No. 13-40644

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

THE ALABAMA-COUSHATTA TRIBE OF TEXAS,

Plaintiff-Appellant

v.

UNITED STATES OF AMERICA; THOMAS JAMES VILSACK; in his capacity as Secretary of the United States Department of Agriculture; SALLY JEWELL, in her capacity as Secretary of the United States Department of the Interior,

Defendants-Appellees

On Appeal from the
U.S. District Court for the District of Eastern Texas
(No. 2:12-cv-83)

APPELLANT'S OPENING BRIEF

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

A. **Parties:**

Plaintiff-Appellant:	Alabama-Coushatta Tribe of Texas
Defendant-Appellee's:	United States of America;
	THOMAS JAMES VILSACK, in his capacity as Secretary of the United

States Department of Agriculture;

SALLY JEWELL, in her capacity as Secretary of the United States Department of the Interior.

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C. **Unknown Recipients/Beneficiaries for final agency actions (lease, permits, etc..) to be taken within:**

1. The Big Thicket National Preserve;

2. The Davy Crocket National Forest;

3. The Sam Houston National Forest.

/s/ Andy Taylor
Andy Taylor

/s/ Scott David Crowell
Scott David Crowell

Attorneys for Plaintiff-Appellant Alabama-Coushatta Tribe of Texas

Statement Regarding Oral Argument

Appellant/Plaintiff Alabama-Coushatta Tribe of Texas affirmatively request oral argument on the appeal. A critical part of the appeal regards a matter that has not been authoritatively decided by this Circuit and oral argument provides an opportunity for the panel to seek any clarification or extension of the arguments addressed in the briefs and the supportive citations of authority.

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Jurisdictional Statement

The basis for the District Court's subject-matter jurisdiction is found within the jurisdictional grants of 28 U.S.C. § 1331(federal question) and 28 U.S.C. § 1362 (actions by Indian Tribes)[1]. The Tribe brings causes of action pursuant to the Administrative Procedures Act, 5 U.S.C. §§ 702 and 706, the Non-Intercourse Act, 5 U.S.C. § 177 et seq., the Declaratory Judgment Act, 28 U.S.C. §§ 1346 and 1491, and federal common law. See, e.g., *County of Oneida v. Oneida Indian Nation of New York State*, 470 U.S. 226, 236,105 S.Ct. 1245 (1985).

The basis for Appellate Court jurisdiction is found within the jurisdictional grant of 28 U.S.C. § 1291 (appeal from final decision of the District Court).

The Tribe's Appeal is timely. The Notice of Appeal appealing the District Court's Final Judgment of April 22, 2013 (ER 3 and OR at page 322)[2] was filed on June 10, 2013 (ER 2 at page 323), which falls within the sixty days required to timely appeal a civil action where the United States is a party. Fed.R.App.P 4(a)(1)(B). The Order appealed from, which grants Defendants' Motion to Dismiss and disposes of all the Tribe's claims, constitutes a final judgment.

[1] Appellant/Plaintiff also asserted a separate ground of jurisdiction in the District Court for its mandamus claim based on 28 U.S.C. § 1361. However, the Tribe is not pursuing this claim on appeal.

[2] Excerpt of Record is abbreviated as "ER" and the Original Court Record is abbreviated as "OR".

Statement of the Issues Presented for Review

1. Whether the District Court erred in ruling that allegations of failure to protect tribal aboriginal title from wrongful interference, other than extinguishment of title, are insufficient to establish a cause of action sounding in breach of fiduciary duty arising out of either the Non-Intercourse Act or federal common law.
2. Whether the District Court erred in ruling that Appellant/Plaintiff's Claims constituted a "programmatic" challenge that is not actionable under the Administrative Procedures Act, 5 U.S.C. § 706.
3. Whether the District Court erred in granting Federal Appellee/Defendants' Motion to Dismiss.

Statement of the Case

Appellant/Plaintiff Alabama-Coushatta Tribe of Texas, a federally recognized Indian Tribe (the "Tribe"), filed the action below on February 29, 2012. By its Complaint, the Tribe seeks equitable relief to redress the Federal Government's breaches of fiduciary duty under federal law to protect land and natural resources that are subject to the aboriginal title of the Tribe. ER 6 and OR at pages 9-28. In 2000, the Court of Federal Claims recognized that the Tribe holds unextinguished aboriginal title to over approximately 5.5 million acres of land in Texas. Further, the Court held that the Government had breached its fiduciary duty

to safeguard the Tribe's rights to that land against 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 encompassed historical wrongs—i.e., those that occurred before 1946. By the Complaint at issue in this appeal, the Tribe seeks prospective equitable relief against Federal Defendants' recent and ongoing breaches of fiduciary duty.

