Supreme Court, U.S.
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No. 11-573

In The
Supreme Court of the United States

K2 AMERICA CORPORATION,

Petitioner,

v.

ROLAND OIL & GAS, LLC,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether federal courts have jurisdiction over civil actions that seek to adjudicate ownership of or possession to any interest in real property the title to which is held by the United States in trust on behalf of Indians, as stated in *Boisclair v. Superior Court*, 801 P.2d 305 (Cal. 1990) (en banc).

STATEMENT PURSUANT TO RULES 14.1(b) AND 29.6

Statement pursuant to Rule 14.1(b): The caption set forth above contains the names of all the parties to the proceeding in the court whose judgment is sought to be reviewed.

Statement pursuant to Rule 29.6: The Petitioner K2 America Corporation is a wholly-owned subsidiary of Guardian Exploration Inc. ("Guardian"). Guardian is a publicly held company which is traded on the Toronto Stock Exchange.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
STATEMENT PURSUANT TO RULES 14.1(b) AND 29.6	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISION INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE PETITION	6
A. The Supervisory Role of the United States Government over Indian Trust Lands	6
B. The Conflict Between the Ninth Circuit's Decision and the Decisions of State Courts of Last Resort Regarding the Application of Federal Preemption to Disputes Involving Indian Property Held in Trust	8
C. The Confusion Over this Court's Previous Decisions Regarding the Application of Federal Preemption to Disputes Involving Indian Property Held in Trust	12
D. The Resulting Impact of the Conflicting Decisions and Confusion	17
CONCLUSION	20

TABLE OF CONTENTS – Continued

Page

APPENDIX A: Opinion of the United States Court of Appeals for the Ninth Circuit, filed August 5, 2011 .... App. 1

APPENDIX B: Order of the United States District Court for the District of Montana, Great Falls Division, Dismissing for Lack of Jurisdiction, filed April 15, 2009 .... App. 21

TABLE OF AUTHORITIES

Page

CASES

Allstate Indem. Co. v. Stump, 191 F.3d 1071 (9th Cir. 1999) 18

Atkinson Trading Co. v. Shirley, 532 U.S. 645 (2001) 19

Boisclair v. Superior Court, 801 P.2d 305 (Cal. 1990) .... *passim*

Caterpillar v. Williams, 482 U.S. 386 (1987) 5, 13, 14

County of Oneida v. Oneida Indian Nation of New York State, 470 U.S. 226 (1985) 15

Crow Tribe of Indians v. Deernose, 487 P.2d 1133 (Mont. 1971) 11

Foster v. Alaska, 34 P.3d 1288 (Alaska 2001) 10, 12

Heffle v. Alaska, 633 P.2d 264 (Alaska 1981) .... *passim*

Holman v. Laulo-Rowe Agency, 994 F.2d 666 (9th Cir. 1993) 13, 14

Jachetta v. United States, 653 F.3d 898 (9th Cir. 2011) 11, 12, 17

K2 America Corp. v. Roland Oil & Gas, LLC, 653 F.3d 1024 (9th Cir. 2011) .... *passim*

Kimbell Foods, Inc. v. United States, 440 U.S. 715 (1979) 15

Krause v. Neuman, 943 P.2d 1328 (Mont. 1997) 10, 11

Landauer v. Landauer, 975 P.2d 577 (Wash. Ct. App. 1999) 8

Minnesota v. United States, 305 U.S. 382 (1939) 12, 13

TABLE OF AUTHORITIES – Continued

Page

Montana v. United States, 450 U.S. 544 (1981) 18

Nevada v. Hicks, 533 U.S. 353 (2001)........................18

Oneida Indian Nation of New York State v. County of Oneida, 414 U.S. 661 (1974) 13, 14, 15, 16

Philip Morris USA, Inc. v. King Mtn. Tobacco Co., Inc., 569 F.3d 932 (9th Cir. 2009)....................18

Plains Commerce Bank v. Long Family Land & Cattle, Inc., 554 U.S. 316 (2008).......................18, 19

Strate v. A-1 Contractors, 520 U.S. 438 (1997)..........18

Unalachtigo Band of the Nanticoke Lenni-Lenape Nation v. New Jersey, 867 A.2d 1222 (N.J. Super. Ct. App. Div. 2005)................................9

U.S. Fidelity and Guar. Co. v. Lee Invs. LLC, 641 F.3d 1126 (9th Cir. 2011).................................16

