No. 13-2181

In the
United States Court of Appeals
for the Tenth Circuit

PUEBLO OF JEMEZ, a federally recognized Indian Tribe,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee.

On Appeal from the United States District Court
for the District of New Mexico
1:12-CV-00800-RB-RHS
Robert C. Brack, District Judge

Brief of Appellant Pueblo of Jemez

RANDOLPH H. BARNHOUSE
Johnson Barnhouse & Keegan LLP
7424 4th Street NW
Los Ranchos De Albuquerque, NM 87107
(505) 842-6123
dbarnhouse@indiancountrylaw.com

Attorneys for Plaintiff-Appellant

CORPORATE DISCLOSURE STATEMENT

Appellant Pueblo of Jemez is a sovereign Indian Nation and has no parent company, and no public company has any ownership interest in it.

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STATEMENT OF RELATED CASES

There are no known related cases pending in this Court.

JURISDICTIONAL STATEMENT

I. Federal District Court Jurisdiction.

The United States District Court for the District of New Mexico had original subject matter jurisdiction over Jemez Pueblo's claims under the Quiet Title Act because the Pueblo brought its claims within twelve years after the United States acquired its title to the lands at issue. 28 U.S.C. § 2409A, Add. 13. The Pueblo's claims present a federal question that arises under the laws and a Treaty of the United States. 28 U.S.C. § 1331. The district court also had original jurisdiction because the Pueblo of Jemez, a federally recognized Indian tribe, filed the action. 28 U.S.C. § 1362. The Indian Claims Commission Act has been repealed, and was never relied upon by Jemez Pueblo to establish the district court's subject matter jurisdiction as the Pueblo's claim against the United States did not accrue until the year 2000.

II. Jurisdiction On Appeal.

The Tenth Circuit Court of Appeals has appellate jurisdiction over this appeal pursuant to 28 U.S.C. § 1291 because the district court's holding that it lacked subject matter jurisdiction to hear the claim constitutes a final decision of a district court of the United States. Final Order: Memorandum Opinion and Order (Sept. 24, 2013) Aplt. App. at 39-49; Final Order (Sept. 24, 2013) Aplt. App. at 50;

Timely Appeal; Pueblo of Jemez' Notice of Appeal (timely filed on Oct. 11, 2013) Aplt. App. at. 51.

ISSUES PRESENTED FOR REVIEW

1. Whether the district court erred when it held that "Plaintiff has not met its burden to establish a valid waiver of sovereign immunity" without ever addressing the government's waiver of sovereign immunity in the Quiet Title Act.

2. Whether the district court erred when it reached the factual merits of the Jemez Pueblo's claims under Rule 12(b)(1) instead of proceeding to trial.

3. Whether the district court erred when it held that the Indian Claims Commission Act forced Indian tribes to appear before the Indian Claims Commission and, in exchange for money, surrender their unextinguished aboriginal title to land on which there was no shadow of an adverse United States' interest, failing which they would be forever barred from any remedy in any other forum against the United States relating to those lands.

STATEMENT OF THE CASE

I. Procedural History And Rulings Presented For Review.

The Pueblo of Jemez brought this action against Appellee United States relying on the waiver of sovereign immunity contained in the Quiet Title Act, 28 U.S.C. § 2409A. Add. 13-15. The Pueblo sought to quiet its title to the lands of the Valles Caldera National Preserve based upon the Pueblo's unextinguished and continuing original Indian (aboriginal) title to these lands.[1] The United States moved to dismiss for lack of jurisdiction under Fed. R. Civ. P. 12(b)(1) and for failure to state a claim under Fed. R. Civ. P. 12(b)(6). Add. 32-33. The Pueblo opposed the motion and requested oral argument, which the district court denied.

The district court held that the Pueblo's Indian Claims Commission (ICC) action was not connected to its title in the Valles Caldera, effectively denying Appellee's 12(b)(6) motion.

In ruling upon Appellee's 12(b)(1) motion, the district court failed to address its jurisdiction based on the United States' waiver of sovereign immunity in the Quiet Title Act. Ignoring that waiver the district court held that the 1946 Indian Claims Commission Act (Add. 18-25) (now repealed but formerly codified at 25 U.S.C. §§ 70 to 70n-2) divested the court of subject matter jurisdiction because the

[1] The terms "original Indian title," "Indian title" and "aboriginal title" describe the same ownership interest and are used interchangeably in this brief.

Pueblo did not file a claim with the ICC related to its Indian title in the Valles Caldera. But to do so, the Pueblo would have been forced to transmute its unextinguished Indian title claim into an ICC claim for monetary compensation within the ICCA's five-year statute of limitations. Nevertheless, the district court dismissed without determining whether the Pueblo had a cause of action against the United States. More importantly, the district court dismissed without determining when the Pueblo's alleged "claim" for monetary compensation before the ICC and within the meaning of ICCA Sec. 2(4) might have accrued. Instead, the district court dismissed the case, relying on Fed. R. Civ. P. 12(b)(1) and based upon its determination that it lacked subject matter jurisdiction due to the sovereign immunity of the United States.

I. Statement of the Facts

The district court made a number of specific findings supporting the Jemez Pueblo's original Indian title to the Valles Caldera, a dormant crater of a super volcano in the center of the Jemez Mountains. The caldera is now located within the exterior boundaries of the Valles Caldera National Preserve, established pursuant to the Valles Caldera Preservation Act, 16 U.S.C. §§ 698v-609v-10. Add. 2. Specifically, the district court found that the Jemez people migrated to the Jemez Mountains prior to 1200 A.D., establishing themselves as the primary

Native American occupants and land users of the Jemez Mountains, including the Valles Caldera and the Rio Jemez watershed. Add. 2. The modern Jemez Pueblo is a consolidation of the descendants of the ancestral Jemez people. Add. 2. Evidence in the record identifies at least sixty pueblo villages, all linked with an extensive network of trails, and many thousands of home sites, agricultural fields, ceremonial sites, sacred areas, mineral procurement areas, hunt traps and blinds, and camp sites associated with the ancestral Jemez people within the Jemez Mountains, including the Valles Caldera National Preserve. Add. 2.

The district court found that the Jemez Pueblo greatly values the Valles Caldera as a spiritual sanctuary as it contains many important religious sites vital to traditional Jemez religion and culture. (Add. 3). The ceremonial sites and gathering areas are actively used by Jemez Pueblo members and are crucial to the continuing survival of the traditional Jemez culture and religion. Add. 3.[2] Jemez Pueblo members continue to rely on the Valles Caldera for many critical resources, and make religious pilgrimages to these sites to leave prayer offerings and conduct religious ceremonies. Several important Jemez religious societies make lengthy visits to the Valles Caldera for hunting, society initiations and religious

[2] The single most important sacred site for the Pueblo is Wavema, the highest mountain within the Valles Caldera National Preserve, also known as Redondo Peak. (Aplt. App at 12; *Ex. to Pl. Resp. to Def. Mot. to Dismiss*, dated May 7, 2013, docket number 18-3 at 6).

ceremonies. Add. 3. The mineral and hot springs within the Valles Caldera are used by Jemez Pueblo medicine societies for healing. Add. 3.[3]

In addition to these specific factual findings, the district court discussed the 1860 congressional grant to the heirs of Luis Maria Cabeza de Baca. Add. 7. That grant resulted in what are known as the "Baca Floats" – the Baca heirs' right to select up to five unspecified parcels from the "public domain" within the then New Mexico Territory[4] totaling 500,000 acres in settlement of a Spanish land grant conflict with the Las Vegas [New Mexico] Community Grant. (Pub. L. No. 36-197, 12 Stat. 71, 72 (1860), (Add. 30-31). The Baca heirs selected one location in what is now Colorado, two in what is now Arizona, and two in what is now New Mexico. One of the New Mexico locations is referred to as Baca Location No. 1, comprising 99,289 acres encompassing the Valles Caldera. Baca Location No. 1 is also sometimes referred to as the Baca Ranch. Alt. App. 17-18. The Baca heirs never received a deed to this land, and instead simply began using the location (primarily for grazing) after approval of the location by the Surveyor General for

[3]The district court did not specifically issue a finding that the Pueblo's actual, long term continuous use and occupancy established aboriginal title, but the court did find that the Pueblo was the primary user of the Valles Caldera for a long time – over 800 years. Exclusive use and occupancy remains a matter for trial under the Quite Title Act unless the United States concedes that point.

[4] New Mexico Territory at that time included Arizona and parts of Southern Colorado. Much, if not most, of the Territory was subject to unextinguished Indian title. *See United States v. Santa Fe Pacific R.R. Co*, 314 U.S. 339 (1941).

New Mexico. *Id.* The Jemez Pueblo presented evidence to the district court confirming that the Baca heirs received this location subject to the Pueblo's original Indian title. (*Id*.) The district court found that the Baca heirs and their successors-in-interest did not disturb the Jemez Pueblo's peaceful enjoyment of their right of occupancy of the Valles Caldera. (Add. 3).

The district court also found that "[o]n July 25, 2000, [the United States] purchased the property interests of the Baca heirs' successors-in-interest to establish the Valles Caldera National Preserve." *Id*. That "property interest" was, by definition, no greater than the interest held by the Baca heirs, and thus remained subject to the Jemez Pueblo's original Indian title. Following its purchase in 2000, Appellee United States for the first time ever began restricting the Jemez Pueblo's access to these lands. To confirm its continuing Indian title, the Jemez Pueblo brought the instant litigation under the Quiet Title Act and within the twelve year limitations period established in that Act.

SUMMARY OF THE ARGUMENT

The district court erred when it failed to exercise its subject matter jurisdiction over the Jemez Pueblo's unextinguished Indian title claim under the sovereign immunity waiver in the Quiet Title Act. It was not until the United States acquired an interest in the Valles Caldera in 2000, and shortly thereafter began limiting the Pueblo's access to the land at issue, that quiet title relief under the Quiet Title Act became available to the Pueblo. The Pueblo brought its complaint within the Quiet Title Act's twelve year limitations period, requiring the district court to exercise its jurisdiction under the Quiet Title Act and address the Pueblo's claims.

The Appellee's Fed. R. Civ. P. 12(b)(1) factual challenge to subject matter jurisdiction goes to the merits of the case, intertwining subject matter jurisdiction analysis with the merits of the claim. Therefore, the case should proceed to trial. *Holt v. United States*, 46 F.3d 1000, 1002 (10th Cir. 1995). Rather than simply ruling on the pleadings and limited evidence before it under Rule 12(b)(1), the district court was required to exercise its jurisdiction pursuant to the Quiet Title Act and hold an evidentiary hearing following jurisdictional fact discovery, or proceed to trial. Only then could the district court have entered a factual finding as to the date upon which the Pueblo's claim accrued, or that no claim within the

jurisdiction of the Indian Claims Commission Act did accrue, a factual prerequisite to any ruling on whether the statute of limitations in the Indian Claims Commission Act is a bar to the Pueblo's claim. The district court's failure to do so deprived the Pueblo of procedural safeguards—such as discovery—that apply where, as here, a plaintiff faces a direct attack on the merits. The district court's ruling under Rule 12(b)(1) on Appellee's indirect attack on the merits improperly denied the Pueblo the greater level of protection to which it was entitled under Rule 12(b)(6) or Rule 56, both of which place greater restrictions on the district court's discretion.

The ICCA was remedial legislation adopted by Congress to provide Native Americans with a measure of justice and a remedy for "ancient wrongs." The legislative history of the ICCA confirms the remedial nature of the Act, and does not support the district court's "exclusive remedy" holding in its decision below, which would turn the ICCA into an engine of new wrongs. Nor does the Act itself support the district court's holding. Indeed, Section 24 of the ICCA provides a waiver of the government's sovereign immunity for claims accruing after the date of passage of the ICCA. If the district court's holding were correct, it would follow that all unadjudicated Indian water rights, property rights, treaty rights, hunting rights, and fishing rights were extinguished on August 13, 1946, and

converted to taking claims against the United States for monetary compensation regardless of whether a claim had otherwise "accrued." Yet there have been hundreds of cases involving land and water rights, settlement acts, and other actions that cannot be explained if the district court's holding is correct.

Here, the Jemez Pueblo merely seeks recognition that the federal government holds title to the Valles Caldera subject to the Pueblo's pre-existing and unextinguished original Indian title. The Pueblo did not have a claim against the United States in 1946 for loss of title because the Pueblo's original Indian title to the Valles Caldera was never extinguished. The district court's interpretation of the ICCA is contrary to the Acts legislative history, the Act itself, and a string of controlling court decisions including those of the United States Supreme Court. Indeed, the position of the United States here on the effect of the ICCA on otherwise unextinguished Indian title claims is inconsistent with its position in other cases. The district court's holding that the ICCA divested it of jurisdiction to hear the Pueblo's claim is incorrect, and must be reversed.

STANDARD OF REVIEW AND BURDEN OF PROOF

This Court reviews *de novo* a district court's grant of a 12(b)(1) motion to dismiss. *Holt v. United States*, 46 F.3d 1000, 1003 (10th Cir. 1995). That *de novo* review is guided by the "virtually unflagging obligation" that courts have to exercise the jurisdiction granted to them. *Colo. River Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976).

This Court reviews issues of statutory construction *de novo*. *Coffey v. Freeport McMoran Copper & Gold*, 581 F.3d 1240, 1245 (10th Cir. 2009). When conducting its *de novo* review, the Court must apply the canons of construction requiring statutes to be liberally construed in favor of the Indians. Cohen, Felix S., *Handbook of Federal Indian Law* (2012 Ed.), § 2.02; *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985) ("standard principles of statutory interpretation do not have their usual force in cases involving Indian law"); *Choate v. Trapp*, 224 U.S. 665, 675 (1912) ("in the government's dealings with the Indians the … construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith. This rule of construction has been recognized, without exception, for more than a hundred years").

In holding that Jemez Pueblo's claim implicitly "accrued" at some unidentified time pursuant to some unidentified federal "taking" event prior to 1946, the district court addressed a mixed question of law and fact, which this Court reviews *de novo*. *Pittsburg & Midway Coal Min. Co. v. Yazzie*, 909 F.2d 1387, 1393-94 (10th Cir. 1990) ("The ascertainment of congressional intent is a matter of statutory construction, which typically involves a *de novo* review. To the extent that statutory construction turns on an historical record, however, it involves a mixed question of law and fact. Where a mixed question 'primarily involves the consideration of legal principles, then a *de novo* review by the appellate court is appropriate'" (citation omitted)).

This Court reviews the district court's findings of fact for clear error. *Holt*, 46 F.3d at 1003. If evidence is required to demonstrate the existence of subject matter jurisdiction, then the burden is on the Plaintiff to show that subject matter jurisdiction exists by a preponderance of the evidence *Celli v. Shoell*, 40 F.3d 324, 327 (10th Cir. 1994).

ARGUMENT

I. The District Court Erred When It Failed to Address Its Subject Matter Jurisdiction Over the Jemez Pueblo's Unextinguished Indian Title Claim Under the Sovereign Immunity Waiver in the Quiet Title Act.

The United States has waived its sovereign immunity in the Quiet Title Act, 28 U.S.C. § 2409a (1972). The Pueblo's complaint asserts this waiver of immunity as the basis for bringing the United States before the district court. The Pueblo did not rely on the waiver of immunity in the (now repealed) Indian Claims Commission Act.

Under the Quiet Title Act: "The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest." 28 U.S.C. § 2409a. As this Court has noted:

> The legislative history of section 2409a refers to the historical development of Quia timet suits in the courts of equity in England, and to quiet title suits as developed in this country. U.S.Code Cong. & Admin.News, 1972, Vol. 3, p. 4547. It thus must be assumed that Congress intended to permit to be brought against the United States the typical quiet title suit, as it has developed in the various states in this country through statutory and case law.

Kinscherff v. United States, 586 F.2d 159, 160 (10th Cir. 1978). A plaintiff in a quiet title action need not claim fee simple title to the property at issue. A plaintiff need only allege its interest, and that of the United States. *Id*. at 161.

Both the district court's factual findings and Jemez Pueblo's complaint confirm that the Quiet Title Act's minimal jurisdictional requirements are met in this case and therefore the court had a virtually unflagging responsibility to exercise its jurisdiction. *Colo. River Conservation Dist.*, 424 U.S. at 817.

A. The nature of the Pueblo's rights, title or interest in the real property.

The district court's factual findings support the Pueblo's unextinguished Indian title to the Valles Caldera. *See* Statement of Facts, *supra*; Compl. at paragraphs 59 through 84. (Aplt. App. at 14-18). *Cherokee Nation v. Georgia*, 30 U.S. 1, 48 (1831) (original Indian title is as "sacred as the fee–simple, absolute title of the whites"); *County of Oneida, N.Y. v. Oneida Indian Nation of N.Y.*, 470 U.S. 226 (1985).

B. The circumstances under which the Pueblo acquired its right, title or interest.

The district court's factual findings support the Pueblo's claim to have acquired its original Indian title to the Valles Caldera through its exclusive use and occupancy of these lands from as early as the 13th century. *See* Statement of Facts, *supra*; Compl. at paragraphs 14 through 84. (Aplt. App. at 9-18). *Strong v. United States*, 518 F.2d 556, 560 (1975), *cert. denied*, 423 U.S. 1015 (1975) ("In order to establish aboriginal title, the tribe must demonstrate actual, exclusive and

continuous use and occupancy 'for a long time' prior to the loss of the property"). Appellee's attacks on the Pueblo's factual averments can be, and should have been, addressed through evidence introduced at trial. *Santa Fe*, 314 U.S. at 345. ("Occupancy necessary to establish aboriginal possession is a question of fact to be determined as any other question of fact").

