No. 13-40644

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

THE ALABAMA-COUSHATTA TRIBE OF TEXAS,
Plaintiff-Appellant,

-v.-

UNITED STATES, et al.,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT OF TEXAS
Case No. 12-cv-00083 (Hon. J. Rodney Gilstrap)

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STATEMENT REGARDING ORAL ARGUMENT

The United States requests oral argument because it may assist the Court in disposing of the issues raised by this appeal.

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STATEMENT OF JURISDICTION

Plaintiff-Appellant The Alabama-Coushatta Tribe of Texas (Tribe) sued the United States; Sally Jewell, Secretary of the U.S. Department of the Interior; and Thomas J. Vilsack, Secretary of the U.S. Department of Agriculture (collectively, United States). The Tribe brought claims under the Administrative Procedure Act (APA), the Indian Non-Intercourse Act (Non-Intercourse Act), and federal common law.

The Tribe argues (Br. 18–20) that Congress waived federal sovereign immunity to its claims in 5 U.S.C. § 702 of the APA. The district court concluded otherwise and dismissed the Tribe's suit on April 22, 2013. Defendants-Appellees' Supplemental Excerpts of Record (SER) at 49, Original Record (OR) at 322. The Tribe filed a timely notice of appeal on June 10, 2013. SER 50–51, OR 323–24; *see* Fed. R. App. P. 4(a)(1)(B). This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. Whether the Quiet Title Act, 28 U.S.C. § 2409a, forbids all relief sought by the Tribe and thereby renders the APA's sovereign immunity waiver inapplicable to the Tribe's claims.

2. Whether the Tribe challenges an identifiable "agency action," as is necessary to fall within the scope of the APA's sovereign immunity waiver.

3. Whether the Tribe challenges "final agency action" or "agency action made reviewable by statute," as is necessary to fall within the scope of the APA's sovereign immunity waiver.

4. Whether the Tribe states a claim upon which relief can be granted.

STATEMENT OF FACTS AND STATEMENT OF THE CASE

The Alabama-Coushatta Tribe of Texas (Tribe) is a federally-recognized Indian tribe whose members reside on a 9,700-acre reservation in the Big Thicket region of East Texas. SER 12–13, OR 12–13 (Compl. ¶ 12). The Alabamas and the Coushattas are incorporated under the Indian Reorganization Act of 1934, and federal law treats them as a single tribal unit. 25 U.S.C. § 477. Congress terminated the United States' trust relationship with the Tribe in 1954, but that relationship was restored in 1987. *Id.* §§ 722, 733.

In the Indian Claims Commission Act of 1946, Pub. L. No. 79–726, ch. 959, 60 Stat. 1049, Congress created a special tribunal to hear a broad range of historical claims by Indian tribes against the United States. *See generally United States v. Dann*, 470 U.S. 39 (1985). The Tribe failed to file a timely claim with the Indian Claims Commission, but it later petitioned Congress for special assistance. *See Alabama-Coushatta Tribe of Texas v. United States*, Cong. Ref. No. 3–83, 2000 WL 1013532 at *1–*2 (Fed. Cl. June 19, 2000) (*CFC Report*). In 1983, a private bill was introduced to compensate the Tribe for allegedly unfair dealings of the

United States. H.R. 1232, 98th Cong., 1st Sess. (1983). Congress referred the bill to the Court of Federal Claims for review and a recommendation. H.R. Res. 69, 98th Cong., 1st Sess. (1983); *see* 28 U.S.C. §§ 1492, 2509. In 2000, that court presented Congress with a report recommending that the United States compensate the Tribe for certain acts between the mid-19th and mid-20th centuries. *CFC Report*, 2000 WL 1013532 at *61. To date, however, Congress has taken no action in response to the Court of Federal Claims' non-binding recommendation.

In 2012, the Tribe brought this lawsuit seeking "declaratory and equitable relief with respect to current breaches of fiduciary duty by the Federal Government." SER 11, OR 11 (Compl. ¶ 7). The Tribe asserts that it holds "aboriginal title" to more than 400,000 of acres of federal land in the Davy Crockett and Sam Houston National Forests and the Big Thicket National Preserve. SER 17, 20, OR 17, 20 (Compl. ¶¶ 32, 48). Aboriginal title, also known as Indian title, is a unique form of title to real property, loosely analogized to a "perpetual right of occupancy" with an "ultimate reversion in fee" to the sovereign. *Mitchel v. United States*, 34 U.S. 711, 756 (1835); *see Northwestern Bands of Shoshone Indians v. United States*, 324 U.S. 335, 338–39 (1945) (distinguishing unrecognized aboriginal title, at issue here, from a formally-acknowledged right of tribal occupancy); *see generally* Cohen's Handbook of Federal Indian Law § 15.04[2], at 999–1004 (2012). Once established, aboriginal title can only be

extinguished through statute or treaty. *See United States v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 347 (1941). Until that point, fee title to the property remains "subject to the encumbrance of Indian title." *Id*.

