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

THE ALABAMA-COUSHATTA TRIBE OF TEXAS,	§	
	§	Civil Action No. 2:12-cv-83-JRG-RSP
Plaintiff,	§	
v.	§	
THE UNITED STATES OF AMERICA, *et al.*,	§	
Defendants.	§	

DEFENDANTS' MOTION TO DISMISS FOR LACK OF SUBJECT-MATTER JURISDICTION OR, IN THE ALTERNATIVE, FOR FAILURE TO STATE A CLAIM

ISSUES

The United States and its officials are immune from suit unless Congress has specifically waived the United States' sovereign immunity. In this lawsuit, plaintiff sues the United States and its officials and this case should not proceed unless the United States has waived its sovereign immunity as to plaintiff's claims. Because Congress has not waived the United States' sovereign immunity as to plaintiff's claims, this Court lacks subject-matter jurisdiction over plaintiff's complaint. This Court also lacks subject-matter jurisdiction over claims against the United States that are barred by the applicable statutes of limitations. Here, plaintiff seeks relief against the United States for acts or omissions that occurred decades ago. Also, a plaintiff has to plead facts in its complaint that plausibly give rise to a claim upon which relief can be granted. Thus, the issues presented by this motion to dismiss are

1. Whether this Court lacks subject-matter jurisdiction over this case because Defendants have not waived their sovereign immunity as to plaintiff's claims and the complaint

should be dismissed (Fed. R. Civ. P. 12(b)(1));

2. Whether this Court lacks subject-matter jurisdiction over this case because plaintiff's claims are time-barred and the complaint should be dismissed (Fed. R. Civ. P. 12(b)(1)); and

3. Whether plaintiff's complaint should be dismissed for failure to state a claim upon which relief can be granted (Fed. R. Civ. P. 12(b)(6))?

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

By this action, plaintiff seeks to establish regulatory and financial interests in federal lands that lie exclusively outside of plaintiff's reservation. Specifically, plaintiff, a federally recognized Indian tribe, claims that its alleged aboriginal title (*i.e.*, "Indian title") to lands located in eastern Texas entitles it to regulatory control over and an equitable accounting of rents, royalties, and profits derived from the Big Thicket National Preserve, the Davy Crockett National Forest, and the Sam Houston National Forest. The United States has not waived its sovereign immunity as to plaintiff's claims, and plaintiff's complaint does not identify an applicable waiver of sovereign immunity. Thus, this Court lacks subject-matter jurisdiction over plaintiff's complaint and it should be dismissed.

Even if there were a waiver of sovereign immunity, plaintiff's claims are time-barred. Plaintiff's reservation was created by Texas in the 19th Century, and at that time plaintiff knew or should have known it was dispossessed of the lands at issue in this case. Plaintiff was organized as an Indian tribe in 1938, and plaintiff knew or should have known that it was dispossessed of the lands at issue in this case at that time. The Big Thicket National Preserve was established in 1974, the Sam Houston National Forest was established in 1934, and the Davy Crockett National Forest was also established in 1934. Thus, plaintiff knew or should have

known that it was dispossessed of the lands at issue in this case no later than 1974. Because all acts or omissions that give rise to plaintiff's alleged claims occurred more than six years prior to the filing of plaintiff's complaint—and all such acts or omissions were actually known to plaintiff or were objectively knowable to plaintiff long before 2006—plaintiff's claims are untimely and this court lacks subject-matter jurisdiction to hear those claims.

Should the Court determine that it has jurisdiction over plaintiff's claims, plaintiff's complaint should be dismissed because it fails to allege facts that legally entitle it to relief. Assuming the allegations in plaintiff's complaint to be true, plaintiff alleges nothing more than Indian title to lands within the Big Thicket National Preserve, the Sam Houston National Forest, and the Davy Crockett National Forest. Courts have long recognized that Indian title does not confer legal rights to Indians, but instead a right of permissive occupation. Thus, Indian title alone does not entitle plaintiff to the relief it seeks: a possessory trust interest in the land that confers regulatory and financial interests. As such, plaintiff's complaint fails to state a claim and should be dismissed.

II. STANDARD OF REVIEW

The party asserting jurisdiction bears the burden of proof on a Fed. R. Civ. P. 12(b)(1) motion to dismiss. *Randall D. Wolcott, M.D., P.A. v. Sebelius*, 635 F.3d 757, 762 (5th Cir. 2011). In considering a motion to dismiss for lack of subject-matter jurisdiction under Fed. R. Civ. P. 12(b)(1), dismissal is proper when it appears certain that the plaintiff cannot prove any set of facts in support of its claim which would entitle it to relief. *Saraw P'ship v. United States*, 67 F.3d 567, 569 (5th Cir. 1995) (quoting *Hobbs v. Hawkins*, 968 F.2d 471, 475 (5th Cir. 1992)). Moreover, under Fed. R. Civ. P. 12(b)(1), the Court is permitted to look at evidence in the record beyond simply those facts alleged in the complaint and its proper attachments. *Ambaraco, Inc. v. Bossclip B.V.*, 570 F.3d 233, 238 (5th Cir. 2009) (quoting *Ginter ex rel. Ballard v. Belcher,*

Prendergast & Laporte, 536 F.3d 439, 441 (5th Cir. 2008) (Dennis, J., dissenting)). The Court may base its disposition of a motion to dismiss for lack of subject-matter jurisdiction on the complaint alone, the complaint supplemented by undisputed facts evidenced in the record, or the complaint supplemented by undisputed facts plus the Court's resolution of disputed facts. *Ynclan v. Dep't of the Air Force*, 943 F.2d 1388, 1390 (5th Cir. 1991) (citing *Williamson v. Tucker*, 645 F.2d 404, 413 (5th Cir. 1981)). If the Court lacks subject-matter jurisdiction, it has to dismiss the case. Fed. R. Civ. P. 12(h)(3).

Fed. R. Civ. P. 12(b)(6) allows a party to move for dismissal of a complaint when the plaintiff has failed to state a claim upon which relief can be granted. In order to survive a Fed. R. Civ. P. 12(b)(6) motion to dismiss, a plaintiff's pleadings must allege "enough to raise a right to relief above the speculative level" with facts sufficient to "state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007); *see also Elsensohn v. Saint Tammany Parish Sherriff's Office*, 530 F.3d 368, 372 (5th Cir. 2008). A facially plausible claim "pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1949 (2009). The plaintiff need not provide detailed factual allegations, but the plaintiff must provide more than a "formulaic recitation of the elements of a cause of action." *Twombly*, 550 U.S. at 555.

