William F. Bacon, General Counsel (ISB #2766)
Monte Gray, Asst. General Counsel (ISB #5988)
Shoshone-Bannock Tribes
Tribal Attorneys Office
P.O. Box 306
Fort Hall, Idaho 83203
Telephone: (208) 478-3822
Facsimile: (208) 478-9736
Email: bbacon@sbtribes.com
Email: mgray@sbtribes.com

Mark A. Echo Hawk (ISB #5977)
Joseph T. Preston (ISB #9082)
ECHO HAWK & OLSEN, PLLC
P.O. Box 6119
505 Pershing Ave., Ste. 100
Pocatello, Idaho 83205-6119
Telephone: (208) 478-1624
Facsimile: (208) 478-1670
Email: mark@echohawk.com

Counsel for Plaintiff

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

SHOSHONE-BANNOCK TRIBES OF THE FORT HALL RESERVATION, Plaintiff, vs. UNITED STATES OF AMERICA; et al., Defendants.	Case No. 4:18-cv-285-DCN **REPLY TO THE UNITED STATES IN SUPPORT OF MOTION TO RECONSIDER [Dkt. 114].**

REPLY TO THE USA IN SUPORT OF MOTION TO RECONSIDER [Dkt. 114]

COMES NOW, the Shoshone-Bannock Tribes and submits the following brief in reply to the United States ("US") in support of the Tribes' Motion to Reconsider [Dkt. 114].

A. The Court's did not correctly apply the *Meyer* standard by neglecting to include the requirements of the U.S. Supreme Court established by *Bell v. Hood*.

Even if the Court were correct to hold the Quiet Title Act's (QTA's) statute of limitations is jurisdictional, it still erred in dismissing the case under Rule 12(b)(1). The Court applied jurisdictional review standard is only permitted in exceptional cases. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). As opposed to the normal standard of review which presumes the truthfulness of the plaintiff's allegation, it applied:

> "[b]y contrast, in a factual attack, the challenger disputes the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction." *Meyer*, 373 F.3d at 1039. In resolving a factual attack on jurisdiction, the court need not presume the truthfulness of the plaintiff's allegations, and may review evidence beyond the complaint without converting the motion to dismiss into a motion for summary judgment.

(Dkt. 102 at 4, citing *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). However, in setting forth the legal standard, the Court failed to list the complete standard for such an application provided by *Meyer*. Particularly, Meyer provides for a court to disregard the truthfulness of averments in a complaint, it must comply with the standards set forth in *Bell v. Hood*, 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939 (1946). *Meyer, 373 F.3d at 1039*

"Jurisdictional dismissals in cases premised on federal-question jurisdiction are exceptional, and must satisfy the requirements specified in *Bell v. Hood,* 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939 (1946)." *Sun Valley Gas., Inc. v. Ernst Enters.,* 711 F.2d 138, 140 (9th Cir.1983). "In *Bell,* the Supreme Court determined that jurisdictional dismissals are warranted

"where the alleged claim under the constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining federal jurisdiction or where such claim is wholly insubstantial and frivolous." *Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004) citing *Bell*, 327 U.S. at 682–83, 66 S.Ct. 773.

A 12(b)(1) motion is improper when the jurisdictional issue and substantive issues are so intertwined the question of jurisdiction is dependent on the resolution of factual issues going to the merits of an action. *Sun Valley Gasoline, Inc. v. Ernst Enterprises, Inc.*, 711 F.2d 138, 139 (9th Cir. 1983). Specifically, "[t]he question of jurisdiction and the merits of an action are intertwined where 'a statute provides the basis for both the subject matter jurisdiction of the federal court and the plaintiff's substantive claim for relief.'" *Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004) (quoting *Sun Valley*, 711 F.2d at 139). In these situations, "a motion to dismiss for lack of subject matter jurisdiction rather than for failure to state a claim is proper only when the allegations of the complaint are frivolous." *Thornhill Publ'g Co.*, 594 F.2d at 734.