C. The right, title or interest claimed by the United States.

The district court's factual findings confirm the interest claimed by the United States following its purchase of the Baca heirs' American grant title in 2000. *See* Statement of Facts, *supra*; Compl. at paragraphs 85 through 87. (Aplt. App. at 18).

But the district court never analyzed the government's waiver of sovereign immunity under the Quiet Title Act, and mentions the Act in passing only twice in the decision below: (1) in the opening sentence of the decision confirming that the "Plaintiff brought this action pursuant to the Quiet Title Act" (at 1); and (2) in a parenthetical to a case citation near the end of the decision (at 10). This stands in stark contrast to the approach taken by appellate courts when deciding Quiet Title Act claims brought by tribes, even those cases holding that the claim the case was addressing was barred by the ICCA. Those cases rely on factual determinations

regarding the date the claim arose, and still address the Quiet Title Act aspect of the case at issue. So, for example, in *Navajo Tribe* this Court noted:

> even if we were to find that the Tribe was not limited to an action for money damages before the Indian Claims Commission, its 'quiet title' action could not now lie. The only statute under which the Tribe could bring a quiet title action is the Quiet Title Act of 1972, but any *claim the Tribe might have under the QTA is time-barred*.

809 F.2d at 1468 (emphasis added) (citations and footnote omitted). The United States acquired its interest in these lands in 2000, and the Pueblo brought its claim in 2012, within the Quiet Title Act's twelve year limitations period.

Similarly, the Seventh Circuit Court of Appeals in *Sokaogon Chippewa* held that the Tribe's Quiet Title Act claim was time barred because:

> the tribe alleges that within several decades following the 1854 treaty the tribe (or its predecessor) had been dispossessed [from the land at issue] by the defendants. . . . Of course, limited use of the land by farmers and vacationers would not necessarily have infringed a right of limited and intermittent occupancy, but it is the plaintiff itself that claims that this limited use dispossessed the tribe. So the suit against the U.S. was properly dismissed.

Sokaogon Chippewa Cmty. v. State of Wis., Oneida County, 879 F.2d 300, 303 (7th Cir. 1989). Here, the Jemez Pueblo has not been dispossessed, nor has it ever claimed otherwise. And because it was never dispossessed, it had no claim against

the United States for the loss of its original Indian title prior to 1946 that it could have brought before the Indian Claims Commission.[5]

It was not until the United States acquired an interest in the Valles Caldera in 2000, and shortly thereafter began limiting the Pueblo's access to the land, that quiet title relief under the Quiet Title Act became available to the Pueblo. The district court erred when it failed to address its subject matter jurisdiction over the Jemez Pueblo's unextinguished Indian title claim under the sovereign immunity waiver in the Quiet Title Act. That error requires that the district court's decision be reversed and the case remanded for further proceedings.

II. The District Court Erred When It Decided the Factual Merits of the Jemez Pueblo's Quiet Title Claims Under Rule 12(b)(1).

A. The United States raised factual (not facial) challenges to the Pueblo's complaint.

The district court's ruling is grounded entirely on Federal Rule of Civil Procedure 12(b)(1). Under this rule a defendant may: (1) make a facial challenge to the pleadings; or (2) rely on evidence to make a factual challenge. *Holt v.*

[5] This analysis does not require the Court to accept the proposition that mere dispossession would result in loss of title – which it does not. *Alabama-Coushatta Tribe of Texas v. United States*, 28 Fed. Cl. 95, 108 (Fed. Cl. 1993) *aff'd in part as modified, rev'd in part*, 3-83, 2000 WL 1013532 (Fed. Cl. June 19, 2000). But this Court need not address this issue because there was no dispossession of the Pueblo until the Appellee began limiting the Pueblo's access to the Valles Caldera after the 2000 purchase.

United States, 46 F.3d at 1002. The United States did not make a factual challenge to the pleadings. Instead it advanced two factual attacks on the complaint:

> (1) A factual argument that the Pueblo's ICC monetary compensation claim for other real property (the title to which had been taken) precluded the Pueblo's unextinguished title claim to this separate and distinct piece of land; and
>
> (2) A factual argument that the Pueblo's claim somehow accrued prior to August 13, 1946 and was therefore barred by the ICCA.

The district court rejected the Appellee's first argument. Add. 9-10 ("Plaintiff did not include the subject property in its claim before the ICC"). Indeed, the Appellee itself admitted that the Pueblo's current claim to unextinguished Indian title in the Valles Caldera was not included in the title extinguishment claim before the ICC – which was related to other lands. *See Def. Mot. to Dismiss Pl.s Compl.*, dated February 14, 2013, docket number 14 at 25 ("the Pueblo did not claim title to the Valles Caldera in the ICC litigation").

But the district court accepted the second argument without making the necessary factual determination as to whether the Pueblo's land was taken and if so, when its claim accrued. In reaching its decision, the district court ignored the distinction between extinguished and unextinguished title to real property, and

failed to differentiate between property title (a bundle of sticks) and a cause of action to protect property title (the right to ask a court to protect one's interest in a particular stick or sticks).

The district court's reliance on Rule 12(b)(1) under the facts and procedural posture of this case was improper. The court was instead required to allow the Pueblo to develop a full record on summary judgment or at trial. *Paper, Allied-Indus., Chem. and Energy Workers Intl Union v. Contl Carbon Co.*, 428 F.3d 1285, 1292 (10th Cir. 2005) ("a court is required to convert a Rule 12(b)(1) motion to dismiss into a Rule 12(b)(6) motion or a Rule 56 summary judgment motion when resolution of the jurisdictional question is intertwined with the merits of the case" (citing and quoting *Holt*, 46 F.3d at 1003)).

This requirement is critical under the rules as it denied the Pueblo its right to present evidence and engage in discovery, and because it improperly shifted the burdens and presumptions onto the Pueblo:

> vesting a district court with the discretion to determine whether it possesses jurisdiction generally presents no problems. But as Judge Sprouse cautioned in *Adams*, "where the jurisdictional facts are intertwined with the facts central to the merits of the dispute," a presumption of truthfulness should attach to the plaintiff's allegations. *Id.* In that situation, the defendant has challenged not only the court's jurisdiction but also the existence of the plaintiff's cause of action. A trial court should then afford the plaintiff the procedural safeguards—such as discovery—that would apply were the plaintiff facing a direct attack on the merits.

Kerns v. United States, 585 F.3d 187, 192-93 (4th Cir. 2009) (citing *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982)). As the Fifth Circuit Court of Appeals has recognized when addressing this same issue:

> Where the defendant's challenge to the court's jurisdiction is also a challenge to the existence of a federal cause of action, the proper course of action for the district court (assuming that the plaintiff's federal claim is not immaterial and made solely for the purpose of obtaining federal jurisdiction and is not insubstantial and frivolous) is to find that jurisdiction exists and deal with the objection as a direct attack on the merits of the plaintiff's case. The Supreme Court has made it clear that in that situation no purpose is served by indirectly arguing the merits in the context of federal jurisdiction. Judicial economy is best promoted when the existence of a federal right is directly reached and, where no claim is found to exist; the case is dismissed on the merits. This refusal to treat indirect attacks on the merits as Rule 12(b)(1) motions provides, moreover, a greater level of protection to the plaintiff who in truth is facing a challenge to the validity of his claim: the defendant is forced to proceed under Rule 12(b)(6) (for failure to state a claim upon which relief can be granted) or Rule 56 (summary judgment)-both of which place greater restrictions on the district court's discretion.

Williamson v. Tucker, 645 F.2d 404, 415 (5th Cir. 1981) (footnote omitted) (citing *Bell v. Hood*, 327 U.S. 678, 682 (1945).).

B. Basic concepts of property law confirm that owning an interest in property is distinct from the necessity to bring a claim to protect that interest.

Owning an interest in land does not, on its face, give the owner the right (or need) to bring a claim or cause of action to protect that interest. In other words, a

party may own an *interest* in real property, but not have a *claim* to protect that interest so long as the interest owned is not threatened. *See generally* 65 Am. Jur. 2d Quieting Title § 1 (a quiet title action is "brought to quiet an existing title against an adverse or hostile claim of another"); *accord Rio Grande Silvery Minnow (Hybognathus amarus) v. Bureau of Reclamation*, 599 F.3d 1165 (10th Cir. 2010) (Quiet Title Act limitations period began to run in 1953 when United States acquired interest in property at issue).

This basic tenet of real property law is critical to an understanding of the error in the district court's decision below. The Jemez Pueblo owns today and has owned for centuries original Indian title – which is a real property interest in the land at issue in this case. Cohen, Felix S., *Original Indian Title*, 32 Minn. L. Rev. 28, 47 (1947) (gathering cases). "A tribe's original Indian title does not require an affirmative act of the sovereign for its continued viability." *Id.; Santa Fe*, 314 U.S. at 347; *Lipan Apache Tribe v. United States*, 180 Ct. Cl. 487, 492 (1967). The American grant to the Baca Heirs did not affect the Pueblo's original Indian title. *Fletcher v. Peck*, 10 U.S. 87 (1810) (aboriginal title is not "repugnant" to the grant of a fee)).

Before 2000, the Jemez Pueblo could not bring an action against the United States under the Quiet Title Act because the United States did not own an adverse

interest in the property. That requirement was only satisfied in 2000 upon purchase of the Baca heirs' American grant interest by the United States, followed by federal government action to limit the Pueblo's access to the land. So the Pueblo had *title* to the Valles Caldera in 1946 – but it did not have a *claim* or cause of action to quiet title against the United States in 1946 because its original Indian title was not inconsistent with the interest of the United States nor with the American grant title held by the Baca heirs. *Johnson v. M'Intosh*, 21 U.S. 543, 594 (1823) ("absolute ultimate title has been considered as acquired by discovery, subject only to the Indian title of occupancy, which title and discoverers possessed the exclusive right of acquiring. Such a right is no more incompatible with a seisin in fee, than a lease for years, and might as effectually bar an ejectment.")

The Jemez Pueblo did not have a claim against the United States under the ICCA for compensation for a taking because the Pueblo still held its original Indian title to the property, had not been disturbed in exercising its rights to its property, and so had not been damaged. And it did not have a claim against the United States under the Quiet Title Act (even if the Act had been in place at that time) because the United States did not hold an interest in the property adverse to the Pueblo in 1946. Regardless of whether the Pueblo had a claim against the Baca heirs in 1946, it did not have a claim against the United States because the United

States had no interest in the land adverse to the Pueblo, and the Pueblo's property interest was still intact because the Baca grant was subject to pre-existing interests, including the Pueblo's original Indian title.

Yet the United States, relying upon Fed. R. Civ. P. 12(b)(1), argued that these facts destroyed the district court's subject matter jurisdiction over the Pueblo's claim. Where, as here, a defendant raises a 12(b)(1) factual challenge to subject matter jurisdiction that goes to the merits of the case, then the subject matter jurisdiction is intertwined with the merits of the claim and the case should proceed to trial. *Holt*, 46 F.3d at 1002. Rather than simply ruling on the pleadings and limited evidence before it under Rule 12(b)(1), the district court was required to proceed to trial, or at a minimum to hold an evidentiary hearing following jurisdictional fact discovery, and was then required to enter a factual finding as to the date upon which the Pueblo's claim arose. *Williamson*, 645 F.2d at 415. Although the Pueblo argued below that the court had to engage in this process, the district court decision failed to address the issue. *Pl. Resp. to Def. Mot. to Dismiss*, dated May 7, 2013, docket number 18-1, at 12.

C. Litigation to protect existing title is different from litigation to recover monetary compensation for the taking of title.

When a party's interest in real property is extinguished, the party may sue for monetary compensation – but it may not sue to protect an interest in property

that is no longer extant. *Accord United States v. 677.50 Acres of Land in Marion Cnty., Kan.*, 420 F.2d 1136, 1139 (10th Cir. 1970) ("the Government must pay for all tangible interests actually condemned and for intangible interests directly connected with the physical substance of the thing taken" (citing *Adaman Mutual Water v. United States*, 278 F.2d 842, 845 (9th Cir. 1960)).

In contrast, when a party has some current interest in real property – an interest that has not been extinguished – the party is not required to seek compensation but instead may bring a quiet title action to establish the party's ownership interest. 65 Am. Jur. 2d Quieting Title.

These are two distinct claims providing two distinct remedies.[6] Monetary compensation for *extinguished* title differs substantially from the equitable remedy of quieting a party's existing (unextinguished) title. In 1946 the Pueblo did not, and could not, have sought monetary compensation for its ownership interest in the Valles Caldera because that interest was still in place and had been since at least

[6] "Remedy" is a concept distinct from "claim," but the two were improperly treated as interchangeable by the district court below. "As a matter of understanding the scope and terminology of the remedies field, it is quite important to distinguish remedy from substance. The substantive questions whether the plaintiff has any right or the defendant has any duty, and if so what it is, are very different questions from the remedial questions whether this remedy or that is preferred, and what the measure of the remedy is." *Navajo Tribe of Indians v. State of N.M.*, 809 F.2d 1455, 1467 (10th Cir. 1987) (citing and quoting D. Dobbs § 1.2 at 3 (1973)).

1200 A.D. Indeed, there were only four ways that Jemez Pueblo's title could have been extinguished, none of which is applicable here: 1) a treaty of cession; 2) an Act of Congress expressly identifying a parcel of Indian land and intending to extinguish Indian title; 3) an official and intentional tribal abandonment; and 4) conquest. *Santa Fe*, 314 U.S. at 347. And the Pueblo could not have brought a Quiet Title Act claim in 1946 because there was no Quiet Title Act in 1946, and in any event the United States did not have an interest adverse to the Pueblo in the Valles Caldera at that time.[7] But once the United States acquired the Baca heirs' American grant title in 2000, and then limited the Jemez Pueblo's access to the land, the Pueblo could bring its Quiet Title Act Claim, a claim left unaffected by the ICCA's limitations period for bringing monetary compensation claims for the taking of Indian lands. The district court erred when it held otherwise.

III. The District Court Erred when it Held that the ICCA Provides the Exclusive Remedy for Unextinguished Indian Land Claims.

A. The ICCA was remedial legislation for takings.

Before adoption of the Indian Claims Commission Act, there was no umbrella waiver of sovereign immunity by the United States that would permit tribes to pursue claims against the federal government. Indeed, the Court of Claims was expressly prohibited from adjudicating suits based on Indian treaties.

[7] The Quiet Title Act was enacted in 1972. 28 U.S.C.A. § 2409a.

Act of March 3, 1863, ch. 92, § 9, 12 Stat. 765. (Add. 26-29). That statutory preclusion was generally interpreted as barring all tribal claims against the United States. As a result, tribes repeatedly petitioned Congress to obtain special statutes granting the Court of Claims jurisdiction and waiving sovereign immunity. Between 1836 and 1946, Congress enacted 142 such acts. Cohen's *Handbook* § 5.06[2].

By the beginning of the twentieth century the United States faced an accumulation of Native American grievances extending through two centuries. Congress tired of frequent requests to enact special jurisdictional acts to allow Indian tribes to sue. In 1946, Congress created the Indian Claims Commission to provide Native Americans with a measure of justice and a remedy for "ancient wrongs." *Blackfeet & Gros Ventre Tribes of Indians v. United States*, 119 F. Supp. 161, 168 (Ct. Cl. 1954).

B. The ICCA was not an "exclusive remedy."

1. The legislative history of the ICCA does not support the district court's "exclusive remedy" holding.

Felix Cohen, the author of the definitive treatise on federal Indian law, was very involved in the drafting and enactment of the Indian Claims Commission Act while serving as Department of Interior Solicitor. Dalia Tsuk Mitchell, *Architect of Justice: Felix S. Cohen and the Foundation of American Legal Pluralism*, pp.

191-245 (Cornell Univ. Press 2007). In a dialogue between House Indian Committee Chairman Jackson and Solicitor Cohen, it was revealed that Solicitor Cohen understood that Section 12 of the ICCA would not extinguish then existing property and treaty rights and transmute such rights into a monetary claim against the United States for compensation. When in the course of that dialogue, Chairman Jackson suggested that the ICCA statute of limitations would terminate treaties; Solicitor Cohen corrected him by pointing out that it would only deny a remedy for *then existing claims*. Transcript of Hearings before the House Committee on Indian Affairs on H.R. 1198 and H.R. 1341, 79th Cong. 1st Sess. (1945). *Ex. to Pl. Resp. to Def. Mot. to Dismiss*, dated May 7, 2013, docket number 18-7.

2. Section 24 of the ICCA provides a waiver of sovereign immunity for post 1946 claims that does not impose an "exclusive – money damages only – remedy" on Indian tribes.

Section 24 of the ICCA provided a waiver of the government's sovereign immunity for claims accruing after the date of passage of the ICCA. (Add. 24-25). This section of the ICCA was intended to solve the problem that gave rise to the ICCA in the first place, by putting an end to the need to obtain special jurisdictional acts from Congress. *See Navajo Tribe v. New Mexico*, 809 F.2d 1455, 1460 (10th Cir. 1987).

This is important because Section 24's grant of *ongoing jurisdiction* in the Court of Claims over tribal claims for damages arising after August 13, 1946 itself shows the fallacy of the district court's statement that "[t]he primary purpose of the ICCA was to 'dispose of the Indian claims problem with finality', (Add. 6) (citing *United States v. Dann*, 470 U.S. 39, 45 (1985)). Contrary to the district court's assertion, Congress's intent was to dispose of *all claims that had accrued* by August 13, 1946. The inclusion of Section 24 in the ICCA makes it clear that Congress fully understood that in the nature of things new claims would accrue after 1946.

