to: 1) dismiss the Tribe's claim for damages under the Snyder Act, one of the earliest federal statutes under which federal assistance was and continues to be provided to Tribes, Pet. App. 96a-97a, 2) dismiss the Tribe's claim under the Indian Self-Determination and Education Assistance Act, the primary modern-day means by which Tribes receive federal funds, Pet. App. 96a, 3) dismiss the Tribe's claim regarding a large Bureau of Indian Affairs program, known as Tribal Priority Allocations ("TPA"), which provides funding for a wide range of tribal governmental activities, Pet. App. 10a-14a, and 4) deny the government's motion to dismiss, for lack of jurisdiction, the Tribe's claim under the Revenue Sharing Act, a now repealed measure that, until 1985, provided a much smaller source of funding to tribes while it was in effect. Pet. App. 15a-16a.

For example, the Court of Appeals affirmed dismissal, for lack of jurisdiction, of the Tribe's claim for damages regarding TPA. As to this claim the Court

of Appeals concluded that under this Court's decisions in the *Navajo* cases "the TPA system, Appropriations Acts, and statutes authorizing Indian programs are not money-mandating." Pet. App. 10a. While the court noted that the "money-mandating' condition is satisfied when the text of a statute creates an entitlement by leaving the Government with no discretion over the payment of funds," *id.*, the court found no such entitlement present in the statutes governing TPA. Pet. App. 11a-14a. The Court of Appeals further declined to infer jurisdiction based on the trust responsibility between the United States and the Tribe. Quoting *United States v. Jicarilla Apache Nation*, 564 U.S. __ (2011), the Court of Appeals stated that "the trust relationship between the tribes and the Government is 'defined and governed by statutes.'" Pet. App.13a. The court applied *Jicarilla* to conclude that "although the TPA system facilitates the allotment of federal money to the tribes, it is not money mandating. The network of statutes underlying the TPA system does not contain detailed express language supporting the existence of a fiduciary relationship or a trust corpus." Pet. App. 14a.⁶

The Court of Appeals found the Revenue Sharing Act to be different from all the other statutes it considered in this case and affirmed the trial court's determination that it had subject matter jurisdiction for a damages claim made under that Act. As the

⁶ The Court of Appeals conducted a similar analysis and reached like conclusions regarding the Tribe's claims under the Snyder Act and the Indian Self-Determination and Education Assistance Act. See Pet. App. 92a-97a. The Court of Federal Claims did the same with regard to the balance of the statutes under which the Tribe raised claims. Pet. App. 48a-77a.

Court of Appeals found, the Revenue Sharing Act itself provided both of the required elements of the test for determining whether a statute provides a basis for subject matter jurisdiction under the Tucker Act. First, the Revenue Sharing Act, by its plain text, created a duty – that is, a duty to pay an allocation from the fund created by the Act to tribes. The Court of Appeals explained that the “Revenue Sharing Act distributed federal funds to state and local governments, including Indian tribes,” and that the Act described the funds as “entitlements,” and directed that Indian tribes “shall be allocated’ a portion of the funds based on population.” Pet. App. 15a. The Court of Appeals also found the second element of the standard to be satisfied, reasoning that the Revenue Sharing Act, by virtue of its mandatory language regarding payment, can fairly be interpreted as providing a claim for damages. Pet. App.15a-16a.

The Court of Appeals’ ruling was clearly guided by this Court’s rulings. Pet. App. 10a.⁷ Since the Court

⁷ The Court of Appeals’ ruling was also consistent with its own case law holding that those statutes that create a mandatory duty to pay money to a class of recipients provide a basis for subject matter jurisdiction in the Court of Federal Claims with respect to a claim that one member of the class was wrongfully excluded. Pet. App. 15a (citing *Agwiak v. United States*, 347 F.3d 1375, 1378-80 (Fed. Cir. 2003) (noting that the court has “repeatedly recognized that the use of the word ‘shall’ generally makes a statute money-mandating,” and finding jurisdiction for a claim under a statute that recited that an employee “is entitled” to remote duty pay and directed that such allowance “shall be paid”); *Greenlee County, Arizona v. United States*, 487 F.3d 871, 877 (Fed. Cir. 2007) (finding jurisdiction for a claim based on a statute that recited that the government “shall make a payment for each fiscal year to each unit of general local government in which entitlement land is located”); *Britell v.*

of Appeals applied the standard established by this Court, there is no conflict that would warrant this Court's review.

