

FILED

UNITED STATES COURT OF APPEALS

SEP 13 2021

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

THOMAS G. LANDRETH,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA; et al.,

Defendants-Appellees.

No. 20-35683

D.C. No. 3:20-cv-05333-RBL  
Western District of Washington,  
Tacoma

ORDER

Before: THOMAS, Chief Judge, and HAWKINS and McKEOWN, Circuit Judges.

The panel has voted to deny the appellant's petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on the petition for rehearing en banc. Fed. R.

App. P. 35(b).

The appellant's petition for rehearing en banc is denied.

The appellant's motion to reopen for rehearing is also denied.

**FILED**

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D.C. No. 3:20-cv-05333-RBL  
Western District of Washington,  
Tacoma

ORDER

Before: THOMAS, Chief Judge, and HAWKINS and McKEOWN, Circuit Judges.

Appellant Thomas Landreth's petition for panel rehearing is **DENIED**.

FILED

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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UNITED STATES OF AMERICA; et al.,

Defendants-Appellees.

No. 20-35683

D.C. No. 3:20-cv-05333-RBL

MEMORANDUM\*

Appeal from the United States District Court  
for the Western District of Washington  
Ronald B. Leighton, District Judge, Presiding

Submitted August 4, 2021\*\*  
San Francisco, California

Before: THOMAS, Chief Judge, and HAWKINS and McKEOWN, Circuit Judges.

Plaintiff Thomas Landreth appeals the district court's dismissal of his action against Quinault Indian Nation (QIN) and the United States regarding ownership of

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\* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

\*\* The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Lake Quinault on jurisdictional and sovereign immunity grounds.<sup>1</sup> We review such a dismissal de novo, *Clinton v. Babbitt*, 180 F.3d 1081, 1086 (9th Cir. 1999), and we affirm. Because the parties are familiar with the history of this case, we need not recount it here.

I

The district court properly dismissed Landreth’s claims against the United States because they did not fall under any congressional waiver of the United States’ sovereign immunity. *See Roberts v. United States*, 498 F.2d 520, 525 (9th Cir. 1974), cert. denied, 419 U.S. 1070 (1974).

Landreth’s quiet title claim falls outside the scope of the Quiet Title Act’s (QTA) immunity waiver because it concerns Indian trust land. *See Alaska Dep’t of Nat. Res. v. United States*, 816 F.3d 580, 585 (9th Cir. 2016) (“The Indian lands exception applies if the federal government has a ‘colorable claim’ that the lands in question are trust or restricted Indian lands.”); *Quinaielt Tribe of Indians v. United States*, 102 Ct. Cl. 822, 832–35 (1945) (finding that Lake Quinault is within QIN’s reservation). The district court also correctly reasoned that QTA’s twelve-year statute of limitations had elapsed before Landreth filed suit, because QIN’s

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<sup>1</sup> Landreth’s motion to file a replacement reply brief and his motion to attach additional documents to that brief are granted. Landreth’s remaining pending motions are denied as unnecessary.

repeated closure of the lake in the 20th century should have put Landreth's predecessor on notice of the United States' claim to the lake.<sup>2</sup> 28 U.S.C. § 2409a(g).

The district court correctly determined that it lacked jurisdiction over Landreth's tort claims against the United States because Landreth did not administratively exhaust the claims, as required under the Federal Tort Claims Act (FTCA). *See* 28 U.S.C. § 2675; *Brady v. United States*, 211 F.3d 499, 502 (9th Cir. 2000).

Likewise, the United States Court of Federal Claims has exclusive jurisdiction over Landreth's non-tort claims for money damages because he requested an award of over \$10,000.<sup>3</sup> *See* 28 U.S.C. § 1491; 28 U.S.C. § 1346(a)(2); *Munns v. Kerry*, 782 F.3d 402, 413–14 (9th Cir. 2015).

Landreth has not articulated any other cognizable claims against the United States with sufficient clarity to provide notice to the defendant of their nature or

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<sup>2</sup> We decline to consider Landreth's argument, raised for the first time on appeal, that this case is a dispute over federal reserved water rights covered by the immunity waiver contained in the McCarren Amendment. *See El Paso City v. Am. W. Airlines, Inc. (In re Am. W. Airlines, Inc.)*, 217 F.3d 1161, 1165 (9th Cir. 2000).