The Pueblo is unaware of any case law holding that ICCA Section 24 was intended to convert all future unextinguished tribal property and treaty rights claims into claims for money damages only. Yet, this is the result that 28 U.S.C. Section 1505 (Add. 16) would have on all claims brought after August 13, 1946, under the district court's "exclusive remedy" holding. If the district court's exclusive remedy theory is correct, then there should have been no Indian tribal litigation against the United States whatsoever after August 13, 1946 involving on or off-reservation treaty or property rights, including hunting, fishing, land and water rights.

3. A great number of Indian tribal claims and settlements involving tribal rights to land and water are inconsistent with the district court's "exclusive remedy" theory.

As noted above, if the district court's holding were correct, it would follow that all unadjudicated Indian water rights, property rights, treaty rights, hunting rights, and fishing rights were extinguished on August 13, 1946, and converted to taking claims against the United States for monetary compensation regardless of whether a claim had otherwise "accrued." Yet there have been hundreds of cases involving land and water rights, settlement acts, and other actions that cannot be explained if the district court's holding is correct, and there are no reported decisions finding a taking or extinguishment date of August 13, 1946. *Exhibit to Pl. Resp. to Def. Mot. to Dismiss*, dated May 7, 2013, docket number 18-8.

A significant event since 1946 that contradicts the district court's "exclusive remedy" holding is the enactment by Congress of the Alaska Native Claims Settlement Act (ANCSA) on December 18, 1971, the largest land claims settlement in United States history. The ICCA's Sec. 12 statute of limitations language states that any claim not brought within 5 years was barred thereafter in any court or administrative agency, and could not "thereafter be entertained by the Congress." *Id.* If the district court's holding were correct, all Alaska Native aboriginal title in Alaska would have had to have been brought before the ICC and

could thereafter never have been "entertained by the Congress." Yet the aboriginal rights addressed by ANCSA were "entertained" and resolved by Congress in ANCSA.

Prior to passage of ANCSA, Native Alaskans held original Indian title to approximately 150 million acres in Alaska. ANCSA resolved the long-standing issues surrounding original Indian land claims in Alaska, and extinguished Alaska Native claims to the land, in exchange for nearly a billion dollars and confirmation of title to 40 million acres to Native regional and local village corporations. Pub. L. No. 92-203, 85 Stat. 688 (Dec. 18, 1971) (codified at 43 U.S.C. § 1601 *et seq*.). If the district court's holding were correct, all Alaska Native aboriginal title in Alaska would have been extinguished as of August 13, 1946, and there would have been no need or basis for Congress to "entertain" the aboriginal title claims resolved by ANCSA.

In addition, since 1946, there has been a great deal of litigation addressing tribal land, water and treaty rights where the rights at issue involved original Indian title or arose as a result of treaties or the creation of Indian reservations (*e.g.*, the Winters Doctrine of Indian reserved water rights). *Accord State of New Mexico v. Aamodt*, 537 F.2d 1102 (10th Cir. 1976) (Pueblo reserved water rights were not lost by the Pueblo Lands Act of 1924 and 1933, citing *Winters v. U. S.*, 207 U.S.

564 (1908). Indeed a number of Indian tribes in the Eastern United States have asserted claims to Indian title and treaty lands based on conveyances to states and non-Indians that violated the Trade and Intercourse Act, 1 Stat. 137 (1790), codified as 25 U.S.C. § 177 (Nonintercourse Act). (Add. 17). These claims led to several large settlements. *Ex. to Pl. Resp. to Def. Mot. to Dismiss*, dated 05/07/2013, docket number 18-8. In many instances the United States itself has asserted these rights on behalf of tribes.

The most prominent of these cases is *County of Oneida*, 470 U.S. 226 (1985). The Oneida Indian Nation filed suit in 1970 alleging that their ancestors conveyed 100,000 acres to the State of New York under a 1795 agreement that violated the Nonintercourse Act, and thus the transaction was void. It is important to note that the Oneida Nation had filed a claim for compensation for the same lands in the ICC, and had subsequently withdrawn the claim, preferring to pursue an unextinguished title claim. *County of Oneida*, 470 U.S. at 250, n.25 and 269, n.23. The Supreme Court did not dismiss the case – effectively rejecting the notion that the ICC was the Oneida's "exclusive remedy."

In New Mexico, there are ongoing Indian water rights adjudications that were initially filed in 1966. These cases include *New Mexico v. Aamodt*, 537 F.2d 1102, (10th Cir. 1976); *New Mexico, ex rel. State Engineer v. Abbott*, No. 68-cv-

7488-BB-ACE, 70-cv-8650-BB-ACE (D. N.M.); *New Mexico, ex rel. State Engineer v. Aragon*, No. 69-cv-07941-MV-LFG (D. N.M.); and *New Mexico, ex rel. State Engineer v. Abousleman*, No. 83-cv-01041-MV-WPL (D. N.M.). All of these Indian water rights adjudications involve rights that existed in 1946 – indeed rights that existed as of the accession of the United States to the Southwest under the 1848 Treaty of Guadalupe-Hidalgo. And all of these Indian water rights adjudications involve water sources that have been largely appropriated by non-Indians off-reservation.

The ICCA was not intended to, and did not, terminate Indian interests that were unextinguished and had not accrued at the time of its passage. None of the cases cited by the district court in its decision below are contrary to this important point.[8] For example, in *Molini*, the court held that the bar of Section 22(a) of the ICCA was triggered by payment of an ICC award for a taking of all Western Shoshone Indian title encompassed by the 1863 Treaty of Ruby Valley.

[8] The district court summarily dismisses the import of many significant controlling cases with the comment that they are "against parties other than the Defendant." Decision at 8. But some of the cases were against the United States. *E.g., Eyak Native Vill. v. Daley*, 375 F.3d 1218 (9th Cir. 2004); *People of Vill. of Gambell v. Hodel*, 869 F.2d 1273 (9th Cir. 1989). And in any event, the analysis is the same regardless of the defendant: If the ICCA terminated Indian title, then it does not matter who the defendant is – title is gone. But if, as innumerable cases have held where the defendant was the United States or some other party, title still exists, the proper analysis was under the Quiet Title Act, not the ICCA. Yet the district court improperly failed to reach that issue.

Accordingly, the court held that the Indian title hunting and fishing rights associated with the lands that were taken were necessarily included. *W. Shoshone National Council v. Molini,* 951 F.2d 200, 202 (9th Cir. 1991). Likewise, in *United States v. Dann* , 873 F.2d 1189 (9th Cir. 1989) (Dann III) the Ninth Circuit held on the basis of the same circumstances that a Western Shoshone claim of continuing grazing rights was also barred. 873 F.2d at 1196. Finally, in *White Mountain Apache Tribe v. Hodel*, 784 F. 2d 921 (9th Cir. 1986), the court found that certain lands later claimed by the tribe as having been wrongfully excluded from the Reservation by an 1877 survey were clearly included in the tribe's ICCA claim and the 1972 award for a taking of all tribal lands lying outside the present Reservation boundary. *Hodel*, 784 F.2d at 926.

4. The holding in *Navajo Tribe v. New Mexico* does not bar the Pueblo's claim.

The district court incorrectly held that its "exclusive remedy" determination was required by this Court's decision in *Navajo Tribe*, 809 F.2d 1455. But that is not correct. In *Navajo Tribe*, the Tribe brought claims against New Mexico and others for lands patented to them by the federal government. The district court dismissed the case, holding that the United States was an indispensable party, and could not be brought in because the Navajo Tribe's claims against it accrued before 1946 and were therefore barred by the ICCA. But the court also held that even if

the ICC did not have exclusive jurisdiction for pre-1946 Indian claims, the tribe's suit was barred by the 12-year statute of limitations of the Quiet Title Act.

Unlike the present case, the Navajo Tribe was not claiming Indian title because that title was ceded by the 1868 Navajo Treaty. Instead, the Tribe's claim was based on a subsequent Executive Order expanding the Tribe's reservation. That Executive Order reservation land was indisputably taken by the federal government in 1908 and 1911, returned to the public domain and then transferred to the State of New Mexico and others. That was a takings (not unextinguished title) claim that had clearly accrued as of 1946 so the ICCA was indisputably applicable to the claims at issue in that case. Because *Navajo Tribe* dealt with a takings claim based on Executive Order title, it did not bind the district court in the present case which deals with still existing original Indian title. The action which this Court in *Navajo Tribe* found to be "blatantly inconsistent" with the Navajo Tribe's interest in that case is nowhere to be found in this case. *Navajo Tribe*, 809 F.2d at 1470.

This Court has not applied *Navajo Tribe's* interpretation of the ICCA to another case in the 26 years since *Navajo Tribe* was decided. On the other hand, although there are no subsequent court opinions that expressly reject the holding, there have been at least three courts that have addressed Quiet Title Act claims based on original

Indian title in a manner inconsistent with the district court's holding below, two of which were decided after *Navajo Tribe* without citation to that case.

In *Spirit Lake Tribe v. North Dakota*, an 1867 treaty referred to Devil's Lake as a boundary of the Reservation; but, failed to specify whether the north or south shore of the lake constituted the boundary, thus leaving the ownership of the lake bed in question. 262 F.3d 732 (8th Cir. 2001). In 1971, the state quitclaimed the lake bed to the United States for construction of a massive public works project. In 1986, the tribe sued the United States, the state and others to quiet title to the lake bed. The district court granted the United States' motion for summary judgment, holding that the Tribe had already resolved its claim to the lake as part of a 1977 ICC settlement. *Devils Lake Sioux Tribe v. North Dakota*, 714 F. Supp. 1019 (D.N.D. 1989). The Eighth Circuit reversed, holding that the factual record did not clearly demonstrate that the ICC settlement included the Tribe's claim to the lake. *Devils Lake v. North Dakota*, 917 F.2d 1049 (8th. Cir.1990).

On remand, the district court again granted summary judgment for the United States holding: it held that the tribe's claim was barred both by the QTA and by the ICCA, in the latter case because the tribe could have, but did not, present the claim in its ICC suit. *Spirit Lake*, 262 F.3d at 737. On appeal, the Eighth Circuit did not address the ICCA and relied exclusively upon the QTA to hold that the tribe's claim

was time-barred. The Eighth Circuit thus had two opportunities to hold that no Indian title claims against the United States survived the ICC process, but it declined to do so both times.

Similarly, in *Mille Lacs Band of Chippewa Indians v. State of Minnesota*, 853 F. Supp. 1118 (D. Minn. 1994), the Band sued the state and various counties and landowners to enforce the exercise of off-reservation hunting, fishing and other use rights in the area ceded by the 1837 treaty with the United States. The defendants argued that the ICCA barred the suit because the act provided an exclusive remedy for Indian land claims and the Band failed to file its claim with the ICC. The Band moved for summary judgment on the ground that its claims arose from current violations of its treaty rights, which could not have been brought before the ICC because they had not yet occurred. Further, the Band argued that since the ICC only had jurisdiction to consider claims requesting monetary compensation for extinguished title, it would have had no jurisdiction over claims to enforce the exercise of unextinguished rights.

The district court granted the Band's motion and held that: the ICC did not have jurisdiction to extinguish otherwise unextinguished treaty rights, it only had authority to award damages for takings or other wrongs that existed on or before the date of the ICCA; and the ICC would have dismissed any claim relying on existing rights for lack of jurisdiction. *Mille Lacs*, 853 F. Supp at 1139.

In a second motion, the district court dismissed the defendants' collateral estoppel defense, which argued that the Band's ICC award for lands ceded by the 1837 treaty, based upon the highest and best use of the land, necessarily included the value of the use rights. On appeal, the Eighth Circuit affirmed the decision of the district court in favor of the Band, reasoning that the ICC could have included the value of the use rights in its award only if it had found that the rights had been extinguished. Absent such a finding, the Eighth Circuit concluded, there is no reason to believe that the issue of the use rights had been actually litigated or decided. *Mille Lacs Band of Chippewa Indians v. Minnesota*, 124 F.3d 904 (8th Cir. 1997).

A third case that contradicts the district court's ICCA "exclusive remedy" theory is *United States v. Dann*, which involved the assertion of unextinguished original Indian title by Western Shoshone ranchers in Nevada. In *United States v. Dann* (*Dann II*), 706 F.2d 919 (9th Cir. 1983), despite ongoing proceedings in the ICC seeking compensation for a "taking" of Western Shoshone title, the court provided a lengthy analysis of the effect of various statutes and events on status of Western Shoshone original Indian title as of 1983 and concludes:

> We hold that the Danns are not barred by the doctrines of res judicata or collateral estoppel, or by the bar of 25 U.S.C. § 70u, from asserting aboriginal title as a defense to the claim of trespass in this case. . . . We further hold that the district court did not err in ruling that aboriginal title had not been extinguished as a matter of law by application of the public land laws, by creation of the Duck Valley

> Reservation, or by inclusion of the disputed lands in a grazing district and issuance of a grazing permit pursuant to the Taylor Grazing Act.

United States v. Dann, 706 F.2d 919, 933 (9th Cir. 1983) *rev'd on other grounds*, 470 U.S. 39 (1985). The court does not mention, consider or apply the ICCA "exclusive remedy" theory adopted by the district court here. The Supreme Court reversed *Dann II* on the grounds that when the government paid into a trust account a judgment of the Court of Claims in the Western Shoshone ICC case seeking compensation for a "taking" (that never actually occurred), the Western Shoshones were "paid" for their land and the bar of Section 22(a) of the ICCA was triggered. On remand, the district court, again without mentioning the "exclusive remedy" theory, concluded that Western Shoshone aboriginal Indian title was not extinguished until the 1979 entry of the Court of Claims final judgment in the ICC case. *United States v. Dann*, No. R. 74-60-BRT, 13 Ind. L. Rptr. 3158 (D. Nev. Sept.17, 1986).

On appeal for the third time, and faced with the problem of finding a date of taking when no taking had ever occurred, the Ninth Circuit said:

> The district court erred in ruling that the Western Shoshone aboriginal title had not been extinguished until 1979. As we pointed out in *Dann II*, the claims award could not itself extinguish the title. *Dann II*, 706 F.2d at 928. The Claims Commission had no jurisdiction to extinguish title on its own authority; it simply had jurisdiction to award damages for takings or other wrongs that occurred on or before August 13, 1946. Indian Claims Commission Act, ch. 959, 60 Stat.

> 1049, 1050 (1946) (as amended Pub.L. 93-494, § 2, 88 Stat. 1499, 1499-1500 (1974)). The extinguishment of tribal title must be *deemed* to have occurred no later than that date.

Dann III, 873 F.2d at 1198. To resolve the Supreme Court decision holding that the Danns could not assert continuing original Indian title because the Western Shoshones were "paid" for their land, with its own decision in *Dann II* that nothing had occurred to extinguish Western Shoshone original Indian title prior to 1979, of necessity the court "deemed" July 1, 1872, the stipulated "date of valuation", as the date of "taking." At no time did any court in the *Dann* litigation even mention the "exclusive remedy" theory.

Recently the government itself rejected the concept that the ICCA provided an "exclusive remedy" when it distinguished its own Indian title claims on behalf of Ohkay Owingeh Pueblo as follows:

> The ICC only had jurisdiction to hear claims against the United States that accrued prior to August 13, 1946. Here the factual record has not been sufficiently developed to determine the extent to which the Pueblo had claims against the United States prior to 1946.

Abbott, Case 6:68-cv-07488-BB (Doc. 2788 at 3) (internal citations omitted) citing *Navajo Tribe*, 809 F.2d at 1460. The government also noted that: "As Judge Brack recognized, the decision in *Navajo Tribe* was predicated on unique facts and thus is not controlling where different facts are present. *See Picuris Pueblo*, 228 F.R.D. at

667-68." *Abbott*, Case 6:68-cv-07488-BB (Doc. 2788 at 4). Finally, in *Abbott* the government argued that:

> like Picuris Pueblo's – and unlike the Navajo Tribe's – Ohkay Owingeh's claim is not founded on government action. *See Lipan Apache Tribe v. United States*, 180 Ct. Cl. 487, 492 (1967) (original Indian rights do not depend upon sovereign recognition). That distinction is significant here because the Tenth Circuit's holding merely precluded the Tribe from challenging "actions of the government that were inconsistent with its alleged title." *Navajo Tribe*, 809 F.2d at 1470. Because Ohkay Owingeh's claims do not challenge government action, they should not be barred.

Abbott, Case 6:68-cv-07488-BB (Doc. 2788 at 5).

Here, the Jemez Pueblo does not challenge government action but merely seeks recognition that the federal government holds title to the Valles Caldera subject to the Pueblo's pre-existing and unextinguished Indian title. And here, the Pueblo did not have a claim against the United States in 1946 for loss of title because the Pueblo's Indian title to the Valles Caldera was not extinguished. As was the case in *Abbott*, the factual record on the extent of the continued use and occupancy was not fully developed before the district court ruled on the merits of the Jemez Pueblo's claims. That alone requires reversal of the decision below and remand for trial on the merits.

