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Introduction

The Assiniboine and Gros Ventre Tribes (Tribes) explained in their opening brief that the district court erred by: (1) holding that the Administrative Procedures Act (APA) created jurisdictional prerequisites for the Tribes' common law trust claims; (2) finding, prior to the remedies phase of the case, that no remedies were available to the Tribes; and (3) conflating cases involving the Indian Tucker Act with cases involving the federal government's general and treaty trust obligations.

Defendants' answering brief asserts that the district court: (1) properly applied the APA to the Tribes' common law claims, because those common law claims depend on the waiver of sovereign immunity contained in § 702 of the APA; (2) cured any error in its first order on summary judgement by properly finding in second order that it had no jurisdiction in any event; and (3) correctly stating (but only as dicta) this Circuit's law regarding the federal government's trust obligations to the Tribes.

As the Tribes explain below, defendants are wrong for several reasons: (1) the APA is not jurisdictional, and § 702's waiver of sovereign immunity is "limited" only by § 701 of the APA. If § 702 was limited by other provisions of the APA, as defendants urge, the non-statutory claims that § 702 was intended to allow would simply become APA claims, and there would be no reasons for § 702;

(2) the district court's failure to follow its own scheduling order was not harmless error, because jurisdiction in this case is provided by 28 U.S.C. §§ 1331 and 1362 and the court had jurisdiction to consider remedies at the conclusion of the liability phase of the case; and (3) the court's conflation of cases addressing the Indian Tucker Act with cases involving Indian trust law was not dicta, since the Tribes' common law trust claims must be addressed on remand.

Before addressing the specifics of defendants' arguments, the Tribes stress two points.

First, the Tribes' claims are based upon serious, long-lasting, and ongoing injuries to Tribal resources that the Tribes are suffering even as this appeal is prosecuted. As the district court's initial summary judgement opinion acknowledged:

> It is undisputed that the Zortman-Landusky mines have devastated portions of the Little Rockies, and will have effects on the surrounding area, including the Fort Belknap Reservation, for generations. That devastation, and the resulting impact on tribal culture, cannot be overstated.

Order (June 28, 2004) at 12 (E.R. 179).[1]

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[1] As the Interior Board of Land Appeals (IBLA) found, the BLM "did not fully observe its trust responsibility to the Tribes, had incomplete information about groundwater flows which was essential to a reasoned choice among alternatives[,] and did not comply with 40 C.F.R. § 1502.22, and failed to protect public lands from unnecessary or undue degradation." See Island Mountain

Second, the district court, sua sponte, reversed several of its own earlier rulings in the case. The district court previously recognized, for example, that the Tribes' claims "bear[] more resemblance to nuisance and trespass than to an APA claim." Order at 9; ER at 204 (referring to the court's January 29, 2001, Order denying the government's motion to dismiss). The court also previously rejected an argument by the government that the Tribes' claims were barred by the statute of limitations, and found: "Even assuming the Tribes are correct that the United States first breached its trust duties in 1979, when it first authorized mining, the statute [of limitations] would be tolled, under the continuing violations doctrine, until the last permit issued." January 29, 2001, Order at 7-8; ER at 12-13.

After the court granted summary judgement to the government based upon its conclusion that no remedies were available to the Tribes (June 28, 2004, Order; ER at 168), and after the Tribes pointed out that briefing on remedies had not yet occurred under the court's own bifurcation order, the court revealed, for the first time, that it had reconsidered its earlier orders and was treating the Tribe's common law claims as the equivalent of APA challenges to government's administrative decisions, one of which was moot because the decision was on administrative appeal (Order at 19-20; ER at 214-15) and the remainder of which

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Protectors, 144 IBLA 168, 202-03 (May 29, 1998) (E.R. 128-29).

were barred by the statute of limitations. (Order at 16-19; ER at 211-214).[2]

The Tribes stress these two points because they highlight the true nature of the Tribes' common law claims, and illustrate how defendants and the district court have mis-characterized the claims.

I. The District Court's Ruling That § 704 Of The APA Is "Jurisdictional" Is Clearly Erroneous.

The district court, in a section of its second summary judgement order styled: "Subject Matter Jurisdiction: APA Requirements" (Order at 7; ER at 202), found:

> According to the plain language of the APA, the Court has jurisdiction only over "agency action made reviewable by statute" and "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. Because the actions complained of by the Tribes are not reviewable under a particular statute, the Court's jurisdiction must rest upon the challenged action being 'final agency action."

