



standing to raise its claims. ODNR's memorandum in opposition to the Federal Defendants' motion (hereinafter "ODNR's Response Brief") makes clear that the cross-claim must be dismissed. Neither the Quiet Title Act (QTA) nor the Administrative Procedure Act (APA) provide the requisite waiver of sovereign immunity. In essence, ODNR's cross-claim amounts to a request for an advisory opinion, which is improper. This brief addresses several points from ODNR's Response Brief that warrant reply.

**A. ODNR'S QTA Claim Must Be Dismissed.**

ODNR's QTA claim must be dismissed for two simple reasons. First, ODNR has not met the mandatory, express requirements of the statute. Second, there is no conflict in title between the United States and either the Plaintiffs or ODNR.

**1. ODNR Has Not Met the Express Requirements of the QTA.**

The plain language of the statute establishes that the 180-day notice period is a mandatory requirement, as it states "a State *shall* notify the head of the Federal agency with jurisdiction . . . ." 28 U.S.C. § 2409a(m). Thus, a reading of the statute demonstrates that the 180-day notice provision is a mandatory condition precedent for suit. *Id.* When an action is barred by the terms of a statute, it must be dismissed. *See Hallstrom v. Tillamook County*, 493 U.S. 20, 31 (1989). ODNR does not challenge Federal Defendants' argument that it failed to comply with the express terms of the statute, which require that a state give 180-day notice to "the head of the Federal agency with jurisdiction over the lands in question of the State's intention to file suit, the basis therefor, and a description of the lands included in the suit." 28 U.S.C. § 2409a(m). *See Fed. Defs.' Memo. of Points and Authorities In Supp. of Mot. to Dismiss Am. Cross-Claim* (hereinafter "Fed. Defs.' Memo.") at 5. Instead, in a footnote, ODNR

states that it “provided notice to counsel for the United States of its intention to sue on February 4, 2005.” *See* ODNR’s Resp. Br. at 14 n.1. This notice does not meet the statute’s express requirements, as it neither was 180 days before suit nor was notice to the head of the Federal agency with jurisdiction over the lands in question. *See* 28 U.S.C. § 2409a(m). Without compliance with the notice provision, this action must be dismissed.

In an analogous situation, the Supreme Court held that a 60-day notice provision was a mandatory, not optional, condition precedent for suit and that courts did not have discretion to disregard the provision. *Hallstrom*, 493 U.S. at 26–30. In that case, the Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6972, contained a 60-day notice provision for citizen suits. *Id.* at 22. The Court held that the language of the statute is clear and acts as a specific limitation on a citizen’s right to bring suit. *Id.* Likewise, the Court noted that, “[i]n the long run, experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law.” *Id.* at 31 (quoting *Mohasco Corp. v. Silver*, 447 U.S. 807, 826 (1980)). Accordingly, the Court held that the 60-day notice requirement was to be strictly construed as a mandatory provision.

Likewise, the language of the notice requirement in the QTA is clear, and should be considered to be a mandatory requirement. ODNR admittedly has not complied with the notice requirement. Therefore, because ODNR clearly has not met the statute’s express requirements, the Court must dismiss the action.

**2. In Any Event, the QTA Does Not Apply to the Case at Bar.**

In any event, however, as argued in the Federal Defendants’ motion to dismiss and supporting memorandum (hereinafter “Federal Defendants’ Memorandum”), the QTA simply

does not provide a waiver of sovereign immunity in this case. In its Response Brief, ODNR argues that the Federal Defendants have “interests” under the QTA, in the form of the federal navigational servitude and certain real property interests. However, ODNR nowhere contends that the alleged interests of the United States conflict with the interests of the ODNR, or otherwise clouds those interests. ODNR relies on the Ninth Circuit’s decision in *Leisnoi, Inc. v. United States*, 267 F.3d 1019 (2001) (“*Leisnoi IP*”) to argue that this case falls within the ambit of the QTA. ODNR ignores, however, that the case law — including *Leisnoi II* — requires that the alleged property interests of the United States cloud the plaintiff’s title. *See Fed. Defs.’ Memo.* at 7–8; *see also Leisnoi II*, 267 F.3d 1019, 1023 (9th Cir. 2001); *McMaster v. United States*, 117 F.3d 936, 939–40 (11th Cir. 1999) (noting that dispute must concern title to real property and the quality of title as between plaintiff and the United States, and citing cases).