<sup>3</sup> We decline to consider Landreth's argument, raised for the first time on appeal, that the depredations clause of the Treaty of Olympia allows the district court to exceed the \$10,000 cap. *See El Paso City*, 217 F.3d at 1165.

permit adjudication.<sup>4</sup> The district court therefore properly dismissed Landreth's action against the United States.

## II

The district court correctly dismissed Landreth's claims against QIN on sovereign immunity grounds. Federally recognized tribes such as QIN are immune from suit absent an explicit waiver or congressional abrogation, neither of which is present in this case.<sup>5</sup> *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978).

**AFFIRMED.**

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<sup>4</sup> We decline to consider Landreth's argument invoking the judicial review provisions of the Administrative Procedure Act (APA) for the first time on appeal. *See El Paso City*, 217 F.3d at 1165.

<sup>5</sup> We decline to consider Landreth's argument, raised for the first time on appeal, that QIN's waiver of immunity as part of a statutorily required insurance contract applies to his claims.

HONORABLE RONALD B. LEIGHTON

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

THOMAS G LANDRETH,

Plaintiff,

v.

UNITED STATES OF AMERICA, et  
al.,

Defendants.

CASE NO. C20-5333RBL

ORDER

[Dkt. #s 10, 19, 20, 22, 25, AND 26]

THIS MATTER is before the Court on the following motions: *Pro se* Plaintiff Landreth's Motion to Annex Additional Exhibits [Dkt. # 10]; Landreth's Motion for an Extension of Time [Dkt. # 19], Landreth's Motion to Un-Redact Information from the Bureau of Land Management or the Bureau of Indian Affairs [Dkt. # 20]; the United States' Motion to Stay Initial Disclosure Deadlines Pending Resolution of its Motion to Dismiss [Dkt. # 22]; The Quinault Indian Nation's Motion to Dismiss [Dkt. # 25]; and the United States' Motion to Dismiss [Dkt. # 26].

Landreth owns property abutting Lake Quinault in the Olympic National Park. This is at least his fourth attempt to obtain a judicial determination that the United States does not own the waters of and submerged lands under Lake Quinault (up to the ordinary high water mark) in trust for the benefit of the Quinault Indian Nation (QIN), but rather that Washington State owns those

1 lands and the United States or QIN has tortiously converted them. He claims the United States  
2 owes him a duty to protect his riparian rights. He seeks “quiet title” and \$250,000 damages.

3 Landreth was a plaintiff in *North Quinault Properties, LLC, et al. v Quinault Indian*  
4 *Nation et al.*, Cause No. 14-cv-6025RBL. This Court dismissed QIN and the Washington State  
5 Department of Natural Resources on May 5, 2015. A Judgment was entered on June 9, 2015, and  
6 Landreth did not appeal. [See Dkt. #s 23, 24, and 25 in that case].

7 Landreth sued again in state court, and lost. *N. Quinault Properties, LLC v. State of*  
8 *Washington*, Washington Superior Court, Thurston County, Case No: 15-2-01809-1, *aff’d*, 197  
9 Wash. App. 1056 (2017). He sued a third time in the Federal Court of Claims, and lost. *Landreth*  
10 *v. United States*, No. 1:18-cv-00476, 144 Fed. Cl. 52, 54-55 (July 24, 2019), *aff’d*, 797 F. App’x  
11 521, 522 (Fed. Cir. 2020).

12 Landreth’s new lawsuit asserts claims for (or at least quotes authorities discussing) the  
13 tort of conversion, the Quiet Title Act, the Equal Footing Doctrine, Public Trust Doctrine, and  
14 the 14th Amendment, among others. All appear to relate to his claim that QIN does not own the  
15 area between the low- and high-water marks (in front of his property, that land is 75 feet by 40  
16 feet). It does not appear that he claims ownership of that area, but instead claims the QIN does  
17 not own it (and Washington State does). He seeks to enforce his riparian rights despite QIN’s  
18 determination to not allow adjacent landowners to use the lake.

