No. 20-35683
[NO. 3:20-cv-05333-RBL, USDC, W.D. Washington]

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

THOMAS G. LANDRETH,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA, et al

Defendants-Appellees.

ANSWERING BRIEF OF UNITED STATES

Appeal from the United States District Court
for the Western District of Washington at Tacoma
The Honorable Ronald B. Leighton
United States District Judge

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INTRODUCTION

In this appeal, Thomas G. Landreth, the purported owner of an interest in riparian land adjoining Lake Quinault on the Olympic Peninsula, proceeding *pro se*, seeks reversal of the district court's order dismissing his complaint. That complaint sought to establish that the United States and the Quinault Indian Nation are falsely claiming ownership of the bed of the Lake. Landreth does not claim title to the disputed land. Rather, he contends that Lake Quinault is owned by the State of Washington. For that reason, and others, the district court correctly dismissed Landreth's claim under the Quiet Title Act, 28 U.S.C. § 2409a, for lack of subject matter jurisdiction.

Relying on the common law tort of conversion, Landreth also asserted that the United States is vicariously liable in damages for injuries he has suffered because of what he believes are incursions upon his riparian rights by the Quinault Indian Nation. Although not specifically identified in Landreth's complaint, the only statutory waiver of sovereign immunity that could jurisdictionally support such a claim is the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b); 2679-2680 *et. seq*. However, Landreth did not comply with jurisdictional prerequisites

for the filing of an FTCA claim, and so that claim was also dismissed for lack of subject matter jurisdiction.

Landreth also asserted a variety of indistinct non-tort monetary claims in excess of $10,000 against the United States. These claims, because they exceeded $10,000, were also dismissed for lack of subject matter jurisdiction pursuant to the Little Tucker Act, 28 U.S.C. § 1346(a)(2).

Finally, Landreth newly invokes the Administrative Procedure Act's (APA), 5 U.S.C. §§ 701-706, waiver of sovereign immunity, but he does not identify any agency action that might provide a basis for such a claim. For all of these reasons, this Court should affirm the district court's judgment dismissing the complaint.[1]

STATEMENT OF JURISDICTION

I. Subject Matter Jurisdiction of the District Court

In his complaint, Landreth brought claims under several federal statutes, including the Quiet Title Act, 28 U.S.C. § 2409a. Federal district courts generally have subject matter over Quiet Title Act claims

[1] Claims asserted by Landreth separately against the Quinault Indian Nation were also dismissed by the district court in the same order.

pursuant to 28 U.S.C. § 1346. However, as elaborated in Part I of the Argument, the United States challenges the district court's jurisdiction over the Quiet Title Act claim due to Landreth's failure to make a claim that falls within the waiver of sovereign immunity in that Act.

District courts likewise generally have jurisdiction over claims brought under the Federal Tort Claims Act, 28 U.S.C. § 1346(b)(1). However, as explained in Part II of the Argument, the United States disputes the district court's jurisdiction over Landreth's FTCA claim because Landreth failed to comply with required jurisdictional prerequisites. And, as explained in Part III of the Argument, the district court lacks jurisdiction over claims against the government for monetary damages exceeding $10,000 in cases not sounding in tort, under 28 U.S.C. § 1346(a)(2). Finally, while district courts generally have jurisdiction over Administrative Procedure Act claims pursuant to 28 U.S.C. § 1331, as set forth in Part IV of the Argument, the United States disputes the court's jurisdiction here due to Landreth's failure to identify an unlawful or final agency action, or a mandatory legal duty that the government failed to perform.

II. Appellate Jurisdiction

This Court has jurisdiction based on the July 29, 2020, final judgment (SER 5).[2] 28 U.S.C. § 1291.

III. Timeliness of Appeal

Appellant's notice of appeal from the final judgment, filed on August 3, 2020 (SER 3), was timely.

PERTINENT STATUTES AND REGULATIONS

The pertinent provisions of statutes and regulations relevant to this appeal are as follows:

The Quiet Title Act, 28 U.S.C. § 2409a provides in part:

> (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).
>
> * * *
>
> (g) Any civil action under this section . . . shall be barred unless it is commenced within twelve years of the date upon

[2] SER refers to the Appellee's Supplemental Excerpts of Record.