CONSTITUTIONAL PROVISION

BLACKFOOT CONST., art. VI, § 1(k) 19

STATUTES

25 U.S.C. § 348 3

25 U.S.C. § 396 ....4, 7

25 U.S.C. § 416i 9

25 U.S.C. § 462 3

25 U.S.C. § 1322(b)...9

28 U.S.C. § 1331 5

TABLE OF AUTHORITIES – Continued

Page

28 U.S.C. § 1360(a) 8

28 U.S.C. § 1360(b) ....*passim*

MONT. CODE ANN. § 2-1-304(3)......................................9

REGULATIONS

25 C.F.R. pt. 212 7

25 C.F.R. § 212.4 8

25 C.F.R. § 212.6 ....7, 8

25 C.F.R. § 212.20 ....4, 7

25 C.F.R. § 212.28 7

25 C.F.R. § 212.53 ....7, 16

WEBSITES

Office of the Special Trustee for American Indians, http://www.doi.gov/ost/about_ost/history.html (last visited Nov. 1, 2011) 17

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PETITION FOR A WRIT OF CERTIORARI

K2 America Corporation ("K2") respectfully petitions for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The panel opinion of the United States Court of Appeals for the Ninth Circuit, dated August 5, 2011, is officially reported at 653 F.3d 1024 (9th Cir. 2011) and is reproduced at Appendix A. (App. 1-20.)

The Order Dismissing for Lack of Jurisdiction of the United States District Court dated April 15, 2009[1] is not officially or unofficially reported but has been reproduced at Appendix B. (App. 21-25.)

JURISDICTION

The United States Court of Appeals for the Ninth Circuit entered the judgment sought to be reviewed on August 5, 2011. The petition is timely under Supreme Court Rules 13.1 and 13.3 because it was filed within 90 days of the judgment. This Court has jurisdiction to review the judgment of the Ninth Circuit

[1] Although the Order is dated April 15, 2009, the date it was entered was April 15, 2010.

Court of Appeals pursuant to 28 U.S.C. § 1254(1) (2011).

STATUTORY PROVISION INVOLVED

The statutory provision most relevant to this proceeding is 28 U.S.C. § 1360(b) (2011), which states:

> Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

STATEMENT OF THE CASE

On August 21, 2009, K2 filed its "Complaint of K2 America Corporation and Demand for Jury Trial" ("Complaint") in the United States District Court for the District of Montana, Great Falls Division. As set forth in its Complaint, K2 alleged that it is the lessee under a number of oil and gas leases located in

Glacier and Pondera counties in Montana. From 2004 through 2008, K2 retained John Harper ("Harper") as its contract operator to perform numerous duties on K2's behalf, including drilling, completion, and production operations associated with K2's oil and gas wells.

Harper assumed a position of trust and confidence in the course of performing his duties as contract operator for K2. He acquired confidential and proprietary information which included protected trade secrets, such as strategic business plans and prospective oil and gas lease acquisitions. Specifically pertinent to the instant case, Harper learned that K2 intended to pursue oil and gas leases covering particular lands designated by K2 as the "Kye Trout" area. The Kye Trout area is a 600 acre area comprised of two tracts. The western 320 acres is allotted land, the title to which is held by the United States in trust for several Indian allottees. *See generally* 25 U.S.C. §§ 348, 462 (2011). K2's planned acquisitions of oil and gas leases in the Kye Trout area were based on geologic and engineering data and analyses obtained or developed by K2. K2 provided Harper information regarding the intended lease acquisitions for the purpose of furthering K2's business interests.

Rather than using the information furnished to him to further K2's interests, Harper formed Respondent Roland Oil & Gas, LLC[2] ("Roland") for the

[2] A Montana limited liability company.

very purpose of acquiring oil and gas leases in the Kye Trout area. Specifically relevant to this case, Roland obtained a lease covering the western 320 acres of allotted land (the "Allotment Lease"). The Bureau of Indian Affairs ("BIA") approved the Allotment Lease pursuant to 25 U.S.C. § 396 (2011) and 25 C.F.R. § 212.20 (2011). The beneficial Indian mineral owners identified in the Allotment Lease are the "Heirs and Successors of Allotment # 1362-A, Nellie Ashley (the original allottee)."