5. The District Court's interpretation of the ICCA is contrary to Supreme Court precedent.

Supreme Court precedent does not support the district court's interpretation of the ICCA. The most prominent example is *Arizona v. California*, 530 U.S. 392 (2000) (*Arizona III*). In 1952 Arizona sued California to adjudicate the states' respective rights to water in the Colorado River and the United States intervened on behalf of five Indian tribes. After Supreme Court decisions in *Arizona I*, 373 U.S. 546 (1963) and *Arizona II*, 460 U.S. 605 (1983), the Quechan Tribe's claim for water for certain disputed Fort Yuma Reservation boundary lands remained unresolved. A 1936 Interior Department Solicitor's Opinion held that the Tribe had unconditionally ceded the lands under an 1893 Agreement. *Arizona III*, 530 U.S. at 402. A 1978 Department of Interior Secretarial Order set aside the 1936 Opinion and confirmed the Tribe's ownership of the disputed lands. *Id*. at 404. The state parties asserted that a consent judgment in *Quechan Tribe v. United States*, Docket 320 before the ICC, precluded the Tribe's water rights claim. In the ICC the Tribe sought damages on two grounds: 1) the 1893 Agreement was void, the title remained valid, and the United States owed the Tribe trespass damages; and 2) the Agreement constituted an uncompensated taking of tribal lands. In a settlement of Docket 320, the Tribe received $15 million in full satisfaction of its claims. *Arizona III*, 530 U.S. at 405.

If the district court's "exclusive remedy" interpretation were correct, the Supreme Court would have held that the Tribe's claim for the disputed lands was extinguished no later than August 13, 1946, and the Tribe could only have sought compensation in the ICC for a taking. Instead, the Court held that the Tribe's claim for water rights for the disputed boundary lands was not precluded by the consent judgment in Docket 320, and, by implication, that the ICCA itself did not preclude the Tribe's land or water rights claim.

The history of the *Oneida* litigation is also instructive. The Oneida Nation originally filed a claim against the United States in the ICC, on the theory that the United States breached its fiduciary duty to the tribe by failing to prevent the sale of its Indian title lands to the state of New York, thereby making it liable for the difference between a fair price and the price the tribe actually received for the lands. Years later, the Oneida Nation filed suit in federal district court in New York against two counties that owned a portion of the land, alleging that its initial sale to the state was void and that the tribe retained title. Following the tribe's first victory in the United States Supreme Court, the tribe asked the Court of Claims to stay the appeal of its ICC award, or in the alternative to refrain from ruling on whether the award extinguished its Indian title, while it pursued the litigation against the counties based upon the survival of that title. *See Oneida Indian Nation v. County of Oneida*,

414 U.S. 661 (1974) (reversing the district court's dismissal of the suit for failure to state a claim). The Court of Claims refused to stay its proceedings, although it specifically noted that it had not ruled on the extinguishment of title issue. *United States v. Oneida Nation*, 576 F.2d 870, 882 n.26 (Ct. Cl. 1978). Nevertheless, the Tribe shortly thereafter dismissed its ICC claim altogether electing only to pursue its "live" title claim against the counties, which ultimately was successful. *County of Oneida*, 470 U.S. at 250 n.25 (providing the history of the litigation).

But if the ICCA was the "exclusive remedy" as the district court held in this case below, then the Oneida Nation should not have been able to proceed as it did. If it had a claim against the United States related to the loss of its land, under the "exclusive remedy" reasoning adopted by the district court in this case, then the Oneida Nation should have been forced to concede that its title had been extinguished and present the claim for compensation to the ICC. If the Oneida Nation dismissed its ICC claim, under the "exclusive remedy" reasoning the Oneida Nation should have been barred by the ICCA from pursuing that claim in a different forum or against different parties.

Despite factual differences in the cases that have ruled on Indian claims initiated after 1946, each of the cases demonstrates that the ICCA was not intended to, and indeed could not, put an end to all Indian title, property and treaty claims. The

existence of cases recognizing that unadjudicated Indian rights survived the ICCA undercuts the central holding of the district court ruling below.

Finally, the district court's holding is contrary to the Supreme Court's interpretation of the special, pre-1946 Indian jurisdictional acts through which Congress waived the sovereign immunity of the United States on a case-by-case basis to permit adjudication of Indian claims, and upon which the ICCA was modeled. So, for example, *Shoshone Tribe v. United States*, 299 U.S. 476 (1937) arose from a special jurisdictional act permitting the Shoshone Tribe to sue the United States to recover the value of part of its reservation upon which a band of other Indians was settled. The tribe argued that the act was an exercise of the federal government's power of eminent domain, thereby converting a long-standing trespass into a taking, and that the value of the land taken consequently should be determined as of the date of the act. The Supreme Court rejected that position, reasoning that the act did nothing more than waive the government's immunity from suit. The Court noted that the tribe was not required by the act to sue the government. If the tribe failed to sue under the act, the rights and liabilities of the parties would remain as they were before the act was passed. The Court further noted that the act was not intended "to extinguish titles or other interests against the will of tribal occupants by force of eminent domain." *Id.* at 493. But in the decision now on appeal before this Court, the district court reached

exactly the opposite conclusion with respect to the ICCA. According to the district court, tribes with unadjudicated treaty, land and water rights where no "taking" had yet occurred and no claim had accrued were forced either to accept a taking of and compensation for their land or to forego their claims altogether.

6. The government has taken inconsistent positions on the effect of the ICCA on otherwise unextinguished Indian title.

In *Abbott*, No. 68-cv-7488-BB-ACE, Ohkay Owingeh Pueblo and the United States are asserting claims to original Indian water rights on lands outside the boundaries of the pueblo's Grant. The Truchas Acequia filed a motion to dismiss, arguing that Ohkay Owingeh's claims are in effect land title claims against the United States for which the only waiver of sovereign immunity was the ICCA, the same "exclusive remedy" argument adopted by the district court in this case below. Yet in response to the Acequia's motion in *Abbot*, the government argues:

> The New Mexico Court of Appeals rejected a claim that the ICCA barred adjudication of a Pueblo water right in *State of New Mexico ex rel. Martinez v. Kerr-McGee*, 120 N.M. 118, 898 P.2d 1256, 1260 (Ct. App. 1995). It did so because the Pueblos of Laguna and Acoma could not have adjudicated their water right claim in a proceeding before the ICC. As the court explained, the jurisdiction of the ICC was limited to awarding monetary compensation for the permanent loss of land or property; it could not establish any tribal rights to land or property. In particular, the ICC did not allow a claimant to "assert ownership of water rights against the government," or pursue any sort of claims against the State or private entities. *Id*. The court concluded that because the Pueblos' efforts to establish water rights against the competing claims of non-Indians could not have been

> brought before the ICC, the Pueblos would not be barred from asserting their water rights. *Id.*; S*ee also Devils Lake Sioux Tribe v. North Dakota*, 917 F.2d 1049, 1056 (8th Cir. 1990) (refusing to bar claim where it was "subject to question" whether the ICC had jurisdiction to hear the Tribe's claim).

Abbot, Case 6:68-cv-07488-BB (Doc. 2788 at 2).

In other words, because the Pueblos could not adjudicate live water rights in the ICC, but could only obtain compensation for a "taking" of those rights (which did not occur), the ICCA statute of limitations was inapplicable in *Kerr-McGee*, and in *Abbott*. Here, despite the government's role as trustee and its fiduciary obligations to Jemez Pueblo, and in remarkably similar circumstances to those in *Abbott*, the government argued precisely the opposite position on the scope and effect of the ICCA statute of limitations. In *Abbott*, the government argued that off-reservation Indian title water rights survived the confirmation of a Spanish land grant and the purchase of the grant by the United States in 1934. *Abbott*, Case 6:68-cv-07488-BB-ACE (Doc. 2788 at 4, n.3).

Appellee's position was correct in *Abbott*, yet contrary to the district court's holding in the case now on appeal to this Court.

7. The ICCA did not itself extinguish then existing Indian title.

Ignoring the limited nature of claims that could be pursued before the ICC, the district court effectively held that the ICCA was intended by Congress to

extinguish all otherwise unextinguished Indian land, water, and treaty rights that were unasserted, unadjudicated or unquantified as of August 13, 1946.[9] The district court's "exclusive remedy" ruling converts the ICCA from a "remedy for ancient wrongs" as the legislative history of the Act states, into an engine of new wrongs.[10] This interpretation of the ICCA is historically, legally and logically wrong.[11]

In *State ex rel. Martinez v. Kerr-McGee Corp.*, 898 P.2d 1256 (N.M. Ct. App. 1995), the Court of Appeals, in an opinion written by then Judge and now New Mexico Supreme Court Justice Richard Bosson, provided a compelling and insightful analysis of both the scope of the ICCA's jurisdiction and the Section 12 statute of limitations bar. Rather than resort to the sweeping and facile conclusion that the ICCA itself necessarily extinguished or precluded any subsequent tribal

[9] The court's decision focuses on land, but necessarily applies to all treaty, hunting, fishing and water rights.

[10] If applied to any Indian tribal rights other than original Indian title, the "exclusive remedy" theory is plainly an unconstitutional violation of the Fifth Amendment. *See Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955) (compensation is not required for takings of aboriginal Indian title).

[11] When coupled with the long-standing doctrine that doubtful or ambiguous statutory and treaty expressions are to be resolved in favor of Indian tribes, the persuasive authority in the United Nations declaration of the Rights of Indigenous People (adopted by the United Nations General Assembly on September 13, 2007, and endorsed by the United States on December 16, 2010) advises against the taking of Jemez Pueblo's Indian title lands by application of the district court's "exclusive remedy" theory.

claims, the court carefully analyzed previous ICC proceedings in detail to determine what particular issues were actually litigated and what issues were precluded in relationship to the case before it.

Kerr-McGee involved the adjudication of Indian water rights in New Mexico's Rio San Jose. The district court granted partial summary judgment against the pueblo Indians based on issue and claim preclusion arising from the pueblos' previous claims in the ICC. In the earlier ICC proceedings, the ICC held that the pueblos' title to original Indian lands, and water rights appurtenant to those lands, had been extinguished. A settlement resulted in an award of monetary compensation to the pueblos in the ICC proceedings.

In the subsequent state court proceedings, the New Mexico State Engineer argued that the pueblos had already been compensated for the loss of the water rights they were claiming in the Rio San Jose adjudication, and were barred from relitigating those claims. Addressing that argument, the court said:

> Claim preclusion bars litigation of claims that were or could have been advanced in an earlier proceeding. Claims are not precluded, however, where a plaintiff could not seek a certain relief or rely on a certain theory in the first action due to limitations on the subject matter jurisdiction of the first tribunal.
>
> Congress created the ICC as a tribunal of limited jurisdiction, restricted by statute to monetary claims against the United States for the loss of lands and other property. **In their claims before the ICC, the Pueblos could not have quieted title to lands** or asserted

> ownership of water rights against the government. Similarly, the Pueblos could not have brought any claims against the State of New Mexico nor against the very private parties who oppose them in this litigation. The Pueblos brought the only claim possible, seeking monetary compensation from the United States for loss of title. Therefore, the Pueblos' current effort to establish water rights against the competing claims of non-Indians was not, and could not have been, brought before the ICC. **The Pueblos should not be barred from asserting this claim now, for the first time, when it could not have been brought previously before the ICC**.

Kerr-McGee, 898 P.2d at 1259-60 (internal citations omitted) (emphasis added) *citing Devils Lake Sioux Tribe v. North Dakota*, 917 F.2d 1049, 1056 (8th Cir.1990) (refusing to apply claim preclusion to Indian claim of title because ICC lacked jurisdiction over that claim); *Cayuga Indian Nation of N.Y., v. Cuomo*, 667 F. Supp. 938, 947 (1987) (rejecting res judicata, in part, because the tribe could not have brought present action in ICC proceedings).

The statutory jurisdictional grant to the ICC in Section 2 of the ICCA contained two parts that are relevant to understanding the history of tribal land claims under the ICCA:

> (4) claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant; and (5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity.

ICCA § 2, 60 Stat. at 1050. (Add. 19). But nothing in this jurisdictional grant implies that the ICCA itself was intended to extinguish then existing valid title claims.[12] Had that been the case, then the date of "taking" for purposes of monetary awards would have been 1946. In other words, where the date upon which the requisite taking was uncertain, tribal attorneys asserted events as late as possible, while federal attorneys did the opposite. It is instructive that no decision under the ICCA has ever cited the Act itself as taking or extinguishing Indian title. Had the tribal claims attorneys believed that the passage of the ICCA itself extinguished all Indian title, they would surely have asserted August 13, 1946 as the date of "taking" in order to get a higher value for the land and a larger award.

But the district court's decision, if allowed to stand, would mean that the Jemez Pueblos' existing and unextinguished title claims here were terminated by the ICCA itself in 1946. The district court's decision, if allowed to stand, will

[12] The first paragraph of Section 2 of the ICCA ends with the statement: "No claim *accruing* after [August 13, 1946], shall be considered by the Commission." (Emphasis supplied.) The implication is that the ICC had jurisdiction to adjudicate only claims that *accrued* prior to August 13, 1946. "Accrual" of the claim is an essential pre-condition to ICC jurisdiction.

effectively extinguish all existing Indian property and treaty rights that predate the ICCA. That result was no part of the contemporaneous collective understanding of Congress and the Indian claims bar in 1946 or thereafter.

Nor was it the understanding of the Supreme Court in *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955), a Fifth Amendment property taking claim by the Tee-Hit-Ton Band of Tlingits for compensation for timber harvested in 1951 by the Forest Service from original Indian title lands. In *Tee-Hit-Ton*, the Court held that the Indian title lands at issue were not "recognized" title lands – as in a treaty reservation. As a result, the Court held that the Tee-Hit-Tons had no constitutional right to compensation. In support of this holding the Court stated:

> This is not a case that is connected with any phase of the policy of the Congress, continued throughout our history, to extinguish Indian title through negotiation rather than by force, and to grant payments from the public purse to needy descendants of exploited Indians. The legislation in support of that policy has received consistent interpretation from this Court in sympathy with its compassionate purpose.

Id. at 273-74 citing the ICCA, 60 Stat. 1049. (Add. 18-24). In 1955, the Supreme Court did not imagine that the ICCA itself had extinguished all otherwise unextinguished Indian title or it would have denied the claim on the grounds that the ICCA provided an "exclusive remedy" and the Section 12 statute of limitations had run. Instead, the Court left the Indian title intact, noting the "compassionate

purpose" of the ICCA and federal policy "to extinguish Indian title through negotiation." This Court should follow that precedent, and reverse the district court's holding to the contrary.

CONCLUSION

This Court should reverse the district court and remand this case for further proceedings.

REQUEST FOR ORAL ARGUMENT

The Pueblo of Jemez respectfully requests oral argument. This case involves whether federal district courts have subject matter jurisdiction to consider Indian claims brought to protect their continuing property and treaty rights. At issue is whether the district court erred when it rejected without analysis the grant of jurisdiction in the Quiet Title Act, ruling instead that the Indian Claims Commission Act (ICC) was intended to bar all Indian property claims brought after 1951 – the deadline for bringing extinguished title claims under the ICCA. But hundreds of Indian land claims have been litigated in federal court or resolved by Congress since 1951 – all involving unextinguished title or similar claims brought to protect still existing title. Despite this overwhelming precedent, the district court granted a 12(b)(1) motion brought by the United States, holding that the ICCA destroyed the jurisdiction the district court otherwise has under the Quiet Title Act. Oral argument will allow the parties to address to the Court these and other issues discussed in the briefs yet needing additional argument, and will significantly aid this Court's decisional process. Fed. R. App. P. 34(a)(2)(C).

April 30, 2014

Respectfully submitted,

Johnson Barnhouse & Keegan LLP

By: /s/ Randolph H. Barnhouse
Randolph H. Barnhouse
7424 4th Street NW
Los Ranchos de Albuquerque, NM 87107
Telephone: (505) 842-6123
Facsimile: (505) 842-6124
dbarnhouse@indiancountrylaw.com

OF COUNSEL:
Thomas E. Luebben
P.O. Box 1134
Sandia Park, NM 87047
Telephone: (505) 269-3544
tluebbenlaw@msn.com

Attorneys for Appellant Pueblo of Jemez

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

I certify that pursuant to Fed. R. App. P. 32(a)(7)(C) and Tenth Circuit Rule 32, the attached opening brief is proportionately spaced, has a typeface of 14 points or more and contains 12,113 words.

April 30, 2014

Johnson Barnhouse & Keegan LLP

By: /s/ Randolph H. Barnhouse
Randolph H. Barnhouse
7424 4th Street NW
Los Ranchos de Albuquerque, NM 87107
Telephone: (505) 842-6123
Facsimile: (505) 842-6124
dbarnhouse@indiancountrylaw.com

Attorneys for Appellant Pueblo of Jemez

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

(1) all required privacy redactions have been made;

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April 30, 2014

Johnson Barnhouse & Keegan LLP

By: /s/ Randolph H. Barnhouse
Randolph H. Barnhouse
7424 4th Street NW
Los Ranchos de Albuquerque, NM 87107
Telephone: (505) 842-6123
Facsimile: (505) 842-6124
dbarnhouse@indiancountrylaw.com

Attorneys for Appellant Pueblo of Jemez

CERTIFICATE OF SERVICE

When All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system on April 30, 2014. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Johnson Barnhouse & Keegan LLP

By: /s/ Randolph H. Barnhouse
Randolph H. Barnhouse
7424 4th Street NW
Los Ranchos de Albuquerque, NM 87107
Telephone: (505) 842-6123
Facsimile: (505) 842-6124
dbarnhouse@indiancountrylaw.com

Attorneys for Appellant Pueblo of Jemez

ADDENDUM

ADDENDUM

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

PUEBLO OF JEMEZ, a federally recognized Indian tribe,

Plaintiff,

vs. **No. CIV 12-0800 RB/RHS**

UNITED STATES OF AMERICA,

Defendant.

