F I L E D
United States Court of Appeals
Tenth Circuit

MAY 3 2005

PATRICK FISHER
Clerk

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

SHAWNEE TRIBE, a Federally Recognized Indian Tribe, and Shawnee Tribe, ex rel.,

Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA; W. LEIGHTON WATERS, Acting Regional Administrator, United States General Services Administration; STEPHEN A. PERRY, Administrator, United States General Services Administration; DONALD RUMSFELD, Secretary, Department of Defense; I. BLAINE HASTINGS, United States General Services Administration; GAIL A. NORTON, Secretary, United States Department of the Interior; NEAL A. McCALEB, Assistant Secretary of Interior for Indian Affairs; and THE BUREAU OF INDIAN AFFAIRS,

Defendants-Appellees.

No. 04-3256

Appeal from the United States District Court
for the District of Kansas
(D.C. No. 03-CV-2042-GTV)

R. Scott Beeler (Alok Ahuja and Jennifer M. Hannah with him on the brief), Lathrop & Gage, L.C., Overland Park, Kansas, for Plaintiffs-Appellants.

David D. Zimmerman, Assistant United States Attorney (Eric F. Melgren, United States Attorney, with him on the brief), Kansas City, Kansas, for Defendants-Appellees.

Before **EBEL**, **HOLLOWAY**, and **LUCERO**, Circuit Judges.

EBEL, Circuit Judge.

The Sunflower Army Ammunition Plant ("Sunflower Property" or "Plant") is a 9,065-acre military installation located in rural Kansas between Lawrence and Kansas City. In the 1990s, the Army determined it no longer needed the Sunflower Property and requested that the General Services Administration ("GSA") dispose of it as "excess property." Federal law requires the GSA to transfer, without consideration, excess real property located within the reservation of any federally recognized Indian tribe to the Secretary of Interior, to be held in trust for the benefit and use of the tribe. 40 U.S.C. § 523.

The Sunflower Property is located within the original reservation boundaries of the Shawnee Tribe. However, the GSA determined that this area no longer lies within present-day boundaries of the Shawnee's reservation and, therefore, that the Shawnee were not entitled to a transfer of the Sunflower Property under § 523. The Shawnee Tribe sought judicial review of this

administrative decision, but the district court agreed with the GSA, concluding that the Shawnee Reservation was terminated in an 1854 Treaty between the Shawnee and the United States. This appeal followed.

While this appeal was pending, Congress passed legislation giving the Secretary of the Army specific discretion to convey the Sunflower Property to any entity selected by the Board of Commissioners of Johnson County, Kansas. We have been advised by both sides that the Secretary of the Army has exercised this discretion, and a sale of the Sunflower Property is now in the process of being consummated. Because the Secretary of the Army has this authority and is exercising it, we are unable to give the Shawnee Tribe the relief they seek in the instant action—namely, a consideration-free transfer by the GSA pursuant to § 523. Therefore, we conclude our appeal is moot. This case is remanded to the district court with instructions to dismiss Plaintiffs' complaint and to vacate its order and judgment of March 31, 2004, leaving the issue of the status of the Shawnee's reservation open for another day.

BACKGROUND

I. Shawnee History and Treaties

In the mid-Nineteenth Century, the Shawnee Tribe held 1.6 million acres of land in Kansas pursuant to 1825 and 1831 treaties with the United States. The Kansas Indians, 72 U.S. (5 Wall.) 737, 738-39 (1866). It is undisputed that the

entire Sunflower Army Ammunition Plant lies within this original Shawnee reservation.

However, the Shawnee's Kansas reservation was affected by the encroachment of this country's western expansion and a rapidly increasing non-Indian population in the area. Thus, Congress decided in 1853 it was "advisable to lessen [the Shawnee's] territorial limits," and the President ordered negotiations with the Shawnee. Id. at 753; see also Absentee Shawnee Tribe of Oklahoma v. United States, No. 344, 6 Ind.Cl.Comm'n Dec. 377, 379 (June 19, 1958). Although initial efforts to get the Shawnee to relinquish their lands were unsuccessful, the Shawnee did sign a pivotal treaty with the United States on May 10, 1854. The Kansas Indians, 72 U.S. at 753; Absentee Shawnee Tribe v. Kansas, 862 F.2d 1415, 1417 n.2 (10th Cir. 1988). This 1854 Treaty provides, in pertinent part:

> Article 1. The Shawnee tribe of Indians hereby cede and convey to the United States, all the tract of country [the entire 1.6 million acre reservation] lying west of the State of Missouri, which was designated and set apart for the Shawnees. . . .
>
> Article 2. The United States hereby cede to the Shawnee Indians two hundred thousand acres of land, to be selected between the Missouri State line, and a line parallel thereto, and west of the same, thirty miles distant: which parallel line shall be drawn from the Kansas River, to the southern boundary-line of the country herein ceded. . . .

> Article 3. In consideration of the cession and sale herein made, the United States agree to pay to the Shawnee people the sum of eight hundred and twenty-nine thousand dollars[1]. . . .

Treaty with the Shawnees, May 10, 1854, U.S.-Shawnee, 10 Stat. 1053.