> 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.

The pertinent provision of the Federal Tort Claims Act, 28 U.S.C. § 2675, is as follows:

> (a) An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section. The provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim, or counterclaim.

The pertinent provision of the Tucker Act, 28 U.S.C. § 1491, is as follows:

> (a)(1) The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. . . .

The pertinent provision of the Little Tucker Act, 28 U.S.C. § 1346, is as follows:

> (a) The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of . . .
>
> (2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort, except that the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort which are subject to sections 7104(b)(1) and 7107(a)(1) of title 41.

STATEMENT OF THE ISSUES

I. Did the District Court correctly dismiss Landreth's claim against the United States under the Quiet Title Act, 28 U.S.C. § 2409a, for lack of subject matter jurisdiction?

II. Did the District Court correctly dismiss Landreth's conversion claim against the United States for lack of subject matter jurisdiction because of his failure to first present and have denied an administrative tort claim by the appropriate federal agency as required by the Federal Tort Claims Act, 28 U.S.C. § 2675(a)?

III. Did the District Court correctly dismiss Landreth's unspecified monetary claims against the United States for lack of subject

matter jurisdiction because they exceed the $10,000 cap of 28 U.S.C § 1346(a)(2)?

IV. Does Landreth have a cognizable claim within the subject matter jurisdiction of the district court under the Administrative Procedure Act, 5 U.S.C. § 706?

STATEMENT OF THE CASE

I. The Statutory and Regulatory Background

The United States is immune from the jurisdiction of the courts absent its waiver of sovereign immunity. *Fed. Deposit Ins. Corp. v. Meyer*, 510 U.S. 471, 475 (1994); *see also Chadd v. United States*, 794 F.3d 1104, 1008 (9th Cir. 2015). The Quiet Title Act provides "the exclusive means by which adverse claimants [may] challenge the United States' title to real property." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 219 (2012). That Act provides that the United States may be named in an action to quiet title by a party that claims an adverse interest, subject to certain limitations. Relevant here, the waiver of sovereign immunity for such claims does "not apply to trust or restricted Indian lands," and any claim to quiet title against the United States' claim to land must be filed within 12 years of its accrual. 28 U.S.C. §§ 2409a(a) and (g).

A claimant's exclusive remedy for common law torts by a government employee acting within the scope of his employment is a suit against the government under the Federal Tort Claims Act (FTCA). *See Castro v. United States*, 34 F.3d 106, 110 (2d Cir. 1994). However, as a jurisdictional matter, before a claimant may file suit under the FTCA, they must present an administrative tort claim to the appropriate federal agency, and have that claim denied. 28 U.S.C. § 2675(a); *Brady v. United States*, 211 F.3d 499, 503 (9th Cir. 2000).

Non-tort monetary claims against the United States for an amount under $10,000 may be filed in either the United States Court of Federal Claims or a district court. 28 U.S.C. §§ 1346(a)(2), 1491. If the claim exceeds $10,000 in amount, however, it can only be filed in the Court of Federal Claims. *See Munns v. Kerry*, 782 F.3d 402, 414 (9th Cir. 2015).

Finally, the Administrative Procedures Act creates a waiver of sovereign immunity only for non-monetary claims based on "final agency actions" alleged to be "arbitrary and capricious," and unlawful agency actions. 5 U.S.C. § 704; *Navajo Nation v. Dep't of the Interior*, 876 F.3d 1144, 1172 (9th Cir. 2017).

II. Factual Background

Mr. Landreth alleges that he is a part owner of certain recreational property that adjoins Lake Quinault. SER 18-20. The Quinault Indian Nation is a federally recognized Indian Tribe. *United States v. State of Washington*, 384 F. Supp. 312, 374 (W.D. Wash. 1974). As such, the tribe is a "distinct, independent political communit[y], retaining [its] original natural rights" in matters of local self-government. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978) (internal citations omitted).

