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ATTORNEYS FOR DEFENDANT
UNITED STATES OF AMERICA

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

JAMES HALVERSON as Personal Representative of the fee estate of JACK HALVERSON, Plaintiff, vs. DEBRA ANNE HAALAND, Secretary of the Interior, Defendant.	CV 22-76-BLG-SPW **UNITED STATES' MEMORANDUM IN SUPPORT OF MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION AND FAILURE TO JOIN NECESSARY PARTY**

Plaintiff's case should be dismissed as the Court does not have subject matter jurisdiction over the claims. Fed. R. Civ. P. 12(b)(1). Alternatively, Plaintiff has failed to join a necessary party. Fed. R. Civ. P. 12(b)(7).

Plaintiff seeks a writ of mandamus ordering the United States to file a deed conveying to him sole and exclusive ownership of the allotment at issue. The Court lacks subject matter jurisdiction for Plaintiff's claim. Plaintiff should have brought this case under the Quiet Title Act, as it is the exclusive cause of action for disputes about title to real property when the United States is an interested party. Though the United States has generally waived sovereign immunity for individuals to bring quiet title claims against the United States, there is an exception for cases involving "trust or restricted Indian lands." 28 U.S.C. § 2409a(a). Given that this is a quiet title case about Indian trust lands, the United States has not waived its sovereign immunity, and the case must be dismissed. If the Court holds instead that this case is a mandamus action, then the Court lacks jurisdiction as there is no plainly prescribed, nondiscretionary duty that the United States failed to perform.

Alternatively, if the Court decides it does have subject matter jurisdiction to hear the case, then the allotment at issue is also owned in part by a non-party—the estate of Penny Powers owns 5.55% of the subject property in fee simple. Plaintiff's failure to add this indispensable party requires dismissal so that the case may be brought against the appropriate parties, through the appropriate causes of action, in the proper forum.

PROCEDURAL HISTORY

On July 20, 2022, Plaintiff filed a complaint styled a "Writ of Mandamus" seeking to compel the United States "to issue partition deeds" and "convey sole, exclusive ownership of Jack's 690.54-acre parcel to his Estate." Dkt. 1, ¶¶ 1, 4.

This case is based on a petition to partition land—Allotment 1809—filed with the Bureau of Indian Affairs ("BIA") by Jack Halverson, now deceased. Dkt. 1, ¶¶ 15, 18. Before this year, that parcel (799.06 acres) was owned by the following parties in the interest type and percentage specified:

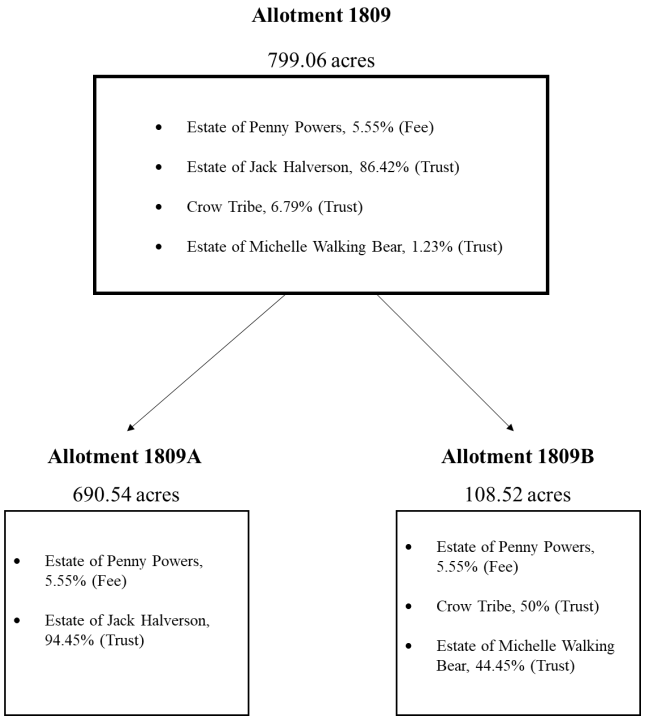
- Estate of Penny Powers, Fee Simple Interest, 5.55%
- Estate of Jack Halverson, Trust Interest, 86.42%
- Crow Tribe, Trust Interest, 6.79%
- Estate of Michelle Walking Bear, Trust Interest, 1.23%

Exhibit A, Salway Declaration, ¶ 3.