The Tribe contends that federal agencies must "consider and accommodate [its] aboriginal title and any incidental rights before issuing permits, approving leases, and taking other federal actions that facilitate activities on or under" the federal lands at issue. SER 11–12, OR 11–12 (Compl. ¶7). The Tribe also requests "a full accounting of the revenues and profits" derived from such activities. SER 27, OR 27 (Compl. ¶D). The Tribe brings claims under the Non-Intercourse Act, the APA, and federal common law.[1] It alleges that Congress waived federal sovereign immunity to those claims through 5 U.S.C. § 702 of the APA.

The United States moved to dismiss the Tribe's claims for lack of subject matter jurisdiction or, in the alternative, for failure to state a claim upon which relief could be granted. Following oral argument, a magistrate judge issued a report recommending dismissal of all claims. SER 37–44, OR 282–89 (Magistrate Judge's Report and Recommendation, hereinafter "M.J. Report"). After considering and

[1] The Tribe also references (Br. 1) "causes of action" under 28 U.S.C. §§ 1346 (Little Tucker Act), 1491 (Tucker Act), and 2201 (Declaratory Judgment Act). Those statutes authorize particular forms of relief, but they do not confer any substantive right to judicial review. *See United States v. Bormes*, 133 S.Ct. 12, 16–17 (2012) (Tucker Act and Little Tucker Act); *Earnest v. Lowentritt*, 690 F.2d 1198, 1203 (5th Cir. 1982) (Declaratory Judgment Act).

overruling the Tribe's three objections to the magistrate judge's report, the district court granted the United States' motion and dismissed the Tribe's lawsuit in its entirety. SER 46–48, OR 315–17. The Tribe appeals from the dismissal order.

STANDARD OF REVIEW

This Court reviews *de novo* a district court's dismissal of a claim under Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction, or under Rule 12(b)(6) for failure to state a claim upon which relief can be granted. *In re Condor Ins. Ltd.*, 601 F.3d 319, 321 (5th Cir. 2010). If the district court dismisses a plaintiff's claim under Rule 12(b)(1) for want of jurisdiction, but the threshold deficiency is the failure to state a claim, this Court can affirm the dismissal on Rule 12(b)(6) grounds. *See Caldera v. Ins. Co.*, 716 F.3d 861, 867 n.11 (5th Cir. 2013). In reviewing dismissal on either ground, this Court must "take the well-pled factual allegations of the complaint as true and view them in the light most favorable to the plaintiff." *Lane v. Halliburton*, 529 F.3d 548, 557 (5th Cir. 2008). "However, conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss." *Fernandez-Montes v. Allied Pilot Ass'n*, 987 F.2d 278, 284 (5th Cir. 1993).

If a party does not object to a particular legal conclusion in a report of a magistrate judge, this Court reviews that conclusion for plain error. *Douglass v. United Servs. Auto Ass'n*, 79 F.3d 1415, 1429 (5th Cir. 1996) (en banc), *superseded*

on other grounds by 28 U.S.C. § 636(b)(1). Under that standard of review, if a legal error is "clear or obvious, rather than subject to reasonable dispute," then the appellate court has "*discretion* to remedy the error—discretion which ought to be exercised only if the error seriously affects the fairness, integrity or public reputation of judicial proceedings." *Puckett v. United States*, 556 U.S. 129, 135 (2009) (internal quotation marks, brackets, and citation omitted).

SUMMARY OF ARGUMENT

This suit should be dismissed for lack of subject matter jurisdiction. Courts do not have jurisdiction over claims against the United States unless Congress unequivocally waives sovereign immunity and the plaintiff meets the precise terms of that waiver. The sovereign immunity waiver invoked by the Tribe—5 U.S.C. § 702 of the APA—does not apply to the claims in this lawsuit for several reasons.

First and foremost, the Tribe cannot use the APA's waiver of sovereign immunity to obtain relief forbidden by another statute. All of the relief sought here is predicated on judicial recognition of the Tribe's disputed aboriginal title to federal lands, but that relief is barred by the Quiet Title Act (QTA). The QTA is the exclusive means for a tribe to bring an aboriginal title suit against the United States. The QTA has a 12-year statute of limitations, however, and the federal government has openly disputed the Tribe's title for several decades. The Tribe cannot use the APA's sovereign immunity waiver to evade the QTA's statute of limitations.

Even if the QTA did not bar this suit, the Tribe's claims still would not be covered by the APA's sovereign immunity waiver. That waiver applies only to claims challenging identifiable "agency action." 5 U.S.C. § 702. But this lawsuit constitutes a broad, programmatic challenge to federal management of natural resources on hundreds of thousands of acres of public lands. Moreover, this Court has further limited the APA's sovereign immunity waiver to claims challenging "final agency action" or "agency action made reviewable by statute." *Id.* § 704. The Tribe does not point to any final agency action that consummated an agency's decisionmaking process. Nor has Congress made the alleged federal conduct reviewable by statute. The Tribe relies on the Non-Intercourse Act, but that statute's prohibitions do not apply to the sovereign United States.