On July 1, 1855, the United States and the Quinault Tribe entered into the Treaty of Olympia. 12 Stat. 971 (treaty ratified March 8, 1859; proclaimed April 11, 1859). Article 2 of the Treaty states in pertinent part that "[t]here shall be reserved, for the use and occupation of the tribes, a tract of land sufficient for their wants . . . to be selected by the President of the United States . . . and set apart for their exclusive use, and no white man shall be permitted to reside thereon without permission of the tribe." *Id.* President Ulysses S. Grant later designated the territory for the Quinault Reservation by Executive Order, specifically setting aside a tract of land for "fisheating Indians."

Executive Order, Quinaielt Reserve (Nov. 4, 1873).[3] Federal courts have determined that all of Lake Quinault is included within the Reservation. *See Quinaielt Tribe of Indians v. United States*, 102 Ct. Cl. 822, 834 (1945) ("It seems to us clear that the northwest point, as that expression was used in the Executive Order, is that place on the western shore which is farthest north. This is the only point that fits the call of the Executive Order and Superintendent Milroy's recommendation."); *United States v. State of Washington*, 626 F. Supp. 1405, 1428 (W.D. Wash. 1981) (finding that the "Quinault Reservation . . . tapers to Lake Quinault about 21 miles inland, which is contained within the reservation and represents its easternmost portion."), *aff'd.*, 694 F.2d 188 (9th Cir. 1982) (Canby, J. concurring), *cert. denied*, 463 U.S. 1207 (1983).

III. Proceedings below

Prior to filing this action, Landreth already was a party to three prior lawsuits asserting the same basic claim upon essentially the same

[3] An image of the Executive Order may be viewed at the following webpage at 923-24:

https://www.washington.edu/uwired/outreach/cspn/Website/Classroom%20Materials/Curriculum%20Packets/Treaties%20&%20Reservations/Documents/Executive_orders_reservations.pdf

factual allegations. Those cases are: (1) *North Quinault Properties, LLC, et al. v. Quinault Indian Nation, et al.*, No. 3:14-cv-06025-RBL, 2015 WL 11251467 (W.D. Wash. June 9, 2015); (2) *N. Quinault Properties, LLC v. State of Washington*, Washington Superior Court, Thurston County, Case No: 15–2–01809–1, *aff'd.*, 197 Wash. App. 1056 (2017); and (3) *Landreth v. United States*, No. 1:18-cv-00476, 144 Fed. Cl. 52, 54–55 (July 24, 2019), *aff'd.*, 797 F. App'x 521, 522 (Fed. Cir. 2020).

Landreth filed the present complaint on April 6, 2020. SER 14-44. The complaint alleges that in April 2013, the Quinault Indian Nation took certain acts that (while fully consistent with its claimed ownership of the disputed property) were injurious to him. SER 20.[4] Specifically, Landreth complains that, in April 2013, the Quinault Indian Nation closed Lake Quinault to recreational use by all non-Quinaults. *Id.* Landreth also alleges that the Quinault Indian Nation has ordered the removal of private docks and structures from the lake and lakeshore. SER 21. Landreth's complaint asserts that these actions resulted in a "taking" of his ownership rights. SER 21. And Landreth further alleges

[4] Landreth's complaint also alleges three prior instances of Quinault Indian Nation assertions of ownership rights over Lake Quinault between 1929 and 1977. SER 39.

that, on an unidentified date, he complained to the United States Bureau of Indian Affairs about actions of the Quinault Indian Nation that he believed were wrongful, but that his complaint fell on deaf ears. *Id.* Landreth broadly charges the United States with misconduct for failing to take his side in his dispute with the Quinault Indian Nation.

On the other hand, the most recent affirmative acts on the part of federal actors of any kind that are alleged in the complaint occurred in 1938, when the north shore of Lake Quinault and the Upper Quinault River were transferred to the Olympic National Park, and in 1940, when the Olympic National Park accepted exclusive jurisdiction of the land within the park. SER 32-33. Otherwise, except for its supposed toleration of the Quinault Indian Nation's "wrongful" conduct *vis-a-vis* Landreth, the United States is not alleged to have done anything at all improper in either this century or the last.