The Sunflower Property is within the area, described in Article II of this Treaty, that was left open for re-cession to the Shawnees. However, the Shawnee did not take this entire area collectively. Instead, pursuant to the treaty, individual Shawnee tribal members were entitled to select 200-acre tracts, primarily for individual ownership, from within this entire area as described by Article II. The Kansas Indians, 72 U.S. at 753. As the Supreme Court explained in 1866:

> [The 1854 Treaty] did not contemplate that the Indians should enjoy the whole tract, as the quantity for each individual was limited to two hundred acres. The unselected lands were to be sold by the government, and the proceeds appropriated to the uses of the Indians. It also recognized that part of the lands selected by the Indians could be held in common, and part in severalty. If held in common, they were to be assigned in a compact body; if in severalty, the privilege was conceded of selecting anywhere in the tract outside of the common lands.
>
> The Indians who held separate estates were to have patents issued to them, with such guards and restrictions as Congress should deem advisable for their protection. Congress afterwards directed the lands to be patented, subject to such restrictions as the Secretary of Interior might impose; and these lands are now held by these Indians, under patents, without power of alienation, except by consent of the Secretary of Interior. This treaty was

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[1]The Indian Claims Commission later awarded the Shawnee over $1.2 million to remedy this "unconscionable" price the United States paid under the 1854 Treaty. See United States v. Absentee Shawnee, No. 5-72, 1972 WL 20807 (200 Ct. Cl. 194) at *1 (Dec. 12, 1972).

> silent about the guarantees of the treaty of 1831 [as to perpetual protection by the United States for the Indians]; but the Shawnees expressly acknowledged their dependence on the government of the United States, as formerly they had done, and invoked its protection and care.[2]

Id. at 753; see also Absentee Shawnee, 862 F.2d at 1422 (describing process by which, after five years, the United States agreed to sell the unallotted parcels and hold the proceeds for an additional five years before distributing them for the benefit of the Shawnees so that if any absentee Shawnee members appeared within the ten-year period they were entitled to the value of their promised allotment).[3]

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[2]What the Supreme Court is explaining here, and what the 1854 Treaty provides for, is an early experiment with what became the infamous and widespread allotment policy. See generally Jessica A. Shoemaker, Comment, Like Snow in the Spring Time: Allotment, Fractionation, and the Indian Land Tenure Problem, 2003 Wis. L. Rev. 729 (2003); Kenneth H. Bobroff, Retelling Allotment: Indian Property Rights and the Myth of Common Ownership, 54 Vand. L. Rev. 1559 (2001); Judith V. Royster, The Legacy of Allotment, 27 Ariz. St. L.J. 1 (1995).

[3]The district court concluded, "A number of allotments made pursuant to the 1854 Treaty were made to Tribe members either entirely or partially within what is now the [Sunflower Property]. But approximately half of the [Sunflower Property] was not allotted to Tribe members." Shawnee Tribe v. United States, 311 F.Supp.2d 1181, 1186 (D.Kan. 2004). At oral argument, the parties disputed whether half or closer to two-thirds of the Sunflower Property was allotted to Shawnee members. However, the record itself is very unclear on this point. There is also no indication of how or when the United States came into ownership of the Sunflower Property; however, the individual allotments could have been sold with the Secretary of Interior's express approval. See The Kansas Indians, 72 U.S. at 753.

The record is unclear as to what exactly happened immediately after the 1854 Treaty. However, in 1869, the Shawnee negotiated an agreement with the Cherokee Nation in Oklahoma. Agreement Between Shawnees and Cherokees, June 7, 1869, Approved by the President June 9, 1869. Pursuant to this formal agreement, the Shawnees committed to be "incorporated into and ever remain a part of the Cherokee Nation," and further agreed "that the said Shawnees shall abandon their tribal organization" and turn over to the Cherokee at least some portion of the annuities (including from the 1854 Treaty) owed the Shawnee by the United States. Id.

II. Sunflower Property Dispute

The United States Army has owned and operated the Sunflower Army Ammunition Plant since 1941. In the 1990s, the Army determined that it no longer needed the property, and requested that the General Services Administration ("GSA") dispose of it as "excess" property.[4] See generally 40 U.S.C. §§ 101-611 (providing for property management, including disposal, role of GSA).

[4]"Excess property" is defined as "property under the control of a federal agency that the head of the agency determines is not required to meet the agency's needs or responsibilities." 40 U.S.C. § 102(3) (2002). By contrast, the "term 'surplus property' means excess property that the [General Services] Administrator determines is not required to meet the needs or responsibilities of all federal agencies." Id. § 102(10).

The GSA is required to transfer, without consideration, excess real property to the Department of Interior, in trust for an Indian tribe, whenever three requirements are met: (1) the property is within an Indian reservation, (2) the property is excess, and (3) the reservation belongs to a federally recognized Indian tribe. 40 U.S.C. § 523. On January 7, 1998, the GSA prepared a Notice of Availability for Excess Real Property. On February 10, 1998, the GSA submitted a Federal Screening Notice to the Bureau of Indian Affairs ("BIA"). The GSA asked the BIA to respond by March 13, 1998, if the Sunflower Property was eligible under § 523 to be transferred to the Department of Interior in trust for an Indian tribe. After the BIA failed to request a transfer of the Sunflower site, the GSA began its usual property disposal process.