In its Complaint, the Tribe seeks to require the Federal Defendants to refrain from taking actions that facilitate third parties from wrongfully trespassing on lands subject to the Tribe's aboriginal title. Moreover, the Tribe seeks relief that ensures the Federal Defendants consider and take appropriate action to protect the Tribe when making discretionary decisions that impact the Tribe's rights related to its aboriginal title to such lands. 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. ER 6 and OR at pages 9-29.

On May 14, 2012, the Federal Defendants filed a Motion to Dismiss (the "Motion") pursuant to Fed.R.Civ.P 12(b)(1) and 12(b)(6) for (1) an alleged failure to state a claim and (2) a purported lack of an effective waiver of the United States' sovereign immunity from unconsented suit. The Motion was heard by United States Magistrate Judge Roy S. Payne on February 7, 2013, after which he issued a Report and Recommendation on March 8, 2013, recommending that Defendant's Motion to Dismiss be granted. ER 5 and OR at pages 282-289. On March 27, 2013, District Court Judge Rodney Gilstrap issued an Order accepting and clarifying the Magistrate's Report and Recommendation. ER 4 and OR at pages 315-317. On April 22, 2013, Judge Gilstrap issued a Final Judgment, and the Tribe filed a timely Notice of Appeal.

Statement of Facts Relevant to the Issues Submitted for Review

Because this matter was disposed of on Defendant's Motion to Dismiss, the facts at issue are those alleged in the Appellant/Plaintiff's Complaint, ER 6 and OR at pages 9-28, which for the purpose of the instant appeal, the allegations set forth therein must be considered as true. Amongst the key allegations:

1. Appellant/Plaintiff is a federally recognized Indian Tribe within the meaning of the Non-Intercourse Act. Complaint at pages 4 and 5.
2. Appellant/Plaintiff has an interest in and claim to certain lands, including federal enclaves within the area identified by the Federal Court of Claims

over which the Tribe still holds aboriginal title. Complaint at pages 5 and 6.

3. The Tribe's trust relationship with the United States was restored by an Act of Congress such that the relationship had never been terminated. Complaint at page 8.

4. The Federal Defendants have failed to take action to protect the Tribe's aboriginal title from wrongful trespass and interference by others. Complaint at pages 2 - 4, 6 - 17.

5. Discreet agency actions have been and are being taken on such federal enclaves without proper consideration and protection of the Tribe's aboriginal title. Complaint at pages 9 – 17.

Summary of the Argument

The District Court made two significant mistakes in its reasoning granting the Federal Defendant's Motion to Dismiss the Tribe's lawsuit, either of which requires reversal and remand of the final judgment back to the District Court with instructions that the lawsuit proceed on the merits.

First, the District Court incorrectly ruled that an action for breach of fiduciary duty based on the Non-Intercourse Act requires an allegation that the Tribe's rights and interests have been extinguished. The fiduciary duty at issue is one wherein the Federal Government is required to protect the Tribe's rights and interests and take action to protect those interests in a manner that is appropriate

under the circumstances. Where, as here, the Tribe's aboriginal title has never been extinguished, the Federal Government still has a duty to take action to prevent, or, at least not to facilitate, third parties from wrongfully interfering with the Tribe's aboriginal title. The authority relied upon by the District Court, *Tonkawa Tribe v. Richards*, 75 F.3d 1039 (5th Cir. 1996) does not stand for the proposition which the Court used to make its decision. The mechanical application of *Tonkawa* employed by the District Court sharply contrasts with the well-reasoned analysis and supporting citation of authority used by the Court of Federal Claims. Allowing the District Court's analysis to stand will create an absurd result of permitting federal officials to facilitate the wrongful interference with and wrongful trespass of the Tribe's aboriginal title, with impunity. Second, the District Court erred in ruling that the Tribe alleges a "programmatic" challenge to federal policies such that remedies are not available pursuant to the Administrative Procedures Act ("APA"), 5 U.S.C. § 706. The Complaint challenges a discreet and narrow set of pending or recently enacted federal agency decisions. Specifically, those federal actions that are pending or recently enacted regarding three certain federal enclaves within the boundaries of the lands the Federal Court of Claims identified as still being subject to the Tribe's aboriginal title. The claims and remedies are deliberately tailored to be evaluated on a decision-by-decision basis, not subject to some broader challenge as to federal policy, as the District Court erroneously assumed the Tribe

contemplated in its Complaint.