Finally, even if Congress had waived federal sovereign immunity to the Tribe's claims, this suit should still be dismissed for failure to state a claim upon which relief could be granted. The Tribe cannot state a claim under the APA without challenging final agency action or agency action made reviewable by statute. The Tribe cannot state any claim against the federal government under the Non-Intercourse Act. And contrary to the Tribe's assertion, federal common law does not create a cause of action against the United States to enforce the specific fiduciary duties alleged in the complaint. The district court's dismissal order should therefore be affirmed.

ARGUMENT

I. FEDERAL SOVEREIGN IMMUNITY BARS THE TRIBE'S CLAIMS.

The federal government cannot be sued absent the "unequivocally expressed" consent of Congress. *Koehler v. United States*, 153 F.3d 263, 265 (5th Cir. 1998). Suits against the United States must be brought "in exact compliance with the terms of a statute under which the sovereign has consented to be sued." *Id.* "[A] waiver of the Government's sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign." *Lane v. Pena*, 518 U.S. 187, 192 (1996); *see United States v. Mottaz*, 476 U.S. 834, 851 (1986) (strictly construing a sovereign immunity waiver "even for Indian plaintiffs"). Claims against officers of the United States in their official capacities constitute claims against the sovereign. *Danos v. Jones*, 652 F.3d 577, 581 (5th Cir. 2011).

The Administrative Procedure Act, 5 U.S.C. § 702, supplies the only federal sovereign immunity waiver invoked by the Tribe.[2] As explained below, however,

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[2] The Tribe also cites (Br. 1) 28 U.S.C. §§ 1331 and 1362, despite previously disclaiming reliance on those statutes. SER 30 n.1, OR 106 n.1 (Opp. to Mot. to Dismiss). Neither statute waives federal sovereign immunity. *See Koehler*, 153 F.3d at 266 n.2 (28 U.S.C. § 1331); *Paiute-Shoshone Indians v. City of Los Angeles*, 637 F.3d 993, 1000 (9th Cir. 2011) (28 U.S.C. § 1362); *Western Shoshone Bus. Council v. Babbitt*, 1 F.3d 1052, 1058–59 (10th Cir. 1993) (same); *Standing Rock Sioux Indian Tribe v. Dorgan*, 505 F.2d 1135, 1140 (8th Cir. 1974) (same). The Tribe has abandoned its argument that the Mandamus Act, 28 U.S.C. § 1361, waives federal sovereign immunity against its claims. Tribe Br. 1 n.1.

that waiver does not encompass any of the claims in this lawsuit. Absent a sovereign immunity waiver, courts lack subject matter jurisdiction over claims against the United States and federal agencies. *See Rothe Dev., Inc. v. U.S. Dep't of Defense*, 666 F.3d 336, 338 (5th Cir. 2011). This Court should therefore affirm the district court's dismissal of the Tribe's claims for lack of jurisdiction.

A. The Quiet Title Act bars this suit.

The APA's sovereign immunity waiver does not apply "if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." 5 U.S.C. § 702. That carve-out "prevents plaintiffs from exploiting the APA's waiver to evade limitations on suit contained in other statutes." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S.Ct. 2199, 2204–05 (2012).

The QTA is such a statute. It waives federal sovereign immunity "to adjudicate a disputed title to real property in which the United States claims an interest." 28 U.S.C. § 2409a(a). Here, the parties dispute whether the Tribe holds aboriginal title to real property in which the United States claims an unencumbered fee simple interest. A QTA suit, however, must be "commenced within twelve years of the date … the plaintiff … knew or should have known of the claim of the United States." *Id.* § 2409a(g). The Tribe cannot sue to quiet aboriginal title now because the United States has openly disputed that title for more than twelve years. In other words, the QTA "expressly or impliedly forbids" the Tribe from seeking

relief against the United States based on aboriginal title. 5 U.S.C. § 702; *see Block v. North Dakota*, 461 U.S. 273, 286 n.22 (1983).

1. The Tribe's claims and requested relief are predicated on a judicial declaration of aboriginal title.

Aboriginal title is the foundation of the Tribe's lawsuit. *Cf. Mottaz*, 476 U.S. at 842 ("[T]he claim for title is the essence and bottom line of respondent's case.") (quoting respondent's brief). The Tribe conceded as much to the magistrate judge. SER 36, OR 194 (Transcript). The United States and the Tribe disagree as to whether the federal government's fee simple title to federal lands is subject to the encumbrance of the Tribe's aboriginal title. Congress has not formally recognized the Tribe's title, so a judicial declaration of aboriginal title would need to precede any of the relief sought in this lawsuit. *See Cummings v. United States*, 648 F.2d 289, 292 (5th Cir. Unit A 1981).

The Tribe appears to contend (Br. 2) that its aboriginal title has already been established by the Court of Federal Claims. But that court merely issued a report to Congress that "is advisory in nature and has no binding value as precedent." *Kanehl v. United States*, 38 Fed. Cl. 89, 96 (1997). Any facts or conclusions reached in the report are "peculiar to that individual action," *id.*, and "the court-made rules of *stare decisis* and *res judicata* do not apply," *Paul v. United States*, 20 Cl. Ct. 236, 266, *aff'd*, 21 Cl. Ct. 758 (1990); *see also Rawlins v. United States*, 231 Ct. Cl. 313, 318 (1982). Congress gave the Court of Federal Claims broad

jurisdiction to investigate "claims … that are not recognized by any existing rule of law or equity." H.R. 1232, 98th Cong., 1st Sess. (1983). But Congress did not thereby create a new cause of action for the Tribe in other federal courts. *See Menominee Indian Tribe v. United States*, 39 Fed. Cl. 441, 459 n.16 (1997).