Order at 8; ER at 203.

As the Tribes explained in their opening brief, the district court's conclusion that "final agency action" within the meaning of § 704 is a necessary predicate to

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[2] The Tribes' opening brief cites to the court's November, 12, 2004, "Nunc Pro Tunc" Order, which duplicated exactly an earlier Order issued October 22, 2004. The defendants' answering brief refers to the October 22, 2004, Order. This Reply brief will simply refer to the "Order," and provides Excerpt of Record (ER) jump cites to the October 22, 2004, Order.

jurisdiction in this case is clearly erroneous. Califano v. Sanders, 430 U.S. 99, 105, 97 S.Ct. 980, 51 L.Ed.2d 192 (1977) ("the APA is not to be interpreted as an implied grant of subject-matter jurisdiction to review agency actions"). See also Gallo Cattle Co. v. United States Dept. Of Agriculture, 159 F.3d 1194, 1198 (9th Cir. 1998) (Gallo) ("while the APA does not confer a district court with jurisdiction, it does provide a waiver of sovereign immunity in suits seeking judicial review of a federal agency action under § 1331").

Jurisdiction in this case is provided by 28 U.S.C. §§ 1331 and 1362. The Tribes are not invoking §§ 1331 and 1362 as a basis for APA or non-statutory "judicial review" of an administrative decision, but rather are invoking §§ 1331 and 1362 jurisdiction in order to prosecute their common law trust claims against the government for ongoing violations of its common law and treaty obligations.[3]

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[3] Defendants' argument that the government did not itself conduct mining ignores the nature of trust claims. The Tribes' trust claims, like most trust claims, asserts a failure to protect the beneficiaries' interest when there was a duty to act. See Cobell v. Norton, 240 F.3d 1081, 1095 (D.C. Cir. 2001) (failure to act in discharging fiduciary duties to Tribes warranted judicial intervention). Defendants citation to the discussion in Norton v. Southern Utah Wilderness Alliance, 124 S.Ct. 2373 (2004) (SUWA) of the "failure to act" provision in § 551(13) of the APA illustrates how importing "judicial review" jurisprudence into common law claims leads to absurd results. In SUWA the Court held that federal courts intrude too far into the Executive branch when courts judicially review agency "failures to act" in carrying out broad regulatory programs and policies. SUWA, 123 S.Ct. at 2381. This principle makes no sense, however, in cases raising common law claims against the government for failing to act when there is

While it is impossible to tell whether, and to what extent, the district court's treatment of the APA as "jurisdictional" influenced the court's ultimate conclusion, the error cannot be dismissed as harmless.[4] As the Supreme Court noted in Steel Company v. Citizens For A Better Environment, 523 U.S. 83 (1998):

> It is firmly established in our cases that the absence of a valid (as opposed to arguable) cause of action does not implicate subject matter jurisdiction, i.e., the courts' constitutional or statutory power to adjudicate the case. . . . It is unreasonable to . . . make all the elements of [a] cause of action . . . jurisdictional, rather than . . . merely specifying the remedial powers of the court.

523 U.S. at 89-90 (emphasis in original). The distinction between jurisdiction and "cause of action" is particularly important where, as here, the district court has concluded that claims must be based upon the APA in order for the court to have jurisdiction.

Defendants argue the district court's "final agency action" requirement was correct (Answering Brief at 30-39), but never address the court's erroneous

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a specific duty to act. In "judicial review" cases any "duty to act" is created by statute and owed to the public. In common law cases such as the instant case the "duty to act" is created by common law (and, in this case, by treaty) and owed to a particular party (here, the Tribes).

[4] The court stated, for example: "Because this issue [the APA's waiver of immunity] goes directly to the court's jurisdiction, it must be considered at every stage of the proceeding." Order at 8; ER at 203.

conclusion that the APA is "jurisdictional." Instead, defendants argue that § 704 imposes a "limitation" on § 702's waiver of sovereign immunity, and cite to this Court's opinion in Gallo, supra.. Answering brief at 30-31.

