IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

PUEBLO OF JEMEZ, a federally recognized tribe, Plaintiff, v. THE UNITED STATES OF AMERICA, Defendant.	)	Case No. 1:12-cv-800 (RCB)(RHS)

UNITED STATES' REPLY AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS PLAINTIFF'S COMPLAINT

The threshold jurisdictional issue in this case is whether the Indian Claims Commission Act ("ICCA"), Pub. L. No. 79-726, 60 Stat. 1049-56 (1946) (formerly codified as amended at 25 U.S.C. §§ 70-70n-2), divests this Court of jurisdiction over Plaintiff's, the Pueblo of Jemez, attempt to quiet title to the lands now underlying the Valles Caldera National Preserve. In its opposition to the United States' motion to dismiss, Plaintiff maintains that it may pursue a Quiet Title Act ("QTA"), 28 U.S.C. § 2409a, claim against the United States, despite the expiration of the limited waiver of sovereign immunity that Congress incorporated in the ICCA. At times, Plaintiff frames their QTA claim as one for "existing title" or unextinguished title, Plaintiff's Resp. In Opp. To United States' Mot. to Dismiss and Mem. of Points and Authorities, 20 (ECF No. 22[1] ("Pl.'s Mem.")), while at others, Plaintiff concedes that the nature of its claim necessarily revolves around the pre-1946 actions of the United States, *id.* at 21. Plaintiff's logical contortions only highlight the expansive and comprehensive nature of the ICCA, because under either theory, Plaintiff had a cognizable claim in the Indian Claims Commission ("Commission"). Plaintiff provides no cogent rebuttal, choosing instead to focus the thrust of their argument on cases where tribes brought suit *against non-federal entities*. But every circuit to have addressed the scope and effect of the ICCA on historic Indian land claims *against the United States* has concluded that jurisdiction is lacking in the district courts, including the Tenth Circuit in *Navajo Tribe of Indians v. State of New Mexico*, 809 F.2d 1455 (10th Cir. 1987).

Having failed to avail itself of the since-expired waiver of sovereign immunity incorporated in the ICCA, Plaintiff simply cannot obtain review of a historical land claim against

[1] Plaintiff filed two briefs in opposition to the United States' Motion to dismiss. *See* ECF Nos. 18 (filed May 7, 2013), 22 (filed May 16, 2013). Because the later-filed memorandum appears to make no more than stylistic and grammatical changes, reference to Plaintiff's memorandum in opposition will be limited to ECF No. 22.

the United States by challenging present-day actions under the guise of a quiet title action. *See* Fed. Def.'s Mem. In Supp. of Mot. To Dismiss, 17-18 (ECF No. 14 ("Fed. Def.'s Mem.")). Plaintiff's attempt to avoid the sweeping jurisdictional bar of the ICCA, however, relies on numerous erroneous and unsupported characterizations of the United States' motion to dismiss, *see infra*, Section I(B)(i). It bears emphasis that the United States does not take, as Plaintiff erroneously suggests, the position that the ICCA operated as a "back handed" extinguishment of all Indian title that was not presented to the Commission by 1951, when the ICCA's waiver of sovereign immunity expired. Plaintiff blurs the distinction between extinguishment of title with Congress's decision to deprive Article III courts of jurisdiction to entertain historic land claims *against the sovereign* by enacting a time-limited waiver of sovereign immunity that expired in 1951. That the QTA and its legislative history is devoid of any indication that Congress intended to repeal any of the limitations incorporated in the ICCA's comprehensive remedial scheme further compels dismissal.

But even assuming, *arguendo*, that the ICCA does not divest this Court of jurisdiction, Plaintiff's opposition brief fails to remedy the legal defects that plague its Complaint. First, Plaintiff's concession that non-Indian landowners occupied this area as early as 1860 defeats their claim of aboriginal title in the first instance. Second, to the extent extinguishment is at all relevant—given Plaintiff's failure to establish aboriginal title in connection with the Valles Caldera—a number of Executive and congressional actions extinguished Plaintiff's claim to aboriginal title of the Valles Caldera, including passage of the Valles Caldera Preservation Act of 2000 ("Preservation Act"), 16 U.S.C. §§ 698v to 698v-10. Finally, Plaintiff fails to provide any support for the proposition that federal common law of aboriginal title can serve as an adequate basis to divest the United States of federally owned land, in the process usurping the will of

Congress expressed in the Preservation Act. That aboriginal title is paramount to the authority of the sovereign is contrary to well-settled law, and Plaintiff provides no case law to the contrary.

I. PLAINTIFF'S FAILURE TO TIMELY FILE ITS CLAIM UNDER THE ICCA DIVESTS THIS COURT OF SUBJECT MATTER JURISDICTION AND DEPRIVES PLAINTIFF OF THE OPPORTUNITY TO LITIGATE ITS CLAIM AGAINST THE UNITED STATES.

A. 12(b)(1) is the appropriate procedural vehicle for the disposition of Plaintiff's claims.

Contrary to Plaintiff's contentions, Pl.'s Mem. 3-5, the United States' 12(b)(1) motion did not mount a mere facial challenge to the complaint, which challenges only the allegations in the complaint. *See Holt v. United States*, 46 F.3d 1000, 1003 (10th Cir. 1995). Instead, the United States raised a factual challenge to the existence of subject matter jurisdiction, contending that Congress's passage of the ICCA's time-limited waiver of sovereign immunity bars this Court from exercising jurisdiction over the subject matter of this lawsuit. *See* Fed. Def.'s Mem. 1-2, 11-20. Thus, this Court need not presume the truthfulness of the allegations contained in Plaintiff's Complaint, and may look to documents outside the pleadings without risk of converting the 12(b)(1) motion to one for summary judgment under Rule 56. *See Holt*, 46 F.3d at 1003.