III. ARGUMENT

A. The United States Has Not Waived its Sovereign Immunity as to Plaintiff's Claims.

"Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit. Sovereign immunity is jurisdictional in nature. Indeed, the 'terms of [the United States'] consent to be sued in any court define that court's jurisdiction to entertain the suit.'"

F.D.I.C. v. Meyer, 510 U.S. 471, 475 (1994) (quoting *United States v. Sherwood*, 312 U.S. 584, 586 (1941)) (citations omitted, alteration in original). A waiver of sovereign immunity "cannot be implied but must be unequivocally expressed." *United States v. King*, 395 U.S. 1, 4 (1969). Sovereign immunity is jurisdictional and, therefore, deprives the Court of the ability to hear the merits of the claim altogether. *Koehler v. United States*, 153 F.3d 263, 267 (5th Cir. 1998). Plaintiff bears the burden of showing Congress's unequivocal waiver of sovereign immunity. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994).

Plaintiff does not explicitly state in its complaint how it believes the United States has waived its sovereign immunity as to plaintiff's claims, but it does identify numerous jurisdictional statutes. Complaint, ¶ 10 (ECF Docket No. 1). In addition to certain statutes, plaintiff's complaint also references undefined "fiduciary duties." *See id.*, ¶ 96. Neither the statutes cited by plaintiff in its complaint, nor "federal common law," nor the general trust relationship between the United States and Indian tribes waives the United States' sovereign immunity as to the claims advanced by plaintiff in its complaint. Thus, plaintiff's complaint should be dismissed for lack of subject-matter jurisdiction.

1. General jurisdictional statutes do not waive sovereign immunity.

In its complaint, plaintiff cites to general jurisdictional statutes, 28 U.S.C. §§ 1331 and 1362. It is well settled that sovereign immunity is not waived by a general jurisdictional statute such as 28 U.S.C. § 1331. *Voluntary Purchasing Groups, Inc. v. Reilly*, 889 F.2d 1380, 1385 (5th Cir. 1989). 28 U.S.C. § 1362 was not intended to waive federal government's own sovereign immunity, nor to abrogate sovereign immunity of the several states. *Standing Rock Sioux Indian Tribe v. Dorgan*, 505 F.2d 1135, 1140 (8th Cir. 1974). Thus, the general jurisdictional statutes cited in plaintiff's complaint do not waive the United States' sovereign immunity.

2. Plaintiff's citation to the Tucker Act and Little Tucker Act are misplaced.

Plaintiff cites to the Tucker Act (28 U.S.C. § 1491) and the Little Tucker Act (28 U.S.C. § 1346) as a basis for jurisdiction. Complaint, ¶ 10. Because plaintiff admits that it seeks only "declaratory and injunctive relief" in this case (*id.*), not money damages, the Tucker Act and the Little Tucker Act do not operate to waive the United States' sovereign immunity as to plaintiff's claims. The Little Tucker Act provides that district courts have subject matter jurisdiction over certain damages claims against the United States, such as those that are founded on the Constitution. 28 U.S.C. § 1346. This statute, together with the Tucker Act, 28 U.S.C. § 1491, constitutes a waiver of sovereign immunity with respect to the claims prescribed in the Act. *United States v. Mitchell*, 463 U.S. 206, 212 (1983) ("*Mitchell II*"). However, this waiver extends only to claims for monetary damages, and does not extend to claims for equitable relief. *Crocker v. United States*, 125 F.3d 1475, 1476 (Fed. Cir. 1997). Thus, the Tucker Act and Little Tucker Act do not waive the United States' sovereign immunity as to plaintiff's claims for injunctive and declaratory relief. Plaintiff's complaint does not seek monetary damages and, if it did, any claims in excess of $10,000 are exclusively within the jurisdiction of the United States Court of Federal Claims.

3. The Non-Intercourse Act does not waive the United States' sovereign immunity.

Plaintiff asserts that this court has jurisdiction over its claims by operation of the Non-Intercourse Act (25 U.S.C. § 177). In relevant part, the Non-Intercourse Act provides 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." *Id.* The Non-Intercourse Act does not waive the states' sovereign immunity. *Ysleta Del Sur Pueblo v. Laney,*

199 F.3d 281, 285 (5th Cir. 2000). Likewise, the Non-Intercourse Act does not waive the United States' sovereign immunity. The Non-Intercourse Act regulates commerce with the Indians and a waiver of federal sovereign immunity is not "unequivocally expressed" in the statutory text. *See United States v. King*, 395 U.S. 1, 4 (1969) (a waiver of sovereign immunity "cannot be implied but must be unequivocally expressed"). Even the civil penalty provision of the Non-Intercourse Act (not relevant here) is limited to persons "not being employed under the authority of the United States." 25 U.S.C. § 177. A waiver of sovereign immunity "must be strictly construed in favor of the United States," *Ardestani v. INS*, 502 U.S. 129, 137 (1991), and not enlarged beyond what the language of the statute requires, *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685–686 (1983). Thus, just as the Non-Intercourse Act does not waive the states' Eleventh Amendment sovereign immunity, it does not waive the United States' sovereign immunity.

4. The Administrative Procedures Act Does Not Waive the United States' Sovereign Immunity as to Plaintiff's Claims.

Plaintiff cites to the judicial review provisions of the Administrative Procedures Act ("APA") (5 U.S.C. §§ 701, *et seq*.) in its complaint. Complaint, ¶ 10. Although the APA waives the United States' sovereign immunity as to some claims, it does not operate to waive the United States' sovereign immunity as to the specific claims advanced by plaintiff in its complaint.

The APA provides a limited waiver of sovereign immunity and allows judicial review of federal agency actions by "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute . . . ." 5 U.S.C. § 702. Judicial review under the APA is limited to "compel agency action unlawfully withheld or unreasonably delayed" or to review of final agency action based upon one or more of six enumerated bases. 5 U.S.C. § 706; *see also* 5 U.S.C. § 704 (APA review limited to "final agency action for which there is no other adequate remedy in a court are subject to judicial

review"). To be entitled to judicial review under the APA, a plaintiff must allege that a discreet, non-discretionary, agency action required by law is

> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
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> (B) contrary to constitutional right, power, privilege, or immunity;
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> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
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> (D) without observance of procedure required by law;
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> (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
>
> (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

5 U.S.C. § 706; *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 63-64 (2004) ("*SUWA*"). Here, plaintiff's claims do not fall within the four corners of the APA, thus the APA's waiver of sovereign immunity does not attach to plaintiff's claims.