MEMORANDUM OPINION AND ORDER

Plaintiff brought this action pursuant to the Quiet Title Act, 28 U.S.C. §2409A, seeking a judgment that it has the exclusive right to use, occupy, and possess the lands of the Valles Caldera National Preserve pursuant to its continuing aboriginal title to such lands. (Doc. 1). Defendant moves to dismiss for lack of jurisdiction and failure to state a claim. (Doc. 14). Plaintiff opposes the motion and requests oral argument. (Doc. 18). The Court finds that oral argument is unnecessary as the Indian Claims Commission Act (ICCA), formerly codified at 25 U.S.C. §§ 70 to 70n-2, divests this Court of jurisdiction over Plaintiff's claim.

I. Background

The ancestral Jemez people used and occupied the lands of the Valles Caldera National Preserve and surrounding areas in the Jemez Mountains of New Mexico. (Doc. 1; Report of Henry J. Walt, Ph.D., Doc. 18-5). The Valles Caldera is the dormant crater of a super volcano in the center of the Jemez Mountains. (Doc. 1). The crater rim is approximately twenty miles in diameter, and contains four high mountain valleys and eleven resurgent volcanic domes. (*Id.*)

The Valles Caldera is located within the exterior boundaries of the Valles Caldera National Preserve, established pursuant to the Valles Caldera Preservation Act, 16 U.S.C. §§ 698v-609v-10. (*Id*.)

The ancestral Jemez people were the primary Native American occupants and land users of the Jemez Mountains, including the Valles Caldera National Preserve and the Rio Jemez watershed, for a period of 800 years. (Doc. 1; Doc 18-5). Plaintiff, the modern Jemez Pueblo, is a consolidation of the ancestral Jemez populations of Towa-speaking pueblos, including Pecos Pueblo and the modern Jemez Pueblo village of Walatowa. (Doc. 1). Plaintiff describes the ancestral Jemez aboriginal title area surrounding the Rio Jemez drainage and the Valles Caldera as the western Jemez homeland. (*Id*.) Plaintiff contends that the aboriginal title to this land is vested in Plaintiff, whose members are the descendants of the ancestral Jemez people. (*Id*.)

Plaintiff states that the western Jemez homeland extends over an area of more than 1,100 square miles in and around the Jemez Mountains, including the Valles Caldera National Preserve, the entire Rio Jemez drainage system above Walatowa, and the sections of the Rio Puerco drainage west of the Jemez Mountains. (Doc. 1; *see also* Declaration of Paul Tosa, Doc. 18-3). The ancestral Jemez have occupied the western Jemez homeland since migrating from the mesa and canyon country to the northwest prior to 1200 A.D. (Doc. 1). Archaeological investigations within the western Jemez homeland have identified at least sixty pueblo villages, all linked with an extensive network of trails, and many thousands of home sites, agricultural fields, ceremonial sites, sacred areas, mineral procurement areas, hunt traps and blinds, and camp sites associated with the ancestral Jemez people. (*Id*.) The ancestral Jemez population in the western Jemez

homeland ranged from approximately 10,000 to 15,000 people. (*Id.*)

Plaintiff greatly values the Valles Caldera as a spiritual sanctuary as it contains many important religious sites vital to traditional ancestral Jemez religion and culture. (Doc. 1). The ceremonial sites and gathering areas are actively used by Jemez Pueblo members and are crucial to the continuing survival of the traditional Jemez Pueblo culture and religion. (*Id.*) Ancient religious pilgrimage trails link Walatowa to sites within the Valles Caldera, including Redondo Peak and sacred springs. (Doc. 18-3).

Plaintiff's members continue to rely on the Valles Caldera for many critical resources. (Doc. 1). For instance, Plaintiff's members make religious pilgrimage visits to these sites to leave prayer offerings and conduct rituals. Additionally, Plaintiff's hunt societies make lengthy visits to the Valles Caldera for the purpose of hunting, religious ceremonies, and initiations. (*Id.*) The mineral and hot springs within the Valles Caldera are used by Plaintiff's medical societies for healing. (*Id.*)

Plaintiff acknowledges that, in 1860, Congress granted the heirs of Luis Maria Cabeza de Baca (Baca heirs) 99,289 acres including and surrounding the Valles Caldera, which was subsequently known as the Baca Ranch. (Doc. 1). Plaintiff maintains that the Baca heirs received this land grant subject to its aboriginal title. (*Id.*) The Jemez people continued to use the land with the permission of the Baca heirs and their successors-in-interest. (Doc. 18-3). On July 25, 2000, Defendant purchased the property interests of the Baca heirs' successors-in-interest to establish the Valles Caldera National Preserve. (Doc. 1). Plaintiff argues that the property interest held by Defendant remains subject to Plaintiff's aboriginal title. (*Id.*)

Plaintiff seeks a judgment that it has the exclusive right to use, occupy and possess the lands of the Valles Caldera National Preserve pursuant to its continuing aboriginal title to such lands, quieting its alleged aboriginal title to the Valles Caldera National Preserve, and for attorneys' fees and costs. (Doc. 1). Defendant moves to dismiss on the grounds that the Indian Claims Commission Act (ICCA) divests this Court of jurisdiction over Plaintiff's claim and the Complaint fails to state a claim. (Doc. 14).

II. Legal Standard

"Federal courts are courts of limited jurisdiction, and the presumption is that they lack jurisdiction unless and until a plaintiff pleads sufficient facts to establish it." *Celli v. Shoell*, 40 F.3d 324, 327 (10th Cir. 1994) (citations omitted). If jurisdiction is challenged, the burden is on the party claiming jurisdiction to show it by a preponderance of the evidence. *Id.* at 327 (citation omitted). "A court lacking jurisdiction cannot render judgment but must dismiss the cause at any stage of the proceedings in which it becomes apparent that jurisdiction is lacking." *Full Life Hospice, LLC v. Sebelius*, 709 F.3d 1012, 1016 (10th Cir. 2013).

Federal Rule of Civil Procedure 12(b)(1) allows a court to dismiss a complaint for lack of subject matter jurisdiction. FED. R. CIV. P. 12(b)(1). A Rule 12(b)(1) motion can take one of two forms. First, a moving party may lodge a facial attack against the complaint's allegations as to the existence of subject matter jurisdiction. *Peterson v. Martinez*, 707 F.3d 1197, 1205 (10th Cir. 2013). In reviewing a facial attack, the Court must accept the well-pled factual allegations in the complaint as true. *Id.* at 1205-06. Second, a party may go beyond the allegations contained in the complaint and challenge "the facts upon which subject matter jurisdiction depends." *Paper, Allied-Indus., Chem. & Energy Workers Int'l Union v. Cont'l Carbon Co.*, 428 F.3d 1285, 1292

(10th Cir. 2005) (citation omitted). In reviewing a factual attack, the Court may look beyond the complaint and has wide discretion to consider evidence in the form of documents, affidavits, and even testimony. *Id.* (citations omitted). Only if resolution of the jurisdictional question requires review of the merits of the substantive claims is a court required to convert a Rule 12(b)(1) motion into a Rule 56 summary judgment motion. *Id.* (citations omitted). Defendant's motion does not relate to the merits of Plaintiff's claims, so the Court may consider evidence outside the four corners of the complaint in determining whether it has jurisdiction.

III. Discussion

Sovereign immunity bars Plaintiff's claim. Defendant, as the sovereign, is immune from suit unless it consents to be sued. *United States v. Sherwood*, 312 U.S. 584, 586 (1941). "The concept of sovereign immunity means that the United States cannot be sued without its consent." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Jacks*, 960 F.2d 911, 913 (10th Cir. 1992). A federal court lacks subject matter jurisdiction over a claim against the United States for which sovereign immunity has not been waived. *Normandy Apartments, Ltd. v. U.S. Dep't of Hous. & Urban Dev.*, 554 F.3d 1290, 1295 (10th Cir. 2009). There is a presumption against jurisdiction and "the burden of establishing the contrary rests with the party asserting jurisdiction." *Kokkonen*, 511 U.S. 375, 377 (1994). As a result, Plaintiff may not proceed unless it can establish that Defendant has waived its sovereign immunity with respect to its claim. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984); *Sydnes v. United States*, 523 F.3d 1179, 1182-83 (10th Cir. 2008).

The Court's ruling is determined by binding Tenth Circuit precedent. In *Navajo Tribe of Indians v. New Mexico*, 809 F.2d 1455 (10th Cir. 1987), the Navajo Tribe asserted that the

United States improperly transferred tribal lands to the State of New Mexico and several individuals. *Id*. at 1462. The United States, the State of New Mexico, and the individual grantees were named as defendants. *Id*. The Tenth Circuit held that the Navajo Tribe's claim against the United States was barred because it fell within the exclusive jurisdiction of the Indian Claims Commission (ICC) and was barred by the applicable statute of limitations contained within the Indian Claims Commission Act (ICCA). *Id*. at 1471.

The Tenth Circuit explained that "[u]ntil 1946, Indian tribes could not litigate claims against the United States unless they obtained specific permission from Congress." *Navajo Tribe*, 809 F.2d at 1460. In 1946, Congress enacted the ICCA, which created a quasi-judicial body, the ICC, to hear and determine all tribal claims against the United States that accrued before August 13, 1946. *Id.*; *see also* 28 U.S.C. § 1505. Congress's intention was to "draw [ ] in all claims of ancient wrongs, respecting Indians, and to have them adjudicated once and for all." *Temoak Band of W. Shoshone Indians, Nev. v. United States*, 219 Ct. Cl. 346, 350, 593 F.2d 994, 998 (Ct. Cl. 1979). The primary purpose of the ICCA was "to dispose of the Indian claims problem with finality." *United States v. Dann*, 470 U.S. 39, 45 (1985).

"Congress deliberately used broad terminology in the [ICCA] in order to permit tribes to bring all potential historical claims and to thereby prevent them from returning to Congress to lobby for further redress." *Oglala Sioux Tribe of Pine Ridge Indian Reservation v. U.S. Army Corps of Eng'rs*, 570 F.3d 327, 332 (D.C. Cir. 2009) (citing *Otoe & Missouria Tribe of Indians v. United States*, 131 Ct. Cl. 593, 600, 131 F. Supp. 265, 272 (Ct. Cl. 1955) and COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 445 (2005 ed.)). "To balance this permissiveness and to ensure finality, the Act established a 5-year limitation on all claims existing before 1946; any claim

not presented within the 5-year period may not be submitted to any court or administrative agency." *Oglala Sioux Tribe*, 570 F.3d at 332. Thus, the ICCA allowed tribes five years within which to file claims with the Commission.[1] *See* 25 U.S.C. § 70k. Any claim not filed by the deadline of August 13, 1951 could not "thereafter be submitted to any court or administrative agency for consideration." *Id*.

It is well-established that the ICCA provided the exclusive remedy for pre-1946 Indian tribal land claims against the United States. *See Navajo Tribe*, 809 F.3d at 1460; *Paiute-Shoshone Indians of Bishop Colony, Cal. v. City of Los Angeles*, 637 F.3d 993, 1000 (9th Cir. 2011); *Oglala Sioux Tribe of Pine Ridge Indian Reservation v. United States*, 650 F.2d 140, 141-42 (8th Cir. 1981); *Minn. Chippewa Tribe Red Lake Band v. United States*, 768 F.2d 338, 341-42 (Fed. Cir. 1985); *Snoqualmie Tribe of Indians v. United States*, 178 Ct. Cl. 570, 578, 372 F.2d 951, 959 (Ct. Cl. 1967); *W. Shoshone Nat'l Council v. United States*, 279 Fed.Appx. 980, 988 (Fed. Cir. 2008); *Hannahville Indian Cmty. v. United States*, 4 Cl. Ct. 445, 461 (Ct. Cl. 1983); *Six Nations Confederacy v. Andrus*, 610 F.2d 996, 998 (D.C. Cir. 1979). In other words, if a tribe failed to bring a timely claim under the ICCA, it lost its opportunity to litigate its dispute with the United States. *Navajo Tribe*, 809 F.3d at 1460; *Paiute-Shoshone Indians*, 637 F.3d 993 at 1000; *Oglala Sioux Tribe*, 650 F.2d at 141-42. This bar extends to those claims that were not litigated but could have been litigated. *See W. Shoshone Nat'l Council v. Molini*, 951 F.2d 200, 202 (9th Cir. 1991) (barring claims of aboriginal and treaty reserved hunting and fishing rights); *United States v. Dann*, 873 F.2d 1189, 1200 (9th Cir. 1989) (holding that payment pursuant to an

[1] To ensure that Indian tribes would have a venue to bring any future claims, Congress authorized the Court of Claims to adjudicate any claims that accrued after August 13, 1946. *See* 28 U.S.C. § 1505.

ICC award barred the plaintiffs from asserting tribal title to grazing rights and aboriginal title to the lands); *White Mountain Apache Tribe v. Clark*, 604 F. Supp. 185, 187-89 (D. Ariz. 1984), *aff'd sub nom White Mountain Apache Tribe v. Hodel*, 784 F.2d 921 (9th Cir.), *cert. denied*, 479 U.S. 1006 (1986) (concluding that a boundary dispute concerning 14,000 acres of national forests was "exactly the type of claim Congress intended the Commission to hear"). Plaintiff does not distinguish these authorities and relies on inapplicable cases involving claims for aboriginal title against parties other than Defendant.

Plaintiff speculates about what the Tenth Circuit meant when it discussed how broadly the word "claim" under the ICCA should be interpreted in *Navajo Tribe*, 809 F.2d at 1462. (Doc. 18-1 at 20). However, this Court is not free to speculate about what the Tenth Circuit might have meant. Rather this Court is tasked with ascertaining and applying the Tenth Circuit's holding that the Navajo Tribe's claim against the United States was barred because it fell within the exclusive jurisdiction of the ICC and was barred by the applicable statute of limitations contained within the ICCA. *Id*. at 1471. Plaintiff's inconsistent suggestions that *Navajo Tribe* does not control and it was wrongly decided are both unpersuasive and unavailing. *Navajo Tribe* is concordant with the decisions of other courts and it is controlling precedent.

Plaintiff claims aboriginal title to the lands comprising the Valles Caldera National Preserve. In its Complaint, Plaintiff maintains that the Baca heirs received this land grant in 1860 subject to its aboriginal title. (Doc. 1). However, in its brief, Plaintiff claims that it did not have a claim against the United States in 1946. (Doc. 18-1). Plaintiff cannot have it both ways. Either Defendant's grant to the Baca family extinguished aboriginal title or not. If the Baca land grant extinguished Plaintiff's aboriginal title, then aboriginal title was extinguished in 1860 and Plaintiff

cannot claim aboriginal title now. On the other hand, if the Baca land grant did not extinguish Plaintiff's aboriginal title, Plaintiff's claim existed prior to 1946 and Plaintiff had the opportunity to avail itself of the remedy afforded by the ICCA and such claim is now barred by the statute of limitations contained in the ICCA.

Indeed, Plaintiff filed a claim with the ICC under the ICCA seeking, in pertinent part, compensation for the extinguishment of aboriginal title to lands that did not include the land that now comprises the Valles Caldera National Preserve. On July 9, 1951, Plaintiff and the Pueblos of Zia and Santa Ana filed a timely claim seeking compensation for Defendant's transfer of approximately 520,000 acres of land in New Mexico to third parties. *See Pueblo of Zia, et al. v. United States*, ICC No. 137, Amended Petition; (Def. Ex. A, Doc. 14-1). Plaintiff sought compensation for the extinguishment of aboriginal title to lands that were privately owned by virtue of Spanish and Mexican land grants, as well as lands that entered the public domain under the Treaty of Guadalupe Hildalgo. (Doc. 14-1). Nonetheless, Plaintiff did not include the subject property in its claim before the ICC. (*Id.*)

After extensive litigation, the ICC found that the Pueblos were deprived of aboriginal title to the lands claimed therein through the actions of the United States. *See Pueblo de Zia v. United States*, 200 Ct. Cl. 601, 603, 474 F.2d 639, 641 (Ct. Cl. 1973). Ultimately, the Pueblos and the United States entered into a stipulation of settlement whereby a final judgment of $749,083.75 was entered in favor of the Pueblos on January 10, 1974. (Def. Ex. C, Doc. 14-3). In 1980, Congress approved the plan for the distribution of funds. *See* Pub. L. No. 96-194, 94 Stat. 61 (Feb. 21, 1980).

Plaintiff could have brought its claim for aboriginal title to the lands comprising the Valles

Caldera National Preserve in the ICC, as demonstrated by Plaintiff's petition in the ICC that sought compensation for the taking of aboriginal title to other lands. (Doc. 14-1). Despite the fact that the alleged aboriginal title existed prior to 1946, Plaintiff did not include the subject property in its ICCA claim. (Doc. 14-1). Because Plaintiff did not comply with the requirements of the ICCA with respect to the subject property, its claim against the United States is barred by sovereign immunity.

The fact that the Defendant acquired the subject property in 2000 does not alter the result. Courts have uniformly held that a tribe cannot obtain review of a historical land claim otherwise barred by the ICCA by challenging present-day actions involving the land. *Oglala Sioux Tribe*, 570 F.3d at 332; *Catawba Indian Tribe of S.C. v. United States*, 24 Cl. Ct. 24, 29-30 (Ct. Cl. 1991); *Pueblo of Santo Domingo v. United States*, 16 Cl. Ct. 139, 141-42 (Cl. Ct. 1988); *Sokaogon Chippewa Cmty. v. State of Wis., Oneida Cnty.*, 879 F.2d 300, 302 (7th Cir. 1989) (holding the district court appropriately dismissed the Quiet Title Act claim against the United States, because the ICCA created an "exclusive remedy against the United States for tribal claims" accruing before 1946, and that plaintiff tribe's lawsuit in 1986 was "too late."). Through the ICCA, Congress waived its sovereign immunity over any claim of aboriginal title to the subject property, but Plaintiff failed to take advantage of that waiver. In that Plaintiff did not comply with the requirements of the ICCA with respect to its claims to the lands comprising the Valles Caldera National Preserve, its claim is barred by Defendant's sovereign immunity.

