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' MOTION TO DISMISS PLAINTIFF'S COMPLAINT AND MEMORANDUM OF POINTS AND AUTHORITIES

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INTRODUCTION

Plaintiff requests that this Court declare that "Plaintiff has the exclusive right to use, occupy and possess the lands of the Valles Caldera National Preserve ("National Preserve") pursuant to its continuing aboriginal Indian title to such lands," ECF. No. 1, Complaint, Prayer for relief, ¶ 1, and requests this Court to "quiet[] the aboriginal title to the lands of the Valles Caldera National Preserve," *id.*, Prayer for relief, ¶ 2. Plaintiff's complaint rests on the contention that the passage of the Valles Caldera Preservation Act of 2000 ("Preservation Act"), 16 U.S.C. §§ 698v to 698v-10, allows Plaintiff to utilize the Quiet Title Act, 28 U.S.C. § 2409a ("QTA"), to adjudicate their aboriginal title to the lands in the National Preserve. As Plaintiff explains, Luis Maria Cabeza de Baca's heirs ("Baca Heirs") selected the tract of land at the heart of this controversy – described by Plaintiff as an "American Land Grant," Compl. ¶ 2 – pursuant to Congress's authorization in Pub. L. 36-197, 12 Stat. 71 (1860), Compl. ¶ 77. Plaintiff also acknowledges, however, that the United States, acting through the "federal lands department,"[1] subsequently approved of this "American Land Grant," Compl. ¶¶ 77-81, following the New Mexico Surveyor General's approval in 1860.

In essence, Plaintiff contends that their aboriginal title allows them to wrest control of the National Preserve from the federal government in contravention of Congress's directives embodied in the Preservation Act, which authorized the United States' purchase of this tract of land and established the Valles Caldera Trust – a wholly-owned government corporation tasked with the stewardship of this national treasure. As a matter of law, however, Plaintiff's claim

[1] While Plaintiff's Complaint provides no point of reference for this "federal lands department," it appears that Plaintiff may, in fact, be referring to the General Land Office. *See Arizona v. California*, 460 U.S. 605, 632 (1983) (referencing a General Land Office survey). For purposes of this motion, Federal Defendants will refer only to the "federal lands department," however.

succumbs to a number of jurisdictional defects that ultimately prove fatal to their efforts to regain control of the lands underlying the National Preserve.

As an initial matter, the United States' payment of compensation to the Pueblo of Jemez in *Pueblo of Zia, et al v. United States*, 11 Ind. Cl. Comm. 131 (1962) fully discharged the United States of all liabilities pursuant to the Indian Claims Commission Act, Pub. L. No. 79-726, 60 Stat. 1049-56 (1946) (formerly codified as amended at 25 U.S.C. §§ 70-70n-2) (hereinafter "ICCA"), even for those claims not raised in the original proceedings but within the jurisdiction of the Indian Claims Commission ("ICC"). The Pueblo availed itself of the ICCA – fully and fairly litigating claims of aboriginal title – and the Quiet Title Act provides Plaintiff no refuge from Congress's decision to divest the district courts of jurisdiction. As a corollary, Congress vested the ICC with expansive and exclusive jurisdiction to litigate all pre-1946 Indian-claims; Congress never intended that plaintiffs could circumvent the statutory limitation of the ICCA and revive historic land claims by styling its grievances as a Quiet Title Act claim.

Should this Court determine that it has jurisdiction over Plaintiff's claims, however, it is equally clear that Plaintiff can allege no set of facts in support of their novel claim that aboriginal title vests the Pueblo of Jemez with the authority to possess, occupy, and control the land in the National Preserve to the exclusion of the United States. First, the doctrine of issue preclusion precludes Plaintiff's attempt to revisit the findings and determinations of the ICC that defined the extent and scope of the aboriginal lands that the Pueblo of Jemez once possessed. Second, Plaintiff's complaint fails to state a claim and should be dismissed because aboriginal title alone does not entitle Plaintiff to the relief it seeks. Rather, Courts have long recognized that aboriginal title confers a right of occupancy and possession that is good against all but the sovereign. Yet Plaintiff seeks quiet title to 99,289 acres of federal land, contending that their right to exclusive

use and occupancy is, in essence, paramount to the rights of Congress and the federal government. Such a result is contrary to well settled federal law and is squarely contradicted by the directives of Congress contained in the Preservation Act.

BACKGROUND

I. The Indian Claims Commission

Until 1946, Indian tribes were subject to a "piecemeal" scheme of resolving claims against the United States. *Navajo Tribe of Indians v. State of New Mexico*, 809 F.2d 1455, 1460 (10th Cir. 1987). Until Congress enacted the ICCA, tribes were resigned to petitioning Congress for special jurisdictional acts authorizing the Court of Claims to hear their grievances against the United States. The ICCA introduced wholesale change to that ad hoc process, and created a quasi-judicial, executive tribunal – the ICC – to hear and determine all tribal claims against the United States that accrued before August 13, 1946. *Paiute-Shoshone Indians of Bishop Cmty. of Bishop Colony, Cal. v. City of Los Angeles*, 637 F.3d 993, 998 (9th Cir. 2011).

Congress vested the ICC with wide-ranging and exclusive jurisdiction to resolve all possible historic Indian claims. The scope of the ICC's jurisdiction was so comprehensive that it encompassed claims not otherwise cognizable in federal courts, including all legal, equitable and moral claims. Accordingly, the ICCA provided for the following five broad classes of claims:

> The Commission shall hear and determine the following claims against the United States on behalf of any Indian Tribe . . . (1) claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive Orders of the President; (2) all other claims in law or equity, including those sounding in tort, with respect to which the claimant would have been entitled to sue in a court of the United States if the United States was subject to suit; (3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity; (4) claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands

> owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant; and (5) claims based upon fair and honorable dealings that are not recognized by an existing rule of law or equity.

See ICCA § 2, 60 Stat. at 1050. Under the ICCA, Tribes routinely obtained monetary compensation for the historic loss of aboriginal lands. *See United States v. Pueblo of Zia*, 474 F.2d 639 (Ct. Cl. 1973) ("*Pueblo de Zia IV*"); *see also e.g.*, *Goshute Tribe v. United States*, 31 Ind. Cl. Comm. 225, 226 (1973). Indeed, monetary compensation was the *only* means of redress contemplated by Congress. *Navajo Tribe*, 809 F.2d at 1467. And pursuant to Section 22 of the ICCA, the payment of any claim pursuant to an ICC award "shall be a full discharge of the United States of all claims and demands touching any of the matters involved in the controversy." ICCA § 22, 60 Stat. at 1055.