Gallo and other cases cited by defendants involve requests for judicial review of administrative agency decision making, and not common law claims seeking equitable relief for agency violations of common law duties. In Gallo, plaintiffs challenged the refusal of an administrative hearings officer to grant a stay during the pendency of an administrative appeal. Gallo, supra, 159 F.3d at 1195. It was in the context of this administrative challenge that the Gallo panel determined that: "the APA's waiver of sovereign immunity contains several limitations." 159 F.3d at 1198.[5] See also National Wrestling Coaches Ass'n. V. Department of Education, 366 F.3d 930 (D.C. Cir. 2004) cert. denied 73 U.S.L.W.

[5] Defendants quote this Court's statement in Clouser v. Espy, 42 F.3d 1522, 1527-28, n 5, (9th Cir. 1994) that: "[I]t is equally the case that plaintiffs' other arguments against the challenged actions – that they were taken without statutory authority, or that they violate statutory standards – should also be regarded and treated as claims under the APA." Answering Brief at 35, note 11 (quoting Clouser) (emphasis added by defendants). This statement recognizes that in some "statutory review" cases plaintiffs may seek judicial review of the legality of particular agency decisions without expressly relying upon the APA. When that is the case, it makes sense to apply the procedural provisions of the APA. That in no way suggests, however, that APA provisions intended to define the role of the courts in reviewing agency decisions should also apply to "common law" claims seeking equitable relief for agency actions (or failures to act).

3415 (June 6, 2005) (challenge to national program implementing Title IX - availability of private cause of action under Title IX constitute an "adequate remedy" barring review under § 704)).

While application of specific APA provisions makes sense in the context of non-statutory "judicial review" cases, these APA provisions have no relevance to non-statutory common law claims based upon ongoing injuries. Defendants cite no cases in which a court has imposed APA procedural provisions to limit § 702's waiver of sovereign immunity in the context of common law claims. In fact, as this Court has repeatedly found, § 702 of the APA waives sovereign immunity for all claims against federal agencies, and "is not limited to suits under the Administrative Procedures Act" (Assiniboine and Sioux Tribes v. Board of Oil and Gas Conservation, 792 F.2d 782, 793 (9th Cir. 1986) (quoting Davis, Administrative Law Treatise § 23:19 at 195 (2d ed. 1983)).

Cases in which plaintiffs, like the Tribes in the instant case, have asserted individualized, common law claims have simply applied § 702's broad waiver without importing other provisions of the APA. See, e.g., Cobell v. Norton, 240 F.3d 1081, 1095 (D.C. Cir. 2001) (Departments of the Interior's "extensive delay" in discharging fiduciary duties to Tribes warranted judicial intervention, § 702 waived sovereign immunity); Jaffee v. United States, 592 F.2d 712, 718-19 (3d

Cir. 1979) cert. denied 441 U.S. 961 (§ 702 waiver allowed class action seeking equitable relief against the United States for individual injuries). See also cases cited in opening brief, at 22-26.

The defendants' argument that the "statutory structure" and "legislative history" of § 702 indicate that the waiver of sovereign immunity is "limited" by § 704 of the APA is also without merit. Defendants argue: "When Congress enacted section 702's waiver in 1976, it did not do so by enacting an entirely new provision of the United State code. Instead, it inserted a waiver of immunity into the APA, and into section 702 in particular." Answering Brief at 32 (citations omitted). This fact, however, does not advance defendants' argument. Defendants do not deny that § 702's waiver extends to non-APA claims, so the fact that § 702 was inserted in the APA does not suggest the § 702's waiver is "limited" to the APA.

Defendants cite to snippets of legislative history stating that § 702 applies only to claims against "agencies" as defined in § 701 of the APA. Answering brief at 33 (citing H. Rep. No. 94-1656, at 11 reprinted in 1976 USCCAN 6121, 6131)). This obvious limitation on the scope of § 702, however, in no way means that Congress intended all of the APA's provisions to "limit" § 702's waiver of immunity. Such a conclusion would make § 702 meaningless, and the

APA itself would provide the exclusive means of seeking non-monetary relief against federal agencies.

