IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

THE ALABAMA-COUSHATTA TRIBE OF TEXAS, **Plaintiff** **vs.** **THE UNITED STATES OF AMERICA; KENNETH LEE SALAZAR, in his capacity as Secretary of the United States Department of the Interior; and THOMAS J. VILSACK, in his capacity as Secretary of the United States Department of Agriculture,** **Defendants.**	**NO. 2:12-cv-83-JRG-RSP**

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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I. INTRODUCTION

This action seeks equitable relief to redress the Government's breaches of fiduciary duty under federal law to protect land and natural resources that are subject to the aboriginal title of the Alabama-Coushatta Tribe of Texas (the "Tribe"). This is not the first time the Tribe has had to seek legal redress for the Government's breaches of duty. In 2000, the Court of Federal Claims recognized that the Tribe held unextinguished aboriginal title to approximately 5.5 million acres of land in Texas (the "Claim Area") and held that the Government had breached its fiduciary duty to safeguard the Tribe's aboriginal land from third party trespasses. *See Alabama-Coushatta Tribe of Texas v. United States*, No. 3-83, 2000 WL 1013532 (Fed. Cl. June 19, 2000). The Court of Federal Claims' decision concerned the Government's breaches of duty that occurred before 1946. By this action, the Tribe challenges the Government's recent violation of its duties—wrongdoing that continues to this day.

Specifically, the Tribe seeks to halt the Government's further exploitation of resources on the Tribe's aboriginal lands without considering and accommodating tribal rights. Specifically, the Complaint challenges (1) the National Park Service's issuance of permits to drill for oil or gas in the Big Thicket National Preserve; (2) the Forest Service's issuance of drilling permits for privately owned mineral estates located under the Sam Houston and Davy Crockett National Forests; (3) the Bureau of Land Management's issuance of oil and gas leases for land in the Sam Houston and Davy Crockett National Forests, including the collection of royalties and rent payments from these leases; and (4) the National Forest Service's exploitation and sale of timber resources from the Davy Crockett and Sam Houston National Forests.

In moving to dismiss the Complaint, the Government does not and cannot dispute that the Claim Area is subject to the Tribe's aboriginal title, a right "considered as sacred as the fee simple of the whites." *Mitchel v. United States*, 34 U.S. (9 Pet.) 711, 745 (1835). Instead, the

Government argues that: (1) the United States has not waived sovereign immunity over the Tribe's claims and the Court therefore lacks subject matter jurisdiction to consider them; (2) the Tribe's claims are time-barred; and (3) aboriginal title alone does not support a cause of action against the United States. These arguments lack merit.

First, the Tribe's claims fall squarely within the statutory waiver of sovereign immunity set forth in the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701, *et seq*. Section 702 of the APA expressly waives the Government's sovereign immunity over any claim challenging federal agency action "seeking relief other than money damages." Here, the Tribe challenges three federal agencies' failure to accommodate the Tribe's aboriginal title.

The Government contends that section 702's waiver does not apply to claims that seek review outside of the APA. *Nine* Courts of Appeal have considered this argument, and each one has rejected it. As the D.C. Circuit stated unequivocally, the "APA's waiver of sovereign immunity applies to any suit whether under the APA or not." *Chamber of Commerce of U.S. v. Reich*, 74 F.3d 1322, 1328 (D.C. Cir. 1996). The Fifth Circuit, moreover, has held that the APA's waiver of sovereign immunity encompasses claims asserted under the federal statutes other than the APA, so long as the claims seek only monetary relief. *Sheehan v. Army and Air Force Exchange Service*, 619 F.2d 1132, 1139 (5th Cir. 1980), *overruled on other grounds by Army & Air Force Exchange Service v. Sheehan*, 456 U.S. 728 (1982). Apart from a passing reference to *Sheehan's* holding on a different issue, the Government inexcusably fails to cite, let alone distinguish, any of these decisions.

The Government's argument that the Tribe is raising an impermissible "programmatic challenge," rather than final agency action, is equally meritless. Stated simply, the Tribe is not challenging a program; it is challenging specific, discrete agency actions—leasing, permitting,

and selling land and resources subject to the Tribe's aboriginal title. That there are many such actions at issue is a reflection of the magnitude of the Government's breaches of fiduciary duty, not an indication that the Tribe is presenting a programmatic challenge.

Second, the Government contends that the Tribe's claims are barred by the statute of limitations because (1) 28 U.S.C. § 2401(a) sets a six-year statute of limitations for civil actions against the United States; and (2) the Complaint references breaches of fiduciary duty by the Government that occurred more than six years ago. But the Tribe is not challenging, in this action, the Government's historic breaches of fiduciary duty. It is challenging the Government's present-day and continuing wrongdoing. The Government cannot hide behind the statute of limitations as a defense to its current breaches of fiduciary duty by touting the fact that it has been breaching those duties for decades.

The Government next asserts that the Tribe's claims are time-barred by the Quiet Title Act ("QTA"), 28 U.S.C. § 2409a. That is a red herring. While the QTA establishes a twelve-year statute of limitations on claims disputing the Government's title to land, the Tribe is not challenging the Government's title. Sovereign or legal title, held by the United States, and aboriginal title, held collectively by Native tribes, are entirely "separate but nonexclusive forms of ownership," *Turtle Mountain Band of Chippewa Indians v. United States*, 490 F.2d 935, 941 (Ct. Cl. 1974), which can both "be held in the same lands at the same time." *Id*. Accordingly, the QTA is irrelevant to this suit.

Finally, the Government fares no better when it arrives at the merits. According to the Government, the Tribe fails to state a claim because "aboriginal title alone does not entitle plaintiff to a declaration that the United States 'must consider and accommodate the Tribe's aboriginal title'" with respect to aboriginal land. Mot. at 25. But the Tribe's claims are not

based on aboriginal title "alone." The Tribe asserts a claim for breach of fiduciary duty under the Trade and Intercourse Act of 1834, 25 U.S.C. § 177 (the "Nonintercourse Act"), which "creates a duty on the federal government to protect all Indians holding land aboriginally within United States borders." *Alabama-Coushatta Tribe of Texas v. United States*, 28 Fed. Cl. 95, 106 (Fed. Cl. 1993). Courts have made clear that the Government breaches this fiduciary duty if it fails to protect a Native tribe's aboriginal lands against third party trespasses. *See, e.g.*, *Edwardsen v. Morton*, 369 F. Supp. 1359, 1373 (D. D.C. 1973) (citing *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955)). At a minimum, the Government has a duty under the Nonintercourse Act to consider and accommodate the Tribe's aboriginal title when issuing permits, leases, or other authorizations that facilitate the exploitation of natural resources on the Tribe's aboriginal land. The Government cites no authority for its assertion that it can flagrantly disregard this duty without any accountability.