In December 2021, Plaintiff and the BIA came to what they thought was an agreement to partition Allotment 1809. Ex. A, ¶ 6. The BIA filed deeds on January 18, 2022, partitioning the original Allotment 1809 into two new parcels, named Allotment 1809A[1] (690.54 acres) and Allotment 1809B (108.52 acres). Ex. A, ¶ 7.

[1] After Allotment 1809 was partitioned on January 18, 2022, the two new allotments are actually named "Allotment 1809" and "Allotment 1809B." But for ease of identification, the pre-January 18, 2022 parcel will be referred to as "Allotment 1809," while the post-partition parcels will be called "Allotment 1809A" and "Allotment 1809B."

Allotment 1809A is now held by the Estate of Powers (5.55% in fee) and the Estate of Halverson (94.45% in trust) as tenants-in-common. Ex. A, ¶¶ 4, 8. Allotment 1809B is now held by the following parties as tenants-in-common: Estate of Powers (5.55% in fee); Crow Tribe (50% in trust); and the Estate of Walking Bear (44.45% in trust). Ex. A, ¶¶ 5, 9.



Plaintiff disagrees that the January 18, 2022 deeds are accurate. He now seeks "sole, exclusive ownership" of Allotment 1809A. Dkt. 1, ¶ 4.

STANDARD OF REVIEW

Subject Matter Jurisdiction

On a motion to dismiss a complaint for lack of subject matter jurisdiction

pursuant to Rule 12(b)(1), Fed. R. Civ. P., the party asserting claims has the burden of demonstrating that each requirement for subject-matter jurisdiction exists. *Leite v. Crane Co*., 749 F.3d 1117, 1121 (9th Cir. 2014). The court presumes lack of jurisdiction until the plaintiff proves otherwise. *Stock West, Inc. v. Confederated Tribes*, 873 F.2d 1221, 1225 (9th Cir. 1989).

In adjudicating a motion to dismiss for lack of jurisdiction, the court is not limited to the pleadings, and may properly consider extrinsic evidence. *Ass'n of American Med. Coll. v. United States*, 217 F.3d 770, 778 (9th Cir. 2000). Where the court concludes that it lacks jurisdiction, it must dismiss the action without reaching the merits of the complaint. *High Country Res. v. FERC*, 255 F.3d 741, 748 (9th Cir. 2001).

Failure to Join a Necessary Party

The moving party has the burden of persuasion in arguing for dismissal. *Shermoen v. United States*, 982 F.2d 1312, 1317 (9th Cir. 1992). The moving party may carry its burden "by providing affidavits of persons having knowledge of these interests as well as other relevant extra-pleading evidence," and providing such evidence does not convert the motion into a Rule 56 motion for summary judgment. *16th & K Hotel, LP v. Commonwealth Land Title Ins. Co*., 276 F.R.D. 8, 12–13 (D.D.C. 2011); *accord Am. Greyhound Racing, Inc. v. Hull*, 146 F. Supp. 2d

1012, 1043 (D. Ariz. 2001), vacated on other grounds, 305 F.3d 1015 (9th Cir. 2002).

"Where an initial appraisal of the facts reveals the possibility that an unjoined party is arguably indispensable, the burden devolves upon the party whose interests are adverse to the unjoined party," here, the plaintiff, "to negate the unjoined party's indispensability to the satisfaction of the court. A failure to meet this burden results in the necessity of either joinder or dismissal." *Boles v. Greeneville Hous. Auth.*, 468 F.2d 476, 478 (6th Cir. 1972).

ARGUMENT

I. The Court has no jurisdiction to hear this Quiet Title Act case.

The Quiet Title Act ("QTA") is the exclusive cause of action for disputes about title to real property when the United States is an interested party. 28 U.S.C. § 2409a.