Plaintiff's argument that the "government has not met its burden for a factual attack on subject matter jurisdiction," and, hence, "no burden of proof shifted to the plaintiff," Pl.'s Mem. 2-4, misunderstands the nature of subject matter jurisdiction. As the party seeking to invoke the Court's jurisdiction, no subject matter jurisdiction exists *unless* Plaintiff can identify a waiver of the United States' sovereign immunity. *See, e.g., Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994) (holding that, because "[f]ederal courts are courts of limited jurisdiction . . . [i]t is to be presumed that a cause lies outside this limited jurisdiction, and the

burden of establishing the contrary rests upon the party asserting jurisdiction.") (citations omitted). Thus, the burden *remains* with Plaintiff to show by a "preponderance of the evidence" that this Court has subject matter jurisdiction. *Celli v. Shoell*, 40 F.3d 324, 327 (10th Cir. 1994).

This is also not a case in which the merits are intertwined with jurisdiction, Pl.'s Mem. 5, *i.e.*, a situation in which "subject matter jurisdiction is dependent upon the same statute which provides the substantive claim in the case." *Wheeler v. Hurdman*, 825 F.2d 257, 259 (10th Cir. 1987); *Holt*, 46 F.3d at 1003. Here, the facts and law relevant to whether the government is now immune from suit due to the expiration of the ICCA's limited waiver has no bearing on the QTA merits question, which provides the substantive claims in the case. *See e.g. Holt*, 46 F.3d at 1003 (concluding in an analogous situation that the jurisdictional inquiry was not intertwined with the merits because "whether the government is immune from suit under [the Flood Control Act of 1928, 33 U.S.C. § 702c] -does not depend on the [Federal Tort Claims Act. 28 U.S.C. §§ 1346(b), 2671] which provides the substantive claims in the case."); *compare with U.S. ex rel Boothe v. Sun Healthcare Group, Inc.*, Civ. No. 03-1276 (J. Brack), 2006 WL 4748673 (D.N.M. May 11, 2006) *aff'd in part and rev'd in part on other grounds*, 496 F.3d 1169 (10th Cir. 2007) (concluding in a *qui tam* action brought under the False Claims Act, 31 U.S.C. §§ 3729-3733, that whether a "public disclosure" had occurred was a jurisdictional inquiry arising out of the same statute, the False Claims Act).

Finally, a motion to dismiss is a frequently and appropriately invoked procedure when determining whether the ICCA prevents the court from exercising subject matter jurisdiction. *See, e.g., Navajo Tribe*, 809 F.2d at 1460, 1462-63; *White Mountain Apache Tribe v. Clark*, 604 F. Supp. 185, 187-89 (D. Ariz. 1984), *aff'd sub nom White Mountain Apache Tribe v. Hodel*, 784 F.2d 921 (9th Cir.), *cert. denied*, 479 U.S. 1006 (1986); *Oglala Sioux Tribe v. United States*, 650

F.2d 140, 142 (8th Cir. 1981). But even if this Court decides that the issue of subject matter jurisdiction is intertwined with the merits, at most, this simply converts the United States' 12(b)(1) motion to one under 12(b)(6) or Rule 56, *Wheeler*, 825 F.2d at 259.[2]

B. The ICCA did not operate as a "backhanded" extinguishment of Aboriginal Title, but instead represented Congress' decision to vest the Commission with exclusive jurisdiction of a limited duration to resolve with finality all claims *against the United States*.

Plaintiff does not dispute that Congress alone grants consent to suit or that the waiver of sovereign immunity must be "unequivocally expressed" in the statutory text. *United States v. Idaho, ex rel. Dir., Idaho Dep't of Water Res.*, 508 U.S. 1, 6 (1993). The ICCA provided the only unequivocal expression of the United States' consent to be sued for the subject matter that lies at the heart of this case: historic land claims against the United States. That waiver, however, was of a finite duration, expiring in 1951. *See* Section 12 of the ICCA, 25 U.S.C. § 70k (stating that any claim not filed by that deadline could not "thereafter be submitted to any court or administrative agency for consideration."); *see also Oglala Sioux Tribe of Pine Ridge Indian Reservation v. U.S. Army Corps of Eng'rs*, 570 F.3d 327, 331 (D.C. Cir. 2009) ("[t]o balance this permissiveness and to ensure finality, the Act established a 5-year limitation on all

[2] Plaintiff's contention that jurisdictional discovery is warranted, *see* Pl.'s Mem. 5, goes without any detailed showing, explanation, or even legal citation, and such conclusory statements are insufficient to carry the burden of "demonstrating a legal entitlement to jurisdictional discovery . . . ." *Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173, 1189 n.11 (10th Cir. 2010) ("Our research reveals that we previously have placed the burden of demonstrating a legal entitlement to jurisdictional discovery—and the related prejudice flowing from the discovery's denial—on the party seeking the discovery . . . ."). Moreover, the Tenth Circuit has expressed its reluctance to grant jurisdictional discovery "when a party has challenged the district court's subject matter jurisdiction on immunity grounds," because "immunity is intended to shield the defendant from the burdens of defending the suit, including the burdens of discovery." *Id.* (quoting *Freeman v. United States*, 556 F.3d 326, 341–42 (5th Cir. 2009), *cert. denied*, 558 U.S. 826 (2009).

claims existing before 1946; any claim not presented within the 5-year period may not be submitted to any court or administrative agency," ultimately dismissing the tribe's historic land claims against the United States that accrued prior to 1946). A tribe's failure to avail itself of the ICCA did not effectuate an extinguishment, a faulty conclusion Plaintiff's erroneously attribute to the United States. Instead, if a tribe failed to bring a cognizable claim in a timely manner, as was the case here, it simply lost its opportunity to litigate its dispute *with the United States*. *See* Fed. Def.'s Mem. 3, 19 (discussing the purpose of the ICCA).