Standard of Review

The Federal Government's Motion asks the District Court to dismiss the Complaint for lack of jurisdiction under Federal Rule of Civil Procedure 12(b)(1) and for failure to state a claim under Rule 12(b)(6). This Circuit reviews *de novo* the application of the law, and reviews for clear error disputed factual findings regarding the grant of a 12(b)(1) motion for lack of subject matter jurisdiction. *Young v. United States,* ___F.3d___, 2013 WL 4458876 (5th Cir. 2013)*; Alexander v. United States,* 646 F.3d 185, 189 (5th Cir. 2011). This Circuit reviews *de novo* the grant of a 12(b)(6) motion to dismiss. *Miller v. BAC Home Loans Servicing Co*., ____F.3d_____, 2013 WL 4080717 (5th Cir. 2013); *Gregson v. Zurich American Insurance Co*., 322 F.3d 883, 885 (5th Cir. 2003)**.** 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, 127 S.Ct. 1955 (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)).

In the course of interpreting the statutes at issue generally--as well as the Non-Intercourse Act specifically--this Honorable Appellate Court should construe the statutes liberally in favor of the Tribe. This canon of statutory construction requires the Court to interpret any and all ambiguous provisions in the manner most beneficial to the Tribe's benefit. *See Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 105 S.Ct. 2399 (1985); *United States v. Dion,* 476 U.S. 734, 106 S.Ct. 2216 (1986); *Minnesota v. Mille Lacs Band of Chippewa Indians,* 526 U.S. 172, 119 S.Ct. 1187 (1999).

Argument

I. The District Court Erred in Ruling that the Tribe Does Not Have a Cognizable Claim for Breach of Fiduciary Duty Pursuant to the Non-Intercourse Act.

This case turns on whether the United States has a duty to consider and accommodate the Tribe's aboriginal title rights when making discretionary decisions, such as approvals of leases, roads and other discretionary acts on federal enclaves to which the Tribe retains aboriginal title. It does.

Aboriginal title is an equitable possessory interest, not a property interest, in the lands actually and continuously used by the Tribe before the arrival of European settlers. *Tee Hit Ton Indians v. United States,* 348 U.S. 272, 75 S.Ct. 313 (1955). Aboriginal title, also referred to as Indian title, includes the right of occupancy, use and enjoyment and can only be extinguished by an express act of Congress. *Oneida Indian Nation v. County of Oneida,* 414 U.S. 661, 667, 94 S.Ct. 772 (1974). Any conveyance of land to which aboriginal title has not been extinguished is conveyed subject to aboriginal title. *Lipan Apache Tribe v. United States*, 180 Ct.Cl. 497, 499 (1967). After years of heavily-litigated claims before the United States Court of Federal Claims, the Court held the Alabama-Coushatta Tribe's aboriginal title to 5.5 million acres of land in east Texas, including the federal enclaves at issue in the instant litigation, was never extinguished. That Court also held that the United States has the fiduciary duty to consider and

accommodate the Tribe's aboriginal title rights when making discretionary decisions, such as approvals of leases, roads and other discretionary acts on federal enclaves to which the Tribe retains aboriginal title. The Court of Federal Claims recommended compensation against the United States for its facilitating wrongful trespass on the Tribe's aboriginal lands:

> However, as we have held above, during the period of time between 1845 and 1954, the Federal Government clearly owed special fiduciary duties to the Tribe pursuant to the U.S. Constitution and the Indian Trade and Intercourse Act of 1834. Based on the Panel's review of the foregoing evidence in the record, and the Panel's consideration of the Federal Government's course of dealing with the Tribe, the Panel is convinced that the United States failed to adequately perform its known duties and responsibilities owed to the Tribe. In other words, when the Federal Government, at the minimum, had constructive, if not actual, knowledge of the State of Texas' land grant policies and the consequent non-Indian encroachment on the Tribe's *unextinguished* aboriginal lands, the Federal Government was clearly required to act pursuant to its obligations arising under the Indian Trade and Intercourse Act of 1834. Reviewing the course of dealing between the United States Government and the Tribe, however, this Panel is convinced that defendant failed to "do all it was required to do under the circumstances" (citing *Seneca Nation v. United States,* 173 Ct.Cl. 912 (1965)."