As noted, ODNR relies heavily on *Leisnoi II* to support its argument that the QTA provides a waiver of sovereign immunity. In fact, *Leisnoi II* is limited to situations where a third party has asserted that the United States owns a property interest in conflict with the property interests of the plaintiff and that assertion causes a cloud on the plaintiff’s title. *See id.* at 1024. *Leisnoi* was an Alaska Native village corporation that received land by patent from the United States pursuant to the Alaska Native Claims Settlement Act (ANCSA). Another individual — Omar Stratman — recorded, on behalf of the United States, a notice of *lis pendens* covering *Leisnoi*’s land. “The *lis pendens* was filed on the strength of a ‘decertification’ action filed in federal court by [the individual] and other individuals, claiming that *Leisnoi* did not qualify as a Native village under ANCSA, and that *Leisnoi* consequently ***must return to the federal government the land*** that it received pursuant to ANCSA.” *Id.* at 1021. In *Leisnoi I*, the district

court dismissed the action, and the circuit court upheld the dismissal, because the Alaska Superior Court had lifted the *lis pendens* and barred Stratman from asserting claims for himself or others on Leisnoi's land. Therefore, "there had not been a colorable dispute between the interests of the United States and the interests of Leisnoi." *Id.* at 1022; *see also Leisnoi v. United States*, 170 F.3d 1188, 1193 (9th Cir. 1999). The Alaska Supreme Court later vacated the Superior Court's decision, which allowed Stratman to maintain the *lis pendens*, thereby clouding Leisnoi's title. 267 F.3d at 1023–24.

The test for jurisdiction, therefore, in *Leisnoi I* and *II* is the same: [T]wo conditions must be met before a district court can exercise jurisdiction over an action under the [QTA]: (1) the United States must claim an interest in the property at issue, and (2) there must be a disputed title to real property." *Leisnoi I*, 170 F.3d at 1191. In both *Leisnoi I* and *II*, the Ninth Circuit held that a third-party assertion that the United States had interests in the dispute could result in QTA jurisdiction under certain conditions. In *Leisnoi II*, the court found that the second requirement of the QTA was met "because, at the time the complaint was filed (and since), there was a continuing dispute between the asserted interests of Leisnoi and the United States in the property at issue." The court noted that "[a]ny other conclusion would thwart the purposes of the Quiet Title Act; an attributed but infirm interest of the United States could cloud the title but not be subject to a challenge." *Id.* at 1024 (quoting *Leisnoi I* at 1192).

This is not a *Leisnoi* case, however, because the third party — Plaintiffs, in this case — are asserting their own interests, not the United States' interests. *Leisnoi II* does not stand for the proposition that ODNr advocates — that a third party's interests can cloud title such that the QTA applies and the United States must be joined as a party. Here, there are no United States'

property interests that cloud ODNR's title, and, thus, the QTA does not apply. For example, in *Leisnoi II*, Stratman claimed that a loss for Leisnoi in the certification proceedings would mean that the land would revert back to the United States. Under no circumstances in this case would land revert back to the United States. The conflict is between the Plaintiffs and ODNR. Therefore, *Leisnoi II* does not support jurisdiction here.

This point was clarified by the *Leisnoi II* court, which explained why its decision in *Alaska v. United States*, 201 F.3d 1154 (9th Cir. 2000), was not contrary to *Leisnoi*. The court noted that:

Although, in keeping with *Leisnoi I*, 170 F.3d at 1192, we stated in *Alaska* that ***there must be a conflict in title between the United States and the plaintiff for jurisdiction to exist***, we did not hold that a third party cannot create this dispute by asserting an interest on behalf of the United States.

*Leisnoi II*, 267 F.3d at 1024 (citing *Alaska*, 201 F.3d at 1164–65). In addition, in *Alaska*, the Ninth Circuit further clarified that the purpose of the QTA was to “furnish[] a means by which state governments can remove clouds on their title ***created by federal assertions of claims***.” 201 F.3d at 1161. Because there is no conflict of title between the United States and ODNR, and no federal assertion of a claim clouding ODNR's title, the QTA does not apply and there is no waiver of sovereign immunity.