The same legislative history cited by defendants makes clear that § 702's primary purpose was to cure the considerable confusion among judicial opinions as to the doctrine of sovereign immunity by simply eliminating sovereign immunity for all claims for non-monetary relief against federal agencies. As the Report states: "Based on the testimony presented to this committee and to the Senate committee, it appears that the consensus in the administrative law community among scholars and practitioners is strong with regard to the elimination of sovereign immunity." H. Rep. No. 94-1656, at 8; 1976 USCCAN at 6128. The Report therefore concludes that "the time has come to eliminate the sovereign immunity defense in all equitable actions for specific relief against a Federal agency or officer acting in an official capacity." H. Rep. No. 94-1656 at 9; USCCAN at 6129 (emphasis added).

Finding that § 702's waiver of sovereign immunity is "limited" by select provisions of the APA would create the same judicial confusion that Congress was attempting to cure when it adopted § 702. The district court's opinion illustrates this point. The Tribes presented the court with simple common law trust claims based upon clearly identified and ongoing injuries. The Tribes identified two

sources of jurisdiction providing the court with the power to address the Tribes' injuries (28 U.S.C. §§ 1331 and 1362), and pointed out that § 702 waived the defendants' sovereign immunity. By super-imposing § 704 on § 702, the court turned the Tribes claims from common law claims based on individualized injury into requests for judicial review of specific administrative decisions, and imported rules designed to govern the relationship between courts and the Executive branch in the regulatory context into the common law context. In so doing, the court undermined the simplicity Congress was attempting to achieve when it adopted § 702.

II. The District Court's Failure To Account For Its Own Bifurcation Order Was An Abuse Of Discretion.

Defendants argue: "The district court acted within its discretion by granting summary judgement to the federal defendants at the conclusion of the liability phase of this bifurcated proceeding." Answering Brier at 22. Defendants assert that the Tribes assignment of error to the district court's deviation from its own bifurcation order "entirely overlook[s] the court's analysis set out in its October 22, 2004 decision." Id.

The Tribes have not "overlooked" the district court's October 22, 2004 order. As explained in Part I, supra, and in the Tribes' Opening Brief at 20-26, the

district court's October 22, 2004, opinion is clearly erroneous. Defendants, however, have "entirely overlooked" the fact that the district court's initial June 28, 2004, order contravened the court's own bifurcation order.

After informing the Tribes in its bifurcation order that the court would consider remedies in a separate phase following a liability phase, the court, without any briefing by the Tribes on the issue of remedies, held that "the lack of an effective remedy for any wrongs committed on the Tribes renders the exercise of judicial power superfluous, and the case moot." Order (June 28, 2004) at 11-12 (E.R. 178-79). This was contrary to the purposes of Federal Rule of Civil Procedure 42(b) regarding bifurcation of trials, and fundamentally unfair to the Tribes. See In Re Hanford Nuclear Reservation Litigation, 292 F.3d 1124, 1134, 1135 (9th Cir. 2002) (in bifurcated proceeding, district court erred by dismissing claims in Phase I based on matters that bifurcation order assigned to Phase II).

Defendants argue: "The Tribes do not (and cannot) explain how the ruling made by the court in that [October 22, 2004] decision raise 'remedial' issues that necessitated factual development and briefing in a remedy phase of this proceeding." Answering Brief at 22.

Apart from the fact that the district court's "jurisdictional" ruling was erroneous, the district court's October 22, 2004, opinion, like its June 28, 2004,

opinion, is primarily concerned with the remedies that may or may not be available in this case. Thus, the court's order stated: "For jurisdictional purposes, the nature of the relief sought determines the source of the sovereign immunity waiver." Order at 9; ER at 14. This is precisely the problem: the district court put the remedies cart before the liability horse.

III. The District Court's Conflation Of Cases Involving The Indian Tucker Act With Cases Involving Trust Obligations To Tribes Was Erroneous And Should Be Corrected By This Court Prior To Remand.

The government encourages this Court to ignore, as dictum, the primary substantive legal basis of the Tribes' claims in this case – Indian trust law. As stated in defendants' brief: "Review of the question whether the district court' dictum reflects an erroneous understanding of Indian trust law should await a case in which that issue is squarely presented." Answering brief at 40. Without clarification from this Court, however, as to the distinct nature of each of the distinct branches of Indian trust law, any proceedings on remand to the district court will be infected with the district courts erroneous view of Indian trust law, and the issue will once again come before the Ninth Circuit. The law and facts underlying this appeal places the issue squarely before the Court.