Though federal courts have subject matter jurisdiction over QTA claims, 28 U.S.C. § 1346(f), and the United States has generally waived sovereign immunity for individuals to bring quiet title claims against the United States, there is an exception for cases involving "trust or restricted Indian lands." 28 U.S.C. § 2409a (a). The United States has *not* waived sovereign immunity in such cases. *Id.*

In this case, Plaintiff seeks to quiet title to Indian land held in trust by the United States. Thus, sovereign immunity has not been waived, and there is no

subject matter jurisdiction to hear the case. The case should be dismissed.

A. The Quiet Title Act is the exclusive cause of action.

Plaintiff seeks mandamus relief, 28 U.S.C. § 1361, but the proper cause of action is to quiet title pursuant to the QTA, 28 § U.S.C. 2409a. *Block v. North Dakota*, 461 U.S. 273, 277–78, 286 (1983).

The United States Supreme Court has stated that if the case can be brought under the QTA, other claims—like those for mandamus relief, injunctive relief, and declaratory judgment—must be dismissed. *Id.* at 278, 286. In the controlling case, *Block v. North Dakota*, North Dakota sued several federal officials to resolve a "dispute as to ownership of [a] riverbed." *Block*, 461 U.S. at 277–78. It sought quiet title relief through the QTA, mandamus relief, injunctive relief, and declaratory judgment. *Id.* at 278. It invoked several jurisdictional bases for its suit: (i) 28 U.S.C. § 1331 (federal question); (ii) 28 U.S.C. § 1361 (mandamus); (iii) 28 U.S.C. §§ 2201–2202 (declaratory judgment and further relief); and (iv) 5 U.S.C. §§ 701–706 (the APA's judicial review provisions). *Id.* at 278.

The Supreme Court held that the QTA "provide[s] the *exclusive* means by which adverse claimants could challenge the United States' title to real property," and that none of the other causes of action asserted by Plaintiff could stand. *Id.* at 286 (emphasis added). The Supreme Court noted that if North Dakota could use

other causes of action to determine ownership of Indian lands, "all of the carefully-crafted provisions of the QTA deemed necessary for the protection of the national public interest could be averted." *Id.* at 284–85.

This holding was reaffirmed three years later in *United States v. Mottaz*, 476 U.S. 834 (1986), and its holding applied specifically to allotments on Indian land. The plaintiff sought to avoid the QTA's requirements and limitations by pleading her interests in Indian allotments under various theories—breach of fiduciary duty, negligence, due process, and a taking without compensation—and by invoking jurisdiction under various federal statutes. *Id.* at 838. The Supreme Court affirmed that the QTA is the exclusive means by which adverse claimants can challenge the United States' title to real property. *Id.* at 841–42. It acknowledged that allowing plaintiffs to seek relief outside of the QTA would pose "precisely the threat to ongoing federal activities on the property that the Quiet Title Act was intended to avoid." *Id.* at 847.

B. This case presents a Quiet Title Act claim.

"[T]wo conditions must exist before a district court can exercise jurisdiction over an action under the Quiet Title Act: 1) the United States must claim an interest in the property at issue; and 2) there must be a disputed title to real property between interests of the plaintiff and the United States." *Leisnoi, Inc. v.*

United States, 267 F.3d 1019, 1023 (9th Cir. 2001). The Supreme Court, in deciding whether a claim was within the QTA's scope, analyzed the plaintiff's description and construction of her own claim. *Mottaz,* 476 U.S. at 841–42.

The United States' interest in the land does not need to be the disputed interest to trigger application of the Quiet Title Act. *Leisnoi, Inc.*, 267 F.3d at 1023. In *Leisnoi*, the United States had conveyed land to plaintiff, but it retained easements. *Id.* at 1021. Plaintiff desired to convey the land it received subject to the easements, but a third-party filed a *lis pendens* on the land arguing that when plaintiff tried to convey the land, it would revert to the United States. So plaintiff filed a QTA claim seeking to quiet title in the land. The United States, in its answer, expressly *disavowed* any interest in the land to which plaintiff claimed title. Still, the Ninth Circuit held that the case was proper under the QTA because the United States had retained some interest in the land—easements—even though title to those easements was not in dispute. *Id.* at 1022.