Plaintiff cannot avoid the consequences of its failure to file a claim before the Commission by casting its claim as one for existing, unextinguished aboriginal title. Plaintiff's land claim against the United States is one that was cognizable under the ICCA, and exclusively so. Fed. Def.'s Mem. 14-20; *Navajo Tribe*, 809 F.2d 1467 (the "underlying substantive claim . . . must determine the Commission's jurisdiction . . . ."). Given that Plaintiff's claim for quiet title to the Valles Caldera fell within the exclusive jurisdiction of the Commission, Plaintiff simply cannot ignore the reality that the ICCA reflected a congressional policy that "[t]ribes with valid claims would be paid in money. No lands would be returned to a tribe." *Id.* at 1461 (citing *Authorizing Appropriations for the Indian Claims Commission for Fiscal Year 1977: Hearing on H.R. 11909 Before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs*, 94th Cong., 2d Sess. 48 (1976)). Plaintiff's decades-long litigation before the Commission over aboriginal title to parts of New Mexico only highlights the expansive reach of the ICCA, and the United States' payment of funds constituted a full discharge of all matters that were raised or could have been raised. *See* Fed. Def.'s Mem. 11-14. As a consequence, the ICCA operates as a jurisdictional bar to Plaintiff's claim that it is entitled to the exclusive use, occupation, and control of the National Preserve. *See* Compl., Prayer for Relief, ¶ 1.

i. Plaintiff blurs the distinction between being foreclosed from litigating the validity of title against the United States and the extinguishment of Indian title, which the ICCA decidedly did not effectuate.

As a threshold matter, the entirety of Plaintiff's brief flows from the fundamentally flawed premise that the United States takes the position that "the ICCA was intended by Congress to extinguish claims to any and all Indian land, water, and treaty rights that existed beyond recognized Indian reservation boundaries . . . ." Pl.'s Mem. 10-11; *see also* Pl.'s Mem. 13, 14, 16, 20, 21. Plaintiff's incorrect characterization, unsupported by any citation to the United States' brief, is a far cry from the narrower position advanced: That "Congress expressly deprived district courts of jurisdiction over the subject matter of Plaintiff's claims, when it enacted the limited waiver of sovereign immunity in the ICCA, which has since expired." Fed. Defs.' Mem. 10. Thus, "any claim the Pueblo had or might have had to the lands underlying the Valles Caldera accrued long before August 13, 1946, and Plaintiff 'cannot obtain review of a historical land claim otherwise barred by the Act by challenging present-day actions involving the land.'" Fed. Defs.' Mem. 17-18 (citing *Oglala Sioux Tribe of Pine Ridge Indian Reservation*, 570 F.3d at 332).

In essence, Plaintiff collapses two distinct principles into one, conflating the want of Article III jurisdiction to entertain pre-1946 land title claims by a tribe against the United States, with the extant jurisdiction of the courts to adjudicate suits by a tribe against non-federal third parties. A consequence of Plaintiff's flawed characterization is that its argument "blurs the critical distinction between being unilaterally deprived of title without being given any opportunity to litigate it *and being foreclosed from litigating that title because of sleeping on one's claim*." *Navajo Tribe*, 809 F.2d at 1469 (emphasis added). If, as was the case here,

Plaintiff failed to timely litigate the validity of its title in an action against the United States, the ICCA "did *not* backhandedly extinguish valid Indian titles," *id.*(emphasis in original), and the United States has never suggested otherwise; rather, the ICCA only "provided the long-overdue opportunity to litigate the *validity* of such titles and to be recompensed for Government actions inconsistent with those titles." *Id.* at 1470 (emphasis in the original). Thus, if a tribe failed to file a timely claim, the tribe "simply lost its forum to litigate the pre-1946 actions of the Government that were inconsistent with its alleged title." Fed. Def.'s Mem. 19 (citing *Navajo Tribe*, 809 F.2d at 1470).[3]

And the position of the United States, and the Tenth Circuit, is entirely consistent with every circuit that has addressed the scope and effect of the ICCA on claims against the United States.[4] *Paiute-Shoshone Indians of Bishop Cmty. of Bishop Colony, Cal. v. City of L.A.*, 637

[3] Plaintiff's flawed contention that Tenth Circuit's interpretation of the ICCA "essentially created a device for inverse condemnation of all remaining tribal land claims," Pl.'s Mem. 25, is remarkably similar to the Navajo Tribe's argument that "affirming dismissal in [*Navajo Tribe*] would be tantamount to finding that the ICCA 'extinguished by implication valid Indian titles' and that such a finding constitutes 'a backhanded assertion of eminent domain powers.'" *Navajo Tribe*, 809 F.2d at 1469. The Tenth Circuit summarily dismissed those concerns, observing, as quoted above, that failure to file a claim for even those "existing" titles simply resulted in losing one's forum for a suit against the United States, not extinguishment of title. *Id*. at 1469-70.

[4] Nor is the United States' position inconsistent with the position taken in *State of New Mexico, et al. v. John Abbott, et al.*, Civ. No. 68-cv-07488-MV-LFG (D.N.M. filed Mar. 22, 1968), where the United States, a *plaintiff* in that case, opposed the Truchas Acequias' motion to dismiss based on the ICCA. ECF No. 2788 (attached as Exhibit A). That case revolves around the Ohkay Oweingeh's attempt to adjudicate aboriginal water rights *against the State of New Mexico and non-Indian private parties* on lands outside the boundaries of the San Juan Pueblo Grant. The non-federal defendants there had moved to dismiss, arguing that the ICCA barred the litigation of those particular water rights-related issues. *Id.* at 1. Plaintiff's reliance on *Abbott* is misplaced. The thrust of the United States' motion was that the water rights claims there were against parties *other than the United States*. *Id.* at 2. The United States maintained, and continues to maintain, that those competing water rights claims against non-federal entities were simply not the type of claim contemplated by the ICCA. Put differently, the Pueblos could not have litigated their water rights against the competing claims of non-Indians because claims against parties other than the United States were not within the jurisdiction of the Commission.

