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)

REPLY BRIEF OF THE ALABAMA-COUSHATTA TRIBE OF TEXAS

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I. The Federal Defendants Do Not Dispute That The District Court Erred In Its Interpretation and Application of *Tonkawa Tribe v. Richards*.

In its Opening Brief at pp. 9-20, the Tribe establishes that 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 Tribe established that the authority relied on by the District Court, *Tonkawa Tribe v. Richards*, 75 F.3d 1039 (5th Cir. 1996) does not stand for the proposition that the District Court used to make its decision. The Federal Defendants in the Answering Brief appear to concede the error. Although this argument is the crux of the appeal, the

Answering Brief does not even attempt to dispute the Tribe's analysis and only cites *Tonkawa* twice. First, for the proposition that the Non-Intercourse Act's provisions protect Tribes from wrongful acts of states and private parties (Answer Brief, "A.Br." 24). While that is correct, *Tonkawa* does not hold or suggest that the Non-Intercourse Act fails to protect tribes from the wrongful acts of the United States. Second, Federal Defendants) concede that *Tonkawa* holds that the Non-Intercourse Act is intended to protect a tribe's interest in land (A.Br. 27.

Rather than defend the District Court's analysis, the Federal Defendants instead repeat arguments made in the Motion to Dismiss that were not the basis of the District Court's decision. Those arguments are addressed below. For purposes of the instant appeal, however, this Appeals Court need go no further than to find that the District Court erred in finding that extinguishment of title, as opposed to trampling, interfering and/or intentionally depriving a tribe of the attributes of aboriginal title, must be pled to state a cause of action for breach of fiduciary duty under the Non-Intercourse Act. That, alone, is sufficient grounds for vacating the decision and remanding the matter back to the

District Court.

The Federal Defendants repeat their argument that the waiver of United States' sovereign immunity found in Section 702 of the APA only applies to review cases brought under Section 704 and not to other cognizable claims for equitable prospective relief against the Unites States and its officials (A.Br. 15). The District Court clarified that it did not accept this argument in its order dismissing the case:

> . . . the Court notes that the R&R (Magistrate's Recommendation and Report) does not state – and is not read by this Court to imply- that the waiver of sovereign immunity contained in § 702 is limited to actions under § 704. Indeed the Fifth Circuit has held that "the 1976 amendment to that statute, § 702, waives sovereign immunity for actions against federal government agencies seeking nonmonetary relief, if the agency conduct is otherwise subject to judicial review. *Sheehan v. Army and Air Force Exchange Service*, 619 F.2d 1132, 1139 (5th Cir. 1980), *rev'd on other grounds*, 102 S.Ct. 2118 (1982).

SER 46–48, OR 315–17. In *Sheehan*, this Court 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. Other courts have regularly cited *Sheehan* for the proposition that Section 702 applies to

non-APA claims for nonmonetary damages. *See, e.g.*, *AFL-CIO v. Brown*, 656 F.2d 564, 567 (10th Cir. 1981) (holding that Section 702 waives immunity against a suit under 40 U.S.C. § 276a and 41 U.S.C. §§ 351-58); *Panola Land Buyers Ass'n v. Shuman*, 762 F.2d 1550, 1555 (11th Cir. 1985) (holding the same for a suit seeking declaratory relief defining plaintiff's rights under 42 U.S.C. § 1485). *Every* Court of Appeals to consider the issue has held that the "APA's waiver of sovereign immunity applies to any suit whether under the APA or not." *Chamber of Commerce v. Reich*, 74 F.3d, 1322, 1328 (D.C. Cir. 1996); *Michigan v. U.S. Army Corps of Engineers*, 667 F.3d 765, 775 (7th Cir. 2011); *Delano Farms Co. v. California Table Grape Com'n*, 655 F.3d 1337, 1349 (Fed. Cir. 2011); *Commonwealth of Puerto Rico v. United States*, 490 F.3d 50, 57-58 (1st Cir. 2007); *United States v. City of Detroit*, 329 F.3d 515, 521 (6th Cir. 2003); *Up State Fed. 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 (1994). As the Eighth Circuit explained in rejecting the same argument advanced by the Federal Defendants here,

"the waiver of sovereign immunity contained in section 702 is not dependent on application of the procedures and review standards of the APA. It is dependent on the suit against the government being one for non-monetary relief." *Red Lake Band of Chippewa Indians v. Barlow*, 846 F.2d 474, 476 (8th Cir. 1988). Despite this overwhelming weight of authority and the District Court's disagreement, the Federal Defendants raise the issue again in the Answering Brief. This argument should be rejected.