On July 29, 2020, the district court granted the United States' and the Quinault Indian Nation's motions to dismiss. SER 6-13. The Court concluded that there was no subject matter jurisdiction to hear Landreth's Quiet Title Act claim for three separate reasons. First, because Landreth does not assert an ownership interest in Lake

Quinault, his claim is not within the ambit of the Quiet Title Act. Second, as Lake Quinault constitutes "trust or restricted Indian lands," Landreth's claim is not cognizable under the Quiet Title Act. Third, the lawsuit was not timely filed within the Quiet Title Act's twelve-year statute of limitations. *See* 28 U.S.C. § 2409a(g). SER 9-10.

The district court also determined that it lacked subject matter jurisdiction to hear Landreth's tort claim for conversion because Landreth failed to comply with the requirement of the FTCA that an administrative tort claim be presented to the appropriate federal agency before filing suit. See 28 U.S.C. § 2675(a). SER 10-11.

Finally, the district court determined that it lacked subject matter jurisdiction to hear Landreth's miscellaneous monetary claims for amounts not limited to $10,000. See 28 U.S.C. §§ 1492 and 1346(a). SER 11.

SUMMARY OF ARGUMENT

Because Landreth is asserting claims against the United States, the subject matter jurisdiction of the district court depended on support for each claim from a statutory waiver of sovereign immunity. None of the claims asserted by Landreth are supported by an applicable statutory

waiver of sovereign immunity. Thus, the district court's judgment of dismissal in favor of the United States should be affirmed.

STANDARD OF REVIEW

This Court reviews de novo a district court's decision to grant a motion to dismiss for lack of subject matter jurisdiction. *DaVinci Aircraft, Inc. v. United States*, 926 F.3d 1117, 1122 (9th Cir. 2019), *cert. denied*, _ U.S. _, 140 S. Ct. 439 (2019); *Harger v. Dept. of Labor*, 569 F.3d 898, 903 (9th Cir. 2009) ("We review de novo . . . whether the United States has waived its sovereign immunity.")

ARGUMENT

I. The District Court Correctly Determined That Landreth's Quiet Title Act Claim Was Not Within the Statute's Waiver of Sovereign Immunity

"The United States, as sovereign, is immune from suit save as it consents to be sued." *United States v. Sherwood*, 312 U.S. 584, 586 (1941) (internal citations omitted). As the contours of any such waiver define a court's authority to entertain a suit against the government, *id.*, each claim against the government must rest upon an applicable waiver of immunity. *Navajo Nation v. Dep't of the Interior*, 876 F.3d 1144, 1167-68 (9th Cir. 2017).

By enacting the Quiet Title Act, Congress waived, with certain important exceptions, the government's sovereign immunity when the government is a party to a dispute over title to a parcel of land. *State of Alaska v. Babbitt*, 38 F.3d 1068, 1072 (9th Cir. 1994). As with any waiver of sovereign immunity, the Quiet Title Act's waiver is construed strictly in favor of the sovereign. *See Block v. North Dakota ex. rel. Board of University & School Lands*, 461 U.S. 273, 275–76 (1983).

As set forth below, the district court lacked jurisdiction over Landreth's claim under the Quiet Title Act claim because the claim does not fall within the statute's narrow waiver of sovereign immunity.

A. Because Landreth does not claim that he has an ownership interest in the disputed property, his claim is not cognizable under the Quiet Title Act.

The United States claims legal title to the bed of Lake Quinault in its entirety, which it holds for the benefit of the Quinault Indians. Although Landreth disputes the United States' title and, accordingly, requests relief under the Quiet Title Act, Landreth does not himself claim any legal title to any part of Lake Quinault. Instead, he contends that the State of Washington is the true owner. See Brief at 53, ¶ 140. ("The Appellant asks this Court to determine if Washington state acquired the

lake bed [sic] and water of Lake Quinault under the Equal Footing Doctrine."). Thus, Landreth is not requesting that title be quieted in himself. Instead, he claims that title to the Lake should be quieted in favor of the State of Washington.