The QTA claims by the Tribes were not frivolous only to maintain federal jurisdiction and no finding of such was made by the Court to support its application of the heightened factual attack standard of review. In fact, several of the Tribes' claims were retained by the Court. The QTA provides the basis for both the court's subject matter jurisdiction and the substantive claim for relief. This is true whether or not the statute of limitations is jurisdictional. Although the grant of jurisdiction is codified in a separate section of the U.S. Code, the grant of jurisdiction and the statute of limitations are in the same act. Pub. L. No. 92-562, 86 Stat. at 1176. The frivolous claim requirement would only be applicable where the entire claims by the Plaintiff are dismissed. Plaintiff has not identified any case where such a jurisdictional standard was used to dismiss a case only partially.

But if, as the Court held, the statute of limitations is jurisdictional, then the limitations question and the merits are necessarily intertwined. *Meyer*, 373 F.3d at 1039 (quoting *Sun Valley*, 711 F.2d at 139).The "jurisdictional" statute of limitations is in the same section of the U.S. Code as the basis for the substantive claim for relief. 28 U.S.C. § 2409a. The Meyer's Court specifically held such facts provides the two are intertwined. Therefore, even if the District Court were correct in determining the statute of limitations is jurisdictional, it still erred in granting the government's 12(b)(1) motion to dismiss. !

B. The U.S. Supreme Court's decision in *Wong* supports the conclusion the Quiet Title Act's statute of limitation is not jurisdictional.

The Court erred in holding the QTA's Statute of Limitations is jurisdictional. Absent a clear statement from Congress to the contrary, an act's statute of limitations is not jurisdictional *United States v. Kwai Fun Wong*, 575 U.S. 402, 409-12 (2015). Congress did not clearly state its intention to differ from this default rule when enacting the QTA. Instead, the QTA's statute of limitations is "an ordinary, run-of-the-mill statute of limitations, specifying the time within which a particular type of action must be filed." *Weil*, 859 F.3d at 814. The QTA separates the grant of jurisdiction from the rest of the Act, including the statute of limitations, indicating the statute of limitations is not jurisdictional. Pub. L. No. 92-562, 86 Stat. 1176, 1176 (Oct. 25, 1972); *Wong*, 575 U.S. at 411.[1]

[1] Plaintiff understands that this Court relies on *Wilkins v United States*, 13 F. 4th 791, 795 (9th Cir. 2021) cert. granted 142 S. Ct. 2776, June 6, 2022 to disregard *Wong*. However, as referenced in the citation, Plaintiff respectfully submits that the U.S. Supreme Court has recently accepted review of the case which has as its principal appealable issue whether the statute of limitations in the QTA is jurisdictional. The second appealable issue is whether the statute of limitations and the accrued claims are intertwined because the QTA provides a basis for both.

C. The United States lacks transparency in the arguments and alleged facts.

The U.S. goes to great lengths to lead the Court to presume the Tribes received notice of an express adverse claim and somehow the 2004 FOIA response was a pivotal moment in the notice. The U.S. in its motion to dismiss alleged several facts which are simply not true. The U.S. held out the 2004 FOIA response as evidence for their assertion the U.S. made an express adverse claim. (Dkt. 77-1 at 23). Not only did the United States not properly represent what was provided (and not provided) to the Tribes to provide notice, they omitted FOIA response documents which directly dispute the facts they alleged to the Court. Three of these documents not disclosed to the Court by the US are: (1) the Bureau of Land Management (BLM) Case Recordation Serial Register Page dated March 16, 2004 (Dkt. 114-5 at 11); (2) a BLM decision letter to the Union Pacific Railroad granting the initial relinquishment dated October 10, 1989. (Dkt. 114-5 at 140); and (3) the Decision to Rescind Acceptance. (Dkt. 114-5 at 130). These three documents tell a much different story than what the United States suggested the Court believe.

1. The United States failed to inform the Court the 2004 FOIA Case Recordation Serial Register Page recognized unresolved status of land ownership.