Moreover, given Congress's resolve to address all historic Indian claims with finality, Congress elected to impose a five year window for any claim to be brought. For that reason, any claim that accrued before August 13, 1946, and which was not filed with the ICC by August 13, 1951, could not "thereafter be submitted to any court or administrative agency for consideration." ICCA § 12, 60 Stat. at 1052 (emphasis added); *Navajo Tribe*, 809 F.2d at 1460-61; *Oglala Sioux Tribe v. United States*, 650 F.2d 140, 143 (8th Cir. 1981); *and* Wright & Miller, 14A Federal Practice & Procedure § 3660 n.22 (collecting cases finding the ICCA to be a Tribe's exclusive remedy). The broad and unambiguous phrase "no claim existing" ensured that no pre-1946 claim could be submitted, not only to the ICC, but also to *any* court, after 1951.

II. The Pueblo of Jemez's Litigation in *Pueblo de Zia, et al. v. United States*

On July 9, 1951 – within the prescribed five-year period for filing claims – the Pueblos of Jemez, Zia, and Santa Ana ("the Pueblos") filed a claim with the ICC, seeking compensation under the ICCA for the United States' cessation of approximately 520,000 acres of lands, located

in Sandoval County, New Mexico, and referred to as the Ojo del Espiritu Santo.[2] *See Pueblo de Zia, et al. v. United States*, Dkt. No. 137, Am. Pet. (filed Mar. 17, 1952) (Ex. A).[3] Of the four causes of action alleged, three of those counts contained claims for aboriginal title,[4] the loss of which the Pueblos attributed to the United States' decision to "permit[] others to take possession of these lands in derogation of the rights of the petitioners." *United States v. Pueblo de Zia*, 11 Ind. Cl. Comm. 131 (Sept. 11, 1962) (Ex. B) (citing Am. Petition).

In Count One, "Aboriginal Title," the Pueblos averred that, "for many years prior to August 6th, 1766 [the year of issuance of the purported Spanish Land Grant], the three claimants were the owners in common and were in exclusive possession and usage of a tract of land aggregating 410,000 acres." Ex. A at 2.[5] The thrust of the Pueblos' first count rested on the

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[2] The Pueblos initially filed a petition containing only three causes of action, two of which were based on aboriginal title over 382,849 acres of land, but later filed an amended petition that expanded the acreage of land to 410,000 acres. The Pueblo of Jemez subsequently amended the petition for a third time, which is attached as Exhibit A, adding a fourth count that was also based on aboriginal title and that expanded the eastern boundary of the tract to cover 520,000 acres.

[3] The United States has attached for this Court's convenience various documents from the litigation before the ICC in *Pueblo de Zia v. United States*, totaling 42 pages, which is below the 50-page limitation allowed under D.N.M. LR-Civ. 10.5. These documents are furnished solely to "challenge the facts upon which subject matter jurisdiction depends" *Holt*, 46 F.3d at 1003, and a court has "wide discretion" to consider these documents when reviewing a factual attack. *Id.*

[4] The remaining cause of action was based on a Spanish land grant to the Pueblos. Ex. B at 16-24. Because that claim is not directly relevant to the litigation here, and in light of this Court's admonition that "[a] party may file only those pages of an exhibit which are to be brought to the Court's attention," D.N.M. LR-Civ. 10.5, those pages of the amended petition that relate to that particular claim are not included in the excerpt of Exhibit A.

[5] Of those 410,000 acres of land for which the Pueblo sought compensation, 113,131.15 of those acres were based on a "conflicting claim" "that was filed in the office of the said Surveyor General of New Mexico on behalf of the heirs of Louis Maria Cabez de Baca as F. No. 36," and that after those proceedings before the Surveyor General, that the claim "was confirmed by Congress March 3, 1869, and a Patent was finally granted thereon on October 14, 1916 . . . ." Ex. A at 4. Another 11,476.68 acres known as the "Town of San Isidro" grant and 176,286.89 acres of land known as the Canon de San Diego Grant," both also later confirmed by Congress, served as the basis for the pueblos' remaining claims. Ex. A 4-5.

notion that the United States was legally bound to recognize the Pueblos' title by virtue of the Treaty of Guadalupe Hidalgo. In Count Two, "Aboriginal Title Recognized by Official Acts," the Pueblos argued in the alternative that official actions of the United States established "recognized title" in the lands, and that the loss of those lands to non-Indians was due to the "lack of fair and honorable dealings" on the part of the United States. Ex. B at 14. Finally, in Count Four, the Pueblos expanded their claims of aboriginal title to include over 520,000 acres of land, which, broken down, included two categories of claims: 1) Lands that were the subject of Spanish or Mexican land grants; and 2) those lands that became a part of the public domain by virtue of the Treaty of Guadalupe Hidalgo. *Id.* at 16.

In its first ruling on the merits in 1962, the ICC found that the three Pueblos had failed to establish aboriginal use and occupancy title to the 520,000 acre tract. *Id*. The three Pueblos appealed only from that part of the determination of the ICC which held that the Pueblos failed to prove aboriginal title to some 298,634 acres of land that had become part of the public domain of the United States under the Treaty of Guadalupe Hidalgo with Mexico in 1848, 9 Stat. 922 (1848). The Court of Claims later reversed those rulings and found that the three Pueblos had established aboriginal title to 298,634 acres. *Pueblo de Zia v. United States*, 165 Ct. Cl. 501, 509 (1964) ("*Pueblo de Zia II*"). The Court of Claims remanded the case to the ICC to determine the time of the taking and the value of the taking. *Id*. On remand, the ICC found that the Pueblos were deprived of their aboriginal lands by virtue of, among other actions by the United States, allowing the settlement of 114 homesteads, the creation of the Jemez Forest Reserve on October 12, 1905, and the creation of Grazing District No. 2 on April 4, 1936, pursuant to the Taylor Grazing Act of June 28, 1934, 48 Stat. 1269. *Pueblo de Zia IV*, 474 F.2d at 641.

Following extensive briefing on issues of valuation and offsets, the parties entered into a stipulation of settlement whereby a final judgment of $749,083.75 would ultimately be entered by the ICC in favor of the Pueblos on January 10, 1974. *See generally* Ex. C. The plan for the distribution of funds to the Pueblos was later declared by Congress as valid and effective. *See* Pub. L. No. 96-194, 94 Stat. 61 (Feb. 21, 1980).