In his efforts to organize Roland and secure Kye Trout area leasehold interests, Harper solicited capital and other assistance from Robert E. Miller ("Miller"). Miller and various entities in which Miller owns an interest are competitors of K2, and Harper was aware of the competitive relationship when he sought Miller's assistance. K2 pled in its Complaint several tort claims against Roland for its wrongful lease acquisitions in the Kye Trout area. K2 also sought to impose a constructive trust on the Allotment Lease. Finally, K2 requested a judgment declaring it the rightful owner of all right, title and interest in and to the Allotment Lease.

On October 6, 2009, Roland answered and moved for dismissal. Roland asserted that the district court lacked subject matter jurisdiction and that K2 failed to exhaust its remedies in tribal court. Relying primarily on the California Supreme Court's reasoning concerning federal preemption in *Boisclair v. Superior Court*, 801 P.2d 305 (Cal. 1990), K2 opposed Roland's arguments supporting dismissal for lack of

subject matter jurisdiction. On April 15, 2010, the district court entered its Order Dismissing for Lack of Jurisdiction ("Order"). (App. 21-25.) The district court rejected K2's argument that the last clause of 28 U.S.C. § 1360(b) sets forth the scope of disputes that must be heard in federal court under the doctrine of federal preemption. The Order focused on the fact that § 1360(b) does not confer federal jurisdiction and that K2 might have pled a right to relief under other federal statutes not appearing in K2's Complaint. (*Id.* 23-24.) K2 timely appealed this Order to the Ninth Circuit Court of Appeals.

On appeal to the Ninth Circuit, K2 argued that its Complaint was sufficient to support federal court jurisdiction under 28 U.S.C. § 1331 (2011) pursuant to the doctrine of complete preemption. K2 relied on this Court's reasoning in *Caterpillar Inc. v. Williams*, 482 U.S. 386, 393 (1987) that, "[o]nce an area of state law has been completely pre-empted, any claim purportedly based on that pre-empted state law is considered, from its inception, a federal claim, and therefore arises under federal law." Roland responded by arguing that the Blackfeet tribal court has concurrent jurisdiction over the action and that K2 was therefore required to exhaust its remedies in that court prior to bringing its claims in federal court. K2 argued in its reply brief that, under this Court's most recent precedent governing the scope of tribal sovereign jurisdiction, the Blackfeet tribal court would have no jurisdiction over this action involving two entities that are not members of the Blackfeet Tribe.

On March 9, 2011, the Ninth Circuit panel heard oral argument. On March 14, 2011, the Ninth Circuit entered an Order inviting amicus briefing from the United States and the Blackfeet Tribe.

After briefing from amici, the case was resubmitted for decision and the Ninth Circuit affirmed the district court in an opinion dated August 5, 2011. The court held that, under the decisions of this Court, K2's case did not fall within the handful of situations where the doctrine of complete preemption would apply. *K2 America Corp. v. Roland Oil & Gas, LLC*, 653 F.3d 1024, 1031 (9th Cir. 2011). Although the Ninth Circuit did not attempt to resolve the issue, it held that the scope of preemption, if applicable, would extend *only* to claims brought by Indian tribes *or* Indians. *Id.* at 1029-31.

REASONS FOR GRANTING THE PETITION

A. The Supervisory Role of the United States Government over Indian Trust Lands

The supervisory role of the federal government over lands held in trust for Indians is deeply rooted in history. Indian title is not one of ownership but one "of occupancy 'good against all but the sovereign' United States government." *Boisclair*, 801 P.2d at 310. The federal government has not only the power, but also the duty, to protect Indian property. *Heffle v. Alaska*, 633 P.2d 264, 267 (Alaska 1981). Indeed, "[t]he predominance of the federal government in

Indian affairs is nowhere more pronounced than in the field of Indian property law." *Boisclair*, 801 P.2d at 309. This predominance is reflected in the formal trust relationship covering Indian lands as well as the extensive federal legislation that protects Indian property – chief among which are those statutes that prohibit alienation without approval from the United States government. *Boisclair*, 801 P.2d at 309; *Heffle*, 633 P.2d at 268.