While the Sunflower Property disposal was still pending, on December 27, 2000, Congress officially identified the Shawnee Tribe as a federally recognized Indian Tribe. 25 U.S.C. § 1041. In accordance with an agreement between the Cherokee and the Shawnee tribes, Congress restored the Shawnee Tribe's "current and historical responsibilities, jurisdiction, and sovereignty as it relates to the Shawnee Tribe, the Cherokee-Shawnee people, and their properties everywhere." Id. All Shawnee land within Oklahoma remained with the Cherokee Nation; however, Congress and the President recognized that the Shawnee Tribe "from and after its incorporation and its merger with the Cherokee

Nation has continued to maintain the Shawnee Tribe's separate culture, language, religion, and organization, and a separate membership roll." Id.

After being federally recognized, the Shawnee submitted a request to the Secretary of Interior, asking that the entire Sunflower Property be transferred to the Department of the Interior ("DOI") in trust for the Tribe's benefit pursuant to the GSA's mandatory transfer obligations under § 523. The Tribe claims that the entire Sunflower Property is within the boundaries of the remaining Shawnee reservation in Kansas and that the Shawnee are therefore entitled to a § 523 transfer. The initial request was made on July 3, 2001. On October 30, 2001; January 18, 2002; and April 16, 2002, the Tribe submitted additional requests.

On September 6, 2002, the GSA wrote to the BIA, requesting a "post haste" determination on the Shawnee reservation issue. On September 19, 2002, Kansas Governor Bill Graves wrote to Gail Norton, Secretary of Interior, opposing the Shawnee's claim to the Sunflower Property and asking for a quick decision from the BIA that the Shawnee Tribe had no interest in the land. On December 6, 2002, the Department of Interior's Assistant Secretary for Indian Affairs provided an opinion letter to the GSA stating:

> Upon receipt of your inquiry, departmental staff engaged upon a thorough review of documents and materials relevant to this issue, including, but not limited to, property records maintained by the Shawnee Tribe in support of their claim that the Sunflower site lies within the exterior boundaries of their reservation, and certain treaties and statutes pertaining to the Shawnee Tribe and/or their lands. Based on this review it is our opinion that the

> Sunflower Army Ammunition Depot does not lie within the present day exterior boundaries of the Shawnee Tribe's reservation.

After receiving this determination, the GSA issued its final decision concerning a possible § 523 transfer in February 2003 stating:

> Concerning the § 523 transfer request, the GSA has carefully reviewed the December 6, 2002 letter from Mr. Neal McCaleb, Assistant Secretary for Indian Affairs, U.S. Department of the Interior ("DOI"). In reliance upon the DOI determination that Sunflower does not lie within the present day exterior boundaries of the Shawnee Tribe "Indian Reservation," you are advised that the Shawnee Tribe is not eligible for transfer consideration of any of the Sunflower Army Ammunition Plant . . . pursuant to 40 U.S.C. § 523.

The Shawnee Tribe sought judicial review of this administrative decision in federal district court. The Tribe claimed the GSA had failed to comply with its mandatory transfer responsibility under § 523. The Shawnee further argued that the United States had breached its fiduciary duty owed to the Shawnee in various aspects of its handling of the Sunflower Property. In addition, they claimed the GSA's arbitrary and capricious acts deprived them of due process. The court upheld the GSA's decision, determining as a threshold matter that the Shawnee's reservation had been terminated by the 1854 Treaty. Shawnee Tribe, 311 F.Supp.2d at 1197. Then, based on this determination, the district court concluded that all of the Tribe's other claims were moot. Id. 1196-97. The Shawnee Tribe appealed.

On February 7, 2005, the United States notified us of a change in the law governing the Sunflower Property's disposal that it argues moots some or all of

this appeal. Appellants then moved for expedited review, citing recent published news accounts of an anticipated transfer of the Sunflower Property to a developer on or before May 31, 2005. We granted that motion and heard oral argument in March of 2005.

JUSTICIABILITY

The United States raised the mootness issue in this case by submitting a Rule 28(j) letter notifying us of recent legislative developments. See Fed. R.App. P. 28(j). Specifically, the Government cites Congress's enactment of § 2841 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, an authorization entitled "Land Conveyance, Sunflower Army Ammunition Plant, Kansas." Pub. L. No. 108-375, § 2841, 118 Stat. 1811, 2135 (2004). This section provides that the "Secretary of the Army, in consultation with the Administrator of General Services, may convey to an entity selected by the Board of Commissioners of Johnson County, Kansas . . . the Sunflower Army Ammunition Plant . . . for economic development and revitalization." Id.

Whereas 40 U.S.C. § 523, on which the Shawnee base their claim to the Sunflower Property, governs general transfers of excess real property by the GSA to the Department of Interior for the use and benefit of Indian tribes,[5] the

[5]Section 523, as it is codified, is part of the larger Property Act, which is intended broadly to "provide the Federal Government with an economical and (continued...)