Plaintiff asserts in its complaint that the United States unlawfully alienated its aboriginal lands by either failing to evict settlers or by failing to protect or preserve aboriginal lands. Complaint, ¶¶ 3, 22, 91, 96. It is unclear what specific actions (if any) by the United States caused the allegedly illegal alienation. A liberal reading of the complaint evinces some possibilities: a policy of failing to evict settlers from the tribe's aboriginal lands (*id.*, ¶¶ 3, 22); exercising control over mineral interests within the Big Thicket National Preserve since 1974 (*id.*, ¶ 32); exercising control over mineral, timber, and other natural resources within the Sam Houston National Forest and Davy Crockett National Forest since 1934 (*id.*, ¶¶ 48, 50); or breaches of some unspecified general trust obligation to preserve plaintiff's Indian title to minerals, timber, and other natural resources (*id.*, ¶¶ 43, 78, 85, 96). The claims in plaintiff's

complaint boil down to a dispute over the government's ability to issue permits and leases for the exploration and development of natural resources within the Preserve and Forests and a challenge to the United States' title to those lands.

Plaintiff challenges the fact that the Parks Service and the Forest Service have issued and continue to issue leases pursuant to agency regulations within the Big Thicket National Preserve, the Sam Houston National Forest, and the Davy Crockett National Forest. *Id.*, ¶¶ 34-42, 58-86. Plaintiff does not claim that the leasing regulations are arbitrary, capricious, or contrary to law, and plaintiff does not challenge any specific lease or permit. *Id.* The APA requires plaintiff to challenge discreet final agency actions based on their own distinct administrative records. 5 U.S.C. § 706; *SUWA*, 542 U.S. at 64; *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743 (1985). Here, plaintiff's complaint is, at best, a "programmatic challenge" to the United States' routine leasing activities, as opposed to a challenge to a specific and discrete agency action (or discrete agency action withheld or unreasonably delayed), and does not fall within the ambit of the APA.

A plaintiff cannot use the APA to bring a collective challenge to a sweeping group of actions. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 892-93 (1990). In *Lujan*, the Supreme Court faced a challenge to 1,250 land classifications and withdrawal revocations by the Bureau of Land Management ("BLM"), which the plaintiff in *Lujan* dubbed BLM's "land withdrawal review program." 497 U.S. at 875, 877. Similarly, here, plaintiff challenges dozens (or hundreds) of leases, permits, and timber sales issued since 1934 as allegedly unlawful because of plaintiff's Indian title. *See* Complaint, ¶¶ 42, 64-65, 75, 84. In *Lujan*, the Supreme Court rejected plaintiff's challenge because the "program" was not an "agency action," much less a "final agency action," within the meaning of the APA:

> The term "land withdrawal review program". . . . does not refer to a single BLM order or regulation, or even to a completed universe of particular BLM orders and regulations. It is simply the name by which petitioners have occasionally referred 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 [statute].

497 U.S. at 890. Moreover, the Supreme Court explained that even if one land status determination were a "final agency action," plaintiff could not predicate its sweeping challenge on that single action:

> [I]t is at least entirely certain that the flaws in the entire "program"—consisting principally of the many individual actions referenced in the complaint, and presumably actions yet to be taken as well—cannot be laid before the courts for wholesale correction under the APA, simply because one of them that is ripe for review adversely affects one of respondent's members.

Id. at 892–93. The Supreme Court reiterated that under the terms of the APA, a plaintiff must "direct its attack against some particular 'agency action' that causes it harm." *Id.* at 891. Here, plaintiff does not challenge any particular agency action. Instead, plaintiff challenges a pattern of federal conduct that has occurred at least since Texas statehood in 1845. *See* Complaint, ¶ 21. As in *Lujan*, plaintiff's "programmatic challenge" does not fall within the ambit of the APA, and the APA does not operate as a waiver of the United States' sovereign immunity as to plaintiff's claims.

Plaintiff disavows that its lawsuit "seek[s] here to recover possession of its ancestral lands, or to remove anyone from their homes." Complaint, ¶ 7. But elsewhere in plaintiff's complaint, plaintiff clearly requests that this Court adjudicate property interests in land and declare that the United States "must consider and accommodate the Tribe's aboriginal title and incidental rights. . . ." *Id.*, ¶ 88, Prayer, ¶ B. Thus, plaintiff's complaint seeks to adjudicate how the United States holds property. The Quiet Title Act (28 U.S.C. § 2409a) provides "the exclusive means by which adverse claimants [can] challenge the United States' title to real

property." *Block v. N. Dakota ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273, 286 (1983). The Quiet Title Act applies to Indians challenging the United States' title to property. *United States v. Mottaz*, 476 U.S. 834, 842-43 (1986). Here, as in *Mottaz*, the United States holds title to land within the Big Thicket National Preserve, the Sam Houston National Forest, and the Davy Crockett National Forest for the Parks Service and the Forest Service (Complaint, ¶¶ 32, 48, 49, 51), not in trust for plaintiff, thus the Quiet Title Act applies to plaintiff's claims challenging the United States' title to those lands. 476 U.S. at 843.

The APA does not apply where other statutes preclude judicial review. 5 U.S.C. § 701(a)(1). The Quiet Title Act provides the exclusive means to challenge the United States' title to land, and it applies even where a plaintiff does not characterize its action as a quiet title action. *Mottaz*, 476 U.S. at 841-42; *see also Block*, 461 U.S. at 284-85 (holding the Quiet Title Act restrictions on suits cannot be circumvented with artful pleading). The Quiet Title Act precludes APA review of plaintiff's challenges to how the United States holds title to the Big Thicket National Preserve, the Sam Houston National Forest, and the Davy Crockett National Forest and thus the APA does not waive the United States' sovereign immunity as to plaintiffs' claims.

Plaintiff did not plead the Quiet Title Act as a basis for subject-matter jurisdiction in its complaint. In general, "the plaintiff is absolute master of what jurisdiction he will appeal to." *Healy v. Sea Gull Specialty Co.*, 237 U.S. 479, 480 (1915). Because plaintiff has not plead a Quiet Title Act claim, and, because plaintiff disavows any such claim in its complaint, the Quiet Title Act does not operate to waive the United States' sovereign immunity as to plaintiff's claims. Even if plaintiff were to assert a claim under the Quiet Title Act, such a claim is barred as discussed below.