STANDARD OF REVIEW

I. 12(b)(1)

Pursuant to Federal Rule of Civil Procedure 12(b)(1), a party may file a motion to dismiss a claim for relief based on the court's "lack of jurisdiction over the subject matter." Fed. R. Civ. P. 12(b)(1). Because federal courts are courts of limited jurisdiction, "the presumption is that they lack jurisdiction unless and until a plaintiff pleads sufficient facts to establish it." *Celli v. Shoell*, 40 F.3d 324, 327 (10th Cir. 1994) (citations omitted). "Mere conclusory allegations of jurisdiction are not enough; the party pleading jurisdiction 'must allege in his pleading the facts essential to show jurisdiction.'" *Id.* (quoting *Penteco Corp. Ltd. Partnership-1985A v. Union Gas Sys., Inc.*, 929 F.2d 1519, 1521 (10th Cir. 1991) (quoting *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936))).

Motions to dismiss pursuant to Rule 12(b)(1) may take two forms. In the first form, the movant asserts that the allegations in the complaint on their face fail to establish the court's subject matter jurisdiction. "In reviewing a facial attack on the complaint, a district court must accept the allegations in the complaint as true." *Holt v. United States*, 46 F.3d 1000, 1002 (10th Cir. 1995) (citation omitted). In the second form, as is the case here, the movant may present evidence challenging the factual allegations in the complaint upon which subject matter jurisdiction depends. "When reviewing a factual attack on subject matter jurisdiction, a district

court may not presume the truthfulness of the complaint's factual allegations . . . [but] reference to evidence outside the pleadings does not convert the motion to a Rule 56 motion." *Id.* at 1003 (citations omitted).

II. 12(b)(6)

Federal Rule of Civil Procedure 12(b)(6) allows parties to move to dismiss claims for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). This rule authorizes a court to dismiss a claim on the basis of a dispositive issue of law. *Neitzke v. Williams*, 490 U.S. 319, 326 (1989) (citing *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984) and *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). "[I]f as a matter of law 'it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations,' a claim must be dismissed, without regard to whether it is based on an outlandish legal theory or on a close but ultimately unavailing one." *Id.* (quoting *Hishon*, 467 U.S. at 73).

The Tenth Circuit has summarized the standard of review for a motion to dismiss under Rule 12(b)(6) as follows:

> In conducting such review, we must accept all the well-pleaded facts of the complaint as true and must construe them in the light most favorable to the plaintiff. Dismissal is appropriate only if the plaintiff can prove no set of facts in support of the claim entitling her to relief. However, counsel may not overcome pleading deficiencies with arguments that extend beyond the allegations contained in the complaint. The complaint itself must show [that the plaintiff] is "entitled to relief" under each claim raised. Fed. R. Civ. P. 8(a)(2).

Bauchman v. West High School, 132 F.3d 542, 550 (10th Cir. 1997) (citations omitted). "The court's function on a Rule 12(b)(6) motion is not to weigh potential evidence that the parties might present at trial, but to assess whether the plaintiff's complaint alone is legally sufficient to state a claim for which relief may be granted." *Miller v. Glanz*, 948 F.2d 1562, 1565 (10th Cir. 1991).

ARGUMENT

I. The Indian Claims Commission Act Divests This Court of Jurisdiction Over Plaintiff's Claim.

The United States is immune from suit, unless it consents to be sued. *United States v. Sherwood*, 312 U.S. 584, 586 (1941). Congress alone may grant consent to suit, and its consent—which is in effect a waiver of sovereign immunity—has to 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); *Dep't of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 261 (1999). "[T]he 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); *see also, United Tribe of Shawnee Indians v. United States*, 253 F.3d 543, 547 (10th Cir. 2001).

"Since federal courts are courts of limited jurisdiction, there is a presumption against [their] jurisdiction, and the party invoking federal jurisdiction bears the burden of proof." *Penteco Corp.*, 929 F.2d at 1521; *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994) ("It is to be presumed that a cause lies outside [Court's] limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction.") (citations omitted). In response to the United States' challenge herein, Plaintiff must "present affidavits or any other evidence necessary to satisfy its burden of establishing that the court, in fact, possesses subject matter jurisdiction," rather than relying on the conclusory allegations in their Complaint. *Michelson v. Enrich Int'l, Inc.*, 6 Fed. App'x. 712, 716 (10th Cir. 2001) (internal quotation omitted); *U.S. ex rel. Hafter, D.O. v. Spectrum Emergency Care, Inc.*, 190 F.3d 1156, 1160 (10th

Cir. 1999) (Courts "presume no jurisdiction exists absent an adequate showing by the party invoking federal jurisdiction.").

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. Plaintiff's claim rests on the contention that they possessed aboriginal title in 2000, when the Preservation Act was passed. But Plaintiff was divested of aboriginal title in 1860 when the "federal lands department" first patented and confirmed the lands in question to the Baca Heirs, non-Indian, private landowners. *See* Compl. ¶ 80. And Plaintiff certainly could have brought this claim in the ICC, as evidenced by Plaintiff's own petition in the ICC that sought compensation for the taking of aboriginal title. *See* Ex. A, 2-16, 24-27.

The ICCA operates as a jurisdictional bar to this action for two reasons. First, the "finality provision" of ICCA dictates that the United States' payment of compensation to the Pueblo of Jemez pursuant to an award of the ICC fully discharged the federal government of all liability touching on any and all claims that could have been raised. Indeed, the Pueblos' "Joint Motion for the Entry of Final Judgment," which served as the basis for the ICC's entry of final judgment, acknowledged that the final judgment of the ICC disposed of all rights, claims or demands which Plaintiffs could have asserted, and barred Plaintiff from asserting those rights in any future action. *See* Ex. C. Second, the ICCA provided an opportunity for judicial review of Plaintiff's claims that were ostensibly ripe by 1860 when the United States confirmed this "American Land Grant" to parties other than Plaintiff; Therefore, the Tribe's exclusive remedy of monetary compensation was under the ICCA, and the exclusive jurisdiction of the ICC divests this Court of jurisdiction in accordance with the law of the Tenth Circuit and Supreme Court precedent.

A. The finality provision of the Indian Claims Commission Act bars Plaintiff from relitigating aboriginal title to the Valles Caldera.

The United States' deposit of funds on to the Pueblos' account in satisfaction of the ICC award fully discharged the United States of *all* liabilities. The ICCA's "finality provision" provided that:

> (1) payment of any claim after a determination under the Act shall be a full discharge of the United States of all claims and demands touching any of the matters involved in the controversy, and (2) a final determination against a claimant made and reported in accordance with the Act shall forever bar any further claim or demand against the United States arising out of the matter involved in the controversy.