F.3d 993, 1000 (9th Cir. 2011) (expressing its agreement with the Tenth and Eighth Circuits that the "ICCA provided the exclusive remedy for claims accrued by Indian tribes against the United States before 1946," and concluding that the plaintiff tribe "lost its opportunity to litigate its dispute with the United States" when it failed to present a claim to the Commission within the prescribed statute of limitations); *Oglala Sioux Tribe of Pine Ridge Indian Reservation*, 650 F.2d at 142-43 ("Congress has deprived the district court of subject matter jurisdiction by expressly providing an exclusive remedy" and thereby barring "any other form of relief."); *accord Oglala Sioux Tribe*, 570 F.3d at 327; *W. Shoshone Nat. Council v. United States*, 279 Fed. Appx. 980, 988 (Fed. Cir. 2008); *Sokaogon Chippewa Cmty. v. State of Wis., Oneida Cnty.*, 879 F.2d 300, 302 (7th Cir. 1989) (holding that the district court appropriately dismissed the Quiet Title Act claim against the United States, because the ICCA created an "exclusive remedy against the U.S. for tribal claims" accruing before 1946, and that plaintiff tribe's lawsuit in 1986 was "too late.").

Yet Plaintiff nowhere rebuts, distinguishes, or even discusses, the above-cited cases, choosing instead to cite a number of inapposite cases that, at best, only reinforce the principle that Plaintiff cannot obtain review of historical land claims against the United States. For example, Plaintiff relies in error on *County of Oneida, New York v. Oneida Nation of New York State*, 470 U.S. 226 (1985) for the proposition that the Tenth Circuit's interpretation of the ICCA, found in *Navajo Tribe*, is somehow contrary to Supreme Court precedent. Pl.'s Mem. 22-25. Plaintiff's argument misses the mark. The question there was whether the Oneida Indian

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As a corollary, water rights adjudications are fundamentally different from land title claims against the United States, because "the ICC did not allow a claimant to 'assert[] ownership of water rights against the government,' or pursue any sort of claims against the State or private entities," *id.* at 2. The United States further opined "the Court's jurisdiction to adjudicate the water rights claims is not dependent upon jurisdiction to determine title to land." *Id.* at 3. Thus, the United States did not dispute the Court's jurisdiction.

tribe could bring suit *against state entities* for damages associated with the *state's* occupation and use of tribal land allegedly unlawfully conveyed *by the state* in 1795. The ICCA, however, dealt exclusively with the establishment of a quasi-judicial tribunal dedicated to the conclusive resolution of outstanding Indian claims *against the United States*. *Navajo Tribe*, 809 F.2d at 1460; *Paiute-Shoshone Indians*, 637 F.3d at 998 ("The ICCA created an executive tribunal, the Indian Claims Commission, to hear and determine all tribal claims against the United States that accrued before August 13, 1946.").[5] Like *Oneida, Mille Lacs Band of Chippewa Indians v. State of Minnesota*—a lawsuit that was also brought against various state entities—further supports the United States' position that the ICCA only bars lawsuits brought *against the United States*. There, the court observed that the "ICC also could not hear the Band's claims because it was limited to adjudicating claims against the United States, and the Band is seeking relief against State defendants." 853 F. Supp. 1118, 1139 (D. Minn. 1994) (citing *Sokaogon Chippewa Community*, 879 F.2d at 302).

All of the above-cited cases further bolster the United States' position: "Congress expressly deprived district courts of jurisdiction *over the subject matter of Plaintiff's claims*, when it enacted the limited waiver of sovereign immunity in the ICCA, which has since expired." Fed. Def.'s Mem. 10 (emphasis added). Having slept on its claims that were clearly cognizable under the ICCA, Plaintiff cannot now invoke the limited jurisdiction of the federal courts to sue the sovereign, more than 60 years after Congress's limited waiver of sovereign immunity expired.

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[5] Plaintiff's reliance on *Arizona v. California*, 530 U.S. 392 (2000) is similarly misplaced, as that case revolved around Arizona's invocation of the original jurisdiction to settle a dispute with the State of California.

ii. Plaintiff's claim of title to the Valles Caldera was cognizable under the ICCA and should have been litigated before the Commission, the exclusive forum available for historic Indian land claims against the United States.

The thrust of Plaintiff's argument that the ICCA does not operate to divest this Court of jurisdiction appears to rest on the premise that the ICCA was not intended to require tribes to present a claim to the Commission if no "taking" had occurred, or, put another way, tribes were not required to "present claims of existing aboriginal title," Pl.'s Mem. 20. Plaintiff's unduly narrow construction does not square with the comprehensive nature of the ICCA. In drafting the expansive language of the ICCA, "Congress wanted to avoid just what the Tribe maintains here-that 'it had a meritorious claim which the Claims Commission was not authorized to consider.'" *Navajo Tribe*, 809 F.2d at 1466 (citing 92 Cong.Rec. 5312 (1946)).[6] As a consequence, the ICCA allowed tribes to bring a range of "claims involving title," *Oglala Sioux Tribe*, 570 F.3d at 331-32, which necessarily included claims of present title. *Navajo Tribe*, 809 F.2d at 1467 ("However, [the Navajo Tribe's] assertion of present title *could* have been heard before the Commission, just as the Yankton Sioux Tribe's claim was heard under an ICCA-precursor jurisdictional act. The Tribe simply would have had to accept just monetary compensation if the Commission found their claim to title valid").