Government emphasizes that § 2841 of the military authorization bill provides different standards dictating when and how a transfer of the Sunflower Property can be made, and identifies a new official to make the final transfer decision. Based upon representations that the Secretary of the Army has chosen to exercise this authority under § 2841 to convey this property, the Government argues that § 2841 moots the Shawnee's claim to a transfer by the GSA under § 523 in the Property Act. The Shawnee Tribe disagrees, reading § 523 as controlling this case despite the enactment of § 2841.[6] Because questions of mootness go to our jurisdiction, we address this issue at the outset. Seneca-Cayuga Tribe v. Nat'l Indian Gaming Comm., 327 F.3d 1019, 1028 (10th Cir. 2003). Ultimately, we agree with the Government and conclude that § 2841 moots this appeal.

A. Mootness overview

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[5](...continued)
efficient system" for procuring, using, disposing, and keeping track of federal property. 40 U.S.C. § 101.

[6]Procedurally, the Shawnee Tribe purported to file their response to this mootness argument in what appears to be another Rule 28(j) letter; however, a Rule 28(j) letter is not the proper mechanism to address a new argument. See United States v. Lindsey, 389 F.3d 1334, 1335-36 n.1 (10th Cir. 2004). Nonetheless, the Government did not object to this filing, and because mootness is jurisdictional, we are compelled to consider these issues fully regardless of this procedural nuance. See McClendon v. City of Albuquerque, 100 F.3d 863, 867 (10th Cir. 1996). The parties also made their positions on mootness clear at oral argument.

We review mootness questions de novo. Id. We also review questions of statutory interpretation de novo. Hill v. SmithKline Beecham Corp., 393 F.3d 1111, 1117 (10th Cir. 2004).

Article III of the Constitution allows federal courts to adjudicate only "actual, ongoing controversies." Honig v. Doe, 484 U.S. 305, 317 (1988). As an appellate court, we cannot rule on a case which, although live when brought in the district court, has been rendered moot by later events. See id. An appeal is moot when we are unable to redress a plaintiff's injury by a favorable judicial decision, even if redressability was possible when the suit was initiated. Park County Resource Council v. USDA, 817 F.2d 609, 614-15 (10th Cir. 1987), overruled on other grounds by Village of Los Ranchos de Albuquerque v. Marsh, 956 F.2d 970, 973 (10th Cir.1992); see also Airport Neighbors Alliance v. United States, 90 F.3d 426, 428-29 (10th Cir. 1996).

The appeal in this case arose after the Shawnee Tribe claimed entitlement to a mandatory transfer of the Sunflower Property pursuant to § 523, which provides:

> The Administrator of General Services shall prescribe procedures necessary to transfer to the Secretary of the Interior, without compensation, excess real property located within the reservation of any group, band, or tribe of Indians that is recognized as eligible for services by the Bureau of Indian Affairs. . . . [T]he Secretary shall hold excess real property transferred under this section in trust for the benefit and use of the group, band, or tribe of Indians, within whose reservation the excess real property is located.

40 U.S.C. §§ 523(a), (b)(1).

In contrast, the new § 2841 authority on which the Government makes its mootness argument provides:

> (a) The Secretary of the Army, in consultation with the Administrator of General Services, may convey to an entity selected by the Board of Commissioners of Johnson County, Kansas (in this section referred to as the "entity" and the "Board," respectively), all right, title, and interest of the United States in and to a parcel of real property, including any improvements thereon, consisting of approximately 9,065 acres and containing the Sunflower Army Ammunition Plant. The purpose of the conveyance is to facilitate the re-use of the property for economic development and revitalization. . . .
>
> (c) The conveyance authority provided by subsection (a) is in addition to the conveyance authority provided by section 2823 of the Military Construction Authorization Act for Fiscal Year 2003 (division B of Public Law 107-314, 116 Stat. 2712) to convey a portion of the Sunflower Army Ammunition Plant to the Johnson County Park and Recreation District.[7]

§ 2841, 118 Stat. at 2135.

Faced with whether the new § 2841 moots the Shawnee's claim to a transfer under § 523, we must first decide whether § 2841's grant of discretion to the Secretary of the Army, combined with the Secretary's election to exercise that

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[7]The parties have not discussed § 2823 of this 2003 Act in filings to this court. However, § 2823 of the 2003 National Defense Authorization Act provides that the GSA "may convey" approximately 2,000 acres of the Sunflower Property to the Johnson County Park and Recreation District in a manner consistent with 40 U.S.C. § 550(e), which governs the disposal of real property for use as a public park or recreation area. Bob Stump National Defense Authorization Act for Fiscal Year 2003, Pub. L. No. 107-314, § 2823, 116 Stat. 2458, 2712 (2002). Because no one asserts the relevance of § 2823, we do not consider it.

discretion, in fact operates to relieve the GSA of its mandatory transfer duties under § 523. After concluding that it does, we must determine whether Congress has constitutionally exercised its authority in enacting § 2841, which has the effect of mooting a specific pending lawsuit. We conclude that § 2841 is a permissible exercise of legislative authority. Therefore, we proceed to decide whether § 2841 also moots Shawnee's breach of fiduciary duty and due process claims, which were raised but not decided below. Ultimately, we conclude that § 2841 moots this entire appeal.