To the extent that plaintiff seeks to pursue "federal common law" claims (Complaint, ¶¶

10, 21, 31, 85, 93, Prayer, ¶ A), those claims lack merit, the United States has not waived its sovereign immunity as to such claims, and the APA's waiver of sovereign immunity does not apply to "federal common law" claims. Although the relationship between the United States and Indian tribes has been described as a trust, "Congress may style its relations with the Indians a 'trust' without assuming all the fiduciary duties of a private trustee, creating a trust relationship that is 'limited' or 'bare' compared to a trust relationship between private parties at common law." *United States v. Jicarilla Apache Nation*, ___ U.S. ___, 131 S. Ct. 2313, 2323 (2011) (citing *United States v. Mitchell*, 445 U.S. 535, 542 (1980) ("*Mitchell I*") and *Mitchell II*, 463 U.S. at 224). Indian tribes cannot simply rely upon common law duties imposed on a trustee; instead, tribes must point to specific statues and regulations that "establish [the] fiduciary relationship and define the contours of the United States' fiduciary responsibilities." *Jicarilla*, 131 S. Ct. at 2325 (quoting *Mitchell II*, 463 U.S. at 224). "When 'the Tribe cannot identify a specific, applicable, trust-creating statute or regulation that the Government violated,. . . . neither the Government's 'control' over [Indian assets] nor common-law trust principles matter.'" *Jicarilla*, 131 S. Ct. at 2325 (quoting *United States v. Navajo Nation*, 556 U.S. 287, 302 (2009)). Thus, plaintiff does not have a freestanding, independent, "federal common law" breach of trust cause of action against the United States. Plaintiff must identify a rights-creating statute or regulation, and, because its complaint fails to do so, the United States has not waived its sovereign immunity as to plaintiff's "federal common law" claims (if any).

Additionally, the APA does not include within its waiver of sovereign immunity "federal common law" claims by Indians, as held by the United States Court of Appeals for the District of Columbia Circuit and the United States District Court for the District of Columbia. The common law allows no claims for breach of trust against the United States. *See Cobell v. Babbitt*, 91 F.

Supp. 2d 1, 29 (D.D.C. 1999) (*Cobell V*); *see also Cobell v. Norton*, 240 F.3d 1081, 1104 (D.C. Cir. 2001) ("*Cobell VI*") ("No common law claim for an accounting is cognizable. . . ."); *Cobell v. Norton*, 392 F.3d 461, 472 (D.C. Cir. 2004) (*Cobell XIII*) ("Insofar as plaintiffs may have said that [they could invoke all the rights that a common law trust entails against the government in this case], they were wrong."); *see also Gros Ventre Tribe v. United States*, 469 F.3d 801 (9th Cir. 2006) (concluding that tribes have no common law action for breach of trust independent of statutory rights). This Court does not possess the discretion of a "private-law chancellor" in fashioning any remedy. *Cobell v. Norton*, 428 F.3d 1070, 1077 (D.C. Cir. 2005) ("*Cobell XVII*"). General references to "federal common law" do not bring plaintiff's claims within the purview of the APA, and this Court lacks subject-matter jurisdiction over those claims.

Finally, the APA does not act as a general waiver of the United States' sovereign immunity from suits for injunctive or declaratory relief. 5 U.S.C. § 702 waives sovereign immunity only for actions brought under the APA. *See Bowen v. Massachusetts*, 487 U.S. 879, 892-93 (1988); *see also Dep't of Army v. Blue Fox, Inc.*, 525 U.S. 255, 260-263 (1999) (holding that waiver of sovereign immunity for non-monetary claims is limited to claims seeking specific relief).

That conclusion flows from the structure of 5 U.S.C. § 702. When Congress amended that provision in 1976 to waive partially the government's immunity from suit, it did not enact an entirely new provision of the United States Code. Instead, Congress inserted a waiver of immunity into the APA, and into 5 U.S.C. § 702 in particular. *See* An Act to Amend Chapter 7, Title 5, United States Code, With Respect to Procedure for Judicial Review of Certain Administrative Agency Action, and for Other Purposes, Pub L. No. 94-574 (1976), 90 Stat. 2721. By so doing, Congress ensured that the waiver would be confined to the causes of action

that 5 U.S.C. § 702 itself recognizes and codifies—*i.e.*, suits through which a "person suffering legal wrong because of agency action" or "adversely affected or aggrieved by agency action" has traditionally obtained "judicial review thereof." *Id.*; *see also Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992) (statutory construction must account for the "structure" of the statute); *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 645 (1990) (court has to "giv[e] effect to the meaning and placement of the words chosen by Congress").

The legislative history confirms that Congress intended to limit the waiver of immunity in 5 U.S.C. § 702 to claims cognizable under that provision. The House Report declared that, "[s]ince the Amendment is to be added to 5 U.S.C. section 702, it will be applicable only to functions falling within the definition of 'agency' in 5 U.S.C. section 701." H.R. Rep. No. 94-1656, at 11 (1976). The Department of Justice, speaking through then Assistant Attorney General Scalia, stated that "it is also an important factor in our support for the bill that the waiver of immunity, since it is made via section 702, will only apply to claims relating to improper official action; and will be subject to the other limitations of the Administrative Procedure Act. . . ." Administrative Procedure Act Amendments of 1976: Hearings Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary, 94th Cong., 2d Sess. 105 (1976). And the authors of the amendment—Dan M. Byrd and Professor Kenneth Culp Davis—stated that "[b]ecause the amendment is to be added to 5 U.S.C. § 702, it will be applicable only when those provisions are applicable." Sovereign Immunity: Hearing Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary, 91st Cong., 2d Sess. 59, 222 (1970). The mere fact that plaintiff's complaint seeks "relief other than money damages" alone does not waive the United States' sovereign immunity under the APA.

Plaintiff's citation to the APA in its complaint is insufficient to confer subject-matter

jurisdiction on this Court over plaintiff's claims. Plaintiff has failed to plead a cause of action cognizable under the APA and the United States has therefore not waived its sovereign immunity as to plaintiff's claims.

5. Plaintiff's claims do not fall within any waiver of the United States' sovereign immunity within the mandamus statute.