Consequently, Landreth's claim is not a "quiet title action" within the contemplation of the Quiet Title Act. Where a claimant merely disputes the government's title, but does not claim adverse title in himself, the claim is not within the Quiet Title Act's waiver of sovereign immunity. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 215-225 (2012).[5]

Here, because Landreth does not contend that he holds adverse title to Lake Quinault, his claim is not within the Quiet Title Act's narrow

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[5] Referring to that plaintiff's claim, the Supreme Court stated:

> As we will explain, the QTA—whose full name, recall, is the Quiet Title Act—concerns (no great surprise) quiet title actions. And Patchak's suit is not a quiet title action, because although it contests the Secretary's title, it does not claim any competing interest in the Bradley Property.

Id. at 217; *see also Grable & Sons Metal Products, Inc. v. Darue Engineering & Mfg.*, 545 U.S. 308, 315 (2005) ("the facts showing the plaintiffs' title . . . are essential parts of the plaintiffs' [quiet title] cause of action.") (Internal quotation omitted.)

waiver of sovereign immunity, and the Quiet Title Act provides no jurisdiction over his claim.

B. Because Landreth's claim seeks to quiet title in land that is "trust or restricted Indian land" the Quiet Title Act does not provide a waiver of sovereign immunity for his claim.

The district court further lacked jurisdiction over Landreth's Quiet Title Act claim because Landreth's claim disputes the United States' title with respect to land that constitutes "trust or restricted Indian land." The Quiet Title Act expressly excludes such claims, and therefore does not provide the necessary waiver of sovereign immunity for Landreth's claim here.[6]

The Quiet Title Act provides as follows:

> 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* . . .

[6] Landreth acknowledges the United States' claim that Lake Quinault is "trust or restricted Indian land." *See* Brief at 37, ¶ 51 ("The United States claims to be the Title Holder to the lake bed [sic] of Lake Quinault and is holding the bed and water in trust for the benefit of the Indians on the reservation.")

28 U.S.C. § 2409a(a) (1978) (emphasis added). By these express terms, the Quiet Title Act's waiver of sovereign immunity does not encompass "trust or restricted Indian land" to which the United States claims title. *See State of Alaska*, 38 F.3d at 1072; *see also United States v. Mottaz*, 476 U.S. 834, 843 (1986). The ultimate validity of the United States' claim is of no moment. It is enough that the United States has a colorable claim and "has chosen to assert its immunity on behalf of land of which the government declares that it is the trustee for Indians." *State of Alaska*, 38 F.3d at 1073 (quoting *Wildman v. United States*, 827 F.2d 1306, 1309 (9th Cir.1987)).

Landreth's Quiet Title Act claim challenges the United States' title to Lake Quinault that it holds for the benefit of the Quinault Indians. Accordingly, the QTA's waiver of sovereign immunity does not provide support for the claim that Landreth is attempting to assert against the United States and the district court properly dismissed this claim.

C. Landreth's claim is untimely.

The district court further lacked jurisdiction over Landreth's Quiet Title Act claim because the claim was filed outside of the Quiet Title Act's jurisdictional twelve-year statute of limitations. See 28 U.S.C.

§ 2409a(g). The statute's integral statute of limitations provision constitutes a jurisdictional limitation upon the exercise of the waiver of sovereign immunity the statute otherwise creates. *See Block v. North Dakota ex rel. Board of University and School Lands*, 461 U.S. 273, 287 (1983). This limitations period is "a central condition of the consent given by the Act." *United States v. Mottaz*, 476 U.S. 834, 843 (1986). By its express terms, the statute begins to run on the date that either the claimant or his predecessors in interest "knew or should have known of the Government's claim." 28 U.S.C. § 2409a(g).