Plaintiff fails in its efforts to distinguish the Tenth Circuit's opinion in *Navajo Tribe*. There, like here, the tribe attempted to establish its "existing title" to lands—designated in two

[6] Plaintiff's argument that claims were limited to traditional "takings," *i.e.* claims that the United States had extinguished aboriginal title, is contradicted by Congress's decision to vest the Commission with jurisdiction "[b]road enough to include all possible claims," *White Mountain Apache*, 604 F. Supp. at 187, which necessarily encompassed claims not otherwise cognizable in the federal courts, *see* Fed. Def.'s Mem. 3-4.

executive orders—and asserted that the United States had improperly issued patents to the State of New Mexico as well various private landowners in the early 20th century, 809 F.2d at 1459. And, much like the position Plaintiff advances here, the tribe there also maintained that "because the Commission was only authorized to award money damages for the extinguishment of title to Indian lands," its suit to "establish the Tribe's existing title to land, could not have been entertained before the Commission." *Id.* at 1463. The Tenth Circuit squarely rejected the tribe's proposition, finding that the tribe's claim of "existing title" "was cognizable, and exclusively so, under the ICCA." *Id.* at 1464.

Plaintiff's citations and exhibits also reinforce the principle that since the expiration of the ICCA's limited waiver of sovereign immunity, Plaintiff cannot maintain *against the United States* a lawsuit for a claim of existing title "without violating both the letter and the intent of the Indian Claims Commission Act," *Oglala Sioux*, 570 F.3d at 333. For example, Plaintiff relies on *Alabama–Coushatta Tribe of Texas v. United States*, Congressional Reference No. 3–83, 2000 WL 1013532 (Ct. Cl. 2000), Pl.'s Mem. 5-6, but that particular congressional reference[7] case came about by ways of a private bill of relief in Congress, *see* H.R. 1232, 98th Cong., 1st Sess. (1983). Indeed, congressional legislation authorizing suit in the Court of Federal Claims was required *because the tribe had admittedly failed to file its ICCA claim prior to 1951* and was consequently "time-barred from litigating its pre–1946 claims" of aboriginal title against the United States. *Alabama-Coushatta*, 2000 WL 1013532, at *1. Thus, the Pueblo of Jemez finds itself in the identical position as the Coushatta: Having failed to bring a timely claim of title

[7] In "congressional reference" cases, Congress refers proposed private bills to the United States Claims Court for an initial determination of the merits of the claim, but retains final authority over the ultimate appropriation. *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 431 (1990).

against the United States, its claims are now barred, and in the absence of a special jurisdictional act of Congress, the limited jurisdiction of this Court no longer extends to those suits *against the United States*.[8]

Moreover, an examination of the QTA's remedial scheme exposes the contradictory nature of Plaintiff's lawsuit. *Cf.* Fed. Def.'s Mem. 17. If this suit proceeds, and the final determination is adverse to the United States, the government retains the authority to either: 1) cede possession and control of the disputed property; or 2) pay just compensation. 28 U.S.C. § 2409a(b). Thus, for example, in the unlikely event the United States chooses to cede possession and control of the Valles Caldera, the QTA would allow Plaintiff to achieve through the back door what it never could have accomplished under the ICCA: Quiet title to the National

[8] Plaintiff also provides an exhibit of "Tribal Land and Water Rights Claims." *See* ECF No. 22-7. The only post-1946 case that Plaintiff identifies in that exhibit, *Pueblo of Sandia v. Babbitt*, 231 F.3d 878 (D.C. Cir. 2000), was brought pursuant to the Administrative Procedures Act, challenging the 1988 decision of the Secretary of the Interior not to correct an inaccurate 19th century survey of public lands. As a result, the district court concluded that the ICCA did not bar the APA lawsuit, because "the Pueblo's claim seeks to review administrative actions taken decades after the ICCA's cut-off date." *Pueblo of Sandia v. Babbitt*, Civ. No. 94-2624, 1996 WL 808067, at *7-8 (D.D.C. Dec. 10, 1996). The district court observed that, "although the Pueblo's claim 'stems' in some sense from inaccuracies in [the original] survey, that official's failure correctly to survey the Sandia Pueblo cannot be equated with the refusal of Secretaries Hodel and Babbitt to order a corrected survey, which is what plaintiff is challenging." *Id.* Here, however, Plaintiff does not rely on the APA as a waiver of sovereign immunity, nor could it; unlike *Pueblo of Sandia*, there is no post-1946 final agency action at issue. In addition, the exhibit cites various settlement agreements entered into by the United States and various tribes, effectuated *via* congressional legislation. Some of these settlements related, in part, to Commission proceedings, *see* Santa Domingo Pueblo Claims Settlement Act, Pub. L. 106-425 (Nov. 1, 2000), codified at 25 U.S.C. §§ 1777-77(e), while others related to water rights, *see* Jicarilla Apache Water Rights Settlement Act, Pub. L. 102-441, 106 Stat. 2237 (Oct. 23, 1992). Again, the cited settlements, as well as *Pueblo of Sandia*, demonstrate that Plaintiff's avenue to address their land claims no longer lies with the Article III Courts, but with Congress or the Executive branch.

Preserve. *Cf. Navajo Tribe*, 809 F.2d at 1467 ("even if [Plaintiff] had timely filed its claim under the ICCA, [it] could not have quieted title in these lands or maintained an action in ejectment . . . its assertion of present title *could* have been heard before the Commission . . . the Tribe simply would have had to accept just monetary compensation if the Commission found their claim to title valid."). This Court should decline to adopt Plaintiff's reading that yields "bizarre" results that are "contrary to a likely, and rational, congressional policy." *Caron v. United States*, 524 U.S. 308, 315 (1998).