The United States' interest that satisfies the requirement need not be significant. A navigational servitude interest, for example, is sufficient. *Ohio ex rel. Merrill v. Dep't of Nat. Res.,* No. 1:05 CV 818, 2006 WL 8459887, at *4 (N.D. Ohio Feb. 14, 2006) (where the United States denied an interest in the subject property, a lake, the Court held that the United States' navigational servitude

interest in the land was sufficient to satisfy the "interest in" requirement).

Here, the United States holds Allotment 1809A in trust for Plaintiff, so it has an interest in the property even if that is not the interest in dispute. *See Leisnoi*, 267 F.3d at 1023. Trust interests must be a kind of interest contemplated by the QTA because the statute specifically excludes trust lands for purposes of jurisdiction only.

As to the second requirement that must be established for application of the QTA, this case involves "disputed title to real property." *Id.* Congress "did not intend to limit" the application of the QTA to "traditional 'quiet title' cause of action; instead Congress was more generally concerned with interests that 'cloud title,' i.e., interests that raise questions that may affect the claim of title and pose problems in the future." *Robinson v. United States*, 586 F.3d 683, 687 (9th Cir. 2009)

This dispute arose on January 18, 2022, when the United States conveyed to Plaintiff less than all of the interest in Allotment 1809A. Plaintiff claims the United States must convey to him the "sole, exclusive ownership" to which he is entitled, and that the deed is "a cloud on the title to Allotment 1809." Dkt. 1, ¶ 50; *see Mottaz,* 476 U.S. at 841–42 (considering plaintiff's description of the cause of action). Implicit in this demand is the assumption that the United States has

additional title to the property that it can convey. The United States disputes this and claims it cannot convey all of the interests in Allotment 1809A to Plaintiff. Thus, there is a dispute as to the title of the Allotment 1809A.

Because both requirements are met, Plaintiff's claims are to quiet title under the QTA, and Plaintiff "do[es] not have a freewheeling right to sue under a different statute." *N. New Mexicans Protecting Land Water & Rts. v. United States*, 161 F. Supp. 3d 1020, 1054 (D.N.M. 2016), aff'd, 704 F. App'x 723 (10th Cir. 2017) (citing *Sw. Four Wheel Drive Ass'n v. Bureau of Land Mgmt.*, 363 F.3d 1069, 1071 (10th Cir. 2004)).

C. The United States has not waived its sovereign immunity for this claim under the Quiet Title Act.

The QTA permits the United States to be named as a defendant in lawsuits seeking the adjudication of disputed title to land. *Block*, 461 U.S. at 286; *Mottaz*, 476 U.S. at 842. But when the property at issue is "trust or restricted Indian lands," the United States is immune from suit under the QTA. 28 U.S.C. § 2409a. *Mottaz*, 476 U.S. at 843. The Supreme Court has emphasized the importance of the QTA's Indian-land exception, particularly when a plaintiff seeks to avoid it by seeking mandamus relief instead: "If we were to allow claimants to try the Federal Government's title to land under an officer's-suit theory, the Indian lands exception to the QTA would be rendered nugatory." *Block*, 461 U.S. at 285.

As explained above, this case is properly brought under the QTA. And as the

property is Indian trust land, sovereign immunity is not waived. This conclusion does not change because the heir to the land is non-Indian. *Ducheneaux*, 837 F.2d 340 (8th Cir.), cert. denied, 486 U.S. 1055 (1988) (holding non-Indian wife's attempt to partition deceased Indian husband's land was barred by the Quiet Title Act's trust land exception). The Court does not have jurisdiction to hear this case, and it should be dismissed.

II. The Court lacks jurisdiction to decide Plaintiff's claim for mandamus relief.

Even if this action were not relegated to the QTA (it is), Plaintiff would fare no better under a mandamus theory. The court does not have jurisdiction to hear a mandamus claim in this case. The Mandamus Act grants district courts "original jurisdiction of any action in the nature of mandamus" against a federal officer or agency. 28 U.S.C. § 1361. Thus, if the action is not "in the nature of mandamus," there is no jurisdiction. Jurisdiction is established "only when a federal officer, employee, or agency owes a nondiscretionary duty to the plaintiff that is so plainly prescribed as to be free from doubt." *Stang v. I.R.S.*, 788 F.2d 564, 565 (9th Cir. 1986) (internal quotation omitted).