19 The United States seeks dismissal, arguing that Landreth has not alleged and cannot  
20 allege that it did any act (or failed to do any act) causing his claimed injury. It claims it has  
21 sovereign immunity, depriving this Court of subject matter jurisdiction over Landreth’s claims. It  
22 also argues that Landreth cannot state a claim under the Quiet Title Act (QTA) 28 U.S.C § 2409a  
23 because he does not claim ownership of the “disputed land”—adjacent to his property, between  
24



1 the Lake's ordinary high and low water marks—and even if he did, the QTA specifically does  
2 not waive sovereign immunity where the disputed property is “trust Indian land.”

3 QIN similarly seeks dismissal of all Landreth's claims against it, arguing that it has  
4 sovereign immunity from suit, which it has not waived, and that the QTA bars the relief Landreth  
5 seeks. It suggests that Landreth's Motion to Annex [Dkt. # 10] additional documents to his  
6 Complaint might be construed as an amended complaint, and its Motion to Dismiss appears to  
7 address the complaint including the proposed annexed exhibits. For that reason, Landreth's  
8 Motion to Annex Additional Exhibits [Dkt. # 10] is **GRANTED**.

9  
10 A complaint must be dismissed under Rule 12(b)(1) if, considering the factual allegations  
11 in a light most favorable to the plaintiff, the action: (1) does not arise under the Constitution,  
12 laws, or treaties of the United States, or does not fall within one of the other enumerated  
13 categories of Article III Section 2 of the Constitution; (2) is not a case or controversy within the  
14 meaning of the Constitution; or (3) is not one described by any jurisdictional statute. *See Baker v.*  
15 *Carr*, 369 U.S. 186, 198 (1962); *see also D.G. Rung Indus., Inc. v. Tinnerman*, 626 F.Supp.  
16 1062, 1063 (W.D. Wash. 1986); 28 U.S.C. §§ 1331 and 1346. When considering a motion to  
17 dismiss under Rule 12(b)(1), a court is not restricted to the face of the pleadings, but may review  
18 any evidence to resolve factual disputes concerning the existence of jurisdiction. *See McCarthy*  
19 *v. United States*, 850 F.2d 558, 560 (9th Cir. 1988), *cert. denied*, 489 U.S. 1052 (1989); *see also*  
20 *Biotics Research Corp. v. Heckler*, 710 F.2d 1375, 1379 (9th Cir. 1983). A federal court is  
21 presumed to lack subject matter jurisdiction until the plaintiff establishes otherwise. *See*  
22 *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375 (1994); *see also Stock West, Inc. v.*  
23  
24

1 *Confederated Tribes*, 873 F.2d 1221, 1225 (9th Cir. 1989). Landreth bears the burden of  
2 establishing subject matter jurisdiction. *See Stock West*, 873 F.2d at 1225.

3 The United States points out that under the 1855 Treaty of Olympia, all of Lake Quinault  
4 is within the Quinault Reservation. *See Quinault v. United States*, 102 Ct. Cl. 822 (1945). It  
5 argues that it has sovereign immunity and that Landreth has not and cannot tie his alleged injury  
6 to any act or omission of the United States over the past century.

7 Where a claim is asserted against the United States, the question of subject matter  
8 jurisdiction is inextricably tied to the doctrine of sovereign immunity. *See, Roberts v. United*  
9 *States*, 498 F.2d 520, 525 (9th Cir. 1974), *cert. denied*, 419 U.S. 1070 (1974) (axiomatic that a  
10 congressional waiver of sovereign immunity is a prerequisite to any suit brought against the  
11 United States). And any action against the United States begins with the “assumption that no  
12 relief is available.” *Tucson Airport Authority v. General Dynamics Corp.*, 136 F.3d 641, 644 (9th  
13 Cir. 1988). It is therefore the burden of any party advancing a claim against the United States to  
14 plead and prove that a statutory waiver of sovereign immunity exists. If the claimant fails to  
15 carry that burden, the Court has no jurisdiction to entertain the claim. *See Holloman v. Watt*, 708  
16 F.2d 1399, 1401 (9th Cir. 1983), *cert. denied*, 466 U.S. 958 (1984).