For these reasons, the Court should deny the Motion.

II. COUNTERSTATEMENT OF THE ISSUES

1. Section 702 of the APA waives the United States' sovereign immunity over any action "seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority . . . ." 5 U.S.C. § 702. Does section 702 waive the United States' sovereign immunity over the Tribe's claims where the Tribe challenges (a) discrete action by federal agencies and the officer defendants in their official capacity, and (b) seeks declaratory, injunctive and equitable relief, not monetary damages?

2. The Mandamus Act waives the United States' sovereign immunity over actions "to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." 28 U.S.C. § 1361. Does the Mandamus Act waive the United States'

sovereign immunity over this action where the Tribe seeks to compel the Defendants to perform a non-discretionary duty, namely, to consider and accommodate the Tribe's aboriginal title pursuant to the Nonintercourse Act and federal common law?

3. Section 2401 of Title 28 sets a six-year statute of limitations on civil actions against the United States. 28 U.S.C. § 2401(a). Are the Tribe's claims time-barred under the provision as a matter of law, and before the opportunity to conduct any discovery, where the Tribe alleges that the Defendants have committed discrete breaches of their fiduciary duties within the past six years?

4. The QTA sets a 12-year statute of limitations on claims seeking to dispute the United States' title to real property. 28 U.S.C. § 2409a. Does the QTA's statute of limitations apply to this action where the Tribe neither asserts an ownership interest in the Claim Area nor challenges the United States' legal title and right to possess the Claim Area?

5. Federal courts have recognized that the Nonintercourse Act imposes a fiduciary duty on the United States to safeguard Indian tribes' land, including land held in aboriginal title. Courts have also recognized that, under the Nonintercourse Act and federal common law, an Indian tribe may assert claims against the United States for failing to protect Indian land from third party encroachment. Has the Tribe stated a claim for breach of fiduciary duty against the United States where it alleges that (a) it holds unextinguished aboriginal title to the Claim Area, and (b) the Defendants have actively facilitated the exploitation of oil, natural gas, and timber resources by third parties, without the Tribe's consent?

III. STANDARD OF REVIEW

The Government's motion asks this Court to dismiss the Complaint for lack of subject-matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) and for failure to state a claim under Rule 12(b)(6). While a plaintiff bears the burden of proof to establish subject matter

jurisdiction, *Randall D. Wolcott, M.D., P.A. v. Sebelius*, 635 F.3d 757, 762 (5th Cir. 2011), "allegations of the complaint, unless patently frivolous, are taken as true," and "courts should be mindful to avoid tackling the merits under the ruse of assessing jurisdiction." *Jones v. Alexander*, 609 F.2d 778, 781 (5th Cir. 1982).

In deciding a motion to dismiss under Rule 12(b)(6), a court must accept all well-pleaded facts in the complaint as true and view them "in the light most favorable to the nonmovant." *Bass v. Stryker Corp.*, 669 F.3d 501, 506 (5th Cir. 2012). A complaint must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Allegations in a complaint are facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Wilson v. Birnberg*, 667 F.3d 591, 595 (5th Cir. 2012). Dismissal is improper "if the allegations support relief on *any* possible theory." *Id.* (quoting *Cinel v. Connick*, 15 F.3d 1338, 1341 (5th Cir. 1994)).

IV. ARGUMENT

In 2000, after years of extensive litigation between the Tribe and the Department of Justice, the Court of Federal Claims found that the Tribe held unextinguished aboriginal title to approximately 5.5 million acres of land in East Texas. Compl. ¶ 26. The Nonintercourse Act imposes on the Government a fiduciary duty to safeguard the Tribe from intrusions on any property to which it holds aboriginal title. Yet despite the Court of Federal Claims' findings, the federal government, through its agencies, continues to breach this duty by authorizing third-party exploitation of oil, gas, and timber resources from these aboriginal lands. Even worse, it is actively profiting from these violations by collecting rents and royalties from the issuance of permits and leases. The Tribe is pursuing this Complaint to halt these abuses.

The Government offers three reasons for dismissal. First, it argues that the federal government has not waived its sovereign immunity against the Tribe's claims. Second, it maintains that the Tribe's claims are untimely. Third, it argues that the Tribe has failed to state a claim. Each of these arguments lacks merit. Ultimately, the Government's motion to dismiss mischaracterizes the Complaint as an untimely attempt to renew the Tribe's claims for the Government's historical breaches of fiduciary duty. This action instead challenges only recent and continuing actions by federal agencies that impair the Tribe's rights.

A. The Government Has Waived Its Sovereign Immunity

The Tribe's claims fall comfortably within two separate, independent statutory waivers of sovereign immunity.[1] First, the APA waives sovereign immunity over claims against federal agencies and their officers and employees seeking relief other than money damages. 5 U.S.C. § 702. Second, the Mandamus Act gives district courts "original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." 28 U.S.C. § 1361. Both statutes give this court jurisdiction over the Tribe's claims.

1. The APA Waives Sovereign Immunity Because the Tribe's Claim Challenges Discrete Agency Actions and Seeks Relief Other Than Money Damages

Section 702 of the APA precludes the United States from asserting sovereign immunity as a defense to the Tribe's claims. That section provides, in relevant part:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States ***seeking relief other than money damages*** and stating a claim that an agency or an officer or

[1] The Tribe does not contend that 28 U.S.C. §§ 1331, 1362; the Tucker Act, 28 U.S.C. § 1491; the Little Tucker Act, 28 U.S.C. § 1346; the Nonintercourse Act, 25 U.S.C. § 177; or the Quiet Title Act, 28 U.S.C. § 2409a, waive sovereign immunity.

> an employee thereof ***acted or failed to act in an official capacity*** or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party.