2. To establish aboriginal title to federal lands, a tribe must sue under the Quiet Title Act.

"Congress intended the QTA to provide the exclusive means by which adverse claimants could challenge the United States' title to real property." *Block*, 461 U.S. at 286. While admitting that the United States holds these federal lands in fee simple, the Tribe is still an adverse claimant challenging whether that fee is subject to aboriginal title. *See Western Mohegan Tribe & Nation v. Orange County*, 395 F.3d 18, 23 (2d Cir. 2004) ("To the extent that the complaint alleges that there has never been a lawful extinguishment of the Tribe's Indian title, it seeks a declaration from this court that [the] exercise of fee title remains 'subject to' the Tribe's rights …."). The QTA encompasses the Tribe's claim to "an interest in real property" owned by the United States. *Humphreys v. United States*, 62 F.3d 667, 672 (5th Cir. 1995); *see also Prater v. United States*, 612 F.2d 157, 159, *aff'd on rehearing*, 618 F.2d 263 (5th Cir. 1980) (discussing breadth of QTA jurisdiction).[3]

[3] The QTA "does not apply to trust or restricted Indian lands," 28 U.S.C. § 2409a(a), but this case does not concern such lands. The Tribe does not allege that these lands are held in trust or restricted status. Furthermore, the exception (*cont'd*)

To be sure, "[w]hether a tribe has *aboriginal* title to occupy land is an inquiry entirely separate from the question of who holds *fee* title to land." *Lyon v. Gila River Indian Cmty.*, 626 F.3d 1059, 1068 (9th Cir. 2010). But as the Tribe's complaint suggests, there is a significant difference between ordinary fee simple ownership and a "naked fee" encumbered by aboriginal title.[4] *Beecher v. Wetherby*, 95 U.S. 517, 525 (1877). Aboriginal title is "a possessory right," *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 665 (1979), and the QTA supplies the exclusive remedy for plaintiffs asserting "the right to possession of lands claimed by the United States," *Block*, 461 U.S. at 282; *see also Mottaz*, 476 U.S. at 847 (noting that plaintiffs' demand for "actual possession of the challenged property … would pose precisely the threat to ongoing federal activities on the property that the [QTA] was intended to avoid").

Match-E-Be-Nash-She-Wish Band of Pottowatomi Indians v. Patchak, 132 S.Ct. 2199 (2012), does not help the Tribe. In that case, the Supreme Court held

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for Indian lands applies only to suits brought by "*third parties* challenging the United States' title to land held in trust for Indians." *Mottaz*, 476 U.S. at 842 (emphasis added). In any event, the exception could not help the Tribe overcome sovereign immunity. The Indian-lands exception "retains 'the United States' full immunity from sui[t],'" *Patchak*, 132 S.Ct. at 2205 (citation omitted), and thus "impliedly forbids" any relief based on a declaration of Indian title, 5 U.S.C. § 702.

[4] For example, the Tribe asserts a right "to control access to and the removal of minerals from all land" and "a right to control access to … timber resources." SER 19, 25, OR 19, 25 (Compl. ¶¶ 43, 85). To be clear, the United States does not concede that either right would flow from a declaration of aboriginal title.

that the QTA did not bar a nearby property owner's APA challenge to the federal government's decision to take land into trust for an Indian tribe. 132 S.Ct. at 2206. But the basis for the Court's holding was that the plaintiff himself "d[id] not assert a right to the property" in question, so he could not have sued under the QTA. *Id.*; *see also Lonatro v. United States*, 714 F.3d 866, 870 (5th Cir. 2013). In this case, by contrast, the Tribe itself asserts a right to real property held by the United States.

Thus, "[i]nsofar as [plaintiff's] current claims are all linked to the question of title, the Quiet Title Act provides the exclusive remedy." *Rosette Inc. v. United States*, 141 F.3d 1394, 1397 (10th Cir. 1998). As explained below, that remedy is foreclosed in this case.

3. The Tribe's suit is barred by the Quiet Title Act's statute of limitations.

"In the QTA, Congress made a judgment about how far to allow quiet title suits—to a point, but no further." *Patchak*, 132 S.Ct. at 2209. And "[t]he 'no further' includes … a statute of limitations." *Id.* A QTA claim must be "commenced within twelve years of the date upon which it accrued," i.e., "the date the plaintiff … knew or should have known of the claim of the United States." 28 U.S.C. § 2409a(g); *see Mottaz*, 476 U.S. at 844. The QTA's statute of limitations is jurisdictional, and it does not allow for equitable tolling. *United States v. Beggerly*, 524 U.S. 38, 48–49 (1998) (equitable tolling); *Bank One Texas, N.A. v. United States*, 157 F.3d 397, 403 (5th Cir. 1998) (jurisdictional nature).