The Quiet Title Act statute of limitations for Landreth's claim expired well before he filed his lawsuit. The ownership of Lake Quinault by the United States and the Quinault Indian Nation has been a matter of public record since 1873 when the reservation was extended by presidential decree, *see* footnote 3, *supra*, thereby providing record notice of the United States' claimed ownership. *See State of California ex rel. State Land Comm'n v. Yuba Goldfields, Inc.*, 752 F.2d 393, 396 (9th Cir. 1985) (record notice is sufficient to start Quiet Title Act's statute of limitations). And if a legitimate question about whether that ownership extended to the North shore of the Lake existed before February 5, 1945,

that question was resolved when the United States Court of Claims determined in a published order that Lake Quinault, including its North shore, was entirely within the boundaries of the reservation. *See Quinaielt Tribe of Indians v. United States*, 102 Ct. Cl. 822, 834 (1945).

Moreover, Landreth's complaint alleges three separate instances of conduct by the Quinault Indian Nation, occurring between 1929 and 1977, that were wholly consistent with the Tribe's claimed ownership of the disputed property. SER 37.[7] This alleged conduct should have been sufficient to cause Landreth, or his predecessors, to inquire about the United States' claim of ownership and to file a Quiet Title Act claim if they wished to challenge that claim. The complaint in the underlying lawsuit was not filed within the twelve-year period following the occurrence of any of these events.

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[7] Specifically, Landreth's complaint alleges:

- In 1929 the Quinault Indian Tribe closed the lake to fishing.
- In 1962 the Quinault Indian Tribe closed the lake to fishing.
- Again, a letter to the landowners on the north shore of Lake Quinault in 1977 from the Quinault Indian Tribe claiming the entire north shore is within the Quinault Indian Reservation.

SER 39.

Because Landreth's Quiet Title Act claim was not filed within twelve years of the Quinault Indian Nation's apparent assertions of ownership rights as to Lake Quinault about which Landreth now complains, Landreth's quiet title action is also jurisdictionally defective because it is time-barred. *See Kingman Reef Atoll Investments, L.L.C. v. United States*, 541 F.3d 1189, 1197 (9th Cir. 2008) (internal quotation omitted) ("The crucial issue in the statute of limitations inquiry is whether the plaintiff had notice of the federal claim, not whether the claim itself is valid.").

Accordingly, for all of the reasons set forth above, the district court's dismissal of Landreth's Quiet Title Act claim should be affirmed.

II. The District Court Correctly Determined That Landreth Failed To Satisfy Required Jurisdictional Prerequisites For Adjudication Of His Conversion Claim Under The FTCA

Although Landreth's complaint in the district court sought to recover damages from the United States based on an alleged conversion of his property, his opening brief makes no mention of "conversion." "Arguments not raised by a party in its opening brief are deemed waived." *Friends of Yosemite Valley v. Kempthorne*, 520 F.3d 1024, 1033 (9th Cir. 2008). But even assuming that Landreth has not abandoned that claim

on appeal, this Court should affirm its dismissal by the district court for lack of subject matter jurisdiction.

FTCA actions are governed by the substantive law of the state in which the "act or omission occurred." 28 U.S.C. § 1346(b); *Delta Savings Bank v. United States*, 265 F.3d 1017, 1025 (9th Cir. 2001). Under Washington law, conversion is a tort. *Washington State Bank v. Medalia Healthcare L.L.C.*, 96 Wash. App. 547, 554 (1999), citing *Judkins v. Sadler-MacNeil*, 61 Wash. 2d 1, 3 (1962). Specifically, it is "the act of willfully interfering with any chattel, without lawful justification, whereby any person entitled thereto is deprived of the possession of it." *Id.*

Assuming, for purposes of argument, that Landreth's complaint alleged sufficient facts to state a claim for conversion under Washington law, because conversion is a common law tort, exclusive jurisdiction to adjudicate Landreth's claim was conferred upon the district court by the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b); 2671-2680. *See Walsh v. United States*, 672 F.2d 746, 747 n.1 (9th Cir. 1982).

However, a jurisdictional prerequisite to the filing of an action under the FTCA is the presentation of a proper administrative claim to

the appropriate federal agency within the statute of limitations and a denial thereof by the agency, or the passage of six months without action on the claim. 28 U.S.C. § 2675(a); *Brady v. United States*, 211 F.3d 499, 503 (9th Cir. 2000).