5 U.S.C. § 702 (emphasis supplied).

Here, the Tribe asserts a claim for breach of fiduciary duty against officers of two federal agencies, who are named in their official capacities. The Tribe seeks relief other than monetary damages—namely a declaratory judgment, injunctive relief, and an equitable accounting. Accordingly, the Tribe's claim falls squarely within the plain language of section 702's waiver of sovereign immunity.

The Government offers two principal arguments to avoid this conclusion. Neither argument has merit.

a. The APA Waives Sovereign Immunity For All Non-Monetary Claims, Not Just Those Seeking Review Under the APA

The APA provides persons aggrieved by agency action with a cause of action, 5 U.S.C. § 704, as well as default standards for reviewing agency action, *id*. § 706. While the section 702 waiver of sovereign immunity clearly applies to such APA actions, it is well-established that the waiver extends more broadly to *any* claim against a federal agency that seeks relief other than monetary damages. Both the Fifth Circuit and this Court, for example, have held that section 702's sovereign immunity waiver applies to non-APA claims, including claims arising under other federal statutes. *See Sheehan*, 619 F.2d at 1139 (holding that section 702 waived sovereign immunity over plaintiff's action asserting various statutory and Constitutional claims arising from the termination of his employment); *Young v. Pierce*, 628 F. Supp. 1037, 1058 (E.D. Tex. 1985) (following *Sheehan* and holding that section 702 waived sovereign immunity over non-APA claims).

Without so much as acknowledging these holdings, the Government asserts that section 702 "waives sovereign immunity only for actions brought under the APA." *See* Mot. at 13. The Government apparently argues that because the Tribe's breach of fiduciary duty claim arises under the Nonintercourse Act and federal common law, rather than the APA, it does not fall within section 702's waiver of sovereign immunity. *Id*. The Government does not and cannot reconcile this argument with *Sheehan* or *Young*.

Nor can the Government square its position with the text of section 702. On its face, section 702 "is an unqualified waiver of sovereign immunity in actions seeking nonmonetary relief against legal wrongs for which governmental agencies are accountable." *The Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518, 525 (9th Cir. 1989). Nothing in the text of this provision suggests that "it covers only claims reviewable through the APA." *Blagojevich v. Gates*, 519 F.3d 370, 372 (7th Cir. 2008).

For this reason, *every* Court of Appeals to consider the issue has held that the "APA's waiver of sovereign immunity applies to any suit whether under the APA or not." *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1328 (D.C. Cir. 1996); *see also Michigan v. U.S. Army Corps of Engineers*, 667 F.3d 765, 775 (7th Cir. 2011) ("[T]he waiver in § 702 is not limited to claims brought pursuant to the review provisions contained in the APA itself."); *Delano Farms Co. v. California Table Grape Com'n*, 655 F.3d 1337, 1349 (Fed. Cir. 2011) (rejecting Government's argument that section 702's waiver of sovereign immunity was limited to claims asserted under the APA and holding that waiver applied to plaintiff's declaratory judgment claims under the Patent Act); *Commonwealth of Puerto Rico v. United States*, 490 F.3d 50, 57-58 (1st Cir. 2007) ("This waiver is for *all* equitable actions for specific relief against a Federal agency or officer acting in an official capacity, and thus applies to any suit whether under the APA or not.")

(internal quotation marks and citations omitted); *Simmat v. United States Bureau of Prisons*, 413 F.3d 1225, 1233 (10th Cir. 2005) (Section 702's "waiver is not limited to suits under the Administrative Procedure Act."); *United States v. City of Detroit*, 329 F.3d 515, 521 (6th Cir. 2003) (holding that section 702's waiver of sovereign immunity is not limited to suits brought under the APA); *Up State Fed. Credit Union v. Walker*, 198 F.3d 372, 375 (2d Cir. 1999) (describing section 702 as a "general waiver" of sovereign immunity); *Specter v. Garrett*, 995 F.2d 404, 410 (3d Cir. 1993) ("Our cases are also clear that the waiver of sovereign immunity contained in § 702 is not limited to suits brought under the APA."), *rev'd on other grounds by Dalton v. Specter*, 511 U.S. 462 (1994). As the Eighth Circuit explained in rejecting the same argument advanced by the Government here, "the waiver of sovereign immunity contained in section 702 is not dependent on application of the procedures and review standards of the APA. It is dependent on the suit against the government being one for non-monetary relief." *Red Lake Band of Chippewa Indians v. Barlow*, 846 F.2d 474, 476 (8th Cir. 1988); *see also Trudeau v. Federal Trade Com'n*, 456 F.3d 178, 185 (D.C. Cir. 2006) (holding that section 702's waiver of immunity applied to an action that did not challenge "agency action" or a "final agency action" within the meaning of the APA).

While ignoring entirely this authority that is directly on point, the Government cites two cases, *Department of the Army v. Blue Fox, Inc*., 525 U.S. 255 (1999) and *Bowen v. Massachusetts*, 487 U.S. 879 (1988), that are inapposite. In both cases, the Supreme Court addressed whether the relief sought by the plaintiff constituted "money damages" within the meaning of section 702. *Blue Fox*, 524 U.S. at 262-63; *Bowen*, 487 U.S. at 891-901. Neither case explicitly addressed whether section 702's waiver of sovereign immunity extends to non-APA actions. Insofar as the cases addressed the issue implicitly, they actually support the

Tribe's position. In *Bowen*, the plaintiff asserted a claim against a federal agency under the Medicaid Act, *not* the APA. The Supreme Court held that section 702's waiver of sovereign immunity encompassed this claim and thus "treated § 702 as generally applicable." *Blagojevich*, 519 F.3d at 372. Indeed, lower courts have relied on *Bowen* in holding that section 702 waives sovereign immunity over non-APA actions. *Id*.

The Government next asserts that its reading "flows from the structure" of section 702, noting that Congress added a sovereign immunity waiver in the APA rather than an "entirely new provision of the United States Code." Mot. at 13. That argument does not hold water. Section 702 waives sovereign immunity only over claims against federal "*agencies*" and officers or employees of *agencies* acting in an official capacity. 5 U.S.C. § 702. The APA is the statute that generally governs the review of agency actions. When enacting a general waiver of sovereign immunity over claims against federal agencies, Congress naturally incorporated that waiver in the APA, rather than a separate statute. *See Delano*, 655 F.3d at 1345 (rejecting the Government's argument that "the placement of the waiver of sovereign immunity in section 702 of the APA suggests that the waiver was meant to be limited to actions arising under the APA itself or under a statute directed at the review of 'agency action' as that termed is defined in the APA.").