Plaintiff cites to the mandamus statute (28 U.S.C. § 1361) as a basis for jurisdiction in its complaint. Complaint, ¶ 10. Unlike several other circuits, the United States Court of Appeals for the Fifth Circuit has held that the mandamus statute is a waiver of sovereign immunity. *Sheehan v. Army and Air Force Exch. Serv.*, 619 F.2d 1132, 1140 (5th Cir. 1980), *rev'd on other grounds*, 456 U.S. 728 (1982). But, 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." *Id.* at 1141. Because the claims in plaintiff's complaint do not meet the requirements of the mandamus statute, that statute does not waive the United States' sovereign immunity as to plaintiff's claims.

Jurisdiction under 28 U.S.C. § 1361 is "strictly confined." *In re Cheney*, 406 F.3d 723, 729 (D.C. Cir. 2005). A writ of mandamus is a "'drastic and extraordinary' remedy 'reserved for really extraordinary causes.'" *Cheney v. United States Dist. Ct. for Dist. of Columbia*, 542 U.S. 367, 380 (2004) (quoting *Ex parte Fahey*, 332 U.S. 258, 259-60 (1947)). As noted above, to obtain this writ, plaintiff needs to establish "(1) a clear right to the relief, (2) a clear duty by the respondent to do the act requested, and (3) the lack of any other adequate remedy." *Davis v. Fechtel*, 150 F.3d 486, 487 (5th Cir. 1998) (citation omitted). The allegations in plaintiff's complaint do not meet this rigorous standard.

The Court's decision to not exercise jurisdiction under the mandamus statute is discretionary. *Franchi v. Manbeck*, 972 F.2d 1283, 1289 (Fed. Cir. 1992); *see also Nat'l Wildlife*

Fed'n v. United States, 626 F.2d 917, 923 (D.C. Cir. 1980) ("Mandamus is issued at the discretion of the court."). The test for jurisdiction under the mandamus statute is "whether mandamus would be an appropriate means of relief." *Jones v. Alexander*, 609 F.2d 778, 781 (5th Cir. 1980). Plaintiff seeks two forms of relief in its complaint: that the United States "consider and accommodate the Tribe's aboriginal title and incidental rights prior to issuing or approving permits or leases for, or taking other federal actions relating to, operations of activities" within the Big Thicket National Preserve, the Sam Houston National Forest, and the Davy Crockett National Forest (Complaint, Prayer, ¶¶ B, C); and a "full accounting of the revenues and profits" from leasing and permitting activities in the Big Thicket National Preserve, the Sam Houston National Forest, and the Davy Crockett National Forest (*id.*, Prayer, ¶ D). Neither of the foregoing constitutes a "clear duty" to which plaintiff has a "clear right to relief," thus mandamus is inappropriate.

The extraordinary remedy of mandamus should only issue to compel the performance of "a clear nondiscretionary duty." *Pittston Coal Group v. Sebben*, 488 U.S. 105, 121 (1988) (citation omitted). Here, plaintiff seeks an order compelling the Departments of the Interior and Agriculture to exercise their discretion: to "consider and accommodate." Plaintiff does not request that an officer of the United States perform a duty outlined by statute or regulations, instead plaintiff seeks an adjudication of the United States' general obligations to the tribe (if any) with respect to the Big Thicket National Preserve, the Sam Houston National Forest, and the Davy Crockett National Forest. Such claims do not fall within the confines of the mandamus statute and 28 U.S.C. § 1361 does not waive the United States' sovereign immunity as to those claims.

Plaintiff seeks a "full accounting," but its complaint is bereft of any citation to a statute,

regulation, or other substantive source of law that entitles plaintiff to such an accounting. The United States has no obligation to provide an Indian tribe with an accounting of non-trust assets. To be clear, plaintiff nowhere alleges in its complaint that lands within the Big Thicket National Preserve, the Sam Houston National Forest, and the Davy Crockett National Forest are trust or restricted lands. *See* 25 C.F.R. § 115.002 ("Trust land(s) means any tract or interest therein, that the United States holds in trust status for the benefit of a tribe or an individual Indian."). Instead, plaintiff only claims allegedly unextinguished Indian title to those lands. *See* Complaint, ¶¶ 26, 88, 91. Plaintiff has failed to allege, and cannot allege, that Indian title alone entitles it to an accounting of assets held outside of trust by the United States. No statute or regulation provides for such an accounting, thus the requested accounting is not a "clear right" to relief falling within the terms of the mandamus statute.

Additionally, the United States has no common law duty to provide Indians with an accounting of assets. *Cobell VI*, 240 F.3d at 1104. The statute that specifically addresses the United States' accounting obligations to Indian tribes, the American Indian Trust Fund Management Reform Act of 1994, 25 U.S.C. § 162a(d) and 25 U.S.C. §§ 4001, *et seq.*, is limited, by its terms, to an accounting of "*funds* held in trust by the United States for the benefit of an Indian tribe. . . ." 25 U.S.C. § 4011(a) (emphasis added). Thus, the United States is not obligated to provide plaintiff with an "accounting" of "leases and permits for oil and natural gas exploitation" (Complaint, Prayer, ¶ D), and because plaintiff concedes in its complaint that lands within the Big Thicket National Preserve, the Sam Houston National Forest, and the Davy Crockett National Forest are not held in trust, any proceeds derived from those lands are not trust funds (*see* 25 C.F.R. § 115.002 ("Trust funds means money derived from the sale or use of trust lands, restricted fee lands, or trust resources and any other money that the Secretary must accept

into trust.")). No statute entitles plaintiff to the accounting requested.

Plaintiff's complaint, liberally construed, does not establish a clear nondiscretionary duty that a federal official has failed to perform and a corresponding clear right to the relief requested. Thus, plaintiff's complaint fails to state a claim under the mandamus statute, that statute does not waive the United States' sovereign immunity as to plaintiff's claims, and plaintiff's complaint should be dismissed for lack of subject-matter jurisdiction.