Defendant is immune from suit unless it consents to be sued. *Sherwood*, 312 U.S. at 586. Plaintiff has the burden of establishing jurisdiction. *Kokkonen*, 511 U.S. at 377. This Court lacks subject matter jurisdiction over a claim against Defendant for which sovereign immunity has not

been waived. *Normandy Apartments, Ltd.*, 554 F.3d at 1295. Plaintiff has not met its burden to establish a valid waiver of sovereign immunity. As a result, Plaintiff's claim may not proceed. *See Pennhurst State Sch. & Hosp.*, 465 U.S. at 100; *Sydnes*, 523 F.3d at 1182-83. Plaintiff's claim is barred because it fell within the exclusive jurisdiction of the ICC and it is barred by the statute of limitations contained within the ICCA. *Navajo Tribe*, 809 F.3d at 1460.

THEREFORE,

IT IS ORDERED that Defendant's Motion to Dismiss (Doc. 14) is granted.

IT IS FURTHER ORDERED that this matter is dismissed pursuant to Federal Rule of Civil Procedure 12(b)(1).

ROBERT C. BRACK
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

PUEBLO OF JEMEZ, a federally recognized Indian tribe,

Plaintiff,

vs. **No. CIV 12-0800 RB/RHS**

UNITED STATES OF AMERICA,

Defendant.

FINAL ORDER

THE COURT, having issued a Memorandum Opinion and Order on September 24, 2013, enters this Final Order in compliance with Rule 58 of the Federal Rules of Civil Procedure. This matter is dismissed pursuant to Federal Rule of Civil Procedure 12(b)(1).

ROBERT C. BRACK
UNITED STATES DISTRICT JUDGE

Effective:[See Text Amendments]

United States Code Annotated Currentness
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
Part VI. Particular Proceedings
Chapter 161. United States as Party Generally (Refs & Annos)
§ 2409a. Real property quiet title actions

(a) The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights. This section does not apply to trust or restricted Indian lands, nor does it apply to or affect actions which may be or could have been brought under sections 1346, 1347, 1491, or 2410 of this title, sections 7424, 7425, or 7426 of the Internal Revenue Code of 1986, as amended (26 U.S.C. 7424, 7425, and 7426), or section 208 of the Act of July 10, 1952 (43 U.S.C. 666).

(b) The United States shall not be disturbed in possession or control of any real property involved in any action under this section pending a final judgment or decree, the conclusion of any appeal therefrom, and sixty days; and if the final determination shall be adverse to the United States, the United States nevertheless may retain such possession or control of the real property or of any part thereof as it may elect, upon payment to the person determined to be entitled thereto of an amount which upon such election the district court in the same action shall determine to be just compensation for such possession or control.

(c) No preliminary injunction shall issue in any action brought under this section.

(d) The complaint shall set forth with particularity the nature of the right, title, or interest which the plaintiff claims in the real property, the circumstances under which it was acquired, and the right, title, or interest claimed by the United States.

(e) If the United States disclaims all interest in the real property or interest therein adverse to the plaintiff at any time prior to the actual commencement of the trial, which disclaimer is confirmed by order of the court, the jurisdiction of the district court shall cease unless it has jurisdiction of the civil action or suit on ground other than and independent of the authority conferred by section 1346(f) of this title.

(f) A civil action against the United States under this section shall be tried by the court without a jury.

(g) Any civil action under this section, except for an action brought by a State, shall be barred unless it is commenced within twelve years of the date upon which it accrued. Such action shall be deemed to have accrued on

the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States.

(h) No civil action may be maintained under this section by a State with respect to defense facilities (including land) of the United States so long as the lands at issue are being used or required by the United States for national defense purposes as determined by the head of the Federal agency with jurisdiction over the lands involved, if it is determined that the State action was brought more than twelve years after the State knew or should have known of the claims of the United States. Upon cessation of such use or requirement, the State may dispute title to such lands pursuant to the provisions of this section. The decision of the head of the Federal agency is not subject to judicial review.

(i) Any civil action brought by a State under this section with respect to lands, other than tide or submerged lands, on which the United States or its lessee or right-of-way or easement grantee has made substantial improvements or substantial investments or on which the United States has conducted substantial activities pursuant to a management plan such as range improvement, timber harvest, tree planting, mineral activities, farming, wildlife habitat improvement, or other similar activities, shall be barred unless the action is commenced within twelve years after the date the State received notice of the Federal claims to the lands.

(j) If a final determination in an action brought by a State under this section involving submerged or tide lands on which the United States or its lessee or right-of-way or easement grantee has made substantial improvements or substantial investments is adverse to the United States and it is determined that the State's action was brought more than twelve years after the State received notice of the Federal claim to the lands, the State shall take title to the lands subject to any existing lease, easement, or right-of-way. Any compensation due with respect to such lease, easement, or right-of-way shall be determined under existing law.

(k) Notice for the purposes of the accrual of an action brought by a State under this section shall be--

(1) by public communications with respect to the claimed lands which are sufficiently specific as to be reasonably calculated to put the claimant on notice of the Federal claim to the lands, or

(2) by the use, occupancy, or improvement of the claimed lands which, in the circumstances, is open and notorious.

(l) For purposes of this section, the term “tide or submerged lands” means “lands beneath navigable waters” as defined in section 2 of the Submerged Lands Act (43 U.S.C. 1301).

(m) Not less than one hundred and eighty days before bringing any action under this section, a State shall notify the head of the Federal agency with jurisdiction over the lands in question of the State's intention to file suit, the basis therefor, and a description of the lands included in the suit.

(n) Nothing in this section shall be construed to permit suits against the United States based upon adverse pos-

session.

CREDIT(S)

(Added Pub.L. 92-562, § 3(a), Oct. 25, 1972, 86 Stat. 1176; amended Pub.L. 99-514, § 2, Oct. 22, 1986, 100 Stat. 2095; Pub.L. 99-598, Nov. 4, 1986, 100 Stat. 3351.)

Current through P.L. 113-92 (excluding P.L. 113-76, 113-79, and 113-89) approved 3-25-14

END OF DOCUMENT

C

Effective:[See Text Amendments]

United States Code Annotated Currentness
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
Part IV. Jurisdiction and Venue (Refs & Annos)
Chapter 91. United States Court of Federal Claims (Refs & Annos)
§ 1505. Indian claims

The United States Court of Federal Claims shall have jurisdiction of any claim against the United States accruing after August 13, 1946, in favor of any tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska whenever such claim is one arising under the Constitution, laws or treaties of the United States, or Executive orders of the President, or is one which otherwise would be cognizable in the Court of Federal Claims if the claimant were not an Indian tribe, band or group.

CREDIT(S)

(Added May 24, 1949, c. 139, § 89(a), 63 Stat. 102; amended Apr. 2, 1982, Pub.L. 97-164, Title I, § 133(g), 96 Stat. 41; Oct. 29, 1992, Pub.L. 102-572, Title IX, § 902(a), 106 Stat. 4516.)

Current through P.L. 113-92 (excluding P.L. 113-76, 113-79, and 113-89) approved 3-25-14

END OF DOCUMENT

Effective:[See Text Amendments]

United States Code Annotated Currentness
Title 25. Indians
Chapter 5. Protection of Indians
§ 177. Purchases or grants of lands from Indians

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. The agent 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 of the United States appointed to hold the same, may, however, 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.

CREDIT(S)

(R.S. § 2116.)

Current through P.L. 113-92 (excluding P.L. 113-76, 113-79, and 113-89) approved 3-25-14

END OF DOCUMENT

at rates fixed by the Administrator, but not exceeding $25 per day, and shall also be entitled to receive an allowance for actual and necessary travel and subsistence expenses while so serving away from their places of residence. The Council shall meet as frequently as the Surgeon General deems necessary, but not less than once each year. Upon request by three or more members, it shall be the duty of the Surgeon General to call a meeting of the Council.

Meetings.

"(c) In administering the provisions of this title, the Surgeon General, with the approval of the Administrator, is authorized to utilize the services and facilities of any executive department in accordance with an agreement with the head thereof. Payment for such services and facilities shall be made in advance or by way of reimbursement, as may be agreed upon between the Administrator and the head of the executive department furnishing them.

Services, etc., of executive departments.

"CONFERENCES OF STATE AGENCIES

"SEC. 634. Whenever in his opinion the purposes of this title would be promoted by a conference, the Surgeon General may invite representatives of as many State agencies, designated in accordance with section 612 (a) (1) or section 623 (a) (1), to confer as he deems necessary or proper. Upon the application of five or more of such State agencies, it shall be the duty of the Surgeon General to call a conference of representatives of all State agencies joining in the request. A conference of the representatives of all such State agencies shall be called annually by the Surgeon General.

"STATE CONTROL OF OPERATIONS

"SEC. 635. Except as otherwise specifically provided, nothing in this title shall be construed as conferring on any Federal officer or employee the right to exercise any supervision or control over the administration, personnel, maintenance, or operation of any hospital with respect to which any funds have been or may be expended under this title."

SEC. 3. Paragraph (2) of section 208 (b) of the Public Health Service Act, as amended, is amended by inserting "(A)" before the words "to assist"; by striking out the word "paragraph" and inserting in lieu thereof the word "clause"; and by striking out the period at the end of such paragraph and inserting in lieu thereof a comma and the following: "and (B) to assist in carrying out the purposes of title VI of this Act, but not more than twenty such officers appointed pursuant to this clause shall hold office at the same time."

Ante, p. 422.

SEC. 4. Section 1 of the Public Health Service Act is amended to read:

58 Stat. 682. 42 U. S. C., Supp. V, § 201 note.

"SECTION 1. Titles I to VI, inclusive, of this Act may be cited as the 'Public Health Service Act'."

SEC. 5. The Act of July 1, 1944 (58 Stat. 682), is hereby further amended by changing the number of title VI to title VII and by changing the numbers of sections 601 to 612, inclusive, and references thereto, to sections 701 to 712, respectively.

58 Stat. 711. U. S. C., Supp. V, p. 1323.

Approved August 13, 1946.

[CHAPTER 959]

AN ACT

To create an Indian Claims Commission, to provide for the powers, duties, and functions thereof, and for other purposes.

August 13, 1946
[H. R. 4497]
[Public Law 726]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there is hereby created and established an Indian Claims Commission, hereafter referred to as the Commission.

Indian Claims Commission.

JURISDICTION

SEC. 2. The Commission shall hear and determine the following claims against the United States on behalf of any Indian tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska: (1) claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President; (2) all other claims in law or equity, including those sounding in tort, with respect to which the claimant would have been entitled to sue in a court of the United States if the United States was subject to suit; (3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity; (4) claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant; and (5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity. No claim accruing after the date of the approval of this Act shall be considered by the Commission.

Classes of claims.

All claims hereunder may be heard and determined by the Commission notwithstanding any statute of limitations or laches, but all other defenses shall be available to the United States.

Deductions for payments, etc.

In determining the quantum of relief the Commission shall make appropriate deductions for all payments made by the United States on the claim, and for all other offsets, counterclaims, and demands that would be allowable in a suit brought in the Court of Claims under section 145 of the Judicial Code (36 Stat. 1136; 28 U. S. C. sec. 250), as amended; the Commission may also inquire into and consider all money or property given to or funds expended gratuitously for the benefit of the claimant and if it finds that the nature of the claim and the entire course of dealings and accounts between the United States and the claimant in good conscience warrants such action, may set off all or part of such expenditures against any award made to the claimant, except that it is hereby declared to be the policy of Congress that monies spent for the removal of the claimant from one place to another at the request of the United States, or for agency or other administrative, educational, health or highway purposes, or for expenditures made prior to the date of the law, treaty or Executive Order under which the claim arose, or for expenditures made pursuant to the Act of June 18, 1934 (48 Stat. 984), save expenditures made under section 5 of that Act, or for expenditures under any emergency appropriation or allotment made subsequent to March 4, 1933, and generally applicable throughout the United States for relief in stricken agricultural areas, relief from distress caused by unemployment and conditions resulting therefrom, the prosecution of public work and public projects for the relief of unemployment or to increase employment, and for work relief (including the Civil Works Program) shall not be a proper offset against any award.

25 U. S. C. § 461 *et seq.*
25 U. S. C. § 465.

MEMBERSHIP APPOINTMENT; OATH; SALARY

SEC. 3. (a) The Commission shall consist of a Chief Commissioner and two Associate Commissioners, who shall be appointed by the President, by and with the advice and consent of the Senate, and each of whom shall receive a salary of $10,000 per year. At all times at least two members of the Commission shall be members of the bar of the

Supreme Court of the United States in good standing: *Provided further*, That not more than two of the members shall be of the same political party. Each of them shall take an oath to support the Constitution of the United States and to discharge faithfully the duties of his office.

TERM OF OFFICE; VACANCIES; REMOVAL

(b) The Commissioners shall hold office during their good behavior until the dissolution of the Commission as hereinafter provided. Vacancies shall be filled in the same manner as the original appointments. Members of the Commission may be removed by the President for cause after notice and opportunity to be heard.

NOT TO ENGAGE IN OTHER VOCATIONS OR REPRESENT TRIBES

(c) No Commissioner shall engage in any other business, vocation, or employment during his term of office nor shall he, during his term of office or for a period of two years thereafter, represent any Indian tribe, band, or group in any matter whatsoever, or have any financial interest in the outcome of any tribal claim. Any person violating the provisions of this subdivision shall be fined not more than $10,000 or imprisoned not more than two years, or both.

QUORUM

(d) Two members shall constitute a quorum, and the agreement of two members shall be necessary to any and all determinations for the transaction of the business of the Commission, and, if there be a quorum, no vacancy shall impair or affect the business of the Commission, or its determinations.

STAFF OF COMMISSION

SEC. 4. The Commission shall appoint a clerk and such other employees as shall be requisite to conduct the business of the Commission. All such employees shall take oath for the faithful discharge of their duties and shall be under the direction of the Commission in the performance thereof.

OFFICES

SEC. 5. The principal office of the Commission shall be in the District of Columbia.

EXPENSES OF COMMISSION

SEC. 6. All necessary expenses of the Commission shall be paid on the presentation of itemized vouchers therefor approved by the Chief Commissioner or other member or officer designated by the Commission.

TIME OF MEETINGS

SEC. 7. The time of the meetings of the Commission shall be prescribed by the Commission.

RECORD

SEC. 8. A full written record shall be kept of all hearings and proceedings of the Commission and shall be open to public inspection.

CONTROL OF PROCEDURE

SEC. 9. The Commission shall have power to establish its own rules of procedure.

PRESENTATION OF CLAIM

SEC. 10. Any claim within the provisions of this Act may be presented to the Commission by any member of an Indian tribe, band, or other identifiable group of Indians as the representative of all its members; but wherever any tribal organization exists, recognized by the Secretary of the Interior as having authority to represent such tribe, band, or group, such organization shall be accorded the exclusive privilege of representing such Indians, unless fraud, collusion, or laches on the part of such organization be shown to the satisfaction of the Commission.

TRANSFER OF SUITS FROM COURT OF CLAIMS

SEC. 11. Any suit pending in the Court of Claims or the Supreme Court of the United States or which shall be filed in the Court of Claims under existing legislation, shall not be transferred to the Commission: *Provided*, That the provisions of section 2 of this Act, with respect to the deduction of payments, offsets, counterclaims and demands, shall supersede the provisions of the particular jurisdictional Act under which any pending or authorized suit in the Court of Claims has been or will be authorized: *Provided further*, That the Court of Claims in any suit pending before it at the time of the approval of this Act shall have exclusive jurisdiction to hear and determine any claim based upon fair and honorable dealings arising out of the subject matter of any such suit.

LIMITATIONS

Presentation of claims.

SEC. 12. The Commission shall receive claims for a period of five years after the date of the approval of this Act and no claim existing before such date but not presented within such period may thereafter be submitted to any court or administrative agency for consideration, nor will such claim thereafter be entertained by the Congress.

NOTICE AND INVESTIGATION

SEC. 13. (a) As soon as practicable the Commission shall send a written explanation of the provisions of this Act to the recognized head of each Indian tribe and band, and to any other identifiable groups of American Indians existing as distinct entities, residing within the territorial limits of the United States and Alaska, and to the superintendents of all Indian agencies, who shall promulgate the same, and shall request that a detailed statement of all claims be sent to the Commission, together with the names of aged or invalid Indians from whom depositions should be taken immediately and a summary of their proposed testimonies.

Investigation Division.

(b) The Commission shall establish an Investigation Division to investigate all claims referred to it by the Commission for the purpose of discovering the facts relating thereto. The Division shall make a complete and thorough search for all evidence affecting each claim, utilizing all documents and records in the possession of the Court of Claims and the several Government departments, and shall submit such evidence to the Commission. The Division shall make available to the Indians concerned and to any interested Federal agency any data in its possession relating to the rights and claims of any Indian.

CALLS UPON DEPARTMENTS FOR INFORMATION

SEC. 14. The Commission shall have the power to call upon any of the departments of the Government for any information it may deem necessary, and shall have the use of all records, hearings, and

reports made by the committees of each House of Congress, when deemed necessary in the prosecution of its business.

Use of documents, etc., in evidence.

At any hearing held hereunder, any official letter, paper, document, map, or record in the possession of any officer or department, or court of the United States or committee of Congress (or a certified copy thereof), may be used in evidence insofar as relevant and material, including any deposition or other testimony of record in any suit or proceeding in any court of the United States to which an Indian or Indian tribe or group was a party, and the appropriate department of the Government of the United States shall give to the attorneys for all tribes or groups full and free access to such letters, papers, documents, maps, or records as may be useful to said attorneys in the preparation of any claim instituted hereunder, and shall afford facilities for the examination of the same and, upon written request by said attorneys, shall furnish certified copies thereof.