Section 22; 25 U.S.C. § 70u(a) (1976 ed.)). The finality provision embodied both Congress's resolve to adjudicate all Indian claims with finality, *Dann*, 470 U.S. at 50, but also represented Congress's "fundamental policy choice" that the sorry injustices of past centuries "be recompensed through monetary awards" only. *Navajo Tribe*, 809 F.2d at 1466.[6]

As the Supreme Court established in *Dann*, payment under the ICCA occurred once the funds were "placed by the United States into an account in the Treasury of the United States for the Tribe." 479 U.S. at 44; *see also*, *United States v. Dann*, 873 F.2d 1189, 1194-96 (9th Cir.

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[6] As the Tenth Circuit further explained:

> Prior to the Act, non-Indians who held title derived from federal patents to land claimed by Indians could not be secure in their ownership until the Indians' claims were litigated. By authorizing the Indian Claims Commission-the only forum in which Indian claims against the United States for land they once possessed could be heard-to grant only monetary damages in satisfaction of Indian claims, non-Indians were assured of continued possession regardless of the outcome of the litigation. *Relief in the form of a declaratory judgment or injunction would have resulted in the radical remedy of dispossessing the dispossessors.*

Navajo Tribe, 809 F.2d at 1467 (citing Note, Indian Breach of Trust Suits: Partial Justice in the Court of the Conqueror, 33 Rutgers L. Rev. 502, 516-17 (1981)).

1989), *cert. denied*, 493 U.S. 890 (1989); *accord Havasupai Tribe v. United States*, 943 F.2d 32, 34 (9th Cir. 1991); *Western Shoshone Nat'l Council v. United States*, 73 Fed. Cl. 59, 66 (Fed. Cl. 2006). Once paid, the award of the Commission barred the tribe from litigating claims against the United States. *See Navajo Tribe*, 809 F.2d at 1467; *W. Shoshone Nat'l Council v. Molini*, 951 F.2d 200, 202 (9th Cir. 1991); *Dann*, 873 F.2d 1189. And the bar extended to those claims that were not litigated but *could have been litigated. See Molini*, 951 F.2d at 203 (barring claims of aboriginal and treaty reserved hunting and fishing rights); *Dann*, 873 F.2d at 1200 (holding that payment pursuant to an ICC award barred the plaintiffs from asserting tribal title to grazing rights just as clearly as it barred their assertion of title to the lands); *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) (concluding that a boundary dispute that affected 14,000 acres of national forests was "exactly the type of claim Congress intended the Commission to hear").

As detailed above, the Pueblo of Jemez lodged a claim against the United States before the ICC and sought compensation for the extinguishment of aboriginal title to lands that were both subject to private land ownership by virtue of Spanish and Mexican land grants, as well as those lands that entered into the public domain under the Treaty of Guadalupe Hidalgo. *See* Ex. A. While the Pueblos abandoned any claim of aboriginal use and occupancy to lands that were subject to Spanish or Mexican land grants patented by the United States – *i.e.*, land that remained in the hands of non-Indian, private landowners – the Pueblos eventually succeeded on their claim of title to 298,634 acres of land that remained in the public domain, and were ultimately awarded in $749,083.75. Ex. C.

A comparison of Plaintiff's current complaint and the amended petition filed in the ICC reveals that Plaintiff's claim of aboriginal title is a demand that "arise[s] from" or "touch[es]" upon the same matters that were litigated nearly 50 years prior. Plaintiff contends that they continue to hold aboriginal title to the Valles Caldera, land that remained in the public domain from the passage of the Treaty of Guadalupe Hidalgo in 1848 until the "federal lands department" – acting by virtue of Congressional legislation passed in 1860, *see* Act of June 12, 1860, ch. 167, 12 Stat. 71 (1860) ("the Act of 1860") – conveyed the land to the Baca Heirs. But this latest claim of aboriginal title clearly touches upon the matters of title resolved during the ICC proceedings. For example, in the ICC, Plaintiff claimed aboriginal title to 520,000 acres of land, contending that, in spite of aboriginal title, the United States had allowed others to claim and possess the underlying area. Ex. A at 25-26. In particular, Plaintiff rested its assertions of purported illegalities on the proposition that the United States failed to protect the Pueblos in their rights of occupancy in these public lands when the federal government patented the lands to non-Indian, private landowners. *Id*. Thus, in accordance with the Supreme Court's holding in *Dann*, once the United States deposited the final award in a Treasury account for the Pueblos, the finality provision of the ICCA was triggered and the liability of the United States was fully discharged. 470 U.S. at 50; ICCA, 25 U.S.C. § 70u(a) (1976 ed.).

Had the finality provision not barred Plaintiff's current complaint, Plaintiff has, in any event, waived any right to assert claims of aboriginal title. On October 5, 1973, at a duly called meeting of the Council of the Pueblo of Jemez, the Pueblo adopted a resolution entering into a Stipulation of Settlement and authorizing final judgment against the United States in the ICC.

Ex. C at 5.[7] On Jan. 7, 1974, the Pueblos and the United States filed a joint motion that effectuated the intent of the parties to enter final judgment, which states:

> Plaintiffs . . . and defendant . . . jointly move for the entry of final judgment in favor of plaintiffs in the sum of $749,083.75. Such final judgment shall finally dispose of all rights, claims or demands which Plaintiffs have asserted or could have asserted with respect to the subject matter of such case; and the plaintiffs, or any one of them, shall be barred thereby from asserting any such rights, claims, or demands against defendant in any other or future action or actions.

Ex. C at 1 (emphasis added). It is clear, then, that Plaintiff cannot assert claims to aboriginal title that clearly could have been brought nearly fifty years prior, as a consequence of Congress's express intent of finality contained in the ICCA or by the Pueblo's own course of conduct in the ICC.