The required affirmative action must be prescribed by statute or regulation. *Barron v. Reich*, 13 F.3d 1370, 1376 (9th Cir. 1994). Without such a prescribed statutory duty, the duty cannot be based on a settlement agreement or contract. *Bobula v. U.S. Dep't of Just.*, 970 F.2d 854, 860 (Fed. Cir. 1992) ("[A] contractual

duty alone cannot serve as the basis of the nondiscretionary duty necessary to invoke jurisdiction under § 1361.").

Plaintiff cites 25 U.S.C. § 378, but its language provides the BIA ample discretion. Under that statute, even if the Secretary of the Interior found that land was "capable of partition to the advantage of the heirs," which is a discretionary decision, she "may cause" such lands to be partitioned. *Id.* No aspect of this statue imposes a nondiscretionary duty to partition land in this case or any case. Thus, mandamus jurisdiction is not appropriate in this case.

III. Plaintiff failed to join a necessary party.

If the Court does not dismiss this case for lack of jurisdiction, then it should still be dismissed as Plaintiff failed to join a necessary party. Currently, Allotment 1809A is owned by both Plaintiff and the Powers Estate, even though Plaintiff believes that such ownership split is improper. Under Federal Rule of Civil Procedure 19, the Powers Estate is a necessary party that must be joined, and Plaintiff's failure to do so must lead to a dismissal so that he may refile with the appropriate causes of action, against the appropriate parties, in the proper jurisdiction.

In making the determination of whether the absent person "must be joined," the court considers the factors set forth in Rule 19(a)(1). It examines whether the district court could award complete relief to the parties present without joining the non-party. *Paiute-Shoshone Indians of Bishop Cmty. of Bishop Colony, Cal. v. City of Los Angeles*, 637 F.3d 993, 997 (9th Cir. 2011).

Here, the absence of the Powers Estate would prevent the district from awarding complete relief to the parties present. The Powers Estate's interest must be evaluated and decided, because if it has retained its fee interest, the United States cannot convey "sole, exclusive ownership" of Allotment 1809A to Plaintiff as it demands in the complaint.

It is widely recognized that joinder is appropriate in cases involving real property disputes. § 1621 Application of Rule 19 in Particular Actions and Proceedings—Real Property, 7 Fed. Prac. & Proc. Civ. § 1621 (3d ed.). This is especially true when the party to be joined is a joint owner of the property. *Broussard v. Columbia Gulf Transmission Co*., 398 F.2d 885, 887-89 (5th Cir. 1968) (upholding dismissal for failure to join owner of "undivided one-sixth interest in realty"); *Hoover v. Gershman Inv. Corp*., 774 F. Supp. 60, 64 (D. Mass. 1991) (joining joint tenants because of their interest in the property); *Johnson v. Wheeler*, 492 F. Supp. 2d 492, 499 (D. Md. 2007) (requiring joinder of co-owner of subject property).

In this case, the Powers Estate is a necessary party.[2]

CONCLUSION

The United States respectfully requests the Court dismiss this action with

[2] The second part of the analysis is only necessary if the Powers Estate is "unavailable," which we do not know at this time. If the Powers Estate is unavailable, then the Court considers whether the proceeding can continue in their absence. If not, the party is indispensable, and the action must be dismissed. Fed. R. Civ. P. 19(b).

prejudice for lack of subject matter jurisdiction. The Court does not have jurisdiction to hear this QTA claim or a mandamus claim. Alternatively, the case should be dismissed for failure to join the Powers Estate, a necessary party.

DATED this 23rd day of November, 2022.

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(d)(2)(E), the attached brief is proportionately spaced, has a typeface of 14 points and contains 3,106 words, excluding the caption and certificates of service and compliance.

DATED this 23rd day of November, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of November, 2022, a copy of the foregoing document was served on the following person by the following means.

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