Alabama Coushatta Tribe of Texas v. United States, No.3 83, 2000 WL 1013532 (Fed.Cl. June 19, 2000). 2000 WL at *58.

In the thirteen years since the decision, Congress has yet to appropriate for the wrongful trespass at issue. The United States exacerbates the injustice by continuing to facilitate wrongful trespass, even over federal enclaves, the

stewardship of which is vested in the United States. The instant lawsuit was brought, not to seek the compensation recommended by the Court of Federal Claims, but to prevent the United States from continuing to breach its fiduciary duties in those pending, and/or recently decided, discretionary administrative decisions on appropriate federal enclaves, going forward.

In sharp contrast to the Court of Federal Claims decision, the Magistrate below held that federal officials' interference with the Tribe's aboriginal title, including the facilitating of wrongful trespass by third parties, is insufficient to establish a breach of fiduciary duty based on the Non-Intercourse Act, and that only wrongful extinguishment of aboriginal title is actionable. The Magistrate embraced a holding that leads to an absurd result: federal officials may trample, interfere and intentionally deprive the Tribe of all attributes stemming from aboriginal title, and may do so with impunity, so long as they do not cross the draconian line of actually extinguishing aboriginal title.

By this appeal, the Tribe is asking this Honorable Court of Appeals to compare the in-depth analysis of the Court of Federal Claims with the superficial and meager analysis of the Magistrate. Although the Court of Federal Claims' decision is not binding on the District Court or this Honorable Court, the Tribe contends that its persuasive authority is so compelling that it cannot properly be disregarded. Indeed, the Tribe contends that the District Court committed

reversible error when it cast aside the extensive, detailed analysis set forth therein, choosing instead to rely solely on one sentence in a decision from this Circuit, which the District Court misreads and takes entirely out of context. Accordingly, the Tribe implores this Court to scrutinize and compare the Magistrate's reasoning with the reasoning of the Court of Federal Claims. Upon doing so, this Court will likely reason, as the Tribe suggests, that the United States continues to breach its fiduciary duty to the Tribe.

The Tribe, in its Complaint, alleges the elements of breach of fiduciary duty, based both on the Non-Intercourse Act and federal common law. Under the District Court's own analysis, by alleging all of the necessary elements for the cause of action sounding in breach of fiduciary duty, the lawsuit should proceed because the waiver of United States' sovereign immunity in § 702 of the APA does not bar the instant lawsuit.

A. Actions Against Federal Officials Who Interfere With or Facilitate Third Parties to Interfere With Alabama Coushatta's Aboriginal Property May Be Brought Pursuant to the Non-Intercourse Act.

The Non-Intercourse Act provides:

> No 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. More specifically, the relevant provisions of the Act of 1834 are

as follows:

> *An Act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers.* * * * *
>
> Sec. 10. *And be it further enacted,* That the superintendent of Indian affairs, and Indian agents and sub-agents, shall have authority to remove from the Indian country all persons found therein contrary to law; and the President of the United States is authorized to direct the military force to be employed in such removal.
>
> Sec. 11. *And be it further enacted,* That is any person shall make a settlement on any lands belonging, secured, or granted by treaty with the United States to any Indian tribe, or shall survey or shall attempt to survey such lands, or designate any of the boundaries by marking the trees, or otherwise, such offender shall forfeit and pay the sum of one thousand dollars. And it shall, moreover, be lawful for the President of the United States to take such measures, and to employ such military force, as he may judge necessary to remove from the lands as aforesaid any such person as aforesaid.
>
> Sec. 12. *And be it further enacted,* That no 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. And if any person not employed under the authority of the United States, shall attempt to negotiate such treaty or convention, directly or indirectly, to treat with any such nation or tribe of Indians for the title or purchase of any lands by them held or claimed, such person shall forfeit and pay one thousand dollars: *Provided, nevertheless,* That it shall be lawful for the agent or agents of any state who may be present at any treaty held with Indians under the authority of the United States, in the presence and with the approbation of the commissioner or commissioners of the United States appointed to hold the same, to propose to and adjust with the Indians, the compensation to be made for their claim to lands within such state, which shall be extinguished by treaty.

Act of 1834, 4 Stat. 729, 730-731, ch. CLXL.