Second, the Federal Defendants repeat the citation of *Federal Power Commission v. Tuscarora Indian Nation,* 362 U.S. 99 (1960), to argue that the Non-Intercourse Act, 25 U.S.C. § 177, imposes no enforceable fiduciary duties on the United States or its agencies. No court has adopted such a broad reading of that case. *Tuscarora* merely held that the Non-Intercourse Act did not preclude a state power commission from taking an Indian tribe's land to build a dam, upon the payment of just compensation, where Congress had specifically authorized the commission to condemn land for that purpose. Here, in contrast, the Tribe is not challenging the Government's *acquisition* of

legal title to the Claim Area, whether through condemnation or otherwise. Rather, the Tribe challenges the Federal Defendants' failure to discharge its fiduciary duty to protect all of the Tribe's aboriginal land from third party intrusion, regardless of whether the United States holds legal title to that land. As discussed in the Tribe's Opening Brief, several federal courts have recognized—in decisions issued long after *Tuscarora* was decided—that the United State has such a fiduciary duty.

II. Federal Defendants' Sophistry Does Not Transform the Tribe's Challenge of a Finite Universe of Agency Actions Into a "Programmatic Challenge."

In its Opening Brief, the Tribe establishes the District Court's second material error 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 (Br. 20-25). The Complaint challenges a discreet and narrow set of pending or recently enacted federal agency decisions. Specifically, the Tribe challenges those federal actions that are pending or recently enacted regarding three certain federal enclaves within the boundaries of the lands that 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, and are not subject to some broader challenge as to federal policy, as the District Court erroneously assumed the Tribe contemplated in its Complaint.

The Federal Defendants, at four different points in the Answering Brief accuse the Tribe of making a "programmatic" challenge, but nowhere do the Federal Defendants even pretend to dispute that the Complaint does indeed specify a finite universe of agency actions: permits, leases and sales within three specific federal enclaves (A.Br. 7, 17, 21, 22). The Federal Defendants even concede that the Tribe could bring a separate APA action for each and every permit and lease issued within the three federal enclaves (A.Br. 20). Why bring one lawsuit identifying a finite universe of agency actions and propose a prudent remedy to redress the Tribe's claims when the Tribe could bring dozens of lawsuits and accomplish the same result?

Federal Defendants assert that the scope of the Tribe's claims goes well beyond any challenge to discreet agency action (A.Br. 19). They do not. The breach of fiduciary duty is manifested by the agency action.

The redress sought is solely directed at agency action. The action at issue is limited to three geographically limited federal enclaves.

Federal Defendants also fault the Tribe for failing to identify a specific agency action. Despite the fact that the cases cited by the Federal Defendants all allowed for discovery. Federal Defendants now deprive the Tribe of discovery and then fault the Tribe for that lack of discovery. If after discovery on remand the Tribe fails to provide the specificity needed to defeat the "programmatic challenge" argument, dismissal of the amended complaint or summary judgment would be appropriate. But it is not appropriate here, where the Tribe is precluded from discovery of recent and pending agency action.

The Tribe's claims based on breach of fiduciary duty, allowable under the APA waiver of immunity under section 702, stand separate and apart from the Tribe's claims under section 706. Accordingly, the District Court's error in concluding that the Complaint constitutes a programmatic challenge is, by itself, sufficient grounds for vacating the decision and remanding the matter back to the District Court.

III. The Federal Defendants' Argument that the Plaintiff's Claims are Governed by the Quiet Title Act is Wrong.

In the Response Brief, Federal Defendants do not dispute that aboriginal title can only be extinguished by an act of Congress or by treaty. Indeed, they do not even address this bedrock principle of federal Indian law. Instead, the Federal Defendants attempt to side-step the argument by reasoning that the Tribe's claims for aboriginal title are adverse to the United States' legal title to the lands in question. From this premise, the Federal Defendants argue that the Tribe's claims could only have been brought under the Quiet Title Act 28 U.S.C. § 2409a ("QTA"), and therefore must have been brought within twelve years of hearing that some federal officials disputed whether the Tribe has aboriginal title. Finally, the Federal Defendants argue that the Tribe's aboriginal title is extinguished because the lack of a timely QTA claim deprives the Tribe of the waiver of sovereign immunity found in Section 702 of the APA.