The 2004 FOIA response contains a Case Recordation Serial Register Page dated March 16, 2004, which list a series of action dates, actions, and remarks for the railroad right-of-way BLM file I-1449. (Dkt. 114-5 p. 11). It shows the involvement of the BLM in handling the railroad right-of-way since June 6, 1887. It shows "ROW granted-Issued" in 1888. *Id*. It shows no activity on the right-of-way for a hundred years. Id. Action date 10/30/1989 shows a "RECORDS NOTED". Id. This time coincides with the initial acceptance of the relinquishment of the railroad right of way. Id. *compare* (Dkt. 114-5 p. 140). The document then notes two

entries of "AUTOMATED RECORD VERIF" in October 2, 1992 and April 26, 1993 under action code number 974. This timeline coincides with the granting of the right of way to the City of Pocatello for part of the City Creek property dated March 26, 1993. (Dkt. 77-7, at 3-7).

Not disclosed to the Court are the remark entries by the BLM for those items. At the bottom of the Case Recordation Serial Register Serial Page it states in relevant part:

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0005    THE PROCESSING OF THE APPROVAL OF THIS ROW WAS BY
0006    THE INDIAN OFFICE AS IT INVOLVED LANDS IN THE FORT
0007    HALL INDIAN RESERVATION
0008    UNABLE TO DEFEND ENTRY OF A/C 974 DUE TO UNRESOLVED
0009    STATUS OF LAND OWNERSHIP.
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(Dkt. 114-5 p. 11) (emphasis added).

Two very important remarks are made by the BLM. First, "THE PROCESSING OF THE APPROVAL OF THIS ROW WAS BY THE INDIAN OFFICE AS IT INVOLVED LANDS IN THE FORT HALL INDIAN RESERVATION". *Id*. The BLM is clearly acknowledging the Tribes' interest in the lands and has referred the processing to the Indian office. Second, the BLM states it is "UNABLE TO DEFEND A/C 974 DUE TO UNRESOLVED STATUS OF LAND OWNERSHIP." *Id*. A/C 974 stands for Action Code 974 which are the entries which coincide with the timing for the granting of the City Creek right-of-way to the City of Pocatello. Clearly at the time of the FOIA 2004 response to the Tribes, the only position of the United States was "UNRESOLVED STATUS OF LAND OWNERSHIP."

2. The United States failed to inform the Court the 1989 relinquishment acceptance of the City Creek Property in the 2004 FOIA response indicates the United States had no interest in the City Creek property.

The United States lacked candor to bring to the Court's attention the initial acceptance of relinquishment by the U.S. Included in the 2004 FOIA response is a letter dated October 10,

1989, in which the BLM is accepting the relinquishment of the entire railroad right of way, file No. I-1449. (Dkt. 114-5 p. 140). As discussed, this was an error by Union Pacific to reference the entire railroad right-of-way, but it only meant a relinquishment of the City Creek section of the right-of-way.

What is concerning in the U.S.'s attempt to make the Court believe the U.S. made an adverse claim of ownership to the City Creek property, it omitted to inform the Court of the acceptance of relinquishment in the 2004 FOIA response in which the United States accepted the relinquishment and states:

> Enclosed is a copy of your letter, requesting that right-of-way I-1449 be relinquished. Upon review of your case file, **it was determined that all the lands involved are privately owned. The Bureau of Land Management no longer has jurisdiction on these lands.** Therefore, the request for a relinquishment will be granted and this case file will be closed.

(Dkt. 114-5 at 140). The Tribes do not understand why the United States failed to bring these important items of information to the Courts attention and even made representations to the Court which could be construed to lack proper candor in light of these statements.

3. The United States failed to inform the Court the United States had rescinded the original 1989 relinquishment.

The U.S. argued the relinquishments accepted by the U.S. were evidence of adverse claims of ownership. The Court even went so far to note the 2014 acceptance of relinquishment was merely a correction of the 1989 relinquishment. (Dkt. 102 at 17). The U.S. failed to bring to the Court's attention the U.S. had issued a decision to rescind acceptance of relinquishment on September 13, 1991. (Dkt. 114-5 at 9 n. 18 & 130). Had the Court been informed of the rescission, it would not make these incorrect findings. The Tribes were not able to bring this to

the Court's attention timely because it was not permitted to conduct discovery and the US did not provide the Court nor the Tribes with the full 2004 FOIA response.

