IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

UTE INDIAN TRIBE OF THE UINTAH AND OURAY INDIAN RESERVATION, Plaintiff, v. THE UNITED STATES OF AMERICA, et al., Defendants.	Case No. 1:18-cv-546-CJN **FEDERAL DEFENDANTS' REPLY IN SUPPORT OF MOTION FOR PARTIAL RECONSIDERATION OF THE COURT'S DECEMBER 16, 2021 ORDER**

INTRODUCTION

Federal Defendants' Motion for Partial Reconsideration (the "***Motion***") is procedurally proper and demonstrates that dismissal of the Tribe's Trespass Claim is warranted. Federal Defendants have identified a clear error of law that will result if the Court's current Memorandum Opinion's ruling on the Trespass Claim stands. That fact alone is sufficient to warrant reconsideration of the Court's decision on the Tribe's Trespass Claim. And the Tribe's suggestion that Federal Defendants should have raised the argument in their motion to dismiss rings hollow when viewed together with the facts of the case. But even if Federal Defendants could have previously raised their argument, the Quiet Title Act (the "***QTA***")'s statute of limitations is a non-waivable jurisdictional bar that the Court must consider regardless of when it is raised. Through its Trespass Claim, the Tribe asks the Court to adjudicate the same title issues barred by the QTA's statute of limitations, and the waiver of sovereign immunity under section 702 of the Administrative Procedure Act (the "***APA***") therefore does not apply. Thus, the Court

should reconsider its prior ruling and dismiss the Trespass Claim consistent with clear Supreme Court precedent on this issue. [1]

ARGUMENT

First, Federal Defendants' motion is proper because "justice requires" reconsideration of the Court's decision on the Trespass Claim to avoid a clear error. In ruling on the United States' motion to dismiss, the Court was tasked with considering "the sufficiency of the *complaint*" and, in doing so, concluded that the Tribe brought its Trespass Claim under section 702 of the APA, rather than section 706 as the parties had briefed and argued. ECF No. 76 at 17 (the "***Mem. Op.***") (emphasis added). The Court then went on to note that the Tribe's Trespass Claim was adequately pleaded for purposes of *Twombly* but that the claim would ultimately require a determination of whether the "lands were not and should not be restored to Tribal ownership." *Id*. at 19. Thus, while the Court may have been correct as to the Tribe's reliance on section 702 for its waiver of sovereign immunity, in sorting out the Tribe's "confused" position, the Court overlooked the fact that its conclusion meant that the Tribe's Trespass Claim fails because the QTA precludes review.

In an effort to avoid dismissal, the Tribe argues that the Motion should be rejected because this is a "new argument" that the Federal Defendants could have raised earlier. But the Tribe overlooks the impetus for the Motion. The Federal Defendants had no reason to raise the

[1] Local Civil Rule 7(b) required the Tribe to file its response 14 days after service of the motion, or by February 14. After the Tribe missed this deadline, the United States informed the Tribe that it did not object to the Tribe seeking leave to file a response out of time on or before February 28, 2022. However, the Tribe sought no such extension from the Court. Because the response was not filed within the time prescribed under the local rules or with leave of this Court, the Court "may treat the motion as conceded." LCvR 7(b); *see also* Standing Order for Civil Cases at ¶ 9(a) ("Extensions or enlargements of time will only be granted upon motion and not upon stipulation of the Parties.")

arguments earlier because Federal Defendants interpreted the Trespass Claim as brought under section 706 of the APA. Indeed, the Court recognized the lack of clarity in the jurisprudential foundation for the Tribe's Trespass Claim. Mem. Op. at 17. It was not until the Court provided its reading of the Trespass Claim that current issue became clear. Moreover, in replying to the Tribe's opposition to the motion to dismiss, Federal Defendants identified the QTA as the only method available to the Tribe to establish its alleged rights to the land (aside from the fourth claim challenging the denial of the Tribe's restoration request) and argued that the QTA is the exclusive method by which a plaintiff could challenge the United States' title. ECF No. 48 at 10-11. And even if Federal Defendants should have raised these arguments earlier, the Court must dismiss an action if, at any time, it determines it lacks subject-matter jurisdiction. *See* Fed. R. Civ. P. 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action"). For that reason alone, the Court should reconsider its prior ruling motion.