In addition, two points warrant brief mention. First, ODNR's Response Brief suggests that the dispute involves the United States because, ODNR asserts, “it must first be determined where [the upper boundary of Lake Erie] was originally set at statehood.” ODNR's Resp. Br. at 10. ODNR explains at length that federal law is involved in the resolution of this suit. The United States, however, obviously is not a proper party to every suit involving questions of federal law, and jurisdiction over the United States cannot be sustained on the presence of

federal law alone.

Second, ODNR relies upon the Federal Rules of Civil Procedure for the proposition that “the rights of all parties generally should be adjudicated in one action,” and suggests that Rules 13 and 14, in particular, should be liberally construed. *See* ODNR’s Resp. Br. at 9. While the Federal Rules no doubt support this proposition, waivers of sovereign immunity are to be strictly construed. *See Soriano v. United States*, 352 U.S. 270, 272 (1957). It would be ludicrous to suggest that a liberal interpretation of the Federal Rules of Civil Procedure could either affect a waiver of sovereign immunity or trump the rule requiring sovereign immunity be found in a clear, express, unequivocal, specific jurisdictional statement by Congress. *See Army and Air Force Exchange v. Sheehan*, 456 U.S. 728, 734 (1982); *Lehman v. Nakshian*, 453 U.S. 156, 160–61 (1981); *United States v. Testan*, 424 U.S. 392, 399 (1976).

In conclusion, even the case law that ODNR cites in support of its argument shows that in order for the QTA’s waiver of sovereign immunity to apply, there must be a conflict of title involving the United States. That simply is not the case here. Plaintiffs in this case assert their own interests, not the United States’. There has been no waiver of sovereign immunity and this Court, therefore, lacks subject matter jurisdiction.

**B. ODNR’s APA Claim Must Be Dismissed.**

In the Federal Defendants’ opening brief, we demonstrated that the APA does not provide a waiver of sovereign immunity in this case because neither ODNR nor the Plaintiffs challenge the Corps’ determination of the ordinary high water mark. *See Fed. Defs.’ Memo.* at 9–10. Specifically, the Federal Defendants illustrated that (1) the Plaintiffs challenge not the Corps’ determination of the ordinary high water mark, but ODNR’s use of the Corps’

determination to determine State ownership,<sup>1</sup> and (2) ODNR seeks to uphold the Corps' determination. *Id.* In its Response Brief, ODNR attempts to bring this case under the umbrella of the APA by arguing that ODNR relies upon the Corps' determination of the ordinary high water mark and, therefore, because of this reliance, both ODNR and the Plaintiffs actually challenge the Corps' determination. ODNR's Resp. Br. at 14–19. In short, ODNR argues that if it is arbitrary for ODNR to rely on the Corps' determination, then it is arbitrary for the Corps to rely on it. *Id.* at 19.

A close examination of ODNR's Amended Cross-Claim and Response Brief shows that, in fact, ODNR's claim is not a proper APA claim. ODNR does not allege that it suffered a legal wrong at the hands of the Corps, as required by the APA. *See* 5 U.S.C. § 702. Any injury ODNR suffered or will suffer is not a result of the Corps' actions. In addition, ODNR does not request relief under the APA. *See* 5 U.S.C. § 706. Instead, ODNR's requested relief amounts to a request that this Court issue an advisory opinion.

The APA provides that “[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.” 5 U.S.C. § 702; *see Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 124 S. Ct. 2373, 2378 (2004). ODNR has suffered no legal wrong because of agency action. ODNR alleges that the final agency action it challenges is the Corps'