B. Effect of the Secretary of the Army's existing discretion under § 2841 on GSA's authority under § 523

It is a "fundamental canon of statutory construction that, when there is an apparent conflict between a specific provision and a more general one, the more specific one governs." United States v. Groves, 369 F.3d 1178, 1188 n.5 (10th Cir. 2004) (quotation omitted). By enacting § 2841, Congress granted specific discretion to the Secretary of the Army to dispose of the Sunflower Property in particular. Therefore, the most logical reading of this scheme is that Congress intended the specificity of § 2841 to control over the general obligations of § 523 and the Property Act.[8]

[8]However, the point that § 2841 vested discretion in the Secretary of the Army to decide whether to effectuate a transfer of the Sunflower Property is an important one. Presumably, the Secretary could have elected not to transfer the Sunflower Property pursuant to this authority, and then the general Property Act (continued...)

The Shawnee Tribe raises two arguments against the applicability of § 2841 to this case.

1. "Limitations" provision

First, the Shawnee rely on a provision of the Property Act that they say makes § 523 controlling regardless of the subsequent passage of § 2841. Specifically, they rely on § 113 of the Property Act as codified, a section entitled "Limitations," which mandates:

> Except as otherwise provided in this section, the authority conferred by this subtitle [including § 523] is in addition to any other authority conferred by law and is not subject to any inconsistent provision of law.

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[8](...continued)
provisions would have again applied. However, this is not our case. Here, the Secretary of the Army has already chosen to exercise this § 2841 authority, and every indication is that a conveyance of the Sunflower Property is imminent. Unless or until the Secretary chose to forego this authority—effectively exercising discretion to relinquish this authority altogether—the continued viability of the more specific § 2841 suspends application of § 523 with respect to the Sunflower Property.

In the very unlikely event that the Secretary reversed course and surrendered the Sunflower Property back to the GSA for disposal, then the Shawnee might renew their § 523 claims. However, mootness exceptions exist only for likely recurrences—such as where a defendant voluntarily ceases the challenged action but is likely to return to earlier practices, or where the very nature of a challenged action makes it "capable of repetition yet evading review." These exceptions do not apply in our case where a return of the Sunflower Property to GSA's management authority is highly unlikely. The United States, as owner of the Sunflower Property, has chosen to dispose of this unique piece of land in a particular way, and the Secretary of the Army is now completing that sale.

40 U.S.C. § 113(a). This section then proceeds to enumerate several exceptions to which the Property Act expressly does not apply; however, none of these exceptions apply here. See 40 U.S.C. § 113(b)-(e). Therefore, the Shawnee Tribe reads this language in § 113(a) to mean that the Property Act trumps *any* other inconsistent grant of authority, including § 2841, and therefore that § 523 still governs this case.

However, the language of § 113 does not compel this reading. Instead, the phrase "in addition to any other authority" suggests the opposite—that § 523 does not preempt other laws. Similarly, the fact that § 523 is not itself "subject to any inconsistent provision of law" does not necessarily mean that § 523 controls regardless of the subsequent passage of any other authority. As we conclude later, this language most likely means only that § 523 is not subject to any inconsistent law then in existence, rather than addressing future legislation.

The Government and the Shawnee refer to different sections of the legislative history to support their very different readings of this statute. First, the Shawnee Tribe points to an earlier version of § 113, which provides that the Property Act "shall be in addition and paramount to any authority conferred by any other law." 40 U.S.C. § 474(c) (2000) (emphasis added). The Shawnee argue we should read the current language of § 113(a) as consistent with this "paramount" meaning. The Shawnee emphasize that "paramount" was removed from § 113 in 2002 as part of a recodification of the Property Act, and that

recodification was intended to "make[] no substantive change in existing law and may not be construed as making a substantive change in existing law."[9] Act of August 21, 2002, Pub. L. No. 107-217, § 5(b)(1), 116 Stat. 1062, 1303 (codified as note preceding 40 U.S.C. § 101). Therefore, the Shawnee say we should interpret the current § 113(a) as meaning that the Property Act, and specifically § 523, is "paramount" and therefore that the GSA's mandatory duties under § 523 attach regardless of the subsequent passage of § 2841.[10]

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[9]In addition, the historical notes to § 113 itself also say that "the word 'paramount' is omitted as included in 'not subject to any inconsistent provision.'" 40 U.S.C. app. § 113.

[10]The Shawnee rely heavily on the decision in San Francisco Drydock, Inc. v. Dalton, 131 F.3d 776 (9th Cir. 1990). There, the Ninth Circuit interpreted the meaning of "paramount" in prior versions of § 113 in the context of a Navy leasing deal. Specifically, San Francisco Drydock addressed a statutory amendment permitting the Department of Defense to lease property at a military installation in the process of being closed or realigned. Id. at 779. The plaintiffs challenged the Navy's leasing of a drydock pursuant to this new authority by procedures that did not satisfy the Property Act's open bidding requirements. Id. The Ninth Circuit interpreted the word "paramount" broadly and emphasized that the purpose of the new leasing authority—which was to "facilitate State or local economic adjustment efforts"—was not inconsistent with the Property Act's emphasis on ensuring a fair and open bidding procedure. Id. at 779, 780. Therefore, the court held that the Property Act bid procedures were "paramount" and, because nothing actually exempted the Navy from its provisions, the Navy was required to comply with the Property Act when arranging a lease pursuant to its new authority. Id. at 779-80.