The Federal Defendants' argument fails on several levels. Most fundamentally, the Tribe is not asserting wrongful taking of its lands,

nor is it seeking to extinguish legal title. As the Federal Defendants concede, legal title continues subject to the Tribe's aboriginal title – the two interests are not adverse to one another.

The Federal Defendants' supportive citations are unavailing.

The Federal Defendants cite *Western Mohegan Tribe v. Orange County*, 395 F.3d 18 (2nd Cir. 2004) as authority that a claim determining whether legal title is subject to aboriginal title is a claim to quiet title. On close review of the case and its analysis, however, the Second Circuit was concerned that the claim to "Indian title" was a claim that non-Indians were "wrongfully in possession of land contained in ten New York Counties." *Id.* at 19. The Plaintiff Tribe in that action conflated "Indian Title" with legal title:

> The Tribe states that it seeks only "Indian title," which it describes as the right "to camp, to hunt, to fish, [and] to use the waters and timbers" in the contested lands and waterways. But the Tribe also describes Indian title as the right "to *exclude all others,*" including holders of fee simple title, through state law possessory actions such as ejectment and trespass. . . It is clear from the Tribe's assertions in the complaint and on appeal, and from our prior statements regarding Indian title, that the Tribe's claim is fundamentally inconsistent with the State of New York's exercise of fee title over the contested areas.

Id. at 22. See also *Osage Nation v. Oklahoma*, 260 Fed. Appx. 13, 21, 2007 WL 4553668 at p.6 (10th Cir. 2007) (distinguishes *Western Mohegan* because relief sought was not a claim for actual title*)*; *Hill v. Kemp*, 478 F.3d 1236, 1260 n.28 (10th Cir. 2007) (declined to follow *Western Mohegan* because claim did not negate State's jurisdiction).

In sharp contrast to the claims in *Western Mohegan*, the Alabama-Coushatta Tribe makes clear that it is not seeking conveyance of title of the lands in issue. Nor does the Tribe question the United States' jurisdiction over the lands, including the exercise of that jurisdiction in a manner that accommodates the rights and interests of non-Indians. Rather, the Tribe seeks relief in the form of the United States performing its fiduciary duty to protect the Tribe's aboriginal rights as is proper under the circumstances. The Prayer for Relief is deliberately constructed to allow any remedy to honor and to accommodate the interests of the United States and the interests of third parties seeking agency action by the Federal Defendants.

The Federal Defendants cite to two Fifth Circuit cases to support the suggestion that the Tribe's claim is one to quiet title. First, they cite *Humphries v. United States* 62 F.3d 667 (5th Cir. 1995) in which this Court rejected a taxpayer's claim of jurisdiction based on the QTA. The Internal Revenue Service claimed a lien on the taxpayer's property and not ownership of the property. Accordingly, this Court held that the claim fell outside the jurisdictional scope of the QTA. *Id*. at 672. *Humphries'* limiting language supports the Tribe and not the Federal Defendants.

Second, Federal Defendants cite *Prater v. United States*, 612 F.2d 157, *affirmed on rehearing*, 618 F.2d 263 (5th Cir. 1980), which involved land deeded to the United States to facilitate the development of a reservoir by the Army Corp. of Engineers. In that matter, the Plaintiff claimed that only land below 350 feet in elevation should have been included in the deed. This Court rejected the United States' argument that the QTA did not provide jurisdiction because the Plaintiff was seeking to reform the deed and was not seeking to quiet title. This Court found jurisdiction because Plaintiff was seeking conveyance of the