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<sup>1</sup>Plaintiffs-Relators' Brief in Support of Motion to Strike First Amended Cross-Claim (Document 16) supports this proposition. *See* Mot. to Strike at 4–5. This brief states that “no one is challenging the [Corps'] authority to choose whatever methodology it wishes for defining ordinary high water marks in carrying out its regulatory functions . . . The only conduct that Plaintiffs challenge as arbitrary is the State's use of the Corps' high water mark designation to redefine over 200 years of Ohio private property ownership.” *See id.* at 5

determination of the ordinary high water mark. ODNR does not, however, argue that the Corps' methodology in determining the ordinary high water mark was arbitrary, capricious, or otherwise not in compliance with the law, as required by the APA. *See* 5 U.S.C. § 706. According to ODNR, its injury is the "loss of its authority to manage the lands beneath the navigable waters of Lake Erie for the publics' [sic] use, resulting in the further loss of federal approval of its coastal management program."<sup>2</sup> ODNR's Resp. Br. at 19. These potential injuries simply do not stem from the agency's determination that the ordinary high water mark of Lake Erie lies at 573.4 feet above International Great Lakes Datum (1985).<sup>3</sup>

The question in this case is not whether the Corps was arbitrary in determining that the ordinary high water mark of Lake Erie is 573.4 feet above International Great Lakes Datum (1985). Instead, the question is whether ODNR can properly rely on the Corps' determination of the ordinary high water mark to delineate the line between State and private land. As ODNR states in its Amended Cross-Claim, "Plaintiffs-Relators dispute in their First Amended Complaint that the State of Ohio holds title to all lands below the ordinary high water mark of Lake Erie." Am. Cross-Claim at ¶ 21. Thus, the Corps' determination that the ordinary high water mark lies at 573.4 feet above International Great Lakes Datum (1985) did not have an adverse effect on ODNR. It is ODNR's reliance on the Corps' determination for the purposes of

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<sup>2</sup>Again, as argued in Federal Defendants' Memorandum, ODNR has failed to establish any connection between a determination that ODNR cannot rely on the ordinary high water mark of Lake Erie as its property line and the loss of federal approval of its coastal management program. *See* Fed. Defs.' Memo. at 15. Nor does it explain how it is at risk of losing federal approval of its coastal management plan.

<sup>3</sup>This lack of injury from the agency's action also further demonstrates ODNR's lack of standing to raise its cross-claim against the Federal Defendants. *See* Fed. Defs.' Memo. at 18–20.

determining ownership that Plaintiffs challenge and that ODNR seeks to uphold. Accordingly, ODNR has not suffered a legal wrong because of agency action, or been adversely affected or aggrieved by agency action under the APA.

Additionally, ODNR has not requested any of the relief provided for by the APA. Section 706 provides that a reviewing court finding a violation of the APA shall “(1) compel agency action unlawfully withheld or unreasonably delayed; and (2) hold unlawful and set aside agency action, findings, and conclusions . . . .” 5 U.S.C. § 706; *see Southern Utah Wilderness Alliance*, 542 U.S. 55, 124 S. Ct. at 2378. The first category does not apply, as ODNR does not seek to compel agency action unlawfully withheld or unreasonably delayed. The second category also does not apply because a reading of ODNR’s Amended Cross-Claim and Response Brief show that ODNR does not seek to hold unlawful and set aside agency action. Instead, as noted in the Federal Defendants’ Memorandum, it is clear that ODNR relies on the Corps’ determination for its own purposes, and, therefore, is seeking to uphold that determination. *See* Fed. Defs.’ Memo. at 8–10.

ODNR’s amended cross-claim shows that ODNR relies on the Corps’ determination of the ordinary high water mark. *See* Am. Cross-Claim ¶¶ 32, 39. ODNR’s prayer for relief does not ask this Court to determine that the Corps’ determination is arbitrary. Instead, it states: “*If* the Corps’ methodology in its determination of the current elevation of the ordinary high water mark of Lake Erie as 573.4 International Great Lakes Datum (1985), is found to be an unacceptable methodology for locating the ordinary high water mark which defines the lands beneath the non-tidal waters of the United States, then the State prays that the Court,” *inter alia*, “[d]eclare what is an acceptable methodology.” Am. Cross-Claim, Prayer for Relief (c)