17 The United States argues that Landreth has no colorable claim under the QTA because he  
18 does not claim that he owns the disputed area, but rather that Washington State does (and QIN  
19 does not). Such a claim is not one within the QTA. *Match-E-Be-Nash-She-Wish Band of*  
20 *Pottawatomi Indians v. Patchak*, 567 U.S. 209, 215-225 (2012). Thus, it claims, the QTA is not a  
21 waiver of sovereign immunity allowing Landreth to assert such a claim against the United States  
22 here.

1 Furthermore, and in any event, the QTA expressly does *not* include a waiver of sovereign  
2 immunity where the disputed land is Indian land:

3 The United States may be named as a party defendant in a civil action under this  
4 section to adjudicate a disputed title to real property in which the United States  
5 claims an interest, other than a security interest or water rights. *This section does  
6 not apply to trust or restricted Indian lands[.]*

7 28 U.S.C. § 2409a(a) (1978) (emphasis added). *See State of Alaska v. Babbitt*, 38 F.3d 1068  
8 1072 (9th Cir. 1994); *and United States v. Mottaz*, 476 U.S. 834, 843 (1986). The QTA also  
9 includes a 12-year limitations period, which would have accrued when QIN first started treating  
10 the “disputed” property as its own. The United States points out that it did so at least three times  
11 that Landreth has identified, the latest of which was 1977.

12 Landreth’s response does not address these issues. Instead, he repeats his allegations that  
13 the Lake is navigable water, and that it is in the National Park. He reiterates his core factual  
14 claim that QIN engaged in an “armed take over” of the navigable lake in 2013, when it decided  
15 to close Lake Quinault to non-Indian users, including those with waterfront property on the lake.

16 The Court does not have subject matter jurisdiction over Landreth’s QTA claim against  
17 the United States and its Motion to Dismiss on that basis is **GRANTED**, and Landreth’s QTA  
18 claim is **DISMISSED**.

19 The United States also argues the Court does not have subject matter jurisdiction over  
20 Landreth’s conversion claim, if he indeed asserts such a claim against it. Landreth seeks  
21 \$250,000 from the United states for the tort of conversion. Tort claims against the United States  
22 must be filed under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b); 2671-2680; *and*  
23 *see Brown v. Bode Constr.*, No. 16-CV-01148-JSC, 2016 WL 1588382, at \*3 (N.D. Cal. Apr. 20,  
24 2016). The FTCA requires a claimant to file an administrative claim as a prerequisite to filing a

1 lawsuit. The United States points out that Landreth did not do so. The United States' Motion to  
2 Dismiss Landreth's tort claim against it is **GRANTED** and that claim too is **DISMISSED**.

3 Furthermore, this Court does not have jurisdiction over Landreth's claim for money  
4 damages over \$ 10,000. Under the "Tucker Act," 28 U.S.C. § 1491, the United States Court of  
5 Federal Claims has exclusive jurisdiction over such claims. *Lexington Ins. Co. v. United States*,  
6 No. 3:20-CV-05038-RBL, 2020 WL 3000777, at \*3 (W.D. Wash. June 4, 2020).

7 For these reasons, the United States' Motion to Dismiss [Dkt. # 26] is **GRANTED** and  
8 Landreth's claims against it are **DISMISSED** for lack of subject matter jurisdiction.

9  
10 Native American tribes and their governing bodies possess sovereign immunity and may  
11 not be sued absent express and unequivocal waiver of immunity by the tribe or abrogation of  
12 immunity by Congress. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58–59 (1978).

13 As a federally recognized Indian Tribe, QIN enjoys sovereign immunity from suit. *See*  
14 *Bodi v. Shingle Springs Bank of Miwok Indians*, 832 F.3d 1011, 1016 (9th Cir. 2016) ("Among  
15 the core aspects of sovereignty that tribes possess is the common-law immunity from suit  
16 traditionally enjoyed by sovereign powers.") (Internal quotations and citations omitted).  
17 Sovereign immunity bars suit absent a clear waiver, congressional abrogation, or application of  
18 the *Ex Parte Young* exception. *See Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indians*  
19 *Tribe of Oklahoma*, 498 U.S. 505, 509 (1991); *see also Michigan v. Bay Mills Indian*  
20 *Community*, 134 S. Ct. 2024, 2035 (2014). A waiver "cannot be implied but must be  
21 unequivocally expressed" *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978), and a waiver  
22 as to one claim does not waive sovereign immunity as to other claims. *See Oklahoma Tax*  
23 *Comm'n*, 498 U.S. at 509.