However, we do not necessarily find this case helpful to the Shawnee. The Ninth Circuit merely construed the Navy statute and the Property Act together. The Navy statute was silent as to the procedures regarding how the leases should be executed, and the court held the Property Act's existing procedures should apply. However, the court in San Francisco Drydock did not construe the

(continued...)

However, the Shawnee's interpretation would have us read § 2841 as being a nullity. They would have the preexistent Property Act give exclusive authority to the GSA to dispose of the Sunflower Property irrespective of the subsequent enactment of § 2841. We have an obligation to construe statutes together so as to prevent such a result. See Bridger Coal Co./Pac. Minerals, Inc. v. Dir., Office of Workers' Compensation Programs, 927 F.2d 1150, 1153 (10th Cir.1991) ("We will not construe a statute in a way that renders words or phrases meaningless, redundant, or superfluous."); accord F.D.I.C. v. Canfield, 967 F.2d 443, 447-48 (10th Cir. 1992). The clear intent of § 2841 is to give the Secretary of the Army authority to dispose of the Sunflower Property in an alternative manner, and thus to remove this property from the reach of § 523. We must give this intent effect.

Therefore, we think the Government's interpretation is not only correct, but also more sensible. The Government emphasizes § 5(b)(3) of the Legislative Purpose and Construction statement passed as part of the 2002 recodification of the Property Act, which says:

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[10](...continued)
Property Act to preclude the Navy's authority to lease the property at issue, even though the Property Act standing alone would presumably have vested that authority in the GSA. Id. at 778. These types of procedural issues are not now before us. Moreover, we also construe § 2841 and § 523 together. Section 2841 allows the Secretary of the Army to dispose of the Sunflower Property in one way and, if the plant is disposed of in that manner, there is simply no "excess" property to be disposed of under § 523, thereby mooting any claim that such property should be disposed of pursuant to § 523.

> This Act restates certain laws enacted before April 1, 2002. Any law enacted after March 31, 2002, that is inconsistent with this Act, including any law purporting to amend or repeal a provision that is repealed by this Act, supersedes this Act to the extent of the inconsistency.

§ 5(b)(3), 116 Stat. at 1303 (codified as note preceding 40 U.S.C. § 101). Although the Shawnee try to discount this as just a reviser's note, this statement was legislatively enacted as part of the public law and is a good indication of Congressional intent, even though it is not an operative part of the statute itself.[11] See 1 Sutherland Statutory Construction § 5A:5 (6th ed.); cf. Public Lands Council v. Babbitt, 167 F.3d 1287, 1299 n.5 (10th Cir. 1999) (rehearing).

We find this time restriction very persuasive. Construing § 113 in light of this legislative statement produces the only reading that makes sense—leaving § 113 to stand for the relatively unremarkable proposition that the Property Act trumps any pre-existing laws not specifically excluded by § 113 when it was re-enacted in 2002, but that the Congress is, of course, free to change the Property Act's coverage in the future by any act enacted after March 31, 2002. Thus, § 2841 of the 2005 National Defense Authorization Act, which was passed in October of 2004, suspends the Property Act's applicability in this case as it gives discretion to dispose of this particular property to the Secretary of the Army.

2. Presumption against implied amendment

[11]In fact, this § 5(b)(3) is from the same general legislative statement that the Shawnee rely on elsewhere for the fact that the 2002 recodification of the Property Act was intended to be without substantive change.

This leads to the Shawnee's second argument, which is that implied amendments and implied repeals are disfavored, and therefore we should not read § 2841 as impliedly amending the reach of § 523 with regard to the Sunflower Property. See City of Tulsa v. Midland Valley R. Co., 168 F.2d 252, 254 (10th Cir. 1948) ("Since repeals by implication are not favored in the law, we should not impute to the Legislature an intent to repeal, modify or supersede the former Act unless such intention is manifestly clear from the context of the legislation."). The Shawnee Tribe correctly points out that § 2841's more recent Sunflower-specific grant of discretion to the Secretary of the Army was added to the 2005 military authorization bill without discussion or reference to its impact on either § 523 or the Property Act more generally.

Nonetheless, § 2841 is very specific, applying only to the Sunflower Property. Therefore, it is exceedingly difficult to imagine that Congress did not intend § 2841 to control over any other statutory property provisions that might otherwise have affected this case. Moreover, § 523 is not repealed or even amended; it simply has no application to the Sunflower Property so long as the property is subject to disposal in this alternative fashion by the Secretary of the Army.