(emphasis added). This is echoed in ODNR's Response Brief: "The State has challenged the Corps' determination seeking a *declaration as to whether or not* the Corps' determination is arbitrary, and if it is found to be so, a declaration of what determination would not be arbitrary." ODNR's Resp. Br. at 18. In its Response Brief, ODNR also notes that it relies on the Corps' determination of the ordinary high water mark. *Id.* at 19–20 ("It is a determination made by the Corps, and relied upon by the Department"). For example, ODNR states that the source of its injury is "the allegedly arbitrary Corps' definition of the location [of] the limit of the lands beneath the navigable waters of Lake Erie, relied upon by the State. . . ." *Id.*

Although ODNR now asserts in its brief that it challenges the Corps' determination, ODNR ultimately seeks to have that determination upheld. For example, in its answer to Plaintiffs' Amended Complaint, ODNR denies that its use of the Corps' determination is administratively arbitrary. *See Am. Compl.* ¶¶ 11, 24, 32; *Answer, Counterclaim and Cross-Claim of Defendants-Respondents State of Ohio, Department of Natural Resources; Sam Speck, Director of Ohio Department of Natural Resources, and; the State of Ohio* ¶¶ 11, 24, 32. Most clearly, however, in its counterclaim against the Plaintiffs, ODNR prays for judgment that:

(e) The Corps' methodology in its determination of the current elevation of the ordinary high water mark of Lake Erie as 573.4 International Great Lakes Datum (1985) is not arbitrary. It is an acceptable methodology for determining the upper boundary of non-tidal navigable waters of the United States, and may be properly relied upon by the State of Ohio in its determination of that boundary over those same non-tidal navigable waters which were granted to the State at statehood, until such time as Ohio law provides another methodology for the State's determination of the natural location of the ordinary high water mark of Lake Erie.

Counterclaim, Prayer for Relief (e) (p.14). Accordingly, despite ODNR's claims otherwise in its attempt to save its cross-claim from dismissal, it is clear that ODNR both relies on the Corps' determination and seeks to have it upheld. Therefore, ODNR has not challenged final agency

action, as required by the APA, nor requested relief that could be provided by the APA. *See* 5 U.S.C. § 706.

In conclusion, the APA does not provide a waiver of sovereign immunity in this case. No party actually challenges the Corps' determination of the ordinary high water mark. ODNR's assertion that it is, in fact, challenging the Corps' determination is incorrect because ODNR's pleadings seek to uphold its reliance on the Corps' determination for its own purposes.

**C. ODNR's Amended Cross-Claim Does Not Raise a Case or Controversy.**

Finally, ODNR's Response Brief makes abundantly clear that there is no case or controversy between the State and the Federal Defendants and that ODNR lacks standing. As demonstrated, ODNR does not challenge the Corps' determination of the ordinary high water mark. ODNR's request, therefore, that this Court determine if the Corps' methodology is acceptable and if not, determine what methodology would be acceptable is a request for an advisory opinion. Under Article III, "[a] court may not proceed to hear an action if, subsequent to its initiation, the dispute loses 'its character as a present, live controversy of the kind that must exist if [the court is] to avoid advisory opinions on abstract propositions of law.'" *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc.*, 528 U.S. 167, 213 (2000) (quoting *Hall v. Beals*, 396 U.S. 45, 48 (1969) (per curiam)). Because there is no case or controversy, this Court lacks jurisdiction and must dismiss ODNR's Amended Cross-Claim against the Federal Defendants.

**CONCLUSION**

As the Federal Defendants explained more thoroughly in their motion to dismiss and supporting memorandum, ODNR has failed to raise a case or controversy against the Federal Defendant, and lacks standing to bring its cross-claim. Further, ODNR has failed to allege a

valid waiver of the United States' sovereign immunity. For the reasons stated above and in the Federal Defendants' Memorandum previously submitted, Federal Defendants respectfully request that this Court dismiss ODNR's amended cross-claim.

Respectfully submitted this 14th day of July, 2005,

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CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1(f)

Pursuant to 28 U.S.C. § 1746, undersigned counsel certifies that the foregoing Memorandum is 13 pages in length and within the limitations of an standard track case.

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**CERTIFICATE OF SERVICE**

I hereby certify that on July 14, 2005, a copy of the foregoing FEDERAL DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS CROSS-CLAIM was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. All other parties will be served by regular U.S. mail. Parties may access this filing through the Court's system.

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