B. The Indian Claims Commission Act provided the exclusive forum for the litigation of the Pueblo's claims.

Even if this Court were to conclude that Plaintiff's claim is not barred by the finality provision of the ICCA, this Court lacks subject matter jurisdiction because the exclusive remedy for Plaintiff's claim was provided for in the ICCA. The ICCA conferred exclusive jurisdiction on the ICC over all Indian claims against the United States that accrued before the date of the ICCA's enactment. ICCA § 2, 60 Stat. 1050; *see, e.g.*, *Navajo Tribe*, 809 F.2d at 1460-61; *Oglala Sioux Tribe v. United States*, 650 F.2d 140, 143 (8th Cir. 1981); *and* Wright & Miller, 14A Federal Practice & Procedure § 3660 n.22 (collecting cases finding the ICCA to be a tribe's exclusive remedy). With the passage of the ICCA, Congress established a one-time, exclusive forum for the final resolution of *all* tribal claims against the United States that accrued prior to 1946. The ICC's wide-ranging and exclusive jurisdiction over "all possible" historic Indian

[7] Ex. C at 5 indicates that a quorum was present, that the participants voted unanimously in favor of the settlement, and the resolution was then signed by Governor Sands and Secretary Pecos.

claims included claims of aboriginal title. *See e.g. Pueblo of San Ildefonso*, 513 F.2d at 1394. As a corollary, the ICC's expansive jurisdiction required that tribes present claims of both extinguished and *existing* aboriginal title, *Navajo Tribe*, 809 F.2d 1463. But Congress decided that equitable relief would not be available to litigants; rather, the ICCA provided that only monetary damages in satisfaction of Indian claims would be available so that "non-Indians were assured of continued possession regardless of the outcome of the litigation." *Id*. at 1467.

Congress also established a strict statute of limitations for claims that were to be presented to and compensated by the ICC. Section 12 of the ICCA established that the ICC "shall receive claims for a period of five years after the date of the approval of this Act [August 13, 1946] and no claim existing before such date but not presented within such period may thereafter be submitted to any court or administrative agency for consideration, nor will such claim thereafter be entertained by the Congress.* * *." ICCA § 12, 60 Stat. at 1052. Thus, any claim that accrued before August 13, 1946, and which was not filed with the ICC by August 13, 1951, could not "thereafter be submitted to any court or administrative agency for consideration." ICCA § 12, 60 Stat. 1052; *Navajo Tribe*, 809 F.2d at 1461; *White Mountain Apache Tribe*, 604 F. Supp. at 187.

Given the comprehensive nature of the ICCA, courts have repeatedly recognized that Congress expressly deprived the district courts of jurisdiction over claims encompassed by the ICCA, most recently in *Paiute-Shoshone Indians of Bishop Cmty. of Bishop Colony, Cal. v. City of Los Angeles*, 637 F.3d 993, 998 (9th Cir. 2011); *see also, e.g.*, *Oglala Sioux Tribe of Pine Ridge Indian Reservation v. U.S. Army Corps of Eng'rs*, 570 F.3d 327 (D.C. Cir. 2009); *Navajo Tribe v. State of New Mexico*, 809 F.2d 1455, 1464-1470 (10th Cir. 1987); *Oglala Sioux Tribe of Pine Ridge Indian Reservation v. United States*, 650 F.2d 140, 142-43 (8th Cir. 1981), *cert*

denied, 455 U.S. 907 (1982); *Te-Moak Bands v. United States*, 18 Cl. Ct. 82, 88 (1989); *Hannahville Indian Cmty. v. United States*, 4 Cl. Ct. 445, 450 (1983), *aff'd*, — Fed. App'x —, 732 F.2d 167 (Fed. Cir. 1984); *McGhee v. United States*, 437 F.2d 995, 999 (Ct. Cl. 1971).

Nor can Plaintiff evade the jurisdictional bar of the ICCA and the clear directives of Congress by framing its grievances as a claim for quiet title. As an initial matter, "[i]t is well established that the Indian Claims Commission Act bars claims involving allotments or other property, [and] claims involving title, that accrued before 1946 and were not brought by August 13, 1951." *Oglala Sioux Tribe of Pine Ridge Indian Reservation*, 570 F.3d at 332 (emphasis added). Regardless, "[w]hile a later enacted statute . . . can sometimes operate to amend or even repeal an earlier statutory provision . . . , 'repeals by implication are not favored' and will not be presumed unless the 'intention of the legislature to repeal [is] clear and manifest.'" *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 662 (2007) (citing *Watt v. Alaska*, 451 U.S. 259, 267 (1981)). Indeed, "a statute dealing with a narrow, precise, and specific subject" – such as the ICCA – "is not submerged by a later enacted statute covering a more generalized spectrum" – such as the QTA. *Nat'l Ass'n of Home Builders*, 551 U.S. at 663 (internal quotation and citation omitted). Relevant here, in enacting the QTA, Congress did not intend to reopen the federal courts to Indian claims accruing before August 13, 1946. Certainly nothing in the QTA or its legislative history evinces an intent to repeal the limitations provisions of the ICCA, and no such repeal should be implied. *See United States v. Mottaz*, 476 U.S. 834, 850-51 (1986). If anything, the QTA's legislative history is unequivocal in expressing Congress's intention to bar stale land claims against the United States. *E.g.*, H.R. Rep. No. 1559, 92d Cong., 2d Sess.

(1972), *reprinted in* 1972 U.S. Code Cong. & Ag. News 4547, 4550-51.[8] Thus, the QTA is neither a repeal of the ICCA's limitations provisions nor a waiver of the United States' sovereign immunity to century-old Indian claims.

At its core, Plaintiff's reliance on the Preservation Act and the QTA is a thinly veiled attempt to seek a remedy through this lawsuit that Congress never contemplated in crafting the expansive jurisdiction of the ICC: to wit, an action for quiet title. *Navajo Tribe*, 809 F.2d at 1467; *Paiute – Shoshone Indians of the Bishop Cmty. of the Bishop Colony, Cal. v. City of Los Angeles*, No. 1:06-cv-00736-OWW-LJO, 2007 WL 521403 at *16 (E.D. Cal. Feb. 15, 2007) (finding that "even if [a plaintiff] had timely filed its claim under the ICCA, [they] could not have quieted title in these lands or maintained an action in ejectment . . . The Tribe simply would have had to accept just monetary compensation if the Commission found their claim to title valid.") *aff'd* 637 F.3d 993, 998 (9th Cir. 2011). But whether Plaintiff frames their action as one for quiet title, *Navajo Tribe*, 809 F.2d at 1467, a Fifth Amendment Taking, *Oglala Sioux Tribe*, 650 F.2d at 143, or as one for mandamus, *Oglala Sioux Tribe of Pine Ridge Indian Reservation*, 570 F.3d 327, dismissal is warranted, given that the "underlying substantive claim – not the character of relief requested by the Tribe – must determine the Commission's jurisdiction." *Navajo Tribe*, 809 F.2d at 1468.