The Tribe commenced this action in 2012. SER 3, OR 3 (Docket). But long before 2000, the Tribe knew that the United States disputed its claim to aboriginal title. This Court need not determine exactly when the Tribe first knew or should have known of the federal government's position, for the judicial record offers clear evidence that the United States openly and notoriously disputed the Tribe's title at least as early as the 1970s. *See Caddo Tribe of Oklahoma v. United States*, 27 Ind. Cl. Comm. 1, 2 (1972) (discussing government's argument that Tribe's aboriginal title claim was barred). The United States echoed that position on numerous occasions. *See, e.g.*, *Alabama-Coushatta Tribe of Texas v. United States*, Cong. Ref. No. 3–83, 28 Fed. Cl. 95, 97–98 (1993) ("The government contends that the tribe has failed to satisfy the test for aboriginal title and, alternatively, that if aboriginal title is established, then it was extinguished prior to the date that United States sovereignty attached."). Indeed, the Tribe alleges that the United States has *never* acknowledged its aboriginal title. SER 14, OR 14 (Compl. ¶22) ("[T]he Federal Government stood by while the Alabama-Coushatta was illegally driven from its lands" in the nineteenth century); *see also* SER 17, OR 17 (Compl. ¶29) ("Since 2000, the Federal Government's breaches of fiduciary duty to the Tribe *have continued unabated* ….") (emphasis added).

The Tribe cannot bring a time-barred claim to quiet aboriginal title under the QTA. Nor can it use the APA's sovereign immunity waiver to seek relief that

depends on judicial recognition of aboriginal title. *See supra*, at 9–10. Therefore, this Court should affirm the district court's dismissal of the Tribe's claims for lack of subject matter jurisdiction.

B. The Tribe does not challenge "agency action."

Even if the QTA did not bar the Tribe's suit, the APA's sovereign immunity waiver still would not apply to the Tribe's claims. The APA provides as follows:

> A person suffering legal wrong *because of agency action*, or adversely affected or aggrieved *by agency action* within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party.

5 U.S.C. § 702 (emphases added). The first sentence of the statute limits the sovereign immunity waiver to claims challenging "agency action." *See generally Lonatro*, 714 F.3d at 870–71 (explaining that any ambiguity in a sovereign immunity waiver should be resolved in the government's favor).

This Court has repeatedly interpreted 5 U.S.C. § 702 narrowly, applying it only when plaintiffs challenge "agency action." *E.g.*, *Rothe*, 666 F.3d at 338 ("The APA waives sovereign immunity to the extent a party 'adversely affected … *by agency action*' seeks 'relief other than money damages.'"); *St. Tammany Parish v. Fed. Emergency Mgmt. Agency*, 556 F.3d 307, 317 (5th Cir. 2009) ("Section 702

… authorizes suits against the United States through a limited waiver of sovereign immunity for 'relief other than money damages' *related to an agency's regulatory action*."); *Armendariz-Mata v. U.S. Dep't of Justice*, 82 F.3d 679, 682 (5th Cir. 1996) ("Congress intended to broaden the avenues for judicial review *of agency action* by eliminating the defense of sovereign immunity in cases covered by § 702 ….") (all emphases added).[5] The Supreme Court's treatment of the APA's sovereign immunity waiver buttresses this Court's strict interpretation. *See Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 62 (2004) (noting that 5 U.S.C. § 702 "insist[s] upon an 'agency action' "); *Dep't of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 260 (1999) (describing 5 U.S.C. § 702's first sentence as a "relevant part" of the sovereign immunity waiver); *Pena*, 518 U.S. at 196 (explaining that the APA allows persons injured by "agency action" to sue the United States); *Bowen v. Massachusetts*, 487 U.S. 879, 892 (1988) (stating that 5 U.S.C. § 702 waives federal sovereign immunity against "judicial review of agency action"). Other courts of appeals may interpret the APA's sovereign immunity waiver differently, *see* Tribe Br. 19–20, but the panel is bound by this Court's earlier decisions.

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[5] *Sheehan v. Army & Air Force Exchange Service*, 619 F.2d 1132 (5th Cir. 1980), *rev'd on other grounds*, 456 U.S. 728 (1982), is not to the contrary. That case recognized that the APA waives federal sovereign immunity to certain claims challenging "agency action." 619 F.2d at 1139. The agency action contested in *Sheehan* was the termination of the plaintiff's employment. *Id.* at 1136.

Thus, to fall within the APA's sovereign immunity waiver, the Tribe "must direct its attack against some particular 'agency action' that causes it harm." *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 891 (1990). Under the APA, an "'agency action' includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13); *see id.* § 701(b)(2). The Tribe does not point to any "identifiable action or event." *Lujan*, 497 U.S. at 899. Instead, it brings a broad, programmatic challenge to federal management of natural resources on public land.