The terms of the Act of 1834, when read as a whole, clearly reflect the Federal Government's policy of protecting the Tribe‘s peaceful occupancy of their lands and not simply precluding the extinguishment of aboriginal title without express Congressional action. For example, section 10 of the Act granted that “the superintendent of Indian affairs, and Indian agents and sub-agents, shall have authority to remove from the Indian country all persons found therein contrary to law; and the President of the United States is authorized to direct the military force to be employed in such removal. ”Moreover, section 11 of the Act of 1834 imposed penalties against persons settling on “any lands belonging ... to any Indian tribe, or shall survey or shall attempt to survey such lands, or designate any of the boundaries by marking the trees, or otherwise, such offender shall forfeit and pay the sum of one thousand dollars.” Finally, section 12 of the Act invalidated in law or equity any “purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians unless the same be made by treaty or convention entered into pursuant to the Constitution,” i.e., federal authority. Thus, upon a review of the plain terms of the Act of 1834, it is evident that the Non-Intercourse Act imposes upon the federal government a fiduciary's role with respect to protection of the lands of a tribe.

Despite the Magistrate’s incorrect reading of *Tonkawa*, discussed below, no federal court has ever applied the Non-Intercourse Act to narrow the attendant

fiduciary duty to only the extinguishment of aboriginal title, allowing the fiduciary to turn a blind eye to other actions necessary to protect aboriginal title. To the contrary those federal courts that have addressed the issue, consistently reasoned that the Federal Government's fiduciary duty is take action necessary to protect the Tribes' interests. For example, the First Circuit reasoned:

> The purpose of the Act is to acknowledge and guarantee the Indian Tribe's 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* . . . 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 [is] beyond question.

Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370, 379 (1st Cir. 1975) (emphasis added)(citing *United States v. Santa Fe Pacific Railroad Co.,* 314 U.S. 339, 348, 62 S.Ct. 248 (1941)); See also, *Mohegan Tribe v. State of Connecticut*, 638 F.2d 612, 622 (2nd Cir. 1981) (through the Non-Intercourse Act, the federal government meant to take into its own hands the problems of intrusions upon Indian property wherever they might occur); *Oneida Nation of New York,* 201 Ct.Cl. 546 (1973) (expressly rejecting argument that the Act's fiduciary duty was limited to transactions in which the United States participated); *Oneida Tribe of Wisconsin v. United States,* 165 Cl.Ct. 487, 493 (1964)(the Federal Government is duty-bound to do whatever is required to do under the circumstances); *Seneca,*

173 Ct.Cl. at 925 (duty to fairly and honorably satisfy its special responsibility to protect and guard against unfair treatment).

On point, the D.C. District Court specifically made clear that the Federal Government breaches this fiduciary duty if it fails to protect a Native tribe's aboriginal lands against third party trespasses. *Edwardsen v. Morton*, 369 F. Supp. 1359, 1373 (D.D.C. 1973). ("[I]f plaintiffs could show their use and occupancy was disturbed [by 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 [federal] defendants had violated their duty to protect plaintiffs from third party intrusions."). Id.

B. The Magistrate's Interpretation and Application of *Tonkawa Tribe of Oklahoma v. Richards* is Wrong.

The Magistrate reasons that an element of a cause of action under the Non-Intercourse Act is that aboriginal title to the land must have been extinguished. ER 5 at page 6 and OR at page 287. The Magistrate acknowledges that other federal courts have held the duty imposed by the Non-Intercourse Act to have been breached where the federal officials allow for interference with *non-extinguished* aboriginal title, citing *Edwardson v. Morton*, 369 F. Supp. 1359 (D.D.C 1973), and then suggests that those cases must be wrong because this Circuit, in *Tonkawa*, held that extinguishment of aboriginal title is a necessary element of the cause of actions sounding in breach of fiduciary duty. ER 5 at page 6 and OR at page 287.

The Magistrate incorrectly relied on *Tonkawa* because interference with aboriginal title was simply not at issue in the case.