Indian trust law jurisprudence varies depending upon the source of the trust obligation (i.e., treaties, statutes, agreements, or other fiduciary arrangements) and

the nature of the remedy requested (i.e., monetary damages or equitable relief). The distinctions between these cases are explained in the Tribes' opening brief, and we shall not repeat that explanation here. The Tribes do not request that the Court rewrite the law or make new law. The Tribes seek only a recognition of these critical distinctions in existing case law and the distinct obligations and requirements arising under each type of Indian trust law jurisprudence.

For the purposes of this reply brief, the most fundamental line of cases are those in which the federal courts recognize a specific trust obligation, arising from treaty or statute, pursuant to which Tribes may obtain equitable relief for violations thereof. See, e.g., Cobell v. Norton, 240 F.3d 1081, 1101 (D.C. Cir. 2001); Pyramid Lake Paiute Tribe of Indians v. Morton, 354 F.Supp. 252, 256 (D.D.C. 1973); Northwest Sea Farms, Inc. v. U.S. Army Corps of Eng'rs, 931 F.Supp. 1515, 1520 (W.D. Wash 1996); Muckleshoot Indian Tribe v. Hall, 698 F.Supp. 1504, 1523 (W.D. Wash. 1988). Cases seeking equitable relief under specific treaties and statutes are not interchangeable with cases arising under the general trust obligation, or with cases seeking monetary damages.

In the district court proceedings, the Tribes repeatedly briefed the promises made to the Assiniboine and Gros Ventre people in the Treaty of Fort Laramie and in the Grinnell Agreement. The government's violations of these promises formed

the primary basis of the Tribes' complaint. The treaty and Grinnell Agreement language specifically assured the Tribes that in exchange for ceding certain lands, they would be protected from the depredations of white men and the federal Indian department would protect their waters flowing from the Little Rocky mountains. These promises were violated by the federal government in allowing the Pegasus Gold Corporation to initiate, expand and inadequately reclaim destructive mining operations at the headwaters of the rivers running onto the reservation, over the course of 25 years.

As explained in the Tribes' opening brief, the district court erroneously subsumed the Tribes' specific treaty and Grinnell agreement claims in its discussion of the "general" trust responsibility. Indeed, the decision of the district court entirely ignores the existence of the Treaty of Fort Laramie and Grinnell agreements. The defendants' answering brief also brushes off these specific treaty and agreement obligations, stating,

> Finally . . . the Tribes argue that, even under the district court's (allegedly erroneous) statement of applicable law, the court should have found that, with respect to the Zortman and Landusky mines, the United States breached specific trust obligations to the Tribes found in the Treaty of Fort Laramie and "discussions surrounding" the Grinnell Agreement. . . . [W]hether this treaty and agreement may give rise to specific trust obligations on the part of the United States that are enforceable in federal court is entirely academic in this case. As the district court correctly ruled, the salient point is that such an

> alleged specific obligation must be brought in the context of a final agency action that falls within the applicable statute of limitations period and is not moot.

Answering brief at 44-45. The government implicitly acknowledges that a claim arising under specific treaty promises is different from a claim arising under the general trust obligation, but avoids any useful discussion of the issue by erroneously assuming that the § 704 of the APA effectively turns equitable common law claims into requests for APA judicial review. The government, like the district court, thus sidesteps the core legal argument underlying the Tribes' complaint.

Conclusion

For the above reasons, the Tribes respectfully request that this Court reverse the district court's opinions granting summary judgment to the defendants, remand the case with instructions to address the Tribes claims and award any appropriate equitable relief.

Dated: July 8, 2005.

Respectfully submitted,

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Statement of Related Cases

Plaintiffs-Appellants are unaware of any related case pending in this Court. Circuit Rule 28-2.6.

Brief Format Certification Pursuant to Circuit Rule 32-1

I hereby certify that Plaintiffs-Appellants' Reply Brief is proportionally spaced, has a typeface of 14 points, and contains 3,777 words.

_____ _____
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Certificate of Service

I hereby certify that on July 8, 2005, I served two true and correct copies of Plaintiffs-Appellants' Reply Brief via first class mail, postage prepaid, to:

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