This lawsuit "seeks to compel the United States to consider and accommodate the Tribe's aboriginal title and incidental rights before issuing permits, approving leases, and taking other federal actions that facilitate activities on or under" more than 400,000 acres of federally-owned land. SER 11–12, OR 11–12 (Compl. ¶ 7). The alleged actions include an unspecified number of natural resource permits, leases, and sales administered by multiple federal agencies. SER 18–25, OR 18–25 (Compl.). The Tribe does not identify any specific lease, permit, sale, or plan of operation. Rather, it contends that "*all* of them are unlawful." SER 34, OR 169 (Sur-Reply in Opp. to Mot. to Dismiss). That includes federal agencies' "ongoing" activities and unnamed "Government actions

initiated more than six years ago [that] … continue to impair the Tribe's aboriginal interests ….”[6] SER 31, 32, OR 117, 118 (Opp. to Mot. to Dismiss).

In short, the Tribe attempts to substitute a “particular agency action” with several broad categories of “continuing (and thus constantly changing) operations.” *Lujan*, 497 U.S. at 891, 890. An individual permit, lease, or sale may constitute an “identifiable action or event” for which the federal government can be sued. *Id.* at 899. But that does not transform entire classes of such activities into generic, amorphous “agency actions” under 5 U.S.C. § 702.

The Tribe's basic argument is that one flaw—failure to consider and accommodate aboriginal title—pervades all of the federal government's natural resource management decisions in two national forests and a national preserve. While it would certainly be easier for the Tribe to challenge that alleged flaw in the abstract (and force the sovereign United States to develop administrative records for an untold number of regulatory decisions, Br. 24), Congress instructed the courts to take a “case-by-case approach.” *Lujan*, 497 U.S. at 894. “[T]he 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—

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[6] The Tribe argues (Br. 22) that “the Complaint is expressly limited to challenging a finite set of agency actions, over a finite time period,” but the cited paragraphs of the complaint do not support that assertion.

cannot be laid before the courts for wholesale correction under the APA." *Id.* at 893. But that is precisely what the Tribe envisions (Br. 23): "relief on a case-by-case basis, with the appointment of a Special Master," who would require federal agencies to "take such action as may be warranted in the circumstances."

The Tribe (Br. 22) interprets *Lujan* as leaving the door open for a party to challenge "a completed universe" of particular agency actions. *Lujan*, 497 U.S. at 890. But as this Court explained in *Sierra Club v. Peterson*, 228 F.3d 559 (5th Cir. 2000) (en banc), a plaintiff cannot use a set of completed actions as a springboard for a general challenge to federal agencies' land management practices.

> Rather than limit their challenge to individual sales, [plaintiffs] merely used these sales as evidence to support their sweeping argument that the Forest Service's "on-the-ground" management of Texas forests over the last twenty years violates the [statute]. This is clear from their allegations, which addressed the entire Texas forests, from their evidence, which concerned practices throughout the Texas forests and which dated back to implementation of the [statute], and from their requested relief.

228 F.3d at 567.[7] Likewise, the scope of the Tribe's claims and the relief that it seeks "go well beyond any challenge to discrete [agency actions]." *Id.*; *see*

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[7] *Peterson* focused on whether the plaintiffs contested "final agency action" under 5 U.S.C. § 704, but the Court's reasoning followed directly from *Lujan*'s "prohibition on programmatic challenges." *Peterson*, 228 F.3d at 566. Such challenges fail to clear the sovereign immunity hurdle because they do not contest "agency action" under 5 U.S.C. § 702. *See Lujan*, 497 U.S. at 890. They also founder for lack of finality, as discussed *infra*, at 22.

SER 26–27, OR 26–27 (Compl.); *see also* SER 41, OR 286 (M.J. Report) ("The broad sweep of the Tribe's Complaint in this matter is unmistakable."). The Tribe cannot broaden the APA's sovereign immunity waiver simply by assuring the Court (Br. 23) that, at some future date, the Tribe will request "specific relief to specific agency actions based on the circumstances of each action."

None of this prevents the Tribe from challenging a discrete agency action in an appropriate case. Information regarding the federal government's management of natural resources on public lands is readily available. *See, e.g.*, 36 C.F.R. § 9.52 (providing for public notice and inspection of documents related to oil and gas permits and leases in national forests). If the Tribe were to challenge a particular agency action (e.g., a particular permit, lease, or sale), its suit would not be barred on the ground that it might have broad ramifications for federal resource management. *See Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 734–35 (1998) ("[O]ne initial site-specific victory … could …, through preclusion principles, effectively carry the day."). This lawsuit, however, should be dismissed for lack of subject matter jurisdiction because it fails to challenge agency action.

The Tribe fares no better in its attempt (Br. 5) to recast this suit as one to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). As with a challenge to affirmative agency action, a claim contesting agency inaction "can proceed only where a plaintiff asserts that an agency failed to

take a *discrete* agency action that it is *required to take*." *Norton*, 542 U.S. at 64. "The limitation to discrete agency action precludes the kind of broad programmatic attack [the Supreme Court] rejected in [*Lujan*]." *Id.* Section 702 of the APA does not waive federal sovereign immunity to the Tribe's programmatic challenge.