Based on the face of Plaintiff's complaint, any claim the Pueblo had or might have had to the lands underlying the Valles Caldera accrued long before August 13, 1946, and Plaintiff

[8] The Senate Report also observed that the bill does not waive sovereign immunity to suits based on adverse possession, because "the vast extent of lands in Federal ownership makes it impossible for the Government to prevent persons from taking possession and occupying Federal land adversely." S.Rep. No. 92–575 at 4 (1971); *see also* 28 U.S.C. § 2409a(n) ("Nothing in this section shall be construed to permit suits against the United States based upon adverse possession.").

"cannot obtain review of a historical land claim otherwise barred by the Act by challenging present-day actions involving the land." *Oglala Sioux Tribe of Pine Ridge Indian Reservation*, 570 F.3d at 332. Plaintiff was surely aware that an action arose before 1946. Due to the conflicting land grants of the Baca Heirs and the Town of Las Vegas Community Grant, Congress authorized the Baca Heir's purchase of 496,447 acres of land when it enacted the Act of 1860. As summarized by Plaintiff, the Baca Heirs ultimately settled on a 99,289 acre tract of land, known as the Baca Ranch, *see* Compl. ¶¶ 2-3, 77-81, that now constitutes the National Preserve. The Surveyor General of New Mexico approved of the Baca Heirs' selection, which, according to Plaintiff, "relinquished" the interest of the United States. Compl. ¶ 81, and allowed third parties other than Plaintiff to settle on this swath of land. Baca Location No. 1 was then confirmed by the "federal land department." *Id*. Thus, the United States ostensibly acted in a manner inconsistent with the Pueblo's aboriginal title long before 1946, and Plaintiff has offered no explanation why they were unable to pursue this claim in the exclusive forum of the ICC.

Plaintiff's reliance on the unique nature of the Baca Location No. 1 – this particular land grant is referred to colloquially as an "American land grant" – only reinforces the notion that Plaintiff's claim of aboriginal title to 99,289 acres of land is exactly the type of claim Congress intended the ICC to hear. It is irrelevant that the Pueblo did not claim title to the Valles Caldera in the ICC litigation; the Pueblo *could have* asserted title to the Valles Caldera in much the same manner that they did with respect to other land claims that were subject to the encroachment of settlers by virtue of Spanish and Mexican land grants, Presidential Proclamations, Congressional enactments, and miscellaneous executive actions. Indeed, in the ICC, the Pueblo maintained that the cessation of their aboriginal lands to non-Indians *via* the settlement of 114 homesteads, the creation of Grazing District No. 2 pursuant to the Taylor Grazing Act of June 28, 1934, 48 Stat.

1269, and the creation of the Jemez Forest Reserve was the result of unfair and dishonorable dealings on the part of the United States, citing Section 2, clause 5 of the ICCA as a basis. Plaintiff has offered no explanation as to why they could pursue claims of aboriginal title to more than 520,000 acres of land as contemplated by Congress but could not have pursued this claim that was clearly within the ambit of the ICCA, as well. As a consequence, "[b]y sleeping on its claim, the Tribe simply lost its forum to litigate the pre–1946 actions of the Government that were inconsistent with its alleged title." *Navajo Tribe*, 809 F.2d at 1470; *Bishop Paiute*, 637 F.3d at 1000 (observing that plaintiff tribe "lost its opportunity to litigate its dispute with the United States" when it failed to present a claim to the ICC within the prescribed statute of limitations).

Plaintiff "simply cannot pretend that the issuance of . . . land patents never occurred, so that no claim against the United States arose before it decided to bring" a claim in 2012. *Navajo Tribe*, 809 F.2d at 1470-71. Nor can Plaintiff wield the QTA in direct defiance of Congress's intent that *all* historic wrongs be resolved with finality. Having slept on their claims that were clearly within the jurisdiction of the ICC, Plaintiff cannot, nearly 160 years later, bring a quiet title action "without violating both the letter and the intent of the Indian Claims Commission Act," *Oglala Sioux*, 570 F.3d at 333. In 2013, it is hard to conceive of a claim more stale than Plaintiff's claim of title to the National Preserve, and it "would require the suspension of disbelief to ascribe to Congress the design to allow its careful and thorough remedial scheme to be circumvented by artful pleading." *Block v. North Dakota ex rel. Board of Univ. and School Lands*, 461 U.S. 273, 285 (1983) (citation omitted).

II. Plaintiff's Complaint Fails to Assert a Claim That Entitles It to Relief.

Even if the exclusive jurisdiction of the ICCA does not work to divest this Court of jurisdiction, Rule 12(b)(6) also forms a basis for dismissal of Plaintiff's claims. Having fully and

fairly litigated the scope and extent to which the Pueblos possessed aboriginal title to public lands in New Mexico, Plaintiff cannot now revisit and attempt to expand those determinations beyond the prior findings. Missing this key component, it is clear Plaintiff "can prove no set of facts in support of [their legal] claim which would entitle [them] to relief." *Conley*, 355 U.S. at 102. And given Plaintiff's concession that the Baca Heirs and subsequent landowners used and occupied this area, Plaintiff cannot succeed in demonstrating a key material factor: that the Pueblo exclusively used and occupied this area to the exclusion of others. Finally, even a fair reading of Plaintiff's complaint reveals that reference to "exclusive" use and occupancy amounts to a claim that the Pueblo alone is vested with authority to regulate the occupancy and use of tens of thousands of acres of federal lands to the exclusion of the federal government, a charge that is without support.

A. The doctrine of issue preclusion precludes Plaintiff's attempt to relitigate issues that were fully and fairly litigated during the ICC proceedings.

Having fully and fairly litigated before the ICC the issue of aboriginal title to lands patented by the United States, the doctrine of issue preclusion[9] prevents Plaintiff's attempted relitigation. As the Tenth Circuit has oft repeated, once a determination on an issue of fact or law has been settled, parties are barred from relitigating particular issues, even if they arise when the party is pursuing a different claim." *Park Lake Res. LLC v. U.S. Dept. Of Agric*., 378 F.3d 1132, 1137 (10th Cir. 2004); *Dodge v. Cotter Corp.*, 203 F.3d 1190, 1198 (10th Cir. 2000). Indeed, the bar of issue preclusion in the present lawsuit would further serve the underlying policies that

[9] The Tenth Circuit has recognized that the terms "claim preclusion" and "issue preclusion" are preferable to the terms of "res judicata" and "collateral estoppel." *Yapp v. Excel Corp.*, 186 F.3d 1222, 1226 n.1 (10th Cir. 1999); *see also Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 77 n.1 (1984) (discussing why "claim preclusion" and "issue preclusion" are preferred over terms " res judicata " and "collateral estoppel").

guide courts' application of the doctrine: namely, the conservation of judicial resources, avoidance of inconsistent decisions, and the prevention of needless costs associated with multiple lawsuits. *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008). At some point, the opportunity to litigate must pass; "those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered settled between the parties." *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 401 (1981) (citations and internal quotation marks omitted); *see also Ute Indian Tribe of the Unitah and Ouray Reservation v. Utah*, 114 F.3d 1513, 1523 (10th Cir. 1997) (quoting *Federated Dep't*).