Moreover, the Quiet Title Act is an adverse claimant's exclusive means to challenge the United States' title to real property. *School Bd. of Avoyelles Parish v. Dept. of Interior*, 647 F.3d 570, 580 (5th Cir. 2011); *United States v. 85,237 Acres of Land*, 129 F.3d 606, 606 (5th Cir. 1997) (unpublished). Several circuit courts have held that the Quiet Tile Act is plaintiff's exclusive remedy, even where plaintiff's complaint does not assert a Quiet Title Act claim, if plaintiff's complaint requires an adjudication of the United States' property interests. *See Shawnee Trail Conservancy v. Dept. of Agric.*, 222 F.3d 383, 387-8 (7th Cir. 2000) (challenge to United States' regulatory authority over roads under theory that Forest Service did not own necessary property rights was limited to Quiet Title Act claim); *Rosette, Inc. v. United States*, 141 F.3d 1394, 1397 (10th Cir. 1998) (dismissing a declaratory judgment action brought outside the Quiet Title Act because plaintiff's claims were "all linked to the question of title"); *Metro. Water Dist. of S. Cal. v. United States*, 830 F.3d 139, 143 (9th Cir. 1987) (Quiet Title Act is exclusive remedy where "[t]he effect of a successful challenge would be to quiet title" of lands of the United States in others). Should this Court issue the mandamus requested by plaintiff, the effect would be to alter the United States' title to the lands within the Big Thicket National Preserve, the Sam Houston National Forest, and the Davy Crockett National Forest. Thus, because plaintiff's complaint challenges the United States' title to land, the Quiet Title Act is the

exclusive means by which plaintiff can advance its claims, regardless of the fact that plaintiff has plead a mandamus claim. *Shawnee Trail Conservancy*, 222 F.3d at 388.

B. Plaintiff's Claims, If Any, Are Time-Barred.

Plaintiff's claims are untimely under either the general statute of limitations applicable to claims against the United States (28 U.S.C. § 2401(a)) or the limitations period under the Quiet Title Act (28 U.S.C. § 2409a(g)). "Limitations periods in statutes waiving sovereign immunity are jurisdictional, and a court exercising its equitable authority may not expand its jurisdiction beyond the limits established by Congress." *Ramming v. United States*, 281 F.3d 158, 165 (5th Cir. 2001). "Unlike an ordinary statute of limitations, [28 U.S.C.] § 2401(a) is a jurisdictional condition attached to the government's waiver of sovereign immunity. . . ." *Spannus v. U.S. Dep't of Justice*, 824 F.2d 52, 55 (D.C. Cir. 1987). Similarly, the Quiet Title Act's limitations period is jurisdictional. *Lasyone v. United States*, 30 F.3d 1490, 1994 W.L. 379695 (5th Cir. 1994) (unpublished); *see also Bank One Tex. v. United States*, 157 F.3d 397, 402 (5th Cir. 1998) ("the [Quiet Title Act's] statute of limitations manifests a condition" to the United States' waiver of sovereign immunity).

1. Plaintiff's breach of trust claims accrued long before 2006.

Plaintiff claims that the United States breached either its trust obligations or the Non-Intercourse Act by alienating its aboriginal lands. *See* Complaint, ¶¶ 3, 22. Based on the facts as alleged in the complaint, that alienation occurred no later than 1974. Plaintiff asserts that the United States "stood idly by" as settlers "began expelling the Tribe from its ancestral lands" beginning with Texas statehood in 1845. Complaint, ¶ 3. When admitted to the Union, Texas retained "all the vacant and unappropriated lands lying within its limits." *United States v. Texas*, 339 U.S. 707, 714 (1950). In 1854 the State of Texas set aside "twelve hundred and eighty acres of vacant and unappropriated land, situated in either Polk or Tyler counties, or both,. . . . for the

sole use and benefit of, and as a home for" the tribe. Gammel, Hans Peter Mareus Neilsen, *The Laws of Texas, 1822-1897*, Volume 4, 68-69 (1898), University of North Texas Libraries, The Portal to Texas History, http://texashistory.unt.edu; crediting UNT Libraries, Denton, Texas. 1,280 acres is substantially less than the 105,000 acres of the Big Thicket National Preserve (Complaint, ¶ 32), the 163,000 acres of the Sam Houston National Forest (*id.*, ¶ 48), or the 160,000 acres of the Davy Crockett National Forest (*id.*). Thus, by the 1860s, plaintiff knew or should have known that it had been provided a reservation substantially smaller in size than its alleged aboriginal land base and that Texas exercised dominion over the remainder of its aboriginal lands.

In 1934 the Sam Houston National Forest and the Davy Crockett National Forest were created. *Id.*, ¶ 48. The lands within the Sam Houston National Forest and the Davy Crockett National Forest are outside plaintiff's reservation boundary. *See* Exhibit 1 (map of Sam Houston National Forest)[1/]; Exhibit 2 (map of Davy Crockett National Forest)[2/]; *c.f.* Exhibit 4 (modified claim area)[3/]. Since 1934, plaintiff has known or should have known that the United States exercised control over the Sam Houston National Forest and the Davy Crockett National Forest and was leasing resources within those Forests without "cosider[ing] or accommodat[ing]"

[1/] The Court may take judicial notice of this exhibit because it establishes a fact that is not subject to reasonable dispute because it is generally known within the Court's jurisdiction and can be accurately and readily determined from the Forest Service website (*see* National Forests and Grasslands in Texas, Maps & Publications, http://www.fs.usda.gov/detail/texas/maps-pubs/?cid=FSWDEV3_008434, last visited May 4, 2012). Fed R. Evid. 201 (b).

[2/] The Court may take judicial notice of this exhibit because it establishes a fact that is not subject to reasonable dispute because it is generally known within the Court's jurisdiction and can be accurately and readily determined from the Forest Service website (*see* National Forests and Grasslands in Texas, Maps & Publications, http://www.fs.usda.gov/detail/texas/maps-pubs/?cid=FSWDEV3_008434, last visited May 4, 2012). Fed R. Evid. 201 (b).

[3/] Plaintiff references the modified claim area in its complaint (Complaint, ¶¶ 7 n.1, 26), but it appears that plaintiff did not attach a copy of the map of the claim area to its complaint.

plaintiff's alleged Indian title. *See Texas Comm. on Natural Res. v. Bergland*, 573 F.2d 201, 204 (5th Cir. 1978) (observing that the "United States owns approximately 662,000 acres" in, *inter alia*, the Davy Crockett National Forest and that lands are "available for timber management purposes. . . . administered by the United States Forest Service."); *Texas v. U.S. Forest Serv.*, 654 F. Supp. 289, 290-91 (S.D. Tex. 1986) (discussing 1978 environmental impact statement addressing, among other things, "timber foresting" in the Sam Houston National Forest).