Tonkawa involved an action that sought to compel the State of Texas to set aside certain lands for the Tonkawa Tribe, a federally recognized tribe with trust lands in Oklahoma. The crux of the claim was that the State of Texas had granted a land interest to the Tribe in a proclamation passed in 1866, and that interest was extinguished when Texas appropriated it for public schools. 75 F.3d at 1042. The District Court concluded, and this Circuit affirmed, that the Tonkawa never had any interest in the land at issue. 75 F.3d at 1047. Aboriginal title to the land was not alleged in the Complaint or discussed in the opinion at all. Interference with the Tribe's aboriginal title, rather than extinguishment of any title, was never at issue in *Tonkawa.* Ignored by the Magistrate is the extensive discussion in *Tonkawa* recognizing interference with, as distinguished from extinguishment of, interests in land as actionable under the Non-Intercourse Act:

> The Act's overriding purpose is the protection of Indian lands. It acknowledges and guarantees the Indian tribes' right of possession and imposes on the federal government a fiduciary duty to protect the lands covered by the Act. *United States on behalf of Santa Ana Pueblo v. University of New Mexico,* 731 F.2d 703, 706 (10th Cir.*), cert denied,* 469 U.S. 853, 105 S.Ct. 177 (1984). The Act applies to "any title or claim" to real property, including nonpossessory interests. *See United States v. Devonian Gas & Oil Co.*, 424 F.2d 464, 467 n.3 (2nd Cir. 1970) (Nonintercourse Act applies to oil and gas leases); *Mohegan Tribe*, 528 F.Supp. at 1370; (Whether or not Connecticut held the fee to the land in question, it could not alienate Indian land without the consent of the federal government after the passage of the first

> Nonintercourse Act in 1790"); Lease of Indian Lands for Grazing Purposes, 18 Op.Atty.Gen. No. 583 (July 21, 1885) ("This statutory provision [§ 177] is very general and comprehensive. Its operation does not depend upon the nature or extent of the title to the land which the tribe or nation may hold."). . . . The purpose of the restrictions is to protect the Indians ... against the loss of their lands by improvident disposition or through overreaching by members of other races.

Tonkawa, 75 F.3d at 1045-1046.

To cite *Tonkawa* for the proposition that extinguishment of aboriginal title is required before the Government's conduct is actionable under the Non-Intercourse Act is simply wrong. The District Court's decision to apply that erroneous ruling to conclude that the Tribe failed to allege all of the necessary elements for a cause of action sounding in breach of fiduciary duty is clear error. Under these circumstances, reversal and remand is appropriate on this point of error alone.

C. Because the Tribe has Alleged a Viable Cause of Action Sounding in Breach of Fiduciary Duty, the APA at 25 U.S.C. § 702 Applies and the Lawsuit is Not Barred by United States' Assertion of Sovereign Immunity.

The Federal Defendants alleged that the immunity waiver in Section 702 of the APA does not apply even if the Tribe did otherwise establish a cognizable cause of action. The District Court, in adopting the Magistrate's Report and Recommendations, clarified that the immunity waiver in Section 702 applies if the Plaintiff Tribe properly alleged the necessary elements of the cause of action sounding in breach of fiduciary duty based on the Non-Intercourse Act. ER 4 at pages 2 -3 and OR at pages 316-317. The correct analysis is that the Tribe

established a cognizable violation of the Non-Intercourse Act and federal common law, *See County of Oneida v. Oneida Indian Nation of New York State*, 470 U.S. 226, 236, 105 S.Ct. 1245 (1985), that would otherwise have been actionable against the United States but for the sovereign immunity of the United States. Accordingly, the action is cognizable under Section 702 of the APA.

Section 702 of the APA expressly waives the United States' sovereign immunity over any action against a federal agency that seeks relief other than money damages. 5 U.S.C. § 702. In *Sheehan v. Army and Air Force Exchange Service*, 619 F.2d 1132, 1139 (5th Cir. 1980), *rev'd on other grounds*, *Army and Air Force Exchange Service v. Sheehan*, 456 U.S. 728, 102 S.Ct. 2118 (1982), this Circuit held that Section 702 authorized a court to entertain an action for nonstatutory review of agency action under 28 U.S.C. § 1331. It described Section 702 as a waiver of "sovereign immunity for actions against federal government agencies, seeking nonmonetary relief, if the agency conduct is otherwise subject to judicial review." *Id.* at 1139. This Circuit's ruling is consistent with every other Circuit that has addressed the issue. *Carpet, Linoleum and Resilient Tile Layers, Local Union No. 419, v. Brown*, 656 F.2d 564, 567 (10th Cir. 1981); *Panola Land Buyers Association v. Shuman*, 762 F.2d 1550, 1555 (11th Cir. 1985); *Commonwealth of Puerto Rico v. United States*, 490 F.3d 50, 57-58 (1st Cir. 2007); *Simmat v. United States Bureau of Prisons*, 413 F.3d 1225, 1233 (10th Cir.