With respect to leasing for oil and gas, in 25 U.S.C. § 396 the United States Congress has acknowledged its trust responsibility over allotted lands. That statute provides the Secretary of the Interior with supervisory authority over the leasing of allotted lands. 25 U.S.C. § 396. Moreover, the Secretary of the Interior has adopted regulations to carry out the federal government's trust responsibility and control over alienation of interests in such lands. *See* 25 C.F.R. pt. 212 (2011). Those regulations require approval from the Secretary of the Interior before an oil and gas lease on allotted lands may issue. 25 C.F.R. § 212.20. Secretarial approval is also necessary for lease assignments (25 C.F.R. § 212.53) and unitization and communitization agreements (25 C.F.R. § 212.28). Further, the Bureau of Land Management and the Minerals Management Service[3] have jurisdiction over

[3] The Minerals Management Service was reorganized and its functions were split into several different federal agencies. It does not appear that 25 C.F.R. § 212.6 has been amended to reflect this reorganization.

operational and accounting matters, respectively. 25 C.F.R. §§ 212.4, 212.6.

B. The Conflict Between the Ninth Circuit's Decision and the Decisions of State Courts of Last Resort Regarding the Application of Federal Preemption to Disputes Involving Indian Property Held in Trust

The nature of Indian title described above and the extensive federal legislation providing for control over alienation have been "recognized as the basis for exclusive federal jurisdiction over Indian property." *Boisclair*, 801 P.2d at 310; *see also Heffle*, 633 P.2d at 267; *Landauer v. Landauer*, 975 P.2d 577, 584 (Wash. Ct. App. 1999) ("Congress retained exclusive federal jurisdiction when Indian trust lands are at issue."). Numerous state courts have either expressly or implicitly acknowledged this when applying 28 U.S.C. § 1360(b). By its terms, 28 U.S.C. § 1360(a) (2011) is a grant of jurisdiction to several states over civil actions involving Indians that arise in Indian country. Subsection (b), however, expressly limits the conferral of state civil jurisdiction. 28 U.S.C. § 1360(b). Several state courts of last resort have interpreted the last clause in § 1360(b) as a reservation of jurisdiction in the federal courts over civil actions that seek to "adjudicate . . . the ownership or right to possession of" property held in trust by the United States,

including actions to adjudicate ownership or possession of "any interest therein." 28 U.S.C. § 1360(b).[4]

For example, in *Boisclair*, Imperial Granite Company brought a suit asserting easement rights over Indian trust land. 801 P.2d at 307-08. The California Supreme Court, sitting en banc, held that 28 U.S.C. § 1360(b) expresses the scope of federal preemption over Indian property disputes and, as a consequence, identifies the scope of actions that must be filed in federal court. *Id.* at 310-15. The court analyzed the legislative history behind § 1360(b) and concluded that it embodies "the principle that the exclusive federal-Indian trust relationship is best maintained by channelling [sic] all disputes about such land into federal court." *Id.* at 309-11; *see also Unalachtigo Band of the Nanticoke Lenni-Lenape Nation v. New Jersey*, 867 A.2d 1222, 1228-29 (N.J. Super. Ct. App. Div. 2005) (deriving from 28 U.S.C. § 1360(b) and other federal statutes "a clear understanding that Congress expressly intended to preserve exclusive federal jurisdiction over claims to Indian land, which is subject to restriction against alienation.").

Similarly, in *Heffle*, the Alaska Supreme Court considered whether a state court had jurisdiction to enter an injunction restraining an allottee from blocking an easement. 633 P.2d at 266-67. After discussing

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[4] This reservation of federal jurisdiction is reflected in other federal and state statutes. *E.g.*, 25 U.S.C. §§ 416i(b) (2011), 1322(b) (2011); MONT. CODE ANN. § 2-1-304(3).

congressional policy regarding Indians and the legislative history behind 28 U.S.C. § 1360(b), the *Heffle* court concluded that state courts did not have subject matter jurisdiction because the propriety of an injunction depended upon an adjudication of interests in an easement crossing an allotment. *Id.* at 268-69. The court said, "Since we conclude that state courts cannot accept this case without improperly deciding questions reversed [sic] exclusively to the federal courts, it appears that filing the case in federal court . . . is the state's proper course if it wishes to pursue the matter further." *Id.* at 269; *see also Foster v. Alaska*, 34 P.3d 1288, 1290 (Alaska 2001) ("But § 1360(b) reserves for the federal courts jurisdiction over questions involving the ownership or right to possession of property held in trust by the United States or subject to a restriction against alienation imposed by the United States.").