Finally, the Government purports to find support for its argument in the legislative history of section 702. Not only is recourse to legislative history unnecessary given section 702's plain language, *Waggoner v. Gonzales*, 488 F.3d 632, 638 (5th Cir. 2007), the legislative history makes it clear that Congress intended section 702 to waive sovereign immunity over all non-monetary claims against federal agencies. Congress added section 702's sovereign immunity waiver in 1976. *See* Pub. L. 94-574, 90 Stat. 2721, 94th Cong., 2d Sess. (1976). As

the accompanying House and Senate reports explain, the purpose of this amendment was to "eliminate the sovereign immunity defense in *all equity actions* for specific relief against a Federal agency or officer acting in an official capacity." S. Rep. No. 94-996, at 8 (1976); H.R. Rep. No. 94-1656, at 9 (1976); 1976 U.S. Code Cong. & Ad. News 6121, 6134 (emphasis added). "Congress [thus] was quite explicit about its goals of eliminating sovereign immunity as an obstacle in securing judicial review of the federal official conduct." *Presbyterian Church (U.S.A.),* 870 F.2d at 524; *see also Delano,* 655 F.3d at 1344-45 ("The legislative history of the 1976 amendment to the APA reinforces the breadth of the statutory language.").

The snippets of legislative history on which the Government relies, Mot. at 14, establish nothing more than that Congress intended section 702's waiver of sovereign immunity to apply only to claims against federal agencies. The Government, for example, cites the House Report's observation that the amendment "will be applicable only to functions falling within the definition of 'agency' in 5 U.S.C. section 701." *Id*. (quoting H.R. Rep. No. 94-1656, at 11 (1976)). But limiting the class of potential *defendants* does not imply any limitation on the scope of *claims* subject to the waiver. The only limitation on the scope of claims is that set forth in the text of the statute itself: a claim must seek relief other than monetary damages. Because the Tribe's claims indisputably seek non-monetary relief, section 702's waiver of sovereign immunity applies.[2]

[2] The Government's sovereign immunity defense, as to Secretaries Salazar and Vilsack, fails for an additional, independently sufficient reason: the Complaint plausibly alleges that these defendants have acted in excess of their statutory authority in authorizing third party encroachments on the Tribe's aboriginal land. Long before Congress amended section 702 to add an express sovereign immunity waiver, the Supreme Court recognized that judicial review was available to "one who has been injured by an act of a government official which is in excess of his express or implied powers." *Harmon v. Brucker,* 355 U.S. 579, 581–82 (1958). *See also Larson v. Domestic & Foreign Commerce Corp.,* 337 U.S. 682 (1949) (suits for relief against federal officers for specific violations that are outside the scope of their statutory authority are not against the United States are not precluded by sovereign immunity); *Saine v. Hospital Authority of Hall,* 502 F.2d 1033 (5th Cir. 1974) (same). When a federal official acts *ultra vires*,

b. The Tribe's Claims Challenge Discrete Agency Actions That Are Cognizable Under the APA

In addition to misconstruing the plain language of section 702, the Government mischaracterizes the Complaint in an attempt to avoid addressing the Tribe's claims on the merits. Specifically, the Government asserts that the Complaint "does not challenge any specific lease or permit" and, as such, constitutes a "programmatic challenge" to "routine leasing activities," rather than a challenge to "final agency action," as required by the APA. Mot. at 9.

To the contrary, the Complaint challenges discrete and specific agency actions as breaches of the Government's duty to safeguard the Tribe's aboriginal property: (1) the issuance of temporary access permits, plans of operations, and exemptions authorized by 36 C.F.R. § 9.32(e) to operators of oil and gas wells in the Big Thicket Preserve, Compl. ¶¶ 42-47; (2) the issuance of drilling and special use permits pursuant to 36 C.F.R. §§ 251.15 and 251.50 for the exploitation of reserved or outstanding mineral rights in the Sam Houston and Davy Crockett National Forests, Compl. ¶¶ 60-70; (3) the BLM's issuance of oil and gas leases (in exchange for royalty payments) for land in the Sam Houston and Davy Crockett National Forests, Compl. ¶¶ 72-82; and (4) the National Forest Service's sale of timber in the Sam Houston and Davy Crockett National Forests, Compl. ¶¶ 83-86. Contrary to the Government's suggestion, the mere fact that the Tribe challenges the legality of a substantial number of agency actions does not transform the Tribe's claims into a "programmatic challenge."

This conclusion is clear from the Government's own cases. In *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990), for example, the plaintiffs challenged what their complaint

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he or she "is not doing the business which the sovereign has empowered him to do," *Larson*, 337 U.S. at 689, and thus "there is no sovereign immunity to waive—it never attached in the first place." *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1329 (D.C. Cir. 1996). Here, the Secretaries of Agriculture and Interior lack the statutory authority to violate the Nonintercourse Act.

labeled a "land withdrawal review program" administered by the BLM. *Id.* at 875. In concluding that plaintiffs raised a programmatic challenge, the Supreme Court emphasized that plaintiffs' complaint "[did] not refer to a single BLM order or regulation, or *even to a completed universe of particular BLM orders and regulations*," but simply objected to "the continuing (and thus constantly changing) operations of the BLM in reviewing withdrawal revocation applications and the classifications of public lands and developing land use plans as required by the FLPMA." *Id.* at 890 (emphasis added).

Here, by contrast, the Complaint does challenge a "universe" of particular orders—namely, those orders (during the applicable limitations period) that sold, leased, or issued permits authorizing the exploitation of land that is subject to the Tribe's aboriginal title. The Government cannot invoke *Lujan's* ban on programmatic challenges by simply recounting the sheer number of instances in which its agencies have issued final orders in breach of their fiduciary duties to the Tribe. And while the Tribe's challenges to specific agency actions may ultimately have the effect of changing the way the Defendants manage land subject to the Tribe's aboriginal title, that possibility does not make the Tribe's claims programmatic. *See, e.g., Fanin v. U.S. Department of Veterans Affairs*, 572 F.3d 868, 877 (11th Cir. 2009) ("[A]s the Supreme Court implied in *Lujan*, the ban on generalized attacks does not prevent a plaintiff from bringing a handful of specialized challenges to specific 'final agency actions' that, if successful, would have a broad impact on the agency's program.").