Conversely, to avoid the possibility that a successful plaintiff could "force the United States from possession and thereby interfere with the operations of the Government," H.R. Rep. No. 1559, 92d Cong., 2d Sess. 4, 10 (1972), the QTA also provides that, "if the final determination shall be adverse to the United States, the United States nevertheless may retain such possession or control of the real property" upon payment of "just compensation." *See* 28 U.S.C. § 2409a(b). In the event the United States utilized Section 2409a(b) to pay just compensation for the Valles Caldera, Plaintiff would then find itself in the *identical position* had it pursued this claim before the Commission, six decades after the expiration of the United States' waiver of sovereign immunity. As the United States pointed out, however, there is nothing in the QTA or its legislative history to suppose that Congress revived the ICCA's expired waiver of sovereign immunity for Indian land claims against the United States. Def's. Mem. 16-17. Dismissal is therefore warranted, particularly in light of the oft-cited canon that "the Government's consent to be sued must be construed strictly in favor of the sovereign, and not enlarge[d] . . . beyond what the language requires," *United States v. Nordic Vill., Inc.*, 503 U.S. 30, 34 (1992) (internal citations and quotations omitted).

But even if, as Plaintiff posits, "[t]he issue in this case, is whether the 1860 Act authorizing the land selection by the Baca heirs, and the subsequent approval of their selection, constituted an action inconsistent with the Pueblo's aboriginal title," Pl.'s Mem. 21, then Plaintiff has itself conceded that the claim here is indeed premised on pre-1946 actions taken by the United States. Indeed, the inquiry proposed by Plaintiff is the *exact* inquiry that Congress tasked the Indian Claims Commission to explore. *See, e.g.*, *Pueblo de Zia III*, 19 Ind. Cl. Comm. 56, 11-12 (weighing the extensive evidence presented by the Pueblos to determine whether the United States' pre-1946 actions were inconsistent with aboriginal title). Plaintiff has simply "lost its opportunity to litigate its dispute with the United States," *Bishop Paiute*, 637 F.3d at 1000, that concededly revolves around actions that occurred more than 150 years prior. *See also, e.g.*, *Sokaogon Chippewa C*, 879 F.2d at 302-03 (finding that the district court appropriately dismissed the plaintiff tribe's Quiet Title Act claim against the United States, as opposed to the remaining non-federal entities, because the plaintiff's cause of action against the U.S. "must certainly have accrued well before August 13, 1946"— the "critical date" established by the ICCA.).

iii. Monetary compensation was the sole remedy available under the ICCA, and, once paid, the United States was discharged of its liability for any claim that "touched" on or "arose from" the matters previously litigated.

Plaintiff attempts to construe Eighth Circuit precedent as being at odds with Tenth Circuit authority. *See* Pl.'s Mem. 26-28. This Court, however, is bound by the Tenth Circuit. But, in any event, the Eighth Circuit provides Plaintiff with no refuge from the clear intent of Congress: If a claim was cognizable under the ICCA, that claim was "compensable only by money damages notwithstanding the Tribe's request to quiet title." *Navajo Tribe*, 809 F.2d at 1464.

Moreover, Plaintiff's proposition that the "Eighth Circuit Does Not Follow the Exclusive Remedy Theory of the Tenth Circuit," Pl.'s Mem. 26, is squarely contradicted by *Oglala Sioux Tribe of Pine Ridge Indian Reservation v. United States*, where the Eighth Circuit concluded "that Congress has deprived the district courts of subject matter jurisdiction by *expressly providing an exclusive remedy* for the alleged wrongful taking through the enactment of the Indian Claims Commission Act." 650 F.2d at 142 (emphasis added) (going on to state that "[t]his express action of Congress serves as a bar to the district court affording the Tribe any other form of relief."). Putting aside that the Eighth Circuit has never overturned *Oglala Sioux Tribe*, Plaintiff's reliance on *Spirit Lake Tribe v. North Dakota*, 262 F.3d 732 (8th Cir. 2001) is unavailing. To the extent this case is at all relevant—it revolved around a 1976 Department of the Interior opinion that pertained to an ongoing dispute over ownership of a lake—there, the tribe did, in fact, present to the Commission an "aboriginal title claim" that was ultimately resolved in the Band's favor, demonstrating that historic land claims against the United States and premised on aboriginal title were cognizable under the ICCA.

Once paid, "the bar extended to those claims that were not litigated *but could have been litigated*." *See* Fed. Def.'s Mem. 12-14 (emphasis in original). In 1975, the Pueblo of Jemez stipulated to entry of final judgment that resolved its pre-1946 aboriginal title claims in the amount of $749,083.75. Fed. Def.'s Ex. C, ECF No. 14-3. The Stipulation adopted by the parties provided that entry of final judgment disposed of all "rights, claims or demands which plaintiffs have asserted or *could have asserted* with respect to the subject matter of such case . . . ." *Id.* That the Pueblo of Jemez's claim was filed with regard to a 382,849 acre tract of land not encompassed by the current claim, *see* Pl.'s Mem. 30-32, does not nullify the consequences of the Joint Stipulation or Section 22 of the ICCA. For example, in *White Mountain Apache Tribe*

v. Hodel, the Ninth Circuit ruled that the exact same "could have asserted" language in a Commission final judgment barred, under the doctrine of *res judicata*, a boundary dispute claim that was not raised. 784 F.2d 921, 925-26 (9th Cir. 1986). As a consequence, Plaintiff's claim is barred—"either by settlement or by failure to assert it," *id.*—and Plaintiff's claim should be dismissed.