land in question, which falls within the scope of the QTA, even if it does not neatly constitute a common law action to quiet title. On rehearing, this Court noted that the Department of Justice, and not the Court, framed Plaintiff's claim as one of "reforming the deed" and that the decision did not expand the scope of the QTA when Plaintiff was seeking to enforce a right of re-conveyance of the property at issue. 618 F.2d at 263. Those circumstances are clearly distinguishable from those here where the Alabama-Coushatta Tribe does not challenge the United States' legal title to the lands in question. Indeed, *Prater* (on rehearing) is cited by the Tenth Circuit to support a ruling that a plaintiff's claim that he was entitled to special use permits on certain federal lands is not actionable under the QTA. See *McKay v. United States,* 516 F.3d 848, 852 (10th Cir. 2008). *Prater* is also cited in *Friends of Panamint Valley v. Kempthorne,* 499 F.Supp.2d 1165 (E.D. Cal. 2007) to support a ruling that Plaintiffs' claim for unfettered access to a road in a national park was not actionable under the QTA. *Prater* and its progeny support the Tribe and not the Federal Defendants.

The two other cases cited by Federal Defendants regarding the scope of QTA jurisdiction, *Block v. North Dakota,* 461 U.S. 271, 286 n.22 (1983) and *Rosette Inc. v. United States,* 141 F.3d 1394, 1397 (10th Cir. 1998) are irrelevant as they discuss classic claims of disputes as to ownership having nothing to do with aboriginal title.

That the Tribe's claims are not QTA claims should dispose of the argument. However, the Tribe must take issue with the Federal Defendants' extension of the QTA argument that the Tribe may not assert aboriginal title now because it did not do so within the QTA's twelve-year statute of limitations. The Federal Defendants concede that aboriginal title can only be extinguished by an act of Congress or by treaty, yet the argument made in the Answering Brief suggests a third manner: imposing an affirmative obligation upon a Tribe to bring a QTA action asserting a dispute with the United States' legal title and if not met, such aboriginal title is extinguished (A.Br. 9-13). The absurdity of this argument only underscores the correctness that this case is not a QTA case. The assertion of aboriginal title is not the equivalent of making claims adverse to the United States' legal title to land. The

illogical extension of the Federal Defendants' argument is that aboriginal title may be extinguished by means other than an express act of Congress or by treaty.

IV. By Its Complaint, the Tribe is Seeking a Judicial Declaration of Aboriginal Title.

Federal Defendants then assert that the Tribe cannot state a cause of action for breach of aboriginal title because there has not been a judicial declaration of aboriginal title. (A.Br. 10). The Tribe is fully prepared to present, establish and expand upon, in this litigation, the very same facts and arguments and expert testimony that were established in the Court of Federal Claims to establish the Tribe's aboriginal title. To deprive the Tribe of the opportunity to establish aboriginal title and then argue that the case should be dismissed because the Tribe has not established aboriginal title is non-sequitor reasoning. The Federal Defendants are arguing in essence that dismissal of the case should affirmed because such dismissal has deprived the Tribe of the opportunity to prove its case.

The Federal Defendants wrongly assert the Tribe is contending that

the well-reasoned, thoroughly litigated 2000 decision of the Court of Federal Claims provides a judicial establishment of the Tribe's aboriginal title (A.Br. 10). There is no basis for the assertion. The Tribe has acknowledged at every stage of the briefing below and in the Opening Brief (Br. 11) that the 2000 decision is not binding. That does not, however, in any manner defeat the persuasive authority of the 2000 decision and this Court is strongly encouraged to consider and dissect the 2000 decision in its deliberation of the instant appeal.

Conclusion

For the reasons set forth above, in the Opening Brief, 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, in the Opening Brief and the authority cited herein, the Tribe has properly pled claims under § 706 of the APA to challenge a discreet limited universe of federal agency actions and established that they 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.

For the reasons set forth above, this Appeals Court should reject the argument raised by Federal Defendants in the Answering Brief, but not relied upon by the District Court that the Tribe's claims are governed by the QTA to the exclusion of APA claims, resulting in the extinguishment of the Tribe's aboriginal title.

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 with impunity—an absurd result. Accordingly, the Tribe seeks a reversal and remand of the District Court's final judgment.

Respectfully Submitted,

Dated: December 2, 2013

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CERTIFICATE OF SERVICE

I hereby certify that on December 2, 2013, the foregoing REPLY BRIEF OF ALABAMA-COUSHATTA TRIBE OF TEXAS was electronically served on the counsel listed below via the Court's CM/ECF Notice of Activity system at their electronic addresses of record:

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

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Dated: December 2, 2013

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