Finally, and in any event, whether the Tribe challenges "final agency" action is ultimately a factual question that is not properly resolved on a motion to dismiss. *Lujan* was decided on a motion for summary judgment, after discovery and with a developed factual record. Indeed, the Supreme Court expressly distinguished a Rule 56 summary judgment motion from a Rule 12(b)

motion, stating that "[t]he latter, unlike the former, presumes that general allegations embrace those specific facts that are necessary to support the claim." *Lujan*, 497 U.S. at 889. Here, the Complaint alleges the specific facts that are necessary to support the Tribe's claims. The Government may dispute those allegations, but it may not do so on a motion to dismiss. See, *e.g., American Farm Bureau v. U.S. E.P.A.*, 121 F. Supp. 2d 84, 105-06 (D. D.C. 2000) ("While it is entirely possible, if not likely, that EPA could prove, after discovery, that its science policies do not qualify as final agency action or are not binding rules, at the 12(b)(6) motion to dismiss stage the court is required to accept as true all well-pleaded factual allegations and draw all reasonable inferences in favor of the plaintiffs.").

2. This Court Has Jurisdiction Under the Mandamus and Venue Act.

Under the Mandamus and Venue Act, federal district courts have "original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." 28 U.S.C. § 1361. The Fifth Circuit has held that "mandamus jurisdiction exists if the action is an attempt to compel an officer or employee of the United States or its agencies to perform an allegedly nondiscretionary duty owed to the plaintiff." *Randall D. Wolcott, M.D., P.A. v. Sebelius*, 635 F.3d 757, 766 (5th Cir. 2011). In assessing whether a court can exercise mandamus jurisdiction, "allegations of the complaint, unless patently frivolous, are taken as true to avoid tackling the merits under the ruse of assessing jurisdiction." *Jones*, 609 F.2d at 781. The Tribe's Complaint does not seek money damages and aims to force federal officers to perform a nondiscretionary duty—"[t]his is the classic function of mandamus," and the Complaint "fits within section 1361's grant of jurisdiction." *McClain v. Panama Canal Commission*, 834 F.2d 452, 454 (5th Cir. 1987).

The Government's discussion of mandamus jurisdiction attempts to "tackl[e] the merits under the ruse of assessing jurisdiction." It argues that "for claims to fall within the mandamus

statute's waiver of sovereign immunity, (1) the plaintiff must have a clear right to the relief, (2) the defendant must have a clear duty to act, and (3) no other adequate remedy must be available." Mot. at 15. This argument is misleading. Although this sentence accurately states the elements necessary to prevail *on the merits* in a mandamus action, a plaintiff need not prove (or even allege) these elements to establish mandamus *jurisdiction*. *See Jones*, 609 F.2d at 781 (describing the three requirements as "elements [that] must exist before mandamus can issue" and stating that "[t]he test for jurisdiction is whether mandamus would be an appropriate means of relief").

In any event, the Tribe's complaint adequately states a claim for mandamus relief. The Government does not contest that the Tribe has no other adequate remedy available. Instead, it argues that the Tribe is not seeking to compel "a clear nondiscretionary duty." But the Complaint claims that the Tribe has a clear right to relief from the Government's breach of its fiduciary duties by (1) facilitating third party trespasses on and conversions of lands to which the Tribe holds unextinguished aboriginal title, and (2) failing to account for revenues and royalties it has collected from this third-party exploitation. Compl. at 19. It also states that, to halt future breaches, government officials *must* "consider and accommodate" the Tribe's aboriginal title and incidental rights before issuing permits, approving leases, and taking other actions that facilitate activities on the Tribe's aboriginal land. Compl. ¶ 7. Although the *form* of consideration or accommodation might involve discretion, Mot. at 16, the Tribe's claims arise from the Government's failure to consider the Tribe's aboriginal rights at all. The Government has no discretion to simply disregard the Tribe's interests. *See, e.g., United States v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 355-56 (1941); *United States v. Dann*, 873 F.2d 1189, 1196 n.5 (9th Cir. 1989).

Finally, the Government's argument that it has no duty to account to the Tribe is refuted by the very case on which the Government purports to rely. Citing *Cobell v. Norton*, 240 F.3d 1081, 1104 (D.C. Cir. 2001) ("*Cobell IV*"), the Government contends that the United States cannot be subject to a common law duty to account because a federal statute, the Indian Trust Fund Management Reform Act of 1994 ("1994 Act"), exclusively addresses the United States' duty to account to Indians. Mot. at 12-13. But *Cobell IV* made no such holding. On the contrary, the D.C. Circuit held that the 1994 Act "plainly reaffirm[ed] the government's *preexisting* duty to provide an accounting" to the beneficiaries of Indian trust fund accounts. *Id.* at 1103 (emphasis added). In so holding, the court recognized that, "[w]hile the government's obligations are rooted in and outlined by the relevant statutes and treaties, they are largely defined in traditional equitable terms." *Id.* at 1099. Thus, where federal law imposes a fiduciary duty on the Government, the beneficiary of that duty may avail itself of traditional equitable remedies, including an accounting, for any breach of that duty. *See id.* at 1103 ("The obligation of a trustee to provide an accounting is a fundamental principle governing the subject of trust administration.") (quoting *White Mountain Apache Tribe of Arizona v. United States*, 26 Cl. Ct. 446, 448 (1992)).

Here, as explained below, a federal statute—the Nonintercourse Act—and federal common law impose upon the United States a fiduciary duty to protect the Tribe's aboriginal lands from third party encroachment. The Complaint alleges in detail that, rather than discharge that duty, the Defendants have instead actively facilitated the exploitation of the Tribe's land by third parties. *See* Compl. ¶¶ 6-8, 30-86, 96-97. If the Tribe can establish those allegations at trial, it will be entitled to an equitable accounting from the Government. *See Oneida County, N.Y. v. Oneida Indian Nation of N.Y. State*, 470 U.S. 226, 236-36 (1985) (quoting *United States*

v. Santa Fe Pac. R.R. Co., 314 U.S. 339 (1941)) (federal common law establishes the availability of "an action for an accounting of all 'rents, issues and profits'" against parties that violate a tribe's aboriginal rights).