Issue preclusion forecloses the relitigation of an issue when the following four elements are met:

> (1) the issue previously decided is identical with the one presented in the action in question, (2) the prior action has been finally adjudicated on the merits, (3) the party against whom the doctrine is invoked was a party or in privity with a party to the prior adjudication, and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action.

Murdock v. Ute Indian Tribe of Uintah and Ouray Reservation, 975 F.2d 783, 683 (10th Cir. 1992) (citations omitted).[10] That the final determination was reached by the ICC does not modify the analysis. For example, in *Uintah Ute Indians of Utah v. United States*, 28 Fed. Cl. 768, 777-779 (1993), a tribe brought suit for the alleged taking of its aboriginal lands as a result of the Federal Government's conveyance of the Fort Douglas Reservation to the University of Utah in 1991. Although Plaintiff's claim there did not mature until 1991, the court concluded that the plaintiff was "precluded from arguing that it retained aboriginal title to the subject land of Fort

[10] An initial consideration is whether, in considering the application of issue preclusion, a court should apply federal or state law. *Murdock*, 975 F.2d at 687. Given that this Court is a "federal court examining a question of *federal* law upon which another federal court" – the ICC – "has previously ruled", it is proper for this Court to "rely on the federal law of collateral estoppel." *Id.* (emphasis added).

Douglas . . . ." because the Commission had addressed and decided the issues of aboriginal title in 1957. As in *Uintah Ute Indians of Utah*, all four prongs are satisfied,[11] and Plaintiff cannot relitigate the ICC's conclusion that no aboriginal title attached to lands that were subject to federally confirmed land grants.

First, the ICC made specific, detailed factual findings with respect to Plaintiff's aboriginal lands, in essence, defining the outer contours of the Pueblo's aboriginal lands. For example, following a factually intensive trial, the Commission concluded that the Pueblos were entitled to recover from the United States payment for the extinguishment of 298,634 acres of land as a consequence of various congressional and executive actions ranging from Atlantic and Pacific Railroad Company Land Grant Act of July 27, 1866, to the creation of the Jemez Forest Reserve in 1905. *Pueblo de Zia IV*, 474 F.2d at 641-42. Those lands did not include the Valles Caldera, and Plaintiff cannot request that this Court revisit and redefine the aboriginal boundaries established by the Commission. *See Uintah Ute Indians of Utah*, 28 Fed Cl. at 779 (declining to revisit the findings of the Commission with regard to aboriginal boundaries). *Second*, under the ICCA, the Commission's judgments had the effect of a final judgment of the Court of Claims and, upon payment to the plaintiff tribe, constituted a full discharge of all matters in controversy. § 22(a), 60 Stat. at 1055, codified at 25 U.S.C. § 70u.[12]

Finally, the Pueblo of Jemez was provided a full and fair opportunity to litigate the issue of aboriginal title in the, an inquiry that "focus[es] on whether there were significant procedural limitations in the prior proceeding, whether the party had the incentive to litigate fully the issue,

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[11] Given that there can be no reasonable dispute that the Pueblo of Jemez was a party to both the ICC case and to the instant case, the third prong is easily dispensed with.

[12] 28 U.S.C. § 2519 also forbids claims arising from matters adjudicated by the Court of Claims, *see United States v. Dann*, 470 U.S. 39, 45 n.10 (1985).

or whether effective litigation was limited by the nature or relationship of the parties.'" *Burrell v. Armijo*, 456 F.3d 1159, 1172 (10th Cir.2006), *cert. denied*, 549 U.S. 1167 (2007) (citing *Murdock*, 975 F.2d at 689). For instance, the Pueblos provided extensive ethnological, archeological, and historical evidence in the form of: testimony from various pueblo leaders regarding the extent of the occupation based on the location and use of religious shrines, the traditional use of farming, herding, hunting and gathering; expert testimony from an historian that traced the pueblos' occupation of the area as far back as the Coronado Expedition in 1540; and, an archeologist's testimony that related to the historical use of the area dating back to 1200 A.D. Ex. B at 21-24. While the pueblos did not present evidence on all claims – given the Commission's determination that no aboriginal title could attach to private property – a court's adverse legal ruling "does not mean that [the plaintiff] was denied a full and fair opportunity to litigate." *SIL-FLO, Inc. v. SFHC, Inc.*, 917 F.2d 1507, 1521 (10th Cir. 1990). To hold otherwise would "eviscerate" the doctrine and allow Plaintiff "to achieve through the back door what it cannot do directly: that is, bring a subsequent action challenging a legal ruling in a prior action." *Id.*

Accordingly, Plaintiff is barred from relitigating, under the guise of a Quiet Title action, the scope and extent to which they hold aboriginal title, if any. The final judgments rendered in the Pueblos' extensive litigation before the ICC put to rest their claims of aboriginal title. Consequently, the doctrine of collateral estoppel deprives Plaintiff of the opportunity to litigate key issues necessary to the success of their claims. Indeed, the public policies undergirding application of collateral estoppel are particularly relevant here, given Congress's resolve to address and settle these issues with finality.

B. Neither the Valles Caldera Act nor the federal common law of aboriginal title provide the Pueblo with a superior right to the National Preserve than that of the United States.

Even if this Court determines that the ICCA does not operate to bar the present action, Plaintiff's assertion that it "has the exclusive right to use, occupy, and possess" the "area encompassed by the Valles Caldera National Preserve," Compl. at 14, is flawed on several grounds. *First*, Plaintiff's averment that the Pueblo occupied this area "without opposition from the Baca family," Compl. ¶ 84, presents a fatal flaw to their claim of *exclusive* use and occupancy, because to succeed on a claim of aboriginal title, a "tribe or group must exercise full dominion and control over the area, such that it 'possesses the right to expel intruders,' as well as the power to do so." *See Native Vill. of Eyak v. Blank*, 688 F.3d 619, 623 (9th Cir. 2012) (internal citation omitted). In 1860, the United States ceded control of this area to private landowners, the Baca Heirs, and the ICC already concluded that United States' decision to relinquish control and ownership of land in the public domain – to homesteaders, for example – extinguished any aboriginal title. *See Pueblo de Zia IV*, 474 F.2d at 641; *see also Ft. Berthold Reservation v. Untied States*, 390 F.2d 686, 698 (Ct. Cl. 1968). Moreover, Plaintiff fails to explain how their use was to the exclusion of others, when, as Plaintiff readily acknowledges, other individuals have occupied this particular tract of land for nearly 140 years prior to the United States' acquisition.