Finally, in *Krause v. Neuman*, 943 P.2d 1328, 1334 (Mont. 1997), *overruled on other grounds by In re Estate of Big Spring*, 255 P.3d 121, 133 (Mont. 2011)), the Montana Supreme Court also concluded that the state courts could not adjudicate a dispute concerning the sale of lands from an Indian allottee to non-Indians. Given that the land was held in trust by the United States, and that the suit involved issues of title, the Montana Supreme Court found that the action was preempted by federal law under several federal statutes – one of which was § 1360(b) – and that the case had to be adjudicated in federal court. *Krause*, 943 P.2d at 1331-33. The court held that a

voluntary dismissal of the equitable claim for specific performance did not change the result, since the money damages claims also hinged on the issue of title. *Id.* at 1333-34; *see also Crow Tribe of Indians v. Deernose*, 487 P.2d 1133, 1134 (Mont. 1971) ("Unless jurisdiction had been granted state courts by Act of Congress, the federal courts have exclusive jurisdiction over foreclosure actions involving Indian trust lands.").

The judgment below conflicts with the decisions of the supreme courts of California, Montana, and Alaska. K2 cited to the decisions above in its briefing before the Ninth Circuit, but that court did not address them. Without determining the application or scope of the complete preemption doctrine, the panel declined to recognize K2's action as one of the situations where the case is deemed to arise under federal law due to its preemptive force. *K2 America*, 653 F.3d at 1031. Implicit in this holding is a rejection of the proposition that the last clause of 28 U.S.C. § 1360(b) sets forth the scope of federal preemption and the classes of cases that must be adjudicated in federal court.

An intra-circuit conflict exacerbates the conflict between the Ninth Circuit's decision and the decisions of the various state supreme courts. Just four days prior to entering the judgment that K2 seeks to review, a different panel of the Ninth Circuit recognized that the last clause of 28 U.S.C. § 1360(b) identifies the types of cases that must be filed in federal court. In *Jachetta v. United States*, 653 F.3d 898 (9th

Cir. 2011), the Ninth Circuit said, "However, Congress reserved for the federal courts jurisdiction over questions involving 'the ownership or right to possession' of property that 'belong[s] to any Indian' and 'that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States.'" 653 F.3d at 909 (brackets in original) (quoting 28 U.S.C. § 1360(b) and citing *Foster*, 34 P.3d at 1291 and *Heffle*, 633 P.2d at 269).

Based on the foregoing, K2 submits that this Court should grant certiorari to resolve the conflict between the Ninth Circuit's decision below and the decisions of state courts of last resort regarding the application and scope of the doctrine of federal preemption to controversies involving title and/or possession to interests in real property held by the United States in trust on behalf of Indians.

C. The Confusion Over this Court's Previous Decisions Regarding the Application of Federal Preemption to Disputes Involving Indian Property Held in Trust

In *Minnesota v. United States*, 305 U.S. 382, 383, 389 (1939), this Court considered the ability of state courts to adjudicate an action seeking to condemn a right-of-way across nine allotted parcels of land pursuant to a federal statutory provision. The Court said:

> There are persuasive reasons why that statute should not be construed as authorizing suit in state court. It relates to Indian lands

> under trust allotments – a subject within the exclusive control of the federal government. The judicial determination of controversies concerning such lands has been commonly committed exclusively to federal courts.

Id. at 389.

More recently, in *Caterpillar*, this Court said that a "state law complaint that alleges a present right to possession of Indian tribal lands necessarily 'asserts a present right to possession under federal law,' and is thus completely pre-empted and arises under federal law." 482 U.S. 386, 393 n.8 (1987) (quoting *Oneida Indian Nation of New York State v. County of Oneida*, 414 U.S. 661, 675 (1974) ("*Oneida I*")). Similarly, in *Holman v. Laulo-Rowe Agency*, 994 F.2d 666, 668 n.3 (9th Cir. 1993), the Ninth Circuit Court of Appeals quoted this Court's statement in *Caterpillar*, also in the context of complete preemption. It said that *Oneida I* identified "a possible additional instance"[5] of complete preemption. *Id.* It continued, "In *Oneida* [*I*], the Court did review over two centuries of legislation and caselaw holding that federal law governed disputes over title to Indian lands." *Id.* Thus, this Court has considered the issue of federal preemption in the context of Indian land disputes, but lower courts, including the Ninth Circuit, have struggled in its precise application.

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[5] In addition to the Labor Management Relations Act and the Employee Retirement Income Security Act.