The Government resists this conclusion by quoting *Cobell IV* for the proposition that "[n]o common law claim for an accounting is cognizable . . . ." Mot. at 13 (quoting 240 F.3d at 1104). But the excerpt quoted by the Government is the D.C. Circuit's summary of the *Government's* argument in that case—an argument that the D.C. Circuit *rejected* on the ground that it "misconstrue[s] the relevant case law." *Cobell IV*, 240 F.3d at 1104. Because the Government has again misconstrued the case law, and indeed blatantly mischaracterized *Cobell IV's* holding, its Motion should be denied.

B. The Tribe's Claims Are Timely

1. The Tribe's Claims Accrued Within the Past Six Years

The Government argues that the Tribe's claims are time-barred under 28 U.S.C. § 2401(a)'s six-year statute of limitations because "it is beyond cavil that the plaintiff knew or reasonably should have known of its claims long before 2006." Mot. at 23. But the Complaint challenges specific agency actions that occurred well after that date. The Tribe is not seeking redress in this action for the Government's historical failures to protect its aboriginal land from third party intrusion. Instead, the Complaint very clearly challenges the federal government's recent and ongoing issuance of unauthorized permits and leases to third parties that allow them to exploit natural resources over which the Tribe holds aboriginal title. *See* Compl. ¶¶ 42-47; 66-70; 78-82; 84-86.

Fairly construed, the Complaint alleges that those permits and leases were issued on or after the six-year period preceding the filing of the Complaint. Accordingly, the Tribe's challenge to those actions is timely. No other conclusion makes sense: the Tribe could not know

or reasonably have known about specific acts that compromised its aboriginal interests before those acts took place. *See Cherokee Nation of Oklahoma v. United States*, 21 Cl. Ct. 565 (Ct. Cl. 1990) (holding that claims against the United States for failure to remove trespassers from Indian lands did not accrue until Plaintiff had knowledge of the specific trespassers); *United States v. Hess*, 194 F.3d 1164, 1177 (10th Cir. 1999) ("In trespass cases, where the statute of limitations has expired with respect to the original trespass, but the trespass is continuing, we and other courts have calculated the limitation period back from the time the complaint was filed, rather than forward from the date of the original trespass, or where applicable, back to the reasonable discovery date.").

Furthermore, certain Government actions initiated more than six years ago undoubtedly continue to impair the Tribe's aboriginal interests to this day. For instance, the BLM might have issued an oil drilling permit in 2005, but may continue to collect royalties from that permit to this day. In such "continuing tort" cases, accrual is delayed "until the tortious acts have ceased." *See In re FEMA Trailer Formaldehyde Products Liability Litigation*, 646 F.3d 185, 191 (5th Cir. 2011) (quoting *General Universal Systems, Inc. v. HAL, Inc.*, 500 F.3d 444, 451 (5th Cir. 2007)).[3] The Tribe seeks relief that targets only actions by federal agencies that have ongoing or future consequences. *See generally* Prayer ¶¶ A-D. Accordingly, section 2401(a) does not bar the Tribe's claims.

[3] Although the Fifth Circuit has not determined whether the continuing tort doctrine applies to federal claims, *see In re FEMA Trailer Formaldehyde Products Liability Litigation*, 646 F.3d at 185, the rationale for the doctrine clearly applies here. In particular, because the Complaint seeks simply the cessation of ongoing violations (and prevention of similar violations in the future), applying the doctrine in this case would not undermine "those practical ends which are to be served by any limitation of the time within which an action must be brought." *Geyen v. Marsh*, 775 F.2d 1303, 1307-08 (5th Cir. 1985) (internal quotation marks and citation omitted).

Finally, the Government's argument assumes that dispossession affects the Tribe's aboriginal title. Mot. at 19-26. However, as the Government recognizes, *id*. at 26, only Congress may extinguish or abrogate aboriginal title and legal title by others is subject to the Tribe's aboriginal title. *See, e.g.*, *Santa Fe Pac. R.R. Co*., 314 U.S. at 354. The statute of limitations did not run well before 2006 because the Tribe retained and continues to retain aboriginal title. The Government's past violations have no effect on its present and continuing duty to protect the Tribe's aboriginal title against third party encroachment.

2. The Tribe's Claims Are Not Subject to the Quiet Title Act.

The Government's argument that the Tribe's claims are time-barred by the QTA's twelve-year statute of limitations, Mot. at 24, fares no better. As the Government acknowledges, *id*. at 10, the QTA applies only—and its statute of limitations is relevant only—to claims that "challenge the United States' *title to real property*." *Block v. North Dakota ex. rel. Bd. of Univ. and School Lands*, 461 U.S. 273, 286 (1983) (emphasis added). *See also* 28 U.S.C. § 2409a(a) (providing that the United States may be named as a party defendant in a civil action under this section to adjudicate a *disputed title* to real property in which the United States claims an interest") (emphasis added).

Here, the Tribe is *not* challenging the United States' title to the National Forests, Big Thicket, or any real property. The Tribe is instead seeking redress for the Government's failure to discharge its fiduciary duty to protect the Tribe's aboriginal land. While the Tribe's claims may be predicated on the existence of aboriginal title over land to which the United States holds legal title, aboriginal title and legal title are distinct and mutually compatible concepts. In particular, "[w]hether a tribe has *aboriginal* title to occupy land is an inquiry entirely separate from the question of who holds *fee* title to land." *Lyon v. Gila River Indian Community*, 626 F.3d

1059, 1068 (9th Cir. 2010). Thus, an Indian's tribe's assertion of aboriginal title over land is not adverse to any claim of legal title to the same land.

Given the harmony between aboriginal and legal title, applying the QTA makes no sense in this context. The Government argues, for example, that the Tribe's claims are time-barred under the QTA because the Tribe "knew or reasonably should have known that the United States claimed title in either 1934 when the Sam Houston National Forest and the Davy Crocket National Forest were established or in 1974 when the Big Thicket National Preserve was established and the United States took legal title to those lands in its own name, not in trust for plaintiff." Mot. at 24 (citations omitted). But the United States' acquisition of legal title over those lands could not have put the Tribe on notice that the United States was asserting any claim adverse to the Tribe's aboriginal rights for the simple reason that the United States' legal ownership is perfectly compatible with the Tribe's aboriginal title.