1 QIN's motion is based on a simple and powerful argument: it has not waived its  
2 sovereign immunity, and the Court does not have subject matter jurisdiction over Landreth's  
3 claims against it:

4 *Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 788, 134 S. Ct. 2024, 188  
5 L.Ed.2d 1071 (2014) (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 98  
6 S.Ct. 1670, 56 L.Ed.2d 106 (1978)). Tribal sovereign immunity "is a necessary  
7 corollary to Indian sovereignty and self-governance." *Three Affiliated Tribes of the*  
8 *Ft. Berthold Reservation v. Wold Eng'g, P.C.*, 476 U.S. 877, 890, 106 S.Ct. 2305, 90  
L.Ed.2d 881 (1986). It shields Indian tribes, for both on- and off-reservation conduct,  
from suit absent unequivocal and express authorization by Congress or clear waiver  
by the tribe. *Bay Mills Indian Community*, 572 U.S. at 789. Courts will not assume  
such an abrogation lightly. *Id.* at 790.

9 [QIN's Motion, Dkt. # 25 at 14].

10 The bulk of Landreth's Response does not address this argument, but instead  
11 describes the history of the land, the Treaty of Olympia, the QIN reservation, Washington  
12 State, and Olympic National Park. He reiterates that the lake is navigable and claims that  
13 under Washington law, the public has an interest in the use of navigable waters and their  
14 underlying lands. He claims that the Court has jurisdiction to resolve disputes over the lake  
15 and the Treaty:

16 **This Court definitely has subject matter jurisdiction over my complaint for Quiet Title and the**  
17 **Tort activities of the Quinault Indian Tribe/Nation. The entire navigable Lake Quinault is**  
18 **surrounded with federally reserved land for recreational purposes and the making of any**  
19 **decision regarding the navigable Lake Quinault is a Federal Question.**

20 [Landreth's Response, Dkt. # 27 at 32].

21 Landreth's claims are inconsistent with settled law.

22 QIN also argues that Landreth cannot state a claim to "remove the cloud of ownership on  
23 his property" under the QTA:

1 The Indian land exception to the QTA's waiver of the United States' immunity  
2 creates an "insuperable hurdle" to suits to challenge the government's interest in  
3 Indian trust or restricted land. *Id.* at 1075. It also applies without regard to  
4 whether there is an alternate means of review and may leave a party with no  
5 forum for its claims. *Id.* at 1077 (citing *Makah Indian Tribe v. Verity*, 910 F.2d  
6 555, 560 (9th Cir. 1990)).

7 [Qin's Motion Dkt. # 25 at 20]. This is correct, and Landreth seems to concede as much, though  
8 he points out that that would leave him with no recourse. His frustration is understandable, but  
9 the fact that he has no remedy is not a basis for inferring a waiver of sovereign immunity, or  
10 ignoring the QTA's plain language.

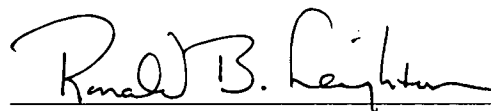
11 Finally, Landreth's remaining claims (for money damages, possible criminal prosecution,  
12 and potential renegotiation of the Treaty of Olympia) are baseless and do not cure the fatal-to-  
13 his-claims jurisdictional problem.

14 QIN's Motion to Dismiss [Dkt. # 25] for lack of subject matter jurisdiction is  
15 **GRANTED** and Landreth's claims against QIN are **DISMISSED**. Because the Court does not  
16 have the power to adjudicate his claims, the dismissal is without prejudice. Landreth should not  
17 view that legal determination as an invitation to file a fifth lawsuit on this topic.

18 All remaining Motions [Dkt. #s 19, 20, and 22] are **DENIED** as moot. The matter is  
19 closed.

20 IT IS SO ORDERED.

21 Dated this 29th day of July, 2020.

22 

23 Ronald B. Leighton  
24 United States District Judge

**Additional material  
from this filing is  
available in the  
Clerk's Office.**