None of the cases the Tribe relies upon in its response involved arguments that went to the Court's subject-matter jurisdiction. And beyond that fact, the cases the Tribe points to are simply not analogous to the instant Motion. In *Risenhoover v. United States Dep't. of State,* for example, the plaintiff only reproduced arguments the Court had repeatedly rejected. No. CV 19-715 (BAH), 2020 WL 5416626, at *1 (D.D.C. Sept. 2, 2020). In *Judicial Watch v. United States Dep't. of Energy*, the court declined to consider a claim of privilege raised for the first time in a motion to reconsider, where the privilege was available to the movants during their prior briefing and the movants provided no explanation for omitting the argument. 319 F. Supp. 2d 32, 34 (D.D.C. 2004). And in *Ecological Rts. Found. v. U.S. Env't Prot. Agency*, the court actually *granted* the movant's motion to alter or amend the judgment under Rule 59 because the movant's

submissions demonstrated the presence of "clear error." 541 F. Supp. 3d 34, 63-64 (D.D.C. 2021). In each of these cases, *where a motion to reconsider was actually denied*, the movant either attempted to relitigate its prior arguments or was aware of its arguments prior to moving to reconsider and simply chose not to assert them. That is not the case here.

Finally, the Court should reject the Tribe's attempt to recast its Trespass Claim as anything other than an attempt to establish an interest in the lands at issue, lands over which the United States has asserted sole ownership. The Tribe's request for the Court to determine if the United States holds the property in trust is, by definition, a request for the Court to resolve a title dispute and determine the nature and extent of the United States' property interest in lands claimed by the United States. *See Pueblo of Jemez v. United States*, 483 F. Supp. 3d 1024, 1101 (D. N.M. 2020), *appeal filed*, No. 20-2145 (10th Cir. 2020) (With respect to trust lands, "[t]he United States . . . holds the 'fee' interest—the right of preemption—while the Tribe holds the 'title of occupancy' or beneficial title."). The Tribe's response admits as much by acknowledging that its allegations ask the Court to determine if the lands were already restored or should be restored to tribal ownership. ECF No. 87 at 3.

Nevertheless, the Tribe argues its Trespass Claim is permitted because it can "antagonize the United States to bring a QTA claim." *Id.* at 3-4. To be sure, *Block* left room for a claimant to "continu[e] to assert [its] title, in hope of inducing the United States to file *its own* quiet title suit." *Block v. North Dakota ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273, 291-92 (1983) (emphasis added). But *Block* does not allow plaintiffs to do what the Tribe attempts to do here: sidestep the QTA's statute of limitations and ask the Court to adjudicate an adverse title claim through artful pleading. Rather, *Block* explicitly states plaintiffs are foreclosed from circumventing the QTA in such a manner. *Id.* at 286 ("Congress intended the QTA to provide the

exclusive means by which adverse claimants could challenge the United States' title to real property.").[2] By asking for adjudication on whether the Public Domain Lands have been or should be restored to tribal ownership, the Tribe asserts a claim to the land adverse to the United States' claim.

The Tribe is not permitted to challenge the United States' title under any waiver of sovereign immunity besides that in the QTA, as allowing the Tribe to proceed on its Trespass Claim would circumvent and nullify Congress' "carefully-crafted provisions." *Id.* at 284. If the claim "is barred by [28 U.S.C. § 2409a(g)], the court[] . . . ha[s] no jurisdiction to inquire into the merits." *Id.* at 292. And the waiver of sovereign immunity under section 702 of the APA cannot provide the basis for such challenges to the United States' title where the challenges are barred by the QTA's statute of limitations. "On whole, *Block* stands for the proposition that express terms of the QTA provide the universe of claims that may be brought against the United States over disputes concerning real property." *Wilkins v. United States*, No. CV 18-147-M-DLC-KLD, 2020 WL 2732251, at *4 (D. Mont. May 26, 2020), *aff'd,* 13 F.4th 791 (9th Cir. 2021).

CONCLUSION

For the foregoing reasons, Federal Defendants ask the Court to partially reconsider its December 16, 2021 Memorandum Opinion and dismiss the Tribe's fifth cause of action for trespass for lack of jurisdiction because it is untimely under 28 U.S.C. §2409a(g).

[2] *Block* discusses that the QTA provides recourse to litigants seeking to challenge the United States' title where it otherwise did not exist. *See id*. at 280. "Prior to 1972, States and all others asserting title to land claimed by the United States had only limited means of obtaining a resolution of the title dispute—they could attempt to induce the United States to file a quiet title action against them . . . ." *Id.* Thus, "citizens asserting title to or the right to possession of lands claimed by the United States were 'without benefit of a recourse to the courts,' because of the doctrine of sovereign immunity." *Id.* at 282. The Quiet Title Act resulted when "Congress sought to rectify this state of affairs." *Id.*

Respectfully submitted this 14th day of March, 2022.

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