II. ACCEPTING THE COMPLAINT'S PLEADED FACTS AS TRUE, DISMISSAL PURSUANT TO 12(B)(6) IS APPROPRIATE BECAUSE PLAINTIFF CAN PROVE NO SET OF FACTS THAT ENTITLE IT TO EXCLUSIVE USE, OCCUPANCY, AND WHAT AMOUNTS TO REGULATORY CONTROL OVER FEDERAL LANDS IN THE VALLES CALDERA.

A. The United States government cannot extinguish aboriginal title that Plaintiff cannot establish in the first instance.

As a threshold matter, Plaintiff's contention that it established aboriginal title to the Valles Caldera is undermined by its concession that the Baca Family occupied the same tract of land. *See* Compl. ¶ 84 (stating that the Pueblo occupied this area "without opposition from the Baca family.").[9] As a matter of law, non-Indian settlement of an area interferes with a Tribe's exclusive use and occupancy, effectively precluding the establishment of aboriginal title. *See Alabama-Coushatta Tribe of Tex.*, 2000 WL 1013532, at *28-29 ("Nonetheless, non-Indian settlement of the acreage granted by Spain before the Tribe established aboriginal title would undoubtedly interfere with the Tribe's exclusive use and occupancy of such acreage."); *Strong v.United States*, 518 F.2d 556, 571-72 (Ct. Cl. 1975) (observing that the court was not presented

[9] In opposition to the United States' 12(b)(6) motion, Plaintiff attached and cited to materials outside the pleadings, including: declarations signed by purported experts, *see* ECF Nos. 22-1, 22-2, 22-3, as well as purported expert reports, *see* ECF No. 22-4, 22-5. Pl.'s Mem. 6. However, in deciding a Rule 12(b)(6) motion, as opposed to a 12(b)(1) motion, a federal court generally "should not look beyond the confines of the complaint itself." *Dean Witter Reynolds, Inc. v. Howsam*, 261 F.3d 956, 960 (10th Cir.2001), *cert. granted*, 534 U.S. 1161 (2002).

with a question of extinguishment given that non-Indian settlement precluded a finding of aboriginal title in the first instance).

To the extent extinguishment as a consequence of non-Indian settlement or passage of the Preservation Act is at all relevant—given that Plaintiff's concessions doom their claim of aboriginal title in the first instance—Plaintiff runs headlong into the conclusions and reasoning of the Commission in the *Pueblo de Zia* matter. There, the Commission concluded that the Pueblos' aboriginal title was extinguished by various acts, including non-Indian settlement of the area throughout the late 1800's and through the 1920's and the designation of the Jemez Forest Reserve. *Pueblo de Zia III*, 19 Ind. Cl. Comm. 56, 11-12. As in *Pueblo de Zia*, it follows from similar activities on this particular tract of land, such as the "federal lands department" decision to patent the lands in question to the Baca Heirs, Compl. ¶ 80, that the Pueblo no longer possesses aboriginal title. Had the Preservation Act recognized aboriginal title within this domain, such purpose would have been clearly and definitively expressed by instruction, as was the case with regard to the unique provisions that pertained to the set-aside for the Pueblo of Santa Clara. *See* Fed. Def.'s Mem. 27 (citing 16 U.S.C. § 698v-2(g)).

Plaintiff also fails to provide the thinnest reed of support for the argument that its aboriginal title remains unextinguished. First, *Picuris Pueblo v. Oglebay Norton, Co.*, 228 F.R.D. 665 (D.N.M. 2005) (J. Brack), a decision described by Plaintiff as a "substantially similar" case "holding that the United States quitclaimed land to a third party under the public land laws without extinguishing Indian title," Pl.'s Mem. 9, is far from similar and nowhere supports Plaintiff's reading. To the extent *Picuris* is at all relevant, if anything, it supports the United States' argument that dismissal is warranted because this Court lacks subject matter jurisdiction. *See supra*, Section I(B)(i), (ii).

Picuris revolved around aboriginal title brought against a private, non-federal entity to whom the United States had issued a mining patent, and it is entirely unclear where exactly Plaintiff gleans the holding it attributes, since the court never reached the merits of aboriginal title, and nowhere mentions extinguishment. Indeed, in the only relevant discussion—which was limited to the necessity of the United States as a party to the suit pursuant to Fed. R. Civ. P. 19—this Court observed that the "crucial difference" between *Navajo Tribe* and *Picuris*, was that the tribe in *Navajo Tribe* "traced its claim to the land to government action in the form of executive order." *Id.* at 667. Unlike *Navajo Tribe*, however, the plaintiff in *Picuris* brought suit against a mining company, not the United States, and the plaintiff did not challenge the mining patent issued by the United States. Thus, this Court concluded that Rule 19 dismissal was not warranted, observing that "[t]he Tenth Circuit and other courts have generally held that the United States is not an indispensable party *when an Indian tribe or individual sues a third party to establish title or recover possession of land*." *Id.* (emphasis added, citations omitted). But, unlike *Picuris*, Plaintiff has brought suit against the United States, and, similar to *Navajo Tribe*, this lawsuit is, in all reality, a quest to establish title to and recover its lands. As discussed previously, however, Plaintiff has simply lost its forum to litigate this dispute. *See supra*, Section I(B)(i), (ii).

Second, Plaintiff's lone citation to Section 105(e) of the Preservation Act, which simply precludes the disposition of any land in the Preserve for the purposes of mineral leasing, does not alter the analysis. *See* Fed. Defs.' Mem. 24-25 (citing cases that concluded that various federal actions extinguished aboriginal title); *see also Lyon v. Gila River Indian Cmty.*, 626 F.3d 1059, 1078-79 (9th Cir. 2010) (distinguishing between title recognized in a treaty and aboriginal title,

and finding that the United States' conveyance of land to Arizona in 1877 effectively extinguished aboriginal title).