The district court's decision in *Comanche Nation, Oklahoma v. United States*, 393 F. Supp. 2d 1196 (W.D. Okl. 2005), is instructive. There, the Comanche Nation filed a claim under the APA against the United States, challenging the transfer of an equitable interest in land held in trust by the United States. *Id*. at 1201. In granting the Comanche Nation's motion for a preliminary injunction, the court rejected the Government's argument that the QTA provided the exclusive avenue for challenging the land transfer. *Id*. at 1207. The court explained that "only disputes pertaining to the United States' ownership of real property fall within the parameters of the QTA." *Id*. In concluding that the QTA did not apply, the court emphasized that the Comanche Nation was "not challenging the United States' right, title or ownership interest in the land, nor does it seek to disturb any possessory interest of the United States in the property." *Id*.

"Even if the Comanche Nation succeed[ed] in this action," the court observed, "title to the subject property will remain in the United States." *Id*.

The Supreme Court's recent decision in *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, --- S. Ct. ----, 2012 WL 2202936 (U.S. June 18, 2012) confirms the QTA's limited scope. In *Patchak*, the Supreme Court considered whether the QTA applied to a claim challenging under the APA a federal agency's decision to take land into trust on behalf of an Indian tribe. *Id*. at *2.[4] Rejecting the Government's argument for a broad reading of the QTA's scope, the Supreme Court held that the QTA applies only where a plaintiff "contends that [it] owns" the United States' property and "seek[s] relief corresponding to such a claim." *Id*. at *6. Because the plaintiff in *Patchak* did not assert an ownership interest in the land at issue, his claim was not subject to the QTA. *Id*.

Patchak and *Comanche Nation* make clear that the QTA has no application here. Like the plaintiff in *Patchak*, the Tribe is not claiming an ownership interest in the Claim Area. Indeed, as the Government itself concedes, aboriginal title is defined as a right to "possession not specifically recognized as ownership by Congress." Mot. at 25 (quoting *Tee-Hit-Ton Indians.*, 348 U.S. at 279). As in *Comanche Nation*, the Tribe is not "challenging the United States' right, title or ownership interest in" the Claim Area, nor would its claims divest the United States of any possessory interest in the land. *Comanche Nation*, 393 F. Supp. 2d at 1207. And "[e]ven if [the Tribe] succeeds in this action, title to the Claim Area will remain in the United States." *Id*. Thus, the QTA and its statute of limitations do not apply to the Tribe's claims.

[4] The defendants in *Patchak* argued that, if the QTA applied, the plaintiff's claim would be barred by a QTA provision barring quiet title suits challenging legal title to Indian trust lands. *Patchak*, 2012 WL 2202936 at *4. That provision is not at issue in this case.

This conclusion is reinforced by considering the implications of accepting the Government's interpretation of the QTA: the Tribe's aboriginal title effectively would be extinguished, at least insofar as it applied to land over which the United States holds legal title. That outcome, however, would violate the well-established rule that aboriginal title may be extinguished only by Congress—and only if Congress manifests a "plain and unambiguous" intent to do so. *Santa Fe Pac. R.R. Co.*, 314 U.S. at 353. *See also Lipan Apache Tribe v. United States*, 180 Ct Cl. 487, 491 (1967) ("In the absence of a 'clear and plain' indication in the public records that the sovereign intended to extinguish all of the [claimants'] rights in their property, Indian title continues.") (internal quotations marks omitted and alteration in original). Because the QTA lacks any language, let alone "plain and unambiguous" language, manifesting Congress's intent to extinguish aboriginal title, it cannot apply here.

Finally, to the extent that there were any ambiguity on the QTA's scope, it must be resolved in favor of the Tribe, under the settled canon that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985). *See also Choate v. Trapp*, 224 U.S. 665, 675 (1912) ("[I]n the Government's dealings with the Indians . . . [t]he construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith."). Here, the Government's proposed interpretation would rewrite the QTA from a narrow statute governing disputes over legal title to one that confers sweeping immunity on federal agencies for their breaches of fiduciary duty to protect aboriginal lands—a duty that Congress imposed on those agencies pursuant to the

Nonintercourse Act. Nothing in the text, structure, or history of the QTA suggests that Congress intended such an evisceration of Indian rights.

For these reasons, the Court should construe the QTA according to its plain meaning and reject the Government's argument that the QTA's statute of limitations bars the Tribe's claims.

C. The Tribe's Complaint States a Claim for Breach of Fiduciary Duty.

When it finally addresses the merits, the Government conclusorily asserts that "Indian title alone does not entitle a plaintiff to a declaration" that the United States must accommodate tribal interests. Mot. at 25. But the Complaint is not seeking relief on the basis of aboriginal title alone. As the second paragraph of the Complaint makes clear, the Tribe asserts a claim for breach of fiduciary duty under the Nonintercourse Act. Compl. ¶ 2.

First enacted in 1790,[5] the Nonintercourse Act provides, in relevant part, that "[n]o purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution." 25 U.S.C. § 177. By enacting this provision, Congress "created a trust relationship between the federal government and American Indian tribes with respect to tribal lands covered by the Act." *Golden Hill Paugussett Tribe of Indians v. Weicker*, 39 F.3d 51, 56 (2d Cir. 1994). *See also Tonkawa Tribe of Okla. v. Richards*, 75 F.3d 1039, 1045 (5th Cir. 1996) ("The Indian Nonintercourse Act . . . imposes on the federal government a fiduciary duty to protect the lands covered by the Act.") (quoting *United States v. University of New Mexico*, 751 F.2d 703, 706 (10th Cir. 1984)); *Joint Tribal Council of Passamaquoddy Tribe v. Morton*, 528 F.2d 370, 379 (1st Cir. 1975) ("That the Nonintercourse Act imposes upon the federal government a fiduciary's role with respect to protection of the lands of a tribe covered by the Act seems to us beyond question, both from the

[5] Act of July 22, 1790, ch. 33, 1 Stat. 137.

history, wording and structure of the Act and from the cases cited above and in the district court's opinion.").[6]

Moreover, it is well settled that the Nonintercourse Act's protections extend to aboriginal lands. *See, e.g.*, *Tonkawa*, 75 F.3d at 1045 (The Nonintercourse Act broadly protects "a tribe's interest in land whether that interest is based on aboriginal right, purchase or transfer from a state."). Indeed, courts have noted that the Nonintercourse Act "was designed precisely to protect aboriginal title." *Narragansett Tribe of Indians v. Southern Rhode Island Land Development Corp.*, 418 F. Supp. 798, 807 (D. R.I. 1976).