The Big Thicket National Preserve was established in 1974. Complaint, ¶ 32. The Big Thicket National preserve is located exclusively outside of plaintiff's reservation. *See* Exhibit 3 (map of Big Thicket National Preserve).[4/] Congress authorized the United States to acquire the lands for the Preserve through donation, purchase, or transfer and provided that "any federally owned lands within the preserve shall, with the concurrence of the head of the administering agency, be transferred to administrative jurisdiction" of the Secretary of Agriculture. 16 U.S.C. § 698(c). Plaintiff knew or should have known since 1974 that the United States owned and leased or permitted land within the Preserve without "cosider[ing] or accommodat[ing]" plaintiff's alleged Indian title.

As early as 1961, the Indian Claims Commission held that upon Texas's admission to the Union "Texas was permitted to retain an exclusive proprietary interest and control over all public lands within its borders. The federal government has never owned or claimed to have owned public lands in the State of Texas. . . . [and Texas's] laws never accorded recognition to the

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[4/] The Court may take judicial notice of this exhibit because it establishes a fact that is not subject to reasonable dispute because it is generally known within the Court's jurisdiction and can be accurately and readily determined from the National Parks Service website (*see, e.g.*, Big Thicket General Management Plan—Newsletter #2: Draft Management Alternative Maps, available at http://parkplanning.nps.gov/document.cfm?parkID=32&projectID=23065&documentID=37182 http://www.nps.gov/bith/index.htm, last visited May 4, 2012). Fed R. Evid. 201 (b).

Indians' right of occupancy." *Caddo Tribe of Okla v. United States*, 9 Ind. Cl. Comm. 557, 557-58 (1961). In 1972, plaintiff filed a motion to intervene in the *Caddo* Indian Claims Commission Act case, alleging "aboriginal occupancy of fifteen counties in east-central Texas. . . ." *Caddo Tribe of Okla. v. United States*, 27 Ind. Cl. Comm. 1, 2 (1972). Plaintiff's motion was granted. *Id.* at 6. As of 1972, plaintiffs knew or should have known that any Indian title it may have in Texas outside of its reservation boundaries was either extinguished by Texas's admission to the Union or was not recognized by the United States or Texas.

Claims against the United States must be "filed within six years after the right of action first accrues." 28 U.S.C. § 2401(a). A cause of action first accrues when a party has either actual or constructive knowledge of the facts forming the basis of his cause of action. *Piotrowski v. City of Houston*, 237 F.3d 567, 576 (5th Cir. 2001); *Vigman v. Cmty. Nat. Bank & Trust Co.*, 635 F.2d 455, 459 (5th Cir. 1981). "[S]tatutes of limitations are to be applied against the claims of Indian tribes in the same manner as against any other litigant seeking legal redress or relief from the government." *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1576 (Fed. Cir. 1988).

When assessing whether plaintiff's claims are timely, the proper focus is on "first accrual" and a "cause of action against an administrative agency 'first accrues,' within the meaning of [28 U.S.C.] § 2401(a), as soon as. . . . the person challenging the agency action can institute and maintain a suit in court." *Spannaus v. Dept. of Justice*, 824 F.2d 52, 56 (D.C. Cir. 1987). A claim first accrues when the operative facts exist and are not inherently unknowable. *Menominee Tribe v. United States*, 726 F.2d 718, 720-22 (Fed. Cir. 1988). Indian beneficiaries, no less than anyone else, are charged with notice of whatever facts that an inquiry appropriate to the circumstances would have uncovered. *Id.* Inquiry notice is evaluated by an objective

standard. *Fallini v. United States*, 56 F.3d 1378, 1380 (Fed. Cir. 1995). This objective standard applies equally to Indian breach of trust claims. *San Carlos Apache Tribe v. United States*, 639 F.3d 1346, 1350 (Fed. Cir. 2011).

In this case, it is beyond cavil that plaintiff knew or reasonably should have known of its claims long before 2006. To the extent plaintiff claims that the United States conveyed plaintiff's aboriginal lands without authority "by treaty or convention entered into pursuant to the Constitution" (25 U.S.C. § 177), in derogation of the Non-Intercourse Act, that claim accrued in 1845 when Texas entered the Union (Complaint, ¶ 21), in 1934 when the Sam Houston National Forest and the Davy Crockett National Forest were established (*id.*, ¶ 48), or in 1974 when the Big Thicket National Preserve was established (*id.*, ¶ 32). Similarly, to the extent plaintiff claims the United States breached its trust duties to plaintiff, the United States took actions inconsistent with the alleged trust duty to protect plaintiff's Indian title in either 1934 when the Sam Houston National Forest and the Davy Crockett National Forest were established (*id.*, ¶ 48), or in 1974 when the Big Thicket National Preserve was established (*id.*, ¶ 32) and the United States took title to those lands in its own name, not in trust for plaintiff. Plaintiff was well aware of the fact that its Indian title to the lands at issue in this case had been abrogated or impaired and transferred to private parties, the State of Texas, or the United States by 1972, when it sought to intervene in the *Caddo* Indian Claims Commission Act proceedings. At a minimum, plaintiff was aware of its claims in 1983 when it obtained a congressional reference for its aboriginal land claims.[5/] *Id.*, ¶ 25. Because the acts or omissions by the United States that give rise to plaintiff's

[5/] In so-called "congressional reference" cases, Congress refers proposed private bills to the United States Claims Court for an initial determination of the merits of the claim, but retains final authority over the ultimate appropriation. *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 431 (1990). Congress need not appropriate funds to satisfy the Court of Federal Claims recommendation, and the Court of Federal Claims findings and recommendation are not binding

claims occurred more than six years prior to the date that plaintiff filed its complaint, and because plaintiff actually knew or objectively should have known of such claims more than six years prior to the date that plaintiff filed its complaint, plaintiff's claims are time barred, the Court lacks subject-matter jurisdiction over plaintiff's complaint, and plaintiff's complaint should be dismissed. 28 U.S.C. § 2501(a).

2. Plaintiff's claims are also untimely under the Quiet Title Act.

As discussed above, plaintiff does not explicitly set forth a Quiet Title Act claim in its complaint. Nonetheless, if plaintiff's complaint is construed as asserting a Quiet Title Act claim (because it seeks adjudication of interests in federal lands), plaintiff's Quiet Title Act claim is untimely. The Quiet Title Act provides, in part, that

> [a]ny civil action under this section. . . . shall be barred unless it is commenced within twelve years of the date upon which it accrued. Such action shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States.