REPRESENTATION BY ATTORNEYS

SEC. 15. Each such tribe, band, or other identifiable group of Indians may retain to represent its interests in the presentation of claims before the Commission an attorney or attorneys at law, of its own selection, whose practice before the Commission shall be regulated by its adopted procedure. The fees of such attorney or attorneys for all services rendered in prosecuting the claim in question, whether before the Commission or otherwise, shall, unless the amount of such fees is stipulated in the approved contract between the attorney or attorneys and the claimant, be fixed by the Commission at such amount as the Commission, in accordance with standards obtaining for prosecuting similar contingent claims in courts of law, finds to be adequate compensation for services rendered and results obtained, considering the contingent nature of the case, plus all reasonable expenses incurred in the prosecution of the claim; but the amount so fixed by the Commission, exclusive of reimbursements for actual expenses, shall not exceed 10 per centum of the amount recovered in any case. The attorney or attorneys for any such tribe, band, or group as shall have been organized pursuant to section 16 of the Act of June 18, 1934 (48 Stat. 987; 25 U. S. C., sec. 476), shall be selected pursuant to the constitution and bylaws of such tribe, band, or group. The employment of attorneys for all other claimants shall be subject to the provisions of sections 2103 to 2106, inclusive, of the Revised Statutes (25 U. S. C., secs. 81, 82–84).

Fees.

Authority of Attorney General.

The Attorney General or his assistants shall represent the United States in all claims presented to the Commission, and shall have authority, with the approval of the Commission, to compromise any claim presented to the Commission. Any such compromise shall be submitted by the Commission to the Congress as a part of its report as provided in section 21 hereof in the same manner as final determinations of the Commission, and shall be subject to the provisions of section 22 hereof.

NO MEMBER OF CONGRESS TO PRACTICE BEFORE COMMISSION

SEC. 16. No Senator or Member of or Delegate to Congress shall, during his continuance in office, practice before the Commission.

HEARING

SEC. 17. The Commission shall give reasonable notice to the interested parties and an opportunity for them to be heard and to present evidence before making any final determination upon any claim. Hearings may be held in any part of the United States or in the Territory of Alaska.

TESTIMONY

SEC. 18. Any member of the Commission or any employee of the Commission, designated in writing for the purpose by the Chief Commissioner, may administer oaths and examine witnesses. Any member of the Commission may require by subpena (1) the attendance and testimony of witnesses, and the production of all necessary books, papers, documents, correspondence, and other evidence, from any place in the United States or Alaska at any designated place of hearing; or (2) the taking of depositions before any designated individual competent to administer oaths under the laws of the United States or of any State or Territory. In the case of a deposition, the testimony shall be reduced to writing by the individual taking the deposition or under his direction and shall be subscribed by the deponent. In taking testimony, opportunity shall be given for cross-examination, under such regulations as the Commission may prescribe. Witnesses subpenaed to testify or whose depositions are taken pursuant to this Act, and the officers or persons taking the same, shall severally be entitled to the same fees and mileage as are paid for like services in the courts of the United States.

Fees and mileage.

FINAL DETERMINATION

SEC. 19. The final determination of the Commission shall be in writing, shall be filed with its clerk, and shall include (1) its findings of the facts upon which its conclusions are based; (2) a statement (a) whether there are any just grounds for relief of the claimant and, if so, the amount thereof; (b) whether there are any allowable offsets, counterclaims, or other deductions, and, if so, the amount thereof; and (3) a statement of its reasons for its findings and conclusions.

REVIEW BY COURT OF CLAIMS

Certification of questions of law.

SEC. 20. (a) In considering any claim the Commission at any time may certify to the Court of Claims any definite and distinct questions of law concerning which instructions are desired for the proper disposition of the claim; and thereupon the Court of Claims may give appropriate instructions on the questions certified and transmit the same to the Commission for its guidance in the further consideration of the claim.

Notice of filing of final determination.

(b) When the final determination of the Commission has been filed with the clerk of said Commission the clerk shall give notice of the filing of such determination to the parties to the proceeding in manner and form as directed by the Commission.

Appeal.

At any time within three months from the date of the filing of the determination of the Commission with the clerk either party may appeal from the determination of the Commission to the Court of Claims, which Court shall have exclusive jurisdiction to affirm, modify, or set aside such final determination. On said appeal the Court shall determine whether the findings of fact of the Commission are supported by substantial evidence, in which event they shall be conclusive, and also whether the conclusions of law, including any conclusions respecting "fair and honorable dealings", where applicable, stated by the Commission as a basis for its final determination, are valid and supported by the Commission's findings of fact. In making the foregoing determinations, the Court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error. The Court may at any time remand the cause to the Commission for such further proceedings as it may direct, not inconsistent with the foregoing provisions of this section. The Court

Remand of cause to Commission.

shall promulgate such rules of practice as it may find necessary to carry out the foregoing provisions of this section.

Review by Supreme Court of U. S.

(c) Determinations of questions of law by the Court of Claims under this section shall be subject to review by the Supreme Court of the United States in the manner prescribed by section 3 of the Act of February 13, 1925 (43 Stat. 939; 28 U. S. C., sec. 288), as amended.

REPORT OF COMMISSION TO CONGRESS

SEC. 21. In each claim, after the proceedings have been finally concluded, the Commission shall promptly submit its report to Congress.

The report to Congress shall contain (1) the final determination of the Commission; (2) a transcript of the proceedings or judgment upon review, if any, with the instructions of the Court of Claims; and (3) a statement of how each Commissioner voted upon the final determination of the claim.

EFFECT OF FINAL DETERMINATION OF COMMISSION

Report.

SEC. 22. (a) When the report of the Commission determining any claimant to be entitled to recover has been filed with Congress, such report shall have the effect of a final judgment of the Court of Claims, and there is hereby authorized to be appropriated such sums as are necessary to pay the final determination of the Commission.

Appropriation authorized.

The payment of any claim, after its determination in accordance with this Act, shall be a full discharge of the United States of all claims and demands touching any of the matters involved in the controversy.

Further claim barred.

(b) A final determination against a claimant made and reported in accordance with this Act shall forever bar any further claim or demand against the United States arising out of the matter involved in the controversy.

DISSOLUTION OF THE COMMISSION

SEC. 23. The existence of the Commission shall terminate at the end of ten years after the first meeting of the Commission or at such earlier time after the expiration of the five-year period of limitation set forth in section 12 hereof as the Commission shall have made its final report to Congress on all claims filed with it. Upon its dissolution the records of the Commission shall be delivered to the Archivist of the United States.

Records.

FUTURE INDIAN CLAIMS

Extension of jurisdiction of Court of Claims.

SEC. 24. The jurisdiction of the Court of Claims is hereby extended to any claim against the United States accruing after the date of the approval of this Act in favor of any Indian tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska whenever such claim is one arising under the Constitution, laws, treaties of the United States, or Executive orders of the President, or is one which otherwise would be cognizable in the Court of Claims if the claimant were not an Indian tribe, band, or group. In any suit brought under the jurisdiction conferred by this section the claimant shall be entitled to recover in the same manner, to the same extent, and subject to the same conditions and limitations, and the United States shall be entitled to the same defenses, both at law and in equity, and to the same offsets, counterclaims, and demands, as in cases brought in the Court of Claims under section 145 of the Judicial Code (36 Stat. 1136; 28 U. S. C., sec. 250), as amended: *Provided, however*, That nothing contained in this section shall be construed as altering the

fiduciary or other relations between the United States and the several Indian tribes, bands, or groups.

EFFECT ON EXISTING LAWS

SEC. 25. All provisions of law inconsistent with this Act are hereby repealed to the extent of such inconsistency, except that existing provisions of law authorizing suits in the Court of Claims by particular tribes, bands, or groups of Indians and governing the conduct or determination of such suits shall continue to apply to any case heretofore or hereafter instituted thereunder save as provided by section 11 hereof as to the deduction of payments, offsets, counterclaims, and demands.

Separability of provisions.

SEC. 26. If any provision of this Act, or the application thereof, is held invalid, the remainder of the Act, or other applications of such provisions, shall not be affected.

Approved August 13, 1946.

[CHAPTER 960]

August 13, 1946
[H. R. 2033]
[Public Law 727]

AN ACT

Authorizing Federal participation in the cost of protecting the shores of publicly owned property.

Protection of shores owned by States, etc.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That with the purpose of preventing damage to public property and promoting and encouraging the healthful recreation of the people, it is hereby declared to be the policy of the United States to assist in the construction, but not the maintenance, of works for the improvement and protection against erosion by waves and currents of the shores of the United States that are owned by States, municipalities, or other political subdivisions: *Provided*, That the Federal contribution toward the construction of protective works shall not in any case exceed one-third of the total cost: *Provided further*, That where a political subdivision has heretofore erected a sea wall to prevent erosion, by waves and currents, to a public highway considered by the Chief of Engineers sufficiently important to justify protection, Federal contribution toward the repair of such wall and the protection thereof by the building of an artificial beach is authorized at not to exceed one-third of the original cost of such wall, and that investigations and studies hereinafter provided for are hereby authorized for such localities: *Provided further*, That the plan of protection shall have been specifically adopted and authorized by Congress after investigation and study by the Beach Erosion Board under the provisions of section 2 of the River and Harbor Act approved July 3, 1930, as amended and supplemented.

Federal contribution.

Repair, etc., of sea wall.

Plan of protection.

46 Stat. 945.
33 U. S. C. § 426.

Payment to States, etc.

SEC. 2. When the Chief of Engineers shall find that any such project has been constructed in accordance with the authorized plans and specifications he shall cause to be paid to the State, municipality, or political subdivision the amount authorized by Congress.

Payments on construction.

SEC. 3. The Chief of Engineers may, in his discretion, from time to time, make payments on such construction as the work progresses, but these payments, including previous payments, if any, shall not be more than the United States pro rata part of the value of the labor and materials which have been actually put into such construction in conformity to said plans and specifications: *Provided*, That the construction of improvement and protective works may be undertaken by the Chief of Engineers upon the request of, and contribution of

Works undertaken by Chief of Engineers.

tinued in force in respect to such courts, and all other laws and parts of laws relating to said circuit, district, and criminal courts, are repealed. Saving and repealing clause.

SEC. 17. *And be it further enacted*, That the President of the United States be, and he is hereby, authorized and empowered to appoint, by and with the advice and consent of the Senate, a suitable person, learned in the law, to revise and codify the laws of the District of Columbia. President may appoint person to codify laws of the District of Columbia.

SEC. 18. *And be it further enacted*, That the person who shall be thus appointed shall receive ten dollars per day for his services whilst so employed, and shall render a final report of his revision and codification to Congress on or before the first day of January next. Pay, and when to report.

APPROVED, March 3, 1863.

CHAP. XCII. — *An Act to amend "An Act to establish a Court for the Investigation of Claims against the United States," approved February twenty-fourth, eighteen hundred and fifty-five.* March 3, 1863.

1855, ch. 122. vol. x. p. 612.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there shall be appointed by the President, by and with the advice and consent of the Senate, two additional judges for the said court, to hold their offices during good behavior, who shall be qualified in the same manner, discharge the same duties, and receive the same compensation, as now provided in reference to the judges of said court; and that from the whole number of said judges the President shall in like manner appoint a chief justice for said court. Two additional judges for the court of claims.

SEC. 2. *And be it further enacted*, That all petitions and bills praying or providing for the satisfaction of private claims against the Government, founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the Government of the United States, shall, unless otherwise ordered by resolution of the house in which the same are presented or introduced, be transmitted by the secretary of the Senate or the clerk of the House of Representatives, with all the accompanying documents, to the court aforesaid. All petitions and bills for private claims against the government to be sent to the court.

SEC. 3. *And be it further enacted*, That the said court, in addition to the jurisdiction now conferred by law, shall also have jurisdiction of all set-offs, counter-claims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever, on the part of the Government against any person making claim against the Government in said court; and upon the trial of any such cause it shall hear and determine such claim or demand both for and against the Government and claimant; and if upon the whole case it finds that the claimant is indebted to the Government, it shall *under* [render] judgment to that effect, and such judgment shall be final, with the right of appeal, as in other cases herein provided for. Any transcript of such judgment, filed in the clerk's office of any district or circuit court of the United States, shall be entered upon the records of the same, and shall ipso facto become and be a judgment of such district or circuit court, and shall be enforced in like manner as other judgments therein. Court to consider set-offs, &c., for the government. If the court finds that the claimant owes the Government, to render judgment therefor. Transcript of judgment to be entered in district, &c., court, and be enforced like other judgments.

SEC. 4. *And be it further enacted*, That the said court of claims shall hold one annual session, commencing on the first Monday in October in each year, and continuing so long as may be necessary for the prompt disposition of the business of the court. The said court may prescribe rules and regulations for practice therein, and it may punish for contempt, in the manner prescribed by common law. It may appoint commissioners, and may generally exercise such powers as are necessary to carry out the powers herein granted to it. The judges, solicitors, and clerks of said court shall be admitted to the use of the congressional library, and also the law library, until a law library be provided for them. The said court may appoint a bailiff, who shall hold his office during four years, unless sooner removed by said court for cause, and who shall receive a salary of Annual session to commence 1st Monday in October. Rules. Commissioners. Law library. Bailiff. Salary.

one thousand dollars, payable quarterly. The judges and clerks of said court may administer oaths and affirmations, take acknowledgments of instruments in writing, and give certificates of the same. Said court shall have a seal, with such device as it may order. Members of either house of Congress shall not practice in said court of claims.

Oaths, &c.

Seal.

Members of Congress not to practise in court of claims.

SEC. 5. *And be it further enacted*, That either party may appeal to the supreme court of the United States from any final judgment or decree which may hereafter be rendered in any case by said court wherein the amount in controversy exceeds three thousand dollars, under such regulations as the said supreme court may direct: *Provided*, That such appeal shall be taken within ninety days after the rendition of such judgment or decree: *And provided, further*, That when the judgment or decree will affect a class of cases, or furnish a precedent for the future action of any executive department of the Government in the adjustment of such class of cases, or a constitutional question, and such facts shall be certified to by the presiding justice of the court of claims, the supreme court shall entertain an appeal on behalf of the United States, without regard to the amount in controversy.

Appeals to supreme court.

When to be taken.

When an appeal may be had without reference to amount in controversy.

SEC. 6. *And be it further enacted*, That the solicitor, assistant solicitor, and deputy solicitor of said court, shall hereafter be appointed by the President, by and with the advice and consent of the Senate, and it shall be their duty faithfully and diligently to defend the United States in all matters and cases before said court of claims; and in all cases taken by appeal therefrom to the supreme court; and no other fee or compensation than the salary of said solicitor, and assistant and deputy solicitors, shall hereafter, in any case, be paid to either of them, and no fee or compensation for services in either the supreme court or court of claims shall hereafter be allowed or paid in any case by the United States.

Solicitor and assistants, how appointed.

Duty.

No fee but salary.

SEC. 7. *And be it further enacted*, That in all cases of final judgments by said court, or on appeal by the said supreme court where the same shall be affirmed in favor of the claimant, the sum due thereby shall be paid out of any general appropriation made by law for the payment and satisfaction of private claims, on presentation to the Secretary of the Treasury of a copy of said judgment, certified by the clerk of said court of claims, and signed by the chief justice, or, in his absence, by the presiding judge, of said court. And in cases where the judgment appealed from is in favor of said claimant, or the same is affirmed by the said supreme court, interest thereon at the rate of five per centum shall be allowed from the date of its presentation to the Secretary of the Treasury for payment as aforesaid, but no interest shall be allowed subsequent to the affirmance, unless presented for payment to the Secretary of the Treasury as aforesaid: *Provided*, That no interest shall be allowed on any claim up to the time of the rendition of the judgment by said court of claims, unless upon a contract expressly stipulating for the payment of interest, and it shall be the duty of the Secretary of the Treasury, at the commencement of each Congress, to include in his report *or* [a] statement of all sums paid at the treasury on such judgments, together with the names of the parties in whose favor the same were allowed: *And it is further provided*, That such payments shall be a full discharge to the United States of all claim or demand touching any of the matters involved in the controversy: *And provided further*, That any final judgment rendered against the claimant on any claim prosecuted as aforesaid shall forever bar any further claim or demand against the United States arising out of the matters involved in the controversy.

Claims sustained, how paid.

Interest.

Payments to be a full discharge, and bar all further claim.

SEC. 8. *And be it further enacted*, That it shall be lawful for said court, at the instance of the solicitor for the United States, to make an order in any case pending in said court, directing that the claimant or claimants in such case, or any one or more of them, shall appear, upon reasonable notice, before any commissioner of said court, and be examined on oath or

Claimant may be examined on oath.

Proceedings.

affirmation touching any or all matters pertaining to said claim. And the examination of such claimant or claimants shall be reduced to writing by the said commissioner, and be returned to and filed in said court, and may, at the discretion of the solicitor for the United States, be read and used as evidence on the trial of said cause. And if any claimant or claimants, after such order has been made, and due and reasonable notice thereof given to him or them, shall fail to appear or shall refuse to testify or answer fully as to all matters within his knowledge material to the issue, the said court may, in its discretion, order that the said cause shall not be brought forward for trial until the said claimant or claimants shall have fully complied with the order of said court in the premises.

Examination to be reduced to writing.

If claimants neglect or refuse.