Finally, Plaintiff fares no better with its novel theory of "fictional extinguishment"— that the findings or reasoning of the Commission are less than conclusive because tribes "were forced to plead" extinguishment, even "in the absence of an actual extinguishment," and that the mutually-agreed upon dates of extinguishment were mere legal fictions, *see* Pl.'s Mem. 8, n.3. Had Plaintiff's theory any force, it is unclear what binding effect the ICCA would have, if any. *Cf. Havasupai Tribe v. Robertson*, 943 F.2d 32, 33-34 (9th Cir. 1991) (per curiam) (finding conclusive the Commission's holding that the tribe's aboriginal title was extinguished). Clearly, any such notion would be contrary to the intent of Congress to resolve these claims with finality.

B. The doctrine of issue preclusion prevents Plaintiff from relitigating issues related to the extensive litigation in *Pueblo de Zia*.

It bears emphasis that the decision in *United States v. Pueblo of Zia*, 474 F.2d 639 (Ct. Cl. 1973) ("*Pueblo de Zia IV*"), separate and apart from the Stipulated Judgment, *see* ECF No. 14-3, precludes Plaintiff's attempt to supplement the findings of the Commission issued nearly four decades prior. Plaintiff attempts to distinguish *Uintah Ute Indians of Utah v. United States*, 28 Fed. Cl. 768 (Ct. Cl. 1993) on the grounds that "where prior ICC claim was for the taking of *all* of the tribe's aboriginal Indian title lands, and the extent of those lands was litigated and determined, the tribe is collaterally estopped from bringing a later aboriginal title claim to lands outside of those boundaries." Pl.'s Mem. 34, n.8. But whether or not a tribe brought suit for "all" of its aboriginal lands is beside the point. The doctrine of issue preclusion "forecloses plaintiff from relitigating the same issues that it could, *or should*, have framed more broadly when the issues concerning the lands aboriginally occupied by plaintiff's ancestors and the

boundaries of those lands were litigated fully and decided over 35 years ago." *Id.* (emphasis added).

Plaintiff's reliance on *State ex. Rel. Martinez v. Kerr-McGee*, 898 P.2d 1256 (N.M. Ct. App. 1995) is also misplaced. Like *Abbott*, *Kerr-McGee* revolved around water rights, claims that were not cognizable under the ICCA. *See supra* note 4. Thus, even after a "focused inquiry" into the findings of the Commission, the court could not "fairly conclude that this issue [relating to water rights] was actually and necessarily determined by the ICC, and particularly we cannot conclude that the issue was decided in a manner that would estop the Pueblos from maintaining their present position." 898 P.2d at 1262. In stark contrast, however, the Pueblo introduced extensive anthropological evidence and fully litigated the issue of aboriginal title, *see* Fed. Def.'s Mem. 23. While the Valles Caldera may have fallen outside the subject lands at issue in *Pueblo de Zia*, the "scope" of the Pueblo of Jemez's "aboriginal lands was present in both the Commission proceeding and the instant case," *Uintah Ute Indians*, 28 Fed. Cl. at 779. Given Plaintiff's involved litigation against the United States over the extent of aboriginal lands, Plaintiff cannot now maintain an action to supplement the findings of the Commission issued nearly four decades prior.

C. Dismissal pursuant to 12(b)(6) is appropriate because the federal common law of aboriginal title does not furnish the Pueblo with a superior right to the Valles Caldera than that of the United States.

It remains apparent from Plaintiff's Complaint and its opposition brief that the current lawsuit to "recover" the lands encompassed in the Valles Caldera remains, in essence, an effort to oust the federal government, assert tribal control over what remains federal land, and thwart Congress's directive that the Executive Branch exercise oversight of this national treasure. But what remains absent is any explanation as to how Plaintiff's aboriginal title, a creature of federal

common law,[10] can displace the legislative directives of Congress that are rooted in positive law, *i.e.*, the Preservation Act. Fed. Defs.' Mem. 25-26. There may very well exist unique circumstances where a tribe's aboriginal title is superior to that of an entity *other than the federal government*, and Plaintiff's brief cites extensively to those cases. *See*, *e.g.*, Pl.'s Mem. 17-18. But this is not that case. And, when pressed, Plaintiff has again failed to cite a single case, and Federal Defendants are aware of none, where a court held that aboriginal title alone provided an adequate basis to divest the sovereign of its own land, usurping the plenary authority of Congress in the process.

Informed by extensive consultation with various tribes, including the Pueblo of Jemez, *see* Fed. Defs.' Mem. 26, n.13, the Preservation Act embodied Congress's directive that the United States assume the role of steward for this vast swath of what is now federally-owned land. Given the paramount authority of Congress in this regard, aboriginal title alone does not furnish Plaintiff with the basis to wrest control of the Valles Caldera from the Federal government. *See Oneida*, 414 U.S. at 667 (Indian title is "good against all but the sovereign.").

CONCLUSION

For the reasons set forth above, the United States respectfully requests that the Motion to Dismiss Plaintiff's Complaint should be granted.

[10] *See generally*, *Oneida Indian Nation of N.Y. State v. Oneida Cnty., N.Y.*, 414 U.S. 661, 667-68 (1974).

Respectfully submitted, this 5th day of June, 2013.

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Certificate of Service

I certify that on June 5, 2013, I caused a copy of the foregoing UNITED STATES' REPLY AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS PLAINTIFF'S COMPLAINT to be electronically filed with the Clerk of the Court for the U.S. District Court of New Mexico using the CM/ECF system, which will send electronic notification of such filings to the attorneys of record in this case.

/s/ *Kenneth D. Rooney*
Kenneth D. Rooney