IV. The Court Of Appeals Held That An Alleged Violation Of The Revenue Sharing Act - Not The Due Process Clause Or The APA - Provides The Basis For Jurisdiction Over A Damages Claim Against The United States.

The petition essentially ignores the Court of Appeals' analysis of the Revenue Sharing Act itself (as well as the court's parallel analysis holding that the Tribal Priority Allocation appropriations, ISDA and Snyder Act do not provide a basis for jurisdiction in the Court of Federal Claims). Instead, the petition points to snippets of language in the Court of Appeals' opinions in this case, primarily the sentence indicating that "the Government's wrongful failure to recognize the Samish gave rise to a damages claim. . . ." Pet. at 12, 21, quoting Pet. App. 9a. Based on this, the petition misconstrues the Court of Appeals' ruling – alleging that the Court of Appeals held that "the Court of Federal Claims (CFC) had subject-matter jurisdiction over the Tribe's claim for damages allegedly resulting from the United States' violations of the Due Process Clause and the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*" Pet. at 3. But the Court of Appeals has never held – and did not hold in this case – that violations of due process or the APA give rise to damages claims.

United States, 372 F.3d 1370, 1378 (Fed. Cir. 2004) (finding subject matter jurisdiction over a claim based on regulations implementing a military health insurance plan which recited that the plan "will pay" benefits "directly" to the insured)).

First, the Court of Appeals has clearly and consistently held that the Court of Federal Claims lacks jurisdiction over claims based on alleged violations of the Due Process Clause and claims brought under the APA. *Wopsock v. Natchees*, 454 F.3d 1327, 1333 (Fed. Cir. 2006); *James v. Caldera*, 159 F.3d 573, 581 (Fed. Cir. 1998); *LeBlanc v. United States*, 50 F.3d 1025, 1028 (Fed. Cir. 1995). The Court of Appeals continues to adhere to this rule after its 2011 decision in this case. *See Lewis v. United States*, No. 2010-5005, 2012 WL 884860, at *3 (Fed. Cir. Feb. 17, 2012) (Due Process Clause does not “obligate the government to pay money damages” and therefore does not provide a basis for jurisdiction). If the Court of Appeals in this case intended to depart from its established rule, surely it would have indicated that it was doing so. But nothing along those lines appears in the Court of Appeals’ rulings in this case. As a result, the theory of the petition – that the Court of Appeals (sub silentio) reversed its course, and unsettled its previously uniform rule – does not fairly reflect the language of the Court of Appeals’ decisions.

Second, the Court of Appeals was never asked to rule that due process and APA violations give rise to damages claims, and it did not purport to do so. For example, the second amended complaint expressly recites that it is based on the government’s “violation of federal statutes that mandate funding to all eligible federally recognized Indian tribes and their members,” including the Revenue Sharing Act. Pet. App. 373a, 382a. That is, the complaint alleged that certain statutory violations – not APA or due process violations – gave rise to claims for damages. And, in its ruling on the Revenue Sharing Act, the Court of Appeals addressed the language of that Act – again

not referring to due process or APA violations. Pet. App. 15a-16a.