C. The Tribe does not challenge "final agency action" or "agency action made reviewable by statute."

Even if the Tribe had identified a particular "agency action," the APA's sovereign immunity waiver still would not apply to these claims. This Court has determined that 5 U.S.C. § 704 further restricts the waiver in 5 U.S.C. § 702 to claims challenging "final agency action" or "agency action made reviewable by statute."[8] In other words, the limits on the APA's sovereign immunity waiver are coextensive with the limits on the APA's cause of action. The APA's sovereign

[8] *See Taylor-Callahan-Coleman Counties Dist. Adult Prob. Dep't v. Dole*, 948 F.2d 953, 956 (5th Cir. 1991) (finding no sovereign immunity waiver absent final agency action); *see also Peterson*, 228 F.3d at 565 ("Absent a specific and final agency action, we *lack jurisdiction* to consider a challenge to agency conduct.") (emphasis added); *Veldhoen v. U.S. Coast Guard*, 35 F.3d 222, 225 (5th Cir. 1994) ("If there is no 'final agency action,' as required by [5 U.S.C. § 704], a court lacks subject matter jurisdiction [over a non-statutory claim]."); *Voluntary Purchasing Groups, Inc. v. Reilly*, 889 F.2d 1380, 1385–86 (5th Cir. 1989) (characterizing 5 U.S.C. § 704 as a "limitation" on the immunity waiver in 5 U.S.C. § 702). The Tribe (Br. 19) relies on *Sheehan v. Army & Air Force Exchange Service*, 619 F.2d 1132 (5th Cir. 1980), *rev'd on other grounds*, 456 U.S. 728 (1982), but that case did not squarely present the issue because the contested agency action—an employee's termination—was plainly "final." 619 F.2d at 1136. Other courts of appeals may interpret the APA's sovereign immunity waiver more broadly, *see* Tribe Br. 19–20, but the panel must follow this Court's precedent.

immunity waiver does not apply to the Tribe's claims because those claims do not contest final agency action or agency action made reviewable by statute.

1. The Tribe does not challenge "final agency action."

A final agency action "mark[s] the consummation of the agency's decisionmaking process," and it is an action "by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 178 (1997) (internal quotation marks and citations omitted). For reasons already discussed, "the continuing (and thus constantly changing) operations" of the U.S. Forest Service and the U.S. Department of the Interior on federally-owned land do not constitute an identifiable agency action, much less a "'final agency action' within the meaning of § 704." *Lujan*, 497 U.S. at 890. The Tribe does not point to any particular decisionmaking process, nor does it identify specific rights, obligations, or legal obligations that flow from any activity of either agency. To the contrary, the Tribe admits (Br. 6) that its suit is directed toward agency activities that are now "pending." The Tribe cannot use the cloak of a programmatic challenge to avoid the justiciability problems that accompany challenges to non-final agency action. *See Peterson*, 228 F.3d at 566 n.11.

2. The Non-Intercourse Act does not make "agency action … reviewable by statute."

Absent final agency action, the APA's sovereign immunity waiver extends only to claims challenging "agency action made reviewable by statute." 5 U.S.C. § 704. The Tribe invokes the Non-Intercourse Act, which provides 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. Every person who, not being employed under the authority of the United States, attempts to negotiate such treaty or convention, directly or indirectly, or to treat with any such nation or tribe of Indians for the title or purchase of any lands by them held or claimed, is liable to a penalty of $1,000.…

25 U.S.C. § 177. The Tribe contends (Br. 12–16) that lawsuits against federal officials may be brought under the Non-Intercourse Act.

As an initial matter, the Tribe did not specifically object to the magistrate judge's determination that "[t]he Non-Intercourse Act clearly does not [provide for judicial review of federal actions], nor does the Tribe argue that it does." SER 41, OR 286 (M.J. Report); *see* SER 45, OR 297 (Objections to M.J. Report). Because the Tribe did not object to that legal conclusion and the district court did not specifically address it, the issue is reviewed for plain error. *See supra*, at 5–6.

In any event, the magistrate judge correctly determined that the Non-Intercourse Act does not provide for judicial review of federal conduct. It is well-established that "general statutes imposing restrictions do not apply to the

Government itself without a clear expression to that effect." *Fed. Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 120 (1960) (*Tuscarora*); *see United States v. Marion Cty. Sch. Dist.*, 625 F.2d 607, 611 & n.6 (5th Cir. 1980). The prohibitions of the Non-Intercourse Act do not expressly apply to federal agencies. Indeed, the Supreme Court has squarely held that "25 U.S.C. § 177 does not apply to the United States." *Tuscarora*, 362 U.S. at 123; *see also Tonkawa Tribe v. Richards*, 75 F.3d 1039, 1046 (5th Cir. 1996) ("The Non-Intercourse Act's prohibition is effective against states, as well as private parties …."). The Act is not concerned with *federal* dispositions of property; its "obvious purpose" is "to prevent unfair, improvident or improper disposition *by Indians* of lands owned or possessed by them to other parties …." *Tuscarora*, 362 U.S. at 119 (emphasis added).