4. The United States incorrectly informs Court there are two types of reversionary interests in the 1888 Act.

The United States incorrectly informs the Court there are two types of property reversions in the 1888 Act; one reverting to the Tribes and the other to the United States. (Dkt. 1212 at 7-8). However, what the United States fails to inform the Court is of the entire sentence which provides for the reversion to the United States. It states: "be forfeited and revert to the United States, **and be subject to the other provisions of this act** . . ." 25 Stat. 452, 456. The omission is huge. The lack of candor by the U.S. Attorney in its arguments is problematic.

D. Tribal Trust land status can only be changed by Act of Congress.

Federal law states: "[t]he existing period of trust placed upon any Indian lands and any restriction on alienation thereof are extended and continued until otherwise directed by Congress." 25 U.S.C. § 5102. This means the Tribal trust lands remain in trust short of Congress taking action otherwise. There is no alleged Congressional action in this proceeding which would remove the property from Trust even though the U.S. Attorney represented in Court some parcels were in trust and some weren't. Neither the U.S. Attorney, any U.S. agency, nor this Court holds the authority to make such a decision short of Congressional action.

E. The Court granted relief in its Memorandum Decision and Order of May 20, 2022 [Dkt. 112] which exceeds the relief requested by the United States and did not permit the Tribes its due process to appropriate brief the issue for the Court.

When the Court ruled on the United States' Motion to Reconsider, the motion only asked the Court for clarification as to the whether the ejectment claims against the United States would

still stand as to the two Counts which were dismissed. The Court went beyond the relief requested and dismissed all ejectment claims against all parties. The Tribes respectfully submit dismissal with prejudice of any of the ejectment claims is improper, because the legal authority cited was not correctly applied.

1. The Supreme Court has long recognized tribal rights of ejectment.

"Under federal common law, Indian tribes have the right to exclude non-Indians and non-tribal members from their lands, and the commensurate right to grant admission to, or use of, their lands on such terms as the tribes see fit to impose." *Swinomish Indian Tribal Cmty. v. BNSF Ry. Co.*, 951 F.3d 1142, 1153–54 (9th Cir. 2020).

Tribes have a federal common law right to sue to protect their possessory interests in their lands. *See County of Oneida*, 470 U.S. at 235–36, 105 S.Ct. 1245 ("In keeping with these well-established principles, we hold that the Oneidas can maintain this action for violation of their possessory rights based on federal common law."). see also *Swinomish Indian Tribal Cmty. v. BNSF Ry. Co.*, 951 F.3d 1142, 1153–54 (9th Cir. 2020).

The Treaty specifically provides the Tribes have a right to exclude non-Indians from the Reservation. *See* Fort Bridger Treater of 1968, 15 Stat. 673, at Art. II (1868). The Treaty is "self-enforcing." *See Fishing Vessel*, 443 U.S. at 693 n.33, 99 S.Ct. 3055 ("The State has ... argued that absent congressional legislation the treaties involved here are not enforceable. This argument flies directly in the face of Art. XIII of the treaties ...."); *see also Skokomish Indian Tribe v. United States*, 410 F.3d 506, 513 (9th Cir. 2005) (en banc) ("The Supreme Court has held that the Treaty of Point No Point and similar treaties are 'self-enforcing' and thus do not require implementing legislation to form the basis of a lawsuit."). Under long-established principles of federal Indian law, treaties are enforceable in equity against third parties. *See,*

e.g., *United States v. Winans*, 198 U.S. 371, 377, 25 S.Ct. 662, 49 L.Ed. 1089 (1905). The Fort Bridger Treaty specifically provides for the "absolute and undisturbed use and occupation" by the Tribes of their treaty lands and the "United States now solemnly agrees that no persons except those herein designated of the Government . . . shall ever be permitted to pass over, settle upon, or reside in the territory described in this article." , 15 Stat. 673, at Art. II (1868).

"No grant of a right-of-way over and across any lands belonging to a tribe organized under the Act of June 18, 1934 [the Indian Reorganization Act] ... shall be made without the consent of proper tribal officials." *Id.* at § 324. It is undisputed the Shoshone-Bannock Tribes was organized under the Indian Reorganization Act. Regulations under the Indian Right of Way Act provide any unauthorized use of an existing right-of-way constitutes trespass for which a Tribe may "pursue any available remedies under applicable law, including applicable tribal law." 25 C.F.R. § 169.413; *see also* 25 C.F.R. § 169.401 ("Any ... violation of the right-of-way grant or right-of-way document, including but not limited to encroachments beyond the defined boundaries, accidental, willful, and/or incidental trespass, unauthorized new construction, changes in use not permitted in the grant, and late or insufficient payment may result in enforcement actions including, but not limited to, cancellation of the grant.").