C. Congressional authority to moot this lawsuit

Having held that § 2841 controls this case in light of the Secretary of the Army's election to exercise his discretion to dispose of the Sunflower Plant

pursuant to § 2841, we must decide whether Congress had the power to moot the Shawnee's pending claim under § 523 by enacting § 2841 after the lower court's decision in this case.[12] "It is well settled that the enactment of legislation can moot an appeal even though there may have been a viable issue in the district court." New Mexico State Highway Dep't v. Goldschmidt, 629 F.2d 665, 667 (10th Cir. 1980); see also 5 Am. Jur. 2d Appellate Review § 657. This includes legislation that specifically eliminates the source of the original dispute or changes the law pertaining to a particular lawsuit. e.g., Khodara Envtl., Inc. v. Beckman, 237 F.3d 186, 193-94 (3rd Cir. 2001); Walker v. United States Dept. of Housing and Urban Dev., 912 F.2d 819, 828-29 (5th Cir. 1990); Stop H-3 Ass'n v. Dole, 870 F.2d 1419, 1432, 1435 n.24 (9th Cir. 1989); Friends of the Earth, Inc. v. Weinberger, 562 F.Supp. 265, 270-71 (D.D.C. 1983).

Congress clearly can make changes in the law and apply those changes to cases still pending on appeal. Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 233 n.7 (1995). Thus, when a plaintiff, as here, seeks only prospective relief, appellate courts must consider the law as it exists at the time of the appeal.[13]

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[12]The parties do not raise this issue specifically; however, it was addressed briefly in colloquy with the court at oral argument. See generally United States v. Sioux Nation of Indians, 448 U.S. 371, 392 (1980).

[13]This is especially logical in this case where the United States is acting in its proprietary capacity as a land owner and, until the Sunflower Property is actually disposed of, it is free to do with the property what it wishes and to

(continued...)

Kikumura v. Hurley, 242 F.3d 950, 961 n.5 (10th Cir. 2001); Adarand Constructors, Inc. v. Slater, 228 F.3d 1147, 1158 (10th Cir. 2000).

However, the principle of separation of powers does place some limits on the ability of Congress to dictate the work of the Article III courts. See generally Plaut, 514 U.S. at 219-25. Congress cannot set aside a final judgment of an Article III court by retroactive legislation. Id. at 240. Similarly, the separation of powers prevents Congress from vesting in the Executive Branch the authority to review the decisions of Article III courts. Hayburn's Case, 2 U.S. (2 Dall.) 408, 410 (1792).

Finally, and most importantly for our purposes, Congress cannot dictate findings or command specific results in pending cases. See United States v. Klein, 80 U.S. (13 Wall.) 128, 146-47 (1871). In Klein, the Supreme Court refused to give effect to a statute that was said to "prescribe rules of decision to the Judicial Department of the government in cases pending before it." Id. at 146. In Klein, the Court considered a proviso in an appropriations bill for the Court of Claims in which Congress attempted to prevent the court from considering previously granted presidential pardons as the proof of loyalty required to restore individuals' property rights in the aftermath of the Civil War. See United States v. Sioux Nation of Indians, 448 U.S. 371, 402-08 (1980)

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[13](...continued)
provide whatever rules of disposal it deems appropriate.

(setting out facts in Klein). The proviso also required the court to dismiss any pending case, and any future case, where a pardon had been used to establish loyalty or where a claimant had received a pardon. Id. at 403. The Court in Klein found unacceptable this proviso's "great and controlling purpose . . . to deny to pardons granted by the President the effect which this court had adjudged them to have" in pending cases.[14] Klein, 80 U.S. at 145.

Although Klein might be read broadly, it has been significantly limited by subsequent Supreme Court decisions. See, e.g., Plaut, 514 U.S. at 218 ("Whatever the precise scope of Klein, however, later decisions have made clear that its prohibition does not take hold when Congress amends applicable law.") (quotations, alterations omitted). In Robertson v. Seattle Audubon Society, 503 U.S. 429, 441 (1992), for example, the Court upheld a provision in an appropriations bill that Congress passed in direct response to ongoing litigation involving timber sales in the Northwest. The new statute at issue in Robertson mandated new standards for forest management in thirteen national forests that were intended to serve as "adequate consideration for the purpose of meeting the

[14]The Court actually said this proviso was unconstitutional for two reasons. First, it "prescribed a rule of decision in a case pending before the courts, and did so in a manner that required the courts to decide a controversy in the Government's favor." Sioux Nation, 448 U.S. at 404 (citing Klein, 80 U.S. at 146-47). Second, it also impaired "the effect of a pardon, and thus infring[ed] the constitutional power of the Executive." Id. at 404-05 (quoting Klein, 80 U.S. at 147).

statutory requirements that are the basis for the consolidated cases" in the litigation in question. Id. at 434-35 (quotation omitted). The Court held that this new authority "compelled changes in law, not findings or results under old law" and therefore was a permissible exercise of legislative power. Id. at 438. In addition, the Court stressed that the new authority did not "purport[] to direct any particular findings of fact or applications of law, old or new, to fact." Id. Instead, because Congress left the courts to adjudicate the impact of the newly articulated standards in the particular cases at bar, the act was lawful. Id.; see also Anixter v. Home-Stake Prod. Co., 977 F.2d 1533, 1544 (10th Cir. 1992) (recognizing Congress can change existing law or create new law as long as the courts are left to their adjudicative function of interpreting and applying the meaning and effect of the new governing law); Miller v. French, 530 U.S. 327, 342-44 (2000).