Third, the petition takes language from the Court of Appeals' opinion out of context. The Court of Appeals' reference to the government's wrongful failure to recognize the Samish was not made in connection with the issue of whether the Revenue Sharing Act (or any other statute) established a duty to pay money, the violation of which gives rise to a claim for damages. Instead, it was made in response to the government's argument that the court was not required to treat the Samish "as federally recognized prior to 1996, and therefore, this court need not even address whether the TPA system or Revenue Sharing Act can be interpreted as mandating compensation for damages." Pet. App. 9a. The Court of Appeals rejected the government's argument, relying on its 2005 ruling in this case in which it held that the Tribe's claim was not time-barred because it did not accrue until the Tribe's status as a federally recognized tribe was resolved by the recognition proceedings and the *Greene* case. *Id.* citing 419 F.3d 1373-74.⁸

⁸ Although *Greene* has long been final and is not subject to review here, the petition includes considerable discussion of those proceedings, aspects of which warrant correction. First, the recognition proceedings were brought by the Samish Tribe (not "a group of individuals." Pet. at 3 citing Pet. App. 4a, 83a.) The petition's contrary view is not supported by the record or the sources cited which use the term "Samish" to refer to the Tribe. *See* Pet. App. 2a, 78a.

Second, contrary to the petition's description (Pet. at 4-5), as required by the Department's regulations, 25 C.F.R. Part 83, the Assistant Secretary in the final decision recognizing the Samish Tribe determined that the Tribe "has been continuously identified throughout history as Indian or aboriginal, has existed as

The Court of Appeals' reference to the wrongful failure to recognize the Samish addressed an issue regarding the Tribe's status as a tribe, not whether the Court of Federal Claims has jurisdiction over a claim for damages that the government violated the Revenue Sharing Act. When the Court of Appeals turned to the latter issue, the Court specifically examined the Act itself – not the Due Process Clause or the APA – to determine whether the Act was money-mandating. Pet. App. 15a-16a. The Court applied this Court's two-part standard and held first, that the Revenue Sharing Act created an independent legal duty on the government to pay money to tribes, and second, the Revenue Sharing Act could fairly be interpreted to provide a damages remedy for a claim that the government violated that Act when it failed to provide such funds. *Id.*

Finally, to the extent that certain language of the Court of Appeals' opinion – such as the language

a distinct community since first sustained European contact, [and] has maintained political influence within itself as an autonomous entity. . . ." Pet. App. 170a-171a, Assistant Secretary's Final Determination, 61 Fed. Reg. 15,825, 15,826 (Apr. 9, 1996).

Third, contrary to the petition's assertion, Pet. at 4-5, the court in *Greene* ruled that as a result of the improper *ex parte* communications the Assistant Secretary removed from her decision a number of findings that had been made by a federal administrative law judge following a formal evidentiary hearing, including that the Samish Tribe continually existed as an independent tribe throughout history and that the government had no basis for omitting the Samish from its list of tribes. Pet. App. 141a, 146a-150a, *Greene*, 943 F. Supp. at 1280-84. The court also held that the administrative law judge's findings should be reinstated, and reinstated the unlawfully rejected findings. Pet. App. 160a-161a & n.13, 163a, *Greene*, 943 F. Supp. at 1288 & n.13; see also Pet. App. 138a, *Greene v. Babbitt*, No. C89-645Z (Final Judgment).

concerning the “wrongful failure to recognize the Samish” – is ambiguous, that does not present an issue worthy of this Court’s review. The Court of Appeals’ decisions below properly applied this Court’s rulings and a fair reading of those decisions does not reflect the vast departure from existing law suggested by the petition. Even if, at some point in the future, a case arises where a party or court misconstrues the Court of Appeals’ ruling and asserts a damages claim under the Due Process Clause or APA, the lower courts and this Court will surely address the situation in an appropriate manner at that time. The remote possibility of such a future case does not warrant granting the petition here.

V. The Court Of Appeals’ Decision Is Consistent With *United States v. Testan*, 424 U.S. 392 (1976).

Since, as noted above, the Court of Appeals properly stated and applied this Court’s rulings regarding whether a statute mandates a damages remedy, the petition’s contrary contention – that the Court of Appeals’ rulings here are undermined by *Testan* – is misplaced. Pet. at 18-20.

The particular statute at issue in *Testan* – the Classification Act, 5 U.S.C. § 5101 – does not provide for the payment of any money to anyone. Rather, the Classification Act, as its name suggests, provides only a classification scheme for various levels of federal employees. 424 U.S. at 399. This is very different from the Revenue Sharing Act, the whole function of which was to provide money to tribes (and state and local governments).