2005); *United States v. City of Detroit*, 329 F.3d 515, 521 (6th Cir. 2003); *Up State Federal Credit Union v. Walker*, 198 F.3d 372, 375 (2d Cir. 1999); *Specter v. Garrett*, 995 F.2d 404, 410 (3d Cir. 1993), *rev'd on other grounds by Dalton v. Specter*, 511 U.S. 462, 114 S.Ct. 1719 (1994); *Red Lake Band of Chippewa Indians v. Barlow*, 846 F.2d 474, 476 (8th Cir. 1988).

II. The District Court Erred in Ruling That The Tribe's Complaint is a Programmatic Challenge.

The Tribe also alleges--in addition to breach of fiduciary duty premised on the Non-Intercourse Act and federal common law--that it is entitled to relief pursuant to 5 U.S.C. § 706 of the APA. This particular section provides that a reviewing court shall "hold unlawful and set aside agency action" that is "not in accordance with law." The Tribe's Complaint seek prospective equitable relief as to only those specific pending, and/or recently decided, federal actions in the federal enclaves that are within the boundaries of the lands to which the Tribe retains aboriginal title consistent with the ruling of the Court of Federal Claims. See ER 6, Complaint at ¶¶ 42-47; 60-70; 72-82; 83-86. The District Court dismissed the APA Section 706 claim, concluding that the Complaint advances a "programmatic" challenge, rather than a challenge to final agency action as defined by the review provisions of the APA. Permits, leases, and sales are quintessential examples of final agency action. *See* 5 U.S.C. § 551(13) (defining "agency action" to include "[t]he whole or a part of an agency rule, order, license, sanction, relief or

the equivalent or denial thereof, or failure to act").

Both the Magistrate and the District Court concluded that the allegations in the Tribe's Complaint are not materially different than *Sierra Club v. Peterson*, 228 F.3d 559 (5th Cir. 2000) (en banc), which held that Section 706 did not apply because the allegations were a "programmatic challenge" rather than a challenge to final agency actions. In *Peterson*, several environmental groups challenged the Forest Service's use of "even-aged timber management" to harvest timber in all national forests in Texas. 228 F.3d at 562. In holding that the plaintiffs raised an impermissible programmatic challenge, this Circuit expressly noted that the sales challenged by plaintiffs were simply "*examples* of the larger even-aged management techniques they were challenging rather than the extent of their challenge." 228 F.3d at 563 (emphasis added).

Lujan v. National Wildlife Federation, 497 U.S. 871, 110 S.Ct. 3177 (1990) is instructive. In *Lujan*, the plaintiffs challenged a "land withdrawal review program" administered by the Bureau of Land Management. 497 U.S. at 875. The Supreme Court concluded that the plaintiffs' complaint was not directed at "final agency action" because it "[did] not refer to a single BLM order or regulation, or even to a completed universe of particular BLM orders and regulations." *Id.* at 890 (emphasis added).

Under *Lujan* and *Peterson*, a suit is "programmatic" when it *challenges an*

agency's policy or overarching program under the pretext of challenging individual agency actions. By contrast, where a plaintiff's claim is limited to challenging discrete agency actions—or even an "entire universe" of actions, *Lujan*, 497 U.S. at 890—the claim is not programmatic. Here, the Complaint is expressly limited to challenging a finite set of agency actions, over a finite time period, and nothing else, and is therefore, not a programmatic challenge. *See, e.g.* ER 6, Complaint at ¶¶ 42, 64, 65, 82, 84 and OR at pages 19, 22, 23, 25.

To be sure, the Tribe's challenge to the Defendants' actions may have the effect of requiring substantial changes to the way that the Defendants administer the Tribe's aboriginal lands. But that does not make the Tribe's claim "programmatic." As this Circuit made clear in *Peterson*, a plaintiff can "challenge a specific 'final agency action' which has an actual or immediately threatened effect, even when such a challenge has the effect of requiring a regulation, series of regulations, or even a whole 'program' to be revised by the agency." *Peterson*, 228 F.3d at 567 (citing *Lujan*, 497 U.S. at 894); *see also Fanin v. U.S. Dep't of Veterans Affairs*, 572 F.3d 868, 877 (11th Cir. 2009) ("[T]he 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.").