Second, the Tribe's assertion that it possesses aboriginal title to the Valles Caldera rests on the fundamentally flawed premise that Congress's passage of the Preservation Act did not extinguish the Pueblo's right to exclusive use and occupancy, if any such right even existed. It is now well settled that the designation of land as a forest reserve or unit of the National Park Service is itself effective to extinguish a tribe's aboriginal title. *United States v. Pueblo of San*

Ildefonso, 513 F.2d 1383, 1391-92 (Ct. Cl. 1975); *Confederated Salish & Kootenai Tribes v. United States*, 401 F.2d 785, 789 (Ct. Cl. 1968), *cert. denied*, 393 U.S. 1053 (1969); *United States v. Gemmill*, 535 F.2d 1145, 1149 (9th Cir. 1976); *Tlingit and Haida Indians of Alaska v. United States*, 177 F. Supp. 452, 467-468 (Ct. Cl. 1959); *Pai 'Ohana v. United States*, 875 F. Supp. 680, 696 (D. Haw. 1995) *aff'd*, 76 F.3d 280 (9th Cir. 1996). Indeed, the Court of Federal Claims concluded in *Pueblo of Zia* that the Jemez Forest Reserve – which similarly overlapped Pueblo lands subject to aboriginal title – effectively deprived them of the land and extinguished title. *Pueblo de Zia IV*, 474 F.2d at 641. Thus, much like the creation of the Jemez Forest Reserve in 1905, passage of the Preservation Act in 2000, which established the National Preserve as a unit of the National Forest System, effected an extinguishment of the Pueblo of Jemez's aboriginal title.

Third, aboriginal title alone does not entitle Plaintiff to the relief it seeks here: "exclusive possession, use, occupancy, and control" of the federal government's land in the National Preserve. The logical extension of the Tribe's argument is that it can assert its dominion over this area to the exclusion of the sovereign, notwithstanding Congress's clear directives. That the Pueblo possesses common law, aboriginal title paramount to the will of the sovereign is without legal precedent. Contrary to Plaintiff's novel construction, aboriginal title is "good against all but the sovereign" and presumes ultimate federal sovereignty and control. *Oneida Indian Nation of N.Y. v. Cnty. of Oneida*, 414 U.S. 661, 667 (1974) ("*Oneida I*"); *see Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 285 (1955).

It also bears emphasis that aboriginal title "is not a property right" in the traditional sense, but is instead "a right of occupancy which the sovereign grants and protects against intrusion by third parties but which right of occupancy may be terminated and such lands fully disposed of by

the sovereign itself without any legally enforceable obligations to compensate the Indians." *Id. Tee-Hit-Ton*, 348 U.S. at 279 (emphasis added). While tribes, where appropriate, may possess a right of occupancy that is "considered as sacred as the fee-simple," *United States v. Santa Fe Pacific Railroad*, 314 U.S. 339, 344 (1941), that interest alone "creates no rights against taking or extinction by the United States protected by the Fifth Amendment or any other principle of law." *Tee-Hit-Ton*, 348 U.S. at 285 (emphasis added). Thus, unless otherwise specified by an act of Congress, aboriginal rights prevail only against parties other than the federal government. *See Oneida I*, 414 U.S. at 667; *Vill. of Gambell v. Clark*, 746 F.2d 572, 574 (9th Cir.1984) ("[Aboriginal] rights are superior to those of third parties, including the states, but are subject to the paramount powers of Congress."). Because the only interest created by Indian title is a permissive right of occupancy – not an enforceable property right – subject to the will of the sovereign and valid only against third parties, Indian title alone does not confer upon plaintiff any authority to accomplish that which it seeks through this lawsuit: exclusive use, occupancy, and what amounts to regulatory control over the National Preserve.

It is quite clear that Plaintiff's lawsuit is an attempt to override the clear intent of Congress, an entity vested with the authority to grant, modify, or even extinguish aboriginal title, and no court that Federal Defendants are aware of has *ever* concluded that the aboriginal title of a tribe eclipses the directives of Congress expressed in a legislative enactment. To the extent any Pueblo had an interest in the area, Congress exercised its prerogative to establish the bounds of those rights, following extensive tribal consultation with the surrounding Pueblos.[13] Put

[13] The legislative history of the Preservation Act demonstrates that the Pueblo of Jemez endorsed the passage of this Act. On March 10, 2001, in testimony before the Senate subcommittee on forests and public land management, then-Governor of the Pueblo of Jemez Raymond Gachupin lent his support to the Act, stating that "we strongly support the proposed

differently, there is simply no support for the proposition that Congress intended the Preservation Act to provide the Pueblo with an exclusive right to occupy and control more than 99,000 acres of federal land.

For example, in Title I of the Act, Congress authorized the Secretary of Agriculture to assign to the Pueblo of Santa Clara the rights to purchase a portion of the Baca Ranch from the current owners, with those portions then deemed transferred into trust in the name of the United State for the benefit of the Pueblo and declared a part of the existing Santa Clara Indian Reservation. 16 U.S.C. § 698v-2(g). No such provision was made for the Pueblo of Jemez. And nowhere in the Act does Congress allow for the degree of control that Plaintiff seeks. Nor can the federal common law of aboriginal title be fairly read as support for Plaintiff's novel claim that their aboriginal title is superior to the authority of Congress. Plaintiff's legally unsupportable proposition would furnish the Pueblo with the authority to veto the activities of the United States on tens of thousands of acres of *federal* land, in essence, wresting control of the National Preserve from the federal government. The authority of the sovereign, however, is plenary, and the federal common law of aboriginal title was never intended to usurp the will of Congress or the federal government.

CONCLUSION

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

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acquisition of the Valles Caldera by the USDA Forest Service and we strongly support the concept of multiple use," 2000 WL 276442, mentioning nothing of aboriginal title.

Respectfully submitted, this 14th day of February, 2013.

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Certificate of Service

I certify that on February 14, 2013, I caused a copy of the foregoing UNITED STATES' MOTION TO DISMISS PLAINTIFF'S COMPLAINT AND MEMORANDUM OF POINTS AND AUTHORITIES 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