In *Oneida I*, the Oneida Indian Nations of New York State and Wisconsin brought suit against two New York counties. 414 U.S. at 663-64. They asserted that a 1795 cession to the State of New York was ineffective under federal treaties and statutes. *Id.* at 664-65. Confronted with a challenge to the federal courts' subject matter jurisdiction over the case, this Court ultimately held that the action arose under the laws of the United States and was therefore properly filed in federal court. *Id.* at 667.

Oneida I discussed two principles concerning federal question jurisdiction in actions that seek to adjudicate title or possession to Indian trust lands. First, federal question jurisdiction will exist where, as in that case, the asserted right to possession of Indian lands is based on violations of federal treaties or statutes. *See Oneida I*, 414 U.S. at 666-67, 676. This is consistent with the notion that federal question jurisdiction will exist where federal law creates the cause of action or the plaintiff's right to relief depends on the resolution of a substantial question of federal law. *K2 America*, 653 F.3d at 1029. The second principle, however, is more germane to the current case and was articulated in *Caterpillar* and *Holman*: A state law complaint that asserts a present right of possession to Indian lands necessarily asserts a right to possession under federal law under the complete preemption doctrine. *Oneida I* was explicit that rights which are not based on a federal treaty, statute, or other formal government action are "nevertheless entitled to the protection of federal law." *Oneida I*, 414

U.S. at 669. Put simply, "Indian title is a matter of federal law." *Id.* at 670. If there is no statute supplying the rule of decision, then the federal courts must decide the case "in the mode of the common law." *Id.* at 674; *see also County of Oneida v. Oneida Indian Nation of New York State*, 470 U.S. 226, 236-40 (1985) ("*Oneida II*") (discussing how common law remedies would be applied where Nonintercourse Act does not address issue of remedies).[6]

The Ninth Circuit did not agree that the second principle articulated in *Oneida I* and *II* extended to K2's case. The court relied in part on the factual distinctions between K2's case and the *Oneida* cases and ultimately concluded that the holdings in the *Oneida* cases extend only to claims brought by Indian tribes or Indians. *K2 America*, 653 F.3d at 1030-31.

K2 readily concedes the factual distinctions between the *Oneida* cases and its case. Nevertheless, the same rule of law concerning federal preemption should lead to the same result. So long as the United States' trust obligation exists, its jurisdiction must be exclusive. This is not a case, as suggested by the Ninth Circuit, where the federal government grants an interest like a fee simple patent to lands and subsequent disputes concerning rights thereto are governed by

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[6] In its Complaint, K2 pled its constructive trust claim based on Montana law because state law will often supply the federal rule of decision. *See generally Kimbell Foods, Inc. v. United States*, 440 U.S. 715 (1979).

local law. Interests subject to Indian trust obligations, like the Allotment Lease here, are subject to the continuing supervision and responsibility of the United States. *See Oneida I*, 414 U.S. at 677; *accord Oneida I*, 414 U.S. at 683-84 (Rehnquist, J., concurring). Certainly the Department of the Interior views its trust obligation as continuing in nature given its control over not only oil and gas lease issuance but also subsequent leasehold assignments.[7] *See, e.g.*, 25 C.F.R. § 212.53.

Thus, in contrast to disputes over lands patented in fee simple, applying federal common law in federal court ensures that state or tribal courts do not infringe upon the United States government's role as trustee. Yet the Ninth Circuit Court of Appeals' decision invites this type of infringement by restricting access into federal court based on the identity of the claimant or the underlying basis for the plaintiff's claim to title or possession. K2 respectfully submits that these kinds of distinctions will lead only to greater confusion and inconsistency in the decisions

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[7] The Secretary of the Interior's authority (implemented by the BIA), however, is not coextensive with the federal government's broader responsibilities concerning the management of trust lands, and the BIA's jurisdiction over lease issuance and transfers is not comprehensive or exclusive of the federal courts. The BIA's function and authority, just like all administrative agencies, is circumscribed by statute and carried out by regulation. *U.S. Fidelity and Guar. Co. v. Lee Invs. LLC*, 641 F.3d 1126, 1136 (9th Cir. 2011). The Bureau of Indian Affairs has no jurisdiction to decide equitable claims to interests held in trust. *Id.*

of the lower courts concerning the proper application of federal preemption. The rule enunciated in *Boisclair* (and endorsed in the Ninth Circuit's August 1, 2011 *Jachetta* decision) recognizing the last clause of § 1360(b) as an articulation of the scope of federal preemption and federal court jurisdiction is not only clearer, but it also guarantees fulfillment of the trust obligation of the United States.