Ejectment is a cause of action existing under federal law, ratified treaties and tribal law. To dismiss the Tribes ejectment claims with prejudice as to all properties, including those claims are not dismissed violates the rights granted to the Tribes through its treaty with Congress and recognized by the United States Supreme Court.

2. The Court's ruling [Dkt. 112] on the Government's motion to clarify [Dkt. 108] far exceeded the relief requested and went so far as to dismiss with prejudice claims of non-moving parties.

The Court dismissed with prejudice the ejectment claims of the Tribes against all parties.

The Court offers no legal support for its authority to take this action. This was not requested in the United State's motion, nor did the tribes have a proper opportunity to brief this matter. Even though the Court ordered dismissal of the Tribes QTA actions as to the 3.27 acre parcel and the City Creek property on the basis of the Statute of Limitations has passed, this does not affect the actual ownership of the land.

The Court misconstrues *Block* which expresses the quiet title matter is not resolved if dismissed on jurisdictional grounds. "A dismissal pursuant to § 2409a[(g)] does not quiet title to the property in the United States. The title dispute remains unresolved. Nothing prevents the claimant from continuing to assert his title, in hope of inducing the United States to file its own quiet title suit, in which the matter would finally be put to rest on the merits." *Rio Grandy Silvery Minnow v. BOR*, 599 F3d 1165, 1189 (10th Cir. 2010) citing *Block v North Dakota ex. rel Bd of University and School Lands,* 461 U.S. at 291–92, 103 S.Ct. 1811 (1983) (internal footnotes omitted); *Knapp,* 636 F.2d at 283 ("Our holding today does not settle plaintiffs' title dispute with the Government. We hold only that under the time-bar of 28 U.S.C. § 2409a[(g)], the trial court should have dismissed this quiet title action for lack of subject matter jurisdiction"); *see also Spirit Lake Tribe,* 262 F.3d at 745 (noting "[t]here is no small difference between a [jurisdictional] dismissal and summary judgment in this [QTA] context."). Accordingly, the status of the title to the Project properties must await possible future judicial resolution. And the district court thus erred by entering judgment on the merits in favor of the United States. *Id*.

For the Court to dismiss its claims with prejudice lacks authoritative support and would cancel claims and defenses which can be raised by the Tribes should the United States ever desire to bring its own quiet title action for the property in question and would preclude the Tribe from asserting such rights as against third parties as is expressly protected in *Block*.

DATED this August 9, 2022.

ECHO HAWK & OLSEN, PLLC

By: */s/ Mark A. Echo Hawk*
Mark A. Echo Hawk
Attorney for Plaintiff

SHOSHONE-BANNOCK TRIBES

By: */s/ Bill Bacon*
William F. Bacon
General Counsel

By: */s/ Monte Gray*
Monte Gray
Asst. General Counsel

CERTIFICATE OF SERVICE

I hereby certify that on August 9, 2022, the foregoing was electronically filed through the Court's CM/ECF system, which caused the following parties or counsel to be served by electronic
means:

Kristofor R. Swanson
US Department of Justice
kristofor.swanson@usdoj.gov

Claudia A. Hadjigeorgiou
US Department of Justice
claudia.hadjigeorgiou@usdoj.gov

Syrena C. Hargrove
US Attorney, District of Idaho
Syrena.Hargrove@usdoj.gov

Blake G. Hall
City of Pocatello
bgh@hasattorneys.com

Lee Radford
Union Pacific Railroad Company
LRadford@parsonsbehle.com

John Cutler
Union Pacific Railroad Company
JCutler@parsonsbehle.com

Julianne P. Blanch
Union Pacific Railroad Company
JBlanch@parsonsbehle.com

Jacob David Ecker
DOJ-Environment and Natural Resources Division
jacob.ecker@usdoj.gov

By: */s/ Monte Gray*
Monte Gray