Contrary to the Government's suggestion, courts have consistently recognized that tribes are entitled to seek redress, under the Nonintercourse Act and as a matter of federal common law, where the United States breaches its obligation to protect aboriginal lands from third party encroachment. In *Passamaquoddy Tribe*, for example, a tribe brought an action against the Secretary of the Interior and Attorney General, seeking a declaratory judgment that it was entitled to protection under the Nonintercourse Act. 528 F.2d at 372. The First Circuit affirmed the district court's judgment for the tribe. *Id*. at 373. In concluding that the Nonintercourse Act imposed an enforceable fiduciary duty on the Government, the court explained that "[t]he purpose of the Act has been held to acknowledge and guarantee the Indian tribes' right of occupancy, and clearly there can be no meaningful guarantee without a corresponding federal duty to investigate and take such action as may be warranted in the circumstances." *Id*. at 379.

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[6] *See also United States v. Oneida Nation of New York*, 477 F.2d 939, 944 (Ct. Cl. 1973) ("The United States Government assumed a responsibility to protect the Indians in *all* their land transactions."); *Seneca Nation of Indians v. United States*, 173 Ct. Cl. 917 (Ct. Cl. 1965) ("[W]e hold that the [Nonintercourse] Act created a special relationship between the Federal Government and those Indians covered by the legislation, with respect to the disposition of their lands, and that the United States assumed a special responsibility to protect and guard against unfair treatment in such transactions.").

The First Circuit also rejected the defendants' argument that the district court's judgment in the tribe's favor imposed an "overly 'general' fiduciary relationship," explaining that "[a] fiduciary relationship in this context must indeed be based upon a specific statute, treaty or agreement, which helps define and, in some cases, limit the relevant duties; but, as we have held, the Nonintercourse Act is such a statute." *Id*. at 380.

Similarly, in *Edwardsen*, native tribes filed an action against the Secretary of Interior and other federal officers, alleging that they had breached their fiduciary duty by issuing permits and licenses that authorized third parties to extract resources from the tribe's aboriginal land. 369 F. Supp. at 1362. In denying the defendants' motion for summary judgment, the district court explained that "if plaintiffs could show that their use and occupancy was disturbed [by such permits and licenses] at a time when their use and occupancy rights were in force and effect and unextinguished, it would certainly be plain that defendants had violated their duty to protect plaintiffs from third party intrusions." *Id*. at 1376.[7]

Here, the Complaint's allegations just as plainly state a claim against Defendants for breach of fiduciary duty. The Complaint alleges that the Tribe holds unextinguished aboriginal title to the Claim Area. Compl. ¶ 4. The Complaint alleges that the Defendants have actively facilitated third party intrusions on the Tribe's land by issuing leases and permits for the exploitation of oil and natural gas in the Claim Area. *Id*. ¶¶ 65-82. The Complaint alleges that Defendants have further breached their fiduciary duties through ongoing sales of timber that is

[7] The court granted summary judgment for the defendants on the tribe's claims insofar as those claims were barred by the Settlement Act, 85 Stat. 688, which retroactively extinguished aboriginal title held by Alaska native tribes, while upholding those claims that accrued before the Settlement Act was effective. *Edwardsen*, 369 F. Supp. at 1378. Here, as noted above, Congress has never extinguished the Tribe's aboriginal title.

subject to the Tribe's aboriginal title. *Id*. ¶¶ 83-86. These allegations are more than sufficient to state a claim for breach of fiduciary duty. *Edwardsen*, 369 F. Supp. at 1376.

While not disputing that it owes fiduciary duties under the Nonintercourse Act, the Government argues that the Tribe has no redress when the Government refuses to even attempt to discharge its duties. First, the Government quotes *Oneida Indian Nation of N.Y. v. County of Oneida*, 414 U.S. 661 (1974) (*Oneida I*) for the proposition that Indian title is "good against the sovereign," and summarily declares that "plaintiff's alleged Indian title entitles plaintiff to no relief whatsoever against the United States." Mot. at 27. But *Oneida I's* observation that Indian title is "good against the sovereign" was made in the context of noting that such title "could be terminated only by sovereign act." 414 U.S. at 667. When read in context, the Supreme Court's point was that a sovereign possess the authority to extinguish aboriginal title, not that federal agencies and their officers can disregard entirely their fiduciary duty to protect aboriginal lands where aboriginal title remains intact. Here, as the Court of Federal Claims acknowledged, Congress has never extinguished the Tribe's aboriginal title. Compl. ¶ 26.

Second, the Government's argument that the Tribe's aboriginal title "does not entitle plaintiff to regulatory control" over the Claim Area, Mot. at 26, is yet another red herring. Far from seeking any regulatory control, the relief sought by the Tribe is modest: a declaration of the Defendants' fiduciary duty to protect the Tribe's aboriginal lands, an injunction against further breaches of fiduciary duty, and an accounting for the revenues and profits that Defendants have derived from their breaches of duty. Compl. Prayer for Relief. Stated another way, the Tribe asks that the Defendants "take such action as may be warranted in the circumstances." *Passamaquoddy*, 528 F.2d at 379. Because the Complaint alleges that the

Government has failed to take *any* action to protect the Tribe's aboriginal rights, the Tribe has stated a viable claim for breach of fiduciary duty.

V. CONCLUSION

For the foregoing reasons, the Government's motion should be denied. If the Court grants the motion, the Tribe respectfully requests leave to amend.

Dated: June 29, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on June 29, 2012, a true and correct copy of the above and foregoing document was electronically filed with the Clerk of Court using CM/ECF system, which will cause service and send notification of such filing to the following e-mail address:

Stephen.Terrell@usdoj.gov

/s/Andy Taylor
Andy Taylor