D. The Resulting Impact of the Conflicting Decisions and Confusion

The United States holds 55 million surface acres and 57 million mineral acres in trust for tribes, individual Indians, and Alaska Natives. Office of the Special Trustee for American Indians, http://www.doi.gov/ost/about_ost/history.html (last visited Nov. 1, 2011). The "bundle of sticks" concept of real property law applies with equal force to these trust lands. As non-Indians pursue business opportunities on Indian reservations, disputes can and will arise between non-Indians over interests "carved out" of trust lands[8] – particularly as companies continue to explore and develop domestic oil and gas resources. Indeed, the federal government manages over 100,000 leases covering trust lands. *Id.*

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[8] For a discussion of federal court jurisdiction over actions concerning interests in allotments brought by persons who are, in whole or in part, of Indian blood or descent, see *K2 America*, 653 F.3d at 1032-33.

The current state of the law regarding the proper application of the preemption doctrine and federal court jurisdiction is confusing. In the absence of a clear explanation from this Court regarding the scope of federal preemption and federal court jurisdiction, companies in K2's position – if denied access to federal courts – will not have a forum to adjudicate their civil actions concerning title and possession to these interests. Even ignoring the issue of preemption, state court jurisdiction is precluded under 28 U.S.C. § 1360(b) and tribal court jurisdiction is lacking under this Court's precedent regarding the extent of tribal sovereignty. The Court has been clear that "[t]he sovereignty that the Indian tribes retain is of a unique and limited character." *Plains Commerce Bank v. Long Family Land & Cattle, Inc.*, 554 U.S. 316, 327 (2008) (citation and quotations omitted). Tribes generally do not possess either legislative or adjudicative authority over non-Indians who enter reservations. *Plains Commerce*, 554 F.3d at 327-28; *Nevada v. Hicks*, 533 U.S. 353, 367 (2001); *Montana v. United States*, 450 U.S. 544, 565 (1981). The Court has "never held that a tribal court had jurisdiction over a nonmember defendant." *Hicks,* 533 U.S. at 358 n.2.

Although there are limited exceptions to the general rule of no tribal jurisdiction over nonmembers, neither will apply in cases like K2's. The "consensual relationship" exception looks to whether the litigants themselves have a consensual relationship. *Allstate Indem. Co. v. Stump*, 191 F.3d 1071, 1074-76 (9th Cir. 1999); *see also Strate v. A-1 Contractors*, 520 U.S. 438, 457 (1997); *Philip Morris USA, Inc. v. King Mtn.*

Tobacco Co., Inc., 569 F.3d 932, 941 (9th Cir. 2009) ("Philip Morris has no consensual commercial relationship with King Mountain; rather, they are market competitors."). Further, other consensual relationships that a litigant has with an Indian tribe or its members are not relevant. *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 656 (2001) ("A nonmember's consensual relationship in one area thus does not trigger tribal civil authority in another – it is not 'in for penny, in for a Pound.'"). The second exception to the general rule of no sovereign jurisdiction over nonmembers relating to self-governance is even narrower. To apply, "the nonmember's conduct must do more than injure the tribe, it must 'imperil the subsistence' of the tribal community." *Plains Commerce*, 554 U.S. at 341. Certainly the conduct alleged in this case does not imperil the subsistence of the Blackfeet community.

Thus, it is difficult to see how a tribal court might assert jurisdiction over actions between two state-chartered entities like the one at bar. Moreover, the Constitution and By-Laws for the Blackfeet Tribe of the Blackfeet Indian Reservation of Montana allow for the establishment of "minor courts for the adjudication of claims or disputes arising amongst the members of the tribe. . . ." BLACKFEET CONST., art. VI, § 1(k). There does not appear to be any provision upon which the Tribe might even attempt to assert jurisdiction to adjudicate claims or disputes between two nonmembers. In sum, in the absence of federal court jurisdiction, K2 and others who are similarly situated lack a forum for their title and possessory

claims to trust lands and are therefore deprived of equitable remedies, which are often the most meaningful in these types of disputes.

CONCLUSION

For the foregoing reasons, K2 respectfully requests that the Court grant its Petition for Certiorari to decide the important federal issue described herein.

Respectfully submitted,

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