28 U.S.C. § 2409a(g). To establish that a Quiet Title Act claim is untimely, the "government need not [show] that [plaintiff] or his predecessor in interest had full knowledge of the United States' claim to the property, for a showing that he or his predecessor in interest had a reasonable awareness that the United States claimed an interest in the property is all that is required." *Lasyone*, 30 F.3d at 1490. For the same reasons as previously discussed, plaintiff knew or reasonably should have known that the United States claimed title in either 1934 when the Sam Houston National Forest and the Davy Crockett National Forest were established (Complaint, ¶ 48), or in 1974 when the Big Thicket National Preserve was established (*id.*, ¶ 32) and the United States took title to those lands in its own name, not in trust for plaintiff. Thus, plaintiff knew or should have known of its Quiet Title Act claim more than twelve years before it filed its

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on other courts. *Kanehl v. United States*, 38 Fed. Cl. 89, 96 (1997) ("the report from [the Court of Federal Claims] to Congress is advisory in nature and has no binding value as precedent.").

complaint and that claim is time barred. Plaintiff's complaint should accordingly be dismissed for lack of subject-matter jurisdiction.

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

Should the Court determine that it has subject-matter jurisdiction over plaintiff's claims, those claims still should be dismissed because plaintiff's complaint fails to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). In its complaint, plaintiff only claims Indian title to the lands within the Big Thicket National Preserve, the Sam Houston National Forest, and the Davy Crockett National Forest. *See* Complaint, ¶¶ 4 ("Tribe's aboriginal title"); 5 (same), 6 ("Tribe's rights to its aboriginal land"), 7 ("Tribe's aboriginal title"), 25 ("aboriginal title"), 26, 33, 43, 50, 66, 78, 85 (same). Indian title alone does not entitle plaintiff to a declaration that the United States "must consider and accommodate the Tribe's aboriginal title and incidental rights prior to issuing or approving permits or leases for, or taking other federal actions relating to, operations or activities on or under land" or to an "equitable accounting for the revenues the Federal Government has derived." Complaint, ¶ 8, Prayer, ¶ B.

Indian title is a right "to roam certain territory to the exclusion of any other Indians and in contradistinction to the custom of early nomads to wander at will in the search for food." *Northwestern Bands of Shoshone Indians v. United States*, 324 U.S. 335, 338-39 (1945). To establish Indian title, plaintiff must establish actual, exclusive, and continuous use and occupancy "for a long time" prior to loss of the land. *Confederated Tribes of the Warm Springs Reservation of Or. v. United States*, 177 Ct. Cl. 184, 194 (1966). Indian title denotes "mere possession not specifically recognized as ownership by Congress." *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 279 (1955). Indian title "is not a property right but amounts to 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.* The permissive occupation conferred by Indian title does not grant legal rights. *Hynes v. Grimes Packing Co.*, 337 U.S. 86, 101 (1949).

The United States may extinguish Indian title by "purchase or conquest." *Johnson v. McIntosh*, 21 U.S. 543, 585-88 (1823). Because Congress is empowered to dispose of public property, Congress can allocate the benefits of reservation lands without also recognizing title. *See United States v. Jim*, 409 U.S. 80, 83 (1972) (1933 Act adding certain lands in Utah to the Navajo Reservation and setting aside mineral royalties for Indians did not create property rights). Congress has supreme authority to extinguish Indian title and "[t]he manner, method and time of such extinguishment raise political, not justiciable issues." *United States v. Santa Fe Pac. R. Co.*, 314 U.S. 339, 347 (1941).

"A common idiom describes property as a 'bundle of sticks'—a collection of individual rights which, in certain combinations, constitute property." *United States v. Craft*, 535 U.S. 274, 278 (2002). Assuming for purposes of this motion that Indian title is a "stick" in the bundle of property rights, that interest alone does not entitle plaintiff to regulatory control over the Big Thicket National Preserve, the Sam Houston National Forest, or the Davy Crockett National Forest. Indian title vests only a permissive right of occupancy, not ownership, and Indian title "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. Although Indian title may give rise to a cause of action against third-parties for unlawful occupation (*Cnty. of Oneida v. Oneida Indian Nation of N.Y.*, 470 U.S. 226, 236 (1985) ("*Oneida II*")), Indian title, even in conjunction with acquired fee title by the Indian tribe, does not allow a tribe to "rekindl[e] embers of sovereignty that long ago grew cold" (*City of Sherrill v. Oneida Indian Nation of N.Y.*,

544 U.S. 197, 214 (2005)).

The ability to regulate the use and ownership of land is a sovereign power. *See Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 289 (1997) (state sovereign control over submerged lands is "critical to a State's ability" to regulate such lands and antecedent navigable waters). Because the only property interest arguably created by Indian title is a permissive right of occupancy, Indian title alone does not confer upon plaintiff any sovereign powers and it is an inadequate property interest to entitle plaintiff to the relief it seeks in this case: regulatory authority, input, and control.

Indeed, Indian title is "good against all but the sovereign." *Oneida Indian Nation of N.Y. v. Cnty. of Oneida*, 414 U.S. 661, 667 (1974) ("*Oneida I*"). Thus, plaintiff's alleged Indian title entitles plaintiff to no relief whatsoever against the United States. This fact should be self-evident from the fact that plaintiff required a congressional reference and legislation to obtain any relief against the United States as to its aboriginal lands. Complaint, ¶ 5.

If this Court determines it has subject-matter jurisdiction over plaintiff's claim, the allegations in plaintiff's complaint, even if accepted as true, do not entitle it to the relief it seeks: regulatory control over land and an accounting of rents and proceeds from federal land. Thus, plaintiff's complaint fails to state a claim and should be dismissed.

IV. CONCLUSION

For the reasons stated herein, as may be set forth in reply, as may be advanced at argument, or as otherwise may be submitted with leave of court, Defendants respectfully request that their motion be granted in full and plaintiff's complaint be dismissed.

Respectfully submitted this 14th day of May, 2012,

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CERTIFICATE OF SERVICE

I hereby certify that, on May 14, 2012, I caused the attached document, the exhibits to the attached document, and the attached proposed order to be electronically filed with the Clerk of Court using the CM/ECF system, which will cause service and send notification of such filing to the following e-mail address:

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