Further, the Classification Act at issue in *Testan* was part of a broader statutory scheme regarding

civil service matters. As this Court has emphasized in connection with civil service matters, “[t]he established rule is that one is not entitled to the benefit of a position until he has been duly appointed to it. . . . The Classification Act does not purport by its terms to change that rule, and we see no suggestion in it or in its legislative history that Congress intended to alter it.” *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 478 (2003) (quoting *Testan*, 424 U.S. at 402). This case, of course, is not about civil service classification, and so the established rule that provided the backdrop for construing the Classification Act at issue in *Testan* has no application.

Likewise, other federal statutes regarding civil service matters provided a further basis for construing the Classification Act as not providing a money damages remedy. As this Court stated, if the Classification Act was construed to provide for money damages, “many of the federal statutes . . . that expressly provide money damages as a remedy against the United States in carefully limited circumstances would be rendered superfluous.” *Testan*, 424 U.S. at 404. With respect to the Revenue Sharing Act, there are no other related statutes that expressly provide for a damages remedy – and the petition does not suggest otherwise.

In short, the Court of Appeals properly applied *Testan* (and this Court’s other rulings on damages under the Tucker Act and Indian Tucker Act), and the petition presents no issue worthy of this Court’s review.

VI. The Court Of Appeals’ Ruling That The Tribe’s Claim Under The Revenue Sharing Act Was Not Barred By The Anti-Deficiency Act Is Consistent With This Court’s Decision In *Salazar v. Ramah Navajo Chapter*, 567 U.S. ___, 132 S. Ct. 2181 (2012).

The Court of Appeals rejected the government’s argument that the Anti-Deficiency Act, 31 U.S.C. § 1341(a)(1)(A), “prevents the Court of Federal Claims from granting relief to the Samish because it bars the award of funds pursuant to a statute for which the appropriations have lapsed or have been capped, unless the aggrieved party files suit before the appropriation lapses.” Pet. App. 17a (quoting U.S. Br. 49). The Court of Appeals reasoned that while the Anti-Deficiency Act is a limit on the power of federal officials to spend funds in excess of the amounts appropriated, it is not a limitation on the Court of Federal Claims’ jurisdiction or its power to enter a judgment in damages as the Permanent Judgment Fund was available to pay damages in such circumstances. Pet. App. 14a, 17a-21a.

The petition states that the Court of Appeals “fundamentally misapprehends the critical limitations on expenditures from the federal fisc contained in the Anti-Deficiency Act and Judgment Fund,” Pet. at 27, and asks the Court to hold this case pending a ruling in *Salazar v. Ramah Navajo Chapter*, No. 11-551, stating that *Ramah Navajo* “may address the availability of the Judgment Fund to pay damages judgments based on claims that government officials have failed to make payments that, if made, would have exceeded the congressional appropriation for such payments, in violation of the Anti-Deficiency

Act.” Pet. at 29. This Court has now decided *Ramah Navajo*, and that decision confirms that the Court of Appeals applied the proper legal standard on this issue. As this Court explained, while the Anti-Deficiency Act is a limitation on a government official’s ability to obligate funds, it is not a limit on the power of the courts to adjudicate claims, *see Salazar v. Ramah Navajo Chapter*, 567 U.S. ___, 132 S. Ct. 2181, 2193 (2012), and if liability is established, the judgment is to be paid from the Permanent Judgment Fund. *See id.* Since there is no conflict between the Court of Appeals and this Court’s decisions, there is no basis for review of the Court of Appeals’ decision in light of *Ramah Navajo*.

CONCLUSION

In sum, even before this case became moot the questions presented in the petition did not warrant this Court’s review. Now, since there is no case or controversy between the parties, the petition should be disposed of by either denying the petition, or granting it for the limited purpose of vacating the Court of Appeals’ judgment relating to the Revenue Sharing Act claim on the grounds that the claim is moot and remanding for dismissal of that claim with prejudice.

Respectfully submitted,

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23

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