Landreth's complaint does not allege that he has presented an administrative claim to an appropriate federal agency claiming $250,000 in damages based on an alleged conversion, nor does he allege that such a claim was denied by the agency before he filed this lawsuit, nor does it otherwise appear in the record that this jurisdictional prerequisite was met before the lawsuit was filed. Accordingly, the district court correctly dismissed Landreth's conversion claim against the United States for lack of subject matter jurisdiction. *See Meridian Int'l Logistics, Inc. v. United States*, 939 F.2d 740, 743 (9th Cir. 1991).

III. The District Court Correctly Determined That It Lacked Subject Matter Jurisdiction to Hear Landreth's Miscellaneous Monetary Claims For Amounts Not Limited To $10,000 In Amount

In the district court, Landreth seemed to be asserting a variety of miscellaneous claims for monetary relief, for which he sought $250,000

in compensation. Those also were dismissed for lack of subject matter jurisdiction.[8]

Landreth's monetary claims are not mentioned in any substantial way in his opening brief here and so are appropriately deemed waived on appeal. *Friends of Yosemite Valley*, 520 F.3d at 1033. However, if this Court deems any argument about those claims adequately developed to have been made on appeal, the Court should nevertheless affirm the district court's dismissal of them.

Lacking any other identifiable statutory waiver of sovereign immunity, Landreth's non-tort monetary claims would be cognizable, if at all, under the exclusive subject matter jurisdiction of the U.S. Court of Federal Claims pursuant to the "Tucker Act," 28 U.S.C. § 1491. Those

[8] At times Landreth uses variations of the term "taking" to describe his alleged injury, but it is not entirely clear the meaning he ascribes to that word. Landreth's claim that he suffered a Fifth Amendment taking at the hands of the United States, however, has been adjudicated and rejected by the United States Court of Federal Claims. *Landreth v. United States*, Case No. 1:18-cv-00476, 144 Fed. Cl. 52, 54–55 (July 24, 2019), *aff'd*., 797 F. App'x 521, 522 (Fed. Cir. 2020). And, in any event, if it was Landreth's purpose to reassert a Fifth Amendment taking claim in the district court against the United States, apart from res judicata implications, the Court of Federal Claims had exclusive jurisdiction over the claim because it was not limited to $10,000 in amount. *Munns v. Kerry*, 782 F.3d 402, 413-14 (9th Cir. 2015).

monetary claims cannot be heard in the district court because subject matter jurisdiction for claims not limited to $10,000 in amount is generally vested exclusively in the Court of Federal Claims. *See Munns v. Kerry*, 782 F.3d 402, 414 (9th Cir. 2015); 28 U.S.C. § 1346(a)(2) (providing concurrent district court jurisdiction for such claims only to the extent they do not exceed $10,000).[9]

IV. Landreth Did Not Identify Any Cognizable Claim Under the Administrative Procedure Act

While Landreth did not invoke the judicial review provisions of the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-704, *et seq*., in the district court, he does appear to be asserting on appeal that he has such a claim. Brief at 28-29. Generally, this Court does not consider issues first raised on appeal. *See Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999). However, should this Court decide to consider the arguments in Landreth's opening brief that appear to be based on the APA, it should

[9] Given that the United States Court of Federal Claims has already heard and dismissed Landreth's monetary claims in a decision affirmed by the U.S. Court of Appeals for the Federal Circuit, the United States submits that it would not be in the "interests of justice" to transfer these monetary claims to the Court of Federal Claims in lieu of dismissal. *See* 28 U.S.C. § 1406.

conclude that those claims would not be justiciable by the district court and do not require that the district court's judgment be disturbed.

The APA provides a waiver of sovereign immunity for actions seeking nonmonetary relief based on wrongful agency actions and final agency actions that are alleged to be arbitrary and capricious, assuming those actions occurred within the applicable statute of limitations. See 5 U.S.C. §§ 701-706, *et seq*; and see *Rattlesnake Coal. v. U.S. E.P.A.*, 509 F.3d 1095, 1104–05 (9th Cir. 2007) ("The APA applies to waive sovereign immunity only after final agency action. 5 U.S.C. § 704."); and *Navajo Nation v. Dep't of the Interior*, 876 F.3d 1144, 1172 (9th Cir. 2017) (recognizing waiver of sovereign immunity for non-monetary claims based on unlawful agency actions).