The Tribe does not cite any case that recognizes a statutory cause of action against the United States for a breach of the Non-Intercourse Act.[9] Even if the Act

[9] The Tribe (Br. 15–16) relies on several authorities, none of which recognize a right to judicial review conferred by the Non-Intercourse Act. In *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370, 379–80 (1st Cir. 1975), plaintiffs relied on an APA cause of action. *See Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 388 F. Supp. 649, 664–65 (D. Me. 1975). The claims in *United States v. Oneida Nation*, 201 Ct. Cl. 546 (1973); *Seneca Nation v. United States*, 173 Ct. Cl. 912 (1965); and *Oneida Tribe v. United States*, 165 Ct. Cl. 487 (1964), were brought under the Indian Claims Commission Act. The United States was not sued in *Mohegan Tribe v. State of Connecticut*, 638 F.2d 612 (2d Cir. 1981). Finally, *Edwardsen v. Morton*, 369 F. Supp. 1359 (D.D.C. 1973), did not involve the Non-Intercourse Act.

created a fiduciary relationship between the United States and the Tribe enforceable under federal common law (a proposition that we contest in Part II, *infra*), the Non-Intercourse Act itself would not give Indian tribes a right to judicial review of federal conduct.

3. Federal common law claims are not "reviewable by statute."

In addition to claims under the APA and the Non-Intercourse Act, the Tribe asserts (Br. 1) a cause of action under federal common law. As explained below, we dispute the existence of that cause of action, but in any case, the common law cannot make agency conduct "reviewable by statute." 5 U.S.C. § 704; *see generally* Black's Law Dictionary (9th ed. 2009) (defining "common law" as "[t]he body of law derived from judicial decisions, rather than from statutes or constitutions"). Even if the Tribe had a common law cause of action against the United States (which we dispute), the only way to bring a federal common law claim using the APA's waiver of sovereign immunity would be to challenge "final agency action." 5 U.S.C. § 704. As established earlier, the Tribe did not challenge final agency action in this case.

The Tribe's claims under the APA, the Non-Intercourse Act, and federal common law fall outside the scope of the APA's sovereign immunity waiver. Therefore, this lawsuit must be dismissed for lack of subject matter jurisdiction.

II. THE TRIBE DOES NOT STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

Even if sovereign immunity did not bar the Tribe's claims, the district court still properly dismissed them. The Tribe does not state a claim under the APA, the Non-Intercourse Act, or federal common law upon which relief can be granted. That conclusion follows largely from what has already been said. The Tribe cannot state a claim under the APA without challenging "final agency action" or "agency action made reviewable by statute." 5 U.S.C. § 704. And the Tribe cannot state any claim against the federal government under the Non-Intercourse Act.

The Tribe is left with only its federal common law claim. But the Tribe did not specifically object to the magistrate judge's conclusion that there is no common law cause of action against the United States for declaratory or equitable relief for a breach of a fiduciary duty, and the district court did not address the issue. SER 42–43, OR 287–88 (M.J. Report); *see* SER 45, OR 297 (Objections to M.J. Report). Therefore, this Court reviews the magistrate judge's determination only for plain error. *See supra*, at 5–6.

The Tribe does not identify any common law cause of action for declaratory or injunctive relief based on the federal government's breach of any fiduciary duty. Nor has the Tribe clearly articulated the specific fiduciary duties that the United States allegedly breached. *See, e.g.*, Tribe Br. 5–6 ("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."). In the context of a claim for money damages, a tribe must "identify a specific, applicable, trust-creating statute or regulation that the Government violated." *United States v. Navajo Nation*, 556 U.S. 287, 302 (2009); *accord United States v. Jicarilla Apache Nation*, 131 S.Ct. 2313, 2325 (2011) ("The Government assumes Indian trust responsibilities only to the extent it expressly accepts those responsibilities by statute."). At a minimum, that principle should apply equally in the case of non-monetary relief.

The Tribe contends (Br. 10, 15) that the Non-Intercourse Act imposes unspecified fiduciary duties on the United States that are enforceable via federal common law. The Non-Intercourse Act generally "protects a tribe's interest in land," *Tonkawa*, 75 F.3d at 1045, but it does not give rise to any "*specific* fiduciary or other duties." *United States v. Navajo Nation*, 537 U.S. 488, 506 (2003) (emphasis added). The Act certainly does not specify which duties (if any) attach when federal agencies manage natural resources on federally-owned lands that are subject to aboriginal title. In sum, the Tribe cannot obtain relief under federal common law, just as it cannot get relief under the APA or the Non-Intercourse Act.

* * *

Congress heard the Tribe's complaints and referred them to the Court of Federal Claims, which recommended that Congress compensate the Tribe for

historical wrongdoing by the federal government. The Tribe can continue to petition Congress to act on that recommendation, but the federal courts lack independent subject matter jurisdiction to reach any of the claims in this lawsuit.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's dismissal of the Tribe's lawsuit.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation set forth in Federal Rule of Appellate Procedure 32(a)(7)(B). Excepting the portions of the brief described in Fed. R. App. P. 32(a)(7)(B)(iii), the brief contains 7,149 words.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6). The brief has been prepared in a proportionally-spaced typeface using Microsoft Word 2007 in Times New Roman, 14-point.

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November 6, 2013

CERTIFICATE OF SERVICE

I hereby certify that on November 6, 2013, I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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