SEC. 9. *And be it further enacted*, That the jurisdiction of the said court shall not extend to or include any claim against the Government not pending in said court on the first day of December, Anno Domini eighteen hundred and sixty-two, growing out of or dependent on any treaty stipulation entered into with foreign nations or with the Indian tribes.

Court not to have jurisdiction of certain claims.

SEC. 10. *And be it further enacted*, That every claim against the United States, cognizable by the court of claims, shall be forever barred unless the petition setting forth a statement of the claim be filed in the court or transmitted to it under the provisions of this act within six years after the claim first accrues: *Provided*, That claims which have accrued six years before the passage of this act shall not be barred if the petition be filed in the court or transmitted as aforesaid within three years after the passage of this act: *And provided, further*, That the claims of married women first accrued during marriage, of persons under the age of twenty-one years first accruing during minority, and of idiots, lunatics, insane persons, and persons beyond seas at the time the claim accrued, entitled to the claim, shall not be barred if the petition be filed in the court or transmitted, as aforesaid, within three years after the disability has ceased; but no other disability than those enumerated shall prevent any claim from being barred, nor shall any of the said disabilities operate cumulatively.

Claims to be filed in court within six years.

Proviso.

Persons under disability.

SEC. 11. *And be it further enacted*, That any person or persons who shall corruptly practise or attempt to practise any fraud against the United States in the proof, statement, establishment, or allowance of any claim, or any part of any claim against the United States, shall ipso facto forfeit the same to the Government; and it shall be the duty of the court of claims, in such cases, to find specifically that such fraud was practised or attempted to be practised, and thereupon give judgment that such claim is forfeited to the Government, and that the claimant be forever barred from prosecuting the same. Appeals may be taken from the court of claims to the supreme court, in all such cases, on all questions of law, in the manner herein provided for appeals in other cases.

Attempts to practise any fraud upon the United States, how punished.

Appeals.

SEC. 12. *And be it further enacted*, That any petition filed under this act shall be verified by the affidavit of the claimant, his agent, or attorney, stating that no assignment or transfer of said claim, or any part thereof, or any interest therein, has been made, except as in said petition stated; that said claimant is justly entitled to the amount therein claimed from the United States, after allowing all just credits and offsets; and that he believes the facts as stated in said petition are true: *Provided, however*, That in order to authorize the said court to render a judgment in favor of any claimant, if a citizen of the United States, it shall be set forth in the petition that the claimant, and the original and every prior owner thereof where the claim has been assigned, has at all times borne true allegiance to the Government of the United States, and whether a citizen or not, that he has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, which allegations may be traversed by the Government, and if on the trial such issue shall be decided against the claimant, his petition shall be dismissed.

Petitions to the court to be verified by affidavit.

Proviso.

Repeal of inconsistent laws.

SEC. 13. *And be it further enacted*, That all laws and parts [of laws] inconsistent with the provisions of this act are hereby repealed.

Money not to be paid out for claims until appropriated upon estimates.

SEC. 14. *And be it further enacted*, That no money shall be paid out of the treasury for any claim passed upon by the court of claims till after an appropriation therefor shall be estimated for by the Secretary of the Treasury.

APPROVED, March 3, 1863.

March 3, 1863.

CHAP. XCIII.—*An Act to give greater Efficiency to the Judicial System of the United States.*

In case of disability, &c., of the judge of the supreme court for any circuit, judge of other circuit may hold the court.

Proceedings.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That whenever the judge of the supreme court for any circuit, from disability, absence, the accumulation of business in the circuit court in any district within his circuit, or from his having been of counsel or being interested in any case pending in such circuit court, or from any other cause, shall deem it advisable that the circuit court in such district shall be holden by the judge of any other circuit, he may request, in writing, the judge of any other circuit to hold the circuit court in such district, during a time to be named in such request; and such request shall be entered upon the journal of the circuit court so to be holden. And thereupon it shall be lawful for the judge so requested to hold the circuit court in such district, and to exercise all the powers of the judge of such circuit within and for such district during the time named in such request.

Judge of any circuit may order any civil cause certified into any circuit, to be certified back.

SEC. 2. *And be it further enacted*, That the judge of any circuit may order any civil cause certified into any circuit court within his circuit from any court of the United States, to be certified back to the court whence it came; and in such case such cause shall be proceeded in by such court, in all respects, as if the same had not been certified from it: *Provided*,

Proviso.

That if from any cause it shall be improper for the judge of such court to try any such cause so certified back, the same shall be tried by some other judge holding such court, pursuant to the provisions of this act. Whenever, by reason of death or resignation, there shall be no judge of any circuit, the chief justice of the supreme court of the United States may make the requests herein provided for, which shall be operative until such circuit shall be assigned to another judge. In case of a vacancy in the office of marshal or district attorney in any circuit, the judge of such circuit may fill such vacancy, and the person so appointed shall serve until an appointment shall be made by the President, and the appointee has duly qualified, and no longer; and the marshal so appointed shall give bond as if appointed by the President, and the bond shall be approved by such judge. The appointment so made shall be in writing, and such writing shall be filed in the clerk's office of the circuit court, and a copy thereof shall be entered upon the journal of such court. The clerk of every court shall give bond in such sum as may be fixed by the court, with sureties to be approved by the court, and a new bond may be required whenever the court shall deem it proper that such bond shall be given. Every marshal's bond so given shall be filed in the office of the clerk of the circuit court, and a copy thereof entered upon the journal of the court. A copy of every bond given by a clerk shall be entered on the journal of the court for which he is appointed, and the bond shall be deposited for safe-keeping as the court may direct. A certified copy of such entry shall be *prima facie* proof of the execution of such bond, and of the contents thereof.

If there is no judge of any circuit, the chief justice of the supreme court may make the requests.

Vacancies in office of marshal or district attorney, when filled by the court.

Appointment, how made.

Bond of clerk,

of marshal.

Repealing clause.

SEC. 3. *And be it further enacted*, That all acts and parts of acts inconsistent with the provisions of this act be, and the same are hereby, repealed.

APPROVED, March 3, 1863.

which lands thus reserved as stations shall be held as permanent mail service reservations, not subject to the operation of any existing pre-emption or other general land laws.

Reservations to be sold, &c. when stations are abandoned.

SEC. 3. *And be it further enacted*, That whenever, from any cause, any of the reservations made under the second section of this act, shall be no longer needed for the purposes originally intended, or the convenience of the service shall require a change of location, the reservation thus abandoned by the Postmaster-General shall be laid off into suitable lots or parcels, and sold at public sale to the highest bidder after at least three months' public notice, under the direction of the Secretary of the Interior, and patents therefor shall issue as in the case of the sale of other public lands, and all laws, or parts of laws, heretofore passed, granting the pre-emption privilege to mail contractors be, and the same are hereby, repealed, but this repeal is not to affect any rights which may have actually vested under those laws before the passage of this act.

Laws granting preëmption rights to mail contractors repealed.

APPROVED, June 21, 1860.

CHAP. CLXVII.—*An Act to confirm certain Private Land Claims in the Territory of New Mexico.* June 21, 1860.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the private land claims in the Territory of New Mexico, as recommended for confirmation by the surveyor-general of that Territory, and in his letter to the Commissioner of the General Land Office, of the twelfth of January, eighteen hundred and fifty eight, designated as numbers one, three, four, six, eight, nine, ten, twelve, fourteen, fifteen, sixteen, seventeen, and eighteen, and the claim of E. W. Eaton, not entered on the corrected list of numbers, but standing on the original docket and abstract returns of the surveyor-general as number sixteen, be, and they are hereby, confirmed: *Provided*, That the claim number nine, in the name of John Scolley and others, shall not be confirmed for more than five square leagues; and that the claim number seventeen, in the name of Cornelio Vigil and Ceran St. Vrain, shall not be confirmed for more than eleven square leagues to each of said claimants.

Certain private land claims in New Mexico confirmed.

E. W. Eaton.

John Scolley.

Cornelio Vigil.

Ceran St. Vrain.

SEC. 2. *And be it further enacted*, That in surveying the claim of said John Scolly it shall be lawful for him to locate the five square leagues confirmed to him in a square body in any part of the tract of twenty-five square leagues claimed by him; and that in surveying the claims of said Cornelio Vigil and Ceran St. Vrain, the location shall be made as follows, namely: the survey shall first be made of all tracts occupied by actual settlers holding possession under titles or promises to settle, which have heretofore been given by said Vigil and St. Vrain, in the tracts claimed by them, and after deducting the area of all such tracts from the area embraced in twenty-two square leagues, the remainder shall be located in two equal tracts, each of square form, in any part of the tract claimed by the said Vigil and St. Vrain selected by them; and it shall be the duty of the surveyor-general of New Mexico immediately to proceed to make the surveys and locations authorized and required by the terms of this section.

Survey and location of claims of Scolley, Vigil, and St. Vrain.

SEC. 3. *And be it further enacted*, That the private land claims in the Territory of New Mexico, as recommended for confirmation by said surveyor-general in his reports and abstract marked exhibit A, as communicated to Congress by the Secretary of the Interior in his letter dated the third of February eighteen hundred and sixty, and numbered from twenty to thirty-eight, both inclusive, be, and the same are hereby, confirmed, with the exception of the claim numbered twenty-six, in the name of Juan B. Vigil, which claim, numbered twenty-six, is not confirmed.

Certain other private land claims in New Mexico, confirmed;

except that of Juan B. Vigil.

SEC. 4. *And be it further enacted*, That the foregoing confirmation shall

Effect of confirmation.

only be construed as quit-claims or relinquishments, on the part of the United States, and shall not affect the adverse rights of any other person or persons whomsoever.

Juan B. Vigil may institute suit, &c.

SEC. 5. *And be it further enacted*, That it shall or may be lawful for the said Juan B. Vigil or any person claiming title under him, to institute suit against the United States for the lands claimed and embraced in said claim number twenty-six, not confirmed under the provisions of the third section of this act; said suit to be instituted in the supreme court of the Territory of New Mexico, to be defended by the district-attorney of the United States for said Territory, under the direction of the Attorney-General of the United States, with the right of appeal to either party from the decision of said supreme court to the Supreme Court of the United States, if such appeal be asked for within one year from the rendition of the judgment in said supreme court of the Territory of New Mexico, and not thereafter: *Provided* That if the suit authorized by this section be not instituted within two years from the passage of this act, the said claimants shall be presumed to have abandoned all right or title to the lands embraced in said claim number twenty-six, and said lands shall thenceforth be held and deemed to be public lands belonging to the United States: *And provided further*, That in the determination of the suit authorized to be instituted by the terms of this section, the courts shall be governed by the treaty of Guadalupe Hidalgo, the law of nations, the laws, usages, and customs of the government from which the claim is derived, the principles of equity, and the decisions of the Supreme Court of the United States, so far as they are applicable.

Proviso.

Proviso.

Vol. ix. p. 922.

Heirs of Luis Maria Baca.

SEC. 6. *And be it further enacted*, That it shall be lawful for the heirs of Luis Maria Baca, who make claim to the said tract of land as is claimed by the town of Las Begas, to select instead of the land claimed by them, an equal quantity of vacant land, not mineral, in the Territory of New Mexico, to be located by them in square bodies, not exceeding five in number. And it shall be the duty of the surveyor-general of New Mexico, to make survey and location of the lands so selected by said heirs of Baca when thereunto required by them: *Provided, however*, That the right hereby granted to said heirs of Baca shall continue in force during three years from the passage of this act, and no longer.

Survey and location.

Proviso.

APPROVED, June 21, 1860.

June 22, 1860.

CHAP. CLXXIX.—*An Act to carry into Effect Provisions of the Treaties between the United States, China, Japan, Siam, Persia, and other Countries, giving certain Judicial Powers to Ministers and Consuls or other Functionaries, of the United States in those Countries, and for other Purposes.*

United States ministers and consuls in China, &c., to have certain judicial powers.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That, to carry into full effect the provisions of the treaties of the United States with the empires of China, Japan, and Siam, respectively, the minister and the consuls of the United States, duly appointed to reside in each of the said countries, shall, in addition to other powers and duties imposed upon them, respectively, by the provisions of such treaties, respectively, be invested with the judicial authority herein described, which shall appertain to the said office of minister and consul, and be a part of the duties belonging thereto, wherein the same is allowed by treaty.

As to crimes and misdemeanors.

SEC. 2. *And be it further enacted*, That in regard to crimes and misdemeanors, the said public functionaries are hereby fully empowered to arraign and try, in the manner herein provided, all citizens of the United States charged with offences against law, which shall be committed in such countries, respectively, and, upon conviction, to sentence such offenders in the manner herein authorized; and the said functionaries, and each of them, are hereby authorized to issue all such processes as are suitable and necessary to carry this authority into execution.

C

United States Code Annotated Currentness

Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)

Title III. Pleadings and Motions

Rule 12. Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing

<Notes of Decisions for 28 USCA Federal Rules of Civil Procedure Rule 12 are displayed in two separate documents. Notes of Decisions for subdivisions I to VII are contained in this document. For Notes of Decisions for subdivisions VIII to end, see second document for 28 USCA Federal Rules of Civil Procedure Rule 12.>

(a) Time to Serve a Responsive Pleading.

(1) ***In General.*** Unless another time is specified by this rule or a federal statute, the time for serving a responsive pleading is as follows:

(A) A defendant must serve an answer:

(i) within 21 days after being served with the summons and complaint; or

(ii) if it has timely waived service under Rule 4(d), within 60 days after the request for a waiver was sent, or within 90 days after it was sent to the defendant outside any judicial district of the United States.

(B) A party must serve an answer to a counterclaim or crossclaim within 21 days after being served with the pleading that states the counterclaim or crossclaim.

(C) A party must serve a reply to an answer within 21 days after being served with an order to reply, unless the order specifies a different time.

(2) ***United States and Its Agencies, Officers, or Employees Sued in an Official Capacity.*** The United States, a United States agency, or a United States officer or employee sued only in an official capacity must serve an answer to a complaint, counterclaim, or crossclaim within 60 days after service on the United States attorney.

(3) ***United States Officers or Employees Sued in an Individual Capacity.*** A United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf must serve an answer to a complaint, counterclaim, or crossclaim within 60 days after

service on the officer or employee or service on the United States attorney, whichever is later.

(4) ***Effect of a Motion.***Unless the court sets a different time, serving a motion under this rule alters these periods as follows:

(A) if the court denies the motion or postpones its disposition until trial, the responsive pleading must be served within 14 days after notice of the court's action; or

(B) if the court grants a motion for a more definite statement, the responsive pleading must be served within 14 days after the more definite statement is served.

(b) How to Present Defenses. Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:

(1) lack of subject-matter jurisdiction;

(2) lack of personal jurisdiction;

(3) improper venue;

(4) insufficient process;

(5) insufficient service of process;

(6) failure to state a claim upon which relief can be granted; and

(7) failure to join a party under Rule 19.

A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed. If a pleading sets out a claim for relief that does not require a responsive pleading, an opposing party may assert at trial any defense to that claim. No defense or objection is waived by joining it with one or more other defenses or objections in a responsive pleading or in a motion.

(c) Motion for Judgment on the Pleadings. After the pleadings are closed--but early enough not to delay trial--a party may move for judgment on the pleadings.

(d) Result of Presenting Matters Outside the Pleadings. If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for sum-

C

United States Code Annotated Currentness
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title VII. Judgment
Rule 56. Summary Judgment

<Notes of Decisions for 28 USCA Federal Rules of Civil Procedure Rule 56 are displayed in three separate documents. Notes of Decisions for subdivisions I to VI are contained in this document. For Notes of Decisions for subdivisions VII through XXV, see the second document for 28 USCA Federal Rules of Civil Procedure Rule 56. For Notes of Decisions for subdivisions XXVI to end, see the third document for 28 USCA Federal Rules of Civil Procedure Rule 56.>

(a) Motion for Summary Judgment or Partial Summary Judgment. A party may move for summary judgment, identifying each claim or defense--or the part of each claim or defense--on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.

(b) Time to File a Motion. Unless a different time is set by local rule or the court orders otherwise, a party may file a motion for summary judgment at any time until 30 days after the close of all discovery.

(c) Procedures.

(1) ***Supporting Factual Positions.*** A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

(A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or

(B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

(2) ***Objection That a Fact Is Not Supported by Admissible Evidence.*** A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.

(3) ***Materials Not Cited.*** The court need consider only the cited materials, but it may consider other materials in the record.

(4) ***Affidavits or Declarations*****.** An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.

(d) When Facts Are Unavailable to the Nonmovant. If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

(1) defer considering the motion or deny it;

(2) allow time to obtain affidavits or declarations or to take discovery; or

(3) issue any other appropriate order.

(e) Failing to Properly Support or Address a Fact. If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may:

(1) give an opportunity to properly support or address the fact;

(2) consider the fact undisputed for purposes of the motion;

(3) grant summary judgment if the motion and supporting materials--including the facts considered undisputed--show that the movant is entitled to it; or

(4) issue any other appropriate order.

(f) Judgment Independent of the Motion. After giving notice and a reasonable time to respond, the court may:

(1) grant summary judgment for a nonmovant;

(2) grant the motion on grounds not raised by a party; or

(3) consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute.

(g) Failing to Grant All the Requested Relief. If the court does not grant all the relief requested by the motion, it may enter an order stating any material fact--including an item of damages or other relief--that is not genuinely in dispute and treating the fact as established in the case.

(h) Affidavit or Declaration Submitted in Bad Faith. If satisfied that an affidavit or declaration under this rule is submitted in bad faith or solely for delay, the court--after notice and a reasonable time to respond--may order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result. An offending party or attorney may also be held in contempt or subjected to other appropriate sanctions.

CREDIT(S)

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Amendments received to 2-24-14

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