Landreth's purported claims do not involve wrongful federal agency actions or final agency actions occurring within the last six years.[10] Indeed, as the U.S. Court of Appeals for the Federal Circuit observed in regard to Landreth's nearly identical complaint in the U.S. Court of Federal Claims, "every act described in the complaint is alleged to have

[10] The six-year statute of limitations set forth in 28 U.S.C. § 2401(a) applies to actions brought under the APA. *Wind River Min. Corp. v. United States*, 946 F.2d 710, 713 (9th Cir. 1991).

been committed by the Tribe, not by the United States . . ." *Landreth v. United States*, 797 F. App'x 521, 523 (Fed. Cir. 2020). The very same is true here.

The only purportedly "wrongful" conduct of the United States alleged by Landreth is the United States' supposed failure to take some kind of action to restrain the Quinault Indian Nation, in exercising its lawful ownership rights, from "violating" Landreth's purported rights to use the Lake. Brief at 28-29. In other words, it is the government's failure to act for his benefit that gives rise to Landreth's supposed APA claims. *Id.* ("The State of Washington and the Federal Government did not take any actions to end the Quinault Indian Nation armed takeover of Lake Quinault in 2013 and subsequent denial of Appellant's civil rights.").

Landreth appears to assume that such duties arise under, *inter alia*, the "Public Duty Doctrine" and the "Public Trust Doctrine." *Id.* at 29. ("The Government allowed the QIN to deny access and deny use of a common highway of Commerce violates the Public Duty and Public Trust Doctrine.") Landreth's reliance on these doctrines as bases for an APA claim is misplaced.

The Public Duty Doctrine, applicable only to claims for tort liability, does not create a legally enforceable duty but instead holds that government officials cannot be held liable for tortious acts of its officials if that liability is based on a duty owed to the public generally. *See e.g., Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1295 (9th Cir. 1992).

The Public Trust Doctrine holds that all public waters are held in trust by a State for the use and enjoyment of the public, and a State may not convey or give away this public trust interest. *See* 78 Am. Jur. 2d Waters § 161. The Public Trust Doctrine, however, applies only to the states and not to the federal government. *See PPL Montana, LLC v. Montana*, 565 U.S. 576, 603-604 (2012); and *see United States v. 32.42 Acres of Land, More or Less, Located in San Diego Cty., Cal.*, 683 F.3d 1030, 1038 (9th Cir. 2012) (quoting *PPL Montana*).

Absent the identification of a legal duty that the United States owed to Landreth to intervene on his behalf with the Quinault Indian Nation, Landreth cannot demonstrate that his claim falls within the sovereign immunity waiver provided by the APA. *See Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 63 (2004) (["A] claim under [5 U.S.C.] § 706(1) can proceed only where a plaintiff asserts that an agency failed to take a

discrete agency action that it is required to take."); and *Gros Ventre Tribe v. United States*, 469 F.3d 801, 814 (9th Cir. 2006). Thus, Landreth's argument fails to demonstrate any claim within the subject matter jurisdiction of the district court under the APA.

CONCLUSION

For the reasons discussed above, the district court's order dismissing the complaint should be affirmed.

Dated this 17th day of December 2020.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that the foregoing brief is proportionally spaced, has a Century Schoolbook typeface of 14 points, and contains 5, 968 words.

Dated this 17th day of December 2020.

s/ Brian Kipnis
BRIAN KIPNIS
Assistant United States Attorney
Western District of Washington

STATEMENT OF RELATED CASES

To the best of appellee counsel's knowledge, there are no other cases pending before the Court that are related to this case.

CERTIFICATE OF SERVICE

I hereby certify that on December 17, 2020, I electronically filed notice of filing the foregoing Answering Brief of the United States with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I further certify that I served the foregoing document on this date by third-party commercial carrier for delivery within three (3) calendar days or, having obtained prior consent, by email to the following unregistered case participants:

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Dated: December 17, 2020.

s/John M. Price
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