As discussed above, the fiduciary duty at issue requires the Federal

Government to investigate and take such action as may be warranted in the circumstances. The Tribe is seeking specific relief to specific agency actions based on the circumstances of each action. The Tribe is not seeking a ruling that the federal government must stop any program or policy. Rather, the Tribe is seeking a remedy that requires the federal government to take reasonable steps to protect the Tribe's aboriginal title, fashioning equitable remedies that adequately protect the Tribe's interest appropriate for the specific circumstances. The Prayer for Relief envisions relief on a case-by-case basis, with the appointment of a Special Master. See ER 6 Complaint at Prayer for Relief at ¶ E and OR at pages 27-28 . This relief is not unprecedented. See *United States v. Washington,* 384 F.Supp. 312 (W.D. Wash. 1974), *affirmed and remanded* 520 F.2d 676 (9th Cir. 1975), *cert. denied* 423 U.S. 1086 (1976); 459 F.Supp. 1020 (W.D. Wash. 1978), and 626 F.Supp. 1405 (W.D. Wash. 1985).[3] The procedural context of the instant case is also

[3] In the three *Boldt* decision in *United States v. Washington,* 384 F.Supp. 312 (W.D. Wash. 1974)(referred to as *Boldt I*), *affirmed and remanded* 520 F.2d 676 (9th Cir. 1975), *cert. denied* 423 U.S. 1086 (1976); 459 F.Supp. 1020 (W.D. Wash. 1978) (referred to as *Boldt II*), and 626 F.Supp. 1405 (W.D. Wash. 1985) (referred to as *Boldt III),* the Court determined that fishery allocations in the Puget Sound must take the fishing rights of several federally-recognized Indian Tribes into account. To ensure a fair and equitable result, the District Court established a Fish Advisory Board and appointed a Special Master to review allocations on a case-by-case basis. As the Court retained jurisdiction over the years, the number of disputes that had to be resolved by the Special Master dramatically dwindled because the interested parties consulted and reached agreement on fishery allocations. A similar remedy may be appropriate here, providing a similar result.

critically different than the posture of *Peterson* and *Lujan*. *Peterson* was decided after a full bench trial. 228 F.3d at 563 - 567. *Lujan* was decided on a motion for summary judgment, after discovery and with a developed factual record. 497 U.S. at 890. Here, the case was disposed of on a Motion to Dismiss without any opportunity to conduct discovery.

The Magistrate in his reasoning that the Tribe's Complaint is a programmatic challenge inaccurately reads the Tribe's request for an accounting as a disguised action for money damages. Consistent with the limitations on the waiver of the United States' sovereign immunity, the Tribe is not seeking monetary damages. The Tribe is seeking to identify the discreet federal actions that are pending, and/or recently decided, in the applicable federal enclaves so that it may then make an assessment as to each discreet federal action at issue and determine what specific relief, if any, is appropriate for that federal action. For example, if a permit to construct or fund a certain logging road would interfere with a site sacred to the Tribe, it may seek prospective equitable relief that an alternative route be used. Unfortunately, without the benefit of discovery, the Tribe is left to speculate rather than give concrete examples. With the benefit of discovery, the focus of the review will be limited to specific discreet pending, and/or recently decided, agency actions evidencing that this case is not a "programmatic" challenge.

Conclusion

For the reasons set forth above, and as set forth in *Alabama Coushatta Tribe of Texas v. United States,* No.3 83, 2000 WL 1013532 (Fed.Cl. June 19, 2000) and the authority cited, the Tribe has established that the Non-Intercourse Act creates a duty for federal officials to protect aboriginal title, and not merely prevent it from improper extinguishment. Accordingly, this Honorable Court of Appeals should reverse and remand this case to the District Court with instructions to proceed with the breach of fiduciary duty claims on the merits.

For the reasons set forth above and the authority cited herein, the Tribe has properly pled claims under § 706 of the APA challenge a discreet limited universe of federal agency actions and are not examples of a "programmatic" challenge to a particular federal policy. Accordingly, the Appeals Court should reverse and remand the case to the District Court with instructions to proceed with the APA Section 706 claim on its merit.

To allow the dismissal of the Tribe's lawsuit to stand is to sanction federal officials to act in manner that deprives the Tribe of its aboriginal right to peaceful use and occupation of the subject lands, with impunity—an absurd result. Accordingly, the Tribe seeks a reversal and remand of the District Court's final judgment.

Dated: September 3, 2013

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CERTIFICATE OF SERVICE

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