In this case, § 2841 simply provides a supervening way to dispose of the particular Sunflower Property. As long as the Secretary of the Army exercises that authority to dispose of the property, we hold that any claim under § 523 is moot. However, § 2841 itself purports neither to compel a particular decision in the case before us nor to decide how the law applies to our specific facts. That function is left to us as a court. Therefore, we conclude that § 2841 is a constitutional exercise of Congress's power to amend existing law and make it applicable to the property which is the subject of this pending case. See Adarand

Constructors, 228 F.3d at 1158. Thus, we conclude that § 2841 constitutionally makes § 523 inapplicable to the Sunflower Property and moots the Shawnee's claim that they are entitled to such a transfer.

D. Effect of § 2841 on Shawnee Tribe's other claims

Finally, we need to determine what effect § 2841 has on the Shawnee Tribe's breach of the federal trust and due process claims. In its Rule 28(j) letter, the Government does note that § 2841 "might not moot" these claims that are not based directly on § 523. However, the district court never reached these other claims because it concluded they were moot once the court determined the Shawnee reservation had been terminated pursuant to the 1854 Treaty. Shawnee Tribe, 311 F.Supp.2d at 1196-97.

To be clear, the Shawnee's other claims, as articulated by the district court, are:

> that Defendants breached their fiduciary duties by: (1) refusing to act on the Tribe's transfer requests; (2) refusing to stay proceedings pending review of the requests; (3) failing to represent the best interests of the Tribe; (4) allowing sham transactions to dispossess the Shawnees of their land; (5) failing to notify the Shawnees of the surplus status of the SFAAP; (6) allowing the SFAAP to be contaminated and environmentally challenged; and (7) failing to keep current records of federally-recognized Indian tribes[, and] the Tribe claims that they were deprived of due process under the Constitution by the arbitrary and capricious actions of Defendants.

Id. In addition, the Tribe originally raised an "equity" claim relating, at least in part, to alleged misrepresentations made by the United States in Nineteenth

Century treaty negotiations; however, the Tribe agreed to dismiss this claim voluntarily before the district court issued its decision. Id. at 1196 n.4.

Some of these remaining claims are facially distinct from a § 523 transfer obligation—particularly the allegations of improper record-keeping of federally recognized tribes, the contaminated state of the Sunflower Property, and the unspecified "sham transactions" that allegedly dispossessed the Shawnee of the land. However, all of the relief the Tribe seeks is tied to its quest for a transfer of the Sunflower Property pursuant to § 523.

Specifically, the Tribe seeks only injunctive and declaratory relief. Id. at 1196. In particular, "the Tribe asks the court to declare that Defendants' refusal to transfer the SFAAP to the Shawnee Tribe is unreasonable, arbitrary, and capricious, and to enjoin Defendants from transferring the SFAAP to any other federal or non-federal entity, other than to the DOI to be held in trust for the benefit of the Tribe."[15] Id.

Because we conclude that the Army's authority under § 2841 now controls in this case, we are unable to grant the Shawnee any of the prospective relief they seek. In other words, we can no longer order the GSA to transfer the property to

[15]The Shawnee Tribe also originally sought $75,000 in "equitable rents"; however, this appears to have been tied exclusively to the equity claim the Tribe voluntarily dismissed. In conjunction with the § 523 claim, the breach of fiduciary duty claim, and the due process claim, the Tribe specifically requested only injunctive and declaratory relief.

the Shawnee or declare that the Shawnee are entitled to a § 523 transfer because the Sunflower Property is now subject to transfer to another entity, by another official, pursuant to other constitutional legislation. "[A] case becomes moot when it becomes impossible for the court to grant any effectual relief whatever to a prevailing party." District 22 United Mine Workers of Am. v. Utah, 229 F.3d 982, 987 (10th Cir. 2000). Because we simply could not give the Shawnee Tribe the relief they seek—even as to the non-§ 523 claims and even though the status of the reservation itself remains an important legal question—this entire suit is moot. See Park County, 817 F.2d at 615.

E. Vacatur

Generally, "[w]hen causes beyond the appellant's control make a case moot pending appeal, a federal appellate court generally should vacate the judgment below and remand with a direction to dismiss." McClendon v. City of Albuquerque, 100 F.3d 863, 868 (10th Cir. 1996); see also United States v. Musingwear, 340 U.S. 36, 39 (1950) (describing Supreme Court's "established practice" of reversing and vacating lower courts' decisions when case becomes moot on appeal). Because the Shawnee Tribe sought a review on the merits of the adverse ruling below, and is now precluded from that review because of

circumstances beyond the Tribe's control, in fairness we will not force the Shawnee to acquiesce in the district court's judgment. See Jones v. Temmer, 57 F.3d 921, 923 (10th Cir. 1995). Thus, we will remand the case and order that the district court's order be vacated, leaving the important issue of the Shawnee's reservation status open for full consideration another day.

CONCLUSION

We DISMISS this appeal as moot and REMAND to the district court with instructions to vacate its earlier order and dismiss Plaintiff's complaint.

LUCERO, Circuit Judge, concurring.

Because of concerns over the majority's separation of powers analysis, I solely concur in the result.